Enterprises and the Constitution of the World Economy

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INTRODUCTION

Notwithstanding globalisation, the traditional concept of state sovereignty is still perceived as a cornerstone of the institutional system of exercise of power in the world economy. Whatever the reduction of the states' autonomy in a globalised world, the state is still treated in legal theory as a sovereign with an independent capacity to regulate the objects falling under its jurisdiction. One is forced, however, to recognise as a matter of fact that in a globalised economy the margin of action of the state is rather limited. Let any given state adopt norms impacting on the economy (the setting, for example, of minimum salaries, safe working conditions, strict environmental regulations, and so on) against the stream of what is being done in competing states and enterprises located on its territory will be in an unfavourable competitive position in global markets and/or will "delocalise" to find in other locations more favourable "supplies" of legal norms. Fearing these negative consequences of their regulatory activity, states are hindered to adopt independent norms by the existence of an open economy which therefore constrains them. In the traditional legal analysis, this situation is a mere fact of no impact on the attribution of the sovereign power to regulate given by law to the institutions of the state. One would have to accept that there is a loss of effective power of no consequence for the traditional understanding of legal ordering, for which the state remains "sovereign" whatever its incapacity to exercise its formal competence.

This chapter will try to demonstrate that one may not understand or act upon a globalised economy without taking into account the autonomy benefiting enterprises in liberal legal systems and drawing the appropriate conclusions for the understanding of legal ordering. The traditional analysis neglects the fact that companies, especially large ones operating on a global scale, have such power and such a degree of autonomy, both from individual rights holders and from public institutions, that they cannot be neglected in the study of the effective functioning of the legal system existing in the world today. My thesis is that globalisation gives us the opportunity to better understand the pluralist nature of legal ordering in a liberal society, and to draw the appropriate conclusions for

our understanding of the functioning of the institutions participating in the world economy.

I will try to demonstrate that the loss of effective power by the state is not a mere fact of no consequence for legal analysis. In our perspective, although enterprises do not officially appear in the constitutional structure of a globalised world society as institutions having a positive existence, they are to be analysed in legal terms as participants in it. By “constitutional structure” I mean the sum of the legal rules determining who exercises power in a given society, and according to what legal rules this power is exercised. We pretend that in a world where liberal principles of social organisation dominate, the constitutional structure of the world, where power is deemed to be allocated among states and the international organisations they have created, is much more complex than usually considered. Our point is that one must include within this “constitutional structure” the capacity of decision and rule making constitutionally guaranteed to enterprises by liberal constitutions.

INTERNATIONAL ECONOMIC LAW AND THE POLITICAL ORGANISATION OF STATES

Classical public international law is not concerned with the internal political organisation of states. The law of war, the law of the seas, the law of international treaties, and so on, takes the states as monolithic sovereigns. Classical international law is theoretically free of political bias and leaves issues of political organisation to be addressed at the domestic level. In economic matters, states are therefore theoretically free to adopt the domestic mode of economic organisation of their sovereign choice.

The liberal juridical system of organisation of society was originally embedded in domestic constitutional documents only, with no legal impact on economic organisation outside of the borders of the state adopting it. This system, however, has been expanded on the international scene through a series of treaties furthering, at the international level, the freedom of movement of goods, services and investments that exist on a national scale. This liberalisation movement started in the last third of the nineteenth century, but gained momentum with the post World War II institutions, and in particular GATT which paved the way for the World Trade Organisation (WTO).

Although classical international law may be free of political bias, international economic law has therefore a very strong liberal flavour that, in turn, impacts on the whole domestic system of social organisation of the politics composing the world economy. Given the sheer amount of economic exchange covered by these treaties, and the need to abide by their rules to have effectively access to the economies covered by this network of treaties, it is very difficult to fully participate in the world economy without participating in those treaties. All polities, even when reluctant to adopt liberal principles of social organisa-
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...tion, are thus affected domestically in their capacity to govern themselves in an autonomous manner by the expansion of international economic exchange in an institutional environment built on liberal principles.

As a consequence of this internationalisation of liberal principles through international treaties, one must make an analysis of the functioning of the world economy from within the liberal system of social organisation. One needs to understand and draw the appropriate consequences from the fact that the constitutional structure of the liberal polities which make most of the core economies of the world society has an inverted mode of attribution of power if it is compared to that existing in a traditional, holistic society, which is the implied model of the traditional conception of state sovereignty in international law.1 The point is that one can not keep on thinking about the organisation of our international society as if the component states were still the absolutist institutions they were at their origin. In all liberal societies, the constitutional revolution has taken place, which submits the state to the fundamental norms set by the Constitution. Things could have been, or may one day become, different. But this is as they are, here and now, and a thinking which disregards this is wholly irrelevant to today’s reality.

THE DISTINCTION BETWEEN NON-LIBERAL AND LIBERAL LEGAL SYSTEMS

In schematic terms, one can describe the difference between a non-liberal and a liberal legal system in the following manner:

(a) Within what we call a non-liberal legal system, the state is an absolute sovereign from which each legal norm derives, directly or indirectly.2 The whole of the state comes first, individuals being merely its instruments, with no rights independent from those granted by the state’s legal order. Whatever the degree of autonomy granted to individuals or bodies (territorial or functional), this autonomy is always precarious since it is not based on a right but on the goodwill of the real holders of power. The limit of state action only depends, at law, on the state’s decision not to act, not on legal rules to which the state is subject and which would legally impair its capacity to act. The state may be limited to act by facts; it is not limited by law.3

(b) Within what we call a liberal system, on the contrary, the state is forbidden, as a consequence of the recognition of certain “fundamental rights” expressed

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3 See the presentation made by Portails (one of the drafters of the French Civil code) in his “Preliminary Discourse” on the draft Code civil made to the Conseil d’État in F Ewald (ed.), Naissance du Code civil (Paris, Flammarion, 1989), 40ff.
in the constitution, and protected through effective procedures, from intervening in certain matters. Assuming an effective functioning of the liberal state according to the rule of law, the liberal state achieves the paradox of defining rights for the individual which the state places out of its own reach. This arrangement is protected through complex institutional devices (the division of state power into legislative, executive and judiciary, the right to go to court given to individuals to enforce their rights against the state, and so on).

As a consequence of the definition of fundamental rights, such as the right to property and various freedoms of movement, of initiative, of commerce, of contract, and so on, a sphere of autonomy to develop its economic activities in which the state is somehow restricted from interfering exists around the individual. The fact that the state may not constitutionally regulate certain aspects of social life, because it would constitute, for example, too strong an infringement to the free use of property rights, does not imply that every kind of regulation is prohibited concerning these aspects: it implies that this regulation is, as a matter of principle, in the domain of civil society and that the state may regulate, as a matter of exception, in the furtherance of constitutionally protected values. The regulation of matters left to individuals' autonomy is therefore left as a matter of principle to the self-regulation of civil society, in particular through contractual means. The equilibrium between the rights of autonomy and the constitutionally protected values is defined through the democratic political process and procedures of constitutional review. It therefore depends on the specific content of each liberal constitution and on each domestic political process. But although the margin of autonomy left to civil society varies from country to country, the point is that this sphere exists in all liberal legal systems.

Of course, a liberal State may be taken over by political leaders who may then breach these fundamental principles of liberal social organisation. If their following is sufficient, the whole system then disappears. But, by definition, we are not in a liberal system any more. And it is not because a liberal system is exposed and can disappear in this manner that one should be prevented from considering the results of the effective functioning of liberal legal systems. There are, in today's world, liberal legal systems effectively functioning and our thesis is that this has a very serious impact on how the world economy operates. In addition, the process of globalisation, by increasing competition among states to provide favourable norms for businesses, in effect increases the margin of autonomy left to civil society and it is therefore all the more important to understand the consequences of liberal legal ordering.

In summary, the liberal constitution has a structure which is reversed in comparison with the non-liberal one: the principle is that power lies in civil

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4 For the same reason that to deregulate a sector of social life in effect consists in transferring its regulation from statut heteronomy to the autonomy of the actors of civil society: see A Supiot, "Détéglementation des relations du travail et autoréglementation de l'entreprise" (1989) Droit Social 195.
society (as a matter of principle, the individual is autonomous and has the freedom to organise its economic life with other individuals through contracts); the exception lies in the specific competencies devoted to the state (which may adopt norms in the common interest through its political organisation – usually democratic in a liberal system).5

THE ENTERPRISE IN THE LIBERAL LEGAL SYSTEM

Originally, the fundamental change introduced in legal ordering by liberal principles of social organisation occurred at the origin of the modern age and was intended to benefit to the individual only. It came as an ancillary to rising individualism in many spheres of social life (religious, political, economic). The notion of property was developed to further the individual’s autonomy to act freely in those spheres, property giving the right to make one’s own decisions with regard to the object of the right, and contributing therefore substantially to the effective existence of these new freedoms.

Enterprises, however, have progressively found the technical means to benefit from these rights originally defined for the individual, mostly through the use of corporate vehicles having legal personality. The capacity left to civil society to regulate itself by defining property rights and allowing freedom of contracts has been used by enterprises, which have progressively concentrated these dispersed competencies to agglomerate them into large organisations. Companies have therefore been using the autonomy granted to civil society by liberal principles of organisation to achieve a fantastic degree of concentration of power and of autonomy.6

This change came in an unofficial manner, progressively, with no fundamental modification brought to the understanding of the liberal organisation of society as comprised of dispersed individuals minding their own interest, on the one hand, and of the state, in charge of the furtherance of the common good, on the other. The enterprise developed its organising power without being effectively recognised as such by the legal system, which does not perceive its unity. The enterprise can exercise its organising activity as a consequence of numerous transfers of control over economic resources deriving from the conclusion of a multiplicity of contracts.7 For example, the entrepreneur contracts with suppliers of capital to have enough financial means to lease premises, to have space to install pieces of equipment leased from manufacturers, to be able to hire individuals pursuant to employment contracts to operate them, and so on. The

5 According to Norberto Bobbio, this radical change of perspective introduced by the American and French Bills of Rights (1787 and 1789) is tantamount to the "discovery of the other side of the moon": N Bobbio, Stato, Governo, Società. Per una teoria generale della politica, (Torino, Einaudi, 1985), 147–148.
whole of the enterprise can be broken down in this manner into a circuit of economic exchange occurring as a consequence of the existence of a network of contracts pursuant to which the various parties are supplying specific resources through time in exchange for a consideration.

As a consequence of the network of contracts that serves as its grounding in positive law, an organisation (the enterprise) exists and is in a position to coordinate resources for an economic purpose. But despite this very real existence of the enterprise, just like the "firm" it is not an object of study for the classical economist, the enterprise is not considered as a legal concept in classical legal analysis. The enterprise as a whole has no existence and breaks down into property rights and contracts. Although the word "enterprise" (or one of the words often used as a synonym, such as "firm", "company", "undertaking", and so on) is frequently used in legislative or regulatory texts, court decisions, law journal articles and books dealing with business, economic or company law, the word "enterprise" does not correspond to one unique legal concept in positive law.

There is a striking difference here between the common perception and that of positive law. One speaks of "IBM", "Toyota", "Microsoft", and so on. But none of these enterprises exists in itself in positive law. For positive law, the enterprise can be perceived, at best, as a series – a network – of contracts and property rights which does not, as a whole, have its own legal existence. Positive law mostly refuses to go beyond this and therefore prevents us from understanding the enterprise as a whole.

The network of contracts is, however, only the vehicle used by the enterprise in positive law, and is not the enterprise in itself; this organisation effectively exists and operates as a whole without positive law being in a position appropriately to deal with it. Although the enterprise in itself evades legal under-

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* See, in this regard, the seminal article by RH Coase, *The Nature of the Firm*, (1937) *Economica* NS 386.


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standing in classical terms, the fact remains that we have to deal with its very real existence and impact on the international economy. The amounts of property rights concentrated in these organisations are enormous. Property rights being parcels of constitutionally protected rights to make decisions with regards to their objects, enterprises have concentrated a power to make rules and decisions which in effect is now challenging the classical state system of social organisation.

THE ENTERPRISE AS A SUBJECT OF LEGAL ANALYSIS

Although the enterprise in itself can not be understood in terms of positive law, for which it does not exist as such, I still think the enterprise as a whole can be analysed in legal terms. The "enterprise" is performing an organisational function - a function of regulating the activity of its members through the production of rules and orders that are specific to each enterprise, and are self-defined within ("by") the enterprise. This activity can be analysed in legal terms as legal ordering, the content of the norms thus created being the consequence of the political equilibrium between the various participants to the enterprise:

(a) The enterprise creates rules which have an impact on its constituents. As an organisation creating norms applying to people in direct relationships with it, the enterprise can be analysed as a legal order in competition with the state legal order, which also adopts norms in its own legal order so as to affect the internal organisation of the enterprise. In the absence of state norms, the enterprise may decide to organise its activities in a given manner (twelve hour shifts, for example), which it may be prevented from doing only where the state itself (or an administrative delegate) adopts norms (eight hour maximum shifts, for example). States' norms, in this perspective, are adopted in an attempt to modify, from the outside, the internal organisation of work within enterprises. In this perspective, the relationship between the enterprises and the state may be analysed in terms of relationships between autonomous legal orders, the enterprise having, as a matter of principle, the right to adopt norms for its internal organisation and deciding on their content as a consequence of the political equilibrium between the various participants to the enterprise; state norms being adopted (as a consequence of political choices made within the state) as a matter of exception to replace, thanks to their higher position in the hierarchy of norms, the norms spontaneously created by enterprises.

(b) The rules and decisions made within the enterprise implicitly comprehend the outcome of political choices made within the enterprise. The enterprise decides to allocate the economic resources it controls by taking into account the

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various demands of its constituents (shareholders, workers, consumers, surrounding polities, and so on) and their relative "bargaining" strengths. Apart from being a legal order, the enterprise is therefore also a political order. As a political order making choices in the allocation and organisation of resources, it enters into competition with the state political system. And the relationship between the enterprise and the state may therefore be thought about in terms of relationship between autonomous political systems.

We will test this theory by first examining some aspects of the relationship between the firm's norms and positive law at the micro-level of the organisation of the enterprise. We will then look at the macro-level of the relationship between enterprises and positive legal orders. We will see that the understanding of the enterprise as a legal order leads to a legal conception of liberal society as being regulated both by (a) the contractual interactions of rights holders (the "market" of the economists), and (b) by the ordering activity conducted internally within organisations, including enterprises, within the general framework of positive norms authorising and orientating this self-regulation of society.

RÈGLEMENT INTÉRIEUR AND THE CONTROL OF PROPERTY RIGHTS

The enterprise is characterised first and foremost by the fact that it is an organisation ordering the activity of people entering into a relationship with it. The intensity of its power over people depends on the specific content of the contracts entered into by the various rights holders who have a relationship with it. The salaried employee in an enterprise is clearly subjected to the rules of the enterprise to a much greater magnitude than other parties having a contractual relationship with the enterprise (the occasional customer, for example). The employee is a subordinate and, as a consequence, the enterprise has the capacity to enact permanent and general rules applicable to employees within the enterprise. To understand how positive law has found the way to deal with this marvel of the existence of "private" unilateral power, one can look at the treatment by authors of the so-called "inner regulations" (règlement intérieur) of the enterprise under French law. The règlement intérieur is the document which contains the rules generally applicable within the enterprise; obeying it is mandatory. The question is why?

To avoid recognising the existence of an unjustifiable power of one individual against another in a liberal legal system, authors have first tried to explain the existence of this power in contractual terms. According to this defunct theory, the employee agrees to be bound by the règlement intérieur at the time of acceptance of the employment contract. The règlement intérieur is treated as an annex to the employment contract, tacitly accepted by the employee. Its legal validity and binding force derives then from the common will of the parties, and liberal theory, based on the exercise of the free will of the individual, is therefore
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safely kept coherent. The employee is bound by the rules because he has accepted them, which he could do in the exercise of his freedom to contract. But how does one explain, then, the fact that the salaried employee is subject to amendments brought to the règlement intérieur well after the signature of the employment contract, and that she or he does not formally accept? Also, how does one explain the fact that any person performing a function within the enterprise, even outside an employment contract, is subject to the clauses of the règlement intérieur? The contractual theory does not provide answers to those questions.

As a reaction to this theory, an "institutionalist theory" developed, according to which the enterprise is an institution that spontaneously creates its own law, as a consequence of the "natural inclination" of private groupings and institutions to provide internal legal rules for themselves. This theory was happy to find sources of authority and norms outside of the state in society itself. Individuals create communities for the pursuit of their common interests, the theory goes. These communities have to create rules to regulate themselves. Such would be the case of the enterprise.

In reality, the enterprise can hardly be thought about as a community. Employees do not happily decide to create a community with their boss because they have a dire need of someone to coordinate their actions through orders. They join enterprises because they need to make a living and have to agree to abide by the orders as a consequence. The institutionalists' theory has a certain paternalistic flavour in trying to justify the authority of the management of the enterprise by appealing to the joint interest of its participants. The institutionalists' theory in effect misses the paradoxical foundation of the power of the enterprise in liberal constitutional principles when giving it an autonomous (sociological) foundation by presenting it as a community. There is a sociological reality to the autonomy of the enterprise, but the legal autonomy to make rules enjoyed by the enterprise derives from positive law.

The règlement intérieur in fact is nothing more than one of the consequences of the control of the property rights used within the enterprise. Although the management of the large enterprise usually does not own these property rights, it effectively controls their use and therefore may set rules in connection with this use. Anyone entering the enterprise's premises must abide by the law of the owner (or, in this case, of its legal representative). The enterprise therefore establishes in an autonomous manner what people have the right to do, and the

14 Which has been adopted by case law: see Mathieu, supra n.13, at 110.
obligation not to do, within the enterprise and has certain means available to ensure that the norms thus created have effectiveness. Although the state has a legal monopoly over legitimate physical violence on a given territory, and may use it to give effectiveness to the norms it produces, it does not monopolise the other forms of social violence that may be used to give effectiveness to norms. The liberal state actually uses its resources to define clearly and protect property rights that allow their owner to give legally enforceable orders to those contracting with them. The salaried employee in an enterprise, for example, is rarely threatened with the use of physical violence if he or she does not abide by the orders (only the state can do that), but the enterprise has very real and efficient sanctions available (the threat of dismissal, for example) to ensure that orders are usually obeyed, and that the inner legality of the enterprise is respected.

The autonomy of the enterprise thus derives from state law and not from a "natural inclination" of natural groupings to create rules. This "natural inclination" may very well exist. It is simply not the source of the power of the enterprise.

PROPERTY RIGHTS AND ENTERPRISE AUTONOMY

This foundation of the enterprise in constitutionally protected property rights has very serious consequences. As a matter of principle, the management makes the rules, and state law only provides for limits which come as exceptional derogations to this principle. This can be perceived clearly by examining how the creation and content of the règlement intérieur is regulated by French positive law.

Until 1982, règlements intérieurs appeared spontaneously in enterprises without any specific regulatory framework giving authority for their adoption and specifying their possible content. In 1982, the French legislature (after the Socialists' victory of 1981) decided that it could no longer leave the regulation of peoples' life during most of daylight abandoned to the arbitrariness of employers. Since this legislative intervention, the domain of the règlements intérieurs is now set by statute:16 the règlement intérieur is mandatory in any enterprise with at least twenty employees. But it can comprise prescriptions only in strictly defined fields, and in particular those relating to discipline, hygiene and safety. For authors, the uncertainties of the past with regard to the legal basis for the existence of règlements intérieurs have now fortunately given way to a clear situation: the power of the employer is based on the statute and is limited by its provisions. For the experts in the field, the management of the enterprise now benefits from a delegation of regulatory power belonging to the state: the statute is making a "delegation of normative competence to the employer".17

16 Article L.122-34 of the French Code du travail.
17 Savatier, supra n.15. It would have now become explicit whereas it would have been only implicit in the past; hence, for Bacquet, "the employer, as a private person, disposes within his enterprise of an autonomous regulatory power by a sort of implicit delegation of the power to do so from the legislator": Bacquet, supra n.15, at 314. See also Supiot, supra n.13.
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The theory according to which the power to adopt a règlement intérieur would be based on the statute is mistaken. The power of the enterprise to make rules does not derive from the statute but from the control over property rights. And the capacity to make rules that derives from property rights does not derive from statutes, but from liberal constitutional norms. Certainly, the enterprise employing at least twenty employees must now (since, and because of, the statute) adopt a règlement intérieur, which may contain provisions only in certain fields. To be valid under French positive law, the norms produced by those enterprises and comprised in the règlement intérieur must thus now fulfill a certain number of criteria. But this does not mean that the power to adopt a règlement intérieur is based on the statute. On the contrary, this power preceded the statute since enterprises spontaneously adopted règlements intérieurs well before the enactment of the statute. There must, necessarily, be one unique foundation for this power in all enterprises, whatever their size. If the statute were today the foundation of the "legislative" power of the employer in enterprises of at least twenty employees, what would be the foundation of that power in enterprises with fewer employees? It clearly cannot be based on the statute.

In fact, the change brought by the statute is that whilst the exercise of the power to adopt the règlement intérieur within the enterprise previously was left to the discretion of the employer, it is now subject to norms applying to its drafting and its content, and to procedures for the control of those norms in certain enterprises beyond a certain size. The state could decide, as it did until 1982, to let enterprises freely choose the content of their règlement intérieur. In 1982, it decided to start using certain means, internal to its own legal order, to reduce employers' autonomy. But it did not suppress this autonomy. What was at stake, for the state, was to make sure that the employers' power was not used to subject people to a form of social control irrelevant to the enterprise's ends. The statute did set limits to the exercise of the employers' power. But the statute did not become the foundation of the power. And in small enterprises, the boss still makes the rules, alone and without any control.

ENTERPRISE AUTONOMY IN THE GLOBAL CONTEXT

With this example, we clearly see in a different light the relationship between the legal order of the enterprise and the legal order of the state. The ideological presentation of the state as the absolute sovereign leaves the way open to a more subtle type of relationship between authorities, each having their own sphere of autonomy as a consequence of liberal principles of the organisation of society.

The possibility of the existence of the règlement intérieur is a consequence of

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18 See Savatier, supra n.10, at 867–869.
liberal constitutional principles; but the state may create norms pursuant to which it will use its own material and human means to verify that the product of the internal legal order of the enterprise (the règlement intérieur) is in conformity either with constitutional principles, or with principles set through state legislation or regulation, in conformity with constitutional principles. There is no integration of the legal order of the enterprise within the state's legal order; there is the establishment, within the state's legal order, of norms and procedures to ensure that the power autonomously exercised within the enterprise is used only to pursue the ends for which its existence is accepted. There is clearly less autonomy for the enterprise after statutory intervention. But, as a matter of principle, the enterprise is still the decision-maker of prime resort, the role of state positive law being only to reduce this autonomy for the sake of the protection of individuals or the furthering of the common interest. It does not make it disappear or invert the devolution of the primary power to make rules granted to property rights holders. Positive law is, in effect, guiding from the outside of the enterprise, the internal production of law by the enterprise.

What this example shows is that the autonomy of the enterprise—the capacity it has to make autonomous decisions and rules—is not something new that appeared with globalisation. Since the beginning of modern times, and especially since industrialisation and the advent of the large business enterprise, this autonomy has been a fundamental element of the system of power effectively operating in a liberal society. It could be disregarded as long as this complex system of interactions among individuals one calls society took place mostly on a national scale. Rules made within enterprises could somehow be reinterpreted as national law, and be attributed to the state legal system. With enterprises operating on a global scale, this is not possible any more. If the inner law of the enterprise may be misinterpreted as national law when the enterprise remains established on the territory of one single state, doing so is a mere fiction when the enterprise becomes multinational. At the international level, one may not pretend any more that the legal order of the enterprise is "incorporated" within that of the state. Each state may very well consider, for its own purposes, that the inner law of the enterprise is state law, and to incorporate it within its own legal order, if it meets certain conditions, or it may consider it as illegal. The law produced by the internal legal order of an enterprise may, in the case of a multinational enterprise, even be illegal in one state legal order whilst it is perfectly legal in another one. For the enterprise in itself, the norms created are the product of the enterprise itself, whatever the position of states' legal orders with respect to them. These self-produced norms usually take into account the

20 On the constitutionalisation of the sub-system of the economy in the works of Habermas, see G. Teubner, Droit et Réflexivité. L'auto référence en droit et dans l'organisation (Paris, LGDJ, 1994), 60.
22 For Teubner, "the validity of law derives from its self-referentiality, that is to say from the
content of state laws in relation to the determination of their own content in order not to enter unnecessarily into a struggle with the various positive legal orders of the states. But this does not change the fact that the norms created internally are their own.

This can be clearly seen by looking at the status of the manager. The enterprise creates a personal status for the manager, a sort of personal law, which follows him or her wherever he or she goes, whether on a business trip, on a long-term mission or as the head of a local subsidiary that is part of the corporate structure of a multinational enterprise. Gérard Lyon-Caen has already noted that

human resources policies are dealt within the framework of rules internal to the multinational group of companies. The status of managers is elaborated internally. Health insurance and pension fund matters are dealt with at the group level. Naturally, relocation packages, the length of missions and detachment abroad are defined internally.

Each State legal order may have its own conception of what the personal status of the manager should be. The manager may very well, in each of the territorial legal orders in which he or she operates, for one reason or another, have certain particular rights that he or she may be in a position to enforce in state courts. And in pathological cases, this is what happens. However, if one is not merely interested in the pathology of the legal system but in its actual functioning, the “rights” of the manager to a certain career progress, to a certain salary, fringe benefits, privileges attached to seniority, to a company pension fund, and so on, are determined by the enterprise itself, and it is this law that the managers operating in the normal course of business obey.

**THE UNILATERAL EXERCISE OF “PRIVATE” POWER**

So far, we only have looked at the normative power of the enterprise over employees. They are the easiest to deal with since they are subject to the legal order of the enterprise employing them as a consequence of a contract -- the employment contract -- which specifically provides for subordination. But the enterprise has other individuals falling within its jurisdiction as well.

Some enterprises have such immense power vis-à-vis the whole of their economic environment that the bureaucratisation of their activity is such that application of legal operations to the result of other legal operations. Validity may not be imported from the outside, it can only be an internal product of law" in G. Teubner, "Le droit, un système autopoïétique" in Les voies du droit (Paris, PUR, 1993), 8. See also S Romano, L'ordre juridique (Paris, Dalloz, 1975), xii and 32.

23 This is so for a very simple reason: property rights are, in final analysis, allocated and protected by the state. This makes it necessary for the legal orders of enterprises to cooperate with the legal orders of states.


it is often all their suppliers (and not only the suppliers of labour – the employees) and distributors that are being "ordered" by these enterprises. In the perspective of institutional economists, the environment of the enterprise may be defined as *what is not ordered by it.* The enterprise thus represents an island of a certain type of order (organisational), in an environment composed of a different type of order (the market); the "market" itself being the result of the combined action of individual actors and of other orders (organisations). The limits of the enterprise may be relatively loose. For example, in terms of these orders where is the contracting party having signed a long term distribution contract, leaving it relatively independent, but providing for a clause for adaptation of prices and numerous detailed and strict obligations over a very long period of time? Is this distributor within or outside the enterprise for which it is a distributor? Is the distributor really an autonomous enterprise or is it not a vassal to the producer? Where does a franchisee belong? Is he integrated within the enterprise? What about joint ventures? The difficulty that exists in finding the limits of the enterprise shows that there is often no neat border between inside and outside: there are only margins, zones where the authority relationships are loosely or poorly defined, changing and/or multiple. Here, we find a striking analogy with states at their formative age. These "borderline cases" are like the principalities located between the great powers of the Middle Ages, before their consolidation into clearly defined nation states led to the invention of the concept of border.

The intensity of the power of the enterprise also depends on its size, since the larger the enterprise, the more its tendency will be to have formalised rules in its dealings vis-à-vis all those entering into relationships with it. The rules applicable to suppliers, manufacturers, and other weak parties will often be described in "charters", general purchase conditions, and other printed documents to take or to leave for contracting parties willing to work with the enterprise; the consumers of the products and services will also sign contracts of adhesion with non-negotiable clauses.

In positive law, this unilateral exercise of the power of the large enterprise is formally presented under the guise of contracts: the supplier, the manufacturer, the consumer will formally accept the charters, general sales conditions, contracts of adhesion. The manifestations of the power of the enterprise are thus translated into the legal order of the state (by participants to the functioning of the state legal order – law professors, attorneys and judges) in order to give them a form compatible with the superior norms of this legal order. But in the reality of the exercise of this power in today's economy, the production of

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28 Bellet, supra n.26.
29 See generally Macneil, supra n.25; Bellet, supra n.26.
these rules, is very often the expression of a unilateral power, of an exercise of authority, that of the enterprise. The contracting parties in a weak position very often have little choice and sometimes do not even understand what they are signing — when they sign anything.

This rise of the normative and political power of the enterprise has been at the origin of an evolution of the legal system of developed economies, starting at the end of the nineteenth century. Weak participants to the enterprise, and in particular salaried employees, have been the object of the creation of a wealth of protective norms imposing material rules on the management of the enterprise. Whole branches of the law — labour law, consumer law, environmental law, and so on — have progressively been created to protect weak parties or interests external to the market system (the negative "externalities" of the economists). These evolutions, although demonstrating that the ideological dream of a liberal society self-regulated by isolated individuals could not be sustained in an industrial world creating substantial "private" powers, kept alive the traditional conception of legal ordering. The classical contractual theories, the strict separation between "public" (as the sole locus of power subject to democratic rule) and "private" (the locus of property rights freely enjoyed by the owner), the theory of state sovereignty, were barely affected, whatever the difficulties in maintaining the coherence of the legal system with its original constitutional foundations. When the outcome, within the political order of the enterprise, of the political choices made at the decentralised level of the enterprise were felt at the political level of the state to be inappropriate, statutory intervention, or an evolution of case law, came to change, from the outside of the enterprise, the political choices made in the first instance at the enterprise's level.

This did work as long as the productive aspect of economic activity took place within enterprises mostly located on the territory of one single state. With globalisation, enterprises are now organising their activities on a multiplicity of state territories. They are therefore in a position to manipulate the market between states and to limit the states' capacity of external political intervention to modify the internal political equilibrium reached within enterprises.

Only an understanding of firms as legal and political orders will allow us to understand what is happening at the macro-level of the relationships among firms and enterprises in the world economy.

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NON-RECOGNITION OF THE ENTERPRISE AS A LEGAL AND POLITICAL ORDER

If enterprises are understood as being legal orders, one may analyse their relationships with positive legal orders in a similar manner to the relationships existing between the institutions traditionally analysed as legal orders (states and public international organisations), with this caveat — of considerable importance — which is that enterprises are not recognised as legal orders by positive legal orders. The enterprise has the same fate as the one experienced by a state that is not recognised by other states: this state does not exist in international public law; this does not prevent it from existing in itself, if its power over a certain territory and a population is effective.33

It is necessary, however, to be very specific about what we mean when we say that there is no recognition of the enterprise as a legal order by the positive legal orders of states. Although there is no positive recognition of the enterprise as a positive legal order by the original positive legal orders (states) since, in particular, they do not grant it legal personality, the liberal legal orders operate as if there were an implicit acceptance of the constitution of the enterprise as a legal order. The mode of intervention of the liberal state in the economy is underpinned by the existence of the enterprise as an original locus of exercise of economic power. This is mere logic: two states ignoring each other (that is, which do not recognise each other) may perfectly coexist on the surface of the planet. They have different territories and, in a sense, their respective fields of authority, of exercise of power — their jurisdictions — may not meet. The situation is necessarily different in the case of the relationships between the enterprise and the state: in contrast to a state, an enterprise does not have any territory.34 But it has a jurisdiction over which it exercises its power, contractually delimited by the network of the exchange relationships it organises as a consequence of the transfer of competencies contractually transferred to it. The enterprise, however, is necessarily established on the territory of one or several states. The power exercised within the enterprise therefore necessarily meets the power exercised within the state, or states, where it is established, since they regulate objects at least partly common to them. They therefore necessarily have competing jurisdictions.

The peaceful existence of the enterprise demonstrates that although the state does not recognise the enterprise as a legal order, the state does not oppose the existence of the enterprise as a legal order as it does for other non-positive legal orders, like the Mafia, for example. There is here a fundamental difference in


34 One may see it, however, as an island (or as an archipelago in the case of enterprises with several sites), with its flag at the entrance door, surrounded by high walls, with guards and dogs, ID-badges, controls at the borders, and so on.
the state-enterprise relationship that is important to understand in order to grasp the nature of the relationship between the state and the accepted (although not recognised) legal orders of enterprises. With respect to the Mafia, the state attempts to fight against its very existence as a legal order, by inculminating, within its own legal order, Mafia-like behaviour. Within a state that is respectful of the individual and of liberties, the existence of the legal orders of the state and of the Mafia are irreconcilable, incompatible. No official co-operation can be imagined between these two types of orders that are, in Santi Romano's terms, irrelevant.35

The situation is completely different with respect to enterprises. In contrast to the Mafia, the enterprise is not usually the object of a relentless struggle with the state, which is attempting to destroy it. On the contrary: if there are relationships of competition between the state and the enterprise for the ordering of the objects they have in common (labour relations, degree of care for the environment, consumer relations, safety of the production premises, nature of the investments made, and so on), there are also, and maybe especially, relationships of co-operation.36 The fact that the positive orders of states let the legal orders of enterprises constitute themselves, and even facilitate their development, demonstrates the factual recognition of the enterprise by the state as a structuring institution of society. In this sense, these orders are—still in Romano's parlance—relevant.

DEVELOPING A NEW CONSTITUTIONAL STRUCTURE FOR THE GLOBAL SOCIETY

The law of liberal politics, therefore, is such that we are in a situation where a legal order (that of the state) refuses positively to recognise the existence of legal orders installed on its territory (those of enterprises), while in fact taking into account in its actions (legislative or administrative) that those orders effectively exist, and facilitating their development. We are thus in a much more interesting (and complex) situation than the one where there is an absence of recognition of a state by another state. The legal orders of enterprises and those of states constitute overlapping, tangled, embedded legal orders. The state may not, in its regulatory activity, neglect the existence—the necessary existence within a liberal legal order—of the enterprise as a legal order.

The concrete implication of this approach is that, contrary to the modern understanding of law that considers the actors of the legal system as being, on

35 See generally Romano, supra n. 22.
the one side, the mass of individuals armed with their personal rights and interests and, on the other side, the sovereign state defending the general interest of internal constituents and external competitors, a new polity composed of bodies with a multitude of overlapping jurisdictions and sectional interests has progressively developed, among which the most important are enterprises, which command most of the daily life of people.\textsuperscript{38}

The attitude of positive law, consisting in ignoring the reality of the legal allocation of regulatory power among enterprises and positive legal orders has the advantage of leaving considerable aspects of social organisation to the autonomy of society. Once their existence is identified, the unofficial legal orders pose very serious problems of legitimacy regarding the private power they exercise and which should require, within a coherent liberal theory, the setting of rigorous procedures to designate managers, to publicise their actions and decisions, to control the use of their power, to ensure the respect for the rights of subordinates, and so on.\textsuperscript{39} To deny or to ignore - the existence of those orders means to leave aside the debate on the need to set those procedures, and on what they should be.

A legal analysis accounting for the mode of relationships between state legal orders and the legal orders of enterprises is fundamental today because of the globalisation of the economy.\textsuperscript{40} Globalisation breaks the delicate dynamic equilibrium which had progressively been found between states and enterprises for the allocation of the power to regulate economic activity: enterprises had the primary right of making basic economic decisions, of arbitraging the various interests involved in each decision, within a particular setting of environmental constraints (including positive legal norms) imposed upon them; states had the duty to defend individual and collective interests insufficiently taken into account, or neglected, by autonomous enterprises, through a modification of the normative environment of enterprises.

Because of the increased competition between states for the provision of norms favourable to enterprises induced by the globalisation of exchanges,


\textsuperscript{38} See N. Bobbio, \textit{Il futuro della democrazia} (Torino, Einaudi, 1\textsuperscript{st} ed., 1991), 10.

\textsuperscript{39} In this respect, one may note that for Bobbio, to speak about a progress of democracy today is not to speak about the substitution of direct democracy by representative democracy but to speak about a transfer of democracy from the political sphere to civil society in its various institutions, from school to manufacture. There may perfectly exist a democratic state in a society within which most of the institutions (I would say "legal orders"), from family to school, from enterprise to public service, are not democratically governed: Bobbio, supra n.38, at 53–55.

divided states are not in a position to provide the appropriate normative environment for enterprises for this system to continue to function in a socially acceptable manner. It is necessary to think anew the constitutional structure of the world, which is now unbalanced to the detriment of the "general interest", at whatever geographical level one looks at (local, state, regional, global).

The path to follow lies, in my opinion, in the deepening of the pluralist conception of law and power.\(^{41}\) The reality of state law, of positive law applied by public institutions on a given territory, is not denied. If one observes from the internal point of view the juridical system of a given state, the enterprise does not exist in positive law. But the situation is different if one uses a conception of law that breaks the relationship of equivalence between "state law" and "law". From such a perspective, we have seen that the enterprise may be analysed as a legal order in itself. From this point of view, the mode of the relationships between states’ legal orders and the legal orders of enterprises may be thought of in the mode of the relationships entertained between autonomous legal and political orders.

My thesis is that by concentrating competencies located in civil society (through the concentration of property rights by contracts), enterprises concentrate a power of original decision making embedded in these rights that is partly out of the reach of the power of the state. From the principle that everything that is not prohibited is authorised, and that state regulations may intervene only in the constitutionally restricted field where state action is legally valid, one necessarily derives the principle that enterprises have the juridical capacity to produce their own norms in an autonomous manner if the state does not intervene (by political choice) and in the more restricted situation where the intervention of the state is prohibited by constitutional norms. The enterprise certainly may not ignore the law of the state on the territory in which it is located any more than the subjects of positive law can: the enterprise needs liberal law to exist through the existence of a network of contracts and of property rights in positive law. The enterprise must respect, to a certain extent, the commands of positive law if it does not want to disappear. But the margin of autonomy left is substantial, and all the more so with the globalisation of society, which allows enterprises to play state against state.

What I have attempted to illustrate are the institutional consequences of a system of regulation of world society in which the dominating constituent units are states legally constituted along liberal principles that, through history, have accepted and/or facilitated the development of the large business enterprise. The understanding of the enterprise as a legal order allows us to make considerable progress, not only in the analysis of the internal functioning of enterprises, but also, and maybe especially, with regard to their relationships with the

\(^{41}\) For a description and a bibliography, see M van de Ketschouw and B. Ost, "Le système juridique entre ordre et désordre" in Les voies du droit (Paris, PUR, 1988), 188-189. See also Trubner, supra n.20.
outside world – their *environment*. It allows us to examine the state/enterprise relationship as a relationship between autonomous legal and political orders, which puts us in a better position to think about the institutional needs of a globalising society.