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Collective Bargaining as a Minimum Employment Standard

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Abstract

Throughout the English-speaking world, collective bargaining has commonly been considered to be an option for workers discontent with the default system of management-determined conditions of work. In this article it is argued that, as a universally acclaimed human right, collective bargaining should be considered a minimum condition for everyone employed under standardised conditions of work. The government policy of offering workers a choice to bargain or to refrain from bargaining, in effect in countries such as the United States, Canada and the United Kingdom, does not meet that standard. Just as the equity goal of governments is the absence of inequality based on traits such as sex and colour, the government bargaining policy goal should be universal collective bargaining. Anything short of universality should be considered a social problem in search of a more effective policy solution.

JEL Codes: J53; J58; J88

Keywords

Collective bargaining; government employment relations policy; human rights; labour standards; voluntarism.

Introduction

In recent decades, collective bargaining has emerged as a prominent human right at work. A strong global consensus has been achieved that, as a minimum condition, all of the world's workers are entitled to negotiate collectively their conditions of work. The right of workers to bargain collectively has been recognised by essentially all of the world's governments in respect of their membership in the International Labour Organisation (ILO). 'Effective recognition of the right to collective bargaining' is a principle goal of the ILO mentioned in The Declaration of Philadelphia which forms part of that organisation's constitution.[1] In the ILO's 1998 Declaration of Fundamental Principles and Rights at Work, affirmed without a negative vote by all members, collective bargaining was affirmed to be a fundamental human right.[2]

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While the principle is generally accepted, the meaning of the term and the behaviour called for by States and employers in order to respect the right is open to different interpretations. In the economically advanced English-speaking countries of Australia, Britain, Canada, New Zealand and the United States, the common understanding is that the right to bargain collectively implies a reasonable and legitimate right to refrain from bargaining. In this essay, contrarily, I will argue that no such right should be recognised as legitimate. Instead the end game of collective bargaining policy should be universality, made evident when all firms large enough to have standardised conditions of work negotiate those terms with independent employee representatives rather than imposing them unilaterally. The concrete presence of collective bargaining should be embraced as a minimum condition of employment. Authoritarian enterprise governance should be rejected as inconsistent with a democratic, human-rights-compliant world.

Interpreting the Right to Bargain Collectively

In his recent book entitled *The Democratic Aspects of Trade Union Recognition*, Alan Bogg explicates the rationale behind the policy of Britain's Labour government between the years 1997–2010 (Bogg 2009). The essential argument is that the state should not impose its notion of the good life on its citizens. Rather, citizens should be able to formulate their own version of the good life and choose the path that they consider appropriate towards its attainment. With respect to collective bargaining, this means that each individual should be able to choose whether or not to become a union member and through the union to bargain collectively terms and conditions of work. Under this philosophy, refraining from collective bargaining is a perfectly appropriate choice that the state should both respect and protect. 'It is the worker's capacity to choose whether or not to associate that is paramount, and the state must be neutral with respect to that choice' (Bogg 2009: 91). The policy is a success if workers are able to make the choice freely without fear of negative consequences.

This is the reigning philosophy not only in the UK but also in the other English-speaking countries. In the United States, although anti-union intimidation is common in practice, worker choice under 'laboratory conditions' is endorsed in theory not only by the state and society as a whole but also by the trade union movement. The philosophy was strongly evident in the 2007–2010 US campaign by organised labour in favour of the *Employee Free Choice Act* which was designed to protect choice more effectively against illicit employer intimidation.[3]

A principal defect with this philosophy is that it implicitly regards collective bargaining as an economic issue and one not to be regarded as a human right. It is seen to be an option for workers who are dissatisfied with conditions being offered to them. If workers are generally content with their conditions and with the way that they are treated by management — so the reasoning goes — it is perfectly acceptable and proper for them to leave well enough alone. From this perspective, a disorganised workplace is the product of good management and thus deserving of praise rather than denigration.[4]

While collective bargaining has an economic character and is properly regarded as a central means for the achievement of favourable economic condi-

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tions, it also has a political character. It institutes civil and political rights in an otherwise autocratic workplace. It replaces management supremacy with a form of democracy.

The right to organise and bargain collectively is globally accepted as the embodiment of freedom of association in the context of work. Freedom of Association is a human right included in the Universal Declaration of Human Rights and in both the UN Covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights. In short, it is both an economic and a political right.[5]

The modern enterprise is not only an economic arena in which labour power is purchased and put to work in pursuit of the enterprise's goals, it is also a political forum. There are governors and the governed. There are rules that specify wages, benefits, hours, workforce adjustment, job duties and procedures for settling disputes. There are rule-making processes and rule adjudication processes. The rules must be made and interpreted by some party. In the modern world the main choices are unilateral management control or joint control via labour-management collective bargaining. Looked at through a political lens, enterprises under unilateral management control may be seen to operate more like medieval manors than like modern communities. Workers are more akin to 'subjects' than they are to 'citizens' in democratic countries. The rulers may rule benevolently or malevolently but in either case they are not answerable to those ruled.

Although imperfect, collective bargaining introduces a kind of democracy. Workers are able to elect officials who are mandated to negotiate conditions acceptable to them. The relationship between the enterprise and the union (or unions) is more equal than is that between the individual and the enterprise. Collective agreements institute a form of mutually acceptable workplace law. Commonly, disputes over the application of the law are settled by reference to unbiased referees. Since collective agreements may not be altered except through collective negotiations, workers may rely on them and make autonomous decisions within their parameters. Where unions are vigilant, arbitrary and demeaning behaviour by management officials is checked. In short, collective bargaining protects civil and political rights at work; without collective bargaining, rights that workers enjoy as citizens of the larger society are compromised in the context of work.

In addition to enabling workers to negotiate superior economic and social conditions, the enterprise under collective bargaining exhibits the civil and political values of democracy, autonomy, equality and justice. Under collective bargaining, the dignity of the worker is more effectively protected. Without universal unionisation and collective bargaining, democracy in any nation-state is imperfect and incomplete. Because of its contribution to the broader project of a fully democratic society, the goal of every state should be near-universal collective bargaining. Although some countries have instituted mechanisms such as works councils and labour courts to instantiate civil and political rights at work to some extent, collective bargaining is by far the principal means for accomplishing that end.[6] Collective bargaining should be considered a minimum condition of employment.

The Issue of 'Voluntarism'

The International Labour Organisation is universally recognised as the principal interpreter of the meaning of the right to organise and bargain collectively. Labour standards are commonly understood to be legislatively mandated minimums. While the ILO vigorously 'promotes' collective bargaining and cajoles all of its member States to do the same, it does not mandate collective bargaining. Indeed, it applauds 'voluntarism' and in doing so might superficially be seen to be endorsing the choice interpretation of the right to bargain collectively. How then may collective bargaining be understood to be a minimum condition of employment?

Article 4 of ILO Convention 98 states that 'Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements'.[7] This standard applies, in effect, to all member States of the ILO, even those who have not ratified Convention 98, because of the constitutional responsibilities of all member States to comply with ILO principles regarding collective bargaining. The constitutional freedom of association responsibilities of member States are interpreted by the ILO's Committee on Freedom of Association (CFA) which evaluates allegations of offensives and issues recommendations on how governments may bring their labour policy into alignment with ILO principles.[8] In assessing specific cases, the CFA consistently refers to relevant conventions and recommendations including, prominently, No. 98.[9]

What is the meaning of the commitment to promote voluntary collective bargaining, while refraining from mandating collective bargaining? One interpretation might be that union recognition for collective bargaining purposes by any employer should be a voluntary act. Under this interpretation, if an employer does not want to bargain collectively it would be improper to compel bargaining.

One principle in the CFA's Digest of Decisions and Principles which summarises its jurisprudence, would seem to support the interpretation that any employer's decision to recognise a union for the purposes of collective bargaining must not be made under duress. Paragraph 926 of that document states: 'Collective bargaining, if it is to be effective, must assume a voluntary character and not entail recourse to measures of compulsion which would alter the voluntary nature of such bargaining'. One interpretation of that statement might be that since the decision must 'not entail recourse to measures of compulsion', not only is the government precluded from passing legislation compelling bargaining but also it is duty-bound to ensure that unions do not exert 'measures of compulsion' in order to acquire recognition. That interpretation is perfectly consistent with the commonly understood meaning of the words that make up paragraph 926. However, anyone familiar with industrial relations would immediately identify it as an absurdity. Employers throughout history have demonstrated a strong preference for avoiding collective bargaining. With the possible exception of a few enterprises run by altruists, if their decision with regard to union recognition were truly voluntary, there would be no collective bargaining and no unions

as we know them. If there were no unions, there would be no ILO. In short, a strong interpretation of the principle expressed in paragraph 926 would almost certainly result in the demise of the principle-creating agency.[10]

A weaker interpretation, often favoured by employer-side advocates, would be that the paragraph should be understood only to forbid governments from exerting compulsion for union recognition. But that interpretation is contradicted by paragraph 928 of the CFA's Digest of Decisions and Principles which states:

> Article 4 of Convention 98 in no way places a duty on the government to enforce collective bargaining, nor would it be contrary to this provision to oblige social partners, within the framework of the encouragement and promotion of the full development and utilisation of collective bargaining machinery to enter into negotiations on terms and conditions of employment.

In short, it is acceptable for governments seeking to fulfil their constitutional obligation of 'promoting' collective bargaining to oblige (aka compel) employers to recognise worker representatives even though doing so would seem to contradict paragraph 926. The ILO's Committee of Experts, whose function is to examine the legislation of countries that have ratified conventions to ascertain the compliance of their legislation with ILO principles has specifically given its approval to laws providing for compulsory bargaining.[11]

To summarise, ILO collective bargaining principles do not require governments to introduce legislation requiring employers to recognise and bargain with legitimate unions but they do permit such legislation even though the preference is for governments to 'induce' collective bargaining via less direct means.[12] The overriding principle, embedded in the constitution, is the duty of governments to make collective bargaining happen. If employers will not 'voluntarily' recognise unions, governments may compel them to do so.[13]

The vision implicit in Article 4 of Convention 98 is that employees will naturally form unions in order to secure their economic and political interests at work. It is also implicit in the fundamental work of the ILO that union formation is a good, indeed essential aspect of any democratic and rights-respecting society and thus should be encouraged. Since unions exist in essentially all societies in which they are permitted and encouraged both by law and by social norms, the assumption would appear to be accurate. Indeed unions exist in many societies where they are cruelly repressed. There is also an assumption that employers will consider it in their interests to form associations. Since employer associations exist in most of the nations of the world, that assumption would also appear to be accurate.[14]

Given the existence of unions and employers' associations, the voluntarism that Article 4 is intended to encourage is not a licence to refuse to bargain, but instead a freedom to negotiate appropriate terms and conditions as well as bargaining structures without undue government interference and restrictions.

The policy that was in effect in the United Kingdom for most of the twentieth century up until the advent of the Thatcher regime in 1979 perhaps comes closest to a realisation of the ILO vision. Governments of both the left and right 'encouraged' voluntary collective bargaining.[15] The governments did not mandate

bargaining, but government officials personally intervened in cases where companies aggressively refused to bargain and imposed implicit or explicit sanctions on those who remained intransigent.[16] At various times arbitrated terms and conditions of employment could be imposed on reluctant employers. As Dukes has summarised the situation:

> From the end of the First World War until the 1970s, governmental interventions in industrial relations, both legislative and non-legislative, were geared towards encouraging the establishment and maintenance of autonomous regulatory and dispute mechanisms. Autonomous, or 'voluntary', procedures were valued above statutory procedures and, though trade unions and employers were not, as a general rule, placed under a legal obligation to bargain collectively with one another, legal and non-legal means were used to encourage them to do so. (Dukes 2008: 239)

By the mid-1970s, according to one estimate, government encouragement, accompanied by the natural militancy and determination of the trade unions themselves, had produced an 85 per cent collective bargaining coverage rate (Bogg 2009).[17]

Another interpretation of voluntarism might be that workers should not be compelled to be union members if they prefer not to be. In general terms, that right is clearly enunciated in the Universal Declaration of Human Rights (UDHR). Article 20 (2) of that Declaration states that 'No one may be compelled to belong to an association'.

In the United States and Canada many employers have taken that principle as licence for their opposition to 'unionisation'. The logic put forth is that if workers have the right to join or not, they have a right to know all of the pros and cons of doing so. Since freedom of expression is no less of a human right than freedom of association, employers have a right to express their opinion about their workers' decision to unionise or not.

There are several problems with this logic. First of all, the legal framework for collective bargaining in the United States and Canada, known as the Wagner Act Model, requires that in order to get government backing for collective bargaining unions must attract majority support in government-specified bargaining units. Under the norms that have come into existence around the Model, if the union is unable to attract a majority, the employer retains full control of the workplace. Globally, unionisation refers to the process whereby workers form or join an association to represent their workplace interests. In North America, however, unionisation has a much narrower meaning. It is defined as the process of certifying a state-supported exclusive bargaining agent. Defeat 'unionisation' and you are relieved of the duty to bargain collectively. In other words opposition to unionisation is also opposition to collective bargaining and the perpetuation of human rights challenged workplaces (Adams 2008b).

Under ILO standards, workers have a right not only to form and join unions but also, through their unions, to negotiate their conditions of work. ILO jurisprudence suggests that, in any situation, 'the most representative' union ought to be recognised as the appropriate organisation for negotiating collective agree-

ments. Where a union commands a majority of the relevant workers it will, of course, be 'the most representative'. But even if a union does not command a majority, ILO jurisprudence strongly suggests that, if it is 'representative' it ought to be granted full bargaining rights.[18] Where no union rises to representative status, the employer should recognise all unions at least for their own members.

Majoritarian rules are permissible in order to establish an 'exclusive' bargaining agent, but where no union holds exclusive agent status, all relevant unions should be recognised at least for their own members. In short, the Wagner Act Model, as currently applied in Canada and the US, denies workers their fundamental right to bargain collectively by imposing a rule impermissible under international law. It also sets in action a contest between the union and the employer in which the object is to win the support of 50 per cent plus 1 of the relevant workers. Employers justify their participation in the game by invoking their freedom of speech. But no such game should be in evidence.

Where human rights clash, one of them must give way to some extent at least. For example, it is generally recognised that freedom of expression does not permit anyone to engage in, for example, racial, ethnic or gender slurs. Indeed, from a human rights perspective, a case is to be made that anti-union, anti-collective bargaining speech is hate speech and, therefore, ought to be made illegal.

The natural implication of this analysis is that the right to organise (the right to form a union or become a union member) is not the same as the right to bargain collectively. It is perfectly possible and reasonable for a state to put in place laws and policies, under which the right of individual workers to join or refrain from joining unions is protected, while at the same time vigorously promoting collective bargaining, with a view towards all standardised conditions of work being the result of collective negotiations.[19]

Since it is possible for any state legislatively to protect the right of workers to join or not join trade unions, while at the same time aggressively promoting collective bargaining, the legal status of mandatory union membership is not a direct concern to the issues considered here.[20] Nevertheless, some scholars have argued that laws forbidding union security, as those of the United Kingdom have done since the advent of the Thatcher regime, weaken unions to a point where they are unable to represent worker interests as effectively as they might.[21] It is therefore worthwhile to consider the status of union security under international law. As noted above, the general principle incorporated into the UDHR is that '[n]o one may be compelled to belong to an association'. Although the UDHR is not legally binding, that clause would seem to indicate that countries wanting to fully abide by international human rights standards ought not permit union security clauses.

The right to refrain from joining a union has been a major issue in the ILO since its inception. In the early years, employers attempted to make it a formal principle, but the Workers Group steadfastly refused and the 'right not to join' has never been formally accepted (Novitz 2003). The ILO has, however, conformed with the UDHR principle to the extent that it has determined that government-compelled membership does infringe upon freedom of association at work. Paragraph 363 of the Committee on Freedom of Association's Digest of Decisions

states that '[a] distinction should be made between union security clauses allowed by law and those imposed by law, only the latter appear to result in a trade union monopoly contrary to the principles of freedom of association'. With regard to closed shops, it has decided that individual member States should deal with the issue as they see fit. Paragraph 364 of the CFA digest reads: 'The admissibility of union security clauses under collective agreements was left to the discretion of ratifying States, as evidence by the preparatory work for Convention No. 98'. In short, both forbidding mandatory membership and making it a permissible subject of collective bargaining conform with international labour law as that law is shaped by the ILO.

Conclusion

It is the right of all of the world's workers collectively to negotiate the conditions under which they work. To believe that any substantial group of workers would 'voluntarily' refrain from doing so is to stretch the imagination beyond the realm of credibility. One has to imagine a workforce of a substantial size, say 100 workers, in which all of them agree that the boss ought to have complete authority to develop and change at will the wage-payment system, the pension plan, hours of work, job duties, health and safety policies and other conditions of work without consulting their representatives. One has to imagine all of these workers content to allow the boss total discretion to alter workforce size and to decide workplace disputes without access to an objective referee if disagreements occur. Without collective bargaining, there may be paternalistic benevolence but there is no democracy. Without collective bargaining, there is no equality of bargaining power. There is no autonomy to make decisions within known sets of rules, because the rules might be changed unilaterally without warning. Without collective bargaining, one has little protection from arbitrary decisions. Without collective bargaining, one is under pressure to surrender one's dignity and become a subservient supplicant to those with the power.

The final objective of employment equity is the absence of discrimination. The rights of freedom from slavery and from child labour will be realised only when there is no more slavery and no more illicit child labour. The right to bargain collectively will be fully realised only when all standardised conditions of work are the result of collective bargaining.

Notes

1. The declaration may be found at http://www.ilo.org/ilolex/english/constq.htm [accessed 28 April 2011]. Reference to collective bargaining is made in paragraph III (e).
2. Paragraph 2 declares that 'all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organisation to respect, to promote and to realise, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:
   a. Freedom of association and the effective recognition of the right to collective bargaining;

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b. The elimination of all forms of forced or compulsory labour;
c. The effective abolition of child labour; and
d. The elimination of discrimination in respect of employment and occupation'. Available at http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm [accessed 28 April 2011].

3. Several comments on EFCA are included in the special edition of *Labor, Studies in Working Class History of the Americas*, 17(3), 2010, available at http://labor.dukejournals.org/content/vol7/issue3/#UP_FOR_DEBATE [accessed 28 April 2011].
4. In the United Kingdom, New Labour rejected the idea that it ought to 'promote' collective bargaining as many British governments had done prior to the advent of Margaret Thatcher in 1979 and instead took a neutral stance towards the question. In doing so it affirmed the legitimacy of management efforts to remain non-union through the pursuit of policies designed to 'make unions unnecessary'. Bogg (2009) reviews historical efforts by British governments to encourage collective bargaining and the decision of New Labour to reject it. On the phenomenon of non-union status as the product of good management see Adams (2001a).
5. For general reviews of the relationship of the ILO to other human rights agencies see, Bartolomei de la Cruz, von Potobsky and Swepston (1996) and Atleson et al. (2008a).
6. On international variation in industrial relations law and practice, see generally, Bamber, Lansbury and Wailes (2011).
7. Included in Atleson et al. (2008b).
8. Technically, the CFA makes a report to the ILO's Governing Body telling that body what, in its opinion, the State in question ought to do in order to comply with its constitutional requirements. Over time, however, custom and practice has elevated the CFA to near independent status. The Governing Body's role in the process has become largely pro forma. It nearly always endorses the committee's reports without discussing the issues involved (Valticos and von Potobsky 1995, p. 296).
9. I have explicated the role of the CFA and the constitutional duties of member States in some detail in Adams (2008a).
10. This point was initially made by Gravel et al. 2002, p. 7.
11. Committee of Experts on the Application of Conventions and Recommendations, *Freedom of Association and Collective Bargaining* (Geneva, International Labour Office, 1983) at paragraph 243.
12. The term 'induce' was included in a report of a Committee on Freedom of Association and Industrial Relations that was unanimously endorsed by the ILO's 31st International Labour Conference (its highest legislative body) in 1948. Article 5 of that report stated that 'appropriate measures should be taken to induce employers and employers' organisations, on the one hand, and workers' organisations on the other, to enter into negotiation with a view to regulating conditions of employment by means of collective agreements'. See 'The I.L.O. and the Problem of Freedom of Association and Industrial Relations', *International Labour Review*, 58(5), November 1948, p. 598.

13. The ILO's position on compulsory good faith bargaining is discussed in some detail in Adams (2008a).
14. Although the independence of some of them has been called into question, representative labour organisations exist in essentially all member States of the ILO. Employer associations also exist in the large majority of ILO member States. See, for example France (2001).
15. This historical policy is reviewed in Bogg (2009).
16. For reports of several incidents in which government officials intervened directly see Bain (1970).
17. This article was originally written as a general comment on the nature of collective bargaining as a minimum condition of work. One of the referees found the lack of mention of Australia's new *Fair Work Act* to be 'unfortunate'. I agree. It is unfortunate. However, to properly discuss the implications of the analysis presented here for the *FW Act* would require revisions far beyond those feasible in the time available. Suffice it to say that the structure and intent of the *Act* appear to be consistent with the goal of universal collective bargaining (Forsyth 2010). On the other hand a few of its techniques (e.g. majority backing for collective bargaining to enrol government support in the face of employer intransigence and the last-ditch arbitration by the state of terms of employment when confronted with a recalcitrant employer) are yellow flags that may stretch international law. As noted in the text, a minority of workers have a right to bargain through their chosen associations even if they are unable to convince a majority of their colleagues of the wisdom of that course. Moreover, the international standards strongly favour the right to strike as the prime dispute resolution mechanism over government arbitration of terms. On the *Fair Work Act* see Creighton (2010) and Forsyth (2010).
18. ILO jurisprudence on this issue in to be found in Committee on Freedom of Association (2006). The relevant jurisprudence is to be found at paragraphs 949–980. Because the jurisprudence is based on opinions issued in response to specific cases it contains ambiguities. However, a close reading of it establishes without much doubt the principle that "the most representative" union is entitled to negotiate on behalf of all of the relevant workers. Of course, if a union has a majority it would be the most representative. But the jurisprudential language strongly suggests that even if a 'representative' union commands less than a majority, its authority to negotiate on behalf of all of the relevant workers ought to be recognised. Some of the key principles embedded in the jurisprudence are:
    1) that legislation should not require that to be recognised for collective bargaining purposes a union must demonstrate majority support.(978).
    2) In order to negotiate at the enterprise level, 'it should be sufficient for the trade union to establish that it is sufficiently representative …' (957).
    3) Recognition by an employer should be extended to 'the main unions represented in the undertaking, or the most representative of these unions …' (953).

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4) Systems with exclusive rights 'for the most representative trade union' and those 'where it is possible for a number of collective agreements to be concluded by a number of trade unions within a company are both compatible with the principles of freedom of association' (950).
5) Where the law of a country 'draws a distinction between the most representative trade union and other trade unions, such a system should not have the effect of preventing minority unions from functioning and at least having the right to make representatives on behalf of their members and to represent them in cases of individual grievances' (974).
6) Under a system 'for nominating an exclusive bargaining agent', if there is 'no union representing the required percentage', bargaining rights 'should be granted to all the unions in this unit, at least on behalf of their own members' (976).

19. For a more extensive consideration of this issue, see Adams (2001b).
20. One of the best examples of this combination is Sweden. For an analysis of the Swedish case, see Adams (1995).
21. See, for example, Mantouvalou (2010).

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