

## Discussion of Associational Freedom in The United States

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### ABSTRACT

This article studies the freedom of association of employees in international labor law and US law; compares and contrasts between international law and US law, and from there, points out the shortcomings of employees' freedom of association in the law of this leading country.

**Keywords-** freedom of association, workers, ILO, USA, labor law.

## I. INTRODUCTION

Previously, during the process of negotiating the Trans-Pacific Partnership (TPP), issues of workers' rights, labor standards, especially the requirements to exercise the right to freedom of association and joining relevant Conventions... have been repeatedly asked by trade unions in the US to promote negotiations with countries on the agenda. So, what are the core contents of the right to freedom of association and how has the US law provided for this right for American unions to base their claims on? Within the scope of this article, the author points out some basic contents of freedom of association in international legal documents and US law.

### *An overview of the evolution of associational freedom*

From the 18th century, along with the industrial revolution in Europe, the unemployment rate increased, causing labor unrest, worsening working conditions in factories, and leading to linkages among workers to fight to protect their rights. Many Governments and employers have responded quickly by-passing numerous laws and regulations to prevent such association. Over time, demands for recognition of the right to association increased with the growth of workers' organizations throughout East Europe in the mid-nineteenth-century. In this context, two businessmen from Wales, Robert Owen (1771-1853) and France, Daniel Legrand (1783-1859), spearheaded the push to form an international labour organisation to address labour concerns. The International Labor Law Association, the forerunner of the International Labor Organization (ILO), was founded in Basel in 1901 as a result of these efforts. Following World War, I, the International Labour Organization (ILO) was created in 1919 under the Treaty of Versailles.

As a result, in Part XIII (Labour) of the Treaty of Versailles and the Preamble to the ILO Charter, the idea of freedom of association has been acknowledged and articulated. This concept is specified in the ILO Constitution as one of the measures for improving working conditions and ensuring harmony. "This principle is emphasised in the Declaration of Philadelphia – A Declaration Concerning the Goals and Purposes of the International Labor Organization, which was adopted in 1944 and incorporated into the revised ILO Charter in 1946, which stated that freedom of association and expression are essential for long-term progress and that this is one of the fundamental principles for the organisation to follow".

This essential principle was not recognised until 1948, when the Conference of International Labor adopted the Convention on freedom of association and safeguarding rights to organise (No. 87, Convention 87) after World War II ended. This Convention protects workers' and employers' rights to form and join organisations of their choice, as well as their organisational autonomy. A few months later, in December 1948, the United Nations passed the Universal Declaration of Human Rights, which included specific sections on freedom of association and the capacity to join (or not join) labour unions.

A second essential document dealing to freedom of association, the Right to Organize Collective Bargaining Convention, was ratified in 1949 ("No. 98, Convention 98"). Convention 98 fills up the gaps left by Convention 87, protects trade unions against discrimination, and strengthens representative organisations' initiative.

The International Labor Conference ratified the ILO Declaration of Basic Principles and Rights at Work in June 1998. This declaration is one of the ILO's most important successes, despite its controversial nature. It emphasises the importance of freedom of association as one of the four key categories of worker rights. Encourage Member States to promote basic rights and values, the Conference declared that all Members, even if they have not ratified the Convention (...), are obliged as members of the Organization to respect, promote, and realise the principles related to basic rights and contents of that Convention in good faith with the Charter.

International labour law has long recognised freedom of association to be a foundation principle. In any culture with free and autonomous workers' organisations and unions, freedom of association is a critical connection between the four main categories of labour rights, which are required for the successful eradication of child labour, forced labour, and discrimination.

#### ***In international documents, freedom of association***

The concept of freedom of association is now widely recognised as a core right in international law. According to the Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, "everyone has the right to freedom of peaceful assembly and association." According to paragraph 4 of Article 23 of the Declaration, everyone has the freedom to form and join trade unions to protect their interests.

Both the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) were signed in 1966, and both addressed comparable issues. The ILO has recognised the right to freedom of association in a number of major texts, the most noteworthy of which being Conventions 87 and 98.

The European Convention on Human Rights (ECHR) of 1950, the American Convention on Human Rights (ACHR) of 1969, the Convention on the Basic Social Rights of Workers (CCFSRW) of 1989, the European Community Treaty on Fundamental Rights (EUCFR) of 2000, and the African Charter of Man and Human Rights (ACHPR) of 1981 all guarantee freedom of association...

#### ***The fundamentals of associational freedom***

The right to freedom of association has a broad definition, and some of its most important features, such as the right to organise, the right to collective bargaining, and the right to strike, will be explored here.

#### ***Right to organize***

This is a crucial aspect of associational freedom. Workers and employers without difference, in any form, will not seek for permission in advance but will still have the freedom to organise and join organised according to your decision, according to Convention 87.

As a result, forming and joining a trade union does not discriminate in any manner, without prohibiting or discriminating against workers and employers on the basis of profession, sex, race, nationality, political opinion, status, marital status, or age. This legislation does not allow for the prohibition or limitation of the right to organise for employees in specified industries such as export processing zones, agricultural labourers, or public sector workers.

The ILO respects employers' and workers' organisations' rights to create their own charters, governing rules, freely elect representatives, arrange their activities' administration, and draw up their own activities. Furthermore, responsible public officials must refrain from interfering with the legitimate exercise of this right.

Anti-union discrimination is one of the most serious violations of the right to freedom of association since it jeopardises trade unions. Employees' and employers' organisations must be adequately protected against any attempt by agents or members of each party to interfere with the other party's creation, governance, or internal management. The entire independence of workers' organisations in carrying out their operations in relation to employers is established under this legislation. Members of the ILO must also evaluate the potential of a clear and exact execution of the law's requirements, guaranteeing appropriate protection of workers' organisations against acts of interference, and assuring their activities in practise, according to the ILO.

#### ***The right to engage in collective bargaining***

The ability to openly negotiate with employers regarding working conditions is a fundamental component of freedom of association, and unions should be able to seek improvements in the living and working circumstances of the employees they represent via collective bargaining or other legal ways. With the exception of the military services, police, and government officials involved in state administration, the right to collective bargaining is recognised in the commercial and public sectors.

Collective bargaining, as a fundamental feature of the right to form a union, can only be successful if both parties are willing to work together. Goodwill, on the other hand, cannot be imposed by legislation; it can only be the outcome of both parties' personal efforts and persistence. On this basis, it is essential that the two parties establish an agreement and that the organisation of discussions is not delayed unduly. Both parties are bound by this agreement, and the employer has no right to unilaterally amend or cancel the provisions of a signed collective bargaining agreement, or to seek renegotiation.

The issues of collective bargaining are not split into binding and non-binding categories, but rather are focused on the establishment of terms and conditions of employment as well as the resolution of disputes between employers and

employees and their organisations. Working circumstances include not just working hours, pay, workplace safety, holidays, and so on, but also closely connected concerns in labour relations such as promotion, transfer, dismissal, and so on, as well as advantageous conditions for unions such as access to the workplace... Any limitation on collective bargaining imposed by the government should be discussed with employee and employer groups in advance to see whether an agreement can be reached.

### ***Strike authority***

Despite the fact that the right to strike is not directly specified in the ILO Charter or in Conventions 87 and 98, the ILO believes it to be a basic right of employees and trade unions. As a consequence, the right to strike is a critical legal tool for employees to exercise their right to free association while also promoting and protecting their socioeconomic interests.

Restriction or prohibition of the right to strike can only apply to certain employees in certain professions or in certain circumstances, such as the armed forces, officers authorised to exercise State power, employees in certain essential service areas “the interruption of those services would endanger the life, personal safety, or health of the entire or parts of the residential community”, and during a national crisis.

Sanctions against unions that conduct lawful strikes, according to ILO criteria, are a major infringement of the rights of freedom of association. In addition, no one will be punished for participating in or trying to participate in a legitimate strike.

When employees go on strike, using methods like dismissing or refusing to rehire them is a breach of the principles of freedom of association. Furthermore, if the employer employs new workers to sabotage the strike or replace those who are on strike, it is regarded a major violation of the freedom of association rules.

### ***In the United States, there is a right to form a group***

The right to freedom of association has become one of the most puzzling of all labour rights in the United States due to its obscurity. The United States has only ratified two of the ILO's eight Basic Conventions, including the International Covenant on Civil and Political Rights (ICCPR).

Convention 87 has yet to be ratified, despite the fact that the US Government voted for its adoption at the International Labor Conference in San Francisco in 1948, as well as recognising the importance of the Convention dating back to the Truman administration and having submitted to the Senate since 1949. The US administration did not present Convention 98 to the Senate for a variety of reasons, one of which being considerable resistance from business owners.

Some of the reasons for the failure to ratify fundamental ILO Conventions are that they are in direct conflict with American law and practise, necessitating significant changes to federal law, particularly a drastic revision of long-standing principles of US labour law in order to align with the conventions' standards if they are ratified. No ILO convention will be ratified until and until US law and practise, at both the federal and state levels, is fully compliant with the convention's provisions, according to the US Department of Labor (s).

So, what does the US Constitution and law say about freedom of association?

The First Amendment only guarantees the rights to freedom of assembly, speech, and petitioning the government for redress of grievances; the right to freedom of association is not explicitly articulated in the US Constitution. According to a US State Department study, the First Amendment, Fifth Amendment, and Fourteenth Amendment sections provide freedom of assembly in all contexts, including the capacity of workers to form and join organisations of their choice... The rights of association and organisation are governed by relevant legislation. As a result, US federal law establishes a legal corridor for freedom of association via a number of key legislation, as follows:

- a. The Railway Labor Act of 1926 (RLA): Railway employees were given the freedom to organise and negotiate collectively via representatives of their choosing under this statute. Because of the significance of rail transportation in the national economy, this legislation applies to employees in the railway business. The RLA was updated, supplemented, and increased the scope of regulation in the area of air transportation for workers and employers in 1964. The RLA now covers around one million employees in the rail and air transportation sectors in the United States.
- b. “The National Labor Relations Act (NLRA) of 1935 (often referred to as the Wagner Act)” covers the great majority of private-sector workers. Workers have the right to self-organize, create, join, or support labour groups, negotiate collectively via their own representatives, and engage in other coordinated actions for the purposes of collective bargaining, mutual assistance, or protection, according to the law. The National Labor Relations Board (NLRB) was established under this legislation with the goal of penalising unfair labour practises and conducting elections when employees wished to organise a union. If employers unjustly fire employees for engaging in union activities, the NLRB has the authority to require them to restore their salaries.
- c. The Taft-Hartley Act of 1947, also known as the Labor-Management Relations Act (LMRA): Despite President Harry Truman's veto, Congress enacted this bill to alter the NLRA, confirming the contention of American companies that the Wagner Act was excessively protective of workers. The employer free speech clause of the LMRA was established to empower managers to publicly and actively agitate against employees' freedom to self-organization. Individual states may implement right to work laws that limit voluntary agreements between employees and companies that compel all workers to pay union dues. This statute establishes guidelines for both union and employer behaviour. The LMRA prohibits

employers from suing unions for losses caused by strikes, forces unions to prolong the cooling-off period to 60 days before striking, and requires unions to make their financial operations public.

d. The Landrum-Griffin Act, also known as the Labor Management Reporting and Disclosure Act of 1959, established a Bill of Rights to protect civil liberties such as the right to free speech, the ability to have secret meetings, and the right to democratically elect trade union leaders. The LMRDA establishes sufficient protections to guarantee a fair election, preserves candidates' freedom to openly campaign, and compels unions to submit reports and comprehensive information to union members about their funds and activities. The Landrum-Griffin Act offers trade unions democratic powers, but it also gives the government more influence over intra-union matters that were previously deemed to be beyond of the public sector's purview.

e. The Wagner, Taft-Hartley, and Landrum-Griffin acts are essential Federal labour law instruments that control employment relationships in the private sector today. The Wagner Act guarantees rights to freedom of association, including the rights to organise, bargain collectively, and strike.

f. Using the aforementioned legal framework, the US Department of Labor claims that the United States has proved time and over again that American law and practise meet or surpass several ILO conventions, despite the fact that it has not yet ratified the six foundational ILO Conventions. However, there are several grounds to mistrust the US Department of Labor's allegations, which will be discussed in detail below.

g. Employees without discrimination in any form, are not needed to seek for permission in advance but still have the freedom to organise and join the organisation of his choice, according to Convention 87. With a few exceptions, this privilege extends to all employees in the commercial and governmental sectors.

h. While the NLRA includes provisions protecting workers' ability to create, join, or support labour groups, it only applies to employees who are legally defined as such. All public servants, farm labourers, family workers, and independent contractors are not covered by the NLRA. In addition, managers and supervisors are not covered by the NLRA, although the above-mentioned employees are regulated and protected by the ILO.

i. Many states have limited the power to organise and negotiate collectively to specified categories of government employees and topics. Furthermore, a few states have passed laws preventing public workers from forming collective bargaining groups. Although the United States has a plethora of labour laws that govern various professions and take diverse approaches to employees' ability to organise, these restrictions are barriers to the country's compliance with ILO standards.

j. In addition, the concept of non-interference with the freedom to organise is emphasised in International Labor Law. By putting significant limits on union calling, advocacy, distribution of union resources, and access to business assets, US labour legislation violated these ideals. The US legislation failed to comply with the ILO's standards of freedom of association and non-interference by permitting anti-union propaganda. Employers in the United States may also restrict union calling at work and the distribution of union resources in the workplace. Failure to execute a collective agreement, according to ILO rules, breaches the commitment to negotiate in good faith and the right to collective bargaining.

k. Furthermore, even though such modifications may contradict the parties' collective bargaining agreement, US labour law does not preclude an employer from unilaterally eliminating an optional subject matter during the negotiation of an agreement. Meanwhile, the International Labour Organization forbids employers from unilaterally relinquishing any right to collective bargaining, whether required or not. And, even though the ILO emphasises on avoiding unreasonable delays in the organisation of discussions, employers in the United States sometimes postpone agreements in order to avoid unionisation.

l. In contrast to ILO standards, the NLRA requires employers in the United States to negotiate mandatory topics of employment, such as wages, working hours, and other conditions relating only to the employer-employee relationship; if the topic is optional, either party can refuse, and the other party cannot ask to negotiate on the matter.

m. In the case of the right to strike, even while the ILO considers it a basic right of employees and trade unions, US labour law limits or forbids it. Unlike many other legal systems, the United States' constitution does not safeguard the right to strike or lay off employees. Instead, this privilege is protected by law and, as a result, has a far lower legal value.

n. Employers in the United States, on the other hand, are allowed to recruit employees on a permanent basis to replace those who are on strike. The Mackay theory was named after the Supreme Court judgement in *NLRB v. The Mackay Radio and Telegraph Company* in 1938. The court ruled that employees had the right to strike in order to acquire a better negotiating position, but that this right did not preclude an employer from continuing to operate by recruiting replacements during a strike. Employers are permitted to recruit employees to cover gaps left vacant by strikers under the Mackay theory, and they are not compelled to dismiss such substituted workers in order to provide a place of employment for workers who desire to return to work when the strike ends.

o. People are on the edge of losing their jobs if they go on strike under the Mackay idea, and the threat of being moved has stopped employees from using their right to strike. By recognising the employer's long-term right to substitute employment, the Mackay theory creates a legal loophole for employers who are prohibited from dismissing striking employees under Section 8(a)(3) of the NLRA from retaliating against workers who engage in strike action.

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## II. CONCLUSION

When comparing the US legislation to the ILO publications, it can be observed that the US law takes a different approach to the right to organise, the right to collective bargaining, and the right to strike. Despite its commitments as an ILO member to respect and promote the principles and fundamental rights of workers, including the right to freedom of association, the United States' law and practise do not fully respect those commitments and tend to provide a lower level of coverage and protection for workers than required by ILO standards.

To put it another way, workers' freedom of association has not been protected in line with international standards, and the US government has failed to fully meet its commitments to protect workers' rights. The United States must continue to modify the laws and procedures that govern worker freedom of organisation in the nation, as well as ratify key ILO Conventions, particularly Conventions 87 and 98.

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