



Workers' Participation in the Firm: Between Social Freedom and Non-Domination

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1. Workers' participation in the firm management as integration of subordination and industrial democracy.

Usually, board-level worker representation is a topic discussed in the context of legal reflection on the governance structure of companies, and, therefore, more from the point of view of corporate law than of labour law (so, for example, in Denmark, Germany, and in the EU's legal framework). Without in any way willing to part from this traditional perspective, in this chapter I would like to develop some arguments in favour of the participation from a perspective that privileges the individual right of workers, by freely developing certain elements of reflection drawn from moral philosophy, and in particular from the idea of "social freedom" as elaborated by Axel Honnet¹, and of "non-domination" as theorized in the neo-republican thought by Philip Pettit², to which is added the important contribution of Amartya Sen on the "capabilities" as an expression of the freedom of people in acquiring important functioning. I believe that these currents of philosophical-moral thought can usefully be mobilized in a convergent perspective, in which board-level worker participation represents the outcome of a process of revisiting the assumptions of traditional labour law, so that the employment relationship is the expression of a structure of domination (the capitalist firm) which necessarily limits the freedom (negative and positive) of the worker, and which identifies in the conflict between capital and labour the only horizon in which the values of the respective (social and economic) spheres find some precarious and transitory moments of composition. I believe that by adopting this traditional perspective - which is still very widespread in the doctrine of labour law - the possibility of promoting the participation of workers in the management of the company is greatly limited, even on the political-institutional level, whether it is considered as the *natural and intrinsic outcome of social freedom* achieved in the main spheres of human life (described in Hegel's philosophy of law: the affective relationships, the market and the democratic state), whether we consider it an *extrinsic legal construction* with respect to a capitalist dynamics governed by a purely individualistic rationality based on exploitation, according to Marxian reading.

If, as Honnet believes, in modern times there is an intrinsic *social normativity* of the economic sphere (compared to previous historical eras)

¹ A. Honnet, *Freedom's Rights. The Social Foundations of Democratic Life*, Columbia University Press, 2014 (french translation A. Honnet, *Le droit de la liberté. Esquisse d'une éthicité démocratique*, Gallimard, Paris, 2015).

² P. Pettit, *Republicanism. A Theory of Freedom and Government*, Oxford University Press, 1997.

capable of reuniting the idea of freedom with that of justice, and if, on the other hand, freedom and social justice are conceptualized as conditions that demand "non-domination" in a private bilateral relationship, a space is opened to revisit the theory of the employment relationship as a relation of subordination, which obviously is linked to the different conceptions of the firm and its governance in democratic terms advocated by the theorists of industrial democracy. In essence, a new perspective is opened in order to consider the employment relationship in a way different from that described by the great twentieth-century sociology at the dawn of the Fordist era, that is, in terms of the full subjection of the worker to the domain of the entrepreneur. Furthermore, we get to have a new space where to rethink both the scope of the economic domination and the structure of the labour market, and, finally, the strategic role of the labour factor in the organizational dimension of productive activity.

Participation becomes an evolutionary model capable of modifying at its root the domination-based framework within the context of a specific employment relationship, redefining the very notion of subordination: subordination *and* industrial democracy *together* represent the terms of the employment relationship³ and together they project themselves into the dimension of enterprise as coexisting and functional factors for the achievement of social freedom. As the participation of workers in the enterprise is realized through the law that interferes with the arrangements, the rights and obligations governing the private relationship, this path obviously breaks the orthodox-liberal conception of freedom of contract to the extent that, as we shall see, *the participation of workers in the management of the firm can be conceived as an individual right related to "employment conditions"*. This contravenes both the classical (and neoclassical) liberal vision that attributes an absolute value to individual contractual autonomy, and to the "standard" economic vision that considers that private ordering is more economically efficient than state-sanctioned rules⁴.

2. Subordination and Participation.

The employment contract, with which the firm acquires a factor of production necessary for productive activity, represents the paradigm of the modern subjection of a person to the juridical, economic and social power of others. Although rationalized in contractual terms and subjected to more or less penetrating limits by labour law, the original power of the

³ M. Pedrazzoli, *Democrazia industriale e subordinazione*, Giuffrè, Milan, 1985.

⁴ See O. E. Williamson, *The Lens of Contract: Private Ordering*, 92 (2) *Am. Ec. Rewv.* 438, 2002.

entrepreneur flows directly into the employment relationship, consecrating the asymmetry of the parties' subjective legal positions as they are functional to the development of the company. Whether it is the exercise of authority in order to reduce the "transaction costs" typical of the market (Coase) or simply to impose the "domination of the will" of the entrepreneur on the one who is forced to live for selling one's labour force on the market (Marx), in the capitalist firm that situation is determined by what JJ Rousseau, in pre-republican France, described in these terms: "in the relation between man and the worse that can happen to one another to the other's discretion". This peculiarity of the employment relationship is masterfully represented in the Weberian fresco on the contractual society, which highlights the logical-juridical connection between the autonomy of regulated authorization through legal schemes, the reduction of constraints and the increase of individualistic freedom⁵. According to Weber, the possibility of entering into contractual relationships with others and the possibility of choosing between an ever greater number of schemes - which the law makes available for "association", in the broadest sense of the word - is in modern law enormously increased compared to the past, at least in the field of the exchange of goods, personal work and the provision of services. But the consequent decentralization of legal production through negotiating autonomy does not always increase the total of freedom within a given legal community: in the case of the employment relationship, the free will of those interested in the labour market allows people to submit to to the "conditions set by the economically strongest subject by virtue of his possession guaranteed by law". Which is to say that the principle of "coactus voluit" in the legal order based on the private ownership of the means of production determines de facto a coercion exercised as manifestation of power in the market struggle.

The tendency of modern law towards a contractual society therefore raises the question whether contractual autonomy has in practice had the result of increasing the freedom of the individual to determine the conditions of his existence beyond the purely formal aspects, or if instead, despite this - or perhaps partly because of this - the tendency towards a coercive schematization of existence has been accentuated. The answer to this fundamental question cannot be decided only on the basis of the development of juridical forms, since the greatest formal variety of the accepted contractual schemes, and even the formal authorization to

⁵ M. Weber, *Economy and Society*, Vol. 2, Chapter VIII, Economy and law (Sociology of law), University of California Press, 1978, p. 666 ff.

arbitrarily determine the content of a contract, do not absolutely guarantee that these formal possibilities are accessible to all.

The possibility of increasing freedom is hindered by the differentiation of the effective distribution of possession, ensured by the legal system. And here we come to the point that most involves labour law and the theory of worker participation in corporate governance. According to Weber, a formal right of a worker to enter into a contract of any content with any entrepreneur practically does not imply that workers in search of employment have the slightest freedom to determine their working conditions, and in itself, such right does not guarantee any influence in this regard; on the contrary, the possibility for the most powerful on the market - in this case, normally, the entrepreneur - to fix those conditions at his will and offer them to the worker in search of work so that he accepts them or refuses them, is transformed - given the greater economic urgency of the need of job seekers - into unilateral power. The result of contractual freedom therefore consists in having the owners of the capitalist enterprise acquiring a power over the others, ultimately favoring their autonomy and their position of power.

This secularized vision of the privatistic myth of contractual private autonomy reaches us, after having represented for over a century the figure of the labour contract as an instrument of coercion - and not of emancipation - of the worker, and the enterprise as an elective place of exercise of the unilateral power of man over man. On closer inspection, then, this conception of the worker as *coactus voluit* finds its natural counterpoint in the socialist ideal that aims at achieving social freedom in the economic sphere, that is a change in the institutional organization of society aimed at producing emancipation from the limitations that hinder the equal participation of all subjects in the process of social self-constitution⁶. The ideology of the "free" labour contract that actually favours a noticeable accentuation of coercion through purely personal claims will make it possible to transform the relations of personal and authoritarian subordination typical of the capitalist enterprise into objects of exchange on the labour market.

The reproduction of this model, which violates every actual subjectivation in the context of the contract, realizes a sort of labour law "objectification" of the worker as the subject without any real possibility of realizing, through the contract, his own freedom; and since individuals or groups are objectively defined not only by what they are, but also by what they are considered to be, by a *perceived being* that, although strictly

⁶ A. Honnet, *Die Idee des Sozialismus*, Suhrkamp, Frankfurt a. M., 2015.

dependent on their being, is never totally referrable to it⁷, labour law has perpetuated on the level of having to be this *perception of subjugation* by translating it into a sort of "distinctive property" of the employee, linked to his "status"⁸.

A century after the Weberian analysis of the contractual society, labour law still questions the techniques capable of balancing the relationship between worker and employer. Above all, labour law is constantly seeking a theoretical and practical legitimacy to establish itself and, at the same time, a more cooperative and democratic vision of the work relationship: a relationship in which the elements of subordination, of domination and of dependence create space for man's social freedom in the workplace. It is time to rethink the notion of subordination and the worker as a *coactus voluit*, who is denied the right to participate in the decisions concerning their work relationship, the organization of work, and the strategic choices of the firm to which he, with his work, contributes. It is time to reconsider subordination as an expression of the unconditional domination of the worker in the workplace, which executes the will of the employer and cannot enter into the merits of the unilateral decisions that the company adopts. Worker participation is the horizon of a subordination that becomes *collaboration*, which involves the worker in the destiny of the firm, and which ultimately puts the value of the person back at the center of production, in the context of an equal participation of all the subjects in the process of social self-constitution⁹. In summary: while the "free" employment contract has allowed the transformation of the relations of personal subordination typical of the capitalist enterprise into objects of exchange on the labor market, participation inserts a decisive element of democracy in the relationship, balancing it in a collaborative and non-authoritarian way. If it is true that the employment relationship, unlike discrete market transactions, is a "governance structure", the participation of workers in the management of the business simply makes this governance more democratic.

⁷ P. Bourdieu, *Le Sens pratique*, Les Éditions de minuit, Paris, 1980

⁸ See B. Veneziani, *The Evolution of the Contract of Employment*, in B. Hepple (ed.), in *The Making of Labour Law in Europe*, Mansell Publishing Limited, London and New York, 1986, p. 33, according to which "the movement from status to contract was never completed".

⁹ See A. Honnet, *Die Idee des Sozialismus*.

3. The participation of workers in the Firm management, between capabilities and non-domination.

Although still today the Weberian vision can be said to be dominant in the representation that labour law has of contractual freedom, the evolution of democratic societies in a personalistic sense allows us to consider in a new light the matter of autonomy and authority guaranteed by the law in the contractual society, with reference both to the employment relationship and to the corporate governance.

First of all, a bundle of changes affects the capitalist industrial enterprise, which in its post-Fordist evolution seems to rely less and less on the discipline and the authoritarian coercion, although the macro-models of "empires" and "pyramids" are widely present also in the current neocapitalist phase¹⁰, which is also characterized by a pervasive planning of behaviour even outside of strictly subordinate work¹¹. But a fundamental change seems to concern the social paradigm as a whole, which after the eclipse of the typical subject of postmodern culture, lies precisely on that subject: no longer an abstract but a concrete subject, "constitutionalized" and imbued with a cultural experience and identity that becomes a channel through which to convey the founding values of the legal system.

In this new dimension of subjectivity, the Weberian theme of contractual freedom takes on an unprecedented rationalizing value: on the one hand, because one can perceive, among the meshes of a conception of the firm and of the relations of production, certainly irreducible to the twentieth-century scheme of the steel cage, what Weber already indicated as a possible "qualitative differentiation" of coercion and its distribution among the subjects from time to time participating in the legal community; on the other hand, because subjectivation, once embedded in the juridical-systematic coordinates that brought the capitalist organization of labour back to principles that are much more democratic than those that the Author of *Economy and Society* had in mind, does not necessarily reflect the *coactus voluit*, and above all it becomes a possible alternative vehicle for the penetration, even in the employment relationship, of individual and universal values and rights¹².

Subjectification can therefore represent a regulatory horizon that is partly free from the risks of domination implemented through negotiating

¹⁰ P. Perulli, *Dopo il capitalismo*, in A. Perulli, a cura di, *Lavoro autonomo e capitalismo delle piattaforme*, Kluwer-Cedam, Milano, 2018

¹¹ See A. Supiot, *Au-delà de l'emploi. Transformation du travail et devenir du droit du travail en Europe*, Flammarion, Paris, 1999.

¹² See A. Touraine, *Nous, sujets humains*, Seuil, 2013.

autonomy, typical of the authorization schemes described by Weber. On the contrary, it, if correctly conveyed and functionalized by normative devices, should constitute a vector of appropriation and strengthening of individual capacities, of the defense of the self identified with the satisfaction of the needs of the subject and the increase of his/her capabilities understood as a kind of substantial freedom to acquire alternative combinations of operations.

This renewed attention to the freedom of the subject is a constant of post-positivist philosophical-juridical critical reflection. A renowned jurist as Franz Neumann, half a century before Sen's theory of capabilities, wrote that "civil-social rights" are indispensable for the realization of freedom, but they do not exhaust all freedom, being simply one of their elements: freedom is something more than the defense of rights against power, it also implies the possibility of developing the full potential of the human being¹³. This vision of freedom as individual freedom not only from coercion (negative freedom) but also as a faculty of acting in accordance with one's own interests (positive freedom) makes it possible to reconsider in more articulated terms the topic of regulatory intervention and its aims, which concern to a greater extent the worker protection (his negative freedom) and less the promotion of his position as a contracting party capable of negotiating in terms of equality (his positive freedom). To such a greater extent that it has been written that only the democratization of work and the cooperative participation of the subject in the control of his own activity will be able to dissolve the alleys of status and to consider the worker a contractually mature figure in the true sense of the term.

Unlike classical liberal individualism, which eliminates the social content of the self and reflects a purely market-oriented logic, the development of subjective freedom to acquire alternatives to operations is not the result of the individual's legal-contractual capacity isolated on a self-regulated market. The acquisition of capabilities is the result of the necessary intervention of legal institutions, aimed at promoting the active development of individual and collective freedoms¹⁴.

¹³ Franz L. Neumann, *The Concept of Political Freedom*, in *Columbia Law Review*, Vol. 53, No. 7 (Nov., 1953), pp. 901 ff.

¹⁴ S. Deakin, *Capacitas: Contract law, capabilities and the Legal Foundations of the Market*, in S. Deakin and A. Supiot, *Capacitas. Contract law and the Institutional Preconditions of a Market Economy*, Hart Publishing, Oxford and Portland, Oregon, 2009; S. Deakin, *Economic Approaches to the Evaluation of Labour Law: Comparing Coase, Hayek and Sen*, in A. Lyon-Caen-A. Perulli (eds) *Efficacia e diritto del lavoro*, Cedam, Padova, 2008, p. 45 ff. On the approach of capabilities applied to labor law see R. Del Punta, *Labour Law and the Capability Approach* (2016) 32 *International Journal of Comparative Labour Law and*

Moreover, as Sen pointed out, individual freedom is not only a *central social value*, but also an inseparable *social product*, which implies precise choices of social institutions and public policies¹⁵. If individuals do not pursue their only limited personal interest, but, as *social persons*, they have broader values and goals that include understanding for others and a commitment to ethical norms, then the promotion of social justice can be pursued with greater chances, without clashing into the pessimistic consideration according to which the conflicts of interest of the subjects (understood as rigid maximizers of limited personal interests) prevail over the pursuit of social values¹⁶.

This perspective of regulatory enhancement of individual capacities is well suited to the idea of worker participation in corporate governance, which is based on a strong axiological basis, which is that of social freedom. While respecting individual interests of the subject, participation does not so much designate the action of an actor selfishly devoted to himself (as in the traditional representation of the employment relationship), but above all, it reflects the penetrating action of the idea of social subject in individuals, transforming them in actors of liberating changes, with the help of institutions in their turn modified by laws inspired by fundamental human rights.

This tension towards the creation of individual capacities requires institutional vectors capable of transforming abstract principles into effective rules: in the theory of capabilities the problem consists in the translation of subjective preferences into substantial freedoms - that is to say in individual capacities - through a series of "conversion factors" operating at different levels¹⁷. Among these conversion factors, the organizational and life context of people, together with social and legal norms, play an essential role, so that the participation of workers should act as a factor of concretization / conversion to support the creation of capacity for the worker in the specific business context and, therefore, to implement concrete forms of democratization of the employment relationship.

Board-level workers participation should, in short, be part of a systemic project consisting in promoting substantial freedom in the workplace and in ensuring that each person can best fulfill him/herself in

Industrial Relations, Issue 4, p.383 ff.; B. Langille (ed), *The Capability Approach to Labour Law*, OUP, 2019

¹⁵ See A. Sen, *La libertà individuale come impegno sociale*, Laterza, Bari-Roma, 2007, p. 39

¹⁶ A. Sen, *La libertà individuale come impegno sociale*, cit., p.41

¹⁷A. Sen, *Human Rights and Capabilities*, in *Journal of Human Development* , Volume 6, 2005 - Issue 2

the performance of tasks useful to him/herself and others¹⁸. In the current phase, labour law is undergoing changes in its levels of protection and its own objectives (if not its values): therefore, the participation of workers can be a useful tool to make sense of the employment relationship in a direction that can bring together the efforts to redefine a social citizenship increasingly threatened by the deconstruction of the social rights and solidarity typical of the industrial era¹⁹. This is a perspective that is widely present in the legal systems of many European states (see below), yet not adequately valued, especially if it is considered in the light of the economic theories of the firm, tied to an individualistic-proprietary vision and refractory to any social review. In reality, the realization of a different conception of the firm paves the way for the construction of new bonds of solidarity in the places of production, such as to relaunch the aspiration, to which labour law has certainly contributed, to realize social freedom in the economic sphere: a conception in which individual freedom is rethought in a sense of solidarity, and the realization of one's own goals of freedom is not incardinated in the single person but in the community of solidarity.

To fully realize this project it is necessary not only to develop limits to the entrepreneur's power (according to the tradition of labour law) but above all to guarantee forms of intervention on the part of the workers in the strategic decisions of the company. A powerful theoretical indication that justifies this perspective can be traced in the neo-republican doctrine and in particular in the conception of non-domination as constitutive of freedom. In this perspective, a legal system that is consistent with freedom ought to embed procedural protections for its citizens vertically facing the State, but also in respect of private social relationship, and in particular in the relationship between worker and entrepreneur²⁰. Republicanism demands, as regards the State and political sphere, not only that citizens have the resilient right to question decisions, but also the resilient *rights to jointly share in influence and control over decision-making* so as to prevent uncontrolled interference and thereby legitimate the collective order itself. By "influence" Pettit intends the shared right and ability to contribute to decision-making; by "control", he intends the shared rights to contribute to decision-making plus the *capacity to impose a direction on decision making processes*. However, if joint influence and control are what

¹⁸ See A. Supiot, *Préface à la seconde édition (2016)*, in A. Supiot, sous la direction de, *Au-delà de l'emploi*, Flammarion, Paris, 2016, p. XXIX.

¹⁹ See A. Supiot, *En guise de conclusion: la capacité, une notion à haut potentiel*, in S. Deakin, A. Supiot, *Capacitas. Contract Law and the Institutional Preconditions of a Market Economy*, Hart Publishing, Oxford and Portland, Oregon, 2009, p. 162.

²⁰ See D. Cabrelli & R. Zahn, *Theories of Domination and labour Law: An Alternative Conception for Intervention?*, in *Int. Jour. Of Comp. Lab.Law*, 2017, p. 339 ff.

make us free in terms of non domination at the political level, we should benefit from a similar status as free and equal people in other major spheres of life: this is because the domination we can suffer in these spheres is no less substantial than the domination we are vulnerable to in political relationships. If we accept these points, the perspective that naturally opens up consists in applying these concepts of *influence and control* typical of the relationship between the citizen and the State, to the relationship between the worker-citizen and the firm.

Other mechanisms indicated by neo-republican theorists, such as a basic income that allows the worker to change employer, or a legal discipline of the employment relationship capable of eliminating arbitrary interference, or, again, a right to challenge decisions which concern the interests of workers, although they are all necessary with a view to democratizing the employment relationship, they are not sufficient, because they do not guarantee the worker participation in the decision-making process of the company²¹.

The forms of industrial democracy and corporate governance in which there is fair shared control among employees, managers, and owners, so that the workers participate in the decision-making processes on matters concerning work, productive investments, changes and the strategies of the company, therefore represent a natural outcome of the theory of non-domination applied to the employment relationship.

4. Firm, autonomy and legitimacy.

The firm, with its economic imperatives (not only of productivity and profit, but of valuing stock and share capital), stands out in contemporary society as an (social, economic, political) actor increasingly independent from the political-judicial sphere and at the same time more and more legitimized by the economic "tyranny of values" that guides the orientation of social communities. However, the autonomy gradually acquired by the firm in the neo-liberal context, and its not only juridical-formal, but, above all, social legitimation, are based on a fundamental contradiction, which the economic and juridical analysis fail to grasp. The firm is not in fact a *politically neutral actor*, and not so much because its structure is regulated by juridical-state mechanisms, but because it participates - like other social actors, including the State - in the logical and moral integration of the world, so that its legitimacy cannot be separated from its overall social

²¹ See S. Blanc, *La codétermination dans deux courants de la philosophie politique contemporaine: le libéralisme-égalitaire rawlsien et le néo-républicanisme*, being published in O. Favareau (ed), *Traité de codétermination*, Presses de l'Université Laval, Quebec City, Canada, 2019

function, from the function of transforming the world through collective creation²². The analysis of the economic-legal matrix is not aware of this fundamental profile of the company, which is conceived as a nexus of contract, if not even more simply (and immaterially) as a "production function".

In the legal field, only labour law has functioned as a (more or less effective) normative instrument of capitalist rationalization of the company, contrasting the pure egoistic and utilitarian logic of the homo oeconomicus, through important mechanisms of conditioning of corporate rationality and providing to the firm its not only formally, but also organizational and social, legal consistency.

There are two perspectives historically cultivated by labour law. On the one hand, a power of control or conditioning of the entrepreneur's choices that is exercised from outside the decision-making process. On the other hand, the Rhenish variant of a capitalism based on the participation of workers in the supervisory boards of large companies, allowing workers to influence the entrepreneur's economic and social decisions from within. Even in other European countries, such as Italy, the participation of workers in the management of companies was placed at the base of the legal and social order drawn up by the Constitution (Article 46 of the Constitution), even if the implementation of industrial democracy was not implemented according to the model provided by the Constitution.

This scenario began to change progressively towards the end of the last century, and the deep roots of this change have been identified in a series of vectors, ranging from restructuring processes rethought in a transnational key to reticular organizational structures in continuous fibrillation, up to the model of financialization in which the managers themselves are selected more because of "objective" financial knowledge than on the basis of traditional values²³.

Today, albeit with many contradictions, that cycle seems to have been completed, and unfortunately with results that are far more problematic than those underlying a mere reorganization of the corporate governance structure. Faced with the financialization of capital on a global scale, the processes of dematerialization of the company, the extreme mobility of capital and the planetary fragmentation of production chains and value, one must wonder about not only what role labour law can still play in the face of the impracticability of the Fordist compromise, but also what residual function of labour law in the dominant view of the shareholder

²² Cfr. P. Bourdieu, *Sur l'état, Cours au Collège de France 1989-1990*, Seuil, 2012, cours du 18 janvier 1990.

²³ R. Dore, *Stock Market Capitalism: Welfare Capitalism. Japan and Germany versus the Anglo-Saxons*, Oxford University Press, Oxford, 2000.

value, of the employment relationship reduced to the agency costs scheme, of the re-emergence of "community" visions with ambiguous aims of social legitimacy.

Faced with these processes, is there still room for a social-moral vision of capitalism or should we accept what Axel Honnet called his "distorted development"²⁴? And what about the company: is it conceivable that it should be constitutionalized in a social and societal sense? Can the economy itself offer a platform for labour law in the reconstruction of a market and business theory that does not exclude the social contribution of regulation?

The benefits and advantages of such a perspective, in which a new paradigm faces the scene to govern social processes and is not engulfed by them, are many. As the German model of codetermination teaches, the advantages of worker participation range from the absorption of social conflicts to the motivation of workers and the increase in productivity, from the social legitimacy of managerial decisions that favours long-term strategies to the possibility of asserting interests of the whole company, even at the levels of investment decision and financing intentions²⁵. It is, in short, a culture of cooperative modernization which, although German participation is the result of a specific historical, cultural and institutional context, can (and it actually is) be practiced in many other juridical systems, and can become a possible project, to be relaunched at European level.

5. Worker participation as an expression of social freedom.

In 1977 the labour lawyer Otto Kahn-Freund spoke out against the participation of workers in company boards as recommended in those years by the Bullock report²⁶. The thesis of the renowned jurist consisted in the pluralism of values and in the ineliminable conflict of interests in industrial relations; participation would in fact have implied a potential prejudice to trade union autonomy, in the sense that it would have denied the very clear division in the pluralist analysis between the management function to effectively manage the trade union function independently.

²⁴ Cfr. A. Honnet, *Le droit de la liberté. Esquisse d'une éthicité démocratique*, Gallimard, Paris, 2015

²⁵ See M. Weiss, *Workers Participation in the Enterprise in Germany*, in A. Perulli & T. Treu (eds), *Enterprise and Social Rights*, Wolters Kluwer Law International BV, The Netherlands, 2017, p. 293 ff.

²⁶O. Kahn-Freund, *Industrial Democracy*, in *Industrial Law Journal*, Vol. 6, 1, 1977, p. 65 ff; see also *Labour and the Law*, Stevens&Sons Ltd, 1977.

For other but converging reasons, board level employee participation was also excluded from the economic theory of the firm and in particular from the agency theory, according to which the sharing of control of the company between workers and shareholders would not be legitimate because the workers are not the residual claimant with decision-making power, nor would such participation be effective because it would diminish the supervision of the controllers in the principal-agent relationship²⁷.

It is therefore necessary to think about the market, the business and labour relations differently, recovering a moral and social vision of the firm as an *institution of social freedom*. According to Honnet, social freedom is closely related to the institutional dimension and to the idea of mutual recognition that lives in the ethical-moral dimension of the market through a *normative functionalism* that, according to a line of thought that leads from Hegel to Durkheim and Polanyi, is capable to legitimize the market by forcing all actors to follow principles of fairness and justice²⁸.

The conditions for achieving social freedom in the context of the market economy are the following: first, "the purely individual self-interest constitutive of market behaviour must be able to fulfil the normative condition that all participants can understand as a suitable means for the complementary realization of their own respective purposes"; second, market institutions must "institutionally reflect these underlying claims to social freedom, thus ensuring that the participants remain aware of these claims"; third, "(e)xpressed in terms of recognition, this means that economic actors must have recognized each other as members of a cooperative community before they can grant each other the right to maximise individual utility"²⁹.

This last step, that directly regards the philosophical and normative theme of the recognition, is very important for the legitimization of the board level employee representation both from the point of view of the theory of the firm and from the point of view of the employment relationship. In general theoretical terms, participation is certainly an expression of recognition as a historical form of human intersubjectivity, that is – in a Hegelian way – a real institution where subjects mutually limit each other's selfish interests and, in such institution, they manifest their mutual recognition as beings endowed with equal dignity and freedom³⁰.

²⁷ See B. Segrestin, S. Vernac, *Gouvernement, Participation et Mission de l'Entreprise*, Hermann, 2018, p. 58; see also B. Roger (éd.) *L'entreprise, formes de la propriété et responsabilités sociales*, Collège des Bernardins, 2012, p. 42 s.

²⁸ A. Honnet, *Freedom's Right*, p. 183

²⁹ A. Honnet, *Freedom's Right*, pp. 191-192

³⁰ See A. Honnet, Recognition and Justice: Outline of a Plural Theory of Justice , in *Acta Sociologica*, Vol. 47, No. 4, (Dec., 2004), pp. 351-364

From this last perspective it is clear that the participation of workers represents a device capable of rebalancing the status of subordination to the extent that the coordination of individuals can be successful only if they "recognize each other not only legally as parties of a contract but also morally or ethically as members of a cooperative community"³¹. The first condition, related to the fact that the actors' behaviour on the market should lead to social freedom, is more problematic, since Honnet's reference is here to the concept of "corporations" that appears in Hegel's *Philosophy of law*: in fact, following Hegel, in the corporations the subjects see themselves as engaged in social cooperation, and solidarity requires discursive mechanisms of formation of will that cannot be reduced to economic rationality. In the Hegelian perspective corporations are "professional associations" of which individuals are members in virtue of their particular skill and profession, and they are part of civil society: corporations regulate these professions and protect their members against the contingencies of life³². It was therefore opposed to Honnet's analysis that the firm (and the market) do not know the solidarity mechanisms typical of corporations, and this was because market mechanism and discursive mechanisms of will formation are alternative, and sometimes competing, mechanisms of action coordination³³. Consequently, in the economic activity of the market, as in the behaviour of the company, there would be no intrinsic structure capable of ensuring the development of social freedom, but only external limits coming from the State.

Put in these terms, critical analysis does not capture the constitutive and regulatory function of law within the institutions of the capitalist economy, namely the market and the enterprise. In reality, the firm and the market are institutions to which the legal system refers as intrinsic solidarity mechanisms (because they are constitutive) and not only extrinsic, as both are embedded in an ethical framework provided by legal norms. The legal systems that practice codetermination therefore achieve social freedom in the sphere of labour through discursive mechanisms with which workers can deploy their cooperative activity. Social freedom requires that all participants in the labour market be able to carry out a cooperative activity in view of a common good that transcends the strategic and selfish behaviour of the actors, and for this they must be placed in a position to influence the business decisions, both strategic and those related to work organization: the first because they concern the development of the firm as a social institution, the second because they

³¹ A. Honnet, *Freedom's Right*, p. 182.

³² G. W. Hegel, *Elements of the Philosophy of Right*, Cambridge University Press, 1991, 255A

³³ See T. Jütten, *Is the market a Sphere of Social Freedom?*, in *Critical Horizons*, Vol. 16, No. 2, May 2015, p. 195

contribute to the "humanization of work" that constitutes, together with the discursive mechanisms of cooperation, the second regulatory prerequisite for achieving social freedom³⁴.

This view was opposed to co-determination because in reality it recognizes the power relations between employee and employer and allows each of the parties to realize their respective egoistic interest (consisting for the workers in gaining a certain degree of influence in the decision-making processes, for the entrepreneur the benefit of industrial peace)³⁵. In this way, therefore, a real cooperative activity where both parties deliberate about the cooperative pursuit of shared aims, thus achieving social freedom, would not take place. But this criticism does not appear convincing, because, in conceiving codetermination as an extraneous device with respect to the (necessarily) conflicting logic between capital and labour, it ends up disregarding the legal reality of co-determination as recognition of the "constitutive" character of capital and labour as the founding factors of the firm (as an entity governed by a political responsibility functional to the creation of a common good³⁶). In essence, the criticism does not take into account the *legal nature* of the mechanism that realizes participation, involving trade unions, works council and elections (or appointments) as an element in corporate governance regulation, that is, a constitutive-intrinsic element of the company; and this mechanism is not just an individual right of the worker but is an expression of societal values and such part of the social order.

If social freedom is identified with the "relationships of recognition" on which our life in common is woven, codetermination unequivocally represents the paradigm of the achievement of social freedom in the economic sphere, and for this reason it must be promoted within the social institutions, and in particular in that form of social institution which is the enterprise. But in order to promote co-determination, it is necessary to mobilize the normative functionalism of which Honnet speaks, through *supplementary norms* that legitimize economic activity through *feelings* (or, if you prefer, *values*) of solidarity and responsibility. This is the task, as we shall now see, of a Europe that must safeguard and revive its social model.

6. The European perspective of board-level worker participation.

³⁴ A. Honnet, *Freedom's Rights*, p. 237

³⁵ T. Jütten, *Is the market a Sphere of Social Freedom?*, p. 199

³⁶ See *Réformer l'entreprise*, Entretien avec Oliver Favareau, in *Études* 2018/9, p. 63.

It is well known that in the context of EU law there is not a single model of participation applicable to all the Member States: the first attempt to achieve such a goal through the Draft of the Fifth Directive on Company Law was unsuccessful, and was abandoned in 1988. Therefore, board level employee representation was left to be determined by the Member States. Member States decided to protect existing forms of participation in European Companies (SE) (Regulation EC No 2157/2001), European Cooperative Society (SCE) (Regulation EC No 1435/2003 and Directive 2003/72/EC) and in the case of cross-border acquisitions of a limited liability company (Directive 2017/1132). A right of worker participation was recognized by the 1989 Community Charter of Fundamental Social Rights for Workers according to which "information, consultation and participation of workers must be developed along appropriate lines, taking account of the practices in force in the various Member States" (Article 17), although it was not included in the 2000 Charter of Fundamental Rights of the European Union, that recognizes only information and consultations rights "in the cases and under the conditions provided for by the Community law and national laws and practices".

However, the right to participate is currently recognized by the Preamble of the Treaty (TEU) where it is stated that the Member States confirm their attachment to fundamental social right as defined in the European Social Charter signed in Turin and in the 1989 Community Charter of the Fundamental Social Rights for Workers, and by Article 151 of the Social Chapter of the TFEU: "The Union and the Member States, having in mind fundamental social rights such as those set out ... in the 1989 Community Charter of the Fundamental Social Rights of Worker"³⁷. These measures are subject to collective bargaining agreements and to the laws and practices of Member States³⁸. However, one must not forget, or underestimate, that pursuant to Article 6 (3) TEU, Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the *constitutional traditions common to the Member States*, shall constitute general principles of the Union's law. As for the European Union's competence to

³⁷ The legal status of the Community Charter is that of a mere political declaration, as stated in its preamble, since, due to the opposition of the UK government, the Charter could not be integrated into the EC Treaty in 1989. Nonetheless, the preamble to the Treaty on European Union confirms the Member States' 'attachment to fundamental social rights as defined in the 1989 Community Charter', and Article 151 of the Social Chapter of the TFEU: 'The Union and the Member States, having in mind fundamental social rights such as those set out ... in the 1989 Community Charter of the Fundamental Social Rights of Workers...'

³⁸ See M. F. Dominick, *Toward a Community Bill of Rights: The European Community Charter of Fundamental Social Rights*, in *Fordham International Law Journal* Volume 14, Issue 3 1990, p. 660.

legislate in this area, it is offered by art. 153 of the Treaty on the Functioning of the European Union (TFEU) which, referring to the achievement of the objectives established by art. 151, states that "the Union shall support and complement the activities of the member States in the following field... (f) representation and collective defence of the interest of workers and employers, *including codetermination*, subject to paragraph 5" (which excludes wages, the right of association, the right to strike and lockout).

After a long period of impasse, the European Council has adopted two legislative instruments necessary for the creation of the European Company, namely the EC Regulation 2157/2001 on the Statute of the SE, and the Directive 2001/86/ EC, which complete the Statute as far as the involvement of workers in the SE are concerned. However, these tools did not produce significant effects. Directive 2001/86, in particular, is limited to providing that the establishment of an SE does not entail the disappearance or the weakening of the worker participation regime already existing in the national law of the companies participating in the constitution of an SE. In essence, Member States have only acknowledged that they protect existing forms of participation in the formation of an SE / SCE, while in the case in which none of participating companies was governed by rules allowing the participation of workers, there will be no duty to establish board-level representation of employees in the SE.

On this basis, the doctrine has long discussed about the virtues of the SE, whose effects in terms of maintaining pre-existing participation rights have even been questioned by empirical analysis³⁹, with a division among those who claim that the SE has produced a effect of *Europeanization* of the right to participation⁴⁰, and those who think that the "before and after" principle on which the Directive is based has not produced useful effects⁴¹. In fact, if on one hand, the principle "before and after" guarantees *within certain limits* the pre-existing participatory rights (the agreement can reduce or terminate certain pre-existing rights under national law with a 2/3 majority vote in the special negotiating body (SE Directive, Art. 4(2) (g)), on the other hand, it does not favor the dissemination of the forms of institutional involvement of workers in those legal systems in which this tradition has not developed.

³⁹ A. Conchon, *Board-level employee representation rights in Europe. Facts and Trends*, ETUI, Brussels, 2011.

⁴⁰ See N. Kluge, *Workers' Participation in BASF SE and the European debate on Corporate Governance*, in *Transfer*, 2008, 14, p. 127 ff.

⁴¹ See P. Davies, *Workers on the Board of the European Company?* in *Industrial Law Journal*, 2003, 32, p. 75 ff.

The substantial failure of the Europeanization of the right of participation through the SE, evidenced by a scarce diffusion of SE concentrated in the countries of central-northern Europe where the forms of organic participation are more rooted, must certainly not be denied. However, recognizing the limits of the SE Directive in the promotion and diffusion of the right to worker participation in national systems does not mean excluding that new attempts can be promoted within the European Union, as shown by the numerous resolutions of the European Parliament. In recent years, the European Parliament has repeatedly stressed the right of workers to be involved in business decisions on issues such as the introduction of new technologies, changes in work organization, production and economic planning. Finally, with the resolution of 19 January 2017 on the European Pillar of Social Rights, the Parliament recalled that the involvement of workers in the decision-making process and in the management of companies is precious, identifying in the social economy enterprises, such as cooperatives, a good example in terms of creating quality employment, supporting social inclusion and promoting a participatory economy.

The right to codetermination is therefore not only a "legitimate objective" in the light of European Union Law, as recognized by point 17 of the Community Charter of Fundamental Social Rights referred to in art. 151 (1) TFEU. In the current regulatory framework, it is possible to reconstruct the workers' participation right as an *individual fundamental social right*, that is, a *subjective right of the employee*. Based on the interpretation provided by the Court of Justice in case C-566/15 *Erzberger*, relating to the right of active and passive electorate in the election of workers' representatives to the supervisory board of the Companies, it can be argued that this fundamental social right, as well as required by art. 17 of the Community Charter of Fundamental Social Rights, falls within the scope of "*other conditions of work and employment*" in Art. 45 (2) TFEU, and therefore fully falls within the category of employees' rights according to the normative traditions of the Member States. In the *Erzberger* case, it was a matter of deciding whether the national rights that allow workers to participate in the boards of directors can legitimately be limited to the companies that operate on the national territory, as required by German law. According to the Court of Justice, art. 45 TFEU, although it precludes any national measure capable of hindering the exercise of the fundamental freedoms guaranteed by the same article, it cannot however guarantee the worker transferred to a branch of the company located in another Member State the rights relating to his "conditions of employment", as required by the legislation of the state of origin; consequently that worker loses his right of representation on the board of directors. According to the

prospectus of the General Advocate, accepted by the Court of Justice, this right of representation on the board of directors (as required by German law) falls within the concept of "other working conditions" provided for by art. 45, 2 TFEU, and therefore constitutes an individual right under the TFEU.

This recognition of the right to participation as an individual right falling under the "working condition" is very important, because as it is connected to the free circulation it entails the abolition of any discrimination based on nationality between workers of the Member States. In connection with the provisions of the Community Charter on Social Rights, this recognition makes it possible to affirm that in the context of the European Social Model the right to participation is a Fundamental Social Right for all employees, even if this right is left to the initiative of each Member State to provide with a statutory law. In the German case, as stated by the Advocate General, the right to co-determination constitutes a "central element of the culture of cooperation" typical of that country, and "it constitutes the statutory development of the freedom to form and join trade unions and permits the exercise of that freedom, which is guaranteed by the Grundgesetz (Basic Law)"⁴². In other words, the legislation that provides for the right to participation is a function not only of the interests of employees "but rather the general interest, in that it is intended to ensure cooperation and integration by also taking into consideration interests that go beyond the specific direct interests"⁴³.

It is evident that in this perspective the right to codetermination, which is also legally conceivable as a subjective right of the person, is also (and above all) *a right to social freedom* in the sense previously described. In fact, through the participation of workers in the management of companies, not only individual freedom is achieved, but the freedom to create together (in the community of solidarity) a more equitable and just society. This social freedom, as we mentioned, is based on the intrinsic social normativity of the economic sphere, on the basis of the mutual recognition of subjects as members of a cooperative community. These considerations can be applied *mutatis mutandis* to all national legislation that provide for the participation of workers in the management of companies, and allow the reconstruction of a model of codetermination which, despite being - in the current state of EU law - left to the will of the individual Member States, to find a common *ubi consistam* as a fundamental social right which expresses a set of "societal values" and traditions of the Member States. Even in those countries, such as Italy,

⁴² Opinion C-566/15 point 102

⁴³ Opinion C-566/15 point 103

which have not yet implemented a right of workers to participate in the management of companies, the horizon of participation as an expression of social freedom is well present in the sphere of social and political values and choices of the State. It is sufficient to say that the Italian Constitution expressly provides for the "right of workers to collaborate, in the ways and within the limits established by law, to the management of companies", and this with the aim of "economic and social elevation of work and in harmony with the needs of the production" (Article 46 of the Constitution). Although not implemented, the constitutional provision expresses a powerful normative value, as demonstrated, moreover, by the Delegation law 28 June 2012, N. 92, which contains a series of principles for supporting participatory industrial relations, inspired by European guidelines. In particular, the Delegation law confirms (paragraph 62, letter f) that, especially in larger companies (over 300 employees) exercised in the form of a joint stock company or SE, where the presence of a Management Board and a Supervisory board may be required to represent workers on the supervisory board with the same powers as shareholder representatives. Finally, the Delegation law provides for (par. 62, letter g) the privileged access of employees to the possession of shares in the company's capital, directly or through the establishment of bodies (foundations, institutions and associations) having as their purpose non-speculative use of shareholdings and the exercise of collective representation in corporate governance.

In other countries, such as France, where in the private business sector codetermination has a very recent legislative origin (2013 and 2015), and has developed on the basis of legislation that still leaves the control of the company to management and shareholders that dominate boards and thus restrict employee representatives' ability to exert power over strategic decisions, employee representatives do not give up: they actively pursue strategies aimed at gaining further influence. This shows that the seed of participation, once it has taken root, is able to develop vigorously, modifying pre-existing models or cultural attitudes of a conflictual nature in industrial relations.

What characterizes Europe is the diversity of institutional models, but not the *basic idea of participation, which is now present in most legal systems*. The prospect of a more extensive Europeanization of worker participation in corporate governance must therefore be continued with conviction, *having in mind that it is not just a governance model referable to the structure of the company, but a fundamental social right of the worker, a right to social freedom*.

While respecting the prudent teaching of those who believed that regulation in the context of labour relations must take into account the

structures of State and social power and avoid "transplanted" reforms, the method of legal comparison makes it possible to enhance the existing structures, traditions and values of the social and economic order of the Member States, in the direction of a more convinced realization of social freedom in the firm and in the society.

In order to cultivate this project, an interesting starting point can be represented by the "scalar" model proposed by the ETUC in 2016. According to that proposal, in companies with 50 to 250 workers, 2/3 of workers' representatives should be provided for, in those with 250 to 1000 1/3 of participation of workers' representatives, while companies with more than 1000 workers should guarantee full equality (1/2 of the seats for workers' representatives). If it is true that this proposal conflicts with the models of many Member States, and results as better than the German mechanism itself, there is no doubt that this is the paradigm to look at if one wants to ponder in terms of a true reform of the firm and of the employment relationship, with a view to a more advanced social freedom.