UNIVERSITY of CALIFORNIA PRESS | GLOBAL PERSPECTIVES

Teubner, Gunther. 2020. "Transnational Economic Constitutionalism in the Varieties of Capitalism." *Global Perspectives* 1 (1). https://doi.org/10.1525/gp.2020.13412.

Politics, Governance, and the Law

Transnational Economic Constitutionalism in the Varieties of Capitalism

Gunther Teubner[1] [a]

[1] Law Department, Goethe Universität Frankfurt, Germany

Keywords: varieties of capitalism, corporate codes of conduct, production regimes, economic democracy, transnational economic constitutions, conflict law constitution

https://doi.org/10.1525/gp.2020.13412

Global Perspectives

Vol. 1, Issue 1, 2020

Among the remarkable results of globalization are economic constitutions, which have emerged independently from the political constitutions of the nation-states. Against ordoliberal as well as critical theorists, who expected a uniform economic world-constitution, a fragmented meta-constitution dealing with massive constitutional conflicts has emerged. Moreover, the conflicting economic constitutions are no longer delineated by the boundaries of nation-states but by different boundaries of various transnational production regimes. The constitutional alternative for the national economies—ordoliberal economic constitution versus social-democratic economic democracy—which had been formulated by the classics of economic constitutionalism, Franz Böhm and Hugo Sinzheimer, has been replaced by the opposition in the Western Hemisphere between neocorporatist production regimes in Northern Europe and the financial-capitalist production regimes of the Anglo-American world.
Against all predictions of their failure, the neocorporatist constitutions of European economies, after the financial crisis, have undergone a reorganization that resulted in their remarkable resilience. Moreover, they have developed a potential for strengthening economic democracy. In particular, public good–oriented corporate codes of conduct, which emerged in large numbers in the sweep of globalization, have contributed considerably to this potential. The codes opened, beyond the protection of workers' rights, a new opportunity for societal actors. The oppositional power of civil society—the media, public debate, spontaneous protest, protest movements, NGOs, labor unions, intellectuals, and the professions—as well as the legal norms created by state intervention exercise such massive pressure on corporations that the latter are compelled to enact binding self-restrictions oriented to the public interest: environmental protection, antidiscrimination, human rights, product quality, consumer protection, data protection, freedom of the internet, and fair trade.

I. LESSONS FROM THE CLASSICS?

Economic constitutionalism: it was Weimar Germany in the 1920s where this concept was invented and where institutional experiments were initiated. Social democracy and ordoliberalism had dominated the fight for conceptual hegemony. Hugo Sinzheimer and Franz Böhm: can the contemporary debate on transnational economic constitutionalism learn from the German classics of the national economic constitution? Or can it only attest to the grandiose failure of both of them? Sinzheimer, whose great contributions were the invention of the concept of the collective labor contract and the introduction of elements of economic democracy into the Weimar constitution, in fact failed with his more far-reaching ambitions in the direction of a comprehensive economic workers council system. And Franz Böhm, who during his opposition to the National Socialist regime worked on an ordoliberal future economic constitution, and then later on the antitrust law that markedly influenced the economy of federal Germany, would—from his ordoliberal conceptions of a decentralized, middle-class–influenced, competitive market under state supervision—recognize hardly anything in the contemporary globalized world markets dominated by transnational enterprises.[1]

Of course, it is only a superficial critique to evaluate their time-bound policy proposals by contemporary realities. Instead, one should look for Böhm's and Sinzheimer's potential to challenge the contemporary debate on economic constitutions. The challenge is whether their ideas, originally developed for the economy of the nation-state, can be fruitfully reconceptualized for the contemporary globalized economy. Then one could replace the superficial question of which of them delivered the better prognosis with a different question: if, back then, Böhm suggested an ordoliberal economic constitution and Sinzheimer a social-democratic economic democracy as realistic third ways between Manchester capitalism and state socialism, what would a realistic constitutional alternative look like for the transnational economy today? Beyond these concrete questions, one may seek the results garnered by both those legal scholars

a g.teubner@jur.uni-frankfurt.de

1 On Franz Böhm, see Grossekettler (2005). On Hugo Sinzheimer, see Kahn-Freund (1981). For Böhm's early key work, see Böhm (1933). For Sinzheimer's early key work, see Sinzheimer (1916). On Sinzheimer's labor constitution, see Dukes (2011).

at a more abstract level. For both based the legal concept of "economic constitution" in the very first place on social theory; today's efforts can build upon them. On a more abstract level, it is worth discussing anew and under today's conditions their ideas on social theory and the theory of democracy, which went far beyond the simple organization of markets and enterprises. Their future applicability must prove itself on both levels: concrete economic law, on the one hand, and abstract theories, on the other.

In this spirit, I would like to develop the following theses:

1. The transnational economic constitution should be contrasted against the simple unity of one global economic constitution as well as against the mere diversity of national economic constitutions. Rather, it is the meta-constitution of collisions—not between national economies but between different production regimes.
2. The economic constitution is not identical to those norms in state-constitutional law that refer to the economy. Moreover, it cannot be limited to higher-ranking norms in a formal hierarchy of legal norms regulating the economy. Instead, it should be understood as a process of "double reflexivity," in which an economic production regime enters into an indivisible relation with constitutional law.
3. Norms of constitutional law seeking to promote the democratization of the economy differ in their chances for realization, depending on their production regime. From the perspective of the varieties of capitalism, the potential for economic democracy is considerably higher in "coordinated market economies" (CMEs) than in "liberal market economies" (LMEs).
4. Theories of economic democracy should not overhastily transpose the principle of identity of authors and affected people, which made sense in the national political context, to corporate governance. Instead, what is needed in economic organizations are constitutional guarantees for forceful organized dissent, which challenge the decisions of power-holders effectively and bring to the fore the power of powerlessness.

II. ON THE SUBSTRATE OF A TRANSNATIONAL ECONOMIC CONSTITUTION

1. A UNITARY ECONOMIC CONSTITUTION IN WORLD SOCIETY?

While in the nation-state the economic constitution had remained more or less embedded in the political constitution, it has become constitutionally disembedded in the process of globalization.[2] Globalization has many aspects, but above all, it means that functional differentiation, first realized historically within the nation-states of Europe and North America, now encompasses the whole world (Luhmann 2012, chap. 1, X, 4, XII). However, not all subsystems have globalized simultaneously, with the same speed and intensity. Religion, science, and particularly the economy are well established as global systems, while politics and law still remain mainly focused on the nation-state. Due to this staggered globalization, the pressure to reconstitutionalize the globalized economy is all the greater as compared to their national counterparts. While in the nation-state, economic processes had been accompanied, stabilized, and strengthened and at the same time limited in their negative effects by the national constitution, this political and legal framework worked only within the borders of the territorial state. Now the triangular constellation of politics-law-economy that bore the economic constitutions in the nation-states has no counterpart in the global context. When the economy is freeing itself from the dominance of nation-state politics, there is no agency anymore to set limits, to stem its centrifugal tendencies, or to regulate its internal conflicts.[3] Thus, the staggered nature of globalization produces a tension between the self-foundation of the global economy and its political-legal constitutionalization. Global self-foundation of the economy and its national constitutionalization are irrevocably drifting apart (Sassen 2006).

The successors to Franz Böhm have been well aware of this new situation and have attempted to free up the concept of economic constitution from the narrow framework of nation-state and national economy in which it was trapped in Böhm's thought and transfer it into an ordoliberal concept of an overarching transnational economic constitution. Ernst-Joachim Mestmäcker (2006) proposed a concept of a European economic constitution and evoked it in a partially successful institutionalization of ordoliberal constitutional principles in the European Union. On the global scale, Wolfgang Fikentscher (1983, 87 ff.) and Peter Behrens (2000, 5 ff.) suggested the legal concept of a unitary global economic constitution on ordoliberal foundations. Entirely in Böhm's sense, these authors give constitutional law the role of building a prescriptive center against the self-destruction of competition.[4]

Parallel thereto, however, with exactly opposed political goals in the tradition of critical theory, authors such as Emilios Christodoulidis (2020), Kolja Moeller (2018), Stephen Gill (2014), David Schneiderman (2013), and James Tully (2007) diagnosed a "New Constitutionalism," which institutionalizes a unitary constitution of the global economy proceeding from the institutions of the Washington Consensus.

Both theories can regard themselves as justified based on real developments in fact. In the last forty years, a push for constitutionalization based on the autonomy of global markets has been massively driven forward politically. The global institutions of the Washington Consensus posited genuine constitutional principles with claims to worldwide validity. These sought to create broad discretionary space for enterprises acting globally, to do away with governmental participation in enterprises, to combat protectionism, and to free economic enterprises from political regulations. Meanwhile, numerous studies have shown that indeed elements of a global economic constitution have emerged, which are based on the constitutionalization of various transnational regimes. For example, the guiding principle of the International Monetary Fund and the World Bank is to open national capital markets. The World Trade Or-

2 Extending Max Weber's and Karl Polanyi's work to today's transnational conditions (Frerichs 2017).

3 For detail on the coordination problems of different system rationalities in world society, see Fischer-Lescano and Teubner (2004), 1005 ff.; see also Kjaer (2010) 494, 533.

4 For a recent critique of the ordoliberal version of economic constitutionalism, see Hien and Joerges (2020).

ganization (WTO) as well as the EC internal market, the North American Free Trade Agreement (NAFTA), the Mercado Común del Cono Sur (MERCOSUR), or the Asia Pacific Economic Cooperation (APEC) seek, respectively, a constitutional guarantee of the freedom of world trade and the protection of direct investment (Petersmann 2012; Cass 2005).

Global corporate governance is likewise marked by a tendency to create a high degree of autonomy for transnational enterprises (Backer 2012a). The principles of corporate governance of multinational enterprises are a high degree of enterprise autonomy, capital market orientation of corporate law norms, and the establishment of shareholder values. The resulting multinational corporate governance has two goals: to break the tight coupling of transnational enterprises on nation-state politics and rules and to build up rule-of-law structures insofar as these are necessary for their worldwide functionally specified communication. "The End of History for Corporate Law"—this was Henry Hansmann's and Reinier Kraakman's (2001, 439) message in an influential article: "Despite very real differences in the corporate systems, the deeper tendency is toward convergence." And the direction was clear: "There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value." (For a critique, see Coffee 1999).

However, such analyses of transnational constitutionalization give us a skewed picture. They are one-sidedly obliged to the so-called convergence thesis, according to which as a result of globalization a broad-ranging legal unification is to be expected (locus classicus: Kerr 1960). According to this thesis, in contemporary Europeanization and globalization, convergence of social economic structures of advanced industrial societies is inevitable. Such supposed social-economic convergence lets legal unification right on up to a unitary worldwide economic constitution appear to be desirable. A connected corollary is a functional equivalence of legal forms.[5] According to this, the national economic constitutions were formed upon differing legal doctrinal traditions; however, they are all confronted by the same structural problems. Accordingly, they will find differing legal solutions for the relevant problems, which, however, are functionally equivalent and which from their side finally lead to the convergence of national economic constitutions.

2. ECONOMIC CONSTITUTIONS IN THE VARIETIES OF CAPITALISM

Both propositions are, however, more than questionable. In the current phase of globalization, their opposite appears to be more plausible. The trend toward globalization, paradoxical though it sounds, does not necessarily lead to a convergence of social orders and a unification of law. Rather, globalization itself produces sharp new differences.[6] Globalization leads not to greater legal unification but rather to a stronger fragmentation of legal orders as a direct consequence of globalization.

Comparative political economy confronts us with empirical results, which fundamentally place the expectations of convergence of economic constitutions that are quite popular among comparative lawyers into question.[7] These results are confirmed by economic history studies on the autonomous cultures of the global economy, which from a perspective of *longue durée* show the resilience of collective mentalities and particularities of productive cultures (Abelshauser, Gilgen, and Leutzsch 2012; Abelshauser 2005). Empirical inquiries and theoretical explanations of the "varieties of capitalism" support the proposition that, against all expectations, the globalization of markets and the computerization of the economy have not led to an efficient convergence of economic institutions and economic constitutional law norms. Despite all factually evident tendencies of minimization of transaction costs, market selection, relitigation, and regulatory competition, which indeed, as evolutionary selectors, ought to have effectively smoothed out institutional differences, the economic conditions of advanced capitalism have not converged (Carlin and Soskice 2012). Just the opposite: the process of globalization and, yes, even the unification measures in the European common market have produced new institutional divergences (Kjaer 2019). Despite the liberalization of the global market and the erection of the common market, one of the most noteworthy results of the last forty years is that in the most varied economic institutions, in the financial regimes of enterprises, in the arrangements of corporate governance, in the collective labor relations, the education of managers, the contractual relations between enterprises, the interorganizational networks, the standardization processes, and the intercorporate industrial associations, the institutional divergences have increased rather more than they have decreased (Soskice 1997). The drifting apart of production regimes means that despite the worldwide victory march of capitalism since the dual division of the economic constitution of the Cold War, a whole variety of diverging economic constitutions have established themselves. China's authoritarian state capitalism, Japan's highly organized production regime dominated by the keiretsu, postcolonial capitalism in South America, all these have become serious rivals for the established production regimes in the Western Hemisphere.[8]

Production regimes are institutional framework conditions for economic activity (Hall and Soskice 2005). They structure the production of goods and services by way of markets and market-related institutions. The "rules of the game" of economic activities—more exactly, the incentives and constraints of economic transactions—will be formulated through an entire ensemble of institutions, in which

5 In this sense, somewhat similarly, see Zweigert and Kötz (1992), § 3 II. For a critique, see Frankenberg (1985); for a reconstruction, see Michaels (2006).

6 Already, in the early discussion on globalization, it became clear that Huntington (1993) with his apocalyptic predictions had exaggerated global divisions. A more realistic view sees a simultaneous increase in convergence and divergence as a consequence of globalization (Featherstone and Lash 1995).

7 Varieties of capitalism is acknowledged as the leading theory of comparative political economy in the OECD; see Feldman (2019); Witt et al. (2018); Hassel (2014). The actual reference book is Hall and Soskice (2005).

8 For a comparative perspective, see Feldman (2019); Witt et al. (2018). For important regional studies, see Walter and Zhang (2012); Schneider (2013). On the highly contested politics of constitutionalization, distinguishing between "ambitious" and "modest" programs, see Kennedy (2020), 117 ff. His concept of politicization is too narrow, since he reduces it to conflicts between groups with ideologies and excludes disruptive conflicts between social rationalities, which he calls "obscurantist" (115).

economic activity is embedded. The single institutions—enterprise financing, managerial education, contractual relationships between enterprises, interorganizational networks, standardization processes, and interenterprise conflict regulation—together form an interlocked system which tends toward self-regulation.

III. TRANSNATIONAL ECONOMIC CONSTITUTIONALISM

1. BÖHM'S AND SINZHEIMER'S CONTRIBUTIONS

The autonomization of various production regimes sets the scene for reconceptualizing the economic constitution on the transnational level. For this our protagonists, Sinzheimer as much as Böhm, produced relevant preparatory works, albeit for the nation-state. For neither satisfies himself with a concept of the economic constitution that—as is even today so often presented in constitutional law—equates it with the rather meager number of norms regulating the economy within the state constitution and then ends with the thesis of the neutrality of the German Fundamental Law on matters of economic policy. Both authors made it clear that such a state-centered concept simply fails to account for the actual dynamic of economic constitutions. Moreover, both Böhm and Sinzheimer set themselves in clear opposition to the Kelsenian tradition in which one would define an economic constitution simply as a formal hierarchy of economic norms. It is Sinzheimer's and Böhm's historical merit that in spite of their theoretical and political differences, they constructed the economic constitution as a legal concept beyond both a state-centered constitutional concept and a mere formal legal hierarchy of norms.

Franz Böhm identifies in his famous "Private Law Society" the economic constitution not as "a gathering of millions of unconnected individuals" but as an "*ordo,*" a free-standing social institution. Historically, it established itself after the French Revolution, ranked equally alongside the political constitution of the state as the autonomous constitution of the economy (Böhm 1966). It has at its disposal institutions of its own: in addition to property, contract, and monetary system, the decentralized decision-making mechanism of market price and competition. Thus it creates a social ordering principle of its own, which corresponds to political representation in the state. This autonomous order of social-steering and coordinating instruments is transformed into a genuine constitution of the economy as soon as it is stabilized by legal rules. Alongside such constitutive rules, an ordoliberal constitution contains limitative rules, which are supposed to protect the economy against self-destructive tendencies.

Hugo Sinzheimer, in his turn, understands the labor constitution as autonomous on an entirely different social basis—namely, as "a legal order for itself, whose rules are not strewn throughout the various fields of civil and public law, but rather rest on their own basis" (Sinzheimer 1976, 108). The decisive impulse for this "own basis" is that social groups, paradigmatically in collective labor contracts but also in group negotiations in other contexts, are enacting an autonomous law in the strict sense, which exists alongside the law of the state. Coalitions (that is, labor unions and employer associations) work together as collective actors on such a democratic labor constitution. The legal system supports the autonomy of the labor constitution in the same ways as it supports the state constitution. Moreover, Sinzheimer, who introduced important elements of economic democracy into the Weimar Constitution, spoke of an autonomous "economic community" (*Gemeinwesen der Wirtschaft*), which parallel to the political community presents its "own economic constitution alongside the state constitution" (Sinzheimer 1994, 18) in which the "economic citizens" play their own roles alongside the citizens of the state (Sinzheimer 1994, 135, 140; for a thorough analysis of Sinzheimer's work, Dukes 2011; Seifert 2011).

It is evident that both authors base the economic constitution on real existing production regimes. But they do so on different elements, Böhm on market structures and competitive processes, Sinzheimer on formal organization of collective actors and their negotiation systems. Thus, despite all surely serious differences, one can describe both as early representatives of a "societal constitutionalism," as is later formulated by the historian Reinhart Koselleck and by the sociologists Philipp Selznick and David Sciulli.[9]

We may draw three essential conceptual innovations from the Böhm and Sinzheimer bank account. They do not use economic constitution as a simple metaphor, nor do they define it as a prelegal, merely socioeconomic order; instead, they place the economic constitution as an independent legal institution alongside the constitution of the state. The state constitution is, for them, only first among equals. Their second innovation is a constitutional concept in which the hierarchy of legal rules that regulates the economy is not counterfactually opposed to the actual organization of the economy; rather, legal rules are melded into a unity with the autonomous institutions of the economy. Their third innovation is that not only the state constitution but also the economic constitution contains constitutive rules (i.e., norms), which, in contrast to regulatory norms and decisional rules, do not merely regulate social realities but literally create social realities. Market and money are—in order to address Neil MacCormick—"institutional facts," which are produced in the first place by the rules of the economic constitution, or more exactly are coproduced by them together with economic practices (MacCormick and Weinberger 1986). With these three innovations, our protagonists stand not only for a legal pluralism that identifies a legal order—private ordering by contract or by association—alongside the law of the state and equally ranked to it; what is more, they have founded a new constitutional pluralism, which understands the constitutive and limitative rules of social institutions as forming genuine legal constitutions alongside the constitution of the state (Viellechner 2020, 359 ff.; Walker 2008).

2. THE TRANSNATIONAL ECONOMIC META-CONSTITUTION

Thereby Böhm and Sinzheimer have laid the foundations for not only a "formal" but for a "material" economic constitution.[10] Briefly stated, this materiality describes, in contrast to the formal norm hierarchy advocated by the dominant doctrinal approach of the positivist school of constitutional studies, the momentum of "double reflexivity" (in detail, Teubner 2012b, 102 ff.). What does this mean? An economic constitution is not simply an ensemble of for-

9 Koselleck (2002); Selznick (1969). It was David Sciulli (1992) who coined the term "societal constitutionalism."

10 For the recent debate on a material constitutional theory, see Goldoni (2018).

mal constitutional rules but an inseparable interrelation between constitutional law and socioeconomic order, in which reflexive legal norms of the constitutional hierarchy are intertwined with reflexive processes of economic practice. At the same time, in parallel to the state constitution, in the economic constitution a very specific binary code is at work, superior to the binary code of legal/illegal with values of "consistent with the economic constitution" / "contrary to the economic constitution." Moreover, this code has a remarkable hybrid character, because it tests rules of economic law for their constitutionality, on the one hand, and on the other hand, it tests economic transactions and organizations for their social responsibility. The economic constitution then would be understood not as a legal text but rather as the complex interrelation of legal and economic basic institutions within a production regime.[11]

This is the reason why material constitutionalism means searching for what Rudolf (Wiethölter 2014b, 49) calls the economic "constitution behind the constitution." Neither philosophy nor the humanities can offer the compass for this search; only social theory can.[12] Against prevailing jurisprudence that defines the constitution as a purely legal concept, what is needed is a "material theory of the constitution as social theory of society" (Wiethölter 2014b, 48). From the outset, this implies a strictly relational concept of the economic constitution. Such a constitution cannot be understood simply as a corpus of higher-ranking legal norms; rather, it must be understood as an interaction between socioeconomic relations and legal relations, and more precisely, as the transformation of socioeconomic relations into legal relations via legal principles, norms, guidelines, programs, and vice versa. It is important to note: an active legal transformation of economic relations, but neither their pure mirroring, nor a derivation from these relations, nor a determination by them. Economic constitutions are primarily temporary compromises in ongoing socioeconomic conflicts and sociopolitical power contestation, and only secondarily a corpus of higher-ranking legal rules.[13]

If constitutions have emerged as historical compromises of socioeconomic power constellations forming the interaction between social relations and legal relations, then it is no longer plausible to restrict the constitutional concept to the political state constitution, yet constitutional lawyers still emphatically advocate doing so today (Loughlin 2009). At the very least, the economic constitution needs to be recognized as independent of the state constitution. What is more, it is necessary to merge it into a more comprehensive unity of labor, economic, and social constitution whose task is to create a "political obligation of the economy to act in the public interest" (Wiethölter 2014a, 298).

Now, if one looks at the global economy with the optical device prepared by Sinzheimer and Böhm, then it becomes clear that the institutions of the Washington Consensus are in no way able to produce a unitary global economic constitution. The year 1989 did signify the end of state socialism, but it was in no way the end of history. The result of the most recent globalization wave is instead an enormous diversity of variants of capitalism, a multitude of production regimes that for their part bring forth a variety of economic constitutions. China's state capitalism, or (better) its single-party capitalist production regime; the keiretsu-dominated economic constitution of Japan; and the postcolonial production regimes of South America are today serious rivals to the established economic constitutions in the Western Hemisphere (Feldman 2019; Witt et al. 2018; Schneider 2013; Walter and Zhang 2012).

It is, however, decisive that the variants within capitalism, which counter-indicate a unitary global economic constitution, do not somehow bring with them a mere renationalization of economic constitutions. Globalization could not develop a unitary economic constitution but, inexorably, has demolished national boundaries of the economy and established production regimes as the new substrates of the economic constitution, without regard to their territorial boundaries.[14] However, even the new regional units, the European Union, NAFTA, or MERCOSUR, do not define the boundaries of the new production regimes. The European Union is cut through in three ways by the boundaries of different production regimes (Abelshauser 2005; Regan 2013). Particularly since 2008, Northern Europe, England, and Southern Europe have been drifting apart in their different production regimes, despite their efforts toward European unification. And in the case of Italy, two different production regimes collide, even within the territory of one nation-state.

Of course, the production regimes have their historical sources in the old unity of nation-state and national economy. However, with the dominance of transnational enterprises and their subsidiaries, with the globalization of markets and their differentiation into various branches, this unity has been broken. The production regimes have expanded beyond their territorial state borders. This process ends in an assembly of different economic constitutions, which are difficult to sort out, at best, and which overlap in their areas of validity. In principle, a single production regime will be shaped by differing local power centers: the autonomous rule production in deterritorialized transnational enterprises, the dominance of only one economic culture in individual branches of the global economy, and the regulations of the individual nation-states. This results in a complex situation, typical for transnational relations. Faced with intersecting boundaries of economic cultures that exist in multinational corporations, in contractual regulations of supply and distribution networks, in different industries in world markets, and in national regulatory regimes, a high functional specification coincides with the simultaneous overlapping of different systems of norms. The individual production regimes maintain their identity against the global economic institutions in their "persistence, transnational hybridization, and path dependency" (Abelshauser 2005, 19). The literature on transnational law established the expression "inter-legality," which dissolves clearly divided areas of validity of territorial legal orders

11 On transnational societal constitutionalism, which lies at the bottom of such a conception of the transnational economic constitution, see Muir Watt (2018); De Munck (2016); Kjaer (2014); and the contributions by Poul Kjaer, Dan Wielsch, and Moritz Renner in Teubner and Becker (2013).

12 Primarily, general theories of social differentiation, in particular constitutional sociology, the theory of private government, and the concept of societal constitutionalism. For details, see Teubner (2012b) 3 f.

13 For details on Wiethölter's constitutional theory, see Teubner (2019).

14 Economic cultures do not correspond to nation-state borders (Abelshauser 2005).

in favor of their interpenetration (Santos 2003, 437). The economic constitutions of different regimes of production claim—one should say, in a relationship of "inter-constitutionality"—validity in a given time and place, while they at the same time are mutually influencing each other. Backer correctly designates with these four marking characteristics the current global constitutional (dis)order as "fracture, fluidity, permeability, polycentricity" (Backer 2012b). Therefore one should speak not of a global but rather of a transnational economic constitution, insofar as *global* stands for the unity of a world constitution and *transnational* for the multipolarity of mutually interwoven economic constitutions. The existing transnational economic constitution must thus—in its multipolarity of various production regimes, on the one hand, and the global economic institutions, on the other—be grasped with greater complexity than the simple unity of a global economic constitution or the simple adjacent constitutions of national economies. The layering of their unity-in-diversity is in all cases to be grasped as a "collision constitution"—that is, as a meta-constitution of the conflicts between different regimes of production.

3. CONSTITUTIONAL COLLISIONS

Contrary to the still dominant doctrine, which considers the economic constitution as a subregion of the state constitution, the economic constitution under transnational conditions is to be understood as a two-level complex:

1. on the lower level, as an independent source of constitutional principles—that is, as the ensemble of the sectorial constitutions of different production regimes,
2. on the meta-level, as a meta-constitution, which establishes itself in the collisions between
   - constitutions of different production regimes,
   - different sectorial constitutions (constitutions of the state, the economy, the media, science, etc.), and
   - global regime constitutions and production regime constitutions (Bomhoff 2015; Bomhoff and Meuwese 2011).

In view of this complexity, the collisions cannot be resolved via either federal principles or international private-law principles (Joerges 2011). The responsibility for balancing the conflicting constitutions cannot be found in the global institutions as hierarchically superior super-instances. The role of a third instance in conflicts within plural constitutions, which Böhm and Sinzheimer still could accord to the nation-state, is absent under conditions of globalization. The reason is, as Niklas Luhmann says, "the structural coupling of the political system and the legal system through constitutions does not have an equivalent at the level of global society" (Luhmann 2004, 488). Instead, the rules to regulate collisions of the economic constitutions—just as paradoxically as in international private law—will be developed in the conflicting constitutions themselves. At the same time, however, the demands of these conflicts far exceed the capacities of international private law. For the production regimes and the global institutions together represent a multilevel governance complex, which produces many more collisions, even between the different levels, which the decentralized collisions calculus needs to take into account in each and any economic constitutional unit.

The simple "horizontal" view of international private law cannot achieve that; as strange as it sounds, neither will hierarchical methods. It is a matter of a strict heterarchical relation between economic constitutions, even between global institutions and individual production regimes. The individual production regimes on the one side and the global economic institutions on the other are the power centers of collisions that define the main lines of the constitutional conflicts. The collisions among economic constitutions are thus to be solved in the conflicts of law rules of each production regime and also of each global institution:

- *horizontally*, within the diversity of production regimes, whose borders are no longer territorial but can only be grasped functionally,
- *vertically*, in the relationship between these production regimes and the global institutions of the world economy,
- *diagonally*, as the collision between a specialized globalized regime and the corresponding specialized particular subject matter of an individual regime of production (inspired by Joerges 2011).

This interplay of constitutions and their meta-constitution resembles network structures (for details, see Teubner 2017, 327 ff., 2011, 122 ff., 2009). It is a matter of a heterarchical relationship between the various semiautonomous levels of multilevel governance, for which network theory provides an appropriate conceptualization. Networks as a specific combination of bilateral individual relationships and multilateral overarching connectivity result from a fragile coexistence of various network nodes—global institutions and individual production regimes—whose normative orders contradict each other. Networks provide an institutional answer to the conflict of rationalities, which result from the differentiation of autonomous systems. Thus arises a "structure of paradox" of institutional interweaving, because these institutions rest on "contradictory demands" that are at the same time "functional" (Benz 1996, 24). Networks translate external contradictions, which manifest in conflicts of norms, into the internal perspective of the individual nodes, which maps them in the internal connections of different levels and subsystems, of network nodes, node relationships, and the whole network. In terms of collision law, this means that the network nodes, thus the regimes of production as well as the global institutions, each develop their own internal collision law, from which perspective norm conflicts are decided.

Network theory describes the multipolarity of the transnational economic constitution as a decentralized network, whose center is—in contrast to a hierarchical organization—only first among equals (Windeler 2001, 105 ff.). In case of collisions between the economic constitutions, there is no center to which to refer, but rather—quite analogous to international private law—only the network nodes themselves. Thus each individual economic constitution itself decides decentrally about norm collisions. Each network node then stands in responsibility, because it must take up both its internal perspective as well as the norms of the other network nodes and of the entire order. Transnational *ordre public* can only be decided decentrally in the internal perspective of each individual economic constitution (Ladeur 2011, 163 ff.).

IV. CONSTITUTIONAL ALTERNATIVES IN THE WESTERN PRODUCTION REGIMES

1. CONSTITUTIONAL COLLISIONS IN THE TRANSATLANTIC AREA

At first glance, it appears that in the Western Hemisphere, a counter-trend has developed, in which the European and

American production regimes are converging more and more. The *varieties of capitalism* seem to diminish, which corroborates Hansmann's and Kraakman's (2001, 439) message of "The End of the History of Corporate Law." The liberalization of world trade, the end of the trade restrictions of the East-West conflict, and falling transport and information costs unleashed adaptation pressures upon the European welfare states, which were widely understood as having no alternative (Abelshauser 2005, 10 ff.). Since the 1980s, the traditional corporatist production regimes of continental Europe have been increasingly dismantled, and they have approached ever more strongly the Anglo-American production regime.

From codetermination to bank participation in enterprises to the triangular cooperation of enterprise associations, labor unions, and government, the neocorporatist institutions ran into pressure. Not only economists critical of neocorporatism but even Wolfgang Streeck (2014), formerly the most important theoretician and sympathizer of European postwar corporatism, predicted that the democratic elements of the European production regime would not survive under conditions of globalization. The necessary fine-tuning between social organizations and political institutions would be unable to be repeated on a global scale. And the amount of mutual trust and sociocultural consensus, which here was a precondition, could not be globalized. The self-reproduction of social systems would become derailed on a global path since only national institutions are available for their political-legal constitutionalization. Böhm's massive criticism of Sinzheimer's vision of economic democracy and codetermination appears to be historically confirmed (Böhm 1951, 1971).

However, the most recent success stories of democratic corporatism in continental Europe come as a surprise. Already, with the transition from standardized mass production to post-Fordist diversified quality production in the 1980s; then, since the middle of the 1990s, with the decentralization of collective bargaining on the enterprise level; later, with the intensive cooperation between enterprise associations, trade unions, and government during the economic crisis of 2008–9; and, most recently, in the coronavirus crisis, a transformation of postwar corporatism has taken place, which proves its astonishing resilience despite globalization and economic crisis (Carlin et al. 2014; Dustmann et al. 2014). The transformation particularly took place in the power relations within the corporate triangles at the macro, meso, and micro levels.[15] The center of power has notably shifted to the "producer coalitions" on the enterprise level, while they were supported in the background by the cooperation of the industry associations, sectorial trade unions, and governmental instances, which guarantee higher productivity and prevention of crises. Empirical investigations show that it was not so much the government's Agenda 2010 that gave the impulse for success but, above all, the intensive cooperation between enterprises and works councils, which was supported by labor unions, industry associations, and government alike.[16] The economic and social success of democratic corporatism in comparison to the production regimes of the United Kingdom and the United States has been so impressive that the American Nobel Prize winner Stiglitz recommended the Scandinavian or German way as a model for the United States.[17]

Against all previsions of the collapse of social corporatism directed toward economic democracy, particularly against Hansmann's and Kraakman's (2001, 443 ff.) sweeping judgment of "The Failure of Alternative Models," varieties of capitalism have been indeed established firmly in the transatlantic space as a result of globalization. The capacity for resistance of European economic cultures against the worldwide successful standard capitalism is definitely notable. The economic constitutions of Scandinavian and Rhine capitalism—regulated by the welfare state, with strong labor unions, tightly woven and organized by neocorporatist coordination—distinguish themselves markedly to this day, in particular in their economic democratic elements, from the more liberal finance capital–dominated economic constitutions of Anglo-American minting. After the economic crisis of 2008, the European neocorporatist arrangements have undergone a considerable transformation and appear today, on the basis of their "historical comparative advantage," in view of their higher productivity and their increased social legitimacy, as the more attractive production regime (e.g., Abelshauser 2018). This is confirmed by a recently developed economic democracy index. In a comparison of different OECD countries, the index does not focus exclusively on collective bargaining and trade union representation; rather, it has been constructed from an expanded view of economic democracy with the following four components: (1) levels of employment protection and insecurity, employee participation, and managerial attitudes; (2) levels of trade union organization, employers' organization, and collective ownership; (3) concentration of economic power; and (4) extent of different social partners in decision making, accountability, and levels of corruption and central bank transparency (Cumbers 2018). Scandinavian countries rank highest, followed by Germany and other European countries with somewhat lower scores, while the unregulated Anglo-American economies show a statistically significant lower ranking, with the United States at the lowest end of the index. And in the relations between economic democracy and economic performance, the figures suggest that among European economies, the Scandinavian countries perform particularly well in terms of economic participation, inequality, and productivity.[18]

2. CONFLICTING PRODUCTION REGIMES

Collisions between these two economic constitutions can be traced back to markedly significant differences between the two great production regimes: the European production regimes (mainly Germany, Sweden, Norway, Finland,

15 The Swedish model of corporatism has not been done away with in this phase but rather has been transformed and adapted to the conditions of globalization. See, for details, Flume (2012).

16 It was this very cooperation that was the target of harsh critique by American corporate lawyers: "… inefficient decisions, paralysis, or weak boards, and that these costs are likely to exceed any potential benefits that worker participation might bring" (Hansmann and Kraakman 2001, 445).

17 Stiglitz (2009). Similar suggestions are even made in Great Britain: "Labour's Economic Plans: Departmental Determinism," *Economist*, January 1, 2014.

18 Cumbers (2018) suggests via an econometric analysis that there is a strong causal relation between the EDI and inequality, as measured by the Gini coefficient.

Netherlands, Switzerland, and Austria), on the one hand, and the Anglo-Saxon regimes of liberal market economies (Britain, the United States, Ireland, Canada, and Australia), on the other. The Anglo-American economic culture forms a group, styled as liberal market economies (LME), of relatively unregulated liberal market economies. In contrast to the European markets, with stronger economic democratic and social welfare state orientations—so-called coordinated market economies (CME) in which neocorporatist negotiating arrangements between economic associations, trade unions, and the government coordinate the economy—industry associations and labor unions in the Anglo-American area are rather weak and play only a very limited role of coordination in the institutional framework (Hall and Soskice 2005). Instead we find there a relatively uncoordinated coexistence of free market processes, on the one hand, and external regulation by the government, on the other hand. There, the government, regulatory authorities, and the courts play the most important role in the formation of regulations whereby the rules typically include little margin of appreciation.

Coming back to the question posed at the beginning of this article, it is the contrast between Anglo-American LME and European CME that represents the realistic economic constitutional alternative today, which has replaced the former difference between Böhm's ordoliberal economic constitution and Sinzheimer's social democratic economic democracy. Böhm's visions have left but few traces in both production regimes, while the European neocorporatist constitutions definitively implemented some of Sinzheimer's visions of economic democracy (Seifert 2011). Although Sinzheimer's rather centralistic ideas of an "economic community," of council workers' democracy and the organized cooperation of coalitions, were never fully implemented, today's social corporatism has nevertheless built impressive institutions of economic democracy. There is one important difference from Sinzheimer's vision. On the macro and meso levels, the current neocorporatist negotiation system is not formalized by organizations of public law; instead, on these levels a rather informal corporatism has arisen by accretion. Meanwhile, on the micro level, a strongly formalized corporatism by way of board codetermination and shop-floor works councils dominates. Sinzheimer's council workers' organizations were never made real, but a functional equivalent for shifting political conflicts into the economic and social areas can be observed, in which today spontaneous protest movements and nongovernmental organizations move to the foreground.

The collisions of economic constitutions fall into the following economic cultural differences of the two production systems (Feldman 2019; Witt et al. 2018; Deeg 2009; Johnston and Hancké 2009; Hall and Soskice 2005):

1. While in the Anglo-American economic culture, financial systems put a relatively short-term horizon on enterprises, which at the same time carry with them high risks, the neocorporatist culture favors financial modes of enterprises toward a rather more long-term financing.
2. In the Anglo-American economies, the extreme deregulation of the labor market has driven out collective labor law, which denies an effective representation of worker interests in enterprises. Thus there exist only weak trade unions, which can hardly oppose the hierarchical leadership of top management. In contrast, in the neocorporatist culture, institutions of economic democracy have been developed that articulate worker interests quite successfully. In the collective labor relations of enterprises and of industry, highly cooperative relationships have arisen, in which trade unions and today, ever more often, the shop-floor works councils play an important role and are responsible for the formation of successful production coalitions on the global market.
3. While in the LMEs the system of interenterprise relations places highly competitive demands and at the same time sets sharp boundaries on potential cooperation between enterprises, the relationships between enterprises tend in CMEs to develop cooperative networks with relational long-term contracts, and these both horizontally within the market as well as vertically between producers, transporters, and sales.
4. The coordination between the economic sector and other areas of society will in LMEs be left either to market forces or exclusively to state regulation. In contrast thereto, CMEs have developed neocorporatist negotiation arrangements in which enterprises cooperate with welfare state regulatory institutions and social organizations. Economic associations and large enterprises coordinate markets by the development of technical standards, standard contracts, and procedures of dispute settlement. Economic associations negotiate technical and social standards with the government. The courts produce social obligations of economic enterprises so that a negotiated *ordre public economique* is constructed.

V. AN EXAMPLE: CORPORATE CODES IN THE COLLISIONS OF TRANSNATIONAL ECONOMIC CONSTITUTIONS

1. TWO TYPES OF CORPORATE CODES

How collisions between diverging production regimes lead global economic institutions to develop in entirely different directions shall be sketched in this conclusion with an example of global corporate constitutionalism—the corporate codes of multinational enterprises.[19] Multinational corporations were involved in recent years in a series of scandals that shocked global public opinion. Ecological catastrophes, inhumane working conditions, child labor, and complicity of multinational enterprises in cases of corruption and human rights violations by political regimes have raised public awareness of the negative consequences of the transnationalization of economic enterprises. Binding regulations under international law could not be implemented. Instead, a massive amount of another species of transnational norms has splayed itself across the global legal landscape: corporate codes of conduct. These are "voluntary" codes of behavior for multinational corporations.

Two basic variations of the codes have been formed. On the one side, the global economic institutions of the state world—the UN, the OECD, the ILO, the EU—have formulated unitary "public" codes of behavior for enterprises. On the other, the massive public criticism, which is diffused by the

19 On the constitutionalization of multinational corporate groups and their codes, see Ruggie (2018); Backer (2016); Backer (2012a); Teubner (2012a).

media globally as well as by the offensive actions of protest movements and nongovernmental organizations, compels countless corporations to "voluntarily" take up a number of "private" corporate codes that posit norms in which they make effective self-binding declarations to the public and promise their implementation.

In the relationship of codes, an inversion of the traditional hierarchy of superior state-law and subordinate private-law norms has occurred (Backer 2012a; Teubner 2012a). A particularly evident reversal is found in the hard-law / soft-law quality of "public" and "private" codes. It is now the rules based on state law providing only nonbinding recommendation that display the quality of "soft law," while the private ordering of multinational corporations effectively implements precise, binding norms and thereby develops into a new form of "hard law."

This inversion makes it clear that the constitutionalization of the transnational economy essentially occurs through corporate formation and implementation of norms. Not the institutions of the state but rather those of corporate collective actors decide whether corporate codes will be at all produced, and if so, which content they will have and how they are to be legally enforced. As a result of drastic power transfers in the global economy, transnational enterprises have become the real constitutive authority, because it is they who create corporate codes of conduct through their unilateral public self-obligation.

Under the influence of the collisions, the character of corporate codes itself is incisively changed. In the vertical dimension, it is the varieties of capitalism that successfully hinder the global institutions of the world of states—UN, ILO, OECD, EU—from providing legally binding corporate codes. If the economic constitutions of the major production regimes in this way diverge, then the "public" corporate codes can be only soft law, while the hard law can emerge only at the level of enterprises in the "private" codes. The "public" codes can no longer provide collision rules for a global *ordre public économique* but only give guidelines for concrete collision norms, which are implemented in the enterprises according to the specifics of the situation.

In the horizontal dimension, the "private" codes take on a different character, depending upon the production regime they are implemented in. This is due not primarily to their adaptation to local particularities but rather, in the first place, to their institutional embedding in different regimes of production. They will differ from each other according to whether they operate in LMEs with their compromise between Keynesianism and the Chicago School, with their priority to private ordering, adapted to the New Sovereignty of enterprises, or in CMEs with greater welfare state and economic democracy components in the neocorporatist triangle of associations, trade unions, and the state.

2. JURIDIFYING CORPORATE CODES IN DIFFERENT PRODUCTION REGIMES

The difference between the production regimes shows itself in the current virulent question of whether corporate codes are legally qualified as binding by courts and are effectively enforced (Beckers 2015; Klösel 2012). Multinational corporations seek to hinder by any means the interpretation and application of codes of conduct by state courts. Thus they insist categorically that their voluntary codes are legally nonbinding.

American courts sympathize with this view and show themselves hesitant when public-interest litigation pushes them to implement the codes as legally binding rules (Revak 2012). The courts are open only to juridify market-based social norms. They make social norms that accompany market processes legally binding there, only insofar as they implement consumer preferences where these are sabotaged by false or misleading information. However, they deny the core material of the corporate codes (i.e., social norms), which proscribe a common-good orientation to the corporations, the imposition of legal obligation with an appeal to judicial restraint.[20]

The chances for juridifying corporate codes appear quite different in the production regime in continental Europe. If they are imported into the thoroughly regulated neocorporatist arrangements, then the codes must be adapted to principles of welfare state and economic democracy. They will be exposed to the stronger legislative activities in the European Union and at the same time to a more extensive juridification by the courts. The EU legislature provides sanctions in § 5 I No. 6 Law Against Unfair Competition against enterprises that give false data about the observation of a code of conduct to which the enterprise has obligated itself in a binding fashion, if it refers to that binding (Beckers 2015, 176 ff.).

Juridification by the courts, with which the legal qualification of the corporate codes enters into newfound land, runs in two opposing directions. On the one side, the courts exert strict control of the contents of the codes, insofar as the codes burden employees or consumers; on the other side, the courts transform the codes into binding state law, insofar as they contain obligations in the public interest.

Substantive review intervenes when the enterprises insist on the legally nonbinding character of their voluntary codes. On the one side, they do so in order to remove private compliance rules from the control of courts, which enables them to more strictly implement their internal rules—as in the cases of rules on whistleblowers, social political activities, internal monitoring, evaluations of performance, and internal supervision of rules. On the other side, the courts perform legal control of the codes by invoking the rules of codetermination law, the rules of standard contract review, and the third-party effect of fundamental rights.

On the one hand, the case of Walmart is the most famous. Walmart was very strict in its corporate codes, governing even the private lives of its employees, and sought to enforce a clause prohibiting love and flirtation in the workplace, which is standard in the United States. The courts, however, refused to permit Walmart to appeal to the nonbinding nature of voluntary code, which would allow them to escape judicial review. The courts let the questionable clauses fail, in part based on the participation rights of the works council, in part on the basis of fundamental rights standards.[21]

On the other hand, the case of Lidl, which has become

20 On these three types of norms in US law, see Peukert (2014). For a recent example of these tendencies, see the VW decision of the FTC that refers to VW's corporate codes: https://www.ftc.gov/news-events/press-releases/2016/03/ftc-charges-volkswagen-deceived-consumers-its-clean-diesel.

21 Talaulicar (2009) analyzes the effects of different economic cultures on the implementation of the codes. Arbeitsgericht Wuppertal NZA-

just as famous, shows how difficult it is for the enterprises to appeal to the "voluntary" and nonbinding character of their codes, whenever they declare self-obligations with respect to the public good but then do not hold to them in practice.[22] Lidl was sued, with success, for anticompetitive conduct when it made false advertisements and declared that it had fulfilled its code obligations.

Not only competition law but also tort law, with its highly developed organizational duties; contract law, with its broad contractual and quasi-contractual obligations; and the third-party effect of fundamental rights are relevant here. With these doctrines, the welfare state–inspired private law of continental Europe has a full tool kit for the legal qualification of corporate codes at its disposal (Beckers 2015, 39 ff., 344 ff.). Thereby the courts can assure the legally binding character of the codes and enable their enforcement and judicial review. Courts can in the final analysis always accuse enterprises of *venire contra factum proprium*—a legally relevant performative self-contradiction—when enterprises have first enacted corporate codes as serious declarations of self-binding, but then seek to qualify them before the court as nonbinding declaratory intentions.

3. CORPORATE CODES AND ECONOMIC DEMOCRACY

So far, we have dealt with a complex process of corporate constitutionalization that takes place in the interactions between global public codes of international organizations, private codes of multinational enterprises, and the decisions of national courts and legislation. If corporate codes make up part of the constitutionalization of transnational economic regimes, are these processes accompanied by their democratization?

Indeed, democratic legitimacy remains the Achilles' heel of transnational economic constitutionalism. Constitutionalization without democracy: this is the basic tenor of a vociferous critique of transnational constitutionalism.[23] Under a variety of labels such as "new constitutionalism," "imperial global state in the making," or "post-democratic executive federalism," transnational economic constitutionalism is criticized as a self-serving device for political and economic elites (Hirschl 2004) or for functional social systems (Holmes 2019; Schneiderman 2016; Goldoni 2014; Christodoulidis 2013). Nonstate constitutions, they argue, may establish successfully the internal procedures of decision-making, they may strengthen the rule of law, they may guarantee constitutional rights—but they fail when they are measured against the standards of democracy.

But critics err fundamentally when they invoke a time-honored principle of political democracy and transfer it uncritically to transnational economic constitutionalism. They present the identity of authors and affected people as the timeless hard core of democracy (Habermas 1996, chap. 4, I; Günther 2001). However, if we look more closely into the history of *omnes tangit*, universality turns into extreme particularities (Luhmann 1998, 157 ff.).

If we are interested in making transnational economic institutions more responsive to their various environments (social, natural, and human), then their democratization cannot be understood as a guarantee of the identity of rulers and ruled. But economic democracy can be understood as a guarantee of forceful organized dissent, which challenges the decisions of power holders effectively and "brings to the fore the power of powerlessness."[24]

This concept of organized dissent is not far away from epistemic and deliberative theories of democracy.[25] They concentrate on the problem-solving capacity of democratic institutions. But there is a difference: while they strive for rightness of political decisions, a theory of organized dissent is skeptical of such claims to normative truth and concentrates instead on a "right to contingency," which opens alternative world constructions (Weiss 2016a). Not the naive hope for the one best solution but the confrontation with alternative worldviews is at the center of democratic communication (Weiss 2016b, 182). Considerable institutional imagination is required if one then searches for a new and different relation of mutual reinforcement: organized dissent needs to be supported by a high learning capacity in economic decisions and vice versa. Transnational economic democracy requires that well-functioning decision procedures create the space for the "possibility of dissent as a precondition of an independent selectivity distributed within society." Vice versa, organized dissent needs to be accompanied by a high potential for organized decisions (Luhmann 1973, 178).

Thus the democratic principle of the unity of rulers and rules, which still expresses the traditional democratic symbiosis, needs *transnational economic institutions* to be replaced by the principle of *self-contestation*. Self-contestation requires them to be responsive to external irritations on the one side and to institutionalize sites of internal dissent on the other (for details, see Teubner 2020b, 382 ff., 2018, 11 ff.).

As for such aspirations to economic democracy, the US courts prove themselves to be rather resistant. Democracy there is understood as having no place in market processes; instead, its role is primarily in the political system. Corporate codes are, accordingly, strictly interpreted for conformity to the market (Peukert 2014). They are only juridified by courts insofar as they implement the changing preferences of market participants in the market. Primarily, it remains a matter for the private transnational corporations to react situationally in their struggles with civil society groups regarding the changing preferences of consumers and investors by common good–oriented codes, so far as this corresponds to their cost-benefit analysis. A further politicization of the marketplace is not held to be legitimate in the United States.

In contrast, the economic cultures of continental Europe, with their neocorporatist institutions, have historically been long directed toward an internal politicization of eco-

RR 2005, 476; Landesarbeitsgericht Düsseldorf NZA-RR 2006, 81. See Klösel (2012) 59 ff.

22 For an extensive analysis of the Lidl case, see Verbraucherzentrale Hamburg v. Lidl, Statement of Claim filed 6 April 2010, case settled on 14 April 2010, http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/LidllawsuitreworkingconditionsinBangladesh.

23 Most prominently, Habermas (2012). For an elaboration of this critique, see Möller (2016), particularly 166 ff.

24 Luhmann (1990). This is different from the argument that in transnational relations, democracy will be replaced by justification (Neyer 2010). Without the pressures of an effectively institutionalized dissent, mere justification tends to become sheer ideological self-justification.

25 On epistemic theory, see Estlund (2008); on deliberative theory, see Elster (1998).

nomic decisions. Alongside wide-ranging social welfare state interventions, the institutions of economic democracy are held to be legitimate particularly because they, through the participation of labor in corporate decisions, are supposed to compensate for market failures (Abelshauser 2005). In their adaptation to democratic corporatism of continental Europe, the corporate codes are being redefined: no longer seen as unilateral enactment by sovereign enterprises, they are instead understood as the result of political conflicts between enterprises and civil society actors. In addition to other institutions of economic democracy, corporate codes serve here to pursue goals of public interest, the re-embedding of the economy into society. That occurs, however, not through external state intervention but rather in the form of a reentry: the internalization of social demands in the decisions of the enterprise (Teubner 2020a, 2012a).

4. THE CODES' IMPULSES FOR ECONOMIC DEMOCRACY

If the internal politicization of the European corporate culture has thus markedly influenced the corporate codes, in the opposite direction three new impulses of economic democracy have also been unleashed. The codes of conduct, in turn, produce effects for the democratization of the economy. Their first impulse stems from a change in direction of the protest movements, in which, according to some observers, a new political quality in society has been realized (Crouch 2011; O'Brien et al. 2002, 2). Civil society protests direct themselves increasingly no longer (only) against institutions of the state but selectively, directly, and intentionally against corporate actors in the market, which are accused of violating their public responsibilities. Social movements react thereby to drastic power shifts in the global economic constitution. The actual economic *pouvoir constituent* has been taken over by transnational enterprises, because it is they who, through their unilateral public self-obligation, enact and implement the corporate codes. However, first and above all, it is social movements that by their protest initiate these corporate codes, codetermine their contents, and monitor their implementation. For it is mostly the NGOs and other actors in civil society who have compelled multinational corporations to conclude agreements with them regarding corporate codes through their protest actions. In their activities, civil society's actors realize a particular potential of corporate codes for economic democracy that goes well beyond the traditional neocorporatist arrangements, which in continental Europe were developed only between enterprises and labor unions.

Their second impulse for economic democracy drastically extends the substantive themes of the politicization of the economy. Corporate codes no longer only mediate the distributive interests of capital and labor within the enterprise. The civil society protests go much further than these important but limited themes, and compel corporations to establish encompassing goals of the public interest with self-binding force: environmental protection, antidiscrimination, human rights, product quality, consumer protection, data protection, freedom of the internet, and fair trade.[26] While such themes had been earlier almost exclusively decided within the political system, a strange paradox of economic democracy arises as a result of direct confrontation of civil society groups with corporations: the public interest will be implemented through private ordering (Vallejo 2020, 321 ff.; Beckers 2015, 262 ff.) Of course, the corporate codes cannot, like political legislation, claim universal validity. However, their obligatory power goes well beyond the individual enterprise. For the civil society groups insist that the power of corporate law arrangements extends to dependent corporations and that contractual agreements bind large networks of supply and distribution.

Their third impulse for economic democracy proceeds from the self-obligation of enterprises to guarantee fundamental rights. Here, the codes go much further than the current doctrines of third-party effect of fundamental rights. For they break through the state-centered character of fundamental rights and recognize explicitly a direct effect of fundamental rights on private collective actors. And they make up for certain weaknesses of the state-law protective duties. If the fundamental rights standards of the codes result directly from the democratic potential of social conflicts, then a higher contextual adequacy is to be expected because organizations and procedures are more exactly calibrated to the particularities of the fundamental rights conflicts.[27]

V. CONCLUSION

Globalization has produced a complex transnational economic constitution, which needs to be understood as a meta-constitution regulating collisions of constitutions. The colliding units are not nation-states but transnational production regimes that extend well beyond national boundaries.

The alternatives—ordoliberal economic constitution and social democratic economic democracy—formulated by Böhm and Sinzheimer have been replaced by the opposition between the institutionally strong, tightly woven production regimes of continental Europe, organized by neocorporatism, and the liberal finance capital–marked Anglo-American production regimes.

Against all predictions, the neocorporatist constitutions of European economies today are undergoing a renaissance, which shows that despite globalization and economic crisis, they are not only resilient but also have a future potential. Moreover, the corporate codes that have emerged in the sweep of globalization have opened, beyond the protection of workers' rights, a new opportunity for powers that are external to the corporation, alongside the opposing power of civil society—the media, public debate, spontaneous protest, intellectuals, protest movements, NGOs, labor unions, and the professions—and the legal norms created by state intervention. These powers exercise such massive pressure on enterprises that they are compelled to enact self-binding restrictions oriented to the public interest.

The crucial issue is whether principles of economic democracy have a potential to be developed under conditions of transnational societal constitutionalism. One should not over-hastily transpose the classical democratic

26 Niklas Luhmann (2012, chap. 4, XV) argues that the so-styled "new social movements" no longer fit the form of socialist protest. They do not refer to the consequences of industrialization and no longer have the sole goal of a better division of wealth and well-being. Their propositions and themes have become much more heterogenous; above all, the ecological theme has crept into the foreground.

27 On such an extension of the third-party effect of fundamental rights, see Hensel and Teubner (2015).

principle of identity of authors and affected people, which made sense in the national political context. A recontextualization of democracy that requires generalization as well as respecification is needed today under the conditions of transnationalization. As for generalization, political representation, the traditional concept of democracy for the nation-state, needs to be replaced by self-contestation, which has to be firmly institutionalized in transnational regimes. As for respecification, self-contestation can be established not in a one-size-fits-all approach but in wide variations that reflect the extreme epistemic diversity among issue-specific transnational regimes.

AUTHOR NOTES

Translated from the German by Eric Engle. For inspiration and criticism, I wish to thank Achim Seifert. Parts of the argument have been published in Italian Law Journal 1 (2015).

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https://www.jura.uni-frankfurt.de/42832482/Zur_Person__Englisch

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