"Worker Representation in the Public Sector: Are the Ideals of the Wagner Act Model Attainable? The Cases of Canada and the U.S."

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Introduction

- Some context
  - Private Sector
    - The Wagner act has evolved into an employer choice model – that is employers have the ability to choose a union
  - Public Sector
    - The public sector is also an employer choice model – there is little opposition to the existence of unions but the form of collective bargaining is often selected by the employer
Introduction

- Public Sector
  - Imagine what collective bargaining would look like if a private sector employer got to choose the form of collective bargaining
    - restrictions on the right to strike
    - a narrow scope of bargaining
    - back-to-work laws
    - or worse – no bargaining at all – e.g., North Carolina
Introduction

- these restrictions may be viewed as a denial of union recognition
- they are contrary to international norms and standards about the meaning of freedom of association and collective bargaining
- thus full and free collective bargaining has never been available to a significant number of public sector workers in Canada and the U.S. – in other cases it is often unilaterally taken away (e.g., Ontario today)
- democratically elected governments select the form of union recognition and collective bargaining - So what!!
- Why shouldn’t governments have the right to do this?
- Because freedom of association is both a constitutional and human right
- the fundamental human right of freedom of association has and continues to be disrespected for public sector employees in the U.S and Canada

- internationally accepted Conventions and decisions of the ILO as can be used as benchmarks for judging U.S. and Canadian federal and state public sector labour laws
What is collective bargaining?

- Freedom of association includes collective bargaining (ILO and Supreme Court of Canada)
- But there is no universal definition
- A broad definition might include 4 elements:
  - a neutral procedure to freely choose a union
  - a duty to bargain and a good faith
  - a right to strike except in the case of essential services
  - the right to negotiate all working conditions and terms of employment
Applying the definition to US and Canada Public Sectors

- a neutral procedure to freely choose a union
- a duty to bargain and a good faith
- a right to strike except in the case of essential services
  - but must provide neutral arbitration
  - thus final dispute resolution must be either strike or arbitration
- the right to negotiate all working conditions and terms of employment
US Collective Bargaining

- the US Government Accounting Office (2002) found that 32 million workers lacked access to collective bargaining,
  - 6.9 million of which were in the federal, state, and local public sectors.
  - 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).
The GAO Study – an expanded analysis

- The GAO definition included 2 elements:
  - a neutral procedure to freely choose a union
  - a duty to bargain and a good faith

- And excluded
  - a right to strike except in the case of essential services
  - the right to negotiate all working conditions and terms of employment
Seven states provide for a right to strike, seven have arbitration and the vast majority of 36 states are in the ‘no finality’ category (defined as neither strike nor arbitration).

The US federal bargaining model is one of the worst:
- no right to strike, no arbitration (except in the Post Office)
- can’t bargaining over wages or benefits
Applying our definition of collective bargaining

- Several states permit unions but outlaw collective bargaining
- e.g., North Carolina found guilty by the ILO in 2006 and directed to repeal the existing law “into conformity with freedom of association principles, thus ensuring effective recognition of the right of collective bargaining throughout the country's territory”.
Applying our definition of collective bargaining

- In Canada, all of the provinces and federal government provide for collective bargaining with either a right to strike or arbitration as a final dispute procedure.
- 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
Since 1978 there have been at least 88 instances in which a province or the federal government has legislated striking or locked-out workers back to work.

A total of 712 agreements that have been affected by provincial orders since 1978.

The number of agreements so affected, however, has fallen significantly since the late 1970s.
Back to Work Legislation

- Among recent examples of such orders are British Columbia’s intervening in strikes by teachers in 2005 and paramedics in November 2009, and Ontario’s ending of strikes by Toronto Transit Commission employees in April 2008 and York University staff in January 2009.
- Ontario often intervened to end strikes by teachers during the 1990s and early 2000s, while Quebec imposed terms in 2005 on a broad range of public-sector employees to avoid a strike.
- The federal government has also intervened in cases such as postal strikes, public-service strikes, and rail and port strikes under federal jurisdiction.
Conclusion

- 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

- 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.
GAO Results

- Group 1 – all employees have some form of bargaining
  - Delaware has an employer “opt-in” provision for local government employees in cities and towns with fewer than 100 employees.
  - 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. P. 8, footnote 12.
Group 2 - some employees have some form of bargaining

- These states are Georgia, Indiana, Idaho, Kansas, Kentucky, Maryland, Missouri, Nevada, North Dakota, Oklahoma, Tennessee, and Wyoming. 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. P. 9, footnote 14.
GAO Results

- Group 3 - no public employee groups have bargaining rights
  - Twelve states do not have collective bargaining laws for public employees. They are Alabama, Arizona, Arkansas, Colorado, Louisiana, Mississippi, New Mexico, North Carolina, South Carolina, Texas, Virginia, and West Virginia.
  - In addition, Texas prohibits collective bargaining for most groups of public employees. However, firefighters and police may bargain in jurisdictions with approval from a majority of voters. P. 9, footnote 13.

- Source GAO Report, 2002
<table>
<thead>
<tr>
<th>Collective Bargaining Law</th>
<th>Conflict Restrictions</th>
</tr>
</thead>
<tbody>
<tr>
<td>No law [422]</td>
<td>no strikes, may be no formal grievance or grievance arbitration system, no unfair labour practices</td>
</tr>
<tr>
<td>No finality in law [1173]</td>
<td>no strikes, union cannot have a settlement imposed by a third party (i.e., by arbitration)</td>
</tr>
<tr>
<td>Conventional arbitration [403]</td>
<td>no strikes, final and binding arbitration</td>
</tr>
</tbody>
</table>

Source: Hebdon (2005)
Extended Analysis

- In table 2, states are identified by the dominant collective bargaining law for municipal employees.

- Seven states provide for a right to strike, seven have arbitration and the vast majority of 36 states are in the ‘no finality’ category. 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.
Canada

- In Canada, all of the provinces and federal government provide for collective bargaining with either a right to strike or arbitration as a final dispute procedure.

- 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 (Panitch and Swartz 2003; Gunderson, Hebdon, and Hyatt 1996).