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CO-DETERMINATION IN THE FEDERAL REPUBLIC OF GERMANY: PRESENT STATE AND PERSPECTIVES

Hans G. NUTZINGER)*

I. The legal framework up to 1975

The idea of a constitutional limitation of private property rights — and especially the right to direct other people's work derived from this property — has a long tradition in Germany, starting as early as in the National Assembly of Frankfurt in 1848 *(Paulskirche)*. Since then, a large number of proposals and laws have been put forward by different institutions and parliaments.

The existing legal structure of co-determination in Germany is partly based on its antecedents in Imperial Germany and in the Republic of Weimar. Due to the specific situation after World War II, legal development has been far from systematic. The first law which was passed by the West German Parliament was the *Montan-Mitbestimmungsgesetz* (co-determination law in the coal and iron industry) in 1951. Up to now, it contains the farest-reaching institutional arrangements. Whereas the workers do not have direct representation at the annual general meeting of the corporations, an equal number of workers' representatives (mainly proposed by the respective union) is elected to the Board of Supervision. In order to avoid impasse situations, a so-called »eleventh man«, the chairman of the committee, is elected by both groups jointly, making the number of members uneven. Theoretically, the chairman has the decisive vote, but in practice he often tries to settle between both groups if there is any serious conflict. According to German company law, the Board of Supervision appoints the Board of Management and is assumed to advise, to supervise and to control its conduct of business. As a special representative of the employees on the Board of Management, the head of the staff department is elected by the supervisory board, and he has to obtain the majority of the votes of workers' representatives. He is called *Arbeitsdirektor* (labour director). In order to include those parts of holdings or conglomerates which are producing in the coal and steel industry, an amending law *(Mitbestimmungsergänzungsgesetz)* with similar arrangements was introduced in 1956. These particular laws for the coal and steel industry

*) University of Heidelberg, Alfred Weber Institute.

owe their origins to the specific situation after World War II where the employers themselves offered the unions equal participation in business affairs in order to avoid or to prevent dismantling of enterprises by the Allies.

Industrial relations in all industrial enterprises with more than five permanent employees are ruled by the so-called *Betriebsverfassungsgesetz* of 1952 (works constitution law). This law passed the legislation despite heavy opposition from the unions. Its regulations are far weaker than those of the co-determination law. This law distinguishes between rights to co-determination *(Mitbestimmung)*, consultation and cooperation *(Mitwirkung)*, and rights to information. As a rule, these rights are strongest in social matters and internal work regulations (e.g., working time); they are mostly of the medium type in personal matters such as engagements, regrouping, discharges, and transfers. In business questions, the works constitution law mainly gives rights to information, and only with respect to those decisions which directly affect employment of workers (e.g., those relating to technical innovation or the opening of new plants), more influence is given to the representatives of the workers. These co-determination and consultation rights were even increased by the amendment of January 19, 1972 which strenghtened the position of workers' representatives in social and personal matters and especially the rights of young workers without changing the basic distribution of decision-making power.

The basic institution of the works constitution law is the *Betriebsrat* (works council). It consists, depending on the size of the enterprise, of a certain number of directly-elected employees of this enterprise who belong mainly to unions or other organized groups. They exercise most of the rights given by the law, and in some practical cases they can even increase their power by some form of logrolling (e. g., granting permission in certain topics subject to strict co-determination in exchange for some concessions by the management in other topics). Apart from that, the works constitution law also gives some rights to the individual employee in matters concerning his own employment that are, however, confined to legal claims to information and the right to complaint. The rather weak possibilities of influence in economic affairs is shared between the works council and the so-called *Wirtschaftsausschuss* (joint economic committee). This latter institution is basically confined to rights to information concerning the policy of the firm. In contrast to the special *Montan-Mitbestimmungsgesetz*, the works constitution law gives only one-third of the seats on the supervisory board to workers' representatives. So, employee participation in basic business decision-making is rather ineffective as an internal pressure to reach agreements acceptable to both parties does not operate. In fact, there seem to be basic differences with respect to employment: during the last economic crisis, the percentage of workers fired was lower, and the application of shortened working time was more frequent within co-determined industries as compared with the other ones.

For employees in public administration, a similar law was introduced *(Personalvertretungsgesetz)* in 1955. In general, the rights to co-determination and consultation are even weaker than according to the works constitution law. A special group of so-called *Tendenzunternehmen* is excluded

from these regulations; these are, above all, organizations in the fields of mass media, charitable and religious institutions, political parties, scientific organizations and the like.

II. The new co-determination law of 1976

One of the basic promises of the social-liberal coalition of 1969 and 1972 was the extension of the co-determination law to all large corporations. After long and heavy discussions, some form of compromise was introduced on July 1, 1976. This new co-determination law applies to all firms with more than 2,000 employees (except the *Tendenzunternehmen* and public administration). Its regulations are quite similar to the old co-determination law of 1951, but in all decisive issues the rights to participation are somewhat weakened. Of course, the existing legal rules of the former law are only changed in those cases in which the new law gives the employees more influence; so, in the coal and steel industry, the old co-determination law still applies.

The main differences between the new co-determination law and the older one have to be seen in the structure of the supervisory board. Again, the total number of its members depends on the size of the firm. In enterprises with more than 2,000 and less than 10,000 employees, the supervisory board has 12 members, among them 6 representatives of the workers. Two of them are nominated from the respective unions, and four are representatives of the working collective. These direct members of a firm have to represent the respective subgroups (workers, salaried employees, and the *leitende Angestellte*, i. e., the salaried management) whereby each group has at least one seat on the board of supervision. This supervisions, which in practice favours the representation of management in the respective committees, differs remarkably from the works constitution law which explicitly *excludes* management from the works council or other institutions according to this law.

It will be clear that the process of electing the members of the supervisory board will be quite complicated. As a consequence, up to now no elections at all have been carried out. There are separate election procedures for workers, salaried employees, and in some cases even for the salaried management. In all enterprises with more than 8,000 employees, an indirect voting procedure with special electors is prescribed. So far, no general implementing statutes concerning these elections have been enacted. Part of the unions is attempting to avoid those general regulations by means of enterprise agreements between the works council and the board of directors.

In fact, since even the salaried management has to be considered at least partly as a representative of capital owners, there is no equal representation of »capital« and »labour« in the supervisory board. The separate voting procedures for the management and the salaried employees strengthen this tendency. Finally, the law gives the representatives of capital the right to elect the chairman of the board of supervision if no candidate gets two-thirds of the votes. In any case, the chairman of the

board has the decisive vote in all voting impasses. Whenever the candidate of the capital owners becomes the chairman of the supervisory board (which has to be expected as a rule), his deputy has to be a representative of the employees; however, he has no decisive vote, even if the chairman is absent.

Similar regulations apply to the election of the board of directors. They have to be appointed with two-thirds of the votes of the board of supervision; but if there is no two-thirds majority, still the simple majority rule with the decisive vote of the chairman applies. Following the *Mitbestimmungsergänzungsgesetz* of 1956, a Labour Director *(Arbeitsdirektor)* as a special representative for personal questions has to be elected with a majority of all votes, but not the majority of the votes of the employees' representatives (in contrast to the Montan-Mitbestimmungsgesetz).

The practice of the new co-determination law will probably not start before July 1978, the end of the two-year transitional stage. But it can be hardly expected that this watered-down co-determination law will change the basic decision-making rights of the capital owners and the management in the large corporations outside the coal and steel industry. Rather, it will increase the bargaining and logrolling power of the unions and workers' representatives in the enterprise. The initial idea of an equal share for both groups has been decisively deformed so as to give the unions and employees less than 50 per cent of the votes. This outcome has to be considered as a result of a longlasting political process whereby the principle of equal participation has been weakened from one draft of the law to the next one. A final hearing before a committee of the *Deutsche Bundestag* especially strengthened this tendency as the large majority of experts shared the opinion that full parity between capital and labour would contradict the basic principles of German civil law, especially with respect to private ownership and liability. Since there was the additional fear that a full co-determination law would lead to successful actions of the employers before the constitutional court which could eventually even cancel the existing co-determination law within the coal and iron industry, and since the liberal party denied any support to a full co-determination law, this weakened form was voted for by the German *Bundestag*. Our evaluation that this law will not change the basic decision-making structure within the industrial sector also finds some indirect support from the fact that even the large majority of the conservative CDU and CSU approved this bill.)

III. Perspectives

It is very difficult to forecast how this new co-determination law will work in practice. Perhaps it contains such large areas of conflict that it has to be revised into one of both directions (one-third share or full parity). Politically, this co-determination law has, at least at the moment, brought public discussion and public interest in these questions to an

[1]) Nevertheless the unions meanwhile have brought an action against the new law before the constitutional court *(Bundesverfassungsgericht)*.

end. Due to the rather bad economic situation in West Germany (according to its own standards), questions of unemployment and of the reform of the social insurance system are predominant.

Of course, both the unions and the social democratic party have declared that they consider this law to be only one step in the right direction. But it is hardly conceivable how this law, which applies to about 650 corporations, could be changed within a short time. There is general agreement that there must be a fair time of practice of the new law before any legal changes should be introduced.

Interestingly enough, more interest is now given to the question of direct participation of the individual worker at his workplace. Vague concepts of »humanization at the workplace« or of »quality of life« are now being discussed, and there are also a few research programmes supported by the government in order to concretize those concepts. This might really be worthwhile as the formal institutions of the traditional co-determination law have failed to solve many of the problems which are now summarized as the »new social question«: foreign workers, part-time workers, women, unskilled workers, young workers. Some labour unrest within the last few years can be considered as an expression of this failure, such as the wildcat strike at Ford in Cologne, which was mainly directed against the German skilled workers who are overrepresented in the institutions of the traditional co-determination laws.

But generally, the West German society is moving into the well-known authoritarian schemes and ideals of the past decades. Perhaps some forces outside West Germany, especially recent developments in France and Italy, will give the West German discussion new incentives to move in the direction of full participation or even workers' management in industry. The institutional arrangement in West German industry, even after practising the new co-determination law, can probably be best compared with the form of a »constitutional monarchy.« This form has proved to be rather stable in the German tradition, and it has led to high productivity and a remarkable degree of social stability. But this long history of successful constitutional monarchy does not exclude the possibility that even in West Germany this constitutional monarchy might be overcome by some form of industrial democracy.

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SAODLUČIVANJE U SR NEMAČKOJ: SADAŠNJE STANJE I PERSPEKTIVE

Hans NUTZINGER

Rezime

Ideja ustavnog ograničenja prava privatne svojine — posebno prava upravljanja radom drugih — ima u Nemačkoj dugu tradiciju zahvaljujući slabosti nemačke buržoazije u 19. veku. Usled specifične situacije posle drugog svetskog rata razvoj zakonodavstva iz te oblasti bio je nesistematičan. Najviša tačka u pogledu ostvarivanja prava saodlučivanja predstavlja Zakon o saodlučivanju u ugljenokopima i čeličanama (Montan-Mitbestimmungsgesetz) iz 1951. godine: polovinu članova nadzornog odbora čine predstavnici radnika birani uglavnom po predlogu odgovarajućeg sindikata. Nadzorni odbor imenuje Odbor direktora, pri čemu, član tog odbora, tzv. direktor za radne odnose (Arbeitsdirektor), šef personalnog odeljenja, može biti izabran samo ako dobije većinu glasova radničkih predstavnika. U cilju uključivanja u ovu shemu svih preduzeća ili konglomerata crne metalurgije, 1956. godine donesena je dopuna ovog zakona (Mitbestimmungsergänzungsgesetz) koja sadrži slične odredbe kao i sam zakon iz 1951. godine.

Radni odnosi u poslovnim preduzećima sa više od pet stalno zaposlenih radnika regulisani su tzv. Ustavnim zakonom o preduzećima (Betriebsverfassungsgesetz) iz 1952. godine. Njegove odredbe su nepovoljnije od odredaba Zakona o saodlučivanju — naime on daje zaposlenima samo trećinu sedišta u Nadzornom odboru. Ovaj zakon pravi razliku između prava saodlučivanja (Mitbestimmung), prava konsultacije i kooperacije (Mitwirkung) i prava na informaciju. Po pravilu, ova prava su najjača kad je reč o socijalnim pitanjima i pitanjima regulisanja interne organizacije rada, srednje su jačine u kadrovskim pitanjima (zapošljavanje, razmeštanje u radne grupe, otpuštanje s posla, itd.), a najslabija su u oblasti donošenja poslovnih odluka.

Osnovna institucija Ustavnog zakona o preduzećima jeste pogonski savet (Betriebsrat), čije članove direktno bira radni kolektiv. On treba da štiti interese radnika u odnosu na upravu (management) i akcionare. Prilično slab uticaj na poslovanje podeljen je između pogonskog saveta i Zajedničkog ekonomskog komiteta (Wirtschaftsausschuss). I, konačno, postoje određena individualna prava za pojedinačne radnike, međutim, ona su u osnovi ograničena na zakonska prava na informaciju i na mogućnost žalbe. Za oblast javne administracije 1955. godine donesen je sličan zakon (Personalvertretungsgesetz). Proširenje važnosti Zakona o saodlučivanju na ove korporacije sa više od 2000 zaposlenih bilo je jedno od glavnih obećanja socijalno-liberalne koalicije i 1969. i 1972. godine. Duga i žučna diskusija dovela je do donošenja (1. jula 1976. godine) kompromisnog zakona čije su odredbe veoma slične onima u Montan-Mitbestimmungsgesetz-u (iz 1951. godine), ali koji u svim suštinskim pitanjima prava participacije unekoliko sužava u odnosu na taj zakon iz 1951. godine. Osnovna razlika između ta dva zakona vidljiva je već iz strukture nadzornog odbora: princip pariteta između »rada« i »kapitala« formalno je zadržan, ali uvođenjem specijalnih predstavnika (najmanje jednog) rukovodećeg i ostalog administrativnog osoblja (lei-

tende Angestellte) oslabljen je položaj radnika. Ovo privilegovano reprezentovanje rukovodećeg osoblja u nadzornom odboru ne može da odstupa od Ustavnog zakona o preduzećima koji eksplicitno isključuje management iz običnog radnog kolektiva, nego doprinosi dodatnom porastu »težine« predstavnika akcionara, budući da menadžeri, bar delimično, zastupaju i interese vlasnika kapitala i banaka.

Činjenica, da ne postoji stvarna jednakost u reprezentaciji »kapitala« i »rada« u nadzornom odboru, još je više naglašena odredbom kojom predstavnik odbora — koji inače ima odlučujući glas — može biti izabran većinom predstavnika kapitala, ako ne može da dobije dve trećine svih glasova. Predstavnici kapitala imaju privilegiju i u izboru članova poslovnog odbora zahvaljujući činjenici da oni članove tog odbora imenuju prostom većinom glasova, ukoliko kandidati ne dobiju dve trećine ovih glasova. Za izbor direktora za radne odnose (Arbeitsdirektor) potrebna je ne samo većina svih glasova, već i većina glasova svih zaposlenih (radnika i službenika).

Izvesno je da ovaj novi zakon o saodlučivanju — koji (zbog složene procedure izbora za različite grupe) verovatno neće početi da se praktikuje pre jula 1978. godine — neće ništa bitno promeniti u ključnim pravima koja u procesu odlučivanja imaju menadžeri i krupni akcionari. On će eventualno povećati pregovaračku snagu sindikata i radnih kolektiva i možda povesti u pravcu novih napora za ostvarenje pune participacije. Njegove mane su se na najbolji način ispoljile u činjenici da je čak većina konzervativnih CDU i CSU u zapadnonemačkom parlamentu glasala za ovaj zakon.