(2020) 63 *Irish Jurist* 82, 82–112

FREEDOM OF ASSOCIATION AND STATUTORY UNION RECOGNITION: A CONSTITUTIONAL IMPOSSIBILITY?

DARYL D'ART*

Abstract: In Ireland, freedom of association or the right to form a trade union is a right guaranteed by the Constitution. The functional embodiment of that right is the recognition by an employer of (an) independent trade union(s) of his or her employees. Without a concomitant right to recognition, the constitutional guarantee of freedom of association remains an insubstantial, partially realised right. Yet the Irish judiciary has consistently held that the right to associate in unions does not involve a corresponding right to recognition of those unions. The first section of this article will examine this liberal, formalist interpretation of freedom of association and ascribe its narrowness to the dominance of common law individualism in judicial thinking and decision-making. Relying on a European Court of Human Rights judgment, it will be suggested that this interpretation of freedom of association is now an anachronism. The second section will critically evaluate the constitutional and other obstacles often raised against statutory recognition. These are found to be of little consequence or substance.

Keywords: Freedom of Association – statutory recognition – Industrial Relations (Amendment) Act 2001 – Industrial Relations (Miscellaneous Provisions) Act 2004 – Industrial Relations (Amendment) Act 2015 – European Court of Human Rights – Constitution of Ireland

1. FREEDOM OF ASSOCIATION, RECOGNITION, IRISH CASE LAW AND THE EUROPEAN COURT OF HUMAN RIGHTS

Introduction

This article is exclusively concerned with two questions. First, does the Irish constitutional guarantee of freedom of association or the right of workers to form independent trade unions necessarily involve a corresponding and implicit obligation on employers to recognise and negotiate with such organisations? This question is answered in the affirmative. Further, it is claimed that without such recognition, freedom of association remains an unrealised right. Second,

* I would like to thank the Editor and anonymous reviewer for their helpful comments. I am also indebted to Anthony Kerr of the UCD Sutherland School of Law, Joe Wallace and Tom Turner, both formerly of the University of Limerick, for their comments and corrections.

would legislation facilitating union recognition, the practical embodiment of freedom of association, pass constitutional muster? It is argued here that a constitutional challenge to such legislation would likely fail. What is not addressed is the important but complex question regarding the efficacy of statutory recognition in promoting the growth of union membership, density and collective bargaining coverage.[1] Crucially, it seems, efficacy will depend on the nature, scope and operation of the legislation.[2] This will be shaped by a constellation of forces, such as the strength of the union movement, the existence or absence of a political arm, the balance of forces within and outside Parliament, the dominant socio-economic and political ideology, along with the prevailing institutional arrangements. Consequently, assessing the efficacy of statutory recognition would involve a comparative study of such arrangements and their outcomes in the US, Canada, the UK and Scandinavia. Such a study is beyond the limited aims of this article.

Article 40.6.1°iii of the Irish Constitution 1937 guarantees the "right of the citizens to form associations and unions" but with the proviso that "[l]aws, however, may be enacted for the regulation and control in the public interest of the exercise of the foregoing right". Like many rights in the Constitution, the right of association is a qualified one.[3] Nevertheless, the Constitution specifies the right of citizens to form associations. This freedom to associate in unions is a hallmark of a democratic state.[4]

---

1. For a tentative consideration of this question, see D. D'Art and T. Turner, "Trade Union Growth and Recognition; The Irish Case in a Comparative Context" in J. Lind, H. Knudsen and H. Jorgensen (eds), *Labour and Employment Regulation in Europe* (Brussels: P.I.E. Peter Lang, 2004).
2. Legislation facilitating recognition, particularly in the US and the UK, is characterised by a procedural complexity that can frustrate its objective. On this, see K. Ewing and J. Hendy, "New Perspectives on Collective Labour Law: Trade Union Recognition and Collective Bargaining" (2017) 46(1) *Industrial Law Journal* 23–57 at 24 and 45–47. See also, A. Bogg and R. Dukes, "Article 11 ECHR and the Right to Collective Bargaining: *Pharmacists Defence Union v Boots Management Services Ltd*" (2017) 46(4) *Industrial Law Journal* 543–565. These negative outcomes have been largely avoided in Scandinavia. In this regard, a lapsed Irish Bill was a model of simplicity and elegance. It appeared to have the potential to circumvent the complexity and legal wrangling sometimes associated with legislation on statutory recognition. See the Trade Union Representation (Miscellaneous Provisions) Bill 2018.
3. An attempt to challenge the constitutionality of the legislation restricting the freedom of members of the Garda to form or join unions was unsuccessful in both the High Court and Supreme Court in *Aughey v Ireland* [1986] I.L.R.M. 201 and [1989] I.L.R.M. 87; see D. Walsh, "The Garda Síochána: A Legal and Constitutional Perspective" in O'Mahony (ed.), *Criminal Justice in Ireland* (Dublin: IPA, 2002), p.453, fn.21. Since then, developments in Europe appear to challenge the *Aughey* judgment. In Resolution CM/ResChS (2014) 12 *European Confederation of Police (Euro COP) v Ireland* Complaint No. 83/2012, complaints by the Association of Garda Sergeants and Inspectors under art.5 of the European Charter of Social Rights that they did not enjoy full trade unions rights owing to the prohibition of police representative organisations joining national employees' organisations was upheld by the European Committee of Social Rights. Subsequently, complaints by Irish Army personnel under arts 5 and 6 were also upheld in Resolution CM/ResChS (2018) 2 *(Euromil) v Ireland* Complaint No. 112/2014.
4. Article 11(1) of the European Convention on Human Rights states: "Everyone has the right to … freedom of association with others including the right to form and join trade

A distinctive feature of freedom of association is that it can only be exercised collectively such that all legal guarantees of this freedom necessarily protect a collective activity. For workers, the act of association in unions is a means rather than an end.[5] Individuals join unions for two principal reasons: first, to deploy their collective strength in bargaining with the employer for improved terms and conditions; and second, to exercise some influence in the regulation of the employment relationship and their working lives. The classical definition of a trade union describes it as "a continuous association of wage earners for the purpose of maintaining and improving the conditions of their employment".[6] Collective bargaining is the union's *raison d'être*.[7] In Ireland, it is claimed, State policy is "supportive of trade unions and the concept of collective bargaining".[8] Yet, joining a union without a right to recognition from the employer renders the exercise of the right to associate meaningless.[9] Likewise, Casey suggests that in the absence of a right to bargain collectively with the employer, the freedom to associate is largely illusory.[10] Indeed, the International Labour Organization (ILO) holds that "collective bargaining cannot begin until the employer recognises an organisation for that purpose".[11] Employers, it continues, "will give such recognition only if they believe it to be in their interests or if they are legally required to do so".[12] So, to grant freedom of association or the right to organise in unions but provide no legal support for the concrete realisation of that right smacks of empty legal formalism. As one Canadian Chief Justice observed, "if freedom of association only protects the joining together of persons for common purpose, but not the pursuit of the very activities for which the association was formed, then the freedom is indeed legalistic, ungenerous, indeed vapid".[13]

---

unions for the protection of his [or her] interests." See also, Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution*, 5th edn (Dublin: Bloomsbury Professional, 2018) ("*Kelly*: 5th edn (2018)"), pp.2153–2154.

5. F. von Prondzynski, *Freedom of Association and Industrial Relations: A Comparative Study* (London and New York: Mansell Publishing, 1987), p.84.
6. S. & B. Webb, *The History of Trade Unionism* (New York: Longmans, Green, 1894), p.1.
7. J.P. Casey, "Reform of Collective Bargaining Law: Some Constitutional Implications" (1972) 7(1) *Irish Jurist* 1–16 at 4.
8. J. Horgan, "The Future of Collective Bargaining" in *Industrial Relations in Ireland* (Dublin: University College Dublin, 1987), p.168.
9. I. Lynch, "Lawyers and Unions; The Right of Freedom of Association in the Irish Constitution" in T. Murphy and P. Twomey (eds), *Ireland's Evolving Constitution 1937–97: Collected Essays* (Oxford: Hart, 1998), p.227.
10. Casey, "Reform of Collective Bargaining Law: Some Constitutional Implications" (1972) 7(1) *Irish Jurist* 1–16 at 4.
11. *Collective Bargaining: A Workers' Education Manual*, 11th impression (Geneva: International Labour Office, 1978), p.28.
12. *Collective Bargaining: A Workers' Education Manual*, 11th impression (Geneva: International Labour Office, 1978), p.28.
13. *Reference re Public Service Employees Relations Act* (Alberta), [1987] 1 S.C.R. 313 at 38, cited in J. Fudge, "Labour Is Not a Commodity; The Supreme Court of Canada and Freedom of Association" (2004) 67(2) *Saskatchewan Law Review* 424–452 at 434.

For unions to bargain effectively, they may need legal support.[14] Such support usually involves statutory union recognition. In the US, Canada and the UK, statutory recognition involves the State legislating so as to enable a majority in a group, grade or category of workers who opt for union membership to give concrete expression to that democratic decision by obliging the employer to recognise and negotiate with the employees' union. Union recognition, it is claimed, is the democratic representation of the voice of employees.[15] As will be seen, the proposition that union recognition is the logical corollary of freedom of association has not won universal acceptance. It is contingent on the adoption of a particular perspective.

Perspectives on freedom of association

There are at least two interpretative approaches to determining the content or meaning of freedom of association. First, there is the formalist approach, which views freedom of association as deriving from the libertarian notion that all persons should be entitled to associate or not to associate with other persons of their choice in a non-coercive way.[16] From this perspective, freedom to associate applies equally to members of political parties or social clubs as it does to trade unions. It is a very limited view going only so far as to allow for the association to take place.[17] Limited though it may be, this interpretation of freedom of association probably sits quite comfortably within the common law tradition. Many Irish judges subscribe to and apply this formalist understanding of freedom of association.[18]

A second way of interpreting freedom of association is the purposive or functional approach. This view sets freedom of association in the context of the 19th-century Europe-wide workers' struggle against anti-union laws and the pursuit of legal acceptance.[19] Given that context, the eventual granting of freedom to associate reflects the political and legal acceptance of trade unions.[20] Freedom of association in the Irish Constitution, one Chief Justice commented, was "designed to make clear that trade unions were accepted and not alone accepted but guaranteed protection". Irish trade unions, he continued, were the main, if

14. A.C.L. Davies, *Perspectives on Labour Law* (Cambridge: Cambridge University Press, 2004), p.198. See also, J.F. Geary "Employee Voice in the Irish Workplace: Status and Prospect", in R.B. Freeman, P. Boxall and P. Haynes (eds), *What Workers Say: Employee Voice in the Anglo-American Workplace* (Ithaca and London: ILR Press, 2007).
15. S. Deakin and G.S. Morris, *Labour Law*, 4th edn (Oxford: Hart, 2005), p.875.
16. von Prondzynski, *Freedom of Association and Industrial Relations: A Comparative Study* (1987), p.225.
17. B. Wilkinson, "Workers, Constitutions and the Irish Judiciary: A Jurisprudence of Labour Liberty?" (1989) 24(2) *Irish Jurist* 198–226 at 211–213.
18. See fnn.39–44.
19. A. Jacobs, "Collective Self-Regulation" in B. Hepple (ed.), *The Making of Labour Law in Europe: A Comparative Study of Nine Countries up to 1945* (Oxford: Hart, 2010 (reprint)).
20. B. Wilkinson, "Workers, Constitutions and the Irish Judiciary: A Jurisprudence of Labour Liberty?" (1989) 24(2) *Irish Jurist* 198–226 at 211.

not the only type of union contemplated by Art.40.6.1°iii.[21] Thus, freedom of association is a functional guarantee which is protected in order to secure a clearly defined social purpose. That social purpose is the attainment of some parity in bargaining power between employer and workers.[22] In national and international law, the rationale underpinning freedom of association is not the protection of individual interests but rather one of securing a more equitable distribution of power within the working environment and, beyond that, to society as a whole.[23] It follows that a functional interpretation of freedom of association necessarily involves recognition and negotiation with independent trade unions.

The functional approach would claim that the positive aspect of freedom of association—the right to associate—and the negative aspect—the right to dissociate—are not two aspects of the same freedom. The positive right concerns the individual as an active participant in social activities and is a collective right in so far as it can only be exercised jointly by a plurality of individuals. Alternatively, the negative freedom aims at protecting the individual against being grouped together with others with whom he or she does not agree and for purposes of which he or she does not approve. While strong protection for the individual is essential, this can be guaranteed under other headings such as freedom of conscience, freedom of religion and freedom of expression. There is no necessity to turn freedom of association into an anti-collectivist concept. It would be strange, von Prondzynski remarks, if the main substance of freedom of association, introduced to allow workers to combine, was now to be seen as the right of individuals to an isolated existence.[24] Neither by logic or implication is this negative right part of the positive freedom to associate.[25]

The above reasoning is at odds with decisions of the Irish courts and the European Court of Human Rights (ECtHR). In *Education Company of Ireland v Fitzpatrick (No.2)*, the Supreme Court found that the constitutional guarantee of freedom to associate necessarily implied a right to dissociate.[26] Neither the Irish nor German constitutions specifically mention a right of dissociation, yet that negative right has been deduced from the positive right to associate.[27] Likewise, in a number of judgments the ECtHR has concluded that art.11 of the

21. Maguire C.J. in *Educational Company of Ireland v Fitzpatrick (No.2)* [1961] I.R. 345 at 379–380 cited in Wilkinson, "Workers, Constitutions and the Irish Judiciary: A Jurisprudence of Labour Liberty?" (1989) 24(2) *Irish Jurist* 198–226 at 211–212.
22. von Prondzynski, *Freedom of Association and Industrial Relations: A Comparative Study* (1987), p.225.
23. von Prondzynski, *Freedom of Association and Industrial Relations: A Comparative Study* (1987), p.232.
24. von Prondzynski, *Freedom of Association and Industrial Relations: A Comparative Study* (1987), p.232.
25. Deakin and Morris, *Labour Law* (2005), p.805. See also, S. Leader, *Freedom of Association: A Study in Labour Law and Political Theory* (New Haven and London: Yale University Press, 1992); Ch.7 shows the flaws of an unqualified right to dissociate. See also the dissenting judgment of Maguire C.J. in *Educational Company of Ireland v Fitzpatrick (No.2)* [1961] I.R. 345.
26. J.P. Casey, "Some Implications of Freedom of Association in Labour Law: A Comparative Survey with Special Reference to Ireland" (1972) 21 *International and Comparative Law Quarterly* 699–717 at 704–705.
27. Casey (1972) 21 *International and Comparative Law Quarterly* 699–717 at 703.

European Convention on Human Rights (freedom of association) encompasses a negative right of association.[28] Whether the guarantee of the right to form unions can be understood only in the context of a right to dissociate will depend on the purpose and policy of the guarantee. If it is seen as an affirmation, against the State and the employer, of the right of unions to exist—a reasonable construction—then no implied right to dissociate is necessary.[29]

Freedom of association and recognition in Irish case law

In their review of litigation in the Irish courts concerning freedom of association, Hogan and Whyte note that the cases "almost invariably concerned the protection of individuals in their relations with trade unions rather than the protection of organised labour in its relationship with the State or with employers pursuing anti-union policies".[30] The Irish judiciary has dealt with freedom of association arguments primarily in relation to questions of individual choice in respect of whether to associate or in terms of the rights of discontented individuals against their union.[31] Two factors have been identified to explain this individualist focus: traditional union distrust of the law and a preferential reliance on industrial muscle.[32] Certainly, union wariness regarding the law has substantial historical and some contemporary justification.[33] Yet to assume a preference or an automatic propensity for industrial action, though a popular myth, is mistaken. Generally, unions and their members are cautious regarding strike action given the hardships involved, the uncertain outcomes and possible public opprobrium. Indeed, a principal objective of collective bargaining is to seek solutions through negotiation and compromise. The strike is a last resort. A case in point is the Ryanair pilots' pursuit of recognition. Over a 14-year period, they made extensive use of the State's industrial relations machinery and existing legislation, even appearing in the Supreme Court, but all to no avail.[34] It was the last resort of a strike that brought eventual recognition.

28. *Young, James and Webster v UK*, ECtHR app. No. 7806/77, 13 August 1981; *Sigurjonsson v Iceland*, ECtHR app. No. 16130/90, 30 June 1993; *Sorenson and Rasmussen v Denmark*, ECtHR app. Nos 52562/99 and 52620/99, 11 January 2006. See also, van Veen, "Negative Freedom of Association: Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms" (2000) 3(1) *International Journal of Not-for-Profit Law*. Available at *https://www.icnl.org/resources/research/ijnl/negative-freedom-of-association-article-11-of-the-european-convention-for-the-protection-of-human-rights-and-fundamental-freedoms*.
29. Casey (1972) 21 *International and Comparative Law Quarterly* 699–717 at 707–708. See also, J. Fudge, "Labour Is Not a Commodity: The Supreme Court of Canada and the Freedom of Association" (2004) 67 *Saskatchewan Law Review* 425–452 at 444, fn.89.
30. Hogan and Whyte, *J.M. Kelly: The Irish Constitution*, 4th edn (Dublin: Tottel, 2003) ("*Kelly*, 4th edn (2003)"), p.1793.
31. B. Wilkinson, "Workers, Constitutions and the Irish Judiciary: A Jurisprudence of Labour Liberty?" (1989) 24(2) *Irish Jurist* 198–266 at 212. See also, *O'Connell v BATU* [2014] IEHC 360.
32. *Kelly*, 4th edn (2003), p.1793.
33. D. D'Art, *Untying Workers' Hands: Trade Unions and the 1990 Industrial Relations Act*, report commissioned by the Workers Party, Dublin, 2018, pp.14–16.
34. M. O'Sullivan and P. Gunnigle, "Union Avoidance in Europe's Largest Low-Cost Airline: Bearing All the Hallmarks of Oppression" in Turner, D. D'Art and M. O'Sullivan (eds),

A more probable explanation for the individualist interpretation of freedom of association may be common law assumptions regarding the contract of employment. A venerable assumption deriving from that tradition is that employers and workers meet in the market as individual and equal contracting parties in the buying and selling of labour. Such a view has been characterised as "an indispensable figment of the legal mind".[35] Nonetheless, this individualist view of the contract of employment reinforces a common law stance that is unsympathetic if not hostile to collectivism.[36] The Irish judiciary, Wilkinson claims, continues to harbour the hostility of the common law to collective labour.[37] This in turn may influence judicial interpretation of freedom of association.

Irish courts have consistently found that workers' right of association does not involve a corresponding obligation on an employer to negotiate with the workers' association or union.[38] In *EI Co Ltd v Kennedy*, Walsh J. stated that "in law an employer is not obliged to meet anybody as the representative of his workers, nor indeed is he obliged to meet the worker himself for the purpose of discussing any demand which the worker may make".[39] Nearly 20 years later, this ruling still held sway. In *Dublin Colleges ASA v City of Dublin VEC* where teachers sought recognition from the employer, Hamilton J. accepted that the plaintiffs had a constitutional right of association. However, he continued, "there was no corresponding obligation on a body or any person … to recognise that association for the purpose of negotiating terms and conditions of employment of its members".[40] Again, in *Abbot v ITGWU*, McWilliam J. stated that "the suggestion … that there is a constitutional right to be represented by a union in the conduct of negotiations with employers … in my opinion could not be sustained. There is no duty placed on any employer to negotiate with any citizen or body of citizens".[41] Similarly, in *Association of General Practitioners v Minister for Health*, the applicants contended that "they had a constitutional right to be represented by the association of their choice when terms and conditions of employment were being decided".[42]

Are Trade Unions Still Relevant? Union Recognition 100 Years On (Dublin: Orpen Press, 2013), pp.270–273.

35. O. Kahn-Freund, *Labour and the Law*, 2nd edn (London: Stevens, 1977), p.6.
36. F. von Prondzynski and C. McCarthy, *Employment Law* (London: Sweet & Maxwell, 1984), pp.2–3; D.G. Morgan, *A Judgement Too Far? Judicial Activism and the Constitution* (Cork: Cork University Press, 2008 (reprint)), pp.2–22.
37. Wilkinson (1989) 24(2) *Irish Jurist* 198–226 at 200. In support, Wilkinson cites Casey, "The Injunction in Labour Disputes in Eire" (1969) 18 *International & Comparative Law Quarterly* 347; von Prondzynski, "Trade Disputes and the Courts: The Problem of the Labour Injunction" (1981) 16(2) *Irish Jurist* 228–240; T. Kerr, "The Problem of the Labour Injunction Revisited" (1983) 18(1) *Irish Jurist* 228–240; T. Kerr and G. Whyte, *Irish Trade Union Law* (Bristol: Professional Books, 1985), Ch.11, pp.316–336.
38. *Kelly*, 4th edn (2003), p.1803.
39. [1968] I.R. 69 at 68, cited in *Kelly*, 4th edn (2003), p.1804, fn.335.
40. Unreported, High Court, 31 July 1983 at p.5, cited in *Kelly*, 4th edn (2003), pp.1803–1804.
41. [1982] 1 J.I.S.S.L. 56 at 59, cited in *Kelly*, 4th edn (2003), p.1804.
42. [1995] 1 I.R. 382 at 391, cited in C. Maguire, "Trade Unions and the Constitution" in Reagan (ed.), *Employment Law* (Dublin: Tottel, 2009), p.640.

This contention was rejected by O'Hanlon J. He denied that there was any obligation imposed by ordinary law or the Constitution on an employer to negotiate with an organisation representing employees. The employer was at liberty to negotiate with one employee's organisation to the exclusion of another or to negotiate with neither.[43] Finally, in *Ryanair v Labour Court*, the Supreme Court appeared to go even further in emphasising the absence of any connection between the right to associate and union recognition. In an obiter remark, Geoghegan J. said "it is not in dispute that as a matter of law Ryanair is perfectly entitled not to deal with trade unions". This followed established precedent but, he continued, "nor can a law be passed compelling it to do so".[44] Legislation facilitating recognition, the practical embodiment of freedom of association, was apparently an impossibility.[45] The Supreme Court judgment in *Ryanair* was to have far-reaching if unintended consequences. It eventually culminated in the enactment of the Industrial Relations (Amendment) Act 2015. However, the immediate effect of the judgment was to render the existing Industrial Relations (Amendment) Act 2001 a dead letter.

The Industrial Relations (Amendment) Act 2001

Prior to the passage of the Industrial Relations (Amendment) Act 2001, two courses of action were open to a union that was refused recognition by the employer. The union could strike or alternatively refer the matter to the Labour Court under s.20(1) of the Industrial Relations Act 1969. Where the court found in favour of recognition, there was no legal obligation on the employer to comply. Between 1985 and 1991, the Labour Court issued 67 recommendations.[46] Of these, 59 (or 88 per cent) favoured recognition. But only 16 firms acted on the recommendation and granted recognition, a success rate of just 27 per cent.[47] As a route to recognition, the Labour Court appeared ineffective. The court, it seemed, required some form of additional legislative support.

The result was the Industrial Relations (Amendment) Act 2001, subsequently amended by the Industrial Relations (Miscellaneous Provisions) Act 2004.[48] It had a twofold objective: first, to ameliorate the increasing difficulties

43. *Association of General Practitioners*, cited in Maguire, "Trade Unions and the Constitution" in *Employment Law* (2009), p.641.
44. [2007] 4 I.R. 199 at 215.
45. See *Kelly*, 5th edn (2018), pp.2147–2148.
46. For developments post-1991, see A. Kerr, *The Trade Union and Industrial Relations Acts*, 5th edn (Dublin: Round Hall, 2015), pp.269–272.
47. D. D'Art and T. Turner, "Union Recognition in Ireland: one step forward or two steps back?" (2003) 34(3) *Industrial Relations Journal* 226–240 at 227.
48. The refusal of many employers to implement Labour Court recommendations for union recognition prompted the Irish Congress of Trade Unions (ICTU) to seek some form of statutory enforcement. Under "Partnership 2000" a high-level group was established to consider the question. It consisted of the Departments of the Taoiseach, Finance and Enterprise, Trade and Employment, ICTU, the Irish Business and Employers Confederation and the Industrial Development Authority. The final report of the High-Level Group on Union Recognition was produced in 1999. Out of this came the Industrial Relations (Amendment) Act 2001, subsequently amended in 2004 and again in 2015. See Kerr, *The Trade Union and Industrial Relations Acts*, 5th edn (2015), p.269.

experienced by unions seeking recognition; and second, to counter the growing disregard by a majority of employers of Labour Court recommendations supporting such requests. Although the contested question of recognition prompted the legislation, the Labour Court was precluded from issuing a determination on collective bargaining or union recognition.[49]

This is how the Act operated. Union members in a non-union enterprise could, if dissatisfied with pay, conditions or the fairness of procedures, seek assistance from the Labour Court.[50] Where the employer was willing to address the issues in dispute, the court, would disengage. If the dispute could not be resolved or the employer refused engagement, the union could then seek a Labour Court investigation and subsequent recommendation. However, before such an investigation could proceed, it had to be established that the employer concerned *did not* engage in collective bargaining.[51] The Act did not define collective bargaining.[52] Yet this was hardly a conundrum. The presence or absence of collective bargaining is easily discovered through the application of ILO principles. As already noted, the ILO holds that recognition of an independent trade union is a fundamental precondition for the existence of collective bargaining.[53] This principle and the efficacy of the Act itself were challenged in *Ryanair v Labour Court*.

Ryanair v Labour Court and the 2001 and 2004 Acts

Ryanair, a litigious anti-union employer, was in dispute with its pilots. The pilots sought a Labour Court investigation under the provisions of the 2001/4 Acts. It was opposed by the company which claimed it already carried on collective bargaining through its employee representative council or excepted body.[54] Consequently, the Labour Court was acting ultra vires. These claims were rejected by the Labour Court. While acknowledging the probability that Ryanair communicated and consulted with its employees, it nevertheless concluded that it did not engage in collective bargaining.[55] Ryanair sought and was granted judicial review. Its application to quash the Labour Court decision

49. Industrial Relations (Amendment) Act 2001 s.6(2).
50. For the purposes of this article, a non-union enterprise is one that does not recognise or negotiate with (an) independent trade union(s) regardless of the number of employees who may be union members.
51. Industrial Relations (Amendment) Act 2001 s.2(1)a.
52. Initially, the absence of an Irish statutory definition of collective bargaining appeared unproblematic. In *Ashford Castle Hotel v SIPTU* [2006] IEHC 201, the court gave the term a meaning "it would normally bear in an industrial relations context", cited in Kerr, *The Trade Union and Industrial Relations Acts* (2015), p.278. See also, Kerr, "Legislative Developments" (2004) 1(3) *Irish Employment Law Journal* 98–101.
53. See fn.12 and also B. Gernigon, A. Odero and H. Guido, *Collective Bargaining: ILO standards and principles of supervisory bodies* (Geneva: ILO, 2000), p.95.
54. The "excepted body" is a creation of the Trade Union Act 1941 (s.6(3)(a)). An excepted body is defined as "a body which carries on negotiations for the fixing of wages or other conditions of employment of its own but no other employees". The excepted body, Kerr and Whyte note, affords some protection for house unions and may infringe art.2, s.2 of the ILO Convention 98: Kerr and Whyte, *Irish Trade Union Law* (1985), p.52.
55. Labour Court Decision No. DEC-P-051 reported in (2005) 16 E.L.R. 99 (25 January 2005).

was refused in the High Court.[56] The company's appeal to the Supreme Court was allowed. It concluded that Ryanair carried on collective bargaining through its employee representative council.[57]

There are, it is submitted, difficulties that emerge from this judgment. In the absence of an Irish statutory definition of collective bargaining, the Supreme Court settled for a dictionary definition.[58] The particular dictionary and the definition on which the court relied remain unclear.[59] In the context of the case, sourcing a definition from a dictionary seemed somewhat misguided. If there was a definitional problem, a practical and pragmatic solution had already been provided in *Ashford Castle Hotel v SIPTU*.[60] Furthermore, there was ready to hand a long-standing internationally accepted definition of collective bargaining in the ILO Recommendation 91. Ireland, it should be added, had ratified various ILO Conventions in the 1950s.

This oversight was compounded by the Supreme Court's understanding of the nature of an excepted body or the employee representative council as operated by Ryanair. An excepted body could be established only at the behest of the employer and did not necessarily require the consent or participation of the employees. Employee withdrawal was of no consequence to its continued existence.[61] In accordance with the Supreme Court's definition of collective bargaining, this body could carry on collective bargaining negotiations with its progenitor employer. Such a body was one established, dominated and controlled by the employer. It was, in short, the employer's creature or an indigenous version of a company or house union. Disparities of power and employee dependence are endemic features of such organisations. Indeed, company or house unions have long been stigmatised as an unfair labour practice. In Canada and the United States, employer-dominated bodies or house unions have been declared illegal since 1935.[62] The ILO categorises any workers' organisation established under the control and domination of the employer as an interference with the right of freedom of association.[63] Whatever negotiations might have gone on with the excepted body or the

56. *Ryanair (applicant) v Labour Court (respondent)* [2005] IEHC 330.
57. *Ryanair v Labour Court* [2007] IESC 6 at p.217 para.38, and pp.225–6 para.55.
58. *Ryanair v Labour Court* at pp.217–18 para.40, and pp.221–2 para.46.
59. See A. Kerr, "Industrial Relations Law" in M. Regan, general editor, *Employment Law*, Tottel Publishing Ltd., Dublin (2009), p.668 at fn.19.
60. See fn.52.
61. *Ryanair v Labour Court* at p.211 para.29, and p.217 para.39. While employee withdrawal was of no consequence to the continuing existence of an excepted body, a different rule applied to the employer: *Iarnród Éireann v Holbrooke* [2001] 1 I.R. 237 held "a body cannot be an excepted body if the employer refuses to negotiate with it", quoted by Maguire, "Trade Unions" in M. Regan (ed.), *Employment Law* (2009), p.643.
62. T. Kerr and G. Whyte, *Irish Trade Union Law* (1985), p.52. See also, D. D'Art and T. Turner, "Ireland in breach of ILO Conventions on Freedom of Association, claim academics" (2007) IRN No. 11, *Industrial Relations News*, 21 March 2007, pp.1–4. See also B. Ogle, *Off the Rails: The Story of ILDA* (Dublin: Currach Press, 2004).
63. ILO, *Collective Bargaining* (Geneva 1960), pp.6–7. See also, ILO Recommendation (No. 91) *Collective Agreements and ILO Convention* and (No. 98) *Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively.*

employee representative council in *Ryanair*, they could never, under ILO Convention 98, be considered as collective bargaining.

Although it clarified how it understood the nature of an excepted body, the Supreme Court did not proceed to formulate any rules governing its establishment, the election of employee representatives or the working of its procedural machinery. In the absence of judicial direction, these remained the exclusive privilege of the employer. An assertion by any employer that collective bargaining was carried on through an excepted body could not, as a result, be gainsaid. Employers who made such a declaration could easily evade the operation of the 2001 Act and its 2004 amendment. In the wake of the *Ryanair* judgment, applications under the Acts sharply declined.[64] The Acts were effectively emasculated.[65]

The Industrial Relations (Amendment) Act 2015

Complaints by the ICTU to the ILO prompted Irish government action.[66] The Committee of the ILO noted the Government's commitment to reforming the current law on employees' right to engage in collective bargaining and to ensure compliance by the State with recent judgments of the ECtHR. In the light of the *Ryanair* judgment, the Committee invited the Government, in consultation with the social partners, to consider appropriate measures, including legislative measures to ensure respect for freedom of association and collective bargaining principles.[67] The result was the Industrial Relations (Amendment) Act 2015, which sought to remedy the defects of the 2001/4 Acts that were highlighted and compounded by the judgment in *Ryanair*. To that end, it provided a statutory definition of collective bargaining closely following that of the ILO. It amended or redefined the nature of an excepted body, bringing it within the ILO's conception of freedom of association. Under the Act, an excepted body now became one that is independent and *not* under the domination or control of the employer.[68]

The Act focused on two types of situation that might arise in a non-union firm. The first involved firms in which some employees are union members

64. N. Cullinane and A. Dobbins, "Considering the Impact of the 'Right to Bargain' Legislation in Ireland: A Review" (2014) 43(1) *Industrial Law Journal* 52–83 at 79.
65. M. Doherty, "Representation, Bargaining and the Law: Where Next for the Unions?" (2009) 60(4) *Northern Ireland Legal Quarterly* 1–45. The result of the *Ryanair* case, Doherty suggests, left "Irish law offering perhaps the weakest protection for trade union bargaining rights in the Western industrialised world". See M. Doherty, "Emergency Exit? Collective Bargaining, the ILO and Irish Law" (2013) 4(3) *European Labour Law Journal* 171–195 at 186.
66. ILO Governing Body 363rd Session, Geneva, 15–30 March 2012, Case No. 2780 (Ireland), *Complaints against the Government of Ireland presented by ICTU*, pp.207–231, paras 723–815. See also, Doherty, "Emergency Exit? Collective Bargaining, the ILO and Irish Law" (2013) 4(3) *European Labour Law Journal* 171–195 at 180–182.
67. ILO Governing Body 363rd Session, Geneva, 15–30 March 2012, Case No. 2780 (Ireland), *Complaints against the Government of Ireland presented by ICTU*, p.230, para.815(a), (b) and (c).
68. Industrial Relations (Amendment) Act 2015 s.27 1A and 1B.

but where the employer refuses to engage in collective bargaining either with the union or excepted body. In such cases, the Act provides a means for a union, acting on behalf of its members in that employment, to have disputes concerning the "totality of remuneration and conditions of employment" assessed against relevant comparators and, if necessary, determined by the Labour Court. However, the Labour Court will intervene only if satisfied that the employer does not engage in collective bargaining and the number of unionised employees, in the particular grade, group or category, is not insignificant.[69] Even so, intervention will not necessarily issue in a determination. It will be contingent on a comparison between the wages and conditions of the workers in dispute with those of workers employed under similar conditions in other firms. Where wages and conditions prove less favourable, the Labour Court may issue a legally binding determination of rectification. On failure of implementation by the employer, the union can seek enforcement in the Circuit Court. Such proceedings will not involve a *de novo* hearing.[70]

The second type of situation can arise where an employer claims to carry on collective bargaining through an excepted body. In the *Ryanair* case, the acceptance by the Supreme Court of such a claim forestalled a Labour Court intervention. Under the 2015 Act, mere assertions of this type no longer carry any weight. Rather, the Labour Court must be satisfied that the excepted body is a genuinely independent entity. In that regard, it will consider the frequency and manner in which employees are elected to the body, how long it has been in existence and whether any prior collective bargaining between the body and the employer has taken place. Any employer financing or resourcing of the body cannot exceed the minimum logistical support.[71] In satisfying the Labour Court as to the body's independence, the burden of proof rests on the employer.

Under the 2015 Act, an excepted body alone cannot initiate access to the Labour Court. This is the exclusive prerogative of the union official representing members in the particular firm. Along with outlining the disputed issues, the official must supply an additional statement under the Statutory Declarations Act 1938. This will detail the number of members in the grade, group or category who are party to the dispute along with their period of union membership. It will constitute admissible evidence without further proof. Employers or their representatives are precluded from scrutinising or interrogating the declaration.[72] Queries as to its content or accuracy will be definitively determined by the Labour Court.

Protection from victimisation for individuals who invoke the 2001/4 Acts is incorporated into the 2015 legislation. Where dismissal is being challenged for allegedly invoking the Acts, interim relief can be sought in the Circuit Court. If granted, injunctive relief will remain in force until the case is decided by the Labour Court.[73] Dismissal apart, other forms of victimisation such as reduced

69. Industrial Relations (Amendment) Act 2015 s.28 and s.31.
70. Kerr, *The Trade Union and Industrial Relations Acts* (2015), p.286.
71. Industrial Relations (Amendment) Act 2015 s.28(10) and (11).
72. Industrial Relations (Amendment) Act 2015 s.29(2A)1–5.
73. Industrial Relations (Amendment) Act 2015 s.34(11A).

access to particular work, training opportunities, shift work, overtime, etc. will be dealt with by enhanced enforcement of ss.9, 10 and 13 of the Industrial Relations (Miscellaneous Provisions) Act 2004. Finally, Ministers Bruton and Nash amended the Code of Practice on Victimisation (S.I. No. 139 of 2004) to incorporate the ECtHR judgement in *Wilson* into Irish law.[74] In that case, the ECtHR ruled that employer inducements to workers to relinquish union membership infringed the right of freedom of association.[75]

In summary, a principal focus of the Industrial Relations (Amendment) Act 2015 is on firms which do not recognise unions and where collective bargaining is absent. It provides a mechanism by which the fairness of remuneration and conditions of employment can be assessed through the agency of the excepted body and/or the Labour Court.[76] As such, it may provide a partial remedy for difficulties experienced by workers seeking to bargain collectively with their employer.[77] Nevertheless, it is at variance with the commonly understood notion of collective bargaining which involves the employer and union representing employees in face-to-face negotiations. The Act does not introduce statutory recognition and there is no requirement on the employer to recognise the union. Consequently, it falls below the standard set by the ILO in which union recognition is a prerequisite for collective bargaining.

The 2015 Act and the Ryanair *judgment*

The statutory definition of collective bargaining, the amended definition of an excepted body, the tests to be met establishing its independence, the restriction on interrogating the statutory declaration, and measures to prevent victimisation, were all responses to the Supreme Court judgment in *Ryanair*. What explains the defects in the judgment that necessitated such legislative correction? Two tentative answers are offered. First, there may be a low level of judicial awareness regarding the conflicting interests and disparities of power that characterise the employment relationship in a market economy.[78] Indeed, it was

74. *Wilson v UK*, ECtHR app Nos 30668/96, 30671/96 and 30678/96, 2 July 2002. Also [2002] I.R.L.R. 568. See Kerr, *The Trade Union and Industrial Relations Acts* (2015), pp.266 and 302; see also, government press release, "Ministers Bruton and Nash to reform Industrial Relations (Amendment) Act", 16 December 2014. See: *https://www.workplacerelations.ie/en/news-media/workplace_relations_notices/ministers_bruton_and_nash_to_reform_the_industrial_relations_amendment_act.html.*
75. *Wilson v UK*, para.47. For commentary, see K.D. Ewing, "The Implications of *Wilson and Palmer*" (2003) 32(1) *Industrial Law Journal* 122.
76. For a comprehensive review and commentary on the 2001 Act and the subsequent amendments made by the 2004 and 2015 Acts, see Kerr, *The Trade Union and Industrial Relations Acts* (2015), pp.269–294, 301–323.
77. See T. Gibbons, "The Industrial Relations (Amendment) Act 2001: A Useful Tool for Irish Trade Unions or Last Refuge of the Powerless?" (2015) 44(3) *Industrial Law Journal* 472–477; see also, C. Murphy and T. Turner, "Tipping the Scales for Labour in Ireland: Collective Bargaining and the Industrial Relations (Amendment) Act 2015" (2020) 49(1) *Industrial Law Journal* 113–114; Zimmer, "The Impact of the Industrial Relations (Amendment) Act 2015 on Collective Bargaining in Ireland", Master's Thesis in Human Resource Management, Dublin City University Business School, July 2017.
78. D. D'Art, "Managing the Employment Relationship in a Market Economy" in D. D'Art

these conditions, still operative today, that gave rise to the struggle for freedom of association in the first instance. Second is the individualist orientation of the common law and its insensitivity, if not hostility, to collectivism.

It is submitted that the lacuna in judicial awareness regarding the disparities of power and conflicting interests that characterise the employment relationship is exemplified in the *Ryanair* case when one has regard to the issue of fair procedures. Following the Supreme Court judgment in *In re Haughey*, the right to fair procedures or natural justice attained the status of a constitutional right.[79] These procedures act as a powerful safeguard for the individual in dealing with State bodies or emanations of the State. Likewise, in individual employment cases, whether in the public or private sector, the requirements of natural justice or fair procedures operate as a check on arbitrary action or the abuse of power. They are usually deployed by individuals against corporate over-mighty subjects. Given that context, Ryanair's application seeking the disclosure of the identities of those in dispute on the basis of fair procedures appears as a novel departure from prevailing norms. It was more likely a tactical if not disingenuous manoeuvre and might have been treated with some scepticism by the court.[80] In these circumstances, a disclosure by the Labour Court, identifying individuals in a collective dispute, might have severely compromised the integrity of the institution. As an honest broker, it would have suffered major reputational damage and certainly a steep decline, if not collapse, in client confidence. These likely outcomes effectively precluded disclosure. Nonetheless, on failure to disclose, the Supreme Court found the Labour Court to be in breach of fair procedures.[81]

The relevance or necessity for such disclosure is difficult to comprehend. It may arise from a misunderstanding of collectivism. The union was not representing a disparate group of individuals with varying aspirations and aims. Rather, it was acting on behalf of a collective with agreed goals and common objectives formulated democratically. Consequently, the identity of the individuals concerned was utterly irrelevant. Could it be argued that disclosure might have advanced a fairer and more just outcome in the case? In reality, it was likely to have had the opposite effect. Identification of the unionised employees would have left them vulnerable to victimisation. Indeed,

---

and T. Turner (eds), *Irish Employment Relations in the New Economy* (Dublin: Blackhall, 2002), pp.21–57.

79. [1971] I.R. 217. See *Kelly*, 4th edn (2003), pp.1121–1122. See also, A. O'Neill, "Fair Procedures—An Inviolable Constitutional Requirement" (2011) 33 *Dublin University Law Journal* 319–338.
80. Ryanair made a similar request during its judicial review in the High Court. It was refused by Hanna J. who "did not see any fundamental unfairness in the absence of any Ryanair pilot to give evidence"; *Ryanair (applicant) v Labour Court (respondent)* [2005] IEHC 330 at pp.23–24. In two UK cases, *NATFHE v UK* [1998] E.H.R.R. CD 122 and *NATFHE v Blackpool & Fylde College* [1994] I.C.R. 648, judges expressed unease at a requirement that a union disclose member names. Under the Trade Union and Labour Relations (Consolidation) Act 1992 ss.226A(2G) and 234A(3F), unions are not required to give names. See K.D. Ewing and J. Hendy, "The Dramatic Implications of *Demir* and *Baykara*" (2010) 39(1) *Industrial Law Journal* 2–51 at 11.
81. *Ryanair v Labour Court* [2007] 4 I.R. 199 at 200, 207, 210 and 225.

the restriction on employer interrogation of the statutory declaration introduced by the 2015 Act was designed to prevent such an eventuality. According to the explanatory memorandum to the Act, it is now State policy that workers involved in a dispute under the 2001/4 Acts should not be required to identify themselves to the employer in the early stage of the process.[82] The necessity for such a measure is a melancholic but accurate reflection of the formidable obstacles confronting employees exercising their constitutional right of freedom of association and in their seeking its functional embodiment in union recognition.[83]

It has been suggested above that the deficiencies in the Supreme Court judgment in *Ryanair* can largely be ascribed to the ideological dominance of common law individualism in judicial thinking. Thus, it is hardly surprising that judicial interpretation of freedom of association is narrowly construed, focusing as it does on the individual's right of association or disassociation. While representing the classical formalist approach, it is a particularly impoverished one. It ignores the origin, function and purpose of freedom of association. Primarily, workers associate in unions to exert some check on employer power and to mediate the conflicting interests, characteristic of the employment relationship, through negotiation and compromise. Consequently, union recognition and collective bargaining constitute the practical realisation or consummation of freedom of association. Since 2008, this purposive or functional interpretation of freedom of association has been applied and adopted by the ECtHR.[84] It represents a radical departure from the precedents set by the ECtHR's previous case law on freedom of association.

Freedom of association, union recognition and the European Court of Human Rights

In *Demir and Bakara v Turkey,* the applicants complained of a breach of arts 11 and 14 of the European Convention on Human Rights.[85] They alleged that their domestic courts had denied them the right to form a trade union and enter into

82. Explanatory Memorandum to the Industrial Relations (Amendment) Bill 2015, p.6, Section 25: Insertion of New Section 2A into Principal Act.
83. See D. D'Art and T. Turner, "Union Recognition and Partnership at Work: A New Legitimacy for Irish Trade Unions?" (2005) 36(2) *Industrial Relations Journal* pp.121–139. See also, D. D'Art and T. Turner, "Union Organising, Union Recognition and Employer Opposition: Case Studies of the Irish Experience" (2006) 26(2) *Irish Journal of Management* 165–183.
84. There has been a similar development in Canada. See Fudge (2004) 67(2) *Saskatchewan Law Review* 425–452. See also, A. Bogg and K.D. Ewing, "A (Muted) Voice at Work: Collective Bargaining in the Supreme Court of Canada" (2012) 33(2) *Comparative Labour Law and Policy Journal* 379–416. In *Mounted Police Association of Ontario v Canada (AG*) [2015] SSC 1, the court held that the ability to engage in collective bargaining was a "necessary precondition" for meaningful exercise of freedom of association. See also, Kerr, *The Trade Union and Industrial Relations Acts* (2015), p.302.
85. *Demir and Baykara v Turkey* No. 34503/97, Strasbourg, 12 November 2008 ECtHR (2009) 48 E.H.R.R. 54. See also *European Convention on Human Rights* ECtHR Council of Europe, Strasbourg 2013.

collective agreements.[86] The applicants' complaint under art.14 was dismissed. However, the complaint under art.11, concerning freedom of association, was upheld by a unanimous decision of the ECtHR.[87]

The ECtHR began with the truism that the object of the Convention is the protection of human rights. Crucially, for the argument advanced in this article, it laid down the manner in which these rights should be interpreted. Interpretation must be in a manner which renders the rights practical and effective, not theoretical and illusory.[88] Furthermore, as a living instrument the interpretation of the Convention must take account of present-day conditions and the evolving norms of national and international law.[89] Turning to art.11, the ECtHR identified its essential objective as the protection of freedom of association from interference by the State. However, it further observed that there may be an additional positive obligation on the State to secure the effective enjoyment of such rights.[90] This observation, the ECtHR conceded, was at variance with existing case law. It had already ruled in *Swedish Engine Drivers' Union v Sweden* and *Schmidt and Dahlstrom v Sweden* that the right to bargain collectively and enter into agreements *did not* constitute an inherent element of art.11.[91] These judgments, the ECtHR held, should now be reconsidered.[92] It was in the interests of legal certainty, foreseeability and equality before the law that the ECtHR not depart, without good reason, from established precedents. However, a failure by the ECtHR to maintain a dynamic, evolutionary approach would risk its becoming an obstacle to reform and improvement.[93] Consequently, having regard to developments in labour law nationally, internationally and the practice of contracting states, the ECtHR concluded that the right to bargain collectively with the employer had become an essential element of freedom of association.[94]

It is difficult to overstate the significance of the judgment when considering conflicting interpretations of freedom of association. The formalist interpretation – namely, that the right to form and join trade unions did not encompass a concomitant right to union recognition and collective bargaining – is now at a discount: an interpretation long applied by the Irish courts and finding its apotheosis in the oddities of the Supreme Court judgment in *Ryanair*. Such a formalist approach is now characterised by the ECtHR as "theoretical and illusory". Rather, a purposive or functional interpretation must be applied to render the right to freedom of association "practical and effective". This ECtHR judgment necessarily encompasses not only the right to form and join

86. *Demir v Turkey* at para.59.
87. *Demir v Turkey* at para.8.
88. *Demir v Turkey* at para.66.
89. *Demir v Turkey* at para.68.
90. *Demir v Turkey* at para.110.
91. *Demir v Turkey* at para.153. *Schmidt and Dahlstrom v Sweden*, app. No. 5589/72, 6 February 1976; *Swedish Engine Drivers' Union v Sweden*, app. No. 5614/72, 6 February 1976.
92. *Demir v Turkey* at para.153.
93. *Demir v Turkey* at para.153.
94. *Demir v Turkey* at para.154.

trade unions but a concomitant and indivisible right to union recognition and collective bargaining.[95] In short, the formalist interpretation of freedom of association has been unanimously rejected by the ECtHR. It follows as a result that contracting states acting bona fide and wishing to implement the spirit and letter of art.11 of the Convention must apply a purposive or functional interpretation of freedom of association. From the ECtHR perspective, the old dispensation which separated the right to form and join unions from the right to union recognition and collective bargaining has no longer any legal validity.

Larger claims have been made for the *Demir* judgment beyond its validation of the purposive or functional interpretation of freedom of association. The challenge it presents to common law and judges schooled in that tradition is, it has been said, "impossible to exaggerate".[96] Such a "monumental pronouncement of principle" seems likely to influence interpretations of domestic law by contracting states.[97] It would appear that those unhappy with the judgment and its ramifications must abandon hope that it constitutes a temporary aberration.[98] As Ewing and Hendy point out, it was a unanimous decision of the 17 judges of the Grand Chamber following the unanimous judgment of the seven judges in the second section.[99] Indeed, a year later, *Demir* was cited in another unanimous decision of the ECtHR upholding the right to recognition and collective bargaining as integral to freedom of association.[100]

The European Court of Human Rights, the European Social Charter, the EU Charter of Fundamental Rights and the ILO

In the period following the judgment in *Demir*, it appeared that the jurisprudence of the ECtHR in trade union rights cases was converging with that of the ILO Committee of Experts on freedom of association and with the European Committee of Social Rights.[101] This latter committee oversees compliance with the social and economic rights contained in the European Social Charter. Article 5 of that Charter requires that "all workers and employers have the right to freedom of association, in national and international organisations, for the protection of their economic and social interests". Parties to the Charter undertake to ensure that national law shall not impair, or be applied so as to impair, this freedom.[102] Article 6(2) of the Charter holds that "all workers and employers have the right to bargain collectively". There is an obligation on states "to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers'

95. *Demir v Turkey* at para.139.
96. K.D. Ewing and J. Hendy "The Dramatic Implications of Demir and Baykara" (2010) 39(1) *Industrial Law Journal* 2–51 at 20.
97. Ewing and Hendy (2010) 39(1) *Industrial Law Journal* 2–51 at 47.
98. Ewing and Hendy (2010) 39(1) *Industrial Law Journal* 2–51 at 48.
99. Ewing and Hendy (2010) 39(1) *Industrial Law Journal* 2–51 at 48.
100. *Enerji Yapi-yol Sen v Turkey*, app. No. 68959/01, 21 April 2009, cited in Ewing and Hendy (2010) 39(1) *Industrial Law Journal* 2–51 at 48.
101. J. Hendy and K. Ewing, *Article 11(3) of the European Convention on Human Rights* (Liverpool: Institute of Employment Rights, 2017), pp.356–375 at p.362.
102. European Social Charter art.5, Council of Europe, November 2016, p.9.

organisations with a view to the regulation of terms and conditions of employment by means of collective agreements".[103]

The judgment of the ECtHR in *Demir* along with arts 5 and 6 of the European Social Charter are at one in holding that the right to freedom of association also encompasses the right to bargain collectively. Furthermore, art.28 of the Charter of Fundamental Rights of the European Union enshrines the "right to negotiate collective agreements".[104] Nonetheless, according to the ILO, collective bargaining cannot begin until a union is recognised for that purpose.[105] On the basis of ILO principles, the embodiment of the right to collective bargaining would necessarily involve employer recognition of the workers' union. Where the employer denies the right to collective bargaining and its concomitant of union recognition, then statutory support for the realisation of that right becomes a necessary option. At first glance, art.6 of the Social Charter appears to support this reasoning. It speaks of an obligation on states to promote negotiations between employers' and workers' organisations in order that wages and conditions can be regulated by collective bargaining. However, art.6 contains an important qualification concerning the nature of these negotiations. It is that the negotiations between the parties be *voluntary*. The Charter is silent on what action a state might take where the employer refuses to engage voluntarily in negotiations. A refusal to recognise and negotiate with the union denies, in effect, workers the right to collective bargaining contained in art.6 of the Social Charter and art.28 of the EU Charter.

A solution to this perceived problem is offered in a recent publication by the ECtHR.[106] In a paragraph headed the "Right to Bargain Collectively", it acknowledges the finding in *Demir* that the right to bargain collectively has become an essential element of freedom of association.[107] However, it goes on to note, this reinterpretation or expansion of art.11 leaves unaltered a state's positive obligations under the Convention.[108] There is no additional obligation on states "to provide for a mandatory statutory mechanism for collective bargaining".[109] Under a voluntary system of collective bargaining, a trade union refused recognition can take industrial action to persuade the employer

103. European Social Charter art.6(2), Council of Europe, November 2016, p.9.
104. European Charter of Fundamental Rights EU (2012/2/c 326/02), Official Journal of the EU, art.28 Right of Collective Bargaining and Action p.C326/401.
105. International Labour Office, *Collective Bargaining: A Workers' Education Manual*, 11th impression (Geneva: International Labour Office, 1978).
106. ECtHR, *Guide on Article 11 of the European Convention on Human Rights: Freedom of Assembly and Association*, Council of Europe, 31 December 2019.
107. ECtHR, *Guide on Article 11 of the European Convention on Human Rights: Freedom of Assembly and Association*, Council of Europe, 31 December 2019, p.40/53 G, para.248.
108. ECtHR, *Guide on Article 11 of the European Convention on Human Rights: Freedom of Assembly and Association*, Council of Europe, 31 December 2019, p.40/53 G, para.251.
109. *Guide on Article 11 of the European Convention on Human Rights: Freedom of Assembly and Association*, Council of Europe, 31 December 2019, p.40/53 G, para.251. See the observations below in section 2 of this article on the use of the word "mandatory" when discussing statutory recognition and inward investment.

to enter into a collective agreement.[110] This is a less-than-satisfactory solution. It is an old adage that a right without a remedy is no right at all.[111] There is little sign here of a convergence with ILO principles.

Ireland and Demir

According to the ECtHR, a contracting state is obliged to take account of elements regarded as essential by the ECtHR's case law.[112] Following *Demir*, this suggests that Irish courts dealing with contested cases on recognition might be obliged to abandon the traditional formalist approach and apply a purposive interpretation of freedom of association. It is a requirement of s.4 of the European Convention on Human Rights Act 2003 that "a court shall when interpreting and applying Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments". However, should conflict or uncertainty arise when applying these principles, then the Irish Constitution will have primacy.[113] As such, the Irish judiciary might be precluded by constitutional considerations from adopting and applying a purposive interpretation of freedom of association in which the right to recognition is the natural concomitant of the right to organise in unions.[114] The supposed constitutional and other obstacles to a legislative enactment on statutory recognition are considered below.

2. OBSTACLES TO STATUTORY RECOGNITION CONSIDERED

In 1994, the government of the day proposed to set up an all-party parliamentary committee to review the 1937 Constitution. To assist in this endeavour, it appointed an expert review group (Constitution Review Group) composed mostly of lawyers, some scholars and a senior civil servant. The group's terms of reference were to review the Constitution and identify areas where change was desirable or necessary.[115] When published in 1996, the report ran to 700 pages.[116] The focus here will be on the section dealing with Art.40.6.1°iii on

110. *Guide on Article 11 of the European Convention on Human Rights: Freedom of Assembly and Association*, Council of Europe, 31 December 2019, p.40/53 G, para.252. See below, discussion on voluntarism and statutory recognition in section 2 of this article.
111. For instance, the Irish State guarantees the right to freedom of association. Where employers attempt to prevent the exercise of that right, they can be directed or sanctioned by the State. See Unfair Dismissals Act 1977 s.5(2) and s.6(2)(a).
112. *Demir v Turkey* at para.144.
113. *Human Rights Explained: A Guide to Human Rights Law*, Irish Human Rights and Equality Commission (Dublin, 2015), p.11. See also, Judge Thomas E. O'Donnell, "The Constitution, The European Convention on Human Rights Act 2003 and the District Court. A Personal View from a Judicial Perspective" (2007) 1 *Judicial Studies Institute Journal* 137–153
114. On this, see *Kelly*, 5th edn (2018), pp.2147–2148.
115. A. Butler and R. O'Connell, "A Critical Analysis of Ireland's Constitutional Review Group" (1998) 33(1) *Irish Jurist* 237–265 at 237
116. *Report of the Constitution Review Group* (Dublin: The Stationery Office, May 1996).

freedom of association and statutory recognition.[117] Objections or obstacles to statutory recognition raised by the group proved very influential. Subsequently, they were deployed with little critical examination by commentators and the high-level group appointed by Government to consider union recognition.[118] The deliberations of this latter group took concrete form in the Industrial Relations (Amendment) Act 2001, later amended by the Industrial Relations (Miscellaneous Provisions) Act 2004. The obstacles to statutory recognition raised by the Constitution Review Group and commentators are reviewed below.

Freedom of association and recognition

The Review Group began by considering the concept of freedom of association. Anticipating the ECtHR judgment in *Demir*, it acknowledged that in the absence of a duty on the employer to recognise a union chosen by employees, the constitutional right to freedom of association may remain illusory.[119] Even so, it was not convinced that the right to recognition should be given constitutional status. As an issue of industrial relations policy, it could be more appropriately resolved by the Government and the Oireachtas.[120] This seems an eminently practical suggestion. Yet, applying the unenumerated rights doctrine, it could be argued that the right to recognition is already an implicit constitutional right. The Constitution guarantees the right to freedom of association while the judgment of the ECtHR in *Demir* holds that union recognition is integral to that right. Granting the right to organise but withholding legal support for its practical embodiment in recognition confers a mere paper right.

Recognition and interference with the rights of an employer

A potential obstacle to statutory recognition identified by the Review Group was Art.40.6.1°iii of the Constitution guaranteeing the right to form associations and unions. In this regard, it might appear somewhat bizarre that the right to form unions could become a barrier to union recognition. It is a paradox, Lynch remarks, that the right to associate and form unions has often served to work against collective organisation.[121] An explanation for this "most ingenious paradox", according to the Review Group, is that while the State respects the individual's right of association, it should not have a "horizontal effect".[122] What this means is that it should not affect the rights of other private persons such as employers. Acceptance of this argument inevitably involves the negation of freedom of association. After all, the primary purpose of workers

117. *Constitution Review Group* (1996), pp.312–317.
118. See N. Howlin and R.C. Fitzpatrick, "The Feasibility of Mandatory Trade Union Recognition in Ireland" (2007) 29(1) *Dublin University Law Journal* 178–208.
119. *Constitution Review Group* (1996), p.316.
120. *Constitution Review Group* (1996), p.316.
121. I. Lynch, "Lawyers and Unions—The Right to Freedom of Association in the Irish Constitution" in T. Murphy and P. Twomey (eds), *Ireland's Evolving Constitution, 1937–97* (Oxford: Hart, 1998), p.226.
122. *Constitution Review Group* (1996), p.316.

associating in unions is to exert collective power in tempering the employers' untrammelled right to make decisions affecting their working lives. In the sphere of employment relations, the laissez faire notion that an employer has a right to do what he or she will, free of interference, has long been abandoned.[123] Extensive legal regulation of the employment relationship amply testifies to that fact. Historically, some of these legislative enactments originated in workers exercising the right of freedom of association. The Review Group's treatment of "horizontality" has been characterised as "extremely facile" given that it deals with neither the philosophical merits or demerits of the concept.[124]

Recognition and employers' right of dissociation

Another obstacle to statutory recognition identified by commentators is the obligation that it would place on an employer to recognise and negotiate with the workers' union(s).[125] This might conflict with the employer's right to dissociate. The employer's right of dissociation, it is claimed, must be regarded as a genuine constitutional impediment to statutory recognition.[126] In the Irish courts, questions concerning the right to dissociate are almost exclusively focused on the right of a worker to leave or, alternatively, not join the union. Across the western world, no extant legislation on statutory recognition requires an employer to join the union but merely to recognise and negotiate with it. Logically, it would be difficult for the employer to dissociate from an organisation of which he or she is not a member. This argument involving the employer's right of dissociation has been characterised as meaningless. In hiring workers, the employer has already chosen to associate.[127] It might be countered that this association is with the individual employee and not a collective. However, the imperatives of managerial coordination and control organise employees in groups, thereby creating a collective aspect to the employment relationship. The employer has, as a consequence, chosen to associate with the individual and his or her organisational collective group.

While remaining in conformity with individualist common law orthodoxy, emphasis on the employer as an individual private person arguably obscures an important consideration. Following the emergence and rise of large corporations, along with the separation of ownership from control, the individual employer may be difficult to identify. In any event, the employer or the enterprise's managerial agents represent an accumulation of material and human resources. In this sense, the enterprise is a collective power.[128] Usually

123. Not only regarding regulation of the employment relationship but in many areas. See, for instance, the remark by Hanna J., "[t]hat the days of laissez faire are at an end"; *Pigs Marketing Board v Donnelly* [1939] I.R. 413 at 417–418, cited in T. Murray, *Contesting Economic and Social Rights in Ireland* (Cambridge Studies in Law and Society) (Cambridge: Cambridge University Press, 2016), p.209.
124. Butler and O'Connell (1998) 33(1) *Irish Jurist* 237–265 at 248–250.
125. Howlin and Fitzpatrick (2007) 29(1) *Dublin University Law Journal* 178–208 at 196.
126. Howlin and Fitzpatrick (2007) 29(1) *Dublin University Law Journal* 178–208 at 196.
127. C. Fennell and I. Lynch, *Labour Law in Ireland* (Dublin: Gill and Macmillan, 1993), p.39.
128. Kahn-Freund, *Labour and the Law* (1977), p.6.

the individual aspirant for employment, unless possessed of rare marketable skills in high demand, has to accept the wages and conditions offered by the employer. This is so because the relation between an employer and the isolated worker is typically a relation between a bearer of power and one who is not a bearer of power. Collective organisation of workers and union recognition mitigates the power imbalance. Yet the resultant negotiation is not one between a worker's collective and an individual employer. Rather, it is a negotiation between collective entities both of which may be bearers of power.[129] Against this background, raising an employer's right of dissociation as an obstacle to statutory recognition carries little weight or substance and arguably verges on the bogus.

Property rights, the Constitution and recognition

Before turning to consider the constitutional protection of property rights as a putative obstacle to statutory recognition, the nature of a property right needs some examination. It is not immediately apparent how a legal obligation on the employer to recognise and negotiate with an independent association of his or her employees could constitute an interference with a property right. Confusion may arise from running together two distinct concepts: a right to property and the right to manage. Certainly, property rights furnish the owner with rights over property regarding its use or disposal. These rights do not extend to a right over people.[130] It is undoubtedly the case that the essential object of privately owned commercial organisations operating in the market is the pursuit of profit. This objective is realised mainly through the management and direction of the people employed therein. The claim that an absolute right to manage naturally flows from enterprise ownership has long been contested. Indeed, the potential for exploitative abuse arising from an unchecked right to manage has necessitated continual and continuing State legislative intervention, political and trade union action.[131] Statutory recognition is not so much an interference with a property right but more a collective, humanistic, democratic qualification of managerial or employer power.

Nonetheless, might a legal obligation on an employer or company to recognise and negotiate with its employees' union fall foul of the constitutional guarantee protecting citizens' property rights? Articles 43.1 and 40.3.2° of the Constitution both enshrine the right of private ownership and commits the State to protect from unjust attack the property rights of its citizens. Yet many of the

129. Kahn-Freund, *Labour and the Law* (1977), pp.6–7.

130. W.W. Daniel and N. McIntosh, *The Right to Manage* (PEP Report) (London: Macdonald and Jane's, 1972), p.113.

131. On this, see Kahn-Freund, *Labour and the Law* (1977), pp.6–7. "The main object of labour law, Kahn-Freund claims, has always been … and always will be, … a countervailing force to counteract the inequality of bargaining power—inherent in the employment relationship. Most of what we call protective legislation; … legislation on safety in mines, factories and offices, on payment of wages in cash, … on race or sex discrimination, on unfair dismissal and most labour legislation must be seen in this context. It is an attempt to infuse law into a relation of command and subordination."

rights in the Constitution are qualified rather than absolute. This is explicitly so in the case of property rights. Article 43.2.1° states that the exercise of property rights "ought in civil society to be regulated by the principles of social justice". This is more than a pious aspiration.[132] Indeed, Art.43.2.2° empowers the State to delimit these rights with a view to reconciling their exercise with the exigencies of the common good. A close or symbiotic relationship between the two Articles has been identified by the Supreme Court. When disputes arise concerning a citizen's property rights, these provisions contained in Art.43 have to be read in conjunction.[133] In *Cafolla v O'Malley*, Costello J. listed examples of legislative restriction on property rights required by the common good which the courts did not regard as an unjust attack. He cited laws restricting fishermen from fishing at certain times and limiting the nature and size of the catch, restrictions on the hours of trading in licensed premises, and laws regulating prices at which goods could be sold or services remunerated.[134] According to Hogan and Whyte, legislative restrictions on property rights are usually upheld by the courts and only a small minority of cases have found the constitutional guarantee of private property to have been infringed.[135] An American observer has gone so far as to doubt the effectiveness of the protection afforded to property rights by the Irish Constitution.[136]

To the extent that there is a popular perception that property rights are constitutionally sacrosanct, that perception is apparently mistaken.[137] This being so, the assumption that statutory recognition would automatically attract constitutional infirmity is ill-founded. Arguably, it is more likely that such recognition would fall within the shelter of the constitutional qualifications of property rights. This will be particularly so if it can be shown that trade unions can facilitate social justice, contribute to the common good and enhance the democratic nature of the State.

In industrial and commercial organisations, hierarchy defines many employees as subordinates, inferiors in responsibility, authority, status and value to the enterprise. It is difficult to conceive of any practicable business organisation where this is not the case. This locates the employee in a position of dependence on the good will, discretion and patronage of his or her superiors in a whole range of areas affecting jobs and career. Such a context is not conducive to an atmosphere in which ideas and criticisms that may implicitly challenge superiors can be freely expressed.[138] Autocratic rule, no matter how

132. See R. Walsh, "Private Property Rights in the Drafting of the Irish Constitution" (2011) 33(1) *Dublin University Law Journal* 86–115.
133. For various cases cited, see *Kelly*, 4th edn (2003), p.1989. See also, G. Hogan, "The Constitution, Property Rights and Proportionality" (1997) 32(1) *Irish Jurist* 373–397.
134. *Cafolla v O'Malley* [1985] I.R. 486, cited in *Kelly*, 4th edn (2003), p.1990.
135. *Kelly*, 4th edn (2003), p.1970. See also, D.G. Morgan, *A Judgement too far?* (Cork: Cork University Press, 2008), pp.41–49.
136. F.X. Beytagh, *Constitutionalism in Contemporary Ireland: An American Perspective* (Dublin: Round Hall, 1997), pp.194–195. He detected an underlying ambivalence with regard to wealth. Notions such as Christian socialism and concern with the common good, he believed, might prove difficult to reconcile with free enterprise.
137. *Kelly*, 4th edn (2003), p.1970.
138. Daniel and McIntosh, *The Right to Manage* (PEP Report) (1972), pp.111–112.

benevolent, flatly contradicts the classic democratic ideals of participation and freedom of expression. The exercise of absolute power and the absence of accountability and countervailing checks and balances are foreign to any democratic polity. Essentially, this is the situation in the non-union firm.[139] It seems, therefore, more likely that the voice of those at the bottom of the hierarchy will be more freely expressed and more effectively heard when backed by a framework that is independent of the power, status and reward system of the organisation. By deployment of their collective strength, trade unions compensate workers for the power they cannot have within the formal hierarchy.[140] Accordingly, trade unions not only emphasise the human value of the labour commodity in a market system but, in imposing a check on the exercise of power, express and foster democratic values and culture.

In wider society, unions act to promote values of social solidarity and counter the socially corrosive effects of atomistic market individualism.[141] Furthermore, there is evidence to show that union membership promotes citizen engagement and political participation.[142] Thus, by enhancing the democratic nature of the State, restricting abuse by the economically powerful and so contributing to social justice and the common good, unions can be regarded as socially beneficial.[143] Indeed, the ILO has highlighted the vital contribution made by trade unions to social justice.[144] Consequently, a constitutional challenge to a legislative enactment on statutory recognition is open to being strongly opposed on at least two grounds. First, the constitutional guarantee of property rights is not absolute but qualified by the exigencies of social justice and the common good. Facilitation of these objectives by trade unions, along with their enhancement of democracy and the democratic nature of the State, would arguably bring unions and their recognition within the shelter of these qualifications. Even if a statutory obligation to recognise a union were to amount to an interference with a property right, it would, under

139. D. D'Art, "Managing the Employment Relationship in a Market Economy" in D. D'Art and T. Turner (eds), *Irish Employment Relations in the New Economy* (Dublin: Blackhall, 2002), p.48.
140. Daniel and McIntosh, *The Right to Manage* (PEP Report) (1972), p.112.
141. On the atomistic effect of market individualism, see M.J. Sandel, *What Money Can't Buy: The Moral Limits of Markets* (London: Penguin, 2012).
142. D. D'Art and T. Turner, "Trade Unions and Political Participation in the European Union: Still Providing a Democratic Dividend?" (2007) 45(1) *British Journal of Industrial Relations* 103–126.
143. See B.J. Frick, "Not Just Collective Bargaining: The Role of Trade Unions in Creating and Maintaining a Democratic Society" (2009) 12(2) *Working USA: The Journal of Labour and Society* 249–264. See also, J. Fudge, "Trade Unions, Democracy and Power" (2011) 7(1) *International Journal of Law in Context* 95–105; B. Furaker and M. Bengtsson, "Collective and Individual Benefits of Trade Unions: A Multi-Level Analysis of 21 European Countries" (2013) 44(5–6) *Industrial Relations Journal* 548–565.
144. Committee of Experts on the Application of Conventions and Recommendations 1983, cited in von Prondzynski, *Freedom of Association* (London: Mansell, 1987), p.232. The ECtHR has identified trade unions as an important tool in achieving social justice and harmony: *Guide on Article 11 of the European Convention on Human Rights: Freedom of Association and Assembly*, Council of Europe, December 2019 at pp.37/53, para.223.

Art.43.2.2°, likely remain valid as a "delimitation" of that right.[145] Second, it could be argued that an implicit unenumerated right latent in the constitutional guarantee of freedom of association is the right to union recognition. Many commentators have noted that without a concomitant right to recognition, the constitutional guarantee of freedom of association remains an illusory or mere paper right.[146] The ECtHR judgment in *Demir* could be invoked as persuasive support for this contention.

Voluntarism and statutory recognition

Another objection raised by the Constitution Review Group and reproduced by commentators and the High-Level Group on union recognition was that an obligation on the employer to recognise the employee's independent trade union would be contrary to the voluntary nature of Irish industrial relations.[147] Voluntarism is usually understood to mean that trade unions and employers are opposed to legal intervention in industrial relations and that the parties remain largely free to regulate the substantive and procedural terms of the employment relationship without State intervention.[148] Yet governments in these islands have continually intervened to regulate both the individual and collective employment relationship. Numerous pieces of Irish legislation regulating individual and collective relationships at work are not regarded as departing from the voluntarist tradition. For instance, there were few if any objections to the Industrial Relations Act 1990 as constituting a departure from voluntarism despite the fact that it breached ILO principles on trade union autonomy and legislated to regulate the internal balloting procedures in trade unions.[149] Again, with the Industrial Relations (Amendment) Act 2015 which imposed limitations and duties on the employer regarding excepted bodies, no claims were made that it broke with voluntarism. It would seem, then, that trade unions and employers are not opposed to legislation per se—certainly not when it is perceived to support their interests. Consequently, the primary issues in respect of the Government's role in industrial relations is not whether

145. Casey (1972) 7(1) *Irish Jurist* 1–16 at 5.
146. See J.P. Casey, (1972) 7(1) *Irish Jurist* 1–16 at 4; Lynch, "Lawyers and Unions—The Right to Freedom of Association in the Irish Constitution" in Murphy and Twomey (eds), *Ireland's Evolving Constitution, 1937–97* (1998), p.227. Fennell and Lynch, *Labour Law in Ireland* (1993), pp.36–40.
147. *Constitution Review Group* (1996), p.316, para.3; N. Howlin and R.C. Fitzpatrick, "The Feasibility of Mandatory Trade Union Recognition" (2007) 29 *Dublin University Law Journal* 178–208 at p.185 fn.34; A. Purdy, "The Industrial Relations (Amendment) Act 2001 and the Industrial Relations (Miscellaneous Provisions) Act 2004—Have they helped?" (2004) 1(5) *Irish Employment Law Journal* 142–145.
148. von Prondzynski and McCarthy, *Employment Law* (1984), pp.28–29. See also, A. Kerr, "Industrial Relations Law", in M. Regan (ed.), *Employment Law* (Dublin: Bloomsbury, 2009), p.665; J. Wallace, "The Industrial Relations Act 1990: An Industrial Relations Perspective" in A. Kerr (ed.), *The Industrial Relations Act 1990: 20 Years On* (Dublin: Round Hall, 2010). See further, J. Wallace, P. Gunnigle and G. McMahon, *Industrial Relations in Ireland*, 3rd edn (Dublin: Gill and Macmillan, 2004), pp.70–79.
149. See D. D'Art, *Untying Workers' Hands*: *Trade Unions and the 1990 Industrial Relations Act*, report commissioned by the Workers Party, Dublin 2018, p.24.

it should intervene but rather what the degree of intervention should be, in what areas and for what objective.[150] Voluntarism appears as a slippery and ambiguous concept. In both the UK and Ireland, voluntarism has "tended to be more a general attitude than a precise doctrine".[151] However, it may on occasion be a useful bogeyman deployed by those opposing a particular legislative enactment.[152]

Far from being a departure from voluntarism or free collective bargaining, statutory recognition fits easily within that tradition. Indeed, in certain circumstances, statutory recognition could act in support of a voluntarist system of industrial relations. This claim relies on the assumption that Irish State policy remains supportive of trade unions and collective bargaining. However, as noted above, collective bargaining cannot begin until a union is recognised for that purpose. Where growing employer opposition makes securing recognition increasingly problematic, then the State may intervene to create conditions where the democratic will of the employees can find practical expression and not be overridden by superior employer power. The ineffective Industrial Relations (Amendment) Act 2001, as amended, and the subsequent remedial measures contained in the Industrial Relations (Amendment) Act 2015 are examples of such intervention. Nevertheless, the question remains whether statutory recognition would involve a radical departure or fundamental break with the tradition of voluntarism. Even a cursory examination of what statutory recognition actually involves can only produce an answer strongly in the negative.

Statutory recognition imposes a legal obligation on the employer to recognise and negotiate with an independent trade union of his or her workers. In the negotiations or bargaining that follow recognition, there is no legal obligation on either or both of the parties to produce an agreement or a particular outcome with regard to wages or conditions of employment. The bargaining outcome will depend on the relative bargaining power of the parties, the skill of the respective negotiators and the market in which the enterprise operates. Thus, the outcomes, whatever they may be, are not imposed by the State but remain very much within the tradition of voluntarist collective bargaining. As the definitions or descriptions of voluntarism have it, the parties remain largely free to regulate the substantive and procedural terms of the employment relationship without State intervention.[153] The contention that statutory

150. M.W. Salamon, *Industrial Relations Theory and Practice* (Harlow: Financial Times Prentice Hall, 1987), pp.219–220.

151. *Report of the Commission of Inquiry on Industrial Relations* (Dublin: Stationery Office, July 1981), p.11, para.28.

152. See F. Meenan, *Working Within the Law*, 2nd edn (Dublin: Oak Tree Press, 1999). "Voluntarism", Meenan claims, "is becoming more and more of a misnomer because individual employment rights are increasingly protected by statute" (p.151). Later, in discussing a failed bill on statutory recognition, Meenan suggests that "its introduction would have undermined the voluntarism of Irish industrial relations" (pp.159–160).

153. See fn.149, which cites sources for many but very similar definitions of voluntarism. See also the definition contained in the *Report of the Commission of Inquiry on Industrial Relations* (Dublin: Stationery Office, 1981), p.10: "It is generally assumed that our system

recognition represents a shift from the voluntary system of industrial relations does not stand up to examination. It seems much more likely that a statutory procedure for union recognition would support voluntarism or collective bargaining as the principal method regulating the employment relationship.

Statutory recognition and inward investment

A further concern raised by the Review Group was the negative consequence that statutory recognition might have on government inward investment policy. The policy of encouraging foreign firms to locate in Ireland might be jeopardised, the group suggested, if these firms "were effectively coerced to negotiate with a particular trade union".[154] This concern was also reflected by the High-Level Group on union recognition.[155] Before addressing the substance of this claim, the language in which it is couched needs examination.

"[E]ffectively coerced to negotiate with a particular union" is a pejorative, partisan formulation. Such rhetoric is the stock in trade of those opposing legislation facilitating recognition. For example, some commentators in discussing legislating for recognition prefer the prefix "mandatory" rather than "statutory".[156] Mandatory suggests command, coercion, conjuring up fanciful images of union power and a disregard of individual rights. The nineteenth-century claim that law itself is essentially and ultimately coercive is now regarded as a crudely lopsided view. It ignores the facilitative role played by the law.[157] Nonetheless, coercion or command remains as an aspect of the law but the salience of these features will be contingent on context. Many legislative enactments in collective or individual employment law can arguably be regarded as primarily facilitative. Examples include the establishment of a floor below which wages cannot fall or the requirement that employees be consulted in pursuit of improved health and safety. Sanctions, however, attend failure of implementation by the employer. Yet these legislative enactments are not, it would seem, regarded as coercive or labelled mandatory. On this basis, beyond a simple animus, it is difficult to comprehend how statutory recognition could be seen as any more coercive than minimum wage or health and safety legislation. Statutory recognition may be more correctly seen as facilitative rather than coercive. It gives concrete expression to the democratic decision of workers to be represented by a union or unions in negotiation with their employer. The particular union or unions designated to represent and negotiate on behalf of employees is not a result of legislative prescription. Rather, it flows from a free, independent, democratic employee choice. Statutory recognition facilitates the realisation of that choice. It is surprising that the question of

is a voluntary one, by which we mean that the parties to the industrial relations process are free to agree or not agree on the substantive principles which are to govern their mutual rights and obligations and to regulate their behaviour without the intervention of the State … it is a shorthand term for a variety of attitudes and principles."

154. *Constitution Review Group* (1996), p.316, para.3.
155. See D. D'Art and T. Turner (2003) 34(3) *Industrial Relations Journal* 227–240 at 232.
156. See Howlin and Fitzpatrick (2007) 29(1) *Dublin University Law Journal* 178–208; Purdy (2004) 1(5) *Irish Employment Law Journal* 142–145 at 143.
157. H.L.A. Hart, *The Concept of Law* 3rd. ed. (Oxford University Press) 2012, pp.18–25.

who decides—employer or employees—the identity or acceptability of the negotiating union(s) should resurface in the late-20th century. That question was at the heart of the 1913 strike.[158]

Owing to a dearth of survey evidence, it is difficult to establish with any certainty the extent to which statutory recognition might act as a deterrent to multinationals contemplating investment in this jurisdiction. Consequently, what follows is purely speculative. Many multinationals locating here already have some form of statutory recognition in their home countries. In the United States, statutory recognition has been on the statute book since 1935. Since then, employer-sponsored enactments have, in the intervening years, shaped the legislation more to their satisfaction.[159] Yet many employers would probably prefer to operate without trade unions. The strength of that preference will vary depending on ideology, culture and the institutional arrangements in the home country. For some corporations, existing legislation on recognition may constitute no more than a minor irritant. It is unlikely to figure as a major determinant encouraging capital flight from the home country. There is apparently no evidence to show that the absence of statutory recognition in this State figures prominently as an incentive in multinational investment decisions. Rather, the principal reasons multinationals locate here are facilitative government policy, a generous taxation regime and the easy availability of educated, skilled workers. In fact, union density levels are higher in foreign multinationals, including those of US origin, than in domestic private sector firms.[160] The prospect of statutory recognition may be of more concern to domestic private sector firms than foreign multinationals.[161]

The Ryanair *case and the impossibility of statutory recognition*

In the *Ryanair* case, the Supreme Court held that "Ryanair is perfectly entitled not to deal with trade unions nor can a law be passed compelling it to do so".[162] The reasoning behind this peremptory dismissal of statutory recognition was not explained or developed in the case. It may stem from an assumed constitutional impediment. If it is the case that statutory recognition is a legal impossibility, the Irish State would occupy a unique position among western democracies. For example, in the Scandinavian countries, employers are legally obliged to recognise trade unions.[163] In the UK, there is a statutory

158. P. Yeates, *Lockout Dublin 1913* (Dublin: Gill & Macmillan, 2000).
159. D. D'Art and T. Turner, "Trade Union Growth and Recognition", in *Labour and Employment Regulation in Europe*, J. Lind, H. Knudsen and H. Jorgensen (eds.) (Brussels: P.I.E. Peter Lang, 2004), pp.126–127. See also, Taft Hartley Act 1947.
160. J. Lavelle, A. McDonnell and P. Gunnigle, "Employee Representation and Consultation" in Lavelle, McDonnell and Gunnigle (eds), *Human Resource Practices in Multinational Companies in Ireland*: *A Contemporary Analysis* (Dublin: Stationery Office, 2009), pp.99–120.
161. Doherty notes that the majority of cases (72 per cent) taken under the 2001/4 Acts involved indigenous employers. See Doherty (2009) 60(4) *Northern Ireland Legal Quarterly* 1–45.
162. *Ryanair v Labour Court* [2007] 4 I.R. 199 at 215.
163. Co-Determination Act (MBL) 1985, Sweden. See also, D. D'Art, *Economic Democracy and Financial Participation: A Comparative Study* (London: Routledge, 1992), pp.156–158.

mechanism in place to facilitate union recognition.[164] Since 1935, employers in Canada and the United States are legally obliged to recognise and negotiate with trade unions if that is the democratic choice of their employees. These latter two countries are of particular interest. Both Canada and the United States, like Ireland are governed by constitutions. The constitutions of these two countries likely extend stronger protection to property rights without the qualifications attending these rights that feature in the Irish Constitution. Yet both countries have laws facilitating statutory recognition. In the United States the law governing statutory recognition survived a constitutional challenge and remains on the statute book.[165]

The claim that a law cannot be passed obliging Ryanair or by implication any employer to recognise and negotiate with a trade union is, arguably, mistaken. According to one authority, existing legislation already imposes a series of miscellaneous duties of consultation and recognition on certain employers. The Universities Act 1997, the Education Act 1998 and the Institutes of Technologies Act 2006 are examples cited in support.[166] However, the strongest or most unequivocal examples are the Railways Acts of 1924 and 1933. These Acts require that all terms and conditions be negotiated between the employer and the trade unions representing employees.[167] It is, in short, a form of statutory recognition. Though these Acts predate the 1937 Constitution, they have gone unchallenged and so remain good law. While they were amended by s.46 of the Transport Act 1950, the provision remains that rates of pay, etc. of CIÉ employees are regulated in accordance with agreements entered into by CIÉ and the appropriate trade unions.[168] That being so, it renders much of the argument in this section somewhat superfluous. The solidity of the supposed constitutional and other obstacles to statutory recognition—employers' property rights and right of dissociation, the horizontal effect, the incompatibility with voluntarism—are all without substance.

SUMMARY AND CONCLUSION

The right to form associations and trade unions is a right that the State guarantees in Art.40.6.1°iii of the Constitution. It is one of the hallmarks of a democratic state. The primary purpose for which workers form and join

164. Trade Union and Labour Relations (Consolidated) Act 1992, also Employment Relations Act 1999. (UK)
165. D. D'Art and T. Turner, "Ireland in breach of ILO Conventions on Freedom of Association, claim academics", (2007) IRN No. 11, *Industrial Relations News,* 21 March 2007, pp.1–4.
166. K. Costello, *Labour Law in Ireland* (The Netherlands: Wolters Kluwer, 2016), p.212.
167. Costello, *Labour Law in Ireland* (2016), p.211.
168. Kerr and Whyte, *Irish Trade Union Law* (1985), p.19. CIÉ is the body responsible for public transport. Originally CIÉ was the body with overall responsibility for public transport. Today the company is divided into three entities—Bus Éireann, Dublin Bus and Irish Rail. Despite this rearrangement wages and conditions in these firms continue to be determined by recognised independent trade unions through collective bargaining.

trade unions is not simply the pleasure of association, but to exercise through their collective some influence on employer decision-making affecting their working lives. This legitimate objective can be fully realised only when the employer agrees or is obliged to recognise and negotiate with an independent trade union(s) of his or her employees. Many commentators acknowledge that the right to associate without a concomitant right to recognition renders the right illusory.

The contention that union recognition is the practical embodiment of freedom of association has not, to date, been accepted by the Irish judiciary. They have consistently ruled that the right to associate does not involve a corresponding right to recognition. This formalist interpretation of freedom of association is not unique to this jurisdiction. Until relatively recently, the ECtHR adopted the same position. However, as a consequence of the unanimous judgment of the Grand Chamber in *Demir*, a radical departure from that ECtHR's previous case law has taken place. The ECtHR now subscribes to the view that the formalist interpretation of freedom of association is "theoretical and illusory". Only a purposive or functional interpretation can make that right "practical and effective". As matters now stand, freedom of association, according to the ECtHR, necessarily encompasses not only the right to form and join trade unions but an accompanying and indivisible right to union recognition and collective bargaining.

The question arises as to what practical effect the ECtHR's *Demir* judgment has in this jurisdiction. It may well place the Irish judiciary under some obligation to modify, if not radically alter, their long-held position separating the right to associate in unions from a corresponding right to recognition. In future cases of contested recognition, Irish judges may be placed under some constraint. Continuing to apply the traditional formalist interpretation in the face of its unanimous and comprehensive rejection by the ECtHR, would seem at least discourteous, as it would appear to set at nought the judgments of that court. The position of the Irish State regarding ECtHR judgments seems less ambiguous. The ECtHR judgment in *Wilson* was briefly considered above. It was incorporated by Ministers Bruton and Nash in S.I. No. 139 of 2004 "to remove any doubt as to Ireland's full compliance with the judgment".[169] Extrapolating upon that willingness, the judgment in *Demir* would have the salutary effect of opening the road to statutory recognition thereby giving practical substance to the constitutional guarantee of freedom of association.

It is, however, the case that the above outcome is subject to the primacy of the Irish Constitution. Where judgments of the ECtHR conflict with the Constitution, there is no requirement that they be incorporated into Irish law.[170] That would hold good in the event of its being shown that a legal obligation on the employer to recognise a union would be unconstitutional. The supposed

169. S.I. No. 139/2004 Industrial Relations Act 1990 (Code of Practice on Victimisation) Declaration Order 2004. See "Ministers Bruton and Nash to reform Industrial Relations (Amendment) Act" (fn.74).

170. *Human Rights Explained* (Dublin: Irish Human Rights and Equality Commission, 2015), p.11.

constitutional and other obstacles to statutory recognition were examined above. Overall, they were found to be lacking in substance. In some instances, the perceived obstacles turned out to be the flimsiest of paper tigers. Even so, the effort expended in dismantling the supposed or perceived obstacles to statutory recognition may be essentially superfluous. The fact is that a form of statutory recognition has been on the Irish statute book since the 1920s. Though amended in 1950, the provision that wages and conditions of CIÉ employees be regulated by negotiations between management and trade unions has remained. While this is confined to a particular group of workers, it is in effect statutory recognition. Unchallenged, it remains good law. On this basis, it would seem that there are no obstacles, constitutional or otherwise, to statutory recognition. However, beyond the chimerical, one formidable material obstacle remains—the opposition of powerful interest groups.

The Industrial Relations (Amendment) Act 2015 provides a mechanism by which the fairness of wages and conditions of unionised employees in non-union firms can be assessed and, if necessary, altered through the offices of the Labour Court and/or the excepted body. Under the Act the Labour Court is precluded from granting union recognition and its concomitant of collective bargaining. The novelty of this arrangement and its departure from ILO requirements has already been noted. Indeed, in this context, Kerr has raised questions regarding the Irish State's compliance, not only with the ECtHR *Demir* judgment, but with other Conventions and Charters. He points to the obligation on Member States under art.6(2) of the European Social Charter to promote collective bargaining. Furthermore, he notes that the right to engage in collective bargaining is enshrined in art.4 of the ILO's Convention 98 and art.28 of the Charter of Fundamental Rights of the European Union.[171] Despite these obligations, the 2015 Act leaves unresolved the contested question of recognition and collective bargaining. Take, for example, the non-union firm where some employees are unionised and operate the 2015 Act. Over time, more employees may join the union and subsequently seek recognition from the employer. If refused, two options are open to the union: to acquiesce, or to submit the issue to a trial of strength. As the law stands, the outcome will be decided by those who can deploy the most power. Finally, it must be remembered that the necessity for statutory recognition arises only where employers oppose workers' attempts to organise and bargain collectively. It might be expected that freedom of employee choice in this matter would be an uncontested right in any democratic polity.[172]

171. Kerr, *Trade Union and Industrial Relations Acts* (2015), p.302.

172. "Collective bargaining is the most effective means of giving workers the right to representation in decisions affecting their working lives—a right which is or should be the prerequisite of every worker in a democratic society." *Royal Commission on Trade Unions and Employers' Associations 1965–1968* (Donovan Commission) (London: HMSO Cmnd. 3623, 1973) (reprint), p.54.

Daryl D'Art lectures in Labour Law and Employee Relations at Dublin City University.