

Regulating civil society

[Notes for a presentation at the session on *Moving beyond burdens on business* on 18 September 2006, at a meeting of the OECD Working Party on Regulatory Management and Reform, by Mike Waghorne, Assistant General Secretary, Public Services International, representing TUAC.]

This paper focuses on the unnecessary burdens placed on trade unions by regulation (including legislation) in some OECD member states (but not only in OECD countries).

The paper starts from the basis that all societies quite rightly regulate aspects of corporate and associational life to some degree. It would be unreasonable to argue that such activities should be beyond accountability to the law. It is essential to have some legal oversight of NGOs and trade unions, if only to protect those bodies and their suppliers and contractors over questions of property, debts, etc. It is also reasonable for the state to have rules and laws to protect individual members of unions, in the same way that it legislates to protect (somewhat more comprehensively) the rights of shareholders or members and clients of incorporated societies and charitable organizations.

In terms of industrial relations, the legitimate concerns about the rights of society and individuals in certain 'essential services' is accepted at the ILO and by unions as a reasonable basis for some kind of regulations (short of prohibition) about industrial action in fire services, health services, etc.

It can be difficult to distinguish between unreasonable restrictions placed on workers and those placed on trade unions. For example, if the law denies some workers the ILO right to organise, as it does in some OECD countries, then that certainly restricts the ability of unions to do their work, to do any work, in fact. We will come back to that later in a separate discussion on Korea

However, the main focus below is on those regulations that place unreasonable burdens specifically on trade unions and their activities. A list of the kinds of unreasonable restrictions on the ability of unions to function effectively or at all includes (but is not limited to):

1. Rules on election procedures and nomination criteria that are tougher than for elections in other bodies
2. Requirements for procedures for making a strike or other industrial action legal very cumbersome, drawn-out and expensive
3. Restrictions on what a union can bargain for in negotiations
4. Requirements that a union is able to show that all/most elements of the membership specifically voted for all items in a unions log of collective bargaining claims
5. Requirements on the establishment of funds to be used for political purposes
6. Restrictions on what can be included in a union's constitution
7. Restrictions on who can be a member of a union
8. Restrictions on the freedom of a union to merge or federate with other unions.

In some of the above, it is not always that the regulation is there but that the restriction is applied in a way that does not apply to other organizations. For example, there is no requirement that an employer must conduct a postal ballot to commence a lockout; employers can fund political parties or candidates for elections without the need for shareholder approval; employers do not have to show that shareholders approved the management's log of claims in collective bargaining; apart from competition law, there are fewer restrictions on company mergers.

Let's take a few of these in more detail.

Roger Jeary, the Director of Research at UK trade union Amicus notes that in the UK currently, much of the existing trade union legislation was introduced in the 1980s with the specific intention of adding to the regulatory burden of trade unions and to make it more difficult for unions to carry out their legitimate work. He notes that *regrettably much of this legislation remains in place today. Amicus has specifically referred recently to the regulatory burden on trade unions in a submission to the UK government when consulting on their policy of simplifying business regulations.*

The submission referred to raises the potential to address burdensome regulations placed upon trade unions in the UK. Two examples are given below.

Trade union political fund ballots: The law is a burden on our [Amicus'] business. It is an unnecessary burden. The Better Regulation Executive's principles of good regulation, including intervention only where necessary, are breached by the continued existence of the provisions of Chapter VI of the Trade Union and Labour Relations (Consolidation) Act 1992.

The Chairman of the Better Regulation Task Force has written:

"Given that trade union members can opt out of the political fund and that there is legislation in place governing the funding of political parties, which identifies the political expenditure of individual unions, is it still valid to ask trade unions to ballot all their members every ten years? The conditions which apply to these ballots, including the adoption of lengthy and complex rules for the holding of each ballot, are as strict as those applying in union elections. This makes the political fund ballots very costly both financially and in terms of resources."

Expulsion of union members: This relates to the provisions of ss64-67 coupled with ss174-177 of the Trade Union and Labour Relations Act 1992. These are the provisions over "unjustifiable discipline" and against exclusion and expulsion even where provided for under the union's rules. Jeary comments: *We do not in fact seek to discipline anyone unjustifiably – far from it – but the law does not address that principle. Not only are these unnecessary interventions but they are in contravention of Article 11 of the European Convention on Human Rights, as well as other international obligations which the UK has signed up to.*

In addition, the provisions and regulations placed upon trade unions that wish to undertake industrial action are extremely burdensome. Trade unions have sponsored a Bill to address these burdens. Whilst the Bill addresses issues relating to workers' rights, a number of the changes proposed also address the current burdens of regulation associated with industrial action.

Some examples from the UK¹ on regulations surrounding industrial action

Prior call: On Midland Mainline in 2005, the company wanted to run trains which had two separate sections with only one guard. *Problem:* in an emergency situation, the guard would not be able to move from one section to the other, which could be a safety disaster. So the guards exercised their legal right to refuse to work on grounds of health and safety concerns and refused to take trains into service unless there were two guards on board. Union head office sought to organise official industrial action on this issue and balloted the guards. The courts ruled it illegal, because any action would be 'tainted' by previous 'unofficial' action taken by the guards – even though the supposed 'unofficial action' was in fact workers exercising their supposed legal right to refuse to work on safety grounds.

Notice requirements: In April 2001 action against train privatisation was at its strongest, with RMT and ASLEF (both unions with members in railways) calling joint strikes. Under the Conservatives, a law had been introduced requiring unions to hand over the names of every member they were calling out on strike to the employers. The New Labour government changed this to a requirement to supply information on the numbers in each grade and location involved in the strike.

A judge granted London Underground Ltd (LUL) an injunction banning RMT's strike because the union had not supplied a sufficiently detailed breakdown of exactly how many staff in each grade and location would be called out on strike. He ruled that a union should supply a spreadsheet of information: grades down the side, locations across the top, numbers in every box of the grid. Any error in the figures would be a reason to declare a strike illegal.

Problem 1: On London Underground, RMT has members in dozens of grades and 400+ locations. 150 staff per week change grade and/or location. It is impossible for the union to compile the required information 100% accurately, so there will always be a pretext to ban strikes.

Problem 2: The law is demanding that the union gives the employer information that the employer can use to organise scabbing and help break the strike.

¹ From *The need for a Trade Union Reform Bill*, published by the Institute of Employment Rights, UK, 2006

Ballot requirements: As part of an RMT campaign on the effects of impending Tube privatisation, RMT had balloted early in 1998 and held strikes. Then after months of fruitless negotiations, the union named further strike dates in December. Justice Sullivan granted LUL's request for an injunction banning the strikes for two reasons:

Firstly, that it would disrupt London! His ruling basically said that you can't go on strike if your action is going to be effective.

Secondly, that too much time had passed since the previous strike. Another ballot would be needed.

Australia

The new legislation currently being introduced in Australia includes:

1. Removing protection from unfair dismissal for all workers in workplaces employing less than 100 workers, making a trade union virtually of no use to many workers.
2. Pushing workers onto individual employment contracts, undermining the notion of collective bargaining agreements, the basic business of many unions.
3. Heavy restrictions on trade union activities, including on the right to talk with workers at work, which certainly place quite a burden on trade unions trying to conduct their legitimate business.
4. Imposing extremely narrow limits on the matters that can be the subject of collective bargaining. Unions can be fined \$30,000 if they seek to reach agreement with employers on unfair dismissal, union training/education leave, use of subcontractors and a range of other matters. All of those negotiable matters are legitimate subjects of collective bargaining in other OECD countries but Australian unions will be hampered in their right to pursue such issues.
5. Removal of the right to public holidays for many workers, and weakened provisions for annual leave.
6. Employers will be able to decide unilaterally on annual leave bonuses, meal and rest breaks, overtime rates and other provisions for many workers, especially younger workers and those starting a new job. Again these are traditional areas for collective bargaining discussions and so will constrain unions.
7. Protection for employees who refuse unsafe or unhealthy work will be reduced.
8. The government will be able to stop industrial action if it decides the action is detrimental to the economy and legal provisions concerning industrial action will be heavily biased in favour of employers. No such prohibition against lockouts by employers is envisioned.

Korea

The earlier problem of restrictions on individual workers impacting on the ability of a union to go about its internationally recognised legitimate business is certainly the problem facing one of PSI's affiliates in Korea, the Korean Government Employees Union (KGEU). Many public sector unions have difficulties operating in Korea because of the kinds of restrictions that will be discussed further below but, until very recently, the KGEU leadership was either in prison, in hiding or under threat of arrest because civil servants were prohibited from join a trade union, an activity that is perfectly legal in other OECD states and under ILO conventions. Here, the prohibition placed on individual workers put more than 'an administrative burden' on the union. With the recent passing of the Public Employees Trade Union Act in Korea this year, these workers can join a union but only one whose activities are excessively restricted in the legislation: no bargaining over pay, no strikes, etc. It's like telling a supermarket chain that, sure, you can operate a business here in Korea but just don't try to sell anything or employ any staff.

Has the new law made a difference? Judge from the recent request from PSI to its affiliates to protest against the actions of the government against the KGEU:

Despite repeated recommendations and protests from the international community to stop repression and to guarantee government employees' trade union rights, the Korean government has constantly proceeded with actions aimed at destroying the KGEU. The government repression on the KGEU has continued and even seriously deteriorated while the ILO Asia Regional Meeting is being held in Busan, Korea.

The forceful closing down of the KGEU offices nationwide is based on "the directive to promote the transformation of illegal organisations into legal trade unions (voluntary withdrawal of membership)" on March 22 by the Ministry of Government Administration and Home Affairs (MOGAHA) and another directive "to take thorough counter-measures, including forceful clos-

ing down of the illegal government employees' organisations against illegal activities"
(MOGAHA August 3, 2006).

Regulations and 'directives' can speak louder than promises.

A recent ICFTU-TUAC-Global Unions mission to Korea involved visits made to a prison in Daegu to meet with the imprisoned leadership of the local construction workers union, whose activities included trying to bargain with construction site main contractors on behalf of unprotected sub-contract labour – leading to charges of “extortion” by prosecutors. The authorities had arrested more than one hundred trade union activists for seeking to exercise what in other countries would be normal trade union rights – namely collective bargaining with main building contractors. This took a tragic turn during August with the death of two members of the construction union in clashes with riot police at demonstrations.

As Member States know, Korea has been monitored since its accession to the OECD because of its promises to bring its labour legislation and practice into line with internationally recognised standards. However since the completion of the 2000 OECD Labour Market Review on Korea, successive Korean governments have failed to make significant progress in this regard. The current labour legislation and government practice to criminalise trade union activity remains the subject of repeated criticism by trade union organizations as well as by the ILO for failing to guarantee basic trade union rights to all workers.

Recalling the Conclusions adopted by the ILO Committee on Freedom of Association at its March 2006 sitting, the ICFTU-TUAC-Global Unions mission strongly urged the Korean government to make the following changes in its labour legislation:

Fully guarantee the rights of **public employees** by:

- (i) ensuring that all public servants including those at Grade 5 or higher have the right to form their own associations and not to define this category of staff so broadly as to weaken the organizations of other public employees;
- (ii) guaranteeing the right of firefighters to establish and join organizations of their own choosing;
- (iii) limiting any restrictions of public servants' right to strike only to those who are in the essential services as defined by the ILO;
- (iv) reversing the order to close down offices of public employees' unions that have exercised their fundamental right to establish organizations of their own choosing for several years already.

In respect of **all workers**, the mission also urged the Government:

- (i) to take rapid steps for the legalization of trade union pluralism at the enterprise level, to guarantee at all levels the right of workers to establish and join the organization of their own choosing;
- (ii) to allow workers and employers to conduct free and voluntary negotiations in respect of the question of payment of wages by employers to full-time union officials, rather than to legislate on this issue;
- (iii) to amend the list of essential public services in the Trade Union and Labour Relations Amendment Act (TULRAA) so that the right to strike may be restricted only in essential services in the strict sense of the term;
- (iv) to repeal the notification requirement and the heavy penalties, including imprisonment, for exercising the fundamental right of collective bargaining;
- (v) to repeal the provisions prohibiting dismissed and unemployed workers from keeping their union membership and making non-union members ineligible to stand for trade union office;
- (vi) to immediately bring section 314 of the Penal Code (obstruction of business) in line with freedom of association principles, ensuring that investigations will not include detention for workers that have tried to exercise their fundamental rights;
- (vii) to refrain from any act of interference in the activities of FK TU and KCTU, such as violent police intervention in rallies, injury of trade unionists, intimidation and harassment of trade union leaders and members;
- (viii) to issue appropriate instructions so that all actions of intimidation and harassment against the unions' officials cease immediately, to review all convictions and prison sentences, and to compensate officials for any damages suffered as a result of their prosecution, detention and imprisonment;
- (ix) to promote recognition that collective agreements negotiated with main contractors can apply to all workers including those hired by subcontractors.

Conclusion

The obvious intention of the kinds of restrictions and burdens discussed above is to weaken the hand of labour in the workplace, in favour of employers. The perverse effects of such restrictions and burdens can be wide-ranging.

For example, the requirement in the UK that unions had to ballot members before being able to establish a political fund was intended to gut such funds. However, the result was that many more unions conducted such ballots to see what members felt about such funds and their number increased significantly.

As can be seen in the LUL examples, one of the consequences of requirements around strike ballots is that it actually extends the time over which an industrial dispute festers and often poisons over a longer term what could have been a short and sharp disagreement that is quickly resolved.

The extended treatment of Korea in this paper illustrates the connections between individual human and worker rights and the constraints put on many trade unions. It would be unreasonable to suggest that only Korea is guilty of the 13 items listed above needing attention in that country: many OECD countries fail in one or more of these elements, making it difficult for trade unions to function in a democratic and effective manner.

Where governments so obviously tilt the playing field in favour of employers, resentment in the workplace is increased and more rapid turnover occurs as more valued workers move away from unreasonable employers, leaving those with less capacity to move or those with fewer marketable skills. These latter feel trapped in their workplace, hardly a motivation for a high-performance economy.

So, to answer the questions to be addressed in this session:

- *What is the unfinished agenda for administrative simplification? How can more progress be made at regional and local levels?* Simplification is not the issue in this case: rather it is a question of implementing internationally recognised standards – including those of the ILO and of the OECD.
- *How can burdens on citizens be reduced?* There is nothing special about what needs to be done as far as burdens on trade unions are concerned. It is not a question of suggesting that the OECD enact new principles but that all Member States apply those that are there in an even-handed way.
- *What about regulation inside government?* Not really relevant in this case.
- *How to assess and communicate progress?* By seeing whether governments are really willing to allow trade unions the same freedom of action and space as is allowed to other organs of civil society.