



A Clean Slate for the Future of American Labor Law

New Organizations for Worker Power

HLS, Friday, March 1, 2019

Works Councils in Germany

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„You can't stand on one leg“

Two responses on the structural weakness of employees:

The dual system of German Labor Law (“two channels”)

- Trade unions as response on the weakness of employees *on the labor market (outside of the firm)*
 - Collective bargaining (hours, wages etc.)
 - Right to industrial action
- Works councils as response on the weakness of employees *within the employment relationship (within the firm)*
 - Competencies in regard to organizing the work process
 - Monitoring the compliance with employee protection law, collective agreements etc.



Which legal framework for works councils?

- **Labor law (and industrial relations at all) is (contingent) social history and path dependence**
- **Forerunners 1891/1905/1916**
- **Works Council Act 1920**
- **After WW II occasionally voluntary works councils**
- **Work Constitution Act 1952**
- **Work Constitution Act 1972 (fundamental reform)**
- **Work Constitution Act 2001 (minor reform)**
- **Significant features of German labor law (in particular of worker involvement at shop-floor level)**
 - Legal situation of employees at shop-floor level is a question of public interest (not only a question of market forces)
 - Legalization of social conflicts
 - „Constitutionalization“ of the establishment (limitation of employer power analogue to the limitation of state power)
 - Law as a reflection of a legitime social order at shop-floor level



Does the Work Constitution Act grant institutional power?

- Complex system of worker involvement in management decisions
- From mere information rights to real co-determination rights (i.e. without consent of the works council the decision of management is not legally valid; if necessary, decision by the conciliation committee)
- (So-called) social, personal & economic matters
- E.g. working time, wage structure (*not* amount of the wage), surveillance with technical devices, training, restructuring
- (Additional) option of voluntary works agreements on every employment-related issue
- **But:** No right of the works council to strike!
- Duty of **both parties** (employer and works council) to collaborate in a spirit of mutual trust for the good of the employees and of the establishment (principle of cooperation)



Does the Work Constitution Act grant real power?

Election of works councils possible in every establishment with at least five employees (no duty, but protection against obstruction)

Real Density of works councils in Germany

Covered establishments

2000: West = 12 %; East = 11 %

2017: West = 9 %; East = 9 %

Covered employees

2000: West = 50 %; East = 41 %

2017: West = 40 %; East = 33 %

Covered employees in establishments (more than 500)

2000: West = 95 %; East = 90 %

2017: West = 85 %; East = 90 %



Does the Work Constitution Act grant real power?

Density of works councils in Germany

Covered employees according to industrial sectors

Manufacturing

2017: West = 65 %; East = 49 %

Construction

2017: West = 17 %; East = 16 %

Trade & Logistic

2017: West = 50 %; East = 23 %

Information & Communication

2017: West = 37 %; East = 26 %



Does the Work Constitution Act grant real power?

Typology of real existing works councils in Germany

According to a study of 1981 and additional research (n = 63)

- **Weak works councils (65 %):**
 - Ignored works council (5)
 - Isolated works council (14)
 - Works council in the hand of management (17)
- **Strong works councils (35 %):**
 - Respected works council (ambivalent position) (11)
 - Respected works council (clear position) (7)
 - Works council as a cooperative countervailing power (1)
 - Class-conscious works council (8) (beyond the original study)

Follow-up study (1994)

- 2/3 strong works councils and only 1/3 weak works councils
 - Works councils behave more professional (sometimes even by way of „co-management“) and less ideological
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Are employees/employers happy with works councils?

Employees

Elections 2018: voter turnout = 66 % (18.000 plants, 3.384.000 employees)

Survey (2008) satisfaction rate of 67 %

Triggers for the introduction of works councils (studies of 2012/2016):

- High plant-specific human capital
- High wages
(= Exit-voice-considerations)
- Organizational shocks

Employers

- Mainly no resistance (in particular in large firms)
- Survey (2008) satisfaction rate of 72 %
- But: Works council busting exists also in Germany (e.g. Deliveroo)



How can the Work Constitution Act be legitimized?

In regard to the employer

- **Protection of employees as the weaker party**
- **Duty of the state to protect fundamental rights**
- **Social state principle (provided in the German Constitution)**
- **Democratic principle? Industrial democracy?**

In regard to the employees

- **Democratically legitimized Act**
- **Democratic elections of works councils by the whole staff**



How can minorities articulate their interests?

Election procedure

- **Secret ballot**
- **Principle of proportional representation**
- **Proposals with list of candidates by employees or trade unions**
- **Protection against obstruction of the election**
- **Representation of employment categories („should“)**
- **Representation of male and female employees („shall“)**

Decisions of the works council

- **Majority rule**

Treatment of employees by employer *and* works council

- **Strict antidiscrimination law (including political or trade union activities)**



What is the role of trade unions?

Within the Works Constitution Act

- **Right to initiate the election of works councils**
- **Right to monitor the election procedure („watch-dog“-function)**
- **Right to attend works council meetings**
(if invited by at least 1/4 of works council members)

Outside of the Works Constitution Act

- **Collective bargaining**
- **Industrial action**

Relation to works councils

- **No right to steer the policy (however 65 to 75 % of works council members are at the same time trade union members)**
- **But right to monitor the compliance with the Works Constitution Act („watch-dog“-function)**
- **Supremacy of collective agreements over works agreements**



What about informal worker involvement?

Empirical evidence

2014: West = 15 %; East = 6 % (of establishments)

- **Sometimes works council-like**
- **Sometimes only round tables, quality circles etc.**
- **Often management-driven (63 %) (HRM, direct participation)**
- **Often common committees (56 %)**
- **Mainly in small establishments**
- **No co-existence with regular works councils**

- **No displacement effect to the detriment of works councils**
- **Insofar stable structures (> stability of social orders)**



And... don't forget the board representation

Dual structure of German Corporate law (two tier-system): Managing board and supervisory board

- **More than 500 employees = 1/3 members of the supervisory board are employee representatives (since 1952)**
- **More than 2,000 employees = 1/2 members of the supervisory board are employee representatives (since 1976)**
- **Same rights and duties as shareholder representatives**
- **E.g. appointment of managing board members, strategic decisions etc.**

Empirical data (2016):

ca. 1.500 firms = 1/3 members are employee representatives

641 firms = 1/2 members are employee representatives