

The GLJ Editorial Board Recognizes Co-Editor Peer Zumbansen's Recent "Habilitation" (Johann Wolfgang Goethe University, Frankfurt am Main) and His Receipt of a Canada Research Chair at Osgoode Hall Law School of York University, Toronto, Canada

Habilitation Thesis Review - Peer Zumbansen, Innovation und Pfadabhängigkeit - Unternehmensverfassung in der Wissensgesellschaft (Innovation and Path-dependency - Enterprise Constitution in the Knowledge Society) (Frankfurt am Main, 2004)

By Gregor Bachmann

I.

The corporate governance "movement," which inspired the modern discussion on corporate governance, took its shape in the 1970s. Its central question – how the anonymous stock corporation could or should be governed – is as old as the stock corporation itself. In the U.S., the question is usually rephrased as the problem of separation of ownership and control. Whatever textbook on corporate law you open, it always highlights Adolph Berle and Gardiner Means classical work on *"The Modern Corporation and Private Property"* (1932) as the starting point of modern corporate law.¹ Although facing the same, universal problem, the German tradition is somewhat different. Here, it was Walter Rathenau who set the tone when he published his treatise *"Vom Aktienwesen"* (1917).²

Rathenau, whose work was still familiar to Berle and Means, pursued the vision of a market order with socialist elements, which should create "equal mid-level

¹ See, e.g., JOEL SELIGMAN, CORPORATIONS 20 (1995).

² Rathenau (1867-1922) was not an academic, but an entrepreneur who served as Germany's Minister of Foreign Affairs after WW I. He was murdered by antisemite extremists in 1922.

wealth for all classes.”³ Naturally, such a vision entailed a different view of the modern corporation. Managers were not viewed as agents of shareholders, but rather as trustees for the public good. Hence, a central theme of the corporate governance debate in 20th Century Germany was not how to tame managers, but how to integrate stakeholder’s interests into the organization of the enterprise. This view has come under ever more pressure since faced with the challenges of open and highly competitive global markets (“globalisation”). Hence, the central question today is: Can the old German vision of an integrated enterprise model survive or must it yield to a purely capitalist, i.e. shareholder-centered system? It goes without saying that this literally vital question can neither be answered by merely comparing statutes, text books or precedents; it requires a broad horizon. Zumbansen’s “Innovation and Path-Dependency” is going to open the way to that horizon.

II.

Accordingly, *Innovation und Pfadabhängigkeit* starts off with a quotation from Rathenau: “The task of managing large enterprises ... exceeds that of governing a state.” In simple words, this sentence states the bottom line of Zumbansen’s monograph, which may be rephrased like this: Modern enterprise is so complex that it defies any attempt to press it into simplistic models; only an interdisciplinary and comparative approach can grasp the concept of enterprise as a learning social system. This claim denotes some key ideas that are characteristic for Zumbansen’s line of argument. First, Zumbansen uses the term “enterprise” (instead of corporation), which stands for a (German) tradition of viewing the business organization as something else (or more) than a fictional instrument of limiting liability. Secondly, he presents neither a legal nor an economic but a *sociological* point of view (also encompassed in the term “enterprise”). Focusing on one view of the cathedral (i.e. the sociologist's) somehow stands in contrast to his own call for a multidisciplinary approach, but may itself be read as supporting the central complexity-claim. Within the sociological tradition, Zumbansen’s thesis is deeply indebted to (or, as the author would put it, “informed by”) Luhmann’s *Systemtheorie* (systems theory), viewing law, business, society etc. as separate, “autonomous” and co-evolving systems. None of those systems may claim superiority over the others, which entails that law is not to be seen as the top level of a hierarchy (as [traditional German] lawyers and legal scholars are inclined to believe). Hierarchy itself is a concept that Zumbansen

³ RATHENAU, *Von kommenden Dingen*, in SCHRIFTEN UND REDEN 94 (1964). The vision has been kept alive ever since. After WW II it was transformed in to the (less socialist) concept of “soziale Marktwirtschaft” (social market economy). Again, the aim was (and is) to create “wealth for everyone,” as Ludwig Erhard, the architect of Germany’s post-war “Wirtschaftswunder” put it. In reality, it is (still) reflected in comparatively lower payments for German managers: Until very recently management compensation has been no topic in the German corporate debate.

sees unfitting in the “radically changing environment of knowledge society,” which he deems characterized by network concepts and fading boundaries of states as well as firms.

Zumbansen’s thesis is not structured in the more or less logical way of traditional continental legal scholarship, testing legal doctrines and developing new ones. Instead, he employs a more discursive, sometimes even essay-like style that moves back and forth from ideas and concepts, weaving a visionary cluster of how a living and learning enterprise might be conceptualized. Not always easy to read (nor easy to review), the sheer variety of different contexts within which Zumbansen places the *Unternehmen* (enterprise) as a complex, learning and co-evolving system may make the head of the “ordinary” lawyer swim. How are we ever going to grasp such a thing as the concept of an “enterprise,” let alone regulate it? Even if it is impossible to review every facet of Zumbansen’s colourful painting, a few central issues deserve critical comment. Let us phrase them as questions:

1. “Enterprise”: *Synthesis of stakeholders vs. shareholders?*

Employing the term *Unternehmen* (“enterprise”), Zumbansen indicates that he is not going to talk about the corporation as defined (and constituted) by (corporate) law. Although used in some statutory language, “enterprise” is not really a concept of positive law. The term, Zumbansen notes, has “stubbornly resisted the grip of legal dogmatics, and yet the law cannot live without it.” Can it really not? Historically, *Unternehmen* stands for the old view, reaching back to Otto von Gierke⁴ and long cherished in German legal scholarship, i.e. that a business organization is more than a long-term-contract among shareholders and/or between them and management. Rather, “enterprise” symbolizes the vision of a living and socially responsible creature encompassing (in modern terminology) shareholders and stakeholders. Much of the post-war debate of German corporate law has focused on the design of an “enterprise law,” understood as a law overarching corporate law and bringing to bear the interests of stakeholders. The result was supposed to be an “enterprise constitution,” something similar to the state constitution, a legal arch integrating the conflicting interests of managers, shareholders, stakeholders and the public and thus legitimizing the use and existence of corporate powers. In fact, the positive result of that debate was not the envisioned “constitution,” but the *Mitbestimmungsgesetz 1976* (Co-determination Act) that provides for a strong and unique position of labour representatives on the board of German corporations.

⁴ O. v. Gierke (1841-1921), next to Carl Friedrich von Savigny, is the most famous and most influential legal scholar in 19th Century Germany. He employed a socio-historical method and is considered an ancestor of legal sociology in Germany.

Facing the challenges of globalization, co-determination has more and more come under heavy attack even within Germany. Businessmen, scholars and many politicians today see it as a historic mistake, a child of 1960s *Zeitgeist* that urgently calls for reform. Zumbansen does not share that populist view. Although not directly defending the positive model as prescribed in the Co-Determination Act, he thinks that the general line of criticism is misguided. Arguing against the proposition that we are witnessing a trend towards convergence of corporate law systems (leading to an inevitable victory of shareholder primacy), Zumbansen refers to the political "Varieties of Capitalism" -school. Assuming that the reader is familiar with its details (which is, as the reviewer must admit, not true for everyone), he sees building blocks that a "reflexive" model of enterprise law may build upon. Viewed against that background, co-determination cannot be measured solely in terms of economic efficiency but must be understood as an attempt to institutionalize processes of communication. Such procedures, the author believes, are no less important today when the allocation of resources, i.e. the former function of enterprise organizations, is transformed into a "knowledge-based integration of enterprise actors."

True enough, a critic might ask, but does this justify the strong (and extremely costly) model of German *Mitbestimmung*? Although Zumbansen avoids the question, as he argues on an abstract level, it is noteworthy that his claim meets with very concrete and actual plans to reform German Co-determination. Spurred by the appearance of the European Stock Corporation (*Societas Europae- SE*), a corporate form based on European Union law, national experts have come up with the proposal to move workers representation from the board to a special consultation panel. This proposal is based on the argument that the function of labour representatives in the real world is not (co-)determination (as shareholder-representatives always have the last word), but communication. Viewing the enterprise itself as system "entangled in a diverse process of communication with its specific environments" (Zumbansen) provides a theoretic base for supporting that proposal.

Unternehmen, Unternehmensrecht, Unternehmensverfassung - those are terms hardly heard anymore in a legal system moving more and more towards the Anglo-American model. Yet it is precisely these "semantic ruins" of the historic enterprise-law-debate that must be rediscovered, Zumbansen rightfully claims, in order to detect the political character of the project *Unternehmensverfassung*. The central task, he believes, has remained the same in the age of globalisation: To balance out the antagonism of shareholders versus stakeholders on a "higher level." It is Hegel's dialectic model that is invoked here when Zumbansen calls for a "synthesis." A similar methodological borrowing had been undertaken 35 years ago, when Philip Selznick quoted the German philosopher in designing a model of "industrial justice" that was informed by the very German debate Zumbansen now wishes to

revive.⁵ Zumbansen makes references to Selznick, though not Hegel himself. Nevertheless, his attempt to reconcile continental ("Rhenish") and Anglo-American concepts of capitalism connects to the continental (German) tradition of reaching for consensus. The "knowledge society," so it seems, provides yet another sociological backbone for keeping up this tradition. If sharing knowledge is vital for the success of business, and if enterprise is a learning system, it needs input from everywhere and everyone. Zumbansen believes that the team production model of the firm (as promoted by Margaret Blair) better fits this situation than the simplistic picture of the corporation as a nexus of contracts. Here he finds economic support for the sociological model of "enterprise."

2. "History matters": Learning what?

Not surprisingly, a work titled "path-dependency" will highlight the fact that history matters. So does Zumbansen's. His attack on Hansmann's and Kraakman's self-conscious claim that the history of corporate law has ended, leaving the Anglo-American model as sole victor, seems easy to support in the light of recent American scandals (Enron etc.) and the problems of implementing that very model in transition countries. What might have been added to make that claim even more convincing is a detailed analysis of the historic developments of corporate law itself. Mark Roe, e.g. has presented such an analysis focusing on political determinants of corporate governance, whereas Coffee has highlighted the importance of legal restraints ("law matters"). Zumbansen briefly touches recent reforms in German corporate law, namely those brought about by the so called KonTraG,⁶ the first in a series of statutes intended to make the German corporate governance system more "competitive." He rightly points out the fact that the requirement to install a "Frühwarnsystem" (early alert system) as a central part of corporate risk management (§ 91 AktG) has opened an interdisciplinary debate among business and legal scholars. Yet his interest is not to follow the preconditions or impacts of certain legal or political reforms in time.

To Zumbansen the phrase "history matters" means something different. Not the trivial fact that what we are depends on what we have been, but that we are talking in ways that always bear remembrances of former debates that - in a literal sense - must be "re-visited." *Learning* is the central term expressing this view. Not only are we, spectators and discussants, learning by re-visiting forgotten debates, but also is

⁵ See SELZNICK, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* (1969). Selznick's work had a notable influence on German legal scholars, among them Zumbansen's academic teacher Gunther Teubner (see, TEUBNER, *ORGANISATIONSDEMOKRATIE UND VERBANDSVERFASSUNG* (1978)).

⁶ *Gesetz zur Kontrolle und Transparenz im Unternehmensbereich - KonTraG v. 27.4.1998.*

the object of our interests, the “enterprise” a learning system. It is therefore not adequate to view the enterprise from the outside perspective of a regulator aiming to direct its behavior; rather, Zumbansen claims, we must see the enterprise from inside. He exemplifies this claim by using the example of how the law might effectively protect the environment. As a learning social system, an enterprise cannot be directed by outside orders but needs mechanisms that allow it to learn. Installing a “corporate conscience” is a way to do that. A Government’s task, then, is not to regulate enterprise, but to enable enterprise to regulate itself. Therefore, “enterprise law” as Zumbansen understands it is more than a mode of expressing “synthesis” of shareholders and stakeholders in “knowledge society”; it is also a symbol for new forms of regulation.

3. *Self regulation: "Privatization" of law?*

Self regulation has been a central topic in recent German public law debates. Private law, on the contrary, has hardly taken note of it, as private law has always been the domain of contract, the purest form of self-regulation. With regard to corporate law, the classical private-public-law divide typical of continental legal thinking is dwindling. Writing in the line of those that have always attacked that distinction, Zumbansen believes that enabling self-regulation is the most adequate form of regulating the behaviour of private firms. This might hold true from a governance perspective: If “knowledge society” requires that private experts set standards that enable enterprises to “learn,” it may indeed be wise to extensively employ that technique. The German legal debate, however, has focused on the normative question whether moving legislation from state to private actors is legitimate (in a normative, not sociological sense). In Zumbansen’s eyes, this view is too narrow: “How shall we explain this ... to a lawyer from the EU or the OECD, who long ago pointed to the need for mobilising private expertise?”

The universal need for private expertise, however, does not make the problem of legitimacy disappear. Here, it becomes very clear that Zumbansen’s concept is not a normative, but a sociological one. From that point of view, it might be true (as the author puts it in terms of systems theory) that “the pluralisation of knowledge and the radical entanglement of scientific appraisal on the one hand, political prognosis and programmatic on the other in a collision of knowledge occurring amongst different social knowledge-discourses permanently radicalises, stabilises, and irritates the participating system-discourses.” But the normative question remains: Who is entitled to tell whom to do what? In fact, the problem is minimized by the fact that the semi-official German Corporate Governance Kodex that Zumbansen uses to discuss new modes of regulation, is no more binding than are other, private standards of “best practice.” Zumbansen compares it to the phenomenon of “lex mercatoria,” i.e. usages in international trade that some theorists deem a “third”

legal order. Clive Schmitthoff's early vision of a transnational private legal order is his aim. Yet he admits that this vision may not ignore the fact that local law regimes are more resistant than followers of the *lex-mercatoria* had thought. At the end, it seems that an earlier *lex mercatoria* vision must be replaced by what Gunther Teubner has called "polycontextural networks." Is that a source of law? Does it matter whether it is a source of law? From Zumbansen's multidisciplinary approach those questions do not seem to matter. From the point of view of a plain lawyer, they do.

III.

Innovation und Pfadabhängigkeit is an unusual book. Its foremost achievement is to teach us that the whole "corporate government" debate is an old story. The importance of "re-visiting" earlier German variations on that theme cannot be overestimated. This insight has been painfully neglected by almost everyone writing on that topic today. Whereas the bulk of contemporary German legal scholarship on corporate governance focuses on norms of positive law, how to construct, compare, or reform them, Zumbansen writes in a tradition that has never succeeded to influence, let alone dominate the German legal debate. It is a meta-juristic tradition mainly linked with the University of Frankfurt and its theory laden socio-legal approach. It self-confidently ignores the strict division between public and private law that characterizes German legal thinking, and it belittles scholars viewing the law only from within the legal system. Somewhat bitterly, the author remarks that the caravan (of traditional corporate law scholarship) moves on, untouched by insights of interdisciplinary models such as "reflexive law" which he views as a powerful tool to grasp phenomena of multi-level global standard setting. Will his book change that? Probably not. Too deep is the gap that divides the traditional from the sociological school of jurisprudence, at least in post-war Germany. Zumbansen's work impressively shows us, however, how colourful and promising the other bank looks, but it also illustrates how difficult it is to bridge the gap. Therefore it is not unlikely that *Innovation und Pfadabhängigkeit* will, as did his dissertation, receive more praise from political science than it will from jurisprudence. What do we *learn* from that? Well, learning requires the willingness of pupils to open up to new lessons. Let us hope that Zumbansen's work inspires legal scholars to do so.