INDUSTRIAL DEMOCRACY AND MANAGEMENT PREROGATIVE:*
Property rights and economic freedom under review

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Die wetgewing wat in Mei 1976 in Duitsland in werking getree het met betrekking tot gelyke verteenwoordiging van aandeelhouers en werknemers op die beheerrade van maatskappye met meer as 2000 werknemers verteenwoordig 'n kompromie in die jarelange stryd tussen arbeid *en* kapitaal *vir 'n* industriële demokrasie. *Hierdie kompromie het egter blykbaar geeneen van die partye bevredig nie. Hierdie stuk bespreek die funksionele en wetlike tekortkomings van die "Mede-bestemmingswet van 1976", asook die besware van sowel arbeid as werkgewer. Sekere implikasies van die implementering van, en ervaring met die Duitse stelsel vir arbeidsbetrekkinge en industriële demokrasie in Suid-Afrika word ook bespreek.*

INTRODUCTION

On 4 May 1976, an act became effective in Germany introducing parity representation — equal representation of shareholders and labour (employees and trade unions) — on the control boards of companies with more than 2 000 employees. This Co-determination Act which, with a transitional period of two years, has acquired full force in the meantime, represented a compromise in the long-standing struggle between *labour* and *capital* for an *industrial democracy* — a compromise which apparently has not satisfied either party. To labour, the Act constituted a relatively weak answer to the long drive for the elimination of the social disparity between 'those who work and those who own' and the realization of economic justice to a higher degree. To employers, it represented an infringement of the basic economic freedom underlying any market economy. Rather than bringing the parties together on the same principles of co-determination — joint decision making with equal rights in this process — the institutionalization of parity co-determination in general and the compromise model of the Act in particular have given rise to a polarization and polemic over the very core meaning and connotation of industrial democracy and its interpretation in political-ideological terms. The question whether parity co-determination is compatible with the concept of a free market economy and the social market machinery of democracy in the German interpretation, has come to the fore. Important as this question is, it is unlikely that an unambiguous answer will ever be found. It is, therefore, the need for formalism, the attempt to solve this question technically, that compresses the problem into the question: IS CO-DETERMINATION UNCONSTITUTIONAL? This, of course, against Germany's own socio-political background and her own constitutional framework.

THE FUNCTIONAL DEFICIENCIES OF THE CO-DETERMINATION ACT 1976

Since 1973, no political party in the German Parliament could apparently afford to oppose the introduction of a bill effecting equal representation of workers on the supervisory boards of companies not falling under the Montan Co-determination Act 1951. Since this time, an extension of parity co-determination analogous to the Montan Co-determination Act 1951 was no longer a question of principle, but merely a question of degree on the intended expansion and the detailed provisions of the Act. (1) The major controversies in the ten-year dispute during which 14 major models were submitted centred in the representation of management personnel, namely whether management should have its representation on the shareholders' or workers' *bench* on the supervisory board; the solution of a draw situation inherent in a perfect parity composition of the board; and the rights of the trade unions in respect of their proposing and delegating representatives to the board.

When the Co-determination Act was inaugurated on May 4, 1976, the unions were far from satisfied. The

* The second in a series of two articles on the German system of "Mitbestimmung", and possible implications of such co-determination approaches in the South African industrial relations scene.

provisions of the Act fell short by far of their demands for a genuine realization of the co-determination principle, and thus of their demand for an effective industrial democracy, already made by the *Deutscher Gewerkschaftsbund* in 1950. Shortly after the passing of the new Act, on May 21, 1976, the Secretary of the I G Metall, Rudolf Judith, expressed the generally prevailing mood of the trade unions. *"We do not want a co-determination substitute. We want parity co-determination according to the proved model of coal and steel."* (2)

Nevertheless, the trade unions grudgingly conceded that the new Act was an advance, even if only partial, to a more humane *world of labour* and increased the chance of the dependent employee for an effective self-actualization. This, however, did not divert their policy. (3)

The objections of Labour

The dispute over the extension of the co-determination concept analogous to the Montan Co-determination model is far from being settled and remains the major demand of the *Deutscher Gewerkschafsbund* on its policy agenda. (4) The dissatisfaction of the trade unions with the Co-determination Act 1976 is offset by the rejection of its basic provisions by the employers. (5) The mutual dissatisfaction imposes on the Act the character of a relatively ineffectual compromise. As far as the trade unions are concerned, the provisions of the Act as such represent a dilution of the original co-determination concept. Their contention is that parity co-determination under this Act is, in plain language, one big bluff and a blurring of the issue. The argument of the trade unions centres in three basic points:

Firstly, the *Deutscher Gewerkschaftsbund* opposes the formation of the special group *management personnel* with their own representation. This raises the question as to who can be classified as *management personnel.* On the one side, every employee who *manages,* namely who is responsible for the execution of work by a group of some employees, would fall under this wide definition. In the narrow sense, an employee can be classified as manager if he fulfills a function close to that of the actual owner and employer. In the first instance, the number of *management employees* is relatively large, and in the second relatively small.

In terms of article 5 of the Works Constitution Act 1972 a *management employee* is an employee who, by the nature of his contract and function, is entitled, among other activities, to employ and dismiss workers, or is empowered to carry out, on his own responsibility and regularly, such functions which are vital to the existence and development of the enterprise. This definition is also applied in the classification of *management employees* in terms of the Co-determination Act 1976. As this definition limits the actual number of *management employees,* the trade unions claim that it warrants neither their separate representation on the supervisory boards, nor their minority protection.

The major contention is that, having been granted separate representation, the *management employee* representative on the supervisory board has been placed on the *employees'* bench which destroys the parity principle in its very essence. The trade unions submit, and their argument is quite justifiable in this particular instance, that *management employees,* owing to their high degree of dependence on the board of management and thus the shareholders on the supervisory board, will always side with *capital* rather than *labour* in all critical decisions. Strong words such as *puppets* and capitalistic *flunkies* have been used in this dispute. What is, however, ignored by the trade unions is that the board of management is voted by a two third majority of the equally composed supervisory board and that the management board in total appoints *management employees.*

In addition, the trade unions' argument carries the ring of the *a priori* assumption that management employees, and also the shareholders' representatives on the supervisory board, will do everything in their power to thwart the aspirations of *labour* just for the purpose of doing so. Rightfully or wrongfully, the decision making of a company and the company's welfare does not so much depend on institutionalized democratic procedures applied at supervisory board level, but, in the final instance, on management principles, and decisions taken on this basis. It appears, therefore, that the demand of the trade unions for an effective elimination of management representation in the first instance, and a shift of the management representation to the shareholders' side in the second, is directed either against the *capitalistic* institution of the company as such (6) or, if this is not the case, is at least aiming at the attainment of a distributive, rather than a participative bargaining situation.

According to the *Deutscher Gewerkschaftsbund,* only a direct representative of the shareholders can be regarded as a *management employee,* and there is no question that no exception should be made as to their representation. Management employees thus defined should be part of the shareholders' representation. Their present representation on the *employees' bench* is regarded as dangerous and as an effort to undermine the principle of parity co-determination. (7)

Secondly, the trade unions maintain that, in addition to the placement of *management employees* on the *employees' bench* on the supervisory board, the second vote of the *capitalistic* chairman in a voting deadlock makes a still greater farce of the parity principle. As far as the trade unions argue that, under the provisions of the Co-determination Act 1976, the chairmanship will exclusively be held by a representative of the shareholders on the board, they are correct. It is unlikely that, in practice, one third of the shareholders will vote for a chairman from the *employees' bench* and thus place the company under

total *workers' management.* A situation to this effect is, however, not excluded in the theory of the model.

A reversal of the situation, namely an automatic accrual of superior voting power to the *employees' bench* on the supervisory board, would have been highly unorthodox within the *free enterprise* system. Although a loading of the dice in favour of employee management would have been most satisfying to the trade unions and would have exceeded their most optimistic expectations, it is highly probable that such provisions would have brought about the collapse of the management structure of German industry, if not the collapse of the traditionally efficient social market economy as such.

Worker management, possibly in the Yugoslavian meaning, was, however, not the aim of the trade unions. Such demands would have been regarded as highly unrealistic in German *real terms,* and to the detriment of the enterprises concerned. The middle path, already suggested by the *Deutscher Gewerkschafsbund* in 1950, was the *neutral* chairman of the Montan Co-determination model. This solution was most obviously not acceptable to the employers for the reason that a chairman in this capacity could never be neutral in the absolute sense and that his key position would open the way to a variety of coupling deals with either side.

In addition, and as the most strongly defended argument, employers maintained that any rational decision making determining the fate of the company in its market could and should not be exposed to the chance of an institutionalized voting procedure under *democratic* aspects, as such a body would necessarily pursue other ends and would either obstruct or miss the purpose of efficient company management.

It has been pointed out that the objections of the employers against the Montan Co-determination model in general and the institution and role of the neutral chairman in particular have been brought forward at a rather belated stage. They should have been voiced at the time of the passing of the Montan Co-determination Act 1951. (8) Suffice it to say that the passing of the Montan Co-determination Act was subject to extraordinary circumstances.

The key enterprises in the coal, iron and steel industry were confiscated by military statutes by the occupation authorities, and their shareholders thus deprived of their *property and the relevant power of disposal.* (9) In 1947, these enterprises were placed under management on the parity co-determination principle subject to the provisions of the *North German Iron and Steel Control Agreement.* These regulations were not extended to the coal mining industry which left the shareholders of the enterprises concerned in their disowned state. As a condition for the restructuring of the coal, iron and steel industry and their release from their administration, the military authorities demanded the continuation of the joint shareholder-worker management in the iron and steel industry and the extension of the parity co-determination principle to the coal mining industry. This demand, supported by the trade unions and enforced by their threat of a general strike, (10) was complied with by the legislative.

An *a priori* condition was thus legally entrenched, giving the employers relatively limited scope to have the Co-determination Act 1951 tested on its constitutional legality within the ensuing period of one year after its passing, which expired on December 31, 1952. (11)

Thirdly, the appointment of the *labour director* represents one of the greatest controversies. In the Montan Co-determination model, the labour director is appointed to the board of management subject to the trade unions' express approval. By contrast, the term *labour director* in the Co-determination Act 1976 merely signifies that one of the directors on the board of management must be responsible for personnel and social matters. The electoral procedure for the post of this director, and thus the particular legal status as applicable in the Montan model, is not reflected in the 1976 Act.

The trade unions maintain that a labour director who does not enjoy the *confidence* of the employee representation of the supervisory board, is merely a labour director in name and ineffective in his position. Unless the appointment of the labour director depends exclusively on the vote of the Works Council and the trade union representatives, the definition of *labour director* as such is inapplicable and farcical.

In opposition to this argument, the employers contend that the appointment of a director responsible for personnel and social matters does not and should not require the institutionalized approval of the trade unions, and that this post should in any case never be filled by a candidate who is completely unacceptable to the employees of the company.

Employers also dissatisfied

Opposed to the criticism of the trade unions of the provisions of the Co-determination Act 1976 stands the extreme dissatisfaction of employers. This dissatisfaction can be expressed under two aspects: the functional efficiency of a supervisory board composed on the parity principle, and the constitutional legality of the Co-determination Act in its present form.

Concerning the functionality of the model, the employers consider the voting procedure on the board to be an obstruction to its functional efficiency. The fact that the additional vote is vested in the person of the chairman and cannot be exercised by proxy, places, in the employers' opinion, a chance effect on the chairman's physical presence rather than emphasising the need for a rational approach to the decision-making process in the internal operations of the company along established policy lines. The

interest representation of the shareholders of the company is thus subjected to secondary, administrative procedures.

Also, the election of the employees' representatives to the supervisory board by means of the electorial gremium (select committee) is regarded as too sophisticated, over-institutionalized and too cumbersome in practice. In addition, the right of the trade unions to determine their representation on the board, irrespective of the approval of the workers effectively employed by the company, is not regarded as a true representation of the company's employees. This outside determination of the company's worker representation is held to clash, firstly, with basic democratic election and representation principles, and secondly, with the implied intention of the Act to create a parity basis for the company's employees. (12)

The most severe objection of the employers concerning the functionality of the parity co-determination model under the 1976 Act is that this model automatically creates a conflict situation and stimulates a polarization around *labour/capital* controversies, and carries this into all decisions of the supervisory boards of companies. The employers argue that, in the case of a deadlock in voting on this board, they are forced to exercise their power in the second round of voting with the inclusion of the second vote of the chairman. This power should not be statutorily delineated and should not be excercised by and through administrative channels and procedures. Employers possibly rightly contend that, since they themselves and the employee representatives know that the *dice is loaded* and that the last resort of exercising this power *is always* at the disposal of the shareholders' representatives, the grounds for a relationship of distrust are automatically prepared. The danger of distributive decision-making is, therefore, institutionalized with the consequence of a certain degree of potential conflict and confrontation.

The greatest ideological controversies over the parity co-determination model in terms of the Act of 1976 can, however, be found on legalistic, constitutional grounds.

THE LEGAL DEFICIENCIES OF THE CO-DETERMINATION ACT 1976

The Verfassungsklage against the Co-determination Act 1976

Articles 17, 19 (4) and 93 (4a) of the German Constitution read respectively

Everyone has the right, individually or jointly with others, to address written requests or complaints to the competent authorities and to the popular representative bodies,

Should any person's rights be infringed by public authority, he shall have recourse to the courts. In so far as there is no other jurisdiction, the recourse shall be to the ordinary courts,

and

The Federal Constitutional Court decides on constitutional complaints which may be lodged by anyone who contends that one of his basic rights have been violated by public authority. (13)

These provisions of the Constitution guarantee the right to individuals or associations to apply to the courts, notably to the Constitutional Court in Karlsruhe in the last instance, for the initiation of procedures whereby a law is tested on its constitutional legality.

On 29th June, 1976, one day before the last day open to the lodging of formal objections against the co-determination Act 1976, 30 employers' associations and nine individual enterprises under the auspices of the Confederation of German Employers' Association (which for statutory reasons could not act as plaintiff as such) availed themselves of their constitutional right and initiated the *Verfassungsklage.* (14) The premises on which the employers insisted on a testing of the Act against the provisions of the Constitution consisted of their major argument that the reserves of private business have been reduced, though not abolished, by the intention and provisions of the Act; and that it was not only their right, but their social duty to submit their case to the highest impartial German Court for consideration. (15). Their motivation centred in four major points every one of which is considered to be a violation of an individual provision of the Constitution. (16)

The violation of property rights

Article 14 of the German Constitution reads

(i) Property and the right of inheritance are safeguarded. (Their) scope and limitations are determined by legislation.

(ii) Property obligates one to duties. Its use should at the same time serve the general welfare.

(iii) Expropriation is admissable only for the welfare of the community at large. It may be effected only by legislation or on the basis of a law regulating the nature and extent of compensation. The compensation shall be determined after just consideration of the interests of the general public and the parties concerned. In case of dispute regarding the amount of compensation, there is recourse to the ordinary courts. (17)

Though not being opposed to the principle of co-determination as such, the employers' contention is that *parity* co-determination as entrenched in the Co-determination Act 1976 represents an effective expropriation by means of a limitation of their power of disposal. It is obvious that the formulation of property rights in the Constitution may be interpreted on conflicting premises, a fact resultant from the constitutional compromise between socialism and liberalism.

The two tier character of property rights as expressed in the Constitution with its absolute guarantee in paragraph one, but its subsequent qualification in paragraph two, raises the age old, normative question as to the obligations of the property-owning individual to society and the true nature of the *general welfare.* (18) The employers are convinced that co-determination must find its limits at that point at which the constitutional rights of other individuals are infringed and that these limits have been reached, if not exceeded, by the parity composition on the supervisory boards. (19) They argue that they can no longer dispose of their property as guaranteed by the constitution without the permission of the workers' representatives.

In addition, they maintain that, as property obligates to duties, and thus to responsibility, their *Letztentscheidungsrecht,* property owners' responsibility of the last decision attached to their exercising property rights, cannot be institutionalized in the first instance, and in the second cannot be sufficiently protected within the framework of the Act gainst chance occurrences. (20) On a higher plane, this argument symbolizes the long standing controversy between the desirability of a predominantly privately or publicly oriented economy. (21)

The violation of the Tarifautonomie

Next to article 14 of the Constitution, article 9 represents the major premises of the employers' contention that parity co-determination in its legally entrenched form is unconstitutional. Article 9 of the Constitution reads:

(i) All Germans have the right to form associations and societies.

(ii) Associations, the objects or activities of which conflict with the criminal laws or which are directed against the constitutional order or the concept of international understanding, are prohibited.

(iii) The right to form associations to safeguard and improve working and economic conditions is guaranteed to everyone and to all trades and professions. Agreements which restrict or seek to hinder this right are null and void, measures directed to this end are illegal.

The *Tarifautonomie* as an integral component of the freedom of association is deduced from this article. The fact that trade union and employee representatives are represented on supervisory boards of companies in equal numbers to the representatives of shareholders and that this supervisory board appoints the board of management which, as a member of an employers' association, negotiates with the trade unions for the terms of an industrial agreement, represents, in the employers' opinion, a serious threat to the freedom to negotiate independently of the other party. (22) The employers contend that a conflict of interest has to be the inevitable result of the dual role of trade union representatives on the highest level of policy formulation in the company. On the one side, in their roles as directors of the company, trade union representatives have to represent the interest of the company with the other directors as one closed body to the outside, as, for example, to the trade unions. On the other side, they have hardly a choice but to support the policy of their trade unions and the demands made against the company or employers' association. (23) It is obvious that in serious negotiations for, say, higher wages, these trade union representatives can find themselves in a delicate position.

Irrespective of the problems of the trade union representatives in such a situation vis-a-vis their company and their trade union, and thus their dual and opposed responsibility to *capital* and *labour,* they are held to represent an effective obstacle to a free and unfettered negotiation process between employers and trade unions. Contrary to the opinion of the *Deutscher Gewerkschaftsbund* that *"... the objectives of co-determination go as far as the principle that all directive and imperative power must be subject to democratic legitimation and control..."* (24) the employers hold that just this forcefully institutionalized *democratization* impairs the very essence of the *democracy* guaranteed in and by the Constitution in general and article 9 in particular. The freedom of association with its corollary, the freedom of dissociation and its most cherished property, the independence of the individual in a pluralistic society expressed in the *Tarifautonomie,* is considered to be seriously endangered.

The violation of the freedom of trade

Article 12 (1) of the German Constitution reads:

All Germans have the right freely to choose their trade or profession, place of work and place of vocational training. The exercise of an occupation or profession may be regulated by legislation. (25)

Employers argue that parity co-determination on the supervisory boards of companies infringes the freedom of trade, the very essence of their profession, entrenched in this article of the constitution. The fact that their decision-making process, the major characteristic of their chosen profession, is subject to the co-determination machinery, is interpreted as a limitation, if not suspension, of the freedom of trade as such. Especially in the appointment of the board of management, requiring the approval of at least one third of the workers' representatives on the supervisory board, the limitations to exercising their profession, namely to determine the policy of a company and to manage it without interference, is felt most strongly. (26)

It is obvious that the employers' argument rests on the premises of regarding the status of ownership and the managing of a company as a *profession* and their equating it with any other profession in the conven-

tional sense. Thus they open themselves to the attack of the trade unions that, firstly, to be a *capitalist,* namely an owner or part owner of the means of production by virtue of holding shares in a company, cannot be considered as a trade or profession in the sense expressed by article 12; secondly, that any ownership or management activity reflects automatically the classical *capital-labour* animosity which is to the detriment of the worker; and, thirdly, that the *"... ownership of large enterprises (is) no longer a privilege for social power."* (27)

From the trade unions' side, co-determination is regarded as the *"... answer to one-sided rule."* (28)Co-determination represents just the most effective solution to curtail the power of a *profession,* namely management, which has emancipated as a force on its own in large enterprises and has become *alienated* from ownership as such. (29) Co-determination is to prevent that the division of managerial and executive functions, which according to all experience is unavoidable in large work-divided organizations, leads to confrontation between rule and dependence. Co-determination is to prevent the entrepreneurial macro-economic interest in economic growth, investment, innovation and rationalization, but also in supply and quality of goods, asserting itself at the expense of the workers, whose labour made all these successes possible in the first instance. (30) In addition, co-determination is regarded as a preventive measure against the abuse of economic power generated by the conglomerate. *"One of the characteristics of modern industrial society is the progressive economic concentration which leads to a conglomeration of extensive power in large enterprises and concerns. The danger of an abuse of this economic power — for economic, but also for political purposes — thus increases constantly. It is the duty of the democratic state to prevent this abuse."* (31)

For the better or the worse of the disputed case of co-determination in this particular instance, the not so faint rings of the *exploitation* and *surplus* value theories and the social theory of the *economic basis and supra-structure* cannot be ignored, (32) although it appears that certain Gailbraithian principles have also not passed unnoticed. (33)

There is no doubt that, unintentionally or by force of doctrines, the arguments of employers and trade unions miss each other on this particular point. Employers argue in terms of a fused owner-management-executive function whereas the trade unions categorically emphasise the clear separation between and independence of the objectives of both. It is difficult to perceive a delineation of the contentions on either side, but, if the dispute moves to the German conglomerate and the traditional management hierarchy, as well as its equally traditional method of establishing it, the trade unions have, though not in principle, but in practice and degree, well-founded reasons for their argument.

The violation of the economic freedom

The employers' constitutional complaint against parity co-determination on the basis of article 2 (1) is of particular interest. Article 2 (1) of the German Constitution reads:

Everyone has the right to the free development of his personality, in so far as he does not infringe upon the rights of others or offend against the constitutional order or the moral code. (34)

From this article, the principle of economic freedom and its protection by the constitution is deduced which, employers maintain, is diluted by parity co-determination. If it is recalled that article 2 (1) represents the very same premises on which *labour* has re-formulated and built up its concept of *industrial democracy* during the past 25 years, the depth of the ideological rift becomes apparent.

Employers may argue that the economic freedom is an absolute prerequisite and integral part of the free development of their personality in a pluralistic society on an equal, individual basis, yet their argument will break on the trade unions' doctrine of the irreconcilability of *labour's* and *capital's* interests. The individual rights and freedom of employers and employees are considered in their classical dichotomy and as unavoidable restraints on each other in their social context. Both the *owners of the means of production* and *labour* emphasise the freedom of the individual and the development of his or her personality, though under different views and perception of society as a whole, embodying the time-honoured, apparently irreconcilable contradiction between individualism and collectivism.

It forms part of the trade unions' fundamental economic policy that *"... the economy is subordinate to the free and responsible development of the personality (of the individual) within society. Like every other member of society, the employee must also be in a position to lead his life by free self-determination. (As) ... every economic activity, by its mere nature, is a social process, ... employees and their trade unions must participate on an equal basis in the management of the economy. Co-determination by the employees in the economic sphere is one of the foundations of a liberalistic and social order ... within the framework of the democratic and rule of law state."* (35)

As far as the perception of the economic order and its basic doctrine are concerned, hardly a difference exists in the declared credo of the employers. *"The purpose of the economy lies in the satisfaction of human needs... However, every economic activity is not an end in itself. The significance of the economy can be found in its contribution to the ultimate values of human existence ... The success of economic activities can, therefore, be measured by their contribution to the realization of the aims of social justice and social peace. The economy is enmeshed with society. Economic life thus forms a part of society's existence*

and is modulated by the objectives, motivation and rules of conduct which guide man engaged in the economic process." (36)

Despite this mutually not exclusive acceptance of an economic order and its basic values in principle, it is doubtful whether trade unions and employers will ever come to terms on the degree and extent of *economic freedom* as a corollary to the political freedom granted and guaranteed on an egalitarian basis by the Constitution. The major barrier appears to be of a traditional, ideological character. Economic power incorporates social power which again represents the key to the relative freedom for the *development of the personality.* It is within the open-ended provisions of article 2 (1) of the Constitution, namely that the individual may freely develop his personality *"... in so far as he does not infringe upon the rights of others ..."* that the rights and interest of *capital* and *labour* are held to be opposed to each other, limiting each other and apparently irreconcilable, very similar to the normative, but abstract problem posed by the social ties of property in article 14 (2).

Whereas the trade unions follow their classical argument that the constitutional guarantee of economic freedom becomes meaningless to the worker as long as the overbalance of deterministic economic and social power is held not only by the owners of the means of production, but is usurped and effectively wielded by a non-owning management elite, the employers consider a power sharing as demanded by the trade unions as an infringement of their rights and freedom guaranteed by the same article of the Constitution. There is no doubt that, in the interpretation of article 2 (1) in substantiation to article 9 (ii), the different perceptions of the social concept collide in a power struggle for their effective realization and that this struggle might change effectively the socio-economic-political order of the country in the long term.

INDUSTRIAL DEMOCRACY AT THE CROSSROADS

It is safe to assume that the pursuit of an industrial democracy centring in the institutionalization of parity co-determination in Germany has come to the crossroads, at least if compared with its slow build-up and relatively accelerated development in the thirty odd years since the end of World War II. To a certain extent, the constitutional complaint of the employers can be regarded as a watershed from which the course of development, not only in industrial relations in the narrower frame, but also in the socio-economic-political infra-structure in the wider context, will be determined.

One of the most striking features in German industrial relations is the extremely pronounced system conformity of the individual, as well as the body politic, expressed in the invocation of the basic law of the constitution as guideline for all social norms. It has sufficiently been demonstrated that the provisions of the basic law, particularly those of articles 2, 9, 12 and 14, contain ambivalent promises to either party. These promises are, however, derived from different interpretations and different idealistic social goal settings in the framework of equally different *Weltanschauungen.* The interpretation of the Federal Constitutional Court of the disputed extent of parity co-determination in general and the individual provisions of the Co-determination Act 1976 in particular, in order to remain true to the ambivalent character of the basic law, can, therefore, aim at nothing else but to achieve once again a compromise between two opposed social orders and ideals. Arguments on mere technical grounds notwithstanding, it should be questioned whether a problem of such magnitude reflecting the deep rooted controversy between the factual economics of production, the socio-politics of distribution and the affective ideologies of social and economic justice can at all be brought formally *sub-judice.* Apparently, the highly acknowledged system conformity opens the way to such experiment. Also, mere formalism would be imposed if it had to be decided whether the subject matter of the *legal* dispute falls into the realm of interests or rights.

Basic rights, as those which are guaranteed by the basic law and are contended by both parties, have no absolute existence *per se.* They are created initially by declaratory acknowledgement on the basis of a consensus which is held to serve the balanced interest of the individual and society. Their ambivalent nature is automatically tied to the prevalent social concept which, most obviously, can never assume the prerogative of an absolute value judgement. Social concepts, representing the conglomerate interest of the body politic, are dynamic. However, while the dynamism of their ethics is accepted beyond any doubt, that of constitutionally entrenched norms is negated. An accelerated evolution of social concepts, norms and ethics must, therefore, time and again, touch on, and possibly even break, the constraints of the constitutional frame of necessity, and must increasingly come into conflict with its initially accepted and declared values.

There is no doubt that the concepts of *economic freedom, the freedom of trade, the right to develop one's personality and industrial democracy* have undergone considerable changes in their connotation since their initial perception and consideration in the constitution making process. In fact, hardly any greater confusion could reign than that in the goal setting and interpretative spectrum of industrial democracy. If it is accepted that social dynamics have a life of their own, the mere act of testing a social law on its constitutional legality represents rather a test of the basic law on its suitability or outdatedness against a shift in social norms.

As matters stand, the German basic law, at least functionally, appears to be able to accommodate major changes in the social concept without having to change itself. This, undoubtedly, was the intention in

the initial formulation process. Also, the valuable, essential function of the basic law as a catalyst in the process of democratizing society and industry in conjunction with the system conformity of the body politic deserves the greatest admiration. Yet, some doubt necessarily permeates any reflection on the ability of the judiciary to maintain the balance between the social forces by the machinery of formalism in the long term without changing — not the wording of the *basic rights* but — major substantive elements of the basic law by interpretation and adaptation to the most driving of forces. For all practical purposes, and arguments on technical grounds notwithstanding, the development of social concepts by and through the basic law in an evolutionary, interpretative process of its entrenched ethical values can be equated with amendments to the basic law as such.

In the initial stages of development, *political democracy* as entrenched in the Constitution served as model and test case for *industrial democracy,* namely a transfer of principles and rights from the *political* to the *economic* sphere. The enmeshment of humanistic, political and economic ideals by which an advanced industrial society is characterized has brought about a reversal of cause and result. Major changes of soio-economic origin are generated by the industrial relations system and find their reflection in the political sphere.

The decision of the Constitutional Court is expected to be known early 1979. Whatever the rulings of the court may be, they will certainly introduce a new dimension to the development of industrial democracy. However, the decision will not contain any extreme tendencies. It appears unlikely that the Court will declare the relevant and contested provisions of the Co-determination Act as unconstitutional, nor constitutional beyond any doubt. Most likely, the Court will rule that the provisions of the Act fall just within the limits of constitutional legality and the implied intentions of the relevant articles. Not the rulings as such will be expressive of the impasse in ideologies and the future course of social ethics, but rather the motivation, the *orbiter dictum,* which will accompany them. It can be safely assumed that the emphasis in all considerations will fall heavily on the character and natue of property, the individual rights attached to it on the one side and its social ties on the other. Possibly a new definition of property and property rights may evolve.

Rumour has it that in their deliberations as to whether or not to lodge their complaint, the employers had no delusions of obtaining a ruling in their favour from the Federal Constitutional Court and that a ruling declaring the contested principles as falling into the limits of constitutional legality by the finest of margins would be considered by them as the best result possible. In the face of an impossible reversal of the situation, such a ruling would serve the employers' purpose in demonstrating that any further drive towards *Wirtschaftsdemokratisierung* would exceed the constitutional limits. Necessarily, the trade unions' thrust would come to a halt with such ruling, even if only temporarily, and a change in strategy in their long term programme would enforce itself. Instead of concentrating on the advance of industrial democracy on the broad front of parity co-determination, the trade unions would have to switch their point of attack to individual, quasi-technical key issues. Of these, the differentiation between *Arbeiter* and *Angestellte,* the role of the labour director and, particularly, the separation of management personnel, their qualifying for minority representation and, even if these aspects are excluded from the dispute, the placement of management representatives on the workers' *bench* on the supervisory board can be regarded as focal points.

Whether or not the trade unions, failing the complete realization of their objectives in respect of an effective workers' participation in the affairs of large companies by legislative and parliamentary measures could and would tackle employers and enterprises *piecemeal* in and through the capital market, is a highly debatable issue. Under financial aspects, they would be in a position to do so. By the ethical criteria of the market, such strategy could be regarded as *systemkonform.* This issue, however, remains still theoretical as it would open completely new dimensions of socio-economic-political dynamics with inestimable consequences.

A short summary of the basic positions of trade unions and employers in this key issue over the shape of social ethics to come should serve adequately as a conclusion at this stage.

The *Deutscher Gewerkschaftsbund* interpreted the complaint of the employers as an attack against the very principles of co-determination as such and attributed to it motives and intentions directed at the subversion of all efforts and progress towards an industrial democracy. Labour's reaction was expressed by Mr. Vetter's withdrawal from the Concerted Action Programme and the implied doubt whether Labour would see any use in participating again in this programme. In these concerted action programmes, trade unions, employers and the state formulate economic, social and labour policy at the highest possible level. A serious threat to social peace was seen as growing from the intentions and actions of the employers, spilling over into the political sphere. In fact, the controversy over the withdrawal of the trade unions from the Concerted Action Programme and the subsequent quasi-declaration of solidarity by the Minister of Labour, implied by his own withdrawal, rendered relations in the social democratic/liberal coalition government critical.

On the employers' side the disputed intentions of the Act are regarded as efforts towards *cold socialization.* The fear prevails that such measures represent merely the beginnings of a long development. The employers

concerned were convinced that, although not disputing co-determination in principle, they were entitled to avail themselves of their constitutional right, a right open to anyone without discrimination, to have certain measures of the Act tested on their constitutional legality. Emphasizing the system conformity of their approach and declaring that they would abide by whatever ruling of the Court, they considered the protest of the trade unions and their withdrawal from the Concerted Action Programme as a spiteful overreaction. They contended that the trade unions were unwilling to accept that a co-determination act had been passed which did not suit them to the last iota. If the Co-Determination Act would conform in the last detail to the basic law, then it would pass the test in the Federal Constitutional Court. If not, it would have to be rejected or amended. Anyone who would not accept this should direct his criticism and attack not against the plaintiff, but against the Federal Constitutional Court as an institution of a rule of law state, and thus against the rule of law itself.

The late Dr. Schleyer, in his capacity as president of the German Employers' Federation who for statutory reasons could not act as plaintiff but nevertheless directed the complaint, considered the application for the testing of the Co-determination Act not only as a right of the employers, but as their ethical duty in a rule of law state in order to establish the limits which are set by the Constitution to violations of the economic freedom and the limits of property rights and the power of disposal.

In answer to the trade unions' accusation that the employers have endangered the social peace by their resort to the Constitutional Court, the employers hold that social peace can be maintained only on the rule of law principle and that not their constitutional complaint, but the trade unions' bias in the interpretation of the basic law only to their own advantage and their overreaction represented an intrinsic and actual danger to social peace.

At this point of deadlock of opinions in co-determination at the highest level, a comparison with the Montan Co-determination model enforces itself. Both parties have come to a draw decision and are awaiting the casting vote of the *neutral* chairman, in this particular instance the Federal Constitutional Court. Whether, however, the rulings will satisfy both parties sufficiently to remove the *threat to social peace* and whether the rule of law will be diluted, remains to be seen. Also, whether a model which started off under such unfavourable conditions will be workable in practice and in the time to come.

SOME IMPLICATIONS FOR SOUTH AFRICA

Despite its internal difficulties, conflict of interest and ideologies and socio-political uneasiness, the German model of parity co-determination has become the Western European precedent of industrial democracy, at least as far as the institutionalization of workers' participation in decisions in enterprises is concerned. The strong influence this model has exercised on the thinking of the European Economic Community, expressed in its Fifth Directive for the harmonization of company law of its member states, is suggestive of future trends to emerge. At a time when foreign companies in South Africa, or companies with foreign interests, are being faced with several codes of conduct generated in their home countries, the question of workers' participation in decisions in enterprises, though not yet imminent and overshadowed by other, more fundamental aspects of *industrial democracy,* cannot be completely ignored. At present, the granting of trade union rights indiscriminately to all workers, or, from the points of view of these codes, the recognition of trade unions and collective workers' interests irrespective of South Africa's dual legal system and the elimination of all discriminatory measures on a racial basis, represent the focal points of these codes.

In 1976, the investment of member countries of the EEC in South Africa was estimated at 57 per cent of total foreign investment, that of the United States at 24 per cent, clearly indicating the important position of the EEC countries as a total bloc. While the Sullivan Code stayed clear of any demand for trade union recognition, the EEC's concern with the labour ethics of South Africa, possibly reflectively, was expressed by making such demand one of the major points of its code adopted in September 1977. Given the condition that this aspect, representing the major bone of contention externally and internally, could be solved satisfactorily by a combination of the Industrial Conciliation Act (No 28 of 1956) and the Bantu Labour Relations Regulation Amendment Act (No 70 of 1973) into one Act, the Industrial Relations Act (37) in the foreseeable future, it is to be accepted that the emphasis in the realization of an effective industrial democracy will shift to institutionalized forms of workers' participation. Provided that the first, unavoidable step, namely the granting of unitarian trade union rights to all workers has been made, South African enterprise might very well be faced with more specified, detailed demands for effective workers' participation. Numerous models will be tossed around and equally numerous proposals will be made which, however, will have one common factor: they will be mutations of the German precedent.

A comparison of the Bantu Labour Relations Act with the German Works Constitution Act 1972 reveals some striking similarities. It could, therefore, well be argued that, despite some shortcomings, this piece of legislation represents, in essence, a potential Works Constitution for South Africa. For this reason it is only too ironic that this potential and basic machinery for workers' participation in decisions in enterprises is open only to Blacks, whereas trade union rights, though not denied to Blacks in their voluntaristic interpretation, are protected by the Industrial Conciliation that trade unions in the accepted, traditional

sense are not an appropriate form of interest representation for black workers and that their interests are better served by a committee system. The corollary to this reasoning would be the rationalization that institutions for basic workers' participation are unsuitable for Whites, Coloureds and Asiatics.

South Africa's perception of industrial democracy thus becomes also dualistic, and this necessarily along racial lines. Ironically, as far as Whites, Coloureds and Asians are concerned, the American interpretation of industrial democracy applies: No workers' participation by means of committees or councils in the enterprise, but representation by recognized trade unions and the realization of workers' interest through the collective bargaining process. In the case of Blacks it is only one tier of the European system: participation by and through a company internal (lately also supra-company) committee system, yet without any external collective bargaining rights.

As the pressure for trade union rights for Blacks under the Industrial Conciliation Act has increased, non-black voices are being heard demanding, in addition to the present trade union structure, the institutionalization of a committee system for their participation in company internal affairs. Some companies have, in fact, already complied with such requests and have instituted committees for the respective population groups. These committees, however, do not enjoy the protection of either Act and are thus not completely free of the suspicion, as external critics have it, that they are nothing else but mouthpieces of management and management technique inspired instruments. Be this so or not, and irrespective of certain South African realities, not easily understood and appreciated from the *outside looking in,* South Africa has manoeuvred herself into a precarious position by her dualistic approach. Two different systems have been created, each representing one tier of an otherwise two tier system.

Both systems are not regarded as complementary, but as substitutes of each other. The granting of trade union rights to Blacks is inevitable, and, in fact, might be imminent. It would complement *their* system, yet to such an extent that, at this late stage, company external unions, plant unions and committee systems, particularly in respect of recognition for collective bargaining purposes and collective bargaining itself, will represent one complex entity. The withholding of trade union rights from Blacks has, in many instances, imposed a plant union character on committees. Thus the opening of the Industrial Conciliation Act to Blacks would create considerable confusion as to their function under either aspect, as collective bargaining agents in a *labour/capital* relationship, or institutions of workers' participation in work-life related matters in a process of *employer/employee* co-operation. Also, management in South Africa will be exposed increasingly to demands for industrial democracy and to challenges of its traditional prerogatives, although possibly with a time lag, following European developments. The present structure of the country's labour relations system is unsuitable to accommodate this pressure — external and internal — in an orderly, evolutionary manner. Its institutions are basically sound, yet the weakness of the system lies in the deficient alignment and synchronization of the individual pieces of legislation and their selective applicability. It is predominantly in this area that management will have to prove its capability of coping with the challenge to its prerogatives and meeting the multi-faceted demand of labour for *industrial democracy.*

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