

# CSR and Social Rights: Juxtaposing Societal Constitutionalism and Rights-Based Approaches Imposing Human Rights Obligations on Corporations

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## Abstract

This article examines two different approaches seeking to impose human rights obligations on corporations: Rights-based approaches and societal constitutionalism. Drawing from natural law arguments and from a fundamental basis of universal morality, rights-based approaches focus on the human rights of the rights holders applying against all those that could infringe upon them. On the contrary, societal constitutionalism understands human rights as social and legal counter-institutions to the expansionist tendencies of social systems and places the emphasis on the need to trigger the internal self-regulatory dynamics of corporations. Rights-based approaches favor the establishment of legally binding obligations on corporations through an international treaty, while societal constitutionalism sees in Corporate Social Responsibility codes emerging *civil constitution*. The article concludes with a nuanced normative argument, tailored according to whether the goal sought through social rights protection approaches further the distributional imperative of *sufficiency* or *equality*.

## A. Introduction

According to the prevalent view, the current state of international law does not recognize corporations possessing direct human rights obligations.<sup>1</sup> The state-centrism of international law imposes obligations on states that flow from human rights instruments. However, the social power possessed by transnational corporations and their potential to prejudice human rights<sup>2</sup> has for decades motivated negotiating processes and attempts at the level of the UN to impose some form of human rights standards or obligations on corporate activity. The framework that has resulted after previously unsuccessful efforts<sup>3</sup> is the three-pillar *Protect, Respect and Remedy* Framework, encapsulated in the United Nations Guiding Principles on Business and Human Rights of 2011. The Guiding Principles (UNGP) first reiterate the international human rights law obligations of states to protect individuals against human rights abuses within their territory, clarifying that this includes the duty to protect against human rights abuse by third parties.<sup>4</sup> Regarding corporate obligations, the UNGP state that corporations, on their part, “[...] should avoid infringing on the human rights of others and should address adverse human rights impacts with which

<sup>1</sup> The possibility of providing the International Criminal Court (ICC) with jurisdiction over legal persons for the offences listed in the ICC Statute has been repeatedly considered but dismissed. For a discussion of the issues that relate to criminal liability of corporations, and in particular under the jurisdiction of the ICC, see C. Chiomenti, ‘Corporations and the International Criminal Court’ in O. De Schutter (ed.), *Transnational Corporations and Human Rights* (2006). For a heterodox interpretation of international law on the matter, see D. Bilchitz, ‘A Chasm Between ‘is’ and ‘ought’? A Critique of the Normative Foundations of the SRSG’s Framework and the Guiding Principles’, in S. Deva and D. Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (2013).

<sup>2</sup> According to data put together by NGO ‘Global Justice Now’, 157 of top 200 economic entities by revenue are corporations not countries, Global Justice Now, ‘69 of the Richest 100 Entities on the Planet are Corporations, not Governments, Figures Show’ (2018), available at <https://www.globaljustice.org.uk/news/2018/oct/17/69-richest-100-entities-planet-are-corporations-not-governments-figures-show> (last visited 21 August 2019). For a list of claims challenging private business activity already from 2001, see S. R. Ratner, ‘Corporations and Human Rights: A Theory of Legal Responsibility’, 111 *Yale Law Journal* (2001) 3, 443, 446 - 447.

<sup>3</sup> For a history of the debate and previous efforts, including the UN draft Norms of 2003, see O. De Schutter, ‘The Challenge of Imposing Human Rights Norms on Corporate Actors’ in Olivier De Schutter (ed.), *Transnational Corporations and Human Rights* (2006).

<sup>4</sup> UNHRC, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, UN Doc HR/PUB/11/04, 2011, I. A. 1.

they are involved [...]”.<sup>5</sup> A core obligation in this regard is for corporations to conduct human rights due diligence.<sup>6</sup> Attempting to harness already existing risk assessment processes within corporations, John Ruggie, the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises (SRSG) and leading figure behind the adoption of the UNGP, understands human rights due diligence as “[...] a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it [...]”.<sup>7</sup> Yet, the obligation to respect human rights and conduct due diligence is not a legal obligation, carrying no sanctions for failure of compliance and drawing its normative force from social expectations and the subsequent “[...] courts of public opinion [...]”.<sup>8</sup> The last pillar is the obligation of States to ensure access of victims of human rights abuses by third parties to an effective remedy.<sup>9</sup>

Despite broad consensus around the UNGP from various stakeholders, including States and corporations alike, criticism of the *Protect, Respect, Remedy* Framework has also been widespread. The non-binding nature of the UNGP has been the major focus of critique, including normative arguments on the understanding of human rights per se, as well as arguments of inadequacy, excessive attachment to pragmatism and strategic considerations, and weak implementation mechanisms.<sup>10</sup> These critical voices played an important role

<sup>5</sup> *Ibid.*, II. A. 11.

<sup>6</sup> *Ibid.*, II. B. 17.

<sup>7</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc A/HRC/8/5, 7 April 2008, 9, para. 25. Companies should identify the human rights challenges in the countries they operate, as well as the impacts their own activities may have within that context and to what extent they might contribute to abuse (para. 57). They should also adopt a human rights policy, integrate it throughout the company, and track its performance, in addition to policies that facilitate remediation of adverse human rights impact (para. 60-63).

<sup>8</sup> *Ibid.*, para. 54. These comprise of “[...] employees, communities, consumers, civil society, as well as investors [...]”.

<sup>9</sup> UNHRC, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, *supra* note 4, III. A. 25.

<sup>10</sup> Indicatively, for an overall critique see D. Bilchitz & S. Deva, ‘The Human Rights Obligations of Business: A Critical Framework for the Future’ in S. Deva & D. Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (2013). For a critique of inadequacy of the soft framework, see J.-M. Kamatali, ‘The New Guiding Principles on Human Rights’ Contribution in Ending the Devising Debate Over Human Rights Responsibilities of Companies: Is It Time for an ICJ Advisory Opinion?’, 20 *Cardozo Journal of International and Comparative Law* (2012) 2, 437. For

in the adoption in 2014 of a UN Resolution, originally drafted by Ecuador and South Africa, establishing an intergovernmental working group with the goal of drafting an international legally binding instrument on corporations and human rights.<sup>11</sup> Motivated by this goal, the working group presented a *Zero Draft* of a Treaty and an Optional Protocol in July 2018 and a Revised Draft in July 2019. The purpose of this article is to examine the two different theoretical approaches that underpin the legal instruments and mechanisms seeking to impose human rights obligations on corporate actors: Rights-based approaches and societal constitutionalism. While the context is that of international law, both theoretical endeavors discussed involve a normative substratum that would also make them applicable to national law. Through the juxtaposition of societal constitutionalism and rights-based approaches, I aim to contribute to the debate around the human rights obligations of corporations, especially regarding socio-economic rights, as well as to elucidate the genealogy and practical implications of two distinct ways of approaching the issue of constraining corporate power in the context of globalization. In practice, the article is inspired by and addresses the current opposition in the field of business and human rights between the proponents of strengthening legal accountability for corporations through a new treaty and those defending the UNGP and the effort to embed social values in companies.

My argument is that the attachment to the UNGP and the zeal for a new, binding treaty correspond to different philosophical approaches in thinking about rights and the State in the context of globalization. The UNGP framework constitutes a polycentric approach that tries to uncover nodes of normativity in the interactions between States, business, and civil society, in a way that parallels the theoretical basis of societal constitutionalism and its prioritization of *reflexivity* in questions of law, regulation, and political economy. Before unpacking this in

a critique of the UNGP being overly driven by the need to achieve consensus, sacrificing part of the normative understanding of human rights, see S. Deva, 'Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles' in S. Deva and D. Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (2013). For a critique by civil society regarding insufficient implementation mechanisms, see Human Rights Watch, 'UN Human Rights Council: Weak Stance on Business Standards' (2011), available at <https://www.hrw.org/news/2011/06/16/un-human-rights-council-weak-stance-business-standards> (last visited 15 October 2019).

<sup>11</sup> *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises With Respect to Human Rights*, UN Doc A/HRC/26/L.22/Rev.1, 25 June 2014.

the following sections, it is worth drawing attention to the fact that societal constitutionalism understands change and evolution to be happening *within* social systems (such as corporations or industries), rather than enforced upon them, thus underpinning the notion that enhanced social responsibility of private actors must come through their internal constitutions. On the other hand, the attempt to establish legally binding obligations for corporations through an international treaty rests on a state-centered understanding of law and normativity, as well as on the moral imperative of recognizing and remedying human rights violations. In that sense, the quest for a Binding Treaty on Business and Human Rights is interlinked with rights-based approaches regarding corporate human rights obligations. Indeed, drawing from natural law arguments, rights-based approaches focus on the human rights of the rights-holders applying against all those that could infringe upon them, while they accentuate the importance of legal obligations and external regulation of corporate conduct, as opposed to triggering change within the internal structures of social systems.

For the purposes of this article, I examine the rationales and ramifications of these two approaches not only regarding socio-economic rights (or simple *social* rights), even if these remain a centripetal force and a point of reference for this article. Rather, I examine the theoretical approaches behind the horizontality of human rights obligations in general, for civil, political, and social rights alike, because the arguments invoked in both approaches call for a uniform effect of all categories of rights. These arguments in favor of the horizontal effect of human rights obligations arise from three shared lines of reasoning: (a) A sociological/empirical observation of the rise of private power, (b) a specific concept of rights, and (c) a specific view on the nature of the corporation. As I will show, both rights-based approaches and societal constitutionalism share the observation of the rise of private power and find significant common ground on the conceptualization of the corporation as an – at least on a normative level – not entirely private entity. Yet, they diverge significantly on their understanding of rights, which, unsurprisingly, structures different understandings of the role of the State, regulation, and international politics. The prime goal of the article is to use the comparison between rights-based approaches and societal constitutionalism not to offer a straightforward normative suggestion for future regulatory frameworks, but to contribute to the relevant on-going discussions by suggesting a level of abstraction that allows for further contextualization and a deeper understanding of the connotations and implications of different approaches in favor of imposing human rights obligations on corporations. Beyond this original priority, I do attempt a nuanced normative outlook, tailoring it, however, to the goal that is sought. If the goal of human rights protection,

and especially social rights materialization, is the distribution imperative of *sufficiency*, meaning guaranteeing a floor of protection against deprivation, then rights-based approaches appear more immune to risks of market capture and co-option than societal constitutionalism, while they better accommodate concerns of democratic legitimacy. On the other hand, I acknowledge that societal constitutionalism, if operationalized differently than its current proponents are attempting, holds significant promise for a distribution imperative that is closer to aspirations of *equality*, understood as the erasure of hierarchies and relative differences in the possession of the good things in life.

Part II of the article discusses the competing rationales in favor of human rights obligations for corporate actors. It is divided into one section for each approach, where each section examines the views of each approach on the purpose of rights and the nature of the corporation respectively. Part III focuses on the different operationalizations of the suggested horizontal effect of human rights. While rights-based approaches place increasing emphasis on the need of an international binding treaty (Section A), societal constitutionalism sees the dynamics of self-limitation of corporations emerging through transnational communicative processes as the key to controlling the centrifugal dynamics of the economy, highlighting the role Corporate Social Responsibility (CSR) can play in that regard (Section B). The article concludes with some reflections on the potential of synergy between the two approaches and with the nuanced normative position outlined above.

## B. Two Competing Rationales in Favor of Human Rights Obligations of Corporate Actors

### I. Rights-Based Approaches

Rights-based approaches are by predisposition oriented towards a moral understanding of rights as commanding obligations regardless of the scope of the law.<sup>12</sup> It is from this cognitive claim to universal morality, associated with dignity, freedom, and autonomy, that rights-based approaches commence to construct their normative edifice regarding the need to interpret current positive

<sup>12</sup> See, for example, F. Wettstein, 'CSR and the Debate on Business and Human Rights: Bridging the Great Divide', 22 *Business Ethics Quarterly* (2012) 4, 739, 740 citing A. Sen, 'Elements of a Theory of Human Rights', 32 *Philosophy & Public Affairs* (2004) 4, 315, 321 according to whom human rights are "[...] quintessentially ethical articulations, and they are not, in particular, putative legal claims [...]".



law<sup>13</sup> or expand it in such a manner that corporations become obligation-holders. Rights-based approaches supplement this philosophical foundation with a view on the corporation that challenges shareholder primacy.

## 1. The Purpose of Rights

Why should corporations be bound by international human rights law? To answer this question of normative orientation, the *rights-based* approaches commence with an empirical/sociological observation of the rise of private power and its influence on large segments of the global population. Corporations, it is concluded, can severely and adversely impact on human rights, while, at the same time, they are not normatively bound by the constraints these impose, other than what has been translated into domestic legislation and regulations. This tension intensifies when one is confronted with a fundamental question behind the concept of human rights: What is the foundation, the *raison d'être* of rights? The answer that most elegantly aligns with the drive to make corporations rights-bound is that rights are important and justified because of the interests they safeguard, namely liberty and well-being.<sup>14</sup> This is an approach that starts with the desired consequences that rights can achieve. Building on the distinctly Dworkinian premise that “[...] each individual’s life is to be treated as being of equal importance to that of every other individual [...]”,<sup>15</sup> as well as on the claim that certain conditions are necessary for individuals to realize “[...] lives of value [...]”,<sup>16</sup> rights-based approaches underline the *purpose* of rights with regards to individual lives. That purpose of guaranteeing liberty and well-being can only be fulfilled if rights apply against everyone. Taking into consideration the social

<sup>13</sup> See, Bilchitz, ‘A Chasm Between ‘is’ and ‘ought’? A Critique of the Normative Foundations of the SRSG’s Framework and the Guiding Principles’, *supra* note 1, 113 on why existing human rights treaties should be understood to bind corporations legally. See also, Wettstein, ‘CSR and the Debate on Business and Human Rights: Bridging the Great Divide’, *supra* note 12, 743 who brings up the Universal Declaration of Human Rights, which “[...]even though principally focusing on nation-states, does not exclude other institutions as duty bearers, but explicitly states in its preamble that it applies to ‘every individual and every organ of society’[...]”. Same in D. Weissbrodt, ‘Corporate Human Rights Responsibilities’, 6 *Journal of Business, Economics, and Ethics* (2005), 279, 285.

<sup>14</sup> D. Bilchitz, ‘Corporations and the Limits of State-Based Models for Protecting Fundamental Rights in International Law’, 23 *Indiana Journal of Global Legal Studies* (2016), 143, 147.

<sup>15</sup> D. Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007), 58.

<sup>16</sup> *Ibid.*, 58.

reality of private power, if rights were to burden only the State with obligations then they would fail to fulfill their purpose of guaranteeing individuals these fundamental interests.

On the contrary, if rights are justified in a non-consequentialist way, then their horizontal effect does not necessarily follow. Even though dignity and the inherent worth of individuals are powerful foundations for human rights, they do not unequivocally lead to the conclusion that obligations flowing from those rights should burden private actors.<sup>17</sup> Status theories of rights, drawing from the Kantian imperative against treating humans as means to an end, focus on the inalienability of rights and see them as side constraints on the pursuit of even desired consequences.<sup>18</sup> Such deontological approaches may say little about how the rights should be rendered functional – in fact, they emphasize a paradigm of autonomy and non-interference associated with liberty.<sup>19</sup> This non-interference with the enjoyment of natural rights may mean that social power, also accrued in the process of the enjoyment of rights (such as the right to liberty and right to property) remains unrecognized. This seems to be a point that rights-based approaches, in their effort to strike a balance between deontological and consequentialist approaches to rights – exemplified in the cornerstones of *liberty* and *well-being* – have underestimated. Rights are not only the privilege of those that might feel the consequences of private power, but they can in fact be constitutive of private power themselves. For instance, David Bilchitz discusses the example of a corporation strictly limiting the freedom of expression of employees.<sup>20</sup> From a consequentialist perspective, it follows that the only way to make the right to freedom of expression meaningful in this case is to allow for a certain degree of horizontality. From a deontological – natural law perspective on the other hand, it could be counter-argued that the employer makes use of his or her liberty of contract, a right recognized as a natural right already by Grotius.<sup>21</sup> As employees enter willingly into contract *liberty* appears to be a

<sup>17</sup> See, in this sense the *Universal Declaration of Human Rights*, 10 December 1948, Preamble, affirming the “[...] faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women [...]”.

<sup>18</sup> R. Nozick, *Anarchy, State and Utopia* (2013), 29.

<sup>19</sup> See, *ibid.*, 27, citing John Locke’s claim that the bounds of the law of nature require that “[...] no one ought to harm another in his life, health, liberty, or possessions [...]”.

<sup>20</sup> Bilchitz, ‘Corporations and the Limits of State-Based Models for Protecting Fundamental Rights in International Law’, *supra* note 14, 147.

<sup>21</sup> R. Pound, ‘Liberty of Contract’, 18 *Yale Law Journal* (1909) 7, 454, 455. It is important to note that this analysis leaves out the important topic of fundamental rights of corporations. For an overview in comparative perspective, P. Oliver, ‘Companies and

two-sided coin, not necessarily leading to direct human rights obligations of corporations.<sup>22</sup>

It is, therefore, rather the latter purpose of rights *well-being*, that fuels the call for horizontality of human rights, especially when the focus is on social right. *Well-being* necessarily implies a vision of good life, highlighting the vital and essential quality of certain aspects of the human experience. Despite the debates and disagreements around the *capabilities approach* and the variations between *thin* and *thick* theories of the good,<sup>23</sup> rights-based approaches that aim to extend the application of the binding force of human rights to corporations recognize a common ground of value for individual. *Well-being* becomes, therefore, an objective category that is foundational of obligations for all that might be infringing upon it, including instances of private power. An element of objectivity is necessary for the focus on the rights-holder to lead to the implied recognition of the horizontal obligation to respect his or her human rights that guarantee precisely this – perhaps minimum – objective level of *well-being*. A relativistic dismissal of the notion of the *good* leads to the impossibility to discern any extra-legal obligations other than those of non-interference. Why, to return to the example of freedom of expression, should a company be required to tailor its speech codes directed toward the maximum freedom of expression for its employees and not resort to liberty of contract, if there is no recognition that freedom of expression makes part of an objective order of values necessary for individuals' well-being? Or, on the level of positive obligations, why should a pharmaceutical company be required to give free access to life-saving medication

their Fundamental Rights: A Comparative Perspective', 64 *International and Comparative Law Quarterly* (2015) 3, 661.

<sup>22</sup> Alternatively, it can lead to a restriction of corporate obligations only to 'negative' duties, meaning avoiding the infringement upon individual rights, see S. R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', *supra* note 2, 517.

<sup>23</sup> Only indicatively, see M. C. Nussbaum, 'Human Functioning and Social Justice: In Defense of Aristotelian Essentialism' 20 *Political Theory* (1992) 2, 202, defending essentialism as the view that human life has certain defining features that merit protection. See, also A. Sen, 'Human Rights and Capabilities', 6 *Journal of Human Development* (2005) 2, 151, drawing from Rawlsian 'objectivity' in ethics, even though Sen and Nussbaum's approach is already meant to take more note of the diversity of human experience, as opposed to Rawls' resourcist approach. Bilchitz, *Poverty and Fundamental Rights*, *supra* note 15, 17, supports a *thin* theory of the good that aims to give even more weight to the diversity of human experience.

to the poor, if there is no recognition that the right to life and to health constitute a common ground of value?<sup>24</sup>

## 2. The Nature of the Corporation

The second line of argument as to why corporations should be bound by human rights goes back to the nature of the corporation. According to Ruggie, it is precisely the nature of the corporation as a “[...] specialized economic organ [...]” not a “[...] democratic public interest institution [...]”, that leads to the restricted nature of its duties with respect to human rights.<sup>25</sup> This position reiterates in a moderate way the predominantly *private* nature of corporations, while acknowledging the importance of their function in society, from which their limited human rights obligations are derived. However, according to rights-based approaches, corporations cannot be conceived as entirely *private* but instead as partially *public* entities and genuine carriers of remedial responsibility. Florian Wettstein, drawing from a number of political philosophers, underlines that remedial responsibility is proportionate to an agent’s capabilities.<sup>26</sup> Considering that the positive duties to protect and realize the moral claims that make up human rights burden the moral community of human beings as a whole, those agents with increased capabilities have increased responsibility towards the fulfilment of these moral claims.<sup>27</sup> Bilchitz, drawing from social-contract theory, suggests that the State’s reason for being is to guarantee certain human rights and therefore, it legitimizes corporations only to the extent they have a social purpose and can bring benefits to society.<sup>28</sup>

Even though there seems to be a distinct disagreement over the nature of the corporation between the views that inspired the UNGP and the views of rights-based approaches aspiring to a new binding treaty on business and human rights, their differences seem to a certain extent bridgeable when the issue is examined on the level of corporate governance. That is because both views can, with different degrees of intensity, be placed under the auspices of

<sup>24</sup> Example drawn from D. Bilchitz, ‘Do Corporations Have Positive Fundamental Rights Obligations?’, 57 *Theoria* (2010) 125, 1, 2.

<sup>25</sup> Ruggie, ‘Protect, Respect and Remedy: a Framework for Business and Human Rights’, *supra* note 7, para. 53.

<sup>26</sup> Wettstein, ‘CSR and the Debate on Business and Human Rights: Bridging the Great Divide’, *supra* note 12, 753.

<sup>27</sup> *Ibid.*

<sup>28</sup> Bilchitz, ‘Corporations and the Limits of State-Based Models for Protecting Fundamental Rights in International Law’, *supra* note 14, 163-164.

the *stakeholder approach* in corporate governance. This approach contends that the interests of stakeholders, that is, “[...] persons or groups with legitimate interests in procedural and/or substantive aspects of corporate activity [...]” are of “[...] intrinsic value [...]” and “[...] merit consideration [...]” by the corporation regardless of instrumental considerations.<sup>29</sup> Stakeholder theory might benefit from instrumental considerations that relate to strategic management as a component of improved performance,<sup>30</sup> but it is also supported by normative justifications that arise from the interdependencies of the corporation with various groups and communities.<sup>31</sup> Contrary to the dominant view of shareholder primacy, which asserts that the sole responsibility of business is to maximize returns for shareholders,<sup>32</sup> stakeholder theory adopts an evolving understanding of property rights as embedded in human rights and carrying restrictions with respect to the interests of others.<sup>33</sup>

However, if stakeholder theory recognizes the partially social purpose of the corporation and thus commands some level of human rights obligations of corporations, it is flexible enough to allow for the accommodation of both the *soft* agenda of the UNGP and the more demanding normative framework of rights-based approaches. What separates the rights-based approaches further is their implicit recognition of the concession theory of corporate personality.<sup>34</sup> In other words, in their effort to provide philosophical foundations for the human rights obligations of corporate actors, rights-based approaches underscore that

<sup>29</sup> See, T. Donaldson & L. E. Preston, ‘The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications’ 20 *Academy of Management Review* (1995), 1, 67.

<sup>30</sup> E.g., R. E. Freeman, *Strategic Management: A Stakeholder Approach* (1984) 96-98.

<sup>31</sup> See, Donaldson and Preston, ‘The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications’, *supra* note 29, 81-82, citing American Law Institute, ‘Principles of Corporate Governance: Analysis and Recommendations’ (1992) 80, “Corporate officials are not less morally obliged than any other citizens to take ethical considerations into account, and it would be unwise social policy to preclude them from doing so.”

<sup>32</sup> See for example, M. Friedman, ‘The Social Responsibility of Business Is to Increase Its Profits’, in W. C. Zimmerli, K. Richter & M. Holzinger (eds), *Corporate Ethics and Corporate Governance* (2007) 173.

<sup>33</sup> Donaldson & Preston, ‘The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications’, *supra* note 29, 83-84. This view is further legitimized by the fact that even strong defendants of property rights accept limitations to property rights. See, for example, Nozick’s example of the appropriation of the single waterhole in the desert and the worsening of the position of others. Nozick, *Anarchy, State and Utopia*, *supra* note 18, 140.

<sup>34</sup> E.g., Bilchitz, ‘Do Corporations Have Positive Fundamental Rights Obligations?’, *supra* note 24.

corporations are fundamentally State creations that can be regulated on the basis of the public interest – rather than corporations being the aggregate of natural persons with the rights to resist regulation.<sup>35</sup> It is State law that enables the benefits of the corporate form, including limited liability and perpetual succession, and it is precisely because of the social purpose of the corporation to fulfill certain functions in society that these advantages are granted. Reversing the equation and adopting a consequentialist perspective that aims to constrain corporations, it is only possible to justify the demand for corporations to be *good citizens* and assume their remedial responsibility if the corporation is seen as having a separate personality. Indeed, social responsibility cannot arise from merely an aggregate of shareholders.<sup>36</sup> Concession theory of corporate personality emerges as a justification of and aligns itself with stakeholder theory on the level of governance, leading to the treatment of corporate governance as a “[...] species of public law [...]”.<sup>37</sup>

## II. Societal Constitutionalism

Societal constitutionalism aims to provide an answer to the conundrum of how to constrain global capitalism in the absence of global democratic institutions. Imagining constitutionalization without the State, societal constitutionalism posits the emergence of a multiplicity of civil constitutions beyond the representative institutions of international politics.<sup>38</sup> The challenge

<sup>35</sup> S. Padfield, ‘Rehabilitating Concession Theory’, 66 *Oklahoma Law Review* (2014) 2, 327, 333-337.

<sup>36</sup> This was recognized early by E. M. Dodd in his exchanges with A. Berle. See, E. M. Dodd, ‘For Whom Are Corporate Managers Trustees?’, 45 *Harvard Law Review* (1932) 7, 1145; E. M. Dodd, ‘Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?’, 2 *University of Chicago Law Review* (1935) 194.

It is important to highlight that rights-based approaches challenge shareholder primacy while focusing on corporate personality. They do not engage with the inverse critical perspective that aims to challenge the ‘Limited Liability – Shareholder Primacy’ dualism by suggesting a return to unlimited liability and thus an attenuation of corporate personality. For the relevant discussion of the two possible critiques of the current priorities of company law, see P. Ireland, ‘Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility’, 34 *Cambridge Journal of Economics* (2010) 5, 837.

<sup>37</sup> S. Padfield, ‘Corporate Social Responsibility & Concession Theory’, 6 *William & Mary Business Law Review* (2015), 1, 24-25, citing S. M. Bainbridge, ‘Director Primacy: The Means and Ends of Corporate Governance’, 97 *Northwestern University Law Review* (2003) 2, 547, 549.

<sup>38</sup> G. Teubner, ‘Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?’, in C. Joerges, I. Sand & G. Teubner (eds), *Transnational Governance and*

then becomes for these sub-constitutions to combat the centrifugal dynamics of social subsystems in global society.<sup>39</sup>

## 1. The Purpose of Rights

To understand how societal constitutionalism conceives rights, it is necessary to take a step back and view the entirety of society through the lenses of systems theory. According to systems theory, society is made up of social systems that are defined by boundaries between themselves and the environment. Systems consist of communications that are self-referential, being determined by themselves and determining themselves.<sup>40</sup> However, self-referentiality does not contradict the system's openness to the environment. Systems remain responsive to the increasing complexity of the environment by translating this complexity into their own functionally differentiated form of communication. Change, learning and evolution are not excluded, but redefined to be understood as happening within the system.<sup>41</sup>

This prompts a broader project of social transformation based on the internal functioning of social (sub)systems. Acknowledging the functional differentiation of contemporary society, reflexive law was conceived as a shift from substantive law, aiming to achieve social co-ordination not by centralized, top-down regulation, but by enhancing the self-reflecting capacities and promoting the self-limitation of social systems.<sup>42</sup> According to Gunther Teubner, "[...] law realizes its own reflexive orientation insofar as it provides the structural premises for reflexive processes in other social subsystems [...]"<sup>43</sup> Since society has no center, law's production needs to be decentralized to better respond to the changing societal needs, allowing for system self-governance, flexibility, experimentation, and learning. In that direction, societal constitutionalism emphasizes the need to strengthen the democratic potential of the social sub-

*Constitutionalism* (2004), 1, 8.

<sup>39</sup> G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (2012), 4.

<sup>40</sup> N. Luhmann, *Social Systems* (1995), 61-62.

<sup>41</sup> G. Teubner, 'Introduction to Autopoietic Law', in G. Teubner (ed.), *Autopoietic law: A New Approach to Law and Society* (1987), 1, 7-8.

<sup>42</sup> See, in general, G. Teubner, 'Substantive and Reflexive Elements in Modern Law', 17 *Law & Society Review* (1983), 239.

<sup>43</sup> *Ibid.*, 275. In Teubner's later work, this is taken to include the possibility of dissent, which in the social system of the economy could for example mean ethics commissions and external mechanisms of support for *whistleblowers*. See, Teubner, *Constitutional Fragments*, *supra* note 39, 89.

areas.<sup>44</sup> In sharp contrast to the morality-inspired justifications presented above, the lack of a center of society further insinuates that there is neither a common morality according to which social systems operate, nor the universal reason that will provide grounds for legitimation structures; instead, legitimacy is a mere mode of reproduction for social systems.<sup>45</sup> Systems theory, as well as its progenies reflexive law and societal constitutionalism, relocate the focus from the supposedly self-determining individual and the subsequent normative aspirations of modernity, to anonymous matrices of communication, which individuals simply make a part of.

Does this mean that rights, traditionally conceived as belonging to the rights-holder as translations of pre-legal moral claims, are obsolete? On the contrary, human rights are integral in this decentered conceptualization of society; nevertheless, not because of the fundamentality of the affected legal interests, but because they function “[...] as social and legal counter-institutions to the expansionist tendencies of social systems [...]”.<sup>46</sup> Human rights are not about intersubjective relations but about “[...] the dangers to the integrity of institutions, persons and individuals that are created by anonymous communicative matrices [...]”.<sup>47</sup> Rights are not addressed against the State but against political power.<sup>48</sup> This approach is consistent both with the descriptive understanding of society as made up of autopoietic social systems, law being one of them, and with the normative aspect of reflexive law and societal constitutionalism expressed in the idea of triggering the self-limitation of social systems in order to prevent them from expanding their rationalities to a degree that it would create unsurmountable problems to other functional systems. Indeed, a necessary ramification of the autopoiesis of the legal system is that it produces its own social reality and that its legal operations produce human actors as “[...] semantic artefacts [...]”.<sup>49</sup> At

<sup>44</sup> G. Teubner, ‘Transnational Fundamental Rights: Horizontal Effect?’, 40 *Netherlands Journal of Legal Philosophy* (2011) 3, 191, 206.

<sup>45</sup> According to Luhmann, the question of legitimacy as a moral condition about the conditions of exercise of political power is tied to a metaphysical view of the world that assumes a generalized human consciousness, an ultimate point of reference of claims to Truth, not unlike premodern metaphysical philosophy. See, N. Luhmann, *Soziologische Aufklärung I* (1970), 159. For an excellent overview of Luhmann’s understanding of legitimacy, see C. Thornhill, ‘Niklas Luhmann: A Sociological Transformation of Political Legitimacy?’, 7 *Journal of Social Theory* (2011) 2, 33.

<sup>46</sup> Teubner, ‘Transnational Fundamental Rights: Horizontal Effect?’, *supra* note 44, 210.

<sup>47</sup> *Ibid.*

<sup>48</sup> Teubner, *Constitutional Fragments*, *supra* note 39, 132.

<sup>49</sup> G. Teubner, ‘How the Law Thinks: Toward a Constructivist Epistemology of Law’, 23 *Law & Society Review* (1989) 5, 727, 730. Yet, this does not mean that human actors



the same time, human rights are an integral part of the reflexive structures that are necessary to prevent the expansionist tendencies of social systems, including the economy. The horizontal effect of human rights logically follows from these assumptions, along with the recognition that the state-centered view of rights or their conceptualization as spheres of individual autonomy cannot be sustained. Besides, Teubner espouses the view that natural law arguments, not dissimilar to the ones presented above, cannot withstand the test of pluralism and diversity of human experience and beliefs.<sup>50</sup>

The purpose of rights is then, according to Teubner, double-edged: Both inclusionary, in including the population in the political processes, and exclusionary, in their effect of demarcating non-political arenas from the political field.<sup>51</sup> This means that human rights both guarantee the inclusion of the entirety of the population into all function systems, while they also protect areas of autonomy from these systems. As a result, human rights are both constitutive of sub-constitutions of social subsystems by guaranteeing their autonomy and they act as factors of self-limitation, restraining the expanding logic of system dynamics. Fundamentally, however, especially to the extent socio-economic rights are concerned, human rights operate as the entrance gates for the entirety of the population into functional systems. Therefore, societal constitutionalism views human rights as the guarantor of access to institutions and resources for the entirety of the population.

## 2. The Nature of the Corporation

Societal constitutionalism anchors its normative orientation significantly on the question of constitutionalizing polycontextuality. Transcending binary distinctions of public/private, societal constitutionalism points out the fragmentation of society and the need for a multiplicity of perspectives of self-description. This approach has an effect on both the understanding of politics and the economy. On one hand, polycontextuality means that social systems should not be allowed to express solely private rationalities. Instead, they should be infused with public rationalities, whereby public means the relation of the

are reduced to the one-dimensional semantic artefact of the *person*. Acknowledging the complex interrelations between the social person, the psyche, and the body, a systems theory perspective recognizes an institutional, a personal, and an individual dimension of human rights, see G. Teubner, 'The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors', 69 *The Modern Law Review* (2006) 327, 327.

<sup>50</sup> Teubner, 'Constitutional Fragments', *supra* note 39, 125.

<sup>51</sup> *Ibid.*, 132-134.

system to the entirety of society. Human rights protection is such a public rationality. On the other hand, the private should be seen as an obstacle to what Teubner characterizes as the “[...] unstoppable growth of the welfare state [...]”, transforming social activities into public services.<sup>52</sup> This type of double movement of de-economizing and de-politicizing is meant to both restrain the centrifugal dynamics of social systems and to prevent the totalizing presence of the public through state regulation of social activities. Law is meant to intervene in order to sustain this delicate balance between social responsibility and self-realization.<sup>53</sup> As the singularity of reason of modernity has faded, the constellation of partial rationalities enables both the self-constitution of social systems and coordination between them.

Therefore, the economic system should not be allowed to incorporate only economic rationalities. At the level of their autopoietic self-description, social subsystems should already incorporate a mix of partial rationalities, both private and public. The subsequent break with the distinctly private character of corporations is reminiscent of rights-based approaches of imposing human rights obligations on corporate actors. Societal constitutionalism, nevertheless, takes a different turn, shifting the focus on the internal workings of organizations. Corporations should, already as part of their internal processes and irrespective of state regulation, take into consideration their normative effects on society at large. The parallels of this theoretical approach to corporate self-limitation and the approach of Ruggie, manifested in the UNGP, are already discernible. Yet, the breadth and transformative potential of polycontextuality is too large to be confined to processes of economic self-regulation. This is because societal constitutionalism, drawing from the tradition of reflexive law, goes beyond the need to establish self-reflective (and hence self-limiting) structures within organizations; in fact, a prerequisite for genuine self-reflection is the existence of discursive structures within social systems in the direction of an organizational democracy. Indeed, societal constitutionalism is, in theory, a project of democratization not only of institutionalized politics, but of the entirety of social spheres; crucially, however, this process of democratization should take place internally within social systems. Furthermore, it is not proper to transfer the democratic institutions and procedures that have been associated with the

<sup>52</sup> G. Teubner, ‘Societal Constitutionalism and the Politics of the Common’, 21 *Finnish Yearbook of International Law* (2010) 111, 113-114. Teubner places the emphasis around his disagreement with A. Negri especially on the notion of public, highlighting the need to resist the idea that a unified political collective can represent society.

<sup>53</sup> *Ibid.*, 5.

political system to all social arenas; instead, every social subsystem should find its own way to democratization.<sup>54</sup> Hence, corporations, as social subsystems of the economic system, need to be democratized from within. The role of the state is to produce such a framework that will generate the internal forces that are necessary to generate self-reflective structures and the subsequent self-limitation.

### III. Recapping the Comparative Analysis

Before examining the different operationalizations of human rights obligations that rights-based approaches and societal constitutionalism point toward, it is worth recapping the main points drawn from this comparative analysis. While both rights-based approaches and societal constitutionalism stress the importance of the horizontal effects of human rights, they differ fundamentally in their presuppositions. Rights-based approaches build on a moral understanding of rights as commanding obligations flowing from the rights-holders themselves. Rights are important to concretize lives of value and to safeguard individual liberty and well-being. On the contrary, societal constitutionalism perceives rights as institutions, the function of which is to limit the expansionist tendencies of social systems, including corporations, industries, and the economy more broadly. Furthermore, rights-based approaches conceive corporations as not entirely private entities but as partially public, having been created by and enjoying special benefits thanks to the State. This is meant as a legitimation of external regulation of corporate conduct by public institutions. Societal constitutionalism takes the notion of *public* nature of corporations into a different direction, suggesting that all social systems need to incorporate public rationalities within their inner workings. These theoretical divergences inform different conceptualizations of how human rights obligations are to be operationalized, with rights-based approaches stressing the importance of external regulation and a determined scope of legal obligations and societal constitutionalism highlighting the need for internal corporate transformation and coordination of multiple actors in conditions of complexity.

<sup>54</sup> *Ibid.*, 13.

## C. The Different Operationalizations of Corporate Human Rights Obligations

### I. Rights-Based Approaches: The Example of the Draft Treaty on Business and Human Rights

Considering that human rights correspond to primordial moral claims, rights-based approaches place increasing emphasis on the notion of bindingness and see the UNGP Framework and its soft nature as necessitating amendment. On the level of international law,<sup>55</sup> this shift towards *harder* instruments is meant to come through an international treaty. Indeed, the Revised Draft of the Treaty on Business and Human Rights provides in its preamble that all businesses shall respect human rights by both avoiding adverse human rights impacts and by addressing such impacts when they occur.<sup>56</sup> Yet, the Draft maintains a state-centered approach, attributing the primary responsibility for human rights protection to States.<sup>57</sup> It purports to strengthen human rights protection and access to justice and remedy for victims of violations in the context of business activities, particularly those of transnational character.<sup>58</sup> Socio-economic rights fall within the ambit of the Draft, which aims to cover “[...] all human rights

<sup>55</sup> Rights-based approaches are not restricted to embedding human rights obligations for corporations in international law. In national (or supranational) law, this could take the form of legislation, along the lines of the French Duty of Vigilance Law of 2017. It could also take the form of horizontal effect of constitutional provisions, as is for example famously the case in South Africa. Indicatively, on the question of social rights, see the recent *Daniels v. Scribante and Another (CCT50/16) [2017] ZACC 13* establishing direct horizontality on the grounds of dignity, following to a significant extent the rights-based approaches presented in this article.

<sup>56</sup> *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises: Revised Draft*, 16 July 2019, Preamble.

<sup>57</sup> Contrary to the original contemplation of a binding international enforcement mechanism, the *Zero* Draft treaty relied on the enforcement by states and monitoring by a committee of experts. The primary responsibility for human rights remains with the states. D. Cassel, *At Last: A Draft UN Treaty on Business and Human Rights* (2018), available at <https://lettersblogatory.com/2018/08/02/at-last-a-draft-un-treaty-on-business-and-human-rights/> (last visited 27 August 2019).

<sup>58</sup> *Revised Draft*, *supra* note 56, Art. 2, 3, 4. The earlier *Zero* Draft was criticized for attempting to only regulate transnational activities of business enterprises. The Revised Draft clarified that the proposed treaty will cover all business enterprises, maintaining nevertheless a special focus on transnational corporate activity.

[...]”<sup>59</sup> even though there is no provision for positive obligations of corporations besides cases of violations. The attempt to place victims of human rights violations in the foreground conveys the focus of rights-based approaches on individuals as holders of legal and moral claims. Beyond a functionalist approach that would only target the mechanics of institutional change, the Draft Treaty seeks to place concrete individuals and their suffering at the center of the quest for corporate accountability.<sup>60</sup>

Core provisions of the Draft Treaty are the due diligence obligations and the provisions for legal liability.<sup>61</sup> Due diligence obligations build on the framework established by the UNGP (identification, prevention, monitoring and communicating) to include a more detailed set of responsibilities, including undertaking environmental and human rights impact assessments, carrying out consultations with relevant stakeholders, reporting on non-financial matters, and integrating human rights due diligence requirements across contractual relationships in supply chains.<sup>62</sup> Unlike the UNGP, due diligence requirements are meant to become legally binding by means of national law, as State parties need to introduce national procedures to ensure compliance.<sup>63</sup> The emphasis

<sup>59</sup> *Ibid.* Art. 3(3). According to Carlos Lopez, a reference to treaties or custom would make more sense than such a broad phrasing, C. Lopez, *Towards an International Convention on Business and Human Rights* (Part I) (2018), available at <http://opiniojuris.org/2018/07/23/towards-an-international-convention-on-business-and-human-rights-part-i/> (last visited 27 August 2019).

<sup>60</sup> See for example, the provision of an *International Fund for Victims*, designed to provide legal and financial aid to victims, *Revised Draft*, *supra* note 56, Art. 13(7). The focus on victims has been a point of critique, with the argument that the state cannot rely solely on regimes of liability that place the burden on victims. Instead, it should have a proactive role in controlling or preventing abuses in the spheres where it facilitates or shapes business activity, see G. Quijano, *A new draft Business and Human Rights treaty and a promising direction of travel* (2019), available at <https://www.business-humanrights.org/en/a-new-draft-business-and-human-rights-treaty-and-a-promising-direction-of-travel> (last visited 1 December 2019).

<sup>61</sup> *Ibid.* Art. 5, 6.

<sup>62</sup> *Revised Draft*, *supra* note 56, Art. 5. A point of critique has been the reference to businesses’ “[...] contractual relationships [...]”, as opposed to the broader “[...] business relationships [...]” of the UNGP. This narrow phrasing could prove an additional obstacle in imposing human rights due diligence obligations on parent companies. Indicatively, see R. Meeran, *The Revised Draft: Access to Judicial Remedy for Victims of Multinationals’ Abuse* (2019), available at <https://www.business-humanrights.org/en/the-revised-draft-access-to-judicial-remedy-for-victims-of-multinationals-abuse> (last visited 1 December 2019).

<sup>63</sup> *Revised Draft*, *supra* note 56, Art. 5(4). The Revised Draft softened the phraseology of the Zero Draft, which required national procedures to *enforce* (rather than *ensure*)

on the role of public authority is consistent with rights-based approaches' understanding of the nature of the corporation as a partially public entity. Ruggie, however, laments in this renewed approach the rendering of due diligence into "[...] a standard of results [...]", requiring companies "[...] to prevent [...]", rather than "[...] seek to prevent [...]".<sup>64</sup>

The Draft further requires States to elaborate a regime of legal liability for human rights violations occurring in the context of business activities. More specifically, parent companies could be liable for the actions or omissions of natural or legal persons with which they have contractual relationships, if parent companies "[...] sufficiently control[] or supervise[] the relevant activity that caused the harm, or should foresee or should have foreseen risks of human rights violations or abuses in the conduct of business activities [...]".<sup>65</sup> It is beyond the scope of the present article to discuss the ramifications of this provision. It suffices to say that a crucial question would be the extent to which this provision enables the piercing of the corporate veil. Furthermore, the Draft lists a number of criminal offences (including war crimes and forced labor) for which State parties must provide a regime of criminal, civil, or administrative liability of legal persons.<sup>66</sup>

In the context of the discussion of the foundations and operationalization of human rights obligations for corporations, of particular interest is Ruggie's brief, albeit foundational, critique of the Draft Treaty regarding the issues of scale and complexity of the corporate form.<sup>67</sup> Ruggie suggests that the scale of transnational business activity, which includes a vast number of suppliers as part of supply chains, is such that successful regulation of corporate behavior requires instrumentalities of implementation matching the magnitude of the task. While Ruggie does not state that such an implementation dynamic is impossible, there is an implicit assumption that a uniform, centric, and static solution as that of an international treaty is ill-equipped to deal with the complexity of transnational

compliance.

<sup>64</sup> J. G. Ruggie, 'Comments on the "Zero Draft" Treaty on Business & Human Rights', *Business & Human Rights Resource Centre* (2018) available at <https://www.business-humanrights.org/en/comments-on-the-%E2%80%9Czero-draft%E2%80%9D-treaty-on-business-human-rights> (last visited 27 August 2019) [Ruggie, Comments on the Zero Draft].

<sup>65</sup> *Revised Draft*, *supra* note 56, Art. 6(6).

<sup>66</sup> *Revised Draft*, *supra* note 56, Art. 6(7).

<sup>67</sup> In that sense it differs from the reformist spirit of the critical comments made by Cassel, *At Last: A Draft UN Treaty on Business and Human Rights*, *supra* note 57 and Lopez, *Towards an International Convention on Business and Human Rights*, *supra* note 59.

business activities.<sup>68</sup> Other commentators go further, suggesting that it is already from the outset questionable whether a legally binding instrument of public international law is capable of effective protection against corporate human right abuses.<sup>69</sup> Instead, corporate accountability should perhaps be based on national tort, criminal, contract, regulatory law, and the self-regulatory dynamics of corporations themselves, following the soft obligations of the UNGP. The scepticism towards human-rights centrism and the highlighting of social complexity as the foundational condition of postmodernity finds its theoretical pinnacle in the conceptualization of rights enforcement through societal constitutionalism.

## II. Societal Constitutionalism: CSR Codes as Transnational, Civil Constitutions

The major task in operationalizing societal constitutionalism, especially in the field of the economy, is to exert such a level of external pressures on social systems that trigger forces of self-limitation to develop within their internal processes.<sup>70</sup> The role of the law in this process is to facilitate the permeability of private institutional structures to deliberation and contestation.<sup>71</sup> In turn, this accentuates the importance of soft law and regulation that may open corporate activity to the scrutiny of global civil society and trigger self-regulatory dynamics as a reaction to potential reputational sanctions. Therefore, the UNGP, the OECD Guidelines for Multinational Enterprises, the earlier Global Compact, legislation imposing transparency obligations regarding human rights and

<sup>68</sup> See, in this spirit, the explanation of the American vote against the resolution, seeing a binding treaty as competing to the UNGP, S. Townley for the US Delegation, *Explanation of Vote: A/HRC/26/L.22/Rev.1 on BHR Legally-Binding Instrument: Statement by the Delegation of the United States of America* (26 June 2014), available at <https://geneva.usmission.gov/2014/06/26/proposed-working-group-would-undermine-efforts-to-implement-guiding-principles-on-business-and-human-rights/> (last visited 27 August 2019).

<sup>69</sup> P. Thielborger & T. Ackermann, A Treaty on Enforcing Human Rights Against Business: Closing the Loophole or Getting Stuck in a Loop', *24 Indiana Journal of Global Legal Studies* (2017) 1, 43, 72.

<sup>70</sup> Teubner, 'Societal Constitutionalism and the Politics of the Common', *supra* note 52, 7.

<sup>71</sup> C. Parker, *The Open Corporation: Effective Self-regulation and Democracy* (2002) 37-40.

environmental impact of corporate activity,<sup>72</sup> as well as civil regulations<sup>73</sup> are examples in this direction. Indeed, Ruggie stresses the importance of informal cooperation, responsiveness, and public-private partnerships in this “[...] new governance [...]”.<sup>74</sup> The intertwining of international non-binding instruments and private corporate codes of conduct is projected as potentially leading to transnational, functional equivalents to the classical constitutional state.<sup>75</sup> The abstract norms entailed by non-binding instruments serve as starting points for the generation of intracorporate norms, which then produce actual standards for internal and external review. This indicates a reversal of the qualities of law, whereby the private ordering of corporations adopts characteristics of hard law, while state norms maintain a soft character.<sup>76</sup> A central role in this transformation is attributed to the learning pressures exerted to corporations, meaning the internal changes induced by external constraints, such as the abovementioned reputational sanctions.<sup>77</sup> The role of legislation or non-binding instruments is therefore to enable these pressures by harnessing existent social dynamics, thus steering intracorporate norms toward transnational public policy.<sup>78</sup> This corresponds to the fundamental motive of reflexive law being reciprocal adaptation, rather than direct intervention.<sup>79</sup>

<sup>72</sup> See for example, the 2014/95/EU Directive on nonfinancial reporting, the UK Modern Slavery Act of 2015, and the California Transparency in Supply Chains Act of 2010 imposing *soft* obligations of reporting.

<sup>73</sup> See D. Vogel, ‘The Private Regulation of Global Corporate Conduct’, 49 *Business & Society* (2010) 1, 68.

<sup>74</sup> J. G. Ruggie, ‘Global Governance and New Governance Theory: Lessons from Business and Human Rights’, 20 *Global Governance* (2014), 5, 9 [Global Governance and New Governance].

<sup>75</sup> Indicatively, O. Dilling, M. Herberg & G. Winter, ‘Introduction: Private Accountability in a Globalising World’ in O. Dilling, M. Herberg & G. Winter (eds), *Responsible business: Self-Governance and Law in Transnational Economic Transactions*, 2008; G. Teubner, ‘Self-Constitutionalizing TNCs? On the Linkage of “Private” and “Public” Corporate Codes of Conduct’, 18 *Indiana Journal of Global Legal Studies* (2011) 2, 617 [Teubner, Self-Constitutionalizing TNCs?].

<sup>76</sup> Teubner, ‘Self-Constitutionalizing TNCs?’, *supra* note 75, 630.

<sup>77</sup> *Ibid.*, 635.

<sup>78</sup> *Ibid.*, 637.

<sup>79</sup> According to this perspective direct, top-down regulation faces a *regulatory trilemma* of under-effectiveness, over-effectiveness, or regulatory capture. See G. Teubner, ‘After Legal Instrumentalism? Strategic Models of Post-Regulatory Law’ in Gunther Teubner (ed.), *Dilemmas of Law in the Welfare State* (Walter de Gruyter 1986), 310-312 [Teubner, After Legal Instrumentalism].



Therefore, according to such an approach of constitutionalization of the economic subfields, effective operationalization of the corporate responsibility to respect human rights depends on the corporate uptake of social norms – following the guidance provided by public instruments. CSR codes become then an integral part of international private regulation and of global legal pluralism. Corporate codes institutionalize a form of corporate self-governance that permeates – at different levels – supply chains by applying to contractors and potentially sub-contractors.<sup>80</sup> Teubner sees in these codes and in their potential to bind private actors emerging “[...] civil constitutions [...]”.<sup>81</sup> According to his analysis, like state constitutions, private regulations employ mechanisms of self-restraint to reduce intrusions on individuals. In that direction, the codes appear to break with the state-fixation of human rights and recognize explicitly a direct effect of human rights on private actors.<sup>82</sup> The enforcement of these human rights obligations does not fall solely upon the national courts, but is instead a result of a nexus of actions that involve public interest litigation,<sup>83</sup> corporate self-regulation,<sup>84</sup> and external monitoring and multi-faceted control by civil society

<sup>80</sup> Most codes apply to the first tier of the supply chain but the use of CSR codes by TNCs further down the supply chain has steadily increased. UNCTAD, *Corporate Social Responsibility in Global Value Chains* (2012), 2-4.

<sup>81</sup> G. Teubner, ‘The Corporate Codes of Multinationals: Company Constitutions Beyond Corporate Governance and Co-Determination’ in R. Nickel (ed.), *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification*, 2009, 204 [Teubner, Corporate Codes of Multinationals]. Precisely because of this analysis, CSR is not seen as *management ethics* or as a *moralization* of corporate actors, contra R. Shamir, ‘The age of responsabilization: On market-embedded morality’, *37 Economy and Society* (2008) 1, 1, according to whom CSR corresponds to a morality grounded in neoliberal epistemology that dissolves the distinction between society and economy See also C. Hackett, *On the Moral Landscape of Corporate Obligations Within International Law*.

<sup>82</sup> G. Teubner, ‘Corporate Codes in the Varieties of Capitalism: How Their Enforcement Depends on the Differences among Production Regimes’ (2017) 24 *Indiana Journal of Global Legal Studies* (2017) 1, 81, 96 [Teubner, Corporate Codes in the Varieties of Capitalism].

<sup>83</sup> See for example, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, [2013] (US Supreme Court) and in general the use of the Alien Tort Statute in the U.S.

<sup>84</sup> See the example of Apple Inc. and its organizing principles and Code of Conduct, its values that are addressed universally to workers and suppliers through education and socialization programs, as well as its power to settle disputes, L. C. Backer, ‘Transnational Corporations’ Outward Expression of Inward Self-Constitution: The Enforcement of Human Rights by Apple, Inc’, 20 *Indiana Journal of Global Legal Studies* (2013) 2, 805, 832-847.

actors.<sup>85</sup> This control could take different forms, including ethical shareholder activism,<sup>86</sup> organization of public campaigns, and, perhaps most importantly, institutionalized forms of monitoring and certification. An example of the latter is offered by the international organization Fair Labor Association, which integrates labor rights in its Code of Conduct, it monitors participating companies and ensures the transparency of their operations, and it offers accreditation to companies' compliance programs.<sup>87</sup> Similarly, certification bodies such as FLOCERT certify Fair Trade standards that aim, among other things, to increase investment in social, economic, and environmental development. It is, then, through a recourse to consumer preferences and priorities (“[...] consumer politicisation [...]” according to Teubner) that corporate actors are incentivized to uptake human rights obligations, especially with regards to socio-economic rights in the developing world. Such complex processes of transnational law, whereby private regulatory bodies without legal or constitutional authority impose norms, oversee, and evaluate the performance of private economic actors regarding goals of social responsibility, highlight the autonomy of legal operations from statehood and the emergence of obligations that are not strictly speaking derived, but only inspired by standards set by public authority.<sup>88</sup> Another possible avenue for enhancing and diversifying the enforcement of human rights obligations under CSR Codes is to render corporate codes judicially enforceable. This could be by means of national private law, especially, but not exclusively, through a recourse to competition law and the possibility to draw undue competitive advantages from advertised supposedly socially responsible practices

<sup>85</sup> Teubner, ‘Corporate Codes in the Varieties of Capitalism’, *supra* note 82, 97.

<sup>86</sup> I.e., NGOs gaining status and voice within corporations through share ownership.

<sup>87</sup> The vagueness of primary rules set either by international bodies or by private regulators and civil society leads to a jurisgenerative role of regulatory intermediaries who, through their interpretations of rights (such as freedom of association) shape their concrete content. See P. Paiement, ‘Jurisgenerative role of auditors in transnational labor governance’, 13 *Regulation & Governance* (2018) 2, 125, 280.

<sup>88</sup> According to J. Ellis, ‘Constitutionalization of Nongovernmental Certification Programs’, 20 *Indiana Journal of Global Legal Studies* (2013) 2, 501, 1035, 1041-1042, certification programs “rely on perceptions of their legitimacy and credibility”. This underscores that the constitution is understood not as a body politic, but as communications.

that do not correspond to reality.<sup>89</sup> This has been a recent object of study and analysis in private law and legal theory.<sup>90</sup>

Following such a theoretical analysis that aims to elevate the status of CSR beyond voluntarism, without at the same time directly confronting shareholder primacy or returning to mandatory state regulation of corporate behavior, a number of developing States have created binding CSR obligations with direct relevance for social rights. Most strikingly, India's Companies Act of 2013 requires large companies to spend at least 2% of their profits in pursuance of their CSR policy, with preference given to the areas in direct proximity with its operations.<sup>91</sup> In the first years of after the implementation of the Act, companies have been predominantly directed their CSR spending on health and education.<sup>92</sup> However, it is important to highlight that, in line with the urge of the reflexive approach to avoid direct State intervention, this obligation is not followed by sanctions other than the obligation to justify non-compliance (comply-or-explain-approach), which in turn makes sanctions dependent on the outcry of

<sup>89</sup> See also, the famous case *Kasky v. Nike, Inc.* 27 Cal. 4th 939 (2002), cert. granted, 123 S. Ct. 817, and cert. dismissed, 123 S. Ct. 2254 (2003), where an activist brought a lawsuit against Nike Inc. for false advertising and unfair competition resulting from its advertisements about the treatment of its workers in supply chains. Nike Inc. paid an out-of-court settlement to the Fair Labor Association. In that direction, even though eventually settled, the *Lidl* case, *Verbraucherzentrale Hamburg v. Lidl Dienstleistung GmbH & Co KG*, LG Heilbronn, 21.04.2010 - 21 O 42/10. According to Anna Beckers, an example of an instrument in this direction is Article 2(d) of the EU Consumer Sales Directive, which makes it possible to enforce public declarations that traders use in marketing, insofar as these characterize the product. See generally, A. Beckers, *Enforcing Corporate Social Responsibility Codes: On global Self-Regulation and National Private Law*, 2015, as well as the positivist analysis of M. Torrance, 'Persuasive Authority Beyond the State: A Theoretical Analysis of Transnational Corporate Social Responsibility Norms as Legal Reasons Within Positive Legal Systems', 12 *German Law Journal* (2011) 8, 1573. This discourse is also supported by theoretical accounts that aim to go beyond the positivistic discussion on CSR's bindingness, conceptualizing it as a space for "[...] compromise between incommensurable logics of action", K. H. Eller, 'Private governance of global value chains from within: Lessons from and for transnational law', 8 *Transnational Legal Theory* (2017) 3, 296, 317.

<sup>90</sup> For a series of articles debating the ideal way of maximizing the regulatory effect of CSR Codes, see *Indiana Journal of Global Legal Studies* Vol. 24 (2017).

<sup>91</sup> Companies Act 2013, sec 135(5).

<sup>92</sup> According to KPMG, 'India's CSR reporting survey 2017' (Jan 2018), available at <https://assets.kpmg.com/content/dam/kpmg/in/pdf/2018/02/CSR-Survey-Report.pdf> (last visited 17 December 2019), compliance is robust and findings are encouraging regarding both CSR spending and reporting.

civil society and the courts of public opinion.<sup>93</sup> In Mauritius, a similar – and this time sanctionable – CSR obligation was legislated, whereby corporations should contribute the 2% of their chargeable income to a CSR Fund to be dedicated to CSR activities.<sup>94</sup> In South Africa, a country famous for the constitutional recognition of the horizontal effect of human rights, CSR provisions have also been enshrined in legislation for specific sectors of the economy. For example, the South African Mineral and Petroleum Resources Development Act sets as one of its objectives to ensure that “[...] holders of mining and production rights contribute towards the socio-economic development of areas in which they operate [...]”.<sup>95</sup> Even softer forms of legislated CSR, where there is no mechanism of implementation, can be found in China and Indonesia.<sup>96</sup> These initiatives maintain a distance from both a state-enforced paradigm of corporate human rights obligations and from the transnational, deterritorialized communicative networks that constitute the fundament of obligations within the paradigm societal constitutionalism. Yet, insofar as sanctions are dismissed as an option and the companies enjoy a broad margin of choice regarding the target of their CSR contributions, such legislative initiatives can arguably be seen as the type of external constraints that aim to produce internal corporate change, eventually reaching to the core of corporate culture.

<sup>93</sup> Companies Act 2013, sec 135(5).

<sup>94</sup> Interestingly, however, according to Daniel Kinderman, ‘Time for a Reality Check: Is Business Willing to Support a Smart Mix of Complementary Regulation in Private Governance?’, 35 *Policy and Society* (2017) 1, 29, the CSR clause was introduced as part of a package-deal that involved cutting the corporate tax rate from 25% to 15%.

<sup>95</sup> Mineral and Petroleum Resources Development Act 2002, sec. 2(i). From a sociological perspective, according to Maha Rafi Atal, the reception of the corporate welfare and service provision programs by the workers ranges between their rejection as a continuation of apartheid-style paternalism and their endorsement as part of companies’ obligations. According to the same research, corporate managers framed their CSR programs as part of a wider project to combat labour resistance, including strikes. M. R. Atal, ‘White capital: Corporate social responsibility and the limits of transformation in South Africa’, 4 *The Extractive Industries and Society* (2017) 4, 735, 738-740.

<sup>96</sup> M. Yan, ‘Corporate Social Responsibility vs. Shareholder Value Maximization: Through the Lens of Hard and Soft Law’, *Queen Mary School of Law Legal Studies Research Paper No 280/2018* (2018) 25-26.

## D. Conclusions: Synergies, Divergences, and Social Rights Between the Distribution Imperatives of Sufficiency and Quality

How to navigate between these different approaches? Is it possible to imagine a synergetic effect leading to a more enhanced human rights protection, despite their radically different theoretical underpinnings? They both lend themselves in support of human rights obligations applying to corporate actors. Yet, even though both approaches recognize the increasing incapacity of State institutions alone to mitigate the effects of globalizing corporate power, they diverge greatly on the question how the centrifugal dynamics of the economic system are to be addressed. Rights-based approaches cling on a Kantian idea of globalization of public law as a result of a legalization of international politics. There is a latent belief in the idea of a just global legal order, mediated through binding international agreements. The answer to the disjunction between the globalization of corporate power and the weakening of State institutions is a constitutionalized global polity, a constitutionalized international law.<sup>97</sup> This – perhaps overly – optimistic stance regarding the possibilities of politicization of international law within international institutions dominated by powerful capital-exporting States is contrasted by the postmodern scepticism of systems theory that sees in world society an ensemble of highly fragmented and contradictory processes, wherein politics has lost its formerly leading role and such top-down approaches are bound to fail. According to societal constitutionalism, societies have an informal constitutionality that is not centered on States<sup>98</sup> and it is precisely on these processes of partial constitutionalization that normative arguments should focus. It would not only be misplaced to expect the globalization of autonomous law through centralized global governance. It could also potentially adversely impact on the autopoietic processes of constitutionalization initiated through learning pressures. Indeed, the medium of the law should restrain itself to the role of the facilitator of the permeability of private structures to this type of learning pressures, realizing thusly its own self-reflexion.

<sup>97</sup> G. Teubner, 'Constitutionalizing Polycontextuality', 20 *Social & Legal Studies* (2011) 2, 210, 210-211. See also J. Klabbers, A. Peters & G. Ulfstein, *The constitutionalization of international law*, 2009.

<sup>98</sup> C. Thornhill, 'Constitutional Law from the Perspective of Power: A Response to Gunther Teubner', 20 *Social & Legal Studies* (2011) 2, 244 [Thornhill, Constitutional Law].

This conscious divergence<sup>99</sup> of approaches embedded in transnational legal theory and the normative project of societal constitutionalism from ideas of a constitutionalized global polity stems from a deeper mistrust of centralized public authority – both due to its limited resources and its latent potential for overreaching and colonizing social spheres. However, in a moment of increasing international fragmentation, when forces of backlash against most institutionalized forms of international cooperation or supranational unity are gaining ground continuously, the fear of an all-engulfing State that threatens to annex the entirety of the Social seems misplaced. As Chris Thornhill has insightfully suggested, invoking the example of fascist European States of the 1930s, totalitarian tendencies are actually supported by a model of “[...] weak statehood [...]” that rests on the colonization of the Social by co-opted private actors in the peripheries of government.<sup>100</sup> In a world of ever-increasing corporate power, the priority of a normative project of socio-legal transformation cannot be the conditions that enhance an – already existing – self-realization of the autopoietic economic system through, for example, mechanisms of corporate self-governance and industry self-regulation. Instead, the goal must be the regulatory transformations that will allow for the curbing of this power in the face of public considerations.

Even though the descriptive aspect of societal constitutionalism, devoid of the transcendental and inherently arbitrary invocations of natural law, retains an explanatory power, its normative aspect risks indulging the view of a self-adjusting, self-regulating society, with only a limited role for public authority. The dependence of social constitutionalization on market mechanisms (if one only thinks of examples such as certification, accreditation, general consumer preferences, etc.) carries the risk of a colonization of any emerging constitution by economics. This translates in an institutionalization of dynamics of inequality, even if the inclusionary aspect of human rights requires the openness of functional systems to all members of society. This is because, if the

<sup>99</sup> Approaches with practical orientation are more likely to appreciate possible synergies in the frame of the common goal of imposing rights obligations on corporations. See B. Choudhury, ‘Balancing Soft and Hard Law for Business and Human Rights’, 67 *International and Comparative Law Quarterly* (2018) 4, 961, placing the emphasis on ‘harder’ law rather than a binding treaty or O. K. Osuji & U. L. Obibuaku, ‘Rights and Corporate Social Responsibility: Competing or Complementary Approaches to Poverty Reduction and Socioeconomic Rights?’, 136 *Journal of Business Ethics* (2016) 2, 329, suggesting CSR should be the legal translation of broad human right commitments into concrete programs.

<sup>100</sup> Thornhill, ‘Constitutional Law’, *supra* note 98, 246.

access of the participating individuals to a system is subject to the translation of these individuals into semantic artefacts of a code oriented toward profit-maximization, then the different economic capacities of individuals translate in differentiated access. Simply put, only small parts of the global population (but perhaps significant parts of the global market) can steer corporations toward Fair Trade certification. Therefore, even if the outcome of such a process might lead, for example, to increasing protection of social rights in the developing world, it comes at the price of the absence of participation of precisely those individuals that are supposed to benefit from the enjoyment of the rights. It comes to them as a gift endowed by the anonymized processes of globalized capitalism and the change of the consumption discourses in places far away. Harder laws regarding required CSR contributions, despite their immediate positive effect, fall within the same paradigm, drawing the critique of being a “[...] legislation of corporate philanthropy [...]”.<sup>101</sup> This de-politicization and de-localization effectuated by such a transnational, horizontal effect of human rights disrupts the delicate balance between the imperatives of democracy and rights that supposedly rests in the co-originality of public and private autonomy.<sup>102</sup>

On the other hand, rights-based approaches, in their persistence for legally binding obligations,<sup>103</sup> approach further what Jacques Rancière characterizes as a form of visibility of equality, derived from the inscription of human rights in words.<sup>104</sup> Setting aside questions of philosophical foundations and the claims of a universal morality, from the moment these rights are inscribed (as in the case of a treaty), they enable their addressees to “[...] make something out of that inscription [...]”.<sup>105</sup> This both recognizes the individuals subject to corporate power as autonomous agents, rather than as parts of anonymous communicative processes, and it enables processes of politicization through contested

<sup>101</sup> See R. G. Pillay, ‘The Limits to Self-Regulation and Voluntarism: From Corporate Social Responsibility to Corporate Accountability’, 99 *Amicus Curiae* (2014), 10, 12, according to whom corporations could be paying only a living wage to employees or engage in massive lay-offs and still be considered as *socially responsible* if they make the required contributions.

<sup>102</sup> J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996), 121.

<sup>103</sup> Ruggie calls them *legal formalists*, J. G. Ruggie, ‘Comments on Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?’ (2014), available at <https://www.business-humanrights.org/sites/default/files/media/ruggie-comment-surya-deva-david-bilchitz.pdf> (last visited 02 September 2019).

<sup>104</sup> J. Rancière, ‘Who Is the Subject of the Rights of Man?’, 103 *South Atlantic Quarterly* (2004) 2-3, 297, 303.

<sup>105</sup> *Ibid.*

interpretations of the extent of corporate obligations. Indeed, social rights, precisely because of their role in sheltering certain fundamentals of existence from market allocations require a type of entrenchment that is immune to the vagaries of the market.<sup>106</sup> To the extent that social rights mandate a certain unquestionability about a minimum of social solidarity, their dependence – as societal constitutionalism would have it – on mechanisms of reflexivity subject to market capture and the dynamics of a volatile consumer society appears to destabilize such a conceptual foundation.

However, this position needs further nuancing as well. The quest to entrench social rights precisely as the sheltering of “[...] minimums of existence [...]”<sup>107</sup> reflects the sufficiency imperative of distribution, which, as Samuel Moyn convincingly shows, can easily coexist with significant socio-economic inequalities.<sup>108</sup> Sufficiency guarantees a floor of protection against insufficiency, but not a ceiling on inequality, remaining uncritical of societal hierarchies. Sufficiency might be a more immediate priority in certain contexts, such as in developing countries. Yet, if social rights are to be conceived in a way that equality and not only sufficiency is addressed, then the inscription of human rights obligations of corporations is only a first step. Deeper changes in the relationship of law to the political economy are required, including changes in corporate governance that challenge shareholder primacy and are indeed capable of shifting the priorities of corporations toward social responsibility. From such a perspective, it appears that the ultimate goal of societal constitutionalism to democratize the economy from within carries a certain potential for egalitarian aspirations that could possibly go beyond the regulation of only some minimum obligations through hard law. The open-endedness of societal constitutionalism could indeed enable transformative projects of democratization to sprout. Fleshing out and operationalizing the objective of triggering systemic self-limitation needs, in this case, extensive reimagination in order to correspond to demands of democratic legitimacy and avoid market capture and the risk of institutionalizing socio-economic inequalities. Such a project of publicization of private actors would need to go further than the current framework of the

<sup>106</sup> See E. Christodoulidis, ‘Social Rights Constitutionalism: An Antagonistic Endorsement’, 44 *Journal of Law and Society* (2017) 1, 123.

<sup>107</sup> See Bilchitz, *Poverty and Fundamental Rights*, *supra* note 15 and the development of a *thin* theory of the good, as well as J. Tasioulas, *Minimum Core Obligations: Human Rights in the Here and Now*, 2017, and the elaboration of the concept of *minimum core obligations*.

<sup>108</sup> S. Moyn, *Not Enough: Human Rights in an Unequal World*, 2018.



UNGP, possibly involving a more prescriptive approach from public authority in the regulation of both corporate conduct and corporate governance.<sup>109</sup>

These reflections lead to the tentative speculation that, while rights-based approaches seem better equipped, at least in their practical orientation, to guarantee the minimum standards of social rights by imposing human rights obligations on corporations, a re-envisioned societal constitutionalism might hold more promise for the structural transformations that could elevate social rights beyond the moral demand of sufficiency. This is not to say that societal constitutionalism is the only approach in that regard; more traditional approaches along the lines of the welfare State could also be effective, although, contrary to societal constitutionalism, it remains a point of question the extent to which they could have transnational effect. If the goal of effectuating social rights is the fight against poverty and lack of access to institutions and resources, imposing human rights obligations through international law on corporations that have a significant impact on people's lives around the world appears to be a necessary first step in attenuating the effects of their social power. Yet, if the goal is related to aspirations of equality then social rights are only part of the answer.<sup>110</sup>

<sup>109</sup> An example in that direction could possibly be the *inclusive ownership fund* (IOF), a suggested employee ownership scheme in the UK that would transfer part of the ownership of a company to the employees, distribute dividend payments, and direct further dividends to a national fund for public services and welfare. See R. Syal, 'Employees to be Handed Stake in Firms Under Labour Plan', *The Guardian* (24 September 2018), available at <https://www.theguardian.com/politics/2018/sep/23/labour-private-sector-employee-ownership-plan-john-mcdonnell> (last visited 02 September 2019).

<sup>110</sup> Donaldson & Preston, 'The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications', *supra* note 29, 83-84. This view is further legitimised by the fact that even strong defendants of property rights accept limitations to property rights. See, for example, Nozick's example of the appropriation of the single waterhole in the desert and the worsening of the position of others. Nozick, *Anarchy, State and Utopia*, *supra* note 18, 140.