

COMPANY LAW IN ZAMBIA - ITS IMPACT
ON MEMBERS CREDITORS AND WORKERS

A dissertation submitted in partial
fulfilment of the requirements for
the degree of Master of Laws at the
University of Zambia.

by

Munalula V. Lisimba

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A B S T R A C T

The title of this dissertation is Company Law in Zambia : Its Impact on Members, Creditors and Workers. The dissertation is concerned mainly with company law in Zambia and attempts to examine the nature of this law especially as it affects the members, creditors and workers. It seeks to show that company law is archaic and has maintained its colonial character and form since its adoption from England in 1921.

There has been many changes in Zambia affecting social and economic life of people, for example, take-over of key mining and industrial concerns, the adoption of Humanism as a national philosophy and as a basis for social engineering, and the introduction of industrial democracy as a policy in industrial relations. Company Law, however, has not been responsive to these changes and in fact lags behind them. As a result it has become an inappropriate regulatory instrument of corporate rights and obligations of members, creditors and workers as envisaged by the new economic and social order.

Further this paper will show that the present company law is capitalist and protects only the rights of members and creditors and not those of workers. This is in direct conflict with the Philosophy of Humanism as typified in the policy of industrial democracy.

Apart from having no provision to protect workers those provisions relating to members and creditors are out of date and need complete revision. They have been outlived by time and are not in keeping with modern business management techniques. The subject of this inquiry

therefore is to highlight the salient aspects of company law which affect members and creditors and to propose changes that will be necessary in order to up-date the law by extending its application to the workers.

In pursuing this inquiry this paper has been divided into three main parts. The first part deals with company law and economic change. An initial attempt is made here to try and examine the nature of company law from its historical background. Zambia Company Law is based on English Company (Consolidation) Act of 1908 which was principally a capitalist legislation. Under that Act ownership and control were vested in those who owned shares in the company and not workers. The present English Company Law has not changed significantly in this respect and shareholders still reserve the right to hire and fire management with minimum recourse to the workers. This is the law which was inherited and is still in force in Zambia. The only difference however is that whereas English Company Law has through time been constantly changed according to the needs of the English Society, the Zambian Company Law has not. Thus one finds that despite the Party and Government Policy of involving workers in all the affairs of their companies the applicable law stands in direct contradiction to this policy.

Further the success of the Economic Revolution initiated in 1967 involving the take-overs of key mining and industrial concerns largely depends on the regulatory law that will put it into effect. Law is the instrument through which state objectives may be realised. If it is archaic

it will defeat those objectives. Part One therefore exposes the unsuitability of the present company law and suggests that the Economic Revolution will only succeed if the Company Law rules are revised so that provision is made for regulating the economic activities in accordance with the state objectives of acquiring ownership and control. It is further suggested that the corporate base of ownership and control should be changed from a purely capitalist to a socialist one which will recognize the need for workers' participation. In other words whereas there is a need to vest the power of control in the state from the metropolitan capital owners, there is also a growing demand for workers to participate in management and ownership of the State-controlled companies. This does not mean that workers' participation should be restricted to the state-controlled companies but that the state companies should pave the way for the private companies. Workers being part of the public have a stake in state companies and their position in relation to these companies will be enhanced even more if they were allowed full involvement.

The idea of workers' participation will entail substantial variation of the present rules relating to protection of members and creditors' rights. This aspect is amply brought out in Part Two of the paper. The line of thought is that the source of protection is membership in the corporation. It is only membership that confers the rights of attendance at meetings, voting and dividends. Because workers are not members they are not entitled to these rights. Any scheme intended to give rights to workers should therefore start by conferring on them the right to membership of the company. Hence company law should be changed to provide for membership based on both capital and labour. When this is done and upon satisfying certain

criteria as to length of service, good conduct et cetera workers should be entitled to become members.

Apart from membership rights Part Two further stresses that workers should be entitled to those rights which are generally conferred on or reserved for the creditors. Workers should have the right, for example, to object to the passing of a resolution to reduce share capital of the company if such a move will be prejudicial to their interest. They should also be entitled to petition for winding-up if the company fails to pay its debts or if the substratum and all the objects of the company have failed. One may admit that it is going too far to confer these rights on the workers but a counter view is that workers are in an inherently weak position which needs special protection. This is only possible if they are given wider powers than the general shareholders.

Protection of workers' rights will also be enhanced if they have the right to disclosure of information which is presently restricted to members and creditors. This category should include disclosure of company accounts and the right of access to directors' and auditors' reports. The problem at the moment is that most of the rules relating to these matters are very old and scanty and in order to give effective protection to the workers they require to be revised so as to ensure full, accurate and detailed disclosure of corporate information.

Directors occupy strategic and influential positions in the company which they can abuse to their own advantage by using inside information. To avoid or at least minimise such abuse it has been argued under Part Two that directors should be compelled to disclose insider interests. Presently there is nothing in the Companies Act to govern this aspect.

The Leadership Code Regulations which require leaders to declare their assets and liabilities should be extended and strengthened and should include disclosure of the Leaders' beneficial interests. Such a provision should necessitate the amendment of the Companies Act so as to facilitate disclosure of trusts and beneficial interests which are prohibited.

Assuming it is accepted that company law rules should be revised, then Part Three outlines in greater detail proposals for participation of workers in company law. It is true that under the present law some progress has been made in the area of participation but unfortunately this is restricted to decision making through the Works Councils. The nature of participation is also purely consultative for Works Council members do not participate directly in making decisions.

Again workers unlike shareholders have no legal representation on the board of directors. Hence the effectiveness of the Works Council is greatly minimised. In the absence of workers' representation on the board which is the directing and policy-making organ of the company it is difficult to conceive how meaningful participation is possible.

Another submission is made under Part Three that workers should participate in equity by owning shares in the company. This should give them the rights to attend shareholders meetings and to vote. In line with this submission three modes of participation have been suggested catering for companies with large amount of retained profits and for small companies.

Once you have managed to involve workers in decision-making and in equity through appropriate amendments to the Companies Act and related Laws then you will have gone a long way in changing company law from a capitalist to socialist one and thereby sharing the power of control between the shareholders and creditors on the one hand and workers on the other.

A C K N O W L E D G E M E N T S

After attending the National Symposium on Industrial Participatory Democracy at Kabwe in July, 1976, I developed intense interest in the problems of the workers and the question of how their worthiness, first as workers and second as human beings can be reflected in our corporate system. When choosing a topic for my LLM dissertation, I therefore felt constrained to write on this area.

In the early days of my research I had the kind guidance and supervision of the late Professor J.T. Craig to whom, post-humously, I feel very indebted. Thereafter, I encountered some difficulties in finding another supervisor and at some stage I abandoned the project altogether. However, through special encouragement from Dr. Lawrence S. Zimba, Assistant Dean of the Law Faculty and a long time school-mate and friend, I resumed the research. My special thanks go to him.

I wish to give great appreciation to Dr. John M. Mulwila also of the Law Faculty, who, at short notice and under pressing circumstances agreed to substitute the late Professor Craig as my supervisor. I have earned valuable experience from his extensive knowledge and research of parastatals and company law in Zambia.

Words may not be sufficient to express my indebtedness to Grace C. Mumba, my secretary, who typed this work and to all the many people who assisted me in innumerable ways.

Above all, I am indebted to my family for their patience, support and understanding while I was doing my work.

But, none of these people is responsible for any errors, I am responsible for them.

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P A R T 1

COMPANY LAW AND ECONOMIC

CHANGE

I N T R O D U C T I O N

The late Kwame Nkrumah, first President of Ghana, said, the paramount task before the newly independent nations of Africa is the raising of an equitable and progressive order which will provide food, clothing and shelter to meet the needs of the people in accordance with their means, a social order that will reflect a higher standard of living in the happiness of our people. Economically, this means full employment, good housing and equal opportunity for educational and cultural advancement up to the highest level possible for all people. In concrete facts, it means farmers and peasants must rise, that prices of goods must be within the means of all groups that educational and cultural amenities must be available to all people.¹ Putting it in a nutshell, President Kaunda of Zambia stated that "Political independence without matching economic independence is meaningless. It is economic independence that brings in its wake social, cultural and scientific progress of man."²

These pronouncements by two of Africa's prominent past and contemporary leaders clearly re-affirm the notion that "in every society it is not only necessary to safeguard and advance the civil and political rights of the individual but also to establish and foster social educational and cultural conditions under which his legitimate aspirations and dignity may be realised."³ They further indicate that emergent states recognize and accept the duality of independence as being political and economic emancipation.

But how can new nations realise these aspirations? In other words, what instrument can bring about or advance the desired economic and social conditions in these nations? Meir Heth suggests a tentative answer that, economic activity being an essential sphere of action (should be)⁴ carried within a complex local framework. This framework of institutions, rules and conduct both permits the undisturbed pursuit of various activities and imposes restrictions on the freedom of conduct.⁵

Restated, it means in any legal system both economic and social conditions should be regulated by dynamic legal rules and when there are changes in these conditions there should be parallel changes and adjustment processes in the legal rules. Law thus should answer the needs arising from major economic and social changes and should not act as a brake to economic and social progress. Rather it should harness and enhance such progress. Unless this is so law will cease to be an instrument of change and instead will become a hindrance to such change.

In the performance of its function law therefore should reflect the aspirations and objectives of the society for which it is intended to serve and must relate to the character of the institutions it is designed to regulate. This is not to suggest that law should not bring about social and economic change in the sense of shaping institutions and thus playing a creative or leading role in development as opposed to a following role, but it is to emphasize the cardinal point that even if law is assigned the paronchial functions of regulating institutions it should keep pace with changes in those institutions.

The predicament of many newly independent countries particularly those in Africa is that though there have been major economic and social changes there have been very few or no parallel changes in the applicable laws with the result that pre-independence legal rules continue after independence. This is particularly true with company law than perhaps with any other branch of law. In these countries company laws remain the same as they were several years before independence and have assumed an immutable status and appear to have reached a state of finality. In fact the majority of corporation laws in these countries have not been revised since they were *inherited from colonial governments. Zambia is not an exception* to this problem. In fact company law in Zambia may be more

archaic than most of the company laws in Anglo-phonetic independent Africa.

Zambia, a former British colony, inherited English Company Law which is capitalist and was designed to regulate and protect private companies. After independence this system of company law became increasingly unsuitable to the needs of the country especially as new leaders wanted the state to assert and assume a more effective role in the management of the strategic mining and industrial concerns. This was only possible by take-overs of those concerns which hitherto were owned and controlled by private capital. Take-overs however did not affect the form and structure of inherited company law which continued to be applied and enforced in its entirety without regard being had to the changed needs of the Zambia economic system. The result is that there has been a growing gap between company law on the one hand and commercial practice and procedure on the other.

Further in an effort to introduce human element in corporate management Zambia introduced workers' democracy which has been achieved partially through the introduction of Works Councils. However an effective form of industrial democracy would require not only participation in decision-making through Works Councils but also participation in equity. Such an effort will be futile, of course, unless it is backed up by an up-to-date system of company law where workers' rights will be clearly articulated. It will therefore be suggested that whereas take-overs have brought about the transfer of ownership and control of the economy to the state such control should be extended to workers too. When the inherited system of company law is re-structured it may be possible to procure to the workers full participation.

The re-structuring of company law should necessitate the alteration of the rights and duties of the members, creditors and workers in that the former two will have to relinquish certain of their rights to the latter. This will have an avoidable impact on the members and creditors although at the same time it will help to bring about proper balance between members and creditors on the one hand and workers on the other.

The process of re-structuring company law should involve extensive amendments to the existing rules relating to members, creditors and workers with a consequent need to adjust their rights and obligations so that workers assume an equally prominent position in the corporation as the other two.

In the context and for the purpose of this dissertation company law is defined very broadly as being the total of those legal principles which regulate both large and small scale organisations of industrial and business management and finance in most branches of economic life and which define the relative rights and duties of those participating in those organisations and delimit the powers of the organisation vis-a-vis the external world.⁶ So defined company law should cover not only the Companies Act Chapter 686 of the laws of Zambia but also other related business legislation like the Co-operative Societies Act,⁷ Registration of Business Names Act,⁸ Trades Licencing Act,⁹ Industrial Relations Act,¹⁰ and such similar Acts. Through-out this paper, unless otherwise stated any reference to the Companies Act means the Companies Act as cited hereinabove.

References

1. Dr. Kwame Nkrumah: "Some Aspects of socialism in Africa," in "Pan Africa (Nairobi) April 19, 1963 P 13 reprinted in Friendland and Rosbery, African socialism (Stanford U. Press, 1964) pp. 259 - 263.

CHAPTER 1

COMPANY LAW IN THE HISTORICAL PERSPECTIVE

The present Companies Act is archaic and in many respects presents a picture of considerable uncertainty. It is unsatisfactory and totally unrelated to the economic and social changes that have taken place since Zambia attained independence in 1964. In a great measure the Act is not at all an effective instrument for the creation of an egalitarian corporate structure in which workers assume an equal participative role not only in production but also in the decision-making process and in equity.

In order to understand how unsuitable and irrelevant company law is to the present circumstance of Zambia it is imperative perhaps first to look at company law in its historical perspective and then try and evaluate whether its unsatisfactory nature arises and can be explained from such a historical stand point.

It will be noted from the very start that the history of company law in Zambia is very short. In fact it only dates as far back as 1921 when the first legislation to provide for the formation management and administration of companies in the then Northern Rhodesia was made. In that year the Northern Rhodesia Companies Proclamation (No. 18 of 1921)¹ was promulgated by His Royal Highness the High Commissioner of Cape Colony,² who represented the Queen of England. The proclamation was based on the British Companies (Consolidation) Act of 1908 which was the applicable law then in England. At that time Northern Rhodesia was under the rule of the British South Africa Company (B.S.A.) which was a British Company incorporated in England in 1889 by a Royal Charter and operated both as a commercial company and government for

Northern Rhodesia and Southern Rhodesia from its year of incorporation to 1924.³ As a government the B.S.A. played the role of a caretaker for the Queen, who through the High Commissioner of Cape Colony, retained and exercised legislative functions in the two colonies.

Before the introduction of the Companies Proclamation of 1921 Northern Rhodesia, like Southern Rhodesia, was using a system of registration of deeds based on a system analogous to that in force in the Cape Colony. Under that system which was inaugurated to the two Rhodesias in 1891 a principal registry was established in Salisbury and a branch office in Bulawayo where articles of association of companies with limited liability were recorded. By government notice 68 of 1898, form B of the Act No. 25 of 1892 of the Cape Colony was formally adopted in the two Rhodesias as the form of articles of association of unlimited company having a capital divided into shares. After this notice there were therefore two types of companies in Rhodesia namely a company with limited liability and a company with unlimited liability.

The Northern Rhodesia proclamation of 1921 did away with unlimited companies and only provided for incorporation of companies with limited liability, thus reverting to the legal position as it was before 1898. To the present day the Companies Act only provides for companies with limited liability.

Under the present Companies Act liability may be limited either by shares⁴ or by guarantee.⁵ The liability of members in respect of companies limited by shares is limited to the amount, if any, unpaid on the shares respectively held by them⁶ and for guarantee companies liability is limited to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up.⁷ Both these companies may either be public or private.

The distinction between a public and a private company lies in that a private company should in its articles restrict the right to transfer its shares, limit the number of members to fifty and should prohibit any invitation to the public to subscribe for any shares or debentures of the company.⁸ A private company therefore cannot file prospectus.⁹ Also directors of private companies do not need to lodge consent to act as directors as is the case with directors in public companies.¹⁰

As to the formalities of incorporation section 8 (1) (a) requires that the memorandum of association of every company should state the name of the company with 'limited' as the last word of the name. But this requirement applies to both types of companies; consequently it is difficult to distinguish one type from the other by merely reading the name of the company. To avoid this confusion it is suggested that the word 'limited' should be reserved to companies with shares and to the names of guarantee companies could be sub-joined the statement 'limited by guarantee'.

Again in respect of a guarantee company the undertaking to contribute to the assets of the company in the event of winding up should be for a specified figure which should exceed a certain minimum, say one thousand kwacha. This would avoid the present practice whereby members undertake to contribute a sum as low as K2.00 thereby rendering the advantage of the undertaking completely nugatory. In the same vain a company with share capital should have a minimum amount of fully-paid capital. For example, every company with share capital should be required to have ten per cent of its nominal capital as fully paid up. This will limit the proliferation of under-capitalised companies.

Turning specifically to guarantee companies two forms are recognised under the Act namely a guarantee company with share capital¹¹ and a guarantee company without share capital.¹²

In respect of the former type Section 9 (2) of the Act provides, inter-alia, that for the purpose of the provisions relating to the memorandum of a company limited by guarantee every provision in the memorandum or articles or in any resolution of the company purporting to divide the undertaking of the company into shares or interests shall be treated as a provision for a share capital, notwithstanding that the nominal amount or number of shares or interests is not specified thereby. This section undoubtedly creates double liability for the members in that while the company is a going concern they are liable to pay up to the nominal amount of their shares and when the company goes into liquidation they are liable on the guarantee as in the case of an ordinary guarantee company without share capital.¹³

The obvious intention of this provision is to enable the company to raise initial capital from members and to distribute any incidental profits while at the same time taking advantage of the members undertaking to contribute to the assets of the company in the event of winding up.

Notwithstanding its advantages the guarantee company with share capital is very unpopular in Zambia. In fact from 1921 when the first Companies Proclamation¹⁴ was made up to June 1979¹⁵ there has not been a single such company registered with the Registrar of companies. This clearly demonstrates that there is no demand for this form of guarantee company at all in Zambia and there is no indication whatsoever that it will now or in future be used or required. The provisions of Section 9 (2) are therefore superfluous as they regulate matters which are mainly academic. This section is undesirable as it creates the possibility of incorporating hybrid companies, a thing which is not only unnecessary but has also the negative effect of adding to the complexity of the Companies Act.

As for the guarantee company without capital it has, too, been rarely used and its popularity is decreasing yearly. Thus whereas during the period of January 1, 1962 to December 31, 1969 there were on the average three such companies registered every year, this figure was drastically reduced to an average of one company per year for the period January 1, 1970 to December 31, 1977.¹⁶ The majority of the registered guarantee companies are recreational clubs,¹⁷ charitable¹⁸ and religious organisations¹⁹ which are mainly public companies. There are very few such companies that are commercial.

It is difficult to account for the decline in the number of guarantee companies but one reason for this may be that due to economic recession through which Zambia is passing there is very little or no investable surplus capital that could be deployed to form charitable organisations. The limited capital that is available is used in profit making ventures. Also the country may have already a sufficient number of such organisations so as to disperse with the need for more. The other reason could be the unfavourable government attitude towards the formation of private quasi-charitable organisations such as schools, colleges and hospitals.²⁰ Such attitude may have frustrated many entrepreneurs who could otherwise have invested in such ventures. Due to limited Government resources however there are indications that private capital can now freely participate in running such organisations.²¹ On the other hand companies limited by shares have increased annually since the first company was incorporated on February 1, 1922.²² Thus for the period of 30 years commencing from 1922 there were approximately 500 such companies registered with the Registrar of Companies. But over recent years almost the same number of companies are being registered per annum.²³ This increase shows a growing demand for this type of company, a trend that may be explained by the fact that Zambian businessmen are becoming more and more profit-oriented and that the best method of achieving such an objective is by using companies limited by shares for such companies normally provide in their memorandum and articles for participation by members in any earned profits. The increase may also be an indication of the continuous growth of the Zambian economy.

It is necessary to note that the companies Proclamation of 1921 was a capitalist piece of legislation which was imported to Zambia in order to serve the economic interest of imperialist capitalism. Its substantive provisions have since that year remained the same and have never been consolidated or substantively amended. The only changes that have been made to that legislation since 1921 are simply piecemeal amendments recognizing the particularity of political changes, namely the substitution of proclamation for Ordinance, Ordinance for Act, Board of Trade for Minister, Northern Rhodesia for Zambia. As for the corporate structure and content they have remained the same. In essence this means that the present Companies Act is a verbatim copy of the British Companies (Consolidation) Act of 1908 for it is upon that Act that the Northern Rhodesia Companies Proclamation was based. The only major distinction between the British Act of 1908 and the Companies Act is that the latter does not provide for unlimited companies whilst the former did. Otherwise in other respects they are the same.

The British Act of 1908 has however, since 1908 been extensively amended with a least ~~two~~ consolidations, one in 1920 and the other in 1948. Subsequent to these consolidations the British Act had had substantial amendments in 1967, 1976 and 1980. All these consolidations and amendments were necessitated by the changing needs of the British Society. The Act of 1929, for example, reflected the detailed systematic review undertaken by the Greene Committee by providing for more and more protection not only of shareholders and creditors but also of the general public. This was achieved by compelling the publication of the profit and loss accounts for public companies, a significant step from the Act of 1908 which only required the filing of balance sheet and financial statement. As the Cohen Committee put it in 1945 the Act (of 1929) was intended "to ensure that as much information as is reasonably required shall be made available both to the shareholders and creditors of the companies concerned and to the general public."²⁴

As for the British Acts of 1948 and 1967 they further introduced major stringent requirements in connection with disclosure of information in prospectus and accounts and directors' reports. Thus Section 25 of the Act of 1967 makes certain dealings by the directors illegal and Section 18 requires directors to disclose average number, by the week, of the number and remuneration of persons employed in a year. Section 20 even goes further to require disclosure by certain companies of particulars of exports. As for the Act of 1976 it re-enforced the law relating to preparation and presentation of accounts of companies. There has been extensive amendments of the accounting and disclosure rules in Britain in 1980.²⁵ All these changes reflect clearly a significant response by the British Company Law to business developments and thinking and a genuine attempt at modernisation. This is what is required of a dynamic law for as O Kahn - Freund put it "Business organisation being in constant state of flux, law cannot hope to keep abreast of developments if it ascribes to its own provisions the quality of immutability."²⁶ Thus company law in particular should not, unlike other branches of commercial law be content with setting up a stable framework and leave the function of adaption to the contractual practice of business community itself. As soon as privileges have been made available or rights conferred on members creditors or workers it must be on the alert to protect such privileges or rights against abuse.

The basic problem with Zambian Company Law is that it is still comprised of legal rules that were applicable in England in 1908 or before, but which rules have since been inoperative even in the country of origin. There has been many changes in Zambia since 1964 affecting the rights and privileges of workers but there has been few parallel changes in company law. Instead company law only continues to protect the shareholders and creditors much to the hindrance of full and effective worker participation and business development.

No doubt that when the company proclamation of 1921 was made it was a relevant instrument to regulate corporate activities of that time. But with the advent of independence and economic changes connected with it that legislation is now totally inappropriate. For example because the proclamation or the Companies Act was intended to regulate activities of private companies, it makes no provision for the management and control of parastatals²⁷ with the result that there is no guidance on the relationship between holding companies and their subsidiaries. Even the Parastatal Bodies Commission Act (No. 18 of 1976)²⁸ rendered very little assistance in this regard as that Act only provided for the establishment of the Parastatal Bodies Service Commission and for the creation of substantial parity in terms and conditions of service of public officers and employees of Parastatal Bodies.

Again the Companies Act only provides for disclosure to members and creditors but not to workers notwithstanding that the Industrial Relations Act²⁹ requires disclosure to workers of certain information on corporate activities. Clearly therefore the Companies Act needs a complete overhaul if it is to serve the interest of the Zambian business community. There has been many changes since 1921 and it is not proper to continue applying legislation which is so archaic. The present circumstances in Zambia dictate that a new Companies Act should be enacted so as to provide for the changes that have taken place since independence. In particular the Act should change from its present capitalist base to a more participative one which would allow for workers' involvement.

References

1. Proclamation No. 18 of 1921 - National Archives Lusaka.
2. See B.S.A. Company reports on the Administration of Rhodesia 1897 - 1900 Vol. II - National Archives Lusaka.
3. In 1924 the British South Africa Company Limited relinquished all its governmental responsibilities and henceforth continued only as a commercial concern - National Archives Lusaka.

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4. S. 4(a)
5. S. 4(b)
6. S. 7
7. S. 4(b)
8. S. 5
9. Public Companies are required to file such prospectus - S. 69
10. S. 63 (3)
11. S. 9(2)
12. S. 9(1)
13. See generally L.C.B. Gower: "The Principle of Modern Company Law" 3rd Ed, Stevens & Sons, p.12
14. Northern Rhodesia Companies Proclamation No. 18 of 1921
15. Date when search was made in the Companies Register at Lusaka.
16. Information extracted from the Companies Register Lusaka, June 1979
17. E.G. The Copperbelt Turf Club Limited, Lusaka Flying Club Limited and Pilots and Aircraft Owners Association.
18. E.G. Makeni Ecuminical Limited and the Defunct Zambia Medical Aid Society Limited
19. E.G. the New Apostolic of Zambia
20. Medical Aids and Nursing Homes were dissolved by Zambia Medical Aid Societies and Nursing Homes (Dissolution and Prohibition Act - No. 21 of 1975)
21. Already private companies like Academy of Business and Accountancy Zambia Limited have been allowed to operate private educational institutions. (e.g. Midlands High School opened by the same company in January 1978 in Lusaka). There a number of private schools operating in the country.
22. Northern Rhodesia Creamery Limited - Register of Companies Lusaka.
23. Information extracted from Companies Registry Lusaka, June 1979.

References cont'd

24. CMD 6659 Paragraph 5.
25. See the Companies Act 1980, Parts IV and V.
26. O Kahn - Freund: "Company Law reform - A Review of the Report of the Committee on Company Law Amendment" (9 M.L.R. 1945 from Page 235).
27. For full details see below Chapter 2.
28. Now repealed by Act No. 14 of 1979.
29. Chapter 517 of the Laws of Zambia S.S. 70 - 73 - For details see below Chapter 5.

CHAPTER 2

ECONOMIC REVOLUTION AND STRUGGLE FOR CORPORATE CONTROL

The proposition is that the legal framework within which commercial activities operate should continually be adapted to the changing economic and social needs of the country. It is not desirable to have divergence between law and legal institutions on the one hand and business development and practice on the other because when this happens law ceases to be an effective instrument of change. If it has to serve its purpose law should not conflict but should change in accordance with the national policies and objectives.

Independence changed the political system, but it did not itself change either the structure of business organisation or the basic character of the economy. As a result property and its distribution is still regulated by capitalist rules and occupies a central and decisive role. In the capitalist system ownership of property confers on the proprietor a dual power, to enjoy and command. The right to enjoy property and right to command tend to be joined in the owner, reflecting the tendency for ownership to be dissociated from labour. The owner of industrial assets therefore is a commander merely by virtue of his ownership of the tools of production. This differs significantly from the socialist system in which ownership and labour are usually connected and the enjoyment of property and the limited command function are tightly tied to ownership¹. The African system is also based on this premises.

It was because of the need to re-structure the capitalist legal and economic systems that Zambia adopted Humanism as a national philosophy and a basis for economic and political organisations.

In accordance with this philosophy it became necessary to adopt a new industrial policy and to democratise participation in corporate management. A decision to change from capitalism to Humanism would only be meaningful however if the legal substratum is also changed. In this chapter we shall outline first the measures taken by the Government to assert control in commerce and industry and secondly we shall analyse the extent to which these measures have managed to reshape the inherited corporate institutions and whether this has brought about effective transfer of control not only to the Government but to the workers too.

a) Struggle for corporate control:

One of the principal objectives of the people of Zambia is to create a mixed economy, an economy in which both public and private organisations are permitted to operate subject to the cardinal principle that 'the power of the private entrepreneur should be subordinate to that of the community'.² This principle is founded in the philosophy of Humanism which advocates the creation of a man-centred society, a philosophy which is in accordance with the African way of life. In the words of K.D. Kaunda, "African society has always been man-centred. Indeed this is as it should be in the sense that all human activity centres around man."³ He further asserts that our society through its institutions "must fight with all it has at its disposal against the exploitation of man by man in whatever field."⁴ This means creating an equilibrium "so that our society is not destroyed by the upsurge in our people of the instinct to accumulate more and more wealth so that in the end it is done at the expense of the importance of man."⁵

In an effort to create a man-centred society and in order to eliminate exploitation of man by man Zambia embarked on a systematic programme of effecting state control of the national economy through take-overs. Under this programme the Economic Reform initiated by President Kaunda in 1968 and expounded and extended in 1969 were ushered in with a view to re-organise the Zambian economy so as to increase the capacity of Zambians to control their own economic destiny.⁶ This was the only way for the country to achieve its goal of economic independence under Humanism.⁷ The Economic Reforms brought about the take-overs of the industrial and retail sector and the mining sectors.

Regarding the first sector the Government took-over 51 per cent shares in 24 companies in 1969⁸ and a further 51 per cent shares in 5 other companies in 1970 while one company United Bus Company of Zambia Limited was taken 100 per cent.⁹ The majority of the industrial and commercial companies that were taken are now 100 per cent owned by the Government.¹⁰

The basic consideration for the take-overs of the industrial and mining concerns was control and this was necessitated by the behaviour of the foreign firms in Zambia. During the Federation of Rhodesia and Nyasaland¹¹ and even before, the tendency was for secondary industries to be concentrated in Southern Rhodesia, while Northern Rhodesia remained a supplier of revenue from the copper mining industry and a market for manufactured goods.¹² It was not only the Southern Rhodesia industries which served Northern Rhodesia but also those of South Africa.¹³ It has been the custom over many years for Zambian subsidiaries to be administered from the South. Most foreign firms looked to Southern Rhodesia or South Africa for supplies and stock. After the Unilateral Declaration of Independence in Rhodesia in 1965 the companies went on as before, although it became increasingly clear that this was contrary to Government Policy, especially as Zambia responded to the United Nations call to impose sanctions on Rhodesia.¹⁴ She was also

committed to reducing her dependence upon imports from South Africa. Despite Government appeal many firms appeared unwilling to seek alternative sources of supply elsewhere or to explore the possibility of import substitution. They resisted the creation of companies with genuine bases in Zambia. Some of them even assisted in circumventing economic sanctions.¹⁵

These problems existed in the industrial sector as well as in the mining sector. It was because of this that the Government also decided to take-over 51 per cent shareholding in all the mining companies, which, until then, were owned and operated by two groups of companies, namely Roan Selection Trust Group (RST) and Zambia Anglo-American Company (Zamanglo).

The take-over of the mines consisted in the creation of the two new companies - Roan Consolidated Mines (RCM) and Nchanga Consolidated Copper Mines (NCCM). The 51 per cent shareholding which was acquired by the State through ZIMCO was credited as fully paid in return for ZIMCO bonds and loan stock. Subsequently the State interest was vested in the Mining Development Corporation, but now is directly vested in the Government through the Minister of Finance. The minority interest in NCCM is held by Zambia Copper Investments (ZCI), a wholly owned subsidiary of Zamanglo. Both ZCI and Zamanglo are registered in Bermuda.¹⁶ In RCM the 49 per cent was split as follows:-

- RST (International) a wholly owned subsidiary of American Metal Climax Inc. - 20 per cent, ZCI 12.25 per cent and the general public 16.75 per cent. Both RST and American Metal Climax are incorporated in the United States. The terms of take-over and participation were contained in a series of legal instruments. The main agreement was the Master Agreement between RST and Zamanglo on the one hand, and the Government and ZIMCO on the other hand. It set out the basic terms and principles for the acquisition of the 51 per cent interest.¹⁷ All other instruments were subsidiary to it, and these were :

- (a) Indenture and Trust Deed Creating the Bonds and Loan Stock of 1970.
- (b) Management and Consultancy Contracts between RCM and RST, NCCM and Zamanglo: appended to Explanatory Statement to Shareholders issued by RST Limited dated 30th June, 1970.
- (c) Memoranda and Articles of Association of RCM and NCCM.
- (d) Sales and Marketing Contracts RCM/RST and NCCM/Zamanglo.
- (e) Arbitration Agreement.
- (f) Memorandum of Undertaking and Schemes of Arrangement under the Companies Act.
- (g) Acts of Parliament e.g. Mines Acquisition (Special Provisions) Acts 1970 to 1973.

The take-over of the mines like the take-over of the Commercial and industrial companies, was mainly contractual. And as in all contracts the ultimate terms are largely determined by the bargaining strengths of the parties. The question which must be asked, therefore, is whether the agreements were so structured as to provide a power for the achievement of the State's policy objective of control? An answer to this question will only be found if the principal provisions of the agreements referred to above are examined in some detail.

The first provision related to payment and was to the effect that 51 per cent interest was to be based on the book value, appearing in the audited accounts of each group at 31st December 1969. For Zamanglo it was 178.7 million US Dollars and for RST 117.8 million US Dollars. RST was issued ZIMCO Bonds redeemable over 8 years and Zamanglo Loan Stock repayable over 12 years, both at 6 per cent interest. All repayments which were to be made out of mining profits were to be in US Dollars in equal half yearly instalments. In each case the state was bound to pay a guaranteed minimum annual sum of 15 million US Dollars. This amount was to be paid irrespective of the level of the copper price or

whether or not the mines were actually producing saleable copper or any copper at all.

Further, repayments were to be accelerated if dividends received by the State exceeded 28.6 million Dollars after the first year. In the event two thirds of excess above that figure had to be applied in redemption. But if the converse situation arose i.e. a drastic fall in dividends no provision was made to decelerate repayments or suspend or extend period of repayments. This was highly inconsiderate as it disabled the State even to save any money for repayments during lean years. To that extent the burden that could arise in the event of copper prices falling or natural disaster occurring would be unbearable. For example in 1970 when Mufulira Mine sustained a cave-in and production had to be suspended, repayments had to be honoured.¹⁸

The provision that all repayments were to be in US Dollars was also very unfair in that Zambia had to commit a very large portion of her foreign exchange resources to these deals more than she should otherwise have done if she had a voluntary option. This provision was intended as a safe-guard against Kwacha devaluation and was never in the interest of Zambia for at the time when it was made the prices of Zambia's number one foreign exchange earner, copper, were falling and continued to fall thereafter.¹⁹

Turning to Management and Consultancy Contracts and Sales and Marketing Contracts, they provided that RST and Zamanglo were to provide to RCM and NCCM all managerial, financial, technical and other services which included planning of operations, production and of capital expenditure, engineering and metallurgical services, expatriate staff recruitment and purchasing outside Zambia. Both contracts were to run for a minimum period of 10 years and thereafter they could be terminated on two years notice or until the redemption of the Bonds and Loan Stock whichever is the later. Similarly the right to nominate Managing Directors for RCM and NCCM was vested in RST and Zamanglo as Management Companies.²⁰

The net effect of these provisions was to retain control in the hands of the minority and for a very long time. Hence the phrase "whichever is the later" in the preceeding paragraph. It meant that in relation to termination of the contracts only the longer period was material so that early redemption could not give the mining companies and the State through them, the right to either unilaterally terminate the contracts or appoint Managing Directors.

There is no doubt that the primary interest of Zamanglo and RST was to ensure full and punctual repayments of the Bonds and Loan Stock. But it is submitted that the safeguard arrangements went far beyond normal security for repayment. For example the provisions relating to failure by RCM or NCCM to pay a dividend out of profits, to the extent required by the Articles of Association and the freezing of tax and Exchange Control Laws with respect to remission of dividends and Management fees were not essential to secure repayment. They were intended simply to divest the State of its Sovereign Legislative power and tax jurisdiction.

Again the Tax Act of 1970,²¹ which was part of the package deal, provided that RST and Zamanglo could only be liable to mineral tax of 51 per cent on profits and company income tax of 45 per cent on the balance and that dividends declared and fees paid could be charged a withholding tax of 20 per cent until redemption of the bonds. Further the Exchange Control rule that only 50 per cent of dividends could be remitted did not apply to the companies.²² All these provisions, apart from limiting Zambia's tax jurisdiction, made it possible for two foreign companies to maximise their profits without in anyway helping to reduce Zambia's repayment commitment on the Bonds and Loan Stock. Besides Zambia lost large sums of revenue in this way.

It was in view of this sad situation that President Kaunda in his Statement of August, 31 1973 said that the take-overs contracts were working against the national interest and therefore, "in accordance with the mandate given to me by the nation, I have decided that with immediate effect:-

- (i) Outstanding bonds should be redeemed;
- (ii) Steps should be taken to ensure that RCM and NCCM revert to the old system of providing for themselves with all the management and technical services which are now being provided by minority shareholders.
- (iii) A new copper marketing company wholly owned by the Government should be established in Zambia.
- (iv) The Minister responsible for Mines shall be the Chairman for RCM and NCCM
- (v) The Government will appoint the Managing Directors of both RCM and NCCM.
- (vi) Mindeco shall cease to be the holding company for RCM and NCCM.
- (vii) The Minister responsible for Finance will hold shares in RCM and NCCM for and on behalf of the Government.
- (viii) The rest of the mining operations which are not connected with NCCM and RCM will continue to be administered by Mindeco as is the case at present and the status of Mindeco ~~therefore~~ will be equal to that of NCCM and RCM.
- (ix) Normal taxation provisions and Exchange Control Regulations will apply to RCM and NCCM and the Minister responsible for Finance and the Governor of the Bank of Zambia are instructed to take appropriate measures.

To a large extent the State by redemption, regained the power to increase rates of taxation on the mining companies and their shareholders and has enhanced its bargaining power against minority shareholders. It was in pursuance of these measures that the Mines Acquisition (Special Provision) Amendment Act 1973²³ was enacted. This Act re-imposed normal taxation and control restrictions which extended to the two mining companies as well.

As regards the Management and Consultancy Contracts they were not effectively terminated until on the 15th November, 1974 when an agreement between the parties was concluded. That agreement provided for the alteration of the articles of association of the two companies by firstly giving power to the majority 'A' directors instead of 'B' directors to nominate Managing Directors. Secondly, by modifying the veto power of the minority shareholders in general meetings and that of the minority directors in Board Meetings. In the latter case a simple majority is sufficient; and in the former a special resolution passed by a 75 per cent majority of the votes cast is required for an alteration to the capital structure and the provisions of the constitutions of RCM and NCCM.

The requirement for 75 per cent majority though not abnormal under the Companies Act was in the present circumstances unfortunate. Since the State only held 51 per cent shareholding there was a possibility of a dead-lock in that minority shareholders could by special agreement amongst themselves, prevent a resolution being passed by deliberately absenting themselves from a meeting, so as to deny it a quorum. This, in effect, was a right of veto in another form and should not have been accepted.

The State increased its controlling shares in NCCM from 51 per cent to 60.003 per cent on October 12, 1978.²⁴ But 75 per cent majority required in resolution relating to alteration of capital still remains the same. There is no doubt that the termination of Management consultancy and related contracts laid a basic legal framework within which to secure control of the mining industry. If this control, however, is to be effective then the 75 per cent majority should be changed and substituted by one providing for simple majority as is the case with other decisions. Such a change will be more rational not/in law but /only also to both the majority and minority shareholders. In any case there is little or no possibility that such a change will erode minority rights.

(b) Objectives for State Take-overs:

Before Independence Zambia's economy, like economies of many other newly emergent States, was not only tied to the metropolitan countries but was also seriously entangled in the web of multi-national business corporation's networks. The only and probably most effective way of extracting benefits from these foreign business has largely been through the use of fiscal policies such as taxation. After independence this was no longer sufficient as it became necessary to reduce deeply ingrained suspicions of foreign economic domination. This could only come about by State participation. But voluntary State participation often is not possible since the majority, if not all, capital owners do not readily want local participation. In such a situation intervention through take-overs is the only alternative to bring about State participation and control. Once there is control the State can ensure that corporate activities operate within the overall economic and social policy of the country. Hitherto there have been many areas of conflict between the State and capital owners, particularly in the mining sector. In the mining industry there was in the 1960s slow rate of development because the mining right holders were reluctant to increase mineral extraction whereas the State wanted this to be speeded up so as to provide sufficient stock for export.²⁵ Another area of conflict which has often emerged is the use to which investible resources should be put. In the past the mine owners have wanted the reinvestible profits confined to mining activities whereas the State wanted them applied to other areas of the economy. Besides, a big portion of the profits were externalised leaving very little for re-investment.²⁶

There was also conflict in the area of import substitution. The State being desirous of diversifying the economy preferred local sources for in-puts even if it meant some sacrifices in performance, whereas the foreign capital owners tended to insist

on the best and cheapest sources of supply, mainly Rhodesia and South Africa.

State participation was intended to be an instrument by which these areas of conflict could be reduced. It also had a profit motive. Many companies were making a lot of profits which were externalised.

With State participation it becomes possible to share these profits and to increase Government revenue while at the same time decelerate outflow of dividends to foreign shareholders and reduce the demand on the scarce foreign exchange resources. In fact "the Government did not want the profits of its self-created boom to be taken entirely by foreign and expatriate enterprise. to be consumed or re-invested outside Zambia."²⁷

Increased State participation also means a curtailment in the number and size of foreign enterprises and multinational expansionism. To some extent the Government has been successful in this respect and as of January 1980, 80 per cent of the economy was under State Control.²⁸ This is a proud record. The only disappointment is that State control has brought about low productivity and economic stagnation.²⁹

Although State controlled companies have the biggest market share the majority of them are loss-making, as a result their total annual average contribution to company tax revenue over recent years has only been 20 per cent.³⁰ This has meant less receipts from company tax revenue and corresponding increase on personal tax. As a chain reaction this situation has led to a decrease in the funds available for re-investment in enterprises and diminished personal savings. All these problems seem to militate against mass take-overs particularly at the pace and scale it was done in Zambia. The only consolation

is that State participation has increased employment and participation in management by local personnel in companies and has facilitated the development of a nucleus of experienced local managerial personnel in both the public and private sectors.³¹ This was not possible when the companies were controlled by expatriates. In the mining sector, for example, Zambianisation was unsuccessful in the first five years after Independence despite Government efforts³² and as a result the mines continued to be staffed at senior levels by expatriates. In 1969, out of the employees of the mining companies operating in the country 40,000 were Zambians (mostly unskilled) and about 7,000 expatriates were in skilled jobs. On the **Boards** of the mining companies there were only two Zambians, one indigenous Zambian and one expatriate who had taken Zambian nationality.³³ The position has not been completely rectified/since / but the Government acquired majority shares in the mines it has greatly improved.³⁴

Again participation affords the State an opportunity to control the extent to which companies allow their parent bodies to profit from their relationship with their subsidiaries. This in certain circumstances is important particularly as the mining and big commercial companies in Zambia are world wide. Multinational corporation often develop a deliberate global strategy in their foreign operations and through transfer of products within a vertically integrated company, they are capable of over-pricing. State participation enables government directors to scrutinise purchasing, marketing and pricing arrangements, the fees for provision of technical and consultancy services and investment of surplus funds, all of which can be used by the companies to make hidden or disguised profits outside the host country. The termination of the management and consultancy contracts and of the sales and marketing contracts referred to earlier was only possible because of State intervention, just as was the control of mass externalisation of dividends by foreign shareholders. But state

participation will achieve little results unless it is complemented by the employment of qualified and efficient personnel, which unfortunately has not been the case in Zambia.³⁵ This has raised doubts in the minds of many people including workers as to the utility of take-overs. Zambia congress of Trade Unions the mother body of all trade unions in Zambia has, for example, strongly criticized the manner in which taken-over enterprises are being managed and has suggested that take-overs should be "scaled down".³⁶

There is no better message than this. If take-overs only mean State capitalism and monopoly which breed inefficiency and shortages then they are better abandoned. Hence until efficiency and productivity are maximised in the existing State controlled companies there should be no further take-overs. In those areas where State participation has failed there should be de-nationalisation and the ailing companies should be offered to private entrepreneurs. Only in this way will the economy survive and meet the needs of the people.

) Nature of Participation and control in the once
privately owned companies:

Take-overs brought into existence a new form of corporation, (the parastatal corporation). The term parastatal corporation has been in common use but was not defined until in 1973. In that year the Trades Charges Act³⁷ was enacted and it provided that a parastatal corporation means any body corporate established by an Act of Parliament. or any company (registered under Section 32 of the Companies Act) in which more than fifty per centum of the paid-up capital is held directly or indirectly by Government.³⁸ This definition was extended though not substituted in 1976 with the enactment of the Parastatal Bodies Service Commission Act³⁹ which provided for the term (Parastatal Body). Section 2 of the Act of 1976 defined a parastatal body as "any company, association, statutory board or corporation or any institution of learning in which the State has a majority

or controlling interest", or one "in which the State holds any interest and which the President may by statutory order, declare to be a parastatal body".

The inclusion in the definition of the "institution of learning" clearly demonstrates the concern of the Government to try and assert control over the institutions of learning which at the time were in a state of revolt⁴⁰ such control was only possible if these institutions came under close supervision of a smaller body like the Parastatal Bodies Service Commission. The Commission however, failed to live to its expectation, in consequence of which it had to be dissolved and the Act repealed in 1979.⁴¹

The most strange aspect of the definition of parastatal body in the repealed Act was one regarding the formation of a parastatal body by a Presidential Order. This provision permitted the creation of a parastatal body even in cases where the State held minority shares and enabled the State to control privately owned companies if they were declared parastatal bodies. Fortunately there has been no such body created by Presidential Order and with the Act of 1976 repealed there is no prospect of this being done.

Again the Act of 1976 made a complete departure from the conception of control as envisaged by the Companies Act. Under the Act of 1976 control which is a definable portion of the bundle of rights held by shareholders, whether separate or inseparable from the shares themselves, was no longer the principal attribute of ownership.⁴² Hence in those companies in which the State had minority interest and which were subsequently to be declared by Presidential Order to be parastatal bodies the holder of control would not be so much the owner of proprietary rights but rather the occupier of a power position which would be the State itself. Such a result, it is submitted, is unfair as it amounted to a take-over in a different

but distinguished form. Difference in the sense that there was no provision for negotiation between the State and the controlling shareholders whose interests would be affected neither was there any provision for payment of compensation for the acquired shares.⁴³ If it was desired to give the State power of control even in those companies in which it held minority shares this should have been clearly spelt out by the Legislature instead of leaving it to speculation and conjecture. It is recognized that the State has a sovereign right to take-over strategic enterprises but ~~when~~ this is done clear terms and conditions in respect thereof ~~should~~ be specified so that those who desire to invest in the country and those whose interest are likely to be adversely affected are forewarned. This is the only sure way the Government will make even the Industrial Development Act ⁴⁴ a meaningful instrument of attracting foreign investment.⁴⁵

Now that the Act of 1976 has been repealed control has reverted to the old capitalist principle which recognises ownership as the source of control. The repeal has also succeeded in removing the potential friction that existed as a result of the provisions of that Act between the State as a minority shareholder and majority shareholders who would have rightly felt that by virtue of their majority shareholding they possessed the right to control the enterprise. The chances of such friction were even greater in those companies in which majority shareholding was held by few persons for those could easily team up to assert their rights as a group in majority against the State.

Again the repeal of the Parastatal Bodies Service Commission Act means that the term "Parastatal Body" has ceased to have legal definition. Instead the only operative term in relation to State controlled companies is "Parastatal Corporation"

as provided for in the Trade Charges Act.⁴⁶ This Act confines such companies to those in which the State holds more than 50 per cent of the equity. Under this category are companies such as Zambia Industrial and Mining Corporation Limited (ZIMCO) and its subsidiaries, the statutory boards like Zambia Railways Authority, National Agricultural Marketing Board and Dairy Produce Board. Institutions of learning are not specifically included but those that are constituted by Acts of Parliament like University of Zambia⁴⁷ and National Council for Scientific Research⁴⁸ are, by virtue of being wholly owned, included. In these companies and institutions the capitalist system of control which is based on ownership still applies just as it does to the majority of privately owned companies. The only difference between the two is that in the latter case the capitalist may be an association, a company, an individual or a group of individuals whereas in the former the capitalist is the State. In essence this is State Capitalism in its fullest extent which unfortunately is a complete negation of co-operative ownership being advocated under Zambia's Industrial Participatory Democracy.

There is another peculiar feature about shareholding in parastatal companies. In these institutions if co-partnership is permitted it is invariably restricted to institutional organisations. In some cases such restrictions are created by law. For example minority shares in Development Bank of Zambia (DBZ) have to be subscribed for by institutions and not individual persons or employees. According to Section 10 of the Development Bank of Zambia Act⁴⁹ allotment of shares has to be made to two classes of subscribers namely Class A and Class B. Out of 1,000 issued shares 600 are to be subscribed by Class A in the following ratio: 450 to the Minister of Finance on behalf of the Government and 150 by financial institutions -

Bank of Zambia, Zambia National Provident Fund, Zambia State Insurance Corporation, Zambia National Building Society and Zambia National Commercial Bank Limited. The remaining 400 shares should be allotted to private and international institutions. By March 31, 1979 all the K10 million authorised capital was fully subscribed.⁵⁰ The Development Bank of Zambia Act has now been amended by the Development Bank of Zambia (Amendment) Act 1979⁵¹ which makes provision for Class C shares. It provides in Section 3 that the "authorised capital of the Bank may be increased by the creation of a new class of shares designated Class C Shares with such preferred or other special rights as the Board may deem fit". Unlike the main Act, the new Amendment does not specify who are the subscribers to Class C Shares except that the Board "may allot the additional shares resulting from the increase of authorized capital to such persons as the Minister may approve".⁵²

Clearly the intention of the new Amendment is to increase the horizon of the subscribers. It is however, doubtful that individual subscribers are envisaged for the Amendment has not gone so far as to change the value of a share which still stands at K1,000 per share. If it was intended that even individual persons will be allowed to subscribe, the authorised capital should have been changed to provide for shares of smaller amounts. As it is the capital structure restricts participation by individuals or employees in that there are few individuals who can afford to pay for shares of K1,000 per value.

Again it is difficult to understand why approval by the Minister is necessary for Class C shareholders. This provision, it seems, is intended to give the Minister the power to control who will be a shareholder and it is unlikely that an approval will be given if employees applied to purchase shares. This is

particularly true especially that Classes A and B shareholders are restricted only to Government controlled and foreign institutions respectively.

The example of DBZ may be peculiar in that the restriction to institutional equity participation is by an Act of Parliament, but in principle it applies nearly to all Parastatlas in which co-partnership between the State and private shareholders is permitted. This deliberate exclusion of workers from participation undoubtedly is in direct conflict with the letter and the spirit of industrial participatory democracy. How are the "means of production and distribution to be totally owned by those who labour to produce" if they are even excluded by law from participation. It may be that this restriction is imposed because in any case workers are not able to subscribe even if shares were offered to them. Such a suggestion, however, is a mere supposition. Simply because there is a slim possibility for workers to make subscriptions when shares are issued is no justification to exclude them by law from participation. In any case it has now been shown that given the opportunity workers can participate very effectively in equity.⁵³ Workers therefore should be given the opportunity in Government controlled companies to participate and should not be excluded by legal barriers from at least trying.

It is often argued that institutional shareholders possess expertise in investment matters and that, therefore, are better co-partners. This argument, too, it is submitted, holds very little water. It may be true that institutions, particularly financial institutions, have investment expertise but the cardinal point in matters relating to equity participation is whether the prospective subscriber has sufficient money to pay for the calls when they are made and not whether or not he is an investment expert for investment expertise should be the preserve of management and not shareholders. What shareholders principally require is the capacity to pay for calls and nothing else.

Again it may be that the State only wants co-partners with certain minimum standards of character and responsibility and that workers do not satisfy these standards. This may be a good precautionary measure but it is argued that it is a fear without base. It is, of course, undesirable for control to be held by notoriously improper hands, but since the holder of a majority of the voting shares, the State, elects the directors who are to manage the business affairs of the corporation and, in that sense and to that extent, controls the corporation and its assets, control by improper persons is very unlikely. In the absence of any evidence it is therefore, incorrect to assume that workers as shareholders are irresponsible and of poor character. After all in Zambia those companies which are still controlled by private persons are in fact more efficient and productive and their management more prudent than those controlled by the State. Yet some of these companies have introduced workers' participation with good measure of success.⁵⁴

The unsavory attitude of the State towards workers' participation can only be supported on the basis that the State, is, contrary to its campaign for industrial democracy, not ready for such participation in parastatal corporations. This is a sad situation and can not be reconciled with the costs being incurred currently in spear heading equity participation in industry.⁵⁵ If the intention is to bring about equity participation and if this exercise is to be meaningful it must be implemented first in State-controlled corporations, then spread later to private companies. But at the moment the reverse is true.

What has emerged from this chapter is that the Economic Revolution has only succeeded in as far as transfer of ownership of strategic foreign owned and dominated companies is concerned, particularly in the industrial sector. As regards control it has not been completely asserted especially in the mining companies whose constitutions still require 75 per cent majority in matters relating to alteration of capital structure. The chapter has also highlighted

the need to improve efficiency in the taken-over enterprises and that there should be no further take-overs until this is achieved. In view of its desire to implement workers' industrial democracy, the Government should take the lead in this direction and should ensure that control is vested not only in the State but in the workers too. Only when this is achieved will Zambia boast of a real economic revolution under the philosophy of Humanism.

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2. K.D. Kaunda - Humanism and Guide to its Implementation, Part II p. 56, Government Printer, Lusaka.
3. K.D. Kaunda - "Zambia's Economic Revolution" Address at Mulungushi, Kabwe to UNIP National Council on April 19th 1968, P. 2, Government Printer, Lusaka.
4. Ibid p. 6
5. Ibid p. 5
6. K. D. Kaunda - "Towards Complete Independence" Address to UNIP National Council, Matero Hall Lusaka on August 11th 1969, Government Printer, Lusaka.
7. K.D. Kaunda "Zambia's Economic Revolution (Supra) P. 11
8. Ibid pp. 37-44 - which gives full account of the companies taken-over.

9. K.D. Kaunda - "This Completes Economic Reforms"
Address to UNIP National Council on 10th November
1970 p. 6 - Government Printer, Lusaka.
10. Out of 94 non-mining companies 52 are 100 per cent owned
by the State, while the rest are between 50 per cent and
100 per cent except for five companies - see ZIMCO Chart
of April 1, 1980, ZIMCO Information and Publicity Unit,
Lusaka.
11. The Federation lasted for ten years from 1953 to 1963.
12. During the ten year period of the Federation it is
estimated that Zambia lost well over K84 million - see
UNECA/FAO, Economic Survey Mission on the Economic
Development of Zambia 1964 p. 36.
13. In 1964 Southern Rhodesia supplied 39 per cent of all
imports and South Africa a further 21 per cent. See
Central African Research - 4; the significance of Zambia's
New Economic Programme, 1968 p. 1.
14. Ibid page 2: for example coke from Wankie had to be replaced
for mining use at great cost with supplies from Germany -
see Zambian Economic Survey, African Development 1973
p. 13.
15. Republic of Zambia, Commission of Inquiry, Report of the
Tribunal on Detainees, 1967. This report revealed many
practices that were going on and showed that there was
general sympathy among the white population to Rhodesia's
point of view.
16. See the Mines Acquisition (Special Provision) (No:2)
No: 45 of 1970.

17. See proposals for the merger of Bancroft Mines Limited, Nchanga Consolidated Copper Mines Limited, Rokana Copper Refineries Limited and the Acquisition of 51 per cent therein by ZIMCO Limited issued by Anglo American (Central Africa) Limited, dated 27th April, 1970.
18. Mining Mirror, 4th September 1973 p. 20.
19. The average prices of copper during this period were as follows: In 1973 - K1156 per ton; in 1974 - K1326 per ton; in 1975 - K789 per ton - see Budget Address by Minister of Finance on 30th January 1976 p. 3, Government Printer, Lusaka.
20. Income Tax (Special Provisions) (No:1) Act No. 31 of 1970.
21. Act. No. 27 of 1970 S.3 - Also in the schedule thereto.
22. Income tax Act Cap 668 Annexure "C" as amended by Income Tax (Amendment) Act No. 27 of 1970 S. 46 (h)
23. Act. No. 45 of 1973
24. "Zambia Daily Mail" October 13, 1978 at p. 1
25. See Professor Muna Ndulo, "Domestic Participation in Mining in Zambia" in Ben Turok (ed), Development in Zambia (Zed Press, 57 Caledonian Road, London N1 9DN) at p. 53.
26. On the average 80 per cent of the profits were declared as dividends annually and externalized - see K.D. Kaunda: "Towards Complete Independence" op cit at p. 30.
27. Fortman, B - "After Mulungushi" East African Publishing House, Nairobi, 1969 p. 103.
28. K.D. Kaunda - Address to Parliament, 11th January 1980, Government Printer, Lusaka.
29. For example the value added by manufacturing in 1978 was, in real terms, 15 per cent lower than in 1974, and the contribution of construction to GDP in 1978 was 30 per cent less than in 1976 - see Zambian Economic Reports for 1976 and 1978, Government Printer, Lusaka.

30. K.D. Kaunda Op cit.
31. By September 1979 out of 85 Chief Executives of ZIMCO Group of Companies 60 were Zambians and only 25 were non-Zambians. (figures for private sectors are not available but even there, there has been serious attempt at Zambianisation particularly at middle and lower management) See ZIMCO Directory, September 1979.
32. Burawoy the Colour of Class on the Copper Mines - From African Advancement to Zambianisation, Zambian Paper No: 7 1972; Also in the Mining Year Book of Zambia, 1969.
33. Central African Research - 4, the Significance of Zambia's New Economic Programme, 1968 p.2.
34. Ibid - As at end of 1974 there were no less than 107 Zambians who held senior positions in the Mines - see NCCM Ltd Annual Report for 1974.
35. See Professor Ndulo "Domestic Participation in Mining in Zambia" Ben Turok (ed) Development in Zambia p.
36. Resolutions of ZCTU passed at Livingstone on 18th July 1980 see "Times of Zambia," Saturday July 1980 p. 1.
37. Act No: 49 of 1973
38. Ibid S. 2
39. Act No. 18 of 1976
40. The University of Zambia was closed on the 10th of February 1976 for 4 months and there was demonstration of solidarity by other institutions of higher learning - "Zambia Daily Mail" February 11th, 1976 p.1
41. The Parastatal Bodies Service Commission (Repeal) Act (No. 14 of 1979)
42. There is a contrary view that effective control can be exercised in many other ways besides that of majority holding - see Berle & Means, The Modern Corporation and Private Property (Macmillan Co. New York, 1932) p. 69 etseq.

43. This amounts to contravention of Article 18 of the Constitution of Zambia (Act No. 27 of 1973) which provides for protection from deprivation of property without payment of compensation.
44. Act No. 18 of 1977
45. The Industrial Development Act provides the following incentives to priority enterprises:- preferential treatment with respect to Government purchasing, granting and processing of import licences, rebates on customs duty payable on capital equipment and raw materials and relief from sales tax, selective employment tax and income tax - S. 20. Similar incentives are also given for exporting enterprises - S.21; for providing training facilities for Zambian citizens - S-22; for companies investing in rural areas - S.23; for companies utilising foreign investment - S.24 and enterprises involved in research and development - S.25.
46. Act. No. 49 of 1973
47. Chapter 233 of the Laws of Zambia
48. Chapter 236 of the Laws of Zambia
49. Chapter 712 of the Laws of Zambia
50. The following shareholders appeared on the list of members:

<u>Class A Shareholders</u>	<u>K</u>
(a) Ministry of Finance	4,500,000
(b) Bank of Zambia	500,000
(c) Zambia National Provident Fund	500,000
(d) Zambia National Building Society	150,000
(e) Zambia National Commercial Bank Limited	200,000
(f) Zambia State Insurance Corporation	150,000

Total Authorised and Subscribed

K6,000,000

<u>Class 'B' Shares</u>	<u>K</u>
(1) German Development Company (D.E.G.)	1,500,000
(2) European Investment Bank (EIB)	550,000
(3) Barclays Bank Zambia Ltd	400,000
(4) International Finance Corpora- tion	350,000
(5) Standard Bank Zambia Ltd	200,000
(6) Bank of Tokyo	100,000
(7) Africa Development Bank	150,000
(8) Grindlays Bank (I) Zambia Ltd	100,000
(9) Bank of America	100,000
(10) Banca Nazionale De Lavoro	100,000
(11) Den Norske Credit Bank	50,000
(12) Beogradska Banka	40,000
(13) Jogobanka	40,000
(14) Zdaruzema Yugoslovenska Ikre- ditna Banka	40,000
(15) Kreditna Banka	40,000
(16) Privredna Banka	40,000
(17) Ljubjanska Banka	40,000
(18) Rijecka Banka	40,000
(19) Dai-ichi Kangyo Bank Ltd	20,000
(20) Mitsubishi Trust & Banking Corporation	20,000
(21) Fuji Bank Limited	20,000
(22) Mitsui Bank Limited	20,000
(23) Investciona Banka	20,000
Total Authorised and Subscribed 'B' Share Capital	<u>4,000,000</u>

Total Authorised and fully
subscribed share capital K10,000,000

51. Act No: 9 of 1979
52. Ibid S. 3
53. There are already successful equity participation schemes at
Medwitch Clothing Factory in Kitwe and Unity Press in Lusaka .

54. See Note 53 above.
55. A Commission of Inquiry to examine the concept of workers' participation in equity appointed by President Kaunda on 6th October 1977 has not made any recommendations to date. See Inquiries Act, Cap 181 of the laws of Zambia, S. 1 No: 187 of 1977.

PART II

TOWARDS VARIATION OF RULES
RELATING TO PROTECTION
OF WORKERS, MEMBERS
AND CREDITORS

CHAPTER 3

THE NEED TO PROTECT WORKERS' INTERESTS AND TO CHANGE THE RIGHTS OF MEMBERS AND CREDITORS

As already stated above the policies of the Party and its Government were aimed at bringing about the effective transfer of economic power from foreign private entrepreneurs to the indigenous people and this was achieved principally by take-overs of key industries in the country. But take-overs only brought about state control and not worker control of the taken-over enterprises because control is mainly determined by membership and workers are not members under the Zambian corporate system.

There are two principal methods of becoming a member under the Companies Act. The first method is as a subscriber to the memorandum of association. According to section 41, a subscriber to the memorandum of association is deemed to have agreed to become a member of the company and is entitled to be entered on the register as a member upon registration of the company.¹ The second method is by any other person who has agreed in accordance with the said section 41, to become a member of the company and whose name is entered on the register of members.²

of Association of ZIMCO provide that:-

At any General Meeting a resolution put to the vote of the meeting shall be decided on a show of hands unless a poll is (before or on the declaration of the result of the show of hands) demanded by the Chairman of the meeting or by any member present in person or by proxy and entitled to vote on a poll. Unless a poll be so demanded, a declaration by the Chairman of the meeting that a resolution has on a show of hands been carried, or carried unanimously, or by a particular majority, or lost, an entry to that effect in the book containing the minutes of the proceedings of the company shall be conclusive evidence of the fact that without proof of the number or proportion of the votes recorded in favour of or against such resolution.

A provision for voting by show of hands means that decisions can be made and control exercised by the minority because majority in this context is unrelated to the majority of the members of the company as a whole. A corollary to this is that at a company meeting a member who has been given proxies cannot use them, and a member holding shares which have a voting majority cannot override the wishes of the other members.⁷

(b) Passing Decisions by Acclamation

Apart from voting by show of hands, a decision can be passed at a meeting by acclamation. This view has now been confirmed by the Supreme Court of Zambia in the controversial case of Harry Mwanga Nkumbula and Simon Mwansa Kapwepwe V. The Attorney General and United National Independence Party.⁸ The circumstances of this case arose out of the fact that under Article 38(3) of the Constitution of Zambia the members of the General Conference of the United National Independence Party should elect a person to be the President of the Party, and such person should be the

sole candidate in an election to the office of President of the Republic. The two appellants were aspiring candidates for Presidency of both the Party and the Republic and they intended to put forward their candidature at a meeting of the General Conference of the Party which was held at Mulungushi Rock between the 8th and 12th September, 1978. Prior to this meeting the Party Constitution of 1973 provided that any member of the Party should be eligible to be a candidate for the office of President of the Party if he was qualified to be President of the Republic under the Republican Constitution and was supported by at least ten sponsors. Before the meeting on the 8th of September, 1978 the Central Committee of the Party proposed amendments to the Party Constitution restricting the qualifications of prospective candidates for the Presidency of the Party. At the actual conference an entirely new document amending the whole of the Constitution was presented for approval, first to the National Council and then to the General Conference. The new amendment provided, inter-alia, that a candidate for the office of President must lodge nomination papers with the returning officer supported by twenty delegates from each of the provinces of Zambia attending the General Conference and that a member of the Party shall not be qualified as a candidate for the office of President unless he has been a member of the Party for five years.

On the 9th September, 1978, these amendments were adopted by the General Conference by acclamation, although no actual vote was taken. The applicants argued that this was irregular

and they sought a declaration to nullify the amendments. The application was dismissed and in doing so Gardner, Ag. D.C.J., who delivered the opinion of the Court said at p. 105 that there was by acclamation a unanimous adoption of the new constitution and that the acclamation was legal.

This decision is on meetings generally; consequently it should cover company meetings. Hence a company can pass a resolution by voice if it is obvious that the meeting is practically unanimous. But the extent to which this may be done in practice remains to be seen.

In arriving at its decision the Court apparently was guided by political considerations more than law. It is because of this that Gardner, Ag. D.C.J. justifies the decision of the Court by quoting Lord Sterndale, M.R. in Hanson V. Radcliffe U.D.C.⁹ that generally speaking the "jurisdiction of the court under this rule (relating to declarations) is in effect only limited by its own judicial discretion. It is a further principle that courts will not make orders which are of no avail. It is trite for instance that a court will not normally make an order relating to the custody of an infant, who is out of jurisdiction, where such order cannot possibly be enforced." By so stating the Court was in fact saying that it could not decide otherwise even if the facts warranted because such decision would not be enforceable. This was unfortunate and renders the decision of little legal significance. The Court should have been bold enough to make decision in accordance with the facts before it and not plead lack of jurisdiction which in fact it had.

(c) Voting by a Poll

The other method of voting provided for under Table A is by a poll. This method is based on the proprietary rule of one share one vote. What counts here is not shareholders but shareholding. This rule entrenches not only the capitalist conception of membership but also the power and control of the company in those who hold majority shares irrespective of their number. Under this system workers are reduced simply to corporate objects and mere adjuncts of machines who do not partake of the business profits which come out of their labour. Thus, workers are merely accepted as participants in the production process but not in the profit which comes from such production. This is a negation of a true "People's Capitalism"¹⁰ which emphasizes a correlation between shareholders and shareholding.

Since Zambia has adopted industrial democracy the capitalist approach to membership is certainly out of place. It is difficult and indeed impossible to accept the proposition that profit originates only from capital because capital alone without labour cannot be productive. It is the combination of both capital and labour that will yield desired results; hence any reward in form of profit that is given to capital owners must also be available to labour because the two are interdependent. The present compartmentalized corporate structure providing that once a worker always a worker and once a capital owner always a capital owner should pave way to a system that permits workers by virtue of their labour to become members.

Membership based on labour augurs well with the principles of Zambia's industrial democracy. As K.D. Kaunda put it, "now just as in the field of politics the masses of our people have wrested power from a selfish minority clique who believe in the exploitation of man by man. Just as there was no political stability until political independence so there cannot be genuine and lasting peace in Zambia's industrial structure or elsewhere for that matter until the means of production and distribution are totally owned by those who labour to produce."¹¹

It means employers and owners of capital must accept a new conception of membership which includes workers. The traditional restriction of membership to shareholders is a negation of the cherished principles of industrial democracy and an irreconcilable parochial anachronism. In the words of Chayes, "a concept of corporation which draws boundary of membership narrowly (to shareholders) is seriously inadequate..... A more spacious conception of membership and one close to the facts of corporate life would include all those having a relation of sufficient intimacy with the corporation or subject to its power in a sufficiently specialized way."¹² By virtue of their employment workers have sufficient intimacy with the corporation and should be included under the general category of membership with full rights pertaining thereto. These should include the rights to dividends, attendance at meetings and voting. Workers should also have the same rights as the members in matters relating to the appointment of representatives on the board of directors. Such rights, of necessity, require some adjustment

of the existing rights of members which are based exclusively on capital contributed.

(d) Rights of Creditors as Contrasted with those
of Workers

Though creditors do not possess voting rights or rights to attend company meetings or to a declared dividend, they have, unlike workers, better protection. Under the Companies Act creditors have the right to apply for protection against a resolution to reduce share capital of a company in as far as the proposed reduction involves either reducing shareholders' liability for unpaid capital or returning paid up capital to the shareholders.¹³ The right to object even goes further to require the court to settle a list of creditors who are entitled to object to a reduction and this has to be done by publishing a notice in the gazette or any daily newspaper fixing a day or days within which creditors not entered on the list may claim to be so entered or be excluded from the right of objecting to the reduction.¹⁴

Further the court can only consider a reduction if so satisfied that debts have been paid off or creditors have consented to the reduction.¹⁵ It should be added that the court should have jurisdiction to sanction a reduction if the class of reduction is fair and equitable.

As stated by Lord Cooper in the Scottish Insurance Corporation V. Wilsons and Clyde Coal Co. that the courts (should) have

a "discretion to confirm or not to confirm which it was their duty to apply in every proper case and that this discretion fell to be exercised by reference to whether the scheme would be fair and equitable, just and equitable, fair and reasonable or not unjust or inequitable".¹⁶

If a creditor who is entitled to object to a reduction is by reason of his ignorance of the proceedings not entered on the list of creditors and after the court has sanctioned the reduction the company fails to pay his claim, he may require each shareholder at the date of reduction, to contribute towards payment of his claim an amount not exceeding the difference between the nominal and paid up values of his share immediately before reduction. Thus a creditor has a statutory right to sue the shareholder without having the company wound up, and the shareholder appears to be liable to the creditor to the extent of the former amount unpaid in respect of his shares, and also to the company for the amount which remains unpaid on his shares after reduction so that his total liability may exceed the original nominal value of his shares.

Workers on the other hand, do not have the right under the Companies Act to object to capital reduction. Hence creditors may consent to a capital reduction that may lead to under capitalisation and subsequently liquidation of the company. In consequence there will be lay-offs.

Even the limited veto powers under section 72 of Industrial Relations Act do not seem to be very effective unless they were supplemented by corresponding powers in the Companies Act. That section provides, inter alia, that "the decision by the management of an undertaking in respect of.....
.....redundancy of employees in the undertaking
.....shall be of no effect unless such decision is approved by the Works Council." This section only deals with decision by Management. But what about a decision by creditors e.g. on reduction of capital which may lead to serious under-capitalisation and eventual liquidation? Are workers not to be given powers of Veto in such cases?

Again the powers conferred by Section 72 of the Industrial Relations Act are not easily enforceable for the section does not provide for sanction in cases of defaulting Management.¹⁷ It is really difficult to see why this is so. Under normal circumstances one would have expected that if there is a legal right there should be a corresponding duty on the part of the public to observe that right and in the event of breach of the same there should be sanction. The failure to provide for such sanction completely waters down the effect of the section.

What is required essentially is a provision in the Companies Act that a reduction will be ineffective unless consented to by creditors and workers. In all situations where the company is facing difficulties the worst victims are the workers and they



should therefore be consulted and their consent obtained each time a decision likely to jeopardise the continuity of the company is taken. The provision in the Companies Act should be complemented by extending the veto powers under section 72 of the Industrial Relations Act so as to include those cases relating to reduction of shareholders' liability for unpaid capital or returning of paid up capital. In this way workers' protection will be assured.

(e) Position During Liquidation

Liquidation may be compulsory under an order of the court or voluntary under a special resolution passed by the company.¹⁸ The company, a creditor or a member or an aggregate of the creditors and/or members may petition the court to wind up the company if, inter alia, the company is unable to pay its debts¹⁹ or if the substratum and all the objects of the company have failed.²⁰ As indicated earlier if industrial democracy is to achieve its purpose, the Companies Act should be amended to give to the workers the right to petition. The provisions of Section 139 of the Companies Act therefore should be extended so that any court order made in pursuance thereof should operate not only in favour of creditors but of workers too. To ensure that this is done the official liquidator appointed by the court should act under the close supervision of such court as well as the creditors, members and workers. Section 146 which enhances the interest of the creditors by providing that the court will

consider the wishes of creditors in all matters relating to winding up should go further to include those of the workers. In order to effect this the Liquidator should, when calling meetings of creditors, invite workers representatives also to attend.

Section 137 further states in subsection (1) that a company may wound up "whenever the court is of opinion that it is just and equitable that the company should be wound up." There are a number of circumstances in which this ground for winding up may be applied and one of the circumstances is that a majority shareholder has acted oppressively to a minority who is entitled to petition the court for a winding up order. The circumstances in which the court may exercise its winding-up jurisdiction however do not seem to include oppression of the workers because a winding order can only be made upon petition and the workers as non-members do not have the rights to petition. Thus no matter how oppressive the shareholders or those who control the company are to the workers the latter will have no recourse to court under the Companies Act to have the company wound-up. The limited powers of the Industrial Relations Court under Section 98 (g) of the Industrial Relations Act also would be of little assistance as that section only confers jurisdiction on the Industrial Relations Court to "inquire into and adjudicate upon matters affecting the rights, obligations and privileges of employees." This section cannot be construed to give to the Industrial Relations Court jurisdiction to wind-up a company otherwise it should have been expressly provided for. The absence of any provision means that

these steps have been taken the directors may exercise their discretion without interference.

The strict application of non-interference rule²¹ would lead to a situation in which there could be no interference with the directors' discretion, even if they themselves had infringed the company rights and refused to sue themselves in the company's name. Besides it is most unlikely that directors would bring an action in the name of the company against themselves. Exceptions to the rule therefore are necessary. L.C.B Gower states that a suit by a shareholder instead of by the company is allowed in five circumstances.²² First when it is complained that the company is acting or proposing to act ultra vires. Second, when an act complained of though not ultra vires the company, could be effective only if resolved upon by more than a simple majority i.e. where a special or extraordinary resolution is required and (it is alleged) has not been validly passed. Third, where it is alleged that the personal rights of the plaintiff shareholder have been infringed or are about to be infringed. Fourth, where those who control the company are perpetrating a fraud on the minority and lastly any other case where the interests of justice require that the general rule requiring suit by the company, should be disregarded.

A worker member it is submitted should also be entitled to bring suit on behalf of the company and other workers against directors and/or other controllers for wrongs committed by them against the company. Such wrongs of course must be such as to involve a breach of directors' duties of "subjective good faith" or

a fraud on the workers. As Lord Wilberforce in re Westbourne Galleries Ltd put it: "I see no reason for preventing him from relying upon any circumstances of justice or equity which affect him (as shareholder) in his relations with the company or with the other shareholders."²³

An action by worker members should also be allowed in those cases where a wrong complained about can be satisfied by a general meeting unless the worker members do not only participate in the meeting but have a controlling voting majority in which event their interests are likely to be protected. Further worker members should be able to institute proceedings in the name of the company without first inviting directors to take action for directors being the wrongdoers very little will be achieved by inviting them.

Again the court should allow a suit by a worker member if justice so requires even though no specific wrong may have been committed.²⁴ A worker member being in an inherently weak position needs better protection than an ordinary member. A provision that permits the court to inquire separately into each case affecting him therefore will serve his interest better.

A suit by worker-member should like, in actions by an ordinary member, be made in a representative capacity on behalf of himself and all other co-worker members. In this way all worker members will be bound by the result of the action and will on the principle of res judicata, be prevented from instituting actions based on the same facts. This will avoid multiplicity of actions.

Workers' rights to sue should be coupled with directors obligation not to act in the interest of the company alone disregarding the interest of the workers. They should not be required "to live in an unreal region of detached altruism and to act in a vague mood of ideal abstraction from obvious facts which must be present to the mind of any honest and intelligent man when he exercises his powers as a director."²⁵ Directors should have a regard to the interests of not only the general members but also of the worker members, present and future. The Ghana Companies Code of 1963²⁶ makes very good provision which is relevant on this particular aspect. The Ghana Code provides that "in considering whether a particular transaction or course of action is in the best interests of the company as a whole a director may have regard to the interests of the employees, as well as the members, of the company, and when appointed by, or, as a representative of, a special class of members, employees or creditors may give special, but not exclusive consideration to the interest of that class."²⁷ In this respect the Ghana Companies Code is quite revolutionary and no doubt a similar provision will be far more in keeping with Zambia's desired goal of democratising company law. The only addition here is that the provision requiring director's consideration of employee's interests should be mandatory and not merely permissive as is the case in the Ghana Companies Code. A director "should have" and not "may have" regard to the interests of the employees. Although such a provision will inevitably limit the director's discretion, it is argued that there is no alternative for unless workers are given legal protection by the law the directors are more likely to ignore

accordance with the letter and the spirit of workers' participation.

References

1. These are founder members who may not necessarily have rights to dividends.
2. These are the members who subscribe to the capital of the company.
3. See Table A. Regulation 61.
4. Ibid.
5. Birch V. Cropper (1889) 14 App. cas. 525.
6. See for example the Articles of Association of ZIMCO and Mindeco Limited.
7. For similar observation see Dr. J.M. Mulwila, Parastatal Companies and Law in Zambia, a Ph.D thesis submitted to the School of Oriental and African Studies, 1980, p. 180.
8. (1979) S.C.Z. p. 96
9. (1922) 2. ch. 507
10. Melvin Aron Eisenberg, "The Legal Roles of Shareholders and Management in Modern Corporate Decision-making" 57 California Law Review, No.1 (1969) p. 44
11. K.D. Kaunda : Humanism in Zambia and Guide to its Implementation Part II Government Printer, Lusaka p. 100
12. Chayes "The Modern Corporation and the Rule of Law" in E. Mason (ed), The Corporation in Modern Society (1959 Edition) p.25.

13. The Companies Act, Chapter 686 S. 17(i)
14. Ibid S. 17(2)
15. Ibid S. 18
16. (1948) S.C. p. 375
17. Cf. S.74 - which gives the Works Council watchdog powers over management.
18. Companies Act, Chapter 686 S. 137
19. Ibid S. 137(d) and S. 138
20. This principle was discussed in Re German Date Coffee Co. (1882) 20 Ch. D. 169.
21. This rule was amplified in FOSS V. HARBOTTLE (1843) 2 Hare 461
22. L.C.B. Gower : The Principles of Modern Company Law, 1969. 3rd Ed., Stevens & Sons, p. 584.
23. (1972) 2 W.L.R. p. 1289 at p. 1293.
24. In Britain similar action by members are recognised as for example in the case of Baillie V. Oriental Telephone and Electric Co. Ltd (1915) I ch. 503 especially at p. 518 where Swinfen Eady L.J. says:
"in other words it has been said that in certain cases members may sue on behalf of the corporation if the interest of justice require it."

25. Mills V. Mills (1938) 60 C.L.R. 150 (Aust. H.C.)
per Latham C.J. at p. 164.
26. Ghana Companies Code 1963, Act 179
27. op cit S. 203(3)

CHAPTER 4

DISCLOSURE OF CORPORATE INFORMATION AS AN ASPECT OF PROTECTION - A CASE FOR REVISION

It is obvious that the principle of disclosure is essential in any system of company Law. If creditors, members, workers and the general public are to have a "sure shield" then they should be given or be enabled to find out all relevant information about the company and those who have interest in it. Gower says the general aim of disclosure is clear, namely, "to ensure that the company gives to the public the essential minimum information about its position when it is launched into the world and that whenever it offers its securities to the public it fully discloses the relevant facts so that the risk of investment can be assessed."¹ Disclosure therefore presupposes publicity; it is through publicity that the public and indeed members, creditors and workers are afforded the best protection. Without full disclosure of the company's affairs, for example, workers' participation as envisaged in the Industrial Relations Act² will not be effective.

In this chapter we shall attempt to outline the provisions in the Companies Act relating to disclosure and to evaluate to what extent these provisions are relevant in the protection not only of members and creditors but of the workers too. To the extent that disclosure rules are inadequate what further proposals can be made for reform. What about the conflict existing between the requirement for disclosure under the Leadership Code and the Companies Act which prohibits disclosure of trusts. Is the introduction of the Leadership Code an attempt to defeat trusts? What is the area of compromise? It is intended to answer these and related questions.

(a) Anachronistic Disclosure and Accounting Rules
and the Need for Change

Disclosure is synonymous to publicity. When discussing disclosure rules the principal consideration is to what extent are these rules publicized so that those for whom they are intended get the required information accurately, in time and in sufficient detail. The essential consideration therefore is publicity.

Under the Companies Act publicity may be secured in one of the following ways. First, by provision for registration at the companies registry. A company should register its constitution, that is, its memorandum and articles,³ its officials,⁴ its registered office⁵ and its capital structure.⁶ Second, by maintaining various registers.⁷ Third, by providing for compulsory disclosure of the financial position in the company's published accounts and by attempting to ensure their accuracy through a professional audit. It is necessary to amplify these points.

Regarding the requirement for registration Section 32 of the Companies Act provides that on formation the "memorandum of association and the articles of association(if any) shall be delivered to the Registrar, who shall, if they are in order, retain and register the same." These documents can only be altered by special resolution.⁸ But such resolution does not take effect until and except in so far as it is confirmed on petition by the court.⁹ Copies of the order confirming alteration together with a printed copy of the memorandum should within fifteen days from the date of the order be registered.¹⁰ Hence it is possible

to ascertain from an inspection of the company's file exactly what its constitution is. The Act further provides that before confirming the alteration the court must be satisfied that sufficient notice has been given to debenture-holders and to other interested persons who may be affected by the alteration. These provisions are intended to ensure that creditors and those who deal with the company are enabled to know the objects and powers of the company and its maximum authorised capital and the formal rules relating to management of its internal affairs.

Notwithstanding its advantage the procedure involved in the alteration of memorandum of association is very cumbersome, lengthy and costly. In the management of modern enterprise it is necessary not only to make decisions but to make such decisions with minimum delay. If the company is desirous of altering its objects in order to carry on its business more economically or more efficiently; or to attain its main purposes by new and improved means; or to restrict or abandon any of the objects specified in the memorandum, it should be authorized to do so freely provided that the shareholders including worker-members are consulted and are agreeable to the proposed alteration. In other words the power to alter the memorandum or objects therein should not be hedged in with the qualifications and conditions now contained in section 12¹¹ of the Companies Act but should be freely exercisable by way of special resolution. This should not necessarily affect the rights of shareholders to take up a derivative suit as earlier discussed.

As for the provisions relating to the Company's registered office it will be noted that this is the office at which the company's registers have to be kept and where service of process on the company may be effected. A registered office is not necessarily the residence of the company in the technical sense, for a company registered in Zambia may have or transfer its residence abroad. In relation to companies of this nature residence is restricted to the place of central management and control. Thus a company must retain an office in Zambia though within Zambia it can change its actual situation as it wishes and however much its residence may change its Zambian registration fixes its nationality and domicile. The Companies Act provides that notice of situation of this office and any change of it must be given to the Registrar who should record it.¹² Until such notice is given the company is not deemed to have complied with the provisions of the Act with respect to having a registered office. A penalty for default is twenty Kwacha for every day during which business is carried without having a Registered Office.¹³

Although the majority of companies comply with the requirement to lodge the notice of situation of office or change thereof, often *most of them do not supply proper information. It is not* uncommon, for example, to find a town indicated as the registered office and yet the same would be receivable by the Registrar. *It is difficult to explain why this should happen. One possible* reason may be lack of qualified personnel in the Registry.¹⁴ The other could be simply inefficiency of the Registry Staff. Whatever the explanation this situation should not be allowed

to continue. Notice of situation of office is a simple form which should be scrutinized even by an ordinary clerk. Lack of manpower therefore would not be accepted as an excuse.

Again the penalty of / kwacha is insufficient. Company Officials /twenty who want to evade service of process may risk the penalty and possibly get away with their villainy than comply with the requirement of the law. Further the Act should specify the period within which the notice must be given and should provide that vis-a-vis third parties a change of situation is not effective until notice is given.¹⁵

It will also be noted that if the company maintains a branch register it must file a notice stating situation of office where the branch register is kept and of any changes in its situation and if discontinued of its discontinuance. Such notice should be filed within twenty-one days of the opening of the office or of the change or discontinuance as the case may be.¹⁶ The file, therefore, will show where it is possible to obtain additional and perhaps more up to date information than is available at the registry and where writs and notices can be served on the company. The file however will not show where the company carries on business for this will not necessarily be at the registered office, which quite often is simply the address of the company's advocate, accountants, or auditors. In order to facilitate the service of process the company should also be required to file notice showing where the company carries on its business. In litigation a successful party who wishes to levy execution is not interested in the registers, those may be good historical documents. What he wants is to know where the

assets of the defaulting company are and such a place normally happens to be where it carries business, that is the place where machinery, stock-in-trade and other assets of the company worthy seizing may be found and that is the place which should be disclosed.

Turning to disclosure of the company's financial position the Companies Act requires annual returns to be completed within fourteen days after the first or only ordinary general meeting and forwarded to the Registrar within thirty days from the date of completion by every company with share capital.¹⁷ The return should specify the amount of the capital of the company, the number of shares into which it is divided, the number of shares taken, the amount of calls made and such like information. The object of the annual return is to provide an annual consolidation of periodical information so that a searcher will not generally have to go back beyond the last annual return. He will also have an opportunity to obtain additional information which would otherwise be available only at the company's office. The annual return, however, does not include the balance sheet and profit and loss account with the exception of foreign companies that have to file an audited balance sheet though, strangely, the same need not include the statement of profit and loss.

Companies that are registered under the Companies Act and have adopted Table A should, however, every year lay before the company in general meeting a profit and loss account¹⁹ and a balance sheet which should be accompanied by a report of directors as to the state of the Company's affairs.²⁰ But even where Table A is adopted the

company has no obligation to adopt all the provisions. ²¹ Hence, regulations 107 and 103 which provide for matters relating to accounts may not always be applicable.

Regulation 106 further states that "directors shall determine whether and to what extent and at what times and places and under what condition or regulations the accounts and books of the company or any of them shall be open to the inspection of members not being directors, and no member (not being a director) shall have any right of inspecting any account or book or document of the company except as conferred by law or authorized by directors or by the company in general meeting." The provisions of this regulation give absolute discretionary powers to the directors in matters relating to inspection by members. This is rather unfortunate as it defeats the very objective of inspection, viz, disclosure which is the vehicle "par excellence" for the conveyance of information and accounting to shareholders. Exceptions "conferred by law" or "the company in general meeting" are ineffective firstly because there is so far no such law in Zambia and secondly because the general meeting would, in most cases, accept the recommendations by the directors if they suggested that company accounts should not be open to members. This is wrong postulate. The correct approach is that Company Law itself should make provision that will bring about a fair and just balance between duties of directors to make full disclosure not only to the shareholders but to the workers too. It implies that directors' discretion should only be exercised where the disclosure of any particular information would be harmful to the company. In other aspects it should not be exercised.

Apart from the requirements as to the annual returns the Companies Act requires proper books of account to be kept.²² Where a company is being wound-up and it is shown that books of accounts were not kept throughout the period of two years immediately preceding the commencement of the winding-up or the period between incorporation of the company and the commencement of the winding-up, whichever is the shorter, every officer of the company who is in default is liable on conviction to imprisonment for a term not exceeding one year.²³ The term "proper books of; accounts" is, however, not defined in the Act apart from the negative provision that proper books of accounts shall be deemed not to have been kept..... if there have not been kept such books of accounts as are necessary to exhibit and to explain the transactions and financial position of trade or business of the company, including books containing entries from day to day in sufficient detail of all cash received and cash paid, where the trade or business involves dealings in goods, statements of the annual stock takings and (except in the case of goods by way of ordinary retail trade) of all goods sold and purchased, showing the goods and the buyers and sellers thereof in sufficient detail to enable those goods and those buyers and sellers to be identified.²⁴

The clear implication of this provision is that a company may not dispose of any of its books of account until after the completion of winding-up. If it does and a petition for compulsory winding-up is lodged within two years preceding the winding-up the officers of the company will be liable. This requirement is very unfair

as it compels companies to keep even those oldest records for which they no longer have any use. Apart from this, such documents may take-up a very big position of the company's premises. In any case it is doubtful whether all the "books of account," especially those dating several years back will be of utility even to the State itself as they may be torn or defaced through time. A more realistic provision would be one requiring the preservation of the books of account for a specified time²⁵ after which the same may be destroyed without possible prosecution of the company officers if there is winding-up. Such a provision may be similar to the one in the Income Tax Act²⁶ which requires that a person carrying on business should keep books and details of his transactions for six years.²⁷ The period within which books of account may be kept should not be calculated by reference to winding-up, rather it should be reckoned according to lapse of time.

Another aspect relating to accounting and disclosure concerns directors' report. Directors' report read with the accounts should give the fullest practical disclosure of the company's affairs. It is necessary, therefore, that the annual report of the company should consist of the balance sheet, profit and loss account, auditors' report as well as directors' report. At the moment there is no provision in the Companies Act requiring disclosure of this information. In practice, however, the directors give reports although these are very uninformative and consist of "cryptic" statements covering general matters which convey no message at all as to the state of affairs of the company. In some reports it is even impossible

to discover what business the companies concerned were engaged in unless this may, in some cases, be discerned from the name of the company. It would be difficult even for the expert to extract a satisfactory picture of the state of affairs of the company out of the figures alone. And even where the directors' report is supplemented by the Chairman's statement, as is often the case with many parastatal companies, the deficiencies found in the former are not covered in the latter. Besides, often the annual report, to which the chairman's statement is attached, is not circulated to all members apart from the notice of meeting which is sent to them. Those members who do not attend the annual general meeting therefore remain in ignorance as to the contents of the chairman's statement.

There is no doubt that director's report constitutes one of the basic requirements for disclosure to both ordinary and worker-members, but if it has to serve its purpose it should give full narrative account of the state of affairs of the company. In particular, it should state the names of directors of the company (although usually in practice this is done), the principal activities of the company and its subsidiaries and any significant changes in the company's assets, share structure or contractual relationships and those of its subsidiaries.²⁸ A further provision must be made requiring disclosure of shareholdings and dealing by directors²⁹ as a supplement to the director's report.

Apart from the directors' report the Companies Act should provide for the inclusion of the auditors' report in the accounts. Such

provision should require the appointed auditors to carry out such investigations as will enable them to form an opinion on whether proper books have been kept and to report to the members and workers on the accounts examined by them and on all balance sheets, profit and loss accounts, and group accounts.³⁰ Provision must also be made conferring on the auditors the right of access to all books, accounts and vouchers of the company and to require from the officers of the company such information and explanation as they may need for the performance of their duties.³¹ Further, the auditors should be entitled to notices and circulars relating to any general meeting, to attend it, and to be heard on any part of the business which concerns them.³⁴ Auditors report should include a certificate to the effect that as presented the accounts give a true and fair view of the affairs of the company or group as the case may be. Where they fail to obtain all the information and explanation which are necessary for the purpose of their audit, the auditors should state this fact in their report.³³

All these proposed changes in accounting and disclosure rules are necessary in order to enable both the general and worker-members as well as the investors to have details of financial structure of the business, the invested capital, charges, mortgages and hire agreements on the company's assets and to be regularly informed of the size and scope of the company's undertakings so that they can focus the returns and payments. Besides as co-partners in the enterprise they must satisfy themselves that assets and profits of the business are not improperly milked away, for example, through inflated salaries, benefits, allowances, loans or grants

to management at the expense of the company or the general creditor or worker or disposal of assets at uneconomical prices. They can only do so if all the relevant information on the company accounts is readily available to them, which, unfortunately is not the case at the moment, at least not in law. Yet the need for it cannot be overemphasized.

(b) The Problems of Nominee Shareholders - Changing Requirements
for Disclosing Insider Interests

The register of members generally does not enable the company or anyone else to ascertain more than the identity of the registered proprietors of the shares. Indeed Section 52 of the Companies Act provide that, "no notice of any trust shall be entered on the register of members or be receivable by the Registrar." Where share warrants have been issued, still less is known. In both situations it is thus impossible to find out who are the true beneficial owners of the shares since it is quite common for registered shares to be held by nominee shareholders as trustees for the true owners. In this sense a nominee shareholder is that person who holds shares in his own name on behalf of the beneficiary who has the effective ownership and control of the shares. Thus, the nominee is only the registered legal owner, an owner in name, holding the shares on trust for the beneficiary who retains an equitable interest.

The nominee, rather than the beneficiary, is a member of the company in which the shares are held and as such only his name is entered in the register of members.³⁴ It is even doubtful whether the beneficiary is a party to the statutory contract

constituted by the memorandum and articles of Association of the company.³⁵ It may be argued that the nominee is a party to the contract as agent for an undisclosed principal, the beneficiary, but the provisions of Section 10 read together with those of section 41 of the Companies Act would not admit such a construction. Section 10 states that "the memorandum of association.....shall, when registered, bind the company and the members thereof to the same extent as if it had been signed and sealed by each member.....". On the other hand section 41 defines a member as ".....every other person who has agreed to become a member of a company and whose name is entered on the register of members.....". Since a beneficiary does not appear on the register of members as per section 41 he is not a member referred to in section 10. In consequence he is not bound by the contract constituted by the memorandum of association.

As a member and registered owner of the shares, the nominee is entitled to vote. However, whether he has power in relation to his beneficiary to vote otherwise than as and when expressly directed, depends upon the terms of his contract of appointment. But express terms dealing with voting are rare in Zambia; in the absence of such terms it is doubtful whether, in general, the contract would be interpreted as authorizing or permitting such a power. This is supported by the fact that, in distinction to other trust relationships, it is the beneficiary who exercises the control over shares held by his nominee.

It is not clear whether disclosure by a nominee of his beneficiary's identity would be a breach of duty. Again, express terms dealing with disclosure are rare. Given the nature of nominee shareholding,

it is quite possible that, in general, a court would imply a term against disclosure in the contract of appointment, and indeed in some legal systems this may be the basis of the contract.³⁶ In any case most nominees would consider it a matter of good faith and prudence to keep secret their beneficiaries' identity for disclosure may cost the nominee both his position and reputation.

The real extent of nominee shareholding in Zambia is not known, due partly to the fact that often it cannot be determined whether a person is a nominee and mainly to the fact that no comprehensive statistics have ever been compiled. However, indications are that before the introduction of the Leadership Code Rules,³⁷ some politicians and Senior Civil Servants were openly running several businesses which they could not continue when the Code came into effect.

There is nothing inherently wrong in creating nominee shareholding and indeed there are many circumstances in which it is both normal and convenient on commercial or personal grounds. For example the maintenance of secrecy. A person who wants to take over control of a company may wish to keep secret his identity, and perhaps even the fact that a take-over attempt is being made, in order to avoid resistance to his attempt or to be able to buy shares at a lower price than otherwise, since, as Peden puts it, "market price usually goes up when a take-over bid is made."³⁸ By using several nominees, especially a large number not identifiable as such, a person may thus acquire a large proportion of shares before someone eventually notices the heavy buying of shares or their accumulation in certain persons' names.

Nominee shareholding may also be created as a result of shyness and fear of disciplinary action. A person may for a variety of reasons be reluctant to allow others to know his shareholdings. He may be a politician or public servant in Government or Parastatal who because he is caught up by the Leadership Code would be disciplined if he was known.³⁹ He may simply wish to keep secret his financial affairs. But whatever the reasons for creating nominee shareholding, this practice is capable of abuse. It enables directors who may also be beneficial owners to traffic in the securities of the company without this being known or disclosed or someone secretly to acquire control or a sizeable holding on which to base a bid for control. This problem may be of great magnitude in private companies than in parastatal corporations for in the latter the state will always ensure that it maintains majority shareholding. Further the absence of a stock exchange in Zambia militates against share buying without this being known by the company. However if the buying is done by the directors then in the absence of a stock exchange market such trafficking in shares and securities by them can take place.

One way to minimise trafficking is by requiring directors to disclose their interests in the company. At the moment there is no compulsory requirement to disclose directors' interests. The only reference to this matter is in regulation 78(b) of Table A which provides for the office of director to reveal if "he holds any office of profit in the Company except that of Managing Director or Manager". But the provisions of this regulation will not always apply because the adoption of Table A is optional. And even if it was compulsory still regulation 78 (b) is inadequate as it refers only to

vacating office, thereby leaving aside the important requirement of disclosing directors' interests. As the law stands directors can easily abuse their powers by trafficking in company securities with impunity. By virtue of their positions directors can also make unfair profits in the improper use of confidential price-sensitive information that is not generally available to the worker or investing public. This of course is likely to happen in a bid or expected bid situation, but in principle it can happen at any time.

The efficient operation of the market as a source of capital, as a means of achieving a desirable and efficient disposition of resources requires that relevant information should be fairly available, and that all investors including workers should be able to back their knowledge and judgement rather than favoured individuals should be able to take private advantage of confidential information. Hence directors should be compelled to notify the company of their interest in shares and dealings in the securities of the company or group, the commencement or cessation of interest or its sale or assignment and that of their spouses and infant children. Such notification should be made within reasonable time of the director having knowledge of the event and the information so notified must be available to both general and worker-members at the earliest opportunity and in all cases at or before the next general meeting after the event and at which meeting worker-members should be present and have the right to vote.

Disclosure should be further necessary of director's service contracts and variations thereof. A copy of such service contracts should be kept by the company at its registered office or the place

where the register of members is kept or its principal place of business. The same should be available for inspection by ordinary and worker-members. Another copy must be filed with the Registrar of Companies.

Directors and Senior Managers should also be required to disclose their emoluments and other relevant particulars on the same lines as those provided for in the British Companies Act 1967.⁴⁰ The British Act even goes further to require disclosure in the accounts of the company salaries of employees receiving 10,000 pounds or more per year.⁴¹ A similar requirement is most desirable in Zambia though the actual sum could be smaller as salaries in Zambia are much lower than those in Britain.

By insisting on disclosure of this type of information, workers, investors and members will be afforded effective protection against the abuse of nominee shareholding relationships and insider information by Directors and managers of the company.

(c) The Leadership Code and Disclosure of
Beneficial Shareholdings

The Leadership Code is a creature of the Constitution. According to section 33(1) of the Constitution of the Second Republic of 1973, ⁴² the Leadership Committee may by statutory instrument make regulations applicable to the holders of specified offices. Regulations here refer to the Leadership Code, The Leadership Committee itself is constituted by S.32 of the Constitution and consists of five members appointed by the President. Although

there are no formal qualifications laid down in the Constitution for the members of the Committee, one distinguishable feature of the Committee is that it is composed of members of the Central Committee⁴³ with the Secretary General of the Party as its Chairman.⁴⁴ The Committee therefore is very powerful.

In pursuance of the powers conferred upon it by article 33 of the National Constitution the Leadership Committee has since made a total of five statutory instruments. The first was statutory instrument No. 249 of 1973. This was revoked and replaced by statutory instrument No 288 which was gazetted on 21st December, 1973. The second instrument was in turn revoked and replaced by statutory instrument No. 47 which was gazetted on 20th March, 1974. This was also revoked and replaced by statutory instrument No. 108 which was in turn revoked and replaced by statutory instrument No.88 of 1976, being the instrument currently in force.

It will be noted that one of the fundamental requirements in each of the previous statutory instruments was that every Leader and his spouse had, within three months of the coming into operation of the Code or the leader's assumption of specified office, to declare their assets. Because the majority of the Leaders could not comply with the requirement the period of compliance had to be post-poned and this could only be done by revoking and replacing the earlier instrument by a new instrument setting out a new period. As the leaders did not

comply with the new period of three months postponement also became necessary and this continued to the present Code.

The major reason for the postponement of the Leadership Code therefore, was to afford sufficient time to the affected Leaders within which to prepare and orientate themselves for the changes intended to be introduced by and to comply with the requirements of the Code. As Mr. Grey Zulu, then the Secretary General of the Party put it, "the Leadership Code as a novel experience in our constitutional development has been subjected to critical analysis by the people of this country and the present statutory instrument reflects the Kabwe Declaration⁴⁵ as analysed by ourselves."⁴⁶ It was stated later that as a result of representation, the Committee (Leadership Committee) decided that an amended Leadership Code should be introduced with a view to making the Leadership Code more realistic and effective ⁴⁷ Reference to "representations" here demonstrates that there was pressure from those leaders who were adversely affected by the Code and who did not support its rigorous implementation. These are the leaders who used their positions to amass a lot of wealth and had financial interests in many businesses. But by allowing several postponements of the Code the Party and its Government were clearly conceding to these pressures and in that way they have managed to accommodate the interest of these leaders. In fact to the present date, it has not been possible for all the affected leaders to comply with the Code. As late as January 1980 Mr Alexander Chikwanda, the Chief whip conceded that the Leadership Committee has not yet

punished any leader for contravention of the Code adding this was, "because there was no conclusive information on violations."⁴⁸ It is doubtful whether this is true. If the Committee was seriously interested in obtaining the required information on violations, it could have got it through the various agents of Government and directly from the public. That this has not been done clearly shows that there is very little or no importance being attached to the implementation of the Code by the Party and Government. In any event those that are supposed to implement it may also be culprits and it is very unlikely that they can implement it seriously.

The principal aim of the Leadership Code was to lay down a code of behaviour expected of Leaders within the context of social egalitarianism. It was argued that the Code would, "eliminate corruption among leaders, ensure and maintain a high standard of discipline and portray an unquestionable rectitude as well as a high sense of duty and responsibility, "in that way their image would be protected from unnecessary attacks and insinuations"⁴⁹ The Code, therefore was not strictly intended to be a Company Law document regulating corporate interests of leaders as such. However it contains provision which would be relevant on the question of disclosure of leaders shareholding and other financial interests. It is now necessary to consider these provisions.

The first provisions are those contained in regulation 3 of the Code which state that, "serve as otherwise provided in this Code, a Leader shall not carry on any business or receive any emoluments other than those payable to him in respect of the specified office, whether on a temporary, probationary or permanent basis, but does not include any person employed on the authority of an employment permit issued under the Immigration and Deportation Act." The extension of the term "leader" to temporary or probationary persons, it is submitted, can lead to absurdities. Is it expected that even a student doing a temporary job during three months vacation and satisfies the requirements as to "specified office" will be subjected to the tedious rules of the code particularly those relating to declaration of assets.⁵⁰ In the event that he fails to comply with the Code is such a student to be censured, suspended or his emoluments to be forfeited in accordance with regulation 12. If the answer is in the positive, of what value is such an action if the student has returned to college or University? What about an employee who is, for example, on six months probation and satisfies the requirements as to "specified office" but whose service at the expiry of that period is terminated for incompetence or similar offence, is such a person expected to comply with the provisions of the Code. If he does not, how can punishment be meted against him. All these questions show that it is unwise to extend the application of the Code to people doing temporary or probationary employment because enforcement of the Code rules against them is impossible. Besides such people are the least expected to use their positions corruptly or to

amass wealth as the period within which they will be employed will be very short. Again during that period they are likely or are supposed to be supervised thereby minimizing the chances of abusing their positions.

The other aspect of the definition of "leader" is that relating to "specified office" which is defined as that office held by any person in the service of the Party; Government; local authority; any corporation; body or board including an institution of higher learning, in which the Party or the Government has a majority or controlling interest, any commission established by or under the law; the Zambia Congress of Trade Unions or any registered trade union and which person is in receipt of an annual salary of K2500 or more.⁵¹ The requirement as to an annual salary of K2500 was introduced for the first time by statutory instrument 103 of 1974. The effect of this regulation is to confer the title of "leader" on nearly one quarter of the working population of Zambia which would include even clerical and secretarial staff in Government, Government owned or controlled corporations or institutions. This unfortunate result has come about because of defining leadership by income instead of using the usual and accepted criteria of authority, power, control and responsibility. People who possess these are those in senior political positions, namely District Governors, Provincial Political Secretaries, Ministers of State, Cabinet Ministers, Members of Central Committee etc., and Senior Civil Servants, like Assistant Secretaries Deputy Secretaries and Permanent Secretaries. These are the leaders as they hold positions of influence which they can abuse to their personal advantage. As regards clerical or

secretarial staff such abuse is very slim, almost non-existent as they work or are supposed to work under supervision. And simply because they earn K2500.00 or more will not make them leaders in the normal sense. In fact the majority of reported cases of official corruption and abuse of power involve those in top Party and Government positions⁵² and not junior officers presently included under the Code.

There is a proviso to regulation 3 stating, inter alia, that a leader has a right to receive "dividends on Government Stock". The proviso does not extend to dividends on private stock with the result that leaders are not authorized to own shares in private companies. In fact regulation 11 provides that any leader who holds or acquires any business or interest in business, or any land or other property and assets in excess of what is allowed should within twelve months of the coming into operation of the code, or the date of assuming the specified office, or the date of his acquiring such excess, dispose of it by sale, transfer or other means to any person other than his wife, her husband or his or her child.⁵³ The leaders who owned shares on the 28th May, 1976, the date when the present Code came into effect, were therefore, supposed to sell or transfer the same by 27th May 1977 which is 12 months from the effective date. To date, however, this requirement has not been satisfied. It is also doubtful that even with the passing of Corrupt Practices Act 1980⁵⁴ leaders' beneficial shareholdings will be fully known. Of course the introduction of the Corrupt Practices Act confirms the general notion that corruption has increased

in Zambia and the Act is intended to curb it. Whether this will be successful remains to be seen.

A leader who prefers to maintain his private business interest may apply to the President for exemption from the provisions of regulations 3 and 4 and if the same is granted he will have to forfeit the salary of the specified office. In that event however, he will still be bound to make declaration of all his assets and liabilities and those of his wife in accordance with regulation 9. Thus if a leader or his wife is a beneficiary of any shares these must be declared as well. But such a declaration will be in conflict with section 52 of the Companies Act which prohibits even notice of any trust to be entered on the register of members or to be receivable by the Registrar of Companies. To avoid this conflict Sect 52 should be amended so as to require disclosure of beneficial interest generally. This is already a requirement in Australia where every "substantial shareholder", that is a person with beneficial interest in 10% or more of nominal value of any class of voting shares in the company, is required to give to the Company full details of his interests in all of the voting shares.⁵⁵ There is a similar provision in the British Companies Act 1967⁵⁶ which even goes further to require a separate register of those shareholdings and dealings to be maintained by the Company⁵⁷ and to be open for inspection of any member of the company⁵⁸ and copies thereof to be available except in so far as it contains information regarding the holdings of companies incorporated or carrying on business abroad in which case dispensation from disclosure may be granted by the Board of Trade.⁵⁹

The provisions of the Australian and the British Companies Acts enable those interested in the Company, the shareholders and potential shareholders to know whether there are in existence "substantial holdings" of shares which might enable a single individual or corporation or a small group, to control the destiny of the company and if such a situation does exist, to know who are the persons on whose exercise of voting powers the future of the company may depend. Also, the requirement discloses the existence and identity of a person who is buying shares in a bid to take control of the company.

As applied to Zambia the requirement for disclosure of this type of information will enable the Party and its Government from Company Law point of view, to know the extent of leaders' shareholdings and would strengthen the provision of the Leadership Code. It will also enable all the others who wish to know not only the shares of the leaders but also every person substantially interested in the shares of the company and thereby affording such people better protection. Hence the provisions of S.52 of the Companies Act will have to be modified in order to permit disclosure of beneficial shareholders. This will be the surest way to make declarations under the Leadership Code meaningful. It will also help to eliminate the conflict existing between the Companies Act regarding non disclosure of trusts and the requirement for disclosure of Leaders' assets under the Leadership Code. Nothing is being suggested here to change trust laws which in all other respects may be maintained.

References

1. L.C. GOWER, Op. cit 295
2. Chapter 517 of the Laws of Zambia SS. 71 and 72
3. Companies Act Chapter 686 S. 32
4. Ibid. S.68
5. Ibid S.83
6. Ibid S.47
7. e.g. register of members - S.43 (1)
8. Companies Act S. 12 (1)
9. Ibid S.12 (2)
10. Ibid S.12 (6)
11. These conditions are the passing of a special resolution, confirmation of the alteration on petition by the Court, service of notices on holders of debentures and other interested persons and obtaining consent of every creditor whose debt or claim has not been discharged.
12. Ibid S.84
13. Ibid S.12 (7)
14. For example as at June 1979 when the inquiry was made there were only two people in the Registry who had gone beyond level of form V. i.e. the Registrar himself and his deputy - Information obtained from the Registrar.
15. See the Scottish case of Ross V. INVERGORDON DISTILLERS LTD (1961) S.C. 286.
16. Companies Act S.44
17. Ibid S.47
18. Ibid S.226 (3)
19. Table A. Regulation 107

References cont'd

20. Ibid Regulation 103
21. Companies Act S. 28
22. Ibid S. 217
23. Ibid S. 217 (1)
24. Ibid S. 217 (2)
25. The Commission on South African Company Law recommended a period of 10 years. - see paragraph 110 at p. 92 and the Jenkins Committee (supra) recommended 5 years. Under the Australian Companies Act 1962 - 73 the period is 5 years.
26. Income Tax Act, Chapter 668, of the Laws of Zambia.
27. Ibid S. 55
28. For similar and even more extensive requirements see the British Companies Act 1967 S. 16.
29. British Companies Act 1980 makes insider dealing a criminal offence (ss. 68-73).
30. On the same lines as in the British Companies Act 1967. S. 14 (1)
31. Ibid S. 14(5)
32. Ibid S. 14(7)
33. Ibid S. 14(6)
34. The Companies Act Chapter 686 S. 41
35. Ibid S. 10
36. See generally the South African Privacy Act 1974
37. See the Leadership Code Regulations S. 1 No. 88 of 1976.
38. Peden, Control of Company Take-overs (1970) p.16.

39. Refer generally to the Leadership Code Regulations (Supra).
40. S.6 of the British Companies Act 1967 requires particulars of the Chairman and Directors' emoluments to be shown in the accounts of the Company.
41. Ibid S.8.
42. Constitution of Zambia Act No. 27 of 1973. The second Republic was created after the establishment of the One Party State in 1973 - see Article 4 of the Constitution.
43. The Central Committee is the Supreme policy-making body in Zambia - Constitution of UNIP - article 12 appendix to the Constitution of the Republic.
44. The Secretary General deputies for the President and acts as President in the absence of the President - Constitution of UNIP (Supra) article 15.
45. The Kabwe Declarations were made pursuant to President Kaunda's speech to UNIP National Council at Kabwe on December 2, 1972, Government Printer Lusaka.
46. Reported in "Times of Zambia" June 17, 1974 at P.1.
47. In "Zambia Daily Mail" July 19, 1974 P.6
48. Reported in "Times of Zambia" January 24, 1980 p.1
49. Report by the National Commission on the Establishment of One Party State of 1972 P.3, Government Printer Lusaka.
50. The Leadership Code, Regulation 9(1)
51. Ibid. Regulation 2
52. E.g. See Nyalungwe V. The People, Z.L.R. (1976) p. 176; Sensenta V. The People, Z.L.R. (1976) p. 184 and Mulwanda V. The People, S.J.H. (1975) p. 119.
53. The Leadership Code, Proviso to regulation 11.
54. Act. No. 14 of 1980. The Act confers powers on the Anti-

References Cont'd

corruption Commission to investigate any public officer who is in possession of property for which he does not give satisfactory explanation - S. 33.

- 55. Australian Companies Act 1962-73 S.690.
- 56. British Companies Act 1967 S. 33
- 57. Ibid. S. 34 (1) - (3)
- 58. Ibid. S. 34 (5)
- 59. Ibid SS. and 5 (2)

PART III
WORKERS' PARTICIPATION
IN
COMPANY LAW

CHAPTER 5:
PARTICIPATION IN THE DECISION-MAKING
PROCESS: THE ATTAINMENT OF WORKERS'
CORPORATE DEMOCRACY

The thesis so far is that company law is based on the idea that capital owners are the sole decision-makers in the company and that protection is weighted in favour of the interests of creditors and shareholders. For a long time decisions concerning employment, investment, production and generally corporate planning were concentrated in the hands of top management, as organic representatives of capital owners, and workers' influence on these decisions tended to be negative or remote.

K.D. Kaunda questions whether workers "should be excluded from participating in the functions of ownership and management just because they do not happen to belong to these privileged groups."¹ More or less as an answer to this question he suggests that, "time has now come for us to establish relations between the worker and the employer that are in keeping with the Philosophy of Humanism..... It is the intention of my Party and Government to change the whole system of industrial relations, so that our workers can effectively participate in the decisions of management.....In certain clearly defined areas, which have traditionally been regarded as so-called management prerogatives, decisions will only be taken with the participation of Works Councils."²

This is a clear recognition that workers inevitably should have greater involvement in the determination of not only their working conditions but also the economic operation of the enterprise in which they work. In further pursuance of this idea the Works Councils were introduced by an Act of Parliament³ as an instrument to promote effective workers' participation and secure mutual co-operation "in the interests of industrial peace, improved working conditions, greater efficiency and productivity"⁴ and in order to give better protection to workers' interests; in general to introduce what has been referred to as "workers' industrial participatory democracy."

The purpose of this Chapter is to explore this new concept of workers' participation in the decision-making process as a measure to give workers better protection and control in corporate management. We shall attempt to evaluate the nature and extent of such protection and control. It will also be necessary to analyse the efficacy of the applicable law on these important questions. A suggestion will be made that an effective scheme of workers' participation in decision-making would require not merely the compulsory establishment of Works Councils but also certain fundamental changes in the nature of company law and that management structure should be altered in order to reflect a more

democratized system of industrial relations. Such changes should include provision for worker directors on company boards.

(a) Background To Workers' Participation

Zambia inherited a society of unequal human beings. There was, at independence, in all walks of life, racial discrimination and class subjugation at places of work.⁵ The white manager was still in control and treated the black Zambian worker as an inferior human being whose main purpose of life was to provide cheap labour in the extraction of copper and other minerals for the economic benefit of the expatriate capital owners. It was not thinkable then, and for a considerable period after independence, for indigenous Zambians to participate in corporate management. Independence brought about universal participation in politics but not in corporate affairs in industry. The essential criterion for taking part in decision-making in commerce and industry continued to be ownership of capital. The owners of capital appointed boards of directors, which in turn appointed management to run the enterprise on behalf of the owners of capital.

It was in view of this corporate set-up that President Kaunda at the Second National Convention in Kitwe in December 1969,⁶ gave general guidelines for the establishment of Works Councils in Zambia. In another address to United National Independence Party National

Council (UNIP) in November 1970, President Kaunda recommended that the Party and Government should take economic measures to prevent the rise of a group of exploiters and such measures should include:

- (a) the promotion of Zambian companies rather than individual entrepreneurs; and
- (b) the establishment of the concept of co-determination.⁷

The President envisaged that the adoption of such measures would ensure not only greater participation of workers in the direction of the growth of the national economy but would also bring about a new and constructive partnership between management and the workers.

These recommendations were adopted by the UNIP National Council which made a further pledge to watch any developments of capitalist tendencies and to fight against all forms of exploitation and corruption. The Council also recognized that this would only come about if deliberate action was taken to promote Zambian companies and co-operatives rather than individual investors.

The sentiments of the UNIP National Council of November 1970 are similar to those which were expressed earlier at the historic Livingstone Labour Conference in April 1967⁸ regarding the problems in industry. These problems were

identified as being discrimination, low productivity and industrial misunderstanding. Thus, at the Livingstone Conference and at subsequent conferences and conventions both philosophical and moral considerations based on the Philosophy of Humanism were highlighted. It was stressed that "alienation of the worker in industry can only end when the process of democratisation is completed...." and that "no managerial diplomacy could amend a structure in which men were units of production and subjected to an external discipline whose roots lay in a pristine form of imperialism".⁹ A further pledge was made that exhaustive structural changes were to be brought about including an attack on traditional management prerogatives and the existing system of industrial supervision would be replaced by leadership in economic tasks which would be similar to the role played by the headman in the traditional economy.¹⁰

These various suggestions, however, were not formulated into legislation until in 1971 when the Industrial Relations Act ¹¹ was enacted. The Act of 1971, says Quemby, bore little resemblance to what was agreed and the subordinated status of the worker, a colonial legacy, remained unscathed; which seems to be the habitual fate of colonial legacies in particular those which have little to do with colonialism as such, but are rather attributable to the capitalistic industrialism for which colonialism served as nursemaid.¹²

One proposition which was changed significantly relates to the size of the Works Council. The Industrial Relations Act requires Works Councils to be established in those undertakings with hundred eligible employees or more,"¹³ whereas it was originally envisaged that this figure would be at least as low as twenty-five.¹⁴

One possible explanation for this modification is that the Party and Government wanted to establish Works Councils on an experimental basis only. The other may be that it was a capitulation to certain interests who wished to be excluded from the provisions of the Act. This may be discerned from the statement made by the then Minister of Labour, Mr. Wilson Chakulya that "some people have gone to the extent of labelling the idea (of Works Councils) as Communist inspired. I do not accept this line of thinking which is so obviously based on a misunderstanding. We are not establishing Workers' Councils, but Works Councils....."¹⁵ Further "there is no intention to punish anyone, there is no intention to grab the power of management and place it in the hands of workers."¹⁶ But how is the concept of 'co-determination' to be established if workers are not given certain of those powers which previously were the preserve of management and how is 'constructive partnership' between management and workers possible if power is retained by the former?



It may be because of the foregoing reasons that though the Act was passed in 1971 it only came in force in April 1974 and even then Part VII dealing with Works Council was delayed until 1st May 1976 when the President announced by the Statutory Instrument No. 76 that it would be effective from that date, which is five years later. This shows how indecisive and uncertain the Party and its Government were on the establishment of Works Councils and explains why, as will be demonstrated later in the Chapter, the Industrial Relations Act was vaguely drafted leaving a lot of ambiguities and loopholes.¹⁷

(b) Workers Participation As a Concept - A Universal View

It is an accepted world-wide notion that workers should have more say in determining not only their own working conditions but also many aspects of the operation of the enterprise where they are employed. In some European countries, notably, Federal Republic of Germany and the Netherlands the joint stock company has been used with effect to ensure worker participation in management by providing for workers representatives on the board of directors. In Denmark, Sweden, Norway and Luxembourg some pieces of legislation to allow some form of participation in decision-making in industry have also been adopted. Further, official investigations have been carried out in France and the United Kingdom. The

European Economic Community has also made proposals to establish some system of worker's participation in decision-making and to harmonize law to that effect among the Community's member countries. In India, a scheme of Joint Management Councils between management and worker's representatives was established in 1958. There is the Workers Self-Management in Yugoslavia. In developing countries too much attention is being given to the idea of Workers' participation.¹⁸

The general acceptance of some form of worker's participation in almost every part of the world demonstrates that the question is not whether but how worker participation should be introduced. But it seems evident that this trend does not necessarily arise from a groundswell movement emanating from the workers themselves. It has not developed in response to a clearly articulated demand from the workforce or from workers' organisations, but rather seems to derive from a variety of theoretical ideas and practical considerations.

Underlying the notion of industrial democracy in Zambia is a basic Philosophy of Humanism which has profound belief in the worth of every individual and respect for the dignity of man, which makes it inconceivable that workers should be reduced to a role as mere

'factors of production.' The pressures of modern society dictate that industrial relations must be such that it "creates an atmosphere which will be conducive to the creation of a man-centred society..¹⁹

Humanitarian consideration are also present, deriving from another social philosophy which claims that the improvement of working conditions and the need for self expression among workers can best be satisfied by opening up avenues for them to take part in decisions affecting their working life. This is intertwined with the desire to eliminate conflict and to develop an approach which will emphasize a community of interests of workers and employers, and promote a joint effort to improve productivity and the efficiency of the undertaking. In fact empirical investigation has concluded that even if it cannot be shown conclusively that workers who participate work harder, at least they become less owners of the basic conflict between themselves and management.²⁰

Another profound motivation for worker participation lies in the egalitarian notion of social justice and equality of rights for individuals engaged together in a productive undertaking. The basic idea being that workers, who contribute their labour, should share with those who contribute capital in the gains of the undertaking as well as in the responsibility for decisions concerning its operations. Related to this is the political

notion of the sharing of power between the forces of capital and labour, a concept that goes far beyond the confines of the undertaking, which tends to reflect in its structure the balance of forces in the society as a whole. It is a concept that advocates the democratisation of industry. That is to say, although it is accepted that relationships of authority and subordination are an integral part of the industrial complex, it is hoped there should be a machinery of participation which will prevent the 'abuse' of power wielded by the few over the many. This seems to be the meaning of participation in the Eastern Europe socialist society. For example, the Yugoslav workers' self-management system, including workers' co-operatives, represents a form of industrial democracy that places the total responsibility for management and production of the undertaking in the hands of the workers themselves, who are also the owners.²¹

This is a higher form of participation than representative system found mainly in countries with market economies, where participation of workers in decision-making is exercised through elected representatives in different management organs or bodies for joint consultation or co-decision and systems where individual workers participate directly in management decisions affecting their work. In the former group is the system

that provides for representation of workers on boards of management and supervisory boards of the undertakings, similar to the one found in the Federal Republic of Germany. Still under the same group is the system of setting up of internal organs within the enterprises for joint consultation between management and workers. This is a system similar to Zambia's Works Councils which we now have to consider in some detail.

(c) Establishment and Management of Works Councils

The Industrial Relations Act 1971, provides that not later than six months from the coming into operations of Part VII of the Act a Works Council should be established in every undertaking employing not less than one hundred eligible employees,²² and undertaking being defined as "any company, firm, trade, business, industry or any other kind of enterprise, any statutory board, or corporation or any local or public authority or any branch or autonomous division thereof."²³

Thus the extent of the application of the Act is not necessarily restricted to limited companies. As for the term "eligible employee" here refers to any employee other than a probationary, part-time, casual or temporary employee or a member of the management of the undertaking.²⁴

Part VII came into operation on the 1st May 1976 by statutory instrument issued by the President.²⁵ After the Presidential order a Working Party comprising 4 members nominated by the management and 4 nominated by the trade union, if there is one, is required to be formed.²⁶ If there is no trade union in the undertaking, the workers themselves will appoint their 4 representatives.²⁷ There is no explicit requirement that members of the Working Party must be eligible employees or members of management. Both the union and management are free to appoint anybody but in practice union appointees are union officials or members of the union within the enterprise while management appointees are those workers who are pro-management.

The principal functions of the Working Party are, to classify employees as between 'management' and 'eligible employees,' to fix the size of the Works Council, to receive nominations and to run the first elections for the Works Council.²⁸ Once the elections are completed the Working Party must be dissolved,²⁹ subsequent elections are run by the person appointed

by the outgoing members of the Council.³⁰

Section 3 of the Industrial Relations Act defines an eligible employee as:

Any employee other than an employee serving a trial period of probationary employment, a casual employee, an employee specifically engaged on a temporary basis for work of an intermittent or seasonal nature, or a member of the management of an undertaking: Provided that the level at which an employee ceases to be an eligible employee and becomes a member of the management shall be decided by agreement between the management and the trade union concerned, where such trade union exists.

The proviso to section 3 is in conflict with Section 56 (3) (b) which provides that it is the function of the Working Party to:

Classify the employees as to who shall be members of the management and to who shall be eligible employees in an undertaking.

This problem arose in Vincent Mulunda Bwalya V.

Mineworkers' Union of Zambia and Working Party Roan Consolidated Mines Limited Central Services Division.³¹

In that case the nomination of the appellant was disapproved on the ground that the appellant's nomination paper was supported by employees including two non-Zambian employees namely Mr. J.W.H. Moore and Miss C.J. Postaremezak, who were serving on a fixed term contract and who, though classified by the Working Party as eligible employees, were not, in the opinion of the Mineworkers' Union of Zambia eligible employees.

The Recognition Agreement between Nchanga Consolidated Copper Mines Limited Central Services Division, the employers of the applicant, and Mpelembe House Branch of the Mineworkers' Union of Zambia provided that persons, who, not being citizens of Zambia, and are employed on fixed term contracts, shall not be eligible employees. But the Working Party, Brief dated 10th August, 1976 issued by the Working Party, Central Division, stated inter alia:

Your Working Party has decided that eligible employees for the Works Council elections will be those employees (Zambians and expatriates) on general payroll, except personnel officers, probationers, trainees and casual workers. These employees can participate in the elections as voters, candidates or both.

When considered together the Working Party Brief was in

conflict with the provisions of the Recognition Agreement made pursuant to Section 3. The Court then had to decide whether or not the disapproval of the nomination of the applicant made pursuant to the Recognition Agreement could stand in view of the provisions of 5.56 (3) (b). The Court came to the conclusion that Section 3 was a general enactment while Section 56 (3) (b) was a specific and particular enactment relating to certain special matters and that they overrode the provisions of Section 3 and the Recognition Agreement made pursuant to it. Hence the Working Party was the only organ empowered to classify employees into eligible employees and members of the management. It followed, the Court held, that the disapproval of the appellant's nomination was invalid.

A similar decision was made in the case of M.C.K. Banda V Minesworkers Union of Zambia (Mpelembe Branch) and Working Party Roan Consolidated Mines Limited (Central Services Division).³²

In the elections of Works Councils one major requirement as seen from Bwalya's case is that voters and candidates must all be eligible employees.³³ If there is no trade union in an undertaking the eligible employees may nominate the candidates but if there is a trade union, its approval is necessary for nominations to stand.³⁴ In most cases such

approval is informal and given almost automatically by a union official who is present at the elections. If a trade union rejects a nomination, it must give its reasons in writing³⁵ and any person aggrieved thereby may appeal to the Industrial Relations Court³⁶ whose decision is final.³⁷ Reference to "any person" implies that an appeal does not necessarily have to be made by the candidate himself. So far however there has been no appeal made to the Court other than by the aggrieved candidates and in such cases the Court has insisted on strict adherence by the unions to the requirement that a rejection of a nomination should be in writing.³⁸

Works Council elections which should be by secret ballot³⁹ have to be held every two years.⁴⁰ A member is eligible for election for a further term of two years. By implication therefore, a member is only allowed a maximum period of four years. During the tenure of their office members of the Works Council should be given reasonable time and facilities for their duties during working hours, without suffering any loss or disadvantage and should not be subjected to victimisation or discrimination because of their membership in the Council.⁴¹ Victimisation and discrimination are also prohibited under the Constitution of Zambia⁴² and their inclusion here seems to be superfluous. The intention of the Legislature in including these words could be to ensure that this particular aspect is clearly spelt out in order to avoid any doubts that some employers may have. Notwithstanding

this provision there has been numerous allegations by the Works Council members that they have been victimised by management because of their membership in the Council. Some Works Council members even went as far as seeking relief in the Industrial Relations Court.⁴³

At the time of writing practically all companies caught by Part VII of the Industrial Relations Act had established Works Councils. The enthusiasm of 1976 among councillors however seems to have died down and the majority of Works Councils exist because of the statutory requirement and not that they are performing any effective role. This situation is directly connected to the ineffectiveness of the Industrial Relations Act vis-a-vis the powers of the councillors. This point will become clearer in the next section. Here it is only necessary to note that the success of Works Councils can only be achieved if the Councillors themselves continue to assert their powers in accordance with the Industrial Relations Act. If they slacken as is the case now this will only help to weaken workers' democracy particularly in those companies that are still capitalist oriented. In such companies apart from management resistance to workers' encroachment on their powers, there is a general tendency to look for loopholes in the Industrial Relations Act and to exploit the weakness and vulnerability of the councillors to their advantage. The answer lies not only in educating the workers of their new rights but also in giving counsel to management to accept new management approach which emphasises participation by all in the corporate system.

(d) Nature and Extent of the Works Council Powers.

Eisenberg describes the typical distribution of functions among shareholders, the board and management in American Corporation law as follows: "The standard operating procedures for corporations, frequently referred to as the corporate norm, might be described as pyramidal. At the base are the shareholders whose vote is required to elect the board of directors and to pass on other major corporate actions..... The next level is represented by the directors who constitute the policy making body of the corporation, and select the officers, annually as a rule. The keynote of corporate procedure is the provision common to most corporate laws that 'the business of a corporation shall be managed by its board of directors.' Finally, at the top of the pyramid are the officers who have some discretion but in general are deemed to execute policies formulated by the board."⁴⁴ This description may be said to represent distribution of functions within Zambian companies with the exception that in Zambia the grant of general management powers to the board is effected not by the Companies Act but usually by an appropriate provision in the articles of association.

Since the board is the policy making body of the company it would be more logical that workers' representatives should

sit on it. Indeed this is the requirement in the Federal Republic of Germany which has a model of workers' participation. Under the German system worker directors have one half of the seats upon the Supervisory Board (Aufsichstrat) which is wholly non executive though it appoints and supervises a Management Board which is the executive body but on which workers have no legal right of representation. In fact no executive director can sit on the Supervisory Board in Germany. Thus restricting its functions and effectiveness especially when compared to Holland where the supervisory board is responsible for approving investment decisions, the appointment and terms of employment of executive directors and senior management and scrutiny of accounts and other reports from management as well as appointing and generally supervising the Management Board.⁴⁶ But unlike the twin-board systems in Germany and Holland, in Zambia there is the unitary - board system which consists of the general meeting, the board and senior management. It may be argued that by virtue of the delegated powers of management by the board the two systems are similar for as Davies states the "crucial question is what are to be the powers of the organ upon which the workers' representatives are to sit, rather than the particular designation of that organ."⁴⁷ But an equally important question is to determine what powers and rights should be given to the workers even before designating the organ upon which the same will be

exercised.

In Zambia worker's powers and rights are exercisable through the Works Council and these may be stated briefly as being the right to information,⁴⁸ the right to be consulted,⁴⁹ the power of veto⁵⁰ and the duty to act as a 'watch-dog'.⁵¹ Nothing more will be said about the watch-dog function except that this is a duty imposed upon the Works Council to inform management of any contravention or infringement of the Industrial Relations Act, collective agreements, works agreements and rules or any other written law. Upon receipt of such information management must investigate the alleged contravention or infringement and take remedial action.⁵² But how is remedial action to be taken by management if the infringement is, as is likely to happen in the majority of cases, committed by them. It is submitted that an independent person for example, the Labour Officer should have been given the power of investigation and depending on the results of such investigation he should, if there is contravention by management, direct them to take corrective action failure to which criminal charges should be preferred against senior officers in management.

The watch-dog function presupposes that the Works Council members understand fully industrial relations matters and can interpret collective and works agreements. Obviously this is far from the truth for in the majority of cases members of the Works Council are junior workers with humble educational background. They are therefore not in a good

position to understand intricate and erudite issues of this nature.

As regards the right to information section 71 of the Industrial Relations Act provides that the, "Council is entitled to be informed forthwith in writing of all decisions taken by the board of directors, the proprietors or the management of an undertaking, as the case may be, in relation to the investment policy, financial control, distribution of profits, economic planning, job evaluation, wages policy and the appointment of senior management executives in the undertaking." This is a wide range of subjects but the effectiveness of these provisions is very doubtful for the Council is merely to be 'informed.' It has no right to discuss any decision passed on these or to veto such decision. It is also not explicit whether the Council would be entitled to know the facts upon which the decision was based and if so to what extent. The Council also seems to have no right to satisfactory explanation or at all of a decision which is equivocal or of a technical nature.

The other most ineffectual provision in this respect is on the question of the utilisation of financial and other economic data which management is required to furnish. Quemby asserts that there is no control over the quality of the information to be provided by management, and it

would be possible for an obstructive management to do the least they are bidden and to present factual material at the Council meetings which is incapable of being digested or discussed.⁵³ Further that council members are prevented under penalty from disclosing this information to any other person.⁵⁴ This is of great significance since even if 'good information' is provided by management, much of it will remain redundant since it is not interpretable unless subject to the scrutiny of an auditor, accountant, or company advocate, which the Council may have to employ. So the matter stands unless it proves possible to circumvent the limitations of the provision by extending an invitation to such an expert to attend the Council meetings. But the attendance by such an expert may be for a fee which the Council may be unable to pay. So the problem remains.

As regards the right to be consulted, this only covers 'schemes and programmes' relating to health and welfare. In these matters the Works Council is expected to participate fully and effectively.' But the difficulty is to interpret the phrase 'participate fully and effectively' especially in this context where it relates only to general matters of health and welfare. What is even more strange is that on specific items falling under health and welfare in which there should be active participation the Council is only to

be 'consulted.'⁵⁵ Again the use of the words is entitled to be consulted' waters down the effectiveness of participation as these words are merely permissive. It is necessary to use a more forceful language that would specifically direct the board and management to ensure that the Council is actively involved in these activities.

In respect of those matters over which the Works Council has jurisdiction namely recruitment, transfer, redundancy, bonus etc.,⁵⁶ they too are redundant issues, since as it has been shown the Council will not have interpretable information which will be used by management to justify a single decision in any one of these areas. To be able to discuss these issues assumes that the economic information is available with which an argument might be construed. But this is not the case. Again the approval required is only on 'matter of policy'⁵⁷ so that individual cases dealt with by management on day to day basis need not be referred to the Council. Yet serious injustice is often committed not in the formulation of policy but in its implementation. It is during implementation stage that the workers participation will be decisive. Where there is dispute in respect of the matters indicated a separate grievance procedure is provided.⁵⁸ If a Council does not approve any decision of management to any of these matters it should, before doing so, afford management an opportunity of appraising the Council of the reasons for their decision; but in all cases the approval should not be

unreasonably withheld. Where a Council refuses to approve any decision of management it must at once give its reasons in writing to the management⁵⁹ who, if aggrieved, can refer the matter to a special Board of Review⁶⁰ consisting of 3 members, one appointed by management, one appointed by the Works Council and the third agreed between them, or failing such agreement, appointed by the Labour Officer.⁶¹ It is not clear whether any person other than an eligible employee or a member of management, can be appointed. Assuming that all the three members will be appointed internally then in all cases of such appointments there is a strong possibility of having an imbalance against either the eligible employees or management depending on who of the two groups will have majority of the members on the Board. But by virtue of its position in the company the management is likely and in most cases can, in order to get its decision carried through, manoeuvre in its favour in the appointment of the third member and get on the Board two members who will constitute majority and decide for the management. The Works Council may appeal to the Industrial Relations if it is dissatisfied with such a decision.⁶² Such a course of action, however, is expensive and may be rarely taken. It means that though on the face of it the composition of the special Board of Review appears to be balanced, in reality it is likely to favour management. One possible remedy to this would be to confer on a disinterested party such as the Labour Officer, exclusive

power to appoint the third member of the Board possibly an officer from the office of the Labour Officer. If such a third member is an outsider a proper balance will be achieved on the Board of Review and their decisions are likely to be far more impartial than is the case at the moment.

It is clear that unless all these problems are analysed fully and appropriate changes made in the present law the Working Council will remain a 'toothless bull-dog' for quite sometime to come.

(e) Distribution of Decision-Making Power: An Argument
For A Worker Director

The Industrial Relations Act requires every Council to consist of not less than three or more than fifteen members, of whom two-thirds are elected by eligible employees and one-third appointed by management.⁶³ This should ensure majority representation on the Council and full participation by workers. But the decisive question is whether the Works Council is the proper instrument to bring about effective participation of workers. This question can only be answered by analysing the nature and structure of decision-making in Zambian company law.

It was observed earlier that in the pyramidal model the functions in the company are distributed among shareholders, the board and management. According to this model the shareholders elect the members of the board and have

exclusive control of the following corporate actions namely the approval of a scheme of arrangement,⁶⁴ the passing of a resolution for a voluntary winding-up,⁶⁵ alterations of articles⁶⁶ or memorandum,⁶⁷ and reduction⁶⁸ or increase of capital.⁶⁹ The main functions of the board on the other hand are to direct and control the business of the company and these have been described in relation to British companies to include the following:⁷⁰

- (i) to establish the long-term objectives of the company and the policies to be followed in order to attain these objectives, and to review these objectives and policies from time to time;
- (ii) to ensure that appropriate arrangements are made to enable these policies to be carried out;
- (iii) to appoint the chief executive or executives of the company to carry out these policies and to set up adequate means for checking the condition of the company and the results of its operation,
- (iv) to ensure that the company has at all times a board which fulfills its responsibilities, led by a competent chairman;
- (v) to ensure that appropriate arrangements are made for succession to the senior positions in the company.

As applied to Zambian companies particularly parastatals the above description is far from reality. There are very few parastatal boards or corporations that establish long-term objectives. And even where corporate planning has been introduced this has been instituted at the instance of ZIMCO, the octopus holding company of all Government-owned or controlled companies (other than statutory boards which are responsible to sectoral Government Ministries).

Similar anomalies are found in other countries too. For example, in a study of large and medium-sized companies in the United States it was discovered that none of the boards there 'established basic objectives, corporate strategies and broad policies and where such policies required board approval this was perfunctory, automatic and routine. The asking of discerning questions as a way of checking and supervising management was not a task taken upon themselves except by those directors who were representatives of substantial stock ownership rather than nominees of management.'⁷¹ Apart from this the board normally did not play an important role in selecting the president's (managing director's) successor. The President performed this task himself except in crisis situations such as the sudden death of the president or incompetent management by him leading to severe financial problems for the company.

In Zambia though often a provision is made in the articles for the appointment of the managing director by the directors from amongst themselves, in practice such appointment especially in the case of parastatal corporations is done either by the President of Zambia on his own or on the recommendation of ZIMCO Board.⁷² Thereafter the appointment may be ratified by the board in order to satisfy the legal requirements. At no time can a managing director appoint his successor in parastatal corporations.

The board of directors in Zambia has policy-making functions though in the case of parastatal corporations such functions are subject to the general directives of the ZIMCO Board. These functions however are not spelt out in the Companies Act. For the true source of the directors' powers one has to turn to the articles where sweeping grant of power is found.⁷³

The maxim delegatus non potest delegare applies to the board but its effect is usually modified by provisions, in the articles empowering the board to delegate all or any of the functions to a committee of the board which consists of only one person, or to a managing director or directors who will be responsible for the day to day management of the company. But even when this happens the real powers are still with the board and, in the case of parastatals, with ZIMCO Board. Since there are no workers' representatives on the boards in Zambia an important question is whether, as presently constituted, the Works Council has sufficient impact on the

decision-making process so as to ensure meaningful participation. We have already discounted the effectiveness of the Council's rights to information, to be consulted, to act as watchdog and its power to veto as these do not go to the very basis of power. There is no doubt that the veto powers would, to some extent, have constituted a good source of worker strength but unfortunately these powers do not cover all the activities of the company as they relate only to matters of policy in the 'field of personnel management and industrial relations.' What is required is a form of participation that will extend council powers and generally change them from a consultative to a more aggressive role. This would facilitate the joint formulation of company policy by representatives of labour and capital, thereby establishing a new basis for consent in industry and providing a new legitimacy for the exercise of management function within the agreed framework. The best way to achieve this would be to provide for worker directors.

In West Germany worker directors sit on the supervisory board and under the German Act of 1965,⁷⁴ the shareholders, in the absence of any applicable provisions concerning worker directors, elect the members of the supervisory board, who appoint the members of the managing board. The general meeting of the shareholders, however, may not give the managing board directions as to business policy⁷⁵ and the shareholders have no power to dismiss the members of the managing board. The latter can only be removed by the supervisory board and then only for a cause.⁷⁶ The term 'Cause' however, includes a vote of no confidence by the

shareholders in the managing board, unless it is obviously arbitrary, and if the supervisory board does not act on the vote, as it is entitled not to do, the members of the supervisory board may be removed by the shareholders by a majority of three-quarters of those voting and be replaced by those who will act on the vote of no confidence.⁷⁷ In this way the managing board is somewhat more insulated from the shareholders than is the case in Zambia where the power of the board is at present derived from the articles which are under the exclusive control of the shareholders in general meeting and may be altered or modified according to their whims.⁷⁸ Despite the somewhat entrenched positions of the members of the supervisory board in Germany, their powers are limited only to supervision. Management functions and consequently policy-making power are entrusted solely to the managing board.⁷⁹ Again management does not need to obtain the approval of the supervisory board before taking any major decision except in limited circumstances.⁸⁰ And even in these circumstances where the supervisory board refuses its consent the management board may bypass it by taking the matter to the shareholders, who may overrule the supervisory board by a three-quarters majority of those voting.

The supervisory board in West Germany, thus has essentially limited powers and cannot be expected to have an effective voice in policy-making which will represent a real shift in the power-relationships within the company. In rejecting

the German system of worker directors the Bullock Committee states that the system seeks "to separate the supervisory and the management functions-"⁸¹ when a clear distinction cannot be easily drawn. The Committee instead recommended the establishment of unitary boards which would be composed of an equal number of employee and shareholder representatives plus a third group of co-opted directors. The co-opted directors would be an odd number greater than one and this is explained in terms of the formula $2x + y$ where x stands for employee and shareholder representatives and y for co-opted directors.⁸² The argument is that the presence on the board of co-opted directors who do not represent distinct interest groups should help the board to reach a consensus and should encourage company policy to be viewed in a wider context. This formula, however, is likely to lead to cumbersome and unwieldy boards unrelated to real needs of companies. It is also not likely to achieve the intended aims of equal representation other than complicate the law in this respect. A more realistic proposal and one being suggested for Zambia is that which provides for worker representation on boards of directors as a legal right on a 50-50 basis with shareholders' representatives. A similar proposal was made by the Government in 1969 when it was stated and agreed that workers should be given "representation on the boards of directors of all joint stock companies including State enterprises."⁸³ It was envisaged that steps would be taken to amend the Companies Act in order to

establish the legal right of workers to such representation.⁸⁴

Despite Government proposals made over a decade ago there is no worker representation on the boards of directors in Zambia and this applies to parastatal corporations and private companies. One possible explanation for this failure is the uncertainty of the success of such an experiment particularly in view of the problems encountered in implementing the Works Councils. The other could be purely psychological resistance by the companies which for a long time have conducted their business on capitalist lines. Such companies are reluctant to change their management methods. Yet it is difficult to see how full workers' participation will be possible if there are no workers' representatives on the boards of directors.

Since worker representation has been accepted in principle it is urged that this should be implemented with minimum delay. The 50-50 structure is similar to the German model except that in Zambia a unitary board system should be maintained. In this respect the Zambian structure will be different from one recommended by the Bullock Committee that representation should be by request through recognized and independent trade unions.⁸⁵ The proposal by the Bullock Committee is similar to collective bargaining and unlikely to procure sufficient workers' representation for such representation will be determined by the bargaining strength of the workers.

Under the proposed structure the Chairman of the board may come from the shareholders' representatives though in all cases he should be elected by majority of all representatives on the board. As for workers' representatives they should be elected by all eligible workers from amongst the workers. But to qualify for elections as a representative on the board a worker must have served the company for a period exceeding five years during which period he should have displayed exemplary behaviour.

Although workers representatives are to be elected by workers they should not be regarded as representatives of the workers, but that of the company as a whole and must be subjected to the same rights and duties as the other members of the board. Thus worker directors together with the other directors should manage the company in the interests of the shareholders, the workers and the community and not merely in the interests of the workers only. Workers directors should also have fiduciary obligation and should not reveal any confidential information or secrets of the company. In order to ensure that shareholders do not defeat the powers of the directors by amending the articles in the general meeting especially as the board will then cease to be formally representative of the shareholder's interests in the classical sense, the powers to amend the articles should be removed out of the exclusive control of the shareholders. Hence when it is proposed to amend the articles the board should be consulted and where three quarters of the board members raise an objection the amendment should not go through.

The shareholder's meeting, however, should retain the right to decide whether to pass a resolution in respect of changes in the memorandum and articles of associations, dividends, changes in capital structure, winding-up and disposal of substantial part of the undertaking. But in respect of the last two before a resolution is passed the meeting should ensure that worker's interests have been considered. Where workers interests are ignored the officers who were managing the company immediately preceding the winding - up or disposal should be liable to criminal penalty. When these proposals are in force corporate power will be evenly distributed between the workers and the shareholders.

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CHAPTER 6

WORKER'S PARTICIPATION IN EQUITY - A PATH TO REAL ECONOMIC DEMOCRACY

In 1977 President Kaunda appointed a Commission of Inquiry on equity participation and gave it the following terms of reference:¹

- (a) To examine the concept of workers participation in equity in business enterprises and to recommend the most suitable ways of its introduction in the economic life of Zambia.
- (b) To recommend the role and type of worker, employer, co-operative and financial institutions which will be necessary to sustain the new economic order.
- (c) To recommend an organisational structure through which the rural peasantry can achieve self-sustaining socio-economic advancement through collective utilisation of resources.
- (d) To recommend any necessary legislation required to give the workers effective participation in the management of business enterprises
- (e) To inquire into any other matters which appear to the Commission to relate to the foregoing and which in the opinion of the Commission ought, in the public interest, to be inquired into.

The Commission of Inquiry which is headed by Mr. Dominic Mulaisho, Special Assistant to the President (Economics)

started sitting in July, 1977 but was not gazetted until in October, 1977.² Thereafter in 1978 it held a few sittings but there has been no sittings in 1979 and 1980 and todate the Commission appears to have not completed its work. It is difficult to explain the reasons for this delay by the Commission but one possible explanation could be the opposition to the concept of workers' participation in equity expressed by the majority of those who gave evidence including the Trade Union Movements.³ The other reason could be the wide variety of subjects covered under the terms of reference which ranged from the examination of the concept of workers' participation in equity to organisation of the "rural peasantry" and recommendation of the necessary legislation. Looking at its composition which did not include even a single lawyer one fails to see how the Commission can accomplish its task especially the drafting of a legislation if it has no expert to assist it in this respect. Certainly this was serious oversight which should have been avoided if it was desired that the Commission should make meaningful recommendations.

Although no recommendations have been made so far it is unequivocally clear that the Party and Government policy is to introduce some form of participation by workers in equity. Thus K.D. Kaunda states:

Our Humanism will not allow us to use our superior skills to exploit the less endowed by organising

them into a labour force which does not get fair return for its work. A humanist accepts that capital must be regarded, capital alone, without labour, land and management, cannot produce anything. And since such capital is barren without these factors it must be treated accordingly.⁴

Despite Party and Government desire for workers' participation in equity nothing so far has been done to legalize it. The Companies Act is silent and makes no provision for the progressive acquisition of ownership and control of business enterprises by workers. The Government measures to streamline the activities of the commercial sector in accordance with the principle of industrial participatory democracy will also fail unless the Companies Act provides for enforcement of such reforms.

Because there is no provision for workers' participation in equity in company law the best that can be done at this stage is to examine different types of equity participation in Zambia and then suggest the most suitable form in the light of the Party and Government policy of democratising industry. Before even doing so we have to look at the objectives behind this concept.

(a) Objectives of Worker Participation in Equity

The principal objective of workers' participation in equity is to bring about joint ownership and control of companies by the workers and capital owners. It is argued that once this is achieved it will lead to economically and financially viable business enterprises in that workers will be genuinely involved in the production process because of the knowledge that they will partake of any earned profits. Successful business ventures in turn will bring about goods and services of the highest quality at reasonable prices within reach of the common man.

Participation in equity will give workers reasonable opportunity for their interests to be protected and their voice to be heard within the business enterprise while at the same time enhancing the promotion, advancement, and development of both individual and collective skills, security and satisfaction in work. Further, equity participation will make it possible not only for workers to acquire share interests in the capital of the business enterprise but also maintain a fair and reasonable return to the investors and shareholders. In this way it will be possible to promote a community of interest and interdependence between labour and capital.

It has often been argued that workers' equity participation will scare away potential investors. Since the Government has adopted as a matter of policy 51 per cent participation

in nearly all strategic business enterprises, a further reduction of the cash investors' share by worker share would be a detriment to prospective investors. Investors seek a return on their investment and if too great a share of profits were given to workers, this might make the risk unattractive to investors.

There is no doubt that Zambia being principally dependent on foreign investment should avoid any measures that may discourage inflow of that investment. But as earlier discussed, worker's participation is almost a universal concept and some of the champions of workers' participation are capitalist countries.⁵ There is no evidence to support the argument that capitalism is in conflict with worker participation. If workers' participation can bring about high productivity and efficiency then even capitalists should support it.

The successful implementation of equity participation, however, depends upon whether or not workers themselves are ready to take up this immense responsibility. Full consideration therefore must be given to this aspect before deciding on implementing any piece of legislation. The general opinion of workers was expressed by the Zambia Congress of Trade Unions (ZCTU) when it was invited to give evidence to the Mulaisho Commission.

ZCTU stated that

"Zambian workers had never asked for participation in industries, and the move could not be determined by any fomular. Whatever system we want to involke workers in, we must ensure that that they are prepared for it in all aspects. For us in Zambia at the level of our development and in pursuit of our classless society equity participation would be a negation of this goal and a sure step towards capitalist inclinations and tendencies on the part of the workers."⁶

In view of the Government policy to involve workers in all aspects of corporate life the position taken by ZCTU is certainly very discouraging. It amounts to saying that those who own capital should continue to be masters and the workers should remain as servants. If the ZCTU is opposed to share ownership by workers it should not condemn equity participation in general because it is possible to try a few schemes of participation.

Wholesale condemnation of equity participation is therefore not realistic. It could be that the ZCTU does not fully appreciate the concept of equity participation and this can be discerned from the statement that the concept cannot "be determined by any fomular." Certainly this is untrue for there is a fomular by which participation may be determined and as will be seen in the next section some companies have in fact adopted equity participation schemes with great success.

(b) Equity Participation Schemes

Though there is no legislation providing for workers' participation in equity as a legal right few private companies in Zambia have started their own share ownership schemes. No parastatal corporation has embarked on any equity participation scheme involving workers so far and there are no signs that any will do so in the foreseeable future.

There are two principal types of workers' participation schemes in Zambia. The first type are share ownership schemes. Under share ownership schemes workers are allowed to own shares which may be given or sold to them through some agreed arrangement by existing shareholders. Once the shares have been allotted to the workers they acquire rights relating to dividends, attendance at meetings and to right of representation on the board of directors. The second type are profit-sharing schemes under which workers do not become members of the company as such but are given the rights by existing shareholders to participate in profit sharing through bonus payments. Such payments depend on the performance of the company as a whole and are different from merit bonus payments which are based on the performance of the individual worker as well as the profit made by the company. For convenience we shall discuss the second type first.

(i) Profit Sharing Schemes

Very little will be said about profit sharing schemes because few companies have introduced them apart from one company Northland Engineering Company Limited, Ndola. The scheme at Northland Engineering Company Limited is that bonus is paid on a quarterly basis to the workers out of profits made in that quarter. Under this scheme workers do not acquire shares, consequently ownership and control is retained by the shareholders. This is not good enough for it does not bring about full partnership between workers and shareholders.

(ii) Share Ownership Schemes

One notable company that has introduced a share ownership scheme is Unity Press Limited, Lusaka. In 1979 Unity Press Limited started its scheme and offered 30 per cent of its paid up capital to the workers in the form of shares.⁷ These shares were given free of charge by the existing shareholders. The Company has also committed to give a further 18 per cent of its shares to the workers so that ultimately, workers will own 48 per cent of the company's equity. In addition the company intends to give annual bonus ranging from 2.5. per cent to 5 per cent of the earned profit. The actual rate of bonus will depend on the profit made.⁸

When 48 per cent ownership is achieved workers will be

entitled to elect one representative to sit as a director on the board of directors thereby increasing the total number of directors presently at three to four.⁹ A provision for one worker director appears to be unsatisfactory. If workers will eventually own and control 48 per cent of the company's equity board representation should have been higher in order to reflect the size of workers' shareholding.

Another company that has introduced share ownership scheme is Medwich Clothing Limited, Kitwe. Medwich Clothing Limited may be considered as one of the most successful pioneers of share ownership schemes in Zambia having started its scheme in 1972.¹⁰ Unlike share ownership at Unity Press Limited which originated from the benefaction of what may be categorized as rich shareholders, shareholding at Medwich Clothing Limited is equated to annual remuneration so that a salary of K1,000 a year is regarded as equivalent to K1,000 worth of shares. An increase in salary therefore automatically increases the shareholding. Hence it is quite possible for workers to acquire majority control as the number of workers grows and their remuneration increases.

Workers may be paid dividends on their shareholdings but before this is done shareholders should first be paid what they refer to as "a basic return" on their investment.

This is based on a flat rate of interest equivalent to the interest one would have earned if he placed his money on long term deposit with the Zambia National Building Society. The basic return will therefore fluctuate with rise or fall in the Society's interest rate. Management at Medwich Clothing Limited say the basic return is intended to compensate for the fact that inventors receive nothing during the year while workers earn a salary. Once the basic return has been paid both workers and shareholders bare company tax in proportion to their shares of the remaining profit. A dividend may be paid in cash or converted into paid up shares. It is therefore possible for workers to acquire more shares than their annual salary.

Since workers' shares are not paid up the payment of dividends on them appears to be absurd. One would have expected that once the company has allocated shares to an employee it should attempt to pay for them either out of profits for the current year or reserves and that until those shares are fully paid up no dividend may be paid on them. After all a dividend is paid on the invested capital and where there is no such capital ploughed in the company there should be no dividend.

At Medwich Clothing Limited both workers and shareholders shares are issued at par value and instead of the value

of the shares being allowed to rise when profits are transferred to reserves, bonus shares are issued. In this way the company avoids having to sell its shares at a premium and to justify to the workers the sale of shares at a price higher than its nominal value, the thing which may be considered as cheating by the workers.

It may be difficult to convince workers to buy shares at more than par and in fact even the Companies Act does not provide for no par value shares, but it is argued that the par value system is very unrealistic as it puts value on a share which is untrue and unreal. Besides since the par value system requires that the dividends should be expressed as a percentage of the nominal value and as there is no relationship between the nominal value and intrinsic value of a share, the label indicating the nominal value becomes deceptive. But even if Medwich Clothing Limited wanted to change to no par value system it cannot do so because of the restrictions contained in section 8 (3) (a) of the Companies Act. That section provides that:

In the case of a company having a share capital, the memorandum of association must also state the amount of the share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount.

What is required therefore is to amend the above provision first so that companies may be free to issue no par value shares.

(c) Modes of Acquiring Shares by Workers:

Some Proposals

It is trite that the majority of the workers have no capital of their own with which to purchase shares. But the equity participation schemes outlined above show that the acquisition of shares is possible through the issue of bonus shares to workers. It may also be added that shares may be acquired by funds contributed by the company to a special fund set for that purpose. Further, shares may be purchased by deductions levied on the workers' salaries. These three modes of acquiring shares are discussed below.

(i) Bonus Shares

When a company makes profit it should retain part of it as reserve and convert the same into share capital available for issue to workers as fully paid-up bonus shares. Only a worker who has been with the company for a certain minimum period of years and has a good record should be eligible to bonus shares.

Because it is not likely that many workers will qualify for a big number of shares necessary to acquire control, shares should be issued on the principle of one member one vote. Alternatively, if the capitalist principle of one share one vote is to be maintained then the voting should be weighed in favour of worker members by amending

section 8 (3) (a) of the Companies Act so as to provide for the creation of no par value ordinary worker shares with more than one vote per share. When other members wish to take-up no par ordinary shares they may do so provided such shares do not carry weighed voting.

The reference to no par value ordinary shares does not mean that no par value preference shares should not be introduced. There seems to be nothing inherently wrong with such shares and in certain circumstances they are very desirable. In particular where the rate of interest is liable to considerable changes over relatively short periods par value preference shares may be misleading especially to uninitiated investor. Also a company might wish to issue blocks of no par value preference shares at different dates (when different rates of interest are ruling) which may all rank pari passu. Thus over a period of years a company is enabled to issue, at different prices, a single class of no par preference shares instead of a series of classes of par value preference shares carrying different percentage returns. This is not only convenient for the company but brings the advantage of a bigger total issue and a wider market in the shares, to the shareholders.

No par value preference shares, however, should not be given to worker members for the simple reason that they get free shares and preference in respect of either payment of



dividend or repayment of capital should be restricted to the shareholders who contribute actual capital. Again worker members, unlike general members, continue to render their services to the company; if they get a preferential dividend irrespective of the profit performance of the company, they may slacken in their work because they will be assured a dividend in any case. The result will be low productivity. This does not arise when preference shares are given to the general members for they do not provide labour to the company.

Assuming that no par value shares will be incorporated in the Companies Act, and a company has part of the capital consisting of par value and another part of shares without par value, then such a company should not be allowed to have one class of shares in both categories at the same time because this may bring confusion. Hence a company may have no par value system but only if all the ordinary shares are without par value and the preference share are with par value or vice versa.

(ii) Acquisition of Shares through Company Contributions

Every company that is required to implement workers' shareholdings, and this could include all companies employing 25 or more workers, should aim at giving 50% or more of the issued capital to the workers. Such a provision together with the weighed voting mechanism will

ensure that the power base in the company is altered by removing ownership and control from the hands of a small number of capital owners and spread it among the capital owners and workers. It will also prevent the sale of control to the financial advantage of the capital owners, without reference or regard being had to the interest of the workers or sharing with them. Further it will enable workers to provide checks and balances against directors doing more or less what they like with company funds for all decisions relating to company finances will only be made with full knowledge of the worker members.

Where existing shareholders are not able to give outrightly any shares to the workers on the ground that the paid up capital of the company or the reserves are insufficient to pay for the workers' shares the company should introduce a contribution scheme whereby it pays a certain amount of, say 5 per cent of its earnings, into a contribution fund rising annually by the same amount until the contribution is equal to 50 per cent of the paid up capital. The capital so contributed should belong to the workers in common and every year share certificates should be issued to the workers who have been with the company for a certain minimum period of years. A very short period of service should not entitle a worker to any shares.

(iii) Purchasing of Shares by Deductions
from Workers' Salaries

In small companies that is those companies employing less than 25 workers or whose annual turn-over does not exceed one million Kwacha or those companies with serious liquidity problems the purchase of shares may be by monthly deductions of a specific amount from the salary or wage of each worker. At the end of each year the accumulated deductions may be ploughed into the business in form of paid up shares. In this case shares may be purchased by any worker irrespective of the period of employment and may be held outrightly by him in his personal name.

It may appear unfair that in other companies workers are given bonus shares and others have their shares paid for by company contributions, while in small companies workers have to pay for their shares. A counter argument, however, is that in small companies the purchasing of shares is not pegged with conditions and qualifications as those found in big companies. Besides, where a big company is found to have serious liquidity problems, the purchase of shares will be through deductions from salaries and wages.

(d) Transfer of shares

Workers who leave the company or retire or whose services are terminated may keep their shares or sell them. The sale of such shares should be subject to existing worker members'

right of pre-emption or the right of first option. This will avoid or at least minimise transfers to persons other than the workers a practice which may be abused by shareholders to buy-off certain workers and thereby tilt the balance of control against the workers. Where, however, the case is one of transmission of shares, for example, upon death or bankruptcy the usual rules should apply and the shares should vest in the personal representative or trustee in bankruptcy of the worker.

In case of those companies that have a common fund there should be no transfer of shares until the shares are allotted to the workers individually. Of course in practice it is not possible to transfer shares in the common fund as these are jointly owned until they are issued to individual workers.

A worker who leaves the service of the company for whatever reasons and retains his shares should cease to be considered as a worker member and for the purpose of determining the number of shares owned and controlled by workers he should be excluded. The same should apply to people who acquire shares by transmission. They too should fall under the category of and be considered as general shareholders. Such a provision should ensure that shareholders do not manipulate by altering the share structure in order to secretly acquire control.

(e) General Reflections

An argument may be presented that individual ownership of shares promotes workers' capitalism which may be as abhorrent as any other type of capitalism and that an acceptable proposition is one advocating collective or communal ownership of shares. Such an argument would appear to be sound in a communist state, which Zambia is not. Zambia, being a mixed economy, recognizes both individual and communal ownership of property. The objective of equity participation in such an economy should be even distribution of ownership among all those involved in the enterprise so that neither the shareholders nor the workers assume a position of dominance over the other and not the avoidance of individual ownership of shares.

In order to ensure that no worker acquires capital at the expense of others, there should be restrictions on the number of shares a worker may own or a ceiling may be put on the amount of capital he may purchase. For example it could be provided that no worker may hold more than 2 per cent of the paid up capital of a company. Eventually it should be possible for workers to hold the same number of shares and to have equal participation in terms dividend or voting.

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CHAPTER 7

C O N C L U S I O N

The preceding analysis leads to one quite obvious conclusion that the Companies Act as the principal instrument for regulating business organisation is archaic, lacks impact and needs complete overhaul.¹ The gap between the main purpose and emphasis of the Act and the state of social and business organisation seems to be widening. One major factor responsible for this situation is that the Companies Act has had no substantial amendments since 1921 when it was adopted from England. As a result the privileged position of the members and creditors has remained unchanged.

The horizon of membership under the Companies Act is very narrow and does not include workers. In other words, the rules relating to membership do not recognize that labour and capital are equal and should be rewarded equally.

Another aspect arising from the above discussion is that workers are not afforded the same protection as is given to the creditors. Consequently they are not entitled to object to a reduction of capital even if such a reduction adversely affects their interests. Above all, workers have no right to take up action in a situation where directors act to the detriment of their interests.

Under the Companies Act the disclosure rules are seriously inadequate and are not in keeping with Zambia's social and economic needs in so far as they do not provide for disclosure of material information to the workers. Even in relation to members and creditors for whom they were principally intended, they are terribly wanting. The reason is that they have not responded to modern methods and practices of corporate management which demand that those who have interest in the company, that is, the workers and members strictly so called, should be given information on the state of the company.

The piecemeal attempt to secure disclosure through the Leadership Code has not yielded the desired results for various reasons. First, the Code only applies to leaders and not to members, creditors and workers generally. Second, even as regards leaders' interests the Code is very general and does not specify in detail information which would have been useful if disclosed. Third, the provisions under the Code relating to disclosure of assets and liabilities of leaders are in conflict with the restrictions imposed by section 52 in so far as it prohibits disclosure of beneficial interests. Unless this conflict is resolved, there is no way the Leadership Code will be applied to company matters. Even the strengthening of the Code Rules will not take matters very far.

In addition, the Companies Act ignores the problems of nominee shareholders. Because notice of trusts should not be entered on the register of members or be receivable by the Registrar, it makes it difficult to ascertain the true beneficial owners of the shares in a company. This situation enables the directors who may also be beneficial shareholders to abuse insider information to their advantage. The problem is further compounded by the absence of any provision for disclosure of all substantial holdings in a company. Hence, there is no way of knowing, at any given time, who are the controllers of a company.

Again the Company Act does not mention workers' participation in the enterprise. A start has been made with the enactment of the Industrial Relations Act as already shown. But that Act is weak and, to a great extent, ineffective as it only emphasises consultative participation. There is no full and effective involvement of workers in all the aspects of the company. The Works Council power of veto, the right to information and to be consulted can be ignored by the management with impunity and little consequence. Besides, as workers have no representation on the board of directors it is difficult to provide any safeguard for workers' rights.

In view of this state of things, what should be done?

(a) A NEW COMPANIES ACT

The goal of the Party and Government in introducing participatory democracy in industry in accordance with the Philosophy of Humanism entails full and effective participation of workers in the Management and control of the enterprise. This is the emergence of the workers' corporate revolution and a clear acceptance of inexorable forces which over recent years and in many countries has resulted in a considerable ascendancy of workers' power over the affairs of the enterprise. But the workers' corporate revolution will only succeed if company law is revised. This is what should be done immediately. The revision of company law should necessitate the passing of a completely new Companies Act and not merely a consolidating or codifying statute. Since 1921 when the present Companies Act was enacted there has been no company law legislation which may justify consolidation. Codification is also not recommended because a significant portion of the applicable company case law in Zambia is English which has little or only tangential relevance to the concept of workers' participation in company law.

The new Companies Act should aim at changing the capitalist base of ownership and control so as to facilitate acquisition of membership by methods other than through subscription of capital. The new Act should provide further that worker members have the right to attend the general meetings of the members where they may debate, exchange information and make

suggestions on matters that are normally dealt with at general meetings, viz, appointment of directors, or auditors and approval of company accounts.

As proposed workers will perform a dual role, that as workers and as members. This is a special role which calls for additional obligation on the part of the workers. For example, workers should be required to observe disciplinary rules and should undertake to contribute effectively to the productivity and prosperity of the enterprise. They should also undertake to refrain from doing anything adverse or prejudicial to the interests of the company and the other members and should strive for the profitability and viability of the enterprise. The liability to contribute to the assets of the company in the event of winding up provided for under S. 134 of the present Act should also devolve upon the workers. In the event of a breach of these obligations disciplinary action may be taken against the erring worker.

The obligation by the workers should be required not only under the Companies Act but must be incorporated in all the collective agreements made pursuant to Section 81 of the Industrial Relations Act. This should ensure that there is no overlapping between the latter Act and the Companies Act.

Further provision should be made for mandatory disclosure to the workers and members of the financial structure of the company including the current debts. Long term commitments and liabilities, for example, hire purchase agreements, mortgages and debentures over the assets of the company should also be disclosed. Contracts of employment of directors should not only be disclosed but must be approved by the workers and members just as should property transactions of substantial nature between the company and the directors and loans to the directors.² It should also be a requirement that auditors' and directors' reports including the accounts of the company shall be made available to the workers. Such accounts must be sufficiently detailed so as to show all the assets and liabilities and to give a true and fair view of the company. Unless this is so it will be difficult to focus the expected returns of an enterprise.

An additional protective clause should be incorporated to make provision for workers on cessation or transfer to any person of the whole or part of the undertaking of the company or its subsidiary. The provision should include payment of outstanding salaries and wages, pensions and social benefits.

In addition, workers should have the right to petition for a winding up or take-up a derivative action on the ground that the affairs of the company are being or have been conducted

in a manner which is unfairly prejudicial to their interests. These are wide proposals which require a proper instrument to put them into effect.

(b) The Law Development Commission

The Law Development Commission which is constituted by the Law Development Commission and Institute of Legislative Drafting Act³ is the organisation that is responsible for law reform. According to Section 7 of that Act the functions of the Commission are to keep under review all the law with a view to its systematic development and reform, including in particular the codification of such law, elimination of anomalies, the repeal of obsolete and unnecessary enactments and generally the simplification and organisation of the law.

These are very wide functions as they cover all areas of law and are not restricted to company law reform. The fundamental question however is whether the Commission can effectively discharge these functions. In other words, is the Commission sufficiently equipped in terms of financial and technical resources to bring about within the shortest possible time the law reform that is so urgently required.

The Law Development Commission should consist of a Council of Commissioners not exceeding ten Commissioners, a Director, a Deputy Director and such number of research fellows and other

members of staff as the Minister may determine.⁴ The Commissioners do not need to be lawyers and at the time of writing this paper the total number of qualified persons in the Commission is five, comprising of a director, the deputy director and three research fellows.⁵

With such a small number of qualified personnel it is difficult to imagine how the Commission can perform the gigantic role given to it. In fact since 1974 when the Commission was established, it has not been able to make recommendations on the reform of any branch of law. Even in those areas like the Law of Succession, Divorce and Marriage, and the Jurisdictional Structure of Subordinate Courts where research started three or four years ago, there has been no meaningful progress.

As regards company law reform, there has been no serious efforts even to start research and there is no prospect that anything will be done in the next two or three years. Company law is a complex subject and assuming that research will start in two years' time recommendations may be made five years thereafter which is seven years from now. In view of the urgent need to bring about changes in company law such a period is too long and intolerable. It is therefore suggested that in order to expedite company law reform, the size of the Commission should be increased by at least ten

research fellows. This should necessitate increased financial assistance to the Commission. At present the Commission only receives a small grant from Parliament every year which is inadequate even to finance current research.⁶

To be an effective instrument of company law reform the Commission should also be semi-autonomous and should be able to carry out its duties with minimum bureaucracy. Hence the extensive and exploratory powers of the Minister provided for in Section 7 (2) of the Law Development Commission and Institute of Legislative Drafting Act⁷ to approve practically everything the Commission does should be curtailed. Instead the Commission should only be given general guidelines and terms of reference within which it should carry out its functions.

Alternatively and for the purpose of company law reform a separate adhoc committee consisting of highly qualified and experienced company lawyers should be appointed. In view of the constant changes in commercial and financial practice it is necessary to appoint such a committee and to have a major recasting of the law not less than about once in fifteen years. This appears to be the general practice in some developed countries⁸ and is the only way of keeping company law abreast of changes in the business sector.

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2. British Companies Act, 1980 ss. 47 - 50 make extensive provisions on this aspect.
3. Act. No. 5 of 1974
4. Ibid S.7
5. Information obtained from Professor P. Mvunga, Director of the Law Development Commission - Interview made on the 20th March 1981 at Lusaka.
6. Information obtained from Professor P. Mvunga - see note 5 above.
7. See note 3 above
8. For example, in Britain nearly all the committees appointed to look into company law reform were adhoc, most important of which were the Cohen Committee appointed in 1945 - (Cmd 6659) and the Jenkins Committee appointed in 1962 (Cmd 1749).

ABBREVIATIONS

Ad.L.R.	Adelaide Law Review
Am.Jo.Comp.Law	American Journal of Comparative Law
Ca. L.R.	California Law Review
Col. L.R.	Columbia Law Review
I.R.C.	Industrial Relations Court
I.C.L.Q.	International and Comparative Law Quarterly
J. Bus.L.	Journal of Business Law
M.L.R.	Modern Law Review
S. J.H.	Selected Judgements of the High Court of Zambia
S.C.Z.	Selected Judgements of the Supreme Court of Zambia
U.N.I.P.	United National Independence Party
Z.L.R.	Zambia Law Reports
ZIMCO	Zambia Industrial and Mining Corporation Limited

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