



Employee Participation in Governance

A Legal and Ethical Analysis

CAMBRIDGE

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EMPLOYEE PARTICIPATION IN GOVERNANCE

A Legal and Ethical Analysis

Catholic Social Thought is a branch of moral theology. There is now a unified corpus of official Catholic teaching that focuses the resources of moral theology and natural law theory on important social issues of the day. The rights of the employee and the themes of employee ownership and participation have been central and recurring themes as this body of teaching has developed.

This description and explanation of the essential elements of Catholic Social Thought and its relationship to these themes helps the reader think about the place of the corporation in the economy and whether British and European corporate governance and labour law do what they should to put the employee at the centre of corporate governance.

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To Tao and Lewis

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Fulham Football Club Ltd v Cabra Estates plc (1993) 65 P & C.R. 284
Gas Lighting Improvement Co Ltd v Commissioners of Inland Revenue [1923] AC 723,
HL
Re Saul D Harrison & Sons plc [1994] BCC 475
Überseering BV v Nordic Construction Baumanagement GmbH (NCC) (C 208 / 00)
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- s. 168
- s. 172
- s. 415
- s. 416
- s. 417
- s. 942
- s. 1273

Trade Union and Labour Relations (Consolidation) Act 1992

- s.178
- s. 181
- ss. 183–5
- Sch. A1

EC treaties

- art. 138
- art. 139
- art. 257
- art. 262

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Council Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses.

Council Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer.

Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees.

Council Directive 97/74/EC of 15 December 1997 extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 94 / 45 / EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees.

Council Directive 98/50/EC of 29 June 1998 amending Directive 77 / 187 / EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses.

Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the member states concerning collective redundancies.

Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European Company with regard to the involvement of employees.

Directive 2002/14/EC of the European Parliament and of the Council on of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community.

Directive 2004/25/EC of the European Parliament and of the Council on of 21 April 2004 on Takeover Bids.

Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company.

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Betriebsverfassungsgesetz ("Industrial Constitution Act")

Gesetz für Kleine Aktiengesellschaften und zur Derelegierung des Aktienrechts ("Law for Small Stock Companies and to Deregulate Stock Law")

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Introduction

Employee participation as an ethical issue

Catholic Social Thought ('CST') is often said to begin with Leo XIII's 1891 encyclical *Rerum novarum*. Written in response to the inhumane treatment of labour during the industrial revolution, it spelled out the fundamental rights of workers. While it stressed the importance of respect for private property rights for a well-ordered society it set out the ethical parameters within which these rights should be exercised. In a sense, the need for capital-labour relations to be governed by ethically legitimate rules is at the heart of CST. *Rerum novarum* does not mention employee participation specifically but the theme emerged several times in later magisterium (official teaching).

CST is used in this book to refer to the official teaching of the Catholic Church on social matters. It can be distinguished from the attempts of individual scholars either to critique CST or to apply their understanding of CST to particular issues. The first part of this book attempts an explanation and exposition of CST. It sometimes prays in aid non-CST sources (natural law theorists and moral theologians) with a view to providing a fuller explanation of CST. It attempts neither to critique CST nor to defend it from criticism, but simply to explain it. The second part of the book uses CST to carry out an ethical evaluation of the status of employee participation in UK (and EU) corporate governance law and practice. It considers whether they adequately respond to CST's calls for employee participation and, hence, whether or not improvements are possible which might make the corporate governance environment more conducive to the integral human fulfillment of those affected by it.

CST's exclusive focus is on the integral human fulfillment of each individual human person. Integral human fulfillment is a very expansive concept. Grisez, Finnis and Boyle explain that:

ideally the freely chosen actions shaped by moral truths would bear fruit in the fulfillment of all persons in all the basic goods. This *ideal community* is what we mean by 'integral human fulfillment'.¹

Clearly, there is a limit to the extent to which any individual human being (or even all humans of all times) can achieve this goal. Grisez, Finnis and Boyle suggest, though, that the morally good will is a will towards integral human fulfillment.²

CST is concerned with social phenomena because it is convinced that human communities exist to serve the individual (though they can legitimately make great demands on him or her) and that the way that communities are organised has a profound impact on individual well-being. The 'social' in CST should not mislead one into imagining some kind of breach between individual ethics and social ethics; each are concerned with the integral human fulfillment or flourishing of each individual person. Healthy social structures are important because they facilitate the lives and moral growth of individuals.

CST looks at corporate governance, and at social phenomena in general, from the point of view of human self-development (or 'happiness', 'flourishing' or 'integral self-realisation'). The point of any social institution is that, usually in a variety of ways, it meets the needs of individuals. Clearly, the corporation exists to meet the needs of customers or clients. It also meets the needs of its employees and shareholders as well. In a sense, it provides services to employees and shareholders to allow them to meet their own needs, for work and a return on capital respectively. Much of the first half of this book is devoted to an ethical exploration of the relevant needs. Some are obvious, others are less so (though just as real and just as important).

Charity, properly understood,³ is at the heart of CST and this point should be made from the outset. In modern parlance, charity is seen as a matter of personal taste and disposition and certainly not a factor to be counted on in the 'real world'. Benedict XVI emphasised in *Caritas*

¹ G. Grisez, J. Boyle and J. Finnis, 'Practical principles, moral truth and ultimate ends', *The American Journal of Jurisprudence* 32 (1987), p. 128.

² Grisez, Boyle and Finnis, 'Practical principles', p. 128.

³ See the discussion in J. Messner, *Social ethics. Natural law in the western world*, (St Louis and London, B. Herder Book Co, 1965), pp. 334–341, J.-Y. Calvez and J. Perrin, *The Church and social justice. The social teaching of the Popes from Leo XIII to Pius XII*, (Chicago, Henry Regnery and Company, 1961), pp. 162–173 and in G. Grisez, *The way of the Lord Jesus. Living a Christian life*, (Quincy, Illinois, Franciscan Press, 1983), pp. 306–320.

in veritate that charity is very much a factor in human nature and in all inter-personal relations. Charity, he argues, is not something at the margins of the human personality but is rather, 'the principal driving force behind the authentic development of every person and of all humanity'.⁴ An impulse to love authentically is built into every human person.⁵ For this reason, charity is at the heart of the Church's social doctrine.⁶

CST urges that social structures should be at the service of the integral self-realisation of the individual. It insists that effective communities can only be constructed on the basis of an adequate anthropology (understanding of human nature). Since the need to love and be loved is so central to the human person, any sound system of social ethics must take it into account. Thus, charity, 'gives real substance to the personal relationship with God and with neighbour; it is the principle not only of micro-relationships (with friends, with family members or within small groups) but also of macro-relationships (social, economic and political ones).'⁷

Charity might seem an alien concept to the reader of a book about corporate governance. Corporate governance is, however, principally about the organisation of relationships between the people who engage with each other within the firm. If charity truly is such an important human need and such an important driver of behaviour and relationships then a respect for truth demands that it be taken into account.

Benedict XVI highlighted the link between truth and charity. Charity is not simply a sentiment but is a central aspect of human nature that can be thought about and understood. Charity 'can be recognised as an authentic expression of humanity and an element of fundamental importance in human relations, including those of a public nature.'⁸

One of the major ideas in CST, that this book will seek to explain, is that capital and labour are mutually interdependent (again for a range of reasons some of which are economic but others of which belong to the realm of moral theology). One of the most pressing tasks for societies in general, and for corporations in particular, is to bring about an alignment of the interests of capital and labour. Old images of them as two impersonal (and often mutually hostile) forces need to be discarded, for the right to own private property and work each play a vital role in human self-development. Indeed, in the last analysis private property ownership both serves work and represents work. Employees and shareholders work together in the corporate community.

⁴ Benedict XVI, *Caritas in veritate*, para. 1.

⁵ Benedict XVI, *Caritas in veritate*, para. 1.

⁶ Benedict XVI, *Caritas in veritate*, para. 2.

⁷ Benedict XVI, *Caritas in veritate*, para. 2.

⁸ Benedict XVI, *Caritas in veritate*, para. 3.

Employee participation can be seen as an important strand in a programme that puts respect for the individual human person at the heart of economic, political and civic society. CST's ultimate aim is to humanise communities and institutions with pride of place being given to the workplace and to the economy. It seeks, where necessary, the transformation of the workplace so that the employee is always in some sense in charge of his or her own work and is never a commodity, never a mere object to be manipulated.

Catholic Social Thought

Catholic Social Thought (CST) is primarily to be found in a series of papal encyclicals beginning with Leo XIII's *Rerum novarum* in 1891. The timing of the encyclical is significant; it was the Catholic Church's response to the problems faced by workers at the time of the industrial revolution. Leo XIII lamented that, 'a small number of very rich men have been able to lay upon the teeming masses of the labouring poor a yoke little better than slavery itself'.⁹ At the same time, he was concerned to point out the inadequacies of the socialist response to the 'worker question' which saw the abolition of the institution of private property as the solution. *Rerum novarum* proposed an understanding of the question that avoided the excesses of individualistic, *laissez faire* capitalism and the collectivist approach of socialism. CST proposes a much more subtle, and much more realistic understanding of the relationship between the individual and the various communities of which he or she forms part.

John Paul II gave this concise summary of CST's essential nature:

The Church's social doctrine is not a "third way" between liberal capitalism and Marxist collectivism, nor even a possible alternative to other solutions less radically opposed to one another. Nor is it an ideology, but rather the accurate formulation of the results of a careful reflection on the complex realities of human existence, in society and in the international order, in the light of faith and of the Church's tradition. Its main aim is to interpret these realities, determining their conformity with or divergence from the lines of the Gospel teaching on man and his vocation, a vocation which is at once earthly and transcendent; its aim is thus to guide Christian behaviour. It therefore belongs to the field, not of ideology, but of theology and particularly of moral theology.¹⁰

⁹ Leo XIII, *Rerum novarum*, para. 3.

¹⁰ John Paul II, *Centesimus annus*, para. 41.