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CORPORATE RESPONSIBILITY AS A PROBLEM OF COMPANY CONSTITUTION

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"Corporate Responsibility" as a Problem of Company Constitution*

I

In the Federal Republic of Germany the theme of co-determination has dominated debate on company constitutions to such an extent that approaches and potential solutions under both heads almost blend into each other. This has apparent advantages. The academic debate on models of company constitution has clearly gained in realism, dynamism and depth (1) from the successful institutionalization of co-determination, viewed internationally as German corporate law's most important contribution (2). At the same time, the risks of such a blending of concepts are becoming apparent. If company constitution becomes totally embedded in the conceptual approach of co-determination, then important dimensions of the problem risk being submerged. Typical of this is the "Report of the Company Law Commission", in which structural problems of economic organization are reduced to interests of interested interest groups (3). As against this background, it would seem important - and this is the thesis of the considerations set out below - to free the law of company constitutions from the narrow perspective of co-determination, and

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systematically orient it towards the concept of social responsibility of economic enterprises. With this in view it seems useful to compare the debate on "corporate responsibility" , carried on mainly in the USA, with the German discussion on company constitutions. Such a confrontation can be expected to yield mutual enrichment. While interesting results of the debate on "corporate responsibility" can be found (4), their relation to organizational structures remains largely unclarified. On the other hand, the shortcoming of the company constitution debate lies in its leaving in the dark the importance of the central concept of the firm's relationship to society, though it does call for this. Whether "corporate responsibility" can throw any light on this darkness must be investigated, and the question of its implications for company constitution should be posed.

Why is the co-determination perspective too narrow? It is at any rate too narrow when it is underpinned by a concept of economic democracy that aims primarily at the individual participation of those concerned. But this treatment of the co-determination idea in terms of the individual is widespread (5). In a number of variants co-determination is interpreted as compensation for social domination. Individual participation by workers - admittedly mediated through complicated representation

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mechanisms - is supposed to promote the worker's human dignity, humanize the world of work, control managerial domination and also extend the realization of the democratic principle of participation in decision-making to corporate enterprises. Indubitably individual democratic participation and humanization of the world of work constitute social policy goals of the highest rank. But there can certainly be no doubt as to whether the function of institutionalized co-determination has really been grasped thereby. This is even more true for the concept of company contitutions. It is just not enough to confine oneself here to the internal perspective of the firm and its members. This perspective entirely overlooks the social function of the corporate organization, which should be the first thing a legal corporate constitution should concern itself with. Putting it quite bluntly, a corporate enterprise is not an institution of self-service and self-realization for either shareholders or workers, but has a social task to fulfill.

One cannot break out of this over-narrow perspective even by being more ambitious and basing co-determination and company constitutions on the theory of the social association and its further developments in organization theory (6). To be sure, objections to cross-fertilizing company constitution law with the sociology of

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organizations or business administration cannot be based on the assumption that normative conclusions might be drawn from presumably empirical observations - a criticism repeatedly made (7). On this point the representatives of the organization sociology approach are much more reflective, even if they sometimes express themselves incomprehensibly, than their legal critics are prepared to accept (8). On the contrary they have the specific merit of having drawn attention to a normative problem not brought out sufficiently by the classical ownership model: the mediation of social demands on economic action through organization. But the real problem with organization sociology lies elsewhere, namely in its lack of relationship to society at large (9). The limitation to internal aspects of organization sociology excludes to develop society-oriented criteria for the distribution of internal property rights. It is true, that to a certain degree organization sociology does reflect the organization's relationship to the environment, via the concept of organizational goal (10). But since this still symbolizes only the internal view of the environment it ultimately cannot lead beyond the internal perspective. It is the historic merit of the followers of organization theory to have consciously questionned the legitimacy of the company law membership concept. But their contribution has been limited in that it only inadequately raises the problem of an

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organizatons's relationship to society. Hence the legal discussion should not give up grapping with organization theory, but instead intensify its activity while simultaneously seeking the analytical means for developing systematically the societal relation of firms (11).

Another inadequate analogy drawn from the co-determination discussion is that whereby membership in a firm is oriented towards the resources contributed. The resource approach is presented in two versions, one analytical and one normative. In the analytical version, it is only membership in the firm that is defined, according to which actors, in contrast to mere partners to an exchange, have "pooled" resources in the firm (providers of capital, managers, employees). Questions that then appear matters of company constitution are arrangements for aspects of command and of distribution, dealing with the members as resource contributors (12). It is obviously that this approach is even conceptually confined to the internal perspective. The only thing that appears as a social function of the firm is the placing in common of individual resources and the problems that result. Functions for the company constitution that relate to the economic system or to society as a whole remain obscured.

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The second, normative version relates resource contribution not merely to membership but largely also to the possession of control rights in the firm (13). How control rights are distributed within the organization is to be determined by what groups of people have contributed resources to the enterprise. The classical model is, of course, private property: he who pays, acquires. This justification pattern has however since been taken up by the trade union movement and transferred to the resource of labour: labour creates, if not ownership, then at least co-determination. The equal rights of capital and labour in the distribution of control rights in the firm are supposed to be justified on the basis that the factors of labour and capital make equivalent contributions to the firm's success. On this argument, of course, the factor of "disposition" can also secure its legitimate share in control rights.

The connection between resource and control rights is thereby generalized by comparison with the ideas of property law (ownership of things, capital). But its legitimation nevertheless remains questionable. Just as it is hard to see "why control functions in the economic process should be heritable within families and be bound up with the accumulation of fast cars and beautiful women, fine houses and yachts" (14), it is equally hard

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to see why the contribution of labour (which is after all paid) should legitimate the exercise of control rights of importance to society as a whole. What justifies the making of production decisions dependent on the needs only of the resource contributors - capital owners, workers, managers? The link between resource and control, so successfully critized by the co-determination movement, and weakened as it already was by the familiar trend to separate ownership from control, is in a new way reestablished by that movement itself. The discussion on company constitutions should now absolutely free itself from this bracketing together. From the viewpoint of legal policy, it is precisely the opposite that seems necessary: The de-coupling of resource ownership and privileged control rights (15). The distribution of control rights within the firm should be oriented primarily towards the social functions of the firms, and not to which resources are contributed by which groups of people. More abstractly, "distribution and production planning must be made variable against each other independently of specific interest linkages and thereby rationalized" (16). What is worth retaining from one control model of private ownership is, certainly , the machinery it contains for rewarding success. With a de-coupling of resource ownership from control rights, functional equivalents for the historically rather successful unification of motivation, risk and yield will have to be sought for.

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It is precisely when one abandons the idea that control rights in the firm must unconditionally be a consequence of "corporate property" that one will be compelled to learn a lesson from private ownership, that of the effective linkage of decision-making powers with the bearing of the consequences, as an incentive and control principle (17).

While, then, the debate on the company constitution ought to free itself of many elements of the co-determination debate as it mostly treats control problems onesidedly on the internal or resource perspective, the latter does nevertheless provide a variety of starting points. This is true particularly of the so-called pluralist approach as a legitimation of co-determination (18). This deduces company constitution structures from the requirements placed by differing social interests and interest groups on the economic enterprise. In the pluralist approach the internal perspective has already been left behind: What interests in society (and not only in the organization) should legitimately affect the structure of the organization? The link between resources and control is broken: It is not the contribution of a resource that decides on co-determination rights, but society's interest in the firm's success. To be sure , this problem remains subject to the lasting problem of all

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pluralist theories. It stresses the multiplicity of social interests, without offering theoretically based criteria for normatively distinct interests (18a). It therefore runs the risk of abandoning the shaping of the company constitution to the mercy of the constantly changing resultant of the power constellations between social interest groups. This is a temptation that a legal discussion aware of its jurisprudential task, should not yield to: that of providing legal foundations for the power claims of interest groups in terms of political or constitutional arguments. A pluralist approach thus frees company law from onesided interest ties, but at the same time creates new problems of orientation. Clearly the pluralist approach needs leadership from a theory that poses the legitimate social function of the firm at the centre and which thereby chooses legitimate social interests in the control of the firm from among the multiplicity of interests (19). The question then arises, whether the theory of "corporate responsibility" is capable of this. There are important questions to ask of this theoretical tradition, presented here through two representative authors. What contribution does the concept of social responsibility make to clarifying the legitimate goals of a universal company constitution? What legal instruments are capable of enhancing the social responsibility of economic enterprises?

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II

"The social responsibility of firms" is central to the analysis of the Swiss economist Peter Ulrich, who has developed a critique of the concept into a theory of the big corporation as a semi-public institution. Consistently, Ulrich orients his investigation from the outward social function of the corporation, thereby freeing himself simultaneously from the perspective criticized above, of internal democratization, from the theory of the social association, from the resource approach and from the view oriented only towards group interests . This becomes clear even in the expansive exposition of his theoretical premises, which compels him to cut a swather through the "grand theories" of political science i.e. concepts of democracy, crisis and control (19a). But especially in the last part of his work which is what primarily concerns us here, he develops, from a societally oriented standpoint, an original conception of the quasi-public corporation, giving suggestions for its legal realisation (20).

Even in the introductory description of the liberal idea of legitimation of the firm, by contrast with individual centred interpretation it is the social relevance of the corporate structure that is stressed (21). The primary

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justification of classical liberal single-interest corporate structures lies according to this not only in the link with the intentions of the capital owners, but primarily in the functional orientation towards welfare of the people and the general interest (Adam Smith). The classical "democratic legitimation" through corporate constitution and private ownership finds real support only through the "functional legitimation", namely the relationship to functions of allocation and growth. Accordingly Ulrich does not simply confine criticism of the liberal model to the constitutional reality of the corporation, which he characterizes by the personal subdivisions of the identity in the model between risk, control and profit. Instead, he stresses, as against this "internal deficit of democracy" the importance of the "functional deficit of legitimation". The foreground of his criticism of the liberal model of the firm is therefore occupied not by aspects internal to the organization but by the whole "constitutional reality of the economic system." The current problems of the latter are sketched out by Ulrich in four dimensions: producer sovereignty, politicization of the private firm, deficits in the allocation and distribution performance of the economic system (22).

Hence the classical model and present day reality, in terms of the social function of the firm are

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counterposed. Thus, course for further discussion has been set. Normative proposals for the company constitution would then have to be developed by overcoming this discrepancy. They cannot content themselves with calling for internal democracy within the organization for the members, nor for a strengthened legal protection for interest groups, whether internal or external. The company constitution should instead be oriented much more towards "societal criteria": "allocation function in the national economy, employment function, yield and income function for workers, capital providers and state, ecological effects, socio-cultural effects on those working in the firm and on the environment etc." (23).

Ulrich's specific company constitution proposals are clearly oriented towards this external perspective of the firm. He sees the function of a pluralist company constitution as being that it "institutionally internalizes in management's mandate interests, motivations and goals previously seen as external interests" (25). He pleads for a four-bench-system (capital, management, workers, public) which should be set up directly within the management organ (board system) and not merely in a body for representation of interest and of supervision (supervisory board system) (26). The external societal reference become clearest

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in the representation of the so-called public. According to Ulrich, special commisssions formed jointly by economic, social environmental and consumer protection agencies, should send public representatives to the board. They would have two functions: (1) internalization of societal effects in the decision-making criteria of the board, (2) function as linkpins between governmental economic policy agencies and the individual firm. The trade union presence is likewise justified essentially by external functions, namely by the coordination between divergent employee interests (27). Correspondingly, ideas of individual democratic participation appear only secondarily - as "complementary concepts of basic democracy", with which a company constitution must be compatible, but which do not represent the primary function (28).

Up to this point Ulrich is remarkable for the consistency with which he conceives the company constitution on the basis of its social function. Thereafter, however, the chain of thought breaks off rather abruptly. After Ulrich has worked out the outlines of a societally related, pluralist company constitution, he suddenly turns to various mechanisms of governmental economic control, which should have the actual task of securing the social function (29). Ulrich now stresses governmental economic control, the

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functions of which he sees in coordination, the setting of priorities, the internalization of social decisions and control over the activities of firms (30). For this purpose, indirect means of macro-political control of investment (guidance taxes), and direct means of micro-political investment control (orders, prohibitions, permit procedures) should be introduced (31). The company constitution as such then appears only as more or less a means to an end. Its internal pluralist structure is only a condition for the effectiveness of a societally related external political control (32).

The point to criticize here is not the attempt to secure the mutual alignment of the organizational constitution of firms and the economic policy of the state. Any well-considered conception of economic constitution would have to do so. But there must be objection to - or better regret at - the premature termination of the intellectual effort at orienting precisely the internal order of the firm towards the social task of the enterprise. The implicit undervaluation of the overtures made towards a societally related company constitution results almost inevitably in an overvaluation of state economic control. This leads Ulrich's thinking back along to traditional lines, not to say up a blind alley. For while he identifies the

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"knotty problem of selecting criteria for the necessity of intervention and the direction of guidance" as the crux of state economic control, he offers only a faute de mieux solution, a "cautious, learning-oriented political procedure" by the external political control bodies (33).

Ulrich's intellectual approach should therefore be retained at the expense of his implementation. For the approach in fact offers the possibility of avoiding the overstrain that becomes very clear in Ulrich on governmental control capacities, with tasks of economic guidance definition of the political function of enterprises, and specific and detailed regulation of obligations by pulling back the governmental control into more abstract, indirect forms of influence. Ulrich's approach would have to be thought out further in this direction: the company constitution as the constitution of an autonomous , learning-capable social system, the general structures, but not the practical results of which are societally defined.

Following up the question of the cause of this discrepancy between approach and implementation , one very quickly comes upon the concept of the "social responsibility" of enterprises (34). Ulrich reports in

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detail the debate on "corporate responsibility", but in such a way as to leave unexploited the chances of actually integrating social responsibility and company constitution with each other. He sketches out the arguments that have been developed in the various dsciplines in favour of the concept of corporate responsibility. Economically, the aim is long-term stabilization of the firm as against short-term profitability, and simultaneously the securing of social framework conditions for economic activities. Politically, the point is the firm's reaction to the rising pressure of interest groups to secure such a minimum level of social responsibility, which ultimately is the only thing that enables and ensures the autonomy of economic decisions. Legally ,the aim is to concretize general-clause conceptions of social responsibility into operational obligations and implementing machinery. Nevertheless, in Ulrich the whole thing comes down to a remarkably narrow version of the concept of corporate responsibility. It appears as a "morally motivated freewill responsibility of businessmen and managers" (35). Ulrich is thereby formulating the problem as if the growing politicization of economic enterprises, and hence the increase in their power of decision and of influence, can be compensated through an increased moralization of economic activity. Corporate responsibility would then mean that undesired social effects of private economic activity could be

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prevented by individual moral endeavour on the part of those responsible.

Criticising such a concept is hardly difficult. The impotence of morality as a control mechanism in the face of imperatives of economic rationality is no new insight (36). Ulrich finds it then relatively simple to show the peculiarly unrealistic, ideological aspects of a morally charged corporate responsibility (37). The wish to build upon individual decisions through the consciousness of managers acting in a statesmanlike manner to control societal structural effects is rightly criticized by him as economically inefficient, politically elitist and legally uncontrollable. But with this morally-based conceptual scheme Ulrich has manoeuvred the issue into a rather unfruitful situation of decision between morals or law. Thus, if the question is: "Should the undesired social effects of private economic activity be internalized in economic decisions through morally motivated voluntary responsibility on the part of businessmen and managers, or through legal responsibilities?" (38), then the answer can obviously only be through the law. It then also seems plausible that the fulfillment of the social tasks of the firm can primarily be ensured only by governmental measures. Then, however, the three elements of his theory of the quasi-public enterprise -

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company constitution, economic control by government and social responsibility - can no longer be truly integrated, but only put - as Ulrich does - additively in a tripartite concept (39). While governmental economic control is to provide the primary definition of functions, pluralist company constitution and legally regulated responsibility act only secondarily, as support mechanisms. Corporate responsibility then appears subordinately as a professional attitude of the managers (professional ethics) (40).

The alternative to this ill conceived choice between morals and law would however be to ask the following question: Is it possible to enhance the potential of decentralized self-control by legal structural provisions? Can one conceive of external control via internal self-regulation that would relieve governmental control of the burden of substantive regulation and internalize social responsibilities into the decision-making structures of economic enterprises (41)? Here one does not need to make a choice between morals and law, but instead to utilize the law to compel firms to take account of the social consequences of their actions. Such a formulation of the problem would in fact lead to confronting functional problems of social responsibility primarily with structural solutions, through the company constitution.

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III

Under the provocative title "Where the law ends", Christopher Stone has directed a study towards precisely these questions (42). Where the law ends, namely with legal bureaucratic control of economic activity on behalf of society, is where the realm of corporate responsibility should begin. But this is no longer to be understood as voluntary submission to a morality of enterprise, but on the contrary as a legally grounded social obligation to limit certain economic possibilities in the interest of society. Accordingly, the title might equally well have read "Where the law begins", namely with the hard task of social control of self-regulation within organizations.

In parallel with Ulrich, Stone takes the first step in his thinking with the theory of market-failures (43). He sketches out the essential arguments concerning the limits of the market's control capacities. But right from the next step in the argument, the difference becomes clear. While Ulrich recommends, as compensatory measures, political control of the economy and external legal regulation of company responsibility, which are only to be ensured by an internal pluralist company constitution, Stone counters with "politics-failure" and

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"law-failure": "Why the Law Can't Do It" (44). In this Stone systematically pursues the structural deficits of interventionist legal control of economic activity : the unavoidable time lag of the law, which allows only reaction after the fact, the selectivity of the legislative process, information deficits, consensus difficulties, the difficulties of legal purposive programs, the limits of negative sanctions by comparison with positive means of motivation, and the implementation difficulties of the "regulatory agencies". Both, the "market-failures" and the "law-failures" taken together lead Stone to a concept of corporate responsibility clearly distinct on the one hand from the philosophy of managerialism and on the other from the sheer internal implementation of external laws (45). He relies not on moral appeals but instead on the compulsion of the state law. Nor should law be used for directly regulating economic activity, according to the model of the regulatory agencies, but instead for indirectly controlling internal organization structures through external regulation. The function of the law is then not as for Ulrich the external control of the firm's conduct, but external mobilization of internal self-control resources. For this, to be sure, a new approach is needed : "The society shall have to locate certain specific and critical organizational variables, and where feasible, reach into the corporation to arrange them as it itself deems

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appropriate" (46). By contrast with the result-oriented interventions of the regulatory agencies, there is here only process-oriented control: the legal system now concentrates on the regulation of essential decision-making processes of the firm itself.

What legal instruments does Stone propose to create the structural conditions for a "corporate conscience?" He suggests a concept of company constitution in the broadest sense, which is now, however, oriented primarily towards the goal of social responsibility (47). Stone puts forward a number of company constitution proposals, going from the distribution of control rights on the board and among management, via the reestablishment of powers for so-called public directorships to the changing of information channels in the firm and the reorganization of decision-making processes.

He begins with relatively modest proposals for reforming the board of directors. They are aimed at enhancing its sensitivity to social consequences by measures aimed at insuring that relevant information reaches the appropriate point of decision (48). As well as questions of the composition of the control body (inside or outside directors) and of the financial interests of

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directors, this includes the proposal for a compulsory exhaustive and clear description of the directors' functions ("formal job description"), along with liability arrangements precisely related to it. Further aspects are the finishing of a bureaucratic staff for the control body and the guaranteeing of an adequate flow of information to the board.

While measures of this kind are certainly capable of enhancing the board's control activity, particularly by the combination of job description and liability arrangements, they nevertheless do not reach the really sore point of a direct conflict between organization and society. Here Stone comes up with proposals for much more throughgoing reform. He recommends the legal institutionalization of new types of control and decision-making power: general public directorships and special public directorships (49).

For firms above a particular size, a definite percentage of seats on the board should be occupied by public directors. This percentage should, moreover, rise with increasing size of firm. They should be appointed by an independent commission (the Securities and Exchange Commission or a Federal Corporations Commission, to be created). Generous pay and adequate staffing should

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guarantee that they can exercise the following functions: (1) "Super-Ego-Function": reflecting the social consequences of economic activity, (2) "Legal Audits": the supervision of programme that control the implementation of state laws within the firm , (3) Link with legislation: proposals for laws and for economic standards, (4) Efficiency control over important internal systems, (5) "Hot-line-function": collecting station for critical information from the corporate area, (6) "Impact Studies": the gathering of information on the effects on society of the corporate product, (7) Information flow between firm and environment, (8) Verifying the representation structure of the firm's management, (9) Identification with the long term interests of the firm.

The problems with such a proposal to embrace the complex, multi-dimensional "public interest" in an economic enterprise "administered" by one single bureaucratic organ within the organization, even one with very great power and information, are seen by Stone himself (50). He seeks to deal with them through a well-tried organizational ploy - internal differentiation and specialization. For those social areas where economic activity creates chronic problems - such as technological innovation, product security, environment pollution, international relations -

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independent experts should be employed as "special public directors" . This should in any case be done when two critical situations arise. Firstly, in the case of repeated infractions of the law, if there are indications that internal organizational structures systematically produce legal irregularities that evidently cannot be removed by external sanctions. Secondly, in the case of typical industrial problems (e.g. health risks in the asbestos industry) that call for constant expert supervision. As in European experiments with the role of the worker director or of a data protection expert (51), Stone stresses the dual function of such a position within the organization. He relies on a "stroke of genius of modern social systems", namely the deliberate use of intra-role-conflicts by means of the law (52). Protection of external interests is to be combined with internal power and information. Stone seeks to solve the problems arising with this - the limits of the role conflict and resistance within the firm - essentially by providing the special public director with a maximum of information and power thus placing him as high as possible in the corporate hierarchy.

Follow up proposals of Stone are aimed at influencing corporate structures even below the top management level in a direction of increased social responsibility (53).

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On the basis of his ideas, it should be possible, through legislation, court decision or administrative act of regulatory agencies, to make obligatory, at various levels of the hierarchy of the firm's organization, either the setting-up of different programmes of action or the creation of internal control powers for particular social problems. These would have to be combined with clear assignments of functions and effective liability sanctions. Stone is building here on various experiments in American law where - mostly in connection with court settlements - economic enterprises had to set up internal decision-making and control procedures, or accept the sending-in of a supervisory expert. Further proposals aim at the compulsory creation of internal information systems (54). Here Stone relies on the control efficiency of publicity which he would like to see put to service of a variety of social interests. Finally, Stone goes on to develop ideas on the external restructuring of decision-making processes internal to the firm (55). These concern the choice of hierarchy levels at which particular critical decisions have to be taken compulsorily, or would require a qualitative majority within a collective body for certain decisions, and further the need to involve outside interests (workers, local councils, interests groups) in particular decisions, and finally particular reporting duties on the firm in relation to severe social problems (environmental impact, technology

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assessment).

IV

What can be gained from all this for the debate on company constitutions? How can the concept of corporate responsibility, selectively presented here on the basis of two approaches, contribute to throwing light on the goals of company constitutions and to developing legal regulations for them? As we saw, the strength of Ulrich's analysis was at the level of goals, while at the level of means he did not essentially go beyond existing proposals. Precisely the opposite is true of Stone. While his structural proposals to enhance corporate conscience are capable of considerably advancing discussion at the level of means, his ideas at the level of goals remain remarkably vague and indefinite. Are convergences possible here? And in what direction should both approaches then be rethought?

The legal imaginativeness which with Stone develops his structural proposals on a wide basis of material is impressive (56). If one abstracts a little from his specific proposals and pays attention to the foundations, it becomes clear in what directions they

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lead beyond the existing debate and how they have might stimulate legal policy thinking.

One of the directions is specification. While the German debate on company constitutions essentially concentrates on the representation of a general "public interest" on the boards (government representatives, co-opted public figures), Stone's proposals aim at specific machinery for solving specific problems. The proposals to concentrate the powers of one special public director on dealing with environment problems is only one example for the general approach : the identification of a particular social problem and the creation of a solution mechanism precisely designed for the purpose with specific powers, decision-making procedures and standards of liability.

A second direction is the inclusion of the whole corporate structure. While the German debate essentially turns on interest representation on the supervisory board, Stone's ideas suggest that all corporate bodies and hierarchy levels should be taken into consideration, paying attention, not only to participatory rights, but at the same time to decision-making procedures, liability standards and information provisions (57).

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The third and perhaps most important direction may be called the generalization of company law mechanisms. The point here is to examine the whole historically developed machinery of interest protection in company law to see whether it can be generalized in the direction of broader social requirements. Participation in decisions, responsibility standards, liability arrangements, control procedures, right to sue court procedures, should be rethought to see whether and to what extent they can be made use of to promote the social responsibility of economic enterprise. To be sure, one has to be aware of cummulative effects caused by this strategy of generalization. A comprehensive utilization of control mechanisms would not make sense, rather, a strategical move to neuralgic areas of "organization-failures".

It is from the aspect of generalization that admittedly the most critical issue is raised: generalization in relation to which social demands? Here lie the unsolved theoretical problems that we already identified as the central problem of all pluralist approaches. In good American tradition Stone sidesteps the problems very ably, through pragmatism. He works with specific historical experiences and can base himself on individual cases of problem areas where there is consensus that there is a social problem, to develop

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solutions for them: environment protection, safety standards, product quality, white collar criminality. But is this enough?

In this connection, again, Ulrich's approach seems to lead further. He begins right where Christopher Stone ends, namely with the demand to develop "societal criteria". Even if Ulrich is overready to have recourse to state coordination and economic control, the consistent societal basis of his concept of company constitution should nevertheless be taken up and further thought out. The only question is how?

The suggestion will be made here, to try in future to use systems theory (58). If it is true that Ulrich has very promisingly analyzed the external functional orientation of the company constitution, but left his statements on internal structure in an unsatisfactory state, and if it is also true that by contrast Stone develops interesting structural proposals but remains vague and indefinite in functional statements, then systems theory has a chance. For its strength consists precisely in analyzing the internal structures of systems (here economic enterprises) in relation to their external environment performance and functions (59). What such an attempt might look like, I shall attempt to

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sketch in conclusion.

V

From a systems theory viewpoint an environment/system approach would seem consequent, if it converts the demands of the social environment into structures internal to the organization, notably also into company constitution law. A theory of the company constitution would then have to be placed in the context of the so-called contingency theory of the organization (60). The special feature of this theory is that it consequently leaves behind the internal perspective of the organization and instead sees the organization's internal structures, including company law, as dependent on the organization's environments. The term "contingency" (conditionality, dependency in particular situations, also uncertainty) is intended to indicate that there is no " best way to organize in all situations", but that it is only a differentiation of organizational structure according to the differing functions in the environment that can yield adequate solutions. The theory has considerably proved itself in empirical studies of industrial organizations (61). It appeared in two versions. The analytical version allowed the formulation of hypotheses on empirically

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discoverable connections between external functions and internal structures; the practice-oriented version arrived at normative statements on structural recommendations and innovations. This second version becomes interesting from the viewpoint of company constitution law if one stands aside from the viewpoint of the organization's management, in which works management theory, and goes over towards a societal perspective of the firm (62). Hence the point here is not to develop suitable strategies for environmentally appropriate internal differentiation and management styles, but to design general legal patterns that can provide the normative framework for environmentally adequate conduct on the part of economic enterprises.

To be sure, the question arises here too of theoretical guidance for the choice between different social approaches. (1) What demands should be selected as legitimate? (2) Which out of this narrower circle of legitimate social demands should then be transposed within organization and given legal form? From the legal standpoint Wiedemann gives a very remarkable systems oriented reduction of social structures to the demands of differing partial markets (62a). This can be used as a starting point. In a broader perspective, Krause has developed a consistent model of a market- and consumer-oriented company constitution which translates

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consumer needs via market mechanisms into organizational goals and these in term via organizational mechanisms into individual economic acts (63). According to this, the function of the company constitution would be to sensitize the organization, through internal arrangements of corporate control rights , optimally to market-mediated consumer needs. The critical point of both approaches, however, lies in their normative restriction to the market and consumer perspective. Is the function of the economy adequately summed up by the satisfaction of material consumer needs ? Should social requirements on the economy, or on individual firms, not be formulated more widely? An easy way out might of course lie in differentiating between primary and secondary functions , whereby all non-market or non-consumer oriented demands might be assigned to the secondary level.

The dual orientation of the concept of the firm introduced by Th. Raiser might be of assistance here (64). On this, the "higher goal" of the firm can be defined either on its own viewpoint and from the perspective of the shareholders, managers, and employees, or on the viewpoint of the whole economy, namely of its contribution to increasing the social product and the national prosperity. It is alleged to be a politically relevant difference whether the law, in

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shaping the company constitution, places in the foreground the benefits for those taking part in the enterprise or for the consumers of its products. A legal concept of the firm ought to range these two goals side by side. It would then be left to economic policy decisions as to which aspect should ultimately be brought into the foreground.

Such a formulation of the legal concept of the firm has its advantage in avoiding the normative restrictions of a purely market or consumer orientation. State economic policy must then seek a "balance between private profit seeking and economic care and protection for the generality". The law of the company constitution ought then to be derived from a confrontation between competing economic policy conceptions. The appropriate neo-liberal or state intervention theories are already prepared to provide the combatants with legal ammunition. From the experiences of the co-determination debate, it is easy to extrapolate how here too each side can accuse the other of ideology, or still worse of "ideological cleverness" or even more crudely of hostility towards the constitution, if these economic policy positions are legally instrumentalized.

The question is, however, whether this confrontation is

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not already out of step with reality. The reality of the present-day constitution of firms and that of the economy - stands as it were, across the great economic policy controversy. The theoretical justification for this may lie in the fact that governmental economic policy - whether as rules of the game system or as constructive interventionism - is in principle not in a position to bring about a balance between private profit seeking and concern for the generality , but that this can be achieved only within the economic system itself, with the role of government economic policy and legal regulation remaining confined to indirect and abstract structural measures to stimulate such balancing within the economy (it is to be hoped) effectively. By contrast with neo-liberal positions, government economic policy is not simply practicing the restoration of natural social order through the "visible hand" of the law. Instead it is aiming at "regulated autonomy", actively promoting self-regulating "learning" social systems and simultaneously endeavouring to reduce their deficits through compensatory corrections.

In support of this thesis we shall use here the distinction introduced by Luhmann between three system references - function, performance, reflection (65). Function concerns the relationship of the sub system to the whole system; performance the relation of the sub

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system to other sub systems; reflection the relationship of the sub system to itself. The consumer oriented approach thinks, as it were, only in one system reference, that of the performance relationship, i.e. the relationship of the enterprise to the consumers. However, it lacks the transposition into structure of the function of the economy. If this is defined - again following Luhmann - as ensuring the satisfaction of social future needs, then the functional orientation of firms is not, as consumer-oriented conceptions put it, maximum satisfaction of consumer needs, but the diversion of as large as possible a yield from the production process for the guaranteeing of future need satisfaction, which in concrete terms is carried out by different forms of profit, taxes and wages (66).

This again does not mean that this orientation toward the societal function should be stressed onesidedly at the expense of the economic performance (satisfaction of consumer needs). What is necessary is a process of attunement of function and performance of the enterprise. In this systems theory reformulation of the above-mentioned dual orientation of economic enterprise, it becomes at the same time clear why the "balance", the attunement between function and performance, cannot be produced from the outside through governmental economic policy or legal regulation. One can build on the

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well-established thesis that from a particular degree of functional differentiation on, here the differentiation of the economic system as against politics and law, the separation between function and performance is so far advanced that they can be linked up only within subsystems as such (67). This is where theoretical justification can be found for the phenomena of "market failure" and "politics failure" in relation to the conduct of firms, which, as we saw above, caused Christopher Stone to attempt a reformulation of "corporate responsibility" . To create the "balance" through governmental economic policy would mean to make the worthless effort to attune the societal function and the performance relationships to social subsystems through control instruments external to the system. It is not prior structural policy decisions such as the familiar "basic decision " of neo-liberal doctrine or governmental planning decisions in an interventionist concept , that can solve the problems of mediation, but only - externally stimulated - reflexive action within the functional system itself (68). On this view, thus the social contingency of the company constitution is characterized by contradictory demands of performance and function, which can be resolved only by externally stimulated internal reflection. The interdisciplinary key-concept of the organizational interest should be oriented exactly towards this dual requirement. The issue is not a mere internal discursive unification

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process (69), nor the orientation of economic action towards the consumer interest (70), nor maximum increase in yield , not to speak of profit maximization (71). Instead, the organizational interest is directed towards the creation of organizational structures for such discursive unification processes as to allow the optimal attunement of company performance and company function.

How can such dependence on the environment be transposed to structures? What contribution can the company constitution make to this? As far as the yield function of the firm is concerned, this has been brought about in three ways in historical development processes. Profit taking proceeds juridically through private property and company law, taxation through tax laws that have to be justified politically, and taking wages, or the securing of jobs, through the legally guaranteed conflictual system of collective bargaining.

In principle these drawing off interests run along separate lines. It is at this point that the central reference problem of the company constitution should be formulated. It seems to be an essentially still unresolved control problem how these three siphoning -off mechanisms can be coordinated while retaining their autonomy. If it is true that none of the siphoning- off

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mechanisms can be allowed to rise inordinately at the expense of the others, then any one of the three interests - capital, state, labor - can be excluded from being sole possessor of control rights. Is the alternative then - as in Ulrich - managerialism or state coordination?

At this point one ought not immediately to reply with the company constitution , but initially embark on an analysis of neo-corporatist phenomena (72). This can only be sketched out here. The interpretation of neo-corporatism would then lie beyond the definitions of Schmitter on the one hand and Winkler on the other (73). We are dealing not only with a new form of political interest intermediation (Schmitter) nor on the other hand with a special form of comprehensive governmental economic control (Winkler). Neo-corporatist mediatory mechanisms would instead be there in order to coordinate with each other the three functional mechanisms of the economy - profits, taxes, wages - in their mutual independence.

This would ultimately again lead to an orientation towards social interests, but now not as ends in themselves, but instead as means to the realization of the social function of the economy. The neo-corporatist

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syndrome would no doubt have to be looked at as a whole. Such attunement processes would take place at least at three levels: (1) The macro level of major economic policy decisions on incomes policy, tax policy and profit policy, negotiated among the summit bodies of the economy, the trade unions and government bodies; (2) the meso level of regional and sectoral structure policy and the relationship between employer associations and trade unions; (3) the micro level of the enterprise , via co-determination processes and public involvement, which would mediate between the systems for distributing the firm's yield (company law profit distribution and collectively bargained wages). This definition of neo-corporatist phenomena would relate in the first place to the yield function of the economy in the above defined sense. One would have to consider the extent to which neo-corporatist structures can continue to be used also for the attunement between functional requirements on the one hand and performance requirements on the other. The company constitution would then be defined as the internalization of external social pressures, related to the balancing of the various functional mechanisms and the performance requirements of the enterprise.

At this stage only preliminary institutional conclusions can be indicated here. Firstly, they would always have

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to relate the company constitution to the total context of neo-corporatist mediatory mechanisms at the various levels. Codetermination and company constitution would have to be precisely aligned on this, also from the legal standpoint. On this view, co-determination law would have to be separated from its individualistic or interest group related interpretation and reoriented towards this kind of social guidance concept. This would have consequences that would extend into the questions of the position in co-determination law of the trade-unions, of information and accountability obligations, of the delimitation of co-determination and collective bargaining system, and of the institutional links of the organizations and their internal structures. Secondly, this approach would have implications particularly for state participation in co-determination models. The public interests that would have to be represented in the firm would primarily have to be aligned on the yield function and the questions of distribution, and only secondarily on attunement with performance requirements of the enterprise. In this perspective , Stone's far-reaching structural proposals would have to be rethought, as would Ulrich's general functional definitions. This linkage between function and structure might in the very end provide a chance of making the theory of social responsibility practically relevant in company constitution law.

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Footnotes

*Being also a discussion of Christopher D. Stone, Where the Law Ends. The Social Control of Corporate Behavior (New York: Harper & Row 1975) and Peter Ulrich, Die Grossunternehmung als quasi-oeffentliche Institution. Eine politische Theorie der Unternehmung (Stuttgart: Poeschel 1977).

(1) See only its reflections in the American debate, e.g. Vagts, Reforming the Modern Corporation: Perspectives from the German, 80 Harvard Law Review 23 (1966); Bonnano, Employee Codetermination: Origins in Germany, Present Practice in Europe, and Applicability to the United States, 14 Harvard Journal of Legislation 947 (1977); Summers, Codetermination in the United States: A Projection of Problems and Potentials, Journal of Comparative Law and Securities Regulation 4 (1982), p. 155 ff.

(2) Detailed references in Wiedemann, Gesellschaftsrecht I, 198o, p. 291 ff.

(3) Bundesministerium der Justiz (ed.), "Bericht ueber die Verhandlungen der Unternehmensrechtskommission 1980. Rz. 135 ff., 149 ff. See also the critical observations by Kuebler, Unternehmensorganisation zwischen Sachverstand und Interessenpolitik, ZGR 3 (1981), p. 377 ff.

(4) An exhaustive description of the state of the debate also related to legal questions can be found in Engel, An Approach to Corporate Social Responsibility, 32 Stanford Law Review 1 (1979).

(5) For a recent review on the objectives of codetermination, see Wiedemann (Fn. 2), p. 592 ff.

(6) Fechner, Das wirtschaftliche Unternehmen in der Rechtswissenschaft, 1942; Boettcher/Kunze/Nell-Breuning/Ortlieb/ Preller, Unternehmensverfassung als gesellschaftspolitische Forderung (1968), p.20 ff.; Th. Raiser, Das Unternehmen als Organisation (1969), p. 138 ff. Kunze, Zum Stand der Entwicklung des Unternehmensrechts, ZHR 144 (198o), 1oo ff.

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(7) E.g. Wiedemann, (Fn. 2), p. 3o9 with further references.

(8) See Th. Raiser, Das Arbeitsrecht aus der Sicht der Organisationssoziologie, ZRP 1973, p. 15, ders., Die Zukunft des Unternehmensrechts, in FS Robert Fischer (1979), p. 561 ff., 527 ff.

(9) See the criticism by Kudera, Organisationsstrukturen und Gesellschaftsstrukturen, Soziale Welt 28 (1977), 17 ("Soziologie ohne Gesellschaft") on the one hand and Luhmann, Organisation im Wirtschaftssystem, in: Soziologische Aufklaerung 3 (1981), p. 39o ff. on the other.

(9a) See e.g. the critical discussion by Schreyoegg, contingency and choice in organization Theory, Organization Studies, 1 (1980) 305.

(10) E.g. Mayntz, Soziologie der Organisation (1963), p. 58 ff. Etzioni, Soziologie der Organisation (1976), p. 15 ff.

(11) In particular Th. Raiser clearly sees the need to utilize the organization theory approach and at the same time to extend it. E.g. Unternehmensziele und Unternehmensbegriff, ZHR 144 (198o), p.2o7 ff., 224 ff.

(12) Vanberg, Markt und Organisation (1982); ders. , Das Unternehmen als Sozialverband , Jahrbuch fuer Neue Politische Oekonomie 1 (1982), p. 276 ff.

(13) More or less the "official" justification of codetermination: See the statement accompanying the government report of 22th february 1974, BR-Drucksache 200/74, p. 16; Bundesverfassungsgericht 50, 290 (350) (codetermination judgment).

(14) Luhmann, Rechtssoziologie 1, p. 13.

(15) Systematic elaboration of this thesis in Krause The "Constitution" of the Firm - Elements of a New Approach (1981).

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(16) Luhmann, (Fn. 8), p. 13.

(17) Vanberg (Fn. 12), p. 3o5.

(18) Steindorff, Einfuehrung in das Wirtschaftsrecht der Bundesrepublik Deutschland (1977), p. 35, 39 ff.; Ott, Recht und Realitaet der Unternehmenskorporation (1977), p. 226 ff.

(18a) On the (Self-)criticism see Ott (Fn. 18), p. 259 ff., 19 ff.

(19) There is a similar formulation of the problem in Th. Raiser (Fn. 8), who obviously starts from a dualism of private and public interest.

(19a) Ulrich, (Fn. *), p. 47 ff., 68 ff., 111 ff.

(20) p. 159 ff.

(21) p. 161 ff.

(22) p. 165.

(23) p. 192.

(24) p. 174 ff.

(25) p. 173.

(26) p. 174 ff.

(27) p. 181 f.

(28) p. 183 ff.

(29) p. 189 ff.

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(30) p. 192.

(31) p. 200 ff.

(32) p. 193.

(33) p. 2o4.

(34) p. 212 ff.

(35) p. 213.

(36) The debate between Dodd, For Whom Are Corporate Managers Trustees. 45 Harvard Law Review 1145 (1932) und Berle, For Whom Corporate Managers Are Trustees, 45 Harvard Law Review 1365 (1932), already stresses this aspect very clearly.

(37) p. 217 ff.

(38) p. 213.

(39) p. 225 ff.

(40) p. 223.

(41) For details on the theoretical justification for such a shifting of the problem, see Teubner, Reflexives Recht, Archiv fuer Rechts- und Sozialwissenschaften (1982), 1; Teubner, Substantive and Reflexive Elements in Modern Law:, 16 Law and Society Review (1982).

(42) Stone (Fn. *), p. 111 ff.

(43) p. 88 ff.

(44) p. 93 ff.

(45) p. 111 ff.

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(46) p. 120 .

(47) p. 119 ff.

(48) p. 122 ff.

(49) p. 153 ff.

(50) p. 174.

(51) Vgl. Leicht, Der Arbeitsdirektor der Mitbestimmungsgesetze 1976 (198o).

(52) Lutter in Festschrift Coing (1981), p. 576.

(53) p. 184 ff.

(54) p. 199 ff.

(55) p. 217 ff.

(56) The book is the result of a major research project promoted by the American National Science Foundation in which Stone studied several cases of the social "failure" of big American firm scrutinized the causes and developed legal policy recommendations on an interdisciplinary basis.

(57) Similar ideas from an industrial economic viewpoint developed by Steinmann, Kosten-Nutzen-Analyse der Mitbestimmung, in Steinmann, Gaefgen, Blomeyer, Die Kosten der Mitbestimmung (1981), p. 39 ff., 49 ff., in a multi-level model of co-determination.

(58) In an interdisciplinary debate on the organizational structure of firms, the systems theory approach act as a general reference framework in which a unitary level of abstraction and problematization can be found for divergent research results of individual disciplines. See e.g. Bleicher, Organisation als System (1972); Staehle, Organisation und Fuehrung soziotechnischer Systeme (1973); Tuerk, Grundlagen

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einer Pathologie der Organisation (1976).

(59) On this approach in relation to voluntay associations see: Teubner Organisationsdemokratie und Verbandsverfassung (1978), on its application to economic enterprises see: Abeltshauser, Unternehmensbegriff und oeffentliches Interesse (1982), p. 77 ff.

(60) Representative of this approach is Lawrence/Lorsch, Organization and Environment (1967), summary by Kieser, Der Einfluss der Umwelt auf die Organisationsstruktur der Unternehmung, in: Tuerk, Organisationstheorie 1975, 32. Critical remarks in: Schreyoegg Contingency and Choice in Organization Studies 1 (1980), 305 ff.

(61) A summary in Staehle, Organisation und Fuehrung sozio-technischer Systeme (1973), p. 72 ff. Kieser (Fn. 6o).

(62) Luhmann Allgemeine Theorie organisierter Sozialsysteme in: Soziologische Aufklaerung 2 (1975), p. 39 ff.

(62a) Wiedemann, (Fn. 3), p. 314 ff.

(63) Krause, (Fn. 15).

(64) Th. Raiser, Unternehmensziele und Unternehmensbegriff, ZHR 144 (1980), p. 206 ff., 224.

(65) Most clearly in the sociology of religion, Luhmann, Funktion der Religion (1977), p. 54 ff.

(66) Luhmann, Wirtschaft als soziales System, in: Soziologische Aufklaerung 1, (1970), p. 2o4 ff.; Luhmann (Fn. 9), p. 394 f., 4o1 f.

(67) Luhmann (Fn. 65)

(68) For details see: Teubner (Fn. 33) cf. as well Teubner, Ordnungspolitische Optionen im Recht privater Organisationen. In: Dettling, Die Zaehmung des

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Leviathan (198o), p. 227 ff.

(69) Thus, however, Laske, Unternehmensinteresse und Mitbestimmung, ZGR 1979, p. 173 ff., 196 ff.

(70) Krause (Fn. 15).

(71) Junge, Das Unternehmensinteresse, in: FS fuer Ernst Caemmerer (1978).

(72) For an informative introduction see Alemann/Heinze, Verbaende und Staat (1979); Alemann, Neokorporatismus (1981).

(73) Schmitter, Modes of Interest Intermediation and Models of Societal Change in Western Europe, in: Comporative Political Studies 1977, p. 7 ff.; Winkler, Corporatism in European Journal of Sociology 1976, p. 1oo ff.

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