ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 58, 1993

*Jo Carby-Hall**

A EUROPEAN DIMENSION OF WORKER PARTICIPATION IN THE UNITED KINGDOM

I. INTRODUCTION

The expression „industrial democracy" was first used in the United Kingdom by Syndey and Beatrice Webb in 1891 in a book they wrote on collective bargaining and trade unions[1]. They were then thinking of „industrial democracy" as a bargain between employers and trade unions, in other words, collective bargaining, and not worker participation in its modern sense.

Collective bargaining performs a more important function than merely settling wages and terms and conditions of employment. Its effect is to create a dialogue between the two sides of industry. Matters which at one time formed part of the employer's prerogative are now generally regulated jointed by unions and employers. The word „generally" is judiciously used because some employers still refuse to bargain, or even recognise trade unions[2].

Joint regulation does have it advantages. Some of these are firstly, that problems which arise are smoothed out by the existence of joint expertise; secondly, the morale of workers is enhanced by such joint regulation; thirdly, a better climate of industrial relations is created; and finally, the employees

* Profesor Uniwersytetu Hull (Wielka Brytania).

[1] B. Webb, *The Co-operative Movement in Great Britain.*

[2] Trade union recognition had not (apart from a few exceptions), been regulated by any legislation before the Industrial Relations Act 1971. When the 1971 legislation was repealed, a statutory procedure on recognition was provided for by s. 11(1) of the Employment Protection Act 1975 until repealed by the Employment Act 1980, s. 19. Did the recognition provisions and the practice relating to those provisions, encourage and promote collective bargaining? A discussion on this topic will be found, and an answer attempted, in J. Carby-Hall, *State Function in Collective Bargaining*, (1984) MCB University Press, p. 6 to 12.

have a say in the running of the company through their trade union representatives.

Some people believe that collective bargaining, as explained briefly above does not go far enough in modern industrial society, hence moves have been made to examine how much further the concept of worker participation may be developed. It is these developments which will be examined in this article. The reader must however bear in mind that what will be said is but a modest attempt to put the concept into some perspective, for limitations of space do not allow for an in-depth and detailed analysis to take place of each of the aspects of worker participation.

II. THE VARIETY OF MEANINGS GIVEN TO THE TERM „WORKER PARTICIPATION"

When the term „worker participation" is being talked about in the United Kingdom, it means something beyond mere collective bargaining. It means some form of participation in the decision-making proces of the enterprise, but it must be stressed *ab initio* that in the United Kingdom there exists no concrete form of worker participation in that, unlike some European countries, no laws have been enacted on this aspect. There has been an extensive debate on this issue not only in the United Kingdom, but also in the European Community. Before a brief examination takes place on the moves made in the United Kingdom and the European Community in this direction, it is important to, at least, attempt a definition of what is meant by the concept of worker participation or industrial democracy. It shoud however be pointed out that, in the United Kingdom, the meaning is not static; it means different things to different interest groups. As far as the meaning given to it by the European Community is concerned, it is more static in that the Fifth Directive[3] and Vredeling[4] make more concrete proposals which will be examined presently.

One form of worker participation which already exists is share and profit participation schemes[5]. In this kind of worker participation the employees are given the benefit of share ownership as regards both profit and control to a certain extent only. It should however be

[3] On *Harmonization of Company Law* the directive was first proposed in 1972 (O.J.E.C. 1972 No. C 131/49). The present version is that of 1983 (OJEC 1983 No. C. 240/C). See also Green Paper on Employee Participation and Company Structure in the European Communities, E.E.C. Bull. Supp. 8/75. See also Schmitthoff (1983) J.B.L. 456.

[4] July 13 1983 O.J.C 217/3.

[5] A few examples where employees are able to buy shares in the company in which they work are the John Lewis Partnership; Kalamazoo Ltd.; Scott Bader Commonwealth; and Landsman's (Co-ownership) Ltd.

stressed that very few such schemes exist in the United Kingdom[6] despite the fact that the Thatcher and Major Governments has recently encouraged this kind of operation.

Another form of worker participation is that of employee participation in the establishment's decision making body. Subject to what will be said this form of worker participation is unlike what is understood in other European countries. i.e. taking part in the management of the establishment. In the private sector such paticipation is virtually non existent. In the public sector, and in the former nationalised industries (depending upon the statute which had nationalised the industry), there was some kind of worker participation, but it did not exist throughout the public sector. The legislation nationalising the industry since 1946[7], provided for members with trade union experience to sit on the Board of Directors. This did not mean that there was an employee representative in the fullest sense, because the regulations governing the former nationalised industries, (apart from one exception, namely British Steel); provided that no person who had an interest in the establishment should be on the Board since he would prejudice the exercise of its functions. In practice, retired trade unionists only were on the Board.

To what has been said above, there was one exception, namely British Steel, before it was denationalised. As a result of an agreement with the Trades Union Congress Steel Comittee, worker directors who were also active trade unionists could sit on the B.S.C. divisional boards.

Collective representation through works councils and individual representations through shop stewards is another form of worker participation. In this form of representation information is given by the employer, opinions are expressed on both sides of industry and consultations take place.

Worker control is yet another form of worker participation but it is of little of significance in the United Kingdom despite the fact that some recent moves in that direction have taken place. Worker control comes about when the workers in the enterprise take over its management.

Finally, collective bargaining may be said to be the most popular form of worker participation in the United Kingdom.

---

[6] E.g. Lynx, and shares being bought by employees in former nationalised industries which have been privatised. See also the results of the research carried out by C. Hanson and R. Watson, *Profit Sharing and Company Performance: Some Empirical Evidence for the U.K.* See also D. W. Bell & C. G. Hanson, *Profit Sharing and Profitability* (1987) Kogan Page and *Profit Sharing and Employee Shareholding Attitude Survey* Industrial Participation Association (1984).

[7] E.g. Gas, Electricity, Coal, etc...

Although, there are numerous forms of worker participation in the United Kingdom, there exists no legislation on this aspect. The exception applies only to the nationalised industries where, as has been briefly stated above, the nationalising legalisation makes provision for worker directors. Even then, apart from the experimental schemes in the Post Office and British Steel, before it was denationalised, there was the limitation that anyone who had an interest could not sit on the Board. Legislation is in force in connection with the collective agreement[8], but it is very general and has nothing to do with worker participation *per se*. It is arguable whether collective bargaining actually forms apart of the concept of worker participation or whether it is a substitute; for the Conservative party is n o t in favour of legislation on employee directors and the moves that have been made up to 1979 when this government came into power have been immediately scotched[9]. An illustration of this may be seen by Mrs Thatcher's attitude at the European Community ministers' meeting in Brussels in May 1989 when she strongly opposed, i n t e r a l i a, any form of worker participation for Great Britain. This aspect formed one of the provisions in the proposed European workers' charter. The Consevative party is however in favour of experimentation. The reason is that there is a general lack of consensus. The Labour party on the other hand suggested a two tier system in connection with large companies only. The supervisory board would have half its members appointed through the trade union machinery. The worker directors would owe allegiance to the company, but at the same time they would bear in mind the interests of their constituency. The supervisory board would have the final say, on important changes in the company e.g. mergers, future planning, contraction, expansion. In 1974 the Labour Party took action on this front, by appointing a Royal Commission and in 1977 the Bullock Report[10] was published.

The Social Democratic Party and Liberal Alliance Party was at one time for some form of worker participation. It proposed a single board of directors elected by employees and shareholders in equal proportions in companies employing 50 to 200 employees. Companies with over 200 employees would attract a supervisory board to supervise the management board. Now that the SDP/Liberal alliance no longer exists, it is difficult to ascertain the views of each of the two newly constituted parties.

---

[8] Trade Union and Labour Relations (Consolidation) Act 1992, s. 179.

[9] E.g. the Bullock Report and Labour Party's white paper entitled Industrial Democracy in 1978.

[10] Report of the Committee of Inquiry on Industrial Democracy (Chairman Lord Bullock) Cmnd. 6706 (1977).

III. VARIED OPINIONS EXPRESSED ON WORKER PARTICIPATION

The Confederation of British Industries is opposed to worker directors. It considers that an option should exist under present company law, making it voluntary upon the company's wishes. This body prefers consultation, rather than actual worker participation. The Trade Union Congress suggested a two tier structure in companies with over 200 employees. Half of the Supervisory Board members would be trade unionists and this Board would have supremacy over both management and shareholders on major decisions.

Any decisions on the structure of the enterprise and appointment on the management board would have to be consented to by the employee representatives who would be directly responsible to the trade union rather than to the shareholders of the company.

A subsequent resolution was adopted later, stressing collective bargaining which seems to be inconsistent with the first view expressed by this body.

The British Institute of Management is opposed to legislation being imposed. It prefers experimentation, while the Engineering Employers' Federation and the Stock Exchange are opposed to worker participation s i m p l i c i t e r.

IV. POSITIVE STEPS TAKEN TO ACHIEVE WORKER PARTICIPATION

In the United Kingdom the Bullock Report proposed in 1977 ways in which industrial democracy could be extended, the industrial democracy being union based. It suggested that employee representatives (elected through trade unions) should sit in equal numbers with shareholder representatives on the board of directors of large companies. This was to be balanced by another category of co-opted members, i.e. the shareholders and employees choosing a third section of the board by agreement. Put as a formula it appeared as the 2 X + Y factor. This was only to apply to companies which recognised trade unions for collective bargaining purposes. The Report was much criticised by industrialists and strongly worded attacks were made; both of a political nature and in terms of dogma. Much criticism also came from the academic world. For example Kahn-Freund in an article found it difficult to equate „company interests" when considering the divergent views of capital (shareholders) and labour (employees)[11]. Trade Unions themselves were divided as to

[11] Industrial Democracy 1977 I.L.J. 65.

whether they wanted to participate in managerial decision-making. Finally, because of the enormous opposition, the Labour Government, began to lose interest in Bullock. It did however publish a White Paper in 1978 entitled „Industrial Democracy", which was the Labour Government's response to its commitment for worker participation. It watered down the Bullock Report considerably and although it retained the „large company" (i.e. 2,000 employees or over) proposals made by Bullock, it suggested a two tier system of representation, – a Supervisory Board and a Management Board. Worker representation would be at Supervisory Board level. The Bullock formula 2X + Y was thus rejected by implication. The Labour Government was no doubt much influenced by the European developments which had taken place earlier on in the decade and which will be briefly treated below.

With a Conservative Government being returned in the 1979 election the White Paper was abandoned. The Conservatives are opposed to any form of worker participation in the private sector for reasons already given. Nevertheless this has not been a futile exercise for views have been aired and the exercise was useful in that questions have been asked. The divided loyalty issue brought up by Professor Khan Freund; will representatives of employees be selected from trade union channels?; would there be an equal proportion of employee representatives to shareholder representatives?, would employees manage the firm or would they supervise the management of the firm?; are all important questions, answers to which might help solve the problem of worker participation when the issue eventually comes up again[12].

At European Community Level draft proposals have existed since 1972, in the form of the Fifth Directive[13]. Their aim is to harmonise company law throughout the European Community.

This draft directive which deals with the important matters of company structure and worker participation has been controversial.

The draft Fifth directive suffered repeated amendments, largely because of its proposals for worker participation. Problems arose, not only as a result of natural conflicts of interests between trade unions and employers, but also as a result of widely differing labour legislation (or occasionally the lack of it) within the member states. The draft Fifth was concerned with worker

[12] For further reading on the Bullock Report see, inter alia, Government Proposals *Industrial Democracy* Cmnd. 7231 1978; *The Nationalised Industries* Cmnd 7131 1978; Kahn-Freund (1977) 6 I.L.J. 65; Benedictus, Bourn, Neal (eds), *Industrial Democracy – The Implications of the Bullock Report* (1977); Davis and Wedderburn (1977) 6 ILJ 197; Cressey, Eldridge, MacInnes, Norris, *Industrial Democracy and Participation: Scottish Survey* (D. E. Research, 1981, No. 28 pp. 56–57); Brannen, *Authority and Participation in Industry* (1983) Chs. 2, 3 and 6.

[13] OJEC 1972 No. C 131/49. The authour is indebted to Fiona Butler for the research she has carried out, entitled *The Politico-legal Implications of European Community Proposals for Employee Participation: Vredeling and the Draft Fifth Directive,* some of the materials of which have been used in this work.

participation creating opportunities for employees to be represented on supervisory boards of companies, whereas the Vredeling proposals (to be discussed below) aimed at instituting a requirement for firms and their subsidiaries (ie multinationals) to provide workers with full information about their company's financial situation and activities. The basic principle of the draft Fifth was to further the process of harmonizing company law within the European Community. The process of economic integration had been hindered by national differences in company structures, and both transnational business and worker freedoms had consequently suffered.

Earlier, in 1970, the Commission proposed a European Company Statute enabling companies with cross-frontier interests to adopt, as an alternative to national company law. The Statute had intended to create a two-tier structure of executive management and worker-shareholder representatives. Needless to say the Statute was never adopted: the Council of Ministers instead approved a package of measures to protect the welfare of workers in the case of mergers or redundancy.

This key issue of worker participation in strategic business management had naturally aroused controversy in those member states which traditionally employed other models. Hence the Commission's rationale for wishing to introduce the draft Fifth was based largely around the rationalisation and harmonization of Community methods of worker participation, especially since the West Germans and Swedes had for a time been recognized as maintaining the highest standards in the field. Although member states, under the Fifth, would have to ensure legal provision for a company to be organized on a two-tier system, the Commission recognized that in countries such as the United Kingdom and Eire with no tradition of such methods, the legislation would be flexible enough to permit a choice.

The directive would only be mandatory for public liability companies (PLC) which, directly or indirectly through subsidiaries, employed over 1000 people. The draft Fifth specifically offered a variety of legislative options for member states to adopt: these being employee representation on the supervisory or unitary administrative board; employee co-option on to the supervisory board; employee participation by creation at company level of a separate body of worker representatives exclusively; or employee participation by procedures agreed through collective bargaining. It also provided an option for employees to decide by majority vote whether they actually wanted any participation procedures at all. The Commission argued strongly for the adoption of the draft Fifth, suggesting that it would contribute to the more efficient operation of PLCs (ie in clearly defining the role of management and supervision) and of course, harmonizing the status of employees and creating conditions for more harmonious industrial relations.

The United Kingdom's reactions to the draft Fifth was, as ever, negative; both the Government and the CBI made clear their reservations to the principle of legislation, and the TUC had historically opposed the eligibility of all workers in a company, irrespective of union membership, to play a participatory role. For British industry, the Conservative Party felt that employee legal rights in a company was revolutionary and the Institute of Directors commented that; „the primary purpose of company law is not protective, it is to enable".

Patterson[14] points out that the centre-right majority on the European Parliament's Legal Affairs Committee which studied the draft Fifth, felt that the concept of 'worker directors' would be unsuitable where there was only a single board system, as in the United Kingdom. British Conservative MEP's again stressed the point that to provide for all the proposals by law, would be inherently foreign to British practices.

It is envisaged that if employee participation were ever to be adopted in the United Kingdom, the decision making process of the company would most probably take one of the following forms. First, through representation on the board at supervisory level; (i.e. whether on a two tier or one tier structure). Second, through the works council[15], or third through a collective agreement which would implement either of the first and second forms.

In addition there is also a draft Directive on procedures for informing and consulting employees known as the Vredeling proposals. The Vredeling proposals overlap with the Draft Fifth Directive.

Unlike the Fifth Directive, Vredeling does not form part of the company law harmonisation programme because it applies to other employers as well as to companies.

The Vredeling directive has put forward by the Commission in an attempt to harmonise workers' rights. The directive was first proposed in 1980 and named after the Dutch Socialist Commissioner for Social Affairs, Henk Vredeling. The proposal was aimed at multinational companies in particular: it hoped to expand the information and consultation rights of employee representatives, and increase their acces to decision-makers within their company.

Northrup[16] makes the point that Vredeling and other social policy initiatives within the European Community became contentious, not so much for their content and scope, but because European Community social policy

[14] See B. Patterson, *Vredeling and All that* at p. 8.

[15] See research carnied out in three European Community countries and subrissions made in Carby-Hill, *Worker Parhcipation in Europe* (1977) London, Croom-Helm Ltd and New Terscy (USA) Rowman and Littlefield.

[16] R. R. Northrup, et al., *Multinational Union-Management Consultation in Europe; Resurgence in the 1980's?*, „International Labour Review" 1988, Vol. 127(5), pp. 525–543 particularly at 528.

was at odds with the prevailing political climate of the 1980's; one of deregulation and free market economic liberalism.

Hence the Vredeling proposal itself underwent major discussion and attempts to downgrade its degree of applicability and compulsion on the part of the employers. Although introduced for discussion in late 1980, the Vredeling directive was immediately attacked by member states, notably the United Kingdom and the Commission found itself being forced to revise the original proposals in order to achieve a degree of consensus. The final revised version, owing much to the work of Commissioner Richards, was presented by the Commission in January 1984, and was the result of successive approvals of the Economic and Social Committee, the European Parliament and national bodies, on the basis that amendments be made.

The Vredeling directive was based on Article 100 of the EEC Treaty, which empowers the European Community to approximate laws which directly affect the establishment or functioning of the „common market". The directive sought to establish „procedures for informing and consulting employees of large scale undertakings in the Community who work in subsidiaries controlled by parent undertakings whether located in the Community or outside it". Article 1 of the directive[17] defined the concepts of „parent undertaking" and „subsidiary" in relation to Council criteria laid down in the 7th. Directive on company law. „Parent undertakings" established within the European Community would be determined by the member state, and „subsidiary" applied to any undertaking which was subject to legislation affecting the former. „Employees' representative" was also defined in that Article and the European Parliament was in favour of the compulsory introduction, in all member states, of a system of direct elections by secret ballot. The Commission however suggested that the purpose of Vredeling was limited to procedures for informing and consulting employees, not for the redesigning of industrial relations within member states.

Article 2[18] was the result of Economic and Social Committee pressure that a threshold of 1000 employees should be introduced for the undertaking as a whole. Moreover, each subsidiary in the European Community would be held responsible if the parent undertaking (established outside the European Community) failed to fulfil its information/consultation obligations.

Article 3 was discussed in the European Parliament. Information given to employees would now be provided annually, instead of bi-annually as originally proposed. The information itself would be concerned with „general" as well as specific needs, and employees should have the right of access to future business predictions or forecasts.

[17] Originally Article 2.
[18] Formerly Articles 1, 4 and 10.

Article 4[19] also reflected amendments put forward by the European Parliament that the consultation procedure did not concern all Community employees but only those affected by a particular decision. Hence employees would require prior consultation only if the decisions in question are liable to have „serious consequences for the interests of employees". Both the Commission and the European Parliament expanded this Article to include modifications in health protection, occupational safety and the effects of new technologies upon working practices.

The Commission would not accept the proposal for the deletion of certain paragraphs enabling management to withold certain information if disclosure would substantially damage the interests of the undertaking. Consultation would take place before the final decision is taken; the intention however was not to impose a right of co-determination.

Article 5 granted the European Parliament their wish that employee representatives could decide to transfer their right of consultation to a higher level. Member states were given the option of limiting the informing and consulting procedures to already existing bodies (such as works councils) and would preserve existing systems for informing/consulting without prejudice to employees' rights to demand the application of the Directive.

The European Parliament's wish that management need not divulge to employee representatives any confidential information leading to the failure of plans or the damaging of the undertakings interests was maintained[20]. This secrecy requirement concerned both „regular" and „sensitive" information, for example, matters connected with, or relating to, merger or takeover plans. The Commission managed however to retain the right of employee representatives to appeal, since management could not be the sole judge of the secret or confidential nature of information.

The proposals contained in Vredeling were forwarded to national bodies for their consideration prior to Council discussion. In the United Kingdom, the Department of Employment, and that of Trade and Industry issued a consultative document (1983), concerned with both the Vredeling and the draft Eifth directives: „whilst (the UK Government) is firmly committed to the principle of managements informing and consulting employees, and has consistently urged organisations to develop procedures appropriate to their circumstances [...] it believes that successful employee involvement depends as much on a spirit of co-operation as on the existence of formal machinery, and that it is best introduced voluntarily"[21] (brackets added).

---

[19] Previously Article 6.

[20] In Article 7 (formerly Article 15). See also (1982) 3 The Company Lawyer 78.

[21] Department of Employment and Department of Trade and Industry Consultative Document at p. 1.

Throughout the document, the wishes of the United Kingdom Government were clear, namely that any introduction of European Community-wide legislation in this field, would not only hinder the progression of the „common market", but would increase employers' costs and damage the competitive position of industry within the European Community itself. No doubt the ideological opposition and hostility of the United Kingdom Government, not only to any positive industrial relations legislation, but to anything „European", played a major part in this.

In the European Parliament, Conservative opposition to Vredeling concerned several matters. They questioned the legal basis for Vredeling[22] by asking whether differing national procedures for informing and consulting employees had a direct effect upon the functioning of the common market. They also suggested that if both directives were adopted, an anomaly would arise. In circumstances where both directives would apply, duplication of information could occur, if it had to be sent to separately appointed employees representatives.

Patterson is at pains to point out that the European Parliament votes on Vredeling were the most important since that Parliament had been directly elected in 1979[23]; it proved to be the centre-right who combined to prevent the original Vredeling text, as well as the revised version, from adoption.

The successful lobbying of UNICE (the European employers group) combined with United States and Japanese based multinationals bringing pressure upon national political groupings in favour of economic liberalism and state deregulation provided the metaphorical „last nail in the coffin" for the future of the Vredeling and draft Fifth Directives.

The United States companies stressed the „extra-territoriality" nature of Vredeling's informative role, and the Japanese were eager to protect the autonomy of the subsidiary's management team. British MEP's and employers were also quick to point out the perceived threat to United States and Japanese investments if the proposals were adopted: the „japanisation" of British industry and the provision of jobs was doubtless a major spur to British hostility towards the European initiatives. Ultimately, the British Government and Conservative MEP's stressed the more desirable alternatives: to consider increasing opportunities for direct communication with employees (that is, individual employees), rather than with their representatives, in line with the Japanese method: to ensure the strict legality of the ballot box when electing representatives, but above all, to stress the voluntary nature of employer-employee relations and to encourage employee share ownership.

[22] I.e. Article 100 of the European Economic Community Treaty.

[23] B. Patterson, *Vredeling and All That* at p. 13.

In a paper presented to the Industrial Society, Dr. James McFarlane of the UK's Engineering Employers Federation (EEF) in 1983, outlined his objections to Vredeling. He said: „what we don't like about Vredeling – even in its revised form-is that it still represents a creeping and insidious form of paralysis leading to expropriation [...] powers must exist to curb abuse. But it is for properly elected governments to exercise such powers [...] not for favoured proxies who, though having power, have no responsibility"[24]. He concluded that „legislation changes the relationship of the parties-they are no longer co-operating freely and openly. If one party is forced to the table under threat of penalty, involvement becomes a meaningless charade".

Having outlined the criticisms of the British political right, it is necessary to compare their views with those on the left. Politically the parties of the European left were largely supportive not only of the Vredeling and draft Fifth proposals, but of earlier attempts in the 1970's to advance workers rights in a manner compatible with the freedoms of economic integration. Those on the left understood perfectly the employers' and the political opposition to the proposals; „the Vredeling directive was far removed from a right of veto for workers over the plans of the multinationals-but it could be the thin end of the wedge and a »dangerous« precedent"[25].

The left perceived the initial impetus for the Vredeling proposals to be tabled in 1980 as a response to the growing wave of plant closures and mass sackings carried out by foreign-based parent companies operating in the Community. The Dutch Socialist Commissioner at the time, Henk Vredeling, was anxious to label a progressive measure with his name, for his personal political status, and in a wider context, the directorate general for social affairs was keen to shape European Community social policy in the 1970's context of prolonged periods of economic downturn growing unemployment and fractious industrial relations within the member states.

Having discussed the political demise of the Vredeling and draft Fifth directives, their relevance to economic and social integration of the Community needs to be briefly placed in the context of national models and practices for worker participation.

In very recent years, with the renewed controversy over the „social dimension" of 1992, the discussion, (not only over Vredeling and the Fifth directive, but also on wider plans for industrial relations, employment policies and fundamental social rights), has often been subject to comparison with individual member states and their domestic evolution of legislation. The European Community's wish to harmonize such legislation in terms of the 'highest common denominator", that is to ensure the Community's adherence

[24] J. McFarlane, *EEC Employment Law: A British Employer's View*, EEF, London 1983.
[25] *Hush – Don't Tell the Workers*, „Agenor 90", May-June 1983, p. 7.

to practices acknowledged to be the most comprehensive and beneficial, has not proved to be an easy task. Even for those member states, such as Germany, and France, with systems of employee representation favoured by the Commission, proposals such as Vredeling have been met with reservations. Significant differences do exist therefore between models offered by the Commission and models already operating. Such differences include the general scope of the law or agreements, the types of bodies through which participation occurs, the types of issues upon which employees are consulted, and the role of trade unions. Examples abound. Employee participation in Germany operates through two parallel systems; codetermination on the boards of companies, and the systems of works councils. Both these systems have been in operation since the inception of the European Coal and Steel Community (ECSC), although they were modified and extended during the 1970's.

Board level representation in the European coal, iron and steel industries was enshrined in the 1951 Codetermination Act, applying to companies with more than 1000 employees and 50% or more of their turnover in these sectors. The supervisory boards consist of 5 shareholder and 5 employee members, with 1 neutral member (often an academic or jurist). Employee representatives have the right to block the appointment of the labour director (responsible for personnel matters) who is elected to the Board of Management.

Outside of the coal, iron and steel industries, there exist two systems of codetermination in Germany, based on the 1952 Works Constitution Act and the 1976 Codetermination Act. The 1952 Act stipulated that one third of the members of any joint-stock company's supervisory board must be employee members, and the 1976 Act increased employee representatives to 50% in any company with 2000 or more employees.

A recent IDS report[26] has suggested that although such German systems appear to offer equal employer and employee representation, in practice the boards tend to be management-dominated, whilst the works council system tend to be union-dominated.

In France, the works council system is well established. Works council (comités d'entreprise) legislation was first passed in 1919, and since then further measures, such as the 1982 „Auroux" law, have defined the function of the works councils to ensure that the collective views of employees are taken into account. Works councils must be set up in enterprises with 50 or more employees, in virtually all the public and private sector, enterprises, and the law stipulates the type of information which must be given in advance to the works council, including economic performance and prospects (eg. mergers, new technology, princing policy), terms and conditions of employment,

[26] I.D.S. European Report at p. 10.

proposed redundancies and so forth. Perhaps one of the most important powers given by French law is the monitoring role of the works council in the event of collective redundancies.

The Swedish system of employee participation (though it should be noticed that Sweden does not form part of the European Community), differs from that of the French or Germans; it does not rely upon any formal works councils, but instead is based upon collective bargaining and employee representation is conducted through the trade union machinery. Differentiation is made between shopfloor participation, (generally aimed at enhancing the employees' working environment, eg. on-the-job training, sexual equality etc); company level participation aimed at union organisation deriving from the 1977 Codetermination Act; and participation on boards of directors where unions are entitled (but not obliged) to elect members onto the boards of virtually all companies employing 25 or more workers. Such representatives have the right to attend and speak, but they have not voting rights.

The 1977 Act applies to all workplaces where one or more union members are employed and it covers issues other than those directly related to employee participation, such as mediation, conciliation, and collective agreements. The Act's wording gives employees (ie, union members) the right to negotiation on all „crucial changes", although the exact meaning of this terms has yet to be clarified. Unions and employers are jointly encouraged to pursue collective codetermination agreements, and although most public sector employees are now covered, the agreement for the private sector clearly made efficiency, profitability and effectiveness the main motive for extending codetermination.

Having briefly outlined the models of employee representation in some member states, one can identify the problems faced by both labour and management if proposals such as Vredeling were to be adopted. For those member states who have always generally supported a federalist, pro-integrationist Europe, the intervention of yet more complex and far-reaching legislation suggests a clear contradiction. For those member states, such as the United Kingdom, lacking in any comparable legislation, and more pointedly, who do not wish to see the introduction of such measures, the position is also clear.

In conclusion, the future (if indeed there is one) for Vredeling and the draft Fifth will be examined, as will the potential repercussions of the „social dimension" upon the Community legal system. British commercial and political opponents to the proposals have often buttressed their arguments by pointing to the fact that even if such legislation were useful and did not impede competitiveness and operating costs, the real problems would arise if Vredeling or the draft Fifth were to be incorporated into United Kingdom law. Up to a point, one could agree simply by recognising that such institutionalised means of employee participation would be complex both to create and to

administer. However, it has been suggested by critics that this is indeed not the case; that much of the content of Vredeling and the draft Fifth could be effectively implemented, as being complementary to British practice. Welch[27] offers a detailed analysis of the draft Fifth: she points out that a clause contains a duty for the supervisory board to „carry ourt their functions in the interests of the company, having regard to the interests of the shareholders and employees". Welch makes the point here that since board members will be concerned to protect the interests of their immediate constituency, hence „the price of industrial peace may be the retention of antiquated working procedures and delays in the introduction of new technology". Also, it is important to bear in mind that the type of worker representation offered by the draft Fifth, whatever the option, could be thwarted by a company's desire to limit the number of board meetings, or the number of decisions able to be taken. Although it is clear that the draft Fifth has become a more flexible instrument during its years of discussion, it is ultimately a framework upon which a great degree of elaboration could be made. Although its 'foreigness' is of dubious nature with regard to the nature of British industrial relations, it may well prove to be a reality in terms of its obstruction from reaching the statute books.

As regards the Vredeling proposals, opposition has been largely ideological (re. the United Kingdom Government's hostility towards any binding, institutionalised means of scrutiny by workers) although it has been opposed also on the grounds that its provisions are complicated, unfamiliar, and would disrupt existing voluntary agreements. Docksey[28] has offered an analysis of Vredeling in a United Kingdom context, and suggest that if implemented, it is flexible enough to be put into effect by both companies and employees and is not as impossible as the opposition would have us believe. For example, he suggests that the board-level representation options are wide enough for the United Kingdom to choose alternatives, such as the individually-agreed representative bodies, and a standard statutory body. The United Kingdom could also provide a „national collective bargaining option", to operate in conjunction with statutory requirements for collective redundancies and unfair dismissal.

Current debate within the European Community specifically involving Vredeling and the Fifth has taken place within the wider concern for „social dialogue". European trade union leaders are becoming increasingly concerned that the Commission's proposals and internal market council may serve to water down social policy issues. For example, in December 1988, the ETUC

---

[27] *The Fifth Directive – A False Dawn?*, „European Law Review", April 1983, p. 83–102.

[28] *Information and Consultation of Employees: the U. K. and the Vredeling Directive*, „Modern Law Review", 1986, Vol. 49, p. 281–313.

became increasingly concerned over the Papandreou proposal which would allow companies in the EC to experiment for up to five years with different forms of participation; although the amendment would require incorporation into domestic law. Companies would then have the discretion over whether to adopt the provisions, introduce an alternative scheme or not introduce any system at all.

British organisations such as the Confederation of British Industries (CBI) the Institute of Directors and the Engineering Employers' Federation (EEF), have historically opposed the proposals, and no doubt gave support to the recent White Paper on Employment clearly suggesting the Government's view that legislation was an improper method of promoting employee participation. In a press release, the CBI expressed its serious disquiet over what it perceived to be a 'back door' attempt by the Commission to introduce measures.

„In the UK, policies and practices on employee participation are voluntary [...] firms [...] would find institutionalised participation alien to their practices [...] Genuine employee involvement is a creation of the workplace, not of Brussels statutes"[29].

This particular quotation referred to the proposal for a European Company Statute, drived from proposals contained within the draft Fifth.

Both the ETUC and the Commission have developed their action plans for the furtherance of workers' rights; the ETUC's European Social Programme of February 1988 stressed the need for framework directives to guarantee fundamental social rights, and when the Commission's plans, drawn up by Marin, are compared, the latter appear distinctly meagre. The Commission generally endorse a greater freedom of movement for workers, and dismiss union fears of „social dumping" as „unfounded in as far as social costs are not the only determinant of competitiveness"[30]. National trade union disagreements remain the major stumbling block to a united labour movement providing mass support for any social legislation. The German DGB has expressed its fears that existing codetermination could be at risk from the purely economic progress toward 1992; the French non-aligned CGT has made it clear that it is against the Europe of the Twelve, and the Europe of 1992. The Italian unions recognise the need for initiatives to protect and further workers' rights, but are concerned at the development of the centre at the expense of the periphery.

British trade unions have conducted something of a „v o l t e - f a c e" from their earlier hostility toward the European Community: Ron Todd, of the TGWU, told the 1988 TUC Conference that: „in the short term we have not

[29] CBI Press Release, 26th October 1988.

[30] Labour Research November 1988.

a cat in hell's chance of achieving that (industrial democracy) at Westminster The only card game in town at the moment is in a town called Brussels" (Brackets added).

Vredeling and the Fifth, or future interpretations, will ultimately be gained or lost according to the political will and organisational ability of the European trade union movement to prioritise their needs for industrial relations.

What is of crucial importance is that the European labour movement attempt to reconcile their differences, in order that workers' interests are not ignored or marginalised in the rush to establish one of the world's largest commercial and industrial trading blocs[31].

The Vredeling proposals would go well beyond the provisions of the existing law on disclosure of information for collective bargaining purposes[32] and could deal with the future plans of the Company and general business situation of the group of companies.

So far it becomes clear that not much progress has been made on the worker participation front – First because there is no consensus as to the means of the term worker participation, Second, there are diametrically opposed views from politicians, industry itself and other bodies to the implementation of such a concept. Third, the European Community's Draft Fifth Directive and Vredeling have made little progress since their inception.

---

[31] For further reading on the Fifth Directive and Vredeling see *Are Europe's Unions United?*, „Labour Research", November 1988, No. 77(11), p. 15 to 17; *1992-What's in it for Workers?, Ibidem,* September 1988, No. 77(9), p. 9 to 11; I. Mcbeath, *The European Approach to Worker-management Relations*, British-North America Committee 1973; Batstone et al., *Unions on the Board* (1983) Basil Blackwell; *Industrial Democracy*. Interim Report by the T.U.C. (1973); *Employee Participation: – Models and Practices*, „IDS European Report", October 1988, 322, European Commission *Explanatory Memorandum on Vredeling* C.C.H. (83) 292 (1984); „Industrial Democracy": Special Report. Chief Executive 6, 1978; C. Hanson, *The Bullock Report and the West German systems of Codetermination*, „The Banks Review" Sept. 1977, pp. 30–51; T. Straubhaar, *Freedom of Movement of Labour in the Common Market*, „EFTA Bulletin" 4/87, pp. 9–12; Wedderburn, *The New Legal Framework in Europe*, [in:] *International Issues in Industrial Relations* (1983. Industrial Relations Society. Australia) 35 pp. 49–57; Carnoy and Shearer, *Economic Democracy* (1980); Batstone and Davies, *Industrial Democracy, European Experience* (1978); Elliott, *Conflict or Co-operation?* (1978).

[32] Employment Protection Act 1975. ss. 17 to 21 (now T.U.L.R.(C).A. 1992 ss. 181 to 185). See also Carby-Hall, *Modern Employment Protection Law:- Managerial Implications* (1979) MCB Publications pp. 104 to 112 and this author's entry on *Disclosure of Information for Collective Bargaining Purposes* in *Encyclopaedia of Northern Ireland Labour Law*, 001 to 063.

V. STEPS TAKEN TO ENCOURAGE WORKER PARTICIPATION

A watered down form of worker participation has taken place in the United Kingdom in a number of fields. Firstly, under the Employment Act 1982[33] directors are required in their report to shareholders to describe what action (if any) has been taken during the previous year, inter alia, to maintain or develop arrangements aimed at (a) providing employees with information on matters of concern to them as employees; and (b) consulting employees or their representatives on a regular basis so that the views of employees can be taken into account in making decisions which may affect their interests. This only applies to companies employing 250 employees and over.

The section is weak in that, (i) no action need be taken, by the management; (ii) the report is to be made to the shareholders (iii) the action taken does not have to be through trade unions, and (iv) the matters of providing „information" and „consultation" are, weak in themselves.

Secondly, under the Employment Protection Act 1975[34], there is an obligation on the employer to consult (not to bargain) with the recognised trade union over proposed redundancies. This provision emanates from the European Community Directive on Redundancies[35]. Time limits are imposed and only recognised, independent trade unions are to be consulted[36]. The employer must give (i) the reasons for the dismissal; (ii) the numbers and types of workers to be dismissed; (iii) the proposed procedure of selection. The employer must consider and reply to the representations made by the trade union.

In the third instance, there is to be found an element of worker participation in the Transfer of Undertakings regulations. These concern the employer's duty to consult with a recognised union over a proposed transfer of a business. The impetus for this legislation[37] come from a European Community Directive[38] although there did also exist some domestic pressure.

The duty to consult is owed to the recognised trade union. The effect of these regulations is to extend employee influence into an area not covered by collective bargaining. The regulations are concerned with employee influence over the consequences of the transfer rather than the transfer itself.

---

[33] S. 1 amending s. 16 of the Companies Act 1967.

[34] S. 99 (now Trade Union and Labour Relations (Consolidation) Act 1992 s. 188).

[35] Directive 75/129.

[36] See a fuller discussion in Carby-Hall, *The Handling of Redundancies* (1988) MCB University Press.

[37] The Transfer of Undertakings (Protection of Employment) Regulations 1981.

[38] 77/187.

The employer's duty to consult arises where a transfer is contemplated from one person to another of the undertaking and not a transfer of shares[39]. This is indeed an odd phenomenon since in both cases a transfer takes place.

Nor does the duty apply where only the assets are being transferred, and to undertakings which are not of „a commercial venture"[40].

Two duties exist, first to inform and second to consult. The relevant official of the trade union must be informed where an employee may be affected by the transfer. The employee may be employed by either the transferor or the transferee employer. He may be an affected employee even if he is not employed in the part of the business that is to be transferred.

The information must include; (i) the approximate date of the transfer; (ii) the reasons for such a transfer; (iii) the economic and social implications of the transfer for the employee, and (iv) measures (if any) which either the transferor or transferee proposes in relation to employees.

There is no specified period of time provided for, but the regulations say „long enough before a relevant transfer to enable consultations to take place". There are „special circumstance" defences which, because of space, cannot be treated here.

The transferor employer has also the duty to consult with the recognised trade union. This duty arises in more restricted circumstances than the duty to inform. Remedies exist by way of complaint to an industrial tribunal made by the recognised trade union. If the complaint is upheld the tribunal may award two weeks' pay to the employee(s) concerned.

Fourthly, there is a requirement that the employer must disclose Information for collective bargaining purposes. Under the Employment Protection Act 1975[41] the employer must disclose to a recognised trade union which is independent „information without which the union representatives would be impeded to a material extent in carrying on collective bargaining with him, and which it would be in accordance with good industrial relations practice for the employer to disclose"[42].

The consequences of non disclosure is ultimately a CAC award and upon further complaint, an incorporation of the CAC award in the Contract of Employment[43].

---

[39] A take over bid is therefore not covered.

[40] See the fuller discussion in Carby-Hall, *Industrial Tribunal Procedure in Unfair Dismissal Claims* (1986) MCB University Press at p. 9.

[41] S. 17 to 21. Now The Trade Union and Labour Relation (Consolidation) Act 1992, ss. 181 to 185.

[42] S. 17(1) (now T.U.L.R.(C).A. 1992), S. 18(1)).

[43] A more detailed discussion will be found in Carby-Hall, *Legislative encouragement to bargari collectively in Great Britain* in Manuel Peláez (Ed) Revista Europea de Derecho de la Navigación Marítima y Aeronáutica. No. 7. (1991) Barcelona pp. 861 to 909.

Finally there are certain provisions in the Health and Safety at Work etc... Act 1974[44] and under the Health and Safety Regulations[45] which provide for some form of worker participation. The Robens Report[46] considered that this is an area where management and workers can join forces to combat a common hazard, namely Safety which is no longer the prerogative of management.

The recognised trade union has a right to appoint safety representatives and these latter may require the setting up of safety committees „to keep under review the measures taken to ensure the health and safety of employees"[47].

The duties of the safety representatives are varied[48] and need not be discussed here, nor do the functions of safety committees be treated, suffice to say that all these indicate that worker participation is taking place in the field of health and safety.

VI. STEPS TAKEN TO DISCOURAGE WORKER PARTICIPATION

The Thatcher and Major Governments has repealed some very laws which had the effect of encouraging worker participation. So that the legislation which provided for recognition by the employer of a trade union for purposes of collective bargaining and its procedure, and which played a significant role in the sphere of worker participation, has been repealed[49]. Also repealed has been schedule 11 of the Terms and Conditions of Employment Act 1959[50] which provided for the extension of terms and conditions of employment to employees who had not themselves negotiated the collective agreement. Although this has a less significant role as far as worker participation is concerned, the consent itself is important for collective bargaining was itself

---

[44] See e.g. s. 2(4)(7).

[45] Safety Representatives and Safety Committees Regulations 1977 (S. I. 1977 No. 500) and to a limited extent Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1985 (S.I. 1985 No. 2023).

[46] *Safety and Health at Work* (Chairman Lord Robens) Cmnd. 5034.

[47] Health and Safety at Work etc... Act 1974 s. 2(7).

[48] I.e. to investigate potential hazards and complaints made by employees; to make representations to the employer, to carry out inspections; to consult with, and receive information from, inspectors of the health and safety executive; to attend meetings of the health and safety committee, all of which have to do with the dialogue with the employer.

[49] Employment Protection Act 1975 s. 2(1) (voluntary system through ACAS conciliation) and ss. 11–16. repealed by the Employment Act 1980 s. 19(b) as from 15th August 1980. See a fuller discussion and analysis in Carby-Hall, *State function in Collective Bargaining* (1984) MCB University Press, at pp. 6 to 12.

[50] See the analysis in Carby-Hall, *Ibidem* at pp. 4 et seq.

extended to third parties. The Fair Wages Resolutions have also been repealed[51]. They were not enacted by legislation, but as House of Commons Resolutions, they were observed by government departments and local authorities. They were not directly connected with worker participation per se, but they had the effect of a dialogue being created between the government department and the contractor. Finally, wages councils and statutory joint industrial councils were abolished in 1986[52]. The former applied to industries which were weak in collective bargaining and the latter were a „half-way house" between wages council industries and full collective bargaining. Again an element of worker participation featured in the functions of these bodies.

VII. INTERSTITIAL CONCLUSIONS

Some interstitial conclusions may be drawn from what has been said. First, as far as the different types of worker participation are concerned, there exists but little in the United Kingdom of, for example share and profit schemes, or worker control, or participation in the establishment's decision making body with the exception of the former nationalised industries where a form of worker participation operated. If the policy of the Major government of denationalisation is to be pursued, there will be even fewer nationalised industries with the result that the existing 'watered down' worker participation will (unless continued after privatisation) cease to exist.

Second, the various political and other opinions expressed on worker participation in the United Kingdom, confuse, rather than clarify, the issues. This is, for example, true of the conflicting opinions expressed by the Trades Union Congress itself.

Thirdly, The Bullock Report was shown to be unacceptable to the present Government and indeed to the past government as well, since no consensus exist in the country on this issue. The alternative version proposed by the Labour government in the late seventies was overtaken by events. Furthermore, the European Community position is equally confused and much discussion is still required between the various nations which compose it.

Finally, the steps taken to encourage industrial democracy, eg report to shareholders, redundancy consultations, transfer of business consultations, disclosure of information and safety are ineffective in so far as the employee has little or no say in the matter. Furthermore, the repeal of legislation which

[51] This aspect is treated in Carby-Hall, ibidem at pp. 1 et seq.

[52] See the discussion in Carby-Hall, *Ibidem* at pp 12 et seq. and this author's *Proposed changes in Wages Legislation* (1986) MCB University Press at pp. 3 et seq.

had a bearing on worker participation eg. recognition, Schedule 11, Fair Wages, gives „a hammer blow" to worker participation.

It is unlikely that there will be any form of proper worker participation in the United Kingdom in the near future. It is however i n e v i t a b l e that some future reform will take place in the United Kingom, but that will take time and it is submitted will initially emanate from the European Community.

Jo Carby-Hall

PARTYCYPACJA PRACOWNICZA W WIELKIEJ BRYTANII MIT CZY RZECZYWISTOŚĆ

Idea partycypacji pracowniczej, rozumianej jako udział w podejmowaniu decyzji, pojawiła się w Wielkiej Brytanii w 1977 r. W raporcie Bullocka zaproponowano wówczas, by w zarządach wielkich towarzystw zasiadali parytetowo – z udziałowcami – pracownicy wybrani przez związki zawodowe. Do procesu decyzyjnego miała być włączona również trzecia sekcja zarządu, wyłoniona spośród udziałowców i pracowników, po to, by zapobiec impasowi w podejmowaniu decyzji (formuła 2x + y). Krytyka propozycji zawartych w raporcie Bullocka zaowocowała w opracowanej w 1978 r. koncepcji dwuczłonowej reprezentacji wielkich towarzystw. Te człony to: zarząd i rada nadzorcza. Dla reprezentacji pracowniczej zarezerwowano miejsce w radzie nadzorczej. Koncepcja ta koresponduje ze standardami regionalnymi partycypacji pracowniczej, w szczególności z piątą dyrektywą Wspólnoty Europejskiej (1972). Realizując cel w postaci harmonizacji prawa o towarzystwach w krajach Wspólnoty, dyrektywa ta propagowała ideę udziału pracowników w radach nadzorczych tych towarzystw.

W innej z dyrektyw Wspólnoty Europejskiej, tzw. dyrektywie Vredelinga (1980), upowszechniono ideę informowania pracowników i konsultowania się z nimi. Ta myśl znajduje odzwierciedlenie w *Employment Act* (1982). Wcześniej, w *Employment Protection Act* 1975 (zastąpionym T.U.L.R.(C.) A. 1992), przewidziano obowiązek pracodawcy konsultacji ze związkami zawodowymi propozycji zwolnień z pracy. Elementów konsultacji z pracownikami doszukać się można w transferze zobowiązań i w sprawach związanych z ochroną zdrowia.

Ogólnie ocenia się, iż partycypacja pracownicza w Wielkiej Brytanii nie ma większego znaczenia. Przyczynia się do tego niewątpliwie polityka rządu konserwatywnego.