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Employee Participation in Indonesia and Co-determination Concept under German Law

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ABSTRACT

This paper aims to provide comparative analysis on Indonesian regulation on employee participation in contrast with Germany's regulation on co-determination. This paper used normative method with a combination of statute approach and comparative approach. The implementation of labor union and employee stock participation under Indonesian law to guarantee employee participation in the decision making of companies is still ineffective. The concept of direct employee participation under German law should be seen as a feasible means to guarantee employee participation, thus improve Indonesia's corporate governance. This concept can be implemented in Indonesia through two ways: the amendment of the Company Law or another implementing regulations that provides a more specific guidance to complement the Company Law.

Keywords: co-determination; labor union; employee stock option; employee activism; corporate governance.

INTISARI

Tulisan ini bertujuan untuk menganalisa perbandingan regulasi di Indonesia tentang partisipasi pekerja dan regulasi di Jerman tentang *co-determination*. Metode penulisan yang digunakan dalam tulisan ini adalah metode normatif dengan mengkombinasikan pendekatan undang-undang dan pendekatan komparatif. Praktik serikat pekerja dan skema saham pekerja untuk menjamin partisipasi pekerja dalam pengambilan keputusan perusahaan di Indonesia saat ini masih belum efektif. Konsep partisipasi langsung yang diterapkan dalam hukum Jerman dapat dilihat sebagai sebuah sarana untuk menjamin partisipasi pekerja, terutama dalam meningkatkan sistem tata kelola perusahaan di Indonesia. Konsep partisipasi langsung ini dapat diterapkan di Indonesia melalui dua cara, yaitu dengan melakukan amandemen terhadap Undang-Undang Perseroan Terbatas, atau dengan membuat suatu regulasi yang dapat melengkapi ketentuan dalam Undang-Undang Perseroan Terbatas.

Kata kunci: *co-determination*; serikat pekerja; skema saham pekerja; aktivisme pekerja; tata kelola perusahaan.

INTRODUCTION

As generational values change, employee activism has been on the rise and affecting companies worldwide. In May 2019, the employees of Amazon actually resorted to using their shares in the shareholder meeting to submit a proposal on the issue of climate change to the technology giant company board by which over 5000 employees signed up a petition to gain attention to the matter discussed.[1] The level of employee activism is further increasing due to the COVID-19 pandemic[2]. Seeing this trend, it is possible that the high level of participation and opinion voicing will be commonplace in the near future.

In Indonesia, employee protests and opinion voicing have been accommodated by the existence of labor union since the enactment of Law Number 21 of 2000 on Labor Union, strengthened by relevant provisions in Law Number 13 of 2003 on Manpower. Nevertheless, the implementation of employee's right to be heard and to express opinion on the company's decision making processes, including through labor union, can still be improved.[3] As such, it brings the first research question of whether employees in Indonesian companies actually have a say on the company's decision making processes.

Further, to provide a benchmark of the possible improvement that can be conducted towards the current employee participation regime under Indonesian law, a collation with the co-determination under German law context is then subsequently presented. German co-determination system is renowned for its high employee representation standard in which 50% employee representation is required on the supervisory board of certain corporations.[4] In this case, to support the findings provided for the aforesaid first research question, another research question is presented with regard to the comparative analysis on Indonesian regulation on employee participation in contrast with Germany's regulation on co-determination.

[1] Kari Paul, 'Amazon Workers Demand Bezos Act on Climate Crisis' (*The Guardian*, 23 May 2019) <https://www.theguardian.com/technology/2019/may/22/amazon-workers-climate-crisis-board-jeff-bezos>.

[2] Lila Maclellan, 'A Timeline Charting the New Rise of Employee Activism' (*Quartz*, 13 December 2020) <https://qz.com/work/1943717/a-timeline-charting-the-new-rise-of-employee-activism/>.

[3] See for example the empirical findings in Ulung Yhohasta, 'Pelaksanaan Perjanjian Kerja Bersama (PKB) Antara Serikat Karyawan Dengan Manajemen Perusahaan PT. Telkom. Tbk Devisi Regional IV Semarang' (Universitas Diponegoro 2009); Andrian Rachman, 'Peran DPC FKUI SBSI Dalam Memperjuangkan Hak Buruh Di PT. Asian Profile Indosteel Surabaya Tahun 2011' (2013) 2 Jurnal Politik Muda; Shelmy Yuniar and Arinto Nugroho, 'Peranan Serikat Pekerja PT Petrokimia Gresik Dalam Penyelesaian Perselisihan Hubungan Industrial' 4 Novum: Jurnal Hukum.

[4] Gary Gorton and Frank A. Schmid, 'Capital, Labor, and the Firm: A Study of German Codetermination' (2004) 2 Journal of the European Economic Association 863; Justin Fox, 'Why German Corporate Boards Include Workers' (*Bloomberg*, 24 August 2018) <https://www.bloomberg.com/opinion/articles/2018-08-24/why-german-corporate-boards-include-workers-for-co-determination>.

METHODS

This article employs a normative method with a combination of statute, and comparative approaches. The statute approach is applicable herein because elaborations are carried out towards general laws and regulations, in which no specific decree or decision becomes the focal point of the analysis[5]. In this research, Indonesian laws and regulations that are discussed include Law Number 13 of 2003 on Manpower (hereinafter referred as the '**Manpower Law**'), Law Number 21 of 2000 on Labor Union (hereinafter referred as the '**Labor Union Law**', Law Number 2 of 2004 on Industrial Relations Dispute Resolution (hereinafter referred as the '**Industrial Relations Dispute Resolution Law'**), and Law Number 40 of 2007 on Limited Liability Company (hereinafter referred as the '**Company Law'**).

For information, in 2020, the Indonesian government enacted the Law Number 11 of 2020 on Job Creation (hereinafter referred as the '**Job Creation Law**'), or more commonly known as the omnibus law, which changes some of the provisions in the Manpower Law and Company Law. However, the applicability of this Job Creation Law is challenged in the Constitutional Court, which results can be seen in the Decision Number 91/PUU-XVIII/2020. In brief, the Constitutional Court ordered the legislators to revise the Job Creation Law within 2 years since the decision was enacted, and if no revisions were made within that time limit, then the Job Creation Law becomes permanently unconstitutional.[6] Until this article is written in 2022, there has been no further information regarding the implementation of that decision. As such, it can be concluded that the implementation of the Job Creation Law is still unclear. Regardless, changes due to the Job Creation Law will still be mentioned in this article—if any.

This research follows the comparative approach since it follows the steps of a comparative analysis as elaborated by Siems,[7] namely starting with preliminary consideration and determining research question, describing laws of different countries, while exploring reasons for likeness and differences, and ultimately, conducting evaluation upon the findings while offering policy recommendations. As mentioned in the background, the chosen jurisdiction that is compared to Indonesia is Germany. The reason for this is due to German set of laws on co-determination that is considered to be one of the most advanced, thorough, and precise regulations that serve as a solid example for analyzing co-determination and employees right to participation in Indonesia.

[5] Peter Mahmud Marzuki, *Penelitian Hukum: Edisi Revisi* (Prenada Media 2016).

[6] 'Yasonna: Pemerintah Patuhi Putusan MK Tentang UU Cipta Kerja Demi Kepastian Hukum' (*BPDSM Kementerian Hukum dan HAM RI*, 4 February 2022) <https://bpsdm.kemenkumham.go.id/berita-utama/yasonna-pemerintah-patuhi-putusan-mk-tentang-uu-cipta-kerja-demi-kepastian-hukum> accessed 12 September 2022.

[7] Mathias Siems, *Comparative Law* (Cambridge University Press 2014).

RESULTS AND DISCUSSION

The results and discussion part will be divided into three main sections. The first section will discuss about employees right to participate based on Indonesian law. The second section will then explain the co-determination concept and mandatory board representation applicable under German law. Lastly, the third section will conclude the key takeaways for the improvement of employee participation and the implementation of co-determination in Indonesian law.

1. Employees Rights to Participate under Indonesian Law

The discussion on employee rights of participation under Indonesian law is further divided into three issues, namely right to form a labor union, right to become a shareholder, as well as right to be represented in the company board.

1.1. Employees Right to Form a Labor Union

Article 1 paragraph 7 of the Manpower Law defines union is an organization established, by and for employees both within the company and outside the company, which are free, open, independent, democratic and responsible for fighting, defending, and protecting the rights and interests of the employees while also improving the welfare of employees and their families. The purpose of a labor union can be regarded as a part of manpower development, in which it is reemphasized under Article 4 of the Manpower Law that one of the purpose of such development includes safeguarding the rights and interests of the employees as well as improving the welfare of the employees and their family.

It is also important to note that, under the Manpower Law and the Labor Union Law, there are explicit provisions stating the formation of a labor union as employee rights.[8] Nevertheless, it remains merely a right of the employees and not the companies' obligation to provide a labor union for their employees. As a result, implementation heavily relies on the employees' own initiative, time, and effort. Formation of a labor union may also be hindered due to the employees' disinclination, taking into account various background and education level that the employees have undertaken previously. Based on the research carried out by Prof. Ari Hernawan in Sleman District for example, the employee respondents did not have the basic understanding on the procedures and requirements to establish a labor union and instead, consulted and asked for advice with regard to the matter.[9]

Furthermore, even in the event when labor unions are formed, its organization and management may also cause ineffective employee participation and reluctance if not conducted properly. Under the Labor Union Law, labor unions are required to have their own Articles of Assocation and by-

[8] Article 104 Paragraph 1 of the Manpower Law in conjunction with Article 5 Paragraph 1 of the Labor Union Law.

[9] Ari Hernawan, 'Faktor-Faktor Penyebab Belum Terbentuknya Serikat Pekerja Unit Kerja Perusahaan Di Kabupaten Sleman' (2008) 20 Jurnal Mimbar Hukum.

laws or association rules[10] as well as an independent management that carry out financial administration and bookkeeping in accordance with their Articles of Association and/or by laws.[11] Again, this may result in reluctance and hesitation since proper financial administration and bookkeeping require knowledge and skill on financial management, on top of adding extra burden and workload for the labor union's appointed management board.

Moreover, there are also situations where different labor unions are established within a company, and this often causes conflict and disputes amongst the employees internally.[12] Such conflict is actually considered as one of the types of industrial relations dispute covered in Article 2 of the Industrial Relations Dispute Resolution Law, by which the definition of 'dispute among labor unions' is provided under Article 1 paragraph 5 as follows:

> *A dispute among labor unions is dispute between one labor union and another labor union that is within one company due to disagreements on the membership, implementation of rights, and obligations of the union.*

Reversely, sometimes the number of employees that are willing to participate in such union is a small percentage compared to the total number of workforce. In this case, especially when the membership consists of less than 50% from the total number of employees in the company, the power of labor union can be considered weak and its implementation can be deemed as ineffective.[13] Naturally, when a labor union does not represent the majority of the workforce, its representation of the interest, request, and demands from company's labor force can actually be inaccurate and misleading. Furthermore, participation of less than 50% of the total number of employees also hinder the labor union to obtain full rights and advantages as prescribed by the law. An example to this include the right to negotiate and conclude a collective labor agreement as regulated under Article 119 and 120 of the Manpower Law, despite such collectiveness being one of the main purposes of establishing a labor union.[14]

All in all, the exercise of employees participation in Indonesian companies decision making processes through labor union is still suboptimal due to the complications arising from the still developing labor union awareness and capability itself. Bearing that in mind, added with imperfect structuring and execution of labor union management, another method to ensure employees participation in deciding corporate plans may need to be devised, by which increasing employees' shares and control over the company may serve as a strong alternative.

[10] Article 11 Paragraph 1 of the Labor Union Law.

[11] Article 34 Paragraph 1 of the Labor Union Law.

[12] Asri Wijayanti, *Hukum Ketenagakerjaan Pasca Reformasi* (Sinar Grafika 2010).

[13] See further for example: Yosephine Marcella and Komang Pradnyana Sudibya, 'Peran Organisasi Serikat Pekerja/Buruh Dalam Pembangunan Perekonomian Indonesia' (2016) 4 Kertha Semaya : Journal Ilmu Hukum.

[14] Yosephine Marcella and Komang Pradnyana Sudibya (n 13).

1.2. Employees Right to Obtain Company Shares

Employee stock options have been discussed often in the past such as when the United States' Financial Accounting Standards Board (FASB) introduced a new standard to the value calculation of employee stocks in the 1990s[15], but the rise of new types of fast growing businesses and startups as well as the increasing role of employees in determining and developing the company's business instead of merely 'doing a job' propelled the currently increasing trend of employee stock options exercise as a way to motivate employee performance and incentivize employee loyalty in the company.

The exercise of employee stock option plan in technology companies is not a new thing. Sweden-based telecommunication company Ericsson have employed this strategy to reward outstanding non-executive employees in 2003,[16] but the prevalence of employee stock option become higher due to the current high-tech, ever evolving business models. The employee stock option plan is a convincing mean of attracting and retaining talent,[17] and unicorn firms are now also resorting to the use of such stock option plan to encourage employees creativity, innovations, and hard work in order to strive in the highly competitive global marketplace nowadays.[18] As a consequence, since the employees are now also acting as shareholders, they become participants in the company's meetings of shareholders and this provides a solid platform for employees participation in the company's decision making processes.

Nevertheless, substantial control over the company may rarely be granted to the employees in terms of the percentage of shares hold collectively by the employees who are subjected to the stock option plan. Despite the existence of employee-owned companies such as Publix Super Markets in the United States[19] and possibly Huawei in China depending on their internal trade union mechanism,[20] the majority of companies in the world very rarely allow their employees to be the majority shareholders of the company.

[15] David Aboody, 'Market Valuation of Employee Stock Options' (1996) 22 Journal of Accounting and Economics 357; Nalin Kulatilaka and Alan J. Marcus, 'Valuing Employee Stock Options' (1994) 50 Financial Analyst Journal 46; Steven Huddart and Mark Lang, 'Employee Stock Option Exercises an Empirical Analysis' (1996) 21 Journal of Accounting and Economics 5.

[16] Henrik Glimstedt, William Lazonick, and Hao Xie, 'The Evolution and Allocation of Employee Stock Options: Adapting US-Style Compensation to the Swedish Business Model' (2006) 3 European Management Review 156.

[17] For example, see: Inge M Meeuwenoord, 'Share Options as an Instrument to Attract & Retain Talent for Dutch Startups' (Master Thesis, University of Twente 2014).

[18] Anat Alon-Beck, 'Unicorn Stock Options - Golden Goose or Trojan Horse?' (2019) 1 Columbia Business Law Review.

[19] Sarah J. Westendorf, 'Compensation through Ownership: The Use of the ESOP in Entrepreneurial Ventures' (2007) 1 Entrepreneurial Business Law Journal.

[20] Colin Hawes, 'Why Is Huawei's Ownership so Strange? A Case Study of the Chinese Corporate and Socio-Political Ecosystem' (2021) 21 Journal of Corporate Law Studies 1.

In addition to the company's internal limitation, regulatory restrictions may also provide restraints with regard to the possible employee share ownership percentage. For example, Indonesian Financial Services Authority (*Otoritas Jasa Keuangan*) through Financial Services Regulation No. 14/POJK.04/2019 put priority over existing shareholders, allowing the share ownership program to only take place if there are remaining shares and/or equity stock that are not yet subscribed by the preemptive rights holder. This regulation also limits the ratio of employee shares to a maximum 10% from the total offered shares.[21]

The practice of employee stock option plan implementation in Indonesia is also further intricated by its method of implementation. In practice, many Indonesian companies handle the employee stock option plan through a committee with the director or commissioner in charge of the administration of the employee stock,[22] and as a consequence the granting of employee stocks still in one way or another is controlled by the company vis-à-vis the company boards in this sense. In light of this, it is relevant to see whether employees have the right to be represented in the company board under Indonesian law, especially since several other jurisdictions have regulated the right to be represented in company boards as one of the basic employee rights.

1.3. Employees Right to be Represented in the Company Board

The requirement and procedure of board of director and board Indonesian company law is mainly regulated in the Company Law. Indonesia adopts a two-tier model board with a separate supervisory body and executive body, namely the Board of Commissioners and the Board of Directors respectively.

As stipulated under Article 92 of the Company Law, the main task of the Board of Directors is to carry out the management of the Company in the best interest of the Company in accordance with its objectives and purposes, and this includes *inter alia* the day-to-day management of the Company. The criteria of eligibility of a member of the Board of Directors is listed in Article 93 of the Company Law to be an individual with the capacity to carry out legal acts, in which within five years prior to the appointment such candidate must not fall under the following categories:[23]

a. Be subjected to a bankruptcy declaration;
b. Been a member of the Board of Directors or Board of Commissioners that were declared at fault for another Company's bankruptcy; and

[21] Article 8C(1) of Financial Services Regulation No. 14/POJK.04/2019 stipulates that capital increases for employee stock ownership program can only be made up to a maximum of 10% of the number of shares that have been issued and fully paid up or authorized capital.

[22] Brimanti Sari, 'Employee Financial Participation Plan Implementation in the United States and the Netherlands: Lessons for Indonesia' (2020) 1 Corporate and Trade Law Review 1.

[23] As provided under Article 93 paragraph (2), authorized technical agency is not precluded from determining additional requirements for the appointment of Board of Directors. This is applicable for example in the financial sector that imposes a higher standard towards the Board of Directors of financial institutions.

c. Been convicted for commiting a criminal offense that causes loss to state finance and/or other relevant financial sectors, including bank and non-bank financial institutions, capital markets, or other sector that deal with public fund raising and management.

Further, authority to appoint the members of Board of Directors itself is actually bestowed upon the General Meetings of Shareholders[24] but the Company Law provides freedom for each company to specify the procedure that the General Meetings of Shareholders will use in determining Board of Directors candidate. Some companies require the Board of Directors candidature to be selected from shareholders, but the curent trend shows strong inclination towards having an external third party as the Company's watchdog to prevent conflict of interest.[25] The discourse on making employee representative as a required candidate in the Board of Directors candidacy ballot is not yet common in Indonesia, even though having employee representatives in the Board of Directors can provide a more wholesome perspective on the improvement that can be made to the day-to-day management of the company from the people who are carrying out the task themselves.

Moving on to the Board of Commissioners, the appointment criteria and appointing authority, namely the General Meeting of Shareholders, are similar to the aforementioned criteria and procedure to appoint Board of Directors. The main difference between the Board of Directors and Board of Commissioners lie in their function. Under Article 108 of the Company Law, the Board of Commissioners is stated to have the responsibility to supervise the management policy made by the Board of Directors in exercising their function as well as supervising the workability of the management in general with regard to the Company and the business of the Company, while ultimately having the authority to provide advice to the Board of Directors whenever and wherever necessary. The Board of Commissioners is also given the authority to suspend a member of the Board of Directors temporarily due to negligence, fault, or violation that causes loss to the Company.[26]

Based on this, another option would be for the employee representatives to partake in the supervisory function of the company, contributing to the overall check and balances mechanism of the company especially in terms of ensuring that employees participation channels e.g. through the existing labor union communication forum. The employee representatives may get a better and quicker grasp of irregularities that are taking place in the company, and consequently, may provide a valuable perspective towards the company's oversight as part of the Board of Commissioners. Nonetheless, since the concept of involving employee representatives in the company board is not

[24] Article 94 of the Company Law.

[25] M Yahya Harahap, *Hukum Perseroan Terbatas* (1st edn, Sinar Grafika 2016).

[26] Yahya Harahap (2016) explains that the rationale behind giving the Board of Commissioner authority for temporary suspension under Article 106 of the Company Law is to provide room for urgent matters that needs immediate action that cannot be done promptly if waiting for the General Meetings of Shareholders to happen. Time is essential in this case with regard to prevent further damage or bigger loss to the Company caused by the Board of Director's fault, negligence, or violation.

yet implemented in Indonesia, a comparative analysis towards the jurisdictions that have applied such system, such as Germany, may bring benefit to the discourse of issue presented herein.

2. Co-determination and Mandatory Board Representation under German Law

Germany adopts a two-tier board model similar to Indonesia, and this is stipulated in Article 30 of Stock Corporation Act which states that a company shall have a Supervisory Board (*Aufsichtsrat*) and Management Board (*Vorstand*). The Supervisory Board is responsible to advise and supervise the Management Board and as a result, not responsible for the management of the company.

The corporate governance system in German is unique as it allows employees to directly participate in the company by being a Supervisory Board member. This is also known as co-determination, which refers to a system in which both managers and employees are involved in the important decision-making for a company.[27] Within the European context, co-determination is defined as a structure of decision-making within an enterprise whereby employee and their representatives exert influence on decisions, often at a senior level and at a relatively early stage.[28]

German company law is mainly regulated in German Stock Corporation Act (*Aktiengesetz*) (hereinafter referred as the '**Stock Corporation Act**'). The Stock Corporation Act states that the members of the Supervisory Board are elected by the General Meeting of Shareholders (*Hauptversammlung*), unless they are to be appointed to the Supervisory Board or elected as representatives of the employees.[29] The initial Supervisory Board members are elected by the founders in a notarial deed.[30] Only a natural person with full legal capacity may be a member of the Supervisory Board, exceptions are applicable to those who:

a. is already a member of the Supervisory Board in ten commercial enterprises which are required by law to form a Supervisory Board;
b. is the legal representative of a controlled enterprise of the company;
c. is the legal representative of another corporation whose Supervisory Board includes a member of the Management Board of the company; or
d. was a member of the Management Board of the same listed company during the past two years, unless he is elected upon nomination by shareholders holding more than 25 per cent of the voting rights in the company.[31]

It can be observed then that the German company law allows direct employee participation in the company by being a Supervisory Board member. With regard to the procedure and requirement

[27] 'Co-Determination' (*Cambridge Dictionary*) <https://dictionary.cambridge.org/dictionary/english/co-determination>.

[28] 'Co-Determination' (*Eurofound*, 2021) <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/co-determination>.

[29] Article 101 (1) of the Stock Corporation Act (*Aktiengesetz)*.

[30] Article 30 (1) of the Stock Corporation Act (*Aktiengesetz*).

[31] Article 100 Paragraph (1) and (2) of the Stock Corporation Act (*Aktiengesetz*).

for making this happen, several regulations are applied depending on the types of company as well as the total number of employees. The explanation for each type of company is offered below.

2.1. Co-determination for Companies That Have Between 501 to 2.000 Employees

Co-determination for companies that have between 501 to 2.000 employees is regulated through the Law on One-Third Employee Representation in the Supervisory Board (*Gesetz über die Drittelbeteiligung der Arbeitnehmer im Aufsichtsrat)* (hereinafter referred as '**One-Third Participation Act'**). One-third of the Supervisory Board in these types of companies must consist of employee representatives. [32] If the employee representatives to be elected are one or two people, then all of them should be engaged as employees in the company.[33] However, if there are more than two people to be elected as employee representatives, only a minimum of two should be engaged as employees in the company.[34]

The regulation provides a very detailed guideline with regard to the employee representation in the supervisory board. The employee representatives should be over 18 years old and have been engaged for at least a year in the company.[35] The employee representatives are elected through voting, in which all employees in the company that are over 18 years old shall have the right to vote.[36] Further, the scope of the One-Third Participation Act was extended to include companies exercising control over companies under the One-Third Participation Act through the The Supplementary Co-determination Act (*Mitbestimmungsergänzungsgesetz*)[37] and that being the case, more companies are subjected towards the co-determination requirement.

2.2. Co-determination for Companies That Have More Than 2.000 Employees

Co-determination for companies that have more than 2.000 employees is regulated under the Act on Co-determination by Employees (*Mitbestimmungsgesetz*) (hereinafter referred as '**Co-determination Act'**). The Supervisory Board in these types of companies must consist of employee representatives and shareholder representatives. The ratio between both representatives may vary depending on the number of employees as follows:

a. for companies that have 2.001 to 10.000 employees, the Supervisory Board shall consist of six shareholders' members and six employees' members;

[32] Article 4 Paragaph (2) of the Act on One-Third Employee Representation in the Supervisory Board (*Gesetz über die Drittelbeteiligung der Arbeitnehmer im Aufsichtsrat*).

[33] Article 4 Paragraph (2) of the Act on One-Third Employee Representation in the Supervisory Board (*Gesetz über die Drittelbeteiligung der Arbeitnehmer im Aufsichtsrat*).

[34] Article 4 Paragraph (2) of the Act on One-Third Employee Representation in the Supervisory Board (*Gesetz über die Drittelbeteiligung der Arbeitnehmer im Aufsichtsrat*).

[35] Article 4 Paragraph (3) of the Act on One-Third Employee Representation in the Supervisory Board (*Gesetz über die Drittelbeteiligung der Arbeitnehmer im Aufsichtsrat*).

[36] Article 5 Paragraph (1) and Article 5 Paragraph (2) of the Act on One-Third Employee Representation in the Supervisory Board (*Gesetz über die Drittelbeteiligung der Arbeitnehmer im Aufsichtsrat*).

[37] Rebecca Page, 'Co-Determination in Germany - a Beginners' Guide' (Arbeitspapier 2011).

b. for companies that have 10.001 to 20.000 employees, the Supervisory Board shall consist of eight shareholders' members and eight employees' members; and
c. for companies that have more than 20.000 employees, the Supervisory Board shall consist of ten shareholders' members and ten employees' members.[38]

The ratio of employee representatives is also regulated under the Co-determination Act:
a. where the Supervisory Board has six employees' members, four employees are from the company and the other two are from the trade union representatives;
b. where the Supervisory Board has eight employees' members, six employees are from the company and the other two are from the trade union representatives; and
c. where the Supervisory Board has ten employees' members, seven employees are from the company and the other three are from the trade union representatives.[39]

The employee representatives should be over 18 years old and have been engaged for at least a year in the company.[40]

The shareholders representatives are appointed by the body empowered by law, or the by-laws, or the shareholders' agreement to elect members of the board (electoral body) and, save as stipulated to the contrary in statutory provisions, in accordance with the by-laws or the shareholders' agreement.[41] The employee representatives are elected by delegates (for a company with under 8.000 employees) or by a direct election (for a company with no more than 8.000 employees), unless the employees who have the right to vote decided to do otherwise.[42]

2.3. Co-determination for Companies in Coal, Iron, and Steel Industry

Last but not least, one of the specific laws that are subjected to a particular set of co-determination regulation is the coal, iron, and steel industry. Co-determination for companies in coal, iron, and steel industry is regulated through the Act on the Co-determination of Employees in the Supervisory & Management Boards of Companies in the Coal, Iron & Steel Industry (*Gesetz über die Mitbestimmung der Arbeitnehmer in den Aufsichtsräten & Vorständen der Unternehmen des Bergbaus und der Eisen und Stahl erzeugenden Industrie*) (hereinafter referred as the '**Coal, Iron, and Steel Co-determination Act'**). The Coal, Iron, and Steel Co-determination Act is applicable to all public companies in the industry which has more than 1.000 employees. The Supervisory Board consists of shareholders and labour representatives with an equal number of seats, plus one additional "neutral" member to prevent tie voting. The total members of Supervisory Board depend on the nominal capital of the companies, it ranges from 11, 15, to 21 in total. The general meeting

[38] Article 7 Paragraph (1) of the Co-determination Act (*Mitbestimmungsgesetz*).

[39] Article 7 Paragraph (2) of the Co-determination Act (*Mitbestimmungsgesetz*).

[40] Article 7 Paragraph (4) of the Co-determination Act (*Mitbestimmungsgesetz*).

[41] Article 8 Paragraph (1) of the Co-determination Act (*Mitbestimmungsgesetz*).

[42] Article 9 Paragraph (1) and Article 9 Paragraph (2) of the Co-determination Act (*Mitbestimmungsgesetz*).

of shareholders elects the shareholders representatives, while the work council nominates employees' representatives after consultation with trade unions.

3. Key Takeaways for Employee Participation and Co-determination under Indonesian Law

Direct employee participation in the company's decision making processes, especially to support the oversight function of the supervisory board, should be considered as a feasible means to improve corporate governance in Indonesia. Up until now, employee's participation is mostly linked to labor union protests, and more recently, employees getting shares in the rising startup businesses, but not yet with regard to participating in the company's board. This can be achieved through two ways, namely the amendment of the Company Law in which an article is added with regard to mandatory employee representation in the company board, or alternatively, and another implementing regulations that provides a more specific guidance to complement the Company Law. The latter is only effective when there is no conflicting provision provided under the Company Law itself.

Given that legislators are currently revising the Job Creation Law—which changes several provisions in the currently applicable Company Law, this could be the right momentum to add provisions on direct employee participation into the Indonesian legal system, that is by adding it to the Job Creation Law. The emergence of the Job Creation Law back then was considered to not show the government's effort to protect employees in Indonesia, as its provisions are believed to be more detrimental to workers.[43] Adding the provisions on direct employee participation in the Job Creation Law could be a way to resolve this issue, although it is a risky approach since the statutory structure of the Job Creation Law also arises controversy.

Nevertheless, the balance between providing a platform for employee participation in the company decision-making processes as well as ensuring sound and reasonable business decisions must be kept in order to encourage implementation in the companies. Regulations that are too strict or too complicated can backfire and discourage implementation in the companies. This can cause reverse effect as further as finding loopholes to evade the requirement: a situation that is still happening even in Germany.[44]

Furthermore, it should be understood that implementing the concept of direct employee participation in the company's management structure in Indonesia would not contradict or shift the functions of the labor union that currently act as the employees' representative. As can be seen from the German legal framework, the implementation of co-determination actually involved the work

[43] Yudho Winarto, 'Buruh Minta UU Cipta Kerja Dicabut, Ini 5 Alasannya' (*Kontan.co.id*, 1 May 2021) <https://nasional.kontan.co.id/news/buruh-minta-uu-cipta-kerja-dicabut-ini-5-alasannya?page=all> accessed 13 September 2022.

[44] For example, see: Daniel Delhaes, Dieter Fockenbrock, and Frank Specht, 'Keeping Workers A Way From the Boardroom' (*Handelsblatt*, 20 April 2016) <https://www.handelsblatt.com/english/politics/labor-laws-keeping-workers-away-from-the-boardroom/23537370.html?ticket=ST-1116498-0EdMlSpbitU7nWd7igW1-ap3>.

councils and/or trade unions—a similar concept to labor unions in Indonesia. The employee representatives in the Supervisory Board are from the trade unions, or nominated by the work councils and trade unions. As such, if Indonesia implements such a concept, it will actually facilitate the labor union to further speak their voice directly to the management board. However, as the detailed provisions may differ, it is important for legislators to ensure that it will not contradict with the already applicable labor union concept in Indonesia.

CONCLUSION

Employees in Indonesian companies are able to participate in the companies' decision making through their right to form a labor union, right to obtain company shares (through employee stock option plan), and right to be represented in the company board. The exercise of employee participation through labor unions is still suboptimal due to the complications arising from the still developing labor union awareness and capability itself. Similarly, the exercise of employee participation through employee stock option plan is also still ineffective due to the company's internal limitation and regulatory restrictions on the possible employee share ownership percentage.

Both Indonesia and Germany adopt a two-tier board model, which consists of a board that performs a management function and another board that performs supervisory function. However, in terms of direct employee representation, the practice is very different between Indonesia and Germany. As for the employees right to be represented in the company board, it can be implemented by having employee representatives on the management board and/or the supervisory board. This concept has long been implemented in Germany, but has not yet been implemented in Indonesia.

Learning from German's corporate governance, they guarantee employees' participation through the concept of co-determination, in which the employees are allowed to directly participate in the company by being a Supervisory Board member. The minimum percentage of employee representatives are regulated under German laws. The percentage itself differs from each type of companies, namely for: companies that have between 501 to 2.000 employees; companies that have more than 2.000 employees; and companies in coal, iron, and steel industries.

Direct employee participation in the company's decision making processes, especially to support the oversight function of the supervisory board, should be considered as a feasible means to improve corporate governance in Indonesia. The implementation of direct employee participation in Indonesia would not contradict or shift the functions of the labor union, rather it will actually facilitate the labor union to further speak their voice directly to the management board.

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