THE SOCIAL RESPONSIBILITY OF CORPORATIONS IN EAST AFRICA

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LL.B. (Hons.), University of Makerere, 1977

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE

REQUIREMENTS FOR THE DEGREE OF

MASTER OF LAWS

in

THE FACULTY OF GRADUATE STUDIES

Department of Law

We accept this thesis as conforming to the

required standard

THE UNIVERSITY OF BRITISH COLUMBIA

September, 1979

Department of LAW

The University of British Columbia
2075 Wesbrook Place
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Date October 15, 1979

ABSTRACT

The corporate social responsibility concept has, over a period of time attracted many both in North America and Western Europe as evidenced by the literature on the subject. Although various suggestions have been made, no comprehensive reform has been undertaken and the debate continues. The thesis is an extension of this debate to the circumstances of East Africa. Drawing on reform proposals and practical examples in other countries, corporate law reform is discussed and related to the East African conditions.

The thesis is divided in five chapters. Chapter I discusses the nature of the problem - disregard to society and human values by business organizations. The chapter focusses on the conceptual legal problems that are a result of legal history, the development of which aimed at individuals and not companies. The limited liability concept that has enhanced corporate social irresponsibility is discussed and the separation between ownership and control that makes it difficult to punish and control corporations is pointed out.

A review of the debate on corporate social responsibility is followed by an assessment of the interest of the various groups (the shareholders, the employees, the consumers and the general public) in a company. The irresponsible activities of corporations, especially the multinational corporations (MNC) both in their mother countries and in the developing world are discussed. Finally, the chapter concludes with a call for corporate social responsibility if for nothing else, for the survival of the free enterprise system as an acceptable economic and political philosophy.

Chapter II presents a case for worker-participation in corporate decision making as a means of extending political democracy beyond the factory gates. Worker participation is seen as a means of enabling workers to appreciate the value of their labour and in the East African context, it is hoped this would enhance worker identification with national economic development strategies. In the final analysis, the aim is to improve industrial relations, avoid waste and promote efficiency in production and hence economic development in a healthy society.

In Chapter III, the disclosure philosophy is seen as a means of policing corporations through an informed public, the investor and the government. Social audit is advocated as a means towards achieving the same objective. An extension of duties of the governing board of the corporation is discussed in Chapter IV and finally, in Chapter V, the reform proposals are related to the historic, economic and social circumstances of East Africa.

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INTRODUCTION

The thesis does not concentrate on any one country but instead focusses on company[1] law reform in East Africa as a whole. This is because in my view, a uniform commercial law for the whole of East Africa is not only desirable but is essential for the development of the East African economies.

It may, with justification be questioned whether this emphasis is realistic given the fact that the three East African countries do not have a common economic and political philosophy. Tanzania has adopted a socialist political and economic philosophy emphasising self-reliance while Kenya is more sympathetic to private ownership of property. The road that Uganda will follow has yet to be defined.

The possibility of a unified East Africa has further been eroded by recent political developments that led to the collapse of the East African community last year.

The community which evolved as a result of geographical and historical circumstances (Uganda, Kenya and Tanganyika/Tanzania are in the same geographical location and were under the same colonial power) was first conceived in the 1920's and developed into a highly integrated and advanced organization for economic and political co-operation. The relations between the three states were so close that at the time when Tanganyika became independent (1961) there was tremendous enthusiasm among the people of East Africa for a Federation. Tanganyika offered to postpone her independence for a year if Britain agreed to grant independence to Kenya and Uganda at the same time so that a Federation could be formed. However, after independence both of Uganda (1962) and Kenya (1963) the enthusiasm for a Federation waned especially among the leaders. The community however remained strong until the change of government in Uganda in 1971 when relations between Uganda and Tanzania deteriorated. The community finally broke up in 1978.

Recent changes in leadership both in Kenya and Uganada have however once again raised optimism for closer co-operation among the people of East Africa. It is noteworthy that many people in East Africa still believe in a Federation and if a referendum were taken today, it is almost certain that the idea would command a lot of support.

With these facts in mind, the idea of a uniform commercial law is not completely out of touch with reality. Close economic and political co-operation in East Africa is still possible. This view is reflected in a recent statement by the then President of Uganda who is an interview with AFRICA Magazine said:

> "Uganda has traditionally always had very good relations with Kenya and Tanzania. As you know we belonged at one time to the East African community and we were part of a complete system of collaboration and cooperation within the region. We hope to use our influence to restore a form of cooperation in the region. This does not necessarily mean that the East African community will be recreated as such, but we believe there must be some form of political and economic integration if our region is to prosper. I believe harmonious relations between the countries of East and Central Africa are crucially important."[2]

As to the differences in economic and political philosophies, although Tanzania has nationalised key sectors of the economy, privately owned concerns, both foreign and local continue to prosper and no doubt corporate social responsibility would reduce the trend towards nationalization.

The benefits to be derived out of a uniform commercial law are substantial. The draftsmen of the present companies Acts were well aware of these benefits when moving the Bill to enact the Kenya Companies Act, the Attorney-General noted:

> "Sir, this Bill has its particular origin in a Bill drafted by the Registrar of companies in Uganda in 1954. It is obviously in the highest degree desirable that the legislation in this subject in the three East African territories should be similar and indeed, if possible identical. . . . [Any] butcher, baker or candlestick maker on a large scale who wishes to extend his activities to East Africa will . . . commence his business in Nairobi and form here a company. . . If, in the course, the business extends to the neighbouring territories, it may become desirable to form a further company or companies in Uganda or Tanganyika and I think Mr. Speaker, that the advantages which everybody concerned - shareholders, directors, secretaries and accountants - will derive from identical laws are obvious."[3]

The response in Tanganyika was not different. When an amendment was suggested, the Attorney-General replied:

> "The other [amendment] involves a matter of principle requiring an alteration in the draft which I would be unwilling to consent to unless I have had previous consultation with the law, officers of Kenya and Uganda."[4]

The desire of a unified commercial law was expressed in ARticle 29(b) of the Treaty for East AFrican corporation which provided:

> "The counsel to the community shall advise the partner states on, and endeavour to promote, the harmonisation of the commerical law in operation in the particular state. Company law provides a starting point for the harmonisation of commercial laws."

Such efforts would encourage investment throughout East Africa both by foreigners and nationals.[5]

The basic argument for unification of commercial laws in East AFrica is applicable to many other parts of the world. Lack of unity in commercial laws will make it more difficult for commercial enterprises to conduct their business on an inter-state basis, and unification will encourage the establishment of a single trade area. It is interesting to note that even the members of the European economic community despite their divergent legal systems are making constant effort to adopt a transnational European Company to enhance inter-state commerce. Given the close ties between the East African states, there is an even stronger case for an East African company law.

Similar company legislation, facilitates an easy transfer of companies' registered offices without the need to change Articles etc., legal movement of corporate structures and legal mergers. Companies organised under one state law should be able to pursue their economic activities in the other states.

Another reason for uniformity is the distribution of commercial enterprises. An example easily illustrates this. If the company law of one state gives the management of a corporation greater freedom from its social responsibilities, than the law of other states, more corporations may incorporate in that state though their activities may extend to the rest of East Africa. The result would be an inequitable balance in commercial activities among the states thus making it even more difficult for increased economic integration.

Finally, the law encourages the development of certain values. Uniformity in commercial law would contribute to a closer relationship between the states and facilitate the development of common values, culture and attitudes which is desirable for closer economic and political co-operation.

CHAPTER I

THE SOCIAL RESPONSIBILITY OF CORPORATIONS IN EAST AFRICA

Each of the three East African states; Kenya, Uganda, and Tanzania has a companies act[1] that regulates companies operating or registered in the particular state. The three acts, however, are similar, all of them being an adoption almost word for word of the 1948 English Companies Act.[2] A proposition underlying company law (applying to all companies but having greater significance in relation to large public companies) is that the activities of the company must aim directly or indirectly at the making of profit which in the end must fall into the hands of its 'owners', the shareholders. The activities of the company must be for the benefit of the shareholders without regard to the employees, the consumers, the state and society at large. A few cases clearly illustrate this proposition.

In Hutton v. West Cork Ry. Co.,[3] Bowen L.J. speaking for the Court of Appeal, England, referring to a companies proposition on deciding to wind up, to pay compensation for loss of office to its directors and executives said:

> They [the directors and shareholders [have paid liberally, perhaps not at all too liberally, persons who have served them] faithfully. As soon as a question is raised, by a dissentient shareholder, or by a person standing in the position of a dissentient shareholder, sympathy must be cut adrift, and we have simply to consider what the law is . . . .'(4)

Having referred to the fact that the money about to be spent was not the shareholders' money, he continued;

> 'They [the shareholders] can only spend money which is not theirs, but the company's, if they are spending it for the purposes which are reasonably incidental to the carrying on of the business of the company.' (5)

He concluded with his famous statement;

> 'The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company.' (6)

Thus, activities that are neither of direct nor of indirect benefit to the company and ultimately to the shareholders are totally excluded from consideration by company law. On charity, Lord Bowen stated emphatically;

> 'It is not charity sitting at the board of directors because as it seems to me, charity has no business to sit at boards of directors qua charity.' (7)

In Parke v. Daily News Ltd.,(8) the issue was whether a company that was about to cease substantial business could make ex gratia redundancy payments to the dismissed employees. The directors of the company argued that the employees having helped to build the proceeds of an enterprise, they had a justifiable claim for consideration to which it was proper for the company to pay regard. They contended that the interests of the shareholders would be satisfied by ensuring that the other assets of the company remained intact for their benefit. 'An accountant of great experience' in his evidence showed that 'although obviously the prime duty of directors is to conserve the assets, they also have these days a practical obligation to their employees.'

Plowman J. held that there was no authority to support the proposition and concluded;

> 'In my judgment, therefore, the defendants were prompted by motives which, however laudable, and however enlightened from the point of industrial relations, were such as the law does not recognize as a sufficient justification. Stripped of all its side issues, the essence of the matter is this, that the directors of the defendant company are proposing that a very large part of its funds should be given to its former employees in order to benefit those employees rather than the company, and that is an application of the company's funds which the law as I understand it, will not allow.' (9)

This was a special situation where the company was winding up. The expenses therefore, could not be justified on the grounds that it is to the benefit of the company in the long run. In practical terms, such expenditure will be allowed under the broad view expressed in Hutton v. West Cork Railway Co.[10]

Hadden, in his interpretation of the decision, expresses the view that most of such expenditure by a company still in business can be justified under the law. He writes;

> 'Most expenditure of a strictly non-commercial kind can clearly be justified on these grounds. Swimming pools for employees, prestige advertising, refreshments for shareholders before a general meeting, grants to outside bodies for research or for charity may all be of long-term benefit to the company in creating attractive working conditions for employees, in promoting a better understanding of the companies activities by shareholders and the public at large or in increasing the supply of well-trained recruits. As long as the company remains prosperous, there will be few objections to such expenditure except perhaps on political grounds.' (11)

This, however, does not change the classical theory that was once unchallengeable. The theory still remains at least in East Africa, that the directors' duty is to the company. The company's shareholders are the company[12] and no other interests outside those of the shareholders can legitimately be considered. The employees, the consumers, and society at large have no right by themselves that company law recognises. Their interests become relevant only if it is in the interest of the company and therefore, the shareholders that such an interest be considered.

The classic 1919 United States case of Dodge v. Ford Motor Co.[13] clearly illustrates the point. This is a case where instead of paying out dividends to shareholders, the management of the company decided to divert the money to other investment extension programs. One of the shareholders, who owned 10 per cent of the company's shares objected, alleging that Mr. Henry Ford who owned 58 per cent of the shares was motivated by personal feelings. Ford was in fact motivated by his concern for society. Defending his views, Ford said 'my ambition is to employ still more men; to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this, we are putting the greatest share of our profits back in our business.'[14] The Court also found that Ford had consumer interests in mind; 'Also that he [Mr. Henry Ford] thinks the Ford Motor Company has made too much money, has had too large profits, and that although large profits might still be earned, a sharing of them with the public, by reducing the price of the output of the Company, ought to be undertaken.'[15]

Despite these appealing objectives, the Court found that Ford was aiming at serving a wider constituency which the law did not allow. It was held that the interests of the shareholders must take precedence over the interests of all others affected by the activities of the Company. As Ostrander C.J. put it;

> 'A business corporation is organized and carried on primarily for the profit of the stockholders. The power of the directors is to be exercised in the choice of means to attain that end and does not extend to a change in the end itself, to the reduction of profits, or to the non distribution of profits among stockholders in order to devote them to other purposes.' (16)

All these cases point to the fundamental principle; the directors of a company must have regard to the interests of the company. (ie. its members, present and future). The interests of the employees, the consumers of the company's products or the nation as a whole are legally irrelevant.[17] This is an anachronistic view that totally disregards modern reality. As Jackson J. put it;

> '. . . the corporation has become almost the unit of organization of our economic life. Whether for good or ill, the stubborn fact is that in our present system the corporation carries on the bulk of production and transportation is the chief employer of both labour and capital, pays a large part of our taxes, and is an economic institution of such magnitude and importance that there

is no present substitute for it except the state itself.' (18)

This is the reality that company law ignores. The important question thus is whether the law should continue to ignore these hard facts of life. It is unreal, in the light of the structure of modern companies and of modern business life for company law to protect the narrow view that the directors of companies should continue to focus their attention on the interests of the company, that is to say, the shareholders to the total disregard of all other parties whose daily lives are affected by corporate activities and whose contribution to the success of any company cannot be doubted.

A decision of the United States Court, Smith Mfg. Co. v. Barlow,(19) acknowledged this fact back in 1953. This was an action by a shareholder who wished to prevent the company from making a donation to Princeton University. The Court held that the company could legally make such a donation. Jacobs J. proceeded to make an important observation;

> 'It seems to us that . . . modern conditions require that corporations acknowledge and discharge social as well as private responsibilities as members of the communities within which they operate. Within this broad concept there is no difficulty in sustaining, as incidental to their proper objects and in aid of the public welfare, the power of corporations to contribute corporate funds within reasonable limits in support of academic institutions.
>
> . . . . Clearly then, the appellants, as individual stock holders whose private interest rest entirely upon the well-being of the plaintiff corporation, ought not to be permitted to close their eyes to present day realities and thwart the long visioned corporate action in recognizing and voluntarily discharging its high obligations as a constituent of our modern social structure.' (20)

The Court recognised that the corporation has an obligation to the community and society in which it operates. Jacobs J. further noted that without the social responsibility of the corporation, the survival of the free enterprise system would be jeopardised. Thus, a charitable contribution, he said 'may likewise readily be justified as being for the benefit of the corporation: indeed, if need be the matter may be viewed strictly in terms of actual survival of the corporation in a free enterprise system.'[21] There is need to re-examine the whole theory and purpose of the law governing large public companies. The comparative rights and obligations of the shareholders, directors, employees, the community in which the company operates and the nation as a whole should be reassessed.

It is difficult to explain why the law has so far failed to control companies to a satisfactory degree. It is important to recognise that no law can be effective so long as it ignores the moral and social environment in which it operates. Operations of companies range from influencing the political system to a highly complex technological society. All these influence corporate response to legal control. Added to this is the reduced sense of responsibility of one's activities to which many individuals are subject when they are put together and are clothed with an institutional framework - a musk that covers their faces and hinders any attempts to identify them with the irresponsible corporate activities. It is the failure in legal history to acknowledge this important feature of business corporations and take it into account that explains why corporations as opposed to human beings continue to be difficult to control.

During the early stages of legal development, law responded to the individual that committed crimes and nuisances by questioning what motivated him. At that time, (ie. about the twelfth century), very little attention was paid to existing institutions like churches, municipalities, and educational institutions. One of the reasons for this was the existing legal doctrines. It was doubted whether a corporation - a persona ficta, could conceptually be legally responsible. But there were practical reasons too. Their special functions were limited and in appropriate cases, the organization was such that the responsible individual could still be identified and subjected to legal control.

As their organisation and activities became more complex and widespread, it became more difficult to pierce through the entities and identify the culprit let alone punish him. This necessitated acceptance that corporations themselves could be held liable for certain classes of wrongs although up to this day, they are still exempt from certain wrongs. The legal system, at this point, acknowledged corporations as actors but did not adjust to their presence and simply incorporated them into the pre-existing general legal system by deeming them 'persons'. Once the formal requirements of incorporation were fulfilled, the law treated them wherever conceivable like any other person.[(22)] While this might have been the best practical approach, it remains the source of problems in controlling corporations.

A company is a "legal fiction with no pants to kick or soul to damn. . . and by God, it ought to have both" writes the English jurist.[(23)] While company factory premises can be pointed at and company offices identified together with the individual managers, there is no physical thing - the company that we can point to. It is a fiction that 'does no act, speaks no word, thinks no thought'[(24)] and hence only operates through the agents. In <u>Lennard's Carrying Co. Ltd</u>. v. <u>Asiatic Petroleum Co. Ltd</u>.,[(25)] Haldane, L.C. put it in clear terms;

> 'My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own. Its acting and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.' (26)

He went on to point out who that person could be;

> 'that person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself or it may be and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him

> under the articles of association, and is appointed by the general meeting of the company and can only be removed by the general meeting of the company.' (27)

The protection of members of corporations from individual liability was achieved through the concept of limited liability. It will be remembered that this concept was not accepted without great concern both in the United States and Britain. In England, Professor Gower notes that this vexed question was a subject of heated debate. It was referred to various committees, including 'a strong Royal Commission' containing representatives from England, Scotland and Ireland. The commission could not reach uninamity. In their report they said they had 'been embarrassed by the great contrariety of opinion . . . . Gentlemen of great experience and talent have arrived at conclusions diametrically opposite; and in supporting these conclusions have displayed reasoning power of the highest order. It is difficult to say on which side the weight of authority in this country predominates.'[28]

The House of Commons, however, finally favoured the laissez-faire principle and introduced the Limited Liability concept in corporations. It was argued this was in the best interest of society. For example, Bramwell contended; 'If ever there was a rule established by reason, authority, and experience, it is that the interest of a community is best consulted by leaving its members, as far as possible, the unrestricted and unfettered exercise of their own talents and industry.'[29] Restriction on limited liability it was said offended this rule.

It is significant that while raising capital for business enterprises necessitated the development of the corporate entity, the possibility of corporate social irresponsibility was a source of concern for many even at a time when corporations were not as significant as they are today in their impact on society. This historical development partly explains the difficulties involved in controlling corporations.

The intellectual climate favoured a legal system that in several ways considered the individual rather than the group. Laws were developed to take into account the natural capacities and rights of individuals. Reason, dignity, will, perfectability and freedom were emphasised. If man had such rights, he had to be responsible as an individual for failure to comply with these obligations. Thus, the individual had to account to the law rather than his family, clan or institution to which he was associated taking responsibility. Punishment was focussed on the individual rather than the group. Penalties, like hanging and torture, are so personal that they cannot be compared with a fine shared by individuals in a group.

Following this development, standards of liability changed. Instead of strict liability, the law developed the overworked 'reasonable man', the man of 'ordinary prudence and intelligence'. The nature of punishment too has had its impact. A theory of punishment was built on the utilitarian model of how a human being should think; 'the rational caltulator of pleasures and pains, the paragon bargainer with the law.'(30)

One of the exponents of these theories was Jeremy Bentham who wrote that 'Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as what we shall do.'(31) He went on to say; 'The temptation to commit crime may be said to be strong, when the pleasure or advantage to be got from the crime is such as in the eyes of the offender must appear great in comparison of the trouble and danger that appear to him to accompany the enterprise.'(32) In his later writings, Bentham concluded that 'the value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offence'.(33) The point here is not to discredit this legal development but the fact is that the legal system built on considerations of human behaviour and motivation was basically left intact when the legal fiction; the corporation was assimilated into the legal system and deemed a 'person'. The corporation being an artificial person but subject to the same law as a natural person has been difficult to control.

The corporations that were in existence during this early period were the churches, the universities and municipalities. They were largely formed to hold property and their important rights included having their own courts and developing their own customs and were not taxed. These were grants from the King. The nature of their activities was limited and did not attract the attention of the law. The merchant and trade guilds which were the predecessors of the modern commercial corporation were like associations which those who entered the calling joined to lay down rules for their trade and to hold courts to enforce the rules. Any wrongs committed by individuals within these charter grants could still be attributed to the responsible individual. In the circumstances, this was only natural. The law and the philosophers of the day were tending more and more towards individual as opposed to group responsibility. This was also possible because of the limited range of activities of these early corporations. With the development of the modern corporation whose functions include production, distribution and marketing, the business community urged the adoption of the limited liability concept and the acceptance that the activities of a corporation be attributed to the corporation and not the individuals that either own it or act as its agents.

Today, the various forms under which companies are incorporated allow the shareholders the privilege of limited liability. This arrangement was, and still is, indispensable to the public financing of companies. At the same time, it creates the problem of placing responsibility on individuals. The slow development of the legal theory was partly because of the many questions that remained unanswered. If the corporation could be liable at all, would it be only for acts specifically authorised by its corporate deed? What if the directors or shareholders authorised the wrong or ratified it after the act? Was the corporation to be held liable for wrongs committed in the course of business? Since the corporation has no mind of its own, could it be liable for wrongs that required a mental state like malice or intention? A corporation is not imprisonable; could it be liable for a crime whose punishment included imprisonment?(34)

Management no doubt advocated liability of corporations. It became clear that corporations were beginning to engage themselves in activities that could cause injury and so long as the managers were not called upon to pay, they were happy. Hence the emphasis on corporate liability. The actual owners of the corporation, the shareholders, shared the same views. Before and during the early part of the nineteenth century, those in business enjoyed the benefits but they had to bear the losses as well, even if it meant impoverishment. The possibility of ruin kept businessmen responsible and efficient. The moral issue was subordinated to economic interests. As Gower observes, by 1855 when the Limited Liability Bill was passed in Britain, 'the fortunes of the governing classes were in commerce rather than land, there had been a number of disturbing liquidiations in 1954-1855, and more were to follow.'(35)

Limited liability was to stop these disturbing liquidations but as Smyth has noted, there would be no problem if the legislature could say, "while we are going to relieve the shareholders of some of the liability normally associated with ownership, we are going to assign that liability to someone else? But the law does not transfer this responsibility anywhere; it only cancels it.'(36)

The problem of tracing responsibility for corporate conduct is not limited to the limited liability concept. For many years, free enterprise - the freedom to use property as one wills has been central to Western political philosophy. The society was built around principles of individualism. Each is free to use his property as he likes so long as his actions do not adversely affect the rights of others. This, it was hoped, would achieve the greatest good for the greatest number or in terms of contemporary economics, the optimal welfare. This was in line with the old political philosophy that a government which governs least governs best and in economics, the laissez-faire doctrine. These rights, however, were accompanied by duties.

As a result of incorporation, the physical assets are divided but at the same time they are left intact to be looked after by others. The legal notion of interest in property is used to divide property for convenience between the shareholder and the legal entity, the corporation. As Smyth ably puts it; ' Unfortunately, in so far as ownership implies responsibility for the use of property, the division of that ownership implies divided responsibility. And divided responsibility is generally no responsibility.'(37) Responsibility for the property owned by corporations, therefore, must be sought elsewhere.

The development of property rights in share certificates as items of commerce has obscured the reality of ownership, and hence control of property. To appreciate the problem, one needs a clear understanding of the economic and social changes that have occurred and led to a build of of wealth in these certificates. The resulting conceptual difficulty has been noted by

Professor Commons;

> 'Back of this insubstantial and delicate process of the mind with its purely nominal values or prices, is the great reality of production and consumption, prosperity and poverty, private wealth and common wealth. We cannot, however, clearly see the connection between promises and reality, between prices and welfare, until we have seen another and most remarkable quality of this mental process, by which the courts have made mere promises actually to look and act like a commodity - the quality of negotiability.' (38)

An individual buying shares directly from the company acquires a legal interest in all the assets of the company. The fact that this interest is only a very small fraction of the assets still makes him owner. The attitude of such an owner is extremely crucial at this point given the fact that even the legal interest in the assets of the company is not attached to any earmarked asset. As Smyth points out; 'the shareholder of a company who proceeds to take ten items of inventory out of its warehouse on the grounds that he has decided to liquidate his ownership in the company is actually guilty of theft. His relationship even as an owner, with any physical assets has become subtle, to put it mildly.'(39)

The question of ownership is even more remote for a shareholder that buys his shares from someone else. The new shareholder is an assignee and takes on all the contractual rights of the assignor. The new shareholder is as much an owner as the original purchaser of the shares. There is no doubt that he has serious psychological problems to solve before he can believe that there is any property relationship between him and the assets of the company. The relationship is certainly remote. To take it even further, in many cases there is a financial intermediary to do the investing.

This important separation of ownership from possession has the benefit of enabling sources of capital to obtain professional managerial competence and thus promoting efficiency. Capital sources do not have to coincide with managerial ability but the social values that go with ownership suffer. The ordinary shareholder does not care about the assets of the company. The interest is limited to the price of his shares and the dividends following. Quite often, the shareholder does not even know what the company produces. The implications of this state of affairs are serious. As already seen, rights in property implies duties. Although these duties exist for the various forms of property, one may ask; what are the duties when the property owned are shares? If this is a form of property with no corresponding duties, how seriously will the rights be treated?

The right to profits perhaps indicates that little weight is attached to the property right in shares. Managers decide on how much to declare as dividends and how much to invest, quite often without consulting shareholders. In some jurisdictions, even employees share profits.[40]

Companies have assets and while shareholders enjoy the rights, there is none to shoulder the responsibilities of property ownership. The owner of property had a moral and legal responsibility to the use of property. The corporate concept destroyed this relationship and as Drucker has said, 'in the modern corporation, the decisive power, that of the managers, is derived from no one but the managers themselves, controlled by no body and nothing and responsible to no one. It is in the most literal sense unfounded, unjustified, uncontrolled and irresponsible power.'[41] Of course not all would agree. Many would say that shareholders have a duty to control the use of the company property. They observe the duty by appointing or electing professional managers to manage company property in the interest of shareholders. It is thus relevant to examine how much control the shareholders have over the managers. Is managerial accountability to shareholders a reality?

SHAREHOLDER DEMOCRACY

The size and scope of large public companies is such that the shareholders and the directors are not the same people. The directors and managers are often men of wealth and professional competence in management. The directors and shareholders are two distinct people although the directors often have shares in the company. From a strictly legal point of view, the directors are subordinate to the shareholders. The directors appoint management which is accountable to the shareholders. In practice, however, this is not the case. Management which is often composed of the directors themselves is a small compact group that runs the affairs of the company as it chooses.

Shareholders are a large group of people each with a small stake in the enterprise. They are apathetic, not easy to mobilise and quite often uninformed. They rely on management and the board of directors and are not ready to challenge management except in cases of obvious mismanagement by the managers. The powers of the shareholders therefore remain of a strict legal nature but in practice they are in no position to control the board and management. As a result, there is a separation of ownership and control though the extent must vary from company to company.(42) Berle and Means, in their classic work; 'The Modern Corporation and Private Property' effectively demonstrated this point.

The notion that shareholders could run the company they owned was dismissed as being illusory and instead it was argued that controllers held and exercised corporate powers for the benefit of all shareholders and thereby, it was concluded, corporation law formed part of the Law of Trusts. This, however, it was contended could not protect shareholders.

'The indefiniteness of its application, and the extreme expense and difficulty of litigation, still leave the stock-holder virtually helpless. In fact, if not in law, at the moment we are thrown back on the obvious conclusion that a stockholder's right lies in the expectation of fair dealing rather than in the ability to enforce a series of supposed legal claims.'(43)

It was argued that ownership and control could only remain under the same people where shares were not sold on the public market. Even in cases of majority ownership, it was concluded; ' T he concentrating of control in the hands of a majority means that the minority have lost most of the powers over the enterprise of which they are the owners. For them, at least, the separation of ownership and control is well nigh complete, though for the majority the two functions are combined.'(44) It was concluded that separation of ownership and control in a public company is inherent. ' A large group of individuals cannot combine their capital effectively in a single enterprise without a loss of control by some members of the group. Clearly it would not be possible for each member to exercise the major elements of control over the enterprise.'(45) The end result is that we have a self perpetuating group of management that is responsible to none.

CONCLUSION

The creation of a separate legal personality of corporations is an indispensible economic advantage but it creates the legally responsible entity separate from individuals that formulate the policies. The law may provide for criminal liability of the corporation but of course the corporation cannot be imprisoned. What would be jailed; the corporate seal? Corporations can only be fined but it is legitimate to wonder whether a fine imposed upon the corporation that has no soul is a sufficient sanction to compel observance of the law.

The emergence of big businesses has created a ruling class in the new society; the managers. They are judged by the evidence of profits made when the corporation is under their management. The relationships between the manager and his staff gives him more freedom than many years back when he was a servant of a sole proprietor. His relationship with the corporation then was personal. This cannot be said of a case where ownership is diffused among thousands of absentee shareholders.

Owner directors were men of personal idiosyncracies but they had a sense of responsibility. Their replacement by a distant board of directors, working for even more distant shareholders, through resident managers who are not local men makes management less free to follow its own convictions in balancing the various conflicting claims which come to it from the workers, customers and the community.

Management has become impersonal and less sensitive. With localised industry and ownership in a small town, social responsibility could be brought home by pointing to the offender in the market place. Today, decisions on methods of production, employment policies, quality and marketing of products are made by face-less men. They are not owners but managers appointed to make profits. They are invisible and unaccountable to the community. As a result, the business community has lost public confidence and has become a center of suspicion. This trend can only be minimised by increased accountability.

At present, the decision makers - the managers, pass on accountability to the 'invincible, intangible and artificial being.'[(46)] What prevents crime is often not the threat of law 'but the sense of guilt, shame, anxiety, conscience and supergo.[(47)] Yet the corporation that is responsible for corporate socially irresponsible activities has no 'soul nor conscience'. Civil as well as criminal actions against corporations simply threaten profits since the corporation cannot be hanged. On profits, law competes with other threats like acquiring and losing good personnel, new markets and improved methods of production as well as competition from other firms. A law suit is a small threat compared to these. This explains why legal regulations are often ignored by companies. Against this background of conceptual difficulties in controlling corporations, some would still argue that corporations have no social responsibility.[48]

THE SOCIAL RESPONSIBILITY DEBATE

Corporations have caused enormous and complex problems to society and the solutions are not always clear. Corporate reform has for long been centered on shareholder democracy but as discussed above, because of separation of ownership and control, the reform measures have not eradicated the problem. Since the late 1960's, there has been once again an increase in the voices calling for corporate social responsibility. The business community has not totally rejected the idea of social responsibility. This has been largely due to social and political pressure. The unfortunate element though is that instead of building up a decent economic order, the business community, concerned with nothing else but to make money, view social responsibility as a means of repairing public relations and hence indulge in the rhetoric of corporate social responsibility that is far from reality. It is thus important to identify and assess the merits of the arguments for and against corporate social responsibility. This should not only help in narrowing down what social responsibility is all about, it should also provide a base for effective corporate reform measures.

One of the arguments against social responsibility is that corporate managers should concentrate on profit maximisation so as to increase financial returns to the shareholders.[49] This would mean that corporations are free to calculate the financial costs of obeying or not obeying the law. For example, in an industry where the law sets health and safety measures, if in the opinion of the managers, the corporation would make more profit by not obeying these regulations, the health inspectors should be bribed and health records locked up under the cover of confidential information.

This extreme view has not been taken by many and instead, it is said, corporations should maximise profits within the constraints of the law. This would mean that while social interests are disregarded, the managers should follow the dictates of the market and law. A society that is dissatisfied with the legal control can, through its democratic process, make it tougher. Before this is done, corporations should continue to steer themselves by the profit motive rather than rely on the managers' vague personal notions of what is in the best interest of society.

To protect ownership interest in the corporation, private gain must be the prime motive. Interests of the community as affected by corporate activity must be left to the free market. This is based on the traditional economic model which assumes that economic forces of competition and price mechanism will afford the public a free choice and ultimately provide the optimum allocation of resources. As Schwartz puts it, ' . . . the logic of traditional theory demands that managers operate a business with a view only to profit seeking, and that they leave it to the market place to develop moral and social judgments.'[50] This leads to Professor Milton Friedman's assertion that 'few trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible . . . .[I] f businessmen do have a social responsibility other than making maximum profits for stockholders, how are they to know what it is? Can self-elected private individuals decide what the social interest is?'[51]

Because of the imperfect nature of the market structure and demands of society, it is very difficult to maintain the pure profit thesis and Friedman does not maintain it either. He qualifies profit maximisation with the caveat that managers should abide by the rules of the game.[52] This he explains involves engagement in 'open and free competition without deception and fraud'. Later he modifys this even further when he says that the responsibility of business is to make as much money as possible while conforming to the basic rules of society, both those embodied in the law and ethical customs.[53] Which ethical standards - over and above the demands of the law?[54]

On this thesis ethical customs would perhaps require corporations to increase their expenditure on pollution control mechanisms to keep pollution as low as possible if for no other reason, on the basis of "do unto others as you would have them do unto you." It is very difficult to justify a pure economic model devoid of social concern given the corporate impact on society. Anita Summers has summarised it. 'A factory dumps its wastes into an adjoining river, and consequently fishermen no longer fish, sailors no longer sail and nature lovers search for another retreat. Urban centers swarm with autos, the pollution index soars, eyes burn, shirts get dirtier, and the view from the cities highest point is no longer a source of delight.'[55] Ethical customs might require corporations to have regard to this phenomenon.

Even on a narrow economic criteria, the values hold. Nader reports that the Environmental Protection Agency calculated that health and property damage from industrial air pollution alone would cost Americans $23 billion in 1977. This social cost could have been cut almost in half but for the industry opposition to spending $3.9 billion in added abatement gear.(56) This social cost is what those against corporate social responsibility protect. Quite clearly, this is a misallocation of resources.(57)

A strong argument for those against social responsibility does not rely on the distinction between profit maximisation and non-profit maximisation of corporate activities but rather they emphasise expertise and efficiency. They argue that corporations must confine themselves to the activities they are best qualified to perform and avoid involving themselves in activities which impede the carrying out of their main function and which they are in fact ill-equipped to perform.(58)

Stone, in his analysis, provides an example that would seem to support this thesis.(59) The Atlantic Richfield Oil Company (ARCO) decided to engage in social matters and attempted to 'retrieve hard core dropouts from society' in Philadelphia by recruiting ex-convicts and perennial welfare recipients. A lot of money was spent to educate and train them but the results were disappointing. In the meantime, a natural gas seepage was developing in the vicinity of ARCO drilling rig in Santa Barbara. In June 1973, the oil had spread over several miles of water. This was without the negligence of any party. However, if the corporation had not indulged in the ill-fated rescue mission not required by law, it would have saved money, expertise and personnel that could have been used in surveying underwater geological conditions - matters that it is better equipped to handle than trying even with the best of intentions to help social dropouts.

The argument is difficult to refute because it is true that we are better off by considering efficiency. However, this begs the question on determination of the proper function. The impact of corporate activities is such that it is difficult to define their main function. One may ask whether they are best qualified to engage in misleading advertisements and lobbying to influence legislation that would assist in reducing pollution.

The more widespread but least persuasive arguments are based on moral claims of the supposed obligations of corporations to the shareholders. The argument is that management must honour the promise to the shareholders that it will maximise profits. However, there is no express obligation between management and the shareholders to maximise profits. Indeed profit maximisation has never been an applicable legal standard. If one accepts the view that law is what the courts will enforce, in the words of Hetheington, 'there is no legal obligation of management to maximise profits.'[60] Most of the shares were issued many years back and only circuitously found their way to current shareholders. The shareholders do not set terms because the management never had the opportunity to refuse such terms as maximisation of profits for shareholders.

Assuming there was a promise by management to the shareholders and none elsewhere, say between management and employees, consumers and society, it might be morally justifiable to break a promise to an individual in the interest of social interest of higher concern.

Related to the promisory proposition is the agency argument. Instead of implying the promise, it is argued that shareholders designated managers to act as their agents to maximise profits. Friedman, for example, asserts that 'the key point is that . . . the manager is the agent of the individuals who own the corporation.'[61]

This proposition is, of course, wrong as a matter of law. Directors are agents of the company and not the shareholders. Further, as already indicated, management uses the proxy machinery to determine who the directors will be rather than the share holders making the choice. In the final analysis therefore, the argument is that for some reason, directors ought, as a moral matter, to consider themselves agents of shareholders rather than customers or employees. The unasnwered question is why? As Stone has observed, this argument is not only morally inconclusive, but is also embarrasingly at odds with how the supposed agents behave. If the managers considered themselves agents, they would act in accordance with the wishes of their principles. Dow's production of Napalm would have been referred to the shareholders. It is a peculiar agency where "agents" spend tens of thousands of dollars of their 'principals' money in legal fees to resist the determination of what their principals want.(62)

The role argument is a strong one. The basis of this is that people are assigned obligations on the basis of their having assumed some role independent of any promise. This is strong because it is in line with the facts. Management neither promises to maximise profits nor do the shareholders appoint them agents. By the nature of the role they assume, directors and business managers assume a fiduciary relationship, and therefore, should not indulge in 'self-dealing' waste of corporate funds. The argument however, misses the gist of the call for corporate responsibility. None advocates that management should indulge in self-dealing waste of corporate resources. What is urged is not that shareholders' interests should be ignored but rather that all interests - those of employees, the consumers and society at large together with shareholder interests should be balanced. A shareholder disappointed by the activities of a corporation may be able to sell the shares but those who depend on the corporate plant for employment and supply of goods and services might not be able to remove themselves from the corporation by a simple phone call.

Finally, the strongest argument against corporate social responsibility is that if managers aim at profit maximisation, the end result is not only good for shareholders but the society as a whole. This is based on the assumption that moral judgments are peculiar, arbitrary and vague to such a degree that they cannot be subjected to rational discussion. The fear is that this does not provide a standard at all while profit maximisation provides some solid and tangible standard on which the participants in the enterprise can be rated.

This, however, ignores the fact that profit maximisation itself is very difficult to define. Both Hetheington and Professor Blumberg have shown the virtual impossibility of defining 'profit maximisation.'(63) The business judgment rule is no more of a solid guide than social responsibility. As Schwartz observes, 'corporate law has always recognised this wide and flexible mandate of power to corporate managers. The proposition is simply that the business judgment rule, which is the classic way of expressing managerial latitude, would permit the corporation to engage in socially useful work, entailing costs or a sacrifice in profits, if a decision maker in good conscience could claim a business benefit from it.'(64)

Not only are the moral issues in social choice vague but they also require expertise that corporate managers do not have. Added to this is the fact that they also lack the authority to determine the policy issues. They have no mandate to determine policy matters.(65)

If the law and market forces could keep the corporations in desirable bounds, it would be in the best interest of us all. This is better than trusting corporate managers to implement their own vague notions of what is best for us. The truth, though, is that it is a stubborn fact of life, that law and market forces have not kept them under control. The traditional restraints have short comings and where they are inadequate, new alternative measures of corporate control are necessary. Such measures should take into account the significance and the existing and potential impact of large companies.

THE SIZE AND POTENTIAL DOMINANCE OF LARGE PUBLIC COMPANIES

To appreciate the significance of corporate social responsibility one needs to have some idea of the size in terms of the work force, membership and assets held by these companies. Such facts are difficult to come by in East Africa but some examples may give some idea. In Kenya, for example, in 1973 exports from the manufacturing sector which is all controlled by companies, together with petroleum products amounted to 25 million out of a total of £123 million export receipts. Of the total manufactured exports, some £15 million was accounted for by the output of just three companies; the Magadi Soda Company, East African Oil Refineries and the Bambuni Cement Company.[66]

In 1970, Magadi Soda Company alone had issued capital amounting to 2,727,933 and net assets worth £3,289,341, with an annual profit of 410,957.[67] A large corporation like the Magadi Soda Company controls its source of raw materials and determines its own market conditions at least for local consumption. The 1967 census of industrial production in Kenya revealed that 433 companies, employing 5 or more workers (out of the 605 that were under study) were wholly or mainly owned by foreigners. These enterprises generated 71 per cent of the gross product and 72 per cent of total sales in the sector for firms employing fifty or more people which in turn generated 82 per cent of gross product.(68) It is thus clear that there are a few relatively large companies controlling major factors of production and this dominance seriously affects the general population.

In East Africa, company law provides no limit on the size of a company and only states the minimum number of shareholders. The large public companies have the potential to expand as the law facilitates easy formation of groups of companies.(69) This can be done in several ways. The most common is by creation of a holding company - subsidiary relationship.(70) It could also be through 'take over' or through the holdingcompany incorporating a new company as a subsidiary. Company law does not limit the number of subsidiaries that a holding company may have and a subsidiary may have sub-subsidiaries and hence creating a chain of control. Although a subsidiary may not hold shares in a holding company,(71) the law allows a situation where two or more companies may become closely linked in terms of ownership and control without any holding - subisidary relationship being present. Because the small shareholders do not effectively participate in the running of a company, 40 per cent or even less share holding may be enough to ensure control.(72)

A common but less obvious arrangement is where, by simple contractual arrangements companies of various sizes without any form of cross-holding agree that some or all of the directors of these companies should be the same people. This is particularly significant on the international scene where some national company laws might prohibit mergers or acquiring controlling shares.

It is also possible to have a few large companies that dominate the market in a particular product agreeing formally or informally not to compete with each other in a particular region.

Separation of groups into separate companies or creation of a pyramid of inter-related companies, while each is in theory a separate entity, is not always improper. It might be the best economical and convenient form of doing the business. This could be due to the need for the different companies to look after manufacturing while others do the marketing or trade in other products. Large size companies enjoy the economies of scale and have the potential to expand, raise capital and promote efficiency.

The arrangements, however, are capable of abuse and this is the problem that causes concern for those advocating the social responsibility of companies. They are not against size although this may in itself be a source of irresponsibility but rather on the way in which these associations affect the economy, the workers, the consumer and the public in general.

The industrialised developed countries have for long recognised the danger inherent in allowing one company or a group of them to become too large and dominant in one particular field. Improper agreements that limit competition are against the law that governs restrictive trade practices. In the United States, the substantive provisions of anti-trust laws are contained mainly in three statutes. Under the Sherman Act of 1890, a contract in restraint of trade or commerce among the several states or foreign nations is illegal.(73) Under the same Act, a person (and this includes the corporation) who monopolises or attempts to monopolise any part of trade or commerce among several states or with foreign nations is guilty of a misdemeanor.(74)

The Clayton Act of 1914 specifies certain restrictive trade practices, and declares them illegal. In brief, these are;

(a) price discrimination;(75)

(b) exclusive dealing and tying contracts;[76]

(c) acquisition of competing companies;[77] and

(d) interlocking directorates.[78]

All these provisions are qualified to the effect that the practice only becomes unlawful when 'its effect may be to substantially lessen competition or tend to create a monopoly'.

Finally, the Federal Commission Act of 1914, though mainly concerned with the establishment of the Commission, has an important substantive provision; 'Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce are hereby declared illegal.'[79]

In Britain, monopolies and other restrictive trade agreements are checked upon by the Monopolies Commission established in 1948. The purpose of the Commission is;

> 'To inquire into and report on cases in which competition in the production or supply of goods appeared to be prevented or restricted. This might arise where a monopoly situation defined as the concentration of at least one third of the market in particular goods or services in the hands of a single company or group of companies, existed or where restrictive agreements were found to exist and to operate against the public interest.' (80)

The powers of the Commission and the government to intervene in possible monopolies and mergers were increased under the Monopolies and Mergers Act 1965 which enables intervention in a proposed take-over or merger where the assets exceed 5 million or which might lead to a monopoly situation. Finally, the Fair Trading Act 1973 extends the definition of monopoly to include control of one quarter of the supply of any goods or services by any one person, company or group either in the United Kingdom as a whole or in any part of it.[81]

Existence of the law must be distinguished from effectiveness. Most of the industrialised countries with all their resources - both financial and highly trained and experienced personnel still face difficulty in enforcing general legal standards for their anti-trust national laws. Increased government regulation of business is expensive, both for the government and the business community and hence, it is increasingly becoming a common complaint among the business community in North America. What is often forgotten, however, is that these regulations have become necessary largely because companies have failed to regulate themselves and observe their social obligations to the community. Unless companies can regulate themselves, government intervention is inevitable.

In East Africa, no attempts are made to control the possible monopolies. What is important is not so much the size but the dominance of the market. An example will illustrate the ease with which monopoly situations arise. Kenya Casements Ltd., a Mombasa firm manufacturing metal products, had assets of £550,000, making a profit of £73,000 in 1966. A competitive situation had been created in 1956 when another firm, Ideal Casements (E.A.) Ltd. of Nairobi had entered the market in 1956. In 1959, the chairman of Kenya Casement Ltd., in his annual report, said;

> 'The directors are pleased to report that Messrs Ideal Casements (E.A.) Ltd., the only other factory in East Africa, have realised the futility of cut-throat competition and have cooperated in the creation of the Metal Windows Development Association Ltd., a company without capital but guaranteed by both companies thereby making it possible to rationalise, improve production methods, stabilise prices and put the industry on a sound footing.' (82)

The company thus successfully eliminated elements of competition and established a virtual monopoly.

In other fields where there would have been sufficient competition, the manufacturers realise the futility of price competition that would result in price reduction to the benefit of the consumer. Hence the companies producing at international levels have derived monopoly advantages from advertising rather than price competition. The multinational corporations transfer a whole package of marketing techniques from their operations abroad to East Africa. For example, Unilever gained control of the market by setting up a local plant to produce differentiated brands of toilet soap. Colgate Palmolive and Cussons joined them and advertised heavily to maintain western tastes established first during the colonial period in the form of the European population and the prosperous Asian community. The changes after independence introduced more African elites in the consumer group of such products but did not change the structure of demand. Thus, heavy expenditure on advertisements by the big companies pushed local soap manufacturers out of the market and hence created a situation close to total monopoly.(83)

In the 1940's, the local soft drinks industry was composed of small-scale producers and was highly price competitive. By 1952, the big Coca Cola and Pepsi Cola had entered the market and soon Dow-Smith noted 'With high pressure advertising and sales campaigns, [they] . . . appear to be firmly established.'(84)

In East Africa, like in many other countries, governments for other economic or political reasons impose high tariffs or even quotas on imports that would otherwise compete with local products. Thus, while in most cases, governments in developed countries intervene to stop monopolies, in many cases in East Africa governments intervene to stop competition and grant legally protected monopolies. In Kenya, for example, the government has stressed that it will intervene in the free market mechanism if the potential investment supports the infant industry model leading to an eventual increase in real income. A complete statement of this policy appeared in the 1966 development plan which stated;

'The overriding consideration in allocating industrial priorities

> is, of course, the actual or potential efficiency of the proposed industry. Efficient industries can meet international competition at home or abroad with a limited need for concessions or protection . . . . The government is prepared to protect those infant industries which show most promise of growing out of their difficulties.' (85)

In a majority of cases, firms have been granted the protection on request. Landgon and Godfrey note that 'Requests for import protection also dominated M.N.C. (Multinational Corporation) entry negotiation with the government, and in 90 per cent cases covered the request was successful.'(86) Such monopoly protection grants have reached absurd proportions in some cases as the Firestone Tyre Manufacturing project suggests. The advantageous position of the company was created in 1969 by agreement between the company and the government with the following concessions;

(a) a virtual monopoly of the Kenyan tyre market, supported by a ban on all imports. Firestone would have to grant written approval before the government could grant a licence to import tires;

(b) the right to use its own price formula in sales, despite this monopoly;

(c) the right to duty-free import of machinery and material inputs required in the factory;

(d) government financial participation in the project to the extent Firestone desired (sufficient to give the government a stake in the subsidiary's success, but not enough to threaten Firestone's managerial control);

(e) the right to count its technical and service assistance in setting up the plant as a U.S. $1 million contribution in equity; and

(f) the right, at the same time, to change technical fees, as a percentage of sales, on the ongoing operations of the factory.(87)

Examples of such guaranteed monopolies are endless in East Africa. The aim here is not to question such an economic policy. That will be left to others. Such policies have got their own economic, political and social justifications. However, it becomes almost ridiculous under such conditions to emphasise Adam Smith's theory of the market forces to control activities of corporations. Such conditions also indicate that there is no foreseeable legislation against monopolies. Thus, the traditional elements of control of corporate behaviour are lacking and this calls for alternative forms of control. Reform in the structure and theory of company law provides a starting point in creating a responsible company.(88)

CONSUMER PROTECTION

Because of the low purchasing power of the East African population, there is limited market for products. Hence, in order to protect local producers, governments impose heavy import taxes. The corporations operating in these countries are aware of their monopoly position. As a result, the consumer has no choice but to purchase the only commodities available at a price set by the producers. Under ideal conditions, the consumer is protected by competition. As already noted, many countries appreciate this theory and have legislation against monopolies to protect the interests of the consumer.

Thomas in his study has noted the position in which the consumer in East Africa has found himself. 'The indigenous consumer is an obvious target for the unscrupulous manufacturer and agents of distribution, for products which are defective, absolete, unnecessary or exorbitantly priced can be sold to the unsuspecting and defenceless person.'(89) The consumer often has had no formal education of any kind. He can neither read nor write. He has no idea about the sophisticated goods and has never heard of anything like a legal right arising out of purchasing defective goods. It is to ignore reality in these circumstances, to talk about quality of bargaining power. 'The consumer is far too vulnerable to be allowed to flounder in the doctrine of caveat emptor.'[90]

The Sale of Goods Act and the Hire-Purchase Act provide protection for the consumer. Existence, however, does not mean that the consumer is aware of this protection and even if he were, he might not be capable of setting the formal machinery of legal redress into motion. While the consumers comprise of the largest group in the term public, they are the least organised and the easiest to exploit[91] and this is not alleviated by the fact that company law does not recognize the duties owed by the company to the consumer.

To this add the effect of misleading advertisements and the picture is complete. Ideally, informative advertising educates consumers and encourages intelligent choice and allocation of resources. But as Nader has argued, 'All too often, however, corporate advertising is the inane, misleading, or deceptive fare we digest daily on television. Instead of advertising about price and quality, leading companies strive to associate their products with alluring super stars or seductive moods.'[92] The advertising is so specialised that even the highly informed and technically competent buyers are subjected to the appeal of the advertisement.

A trend noted by Baran and Sweezy is the increasing emphasis on marketing rather than production.[93] The high sounding talk about advancing science and technology is of secondary concern. The effort is more related to the increase of saleable goods, perhaps new in design and appearance but serving the same purpose as the old product and often with no increased efficiency. This concentration on market rather than production causes concern for the consumer. As Dexter Master put it;

> 'When design is tied to sales rather than to product function, as it is increasingly, and when marketing strategy is based on frequent style changes, there are certain almost inevitable results; a tendency to the use of inferior materials; short cuts in the time necessary for sound product development; and a neglect of quality and adequate inspection. The effect of such built in absolescence is a disguised price increase to the consumer in the form of shorter product life, and, often, heavier repair bills.' (94)

Consumer interests have been neglected. In the early part of the Industrial Revolution, the competitive market provided the protection. Any firm overchanging would be undercut by a competitor. Market is no longer an effective regulatory mechanism. How are the consumer interests to be protected? Some public interest groups like 'the Consumers' Association' in U.K. and the "Housewives Association' in Kenya may be useful in providing information about products but their job is made difficult by misleading advertisement.

Every government has a responsibility to protect consumer interests. Industrialists are well organised and can lobby to influence government policies. Although the influence of shareholders is minimal, their interests are protected by the Companies Act. Companies must recognise a social obligation to supply the consumers with the right products at the right prices otherwise a frustrated public will turn to the government for intervention.

THE WORKERS

In the field of contemporary economics where the activities of the corporations are governed by Adam Smith's theory of the market place, corporations have done very well. They are largely responsible for today's economic progress. Adam Smith, it may be recalled, wrote that the pursuit of economic self interest in the free competition of the market place was in the best interest of the nation. It was through the competitive striving for personal profit by the members of the society that the wealth and power and hence the general well-being of a nation was produced.[95] Because business profit seeking fostered the ultimate best interest of the society, it was justified as ethical. Once this was accepted, it was left to the market place to solve social problems of child labour, poor working conditions and poverty. It became clear that man was not on earth to enjoy but to work and earn a living.

The problem, however, is that we cannot morally justify business around a purely economic model because it is not a purely economic technical system; it is a social system as well. Business produces not only economic consequences, goods, services, profits and wealth, but a variety of other social consequences. This recognition calls for abandonment of social values as a peripheral issue among the members of the business community.[96]

One of the groups likely to be affected most by corporate activities are the employees. As already noted, these are not 'within' the company structure and as such are left to operate through their own unions against the company from outside.

This form of division between labour and capital is at the heart of the differences between capitalist and communist or socialist political philosophies. The capitalist economic theory assumes 'perfect competition' where firms in competition bid for workers and the level of employment will be determined by the government management of monetary and fiscal policy.[97] The level of wages would be determined by the competition among the workers, the rest goes to capital and the rate of profit is the marginal product of capital and measures capital's contribution to production. The rate of profit is a reward to the savers who postponed their consumption and risked their capital in their investment.

Marx on the other hand developed his theory of labour value. He argued that products have a value according to the labour that was used to produce them. Raw materials, capital and labour combine to produce. Part of a commodity value is the labour used to produce the raw materials and maintaining capital equipment. Further value is added by the labour used in the actual production of the commodity. Labour, having produced that much for society only receives a small portion in the form of wages. "It is as if the workers spend only part of their working time working for themselves and while the rest is spent working for the capitalists. . . . The ratio between what the capitalists keep (surplus value) and what they are obliged to pay the workers to keep them at work (wages or variable capital) is called by Marx the rate of surplus value or sometimes rate of exploitation.'[98]

Without going further into the different political philosophies, it is important to consider the extent to which the growth of large companies in East Africa affect the balance of power between the employer and the employee.

In East Africa, unemployment is increasingly becoming a problem. It can be argued that in the East African context, this is not so since arguably, every able bodied person can get some casual work in the so called informal sector. (ie. crafts and services) While this may be so, the amount so earned is so small that very few families can be sustained on it. The problem is not only of unemployment but also of gross unequal distribution of income.

In 1972, Parkin noted that in Kenya, over 120,000 school leavers annually competed for a very small number of wage jobs. This number has no doubt increased. A fortunate school leaver may get a job as a junior clerk and earn about KS. 400 per month while his colleague equally educated fails to do so and ends up being employed as a casual labourer earning about KS. 50 per month. Quite often, the only difference between the two are personal contacts. Parkin, in his study, concluded that urban trends show;

1. An increasingly inverse ratio in the number of job-seekers and available wage jobs.
2. An increasing imbalance in the education manpower. ie. educational levels are rising but job opportunities are, nevertheless decreasing proportionally.
3. A rate of urban population increase (at least 6 per cent and probably more) which is roughly twice that of the national increase and thrice that of the rural. (99)

The tendency is for small companies to be bought by the large ones and this concentration leaves means of production in even fewer hands. In his study, Eglin, referring to foreign companies has noted;

> Where foreign investors have been unable to break into the local industry using their superiority in access to monopoly advantages in either the product or factor markets, they have on occasion resorted to taking over local firms to enter the industry . . . .
>
> Once entry has been gained, the competitive strategy employed by foreign entrepreneurs has tended simply to be an extension of their entry procedure, involving heavy advertising where their monopoly advantage has been vested in a foods market imperfection, continued application to the government for protection against competition both from home and abroad, and on occasion an agressive strategy of takeovers and mergers to reduce competition . . . .(100)

This may be aiming at greater economic efficiency but it may also limit employment opportunities and the implications for East Africa are serious. No studies in East Africa on the implications of such a trend have been found but an example of what has happened elsewhere could provide some idea of what is likely to happen. In 1968, an English company, the General

Electric Company (G.E.C.) merged with Associated Electrical Industires (A.E.I.) and English Electric (E.E.).

Of the merger, Marriot and Jones noted; 'The G.E.C.-A.E.I.-English Electric merger was a victory for those members of the labour government . . . who believed that Britain's industrial strength would be enhanced by the creation of giant companies comparable in size to the leading business in America and on the continent. It was a very different labour government from the Attle regime, which had created the Monopolies Commission to curb the activities of giant companies. But there was something of the same feeling that government should take a hand in influencing the behaviour of businessmen, and not leave the major decisions to the mercies of free competition.'(101)

'The Times' was quick to point out that the 'benefits can be achieved [from the merger] only if G.E.C. manages to proceed as it intends to - ruthlessly towards some ideal efficiency in operation with vigorous control of its own products. Factories will be closed and men made redundant.'(102)

It did not take long. Four years later, G.E.C. had laid off some 64,000 workers, about one-quarter of its work force. During the same period, profits rose from £36,500,000 to £77,000,000.(103) This may be efficiency but it is clear that such business combinations can cause serious problems to the workers who to date are ignored by company law.

WAGES

Workers are not disinterested in the activities of companies. They are affected by the success or failure of a company to which they devote their working life. To that extent, their interest in the success of the company converges with that of management and shareholders. The problem arises when it comes to the distribution of profits. President Nyerere appreciated this fact when he said;

> ' . . . strikes for instance, they say that Mwongozo makes the worker strike. But we are in an unequal society, how can you expect that workers will not go on strike. They will sit down and we will say, do you understand what going on a strike means, and the workers will reply and say do you understand what inequality means? We must have a society where if you like we experience the birth of socialism. We accept this because we don't pretend we have a socialist society.' (104)

The worker expects reward in the form of increase in wages or fringe benefits while the shareholder expects maximum profits through dividends and this accounts for the endless labour disputes in East Africa. Economic growth in East Africa relys on a large, low wage labour force and hence discouragement of high wages. One of the results of such an economic policy is the reduction of bargaining power of labour.

The major problem for the workers is the inadequacy of wages for a minimum standard of living. This is a potentially dangerous situation. 'Dissatisfaction, low productivity and industrial upheaval are potential dangers. History indicates that these factors can manifest themselves in some form of political action if organs of expression are denied to labour.'(105) Labour in East Africa was encouraged to remain unorganised for easy manipulation. This is no longer possible and continued attempts to do so is potentially dangerous.

The traditional western approach has been through collective bargaining, backed if necessary by the right to strike. In East Africa, the most powerful weapon for labour, the right to strike, is highly restricted. This leaves very little room for collective bargaining. The law should at this time recognise the contribution of labour rather than simply capital. This is not to suggest that employees have no legal protection of any kind. There is legislation in all the East African countries to regulate minimum wages, maximum hours, employment of women and children and industrial accidents. Existence, however, is different from adequacy and company law should acknowledge this fact and recognise employees as being 'within' the company by granting them rights that the managers will have no legal justification to ignore.

The issues involved here are not only economic but are also an appreciation of the dignity and contribution of labour. Colonial history made no effort to this end. It becomes the duty of the leaders of today to convince their population of the value of their labour so as to enable the workers to identify themselves with national production, self-reliance and nation building. This will not be achieved so long as workers continue to be looked at as tools rather than essential contributors to production and development.

THE PUBLIC

The destruction of intangible community assets is a serious potential problem. Here the beauty of the environment is at stake and the serious health problems surrounding a heavily polluted environment are involved. Industrialised countries have realised this problem and have pollution control regulations and agencies but even then pollution with all its effects remains a big problem. In East Africa, governments do not have the resources - both financial and highly skilled personnel to study the effects and implement mechanisms for pollution control. There are no regulations on pollution control in industures. The copper smelting centres in Kilembe and Jinja, the iron and steel industries in Jinja, the paper factories which are scattered in many places, the chemical industries and oil refineries in Mombasa and Dares Salaam continue to pollute the air and the sea without being checked. It may be argued that pollution is not yet a big problem due to the low level of industrialisation. But no one wants to breathe polluted air before we realise that pollution control is necessary.

Until early in the 1960's, economists urged developing countries to specialise in agricultural produce and leave industrialisation to the developed countries. This strategy for economic development has since been abandoned and industrialisation is now being emphasised as a pre-requisite for development.(106) Countries focussing on industrialisation, therefore, have to consider the environmental impact since the aim should be to control pollution before it becomes a major problem. Depollution may prove to be more expensive than controlling it in the beginning. This calls for companies to be responsible and recognise their impact on the environment and the general population.

Profit maximisation by companies also affects the economy of the country. Both developed and developing economies may find it necessary to regulate the rates of profits or dividends. Tanzania regulates rates of distribution of profits made by subsidiaries of public specified corporations.(107) In the U.K., the Counter Inflation Act, 1973, set up a pay and price code to control both the profits and their distribution. This was found necessary because inflation that affects prices and wages was making it difficult for British products to compete successfully on international markets.(108) Thus profit maximisation might not be in the interests of the nation's economy and unless companies observe their responsibility, it might be necessary for governments to intervene.

FOREIGN ENTERPRISES

The international companies make excessive profits largely because quite often they monopolise the market, demand excessive protection, charge excessive prices for technology and managerial services. They control the means of production which according to the Arusha Declaration include the following; land, forests, mineral resources, water, oil and electricity, communications, transport, banks, insurance, import and export trade, whole sale business, steel, machine tools, arms, motor car, cement and fertilizer factories, the textile industry and any other big industry upon which a large section of the population depend for the living, or which provides essential components for other industries; and large plantations, especially those which produce essential materials.(109)

This effective control of resources gives them a strong bargaining position in relation to the government. The governments, to increase their bargaining power will need more information, and a firm and tough attitude.

Foreign investors have various alternative legal techniques from which to choose. An individual foreigner intending to invest say in Kenya could become a member of a Kenyan company or a lender thereof through debenture holding. He can also register his own company incorporated abroad as a foreign company.(110) He could also incorporate a company directly either by himself or with other associates. He also has a choice of incorporating a company as a subsidiary of his company incorporated abroad.

If the investor is a company, it has the same techniques as above mentioned. It can register itself as a foreign company or incorporate its own subsidiary in Kenya and hence become a multinational if it is not yet one. Foreign companies, however, are subject to control by legislation. Generally such legislation takes two forms; restriction on the extent to which such a foreign owned or controlled company can carry on business and control on the out flow of profits earned.

In Kenya, for example, under the Foreign Investments Protection Act,(111) the Minister of Finance may on his own discretion grant a certificate approving an enterprise to invest foreign assets or reinvest their profits if he is satisfied that the investment is in the interest of the country. The economic benefits of the country has been interpreted to mean that the investment will;

(a) lead either to an earning or saving of foreign exchange;

(b) result in a gain of technical knowledge to the country; and

(c) result in an increase in the economic wealth and social stability of the country by raising the national income or promoting the diversification of the economy. (112)

The certificate guarantees two forms of protection. The investor is allowed repatriation which guarantees transfer out of Kenya in the approved foreign currency and at the prevailing official rate of exchange -

(a) the profits, after taxation of his investment of foreign assets;

(b) the approved proportion of the net proceeds of sale of all or any part of the approved enterprise . . . and

(c) the principal and interest of any loan specified in the certificate.

Further, there is protection against compulsory acquisition by the state except under the constitutional provisions which state that no property may be compulsorily acquired except when;

(a) the taking is to promote the public benefit; and

(b) the necessity is such as to afford reasonable justification for the hardship caused to the owner; and provision is made for the prompt payment of full compensation.

Under the Exchange Control Act,[113] any Kenyan corporation issuing shares to a non-resident must first seek permission from the Minister of Finance. The funds must be brought into the country in an approved currency.

Non resident directors must be approved by the Minister and a resident who borrows money from abroad must seek permission so as to enable the lender to repatriate the principle and interest.

Tanzania which is less sympathetic to foreign investment has similar provisions(114) except for compulsory acquisition which provides; the full and fair value of such enterprise or property shall be ascertained and the holder . . . shall be paid a proportion specified in his certificate as the approved proportion.(115) There is no mention of judicial review except for arbitrators appointed by the two parties. The Tanzanian constitution does not make any reference to the protection of property rights.

In Kenya, in practice, a certificate of 'Approval Enterprise' is easy to obtain and in the event of nationalization, fair compensation is granted without difficulty.(116) It is thus evident that while the governments recognise the need for foreign investment which provides capital(117) and technical know-how for the development of resources, they also realise that unchecked foreign investments would make economies of developing countries suffer.(118) Thus, foreign companies cannot pursue profit maximisation to the total exclusion of all other considerations without being in conflict with the government policy.

In Hale v. Henkel, the United States Supreme Court remarked that

> '[T]he corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain privileges and franchises and holds them subject to the laws of the state and the limitations of its charter . . . .' (119)

However, many corporations, in their hot pursuit of the dollar, have completely ignored their table manners and shown no sense of responsibility. This is true both in the developed and developing countries. However, the impact of irresponsibility is felt more in the developing economies because of the weaknesses in the economy and the aggressive attitudes of mangers who have no sense of loyalty to these countries.

In England for example in 1973, it came to light that Lonrho, a British multinational with about fifty subsidiaries in East Africa alone was in breach of sanctions against Rhodesia. It came to be public knowledge that the respectable directors were avoiding tax, that large sums of money were being paid to them for very little work and that many of them lived in luxurious rent-free houses. To most people, however, 'the fact that Lonrho was a multinational operating in Africa was not of particular interest. It was the events set in their British context that caught the headlines.'[120] Even then, though worse activities were going on in Africa, Lonrho's disregard to social responsibility prompted the then conservative Prime Minister, Edward Heath, to describe it as 'the unpleasant and unacceptable face of capitalism.'[121]

There are examples to suggest that corporations operating in East Africa have more concern for their mother countries than the host countries. The chairman of Reckitt and Colman Holdings Ltd., a multinational that operates in East Africa, was quoted in 1966 as saying (He speaks of 'this country' meaning Britain)

'I propose to comment this year on our overseas business, since in total, they comprise about 60 per cent of our world trade. We now manufacture in 36 countries overseas, which include almost all the main available markets of the world. We can claim that in this way, we have built up a great national asset with a value of many tens of millions of pounds sterling and I would like to repeat the statement made by my predecessor, Mr. Upton, a year ago that we are earning in foreign exchange; actually remitted to this country over 50 per cent per annum on the funds we have sent abroad . . . We can claim our record places us at the top of the bracket of profitability.[122]

The statement underlies the understandable concern of a British businessman with Britain's balance of payments but it also shows that the development of overseas countries for the sake of it is of no interest to the company. Despite the restrictions, there are many evasions and some companies have stated publically that a lot of money is repatriated beyond the amounts allowed by the host countries.(123) Some of the methods used can be mentioned briefly.

TRANSFER ACCOUNTING

Repatriation of profits is an inadequate measure of resources transferred from developing countries. This is especially so in the manufacturing sector. In Kenya, a study of the employment incomes and equality in 1973 concluded that transfer accounting by multinationals is a common practice. 'The amounts involved are obviously very hard to ascertain, but the existence of these procedures is widely acknowledged, frequently by the parent companies themselves. Although it is very difficult to quantify their effects in Kenya, we feel that any discussion of the role of foreign enterprises in the manufacturing economy would be incomplete, and naive it it did not include some analysis of the problem, the more particularly because Kenyan officials are well aware of it, even though they find these operations extraordinarily difficult to control.'(124)

TRANSFER PRICING

Transfer pricing is a common practice. The company over-invoices the intermediate goods that it imports from the parent company abroad. The same objective is achieved by companies involved in the processing of raw materials by selling their products to their parent companies at reduced prices. On this, the ILO paper said; 'We have very little evidence of the latter practice, namely, the underpricing of exports, but there is some evidence that the over-invoicing of immediate imports is practised in some import-substituting firms. In other words, a number of these firms are thought to pay their parent companies more for the immediate goods they import for their processing than could be obtained for those goods on the open market in the industrialised countries.'[125]

Transfer pricing is not limited to parent-subsidiary companies. Such resources transfer, often to tax haven countries, can be arranged between the companies operating in East Africa and those elsewhere. The practice is not limited to the foreign companies either. Some locally owned or controlled companies too indulge in the practice and as Nyerere put it, though in a different context; 'Mistakes are mistakes: exploitation is exploitation regardless of whether those indulging in it are big people or the majority.'[126] It is still a practice by the companies maximising their returns regardless of the effect this will have on the country's economy. Whether the company is locally controlled or foreign owned is to that extent irrelevant.

Many foreign companies operating in East Africa consistently make 'losses' according to their books. There is often no actual loss but an accumulation of profits outside East Africa. There is some evidence that some companies over-invoice their imports by about 30 per cent the market price.[127] Tanzania, for example, in an effort to compensate at least partially for the disadvantageous position she finds herself in when dealing with foreign companies, appointed the General Superintendents Company of Geneva to act on its behalf in assessing pricing quality and quantity of imported goods. This expensive, but justifiable service, has on many occasions exposed transfer pricing rackets in which the foreign management manipulate machinery and raw material prices in order to transfer untaxed profits without clearance from the Foreign Exchange control. In one particular case, the firm wanted to order some machinery at the price of sh 9.4 million. It was found that the reasonable price at the world market was only sh 3.2 million and in any event, the machinery was inadequate for the output it was supposed to meet.[128]

The figures involved in transfer pricing situations are very high given the fact that most of the trade outside the country is affected. 'Over-invoicing of intermediate goods probably more than doubles the real outflow of surplus from the manufacturing sector as compared with the outflow of profits and dividends.'[129]

SERVICE PAYMENTS

Apart from transfer pricing, there are various kinds of service payments between the subisidaries and parent companies. A company, for example, may pay 5 per cent of the total sales in terms of royalties in order to use the brand name of its parent company. Further the companies pay for technical services, contributions to the headquarters for management, research and development. A single company, making payments under all these heads will be able to transfer all its profit resources and ask the government to control imports of the product the company is producing so as to enable it to make a profit! In these circumstances, it might be difficult, even for the great exponents of profit maximisation by companies as the sole concern to defend such practices.

The impact of such practices on the workers since they cannot claim wage increases when the company is said to be making 'losses' is obvious. The implications for the consumer are clear. To enable the company to continue its operations, the prices must be increased since the company is operating in a monopoly situation. The whole economy of the country and hence, the general public is affected.

It is unrealistic for company law to ignore the impact of all these aspects on the general public and simply offer protection to those with surplus capital to invest and fail to recognise all other interests. It may, of course, be argued that these practices can be regulated by special legislation. Indeed they are, but despite the law, the practices continue. This is because as already discussed, above, companies are difficult to control. Changes in the corporate philosophy and structure geared at creating socially responsible business enterprises should provide an inner-built sense of responsibility among companies so as to minimise irresponsible activities that special regulatory legislation has so far failed to achieve by itself.

SOCIAL RESPONSIBILITY FOR SURVIVAL

Because of the increasing influence of big corporations, private business corporations became a matter of intense political dispute in the nineteenth century. In 1836, the Charter of the Second Bank of United States was to expire. Vetoing an act to extend the term of the Charter, President Jackson argued that the bank was concentrating 'power in the hands of a few men irresponsible to the people.' In the veto message he said;

> 'Distinctions in society will always exist under every just government. Equality of talents, of education, or of wealth cannot be produced by human institutions. . . but when the laws undertake to add to these natural and just advantages artificial distinctions . . . . to make the rich richer and the potent more powerful, the humble members of society - the farmers, the mechanics and labourers - who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injuries of their government.'(130)

Every large institution should ultimately legitimize its existence in order to survive and in a society committed to democracy, legitimacy depends on responsibility and accountability. Dean Edward Mason once asked; 'Who selected these businessmen, if not to rule over us, at least to exercise vast authority, and to whom are they responsible? The answer to the first question is quite clearly, they selected themselves. The answer to the second is, at least nebulous.'[131] Corproations could only find legitimacy in their economic success. Their economic success, however, is paradoxically part of the reason for their apparent loss of legitimacy. The economic success led to increase in size which is partly responsible for the breakdown in their accountability and hence legitimacy.

Corporations were created in order to assist in raising capital and enable the public to realise some social and national benefits without the direct involvement of governments. Thus, the corporation may be seen as a creation of law for the purpose of attaining public good through private interests. As a result, they were granted privileges of limited liability, perpetual life and protection of the law in return for the social utility. They were created and granted privileges to enable the consumer to choose when and what to buy. Today, this is not the case. In most cases, the consumer has no choice and is left to breathe the polluted air. He does not know what to buy either because the corporations do not disclose the material facts about the commodities or because the consumer cannot detect the defects.

In the industrialised countries of Western Europe, North America and Australia, organised labour and capital are engaged in a constant struggle for a larger share of the industrial profits and power without regard to the interests of the consumer or the society as a whole. None of the two organisations is accountable to anybody and both tend to act irresponsibly. The end result is inefficiency and waste. The public pays for the waste in the form of increased prices or reduced quality as well as heavy repair bills. Only through state intervention can responsibility be brought about and the implications are likely to transcend the free enterprise system as we know it today.

Goyder has warned;

> 'This perpetual conflict between labour and capital is not only wasteful; it is highly dangerous to all of us as free men. It threatens to destroy our great achievement in establishing the social and political climate known to us as democracy. For if it continues unchecked, liberty in the economic field will come to appear less valuable than order; order will be imposed by some form of authoritarian rule through the machinery of the state; and once the power of the state has become dominant in the economic field, its extension to our social and political lives will not be long delayed. The freedom that we cherish as the most important human attribute, the freedom of choice which we feel entitled to exercise over the decision-making that affects our lives, will be renounced in favour of big brother, and the view of human destiny represented by the communist powers will be paramount on earth.' (132)

Continued socially irresponsible corporate activities will inevitably invite governments intervention. In East Africa, the worker earning the marginal subsistence level of income, feels ignored by the enterprise. This feeling is crucial because it leads to adoption of an attitude irresponsible to the company. There is a lot to be said for this irresponsible attitude. The company to which he has devoted all his working life does not recognise him as anything more than a tool of production. His attitude is in response quite often to the irresponsible attitude of management. Loss of sympathy for the company has led to waste, industrial unrest and increased costs. The consumer and the community for whom industry ultimately exists are forgotten. The frustrated public will in the end turn to their last bastion; the government to intervene.

The function of a government, is not as some socialists will tell us, to interfere in the relationships between the managers, workers, shareholders, consumers and the community. The government should create legal institutions that are capable of governing themselves as the ultimate aim is justice which according to Aristotle means the giving to every man what belongs to him.

Continued exploitation by irresponsible companies will lead to government intervention on behalf of the public and this may mean an end to the freedom of the free enterprise political and economic philosophy. This can only be averted by responsible corporate behaviour. 'The golden rule for the responsible company is as simple as it is austere: to act in its relations with the community as if it were a citizen of the community, as in fact it is.'[133]

An irresponsible company does not only affect its own image in relation to the workers and the community but it also makes it difficult for the other companies in the community to maintain good relations with other citizens.

As an economic enterprise, the company is justified in putting its interests first. But once it is established, the interests of the community must be taken into consideration, not as a branch of its public relations policy as usually is the case, but as a matter of genuine responsibility like any other responsible citizen. To use the community for self-advertisement is to fail in social responsibility as the aim here is to confuse the minds of the public and the workers. Public approval and support is increasingly becoming necessary for survival and such support cannot be bought by self-advertisement. Some examples will illustrate the likely consequences of continued corporate irresponsible behaviour.

THE GUYANA EXAMPLE

Guyana, a small country with a multi-ratio population and a British colony from 1814 to 1966, is typical of a developing country. Booker

McConnell Ltd., a British multinational corporation with diverse interests in Guyana, has major holdings in the agricultural sector through its subsidiaries including Booker Sugar Estates that controls their interests in the sugar industry. The sugar industry employs about 13 per cent of the Guyanese work force and earns about 35% of her foreign exchange. 90 per cent of the sugar production is controlled by two British companies; Bookers and Jessell Securities Ltd.(134)

Alcan Aluminium Ltd., one of the largest Canadian multinational corporations had interests in Guyanese Bauxite industry through its subsidiary Demerara Bauxite Company (Demba) until 1971. Guyana ranks fourth as the worlds largest producer of bauxite which earns it 45 per cent of her foreign exchange. The Canadian subsidiary produced 80 per cent of this, the rest being produced by Reynolds Metals Company, a U.S. corporation.(135)

The history of the two subsidiaries, one British and one Canadian, operating in two main areas of activity in independent Guyana illustrate the need for corporate social responsibility. Their history reflect what senator Church has said;

> 'It is possible that murder (of multinational companies) could occur . . . . For despite their enormous growth and wealth, it is still an unequal contest. Armies march for national governments, whether large or small, and each of these governments possesses, in its sovereign right, the power to tax, to restrict, to discriminate against, or to nationalize foreign-owned business, or indeed, to confiscate their properties.' (136)

National governments have indeed assaulted foreign companies. This often follows political independence and an awareness of neo-colonialism under the guise of foreign investment. The multinationals control and develop most natural resources. National governments welcome the foreign investment to assist in development. Quite often, however, these companies undermine the national development strategies and hence government intervention.

The new nations are, perhaps with justification, extra-sensitive about possible invasion of their national sovereignty and hence constant reference to decolonisation and sovereign authority. The major cause of strain in relations between foreign companies and national governments is the concept of social responsibility which according to Andrews implies 'sensitivity to the social costs of economic activity and to the opportunity to focus corporate power on objectives that are possible but sometimes less economically attractive than socially desirable.'[137] Social costs must be weighed against business when formulating policy. A country with social, economic and political problems will not tolerate a foreign company that does not pay regard to the socio-economic development of the country, especially where a few corporations control the country's economy.

Guyana's expectations from Bookers and Alcan were not different from the above. The two companies, however, differed in their business philosophies. Bookers advocated a philosophy that acknowledged four responsibilities; to the shareholder, the employees, the customers and the community, and the chairman declared; 'people are more important than ships and shops and sugar estates.'

Alcan did not share this view and consistently made it clear that their decisions would be guided by shareholders' interests and that profitability was determinative. Any other considerations were said to be subordinate to profit.

In industrial relations, the Guyana government urged the foreign companies to train the Guyana citizens and make effort to Guyanize their management staff. Bookers took up the policy, awarded scholarships and after training implemented the Guyanization policy. More people than Bookers needed were trained and they took responsible positions in government. In this respect Bookers was identified with national aspirations and maintained good industrial relations with the workers.

On the other hand, Alcan was not quick at implementing the policy and continued to segregate management from labour. The result was the inevitable conflict and because management was white and foreign while labour was coloured and local, the conflict was easily translated in racial and nationalistic terms.

Alcan insisted that Guyanese were not well qualified and took long to employ them. Although the trained were given top positions leaving only 10 per cent of management foreign by 1971, it was too late to show a sense of responsibility. While Bookers was seen to be integrated in Guyanese economy acting as an engine for social and economic development, in many fields, Alcan remained 'foreign' and did not expand on operations. Attempts by Alcan to repair the public image were viewed by the community as window dressing and deceiving. Alcan planned further investment but in areas and under conditions unacceptable to the government. Because it was isolated from the rest of the economy, it offered no stimulus to the development of related industries.

Guyana continued to have problems with its balance of payments largely due to foreign companies investing abroad, paying dividends and expatriate staff and foreign services. To avoid suspicion, Bookers extensively disclosed her financial activities to the government. Bauxite brought in little revenue, resisted disclosure of financial dealings and created suspicion of transfer pricing since Alcan marketed all the bauxite. The government distrusted Alcan and it was suspected Alcan was making excessive profits to the detriment of Guyana. The government finally decided on equity participation. Bookers allowed local equity participation by the government but Alcan resisted adamantly and instead advised the Guyanese government to invest in the parent company where the government would never have influence and find out any financial details. In 1971, the government summarily nationalized Demerara Bauxite Company. Bookers is still in operation and continues to make profits. The same Canadian firm Alcan operated the Uganda Copper Mines at Kilembe. There is no reason to believe that the practice in Uganda was any different or more benevolent.

THE TANZANIAN EXPERIENCE

During the colonial rule and soon after independence in 1961, the Tanzanian workers, like many others in East Africa, quietly and humbly submitted to authority even under very hard conditions. Managers used derogatory terms and threatened the workers. They were denied traditional forms of labour negotiations through their own organisation. Labour unions were not encouraged but whenever tolerated, they claimed increase in payment, improvement in working conditions, provisions for health and safety as well as any other fringe benefits. It was always a struggle between the workers and employers, the strongest weapon for the workers being their ability to lay down their tools and walk off the job. Management, supported by the government, took the view that this was a sign of non commitment, rebellion and irresponsible behaviour and the strikes quite often were declared illegal and the workers forced back to work.

In 1967, President Nyerere,in an effort to build up 'African socialism', nationalised some of the foreign owned enterprises and called upon the workers to identify themselves with national economic development. The president constantly emphasised that man is the greatest resource factor in development. The result of the political education, which is necessary if the workers are to appreciate their contribution to development was the growth of a spirit of self-awareness and a great degree of appreciation of equal treatment.[138]

In 1971, a political document, Mwongozo[139] was produced by the ruling party and advocated participative management and democratic leadership.[140] These policy statements were largely ignored by the private sector and the state corporations. The workers, as a result of their new awareness and the presidential call for increased production for development, were frustrated by the neglect of these policies in the enterprises. Finally, they changed their strategy. They did not lay down their tools but instead increased production. Instead, in many companies, they discussed 'take over' of full management of the privately owned companies and actually locked out managers in a few cases, and established their own management. In some cases, the government realising the determination and militancy of the workers conceded to the take-over. The Rubber Industries Ltd. was such a case and illustrates the pace at which the free enterprise system will go unless the social responsibility of the companies is recognised by management.

THE RUBBER INDUSTRIES LTD.[141]

The company was started in 1969 by a group of six people, all of Asian origin. In recruiting staff, the company was unable to find any qualified person of African origin! Hence, all management positions were in the hands of Asians and the Africans did mannual work as casual labourers. The women, in order to get jobs had to promise to work overtime without pay.

Any supervisor sympathising with the workers would be fired without notice. As for the worker, it was obvious. The workers were set to spy on each other for favours. Once they were set against each other, they could not take unified action. Management neglected the national policy of the workers' council. NUTA, the national trade union, set up a committee at the factory to take care of the interests of the workers. Management supressed it. Working conditions became difficult and as Bell put it nearly fourty years ago;

> 'It is a matter of sociological fact, to be observed in history and political life, that in periods of class ferment there's a quickening of intellectual life. Little groups spring up everywhere, each announcing to the world its theory, remedy and the way out of the crisis, as the only way.' (142)

One of the workers recalled Coles views that, 'poverty is a symptom, slavery the disease. The extremes of riches and destitution follow inevitably from the extremes of licence and bondage. The many are not enslaved because they are poor, they are poor because they are enslaved.'[143] He organised for what he called 'a Revolutionary Council.' He argued that the workers had no alternative but to liberate themselves. A group of workers was organised and their duty was to arouse 'the consciousness of fellow workers and unmask the evils of the employer and his puppets.' Management, on realising what was going on, fired the leaders. The workers were quick to react. They resolved that it was time for management to be sacked, and they would do it themselves.

On 29th March 1973, all the workers arrived early at the factory, closed the gates and when the General Manager arrived he was told; 'Go home.' The leader of the 'Revolutionary Council' read a prepared statement and declared that 'for and on behalf of the workers', it was not only the intention of the workers to take over and run the firm but that they had taken it over and were running it.'[144] They quoted Mwongozo and affirmed that even if their take-over of the firm did not increase their bread or improve their working conditions, it was an act of liberation because it increased their say in matters.affecting their lives. Nothing, they argued, hurts more than the pain of humiliation.

The workers, after their victory, in a militant mood, guarded the factory only going home one at a time to eat and change clothing. They continued to work without pay for a month and the government, after analysing the facts, responded in favour of the workers. The take-over was recognised and aid provided in terms of technical assistance. The workers rejected financial aid from the government and instead registered the firm as a co-operative society, negotiated loans from banks and compensated the shareholders after an independent body had evaluated the assets of the company.

This is but one example[145] of what a frustrated public can resort to. Unless the companies recognise the effect of their activities on the public and appreciate the consequences, the workers and the community are likely to turn to violence and no doubt a responsible government will respond to its electorate. Continued social irresponsibility carrys with it the seeds of self destruction. Company law must acknowledge this fact if it is to serve the interests of society. Reform in the corporate philosophy and structure is a necessary pre-requisite for corporate social responsibility. The suggested reform measures include worker-participation in decision making, increased disclosure through the social audit and the creation of more responsible boards of directors that manage the companies.

CHAPTER II

WORKER PARTICIPATION

Industrial democracy, in many respects resembles political democracy. Late in the nineteenth century and early in the twentieth century, advocates of political democracy faced hostility and suspicion when they urged political leaders to extend political democracy to the masses. Today, the right to vote for every adult is accepted as an integral part of social and political development. Extension of employee participation in decision making in industry may sound alarming to many but it has been with us for a long time and the rapid increase since the turn of the century is sufficient evidence that it has come to stay. The question is no longer whether it is desirable or not but rather what form it should take.

In 1919, the Federation of British Industries recommended that 'workers in every industry should be given the fullest possible voice in the conditions under which they are employed.'(1) Democracy it was urged should not stop at the factory gate. Myers, a noted psychologist has said;

> 'the impartial observer cannot deny the justice of workers' demand for greater industrial control in these days of government by consent, of increasing democratic spirit in education, and growth of personality and responsibility.' (2)

In his encyclical letter, Mater et Magistra, Pope John XXIII wrote;

> 'The present demand for workers to have a greater say in the conduct of the firm accords not only with man's nature, but also with recent progress in the economic, social and political spheres.'

The subject of worker participation is of concern to people of varying interests. It is a subject of study for the industrial relations specialist, the trade unionist, the sociologist, the political scientist, the economist, the lawyer and the politician.

The increasing influence on enterprise decisions that affect their lives at work has been a subject of study and experimentation in Western Europe for sometime. The discussion has been centered on two aspects; an attempt to give more value to human dignity in all social relations in line with the teachings of the Christian Churches. In the alternative, it has been seen as a demand of ethical philosophy as formulated by Immanuel Kant, that men should be subjects and not only objects of decisions affecting them. Thus, attempts may be made with modifications to utilise the basic principles of democracy as they apply in the political sphere where decisions are made by consensus through the system of checks and balances. The same principles can be used in altering the structure of big corporations.

Of recent, there is increasing recognition of the need for worker-participation in corporate decision making as a means of increasing production. It is becoming increasingly clear that terrible waste by strikes, absenteeism, disinterest, sabotage and other effects of job alienation could be reduced by attempts to humanize and democratize the industries. Views that it is worthwhile to sacrifice economic efficiency for human satisfaction to be derived by the individual from work were not convincing enough since this could be detrimental to the weak economies. Thus, if it can be shown that industrial democracy could improve economic efficiency and productivity, the case becomes stronger.

Although many countries have started implementing some form of industrial democracy programmes, some are still engaged in research. In 1973, a bill was passed in the United States;

> 'to provide for research solutions to the problem of alienation among American workers in all occupations and industries and technical assistance to those companies, unions, state and local governments seeking to find ways to deal with the problem.' (3)

It was recommended that efforts should be madeto encourage the humanization of working conditions and the work so as to increase worker job satisfaction and diminish the negative effects of job dissatisfaction.

In Britain, although there is no agreement on the form worker-participation should take, all political parties agree on some form of industrial democracy. These developments in the top political circles are a reflection of the views of the people.

The spontaneous worker councils in Hungary in 1956, France in 1968 and Italy in 1969; the government initiative in Yugoslavia, Czchoslovakia, China, Peru, Chile and Algeria; the labour struggles over worker-participation in France, Germany, Belgium, England as well as government and management initiated schemes in the Scandinavian countries, Holland and the various experimental schemes in the United States and Canada all illustrate universal social pressure that favours the development of one model or another all aiming at worker involvement in taking decisions that affect his work and life.

In East Africa, although all the three countries; Kenya, Uganda and Tanzania have at one time or another considered worker participation in the management of a company, only Tanzania has taken positive steps towards its implementation. A fundamental question is whether workers not only in East Africa but the world over are interested in such schemes. The attitude of the workers towards worker participation is critical since if there is little interest and pressure among workers, little difference is made by their having the capacity and power if they are not willing to use it.(4) Various studies have revealed that there is sufficient interest among the workers. Pateman writes that 'there is at present widespread desire among very different categories of workers for such participation.'(5) This, however, is contradicted by Derber who did his research at about the same time and concluded;

> 'In none of the countries that I have visited was there much evidence of widespread or intense worker interest in participation in management decision making, even at the shop or departmental level. In England, Isreal and Austria strong proponents of the idea conceded that educating workers to think in participative terms was essential before more progress could be achieved.' (6)

It is submitted that the workers are interested and while there is need for more education to make their participation effective, it is the duty of each nation to give them the necessary education. After an extensive review of the literature, Blumberg concludes that 'there is hardly a study in the entire literature which fails to demonstrate that the satisfaction in work is enhanced or that other generally acknowledged benefits accrue from genuine increase in the workers' decision-making powers. Such consistency I submit is rare in social research.'[7] With such promising benefits, the cost of increased education both to the workers and management to think and act in participative terms is worth the price.

In Uganda, the attention of the government was drawn to the issue of worker-participation in the editorial note of the Voice of Uganda, Wednesday 1 May 1974 where it was asked;

> 'why should one who has dedicated his life to the success of a particular business organisation and has achieved a lot in the way of making the venture of the business organisation a success suffer the anachronistic device of making him less important than a shareholder of a company who has similarly offered his property for the very same reason?'

The paper went on to say that workers have been given a greater say in their companies in many countries and it was time to begin raising the status, dignity and respect of the worker in the country. The paper warned that such a step should not be sudden and drastic otherwise the result may be a hampering of the advancement of any industry instead of making a mutual and advancing union. The solution suggested was gradual and systematic education of the labour force not only to appreciate the benefits of the co-operation but also to have a contributive and useful role so as to realise their dreams and ultimately that of the whole nation.

The workers through their representatives have had occasion to state their case;

> 'Exploitation of man by man has not ended as black Ugandans continue to milk their fellow countrymen. NOTU (National Organisation of Trade Unions) has strong feelings that workers should participate in national economic planning, and buy shares in industrial undertakings to ensure that they are part and parcel of the country's economy.' (8)

It was expected that political independence would result in development of strong trade unions free from government interference. Such associations would provide guidance, assistance and a long term plan of action resulting in higher wages and better conditions for workers. However, in most developing countries, emergence of powerful, autonomous trade unions is not always welcomed by the central authority for they are unifiers of large bodies of militant men who may easily be organised as a threat to the established political regime.

Sometimes, public speeches sound favourable to the workers but in practice it is another matter. For example, in 1974, the then president of Uganda in his address to the nation said;

> 'To workers, they are free to organise themsleves in Trade Unions as they choose. The leaders might not incite them to strike. The government policy is for a stable, disciplined and progressive workforce, industrial relations, training, working conditions, labour exchange services and provision of social security for employees. The Trade Disputes Act, Factories Act, the Social Security Fund and Minimum Wages are to prevent emergence of extreme hardship among those in paid employment.' (9)

In practice however, a strike may be declared illegal at the discretion of the Minister of Labour and there are complicated administrative procedures to exhaust before a legal strike can be contemplated by labour if at all.

Thus, there is an even stronger case for worker participation in management in most developing countries where the central authority considers trade unions a political threat. Unlike trade unions which are organised at the national level and thus including many people, worker participation can be limited to the enterprise and hence may be more politically tolerable. The United States and Canada may claim that there is no room for worker-participation since collective bargaining through trade unions is quite effective. With all the imperfections of such an industrial policy, it is not even open to workers in East Africa. No country in East Africa can justifiably make such a claim and yet we are aware that companies employ a traditionally dangerous group of people which if history repeats itself as it often does, becomes more and more discontented with the low wages, mistreatment, poor conditions of work and the like. If management and control of business enterprises is left in the hands of short sighted, uninterested or politically ignorant individuals, the conditions of work could deteriorate to an extent where workers may be convinced that resort to physical violence is the only solution. This view was appreciated by the Common Man's Charter a UPC (Uganda Peoples' Congress, the then ruling political party) political document which stated;

> "if we do not take initial effective measures to change the course of events at this stage of our history, it may be too late to avoid violence in future years.' (10)

Many countries in an attempt to improve conditions of workers and maintain good industrial relations have either by initiatives of management, government or labour started implementing some program that involve workers in decision making.

Worker participation generally refers to a wide range of programs through which employees are able to involve themselves in the management of industry. The employees or their representatives are given a right to take part in and influence management decisions which affect them. It, for example, requires the management to show a willingness to take labour into its confidence about its proposals and plans for the business enterprise. It requires consultation between management and employees or their representatives about operational and other day to day matters that concern the enterprise.

With time, it has acquired further meanings. It has come to mean the participation by workers in the processes of management. This increasing feature has become common in Western Europe where it has acquired the name; 'co-determination' which involves workers acquiring seats on boards as non executive directors. This should, however, be immediately distinguished from 'worker control', a concept advocated by many left wing theoreticians who view it as the only logical and desirable outcome in the long run so as to eliminate management and labour clash.(11)

Worker participation can take place at different levels. Participation, on the plant level, often known as shop floor democracy(12) allows employees to have control over matters that directly concern the quality of work-life. In many countries in Western Europe, shop floor democracy is a national concern and worker influence has increased.(13)

The Works Council, which is required almost by every European country, varies from country to country but the aim in all cases is to provide some forum to employees below the management group to present their opinions to management. The works councils, first established by Germany in 1922, have from a practical point of view been considered the most important form of worker participation.

The most sensitive and politically significant form of participation is the direct employee representation on boards of directors or supervisory boards. This is what has been called co-determination and involves elected representatives of employees on the board with equal duties, responsibilities and powers as those selected by the shareholders.

A few countries have also attempted or at least considered investment programs that would enable workers to invest in their companies as shareholders. Most people have viewed this with hostility and the attempts are often unsuccessful.

The response to worker participation has varied from country to country. In Germany, for example, when it was first introduced, the attitude of managers was 'one of horrified outrage. It predicted that labour representatives would come blundering into management affairs like a herd of bulls into a china shop.'(14) After living with it for some time, many of them have come to regard it as a fortunate development. It has been linked with the relatively good industrial relations that prevail in that country. In other countries like the United States, Canada, Italy and France, worker participation was and continues to be opposed by both management and labour. The debate is even more heated over board representation. Management is alarmed by the implications of its reduced power. There is fear that workers will reduce efficiency and turn 'the boards into ideological battle grounds.'(15)

There is strong opposition from trade union leaders. 'Some workers believe that worker participation dilutes the natural and inevitable friction between labour and capital. It is thus criticized as class collaboration and as an unrealistic attempt to reconcile incompatible viewpoints.'(16)

Some have argued that experience has shown that worker participation on the board has not been effective and serves as window-dressing for continued dorminance by management. Labour claims there has been substantial progress with collective bargaining and they are not willing to reduce their established position by joining management to make decisions against themselves. In the United States, the president of the Machinists' Union has stated the position of unions.

> 'We have no interest in replacing free enterprise with a more utopian system . . . And we believe workers can receive a better share of the fruits of free enterprise at bargaining tables than in board rooms.' (17)

The Secretary treasurer of the AFL-CIO has bluntly said;

> 'He (the American worker) is smart enough to know, in his bones, that salvation lies - not in reshuffling the chairs in the board room or in the executive suite - but in the growing strength and bargaining power of his autonomous organization.' (18)

Despite these varying responses, worker participation has been on the increase especially since the 1970's. Only about twenty years ago, Germany seriously pursued employee representation at board level. Today, almost every European country either has board level representation or is seriously debating the issue. Even Japan has taken limited action in this direction. But the best example of increased interest in worker participation is provided by the proposals for the European Economic Community Company Law which provides for a standard company structure among the common market countries. The proposals provide for both works council and board representation.(19)

Algeria and Tanzania provide African examples of attempts to involve workers in decision making. Any country attempting anyform of worker participation must study the various schemes that have been implemented or proposed elsewhere. Success or failure is not conclusive evidence that a scheme is either suitable or not. There are economic, social, cultural and political differences that must be considered. Attitudes of managers and employees themselves differ considerably. However, a study of the schemes in different countries can shed some light on the available alternatives. The East African countries can study these alternatives and modify them to suit their own circumstances. The schemes as implemented or proposed in Germany, Great Britain, Yugoslavia and Algeria will be discussed and together with the Tanzanian example, proposals for worker participation in East Africa will be made.

GERMANY

Germany has probably had more experience with co-determination than any other country. The first statute was enacted way back in 1894. The Work Protection Act (Arbeitsschutzgesetz) established and regulated workers' committees. There was no right of co-determination as understood today but the statute gave the committees advisory functions. They became a legally recognised institution representing the workers. However, they were optional and the employer had the right to choose whether to have them or not.

During the First World War, the Auxiliary Service Act (Hilfsdienstgesetz 1916) made them mandatory. Members of the worker's committees and committees of the office staff were elected by the respective groups and were mainly concerned with social matters of the personnel.[20] The German labourer felt and resented a sense of powerlessness and as the labour movement gained force and momentum, the demand for a voice in industrial decisions became louder.[21] In 1920, the first Works Council Act was passed to apply both to public and private works. 'The Works Councils had now already genuine co-determination rights in social, personnel and fundamental economic questions.'[22] Management could still take any decision but workers had a right to be heard. The Supervisory Board Act of 1922 enabled the employees to be appointed members of the supervisory board having equal rights. This representation, however, was not effective and Vagts notes that 'it is generally agreed that this legislation, particularly with respect to supervisory councils, failed its purpose, owing to the weakness of labour's economic position in a period of unemployment and to the hostility of management, which used every device to isolate the labour representatives and to bypass serious decisions through committees or informal private gatherings of insiders'.(23)

The Nazi regime, in 1933 passed the Order of National Labour Act (Gesetz Zur ordnug der nationalen Arbeit) which abrogated the provisions and weakened labour itself. The position of management was lifted to that of a trustee for the enterprise and while management could still consult the workers, the entrepreneur had the final word without restrictions. The end of World War II marked the emergence of an even stronger trade union movement whose final goal was full co-determination. The construction of the torn economy demanded good industrial relations and the labour movement won the sympathy of the British labour government that had occupation forces in the country, especially in the Rhur coal and steel region.

The North German iron and steel control which managed the iron and steel industry through their articles of association introduced co-determination on an equal representation basis. Thus, there were to be equal numbers of employee and shareholder representatives on the supervisory board. A labour director, responsible for social and personnel matters would be appointed a member of the board. Trade unions exerted political pressure for equal representation in all industries. The result was co-determination law of 1951.

Under this law, every company in the iron and steel industry whose number of employees exceeded one thousand had to have a supervisory board elected on equal basis. On the same board was to be an independent member nominated by agreement. Thus, the resulting model was five shareholder representatives, five employee representatives, and a so called neutral 11th man on the supervisory board. The neutral member was to decide in case of a stalemate with no foreseeable compromise. Disagreement beyond this would become a matter for the court. In 1956, this model was extended to cover all holding companies in the industry.

The works council constitution law of 1952 introduced partial co-determination in all companies employing more than five hundred people unless the companies could be classified as family corporations. Under this law, there was no labour director. Only one-third of the members of the board represented employees. As a result, employee representatives could easily be outvoted. Further, in contrast to the iron and steel sector, nomination of the employee director did not have to be by trade unions.

The Co-Determination Law of 1976 made changes in this structure. The Act was a result of political developments in Germany. The Social-Democratic Party and the Liberal Democratic Party negotiated a coalition and together introduced the bill on Co-determination based on equal representation in all joint-stock and limited liability companies employing more than two thousand people. The Bill was debated both in Parliament and in public and all likely constitutional problems were scrutinised and resolved.

Finally, the Bill was passed. Each company affected has twenty members on the supervisory board, ten representing shareholders and ten representing employees. Only three of the ten employee representatives are directly linked with trade unions and one of the remaining seven represent staff and middle managers. The Federal Constitution guarantees property rights and thus there was fear that equal representation would infringe the property rights and the legislation would be declared null and void by a constitutional court. To avoid this objection, the chairman of the supervisory board, who has a casting vote cannot be chosen against the wishes of the shareholders' representatives.

Companies in the steel and coal industry still have to appoint a labour or personnel director who is acceptable to the supervisory board. His concern is mainly industrial relations and other social matters which include safety, welfare, leisure and pensions for employees. It was feared that the position of the labour director was untenable due to divided loyalties as a working member of the executive board and at the same time an indirect representative of employees. But as Hadden has observed, 'in practice, it appears that while labour directors have usually been selected with full cooperation from trade unions, they have not been expected to and have not in fact sided with unions or employees against the collective view of the executive board.'(24) However, the fact that they are on the board and are in close contact with unions, added to the right of employee representative directors' right to veto their dismissal 'has helped to ensure that important issues of industrial relations are not left of account in the preparation and discussion of company policies.'(25)

The Labour Management Relations Act of 1972 provided that each unit of an enterprise with five or more employees should have a works council. Members of the works council cannot be dismissed during their term of office and are allowed time off their working hours to conduct the business of the council as and when necessary. The works council are mainly concerned with social matters at the plant level. Their function is to see to it that the legislation protecting workers is implemented, for example, safety and health regulations. The council has a right to discuss matters affecting personnel and make suggestions.

It handles issues relating to those seriously disabled and promotes employment of the older employees.[26] To be effective, the council must be informed in time by the employer on problems to be discussed. On request, the employer must allow the council access to all records and data that the council needs for its duties. On all the issues, the works council presents a case to the employer but cannot force a certain decision.

In all plants with more than one hundred employees, there has to be an economic committee under the auspices of the works council. Management is required to inform the committee matters relating to the economic and financial situation of the enterprise. Management reports on sales, production, investment plans, expansion or closure of the plant and any other arrangement that may affect the employees of the firm. The committee thus provides a forum for discussion of major issues but the power of decision making rests with the executive and supervisory boards.

IMPACT OF CO-DETERMINATION

The Biedenkopf Commission produced a detailed analysis of the operation of co-determination. The Commission was given the task of evaluating the experience of co-determination. For two years, it made inquiries by questionnaire, compiled all important publications on the subject, analysed the available data and had comments from leading scholars, union representatives as well as business executives.[27]

The Commission found that where trade unions had neither a right of nomination nor a right of delegation (ie. where co-determination was only partial with 1/3 employee representatives) the representatives came from the company itself and not from the officials of the trade union. By implication, employees prefer electing their own colleagues from the company unless they have no choice under the law. Hence, under the 1976 law, where union representation is needed, it is provided by law.

On introducing co-determination, dramatic confrontation was expected but experience has shown that there is not much of it. The formal structures for co-determination have resulted in an informal network of communication between management and employees.[28] In his study, Hadden notes; 'It was reported that almost all decisions at supervisory board level were unanimous, largely as a result of prior negotiation between the parties.'[29] Earlier on, Professor Vagts had noticed the same trend when he said;

> 'It is now generally agreed that there are a few confrontations within supervisory councils and that the overwhelming bulk of the decisions are made unanimously or, in a few cases, by divisions that cut across the labour management front.' (30)

The Commission found that fear of frequent deadlock was groundless. Between 1964 and 1968, the neutral member of the supervisory board in the coal and steel industry had never had occasion to use the casting vote in the 2/3 of the companies surveyed and in the remaining 1/3 of the companies, the casting vote favoured shareholders more frequently.[31]

The explanation for none-confrontation is that most important issues are not discussed at the meeting but rather in the preliminary talks. 'The result of the new realities in the supervisory board is that open end contraversial discussions hardly ever take place. The discussions happen in preliminary talks which the management sets going separately with the individual groups, this is to say to a much greater extent with the group of the employees' representatives than with the representatives of the proprietors. In these preliminary talks, the real discussions take place and the important material decisions are taken. Then the meeting of the supervisory board is confined very often to the formal execution of the decisions taken before.' (32)

The Commission also found that co-determination in the spheres of equal representation did not lead to impairment of the will to make profits, the readiness to invest or expand. The representatives of the employees favour the development and expansion of their enterprise. Securing of more work, salary and wage increases has led in many cases to investment and expansion initiatives by representatives of the employees.(33)

These findings must, however, be seen in the light of who has actual power in the companies. The supervisory board does not have direct executive power. Its 'decisions' are quite often a rubber stamp of policies of management. Quite often, all the supervisory board does is to refer back the policies to the management board for further scrutiny. This was acknowledged by the Commission when it said;

> 'It was constantly stated that only in exceptional circumstances did controversy arise in supervisory board meetings over management's investment proposals . . . . as a rule the individual member of the supervisory board has neither the technical ability nor the time to examine the caltulations which are attached to the substance of investment proposals.' (34)

In the end, however, management is conscious of the fact that a decision that affects employees should be scrutinised with care and sometimes, a balance has to be struck between technical and economic considerations and the social demands of employees.

Another finding of the report was that both the supervisory board and the works council had operated without interfering with the collective bargaining structure that is left to the trade unions. The workers and trade unions leaders had agreed to keep the two separate by making sure that individuals involved in one were not involved in the other. Although labour directors come from the trade unions quite often, the Biedenkopf report concluded that the institution of the labour director had not interferred with collective bargaining. The trade unions are much better informed on the economic situation of the enterprise and they respect the role of the labour director to represent the interests of the enterprise in collective bargaining.(35)

There have been a few instances where a labour representative has found himself in a difficult situation when the trade union is in conflict with the firm. It may be recalled that English law emphasises the paramouncy of the interests of the company. It is for this reason that no director is bound to represent a sectional interest of the members. This principle was stressed by Green M.R. in Re Smith and Fawcett(36) when he said that the duty of the directors in managing the company is to act 'bona fide in what they consider, not what the court may consider, in the interests of the company and not for some collateral purpose.'(37) The same principle applies in Germany. A worker representative must not necessarily support his constituency but rather has to exercise the authority in accordance with what is in the best interest of the company. The representatives are not expected to organise or participate actively in a strike.

> 'All strike activities infringe the duty to cooperate peacefully with the employer. The integrational function of the concept thus becomes evident. Participation is tolerated but not as an instrument exclusively designed to safeguard the interests of workers. The link between participation and the plant's benefit dissociates the representatives from the workers and transforms them into a special kind of manager.' (38)

A worker representative may find himself in the unenviable situation when the union presents a case for wage increases and finally resolves to strike. A German case on the issue highlights the problem. In 1955, a labour supervisory council member actively urged the employees to strike. He became the chairman of the strikes committee after the strike had started. Another member of the board though less active supported the strike. After the strike, the company sued the two claiming all the damages resulting from the conflict.

The lower court held that the involvement by the two was in breach of their duty of loyalty since they were not 'to represent special workers' interests but to conduct their functions solely for the good of the corporation and its employees while taking account of the common welfare.'[(39)] The dilemma in which the labour representatives were placed was acknowledged by the court and in an ambiguous language said the representatives could participate in a strike passively but not actively. This was the best the court 'could do with a paradoxical situation created first by the legislature, which created this office, and then by the union which gave individuals entirely incompatible offices of labour leaders and members of management.'[(40)] Perhaps this was the only way the court could acknowledge the paramouncy of the company's interests while at the same time upholding the workers' right to strike. The court of appeal upheld this view.

German authors, however, reject the question of conflict as being a major problem and they point out that this is not a unique situation. Resolving conflicting loyalties is an every day exercise that every public official encounters.[(41)] The concept underlying co-determination is that the company should be run not exclusively for the interests of the shareholders but the workers as well and such a resolution is necessary. On the available evidence, those involved in co-determination have always reached a workable compromise.

On appointment on the management board, a responsibility of the supervisory board, the Biedenkopf report noted that the process was more difficult due to the necessary arrangements that have to be made with the employees' representatives. However, it was reported that contrary to the views expressed when co-determination was first introduced, employee representatives have not used undue influence in filling vacancies on the management board.

The report expressed concern over the independence of the management board, not so much because employee representatives participate in their appointment but rather that the chances of moving from one enterprise to another might be curtailed and thus reducing the market for top management positions. For example, if one member of the board was unable to get along with some members of the trade union, there is a possibility that he might not get a position in another company in which members are the same or are in close contact. Members of the management board therefore might not feel free to take decisions that could prove unpopular with the trade unions. The result would be a vote together with the supervisory board irrespective of the interests of the company.(42)

This fear, however, loses ground in view of the commission's finding that on the basis of its hearings; 'there was no fundamental difference in approach by shareholder and employee representatives over basic company policy or over the criteria to be applied in making decisions on investment, lay-offs or even disclosures.'(43)

Co-determination both at the supervisory board and works council levels is firmly established in Germany and there is no pressure to dismantle the structure. The workers, too, are happy with the structure. 'Numerous opinion polls and surveys have reported that most German workers are happy with the system, even though they are apparently less convinced that it had brought about any real change in their position within their own companies and plants.'(44)

It is difficult to give clear cut answers as to the ways in which co-determination has helped individual workers. Wages for example are usually negotiated by the representatives of the union and the Employers' Association. Actual wages may be considerably higher than in many other countries but this could be due to other factors like the trend of the labour market. Decisions on wage increase are made by the managing board. It is rare that the supervisory board gets directly involved. It was feared that management and labour would raise wages at the expense of the consumer but this does not seem to have happened. 'Studies of what has in fact occurred are very cautious in assessing the contribution of co-determination to the increase in wages that has taken place since the early 1950's.'(45)

Other factors like intense labour shortage are used to explain the increase. 'One can also find specific episodes in which the labour representatives have helped to dampen wage demands of the rank and file.'(46) Vagts concludes that 'the most one can devine from the German imperical studies, then, is a cautious estimate that full co-determination has somewhat spurred the rise of wages in the coal and steel industries, in comparison both with other German industries and with the coal and steel industries in the rest of Europe. In the process it has kept the man hours lost through strikes at a fantastically low level, an achievement that helped to pay for the increases.'(47)

Labour representatives successfully struggled for increased fringe benefits. This, however, should be seen in the context of Germany, an industrial society with a tradition of paternalism whose voluntary social benefits program, by 1957, made up 16.5% of the total income received by labour.

Labour representatives have also taken interest in job security. They have as a result improved job stability and continuity of employment. 'An outsider is favourably impressed by the humanity and care with which new jobs have been found, or even created by bringing in new industries, and workers retrained or pensioned.'(48)

Labour representatives are reported to have increased concern over new investments. It is said that they are not concerned with the profitability of new investments but rather they emphasise the effect in displacing workers, offering new jobs or improving working conditions. They are willing to spend money so long as the alternative is a payment of dividends. They are opposed to investments in plants allocated outside Germany and would prefer to see all profits ploughed back into the enterprise.

It is further alleged that there is little concern about the goals of the working class as a whole or the consumer. Emphasis is laid on wage increase, working conditions, fringe benefits and job security at the plant.

These allegations, however, are not supported by the facts and on the whole, co-determination has been successful. Despite problems, it has made it possible for workers to improve their conditions at very little extra cost to the economy. Vagts notes that;

> 'It has raised industrial morale and eradicated the worst features of the old paternalism by providing a vehicle for close collaboration and sharing of responsibility. It has made possible the rapid climb to power of individuals who might otherwise have been held back by the rigid German status system. Many of these have proved themselves capable and adaptable men. More broadly, it has opened channels of communication between labour and management that were desperately needed by a stratified society. Thus co-determination has established itself quite solidly on the German scene, has won a good deal of acquiesence from management and, if the Social Democratic party have their way, is likely to be intensified and extended.' (49)

This is in fact what has happened with the 1976 legislation.

There can be no doubt that co-determination has helped in the reconstruction and rapid build up of the German economy since World War II. A German diplomat, Rudolph Vollmer, has ably summarised the success of co-determination in the following words;

> 'If you asked me agäin what is co-determination, I would say; The fact that a little country like West Germany which you can put into Lake Ontario, is able to compete on equal terms with America on the world markets, that is co-determination.' (49)

THE DEBATE IN GREAT BRITAIN

Although there is no legal compulsion for worker participation in U.K., it has been a subject of study and discussion. A review of the debate further throws some light on the problems anyone contemplating reform in company law by requiring direct involvement of workers in decision making must consider.

In Britain, involvement ofworkers in decision making has been accepted by all political parties and the problem is what form is should take. This is evident from the terms of reference to the Bullock Committee;

> 'Accepting the need for a radical extension of industrial democracy in the control of companies by means of representation on boards of directors, and accepting the essential role of trade union organisations in this process, to consider how such an extension can best be achieved, taking into account in particular the proposals of the Trades Union Congress Report on industrial democracy as well as experience in Britain, the European Economic Community and other countries. Having regard to the interests of the national economy, employees, investors and consumers, to analyse the implications of such representation for the efficient management of companies and for company law.' (50)

Management and shareholders are worried about the reform. They fear the capitalist structure will be transformed beyond recognition. This fear is increased by some ideas expounded by certain trade union leaders who word their proposals in a revolutionary language implying take over of power by workers. Trade union proposals are a result of the fear that participation could undermine their power.

While management is worried about the possible loss of prerogative powers, they are comforted by the fact that transfer of legal control is different from effective control. Despite the fact that legal control is held by shareholders, management still has effective control and it might make little difference if legal control is shared between shareholders and employees.

The Trades Union Congress, in 1974 made proposals for reform of the Companies Act and suggested that industrial democracy should be introduced both in the private sector and the nationalised industries.(51) It was proposed that all enterprises employing more than 2,000 employees, on request by their trade union representatives should be allowed to have equal representation with the shareholders on the supervisory board. The supervisory board would appoint members of the management board and would have the power to veto decisions of management and the shareholders' annual general meeting.

It was also proposed that company law should be changed so that all companies of all sizes are required by law to have regard to the interests of both the shareholders and the workers. Below board level, proposals for flexible experimentation with various forms of representation and consultation were made.

By the time of the Bullock inquiry, the Trade Union Congress had changed their views and in their evidence, a single board with 50% worker representation was proposed.

The recommendations of the Bullock Committee have been well summarised by Denton.(52) The majority view was that the Companies Act should be amended to require boards of public companies to have regard to both the shareholders and the employees. Worker participation should be introduced in enterprises employing more than two thousand workers but the employees and their trade unions should be given the option whether to adopt it or not. Workers in the enterprise should first vote on whether they want participation or not.

The Committee further recommended that employee directors should be elected through the trade union machinery in the enterprise and that once elected, all directors should have the same legal responsibilities; ie. to pursue the interests of the company but having regard to employees and shareholders. The two-tier system as is operating in Germany was rejected and instead, the Committee recommended that a unitary board structure should be retained, but to be chosen on the 2 x + y formula. ie. equal representation for workers and shareholders, plus an independent member co-opted by others with provisions for arbitration in case of disagreement.

An Industrial Democracy Commission was recommended whose duties would include arbitration, promotion and supervision of the introduction of the new system. Further, the government should establish a fund for training workers and trade unionists in the operation of the system.

The government studied the report and in May 1978, the Prime Minister presented the government paper to Parliament.[53] The government acknowledged that industrial relations should be conducted on voluntary arrangements and legislation provides minimum standards that should only be turned to as a last resort.

The problem of confidential information which if disseminated by employee directors to competitive firms could be detrimental to the success of the enterprise. However, the sensitivity of the information varies from company to company and while some issues may already be known to the public, others may not. Not all information is sensitive and such may be discussed by all employees. The sensitive aspects like development of new products, investment intentions and market strategies could injur the enterprise if disclosed.

The problem, however, should not be exaggerated. Trade unions have successfully handled the information and in any event, representatives of employees like all workers depend on the success of the company and are interested in its success. There is no more reason for them to betray the confidentiality of the information than any other directors of the company. Besides, company law has always tolerated the position of directors that could have harmful effects on the company if they chose to. A director of one company can at the same time be a director of another rival company so long as it cannot be shown that he was making the second company any disclosure of information obtained confidentially as a director of the first company.[54] Thus, the problem on confidentiality is an already existing problem and it is submitted that employee representatives add nothing to the problem so long as the significance of the information is explained to them. All directors together can decide which information to disclose to the public and any breach of this obligation could lead to civil liability for all directors.

The British government white paper noted the lack of consensus on board level representation although there was widespread support for representation where both the company and the employees agreed. Lack of consensus is a reflection on the views of the role of the directors. One possible viewpoint is that employee directors would complement collective bargaining and they would ensure that matters of concern to employees were sufficiently discussed with all relevant facts in mind. The other view is that taken by the Bullock report which enable employees to participate in management and share all responsibilities of the company.

The government made it clear that it was not keen on introducing any inflexible legislation and would leave it to the companies and their employees to negotiate the form of representation. To facilitate this, the government policy favoured legislation for a two-tier board structure with separate policy and management boards as an option forany company. The government was convinced, however, that a two-tier board structure would be advantageous. 'Its study of this subject has convinced the government that regardless of the question of employee representation, the two-tier board structure can offer the companies certain advantages over a unitary board.'(55) In its view, this structure is even more appropriate where employees are represented. The policy board would formulate company policy and take decisions on major issues and thus enabling employee representatives full participation throughout the company. The day to day running of the company would be left to the professional management board and any arrangements for employees to participate in such decisions would be through some other arrangements below the board level. Such arrangements should be made by each company taking into account its own circumstances and the interests of all those involved.

The directors, irrespective of their constituencies should share the same responsibilities and none should be required by law to vote in a particular manner. The directors, however, must keep close contact with their electorate and reflect views of their constituencies.

Companies employing more than 2,000 employees which fail to agree on the form of representation should be required by statute to allow representation if employees vote and show desire for such representation. The company would then make a choice between the two-tier structure and the existing unitary board.

On the proportion of employee directors, the government was less certain. The employee representatives, it is argued, cannot share the same responsibilities without equal influence on the decision making process. Soon they would lose credibility in the eyes of their constituencies if their views are always outvoted. In any event, the argument goes on, it is no longer acceptable that in the last resort, shareholders' interests must prevail.

On the other side of the story is the fear of the deadlock that could result out of parity. Collective bargaining requires independence of all directors. If employees have equal say in the appointment of the management board and equal representation on the policy board, with the support of trade unions which represent workers, it could upset the collective bargaining structure and shake the confidence of investors leading to problems in raising capital. Without extending parity as the end result, the government would prefer a step by step arrangement leaving it to experience to determine the final form. In its view, as a first step, employees should only be allowed to have 1/3 of the members of the policy board.

The government considered the method of selecting employee representatives and concluded that there should be no legislation to cover this. The policy board requires to maintain links with the shop floor democracy and to keep clear lines of communication. There is also need to balance interests of different occupational groups in different geographical locations. If the board members represent all employees, then all employees should participate in their selection. To leave selection to the union machinery might damage the morale of middle class managers and other non union members whose commitment to the company may not differ from that of all other employees.

Trade unions, however, have a strong case too. Their position should not be threatened. Any effective collective bargaining is based on collective organisation. A structure of board level representation that is different from the trade union machinery would provide experienced personnel that would fully participate in decision making and thus providing an efficient and credible channel of communication to the shop floor and to all employees.

The two countires discussed so far - Germany and Great Britain, are highly industrialised and their economies well developed.(56) With substantial modification to the two-tier German structure so as to take into account the differences in trade unions, management practice and other social, economic and political differences, Holland, Denmark, Belgium and Sweden have adopted the model. Again these countries have well developed economies. The practice in these countries, however, can be used as a guide. The heated debate in Britain whose legal system prevail in East Africa has highlighted the problems involved and suggested the various possible alternatives. Any country considering worker participation must have regard to these issues without forgetting of course that conditions differ from country to country.

Developing countries considering worker participation however, should also take into account the experience of the less industrialised countries like Spain, India, Algeria and Yugoslavia that have attepted introducing such reforms. In some, it has failed and in others there are signs of success. It is therefore relevant to consider the structure these countries have adopted and the problems they have faced. The experiences of Tanzania and Yugoslavia will serve this purpose.

YUGOSLAVIA

There is extensive literature on the subject and no attempts will be made to review it all. The aim here is to pick out the basic elements of the structure adopted and consider the problems involved.

Yugoslavia emerged out of World War II with ideas of economic and political independence and hence the break with Russia in 1948 was only natural. Both political and economic independence demanded experimentation on possible political and economic institutions. Although the government explained the change from centralised to a decentralised national economic policy through the works' councils in terms of economic developments, emphasis on reduced state power must have been influenced by external factors like opposition to the Stalinist monopoly of power. To reflect the reduced state power, property was no longer owned by the state but rather it was made social property by definition.

The workers under the model of self management were to manage but not to own the enterprise. According to the basic law;

> 'The working collective shall manage as the peoples' property and in the name ofsociety, the factories, mines, means of communication, means of transportation, and commercial, agricultural forest, communal and other socially owned economic enterprises, and they shall do so within the framework of the state economic plan and pursuant to the right and duties as established by the laws and other legal prescriptions.' (57)

It is important that the position taken by Yugoslavia should not be taken out of context. The basic difference between self management as practiced in Yugoslavia and worker participation elsewhere is that in Yugoslavia, workers decide on their own destiny while in other countries, their participation in decision making is of limited nature or simply advisory.

Self management has been made possible by a number of factors. It is a socialist state where it is claimed power is in the hands of the working class; the social ownership over means of production and the fact that self-management is an integral part of social self-government.(58)

Under the Yûgoslav ideology, a socialist democracy implies the participation of citizens in decisions on all questions in which workers' self management has a dominant part. It should also be emphasised that in Yugoslavia, workers' self management is not mere economic democracy but is part of the political democracy as well. 'In the system of workers' self management, the workers decide not only on the division of the income of their work organisation and the distribution of their individual incomes, they also decide on whom they will elect to the parliaments of the social-political communities, from the commune to the Federation, to the particular works' councils which make each enterprise equal in rights in the parliaments through which the workers' interests should come to a most direct expression in the formation of the general social and economic policies.'(59) The worker is made to decide rather than be an object of decisions made elsewhere. The system thus aims at the well known idea of Marx-Engels-Lenin in which power exercised on behalf of the workers is transformed into power exercised by the workers themselves.

The organisation of self-management has been undergoing changes with time. Generally, enterprises are in two categories. In enterprises employing up to thirty workers, all employees represent the workers' council which is the supreme organ in the enterprise. They decide directly on every question and elect the management board as an executive organ only to implement their decisions. Enterprises employing more than thirty workers are organised according to the features of the enterprise.

Before the 1968 legislation, there was a uniform arrangement for all enterprises.[60] Differences in enterprises, however, created problems and need for flexible arrangements within the enterprise was acknowledged. Amendment No. 15 of 1968 was therefore introduced to enable enterprises to make their own internal arrangements independently and determine their self management structure according to the conditions and circumstances of each enterprise. However, certain organs are still obligatory for all enterprises, and these are; the workers' council that perform certain managerial functions. Each enterprise must also have either a collective organ or an individual to exercise executive functions. These are elected by and are answerable to the workers' council.[61] It is within these limits that each enterprise can fix its own organisation of self management.

Though there are variations from enterprise to enterprise, there are certain features that are common to all. Direct decision making by workers is still the underlying objective in the development of self management. But because this is not always possible, certain rights of decision making are deligated to the executive organs.

Direct management involves decision making by all workers through meetings, election and recall of the executive organs, use of referendum as well as the right to initiative.[62] Each of these will be discussed briefly.

MEETING OF WORKERS

Where the meeting of workers is the only management organ (ie. in enterprises employing less than thirty workers), a meeting is called whenever it is necessary to take a decision on any question in the work unit.

In all enterprises, meetings are called to nominate representatives to the various bodies outside the enterprise; to nominate candidates to management organs, to draft any structural changes in the enterprise; to discuss and adopt investment plans; to discuss, before the workers' council takes decision on foundation, merger, annexation or separation of work units; discuss all cases where the statute provides that a decision be taken by a meeting of workers or when required by the works' council.

Depending on the size and location of the sections of the enterprises, meetings can be held at individual work units or at the enterprise level. More than half of the workers must be present and decisions are by majority vote of all present. The decision is not binding on the works council but for the works' council to disagree and take an alternative decision, an explanation must be given. Meetings are called by the chairman of the council of the work unit or an elected chairman of the meeting. Voting is by show of hands unless regulations require a secret vote.

ELECTIONS OF THE MANAGEMENT ORGAN

Every worker has a right to elect or be elected to any management organ in the enterprise. The works' council of the enterprise takes the decision on when to call for elections. The term of office of the management organs is two years although extra-ordinary elections could take place any time in case of emergency.

REFERENDUM

The workers in an enterprise may by referendum decide issues that affect their own economic positions. In any event, there must be a referendum in the following cases; mergers, annexation or division in an enterprise, a decision to change the location of an enterprise, when the enterprise is to cease operating due to changes in the natural conditions that might not be allowed continued operation, when there is general demand for a referendum to decide certain issues and when the management organ finds it necessary to carry out one.

THE RIGHT TO INITIATIVE

Every worker has a right to voice proposals either orally or in writing on any issue including a decision that has been taken. He can propose measures for implementation of any decision, call a general meeting of workers, proposals for improvement of conditions of work and safety regulations, improvement on industrial human relations or proposals on how to improve self management in general, increase in production as well as some changes in the system of the distribution of income. The relevant organ must reply to the proposal within the stipulated time.

INDIRECT MANAGEMENT

Indirect management involves delegating power to management organs both at unit and enterprise levels. Work units employing between thirty and fifty workers may elect a management organ and those with more than fifty workers must. The council of the work unit deals with matters affecting the unit including investment plans, personnel organisation, division of income in the unit and other matters that affect the welfare of the workers.

The supreme organ of the enterprise is the workers' council although its relationship with the council of the work unit is not one of subordination but rather one of advisory and consultation with defined areas of competence. The council deals with all issues affecting production, marketing, personnel and division of income within the whole enterprise.

THE SYSTEM IN OPERATION

Yugoslavia has not done badly since the last World War and it is coming close to being an industrialised country. The achievement is not only in economic terms but also in human relations and political development. The general level of consciousness of the working class has been enhanced and significant experience has been gained for the further development of workers' self-management and for the country's economic and political advance in general. Workers' self-management represents a great training ground for the working class of Yugoslavia, wherein the trade unions have played a substantial part, particularly in the education of self-management.(63)

One of the most serious problems is that there is no developed self-management structure anywhere else in the world and hence there is no experience to refer to. Thus, there is a continuing search for the proper direction.

Although the workers participate in profits, they still do not associate themselves with management. They show no interest in the agenda of the works' council or any other meeting except when there are issues that affect them personally like housing or other items that concern their immediate economic well being. The majority of the workers though not against their enterprises in attitude have no interest in active participation in management.(64)

The Yugoslav society is still a traditional one. The majority of industrial workers entered industry directly from villages and have retained some traditional characteristics in their culture. One of the pronounced elements in the culture is authoritarianism. These cultural traits tend to be repeated in the industry through managerial styles adopted by the leaders and the passive attitude adopted by the workers.

Influence or power is in the hands of the elite group in the enterprise. These are the professional managers who include the director, his assistants and others in non-managerial professions. The group is active and often dominates the workers' council opinions although they are not supposed to belong to the council.

They have influence in all company spheres, technical, economic, human relations and income distribution aspects. It influences decisions by intensive participation in the self management body, where its presence should not be felt at all.[65]

The relationship between dominance of the elite in participation and the efficiency of the enterprise is still unknown but it is probable that certain aspects of enterprise activities require more expert opinion but what spheres and to what extent is still unknown.[66]

Another problem ofserious concern with the Yugoslav experience is that the representatives of employees confine themselves to issues of immediate concern. On this, Professor Van Dyck has said; 'we have learned from the Yugoslavian experience that a body of employee representatives controlling or trying to control management confines its policy influence very easily to short-run social and socio-economic problems.'[67]

Apart from the problems that the Yugoslavian experience brings to light, the use to which this experience can be put is limited. It is a structure based on a system that is committed to socialism. Thus, it is in line with a political ideology the assessment of which is beyond the scope of this work. Any attempts to draw conclusions that could be implemented anywhere else must have regard to this fundamental factor. Social ownership of property is a concept likely to shut off a lot of foreign capital and whether this would be in the interests of the East African countries cannot be discussed here. What can be said is that any company law reform must consider the extent to which the reform will affect the flow of capital and the rate of investment whether foreign or local.

TANZANIA

Tanzania being one of East African countries under consideration provides relevant factors that must be considered when company law reform is contemplated. The economy, attitudes of workers and managers and the general level of education in Tanzania corresponds with the other two countries; Kenya and Uganda.

It should be made clear from the starting point that the Tanzania Companies Act, like the companies acts in the other two countries, makes no reference to employees whatsoever. Further, there is no law in Tanzania providing for worker-participation except the Security of Employment Act[(68)] enacted in 1965 establishing workers' committees for the purpose of settling disputes between workers and their employers as well as disciplining the employees. The current attempts for worker participation are a result of presidential directives and as such they are only part of the government policy rather than law.

By presidential circular, President Nyerere directed the establishment of workers' councils, executive committee and boards of directors in certain types of companies operating in Tanzania.[(69)] The circular explained the need for worker participation;

> 'We ask the people to work hard, yet in modern factories each man and woman is only a very small part of the whole process of production. How can he really go on year in

and year out taking a pride in that one job?' (70)

He explained that the majority of the people cannot relate their simple task to the total output of the factory. The worker often has no idea on what the factory aims at nor does he know the progress being made towards achieving the goal.

'It is not sensible to expect people to be enthusiastic about their jobs under these circumstances.' The President suggested that enterprises should have targets which the workers should be informed of and what is actually achieved should be compared with the produce of the previous year.

Quite apart from improving the well being of workers, the presidential circular empahsised the economic considerations that would flow. 'Given a proper work environment and proper cooperation and support from their leaders and fellows', the circular went on, 'the majority of Tanzanian workers are capable of accepting more responsibility, and would like to do so; they can become more creative and can accomplish more. Easy communication of ideas and information between workers and all levels of management, can have the effect of improving the quantity and quality of goods produced, provided that an atmosphere of common endeavour and common responsibility is created. In particular, the top management must have an attitude which regards the workers and the lower levels of management as partners in a common enterprise, and not just as tools like the machines they work with.'[71]

The circular referred to the importance of discipline in an enterprise and concluded that industrial relations would indeed be better when workers understand their objective and are respected for their own contribution.

Thus, apart from the already existing committees that discussed conditions of service, warnings and dismissals of workers, the circular emphasised the need for the workers to be represented on bodies that consider matters of production, sales and the general organisation of the enterprises.

All public corporations or firms employing more than ten workers were directed to establish, before the end of 1970,[72] workers' councils and re-establish executive committees and boards of directors so as to give practical effect to workers' representation and participation in planning, productivity, quality and marketing matters. Their responsibility would be to further industrial democracy and 'contribute to the general welfare of our nation by helping the efficiency and the effectiveness of our public enterprises'.

MEMBERSHIP OF WORKERS' COUNCIL

The party chairman of the business plant, the general manager of the enterprise, all heads of departments in the plant, members of the workers' committee and workers' representatives elected by workers provided that the number of workers on the council does not exceed three-quarters of all the total membership. In addition there would be a co-opted member from outside the business as and when required. The National Union of Tanganyika (NUTA) would be entitled to send a representative to the meeting.

For the first year, the general manager of the business would be the chairman of the council after which members have the right to elect one from among themselves.

FUNCTIONS

The functions of the council are purely advisory to the board of directors. They include;

a) to advise on the requirements of the existing wages and incomes policy as announced by the government;

b) to advise on marketing aspects of the produce;

c) to advise on quality and quantity of production;

d) to advise on planning;

e) to advise on all aspects of production, such as workers and enterprise organisation; technical knowledge; workers education; and

f) to receive and discuss the balance sheet.

The circular further provided for the establishment of an executive committee whose membership is the general manager, heads of departments and workers' representatives elected by the workers' council from among members of the council representing workers. The number of workers not to exceed one-third of the total members of the executive committee.

The major function of the executive committee is to advise the general manager who is the chief executive. Their spheres of concern include a study of financial and production estimates as prepared by management; study quality of production, export and marketing ofthe product produced; advise on implementation of the policies as proposed by the workers' council and approved by the board of directors and finally, to advise on the efficient running of the industry.

THE BOARD OF DIRECTORS

The circular directed that boards of directors should at least have one of its members nominated by NUTA. All the institutions could be varied in accordance with any agreement between NUTA and management subject to approval by the Minister of Labour. Finally, the labour officers were required to supervise the implementation of the directive.

What the Tanzanian government hoped to achieve through the implementation of this programme was a subject of discussion at the National Development Corporation (NDC) group managers' conference held in Dodoma in 1971.(73) The managers expressed support for the programme and hoped it would change the attitudes of workers who felt they were working for 'them' and not for 'themselves'.

The programme, it was observed, should not be confined to the decision making process but workers should be educated to have interest in the results of 'their' companies. In the long run, the worker often recognising his rights and obligations in the factory will be able to demand similar rights and obligations in the whole society and thus effectively participating in activities of his society. The manager agreed that;

> 'The new moves, if carefully executed, will be one step towards eventual workers' control, an ideology which stems from the belief that the workers should be given the opportunity to control the overall policy of their companies as well as their destiny. It is democracy at its highest stage of evolution. In Tanzania, the workers will be taught that in democracy, the people have the right and ability to decide what is good for them and the nation. They will be taught what is bad, also, so that they may be able to take corrective steps.' (74)

THE SCHEME IN OPERATION

Unfortunately, because of the limited available literature, one cannot get an up to date assessment of the scheme and hence the comments made should be taken with caution but since some of the problems encountered in the beginning are basic, it is unlikely that the position has changed dramatically.

It is significant that the project was started by a presidential circular rather than having it debated through Parliament. This method of introducing a rather novel project did not allow any discussion of the whole idea and its practical implementation. The government machinery was just set into motion to implement an idea that had not been discussed at length.

As early as October 1971, at the conference of the managers of the NDC group, it was reported that many issues had been misinterpreted and the project was a disappointment to some. 'Although most NDC companies have fulfilled the statutory requirement for the creation of workers' councils and committees, these bodies, have to a marked extent, faced disappointments, frustrations and even doubt as to the real value of the programme. And in most cases, the concept has been misinterpreted and many workers' representatives have tended to use them as a platform from which to air personal grievances.'[75]

The managers were faced with a challenging task of operating the transitional period of social and economic relations in the country. The manager implementing the socialist programme has to face competition from capitalist institutions and he has limited resources. He has to fight for a society that is young and not fully educated in the country's social-political and economic spheres of development. He has limited finance and skilled personnel.

Another problem is the long standing conflict between management and labour. The managers are authoritarian and paternalistic in their approach to industrial problems. Many quite often have felt that workers are simply being brought in to interfere with matters of great importance to the company. After all, they say, 'what can a worker contribute to the company's well being when he goes to the boardroom?' Thus not only do the managers fail to appreciate the social management scheme, but most of them are expatriates and have no ideological commitment.

The National Political Party (TANU which has since changed the name to CCM) representatives at the enterprise have also caused discomfort. The role of the party was explained in the NDC guideline where it was said;

> 'The TANU branch is the political nerve centre of the company. Its role is to arouse the political consciousness of its members and supervise party matters in the organisation.' (76)

In practice, it became difficult to know the functions of the party representatives. They could not discuss planning, production or sales because that was the work of the workers' council. They could not discuss workers' grievances because this is the function of the workers' committees. As a result, they had no specific functions. To justify their existence, they attempted to get involved in planning and production or worker grievances and the managers warned them against interference. NDC managers and the National Bank of Commerce constantly warned TANU leaders 'so much that the word interference is now often associated with the TANU branches in Parastatals'.(77)

WORKERS' COMMITTEES

Workers' committees represent the national trade union (NUTA) at the enterprise level. It is a consultative organ on matters pertaining to the welfare of the workers. In the course of time, however, the organ became an instrument of management. As a result, they were seen as enforcing 'discipline'. The guidelines of the NDC refer to the institution in the following terms;

> 'The workers' committees deals mainly with discipline. It does not deal with politics of personnel policy or even with other aspects of management.'

It is not surprising that soon, the workers agited for the abolition of NUTA. The government granted the union parastatal status with leaders nominated by the government and the funds to maintain it were compulsorily deducted from workers' wages. The workers ceased to regard it as an expression of their interests and the leaders of NUTA, including the president himself resorted to speeches to try to justify NUTA's existence.[78]

Yet the reaction of the workers was justified. The poor conditions of work threatened their existence and whenever they decided to lay down their tools in protest, NUTA dissociated itself from them and issued warnings against them. NUTA, having assumed the role of an 'industrial relations officer', in industries where racial discrimination is blantant, where working and living conditions do not differ from those under slavery, the workers' committees were not only seen as inefficient but were regarded as repressive enough to provoke the following letter in a national newspaper:

> 'NUTA has outlived its convenience and a completely new role for it is called for in the changed socio-political economic framework. . . . We still question the idea of having to spend so much of our money to prop up a sickly body that has since ceased to be functionally representative of the workers . . . . NUTA should be reorganised and given a new role or be disbanded in the interests of the workers it purports to represent.' (79)

At the end of the day, one can say that the Tanzanian experience has not been successful so far and as Mwanda warned, 'For certain, premature participation in decision making is gradually ruining the economy and discipline with the civil service.'[80]

Studies of the various models of worker participation in the above discussed countries reveal many problems and varying degrees of success. The industrially developed capitalist countries of Western Europe still face difficulties in implementing worker participation but there is a remarkable degree of success. The position in the socialist countries is far from being clear. The implementation of worker participation in the under developed world will even be doubly difficult. The attempts made so far have either failed completely or they have created institutions that are alienated from the workers.

The underdeveloped countries face the difficulties that developed countries have in implementing worker participation and in addition they have their special problems. The relationship between labour and management is more repressive and authoritarian due to the colonial historical factors as well as the foreign character of capital.

The important policy decisions are not taken in the underdeveloped countries where the enterprises are situated. Managers are foreigners and so are the woners of the businesses. All these factors weigh against worker participation. Educational and skills of the industrial working class in the developing countries is low. Yet the understanding by the workers as to what is involved in worker participation is crucial for the success of worker-participation. Because of these factors, some writers argue that participation in developing countries is a far fetched idea.(81)

Few countries in the underdeveloped world have tried it but the results have often been discouraging. Das was able to explain the failure of the exercise in India in the following terms;

> 'The socio-economic circumstances in India today are not yet conducive to the development of worker participation because (i) traditions of political democracy are more rooted in the West, (ii) the attendant benefits of a developed economy have provided a more congenial climate there and (iii) employers there are more progressive and receptive in their outlook.' (82)

India made its attempts in 1958 so as to promote ' consultative and participative management.' The workers were supposed to be consulted and informed on issues pertaining to the operations of the enterprise. In the course of time, consultation was limited and the information supplied was unsatisfactory. Thus, studies on the subject concluded;

'The Indian experience provides little encouragement to those who would like to see a greater and speedier development of participative managerial practices.' (83)

In Africa, Algeria tried 'self-management' closely following the Yugoslavian experience although with modifications. Although Ben Bella, the day before his government was toppled, is reported to have said 'self-management is more successful in Algeria than in Yugoslavia',[84] the primary justification for the change of regime was that the inefficiencies and the unplanned "socialism of emotion" of the Ben Bella period were leading the country to economic ruin.[85]

The first problem in the program was the implementation guideline. 'The absence of precise implementation procedures threw critical sections of the programme's direction to inexperienced middle and low-level officials, who had neither the ideological commitment to the programme nor the experience that would allow them to handle the situation effectively. The predictable result was the widespread failure of the effort to get the programme started.'[86]

Other problems included the inability on the part of the generally uneducated Algerian peasantry to understand and operate an overly ambitious program. The indeference and machinations of the private sector and the bourgeois technicians in the civil service and lack of sufficient time to shake out problems resulted in it being said that the economic output was disappointedly poor.

The problem in most of these countries is to mix-up worker-participation with a confused and ambiguous mass of ideas of some form of socialism. The programs have failed largely because they are being used to transform the whole socio-economic and political structure. One does not have to have a socialist state for one to implement worker-participation. Indeed, the most successful efforts in Western Europe operate under the capitalist economy.

Outside Europe, Japan provides a good example. The rapid economic growth since the 1950's has led to an increasing desire for more participation by employees as the traditional authoritarian and paternalistic methods of Japanese management become less and less effective.(87)

The Japanese experience is even more interesting because for increased worker participation have come from management. There is no legislation to govern worker participation but this is not surprising since legislation in other countries has generally been designed to compel reluctant managers.(88)

It requires no further emphasis that one does not need a socialist political ideology in order to have worker participation. There is no doubt that the introduction of such a scheme will require a lot of training. Employee representatives will concern themselves not only with terms and conditions of employment as well as other industrial relations problems but also over all company policies and strategy. For the representatives, whether on the board of directors or workers' councils, there will be need for wider knowledge of subjects such as business finance, management and forecasting techniques and statistics. The managers and shareholders too will have to learn more about worker participation.

Tanzania, for example, acknowledged the need for more education and established the Workers' Education Committee for the purpose. Surprisingly enough, despite the fact that there was little time allowed, the first series of lectures were devoted exclusively to politics. (ie. TANU beliefs and objectives, principles of socialism, socialist democracy, types of exploitation and responsibilities of TANU leaders.)(89)

To have a workable worker participation structure, the East African countries must be able to distinguish between worker participation and transforming the whole socio-economic and political structure. Ideas of socialism and worker participation are not inseperable. The former requires more time, planning, political consciousness and an ideological commitment the merits and shortcomings of which cannot be discussed here. This is not to say that worker participation by itself is easy to implement but the prospects are better when the limits are defined.

An essential element of effective worker participation that is often given little consideration is the financial returns to the workers.

FINANCIAL RETURNS

Worker participation in decision making may increase productivity and the morale of the workers. This, however, cannot last long unless the other essential elements exist. One essential element is a regular monetary feedback from the surplus the workers have produced. In a case study on worker place democratization, Bernstein[90] after reviewing various worker participation schemes concludes that economic returns are necessary for the success of worker participation.[91]

This could be done on an annual or monthly basis but this factor will not be significant unless it relates directly to what the workers themselves have done. This economic return must be got by the workers as a right so that it is not left to management to arbitrarily decide whether to give it or not because if this is allowed it becomes a bonus and runs the risk of being in the interest of managers who may use it to manipulate or foster paternalistic relations. Self reliance and confidence is absolutely necessary if the workers are to sustain a decision making position and paternalistic attitudes do not assist this to develop.

This economic feedback must be to all groups, managers inclusive so as to encourage group identity and remind managers that like workers, they are dependant on one another. The managers will then find it difficult to regard workers as expendable commodities. On the other hand, the workers will be more relaxed in their dealings with the supervisors. The experience from the attempted schemes suggests that individual rewards have a reverse effect and encourages hostility.[92] A number of companies that have attempted individual incentive plans have been equally disappointed.

The financial returns should be different from the basic pay because they are flexible depending on economic conditions. The rewards must vary with profits and productivity, and hence act as an indicator to the workers on their efforts. Studies by Lesieur indicate that workers are not willing to risk guaranteed payments for the chance of making more.[93] There are obligations and regular expenses that require certainty of income. Any variations thus should keep above the basic pay. The source of the surplus should be kept under their control so that they know they are responsible for any increase or reduction. This emphasises the need to keep the employees informed.

The economic return is a necessity because if employees are allowed to participate in decision making and see results accruing to the company from their efforts, they are bound to feel that they deserve a share of the added value. This is especially so if the firm prospires and increases dividends to shareholders and payments or fringe benefits to managers. Even if worker participation is introduced without a scheme that allows some percentage of the profits made to be paid back to the workers, sooner or later they will demand it. This demand will become a crisis for management which must either accept it or reject it.

At this point, management might become hostile to worker participation, undermine its value and advocate its abolition or allow some bonus thus limiting the rights of employees. Once the workers feel they are receiving nothing tangible for helping the firm, they will pull out of participation in a mood of distrust and distrust is a major cause of industrial unrest.

Individual incentive bonus and profit sharing schemes have been tried by well intentioned managements but these efforts have failed. A successful scheme must allow workers a fixed percentage of the surplus. The 'share' must be fixed in advance such that the employer cannot, at his discretion, determine the fraction of the profits which shall be shared with the employees. Thus, the 'share' should be as of right and the employees must be kept informed of the total profits made and the percentage of their share.

Profit sharing has been called 'an expression not of economic or political theory but of practical morality'(94) and a 1967 French report on the subject concluded; 'it is essential that employers and wage and salary earners, who together further development of firms, should share the reward of their joint efforts . . . progress, which is achieved by all, must be a source of greater wealth for all, which means that all must take a share in the increase of capital thus produced.'(95) Appealing and idealistic as it is, few countries in the world have legislation requiring compulsory profit sharing. France started compulsory profit sharing legislation in the workers' co-operative societies in 1915. Since that time, the French government continued to pass legislation encouraging profit sharing until 1967 when worker participation in the profits of expansion was recognised as a right and not a discretionary prerogative on the part of employers. Under this law, all companies employing more than a hundred people have to set aside a proportion of the annual profit, after taxation and five per cent rate of distribution to employees in the form of shares or other form of investment.(96)

A few other countries provide for profit sharing schemes. Venezuela introduced compulsory legislation in 1939. Chile, Bolivia, Ecuador, Peru, Argentina and Columbia have legislation to the same effect. The socialist countries of Czechoslovakia, Hungary, Bulgaria and Yugoslavia have compulsory schemes for the benefit of employees. In the United States, voluntary schemes have been on the increase especially since 1942 when the Internal Revenue Code allowed funds employed in the schemes to be deductable expenses for the purposes of taxation. New Zealand[97] and some states in Australia[98] have legislation enabling companies to issue non-transferable 'labour shares' with no capital value to the workers.

In East Africa, although there has been no legislation for compulsory profit sharing, the schemes have been encouraged. In 1967, the East African standard quoted Mr. Kibaki, then Minister for Commerce and Industry and now vice-president and Minister of Finance in Kenya as saying 'There could be no better way of promoting African socialism than that the workers in an industry should be able to control a substantial proportion of the share capital of that industry.'[99]

In 1968, a report on who controls industry in Kenya reported that employee share holding schemes had been developed by a number of companies. These included Unga Millers Ltd. and the East African Breweries who had 2,000 employees participating in 1965. White Rose Dry Cleaners Ltd. distributed 1,000 shares to employees in 1964 and on the occasion, the then Minister of Commerce and Industry, Dr. Kaino, noted that this was 'the right way to African socialism' which would turn the 'Harambee' spirit into concrete action by sharing both labour and profit.[100]

Despite these efforts in various parts of the world, the results have often been disappointing. In an assessment of such schemes, Tom Hadden has noted,[101] 'It is difficult to give a valid assessment of the success of profit sharing schemes. There is little doubt that they are popular with employees in so far as they result in appreciable extra payment. It is less clear whether they make any lasting contribution to the efficiency of an enterprise or the commitment of employees to it. None of the studies on companies which have adopted profit sharing on a voluntary or guaranteed basis have established that they are any more successful or that they survive longer than any other companies. Official surveys in Britain 1912, 1920 and 1950 reported with remarkable consistency that somewhat more than half of the schemes started had been abandoned due to lack of profit or to apathy or dissatisfaction among employees; The average life of abandoned schemes was eight years and of continuing schemes from twelve to fourteen years. The tendency of employees to dispose of any shares issued to them as soon as they are entitled to do so is further evidence that they are primarily interested in immediate financial benefit as opposed to continuing participation as shareholders.

In New Zealand, a 1949 report on such incentive schemes noted that only one company had been operating the scheme for more than 21 years and Hancock summarises the situation as follows;

> 'Even in the absence of more precise information it can confidently be asserted that s. 67 of the Companies Act 1955 is a dead letter.' (102)

One of the reasons for this failure is the fact that in most cases, the schemes are voluntary and have been largely ignored. In fact, in New Zealand as Hancock notes, the tax structure penalised many schemes.[103] In France under 1959 legislation where tax and social exemptions were allowed to firms that operated the schemes, the incentive was not sufficient and both management and labour were reluctant to accept the status quo.

The schemes have also failed because of the hostility and distrust between employers and workers.[104] Unions are not keen on profit sharing schemes for fear that such schemes might divert the loyalty of the members and weaken their position. Unions have always negotiated wage increases for workers and hence the support. Any move that would benefit the workers by some other means is seen as a threat to the solidarity of unionism.

The French scheme is particularly significant since it is the most recent, detailed and highly developed compulsory scheme in a major industrial country.[105] The scheme, however, has not escaped criticism. One of the critics, Professor Lasserne of the University of Paris has said;

> 'The reform was imposed on the country when it had been wanted by almost nobody . . . and yet, when the ordinance appeared, it was evident that it completely failed to answer the great intentions expressed by the Head of State. It was a curious result of the obstinancy of a man who is not a specialist in these questions and who sees them from a distance, and on the other hand of alarmists campaigns and pressure of big business . . . which obtained an extraordianry metamorphosis of the reform in a supplementary financial advantage itself, without any sacrifice on its part.' (106)

The critics point out that the scheme applies to less than one quarter of the employees since it is limited to firms employing more than 100 people. The end result is that it benefits only two million out of about 13 million employees. It is said the law does not encourage workers to identify themselves with the firms and hence does not foster interest, zeal and good will among the workers. The five year period which must expire before workers realise the benefit added to the size of the benefit itself it is argued makes it insignificant. A further serious criticism is based on the tax burden consequences. 'It is no longer the firm which shares its enrichment with the workers in order to make them true associates; it keeps the benefit completely for itself. It is the entire nation which gives the firm a subsidy, a gift.'[107]

More criticisms are based on the ground that a small minority of workers will benefit out of the scheme not on grounds of need or merit but because they happen to work for more profitable companies. Such a private benefit to a minority of workers, insignificant as it might be, causes unnecessary complications. Those excluded through no fault of their own will demand their share and Lasserne concludes; 'It is there that the danger of the unlucky ordinance lies, and not in the prophesies of doom voiced by management and the stock exchange.'[108]

Despite the cirticisms and although 1974 surveys indicated that approximately half of the shares distributed in 1974 at the expiry of the prescribed five year period, were immediately sold on the market, the Sudreau Report studying the operation of the scheme recommended its extension and a replacement of the five year period with individual tax incentive deductions to encourage investment.[109] The report confirmed the optimism expressed by the government in 1971 in which the Minister of Labour Employment and Population said;

> 'In all objectivity, and at the present moment, one can conclude, I think, in the success of the application of the ordinance of 1967, taking into account the different objectives which it includes. This success is owed, of course, to the decisive action of those who have been the promoters and the pioneers of this reform and also to the progressive understanding and to the profound intuition of the work force. From the present time : . . it is incontestable that, by the application of the participation agreements, the partners in the company have found, within their enterprises, the possibility for concrete and objective discussions, taking place in a climate of free co-operation. I add . . . that the ordinance of 1967 has well-defined objectives, and that it is fundamental, in particular, that it does not have an influence on salaries, it introduces a participation by employees in the fruits of company expansion . . . . We have a feeling that beyond the initial reservations, a large agreement is

> developing and that beyond even today's results, one will perceive, as the president of the Republic noted, in his last press conference, the capital importance of the ordinance of 1967 in three or four years.' (110)

There is no doubt that the monetary rewards involved are so small that by themselves, they cannot change the attitude of workers. By themselves, they cannot provide increased incentive to workers. But taken together with the other elements in a worker participation scheme in decision making, they are likely to have positive results. Detailed studies in the U.S. have indicated that profit sharing is a contributary factor to good industrial relations although it is difficult to isolate and evaluate with precision the influence of profit sharing.(111)

The analysis above indicates that worker participation in decision making without profit sharing would sooner or later fail and hence profit sharing is an essential element of the whole process of worker participation. Further, studies indicate that profit sharing in its own right has positive contributions to the betterment of industrial relations. The experience reveals that it has failed in many cases because by itself, it is not sufficient to influence labour attitudes and besides it has been a voluntary scheme that has been ignored both by management and trade union leaders. Where it has been introduced as a compulsory scheme, such as in France, studies available indicate that it has been, on the balance, successful. The scheme is capable of being applied in East Africa where on a voluntary basis, it is already practised by a number of companies. Comprehensive compulsory legislation on the subject would have to take into account the need for a qualifying service period of, for example, two years. It should also be applied to large companies employing at least twenty or more people so as to ensure that many of the workers benefit from the scheme. This would fit in with the requirement of worker participation in decision making in firms employing more than twenty people.

In order to encourage investment but at the same time recognising the fact that most workers in East Africa earn low wages, the legislation should allow tax benefits to those who invest their monetary benefits from the scheme but should not limit the realisation of the shares by any prescribed period of time. Those who want to sell their shares should be allowed to do so. In this way, the workers would be able to evaluate their contribution to increased production and hence profits. This would generate a spirit of good industrial relations, efficiency and economic development of the whole nation.

CHAPTER III

SOCIAL AUDIT

The modern corporation has proved to be a major source of power. The corporation has significant impact on the lives of those associated with it. It is a social, political and economic institution whose impact cannot be regarded as a matter of private concern. Activities of corporations have become matters of public concern as evidenced by the development of public interest pressure groups and government legislation in areas of public interest like pollution and environmental protection legislation.

In 1970, Campaign G.M. Round I started off, in the United States, a new technique - 'Public Interest Proxy Contest' of mobilising public pressure by stockholders to influence corporate conduct. Since then, corporations have faced increased pressure in this form and stockholder proposals for disclosure have played a significant role. Increased disclosure is a less ambitious reform measure compared to organic reform in the corporate structure but it is an effective measure which is likely to attract support especially from financial institutions.(1)

Disclosure is an important tool for social reform. In the words of Brandeis, 'publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman'.(2) Embarrassing conduct, if disclosed will be avoided by management and the possibility of future disclosure will shape current decision making. Further, increased disclosure will provide more information to the public and as we know, knowledge is power. An informed public has more effective pressure. Thus 'disclosure is not only preventive but is an essential element in the public evaluation of corporate performance and in the determination of appropriate objectives for reform.'(3)

In this Chapter, it is argued that the public is interested in, and has a right to know the activities of corporations. Apart from informing the general public, increased disclosure is necessary to serve the traditional purposes of disclosure, to prevent fraud, manipulation and questionable business practices as well as to provide information for investors to enable them to make rational decisions and thus establish a free and efficient market for securities. Finally, suggestions for reform through the utilization of the corporate social audit will be made.

PUBLIC'S RIGHT TO KNOW

It was argued in Chapter I that corporations are matters of public concern. The corporations cannot be seen as an economic model alone because their impact on society in political, social and economic issues is significant. They shape the lives of the employees, the consumer, the immediate surrounding community and the nation as a whole. This gives the general public the right to know, discuss and influence the conduct of corporations.

Full acceptance of the idea that the corporation owes a duty to employees, customers and the general public as well as the shareholders may involve changes in the organic structure of the corporation. The requirement for society oriented disclosure need not even go that far. While still accepting maximization of profit as the primary concern of corporations, they could still be required to acknowledge and consider other values. The requirement of society oriented disclosure would be a recognition of a fact; that large corporations have a significant impact on society and this impact merits accountability. Even with maximisation of profits, the public has a right to know of the undeniable public impact of their actions.(4)

DISCLOSURE IN EAST AFRICA

In East Africa, all public companies[5] have to disclose certain minimum information about their affairs. Generally speaking, only public companies incorporated locally are required to make full financial disclosure to the public. Neither foreign companies nor private companies have such an obligation. However, private as well as public companies must disclose their financial affairs to their shareholders at least once a year at the annual general meeting.

Public companies disclose their financial positions to the public by filing their profit and loss account, the balance sheet, the directors' report and the auditors ' report in the office of the registrar of companies. The financial disclosure requirements in East Africa have their origin in the 1948 U.K. Companies Act but subsequent amendments to the U.K. Act have not been followed up.[6]

Public companies must also issue a prospectus to the public for newly authorised share or loan capital. This is a requirement for both the company appearing on the market for the first time and the already established public company. The number of shares and the rights attached to them must be included and administrative arrangements for application and allotment disclosed. Details of contracts the comapny is to acquire or has entered into during the last two years must be described. Finally, a report from the company's accountants setting out profits and dividends during the last five years has to be attached.[7]

It is clear that the information disclosed by public companies to the public in East Africa is very limited. The public is thus denied the right to know and hence the power to influence the conduct of business enterprises.

This, of course, is not to forget the financial expenses involved in increased disclosure as well as the ability of the East African public to understand, let alone make effective use of it.

Although the general public may make limited use of the information, scholars, non-profit making institutions and other organisations concerned with the public interest would be able to evaluate the conduct of business enterprises and their impact on society. The disclosed information would direct the government to the required form of legislation. Besides, the information would enable the investor interested in social responsibility of companies to make a wise decision. The investor in East Africa includes the members of the public purchasing shares in public companies, the local institutions like banks and insurance companies as well as the individuals and institutitons in other countries that invest in the multinational corporations doing business in East Africa. Any investor protection legislation therefore must have regard to all these groups.

In the developed countries, there is a strong financial press giving more detailed information about the eifferent business activities in which the different companies are involved. This is non existent in East Africa. Very little is known about the social impact of various multinational companies activities because very little is disclosed. Further, the developed countries have the advantage of strong public interest groups with financial and personnel resources who report on some of the undesirable social consequences of corporate activities thus raising public opinion against irresponsible corporate activities. As a result, corporate management is likely to be cautious. In East Africa, again this is lacking.

Britain and the United States have more detailed disclosure requirements. If despite all this, there is a case for corporate social disclosure, both in the U.K. and the United States, then there is an even stronger case for such disclosure in East Africa where there is practically no 'watch dog' on corporate conduct.

In the U.K., the philosophy of public disclosure has been carried even further by the 1967 Act.[8] The 1973 White Paper on company law reform[9] recommended increased disclosure including information on matters of social concern. While acknowledging the need to preserve commercial confidentiality, the paper emphasised that disclosure of information is an essential part of the working of a free and fair economic system. The need for corporate social disclosure was stressed. 'The more people can see what is actually happening, the less likely they are to harbour general suspicion and the less opportunity there is for conceiling improper or even criminal activities. Openness in company affairs is the first principle in securing responsible behaviour.'[10]

The government was clear that in the circumstances, the best method of tackling irresponsible corporate social activities was increased disclosure which would give 'shareholders and the public a chance to judge companies' behaviour by social as well as financial criteria.'[11] The directors should be required to report on the 'performance of their company in regard to the safety and health of the company's employees, on the number of consumer complaints and how they were dealt with and on the conduct of industrial relations.'[12]

The United States has the most detailed requirements for financial disclosure. The Securities Act of 1933 and the Securities Exchange Act of 1934 as well as subsequent amendments created a regulatory environment aiming at disclosure of all material facts about the issuers of securities. Any corporation that issues securities becomes subject to the regulations.

When securities are offered, a new registration statement must be filed. The requirements include information about management and controlling shareholders of the issuer, the nature of its business, financial history and capital structure, any pending or threatened legal proceedings, planned use of proceeds of offering and a financial statement certified by independent accountants.(13)

The Securities Exchange Commission (SEC) scrutinises each statement and a material misstatement or omission of a material fact could result in civil or even criminal liability. The Securities Act further requires a prospectus with information almost similar to that in the registration statement and the aim is to increase dissemination of the information both to the general public and potential investors. In addition to the Securities Act, the Securities Exchange Act requires more information.(14) The information must be kept up to date.

Further, companies supply proxy materials regarding the nature of the business, the management and financial history. At a general meeting where directors are elected, a proxy solicitation on behalf of management must accompany the annual report. All these requirements aim at supplying information to the public. 'The ultimate goal is to drastically increase the amount of information a company must disclose on a continuing basis, the dissemination of this information and the number of companies required to make such disclosure.'(15)

The Commission has also taken on contemporary issues like pollution and discrimination but only to a limited extent. There is a requirement for disclosure when environmental laws may require a lot of capital expenditure. Material legal proceedings arising out of failure to comply with anti-pollution legislation as well as proceedings that could lead to concellation of government contracts due to discriminatory employment practices must be disclosed.[16] All this information is sent to major stock exchanges as well as to the National Association of Securities Dealers for issuers of over-the counter traded stock.[17]

In East Africa, the Nairobi Stock Exchange is the only major stock exchange. Formally incorporated in 1954, the Exchange has been expanding throughout except for the short period prior to independence in Kenya when the political situation was uncertain. By comparison with Western counterparts, it is small and lacking in sophistication of the super structure. However, the stock exchange has been expanding especially since the 1970's. The stock exchange exercises limited control over shares quoted on it. The quoted companies have to observe certain conditions, fill an application and a general undertaking to observe the customs and usages developed by the brokers on the Exchange.[18] The role of the stock exchange will continue to increase and no doubt this would provide a venue for dissemination of information about corporations to the public.

REASONS FOR DISCLOSURE

Investor Protection, the creation of a free and open securities market, and the raising of the standards of conduct of corporate fiduciaries are the basic reasons that have neccessitated government interference in the free market of securities.

Investor protection is the principle objective of the disclosure philosophy. 'The effort was to assure the potential purchaser of a security that he could obtain adequate information regarding the security and further more that the information would not be fraudulent or misleading.'[19] The creation of a free market for securities is related to this. It is said that the better the shareholder is informed, the more likely he is to invest according to reason and not tuition. The information helps the investor to make an intelligent choice and thus bringing the price of the security close to its actual value. This also helps the allocative efficiency of capital markets. In other words, the goal of disclosure is to avoid interruption in securities markets by supplying equal information to investors who will then make wise decisions and thereby allocate capital markets efficiently. It is therefore relevant to consider whether the disclosure policy has had an impact on the behaviour of the financial market and the investors.

The value of the disclosure requirements has been a subject of heated debate. Stigler[20] supported by Benston[21] have undermined the benefits to be derived out of the system. Professor Mendelson after reviewing the evidence has observed, 'The preponderance of evidence suggests that disclosure has improved the allocation of resources, but the process has benefited some investors at the expense of others.'[22] Those with valuable information have had to share it and the economists are uncertain whether the economy is better off as a consequence of the disclosure regime.[23] 'Hence, the light economists can cast on the optimality of a specific set of disclosure requirements is limited.'[24] However, there seems to be sympathy for the unsophisticated investor. 'An objective of financial statements is to serve primarily those users who have limited authority, ability or resources to obtain information and who rely on financial statements as their principle source of information about an enterprises' economic activities.'[25]

Dr. Mercadal of the University of Rouen, France, has expressed the view that in France, the public is unwilling to invest in companies. 'It is pointless to underline the almost total failure on French companies in their request for public money for investment . . . . This discouraging state of affairs is further aggravated by a marked lack of interest on the part of the shareholders.'[26] Professor Tunc also found that the position is the same in the United States.[27] In all countries, the percentage of institutional investment is on the increase.[28]

It is difficult to identify factors that determine share prices. Neither economic stability of the country nor the value of the company are determinative. It has been claimed that shareholders' lack of knowledge has nothing to do with the imperfection in determining market prices.[29] It is argued for example, that best investment records have been noted in Brazil, South Africa, Singapore, Hong Kong and Japan and yet apart from variations in the information disclosed in these markets, the practice of disclosure is unknown in some of these markets.[30] Professor Mendelson concludes that economists are unable to conclusively determine the impact of disclosure on share prices.[31] It is claimed shareholders distrust accounting assessments and in particular have no interest in forecasts of the future.[32]

It is also argued that disclosure does not guarantee predictable behaviour in the market prices. Although the U.S. system is the most developed in the world, often there are sudden variations in market prices. Further, the highly recommended practice of diversification of risks, it is said, waters down the importance of disclosure since this eliminates some risks. Mercadal concludes;

> 'Therefore, it is by no means certain that a rational investor will attach extra value to a share simply because his uncertainty about it has been reduced by fuller disclosure.' (33)

In practice, the shareholders, the argument continues, are only interested in dividends. It is a known fact that they do not attend annual meetings.[34] The shareholders do not even read the information disclosed to them. At the annual meeting, management end up going through the tedious exercise of reading documents to a disinterested scattered audience basically composed of the company's bankers. And for this, the company has to bear the costs of disclosure which are considerable.

Not all scholars agree that the disclosure requirements do not serve a useful purpose. Sommer, a former commissioner of the United States Security Exchange Commission, has noted that while individual investors complain that the information supplied is too complex for their comprehension, the professional and institutional investors criticise the policies of the Commission for denying them more information with regard to forecasting and the like.[35] But the issuers also complain of the increasing burden arising out of the complex governmental regulations.

Because of these issues, an advisory committee on corporate disclosure was established in 1976 to recommend to the commission on the efficiency of the disclosure requirements.[36] The committee concluded that 'it is essential to a well ordered society and to the efficient allocation of resources that there be a system by which sufficient and reliable information reaches investors in as timely a fashion as practicable.'[37] The committee also found that investment decision makers take into account a lot more than is required by the SEC. The committee concluded further that it was not practicable for the SEC to require more information to be included. The committee was of the view that the commission should administer the system in order to provide information to investors. Thus, the commission should not by its powers require disclosure concerning social or environmental matters, and hiring practices unless it is shown that such matters are material to the investors.

DISCLOSURE'S BROADER ROLE: THE SOCIAL ASPECT

The increasing pressure of public groups to obtain information about corporate acitivties in the areas of social, environmental or moral concern is a reflection of both the investors' and the general public's interest in these matters. It is also an indication of the acceptance of the doctrine that corporations are quasi-public entities. As early as 1933, Frankfurter, one of the drafters of the United States Securities Act, 1933, wrote that the Act proceeded 'on the principle that when a corporation seeks funds from the public it becomes, in every true sense a public corporation.'[38] Acceptance of this view suggests that the public should have the power to scrutinise corporate activity.

Corporate social disclosure may also require extension of the theoretical basis for disclosure. The shareholders' interest in the investment must be seen as more than simply making profit and disclosure must be seen as an inducement to socially responsible corporate behaviour. The foremost justification for disclosure has been the protection of the investors' pecuniary interest. Recently, however, the financial and legal communities have recognised disclosure's tendency to induce socially responsible corporate decisions as a legitimate independent function.[39]

The SEC, under Securities Act, has the authority to require disclosure of such 'other information' as the commission determines is 'necessary or appropriate in the public interest or for the protection of investors.'[40] A fair reading of this section would imply that the securities laws are not confined to the protection of investors' pecuniary interests alone. The courts too in fact have recognised that social policy affects corporate profits.[41] This further suggests that social policy disclosure is within the securities laws. The SEC, however, has refused to accept the development of disclosure as an instrument of corporate responsibility. The SEC has rejected numerous suggestions that it expand disclosure of information on socially significant corporate activities.[42]

ENVIRONMENTAL IMPACT DISCLOSURE

The public concern over corporate environmental impact is reflected in the National Environmental Policy Act (NEPA) that became effective in 1970[43] requiring a statement to accompany every 'major federal action significantly affecting the quality of the human invironment.'[44]

The National Resource Developmental Council (NRDC) pursued environmental disclosure by a petition, requesting the SEC to promulgate rules that would enforce the policy behind NEPA. SEC did not comply and the court dismissed the suit for lack of jurisdiction.[45] The SEC, however, responded by requiring disclosure of the effect of a corporation's environmental impact on the issuers business.[46] Thus, the concern is on the economic impact on the business and not the impact itself.

The NRDC proposals would require disclosure of 'current environmental impact, quantified to the extent possible.' Included in the proposal is the requirement to disclose the feasibility of reducing pollution caused by the corporation, any pending or likely litigation and a report on the plans of the corporation to improve invironmental impact. Further, the corporation would have to file non-compliance reports. The proposals further stress that the environmental impact is important to the shareholder, whether or not the impact has economic effects.

The commission did not deny the authority to promulgate such rules but argued that such proposals are an undesirable administrative burden which is of no interest to investors.

The District of Columbia court remanded the case to the SEC for further consideration on the grounds that the SEC had not notified the public that the proposed rules were intended to satisfy the SEC's obligation under NEPA. Further, the commission had not explained the rationale and purpose of the proposed rules in sufficient detail. The commission was therefore directed to determine the extent of 'ethical investor' interest in environmental disclosure, and to consider which disclosure methods would best provide the interested investors with the necessary information and eliminate corporate practices that are inimical to the environment.[47] The court expressed sympathy with environmental disclosure noting that there 'appears to be merit in the plaintiffs' disclosure suggestions which the commission should carefully consider along with other proposals by interested parties.'[48]

The commission held a two year inquiry and re-affirmed its original position. NRDC, however, has challenged the validity of the conclusions of the commission and seeks the federal courts to decide conclusvely that the SEC is obliged by the provisions of NEPA to require comprehensive corporate environmental impact disclosure.

The SEC did not find that there was no investor interest but concluded that the investor interest was difficult to quantify.[49] One hundred investors participated and indicated that they had interest in social policy disclosure. It is suggested that due to the costs of participation, this is probably a small fraction of those interested.[50] The commission found that 'an insignificant percentage' of shareholders have interest. Those who claimed to be investors did not indicate the extent of their investments but the commission estimated their holdings as 2/3 of 1% of the estimated aggregate value of the stocks and bonds held in the U.S. as of the end of 1974.[51] But as Frolin observes, the estimate does not say much since it does not relate the ratio of all the participants to the actual number of interested investors. Further, the quantification is grossly misleading since the interested participants included 'approximately seven foundations, eleven educational institutions, two mutual funds, five environmental groups, thirty-seven individuals and one state; Minnesota . . . .'(52) The participants represent many individuals and hence the number of interested investors could be many times more than the number of participants.

The SEC found that the rationale for investor interest among most participants is economic rather than social. They felt that non compliance with environmental laws could result in corporate liability. The requirement for pending or likely litigation leaves this concern unsatisfied.(53) Requirements to disclose non-compliance with environmental standards could be a solution.

The SEC found another rationale of interest to be that avoidance of environmental litigation could be used to measure the effectiveness of management. However, absence of litigation does not mean absence of problems. In any event, if absence of litigation can measure managements' effectiveness, responsible decision making could also provide an index and hence this reason for investor interest would favour regulations that make corporations accountable for the environmental impact irrespective of whether the activities lead to litigation.

The third rationale found by the commission is that corporate social responsibility would lead to good public relations that are relevant for the long term profitability of the corporation.

This was considered by the commission ... an important factor in indicating that the concern of the investors is economic and not social. This may as well be true but the existing disclosure requirements do not require information useful in determining whether a corporation is socially responsible. Hence, as Frolin concludes, ' . . . if investor interest is valid, for any reason whatever, then disclosure regulations which would aid the investor in evaluating corporate environmental responsibility are in order.'[54]

The SEC found that administrative costs and burdens that would be imposed by requirements exceeded the benefits. This is because, the commission said, environmental statutes already require corporations to monitor environmental injury. However, it was noted that shareholders did not have direct access to this information.[55]

Further, the commission was of the view that disclosure rules would be subjective since the scientists do not agree on the effect of many activities. Finally, the required data would make disclosure documents more complex and confusing to the investors.

It is significant that it was acknowledged that shareholders would use the information both for making their proxies and shareholder proposals. By not providing the information, the investors are denied a right to express views on the conduct of their corporations. Disclosure to shareholders, in big corporations amounts to public disclosure and since publicity induces socially desirable behaviour, the wider distribution of the information would result in greater behavioural benefits.

POLITICAL CONTRIBUTIONS

Questionable political contributions by corporations are increasingly alarming the general public and the investors in particular. As Senator Durkin has questioned; who is responsible for these illegal contributions and what do they buy?[56]

In England, company donations have always been relatively low.[57] Their legality was determined in Morgan v. Tate & Lyle.[58] The directors of the company, threatened by the labour party's policies of nationalization contributed a sum of money out of the company's funds to advertise a campaign against nationalization. At a general meeting, a resolution was passed empowering the directors 'to do everything in their power to meet the threats of the nationalizers.' The Inland Revenue office, objected to the company's contention that it was entitled to tax relief. The Inland Revenue argued the money was not 'wholly and exclusively laid out for the purpose of the company's trade.' The House of Lords allowed the relief holding that the payment had been made in the honest belief that it was necessary to preserve the company's assets and business from expropriation, and so to enable the company to carry on its business and earn profits.

The case in practical terms settled the legality of political donations. Any doubt on the subject was cleared by the statutory requirement that details of such payments should be disclosed.

In the United States, Smith Mfg. Co. v. Barlow[(59)] settled the issue. A donation to a university was challenged by a shareholder. The New Jersey supreme court held that such contributions 'if held within reasonable limitations was a matter of direct benefit to the giving corporation.'[(60)]

Such payments, however, are authorised by law and companies are required to disclose them. The major problem is with other forms of political involvement by corporations which range from supporting favourable regimes and commercial bribery to toppling of governments and assassinations of political figures. Such operations have become widespread both in developed and developing countries.[(61)] After the Watergate Affair in the United States, it was discovered that a number of American corporations had made unlawful political contributions, both foreign and domestic. The investigations that followed[(62)] opened a 'pandora's box' of undisclosed illegal expenditures and revealed that 'many large corporations had engaged in a variety of misdeeds and questionable deeds to an extent never imagined.'[63]

In 1975, the then SEC Commissioner, Sommer, talked about the problems relating to domestic and foreign political contributions and payoffs by corporations in the U.S.[64] He specifically referred to the question of whether it might be important to investors to know that the management had violated the election laws of the country by using corporate funds to make political contributions. He concluded that the information is 'important to investors even though the amounts involved may seem relatively small by some measure.' The Commissioner emphasised that the most serious aspect of secret payoffs was the fact that such money is got out of the normal system of corporate financial accountability. It is disguised by false book keeping entries, mislabelling and phoney subsidiaries. These practices undermine financial accounting and strike at the core of the disclosure philosophy.

This information is relevant to the investor both on moral or ethical and economic grounds. The Commissioner himself noted 'the serious dilemma posed by disclosure of foreign bribes and payoffs which relate to a significant part of the business of the payor. The results of such disclosure could be horrendous - expropriation of properties, toppling of governments and political figures (some perhaps friendly to this country), the curtailment of American overseas activity, the denial of future favor, and in some cases, perhaps even loss of life.'[65] Thus to disclose these activities would perhaps affect the present investors but to sanction non-disclosure of criminal activities, leaving alone all other values, would be to imperil the interests of every new investor that purchases shares without knowing the dangers that face the corporation overseas. The Commissioner was aware that a policy of forced disclosure would have 'a restraining impact on corporate conduct' but declared that the SEC had no mandate to launch a moral crusade and outlaw any conduct.

Corporations even if required by law might not disclose such information but it is likely to have a deterring effect. There would be concern over such payments coming to the public where they would be discussed. The shareholders and public opinion would act as a check on management and stimulate executives to higher ethical standards. Further, non or false disclosures would make management liable and this potential liability would encourage disclosure.

STOCK HOLDER PROPOSALS

Perhaps the most important evidence of interest among the investors and the general public as a whole in information about corporate activities in fields of social, environmental or moral concern can be got from the development of the 'public interest proxy contest' making use of rule 14a-8 of the Securities and Exchange Commission. In the late 1960's, investors did not care for a socially responsible company. They were concerned with making money in the increasing stock market and hence, the so called 'Wall Street Rule' prevailed.(66)

For a variety of reasons, there has been a change in investor attitude. In the words of Branson, 'The Wall Street Rule has been steadily on the wane. The fallout from the Vietnam War, the Equal Rights movements, the death of Martin Luther King, Earth Day in 1970 and the ensuing ecology movements and the bear markets of 1969-70 and 1973-75, all occuring in a short time frame, have converged and led to every increasing investor interest in corporate social responsibility and disclosure.'(67) Clark Abt is of the view that the changes in attitude are due to 'automation, intensive industrialization and its undesirable side effects on the environment, the unanticipated social costs imposed by certain technological advances, and counter productive effects on systems resulting from technological advances in sub systems.'[68]

Whatever the reasons, investors, especially institutional investors, claim that social responsibility is one of the considerations they take into account when deciding on good investment opportunities. They also complain of their inability to get information on which to base a social responsibility appraisal of some companies.

The proposals before the General Motors 1971 Annual Meeting illustrates how issues relating to social responsibility can attract support. Approximately 1,800 persons attended the General Meeting in 1971 and approximately 1,200 attended the 1972 meeting.[69] The proposal for a committee to prepare and disclose information on General Motors' social performance got 2.73 per cent of the votes cast, representing 7.19 per cent of the shareholders voting.[70] The New York City pension funds, the Carnegie and Rockfeller Foundations, the Teachers Insurance Annuity Association, and the College Retirement Equity Fund voted for the proposal. Others voted with management against the proposal but expressed sympathy for it and others indicated that they would have voted for it if it had been better drafted.[71]

Encouraged by the results of the 1971 proposals, the 1972 proxy season attracted thirty four shareholder proposals for disclosure in twenty two companies listed on the New York Stock Exchange.[72] Support for the disclosure proposals ranged from a high of 5.5% at Standard Oil . . . . to a low of 0.5% at Eli Lilly. For example, holders of approximately $95,000,000 market value of General Motors stock voted in favour of a proposal for disclosure.[73] The 1973 proxy season produced statements on societal problems in 224 companies.

There is evidence that institutional investors have used the social responsibility criteria. In 1973, the Ford Foundation carried out a study among the 196 institutional investors in the United States and of the 115 institutions that responded, 57.4% indicated that they used social responsibility as a criteria in deciding in which corporations to invest. 39 institutions, mainly Banks and mutual funds believed that socially responsible corporations produced more satisfactory economic returns.(74) Twenty one insurance companies responded to the study and were 'notable both for the degree of interest they expressed in the social aspects of investment policy and the extent of present involvement they claimed.'(75)

The study found, rather surprisingly, that the profit making institutions like banks and insurance companies used the social responsibility criteria than institutions that one might feel would consider such a role more seriously. These included universities and charitable institutions. 18 of the 22 universities that responded had some consideration for social responsibility but only two believed that socially responsible corporations had long term profit prospects. After reviewing the evidence, Branson concludes; '. . . the Ford Foundation study indicated that a sizeable percentage of a representative sample of institutional investors do attempt to take corporate social responsibility into account in investment selection.'(76)

Congress carried out a survey in 1974 among 16 of the largest banks and insurance companies as well as ten investment advisors to mutual funds. Most revealed that not only have they rejected the Wall Street Rule,(77) but they also criticise social responsibility closely and use social responsibility in investment selection.(78) Chase Manhattan Bank stated; 'As managers of other people's money, our primary responsibility is to achieve the best investment results . . . . This primary obligation, however, does not relieve us of our concomitant responsibility to demonstrate a due regard for the manifest priorities of society as a whole. It is becoming increasingly evident that . ... the success of any business depends upon a thoughtful concern for the society it serves. When a company does not respond affirmatively to . . . public aspirations, whether from intentional disregard or economic neccessity, clearly its prospects for healthy long term growth are impaired.

. . . certainly socially negative factors can be isolated, and these aspects of corporate policy or performance are considered in arriving at our investment decisions. When careful analysis shows them to persist . . . they may result in a negative attitude regarding the company's prospects as a suitable investment.'(79)

On reviewing the evidence availabe, it is tempting to conclude that the Wall Street Rule has lost import and indeed with reference to institutional investors, the evidence shows that many, if not fully a third, of representative samples of institutions now profess to take corporate social responsibility into account in selecting and managing investments. They believe that such factors have utility in investment decisions and in determining long term yields.(80) Because corporate social responsibility has become a criteria for investment, some corporations would like disclosure on corporate responsibility and some institutions have expressed their views in strong terms. A bank manager is reported to have said; 'It would certainly be helpful to an investor if he was informed periodically about the practices of corporations in connection with minority hiring, pollution control, employee relations, consumer policies, community activities and charitable contributions. It seems to us that such information would give us an insight into the company attitudes and practices which in the long run will have substantial impact upon its ultimate success as a corporation.'(81)

There is limited evidence on individual investor attitudes towards corporate social responsibility. Individual votes for public interest proxy proposals could be used as an indication. Further the reaction of the public as a whole may be a guide though limited since unlike the general public, the investor has a stake in the assets of the corporation. In any event, Branson on reviewing the available evidence has concluded; 'Nevertheless, a number of statistical inferences and other observations do suggest that individual investor interest in corporate social disclosure is plausible.'[82] The 1970's up-and-down market may not encourage individuals to trade. Thus they cannot switch their stocks from corporation to corporation and this may be an incentive for them to choose socially responsible management for investment. Their desire for disclosure therefore may not differ from that of institutional investors.

Corporate social disclosure will not only indicate how the corporation has performed in that area but will also give information on which to compare the corporation with others. Where there are two companies in an industry with the same profit prospects and approximately equal risks, the investor will choose the company that is more socially responsible. Further, corporate social disclosure would enable investors to consider the long term social performance rather than look at one measure taken by a corporation and highly publicised for public relations when it is at the same time doing great damage in another area of social responsibility.

Another reason why investors might be interested in corporate social disclosure may be because accounting and social disclosure may be the least costly and drastic of other competing corporate law reform. This may be a less 'evil' than state ownership and expropriation by governments overseas. On this view, Mundheim has written; 'disclosure . . . is a more saleable idea that tends to attract institutional support.'[84]

Further, support for corporate social disclosure is increasing among the business community itself. The corporate executives continue to speak of the 'corporate good citizen.' 'Like the unbiguitous reasonable man of tort law, the corporate good citizen is invisible, but his presence is proved by the testimony of executives and other reputable witnesses.'(85) The respectable business community speak of their social role in society. Henning refers to their talk as a 'social benefactor of good citizen' as self made and unfulfilled.(86) Hethenington says that 'the purpose of social pronouncements is to protect corporate management's autonomy and freedom from interference. . . . and to create a public image that diminishes and forestalls pressure for increased governmental regulation.'(87) This may be true but the impression conveyed to the public and the investor in particular is that the corporation has a social responsibility. An investors who invests in a corporation on those pronouncements naturally would like some evidence to show that management is living to the professed values and the best evidence would be through social accounting and disclosure.

The increasing politicization of corporations in their involvement in matters of social concern in the press, radio and television is a reflection of public interest in these issues. The public concern has been expressed through several different venues including; the development of social forces that attract seriously motivated and respectable people that are prepared to spend a lot of time on these issues, confront and disrupt shareholders' meetings; the picketing, sit ins, world wide demonstrations like the most recent on nuclear power, boycotts, bombings sabotage and burnings, harrassment and interference with recruiters for certain companies; demands for elections of women and minority groups to boards of directors, organisation of public interest groups like the project for corporate responsibility, the centre for the study of responsive law, the council of economic priorities, the South African Task Force, Industrial Areas Foundation, Council for Corporate Review, and the Public Interest Centre.(88)

legislation in matters of quality of environment, employee working conditions, product quality and other concerns all indicate change in public expectation of what is proper corporate conduct. With this evidence, it is extremely difficult to deny that a significant number of the many investors, a number significant enough for the SEC to provide some disclosure on corporate social responsibility, share those public values and public expectations on corporate social responsibility, or to deny that some of those inventors would like some accounting by large corporations of what those corporations are doing on the social responsibility front.

The academicians and theorists have written on the subject and their teachings have been grasped by the public. Many have taught that prospective investors should have regard to the imagination, ability and quality of management. SEC has also admitted that disclosure helps investors to evaluate management. Management handling of current problems is one way of evaluating their quality. One gets a better view of their quality by considering how they deal with consumers, shareholders, the public and the government as well as labour relations in their enterprises. All these aspects, it seems point out the benefit of corporate social disclosure.

THE PARITY GOAL OF DISCLOSURE

The disclosure philosophy requires a company to disclose not only its good side but the bad side as well. Financial accounting principles are being expanded to meet the requirements of modern corporations. The SEC is constantly expanding financial accounting requirements but has not encouraged social audit. The aim of increased financial accounting is to give a complete picture, across the entire spectrum of a company's affairs. Without social audit, the picture of the company is incomplete.

Some have argued that all corporate social responsibility information should be expressed in monetary terms before disclosure is required.[89] But not all SEC disclosure requirements are always expressed in monetary terms before disclosure is required.[90] Violations of statutory environmental standards must be disclosed but this only gives the historical perspective; what has already happened and does not inform investors of what is perceived as an environmental problem in the future. The end result is that the current disclosure requirements fail to achieve one of the goals of disclosure - giving information on the various activities of the corporation.

Various government agencies require some information on social responsibility.[91] An investor interested in social responsibility would have to visit the various agencies before identifying the proper information.[92] The investor must first know whether the information required is filed under some statute. He must then know which agency has the files and it is not always easy. Thus, even if the information is available somewhere in the system, the investor might not get it.

Even after allocating the appropriate agency, the information might not be open to the public since the Freedom of Information Act has many exemptions, and even if the information is not exempted, it might require litigation since most agencies are loyal to the industry they are related to rather than the public. The end result is that even the information available is not easy to get and as such, while some investors may obtain it, others may not. As a consequence, disclosure fails because few investors in the United States can obtain anything resembling a relatively full and well-rounded picture of the typical modern publicly held corporation.

The disclosure philosophy is built on the premise that all investors, big and small, insiders and outsiders, individual or institutional have equal access to the important investment information. Relatively equal access to information is just as much a central purpose of the securities acts' affirmative disclosure requirements - such as the periodic reporting requirement and the proxy rules under the 1934 Act as it is a central purpose of rules like 10b-5 that deal with failure to disclosue. Some investors can obtain information on forecasts from the company officials while others cannot. The Commission itself has noted 'that all investors do not have equal access to this significant information.' If as noted above information on corporate social programs is significant, then disclosure fails to provide equal information to all investors. Evidence indicates that some investors, most notably institutional investors, can and do obtain social responsibility information, not only from their trade groups' clearing houses but also from corporations themselves, while many individual investors cannot obtain such information.(93)

Under SEC regulations, the proxy statements and annual reports need not include information on social responsibility. However, some shareholders who are able to attend general meetings, raise social responsibility issues, and management answers by disclosing the information. Professor Blumberg has found that 'information otherwise not publicly available, such as the amount of corporate contributions to charitable . . . institutions, amount of expenditures for environmental purposes, extent of black and other minority employment and similar matters, have been elicited through direct question at the annual meetings.'(94) Those unable to attend do not get such information and thus proxy statements and annual reports fail to fulfill their function - substituting for a general meeting.

Further, as a result, not all investors start the investment process on the same information footing. The influential investors get more information about corporations than both the general public and the small investor. This partly explains why individual investors have withdrawn from direct equity investment in preference to influential institutions.

One other reason behind the disclosure philosophy is that corporations should provide the same information so as to enable investors to compare their performance. Some companies provide social audits while others do not. Some corporations that would otherwise release the information do not do so because their competitors do not release the information. By disclosing it, they may be a subject of attack by public interest groups while those who disclose nothing are left undisturbed.[95] Many corporations disclose the positive aspects of their activities without reference to their undesirable activities. Others disclose information on both sides but only on one area of social responsibility. Yet others disclose but only for the purpose of public relations effort and spend millions of dollars advertising what they have done. As Branson has observed; 'The principle beneficiary of the current flood of corporate social concern has been the media. The so called public-utilities spend well over three hundred million dollars per year for advertising, much of it expressing their concern for the environment. One might think they were in the business of wilderness preservation . . . until one examines their dismal record . . . . their advertisements to not reveal that utilities rank bottom when it comes to hiring . . . blacks. The four biggest can makers . . . have been heavily advertising their 'recycling centres', but privately the industry admits the campaign involved no investment.'[96]

Thus, the disclosure requirements so far fail to achieve yet another purpose of disclosure - to provide roughly the same amount of information available about each company. As a result, the investors may misallocate their resources not only in a way that offends their moral values but also in a way that may affect their profits. Information on corporate social responsibility is significant both to the investor, the public and the corporations in general and the information can best be disclosed through the corporate social audit requirement.

SOCIAL AUDIT

Social audit is any organised attempt to determine how a corporation meets its social responsibilities. It is an investigation of the enterprise's performance as a member of the community in which it has its primary impact. Such an investigation consists ofthe preparation of an inventory of socially relevant activities of the enterprise, quantification of the social cost and benefits resulting from those activities and compilation of other quantitative information providing insight into the social performance of the enterprise.(97)

ELEMENTS OF SOCIAL AUDIT

Social audit can be developed to make corporations provide the information the public and investors want and can also be used to monitor and demonstrate what the corporations are doing, their costs and benefits in implementing the social audit and how they can use their resources in areas of social responsibility more efficiently.

The social audit can vary considerably in scope. It can consider matters on which corporations generally agree like product safety, plant safety, employee affairs, environmental matters, charitable contributions, minority hiring and promotion, energy conservation and development as well as impact on communities in which the plant might be located.

The audit, however, can also be extended into controversial areas like doing business in apartheid countries, providing weapons, making payments to officials abroad either to solicit business or change governments and complete truthfulness in advertising.(98)

Once the fields to be covered by social audit are determined, the next question that arises is how detailed it should be. This will be determined by several considerations.

The purpose for which the corporation intends the social audit to serve is a major factor. It could be simply to satisfy the conscience of the officers of the corporation; to look into the future and avoid community (comprised of employees, shareholders, the public and the government) pressure or to solve social problems especially those of their own creation.

The social audit could also be used not only to solve social problems, but also to help the corporation in determining the efficient allocation of corporate resources by directing the efforts into fields in which they are most competent. In the long run, it could also be used to increase profits of the corporation. It can thus become a management analysis on how to achieve social responsibility efficiently.

The social audit could also be directed at the investor. It can be used for the purpose of satisfying the investors that bother with socially responsible corporations. To such an investor, the social audit provides information as useful as financial accounting.

Having determined the depth and breadth, another element to be determined is with what precision. This again is determined by the interested parties. Management, the public interest groups, and shareholders. Unlike financial accounting,, social audit may find expenditures of resources and the results obtained incapable of being expressed in terms of the dollar.

The report can be a description of what the corporation is doing in social responsibility or it can attempt to translate all the items in terms of the dollar. A precise social audit can determine the net yearly dollar in addition to welfare that the corporation activities generate. Such a detailed audit contemplates a social responsibility profit and loss statement and balance sheet showing stocks of social assets with flows to and from those stocks. According to Abt, the social income statement is an annual flow statement in which social benefits to employees, communities, consumers and the general public are added, and social costs to each constituency are subtracted, to determine a net social income on an annual basis.(99)

TYPES OF SOCIAL AUDIT

Various titles have been used to describe social audit. It could be called a social action evaluation or Human Investment Analysis or Social Performance Measures or Figuring How to do Well and Good or even Benevolence for the Profit Seeking Rationalist.(100)

As there are many titles for social audit, there are many forms of social audit. Branson categorises the various forms under the process audit, the complete audit and the super social audit.(101) Others simply make a distinction between dollar audits and process audits. Linowes has developed what he calls the 'Social Economic Audit' which uses accounting doctrines that socially significant corporate actions are worth what they cost a corporation.(102) On the other hand, Abt's social audit estimates the social worth on the basis of monetized market worth of the impact on the populations affected.(103)

For our purposes, however, the social audit will be divided in two; the process audit and the complete audit.

THE PROCESS AUDIT

This is the oldest form of social audit and is the simplest. It attempts to cover a limited range of subjects rather than measure the total societal impact. It gives reasons for undertaking a particular social responsibility program and describes the actual activities it has done under the program.[104] It is not so ambitious to quantify the amount of resources a company commits to a program or the results of the program.

The process audit could limit itself by simply describing and measuring the effects of its social responsibility program without emphasising its short comings. Thus it could state what it has done without making reference to what it has not done.

The process audit is used by many. The Eastern Fuel and Gas Associates Inc., has for long devoted a few pages of its annual report to social responsibility involvement. The Bank of America has a process audit on many social accounts. Dyton Hudson Corporation always has some report under 'Towards Fulfilling our Social Responsibility.'[105]

Other corporations publish a process audit through other media than the annual report. Ralston Purina Corporation has a special magazine covering the company's social responsibility and so do many others.[106]

The process audit has been criticised by many.[107] The basic criticism is that it does no more than the noble puff speeches on social responsibility given by the business executives and the self-serving high-sounding rhetoric that appears in the annual reports. The positive action process audit, however, goes further than these mere statements. The audit contemplates hard facts on what the corporation has done and what it has failed to do.

A corporation interested in social responsible fields must have priorities and make decisions on what projects to undertake. It will have to be guided by what it believes to be its social responsibility. For example, lending policies would be relevant for banks; product safety for manufacturers; reliability and safety for appliance manufacturers; exploration practices for oil companies, etc. But this will not always be the case. The range of issues involved in present conceptions of corporate social responsibility is highly diverse. 'Even if we bypass the more political/philosophical issues such as investment in South Africa, producing munitions . . . and so on, we are confronted by . . . black capitalism, . . . community development; physical rehabilitation of cities, support of various levels of education, crime; mass transportation; the impact of plant location on population distribution; consumerism; advertising and marketing practices; and so on.'[108]

As new social responsibility issues arise, decisions on what to do about them must be made. Thus, the audit forces management to take decisions on social responsibility issues.

The other advantage of the process audit is that it satisfies most public investor demands for corporate accountability and is not unduly broad in coverage. The investors that may be interested in social responsibility like the public are not so much concerned with the success of the corporate responsibility program but rather on assurance that the corporation is aware of its responsibilities and effort is being made to observe them. The process audit will satisfy this. It does not have to include the controversial issues, it is simple and easy to read.

Any attempts to give a detailed social audit expressed in dollar terms will give inaccurate accounts and thus lose credibility and further, it may not be intelligible to readers. A monetized report becomes volumenous and has conceptual difficulties, all of which confuse the reader and discourage management.

The process audit may be preferred by the reader because it is easier to understand, the investor and management because it is cheap and easy to compile without having to face the repelling idea of the formidable monetization of activities which the experts themselves are yet to define.

THE COMPLETE AUDIT

A complete audit attempts to design social audit techniques to satisfy all dimensions. It attempts to measure the social impact of the corporation's activities in dollar terms. It is comparable to the financial audit. Both are evaluations of performance and can be made available for internal and external audit in quantitative money terms.

A social balance sheet shows the relative scale and worth of two different social assets or social liabilities. It indicates the relative productivity of different social investments and shows the relevance to major social needs of a given social investment and how much it is likely to be in the future given its flexibility.(109)

The complete audit also evaluates the efficiency of different social investments in multiplying the social and financial assets invested in them. The audit includes the social costs inherent in the activities of the corporation and measures what the corporation has achieved in its efforts. The effort and performance is quantified and converted into monetary terms. Thus it produces a balance sheet of profit and loss statement. The detriments are offset by the benefits to society. The benefits that accrue to society due to government regulation or collective bargaining are not included since they are not a result of the corporation observing its responsibilities on its own will.

There are various reasons for generating the social benefits and expressing them in dollar terms. According to Abt, the corporation's incentive for generating social worth is the strengthened justification of the real worth of 'good will'. Social worth helps to justify on a realistic basis the difference between book and market value and conceivably could be legitimately used to justify an increased difference between the two.[110]

A major incentive for financial expression and integration of the social audit is the justification of a corporation's capitalization of current costs expended for social benefits in the public interest which are expected to yield both social and financial returns in the future. The net effect of such a procedure could be to increase earnings per share because of the capitalization of social costs or alternatively, to permit increased social expenditures without damage to earnings.

The social effect of such a financially integrated social audit is to decrease the apparent financial cost of the corporation's social responsibility activities without reducing the short term profitability and in some cases increasing the long term financial profitability.

Some social responsibility expenses can be capitalized. The capital costs could include research and development to improve the value of the product, service and safety of the product, purchase of depolluting, less noisy or safer equipment to use in production. Health facilities and environmental improvement facilities are also capital expenses.[111]

The operating costs would include minority recruitment and training, adjustments in salary for equal employment opportunity reasons, employee fringe benefits, contributions to charity and knowledge.

Like a corporation is capable of being financially bankrupt, it is also capable of being socially bankrupt. The bankruptcy is the inability to meet the liability the company has incurred. Financial bankruptcy is when the liabilities exceed the assets. Social bankruptcy is analogous to moral bankruptcy. (ie. when moral assets are exhausted and the company has moral liabilities.) A company becomes socially bankrupt when public opinion swings against it for creating such liabilities as consumer fraud, employee abuse, and excessive pollution to a degree that is unmitigated by any positive social contribution to society.

The audit provides the data and assists in management decisions. Without it, it is argued, the company may base its decisions on a combination of quantitative economic data and qualitative, often subjective estimates of social impacts. Where social impacts are a significant aspect of the issue being decided, as is the case with all decisions affecting the environment, the community, consumers, workers and the general public, management decisions without social audit inputs are less likely to be good ones, except by luck, because the social component of the issues will not receive the quantitative analysis needed to integrate it with the economic component.(112)

The corporations have given their reasons for conducting the social audit that some of them do. Their aim is to examine what the company is actually doing in selected areas, to appraise or evaluate performance in selected areas; to identify those social programs which the company feels it ought to be pursuing, to inject into the general thinking of managers a social point of view, to determine where a company is likely to be attacked by public interest groups; to ensure that the corporate decision making process incorporates a social point of view; to meet public demands for corporate accountability in the social area; to inform the public of what the company is doing; to identify those social programs which the company feels pressured to undertake, to offset irresponsible audits made by outside self appointed auditors and to increase long term profitability of the corporation.[113]

The obstacles in the development of the audit have been identified. The development of measures of performance that everybody will accept has been shown to be a major problem. Inability to make credible cost/benefit analyses to guide company actions; inability to agree on what activities shall be included, the danger to the corporation on publication of the results and a decline in public pressure on business to undertake social responsibility programs are some of the unsolved problems.

One of the objections to the complete audit is that faced realistically, the corporations are not going to identify and report their shortcomings in detail. To this, however, it can be said that business enterprises have always been accounting for and giving visibility to adverse fiscal conditions when they report on their liabilities. In any case, external public interest organisations will always point out the areas of non-performance.

The other objection is that complete monetization of the social audit makes reporting far different from the true affairs than in terms of raw data like pension arrangements with retired employees and the like.

This, however, could be said to be nothing new. It is known that income statements and balance sheets are far from being precise. These are problems of evaluation that are common in every day accounting and all accountants agree that traditional accounting should include it. Accounting is developed and new methods of solving new valuation problems will evolve.

Binding disclosure and managerial accounting systems analysis causes serious conceptual difficulties and does not allow a social audit to develop quickly. This may cause problems since the accomplishments of social accounting cannot be noted. The complexity and false accuracy is likely to discourage many. With a modest format of disclosure, some corporations would reveal the good they believe they have done and probably a general listing of their short comings as well. Other corporations seeing this would be induced to disclose the effects of their operations.

Social accounting in the traditional accounting form should be left to develop as a different study to assist managements in their systems analysis. One cannot deny that without the managerial systems analysis, the total impact of a corporation would not be realised in detail. But the public, the investors, and the critics realise that even socially responsible corporations are subject to restraints of profit maximization and this is realised to be essential if the goods and services provided are to continue; corporate social responsibility has limits which can be appreciated.

The cost of setting up a social accounts office may exceed those of setting up the financial accounts office. According to Abt, the audit team requires many professionals. These should include an accountant, an economist, a sociologist and an engineer, depending on the nature of the business. Data collection requires a statistician, a survey designer, a social psychologist and a community affairs specialist. Analysing the data further requires a microeconomist and a macroeconomist as well as a management scientist. Many operations may require more than one team.(114)

Thus, a complete social audit is an expensive exercise that the law should take notice of. This is especially significant in the context of East Africa where besides the expenses, there are not enough specialists in all these areas and in any event, the capital available for investment is limited and must be put to use in the most efficient manner. The extent to which a company can be required to disclose the effects of its operations must be seen in the light of the available resources.

At the end of the day what the public and critics want to see are business managers that have a concerned attitude. They want the assurance that the corporate managers will realise the effects of the corporations; they foresee and try to avoid irresponsible corporate activities and do something about it. This can be achieved through the simple corporate audit.

IMPLEMENTATION OF A SOCIAL AUDIT

The most appropriate and least burdensome method of disseminating social responsibility would be through the annual report. The report is an effective method since the information would get directly to the investors and a copy of the annual report filed with the SEC would be open for public scrutiny on request. The content of the report would be specified by the Commission to include issues on which there is a fair amount of agreement among the corporations that they ought to observe. Disclosure on the specified categories would then be a requisite part of the filed annual report.

The question that remains is; Who should prepare the audit? To leave it to management to determine what to include and what to leave out will not be different from what is already happening among some companies that do little in the area of social responsibility and spend a lot of funds advertising the little they have done. The companies must not be allowed to give self-serving reports that in no way reflect the real corporate social performance. It becomes necessary thus to have either some external agency to prepare the audit or at least some external agency to check on what the companies claim to have done. An agency that would supervise or confirm the truth of the report like an external auditor checks and certifys the financial statement. To have an external agency preparing the audit would not only be expensive for the state if the state were to pay but would also be an increased burden to the corporations which for good business practices might not be willing to allow external agencies interferring with internal management of the corporation.

The appropriate body to supervise the audit is a committee within the company that would be responsible for the audit. A committee parallel to the already existing financial audit committees in some jurisdictions would serve the purpose. This is especially relevant in East Africa where the states might not be able to employ the experts from outside the company to certify the social audit.

The New York Stock Exchange and some provinces in Canada require corporations to have audit committees. They are sub-committees of directors assigned the duty to deal with matters relating to the corporation's financial affairs.(115) As Williams puts it, 'the audit committee is now a fact of life for the publicly held company and it may well be the most important development in corporate structure and control in decades.'

In the United States, audit committees were first proposed by the New York Stock Exchange following an investigation of the McKesson & Robbins debacle where it was found that the financial statement of the drug company contained $19,000,000 in fictitious assets including 10,000,000 of non existent inventories.(116) Many corporations gradually adopted the proposal but it was not until 1978 that it was made compulsory by the New York Stock Exchange Commission for all listed corporations.

In Canada, the committee is composed of not less than three directors, a majority of whom must not be officers or employees of the company. The major function of the committee is to review the company's financial statements before they are signed by the auditor for presentation to shareholders.(117) Thus, their function is investigatory and advisory, the primary objective being the provision of facts and advice that enables the board of directors to appreciate all the affairs of the company. Their duties have not been specified by SEC or the statutes in Canada. Each corporation defines their duties by itself. Most corporations view them as a means of assisting directors in fulfilling their responsibilities to the shareholders and the investing public as well as enhancing credibility of corporate financial disclosure.

In many cases, they nominate an independent auditor subject to ratification by the board of directors or the shareholders. They are to ensure objective financial reporting and report to the board of directors.

The principle benefits from the financial audit committees have been said to be an informed board of directors, increased public confidence in corporate financial reporting and strengthening the independent position of the auditor.

The East African countries could adopt such a parallel body to check on the social audit. Thus, each public company should be required to have a sub committee of the board of directors for the purposes of checking on the report on social audit produced by management. The majority of the members of the committee, which should consist of at least three members of the board of directors should be outside directors to ensure objectivity when reviewing the corporate social audit.

They should be appointed by the full board and should be people of a variety of backgrounds and experiences with a sense of the needs of society and a personal commitment. The committee should adopt an advisory attitude both to management and the board of directors. They should be able to have frank discussions with management on the social audit report before it is presented to the board of directors and the supervisory board for release to the shareholders and the public through the office of the registrar of companies.

They should be able to explain; defend and attack the social audit report when it is presented to the board of directors so that the board is better informed on the social performance of the company. This is only possible if the committee maintains good relations with management and hence the need for the committee to act as an ally and adviser to management but without abdicating their duties of pointing out areas on which it is dissatisfied. Any disagreement between the committee and management should be brought to the attention of the full board of directors and the supervisory board.

Other directors should not be free, to rely on the members of the committee and should be equally liable in case of failure to observe the duty of care imposed on them. This will encourage the board, when nominating the members that have a sense of responsibility and personal commitment to their duty. Furthermore, it will encourage the members of the board individually to obtain as much information on the company's social performance as is practically possible. It is important that all forms of false appearance be discouraged. The public, knowing that there is such a committee to check on the reports produced by management will have confidence and may rely on the report since there may be no other way of finding out any misstatements. Thus, the committee should provide some information to the board but failure on the part of the committee should not absolve the whole board from liability. The principal benefit from the audit committees therefore should be an informed board of directors.

In Canada and the United States where financial audit committees have been used for sometime have been successful to a large degree. A 1975 survey[(118)] found that 'many corporate presidents found that after several years' experience with the committee they found that it served a very useful and constructive function in the operations of the company.' The members of the committees themselves felt that the committees serve a useful purpose of focussing more attention on the audit process and on financial control function at the directors' level.

As said before, the main concern of the public and interested shareholders is an assurance that public interest is not disregarded by the corporations when decisions are taken. The social audit committee would bring the attention of the full board, and the supervisory board to the social significance of the corporate activities and this would in turn compel management, in taking corporate decisions to have regard to what should appear both in the corporate social audit report and before an informed board of directors. This indeed is the aim of the modest corporate reform through the process of social audit.

CHAPTER IV

A RESPONSIBLE BOARD

Under the East African Companies Acts, the directors of the company have the responsibility to manage the affairs of the company in accordance with the memorandum and articles of association. The directors are appointed by the shareholders and act on behalf of the shareholders. The directors owe duties only to the company and must act in the company's best interests.[1] The interests of the company have been interpreted to mean the interests of the shareholders present and future taken as one group.[2]

The duties of directors are in two categories; honesty and good faith giving rise to a fiduciary relationship and exercise of power with due care, diligence and skill of a reasonably prudent person in the circumstances of the individual directors. On various occasions, English courts have clearly stated the fiduciary position occupied by company directors. In Re Lands Allotment Co.,[3] Lindley L.J. said;

> 'Although directors are not properly speaking trustees, yet they have always been considered and treated as trustees of money which comes to their hands or which is actually under their control; and ever since joint stock companies were invented, directors have been held liable to make good monies which they have misapplied upon the same footing as if they were trustees . . .'

The directors are not trustees of a company but rather, they are its agents. As Romer J. put it;

> 'It has sometimes been said that directors are trustees. If this means no more than that, directors in the performance of their duties stand in a fiduciary relationship to the company, the statement is true enough. But if the statement is meant to be an indication by way of analogy of what those duties are, it appears to me to be wholly misleading. I can see but little resemblance between the duties of a director and the duties of a trustee of a will or of a marriage settlement.' (4)

As agents, the duties of good faith they owe to the company are identical to those imposed on trustees.[5] The analogy, however, does not go far when the duties of care and skill are considered. The trustees have to be cautious and avoid risks that may threaten the trust fund. The directors of a company must take risks and speculate. The required standard of care was stated in the leading English case; Re City Equitable Fire Insurance Co. Ltd.,[6] where Romer J. said;

> 'There are, in addition, one or two other general propositions that seem to be warranted by the reported cases;
>
> (1) A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience.
>
> (2) A director is not bound to give continuous attention to the affairs of his company. His duties are of an intermittent nature to be performed at periodical board meetings, and at meetings of any committee of the board upon which he happens to be placed. He is not, however, bound to attend all such meetings, though he ought to attend whenever, in the circumstances he is reasonably able to do so.
>
> (3) In respect of all duties that having regard to the exigencies of business, and the Articles of Association, may properly be left to some other official, a director is, in the absence of grounds for suspiscion justified in trusting that official to perform such duties honestly.'

Thus, the standard of care required under the common law is fairly relaxed.[7] Professor Paterson has briefly stated the functions of the board of directors to be the following;

(a) to provide a source of advice and information to management;

(b) to be a check on management performance;

(c) to establish long-term corporate objectives and broad policies;

(d) to select the president (chairman); and

(e) to act in crisis situations.[8]

Any company law reform proposals must have regard to the duties and functions of the board which manages the affairs of the company. The board is the directing mind of the company and that is where corporate consciousness must begin. It therefore becomes the duty of the legislature and those interested in law reform to provide room in company organisation, duties and functions of company officials for the development of corporate consciousness, the board being the starting point.

Corporate social responsibility requires a recognition that interests beyond those of shareholders should be protected. Company law, therefore, must first recognise these interests and require boards of directors to protect them.(9) An East African company with enlightened management which decides to balance all interests in society would soon be told it is contravening the law unless it can justify such a decision to be in the interests of shareholders. This is because of the ultra vires doctrine. The term, literally translated means beyond the powers. The doctrine is that a company cannot validly engage in any activities outside the powers expressly or impliedly set out in the objects clause in its memorandum of association even if the activities are agreed upon by all the members and any action done ultra vires is generally not binding on the company.(10) The principle is a creature of the courts except for sections 5 and 8(11) of the Uganda Companies Act which imply it, is hardly regulated by the Act. The impact of the doctrine is quite substantial in so far as it affects both the various groups in society and the economic efficiency of the company.

The aim was to protect potential shareholders in that when investing, they are deemed to study and assess the objects of the company and invest on that basis. It would not be fair, it was argued, for a shareholder to invest on the basis of the objects of the company as given only to learn later on that the company is engaged in objects he never intended to invest in either on moral, political, economic or social basis.

The doctrine was further to protect third parties like creditors dealing with the company. The law insists that a company's memorandum is a public document and every person dealing with the company is deemed to know its contents as well as the articles of association.[12] Creditors, for example, would advance loans on the basis of the document. If a creditor is of the view that the objects are favourable, he should not find himself in financial losses when the company engages in new objects unknown to him.

On close observation, it becomes clear that today, the purported protection is a nuisance and the doctrine has outlived its usefulness. Lawyers, courts, and the legislature have worked hand in hand to mitigate its hardships but the situation is still unsatisfactory.

It is a complicated doctrine that has brought about a lot of confusion and is likely to cause serious legal problems in developing countries like those of East Africa. The basis of the decision in Ashbury Railway Carriage and Iron Company Ltd.[13] which established the doctrine is that before contracting with a limited liability company, even in so mundane a matter as supplying coke for the office, one ought in theory to satisfy oneself of its existence and ought to examine the memorandum of association to see that the company is acting within its powers. Certainly this does not reflect any commercial practice. In the circumstances of developing countries, it is not a practical rule in light of the high level of illiteracy and the statutory requirements that the memorandum of association should be in the English language. How can it be said with justification that a farmer, living some three hundred miles away from the companies registry, because he decides to sell his vegetables to a limited liability company on credit must read its memorandum to ensure that the company has the power to buy the cabbages?

In practice very few people, if any, ever look at the documents, let alone understand them before dealing with the company. As Professor Gower observes, the purported protection is a nuisance and the doctrine has outlived its usefulness.(14)

In order to mitigate the likely hardships of the doctrine, attempts to mitigate its effects have been made, and these have made the law all the more complicated than it ought to. The Companies Acts require the objects clause to be included in the memorandum of association. The intention of the legislature was that this clause should be a short statement of the main activities of the company and that the powers necessary for successful pursuit of these activities would be implied. However, the practice of expressly including these powers in the objects clause with a declaration that each sub-clause shall be an independent object of the company and in no way limited by reference to any other sub-clause has blurred the distinction between objects and powers.(15)

The ultra vires doctrine makes it difficult for companies to observe their social responsibility even where management would like to do so. The doctrine thus emphasises corporate selfishness.

The Cohen Committee, reporting in 1945, concluded that 'in consequence, the doctrine of ultra vires is an illusory protection for shareholders and yet may be a pit fall for third parties dealing with the company' and that 'as now applied to the companies, the doctrine serves no positive purpose but is on the other hand a cause of unnecessary prolixity and vexation.

Despite the doctrine, management will always be able to justify their activities as being in the interest of shareholders. This, however, is the outdated emphasis that the legislators must eradicate. Dodd pointed out the need for this change in emphasis when he wrote that while it was proper for the law to establish control to prevent managers from diverting profit from shareholders into their own pockets, 'it is undesirable, even with the laudable purpose of giving stockholders much needed protection against self seeking managers, to give increased emphasis at the present time to the view that business corporations exist for the sole purpose of making profits for the shareholders.'(17)

Public opinion today views the business corporation as an economic institution with a social service as well as a profit-making function. This view has already had an impact on legal theory and it is time for the legislators to expressly incorporate it in our statutes. Business by corporations is allowed and actually encouraged by the law not only because it provides profit but primarily because it should serve the community in which it operates. As Dodd observed;

> 'If certain business then continue to be allowed unregulated profits, it will be as a matter of legislative policy because the law makers regard the competitive conditions under which such businesses are carried on as making regulation of profits unnecessary, and not because the owners of such enterprises have any constitutional right to have their property treated as private in the sense in which property held merely for personal use is private.' (18)

Today public opinion seems to be at variance with the law. The public expects managers to concern themselves with the interests of the employees, consumers, the general public and the shareholders. Although the law is beginning to change, it has not yet gone far enough. Public expectation is not compatible with the restricted legal duties that directors owe the shareholders/owners as their elected representatives. Profit maximisation, it may be assumed, motivates shareholders to invest. The business enterprises in which they invest, however, operate in a business world with ethical standards that require social responsibility. Company law thus should impose a positive duty on directors to have regard to interests of the employees, consumers, the community and the nation as a whole.

That this should be the casé has been acknowledged by Ford, the then president of the United States when he said;

> 'It is heartening to me to note that businessmen are no longer simply measuring corporate performance in terms of profit and loss, but also in terms of social responsibility. There is I am convinced, a growing view in the business community that increased productivity and profitability go hand in hand with a health social environment.' (19)

Leading company law cases also contain some dicta recognising interests beyond those of shareholders. In Tech Corporation Ltd. v. Miller,[20] Berger J. challenged the classic theory that the directors' duty is to the company and the shareholders are the company and therefore no interests beyond those of shareholders can legitimately be considered. His Lordship considered the fact that even if this were to be accepted, there would be difficulties in defining the interest of shareholders. He concluded that 'in defining the fiduciary duties of directors, the law ought to take into account the fact that the corporation provides the legal framework for the development of resources and the generation of wealth in the private sector of the Canadian economy'.[21]

The judge in the case went as far as saying that in fact the law already recognised other interests. In his words,

> 'A classical theory that was once unchallengeable must yield to the facts of modern life. If today, the directors of a company were to consider the interests of employees no one would argue that in doing so they were not acting bona fide in the interests of the company itself. Similarly, if the directors were to consider the consequences to the community of any policy that the company intended to pursue, and were deflected

> in their commitment to that policy as a result, it would not be said that they had not considered bona fide the interests of the shareholders.' (22)

An illustration of how shareholders' interests can conflict with those of the community is provided by a take-over bid made to Savay Hotel Ltd. in England in 1954. The bidder intended to clause one of the Hotels and turn it into an office building. The directors of Savoy Hotel Ltd. formulated the 'Worcester Scheme' to defeat the take-over bid.(23) The case had serious social issues involved. A successful take-over bid would lead to many employees losing their jobs and the contribution of the Hotel to the British Tourist Industry and to Foreign Exchange would be lost.

Mr. Holland noted these facts in his report;

> 'It is clear from what has been said by the directors that they also considered that the discontinuance of the Berkley as a hotel and restaurant would be injurious to the interests of the employees since it would involve a reduction of staff and would be injurious in their opinion to the national interest having regard to the dollar-earning powers of the Berkley Hotel.' (24)

Despite this, Mr. Holland took the view that the interests of the company meant the shareholders alone. Professor Gower has offered his opinion of the whole case and indicates the reform that company law needs:

> 'What is perhaps regretable is that the directors in the Savoy case were not prepared to come out boldly with an argument that they owed duties to the company's employees and customers and to the public as well as the shareholders, and that their actions were justified as the only way in which the best interests of all these classes could be protected against the misguided threats of the would-be controller.' (25)

The German experience in imposing a duty on corporations to act in the public interest may be of guidance. Traditionally, German law was based on profit maixmisation for the shareholders. This narrow view, however, was criticised by many. In 1896, Abbe, the then proprietor of Carl Zeiss Opitcal

Works started a foundation to hold assets for the benefit of the employees and the public. This aroused interest. A flow of supporting literature followed soon. Of particular significance were the works of Rathenau who has been described as a 'businessman, statesman and publicist.'[26] In 1918, he wrote that domination of the shareholder profit motive was intolerable.

These views, however, were not incorporated into law until the enactment of s. 70 of the 1937 Act which read;

> 'The managing board is, on its own responsibility to manage the corporation as the good of the enterprise and its retinue and the common weal of folk and realm demanded.' (27)

The section remained till 1958 when a draft law eliminated it due to the racial connotations surrounding the concept of folk but also because it was felt to be unnecessary. The draft did not become law until 1965. However, the current German law provides that a corporation may be dissolved if it is not operating in the public interest.

The section when still in the statute was not invoked often. This was largely because the NAZI government had many other ways of enforcing its own directives. After the war, the language of the section was found to be embarrassing. Some argued that it was meaningless and did not surve a useful purpose but others observed that in some cases, management had used it to keep prices low contrary to the wishes of dissient shareholders.

The section was invoked in 1962 when the then Minister of Economic Affairs, Ludwig Erhard, confronted the management of Volkswagen Works on a proposed price increase of the product. The Minister argued that management had a duty not to increase inflation and cause international trade problems due to increased prices.[28] The case did not reach the courts but management emerged as the winner although the government held 20 per cent of the shares and had seats on the supervisory board. The price increase, however, had been well planned and timed and management was able to show that their prices were lower than prices of most other products.

The problem with such a statute is that it enables management legally to serve their own enterprenuerial or philanthropic feelings rather than act as trustees to the general public. This suspiscion is enhanced by the corporate practice of making political contributions to influence legislation. Although some corporate managers entertain the idea that business has a responsibility to enlighten the public on political issues,[29] the public is worried about the consequences.[30] This may simply give a right to management to serve their political interests using corporation money. Indeed, the German law enabled industry to keep the bankrupt NAZI party in power.

While corporate managers have not proved themselves as statesmen, the facts of life indicate that even without such a law recognising other interests, corporations have a substantial impact on both national and international politics. The NAZI party could have obtained financial support even without the law if it so wished. Big corporations today determine who will and who will not go into government. To a large degree they influence legislation. Corporate managers can still justify their activities when they choose to. The only limitation is that the public and other neglected groups have no legal basis on which to challenge corporate activities and demand that corporations have regard to their interests.

Political contributions can be made unlawful so that attempts are made to reduce misuse of corporate funds to serve personal political interests. To require corporate managers to balance all interests is not necessarily to give them a free hand to act as they like.[31]

The German law was partly not effective because there were no effective means of enforcing the legislation. The only enforcement mechanism provided was a proceeding by the state to dissolve the enterprise that disregarded public interest. This was a threat that could not be employed easily. A more modest mechanism of enforcement would be to hold the directors liable for failure to observe their duties and they would still be subject to the requirement of good faith.(32)

The German experience was not a total failure. It helped the development of co-determination, a mechanism that has played a significant role in improving industrial relations in Germany. Because interests beyond those of shareholders were recognised by law, it was easier to find the legal basis of labour representatives on the supervisory board.

Corporate reform proposals through a change in the composition of the board have been suggested. It is important, therefore, to consider these proposals and examine their applicability to the East African conditions. The aim of these proposals is to transform the board from being a representative of shareholders alone to one that will represent the public interest as well. The proposals range from 'broadening the perspectives of the board to board representation of interest groups or the public.'(33)

BROADENING PERSPECTIVES OF THE BOARD

This approach emphasises that companies should include on their boards people with new and fresh ideas. These would be people of different background and experience and hence would introduce new values in the boardroom. In the American context, this includes electing minority groups and women to the board. In East Africa, this would refer to Africans as opposed to the Asians who dominate the business community (except in Uganda since they were expelled by the fascist regime of Amin) and other expatriates. This would also require appointment of women to the boards. Such proposals are not aimed at creating new constituencies to be represented but rather the aim is to broaden the perspectives of the board and indicate non-discriminatory practices. These 'new directors' would be selected by the existing board.

The advantage here is that if appointed by the existing board, they would be well received and their views respected. On the other hand, there is a risk that their presence on the board may be of no significance if they are there only at the pleasure of the existing board.

Even if their position was secure, one or two new directors will have little impact on the decision making. Even then, this is to assume that boards of directors have any real impact on corporate decision making. In most cases, the important decisions are taken by management and the board simply approves the policies.

This, however, is not to say that such a development would make no changes at all. Such a policy would have some impact on recruiting and training of managerial staff. The presence of the African director would ensure that policies of Africanisation of managerial staff are consciously considered by management. Such a policy would also get support from the supervisory board where the workers would be represented.

Thus, while it might not yet be prudent to require a majority of Africans on the board due to shortage of experienced personnel, a requirement that at least one of the members of the board of directors should be a citizen of a particular country in issue would be possible to implement.[34]

PUBLIC INTEREST REPRESENTATION

Some corporate reform proposals have far reaching implications. They suggest a change in the allocation of power within the corporation. The aim is that all groups in society who are affected by corporate activities should participate in corporate decision making. One of the groups of people affected most are the employees of the corporation. However, experience in Germany and other countries where employees participate in corporate decision making has shown that their representatives are concerned with labour relations only. They have shown no more concern for the consumer and the general community than other corporate executives.

It is thus argued that other groups too should be represented.[35] There is no experience on consumer representation on which we can assess the significance of consumer representation. The proposal has not received any form of support, theoretical or practical. Besides, there are many serious technical problems in determining the constituency to be represented. Who is entitled to vote? How are votes to be allocated? What distinction is to be drawn between the major and the incidental purchasers? What would be the distinction between the corporate and the individual perchasers? What procedure would be adapted for the campaign and the election? Should the elections be carried out by the shareholders on behalf of the consumers? Of what effect would it be?[36] As Rostou pointed out, allowing such interest groups voting power would only add 'new groups of apathetic and disinterested voters to the masses of stock holders who new fail to exercise their franchise intelligently.'[37] There is no way of selecting representatives of special interest groups, no way of giving them a legitimate power base.[38]

PROFESSIONAL DIRECTORS

Yet another proposal for reform in the composition of the board is the idea of professional directors first suggested by Justice Douglas as a means of protecting investors.[39] Others have developed it with a view of protecting not only investor interests but community interests as well.[40] The advocates of this reform call for directors that would be very well paid so as to attract the highly qualified and competent. Such a group, it is argued would keep independent of management.[41]

A professional board would have a full time staff of lawyers, economists and people of other relevant qualifications to advise them. Such a board, it is argued would control management and make it accountable not only to the law but the shareholders as well.

According to Nader, each director apart from general duties would have separate oversight responsibility over a particular area of his/her expertise. A nine member board would be necessary and each would have separate areas of concern. These being, employee welfare, consumer protection, environmental protection and community relations, shareholders rights, compliance with law, finance, purchasing and marketing, management efficiency, planning and research.[42]

Added to this would be the requirement that no one director may serve on more than one board at a time and their term of office would be limited to four years in order to avoid some of them becoming stale.

A basic problem that arises is the question of the appointing authority. Who would elect them? Further, where some professionals have been included on the board, supposedly to protect public interest, they have not brought any changes in corporate behaviour.[43] However desirable such a structural change may be, it is not practical. First of all, there is not a sufficient number of such personnel and even if there were, the costs involved are simply prohibitive. What seems to be gaining a lot of support is the idea of 'outside' as opposed to 'inside' directors.

OUTSIDE DIRECTORS

It is the duty of the board of directors to manage the affairs of the company. These duties include the establishment of company objectives and policies, appointment and providing advice to management as well as monitoring their performance. The board must safeguard the assets of the company by approving important financial decisions and deligently deligating powers to responsible corporate officers for the smooth running of the corporation. These important duties require a strong and efficient board independent of management influence. In practice, however, management controls the board and determines what role the board should play. To maintain an effective board, it is necessary to inquire into whether the composition of the board should include inside directors, outside directors or both. In East Africa, a company can have 'insiders', 'outsiders' or both on the board of directors.

White has summarised the advantages of both the inside and outside directors.(44) As employees of the company, inside directors are available to serve the company. They are interested in serving the company as a means of improving their career, prestige, financial gains and other fringe benefits that may be available to the directors. On the other hand, people of distinguished qualities, respect and integrity may not avail themselves to serve as outside directors especially if the company in question has not yet established itself. Most companies provide no monetary rewards for directors and as such outsiders might not risk their integrity with a company the directorship of which does not carry prestige.

Inside directors have internal knowledge on the operations of the company. They are aware of the market, labour relations and competition within the industry. As employees in top management positions, they have expertise in their areas of study. They are aware of the immediate needs of the company and can deal with emergency situations. The outside director in an emergency situation would still need time to acquaint himself with the day-to-day affairs to the company.

Inside directors have a lot of time to spare for the management of the company. Outside directors with full time jobs do not have sufficient time to focus on the activities of the company.

Finally, inside directors are dependant on the success of the company. They have more at stake than an outside director whose only damage, in the event of the corporation failing is only loss of prestige and an unlikely fine for negligence. Thus insiders should in a normal situation work harder for the benefit of the company.

Outside directors, however, have their own advantages. An outsider who has no position in the management of the company should be more objective in the assessment of corporate activities. This puts the outside director in a better position to assess and evaluate management. An outside director should be an asset to the company on matters of social responsibility since he is likely to be more objective.

Independence of the board from management is important. A junior manager who is also a director would be in a difficult position if on entering the boardroom, he thought it fit to challenge the position taken by senior managers.

Outside directors have experience and contacts that might be valuable to the company. This may become even more important when the company is trying to raise capital. Raising capital in East Africa is one of the biggest problems of companies and it pays to have knowledgeable and well established people on the board.

In times of crisis when the chief executive resigns, retires or dies, the board should be able to fill the gap and provide continuity. This may best be done by outside directors who objectively should choose the successor without bias.

Protection of shareholder interests is another important consideration for directors. The interests of management might be at variance with those of shareholders and an outside director would in most cases be able to provide a fair assessment of the different interests.

The New York Stock Exchange requires a minimum of two outside directors on every quoted company. In Canada, s. 208(1) of British Columbia Companies Act requires the board of directors of every reporting company to elect an audit committee from among themselves. The committee, composed of not less than three members must have a majority of members who are not officers or employees of the company or an affiliate of the company. By implication, therefore, each reporting company must have at least two outside directors.

Some scholars are of the view that the majority of directors should be outside directors.(45) In East Africa, we still need to tap the limited manpower resources to maximum capacity. Men of integrity and quality whether in management, government or elsewhere are needed on the boards. However, with a two-tier system, the companies would have the benefits of both inside and outside directors.

GOVERNMENT DIRECTORS

A proposal for government appointed directors to represent the public interest on the board of directors appears often both in the English and

American literature on corporate law reform.[46] It is a technique of controlling companies that is gradually gaining support and has been resorted to in many developing as well as the developed industrialised countries of Western Europe and North America. Thus, it is a proposal that requires careful consideration.

In the United States, for example, the technique has rarely been resorted to.[47] Under the Communications Satellite Act of 1962, a private corporation was created to develop a global satellite communications network. Three of the fifteen members of the board were appointed by the president and confirmed by the senate. Six members were appointed by the communications common carriers who have fifty per cent of the voting shares and the remaining six were elected by public shareholders. Supporting the presidential appointment proposals, Newton Minow declared thatthis would introduce 'a very wholesome development in American life, of government and private enterprise harnessed together to advance the national interest.'[48] An analysis of the problems that confronted this arrangement brings out the problems that would result from changes to introduce government directors on the board.

Professor Schwartz, after studying the role of government directors, concluded that there are defects in the technique and that appointment of three of the fifteen directors in the corporation did not provide any significant protection to public interest.[49] The presidentially appointed directors were to protect the public interest which included speed and efficiency, contribution to world peace and understanding by extending communication to underdeveloped countries, keep low rates, keep the communications industry competitive and avoid discrimination in access to the use of the satellite.[50]

It is not clear how three directors were to achieve this. They could easily be outvoted if other directors did not agree with them. A more probable reason for government representation was to keep the government informed from within the corporation.

There are many problems involved. A government director unacquainted with technicalities of the business in issue and with no experience is likely to be overshadowed by the experienced directors from the business community.

An even more serious problem is the likely hostility from other directors. The government director is likely quite understandably to be treated as a potential spy. The unfriendly attitude is likely to make the position difficult to maintain effectively. Thus, on government directors in the United States, Schwartz concluded;

> 'Both the practicalities of life and the lessons of history lead to the conclusion that the appointment of government directors to a private board cannot effectively protect the public interest against private abuse.' (51)

In New Zealand, however, it has been suggested that government directors have proved effective.(52) The government has acquired shares in a number of companies and is guaranteed seats on the board of directors. 'In such circumstances the government is able to maintain close supervision over the affairs of internal management while at the same time allowing the company to operate as a normal profit making concern and to achieve its maximum growth potential.'(53)

In these instances where the government has opted to operate through a corporate body together with the private sector rather than through a state trading corporation or board, the appointment of directors is secured through the articles of the company rather than an Act of parliament. The directors appointed by the government function and view themselves as any other directors. To ensure that articles are not altered to exclude government directors, their position is normally guaranteed by the Articles and the Memorandum.

The duties of such a government director are to act for the interests of the company as a whole though nominated by one group. Their responsibility was well expressed by Lord Denning when he noted obiter;

> '. . . . . or take a nominee director, that is a director of a company who is nominated by a large shareholder to represent his interests. There is nothing wrong in it. It is done every day. Nothing wrong that is, so long as the director is left free to exercise his judgment in the interests of the company which he serves. But if he is put upon terms that he is bound to act in the affairs of the company in accordance with the directions of his patron, it is beyond doubt unlawful, ... or if he agrees to subordinate the interests of the company to the interests of his patron, it is conduct oppressive to the other shareholders for which the patron can be brought to book.' (54)

Thus, so long as the interests of the company continue to be defined as interests of shareholders as a whole to the exclusion of employees, consumers and the nation at large, a government director who views himself as a representative of public interest runs a potential risk of liability. As Gower observes, 'To deny a director openly appointed under the articles to represent a particular class the right to think primarily of the interests of that class, instead of exclusively of the members as a whole, may be to defeat the whole object of the appointment.[55]

It is to be noted that in New Zealand the government directors are appointed only in a few corporations in which the government has an investment. Thus, it operates as an exception rather than the rule.[56] While it might be in the public interest to have the government investing together with private individuals in certain sectors of the economy and appointing some directors in such companies, this does not warrant a requirement for government appointed directors in companies where the government has no investment. In East Africa, governments appoint directors of state corporations that are either wholly state owned or at least the government is the major shareholder. These corporations, however, are set up by statute and are not subject to the law governing companies. Even if it were desirable to have government appointed directors, the East African governments are continuing to establish state corporations and they are limited as to how far they should interfere with private companies given the limited resources, efficiency and continued need for increased investments.

It is clear that apart from the need for extending duties of directors beyond the interests of shareholders, it seems it is neither possible nor desirable to transform the structure of boards of directors of companies in East Africa. The current structure with a supervisory board on which workers are represented with extended duties is a desirable reform. But it is necessary to consider how the duties can be enforced.

LIABILITY OF DIRECTORS

Professor Stanley Kaplan has said that 'fiduciary duty' is 'a concept in search of content.'(57) This is a revival of the questions Justice Frankfurter asked nearly fourty years ago when he remarked, 'to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? In what respect has he failed to discharge those obligations? And what are the consequences of his deviation from duty?(58)

As indicated at the beginning of this chapter, the common law duty of care and skill with diligence is quite lax. The directors of the company deligate their responsibility to officers of the company. Management makes decisions and the board as a formality approves the decisions. Any questions arising are referred back to management.

The end result is that boards of directors often do not have the necessary information on which to supervise management. The only information they get is filtered by management. The director being minimally compensated, infrequently called upon and usually being a friend of the chief executive cannot hold corporate officers accountable. In the United States, Lord Boothby has described the role of the outside director as follows;

> 'No effort of any kind is called for . . . you go to a meeting once a month in a car supplied by the company. You look both grave and sage, and on two occasions say 'I agree', say 'I don't think so' once, and if all goes well, you get $1,440 a year. If you have five of them it is a permanent hot bath.' (59)

The courts have never denied the liability of directors in negligence for failure to act with care, skill and diligence. However, in any attempts by shareholders to hold directors liable, the shareholders invariably lose. The courts have been reluctant to hold directors liable because to do so, in the words of Lord Hatherley 'would make his position intolerable'[(60)] and deter men of quality and integrity from accepting directorships.

Another problem is that it would be difficult to lay down precise rules to govern the conduct of businessmen as their responsibilities and degree of care and skill must vary from company to company depending on the size, nature of the business and experience as well as the background of individual directors. In the words of Lord McNagten in Dovey v. Cory,[(61)]

> 'I do not think it desirable for any tribunal to do that which parliament has abstained from doing - that is, to formulate precise rules for businessmen in the conduct of business affairs. There never has been and I think there never will be, much difficulty in dealing with any particular case on its own facts and circumstances and, speaking for myself, I rather doubt the wisdom of attempting to do more.'

Thus, the standard required is of reasonable care to be measured by the care an ordinary man might be expected to take in the circumstances on his own behalf.[62] This relaxed requirement on directors has enabled directors to occupy positions without taking responsibility for them. Individuals hold many directorships and cannot acquaint themselves with the activities of all the companies.

In East Africa, an emperical study in Kenya in 1965 revealed that twelve directors of a Kenya company, Consolidated Holdings Ltd., held between themselves 157 directorships.[63] A list of Kenya's 'top fifty directors' for 1968 has at the top a director holding 43 directorships. Six had twenty each and the lowest on the list had nine. The result is inefficiency.

In other countries, there have been legislative and judicial attempts to upgrade the duties of directors.[64] In the United States, since the 1960's there has been increasing pressure on boards of directors to exercise a meaningful check on management conduct.[65] The Securities Exchange Commission (SEC) initiated investigations in some large corporations and in addition, there was increased concern on the po-sibilities of private plaintiffs successfully suing negligent directors under securities laws. By 1975 commentators could talk of the 'age of corporate litigation' and go in detail to explain personal financial risks and costs to a director who failed to monitor management.[66] Corporations took out insurance policies covering directors in case of liability.[67] Time seemed to have come when 'no men of sense would take the office if the law imposed upon them a guaranty of the general success of their companies as a penalty for any negligence.'[68]

While it is undesirable to deter men of competence from accepting directorships, it is quite legitimate to question whether it should be acceptable to allow such men to lend their names to corporations and allow the irresponsible activities of management to pass unchecked. Corporate decisions have significant impact on society and those with at least theoretical ultimate control over those decisions ought to be held accountable. Directors must be required to make responsible decisions and 'a decision is responsible when the men or group that makes it has to answer for it to those who are directly or indirectly affected by it.'(69)

In East Africa, the level of business sophistication varies widely from small local business to large public and often foreign owned and controlled corporations. Directors are of varying qualities ranging from the partially illiterate on boards of small companies to the professional and experienced that manage large multinational corporations. Thus, the standards set by the law must vary accordingly if they are to reflect the commercial realities.

The power to vary the standards, therefore, must remain in courts in order to maintain flexibility. The best way to do this is to impose strict liability for negligence without resorting to 'gross or culpable negligence' and leave it to the individual directors to prove that because of their different experiences, background and competence, they could not be said in the circumstances to have been negligent. This would impose a higher standard of duty of care but at the same time allow for flexibility. This would assist in allocating fault which is an essential ingredient of building a credible, healthy society. Such a measure would take into account the degree of sophistication among businessmen; especially foreigners who control multinational corporations would be distinguished from local simple businessmen and each would be held liable depending on the circumstances, the nature and location of the business. The individual responsible for failure to observe the duty of care to the company (ie. the shareholders, employees, consumers and the nation as a whole) would be made accountable.

CRIMINAL LIABILITY

Corporate officers and directors either because of action or omission have been able to cover their faces behind the corporate 'bureaucratic fog' and made it significantly difficult for the legal process to fix blame on any one. Fixing responsibility on individual managers and directors has not received sufficient attention from the law makers.

There are indications that in the United States holding directors criminally liable is taking an upward trend. 'Recent developments, however, suggest the emergence of a zest for penetrating the bureaucratic fog to impose personal accountability. From pollution control, to anti trust, fraud, occupational safety and health and beyond, we find the government directing its enforcement efforts not merely to the organization but to its officers as well.'[70]

Traditionally, corporate officers have been held criminally liable only in cases where they either knowingly participated or aided and abetted. They have also been held liable for public offences that are a result of administrative regulations that carry light penalties and no moral disapproval. Relying on the doctrines of vicarious liability and omission of duty provides a base for holding officers and directors criminally liable.

In a recent American case, United States v. Park,[71] the court demonstrated the need for criminal liability of corporate executives for actions or omissions they have traditionally not accounted for. In that case, Park, a President of a $2 billion food chain store was found guilty of criminal negligence under the 1938 Federal Food Drug and Cosmetic Act. The court held that he was in a position of responsibility and having failed to observe proper sanitary conditions, he was liable. The argument that the chain of food stores was so large that he had assigned some of the responsibility to 'dependable subordinates' was rejected and Chief Justice Berger said;

> 'The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than that the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.' (72)

The significance of the decision lies in the fact that there was no causal link that could specifically be pointed out between the wrong doing and Park's omission. According to the court, failure to observe a general duty was sufficient. As it has been said, 'the court seems to have said that the requirement of a causal link may be satisfied by showing that a violation occurred and that the officer had the power and the responsibility to prevent it.'[(73)] The defendant thus has the burden of showing that he was either powerless or not responsible in his defence. This is a welcome trend that will remind those in responsible positions, making decisions that affect the lives of many to develop some consciousness and fulfill their obligations to society.

Such a policy may understandably be said to be an intrusion on the corporate personality. It may well be but it is nothing new. Under certain circumstances, public policy may require disregard of the corporate entity and instead look to the 'economic realities behind the legal facade'.[(74)] There have been both statutory and judicial efforts to 'pierce the corporate entity' when public policy demands it. All the East African companies acts have always provided that members of a company will be held personally liable should their number fall below a certain minimum.[(75)] 'Fraud' is expressly provided for as a ground for holding individuals liable irrespective of the corporate personality.[(76)]

Holding and subsidiary relationship companies provide potential for abuse and the companies acts provide that in some cases, their separate personality will not be recognised. An American court has said; 'If the corporate business of a subsidiary and that of the parent company are so hazily confused that the officials themselves do not know which is which, the legal fiction of separate corporate entities evaporates and courts will deal with the realities of the situation.'(77)

Beyond the companies acts, the corporate 'veil' has been 'lifted' in several instances, for example for taxation purposes.(78) Transactions involving land and 'Africans', it has been held, justify ignoring the corporate personality.(79) In the United States, the courts have often said in clear terms that they will not hesitate to pierce the corporate veil if recognising the corporate entity will defeat justice. In Sin Store Eacho, Parker J. said;

> 'It is well settled that courts will not be blinded by corporate forms nor permit them to be used to defeat public convenience, justify wrong, or perpetuate fraud, but will look through the forms and behind the corporate entities involved to deal with the situation as justice may require.' (80)

The English and the East African courts have not been so explicit but they have lifted the veil where to do otherwise would perpetuate fraud. A court for example would not tolerate a situation where a sole shareholder of a company steals from his own company and keeps quiet. Perhaps the most famous English case on this is Gilford Motor Co. Ltd. v. Horne,(81) where the defendant incorporated a company to avoid his obligations under a contract. Lord Hanworth M.R. reviewed the circumstances and concluded;

> 'This company was formed as a device, a stratagem, in order to mask the effective carrying on of a business . . . . The purpose of it was to try to enable him, under what is a cloak or a sham, to engage in business . . . .' (82)

In Jones v. Lipman,[83] Russell J. echoed the same views when he said;

> 'Those comments (in the Gilford case) on the relationship between the individual and the company apply even more forcibly to the present case. The defendant company is a creature of the first defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity. The case cited (the Gilford case) illustrates that an equitable remedy is rightly to be granted directly against the creature in such circumstances.' (84)

Thus, while imposing criminal liability on individual corporate directors and executives may be an intrusion on the corporate personality, it is nevertheless a desirable intrusion in the public interest as has always been the case when public policy demands it.

CHAPTER V

APPLICATION IN EAST AFRICA

The previous chapters have concentrated on the need for fundamental reforms in the structure and philosophy of company law. The need for re-examining the theory and purpose of the law relating to large public companies has been emphasised. The changes and law reform proposals in different parts of the world - Western Europe, Britain and North America, have been reviewed. The success of the reform measures in these countries has been evaluated. The purpose of this chapter is to relate the proposed changes to the circumstances of East Africa and suggest ways and means of adopting them into the law that will reflect not only the commercial realities of the developing economies but also the aspirations and values of the people of East Africa.

Reform measures in other countries are no doubt valuable as a guide and means of assessment of the practical application and possible consequences but their value is limited by several factors which in general terms are a result of differences in economic and political history. Thus, the diversity of socio-economic and political systems makes the inquiry into company law reform doubly difficult since law reform proposals must have regard to these differences in order to provide a sound base for practical law reform.

The task of company law reform in East Africa is even more difficult due to lack of sufficient information on the operation of companies under the existing structure. There have been no serious studies on company law reform as such in any of the East African countries. There is even very little comment on the subject from academic circles. The available limited literature has not questioned the difficult conceptual issues that explain why companies have failed to observe their obligations to society in terms of social responsibility.

The studies have focussed on isolated aspects of company law reform like worker-participation but have not provided a sound philosophical base for a total re-examination of the theories on which company law is built. Piecemeal reform proposals without regard to the theories which form the basis of the law are bound to be lacking in consistency and hence the efforts of the previous chapters to provide a workable framework.

An important consideration to bear in mind is that East Africa still remains a neo-colonial economy which according to Shivji 'essentially remains a trading economy. It remains an export-oriented economy whose industrial units are vertically integrated with the parent industires in the metropolis with no or very little integration with other industires or sectors of the neo-colony itself.'(1)

From this remark, it follows that industrial development in East Africa is merely an extension of lines of production or branch plants of multinational corporations that are situated in Europe, America, Australia and Japan. The power of these multinationals cannot be ignored. As Mutharika has put it;

> 'the power of multinational corporations is so great in relation to individual African countries that we can compare them with a giant octopus, spreading its hands in every conceivable form of economic activity thereby preventing the growth of indigenous enterprises. What it fails to catch with one hand, it will certainly do so with the other hands.' (2)

These multinationals have huge interests in East Africa and major areas of activity include import and export business; wholesale and retail, including supermarkets; transport and communications; banking and insurance, manpower and training; tourism; mining and extractive industries; petroleum industry; manufacturing and processing industries as well as agriculture.(3)

There are many multinationals operating in East Africa and only a few of them can be mentioned here. Lonrho Group, a British owned corporation had a turnover of about US $550 million in 1972 and nearly 80% of this was produced in Independent Black Africa.(4) Lonrho operates in East Africa through its subsidiary, Consolidated Holdings Ltd., which among others owns The Standard, a widely circulated newspaper in East Africa. In Kenya, the company is engaged in almost all the major aspects of the economy. Besides Consolidated Holdings Ltd., the group has interests in the Express Transport Company, Kenya Paper Mills Ltd., Commercial and Industrial Combine Ltd., and a variety of others. Activities include steamship agency, export and importing, plantation farming, refrigeration and cold storage, electrical supplies, flour milling, fish marketing, building and construction, warehousing and hardwares.(5)

The Mitchell Cotts Group is firmly entrenched in East Africa. Its intersts in Kenya include Packers Ltd., Sunglora Co. Ltd., British East Africa Corporation - General Merchants, Agents and Engineers, Mitchell Cotts Estates Ltd., which is largely engaged in farming of sisal and livestock, E. Epsterin and Co. Ltd., General Merchants and Manufacturers; G. North and Son Co. Ltd., in agricultural machinery and equipment; Simpson and White Law Ltd., in agricultural seeds and Michell Cotts Pyrenthrum Ltd. The East African chain of companies are all under the Cotts Holding (E.A.) Ltd. Company. Their financial interests in Uganda are also huge.

The United Africa Company Group is largely concentrated in West Africa but has interests in East Africa. It is under the control of Unilever and their interests in East Africa extend to timber, plywood, food processing, departmental stores, cosmetics and pharmaceuticals, weaving, textiles, transport and printing.

Tate and Lyle is another multinational whose empire in East Africa is managed by the East African Storage Company Ltd. (Kenya), engaged in sugar refining, transport and handling, shipping, engineering, retail trading and consultancy services.

A host of other corporations are engaged in transportation, tobacco, petroleum, hotels, soft drinks, breweries, food and dairy products and minerals. The oil companies include Shell, Standard Oil, Mobil, Caltex, Esso, Agip, Total and the U.S Gulf Oil Corporation. Beverages companies like Coca-cola, Pepsi-cola, Fanta, Sprite and Scheppes are scattered in the region.

In Kenya, estimates of the book value of Direct Foreign Investments 1971/72 represented 21 per cent of the country's annual G.N.P. This suggests that multinationals play a significant role in the country's economy. This is confirmed by the Kenya development plans. Under the 1970-74 plan, 52 per cent of foreign exchange requirements for the plan were expected to come from private foreign investment.[6] The 1974-78 plan expected the inflow of capital to rise to K 28 million annually contributing over 10 per cent of capital formation.[7]

The 1971/72 book value estimates suggest that U.K. based multinationals held investments worth K 87 million, totalling 67 per cent of total foreign investment. U.S. based multinationals held K 26 million worth of investments forming 20 per cent of foreign investments. German companies held investments worth K 6 million being 5% of foreign investments. Next were the France based corporations investing K 5 million forming 4 per cent, and finally Japan with 1 million, forming 1 per cent. Multinationals from the five countries had a total of investments worth K 125 million.[8]

Multinational investment projects accounted for about 60 per cent of investments in Kenya in 1967 and 50 per cent of this went into manufacturing. The 1970 UNCTAD study noted that the multinationals played a big role; not only in manufacturing, but in primary and tertiary sectors also.'[9]

These are but a few of the major multinational corporations that control the East African economies. The various ways and means of controlling multinationals are beyond the scope of this chapter. Whatever the merits and demerits of the control measures, it is quite clear that multinationals are actively engaged in many economic activities in East Africa and will continue to do so in the foreseeable future.

Even Tanzania which has adopted a socialist political philosophy has not done away with the multinationals and in any event, private enterprise continues to prosper in Tanzania. Thus, while restrictions might be imposed on multinationals intending to operate in East Africa and existing subsidiaries nationalised, it is clear that all these measures will only be to a limited extent. Nationalisation after all has only been partial leaving often up to 49 per cent of the shares to the original owners. Foreign investments will continue to be allowed if not encouraged because of compelling reasons like technology, managerial expertise and capital investment all of which are provided by multinationals.

It is relevant at this point to discuss nationalisation as a means of injecting social responsibility values into the corporate entities and examine the problems involved which confirm the view that private enterprise is still an essential part of the East African economies and may only be damaged by continued irresponsible corporate activities. This being the case, company law reform proposals can play a significant role if implemented to shape the attitudes, values and the future of East Africa.

WHY NATIONALISE?

It has been argued by economists for long that a key solution, although by no means the exclusive solution, to problems of development is the encouragement of foreign capital through investment. This it is said would result in strengthening local currencies, providing governments with more revenue through taxation and stimulate economic activities that would lead to employment opportunities, reduction on imports and increase exports and thus save the badly needed foreign exchange. This is acknowledged by many even at the time of announcing nationalisation policies. For example, President Nyerere referred to this argument when he, in 1967 nationalised a number of foreign owned companies in the key sectors of the economy. In the same policy statement, he noted that foreign investment would continue to play a significant role in the Tanzanian economy in the areas not affected by nationalisation.(10)

A Tanzanian economist, referring to the economic argument, noted 'this argument explains why developing countries in the world are anxious to create a climate favourable to investment, to make laws, public declarations or even entrench clauses in their constitutions guaranteeing that private investment is welcome and will be safeguarded. To take over private assets, and in particular foreign assets, is to kill the goose that lays the golden eggs.'(11)

Developing countries would be the least expected to 'kill the goose that lays the golden eggs'. However, since the birth of soviet Russia, nationalisation has become an everyday event ranging from countries like Britain and extending to Europe, Asia, Africa and Latin America. Reasons for nationalisation vary from country to country and from time to time but they all aim at the same goal - economic and social development.

The new nations, sensitive about their hard won independence feel that if control over their economies remain in the hands of foreign persons who invariably have been entrenched in the dominating positions by former colonial or neo-colonial ruling regimes, independence remains a farce. This is highlighted by the fact that some of the foreign 'persons' are big and exploitive, controlling the vital elements of the economy. In Latin America for example, Goshko has noted;

> 'Historically, the picture presented by many American firms was one of oppressive bigness, of rapacious spoiling of natural resources, of hunger for excessive profits, of unwillingness to hire Latin Americans for responsible positions. From this came the present nationalistic demand for expropriation and curtailment of American interest.' (12)

Thus, some policy considerations override the economic argument. In the Arusha declaration, the Tanganyika African National Union (TANU) manifesto observed;

> 'How can we depend upon gifts, loans and investments from foreign countries and foreign companies without endangering our independence? The English people have a proverb which says; "He who pays the piper calls the tune." How can we depend upon foreign governments and companies for the major part of our development without giving to those governments and countires a great part of our freedom to act as we please? The truth is that we cannot.' (13)

This nationalism has been a major force and indeed Nyerere said; 'Our purpose was thus a nationalistic purpose; it was an extension of the political control which the people secured in 1961.'[(14)]

The policy of Africanising the economy is thus nothing more than economic nationalism which has nothing to do with ideologies of socialism, capitalism and communism. Indeed it is common in countries pursuing any of these political ideologies; the difference being only a matter of degree. Even the United States is very concerned about foreign holdings of agricultural land.[(15)] This explains why, both Kenya and Tanzania, though with different political ideologies have displayed strong economic nationalism through the use of state corporations, co-operatives, statutory boards and encouragement of local entrepreneurs.

The problem, however, is that because of limited local capital, it is difficult to control the economy through domestic private enterprises. President Nyerere has argued strongly in realistic terms that the only choice is to control the economy through some state agency or other collective institution.

> 'The question is not whether nations control their economy, but how they do so. The real ideological choice is between controlling the economy through domestic private enterprise or doing so through some state or other collective institution.
>
> But although this is an ideological choice, it is extremely doubtful whether it is a practical choice for an African nationalist. The pragmatist in Africa - the man who is completely uncommitted to one doctrine or another, but claims only to deal with the situation as it is will find the real choice is a different one. He will find that the choice is between foreign private ownership on the one hand, and local collective ownership on the other. For I do not think that there is any free state in Africa where there is sufficient capital, or a sufficient number of local entrepreneurs, for local based capitalism to dominate the economy. These are the facts of the African situation. The only way in which national control of the economy can be achieved is through the economic institutions of socialism. (16)

These facts have dictated the establishment of state corporations and co-operatives in Kenya, Uganda and Tanzania but private foreign investment has continued and the threat of nationalisation has not eradicated corporate social irresponsibility although no doubt its contribution has been substantial.

Full nationalisation in the key sectors of the economy has not been possible for various reasons including shortage of managerial expertise, capital, highly specialised scientific skills and marketing experts. The solution, therefore, has been partnership between state corporations and multinational corporations and continued employment of foreign consulting firms.[17]

STATE CORPORATIONS IN PARTNERSHIP WITH MULTINATIONAL CORPORATIONS (MNCS)

Partnership between state corporations and the multinational corporations has taken many forms. Multinationals participate with state corporations in the equity capital of subsidiaries established for the purposes of specific projects. In many cases, the MNCs are quite prepared to participate as minority shareholders. In some cases, the MNCs simply provide capital in the form of loans. This is common with many firms like the National Industrial Credit (EA) Ltd., and the Credit Finance Company which have outstanding loans in all the three East African states.

Some foreign finance companies have combined together with state finance corporations to provide capital and stimulate economic development. Tanzania Development Finance Ltd. is such a company. The shareholders in the company include the National Development Corporations (NDC) of Tanzania, the Commonwealth Development Corporation of Britain, the Netherlands Finance Company for Developing Countries of Holland and the German Company for Economic Cooperation of West Germany.(18)

The third form of partnership is where the state corporation or its subsidiaries enter into a management or service agreement with a multinational. Such management/service agreements include general management, consultancy, licensing, marketing and purchasing agreements. All these three forms of agreement are not mutually exclusive and hence a management agent may also provide for equity participation and consulting services.

Payment for the services may take several forms. Commission fees, percentage of net sales or turnover, percentage of profit before or after taxation and depreciation, fixed fees, purchase of machinery and royalties for patents and trade marks.

The multinational corporations themselves have a lot to gain from such partnerships. The 'third world' countries in which such partnerships are common are an important source of raw materials, they have an expanding market for both consumer and capital goods and they rank high as profit earners for MNC's. Thus, they would not risk losing such important areas of trade.

Under the formal colonial rule, the multinationals had the full support of their respective countries and could exploit resources without checks. With the development of nationalism, the world experienced a new international economic and political order to which multinationals had to respond. Socialist states provided to the third world an example of state ownership as an alternative to private ownership. States intervened in the economy and total nationalisation did not seem impossible. The multinationals, aware of their monopoly of science and technology, their financial autonomy, their size, military and political power to influence not only the governments in the third world but their home governments as well, quickly realised that it was not necessary to have absolute ownership of the means of production. What was important was management and control. Partnerships sufficiently provide not only for the management but control of the enterprise even as a minority shareholder.[19]

Although some multinationals expressed concern fellowing nationalisation programs, the far sighted, well established corporations have been calm in their response and those which had left have returned. Indeed, 'The Economist', following Zambia's nationalisation program cautioned;

> 'It will be a pity if the realities of President Kaunda's move last week to nationalise Zambia's copper mines are overlooked in a useless debate on the ethics of it. It will be a tragedy if potential investors in Africa are mistakenly led to believe that there is no longer a place for them there. Although doing business in independent Africa now calls for a high degree of

> political acumen, the opportunities available to those who possess it are good. The risks are greater than in more settled parts of the world but so are the returns.'

The paper went on the comment that the concern of businessmen should be the future political and economic stability rather than the mechanics of compensation. After all, minority shareholding, amounting to 49 per cent in an enterprise whose success would be underwritten by the government might be more valuable than 100 per cent interest that might be subject to political concern. The chairman of Lonrho Ltd. declared that he favoured government participation. 'We welcome government participation in these businesses for in our view, the very fact that the government will be a substantial shareholder should assist in their future stability and expansion.'[21]

Through partnerships, multinationals are enabled to raise local capital, add it to the profits already made before nationalisation and continue to do business without importing capital. In this way, the old markets are retained and new ones opened with the backing of the state. For example, in Tanzania, when the Overseas Construction company of Holland (OCC) managed MECCO (Mwananchi Engineering and Construction Company), OCC used the contacts to get contracts for its parent company and employed MECCO at cheap rates as subcontractors. An Isreali company, Mlonot, when managing Kilimanjaro Hotel, switched clients from Kilimanjaro to its own hotel, the African Vacation Village.

A foreign company in partnership with a state corporation enjoys the benefits of high protective tariffs, quotas, and tax concessions. The partnership is considered a state corporation and thus is given priority in government contracts. A managing agent is in a very good position to secure the market for the products of the parent company and can mobilise loans easily from nationalised banks. In this way, the managing agent gets contacts with important political figures and hence ensures political security for the company and the sympathy of the government against high wage demands by employees.

The state corporations and therefore the host countries have a high price to pay for the partnership. The managing agents are branches of global groups and are thus in position to manipulate prices and over invoicing. Then there are payments for the services and royalties. The multinationals have in fact even engaged themselves in mismanagement practices. OCC, the management agent of MCCO in Tanzania, because it was paid a fixed fee on all the contracts, took on contracts even where MECCO would certainly make losses. They over invoiced and bought defective products from the parent company at three times the market price of suitable products. When all this was discovered and they were kicked out, they were heavily compensated.

Mlonot, apart from diverting clients from the Kilimanjaro Hotel to their own Village, they indulged in accounting multipractices. The partnership required the managing agent to train Tanzanian managers over a period of time. The Tanzanian government paid for all training expenses but after 9 years, no single Tanzanian had been trained to occupy a managerial position and when the partnership agreement was terminated, Tanzania rushed abroad to recruit managers.

The investment criteria for multinationals is maximisation of profits. The state corporations aim at socio-economic development in the long run. Thus, their investment criteria are at variance. Through partnerships, the multinationals are still in a position to shape the state tastes and encourage luxurious domestic consumption spending. They continue to import irrelevant technology that renders many unemployed without increasing efficiency. A case that comes to mind is the Canadian firm that built the Dar es Salaam

Bakery which apart from the commercial profit for the firm that built it and the suppliers of the machinery is a disaster. It cost Sh 17.4 million, Sh 12 million more than the cost of 10 small plants with the same production capacity. It has a very high demand on foreign exchange and has considerably reduced employment. The capital cost per job in the semi-automated bakery is Sh 300,000 instead of Sh 15,000 in the traditional type bakeries. The demand for skilled manpower and for the time being, foreigners is higher. The Bakery is to supply half the market of the city but total production is processed through one oven and hence, in the event of a technical problem, the city would be without bread.(22)

These are a few examples that illustrate the facts of Africa. Despite nationalisation programs, foreign companies still have a great role to play in the East African economies. Partnership agreements have not proved to be so successful as to warrant total exclusion of total ownership by foreign firms. Even Tanzania, despite a commitment to socialism and participative management still has western management systems that are elitist and hierarchical. Consultants like the McKinsey Group who have been criticized in Britain and America for their 'known distaste for any kind of committee work and their tendency to see individuals as little more than statistics in a balance sheet'(23) are still imployed to organise management. The governments already have a lot of managerial problems in the state corporations to such an extent that they are not in a hurry to take over all firms.

Any company law reform proposals, therefore, must have regard to these facts. Local private enterprises are developing. The legal structure must build in them the necessary valúes before traditions of corporate profit maximisation to the total disregard of its social consequences are firmly entrenched. At the same time, the law should enable them to become strong and viable enterprises that can survive the competitive commercial world. It would not be wise to have two separate companies acts one governing foreign companies and the other local companies. Discriminatory legislation in all forms must be rejected. After all, local companies too are capable of misusing their corporate power. In the final analysis, the legislation must be a compromise to accommodate and reshape corporate practice among foreign companies while at the same time, it enables small local companies to prosper.

The goal of legislation should be to make companies realise their social obligations and make corporate executives develop a sense of corporate consciousness so that before they take decisions that affect the workers, the consumers, the shareholders and the country at large, all these interests are taken into account and balanced. Company law reform cannot only aim at building a structure that will cater for corporate social responsibility but must also have regard to the degree of sophistication of the people who are subject to it. It is this element that we should turn to.

COMMERCIAL RELEVANCE

Some may argue that given the level of sophistication of the East African population, any legislation should be direct, simple and clear so as to be understood by those it is to regulate. Indeed, a Tanzanian official has written;

> 'people have not yet come to appreciate the advantages of such commercial enterprises as companies and they are not accustomed to working under conditions such as are imposed by the present company legislation. What in 1929 suited a country as wealthy and commercially sophisticated as England then was, did not necessarily suit the commercial needs of Tanganyika.' (24)

It is noteworthy that the same official observed that 'wholly owned subsidiaries of massive companies of world reknown whose shares feature prominently on London, New York and other stock exchanges appear in the register of companies in Tanzania.

With such a divergence in the sophistication of the people that are subject to the legislation, the question is whether complexity as opposed to simplicity is more likely to protect all the interests that have a stake in the company. Almost 75 per cent of the commercial activities in East Africa are in the hands of a few sophisticated people who are well versed with the law and can manipulate finances to exploit the less sophisticated public.

Professor Gower in his report on company law legislation in Ghana addressed himself to this question. He was of the view that whatever considerations in other branches of the law, when dealing with abstract creatures of the law as is the case with companies, it is not possible to have simple legislation without leaving loopholes that can be manipulated by the few sophisticated people to exploit the majority. He said;

> 'There are certain features of the social scene which are of direct relevance . . . . Another is the enormous difference in education and sophistication among the population. A minority (but a rapidly growing minority) are highly educated, the majority (as yet) have little advanced education and many (but by no means all) of these do not know the ways of commerce. The latter constitute potential victims of the financial machination of the few among the minority who are lacking in proper scruples. To these unscrupulous few are added a scattering of undesirable expatriates, attracted to Ghana by a possibility of easy picking.
>
> The considerations mentioned (above) present the framer of a company law with a dilemma. If he suggests a law which will be sufficiently simple for the small African business he will inevitably produce something which is insufficiently advanced for the expatriate concern and for the sophisticated minority. Moreover it will almost inevitably then omit safeguards which are vitally necessary if the unsophisticated majority are to be protected against the unscrupulous few.' (25)

These observations are equally true in East Africa and the governments have a duty to protect the general public from the machinations of the sophisticated few by passing legislation that is comprehensive to avoid obvious loopholes. The argument that a country like Ghana should start with simple legislation and gradually develop a more complex one as the industry and commerce develop was rejected by Gower who observed that having had the benefit of learning from experience of others, it would be inexcusable to introduce a law based on the assumption that abuses that have occurred elsewhere will not occur in Ghana. In his view;

> 'As empahsised, it is just not true to suggest that Ghana is 'primitive'. Admittedly a great many people are still lacking in education and commercial sophistication, but a great many are not. There are a number of people, both expatriates and Ghanians, who are alive to all the tricks of the trade and acquainted with all the flows and loopholes in the existing law. A few of them are not above taking advantage of these loopholes; some have already done so. The fact that the majority of the population are less sophisticated is a reason for inserting modern safeguards - not a reason for omitting them. The majority are potential victims who need every protection.' (26)

This argument again is valid for East Africa. In fact, before the Gower report came out, a Tanzanian Minister argued on the same lines. He said;

> 'The fact that many people who may become investors in companies here are uneducated and have not the experience of companies law is in fact a reason for their being given even stronger protection if that could be given, than is given in other countries.' (27)

Company law legislation, it is submitted, should not avoid the necessary complexities which are unavoidable if loopholes capable of being abused are to be sealed. Comprehensive legislation is needed if all the interested elements of society are to be protected by company law.

A valid criticism of comprehensive company legislation is the cost of compliance. The services of professional people -lawyers and accountants are necessary and the bill is high. This, one must concede, is a live problem but one with which companies must live. The benefits of comprehensive company legislation are worth the price. However, the costs could be made bearable by limiting the elaborate and comprehensive reforms to those companies that have already become viable. For example, requirements for worker participation could be limited to companies employing more than twenty people. In this way, the small enterprises could be saved the expenses of implementing worker participation. At the same time, the knowledge that as they expand, they will have to implement the worker-participation policy would enable such small enterprises to make the necessary preparation as they plan future expansion programs.

Similarly, requirements for disclosure as elaborated in Chapter III could be limited to companies with substantial assets. Such disclosure requirements should be limited to companies whose assets are worth $50,000. This would affect the companies whose decisions have a significant impact on society while at the same time reminding the smaller companies that they have a duty to take responsible decisions and sooner or later as they expand, they will be subject to such public scrutiny as well.

To avoid these elaborate requirements, some public companies, including subsidiaries of multinationals might opt to incorporate many small companies and hence fall within the exempt small companies. This, however, can be avoided by legislation which would require all subsidiaries of public companies to be subject to the requirements irrespective of their size or number of employees. To avoid public companies incorporating private companies that would in turn incorporate small subsidiaries, public companies should not be allowed to incorporate private companies. These regulations would ensure compliance with the disclosure requirements by all subsidiaries of multinational corporations, public companies and private companies whose assets exceed $50,000.

It should also be pointed out in passing that although the state owned corporations are set up by special statutes and are therefore in most cases not subject to company legislation, they are often as capable of abusing their corporate power as the privates corporations. This is especially so where 49 per cent or even more of the shares are held by other multinational corporations. Hence, they should also be made subject to the worker participation and increased disclosure requirements.

Having discussed the relevant factors to bear in mind when proposing company legislative reforms, it is now necessary to return to the reform proposals and reflect on them one at a time.

WORKER PARTICIPATION

The progress that has been made in many countries in Western Europe to provide for worker participation in the enterprise has been a result of the recognition of the value of labour and the need for a new 'social contract' which is imperative if society is to tackle the problems of strikes, lagging productivity, inflation and the redistribution of wealth. The approach is still based on private ownership of property but has moved from being adversarial to the collaborative mode in industrial relations.

The approach has found strong support in the proposed European company. The European commission has at all times supported worker participation and has introduced legislation aiming at achieving that objective. The commission insists that the goal of balanced economic growth and social justice will not be achieved unless 'government authorities and the two sides of the industry can arrive at democratic decisions.'[28] The views of the commission on company law reform and worker participation have been clearly stated.

> 'The way in which a legal system structures industrial and commercial enterprises is intimately connected with fundamental elements in the general social and economic policies adopted by the society in question . . . . the time is ripe for the reform of certain social institutions, companies included, to take account of some important evolutions . . .
>
> The first evolution is the increasing recognition being given to the democratic imperative . . . . In particular, employees are increasingly seen to have interests in the functioning of enterprises which may be as substantial as those of shareholders and sometimes more so.' (29)

In North America, the objections to employee representation on decision making boards are based not so much on the grounds that worker participation in Europe has not improved industrial relations, but rather that there are differences in the historical development of the systems of industrial relations; such that even if worker participation were successful in Europe, it would fail in North America. Both management and trade unions regard collective bargaining as the most suitable system of industrial relations. Strikes, lockouts and picketing are the weapons of labour. The bargaining power of each side determines terms and conditions of employment. Whatever the merits and demerits of this tradition based on confrontation, it is not a tradition of East African industrial relations and given the waste that must follow from the struggle, each side attempting to prove its strength, it is a tradition that is neither possible nor desirable given the circumstances of East Africa. Even if it were possible to go on strike without government intervention, the East African workers would not be able to go on strike for six or eight months that seems to be a normal duration of a strike in North America. In East Africa, the worker and the family would starve. Besides, economies of developing countries cannot withstand such prolonged strikes. Although collective bargaining was encouraged as the basis of industrial regulation in all the East African countries since pre-independence days, national involvement in and concern about the smooth running of industrial relations are urgently felt by the governments. In a developing country, a minor breakdown in industrial relations may cause a political crisis and panic in investment. The negotiating machinery is not sufficiently established to absorb labour problems.

Thus, labour relations in East Africa have always been based on a combination of the collective bargaining system and the involvement of the government, and hence unions never became strong enough to wield the necessary power for collective bargaining. Under colonial rule, trade unions were viewed with suspiscion and regarded as a threat to the political regime. This view has not changed since independence. This is because the trade unions have a history of political activism.

The Kenya labour department in the 1940's reported that there were 'only some half dozen trade unions not one of which was functioning as a trade union should . . . The African found it difficult to grasp that a trade union was not a political weapon.'(30) The late Tom Mboya, Secretary of the Kenya Federation of Labour, who emerged as a prominent politician in Kenya, confirmed this view. He wrote;

> 'Most of us in the trade unions felt that the movement must identify itself with the nationalist cause. If it fails to do this, it runs the risk of being accused of becoming an imperialist agency. A number of trade unionists who were not sensitive to this fact and concentrated only on industrial relations suffered this fate.' (31)

The threat of labour to political regimes has necessitated legislation giving the relevant minister the discretion to declare a strike unlawful. In Uganda, the industrial court which acts as the arbitrator with quasi-judicial powers has been a subject of attack by the government leading to the murder of two successive chairmen of the court by agents of the government.

In Tanzania, workers are forced to contribute to a union fund which supports 'union leaders' appointed by the government and not the workers to act as 'industrial relations officers' and 'discipline' workers instead of supporting their cause. The government instead emphasises worker participation although there is no legislation to enforce the scheme.

Under these circumstances, it is imperative to develop an industrial relations policy whose long term effect should enable the workers to identify themselves with the goals of economic development and enable them to appreciate the value of their labour. This cannot be achieved if employers continue to regard employees as tools of production. The long term strategy must aim at avoiding waste resulting from harmful industrial disputes and should also promote human respect and dignity. Worker participation although difficult to implement in East Africa promises to achieve these results and should therefore provide the basis of industrial relations policy. Employee representation in the decision making process of companies requires fundamental changes both in the structure and functions of company boards.

COMPANY STRUCTURE

The real problem is where participation should begin. It is questionable whether full sovereignty by workers is the most equitable way of running the economy. On the other hand, a suggestion box or occasional inquiry by a manager cannot on the balance be regarded as worker participation. Such systems do not allow discussion since employees are not present where decisions about their suggestions are made. Employees will not know why decisions about their suggestions were either rejected or accepted. Managers choose what to discuss and their preferences prevail.

Power should be apportioned according to relative contribution to production. Capital labour as well as society contribute to the success of any enterprise. Domination by either labour or capital should be rejected. The problem here is how to determine the proportion of power to each element in production. Parity could lead to conflict of interest resulting in inefficient running of sophisticated modern business concerns. On the evidence available, this is not necessarily the case. There is room for compromise.[32]

Board level representation based on the German approach seems to be appropriate. All companies employing more than twenty workers should be required to have an equal number of shareholder and employee directors and a third group chosen jointly by both sides, thus using the 2 x + y formula.[33] The candidates for the third category may be proposed by the shareholders, the management board or the employees but only members of the policy board have the power to elect the third category who presumably would be independent of both management and employees and hence protect interests of the general public.

The powers and duties of the boards should be well defined by law so as to avoid 'interference'. A policy board should control the strategic decisions that affect the future of the company. It should appoint the management board that should in law be responsible for the day-to-day management of the company under the supervision and control of the policy board. Matters which the policy board has the competence to decide should be referred to the board by management for decision.

Functions of the policy board.

(i) Appointment and fixing remuneration of the management board.

(ii) Setting the company's objectives and approving its strategic plans for expansion and contraction.

(iii) Measuring the performance of the management board and approving decisions as may be required under the Articles of Association.

(iv) Supervising the conduct by the management board of the company's financial affiars especially in regard to capital investment and allocation of resources within the company to meet the objectives of the company.

(v) Determining the policies on take-overs of and merging with other companies.

(vi) Studying and approving the company's report on the performance of its social obligations.

(vii) Convening general meetings of shareholders; and making recommendations to the shareholders on appropriate matters.

(viii) Setting policies for employment and personnel matters.

THE MANAGEMENT BOARD

A management board composed of executives appointed by the policy board should be under a chief executive. It is the management board that the law should assign the responsibility of managing the day-to-day affairs of the company. The responsibility of the board should be to manage the company like the board of directors manage companies under the existing structure only that their decisions would be subject to approval by the policy board where the new legislation specifically requires such approval. The duties of directors as existing under the law together with the proposed new duties regarding interests of employees, consumers and the nation at large should apply to the management board except where they are specifically assigned by legislation to the policy board.

Thus, subject to the overall control and supervision by the policy board, the management board has the responsibility to run the company. The board will act for the company in relation to third parties, keep proper accounts and prepare the annual report which must be submitted to the policy board for approval. The management board should be responsible to the policy board and supply the necessary information and cooperation to the policy board to enable it to perform its functions and fulfill its responsibilities. Members of the management board may serve on the policy board but because it is important that the supervisory board remain independent of management, the majority of shareholder representatives on the policy board should not be members of the management board.

The two-tier structure is essential for efficient management. It avoids the possible risk of having employee representatives on the management board agitating for the immediate interests of the employees without due regard to the long term interests of the company. The management board will thus be in a position to explain their policies to the policy board and ensure that their decisions will take into account all the interested parties. In these circumstances, there is no reason for assuming that employee representatives will either not understand or vote for the long term interests of the company. The employee representatives would then have an opportunity to explain the policies to their constituency.

To protect the interests of the company and ensure effective representation of the workers and having regard to the low level of education of the workers in East Africa, it would not be wise to legislate for election procedures. This should be left to individual companies with a general provision that all workers including middle managers have a right to elect and be elected to the policy board. The workers should also have the option to elect their representatives either from among themselves or union leaders. The workers thus would have a wider range of people from whom to elect those with management expertise and familiar with industrial relations problems which should ensure effective representation.

This arrangement might cause difficulties for corporations that have management service contracts with foreign corporations. The managing companies might prefer to use their own managerial systems. This, however, is a matter of contract. These corporations are normally state corporations set up by special statute and are not subject to company law. However, as indicated earlier on, these corporations too should be subject to these reform measures through the statutes that set them up. If worker participation is accepted as a desirable industrial policy and is translated into law, companies offering managerial services must comply with the law. The contracts are often for a short time and are designed to train local managers during the period of the contract. Local managers must be trained to accept and develop a desirable industrial policy. Thus, it is not desirable to hire the services of a managing company which has no expertise in the advocated industrial relations policy.

It is the duty of every corporation which intends to use the managerial services of a foreign corporation to employ corporations with expertise in worker participation. A corporation would ignore this to its detriment when the law on worker participation is made effective. There should be no problem getting corporations with such expertise. Many corporations in Western Europe already use participative management. The American corporations have branches in Western Europe and therefore must train their managers for such an industrial policy. The managers of corporations in Germany for example should not find it difficult to establish worker participation in their corporations in East Africa.

WORKS COUNCIL

Representation at board level without employee participation below the board would not be effective and would not have the support of all the workers. Without a legal requirement for works councils, they are likely to be ignored. In many countries where they are not ignored, they have no influence mainly due to the fact that they have no power especially when they are isolated from structures of collective bargaining.[34]

In Germany where they have a lot to do as already noted, they are considered useful and effective. Like in Germany, the obligation to establish works councils should be extended to all enterprises employing five or more people. Even such small enterprises should be required to allow workers to have a voice in the affairs of the company and prepare them for effective representation as the enterprise expands. This should also enable the managers to appreciate the contribution of workers to the welfare of the company.

The functions of the works council should be in areas of social concern like working hours, holiday arrangements, pensions and housing. The council should also deal with dismissals and terms of employment of the rank and file employees. On major plans like mergers or shut-down, the council should be consulted and their opinions submitted to the policy board where this is applicable. This avoids the possibility of managers taking decisions without employee representatives expressing their opinions.

Trade unions whose role today in East Africa is not clear could also participate at this level. As already noted, trade unions are not strong and where governments are not hostile towards them, like in Tanzania, they are used by the government to achieve its objective. In either case, they have not proved themselves to be useful to the workers. Representatives at the works council level could include unionists so long as it is left to the workers to elect representatives either from among themselves or the union leaders.

INDIVIDUAL RIGHTS

Employees must be encouraged to participate but they will not do so unless they are sure that they will not be victimised. Guaranteed protection, apart from enabling employees to speak freely with confidence will allow self correction. Some well intentioned policies may lead to unintended results and without feedback, management has no way of knowing the unintended consequences. When management gets to know, harm may already have been done.(35)

Should the employee-representatives think that what they say will affect their job opportunities and relations at work, they will be less willing to represent the employees and even if they do, they will talk with caution and hence they will say what managers would like to hear. As a result, self correction will disappear. Due process and right of appeal to the board where they are represented will control some managers that use power arbitrarily. This will ensure that rights do not depend on the manager in office at the time.

GROUPS OF COMPANIES

Many groups of companies operating in East Africa are organised in pyramids of holding and subsidiary companies. In many cases, it is difficult to define the relationship between the group holding board and its subsidiary boards. This further makes it difficult to identify the level at which decisions are taken. Under the law, each subsidiary is a separate legal entity with directors who have legal responsibilities. It is therefore a significant consideration whether the boards of a holding company should consider the interests of employees in a subsidiary or whether directors of a subsidiary should consider the interests of employees in the holding company or for that matter in all companies in the group.

Often a subsidiary is closely controlled in its decision making by the holding company. Some holding companies consider their subsidiaries, especially those wholly owned by the holding company as instruments of carrying out the holding company policies. On the other hand, there are holding companies which act as investment holding companies exercising least control over the management of the subsidiary companies. In between these extremes are a variety of patterns of holding-subsidiary company relationships. A group controlled from the top may have the same personnel of executives sitting on the different boards within the group. A managing director of a subsidiary may sit on the parent company's board and vice-versa. In such a group, all the separate legal units are controlled from the top.

This diversity of group structure makes it difficult to devise the procedure for effective worker representation at all levels where key decisions are taken. Such representation is essential but it is also important to recognise that worker representation proposals must be consistent with the operation of a group as an economic entity.

The right to employee representation on the board should apply not only to individual companies but to groups of companies as well. In most group companies, major decisions on policy are taken at the holding company level and board level representation would be incomplete if it did not extend to the board at the apex of the pyramid in decision making. It would also, with justification, be unacceptable to the employees and would not assist in the long run strategies for good industrial relations policy.

The practice in European countries varies but generally there is privision for representation of the group's employees at the holding company levels. In Sweden, the 1973 law did not provide for such representation and as a result, employee representatives were excluded from the board on which decisions were taken. Some companies went to the extent of setting up small subsidiaries to escape the legal requirement of employee representation. The defect was recognised and rectified by the 1976 law.[36] In the Netherlands, where there is representation on the group board, then the subsidiaries are exempted. This, however, limits the employees' ability to influence major decisions taken at the subsidiary level. Thus, representation should be both at the subsidiary and holding company levels. Employee representatives to the holding company board should be elected by those representing employees on the subsidiary boards either from among themselves or other employees from within the group. This avoids the inconvenience of separate ballots among the work force.

MULTINATIONALS

The discussion above on group companies applies both to the locally owned and controlled companies as well as the multinationals with group companies in East Africa. The multinationals are based in the U.S., Canada, Europe, and Japan. These multinationals cause special problems since major decisions are taken abroad.

The degree of autonomy of the Kenya based subisidiares of the multinationals has been studies by Langdon.[37] In eight policy areas; annual budget planning, decisions to make significant capital expenditures, decisions on where material inputs may be purchased, choice of production techniques, the nature of marketing operations, the hiring and remuneration of senior subsidiary executives, the setting of profitability targets against which to gauge potential investments and export operations, it was found that while there are variations in the degree of control by the head office, most multinationals either take the decisions at the head office or at best the head office must approve the decisions made by the subsidiary executives.

Investment planning is specifically left for the head office. Only one firm of the 74 firms analysed makes investment choices without substantial influence from the parent corporation. On the annual budget, the common answer was 'The major limitation (on our autonomy) is the annual budget, in which you programme precisely what you are going to do during the year; moving outside the bounds of the budget normally requires reference back home.'[(38)] The appointment of senior personnel executives and exploration of export markets are left to the head office. Surprisingly enough, this was found to be the case even in subsidiaries where the government is a local shareholder.

These foreign based decision making centers make it difficult to ensure some meaningful representation on a subsidiary board based in East Africa. It is still possible, however, provided such a subsidiary is incorporated under the law in East Africa, to require employee representation on the board. One of the problems of multinationals is this distance factor. The decision makers are abroad and are unmindful of the consequences of their decisions so long as the subsidiary makes more profits. This trend is in fact assisted by the law itself. Large enterprises with businesses in East Africa do not have to be incorporated under the companies acts in any East African states. Thus, company law makes no effort to increase the autonomy of the locally based subsidiaries.

Although there may be valid reasons for operating as an unincorporated branch, given the fact that the proposals made for company law reform are far reaching and require a new approach in an attempt to make large companies accountable to the various groups in society who are subjected to the activities of the company and realising the need for a scheme of monitoring corporate social responsibility, it is submitted that all foreign companies in East Africa should be required to be incorporated under the East African law.

This would ensure that all the companies are subject to the companies acts and decisions taken whether from abroad or within East Africa would be subject to this law. The board of a foreign parent company cannot of course be required by East African law to have employee representatives. However, the decision making power of the board of the locally based subisdiary would be increased by the requirement for local incorporation and employee representation. The decisions taken abroad would have regard to the local conditions and allow more autonomy to the subsidiary companies in East Africa.

TIME FOR IMPLEMENTATION

Worker participation cannot successfully be introduced in a day. Such an ambitious scheme requires time for preparation otherwise it could result in an economic disaster. Sudden and drastic steps might hamper the advancement of industry instead of making it a mutual and advancing union. The solution lies in systematic education of the labour force not only to feel as part of the cooperation but to have a contributive and useful role in which to realise their own dream and ultimately that of the nation. The managers still regard themselves as sitting in the ivory tower and the employees must obey without question. There is thus great urgency to remind the managers that workers are not expendable commodities and that their participation in the decision making process has the ultimate aim not only of improving the working conditions for the workers but also to increase productivity and hence company profitability and prosperity.

Such a process will take time and finally the restructuring of the corporate set up will require careful planning and preparation. The workers require time to organise themselves and prepare their representatives for the new role. The worker representatives, whether on the board or the council, will concern themselves not only with industrial relations problems but also overall company policies and strategies. They need the support of the government for training to acquire wider knowledge of subjects such as business finance, management and forecasting techniques. They need not be experts but broad knowledge is essential.

The proposals made here are thus long term strategies. Thus, while it is necessary to pass legislation as soon as possible so as to define the structure of the companies and roles to be played by the various groups so that appropriate preparation can be made, five years should be allowed to pass before compliance is made compulsory. It is submitted that five years is sufficient time for the necessary preparation, planning and training.

SOCIAL AUDIT

As noted in Chapter III, the cornerstone of corporate social responsibility lies in increased information, not only to the investors but to the government and the public at large on corporate activities and their impact on society. The benefits of such increased information cannot be repeated here. The basic concern now is how this can best be achieved in East Africa. What machinery will enforce the requirement of a social audit?

The aim of a social audit it may be recalled is to increase the amount of information about corporate activities to the public and in this respect, social audit is a tool for social reform. It is a method by which the public may be enabled to evaluate corporate social performance and determine appropriate objectives for reform. The audit should give hard facts on what the corporation has done and what it has failed to do.

A process audit as emphasised in Chapter III will achieve this objective without imposing prohibitive costs on corporations. This can best be achieved by introducing committees on management boards to which management will report. To leave it to management to determine what to include and what to leave out may serve no useful purpose beyond what is already being done by some companies that give self-serving annual reports which do not reflect real corporate social impact.

An external agency that checks on the report and confirms the statements like the auditors certify financial statements would not only be expensive but might also prove a burden to the corporations.[39] A committee within the company therefore provides an appropriate body for the preparation of a social audit. The principle benefit of a social audit committee should be an informed board. All public companies should be required to have a sub-committee on the management board for the purposes of checking on the process audit report prepared by the company. This requirement should also be extended to private companies whose assets are in excess of $50,000.

The committee composed of at least three members of the management board should review, question and discuss matters in the report with management before management passes on the report to the full board. Members of the committee, appointed by the full board should be men of experience and with a sense of responsibility and should act as advisers both to management and the policy board. When the report is approved by the management board, it should then be presented to the policy board for final approval.

A finally approved report should then be attached to the annual report to be filed together in the office of the registrar of companies who should have the discretion to accept or reject the audit report. In the event of the report being rejected by the Registrar of Companies, who must give reasons in writing for rejecting it, the report should be sent back to the company for more information as the registrar may decide. The decision of the registrar, though discretionary should be subject to judicial review.

The importance of such a process of approval is to arouse responsibility on the part of management and the reviewing boards. The report should thus be a well reasoned and accurately prepared document that the governing bodies of the company can stand to and defend. It avoids irresponsible and inaccurate statements that might otherwise be given without serious consideration. Thus, this should be a means of ensuring that management in taking decisions will have regard to the social consequences of the activities of the company which is the ultimate aim of increased corporate social disclosure.

A wilfull inaccurate report by the company should lead to individual civil liability for the members of both the policy board and the management board. The threat of potential liability would compel the management board to appoint well informed and responsible individuals to the social audit committee and should encourage all the directors, on both the management and policy boards to obtain as much information as is practically possible. Thus they should be discouraged from approving a report they cannot defend. The registrar of companies should have the power to accept or reject the report and it should be the duty of the registrar's office to check and ensure compliance with the statute.

ENFORCEMENT OF DUTIES OF DIRECTORS

One of the reasons why the German statute requiring corporate decisions to have regard to the public interest was largely ineffective was the failure of the statute to provide an appropriate remedy for the injured/offended party and the mechanism of enforcing the right. The penalty clause provided that disregard to the public interest would be a ground for the state to take proceedings against the company for dissolution. Such a threat, however, is too extreme to be of practical application.

As suggested in Chapter IV, social responsibility of corporations may be achieved through increased demands on the boards of directors. The duties of directors should be extended to the employees, the consumers and the public in general. To ensure efficiency and consciousness among the members of the board, individual directors should be held personally liable for failure to observe the duty of care they owe to the interested groups.

A major question, however, remains unanswered; who would protect the public interest and make sure that the directors observe their duty to the public? A government is the representative of the public and should therefore be the appropriate agency to check on corporate observance of the duty of care to the public. The Canadian department of Consumer and Corporate Affairs provides a model that could be modified and utilised as a means of enforcing the interests of the consumer and the general public.

Established in 1967, the department regulates and governs the market place at federal level. The objectives of the department have been summarised in the following terms;

> 'The creation of the department was brought about by the recognition that the rules and procedures which govern the operation of the marketplace exert a direct influence on the individual well being of all citizens. Consequently it was considered necessary to have one department of government at the Federal level, responsible for formulating and enforcing laws designed to ensure that our market system would further the social and economic welfare of all Canadians.' (40)

The department aims at encouraging and developing a fair and competitive market system. By legislation, the department protects the consumer against deception, misrepresentation and detection of hidden hazards in the goods. The department further tries to ensure that products meet the set standards and are properly labelled.

The department also runs information and educational programs to assist the consumers to make sound decisions when buying products. Perhaps most important from the pôint of enforcing the duties of corporations, the department provides legal means of dealing with certain unfair trade practices like deceitful and misleading advertisements.

The Bureau of Competition Policy, a branch within the department has wide investigatory powers. The Bureau conducts inquiries where there is reason to believe that there are practices in restraint of trade, mergers and monopolies against the public interest. Unfair trade practices involving price-discrimination, disproportionate promotional allowances, misleading representation of prices, false and misleading advertising and resale price maintenance. The results of such inquiries are sent to the Attorney General who decides whether or not to lay charges against the responsible companies or individuals as the case may be.

The Bureau of Consumers Affairs provides information to the public. Consumers may send their complaints and inquiries to the Bureau and it is the duty of the Bureau to answer the inquiries and direct the complaints to the appropriate government agency, whether Federal or Provincial. Such a process assists both the government and the private sector to pinpoint at the wrong doer and pass legislation if necessary. In this way, a disappointed consumer who has purchased a defective product contrary to his intentions has a government department to turn to. This cannot be said of the Ugandan counterpart.

The Ugandan would be told to go it alone through the court. To many, in practical terms, this means 'keep quiet'.

In all the East African countries, matters relating to companies are handled by the Registrar of Companies. This is the agency whose duties and powers should be extended. Thus, the Registrar of Companies should be given wide investigatory powers so as to make an inquiry either on his own initiative or on receiving a complaint from the public regarding any corporate practice that might in his opinion be detrimental to the public and the nation at large. On the basis of such an inquiry, in consultation with the Attorney General, the Registrar would then decide whether or not to take legal proceedings against the company and its directors for failure to observe their social responsibility. Where necessary, the office of the Registrar could also initiate legislation.

The public would be informed of such a venue and be requested to point out their grievances against the offending companies and directors. Thus, for example, a public interest group, objecting to a decision by a company to build a highly pollutive factory in a heavily populated area without sufficient pollution control mechanism could petition the Registrar of Companies to intervene on behalf of the public. If a decision to build such a factory was taken by the board of directors without sufficient consideration to the effect on the local community in that area, the Registrar of Companies would take legal proceedings not only to stop the project but also against the directors and the company for failure to observe their duty of care to the public, so that they pay for any damage that may have resulted. The protection thus would be either as a result of the initiative of the Registrar or on the information supplied by any interested party.

This is the cheapest and most practical way of protecting the public interest not only when injury has already been done but also before it occurs. The potential of this liability it is hoped would arouse corporate awareness of the public interest. It would ensure that before corporate executives take a major decision likely to affect not only shareholders and employees but the public as well, they would make positive effort to balance all the interests and come to a decision that they can successfully defend both in public and in court if necessary. In the final analysis, this is what corporate social responsibility is all about.

FOOTNOTES: INTRODUCTION

1. The words company and corporation are used interchageably throughout the thesis. They should be distinguished from a state corporation which is used to mean a Crown corporation established by special statute.

2. AFRICA, May 1979 at 18.

3. Mr. Webb, Kenya Legislative Council Debates, Vol. 81, p. 22, July 21, 1959. Quoted by Katende, Company Law in East Africa; Present and Future (1968-69) 1-2, E.A.L. Rev. 135, 161-2.

4. Quoted by Katende, supra.

5. It is for this reason that Gower in his report suggested that all African states, including non English speaking should have the same or at least similar company law. See Final Report by the Commission of Inquiry of the working and Administration of the present company law in Ghana, para. 14, p. 2.

   Cf. Whitford, The treaty for East African cooperation and the Unification of Commercial laws (1968-69) 1-2, E.A.L. Rev., 115.

FOOTNOTES: CHAPTER I

THE SOCIAL RESPONSIBILITY OF CORPORATIONS IN EAST AFRICA

1. Kenya Companies Act, Cap. 468, Uganda Companies Act, Cap. 85, Tanzania (Mainland) Companies Ordinance, Cap. 419 (not yet in force). The Act in force is the companies ordinance, Cap. 212.

2. In 1974, Tanzania passed legislation (Regulation of Dividends and Surpluses and Miscellaneous Provisions) Act, 1972 which introduced important changes but these are limited to 'specified companies.'

3. (1883) 23 Ch. D. 654.

4. Ibid., 671.

5. Ibid., 672.

6. Ibid., 673.

7. Id.

8. [1962] Ch. 927.

9. Ibid., 963. See also Greenhalgh v. Arderne Cinemas Ltd. [1951] Ch. D. 286, where Evershed M.R. said that the benefit of the company meant the benefit of the shareholders. In Re Lee, Behrens & Co. Ltd. [1932] 2 Ch. 46, a claim by a widow of a director who rendered invaluable services to the company during the many years he was associated with it was rejected because the payment would not benefit the company.

10. Supra, note 3.

11. Tom Hadden, Company Law and Capitalism (Weidenfeld & Nicolson, 2nd ed., 1977), 317-318 (hereafter Hadden).

12. In Canada, see Martin v. Gibson (1907), 15 O.L.R., 623. Also Greenhalgh v. Arderne Cinemas Ltd., supra, note 9.

13. (1919), 170 N.W., 668.

14. Ibid., 671.

15. Ibid., 683-684.

16. Ibid., 684.

17. See L.C.B. Gower, Modern Company Law (Stevens & Son, 3rd ed., 1969), 522 (Hereafter Gower).

18. State Tax Commission v. Aldrich et al. (1942), 316 U.S. 174, 192.

19. (1953), 13 N.J. 145, 98A 2d 581.

20. Ibid., 590. Also Teck Corporation Ltd. v. Millar et al. (1973) 33 D.L.R. (3rd) 288.

21. Ibid., 586. For a discussion of this see note 136 infra and accompanying text.

22. See Stone, Where the Law Ends (Harper & Row, 1975), 2 (Hereafter Stone).

23. Mencken, A New Dictionary of Quotations on Historical Principles from Ancient and Modern Sources (1942), 223.

24. Maitland, Introduction to Otto Gierke, Political Theories of the Middle Age (1927), XXI.

25. [1915] A.C. 705.

26. Ibid., 713.

27. Id.

28. Gower, 46.

29. Ibid., 47.

30. Stone, 9.

31. Jeremy Bentham, An Introduction of the Principles of Morals and Legislation (1789), 1:1.

32. Ibid., 245.

33. Ibid., 2:16.

34. See Stone, 15.

35. Gower, 47.

36. Smyth, The Social Implications of Incorporation in J. Ziegel (ed.), Canadian Company Law (Butterworths, Toronto, 1967), 651 at 652.

37. Ibid., 653.

38. Commons, The Legal Foundations of Capitalism (1959), 246.

39. Smyth, supra, note 36.

40. For example France; see profit sharing, infra, Chap. II.

41. Drucker, The Future of Industrial Man, 99.

42. There is a lot of literature on the separation of ownership and control. Not all agree on the overall result. See Berle and Means, The Modern Corporation and Private Property (1932).

43. Berle and Means, ibid., 114.

44. Ibid., 68.

45. This has been criticised by many. See for example Henry Manne, The 'Higher Criticism' of the Modern Corporation (1962) 62 Col. L. Rev. 399. But see the response thereto in Berle, Modern Functions of the Corporate System (1962) 62 Col. L. Rev. 433. See also Walter Werner, Management, Stock Market and Corporate Reform: Berle and Means Reconsidered (1977) 77 Col. L. Rev. 388.

46. Chief Justice John Marshall in Bank of the United States v. De Veaux, 9 U.S. (5 Cranch), 61 86 (1809).

47. Stone, 35. See also Smyth, supra, note 36 and Stevenson, Corporations and Social Responsibility in Searching the Corporate Soul (1974) 42 Geo. Washington L. Rev. 707.

48. There is no general consensus as to what society is against. The debate is centered on whether corporations should act responsibly. Some would say that they do not act responsibly, others show that they do and yet others are of the view that the situation is not worse than we have a right to expect. See for example Manne, supra, note 45 who argues that the problem is actually less serious than is generally assumed and that there is nothing to worry about. In his view, shareholders are basically and primarily interested in maximisation of profits and this is what is happening. 'Separation of ownership and control may be, as traditional attitudes had it, merely a method of maximizing income by specialization of labour. We should find nothing very revolutionary or disturbing in this notion.' While there may be nothing revolutionary about the notion, to many, it is disturbing.

49. See Ruder, Public Obligations of Private Corporations (1965) 114, U. Pa. L. Rev. 209. For a brief review of the arguments for and against corporate social responsibility, see M. Beesley and T. Evans, Corporate Social Responsibility (Crown Helm: London 1978) Chapter I.

50. Schwartz, Public Interest Proxy Contest: Reflections on Campaign G.M. (1971) 69 Mich. L. Rev. 421, 463.

51. M. Friedman, Capitalism and Freedom (1962), 133.

52. Id.

53. Friedman, 'The Social Responsibility of Business is to Increase its Profits,' New York Times, Sept. 12, 1962, Sect. 6, p. 126, Col. 2.

54. See Stone, 75.

55. Quoted in Nader et al., Taming the Giant Corporation (1976) (Hereafter Nader), 18.

56. Nader, 18.

57. For a detailed discussion of the shortcomings of Friedman's ethical custom, see Stone, 76. Quite clearly, even the most dedicated exponents of laissez-faire admit the limitations on legal and market forces as a means of achieving social good and call for self-imposed moral restraint.

58. See Manne, supra, note 45, 414-415.

59. Stone, 78.

60. Hetherington, Fact and Legal Theory; Shareholders, Managers and Corporate Social Responsibility (1969) 21 Stan. L. Rev. 248, 258.

61. Friedman, supra, note 53.

62. Stone, 82-83.

63. Hetherington, supra, note 60. Blumberg, Corporate Responsibility and the Social Crisis (1970) 50 B.U.L. Rev. 157, 163.

64. Schwartz, supra, note 50, 471.

65. Friedman, supra, note 53 for example argues that if directors took social policies into account they would become in effect public employees, civil servants. 'On grounds of political principle, it is intolerable that such civil servants. . .should be selected as they are now.'

66. See Richard Eglin, 'The Oligopolistic Structure and Competitive Characteristics of Direct Foreign Investment in Kenya's Manufacturing Sector' in R. Kaplinsky (ed.), The Multinational Corporation in Kenya (Oxford University Press, 1978), 96, 97.

67. See Nicola Swainson, Company Formation in Kenya before 1945 with Particular Reference to the Role of Foreign Capital in Kaplinsky (ed.), supra, note 66, 22, 75.

68. R. Eglin, supra, note 66, 97. For a further indication of the significance of the size and potential dominance by comapnies, see Foreign Enterprises, infra .

69. See for example, B.D. & Co. Ltd. v. Commissioner of Income Tax (1959) Case No. 66, 3 EATC, Part 1, 41 (Supreme Court of Kenya). The attempt to form a new company failed because of tax laws but it illustrates the ease with which new companies can be formed to hold the assets of existing companies.

70. S. 154 (K), s. 154 (V), s. 154(T).

71. S. 29(K), s. 29(V), s. 29(T).

72. See Katende et al., The Law of Business Organisation in East and Central Africa (East African Literature Bureau, 1976), 64. Also Hadden, 389-400 and Gower, 194.

73. S. 1.

74. S. 2.

75. S. 2.

76. S. 3.

77. S. 7.

78. S. 8.

79. S. 5 of the Act (as amended by the Wheeler-Lea Act of 1938). For a detailed discussion of the U.S. anti-trust laws see A. Neal, The Anti-trust Laws of the United States of America: A Study of Competition enforced by law (Cambridge University Press, 2nd ed., 1970).

80. See Hadden, 488.

81. See also the Restrictive Trade Practices Act, 1976. All agreements between manufacturers or suppliers restricting freedom of any party to make independent decisions on such matters as pricing, range, quality and aupply of goods or services have to be registered. Agreements for exchange of information and other less formal arrangements if not justifiable in the public interest may be declared illegal and unenforceable and could be subject to a fine. In Canada, see the Combines Investigation Act, R.S.C., 314. Also the Australian Trade Practices Act, 1976.

82. See Who Controls Industry in Kenya (1968), 112.

83. See Eglin, supra, note 68, 124.

84. Dow-Smith, Survey on Economic and Commercial Conditions in British East Africa, London, 1952.

85. Kenya, Development Plan 1966-1970, Nairobi, Government Printer, 1966, 236.

86. Langdon and M. Godfrey, 'Partners in Underdevelopment? The Transnational Thesis in a Kenyan Context' (1973) quoted by Eglin, supra, note 68. See also Table of Tariff Protection in Kenya, provided by Eglin at 107.

87. Companies Registry, Nairobi, quoted by Steven Langdon, 'The Multinational Corporation in the Kenya Political Economy' in Kaplinsky (ed.), supra, note 68.

88. It may be argued that the monopoly grants are to encourage foreign investment and reform in company law could produce negative results. It should be noted however that the protection is granted to both foreigners and nationals and therefore with or without foreign investment, the protection would still be granted. Secondly, such an argument assumes that reform measures to create a responsible company substantially reduces profits made by companies. This is certainly not necessarily the case. See Chap. III.

89. Thomas, Legal and Social Responsibilities of the Limited Liability Company to the Public, in Thomas (ed., Private Enterprise and the Private Company (1966), 23.

90. Ibid., 24.

91. Many countries recognise this fact and have established a government Department of Consumer and Corporate Affairs. Canada provides such an example.

92. Nader et al., supra, note 55, 25.

93. Baran and Sweezy, Monopoly Capital: An Essay on the American Economic and Social Order (1966) 120-121, 132-135.

94. Quoted by Baran and Sweezy, ibid., 135.

95. Adam Smith, The Wealth of Nations.

96. A.H. Hanson, Public Enterprise and Economic Development (Love and Brydene Ltd., London, 2nd 3d., 1965) has noted: "whereas in the 'underdeveloped' Europe and America of the eighteenth and nineteenth centuries, very little public enterprise was needed to achieve developmental take-off, in the undeveloped countries of today, a great deal is needed, and consequently, the Adam Smith formula will not work."

97. See Glyn and B. Sutcliffe, British Capitalism, Workers and the Profit Squeeze (1972), 226.

98. Ibid., 229.

99. Parkin, 'Politics and Society in Kenya,' 19. Reproduced in Katende et al., supra, note 72, 70.

100. Eglin, supra, note 68, 129-130. See also the tables indicating take-over of local firms by foreign firms, and takeovers involving foreign firms after entry, pages 129 and 130 respectively.

101. Marriot and Jones, Anatomy of a Merger (1972), 12.

102. The Times, September 14, 1968.

103. See Katende et al., supra, note 72, 71.

104. Quoted by John Loxley and John Soul, Multinationals, Workers and the Parastatals in Tanzania (1975), Rev. African Political Economy, 54, 84.

105. Thomas, supra, note 89, 21.

106. There is extensive literature on industrialisation for development but see generally Raul Prebisch, Toward a New Trade Policy for Development in 2 United Nations Conference on Trade and Development (UNCTAD) Proc., 1st Sess. 5 (1964).

107. Ss. 7-11, Regulation of Dividends and Surpluses and Miscellaneous Provisions Act, 1972. The Act prohibits such subsidiaries from being would up without the Minister's consent. See s. 6.

108. See Glyn and Sutcliffe, supra, note 97, 75.

109. The Arusha Declaration and TANU's Policy on Socialism and Self-Reliance (Dar es Salaam, The Publicity Section, TANU, 1967, 3.

110. S. 365 of the Kenya Companies Act.

111. Cap. 518 Law of Kenya, 1964.

112. See Lubar, 'Government Protection of Foreign Investment in East Africa' (1971) 7 E.A.L.J. 108.

113. Cap. 113, Laws of Kenya as amended.

114. The Foreign Investments Protection Act, Cap. 533.

115. Ibid., s. 6(1).

116. Lubar, supra, note 112. The certificate is more difficult to obtain in Tanzania and in both countries, further restrictions are imposed on foreign companies through the Trade Licensing legislation.

117. Both in Tanzania and Kenya, local borrowing by foreign investors is restricted. In Kenya, they may not borrow funds exceeding 20% of their capital.

118. Restrictions on Foreign Investors are not unique to developing countries. See for example Canadian Foreign Investment Act.

119. Hale v. Henkel (1906) quoted in Nader et al., supra, note 55, 1.

120. Cronjé, Ling, and Cronjé, Lonrcho Portrait of a Multinational (1976), 136.

121. Parliamentary Debates, House of Commons, Col. 1243, 15 May 1973, quoted in Cronjé et al., ibid., 136.

122. Quoted in Who Controls Industry in Kenya (1968), 155.

123. The Managing Director of East African Breweries Ltd. has said that about 27 per cent of the company's profits leave Kenya and about 75 per cent stay in the country adding that 'I think, that puts us well ahead of any other large company in localising our operations.' See Who Controls Kenya Industry, 158.

124. I.L.O. Working Party, Employment, INcomes and Equality: A Strategy for Increasing Employment in Kenya, Geneva, 1972.

125. Id.

126. Quoted by Professor Green, Relevance, Efficiency, Romanticism and Confusion in Tanzanian Planning and Management (1975) 5 African Review, 209 at 232.

127. I.L.O. Paper, supra, note 124.

128. See John Loxley & J. Soul, supra, note 104 at 76-77.

129. I.L.O. Paper, supra, note 124.

130. Quoted by Nader, 36.

131. Ibid., 75.

132. George Goyder, The Responsible Company (Basicl Blackwell, Oxford, 1961), 6.

133. Ibid., 30.

134. Isaiah, A., Litvak and Christopher, J. Maule, Foreign Corporate Social Responsibility in Less Developed Economies (1975) 9 J.W.T.L. 121, 125.

135. Id.

136. Multinational Corporations and United States Foreign Policy, Hearings before the Sub-Committee on Multinational Corporations of the Committee on Foreign Relations, U.S. Senate, 20-22 March, 2 April 1973, Part 2, Washington, U.S. Government Printing Office, 521.

137. Kenneth Andrews, Can the Best Corporations be Made Moral, Harvard Business Review, May-June 1973,57.

138. See generally Mwapachu, Industrial Labour Protest in Tanzania, An Analysis of Influential Variables (1973) 3 African Review, 383.

139. Mwongozo is a Swahili term and stands for TANU (the then mainland only political party which has since joined the Zanziban ruling party to form what is now called C.C.M. Party). Guidelines on Guarding, Consolidating and Advancing the Revolution of Tanzania and of Africa, 1971.

140. Clause 28 of Mwongozo states, 'For a people who have been slaves or have been opporessed and exploited by Colonialism or Capitalism, 'development' means 'Liberation.' Any action that gives them more control for their own affairs is an action for development, even if it does not offer them better health or more bread. Any action that reduces their say in determining their own affairs or running their own lives is not development and retards them even if that action brings them a little better health and a little more bread. . . . Therefore in considering the development of our nation, our main emphasis at all times should be the development of people and not of things. If development is to benefit the people, the people must participate in considering, planning and implementing their development plans.

Clause 15 of the same document says; 'Together with the issue of involving the people in solving their problems, there is also the question of the habits of leaders in their work and in day-to-day life. There must be a deliberate effort to build equality between the leaders and those they lead. For a Tanzanian leader, it must be forbidden to be arrogant, extravagant, contemptuous and opressive. The Tanzanian leader has to be a person who respects people, scorns ostentation and who is not a tyrant. He should opitomise heroism, bravery, and be a champion of justice and equality.

141. For a detailed discussion see Mihyo, Labour Unrest and the Quest for Workers' Control in Tanzania: Three Case Studies (1974) 7 E.A.L. Rev. 1.

142. Thomas Bell, Pioneering Days (1941), 78.

143. Cole, Self-Government in Industry (1920), 29.

144. See Mihyo, supra, note 141, 33.

145. The Nightwatch Security Co-operative Society was also a result of a 'revolution' that took over management. See also The Mount Carmel Rubber Factory Tragedy, Mihyo, supra, note 141.

CHAPTER II

WORKER-PARTICIPATION

1. International Institute for Labour Studies, 1972, Bull. 9, 177.

2. Ibid., 176-177.

3. Worker Alienation, 92nd Congress, 1972, 1.

4. Derber, M., The American Idea of Industrial Democracy, 1965-1965. (Chicago, University of Illinois Press, 1970) and Rus, V., The Limits of Organised Participation: Internationale Sociological Conference on Participation and Self-Management, 2 Zabreb: Institute for Social Research, 165-168. All suggest that employees have no interest in participation.

5. Pateman, C., Participation and Democratic Theory (Cambridge: Cambridge University Press, 1970), 56.

6. Derber, supra, note 4, 133.

7. Blumberg, Paul, Industrial Democracy: The Sociology of Participation (1968), 123.

8. Chairman of NOTU, Voice of Uganda, 2nd May 1974.

9. Voice of Uganda; 1st May 1974.

10. The Common Mean's Charter, Art. 23.

11. See Bryan Cassidy, Workers on the Board (Conservative Political Centre, 1973), 5.

12. Sometimes known as job enrichment, particpative management, autonomous group operation and democratic management.

13. For example under the Swedish Workers' Protection Act, 1973, the Union Safety deligate may close down a plant if he believes it to be seriously unsafe.

14. See Vagts, Reforming the 'Modern' Corporation: Perspectives from the German (1966) 80 Harv. L.R. 23, 68.

15. MacGregor, 'A Structural Analysis of Worker Participation in Europe' (1977) 9 Law & Pol. in Int. Bus., 639,641.

16. Id.

17. Ellenberger, The Realities of Co-Determination, AFL-CIO American Federationist, OCt. 1977 at 15 quoted by Clyde Summers, Worker Paritipation in Corporate Management - The United States version (1978) 1 J. of Comp. Corp. L. & Sec. Reg., 157.

18. Id.

19. See Pieter Sanders, The European Company (1976) 6 Geo. J. Int. & Comp. L. 366. Also Clive M. Schmitthoff, Company Structure and Employee Participation in the E.E.C. - The British Attitude (1976) 25 Int. & Comp. L.Q. 611 and Dimitris Constas, The Developing European Community Law of Worker Pariticpation in Management (1978) 11 N.Y.U.J. Int. Law & Politics, 93.

20. See Hoffmann, The German Co-Determination Act 1976 (1976) (Hereafter Hoffmann), 9.

21. Vagts, supra, note 14, 65.

22. Hoffmann, 9.

23. Vagts, supra, note 41, 66.

24. Tom Hadden, Company Law and Capitalism (2nd ed. 1977), 450 (Hereafter Hadden).

25. Id.

26. Hoffmann, 18.

27. Hoffmann however suggests that the report should be read with caution because due to the pwoer the trade unions wield, very few pepole are willing to express views. Further more, Hoffmann suggests that business executives want to give the impression that they are in command of the situation, they are unwilling to point out difficulties that result from codetermination.

28. Hadden, 453. Also Vagts, supra, note 14, 68.

29. Hadden, 453-455.

30. Vagts, supra, note 14, 67-68.

31. Hadden, 455.

32. Hoffmann, 22-23. Also Biedenkopf Report, Part III, Para. 62 and Hadden 455.

33. Hoffmann, 23.

34. Briedenkopf Report Part III, para. 65.

35. Hoffmann, 24.

36. [1942] Ch. 3064.

37. Ibid., 306.

38. Simitis, Workers Participation in the Enterprise -- Transcending Company Law (1975) 38 M.L.R. 1. The article discusses the conflict between worker participation on the one hand and principles of company and labour law on the other hand. See also Willem Albeda, 'The Problems of Loyalty Conflict, Confidentail Information and Education, in Bairstow (ed.) International Conference on Trends in Industrial and Labour Relations (1977), 311.

39. See Vagts, supra, note 14, 75.

40. Id.

41. See Simitis, supra, note 38 and the authorities cited by him.

42. Hoffmann, 24.

43. Hadden, 456.

44. Ibid., 457-8.

45. Vagts, supra, note 14, 69.

46. Id.

47. Ibid., 70.

48. Ibid., 71.

49. Rudolph Vollumer in a Comment on the German System of Worker-Participation in Bairstow (ed.), supra, note 38.

50. Committee of Inquiry on Industrial Democracy, Cmnd. 6706 (1977), Preface, V.

51. Trade Union Congress; Industrial Democracy (1974).

52. Geoffrey Denton, Beyond Bullock: Economic Implications of Workers Participation in Control of Ownership of Industry (1977).

53. Industrial Democracy (1978), Cmnd 7231.

54. Bell v. Lever Brothers [1932] A.C. 195. Also London and Mashonaland Exploration Co. v. New Mashonaland Exploration Co. [1891] W.N. 165 and Gower, Principles of Modern Company Law (3rd Ed. 1969), 547-548.

55. Industrial Democracy (1978) Cmnd 7231, para. 24.

56. For developments in New Zealand, see Alexander Szakats, Workers' Participation in Industry: Past, Present and Future - Whither New Zealand? AULSA Conference Paper 1976, The University of Canterbury.

57. Jiri Kolaja, Workers' Councils, The Yugoslav Experience (Tavistock Publications, 1965), 2.

58. See Milan Rukavina, Yugoslavia, In Charles Levinson (ed.), Industry's Democratic Revolution (1974), 154.

59. Ibid., 154-155.

60. Jiri Kolaja, Workers' Councils: The Yugoslav Experience (1965).

61. See Rukaniva, supra, note 58, 162.

62. Ibid., 164-169.

63. Ibid., 181

64. See Kolaja, supra, note 60 at 60.

65. See Josip Obradovic, Workers' Participation in Yugoslavia: Theory and Research Institute of International Studies, University of South Carolina (1976), 15.

66. Ibid., 19.

67. Dyck, Comment on Participation in the European Company - The European Company Statutes by Dr. Jorn Pipkorn in Bairstow (ed.) supra, note 38, 344. Also Josip Zupanou, Yugoslavia: A Socialist Alternative in Charles de Houghton (ed.), The Company, Law, Structure and Reform in 11 Countries (1970), 330-335.

68. Cap. 574 Laws of Tanzania, 1965.

69. Presidential Circular No. 1 of 1970, SHC/C 180/1/102, State House, Dar-es Salaam.

70. Ibid., para. 1.

71. Ibid., para. 2.

72. The date was later extended to May 1971 to allow preparation.

73. 10th and 11th issues of Jenga, The Tanzanian NDC official magazine.

74. <u>Ibid</u>.

75. <u>Ibid</u>.

76. Guidelines on the Establishment of Workers' Councils by NDC, Der-es Salaam.

77. See Mapolu, The Organisation and Participation of Workers in Tanzania, Economic Research Bureau, Paper No. 72-1, University of Dar-es Salaam.

78. Ibid., 20.

79. The Standard, 24th May, 1971, Dar-es Salaam.

80. Mwanda, NUTA: Its Organisation, Operation and Role in Post-Arusha Era, Examination Paper, Department of Political Science, University of Dar-es Salaam (1972), 30.

81. See for example, Mapolu, <u>supra</u>, note 77.

82. Das, Experiment in Industrial Democracy (Asia Publishing House, 1964), 157.

83. Workers' Participation in Management; A Review of Indian Experience, Bulletin No. 5 of the International Institute for Labour Studies, 184.

84. Quoted in Humbaraci, The Revolution that Failed (Pall Mall Press, 1966), 387.

85. See John Nellis, Workers' Participation in Algenia's Nationalised Industries (unpublished occasional papers, The Norman Paterson school of International Affairs, Carleton University, Ottawa (1976).

86. <u>Ibid</u>., 11.

87. See Bryan Cassidy, Workers on the Board (1973), 12.

88. Corporations themselves in Japan are in the forefront of corporate social responsibility. See Ichiro Kawamoto, Social Responsibility of Corporation (1977) Kobe U. L. Rev., 1.

89. The Syllabus used to train the representative as translated to English by Mapolu, <u>supra</u>, note 77. After politics they studied the presidential Circular; Trade Unionism, i.e. principles of trade unions since [illegible] colonialism till founding of NUTA, the principles of NUTA and its functions constitutionally, Politically and economically. Then followed wages and production policies, industrial relations and work safety regulations.

90. Paul Bernstein, Worker Place Democratization, Its INternal Dynamics (1976).

91 Ibid., 58.

92. See Lesieur, What the Plan Isn't and What It Is, in Lesieur (ed.), The Scanlon Plan (1958), 34, 42.

93. Id.

94. Council of Profit-Sharing Industries, Profit-Sharing Mannual, Edwards Bros., (1949), 3-4.

95. Report to the President of the French Republic, proceeding the ordinance No. 67-693, 17 August 1967 on the Participation of Salary and Wage Earners in the Fruits of Expansion of Enterprise, Journal Official, 18 August 1967, 8288-9. Translated and cited by Hancock Profit-Sharing Reform with Particular Reference to the French Law of 1967 (1973-5) 7 V.U.W.L.R., 36 (Hereafter Hancock).

96. Hadden, 479. The proportion of the profit is calculated from the relationship between the company's bill in wages and the net value of the output. This is to avoid a situation where employees, in the capital intensive industry having an unfair advantage over those in the labour intensive industries. The individual employees wage is also taken into account by a ceiling of £500 attributable to anyone person and the employees cannot realise their shares for five years. Management and employees may by agreement, approved by an official agency replace the statutory scheme with some other arrangement of benefit to employees.

97. The Companies Empowering Act 1924, subsequently adopted in s. 59 of the Companies Act 1933 and s. 67 of the Companies Act 1955.

98. For example New South Wales.

99. The East African Standard, October 10, 1967 in Katende at 119.

100. Who Controls Industry in Kenya, 243. Also Onuoha, The Elements of African Socialism (1965), 77.

101. Hadden, 480.

102. Hancock, 40.

103. Ibid., 41. He observes: 'Thus the New Zealand taxation laws which relate to profit sharing reveal that at best profit-sharing schemes are accorded no tax incentives whatsoever and in the case of employee shareholdings there are positive disincentives.'

104. A 1948 survey in New Zealand noted: 'The reasons for its (the scheme) non-adoption lie on the one hand in the reluctance of capital to abdicate any portion of its sovereignty and on the other hand in the fear that capital will not be freely invested for a limited reward. In both directions these fears are, it is contended, misplaced.' Profit-sharing (Supplement to 1949 Report by the Department of Labour and Incentive Schemes in New Zealand), 8.

105. For a more extensive analysis of the substantive provisions of the French law, see Hancock, 42-55.

106. Quoted by Hancock, 55.

107. Lasserre quoted by Hancock, 56.

108. Id.

109. Hadden, 479-80.

110. Cited by Hancock, 57.

111. Helburn, Profit Sharing in Perspective (1965), 163-177.

FOOTNOTES: CHAPTER III

SOCIAL AUDIT

1. Institutions not willing to vote against management or shareholder proposals have been found to be willing to support disclosure. The Harvard Foundation, Ford Foundation, Rockefeller and First Pennyslvania Banking and Trust Company have all supported disclosure proposals.

2. L. Brandeis, Other Peoples' Money (Nat'l Home Library, ed. 1933), 62, quoted by Blumberg; The Public's "right to know" (1973) 28 Bus. Law, 1025, 1026.

3. Blumberg, ibid., 1026.

4. See Frolin, Toward Corporate Environmental Disclosure: NRDC, v. SEC (1977) 6 Env. Aff., 161.

5. Broadly speaking, a company qualifies as a private company when its constitution provides that its shareholders may not exceed fifty in number (not counting employee-shareholders); that it may not invite members of the public to subscribe for shares or lend money to it; that the right to transfer its shares is restricted and finally, the company must adhere to these provisions. See ss. 30 and 31 of the Uganda Companies Act, Cap. 85. In Kenya, there is an exception - a private company which has a public company as one of its shareholders must file the statement of accounts. See s. 128(4) Kenya Companies Act, Cap. 486. The distinction has been a subject of criticism and recommendations for change have been made. In U.K., the Jenkins Committee (Cmnd. 1749, 1962) recommended its abolition. See also The Hon. Mr. Justice Spry; 'Company Legislation' in Thomas (ed.), Private Enterprise and the East African Company (1969), 64.

6. Disclosure requirements in U.K. are well summarised by Tom Hadden; Company Law and Capitalism (2nd Ed., 1977), 296-306.

7. There is also a continuing obligation on the companies to file at the companies registry more information like names of directors, new shareholders and changes in registered offices. The company also files an annual return summarising information about the company including an up to date list of shareholders.

8. For example the Act requires the accounts and directors' report to include more details than before like the turnover for the year, directors' emolments and interests in contracts as well as charitable and political gifts.

9. U.K. White Paper on Company Law Reform (1973), Cmnd. 5391.

10. _Ibid._, para. 10.

11. _Id._

12. _Id._

13. See Form S-1 Registration statement under the Securities Act of 1933, in Knauss (ed.), Securities Regulation Sourcebook 3-1 (1970-71).

14. The Act requires securities of companies of certain size. Those whose assets exceed $1 million and where a class of equity securities is held by more than 5,000 persons.

15. Schoenbaum, The RElationship between Corporate Disclosure and Corporate Responsibility (1972) 40 Fordam L. Rev. 565, 571.

16. _Ibid._, 572.

17. _Ibid._, 573.

18. See specimen of the application form and the undertaking, in Katende et al., The Law of Business Organisations in East and Central Africa (1976) Appendix N.

19. Schoenbaum, _supra_, note 15 at 575.

20. Stigler, Public Regulation of the Securities Markets (1964) 37 J. Bus. L. 117.

21. Bentson, Required Disclosure and the Stock Market, Rejoinder (1975) 65 Am. Econ. Rev. 473.

22. Mendelson, Economics and the Assessment of Disclosure requirements (1978) 1 J. Comp. Corp. & _Sec._ Reg. 49.

23. _Ibid._, 50. Also Mercadal, The Disclosure Approach to Securities Regulation (1978) 1 J. Comp. Corp. & Sec. Reg. 140.

24. Mendelson, _supra_, note 22 at 50.

25. A statement by the objectives committee of the American Institute of Certified Public Accountants (AICPA) - objectives of financial statements (1973).

26. Mercadal, _supra_, note 23 at 140.

27. Tunc, De Droit des Sociétès Anonymes aux Etatis-Unis (1976), quoted by Mercadal, _id._

28. Mercadal notes that in the U.S., institutional investments represent 50% of the securities listed on the New York Stock Exchange and often accounts for 75% of the trading.

29. Ibid., 141.

30. Id.

31. Mendelson, supra, note 23 at 62-63.

32. But see Notes: Disclosure of Future-Oriented Information under the Securities Laws (1978) 88 Yale L.J., 338 where it is stated:

> ". . .there is substantial evidence that the disclosures now required by the SEC are not fulfilling the purposes of the Acts. Investors are unable to make realistic choices based on available information . . . . a major reason for this failure is that information disclosed in corporate filing is an inadequate and an unreliable basis for investment decisions. To implement the goal of securities regulation, the SEC should require formal disclosure of financial forecasts by management."

33. Mercadal, supra , note 23 at 142.

34. In France, it is a triumph if there is one shareholder out of every 1000 people present for the annual meeting.

35. Sommer, The U.S. SEC Disclosure Study (1978) 1 J. Comp. Corp. & Sec. Reg. 1465, 146.

36. The Committee was

    (1) to identify the characteristics and functions of the present system of corporate disclosure and the role of the Securities and Exchange Commission within that system;

    (2) to assess the costs of the present system of corporate disclosure and to weigh those costs against the benefits it produces;

    (3) to articulate the objectives of a system of corporate disclosure and to measure the Commission's present disclosure policies against those objectives;

    (4) if necessary, to formulate recommendations to the Commission for adjustments to Commission policies to better effectuate those objectives.

    See the Report of the Advisory Committee on Corporate Disclosure to the Securities and Exchange Commission, D-3 (1977).

37. Sommer, supra, note 35 at 147.

38. Frankfurter, The Securities Act: Social Consequences, Fortune, August, 1933, 55.

39. See Frolin, Toward Corporate Environmental Disclosure: NRDC V. SEC (1978) 6 Environ. Aff. 155, 162.

40. 15 U.S.C. § 77(g) (1970).

41. Medical Committee for Human Rights V. SEC, 432 F 2d, 659, 681 (1970), Products liability law suits, government and private damage actions for environmental degradation and public boycotts of a company's products are examples of financial ramifications which may result from irresponsible corporate activities.

42. Frolin, supra, note 39, 162-163.

43. Pub. L. No. 90-190, 83 Satat 853 (1970).

44. 42 U.S.C. § 4332 (c) (1970).

45. See Frolin, supra, note 39 at 166.

46. SEC Release No. 33-5386 (April 20, 1973).

47. Frolin, supra, note 39, 168.

48. NRDC v. SEC, 389 F. Supp. 689 (D.D.C. 1974), 702.

49. Commission Release: SEC Reg. & L. Rep. (BNA) No. 324 E-9.

50. Comment; Federal Agency Compensation of Intervenors, 5 Environ. Aff. 697.

51. Commission Release, E-9.

52. Frolin, supra, note 39, 170.

53. See Sonde & Pitt; Utilizing the Federal Securities Laws to 'Clear the Air! Clean the Sky! Wash the Wind!' (1971) 16 Harvard L.J. 831. They suggest comprehensive environmental disclosure rules. In addition to reporting non-compliance with environmental standards, the corporation should assess any detrimental effect of its activities or extended use of its manufactured products.

54. Frolin, supra, note 39 at 171.

55. Commission Release, E-11.

56. Hearings before Committee on Commerce, United States Senate, 94th Cong. 2nd Session on Corporate Rights and Responsibilities (1976), 3.

57. See Hadden, 319.

58. [1955] A.C. 21.

59. (1953) 346 U.S. 861.

60. See Mendes Hershman, Liabilities and Responsibilities of Corporate Officers and Directors (1977) 33 Bus. Law, 263. The foreign Military Sales Act 22 U.S.C. §§2751-93 (1970 & Supp. IV, 1974) require disclosure of political contributions, significant corporate payments and nearly all gifts made or offered in connection with the sale of defence products or services.

61. See statement by Napoleon Cooper, Chairman, AP Action & Co. Inc. Project 76 - AN AMERICAN AFFAIR, INC., Cleverand to the Senate Hearings, supra, note 56 at 92.

62. The corporations investigated included Minnesota Mining and Manufacturing Company, Phillips Petroleum Company, Gulf Oil Corporation, Ashland Oil Inc., Braniff Airway, Inc. and Northrop Corporation.

63. Lowenfels, Questionable Corporate Payments and the Federal Securities Law (1976) 51 N.Y. U.L. Rev. 1 at 2.

64. Sommer, Limits of Disclosure, Adress to AICPA, quoted by Lowenfels supra, note 63.

65. Ibid., 8

66. The majority of shareholders simply read ball scores to proxy statements and if they became dissatisfied with the performance of management, the best thing to do was to sell. See Hetherington, Fact and Legal Theory, Shareholders, Managers, and Corporate Social Responsibility (1969) 21 Stan. L. Rev. 248, 253.

67. Branson, Progress in the Art of Social Accounting and Other Arguments for Disclosure on Corporate Social Responsibility (1976) 29 Vand. L. Rev. 539, 586 (Here after Branson).

68. Clark C. Abt, The Social Audit for Management, New York, Amacom (1977), 4.

69. See Blumberg, supra, note 2 at 1033.

70. Schwartz, The Public Interest Proxy Contest, Reflections on Campaign G.M. (1971) 69 Mich. L. Rev. 419, 430.

71. Ibid., 505-507.

72. The corporations included crysler, American Metal Climax, Bristol Myers, Eli Lilly, Ford Motor, General Motors, Good Year Tire and Rubber,

Gulf Oil, Honeywell, International Telephone and Telegraph, Jowel Companies, Merck, Newmont Mining, Smith, Kline and French Laboratories, Standard Oil of California and Warner Lambert.

73. See Blumberg, supra, note 2 at 1030.

74. Branson, 588. Conviction among some executives and money managers that social responsibility enhances long term profitability of a corporation is on the increase. The views range from a belief that corporate social responsibility is essential for the government and the public to allow the corporations as they exist to continue. (Mann, The Limits and Rationale of Corporate Ultruism, An Individualistic Model (1973) 59 Vand. L. Rev. 709) to the view that the public would be hostile and buy less of the products of the irresponsible corporation (Baver and Fenn; the Corporate Social Audit (1972) and Clark Abt., supra, note 68 at 6.

75. Branson, 588.

76. Ibid., 589.

77. Only Chemical Bank of New York said it relied on the Wall Street Rule.

78. See Hearings on Corporate Disclosure before the Sub Committee on Budgeting, Management and Expenditures and Sub Committee on Intergovernmental Relations of the Senate Committee on Government Operations, 93rd Cong. 2nd Sess. pt. 1, at 245-377 (1974).

79. Quoted by Branson, 591.

80. Id.

81. See Longstreth and Rosenbloom, Corporate Social Responsibility and the Institutional Investor (1973), 63.

82. Branson, 593. There are several reasons for the limited evidence. Surveys of individual investor attitudes would be more costly and would require more expertise. Since institutional investors dominate the market, attitudes focus on institutions rather than individuals. Further, a survey of individual attitudes may be unproductive due to varied individual interests.

83. See Welles, The public: Who Needs Em? (1972) 33 Inst. Investor, 35.

84. Mundheim, Book Review: The University as a Shareholder and Investor in Publicly Held Corporations, A Comment on the Ethical Investor (1972) Duke L.J. 1061, 1073.

85. Hetherington, supra, note 66 at 277. Talk of corporate good citizen appears in a lot of literature. See for example: Ackerman, How Companies Respond to Social Demands (1973) 51 Harv. Bus. Rev. 88; Andrews, Can the Best Corporations be Made Moral (1973) 51 Harv. Bus. Rev. 57; and Henderson, Towards Managing Social Conflict (1971) 49 Harv. Bus. Rev. 82.

86. Henning, Corporate Social Responsibility: Shell Game for the Seventies? In Nader and Green (eds.), Corporation Power in America (1973, 157.

87. Hethenington, supra, note 66 at 278.

88. For the corporations that have been subjected to such public pressure, see Blumberg; the Politicization of the Corporation (1971) 26 Bus. Law, 1551.

89. If there is no dollars and cents impact that can be discerned, then is the fact material? The traditional interpretation of the securities laws has been 'No', special edition, Corporate Social Responsibility: The Role of the SEC (1973) 28 Bus. Law 215, 232.

90. Matters such as company's management, nature of business, nature of products, marketing and sales programs etc.

91. The Consumer Product Safety Commission maintains test reports and product-caused injury records for certain corporations. The Occupational Safety and Health Act requires employers to report occupational injuries and to report on compliance with safety standards issued by the Department of Labour. Equal Employment Opportunity Act require inter-state corporations to file corporate employment practices; Environ-mental Protection Agency requires corporations to file an environmental impact statement when major resources activity is planned.

92. There may be more private organisations that perform social auditing but the investor might not know them and they are likely only to be used by institutions that have sufficient resources to warrant such expenses.

93. See Branson, 618.

94. Blumberg, supra, note 2 at 1034.

95. See Note, Corporate Ultruism: A Rational Approach (1970-71) 59 Geo. L.J. 117.

96. Branson, note 260. Also Henning, supra, note 86 at 154.

97. See Dilley, What is Social Responsibility, Some Definitions for Doing the Corporate Social Audit (1974) 105 Canadian Chartered Accountant, 24.

98. See Clark Abt, supra, note 68, 8-9.

99. Ibid., 45.

100. Branson, 546.

101. Ibid., 551, 560 and 566 respectively.

102. Sec. Abt. 203.

103. Id.

104. See Bauer and Fenn, The Corporate Social Audit, 84.

105. See Blumberg, supra, note 2 at 1035.

106. See Branson, 553.

107. Sethi, Getting a Handle on the Social Audit (1972) Bus. & Soc. Rev. 31.

108. Bauer and Fenn, supra, note 104 at 85.

109. See Abt., 48.

110. Ibid., 57.

111. Ibid., 58.

112. Ibid., 61.

113. Ibid., 92. See also John Carson and George Steiner, Measuring Business' Social Performance. The Corporate Social Audit, Committee for Economic Development (New York, 1974).

114. Abt., 113.

115. In Canada, see CBCA, s. 165, B.C.C.A., s. 208; OBCA s. 182. In the United States see Marget, Accounting - The Audit Committee - a Progressive Financial Reporting (1978) 3 J. Corp. L. 400. Also Fleisher and Others (ed.) 9th Annual Institute on Securities Regulation (1978), 67.

116. See Marget, supra, note 115 at 402.

117. See Beck, et al., Business Associations (York University, 1978) at IV-30.

118. See Lam and Arens, Audit Committees in Practice: A Survey (1975) Chartered Accountants Magazine, 49.

CHAPTER IV

A RESPONSIBLE BOARD

1. Percival V. Wright [1902] 2 Ch. 421. In the United States, see Eisenberg, The Legal Roles of Shareholders and Management in Modern Corporate Decision Making (1969) 57 Calf. L. Rev. 1.

2. Alexander v. Automatic Telephone Co. [1900] 2 Ch. 56 (C.A.). Re Lee, Behrens & Co. Ltd. [1932] 2 Ch. 46., and Martin v. Gibson (1907) 15 O.L.R. 623.

3. [1894] 1 Ch. 616, 631.

4. Re City Equitable Fire Insurance Co. [1925] Ch. 407, 426. Also Peso Silver Mines v. Cropper (1966) 58 D.L.R. (2d) 1; affirming (1966) 56 D.L.R. (2d) 117.

5. See Sealy, Fiduciary Relationships (1962) C.L.J. 69 (1963) C.L.J. 119 and The Director as a Trustee (1967) C.L.J. 83. Also Gareth Jones Unjust Enrichment and the Fiducieny's Duty of Loyalty (1968) 84 L.Q. Rev. 472.

6. Supra, note 4 at 428-429.

7. In Cardiff Savings Bank [1892] 2 Ch. 100, A director who had not attended a board meeting in 17 years was not held liable. Recent commonwealth cases suggest a higher standard of care. In an Australian case, Re Australian Venezolana Pty. Ltd. [1962] 4 F.L.R. 60, a director was held liable in negligence for acting before he had properly acquainted himself with the affairs of the Company. See also the Nigerian case of the High Court of Lagos State Shonowo v. Adegayo, 1969(2) A.L.R. Comm. 419. In Canada, there have been legislative reforms aiming at upgrading the duties of directors. For example B.C. Companies Act, s. 141(1)(b). See Iacobucci, The Exercise of Directors' Powers: The Battle of Afton Mines (1973) 11 Osgood Hall L.J. 353. For a comparative study of duties imposed by common law and those developed in the United States see R. Paterson, Reforming the Standard of Care of Company Directors (1975-77) 8 V.U.W.L. Rev. 1.

8. Ibid., 12.

9. This view has had no real support in practice though it constantly appears both in English and American literature. For example, Fogarty, Company and Corporation - One Law? (1965), 8-10. Stein, Harmonization of European Company Laws (1971) 81-82. Eisenberg, The Legal Roles of Shareholders and Management in Modern Corporate Decision Making (1969) 57 Cal. L. Rev. 21. Hetherington, Fact and Legal Theory: Shareholders,

Manager and Corporate Responsibility (1969) 21 Stan. L. Rev. 248, 277-78. Also Fourteenth Annual Columbia Law Symposium: The Greening of the Board Room: Reflections on Corporate Responsibility (1973/74) 10 Colum. J. L. & Soc. Prob. 15.

10. Ashbury Railway Carriage and Iron Co. Ltd. v. Riche (1875) L.R. 7 H.L. 653.

11. Same for Kenya and Tanzania.

12. Obaseki v. African Continental Bank Ltd. [1965] A.L.R. Comm. 538.

13. Supra, note 10.

14. Gower, Principles of Modern Company Law (3rd Ed.) 1969, Chap. 3.

15. The distinction however is still relevant. See Re Introductions Ltd. (1971) 1 Ch. 199. Also Bastin, Company Powers and the Ultra Vires Doctrine (1971) J. Bus. L., 268.

16. Cmnd 6659/45. In some places, the doctrine has been abolished. For example B.C. Companies Act. See also Isreal and Ghana.

17. Dodd, For Whom are Corporate Managers (1932) Harv. L.R. 1145, 1147-48.

18. Ibid., 1149.

19. Cited by Mendes Hershamn, Liabilities and Responsibilities of Corporate Officers and Directors (1977) 33 Bus. Law, 263 at 288. C.f. Henry Ford II in a statement to the annual shareholders' meeting of May 1972 where he said: 'I believe that the social responsibility of the corporation today is fundamentally the same as it has always been, to earn profits for shareholders by serving consumer wants with maximum efficiency. This is not the whole of the matter, but it is the heart of the matter.'

20. 33 D.L.R. (3d) 1973, 288.

21. Ibid., 314.

22. Id. He considered the directors would be within their fiduciary obligations if they observed a decent respect for other interests beyond those of the company's shareholders. In another case, Savoy Corp. Ltd. v. Development Underwriting Ltd. (1963) N.S.W.R., 138, the Australian judge said: 'It would seem to be unreal in the light of the structure of modern business life to take the view that directors should in no way concern themselves with the infiltration of the company by persons or groups which they bona fide consider not to be seeking the best interests of the company. See also the American case of A.P. Smith Mfg. v. Barlow (1953), 13 N.J. 145, 98A (2d) 581 at 586. Cf. Dodge v. Ford Motor Co. (1919), 170 N.W. 668 at 684. But see Mendes Hershaman, supra, note 19 at 292 where he concludes: 'If corporations continue to commit

funds toward socially desirable ends, and if the courts continue to relax the operative legal limits on such commitments, it will no longer be possible to state as did the noted English jurist Sir Edward Coke over four centuries ago that corporations cannot commit treason nor be excommunicated nor be outlawed for they have no souls'.

23. For a full discussion see Gower, Corporate Control: The Battle for the Berkeley (1954) 68 Harv. L.Rev. 1176.

24. Ibid., 118.

25. Id.

26. Vagts, Reforming the 'Modern Corporation: Perspectives from the German' (1966) 80 Harv. L. Rev. 23, 39.

27. Ibid., 40.

28. For a detailed discussion, see Shonfield, Modern Capitalism: The Changing Balance of Public and Private Power (Oxford University Press, 1965), 293.

29. See Gossett, Lumb and Wood; The Role of the Corporation in Public Affairs (1959) 15 Bus. Law 92.

30. See Comment, Corporate Political Affairs Programs (1961) 70 Yale L.J. 821.

31. See Blumberg, Corporate Responsibility and the Social Crisis (1970) 50 B.U.L. Rev. 157, 188 where he discusses Federal and State law in the U.S. against political contributions by corporations.

32. Infra, liability of directors.

33. Blumberg, Reflections on Proposals for Corporate Reform through change in the composition of the Board of Directors; 'Special interest' or 'Public' Directors (1972) 52 B.U.L. Rev. 547, 549.

34. A requirement that directors should be citizens of the country in which the company is operating is not uncommon. For example, see the B.C. Companies Act s. 131 which requires the majority of Director of Every company to be residents in Canada.

35. See Nader et al., Taming the Grant Corporation (1976), 124.

36. See Blumberg, supra, note 33 at 558.

37. Rostow, To Whom and for What Ends is Corporate Management Responsible? In Mason (ed.), The Corporation in Modern Society (1960), 56.

38. Townsend, The Ups and Downs of Working Life, Center Magazine, Jan.-Feb. 1972, 27 at 34.

39. Douglas, Democracy and Finance (1940), 52.

40. See Townsend, <u>supra</u> note 37.

41. Nader et al., <u>supra</u> note 35 at 121.

42. <u>Ibid</u>., 125.

43. See Blumberg, <u>supra</u> note 33 at 558.

44. Terrence H. White, Power or Pawns - Boards of Directors in Canadian Corporations (1978). 'Outside' directors are normally defined as non-employees of the corporation but this definition has been criticised and White suggests a new definition which should be as follows (page 25).

    A director is an insider on the board of corporation X if any of the following describe a director:

    1. A current or past employee of corporation X.

    2. A current or past employee of any corporation which owns at least 10% of the equity.

    3. A current or past employee of any corporation in which corporation X owns at least 10% of the equity.

    4. A person who either owns at least 10% of the equity in coporation X or at least 10% of the equity in any corporation in which corporation X owns at least 10% of the equity or at least 10% of the equity in any corporation which owns at least 10% of the equity in corporation X.

    5. A person who serves or has served on a fee-for-services basis (such as legal counsel) for corporation X, or any corporation in which corporation X owns at least 10% of the equity, or any corporation which owns at least 10% of the equity in corporation.

    6. A relative of any person classed in 1, 2, 3, 4 or 5 above.

45. Stone, Where the Law Ends (Harper & Row, 1975), 135. Also Hahn and Manzoni, The Monitoring Committee and Outisde Directors' Evolving Duty of Care (1978) 9 Loyola U.L.J. 587.

46. See Goyder, The Responsible Company (Basil Blackwell, Oxford, 1961), 100. Nader et al., Taming the Gian Corporation (1976), 124 and Levin, Organisationand Control of Communications Satellites (1965) 113 U. Pa. L. Rev. 315.

47. The Second Bank of the United States in 1816, The Union Pacific Railway Road in 1862 and 1864, The Federal Reserve System 1913 and more recently, the Communications Satellite (Comsat) of 1962.

48. Hearings on Communications Satellite Act of 1962 before the Senate Committee on Foreign Relations, 87th Cong. 2d Sess. 70 (1962).

49. Herman Schwartz, Governmentally appointed Directors in a Private Corporation - The Communications Satellite Act of 1962 (1965) 79 Harv. L. Rev., 350.

50. Communications Satellite Act, 76 Stat. 419 (1962), 47 U.S.C. § 701 (1964).

51. Schwartz, supra note 49 at 363.

52. See Kyle, The Government Director and His Conflicting Duties (1973/75) 7 U.V.W.L. Rev. 75.

53. Id.

54. Boulting v. Association of Cinematography, Television and Applied Tec echnicians [1963] 2 Q.B. 606, 626-627. See also Jacobs J. in Levin v. Clark [1962] N.S.W.R. 686, 700.

55. Gower, Modern Company Law (3rd ed., 1969), 523.

56. In Germany, the government owns shares in the Volkswagon Corporation and has guaranteed seats on the Board of Directors.

57. Quoted by Sommer, Foreward: Fiduciary Duties - The Search for Content (1978) 9 Loyola U.L.J. 525.

58. SECV. Chenery Corp. 318 U.S. 80, 85-86 (1943).

59. Quoted by Hahn and Manzoni, supra note 45 at 588. See also Statement of Business Roundtable: The Role and Composition of the Board of Directors of Large Publicly Owned Corporations (1978) 33 Bus. Law 2083 at 2092.

60. Land Credit Company of Ireland v. Lord Fermoy (1870) 5 Ch. App. 772.

61. [1901] A.C. 477.

62. See Neville J. in Re Brazilian Rubber Plantations & Estates [1911] 1 Ch. 425.

63. National Christian Council for Kenya; Who Controls Industry in Kenya (1968) 140-143.

64. In Canada, see Iacobucci, supra note 7 at 354. The B.C. Companies Act s. 141 provides:

1. Every director of a company, in exercising his powers and performing his functions shall

   (a) act honestly and in good faith and in the best interests of the company; and

   (b) exercise the care, deligence and skill of a reasonably prudent person.

2. The provisions of this section are in addition to and not in derogation of, any enactment or rule of law or equity relating to the duties or liabilities of directors of a company.

The reform attempts to adopt an objective standard of a reasonably prudent person.

In the U.S. see The Model Business Corporation Act - Corporate Director's Guidebook (1978) 33 Bus. Law 1591.

65. In 1974, in a speech to the Colorado Association of Corporate Counsel, the Sec Commissioner, Somner said: "It is axiomatic to say that these days that society is demanding constantly more from those who occupy positions of trust. . . . In corporate life, expectations are constantly rising. . .increasingly the focuss is upon those who at least theoretically, have the ultimate control over the vast corporate wealth of this country. The directors of publicly held corporations. . . . In general I think it fair to say that historically directors have not been held to an excessively high or even very high standard of conduct. State corporate laws do not appear to erect unreasonably, or again, even very high, standards for directors. . . . The tough questions concerning the responsibilities and liabilities of directors have not in recent times arisen under state statutes, but rather have their origins in Federal cases has led to a renewed interest in the statutory delination of directors' duties and responsibilities." See Hahn and Manzoni, supra note 45 at 589. Also Re Australian Venezolan Pty. Ltd. [1962] 4 D.L.R. 60.

66. Caplin, Outside Directrs and the Responsibilities: A Program for the Exercise of Due Care (1975) 1 J. Corp. L. 57.

67. See Joseph Johnston, Corporate Indeminification and Liability Insurance for Directors and Officers (1978) 33 Bus. Law 1993.

68. Per Learned Hand in Barnes v. Andrews, 1924, 298F 614, 617 (S.D.N.Y.).

69. Charles Frankel quoted by Tony Mcadams and B. Tow, Personal accountability in the Corporate Sectors (1978) 16 Am. Bus. L.J., 67. See also the Australian Venezolana Pty. Ltd. [1962] F.L.R. 60 where a director was held liable in negligence for acting before he had properly acquainted himself with the affairs of the company.

70. Mcadams and Tower, supra note 69 at 67.

71. 421 U.S. 658 (1975).

72. Ibid., 672.

73. Mcadams and Tower, supra note 69 at 71.

74. Gower, 189-217.

75. S. 33. See also s. 31 of the English Companies Act, 1948.

76. S. 323(K) and 327(U). 'Fraud' has been given a liberal interpretation: "If a company continues to carry on business and to incur debts at a time when there is, to the knowledge of the directors, no reasonable prospect of the creditors ever receiving payment of those debts, it is, in general, a proper inference that the company is carrying on business with intent ot defraud." Per Maughan J. in Re William C. Letich Bros. Ltd. [1932] 2 Ch. See also Liability for Misdescription of the Company. S. 109(4) of the Uganda Act, the equivalent of s. 108(4) English Companies Act 1948.

77. Per Dawson J. in Cities Services Co. v. Hoeneke, 20 p. 2d 460, 470 (1933). See also ss. 152-154 of the Uganda Companies Act. Also Smith, Stone & Knight Ltd. v. Birmingham Corporation [1939] 4 All E.R. 116 where the property of a subsidiary was destroyed and the holding company successfully sued for damages.

78. The East African Income Tax Management Act, Cap. 20 (1970) provided:

22(1) Where the Commissioner-General is of the opinion that the main purpose or one of the main purposes for which any transaction or transactions was or were effected (whether before or after the passing of this Act) was the avoidance or reduction of liability to tax, for any year of income, or that the main benefit which might have been expected to accrue from the transaction or transactions in the three years immediately following the completion thereof was the avoidance or reduction of liability to tax, he may, if he determines it, to be just and reasonable, direct that such adjustments shall be made as respects liability to tax as he considers appropriate to counteract the avoidance or reduction of liability to tax which would otherwise be effected by the transaction or transactions.

The Act is now repealed but reproduced in Income Tax Acts (U) s. 22, (K) s. 23 (TO s, 27. The effect of the section on companies is considered in R.D. & Co. Ltd. v. Commissioner of Income Tax (1959) Case no. 66, 3 EATC, Part 1, 41 (Supreme Court of Kenya). See also Lawrence Investments Ltd. v. Commissioner of Taxes, Plaint No. 1971/HN./C.A./2 (unreported, Aug. 17, 1971) (High Court of Zambia) and De Beers, Consolidated Mines Ltd. v. Howe [1906] A.C. 455 (H.L.).

79. National & Grindleys Bank & Co. v. Kentiles & Co. [1966] E.A. 17 (Privy Council on Appeal from Kenya). Katate v. Nyakatukura (1956) 7 U.L.R. 47(U) and the South African case, Dadoo Ltd. v. Krugersdorp Municipal Council, 1920 A.D. 530 (C.A., South Africa). Also Hindu Dispensary, Zanzibia v. N.A. Patwa & Sons [1958] E.A. 74.

80. 127F 2d 284 (1942), 288.

81. [1933] Ch. 935 (C.A.).

82. Ibid., 956.

83. [1962] 1 W.L.R. 832.

84. Ibid., 836-837. Also Re. F.G. (Films Ltd.) [1953] 1 W.L.R. 483. The state of mind of the corporate executives has been said to be the state of mind of the company. Bolton (H.L.) Engineering Co. Ltd. v. T.J. Graham & Sons Ltd. [1957] 1 Q.B. 159. Cf. John Henshall (Quarries Ltd. v. Harvey [1965] 2 Q.B. 233.

FOOTNOTES: CHAPTER V

APPLICATION IN EACH AFRICA

1. Shivji, Tanzania, The Silent Class Struggle, in Cliffe and J.S. Saul (eds.), Socialism in Tanzania (East African Publishing House, Nairobi, 1973) at 31.

2. Bingu W.T. Mutharika, Multinational Corporations in Regional Integration: The African Experience (1975) 5 Africa Review, 365 at 368.

3. Ibid., Figure 1 - The Colonial Mesh in Africa, 369.

4. Africa Magazine, May 1974, 9. For a detailed study of the activities of Lonrho in Africa, see Suzanne Cronje et al., Lonrho Portrait of a Multinational (Julian Friedmann Books, 1976).

5. The Lohnro holdings in Tanzania were nationalised by the Tanzanian government in 1978 due to continued breach of sanctions against Rhodesia.

6. Kenya, Development Plan 1970-74, Nairobi, Government Printer, 1969, 101-102.

7. Kenya, Development Plan 1974-78, Nairobi, Government Printer, 1974, Part 1, 151, 195.

8. See Steven Langdon, The Multinational Corporation in the Kenya Political Economy, in Kaplinsky (ed.), The Multinational Corporation in Kenya (Oxford University Press, 1978), 134 at 136.

9. Needleman, Lall, Lacey and Seagrave, Balance-of-Payments Effects on Private Foreign Investment: Case Studies of Jamaica and Kenya, UNCTAD Document TD/B/c.3/79 Add. 2, 21 May 1970, 36 in Kenya, Commerce is dominated by the international firms like the Chandarias which is one of the first companies originating from Kenya to become a multinational with operations all over the world. Added to this are Mitchell Cotts, Motor Mart and Exchange, Mackenzie Dalgety, Marshalls E.A., Twentsche Overseas Trading Group, Gailey and Roberts Ltd., International Dominate Banking. Berclays and standard bank both British owned handle more than 50 per cent of the banking business. Multinationals control transportation and tourism. German and American firms have invested heavily in hotels throughout the country. Mining and Agriculture are also largely controlled by foreing firms.

10. The Arusha Declaration, 1967, Dar-es Salaam.

11. Temu, Nationalisation in Tanzania, East Africa Journal, June 1967. Also The Foreign Investment Protection Act (1964).

12. "U.S. Try to adopt to new Realities," The Washington Post, March 12, 1969, cited by D.D. Nsereko, The Tanzania Nationalisation Laws (1970) 3 E.A.L. Rev. 1,2. In another article, "U.S. companies strive for New Image," The Washington Post, March 10, 1969, Goshko had elaborated the problem further:

    The atmosphere created by United Fruit in its domains was that of a gigantic company store. Thousands of farmers were coerced into selling bananas exclusively to United Fruit at prices set by the company, hired thugs enforced cooperation and Latin government either pocketed 'subsidies' and looked the other way or they did not last very long.

    Coup for sale. Toward the end of his life, Zemurry, who openly admitted having bought one coup in Honduras, told an interviewer that he had done many things in the early years of the company that he did not like to think about in the dark hours of the night.

    Because these things were done with the tacit approval of successive administrations in Washington, the impression grew that the United States promoted dictatorships to further the aims of United Fruit. This cry was heard as recently as 1954, when CIA incited right-wing Military elements in Guetemala to overthrow a popular but leftist government.

    Actually, the 1954 incident was prompted mainly by cold war fears of a potential communist takeover. However one of Wasington's conditions for aiding the coup leaders was a promise to eliminate a land program that had offended United Fruit, a former United Fruit executive acted as an intermediary between CIA and rebel military officers.

13. The Arusha Declaration and TANU's policy of socialism and self-reliance 1967. It has long been recognised that governments have the duty and the right to exploit their resources in the national interest. See U.N. General Assembly Resolution No. 626 (VII) of 1952 which affirms that 'the right of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty and is in accordance with the purposes and principles of the charter of United Nations.' For a detailed study of this subject, see J.S. Stanford, International Law and Foreign Investment in Macdonald et al (ed.), The International Law and Policy of Human Welfare (1978), 471.

14. Quoted by Nsereko, supra note 12 at 4.

15. See Agricultural Foreign Investment Disclosure Act of 1978. The Preamble reads: 'An Act to require foreign persons who acquire, transfer or hold interests in agricultural land to report such

transactions and holdings to the Secretary of Agriculture and to direct the secretary to analyse information and determine the effects such transactions and holdings have, particularly on family farms and rural communities, and for any other purposes.'

16. Julius K. Nyerere, 'Economic Nationalism,' speech February 28, 1967 in Nyerere, Freedom and Socialism (London, New York, Nairobi, 1968), 264. Also Nowrojee, Public Enterprise and Cooperatives in Kenya and Tanzania (1972) 5 E.A.L. Rev. 141.

17. See Temu, The Employment of Foreign Consultants in Tanzania, Its Value and Limitations (1973) 3 African Review at 69.

18. Shivji, Capitalism Unlimited, Public Corporations in Partnership with Multinational Corporations (1973) 3 African Review 359 at 361-362.

19. There are still exceptions to this rule. For example IBM left both Nigeria and India after refusing to go national as required by the governments. For trade links between Africa and the American multinationals see Africa Magazine, June 1979.

20. 'A Stake in Zambia', The Economist, 23rd Aug. 1969,56.

21. See Shivji, supra note 18 at 366.

22. See John Loxley and Saul, Multinationals, Workers and the Parastals in Tanzania (1975) Review of African Political Economy, 54 at 74.

23. Mckensey Report by Christopher Walker in Business Observer, 9th August 1970, 7.

24. Doelwell, Company Law in Tanzania and its Administration (1969) quoted by Katende, Company Law in East Africa: Present and Future (1969) 2 E.A.L.R., 135 at 153.

25. Final Report of the Commission of Inquiry of the Working and Administration of the Present Company Law in Ghana, p. 2, para. 12 and 13. For a comment on the Report see Kahn Freund (1962), 25 M.L. Rev. 78.

26. Ibid., para. 19.

27. Mr. Tilney, then Minister of Finance and Economic Affairs; Tanganyika Legislative Council debates, 34th Session, Vol. III, 17th March, 1959. Quoted by Katende, supra note 24, 155.

28. Commission of the European Communities, Preliminary Guidelines for a Community Social Policy Programme, 4 Bull. of the European Community Supp. No. 2 (1971), 48.

29. Employee Participation and Company Structure in the Eruopean Community, 8 Bull. of European Communities, Supp. No. 8 (1975), 8-9.

30. Labour Department Annual Report 1947 quoted by Livingstone, The Government, the Worker and the Law in Kenya (1967) 3 E.A.L.J., 383 at 309.

31. Tom Mboya, Freedom and After, at 195.

32. All the Directors should continue to be bound by the same duty to protect the long term interestsof the company.

33. This is in line with the British Labour government policy and the practice both in Germany and the Netherlands. The European Company proposed by the EEC is on the same footing. See Dimirtis C. Constas, The Developing European Community Law of Worker Participation in Management (1978), 11, N.Y.U.J. of Int. Law, 107.

34. See Hadden, 474.

35. Lack of these rights has been said to be the cause of failure of democracy in some attempted schemes. See Bernstein, Worker Place Democratization - Its Internal Dynamics (1976), 75.

36. See Report on the Committee of Inquiry on Industrial Democracy (Britain, 1977), Cmnd 6706 (Bullock Report), 132.

37. S. Langdon, The Multinational Corporation in the Kenya Political Economy in Kaplinsky (ed.), The Multinational Corporation in Kenya (Oxford University Press, 1978), 148-157.

38. <u>Ibid</u>., 149.

39. See text, <u>supra</u> Chap. ***.

40. Annual Report, 1974/75, Department of Consumer and Corporate Affairs, Ottawa, 3.

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