THE FUNDAMENTAL CONVENTION NO. 87 OF
THE INTERNATIONAL LABOUR ORGANIZATION
– UNION’S FREEDOM OF ASSOCIATION IN
BRAZIL AND IN THE UNITED STATES

Jane K. Aparecido *

I. INTRODUCTION........................................................................................................ 376

II. INTRODUCTION TO THE INTERNATIONAL LABOUR ORGANIZATION AND
ITS FUNDAMENTAL CONVENTIONS................................................................. 377

III. CONVENTION NO. 87 ON FREEDOM OF ASSOCIATION AND THE
PROTECTION OF THE RIGHT TO ORGANISE.................................................. 380

IV. BRAZIL’S DOMESTIC LEGAL SYSTEM......................................................... 383
   A. International Conventions in Brazil’s Legal System ......................... 383
   B. The International Labour Organization and Convention No. 87—
      Brazil’s View ............................................................................. 385
   C. Workers’ Freedom of Association in the Brazilian Legal System 386

V. THE UNITED STATES’ DOMESTIC LEGAL SYSTEM................................. 389
   A. International Conventions in the American Legal System .......... 389
   B. The International Labour Organization and Convention No. 87—
      The United States’ View ..................................................... 391
   C. Workers’ Freedom of Association in the American Legal
      System ...... ............................................................................. 393

VI. CONCLUSION........................................................................................................ 396

This piece is about how two economically and socially different
countries interpret and deal with the International Labour Organization’s
(ILO) conventions in their respective legal systems. Convention No. 87,
regarding the Freedom of Association and Protection of the Right to
Organise, will serve as the basis for the discussion and comparison. The
article’s objective is to show that both Brazil and the United States restrict
the right of labor organizing in different ways, but that both ways go against
the recommendation of the ILO to allow workers to join the union of their
choice. The article does not intend to discuss sovereignty issues and points
of view on that regard. Each country’s view on sovereignty is definitely
taken into consideration by governments when deciding on international
instruments, such as the conventions of the ILO. However, this article aims

* LLM in International and Comparative Law from The Ohio State University Moritz
College of Law. International Fellow of the American Association of University Women (AAUW),
2014.
to focus on the legal rationale used by the United States and Brazil when faced with Convention No. 87 of the ILO. The analysis will go into the reasons why neither Brazil nor the United States have ratified Convention No. 87. It will take a closer look at these countries’ different approaches towards labor and employment rights, and the relationship between international law and their domestic laws. This piece does not try to go over all the existing literature on the topic, but rather it brings out the opinion of recent writers and judicial decisions of both countries. Throughout the comparison of both legal systems, it will be possible to see how developed and developing countries react to the attempts of international organizations to reach a global standard for the protection of workers’ rights and the weight needed for economic growth and market competition.

I. INTRODUCTION

This Introduction includes Part I of this article, which discusses the International Labour Organization (ILO), a specialized agency of the United Nations (U.N.), promoting labor and employment rights among its members. One way it seeks to fulfill this mission is by obligating members to follow the regulations (i.e. covenants) they create by signing and ratifying. Part II of this article sets out an overview of the eight covenants that the ILO considers to be fundamental on the basis of their delineation of the most basic labor and employment rights that aim at promoting fair working standards, social justice, and economic prosperity. Part III takes a closer look at the Convention on Freedom of Association and Protection of the Right to Organise (Convention No. 87). This is one of the aforementioned fundamental conventions, which deals with the right of workers to organize themselves, and have an active role in the formulation, and defend their interests.

Parts IV and V of this article go into the Brazilian and the American domestic legal systems regarding international and labor law and their views of the ILO and Convention No. 87. Neither Brazil nor the United States has ratified Convention No. 87. Although these countries have different approaches towards labor rights, employment rights, and even towards the way international documents are ratified and then incorporated into their domestic legal systems, both have decided that the standards brought by Convention No. 87 conflict with their domestic standards. Thus, the conclusion of this article states that analyzing and comparing the manner in which countries, from different economic and industrial stages, recognize ILO’s international documents should be paramount when discussing international labor rights and building necessary and binding global standards for ILO members to follow.
II. INTRODUCTION TO THE INTERNATIONAL LABOUR ORGANIZATION AND ITS FUNDAMENTAL CONVENTIONS

ILO was founded in 1919 as part of the Treaty of Versailles that ended World War I, and aims to end “injustice, hardship and privation” by improving working conditions.\(^1\) ILO is a special agency within the U.N., containing 185 Member States, and has tripartite representation by governments, workers, and employers.\(^2\) For the purpose of achieving its goals, ILO regulates issues pertaining to labor and employment rights.\(^3\)

There are three instruments that ILO can use in pursuit of reaching its goals: conventions, recommendations, and resolutions.\(^4\) Conventions and recommendations form the “International Labour Code,” and the resolutions are considered annexes.\(^5\) Only conventions can be ratified by Member States and become binding.\(^6\) Despite this power to make binding documents, “[t]he ILO is not an international parliament or a supranational organization it is more like a diplomatic conference in labor law and, in this condition, its strength depends on the consent of its participants.”\(^7\)

After a convention is adopted, its text is transmitted to Member States to be examined during a period of twelve or eighteen months.\(^8\) If a Member State approves the convention, it will contact and submit a report to the International Labour Office detailing if there is any difficulty that might impede or delay the ratification.\(^9\) A Member State may also agree to only part of the convention.\(^10\) In that case, the State can partially ratify the convention if the text of the document so allows.\(^11\)

---

3. Id.
6. ILO CONST. art. 20.
8. Id. at 137.
9. Id.
10. Id. at 138.
11. Id. at 137.
In 1998, ILO recognized some of its conventions as fundamental because they represent “core labor standards,” defined as the most important labor principles pertaining to workers’ human rights. Brazilian Professor Rúbia Zanotelli explains that the eight fundamental conventions “cover four essential areas: freedom of association and the right to collective bargain; eradication of child labor; eradication of forced labor and non-discrimination in employment or occupation.” Below is a chart illustrating the fundamental conventions and their ratification dates both by Brazil and by the United States, the countries discussed in this article.

---


Brazil has signed most of the fundamental conventions, whereas the United States has signed only two of them. Neither Brazil nor the United States has signed Convention No. 87 on Freedom of Association and the
Protection of the Right to Organise, although both countries are free democracies that protect the freedom of association in their constitutions.\(^1\)

One of the problems ILO faces is “[t]he idea that workers’ rights and labour standards impair employment and slow down economic growth.”\(^2\) Moreover,

As long as this narrative remains entrenched, national labour standards, rules to strengthen collective voice and enhance bargaining, and other institutions designed to address either the general or particular predicaments of workers will manifest as second-best solutions which States may be able to afford when times are good but which are at perennial risk . . . as soon as things get bad.\(^3\)

It is very likely that this thought is what led Brazil and the United States to avoid ratifying some of the ILO conventions, the former because it aims at increasing its development and the latter to keep its development rates.

III. CONVENTION NO. 87 ON FREEDOM OF ASSOCIATION AND THE PROTECTION OF THE RIGHT TO ORGANISE

Convention No. 87 of the International Labour Organization was adopted in 1948 and has been signed by 153 countries.\(^4\) Of all the fundamental conventions, No. 87 is the least ratified, as can be seen from the graph below.\(^5\)

---


17. *Id.* at 86–87.


19. *Id.*
Convention No. 87 is about the right that all workers and employers, without distinction, shall have to establish and to join organizations of their own choosing without previous authorization. The objective is “to protect the autonomy and independence of workers’ and employers’ organizations in relation to the public authorities, in their establishment and in their functioning and dissolution.”

In 2008, ILO launched a report on global freedom of association, this document is part of a major global report following the ILO’s declaration regarding the fundamental labor principles and rights at the ninety-seventh session of the International Labor Conference in 2008. The report revealed that many States are interested in Convention No. 87 and in the pursuit of a higher number of ratifications.

The specific report on freedom of association further demonstrated that some of the countries that are among the most densely populated or have the greatest industrial importance, are among the ones that have not ratified Convention No. 87. This fact caught the ILO policy-makers’ attention because a great number of workers and employers were not beneficiaries of the protection established by the convention. The report states that:

23. Id. at 85–87.
24. Id. at 6.
25. Id.
about half of the total active population of the member States of the ILO live in five of the countries that have not yet ratified the Convention 87 (Brazil, China, India, the Islamic Republic of Iran, and the United States). In the last four years these countries have not taken any significant measures towards ratification.26

The report also states that Argentina, Brazil, Paraguay, and Uruguay assumed a series of commitments by signing the Labor-Social Declaration of Mercosur in 1998.27 This is because the Declaration of Mercosur makes reference to the Declaration on Fundamental Principles and Rights at Work from the ILO.28 As such, it reaffirms these countries’ commitments to respecting, promoting, and implementing the rights and obligations contained in the core conventions of the ILO.29 However, these countries do not seem to have fulfilled the cited commitment. As the graph below shows, most of the complaints about violations of the freedom of association come from the Americas:30

![Figure 1.2. Allegations examined by the CFA from March 2004 to June 2007 by region](image)

The Committee on Freedom of Association (CFA) is a complaint mechanism utilized by ILO; the Committee may hear complaints against governments even if the country is not a party to Convention No. 87.31 “The CFA has long been lauded for its contribution to human and labor union rights.”32 However, its review is not a binding obligation. ILO especially encourages the ratification of the fundamental conventions and

26. Id.
28. Id.
29. Id.
30. Id. at 9.
31. Id. at xii.
the Member State actions that aim at effectively fulfilling those rights, such as implementation and harmonization with domestic laws. 33

Professor Mariângela Ariosi understands that international treaties with labor nature should be analyzed as human rights matters, especially concerning their hierarchy in the domestic legal system. 34 Indeed, countries like Brazil provide special treatment when international documents involve human rights, but that does not make it any easier to solve harmonization difficulties.

When it comes to the harmonization between ILO conventions and States’ domestic legislation, ILO has specific procedures to give Member States some guidance:

The ILO works with [M]ember States that want to bring their national laws into line with international labour standards. The development of appropriate legal frameworks to govern relations between employers, workers and governments and sound functioning of industrial relations, help to ensure the rule of law in the labour market. 35

In this regard, harmonization with the domestic legal system was the reason raised by both Brazil and by the United States for not ratifying Convention No. 87.

IV. BRAZIL’S DOMESTIC LEGAL SYSTEM

A. International Conventions in Brazil’s Legal System

Since the promulgation of its democratic constitution in 1988, Brazil began an opening period to international norms and expanded its constitutional protection of human rights. 36 Therefore, Brazil was engaged in the international movement towards the protection of human rights by signing and ratifying international treaties on this regard as part of its

35. Freedom of Association in practice, supra note 22, at 63.
international agenda. The Constitution of 1988 prescribes the integration of these international documents into Brazil’s domestic legal system, giving them constitutional status to increase their protection.

As can be seen in Title II of the Brazilian Constitution, which discusses the Fundamental Rights and Guarantees, Article Five is the first article in this title to address the important considerations regarding these rights. In Paragraph One, it explains that fundamental rights are immediately applicable, that is, there is no need for further regulations in order for the right to be considered. In Paragraph Two, which is of great importance in this discussion, it specifies that the fundamental rights expressed in the Constitution are not exclusive and rights coming from international treaties, of which Brazil is part of, are also constitutionally protected.

In the Brazilian legal treatises, Paragraph Three is the most discussed, and it is also the most recent since it was added to the Brazilian Constitution in 2004. It dictates that only international human rights treaties that undergo the same approval procedure of constitutional amendments, a longer and more difficult approval process, will be considered as constitutional amendments, thus, having the highest hierarchy in the constitution. As the constitution states, “International human rights treaties and conventions which are approved in each House of the National Congress, in two rounds of voting, by three fifths of the votes of the respective members shall be equivalent to constitutional amendments.”

The Brazilian Constitution of 1988 was developed from the break of the authoritarian regime that started in 1964. The political background for this decision can be noticed in the importance the Constitution framers gave to fundamental human rights, and by the preoccupation with the country’s image in the international scenario.

37. Id.
38. Id.
39. CONST. OF THE FEDERATIVE REPUBLIC OF BRAZIL 2010, art. 5.
40. CONST. OF THE FEDERATIVE REPUBLIC OF BRAZIL 2010, art. 5, para. 1.
41. CONST. OF THE FEDERATIVE REPUBLIC OF BRAZIL 2010, art. 5, para. 2.
42. CONST. OF THE FEDERATIVE REPUBLIC OF BRAZIL 2010, art. 1 (amended 2004); CONST. OF THE FEDERATIVE REPUBLIC OF BRAZIL 2010, art. 5, para. 3.
43. CONST. OF THE FEDERATIVE REPUBLIC OF BRAZIL 2010, art. 5, para. 3.
44. CONST. OF THE FEDERATIVE REPUBLIC OF BRAZIL 2010, art. 5, para. 3.
B. The International Labour Organization and Convention No. 87—Brazil’s View

Brazil is one of the original members of the International Labour Organization. It was already a member in November 1, 1945 when ILO was incorporated to the U.N. as one of its specialized agencies.\(^{45}\) Brazil was also one of ILO’s members when the Organization was founded in 1919.\(^{46}\)

Convention No. 87 is about full freedom of association and protection of the right to organize as well as the plurality of organization, defined as the existence of many union units concerning the same issue or in the same territorial base.

In this convention, workers and employers, without distinction, have the right to organize or be part of an organization of their choosing, to promote and defend their interests. Therefore, these organizations have the right to elaborate their statutes and regulations, freely elect their representatives and organize their administration, according to art. three of the convention.\(^{47}\)

Brazil did not ratify Convention No. 87 because the Convention allows for the plurality of organizations, whereas the Brazilian Constitution does not. Article Eight of Brazil’s Constitution determines the singleness of labor organizations per territory.\(^{48}\) Singleness is defined as a limitation imposed by the government against the freedom of workers to join the organization of their choice.\(^{49}\) This is because the government only allows one organization for a specific profession or category, and in a specific region. For example, in an entire city all the metalworkers of all industries can only be organized under the same workers’ organization, the only one permitted to act in that city. Therefore, if Brazil ratified Convention No. 87, there would be a conflict between the international norm and the domestic norm.

---

45. ILO CONST. art. 1.
47. Freedom of Association, supra note 14, at art. 3.
C. Workers’ Freedom of Association in the Brazilian Legal System

Labor law experts in Brazil criticize the Brazilian union model to a great degree. Jose Carlos Arouca, a Brazilian federal judge in labor and employment courts, argues that the model is archaic. Norms that come from collective bargains may be even more important than conditions stipulated in an individual employment contract, because the hypioskewr of an individual worker is superseded by workers discussing employment terms on an equal footing with the owner of the employment positions, the employers.

In Brazil, the first unions were called “workers’ leagues” and started between 1800 and 1900, as a result of the influence brought by European immigrants who arrived in Brazil. Rural unions were first officially recognized in 1903, and urban ones in 1907. In 1930, however, unionization suffered with the State’s intervention during a period known as the “Vargas Era” when President Getulio Vargas created the Ministry of Labor, Industry and Commerce.

Governmental interference ultimately harmed the freedom of association. In 1943, the Consolidation of Labor Legislation (CLT in Portuguese), a Brazilian labor legislation, was promulgated. In 1964, with the beginning of the military dictatorship in Brazil, intervention upon unions increased and a new kind of union emerged: assisted unions, which received its assistance from government resources and as such were limited by what the government considered proper.

With the enactment of the democratic Constitution of 1988, unions regained some of their freedom by eliminating governmental intervention. However, some characteristics were kept, such as the union singleness discussed here. According to Arouca, what happens in Brazil is something labor writers coined “inverted pluralism”:

---

50. See generally JOSE CARLOS AROUCA, O FUTURO DO DIREITO SINDICAL 654 (2007).
52. Id. at 5–6.
53. Id. at 11.
55. Id.
The Ministry of Labor through its technocrats has recognized all kinds of “so-called” unions, in the name of the freedom of association that, in reality, is just an opportunism motivated by the easy funding from the union official contribution . . . “[t]he real purpose is to demoralize the singleness system, which allowed the unstoppable formation of weak, “yellow”, “stamp”, “ghost” unions, nothing less than 15,961, 11,354 of workers and 4,607 of employers, an increase of 42.6% since 1991, according to Center Union polling in 2002 from IBGE.”

Defenders of the singleness of labor organizations argue that the plurality of organizations would make unions weak because there would be a great number of them dealing with the same workers’ rights in different ways, and thus diluting the strength of the workers’ movement. On the contrary, it is the Brazilian singleness that has been causing this exact problem, since organizations tend to create divisions in professions and categories that do not really exist, fragmenting description of duties in an attempt to create their own organization. Among the 1900 labor organizations in Brazil, only 1000 are effective representatives of workers’ interests. If Brazil ratified Convention No. 87, those organizations would be the only ones that would survive.

In 2002, the National Council on Economic and Social Development elaborated a final report that, among other dispositions on labor associations in Brazil, recommended that the principles in Convention No. 87 be applied. A Labor National Forum started working on this task, and in its final report, the same recommendation was present. However, the labor association reform project never went forward because of a lack of legislative interest in changing the current model.

In a Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, it is said that

56. See generally AROUCA, supra note 50.
57. Id.
59. Id.
60. See generally AROUCA, supra note 50.
61. Id.
The provisions contained in a national constitution concerning the prohibition of creating more than one trade union for a given occupational or economic category, regardless of the level of organization, in a given territorial area which in no case may be smaller than a municipality, are not compatible with the principles of freedom of association.62

A study performed by the Secretary of Labor Relations of the Ministry of Labor and Employment in Brazil identifies the existence of 23,726 associations registered and spread over 1950 categories.63 It seems that creativity is the only limit for starting an association. Some examples of current unions are: Country Artists’ Union, Astrologers’ Union, Union of the Professions in Collective Bargaining, Union of the Owners of Pure Blood English Horses, Rug Workers’ Union, Union of Workers of Similar Categories, Union of Sellers of “Acaraje” and other Typical Foods.64

Convention No. 87 has similar topics as those in Article 22 of the International Covenant on Civil and Political Rights, which dictates that every person has the right to organize and be part of labor organizations of its choosing, being subject only to restrictions that are needed in a democratic society such as national security interest, public order, and protection of rights and freedoms.65 Similar language appears in Article Eight of the International Covenant on Economic, Social and Cultural Rights and Article Sixteen of the American Convention on Human Rights (Pact of San Jose, Costa Rica), ratified in 1992 by Brazil without reservations. Singleness of association does not seem a necessity in a democratic society and, does not even respond to national security interests, public order or protection of rights and freedoms. It is only an unjustified restriction to the ample freedom of association that includes labor organizations.66

---


64. Id.


66. Id.
If Convention No. 87 were ratified by Brazil, according to Article Five of the Brazilian Constitution, these two interpretations would be possible:

a) According to Paragraph Two, the Convention No. 87 would enter the domestic legal system as a constitutional norm, because it contains fundamental human rights. However, there would be a conflict with art. 8, II of the Constitution that would be resolved by choosing the most favorable norm (a principle of labor law in Brazil). The most favorable norm to workers would be Convention No. 87 and art. 8 would simply stop being applied.

b) If the internalization of the convention followed the procedures in Paragraph 3 of art. 5, the dispositions in Convention No. 87 would be part of the roll of human rights protected by the constitution with the same status of a constitutional amendment, that is, it would be a petrous clause, which means it would not be taken out of the constitution. However, problems could arise in the case of eventual denunciation of the convention.

Convention No. 87 would probably be considered supra-legal or even constitutional law, if ratified. However, ratification has not occurred because it conflicts with Brazil’s Constitution regarding the singleness of unions per region and category present in Brazil’s domestic legal system. Although judges and doctrine writers favor the ratification of Convention No. 87, Brazil’s legislative bodies have chosen not to consider changes to the constitution regarding this issue yet.

V. THE UNITED STATES’ DOMESTIC LEGAL SYSTEM

A. International Conventions in the American Legal System

According to the Supremacy Clause of Article VI, Paragraph 2 of the Constitution,

---

67. CONST. OF THE FEDERATIVE REPUBLIC OF BRAZIL 2010, art. 5, para. 2.
68. CONST. OF THE FEDERATIVE REPUBLIC OF BRAZIL 2010, art. 5, para. 3.
This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby.\(^{69}\)

Therefore, when the United States ratifies a convention such as No. 87 of the ILO, it will become part of the law of the land, and it will bind states as any other law.

The procedure for the ratification of treaties includes the submission of the signed treaty to the Senate, where a committee on foreign relations will analyze it.\(^{70}\) If the Senate approves the treaty by a majority vote of two thirds, the President proclaims the treaty to enter into effect.\(^{71}\) Art. II (Two) of the United States Constitution provides that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”\(^{72}\)

There is nothing in the constitution differentiating the hierarchy of treaties when compared to domestic law, or the treatment of treaties that incorporate human rights. These more detailed issues are left for the courts to decide. As an example of these applications, the case Whitney v. Robertson, 124 U.S. 190 (1888) establishes the ‘last-in-time rule;’ when there is a clash between an international treaty provision and a national law, the ‘newest’ law applies.\(^{73}\)

Steve Charnovitz, Associate Professor of Law at George Washington University Law School, explains that

“\text{ILO conventions have the potential to be directly applied by U.S courts. In the case Warren v. United States, the Supreme Court held that the United States, as owner of a merchant ship, was liable to seamen for injuries he had suffered on shore leave. In deciding the case, the court appeared to accept the applicable ILO convention as United States law.}^{74}\)"

However, courts could also require implementing legislation that would incorporate Convention No. 87 into domestic law, superseding any

\(^{69}\) U.S. CONST. art. VI, ¶ 2.  
\(^{70}\) U.S. CONST. art. II, § 2.  
\(^{71}\) Id.  
\(^{72}\) Id.  
\(^{73}\) Whitney v. Robertson, 124 U.S. 190, 194 (1888).  
\(^{74}\) Charnovitz, supra note 32.
prior federal or state statutes that might have conflicting legal requirements due to the last-in-time rule.75

B. The International Labour Organization and Convention No. 87—The United States’ View

Although United States officials had been among the writers of the ILO Constitution in 1919, relations between the ILO and the United States have not always been smooth. The United States withdrew from ILO in 1975, and in the “notice of withdraw[al] . . . , secretary of state Henry Kissinger stressed that question[s] involving relation[s] between states and proclamation of economic principles should be left to the U.N. . . . [and that the ILO should not] exceed its mandate.”76

The United States only rejoined the organization in 1980 after establishing a consultative committee to oversee international labor issues.77 This consultative committee, the President’s Committee on the ILO (PCILO), is comprised of the Secretaries of State and Commerce, President’s National Security Advisor, the Assistant to the President for Economic Policy, the Presidents of the AFL-CIO, and the United States Council for International Business (USCIB).78 This committee adopted a tripartite rule of analysis for ILO conventions:

1. If there are any differences between the convention and Federal law and practice, these will be dealt with in the normal legislative process;
2. There is no intention to change State law and practice by federal action through ratification of ILO conventions;
3. The examination will include possible conflicts between Federal and State law that would be caused by such ratification.79

The group responsible for this analysis is a subcommittee called Tripartite Advisory Panel on International Labor Standards (TAPILS); this procedure must be followed before any ILO convention is sent to the United States Senate for ratification.80

77. Id.
79. Id.
80. Id.
Back in 1949, President Truman transmitted Convention No. 87 to the Senate for advice and consent. However, this is the longest-pending treaty before the Senate. One interesting aspect is that, although the United States has not ratified the convention, it has required other countries, to which it has trade relations with, to do so. “In one somewhat ironic episode, Indonesia ratified Convention No. 87 in 1998 after being urged to do so by the United States government and the International Monetary Fund.”

Facts like these subject the United States to criticism that it does not practice what it preaches. Besides this reputational cost to the country, the United States also places itself at a disadvantage because it cannot bring complaints against other countries that fail in observation of what they ratified.

Like Brazil, the United States also raises concerns about the harmonization with domestic law as one of the reasons for not ratifying Convention No. 87. TAPILS considered the convention very different from American labor standards because it would require so many drastic changes to existing United States laws.

Some other reasons given were:

a) It would broaden the classes of employees covered under the NLRA, because certain classes of workers such as supervisors, public employees and independent contractors are excluded from coverage under the NLRA;

b) The Landrum-Griffin Act’s detailed regulation of union election procedures and comprehensive standards for union conduct exceeds the non-interference standard set out in ILO in Convention No. 87;

c) Convention No. 87 requires that minority unions be allowed to function and be allowed to represent members in individual grievances, which is contrary to Section Nine(a) of the NLRA;

d) It would effectively force employers to be neutral to all union organizing efforts;

81. Charnovitz, supra note 32.
82. Id.
83. Id.
84. Id.
85. UNITED STATES COUNCIL FOR INT’L BUS., supra note 75.
e) It would limit United States restrictions on the right to strike, including in secondary boycotts, in both public and private sectors.  

All these aspects are present in the American legislation and case law regarding labor rights.

However, in the first annual report sent under the 1998 ILO Declaration on Fundamental Conventions, the United States government in 2000 acknowledged that: “there are aspects of this system that fail to fully protect the rights to organize and bargain collectively.” Although statements like these are important recognitions, the United States has not yet moved forward with the idea of ratifying Convention No. 87. It is interesting to note that due to the United States’ membership in the ILO, the country has to at least comply with the principles of the ILO, such as freedom of association.

C. Workers’ Freedom of Association in the American Legal System

The United States argues that the freedom for employees and employers to decide on employment contractual provisions is at the core of American legislation and case law, and that this is the idea of “negative rights” (i.e., for the right to be honored), therefore the state does not need to do anything. However, Lance Compa, senior lecturer at Cornell University's School of Industrial and Labor Relations, argues that “a government that respects workers’ negative rights is not meeting its international human rights obligations if private individuals or groups can violate workers’ rights with impunity. The state must protect the rights by providing effective recourse and remedies for violations.”

An important report from the Human Rights Watch titled “Unfair Advantage: Workers’ Freedom of Association in the United States under International Human Rights Standards,” which was also written by Lance Compa, brought significant insights into the United States relations to international labor standards.

---

86. Id.
87. Charnovitz, supra note 32.
88. Id.
90. Id. at 284.
91. Id.
92. Id. at 285.
The absence of systematic government repression does not mean that workers in the United States have effective exercise of the right to freedom of association, freedom of association is under sustained attack in the United States, and the government is often failing its responsibility under international human rights standards to deter such attacks and protect workers’ rights.93

The first federal statute to deal with unions and their rights was the Railway Labor Act of 1926, and it still applies to workers in the railway and airline sectors.94 The Norris-LaGuardia Act of 1932 is considered to be the document that brought “[t]he broader break in the hostile legal climate”95 towards unions by making yellow dog contracts (when an employee agrees, as a condition of employment, not to be a member of a labor union) unenforceable and by not allowing courts to use injunctions in nonviolent disputes.

The National Labor Relations Act (NLRA) of 1935, the Wagner Act in its original version, came right after the effects of the Great Depression and the increase in strikes.96 Senator Robert Wagner once argued: “What does it profit a man to have so-called “political freedom” if he is made an economic slave?”97

Two other documents followed as amendments to the NLRA: The Labor Management Relations Act of 1947 (Taft-Harley) and The Labor Management Reporting and Disclosure Act of 1959 (Landrum-Griffin).98 The former added union Unfair Labor Practices and the “right to work,” made closed shops illegal,99 and excluded supervisors from its protection among other changes.100 The latter increased restrictions on secondary boycotts.101

94. Id. at 68.
100. Id.
101. The Landrum-Griffin Labor Act, supra note 96, at 182.
Supervisors are not the only category not covered by the NLRA. Its provisions regarding the rights to organize and bargain collectively also cause managers, confidential employees, independent contractors, agricultural workers, and domestic workers to suffer the same fate. The exclusion means “employers can discharge these workers with impunity for attempting to form and join a union.”

There is no specific mention of the rights to organize in the United States Constitution. However, the First Amendment protects freedom of assembly. Furthermore, the United States ratified the International Convention on Civil and Political Rights in 1992 and did not enter any reservations, declarations, or understandings with respect to Article Twenty-Two on freedom of association. Nevertheless, there are numerous cases where employees have been fired because of their attempt to assemble. The Human Rights Watch report brought some examples:

At the Palm Garden nursing home in North Miami, the Unite for Dignity campaign narrowly lost an election, thirty-five to thirty-two, in April 1996. Palm Garden management resorted to massive unlawful means including repeated threats to cut pay and benefits if workers chose union representation. Managers forged signatures on warning notices against Leonard “Ted” Williams, a key Unite for Dignity activist. Its personnel manual states: 

This is a non-union health center . . . If you are approached to join a union, we sincerely hope you will consider the individual freedoms you could give up, and the countless risks you could be taking. *We intend to protect those freedoms and prevent those risks for you by opposing unionization of this health care center by every lawful means available.*

This unfair labor practice situation was “confirmed by the NLRB in its Decision, Order, and Direction of Second Election, Palm Garden of North Miami and UNITE, 327 NLRB No. 195 (March 31, 1999), pp. 6–8, 13–14.”

One interesting fact is that “[t]he NLRB website appears to say nothing about the international labor law binding the United States and does not advise worker or employer organizations of their right to complain to

102. HUMAN RIGHTS WATCH, supra note 93, at 70.
103. Id. at 67.
104. Id. at 52.
105. Id. at 99.
106. Id. at 99 n.145.
the CFA about a Board decision that transgresses the principles of the ILO.”

They can do so because the United States is a member of the ILO and as such has to comply with ILO’s principles. In addition, “[a]djudications of the ILO are obviously not foreign law; they are reflective of international law which is part of the United States law.”

Although the chances of Convention No. 87 being ratified by the United States are extremely low, as determined by careful analysis of the literature provided, new steps in the direction of ratification could be possible if the President’s Committee on the ILO or the Senate worked for it.

VI. CONCLUSION

Brazil and United States have many historical, cultural, social, legal, and economic differences. While Brazil went through a long period of military dictatorship, the United States did not. During the drafting of the Brazilian democratic constitution, some political parties fought to include in the extensive text of the constitution the protection of the workers’ rights as one of the constitutional rights that government has to act upon. Whereas, in the United States, the constitution brings mostly political rights and does not go through details of the social rights it provides. Legislation in Brazil is friendlier to workers than to employers, coming from the premise that workers do not have the same power over employment contracts and labor relations as employers do. In the United States, both are considered to have negotiation powers over the employment contract and both are free to terminate it as would be in any other contract.

Considering economic aspects, Brazil is still a developing country which depends more on selling commodities than on its own industrial and technological strength, whereas the United States is a developed country with technology that spreads to all corners of the world through its strong businesses interchanges.

In which country are workers’ association rights more protected? Despite the cited differences, neither Brazil nor the United States has protected workers’ right of association according to international standards since they have not ratified Convention No. 87 of the ILO, because of divergent domestic laws. This phrase from Lance Compa about the United States could actually be said of both countries: “What is most needed is a

108. Id.
new spirit of commitment by the labor law community and the government to give effect to international human rights.\footnote{109}

By analyzing both countries’ laws and international reports on the right of association, the conclusion that emerges is that while the United States clearly tries to make it difficult for workers to associate by setting up complicated rules for unionization and excluding many categories of workers from its labor laws, Brazil tries to ignore that its laws weaken or even nullify workers’ attempt to do so. By not allowing a diversity of unions, Brazil leaves the path open to the creation of weaker divisions. Both countries may defend their policies by saying that they have economic reasons to protect companies and employers against the expenses and market inefficiencies that protecting workers’ rights could bring, but these arguments have not satisfied the ILO.

The two main purposes of international labor law, stated by Steve Charnovitz, are: “First, ILO standards can provide the rules of the road for the world economy and labor-markets. Second, the international labor regime can enhance the accountability of domestic labor agencies and prevent regulatory failure.”\footnote{110} Both Brazil and the United States should take these purposes and the advantages that they bring to the country into consideration because it could help balance the weight between protection of workers’ rights and economic development. It is in the governments’ interest and obligation to make greater efforts towards protecting employment relationship in order to prevent economic crises and to avoid a backlash in workers and human rights, because countries’ leaders are expected, by the people who put them in power, to make their country grow not only economically, but also in human development aspects.

\footnote{109}{Human Rights Watch, \textit{supra} note 93, at 24.}

\footnote{110}{Charnovitz, \textit{supra} note 107, at 321.}