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WORKERS PARTICIPATION IN THE COMPANY DECISION MAKING PROCESS AND COMPANIES SOCIAL RESPONSIBILITY

by
T J Nyapadi [1]

The starting point in this article is to look at the *Companies Act Chapter 190* and determine whether there is anything in the Act that allows for employees of the company to participate in the decision-making process within that company. The answer is a simple one. There is nothing in our present *Companies Act* which requires companies to involve employees in the decision-making process of the companies even in major industrial matters concerning them, for example, in amalgamation, in transfer of undertakings or winding-up and so on. The workers interests are completely ignored. The reasons are partly historical and partly commercial. It is not the purpose of this article to look into these reasons in detail but the root cause of the absence of such provisions will be highlighted.

The law favours the capitalists i.e. the shareholders who, as owners, are the supreme constitutional authority in a company; they control such key decisions as the passing of a resolution on a winding up, the alteration of the articles and the memorandum of association, and the reduction or increase of capital as well as the appointment of directors to act in the interest of the company (i.e. the interests of shareholders both present and future). in this structure of ownership and control of the company employees do not figure at all. Taking an overall view, economic power is being increasingly concentrated in large industrial enterprises which are becoming increasingly remote from the communities they serve and their employees. Our country is failing to draw out the energies and skills of its working population. If a new basis for relations in industrial democracy could be created then this problem would be solved to an appreciable extent. Industrial democracy would lead to a greater willingness on the part of the employees' unions to accept a share of responsibility for the increased efficiency and prosperity of Zimbabwe companies.

Industrial Democracy and the E.E.C.

Industrial democracy[2] itself is concerned with the involvement of employees, at least in large companies, in the making of those decisions which substantially affect their working lives. The purpose of this article, therefore, is to explore the form of that involvement. There are two basic approaches to the achievement of industrial democracy; firstly, there is the representation of employee directors at board level and secondly, the existing structure for consultation and collective bargaining could be developed at the greater scale. The subject is complex and poses fundamental questions concerning the basis of control of decision-making in companies. A major force behind the movement for industrial democracy is the *European Economic Community* which has brought pressure to bear to introduce employee representation at board level in all large companies in Europe. I will therefore consider the *E.E.C.* proposal and then go on to consider the *U.K. Bullock Report* on industrial democracy and subsequent developments in order to see what lessons we can learn from such developments in Zimbabwe.

In 1972 the *E.E.C.* published a *Fifth Directive* harmonising company legislation which provided for the appointment of employee directors on supervisory board in a two-tier board structure. In November 1975 a *Green Paper* entitled "*Employee Participation and Company Structure*" revised this proposal by providing for greater flexibility, with special provisions for transitional arrangements so that member states of the E.E.C. would not have to make sudden changes. The ultimate target of employee representation on the top level of the two-tier board

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2 On Industrial Democracy generally see Gower's Principles of Modern Company 4th ed.

structure was recommended but member states would be allowed to established their own models. Under the two-tier system all companies with more than 1,000 employees were required to have a management organ whose members were appointed and dismissed by an entirely separate supervisory organ. All employees were to participate in the election to employ directors. It was felt that an extension of collective bargaining would not be a suitable base for *E.E.C. legislation.* In fact, by the end of 1976 some eight west European Countries had one or more schemes in operation which secured employee representation on company boards (some of these schemes will be referred to later). In 1981 the *Legal Affairs Community of the European Parliament* adopted its report on the Commission's proposal for the *Fifth Company Law Directive.* Its final draft was almost the antithesis to the *United Kingdom's Bullock* (Report) approach to employee participation by the exclusive means of workers directors.

Industrial Democracy and the United Kingdom

The establishment of the *Bullock Committee* was announced on 3 December 1975 and after a little more than a year the main report was published on 14 December 1976.

The Committee was set up to consider how employees could have a greater say in the decision-making process of large companies. The strong industrial and political position of the trade union was recognised in the membership of the committee and in its terms of reference. The majority of the committee reported in favour of the introduction of employee representatives on the boards of large British Companies to take into account the then existing organisation and practice of management and unions in the country.

To create a better basis for industrial relations the central proposal of the majority report was that employees should have a statutory right to be represented by trade union based employee directors in a single tier board structure in groups of companies and subsidiaries with two thousand and more employees. Under this system the boards of directors of the companies would be constituted by an equal number of shareholder and employee directors with a third group chosen jointly by both sides. This new board would be granted specific non-delegatable and exclusive authority by statute to submit proposals to the general meeting of shareholders on five specific issues; the winding up of the company: the alteration of its memorandum and articles of association: shareholders' dividends: increases or reductions in capital, including the issue of shares on a take-over or merger: and the disposal of a substantial part of the undertaking. Two other functions would be subject to the board's ultimate responsibility; the allocation or disposition of resources to the extent not covered by dividends, capital structure and substantial disposals (planning, investment, research and development, budgeting and political donations) and the appointment, removal, control and remuneration of management.

Senior management would be relied on to prove detailed advice on the formulation of corporate policy and the implementation of board decisions, and would act as an informal or formal management committee. Management could not act unilaterally where ultimate responsibility for a matter rested with the board of directors by law. Shareholders would lose the right to initiate resolutions on the attributed functions above but would retain their power of veto. They would not be able to appoint all the directors. All directors would be under the same duty to take into account the interests of shareholders and workers in subsidiary companies. However, this proposal was blurred by the majority report saying that the employee directors would be accountable to those they represented and to whom they would have to report back on their work. The system, watched over by the British Industrial Democracy Commission, was to be triggered by the request of one or more trade union recognised for collective bargaining proposes and representing at least twenty per cent of the company's work force. It was not to come into operation unless a proposal to introduce it was carried by a ballot of all employees with majority of at least a third of those eligible to vote. If an affirmative ballot was carried then the recognised trade unions in the company would form a joint Representation Committee (if they had not done so already) which would be the equivalent of a company and multi-union shop steward's

committee, including both staff and manual employees. Its main functions would be to negotiate the size of the new board, to arrange for the election or appointment of the employee representatives, to agree a list of union nominees to the board unanimously, to regulate any inter-union rivalries and to act as a link between the board representatives and the membership. The union representative on the board would be appointed for a fixed period of two or three years with possible extensions. The Industrial Democracy Commission would help to resolve any problem which would emerge.

Following these proposals, *section 46 of the (U.K.) Companies Act of 1980* introduced the duty to consider the interest of the employees in addition to that of the shareholders. This was not known to English law prior to the *1980 legislation. Section 46* now provides that:

> "(1) the matters to which the directors of a company are to have regard in the performance of their functions shall include the interest of the company's employees in general as well as the interest of its members.
>
> (2) Accordingly, the duty imposed by subsection (1) above on the directors of a company is owned by them to the company (and the company alone) and is enforceable in the same way as any other fiduciary duty owed to a company by its directors.[3]"

It can clearly be seen, however, that in terms of *subsection (2)* this duty is owed only to the company and not to employee individually. No doubt such a change is welcome because it is intended to reverse previous position which required the directors to take into account the interests of the employees provided that in so doing they ultimately advance the interests of the shareholders that is, the interests of the company. Now what is not made clear by this change is whether and in what circumstances the directors are entitled to subordinate the interests of the shareholders (i.e. company) to those of employee because the change does nothing to alter the legal meaning of "interests of the company" which the courts over the years have always said must ultimately be paramount.

Industrial Democracy and Italy

In Italy the interests of the employees would not have been fully taken into account unless and until the employees' council are given full information and consult before any decisions, such as to wind up a company, was taken by the directors. Thus the *Employees' Council* now has rights to information and consultation. In that sense major decisions lie with directors, but the employees' right to influence decisions is enhanced as they have access to information and thus greater awareness. The Council has other rights; it has right to information on and to be consultated about administration, the situation, progress and prospects of the company, its competitive position and its credit situation and investment plans. The *Employees' Council* also has the same rights as the executive members of the board to progress reports by the executive every three months as well as powers to request special reports on company affairs and to undertake investigation.

Industrial Democracy and Germany

In any debate on industrial democracy some reference must be made to the German system of co-determination which grew out of the post-war reconstruction. Employee representation on company boards was first introduced into the coal and steel industry and then spread into other industries. However, it was grafted on to the peculiarly German system of company management. A large privately owned company in Germany has two boards of directors; there is the executive board and the supervisory board. The executive board has the sole control over the day-to-day

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3 **See 165A of the Proposed Amendments to the Zimbabwean Companies Act Chapter 190 Report No.8 which suggests a similar change.**

management of the company affairs. It is elected by a supervisory board of shareholders' representatives. The executive board makes regular reports to the supervisory board on a wide range of specified matters, including future policy. The prior formal consent of the supervisory board must be obtained for certain major transactions such as plant closures, takeovers and mergers. Laws concerning industrial democracy were passed in 1951, 1952 and 1972. These laws provide for employee representation on the supervisory board and the establishment of works councils concerned with social matters at plant level. Under the *Co-Determination Law of 1976* the supervisory boards of all companies are to be composed of twenty members equally divided between employee and shareholder representative. Of the ten employees' representatives only three are directly linked to the trade unions and the other seven are representative of staff and middle managers.

The chairman of the supervisory board who has a casting vote, cannot be chosen against the wishes of the shareholders' representatives. In addition, companies in the coal and steel sector are required to appoint a labour or personnel director to the supervisory board, who is acceptable to the employees' representatives on that board. The labour director has specific statutory responsibility for industrial relations and for other social matters. Such an appointment ensures that important issues of industrial relations are not ignored in the preparation and discussion of company polices.

In 1968 *Briedenkopf Commission* was appointed to report on how the system of co-determination should be reformed or developed. Although much of the contents of the resulting *Briedenkopf Report* are of historical interest only, some of its findings are of contemporary interest. It found that the formal structures for co-determination had caused the development of a much more extensive informal network of communication between management and employees' representatives at all levels in the company. Secondly, prior negotiations between the parties resulted in almost all decisions at supervisory board level being made unanimously. Thirdly, co-determination did not interfere in established patterns of collective bargaining with trade unions at either national or regional level. The system of co-determination is now firmly established in German. It was the model for the original *Draft Fifth Directive* of the *E.E.C.* German experience does seem to show that effective control of decision-making rests with management and equally it does show that industrial democracy does not necessarily lead to a breakdown of company decision-making.

Industrial Democracy and Sweden

There are other systems of industrial democracy. Thus there is a three-pronged approach to Sweden. Firstly, there is provision for minority representation for employees on the Board of Directors. Secondly, trade unions are granted the right to bargain on any matter. Thirdly, there is a compulsory allocation of a certain percentage of profits for the purchase of company shares by trade union bodies with the result that in a few decades Swedish industry will be largely owned by trade unions.

Industrial Democracy and France

In France the two tier board structure has been introduced as an option available to companies with employee representation on its boards. As in Germany the employee representatives are placed on the supervisory board with management board composed of senior company executives as the second tier. However this option has proved to be troublesome as the two boards in some companies have fought for control of decision-making in certain areas. Herein lies one problem which can emerge if a two tier board structure is introduced instead of system based on a single tier board structure.

The application of the principle of industrial democracy as I have examined would lead to a drastic reduction of the powers of the shareholders' general meeting. In theory the general meeting is the ultimate organ of corporate control. It is the occasion when the shareholders of the

company gather to consider the company's recent performances and it lays down policy guidelines for the future. It is the occasion when the shareholders, and not the employees, can confront the Board of Directors, air their grievances and try to make changes in the Board's composition.

Toward a new Industrial Order

Employees should have a well organised democratic partnership with employers; of course, I take notice of the fact that partners, in order to operate for common goal, must be more or less equal. Employers and employees must be associated closely. The time has come to restore the balance between public welfare (i.e. of employees) and the private interests (i.e. of business interests) between commonwealth and business. I must hasten to point out that this does not mean hostility to business, it only means giving powers of decision-making to the workers so that they can carry out their rightful responsibilities to the industrial enterprise. Among these responsibilities is the protection of the individual against the hazards and exploitation of economic life.

In this time and age we hear it so often said that companies are laying off out their employees because the company is no longer making profit; no more new orders are in sight; recession is affecting the overall performance of the company; the general economic climate is not good; and a host of other excuses. What is sad in all these cases is that it is always the ordinary workers who are dismissed, made redundant or retrenched or suspended indefinitely. The decision-makers usually keep their jobs and no account is taken of their mismanagement of the company's affairs, such as by approving ambitious programmes for capital investment which were never going to be profitable or bad management of general allocation of resources to meet the company's objectives. In all their decision making-processes the interests of the workers hardly feature at all, except when they come to talk about terms and conditions of employment. I submit that the interests of the workers should be taken care of and this could be done more effectively if the workers themselves are also involved in the decision making process.

The welfare of the workers should come first as one American historian *Woodrow Wilson* is quoted as saying;

> "... Property is an instrument of humanity, humanity isn't an instrument of property. And yet when you see some men riding their great industries as if they were driving a car of Juggernaut, not looking to see what multitudes prostrate themselves before the car and who lose their lives in the crushing effect of their industry, you wonder how long men are going to be permitted to think more of their machinery than think of their men ... It is time that property, as compared with humanity should take second place, not first place.. "[4]

The company's ultimate goal should be to meet ever rising moral and ethical standards. Of course, I am well aware of the argument that might be raised by theorists that business serves society best if it concentrates solely upon its economic function. This argument is based on the premises that a corporate's sole obligation is to maximise its profits, thus contributing to a prosperous economic system which in turn will improve the welfare of the society. The proponents of this view however agree generally that business should live up to its legal obligation, for example, keep honest expense accounts, label and weight out its product accurately, and pay its bills and taxes. The problem with this approach is that the undesirable social consequences of business activity are left to the government to regulate or correct. The basis of the argument that profit seeking knows no other bounds is ultimately Adam Smith's "*Wealth of Nation*" idea. Classical economic theory as postulated by Adam Smith maintains that in autonomised markets, perfect competition produces not only the optimum allocation of economic resources but also satisfaction of the general interest. The "invisible hand" of competition keeps

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4 **Cahn, E.N. Social Meaning of Legal Concepts. No.3 - The Powers and Duties of Corporate Management . (New York University of Law) 1950 pp. 277.**

the self-seeking of men striving against each other instead or harming the public. Thus, in open markets serving consumers who are supposed to have complete knowledge of sources of supply and prices and to be motivated to make only the most economical purchases, the general good can best be served by the self-centred drive of survival and efficiency of the entrepreneur or small firms

I submit that company directors of the calibre, integrity, intelligence, and humanity required to run substantial companies can not be expected to confine themselves to their narrow economic activity and to ignore its social consequences. They must be aware that social, political, and economic affairs are increasingly interrelated; they must at least be intuitively conscious that a large "private" corporation is a public institution and that its management is conducted under the guidance of implicit moral value constituting a corporate conscience. The importance of this development is that it will soon put an end to such cliches as the businessman's first obligation is to the shareholders.

It should not be forgotten that although the directors may take the interest of the employees into account when considering the ethical and economic considerations of the company, they are not obliged to do so. In fact the directors are usually concerned with what to do to make them look good in terms of the capitalist system and not in terms of the social needs of the community in which they live. Thus an anticipated pressure to act irresponsibly may be applied by top management. The process of promotion by which persons are moved from place to place so fast that they do not develop concern for the problems of the community in which they live or for effective relationships within which to accomplish anything unintentionaly weakens the participation of directors in community affairs. The tendency to measure directors or executives in divisionalised companies on this year's profits reduces sharply their motivation to invest in social action with returns over longer times.

Labour Relations Act 16 of 1965

As I have already stated above in Zimbabwe employees can presently only be involved in decision-making process to a very limited extent, for example when they discuss terms and conditions of employment. For instance *Section 23* of the *Labour Relations Act of 1985* ("the Act) allows employees employed by any one employer to appoint and elect a workers' committee to represent them. The function of the workers' committee, according to *section 24(1)* of the *Act 24(1)*, is to represent the employees concerned in any matter affecting their rights and interests. The committee is also entitled to negotiate with the employer concerned a collective bargaining agreement relating to the terms and conditions of employment of the employees concerned and, where necessary, recommend collective job action to the employees concerned. The words "collective job action" are defined in *S. 2* of the Act and they mean an industrial action calculated to persuade or cause a party to an employment relationship to accede to a demand related to employment. This includes a strike,boycott, lock-out, sit-in or sit -out. The Act then seems to recognise the fact that, unlike shareholders, employees are not members of the company and the management owes no duties to them except those which any employer owes to his employees. Thus the rights of the employee springs from the contract of service, the terms of which are likely to be determined as a result of collective bargaining undertaken by the employees' trade union(s). It can be seen that the workers here owe their right to collective bargaining backed, in the last resort by industrial action and, no doubt, this has the effect of undermining workers' feelings of loyalty to the firm/company. This helps to contribute to the industrial unrest.

However, the Act provides the necessary machinery for the employers and employees through their representatives to get together to make decision in matters only relating to employment. The employees, however, remain excluded from the major decision-making process in the matters for such as those concerned with appointment of the management board and fixing levels of remuneration of its members, setting the company's objectives and approving its strategic plans (including major expansion and contraction of the company's business), monitoring the

performance of the management board and approving its decisions in specific areas, determining the company's policy on take-overs of and mergers with other companies, convening general meeting of shareholders, making recommendations to the shareholders, setting overall guidelines for employment and personnel policies and supervising the conduct the management board of the company's financial affairs. In respect to financial affairs, the Act compels employers to bargain more widely and disclose more information to trade unions. *Sections 80 and 81* of the Act require the employer to negotiate with the workers committee in good faith. This means if the employer alleges financial incapacity as a ground for his inability to agree to terms or condition or to any alteration of any terms and conditions it shall be his duty under the Act to make full disclosure of his financial position duly supported by all relevant accounting papers and documents to the workers' representatives. This is the first serious attempt by the legislature to support joint decision-making with employees represented solely by trade union machinery, supplemented, perhaps, by legislation to compel disclosure of the company's economic position. However, our company legislation should have taken the lead in compelling disclosure beyond that needed for the information of shareholders and creditors. All documents which the present law requires, for example, directors reports and audited accounts to be made available to shareholders for inspection should also be made available to employees. The employees, then, like shareholders, should have a right to comment on or even approve the directors' reports and accounts. All directors including employee representatives should have a total access to information. This would be a clear advance beyond the limited disclosure duty for the purposes of collective bargaining contained in Labour Relations Law. One could argue that under the system of boardroom representation the employee representative's duty to report back to his constituents can not be reconciled with directors duty not to disclose confidential information. The *United Kingdom's Bullock Committee* in its report earlier refered to thought that the label of confidentiality is used too widely but, of course, one must fully accept the need of confidentiality in certain circumstances, for example, price-sensitive information. But trade union negotiators, already experienced in observing confidentiality for the purpose of collective bargaining and with direct interest in the welfare of the company, would be unlikely to engage in premature disclosure of sensitive information.

Directors' duties and social responsibility and employees interests

Under our present system, the only time when the interests of the employees are taken into account is when the directors, who direct and control the affairs of the company and represent it in its dealing with outside word, act (in the interest of the employees) in their fiduciary duties to their company. This is a duty akin to those owed by trustees to their beneficiaries. It is now convenient to examine this duty in relation to employees and also to the community at large

The primary problem, in connection with this aspect of the fiduciary duty, is to determine what are a company's interests. The traditional view of company law is that the interests of the company are the interests of its shareholders as a general body. This view has not gone unchallenged in the Commonwealth, and support for a wider consideration perhaps finds its expression in the judgment of Burger, J. in the Canadian case *Teck Corporation v Millar*[5]

> 'The classical theory is that the directors duty is to the company. The company's shareholders are the company and therefore no interests outside those of the shareholders can legitimately be considered by the directors. But even accepting that, what comes within the definition of the interests of the shareholders? By what standard are shareholders' interests to be measured? In defining the fiduciary duties of directors, the law ought to take into account the fact that corporation provides the legal framework for the development of the resources and the generation of wealth in the private sector of the Canadian economy. A classical theory that once was unchallenged must yield to the facts of modern life. In fact, of course, it has. If today the directors of a company were to consider the interests of its employees no one would argue that in doing so they were not acting bona fide in the interests of the

5 1972 (33) OLR (3rd) 288

> company itself. Similarly, if the directors were to consider the consequences to the community of any policy that the company intended to pursue, and were deflected in their commitment to that policy as a result, it could not be said that they had not considered bona fida the interests of the shareholders. I appreciate that it would be a breach of their duty for directors to disregard entirely the interests of the company's shareholders in order to confer a benefit on its employees. But if they observe a decent respect for other interests lying beyond those of the company's shareholders in the strict sense, that will not, in my view, leave directors open to the charge that they have failed in their fiduciary duty to the company'.

No doubt this passage represents an eminently practical approach to the problem of a company's interests and should be adopted, in so far as has not been applied in the past, by the Zimbabwean courts.

One particular problem which seems to have arisen is whether a company (through its directors in exercising their duty) may make gratuitous payments to its employees in the interest of the company. In *Re Lee, Behrens and Co. Ltd*[6] it was said that these payments must be made with the intention of advancing the company's interest. In that case *Eve, J.* said that:-

> 'the validity of such grants is to be tested by the answers to the three pertinent questions
> (1) Is the transaction reasonably incidental to the carrying on of the company's business?
> (ii) Is it a bona fide transaction? and
> (iii) Is it done for the benefit and to promote the prosperity of the company?'

According to *Eve, J.* his three pertinent questions apply whether the gratuitous payment are made under express or implied powers. This has, however, been doubted, and *Pennycuick, J.* in *Charterbridge-Corporation Ltd v Lloyds Bank Ltd*[7] did not think that Eve, J really intended to apply his third question to express powers because the memorandum of the company sets outs it objects and proclaims them to persons dealing with the company and it will be contrary to the whole function of the memorandum that objects unequivocally set out in it should be subject to some implied limitation by reference to the state of mind of the parties concerned. Here again only the managing directors have a say in the matter on whether or not such payments should be made in the interests of the company.

Conclusion

The sorts of legislative interference in Labour Relations outlined above demostrates the limits of the voluntary solutions which were tied. These legislative interference transforms the statutory participation model into a dominating element of public policy which both the company directors and workers' representatives working as a board cannot ignore. The reference to the paramount importance of the company's benefit is of course nothing new within Company Law. It was first used to underline the independence of directors. By emphasing the company's best interest the courts pointed out that no director is bound by the sectional interest of any member. He has, on the contrary, to adopt a long-term view respecting the position of both the present and the future members.

The company's interests thus justify, in the eyes of Company Law, decisions which at first may seem absolutely incompatible with the wishes of, at least, some owners. The statement made by an English judge Lord Greene M R in *In Re: Smith and Fawcett*,[8] that the foremost duty of directors in managing the company is to act always *bona fide* in what they consider, not what the court may consider, is in the interest of the Company and not "for some collateral purpose", describes certainly a rule common to most Company Laws. But equally common is the ultimately decisive question, what the constantly cited phrase "interest of the company" real mean?

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6 [1932] 2 Ch. D. 46.

7 [1970] Ch.D 62.

8 [1942] Ch.D 306.

The acceptance of a genuine interests of the company not only augments sensibly the discretionary powers of management with respect to the owners, it also permits control of any other activity within the company. This has led to some writers[9] to say that once the independence of directors has been acknowledged, the company begins to develop what has be described as "corporated conscience". This means that the directors must exercise their powers in the interest of not only the company and its owners but also in the interests of the employees and the community at large. Thus the corporate power should be applied to socially desirable ends.

9 For example Berle in the 20th Century Capitalist Revolution 1956 P.61 esp. 113 and 169.