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Promoting Social Responsibility: Change in Dominant Actors and Instruments?

1. Introduction

Before treating my subject, I have to confess one thing: I am not an addict to CSR. Presumably, the organizers of our meeting thought that a German left winger or a kind of social democrate would be in favour of this concept: Is it not the contemporary way of adding social aspects to the profit-oriented market economy? Has this not been always the aspiration of those who want to modify the existent society? Is this not the main point for the only left which is left?

In my view, Corporate Social Responsibility is before all a means of propaganda. Multinational enterprises improve their reputation in giving themselves a code of ethics or concluding even an international framework agreement with an international union federation. “We are the good guys” – the multinationals can tell to the consumers and to the politicians. “If you want to criticize excessive exploitation in developing countries, please contact some of our competitors or some other enterprises which will perhaps follow exclusively the shareholder value concept.”

Normally, the codes and the agreements contain more than the legally binding obligations. Ecological aspects are said to be observed, employees should be treated in a fair way. All kinds of discriminations are forbidden, working time is flexible in order to establish a work-life-balance. Health protection at the work

place is compulsory, measures of qualification are supported. Can anybody be opposed to such a concept?

Yes, we can (even without Obama). Good principles are only useful if they have a practical impact on the environment or the working conditions. But are there any mechanisms to control if reality is influenced by them? Only in some framework agreements you will find provisions about a monitoring system, but it would be absolutely exceptional if the committee entrusted with this task would be as independent as a panel of judges. Apart from this, there is no authority which defines what is really meant by the words of the code or the framework agreement. You will often find expressions like "encourage" a certain behaviour, or "try" to come to healthy working conditions – but who can really evaluate if these principles are fulfilled? And what do you understand exactly by fairness at the workplace? In contrast, hard law rules are in a certain way completed by judge-made law which makes them work – but there are no courts in the field of soft law rules whose vagueness remains unchanged.

2. Abolishing the "codes" and "agreements"?

Shall we put away the whole concept? I can mention two examples from the German experience which seem to give a positive answer to this question.

Sec. 65 of the law on joint stock companies provided that the board of directors has to take its decisions in the interest of the shareholders, in the interest of the employees and in the interest of the common good. That is nothing else than a short description of corporate social responsibility. In 1965, the law was amended; its new version did not repeat these words but the reason given in the Government´s report was that this pluralistic concept of the enterprise needed no special rule because it is commonly accepted. By this way, CSR is even part of

"hard law" in Germany. A foreign observer may ask if there are court decisions about cases of bad governance. In seven decades, there was not even one case in which a board of directors had neglected its legal duties in this field. The rule of law was followed without any exception, German managers are a very special kind of human beings. As the original law dates from 1937, apparently even the behaviour of German enterprises in foreign countries during the war could not be blamed. Everything is perfect – "what a bloody nonsense" would be the just commentary of a person who has preserved some common sense. Even in democratic times the courts acknowledge a huge margin of appreciation to the board of directors. Whatever their decisions may be – board members, observers and judges will always find a sufficient reason why they had to pay special attention to the needs of the capital market. There is no legal responsibility even in cases in which the profitability of the enterprise is questioned. The crisis of the banking sector shows it with sufficient clarity. If a decision maker puts at risk 10, 50 or 500 billions of dollars the bank may get bankrupt or the state must intervene and pay the debts in order to save the whole system, but there is no illegality in destroying even huge sums of money and indirectly of public goods. Only in cases in which individual profit is pursued penal law may be applicable. As long as enterprises act in the framework of the market, they remain the real sovereign power of our days. Since the French Revolution, "princeps legibus solutus" has seemed to be an outdated principle but is it really true? The problem is that we will not find any funds for a research dealing with the extreme power of enterprises and their possible restrictions. I come back to my subject: Even as part of corporation law, CSR does not really influence the behaviour of enterprises.

My second example comes from the German Basic Law, our Constitution. Its section 14 guarantees the right of property and specifies it in its second paragraph: "Property entails obligations. Its use shall also serve the public

good." The word "property" comprises all kinds of assets– shares as well as the goods owned by the company. Our constitution has a high authority in our political system. There is nearly no important question where constitutional aspects do not play a considerable role. In most of the cases, the definite decision is not taken by Parliament but by the Constitutional Court. To quote some recent examples: If the German army can act as we say "out of area" e. g. in Afghanistan, if a homosexual couple can form a kind of marriage or if smoking can be prohibited in restaurants – all these cases have been discussed broadly and then decided by the Constitutional Court. But what about Section 14 § 2 of the Basic Law? It is evoked from time to time by trade union leaders if they ask for more codetermination or – more realistically - if the try to defend the existing form of codetermination. You will find no decisions of the Constitutional Court restricting the freedom of the enterprise referring to this provision. It is no efficient rule in the sense that it really influences the behaviour of citizens. Corporate Social Responsibility transformed into Constitutional Law – Sec. 14 § 2 can be seen in this way but the results are as deceiving as in the field of company law.

3. Explaining the good image of CSR

For me, the two examples seem a sufficient reason not to spend too much time with such a subject. But why do so many colleagues concentrate on the topic? Especially people who have read Marx and Engels at least in former times, people who are normally devoted to the interests of the workers and not to the interests of capital? You may explain it by a lack of concepts in Europe after the end of the Soviet Union and the fall of socialist governments in Eastern Europe. You may explain it by a very defensive position which tries to deal with subjects acceptable to the other side – legal scholars are unlike Teun Jaspers normally not characterized by a lot of courage or non-conformism. One has to be

respected by the colleagues and by the authorities – would it not be better to deal with CSR instead of studying state restrictions on market economy in China and Vietnam or even ask for "economic democracy"? Last year, I participated in a conference in Montevideo entitled: "Labour law in the era after neoliberalism" (Derecho del Trabajo después del neoliberalismo). It would hardly be conceivable to organize a comparable conference in Europe; it would sound like a provocation far from reality. But we are living in one world and it could be useful to concentrate a little bit more on Chávez than on Sarkozy despite the peculiarities that characterize both persons.

Lack of concepts and the fear of being considered "unreliable" cannot explain completely the interest, even the enthusiasm of certain persons who deal with the subject of CSR. There are at least some cases in which it may be useful to refer to CSR in fighting against social injustice.

Codes of conduct and framework agreements apply to multinational enterprises with subsidiaries in developing countries. It may happen that working conditions are so bad that the contradiction to the principles of CSR is obvious for everybody. If 40 % of the employees fall ill, health protection is insufficient, if all union members are dismissed there will be some discrimination; if the minimum wage of the host country is not paid that can be explained clearly, too. As far as I know, it is not very probable that subsidiaries of European firms in Bangla Desh or in Sri Lanka act in this way. The problem are the subcontractors – enterprises of the country which seem to escape to the control of the multinational company. Their inclusion is, therefore, of high importance but rarely realized. It would be wrong to stop at this point leaving the enterprises of the host country in the role of the bad guys. In reality they are no capitalists of a less moral kind. Mostly, the multinationals dictate the prices in a way that there is no other alternative for the subcontractors than utmost exploitation.

If in a concrete case, the code or the framework agreement has been violated, there is no legal sanction. Soft law is not compulsory. Even if health and safety or economic rights are neglected it will be difficult to go to national authorities and courts. They do not function in a way that guarantees relief in a reasonable time. Damaged workers have tried to sue multinationals in the US but normally without success. In Europe, such a project would perhaps have better chances, but until now nobody has seriously tried it.

The sanction is in some cases a social one. If the multinational produces goods which are sold directly to the consumer, public opinion plays an important role. Food and textile industry would suffer a lot if press and television would report about inhumane conditions in their foreign subsidiaries. Nobody would like to wear a T-shirt produced by slaves or buy a carpet produced by children. The profit increases by giving bad conditions in developing countries but the profit would go much more down by a bad publicity in industrialised countries. So you can call it a well conceived policy if multinational enterprises accept a code and control if there are obvious violations within the own group of enterprises. The prevention of obvious violations of elementary rights and interests may be called a success – viewed from a position of extreme weakness. It can be compared with some steps made in Europe in the nineteenth century: To reduce daily working time from 12 to 11 hours was a similar kind of (considerable) progress.

4. Promoting Corporate Social Responsibility?

You may be very happy that we finally found a field where CSR can be of some help. But before reaching this goal there are important conditions to be fulfilled.

The image on the market is important only for certain enterprises. The sale of military equipment or steel constructions is not affected if newspapers write about disgusting conditions in their foreign subsidiaries: The clients of those enterprises do not attach importance to such things. We must therefore concentrate on firms being near to consumers.

The information of what happens in other countries is quite difficult to get. The foreign management will invite journalists only if nothing can be criticized. If there is something to be hidden, they will do everything to prevent people from coming. Workers are anxious to speak about their conditions because they may risk dismissal or even worse sanctions. One needs a minimum of organisation and social experience before giving infomation to persons coming from outside.

Even if some information is available, there will often be a divergent view given by the management. Nobody knows exactly who is right and who is wrong – for a journalist the news becomes irrelevant. Readers want to have clear facts – not a pure suspicion which may be wrong or misleading. Controversial facts are interesting for the courts but not for the Times.

Even clear facts are not always transferred into newspapers or broadcasted by television. At least the German media are very much concentrated on Europe and the United States. What happens in China or Latin America is much less important – if they are mentioned bad news are prevailing: Restrictions to go to the internet in China, disorder in Bolivia, lack of freedom in Myanmar. Let aside really extreme cases (which will nearly never happen) the behaviour of German enterprises will not be part of those bad news.

How can we overcome these obstacles? International unions can play a certain role in transferring information to those who can distribute them in industrialized countries. But other NGOs like attac or Greenpeace seem to be more important in this context. They may be more flexible and without any need to take into account some interests of capital in order not to breach compromises which have been reached in the past.

NGOs and public opinion as new actors in industrial relations? Yes, but in a very small field with very limited possibilities.

5. Alternatives?

To establish rules for the behaviour of an enterprise is a way to fight extreme injustice. It is insufficient if we want to include stakeholders´ interests into the decision-making process. A more effective way is conceivable.

Firstly, one can change the decision-makers and replace them by other persons. This was the approach of the German co-determination after the Second World War. Originally, the supervisory board of companies in the mining and steel sectors had a kind of tri-partite composition: Four representatives of labour and four representatives of capital had to find two persons representing public interests and one “neutral” who was not involved in possible conflicts. Afterwards this model was transformed in a way that each side got five “seats” and had to agree about the so-called eleventh person. The supervisory board elects the board of directors which is responsible for the management of the enterprise. This can give place to decisions which are not dominated by profit interests but represent compromises between divergent interests.

In practice, the model did never reach its goal. The workers´ representatives could not find a sufficient number of managers to be on their side – they were satisfied to elect the human resources manager whereas the capital elected de facto all other members of the board of directors. Secondly, the model was implanted into a market economy where all other enterprises had a traditional structure – to follow different principles was at least difficult if not impossible. Thirdly, mines and steel industry were branches in crisis ten or fifteen years after the establishment of the system - no good condition for promoting a better politics of the enterprises.

The second way is a quite traditional one: if certain interests are neglected, there will be a lack of necessary cooperation. The strike is the best-known instrument to correct a behaviour which is unacceptable for workers. Other stakeholders can use other means – shareholders and banks do not need a special legal protection, they can use their economic freedom. The public interest comprising ecological questions must be realized by law and other government action which may reflect the desires existing in the population. Consumers are protected by a special set of rules and by their power to buy or not to buy a certain product. All these interests and their legal and social protection constitute a framework enterprises have to recognize and to observe. The result may be called “social responsibility” but it is more than a moral appeal. It will be an urgent necessity for enterprises to take into account all interests which are touched by their politics. To organize these interests in a national framework and in the global world will be the big task in the future.