

Reforming Trade Unions in The Republic of Kazakhstan

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Abstract

The article deals with the trade unions reforming issues in the Republic of Kazakhstan which involve protection of labour and employment rights, and settlement of labour disputes arising between an employer and a worker when bargaining collectively. The author gives a juristic commentary on the enacted Trade Unions Law and offers amendments with the purpose of facilitating a dialogue between an employer and worker representative. Although the Trade Unions Law was enacted fairly recently, serious shortcomings have already revealed themselves in the course of assessment, which is the reason for this article to be published.

Keywords: trade union, industrial union, local trade union, worker representatives, social-labour relationships, collective labour agreement, employer.

Under the conditions of market relations formation, it appears to be important for Kazakhstan to stimulate such social activities of subjects in the legal relationships as would foster industry-specific infrastructure development, legal consciousness and self-comprehension of individuals, which will ultimately determine a successful implementation of all democratic processes in the Republic of Kazakhstan.

In this context, collective entities of individuals are an overriding concern. The most critical collective subject of law that addresses an array of labour market problems in the Republic of Kazakhstan is trade union.

Legal regulation of the trade unions' status has travelled a long and thorny way from prohibitions and declaration of trade unions and their actions illegal until their legalisation.

The first ever trade unions were formed in the years of the Industrial Revolution in England, the country that was most developed industrially, in the late 18th century. They aimed at protection of professional interests of their members and were met by a strong resistance on the part of the masters and the crown. A criminal liability was even introduced to suppress trade unions, and unionising was treated as a criminal conspiracy. However, under the pressure from labour movement, trade unions were statutorily recognised at a later date.

Formation and development of trade union movement in different countries generally followed the English pattern. Abroad, trade unions are prioritised differently: there are horizontal unions and vertical unions.

Horizontal unions unite workers and workers by skills and trades rather by industries, and one organisation may have more than one trade union. Part of the trade unions in the UK, USA and

Australia are organised as horizontal unions. This structure to some extent links to medieval-era guild traditions, splits and weakens the workers' forces in their conflicts with employers.

Vertical unions, unlike the horizontal ones, are organised by industries; all workers in a given enterprise, organisation are members of a single industrial union, for instance, railway union.

In a number of countries (Germany, Italy, Cameroon, the Netherlands), there are Christian trade unions where workers unite by religion. These trade unions are often under influence of clerical parties (Antropov, 2005).

In some countries, trade union laws allow trade unions rather considerable room for acting to address the challenges they face, which is in line with the world's up-to-date high standards in the industry, while in some other countries, trade unions act subject to considerable restrictions.

Part 2 Article 131 of the Spanish Constitution expressly provides that planning projects shall be developed in consultation with and collaboration by the unions. The existing preamble to the French Constitution of 1946 states that "all men may defend their rights and interests through union action and may belong to the union of their choice."

In the Soviet Union, the Code of Labour Laws of 1918 already conferred upon the unions certain rights protecting the interests of the workers, and the Code of Labour Laws of 1922 significantly expanded those rights.

The mid-20th century witnessed a particular development of the trade union movement, one of its achievements being adoption in Australia, Greece, Spain, France and some of other countries of laws significantly expanding the rights of the unions in industries, including those requiring the union membership in order to be employed (closed shop system), the right to have the union dues be automatically withheld by the employer from the workers' salaries.

However, by the 1980s, the union movement in the developed countries declined, and followed by the collective labour agreements' and trade unions' losing significance.

For example, in Canada, the unions today bring together approximately one third of the people engaged in non-agricultural sector, while in the US this rate makes 15-17%. This is due to entry by the most developed countries to the age of computerisation which leads to their economic restructuring, specifically, in labour status (transition of labour from producing to non-producing industries, reduction in the need for unskilled and menial labour), implementation of unique advanced technologies triggers propagation of negative stance on collective agreements of highly qualified workers and professionals who prefer working under individual contracts.

Amidst decline in the trade union movement, labour laws also saw changes. New rules emerged prohibiting anti-union discrimination and capturing the negative right of association, *i.e.* the right not to join trade unions. It exists at the current legislation level, for instance, in France, Belgium, Spain.

Pursuant to Part 1 Article 28 of the Spanish Constitution, "no one may be compelled to join a trade union." Under the existing US laws, a trade union may be organised in an organisation if it is the intention of a majority of its workers. This means that no trade union supported by a minority may lawfully exist.

According to official statistics for 2007, trade unions in the Nordic countries maintain their base membership without loss: in Sweden, 78% of workforce are members to the unions, in Denmark – 70.4%, in Finland – 74.1%, meaning the trade unions bring together 2/3 to 3/4 of the workers in those countries. In Germany, only 22.6% of workforce are members to the unions, in Spain – 16.3%, in France – 8.3%.

Trade unions are mass public organisations of workers of all professions without regard to their race, nationality, gender, religious beliefs, etc. Trade unions are designed to protect economic, social and cultural rights and interests of the workers. The extent of trade union development is the guide to a country's social policy, level of its democratic development, as trade unions embody a socio-economic mechanism for protection of citizens' labour rights and freedoms. In the course of their activities, trade unions address not only direct employment-related issues (salary, avoidance of employment contract termination, including due to job displacement of some of the worker categories, etc.) but also general social problems related to labour policy, public consent, development of labour culture, and, consequently, well-being of the society as a whole.

Under current conditions, trade unions have the form of free-will independent civic organisations which bring together workers wedded by common occupational interests both in industrial and social spheres. Protection of the rights and lawful interests of workers, establishment of social justice, efficient and humane economy are regarded by trade unions of all descriptions as their primary goal.

Trade unions are regarded as specific legal entities. Their legal status is determined by the laws governing general legal capability and competency of trade unions, basic (statutory) rights and liabilities, and their safeguards. Still, within the framework of general legal status of trade unions the legislation relies on the existence of the principle of pluralism within organisation and activities of trade unions, on one side, and regulates statuses of separate levels of the trade union system, in particular, professional committees, primary organisations of unions.

Trade unions have come to existence to protect the interests of the workers, and their *primary leading function is a protective one*. Trade unions protect the rights of the workers vis-à-vis their employer, governmental and economic bodies, and participate in development of labour protection programmes, laws and regulations. Labour laws of the Republic of Kazakhstan govern relations of trade unions with employers and their representatives for social and labour issues at all levels of social and partnership relations from shop floor on out to the national level. At all those levels, trade unions fulfil both their protective function and the second crucial function of theirs – representation of the workers. In order for the trade unions to fulfil these two crucial functions, the government has allotted to them a number of rights and safeguards in the rule-making, law enforcement practice and monitoring of compliance with the labour laws of the Republic of Kazakhstan, and in industrial disputes settlement as well.

The protective function of trade unions lies in a task-oriented legal activity aimed at protection of social and labour rights and legal interests of the workers, protection of their rights and interests against violations, restoration of violated rights and establishment of higher and better conditions of work and well-being for the workers. Trade union representatives participate in industrial accidents investigations, conduct work safety audits and inspections, and supervise improvement activities. Where there is a threat to health or life of the workers, trade unions may propose that any operations be suspended until such threat is eliminated.

Trade unions may sue to protect the rights of the workers to receive compensation for damages resulting from labour-related injuries or other health damages and otherwise in the event of infringement of the workers' rights.

The other crucial function of trade unions is representation of workers and labour collectives. Such representative function involves representation by trade unions of their members in the employment issues and other social and economic issues.

An analysis of economic, political, cultural and legal aspects of our society development shows that a public organisation that bears the burden of solving certain social problems is a proxy for public consent in the first instance, which *verbatim* means understanding, *i.e.* accord of wills of public institutions.

In the UK, the actual unequal status of the parties in the social partnership equalises through the statutory leverages available to trade unions in the event that the employer is reluctant to take the workers' interests into account. In addition, the Consolidated Act legalises competition among trade union organisations which in fact compete with each other to earn confidence of workers, and, finally, obliges the employer to conduct collective bargaining with the trade union which is officially authorised to represent the interests of the workers by a special governmental authority – Central Arbitration Committee (Voronkova, 2008).

The notion of trade union representation was considered by the founder of labour law branch, L.S. Tal. Polemicizing with supporters of the theory of private (civil) representation, L.S. Tal has characterised trade union representation as a public notion. He wrote: “In public law, a special notion has formed which bears the name of representation but has very little in common with the civil representation. Public representation lies in the fact that a person or an institution is trusted with certain authority... imposed a duty to only apply (such authority) in the interests of a group, circle, part or all population... In this very sense the unions act as representatives of professional interests of their members, and not in the sense of civil representation.” (Tal, 1918).

At present, majority of the states in the world including the Republic of Kazakhstan statutorily recognise the rights of trade unions to any extent in their endeavour to comply with the ILO's Freedom of Association and Protection of the Right to Organise Convention (1948) No. 87 (the “Convention”) (ILO Convention, 1948). Under the Convention, workers shall have the right to establish and to join organisations of their own choosing to express and protect their interests, and employers shall have the same right. Each worker, citizen has the right to freely join and exit a trade union.

The same right, *i.e.* the right to freely join and exit a trade union, the universal right to unionise, to establish trade unions to protect common interests, is expressly enshrined in the Constitution of the Republic of Kazakhstan (Republic of Kazakhstan, 1995). A special mention of trade unions in the fundamental law of the country, in an act of the highest legal force witnesses a special role and significance the trade unions have in the social life.

The legal status of trade unions in the Republic of Kazakhstan is defined by a number of laws and regulations, in particular, by Article 23 of the Constitution of the Republic of Kazakhstan, whereby nationals of the Republic of Kazakhstan have the right to freedom of association.

Thus, the right to freedom of association is one of the most important and constitutional human and civil rights, the enforcement of which is in the interests of society and which is

protected by the state.

Activities of public associations are regulated by the Law of the Republic of Kazakhstan dated 31 May 1996 “On Public Associations” (the “Public Associations Law”) ([Republic of Kazakhstan, 1996](#)) and the Law of the Republic of Kazakhstan dated 27 June 2014 “On Trade Unions” (the “Trade Unions Law”) ([Republic of Kazakhstan, 2014a](#)).

Article 2 of the Public Associations Law enshrines trade unions in the Republic of Kazakhstan as one of the types of voluntary associations of citizens established on a voluntary basis in order to achieve their common goals in compliance with the laws.

Organisational issues of trade unions as a form of public association are also regulated by the Civil Code of the Republic of Kazakhstan (Article 106 of the RK CC, General Part) ([Republic of Kazakhstan, 1994](#)), the Law of the Republic of Kazakhstan “On Non-commercial Organisations” dated 16 January 2001 No. 142-II ([Republic of Kazakhstan, 2001](#)), etc.

In his programme article entitled *Social Modernisation of Kazakhstan: Twenty Steps Towards A Universal Labour Society*, the President of the Republic of Kazakhstan N.A. Nazarbayev noted that ‘a number of laws are obsolete or declarative, and for these reasons they fail to efficiently regulate specific areas of social relations, including the Trade Unions Law of the Republic of Kazakhstan adopted back in 1993. It even lacks the concept of social partnership, mechanism of conclusion and implementation of collective agreements, etc. As such, it’s no surprise that trade union institutions in Kazakhstan often unable to act as an effective tool of preventing and resolving labour disputes. Having a good grip of the situation from inside, I’d say that in order for the workers to feel themselves dignified, the trade union movement should be up to the mark.’ ([Nazarbayev, 2012](#)).

Advantages of unionising industry-wise are obvious as it allows to represent the workers not only within one business unit but also taking into account the particularities of any given industry and labour conditions existing therein which, subject to independent status of the trade union body, its commitment to the interests of the workers it represents and proper efforts of the trade union members themselves, is instrumental in ensuring that the most efficient protection for them is in place.

A trade union comprises members of the trade union, *i.e.* individuals who freely wished to join and joined the trade union, and who admit and abide by its constitution, pay trade union membership fees; procedure of admission and withdrawal is set out in the trade union’s constitution.

A trade union acts as a legal entity through its bodies. Trade union body is a management body formed in accordance with the trade union’s constitution. The powers and authorities of trade union bodies are determined by the trade union’s constitution (Article 27.2 of the Trade Unions Law).

It is noteworthy that under Article 18.1.4 of the Trade Unions Law, trade unions are independent of employer *and through trade union bodies* may represent its members in their dealings with their employer when entering into a collective agreement, acting on behalf of its members and *workers who have agreed to authorise it to do so as well*.

In other words, trade unions may represent workers who are not members thereof but

provided that the way it deals with non-members is expressly set out either in its constitution or resolution of the trade union body. Constitution of the trade union may provide not only for the right to represent any non-member workers. A similar right is also provided in Article 157.4 of the Labour Code of the Republic of Kazakhstan dated 23 November 2015 (the “Labour Code”) ([Republic of Kazakhstan, 2015](#)) whereby any workers who are not members to a trade union *may by a written application authorise* only the trade union’s body to represent them in their dealings with the employer when drafting and then entering into a collective agreement.

According to many labour law scholars, the main credit of development of the Soviet trade union movement theory goes to V.M. Dogadov. He highlighted the following crucial legal functions as performed by trade unions at the time:

- representation of the workers;
- participation in organisation and regulation of the national economy;
- participation in administrative activities of non-economical public agencies.

Along with that he noted that the trade union, while acting as a representative of the workers, is not doing so under any delegation of authority issued to it by individual employees. It needs no special powers to be vested therein by the workers to act on behalf of them. Under the existing laws, our trade unions represent not only their members but also all of the persons employed in the given industry. Hence the known dual status of the trade unions: on one hand, they are representatives of all of the workers, on the other – trade union body having known rights and bearing known duties before the union members, as well as before lower and higher union bodies ([Dogadov, 1928](#)).

At present, in Kazakhstan any worker with no union membership may, under Article 20.2 of the Labour Code, delegate powers to represent him or her *only to a trade union*, provided his or her organisation has one, within the powers so delegated, by a written application, including when negotiating and entering into a collective agreement.

The notion of worker representative was modified by the Law of the Republic of Kazakhstan dated 27 June 2014 No. 212-V “On Amendments to Certain Laws of the Republic of Kazakhstan on Activities of Trade Unions and Labour Relations Regulation” ([Republic of Kazakhstan, 2014b](#)), thus in the modified labour laws effective 1 January 2016, namely in Article 1.1.44 of the Labour Code, such representatives now include bodies of trade unions and their associations, and *where there are no trade unions* – elected representatives, to be elected and authorised by a majority of the votes cast in a general meeting (conference) of the workers present, provided that no less than two thirds of the workers (conference delegates) are present.

With the adoption of the Labour Code of the Republic of Kazakhstan in January 2016, a worker with no trade union membership may delegate the right to represent him or her to trade union bodies on the basis of a written application of the worker, *i.e.* the Labour Code provides for no obligation of the worker to enter into an agreement with the trade union for representation of a non-member.

As a result, any worker without trade union membership has a statutory *right* to delegate his or her interests to trade union bodies, and trade unions have an *obligation* in the meaning of Article 20.2 of the Labour Code of the Republic of Kazakhstan and Article 18.1.8 of the Trade Unions Law to procure representation of such workers being non-members thereof.

Notwithstanding the changes in the Labour Code in the notion of “worker representatives,” the labour laws allow, as an exemption from the general rules, representation when representing a worker in the event of, and further resolution of, an individual labour dispute.

Individual labour disputes shall be resolved by grievance committees or, failing which or failing enforcement of grievance committee’s resolution – by the courts. The grievance committee is a permanent body formed within the organisation, its branches and representative offices on a par and *comprising an equal number of representatives of employer and workers*. The grievance committee shall comprise workers’ representatives, *i.e.* if the organisation has a trade union, only trade unions may represent the workers including non-members. With a view to enforce the constitutional right to protect the rights of citizens, the workers are afforded the right to appoint a representative, even if they have their representatives among the grievance committee members. Pursuant to Article 159.4 of the Labour Code, disputes shall be heard in the presence of the complainant and/or the representative appointed by the complainant within the powers delegated to such representative in accordance with the laws and regulations of the Republic of Kazakhstan. This provision regulates the right of an individual to represent a worker under a document of authority within the powers delegated to such representative, acting in the dealings with the employer as such worker’s legal representative for the purposes of resolving individual labour dispute.

Consequently, a worker may independently determine who will represent him or her in the dealings with the grievance committee members, and this does not prejudice or undermine the role of trade unions as they are mandatory members of the grievance committee.

Under Article 167 of the Civil Code of the Republic of Kazakhstan (General Part), a power of attorney is a written authorisation by one person (principal) to represent him or her issued to another person (agent) ([Republic of Kazakhstan, 1994](#)). Pursuant to the Notarisation Rules of the Republic of Kazakhstan approved by Order No. 31 of the Minister of Justice of the Republic of Kazakhstan dated 31 January 2012, notaries shall attest powers of attorney on behalf of one or more persons in the name of one or more persons ([Republic of Kazakhstan, 2012](#)).

A representative may neither act under a power of attorney with respect to him- or herself nor with respect to any other person whom he or she represents thereunder. A person granting power of attorney may revoke such power of attorney at any time, and a person in whose name it is issued may withdraw at any time. No agreement of waiver of such rights shall be valid.

This means that once a power of attorney has been granted by a worker to represent him or her, his or her representative may represent the appointing worker or a group of workers and defend his or her or their rights and interests, but with respect to individual labour dispute resolution only.

As a result of introduction of amendments to Article 65 of the Labour Code in November 2013, it became significantly more complicated to identify a worker’s representative. Personal data laws prohibit employers from requiring workers to disclose their membership or activities in public associations, including in trade unions.

This novelty may be said to “tie the hands” of employer in satisfying some of the provisions of the Labour Code. Thus, for instance, Article 53.3 of the Labour Code provides for

employer's obligation to include the worker's representative in the attestation commission. Pursuant to Article 12.1 of the Labour Code, to the extent provided by agreements, collective agreement, the employer shall issue internal documents subject to opinion or in consultation with the worker representatives. At the same time, the Labour Code prohibits the employer from obtaining any information from a worker regarding his or her representative.

Since this issue is not settled in the Trade Unions Law, it might give rise to a labour dispute in the course of further dealings of the parties to the social partnership. Given that the employer, by virtue of Article 26.2 of the Trade Unions Law, shall take into account the reasoned opinion of the trade union body when terminating employment contract with its workers representing the elected body of the trade union, we consider it expedient to introduce a provision obliging trade unions to provide confirmation of the workers' membership therewith when requested by the employer in writing. Therefore, we propose amending Article 18 of the Trade Unions Law so that to oblige trade unions to provide details of the workers' membership therewith including members of the elected trade union bodies, upon reasonable request of the employer in writing. For example, no worker who is a member of an elected trade union body without relief from primary employment may be brought to disciplinary responsibility under Article 26 of the Trade Unions Law without reasoned opinion of the trade union body of which he or she is a member. Consequently, to ensure that the members of elected trade union bodies are properly brought to disciplinary responsibility, the employer needs to know the members of the elected trade union body among its workers.

The Trade Unions Law considerably complicates the work of existing trade unions by making it *mandatory for each trade union to be part of an industry union, national trade union association as a member organisation*, which contradicts Articles 2, 3, 4, 5 of basic ILO Convention No. 87 as to limiting the ability of workers' organisations to independently decide their membership issues, including formation of federations, confederations, and to joint them.

This edition of the Trade Unions Law is discriminatory against the rights of citizens and their associations willing to be part of those trade unions meeting their requirements. Ignoring such rights is a violation of rights and freedoms provided in Article 23.1 of the Constitution of the Republic of Kazakhstan. In accordance with the civil legislation of the Republic of Kazakhstan, trade unions may, by resolution of their board, independently form and/or join any existing trade union association(s).

Elaboration of the constitution and determination of membership in other associations by trade unions is a sovereign right of the workers' organisation itself (Article 3 of ILO Convention No. 87). Nevertheless, the Trade Unions Law makes it mandatory for the trade unions to include in their constitutions an indication to their membership in an industry union, national trade union association.

Forming a trade union contrary to a definite structure prescribed by the Trade Unions Law, just as having no mandatory membership in an industry trade union and/or a national trade union association implies cancellation of trade union's state registration. As Article 10.2 of the Trade Unions Law requires, within six months of registration date, a national or a territorial association of trade unions, industry and local trade unions *must* submit to their registering authority copies of written evidences confirming their *compliance with requirements* contained in Articles 11.3, 12.3, 13.2, 13.3 and 14.4 of the Trade Unions Law.

Failure to comply with the above provisions of the Trade Unions Law implies

cancellation of the trade union's state registration as prescribed by the laws of the Republic of Kazakhstan.

An imperative provision requiring mandatory membership of an industry union with a national trade unions association (Article 13.3 of the Trade Unions Law) and mandatory membership of a local trade union with an industry union (Article 14.4 of the Trade Unions Law) is inconsistent with ILO Convention No. 87 and the Civil Code of the Republic of Kazakhstan.

These inconsistencies were discussed during the Extraordinary Congress of Kazakhstan's Labour Confederation in 2014, where specific proposals were made on the then draft Law of the Republic of Kazakhstan "On Trade Unions" which proposals, however, were not taken into account when the bill was read.

Considerable complications are caused during formation of an industry union by the requirement of no less than half of industry's and allied industries' workers or organisations membership in the industry union, or that the industry union must have subdivisions or member organisations in more than half of oblasts, cities with national status or the capital city.

This requirement brings in *trade union monopoly at industry level* as it requires that such trade union embrace at least half of the total number of the workers or organisations or that it have subdivisions or member organisations in more than half of oblasts, cities with national status and in the capital city, *which might even lead to a greater trade union monopoly*.

International Labour Organisation has always noted that development of trade union monopoly by operation of law contradicts Article 2 of Convention No. 87 which enshrines the right of the workers to establish and to join organisations of their own choosing.

One can ambiguously interpret Article 5 of the Trade Unions Law which states that trade unions shall be *independent in their activities* of any governmental authorities of all levels, political parties, employers, and associations thereof, *not subordinate and not accountable thereto*. So, a question arises as to why a public association, which a trade union is, exempt from accountability and subordination to governmental authorities of all levels? While Article 3 of ILO Convention No. 87 states that the public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof, the Convention does not relieve the public authorities from enforcement of laws upon public associations, being trade unions in our case. Therefore, we propose to amend Article 5 of the Trade Unions Law to read as follows: "Trade unions shall be independent in their activities of any political parties, employers, and associations thereof, not subordinate and not accountable thereto."

Nowadays, there are many companies where workers may be represented by more than one trade union, which makes it way more complex for the employer to conduct negotiations when resolving disputes, collective bargaining, and in other cases. Thus, for example, Article 282.2 of the Labour Code (which is now of no force) provided that if there was more than one worker representative in an organisation, *they might form a joint representative body* to sit on the committee and execute the collective agreement. Might means not obliged. Consequently, if one trade union refused to negotiate a collective agreement with another trade union, the employer would be forced to hold negotiations with each of them separately. Such negotiations could not lead to a universal understanding upon the terms and conditions of the collective agreement in question, so in practice it gave rise to labour disputes over provisions of drafts of the collective agreements. In Kazakhstan, cases of execution of two collective agreements

containing different provisions within the same organisation became more frequent, and it did not promote stability of social and labour relations. This was the reason for including a different provision in Article 156.4 of the Labour Code dated 23 November 2015 that reads as follows: “Where there is more than one worker representative in an organisation, *they shall form a joint representative body* to sit on the committee and execute the collective agreement.”

With a view to building a dialogue between the employer and the workers’ representative on any other issues covered by the Labour Code, since the employer - trade union relationship goes beyond collective bargaining, we propose amending Article 18 of the Trade Unions Law so that it would require that where an organisation has more than one worker representatives, trade unions *forma joint representative body* to settle social and labour relationships while dealing with the employer.

For the first time, the Trade Unions Law has enshrined the obligations of trade unions to comply with the laws of the Republic of Kazakhstan and provisions of the constitution, resolutions of trade unions. However, the Trade Unions Law still has no provision imposing liability on trade unions for failure to fulfil assumed obligations. At present, we can only speak of trade union’s liability, if any, before its members as provided for in the constitution. Article 33 of the Trade Unions Law provides for liability with respect to individuals and legal entities breaching the trade union laws of the Republic of Kazakhstan who/which will be held liable in accordance with the laws of the Republic of Kazakhstan.

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