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On the Right to Labor Participation: Safeguarding Democratic Participation in Enterprise Operation and Management

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Abstract: Safeguarding workers' right to labor participation and enabling them to participate in democratic management of enterprises is a manifestation of labor as human capital. However, the adverse selection and moral hazard arising from information asymmetry also need to be prevented. Moreover, engaging in games with enterprises through workers' congresses or staff representatives' congresses, as well as through worker directors and worker supervisors, is inherent in trade unions' protection of workers' right to labor participation.

Keywords: right to labor participation; law and economics; democratic participation

Workers' right to labor participation is also referred to as the right to participate in management, the right to democratic management, or the right of co-determination. It is "the right of workers to directly or indirectly participate in the operation and management (including interest distribution) of the enterprise in which they work, through control and involvement in the economy and the production process."[1] The scope of the right to labor participation is relatively broad, including at least: the right to know, the right to make suggestions, the right to consultation, the right to propose initiatives, the right to consent, and the right to veto. [1] In a broad sense, the right to labor participation should also include the right to profit sharing. In this paper, the author discusses the right to labor participation in this broad sense.

The right to labor participation is one of the statutory labor rights enjoyed by workers. Under relevant Chinese labor laws, the content of the right to labor participation mainly includes the system of staff and workers' representative congresses, the system of enterprise affairs disclosure, and the system of worker directors and worker supervisors. Article 8 of China's Labor Law explicitly provides: "Workers shall, in accordance with the law, participate in democratic management through workers' congresses, staff and workers' representative congresses, or other forms..." Safeguarding workers' right to participate in democratic management of enterprises is also one of trade unions' duties to protect rights. Article 6 of the Trade Union Law provides: "Trade unions shall, in accordance with the law, organize workers to participate in democratic decision-making, democratic management, and democratic supervision of their own units through staff and workers' representative congresses or other forms." At the same time, the Trade Union Law imposes respective requirements on trade unions' protection of workers' right to democratic participation according to different types of enterprises. Article 35 of the Trade Union Law provides for the democratic management methods and trade union duties in state-owned enterprises: "The staff and workers' representative congress of a state-owned enterprise is the basic form of democratic management of the enterprise and the institution through which the staff and workers exercise their power of democratic management, and it exercises its functions and powers in accordance with legal provisions. The trade union committee of a state-owned enterprise is the working body of the staff and workers' representative congress, responsible for the daily work of the staff and workers' representative congress, and for inspecting and urging the implementation of the resolutions of the staff and workers' representative congress." Article 36 provides for the duties in collectively-owned enterprises: "The trade union committee of a collectively-owned enterprise shall support and organize the staff and workers to participate in democratic management and democratic supervision, and safeguard their powers to elect and recall managerial personnel and to decide on major issues concerning operation and management." As for trade unions in other types of enterprises, they shall, in accordance with Article 37, "organize the staff and workers to participate in democratic management of enterprises and public institutions in forms appropriate to the enterprises and public institutions."

Regarding the system of worker directors and worker supervisors, China's Company Law provides that state-owned enterprises must have worker directors, while other enterprises may have worker directors. Worker supervisors, however, are required to be established in all types of companies. It can be seen from this that the Company Law primarily grants workers the right to supervise company operation and management as supervisors. As for workers' right to participate in operation and management decisions as directors, except for state-owned enterprises, no mandatory provision has been made. This is also taking into account China's current national conditions, as promoting worker directors in non-state-owned enterprises may not be accepted by such enterprises.

At the same time, we observe that, in addition to granting workers the right to labor participation, the Trade Union Law also grants trade unions the right to participate in enterprise operation and development. Article 38 provides: "When an enterprise or public institution studies major issues concerning operation, management, and development, it shall listen to the opinions of the trade union; when holding meetings to discuss matters involving the immediate interests of workers, such as wages, benefits, occupational safety and health, and social insurance, the presence of trade union representatives is mandatory." The author believes that, since trade unions are the representatives of workers, the purpose of the above provisions of the Trade Union Law is to indirectly safeguard workers' right to labor participation by granting trade unions the right to participate in enterprise operation and management. Therefore, the right granted by law to trade unions to participate in enterprise operation and management may also be regarded as the right to labor participation in a broad sense, and it is precisely in this broad sense of the right to labor participation that the author uses it in this paper.

In addition to the forms of realization of the right to labor participation such as workers' congresses, staff and workers' representative congresses, and the systems of worker directors and worker supervisors, it also includes the system of enterprise affairs disclosure, the system of worker stock ownership, and others. Due to space constraints, the author will not analyze the enterprise affairs disclosure system and the worker stock ownership system one by one.

I. The Right to Labor Participation: Labor as a Manifestation of Human Capital

At the outset of research on the right to labor participation, we must first clarify one question: why should workers enjoy the right to labor participation? In state-owned enterprises and collectively-owned enterprises, it may seem understandable to say that workers participate in democratic management because the ownership of the assets of these enterprises belongs to the state and the collective, and workers, as masters of the country, have the right to participate in such enterprises. However, with respect to private enterprises and foreign-invested enterprises, which are non-publicly owned, the general understanding is that the ownership of their enterprise assets belongs to the employer, and workers are merely the subjects who provide labor by employment. Thus, distribution is according to labor, and workers receive a certain amount of wages based on the labor they provide. On what basis and for what reason do they participate in enterprise operation and management? Do they enjoy the right to labor participation?

The answer is affirmative. The rise of the right to labor participation "is, on the one hand, inseparable from the long-term demands and struggles of workers; on the other hand, it is closely related to the contemporary trend of thought that regards the enterprise as a collection of multiple interests (rather than merely the private property of investors)."[1]

Understood from a deeper perspective, the reason why workers should have the right to participate in enterprise operation and management is that "both managers and workers are the subjects of labor property rights. When workers invest labor into an enterprise, it is not only a labor act but also an investment act. Workers should not only receive labor income but also, like other investors in corporate property, obtain property rights returns." [2] This is the viewpoint of human capital theory, which holds that labor is also a form of capital—human capital—and that when workers invest in an enterprise, they are in fact investing their own capital. An enterprise is the result of capital investment. As investors and owners of capital, they are entitled to corresponding rights of operation and management. Therefore, as a manifestation of human capital, and as the owners (property rights holders) of human capital, workers should enjoy the same right to participate in operation and management as enterprise employers who invest physical capital. They should participate in the democratic management of the enterprises in which they have invested, so as to ensure a favorable return on their human capital investment. This is the law and economics basis for workers' right to labor participation.

As to capital, the conventional economic view is that it refers to "the physical assets owned by households, firms, or the government." [3] Thus, for an enterprise, capital is the physical assets invested into the enterprise by the state or private individuals, including funds, land, machinery and equipment, and so forth. Obviously, under this view, human capital, existing in an intangible form, does not fall within the category of capital. However, human capital theory innovates on this point, holding that intangible human capital also constitutes capital.

The explicit formulation of human capital theory occurred in the early 20th century and was not widely accepted by academia prior to that time. For a long period, influenced by the pursuit of material wealth and the moral pressure associated with treating people as capital, the concept of human capital was not recognized by economists. However, in 1906, American economist Irving Fisher, in his book The Nature of Capital and Income, first proposed the concept of human capital and incorporated it into the theoretical framework of economic analysis. [4] Subsequently, American economist Theodore Schultz, a leading representative of modern human capital theory, systematically expounded human capital theory in his 1961 work Investment in Human Capital. He argued that, just as physical capital is embodied in material products, human capital is embodied in workers, formed through investment, and consists of workers' knowledge, skills, and physical strength (health status). Alternatively, capital that is embodied in workers and expressed by their quantity and quality is human capital. [5] Schultz's views on human capital are largely the mainstream view in the West. Thus, human capital, as opposed to physical capital, is capital that is embodied in workers and composed of their knowledge, skills, and physical abilities. Investment in human capital has two implications for workers: first, workers, as owners of human capital, have the right to participate in enterprise operation and management; second, workers have the right to share in the earnings of enterprise operations. The author's research on the right to labor participation is developed along these two dimensions.

"The rise and practical exploration of human capital theory have injected new demands for rights into the right to labor participation. Modern enterprise theory holds that an enterprise is not merely the enterprise of its shareholders, but rather a contract formed by human capital and non-human capital. … The novelty of this proposition lies in the fact that it not only makes possible a new form of right to labor remuneration, but also provides support for the right to labor participation." [6] Precisely because workers enjoy the right to labor participation, trade unions, as organizations safeguarding workers' rights, should bear the obligation to ensure that workers' right to labor participation is effectively enjoyed and realized.

Next, the author will conduct a law and economics analysis of issues such as information asymmetry and game-playing that may arise during the exercise of the right to labor participation by workers and the trade unions that represent them.

2. The Right to Labor Participation: Sharing Decision-Making Power and Information Asymmetry

Since workers have the right to participate in democratic management of enterprises, it also means that workers need to make decisions on relevant enterprise matters. Workers' participation in enterprise operation and management decisions is referred to as sharing decision-making power, i.e., the right of workers to share in enterprise operation and management decisions.

Decision-making must be based on information. Decisions made without information or based on inaccurate information are often incorrect or may even mislead the enterprise's operation and development. Since workers' work within an enterprise typically involves only a part of the enterprise's overall operations, it is difficult for them to fully understand all kinds of enterprise operating information. Therefore, when participating in enterprise operation decisions, they often face the problem of information asymmetry vis-à-vis other parties in the enterprise, such as directors and professional managers, which results in their corresponding decisions not fully conforming to actual circumstances and failing to maximize workers' interests.

2.1. The Right to Labor Participation: Sharing Decision-Making Power and the Problem of Adverse Selection

The author has already discussed the problem of adverse selection above. Adverse selection can lead to a phenomenon in which workers with low work skills drive out those with high work skills in the labor market. In the process of workers' participation in democratic management of enterprises, there are at least two levels of issues. First, in the process of electing worker directors and worker supervisors to realize workers' right to labor participation, how to avoid the problems of adverse selection and moral hazard caused by information asymmetry. Second, in participating in decisions such as the selection of professional managers, how to avoid the problems of adverse selection and moral hazard caused by information asymmetry. The issues at the two levels above are essentially identical, both involving the problems of adverse selection and moral hazard in the context of information asymmetry. For workers participating in democratic management, adverse selection may occur because the information they possess is asymmetrical to that of worker directors, worker supervisors, professional managers, and so on. For example, due to lack of knowledge about the backgrounds and qualifications of candidates for worker directors, worker supervisors, and professional managers, they may vote incorrectly and select relatively poor worker directors, worker supervisors, and managers, rather than selecting excellent ones who truly consider workers' interests. Another example is that, without understanding the company's business projects as presented by professional managers, they may be misled into choosing business projects with poor profitability while abandoning those with strong profitability. This is not to say that workers' participation will necessarily lead to such adverse outcomes—after all, enterprise shareholders and the directors and supervisors appointed by them also participate in democratic management. However, workers' participation increases the likelihood of such adverse outcomes occurring.

In response to the situation where adverse selection resulting from information asymmetry may hinder the effective exercise of workers' right to participate in democratic management, the author suggests that trade unions should provide safeguards in the following two aspects:

First, establish a competitive selection system and an open election system for candidates for worker directors, worker supervisors, and professional managers prior to their appointment. The advantage of a competitive selection system is that it can more fully identify qualified personnel in the market (the source of worker directors and worker supervisors is the internal labor market of the enterprise, while the source of professional managers is both the internal labor market and the external labor market). Fair and full competition enables truly talented individuals to stand out and reduces adverse selection problems caused by insufficient information. The significance of an open election system lies in the fact that the resumes and other information of candidates for worker directors, worker supervisors, and professional managers can be publicly disclosed, and elections can be conducted in open settings, subjecting them to public scrutiny by the enterprise's workers, thereby reducing adverse selection problems caused by information asymmetry.

Second, establish a specialized body or assign dedicated trade union staff to collect information relating to enterprise operations, so as to mitigate the adverse selection problems caused by information asymmetry. Although some information may be considered trade secrets that enterprises are unwilling to disclose to trade unions and workers, except for core trade secrets, at least at the trade union level, trade unions should endeavor to obtain as much enterprise operational information as possible, thereby enabling workers to participate in democratic management of the enterprise in a more comprehensive and objective manner.

2.2. The Right to Labor Participation: Sharing Decision-Making Power and the Problem of Moral Hazard

In addition to adverse selection, information asymmetry may also give rise to the problem of moral hazard. The moral hazard that may occur here is that employees of the enterprise (other workers not participating in democratic management), particularly worker directors, worker supervisors, and professional managers, may work half-heartedly and fail to diligently perform their duties. However, due to the difficulty of supervision, workers participating in democratic management can hardly detect their inefficient or even ineffective work, which harms the overall interests of the enterprise and, at the same time, damages the interests of workers. Regarding the undesirable phenomena arising from moral hazard, "it is necessary not only to give full play to the role of moral education and legal discipline, but also to pay greater attention to adjusting institutional arrangements, so as to fundamentally change the incentive mechanisms and behavioral patterns of individuals and organizations."[7]

In response to the problem of moral hazard arising from information asymmetry that may affect workers' right to democratic participation, the author suggests that trade unions may address the issue from the following aspects:

First, establish a supervision mechanism for worker directors and worker supervisors. Due to the information asymmetry between ordinary workers and worker directors and worker supervisors, ordinary workers relatively possess insufficient information. To avoid the moral hazard problem of worker directors and worker supervisors, a system should be established whereby worker directors and worker supervisors regularly report to the trade union and workers on the enterprise's operating conditions and the performance of their own duties, so that workers can understand the performance of the worker representatives they have chosen and the company's operating conditions, thereby realizing their right to labor participation.

Second, trade unions shall negotiate with enterprises on behalf of workers as to which matters fall within the scope of democratic management. Workers' participation in democratic management of enterprises requires trade unions to negotiate with the enterprise's shareholders or their corresponding board(s) of directors to obtain their understanding and support; otherwise, the right to labor participation will remain a right on paper and cannot become an actual right. At the same time, which specific matters should be included in the scope of workers' democratic participation should also be negotiated in advance between the trade union and the enterprise, because not every matter of the enterprise needs or should be participated in by workers. On the one hand, some aspects of enterprise operation involve trade secrets, particularly core secrets, which are not suitable for workers' democratic decision-making. On the other hand, some matters have little relevance to workers. The author believes that, at a minimum, matters relating to workers' immediate interests, such as the expansion of factories, the addition of canteens, and similar matters, should permit workers' democratic participation and decision-making. Such democratic participation ensures, on the one hand, that workers are aware of these operational plans so as to pool wisdom, and on the other hand, that workers' participation in democratic management enhances their work enthusiasm and efficiency, indirectly increasing the enterprise's profits. Therefore, workers' participation in democratic management of enterprises is beneficial not only to workers themselves but also to enterprises, constituting a "win-win" outcome.

The practice of Japan is worth learning from. It is not difficult to see from Japan's paternalistic corporate culture that, unlike trade unions in developed countries such as Europe and the United States, trade unions in Japanese enterprises are closely linked to enterprises, and their relationship with enterprises is relatively coordinated and moderate. They serve more as representatives of workers participating in enterprise operation and management rather than confronting enterprises as adversaries, in the hope that workers will benefit through enterprise development. As one Japanese scholar observed, "the extensive cooperative relationship between enterprise trade unions and management injects lubricant into Japan's labor market."[8] At the same time, Japanese trade unions often focus their efforts on how to promote enterprise development, because only when the enterprise develops can workers' treatment be fundamentally improved. Therefore, some scholars have pointed out that, in terms of strengthening enterprise management, carrying out rationalization activities, and so forth, trade unions are powerful and irreplaceable partners for enterprise operators.[9] This is also a distinctive characteristic of Japanese trade unions compared to their counterparts in developed countries in Europe and America.

2.3. The Right to Labor Participation and Game-Playing

In the process of exercising the right to labor participation and engaging in democratic management of enterprise affairs, workers also face the issue of game-playing with enterprises. As mentioned above, there are two main forms of worker participation in democratic management: the workers' congress or staff and workers' representative congress, and the systems of worker directors and worker supervisors. For workers, discussing and resolving major issues of enterprise operation and management through the workers' congress or staff and workers' representative congress constitutes game-playing with the employer, because the fact that such resolutions can be accepted by the enterprise is itself the result of game-playing between the two sides. In addition, worker directors and worker supervisors, as their representatives, are involved in game-playing with other members of the board of directors and the board of supervisors when the corresponding board meetings are held, and the outcomes of such game-playing directly affect the resolutions of the board of directors and the board of supervisors. For worker directors and worker supervisors, their strategies on relevant matters are influenced by other participants in democratic management, and they can only make optimal decisions after determining the strategies of other parties. Therefore, game-playing has a significant impact on the realization of the right to labor participation. What role do trade unions play in the above-mentioned game-playing? The author intends to analyze the subjects and means of game-playing in this regard.

3. Game-Playing Through the Workers' Congress or the Staff and Workers' Representative Congress

With respect to the two forms of game-playing in labor participation mentioned above, regarding game-playing through the workers' congress or the staff and workers' representative congress, the subjects of such game-playing need to be clarified. Before discussing whether the subjects of game-playing in the workers' congress or the staff and workers' representative congress are all workers, worker representatives, or trade unions, we must first clarify the relationship between the workers' congress, the staff and workers' representative congress, and trade unions. China's current laws distinguish in this regard according to the nature of enterprises. Article 35 of the Trade Union Law provides that the trade union in a state-owned enterprise is the working body of the staff and workers' representative congress, responsible for the daily work of the staff and workers' representative congress, and for inspecting and urging the implementation of its resolutions. For collectively-owned enterprises and other types of enterprises, however, no explicit provision is made; the law merely generally requires that trade unions shall support and organize workers to participate in democratic management. The reasons for this legal arrangement are essentially two: First, trade unions in state-owned enterprises are relatively common and well-established, capable of existing and operating as the working body of the staff and workers' representative congress. However, many collectively-owned enterprises and non-publicly owned enterprises have not formed trade unions at all. If the law were to provide that trade unions in these types of enterprises serve as the working body of the staff and workers' representative congress, such a provision would inevitably be impossible to implement in practice, becoming a "right on paper." At the same time, it might also cause the already established staff and workers' representative congress to become paralyzed because it could not handle its daily work due to the absence of an enterprise trade union. This flexible treatment by the law is thus also an expedient measure. Second, the membership base of trade unions in state-owned enterprises is relatively strong; the rate of workers joining trade unions is higher than in collectively-owned enterprises and non-publicly owned enterprises, enabling the trade union to effectively represent all workers in participating in democratic management. In contrast, in collectively-owned enterprises and non-publicly owned enterprises, even where trade unions have been established, the nature of the enterprises means that employers are not as proactive and generous on the issue of trade union membership as in state-owned enterprises, resulting in the proportion of trade union members among all workers generally being lower than in state-owned enterprises. Consequently, if a trade union representing the interests of its members (a portion of the workers) were to serve as the working body of the workers' congress or the staff and workers' representative congress, its representativeness would be easily questioned by non-union members, making it difficult to obtain the recognition of the majority of workers.

It is precisely this ambiguity in the representativeness of trade unions that leads to confusion regarding trade unions' role in game-playing over the right to labor participation. With respect to trade unions in collectively-owned enterprises and non-publicly owned enterprises, since they are not the working bodies of the workers' congress or the staff and workers' representative congress, what role can they play in safeguarding the genuine enjoyment and realization of workers' right to democratic participation? How can they achieve the protection of that right through strategic interaction (game-playing) with employers?

Since the enterprise trade union is a permanent body, while the workers' congress or the staff and workers' representative congress is convened periodically or on an ad hoc basis and is not a permanent body, if the law fails to clarify the relationship between the workers' congress or the staff and workers' representative congress and the enterprise trade union in collectively-owned enterprises and non-publicly owned enterprises, but merely generally requires the trade union to undertake the support and organization of the workers' congress, the intensity and depth of the trade union's efforts to protect the right to labor participation will be greatly diminished. This could easily render the workers' congress or the staff and workers' representative congress superficial and formalistic, failing to achieve a substantive role in democratic participation. The author believes that, given that the enterprise trade union is the representative of the enterprise's workers, trade unions in collectively-owned enterprises and non-publicly owned enterprises should also be granted by law the functional position of the permanent working body of the workers' congress or the staff and workers' representative congress. This would enable trade unions in collectively-owned enterprises and non-publicly owned enterprises to participate to a greater extent in the daily affairs of the workers' congress or the staff and workers' representative congress, inspect and supervise the implementation of its resolutions, and ensure the genuine realization of the right to labor participation. As mentioned above, the Trade Union Law only provides that the trade union in state-owned enterprises is the working body of the staff and workers' representative congress, primarily as an expedient measure based on the current differences in the status and strength of trade unions in enterprises of different natures. However, in order to encourage trade unions in collectively-owned enterprises and non-publicly owned enterprises to actively protect the right to labor participation, it is necessary to grant such enterprise trade unions the status of the permanent working body of the workers' congress or the staff and workers' representative congress. Rights that should be enjoyed must first be reflected as rights provided by law, and then transformed into actual rights through efforts.

Making the enterprise trade union the permanent working body of the workers' congress or the staff and workers' representative congress not only helps affirm and strengthen the trade union's right to protect the right to labor participation, but also benefits the outcomes of the trade union's game-playing with the employer. After clarifying the relationship between the enterprise trade union and the workers' congress or the staff and workers' representative congress, we further consider the subjects of game-playing and the role of the enterprise trade union in the game-playing over the right to labor participation.

Since the decision-making subjects of the workers' congress or the staff and workers' representative congress are all workers or worker representatives, the subjects of game-playing through the workers' congress or the staff and workers' representative congress should undoubtedly be all workers or worker representatives versus the employer. Then, as the representative of workers' interests, if the trade union wishes to play a positive role in such game-playing and protect the right to labor participation, it needs to make reasonable decisions through its trade union members among all workers and among worker representatives, thereby influencing the resolution outcomes of the workers' congress and the staff and workers' representative congress. From this perspective, the trade union's own membership ratio and whether its membership base is solid directly affect the resolution outcomes of the workers' congress and the staff and workers' representative congress, and thus have a significant impact on the game-playing between the trade union and the employer. Therefore, from the perspective of game-playing, in order to give full play to the trade union's role in protecting the right to labor participation and maximizing workers' interests through game-playing via the workers' congress or the staff and workers' representative congress, trade unions and relevant legislation should make efforts in the following aspects:

First, on the basis of legislation providing that the enterprise trade union is the working body of the workers' congress or the staff and workers' representative congress, the law should further stipulate the specific procedures, rules, daily work content, and the specific requirements and methods for supervising and ensuring the implementation and effectiveness of the resolutions of the workers' congress or the staff and workers' representative congress. This will enable the trade union to conduct game-playing through the workers' congress or the staff and workers' representative congress with a legal basis, making the operation simple and feasible.

Second, expand the proportion of trade union organization. When the trade union becomes the working body of the workers' congress or the staff and workers' representative congress, whether the trade union can truly gain the trust and support of all workers or worker representatives depends significantly on the proportion of trade union members among all workers. If trade union members account for one-half or more of all workers, the trade union's membership base is relatively solid, enabling it to better play its role in rights protection. In the daily work of the workers' congress or the staff and workers' representative congress, the trade union will be more proficient and more likely to gain the trust and support of workers. Furthermore, when voting at the workers' congress, the proportion of trade union members directly affects the voting results. When trade union members account for one-half or more of the voting participants, the trade union can determine the final voting results through its members, and such voting results constitute the trade union's strategy in game-playing with the employer, influencing the employer's strategy.

Third, increase the proportion of trade union members among worker representatives. In the case of game-playing through the staff and workers' representative congress, if the trade union wishes to enhance its influence in the game-playing and leverage its advantage of collective rationality to prevent worker representatives from making blind decisions on enterprise operation and management matters, it needs to increase the proportion of trade union members among worker representatives. In this way, when voting at the staff and workers' representative congress, the opinions of trade union members become a force that more easily influences the final voting results.

In summary, compared to individual workers, trade unions have the advantage of collective rationality. The trade union's engagement in game-playing with the employer through the workers' congress or the staff and workers' representative congress, voting on matters of enterprise operation and management, and thereby further influencing enterprise operation and management decisions, is one of the effective ways for trade unions to protect workers' right to labor participation.

4. Game-Playing Through Worker Directors and Worker Supervisors

Game-playing through worker directors and worker supervisors is one of the means to realize workers' right to labor participation. Article 39 of China's Trade Union Law provides: "The generation of worker representatives on the board of directors and the board of supervisors of a company shall be carried out in accordance with the relevant provisions of the Company Law." China's Company Law imposes mandatory requirements for worker directors in state-owned enterprises, but does not impose mandatory requirements for worker directors in enterprises of other natures: "In a limited liability company invested in and established by two or more state-owned enterprises or two or more other state-owned investment entities, there shall be worker representatives on its board of directors" (Article 45); "In a wholly state-owned company ... there shall be worker representatives on its board of directors. ... The worker representatives on the board of directors shall be elected by the company's staff and workers' representative congress" (Article 68); "In other limited liability companies, there may also be worker representatives on the board of directors. The worker representatives on the board of directors shall be democratically elected by the company's workers through the staff and workers' representative congress, workers' congress, or other forms" (Article 45). This means that whether the system of worker directors is adopted in non-state-owned enterprises is determined by the company's articles of association, i.e., the choice of the employer. Although the system of worker directors plays an important role in workers' participation in company operation and management, from the perspective of the company's shareholders (investors), if there are worker representatives on their board of directors, they would need to share decision-making power over operations with the workers. Moreover, the board of directors often decides on major matters of the company and involves important company secrets. Establishing worker representatives is, for the profit-seeking nature of shareholders of non-state-owned enterprises, more disadvantageous than beneficial. Therefore, it can be foreseen that the promotion and application of the worker director system in non-state-owned enterprises will be relatively difficult. Due to the absence of worker directors, it is very challenging for enterprise trade unions to engage in game-playing with enterprises through worker directors. Of course, there will certainly be some non-state-owned enterprises that establish worker directors. Clearly, establishing worker directors in non-state-owned enterprises does not necessarily align with the interests of the shareholders of non-state-owned enterprises. Therefore, mandating the establishment of worker directors in non-state-owned enterprises through legislation would not be of great help, and might even be counterproductive or merely formalistic, resulting in worker directors in non-state-owned enterprises still being manipulated by the company's shareholders. Hence, the Company Law's voluntary approach to the establishment of worker directors in non-state-owned enterprises is advisable. For enterprise trade unions, engaging in game-playing with employers through worker directors to realize workers' right to democratic participation is one approach, while engaging in game-playing with employers through worker supervisors to realize workers' right to democratic participation by means of democratic supervision is another approach.

Article 52 of China's Company Law provides: "A limited liability company shall establish a board of supervisors. … The board of supervisors shall include shareholder representatives and an appropriate proportion of the company's worker representatives, provided that the proportion of worker representatives shall not be less than one third; the specific proportion shall be prescribed by the company's articles of association. The worker representatives on the board of supervisors shall be democratically elected by the company's workers through the staff and workers' representative congress, workers' congress, or other forms." It can be seen that the establishment of worker supervisors differs from that of worker directors. The law does not distinguish between state-owned enterprises and non-state-owned enterprises in this respect, but uniformly requires the establishment of worker supervisors. The reason is that democratic supervision, being a different dimension from participation in enterprise operation and management, is more easily accepted by employers. At the same time, from a temporal perspective, supervision falls into the ex post category for enterprises compared to participation in operational and management decisions, and its impact on enterprises is relatively small, making it more acceptable to employers.

Under the current legal framework, which adopts a voluntary approach to the establishment of worker directors but a mandatory approach to worker supervisors, the preferable practice for enterprise trade unions (particularly those in enterprises that have not established worker directors) is to place importance on the construction of the worker supervisor system, engaging in game-playing with employers through worker supervisors and thereby realizing the right to democratic supervision. In order for enterprise trade unions to engage in game-playing with employers through worker supervisors, and given that worker supervisors are often elected through the workers' congress or the staff and workers' representative congress, the proportion of trade union members in the workers' congress or the staff and workers' representative congress, as well as the proportion of trade union members among worker supervisors, directly affect the outcomes of the enterprise trade union's protection of the right to democratic participation through the worker supervisor system. What enterprise trade unions need to do is to increase the number and proportion of trade union members elected as worker supervisors, thereby expanding the trade union's influence in such game-playing.

In summary, the right to labor participation is an important component of labor rights. From the perspective of law and economics, its origin can be analyzed as a manifestation of labor (human) as capital, namely human capital. At the same time, the problems of adverse selection and moral hazard that may arise from information asymmetry also cause difficulties for workers in exercising the right to labor participation and participating in enterprise operation and management. Establishing systems such as competitive selection, open elections, and supervision mechanisms for worker directors and worker supervisors can reduce the problems of adverse selection and moral hazard with respect to worker directors and worker supervisors. Furthermore, in order to realize workers' right to labor participation, enterprise trade unions and workers engage in game-playing with enterprises not only through the workers' congress or the staff and workers' representative congress, but also through worker directors and worker supervisors.

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