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The Double Movement in Global Law: The Case of European Corporate Social Responsibility

I.

Polanyi's work is gaining momentum in recent globalization theory. His double movement thesis seems to many to be particularly well suited to delineate the different forces at work in the globalization process. Increasingly, Polanyi scholars are submitting that globalization is nothing else than the worldwide application of laissez-faire and that the anti-globalization movement must be understood as a countermovement. This is, indeed, not a clichéd use of Polanyian views but a step implying practical consequences. As Sugden and Wilson (2005: 18) have argued, "While a polar form of market relations is currently closely associated with the word 'globalisation', this is no more than a capture of the language by the dominant neo-liberal hegemony; different forms of expanding and deepening of global economic relationships might in fact address many of the pervasive concerns of those currently labelled as being 'anti-globalisation'". The upshot of this argument is dialectical: "Anti-globalization" is not an anti-thesis to globalization, but is its completion. Or, put differently: In close correspondence to Polanyi who suggests that the self-regulating market is simply "utopian" and unsustainable on its own terms, and therefore needs a social countermovement to be able to work properly, the globalization scholarship that I have summarized postulates the necessity of an "anti-globalization" countermovement.

This application of Polanyi's theory on globalization is not entirely new. Polanyi himself has designed his ideas so as to integrate the transnational dimension of the economy of his time. Thus he wrote: "Nothing less than a self-regulating market on a world scale could ensure the functioning of this stupendous mechanism [that is, the double movement]" (1944: 138). However, this global orientation of the double movement theory appears, at least in the narrative of *The Great Transformation*, to be somewhat biased. As Silver and Arrighi have stressed, "For Polanyi, while the agents of the movement toward the market economy ranged from the local and national to the global *(haute finance)*, the agents of the countermovement ('groups, sections, classes') were largely local and national (although their actions e.g., protectionism, colonial conquest, anti-imperialist revolt often had transnational implications)" (2003: 328). That is to say that, for Polanyi, the "society" that

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protected itself in the 19th and the first half of the 20th century is mainly a national society.

This architecture of Polanyi's argumentation scheme entails some difficulties for modern globalization scholars trying to establish their work on the double movement thesis. The studies in this line of thought tend to treat forces both of expansion, i.e. globalization, and of protection, i.e. "anti-globalization", as generated by macro-sociological processes and structures. For instance, "the claim that global capital can be opposed most effectively in the global arena and through the agency of a 'global civil society' is often advanced and defended with reference to macro-sociological Polanyian movement of liberalism and protectionism" (Halperin 2004: 267). Yet, what the features of these macro-sociological forces backing the transfer of Polanyi's social countermovement – which in *The Great Transformation* is essentially a local or national force – to the global terrain exactly look like is an issue that is rarely clarified in these studies. Often the reference to Polanyi's work is considered to be plausible enough, although Polanyi himself, as mentioned, never expressed himself on the question of how the protective movement on a global scale has to be defined.

As a matter of fact, this shortcoming of modern Polanyi scholarship has been furthered by a specific fuzziness in the design of the double movement thesis. Polanyi, actually, sees the protective countermovement as stemming from society as an organic and sociologically undifferentiated whole. In his view, the double movement represents primarily the reassertion of the dominance of society over markets. Thus, he elaborates the countermove mostly whithout reference to specific social structures, that is to particular interactions in society's fabric. It may, therefore, be said that "For Polanyi, the most important way in which groups, sectors and classes – act and are acted upon and, in particular, the way in which they interrelate with state and globale structures, is an organic whole" (Halperin 2004: 274). This approach, especially the vision of society as an "organic whole", seems to be rather a weak foundation for the study of a protective countermove in the global arena.

These limitations of Polanyi's theory for modern globalization scholarship are not restricted to economic sociology. They are also a concern for legal theory. The ambiguity accompanying the theoretical underpinnings of the protective countermovement leads to a poor account of the function of law in the double movement process. The legal provisions butressing the social countermove are mainly seen, as Halperin (2004: 273) has aptly stressed, as the product of the working class being "effective in gaining passage of various sorts of social legislation". This explanatory scheme which is already quite modest on the level of the nation state is almost immaterial for the elucidation of global law since the concept of "working" class is particularly thorny in a transnational setting.

The objective of my paper is to show what role law may play in bolstering Polanyi's protective countermovement in globalization. In order to achive this, I will have to overcome the shortcomings that I have tried to characterize. For this purpose I will proceed in two steps. I will first elaborate on the concept of globalization since one of the main intricacies of *The Great Transformation* is an underdeveloped notion of this societal phenomenon. Then, in a second step, I will try to identify the ingredients of a law designed to institutionalize a social countermove in the global arena. My method will be inductive: I will analyze the efforts of the European Union to develop a framework for Corporate Social Responsibility, my main thesis being that these efforts exhibit the basic lines of a legal structure tailored to the needs of social protection in a global economy.

II.

The major challenge of a globalization concept is to unravel the entanglement of national and global structures in today's world society. I think that a fertile way to tackle this problem is to make use of modern systems theory, especially of Stichweh's work on globalization. According to this author, world society operates in a structural setting which is very different from the one germane to the nation state. Stichweh calls the structures of world society *eigenstructures* in order to stress the following point: "*Eigenstructures* reproduce pre-existent cultural diversity and push it back at the same time, creating new social and cultural patterns of their own" (2006: 241). This vision of globalization is based on a plurality of levels in the formation of social systems which means "that new structures overlay old structures but do no extinguish them" (2006: 241). The old structures – that is the national structures – are still active, but their informational relevance is driven back so that the new structures – that is the global structures – are growing in importance.

On this basis, three axioms help us to grasp the signification of globalization:

(1) It is flawed to see the relationship between the nation state and globalization as one of mutual exclusion. Globalization is something else than the mere territorial dis-segmentation of functional systems, such as the economy, politics, law, or science.

(2) Although old and new structures are intertwined, they possess their own *eigen*-values. Above all, this means that these structures operate autonomously. The historically specific condition of the nation state is the result of its own and only of its own operations while globalization operates likewise.

(3) The national and global structures represent for each other *eigen*-values. This is to say that they are, as v. Foerster (1985: 127) has put it, mutually generative. The current form of the nation state cannot be thought of without globalization. The same is also true for globalization.

The bottomline of this *eigenstructures* vision of globalization is that national and global structures are closely interrelated while they work, at the same time, according to quite different sociological rules.

What are now the implications of this concept of globalization for law in general and for legal norms buttressing Polanyi's protective movement in particular? I will try to answer the general issue first, i.e. the issue of the distinct features of a global law. For this purpose, I will start by emphasizing that, from a systems theory perspective, law is a product of society. That is to say that the differentiation of a legal system requires that law solves a societal problem. If such is not the case, society does not allow for the differentiation process to happen. As Luhmann has put it, "One could say that society tolerates … [differentiation] if … [the differentiated system] maintain[s] a functional relation to the problems of society" (2004: 467). Systems theory ususally considers that the function of law is the stabilization of normative expectations. Of course, this functional description is devised for a legal system operating in the context of a nation state. This finding is now of crucial importance: If it is true — as I submit for the reasons that I have given — that society is working in the global arena according to very different principles than it does in the national arena, then we must assume that the functional description of global law must differ significantly from the functional description of a nationally segmented law. And this implies, consequently, that we may assume an emergence of a global law only under the premise that we find an adequate description of the societal problem that law has to solve in the global arena. Since, if we do not find such a functional description, we must suppose that world society will not tolerate the differentiation of a global law system.

Yet, If we must abandon the idea that law stabilizes normative expectations in world society, what could possibly the function of global law be? One reason why the global structures diverge from national structures is the complexity of world society. This is due to the fact that *eigenstructures* are highly specialized. We must, therefore, assume that this complexity directly alter the expectations composition in world society. In a seminal paper, Luhmann (1971) has argued that in the complexity setting of world society learning is a much more effective option than the adherence to predetermined expectations. He concluded from this analysis that in world society the evolutionary primacy has shifted from normative to cognitive expectations. This must be considered the main difference between *eigenstructures* and locally or regionaly segmented structures: World society is marked by a predominance of cognitive over normative expectations.

If one is prepared to endorse this thesis, the consequences for the functional description of global law are considerable. It suggests that world society will tolerate the differentiation of global law only if it relates to the problem of cognitive expectations. In particular, this means that in the global arena law is not to work with coercive rules. This technique is well adapted to the stabilization of normative expectations. Yet, it is detrimental to social structures that are underlayed with learning demands. Therefore, global law has to reverse to a legal technique which is not often used in the national arena: It has to provide the *eigenstructures* with cognitive ressources supporting and assisting learning in world society.

What has been said so far begs the question of how such a global law concretely looks like. Similarly, it raises the issue of whether it is conceivable that global law may bolster a protective countermove in world society. As already mentioned, I will approach this problem inductively and examine what the European Commission is actually doing in its attemps to set up a framework for Corporate Social Responsibility. I will first summarize what happened up to now. After that, I will try to show that these attempts are exhibiting the basic lines of a global socially protective law.

III.

The development of the European CSR can be divided into three phases.

(1) The first phase was the launching of a dialogue on CSR between the different stakeholders. The dialogue was initiated in 2001 by the publication of a Green Paper. Therein, the relevant actors were asked to submit suggestions on how a partnership for the development of a new framework for the promotion of social responsibility for companies could look like. Although the European Commission forewent deliberately a specific definition of CSR, it emphasized the voluntary character of CSR. Accordingly, the Commission situated CSR beyond any statutory obligation.

The Green Paper reads in this matter as followed: *"Being socially responsible means not only fulfilling legal expectations, but also going beyond compliance and investing 'more' into human capital, the environment and the relations with stakeholders".*

(2) In the second phase the Commission evaluated the comments on the Green Paper in its communication from July 2nd 2002. The result of the consultation process was disappointing. The Commission only identified irreconcilable dissents among the parties to the process. While the companies welcomed the voluntarily character of CSR unreservedly, the civil society organisations emphasized that voluntary initiatives would not suffice. The probably most important result of the second phase lies in the following:

While the Parliament pledged for a supranational regulative agency with power to coerce, the Commission decided that the CSR forum should remain voluntary. This so-called EMS forum, composed of all European companies and their stakeholdes, was solely to serve the institutionalisation of the CSR dialogue. It was mandated to promote transparency and to find ways for the convergence of CSR practices.

The EMS forum deployed a compliant activity and presented its final report in mid 2004.

(3) The third phase began with the Commission's communication of 2006. As a general result, this document held somewhat ambigously that the EMS forum succeeded to reach a certain consensus between participants with very different views, but that it also revealed huge dissensions between representatives of the business and other stakeholders. These dissensions were largely about the necessity of binding European CSR rules. In truth, this account was not fully in line with the reality of the EMS forum. As a participant to this forum noted: „*What the experience of the Forum showed … are the limits of a method which consists in bringing together a range of stakeholders with so different views … This method, which in theory might be praised for its openness, leads in fact to a situation where any final agreement will be based, not on the outcome of a rational discussion based on the law of the best argument – as communicative ethics à la Habermas would have it – but rather on the few items on which the participants can agree … . The final report of the CSR EMS Forum … represented the lowest common denominator which could be achieved: its results were less than impressive*".

In other words: The experiment with the EMS forum proved clearly that an ideal *Sprechsituation* cannot be productive in answering CSR related questions. The Commission realized that with acuteness and took the decision to drastically revise its strategy. It undertook a change of paradigm in European CSR and institutionalized a completely new forum called the European Alliance for CSR. The decisive point in this re-orientation is the fact that the new forum does not intend to pool all interested stakeholders together. Quite differently, it was designed as an alliance of European companies exclusively. One can reasonably say that the European Alliance moves away radically from the former concept of the EMS forum.

So much about the existing history of the European CSR.

Now, if we consider these developments, we may feel that the efforts of the Commission to bring about a European CSR are rather chaotic and lack any reflected direction. I think that there is much more behind this record and I submit that a CSR system has been established which displays qualities of a global law. This hypothesis might appear audacious. I will substantiate it as follows:

To begin with, I believe that it is important to note that the effort of the Commission is not of a purely political nature but it rather has a legal character. This effort is part of the social dialogue which is the goal of Art. 136 EG. The Commission has thus institutionalized the development of CSR practices based on accepted Treaty competences. Yet, the CSR efforts of the Commission do not coincide with classical regulation schemes which ultimately carry out direct intervention into society. Rather, these efforts aim at installing an indirect legal strategy. As McBarnet pointed out, neither are the CSR standards which result from the work of the CSR forum binding, nor are they enforceable with state instruments. What the Commission tries to achieve can be described as a legally governed unleashing of extra-legal forces (like the media) that put pressure on the behaviour of companies in order to bring them to comply with CSR standards. Therefore, the voluntariness of the European CSR does not conflict with its legal character.

But how does the CSR system that the Commission is instituting in what appears to be a trial-and-error process work precisely. At this point I would like to proceed in three steps, illustrating first the content of this system, then its effects, and finally its practical implementation.

(1) Regarding the content of European CSR law, it seems on the face of it to consist of procedural elements, namely those of the institutionalisation of a CSR forum. However, the really interesting part is the outcome of the instituted procedures. This outcome is very specific: It can be qualified as cognitive resources assisting companies in their search for socially responsible behaviour. Cognitive ressources can be of two types: (a) One part of these ressources are supporting the companies directly in designing CSR practices tailored specifically to their individual case. (b) Another part of these ressources are transparency generating tools that provide the stakeholders of European companies with information relevant for their discourse and initiatives.

(2) Regarding the effects of European CSR, we must first ask what motives are behind the Commission's decision to establish a procedure aimed at the production of non-binding CSR standards that ultimately supply European companies and their stakeholders with cognitive ressources. It is not doubtful that the Commission's intention was from the beginning to build up a social regulation apparatus specifically designed to solve globalization problems. Different documents published in the course of the CSR process attest this point, so, for instance, the statement in the communication of 2006 that *"CSR has become an important concept, globally and in the EU and a topic in the discussion about globalisation and… sustainability"*. The voluntarism underlying the Commission's CSR strategy can indeed only be explained if one considers the specific limits of traditional law which is unfit for extraterritorial application.

But then, why the concept of cognitive resources? This issue is directly related to the predominance of cognitive expectations in the global arena. As I have mentioned, the *eigenstrucures* of world society do not allow for a stabilization of normative expectations. The function of law in a globalized society can only consist of learning strategies, that is the normative backing of processes of adapting cognitive expectations. In other words, global law has to provide European companies and their stakeholders with learning tools, namely cognitive resources, which allow them to adapt to the constantly changing circumstances in the global arena. Therein lays the proper function of European CSR law.

But why should the companies be interested in learning? Are there any incentives stimulating them to adapt their behaviour to the social needs in world society?

(3) This is, in essence, the third question of how the European CSR system is actually implemented. I will try to approach this problem by returning to the transition of the EMS forum to the European Alliance. The barring of all stakeholders from the forum converts them into agents of civil society: They form together a functional equivalent to the Weberian coercion agencies in the nation state. One might say, that in the European CSR system the stakeholders constitute a kind of "civil society governance mechanism". The means used in this mechanism are basically informal and include societal forces such as reputation, naming, shaming, scandalization, public protests, consumer boycotts, and the like.

IV.

I would like to summarize my thoughts by stressing two points:

Since the global society is the primary reference of European CSR law, this law can not be set up in the traditional Weberian style which presuposes the existence of the state. Global law can only be envisioned as a standards production procedure interpenetrating the *eigenstructures* of the world society. The European efforts to create a framework for CSR show a possibility of how to set up such an indirect legal intervention.

In particular, European CSR demonstrates how such an intervention can be achieved so as to foster a globally effective protectiv countermove. It grounds on three building blocks: (1) The establishment of institutions, such as the European Alliance for CSR, for the production of cognitive resources. (2) The use of these cognitive resources by companies as global actors as learning device in the global area. (3) The generation by societal means of a pressure inciting companies to make use of the cognitive ressources produced in the aforementioned institutions.