

The Legal Spectrum of Representative Consultation

Aim of the paper

Governance structured by various forms of regulation is central to employee participation in complex human structures like enterprises. This presentation will examine a specific aspect of regulation of voice and representation: that covering indirect participation at the workplace through employee committees. The purpose of these committees is to provide representative consultation or structured communication between employee representatives and management (Rogers & Streeck).

The paper posits that there is a legal spectrum of regulation of representative consultation. At one end of the spectrum, representative councils, known as works councils, exist in EU countries. The EU Information and Consultation Directive 2002 both supports employees rights to representation through works councils and also promotes new schemes of employee participation.

Towards the middle of the spectrum are consultative councils which are voluntarily established by management and currently exist in countries like Australia in the form of joint consultative committees (Marchington).

At the other end of the spectrum are laws that prohibit councils formed by employers or government from forestalling or undoing unionisation. Such a legal prohibition exists in the United States (Kaufman, Lewin & Fossum)

The Central Argument

The presentation will describe the spectrum of legal regulation, from legal rights, through voluntary entitlements to prohibitions. Each of these modes of regulation has problems, and these problems seem to reduce the role of the employee voice. Each mode of legal regulation respectively reflects different social norms, from universalism, voluntarism to unilateralism. Some history of each jurisdiction's legal arrangements, and the legal and practical operation of its laws, will be examined. It will be shown that the law has had both intended and unintended consequences, and that these have both advanced and defeated its purposes in various jurisdictions.

Research Approach and Methods

The methodological approach will be to describe and analyse these three different modes of legal regulation ranging from a right to a prohibition. These modes refer to the legal language of entitlement and interdiction. The paper will clarify the use of such language in the industrial context. This analysis will draw upon classifications developed by legal philosophers and regulatory theorists (Hohfeld, Thomson, Kamm, Braithwaite) to provide common features in order to compare and understand these different modes of regulation in different legal jurisdictions.

The legal sources analysed include EU Directives, national legislation and the common law. The legal and practical operation of legislation will be considered. Attention will also be paid to relevant empirical studies and leading theoretical work.

Contribution to the Field of Study

The legal spectrum advanced by the presentation provides an interdisciplinary model that moves beyond the traditional conception of comparative analysis which focuses on identifying a common legal rule and considering its application in different jurisdictions. Rather, the purpose of the analysis is to (a) facilitate cross-jurisdictional comparison of workplace institutions by emphasising the different legal and industrial contexts in which they operate; and (b) to disaggregate the modes of legal regulation to highlight the stark differences in workplace institutions in the United States, Australia and the EU. The analysis will confront popular perceptions that industrial relations systems, particularly amongst Anglo countries, are all the same. Lastly, the paper will draw upon legal philosophy to sharpen the description and analysis of different forms of industrial regulation.

Contributions to the Track and Conference

The presentation contributes to the track by offering a comparative legal analysis of representative consultation as well as addressing some issues relevant to representative participation through trade unions. In addition, the paper contributes to the theme of the conference by examining the current modes of regulating structured communication through employee representatives and management in three jurisdictions: Australia, the United States and the EU.

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NB: Presentation based on: 'Law and Employee Participation' chapter in Wilkinson et al, *The Oxford Handbook of Participation in Organizations* (forthcoming 2009)