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TRACK 2: VOICE AND REPRESENTATION AT WORK

ALTERNATIVE FORMS OF REGULATING VOICE AND REPRESENTATION IN A DEVELOPING COUNTRY CONTEXT: A SOUTH AFRICAN CASE STUDY

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1.   INTRODUCTION

Voice and representation at work have emerged as vital elements of social dialogue in recent years. This is not a new phenomenon. Social dialogue, particularly in its corporatist guise (Panitch, 1977), emerged as part of post-second world war labour market regulation in a number of industrial relations systems especially those associated with the British tradition.

In recent years, social dialogue at the work place and beyond has been rediscovered as part of the Decent Work Agenda of the International Labour Organization (ILO). This is implicit, for instance, in the Declaration of Fundamental Principles and Rights at Work, 1998 and its follow up. It is in fact an extension of ILO tripartism (ILO, 2003).

What is interesting is the ILO's assertion linking social dialogue to development. It has been suggested that governance of labour markets is usually the missing component in the formulation and implementation of development strategies, and that good quality governance of the labour market founded on social dialogue is crucial in the quest for economic growth and the fight against poverty. The ILO further asserts that labour market governance should not be the responsibility of governments alone but should necessarily involve social partners. Such interaction has to be on the basis of providing effective participation for stakeholders in transparent and accountable ways. To the ILO social dialogue is apparently a re-affirmation of the traditional tripartite partnership of governments, employers and workers' organizations, albeit with some variation in some ways if practical experience is considered. In the ILO's words, social dialogue is an "important force for raising productivity and economic competitiveness". As such, effective social dialogue has a key role to play in minimizing the social cost of globalization and ensuring more equitable access to its benefits (ILO, 2003).

This paper briefly looks at two innovative forms of social dialogue, one at the workplace and the other more broadly based in an emerging economy and developing country, South Africa. The two forms, both statutory based, are the workplace forums under the Labour Relations Act, 1995 and the National Economic Development and Labour Council (NEDLAC), set up under the NEDLAC Act 35 of 1994. We reflect on these two forms of voice regulation and representation in the context of South Africa's historical and relatively innovative labour law and labour market regulatory frameworks. On account of stringent space constraints, our analysis is very superficial and therefore only gives a brief assessment.

2.   WORKPLACE FORUMS: AN ATTEMPT AT VOICE REPRESENTATION WITHIN THE WORKPLACE

As part of introducing a series of progressive labour law reforms which would both speak to the particular South African context and be internationally compatible, the Labour Relations Act (LRA) of 1995 innovatively provided for the workplace forum system. Its evident aim was to grant all employees in a workplace a voice in so-called production issues, and to provide an alternative alongside the existing adversarial and conflict-ridden model of labour relations in South Africa. Traditionally, South African enterprises have for most part been characterised by the lack of proper in-house consultation and joint decision-making powers and competencies for employees. While unions have done much to serve their members' interests, and have represented workers in the course of negotiations, this has mainly been restricted to distributive issues. The need for proper consultation and joint decision-making on non-distributive issues affecting the functioning of the enterprise between employers and employees in-house, has long been recognised by both employers and workers (Olivier, 2005).

The preamble of the LRA therefore states that the legislation is aimed at changing the law governing labour relations, and for that purpose, to promote (amongst others) employee participation in decision-making through the establishment of workplace forums. Section 79 of the Act consequently stipulates that a workplace forum established in terms of chapter V must seek to promote the interests of all employees in the workplace, whether or not they are trade union members; and must seek to enhance efficiency in the workplace.

And yet, the extensively propagated and statutorily regulated workplace forum system soon proved to be highly contentious, and apparently failed dismally. Only a few forums were listed, and still fewer are still functioning (Steadman, 2004). The number of applications made is negligible.

3.   SHORTCOMINGS OF THE WORKPLACE FORUM SYSTEM

The workplace forum system as envisaged by the Act and the draft that preceded it has been subjected to serious scientific criticism (Summers, 1995; Olivier, 2005).

3.1   Union Control And Majority Union Dominance

A perusal of the provisions of the LRA leaves one with the clear impression that the statutorily professed intention of workplace forums to promote employee participation in decision-making and to promote the interests of all employees in the workplace, irrespective of whether or not they are trade union members, has not been achieved. Only a majority union could trigger the establishment of a workplace forum. This has to be contrasted with the position in numerous European countries, where the emphasis has been on simplifying the establishment of similar institutions, firstly, by allowing any union and/or a specified number of employees to officially require the establishment of such a body and, secondly, imposing a duty in particular on employers to establish the institution once the statutory criteria have been met (Weiss, 2002). The negative impact of the majority union requirement on the establishment of workplace forums is exacerbated by the fact that only a very few unions in South Africa could boast majority support in a workplace as defined, as opposed to majority support in a bargaining unit. Furthermore, the relatively modest – and increasingly declining – level of union membership in South Africa makes it wholly inappropriate to require that majority unions should serve as the compulsory trigger for the establishment of a forum (Olivier, 2005).

The majority union(s) concerned may also through collective agreements with the employer usurp and/or regulate the matters over which the employer has to consult or enter into joint-decision-making with the forum (LRA, section 84(1)) & (3); section 86 (1) & (2)). While this might be a phenomenon which also occurs within the framework of similar systems elsewhere, the point is, firstly, that these wide-ranging powers are within the South African context statutorily restricted to majority unions and, secondly, they must be seen as an integral part of the dominant position and role of the unions concerned, which might in the context seriously hamper the growth of workplace forums as independent bodies that play a constructive part in the day-to-day relationship with the employer (Olivier, 2005). Through agreement with the employer the majority union(s) may change the constitution of the forum (LRA, section 82(1)(v)). Furthermore, once a union becomes a majority union, it may demand a new election at any time within 21 months after each preceding election LRA, section 82(1)(f)). Such union(s) may also request a ballot to dissolve a workplace forum (LRA, section 93(1)).

The combined effect of all these provisions is that workplace forums are for practical and legal purposes under trade union control. The LRA allows majority unions to exercise comprehensive

control over workplace forums at the establishment, functioning and termination phases. It is submitted that in essence, extent and impact the particular (majority) union-friendly environment created by the South African legislature transcends by far the personnel and functional links that may exist between unions and similar institutions and the measure of influence unions might be able to exercise in practice in comparable systems. In short, it would also appear that the distinction between the (collective bargaining) role of trade unions and the consensus-seeking functions of workplace forums tends to have been blurred by the legislature – unlike the experience in other systems where the independent nature of the two bodies and the functions exercised by them are taken for granted (Summers, 1995).

3.2   Unrealistic Preconditions

In legal terms and in impact there are several issues which potentially limit the establishment and operation of workplace forums in a workplace. Two issues need to be mentioned in particular.

The first relates to an issue already discussed: the fact that majority unions effectively control the establishment, operation and termination of a forum. The second concerns the threshold required: the employer must employ more than 100 employees in a workplace (LRA, section 80(1)). The implication is that small and medium-sized undertakings, and as many as 74 % of formal sector employees, are in particular affected, as they are effectively excluded from the introduction of the statutory variant of the system. The irony, therefore, is that workplace forums as envisaged by the Act cannot be introduced there where they are perhaps most needed. Why the legislature has opted for such a high threshold is unclear, also in view of the much lower thresholds set by most European systems, where employers generally speaking often employ a larger number of employees (Olivier, 2005; Weiss, 2002).

The inescapable conclusion which flows from the combined effect of the above provisions is that workplace forums remain an elusive ideal for the vast majority of workplaces and employees in South Africa.

3.3   Lack of structural and institutional separation

Tension potentially arises whenever two systems of employee representation in the workplace context exist – namely the workplace forum and plant level bargaining (Summers, 1995). The latter is a peculiar characteristic of the South African labour relations scene. Many employers also prefer bargaining at plant level, at least to the extent that they are not bound to do so at central level. It is no small wonder that unions fear that bargaining and the bargaining agenda at plant level are threatened by the establishment of workplace forums at the same level.

The overseas experience has taught that it would perhaps have been more conducive to avoiding or regulating the potential conflict if the legislature had clearly marked out the boundaries. It is suggested that much could also be learnt from the experience in, for example, Germany where collective agreements on regional or industry level could provide a framework to be specified by works councils and the individual employer: by means of so-called "opening clauses" a central level collective agreement could be amplified by means of a works agreement. In the particular South African context this could be achieved by providing in (central level) bargaining council agreements for such opening clauses. This would fit in with the primacy accorded by the LRA to sectoral/central level bargaining, and would ensure that workplace forums become more integrated into the structure of collective bargaining.

4. ASSESSING THE WORKPLACE FORUM SYSTEM

The failure of the system, so it seems, could be ascribed to several factors, including employer fears and union resistance as well as a lack of proper regulation of the system. In short, the system was legally and structurally conceived in a way which had little chance of succeeding. And yet, the need for this type of in-house regime remains as crucial as ever.

Recent studies have increasingly indicated that non-statutory forms of workplace forums, characterised by a large measure of voluntarism and flexibility, are operating successfully outside the structure of chapter V of the LRA (Steadman, 2004). It is suggested that much can be learnt from this particular phenomenon and its apparent successes. Several reforms are, therefore, needed to ensure that workplace forums become a viable institution of voice and representation at the workplace level. In this regard, it would be beneficial for the largely ignored statutory system if the sphere of application, as far as the establishment of workplace forums is concerned, is broadened so as to allow many more workplaces, employees and employers to benefit from such a system. Furthermore, it does not appear necessary that majority unions, or for that matter any union, should be allowed to control the establishment of such forums. A workplace forum should be established once a certain limited number of employees have applied for the same. Flexibility and inclusiveness should characterise the establishment and, for that matter, the operation of workplace forums.

While due care should be taken to allow registered unions operative at the workplace to be involved to some extent in workplace forum activity, the excessive control by majority unions (or, for that matter, by any union) over workplace forums at the establishment, functioning and termination phases should be done away with. Comprehensive changes to the LRA to give effect to this recommendation are required.

Given the extensive activity of unions at workplace level in South Africa, it is suggested that the boundaries of responsibilities, competencies and powers between unions and workplace forums be clearly marked out by the legislature, and/or that a mechanism be created by the LRA by which an agreement between all interested stakeholders at workplace level as to what those boundaries are, could be effected. Provision should in particular be made for the possibility of a framework approach, whereby bargaining council agreements, or for that matter any collective agreement, provide the framework in respect of certain matters, to be filled out by workplace forums.

5. NEDLAC: VOICE REPRESENTATION BEYOND THE WORKPLACE

The second part of this paper deals with NEDLAC, a social dialogue institution beyond the workplace involving not only the three traditional tripartite partners but civil society as well.

It is now over a decade since NEDLAC was set up as a pioneering institution of social dialogue in South Africa. NEDLAC's institutional framework held out great promise to assist in the deepening of democratic governance in the new South Africa that came out with the demise of apartheid. Its intended role was essentially one of "corporatist intermediation during democratic transition." (Bramble and Ollett, 2004:2). While it could be said that NEDLAC is relatively flourishing as a measure of social dialogue, the need for review of NEDLAC as an institution of social dialogue had been recognised for some time. A review was accordingly conducted in 2007. It confirmed perceptions held by scholars and commentators familiar with the institution (Kalula, 2007).

6.   STATUTORY AND INSTITUTIONAL FRAMEWORK

The origins of NEDLAC as a social dialogue forum can be traced to the period of political transition negotiations in the early 1990s, in particular in the engagement between the National Party government and the newly unbanned African National Congress (ANC) (Papadakis, 2006:54).

NEDLAC was established under statute, the National Economic and Labour Council Act (No. 35, 1994). Although there had been instances of statutory social dialogue for some time in the Southern African region before (Kalula, 2003), the NEDLAC approach was unique in its functional capacity as a social dialogue forum. It was not merely an advisory body in the way most of similar bodies established under labour legislation in the Southern African Development Community (SADC) are. As Naidoo pointed out, NEDLAC came to be regarded as a key part in the "social contract" which the new ANC government aspired for (Naidoo, 1995). A similar observation has been made in comparison to the process of what Bramble and Ollett refer to as "corporatist intermediation" in South Korea (Bramble and Ollett, 2004).

NEDLAC's functional arrangements are at several levels. It consists of an executive council on which 18 representatives of the four constituent stakeholders sit. The Council meets several times per year. The next level is the Management Committee akin to a supervisory body of the secretariat. It meets monthly. The heart of social dialogue are the four different chambers consisting of the Labour Market Chamber; Trade and Industry Chamber; the Development Chamber; and the Public Finance and Monetary Policy Chamber.

The importance of NEDLAC participation in the policy-making process is apparent, particularly where clear consensus emerges in NEDLAC. It is not easy for government to ignore NEDLAC. A case in point which clearly illustrates the influence of NEDLAC was during the enactment of the Labour Relations Act, 1995. The outcome of the key provisions of the new labour law was evidently a result of a combination of intense unilateral pressures by the unions ultimately culminating into consensus between labour and business. The enactment of the Bill by Parliament consequently indicated a negotiated outcome (Webster et al, 1999).

In keeping with the NEDLAC Act and its constitution, the Council's central objective is to seek consensus and reach agreements on economic and social policy. Of the four constituencies represented in NEDLAC, three are the traditional tripartite social partners, that is to say government, organised business and organised labour. The fourth, the community constituency, is an interesting innovation in labour market and social policy dialogue. This somewhat unique element was clearly intended to expand participatory governance beyond the traditional tripartite partners, to include civil society. As Bird and Schreiner have suggested, it was intended to give the poor and marginalised a voice and prevent a narrow corporatist arrangement of the traditional partners: government, organised business, and organised labour (Bird and Schreiner, 1992: 28-29).

The NEDLAC Act sets out the criteria for the participation of four constituency organisations. Participation of Community Based Organisations (CBOs) is envisaged. They have to meet three criteria. In terms of section 3(5) of the Act, participation is only open to "… organisations of community and development interest that (a) represent a significant community interest on a national basis; (b) have a direct interest in reconstruction and development; and (c) are constituted democratically."

Six such organisations currently fulfill the above criteria and are represented as the community constituency. The Community constituency's participation in NEDLAC is formally limited to the Development Chamber and the oversight structures of the Executive Council and the Management Council. It is however reported that the community constituency routinely participates in other chambers, in particular the Labour Market Chamber informally. (Papadakis, 2006). In fact, elements of the community constituency have been rather assertive to a point where organised business and organised labour feel uncomfortable with their participation (NEDLAC sources, 2007). Organised business is particularly known to have strong reservations against the full participation of the community constituency. The establishment of the Millennium Labour Council (MLC), a business-labour bipartite structure set up in 2000, was in part enthusiastically subscribed to by organised business not only to reinforce what it regards as the traditional mode of social dialogue with labour, but also to counter the "misguided ascendancy" of "unrepresentative" community constituency.

In reality, the problems concerning the community constituency's participation in NEDLAC in general and Labour Market Chamber in particular are much broader that mere resentment by the traditional social partners. Problems stem from, among other things, the amorphous nature of the community constituency in comparison to organised business and organised labour. There are also issues of fulfilling the criteria spelt out in the NEDLAC Act, not least the need for democratic mandate. It is no longer as heterogeneous and "stable" as during the pre-democratic era.

7.   ASSESSING NEDLAC

NEDLAC's efficacy as an instrument of social dialogue is now confirmed relative to other countries in the Southern African Development Community (SADC) sub-region (Kalula, 2007). Similarly, in comparison to at least one other emerging economy, that of South Korea, where critics regarded 'corporatist intermediation" as still born, NEDLAC has flourished.

NEDLAC's success is apparent in the agreements successfully negotiated under its auspices over the years, in excess of 120 wide ranging agreements. They include such key legislation as the Labour Relations Act, 1995 (LRA), the Basic Conditions of Employment Act, 1997 (BCEA), the Employment Equity Act, 1998 (EEA) and the Skills Development Act, 1998 (SDA). NEDLAC has also been a key player in other policy initiatives; these include the Presidential Job and the Development and Growth Summits.

Its success has however not been without encumbrances. It has struggled to accommodate the key claim to innovation, the inclusion of the tripartite-plus one structure. Its extensive brief has not helped. NEDLAC's responsibilities cover five broad areas across the social and economic spectrum, not only concerned with negotiation but promotion and coordination as well (NEDLAC Act).

There have also been perceived shortcomings in relation to its influence on government policy formulation. For instance, it was excluded from the formulation of the Growth, Employment and Redistribution (GEAR) programme, which led to serious suspicion between the government and its Alliance partners (Vavi, 2007). Similarly, NEDLAC's influence in formulating an effective HIV and AIDS strategy is seen as negligible (Leclerc-Madlala, 1996). The Council has also been affected by institutional shortcomings in efficiency and capacity (NEDLAC, 2006).

The review conducted in 2007 comprehensively addressed the current challenges and prospects of NEDLAC and sought renewal of the institution as a key social dialogue actor. While

the Council could be more effective, its innovative approach is now well embedded in the formulation process of South Africa's social and economic policy.

8.   CONCLUSIONS

One of the lessons from the South African case study for developing countries, so it would appear, is that voice and representation in the labour market, within and outside the workplace, require at least two factors to be present in order to be effective. The first is that it is extremely difficult to achieve success in this area, if the institutionalised stakeholders, and in particular both social partners, do not support the existence and/or participation of another representative body – workplace forums and the community constituency respectively. Secondly, a suitable and strong legislative framework is needed to both overcome, if not override, resistance by one of the social partners. This statutory framework must be construed sensitively in order to clearly demarcate domains and content of responsibilities, and to allow for sufficient structural and institutional separation, but also meaningful collaboration. Without such an approach, any attempt at entrenching voice and representation in the full sense, is doomed to fail.

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