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SOCIAL DIALOGUE AND DEMOCRACY IN TUNISIA

RÉSUMÉ

La promotion du dialogue social est une exigence de la transition démocratique en Tunisie. Mais, l'efficacité de ce dialogue reste limitée à cause notamment des lacunes de la loi concernant l'institutionnalisation du dialogue social tripartite, ainsi que l'absence d'un cadre juridique adapté en matière de dialogue social bipartite.

MOTS CLÉS: *Démocratie, dialogue social, syndicat, relations professionnelles.*

ABSTRACT

Promoting social dialogue is a requirement of the democratic transition in Tunisia. But, the effectiveness of this dialogue remains limited in particular because of the shortcomings of the law concerning the institutionalization of tripartite social dialogue, as well as the lack of an appropriate legal framework for bipartite social dialogue.

KEY WORDS: *Democracy, Social Dialogue, Trade Union, Industrial Relations.*

Social dialogue is a central concept in any modern industrial relations system. As its purpose is to pacify working relationships, it is both a key instrument for the promotion of social cohesion and inclusive development, and an illustration of modernity in the system of industrial relations¹. The substance of this modernity is that it contributes to «civilizing» these relations, in other words, to replacing power relations with relations regulated by law, via mechanisms for the regulation of industrial relations that are based on dialogue and consultation.

Social dialogue is also a model of governance and a necessary condition of the democratic ideal; indeed, it is perhaps the most appropriate instrument for the realization of industrial democracy, which is the indispensable complement to political democracy. This statement is more relevant than ever in Tunisia today, in the still-fragile context of its democratic transition. The success of this transition depends to a large extent on the existence of a genuine social consensus based on dialogue between representatives and legitimate stakeholders².

The adoption of a new Tunisian Constitution on 27 January 2014 marked a decisive step in the process of this transition. It largely consolidated the body of fundamental social rights that provide the necessary precondition for the construction of a welfare State³. But like the 1959 constitution, the new constitution totally left out the principle of social dialogue, and the freedom of collective bargaining, which is its essential instrument. However, this freedom is an inseparable extension of the principle of freedom of association, solemnly proclaimed by the Constitution⁴ and extensively protected under the Labour Code⁵.

1 M. Tarchouna, «La modernisation du système tunisien des relations professionnelles, bilan et perspective», in *Tunisie 2040 : le renouvellement du projet moderniste tunisien*, collective work, Association Mohamed Ali de la culture ouvrière, Sud Editions, Tunis, 2011, p. 415.

2 See Institut international d'études sociales, «Tunisia, un nouveau contrat social pour une croissance juste et équitable», BIT, 2011. On the role of unions in the transition to democracy in Tunisia, see N. Mzid (dir.), «Syndicats et transition démocratique», in *Etudes à la mémoire du Doyen M. Tarchouna*, Sfax, College of Law, 2016. See also N. Mzid and A. Hamza Safi, «Droit du travail et transition démocratique en Tunisie», in *Mélanges en l'honneur d'Antoine Lyon-Caen*, Dalloz, 2018, p. 693.

3 See the article «L'insertion des droits sociaux fondamentaux dans la nouvelle Constitution tunisienne : une effectivité à l'épreuve», *Revue de droit comparé du travail et de la sécurité sociale*, 2015/1, p. 80.

4 Affirmed by the Constitution of 1 June 1959 (art. 8), the principle of freedom of association was further strengthened by the Constitution of 27 January 2014 (art. 35 and 36).

5 See Chapter 1 of Book VII of the Labour Code, entitled: Professional Unions.

The principle of social dialogue is based, above all, on a set of standards adopted by the ILO and ratified by Tunisia⁶. The ILO, which is based on the principle of tripartism, acts in general to encourage member countries to promote cooperation between public authorities, employers' and workers' organizations through the use of tripartite social dialogue, as well as to promote bipartite social dialogue between such organizations⁷. However, there is no universal model for social dialogue. ILO instruments on this subject give considerable latitude to Member States in regard to the modalities and procedures to be adopted in this respect.

In Tunisia, the practice of social dialogue, particularly in the form of collective bargaining, is relatively well-rooted in the industrial relations system. But the effectiveness of this system is often limited for multiple reasons, including the lack of a clear legal framework intended to ensure the vitality and continuity of consultation and enhance its efficiency. This statement can be verified first of all in light of the tripartite consultation that takes place at the national level between representatives of the government and employees' and employers' organizations. The institutionalization of this form of dialogue via the creation of a specific body known as the National Council for Social Dialogue (CNDS), established by Law no. 54 of 24 July 2017, may serve to support the transition to democracy. But the contribution of this law is still imperfect, due to various shortcomings and ambiguities that risk impacting the role of this body and the conditions of its operation **(I)**. Secondly, the Tunisian industrial relations system has proved rather inefficient in regard to bipartite social dialogue. Indeed, the system establishing structures for such dialogue within companies remains inadequate, and the legal framework within which the primary form of this dialogue is exercised, namely normative collective bargaining, is very incomplete **(II)**.

I - THE INSTITUTIONALIZATION OF TRIPARTITE SOCIAL DIALOGUE, AN IMPERFECT SUPPORT FOR THE TRANSITION TO DEMOCRACY

In 1996, Tunisian lawmakers created a structure called the «National Commission for Social Dialogue», which was to be responsible for issuing opinions on various issues concerning, inter alia, labour legislation, international labour standards, wages, occupational classifications, collective bargaining and industrial relations⁸. However, this structure was a total failure. As it lacked real autonomy vis-à-vis the public authorities and its composition was dominated by government representatives, it was boycotted by the central trade union, UGTT⁹. A reform of the law with a view to promoting and institutionalizing tripartite social dialogue thus became an urgent matter, as expressed by the signatories of the 2013

6 Among these standards, one might mention in particular Convention no. 87 on Freedom of Association and Protection of the Right to Organize, and Convention no. 98 on the Right to Organise and Collective Bargaining. These two conventions, which are part of the body of core labour standards, were ratified by Tunisia as far back as 1957. In 2007, Tunisia also ratified ILO Convention no. 135 on Workers' Representatives. In 2013 Tunisia likewise ratified three other ILO Conventions closely related to the principle of social dialogue, namely: convention no. 144 on tripartite consultation, convention no. 151 on labour relations (public service), and convention no. 154 on collective bargaining.

7 See ILO, Social Dialogue, International Labour Conference, 102nd session, 2013.

8 See Article 335 (former) of the Labour Code.

9 Tunisian General Labour Union.

Social Agreement¹⁰. This reform was concretized by law no. 54 of 24 July 2017 establishing the National Council for Social Dialogue. Nevertheless, an analysis of this law shows that although this new structure has a very extensive scope of activity **(A)**, its operation remains poorly organized **(B)**.

A. AN EXTENSIVE SCOPE OF ACTIVITY

The CNDS is responsible for multiple functions, essentially related to two key areas of activity. First, it is responsible for organizing and managing social dialogue. Within this framework, the law entrusted the Council with several ambitious missions, in particular assigning it the task of promoting consultation by ensuring its continuity and regularity, pacifying professional relations, supervising collective bargaining, presenting proposals for the evolution of the guaranteed minimum wage, as well as establishing peaceful industrial relations, so as to guarantee decent work conditions and encourage investment.

But these missions occasionally remain poorly defined, and are formulated in very vague terms. For example, though it mandates the CNDS to «guarantee efficient tripartite social dialogue», the law nevertheless fails to set any precise, objective criteria for measuring the impact of the Council's action in this domain and evaluating its efficiency. Similarly, the nature of its duty to supervise collective bargaining is very vague. Is it simply a matter of facilitating and assisting social partners so as to ensure smooth negotiations, or would it involve the exercise of authority to organize and control the collective bargaining process, serving both to grant authorization to bargaining agents and to determine the frequency and procedural conditions of their negotiations?

The CNDS is also involved in the governance of public affairs, giving its opinions on the development of reforms and state policies in the economic and social domains. This duty also includes multiple aspects, in particular including the mandatory consultation of the Council in regard to draft laws and government decrees relating to labour, industrial relations, vocational training and social protection.

The scope of compulsory consultation also includes the Council's active participation, issuing an opinion on the ratification of international labour conventions and contributing to the preparation and drafting of reports submitted by the Government to the ILO. This specific duty, which is part of the implementation of the provisions of International Labour Convention no. 144, which Tunisia ratified in 2013, illustrates the principle of tripartism. This principle governs the functioning of the ILO and its normative activities, and would need to be reinforced on the national level through tripartite dialogue in order to promote the ratification and effective application of international labour standards.

Outside the scope of mandatory consultation, the Council may also be consulted on a voluntary basis in regard to draft laws and government decrees of an economic and social nature, development plans, or economic budgets.

In all cases, the Council must issue its opinion as part of a substantiated report, which it must send to the head of government within one month of its receipt of the text submitted. This opinion is required for bills submitted to Parliament. But, legally, the government

10 See the Social Agreement signed 14 January 2013 between the Government, the Tunisian General Labour Union and the Tunisian Union for Industry, Commerce and Handicrafts (available on the internet).

can always opt for forced passage in case there are delays or blockages in the Council's formulation of an opinion.

In addition, the legislator has given the Council the possibility of initiating reform projects using a *sua sponte* approach. But the scope of application of this approach is in fact limited only to issues relating to labour and industrial relations. It is nevertheless significant to the extent that it allows the Council to trigger the reform process on such issues as it may see fit to raise, and to make proposals in such regard to the competent authorities. Still, these authorities are not bound to any specific deadline for examining or approving the proposals. For tripartite social dialogue in this domain to be truly credible, the authorities concerned would need to be required to seriously consider the Council's proposals within a reasonable period of time and decide on the appropriate follow-up.

Though its scope of activity is broad, the role of the CNDS may be limited due to certain weaknesses relating to the conditions of its operation.

B - POORLY REGULATED OPERATION

Several weaknesses are likely to impact the operating procedures of the CNDS. Firstly, there is a certain degree of ambiguity with regard to union representation on the Council. Article 8 of the Law of 24 July 2017 provides that the structure «shall consist of an equal number of representatives of the Government, representatives of the most representative workers' organizations, and representatives of the most representative employers' organizations in the agricultural and non-agricultural sectors». With their use of the plural form in regard to the workers' and employers' organizations, lawmakers were taking a pluralistic view of union representativeness on the Council. The regulatory texts implementing the law, however¹¹, have taken a majority-based approach to this notion of representation¹², referring instead to «the organization most representative» of the workers and employers. Questions thus arise about the legality of these texts, because of their lack of consistency with the law on this subject.

The law is also silent on the criteria determining the representativeness of the unions participating in the CNDS. These criteria were set by order of the Minister of Social Affairs on 26 September 2018. Article 2 of that order states that «the organization which, having held an electoral congress, has the largest number of members and the largest number of sectoral, regional, and local structures shall be considered the most representative union for workers and employers». Of these criteria, then, it is the number of members that appears the most significant, indeed the decisive criterion of union representativeness. But the other criteria mentioned by the decree would seem to be no more than formal criteria, and not sufficient measurements of the audience, influence, or independence of the union organization or its dedication to democratic values.

Furthermore, lawmakers have made provision for the inclusion of other members in the Council's General Assembly, who would be appointed based on their professional capacity,

11 See decree no. 676 of 7 August 2018 determining the number of members of the CNDS, and the order of the Minister for Social Affairs dated 26 September 2018, establishing the criteria to be used to determine the most representative trade union organization nationwide for purposes of the composition of the CNDS.

12 On the distinction between the pluralistic conception and the majority conception of union representativity, see J.-M. Verdier, *Syndicats et droit syndical*, vol. 1, Dalloz, 2nd ed. 1987, p. 480.

as well as including members recognized for their experience and competence in the legal, social and economic fields. The law has not however set clear criteria for the appointment of these members¹³. Yet, lawmakers did not provide for the possibility of involving other civil society organizations alongside the representatives of workers' and employers' unions, such as associations for the assistance of the unemployed. The participation by those segments of civil society could be very useful in increasing the Council's influence, and in including a greater variety of the interests at play.

Other weaknesses can also be observed in the internal organization of the CNDS. Article 1 of the law of 24 July 2017 states that the Council «shall be endowed with administrative and financial autonomy», but does not expressly provide that it shall enjoy legal personhood. In fact, certain provisions of the law illustrate the Council's lack of autonomy. The Council's budget is funded by the Ministry of Social Affairs. Its rules of procedure must be approved by government decree. The administrative and financial organization of the Council is likewise set by government decree. Its administrative and financial management are also handled by an executive appointed by government decree. All of these elements may significantly weaken the Council's autonomy and impact the effectiveness of its functioning and credibility.

Shortcomings can also be observed in the Council's intervention mechanisms. While imposing an obligation to consult the CNDS in the various domains mentioned above, lawmakers did not provide for sanctions in case of failure to fulfil this obligation. Likewise, the law has provided no procedures to ensure the increased influence of the Council's opinions and proposals on the final decisions made by the competent authorities. This legal vacuum may limit the effectiveness of the Council's powers, and lead to a disconnect between industrial democracy - operating *via* the mechanisms of tripartite dialogue - and political democracy.

Finally, as an advisory body, the CNDS is not invested with a normative power similar to that accorded to representative unions, as collective bargaining agents. But the fact that its role in the management of collective bargaining is not precisely delimited may also create a disconnect between tripartite social dialogue and bipartite social dialogue because of the risk of the Council's encroachment on the power of unions in the collective bargaining domain.

II - THE INDISPENSABLE MODERNIZATION OF BIPARTITE SOCIAL DIALOGUE: A REQUIREMENT OF THE DEMOCRATIC IDEAL

The democratization of labour relations takes place essentially via the promotion of bipartite social dialogue, which requires the strengthening of the role of employee and employer organizations as key players in social democracy. Indeed, without freedom of dialogue and negotiation amongst legitimate, representative actors, it is pointless to speak of social democracy. The Tunisian industrial relations system nevertheless suffers from a number of shortcomings that severely limit the effectiveness of social dialogue. On the one hand, the mechanism for the structures of this dialogue within companies is inadequate **(A)**. On the other hand, the legal framework for the exercise of the primary form of this dialogue, namely collective bargaining, is still incomplete **(B)**.

13 The decree of 7 August 2018 makes no comment on this subject either.

A - STRUCTURES OF SOCIAL DIALOGUE WITHIN COMPANIES: AN INADEQUATE SYSTEM

In Tunisia, social dialogue within companies is based on a dual employee-representation system that is nevertheless of a highly ambivalent nature¹⁴. While the non-union representative bodies established by law have demonstrated their ineffectiveness as structures for social dialogue, the presence at the company level of the trade union organization, which in fact serves as the employer's primary point of contact on behalf of employees, is still almost entirely ignored in the Labour Code.

Since 1960, lawmakers have provided for works councils to operate as an elective body to represent the personnel. But these structures were not very successful, and in 1994 they were replaced by another structure called the Company Advisory Committees¹⁵. Unlike the works councils, which were composed only of elected staff representatives, these committees are a joint body composed of an equal number of representatives appointed by management and representatives elected by the workers. Because of their mixed composition and the multiple domains in which they act¹⁶, these organizations would appear to function as structures for dialogue and consultation at the company level. In reality however, it is apparent that for a number of reasons there is still a crisis in the system in terms of elected personnel representatives. First of all, the system only involves a very small number of companies, given that the economic fabric of Tunisia is composed mainly of very small companies not meeting the workforce size requirements set by law for the establishment of staff representation structures. Secondly, the jurisdiction of the company advisory committees, particularly in economic terms, remains very vague. In this regard, we can observe a big step back from the legislation on the old works councils, which provided that they would be «consulted on matters concerning company organization, so that they would gradually become associated with the company's management and growth»¹⁷. Moreover, the Company Advisory Committees are provided with very limited resources for the performance of their duties. The committees furthermore lack legal personhood and have no specific budget for their operation. From this point of view, it is no exaggeration to say that they remain entirely dependent upon the employers. All these factors can only lead to disinterest among employees and a great mistrust of the unions with regard to

14 On this dual system of representation of employees at companies organized under Tunisian law, see the thesis «La liberté syndicale en droit tunisien», *College of Law and Political Sciences of Tunisia*, 1995, p. 297.

15 Art. 157 et seq. of the Labour Code. This structure must be established at any company with at least forty permanent employees. The law requires the election of one titular staff representative and one substitute by all companies with a number of employees equal to or greater than twenty and less than forty.

16 The Company Advisory Committees are involved in various areas related to personnel management, including work organization, management of social benefit programs, vocational training, occupational health, and employee discipline (art. 160 of the Labour Code). They also act as a conciliation structure in the event of collective labour disputes within the company (art. 376 of the Labour Code).

17 Former art. 161 of the Labour Code.

these committees, which have in fact become an exclusively disciplinary body, which has manifestly failed to serve its function as a structure of social dialogue¹⁸.

But in fact, the body that actually performs this function, serving as the primary representative for the employees and primary contact for the employer, is the union organization. The unions' presence in the workplace remains precarious, however, because of lawmakers' ambiguous attitude in this regard. Indeed, although it proclaims the principle of freedom of association as guaranteed by the Constitution¹⁹ and gives extensive powers to trade unions, allowing them to participate as key players in social dialogue on the national level and to collaborate with the State in organizing professional activity, the Labour Code remains virtually silent on the subject of the place of the unions within companies. It does not regulate their presence in the workplace and gives them no specific prerogatives at the company level as a personnel representative structure. Lawmakers, indeed, still seem to give no consideration to the role of unions as a body expressing the collective identity of the employees at the company.

This neglect by lawmakers, however, has not prevented trade unions from asserting themselves in several companies, where they have become indispensable players in any serious and genuine social dialogue. This role has been confirmed by the collective agreements that in 1973 introduced the general outlines for a statute for unions in companies as the representative of the employees and the primary contact for employers. Those agreements thus created an obligation for employers to recognize the trade union organization as represented by its delegates at the company, and to meet with them once a month and in case of any emergency²⁰.

But is collective bargaining, which is by definition a fragile device, often determined by the balance of power between social partners, sufficient to provide a legal framework for the exercise of rights as fundamental as those involved in trade union action at a company? It is indeed doubtful, especially since Article 65 of the Tunisian Constitution provides that texts governing the rights relating to the status of trade unions must take the form of an organic law. It would thus appear necessary for lawmakers to take action to introduce a substantial reform of the law on trade union activity at the company level. Such a reform could contribute to reconciliation between the unions and companies, and foster the emergence of a new dynamic of social dialogue amongst them, particularly via the promotion of collective bargaining.

B - COLLECTIVE BARGAINING AS A PROCESS OF SOCIAL DIALOGUE: AN INSUFFICIENT LEGAL FRAMEWORK

Collective bargaining is a prime instrument of bipartite social dialogue. It occupies an essential role as a normative framework for employment relationships. Thanks to this function, we are now seeing the emergence of a body of negotiated law, emerging

18 See H. Kotrane, *50 ans après. Plaidoyer pour un nouveau Code du travail* Cahier de l'ITES, no. 3, March 2017, p. 79. From the same author, «Quel modèle de dialogue social en droit du travail tunisien?», in *Consensus social: discours et pratiques*, coll. Arforgue and Konrad-Adenauer-Stiftung, Tunis, 2006, p. 133.

19 Art. 35 and 36 of the Constitution of 27 January 2014.

20 On the contribution of the collective agreements in regard to the union presence at the company under Tunisian law, see the thesis, *op. cit.*, p. 216 et seq.

alongside state law as a means of social regulation. This is one of the most important manifestations of social democracy.

In its modern conception, the institution of collective bargaining is no longer understood solely in terms of its results, as recorded in the form of collective agreements concluded between the parties concerned. It is also seen as a process, the various stages of which require a legally constituted framework. Thus, the right of collective bargaining becomes essentially a procedural right, which has a profound bearing on the results of negotiations as ultimately recorded in collective agreements. However, Tunisian law lags far behind this modern conception of the institution of collective bargaining. This is due to the absence of an adequate legal framework for the organization of the negotiation process²¹. This legal vacuum has above all an impact on the representativeness of the unions that are empowered to negotiate and conclude collective agreements. In a context marked by the emergence of trade union pluralism, which has its legal basis in the principle of freedom of association guaranteed by the Constitution, this legal vacuum is today a source of union escalation and industrial tensions.

In fact, Tunisian lawmakers do not entirely ignore the notion of union representativeness, especially in matters of collective bargaining. Indeed, they have made use of the notion of greatest representativeness in regard to trade union organizations, to which they have attributed a monopoly on the negotiation and conclusion of collective agreements. But the law neither sets criteria for assessing this representativeness nor establishes a legal framework for it. Instead, Article 39 of the Labour Code simply states that in the event of a dispute over union representativeness, the Minister for Social Affairs will issue an order determining what union organizations will be authorized to enter a collective agreement. At this time, then, it is of vital importance that lawmakers act to set objective and precise criteria for union representativeness in this field, in order to avoid any risk of partiality or abuses by public authorities²².

Lawmakers should also clarify their concept of trade union representativeness: is it a concept based on the principle of exclusivity, assigning a monopoly on negotiation to the most representative organization, or is it a proportional concept, allowing two or more unions to be considered representative organizations? In the same way, lawmakers should specify the level at which union representativeness should be assessed: at the national level, the branch level, the company level, or at all these levels in a combined manner?

There is another legal vacuum in regard to the institutional organization of collective bargaining²³. This legal vacuum is the consequence of the absence of a right to collective bargaining, and more particularly of the absence of an obligation to negotiate. Similarly, Tunisian law does not specify the frequency of negotiations, or the specific terms and procedures for their progress or for the review of collective labour agreements. All these

21 See in particular M. Tarchouna, *La négociation collective en Tunisie*, thesis, University of Paris 1, 1986.

22 The criteria for union representativeness, as set forth by order of the Minister of Social Affairs on 26 September 2018, concern only a determination of what union organizations are entitled to be members of the National Council of Social Dialogue. See *supra*.

23 See Mr. Tarchouna, *op. cit.* From the same author: «Négociation collective et système de relations professionnelles, quel consensus?», in *Consensus social: discours et pratiques*, *op. cit.*, p. 149.

shortcomings mean that collective bargaining may be impacted by conflicts among social actors and power relations, thus losing much of its meaning and dynamics.

Moreover, collective bargaining in Tunisia is highly centralized at the national level and the sector level. As a result, company-level collective bargaining occupies only a subsidiary place and remains confined to a minor role. Moreover, the approach taken by lawmakers does not favour the development of company-level negotiations. In fact, the law establishes a rigid hierarchy that gives sector-level negotiations a central place in the collective bargaining process. Thus, in accordance with Article 44 of the Labour Code, company-level agreements can only be concluded within the framework of a sector-level agreement applicable to that enterprise, unless the Minister of Social Affairs grants a special waiver. Furthermore, company-level agreements cannot contain provisions in any way less favourable for employees than those of the sector-level agreement applicable to the company. Thus the content of the company-level agreement remains broadly contingent upon the content of the sector-level agreement. By this means, lawmakers intended to help avoid a fragmentation of the conditions of work and employment. But this approach has resulted in an excessive centralization of collective bargaining and unfamiliarity among lawmakers with the real situation at the company level.

Moreover, collective bargaining in Tunisia remains largely focused on the issue of wages, to the detriment of other issues of great importance today, such as strategic workforce planning, vocational training, the democratization of the working relationships within the company, productivity, and employee profit-sharing. These issues, however, can only be negotiated at company level. Hence the need for a diversification of the structure and content of collective bargaining to ensure that it is better adapted to the changing reality of socio-professional relations and can fully play its role as a prime instrument of social dialogue.

In conclusion, it would appear necessary for lawmakers to intervene to introduce a substantial reform of collective bargaining law. But their intervention must take place in the context of a global approach to the modernization of the industrial relations system, permitting the introduction of a new dynamic of social dialogue. Without this reform, the advent of social democracy will remain a utopian dream.

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