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The ILO Core Standards Declaration: Changing the Climate for Changing the Law

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The ILO Core Standards Declaration: Changing the Climate for Changing the Law

Abstract
[Excerpt] Labor law in the United States is deeply entrenched against domestic pressure for change, let alone international influence. It is no surprise, then, that nearly five years after its adoption, the International Labor Organization's (ILO) 1998 Declaration on Fundamental Principles and Rights at Work has not had a direct impact on American workers' right to organize. On closer examination, however, there appears to be a "climate changing" effect that could move U.S. labor law toward the human rights framework of the Declaration.

Keywords
United States, labor law, International Labor Organization, ILO, Declaration on Fundamental Principles and Rights at Work, Wagner Act

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THE ILO CORE STANDARDS DECLARATION:
Changing the Climate for
Changing the Law

LANCE COMPA

Labor law in the United States is deeply entrenched against domestic pressure for change, let alone international influence. It is no surprise, then, that nearly five years after its adoption, the International Labor Organization's (ILO) 1998 Declaration on Fundamental Principles and Rights at Work has not had a direct impact on American workers' right to organize. On closer examination, however, there appears to be a "climate changing" effect that could move U.S. labor law toward the human rights framework of the Declaration.

The Wagner Act: A Fateful Choice
U.S. law protecting workers is not grounded in fundamental rights. It rests on the legislature's constitutional power to regulate interstate business. Congress conceivably could have grounded "Labor's Magna Charta," as the 1935 Wagner Act has often been called, in fundamental rights provisions of the Constitution—like the First Amendment's protection of speech and assembly, the Thirteenth Amendment's affirmation of free labor, and the Fourteenth Amendment's guarantee of equal protection. Such a foundation to labor law might have made it easier in our own time to apply international human rights standards to domestic labor law.

But Wagner Act drafters worried that the Supreme Court would declare the new law unconstitutional. They opted for narrow economic grounds to justify passage, citing the commerce clause and Congress's need to address what the Act's findings called "forms of industrial strife or unrest... burdening or obstructing commerce..." The Supreme Court upheld the Wagner Act based on arguments that the Act reduced strikes, not that it advanced workers' rights.

The choice to base the Wagner Act on economics by stressing the free flow of commerce set U.S. labor law on a path away from human rights as a guiding principle. Ironically, the only genuinely rights-based feature of our labor law is the "employer free speech" amendment in the 1947 Taft-Hartley Act, which allows employers to openly and aggressively campaign against worker self-organization.

Trade union growth after the Wagner Act masked the implications of choosing an economic rather than a fundamental rights underpinning for our labor law. When union membership fell and prevailing values shifted away from industrial democracy and social solidarity—instead moving toward management control, competitiveness, and greed—free-market economic imperatives trumped workers' fundamental rights. Indeed, without a human rights foundation for labor law, employers could argue...
that workers' organizing and bargaining rights were themselves "burdens" on the free flow of commerce.\

A New Opportunity

We missed the opportunity to ground our labor law in workers' basic rights during the 1930s. Now the ILO Declaration and the movement to promote it present a new chance to create a human rights framework for U.S. labor law.

Human rights first penetrated U.S. labor concerns through trade laws, not labor laws. For example, a 1984 labor rights clause in the Generalized System of Preferences made respect for "internationally recognized worker rights" a condition for trade benefits. Congress's definition of those "rights" was idiosyncratic and did not refer to ILO standards. Nonetheless, as advocates filed complaints and cases moved through agency review processes, ILO norms became decisive points of reference in analyzing countries' compliance with the law.

A further move toward an international labor rights framework came in 1994 with the North American Free Trade Agreement (NAFTA) and its labor side-agreement, the North American Agreement on Labor Cooperation (NAALC). Negotiators stressed the obligation to effectively enforce domestic labor laws, not international standards. But they defined eleven common "labor principles," covering what later became core labor standards in the ILO Declaration. The parties to the agreements also included wages and working hours, health and safety, workers' compensation, and migrant workers' rights among their labor principles.

The NAALC's principles created an implicit rights charter for the three NAFTA countries. Besides many cases targeting abuses in Mexico, advocates have used the NAALC in U.S. cases involving Sprint's closure of a California facility after workers formed a union, the efficacy of New York's workers' compensation system, and organizing rights of migrant workers in the Washington State apple industry.

The NAALC is not a "hard law" system, so these complaints did not bring enforceable remedies like reinstatement and back pay, workers' compensation awards, or union recognition, which are still left to domestic law enforcement. But the NAALC's "soft law" approach of investigations, public hearings, reports, and recommendations put U.S. law under a human and labor rights spotlight.

Since the Declaration

Since adoption of the ILO Declaration, several developments indicate that greater attention is being given to core labor standards in U.S. labor law discourse:

- In its 1999 report to the ILO under the Declaration's follow-up procedure, the United States for the first time acknowledged serious problems with U.S. labor law and practice regarding workers' organizing and bargaining rights.
- The United States signaled its growing commitment to core labor standards in its 2001 free trade agreement with Jordan, which explicitly committed the parties to observance of the ILO Declaration.
- The human rights community gave new prominence to ILO core standards in analyzing workers' rights in the United States. Human Rights Watch, for example, published two...
major studies in 2000—on U.S. workers’ freedom of association and on child labor in American agriculture.5

- U.S. labor law scholars are incorporating human rights norms and ILO core standards in their analyses, not just domestic discourse based on the commerce clause and other economic considerations.

- A new student movement that began against sweatshops in overseas factories has adopted a human and labor rights approach to the problems of workers on their own campuses and in their communities, often citing international labor rights norms for guidance.

- The AFL-CIO launched a broad-based “Voice at Work” campaign stressing themes of human rights, civil rights, and labor rights in support of workers’ organizing campaigns around the country. Allied labor support groups are developing a similar “Rights at Work” network.

Two Key Cases

Two significant legal cases in 2002 brought home the importance of the ILO Declaration to workers in the United States. In one, the AFL-CIO used the Declaration in an ILO complaint opposing the Supreme Court’s Hoffman Plastic decision, where the Court ruled that undocumented workers illegally fired for union activity are not entitled to a back-pay remedy.

The AFL-CIO argued that this decision and Congress’s failure to correct it violates the commitment of the United States under the ILO Declaration to promote freedom of association. The ILO cannot overrule the U.S. Supreme Court, but finding that the United States is failing to protect the right to organize could help efforts to correct the Supreme Court decision through new legislation.

In the second case, U.S. labor law faced examination under ILO standards in a November 2002 trial in Norway. The Norwegian oil workers union (NOPEF) sought judicial permission under Norwegian law to boycott the North Sea operations of Trico Corp., a Louisiana company that allegedly violated American workers’ rights in an organizing campaign in the Gulf Coast region. Trico’s North Sea arm was the company’s most profitable venture, and a boycott could have had devastating economic effects.

A key issue in the case was whether U.S. labor law and practice conform to ILO norms. NOPEF and Trico’s Norwegian counsel each called expert witnesses from the United States to testify about whether U.S. law and practice violate ILO core standards on freedom of association. The Norwegian court’s finding that U.S. law failed to meet international standards would have let the NOPEF boycott proceed.

Just before the U.S. experts’ testimony, NOPEF settled the case on Trico’s promise to respect workers’ organizing rights in Louisiana.4 The boycott trigger was deactivated. Still, the Trico case signaled a remarkable impact of ILO core standards within the United States. Similar cases could arise in the future as trade unions increase their cross-border solidarity.

Toward a Human Rights Approach

The movement toward a human rights and labor rights approach using ILO core standards as a guide does not mean changes in U.S. law will follow quickly, especially with the foreseeable makeup of the Administration, Congress, and courts in the near future. But the 1998 ILO Declaration is fostering new ways of talking and thinking about labor law in the United States. Changing the climate is a necessary prelude to changing policy and practice.

NOTES

1. For a comprehensive account of this choice and how it was made, see James Gray Pope, 2002, “The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1937,” Columbia Law Review, Vol. 102, no. 1, pp. 1–121.

2. The Supreme Court’s Mackay Radio decision allowing permanent striker replacement is one example. Two of many other examples are the Supreme Court’s decisions in First National Maintenance and Lechmere: the first promoted employers’ interest in “unencumbered” economic decision making over workers’ bargaining rights, while the second promoted employers’ property rights over workers’ organizing rights.


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