

Back-to-Work Order: outdated legal boundaries of the fundamental labour rights

On 24 November 2022 the Owner-Truckers' Solidarity Union (hereafter "TruckSol") went on a national strike. Just after a few hours, President Yoon and the Minister of Land, Infrastructure and Transport stated their intention to issue a 'Back-to-Work Order' to the striking owner-truckers, violation of which carries heavy fines or prison sentences and revocation of licence for trucking transport service. On 29 November, the Korean Government actually issued the Back-to-Work Order to bulk-cement trailer drivers whose strike could disrupt construction work.

Even before the strike, the Government has decried owner-operators' collective action as illegal. The public authority has long maintained that owner-operators cannot do legitimate collective action as they are not "employees" under Korean labour laws. Moreover, the Government has directly cracked down on the strike of TruckSol since their collective action could disturb logistics in which large corporations have a dominant position. In this article, I explain legal and political debates over an "employee" under labour regulations in Korea. Further explanation about the criteria for the "legitimate collective action" under labour regulations will follow. In conclusion, I explore the implications of legal tools such as the Back-to-Work Order for suppressing freedom of association and the right to strike.

Legal debates over an "employee" in Korea

In Korea, an "employee" is entitled to labour law protection. Traditionally, the definition of an "employee" in labour laws was basically interpreted as a person working in an employment relationship. While various indicators regarding the existence of an employment relationship were listed in judicial precedents, the courts traditionally noted such factors as whether the employer exerted direction or supervision over the performance of work, and whether the employer offered remuneration for the price for labour. In other words, many judicial precedents have interpreted the existence of direction/supervision as exerting detailed directions over performance of work, for example, asking whether or not a hirer instructed drivers to take specific roads. Moreover, the courts quite often denied a worker the status of "employee" in cases where the worker owned the work tools such as a

truck or provided his/her labour for multiple hirers. Such a narrow interpretation of the employment relationship has contributed to an increase in "bogus self-employed".

In the Korean road freight transport sector, for example, most trucking companies forced their drivers to become "independent contractors" since the 1990s. Additionally, the government legitimated previously illicit practices of the trucking transport business in the use of owner-operators through the amendment of the Trucking Transport Business Act (TTBA) in 1997. In such regulatory changes, trucking companies were not required to own trucks or hire drivers, and they just contracted out the entire performance of carriage to other subcontractors or owner-operators.

As a result, the trucking transport sector is characterised by a multi-layered structure of subcontracting and the widespread use of owner-operators. A survey in 2020 found that the level above the tri-level of subcontracting accounted for 20.3 percent in the trucking sector. It was also reported in 2018 that these owner-operators accounted for over 91.5 percent of all truck drivers¹.

As these owner-operators have their own trucks and bear the expenses of the operation of vehicles, they have been regarded as "independent contractors" or the "self-employed". In reality, however, they are dependent on the particular freight transport companies or transport buyers, and they drive trucks by themselves without employing others. Commercial pressures passed down through multi-layered subcontracting lead to reductions in truck drivers' rates. Owner-operators are the most vulnerable, as they often must absorb the costs of ownership, maintenance, and other vehicle-operating costs, while they may not be protected from labour protection such as statutory minimum wage and working hours regulation.

Against this, owner-operators attempted to form trade unions to improve their working conditions. In 2002, owner-operators in the trucking transport sector formed a union – called "Cargo Truckers' Solidarity Union" (TruckSol), which was a special branch of the existing union (the Korean Cargo Transport Workers Federation)². Under Korean labour laws, all trade unions are required to get registration from the Ministry of Employment and Labour (MoEL), but a branch of an existing union

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does not need to do so. Owner-operators formed their union as the form of a branch of the existing union in order to circumvent legal debates over whether they were employees, as shown below.

The Korean Constitution provides workers shall have the right to independent association, collective bargaining and collective action. While the Constitution has provided for such collective labour rights as fundamental rights since 1948, the actual scope of collective labour rights have been determined under the *Trade Union & Labour Relation Adjustment Act* (TULRAA). The “employee” under the TULRAA is entitled to the right to organise a “trade union” and to the rights to collective bargaining and industrial action. As earlier explained, the courts had interpreted an “employee” under the TULRAA as a person working in an employment relationship, until the mid-2000s. In other words, owner-operators may not enjoy collective labour rights as well as employment law protection with their employment status being contested.

Government’s direct interference in collective action

In May 2003, TruckSol called its first national strike, which lasted 14 days, and a huge number of non-unionised owner-operators also participated in this strike. Their demands included elimination of multi-layered subcontracting, a reduction of costs (particularly those caused by fuel taxes), and respecting collective labour rights for own-account workers.

After the first successful strike, which was portrayed as “a major disruption of logistics” by the mass media³, TruckSol and the Government reached the first agreement that included subsidies for the fuel taxes and regulation of multi-layered subcontracting. Although the Government accepted some demands of TruckSol, it still treated the union as a business association. Furthermore, the Government introduced new restrictions on collective action, referred to as a “Back-to-Work Order”. Under the TTBA as amended shortly after the first strike in 2003, the Ministry of Land, Infrastructure, and Transport (MoLIT) may issue a Back-to-Work Order to individual truck drivers engaging in a collective refusal-to-work when such collective action causes or is likely to cause a serious crisis in the national economy. If drivers do not follow a Back-to-Work Order, they are subject to penalties, including revocation of licence for trucking transport service, fines and even imprisonment for not more than three years.

Yet, the legislation of the Back-to-Work Order encountered huge criticism, and this was not actually used until 2022. Instead, the Government has used more traditional methods to interfere the right to collective action. Since the period of Japanese colonial rule in the early 20th Century, workers joining collective action would be penalised for “obstruction of business” under the criminal

laws, and encountered enormous amount of damages claim. Only when an “employee” engages in the “legitimate” collective action as defined under the TULRAA, he/she could be exempted from civil and penal liabilities. In addition, the Government has stationed police forces and even army at strike sites, and lead in replacement of strikers with other truck drivers.

Even though fundamental labour rights have been denied through such legal and policy interference, owner-operators’ unions have fought for better working conditions and labour rights for decades. In particular, TruckSol had demanded an introduction of “safe rates” system, which would provide owner-operators with minimum rates in order to protect truckers from long working hours, speeding and driving while fatigue⁴.

After more than a decade of campaigning, TruckSol achieved new legislation on Safe Rates in 2018. Since January 2020 statutory minimum rates shall be paid to relevant truck drivers although they are not employees of transport companies. Yet, facing resistance of transport companies and buyers, the Safe Rates regulations were introduced on a trial basis, applied to only “export-import container” transport and the transportation of “cement”, and as the Sunset Clause, they were set to terminate at the end of 2022.

On 7 June 2022 TruckSol went on national strike to request the Government and the National Assembly to preserve and expand the Safe Rates system. While the newly elected Yoon administration resorted to the same old tactics such as stationing of police force at logistics hubs around the country, and naming TruckSol’s strike as “illegal collective refusal-to-work”, it agreed with the union on pushing for expanding Safe Rates regulations, on 14 June. The Safe Rates campaign has attracted public attention and support for improving truckers’ working conditions and public safety, and thus, the Government had to accommodate some demands of TruckSol.

However, following the end of the strike the Government did not honour the agreement, and stated that the Safe Rates regulations were not fit for a free market economy. The Government argued that the Safe Rates system only increased the cost of logistics without an improvement of road safety, and even criticised it for enhancing the union’s power to disrupt logistics.

After these fruitless months, TruckSol engaged in the second round of the national strike in November 2022. And the Government, for the first time, issued the Back-to-Work Order, just five days later. The Government firmly stated that the “illegal collective refusal-to-work” of independent contractors caused disruptions in construction work as well as business of transport buyers (e.g. automakers and oil company), and announced the

ending of Safe Rates regulations due to TruckSol's "illegal" collective action.

In addition, the Government let the Fair Trade Commission of Korea (FTC) investigate TruckSol's offices, alleging that TruckSol is a business association and its collective action amounts to "unfair collaborative acts" under the competition law.

Towards modernising the right to strike

In Korea the right to strike has been severely restricted by laws and the state policy, although the Constitution provides for collective labour rights. Under the TULRAA and the court rulings, collective action is legitimised only in cases when i) an "employee" engages in action led by trade union(s), ii) the purpose of action is the achievement of collective bargaining with their "employer" on the subjects related to working conditions in the strict sense, and shall not be related to the managerial prerogatives (e.g. redundancy, hiring and workplace reorganising) or political matters, iii) collective action shall be decided by concurrent votes of a majority of union members, and mediation procedures by the Labour Relations Commission shall be completed prior to collective action, and iv) collective action shall not be done in manners being inconsistent with laws or other social order (e.g. occupation of production facilities).

Consequently, own-account workers could not engage in such "legitimate" collective action, because they are not recognised as an "employee" under the TULRAA, among other reasons. Even though certain types of own-account workers could be recognised as an "employee" by court rulings, there still remain other legal hurdles. For instance, calling for legislation to improve working conditions is not regarded as the 'legitimate' purpose of collective action, and industrial action vis-a-vis the "third party" (e.g. a principal company or a lead firm) amounts to 'illegal' action or coercion.

The Government has repressed collective labour rights of those workers in non-standard employment by excluding them from the scope of labour law. Recently, other legal methods for infringing freedom of association and the right to strike were added to such traditional tactics. The Back-to-Work Order

has contradiction in its own rationale. Provided owner-operators are genuinely independent entrepreneurs, the Order amounts to the infringement of occupational freedom. In reality, however, the Back-to-Work Order was invented and utilised to restrict collective action of workers outside of traditional labour regulations.

Deemed an "indispensable corollary" of freedom of association by the International Labour Organisation (ILO), the right to strike is essential for workers and trade unions to promote and defend their rights, and to change the imbalanced power distribution in the workplace and in society. Nevertheless, contemporary State regulations over the right to strike have not kept pace with new arrangements of work and the specific issues that workers face in this century.

For example, calling for the Safe Rates regulation was related to questions about how to take measures to improve basic working conditions and health and safety, and how to make the economic employer such as transport buyers hold responsibility for workers' rights. However, such demands have been blocked by various legal boundaries which have restricted freedom of association and the right to strike to a legal dispute system between the parties of employment contract relationship in a traditional way. In this regard, realising freedom of association and the right to collective action beyond an employment relationship should be considered essential for modernising fundamental labour rights in the 21st Century.

- 1 Korea Transport Institute. *2020 Freight Transport Market Trends* (Sejong, 2021), p.11 (*in Korean*).
- 2 In 2006, the Korean Cargo Transport Workers Federation was integrated into a larger industrial union – the Korean Public Service and Transport Worker' Union (KPTU) – together with railway, taxi and bus workers' unions. After that, TruckSol became a sectoral division of the KPTU.
- 3 Although the union density of TruckSol was below 10 percent, the power of the strike was so great that it was able to disrupt export and import logistics, for which relatively high density (around 30 percent) of container truck drivers were working.
- 4 For more about Safe Rates campaign, see A Yun, *Safety for the Public, Rights for the Driver* (Friedrich-Ebert-Stiftung, 2020), at: <https://library.fe>

In May 2003, TruckSol called its first national strike against multi-layered subcontracting and fuel tax costs, and for respecting collective labour rights