European Law Open (2022), **1**, 891–913
doi:10.1017/elo.2023.3

CORE ANALYSIS

Property, corporations, and constitutionalisation in a global political economy

Jean-Philippe Robé

SciencesPo Law School, Paris, France
Corresponding author. Jean-Philippe Robé, E-mail: jeanphilippe.robe@sciencespo.fr

(Received 3 October 2022; revised 5 January 2023; accepted 5 January 2023)

Abstract

In the Law of Political Economy perspective, private property is the corner stone right. Constitutionally, it amounts to a right of decision-making as a matter of principle towards the object of property. It is a decentralisation of the State's sovereignty. This feature entitles owners to set rules in connection with the use of their property to which users of their property must submit. This is the origin of the authority relationships within business firms. Within liberal constitutional orders, this strong enabling characteristic of property was originally designed for individuals only. But business corporations, subsequently introduced in the legal system, have found the way to have access to these same rights. Concentrating productive assets, they have in effect concentrated rights of decision-making as a matter if principle. And the global firms (or enterprises) using corporations to structure their activities now make use of their prerogatives in a global legal space in which the Law of Political Economy is unable to reconnect economic and political issues. One way out of this major issue raised by globalisation is to constitutionalise world private governments. Recent court cases addressing climate change demonstrate that this is a viable solution.[1]

Keywords: property; law of political economy; corporation; multinational; globalisation; constitutionalisation

One salient characteristic of the Law of Political Economy approach is that it takes the role of law in the *political* structuring of the economy seriously. It draws consequences from the *constitutive* power of law. Law firmly entrenches abilities, prerogatives, rights of decision-making, *inter alia*, both at the level of what is commonly perceived as 'public law' (the law applying to the State's operations, either in the political or the administrative spheres) and at the level of 'private law' (which is used, notably, to structure economic exchanges). In its holistic approach, the Law of Political Economy has the ambition to explain how, in its operation, the law *both* separates *and* reconnects formally political and economic processes.[2]

In liberal legal systems, this separation/reconnection is effectuated first by the granting of constitutional rights of autonomy to individuals. These rights make it possible for rights holders to pursue their self-defined ends and, in their economic endeavors, create economic organisations. Then, the autonomous operations of private rights holders may generate issues which, at times, are perceived as being improperly addressed via the mechanisms of private rights and obligations, contracts in particular. One may witness systematic insufficient compensation of labour, poor

[1]This paper elaborates on some points made in my latest book, J-P Robé, *Property, Power and Politics – Why We Need to Rethink the World Power System* (Bristol University Press 2020). Some sentences or paragraphs have been left unchanged, for reasons of consistency and clarity.

[2]PF Kjaer, 'The Law of Political Economy – An Introduction' in PF Kjaer (ed), The Law of Political Economy: Transformations in the Function of Law (Cambridge University Press 2020) 1–30.

working conditions, or adverse effects of the economic activity over the environment, and so on. The political system eventually reacts and, via the political institutions provided for by the Constitution, changes legal rules to address the perceived issues. This is how the legal system can,[3] and indeed must, ensure the integration of society, the 'reconnection'. It is the legal system which serves as the central framework for the integration of society.[4]

With this background in mind, what immediately comes to the forefront is the major challenge created by the surge of global issues faced by humanity. We live in a global economy made possible by a complex global legal system allowing participants in this economy to legally structure it – in the 'private' sphere. Via a wealth of enabling rules, the separation of 'economic' from 'political' operations is almost complete. In the World Power System in place today, *external sovereignty* allocates power as a matter of principle to States. International public law is theoretically neutral towards the mode of organisation of the internal Power System of the various States composing the State System. They have constitutional autonomy.[5] But liberalism was embedded in the post-World War II Bretton Woods system which structurally constrained States adhering to its institutions.[6] After having created the legal conditions for the development of market economies internally,[7] powerful Western States created the multilateral norms and institutions making it possible for markets to spread globally. Tariffs, quotas, and non-tariff barriers were progressively reduced and, in some cases, eliminated. Via treaties and international organisations such as the IMF enforcing the 'Washington consensus', States were submitted to a form of 'new constitutionalism' limiting their ability to diverge from the tenets of a 'market economy'.[8] Consequently, global 'multinational' firms obtained the creation of a legal framework enabling them to spread globally. Via a series of treaties leading to an almost free circulation of goods, capital, and services (but not people), a world economy open for private expansion has been legally built.

For a time, the commitment to international liberalisation was institutionally coupled at the State level with norms and practices protecting *national* populations. But the neoliberal ideology has been instrumental in seriously challenging this fragile equilibrium. The 'reconnection' has been made more difficult by market fundamentalism which denies the need for its existence. And today, there are no effective institutions to effectively reconnect *global* economic and political processes. The autonomous operation of private actors in our global society generates *inter alia* climate change, tax evasion, and inequality. But there are no effective procedures available to reconnect issues to be addressed politically to the economic decisions made by these global economic private organisations. We have international treaties and a few public international organisations which purport to address some of these issues (the OECD and ILO *inter alia,* respectively for tax and labour issues). But they are clearly not up to the task. Further, in the absence of efficient global political processes, the global operations of private actors lead to an erosion of formally

[3]Ibid., 12.

[4]Ibid., KJ Arrow remarks that: '. . . (although) efficiency can be achieved through a particular kind of social system, the price system (. . .) there are profound difficulties with the price system, even, so to speak, within its own logic, and these strengthen the view that, valuable though it is in certain realms, it cannot be made the complete arbiter of social life. One point (. . .) is that the price system does not in any way prescribe a just distribution of income. (. . .) . . . in a strictly technical and objective sense, the price system does not always work. You simply cannot price certain things. A classical example (. . .) is the pollution of water or air. (. . .) A similar difficulty (. . .) is found in the case of road use. (. . .) . . . from the point of view of efficiency as well as from the point of view of distributive justice, something more than the market is called for.' Eg *The Limits of Organization* (WW Norton & Co. 1974) 20–3.

[5]NQ Dinh, P Dailler and A Pellet, *Droit International Public* (Librairie Générale de Droit et de Jurisprudence 4th ed. 1992) 413.

[6]JG Ruggie, 'Taking Embedded Liberalism Global' in D Held and M Koenig-Archibugi (eds), *Taming Globalization: Frontiers of Governance* (Polity Press 2003) 93–129, 379–415.

[7]Robé (n 1) Chapter 4.

[8]CA Cutler, 'Transformation in Statehood, the Investor-State Regime and the New Constitutionalism' 23 (1) (2016) Indiana Journal of Global Legal Studies 95–125.

https://doi.org/10.1017/elo.2023.3 Published online by Cambridge University Press

political organisations (mostly States) and to a reduction of their ability to play their role. So much so that, with regards to climate change, at the 2019 COP 25 in Madrid, a 'Climate Ambition Alliance' was established among State and *non-State* actors. The ambition is to achieve net-zero CO2 emission by 2050. The existing States System, fragmented opposite globally integrated 'private' economic organisations, is clearly under stress and needs to enroll private world governments to achieve ends in cannot reach by itself.

There is today a deep sense that, given the dire straits in which we are, everything needs to be rethought down to the foundations; but there is also doubt that this can be done – and done in time.[9] The timing issue is such (we have 12 years before the extinction of our 'CO2 budget') that any radical change of Power System is excluded. A major constraint to the identification of possible avenues of change is thus to offer ways which must be *both* radical *and* within the framework of existing constitutional rules structuring the Power System. A *world State* being excluded, remains the need to invent the ways and means for the required recoupling.

In my analysis, there are two major sources to our predicament. They are to be found in the connected operation of two 'private law' legal institutions: *property* – the first – as reconfigured via the second: business *corporations*. To analyse the consequences of their interplay, what is required is a high degree of precision in the description of the combined operation of these two legal devices. It is this combined operation which has led to the creation of a World Power System in need of enhanced constitutionalisation.

In the Law of Political Economy perspective, I see private property as being *the* corner stone right (Section 1). It is a key component of the overall legal/political World Power System.

In the day-to-day perception, property is understood as a right over things. And private law lawyers understand it as a 'bundle of rights' in connection with the use of things. In a constitutional, Law of Political Economy perspective, however, property is more appropriately understood as a right of decision-making as a matter of principle in connection with the use of things.[10] As a constitutionally created right, it is a right of autonomy originally granted to *individuals*, legal persons made of bones, flesh, and blood. It is one way to decentralise decision-making prerogatives down to the individual owner and has been a key instrument in the institutionalisation of liberal, individualistic societies (Section 2). As astutely summarised by Niklas Luhmann:

> the only great delegalizer with a minimum of rules and a maximum of effects that has been invented in legal history is the institution of property because of its clear and simple way of pre-deciding conflicts.[11]

Conflicts over the use of property are simply ruled about: the owner decides – with no appeal procedure. Of course, the other side of the coin is that property translates into duties for non-owners, who are subject to the owners' decisions in connection with the use of their property. The owner of a factory, for example, commands workers thanks to her ownership of the factory. This power is of course window-dressed in part under the terms of employment contracts. Employees formally *agree* to be subjected to the commands of their employer. But what conveys the ability to determine the use of the factory is property and not employment contracts.

Property is often presented as a right of autonomy. But this is true for the owner *only*. For the rest of the world, property *is* heteronomy. The owner's right of autonomy translates into an ability for the owner to define the conditions under which others can make use of his or her property.

[9]D Kennedy, 'Law in Global Political Economy – Now You See It, Now You Don't' in PF Kjaer (ed), *The Law of Political Economy – Transformation in the Function of Law* (Cambridge University Press 2020) 127–51.

[10]Kjaer (n 2) 1.

[11]N Luhmann, 'The Self-Reproduction of Law and its Limits' in G Teubner (ed), *Dilemmas of Law in the Welfare State* (De Gruyter 1986) 113, 121. For M Hauriou, more generally, 'The rules of law are transactional limits imposed on the claims of the individual powers and on the powers of the institutions; they are anticipated settlements of conflicts.' In M Hauriou, *La théorie de l'institution et de la fondation (essai de vitalisme social), 4 Cahiers de la nouvelle journée* (Bloud and Gay 1925) 89–128, 94.

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And for productive assets, such as a farm or a factory, property entitles the owner to organise the productive activities of those making use of his or her property. The owner will set, as a matter of principle, the production process and, indirectly, its consequences over the workforce, society at large, and its natural environment. And that is true whether we speak about the corner store or a global business firm.

Owners are constitutionally protected despots, who are entitled to freely decide what to do with their property – as long as they do not breach the law. Although this is debatable, one can consider that this is fine if we deal with a home, a personal car or, generally, 'consumption property'. With regards to 'productive property', when it is concentrated into vast world organisations playing the States System, the legitimacy of this despotism is much more questionable. When democratic rule could lead to an adjustment of the duties applying to owners in connection with the use of their property, this was still somewhat acceptable. Decentralised decisions having adverse effects could be democratically reoriented by the adoption of new mandatory rules. But now that globalisation has led to an erosion of this possibility, we are faced with an issue of gigantic proportions: how can we tame property when it is concentrated into world 'economic' organisations, which can hardly be reconnected to a 'political' sphere, which is administered today by a deficient States System?[12]

The development of this world issue is due to the operation of the second major legal institution at the origin of the imbalance in the global political economy: the business corporation (Section 3). By that, I really mean the *corporation*, or *company* (in England) or the *société anonyme* (in France), or the *Aktiengesellschaft* (in Germany), and so on. I really mean this *domestic legal institution* and not the gigantic world economic organisations which can be created by using them to structure their operations and which some people also call 'corporations'[13] Gigantic multinational, transnational, global *enterprises*, or *firms*, are structured around *groups of corporations*. But they are not 'corporations' or groups of corporations. They *use* corporations to structure the ownership of the assets they control and to locate the contracts which connect them to the World Wide Web of contracts.[14] But these global firms can in no way be equated with the discrete domestic legal devices we call 'corporations'. Corporations are domestic legal devices dealing with the relationships among officers, directors, and shareholders. The constituents of global firms go way beyond this and include a wealth of employees, subcontractors, suppliers, distributors, and so on. Mixing firms and corporations moves us further away from an understanding of the extraordinary prerogatives of corporations, and from the identification of the reasons why the concentration of productive property rights within the assets of corporations used by global firms has led to the present imbalance in the institutions of our global economy.

The business corporation is a complex legal instrument, and authors attempting to address its impact over the operation of the legal, economic, and political systems tend to cut corners which often leads to substantially mistaken conclusions. Economists, for example, often consider that shareholder own firms or corporations (they own shares issued by corporations), that directors are the shareholders' agents (they are the corporation's agents) and that they are under a duty to maximise profits (no such duty exists at law). This has led them to develop a dramatically mistaken 'agency theory'. But before we move to this, the first fundamental twist to perceive with the introduction of business corporations in the political economy is that corporations enjoy most of the constitutional rights initially granted to *individuals* only. It is so because corporations are treated by the legal system as *legal persons* which, via hard fought legal battles, have won

[12]J-P Robé, 'Taming Property' 4 (3) (2022) Revue Européenne du Droit 167–9.

[13]On a recent debate regarding this issue, see S Deakin, D Gindis, GM Hodgson, 'What Is a Firm? A Reply to Jean-Philippe Robé' 17 (1) Journal of Institutional Economics 861–71 and J-P Robé, 'Firms versus Corporations: A Rebuttal of Simon Deakin, David Gindis, and Geoffrey M. Hodgson' 18(4) Journal of Institutional Economics 693–701. See also J-P Robé, *Eigentum verteilt Macht* (*Zeit Online*, November 3, 2021).

[14]J-P Robé, 'Conflicting Sovereignties in the World Wide Web of Contracts – Property Rights and the Globalization of the Power System' in G-P Calliess, A Fischer-Lescano, D Wielsch and P Zumbansen (eds), *Soziologische Jurisprudenz, Festschrift für Gunther Teubner* (De Gruyter Recht 2009) 691–703.

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their civil rights.[15] They are not individuals and are purely intellectual constructions. But via the legal system, they enjoy most of the fundamental *constitutional* rights originally designed for *individuals only*. It is particularly the case for the right to property. The concentration of property rights via corporations was never contemplated in the constitutional design of liberal political systems. They hardly existed at the time. But due to the widespread use of corporations to structure economic production and exchange, a massive concentration of productive property rights ensued and led us to live in industrial and financial capitalism. This led in reaction to the surge of the Welfare State required to intervene in economic processes – and *reconnect* economic and political processes on a *national* basis. The concentration of property rights has led to a reconfiguration of the 'political'. But it was done – when it was done – on a national basis only without officially recognising the political power of large business firms.

With globalisation, however, the issue raised by the corporate structuring of property rights has now moved to yet another – global – level, where there is no State to step in. The reconnection between the economic and political spheres must be done in new ways (Section 4).

1. The cornerstone right: property

In a Law of Political Economy perspective, property is the cornerstone right, the one around which the separation/reconnection of economics and politics is structured. To understand this, one must move away from the common sense understanding of property as a right over things.

Property is one of the most sophisticated inventions made within Western legal systems. This, however, is vastly ignored.[16] Economists treat it as a right over things, and usually confuse property and possession. In day-to-day life, one can certainly treat property as a right over things and avoid the pedantry of correcting this widespread mistake.[17] But making the mistake of thinking that rights exist over things and not against others in connection with things prevents the development of a proper understanding of property rights and of their role in today's society.[18] Property is primarily a *legal* concept, a *right* legal persons have against other legal persons in connection with the object of property, things in particular.[19] Lawyers, especially in the common law tradition, do see property as a right of the owner against the world at large. The right to property is generally understood as being a 'bundle of rights'.[20] But both perceptions miss the key *constitutional dimension* of property. The 'bundle of rights' theory fundamentally misrepresents how

[15]A Winkler, *We the Corporations – How American Businesses won their Civil Rights* (Liveright Publishing Corporation 2018).

[16]In 2004, Norman Barry wrote, without qualification – or sources – that 'the first important point to note is that property law in all societies preceded the State'; in 'Property rights in common and civil law', E Colombatto (ed), *The Elgar Companion to The Economics of Property Rights* (Edward Elgar 2004) 177–96. This implies an almost complete ignorance of what property rights are. J Bentham's key message in his *Theory of Legislation* was, however, that 'Property and Law Were Born Together and Would Die Together. Before the Laws, Property Did Not Exist; Take Away the Laws, and Property Will Be no More'; E Dumont (ed) (Oxford University Press 1914) 145–7.

[17]I use the word 'thing' for convenience only. There are many objects of property which are not physical, such as a patent, a trademark, a copyright, a share of stock, a bond, and so on.

[18]In the *Legal Foundations of Capitalism*, JR Commons attributed the prominence of physical objects over legal relationship in economics to the concomitance of the development of economics as a science and the industrial revolution. *See* JR Commons, *Legal Foundations of Capitalism* (The University of Wisconsin Press 1968, 1st edition 1924) 47; 'Modern Economic Theory Started with the Industrial Revolution of the Eighteenth and Nineteenth Centuries. The Steam Engine was Invented by John Watt in the Same Year that His Friend, Adam Smith, Published The Wealth of Nations. This Coincidence of Wealth and Machinery Explains, in Part, the Prominence of Physical Things in the Form of Commodities, Rather than Legal Relations in the Form of Transactions, Which Dominated Economic Theory for a Hundred Years.'

[19]Although of course one can also own immaterial objects of property which are not 'things', such as a patent.

[20]JE Penner, 'The "Bundle of Rights" Picture of Property 43 (3) (1995–96) UCLA Law Review 711–820, 712.

https://doi.org/10.1017/elo.2023.3 Published online by Cambridge University Press

property operates in our power system. With property, what is finite at any point in time is *not* the set of prerogatives, the 'bundles of *rights*'. What is finite is the set of *limitations* to the right to property, to the autonomy it entails. The autonomy of the property owner is *the rule*; the limitations of this autonomy via contracts or laws or other norms created via the political system limiting the uses of property are *the exceptions*. Property is a default rule. It is a *right as a matter of principle* with 'bundles of *limits*', bundles of *exceptions* evolving when the law evolves, depending on the demands made on the political system, and on its eventual reaction to adopt norms limiting the potentially abusive uses of property.[21]

Modern property is *embedded in the overall system of governance of society*.[22] It is part of the *constitutional* mode of allocation of prerogatives. It does not predate society; it is one of its most sophisticated produces. And modern property is the product of a *specific* society: a liberal constitutional society which has gone through what Rafe Blaufarb has appropriately called 'The Great Demarcation'. It is the demarcation via which a radical distinction between private property and public power, introduced by the French 1789 revolution, has led to a series of dichotomies that constitute the modern political economy: the opposition between the political and the social, state and society, sovereignty and property, public and private, and so on.[23] But in this society, political institutions *must* be operative to ensure the reconnection of economic and political processes. Otherwise, the political economy is incomplete and cannot operate properly.

Since property is the cornerstone in the institutionalisation of modern society, the starting point of a Law of Political Economy analysis adapted to a global setting must be the concept of property. Property must be stripped from its material object. Of course, there are *objects* of property. But the right to property is a right against others in connection with the object of property, not a right over the object itself, which is not a subject of rights and cannot have duties. The confusion between the two has certainly been very helpful to window dress the power of owners in the Power System behind the appearance of the ownership of things.[24] But it has also led to an unofficial restructuring of the Power System into a pluralistic legal order composed of official (States) and unofficial (firms, in particular) legal orders.

2. Property as part of the power system

Property, understood as a constitutionally protected right of decision-making as a matter of principle, means that the operation of property is part of the foundations of our constitutional system of government. It is part of a *decision- and rule-making* system, but this is not officially acknowledged, and property is treated as fully belonging to the private side of the Power System. The owner has power, but this power is treated as if it were a *subjective right*, a right which can be exercised without considering the consequences onto others. Owners have this power towards others thanks to law. But they do not perform a prerogative the use of which can be controlled. They do not fulfill the duties of an office. They are autonomous and do not have to explain how they make use of their prerogatives. The privatisation of property is a final constitutional decentralisation of the power of decision-making (as a matter of principle) towards the use of objects of property. It makes it possible to develop economic activities without interference.

[21]See also TW Merrill, 'The Property Strategy' 160 (2011–2012) University of Pennsylvania Law Review 2061–2095, 2069.

[22]Understanding it goes even beyond what De Soto thought: the process within the formal property system that breaks down assets (objects of property) into capital (their legal representation) is not only hidden in thousands of pieces of legislation, statutes, regulations, and institutions that govern the system. *See* H de Soto, *The Mystery of Capital – Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books 2000) 48.

[23]R Blaufarb, *The Great Demarcation – The French Revolution and the Invention of Modern Property* (Oxford University Press 2016), especially 10–11.

[24]H Kelsen, *Théorie pure du droit* (translation H. Thévenaz) (Editions de la Baconnière 1988) 107.

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To understand the role of property and its embeddedness in the governance rules of society, one must draw the consequences from the fact that, in a modern constitutional system of government protecting property rights, there are two sets of interacting rules. One of the purposes of the Constitution is to define the operation of the branches of *public government*, usually via democratic institutions. This is the most traditional way of understanding what a 'Constitution' is. But the Constitution also aims at protecting individual persons and minorities against governmental abuses. There is therefore a set of constitutional rules defining fundamental rights, rights of autonomy designed for individual persons. These rights – freedom of thought, of movement, of religion, of association, *property rights* and so on – are to some extent *out of the reach* of the institutions created via the operation of the separate set of constitutional rules defining the mode of operation of the officially *political* institutions of a constitutional system of government.[25]

Under this constitutional arrangement, *fundamental rights* are placed out of the reach of the political institutions. Individual persons benefit from a combination of freedoms and rights of autonomy allowing them to pursue their individual purposes and, in the sphere of economic exchanges, to use their property rights as they see fit. This may lead to issues the electorate wants to see addressed via the adoption of new laws; and part of the democratic process of government is designed to provide procedures to address these issues. This is how the reconnection is done in a Law of Political Economy perspective. Private autonomy is the rule, but public heteronomy may be required when its combined outcome is unsatisfactory for a majority of the population. This process has been particularly made use of since the State has evolved, especially after the great depression of the early thirties of the twentieth century, from a 'night watchman' State to a 'regulatory' and 'welfare' State, internalising negative externalities (limiting the use of property) and redistributing income (appropriating property for redistribution). But there are limits – which are changing via evolutions in the interpretation of constitutional norms – to what the democratic process can do. Unrestrained democracy could lead to absolute public governmental power. The purpose of the fundamental rights protected by the Constitution is to create limits to absolutism. Their existence necessarily limits democracy.[26]

The key point regarding property rights in a constitutional perspective is that they provide the legal basis for *private governments* in connection with the use of the objects of property.[27] The introduction of modern property was an instrument to ensure *individual* autonomy. More appropriately, it was granting autonomy to *owners* to make use of their properties as they saw fit, without the constraints of a wealth of rules inherited from feudal and corporatist society. The heteronomy of property rule was still there for non-owners, but they had the theoretical possibility of becoming owners and thence access to more autonomy. Whatever the practical merits of this construction, it has been grossly invalidated by the advent of the corporate economy. Gigantic corporate organisations now concentrate so much property, so many rights of autonomy into potentially eternal 'private' world governments, that the whole liberal construction is in total disconnect with the realities of the existing World Power System.

The unitary view of the Constitution proposed, looking at the operation of the rights of autonomy, of the institutions of democracy and of constitutionalism together, is contrary to the traditional one, as expressed for example by Alf Ross. It is classical, he wrote, to consider that the Constitution 'deals with matters such as Parliament, the King, the ministers and the court but

[25]JH Ely, *Democracy and Distrust. A Theory of Judicial Review* (Harvard University Press 1980). See also L Duguit, for who individuals' rights limit the State's sovereignty; in L Duguit, *Les transformations du droit public* (Hachette Livre 1913 edition) 27. See also J Chevallier, 'L'État de droit' 313–380 (1988) Revue de Droit Public 365.

[26]Negri, *Le pouvoir constituant – Essai sur les alternatives de la modernité* (Presses Universitaires de France 1992) 2–7.

[27]L Katz, 'Governing Through Owners: How and Why Formal Private Property Rights Enhance State Power' 160 (2012) University of Pennsylvania Law Review 2029–2059 and L Katz 'Property's Sovereignty' 18 (2) (2017) Theoretical Inquiries in Law 299–328.

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not, eg, … economic organizations, or private individuals … because only the former are regarded as "Organs of the State"'.[28] This is a very restrictive view of the Constitution which neglects the key importance of the affirmation of fundamental rights. For some strange reason, it only deals with part of the constitutional provisions (those dealing with officially political institutions), as if the other ones were not part of the whole constitutional construction.

Even the avant-garde identification of what is today described as 'societal constitutionalism' treats Constitutions as being merely State centred '*political constitutions*'. And these '*political constitutions*' are presented as being '*limited to the political system*'.[29] This is accurate if one understands property rights as being part of the political rights guaranteed by the '*political*' constitution. But this is not the position of the proponents of societal constitutionalism who consider that there is 'a multiplicity of societal constitutions, which are neither wholly public nor private [and] emerge in the various spheres, into which contemporary society is differentiated: economy, science, technology, media, medicine, instructions, transports etc'.[30] These 'societal constitutions' are treated as radically autonomous from 'political constitutions'.

In my own analysis, this is also a restrictive view of the Constitution and of a constitutional system of government.[31] If fundamental rights provided for in the Constitution or in amendments to the Constitution or in other texts having constitutional ranking are *effectively enforced*, ie, are effective restraints on the autonomy of the legislative, executive, and judicial branches of the State, these rights *are part* of the constitutional system of government. They are part of a complex *Power System* comprising State institutions (organs of the State) and non-State ones (private persons) which do exist as such *because of* constitutional provisions. Since the French revolution of 1789 and the first written modern European Constitution – the French Constitution of 1791 – Constitutions typically contain a declaration of fundamental rights, on the one hand, and a description of the separation of State powers, on the other. There is first the definition of certain fundamental rights and principles guaranteed to individuals *against the State* and, second, the description of the political system commanding the *operation of the State*, which can be that of a monarchy, an aristocracy or a democracy or anything else.[32] But these provisions and the institutions thus created operate *as a whole*. And studying the whole is what the study of the Law of Political Economy is all about.

Private property being a decentralisation of the decision-making power towards an object of property to its owner *as a matter of principle*, one must determine how the restrictions to the use of property, *as a matter of exception*, are defined and implemented. In a constitutional Power System, they are defined by the *political* organs of the State. They are then implemented by the *administrative* organs of the State, using the public property at the disposal of the various State's officials. This is how the prerogatives of sovereignty are being apportioned in liberal constitutional States.[33]

Modern property rights lead to a very strange structure of the legal system. As a right of autonomy, property leads to an ability of rulemaking in connection with the use of the object of property. Users of the object of property must abide by the rules set by the owner. They are legally enforceable and are law proper. But because they derive from a right of autonomy, these rules

[28]A Ross, 'On the Concepts of "State" and "State Organs" in Constitutional Law' 5 (1961) Scandinavian Studies in Law 111–29, 115.

[29]A Golia Jr. and G Teubner, *Societal Constitutionalism: Background, Theory, Debates*, Max Planck Institute for Comparative Public Law and International Law (MPIL) Research Paper No. 2021-08, 7–43 (2021) 19.

[30]Ibid.

[31]See also D Kennedy, 'The Mystery of Global Governance' 34 (2008) Ohio Northern University Law Review 827–60, 854.

[32]C Schmitt, *Théorie de la Constitution* (Presses Universitaires de France 1989) 171–2 and 183.

[33]Blaufarb (n 23); R Claassen, 'Property and Political Power: Neo-Feudal Entanglements' in J Christman (ed), *Positive Liberty: Past, Present, and Future* 217–35 (Cambridge University Press 2021).

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are not subject to review. They are binding and final for the users of property, with no possibility to challenge the use made of these *subjective* rights by the owner.[34] Because enforced constitutional rules protect property rights and property rights enable rulemaking, the rules created by owners are part of the constitutional *legal system* while escaping legal review, unless of course they are in breach of otherwise applicable rules applying as a matter of exception. Property enables the creation of autonomous legal orders, which are made possible by property as a constitutional prerogative, ensuring the rule-making autonomy of the property rights controller. These legal orders made possible by property exist as such. *Legal pluralism* is built-in any constitutional system protecting property in the modern sense. But, thanks to the modern notion of property, these legal orders are understood as belonging to the private side of social organisation and are not integrated within official 'public' legal orders.

With globalisation, the ability to make decisions about the most significant property rights – productive property in particular – is now concentrated into very large organisations, into very large enterprises, often called 'multinationals', 'transnational companies' and so on. These organisations generate 'private' *global legal orders* which are built on modern property. In addition, they have a high degree of control over their whole 'value chain' (more appropriately understood as a 'value extraction' chain). This concentration of property rights into large private global enterprises has fundamentally changed the operation of the Power System. It is because strong property rights are the other side of the coin of *individual* liberalism. The couple they create was emphasised by Portalis, the main drafter of the French *Code civil*, when he introduced it to the French *Conseil d'État*. In his construction, '*all laws either relate to persons or to property, and to property for the utility of persons*'.[35] But the 'persons' then contemplated were *individuals*, not the subsequently developed large-scale business *organisations* which have fundamentally exhausted the ability of State institutions to play their reconnecting role in a Global Political Economy.

3. The corporate constitutional revolution

Of equal importance with property is the notion of 'artificial legal person', a distinctively Occidental legal invention which has fundamental consequences for the structuring of modern society and its shaping. The genealogy of the concept of corporation is very long and beyond the scope of this article. Suffice to indicate here that the concept of autonomous legal person has been instrumental to legally structure the modern *State* as a *legal person* existing irrespective of the passing of those performing the duties of the various offices conducted on its behalf. Similarly, without the modern business corporation, today's global business organisations could never have been effectively structured as stable, long-term organisations. As Nicholas Murray Butler, an American philosopher who once was president of Columbia University, insisted:

> I weight my words when I say that in my judgment the limited liability corporation is the greatest single discovery of modern times, whether you judge it by its social, by its ethical, by its industrial, or, in the long run, – after we understand it and know how to use it, – by its political effects. Even steam and electricity are far less important than the limited liability corporation, and they would be reduced to comparative impotence without it.[36]

[34]MR Cohen, 'Property and Sovereignty' 13 (1927) Cornell Law Quarterly 8–30, R Hale, 'Force and the State: A Comparison of "Political" and "Economic" Compulsion' 35 (1935) Columbia Law Review 149–201.

[35]In F Ewald (ed), *Naissance du Code Civil* (Flammarion 1989) 48.

[36]W Lippmann, *An Inquiry into the Principles of The Good Society* (Little, Brown and Company 1938) 13–4. AS Miller, *The Modern Corporate State: Private Governments and the American Constitution* (Greenwood Press 1976) 21. For Georges Ripert also – who called the business corporation the 'marvelous instrument of capitalism' – without the public limited company, we would have had to do without the blast furnace, the steam engine and hydro-electric power; G Ripert, *Les aspects juridiques du capitalisme moderne* (Librairie générale de droit et de jurisprudence 1951) 53.

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Without the business corporation, massive concentrations of capital in the long run would have been impossible. The scale of the industrial revolution would have been seriously reduced. But the coin has its other side. The concentration abilities of corporations have unleashed formidable challengers to the liberal political economy. As written by Justice Louis Brandeis, we are facing a 'Frankenstein monster which States have created by their corporation laws'.[37]

The reason for this is that corporate law, through the ability it offers to concentrate property rights over the long-term and through the flexibility it gives to set up groups of corporations (one corporation being able to own the shares issued by another one and controlling its decisions, and so on in virtually endless chains), plays a central role in the structuring of large global firms. They gain access to legal life *through* corporations. Corporate law plays a key role in the current structuring of the World Power System and plays an important role in the world political economy. But the power thus concentrated is mostly out of control at the world level. It fully benefits from its structuring via *private law* tools with no political duties attached.

The deep-rooted source of the radical evolution of the State Power System lies in the development of the business corporation as a normal mode of structuring business enterprises. The progressive introduction of this legal device into the States' legal systems, which mostly took place during the second half of the nineteenth century, has fundamentally changed the operation of the Power System. The change took place *after* the liberal constitutional revolutions and, for a set of complex reasons,[38] corporations were granted most of the constitutional rights enjoyed by *individuals*, including the right to own property.

Corporations are very efficient legal devices to concentrate capital: they enjoy legal personality, a potentially infinite life, and serve as a shield between the assets and liabilities of the corporation and those of the shareholders.[39] Shareholders have *no* liability in connection with the corporation's affairs[40]; and corporations are not impacted by events (death, bankruptcy, divorce, etc.) affecting the shareholders. These events only impact the allocation of the property rights over the *shares* issued by the corporation, but they do not affect the assets and operations of the corporation's business. On top of that, corporations can own the shares issued by other corporations and can be used to create groups of corporations, each subsidiary corporation enjoying the 'assets partitioning' effect and the benefits of eternal life.[41]

When corporations concentrate property rights, however, it means they concentrate rights of decision-making as a matter of principle towards the property rights they own. It means they concentrate within *artificial legal persons* rights which were created to serve as devices providing autonomy to *individual* owners, to physical persons yearning to express their autonomy, their personality, and live their individually chosen life. But the liberal constitutional equilibrium was never contemplated with business corporations and their potentially eternal concentrating abilities in mind. The surge of corporations to legally structure businesses has led to the corporate constitutional revolution made more visible by the globalisation of the World Power System. Thanks to their foundation in property, even the largest corporate powers are still not treated as being 'public'; but at the same time, they are hardly 'private'.[42] They belong to a *different category*. Because of the property rights they concentrate under their management structures, corporations can issue commands, regulate the activities of those making use of their assets, adjudicate disputes, impose rules of behaviour, delegate the use of resources, train individuals

[37]LK Liggett Co. et al. v. Lee, Comptroller et al., 288 U.S. 517 (1933) 548, 567.

[38]Winkler (n 15). J-P Robé, 'The Legal Structure of the Firm' 1 (1) (2011) Accounting, Economics, and Law, Art 5.

[39]Ibid.

[40]They do not have 'limited liability' as is routinely written. Once the shares are fully paid-up, they have *no liability*. What is routinely called 'limited liability' is the potential loss of value in the shares, and it has nothing to do with a liability.

[41]It was forbidden for a long time, until New Jersey – which was then called the 'traitor State' – allowed it in 1889.

[42]D Ciepley, 'Beyond Public and Private: Toward a Political Theory of the Corporation' 107 (1) (2013) American Political Science Review 139–158, 140.

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to abide by their rules, discipline and punish. And they do this, *inter alia*, over 80 per cent of the legal structuring of world trade which is *intra-firm* trade.[43]

In the area of corporate law, the misunderstanding about the meaning of property rights has been dramatically damaging. It has led to the development of above ground economic theories which have been hurting the economy, the political systems and the natural environment provided by our planet.[44] Here again, the use of the day-to-day understanding of property as rights over things has led to much misunderstanding and analytical errors. In everyday meaning, shareholders are routinely considered to be the owners of *firms* (or *corporations*, the public and most economists making the confusion). This error is widespread, and it affects even the specialised press and scholarly reviews. In reality, shareholders only own shares issued by corporations.[45] They do not own firms or corporations, neither of these being the object of a property right. And they do not own their assets nor execute any contract with the employees, suppliers, or clients. But the widespread '*everyday meaning*' that shareholders own corporations/firms has led economists to develop their above ground so-called 'agency theory', ie, the twisting of the management of most large firms in the interests of shareholders only to lead managers to create 'shareholder value'. Since shareholders own corporations/firms – the theory goes – managers are their 'agents' and must manage in their 'principal's' interest. Then this interest is declared to be the 'maximization of profits' (or of 'shareholder value'). Legally speaking, this is a myth.[46] But this has and is still generating massive negative externalities, including global climate change.[47] Based on mistakes – or worse – this theory leads to a defective operation of the political economy.

Legally speaking, the whole construction is nonsense. Shareholders own shares, corporate officers, and directors are agents of the corporation, and they generally must manage the firm structured using the corporation (or a group of corporations) in the corporate interest. Surely, the 'corporate interest' includes the shareholders' interest. But there are other interests which are affected as well by firm management which need to be considered to manage in the 'corporate interest'. The consequences of the confusion generated by economists having developed their theory based on the everyday meaning of property are dramatic.[48] While corporate power should be treated as any other form of *power*, with a duty to consider the various interests affected by the firm's operations,[49] corporate prerogatives are treated as a *property* with no other purpose than the satisfaction of the 'owner'. And this satisfaction is deemed to be ensured when profits are maximised. Maximising profits in a less than perfect world, however, means maximising negative externalities, abusing human rights, concentrating wealth and depriving States from their fiscal means of action. Our species may not survive this 'mandate' built on a mistake induced by the 'scientific' use of words in their 'everyday meaning'.

To precisely understand the position of firms in the World Power System, it is necessary to avoid the widespread confusion in the literature on economic organisations between the concept of 'corporation' and the concept of 'firm'. The two words are often used interchangeably, 'company' or 'enterprise' being also sometimes used as synonyms. The corporation *is* a legal person; the

[43] <https://unctad.org/en/PublicationsLibrary/tdr2018_en.pdf> 53.

[44] LA Stout, *The Shareholder Value Myth – How Putting Shareholders First Harms Investors, Corporations and the Public* (BK Business Books 2012).

[45] HP Hill, *Accounting Principles for the Autonomous Corporate Entity* (Quorum Books 1987)); J-P Robé, 'L'entreprise en droit' 29 (1995) Droit et société 117–36; J-P Robé, *L'entreprise et le droit* (Presses Universitaires de France 1999); J-P Robé, 'The Legal Structure of the Firm' (n 38); M Blair and LA Stout, 'A Team Production Theory of Corporate Law' 82 (2) (1999) Virginia Law Review 751–806; P Ireland, 'Company Law and the Myth of Shareholder Ownership' 62 (1999) The Modern Law Review 32–57.

[46] Stout (n 44) and 'Why We Should Stop Teaching Dodge v. Ford' 3 (2008) Virginia Law & Business Review 163. Robé (n 38).

[47] Robé (n 1) 293–326.

[48] Robé (n 1).

[49] E Gaillard, *Le pouvoir en droit privé* (Masson 1985).

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firm (the business) *is not*. The corporation owns property rights over assets and is party to contracts; the firm does not and is not. As written by Lynn Stout, '*the careless but unfortunately common habit of treating them as synonyms confuses and misleads*.'[50] And the fact is that the consequences of this linguistic and conceptual confusion are extraordinary. They are a major hindrance for an understanding of the modern Power System and of the institutional structure of economic activity generally. This may also explain why the economic theory of the firm has not made much progress over the last thirty years or so. Economists, disregarding the *legal* structure of the firm (and law generally), are unable to agree on what a firm is.[51] Ignoring the legal structure of the firm leads them to confuse the notions of 'firm' and of 'corporation' and to develop their analyses using concepts which are not suited to the economic system and real-life firms as they effectively exist.[52] In this respect, economics is inherently limited by its abandonment of the Law of Political Economy perspective.

The firm as an economic organisation can be quite simple or extraordinarily complex, with worldwide operations for so-called 'multinationals'. But the legal instruments used to structure them are basically the same: property rights, contracts, and legal persons. Corporations are only one of the types of legal persons used to legally structure firms. Multinational *firms* are organisations having a *corporate structure* which is splintered into numerous States legal systems in which the rights, duties, and liabilities of *each* subsidiary corporation – numbering sometimes in the hundreds or thousands – are all different. This offers a world of opportunities for the structuring of multinational firms and the allocation of rights, duties, and liabilities among the various *corporations* used, precisely because *firms* have no legal unity, and each subsidiary corporation is a separate legal person able to contract with the other subsidiaries of the group. The outside world, including States, contracting parties or third parties can only interact, insist on law abidance, contracts fulfilment and damages correction with one or part of the legal persons (corporations) used to structure the firm. They cannot do it with 'the firm' *as such* which has no legal existence and has no duties. This is one of the key issues of our time, to which economists, political scientists, and lawyers must adapt.

Via the introduction and the development of corporate law, capitalism as we know it appeared. Two separate but interrelated property systems came to life: the property over *productive assets* owned by corporations and the property over the financial assets (shares in particular) issued by corporations and which can be owned by other corporations or other legal persons.

The unfounded notion that shareholders own corporations allows them to contribute very little and take quite a lot.[53] They contribute very little because most shareholders are only active on the *secondary market* for shares, where their 'contribution' (the price paid to get their shares) only goes to selling shareholders and not towards productive investments. Adolf Berle, one of the best corporate lawyers of his time, already wrote in 1967:

> Stock markets are no longer places of 'investment'. [They are] only psychologically connected with the capital gathering and capital application system on which productive industry and enterprise actually depend ... The purchaser of stock does not contribute savings to an

[50]LA Stout, *Corporate Entities: Their Ownership, Control, and Purpose* (Cornell Law School Research Paper n 16–38 2017), referring to my insistence to differentiate both. See also S Bottomley, *The Constitutional Corporation – Rethinking Corporate Governance* (Ashgate 2007) 27.

[51]GM Hodgson, 'Taxonomic Definitions in Social Sciences, with Firms, Markets and Institutions as Case Studies' 1–18 (2018) Journal of Institutional Economics 10.

[52]Law and Economics enthusiasts should never have forgotten Demsetz's early lesson that 'It is a mistake to confuse the firm of economic theory with its real-world namesake. The chief mission of neoclassical economics is to understand how the price system coordinates the use of resources, not to understand the inner workings of real firms.' Eg H Demsetz, 'The Structure of Ownership and the Theory of the Firm' 26 (2) (1983) The Journal of Law and Economics 375–90, 377.

[53]Eg, M Kelly, *The Divine Right of Capital – Dethroning the Corporate Aristocracy* (Berrett-Koehler Publishers, Inc. 2001) 3.

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> enterprise . . . he merely estimates the chance of the corporation's shares increasing in value. The contribution his purchase makes to anyone other than himself is the maintenance of liquidity for other shareholders who may wish to convert their holdings into cash.[54]

Businesses (composed of real assets, real people, etc.) are managed by corporations or, more precisely, by agents of the corporations in the name and on behalf of corporations. These officers are the ones directing the use of the property rights owned by corporations. Shareholders can do this only with regards to what they own: the shares. They can sell them, loan them, give them. Thanks to their ownership of the shares, shareholders can vote in shareholders assembly meetings. But they do not manage the corporation's assets. Shares are not direct rights over the business or the assets of the corporation. There is, on the one hand, the so-called 'real' economy where the property rights over productive assets are administered, and, on the other, the financial system. The two are somewhat related, but not in a direct way.[55] It is impossible to understand capitalism without understanding the dual type of property rights in existence in connection with the operation of a corporate economy. Rights over *productive assets* are structured within firms via the corporations owning them. Rights over *shares* can be exchanged, sold, given, inherited without any impact on the structuring of firms via corporations. In this way, vast and relatively stable organisations have been created thanks to corporations which can concentrate considerable rights of decision-making as a matter of principle over productive assets. This has inherently affected the Power System, which was not designed to cope with the surge of these autonomous corporate powers having concentrated the prerogatives of decision-making granted by property. They were originally only designed to protect *individual* persons against the *State* and have turned *against individual persons and States* in their confrontation with *firms*.

There was a very interesting debate on the role of business corporations in the concentration of property rights and on their impact on the role of the State at the so-called 'Lippmann Colloquium' held in Paris in August 1938. Among the numerous liberal intellectuals who participated, one finds Raymond Aron, Friedrich Hayek, Robert Marjolin, Ludwig von Mises, Michael Polanyi, Wilhelm Röpke, Louis Rougier, Jacques Rueff, Alexander Rüstow, and Alfred Schütz. The colloquium led to the creation, a few years later, of the Mont-Pélerin Society, which still exists today and played a key role in the extension of what is understood today as 'neoliberalism'. At the 1938 colloquium, and during the first years of the Society's activity, *two* strands of neo-liberalism expressed themselves. One of them was the ordo-liberalism of Röpke and Rüstow; the other was advocated by von Mises and (to a lesser extent) Hayek.[56] As is well known, the second strand eliminated the first, 'neo-liberalism' meaning today *only* the second strand of thought.[57] What is interesting for our purposes is that the ordo-liberals, whose legacy is unfortunately vastly ignored or misunderstood, had a clear understanding of the role of law in the effective operation of a liberal society. For someone like Louis Rougier, only the 'liberal mystic' misses the importance of

[54]Introduction by Adolf Berle to AA Berle, Jr & G Means, *The Modern Corporation and Private Property* Transaction Publishers (Ninth printing 2007, 1st edition 1932) xxxiv–v.

[55]Robé (n 1), Chapter 8.

[56]S Audier, *Le colloque Lippmann – Aux origines du néo-libéralisme* (Editions Le Bord de l'Eau 2008) 180. See also P Mirowski and D Plehwe (eds), *The Road from Mont Pelerin – The Making of the Neoliberal Thought Collective* (Harvard University Press 2009), especially 46–51, M Foucault, *Naissance de la Biopolitique, Cours au Collège de France, 1978–1979* (Gallimard-Seuil), Collection 'Hautes Etudes' (2004) 165–90 and Q Slobodian, *The Globalists – The End of Empire and the Birth of Neoliberalism* (Harvard University Press 2018) especially 7–13.

[57]Audier Ibid., 207–9.

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> property, inheritance, contracts, the various types of business partnerships and corporations, the currency, the banking organization, weights and measures which do exist via a series of rights, guarantees and obligations sanctioned by the authority of the State.[58]

Or for Wilhelm Röpke, it was utopian to present a competitive market economy as a '*natural order*' whilst it is '*the artificial and fragile produce*' of a particular civilisation.[59] For Walter Eucken, the central problem of economic thought was that it had lost all connection with social and political reality.

Aware of the role of law in the effective operation of the economic system, Wilhelm Röpke clearly saw the difference between liberalism and capitalism. For him, 'capitalism is nothing else than this soiled, adulterated form which liberalism has taken in the economic history of the last hundred years.'[60] In this move from liberalism to capitalism, *business corporations* have played a major role. But for today's '*neo-liberals*' – the heirs of the *second* strand of thought expressed at the Lippmann Colloquium – there is no issue in treating them like individuals or nexuses of contracts, and this topic was quickly dismissed in the debates.[61]

In this tradition, the US Supreme Court has recently shown that it is ready to twist the arm of corporate law to further extend the theory that corporations benefit from the constitutional rights designed for individuals. It granted additional constitutional rights to corporations on the rationale that they are *associations of people* from whom rights can be derived.[62] The US Supreme Courts dealt with them as is they were *partnerships*. Via corporate law, however, corporations are granted extraordinary features like a legal personality *separate* from the one of shareholders, eternal life, no liability for their shareholders, asset partitioning among their assets and those of the shareholders, etc. Corporations can't be equated to partnerships or individuals in any way. But when it comes to tame their powers – or rather, *not* tame their powers – they are treated like any mortal individual physical human being in need of protection from potentially oppressive State power. Of course, the immediate effect of such a stance is to protect the potentially oppressive power exercised via corporations.[63]

Addressing the effects of the concentration of property rights within (groups of) corporations is certainly not an easy task. But the centrality of the issue created by the concentration of property rights devised for the individual *only* within corporate vehicles should not be underestimated. There was an interesting debate between Friedrich von Hayek and Robert Bork which took place in San Jose, California, in November 1978.[64] Hayek tried to elaborate on it but was unfortunately silenced by Bork:

> Bork, 42:08: You refer in the first two books to the need for institutional invention to bring law back to its proper function. And I wonder if you'd describe to us just the nature of the institutional innovation you have in mind.

[58] Ibid., 80.

[59] Ibid., 187.

[60] Ibid., 199. On the distinction between liberalism and capitalism, *see also* G Arrighi, *The Long Twentieth Century – Money, Power and the Origins of our Times* (Verso 1994, 2006).

[61] Audier (n 56) 282–6.

[62] See generally E Pollman, 'Constitutionalizing Corporate Law' 69 (3) (2016) Vanderbilt Law Review 639–93. In *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the Supreme Court held that the free speech clause of the First Amendment prohibits the government from restricting independent expenditures for political campaigns by corporations. In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the United States Supreme Court allowed privately held for-profit corporations to be exempt from a regulation its 'owners' religiously object to. For such companies, the Court's majority (by a 5–4 vote) struck down the contraceptive mandate, a regulation adopted by the US Department of Health and Human Services (HHS) under the Affordable Care Act (ACA) requiring employers to cover certain contraceptives for their female employees.

[63] The real-life effect of the *Hobby Lobby* decision was to put the religious beliefs of five shareholders above the interests of 13,000 employees.

[64] <https://www.youtube.com/watch?v=Wwq6wrMZHII>.

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> Hayek, 42:30: Well, what I have in mind really is the law of corporations where we have very blindly applied the rules of law which have been developed to guide the individual to legal persons. Now I have no doubt that the problem of delimitation of a protected sphere which we have learned for the individual cannot in the same unchanged form [apply] to very big organizations. They have physical powers which the individual does not have and in consequence we probably should gradually have to invent new restrictions on what an organized group can do which are distinct from the restrictions for the individual.
>
> I would not like to call it an 'invention' because I am now sure you can't at once design such a system. But I think that's a direction in which we ought to aim to guide evolution to [address] problems which we ought to face much more consciously and to experiment in this direction.
>
> It's not a problem we can solve overnight.
>
> Bork 43:47 [Bork, in his great wisdom, moves on to another topic . . .]: No, I was thinking of your suggestion which I've heard about that we have two houses of the legislative.
>
> Hayek, 44:00: Oh, I see yes. I am very much convinced that if democracy is not to destroy itself [Etc.] [Hayek continues on the need to differentiate legislation and regulation].

The corporate rights issue had already been raised at the Lippmann Colloquium by the ordo liberals. They were quickly silenced. And although the fact that corporations are the largest property rights owners on our planet and play a key role in the structuring of the world economy, they are still understood as being merely 'nexuses of contracts' by economists and 'associations of people' by (Supreme) Courts. And on top of that, these 'nexuses' are understood as having no specificities differentiating them from other contracts or the 'market'.[65]

In this perspective, this means that Google, Amazon, Toyota, Shell, Total, etc. not only do not exist as such; in addition, they fade away in 'the market'. This has led to gigantic concentrations of property rights in the realm of pure *private law*, in the absolute ignorance of the constitutional dimension involved and the requirements of a properly operating political economy.[66] The rights of decision-making as a matter of principle towards the property rights controlled via corporate structures are treated as purely private rights while, with the globalisation of the economy, corporate structures can now avoid a large number of the regulatory rules they want to escape.[67] Interests which could find a way towards their protection via State laws are now left to fend for themselves, just like employees during the nineteenth century capitalism prior to the invention of labour law via the democratic reconnection between the economy and the political process.

The fact is that if one does not develop a legally grounded analysis of the firm which requires a legally grounded analysis of property rights and of their reconfiguration via corporate structures, *it is impossible to understand the effective operation of modern capitalism* and of the World Power System. Modern capitalism relies on the existence of artificial legal persons to own, directly or indirectly, real assets, enabling the development of organisations existing in the long-term, and leaving to mortal individuals only *derivative rights* via the securities issued by these artificial legal persons. These derivative rights, and in particular shares of stock, are traded, generate income, can be inherited and have value as *separate* assets connected to, but at the same time isolated from, the activities of business firms. To stabilise large business firms and the coordinated operation of their assets, transactions among individuals in (remote) connection with these assets must take place in a wholly autonomous sphere: the market for shares.

As we can see from these developments, globalisation is not a globalisation of 'markets'. It is the globalisation of a complex Power System within which planned enterprises play a key role in the

[65]SNS Cheung, 'The Contractual Nature of the Firm' 26 (1) (1983) Journal of Law and Economics 1–21.

[66]See A Singer, *The Form of the Firm: A Normative Political Theory of the Corporation* (Oxford University Press 2019) in particular 109.

[67]Robé (n 1).

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operation of productive assets – and markets play a lesser one. A key market in the present World Power System is the *market for State norms* which allows global enterprises to tinker with costs and prices. But it makes it extremely challenging to reconnect economic issues to political processes.

One dramatic consequence of the economists' general lack of sophistication in their understanding of property rights is that they neglect the necessity of having a complete constitutional system of government for the institution of property to operate properly. Without the ability of a 'State' to adopt exceptions to the rule of autonomy provided by property, the numerous and conflicting interests present in society cannot be properly adjudicated by the sole operation of the so-called 'market'. The *reconnection* between economic processes and political ones cannot occur. There is no global State and having one is not an appealing or realistic option. Are we then condemned to live in a *disconnected* World Political Economy?

4. Constitutionalisation in a pluralistic global political economy

Today's political economy is global. It has been built via the interaction of markets, States (sometimes within States-created international organisations, such as the European Union) and privately created organisations we call enterprises (or firms). In this process, firms – which do not have legal existence as such – have made use of key domestic legal institutions like 'contract', 'property' and 'corporation' to build themselves locally, nationally, and then globally.[68] In the globalisation process, multinational firms have played a transformative role in our political economy. They have led to the self-institutionalisation of a new Power System in which they play an integral part. But the limited understanding of their legal structure and of its political consequences is affecting our ability to understand them as organisations existing beyond the public/private divide. The private legal institutions on which they have been built were not initially designed to be taken in isolation from the overall constitutional construction to which they originally belonged. And a lack of proper understanding of the inner structure and political role played by business firms has led to a dramatically imbalanced Power System.

As we have seen, the legal structure of constitutional systems of governments protecting property rights is inherently pluralistic. The almost universal denial of the pluralistic legal structure of society is important to understand because legal pluralism does not derive from globalisation. Globalisation only makes it more *visible*.[69] Legal pluralism has always been there, even in modern, supposedly positivist and monist State law. Historically, the *ancien régime* macro-legal orders of pre-modern States were *officially* pluralistic legal orders.[70] Society was understood as a body made of bodies. Each body was *officially* producing its own law.[71] With the modern dissolution of most intermediary groupings, official legal pluralism has left the stage to be replaced by a monistic legal order *officially* based on the one hand, on the rights of autonomy of *individual* persons free from the restraints of the old corporate institutions of society and, on the other hand, the organs of the sovereign State as the sole official producers of legal rules over the whole State's territory and population.

But irrespective of the stance taken by legal positivists that law proper is State law and that there are no intermediate legal orders anymore there is still legal pluralism.[72] It is *unofficial* because it is hidden behind the concept of *property right* usually understood as a right over a thing. As we know

[68]Robé , 'The Legal Structure of the Firm' (n 38).

[69]J-P Robé, 'L'entreprise comme institution fondamentale de l'échange marchand' in A Hatchuel, O Favereau and F Aggeri (sous la direction de), *L'activité marchande sans le marché* Colloque de Cerisy (Presse des Mines 2010) 91–110.

[70]Blaufarb (n 23).

[71]For example: F Olivier-Martin, 'La France d'ancien régime, État corporatif' 5 (1937) Annales de droit et de sciences politiques 690.

[72]J-P Robé, 'L'ordre juridique de l'entreprise' 25 (1997) Droits 163–77, Les entreprises multinationales, vecteurs d'un nouveau constitutionnalisme, 56 (2013) Archives de Philosophie du Droit 337–61, 'La place de l'entreprise dans le système de pouvoirs' in P Musso (ed), *L'entreprise contre l'État* (Editions Manucius 2017) 152–60; S Romano, *The Legal Order* (Routledge 2017).

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now, property is a right of decision- and rule-making as a matter of principle to which third party users of property must abide. The 'private' legal orders may not be 'intermediary' in the sense that they have no *official* existence and do not *officially* mediate between individual persons and the State. They are not intermediary also in the sense that they are not territorial and may very well operate in the infra- or supra-State level. And private legal orders do not benefit from a *delegation* of power or a positive recognition of their rule-making power. In this respect, it is inappropriate to consider that the reason why 'corporations' (firms) exist is that they disperse collective power from government to civil society, as the sociologist David Sciuli does.[73] It is the *opposite* which occurred: collective power was *dispersed* from government to *individuals* (not 'civil society'), via property rights and liberties. Their *concentration* into the ownership of large *corporate organisations* led to a new form of *concentration* of power, with a great degree of autonomy from State governmental powers, and not at all to a dispersion of (private) power.[74]

The legal orders built using property rights are not part of the *official* system of allocation of power in society. But the autonomy they have in this legal system is *higher* than in officially pluralistic legal orders because they derive their autonomy from property, a right as a matter of principle, *a constitutional right*, and *not a delegation of authority* which could be taken back.[75] This is the real 'constitutional moment' of what is being called 'modernity'.[76]

The global legal pluralism induced by the worldwide spreading of a corporate economy is here to stay. Acknowledging its existence does not imply the acceptance of an undemocratic shift of authority and power to private actors.[77] On the contrary, this legal pluralism needs to be made visible to identify how it is possible to *reconnect* economic and political processes within these 'private' legal orders via law.[78] Confronted with the existing imbalance in the World Power System between the ever-freer prerogatives of organisations concentrating property rights and the limited ability to impact on this 'private' side of the Power System,[79] various strategies have been imagined. A global State being excluded, the contenders are few.

A first effort is the development of so-called 'corporate social responsibility' (CSR) under international law.[80] Historically, there were several attempts to develop binding international law designed to limit the autonomy of globalised corporate structures mobilising property rights worldwide. The prevailing spirit of market fundamentalism, however, led to the failure of these efforts. The CSR movement, led by John G. Ruggie, then developed a strategy of engaging transnational enterprises as such into voluntary and self-regulatory programs. They comprise the

[73]D Sciuli, *Corporate Power in Civil Society – An Application of Societal Constitutionalism* (New York University Press 2001) 26.

[74]J-P Robé, 'Multinational Enterprises: The Constitution of a Pluralistic Legal Order' in G Teubner (ed), *Global Law without a State* (Dartmouth 1997) 45–77; Robé (n 1), Chapter 8.

[75]Robé (n 12).

[76]Blaufarb (n 23); R Claassen, 'Property and Political Power: Neo-Feudal Entanglements' in J Christman (ed), *Positive Liberty: Past, Present, and Future* 217–35 (Cambridge University Press 2021).

[77]CA Cutler, 'Legal Pluralism and the "Common Sense" of Transnational Capitalism' 3 (4) (2013) Oñati Socio-Legal Studies 719–40, 722.

[78]There is awareness of the need to dramatically change the governance of multinational firms. In its 6 December 2022, address to the UN Biodiversity Conference, UN Secretary General Antonio Guterres stated: 'Multinational corporations are filling their bank accounts while emptying our world of its natural gifts. Ecosystems have become playthings of profit .... The private sector must recognize that profit and protection must go hand-in-hand. ... it means challenging the relentless concentration of wealth and power by few that is working against nature and the real interests of the majority.' What is lacking is a sufficiently precise understating of the operations of these global 'private' governments to identify the few levers of action available. See J-P Robé, 'Globalization and Constitutionalization of the World Power System' in J-P Robé, A Lyon-Caen and S Vernac (eds), '*Multinationals and the Constitutionalization of the World Power System*', with a Foreword from JG Ruggie (Routledge 2016).

[79]CA Cutler, 'Transformation in Statehood, the Investor-State Regime and the New Constitutionalism' 23 (1) (2016) Indiana Journal of Global Legal Studies 95–125, 96.

[80]Ibid.

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Global Compact and the Guiding Principles on Business and Human Rights, sponsored by the United Nations.[81] A major issue identified with these efforts, as clearly expressed by Claire Cutler, is that the prerogatives of corporations, and in particular their property rights, are protected through hard, formal, constitutional, enforceable rights while their duties are framed under soft and (mostly) unenforceable legal forms.[82] But experience has shown that these instruments do have positive effects, first movers leading the way for more reluctant firms. And Courts now tend to refer to them as sources of effective obligations.[83] Also, they created a dynamic leading to new demands and they may end up having been instrumental for the development of new forms of the 'State of law', as applied to business firms.

The limits of these instruments as tool under international law may be precisely at the origin of a more fundamental restructuring of the legal system towards a renewed understating of the importance of constitutional law when dealing with instances of institutionalised power. Today, numerous authors look beyond CSR and are working on the concept of 'constitutionalization'.[84] In connection with large corporate enterprises, thinking in a constitutional perspective is rather old. In the *very last words* of *The Modern Corporation and Private Property*, Adolf Berle and Gardiner Means were very clear:

> . . . the modern corporation [they meant 'firm'] may be regarded not simply as one form of social organization but potentially (if not yet actually) as the dominant institution of the modern world. (. . .) The future may see the economic organisms now typified by the corporation [the firm], not only on an equal plane with the State, but possibly even superseding it as the dominant form of social organization. The law of corporations, accordingly, might well be considered as a potential constitutional law for the new economic State, while business practice is increasingly assuming the aspects of economic statesmanship.[85] [emphasis added]

But no one realised that the constitutional system of government – this specific institutionalisation of State power in the Power System – had to be thought about in connection with the surge of the large corporate firm *starting from the concept of property* as part of the decision-making process of society from the smallest micro-powers (individuals) up to macro-powers (States). Berle and Means hinted at it when they wrote in the preface of their book that it was 'intended primarily to break ground on the relation which the corporation bears to property.'[86] But they did not properly analyse the complexity of the evolution of the concept of property in a corporate political

[81]For a critical review by the inventor of the Global Compact, *see* the Foreword by JG Ruggie in J-P Robé, A Lyon-Caen and S Vernac (eds), *Multinationals and the Constitutionalization of the World Power System*, (Routledge 2016).

[82]Cutler (n 77) 730.

[83]See, for example, the decision referred to in n 88.

[84]There are of course many other attempts to curb corporate power, including: challenging limited liability in cases where it has been abused and has led to disasters, H Hansmann and R Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' 100 (1991) Yale Law Journal 1879; using micro-devices to force the internalization of neglected interests, Robé n 78; supplement the existing accounting rules to account for the use of all forms of capital, R Barker and C Mayer, 'How Should a "Sustainable Corporation" Account for Natural Capital?' *Saïd Business School Research Papers*, RP-15 (2017). J-P Robé, 'The Shareholder Value Mess (and How to Clean It Up)' 10 (3) (2019) Accounting, Economics, and Law: A Convivium 1–27 and, generally, Robé (n 1); incentivize the due diligence of value chains, respecting internal determinations of polities if appropriate participative and (possibly) democratic procedures are being used; and so on. There is no silver bullet. A series of combined efforts with capacities to adapt to an evolving situation is necessary.

[85]A Berle, Jr and G Means, *The Modern Corporation and Private Property* (Transaction Publishers 2007) 313.

[86]Berle's preface to the 1932 edition of AA Berle, Jr and G Means, *The Modern Corporation and Private Property* (Transaction Publishers (1932) liii. The objectives of the book were way beyond the issue of 'separation of ownership and control' for which it is known.

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economy with the appearance of rights over securities (by shareholders) in addition to the rights over the underlying productive assets (by corporations).[87]

Also, the pluralistic nature of the constitutional order was perceived a long time ago. But what did not appear clearly is that the medium of the redistribution of sovereignty is to be found in the concentration of *property rights* into large organisations which end up creating significant counter-powers to State powers. This is because there was no understanding that what is concentrated – property – amounts to a concentration of rights of decision- and rule-making towards objects of property, and over those making use of them, as a matter of principle.

There are recent developments in case law which show that courts are sometimes ready to face the harsh reality ahead of us and play their role in reallocating duties in line with this reallocation of power. Although they are of course not mentioning a process of 'constitutionalization', they do submit private world governments to higher norms of conduct, thus *reconnecting* via judicial law economic and political issues. They are part and parcel in the much-needed global constitutionalisation process.

In a recent case involving Shell, a Dutch court treated this global enterprise as a world private government with a duty to act against climate change.[88] The specific issue at stake was to determine whether Royal Dutch Shell PLC ('RDS') has the obligation to reduce CO2 emissions of the Shell group's entire energy portfolio through the corporate policy of the Shell group (para 4.1.1 of Judgment). In a 26 May 2021 Decision, the Hague District Court ordered RDS to reduce the CO2 emissions of the Shell Group's activities by 45 per cent at the end of 2030 relative to 2019 through the Shell group's corporate policy (4.1.4).

Section 2.2.1 of the Judgement indicates that '*RDS is a public limited company, a legal person under private law, established under the laws of England and Wales. Its head office is established in The Hague.*' This, of course, is rather innocuous. It is merely the identification of the party to these private law proceedings. But via this specific private law corporation, it is a much larger organisation – Shell as a *firm*, as a *global private government* – which is impacted by the Decision. The Court notes that RDS is the top holding of the Shell Group. The Shell group is composed of 1,100 companies operating in 160 countries on which RDS has '*a policy-setting influence*' (4.4.18) due, of course, to its direct or indirect ownership of the shares issued by these corporations. Consequently, under the Decision, RDS has an *obligation of result* with regards to the CO2 emissions of *these* entities (4.4.23), wherever they are located in the world. But RDS power goes beyond and extends over its business relations, including end-users. For these, the Court imposed 'a significant best-efforts obligation' on RDS (4.4.24). The Court effectively embraced the whole of Shell's sphere of influence to set the boundary limits of RDS obligations and their standard of compliance (*obligation of result* for the controlled entities; *significant best effort* for those uncontrolled but within the sphere of influence). The *private law* court decision involving RDS in The Netherlands *only* in effect has a *world-wide* impact.

In its defense, RDS position was that the energy transition requires a concerted effort of society as a whole and that the solution should not be provided by a court, but by '*the legislator and politics*' (4.1.2). RDS took the view that States have to, and are able to, balance different social interests, which it argues is not true for businesses. (4.4.12). For RDS, 'states determine the playing field and the rules for private parties' (4.4.51). 'The energy transition must be achieved by society as a whole, not by just one private party' (4.4.51). 'Imposing a reduction obligation on [RDS] will

[87]In a mature corporate economy, there are *two* separations of ownership and control: the one at the incorporation stage and the one when professional managers replace entrepreneurs. Robé (n 84). Berle and Means addressed the second while not sufficiently drawing the lessons from the first one.

[88]Vereniging Milieudefensie *et al.* v. Royal Dutch Shell PLC, Hague District Court, Judgment of May 26, 2021 (hereafter, Milieudefensie et al. v. Shell). An English version of the decision is available at: ECLI:NL:RBDHA:2021:5339, Rechtbank Den Haag, C/09/571932/HA ZA 19-379 (english version).

https://doi.org/10.1017/elo.2023.3 Published online by Cambridge University Press

lead to unfair competition and a disruption of the level playing field on the oil and gas market' (4.4.53).

RDS position was clearly in line with the *de facto* pro-business imbalanced operation of today's global political economy. RDS was in effect trying to make use of these defects to its advantage. In a divided States System, there is no effective 'legislator and politics'... Suggesting that the energy transition should be addressed at this level by 'society as a whole' is in fact making sure that there will be no effective energy transition ... Especially since, as the Court noted, RDS current policies 'amount to rather intangible, undefined and non-binding plans for the long term (2050)'.

In such a context, it is clearly hard for a court to step in. But the Hague District Court did not bend. Via a very detailed and carefully worded decision, it decided on the case, considering that it was not going 'beyond the lawmaking function of the court' (4.1.3).

For the Court,

> 'RDS must do more than monitoring developments in society and complying with the regulations in the countries where the Shell group operates' (4.4.52). 'The ... Shell group monitors developments in society and lets States and other actors play a pioneering role. In doing so, RDS disregards its individual responsibility.' (4.5.2) 'Private companies such as RDS may ... be required to take drastic measures and make financial sacrifices to limit CO2 emissions to prevent dangerous climate change' (4.4.53). 'The compelling common interest ... outweighs the negative consequences RDS might face ...' (4.4.54). 'There is no room for weighting interests' (4.5.3). 'RDS has total freedom to comply with its reduction obligation as it sees fit' ... and 'a "global" reduction obligation, which affects the entire Shell group, gives RDS much more freedom of action than a reduction obligation limited to a particular territory or a business unit or units' (4.4.54).

With regards to the *source* of RDS obligation, the Court notes that although the legal instruments of international law are not binding on enterprises, the duty to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. The serious and irreversible consequences of dangerous climate change in The Netherlands pose a threat to the human rights of its inhabitants (4.4.10). For the Court, tackling dangerous climate change needs immediate action (4.4.28) because the remaining carbon budget is limited and, at unchanged emission levels, it will be depleted within 12 years (4.4.28). The Court also notes that the total CO2 emissions of the Shell Group exceed those of many States (4.4.5). For the Court therefore, '*much is to be expected of RDS*' (4.4.16).

The Court also states that enterprises have an individual responsibility (4.4.13). This duty exists *independently of States' abilities and/or willingness to fulfill their own obligations*. This is not an optional responsibility; it applies everywhere and is not passive (4.4.15). It is undisputed that RDS is not the only party responsible for tackling dangerous climate change, but this does not absolve RDS from its individual partial responsibility (4.4.37). Clearly, the right reduction pathway cannot be determined for everyone – all States and companies – all over the world. But RDS is given its own leeway to develop its particular reduction pathway (4.4.39).

In my view, what the court did is in effect (partly) constitutionalising Shell's 'private' government. The managerial setup of RDS as a global firm is subjected to higher nonnegotiable human rights ('There is no room for weighting interests'), taking on the character of constitutional principles.[89] The Court did so, and could only do so, towards the issue at stake in the specific case at hand, which is a limit to court induced adaptations of the Law of Political Economy perspective. But as a large world government in connection with the operations it controls, Shell is declared to be under a duty to respect human rights. All its operations are now subject to this imperative and

[89]PF Kjaer, 'Constitutionalizing Connectivity: The Constitutional Grid of World Society' 45 (1) (2018) Journal of Law and Society 114–34, 133.

https://doi.org/10.1017/elo.2023.3 Published online by Cambridge University Press

the human right to life must be respected no matter what. Dangerous climate change is a threat to human rights and no excuse, pecuniary or otherwise, can reduce the obligation to respect this human right.

This is clearly a way forward to reconnect economic and political issues in a Global Political Economy. 'Private' world governments must respect human rights *and the profit motive is no excuse*. They are government proper, and the classical public/private divide does not apply to them. They are not public, but they are not private either. RDS, of course, appealed the decision which, however, is immediately enforceable.

This case is in line with the reasoning followed in an earlier one, in France.[90] Further to a Statute of March 27, 2017, very large French enterprises have a 'vigilance duty'. They have an obligation to prevent social, environmental, and governance risks related to their operations, wherever they are in the world. To do this, they must put in place a 'vigilance plan' including risk assessment and prevention procedures in their relations with their subsidiaries, subcontractors, and suppliers.

Total SE, the French holding company of the Total group (1,191 companies active in 130 countries), published its vigilance plan on 15 March 2018. A disparate set of French municipalities and regions and private law associations considered the plan presented as being insufficient and decided to take legal action against Total SE to improve it. Total SE challenged the jurisdiction of the court. By an Order issued on 11 February 2021, the Nanterre Court declared itself competent to review the challenge.[91]

What is relevant for us here is the judge's reasoning on the meaning of the new provisions adopted under French law and what they concretely impose on large companies. The Court combined in its reasoning the vigilance duty with the amendment made to Article 1833 of the French Civil Code by the so-called PACTE Statute of 22 May 2019. Since that date, any French company must 'be managed in its corporate interest, taking into consideration the social and environmental impacts of its activity.' Some wondered whether these provisions could have any real-life impact or whether they were just wishful thinking. According to the Nanterre judge, given the combined effect of these two texts,

> the strategic choices of Total SE ... can no longer be made in a strict economic logic but by integrating elements previously conceived as exogenous: now managed, pursuant to article 1833 of the civil code, "in its social interest, taking into consideration the social and environmental impacts of its activity" ..., it must integrate into its strategic orientations the risks of infringements of human rights and the environment and, in fact, with regard to the nature of its activity, proceed to dropouts or substantial reorientations.

Based on this reasoning, the Judgement further states that:

> the vigilance plan of such a company directly affects Society as a whole, an impact that constitutes its raison d'être, and falls within the social responsibility of Total SE, ... the preservation of human rights and Nature in general cannot be content with 'risk management' ... but commands judicial review. And this requires a strong social control allowed by the publicity of the vigilance plan and a wide definition of the interest to act, standing being ... granted to any person justifying an interest to act.

As in the RDS case, one can see the process of constitutionalising global firms taking shape. With the combined effect of the vigilance duty and the promotion of social and environmental concerns

[90]See also J-P Robé, 'Responsabilité sociale des entreprises : Une forme de droit nouveau est peut-être en train de se créer sous nos yeux' 19 (2021) *Le Monde*, March.

[91]<https://www.actu-environnement.com/media/pdf/news-37043-ordonnance-tribunal-nanterre-total-devoir-vigilance.pdf>.

https://doi.org/10.1017/elo.2023.3 Published online by Cambridge University Press

in the Civil Code, Total's world government must now integrate in its decision-making processes the preservation of human rights and of the natural environment, 'elements [which were] previously conceived as exogenous'. Standing to challenge Total's decisions is to be widely accepted and its decisions must go well beyond mere risk management. What was 'exogenous' in compliance with the tenets of 'agency theory' must now be integrated in corporate decisions. Alongside efficiency considerations, the preservation of fundamental rights and of nature is now *endogenous* to corporate governance.

These bold RDS and Total decisions show the way. But they need to be relayed by *legislative instruments* extending these judicial constitutionalising efforts beyond these two global firms. This would also provide a level playing field.

The adoption of a draft Directive on Corporate Sustainability Due Diligence[92] is currently being contemplated by the European Union. It is designed to provide for mandatory corporate due diligence regarding human rights and the environmental impact of business activities for large business firms and the associated corporate governance rules. It was originally contemplated that the directors' duty of care in the direction of corporate affairs would be extended to require them to (a) set up and oversee the due diligence actions and (b) adapt the corporate strategy to take into account the adverse impacts and adopted due diligence measures. This has been deleted in the most recent draft proposed by the Council. The explanation given is that this was 'potentially undermining directors' duty to act in the best interest of the company'.[93] Implicitly, for the Council, adapting the corporate strategy to address adverse human rights and environmental impacts could go against 'the best interest of the company'. For the Council, contrary to the findings in the RDS and Total decisions, *there is room for weighting interests* even when human rights and the preservation of a livable planet are at stake; *and the shareholders come first*. This is an unconscionable evolution for legal instruments which were designed to impact large business firms' decisions and subject them to higher norms over the whole of their value chains (now limited to their '*chain of activities*' in the Council's proposal).[94] It would be a shame for the EU to miss a chance to effectively reconnect economic and political processes in the context of a globalised economy. This missed opportunity to move further towards the constitutionalisation of business firms could have very dramatic consequences at a time when new systemic rules are urgently required to structurally reconfigure the world governance system. Global firms are nearest to global issues in their day-to-day management of the property rights they control, and their policies need to be reconnected to the global political issues raised by the deficient existing rules of 'corporate' governance. In a globalised economy, this is the lesson to be drawn from the Law of Political Economy approach.

5. Conclusion

Law plays a constitutive role in the structuring of the economy. For many key societal issues, traditional economic analyses disregarding the effective legal concepts involved lead to misleading suggestions. This is particularly the case with regards to the rules of 'corporate governance' which have been improperly biased by an 'agency theory' based on an inaccurate understanding of the legal structure of business firms. Via corporations, the operation of a significant proportion of constitutionally protected property rights has been concentrated within the organising control of large business firms. What is being concentrated, however, is not merely the possession of things. It is the legal ability to make decisions as a matter of principle towards the use of these

[92]On 23 February 2022, the Commission submitted to the European Parliament and to the Council a proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022) 71 final, 23.2.2022).

[93]See the note from the Permanent Representative Committee (Part 1) to the Council dated 30 November 2022, #30.

[94]Ibid., #19.

https://doi.org/10.1017/elo.2023.3 Published online by Cambridge University Press

objects of property. With globalisation, these decision-making powers are now concentrated within world "private" governments in a position to play the 'State System' to 'optimize' their social and environmental costs to maximise profits. Corporate governance issues, at this level, go way beyond the definition of the respective prerogatives of officers, directors, shareholders, or even other so-called 'stakeholders', as is the case in classical 'corporate governance' scholarship. In a global economy without a global State, the Law of Political Economy approach required must integrate the effective existence of these 'private' world governments and submit them to rules forcing them to abide by the duties of their governing function.

Our forebears have invented constitutional rules to submit State power to the rule of law. The challenge of our time is to extend similar institutional devices to cover other instances of governmental powers. The constitutionalisation of global business firms would lead to the identification of a series of principles and procedures to make them more compliant with the respect of the interests affected by their activities. Faced with global warming, unbearable economic inequalities, and the need to redirect resources towards sustainable uses, world 'private' governments need to be put in charge of furthering many more interests than those of shareholders only.

If it contributes to this constitutionalising process, the Law of Political Economy approach will, again, have played its role.

Competing interests. The author has no conflicts of interest to declare.

Cite this article: Robé J-P (2022). Property, corporations, and constitutionalisation in a global political economy. *European Law Open* **1**, 891–913. https://doi.org/10.1017/elo.2023.3