

A global labour constitution?

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Abstract

This article explores the argument that the idea of the labour constitution, as developed by Hugo Sinzheimer, offers a useful perspective for thinking about labour law today. With reference to the work of Wolfgang Streeck and Karl Polanyi, it highlights the potential benefits of the labour constitution as a framework for analysis. With a view to developing and updating Sinzheimer's blueprint for a – national – labour constitution, it then engages with two lines of theoretical enquiry into the nature of constitutionalism under conditions of advanced economic globalisation. It concludes by outlining an agenda for further research, informed and inspired by the idea of a global labour constitution.

Introduction

My aim in this paper is to explore the argument that the idea of the labour constitution offers a useful perspective for thinking about labour law today, under conditions of advanced economic globalisation.¹ The term *labour constitution* is familiar first and foremost from the work of Hugo Sinzheimer (1875–1945). As used by Sinzheimer, it referred, in substance, to the collective labour law of the Weimar Republic: the law regulating trade unions, works councils, collective bargaining and codetermination. By invoking the idea of a *constitution*, Sinzheimer drew attention to the democratising function of that body of law: the labour constitution served to limit the power of capital and to emancipate labour. He drew attention, too, to the ultimately public nature of the economy and the imperative that the economy be governed in the public interest, under the guardianship – in the last instance – of the state.² And he drew attention to the role that law played in constituting the economy; configuring the institution of property and configuring, thereby, the legal status

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1 I build here on earlier work, especially R Dukes, 'Hugo Sinzheimer and the Constitutional Function of Labour Law' in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford 2011).

2 Sinzheimer insisted that a balance must be struck between state control or intervention in furtherance of the public interest and the autonomy of economic actors, which was fundamental to democracy – hence 'in the last instance': *ibid* 60–61

of economic actors: the owners of property and those – workers – who were dependent upon it for their means of subsistence.³

The investigation of the usefulness of the idea of the labour constitution is undertaken here against an influential strand of contemporary labour law scholarship which seeks to realign the study of labour law more closely with the labour market as the primary object of study. The difficulty with this move, I suggest, is that it can tend towards an acceptance of market logic as the organising principle of the field. In studies of international and transnational labour law, for example, it is not unusual for scholars to understand and predict the motivations and policy-decisions of national governments through the lens of a market-based model: the world as a global market place; states as unitary, wealth-maximising market actors. In my opinion, this model is unhelpful. In assuming that national governments will act as a matter of course to increase ‘their’ economic wealth, ‘their’ global competitiveness, scholars allow themselves little scope for arguing in favour of the protection of social rights and labour rights as goods in themselves. The argument is made instead that the guarantee of social rights to citizens might serve the interests of a state because social rights might improve the functioning of labour markets. Social rights and economic interests are presented as potentially mutually reinforcing, and social rights are advocated only insofar as they can be shown to work with the market; categorically not because they result in greater equality, greater democracy and greater stability in workers’ lives.

Building on the work of Karl Polanyi and Wolfgang Streeck, I suggest that the idea of the labour constitution might offer a more useful framework for analysis for the reason that it fits better with the reality of nation states as sites of political struggle: sites where pressures for capitalist progress and the expansion of markets compete for the attention of government with demands for social stability and social justice. Instead of assuming the motives of states-as-market-actors, it allows for the questions to be asked: why do states make the policy decisions that they do, and who stands to win and who to lose as a result? Instead of limiting us to instrumentalist arguments that labour rights might improve labour market efficiency or flexibility, it allows us to argue for the legitimacy in themselves of workers’ claims to human dignity, liberty and equality. And instead of dismissing those labour rights that cannot convincingly be said to improve efficiency or flexibility as impossibly idealistic or anachronistic, it assumes that everything is to play for: economic freedoms and social rights, trade liberalisation and state intervention in the interests of social justice or environmental protection, deregulation and reregulation of the financial sector. As such, the idea of the labour constitution turns the spotlight squarely on questions of power and influence – economic power, political power, social power – and on the myriad ways in which laws and legal frameworks constitute, reinforce and limit such power.

Given the very significant changes that have occurred since Sinzheimer’s time in the organisation of production and in the political landscape, the argument that his work remains relevant today can be met with significant objections: that globalisation to date has insulated global trade and global finance from political and democratic control; that an asymmetry has developed between global capital and weakened trade unions and other democratic, representative institutions still tied to the national level; and that there is no global ‘state’, no global trade union, capable of performing the role of constitutionalising the global economy in the way prescribed by Sinzheimer with respect to the national economy.⁴ With the aim of

3 See especially H Sinzheimer, ‘Die Demokratisierung des Arbeitsverhältnisses’ (1928) in H Sinzheimer, *Arbeitsrecht und Rechtssoziologie: gesammelte Aufsätze und Reden* (Frankfurt/Cologne 1976).

4 H Arthurs, ‘The Constitutionalisation of Employment Relations: Multiple Models, Pernicious Problems’ (2010) 19 Social and Legal Studies 403–22; E Tucker, ‘Labor’s Many Constitutions (and Capital’s Too)’ (2012) 33 Comparative Labor Law and Policy Journal 355–78.

developing Sinzheimer's model in a way that might overcome such objections, the second part of the paper engages with two important lines of theoretical enquiry into transnational constitutionalism: Christian Joerges and Florian Rödl's proposals for a global constitution by way of a global conflicts law and Gunther Teubner's theory of societal constitutionalism. In a final section, I outline an agenda for further research into international and transnational labour law that is informed and inspired by the idea of a global labour constitution.

Labour constitutions and labour markets

Hugo Sinzheimer first developed the idea of the labour constitution as a scholar and a politician participating in efforts to create a new, social democratic state out of the 1918 November Revolution.⁵ Politically, Sinzheimer was positioned to the non-Marxist right of the SPD (Sozialistische Partei Deutschlands). In common with others at the time – Hermann Heller, Franz Neumann – he theorised social democracy as involving the extension of democracy from the political to the economic sphere and, thereby, the emancipation of the working class.⁶ A democratised economy was a capitalist economy with guaranteed property and contract rights, but it was an economy governed by capital *and* labour acting together in furtherance of the public good. Within this theory, the labour constitution (or economic constitution) figured as the body of law that allowed for the collective regulation of the economy by the 'economic organisations' – trade unions, works councils, employers and employers' associations. It was, in Sinzheimer's terms, the body of law which called labour into a community with 'property' (i.e. capital), that created a community of labour and property that existed for the furtherance of the common good and guaranteed the right of labour to participate, on a parity basis, in the administration of the means of production. Through its participation in the regulation of the economy, labour was freed from its subordination to capital and workers were freed from employer efforts to dictate the social and economic conditions of their existence and, at the same time, became free to participate in the formation of those conditions.

It goes without saying that the organisation of production and of working relations has changed quite dramatically since the 1910s and 1920s. Any discussion of labour law in times of globalisation must begin with an iteration of the various ways in which current conditions differ from the 'traditional' model of stable, full-time employment relationships, male breadwinners and female care-givers, high levels of union membership, managerial hierarchies within firms and vertical hierarchies within production chains, nationally based and confined employer-producers and worker-consumers, and nationally based and confined markets. Charting such developments, some scholars have been quick to reject what they describe as the old ways of thinking about labour law; old ways such as Sinzheimer's, which focused on trade union organisation and collective bargaining as the defining elements of the discipline. In light of falling union membership levels and a significant contraction of collective bargaining coverage across nation states, moves to broaden the focus of scholarship beyond these core topics are perfectly appropriate.⁷ But the case for the outdatedness of the 'old ways' can be overstated: in emphasising change and in adapting analysis accordingly, important continuities can be obscured. However

5 O Kahn-Freund, 'Hugo Sinzheimer' in R Lewis and J Clark (eds), *Labour Law and Politics in the Weimar Republic* (Oxford 1981); Dukes (n 1).

6 D Schiek, 'Europe's Socio-Economic Constitution ("Verfasstheit") after the Treaty of Lisbon' in T Dieterich, M Le Friant, L Nogler, K Kezuka and H Pfarr (eds), *Individuelle und kollektive Freiheit im Arbeitsrecht – Gedächtnisschrift für Ulrich Zachert* (Baden-Baden 2010) 172–73.

7 'Collective bargaining coverage' refers to the proportion of workers whose terms and conditions are set by collective bargaining.

much the economy and society have changed in the past 50 or 100 years, what has remained the same is their fundamental nature as *capitalist*. Any attempt to rethink the 'idea' of labour law for the twenty-first century – to articulate the scope and the essential aims of the subject in a way that lends it both coherence and fit with the realities of working relations today – ought to keep this essential point within its sights.⁸ Above all, it ought to recognise the enduring importance of *conflict* in working relations: conflict between social classes battling over the distribution of economic benefits or – if the language of social class is thought, too, to be anachronistic – conflict 'over the extent to which social life should be controlled by competitive markets and by imperatives of economic efficiency'.⁹ Under-emphasising the existence of conflict and instead analysing the economy as abstract and neutral allows for a conception of economic and social rights as potentially mutually reinforcing.¹⁰ And to conceive of economic and social rights in this way can lead one towards the conclusion that social rights should *only* be protected when to do so would have the potential to also bring economic benefits.

The focus of this paper lies with the global economy and with international and transnational labour law – the latter term referring to hard and soft rules with application across national boundaries: labour clauses in bilateral and multilateral trade agreements, European Union (EU) directives, transnational corporate codes, international collective ('framework') agreements and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises.¹¹ By now there is a rich and growing body of scholarship dealing with these rules and with normative questions of the policy aims and regulatory techniques appropriate to the international or transnational level. While it would be impossible in a paper of this length to do justice to the various strands in the scholarship, it is important for our purposes to note that it is not uncommon, even for labour law scholars, to begin from an acceptance of a rather narrow, market-focused analysis of the actions and interactions of nation states.¹² States are treated as rational, unitary wealth-maximisers similar to the *homo economicus* of classical economics – as *patriae economicae*, if you will – and are described as acting to further their own interests, understood principally in terms of the need to remain competitive in global markets. National labour law systems are characterised as an element of a state's comparative institutional advantage and the conclusion that states have an interest in *lowering* labour standards is, as a consequence, difficult to resist. What such a lowering of labour standards might mean for people within the state becomes lost in the bigger picture.

Brian Langille's work on the International Labour Organization (ILO) provides a prominent example of this kind of thinking.¹³ Langille proposes a caricature version of the market-focused model as the dominant but *false* framing narrative of international labour law: states are self-interested actors, domestic labour law is a tax on labour market activity and it is always economically rational for a state to reduce that tax in order to attract

8 E Tucker, 'Renorming Labour Law: Can We Escape Labour Law's Recurring Regulatory Dilemmas?' (2010) 39(2) *Industrial Law Journal* 99–138.

9 W Streeck, *Re-forming Capitalism: Institutional Change in the German Political Economy* (Oxford University Press 2009) 232–33.

10 See e.g. S Deakin and F Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford 2004), ch 5.

11 B Hepple, *Labour Laws and Global Trade* (Hart 2005) 4.

12 See e.g. B Langille, 'What is International Labour Law For?' (2009) 3(1) *Law and Ethics of Human Rights* 47–82; A Hyde, 'The International Labor Organization in the Stag Hunt for Global Labor Rights' (2009) 3 *Law and Ethics of Human Rights* 153.

13 Langille (n 12); B Langille, 'The ILO is not a State, its Members are not Firms' in G Politakis (ed), *Protecting Labour Rights as Human Rights: Present and Future of International Supervision* (ILO 2007).

investment and remain competitive.¹⁴ In setting out his view of an alternative and superior narrative, however, he rejects only the second premise – labour law as a tax on market activity – and not the first. Characterising states, still, as rational self-interested actors, he invokes Sen and capabilities theory to make the claim that social justice and economic growth are mutually reinforcing.¹⁵ More specifically: ‘there are complex ways in which, and “channels” through which, labor rights, such as freedom of association, contribute to successful economies’.¹⁶ It follows, he then argues, that the task of the ILO is not to prevent states from acting ‘in their own self-interest’, but rather to persuade them that it might be in their interest, after all, to enforce labour standards: ‘The project of international labor law is to lead member states to pursue their self interest through the construction of social policies which are part of the complex and mutually supporting aspects of human freedom’.¹⁷

In Bob Hepple’s important book, *Labour Laws and Global Trade*, the caricature ‘race to the bottom’ narrative is resisted in a similar way but in this case through the lens of so-called ‘varieties of capitalism’ scholarship.¹⁸ Starting, again, from a model which posits states as competitors in a global market place, Hepple argues that it does not always serve the interests of a state to lower its labour standards: the experience of coordinated market economies proves that *high* labour standards can also contribute positively to a country’s comparative institutional advantage.¹⁹ It follows that the key question in deciding domestic labour law policy is this: does the labour law in question enhance or inhibit the efficiency of the employment relationship?²⁰ Only if it enhances efficiency will it improve the country’s comparative advantage. In respect of rights to organise and to bargain collectively, then, to provide but one example, Hepple emphasises that such rights ‘may serve some or all [of these] *economic* purposes . . . efficiency, redistribution, dynamic goals or social insurance. Giving workers a “voice” generally improves efficiency’.²¹

At the risk of oversimplifying what, in Hepple’s case, is a singularly rich and thoughtful contribution, we might characterise the approach of both authors, then, as constructed around an analytical model that appears to accept the primacy of economic interests and economic motivations. In order to resist the deregulatory dynamic that the model implies, both authors assert that the enforcement of labour standards can serve to further economic interests. The central weakness of the model is that it builds upon a conception of nation states that is far removed from reality. States are categorically *not* unitary, self-interested market actors. They are sites of political struggle, sites where pressures for capitalist progress compete for the attention of government with – potentially conflicting but in principle no less urgent – demands for social stability and social justice.²²

14 Langille (n 12) 58–60.

15 Ibid 73–74.

16 Ibid 75, citing D Kucera, ‘The Effects of Core Worker Rights on Labour Costs and Foreign Direct Investment: Evaluating the Conventional Wisdom’ IILS Decent Work Research Program Working Paper No 130 (IILS 2001).

17 Langille (n 12) 76.

18 Hepple (n 11) ch 10. Hepple’s argumentation is doubted by Ewing and by Trubek: K D Ewing, ‘Book Review’ (2005) 34(4) *Industrial Law Journal* 353–55; D Trubek, ‘Review Essay: The Emergence of Transnational Labour Law’ (2006) 100 *American Journal of International Law* 725–33, 728.

19 Hepple (n 11) especially 253–56 with references to D Charny, ‘Regulatory Competition and the Global Coordination of Labour Standards’ (2000) 3 *Journal of International Economic Law* 281.

20 Hepple (n 11) 256

21 Ibid 255 (my emphasis).

22 W Streeck, *Re-Forming Capitalism: Institutional Change in the German Political Economy* (Oxford 2004) 5.

The way the conflict between market expansion and protection is, always temporarily, adjudicated – as it was for a while in the ‘postwar settlement’ between capital and labor – depends on contingent political, economic and technological, and other conditions that are bound to change with time, thereby upsetting the historical balance between capitalist rationalization and social stability and calling for new efforts at social reconstruction.²³

The notion of the unitary, self-interested state over-emphasises the extent to which national societies are integrated and closes off important lines of enquiry into questions of influence and political power.²⁴ When applied to discussions of labour law, it can lead authors to tend towards the conclusion – perhaps reluctantly, perhaps fatalistically – that certain labour rights or standards are just not worth fighting for. As Hepple concludes: ‘where labour laws are primarily redistributive, jurisdictional competition will lead to pressures to deregulate or dilute these laws. Countries which face strong competition from others with weaker redistributive laws are at real risk of deregulation’.²⁵

A more useful approach to thinking about the actions and interactions of states at the macro-level has been suggested by Wolfgang Streeck.²⁶ Following Karl Polanyi, Streeck emphasises the historical development of capitalism as a ‘double movement’ of market expansion and social protection: ‘the market [expands] continuously but this movement [is] met by a countermovement checking the expansion in definite directions’.²⁷ The advantage of this model, highlighted by Streeck, is that it allows for the registering of interests that are not economic but social and for an understanding of social interests and social rights as ‘far from systematically subservient to or derivative of interests in economic efficiency’.²⁸ It allows, in this way, for a consideration of politics as an ‘independent autonomous force’ and decisively *not* as a mechanism simply for the advancement of national competitiveness.²⁹ ‘Where markets expand, politics, according to Polanyi, is always liable to be put at the service of interests in the self-protection of society from the destructive potential of self-regulating relative prices’.³⁰ It is always possible, in principle at least, that politics could be used by progressive ‘movements for social protection’ to further their efforts to subordinate the market to society.³¹ The question then arises, *how* might social movements influence political decision-making today? Which political, organisational and ideological conditions would have to be met if social movements were to have a chance of transforming the dominant global regime, subjecting it to democratic political control?³²

A fit between this model and Sinzheimer’s idea of the labour constitution is suggested by Polanyi’s definition of socialism: ‘the tendency inherent in an industrial civilization to transcend the self-regulating market by consciously subordinating it to a democratic society’.³³ In Sinzheimer’s blueprint for the achievement of social democracy, the labour

23 Streeck (n 22) 5.

24 Ibid 7.

25 Hepple (n 11) 256.

26 Streeck (n 22) ch 17, especially 246–53. See also W Streeck, ‘The Crisis of Democratic Capitalism’ (Sept/Oct 2011) 71 *New Left Review* 5–29; and W Streeck, ‘Markets and Peoples: Democratic Capitalism and European Integration’ (Jan/Feb 2012) 73 *New Left Review* 63–71.

27 K Polanyi, *The Great Transformation* (Beacon Press 2001 [1944, 1957]) 136.

28 Streeck (n 22) 251.

29 Ibid.

30 Ibid.

31 Polanyi (n 27) 136–40.

32 P Evans, ‘Is an Alternative Globalisation Possible?’ (2008) 36 *Politics and Society* 271–305.

33 Polanyi (n 27) 242.

constitution was the chosen mechanism for subordinating the economy to democratic control. The move from a liberal to a social democracy was understood to require the emancipation of the working class and emancipation was defined to require both greater liberty for working people and greater equality between the social classes.³⁴ Sinzheimer did not use the language of markets and he understood 'the economy' to extend beyond market activity to include the organisation of production in furtherance of the common good. Democratic control of the economy implied the involvement of *all* (collective) economic actors and not only the most economically powerful. In substance, the labour constitution was a body of procedural rules intended to allow for the resolution of conflicts of interests within the economic sphere: to allow for the registering of interests other than those of the owners of capital. The term 'constitution' implied the intention both to clarify the terms of the political settlement achieved by the November Revolution and to ensure the continuation or permanence of the settlement.

In the labour constitutions of welfare states – for example, under the codetermination legislation of the German Federal Republic – states, unions and employers stood in a hierarchical relation. The 'autonomous economic actors' were free to regulate the economy together within the limits set by the state; they had the capacity to create social – and legally binding – norms, backed, in the last instance, by the power of the state. 'The private ordering of [the economy] remained clearly subordinate to state law; it remained limited to those spaces of autonomy state law had left.'³⁵ Any attempt to make the case for the continued usefulness of the idea of the labour constitution today must overcome the following objection: that the hierarchy state/economic actors cannot be reproduced under conditions of advanced economic globalisation since there is no global state that could perform the role ascribed to it by the labour constitution – supervisor, enforcer, guardian of the public interest. In the new globalised world, so the dominant narrative runs, global capital is all-powerful and nation states are reduced to competing with each other for capital investment. In comparison to the halcyon days of the post-war era, trade unions are significantly weakened and remain tied, still, to the nation state as the ostensible locus of political power. Are these objections insurmountable, or can we think our way past them towards a model of a global labour constitution?

Globalisation and constitutionalism

In order to investigate this question further, I turn now to two important lines of theoretical enquiry into transnational constitutionalism. The first advocates the development of a constitutional conflicts law as a means of harnessing the remaining democratic potential of nation states weakened by processes of globalisation. The second begs the question of societal constitutionalism *without the state*.

A GLOBAL CONSTITUTION BY WAY OF A GLOBAL CONFLICTS LAW?

In the work of Christian Joerges and Florian Rödl, we find a theory of constitutionalism at the global level which locates itself within a tradition that could be traced back to include

34 Cf Keith Ewing's discussion of democratic socialism and labour law: K D Ewing, 'Democratic Socialism and Labour Law' (1995) 24(2) *Industrial Law Journal* 103–32; and Erik Olin Wright's definition of 'radical democratic egalitarianism': E O Wright, 'Compass Points: Towards a Socialist Alternative' (2006) 31 *New Left Review* 93–124.

35 G Teubner, 'Self-Constitutionalizing TNCs?: On the Linkage of "Private" and "Public" Corporate Codes of Conduct' (2011) 18 *Indiana Journal of Global Legal Studies* 617–38, 629–30.

the work of Sinzheimer.³⁶ Central to this tradition of critical democratic theory is an understanding of constitutionalisation as implying, of itself, a search for more legitimate and more democratic forms of governance.³⁷ Drawing an obvious parallel with the social democratic projects of the twentieth century, Rödl identifies the problem to be addressed today as the absence of democracy at the transnational level and the consequent illegitimacy of the emerging structures of transnational norm creation. With reference to Stephen Gill's work, the 'new constitutionalism' of the globalised world is described as follows: 'the complex interlinkages of national, supranational, international and transnational legal orders which often have the effect of legally curtailing democratic and social achievements attained at national level'.³⁸

The 'old' constitutionalism of the nineteenth century aimed at limiting the power of monarchies by means of a legal constitution in order to permit the structures of bourgeois society to develop. 'New constitutionalism' is based upon a comparable intention. Here, too, the purpose is to secure the functional structures of bourgeois society. The opponent is no longer the rule of the monarchy, but the historically achieved extent of the rule of democracy in the Western welfare states, where it was possible to establish those social advances that are being withdrawn from democratic discussion and decision-making in the framework of the 'new constitutionalism' by transferring authority to the transnational level . . . Against this background, the question as to a post-neoliberal legal order can be stated more precisely: How should one counter 'new constitutionalism' when promoting a democratic and social agenda?³⁹

In sketching an answer to this question, Joerges and Rödl begin from a recognition of the plurality of legal orders under conditions of globalisation and a rejection of the notion of a unitary constitution of the entire world community.⁴⁰ Attempting to take account of the weaknesses and limitations of nation states, but at the same time to harness their remaining power, the route to democratisation that they propose is by way of the development of a global conflicts law.⁴¹ This is conceived not in its traditional sense – *viz.* private international law – as a means of selecting the proper legal system in a case with connections to several jurisdictions, but rather as a response to the increasing interdependence of formerly more autonomous legal orders and the consequent democratic failure of constitutional states today.⁴² On the one hand, the laws of nation states have external effects on 'foreign' systems: for example, the economic policies and legislation of one state can have significant impacts on neighbouring- or trading-partner states.⁴³ On the other hand, the capacity of

36 C Joerges, 'The Idea of a 3-Dimensional Conflicts Law as Constitutional Form' RECON Online Working Paper 2010/05 (RECON 2010); C Joerges and F Rödl, 'Reconceptualizing the Constitution of Europe's Post-National Constellation – By Dint of Conflict of Laws' in I Liannos and O Odudu (eds), *Regulating Trade in Services in the EU and the WTO: Trust, Distrust and Economic Integration* (Cambridge University Press 2011); F Rödl, 'Democratic Juridification without Statification: Law of Conflict of Laws Instead of World State' in C Joerges (ed), *After Globalisation: New Patterns of Conflict and their Sociological and Legal Re-Constructs* (Oslo 2011); O Eberl and F Rödl, 'Critical Political Economy and Radical Democratic Theory: An Encounter during the Quest for a Post-Neoliberal Global Economic Order' (forthcoming) Constellations.

37 Joerges (n 36).

38 Eberl and Rödl (n 36) 2, citing S Gill, 'Constitutionalizing Inequality and the Clash of Globalisations' (2002) International Studies Review 47–65; S Gill, 'Law, Justice and New Constitutionalism' in *Power and Resistance in a New World Order* (Palgrave Macmillan 2008).

39 Eberl and Rödl (n 36) 2.

40 Rödl (n 36) 27; Joerges and Rödl (n 36) 383.

41 Joerges (n 36).

42 Ibid Abstract.

43 Ibid 12–13.

nation states to decide their own political priorities autonomously has been restricted such that citizens can no longer understand themselves as the authors of their own state's laws: 'the nation state is quite clearly no longer in a position to define its political priorities autonomously (as a "sovereign") but is, instead, forced to co-ordinate them transnationally'.⁴⁴ Wary of the 'democratic deficit' of nation states today but at the same time insistent on the characterisation of the democratic legislature as the *only legitimate source of law*, Joerges and Rödl propose a global conflicts law as a means both of addressing the democratic deficit and building upon the remaining 'not-so-trivial' political power of nation states.⁴⁵ Specifically, the power of states to impose discipline on transnational norm generation and to defend exit options should be harnessed in furtherance of the elaboration of regimes capable of striking a balance between economic interests and mediating between diverging political orientations. Nation states should 'recognise' the authority of transnational institutions or regimes charged with resolving conflicts of law and conflicts of interest. In recognising that authority, and under the threat of withdrawing their recognition, they should exercise some control over the manner of choice-making. Through this process of recognition, the resolution of conflicts of interest at the global level could be subjected effectively to political and democratic control and the weakness of nation states under conditions of globalisation could be turned into a strength.⁴⁶

In their writing to date, Joerges and Rödl have not offered a precise blueprint for a global constitution, or global economic constitution, comparable with the scheme developed by Sinzheimer in the context of the nation state. The omission reflects the incompleteness of their research project at this time.⁴⁷ In illustrating how a global constitutional conflicts law might function, their most fully developed examples are taken from the (pre-crisis) EU and include comitology and the setting of technical standards at the supranational level. The term comitology refers to a process by which EU law is modified or adjusted within committees of representatives of the member states, chaired by the European Commission. The system developed from the late 1980s as a means of balancing intergovernmental with supranational control of the harmonisation of fields of regulation necessitated by the project to 'complete' the single market.⁴⁸ 'Technical standards' refers here to the setting and harmonisation of, particularly safety, standards by the European standardisation organisations (the European Committee for Standardization (CEN), the European Committee for Electrotechnical Standardization (CENELEC) and the European Telecommunications Standards Institute (ETSI)).⁴⁹ In their discussion, Joerges and Rödl present each of these processes as modes of conflict mediation that 'cannot be understood as merely an "application" of the law to the problem at hand'.⁵⁰ Rather than a traditional choice of laws solution, or a straightforward application of the country of origin principle, the processes involve the development of *substantive* norms that fulfil the function of conflict rules. Legitimation of the processes is derived by way of their recognition by member state governments. Their constitutionalisation, if it could be achieved, would involve the imposition of procedural rules designed to guarantee both the

⁴⁴ Joerges (n 36) 14.

⁴⁵ Ibid 33; Eberl and Rödl (n 36) 4.

⁴⁶ Cf Katzenstein's analysis of the post-war 'semi-sovereign' West German state and its ability to make a virtue of its weakness: P Katzenstein, *Policy and Politics in West Germany: The Growth of a Semi-Sovereign State* (Temple University Press 1987).

⁴⁷ Joerges (n 36) 1–3.

⁴⁸ C Joerges and J Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology' (1997) 3 European Law Journal 273–99.

⁴⁹ H Schepel, *The Constitution of Private Governance* (Hart 2005) especially 35ff.

⁵⁰ Joerges and Rödl (n 36) 393.

taking into account of a plurality of expertise and respect for the social and political plurality of Europe.⁵¹

Though Joerges and Rödl do not directly address the question of trade union involvement in processes of democratisation and constitutionalisation, it becomes clear, extrapolating from these examples, that such involvement would fit well within their scheme. Implicit in their thinking is a presumption of democratic mandates on the part of national governments to act to protect social interests against injury or limitation. Trade unions would have an important role to play here, acting within states to shape political discourse and to influence policy-making. Significantly, the conflicts law approach might also allow for the participation of trade unions in norm creation at the national, regional and global levels, provided that such participation was legitimised or authorised – ‘recognised’ – by nation state governments (i.e. by democratic legislatures).⁵² It might allow, in other words, for the recognition by states of systems of trade union and employer negotiation aimed at the resolution of conflicts of interests within a variety of bounded spaces: corporations and multinational corporations, subnational localities, supranational regions. In addition to traditional forms of collective negotiation between employers and trade unions or works councils, the examples of comitology and technical standard-setting suggest a possible role for trade unions in supranational administrative decision-making, acting as experts and/or as representatives of particular supranational, national or local interests.

Such possibilities call to mind the work of Jennifer Gordon and her advocacy of a pivotal role for unions in the administration of cross-border labour migration.⁵³ According to Gordon’s model of ‘transnational labour citizenship’, membership of cross-border trade unions should be made a pre-condition of permission to enter a host country in search of work. Compulsory union membership would facilitate the enforcement of labour rights and the provision to migrant workers of benefits and services and would thus allow for the movement of workers across borders without the erosion of labour standards in host countries. From a conflicts law perspective, it could be said that trade unions would be involved here in the creation of substantive norms designed to fulfil a choice of laws function and to resolve the conflicts of interest arising between the migrant worker and the host-state worker, the sending state and the host state.

A further opportunity for union involvement in the resolution of conflicts between supranational free trade rules and nation state labour laws is suggested by the *Viking* and *Laval* cases heard in 2007 by the Court of Justice of the European Union (CJEU).⁵⁴ For Joerges and Rödl, the decision in these cases to give precedence to EU market freedoms over member state labour rights was illegitimate because it involved the wrongful extension by the Court of its own jurisdiction (by means of attributing ‘an extremely far reaching and rigid meaning to the supremacy doctrine’).⁵⁵ In addition, the decision was anti-democratic because it involved the striking-down of democratically agreed labour laws. In situations such as this, the task of conflict resolution should not be left to the CJEU – to a court, as Fritz Scharpf has explained, impelled by a dynamic process of ever-increasing integration that renders it incapable of judging the question of when member state autonomy ought to take precedence over EU law.⁵⁶ Instead of acknowledging the Court’s extended jurisdiction,

51 Joerges and Rödl (n 36) 396, 398.

52 ‘[P]rivate standardization seeks the recognition of State or European law; the former depends upon the latter and therefore operates in its shadow’: Joerges and Rödl (n 36) 398–99.

53 J Gordon, ‘Transnational Labor Citizenship’ (2007) 80 Southern California Law Review 503–87.

54 Joerges (n 36) 6–7; Joerges and Rödl (n 36) 388–89.

55 Joerges and Rödl (n 36) 388.

56 F Scharpf, ‘The Asymmetry of European Integration’ (2010) 8 Socio-Economic Review 211–50.

Joerges and Rödl suggest, member states could provide for processes of political deliberation by trade unions and other interested or expert parties. In time, a body of supranational principles or rules could emerge providing answers to such questions as the appropriate terms and conditions of employment of posted workers, or of workers employed by an undertaking that re-establishes itself in a different member state.

Inssofar as it offers a route to asserting and rethinking the role of nation states and trade unions as important sites, still, of democratic deliberation and democratic control, the idea of a global conflicts law is attractive. But there are difficulties with it, as Joerges and Rödl acknowledge. It is no coincidence that the most fully developed illustrations of the functioning of the global conflicts law are taken from the EU: though it goes some way to addressing the weakening of states under conditions of globalisation, the theory rests nonetheless on a presupposition of a level playing field of relatively strong, relatively centralised states, each with the capacity for democratic self-government.⁵⁷ It does not take account, in other words, of inequalities of power *between* states and of the possible domination of supranational decision-making by the strongest.⁵⁸ A second difficulty lies with the way in which the relationship between the national and the supranational, or transnational, is conceived.⁵⁹ Informed again by the model of the EU, Joerges and Rödl posit globalisation as involving the emergence of supranational or transnational spaces that map closely onto existing national boundaries. This allows them to imagine nation state control of the supranational or transnational spaces in terms of relatively straightforward processes of recognition. The model that they develop is therefore useful in charting a route to the democratisation of existing supranational legal and regulatory regimes created by international agreement. But it has less to teach us about the democratic control of the exercise of private economic power; about sites or forms of economic activity that escape the jurisdiction of any nation state or region.

A GLOBAL CONSTITUTION WITHOUT THE STATE?

In the work of Gunther Teubner, we find a vision of transnational constitutionalism that begins from a quite different set of assumptions regarding the nature of globalisation and the possible involvement of the state in processes of constitutionalisation.⁶⁰ Teubner's opening move is to position himself against both sides in a 'debate over transnational constitutionalism'.⁶¹ One side denies the possibility of transnational constitutionalism (pointing to the non-existence of a demos, cultural homogeneity, political founding myths, a public sphere and political parties) and the other advocates exactly that, a new democratic constitutionalism in global society (by way, variously, of a constitution for international law, a deliberative global public sphere, regulatory policies formulated on a global scale and a transnational system of negotiation between global collective actors).⁶² In Teubner's view, each of these positions suffers from an 'obstinate state-and-politics-centricity'.⁶³ The theory he offers looks instead to sociology and to systems theory and conceives of the

57 Eberl and Rödl (n 36) 7–9.

58 Ibid.

59 M Amstutz, 'The Opium of Democracy: A Comment on Rödl' in Joerges (ed) (n 36).

60 G Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalisation* (Oxford University Press 2012); also G Teubner, 'Debate and Dialogue: Constitutionalizing Polycontextuality' (2011) 20 *Social and Legal Studies* 209–52; G Teubner, 'A Constitutional Moment? The Logics of "Hitting the Bottom"' in P Kjaer, G Teubner and A Febbrajo (eds), *Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Hart 2011) 9–51.

61 Teubner, *Constitutional Fragments* (n 60) 2–3.

62 Ibid.

63 Ibid 3.

constitution not in terms, only, of a relationship between politics and law but as characteristic, potentially, of *all* autonomous sectors of global society – the economy, science, technology, education, the new media and the health service. In light of this conception, he suggests, the challenges posed for constitutionalism by globalisation assume a different form. Under conditions of globalisation, a tension develops between the self-foundation of autonomous global social systems – progressing, in principle, independently of territorial borders – and their political–legal constitutionalisation – still bounded by territorial borders. ‘Economic communications are global, but economic constitutions are nationally based. Science makes a claim to universal truth, but scientific constitutions remain national.’⁶⁴ In the absence of transnational institutions capable of ensuring the political–legal constitutionalisation of the autonomous global social systems, the question arises, how might that constitutionalisation be effected and how might society and the environment be protected from the potentially destructive expansionist dynamics of the social systems? Teubner’s answer to this question is that ‘growth-inhibiting countervailing structures’ may emerge *within the social system itself*; the social system may correct *itself*.⁶⁵ In a globalised world, such self-correction represents the only effective route to constitutionalisation. But the impetus for self-correction, for constitutionalisation, can only come from outside of the social system by way of external pressures to self-limitation. The central question to be addressed by a global constitutional order is this: ‘How can external pressure be exerted on the sub-systems of such a force that the self-limitations of their options for action will take effect in their internal processes?’⁶⁶

In an investigation into the usefulness of the idea of the global labour constitution, Teubner’s work figures, on the face of it, as an obvious place to start. Not only does Teubner mark out a clear route towards thinking about constitutionalism at the global level, in the absence of political–legal institutions typical of the nation state; in doing so, he draws quite specifically on German collective labour law – on the German *labour constitution*.⁶⁷ In his book of 2012, he describes codetermination as the ‘paradigm’ of societal constitutionalism: specifically, of the ‘intricate interaction of societal constitutions and their external constitution through politics and law’.⁶⁸

State coordination through statutory laws is closely coordinated with social self-organization in corporations and trade unions, and with the courts constantly readjusting the balance.⁶⁹

There are strong echoes here of Sinzheimer’s proclamations on the desired role of the state in the labour constitution; the necessary balance between the autonomy of the economic actors and the pre-eminence of the state in the last instance.⁷⁰ Note, however, that Teubner does not offer the labour constitution as an example of constitutionalisation by means of self-limitation. Codetermination is categorised as a paradigm of societal constitutionalism within the nation state and the importance of the state to the labour constitution is heavily underlined: ‘the influence of social self-regulation depends to a very large degree on its

64 Teubner, *Constitutional Fragments* (n 60) 44.

65 Teubner, ‘Constitutional Moment’ (n 60) 11.

66 Ibid 13.

67 Teubner, *Constitutional Fragments* (n 60) 36–38. See also G Teubner, ‘Industrial Democracy through Law’ in T Daintith and G Teubner, *Contract and Organization: Legal Analysis in the Light of Economic and Social Theory* (DeGruyter 1986); G Teubner, *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (DeGruyter 1987).

68 Teubner, *Constitutional Fragments* (n 60) 37.

69 Ibid 37–38.

70 See n 2 above.

protection by the state constitution';⁷¹ and 'the law places the spontaneous organization of employee interests on a permanent footing so that their influence on business decisions can be stabilised relatively independently of market and power fluctuations'.⁷² It is principally because of the importance of the state to such arrangements, Teubner concludes, that a global neo-corporatism is highly unlikely: only state organisations have sufficient power and cognitive resources to manage the complicated process of coordinating diverging social systems and, at the global level, these are lacking.⁷³

That said, Teubner does go on to identify a role for trade unions in the constitutionalisation of the global economy, applying 'external' pressure in order that internal self-limitations should be configured. In the global economic sphere, he writes (citing Locke, Qin and Brause), arrangements against indefensible working conditions must be found, that:

combine . . . external (countervailing) pressure – be it from the state, or unions or labour rights NGOs, comprehensive and transparent monitoring systems and a variety of 'management systems', interventions aimed at eliminating the root causes of poor working conditions.⁷⁴

He envisages here, too, a role for nation states, creating pressures, or 'irritations' selectively. He cites Ladeur, writing, too, about codetermination:

The state must not intervene directly so as to achieve particular desired situations or the assessment of 'results'; rather, it must observe the social regulatory systems, and direct its intervention more specifically at their self-transformation.⁷⁵

It is here that doubts begin to surface about the potential usefulness, after all, of Teubner's societal constitutionalism to an investigation of the global labour constitution. Why are trade unions classified by Teubner as *external* to the economy? Why, when discussing codetermination, does he refer to the role of the state in coordinating *diverging social systems*, in the plural? The contrast with Sinzheimer is clear: for the latter, trade unions, work and production were intrinsic to the economy – the labour constitution was synonymous with the economic constitution. For Teubner, 'the economy' extends no further, apparently, than the market and individual market actors; the logic of the economy is only the logic of profit maximisation. In analysing societal constitutionalism, Teubner's intention is to identify the ways in which society and the environment might be protected, in a globalised world, from the potentially destructive expansionist dynamics of the social systems. But to begin from such a narrow conception of the economy, to define conflict as arising *between* rather than *within* subsystems, is already to shut out the very actors who have, most obviously and most directly, an interest in achieving such protection.⁷⁶ Moreover, to categorise nation states as impotent to tame the global economic sphere is to overlook the importance of the role that states have played and continue to play in constituting that sphere; in constituting global

71 Teubner, *Constitutional Fragments* (n 60) 37.

72 Ibid.

73 Ibid 41.

74 Teubner, 'Constitutional Moment' (n 36) 13–14, citing R Locke, F Qin and A Brause, 'Does Monitoring Improve Labour Standards? Lessons from Nike', Corporate Social Responsibility Initiative Working Paper 24 (John F Kennedy School of Government, Harvard University 2006)

75 Teubner, 'Constitutional Moment' (n 36) 14, citing K-H Ladeur, 'Methodische Überlegungen zur gesetzlichen "Ausgestaltung" der Koalitionsfreiheit' (2006) 131 Archiv des Öffentlichen Rechts 643–67, 657.

76 R Freeman, 'New Roles for Unions and Collective Bargaining Post the Implosion of Wall Street Capitalism' in S Hayter (ed), *The Role of Collective Bargaining in the Global Economy* (Edward Elgar 2011).

markets and in guaranteeing global market freedoms.⁷⁷ If states have a part-constitutive role in respect of global markets, why must it be assumed that they cannot have a significant limitative role too? Is the vision offered to us that of the unleashing of a monster, uncontrollable now by its creators? 'You are my creator, but I am your master. Obey!'⁷⁸ Must we pin all our hopes, then, on the possibility that the monster will one day be persuaded to self-limit? And how much suffering will be endured before the monster can be brought to reason?

A more developed and more convincing explanation of the role of the state in processes of self-limitation is suggested by Teubner when he focuses in on the transnational corporation (TNC) as a potential site of constitutionalisation.⁷⁹ With respect to TNCs, the main 'constitutional problem' to be addressed is identified as the 'motivation-competency dilemma'.⁸⁰ Actors outside the TNCs – the general public, the courts, national governments – may be highly motivated to achieve their limitation but they lack the knowledge, the practical competence and the enduring energy to implement the necessary changes. Those inside the TNCs have the ability to effect change but lack the motivation.⁸¹ As a solution to the dilemma, Teubner posits corporate codes of conduct as representing 'the beginnings of specific transnational corporate constitutions conceived as constitutions in the strict sense'.⁸² He refers here to two types of corporate code, 'private' and 'public'. Private codes are those adopted by TNCs and public codes are those promulgated by the 'state world' through agreements under international law or through the norms of international organisations: the UN Draft Code of Conduct on TNCs, the OECD Guidelines for Multinational Enterprises. His argument that the codes can be thought of as constitutions relies on the fact that they 'juridify fundamental principles of a social order' and, at the same time, 'establish rules for its self restraint'; over and above that, that they 'develop genuine constitutional structures with their characteristics of double reflexivity and binary metacoding'.⁸³ What is most interesting about the argument from our point of view is the analysis Teubner offers of the creation of corporate codes: the process of constitutionalisation and, specifically, self-limitation. He compares the interaction of public and private codes at the transnational level with the hierarchically structured interplay of public (state) law and private (autonomous) law in the corporate constitutions of nation states. The latter were based on the primacy of state law: the state established hard law and internal company rules were 'merely a sort of soft law, not recognised as genuine legal norms, but only as [an] expression of private autonomy'.⁸⁴ At the transnational level, an inversion occurs: public codes are 'soft law' and the private ordering of TNCs is 'hard law', 'largely binding and accompanied by effective sanctions'.⁸⁵ In practice, public codes of conduct produce only 'constitutional impulses' sent out by the international organisations

77 The role of states in this process of liberating the global economy from its state-based constraints is described: Teubner (n 35) 621–22.

78 So said the monster to Viktor Frankenstein. For them, of course, there was no happy end in self-limitation but instead murder and self-destruction.

79 Teubner, *Constitutional Fragments* (n 60) 46–49, 56–58, 92–96. See also G Teubner, 'The Corporate Codes of Multi-Nationals: Company Constitutions beyond Corporate Governance and Co-determination' in R Nickel (ed), *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification* (Hart 2009); Teubner (n 35).

80 Teubner, *Constitutional Fragments* (n 60) 92.

81 Ibid.

82 Teubner (n 35) 620.

83 Ibid 621.

84 Teubner, *Constitutional Fragments* (n 60) 47.

85 Ibid 48.

or agreements to the TNCs. 'Whether or not the impulses then crystallize into constitutional norms depends on the transnational corporations' internal processes, not on those of the states.'⁸⁶ Moreover, public codes of conduct figure here as only one set of constitutional impulses among several. TNCs can be pressured into developing codes of conduct by 'long-term disputes' with local organisations, by social movements, NGOs, trade unions and public opinion.⁸⁷

Behind the metaphor of 'voluntary codes' lies anything but voluntariness. Transnational corporations adopt their codes neither because they accept the appeal to the public interest nor because they are motivated to do so by corporate ethics. They act 'voluntarily' only when subjected to massive learning pressures from the outside.⁸⁸

The terms of public code 'recommendations' do not have a direct legal effect but are transformed or 'translated' into the legal language of the hard law of internal corporate codes. It is this indirect link between external and internal processes that confirms this as an example of *self*-constitutionalisation, *self*-limitation.

As Teubner himself goes some way to acknowledging, this account of the constitutionalisation of TNCs is highly aspirational.⁸⁹ In reality, corporate codes that are legally binding and effectively enforced in the way that he suggests are quite exceptional; much more common are codes that lack any procedural arrangements whatsoever, that are written in a language that is 'vague, hortatory, and not well suited to compelling compliance'.⁹⁰ In terms of its descriptive force, Teubner's model might also be criticised for its overemphasis of the weakness of nation states, the 'softness' of their law and the ability of TNCs to escape states' – 'state' – attempts to limit their freedom of action. In reality, the question of whether a TNC is bound by national laws will depend, in any particular case, upon a number of factors, important among them being the nature of the business in which the corporation is involved. In service industries, for example, capital tends to be more strongly tied to particular locations and bound, for that reason, to respect the laws of the land – and, potentially, the demands of the local workforce and customer base.⁹¹ Teubner's model might be criticised, lastly, for its marked reluctance to acknowledge the potential of trade unions to be involved in processes of limitation. By characterising unions, again, as external to the TNC, external to the global economy, Teubner restricts himself to a discussion of corporate codes, overlooking the at least equally important phenomena of international framework agreements and European, or global, works councils.⁹²

None of these objections is fatal to the usefulness of the model if it is understood to illustrate only one possible route to constitutionalisation: to illustrate, specifically, how constitutionalisation might occur in situations in which there is no possibility of the state or the workers exerting direct control over the TNC; or to use Teubner's language, in which state organisations have insufficient power and cognitive resources to impose limitative rules

86 Teubner, *Constitutional Fragments* (n 60) 49.

87 Ibid 56, 92–96.

88 Ibid 96.

89 Teubner (n 35) 619.

90 H Arthurs, citing an OECD study of 1998: H Arthurs, 'Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation' in J Conaghan, R M Fischl and K Klare (eds), *Labour Law in an Era of Globalisation: Transformative Practices and Possibilities* (Oxford University Press 2002) 477, 479.

91 See e.g. S Lerner, 'Global Corporations, Global Unions' (2007) 6 *Contexts* 16–22.

92 K D Ewing, 'International Regulation of the Global Economy – the Role of Trade Unions' in B Bercusson and C Estlund (eds), *Regulating Labour in the Wake of Globalisation* (Hart 2007); K Papadakis, 'Globalizing Industrial Relations: What Role for International Framework Agreements' (2011) in Hayter (n 76).

and in which unions truly are external to the corporation.⁹³ Indeed, Teubner himself emphasises the existence of different sites of constitutionalisation when he discusses the *double fragmentation* of world society.⁹⁴ As a result of the first fragmentation, the autonomous global social sectors insist stubbornly on their own constitutions.⁹⁵ As a result of the second, the world is divided into ‘various regional cultures, each based upon social principles of organisation that differ from those of the western world’.⁹⁶ The vision Teubner offers, then, is of nation-state constitutions continuing to exist under conditions of globalisation but now in competition with the constitutions of global subsystems, of TNCs, of transnational regimes and regional cultures. Like Joerges and Rödl, he concludes that the only way to conceive of a unitary ‘global constitution’, if at all, is with reference to a constitutional conflict of laws connecting particular constitutions of particular global fragments.⁹⁷

Towards a global labour constitution

Like the English language term *constitution*, the German *Verfassung* has two meanings: ‘constitution’ in the legal and/or political sense and, alternatively, the ‘state’ or ‘condition’ of a thing (e.g. ‘she is in no fit state to work’). When applied to the economy rather than the political sphere, either – perhaps both – of these meanings may be apposite. As used by the Ordo-liberals, for example, the term ‘economic constitution’ reflected, in part, the belief that the economy had an inherent *order* that should not be disturbed by concepts originating from other orders.⁹⁸ The economic constitution was the legal framework necessary to protect the ‘natural’ economic order from disturbances – to guarantee ‘fair’ competition, private property rights etc.⁹⁹ And this was so irrespective of whether the laws in question were formally entrenched within a written (political–legal) constitution or bill of rights. In contrast to this essentially conservative understanding of the desired role of the economic constitution, social democrats including Sinzheimer emphasised the potentially transformative nature of constitutionalisation.¹⁰⁰ ‘Constitutional norms [were] purposive norms, charged with the mission to mould society’;¹⁰¹ and the state was potentially the architect, the overseer, the agent, of social progress. With this emphasis, both the constitutive and limiting functions of the law were highlighted. Through labour law, the state recognised – ‘announced’ – the economic actors; it empowered them to act (for example, to create legally binding norms through processes of collective bargaining and codetermination); and it set limits to their powers.¹⁰²

In the preceding part of this paper, I gave consideration to contemporary theories of constitutionalisation and to their identification of ways in which nation states might figure still today as the architects, overseers or agents of social progress. I began by noting that Joerges and Rödl’s theory of global constitutionalisation by way of a global conflicts law shared significant continuities with Sinzheimer’s conception of the labour constitution. Both understand constitutionalisation as a means of ensuring democratic decision-making

93 Teubner, *Constitutional Fragments* (n 60) 41, Teubner (n 35) 623.

94 Teubner, *Constitutional Fragments* (n 60) 13–14.

95 Ibid.

96 Ibid.

97 Ibid.

98 Schiek (n 6) 170–71.

99 Ibid.

100 As does Teubner, *Constitutional Fragments* (n 60) 11.

101 Schiek (n 6) 173.

102 R Dukes, ‘Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund and the Role of Labour Law’ (2008) 35 *Journal of Law and Society* 341–36, fns 15–17 and associated text.

and both advocate a form of constitutionalism based around a set of mainly procedural rules and safeguards intended to guarantee the registering of the widest possible variety of interests and points of view. Both envisage an important role for the nation state in conferring authority and legitimacy upon non-state decision-making bodies and procedures and in exercising a measure of control over those bodies and procedures. Given its focus on the nation state and on democratic legislatures as the only legitimate source of law, Joerges and Rödl's global conflicts law suggested, first and foremost, pathways to constitutionalising supranational and transnational governance regimes that map neatly onto existing national borders. It applied less straightforwardly to the question of democratic control of the exercise of private economic power.

With its roots very firmly in systems theory, Gunther Teubner's analysis of constitutionalisation began, in contrast, from a denial of the capacity of nation states to perform the same role in 'societal subconstitutions' – including economic constitutions – that they had performed in the post-war decades: framing the subconstitution within an overarching state constitution and at the same time recognising the autonomy of the subsystem.¹⁰³ The globalisation of subsystems involved their emancipation from state constitutions and the release of their energies beyond territorial borders. The only route to constitutionalisation of the global subsystems was then self-transformation, self-limitation: nation states could act only from the outside to create pressures, 'irritations' and 'impulses' to self-limit. Notwithstanding the rather forceful terms of this rejection of 'state-centred constitutionalism' under conditions of globalisation, Teubner went on nonetheless to illustrate how states might play quite pivotal roles in processes of 'self'-limitation. States might exert pressure on transnational corporations of such force that 'voluntary' limitation was anything but voluntary. In addition, they might participate (through the United Nations, for example, or through the ILO) in the issuing of codes of conduct which could shape the terms of the otherwise 'private' corporate codes of the TNCs; the terms of the acts of self-limitation.

Though neither the global conflicts law nor the systems theory analysis of constitutionalisation and globalisation was primarily concerned with trade unions and labour constitutions, they each pointed – directly and indirectly – to ways in which unions, too, might figure as participants in the constitutionalisation of the global economy. Unions might figure within states and at the supranational level as sites for the formulation and expression of demands for the protection of social interests and social rights. They might exert pressure on states and supranational governance regimes to take steps to regulate or control economic actors or practices and to protect social interests. Or they might exert pressure directly on corporations and other economic actors to self-limit. Through the emission of 'constitutional impulses' – by way of involvement in the drafting of 'public' corporate codes, for example, or ILO standards, or in alliances with NGOs or civil society groups – trade unions might influence the route taken to self-limitation. Where authority was bestowed upon them by democratic legislatures, unions might act in a 'parapublic' capacity as administrators and decision-makers, expert in matters relating to work and production and/or representative of workers' interests.¹⁰⁴

103 Teubner, *Constitutional Fragments* (n 60) 6.

104 Streeck uses the term 'parapublic' to describe the role of German trade unions, fulfilling public functions (e.g. the administration of social welfare) but acting still as representative of members interests: e.g. W Streeck, 'Industrial Relations: From State Weakness as Strength to State Weakness as Weakness' in S Green and W Paterson (eds), *Governance in Contemporary Germany: The Semisovereign State Revisited* (Cambridge University Press 2005).

The investigation of theories of constitutionalisation under conditions of globalisation tended, then, to support the thesis that Sinzheimer's work on the labour constitution might be developed to offer a useful perspective for thinking about labour law today. Read together with Joerges, Rödl and Teubner, the idea of the labour constitution suggests an agenda for further research that places questions of worker representation and worker voice back at the heart of labour law scholarship. It calls for an analysis of the normative frameworks that regulate representation and voice (labour laws, constitutional laws, human rights instruments, trade agreements, corporate codes) and it emphasises the importance of understanding such frameworks as integral elements of broader economic constitutions or economic orders.¹⁰⁵ (The constitutional entrenchment of labour and social rights, for example, may be of little consequence in a country that is directed by its supranational financiers to dismantle existing collective bargaining arrangements in the interests of greater labour market flexibility.)¹⁰⁶ Notwithstanding the 'unitary bias of the very term constitution',¹⁰⁷ the idea of the labour constitution as read together with Joerges, Rödl and Teubner suggests the need to investigate a whole range of spaces, bounded territorially or organisationally, as sites or potential sites of constitutionalisation: nation states, regional trading blocs, individual workplaces or corporations, cities or localities.¹⁰⁸ As such, it raises questions regarding the implications of the uneven development of labour constitutions in different countries, regions and corporations:¹⁰⁹ questions of inequalities between workers, of conflicts of interest between insiders and outsiders, of labour rights that benefit the few to the cost of the many and of threats of competitive deregulation.¹¹⁰ If conflicts of interest between workers are a significant feature of a fragmented global economy, could a global conflicts law along the lines envisaged by Joerges and Rödl provide a means of resolving disputes?¹¹¹ Could it serve at the same time to prevent capital from exploiting differences in the terms and conditions of workers in different locations and organisations, setting in motion a deregulatory dynamic? Does the very notion of a global conflicts law then raise further questions of its own? Who would decide the terms of such a law – who would decide how decisions were to be made, and by whom, and who would be responsible for their enforcement?¹¹² Absent a global state capable of coordinating a plurality of nation-state, regional and societal constitutions, how could the powerful be held to account by the weak?¹¹³ Is it possible, after all, to find an alternative to the old logic and the old

¹⁰⁵ This point is argued forcefully by Harry Arthurs and by Eric Tucker: H Arthurs, 'Labour and the "Real" Constitution' (2007) 48 *Les Cahiers de Droit* 43; Tucker (n 4).

¹⁰⁶ A Kouidiaki and L Kretos, 'Opening Pandora's Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece' (2012) 41 *Industrial law Journal* 276–304.

¹⁰⁷ Teubner, *Constitutional Fragments* (n 60) 13.

¹⁰⁸ K Stone, 'Flexibilization, Globalisation, and Privatization: Three Challenges to Labour Rights in our Time' in B Bercusson and C Estlund (eds), *Regulating Labour in the Wake of Globalisation* (Oxford University Press 2008).

¹⁰⁹ Tucker (n 8) 122.

¹¹⁰ G Mundlak, 'The Third Function of Labour Law: Distributing Labour Market Opportunities among Workers' in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011); S Hayter and B Weinberg, 'Mind the Gap: Collective Bargaining and Wage Inequality' (2011) in Hayter (n 76).

¹¹¹ J Fudge and G Mundlak, 'Justice in a Globalizing World: Resolving Conflicts Involving Workers Rights Beyond the Nation State', paper presented by Judy Fudge at the University of Glasgow, 6 February 2013.

¹¹² 'In all these questions that could lead to controversies and conflict, what is at stake is the enforcement of the decision concerning the premises of decisions': N Luhmann, *Die Politik der Gesellschaft* (Frankfurt 2002/2000) 85.

¹¹³ H Lindahl, 'Societal Constitutionalism as Political Constitutionalism: Reconsidering the Relation between Politics and Global Legal Orders' (2011) 20 *Social and Legal Studies* 230–52.

conclusion: that a global economy demands nothing less than a unitary global labour constitution?¹¹⁴

Conclusion

The emergence over the past 20 years or so of labour market flexibility as the near-universally accepted goal of government policy and regulation can be understood to pose something of a dilemma for labour law scholars.¹¹⁵ Should we resist the move to recast labour law as the law of the labour market and run the risk of having our work dismissed as irrelevant or futile – out of date? Or should we embrace labour market regulation as defining the field of study, embrace the notion of market participation as the route to worker emancipation and turn our minds to the question of how to make labour markets function better? In this paper I have argued for the importance of finding a framework for analysis that allows for questions to be asked regarding conflicts of interest, winners and losers, and the myriad ways in which the law constitutes, reinforces and limits power: economic, social and political. With reference to the work of Sinzheimer and to contemporary theories of constitutionalism, I have suggested that the old idea of the labour constitution might offer such a framework. If the prospects for a constitutionalisation project along the lines envisaged by Sinzheimer are currently incredibly bleak, his work serves nonetheless to help us to identify what is wrong with the current economic order and the status of the worker within it. In addition it serves to remind us that part of our task as scholars is to imagine alternative and better ways of ordering things.¹¹⁶ '[T]he actual limits of what is achievable depend in part on beliefs about what sorts of alternatives are viable. This is a crucial sociological point: social limits of possibility are not independent of *beliefs* about limits.'¹¹⁷

¹¹⁴ H Sinzheimer, 'Europa und die Idee der wirtschaftlichen Demokratie' (1925) reproduced in Sinzheimer (n 3) 221–25, 225.

¹¹⁵ K Rittich, 'Social Rights and Social Policy' in D Barak-Erez and A Gross (eds), *Exploring Social Rights: Between Theory and Practice* (Hart 2007).

¹¹⁶ E O Wright, 'Compass Points. Towards a Socialist Alternative' 41 (Sept/Oct 2006) *New Left Review* 93–124.

¹¹⁷ *Ibid* 98 (my emphasis).

