

**CREEPING LEGALISM IN PUBLIC SECTOR
GRIEVANCE ARBITRATION: A NATIONAL
PERSPECTIVE**

BARRY M. RUBIN

RICHARD S. RUBIN

Indiana University, Bloomington

ABSTRACT

Creeping legalism, which incorporates an increasingly formal approach to the arbitration process, may help explain the significant decrease in the number of grievance arbitration filings in the private sector. However, little research has investigated the spread of creeping legalism into the public sector. Preliminary research, conducted by one of the authors and described in an earlier issue of this journal, looked at formality, time, and cost as indicators of creeping legalism in the public sector and found evidence that as formality increases, the willingness to arbitrate decreases. The purpose of this research is to expand that initial endeavor by using a national data set to utilize more sophisticated analytical techniques. The results evidence that as formality, time, and preparation increase, the willingness to arbitrate decreases.

The U.S. Department of Labor's Bureau of Labor Statistics reports that unions currently represent 42.1 percent of all public sector workers, but only 10.2 percent of private sector workers [1]. Even more dramatic is the 47 percent representation rate for local government employees. In fact, public sector employees are four times more likely to become union members than their private sector counterparts [2]. Because this high density of union representation in the public sector stands in stark contrast to the private sector, trends that initially emerge in the private sector may, in fact, have a far greater impact on the public sector.

One such trend in the private sector is the decrease in the number of grievance arbitration filings over the past two decades. Recent trends, documented by data from both the American Arbitration Association (AAA) and the Federal Mediation and Conciliation Service (FMCS), indicate that grievance arbitration in the private sector is declining [3]. While the number of grievance filings has remained nearly constant from 1978 to the present, the number of reported arbitration awards has decreased substantially. In 1971, for example, arbitrators issued one award for every 2.8 cases filed. In contrast, by 1994 arbitrators issued only one award for every 4.2 filings. Clearly, the parties now are settling or withdrawing a much higher percentage of filed grievance cases than previously.

This apparent decline in the popularity of arbitration is, at times, explained by the notion of “creeping legalism.” Anthony Bartlett wrote, “Almost from the inception of the modern labor arbitration system, commentators warned against legalism in the process, most believing that legalism was the opposite of arbitration” [4, p. 203]. Among other concepts, legalism entails the use of lawyers, citation of precedent, formal rules of evidence, and written transcripts of proceedings.

In their research, Nolan and Abrams tested the notion that increasing legalism is partly responsible for the decline in the use of arbitration [3]. Their analysis, however, of the dimensions of cost and time found the evidence inconclusive. Nevertheless, they offered two predictions: arbitrations will, of necessity, become more legalistic; and the use of grievance arbitration will continue to decline.

If creeping legalism emerges as a problem in the public sector, the parties should address this issue expeditiously. For, if the alternative dispute resolution (ADR) procedure of grievance arbitration is impeded by an increasing legalistic approach, the ADR *process* then becomes part of the problem. Research examining creeping legalism in the public sector is sparse. Preliminary research on this topic was conducted by one of the authors and described in an earlier issue of this journal [5]. Based on a small data set from only one state, the evidence, nonetheless, did reveal that as formality increased, the willingness to use arbitration did decrease. Therefore, this follow-up research analyzes national data from forty-two states, and probes, with more sophisticated analytical techniques, the emergence of creeping legalism in public sector grievance arbitration.

BACKGROUND

Grievance arbitration quickly grew following World War II. By 1955, approximately 90 percent of collective agreements in the United States provided for arbitration [6]. This growth occurred during a period in which arbitration was relatively simple; hearings were short, decisions prompt, and costs low [3]. The parties themselves believed that the informality of the process was primarily responsible for its effectiveness. In fact, Braden’s model of arbitration urged

the parties to settle disputes without having to resort to the formality and legalism of litigation [7].

As early as 1958, however, critics argued that legalism had increasingly “crept” into the arbitration process through the use of lawyers, briefs, excessive citation of precedent, written transcripts of proceedings, and over-adherence to the formal rules of order [8]. One of the critics was scholar and arbitrator Emanuel Stein, who said, “A frustrating kind of legalism has crept into labor relations because the arbitrator has come to function like a judge and the parties have come to treat arbitration like litigation” [8, p. 605]. The AAA, in an editorial, endorsed this opinion in the pages of *The Arbitration Journal*:

The trend has, in fact, gone so far that unless it is reversed there is serious danger that arbitration will lose the very characteristics of speed, economy and informality that cause companies and unions to prefer this method of grievance settlement above all others [9, p. 130].

However, claims of increasing legalism are indeed difficult to verify. First, legalism has always played a role in arbitration. As Bartlett pointed out, “[T]he use of some legal techniques is unavoidable because a labor arbitration has to interpret and apply the relevant provisions of a collective agreement” [4, p. 195]. If some legal techniques are necessary, then the measurement of legalism is more of a qualitative than a quantitative problem. In other words, legalism more properly refers to the *manner* in which legal techniques are used, not the mere fact that they are utilized [4].

Second, researchers have found little empirical evidence to support claims of excessive legalism in the private sector. After examining Federal Mediation and Conciliation Service (FMCS) discharge cases in 1951, 1956, and 1962, Fleming found only that arbitrators were somewhat slower than before in issuing decisions [10]. Attempts to find evidence of creeping legalism in recent arbitration practices also have failed. Nolan and Abrams studied AAA and FMCS filings over an approximate thirty-year period and found the use of grievance arbitration was declining [3]. They analyzed legalism as a possible explanation by measuring the factors of time and cost in arbitration, but failed to find conclusive evidence for increasing legalism.

METHODOLOGY

Since the largest union in the United States representing public sector employees is the National Education Association (NEA), it provided the best opportunity to determine whether creeping legalism was becoming a factor in the public sector [11]. With approximately 1,500 full-time field staff in every state servicing its 2.5 million constituents, the NEA has a national, knowledgeable and experienced staff in grievance arbitration.

Noting popular perceptions of creeping legalism and prior research in grievance arbitration, we developed a questionnaire to assess whether legalism was a factor in the parties' perceptions and their subsequent decision to advance a case to arbitration. We separated the concept of legalism into the three dimensions of time, cost, and formality, which served as the independent variables. The dependent variable was designated as the parties' willingness to arbitrate. We operationalized each variable using a series of Likert-scale questions. The questionnaire was constructed to measure the influence of the independent variables on the dependent variable. A focus group consisting of ten graduate students reviewed the questions to establish face validity of the scales.

The following e-mail message, with the questionnaire attached, then was sent by the NEA to the 1,500 full-time field staff on its electronic distribution lists. There were 375 respondents from forty-two states, yielding a 25 percent response rate.

As part of the NEA's continuing effort to plan and implement programs that improve services both to UniServ staff and members, we are attaching a short questionnaire. We need responses from UniServ staff, UniServ Coordinators, and UniServ Managers. The intent of this questionnaire is to survey your opinions about the process of third-party arbitration in the settlement of member grievances. For this purpose, the process of arbitration begins once you've made the decision to bring a grievance before an arbitrator for a hearing.

The survey was developed by Indiana University's Center for Public Sector Labor Relations. It contains 19 short questions and takes no more than 5 minutes to complete. Each question can easily and quickly be answered simply by "clicking" your response for each question. Your responses will remain anonymous and confidential, and an aggregated summary report of the findings will be available to the NEA UniServ staff and membership. The questionnaire can be accessed by opening the attached link.

The questionnaire items generally utilized a Likert-scale to measure a respondent's attitude toward the various characteristics of the grievance arbitration process. *Strongly agree* was given a value of 5 and *strongly disagree* was assigned a value of 1. Each of the independent variables—time, formality, and cost—then was operationalized with a scale that was comprised as the sum of four specific questionnaire items intended to address the respective dimension. The dependent variable also was operationalized using a scale based on summing four questionnaire items that addressed the respondent's willingness to use arbitration. Based on focus group responses, the extent of a respondent's experience with grievance arbitration also was considered to be a dimension that would influence a respondent's "willingness." This dimension was included in the questionnaire as a control variable, with a value of 1 indicating no experience and a value of 5 indicating involvement with ten or more grievance arbitrations.

ANALYSIS

Factor Analysis Results

To validate the composition of the dependent and independent variables using the scales derived from the individual questionnaire items, we first conducted principal components factor analysis with a Varimax rotation. The first seven factors emerging from this stage of the analysis accounted for over 55 percent of the cumulative variation contained in the data set. The results of the factor analysis, specifically the rotated factor matrix, confirmed the construction of the scales for the independent variables time and cost, using the originally specified questionnaire elements. Only one questionnaire item appeared to be unassociated with its intended independent variable. This item then was dropped from the scale comprising the formality variable. Overall, the factor analysis results confirmed the final scales of formality, cost, and time as independent variables with high loadings of the appropriate questions on distinct factors that were readily interpretable as representing these intended dimensions.

Surprisingly, the factor analysis results did not confirm the composition of the dependent variable as a composite of the four original questionnaire items intended for this purpose. Instead, three of the four questionnaire items loaded primarily on one factor that was readily interpretable as representing “preparation.” This preparation factor was comprised of the effort involved in preparing the case, preparing a brief, and preparing witnesses. Instead of loading on the same dimension as the questionnaire item that focused directly on “willingness to use arbitration,” these three preparation items can be interpreted as comprising another causal dimension or independent variable. Although this was not apparent to us from the responses of the focus group, the emergence of this dimension from the rotated factor matrix made perfect sense in hindsight and is logically consistent as an additional characteristic of potential creeping legalism in arbitration. Therefore, “preparation” was added as an independent variable to the analytic model, and the scale utilized for the dependent variable was recast as the single questionnaire item that directly asked about the respondent’s “willingness to use arbitration.” In effect, the latter conceptualization of the dependent variable is a much more appropriate measure of attitude toward grievance arbitration than the original conceptualization that combined preparation and willingness in the same scale.

The final analytic model for the presence of creeping legalism therefore comprised “willingness to use arbitration” as the dependent variable; time, cost, formality, and preparation as independent variables; and experience with grievance arbitration as a control variable. The efficacy of preparation as a causal dimension was confirmed by the results presented in the following section.

Multiple Regression Analysis Results

The most useful analytic method for investigating the existence and nature of a relationship between the dependent variable that represents a respondent's willingness to use grievance arbitration and the dimensions of creeping legalism is multiple regression analysis. Although the dependent variable is not, as regression analysis assumes, an exact interval scale variable, it is structured so that an increase of one unit for this Likert-scale questionnaire item would, in our opinion, represent a qualitatively equal jump in the respondent's willingness to use arbitration. Thus, the possible values for the dependent variable comprise an approximate interval scale such that multiple regression analysis may be utilized to address the exploratory issue of creeping legalism in this critical area of the public sector. Table 1 provides the results of this analysis.

To ensure that this assumption of approximately equal-sized categories for the Likert-scale dependent variable did not unduly bias the multiple regression results, the dependent variable also was recast as a binary variable. *Strongly disagree* and *disagree* were recoded to a value of 0 and *strongly agree* and *agree* were recoded to a value of 1. This transformation enabled the use of a logit regression, which incorporates a dichotomous dependent variable in place of the interval-scale dependent variable that is generally assumed for multiple regression analysis. The logit regression was performed on the data to verify any statistical relationships that might be uncovered by the multiple regression analysis. The results of the logit model are presented in Table 2.

Table 1. Multiple Regression Analysis of the Dimension of Creeping Legalism with Respect to the Use of Grievance Arbitration

Independent Variable	Parameter Estimate	Standardized Estimate	t-Statistic	Prob > t
Cost	-0.00783	-0.023	-0.377	.707
Formality*	0.1160	0.286	5.001	.000
Preparation*	0.00468	0.161	3.241	.001
Time*	0.00824	0.241	4.410	.000
Experience*	-0.12200	-0.161	-3.375	.001
Intercept	0.448	-	1.581	.115
F-Value			34.388	
Probability > F			0.000	
R-Square			0.335	
Adjusted R-Square			0.325	

*Denotes statistical significance at the 0.001 level or better.
Number of observations = 346

Table 2. Logit Analysis of the Dimensions of
Creeping Legalism with Respect to the Use of Grievance Arbitration

Independent Variable	Parameter Estimate	Odds Ratio Impact	Wald Chi-Square	Prob > Chi-Square
Cost	0.018	1.018	0.043	.836
Formality*	0.330	1.390	12.238	.000
Preparation*	0.101	1.107	3.165	.075
Time*	0.213	1.237	7.873	.005
Experience	-0.214	0.807	2.044	.153
Intercept	-7.432	-	31.640	.000
Chi-Square Value			70.056	
Probability > Chi-Square			0.000	
Pseudo R-Square			0.362	

*Denotes statistical significance at the 0.10 level or better.
Number of observations = 346

The multiple regression model was estimated with the Ordinary Least Squares technique using the regression procedure in SPSS version 10.0. Of the 375 responses to the questionnaire, twenty-nine had missing data on one or more of the questionnaire items. Thus, 346 cases were used in the regression analysis. Table 1 provides the results from this analysis, and demonstrates that the overall model with “less willing to use arbitration” as the dependent variable and time, cost, formality, preparation, and experience as independent variables had an *F*-statistic of 34.39 and a corresponding *p*-value of .000. These results indicate that the overall model is statistically significant at better than the .001 level, and that the joint hypothesis of no relationship between the dependent variable and the set of independent variables can readily be rejected. The adjusted *R*-squared value of 0.325 for this regression reveals that the overall model explains 32.5 percent of the variation in the dependent variable.

Explaining approximately one-third of the variation in respondents’ willingness to use grievance arbitration is indicative of a strong explanatory relationship. Given the state-level cross-sectional national sample used for the analysis, and the myriad political factors at work in each grievance case that may influence the decision to go to arbitration, there are many random effects that cannot readily be captured by the regression analysis and produce a relatively large component of unexplained variation in the dependent variable. The overwhelming statistical significance of the regression supports this conclusion.

Several tests were used to explore the potential for near-multicollinearity obscuring the effects of the individual independent variables. These included the

condition index for the overall regression, and correlation coefficients and tolerance values for each independent variable. No evidence of significant near-multicollinearity was found among the independent variables, clearing the way for an unimpeded interpretation of their impacts on the dependent variable.

As Table 1 and the *t*-statistics associated with the parameter estimates indicate, formality, preparation time, and experience all have partial relationships with the dependent variable that are statistically significant at the .001 level or better. Cost is the only independent variable that proves to be statistically insignificant in the regression model. Moreover, formality, preparation, and time all have partial regression coefficients with a positive sign, indicating that as the magnitude of each of these independent variables increases, so does the level of the dependent variable, holding the effects of the other independent variables constant. In other words, increasing the formality, time, or preparation involved with a grievance case decreases the willingness of the respondents to utilize arbitration. These results provide direct, empirical support for evidence of creeping legalism in the public sector as an impediment to grievance arbitration.

The standardized regression parameter estimate of 0.286 also reveals that formality has the greatest impact on a respondent's willingness to use arbitration. This is followed in importance by time, with a standardized regression parameter estimate of 0.241, and then preparation, with a standardized parameter estimate of 0.161. Experience is also statistically significant at the .001 level with a negative parameter estimate. This indicates that the more experience respondents have with arbitration, the more willing they are to use grievance arbitration. These results and the standardized parameter estimate of -0.161 clearly imply that experience is an important control variable of equal importance to preparation in the overall regression model.

Logit Analysis Results

As previously indicated, we dichotomized the dependent variable by recoding *agree* and *strongly agree* to a value of 1, and *disagree* and *strongly disagree* to a value of 0. We did not use cases where the respondent answered *don't know* to this questionnaire item, thereby reducing the sample size to 290 cases. In this form, the dependent variable allows for the use of a logit regression with all assumptions fully met. The logit analysis results provide additional support for the existence of creeping legalism in grievance arbitration, and serve to verify the most important findings derived from the multiple regression analysis.

As Table 2 demonstrates, the chi-square statistic for the entire model indicates that the logit regression of the binary form of the dependent variable is statistically significant at better than the .001 level. The pseudo R-squared value of 0.362 implies that approximately 36 percent of the variation in the dependent variable is explained by the set of independent variables.

A logit regression actually utilizes the log of the odds ratio for the dependent variable on the left side of the regression equation. In this case, the odds ratio is the probability of a respondent being less willing to use arbitration over the probability of the respondent not being less willing to use arbitration. As a result of this implicit nonlinear formulation for logit regression, the coefficient estimates for the independent variables are not easily interpretable. Instead, by exponentiating these coefficient values, the impact of each independent variable on the odds ratio of the dependent variable is obtained. The values in column three of Table 2 then may be interpreted as the multiplicative impact on the odds of the dependent variable given a one-unit change in the respective independent variable, holding the effects of the remaining independent variables constant. Moreover, the Wald chi-square values in column four serve to indicate the statistical significance of each independent variable, just as the *t*-statistics do in a multiple linear regression.

The logit regression reveals that formality is again the most important independent variable in the model, with an odds ratio impact of 1.39 that is statistically significant at better than the .001 level. Time is again the next most critical independent variable, with an odds ratio impact of 1.24 that is statistically significant at the .005 level. This is followed by preparation with an odds ratio impact of 1.11, which is statistically significant at the .075 level. On the other hand, experience loses its statistical significance in the logit regression, although one could argue that its significance level of .153 may be marginally significant for such exploratory research. As in the case of the multiple linear regression results, cost is clearly a superfluous variable in the logit regression, with a significance level of .836.

As can be seen from these results, the logit analysis serves to confirm the findings from the multiple regression analysis. In either case, approximately one-third of the variation in respondents' willingness to use grievance arbitration is explained by formality, time, preparation, and experience. Formality is clearly the most important of the independent variables with respect to its relative impact on the dependent variable and its statistical significance, followed by time and then by preparation. Experience appears to be of lesser importance in the logit model and potentially not significant statistically, although in the multiple regression case it is statistically significant and tied with preparation with respect to its impact.

CONCLUSIONS

Substantial evidence that creeping legalism has begun to impede the use of grievance arbitration in public sector disputes is supported by this research. Both the multiple regression analysis and the logit analysis found that formality and time were statistically significant independent variables in explaining respondents' willingness to advance a grievance to third-party arbitration.

Additionally, preparation of both briefs and witnesses emerged as a statistically significant independent variable influencing willingness to use arbitration. These three variables, together with experience as a control variable, accounted for 32.5 percent (in the multiple regression analysis) to 36 percent (in the logit analysis) of the variation in respondents' willingness to use arbitration. As the results demonstrate, formality, time, and preparation not only have statistical significance, but also have substantial practical significance.

These results both affirm the findings of the preliminary research conducted by Rubin et al. and extend the evidence for creeping legalism by adding two additional causal dimensions [5]. Whereas the preliminary research was based on a small sample collected from a single state, this follow-up research is based on a large, national sample that included 42 different states and 375 respondents. The cumulative results from both studies confirm that creeping legalism, in fact, *has* taken root in public sector labor-management relations.

Although there still is a substantial amount of variation in willingness to use grievance arbitration that is left unexplained by this research, the remaining dimensions are unlikely to be captured by the methods used in this analysis. This variation most likely suggests such dimensions as internal political issues within unions and the "winability" of specific cases.¹ These dimensions will vary in unsystematic ways from case to case and therefore contribute to the random error component that makes up the unexplained variation in our regression models.

Given the evidence revealed by this research, creeping legalism does appear to be taking root in the public sector. This presents two issues: an evolving paradox about arbitration, and a course of action for labor and management.

First, conciliation, negotiation, mediation, factfinding, and arbitration all were conceived as alternative dispute resolution techniques to the legal system. However, we now have clear evidence that the arbitration process is becoming more like the legal system, which arbitration initially was intended to avoid. In public sector grievance arbitration, the paradox is that the process of arbitration appears to be evolving as part of the problem, rather than as part of the solution.

Second, labor and management initially believed that the informality of the arbitration process was primarily responsible for its effectiveness. Given the results of this research, the formality of the process appears to be increasing while the willingness to use arbitration is declining. Since it is labor and management that decide what dispute resolution procedures to use, it is the responsibility of

¹The contribution of such random factors was confirmed by numerous unsolicited e-mail messages from respondents who already had completed the questionnaire. They volunteered information about their decision-making process in deciding whether to advance a case to arbitration. Their varied illustrations clustered around the likelihood of winning a grievance and the internal political strains within their bargaining units.

labor and management to address this issue and to determine the nature of the arbitration process itself.

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Barry M. Rubin is a professor in the School of Public and Environmental Affairs at Indiana University in Bloomington. His teaching and research interests include urban policy and management, economic development, quantitative methods, and policy analysis. His undergraduate degree is from Florida State University and both his M.S. and Ph.D. Degrees are from the University of Wisconsin in Madison.

Richard S. Rubin is a professor in the School of Public and Environmental Affairs at Indiana University in Bloomington and Director of the Center for Public Sector Labor Relations. His teaching and research interests center on labor-management relations in the public sector with a particular focus on collective bargaining and labor-management cooperation. His B.A. Degree is from Middlebury College and both his M.I.L.R and Ph.D. Degrees are from Cornell University.

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Direct reprint requests to:

Richard S. Rubin
School of Public and Environmental Affairs
Indiana University, Bloomington
Bloomington, IN 47405