

THE BULLOCK REPORT AND EMPLOYEE PARTICIPATION IN CORPORATE PLANNING IN THE U.K. *

PAUL DAVIES **

1. Introduction

In January 1977 the Report of the Committee of Inquiry on Industrial Democracy (Chairman: Lord Bullock) was published [1]. It is notorious that 'industrial democracy' is a phrase to which many different meanings can be attached, but the Committee in its terms of reference was directed to consider only one possible definition: the representation of employees on the boards of directors of the companies for which they work. Since the Committee was requested by the Government to report within a year, a strict timetable to which it managed to adhere, a restriction on the subject-matter of its deliberations was undoubtedly necessary. More seriously, the definition reflected the realities of the political debate about 'industrial democracy'. The subject had been dragged into the arena of Parliamentary and general public debate largely through the sponsorship of the Trades Union Congress (TUC) [2], although other bodies and persons, notably the Commission of the European Communities and Mr. Giles Radice, M.P., have taken a hand. Between 1970 and 1977 the Commission has put forward four sets of proposals in different contexts for the harmonization of the various provisions of the member states for employee representation and all the proposals have favoured some form of employee representation on a 'supervisory' board [3]. As a member of the European Communities since January 1, 1973 the U.K. has had to respond to these proposals. Mr. Radice, at a crucial point, put political pressure on the Government to establish the Bullock Committee by introducing into Parliament a private member's bill based on the TUC's proposals [4]. The major, new institutional development proposed by the TUC in order to give effect to its conception of industrial democracy was a system of employee representation on the board. The Bullock Committee was required to take into account "in particular" the proposals of the TUC, as well as experience in Britain, the EEC and other countries.

Surprise has been registered in some quarters that the TUC should have advo-

* This article, written in December, 1977, has been updated by a Postscript, written in March, 1979.

** Mr. Davies is a Fellow of Balliol College, Oxford.

cated such a scheme in view of its acceptance of a quite different principle for the constitution of the boards of the corporations set up in the immediate post Second World War period, and subsequently, to run the nationalized industries. Under that system board members are appointed by the relevant government minister for their expertise and in a personal capacity, not as representatives. Some appointments are made, of course, in consultation with the TUC, and trade unionists are sometimes appointed, but they must give up their trade union affiliations if appointed to full-time posts; part-timers are selected from unions not having membership amongst the employees of the corporation [5]. This form of constitution was not accepted, however, without a fierce debate in the trade unions and the labour party where powerful voices had long ago argued for direct representation of the employees on the board, especially at the time of the proposed nationalization of the mines in the early 1920s and again over the 'municipalization' of London transport in 1933 [6]. Those taking this latter view were defeated in the 1930s, but their views did not lose all appeal and this strand of thought re-emerged in the 1960s in the rather different context of the democratization of the private sector. Even so, as we shall see, the TUC has not been able to take all its affiliated unions with it in its revival of the idea; three large unions – the Electricians' Union (EEPTU), the Engineers' Union (AUEW) and the General and Municipal Union (GMWU) – have opposed the TUC's views to a greater or lesser extent. In consequence, the 1974 Trades Union Congress, whilst accepting the General Council's document, *Industrial Democracy*, with its proposals for board-level representation, also passed a motion rejecting the mandatory imposition of such a scheme and stressing the importance of collective bargaining.

The Committee, by a majority [7], came out in favour of a system of employee representation on the board not dissimilar to, though much more refined and articulated than, that proposed by the TUC. The evidence submitted to the Committee by employers and their organizations was unanimously opposed to the TUC proposals, but wavered between outright opposition to any compulsory system of employee representation on the board and grudging acceptance of some minimal scheme [8]. The minority report, signed only by the three industrialist and banker members of the Committee, proposed a system of employee representation which in effect and, one suspects, also in design would be almost meaningless. The strident employer objections to the majority report, orchestrated by the Confederation of British Industry (CBI) [9], tended not to find even the minority's proposals acceptable. The main evidence in favour of employee representation came from the TUC – only unions dissenting from the TUC line gave separate evidence – and from the Fabian Society [10]. Evidence from other groups, e.g., consumers, also tended to be hostile to the notion of employee representation.

Some people have regarded the outcome of the Committee's deliberations as predetermined by its terms of reference [11], which required it to "accept" the need for a radical extension of industrial democracy in the control of companies by means of representation on boards of directors and then to "consider" how such

an extension could best be achieved. In fact, however, the report is not an exercise in the technical implementation of a scheme already decided upon. It contains an elaborate justification both for the general notion of employee representation on the board and for the particular scheme advocated by the majority. The justification of the particular scheme was clearly necessary since the terms of reference, whilst drawing attention to the TUC proposals, did not require the Committee to consider them the most appropriate form of representation at board level; the winning over of all but the industrialist and banker members of the Committee to a strong form of employee representation was clearly not a foregone conclusion. More than that, the Committee did not feel itself able to discharge its task without looking at participation at other levels:

We could not have carried out our inquiry properly, if we had not examined other forms of participation or if we had ignored the relationship of board level representation to changes below that level. Nor were those who sent us written evidence constrained by our terms of reference Our report shows that we have interpreted our terms of reference widely [12].

Legislation on industrial democracy was announced by the Labour Government, elected in 1974, as the third plank in its platform of labour law reforms. The first stage was to be the repeal of the previous Conservative Government's Industrial Relations Act, 1971, a piece of legislation much disliked by the trade union movement because of the limitations it placed upon the lawful use of economic sanctions in industrial conflict and because of its attempts to use trade unions to control rather than to express the hopes and expectations of their members. It was also a piece of legislation that had been singularly unsuccessful in achieving these objectives, though it did succeed in rendering all industrial disputes, no matter how minor, potentially matters of major political and constitutional controversy [13]. The repeal was achieved by the Trade Union and Labour Relations Act, 1974 and an Amending Act of 1976, two attempts being necessary because of the Government's initial minority position in Parliament and the opposition of the upper chamber (the House of Lords, an unelected body). The second stage was to be the enactment of a positive statute conferring rights and protections upon individuals (*e.g.*, against unfair dismissal or in respect of trade union membership and activities) and upon trade unions (*e.g.*, rights to be recognized for collective bargaining purposes or to be given information). This was achieved by the Employment Protection Act, 1975, although the process had begun at least a decade earlier on the individual level.

The third stage of legislation upon industrial democracy remains unfulfilled; indeed the Government has not produced at the time of writing (December 1977) a 'White Paper' setting out its legislative proposals in response to the Bullock recommendations, even though such a document has several times been promised. Some people take the view that the Government never intended to legislate on this subject [14], and that establishment of the Committee was merely a delaying tactic. It is certainly true that support in the Labour Government and among the Labour

Members of Parliament for such legislation is less than it was for the 1974–1976 legislation, but it is not without strong supporters in both places. It can be said with some confidence that legislation to implement the Committee's recommendations on a general basis seems unlikely in the near future. The Government is again in a minority position and is dependent upon the support of other parties in Parliament, notably the Liberals but also in a lesser way the Ulster Unionists, which are not in favour of the Bullock scheme. Moreover, the Social Contract, a bargain between the Government and the TUC whereby the latter accepted an extremely restrictive limit on wage increases (less than what was necessary to keep up with increases in prices) in exchange for the Government's promotion of certain legislative and administrative measures favoured by the TUC, has after two years of rigorous application assumed a form in which incomes policy is more a matter of unilateral government decision than of Government and TUC agreement.

The unlikelihood of immediate legislation does not necessarily reduce the importance of the Bullock Report. As Lord Wedderburn, a member of the Committee, has said:

Of course, this is a debate about tomorrow. The legislation that the government proposes to introduce, if any, may not be the most important thing; the most important thing will be to devote sufficient thought now, in the depth of crisis, to the institutions which we envisage as the right institutions for better economic times and to have plans for legislation now that will operate then [15].

The Bullock Committee was asked to look only at companies in the private sector of the economy, although a parallel, internal governmental inquiry under the chairmanship of a senior Treasury civil servant was set up in respect of the nationalized industries. Ironically, the Bullock proposals seem likely to be tried out first in those nationalized industries where management and unions wish to experiment with such a scheme. In the current political climate the temptation to try Bullock first in a nationalized industry is strong. It enables the Government to do something partially to implement its pledge on industrial democracy; the CBI is less opposed, partly because the private sector is not involved and partly because the scheme is not being applied across the board but only in particular industries. Some unions, notably the AUEW, whilst opposed to such schemes in the private sector, do not oppose them in the public sector. An example is the Post Office. The Post Office Act, 1977 increased the number of seats on the main Post Office board so as to allow, for a two-year experimental period starting in January 1978, the implementation of a scheme agreed between management and unions. Under the scheme this board will consist of seven management representatives, seven union representatives, five 'independents' jointly chosen by management and unions from a list put forward by the Minister and an independent chairman appointed by the Minister. As we shall see, this is by no means an exact transliteration of the Bullock proposals, because the employee representatives are to be appointed by the unions' central

offices [16], two of the independents are to be explicit representatives of the consumers, and the Minister retains control of who will be on the list of potential independent members and who will be the chairman of the board. Indeed, the whole scheme will operate by way of an act of self-denial by the Minister concerned since he retains the power under the Post Office Act, 1969, to appoint all the main board members. More fundamentally, if the aim of board representation is the involvement of employees in long-term corporate planning, as will be argued in this article, the significance of board-level representation in the nationalized industries is less than it would be in private industry. In the nationalized industries at present it seems often to be the case that such long-term decisions are ultimately taken in conjunction with the responsible government Minister rather than by the nationalized corporation alone. It is thus at ministerial level that the employee representatives will need to operate. Contacts between unions and ministers on such matters are of long standing. The beginnings of their institutionalization can be found in the coal industry's tripartite planning agreement among Government, the National Coal Board and the National Union of Miners as well as in the Energy Commission attached to the Department of Energy [17]. To the extent that unions participate in policy formulation in this way, the importance of board-level representation is more formal than real. If, as supporters of the Bullock proposals claim, the report is "a minimum programme for transition in the direction of a socialization of the private sector" [18], then its application in the nationalized sector must be at best a side-show to the debate about the private sector.

2. The Bullock proposals

The Committee had four major problems to resolve: the enterprises to be covered by its proposals; the composition of the board; the method of selection of its members; and the need, if any, for changes in the constitutional structure of U.K. companies or other areas of traditional corporate law.

A. Enterprises to be covered

The Bullock report favours a scheme of employee representation on the board, but only in the case of large companies or groups of companies. The report measures size by the number of workers employed, taking 2,000 as the minimum number that would bring its proposals into operation (though the number might be reduced at a later date). To start with the largest companies seems right since it is the largest companies that in general have the greatest economic power because of their relative emancipation from the constraints of the market. Nevertheless, it is a measure of the concentration of the private sector of the U.K. economy that whilst only some 738 enterprises employ more than 2,000 employees, some six to seven million people (about one third of total employment in the private sector) work for

these large concerns [19], so that the Committee's proposals would in fact embrace a sizeable proportion of the total working population of some twenty-five million. Given the propensity of enterprises to be organized, in legal terms, not as single companies but as groups of companies, it was necessary for the Committee to take the economic rather than the legal unit as the basis for its proposals. Where an enterprise is organized as a group of companies and employs more than 2,000 people, then the employees may be represented on the board of the holding company of the group, even if, as is often the case, the holding company employs far fewer than 2,000 people [20]. Without such a rule there would be a considerable temptation for enterprises to reorganize their corporate structure so as to avoid employee representation at this crucial level. Nevertheless, the Committee also thought it right to retain representation in groups of companies on the boards of those subsidiaries or sub-subsidiaries which by themselves employed 2,000 employees or more.

Wholesale exemption for subsidiaries would impose drastic limitations on the employees' ability to influence major decisions; and while representation at the level of the group holding company board is essential for influence over strategic policy decisions, representation at the subsidiary level is also of importance if employees are to know they can bring influence to bear at the level of the company which is their immediate employer [21].

The provision for representation on the boards of subsidiaries caused problems given the method of composition of the board suggested by the Committee; we shall have to return below to the question of groups of companies (including multinational groups). What can be said here is that, although it could have been more detailed, the Committee's report is one of the few places in U.K. literature where the problems raised for traditional corporate law by groups of companies are recognized and an attempt is made expressly to take them into account in formulating legal rules.

B. The composition of 'reconstituted' boards

Having decided to take the enterprise as the basic unit, the Committee considered the composition of the new board. On this issue the TUC proposed a simple half-and-half split between representatives of the shareholders (or of management, depending on the relationship between the shareholders and management) and the representatives of the employees [22]. The employers giving evidence to the Committee wanted no more than one third of the seats to be taken by such representatives, if they were prepared to countenance employee representation on the board at all. The report proposes a compromise, albeit one close to the proposals of the TUC than to those of the employers, by suggesting an equal number of employer and employee representatives with an additional third smaller group co-opted jointly by the two larger groups [23]. This third group should always be an odd number, but also a number greater than one.

Since the Committee did not want to specify the size of the board for any particular company (except in default of agreement between employers and employees), it translated its recommendations into symbolic form: the composition of the board should be $2x + y$ where $x > y > 1$, x being the number of employer or employee representatives and y (required to be an odd number) the number of jointly co-opted third parties. In this way the minimum size of the board would be 11. The chairman of the board is to have no casting vote, but the report recommends that the employer representatives continue to provide the chairman unless the whole board unanimously agrees otherwise [24]. The third (y) group is seen as having two functions: the positive one of providing "an important means by which special experience and expertise can be brought into the boardroom from inside and outside the company" [25], though no qualifications for co-option are proposed beyond acceptability to the majority of both of the x groups. The negative function is to act as a tie-breaker in case there is a deadlock. It is difficult to make public proposals for equal representation of employers and employees on a board without including some mechanism for breaking deadlocks, but it is equally difficult to see the company being run successfully if a decision by the y group becomes the normal method of resolving problems. It is clear that the Committee thought that tie-breaking by the y group would be the exceptional case [26]. Further providing for the pathological situation, the Committee had to consider what was to happen if the two x groups could not agree on who should constitute the y group. The solution proposed is the creation of a quasi-independent government body, the Industrial Democracy Commission (IDC), which in the current fashion would be government funded but controlled by a tripartite council of representatives of the employees and trade unions and others with relevant experience. The IDC would initially provide conciliation but, if conciliation failed, would itself appoint the y group [27].

The report considers the question of representation on the boards of companies associated in groups. A problem with formulating a policy relating to representation on boards in groups of companies is caused by the combined effect of the proposals that the y group should be jointly co-opted or appointed by the IDC and that not only the holding company of the group but also subsidiaries which themselves employ 2,000 employees or more should be subject to the scheme. In at least some groups the various companies comprising it are treated as a single entity for the purposes of formulating and executing business policy. Such a strategy cannot be pursued unless the holding company can require its subsidiary to adopt the policies decided upon for the group as a whole. The Bullock proposals create a risk — it is not clear how large a risk — that the y group and the employee representatives on the subsidiary's board might combine and outvote the shareholder (*i.e.*, holding company) representatives. The report accepts the desirability of preserving a coherent group strategy by proposing that in the case of disagreement about the composition of the y group on the subsidiary's board the parent company, rather than the IDC, should have power to appoint the y group. The same would apply to

removal of members of the y group [28]. Of course, the holding company's board would be subject to reconstitution, since the group as a whole necessarily employs more than 2,000 people if one of its constituent companies does, though owing to the optional character of the proposals (discussed below), it may not in fact have been reconstituted. The policy here has perhaps been best put by Professor Kahn-Freund, who has remarked: "... the word shareholder has legally the same, but economically a totally different, meaning when you talk about a subsidiary which is really no more than a department of a controlling company; for this reason the parent company's will should prevail with what is really part of the same company, it being assumed, of course, that within the parent that will is formed through the mechanism of the $2x + y$ formula" [29].

This ingenious scheme fails, however, where the group is multinational, controlled by a holding company incorporated in a foreign jurisdiction, for there is now no longer the possibility of reconstituting the holding company's board. One in six or seven of the enterprises employing 2,000 people or more is controlled from overseas. The problems caused by the lack of fit between multinational corporate structures and national jurisdictions are generally intractable and the Bullock Committee found no easy solutions. Unwilling either to ignore the need for coherence of policy in multinational groups or to make the employees of foreign multinational companies 'second-class' citizens, the report proposes that, in cases of disagreement, the y group in the top U.K. subsidiaries be appointed by the IDC, but only after consultation with the foreign parent and the relevant government minister, who would be able to give expression to relevant considerations of foreign investment policy [30].

C. Selection of employee representatives

Having settled the composition of the board the report turns to the method of selection of its members, or rather of the employee representatives. The method of selection of the y group has already been elucidated. It is assumed that the employer representatives will be chosen in the same way as at present, *i.e.*, usually, but not necessarily, by the shareholders in general meeting. The report does not suggest a single method of selection of the employee representatives, but rather a method of determining the method of selection [31].

The decision as to method of selection is to be taken by a 'Joint Representation Committee' (JRC), a new body to be constituted in each company where the scheme of employee representation is introduced and to be composed of representatives from all the independent unions (whether white-collar or manual workers' unions) recognized by the company for the purposes of collective bargaining. The representatives of the JRC are to be not full-time union officials but rather shop-stewards, *i.e.*, employees of the company concerned elected by groups of their fellow workers to represent them in their dealings with management and accredited by the union as its representatives in the workplace. The JRC would decide on the

method of selection of the employee representatives: it might decide to hold a ballot of the whole of the workforce or it might at the other extreme nominate the representatives itself. The JRC would in any case have the power to remove at any time by unanimous decision any of the employee representatives and would have to conduct the initial discussions with the existing board on the size and composition of the 'reconstituted' $2x + y$ board to be introduced. The JRC would not, however, be free to denominate the universe from which to select the board representatives of the employees; the report recommends that except in unusual cases the representatives should be employees of the company, though no other qualifications for selection (*e.g.*, age or length of service) are laid down. The representatives would not receive directors' fees but, like shop stewards when engaged in representational activities, would be reimbursed for their expenses and for loss of earnings (including overtime earnings if board meetings take place outside their normal working hours) [32].

In very few countries are manual and white-collar workers in an industry organized into the same union, and in the U.K. the principle of union organization on industrial lines is not in any case the dominant one. Occupational, craft or general bases of organization are equally often found, so that it may be expected that in a large company a number of manual and white-collar unions will be found representing different groups of workers. It may also be expected that in both the initial constitution of the JRC and in subsequent discussions in that body a degree of inter-union conflict may emerge that will impede the Committee's proposals. The report does not deal with this problem in detail but rather indicates in a general way that the problems should be resolvable through conciliation and supervision by the IDC, coupled in some cases with the threat that failure among the unions to agree will leave the employees unrepresented [33]. Although the possibility of inter-union conflict has been mentioned in public discussion, much more attention has been focused on the principle of placing the selection of employee representatives in the hands of the JRC. It has been suggested that it is undemocratic not to choose the representatives of the work-force through a secret ballot of the whole of the work-force, whether members of a union or not, though in fact the density of union membership in large companies is high (probably around 70%). The decision to base the method of selection on the trade union machinery, to create a 'single channel' of employee representation throughout the enterprise, has been defended on the grounds that "any new system which does not accommodate the organizational function of the shop stewards' committee in the British factory just will not work" [34].

It should be noted that the principle of the 'single channel' not only reduces the influence of non-unionists in the process of selection, but also carries with it the consequence that in the absence of any unions recognized for the purposes of collective bargaining the system of employee representation on the board cannot be instituted: board-level representation is thus supplementary to collective bargaining. In this way the Committee signified its acceptance of a point urged upon it by

nearly all those who gave evidence: changes at board level are not by themselves sufficient to ensure an extension of industrial democracy, but what is needed is an inter-related structure of participation at all levels of the enterprise. However, whereas this led many of those giving evidence to propose the creation, perhaps by legislation, of a system of 'works councils' at lower levels as a prerequisite to board level representation, the Committee wished to root its system of representation at board level firmly in the existing structures of plant-level collective bargaining. The significance of this is discussed further below in section 3.

The non-unionist, moreover, is not entirely without a say. His say follows from the optional character of the Bullock proposals [35]. They are not to be applied to all enterprises employing more than 2,000 employees no matter what the wishes of those employees. In order for the system to be 'triggered' in any particular enterprise a ballot of the whole of the relevant work-force [36] must first be held and a majority of those voting, who must constitute at least one-third of those entitled to vote (a requirement difficult to satisfy), must vote in favour of its introduction. The non-unionist thus has a voice on the question of the introduction of the scheme. He has a voice also on the ballot to decide whether the scheme shall continue. A referendum may be held after the scheme has been in operation for five years or more, though in that case the majority constituting one-third of those eligible to vote must be against the scheme if it is to cease. However, the value to the non-unionist of this procedure is reduced to some extent by the fact that the ballots, whether for introduction or continuance, may be called only by a union recognized by the company in respect of workers who constitute at least one-fifth of the work-force. It is clear that the principal purpose of the ballot procedure is not so much to protect non-unionists as to ensure that in each situation there is a sufficient degree of employee and union support to make the representation scheme work. In particular, a union opposed to board-level representation would be free to urge its members to vote against its introduction and would not be obliged to join the JRC and participate in the scheme even if the ballot was in favour of it.

D. The board, the shareholders' meeting and management

An elaborate debate was conducted, before, during and after the publication of the Bullock Report, on whether the introduction of employee representation on the board should be accompanied by the introduction of a 'two-tier' board in place of the 'unitary' board found in current British law and practice. The debate has been conducted largely with reference to German law, which has required a two-tier board for many types of company since the latter part of the nineteenth century, and which has also required since the early 1950s representation of the employees on the 'top' or 'supervisory' board. The debate has been characterized by complete changes of view by both the TUC and the CBI. The TUC originally favoured a two-tier system with the employees represented on the top board as a way of keeping the employee representatives from embroilment in day-to-day management, but

subsequently opted for a single-tier arrangement for fear that the employee representatives would otherwise be excluded from important decisions. The CBI originally argued against the two-tier system as an undesirable disruption of current British practice and used this as an argument against any employee representation. Feeling obliged, however, to propose a scheme of representation to counter the TUC, the CBI then took the view that such representation should be on a supervisory board.

These changes of view perhaps make it clear that the debate is really about the powers which the board upon which the employees are to be represented is to have rather than about one-tier versus two-tiers as such. From this perspective it becomes equally important to consider not only the desirability of a division of functions between two boards, but also the relationship between the board and the general meeting, since the employees are not to be represented in the shareholders' organ. These problems involved the Committee in consideration of some technical, corporate law problems the nature of which it is perhaps worth sketching [37].

The constitutional structure of British companies under present law usually consists simply of two parts: the shareholders in general meeting who elect the other constitutional organ, the board of directors, which, in turn, is charged with the task of managing the business of the company. Although that is the usual system, the present law does not require that the directors be elected by the shareholders in general meeting. Since the law gives the shareholders control over the contents of company's memorandum and articles of association, what the law ultimately provides is that the shareholders have control over the question of *how* the directors shall be elected [38]. That control is normally exercised so as to provide that the shareholders shall elect the directors, but it is not unknown for the shareholders to confer the power to nominate one or more directors upon a non-shareholder, *e.g.*, a substantial lender of money to the company.

Equally, the constitutions of most companies confer upon the board the broad power to "manage the business of the company" because the shareholders have exercised their control over the company's articles so as to confer this power upon the board [39]. It is always possible, although perhaps unlikely, that the shareholders might alter the company's constitution so as to confer a less extensive power on the board and to keep greater power in their own hands. In such a situation the shareholders' meeting would become a more significant event than it now usually is. However, the shareholders do not have an entirely free hand to delegate to the board, for there are a small number of fundamental organic changes in the company which the present law places wholly and nondelegably within the control of the shareholders (though the Companies Acts provide in some cases for an appeal to or confirmation by the courts to protect dissentient shareholders or creditors) [40]. But with these qualifications one can say that the present constitutional structure of the British company is a simple two-part one in which the board is the predominant organ.

Of course, in practice the board cannot by itself manage the business of the com-

pany. The position of director in itself is only a part-time one. The full boards of large companies meet on the average only once a month; they must necessarily delegate extensively to the senior management of the company and rely heavily on its advice. In practice, a variety of patterns of delegation can be found. No doubt this is partly the reason that the typical board of a large British company is made up mainly of people who are also senior managers of the company, so that the directors and the senior management are not distinct but rather overlap. This overlap is personified in the powerful institution of the managing director, who is both the senior manager and an influential member, sometimes even the chairman, of the board. Only a minority of the board seats, on the average a third, are held by non-executive people [41]. In spite of this it is crucial that in legal terms the extent to which the board delegates to senior management is a matter for the board alone to decide. If a board wishes to control rather tightly the company's business, especially, say, its strategic planning, there is no legal obstacle to its doing so. Indeed the CBI has recommended that the setting of corporate strategy always be a board function [42].

The Committee contrasted the U.K. system with the two-tier system found in Germany. Leaving aside for the moment the question of how the employees are represented within this structure, the first point to notice is that the constitutional structure of German companies is tripartite. It is tripartite, in contrast with the English bipartite structure, because there are two boards. Although the shareholders in general meeting elect the *supervisory* board, the members of the *managing* board are not elected by the shareholders, but are appointed by the supervisory board. Moreover, the members of the supervisory board are wholly non-executive, and the membership of the managing board is wholly executive. Now at first sight all that the Germans have done is to formalize the distinction between the executive and non-executive members of the unitary British board, and to separate the executive members into a separate corporate organ, the managing board. However, there is a vital further factor that must not be overlooked: whereas, under the U.K. system, the division of powers between the board (containing executive and non-executive members) and senior management is a matter for the board itself to decide (and most management theory recommends that the board itself should keep control of strategic planning), under the German system the law determines the division of powers between supervisory board and managing board. Moreover, in Germany that division in fact places policy creation as well as policy execution in the hands of the managing board and leaves the supervisory board with, as its name suggests, almost wholly supervisory functions (apart from the power, exercisable every five years in the usual case, to appoint or re-appoint the members of the managing board) [43].

A comprehensive description of the German system would have to qualify this picture to some extent, but the Committee thought it sufficiently accurate to conclude that a German-style system in the U.K. would increase the risk that the board on which the employees were represented would become "a reactive and passive body, meeting three or four times a year to hear reports from management" [44].

It does not follow that in a two board corporate structure one must adopt the particular division of powers found in the German system. One could have a different division, giving a greater role to the supervisory board and therefore making employee representation on the supervisory board a more significant matter. The Danish system, discussed by Bullock, provides an example of something along these lines [45]. However, that system, which also permits both executives and non-executives to be seated on the supervisory board, is so like the U.K. system (except that in the U.K. senior management of itself is not dignified as a separate corporate organ) that little would be gained, except unnecessary complication and confusion, by introducing the Danish system into the U.K. Nevertheless, the Danish example does serve to demonstrate that the crucial question is perhaps not one-tier versus two-tiers, but the functions of the board upon which the employees will be represented.

However, the introduction of employee representatives onto the existing unitary board would not in itself guarantee them an effective say in corporate decision-making, and so the Bullock committee went further and recommended that the board have certain 'attributed functions' [46]. This was necessary for two reasons.

First, we have seen that the extent of the board's power to manage the business of the company depends on whether the shareholders through the company's constitution have conferred this power upon the board and whether the board has retained this power itself or delegated it to senior management. Obviously, under the new scheme, employee membership on boards could be rendered totally ineffective if the board's powers were to depend upon what the shareholders decided. Although some delegation from board to senior management is desirable, the board must retain control of strategic planning if employee participation is to be at all effective. The Bullock plan therefore suggests that in certain areas the board should legally have responsibility for decision-making, whether the shareholders wish to confer such responsibility on it or not. These areas are the appointment, removal, control and remuneration of senior management, the allocation or disposition of resources (including the payment of dividends), changes in the company's capital structure, and the disposition of substantial parts of the undertaking. In addition, the board should be unable to delegate its responsibility to review management in the specific areas mentioned.

The second reason why the Bullock Committee needed to recommend attributed functions was that the present law requires certain fundamental decisions to be taken by the shareholders alone. The shareholders cannot confer these decisions upon the board, even should they want to. This again may be inappropriate for a company where the employees are represented only on the board. Consequently, the Committee proposed that in some of these areas the power of initiative should lie with the board, although shareholders should retain a veto right. The decisions in question are: the voluntary winding-up of the company, alteration of its memorandum and articles, and certain changes in its capital structure, *e.g.*, a reduction or increase in authorized share capital.

E. Directors' duties

Thus at the end of the day the Committee's recommendations on changes in corporate constitutions are relatively modest. The existing unitary board structure could be retained. The concept of attributed functions of the board did mark an important theoretical break with one of the major influences of partnership principles upon British company law [47] because it involved use of the law to prescribe the basic division of functions among shareholders, board, and management rather than leaving these matters to the shareholders and directors themselves to decide. However, the substantive content of the proposed attributed functions would merely ratify what is in practice the common position of dominance of the board and retain for the board certain basic decisions that management literature generally asserts to be decisions the board ought to take.

The same conclusions can be drawn with respect to the report's recommendations on the legal duties of directors. Here too a major theoretical change is needed, because the duty of directors to act in the best interests of the company is currently interpreted as requiring them to act in the best interests of the shareholders: the shareholders, the members, are the company [48]. However, the employees' interests can be taken into account insofar as it is necessary to do so to further the shareholders' interests. Since the directors may have regard to the shareholders' interests on a long-term as well as on a short-term basis and since the formulation of what the shareholders' interests are is seen by the law as a matter for the directors, not the court, to decide [49], it is sometimes argued that directors may, and in fact do, take the employees' interests into account to a considerable extent, at least where the company is a going concern, with the result that independent legal recognition of the employees' interests as an object of concern by directors would not in practice be significant. The report, however, recommends such independent recognition of the employees' interests. This recommendation has generally been regarded as non-controversial, since it follows a similar proposal in the Conservative Government's Companies Bill of 1973 [50] (which was not enacted because of the change of government in 1974). From another point of view, of course, this recommendation can be seen as containing the germ of the whole employee representation structure: if the duty of directors to advance the interests of the employees is once admitted, should not the employees have power equal to that of the shareholders to secure the discharge of that duty [51]?

With regard to other aspects of directors' duties the report recommended only minor changes, viewing the rules on secret profits, insider trading, *etc.* as appropriate for application to all directors, no matter how selected. The committee does, however, recommend the enactment of a statutory statement of directors' duties which at present have to be deduced from the judges' decisions [52]. The report also recommends no reform of the rules about confidentiality, a controversial topic because the rules themselves are not very clear and management fears they will not be strong enough to prevent disclosure of damaging information whilst the unions fear they will hinder reporting back by employee representatives to the JRC.

3. The rationale of the Bullock proposals

The proposals of the Bullock Committee have been set out in some detail above. This section attempts to explain the theory underlying the proposals. It will be argued that the motivation for both the TUC's and the Committee's proposals is to be found in what these bodies considered to be a deficiency in the scope of collective bargaining arrangements in the U.K., and that the purpose of these proposals is to fill that gap. The gap has two aspects: it is partly a question of the level at which collective bargaining takes place and partly a question of the subject matter of collective bargaining.

A. Level of bargaining

As to level, in the U.K., as in most Western European countries, national level collective bargaining in each industry was established in the early part of this century, especially in the period immediately after the First World War, when the Whitley Committee's recommendations to this effect were enthusiastically supported by the Government [53]. The parties to these bargaining arrangements were typically, on the one hand, the unions having membership amongst the workers in the industry and, on the other, the employers operating in the industry, usually united in an employers' association. Under the impact of the Whitley recommendations the national level bargaining machinery often took the form of a 'Joint Industrial Council', a permanent body with its own small secretariat, consisting of representatives of both employers and trade unions. National level bargaining came under some strain during the depression of the 1930s but in 1965 the Ministry of Labour reported the existence of some 500 pieces of negotiating machinery at national level, covering some eighty-five per cent of manual workers and fifty-five per cent of white-collar workers [54].

In more recent times national level bargaining has been supplemented in two directions. First, in a way again paralleled in other western European countries, there has been the development of 'supra-industry' bargaining, of the type characterized by the Social Contract negotiations noted above, *i.e.*, bipartite or tripartite bargaining among the government and the central organizations of the trade unions (TUC) and the employers (CBI). Such bargaining is still a tender shoot whose ultimate stature is in doubt, but whose growth is not. Second, there has been the development within plants of what is usually called 'domestic' bargaining. Such bargaining is usually carried on, not by the full-time union officials who conduct national bargaining, but by shop stewards. In those plants where domestic bargaining is extensive there will be a hierarchy of ordinary stewards, leading stewards and convenors, the latter often being engaged full-time on their representational activities, though still paid by the company. Domestic bargaining is often of a much less structured kind than national bargaining and its reform has been an object of government policy in recent years [55]. For present purposes, however, only two

points need be noted. First, in the U.K. domestic bargaining has filled the vacuum which in many European countries was filled in the early post-war period by legally required works councils, usually based on a model of cooperation rather than conflict with the employer. For this reason proposals to introduce works councils into the U.K. on a European model are inappropriate, even though they are regarded as a crucial element of the structure of industrial democracy in a number of European countries. Second, although domestic bargaining is well developed, bargaining at company or enterprise level is much less so. Some companies, usually multinational companies not federated to an employers' association, have encouraged it; but where they have not 'combine committees' of shop stewards from all the different plants of a company or group of companies have usually failed to receive recognition from the enterprise. Hence the gap in terms of the level of bargaining [56].

B. Subject matter of bargaining

Equally important is the gap in terms of subject matter. It is the common experience of all countries that employers' association are prepared to move only at a pace which its marginal members can stand, and so national level bargaining tends to be limited, both in terms of the level of settlement but also in the range of matters subject to bargaining. The tendency to a limited subject matter is reinforced by the difficulty of settling at national level matters that require detailed consideration of particular plants or even jobs, *e.g.*, the setting of piecework rates. However, it has been the experience of the U.K. that even domestic bargaining, although covering a much wider range of matters than national bargaining, has not developed much beyond decisions directly about employment matters. Shop stewards may bargain about working conditions (including the distribution of work, manning levels, transfers, the introduction of new machinery), discipline, lay-offs and so on [57] but rarely about investment, the location of plant, pricing, product diversification and all the other matters that may be included under the heading of strategic corporate decisions.

No doubt such decisions have traditionally fallen outside the range of the employees' interests, but a labour movement in the U.K. that has become increasingly self confident over the past thirty years was bound sooner or later to appreciate the inter-dependence of all areas of managerial decision-making. Stirrings of interest in this direction were further prompted by the poor investment record of British industry and the onset of recession in the 1970s when the limitations became clear of bargaining about the terms upon which employment was to be offered without being able to bargain about whether the jobs would be available at all. One can see how level and subject-matter coincide, for strategic planning decisions are taken at corporate level: the need was thus "for workers' participation in the formulation of entrepreneurial policies at enterprise level" [58].

This line of argument does not necessarily lead to the notion of employee representation on the board; indeed, it rather suggests an extension of collective bar-

gaining. The reason for not advocating such an extension can be found in a remark by Professor Mancini which has gained a certain vogue in the U.K.: "The fact is that collective bargaining can do a lot but it cannot do everything" [59]. The reason why collective bargaining cannot do 'everything' lies principally in the nature of the sanction available to the union in such bargaining. In traditional collective bargaining it is ultimately the union's ability to make a credible threat of industrial action that moves the employer towards the union's position. Equally, the threat of loss of pay if industrial action is taken is what moves the employees towards the employer's position. But does the union possess a credible threat of industrial action when it bargains over corporate planning decisions whose precise impact on the work force and, more important, whose impact upon any particular section of the work force may become clear only in the long term? It is an open question whether the level of consciousness among many groups of British workers is sufficiently high that they would be prepared to contemplate the possibility of industrial action, with its certain, immediate costs, over issues of long-term planning. This might be thought to be the fundamental problem of the collective bargaining route. It is, of course, a problem that the Bullock proposals solve very simply by creating an institutional position of power on the board as an optional alternative to industrial action.

In a sense, employee representation on the board in this context constitutes the carrying on of collective bargaining by other means. Board level representation is not a radical break with the processes of collective bargaining but rather the expression, through alternative institutional means, of the principle of joint regulation of decisions by employers and employees which underlies collective bargaining. It is significant that the TUC's proposals for employee representation on the board were put forward in documents that also proposed the extension and improvement of traditional collective bargaining. Nevertheless, one major union (the GMWU) has opposed the Bullock report, not because it objects in principle to joint regulation of corporate planning in the private sector, but because it believes that traditional collective bargaining is the appropriate way to achieve this end. Unlike many who take this view, the GMWU has put forward a scheme for the practical extension of collective bargaining, but it must be said that this writer does not believe that the proposals solve the problem of the sanction [60]. In particular it is difficult to envisage the effective operation of a duty to bargain in good faith over corporate planning decisions. Nevertheless, the optional character of the Committee's proposals gives unions which take this view considerable freedom to opt out of board-level representation and to explore other methods of joint regulation or, indeed, to leave managerial control in this area intact.

Naturally not every scheme of employee representation on the board can fulfill the purpose of extending joint regulation to corporate planning decisions. Indeed, it is the underlying principle of joint regulation that explains the particular scheme proposed in the report. Parity representation of employers and employees is a necessary adjunct of the principle of joint regulation especially since all who have

studied the question seem to agree that minority representation does not bring about a shift in the balance of power [61].

Basing the representation scheme upon the trade union machinery constituted as a JRC also follows naturally from the view of board-level representation as an extension of collective bargaining: those who engage in collective bargaining at plant level, *i.e.*, the shop stewards, should also control enterprise level negotiations so as to avoid institutional rivalries and to ensure smooth communications between the two levels of activity. The non-unionist is in a relatively uninfluential position, but no more so than in normal collective bargaining, and the supplementary nature of board-level representation as an extension of collective bargaining naturally presupposes a substructure of plant-level bargaining upon which enterprise level participation is to be constructed.

Finally, an elaborate concern with the powers of the board on which the employees are to be represented is necessary if the Committee is to ensure that the representatives will in fact participate in corporate planning decisions. From this point of view the surprising thing is not that the report makes recommendations about attributed functions but that these recommendations are not more radical. The subjection of certain of the attributed functions of the board to the shareholders' veto is a compromise in principle with the notion of joint regulation, though in practice it is likely to be less significant [62]. *Vis-à-vis* management it can be questioned whether the rather limited attributed functions of the board, designed to preserve the freedom of companies to arrange managerial structures according to their own perceptions of their needs, will in fact be enough to prevent the board from becoming the mere supervisory body that the Committee wished to avoid.

4. A critique of the Bullock proposals

As has been indicated, the Bullock Committee's proposals aroused enormous controversy when they were published, though the controversy has become muted with the realization that general legislation to implement them is not imminent. Indeed, political exigencies are currently pushing the Government towards legislation on employee share-ownership schemes rather than on employee board representation [63]. In this concluding section a few of the more fundamental issues that have emerged in the public debate will be examined.

The first point to make is how relatively uninfluential foreign systems of board-level representation have been in the public discussions, as have the proposals of the Commission of the European Communities. This is not for lack of knowledge of these systems. The Committee was directed by its terms of reference to have regard to foreign experience. It commissioned two reports, one by a sociologist and the other by a lawyer, which assembled and analyzed the evidence about that experience [64]. Foreign systems, notably those in Germany, Sweden and Denmark, are

discussed at some length in the Committee's report. Nevertheless, although nine Western European countries have schemes of board-level representation in operation, with the possible exception of the German Codetermination Act of 1976, which is not yet fully operational, only one scheme was based upon the principle of parity (so crucial to the Bullock proposals). That was the one introduced in the immediate post-war period in the German iron, coal and steel industries [65]; the rather special circumstances of its introduction and development perhaps do not make it a very useful model for the U.K.

The basic point is that none of the foreign schemes appears to have been introduced for reasons in any way analogous to those which, it has been argued above, underlie the Bullock proposals. Although it may have been useful to examine the foreign systems to establish that point and although examination of foreign systems provided the Committee with a series of questions that needed to be answered about its own proposals, neither the report itself nor any informed contributor to the public debate has treated any of the foreign systems as a model for adoption in the U.K. [66]. The same is true of the EEC proposals, of which it is perhaps not unfair to say that they seem to be more concerned with producing a formula within which the increasing number of rather different national schemes can be contained than with the substantive reasons for employee representation on the board, except as a symbolic matter.

The argument from collective bargaining, deeply rooted in British industrial relations, has convinced some people that not only is foreign experience of little value but also that the whole issue is 'really' one of labour law, not of company law. Although the report considers some difficult areas of modern company law, it is true that these corporate law issues are mainly technical, arising as consequences of the choice of the principle of joint regulation rather than contributing to the debate about that choice. Nevertheless, in a more fundamental way the report challenges the whole basis of our present company law, by posing the question: what is the company and for whom is it to be run?

If one is satisfied to justify the current structure on the traditional lines that "the ultimate authority and control over a company [must] rest with those who provide the capital" [67], then the report's challenge can be easily met. Little of the evidence presented to the Committee, however, took such a fundamentalist line. There was considerable agreement that directors ought to take independent account of interests other than those of the shareholders, though this did not often lead to the further conclusion that employees ought to be represented on the board. The concept of an independent senior management mediating among the various interest groups seemed to be the preferred picture. Even so, the underlying models of the corporate enterprise in the submissions of evidence, in the report itself and in the subsequent public debate have rarely been expressly articulated [68]. This lack of a theoretical perspective has probably done more to hinder management opposition to the proposals than union promotion of them. The TUC effectively seized the initiative with its proposals of 1973 based on the need to

make large companies more responsive to the needs of society in general and of the employees in particular, whilst opposition by employers has tended to throw doubt either on the bona fides of those supporting such proposals or on the practicability of their schemes. Objections on grounds of practicability are, of course, very important, but they do not directly address themselves to the question of the underlying rationale of private enterprise, implicitly raised by the report.

The more fundamental issues have tended to be raised in discussions within the labour movement. Particularly at issue is whether the report assumes in its proposals a unity of interest between employers and employees in contrast with the pluralistic model of a conflict of interest that is usually thought to underlie collective bargaining. The GMWU preference for joint regulation of corporate planning through an extension of collective bargaining seems to be based upon this contrast, and the requirement that all directors (including employee representatives) act in the best interests of the company has been the focus of criticism, even on the basis of a redefinition of the interests of the company which puts shareholder and employee interests on an equal basis [69]. Professor Kahn-Freund has argued that the 'interests of the company' must always be identical with *an* interest of the shareholders but may be opposed to all interests of the employees [70]. The proposition seems to be tenable only on the basis that the sole legitimate purpose of the company is to maximize profits, for actions taken towards this end will always be intended to benefit shareholders, either by way of increased dividends or by way of capital appreciation of their shares. Once this assumption is relaxed and it is accepted as legitimate for those in control of a company to pursue other goals as well as the goal of 'making profits' (as distinguished from 'maximizing' profits), then it seems clear that the controllers may take action in a particular case which may properly be described as "in the interests of the company," but which is not, of itself, in pursuance of any interest of the shareholders [71]. Today, there seems to be no mechanism which will guarantee continuous, profit-maximizing behaviour on the part of the controllers of large companies. Neither shareholder control (whether by institutional or private shareholders), the forces of market competition, the market in corporate control via takeovers, nor the threat of liquidation seem for various reasons to be sufficient to impose upon corporate managements the discipline of profit maximization. There is consequently vested in such managements, in fact if not in law, an element of discretion — the degree of which varies from case to case — in the setting of corporate goals. One of the main purposes of employee representation on the board is, of course, to secure effective influence for the employees in the exercise of that discretion. This is not a development which those who favour a return to the discipline of profit maximization would see as particularly helpful; but those who regard nineteenth century models as inappropriate tools for developing policy in regard to mid-twentieth-century capitalism will not take the natural dominance of the shareholders' interests as an obvious starting point.

In short, the point at issue between Kahn-Freund and the Bullock Committee

majority seems not to be the report's incipient tendency to reification of 'the company's interests' but rather a conflict between Kahn-Freund's (implied) assumption that profit maximization is the dominant objective of corporate activity and the report's (implied) assumption that companies pursue a range of goals, of which making profits is only one. On the former assumption it is perfectly easy to envisage employee directors being under "a conflict of duties which is simply insoluble" for in a particular situation the maximization of profits may not further any employee interest but must always seek to benefit in some way some or all shareholders. When a company may legally pursue a range of goals, attempting to hold a balance among profit, growth, size, employment opportunities, *etc.*, then no particular group interested in the company can claim permanent identification of the company's interests with its interests. The crucial question becomes one of how the balance is to be struck; that is the political/business decision that the board has to make. It must not be forgotten that it is false to represent collective bargaining itself as a process that reflects only a series of conflictual interests. The price paid by trade unions for engaging in collective bargaining is the compromise and collaboration which goes into the making and the administration of the collective agreement. Indeed, the administration of the agreement may become more important on occasion than the bargaining that preceded it. No doubt all this would be accepted by those who prefer the 'pluralist' label. For this reason the term 'collective bargaining' has been criticized by some writers who see the process as one "which would make *joint regulation* a much more appropriate term to indicate its essential character" [72]. A degree of responsibility for the collective agreement and its administration has to be accepted by the trade union as well as by the employer.

The proposition that collective bargaining can be distinguished from *all* forms of participation in the institutions of the enterprise, because the former rests upon a basis of 'pluralism' or 'conflict' and the latter represents a degree of 'unitary' collaboration that suppresses the reality of conflict between labour and capital, is too simplistic to be upheld. Collective bargaining is one form of joint regulation. The extent to which participation in the institutions of the enterprise causes workers to integrate themselves into that enterprise depends upon the concrete terms of their participation.

5. Conclusions

The Bullock proposals are clearly based upon a strategy of involvement of the workers in corporate decision-making, but the report proposes both involvement and a share in the exercise of power, so that it can be said to suggest a true form of *participation*. The model of the report is the pluralistic one of bargaining between employer and representatives of the employees who would be powerful and independent of both employers and the state, and for this reason alone it seems inappropriate to describe it as a form of corporatism [73]. There remains, however, the

troublesome question of whether the model carries conviction, not in terms of pluralism versus monism, but in terms of how the model would be likely to operate in practice. In particular, the report probably does not say enough to convince those who fear that the employee representatives will become, on the one hand, detached from their 'base' in the employees on the shop floor and, on the other, incapable (as part-time amateurs in the board-room) of exercising effective control over professional management [74].

In the writer's opinion these two groups of problems are not avoided by using traditional collective bargaining to extend joint regulation into the area of corporate planning. The fundamental division within the British labour movement is perhaps between those unions which have the self-confidence to wish to extend joint regulation — by whatever means — into this area and those which do not. For academic students of the matters the debate has shown up the inadequacy of our theories about and knowledge of union democracy and, even more so, how decisions in large companies are made. If the report does no more than spur realistic investigation of these two topics, it will not have been in vain.

Postscript

The Government eventually responded to the Bullock Committee's proposals in May 1978 in a White Paper, *Industrial Democracy* [75]. This document, while accepting the Bullock analysis that "at company level there remains a major gap in the development of the employee role" [76], in fact departs substantially from the Committee's prescription.

First, much more stress is placed in the White Paper on the need for voluntary agreements between employers and trade unions, so that legislation is explicitly relegated to a fall-back role.

Second, although the need for legislation is accepted, employee representation on the board no longer appears as the initial, or even primary, form of industrial democracy. Instead, all companies employing more than 500 people in the U.K. should be obliged "to discuss with the representatives of employees all major proposals affecting the employees of the business before decisions are made" [77]. In the absence of contrary agreement, such discussion would take place outside the boardroom but through a Joint Representation Committee of shop stewards of the type proposed by the Bullock Committee. Only a very weak sanction is proposed against companies that do not enter into voluntary agreements and do not comply with the statutory fall-back obligation either. The sanction mentioned is compulsory, unilateral arbitration by the Central Arbitration Committee of the terms and conditions of employment. This is the sanction used in the Employment Protection Act, 1975 where an employer refuses to negotiate with a union after having been 'recommended' to do so by a government agency (the Advisory, Conciliation and Arbitration Service) or where the employer refuses to disclose certain informa-

tion for the purposes of collective bargaining. The sanction does not work terribly well in those two contexts [78] and it is very difficult to imagine its successful application in relation to discussions of corporate strategy.

Third, only after a period of three or four years' experience with discussion of corporate strategy would there be any entitlement to employee representation on the board. In the absence of contrary agreement, such representation would be on the top or 'policy' board of a two-tier board structure in companies employing more than 2,000 employees. This is a departure from the Bullock recommendations, but, as argued above, the crucial question is the range of functions allocated to the policy board. The proposals in the White Paper appear to give the policy board in general as much influence as the unitary board with 'attributed functions' would have under the Bullock scheme. (An appendix to the White Paper spells out in some detail the proposed relationship between the policy board and the 'management' board, which will normally consist only of senior executives, but it is less clear on the relationship between the boards and the shareholders.) The proposals are avowedly influenced more by the Danish than by the German model and they would apply to all large private-sector companies, whether or not employees were represented on the board.

The White Paper's major departure from the Bullock proposals consists, however, in its view that employee representation on the board by law should extend to not more than one third of the seats in the first instance. This is a major rebuff to the Committee because of the stress it laid upon the principle of parity representation. Whereas the Committee viewed parity representation as qualitatively different from minority representation, the White Paper regards one third as "a reasonable first step" [79]. The White Paper is also somewhat hesitant about the idea of selecting the employee representatives exclusively through the JRC. It puts forward as a possibility the granting of a role in the selection process to "any substantial homogeneous group of employees" [80].

Somewhat surprisingly, the White Paper proposals were given a cautious welcome by the TUC, although the CBI maintains its opposition to any form of compulsion, even of a fall-back type. The unions affiliated to the TUC which supported the Bullock proposals do not seem to find the watered-down version presented in the White Paper acceptable, while those unions that opposed the Bullock proposals do not find that the White Paper meets their differing, fundamental objections.

The Government is committed to laying proposals before Parliament in the 1978/79 Parliamentary session, but it seems unlikely that a Bill will be introduced in time to secure passage before a general election intervenes, even if there is sufficient support in Parliament for the legislation, which is in any case doubtful. The Government has introduced a separate Companies Bill, but this does not even contain the proposals for a two-tier board, which the White Paper viewed as offering "certain advantages over a unitary board whether or not the employees are represented at board-level" [81]. The Bill does, however, require directors to have regard to the interests of the employees and does contain a statutory statement of direc-

tors' duties, the two points on which the Government had committed itself in advance of the White Paper on *Industrial Democracy* [82].

The consequence of these various developments is that progress with employee representation on the board is unlikely to be at all rapid in the private sector in the near future and, for the reasons given above, it is the nationalised industries that are likely to be the focus of immediate activity. The White Paper says: "Industrial democracy is of special importance for the nationalised industries, and the Government intends that they should set an example to the private sector . . ." [83]. The chairmen of all the nationalised industries have been asked to consult with the recognised unions and to make joint proposals for further additions to the machinery for consultation and participation in those industries, which proposals may, though need not, include employee representation on the board. In many cases these proposals will be capable of implementation without legislation.

As a result of these initiatives there has been added to the Post Office scheme, described above, a scheme for representation on the main board of the British Steel Corporation. The BSC scheme differs both from the Bullock proposals for the private sector and from the Post Office arrangements. Like the Post Office the steel arrangements are based upon selection of the representatives by the unions recognised nationally by the nationalised corporation but, unlike the Post Office, it was agreed in the steel industry that the representatives should be full-time employees of BSC rather than full-time union officials. In this respect the steel scheme is akin to that proposed by the Bullock Committee, but the scheme gives the employees only six out of the twenty-one main board seats. (There are six senior managers, two civil servants, and seven 'independents'). The employee representatives are formally appointed by the relevant government minister, but he accepts the unions' nominations in full. More nationalised industry initiatives of differing sorts are expected.

Notes

[1] Command Paper (Cmnd.) 6706, London, Her Majesty's Stationery Office (H.M.S.O.), 1977. The Committee consisted of Lord Bullock (Master of St. Catherine's College, Oxford) as chairman; Mr. David Lea from the TUC; the general secretaries of two large unions, one predominantly manual (Mr. Jack Jones) and one predominantly white-collar (Mr. Clive Jenkins); two chairmen of large industrial companies (Sir Jack Callard and Mr. Barrie Heath); a banker (Mr. N.P. Biggs); two academics, one a professor of law (Lord Wedderburn) and the other a professor of industrial relations (Professor George Bain); a partner in a large firm of City solicitors (Mr. N.S. Wilson); and a representative of the consumer interest who subsequently resigned on taking up the post of Director-General of the Confederation of British Industry (Mr. John Methven).

[2] The Trades Union Congress is the (single) central confederation to which nearly all unions of any significance are affiliated. Confusingly, the phrase is used to refer both to the confederation as an institution and to the annual meeting of delegates from the affiliated unions.

[3] See Schmitthoff, *The Bullock Committee and the E.E.C.*, in *Industrial Democracy: The Implications of the Bullock Report*, Ch. 6 (Benedictus, Bourn and Neal eds., Univ. of Leicester, 1977) (hereafter BBN).

[4] The TUC's proposals have been put forward in a series of documents: *Industrial Democracy – Interim Report* by the General Council (London, TUC, 1973); *Industrial Democracy – Report* by the General Council (London, TUC, 1974) (TUC 1974 Report); *Supplementary Evidence to the Bullock Committee* (London, TUC, 1976).

[5] TUC 1974 Report, *supra* n. 4, Ch. 3.

[6] For an account of this period see e.g. Sir N. Chester, *The Nationalisation of British Industry 1945–1951*, at 457–61 (London, H.M.S.O., 1975).

[7] The report of the Committee, *op. cit. supra*, n. 1, contains a main report, a note of dissent by one of the signatories of the main report, and a minority report. Unless otherwise indicated reference is made to the Main Report.

[8] The evidence submitted to the Committee, whether by employers or others, was not published officially, but many groups which submitted evidence did publish it themselves. The evidence given to the Committee is usefully summarized in Lewis and Clark, *The Bullock Report*, 40 Mod. L. Rev. 323 (1977).

[9] The central employers' confederation.

[10] A Fabian Group, *Workers in the Boardroom*. Fabian Tract No. 441 (London, The Fabian Society, 1976).

[11] These were in full:

Accepting the need for a radical extension in 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 E.E.C. 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.

[12] Main Report, Ch. 1, para. 5.

[13] For reviews of the 1971 Act see generally Thomson and Engleman, *The Industrial*

Relations Act (London, Martin Robertson, 1975) and Weekes, Mellish, Dickens and J. Lloyd, *Industrial Relations and the Limits of Law* (Oxford, Basil Blackwell, 1975).

[14] See e.g. Professor Clegg, *The Bullock Report and European Experience*, in BBN, *supra* n. 3, at 5.21D.

[15] *Id.* at 1.3.

[16] This method of appointment, however, has something to be said for it in industries dominated by single companies. See Edmonds, *The Bullock Committee's Report and Collective Bargaining*, in BBN, *supra* n. 3, at 4.6-4.8 and 4.12D-4.14D.

[17] Bell, *Industrial Democracy in the Nationalised Industries*, in BBN, *supra* n. 3, Ch. 3.

[18] Wedderburn of Charlton, *Industrial Democracy and Company Law*, in BBN, *supra* n. 3, at 1.19.

[19] Main Report, Ch. 2, Table 2.

[20] *Id.*, Ch. 11, para. 4.

[21] *Id.*, Ch. 11, para. 17.

[22] TUC 1974 Report, *supra* n. 4, at para. 91.

[23] Main Report, Ch. 9, para. 13.

[24] *Id.*, Ch. 9, paras. 47-48.

[25] *Id.*, Ch. 9, para. 14.

[26] *Id.*, Ch. 9, paras. 18-20.

[27] *Id.*, Ch. 9, paras. 42-43 and Ch. 12, paras. 5-18. Similarly constituted are the Council of the Advisory, Conciliation and Arbitration Service under the Employment Protection Act, 1975, § 1, sched. 1, and the Health and Safety Commission under the Health and Safety at Work etc. Act, 1974, § 10.

[28] Main Report, Ch. 11, paras. 25-32. Analogous proposals are made to ensure that the shareholder representatives on the subsidiary company's board are always acceptable to a majority of the shareholder representatives on the holding company's board. *Id.*, Ch. 11, para. 35.

[29] BBN, *supra* n. 3, at 6.18D.

[30] Main Report, Ch. 11, paras. 52-67. The opposite problem also arises, i.e., the inability of the British parliament to legislate for the rights of the employees of companies incorporated in foreign countries but controlled by U.K. parent companies. Such employees number some two million. The report concludes that the existence of such unrepresented employees should not prevent the implementation of its proposals in respect of employees in the U.K. *Id.*, Ch. 11, para. 51.

[31] *Id.*, Ch. 10, paras. 24-35.

[32] *Id.*, Ch. 10, paras. 36-47.

[33] *Id.*, Ch. 10, paras. 29-35.

[34] Wedderburn of Charlton, *op. cit. supra* n. 18, at 1.6.

[35] Main Report, Ch. 10, paras. 13-23.

[36] That might be the employees of the whole group or of a single company within it.

[37] These points are considered in more detail by the writer: Davies, *Employee Representation on Company Boards and Participation in Corporate Planning*, 38 Mod. L. Rev. 254 (1975) (Davies 1975); Davies, *European Experience with Worker Representation on the Board*, in Batstone and Davies, *Industrial Democracy: European Experience* 49 (London, H.M.S.O., 1976) (Davies 1976).

[38] Companies Act, 1948, §§ 5, 10.

[39] See e.g. Companies Act, 1948, Sched. I, Table A, art. 80, the accepted interpretation of which is that its general grant of powers to the board excludes the shareholders meeting from taking decisions within the same area (except the initiation of litigation). *Scott v. Scott* [1943] 1 All E.R. 582. If the shareholders wish to act, they must either alter the articles or remove the directors under § 184 of the 1948 Act.

[40] The shareholders' powers in this respect seem to be greater under U.K. company law than under the law of many American states. See Eisenberg, *The Legal Roles of Shareholders and Management in Modern Corporate Decisionmaking*, 57 Calif. L. Rev. 1.60-70 (1969).

[41] See generally British Institute of Management, *The Board of Directors* (London, 1972).

[42] Confederation of British Industry, *The Responsibilities of British Public Companies* para. 83 (London, 1973).

[43] See in particular, Aktiengesetz 1965, arts. 76 (1) and 111 (1) and (4), and the analysis in Davies 1975, *supra* n. 37, at 265-270.

[44] Main Report, Ch. 8, para. 9.

[45] *Id.*, Ch. 8, paras. 11-13.

[46] *Id.*, Ch. 8, paras. 15-34.

[47] See Gower, *Some Contrasts Between British and American Corporation Law*, 69 Harv. L. Rev. 1369, 1376 (1956).

[48] *Parke v. Daily News*, [1962] Ch. 927, discussed in Gower, *The Principles of Modern Company Law*, 522 (London, 3rd ed. 1969).

[49] In *Re Smith and Fawcett Ltd.*, [1942] Ch. 304, 306; see also *Gaiman v. N.A.M.H.*, [1971] Ch. 317.

[50] Companies Bill, Bill 52, 1973, c1.53.

[51] For this argument in greater detail see Davies and Wedderburn of Charlton, *The Land of Industrial Democracy*, 6 Indus. L. J. 197, 198-99 (1977).

[52] Main Report, Ch. 8, paras. 35-44. The independent recognition of the employees' interests and a general statutory statement of the duties of directors are the only two recommendations of the Committee on which the government has so far committed itself to legislation. See *The Conduct of Company Directors*, Cmnd. 7037, paras. 1-7 (London, H.M.S.O., 1977).

[53] On this period of industrial relations see Charles, *The Development of Industrial Relations in Britain 1911-1939* (London, Hutchinson, 1973).

[54] Royal Commission on Trade Unions and Employers' Associations, *Written Evidence of the Ministry of Labour 19* (London, H.M.S.O., 1965).

[55] The contrast between the national and plant level systems of collective bargaining is one of the main points in the Report of the Royal Commission on Trade Unions and Employers' Associations (Chairman: Lord Donovan), Cmnd. 3623 (London, H.M.S.O., 1968). The contrast is particularly noticeable in the private sector of manufacturing industry, which is the main area where the Bullock proposals would apply.

[56] Clegg, *The System of Industrial Relations in Great Britain* 265 (Oxford, Basil Blackwell, 3rd ed. 1976).

[57] Parker, *Workplace Industrial Relations* 1972, at 30 (London, H.M.S.O., 1974).

[58] Kahn-Freund, in BBN, *supra* n. 3, Preface at (i).

[59] Mancini, *Costituzione e Movimento Operaio* 13 (il Mulino 1976).

[60] The GMWU proposals are discussed at length by Davies and Wedderburn of Charlton, *op. cit. supra* n. 51, at 204-08.

[61] See, e.g., Davies 1976, *supra* n. 37 at 59-61.

[62] Nor does the Committee confront successfully the difficult problems arising out of the shareholders' freedom to transfer their shares, in particular to a takeover bidder. The Committee proposes an innovation in British company law, i.e., an 'instrument of control' based on a simplified analogy with the German 'contract of control'. However, it is unclear how effective this will be to protect the interests of the new subsidiary. Main Report. Ch. 11, paras. 37-44.

[63] See, e.g., *The Financial Times*, Dec. 23, 1977, at 1.

[64] Batstone and Davies, *op. cit. supra* n. 37.

[65] For analysis see Davies 1975 and Davies 1976, *supra*, n. 37.

[66] See, in agreement, Clegg, *The Bullock Report and European Experience*, in BBN, *supra* n. 3, at 5.11.

[67] The City Company Law Committee, A Reply to Bullock, para. 10 (London, 1977).

[68] For an attempt to stimulate such a discussion see Weinstein, *Bullock and the Business Enterprise*, *The Director*, Jan. 1978.

[69] Main Report, Ch. 8, paras. 38–41.

[70] Kahn-Freund, *Industrial Democracy*, 6 *Indus. L.J.* 65, 75–77 (1977).

[71] This argument is put at greater length in Davies and Wedderburn of Charlton, *op. cit. supra* n. 51, at 200–03.

[72] Flanders, *Management and Unions* 222 (London, Faber and Faber, 1970).

[73] For a thorough analysis of the notion of corporatism in recent employment legislation, see Crouch, *Class Conflict and the Industrial Relations Crisis* 33–40, 186–88 (London, Heinemann, 1977).

[74] For a recent strong statement of these fears, which perhaps over-estimates the extent to which traditional collective bargaining can overcome them, see Däubler, *The Employee Participation Directive – A Realistic Utopia?*, 14 *Com. Mkt. L. Rev.* 457 (1977).

[75] Cmnd. 7231 (London, H.M.S.O., 1978) (hereafter White Paper).

[76] *Id.*, para. 4.

[77] *Id.*, para. 9.

[78] See Davies, 8 *Indus. L.J.* 55 (1979).

[79] White Paper, para. 32.

[80] *Id.*, para. 38.

[81] *Id.*, Appendix, para. 4.

[82] See *supra* n. 52 and accompanying text.

[83] White Paper, para. 43.

Paul Davies is Fellow and Tutor in Law at Balliol College, Oxford and C.U.F. Lecturer in Law in the University of Oxford. He received his B.A. from Oxford and did graduate work at the London School of Economics and at Yale Law School. His main interests are in the fields of labour law and company law. He has written *Employment Grievances and Disputes Procedures in Britain* (1969, with K.W. Wedderburn), *Takeovers and Mergers* (1976) and *Labour Law: Text and Materials* (forthcoming 1979, with M.R. Freedland). He is editor of the *Industrial Law Journal*. He was previously lecturer in the School of Law at the University of Warwick (1969–1973) and was Visiting Associate Professor at Yale Law School in 1975.