



TRADE UNION ADVISORY COMMITTEE  
TO THE ORGANISATION FOR ECONOMIC  
COOPERATION AND DEVELOPMENT  
COMMISSION SYNDICALE CONSULTATIVE  
AUPRÈS DE L'ORGANISATION DE COOPÉRATION  
ET DE DÉVELOPPEMENT ÉCONOMIQUES

## Comments on “Rule of Law and Good Public Governance: Exploratory Discussion” (GOV/PGC(2011)18)

Written contribution to the OECD Public Governance Committee  
Paris, 8 December 2011

1. TUAC submits the following written comments on the draft discussion paper “Rule of Law and Good Public Governance: Exploratory Discussion” (GOV/PGC(2011)18) which appeared under item 10 of the 44th Session of the Public Governance Committee (PGC), 8-9 November 2011, OECD Conference Centre (hereafter “the paper”).

2. The concept of rule of law (RoL) is crucial for trade unions and for an obvious reason. RoL is a decisive element in the fulfillment and enforceability of rights, and of rights at work in particular. Without RoL, there can be no protection of citizens’ rights, including the fundamental rights to freedom of association and collective bargaining as outlined in the ILO Conventions n°87 & 98. Accordingly the TUAC is attentive to the issue at the OECD, notably in the work programme of the PGC and its sister Regulatory Policy Committee (RPC). A year ago the TUAC expressed concern at the way the concept of RoL was treated in the draft report “Regulatory Policy and the Road to Sustainable Growth” (GOV/RPC(2010)16) of the RPC. The RPC report, TUAC wrote at the time, “portrays a partial understanding that is biased in favour free-market liberalism”<sup>1</sup>.

### *General comments*

3. Unfortunately, the PGC paper does not depart from the RPC’s approach. Overall, the impression is that of a document which skews the notion of RoL to fit it into a very narrow, free market conceptual pattern. This does not correspond to the general concept and use of RoL, which is more centred around human rights and proper administration of justice. This impression is strengthened by the hierarchy consistently used throughout the document, placing market-enhancing or -facilitating mechanisms above broader and more crucial issues, such as separation of powers, an independent judiciary etc. The text relegates rights-approaches to a sideshow and emphasises elements which favour business and private contract law.

4. Furthermore, it appears that the sources for the document are partial and limited, which might account for the severe limitations of the text itself. There is no reference (other than a footnote) to the important body of work undertaken on RoL by UN agencies such as the UN itself, UNDP<sup>2</sup> and UNEP<sup>3</sup>; nor by the OSCE<sup>4</sup>, the European Commission. Some good

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<sup>1</sup> Comments on “Draft Report: Regulatory Policy and the Road to Sustainable Growth” (GOV/RPC(2010)16) - Written contribution to the OECD Regulatory Policy Committee

Paris, 7 December 2010 [http://www.tuac.org/en/public/e-docs/00/00/07/FA/document\\_doc.phtml](http://www.tuac.org/en/public/e-docs/00/00/07/FA/document_doc.phtml)

<sup>2</sup> 2010 Annual Report on UNDP’s Rule of Law Global Programme

[http://www.undp.org/cpr/documents/UNDP%20Rule%20of%20Law\\_web\\_FINAL\\_PRINT.pdf](http://www.undp.org/cpr/documents/UNDP%20Rule%20of%20Law_web_FINAL_PRINT.pdf)

<sup>3</sup> <http://www.unep.org/dec/worldcongress/index1.asp>

<sup>4</sup> <http://www.osce.org/what/human-rights>

analyses on RoL have similarly been produced by NGOs, equally omitted in the OECD document.

5. Finally the paper does not mention civil society participation in decision-making processes, which are now considered crucial to ensure compliance with, and acceptance of, the laws and the systems of justice.

### *Specific comments*

6. In paragraph 3, the OECD document uses a definition which is not widely accepted, and, interestingly but probably deliberately, quite narrow compared to the standard definition; it notably omits the strong element of human rights included in the standard definition, which is that given by the UN Secretary General in 2004<sup>5</sup>:

*“Rule of Law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”*

7. There is no reason for the OECD not to use the UN definition. Notwithstanding the UN definition, it should be noted that the RoL is notoriously difficult to define, and that multiple definitions exist. This in itself should lead to greater caution in the presentation of the notion in the OECD document.

8. In paragraph 4, it remains a mystery why the document would choose to start the list by “sustainable economic and social development”. Any authoritative work on RoL by international bodies as listed above ranks economic and social development among the lesser concerns for RoL actors. In particular one wonders where “weak property rights” come from, which are actually seldom mentioned in RoL literature; by opposition an equitable land reform might be considered a stronger element of RoL. Similarly the goal of “creating a conducive climate for doing business and attracting investment” certainly does not rank as an essential RoL concerns as it suggested in the paper.

9. It is even more worrisome that the OECD would claim in a footnote that “many elements of the rule of law are covered in the World Bank (...) “Doing Business” Survey”. The survey’s ‘employing workers’ (EW) sub-indicator depends on the cost of making employees redundant. Countries with the highest possible score are those with low minimum wages, precarious job contracts, minimal restrictions on working time, paid holidays and notice and consultation when making redundancies all of which are in contradiction with basic social rights as defined by the ILO. Unsurprisingly the survey has attracted criticism from many direction, not least the ILO itself<sup>6</sup>.

10. The text rightly notes that RoL is important in promoting social cohesion, but does not explain how that can be achieved. The text should stress that RoL contributes to social

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<sup>5</sup> UN Doc. S/2004/616 (2004), para. 6) <http://www.un.org/Docs/sc/sgrep04.html> & <http://daccess-ods.un.org/TMP/7118663.7878418.html>

<sup>6</sup> World Bank Doing Business report: The employing workers indicator, ILO, November 2007  
[http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_085125.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_085125.pdf)

inclusiveness if and only if there is social dialogue, solidarity and if social rights as defined internationally are respected. As the ILO has rightly emphasized:

*“The effectiveness of the access to social rights is ultimately related to an explicit, clearly interpretable and inclusive framing of social rights, as well as to the justiciability of these rights. Enforceability aims at guaranteeing that every individual effectively obtains the benefits of his or her rights.”<sup>7</sup>*

11. In paragraph 5, bullet point n°1 should refer to the general interest and to the need for regulation and laws to be representative of the general will and to be adopted through democratic organs. Bullet point n°2 should stress the need for separation of the three powers – rule making, enforcement, judiciary – there can be no independence of the judiciary without it. Bullet point n°3 should emphasis independence of the judiciary, proper administration of justice. Public oversight mechanisms should include civil society participation in decision making processes.

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<sup>7</sup> "Social security and the rule of law - General Survey concerning social security instruments in the light of the 2008 Declaration on Social Justice for a Fair Globalization", Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Office, Geneva 2011  
<http://www.ilo.org/gimi/gess/RessShowRessource.do?ressourceId=21980>