Corporate Fiduciary Duties and Their Beneficiaries

A Functional Approach to the Legal Institutionalization of Corporate Responsibility

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I. Introduction: A Re-Formulation of Berle-Dodd

"For whom are corporate managers trustees?" This famous question of the debate between Berle and Dodd has a general and a specific aspect. The more general aspect concerns the legal development of corporate responsibility (CSR), the question if and to what degree the law acknowledges social obligations of the corporation (see Wedderburn supra this volume pp. 3 et seq.). The more specific aspect concerns the ways and means of legal institu-

tionalization, the choice of legal constructions to implement the general decision. It was in terms of a legal trust relation that Berle and Dodd discussed their controversial views on the question in which specific way the law is in a position to control corporate social responsibility (Berle, 1931: 1049; Dodd, 1932: 1145; Berle, 1932: 1365). Against their shared views on the separation of ownership and control of the corporation, they developed drastically different perspectives on the potential of the law to constitutionalize corporate power, via the legal construction of fiduciary duties. Berle put forward a minimalist version: Management powers are not absolute powers. "Rather they are powers in trust. The controlling group is, in form at least, managing and controlling a corporation for the benefits of the owners." (Berle, 1931: 1049). And it is the role of the law, in the course of protecting the interests of the shareholders, to create legal safeguards against management's possible abandonment of the profit motive. Dodd, on the contrary, advocated a maximalist version: The law should require that corporate managers hold powers in trust not only for shareholders, but for other social groups as well, including suppliers, consumers, and employees. This, in fact, would mean the legal acknowledgment of noneconomic CSR to society.

If we, fifty years later, take up the same question, trying to identify corporate fiduciary duties and their proper beneficiaries, we should ask ourselves what lessons can be learnt from both institutional experimentation and the academic debate that have taken place in the meantime. Institutional experiments in the area of social responsibility have developed in the form of two dominant trends. One such trend has been to expand the recognized fiduciary duties owed to other social groups, by redefining directors' duties and liabilities. The other pursues the same goal, but by different means — by legal representation of those groups within the corporation. I will focus on both the American and the German legal order, because they represent the two trends in their extreme, but also complementary forms. Furthermore, the academic debate we should properly draw upon is the interdisciplinary discussion of CSR. In economics, business administration, and sociology, this debate has produced numerous theories and proposals which are in themselves highly controversial. However, this very controversy may provide a rich source of ideas for future legal research in the field of corporate social responsibility.

In my view, there are three lessons to learn from the various concepts of CSR appearing in current theory and institutional practice. I will present them in the following theses:

(1) The Berle-Dodd discussion focuses too narrowly on a legal trust relation. Thus, it is limited in scope to the articulation of concomitant duties and liabilities. Instead, one should clearly separate, on the one hand, fiduciary duties as a *legal principle* from their normative concretizations on the other. This permits the taking into account of functional equivalents of

legally-mandated corporate social responsibility, and the analysis of them in terms of substitutive or complementary relationships.

(2) The Berle-Dodd discussion poses the wrong question by searching for those social groups which are to be regarded as beneficiaries of fiduciary duties. Since the underlying "interest group'' approach is not in a position to provide criteria for selecting and weighing social interests, one should, instead, reevaluate fiduciary duties by means of a *functional approach* to corporate social responsibility. This allows the development of criteria for articulating fiduciary duties, in terms of determining the appropriate bene ficiaries, the proper scope of fiduciary responsibility, and the guidance mechanisms required to realize both in practice.

(3) The doctrine of fiduciary responsibility should shift its focus from substantive norms to *procedural mechanisms'*. Judicial definition of sub stantive standards of fiduciary responsibility has only a very limited potential for controlling corporate conduct. Instead, fiduciary duties should be con cretized in procedural and organizational norms which are complements of a legal constitutionalization of private government.

II. Comparative Aspects: Fiduciary Responsibility and "Unternehmensinteresse"[1]

A. American Law: The Duty-Approach[2]

American law has developed an impressive body of rules based on the prin ciple of fiduciary responsibility. They deal with various interest conflicts of corporate management, among them: personal and institutional self dealing, usurpation of corporate opportunity, dealing in corporate control, insider trading, and the sale of shares (Kaplan, 1976: 883). These fiduciary duties are imposed on the directors in thei? relation with the corporate entity, with the shareholders and with actual and potential investors (e.g. Jennings and Buxbaum, 1979: 441). The scope and content of these duties will be discussed in other contributions of this volume[3]. Here, we are con cerned with the question of to what degree the legal concept of fiduciary responsibility is used to take account of, and to protect, broader social interests. This leads us to the cases in which American courts have dealt with the phenomenon ol "corporate voluntarism" (cf. Blumberg, 1970: 157;

[1] In the same sense Kühler (infra this volume pp. 429 et seq.) and Steinmann (infra this volume pp. 401 et seq.).

[2] See also Wedderburn (supra this volume pp. 10 et seq.) for aspects of the ongoing American discussion.

[1] See also Gomard (infra this volume pp. 208 et seq.) and Hopt (infra this volume pp. 285 et seq.).

Georgetown Law Journal 1971: 117; Hazen, 1978: 391). How does the law react to a managerial strategy which limits the principle of profit-maximation in the interest of other social groups — employees, consumers, educational institutions and the like?

The classic case was *Dodge v. Ford Motor Co.* (204 Mich. 459, 170 N.W. 668 (1919)). Mr. Henry Ford had announced that no further special dividends would be paid, and that the future of the business was to be devoted to the reduction of prices in the interest of the consumers and to plant expansion to provide more jobs for workers. The Michigan Supreme Court compelled the declaration of additional dividends on the grounds that:

> "A business corporation is organized and carried on primarily for the profit of the shareholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercized in the choice of means to obtain that end and does not extend to a change in the end itself, to the reduction of profits, or to the non-distribution of profits among stock-holders in order to devote them to other purposes. . . . It is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and the primary purpose of benefitting others" (204 Mich. 459, 170 N.W. 668, 684).

The subsequent development has lead to a remarkable change in the American law's position (Blumberg, 1970: 166; Georgetown Law Journal, 1971: 124). The ultra vires doctrine has been almost abandoned: it has, at least, been rendered almost meaningless unless there is a flagrant abuse of corporate power. The fiduciary duty doctrine has been modified so that shareholders' interests should be weighed against the interests of other social groups.

This development towards a legal recognition of corporate voluntarism has been eased by the so-called "benefit rule". Formerly, corporate activities were authorized only if there was a reasonable probability that consideration would flow directly to the corporation (for example "cakes and ale" for the employees are allowed only when "required for the benefit of the company", *Hutton v. West Cork Ry.*, 23 Ch. D. 654 (C. A. 1883)). Gradually, however, the strict benefit rule has been liberalized, so that an "indirect" benefit for the corporation may be sufficient justification. In *Union Pacific Railroad Co. v. Trustees*, 8 Utah 2d 101, 329 P. 2d 398 (1958), a donation to a charitable foundation was upheld, since the donation would create "good will" for the enterprise, and a resultant "long-run benefit" for the shareholders.

Parallel to this liberalization of the benefit rule, the doctrine of fiduciary responsibility has been considerably modified. Expansion of the scope of the doctrine, to include the protection of other social interests, again has been eased by the influence of another, separate doctrine, the business judgment rule. This rule, granting a high degree of autonomy to corporate managers, had the effect of watering down the strict construction of the concept of fiduciary responsibility to the vague formula that, in making decisions,

directors are responsible only for a free and unbiased exercise of judgment, uninfluenced by any considerations other than corporate benefit. Under this cover, the class of beneficiaries of the fiduciary duty could be gradually ex panded. Finally, in the landmark decision. *A.P. Smith Manufacturing Co. v. Barlow*, 13 N.J. 145, 98 A.2d 581, appeal dismissed, 346 U.S. 861 (1953), the courts upheld a contribution to Princeton University on the basis of an explicit expansion of corporate fiduciary responsibility to the community at large. The court held openly that "modern conditions require that corpora tions acknowledge and discharge social as well as private responsibilities as members of the communities within which they operate." (13 N.J. 145, 98 A.2d 581, 586). This "good citizen" aproach has been accepted since then as a legal acknowledgment of the existence of fiduciary duties owed to social groups other than shareholders, investors and the corporate entity. The beneficiaries of these duties are primarily the employees and the general public. The employees' benefits include corporate assistance with housing, community facilities, pension, bonuses and death benefits. The general public benefits include donations to research and educational institutions, com munities, charitable institutions and the like. As one observer has noted, these public obligations will undoubtedly expand into more modern problem areas, such as dealing with ghetto, minority group and other social problems (Blumberg, 1970: 207).

It should be noted, however, that this legal acknowledgment of social responsibility is only limited to corporate voluntarism. Furthermore, it is limited to a negative formulation. Social responsibilities of the corporation limit the fiduciary duties owed to shareholders, but they are not themselves required by the law as an affirmative duty. Thus, they have the effect not of obligating management to undertake certain activities in the public interest, but only of increasing management's discretionary autonomy in relation to all interests involved.

There seem to be only few, and, in themselves, very weak trends which create an affirmative fiduciary duty in terms of public responsibility. One is the overlapping of "external" tort obligations of the corporation and "internal" duties of management. If shareholders may initiate legal action against directors or their subordinates who have violated external norms, resulting in public recovery from the corporation, the construction of fiduciary duties is used in an indirect way to protect outside social interests[4]. However, the potential of this merging of internal and external standards of duty seems to be onlv small (Jennings and Buxbaum, 1979: 199). Another example of an affirmative dutv toward broader social interests is the practice of corporate disclosure on social issues. "Ethical investors" may demand from corporations a "new disclosure", obligating management not only to disclose ordinary business matters but social performance as well, e.g. on

[4] See *Graham v. Allis-Chalmers Mfg. Co.*, 41 Del. Ch. 78, 188 A. 2d 125 (Sup. Ct. 1963).

environmental issues. In an interplay between the SEC and the courts some tentative rules of that new form of disclosure have been developed[5].

As a result, one can conclude that American law has acknowledged broader social responsibilities of the corporation by modifying the doctrine of fiduciary duty. However, that acknowledgement is — apart from some minor trends — limited to corporate voluntarism without creating affirmative corporate duties.

B. German Law: The Structure-Approach

If we then look to the institutional equivalent of fiduciary responsibility in German law (cf. Roth, 1979: 1434), we are faced with aparadoxical situation: While an affirmative duty of management to be socially responsible had been explicitly prescribed by the law comparatively early, its practical legal con sequences have been reduced to almost nil. After a profound preparatory debate which lasted for almost twenty years (Rathenau, 1917; Haussmann, 1930/31: 57; Netter, 1932: 502; cf. also Wietholter, 1961: 36), in the reform of German corporation law in 1937 (Aktiengesetz-AktG-1937), management was granted legally a large amount of autonomy, but bound at the same time by the so-called "Gemeinwohlklausel". The Vorstand was required "to direct the company in accordance with the requirements of the enterprise and its working force and the common welfare of the people and the empire." (Sec. 70 AktG 1937). Initially, the potential of this norm was regarded as great. It was to be the supreme guideline for management, with priority given to the public interest as opposed to private interests. In its elements of social policy and economic policy it should represent the basic duty of the Vorstand (cf. W. Schmidt, 1939: § 70, 11; Rittner, 1971: 146). In theory, it could have been developed in a concretizable general clause (Baas, 1976). It could have been enforced by several sanctions, e.g. action of positive per formance by the Aufsichtsrat, dismissal of the Vorstand (Sec. 84(3) AktG 1937), recovery of damages (Sec. 93 AktG 1937) (cf. Mertens, 1970: Vorb. § 76,5). In practice, however, the Gemeinwohlklausel has been reduced to a norm without sanction, to a legally non-obligatory appeal (Westermann, 1963: 266; Rittner, 1971: 146; 1980: 113). Even its legal validity today is in question: Since the new Aktiengesetz 1965 (AktG 1965), does not contain a comparable norm, the Gemeinwohlklausel is understood today as being only "implicit" in German corporation law[6]. Additionally, the Gemeinwohl klausel is burdened with the suspicion of being closely connected to the national-socialist Führerprinzip (Stolleis, 1974: 151), which does not en-

[5] *Natural Resources Defense Council, Inc. v. SEC,* 389 F. Supp. 689 (D.D.C. 1974); *Natural Defense Council, Inc. v. SEC,* 432 F. Supp. 1190 (D.D.C. 1977).

[6] *Bundesverfassungsgericht:* BVerfGE 14, 263, 282; *Bundesgerichtshof:* BGHZ 15, 71, 78; Mertens (1970: § 76,5). Wiedemann (1980: 337); Kübler (1981: 170).

courage contemporary lawyers to develop a body of rules for corporate responsibility on that basis (cf. Rittner, 1971: 146).

While the *institutional* equivalent of fiduciary responsibility has led more or less to a dead end, its *functional* equivalent has brought about quite a dramatic, even paradigmatical change in German corporation law. It is to be found in the still on-going debate on the "Unternehmensbegriff" (Raiser, 1980: 206), i.e. on a legal theory of the enterprise, and particularly on the "Unternehmensinteresse", i.e. on the legally defined "interest" of the enterprise (cf. Brinkmann, 1983). Quite parallel to the American fiduciary duty, the function of these concepts is to draw consequences from the phenomenon of separation of ownership and control (since Rathenau, 1917). The law acknowledges managerial autonomy and attempts to compensate for it by the imposition of obligations. The parallel holds insofar as those obligations were gradually expanded, from shareholders, to the entity of shareholders ("Gesellschaftsinteresse") to the entity of the organization, to employees, and to larger public interests (Brinkmann, 1983: 36). However, the parallel breaks down, as both concepts reach beyond fiduciary duties. While fiduciary duties focus on obligations of management, the German development from "Gesellschaftsrecht zum Unternehmensrecht" (Kunze, 1980: 100) changes the overall legal construction of the corporation from an association of capital-owners into a coalition of different social groups, and, consequently, focuses especially on the constitution of the firm, on member ship, representation and control (Raiser, 1969). The concept of the "Unter nehmensinteresse" is designed to integrate the differing and divergent group interests (Kiibler, 1981: 165). It is supposed to be a legal guideline for resolving conflicts between competing interests (Hanau and Ulmer, 1981: 457). Furthermore, it is supposed to determine the obligations of representa tives of different groups[7].

C. Functional Equivalence?

The interesting point in comparing the American and the German experience sketched above is the functional equivalence of different legal constructs (see Esser, 1974: 28) Both principles of fiduciary duty and "Unternehmens interesse" have the function of imposing broader social responsibilities on the corporation. However, these functions are translated into different legal mechanisms and doctrinal constructions. It is one thing to formulate legal duties, to combine them with legal liability and to enforce them via private litigation. It is another to endow interest groups with rights of representation and to allow them to control the fulfillment of fiduciary duties by internal pressure and negotiation. In any case, this comparison leads us to the con-

[7] Raisch (1976: 347); Raiser (1976: 101); Mertens (1970. 270); cf. as well *Bundesgerichtshof:* BGHZ 64, 325; *Bundesverfassungsgericht:* BVertG 50, 290, 374).

elusion that an approach to the problem of fiduciary responsibility based only on the construction of a legal trust relation with concomitant duties and liabilities, is much too limited. Likewise it is too limited, to consider group representation as the only means of enforcing fiduciary duties owed to society. Instead, one should generalize from the various fiduciary duties to a single pervasive legal principe which then permits the analysis and com parison of different normative concretizations. Furthermore, this allows for the combination of different mechanisms. It allows consideration of the duty-approach and the representation-approach in a complementary per spective, seen as supplementing one other.

Although in both legal systems the principle of fiduciary responsibility seems to be firmly embedded in corporation law, there remain open questions. Which social groups precisely are the beneficiaries of that duty? What is the scope and the content of the principle? What, finally, is the role of the law in institutionalizing fiduciary responsibility? It seems promising to review the interdisciplinary debate on corporate social responsibility in order to discover whether it can offer guidelines for answers to these open questions.

III. Theoretical Orientation: A Functional Approach to CSR

At first encounter, this debate is rather disillusioning. It is highly contro versial and the controversies touch on precisely those issues which we called open questions in the law. However, one might use the richness of the debate and the multitude of arguments as a convenient source of ideas and alternatives for the legal discussion. This discussion, however, must be directed towards finding a theoretical orientation to guide practical considerations on CSR. I expect this orientation from a functional approach to CSR.

A. Dimensions of the Controversy on CSR

/. Beneficiaries: The Limits of Pluralism

Which social groups are beneficiaries of CSR ? Different theoretical approaches to CSR can be ordered on a scale according to the criterion which social groups are favored. If the group of shareholders are favored as the sole group of beneficiaries, then the social responsibility of business is io make profits —as we are told in a famous quotation (Friedman, 1962: 126). Underlying this view is a concept of social control exclusively through market mechanisms (Rostow, 1959: 69; Friedman, 1962: 126; Baumo!, 1975: 46; Manne, 1978; Hayek, 1982: 82). Other concepts of CSR go beyond that, to integrate further the various "internal" participants of the firm, and view management's ob ligation as that of weighing the interests of competing internal groups — different groups of shareholders and different groups of employees, all of

them endowed with particular legally recognized interests. Here, the adequate interpretation of CSR is formulated in a theory of "industrial justice" (Selznick, 1969; 759). Other commentators again include "external" interests, such as consumer interests, in their discussion of CSR, with regard to the quality and safety of products (Nader and Green, 1976). Sometimes, CSR is viewed as a response to political groups, such as environmentalists, to pressure groups, or to the demands of certain governmental agencies. Underlying this view is a theory of "political pluralism" (Davis and Blomstrom, 1971; Davis 1973: 314; 1976: 14; Schmücker, 1976: 13; Hennessey, 1979: 77; Bock 1980: 5).

If we try to evaluate those different approaches, the following comments seem in order. As for the "interna!" approach to CSR, the problem is to offer a legitimation for the privileges of internal groups, be they shareholders or employees (Dahl, 1972: 20). What is to justify the making of production decisions solely on the basis of the needs of the contributors of production resources — capital owners, workers, and managers? It is simply not enough to confine oneself to an internal perspective of the firm and its members. An internal perspective overlooks entirely the social function of the corporate organization, which should be, rather, the first problem addressed by any conception of CSR. Putting it quite bluntly, a corporate enterprise does not exist simply as a self-serving and self-realizing institution for the unique benefits of its shareholders and workers, but rather exists, above all, to fulfill a broader role in society.

One cannot break out of this overly-narrow perspective even by being more ambitious and by basing CSR on responsibilities to social groups "external" to the corporation. Here, wc face variants of one theoretical approach to CSR, the so-called pluralist approach. This approach derives the structures of CSR from the requirements placed by differing social interests and interests groups on the economic enterprise (Ott, 1977: 226; Stcindorff, 1977: 35, 39). To be sure, 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? Additionally, the link between resources, control and responsiblity is broken: It is not the contribution of a resource that determines to whom managers owe their obligations, but rather society's interest in the firm's success. However, this approach remains subject to the lasting problem of all pluralist theories (e.g. I.owi, 1969). It stresses the multiplicity of social interests, without offering theoretically based criteria for normatively distinct interests (Ott, 1977: 259). Wedderburn (supra this volume pp. 14 et seq.) directly addresses the "critical question" of the multi-constituency board: "What guidelines (other than 'decency' and 'reasonableness') will conduct the board to a decision on conflicting interests?" The pluralist approach, therefore, inevitably runs the risk of abandoning the definition of corporate responsibilities to the mercy of the constantly changing results of shifts in

the balance of power between social interest groups (Steinmann, 1973: 1). This is a temptation to which a socio-legal discussion, fully aware of its task, should not yield: 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 direction from a theory that places the legitimate social function of the firm at the centre of the discussion and which thereby selects those social groups with a legitimate interest in the control of the firm from among the multiplicity of interests claiming such legitimacy (Raiser, 1979). The question then arises whether a functional theory of CSR is capable of meeting this task.

2. *Guidance Mechanisms: Morality Versus Laze?*

The second issue in the CSR controversy refers to the social mechanisms which are supposed to promote CSR. Despite their widely differing views on the proper scope and content of regulation, one group of authors has in common a perspective focussing on external legal control. In this view, it is the political process that defines society's expectations for the scope of CSR, in terms of legal norms. They might be narrowly confined to the "rules of the game" which rule out legally fraudulous behavior, (Friedman, 1962: 126; Manne, 1970: 538; Baumöl, 1975: 45), or they might be pervasive legal regulation of business standards (e.g. Levitt, 1958, 1973;Tombari, 1982:51). In both cases, it is exclusively the law which defines the scope and content of CSR.

Another group of authors focuses instead on internal moral controls. Supposedly, it is a kind of economic morality —"voluntarism", or a code of professional ethics —that guides management's action toward socially responsible behavior[8]. CSR then appears as a "morally motivated freewill responsibility of businessmen and managers" (Ulrich, 1977: 213). In this "moralist" version, the problem of CSR is formulated 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 prevented by individual moral endeavours on the part of those responsible.

Criticizing such a concept is hardly difficult (see Steinmann, 1973: 470; Baumöl, 1975: 45; Böhm, 1976: 36; Ulrich, 1977: 217). The impotence of morality as a control mechanism in the face of imperatives of economic rationality is no new insight (Max Weber, 1972: 544; Habermas, 1981: 312). It is then relatively simple to show the peculiarly unrealistic, ideological

[8] E. g. Arrow (1973: 313); Richman (1973: 20); Brown (1979: 77); Engel (1979: 1); Bock (1980: 5); Walton (1982: 173); cf. as well Thompson (1980: 905).

aspects of a morally-based corporate responsibility. The wish to control societal structural effects of corporate activity by relying upon individual decisions made by managers acting consciously in a statesmanlike or socially-rcsponsible manner can be criticized as economically inefficient, politically elitist and legally uncontrollable.

More important, with this morally-based conceptual scheme the discussion on CSR has been manoeuvred into a rather unfruitful situation necessitating choices between morals and law (e. g. Hazen and Buckley, 1978: 135). 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?" (Ulrich, 1977: 213), then the answer can be, obvi ously, only through the law. It then also seems plausible that the fulfillment of the social tasks of the firm can be ensured primarily only by governmental measures.

The alternative to this ill-conceived choice between morals and law would be however, to ask the following question: Is it possible to enhance the potential of decentralized "moral" self-control by "legal" structural pro visions? Can one conceive of external control via internal self-regulation that would relieve governmental control of the burden of substantive re gulation and internalize social responsibilities in the decision-making struc tures of economic enterprises (see Stone, 1975: 111; Böhm, 1976: 38, Coffee, 1977: 1099; Teubner, 1978: 135, 1983b: 34; Coleman, 1982: 94)? Here one docs not need to make a choice between morals and law, but instead utilize the law to compel firms to behave "morally", i.e. to take account of the social consequences of their actions.

Such a concept of CSR which recharacterizes the alternative between law and morality in terms of their combination, i.e. better, in a combination of external regulation and internal self-control, might be intuitively plausible. Its theoretical foundation, however, is still missing. We should again examine the functional approach to CSR.

3. *The Role of the Law: Facilitation, Regulation or Stimulation?*

Closely related to the issue of morality versus legality is the question what role the law can play in a social institutionalization of CSR. Here, again, the current debate on CSR has developed a rather narrow set of alternatives. Either the law is perceived in its regulatory functions (Levitt, 1958, 1973; Tombari, 1982: 51), defining standards of business conduct and production results in all details and enforcing those standards via negative or positive sanctions (penalties, damages, taxes; subventions, tax-relief, contractual transfers). Or rhe law is perceived in its facilitative functions (Friedman, 1962: 126; Baumöl, 1975: 46; Manne, 1978). By granting legal autonomy to the strategic pursuit of private interests, the law facilitates the development of market structures within which social responsibilities might develop.

Both approaches meet with criticism demonstrating "institutional failures". While the concept of facilitative law is closely connected with the problems of the well-known "market-failures", especially in the field of CSR (Arrow, 1973: 303; Stone, 1975: 88; Lindblom 1977: 76; Steinmann and Gerum, 1978: 60) the concept of regulatory law has to cope with "politics failure" (Lindblom, 1977: Ch. II). It is bound to 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 compared to positive means of motivation; and the difficulties of regulatory agencies in implementing programs (Stone, 1975: 93). Both "market-failures" and "politics failures" taken together suggest a different role for the law. Law can play a stimulative role, clearly distinct on the one hand from a purely facilitative function and on the other from a regulatory function. In this role, it relies not on legal facilitation of economic activities in a market-structure which might in turn have socially benign results, but, instead, on compulsion through the state law. Nor should law be used for directly regulating economic activity, as in the model of the regulatory agencies, but instead should be used for indirectly controlling internal organizational structures, through external regulation. The role of the law then is not the external control of the firm's conduct, but external mobilization of internal self-control resources. If that is true, then the question arises again as to what criteria might guide this specific type of legal control. And again, one should turn to a functional approach to CSR.

B. The Function of CSR: Coordinating the Corporation With its Environment

We have discussed up to now the open questions of fiduciary responsibility in the context of the debate on CSR. All three questions — the identification of beneficiaries, the available mechanisms, the role of the law -- led to the same need for identifying the social functions of CSR in a broader context.

In this perspective, we realize that CSR represents a contradiction between guiding principles of the political system and the economic system. CSR in fact stands in strong contrast to principles of economic rationality. Insofar as it relies on political goals, on pressure politics, on negotiating and power balancing mechanisms, and on legal liabilities, it is at odds with principles of profit-maximation, with control through market-structures and with the language of money as the dominant medium of the economy. This politicization of the economy through CSR is the conspicuous target of criticism from both the left and the right. According to the libertarian school of thought, CSR would effectively destroy economic rationality (Friedman, 1962: 126). According to a leftist position, CSR is one of the last tricks of

capitalism (Heilbronner, 1972), insofar as it politicizes the economy by de politicizing the political process. Both positions have their merits, as they highlight important, but limited aspects of CSR. Indeed, CSR flatly con tradicts pure economic principles; the question is only to what degree and with what results. And indeed, CSR is de-politicizing to the extent that political questions are decided in the economic system. Again, the question is only to what degree and with what effect. Both positions tend in a way to overgcnerahze their concrete observations of "market corruption", or "politics corruption". However, they fail to analyze the potential and limits of those phenomena by taking into account the relations between market and organization.

This can be done here only in a very sketchy way. If the relations between market and organization are defined by conditions of perfect competition, CSR does not matter. Under perfect competition, the constraints of the market on the organization are so strong that there is only one best solution and no room for social manoeuvres. However, under conditions of market imperfections — concentration, oligopolization — those constraints become weaker and management gains considerable discretionary power for its decision-making (e.g. Lindblom, 1977: 152). And it is precisely this dis cretionary power that is the main target of CSR. Vice versa, CSR is con strained by the limits of this discretionary power. At least the "selective" CSR (as opposed to "global" CSR) is possible only under conditions of market imperfections[9]. Thus, from the perspective of organization-market relations it becomes clear that it is inadequate to describe CSR as a total politicization of the economy as well as to describe it as a corporate corruption of authentic political processes. The crucial point is one of partiality. Economic rationality remains the prevailing principle, but it is modified to a certain degree by countervailing institutions which work as "built-in" con tradictions to the prevailing orientation (Luhmann 1966: 15).

What then is the social function of CSR if it represents a built-in contradiction to economic rationality? At this point, it makes sense to use some of the theoretical insights and the analytical instruments of the theory of functional differentiation (Dürkheim, 1933; Parsons, 1966, 1971; Luhmann, 1977). It is our thesis that the function of CSR can be understood only in terms of differentiation and integration of society. CSR serves as one among several integrative devices in a society which is characterized by extreme functional differentiation. The most conspicuous trait of the process of differentiation is the high degree of functional autonomy attained by the economic system. This gives rise to the major social problem: How can the societal integration of the economy be carried out without losing the ad-

[9] See also Mashaw (supra this volume pp. 59 et seq.) who stresses the necessity of imperfect market conditions as a prerequisite of CSR.

vantages of a high degree of differentiation? Or even more troublesome: Must we conceive of the relation between differentiation and integration as a zero-sum-game, where winning for one part means losing for the other? Or is there a possibility of designing integrative devices which not only maintain a given degree of differentiation, but which even support increase in differentiation? (Willke, 1978: 228; 1983: 97).

The important point is that under conditions of extreme functional differentiation, societal integration can no longer be achieved by a politico-legal prescription of uniform normative structures as still conceived by Dürkheim (1933; 111). Functional differentiation requires a displacement of integrative mechanisms Irom the level of society to the level of subsystems. Social subsystems have to stand in a meaningful relationship to the functions and structural achievements of other subsystems. "Corresponding restrictions must be built into the reflexion structure of every functional subsystem in sofar as they do not result directly from the ongoing relations with its environment" (Luhmann, 1977b: 245). And it is the very decentralized character of those restrictions which allow maintaining of or even increasing the functional autonomy of social subsystems. CSR then seems to be one of those decentralized integrative mechanisms which place restrictions on economic action in the interest of other subsystems — trees and people included. Its function is social integration insofar as it "compensates social side-effects of economic action by building social side-purposes into economic action" (Willke, 1982: 17).

It is our thesis that CSR serves as a decentralized integrative device between the autonomous economic organization and its environmental systems. To support this thesis, I shall use here the distinction introduced by Luhmann (1977a: 36) between three system references — function, performance, and reflection. Function concerns the relationship of the subsystem to the whole system; performance, the relations of the subsystem to other subsystems; and reflection, the relationship of the subsystem to itself. The consumer-oriented approach (c.g. Nader *et al.*, 1976) thinks, as it were, only in one system reference, — that of the performance relationship, i.e. mainly the relationship of the enterprise to the consumers. However, it fails to take into consideration the social function of the economy. If this is defined — again following Luhmann — as *ensuring the satisfaction of future social 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 to guarantee the satisfaction of future needs, which in concrete terms is manifested by different forms of profit, taxes and wages (Luhmann, 1981: 401).

This again does not mean that this orientation toward the societal function should be stressed onesidedly at the expense of economic performance (inter alia satisfaction of consumer needs). What is necessary is a precarious balancing of function and performance of the enterprise.

Table 1: Dimensions of Corporate Social Responsibility and the Role of Fiduciary Duties

Orientation	Organization Problems	Guidance Mechanisms	Role of the l aw
Performance: Input/output relations to other subsystems	satisfaction of consumer needs	(1) market and organizations; (2) political compensation of "institutional failure"	(1) formal preconditions for market and organizations: contract and corporation law; (2) law of consumer protection
Function: societal role of the organization	yield from the production process for the guaranteeing of future needs satisfaction	(1) profits, wages, taxes (2) coordination mechanisms	(1) private property, corporation law, labour law, tax law, (2) corporatist proceduralism
Reflexion: system-internal integration with other subsystems	harmonization of function and performance in the interest of societal rationality: restrictions of action in the interest of environmental systems	internalization of external effects	liability law, constitution of the firm, fiduciary duties organizational interest

In this systems theory reformulation of the dual orientation of economic enterprise, it becomes clear at the same time why the "balance", the harmo nization between function and performance, cannot be produced from the outside through governmental economic policy or legal regulation. One can build on the well-established thesis that from a particular degree of functional differentiation onward — here referring to the differentiation of the economic system, as opposed to politics and law — the separation between function and performance is so far advanced that they can now be linked only within sub systems as such (Lühmann, 1977a: 36). To create the "balance" through governmental economic policy would make worthless the 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-hberal 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 subsystem itself* (Teubner, 1983a; 1983b: 53). In this view, "responsible" corporate behavior is characterized by contradictory demands of performance and function, which can be resolved only by externally stimulated internal reflexion.

Our key concepts of fiduciary duty and of organizational interest should be oriented exactly towards this dual requirement. The strategic role they play may[r] become clear if one fully develops the relations between system orientations, guidance mechanisms and the role of the law. Here, it suffices to summarize them in a graphical presentation which demonstrates how the general system orientation of the economic organization (performance, function, reflexion) create certain organization problems. Those problems can be solved by certain guidance mechanisms which in turn are supported by specific legal constructions. The graphical presentation suggests that the primary function of fiduciary duty and of organizational interest is to internalize external effects which can be achieved by the subsystem-internal integration of the corporation w'ith other sub-systems as a balancing of function and performance.

C. Functionalist Answers to Open Questions

What follows from the functional approach to CSR? What guidelines do we gain for answers to our three open questions about beneficiaries, mechanisms and the role of the law[F]?

1. Beneficiaries

Social groups are replaced by social functions. It no longer makes sense to search for legitimate group interests which have to be protected by CSR. *Rather, it is the function and structural achievements of environmental sub systems which must now be seen as the beneficiaries of CSR*. Social groups,

in this perspective, are not irrelevant. But they are reduced to an instrumental role insofar as they represent one of those societal interests, and are in a position to control the fiduciary duties which are, however, not owed to them directly but to social functions of other subsystems.

2. *Mechanisms*

Voluntarism is only of marginal interest. Rather, different guidance mechanisms are needed to impose internal restraints on such economic action which has detrimental effects on the non-economic environment. This means that institutions and procedures should be designed to promote internal reflexion processes on the basis of "economic self-restraint". This reflexion cannot be voluntary, but needs to be stimulated by powerful external forces. Personal voluntaristic "responsibility" is not the central question but mechanisms of social institutionalizated "accountability" which are designed to stimulate the system's "responsiveness" to social needs. The important point about this external legal-political stimulation is that it is suited to the structure of market and organization. "Threatening profits" is one effective sanction of external stimulation[10]. The principle of fiduciary duty —or its functional equivalent of "organizational interest" —would then mean the external imposition of an internal "discourse" structure. However, the final goal is not a mere internal discursive unification process, nor is it the orientation of economic action exclusively in the consumer interest, nor a maximum increase in yield, not to speak of profit-maximization. These are only partial aspects. *Instead, fiduciary duties and organizational interests must be directed towards the creation of organizational structures for such discursive unification processes as to allow the optimal balancing of company performance and company function by taking into account the requirements of the non-economic environment* (Teubner, 1983b: 48).

3. *The Role of the Law*

The law's role then is to promote these internal reflexion processes. As we said earlier, neither the facilitative function, nor the regulative function of law are of interest here. Our approach leads us rather to a stimulative role of the law: to the design of legal structures which systematically strengthen reflexion mechanisms within the economic system. The "constitutionalization" of the private corporation might make the "corporate conscience" work if that meant to force the organization to internalize outside conflicts in the decision structure itself in order to take into account the non economic interests of workers, consumers, and the general public. This would make it plausible that economic goal structures which have already undergone a considerable change from profit-orientation to growth-orienta-

[1,1] See Krause (infra this volume pp. 108etseq.)

tion might change again by taking into account problems of ecological balance (Luhmann, 1977a: 39). Could this not even be the point — not where the law ends (Stone, 1975), but where the law begins: "reflexive" control of corporate behavior — by transforming external social problems into internal political issues of the enterprise? The law would have to begin then with the deliberate design of organizational structures which make the corporation sensitive to the external effects of its maximizing its internal rationality. The main function of the law would thus be to substitute outside interventionist control by an effective internal control structure, *to design structural preconditions jor an "organizational conscience" that would reflect the balance between its social functions and its environmental performance* — this would determine the integrative role of law in regard to CSR.

To be sure, this functional conception of CSR needs no a-priori-definition of the substantive goals to be achieved. As Krause (supra this volume p. 116) puts it, it "includes no restrictive prior decision or any conceivable specific set of preferable social outcomes. On the contrary, it is a peculiarity of this functional conception of social responsibility to preserve and secure the system's responsiveness to guide different and changing social needs and claims (Hondrich, 1975)."

IV. Doctrinal Consequences: Proceduralization of Fiduciary Duties

Returning then to our initial theme, fiduciary responsibility and its functional equivalent, "Unternehmensinteresse", the main consequence we have to draw from our theoretical considerations is one of *proceduralization*. Both fiduciary responsibility and Unternehmensinteresse were initially designed to formulate substantive legal rules of behavior. The development of precise standards of liability is expected from the legal principle of fiduciary responsibility. Correspondingly, the definition of the Unternehmensinteresse was supposed to result in substantive guidelines for the Vorstand, Aufsichtsrat and shareholders (Raisch, 1976: 347; Raiser, 1976: 101; Mertens, 1977: 270). From our discussion of CSR it becomes clear why those types of substantive standards could not develop too far, as we have seen in part supra II. B.

One way out of this problem is by legal retreat. The law withdraws from detailed regulation, formulates an ever-expanding "business judgment rule" — respectively, the counterpart of "Geschäftsführung in eigener Verantwortung" — and focuses exclusively on the regulation of extreme cases of power abuse. Our analysis however, points to a different direction: to a recharacterization of fiduciary duties and "Unternehmensinteresse" in the form of procedural and organizational norms.

In the German discussion of the Unternehmensinteresse there have been considerable efforts to define and concretize it in procedural norms[11]. As Kiibler (infra this volume p. 440) puts it; "Directors' duties and liabilities can not be expressed in terms of results but only in terms of behaviour". These concepts should be developed in the direction of our functional approach: as an integrative device concerning primarily the environmental relations of the enterprise and only secondarily the internal political process of com peting interest groups.

In the American discussion similar procedural approaches can be found. Epstein argues for shifting the focus from product-responsibility to process responsibility (Epstein, 1979: 1287). Stone proposes a new approach to CSR which would intrude into the decisions of the organization itself (Stone, 1975: 121; supra this volume pp. 137 et seq.). Jones and Goldberg (1982: 6.03) in their discussion of Public Directors on the board argue against "personal" solutions of managerialism and develop a procedural concept of CSR. Coleman points to the limits of "protector laws" and recommends changing the internal "rules of the game" (Coleman, 1982: 70). These approaches in turn should be developed in the direction of relating them directly to the legal doctrines of fiduciary duties. Buxbaum makes precisely this point:

> "Relief from personal involvement of directors in management, and from an anachronistically personalistic standard of care, is purchased at the cost of requiring and emphasizing proper procedures that help achieve the above-described function of the boards of directors." (Jennings and Buxbaum, 1979: 186).

If it is true that, under modern conditions — specifically under conditions of broad managerial discretion — management activities can be described only as the result of a tremendously complex interest-weighing process, fiduciary duties need to be redefined. As substantive standards, they are reduced increasingly to controlling the limits of discretion in cases of gross abuse ("Ermessensmißbrauch"; see Grossmann, 1980: 169). However, within the limits of discretion there is no room for substantive legal standards. This in turn need not necessarily mean an interest-weighing autonomy for a management's enlightened absolutism. *Substantive standards of fiduciary duties need to be replaced by procedural standards and or ganizational devices which guarantee the rationality of the interest-weighing process.* Within the limits of managerial discretion, the factual repoliti cization of economic decisions needs to be complemented by political control procedures. In that respect, fiduciary duties should be transformed into duties of disclosure, audit, justification, consultation, and organization of internal control processes.

[11] Steinmann and Geruin (1978: 70); Laske (1979: 173); Reuter (1979: 509, 516); Kunze (1980: 100); Raiser (1980: 206, 218); Brinkmann (1983: 305).

A. Duties of Disclosure

Control procedures can function only if sufficient information is made available. Disclosure, however, cannot be unlimited and it is the important task of a concept of "fiduciary responsibility" to define the scope and limits of a responsible managerial information policy (Steindorff, 1974: 632; 1977: 42).

Information rights and information duties are xvell-known control mechanisms in classical corporation law. The conflict between needs for disclosure and needs for secrecy has been reconciled through careful legal distinctions[1] The interesting point is how these procedures and their concomitant procedural duties can be expanded to cover problem areas other than the protection of shareholders' interests.

In Germany, with the introduction of labor participation in Betriebsverfassung (plant constitution) and Unternehmensmitbestimmung (codetermination in the enterprise), the duty of adequate disclosure has been expanded in regard to labor problems. There is a limited duty to inform the Betriebsrat (Sec. 80 (2) BetrVG 1972) and a far-reaching duty to inform the "Wirtschaftsausschuß" (Sec. 106 (2), (3)). And the traditional duty to inform the Aufsichtsrat (supervision board), according to Sec. 90 III 2 Aktiengesctz 1965, protects new beneficiaries since the enactment of Mitbestimmungsgesetz 1976 with labor occupying half of the seats. This creates the need for a re-definition of management's informational duties. Especially two problems complicate that task: the responsibilities of labor representatives toward their constituencies, and the question of business secrets[14].

In the U.S. with the emergence of union representation on corporate boards (as occurred with Chrysler in 1980), a parallel discussion attempts to define access to information for union representatives in terms of fiduciary duties. The conflict between fiduciary[7] duties, in regard to union members and to the corporation is reconciled by a general modification of the definition. This in turn is applied to a concrete delineation of duties of information (Georgetown Law[7] Journal, 1982: 951).

The expansion of informational duties in regard to interests and problem areas outside the corporation has only marginally taken place. It is mainly developed in contract law. Here, in cases of informational asymmetry[7] and organizational power the courts have developed quite an impressive bodv of "duties of loyal information" which can be interpreted as fiduciary duties of corporations in a broader sense (e.g. Teubner, 1980: Sec. 242, 70). Quite a

[12] In the same sense Stcinmann (supra this volume p. 424).'

■■ For the German law e. g. Wiedemann (1980: 374); for American law e. g. Jennings and Buxbaum (1979: 247).

[14] See extensively on this issue Ktibler (infra this volume pp. ** et seq.); Kittner (1972: 208); Reich and Lewerenz (1976: 353); Lutter (1979: 127; 1980: 291); Mertens (1980: 67); Claussen (1981: 58).

different type of informational duties are requirements of impact statements before major corporate actions are taken. In the U.S., environmental impact statements are already mandated by federal law. There are currently proposals to develop them into social impact statements (Miller, 1979: 91). It is expected that "the requirement of published findings prior to significant corporate action could well move the corporation and other social groups toward taking the public or national interest into account" (Miller, 1979: 92).

B. Duty of Audit

While the duty to inform a certain constituency is only a perfunctory reaction to specific problems, authentic auditing requires systematic presentation of data combined with active public scrutiny. Here again, procedural fiduciary duties have their place in defining the precise scope and depth of required information.

Again, we are faced with a drastic expansion of the concept. In Germany, classical auditing is designed in the interest of shareholders and creditors (Sec., 148 et seq. AktG 1965), while the Publizitätsgesetz 1969 (BGBl I, 1189/1969; 469/1974) is supposed to give information to potential investors, to employees and labor unions, to political organizations and to the general public (Kiibler, 1981: 248). Basically, these audits contain financial information. Recent developments, however, go beyond this limitation; the movement towards a "social audit" tends to broaden fiduciary duties in terms of responsibility for social consequences as well[15].

A promising approach in this field seems to be the above-mentioned "new disclosure" on social issues which has been developed in the interaction between the SEC, environmental groups and the courts. While the SEC adopted a rather modest approach which requires disclosure only with regard to non-compliance with environmental standards, there is a whole range of possible disclosure requirements which can be implied from existing regulations and which were favorably judged by the court:

> (1) the comprehensive disclosure of the environmental effects of corporate activities; (2) disclosure of corporate non-compliance with applicable environmental standards; (3) disclosure of all pending environmental litigation; (4) disclosure of general corporate environmental policy; and (5) disclosure of all capital expenditures and expenses for environmental purposes." *{Natural Resources Defense Council, Inc. v. SEC,* 432 F. Supp. 1190, 1201 (D.D.C. 1977).

It might be true that, in terms of legal doctrine, the SEC's investor approach is not the correct road for expanding social fiduciary duties (Hazen, 1978: 412). Thus, it might be more advisable to use a direct "society approach", as attempted in Europe (Schönbaum, 1972; Dierkes, 1983; infra

[15] See more generally on social auditing Dierkes (infra this volume pp. 365 et seq.).

this volume pp. 365 et seq.). One might even go further and provide for a "functional audit" to open to outside scrutiny corporate actions which might be dlegal or improper (Coleman infra this volume pp. 75 et seq.). In any case, it becomes clear that in regard to environmental and social con sequences of corporate action, fiduciary duties take on a procedural cast, i. e. it becomes necessary to design a procedure for providing adequate in formation, whose scope must be carefully developed in terms of a complex interest-weighing process. At the same time it becomes apparent that with regard to environmental and social issues, the beneficiaries of fiduciary duties cannot be identified with social groups. Groups serve only an instrumental role in protecting important functions of the natural, social and human environment of the corporation.

C. Duties of Justification, Consultation and Negotiation

Beyond the scope of punctual and systematic information requirements a whole range of fiduciary duties can be unfolded which limit managerial autonomy by specific procedural requirements. Through various organiza tional devices, management may be under a legal obligation to involve certain institutions, boards, committees, and organizations, in the decision process. Sometimes this obligation is interpreted in terms of a-posteriori-justification, and sometimes as a-priori-consultation, and sometimes as full-fledged negotiation. The fulfillment of these duties depends primarily not on liability schemes but on sanctions available to the institutions involved and their constituencies. There is, however, a need for fiduciary duties en forceable in the courts. These obligate management to proceed in "good faith". "Elements of such an order or behavior can be found at the one hand in the principle of trustful cooperation — and the duties to guide the negotiations with reasoned arguments and to proceed cooperatively in the functionally divided tasks of the enterprise. On the other hand, this order of behavior is formed by those concretizations of duties which make it possible for management to cope adequately with partially contradictory expecta tions" (Brinkmann, 1983: 305).

In the course of "constitutionalizing" the corporation, many controversies have emerged about the scope and content of this "duty of cooperation". In German law, one field is determined by duties of information, consultation and participation with regard to the "Betriebsrat" (work council). Secs. 21. 74 BetrVG 1972 mandate a duty of trustful cooperation and a duty to further the interests of employees and of the enterprise. The Betriebsver fassungsgesetz distinguishes between rights of information, of hearing, of initiative, of consultation, of veto, of consent, and of participation. These duties have been created by legislation while their precise scope and limits have been worked out in a case-by-case approach in the courts (e.g. Zöllner, 1983: 346). Another field of great importance today is the new

order of competences, procedures and participation rights under the Co Determination Act of 1976 (e.g. Raiser, 1977) Here, it is still a question for the future to work out a new procedural order and the concomitant duties of co-operation in detail.

Furthermore, the duty to cooperate with institutions outside the corporation is today still a rather unexplored area. It is only recently that in the discussion on CSR, policy considerations have envisaged duties of con sultation with organized outside interests. Supported by some tentative court decisions which demanded that federal agencies take account of the groups they are affecting, Stone proposes to assimilate concerned outside interests on an ad-hoc basis in the decision-making (Stone, 1975: 220) This would again signify a widening of fiduciary duties if "law might well force high company officials to confront and negotiate 'in good faith' with com munity leaders" (Stone, 1975: 220). Going beyond such an ad-hoc co ordination, Nader *et al.*, (1976) conceive a systematic coordination of the firm with outside interests such as consumers, taxpayers and the neighboring community. In their view, this could be achieved by area-representation on the board: employee welfare, consumers, environment and community, law-enforcement, planning and research etc. Both proposals again show the shift from social groups to social problems. Under the heading "Lobbying the corporation", additional proposals have been made to support institu tionally the lobbying activities of interest groups with regard to the cor poration (Levitt, 1973). This again would create the need to formulate con comitant fiduciary duties, similar to those duties of government in relation to political interest groups (such as rights of hearing, consultation, and participation).

D. Duty to Organize ("Organisationspflichten")

While the fiduciary duties discussed so far are related to the existence of certain institutions which need to be informed or consulted, a different type of procedural fiduciary responsibility would demand, in effect, the very creation of certain institutions. Under conditions of large scale, complex organization, top management obviously cannot be made responsible for all problems arising within the organization, since many are outside their personal sphere of action. However, the idea is that management can still be made responsible for creating a system of coordination, supervision, monitoring and control (Jennings and Buxbaum, 1979: 186).

In German tort law, the courts were not in a position to make the top of the organization liable if the superiors could excuse themselves (Sec. 831 Bürgerliches Gesetzbuch). The courts circumvented this obstacle by creating so-called "Organisationspflichten". The leadership of the organiza tion was thereby held liable because it had not designed an adequate or ganization of production and control (e.g. Palandt, 1983: Sec. 823, 16 D cc).

This concept should be transferred to our field of fiduciary responsibility since it seems to be at the same time realistic and effective. It reduces un realistic duties of personal responsibility and compensates this reduction with an increase in duties to organize a procedure. Again it is Stone who has developed in depth legal policy considerations in this direction (Stone, 1975: 199). He pleads for legal requirements and controls on a company's internal information processes and for legally redesigning internal decision-making. The idea is that management has a duty to organize special responsibilities for external and internal social affairs (Weitzig, 1979: 17).

V. Generalizations

This review of certain legal developments and of possible future trends in American and German corporation law was intended to show what can be expected from a procedural reformulation of fiduciary duties. If one abstracts a little from these specific proposals and pays attention to their foundations, it becomes clear in what directions they lead beyond the existing debate on fiduciary duties and how they might stimulate future thinking about legal policy.

One of the directions is *specification.* While the traditional debate on company constitutions essentially concentrates on the representation of a general "public interest" on the boards (governement representatives, co opted public figures), these proposals aim at specific machinery for solving specific problems. The approach is the identification of a particular social problem and the creation of a solution mechanism precisely designed for the purpose with speciiic powers, decision-making procedures and standards of liability. This reflects precisely the change from an interest-group approach to a problem-oriented, functional approach.

A second direction is the *inclusion of the whole corporate structure.* While the common debate essentially turns on fiduciary duties of management and representatives on the supervisory board, these ideas suggest that all cor porate bodies and levels of hierarchy 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.

The third direction may be called the *generalization of company law mechanisms.* The point here is to examine the whole, historically developed machinery of shareholders' interest protection in company law to see whether it can be generalized in the direction of broader social requirements. Practices of participation in decisions, standards ol responsibility, liability arrangements, control arrangements, and court procedures should all be reconsidered to sec whether and to what extent they can be made use of to promote the social responsibility of the economic enterprise.

The last and perhaps most important direction into which fiduciary relations might develop is their *relation to the company constitution* as a

whole. Traditionally, fiduciary duties exist between persons. If there is a trust relation between people, the trustee comes under certain substantive fiduciary obligations. Under modern conditions, these obligations change their fundamental character. Insofar as management becomes responsible to diverse social interests, its responsibilities are no longer bound by specific substantive duties, but by the process of "constitutionalization", which creates a network of decision procedures, institutional arrangements and organizational units. These represent the modern emanations of fiduciary responsibility as a legal principle. Fiduciary duties as specific norms remain important, but with a different function. They serve now as devices of situational integration within the complex network of the company con stitution. If developed by legislation or by the courts, the duty of co operation "in good faith" is indispensable to guarantee the integration of a complicated, conflict-loaded decision process. In that sense, the above-mentioned duty-approach and the structural approach indeed supplement each other: Procedural fiduciary duties seem to be necessary complements of a highly developed company constitution.

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