CSR and the Public/Private Divide

A Response to Ellen Hertz

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Ellen Hertz's manifold critique of corporate social responsibility (CSR) paradoxically begins by establishing common ground with the ardent defender of free market capitalism and an otherwise political opponent to her normative framework, Milton Friedman. Building on his analytical framework, according to which corporations and government operate on different principles, Hertz reinforces the idea that CSR cannot and should not replace democratic mechanisms in the determination of the public interest. In addition, following established critiques of CSR (e.g., Shamir 2008), Hertz highlights that CSR introduces the logics of the market in areas traditionally governed by different logics of action, while it also serves to obfuscate relations of power and to shape global governance in corporate-friendly directions.

I agree with the broad lines and the spirit of the argument proposed by Hertz. Yet, I would like to suggest, first, one complication—and, perhaps, revision—of the argument against the reliance on CSR, which stems from a problematization of the rigidity of the public/private distinction. Second, I would also like to propose a nuancing of the critique, which relates to the diverse ways legal imaginaries of socio-ecological transformation can become purposeful.

Hertz suggests that it is 'the public' that must set the rules for business, not corporations. However, it is often 'the public' itself, in the sense of the organized polity, that establishes rules that rely on CSR and societal self-regulation. CSR is not the result of a legal vacuum that corporations rush to fill in order to advance their interests, but rather the deliberate product of a legal architecture relying on decentralization, pluralism, and reflexivity to advance public and social goals. The genealogy of this turn to decentralization and proximity in regulation (Black 2001) can partly be traced to the pervasiveness of the neoliberal view of the globalized economy as hyper-complex and 'unknowable' (Slobodian 2018), which disarmed visions of economic planning and top-down regulation. CSR purports to be meaningful in response to 'governance

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gaps' (Ruggie 2008) that result from the disjunction between the transnational nature of networks of production and the national character of regimes of responsibility and liability. Building on the recognition of lead firms as core actors of global economic governance and as producers of normative orders that materially govern supply chains (Bair 2005; The IGLP Working Group 2016), the idea is to embed social values in the operations of lead firms by exposing them to societal pressures. Some examples of such a regulatory approach are found in the EU Directive 2014/95 on non-financial disclosures, the UN Guiding Principles on Business and Human Rights, or the UK Modern Slavery Act. Public authority relies then on transparency, social expectations, and market dynamics, as opposed to legal sanctions, to steer corporate conduct. Yet, such 'social expectations' are not created in a vacuum but reflect pre-existing social inequalities and market power. As CSR—and corporate self-governance more broadly—becomes a core feature of new forms of market regulation that aspire to social and environmental sustainability, critical voices should shift the focus from an uncomplicated defence of the 'public' against 'the private' to how 'the public' may facilitate the expression of private power and the reification of asymmetries of social power into legal arrangements (Kampourakis forthcoming).

Just as the notion of 'public' needs to be problematized, disentangling its descriptive from its normative component, so do the concepts 'private', 'business', and 'market' need to be unpacked. The notion that markets are a product of legal ordering (Hale 1923) harbours the idea that a reconstitution of market dynamics by means of legal instruments is possible, nuancing perhaps the point that 'until the replacement of capitalism', business needs to be driven solely by profit-maximization. While the extent to which legal instruments alone can redirect this fundamental drive might indeed be inherently limited by social relations of production, tectonic shifts in legal arrangements could still have dramatic repercussions for the understanding of what constitutes 'business'. If that is true, then the critique to CSR and to new forms of market regulation that rely on corporate 'self-change' should aim not only at their market-embedded nature but also at their structural inability to challenge the original institutional setup and how it generates market power and socio-economic inequalities. For instance, should legal reforms address both redistributive public law institutions and core aspects of the legal infrastructure of markets which make up 'business', such as, for example, the corporate form consisting of limited liability and shareholder primacy (Ireland 2010), then superstructural reforms like CSR might become meaningful. While the goal remains to place private power under democratic control and assert collective priorities over the

economy, the imaginaries of where public power is to be reconstituted need not be confined within the traditional structures of government.

The last point demonstrates the need for a flexible and mobile critical practice that can unfold within and beyond institutions (Poulantzas 2008), corporations not excluded. In that sense, a critical practice that aspires to a democratic political economy (Britton-Purdy et al., 2020) may advance the reconstitution of public power and democratic control in different ways in different contexts and with varying expectations, including by means of public regulation, reconfiguration of private governance institutions, or expansion of non-capitalist spaces and non-extractive economic practices.

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