

PUBLIC SECTOR LABOR POLICY: A HUMAN RIGHTS APPROACH

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This paper reveals that U.S. and Canadian public sector labor policy fail to conform to international understandings of freedom of association, a fundamental human right.¹ Globalization has set in motion new pressures for a reassessment of labor and union rights. A new paradigm is emerging where antiquated and inadequate labor policies that ignore these international standards may not be sustainable.² By applying international human rights standards through such global institutions as the International Labor Organization (ILO), we find that most U.S. public sector labor laws fall far short of international understandings of freedom of association and collective bargaining. While Canadian laws may conform to such understandings, Canadian governments have repeatedly violated the right to strike through frequent use of back-to-work laws.³ Our findings will underscore a contradiction between what is preached to the rest of the world and what is practiced at home in the United States and Canada in terms of human rights.

INTRODUCTION

Globalization and trade liberalization have had positive and negative impacts on societies. While world production of goods and services has risen, labor's share of this increased wealth has diminished.⁴ Thus, a negative effect of globalization has been the growing inequality in many developed and developing societies.⁵ To deal with this inequality the ILO in 2008 passed a "Declaration on Social Justice for a Fair Globalization."⁶ The declaration requires that nation states adhere to and promote the core labor standards of the ILO: "free-

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¹ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/RES/3/217 A (Dec. 10, 1948).

² See James A. Gross, A Human Rights Perspective on United States Labor Relations Law: A Violation of the Right of Freedom of Association, 3 EMP. RTS. & EMP. POL'Y J. 65, 65 (1999).

³ See LEO PANITCH & DONALD SWARTZ, FROM CONSENT TO COERCION: THE ASSAULT ON TRADE UNION FREEDOMS 5 (3d ed. 2008).

⁴ Margaret Jacobson & Filippo Occhino, *Labor's Declining Share of Income and Rising Inequality*, FED. RES. BANK CLEVELAND (Sept. 25, 2012), <http://www.clevelandfed.org/research/commentary/2012/2012-13.pdf>.

⁵ ORG. FOR ECON. CO-OPERATION & DEV., INCOME INEQUALITY AND GROWTH: THE ROLE OF TAXES AND TRANSFERS (Jan. 2012), available at <http://www.oecd.org/eco/public-finance/49417295.pdf>.

⁶ Press Release, Int'l Labour Org., ILO Adopts Landmark Declaration on Social Justice for a Fair Globalization (June 12, 2008), available at http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_094186/lang—en/index.htm.

dom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, and the elimination of discrimination in respect of employment and occupation.”⁷

According to the United Nations’ Universal Declaration of Human Rights from 1948, freedom of association is a fundamental human right.⁸ After the grotesque violations of human rights during World War II, the countries of the world decided that human rights could not be left to the political whims of nation states.⁹ According to this approach, human rights flow from our very existence on earth; they cannot be taken away by national entities.¹⁰ This paper examines public sector labor laws in North America to see if they meet international standards on the fundamental human right of freedom of association. More specifically, collective bargaining and dispute resolution procedures for state, provincial, and federal laws in Canada and the United States will be examined in light of international norms and standards.

A HUMAN RIGHTS APPROACH

Several scholars have made a case for a new internationalist human rights approach to American private sector labor policy.¹¹ It is framed as a critique of existing labor policy whereby labor law, employee rights, and union powers have all been subject to the ebb and flow of politics.¹² The 2011 Tea Party attacks on public sector collective bargaining in several states are an example.¹³ This shifting labor policy has often been justified in terms of achieving a balance of power between management and labor.¹⁴ Historically, U.S. labor law has not been fashioned by using a human rights standard.

The concept of human rights, however, has not been an important influence in the making of U.S. labor policy. Legislation concerning workers’ collective action, in particular, was rooted in frequently changing conceptions of labor-management relations, not fundamental human rights. Consequently, workers were considered to have only those rights set forth in specific statutes or collective bargaining contracts and those statutes and contracts were subject to shifting political and bargaining power.¹⁵

⁷ INT’L LABOUR ORG., ILO DECLARATION ON SOCIAL JUSTICE FOR A FAIR GLOBALIZATION 6–7 (June 10, 2008), available at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms_099766.pdf.

⁸ Universal Declaration of Human Rights, *supra* note 1.

⁹ See *id.*; Gross, *supra* note 2, at 68.

¹⁰ See Gross, *supra* note 2, at 67.

¹¹ Roy J. Adams, *Choice or Voice? Rethinking American Labor Policy in Light of the International Human Rights Consensus*, 5 EMP. RTS. & EMP. POL’Y J. 521, 522 (2001); Lance Compa, *Do International Freedom of Association Standards Apply to Public Sector Labor Relations in the United States?*, 13 HUM. RTS. REV. 373, 374 (2012); Gross, *supra* note 2, at 66.

¹² Gross, *supra* note 2, at 66.

¹³ Robert Hebdon et al., *Public Sector Collective Bargaining: Tumultuous Times*, in COLLECTIVE BARGAINING UNDER DURESS 251, 279 (Howard R. Stanger et al. eds., 2013); see also David Lewin et al., *The New Great Debate About Unionism and Collective Bargaining in U.S. State and Local Governments*, 65 INDUS. & LAB. REL. REV. 749, 751 (2012).

¹⁴ Gross, *supra* note 2, at 86.

¹⁵ *Id.* at 65–66.

In contrast to the flexible employee rights produced by current labor policy, human rights are moral rights stemming from the fact of our human existence, not dependent on a statute or the strength of the collective bargaining agreement.¹⁶

AN INTERNATIONAL CONSENSUS

During the 1990s, in the context of globalization, a strong international consensus emerged around core labor rights.¹⁷ It held that all human rights are universal, indivisible, interdependent, and interrelated.¹⁸ The accord was politically diverse and included the Organization of Economic Cooperation and Development, the World Trade Organization, the ILO, and the United Nations.¹⁹ Also signing on to the agreement were such employer organizations as the International Chamber of Commerce, the International Organization of Employers, at least fifty major multinationals, and the U.S. Council for International Business.²⁰ The consensus centered on the ILO's Declaration of Fundamental Principles and Rights at Work in 1998.²¹ As discussed above, the 1998 consensus was renewed in 2008 with the Declaration on Social Justice for a Fair Globalization.²² Both the 2008 and 1998 declarations had two central purposes. The first purpose was to encourage members to endorse and legislate the core labor standards. The second purpose was to respect, promote, and to realize in good faith four core rights deemed to be fundamental human rights. These four core rights include: freedom of association and effective recognition of the right to collective bargaining, elimination of compulsory labor, effective abolition of child labor, and elimination of employment discrimination.²³

THE RESEARCH TASK

This project will use internationally accepted conventions and decisions of the ILO as benchmarks for judging federal, state, and provincial public sector labor laws in the United States and Canada. The key question that this paper will attempt to answer is whether the fundamental human right of freedom of association has and continues to be violated for public sector employees in the United States and Canada. We begin by setting out the structure of U.S. public sector collective bargaining. The paper then takes an initial look at the question by first broadly defining collective bargaining. A prior study conducted by the United States Government Accountability Office (GAO) that performed a similar task to ours is then examined. This is followed by a critique of the GAO study in light of the narrow definition of collective bargaining that was

¹⁶ *Id.* at 67.

¹⁷ Adams, *supra* note 11, at 522–23.

¹⁸ *Id.* at 527.

¹⁹ *Id.* at 523.

²⁰ *Id.*

²¹ *Id.*

²² INT'L LABOUR ORG., *supra* note 7, at 6.

²³ *Id.* at 11; *The Text of the Declaration and its Follow-Up*, INT'L LABOUR ORG., <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang—en/index.htm> (last visited Feb. 5, 2014).

employed. We include a discussion of the implications of the Canadian practice of back-to-work legislation for freedom of association. The final section will carry out a more complete analysis of U.S. laws using a more accepted definition of collective bargaining in accord with international principles.

THE ORIGIN AND STRUCTURE OF U.S. PUBLIC SECTOR BARGAINING

The National Labor Relations Act of 1935 excluded all federal, state, and local government employers from collective bargaining coverage.²⁴ Thus, without national guidelines, collective bargaining emerged on a rather piecemeal basis by the federal and state governments. The first state to formalize collective bargaining for its employees was Wisconsin in 1959.²⁵ The federal government provided a weaker system of bargaining later in 1962, when President Kennedy signed Executive Order 10988.²⁶ It provided no right to strike and prohibited bargaining on wages and benefits.²⁷ Following these early developments, a number of states passed laws covering some or all state and local public employees. The state laws fall into four categories:

1. States with a single comprehensive law covering multiple occupations: District of Columbia, Florida, Hawaii, Iowa, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New York, Ohio, Oregon, New Mexico;
2. States with a law for each occupation: Alaska, California, Connecticut, Delaware, Illinois, Kansas, Maine, Michigan, Nebraska, Pennsylvania, South Dakota, Vermont, Washington, Wisconsin;
3. States with a law for some occupations: Alabama, Arizona, Georgia, Idaho, Indiana, Kentucky, Maryland, Missouri, Oklahoma, Rhode Island, Tennessee, Nevada, Utah, Texas, Wyoming; and
4. States with no law: Arkansas, Colorado, Louisiana, Mississippi, North Carolina, North Dakota, South Carolina, Virginia, West Virginia.²⁸

North Carolina, a state in the fourth category that explicitly bans collective bargaining, has received considerable attention from the ILO.²⁹ Until 2011, changes in the law governing collective bargaining were infrequent and collective bargaining received little attention in the media and by academics.

²⁴ 29 U.S.C. § 152(2) (1978).

²⁵ Paul M. Secunda, *The Wisconsin Public-Sector Labor Dispute of 2011*, 27 A.B.A. J. LAB. & EMP. L. 293, 294 (2012).

²⁶ Richard B. Freeman & Eunice Han, *The War Against Public Sector Collective Bargaining in the US*, 54 J. INDUS. REL. 386, 388 (2012).

²⁷ *Id.*

²⁸ See *id.* at 389; Robert Hebdon, *Public Sector Dispute Resolution in Transition*, in PUBLIC SECTOR EMPLOYMENT IN A TIME OF TRANSITION 85, 91–92 (Dale Belman et al. eds., 1996).

²⁹ Compa, *supra* note 11, at 375.

WHAT IS COLLECTIVE BARGAINING?

Collective bargaining is embedded in the fundamental right of freedom of association.³⁰ That is, if workers join unions to influence their working conditions, then in exercising their right to freedom of association they ought to have some minimum form of collective bargaining. This is a widely held view supported by the Supreme Court of Canada and the ILO.³¹ The Canadian Supreme Court's decision on this subject is important because it "constitutionalized" collective bargaining and in so doing, internationalized labor rights by referencing the Universal Declaration of Human Rights, United Nations human rights covenants, ILO conventions, and the 1998 ILO Declaration.³²

The Supreme Court has said that "Canada's current international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the *Charter [of Rights and Freedoms]*—Canada's counterpart to the US Bill of rights."³³ Applying the *Charter* to public employees, the Court said that:

The right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work

. . . .

. . . Collective bargaining permits workers to achieve a form of workplace democracy and to ensure the rule of law in the workplace. Workers gain a voice to influence the establishment of rules that control a major aspect of their lives

. . . .

. . . Recognizing that workers have the right to bargain collectively as part of their freedom to associate reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the *Charter*.³⁴

THE ILO DEFINITION OF COLLECTIVE BARGAINING

In 2002, the ILO published a comprehensive work that detailed the standards and principles of its supervisory bodies.³⁵ Employing a case law approach, the definition of collective bargaining has evolved through the years. The final stage was reached in 1981 with the adoption of the Collective Bargaining Convention, 1981 (No. 154), which includes the whole public service (with the exception of the armed forces and the police) alongside the private sector. This Convention only allows for the public service to set special modalities of application through national laws or regulations or national practice.³⁶ A state that ratifies the Convention cannot confine itself to consultations, but has

³⁰ See *id.* at 374–75.

³¹ See *id.* at 377; see also *Facilities Subsector Bargaining Ass'n v. British Columbia*, [2007] S.C.R. 391, 437–38 (Can.).

³² See Roy J. Adams, *Bewilderment and Beyond: A Comment on the Fraser Case*, 16 CANADIAN LAB. & EMP. L.J. 313, 316, 326–28 (2012).

³³ *Compa*, *supra* note 11, at 377 (internal quotation marks omitted).

³⁴ *Facilities Subsector Bargaining Ass'n*, [2007] S.C.R. at 439, 441.

³⁵ See generally BERNARD GERNIGON ET AL., *COLLECTIVE BARGAINING: ILO STANDARDS AND THE PRINCIPLES OF THE SUPERVISORY BODIES* (2000).

³⁶ *Id.* at 94.

to “promote collective bargaining” with the aim, *inter alia*, of “determining working conditions and terms of employment.”³⁷ The recognition of the right of public servants in two international instruments to collective bargaining swept aside previous objections, although it was accepted that the characteristics of this sector modify the application of this right.³⁸

The modification of rights for the public sector referred to above represents a limitation on the right to strike for those public employees providing services “whose interruption would endanger the life, personal safety or health of the whole or part of the population.”³⁹

The ILO paper provides a working definition of collective bargaining, and Article 2 of Convention No. 154 defines collective bargaining as:

[A]ll negotiations which take place between an employer, a group of employers or one or more employers’ organisations, on the one hand, and one or more workers’ organisations, on the other, for:

- (a) determining working conditions and terms of employment; and/or
- (b) regulating relations between employers and workers; and/or
- (c) regulating relations between employers or their organisations and a workers’ organisation or workers’ organisations.⁴⁰

The definition provided by the ILO, while helpful, does not fully explain what “regulating relations” means and how disputes are resolved. To gain a better understanding of the real meaning of the ILO collective bargaining definition, two U.S. cases are relevant: one involving North Carolina and the other involving New York.

A) *North Carolina*

The Committee on Freedom of Association (CFA) of the ILO applied international standards on freedom of association to the North Carolina ban on public sector collective bargaining in a 2007 case involving the United Electrical Workers and the State. Here are some excerpts from the CFA decision:

In conclusion, the Committee emphasizes that the right to bargain freely with employers, including the government in its quality of employer, with respect to conditions of work of public employees . . . constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof . . .

. . . .
 . . . The [CFA] Committee requests the [U.S.] Government to promote the establishment of a collective bargaining framework in the public sector in North Carolina – with the participation of representatives of the state and local administration and public employees’ trade unions, and the technical assistance of the [ILO] Office if so desired – and to take steps aimed at bringing the state legislation, in particular, through the repeal of NCGS §95-98, into conformity with the freedom of association principles, thus ensuring the effective recognition of the right of collective bargaining

³⁷ *See id.* at 95.

³⁸ *Id.* at 50.

³⁹ *Id.* at 39–41.

⁴⁰ *Id.* at 95.

throughout the country's territory. The Committee requests to be kept informed of developments in this respect.⁴¹

The ILO has followed up on their decision on several occasions since 2007,⁴² but at the time of writing this paper, North Carolina had failed to implement their recommendations. The latest update was documented in November of 2011 by the CFA as follows:

The Committee notes the above information provided by the Government and regrets that none of the bills introduced in North Carolina to remove the collective bargaining ban imposed on state and local public employees were enacted into law. The Committee expresses the firm hope that similar legislation will be introduced and adopted in the very near future. Taking note of the efforts made by the Government, the Committee urges it to continue to promote freedom of association and collective bargaining rights in the public sector, including by promoting the establishment of a collective bargaining framework in the public sector in North Carolina and to keep it informed of developments in that respect.⁴³

B) New York

More recently, the CFA found that New York State's "Taylor Law" prohibiting strikes by public employees and imposing fines and imprisonment on strikers violates the ILO definition of collective bargaining.⁴⁴ The case arose from a three-day New York City subway strike in 2005.⁴⁵

The Committee said that "the restrictions of the right to strike in the transportation sector as set out in the Taylor Law are not in conformity with the principles of freedom of association" and requested the government "to take steps aimed at bringing the law into conformity" with Committee on Freedom of Association (FOA) principles.⁴⁶

The key recommendations of the CFA were the following:

(a) While noting the Government's reference to the Federalist system of constitutional government, the Committee nevertheless requests the Government to take steps aimed at bringing the state legislation, through the amendment of the relevant provisions of the Taylor Law, into conformity with freedom of association principles so that only (1) public servants exercising authority in the name of the state and (2) workers of essential services in the strict sense of the term may be restricted in their right to strike

. . . .

⁴¹ *Report in Which the Committee Requests to be Kept Informed of Development – Report No 344, March 2007*, INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50002:0::NO::P50002_COMPLAINT_TEXT_ID:2909835 (last visited Feb. 5, 2014).

⁴² *Effect Given to the Recommendations of the Committee and the Governing Body – Report No 362, November 2011*, INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO::P50002_COMPLAINT_TEXT_ID:2909848 (last visited Feb. 5, 2014).

⁴³ *Id.*

⁴⁴ *Report in Which the Committee Requests to be Kept Informed of Development – Report No 362, November 2011*, INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50002:0::NO::P50002_COMPLAINT_TEXT_ID:2912150 (last visited Feb. 5, 2014) [hereinafter *Report No 362*].

⁴⁵ *Id.*

⁴⁶ *Compa, supra* note 11, at 375.

(d) Noting the initiatives at the federal level to promote collective bargaining in the public service, the Committee trusts that the Government will continue taking measures to promote full respect for freedom of association principles throughout the country.

(e) The Committee urges the Government to keep it informed of developments in respect of all above recommendations.

(f) The Committee invites the Government to consider taking the necessary measures for the ratification of Conventions Nos 87 and 98.⁴⁷

It is noteworthy that, since the complaint must be answered by the U.S. Government, the responsibility for compliance also rests with the national government even though it is directed at the State of New York's law.⁴⁸ The ILO does not accept the excuse that in this federalist system of government, the states have the responsibility for public sector labor law.⁴⁹ The U.S. government is held accountable.

THE GAO STUDY

A relevant study for this enquiry was a study conducted by the GAO on the scope of collective bargaining rights of U.S. employees.⁵⁰ This study was designed to estimate the number of American workers not covered by any collective bargaining law.⁵¹ As such, it provides an uncontroversial estimate of those workers who do not have collective bargaining available. Our particular focus will be on public employees, but it is worth noting that there are many other categories of exclusions from collective bargaining. The GAO chose a very narrow definition of collective bargaining that effectively amounted to a duty to bargain with no right to strike or other dispute resolution procedure and no examination of restrictions on the scope of bargaining. The definition used by the GAO was as follows:

An important issue in this analysis is the definition of bargaining rights. There is variation in the rights provided under the NLRA, the Railway Labor Act and the many state and local laws governing collective bargaining. These differences span a host of issues, from the procedures governing representation elections, the right to strike, and binding arbitration, to the scope of bargaining and the remedies for violations. Although the right to strike could be considered part of a "core definition of bargaining rights," we based our definition on the concepts of union recognition—permitting individuals to join together and form unions and the requirement that employers recognize employee organizations—and "good faith bargaining"—bargaining with intent to reach an agreement. . . .

Different definitions of collective bargaining rights would likely lead to different empirical estimates of the percentage of the labor force that has bargaining rights. However, because of the predominance of the NLRA and the Railway Labor Act in the private sector, most of the differences among laws occur in the public sector. Thus, for many alternative definitions, for example, one based on the right to strike,

⁴⁷ *Report No 362, supra* note 44.

⁴⁸ *See id.*

⁴⁹ *See id.*

⁵⁰ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-835, COLLECTIVE BARGAINING RIGHTS: INFORMATION ON THE NUMBER OF WORKERS WITH AND WITHOUT BARGAINING RIGHTS 2 (Sept. 2002), available at <http://www.gao.gov/new.items/d02835.pdf>.

⁵¹ *Id.* at 1.

the change in the percent of the labor force with rights would be largely limited to changes in the number of public employees who had this right.⁵²

The GAO found that 32 million workers lacked access to collective bargaining, 6.9 million of which were in the federal, state, and local public sectors.⁵³ The other groups without rights included about 8.5 million independent contractors, 5.5 million employees of certain small businesses, and 10.2 million supervisory/managerial employees (including 8.6 million first-line supervisors).⁵⁴

The GAO created three groups of states according to the legislation with respect to collective bargaining: (1) all public employee occupations have some form of bargaining, (2) some public employee occupations have a form of bargaining, and (3) no public employee groups have bargaining rights.⁵⁵

The GAO results, using their definition of freedom to choose a union and a duty to bargain in good faith, produced the following distribution of states. Note again that the GAO definition excluded a right to strike and failed to include a requirement to negotiate all terms and conditions of employment.

The first group contains twenty-five states and the District of Columbia.⁵⁶ “Delaware has an employer ‘opt-in’ provision for local government employees in cities and towns with fewer than 100 employees.⁵⁷ As with the NLRA, the state laws that provide collective bargaining rights to public employees often exclude various groups of employees (e.g., many states expressly exclude management officials) from coverage.”⁵⁸

Group two contains twelve states.⁵⁹

Three of these states, Indiana, Kentucky and Missouri, extend collective bargaining rights to certain public employees through an executive order from the governor. Many public employees may be covered by local laws, for example, in Maryland they do not have a comprehensive law covering all public employees. All state employees are covered under state labor laws, but state statutes cover local employees only in certain counties. Local governments in Maryland may have their own ordinances giving local public employees collective bargaining rights, but these ordinances do not exist in every county.⁶⁰

The twelve states in group three do not have collective bargaining laws for public employees.⁶¹ In addition, “Texas prohibits collective bargaining for

⁵² *Id.* at 23–24.

⁵³ *Id.* at 2–3.

⁵⁴ *Id.* at 2.

⁵⁵ *Id.* at 8–9.

⁵⁶ *Id.* at 8. The 25 states are Alaska, California, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Vermont, Washington, and Wisconsin. *Id.* at 8 n.12.

⁵⁷ *Id.* at 8 n.12.

⁵⁸ *Id.*

⁵⁹ *Id.* at 9. These states are Georgia, Indiana, Idaho, Kansas, Kentucky, Maryland, Missouri, Nevada, North Dakota, Oklahoma, Tennessee, and Wyoming. *Id.* at 9 n.14.

⁶⁰ *Id.* at 9 n.14.

⁶¹ *Id.* at 8–9. These states are Alabama, Arizona, Arkansas, Colorado, Louisiana, Mississippi, New Mexico, North Carolina, South Carolina, Texas, Virginia, and West Virginia. *Id.* at 9 n.13.

most groups of public employees.”⁶² However, “firefighters and police may bargain in jurisdictions with approval from a majority of voters.”⁶³ Thus, according to the GAO’s analysis, all employees in group three and an unspecified portion of those in group two do not have bargaining rights. This results in the denial of bargaining rights for almost 7 million public employees.⁶⁴ Using our terminology, they are denied a fundamental human right – freedom of association. However, the GAO analysis is at best incomplete because key elements of collective bargaining are excluded.

THE GAO STUDY – AN EXPANDED ANALYSIS

The problem, however, is that despite the ILO definition of collective bargaining and the interpretations of it in the North Carolina, New York, and GAO cases, there exists no accepted universal definition. To the GAO definition of a neutral procedure for unionization and a duty to bargain in good faith is added the ILO requirement of a right to strike, except in cases of essential services that may pose a threat to the health and safety of the public.⁶⁵ The ability to negotiate on all terms and conditions of employment with possible exceptions of group benefits and pensions where more than one bargaining unit would be affected by negotiation outcomes must be added to this definition. Thus, for all workers, a meaningful definition of collective bargaining must have the following elements:

1. A fair and neutral procedure to freely choose a union without undue influence from employers, unions, or other organizations or persons;
2. A duty to bargain and a good faith requirement for both employers and unions;
3. A right to strike except in the case of essential services; and
4. An ability to bargain for all terms and conditions of employment.

The ILO permits an exemption from striking for those employees providing essential services that if withdrawn would pose a threat to the health or safety of the public.⁶⁶ Employees who are essential should be provided an adequate substitute procedure to that of the strike. The recommended acceptable substitute is compulsory interest arbitration.

Failure by any government to provide any of these four conditions would make it impossible for employees to exercise their human right to freedom of association. Governments have direct control over the rights of their own employees. There can be no excuse for denying public employees access to freedom of association.

If the GAO had used a definition more in line with international norms, there would be a significantly larger number of workers without collective bargaining rights. We re-examine the GAO evidence by requiring that collective

⁶² *Id.* at 9 n.13.

⁶³ *Id.*

⁶⁴ *Id.* at 10.

⁶⁵ GERNIGON ET AL., *supra* note 35, at 34, 41, 59.

⁶⁶ *Id.* at 75–77.

bargaining include the right to strike for non-essential workers. According to a 1999 survey about municipal bargaining in the United States, 422 cities among 1998 cities in the sample had no collective bargaining law. This group is clearly in violation of the ILO conventions because all four of the conditions for collective bargaining and freedom of association are missing. The largest category of cities in the survey, 1,173 cities, had laws in place that did not provide finality.⁶⁷ No finality was defined as neither a right to strike or arbitration as a final dispute procedure.⁶⁸ These laws typically end in non-binding fact-finding or mediation.⁶⁹ They are in violation of ILO conventions either because the law does not provide for a right to strike for non-essential employees or because there is not an adequate substitute for the right to strike where they are essential.⁷⁰ The 1,125 cities that are under arbitration are in compliance with international norms, but only if employees were performing non-essential functions.⁷¹ The 872 cities in the next group had a limited right to strike and would be subject to labor laws that are in compliance with international norms.⁷² This survey shows that most city employees in the United States are under laws that violate international norms for freedom of association.

States have different dominant collective bargaining laws⁷³ for municipal employees.⁷⁴ Seven states provide for a right to strike but not for all employees, seven states have arbitration, and thirty-six states, the vast majority, are in the “no finality” category.⁷⁵ These latter states are in violation of the human right to freedom of association insofar as there is no procedure available to a union to effectively bargain with employers.⁷⁶ There is neither a right to strike nor, in the case of essential services, an adequate substitute.⁷⁷

The analysis would not be complete without a discussion of the federal collective bargaining laws. Again, all federal employees lack a right to strike and only postal workers have arbitration.⁷⁸ However, postal workers have already been determined by the ILO to be non-essential in the sense that a withdrawal of services would not harm the health and safety of the public, especially if an essential services protocol were negotiated.⁷⁹ Thus, all federal

⁶⁷ Robert Hebdon, *Toward a Theory of Workplace Conflict: The Case of U.S. Municipal Collective Bargaining*, in 14 *ADVANCES IN INDUSTRIAL & LABOR RELATIONS* 33, 51 (David Lewin & Bruce E. Kaufman eds., 2005).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Dominant in this context is defined as the law that covers the most public employees in States where there are more than one law.

⁷⁴ See Robert Hebdon & Robert Stern, *Do Public-Sector Strike Bans Really Prevent Conflict?*, 42 *INDUS. REL.* 493, 493 (2003).

⁷⁵ *Id.* at 501.

⁷⁶ See GERNIGON ET AL., *supra* note 35, at 7, 13, 31; see also GERNIGON ET AL., *ILO PRINCIPLES CONCERNING THE RIGHT TO STRIKE* 14, 38 (1998).

⁷⁷ *Id.*

⁷⁸ RICHARD KEARNEY, *LABOR RELATIONS IN THE PUBLIC SECTOR* 26 (4th ed. 2009).

⁷⁹ *Report in Which the Committee Requests to be Kept Informed of Development – Report No 367, March 2013*, INT’L LABOUR ORG., <http://www.ilo.org/dyn/normlex/en/f?p=1000>

collective bargaining laws in the United States violate internationally accepted norms for freedom of association.

A more complete analysis would also include an investigation of the scope of bargaining. The federal government and several states severely restrict the items that can be negotiated and thus violate one of the necessary conditions of freedom of association.⁸⁰ The federal government, for example, prohibits bargaining over wages and benefits.⁸¹ Thus, in our view, the GAO study significantly understates human rights violations in the United States.

In Canada, all of the provinces, as well as the federal government, provide for collective bargaining with either a right to strike or arbitration as a final dispute procedure.⁸² Canadian violations of freedom of association fall into four categories: removal of right to strike for non-essential workers, frequent use of back-to-work legislation to end strikes, the exclusion of police groups from collective bargaining, and restrictions on the scope of negotiable issues.⁸³ A recent ILO decision on a federal government back-to-work law determined that the Canadian government violated postal employees' freedom of association by taking away the right to strike for non-essential workers.⁸⁴ Here is an excerpt from the ILO decision:

The Committee notes that, in the present case, the complainant organization alleges that by enacting the Act to provide for the resumption and continuation of postal services (Bill C-6), which terminated the strike, the Federal Government interrupted collective bargaining between the CUPW-STTP and the Canada Post Corporation and referred the dispute to compulsory and binding arbitration, thereby violating the right to freedom of association and setting a dangerous precedent of government intervention in labour disputes that do not involve essential services.

The Committee notes that, in the complainant's view, the Government of Canada violated Convention No. 87 through the passage of Bill C-6, which has impeded postal workers employed by Canada Post Corporation and represented by the CUPW-STTP from engaging in free collective bargaining and exercising their right to strike, by imposing compulsory final offer selection arbitration and terminating the strike, whereas the parties had arrived at essential service protocols.⁸⁵

CONCLUSION

This paper is a preliminary enquiry into the question of North American governments' violation of their employees' human right to freedom of association. It is clear that we are in a new era of globalization that involves free trade in goods and services, greater mobility and security of capital, and constraints

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⁸⁰ KEARNEY, *supra* note 78, at 25–29.

⁸¹ *Id.* at 28–29.

⁸² See Morley Gunderson et al., *Collective Bargaining in the Public Sector: Comment*, 86 AM. ECON. REV. 315 (1996).

⁸³ See generally LEO PANITCH & DONALD SWARTZ, FROM CONSENT TO COERCION: THE ASSAULT ON TRADE UNION FREEDOMS (3d ed. 2008); see also Gunderson et al., *supra* note 82, at 315 (discussing how dispute costs are affected by requiring binding wage arbitration versus granting the right to strike in the Canadian public sector).

⁸⁴ *Report No 367*, *supra* note 79.

⁸⁵ *Id.*

on government action. Labor market regulations have been slow to respond to these developments. There is a growing international consensus around core labor rights as set out by the ILO and various international bodies. We have found North American governments to be in violation of the fundamental right to freedom of association for a significant number of their own employees. This question needs a much more thorough investigation than we offer here. For example, there should be a full enquiry into legislative restrictions on the scope of negotiable issues. It seems clear, however, based on their own evidence that governments have been playing 'fast and loose' with employee rights including freedom of association – a human right.