WORKERS' PARTICIPATION IN ECONOMIC ENTERPRISES UNDER GERMAN LAW

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I. Introduction

In Germany, Switzerland usually is said to be the 'Musterländle der Demokratie', a pet form, that means model of democracy. Similarly it might be said that the Federal Republic is the 'Musterländle', the model country, for co-determination and participation of employees in private enterprises and public administration.

1. RESTRICTION OF SUBJECT

In the following, I intend to restrict myself only to economic enterprises which are operating in the form of a company with legal personality. This restriction seems to be expedient, as a reader of this periodical will hardly be interested in German public administration.

The restriction to companies is expedient, as in the Republic of Malta, participation has been introduced in enterprises with corporative and company structure only.[1] Besides this aspect, Maltese firms are cooperating with German companies. So the working structures of enterprises in Germany, especially companies, may be of interest.

Following these lines, we are going to deal with workers' participation in German companies. This means that the specialities of companies, concerned with workers' participation on Board levels are being considered. This starting point does not exclude a short consideration of workers' participation on plant level by works councils, as works councils are being constituted not only in enterprises run by a single natural person or a partnership but also in companies.

2. MEANING OF 'PARTICIPATION'

Participation in my statements in a broad sense means that the entrepreneur is by law not authorised to make an entrepreneurial

[1] See Gerard Kester, *Workers' Participation in Malta — Issues and Opinions,* Rotterdam 1974, and the book review, written on Kester's publication by Josef Micallef, in *Development and Change,* published by the Institute of Social Studies, The Hague, Vol.6, number 3, July 1975.

decision without cooperating with workers' representatives. This *cooperation* may include *co-determination*, which means that the intended decision can only be made together with workers' representatives.

Further participation may materialise according to our law in a *discussion* of the object with workers' representatives before the decision has been made, or the entrepreneur may be obliged *only to hear* the views of workers' representatives. Finally the law may prescribe that the entrepreneur has to give notice of his decision being made. So participation means cooperation in different grades.[2]

Before I start to give you more detailed viewpoints, let me mention some aspects of the laws which are involved in the subject.

II. Main German Laws Involved

As regards economic enterprises in practice, the most important legal structures of company law in the Federal Republic of Germany are the Aktiengesellschaft (AG), that is a public stock company, and the Gesellschaft mit beschränkter Haftung (GmbH), which is a private company limited by shares. So I will restrict myself to these two types of companies.

The Acts concerned are the *Aktiengesetz 1965* and the *Gesetz betr. die GmbH of 1892*.

Relating to company boards in view of participation, the *Coal and Iron Industries Co-determination Act of 1951* and the *Coal and Iron Industries Co-determination Amendment Act of 1956* must be mentioned, as *special laws*, which deal with iron and coal producing companies, established by the occupational powers, especially Great Britain, after World War II.

General law, however, is contained in the Betriebsverfassungsgesetz 1972 (BetrVG 1972), which we shall call *Works Councils Act 1972*, and which is the successor of the Works Councils Acts 1952 and 1920. The Act of 1972 does not only regulate the competence of works councils at plant level, but also generally the participation of workers' representatives at company boards.

The mentioned Acts concerning participation reflect steps of a historical development which has not yet been concluded. German Trade Unions are urging further development of co-determination. And it must be seen as one step forward in that direction, that the

[2]For further view-points see J. Micallef, *The European company – A Comparative Study with English and Maltese Company Law*, Rotterdam, University Press, 1975, Chapter V, p. 1 ss.

German Parliament is discussing a new *Co-determination Bill* at the moment.

III. Basic Structures of German Companies

1. Aktiengesellschaft (AG): Public Stock Company

The structure of the German AG is especially marked by the *dual board system.* Beside an *executive board,* managing the company, the setting-up of a *supervisory board* is obligatory, which is to supervise the management of the executive board and to take part in fixing the broader lines of company policies. The *General Assembly* elects the supervisory board which in its turn appoints the executive board.

The *supervisory board* in a *AG* was created in the middle of the 19th century. Until then, the foundation of an AG as well as its management were under the control of the state. Under the influence of the liberal ideas of freedom, and the further fact that the state authorities felt their control over AG to be rather inefficient, it was abolished. (Being of the opinion that) a shareholders' assembly would be inefficient also to control the management of an AG, the State authorities created a supervisory board, elected by the shareholders.

2. Gesellschaft mit beschrankter Haftung (GmbH): Private Company Limited by Shares

As regards the GmbH the *GmbH Act* itself does not follow the dual board system. But in this respect the mentioned Acts concerning participation are of importance.

3. Influence of Works Councils Act and Co-determination Acts

The *Works Councils Act 1972* peremptorily demands the setting-up of a supervisory board for all GmbH with more than 500 employees; and the *Coal and Iron Industries Co-determination Act of 1951* and the *Amendment Act of 1956* prescribe the setting-up of a supervisory board for any GmbH coming under these Acts.

The mentioned Acts also define as obligatory the composition of the supervisory boards for the AG and the GmbH and restrict the traditional freedom of decision of the shareholders' assembly.

The *Coal and Iron Industries Co-determination Act 1951* as well as the *Amendment Act of 1956* further prescribe the obligatory composition of the *executive* or *managerial board* of the AG and the GmbH, coming under these Acts.

IV. Composition of Supervisory Councils

1. Works Councils Act

In companies coming under the *Works Councils Act*, the Supervisory Board consists of at least three members. If the articles of association provide for more members, their number must always be divisible by three. This regulation is necessary as the supervisory boards of AG and GmbH coming under the *Works Councils Act* must consist, in one third, of representatives of the employees who hold the same rights and duties as the members of the supervisory board representing the shareholders.

These workers' members are not elected by the shareholders' assemblies of the companies, as is the case with the shareholders' representatives in the supervisory boards, but they are elected by the employees of the plants of the enterprise.

2. Co-determination Act 1951

In the companies of the iron and coal producing industries coming under the *Co-determination Act 1951*, the supervisory boards are to consist of 11, 15 or 21 members. The supervisory board consisting of 11 members is to be made up of

(a) 4 representatives of the shareholders and one so-called further member,

(b) 4 representatives of the employees and one further member,

(c) one further member.

The *further members* must be independent personalities, that is they must neither have common interests with the shareholders nor with the employees. The *Co-determination Act* contains more detailed regulations as to this.

The *election* of the representatives of the shareholders does not raise any special questions.

The election of the representatives of the employees, on the other hand, is a rather complicated procedure.

Out of the 5 representatives of the employees of the supervisory board of 11 members, *one worker* and *one white-collar worker* of the enterprise are *elected by the works councils* of the plants of the enterprise by secret ballot, after consultation with the head organisations of the trade unions. They are nominated to the shareholders' assembly for election as the representatives of the employees. *Two members* are nominated by the head organisations of the trade unions after consultation with the trade unions represented in the enterprise concerned and the works' councils of the enterprise. The same applies to *the further member* who is to be no-

minated for the representatives of the employees.

The *11th member,* a so-called further member, is to be nominated to the shareholders' assembly by the 10 members of the supervisory boardrepresenting the shareholders and the employees.

A very complicated procedure is provided for, in case the shareholders' assembly does not elect the nominated persons, a case which fortunately so far has not happened yet in practice.

3. AMENDMENT ACT 1956

Referring to the *Coal and Iron Industries Amendment Act 1956,* I only want to state that after the Occupational Powers of World War II had given up their de-cartellisation policy in Germany and permitted again the setting-up of concerns for German firms, the *Co-determination Amendment Act 1956* was passed in order to secure the co-determination of employees in the supervisory boards of the concerns. I do not want to consider this further because of and executive boards of the concerns. I do not want to consider this further because of lack of space.

V. Composition of Executive Boards

Apart from the composition of a Supervisory Board in parity of shareholders and employees, one further decisive characteristic of co-determination in coal or iron producing enterprises coming under the *Coal and Iron Industries Co-determination Act* or the *Amendment Act* is the obligatory legal regulation that a *director for labour relations* must be appointed to the executive board as a member of equal rights and duties. The labour relations director cannot be appointed to the executive board against the votes of the majority of the employees' representatives in the supervisory board.

VI. Tasks of the Supervisory Board and the Executive Board

Let us now shortly deal with the tasks of the executive boards. The *executive board* of an AG has to manage the company in its own responsibility (§ 76 AktG); this means that they are neither bound by law to orders of the supervisory board nor to those of the general assembly. There does not exist a corresponding regulation for the management of the GmbH. The managers of the GmbH may be bound by conclusions of the shareholders (§ 37 GmbHG).

The *supervisory board* mainly has to supervise the management (§ 11 AktG). It holds the unlimited right of information, and the executive board is obliged to inform it on all essential occurrences in the company, especially so on the company's policy (§ 90 AktG). This enables the supervisory board to influence the mana-

gement's policy by recommendations, hints and suggestions. It is not bound to orders from the shareholders' assembly.

VII. Participation of Employees according to the Works Councils Act 1972

After having pointed out some basic ideas of participation and co-determination at company boards, I want to give you some short information on works councils, in order to complete the picture.

According to the works councils law, in plants with more than 5 regular employees works councils have to be formed which may consist of one to 35 persons according to the number of employees. These councils deal with various matters.

The works council has an actual and real *right of co-determination* as to *social affairs* (§ 87) and as regards *changes in the plant* which will be disadvantageous to the employees (§§ 111 ss.).

They also have a right for co-operation in *personal affairs* (§§ 92 ss.).

Further, in plants with more than 100 regular employees an economy-committee is to be formed which has a right of information by the employer (§§ 106 ss.).

All workers of a plant constitute the plants' assembly (§§ 43 ss.).

1. Social Affairs

As I mentioned, the works council has to co-decide in social questions, i.e. the employer cannot decide alone on these affairs; he must discuss them with the works council and must come to an agreement with them. The affairs which come under the co-determination of the works council are exactly stated in the law:

(a) questions of order in the works and the conduct of employees therein;

(b) beginning and ending of daily working time and recesses as well as the allocation of the working hours to the week days (including Saturdays);

(c) temporary shortening or extension of the usual working hours at the works;

(d) time, place and manner of payment of wages and salaries;

(e) establishment of general principles governing vacations and the scheduling thereof as well as fixing periods of vacation for individual employees, if no agreement can be reached between the employer and the employees concerned;

(f) introduction and application of technical apparatus serving to check the conduct or the efficiency of employees;

(g) regulations concerning the prevention of industrial accidents and occupational illnesses, and the protection of health within the scope of the legal provisions or the safety regulations;

(h) form, arrangement and administration of social welfare services that are limited to the operations of the works, the enterprise or the concern;

(i) allocation and termination of housing which is rented to the employees on the basis of the employment relationship as well as the general fixing of conditions for use;

(j) questions pertaining to the wage framework, especially the setting-up of principles of remuneration and the institution and application of new methods of remuneration as well as their alteration;

(k) fixing of piece-work pay and premiums and comparable performance-based remuneration including the financial factor;

(l) principles concerning the suggestions procedure.

The settling of questions between the employer and the works council will be carried out in each case by a *plant-bargaining.* These single plant-bargainings are rendered the same effects as the collective agreements of Trade Unions, i.e. these agreements are directly effective and obligatory for all employees (§ 77 subsec. (4)).

2. Personnel Matters

In questions of *personal affairs* the works council takes part in recruiting man power, change of working groups, change of working place and dismissals (§§ 99 ss.).

When, for instance, a new employee is taken on, the employer has to inform the works council of the new employment. The works council can raise objections against it. If no agreement can be reached the employer is entitled to engage the applicant provisionally and has to apply then to the Court of Labour for the replacement of the lacking consent of the works council by a decision of the court, which will examine whether the council had a justified reason for their refusal of approval. The same applies to changes of working groups and changes of working places.

Furthermore, the employer is obliged to hear the works council before dismissing an employee.

3. Plant Assembly

The plants' assembly will come together at least every quarter of a year. There will be given reports on current affairs by the works council and the employer only and questions will be discus-

sed, but no decisions are taken.

4. ECONOMIC COMMITTEE

The Committee of Economics, which, though not identical with the Works Council, must however, count at least one member of the works council among its members, and is intended to secure mutual information between the works council and the employer on economic affairs (§§ 106 ss.). This Committee is entitled to information on the economic affairs of the enterprise. The economic affairs include amongst others:

(a) the economic and financial situation of the enterprise;

(b) the production and sales situation;

(c) the production and investments program;

(d) manpower-saving plans;

(e) methods of work and production, particularly the instituting of new methods of work;

(f) cutbacks or closing down of works or of parts of works;

(g) the geographical transfer of works or parts of works;

(h) the amalgamation of works;

(i) any change in the organisation or the purpose of the works;

(j) other matters and ventures which could vitally concern the interests of the employees of the works.

VIII. **Purpose and Basic Ideas of Participation**

Until now, I have bombarded you with many complicated technical details, though I have only roughly described the contours. The field of participation is so very complicated because of the manifold conflicts of interests behind it, regarding economics, social and general politics. In order to help you understand the specific German problem of participation in spite of the complicated regulations, I will shortly deal, by way of keywords, so to say, with the connections to economic, social and general politics. Thus the deep-going differences to the regulations in other European countries will become more comprehensible.

1. SOME SENTENCES OF A FAMOUS BRITISH AUTHOR

In 1776 a famous British writer published the following sentences:

(i) Labour... is the real measure of the exchangeable value of all commodities.

(ii) Labour was the first price, the original purchase money that was paid for all things.

(iii) The produce of labour constitutes the natural recompense or wages of labour.

(iv) In that early and rude state of society which preceeds both the accumulation of stock and the appropriation of land, the *proportion between the quantities of labour necessary* for acquiring different objects seems to be the only circumstance which can afford any rule for exchanging them for one another.

(v) As soon as the land of any country has all become private property, the landlords, like all other men, *love to reap where they never sowed* and demand a rent even for its natural produce.

(vi) As soon as stock accumulated in the hands of particular persons, some of them will naturally employ it in setting to work industrious people, whom they will supply with materials and subsistence, in order to make a profit by the sale of their work or by what their labour adds to the value of the materials.

The author of these sentences was none other than Adam Smith, formerly Professor of Moral Philosophy in the University of Glasgow, later the High Tax Commissioner in Scotland, in his famous book 'An Inquiry into the Nature and Causes of the Wealth of Nations'.[3]

The reference has been made because I could imagine that you will realise the connection between those sentences and the background of the German approach to Participation, especially co-determination.

2. Background in German Legal History

Seen from the point of view of legal history, the present Co-determination Acts dealing with participation find their predecessors in the Weimar Constitution and in the *Works Councils Act of 1920* and some related laws.

Art. 165 of the Weimar Constitution provided for a programme of socialisation of industries suited for it, which were to be managed by a councils system e.g. works councils, regional labour and economic councils and a Reichs Labour Council and a Reichs Economic Council. Actually, only the works councils were established out of the number of councils of this system, these being organs of public law in view of the aim of socialisation. The *Works Councils Act of 1920* also provided for representation of employees in the supervisory boards by a third of the members.

[3]See the first edition of which I referred to, especially to p. 35, 36, 78, 58, 56, 59, 57.

3. Development after World War II

The efforts of reviving the programme of Art. 165 of the Weimar Constitution which then had not been realised, after World War II, especially that of achieving the socialisation of the key industries, failed above all because of the opposition of the USA as Occupational Power. Within the framework of the de-cartellisation of the coal-, iron- and steel-producing industries, the development went on to co-determination in parity instead. This came about under the *Iron and Coal Co-determination Acts* and the introduction of works councils – by the *Works Councils Act 1952* – as it was already known from the *Works Councils Act of 1920*. The German trade unions, by accepting the step towards co-determination in parity, gave up their claim for socialisation and recognised the capitalist economic system, with the consequence that the works councils were not anymore the employees' representations under public law but organs of the employees under private law.

4. Economic-, Social- and Legal-Political Backgrounds of the Demand for Co-determination in Parity of the Employees[4]

(a) In order to give more light to the background of the demand for co-determination in parity of the employees we may generally go back to the basic idea of *Art. 165 of the Weimar Constitution.* According to the official reasons for that Article, it was understood to mean that the worker was not to be only worker but producer as well. Its aim was 'to pave the way for the working masses to ascend to free human existence with moral dignity and responsibility'.

(b) Behind this basic idea and purpose we find the social fact, that the *employee's* relation to his employer is one of domination, that he is personally and usually also economically *dependent* on the employer. Participation is to give him more equality and freedom.

(c) The demand for co-determination, further, is based on the *change of structure* in the big industrial enterprises, which mark

[4]See as to these aspects for further information Fritz Fabricius, *Mitbestimmung in der Wirtschaft – Ein gesellschafts-, wirtschafts- und rechtspolitisches Problem, Athenäum Verlag,* Frankfurt am. Main, 1970; Fritz Fabricius, 'Co-determination in European Company Law,' in: *The Harmonisation of European Company Law,* edited by Clive M. Schmitthoff, United Kingdom Comparative Law Series, distributed by The British Institute of International and Comparative Law, London, p. 101-129; further Fritz Fabricius, 'A Theory of Co-determination', ibid, p. 138-156.

the picture of economy in our time. As John Kenneth Galbraith states in his book 'The Industrial State', it is marked by the fact that the management of the enterprise has become independent from the entrepreneur, who only appears as the giver of capital. And he also holds that the management's functions are influenced strongly by the so-called technostructure.

(d) Finally, the growing interdependence of industry and state is to be taken into account.

(e) From these facts, above all, the sociologist Hondrich concludes in his book 'Mitbestimmung in Europa', (1970), that the struggle for co-determination is being fought because the position of power of the entrepreneur has been shifted towards the employees in the course of the past 50 years, which shift was combined with the growth of political power of the employees. So, co-determination was to turn this *actual growth of power* into *legalised authority.*

(f) From the point of view of legal politics co-determination may be seen as a means to assist the working masses 'in attaining a human status, enjoying moral *dignity and responsibility',* terms which are based upon the concepts of human *freedom and equality.* The demand for co-determination derived from a demand for more equality and equal legal rights. It is thus made on the basis of equal rights for labour and capital. So it may be understood as the demand for a further development of the *formally* liberal democratic legal state towards a *materially liberal democratic legal state.* This, above all, means a far-reaching realisation of the principle of equality.

(g) From a theoretical point of view it may be asked whether co-determination in parity can be introduced without answering the issue of *ownership in industrial property.*

Such co-determination would involve the representatives of the employees in decision-making with regard to the disposition of goods which they do not own, such as the property of the entrepreneur. In my personal view, it is necessary to make them co-owners of the production, not the means of production, based on the basic principle that labour aims at property. Besides, a certain amount of the share of the production-property must obligatorily be invested in shares of the company. Acknowledging these principles, socialisation or nationalisation of industrial property will be avoided, the free market economy will remain untouched and workers will become shareholders in the capitalist system.

As to further information I may refer to my publications, mentioned in footnote 4.

IX. Practical Experience

As regards practical experiences with co-determination in the Federal Republic so far, I would like to state that the results of respective investigations on the whole have shown *positive results*. There will only be mentioned here the Report of the Expert Commission of the Federal Government.

X. Aspects of Future Development

1. A New Statute in the Making

In its communique at the beginning of their legislative period on the 12th January 1972, the present German Government announced its intention to draft a new statute on co-determination of employees in enterprises developed from the principle of legal equality and equal weight of employees and shareholders. On the 22nd of February 1974, a draft called 'Entwurf eines Gesetzes über die Mitbestimmung der Arbeitnehmer (Mitbestimmungsgesetz – MitbestG)' was submitted by the Federal Government to the Bundesrat. The draft proposed to introduce an equally balanced co-determination of employees into all AG and GmbH with 2000 employees. The complicated rules of the draft, put together in 34 sections, cannot be dealt with here. There are heated discussions about it at the moment, since a compromise, which would be endorsed by all political groups, does not seem to have been found.

2. An Evolution from the Concept of Company Law to a Law of Enterprise

Under the influence of the Co-determination Acts, traditional company law is developing new structures. In view of the fact that co-determination in the enterprises in the Federal Republic will be extended during the next years, the Federal Republic is on the way to a new law of enterprise, which will earlier or later absorb traditional company law.

But the main point, you may keep in mind, is that co-determination is an approach to materialise the basic democratic principles of freedom and equality.

I am therefore not inclined to translate the German word 'paritätische Mitbestimmung' into English by 'Co-deterioration on the basis of equal representation on the board of companies', as was done in a book review in the 'Guardian' of 18th December 1974 on the recently published new edition of Langenscheidt's Encyclopaedic Dictionary of the English and German Languages.