

# Two Ethical Questions for Corporate Lawyers

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Exactly thirty years ago on 11 August, I was admitted to the bar, specializing in corporate law. It has been even longer – since my appointment as a fellow at Utrecht University in 1979 – that I have studied the theory of corporate law. So, it is safe to say that I have worked my entire active, professional career in corporate law. But just as, I suspect, everyone, I, too, have had my doubts from time to time. I have asked myself: what, aside from earning an income, have I been doing all this time, really? What purpose have I served? Has it had any social impact?

A book that you definitely should NOT read if you do not want to be confronted with these kinds of questions is *The Code of Capital* by Katharina Pistor.<sup>1</sup> She reviews and analyses the law as a government supported ‘code’. That code mainly serves to protect capital assets. Capital assets are legal properties representing a certain monetary value because of the future income they are expected to generate. Shares and securities in corporations are, of course, very important capital assets. Assets are protected because the law bestows four qualities on them: Priority, Durability, Universality and Convertibility.

In our corporate law, it is particularly the convertibility of legal entities that has increased considerably over the past few years. Think, for example, of the possibilities of international establishment by means of cross-border mergers and demergers. European Court of Justice case law has been an important driver in this respect. The implementation of the EU Mobility Directive on 31

January 2023 will make it possible, at least within Europe, to enter into cross-border conversions, mergers and demergers to one’s heart’s content, both inbound and outbound.<sup>2</sup>

This increased convertibility comes together with the hugely increased flexibility of legal entities. Legal persons can be used for any possible activity, such as shielding assets or creating partnerships, the contribution of a whole business or of a single component thereof, local or international, commercial or idealistic. Especially the private limited company has become a *Jack of All Trades*, which requires a minimum of resources to be used in any way and for any purpose. As Katharina Pistor puts it poignantly: ‘*Corporate law has become up for grabs*’.

The idea behind this Capital Code function of the law is that, if everyone were free to use their assets as they see fit, not only individual wealth will increase but, through Adam Smith’s ‘invisible hand’, so will collective wealth. The problem, however, is that this mechanism does not work in a globalized market. In Adam Smith’s eighteenth-century Scotland, the advantages generated with the assets were invested nearly exclusively in their own country. Today, investments are made in a split second wherever in the world the best yield is expected. As a consequence, although global wealth has substantially increased since the 1980s, it is also vastly unequally distributed. A recent study shows that, what initially was referred to as an ‘Elephant Curve’, should, on reflection, be considered to be a ‘Loch Ness Monster Curve’: in 2008, approximately 1% of the world population earned over 40% of the global income!<sup>3</sup>

Of course, entering the globalized market takes the necessary specialized knowledge of the law. And that is where you and I come in: the lawyers, the notaries, and other service providers specializing in international property law, corporate law, and tax law. We are, in the words of Katharina Pistor, the ‘*Masters of the Capital Code*’. Needless to say, not everyone can afford our services. That brings me to the first ethical question:

*As corporate lawyers, aren’t we partly responsible for the vastly increasing unequal distribution of wealth and income in the world?*

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1 Katharina Pistor, *The Code of Capital. How the Law Creates Wealth and Inequality* (Princeton University Press 2019).

2 Directive (EU) 2019/2121, OJ EU 2019, L 321.

3 <https://strevetijdschrift.be/wereldwijde-ongelijkheid-olifantcurve-wordt-monster-loch-ness/>.

In his eloquent preliminary advice to the *Koninklijke Vereeniging 'Handelsrecht'* of last year, the Belgian professor Hans de Wulf paints an expressive picture of a *'high wave ( ... ) that, in 2019, broke on European and North American beaches'*.<sup>4</sup> He refers to the – *environmental, social and governmental* (ESG) – relevant themes as *'the new undercurrent in corporate law'*. Could we really give ESG a dogmatically and permanently important place in our time-honoured stakeholder model? De Wulf himself does not think so. But it should be noted that he is not very enthusiastic about that model anyway. He considers a broad detailing of the company interest and the corresponding expansion of the duties of directors as *'empty words and no action'*.

In this respect, it should be considered that De Wulf mainly comes to his conclusion because he does not wish to create any duties for directors that cannot be enforced by interested parties. He does have a point there. Imposing all kinds of ESG duties on directors is useful only if they can eventually be held accountable for those duties in court. Otherwise, it is a waste of time. In that respect, it will be interesting to see whether Article 25 of the recent Proposal for an EU Directive on Corporate Sustainability Due Diligence will make the cut. That provision creates a link between directors' duties and corporate sustainability.<sup>5</sup> It calls for enforcement instruments on Member State level for stakeholders without any capital assets, which brings me to the second ethical question:

*If corporate law does not answer to essential issues, such as the environment and human rights, what then is the relevance of our area of the law?*

In this regard, the pending appeal against the Shell climate judgment by the Hague District Court of 2021 is crucial not only to the further development of environmental law and the import of human rights, but also to that of corporate law.<sup>6</sup> According to some, the Shell judgment is pulling the rug out from under the traditional frame of reference of the (Dutch) company lawyer. But desperate times call for desperate measures. The law usually develops in fits and starts. New technologies and the globalization of trade present the law with new challenges. New insights may break within a single generation and, yes, that can sometimes lead to a break with the traditional way of thinking.

I also feel that it is a good thing for corporate law in the future not only to occupy itself with the *organization* of making a profit, but also with the *way* in which that profit is made. That is why I have also joined the 'Gang of Twenty-Five' Dutch professors of company law promoting a corporate purpose and a director's sustainability duty in the law.<sup>7</sup> In my view it is only a logical evolution of corporate law: from the raw individual pursuit of profit of the VOC in the seventeenth century, through its socialization in the 1970s, to combating excrescences in the global market by ESG today. Let's work towards that!<sup>8</sup>

4 H. de Wulf, *ESG en vennootschapsrecht: innig verbonden, maar ook duurzaam?*, in *Preadviezen van de Koninklijke Vereeniging 'Handelsrecht'* 2021, 29 (Uitgeverij Paris, Zutphen 2021).

5 Compare Federica Agostini & Michele Corgatelli, *Article 25 of the Proposal for a Directive on Corporate Sustainability Due Diligence: Enlightened Shareholders Value or Pluralist Approach?*, 19(4) Eur. Co. L. 92.

6 Compare my analysis of this subject in *Ondernemingsrecht* 2022/73, at 514, titled: *Een concernrechtelijke beschouwing naar aanleiding van het Shell-klimaatvonnis*.

7 Compare J. W. Winter et al., *Naar een zorgplicht voor bestuurders en commissarissen tot verantwoordelijke deelname aan het maatschappelijk verkeer*, *Ondernemingsrecht* 2020/86.

8 An orientation on China and 'the East', as P. F. van der Heijden advocates in *Oostenwind, of: van zacht recht naar harde handhaving*, *Ondernemingsrecht* 2021/2, seems to me the least appropriate way to do that.