WORKER PARTICIPATION IN COMPANY MANAGEMENT: WITH PARTICULAR REFERENCE TO CODETERMINATION IN THE FEDERAL REPUBLIC OF GERMANY

It is increasingly being appreciated that "democracy" is a little like the "right to dine at the Ritz"—empty except under certain narrow circumstances. Much of the recent unrest in industrialised nations has been linked with the issue of "participatory democracy" and has pleaded for the possibility of involvement in decision-making processes by much larger numbers of persons than has hitherto been permitted. The corporate form of capitalist enterprises in the so-called "western democracies" are institutions particularly vulnerable to the charge that decisions affecting large numbers of society are made by a small, unrepresentative group of persons accountable, if at all, only to shareholders and, even then, on a narrow range of matters. Nor is there reason for believing that industrial organisations in "socialist" countries are necessarily less vulnerable to similar criticism. It is in this context that one writer is able to predict that:

> Workers' participation in management may well become an increasingly important issue as we move into the final third of our century[1].

The purpose of this paper is to raise the basic questions of industrial democracy, and, specifically of worker participation in management; to isolate one experiment in industrial democracy—that of "codetermination" in the Federal Republic of Germany—with a view to evaluating its merits; and to consider some of the stresses which worker participation in management might impose on the present concept of the company in Anglo-American law.

Some opprobrium attaches to lawyers who stray from the carefully staked-out limits of their science, as it does to lawyers who concern themselves with the problems of industrial relations. Although these two faults are compounded in this paper, the writer considers that a factor relevant to a partly legal problem cannot be given zero value merely because it falls more properly within another discipline, and, secondly, that while an elaborate legal framework is neither a sufficient nor a necessary condition for good industrial relations, the *absence* of a legal framework may inhibit the development of industrial relations where there is uncertainty or insufficient formal machinery for the conduct of those relations.

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1. Paul Blumberg, *Industrial Democracy: The Sociology of Participation*, Constable, London, 1968, p. 1. This work will be cited as Blumberg, *Industrial Democracy*.

I. SOME WIDER ISSUES

In Marxian philosophy, the dénouement of the struggle against capitalism features the overthrow of an owner-class no longer able to "resolve the contradiction between the social character of the productive process and the private character of the system that directed it" [2]. The Marxian emphasis is on *ownership* and its attendant power: the lines of battle are, for the Marxist, drawn accordingly.

Since the discovery that property is not the only, and in many cases not the main source of power in the industrialised capitalist economy, the notion has developed that the significant characteristic of the worker is not his lack of property but his lack of economic power. One writer[3] refers to the aptness of a slogan on the walls of the Sorbonne during the disturbances in France during 1968: "A proleterian is a man who has no control over his own life and knows it". Some attention has, accordingly, been focused on the possibility of redressing this situation by granting workers the right to participate directly in the management of the enterprise in which they are engaged. The issues here involved cut across the Marxist lines and the "socialist" countries, particularly Yugoslavia, have recognised that social ownership no more entails industrial democracy than does private ownership.

A senior officer of the International Labour Office has recently written (in words similar to Blumberg's):

> . . . one of the fundamental demands of workers in this second half of the twentieth century may well be—and already is in some countries—for a share in economic power, so that they can control its exercise and the consequences it may have on their employment . . . [4]

A meeting of experts under the aegis of the International Labour Office at Geneva in November 1967[5] produced a report which, as well as underlining a world-wide trend toward worker participation in management, pointed to some of the theoretical problems in the way of wider acceptance of its place in industrial relations. The meeting reported that:

> . . . [S]everal experts referred to research undertaken in their countries, including opinion polls, showing that workers were generally interested in certain forms of participation; other

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2. Michael Harrington, *The Accidental Century*, Penguin, 1965, p. 84.
3. Jean De Givry, "Developments in Labour-Management Relations in the Undertaking", *International Labour Review*, Vol. 99, No. 1 (Jan. 1969) p. 1, 26.
4. De Givry, op. cit. 26.
5. *Report of the Technical Meeting of the Rights of Trade Union Representatives and Participation of Workers in Decisions Within Undertakings*: Geneva, 20-29 November, 1967.

> experts referred to the results of other investigations which demonstrated that workers showed little interest in certain types of participation . . .[6]

And again, discussing the question of workers' participation in broad economic decisions and in decisions concerning the production process itself:

> Several experts emphasised that the decisions concerned were the prime responsibility of management . . . management's right to have the final word was undeniable . . . It was pointed out that any form of sharing decisions in this area between management and workers would raise the fundamental problem of liability and of the responsibility for the consequences of the decisions.[7]

Doubts as to the compatibility of the concept of workers' participation with the traditional adversary role of the trade unions were also expressed:

> . . . [T]he trade unions movement would fail in its primary task of protecting and advancing the interests of workers if it got directly involved in management decisions of an economic or financial character, and it was noted that this view was held not only by some employers but also by trade unions in several countries.[8]

Nevertheless, the meeting allowed that "from the point of view of universal trends" there was a clear movement towards worker participation in decision-making at the enterprise level and recommended that this cause should constitute a long-term commitment of the I.L.O.

Some of the theoretical problems alluded to by the I.L.O. meeting must now be examined and it is to the works of one of the most eminent exponents of these problems that it is proposed to turn. H. A. Clegg, a leading British industrial relations expert, has put forward views on the subject of industrial democracy in two publications separated by nearly a decade and an apparent change of heart on the issue. In *Industrial Democracy and Nationalisation*[9], Clegg leaned towards the somewhat anodine and since discredited "joint consultation" as a means of infusing a measure of democracy into British industry. Clegg's more recent views, expressed in *A New Approach to Industrial Democracy*[10], offer, in the words of one commentator:

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6. Ibid., para. 48.
7. Ibid., para. 52.
8. Ibid., para. 53.
9. H. A. Clegg, *Industrial Democracy and Nationalisation,* Blackwell, London, 1951.
10. H. A. Clegg, *A New Approach to Industrial Democracy,* Blackwell, London, 1961. This work will be referred to as *New Approach.*

> . . . the latest, most contemporary, and most sociologically sophisticated refutation of workers' management[11]

Clegg purports to discern three main "elements" in what he terms a "theory about the proper role of trade unions in industry". These elements are alleged to yield corollaries which demonstate the incompatibility of worker participation in management with a "proper role" for trade unions in industry. The author does not confine his principles to the British industrial scene but makes it clear that he views his theory as having *general* application.

For convenience it is proposed to state the elements of the theory alongside the corollaries to which, in Clegg's view, they give rise[12]:

Element I: "Trade unions must be independent both of the state and of management".

Corollary: "Trade unions cannot govern the country or manage industry or take part in those processes".

Element II: "Only the unions can represent the interests of the workers".

Corollary: "No other system of workers' representation can be constructed to take on the share of management from which the unions themselves must be debarred".

Element III: "Ownership of industry is irrelevant to good industrial relations".

Corollary: "The aims of industrial democracy must be capable of achievement under private ownership if they can be achieved at all".

The basis for Clegg's theory is an analogy with political democracy. The "essence" of democracy, Clegg argues, is opposition and "independence is necessary for opposition to be real"[13]. Clegg's "essence" is distilled from a comparison of the modern democracy with the totalitarian state. Extrapolating his conclusion to the realm of industrial relations, Clegg asserts that:

> One of the main tasks of trade unions is to limit and control those persons and institutions who wield direct authority over industry. If trade unions were too closely connected with industrial management they would not be able to do that job.[14]

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11. Blumberg, *Industrial Democracy*, p. 139.
12. The quotations that follow are all drawn from the text of *New Approach*, p. 21, 22.
13. Ibid., 28.
14. Ibid., 28.

It is possible to argue that Clegg's analogy break down in three respects: firstly, in that his analysis of the "essence" of democracy is crude and faulty; secondly, that the analogy itself is inappropriate; and thirdly, in that, even granting the correctness of his analysis and the appropriateness of his analogy, the conclusion begs the question (what if close connection with industrial management *itself* limited and controlled those persons and institutions?)

As to the first objection, Blumberg points out that:

> . . . [T]o define democracy exclusively in terms of opposition is a mistake; democracy is much more appropriately defined as the *accountability* of leadership to an electorate which has the power to remove that leadership . . . the mere existence of political opposition without accountability does not assure democracy.[15]

In the words of another critic:

> [T]he *essence* of democracy—if one must use this sort of language—is to be found in the right of election and accountability[16].

But to be drawn into a search for the "essence" of democracy is to fall prey to the basic fault of Clegg's theory. An analogy between political and industrial democracy will no more yield a "theory of the proper role of trade unions in industry" than will an analogy between doctors and dentists yield a "theory on the proper care of teeth". The institutions for achieving democracy in any given circumstances will vary as those circumstances demand, and no *a priori* structural imperatives can be derived from the broad principle of democracy itself.

Clegg also suggests that his theory will "illuminate the behaviour of trade unions"[17] in the United States, Britain, Scandinavia, Holland and Switzerland, Australia, Canada and New Zealand, thereby attempting to give his principles a descriptive as well as prescriptive function. Clegg asserts that his principles are in force in the above-named countries, although it is difficult to see, for instance, how the compulsory arbitration systems of both Australia and New Zealand are consistent with Clegg's primary priciple of trade union independence.

But it is in his examination of industrial systems that do *not* conform to his theory—the deviant cases—that Clegg is most assailable. Blumberg, in a chapter devoted to an all but overwhelming refutation of the "New Approach', suggests, somewhat immoderately, that Clegg's

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15. Blumberg, *Industrial Democracy,* p. 144.
16. Royden Harrison, "Retreat from Industrial Democracy" in *New Left Review* No. 4, 1960. Appearing in *Industrial Democrocy in Great Britain,* ed. Ken Coates and Anthony Topham, MacGibbon & Kee, 1968, 357, 359.
17. Clegg, *New Approach,* p. 21.....

approach is "to state his principles boldly and then turn and run from them as the contradictory evidence pours in".[18]

For instance, the West German experiment in industrial democracy known as "codetermination" (which is the subject of study in the next part of this paper) is conceded to be a deviant case and, Clegg observes:

> . . . it cannot be shown that the German unions have lost their independence under codetermination.[19]

In the case of codetermination in the coal and steel industries, which, as will be seen, provides the most radical and far-reaching form of participation, including a theoretical right of veto on all company decisions, Clegg concedes that:

> There is certainly no evidence that codetermination has weakened the metal workers and mine workers in comparison to other unions in the (union federation). On the contrary, they are two of the strongest links in its armour.[20]

Clegg's thesis being that a close connection with management will debilitate union strength, one would have expected that the coal and steel unions would have suffered accordingly. On Clegg's own admission, such is not the case.

Again, the Israeli experience of the *Histadrut* in which trade union participation in management is total[21] represents another deviant case. Clegg concedes that the *Histadrut* "has not realised the fears of those who think that trade unions cannot avoid corruption if they lose their independence from management"[22] but adds that the retention of union strength in the face of managerial responsibility may be due to the calibre of its membership—"some of them had been amongst the most capable, the most trustworthy, and the most independent-minded". Blumberg points out that if the structural imperatives of Clegg's theory can so easily be contravened by "capable", "trustworthy" and "independent-minded" unionists there seems little justification in according them the status claimed by their sponsor.

Finally, Clegg himself appears to recognise the inroads which his own evidence makes on his theory. The first principle—that of union independence from management—is conceded to be applicable only "to weak trade unions, to trade unions which lacked strength to bear responsibility".[23] Blumberg suggests that this reduces Clegg's first principle

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18. Blumberg, *Industrial Democracy,* p. 148.
19. Clegg, *New Approach,* p. 94.
20. Ibid., 54.
21. For an account of the *Histadrut* in Israel, see Blumberg, *Industrial Democracy,* pp. 150-156.
22. Clegg, *New Approach,* p. 69.
23. Ibid., 77.

to a tautology: unions which are not strong enough to bear responsibility for management are not able to bear responsibility for management.

> Perhaps the most surprising of Clegg's concessions is that: it does not follow that the independence of British or American or Scandinavian unions would be destroyed by a dose of codetermination.[24]

The writer suggests, following Blumberg, that very little of Clegg's first principle remains standing in the face of the evidence and his concessions to it.

Nor does Clegg's second principle fare very much better. Clegg had theorised that only the trade unions are able to represent the interests of the worker. In his analysis of the German codetermination scheme, Clegg examined the role of the works council (to be discussed later in this paper) and concluded that:

> The authority given to Works Councils comes close to breaking the rule of sole representation.[25]

And, in the face of the apparently successful *modus vivendi* reached between the unions and the works councils, concedes that:

> the principle of sole representation can no longer stand alone.[26]

In summary, then, Clegg's restrictive prescriptions for the structure of democracy in industry are unduly doctrinaire and fail to take account of the need for different structures under different circumstances. In so far as they purport to describe the existing industrial systems, the prescriptions do not accord with the empirical evidence.

II: CODETERMINATION IN THE FEDERAL REPUBLIC OF GERMANY

History and Background

The word "codetermination" is a literal translation of the German noun *Mitbestimmung*—so literal indeed that (in the words of one writer), "it conveys absolutely no meaning to most English-speaking persons".[27] Codetermination is the system by which a measure of industrial democracy has been achieved in the Federal Republic of Germany. The philosophical core of this sytem is perhaps best expressed in one of

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24. Ibid., 99-100.
25. Ibid., 56.
26. Ibid., 114.
27. Herbert Spiro, *The Politics of German Codetermination,* Harvard University Press, 1958, p. 20. This work will be cited as: *The Politics of German Codetermination.*

its favourite slogans: "The human being must be brought into the centre of things". The task of this part of the paper will be to explicate the origins and operation of the codetermination schemes.

Herbert Spiro, in his work *The Politics of German Codetermination*,[28] has analysed the socio-political background to the introduction, in 1947, of the earliest codetermination projects in some iron and steel companies in the Ruhr. This background is important because it suggests that, rather than being a visionary prescription for industrial relations, codetermination began as the product of a pragmatic attempt to deal with the unusual circumstances prevailing in Germany immediately following the collapse of the Third Reich. This is not to deny, of course, that the principle of codetermination has roots running deeper into German social thought and industrial history.

The British occupation authorities in post-war Germany saw their task with respect to heavy industry (particularly steel-producing) as twofold: to re-start production and, secondly, to "deconcentrate" ownership. It quickly became apparent, however, that the reconstruction of the management of the steel companies would be difficult in view of the fact that many of the former managers were now "unacceptable" because of their close identification with the defunct Nazi régime, and that many others were unwilling to preside over the "deconcentration" programme to which the Allies were pledged under the Potsdam Agreement. Alternate sources of managerial personnel had to be found.

At the same time, the German trade union movement, which had been decimated under the Hitler régime, was building its strength. Spiro suggests that one of the motives for initial union interest in participation was its desire to avoid a repetition of the situation in which big business could finance the rise to power of totalitarianism. Other factors were the more orthodox union aims which were spurred by the partial vacuum left by a discredited and depleted owner-class. Kerr suggests that:

> The trade union movement in Germany after World War II set itself the historical task of socialising power without socialising ownership.[29]

The plans that began to crystallise in the minds of the post-war union leaders were, no doubt, influenced by the precedent of the 1920 Weimar Republic Law providing for the setting-up of works councils in industry.

Negotiations and discussions between the British authorities (to whom Spiro attributes much of the credit for the early versions of codetermination), the German trade union leaders, and the Chairman of the trustee steel administration set up by the occupation authorities,

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28. op. cit.
29. Clark Kerr, "The Trade Union Movement and the Redistribution of Power in Post-war Germany", *Quarterly Journal of Economics*, LXVII, Nov., 1954, p. 535.

produced agreements on which were based the 1947 codetermination arrangements for the steel-producing companies.

By 1949, the year of the founding of the Federal Republic of Germany, the German trade union movement had nailed its flag firmly to the mast-head of codetermination and wished to see its continuance and extension in the new Republic after the transfer of power from the Allies. The subject of codetermination then became, and has remained since, a live political issue and it was only a massively supported threat of strike action by the more powerful unions that forced through the new Bundestag a law which retained the system of codetermination which had prevailed in the steel-producing companies under allied control and extended it to coal-producers. This law,[30] the content and operation of which will be described in detail below, assured workers of the right to participate, through their elected representatives, in deliberations and decisions of the controlling organs of the companies concerned.

The trade union movement, and its political allies in the legislature, now turned their attention to securing an extension of codetermination to other sectors of industry. The forces at work in the ensuing political struggle have been described by Spiro:[31] the result was the *Works Constitution Law* of 1952[32] which the unions regarded as a defeat for labour in that it envisaged a very much more limited form of codetermination than that in force in the coal and steel producing industries.

If, as has been suggested following Spiro, the origins of German codetermination are to be found partly in pragmatism, the movement has, in the twenty years since its inception, become increasingly characterised by ideological and philosophical rationales, and the advocates of codetermination have maintained their pressure for its extension in the more radical form to many more sectors of industry.

The two statutes, the history of which has been sketched above, are (with some subsequent amendments) the legal mainstays of codetermination and an attempt must now be made to analyse their content and to situate them in the context of German company law.

Law and Operation

German corporate structure is characterised by the "double-decker board" and it is only with an understanding of the constitution of the German company that it is possible to comprehend the legal prescriptions for codetermination. As one commentator, criticising a misunderstanding arising in the oral evidence to the Jenkins Committee on

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30. *Codetermination Law,* 21 May, 1951. A translation into English appears in in the *International Labour Office, Legislative Series:* 1951—Ger. F.R.2.
31. Spiro, *The Politics of German Codetermination,* Chapter 2.
32. *Works Constitution Act,* 11 October, 1952. A translation into English appears in the *International Labour Office, Legislative Series:* 1952—Ger. F.R.6.

company law,[33] has explained, the present German company structure preceded the advent of codetermination and the latter took its shape from the former.[34]

The present company law of the Federal Republic of Germany is consolidated in the *Aktiengesetz 1965*[35] which came into force on January 1, 1966. The "double-decker" board structure has been retained from the 1937 legislation and must now be examined.

Statute recognises and requires three organs of control in the German stock company: The Board of Management (Vorstand), the Supervisory Board (Aufsichrat) and the Shareholders' Meeting (Hauptversammlung). The Board of Management is empowered to "direct the association as a matter of its own responsibility"[36] and is concerned with the day-to-day running of the business. The Supervisory Board is entrusted with the role of "watchdog" on behalf of the shareholders and, as we shall see, the employees. The Shareholders' Meeting appoints the Supervisory Board and is given decision-making powers in the matters enumerated in the statute but "may only decide questions of management if the board of management so requests"[37]

The relationship between the Board of Management and the Supervisory Board has important consequences for codetermination. Article 90 of the *Aktiengesetz 1965* sets out the matters on which the Board of Management shall report to the Supervisory Board:

> The intended business policy and other questions of the future management . . . the profitableness of the association . . . the current business . . . transactions which may be of substantial importance.

Article 90 also prescribes the frequency of reports and gives any member of the Supervisory Board a right to "request a report from the board of management on the affairs of the association". The reports are to "accord with the principles of conscientious and faithful accounting".

The Supervisory Board is empowered by Article 111(4) to determine which "kinds of transactions may only be entered into with its consent" and, thus, may decide the extent of its authority, but the statute contains the proviso that refusal of consent by the Supervisory Board may be over-ridden by a decision of the Shareholders' Meeting.

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33. Board of Trade, The Report of the Company Law Committee, Cmnd. 1749, 1962, pp. 258-260.
34. Michael P. Fogarty: "Codetermination and Company Structure in Germany" *British Journal of Industrial Relations*, Vol. 2, 1964, p. 79.
35. Available in translation: *The German Stock Corporation Law:* Bilingual edition with Introduction, edited and translated by Dr Rudolph Mueller and Evan G. Galbraith, Frankfurt, 1966. All textual quotes in this paper are from this translation.
36. *Aktiengesetz 1965*, Art. 76 (I).
37. Ibid., Art. 119.

Prior to the 1965 Act, a simple majority of the Shareholders' Meeting could satisfy the statute. The new law stipulates that only a majority of "three fourths of the votes cast"[38] will be effective to over-ride the refusal of consent by the Supervisory Board. The amendment is a consequence of the anomaly that the Supervisory Board—representing the wider interests of the shareholders, employees and the public—could be over-ruled by a simple majority of a body comprising only shareholders. One writer on the new law has characterised the compromise amendment as:

> another example of the refusal of the majority of parliament to take full account of worker participation in management and to adapt the classical rules of company law to it.[39]

Nevertheless, a Board of Management must now be less ready to disregard the advice of its Supervisory Board where it may fail to obtain vindication from the Shareholders' Meeting.

Of importance to codetermination in the coal and steel producing companies is the collegial nature of the Board of Management which is emphasised by the tenor of Article 77 (I) of the *Aktiengesetz:*

> If the board of management consists of several persons, then all the members of the board of management are authorised only to manage jointly . . .

It is of some significance that the framers of the new company laws were not able to fuse the codetermination laws which it is now proposed to examine with the general consolidation of company law. The legislature has contented itself with the inclusion of cross-references where necessary to the separate codetermination laws. The explanation for this may be found in the difficulty in reconciling the "classical rules of company law" with the worker participation schemes.

It is necessary to distinguish between two kinds of codetermination in Germany[40]:

I Full Codetermination

II Partial Codetermination

Both of these forms have one element in common: the provision for the setting-up and operation of Works Councils, and it is convenient to describe the constitution and function of these bodies which rep-

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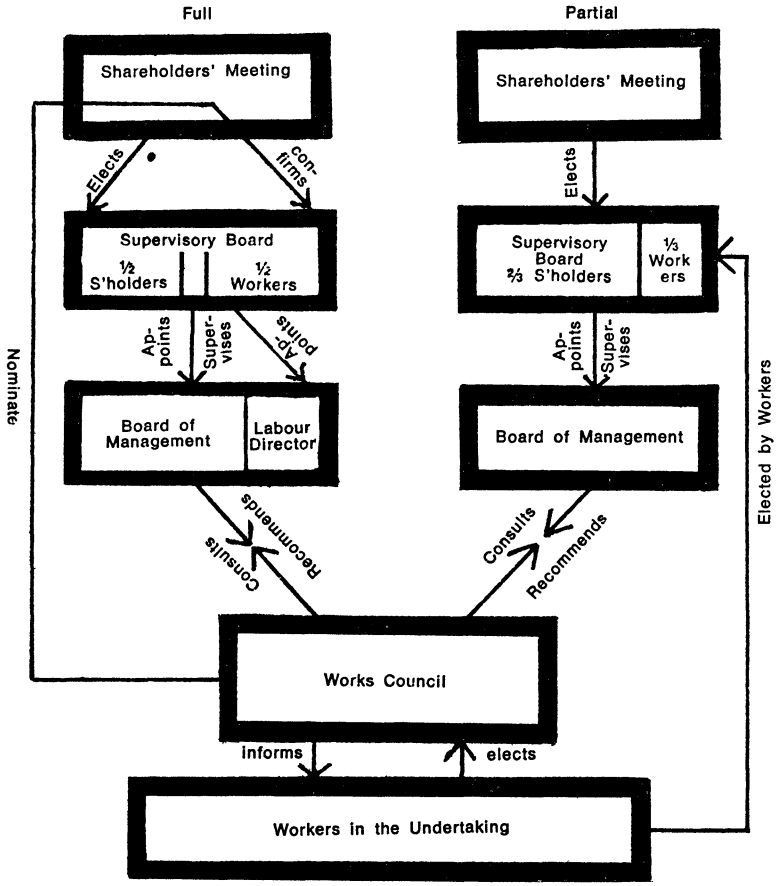
38. Ibid., Art 111(4).
39. Jurgen Einmahl: 'La réforme du droit des sociétés anonymes en Allemagne', *Revue Trimestrielle de Droit Commercial,* No. 3, 1968, p. 592. The writer's translation from the French. Translations will hereinafter be indicated by the symbol (T). Apologies are made for any infidelities or infelicities of translation.
40. The diagram on the page immediately following is intended to assist understanding of the distinctions between the two forms.

DIAGRAM SHOWING THE NATURE OF PARTICIPATION OF WORKERS IN GERMAN COMPANIES UNDER BOTH FULL AND PARTIAL CODE-TERMINATION (N)



The workers exercise rights of participation at three main levels:

1. The *Works Council* is elected by the workers and has a recommendatory role on most issues and a limited right to share in decisions on specific issues.
2. The *Supervisory Board* includes workers' appointees (½ in the case of full codetermination and ⅓ in the case of partial). The supervisory board appoints the members of the board of management and supervises their activities.
3. The *Board of Management* includes (under full codetermination only) a labour director who may only be appointed or removed by a majority of the workers on the supervisory board. The labour director has full and equal rights with other directors.

(N) Adapted and translated from a diagram appearing at p. 111 of a publication of the Communauté Européene du Charbon et de l'Acier (C.E.C.A.) entitled *Le Représentation des Travailleurs sur le Plan de l'Enterprise et du Secteur de l'Industrie:* Tablaux Comparatifs (undated).

resent the "infrastructure" of codetermination before discussing worker representation on the boards of control.

Works Councils

The statute governing Works Councils is the *Works Constitution Act* of 11 October, 1952, Article I of which provides that:

> Works Councils shall be established in undertakings in accordance with the provisions of the Act.

More specifically, the Act stipulates that Works Councils are to be elected in "every undertaking normally employing five or more permanent employees with voting rights including at least three who are eligible".[41] Voting rights are accorded to all employees of 18 years of age. An employee is "eligible" if he is 21 years of age, has been employed for one year in the undertaking and enjoys voting rights with respect to the German Federal Diet.

The numerical composition of Works Councils is governed by Article 9 and varies from one to thirty-five according to the number of employees in the undertaking. The Act recognises a distinction between blue collar and white collar employees and permits separate representation of these constituents according to numerical strength unless the two groups agree on common representation. The Act carried its democratic intent to its logical conclusion with a provision that "the sexes shall be represented within each group according to their relative numerical strength".[42]

Procedural provisions for elections, which are to be by secret ballot, are also included in the Act. The term of office of the Works Council is to be two years.

The Act defines the relationship which is to exist between the Works Council and the employer in language which will appear to Anglo-American lawyers more akin to expression of lofty aspirations than to legal rules:

> The employer and the works council shall work together in a spirit of mutual trust under the applicable collective agreements, in co-operation with the trade unions and employers' associations . . . for the good of the undertaking and its employees, having due regard to the interests of the community.[43]

The functions of the Works Councils are more explicitly enumerated in Articles 54 and 56 of the *Works Constitution Act* and are summarised by one leading writer on the subject as follows:

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41. *Works Constitution Act:* Art. 8(1).
42. Ibid., Art. 9(4).
43. *Works Constitution Act:* Art. 49 (I)

> . . . [T]he council is entitled to negotiate on wages and working conditions . . . on the plant rules, on hiring and firing of groups, on cases of discrimination and on substantial changes in the plant. The council handles grievances. It administers plant welfare agencies. It supervises the application of existing labour laws and of collective agreements. For the rest it may be heard or consulted, and it is entitled to information.[44]

The sceptic who suggested that, on this summary, the Works Council plays no more significant a role and wields no greater power than organised union representatives in other industrial systems will have been misled. As Sturmthal has observed:

> As is common to institutional arrangements in the field of industrial relations . . . considerable differences exist between legislation and practice[45].

It is only from the operation of Works Councils in practice and in the context of worker representation on the Supervisory and Management Boards that a reliable picture emerges of the place of Works Councils in German industrial relations.

Full Codetermination

The scheme for full codetermination is provided in the *Codetermination Law* of 21 May, 1951, and in the supplementary *Codetermination Law* of 7 August, 1956. The first of these defines the scope of the scheme: undertakings mainly devoted to the extraction of coal and iron ore and which normally employ more than 1,000 persons are to be subject to the statute.[46] The supplementary Law was intended to increase this scope to catch holding companies controlling coal and steel producing undertakings.

The 1951 Law requires companies subject to it to constitute their Supervisory Boards in accordance with Article 4, and, thus, to have eleven members made up as follows:[47]

(a) *Four* representatives of the shareholders elected by the Shareholders' Meeting in accordance with whatever procedures are provided for in the company constitution; *one* further member chosen by the shareholders (this member must not have any financial interest in the company).

(b) *Four* representatives of the employees to be nominated by the Works Council after consultation with the trade union; *one* further members chosen by the employees (this member must not be an employee or a union representative).

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44. Adolf Sturmthal, *Workers Councils,* Harvard University Press, 1964, pp. 63, 64.
45. Ibid., 74.
46. *Codetermination Law, 1951:* Art. 1.
47. The provisions for the composition of the Supervisory Board are here summarised and are to be found in Articles 4 to 8 of the Law.

(c) *One* additional member to be elected by a majority of the other members of the Board.

Provision is made for increasing the numbers on the Supervisory Board from eleven to either fifteen or twenty-one where the nominal capital of the company exceeds sums specified in the statute. The ratio of employee/shareholder representatives is to remain the same (i.e. parity representation is to be maintained).

It might have been expected that the Supervisory Board under full codetermination would become a battleground on which the numerically equal shareholder and employee representatives would frequently become deadlocked. The legislature's provision for the "eleventh man"—the "neutral" member of the Board—indicates that this fear was shared by the framers of the Act. In practice this has not been a problem. Blumenthal, in his 1956 study of codetermination in the German steel industry, concluded that:

> . . . there is rarely open controversy or split voting on the Board of Supervision.[48]

and explained that techniques have been developed for avoiding open confrontations on the Board. Favoured among these are the delegation of powers to *ad hoc* committees and behind-the-scenes negotiating and compromises. Blumenthal's findings have been confirmed by other and more recent studies.[49]

The potentially controversial question of the choice of the President of the Supervisory Board has been solved by the growth of a convention to the effect that the "eleventh man" is nominated by employee representatives, the President is a shareholder and the Vice-President an employee.[50]

In addition to representation on the Supervisory Board, full codetermination gives employees representation on the Board of Management. Article 13 of the 1951 Law provides:

> A labour manager shall be appointed . . . with the same rights as the other members.

Article 13(1) goes on to stipulate that the labour director[51] may neither be appointed nor be removed from office against the vote of the

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48. W. M. Blumenthal, *Codetermination in the German Steel Industry,* Industrial Relations Section, Princetown Univ., 1956, p. 51.
49. See Blume, *Les Relations entre Employeurs et Travailleurs,* Communauté Européene du Charbon et du l'Acier (C.E.C.A.), Luxemburg, 1967, p. 122; and Vagts: "Reforming the 'Modern' Corporation: Perspectives from the German", (1966) *80 Harvard Law Review* 23, 67-68.
50. Blume, in the *C.E.C.A.* publicaton, ante n. 49, p. 119.
51. It may have been noted that the I.L.O. translation uses the term "labour manager". The English language literature on codetermination favours the expression "labour director" which is used in this paper.

majority of the employee representatives on the Supervisory Board. Effectively, then, the labour director is the appointee of the employee representatives.

Much criticism has been generated by the apparent ambiguity in the position of the labour director and it may be useful to record the opinion of one authority on the subject.

> . . . the labour director has the same rights as the other members of the Board of Management. He is not an agent or delegate of the workers in the undertaking, nor an "extension" or "appendage" of the unions. His task is to represent the "human" factor on the Board of Management just as the other members of the Board represent the financial and technical factors. (T)[52]

As to the duties of the labour director, Professor Boldt explains that he must concern himself with the normal duties of a director and where he can be shown to have neglected or disregarded these, either intentionally or through negligence:

> . . . he is liable to the wronged company for damages and, in the event of failure (of the company), to its creditors by virtue of Article 93(2) of the new Company Law. (T)[53]

Although the labour director has (because of the collegial nature of the Board of Management) a theoretical right of veto on all decisions, whether of direct concern to employees or not, in practice he is typically content to barter his potential interference in the provinces of his co-directors for a freer hand in the areas of most concern to the employees in the undertaking. This was Blumenthal's conclusion from his study of codetermination in operation.[54]

The position of labour director is recognised by the unions as the lynch-pin of codetermination in the coal and steel industries and this recognition has generally been reflected in the calibre of appointees.

Partial Codetermination.

As indicated earlier, this form of codetermination was a compromise extension of the coal and steel industry scheme to other sectors of industry—in union eyes, an unsatisfactory compromise.

The legal basis for partial codetermination is to be found in the *Works Constitution Act* of 11 October, 1952, Article 76 of which provides that:

> One third of the members of the board of supervision of

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52. Prof. G. Boldt in the *C.E.C.A.* publication, ante n. 49, p. 51.
53. Ibid., n. 49, pp. 68-69.
54. Blumenthal: *Codetermination in the German Steel Industry,* op. cit. p. 51.

> (companies to which the statute applies) shall be employees' representatives.[55]

"Family" companies with less than 500 employees are exempted from the obligation to constitute their Supervisory Boards in accordance with the statute.[56]

Fogarty records that some commentators see partial codetermination as "no more than an advanced form of joint consultation":

> Employees themselves often do not take it very seriously, and the quality of employee representatives tends to be markedly lower than under [full codetermination].[57]

There is, of course, no provision for a labour director on the Board of Management under partial codetermination.

The employee representatives on the Supervisory Board are elected by direct, secret ballot among the employees in the undertaking.[58]

Clearly the position of the employee representatives under partial codetermination is weaker than under full codetermination. Not only are they a minority on the Supervisory Board, they also lack the "back-stop" provided by the presence of the labour director. It has proved possible for the majority members on the Supervisory Board too "shunt" controversial decisions to committees on which there is no employee representation. This ploy has been the subject of union criticism and was discussed by the legislature during the debates preceding the passage of the new company legislation. Remedial measures were not thought practicable. One commentator has pointed out that:

> an habitual exclusion of employee representatives from committees of the Supervisory Council would have the effect of emptying the codetermination principle of its content; it would thus be contrary to the spirit of the law (articles 76 and 77 of the Works Constitution Act) and without legal effect. (T)[59]

Evaluation of Codetermination

Fogarty has seen the strength of codetermination in the "network of representative institutions"[60] it provides, and isolates two aspects of this: the "information network" and the "network of shared power". His conclusion as to the first is that:

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55. *Works Constitution Act, 1952,* Art. 76(1).
56. *Works Constitution Act, 1952,* Art. 76(6).
57. Fogarty: "Codetermination and Company Structure in Germany", op. cit. n. 34, p. 87.
58. *Works Constitution Act, 1952,* Art. 76(2).
59. Prof. Boldt in the *C.E.C.A.* publication, n. 49, p. 46.
60. Fogarty, ante n. 34, p. 99.

> . . . [T]he overwhelming impression, for an outside reader of the voluminous studies of codetermination published in the last few years, is of the information network's extent and efficiency.[61]

As to the second:

> At all levels employee representatives are aware that they can act with full effect only in co-operation with representatives at other levels.[62]

One of the major fears that has impeded the evolution of codetermination has been that worker representation on the organs of company control will paralyse the drive and executive efficiency necessary for the successful operation of a business enterprise. A corollary to this has been that companies subject to codetermination might find difficulty in attracting necessary capital investment. Neither the fear nor its corollary have proved to be justified. Fogarty writes that:

> . . . [I]n the German coal and steel industries, where full codetermination is in force and shareholders no longer have final and exclusive control over their companies, entrepreneurial drive has not been crippled or even significantly impaired. In a number of firms it seems that the entrepreneurs, the members of executive boards, have found employee representatives on supervisory boards a valuable support against previously over-dominant large shareholders.[63]

The effect of codetermination on wage levels in those industries affected is difficult to assess. Basic wage agreements are negotiated at industry level between union and employer federations. Actual wages are, in Germany as elsewhere, subject to a "wage drift", and it is only in this area that the influence of codetermination can be traced. Vagts suggests that:

> The most one can divine from German empirical studies, then, is a cautious estimate that full codetermination has somewhat spurred the rise of wages in the coal and steel industries, in comparison both with other German industries and with the coal and steel industries in the rest of Europe.[64]

Vagts goes on to point out, however, that the "fantastically" low level of industrial stoppages has helped to pay for the increases.[65]

Perhaps the most fundamental question to be asked of codetermination is that raised by Professor Kahn-Freund when addressing a

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61. Ibid., 101.
62. Idem.
63. Fogarty, ante n. 34, p. 89.
64. Vagts, ante n. 49, p. 70.
65. The question of the effect of worker participation on strike activity is further discussed in Part III of this Paper.

symposium on worker participation in management in Europe.[66] Professor Kahn-Freund asked, (not rhetorically, he assured his audience), whether:

> codetermination does not appear to the worker as something vague, distant and abstract in comparison with the representation of his interests on the Works Council. (T)[67]

The writer suggests that, while the question is legitimate and important, it is a mistake to see the institutions of codetermination as separate from the Works Council. As Fogarty suggests, it is the "network" of Works Council, employee representation on the Supervisory Board and, in the case of full codetermination, the labour director, which provides the substance of industrial democracy in Germany.

III: AN INTERDISCIPLINARY APPROACH

It is proposed, in this part of the paper, to examine some of the questions to which a proposal for worker participation in management might legitimately give rise. Armchair intuition will, unfortunately, not yield answers to these questions and it is to the body of empirical data accumulated by social scientists that we must turn. It would be more appropriate to concede that this selective survey is not adequate than to confess the obvious fact that it is not exhaustive. Nevertheless, the writer does not think it unreasonable to expect those who would dispute the tentative and insecure conclusions reached to shoulder the burden of adducing contrary evidence.

The liminal question of worker attitudes to participation might first be considered: do workers *want* a share in the management of enterprises? Clearly, only the workers in any given industrial system can answer this question, however, there is some sociological evidence as to worker and union leadership attitudes to participation and it does not seem out of place to examine some of this material and the interpretations to which it has given rise.

In a recently published study on this question[68] the view is expressed that the workers studied had a "predominantly instrumental orientation to their employment"[69], by which is meant that the subjects viewed their work simply as a means of earning as much money as possible with little concern for the presence or absence of "meaning" in their occupational activities.

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66. The proceedings of this symposium make up the previously cited publication of the *Communauté Européene du Charbon et du l'Acier,* ante n. 49.
67. *C.E.C.A.* publication, ante n. 49, p. 261.
68. John H. Goldthorpe, David Lockwood *et al., The Affluent Worker: Industrial Attitudes and Behaviour,* Cambridge Studies in Sociology I, Cambridge University Press, 1968. This work will be cited as *The Affluent Worker.*
69. *The Affluent Worker,* p. 174.

The Affluent Worker studied a sample of 250 workers in three companies in Luton (England). The characteristics of the industrial locale were: a prosperous and growing industrial centre; a highly mobile labour force; an absence of strong traditional attitudes towards industrial relations; and the presence of "progressive" company policies towards personnel questions. The findings of the study are summarised by the authors as follows:

> There is no evidence that within our sample any association exists between job-satisfaction (or deprivation) in terms of workers' immediate shop-floor experience and their attachment to their present employment. This attachment appears rather to be based on predominantly extrinsic—that is to say economic—considerations.[70]
>
> It was evident that, in the main, these workers saw their relationship with their firm as an almost exclusively contractual one, founded upon a bargain of money for effort.[71]

As to the function of trade unions:

> . . . [It] tended to be conceived of in a generally restricted way; that is, as being limited to issues arising directly out of the employment contract: 61% of the craftsmen but only 33% of the rest of the sample thought that it should be one of the objectives of unions to get workers a say in management.[72]

Finally, on the subject of the economic future:

> . . . the majority of the workers in our sample appeared to concentrate their aspirations on securing a continuing improvement in their standard of domestic living rather than on an advancement of any kind in their occupational lives.[73]

The summary has been quoted at length to better convey the totally of the "instrumental attitude" thesis which, if correct, might be said to have consequences for the question of worker participation in management. One interpretation of these findings (and that favoured by the authors) is that the concepts of "job-satisfaction" and its obverse—"work-alienation"—can have little grounding in the worker's perception of his situation. The authors appear to overlook the possibility that the attitudes expressed by the workers were themselves *effects* of the alienation phenomenon.

The data from which the authors of *The Affluent Worker* drew their conclusion as to worker attitudes towards the role of trade unions

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70. Ibid., 145.
71. Idem.
72. Ibid., 146.
73. Idem.

is of direct interest here and deserves closer examination. The source questionnaire was couched as follows:[74]

Attitudes on the Role of Trade Unions in Industry	
Respondent agrees more with view that	N = 199
. . . unions should just be concerned with getting higher pay and better conditions	52%
. . . unions should also try to get worker a say in management	40%

It will be seen that the phrasing of the propositions is unfortunate in that it appears to preclude the possibility of a "say in management" *contributing or leading* towards the getting of "higher pay and better conditions". To that extent, it is suggested, the results are vitiated by a built-in bias against the second proposition.

It might here be added that the advocates of German codetermination are quick to point to the massive vote of support for the strike threat which we have seen was instrumental in forcing the early Codetermination Law through a hesitant Bundestag. Spiro states that:

> This vote was taken on November 29 and 30, 1950, and came out over-whelmingly in favour of a strike, almost 96% of the 201, 512 votes cast supporting this action (referring to Metal Workers' Union). On January 8, 1951, the Mine Workers' Union followed with a strike vote among its membership, Almost 93% of the votes cast in this referendum favoured the strike . . .[75]

A more recent indication of the attitude of German unionists might have been obtained from a 1966 study[76] of workers in seven chemical plants in the Federal Republic of Germany had not the study confused attitudes *towards* the *principle* of codetermination with perception of the structural *role* of codetermination. Furstenberg writes:

> Twenty six percent had no opinion on the matter, 30% thought of codetermination only as a work-place-centred issue,

74. Ibid., 109, Table 47. The table is much simplified here in that the breakdown of responses according to work-groups is omitted. Only the aggregate response has here been recorded. The wording of the propositions of the questionnaire has been given as in the original.
75. Spiro, *The Politics of German Codetermination,* ante n. 27, p. 37.
76. Friedrich Furstenberg, "Structural Changes in the Working Class", *Sociolocal Studies I: Social Stratification,* Cambridge, 1968, p. 145.

30% thought of the whole plant as an object of codetermination, while only 14% included the whole branch of industry.[77]

It is difficult to see (on the limited information given) how any conclusion could have been reached as to worker interest in and enthusiasm for codetermination. Yet Furstenberg states that the reactions to codetermination "under-line" that a "substantial number (of workers) seem to have thought little about the problem of the greater influence of workers".[78]

Closer to home for the New Zealander are the results of a survey of attitudes of trade union leaders and business executives in Melbourne and Sydney (Australia) to industrial relations.[79] The following is an

Attitudes of Union Leaders and Business Executives to Industrial Relations (In percentage agreeing)

	Melbourne		Sydney	
	Executives (N=71)	Union Leaders (N=78)	Executives (N=182)	Union Leaders (N=48)
Items				
Employers should consult the unions more	59	98	49	99
The average union leader has as much ability as the average employer	31	82	28	79
Unions should restrict themselves to getting fair wages and working conditions for their members and keep out of management	59	43	72	29

77. Furstenberg, *op cit.* p. 164.
78. Idem.
79. Kenneth F. Walker, "Attitudes of Union Leaders and Business Executives to Industrial Relations" *Australian Labour Relations: Readings*, ed. J. E. Isaac and G. W. Ford, Sun Books, Melbourne, 1966, p. 58.

adaptation of the tabular presentation of the author (selecting only those items which appear relevant to the present issue).[80]
It will be seen that a minority of trade union leaders in both Sydney and Melbourne agreed that trade unions should "keep out of management" and many business executives (41% in Sydney) also disagreed with the statement. It is noted in passing that the phrasing of item 16 would seem to suffer from the same fault as the corresponding question in *The Affluent Worker*. On this occasion the bias may have induced more executives to favour worker participation in management than might have otherwise been the case.

The writer has been unable to find any similar study on the attitude of New Zealand trade unionists and there are obvious dangers involved in extrapolating even the Australian results to the New Zealand context. However, the conclusion to be drawn from the foregoing evidence is, it is suggested, that there is no *a priori* reason for denying Blumberg's statement that:

> . . . the modern worker is perhaps best understood as being oriented and responsive to participation.[81]

The second question to be considered concerns the *effect* of worker participation in management on the morale of the worker affected. The recently published *Industrial Democracy: The Sociology of Participation*[82] by Paul Blumberg is a leading work in this field. Blumberg surveys "some of the most important research on participation conducted in the last two and a half decades"[83] and concludes that:

> There is hardly a study in the entire literature which fails to demonstrate that satisfaction in work is enhanced or that other generally acknowledged beneficial consequences accrue from a genuine increase in workers' decision-making power. Such consistency is, I submit, rare in social work.[84]

In Chapter Six of *Industrial Democracy,* Blumberg summarised the results of seventeen separate studies involving the effects of participation: as we have seen, his conclusion is that they consistently demonstrate the beneficial effect of participatory systems on matters ranging from morale to productivity.

It is important to note, however, that Blumberg specifically cautions against linking the question of worker morale and job-satisfaction with that of increased productivity:

> It should be made perfectly clear at the outset that no attempt is being made here to establish a relationship between morale

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80. The items selected are items 2, 11, and 16 from Table 1 (p. 60).
81. Blumberg: *Industrial Democracy,* ante n. 1, p. 2.
82. *op. cit.*
83. Ibid., 123.
84. Idem.

> and productivity. It is true . . . that participation often lifts both, but it has been established many times over that high morale and productivity do not always walk hand in hand.[85]

In particular, Blumberg re-interprets one of the seminal experiments in industrial sociology—the Mayo experiment in the late 1920's at the Hawthorne Works (Chicago) of the Western Electric Company. The author argues that the experiment, designed to test productivity rates under varying conditions, may have an unintended significance for the question of worker participation. The investigators encouraged the workers in the experiment to participate in constructing the conditions under which it was to proceed. Blumberg writes that "the introduction of workers' participation was due originally to an error in the research design of the experiment"[86] and expresses a belief that:

> A *major,* although of course not the exclusive, explanation for the remarkable increases in productivity and morale lay in the crucial role which the test room workers played in determining the conditions under which they worked.[87]

Blumberg regards it as significant that later decreases in productivity and morale (which puzzled the investigators) came at a time when the research plan was becoming increasingly haphazard and the participation of the subjects was much reduced. The Mayo experiment has become a part of basic industrial sociology and has almost invariably been explained in terms of the structure of the subject group or of their changed "status". Blumberg calls for a re-appraisal of the experiment along the lines indicated.

The final question to be discussed under the interdisciplinary heading concerns the relationship between worker participation and levels of strike activity and industrial stoppages. It is possible to produced startlingly low figures for working days lost in the Federal Republic of Germany since the inception of post-war codetermination. This evidence does not, of course, establish a causal nexus between participation and strike levels, but certainly shows that participation does not preclude and *may* assist a low level of strike activity.

Some commentators have stated their conclusions more boldly: one of these, writing of the upsurge in strike activity in the war-torn countries following World War II, states:

> Germany constitutes a notable exception to this general tendency, a development which would appear to have been largely an outcome of the reconstruction of the German labour movement and its adoption of a policy of "codetermination."[88]

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85. Ibid., 74.
86. Ibid., 22.
87. Ibid., 20, 21.
88. D. W. Oxnam: "The Incidence of Strikes In Australia", *Australian Labour Relations: Readings,* ante n. 12, p. 18, 21-22.

Another suggests that:

> Obviously the decision to seek representation on governing boards of the enterprise is inconsistent with any substantial reliance on the strike as a tactical instrument.[89]

The suggestion is from time to time made that German workers are somehow inherently less prone to strike and this supposed characteristic is often linked with an alleged exaggerated respect for authority. This is not the place to discuss the generalisation involved in this judgement: suffice it to say that in the period 1927-29, for instance, the German industrial scene suffered a comparatively high level of strike activity. The following table offers a comparative guide to the numbers of man days lost per thousand workers in selected countries during selected periods:

Man Days Lost Per Thousand Workers Through Strike In Selected Countries In Selected Periods[90]

Country	1927-29	1955-60	1964-66
Australia	2562	472	400
France	525	324	200
Germany	802	61	Fewer than 10
Japan	158	395	240
New Zealand	116	83	150
United Kingdom	389	329	190
United States	833	1323	870

Blumenthal sought "the opinions of union officials and labour representatives and directors regarding the effect of codetermination on the incidence of strikes"[91] and found that 62% of his interviewees believed

89. Arthur M. Ross and Paul T. Hartman, *Changing Patterns of Industrial Conflict*, Wiley, New York and London, 1960, p. 100.
90. The writer understands that these figures are often unsatisfactory in that they are compiled on varying criteria and from a varying industrial base in the different countries. It is hoped, however, that they will suffice to support the modest propositions here advanced. The figures for the two earlier periods are selected from D. W. Oxnam, "The Incidence of Strikes in Australia", *op cit.*, p. 22, and have been converted from man-days lost per worker to man-days lost per thousand workers. The figures for the period 1964-66 are from the Report of the *Royal Commission on Trade Unions and Employers' Associations*, Cmnd. 3623, p. 95.
91. Blumenthal, *Codetermination*, op. cit. n. 48, p. 103.

that codetermination "lowers the incidence of strikes", 14% believed it had no effect; 22% thought the effect could not be determined and 2% believed that codetermination increased the incidence of strikes. It should perhaps be remembered, however, that Blumenthal's study is now more than a decade old and also that the interviewees are likely to have been ideologically committed to codetermination.

If participation is a more effective means than confrontation of conducting labour/management relations and if worker morale can be improved thereby, it would seem reasonable to expect a lower level of strike activity. The German experience certainly does not damage this hypothesis and may confirm it.

IV: THEORY OF THE ENTERPRISE

It has been conceded from the outset that the question of worker participation in management was a "partly" legal one and it is now hoped to isolate the legal problems which appear to arise from an infusion of interests other than those of shareholders into company decision-making processes.

Whatever be the position under Anglo-American law of company directors—and it is not proposed to here examine that position—it is very clear that they have no authority to *balance* the interests of shareholders with those of employees of the company. The word "balance" has been used because it implies the operation of some principle of distributive justice by which shareholders are in a literal sense deprived of a possible maximum advantage in the face of what is taken to be a legitimate call on it from other quarters.

No doubt, instances may be found where the Courts have permitted what is, in substance, the application of such a "balancing" approach, but only, it is suggested, where it has been possible to postulate some long-term or indirect advantage, however fictive, to present or potential shareholders. The notion of company responsibility and accountability to employee interests is alien to Anglo-American company law—though perhaps not to company practice.[92]

It is against this background that it is now proposed to examine the content and consequences of the fledgling Continental legal theory of the "enterprise".

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92. For a recent discussion of this question see J. K. Walsh, "The Exercise of Powers In The Interests of a Company", *University of Western Australia Law Review*, Vol. 8, No. 2, p. 176. The view is there taken that "far from preventing companies from having regard to the interests of employees and others, the law confirms that, unless there is some odd restriction, they may do so, to the extent that this has become usual" (p. 194). Even on this view, however, and on the author's argument for it, it would be possible to formulate "some odd restriction" in the Memorandum and Articles.

One Continental jurist, welcoming the acceptance in German law of the distinction between the "company" and the "enterprise", has written:

> Hitherto, an enterprise which took on the guise of a company revolved, as it were, in two distinct spheres, one of which was the reflection of economic and sociological reality and the other the creature of juristic thought. The concepts of the enterprise and of the company were, respectively, the centres of these two spheres. (T)[93]

It is this distinction which has provided the mainspring for the formulation of a legal theory of the "enterprise" to supplement, or perhaps replace, the classical legal concept of the company. This theory postulates that an enterprise is constituted by the conjunction of three factors: labour, capital and organisational ability. The suggestion is that the resources of capital and labour are brought into a productive contractual reltionship by the entrepreneurs who provide the catalyst of organisational talent.

No legal system will be adequate, the proponents of this theory argue, which does not provide a means of regulating the rights of all these factors *inter se*. Thus, the entrepreneurs must have sufficient authority over the resources of capital and labour to play their role, but the providers of both these resources must have some control over their use.[94]

Fogarty comments that:

> The enterprise theory is basically sound. It distinguishes correctly between the common and separate spheres of interest of shareholders, employees and entrepreneurs . . . [T]he theory recognises that, as experience in the German coal and steel industries has shown, entrepreneurs do not need to be specially identified with shareholders in order to be motivated to show entrepreneurial drive and initiative.[95]

The development of the theory of the enterprise has been assisted by the erosion of the notion that a company is directed by its shareholders through their "puppets", the managers. The literature debunking this notion is considerable and mainly American in origin.[96] Well before these writers, howexer, the economist Adam Smith observed (in 1776):

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93. Jurgen Einmahl, La Réforme du Droit des Sociétés Anonymes en Allemagne, *Revue Trimestrielle de Droit Commercial*, Vol. 3 (1968), 563, 574.
94. For an exposition of this theory see Fogarty, ante n. 8, 93-96; Einmahl: ante n. 93, 574; and Prof. Ballerstedt in the *C.E.C.A.* publication, p. 63 et seq.
95. Fogarty: op. cit., p. 95.
96. This literature is surveyed by J. A. C. Hetherington in "Fact and Legal Theory: Shareholders, Managers and Corporate Social Responsibility", *Stanford Law Review* Vol. 21 (Jan. 1969), p. 248.

> . . . the greater part of those proprietors (sc. of a joint stock corporation) seldom pretend to understand anything of the business of the company, and when the spirit of faction happens not to prevail among them, give themselves no trouble about it, but receive contentedly such half yearly dividend as the directors think proper to make to them.[97]

More recently, Professor Galbraith[98] has popularised the idea that the modern large corporation will tend to be controlled by management or, to use his term, by a "technostructure" of expert administrators who, by virtue of the complexity of the decisions they are required to make and the diffuseness of the shareholding of the companies in which they act, are subject to few real restraints on their authority.

The "power without property" situation of management did not surprise the proponents of the enterprise theory—indeed, it confirmed their analysis of the role of the entrepreneur as a catalyst and a "balancer" of all interests in the enterprise. The freedom which the managers were seen, in fact, to enjoy would enable them to discharge their "obligations" to the diverse interests.

The German jurist, equipped as he might be, with a theory of the enterprise, was in a better position to formulate a system of worker participation in management. Moreover, he was not faced with the problem that confronts Anglo-American lawyers of reconciling the presence of employee representatives on management with a narrow view of managerial functions and the apparent limitations on the range of interests which management can pursue.

As Fogarty states, "German law explicitly admits that property is subject to a social mortgage".[99] Furthermore, the 1937 German company legislation had enjoined the Board of Management to manage the company:

> as the good of the enterprise and its retinue and the common weal of folk and realm demand.[1]

Whatever these curious words had meant, it was clear that objection could not be taken to management decisions which recognised the existence of interests other than those of the shareholders.

The *Aktiengesetz* 1965 omitted these words from the corresponding section[2] but the official commentary expressly states that the executive board must take into account the interests of shareholders and em-

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97. *The Wealth of a Nation,* 1776, Book V, Ch. 1, part 3, art . 1, quoted in Einmahl: ante n. 93, p. 567.
98. J. K. Galbraith, *The New Industrial State,* Hamish Hamilton, 1967.
99. Fogarty: op. cit., p. 85. The provision referred to is Article 14 of the German Constitution.
1. Article 70 of the 1937 legislation. For a full discussion of this provision and the difficulties of interpretation see Vagts: *op. cit.,* p .40 ff.
2. *Aktiengesetz 1965,* Art. 76.

ployees as well as the interests of the community[3] and there can be little doubt that, under it, the freedom of management remains unfettered.

The principal legal problem, then, facing the advocate of worker representation on the executive board of Anglo-American companies is that of broadening the range of interests which may influence management in decision-making while retaining the possibility of the exercise of some control over its activities by all interested parties including of course, shareholders. It is difficult to see how this might be done other than by statutory provision similar to the German. The way would then be open for the imposition on all members of the executive board, irrespective of any representative capacity or of the manner in which they may be removed from office, the same obligations towards the enterprise as a whole. As was noted earlier,[4] this is the position in Germany.

Recently, a Royal Commission under the Chairmanship of Lord Donovan[5] has reported on, among other matters pertaining to industrial relations, the question of worker participation in management.

Chapter XV of the Donovan Report begins by stating an apparently unanimous opinion of the members of the Commission on the subject of participation:

> This is a subject to which we all attach great importance.[6]

The Report explains that the Trades Union Congress had submitted proposals for increased participation of workers in management. The union proposals had envisaged an infrastructure of participation (which, on the limited information available in the Report, seems aimed at information gathering) and a voluntary scheme for the seating of employee representatives on boards of directors.

Neither of the parts of these proposals found favour with the majority of the Commission which considered that the infrastructure as proposed by the T.U.C. would be rendered unnecessary by the introduction of collective bargaining on comprehensive agreements at the plant level, as recommended in the Report.

The more far-reaching proposal for representation on the board of directors was rejected by the majority for three reasons: firstly, argued the majority, the incumbents of the labour seats on the board would be under:

> an almost intolerable strain when decisions unfavourable to workers had to be taken.[7]

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3. Fogarty: *op. cit.*, p. 81-82.
4. Page 433 ante.
5. *Report of the Royal Commission on Trade Unions and Employers' Associations*, under the chairmanship of Lord Donovan, Cmnd. 3623; 1965. Referred to as "The Donovan Report".
6. The Donovan Report, para. 997, p. 257.
7. Ibid., para 1002, p. 258.

Secondly, the position of the labour representative would give rise to the difficulty of defining his responsibility.

Lastly, the majority considered that:

> the appointment of workers' directors in the near future might divert attention from the urgent task of reconstructing company and factory collective bargaining.[8]

The first of these objections is, it is suggested, at least partly met by the German experience of the "labour director". The members of the Commission had travelled to Germany to observe codetermination but were only able to conclude that:

> our brief stay does not enable us to pass any reliable judgement on workers' participation as there practised.[9]

The second objection has been conceded to be a legal one and of substance. The writer does not think it impossible to impose the same obligations on all directors provided the range of interests that may influence their decisions is broadened.

The third objection does not go to the merits of participation but is a "tactical" consideration applying, perhaps, to British conditions at the present time.

Five of the twelve members of the Commission, including Professor Kahn-Freund, considered that the problems enumerated by the majority were not insurmountable and that the appointment of workers' directors would be desirable.[10]

The Report cannot be considered satisfactory on the question of worker participation in management. Four pages will, to many, not seem adequate to deal with a subject of an importance recognised even by the Commission. Perhaps the complexity and immediacy of the problems of industrial relations in Britain prevented closer consideration being given to the possibilities of employee representation on boards.

A. Frame.*

8. Ibid., para 1002, p. 258.
9. Ibid., para. 1001, p. 258.
10. The views of the minority are stated in paras. 1004 and 1005 of the Report. The minority presumably contemplated a scheme such as the West German one and must be taken to have advocated going beyond the notion of joint consultation and to have intended their recommendations to apply to privately as well as publicly owned industry. For a brief account of developments in Britain towards worker participation in *publicly* owned industries, see Fogarty, "A Companies Act 1970?" *PEP, Vol. XXXIII No. 500,* Planning, October 1967, pp. 74-75.

* LL.B. (Auckland).