

Corporate Governance and Workplace Democracy: Some Paradigms and Paradoxes

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Abstract:
The paper aims to explore contemporary developments of the debate on employees' participation and workplace democracy. This paper particularly focuses on Company Law and its Review, EU social law and the EU Information and Consultation Directive and its implementation in the UK through the Information and Consultation of Employees (ICE) Regulations. In doing so, this paper has two objectives. First this paper examines various corporation theories in search for legitimacy for employees' participation in the corporate governance model. Second, this paper questions whether there are effective alternatives to collective bargaining as the best mechanism for promoting workplace democracy and justice, and the extent to which current legal developments can be used by trade unions and their members to their advantage. The paper analyses a variety of models, including the 'European Social Model' and South African Labour Law, for promoting workplace democracy and the paradoxes that they arguably generate in terms of their potential consequences.
Keyword: corporate governance, workplace democracy, employees' participation, and employees' collective bargaining.

1. Introduction:

As analysed by Ireland[1], there has been increasing interest over the last decade on the part of some labour law and industrial relations academics in alternatives to collective bargaining structures to promote workers' interests in the workplace. This orientation has not arisen from any hostility to trade unionism, but rather a perception that collective bargaining can no longer deliver and therefore trade unions need to identify and use other mechanisms for representing their members. Moreover, there has been interest in the extent to which employees should be regarded as stakeholders in the organisations which employ them and therefore whether, as is so with shareholders, issues of corporate governance should be addressed.

The focal points of debate have been forms of employee participation, co-determination and works councils. This paper explores contemporary developments in this area with attention paid to the *Company Law Review*, the consequences of European social law for the UK and provisions in the South African Labour Relations Act for the establishment of workplace forums. Particular attention is paid to the Information and Consultation (ICE) Directive (Directive 2002/14) as transposed into UK law by the Information and Consultation of Employees (ICE) Regulations (SI 2004/3426).

This paper reflects two perspectives. Firstly, a company law discourse that considers the extent to which employees should be viewed as stakeholders in the enterprises for which they work and whether and how this should be reflected in concepts of corporate governance. Secondly, a labour law discourse that questions whether there are effective alternatives to collective bargaining as the best mechanism for promoting workplace democracy and justice, and the extent to which current legal developments can be used by trade unions and their members to their advantage. The paper seeks to analyse a variety of models for promoting workplace democracy and the paradoxes they arguably generate in terms of their potential consequences.

The first section of this paper examines company law discourse in considering the extent to which employees are viewed as stakeholders in the enterprises for which they work, and whether and how this should be reflected in concepts of corporate governance.

2. The UK Corporate Governance Model and Employees' Participation:

The Companies Act 1985 provides the constitutional machinery for the governance of UK companies. Recognising the division of functions between the board of directors and the general meeting and applying the general law of contract, trusts and agency, the provisions of the Companies Act 1985 simply perceives the company governance system as a set of powers that are distributed between the general meeting and board of directors. Such a governance system is complemented by the role of the auditor reporting on the accounts, and the freedom of companies to use or adapt model constitutional documents set out in the Companies (Tables A to F) Regulations

[1] P. Ireland, 'Corporate Governance, Stakeholding, and the Company: Towards a Less Degenerate Capitalism?' (1996) 23 Journal of Law and Society 287.

Act 1985. In addition, for listed companies, the Listing Rules promulgated by the Financial Services Authority, in its capacity as the UK Listing Authority, requires a substantial additional level of transparency and disclosure. Hence, the standard corporate governance model does not include employees' participation. It rather emphasises the roles of both the collective body of shareholders (i.e. general meeting) and the board of directors. However, in principle, there is nothing in law that would prevent companies in the UK from opting-out of the standard corporate governance model to include employees' participation.

Yet, a formalistic 'black letter lawyer' focusing only on existing legislation and the constitutional documents of companies, could be forgiven for seeing a clear and straightforward legal model of corporate governance based on a concept of 'shareholder democracy'. According to section 303 of the Companies Act 1985 for example, shareholders can elect and remove directors who owe legal duties to the company to pursue its interests. The legislation and the company's constitution stipulate which powers are vested in the board and which belong to the shareholders, leaving the power to amend the constitution to the latter.[1] However, since the early 20th century, literature in the area of corporate governance began to identify a major contradiction in the corporate governance system; namely, the divorce between ownership and control.[2] Berle and Means (1932)[3] argued that, in the case of a listed company with shares widely dispersed in small parcels among a large number of investors, there exists a separation of ownership and control; to such an extent that the constitutional mechanism of large corporations would fail to hold corporate managers to account.

This thesis of Berle and Means (1932) became well established and widely accepted. Indeed, this was and still is (in part) the case to such an extent that, since the Second World War, scholars in the USA and the UK have regarded the thesis of Berle and Means as a truism. However, more recently some corporate governance scholars have cast doubts on the validity of Berle and Means' thesis with regards to today's market.[4] In doing so, they contend that a degree of remarriage has taken place between ownership and control. Their claim is based on the fact that there have been profound changes to the share ownership structure of public listed companies making institutional investors and investment managers the obvious contenders to be the ultimate power in UK and US public listed companies. Although this paper acknowledges that there are some examples of institutional shareholders' activism,[5] the situation is still very short of one claiming that there an effective system to hold management accountable in listed companies. It is beyond this paper's aims to elaborate on the reasons for the lack of institutional investors and investment managers' "willingness" and "ability" to take initiatives in monitoring and controlling public listed companies' managers, but it is believed that market custom and over-regulation are to be held responsible.[6]

It is clear that large corporations are increasingly important entities in society. Their financial performance and security both connects to the wider economy and impacts on individual members, employees and creditors among others. Whilst, It is traditional in company law to focus on the rules and principles that safeguard members and creditors on employees as a group of stakeholders it is employees who in many cases could be the biggest losers when corporations get into trouble. For instance, when Enron was filed for bankruptcy procedures, thousands of employees not only lost their livelihood, but also their pensions. Arguably, therefore, it is inadequate for those concerned with corporate governance simply to dismiss the interests of employees as being the province of employment law and nothing to do with company law.

Indeed, the fact that shareholders in large UK corporations lack the power to hold corporate managers to account should prompt thinking in finding other models for corporate governance. One possibility is that providing legal support for employee participation could constitute a factor in enhancing the existing corporate governance model so that corporate controllers are held accountable in an effective manner both to shareholders and employees. Before developing this proposition it is valuable to examine corporation theories to ascertain whether they provide any justification for extending corporate governance models to include employee participation.

2.1 Corporation Theories and the Legitimacy of Employees' Participation in Corporate Governance:

A review of the literature on the theory of the company provides clear evidence on the different approaches to

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[1] See, sections 4 and 9 of the Companies Act 1985

2 A. Berle and G. Means, *The Modern Corporation and Private Property*, (Harcourt, Brace & World, Inc., New York, revised (edn.) 1968).

3 *ibid*

4 See for example, M. Gaved, M., *Institutional Investors and Corporate Governance: Proposals for a Code of Disclosure*, (Oxford, NTC Publications Ltd, 1998); M. Gaved, *Closing the Communication Gap: Disclosure and Institutional Shareholders*, (The Institute of Chartered Accountants in England and Wales, London 1997); see also, G. Stapledon, *Institutional Shareholders and Corporate Governance*, (Clarendon Press, Oxford, 1996).

5 For example, institutional investors (mainly Lens and Hermes) joined forces to remove the chief executive of the UK's Mirror Group in 1999.

6 A. Al-Hawamdeh and I. Snaith, Is Private Briefing Illegal in the UK?, (2005) 13 (4) *Corporate Governance*, 463.

stakeholders and consequently, employees' legal status in corporations. Legal theorists have produced numerous legal theories regarding this matter. However, concentration lies on a discussion of how employees are perceived from the viewpoint of three of the main theories on the corporation. Namely, these theories are: corporation communitaire, corporation concession, and corporation contractual or corporation aggregate. These three theories arguably, by and large, form an umbrella for most of the existing theories of the corporations. In examining these theories this article neither seeks to support nor rejects their approaches to stakeholders. Rather, this article seeks to establish whether they provide any theoretical justification for regarding the protection of employees' interests as a legitimate concern of corporate governance.

2.1.1 Corporation Communitaire Theory:

This theory was modelled in the former communist countries and fascist Italy.[1] Corporation communitaire theory states that corporations do not only need the state's approval to exist and operate, but are also created by the state as a utility or commodity to serve its interests. This necessarily entails that the state has the right to alter or destroy a corporation at its disposal. According to corporation communitaire theorists, reining corporations in is a necessity in order to prevent corporations from accumulating enough power that could in turn undermine the state.[2]

Being a mere creation of the state necessarily weakens the commercial identity of corporations. According to this theory, the commercial identity of a corporation must be weakened to give corporations a clear set of goals to achieve. Accordingly, corporations would be set goals to serve the state and society, rather than diffusing the corporations' goals in trying to achieve both commercial and social responsibilities. A corporation communitaire theorist would picture the corporation to be no more than a political tool for serving and pursuing state polices.[3] Some corporation communitaire theorists have justified this public approach to corporations by adhering to the notion that the corporation is a legal entity, which acts as a means to differentiate corporations from their shareholders.[4] This theory viewed corporation as an artificial entity.

Viewing the corporation as an artificial entity entails that the corporation as an entity is separate from its shareholders and other stakeholders' parties who own and control it.[5] Corporation communitaire theorists justify the public law approach (as part of communitaire theory) to company law, by arguing for the implementation of various regulations whilst at the same time, addressing important public concerns.

Teubner argues that corporations have a degree of autonomy.[6] This in part would entitle them to have different sets of interests and objectives to those of their shareholders. However, perhaps due to realisation on the part of some corporation communitaire theorists that even if corporations are independent from shareholders this does not necessarily support the fact that corporations should be dependent on the state, has led to a focus on corporate social responsibility. This is because the autonomy of corporations and their independence from shareholders should not, logically, lead to dependence on the state and in serving to deliver better welfare to society. It would rather mean that corporations are independent and separate from both their members and the state. Accordingly, relying on the argument that corporations are autonomous does not oblige corporations to serve society. Other corporation communitaire theorists' such as Stokes have approved corporate social responsibility as advocated by Dodd and others.[7] Yet, with significance to this paper, Stokes for example, shifted the meaning of corporate social responsibility by placing the emphases on the interests of stakeholders groups within the corporation, (i.e., employees, management, shareholders, creditors, etc.) as well as society in general.[8]

In conclusion, corporate communitaire theory advocates that companies are different to shareholders, which means that the company's interests could be different to the interests of shareholders. This weakens shareholders' legal status in the corporation yet at the same time does not justify employees' participation in corporate governance. However, the fact that this theory advocates the idea that corporations should only serve the welfare of society is thought to provide adequate justification for corporate social responsibility and the latter could be in some cases wide enough to include the wellbeing of employees and their interests in the corporation.

2.1.2. Corporation Concession Theory:

This theory asserts that although the state is not the creator of corporations, corporations still need to be conceded by the state in order to exist and operate. Concession theory rather argues that corporations are the creation of the private initiative of their promoters. The way in which corporations are created is the underpinning principal

1 J. Dine, *The Governance of Corporate Groups*, (Cambridge University Press, Cambridge, 2016).

2 L. Levin, *The Charter Controversy in the City of London*, (Athlone Press, London, 1969).

3 M. Phillips, 'How Much Does Corporate Theory Matter? A Response to Professor Boatright', (1996) 34, *American Business Law Journal*, 239 at 241.

4 E. Dodd, 'For Whom Are Corporate Managers Trustees?', (1932) 45 (7), *Harvard Law Review*, 1145.

5 *ibid*

6 S. Thurber, 'The Insider Dealing Compensation Contact as an Inducement to Monitoring by Institutional Investor' (1994) 1, *George Mason University Law Review*, 119.

7 M. Stokes, 'Company Law and Legal Theory', in W. Twining (ed.), *Legal Theory and Common Law*, (Blackwell, Oxford, 1986).

8 *ibid*

difference between corporation communitaire theory and corporation concession theory. While on one hand, corporation communitaire theorists such as Horwitz,[1] purport that corporations owe their existence and operation to the state where they register and function, concession theory on the other hand perceives the role of the state to be merely procedural and facilitative. Accordingly, shareholders are the only group of stakeholders who enjoy a reasonable position, being allowed to initiate businesses, with minimum interference from the state, and hence employees (amongst other groups) are not included in initiating the company.

Furthermore, concession theory maintains that the state's role is to ensure that the corporate governance structure is fair and sound. Yet, there is more to the state's role, regarding corporations. This is due to the fact that the state would wish to continue monitoring that corporations are always committed to the state's public policy after being registered. This approach is clearly different from corporation communitaire theory, which believes corporations should only serve the welfare of society.

Like corporation communitaire theory, concession theory insists on the notion that the corporation is a separate legal entity. However, unlike corporation communitaire theory, concession theory perceives the corporation as having an existence outside the law. Laski for example, states: '[t]he corporation, being a real entity, with a personality that is self-created and not state-created, must bear the responsibility for its actions.'[2] Therefore, corporation concession theorists have found more plausible means to justify the notion of the corporation as a separate entity to the state; that like the natural person, a corporation should be independent from both the state and its members yet adhere to the state's law and public policy. Some concession theorists have justified the element of the state's intervention in corporations on the basis that the state gives concession to these corporations. Such a concession characterises corporations as separate legal entities that are 'perpetual' and able to sue and be sued in their own name, leaving shareholders to enjoy the notion of limited liability.[3]

The majority of concession theorists accept that corporate managers must take into consideration the interests of other stakeholder groups, other than those of shareholders, as long as they do not oppose shareholders' financial interests. In truth, some concession theorists have been very forceful in pushing for the application of corporate social responsibility.[4]

Concession theorists have disagreed on shareholders' primacy legal status within the corporation. For some concession theorists, such as Berle and Means,[5] corporate managers' fiduciary duties are primarily owed to the company's shareholders, rather than stakeholders including employees. Others concession theorists have purported that corporate managers should extend their responsibility to all interest groups in a company.[6] However, all the promoters of this theory have agreed in supporting the view that corporate management should only be accountable to shareholders, rather than involving other stakeholders groups, such as employees or creditors. According to such theorists, this would be a more effective method of monitoring and, if needed, a means of holding corporate management to account. The rationale behind this belief is that being accountable to many might consequently lead to being accountable to none.[7]

Generally, it is true to say that UK company law was and still is, greatly influenced by corporation concession theory. Shareholders today, by and large, enjoy, (at least in theory), a reasonable status under such a theory. Creditors are arguably, the only other group of stakeholders that enjoy reasonable status under company law. Statutes relative to corporations, for example, provide protections to creditors, from shareholders' abuse of limited liability, which originates from the doctrine of the separate legal entity of the company. Hence, under the Insolvency Act '1986, for example, corporations' controllers, in some cases, could be denied protection attached to the separate legal entity of corporations and limited liability.[8] The legal status of other stakeholders, such as employees is less secured under company law.

1 M. Horwitz, 'Santa Clara Revisited: The Development of Corporate Theory', (1985), *West Virginia Law Review*, 173.
2 H., Laski, 'The Personality of Associations', (1916) 29, *Harvard Law Review*, 404, at 432.
3 Dahl, R., 'Governing the Giant Corporation', in R. Nader and M. Green (eds.), *Corporate Power in America*, (New York, Grossman Publishers, 1973), 11 at 11.
4 J. White, 'How Should We Talk about Corporations? The Languages of Economics and of Citizenship', (1985) 94, *Yale Law Journal*, 1419 at 1422.
5 A. Berle and G. Means, supra n at 311-312.
6 J. White, supra, at 1422-1423
7 See the King Report. The King Report is published by the King Committee, which was established in 1992, by the Institute of Directors in South Africa. The King Committee produced its first Report in 1994, which was followed by a second Report in 2002. The Report eloquently argued that corporations should take into consideration, the interests of a wide range of stakeholders and that there should be a participative and sound corporate governance system, which should be applied with integrity. Yet, the King Report clearly distinguished between responsibilities to stakeholders and the fact that companies should be accountable only to shareholders, convincingly arguing that for corporate managers to be accountable to more than one group is like being accountable to none. <http://www.worldbank.org/html/fpd/privatesector/cg/docs/king.pdf> (May 2004)
8 See, sections. 213-217 Insolvency Act '1986

2.1.3. Corporation Contractual Theory:

The tendency to ease company regulations and deem privatisation as an 'efficient' way of running utilities, gave some theorists in the latter half of the 19th century, the momentum to argue that the corporation is a contract between contractual parties. This move of course, represented the extreme opposite to the approach of corporation communitarian theorists. Corporation contractual theorists argue that the company is a mere contract between shareholders. Hence, shareholders as contractual parties, are the sole creators of corporations.[1]

Contractual theory gives shareholders the freedom to apply the legal maxim; 'the contract is the law for contractors.'[2] Indeed, via such a description, contractualism theorists were referring more to private, rather than large, listed companies. Therefore, it is apparent that corporation contractual theory clearly challenges the theme of 'corporate personality',[3] which is of course the core of both, corporation communitaire theory and corporation concession theory. Apart from promoters and shareholders, contractual theorists ignore all other parties; such as creditors, employees, managers, society and the environment. Hence, although corporation contractual theory provides good status for shareholders which justifies their involvement in corporate governance by giving them power to hold corporate managers to account, it does not provide any legitimacy for employees' participation in corporate governance. For contractual theorists, giving shareholders such a role in companies is justified on the basis that they are the risk bearers, i.e. their investments are potentially exposed to a complete loss of their financial investment in the company.

The origin of this theory can be traced back to the French Civil Code, since its very first version in 1804. The French Civil Code has been fascinated by the idea of the company as a contract, rather than as a charter. Article 1832 of the French Civil Code for example chooses to ignore taking notice of the state's involvement in corporations. Instead, the same Article gives all the credit of establishing corporations, to contracts between parties.

There are many criticisms directed at the contractual theory of corporation. For example, some may find it difficult to explain the three main characteristics of corporations, (namely: the notion of shareholders' limited liability; the separate legal entity theme; and the perpetual duration of corporations), when applying contractual theory.[4] Yet, some contractual theorists have tried vividly to explain these three characteristics contractually.[5] For example, contractual theorists explain the notion of limited liability by purporting that it is derived from implied contracts between shareholders through the board of directors and creditors. Moreover, contractual theorists have attempted to dissolve the corporate separate legal personality by the ingenious perception of a corporation as a web or nexus of contracts.[6] This has been developed by neo-economic theorists, which pictured the company as a web of contracts amongst all its actors, collectively joining efforts to produce output. Consequently, this allows other stakeholders to enter into the equation of the corporation.

The idea of introducing a nexus of contracts in corporations is to include those actors equally needed for the continuation of corporations, as well as providing protections against corporate managers that use their extensive authority to abuse corporations in which they work. The latter, has allegedly resulted in the introduction of a huge amount of legislation, which addresses the protection of each individual actor within a corporation.[7] Hence, the new economic theory has come to the forefront as a legal theory of the corporation.

The new economic theory remained steadfast to the belief that shareholders are the creators of corporations, rather than the state.[8] In addition, and as a consequence of considering the contract between shareholders to be the creator of corporations, the notion of the corporation's separate personality to those who founded it, was almost ignored.[9] Moreover, the new economic theory of corporations, failed to explain the doctrine of limited liability. However, rather than accommodating for these doctrines, some new economic theorists have tried to undermine them. For example, some new economic theorists weaken the status of the doctrine of limited liability by stating that it is a mere incentive for investment by the state.[10] Instead, the new economist theorists have concentrated on the role of the market in ensuring a good corporate governance system, whilst

1 J. Coates, 'Note, State Takeover Statutes and Corporate Theory: The Revival of an Old Debate', (1989) 64, *New York University Law Review*, 806.
2 M. Stokes, 'Company Law and Legal Theory', in W. Twining (ed.), *Legal Theory and Common Law*, (Blackwell, Oxford, 1986), at 162.
3 C. Riley, 'Contracting Out of Company Law: Section 459 of the Companies Act 1985 and the Role of the Courts', (1992) 55, *Modern Law Review*, 782 at 782.
4 M. Horwitz, 'Santa Clara Revisited: The Development of Corporate Theory', (1985), *West Virginia Law Review*, 173 at 183.
5 R. Hessen, 'A New Concept of Corporations: A Contractual and Private Property Model', (1979) 30, *Hastings Law Journal*, at 1331-1336.
6 B. Baysinger and H. Butler, 'The Role of Corporate Law in the Theory of the Firm', (1985) 28, *Journal of Law and Economy*, 179.
7 C. Riley, 1992, p.783
8 B. Cheffins, *Company Law: Theory, Structure and Operation*, (Clarendon, Oxford, 1998), at 41.
9 G. Teubner, 'Enterprise Corporatism: New Industrial Policy and the 'Essence of the Legal Person'', (1988) 36, *American Journal of Comparative Law*, 131.
10 F. Easterbrook, and D. Fischel, 'Limited Liability and Corporation', (1985) 52, *University of Chicago Law Review*, 89.

underestimating the role of the state in interfering with companies. In the view of new economist theorists, state intervention in corporations should be limited to altering any market imperfection, to recreate a better market.

Although the new economic theory of corporations seems to have retracted from exclusively perceiving the corporation as a contract between shareholders (as the view of corporation contractual theory), it still provides a good status for shareholders, distinguishing them from the rest of stakeholders groups by stating that they are the group who should hold corporate managers to account. Yet, it must be recognised that emphasis is also placed on the role of all other stakeholders such as employees, although addressing these roles is not directed at weakening the status of shareholders. It is rather meant to provide enough protection to all stakeholders from corporate managers. For example, some new economic theorists of the corporation justify intervention from the state in the running of corporations as a means by which to protect stakeholders, where the web of contracts fails to do so.[1]

The other focal argument of the theory is to explain managerial behaviour as well as adopting the view that free markets are the most effective system in reining in corporate managers. Yet, the claim that free markets are the most effective system in reining in corporate managers is fundamentally based on the assumption that individual market players bargain with full information.[2] Furthermore, the theory imagines that market players would use the 'sufficient information' available to make 'rational' decisions. As far as the rationality of a decision is concerned, it could be argued that a person would be acting rationally if s/he enters into a bargain in which s/he would benefit.[3]

The economic theory of the corporation has also offered an explanation to managerial behaviour. Perceiving corporations as a set of contracts (nexus-contracts), the relationship between shareholders and corporate managers is characterised to be of utmost importance. The roots of this theory can be traced to Coase's thesis.[4] The work of Coase focused on internal economic transactions as a method of cost saving, compared to market transactions. Transaction costs are reduced by the organisational design of a company. Thus, Coase saw companies as a means of reducing the costs of a complex market, consisting of a series of bargains among different parties. Being an economist, Coase's main concern was the company's relevant actors, rather than the issue of regulating the company. In support of Coase's view, Greenfield[5] dismissed the importance of regulations in shaping companies.

According to this theory, the relevancy of laws and regulations, such as company law, are seen as a utility to reduce transaction costs; preventing high costs being applied to every individual bargain related to a company with those persons involved (i.e., avoiding paying for the same utility repeatedly by different market players). Hence, company law is supposed to provide sound corporate governance and reduce transaction costs by forming corporations according to a standard corporation charter. Such a charter ensures the standardised sets of 'rights' which stakeholders could be expected to insist upon. For example, shareholders would wish to be able to appoint and fire management and hold them to account. Hence, the fact that those rights are standardised in the charters should result in reducing the cost of individual bargaining.[6] The same reasoning was used by the 'neo-classical economic theory of the corporation'; an adaptation of the new economic theory of corporation.

The neo-classical economic theory (also called property rights theory) perceives the corporation as a legal fiction that operates as a nexus for a set of contracting relationships among individuals. Those series of contracts are simply joining inputs to produce an output. Thus, the contractual nature of the firm, which originates from aggregate theory, lies at the heart of the neo-classical economic theory.[7]

One can deduce from the above discussion that the contractual theory of corporation, particularly its consequent developments by the new economic theorists, seems to assume that stakeholders have contractual powers, to negotiate a better legal status for themselves with other groups of stakeholders. This assumption is almost always flawed when it comes to employees. This is because of the fact that employees are normally appointed in individual employment contracts, rather that aggregate employment contracts. Hence, although individual potential employees may negotiate for better employment contracts, their negotiation would normally focus on pay and protecting one's own interests, rather that employees' participation in corporate governance. On the other hand, the concept of aggregate contracts does coincide with the theory and practice of collective bargaining between employers and trade unions. Moreover, such bargaining can potentially cover issues relating to employee participation as well as individual terms and conditions of employment.

In short, the above theories support the dominant approach in company law of reflecting shareholder

1 K. Greenfield, 'From Rights to Regulation', in F. Patfield (ed.), *Perspectives on Company Law: 2*, (Kluwer, London, 1997), at 19.
2 B. Cheffins, 1998, supra p.6
3 J. Dine, 2000, supra, p. 9
4 Coase, supra, p.812, 1937
5 K. Greenfield, supra, 1997, p.10
6 F. Easterbrook and D. Fischel, supra, 1991.
7 M. Jensen and W. Meckling, 'The Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3, *Journal of Financial Economics*, 305 at 310.

primacy. Nevertheless, the three predominant corporation theories do support to different degrees, the protection of employees' interests in the corporation. Thus corporate governance theory does not preclude the legitimacy of trade unions seeking to negotiate on forms of employee participation. In reality, however, this is not and never has been the common practice. Moreover, bargaining on such issues has been viewed with a suspicion by many trade unionists and labour lawyers that mirrors that of corporate managers and many shareholders and company lawyers. Thus the current corporate governance system does not accommodate mechanisms for rendering corporations accountable to their employees. Similarly, company law does not provide for protection of employees' interests within the company: this being perceived as the exclusive concern of labour law.

On the other hand, it is accepted by many company lawyers that the current corporate governance model is not working particularly well, due to inability and/or apathy of shareholders to hold corporate managers to account. Theoretically, the general meeting may well have the ultimate power in the company. In practice, particularly in listed companies where shareholdings are widely dispersed, and as a result of agency costs, it is generally difficult and impractical for shareholders to engage in collective action when the easier option of exit is readily available.

2.2. Company Law and Company Law Review and Stakeholders' Interests:

As stated above, the provisions of the Company Act '1985 demonstrate the traditional concerns with the rights and duties of shareholders add directors. Section 309 of the Company Act 1985, does require that directors should have regard, in the performance of their functions, to the interests of the company's employees in general, as well as the interests of shareholders. However, as a result of being unspecific and open to wide interpretation, this provision has had little if any effect.

At an early stage of the UK Company Law Review, the issue of whether the board of directors needs to promote stakeholders' interests was raised.[1] The CLR stated that UK company law presently does not embrace the 'enlightened shareholder approach'; (i.e. the board of directors should run the company in the interests of equity shareholders. In taking into consideration the interests of other stakeholders groups); asking whether future company law needs to promote the enlightened shareholder approach or even 'stakeholders/pluralist approach', most of the response was in favour of the 'enlightened shareholder approach', which is now echoed in the Government's Company Law White Paper (i.e. the board of directors should run the company, balancing the interests of equity shareholders with the interests of other stakeholders' groups, that are committed to the company).

Under the Company Law White Paper, directors must act in the way they decide, (in good faith), would be most likely to promote the success of the company for the benefit of the collective body of shareholders, 'but that that directors should also recognise, as the circumstances require, the company's need to foster relationships with its employees, customers and suppliers, its need to maintain its business reputation, and its need to consider the company's impact on the community and the working environment'.[2] From this statement, one can deduce that management can consider the interests of other stakeholders in the company so long as it goes in harmony with the requirement of enlightening shareholders' interests.

In fact, classifying the management act as an act that goes in harmony with enlightening shareholders' interests is not such a demanding test to be established.[3] Furthermore, this position of corporate management in its consideration of stakeholders' interests is not entirely new. Directors have always justified modest, business related political or charitable donations[4] relying on the statement of Bowen L.J., (although in the context of *ultra vires)*, that: 'The law does not say that there are no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company.' Hence, the White Paper only adds to the existing common law a duty on the part of directors to consider the interests of other stakeholders when it serves shareholders to do so. This is not necessarily good. This is because, it does not solve the problem in listed companies of the lack of directors' accountability to shareholders, but rather adds to it, i.e. such a position would give some directors the cover they need to justify actions that are clearly not benefiting shareholders. One could therefore argue that keeping the current position of shareholders' primacy is more suitable

One can argue that keeping the current position of shareholders' primacy is more suitable. Alternatively, as Wedderburn has argued, an opportunity has been missed in failing to include measures in the White Paper that include integrating employees' participation into the corporate governance system. However, recent developments in labour law do focus on providing for new employee rights to information and consultation. Having examined these rights it will be contended that they may provide the potential for linkage to the more traditional concerns of corporate governance theory and practice. This is particularly the case if it is accepted that the objectives of both

1 CLR Steering Group, Strategic Framework, 1998, Ch. 5.1

2 Modernising Company Law: Presented to Parliament by the Secretary of State for Trade and Industry by Command of her Majesty July 2002, *Cm 5553-I*, p.26.

3 P. Davies, *Gower and Davies' Principles of Modern Company Law*, (Sweet & Maxwell, London, 2012) at 378.

4 It must be said though that there are the whole set of issues that are related to donations such disclosure of those donations if it needs approval of the GM or not etc., which are beyond the scope of discussion of this article.

corporate governance and rights to information and consultation include the promotion of disclosure and dialogue between corporations and their stakeholders.

3. Labour Law and Worker Participation:

3.1. Background:

Ever since the original European Company Statute, the Fifth Directive and the 'Vredeling' Directive, there has been periodic interest in the UK as to how employees could be involved in the decision-making processes of the organisations for which they work. In the 1970s, this was very much in the aftermath of the Bullock and Ryder Reports. Ultimately, such experiments of industrial democracy and worker participation collapsed through a mixture of apathy and hostility on the part of both trade unions and employers. Most seriously as documented by Elliot[1], from the trade union perspective, there was also evidence that such experiments had incorporated union activists into managerial structures to the extent that they ceased to be capable of effectively representing the interests of their members. In turn, this resulted in a lack of interest on the part of union members when hitherto popular shop stewards, such as Derek Robinson at British Leyland, were sacked as part and parcel of a managerial revolution, reflecting unitiarist perspectives, derived from the writings of thinkers such as Hayek and Milton Friedman.

Consequently, in the late 1980s and early 1990s, many management strategies reflected a move towards individualised forms of employee involvement and participation linked to theories of employee empowerment. One paradox here was that such individualised techniques were much more likely to be located in organisations in which collective bargaining structures were or continued to be put in place.[2] Organisations that eschewed collectivist structures for engaging with their employees were equally likely to eschew individual forms of participation. Moreover, research indicated that the ideological basis for moving away from collected negotiated terms and conditions of employment contracts, and the emergence of the individually negotiated 'personal' contract, was largely based on a myth.[3]

On the other hand, EU social law during this period continued to maintain a collectivist orientation in the form of the European Works Councils Directive. Arguably, the jury is still out on the extent to which EWCs are useful mechanisms to promote effective trade unionism. However, two consequences are clear. The existence of EWCs and the negotiations required to bring them into existence have fostered greater co-operation between unions at a European level. They have also fostered renewed interest in the European social model, as exemplified by works councils, within the UK - as demonstrated both by the writings of academics and the support of the TUC for the implementation of the Information and Consultation Directive.

3.2. Work Councils:

Works councils are a standard feature of industrial relations systems of the member states of the EU, as constituted before the enlargement to twenty-five states, which took place on May 1 2004. In some countries such as Germany and Sweden there is provision for 'higher' forms of participation in terms of workers on the board, but, as Davies has commented, the current tendency in EU social law is very much for the provision of information and consultation rights through works councils' structures rather than supporting rights of co-determination or employee participation in decision-making at board level.[4] This is exemplified by the EWC and ICE Directives and is perpetuated by EC Directive 2001/86 supplementing the Statute for a European Company (Societas Europeae or SE). As Davies has analysed[5] the Directive will only require employee involvement at board level where one or more of the relevant countries has mandatory requirements for such forms of employee involvement. As far as SEs registered in the UK are concerned, the requirement will be for works councils structures largely modelled on EWCs. Thus the relevant provisions of the European Public Limited-Liability Regulations (SI 2004/2326) are essentially based on the TICE Regulations (which as we shall see also inform the content of the ICE Regulations, but with important differences which mean that the provisions of the latter are potentially weaker), Works councils function in different ways in different member states. For example, whilst in all countries trade unionists may stand for election, trade unions have exclusive right to nominate candidates in Belgium, France, Luxembourg and Italy. Similarly, whilst in all countries, members of works councils have rights to information and consultation, it is only in a minority of countries - France, the Netherlands and Germany - that works councils have rights to co-determination in that they can veto certain sorts of proposals put forward by employers.

However, it is the commonality between works councils in these countries that needs to be stressed. In

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[1] Elliot, J., *Conflict or Cooperation? The Growth of Industrial Democracy* (Kogan Page, London, 2015).
[2] Smith P., and Morton, G., 'Union Exclusion and the Decollectivisation of Industrial Relations in Contemporary Britain' (1993) *British Journal of Industrial Relations*, 97.
[3] Welch, R., and Leighton, P., 'Individualising Employee Relations: The Myth of the personal Contract', (1996) *Personnel Review*, 37.
[4] Davies, P., 'Workers on the Board of the European Company?' (2012) 32 *Industrial Law Journal* 75.
[5] *Op. cit*., pp. 84-87.

particular, all works councils operate in a framework where, through one method or another, employers are effectively under a duty to bargain with trade unions. This is even the case in Italy, where, though there is no formal duty on employers to recognise trade unions, the latter have such extensive rights to organise at the workplace under the Workers Statute that employers in practice have no option other than to deal with them. Therefore, elected employee representatives on works councils will typically be union members and, though tensions may arise between works councils and collective bargaining structures, these are nevertheless conflicts that may be resolvable within the framework of trade union organisations.

The general experience of works councils in EU Member States was, of course, the inspiration behind the EWC Directive (Directive 94/45). Consequently, it is trade unions that in practice have the power to trigger negotiations for the establishment of EWCs, and typically it will be union members and/or officials who negotiate the establishment of the EWC and sit on it as representatives of the workforce. It is also the case that where an employer fails to agree to the establishment of an EWC the fall back position contained in the Annex to the Directive will come into play. This will be the case where the central management of a European-level undertaking refuses to enter into negotiations within six months of being requested to do so, or if negotiations do not result in agreement within three years of the request. Under this fall back position there must be at least one meeting a year of the EWC. Moreover, there must be further meetings between these annual meetings if the employer wishes to propose changes to the business which are likely to have serious consequences for employees' interests, such as relocation, merger, and reduction in size or closure of an undertaking.

Under the Transnational Information and Consultation of Employees (TICE) Regulations (SI 1999/3323) the above requirements apply where a European-level undertaking is based in the UK in the same way as in any other member States. However, contrary to the norm in other Member States, the TICE Regulations do not give trade unions any formal role in nominating representatives to sit on EWCs, unless as is highly unlikely, a recognised union represents all the employees in an enterprise. The Regulations require representatives to be elected by the workforce as a whole in a secret ballot. In practice, such elected representatives are likely to be trade unionists, given the role of trade unions in triggering the process to bring an EWC into existence. It should be noted that similar rules apply in the Regulations governing the creation of a UK-based SE. It remains to be seen what role trade unions will play in such undertakings. However, where such an EWC already exists, employees can opt to retain the EWC rather than negotiate a new information and consultation structure.

3.3. The Information and Consultation (ICE) Regulations:[1]

The ICE Regulations are of particular importance to the objectives of this paper. This is because, for the first time, UK employers will find themselves subject to legal obligations to establish information and consultation structures at a national (rather than just transnational) level. Such structures can be regarded compatible with concepts of corporate governance in that they focus on disclosure and dialogue. However, the extent to which they will produce any substantial change in the here and now is open to debate.

Firstly there are problems relating to organisational size and identifying whether an undertaking will be bound by the Regulations. From 6 April 2005, they applied to organisations with 150 or more employees; from 6 April 2007, they will apply to organisations with 100 or more employees; and from 6 April 2008, to those with 50 or more employees. Thus many millions of workers are excluded from their scope.[2] However, it is clear that the larger corporations, with which the theories and practices of corporate governance are concerned, are subject to the Regulations.

Secondly the Regulations will not necessarily effect any change even in those organisations that are covered by them. Unless the employer decides to initiate negotiations, nothing will occur unless at least 10% of employees make a written request for negotiations on an ICE agreement. The Regulations are inherently minimalist in that they do not stipulate the content of information and consultation processes. Nor do they require negotiations, or the ultimate processes, to be with elected representatives of a workforce. Employers can opt for representatives to be appointed rather than elected. Employers can also opt to seek agreement for direct forms of information and consultation rather than the establishment of a works council structure. On the other hand, trade unions can seek to have existing recognition agreements adapted so that information and consultation takes place in established collective bargaining forums.

The only contexts in which the establishment of a works council-type structure becomes obligatory are

[1] For further explanation and analysis and of the ICE Regulations see: M. Hall, "Assessing the Information and Consultation of Employees Regulations" (2005) 34 *Industrial Law Journal* 103; R. Welch & S. Williams, "The Information & Consultation Regulations: Much Ado About Nothing?", (2005) 36 *Cambrian Law Review* 29; R. Welch, The Information and Consultation Regulations – Whither Statutory Works Councils?, (Institute of Employment Rights, London, 2006).

[2] In its Regulatory Assessment the DTI has estimated that 97% of enterprises will not be affected by the Regulations. The problem is compounded by the fact that only workers possessing employee status count, and each separate company is to be regarded as an undertaking in its own right. This is so even where it is part of a larger group and that group is effectively controlled by the same shareholder(s).

where an employer fails to enter negotiations with the workforce where a valid employee request has been made, or negotiations do not result in the formation of an ICE agreement at the end of a 6 months negotiating period and the negotiating representatives refuse to extend the period of negotiations. In these circumstances the standard statutory fall back provisions contained in Part IV of the Regulations will apply.

These provisions require employers to inform and consult with representatives who are elected by secret ballot by the workforce as a whole. In this sense the application of the provisions will result in what can be regarded as a statutory works council. The provisions stipulate that there must be at least two representatives and a maximum of twenty-five – with a norm of one representative per 50 employees or part thereof. Otherwise, the provisions do not set out a basic constitution governing the functioning of the works council. In particular, they do not provide for timing and frequency of meetings. However, they do impose a duty on the employer to provide the relevant information at an 'appropriate' time to enable the representatives to conduct an adequate study and to prepare for consultation.

It is with respect to the subject matter of information and consultation that the fall back provisions do provide some substantial additions to the legal duties of employers to enter into a dialogue with elected representatives of the workforce on future plans and prospects of the business. Thus, it is these provisions that provide some significant connection with corporate governance perspectives focusing on disclosure and dialogue with stakeholders.

Employers are obliged to provide information on 'the recent and probable development of the undertaking's activities and economic situation'. Examples of the types of information that employers should provide are contained in the DTI Guidance Notes that accompany the Regulations. They include increase or reduction in production or sales, opening and closing of establishments, takeovers and mergers, business reorganisations and the organisation’s financial situation. Based on this information they must then consult on the 'situation, structure and probable development of employment within the undertaking and on any anticipatory measures envisaged, in particular, where there is a threat to employment within the undertaking'. Similarly, the employer must inform and consult on 'decisions likely to lead to substantial changes in work organisation or in contractual relations'. In this latter context the employer must initiate consultations with a view to reaching agreement on the decisions that will be made.

The fact that the ICE Regulations can cover proposed mergers and takeovers should also at least partially fill what has been a tremendous practical *lacuna* in UK law. The Transfer of Undertakings (TUPE) Regulations require employers to inform and consult with representatives of a recognised trade union, or if there is no recognised union then with employee representatives, prior to a business transfer taking place. However, the TUPE Regulations do not apply where a merger or takeover occurs though a purchase of shares. This is, of course, the normal way in which one company acquires another and, until now, there has been no obligation to inform and consult with employees and their representatives, even where it is known or anticipated that the merger or takeover will lead to redundancies and/or to major changes in terms and conditions of employment. Where the fall back provisions apply, it should no longer be possible for employees suddenly to find themselves under notice of dismissal in circumstances in which, without prior warning, there has been a change in business ownership.

On the other hand, a particular problem with respect to the operation of models of employee involvement based on notions of social partnership is the protection the law typically gives to employers through confidentiality provisions. The ICE Directive provides for a duty of confidentiality, though it is important to emphasise that the approach to confidentiality taken in the UK is more employer friendly than is typically the case in other EU Member States.[1]

Under the ICE Regulations (as is also the case under the TICE and European Company Regulations), employee representatives face legal penalties in the form of dismissal and liability to civil action if they disclose information deemed confidential in an unauthorised manner. This includes disclosure to the employees they represent and to any trade union to which they may belong. There is a danger that this duty of confidentiality may result in the weakening of information and consultation processes, as workplace representatives may feel unable to seek advice from external sources, such as their trade union full-time officials, or to seek the views of those they represent as to appropriate responses to the employer’s proposals.

It should be noted that employee representatives are able to challenge before the Central Arbitration Committee (CAC) any imposition of confidentiality by an employer. An employer can only impose confidentiality where it is reasonable to do so, and the CAC is able to rule that this is not the case where disclosure is unlikely to harm the legitimate interests of the undertaking. Moreover, ACAS has issued ‘Good Practice Advice’ on the implementation of the ICE Regulations, and this suggests confidentiality should be kept to an ‘absolute minimum’ in order to ‘build trust and understanding’. Usefully, ACAS also suggests that disputes over confidentiality could be dealt with through normal internal dispute procedures, although this is only likely to be practical in organisations

[1] See M. Carley & M. Hall, “The Implementation of the European Works Council Directive” (2000) 29 *Industrial law Journal* 103, at pages 118 – 120.

which already have established collective bargaining arrangements in place.

However, overall, it is contended that the approach to confidentiality, exemplified by the ICE Regulations, can provide employers with a mechanism for intimidating employee representatives from keeping employees informed of deliberations in works councils-type structures. It can also lead to the creation of a distance between representatives and the workers they represent. Representatives can find themselves compromised when they are in the possession of information that they realise could be detrimental to the workers they represent, but are legally unable to divulge this information to them. Representatives may become distant from the workforce as they feel privileged by the information the employer gives to them, and begin, often unconsciously, to perceive issues from an employer rather than worker perspective. As is the case with workers on the board, there is the danger of representatives being incorporated into structures that serve the interests of the employer rather than those they have been elected to represent.

Whilst, clearly, employee representatives should not be permitted to behave in ways that are akin to insider dealing, it is submitted that, rather than being able to hide behind confidentiality, there is a case for employers being legally required to provide much more information through 'opening the books' to worker representatives. Indeed, this is a context in which from a corporate governance perspective there could be a coincidence of interest between shareholders and employees in requiring corporate managers to divulge information that in the here and now is restricted to the privileged few.

By way of an overall assessment of the ICE Regulations it is argued that, whilst they contain the potential for enhancing workplace democracy, they are likely to generate a number of contradictory consequences. The Regulations could both be used by employers to weaken the position of recognised trade unions, and by trade unions seeking to build their strength within an undertaking in order to secure voluntary or, if need be, statutory recognition under the TULRCA. In organisations in which arguably, they would be most important, i.e. organisations in which there is no trade union presence, the Regulations may actually not have any effect whatsoever.[1]

3.5. South Africa:

From a comparative perspective, the South African Labour Relations Act (LRA) 1995 provides both an interesting paradigm and paradox with respect to the role of works councils. The Act provides for the establishment of workplace forums, which impose duties on employers to inform and consult with elected trade union representatives and have some powers of co-determination. However, only a trade union, with majority support at the workplace, can trigger the statutory mechanism to create a workplace forum.

The LRA combines a desire to support collective bargaining and establish rights to strike that are required by international law, with the introduction of a non-adversarial forum for employee relations where workers participate in decision-making processes to identify joint solutions of problems and conflicts arising in a workplace. The drafters of the Act believed that "as South Africa enters new economic markets, it will face demands for restructuring which will require greater flexibility within the workplace. The forums are seen as a way of allowing such flexibility to develop without its being as the expense of workers' rights and job security."

Employers and unions may determine their own arrangements by collective agreement, but the Act stipulates the composition, functions and powers of a workplace forum that are to apply as a statutory minimum. As is the case with EWCs and structures established under the ICE Regulations, there is a size threshold that must be met before a union can require that a forum is established in that an employer must employ at least 100 employees at the relevant workplace. In contrast with the ICE Regulations, it is interesting to note that all workers are to be considered employees other than senior managers

Although it is only a union that can trigger the statutory mechanisms for a forum to be established, all employees can vote for and seek nomination as representatives on the forum once it has come into being. Regular meetings of the workplace forum must take place in working time with its employee members being given the necessary rights to time-off with pay. The employer must give information annually as to the performance and plans of the organisation, and consult the forum on matters arising therefrom that impact on the interests of the workforce. The Act stipulates the issues which must be the subject-matter of consultation and the specific form that consultation must take. The issues include restructuring, mergers and transfers of ownership, the introduction

[1] Empirical research conducted in 2003 can be drawn on in support of the latter contention – see R. Welch S. Williams, 'Complying with the new employment relations laws? A survey of employers' (2004) 2 *Human Resources and Employment Review* 91. A survey of employers in Southern England revealed that only around a third of employers in non-unionised organisations operated collective methods of consulting employees in redundancy situations, or where there were proposals to change contracts of employment in ways that could threaten employment security. Potentially many employers were thus in breach of statutory duties. The results from this survey suggest that, in the absence of recognised trade unions, many employers do not engage in collective consultations with employees even in circumstances where this is the expectation, if not strict requirement, of existing legislation. The concern must be that such organisations are unlikely to take the initiative in establishing collective structures to implement the provisions of the ICE Regulations.

of new technology and any changes in the ways in which work is organised. Statutory duties on employers to consult, prior to implementing retrenchments (redundancies) or dismissals arising out of other operational requirements of the business, must take place in the forum if one has been established.

Employers are permitted to withhold information on grounds of confidentiality. Disputes over whether information is genuinely confidential in that its disclosure might cause substantial harm to an employer (or an employee) are referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) – a body that is not dissimilar in its functions to ACAS and the CAC. However, and in contrast to the equivalent provisions in the ICE Regulations, worker representatives cannot be subjected to individual penalties for acting in breach of confidentiality. However, the CCMA is empowered to impose a collective sanction in the form of releasing the employer from the duty to disclose information for a period of time deemed appropriate by the Commissioner.

Workplace forums have powers of co-determination that are wider than is typically the case under EU law or indeed in the majority of EU Member States. Co-determination is required over certain human resource/personnel issues - in particular disciplinary codes and equal opportunities measures. As is consistent with the prevailing philosophy of this part of the LRA employers and unions may extend the scope of co-determination through collective agreement. Issues that are the subject of co-determination are removed permanently from the scope of collective bargaining and rights to strike. If an employer cannot secure the consent of the forum to a particular proposal, the matter must be resolved by arbitration.

Some South African commentators have hailed workplace forums as "a paradigm shift in industrial relations…", which can be linked "…to the wider social challenges of unemployment and inequality and putting questions of ownership and economic power back into the heart of the struggle." Others have argued that workplace forums will neither empower unions to bring about workplace democracy nor provide a catalyst for radical social change.[1] Rather, their introduction into the workplace is likely to undermine and weaken trade union organisation. Therefore, unions should use the provisions of the Act to secure a collective agreement with the employer for a trade union based structure where the representatives are directly accountable to their unions. Information consequently obtained from the employer in the forum could then be used by a union to strengthen its negotiating hand in collective bargaining.

These provisions of the LRA have generated an interesting paradox in that South African unions have been enabled to bring collective structures into existence along with concomitant duties, that are potentially more onerous on employers than is the case with the provisions of the ICE Directive and in particular the ICE Regulations, regularly to inform and consult with worker representatives. However, despite the emphasis on the trade union role, South African unions have demonstrated a marked indifference to using their powers to bring workplace forums into existence. Moreover, to date, they have resisted attempts by employers to negotiate amendments to the Labour Relations Act that would provide for alternative mechanisms for the establishment of workplace forums.

This lack of interest in workplace forums can be contrasted with the position in Germany where unions have captured works councils and generally used them to their advantage in strengthening their position at the workplace and in ensuring effective employee representation. However, as Truter has argued[2], this positive reciprocal relationship between works councils and collective bargaining has developed in an environment in which there is strong legal support for sectoral bargaining – a situation that does not exist either in South Africa or Britain where the emphasis is on bargaining and consultation at enterprise and workplace levels. Moreover, an important difference between South Africa and Germany on one hand and the UK on the other, is that in the latter, the ability of unions to organise effective industrial action in furtherance and defence of their members' interests is very much undermined by laws that violate international legal standards with respect to rights to strike.

Conclusions:

Whilst theories of corporate governance do not explicitly require employee involvement in decision-making, it is the case that traditional concepts of corporate governance are compatible with forms of employee involvement such as workers on the board and works councils. This is because corporate governance focuses on disclosure and dialogue, and it can be argued that employees, as stakeholders, should have similar rights to information as those possessed by shareholders. Indeed, as Wedderburn has noted[3], companies in other EU Member States are legally required to recognise the interests of their employees, and this is achieved in part through works council structures. EU social law clearly reflects these perspectives through requirements for EWCs, compulsory systems of

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[1] For opposing views on the utility of workplace forums for South African trade unions see J. Baskin and V. Satgar, "South Africa's New LRA , A Critical Assessment and Challenges for Labour", (1995) 19 *South African Labour Bulletin* 46. And K. Von Holdt, "Workplace Forums Undermining Unions?" (1995) 19 *South African Labour Bulletin* (SALB) 59.

[2] G. Truter, *Implementing the Information and Consultation Directive in the UK: Lessons from Germany* (Institute of Employment Rights, London, 2003).

[3] Lord Wedderburn, *The Future of Company Law: Fat Cats, Corporate Governance and Workers* (Institute of Employment Rights, London, 2004).

employee involvement for an undertaking to qualify as a SE, and the introduction of information and consultation arrangements at enterprise level. It is a British peculiarity to require corporate managers to take into account only the interests of the company's shareholders.

The ICE Regulations contain the potential for the systematic establishment of works councils in the UK. However, this potential is unlikely to be fulfilled by the Regulations in their current form. Based on other European models and the South African LRA the Regulations could be strengthened in the following ways. In unionised organisations duties to inform and consult should be owed to recognised trade unions. In non-unionised organisations the employer should be obliged to conduct a ballot for the election of negotiating representatives. Unless employees decide they do not want an ICE agreement, the statutory fall back provisions should always apply after a specified time if an agreement is not successfully negotiated. These provisions should be strengthened to ensure information is given in good time to permit effective consultation to take place. This could be achieved by providing for a basic constitution, modelled on the provisions in the South African LRA, specifying when meetings must take place. A similar approach to confidentiality as that contained in the LRA could also be adopted.

Arguably, in the UK, both shareholders and employees should have more extensive rights to information from the organisations they invest in or work for. Indeed, it can be argued that there are contexts in which it would be mutually beneficial for shareholders and employees to be able to hold corporate managers to account through the imposition of more stringent duties to inform and consult – be this through a collective bargaining forum, a works council or a shareholders' meeting.

Lord Wedderburn has identified one way in which there could be an effective linkage between laws on corporate governance and workplace democracy. Both shareholders and workers have an interest in monitoring the pay and benefits companies are able to grant to their senior executives. Research has shown that chief executives can cost a top company up to £2 million pounds a year through what Wedderburn describes as "rent extraction".[1] Therefore, he proposes that the law should provide for workers' representatives to sit on remuneration committees determining executive pay. Where a union is recognised the representatives should be from that union; otherwise the representatives should be elected by the workforce. Clearly, such a system could run in parallel to and complement collective bargaining arrangements and work council structures. Moreover, there will surely be circumstances in which shareholder and employee interests will converge in seeking to constrain the extent of "rent extraction" by senior executives.

In contrast to the traditional emphasis on legal support for business confidentiality, the involvement of worker representatives on remuneration committees could be linked to more radical demands to 'open the books' for inspection by both worker representatives and shareholders. It would of course be necessary to retain legal provisions to prevent worker representatives from engaging in activities such as insider dealing. However, in evaluating a company's financial situation and operations, it is often information relating to how the company has conducted, and is proposing to conduct, its affairs, rather than price sensitive information, that unions would benefit from having access to.

However, there are potential contradictions in seeking to identify a commonality of interest between workers and shareholders as there always will be circumstances in which their interests will be in direct conflict. For example, the interests of shareholders in maximising profits may require redundancies, or other forms of restructuring or cuts in rates of pay, which workers will want to resist. In such circumstances it is contended that workers are best served by the ability to engage in effective collective bargaining, and a precondition of this is the ability to take effective industrial action should negotiations breakdown.

Whilst information is a gateway to knowledge and knowledge is a component part of power, neither information nor knowledge constitute power in its totality. In practice, possessing knowledge is of little use if you are unable to use it effectively. For shareholders power may be exercised by removing investments or vetoing proposals at shareholders' meetings. Ultimately, the only power possessed by workers is the power to withhold their labour. In this context the essential problem for British workers is the ongoing effect of the legal (and in terms of international law unlawful) controls on 'rights to strike' that Conservative governments imposed between 1980 and 1993 and which have been left largely in place by the current government since it was first elected in 1997. Therefore, it is submitted that UK labour law should provide for rights to strike which are, at the very least, in accordance with the minimum standards required by international law.

It is acknowledged that in the context of industrial conflict it is inevitable that the theories and objectives of corporate governance will be in direct contradiction to systems of collective bargaining and effective rights to strike. Nevertheless, paradoxical though it may seem, in so far as the objective of corporate governance is organisational accountability this is most likely to be met in circumstances where trade unions are recognised and have the power to represent the interests of a workforce in an effective manner. As we have sought to demonstrate, information and consultation processes, including those operating through bodies such as works councils, are both more effective and more likely to take place in unionised workplaces. The essential paradox of the ICE Regulations

[1] *Op. cit* at pp. 12-15.

in their current form is that they may well have little or no impact in those businesses in which consultations with the workforce is not currently part of organisational practice. Similarly, it seems likely that worker representatives on remuneration committees will operate most effectively where they are supported by trade union organisation.

In conclusion, it is contended that the right to information in a context in which it can be used effectively provides an intersection between corporate governance and collective bargaining models. Employers and corporate managers should be legally obliged to engage in disclosure and dialogue processes with both workers and shareholders so it is possible that, when deemed appropriate, their proposals and plans can be effectively challenged. From a labour law perspective, whilst provisions of the sort contained in a strengthened version of the ICE Regulations can play a useful role in these respects, it remains the case that workers are best placed to contribute to decision-making where they are represented by trade unions in collective bargaining structures.

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