

COLLECTIVE BARGAINING: AN ANALYSIS OF HURDLES AND APPLICABILITY IN THE PUBLIC SECTOR

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Abstract

This article discusses the arguments against adopting collective bargaining in the public sector and its benefits. Collective bargaining in the public sector is viewed primarily as undermining democratic governance in one way and paradoxically it is seen as an essential part of democratic governance. In the former view, collective bargaining in the public sector is seen as an interference with administrative law for personal benefit to the detriment of the taxpayer. Proponents of this view argue that unionising public sector employees encourages disloyalty to the government at the expense of public welfare. In the later view, public sector collective bargaining is viewed as a fundamental human right in a pluralistic society. Advocates of this view posit that, public sector unions provide a collective voice that stimulates improvement of government services as well as sound administration of law. They also argue that, public sector collective bargaining represents public policy interests and serves as a watchdog to government's monopoly power in employment matters. Public sector unions raise employee salaries and perks to levels higher than they would have been in the absence of collective bargaining. These two opposite views are subjected to a critical analysis in this paper, with empirical evidence for both the benefits of public sector collective bargaining and arguments against public sector unions. The article found that public sector collective bargaining depends on the socio-economic background of states although international laws favour public sector unionism.

Keywords: Public Sector, Collective Bargaining, Unions, Private Sector, Strike

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Introduction

Unionisation dates back to the period between 1866 and the 1930s born out of the need to improve working conditions primarily in the private sector. But as union membership dwindled in numbers with time in the private sector there was a remarkable growth in the public sector (Devintaz,2010; Masters et al,2010).In the contemporary world substantial debate has been made over the relevance and value of public sector unions (Mellor and Kath, 2011) and their continued prevalence in a globalised economy. Further, due to financial crises there are measures being taken worldwide by governments to increase profits and cut costs (Mellor and Kath, 2011; Salenko and Grunt, 2001). These conditions present an affront to the cause of public sector unions. Luce (2012:67) makes this observation, "The attack on public sector unions had been underway for years in such states as Indiana". In the United States, while some jurisdictions provide statutes to grant collective bargaining rights to some of the employees in the public sector Virginia and North Carolina statutorily prohibit the practice. The argument being that public sector collective bargaining is antidemocratic and that it hinders effective governance. Although this argument is sometimes advanced by courts when

reluctant to enforce collective bargaining agreements the argument is used in most cases by the executive and the legislative branches as a means to diminish the scope of negotiation.

On the contrary Chambers (2014:2) notes that, "While some oppose labour unions, others regard them as valuable, especially for the public sector. In addition, public sector collective bargaining can be preserved if labour law is tailored to economic conditions in a way that benefits all stakeholders (government, public service workers, and tax payers)".

This article reviews the background of collective bargaining in the public sector, arguments against and in support of collective bargaining in the public sector in order to provide recommendations to both practitioners and scholars.

Background

It must be noted that the constitutions of states made no mention of labour unions when early workers organised themselves to protect their earning power. Employers regarded unionisation as a threat to their business and profits although for workers it was about protecting their marketable skills and power of earning.

The genesis of labour unions is aptly described by Alder (2006:312),

"The framers of the U.S. Constitution and the interests they represented may have wanted to 'form a more perfect union' but that desire did not extend to organizations of workers and skilled trade associations. As the new country began to grow, it saw the rise of merchant capitalist and the factory system. Workers sought to protect their earning power and their marketable skills by forming worker associations, mechanic societies, and fledgling unions of skilled craft workers."

As workers joined unions and went on strikes, management tried to suppress labour unions. The national labour union was formed in 1886 in the U.S.A and advocated for increased wages and the establishment of an eight-hour work day. The unions existed for brief periods but led to many of the forms of compensation enjoyed by employees today (U.S.History, n.d.) According to Devintaz (2010) as union density declined in the private-sector, public-sector unionization increased. For Dawkins (2012) past abuses on the part of employers and their opposition to freedom of association among their employees explain the development of unions.

An employment relations system for a country is determined by its history and its socio-political, economic and technological forces. The legislative framework helps to direct employment relations paradigms. Conversely, the employment relations system helps to determine a country's history, simultaneously affecting other subsystems both inside and outside a country (Nel, 2002:55).

Definitions of Collective Bargaining

As noted by Onabanjo (2013) the phrase "collective bargaining" was first used by Beatrice Potter in her book "Co-operative Movement in Great Britain" in 1891. The phrase did not get recognition until in the book "Industrial Democracy" which she wrote together with her husband Sydney Webb in 1897. It is for this reason that the authorship of the phrase is often wrongly credited to the couple, Sydney and Beatrice Webb. They did not define the term but only gave explanations from which Flanders (1968) deduced the meaning. The term has assumed several definitions in use. According to Somers (1980:553-556),

"Collective bargaining is defined as the continuous relationship between an employer and a designated labour organization representing a specific unit of employees for the purpose of negotiating written terms of employment".

The purpose of collective bargaining is articulated as to represent employees on employment matters. This is the modern definition generally used but Beatrix and Webb in Bendix (2001:233) have described collective bargaining as "...one method whereby trade unions could maintain and improve

their members' terms and conditions of employment" This definition spells out improved employment conditions for union members although not depicting the dynamic nature of the process as given by Bendix (2001:232-233);

"a process, necessitated by a conflict of needs, interest, goals, values, perceptions and ideologies, but resting on a basic interdependency and commonality of interest, whereby employees/employee collectives and employers/employer collectives, by the conduct of continued negotiation and the application of pressure and counter pressure, attempt to achieve some balance between the fulfilment of the needs, goals and interest of management on the one hand and employees on the other- the extent to which either party achieves its objectives depending on the nature of the relationship itself, each party's source and use of power, the power balance between them, the organizational and strategic effectiveness of each party, as well as the type of bargaining structure and the prevalent economic, socio-political and other conditions".

Rycroft (1992:116) has defined collective bargaining as,

"a voluntary process for reconciling the conflicting interests and aspirations of management and labour through the joint regulation of terms and conditions of employment".

Collective bargaining is defined in the International Labour Organisation Convention No. 154 of 1981 article 2, as extending to all negotiations which take place between an employer, a group of employers or one or more employers' organizations on the one hand, and one or more workers' organizations 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 organizations and workers' organizations or workers' organizations.

Public Sector and Private Sector Collective Bargaining

According to Wellington and Winter (1971:31),

"Collective bargaining by public employees and the political process cannot be separated. The costs of such bargaining, therefore, cannot be fully measured without taking into account the impact on the allocation of political power in the typical jurisdiction".

The involvement of the private sector unions is obvious but only confined to active participation in lobbying and sometimes election campaigns. Yet in the public sector, the unions lobby and campaign for elected officials whom they deal with regularly in the

bargaining arena. It is for this reason that (Kheel 1999:105-06) contends,

“The difference between the bargaining dynamic in the public sector and the private sector is more significant than those who created most public sector bargaining statutes generally contemplated”.

Freeman and Medoff (1984) found that unions in both private sector and public sector give workers a voice, helped productivity and lower rates of turnover. Further, unions allow workers to deal with management efficiently with one collective voice, promote individual workers to speak freely, monitor employer behaviour, gain information for workers and equalize bargaining power. Workers are far more vulnerable to pressures of other powerful groups without unions.

International Law and Public Sector Collective Bargaining

Article 23 of the United Nations’ Universal Declaration of Human Rights underscores the importance of collective bargaining rights for all workers, including public employees. This is supported by the 1998 International Labour Organization Declaration on Fundamental Principles and Rights at Work.

The International Labour Conference of 1948 adopted the Freedom of Association and Protection of the Right to Organise, Convention 1948 (No. 87). The conference recognized the right to organize for workers in both the private and public sectors. Article 2 of this Convention stipulates that, “Workers and employers, without distinction whatsoever, shall have the right to establish ... organisations of their own choice without previous authorisation”. Exceptions provided for in Convention No. 87 relate to the armed forces and the police, for whom national laws or regulations shall determine the extent to which the guarantees provided for in the Convention, shall apply (Article 9 of Convention No. 87).

A new instrument was designed to promote collective bargaining – the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). It was put before the Conference for deliberations. It was recognized that collective bargaining in the public service has special characteristics that are found to be in varying degrees in most countries. One reason advanced was that a state assumes a dual role of being employer and legislative authority. Sometimes these roles overlapped and contradicted each other. Second, the state depends largely on tax revenue, and yet in its role of employer it is responsible to the electorate for the allocation and management of its resources.

Third and lastly, in certain legal and socio-cultural traditions the status of public servants is incompatible with collective bargaining or freedom of association. Apart from the uniformed forces and the police, the Convention leaves it to national laws to

decide if the guarantees of the Convention shall apply to high-level employees whose duties are policy-making or managerial in nature or to employees whose functions are of a highly confidential degree (Article 1, paragraph 2).

Member states are required to adopt measures to ensure that public employees enjoy adequate protection against acts of anti-union discrimination both in law and practice, and that public employees’ organizations enjoy adequate protection against any acts of interference by a public authority in their establishment, functioning or administration in terms of Articles 4 and 5 of Convention No.151.

Collective bargaining in the public sector: The hurdles

Many a time employee salaries and benefits chew the largest portion of the employer’s budgets thereby affecting expenditure priorities as well as tax rates. As such, it is argued that subjecting such matters to collective bargaining provides the union with an opportunity to have access to public decision makers an avenue that is denied to other interest groups. Labour –management partnerships are seen as a major impediment to implement political and policy agenda (Marlin, 2009). However, Summers cited in Marlin (2009:1374) argues,

“... the antidemocratic nature of collective bargaining is justified because public employees need the special avenue of access that collective bargaining gives them. Without it... public employees will be outnumbered in the political process by the general electorate who, as consumers of the employees’ services, will seek the most service for the lowest price”.

Marlin (2009:1375) contends that;

“The view that collective bargaining impedes effective government can be traced back at least to the infamous Boston police strike of 1919. The Boston Police Commissioner responded by prohibiting officers from being members in the union or any other organization apart from veterans’ groups. The commissioner suspended nineteen officers for their membership in the union For two days, law and order broke down with looting and rioting in downtown Boston and South Boston. Massachusetts Governor Calvin Coolidge called out the National Guard, which restored order. All of the strikers were fired”.

This spectre of the Boston police strike has hung over collective bargaining in the public sector and has led several court judgements to uphold prohibitions against union membership by public employers. It has been argued that in the education sector collective bargaining is taking (Marlin, 2009) public education to the drain. Critics decry difficulties involved in discharging teachers who misbehave or charged with gross incompetence and negligence of duty.

While discrediting public sector unionism, critics have argued that unions might be more loyal to their unions than to the government (Slater, 2004). This might cause unwarranted disturbances to their communities through strikes. These arguments are based on a perceived contradiction between the personal interests of government employees and the interests of the public - the proverbial two masters to which no public employee could serve (Rosenthal, 2013). Courts and scholars (Sunstein, 1999) were worried that bargaining would probably cause public policy to be inclined to the preferences of unions and not the broader public.

Going by the theoretical application of the sovereignty doctrine, it is the prerogative only of the government employer to establish the terms and conditions of employment for its workers (Herman, et al. 1992), therefore a joint determination of terms through collective bargaining is incompatible with the doctrine. The state is sovereign and sovereignty implies absolute power by which any independent state is governed. Collective bargaining in the public sector may constitute an infringement the sovereignty of the state.

After a period of four decades of intensifying collective bargaining rights for public employees, Wisconsin and Ohio among other states in the USA are instituting measures to reduce public sector collective bargaining (Greenhouse 2011). The main argument being, that public sector collective bargaining rights strain state budgets. The solution would therefore be to revoke collective bargaining rights for public sector employees.

Applicability of collective bargaining in the public Sector

Studies have shown a huge difference in pay and benefits between public sector employees who bargain collectively and those who do not (Frandsen, 2014). For instance, Freeman and Valletta (1988) revealed that public sector workers in states with laws in tune with collective bargaining had around six per cent (6%) higher salaries compared with those in states with no provisions for collective bargaining. Baugh and Stone (1982) focussed on public school teachers in the late 1970s and revealed a union/non-union wage gap of twelve to twenty-two per cent (12 to 22 %) while Kearney and Morgan (1980) also found huge wage gaps for different state employees. Marlow and Orzechowski (1996) conclude that, the association between unions and employment for the public sector appears to be positive.

According to Rosenthal (2013) under the new legislation in Wisconsin, public employees can bargain only over wages that cannot exceed the percentage change in the consumer price index. Rosenthal (2013) argues that, proponents of public sector bargaining have made agreements that

sometimes democratic processes for formulating policy allows the majority to set terms and conditions of public employment that are not fair to employee or to the community. Cogen cited in Rosenthal (2013) a former president of the American Federation of Teachers had this to say;

“Boards of education, whether well-meaning or not, decide upon salaries, working conditions, and curricula . . . on what is expedient, economic and politic because taxpayers are not always generous, politicians, civic-minded, nor board of education members magnanimous, our classes are overcrowded, textbooks scarce, clerical work mountainous, salaries low, and morale lower.”

In view of the above, collective bargaining stands provides a solution to some flawed majoritarian processes for determining education policy. Rosenthal (2013:723) notes that, “Workers’ opportunity to bargain collectively is properly classified as a human right.” He further argues that, unions prevent employers from abusing power vested in them over the livelihoods of either public or private employees. In terms of the International Labour Organisation (ILO) Conventions 87 and 98 workers have the right to belong to trade unions, employers’ associations as well as the right to collective bargaining in any employment relationship.

International Association of Fire fighters (Resolution 33, 2005) remarked that, collective bargaining is largely responsible for reforms that have transformed how people in America work and how they are paid. The association reported that collective bargaining is about dignity and justice as well as a vehicle for empowering workers and yet millions of employees are denied this very basic right.

As mentioned before empirical studies have shown that unionized public sector workers tend to have higher average wages and benefits than nonunionized public sector workers (Edwards, 2010). Data obtained from the Bureau of Labour Statistics in Table 1 show that union members have a thirty one per cent (31%) advantage in wages and a sixty-eight per cent (68%) advantage in benefits.

Table 1. State and Local Workers, Union vs Non-union, 2009
Average Compensation in Dollars per Hour Worked

	Union	Non-union	Ratio
Total compensation	\$47.46	\$33.33	1.42
Wages and salaries	29.90	22.86	1.31
Benefits	17.57	10.47	1.68
Health insurance	5.91	3.07	1.93
Defined-benefit pension	3.98	1.94	2.05
Defined contribution pension	0.25	0.36	0.65
Other benefits	7.43	5.10	1.46

Source: Edwards, C. Tax & Budget No.61 March 2010

The difference in this union-non-union pay partly emanates from general labour market variations across states. Literature available shows that states with relatively higher wages tend to be more unionized. Analyses that hold constant such cross-state differences manifest average pay increase levels by about ten per cent (10%) in the public sector unions (Edwards, 2010).

In the USA the public-sector unions are arguably the nation's most powerful special interest groups and this has encouraged millions of government workers to become politically active. It is for this reason that public employees are more likely to vote than other Americans (Bellante, et al 2009) thus magnifying their power.

Public sector labour law was first passed in Wisconsin in 1959 (Slater, 2011). During that time, the reality of public sector union organizing was plainly at odds with the absence of legislation giving public sector unions any rights. The 1959 Wisconsin law was later amended in 1962, dealing with fears of strike and effectively barring it through the creation of alternative means. The alternate means to resolve bargaining impasses came in the form of mediation, fact-finding, and arbitration. According to Slater (2011), by the year 1967, twenty-one states had adopted some form of public sector labour laws providing legality to collective bargaining, and eventually the majority of states did the same. As of 2009, Slater (2011) contends that, there were more government employees than private sector employees who had become union members.

Some studies conducted in USA have found that taking away collective bargaining rights would be detrimental to the populace. A recent study by labour relations experts cited in Slater (2011:15) explained,

“Challenges to the freedom of association and the right to bargain collectively, place the United States out of sync with established international human rights principles. Collective bargaining has historically served to increase consumer purchasing power, assure voice in the workplace, and provide checks and balances in society. Models for collective bargaining in the public sector have incorporated alternative dispute-resolution mechanisms to protect the public interest.”

As opposed to some assertions and stereotypes (Slater, 2011), unions do not cause inefficiencies but rather, they can improve efficiency. Further, data sources ranging from international surveys to analyses of specific types of employers show that unions have indeed a positive effect. The World Bank released a report in 2002 based on more than one thousand (1 0000) studies on the effects of unions and collective bargaining. According to this report, countries with high unionization rates tend to have higher productivity, less pay inequality, and lower unemployment. Also, countries having a large number of workers represented by unions tended to have a stabilizing and beneficial effect on a country's economy (Toke, et al 2003). Robert et al (2009) more specifically found that in the US, unionisation of teachers correlates positively with higher graduation rates and higher student scores on standardized tests.

Slater (2011:18) notes,

“And of course, when public workers are harmed, the general public is harmed; for instance, when a teacher is unable to bargain with respect to a reasonable student-teacher ratio, it is students who are harmed. The attacks on collective bargaining are best understood as partisan politics, and that is no justification for removing a longstanding, important right for working men and women”.

Strike Action

The right to go for a strike is fundamental in private sector bargaining when there is an impasse between labour and management. However, when a strike is sanctioned it is often limited in duration, place and manner, but a total prohibition of the right to strike may be considered unconstitutional and politically unacceptable. In the public sector (Summer, 2003), public employees have no right to strike. Strikes are sometimes regarded as challenges to states' sovereignty and perceived as insurrection. Strikes of public employees are no different from private employees given that the employers are the residents and taxpayers who benefit directly or indirectly from the work of employees.

As such they want maximum production for minimum cost in the private sector and more public

service and lower taxes in the public sector. While management requires services in the form of; more police protection, better schools, improved streets, and more rubbish collection among other services they still seek a reduction in taxes levied to pay a public employee. Interestingly, some public employees do not want to strike because it might expose how little their services are needed by the general public and management alike. As a result nobody cares and they risk sinking into economic oblivion. Nevertheless, strikes by public employees in essential services or not, cause inconveniences in varying degrees of both economic and political pressure. But Summer (2003:452) notes,

“Unlike a strike in the private sector, a strike in the public sector is not an economic instrument operating through the market. It is primarily a political instrument working through the political process.”

Conclusion and Recommendations

States that have ratified and are signatory to international labour laws must comply with the laws. Being a signatory and acting ‘ultra vires’ to the provisions of the international law does not reflect well on the member state. Member states must not seek to be popular by ratifying the superiority of collective bargaining as the best method of handling labour-management issues when there domestic laws contradict what they ratified. Onabanjo (2013) argues that, states should not simply embrace labour policies that include public sector collective bargaining and yet act at variance with it. The analysis in this discourse points to a direction in which there appears to be no empirical evidence convincingly compelling going against public sector collective bargaining. Available literature shows that most of the studies were carried out in the U.S.A.

It is the conviction of this study that extensive research needs to be done in other parts of the world like China, Africa, Japan, and India among others. Although the hurdles discussed in this article appear to balance arguments for the applicability of public sector collective bargaining, the provisions of the international law in the freedom of association and labour laws appear to tilt the balance in favour of collective bargaining in the public. Agreeably, international laws on essential services are important, however, these may be used to limit industrial action in the public sector if every service is deemed to be essential by those states inclined to evade the law. Domestic laws should be crafted to exclusively apply to uniformed forces and other state administrators in line with international laws.

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