A World Still to win; Union Recognition - a Constitutional and Human Right

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The Workers' Party

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In Memory
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Abbreviations

AFL-CIO	American Federation of Labor and Congress of Industrial Organisations
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ETUI	European Trade Union Institute
FIE	Federation of Irish Employers
HRM	Human Resource Management
IBEC	Irish Business and Employers Confederation
ICTU	Irish Congress of Trade Unions
IDA	Industrial Development Agency
IHREC	Irish Human Rights and Equality Commission
ILO	International Labour Organisation
LO	Landsorganisationen i Severige
	(Swedish Confederation of blue-collar unions)
NCP	National Centre for Partnership
NCPP	National Centre for Partnership and Performance
NERI	Nevin Economic Research Institute
NLRB	Nation Labor Relations Board (US)
SAP	Socialdemokratiska Arbetareparties
	(Social Democratic Party – Sweden)
SIPTU	Services Industrial Professional and Technical Union
TASC	Think Tank for Action on Social Change
TQM	Total Quality Management
TUC	Trade Union Congress (UK)
WCM	World Class Manufacturing

Introduction

Recognition by an employer of an independent trade union(s) of his or her workers is of great importance to workers and unions. It allows the workers as members of the union to exercise some influence on employer decision-making affecting their working lives. Democrats can only welcome such an outcome. For the union movement as a whole ease of recognition can enhance its legitimacy and potentially stimulate growth. In many countries in Europe union recognition is no longer problematic. This is not the case in the Republic of Ireland.

The great strike and lockout of 1913 is rightly celebrated by the Irish labour movement as a heroic example of worker resistance and solidarity, not only in Dublin but throughout these islands. At the heart of the conflict was the workers' demand for recognition of an independent union of their choice. This was opposed by nationalist tycoon William Martin Murphy, owner of the Dublin Tramway Company and Independent Newspapers and chairman of the Federation of Dublin Employers. With Murphy at its head this combination of employers set out to smash Larkinism and the Irish Transport and General Workers Union (ITGWU). The dispute would eventually involve tens of thousands of workers and last for six months. It ended in victory for the employers. More than a hundred years later the contested question at the heart of the strike - union recognition - still remains to be settled.

This document on trade union recognition in the Republic of Ireland examines the obstacles often raised against the possibility of any legislative enactment on statutory recognition. Opposition by Irish employers and their agents to such a measure is assumed given their extreme reluctance to concede recognition even in individual firms. The experience of workers in Dunne's Stores and Lloyds Pharmacy and the continuing struggle in Ryanair is testimony to the fact. Except in passing, the focus here will not centre on employer opposition. Of course, that is not to

underestimate the formidable obstacles that may be raised by employers, their agents, and propagandists against any measure facilitating recognition.

Rather, this document is principally 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. Recognition, we argue, is already an implicit constitutional right. It follows naturally from the constitutional guarantee of freedom of association or the right of workers to form trade unions. Essentially, workers join unions to collectively negotiate terms and conditions with the employer. Yet these negotiations cannot begin until the employer recognises a union for that purpose. Joining a union without a concomitant right to recognition renders the exercise of the right to associate meaningless. Commentators who examine the question all agree that granting the right to associate in unions without a corresponding right to recognition renders freedom of association an insubstantial paper right. A 2008 judgement in the European Court of Human Rights (ECtHR) has unanimously upheld and applied this line of reasoning. The Court ruled that the right to bargain collectively with the employer is an essential and indivisible element of freedom of association. A subsequent judgment of the court reaffirmed that ruling.

Second, would legislation establishing statutory recognition be repugnant to the constitution, amounting to a constitutional impossibility? This question is answered in the negative as we believe a constitutional challenge would likely fail. In support of this claim we examine the plausibility or solidity of the arguments or obstacles often advanced against statutory recognition. For example, statutory recognition would constitute an interference with the employer's right of dissociation or infringe the constitutional protection afforded to private property or be incompatible with voluntarism. On examination, these supposed impediments turn out to be mere bogeymen or the flimsiest of paper tigers. Yet the effort expended in deconstructing or critiquing these obstacles may be superfluous. A form of statutory recognition has been on the Irish statute book since the 1920s. Since then, it has gone unchallenged and remains good law. So, apart from the inevitable opposition of powerful interest groups, there are no obstacles, constitutional or otherwise, to statutory recognition.

The hostility of capital to organised labour is a historical commonplace. Yet since the 1980s the old ambition of capital to eradicate unions altogether has been revived and now pursued with renewed vigour. Today unions face the challenge of a transformed work environment, declining union density, and hostile legislation. This document is the second in a series published by the Workers' Party which we hope will help to inform and arm the trade union movement in the battles ahead.

SECTION 1

What unions do and why recognition matters

"Collective bargaining is the most effective means of giving workers the right to representation in decision making 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 Employer Associations 1965-68

Trade unions, it seems, are modest regarding their past and present achievements, be it at the level of the individual enterprise or in the wider society. The classical definition of trade unions describes them as "a continuous association of wage earners for the purpose of maintaining and improving the condition of their working lives."[1] This is hardly a radical aspiration and is probably shared by the vast majority of workers. Nonetheless, without union representation, recognition, and collective bargaining that aspiration will remain unfilled. It will be so because of the nature of the enterprise and the capitalist market system in which it operates.

Workers and unions in the firm

In industrial and commercial firms, the hierarchical pyramid defines many employees as subordinates. As such they are inferiors in responsibility, authority, status, and value to the firm. It is difficult to conceive of any business organisation where this is not the case. This puts 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 situation will constrain the isolated individual employee from raising questions or expressing criticism regarding pay, conditions, or management practice. Evidently, the voice of workers will be expressed more

[1] Sidney and Beatrice Webb, *The history of trade unionism* (New York: Longmans, Green, 1894), 1.

freely and effectively when backed by a union that is independent of the power, status, and reward system of the organisation. By deploying their collective strength, trade unions compensate workers for the power they do not have within the formal hierarchy.[2] Through their unions, workers can exercise some influence on decision-making and impose a modicum of accountability on the employer.

Unions and the market

Even a cursory examination of the market context in which firms operate can only confirm the value and necessity of unions. Classical economists and their neoliberal heirs like to paint trade unions as aberrations or impositions on the market. In fact, unions are creations of the market. They arose from the workers' attempt to mount a collective defence against the unfettered play of market forces, modify their malign outcomes, and offset the great imbalance in power between the individual worker and employer.[3]

It is undeniable that the motor force of the capitalist market system is an insatiable desire for profit. The capitalist, Adam Smith observes, is driven by the "peddler principle of turning a penny wherever a penny is to be got."[4] Capitalism, it is claimed, "is identical with the pursuit of profit and forever renewed profit, by means of continuous rational capitalistic enterprise."[5] Or as Milton Friedman, the proselytising missionary of neo-liberalism, claimed "the social responsibility of business is to maximise its profits."[6] Given the primacy of profit-making it is inevitable that worker interests or needs will be of secondary importance. Employers or their senior managerial agents act under the market imperative of maximising profit and returns to shareholders. This overarching goal of the firm is mainly realised thorough the utilisation, deployment, and management of labour. Yet an unchecked, unaccountable drive for profit can have negative consequences for workers, the society, and the environment. Any capitalist unease on this account is, according to Marx, inevitably suppressed, "drowned in the icy waters of egotistical calculation."[7] Imagine Michael O'Leary, a latter-day William Martin Murphy, with responsibility for managing the Covid-19 crisis.

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[2] W. W. Daniel and Neil McIntosh, *The right to manage? A study of leadership and reform in employee relations* (London: Macdonald, 1972), 111-112.
[3] Daryl D'Art, "Managing the Employment Relationship in a Market Economy" in *Irish employment relations in the new economy* eds, Daryl D'Art and Thomas Turner (Dublin: Blackhall, 2002).
[4] Adam Smith, *The wealth of nations* (New York: Harvard Classics, 1909).
[5] Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (New York: Charles Scribner and Son, 1958).
[6] Quoted in Paul Collier and John Kay, *Greed is Dead: Politics after individualism* (London: Allen Lane, 2020), p.18.
[7] Karl Marx and Friedrich Engels, *Manifesto of the Communist Party* (Moscow: Progress Publishers, 1965), 43.

At firm level workers can experience at first hand the adverse consequences of the drive for profit maximisation. This can sometime demand intensification of work, downward pressure on wages, extending the working day, lay-offs, short-time working, temporary casual work, or redundancy. The un-organised worker will be powerless to modify, influence, challenge or contest any of these "strategic initiatives." Justification of these initiatives by those theologians of capitalism neo-liberal economists, as responses to impersonal market forces, competition or globalisation can only compound this sense of powerlessness. Where workers are organised, this is less likely. Through their union(s) they will be empowered to bring their concerns, modifications, or alternative strategies more forcibly to the attention of management. In firms, unions act as a counterweight or check to the unrestricted play of market forces. By doing so, they assert the human essence of the labour commodity and qualify its treatment as a mere inanimate factor of production.

This has practical outcomes. Compared to most of their non-union counterparts, workers represented by unions and engaged in collective bargaining have higher wage and non-wage benefits, fairer grievance systems, and more control over their working lives.[8] For most workers these are worthwhile benefits. From the employers' perspective they represent costs - a diminution in profit - and a curb on their freedom to respond to market dictates as they see fit. Hence the perennial opposition by employers to unions.

Unions and democracy

Trade unions not only emphasise the human aspect of labour in a market system but by imposing some check on the exercise of employer power both express and foster democratic values and culture.[9] Autocratic rule, no matter how supposedly benevolent, flatly contradicts the democratic ideals of participation and freedom of expression. The exercise of absolute power, the absence of accountability, is foreign to democracy. Essentially, this is the situation in the non-union firm. Their sometimes sham participative structures, whose ultimate outcomes are always in control of the employer, cannot conceal the absence of genuine accountability and worker influence.

[8] Richard B. Freeman and James L. Medoff, *What do unions do?* (New York: Basic Books, 1984); Paul Mac Flynn, *The impact of collective bargaining on pay in Northern Ireland* NERI Working Paper Series (Belfast: NERI, 2020).
[9] Judy Fudge, "Trade unions, democracy and power," *International Journal of Law in Context* 7, no. 1 (2011), 95-105.

This complimentary or symbiotic relationship between trade unions and democracy is of long standing. Throughout the nineteenth century in Ireland, Britain, and Europe, workers and their unions campaigned ceaselessly for the grant of universal suffrage. That is the right of all citizens, men and women, to vote in elections, the outcome of which will determine who governs. Yet the contribution of unions to democracy does not end with the great achievement of universal suffrage. The internal operation and governance of unions provides members with practical experience of the principles and practice of democratic participation.[10] Examples would be choosing representatives, formulating, debating and voting on motions, or speaking at branch or conference level. Unions could be said to function as academies or schools of democracy.

The democratising influence of unions is not limited to firms in which they are recognised but extends to the wider political arena. In that sphere unions act as enablers of democracy. The assumption here is that greater worker/citizen engagement in the political electoral process enhances the legitimacy and effectiveness of the democratic system. Yet an essential requirement for worker/citizen engagement is a sense of political efficacy. That is a belief among individuals and groups that it is possible to exercise some control over their circumstances through involvement and participation in the political process. Crucial for the development of a sense of political efficacy is the opportunity to participate in decision-making at one's place of work. Such engagement will develop the democratic culture and qualities necessary for participation in the wider democratic system.[11] Needless to say, this does not apply to managerial-sponsored schemes of participation. These schemes, irrespective of their level of sophistication, are primarily designed to serve managerial and commercial objectives rather than employee interests. Far from encouraging a sense of efficacy they are more likely to produce apathy and cynicism. Only through recognition of an independent trade union for collective bargaining can workers achieve a genuine measure of influence in the workplace and out of that develop a sense of political efficacy.

There is evidence to support the above contention. A survey of employees in 15 European Union (EU) member states found the effect of trade union membership on political participation to be both positive and significant.[12] Union membership was

[10] Barbara Fick, "Not just collective bargaining: the role of trade unions in creating and maintaining a democratic society," *Working USA: The Journal of Labor and Society* 12 (2009); Bengt Furåker and Mattias Bengtsson, "Collective and individual benefits of trade unions: a multi-level analysis of 21 European countries," *Industrial Relations Journal* 44, no.5-6 (2013).
[11] Carole Pateman, *Participation and democratic theory* (Cambridge: Cambridge University Press, 1970).
[12] Daryl D'Art and Thomas Turner, "Trade unions and political participation in the European Union: Still providing a democratic dividend?" *British Journal of Industrial Relations* 45, no.1 (2007).

associated with higher levels of political activism and electoral participation. Overall, the higher the level of union density the greater the effect on citizen participation. Even in the US, where unions are weak and operate in a very hostile climate, union membership still provides a stimulus to political participation. Apparently, unions promote a richer more participative version of democracy beyond the few minutes spent in the polling booth every five years.

Unions in the wider society

Generally, in capitalist democracies unions act to promote the values of social solidarity and provide a check on the socially corrosive effects of atomistic market individualism. They oppose a conception of society dominated by the calculus of profit and loss.[13] In Britain and Europe trade unions in alliance with labour or socialist parties have been instrumental in the creation of welfare states. The International Labour Organisation (ILO) and the European Court of Human Rights have highlighted the vital contribution made by trade union to social justice.[14] 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.

Why workers join unions

For the generality of workers consideration of the above social goods may not feature prominently in a decision on union joining. It is estimated that the proportion of workers who join unions out of a sense of ideological commitment ranges between 4% and 10%. At the opposite end of the spectrum are the reluctant joiners or those with a negative perception of unions. However, having experienced the benefits of union membership nearly half of this group come to adopt a much more positive attitude. The principal stimulus for union joining arises from the conflicting interests and disparities of power that characterise the employment relationship

[13] See: Michael J. Sandel, *What money can't buy: the moral limits of markets* (London: Penguin, 2012).
[14] See: International Labour Office, *Freedom of association and collective bargaining: general survey by the Committee of Experts on the application of conventions and recommendations* (Geneva: ILO, 1983); Council of Europe: European Court of Human Rights, *Guide on Article 11 of the European Convention on Human Rights: Freedom of Assembly*, 31 December 2019, 37/53 paragraph 223.

in a market system.[15] Apparently, a majority of workers join unions for practical or pragmatic reasons. First, to offset the powerlessness of the individual worker and deploy their collective strength in bargaining with the employer for improved terms and conditions. Second, to exercise some influence on employer decision-making affecting their working lives. Finally, to ensure the maintenance and operation of fair procedures in matters of grievance or discipline. These objectives can only be achieved through collective bargaining.

Box 1. Collective bargaining

The process of negotiations on pay and conditions between employers and workers. Defined by the ILO as "all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations on the other, for:

(a) determining working conditions and terms of employment; and/or

(b) regulating relations between employers and workers; and/or

(c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations."

Yet the ILO holds that collective bargaining cannot begin until a union(s) is recognised for that purpose.[16]

Box 2. Union recognition

The process by which management formally accepts one or more trade unions as the representative or representatives of all or a group of its employees for the purpose of jointly determining terms and conditions of employment on a collective basis.

Evidently, collective bargaining and union recognition are inseparably interlinked. One cannot exist without the other. This restatement of the obvious is necessary

[15] Jean Hartley, "Joining a trade union," in *Employment relations: the psychology of influence and control at work,* eds, Jean Hartley and Geoffrey M. Stephenson (Oxford: Wiley-Blackwell, 1991); John Kelly, *Rethinking industrial relations: mobilisation, collectivism and long wages* (London: Routledge, 1998).
[16] International Labour Office, *Collective bargaining: a workers' education manual* (Geneva: ILO, 1978), 28.

to counter suggestions that collective bargaining can be carried on without union recognition. The ILO would hold that this can never be the case.

Recognition is a key determinant of union growth. It creates a virtuous circle. The more unions obtain recognition the more likely they are to grow. Recognition also enhances union legitimacy. Irrespective of how recognition might be achieved, be it through direct union action or legislative state support, its importance for union survival and growth cannot be overstated.

SECTION 2

Contested ground: union legitimacy and recognition – a historical perspective

"Collective Bargaining is recognised as the best way of conducting industrial relations and as depending on strong trade union organisation."

Royal Commission on Trade Unions and Employer Associations 1965-68

"Collective Bargaining frequently means labour monopoly, the destruction of individual freedom and the destruction of the market place as the mechanism for determining the value of labour."

John R. van de Water, Chairman of the National Labour Relations Board[17]

Nineteenth century employers rarely granted union recognition on request. Usually, they were obliged to concede recognition after a successful strike. Many of these struggles were bitter and prolonged. Any prospect of success required a strong, confident trade union movement willing and able to take solidaristic action in support of those striking for recognition. Yet even in the best of circumstances, workers were not always successful, mainly because the very existence of unions roused formidable and sustained opposition from employers, the judiciary, and the propertied classes in general.[18] Unions were viewed as illegitimate. According to the classical economists, unions distorted the functioning of the market mechanism or, as the judiciary put it, operated "in restraint of trade." By suppressing competition between individual workers, unions prevented wages finding their "true market value." Furthermore, unions attempted to encroach on the employer's freedom of action. This was in direct contradiction of the dominant orthodoxy that all economic

[17] Appointed by President Ronald Regan in 1980s quoted in Barbash 'Do we really want labour on the ropes? *Harvard Business Review (July-August 1985)* see also Terry Bethel, "Recent decisions of the NLRB – the Reagan influence," *Indiana Law Journal* 60, no. 2 (1985).
[18] John Saville, *The labour movement in Britain* (London: Faber and Faber, London 1988); Simon Deakin and Gillian Morris, *Labour law* (Oxford: Hart Publishing, 2005).

actors should be free to do what they will with their own, without interference or dictation from the state or worker collectives.[19]

Statutory recognition in the United States

By the 1920s the doctrine of economic liberalism, or free trade, individualism and minimal state intervention had attained the status of holy writ. It was constantly touted as an unfailing recipe for universal prosperity. However, the Wall Street Crash of 1929 and the resultant Great Depression destroyed the credibility of economic liberalism for half a century. When its remedies of tax cuts and wage reductions were applied, they only served to worsen the crisis. Implementation of the New Deal under President Franklin D. Roosevelt, reversing these prescriptions, saved American capitalism from itself.[20] It did so through massive state investment and infrastructural projects designed to end mass unemployment and stimulate economic recovery.

Some New Dealers suggested an additional way of promoting recovery. Raising wages and increasing purchasing power, they argued, would stimulate demand and boost economic activity. Out of this came a legislative enactment establishing statutory recognition. The National Labour Relations Act 1935 (Wagner Act) gave US workers the right to join a trade union and bargain collectively with the employer through representatives of their own choosing. To ensure employees could exercise these rights, the Act established a National Labour Relations Board. Its function was to determine through secret ballot the free democratic choice of workers to be represented by a union. Employer interference, coercion, or discrimination against workers exercising that right became illegal. The Wagner Act represented a success for trade unions in terms of legal recognition and protection.[21] Its effect on union density level (the percentage of the workforce organised in unions) was dramatic. In 1930 American unions represented 12% of the non-agricultural workforce. Despite increased militancy and willingness to strike for recognition, the gains were modest, amounting to a 1% increase by 1935. Five years after the passage of the Wagner Act union density had more than doubled to 27%. By 1945 union density had peaked at 35%.[22]

[19] N. Soldon, "Laissez-faire as dogma: the Liberty and Property Defence League, 1882-1914," in *Essays in Anti-Labour History: responses to the rise of Labour in Britain* (London: Palgrave Macmillan, 1974).
[20] Daniel Guérin, *100 years of labor in the USA* (London: Ink Links, 1979): 93-4.
[21] James R. Green, *The World of the Worker: Labor in Twentieth-Century America* (Illinois: University of Illinois Press, 1998); Vivian Vale, *Labour in American politics* (London: Routledge, 1971).
[22] Derek C. Bok and John T. Dunlop, *Labour and the American Community* (New York: Simon and Schuster, 1970), 57.

The benign effects of the legislation were short-lived. North American employers bitterly opposed the Wagner Act. Initially, they sought a declaration from the Supreme Court that the legislation was unconstitutional. Surprisingly, they were unsuccessful.[23] Undeterred, they made a series of attempts to modify or weaken the legislation in various ways. These efforts culminated in the Taft Hartley Act 1947. It is claimed that Taft Hartley eradicated many of the rights and protection gained by unions during the New Deal and "perverted" or "virtually repealed" the Wagner Act[24]. As a result of that enactment the US system now stands as a negative exemplar for the design of a statutory system of union recognition.

Statutory Recognition in Canada

In Canada the provisions of the Wagner Act were incorporated in the War Decree Bill of 1944.[25] Like the US, the Canadian system of union recognition is based on the Wagner model but the contrast between the procedures and outcomes is striking. One important difference is the absence of an equivalent to the Taft Hartley Act in Canadian labour law. Secondly, recognition of a trade union for workplace collective bargaining can be achieved without a certification election if it can be shown the union represents at least 50% of employees. If a certification ballot is necessary, it must take place within a specified period of time which is far shorter than in the US.[26] This requirement avoids "unfair" interference by the employer. In the US the "free speech" provision of Taft Hartley allows employers or managers to actively campaign in union elections and the negative effects of such intervention is well documented.[27] The procedural superiority of the Canadian system owes much to the political pressure exerted by unions and social democrats in shaping the evolution of labour law in Canada.

Citing the US example, some have doubted the effectiveness of statutory recognition in promoting the growth of union membership, density and collective bargaining. Crucially, it seems, the effectiveness of any statutory measure on recognition depends on the nature, scope, and operation of the legislation. This in turn will be shaped by

[23] Christopher L. Tomlins, *The State and the Unions: labor relations, law, and the organised labour movement in America, 1880-1960* (Cambridge: Cambridge University Press, 1985).
[24] Green, *The World of the Worker*, p.150 also Boyer and Morais *Labors Untold Story* (Cameron Assoc, New York 1973) p. 347.
[25] European Trade Union Institute, *Trade unions and industrial relations in the USA and Canada: a comparative study of the current situation* (Brussels: ETUI, 1992).
[26] ETUI, *USA and Canada.*
[27] John A. Fossum, *Labor relations: development, structure, process* 6th ed (Chicago: McGraw-Hill Education, 1995).

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; and the prevailing institutional arrangements. The contrasting outcomes in Canada and the US are cases in point. In the US and latterly the UK, the law facilitating recognition is characterised by a procedural complexity that can frustrate its objective.[28] This is far from inevitable. For instance, in Sweden from the 1930s to the 1980s social and political life was dominated by a labour movement in which the industrial and political wings were closely aligned. Legislation on union recognition produced by this alliance was simple, elegant and effective. An Act on the Right of Association and Negotiation 1936 obliged employers to recognise and negotiate with trade unions. Furthermore, the Co-Determination at Work Law 1976 guarantees the right of independent representation to employees in every workplace with five or more employees. Similar rights pertain in Norway and Denmark.[29] Such straight-forward provisions circumvent the complexity and legal wrangling often associated with statutory recognition in the US and UK.

Union legitimacy and recognition under managed capitalism, 1945-1979

In many European countries after 1945 socialist or social democratic parties came to power. There was a general resolve to abandon the policy of *laissez faire* or non-intervention promoted by nineteenth century economic liberalism. Such negative prescriptions had only increased human misery, mass unemployment, and facilitated the rise of fascism. Rather than giving capitalism free rein, it would have to be managed. This involved a number of significant features. First, direct state involvement in economic activity through ownership control and management of some large commercial and service companies. Second, the provision of public health and welfare services along with a commitment to maintain full employment. This was achieved through a policy of demand management based on the economic theories of John Maynard Keynes. Its object was to iron out the periodic and recurring booms and slumps of the capitalist market system through a combination

[28] For expansion of these claims see Section 8 of this document.

[29] See: Daryl D'Art, *Economic democracy and financial participation: a comparative study* (London: Routledge, 1992); Daryl D'Art and Thomas Turner, "Trade Union Growth and Recognition: the Irish case in a comparative context" in *Labour and employment regulation in Europe*, eds. Jens Lind, Herman Knudsen, and Henning Jörgensen (Bruxelles: Peter Lang, 2004); Reinhold Fahlbeck, "Past, present and future role of the employment contract in labour relations in Sweden," in *The employment contract in transforming labour relations* ed. Lammy Betten (Netherlands: Kluwer Law International, 1995); H. M. Lange, "Scandinavian labour 1920-1937," in *Organized labour in four continents* ed. H. A. Marquand (London: Longmans, 1939).

of state investment and manipulation of interest rates. Third, as full employment strengthened workers bargaining power and promoted union growth, the conduct of industrial or employee relations became an important factor in managing the economy and curbing inflation. Employee relations would have to be based on a "negotiated order." This involved recognition and negotiation with trade unions.[30]

Across Europe unions became involved in policy making at government level. These bargained corporatist or tripartite arrangements between unions, employers, and governments became a common feature of the period. For instance, in Ireland from 1950 to 1970 there were a number of general wage rounds and after 1970 a number of national wage agreements, which became the dominant means for regulating pay.[31] The most developed model of bargained corporatism was to be found in Sweden. It was a model many unions and their associated parties in Europe aspired to imitate.

Bargained corporatism and the Swedish labour movement

From its beginning Swedish social democracy embodied the idea of a united labour movement. It emphasised the interdependance of the industrial and political in what it called the "democratic class struggle."[32] Though now under strain, this close connection between the political and industrial wings of the labour movement remains in place.

Coming to power in 1938, the Swedish Social Democratic Party (SAP) was to remain in office for the next forty years. At the political and industrial level its strategy was to seek compromise between capital and labour. Outright suppression of capital, it was argued, would be socially disruptive and had no assurance of success. Instead, capital and labour should cooperate to promote their common interest: greater efficiency in production. Eventual socialisation of economic control would be achieved gradually through progressive taxation, welfare policy, government planning, and industrial democracy.[33] Central to this historic compromise was an agreement between unions, employers, and the governing Social Democrats to operate a system of centralised wage bargaining. Beginning in 1952 it was to last for more than forty years. For the LO, the union centre or congress, (the equivalent of

[30] Philip Armstrong, Andrew Glyn, and John Harrison, *Capitalism since World War II: The Making and Breakup of the Great Boom* (London: Fontana, 1984).
[31] See: Joseph Wallace, Patrick Gunnigle and Michelle O'Sullivan, *Industrial relations in Ireland* 5th ed. (Dublin: IPA, 2020), 15-34.
[32] See: Walter Korpi, *The democratic class struggle* (London: Routledge, 1983); *The working class in welfare capitalism: work, unions and politics in Sweden* (London: Routledge, 1978).
[33] T. Tilton, "A Swedish road to socialism: Ernst Wigforss and the ideological foundations of Swedish social democracy," *American Political Science Review* 73, no. 2 (1979), 505-520.

the ICTU or TUC), centralised bargaining and a policy of wage solidarity appeared as a practical way to realise labour movement goals.[34] These policies would assist its political arm - the governing Social Democrats - to promote full employment and economic stability and to minimise inflation. By the late 1960s the results were impressive. There was full employment, a high wage economy, and a standard of living and welfare system unmatched by any other industrialised nation. Also, Sweden had the lowest strike rate among the western nations.[35]

Despite these achievements, defects in the labour movements bargaining strategy began to emerge both at enterprise level and in the wider economic arena. During the 1960s Swedish industry experienced increasing competition from Japan and the EU. The response of Swedish industrialists was rationalisation and work intensification to increase efficiency. This involved increased use of piece rates and three cycle shifts. Management was supported in this endeavour by the LO or union centre.[36] However, the brunt of the change was borne by rank-and-file workers. Workplace surveys during this time showed a dramatic deterioration in working conditions. Blue collar workers were found to be particularly discontented. Yet there was little they could do to control the rate or pace of change. As part of the historic compromise the union leadership had accepted management's right to manage. Furthermore, to facilitate decision-making under centralised bargaining, power had shifted from the shop floor to the union centre. All wage agreements contained a "no strike" clause. In 1969 an unofficial strike by mine workers in northern Sweden rapidly spread to become the biggest strike in Swedish postwar history. It shattered the fabled calm of the Swedish labour market. The following year saw a wave of strikes 93% of which were unofficial. Many were directed more at the union leadership than management.[37] For the LO, the strikes were a direct challenge to the policy of centralised wage bargaining pursued since the 1950s.

Difficulties also arose at a macro level. Solidarity wage policy obliged all firms to pay a standard wage for a particular job. Yet highly profitable firms could afford to pay their workers much higher pay than the standard rate. These firms could accumulate even greater profit on the back of worker wage restraint. Furthermore, social democratic government policy unintentionally exacerbated this defect. To

[34] Derek Robinson, *Solidaristic Wage Policy in Sweden* (Paris: OECD, 1974).
[35] C. van Otter, "Sweden: Labour reformism reshapes the system," in *Worker militancy and its consequences, 1965-75: new directions in Western industrial relations*, ed. Solomon Barkin (New York: Praeger, 1975).
[36] James Fulcher, "Class conflict: joint regulation and its decline," in Richard Scase, *Readings in the Swedish class structure* (Oxford: Pergamon, 1976).
[37] Korpi, *The Working Class in Welfare Capitalism; Work Unions and Politics in Sweden* (London, 1978)

[38] Joachim Israel, "Swedish socialism and big business," *Acta Sociologica* (Scandinavian Sociological Association) 21, no. 4 (1978).

maintain full employment government attempted to control or dampen fluctuations in the business cycle. Corporations were allowed to deposit 40% of their annual profits tax-free in a blocked account at the national bank. Only during an economic downturn could these deposits be reinvested but this was contingent on government approval. While enhancing economic stability and employment it gave an added impetus to the concentration of wealth.[38] The extent to which wealth and power was concentrated in few hands was revealed by a 1968 government Commission on Industrial and Economic Concentration. In three quarters of the companies quoted on the stock exchange between one to three shareholders held the majority of votes. The concentration of wealth in Sweden was found to be greater than in Britain, the United States or Germany. Finally, the Commission found that the distribution of wealth between 1945 and 1965 had remained static and unequal.[39]

These disclosures created general unrest within the labour movement, particularly as its principal objective since the 1930s had been to redistribute wealth and power. Criticism from the Swedish communists and the New Left was severe. They blamed the labour movement leadership, which, they claimed, no longer represented workers' interests. Solidarity wage policy was disparaged as socialism in one class.[40] If centralised bargaining and solidarity wage policy were to survive and balkanisation of the labour movement avoided, remedial action was essential. This would necessarily involve the political and industrial arms of the movement.

The LO Congress 1971, Industrial and Economic Democracy

The first task of this congress of associated unions was to address the deficit in worker influence at plant level. To that end it adopted a programme of industrial democracy designed to bring the whole range of managerial decision-making within the scope of collective bargaining. The LO called on its political ally in government to legislate for the abolition of managerial prerogative or managements right to manage. Accepted by the Social Democratic Party, the LO programme was rapidly embodied in legislation. Laws that had governed labour market relations since 1912 were almost entirely replaced.

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[39] Commission on Industrial and Economic Concentration, "Ownership and influence in the economy," summarised in Richard Scase, *Readings in the Swedish class structure* (Oxford: Pergamon, 1976).
[40] Richard Scase, *Social democracy in capitalist society: working-class politics in Britain and Sweden* (London: Routledge, 1977); Hans-Gören Myrdal, "The Swedish Model – will it survive?" *British Journal of Industrial Relations* 18, no. 1 (1980).

Box 3. Industrial Democracy Legislation Sweden[41]

Board Representation for Employees 1973
Act gave employees of companies with more than 50 workers the right to elect two representatives to the board of directors. Amending legislation in 1976 extended the application of the Act to companies with 25 or more employees.

Act on Shop Stewards 1974
Gave union shop stewards better employment security and strengthened their position in the workplace. Also allowed for time off in pursuit of union business.

Work Safety Law 1974
This granted the elected safety steward the right to halt any process of production he or she regarded as dangerous, pending judgement from the state safety inspector. The law introduced the principle that the union view of a disputed matter should initially prevail. Employers were obliged to give advance warning of contemplated changes to plant layout, equipment or employment conditions.

Security of Employment Act 1974
The Act obliged employers to objectively justify the dismissal of any employee. In cases of disputed dismissal, the employee in question would retain his/her job until adjudication by the labour court. The Act also contained a set of rules governing the order of layoffs in event of insufficient work.

Act on Employee Participation in Decision-Making 1977
The Act formally abolished managerial prerogative regarding hiring, firing and the direction of work. All matters the Act ruled affecting relations between employer and employees including the process and results of production became subject to collective bargaining. On request a union must be given access to books, accounts, and all relevant documents bearing on the company's operation.

A second but more intractable problem was to find a corrective to the unforeseen consequences of centralised bargaining and solidarity wage policy, namely the maldistribution and further concentration of wealth and power in the hands of a few. To that end the LO congress appointed a team headed by Rudolph Meidner. Its task was to produce a plan that would accomplish three objectives. First, the retention but also the acceptability of wage solidarity policy by ensuring that wage restraint would

[41] See: Industrial Relations in Europe International Research Group, *European industrial relations* (Oxford: Clarendon Press, 1981); A. Larson, *Labour market reforms in Sweden: facts and employee views* (Uppsala, Swedish Institute, 1979).

not disproportionality benefit the most profitable firms. Second, to counteract the concentration of wealth and power. Third, to increase employee and citizen control over the economic process.[42]

Known as the wage earner funds or Meidner Plan, it proposed that companies employing more than 50 workers would make an annual contribution of 20% of their pre-tax profit to a central fund controlled and administered by the trade union movement. Company contributions to the fund would be in the form of shares not cash. This would avoid any adverse effect on company liquidity. Solidarity wage policy could now be pursued free of its mal-distributive aspects. The greater a firm's profit, the faster would wage earners' shares in the fund accumulate. Thus, wage restraint would no longer work to exclusively benefit employers. Furthermore, industrial self-financing and government incentives for capital formation would now become more acceptable as part of the growing assets would accrue to employees collectively. Finally, the wage earner fund would allow employees in profit sharing firms to exercise influence on economic policy by voting shares.[43] After extensive consultation with rank-and-file union members, a modified proposal was accepted by the LO Congress of 1976. Practical implementation of the measure was left to the governing Social Democrats. However, after nearly forty years in office, the Social Democratic Party was defeated in the elections that year. When returned to office in the early 1980s they were confronted by the gathering forces of neo-liberalism. Nevertheless, the wage earner fund marks the furthest point of advance by any social democratic labour movement in attempting to reform and democratise capitalism.[44]

No union movement in Europe could match the achievements of their Swedish and Danish counterparts. Nevertheless, in Britain, Ireland, and Europe a consensus developed according a high level of legitimacy to unions and collective bargaining as representing workers interests and regulating their relations with employers. Indeed, a 1968 Royal Commission on Trade Unions and Employers' Association held that collective bargaining was the best method of managing industrial relations, but this required strong trade union organisation.[45] Again, in the Republic of Ireland the

[42] Rudolf Meidner, *Employee investment funds: an approach to collective capital formation* (London: Routledge, 1978).
[43] Meidner, *Employee investment funds.*
[44] For a history and commentary on the rise and fall of wage earner funds along with a consideration of critiques of the measure see: D'Art, *Economic Democracy and Financial Participation*, Ch. 4; Stefan Sjöberg and Nyegosh Dube, "Economic democracy through collective capital formation: the cases of Germany and Sweden and strategies for the future," *World Review of Political Economy* 5, no. 4 (2014).
[45] Royal Commission on Trade Unions and Employers' Associations, *Report of the Royal Commission on Trade Unions and Employers' Associations, 1965-68* reprint (London: HMSO, 1975), 57.

Industrial Development Authority, an arm of government, recommended incoming multi-nationals to recognise a union for employee representation.[46]

In this climate union recognition became less problematic. Of course, employer opposition did not totally disappear, but there were fewer recognition disputes. Employers who took an openly anti-union stance got little overt encouragement from government or employer associations. Apparently, unions were generally confident they could rely on their strength and solidarity to combat such opposition. State support in the form of statutory recognition was not required. A case in point is the British Trade Union Congress (TUC). During the late 1960s, it seems, government was prepared to enact a bill on statutory recognition but the offer was not taken up by the TUC.[47]

By 1970, decades of stable, managed capitalism had brough unprecedented economic prosperity. Political and trade union action had begun to narrow the great disparity in wealth between the mass of citizens and a tiny wealthy minority.[48] These developments encouraged a general optimism. Among some social democrats a belief developed that the class antagonism and the cycle of boom and slump, characteristics of the capitalist system since its inception, had been permanently transcended. State enterprise, nationalised industries, the welfare state, the live and let live compromise between capital and organised labour appeared as fixed and enduring features of social and economic life.[49] Even a republican president of the United States could announce "we are all Keynesians now."[50] Yet there was a small clique of economists, influenced by Milton Friedman of the Chicago school, who rejected Keynesian orthodoxy. For them it was anathema, a heretical departure from the true free market principles of competitive individualism, non-intervention and minimal state regulation. As proponents of a doctrine discredited since 1929, they were largely ignored. Their day was yet to come.

The oil crisis of 1973 brough in its wake rising unemployment, inflation and a fall in the rate of profit. In managing the crisis Keynesian remedies appeared ineffective. Criticism mounted of its policy prescriptions and its social democratic practitioners. Politicians and policy makers lent an increasingly sympathetic ear to Friedman and his burgeoning band of disciples. The way out of the crisis, they argued, was to restore the primacy of the market mechanism. Its working, they claimed, had been

[46] Patrick Gunningle, Jonathan Lavelle and Anthony McDonnell, *Industrial relations in multinational companies (MNCs): double breasting and trade union avoidance in Ireland* (Limerick: 2007).
[47] *Royal Commission,* 62.
[48] See: Thomas Piketty, *Capital in the twenty-first century* (London: Harvard University Press, 2014).
[49] Ralf Dahrendorf, *Class and class conflict in industrial society* (Stanford: Stanford University Press, 1959). Anthony Crosland, *The future of socialism* (London, J. Cape: 1956).
[50] Bob Sutcliffe and Francis Green, *The profit system: the economics of capitalism* (London: Penguin, 1987).

progressively impeded by decades of government intervention and labour market rigidities imposed by trade union power.[51] Essentially, it was a revival of the living dead of classical economics but retitled or disguised as neoliberalism. Nevertheless, from the 1980s onwards it replaced Keynesianism as the dominant economic discourse. That some social democratic or labour parties came to adopt neoliberal prescriptions demonstrates its hegemonic triumph.

Capital counterattacks, unions de-legitimised, social democracy retreats - the 1980s and beyond

United Kingdom

The victory of the British Conservative party led by Prime Minister Thatcher in 1979 saw the beginning of an all-out attack on trade unions, the interventionist state, social democracy, and collectivism in general. As Thatcher declared, "there is no such thing as society, there are only individuals." Successive Conservative governments carried through a programme of de-industrialisation and de-regulation. State companies were privatised, sold off to private capital, sometimes at knock-down prices. Consultation with unions - the practice of successive British governments since 1945 - ceased. Sixteen pieces of legislation all designed to weaken trade unions were enacted.[52] The striking miners of the mid-1980s were described as "the enemy within" and the full weight of the state was used to smash the strike and the miner's union.[53]

The Labour Party was returned to government in 1997. Under the leadership of Prime Minister Blair, it now became New Labour. For trade unions it was more akin to a false dawn than a new beginning.[54] The anti-union legislation of the Thatcherite era was not repealed but left intact. Indeed, there was some scepticism regarding the electoral benefits of the party's traditional association with trade unions. One aspect of the so-called modernisation was the removal of Clause IV of the party's constitution. Since 1918 this had committed the party "to

[51] Robert Kuttner, *Everything for sale: the virtues and limits of markets* (Chicago: Chicago University Press, 1999). See also: David McCrone, Brian Elliott and Frank Bechhofer, "Corporatism and the New Right," in *Industrial societies: crisis and division in western capitalism and state socialism*, ed. Richard Scase (London: Routledge, 1989); Milton and Rose Friedman, *Free to choose: a personal statement* (New York: Harcourt Brace Jovanovich, 1980).
[52] Colin Crouch, "United Kingdom: The Rejection of Compromise," in *European industrial relations: the challenge of flexibility*, eds. Guido Baglioni and Colin Crouch (London: Sage, 1991).
[53] Seumas Milne, *The Enemy Within; The Secret War Against the Miners* (London: Verso Books, 1994).
[54] Tonia Novitz, "A revised role for trade unions as designed by New Labour: the representation pyramid and 'partnership'," *Journal of Law and Society* 29, no. 3 (2002).

secure for workers by hand or by brain the full fruits of their industry and the most equitable distribution thereof that may be possible upon the basis of the common ownership of the means of production distribution and exchange." It had always been widely seen as indicative of the Labour party's commitment to socialism.[55] However, the unions did prevail upon the party to introduce legislation on statutory recognition: the Employment Relations Act 1999. It was welcomed by the general secretary of the TUC, who saw it as encouraging voluntary recognition. Most employers, he asserted, were now aware that unions wanted partnership not conflict. The law would be directed only at employers stuck in the 1980s or those trying to bring US-style union busting to Britain. During the framing of the bill the Confederation of British Industry (CBI) was consulted and was successful in influencing aspects of the legislation. Nonetheless, it announced its principled disagreement with statutory recognition. The Conservative Party promised its repeal if returned to office.[56] Nevertheless, Labour remained committed to the new economic order. Succeeding Blair as Labour Prime Minister in 2007, Gordon Brown revealed to all that "the era of boom and slump is over." It was a revelation that proved to be spectacularly ill-informed. Within a year the world was overtaken by another crisis of capitalism similar in origin and effect to that of 1929.

United States

The persistent antipathy of US employers to organised labour has been noted above. More than most nations, violence and bloodshed feature prominently in US labour history.[57] After 1981 under the Reagan and Bush administrations the state openly served as an auxiliary in the employers' war of attrition against trade unions. Soon after taking office Regan was confronted by a strike of air traffic controllers. He adopted the simple expedient of declaring the strike illegal and decertifying the union. Strikers were dismissed, while some were arrested and sent to jail in manacles.[58] Appointees of the Regan and Bush administration to key positions in the state regulatory agencies dealing with worker management relations were openly hostile to collective labour. The chairman of the National Labour Relations Board (NLRB), a Reagan appointee, claimed that "collective bargaining frequently means labour monopoly, the destruction of individual freedom and the destruction

[55] Peter Riddell, "The end of clause IV, 1994-95," *Journal of Contemporary British History* 11, no. 2 (1997).
[56] Mark Hall, "Statutory trade union recognition procedure comes into force," *Eurofound*, July 27, 2000.
[57] Philip Taft and Philip Ross, "American labor violence: it's causes, character and outcome," in *The history of violence in America: a report to the national commission on the causes and prevention of violence*, eds. Hugh Davis Graham and Ted Robert Gurr (New York: F. A. Praeger, 1969).
[58] Warren Brown, "US begins firing striking air controllers," *The Washington Post*, August 6, 1981. See also: Steven Durnin, "The professional air traffic controllers strike: a retrospective analysis" (Masters dissertation, Embry-Riddle Aeronautical University – Daytona Beach, 1994). Also, Bethel, T. 'Reagan influence'

of the market place as a mechanism for determining the value of labour."[59] Under this regime there was drastic change in the interpretation and enforcement of labour law. In some instances, federal agencies used their rule-making powers to modify existing health, safety, and labour laws, while in other cases they choose not to enforce the law. Judgements from previous administrations considered favourable to labour were reversed. Finally, there were substantial reductions in the budgets of the agencies administering labour law. This served to create a backlog of cases which had a two-fold effect. It tended to discourage the filing of charges of unfair labour practice, while of those actually filed a smaller percentage could be heard and if necessary prosecuted.[60] These developments worked to weaken the effectiveness of organised labour and made unions less attractive to potential members.

During this period, state hostility facilitated an unprecedented intensity of legal and illegal management opposition. Illegal firings increased from one in every 25 union elections and one in every 600 union supporters in the early 1950s to one in every four elections and one in every 48 union supporters by the end of the 1980s.[61] It became increasingly common for employers to actively campaign to persuade workers not to join unions. They are assisted in this endeavour by attorneys or labour management consultants who specialise in defeating union organising drives. In 1979 American industry was estimated to spend more than $100 million annually in fees for such consultants. By the late 1980s consultant activity was at unprecedented levels. Anti-union campaigns combining legal and illegal tactics, research shows, reduces union victories to one win in every 25 elections.[62] By 1995 the proportion of US private sector workers who were union members had fallen to 10%. This was 2% below membership density in 1930. In 2000, Human Right Watch Report concluded that workers' freedom of association was under sustained attack and the US government was failing in its responsibility under international human rights standards to deter such attacks and protect workers' rights.[63]

European Union

In Europe the attack on organised labour was a more subtle and urbane affair but maybe no less effective for that. Economic crisis and a revivified economic liberalism,

[59] Quoted in Jack Barbash, "Do we really want Labour on the ropes?"*Harvard Business Review* (July-August 1985).
[60] Kenneth Kovach, *Labor relations: a diagnostic approach* (Maryland: University Press of America, 1986).
[61] Thomas Kochan and Marc Weinstein, "Recent developments in US industrial relations," *British Journal of Industrial Relations* 32, no. 4 (1994).
[62] Fossum, *Labour Relations,* 163, Table 6.4.
[63] Human Rights Watch, *Unfair Advantage; Workers Freedom of Association in the United States under International Human Rights Standards* (New York: Human Rights Watch, 2000).

espoused and practised by the "new right" conservative parties, combined to place social democracy on the defensive and the political balance of power swung against labour. The outright rejection by capital and its agents of the compromise of the 1950s and 1960s left many social democrats confused and disoriented. Furthermore, the collapse of the Soviet Union left many European communist parties weakened and in disarray. To some extent they had acted as a break on a rightward shift of social democracy. That was now removed. Consequently, what could have been a fighting retreat degenerated into a rout. Even some nominally socialist governments pursued conservative economic strategies of retrenchment, control of public expenditure, and restructuring of labour markets.[64] In Sweden, trenchant employer resistance to the wage earner fund forced its abandonment by the social democrats.[65] These developments strengthened the employers' position in the ongoing debate on the single market. Central to that debate was the question of to what extent, if any, should the single market incorporate a social dimension.

It was recognised from the outset that the EU project of economic integration and the creation of a single market could adversely affect industry and employment. There would be casualties as well as beneficiaries. Consequently, the European Commission and some member states saw a social dimension as a complementary necessity to the creation of the single market. It would simultaneously secure support from the European labour movement and enhance the project's social acceptability. The UK government and the generality of European employers took the opposite view. While acknowledging the potentially negative effects of economic integration, the solution, they argued, was best left to the market. Intervention would foul the effective working of the market adjustment mechanism. European economic performance and job creation, they claimed, was been undermined by intervention and regulation leading to labour market inflexibilities.[66] Decoded, these "inflexibilities" turned out to be union demands for standardised hours, a living wage, reasonable working conditions, pensions, and a measure of accountability from management. Once again, unions were being fitted up as the saboteurs of competition and the market mechanism. Initially, the UK and European employers were alone in being very publicly associated with this line.

[64] Richard Hyman and Anthony Ferner, *Industrial relations in the new Europe* (Oxford: Blackwell, 1992).
[65] See: D'Art, *Economic Democracy,* Ch. 4.
[66] Georg Menz, "Whatever happened to social Europe? The three-pronged attack on European social policy," in *Social policy and the Eurocrisis: Quo Vadis Social Europe* (London: Palgrave Macmillan, 2015).

Over time its adherents grew in number even to include some social democrats. Indicative of this shift are the judgement of the European Court of Justice (ECJ) in the cases of *Laval* (CJEU C341/05), *Viking* (CJEU-C438/05) and *Ruffert* (C346/05). These cases suggest that the ECJ has taken the view that trade unions interfere or obstruct free movement. The nineteenth century legal doctrine that unions act in restraint of trade seems to have been resurrected.[67] Apparently, the above judgements indicate the predominance of the so-called fundamental freedoms over social rights.[68]

The rise of neo-liberalism did not go unchallenged. There were protests from members of unions and/or associated parties. These were deflected by technocrats, sometimes employees of the unions or social democratic parties, citing globalisation. In silencing disaffected proletarians, the word "globalisation" appeared to have magic properties. For conjurers with the word, it was a novel phenomenon, an elemental force, seemingly beyond the control of human agency. Resistance was not only foolish but futile. In reality, it was the old capitalist market but dressed maybe in a sharper suit. As early as 1848 Marx and Engels had identified and described the globalisation phenomenon. In terms of prescience and accuracy their description has yet to be bettered.

Box 4. Globalisation

"The bourgeoisie has through its exploitation of the world market given a cosmopolitan character to consumption and production in every country. [...] It has drawn from under the feet of industry the national ground on which it stood. All old established national industries have been destroyed or are daily being destroyed. They are dislodged by new industries whose introduction becomes a life and death question for all civilised nations, by industries that no longer work up indigenous raw material but raw material drawn from the remotest zones, industries whose products are consumed, not only at home but in every quarter of the globe. In place of the old wants, satisfied by the productions of the country, we find new wants, requiring for their satisfaction the products of distant lands and climes. In place of the old local and national seclusion and self-sufficiency, we have intercourse in every direction, universal inter-dependence of nations. [...] The bourgeoise, by the rapid improvement of all instruments of production, by the immensely facilitated means of communication, draws all, even the most barbarian nations into civilisation."

Marx and Engels, *Manifesto of the Communist Party* (1848).

[67] Keith Ewing, *The draft Monti II regulation: an inadequate response to Viking and Laval* (Liverpool: Institute of Employment Rights, 2012); Mark Bell, *Understanding Viking and Laval: An IER Briefing Note* (Liverpool: Institute of Employment Rights, 2008).
[68] Rebecca Zahn, "The Viking and Laval cases in the context of European enlargement," *Web Journal of Current Legal Issues* 3 (2008).

Demoralisation, defeat, and in some cases the capitulation of social democracy and European trade unions during the 1980s can be illustrated by the following examples.[69]

Industrial Democracy

In Britain and Europe during the 1970s, collective bargaining came to be seen by social democrats as a relatively restricted form of democratic participation and influence. A wide range of managerial decisions, such as investment, location, closures, mergers, or take-overs, which had important consequences for employees, were largely beyond the control or influence of trade unions and collective bargaining. Consequently, worker participation or industrial democracy became a democratic imperative. This meant that those who would be substantially affected by decisions made by social and political institutions must be involved in the making of these decisions. Out of these concerns came proposals for elected worker directors or representatives on company boards.[70] Their role was to extend worker influence on managerial decisions beyond the reach of trade unions and collective bargaining. It was a high point of social democratic reformism and its awareness of the deprivations that can accompany unregulated market operations.[71] Various attempts by governments and the EU to promote schemes of participation inspired by democratic principles encountered sustained and ultimately successful employer opposition.[72] By the late 1980s proponents of industrial democracy had abandoned the project and fallen silent. It was replaced by the managerial counter-initiative of employee involvement, participative schemes designed to serve employer interests.

[69] See: Wolfgang Streeck and Sigurt Vitols, "The European Community: between mandatory consultation and voluntary information," in *Works Councils: consultation, representation, and cooperation in industrial relations*, eds. Joel Rogers and Wolfgang Streeck (Chicago: NBER, 1995).
[70] European Commission, "Employee participation and company structure," *Bulletin of the European Communities* 8 (1975); Commission of Inquiry on Industrial Democracy *Report of the Commission of Enquiry on Industrial Democracy* (London, HMSO, 1977) Department of Labour, *Worker participation: a discussion document* (Dublin: Government Publications, 1980).
[71] Jeffrey Hyman and Bob Mason, *Managing Employee Involvement and Participation* (London: Sage Publications, 1995).
[72] Mike Leat, *Human Resources issues of the European Union* (Hoboken: Prentice Hall, 1998).

Draft EU Directive on Procedures for Informing and Consulting Employees 1980 (Vredeling Proposal)

Compared to the worker director schemes Vredeling was a relatively modest proposal. Yet almost immediately it was watered down in response to a storm of employer opposition. In its modified form it applied to firms with more than a thousand employees. Such firms would be required to give workers prior notice of closures, reductions in output, or new agreements with other firms. Before a company could make a final decision on any of these initiatives, workers were to be given thirty days in which to express an opinion. Despite its modifications, the proposal remained extremely unpopular with EU employers but particularly with Japanese and US multinationals. Such was the intensity of lobbying the European Commission feared the implementation of Vredeling would curtail inward investment or even worse divestment and capital flight. The proposal was abandoned.[73]

These developments have inspired a doom-laden prediction. In an increasingly individualised and dergulated labour market with global competition acting as the prime motor for management practice, the bulk of employees will be left with few resources either to query or contest the direction taken by management control.[74] Yet such an outcome is only likely in the absence of union representation, recognition, and collective bargaining.

Human Resource Management - A New Model of Workforce Management or Neo-liberalism at firm level?

The live and let live compromise between capital and labour in the era of managed capitalism was noted above. At enterprise level that compromise was given effect through the employer's agent, the personnel manager. There was a pragmatic acknowledgement that conflict as well a cooperation were inherent characteristics of the employment relationship in a market economy. Consequently, an important aspect of the personnel manager's job was to manage or resolve the disputes or conflicts that would inevitably arise from the sometime diverging interests between employer and employees. The consensus was that this was best done

[73] Michael Gold, "Employee participation in the EU: the long and winding road to legislation," *Economic and Industrial Democracy* 31, no. 4 (2010): 9-23; Richard P. Walker, "The Vredeling Proposal: cooperation versus confrontation in European labour relations," *International Tax & Business Lawyer* 1 (1984)
[74] Jeffrey Hyman and Bob Mason, *Managing Employee Involvement and Participation* (London: Sage Publications, 1995).p.193

through recognition and negotiation with independent trade unions representing the employees' interest. This accommodation became another casualty of capital's neoliberal offensive of the 1980s. It was replaced by a "new" model of workforce management.

Human Resource Management (HRM), a supposedly new model of workforce management, was developed by academics at the Harvard Business School in the early 1980s.[75] The adoption of HRM, they claimed, would end the traditional adversarial relations between employer and employees. It laid heavy emphasis on individualism and the importance of establishing an individual relationship between the employer and the individual worker. The employment relationship was viewed as essentially co-operative. It was a relationship of mutual advantage embracing all stakeholders, employer, employees and shareholders. Conflict did not arise from market operations or divergent interests between employer and employee but was the creation of trade unions. The classic formulation that trade unions do not create conflict but are merely its organised or collective expression was denied. If conflict did arise it was characterised as psychological and subjective or due to misunderstanding. The resolution lay not in collective action, the shop steward, or union official but with the enlightened psychologically aware human resource manager.[76] Collective representation was apparently redundant. Undoubtedly, the ideology policies and practice of HRM are inimical to organised labour.

As a "new" method of managing workers, the adoption of HRM was rapid and almost universal. In workplaces where unions were well-established and confident the change amounted to no more than a fashionable retitling of the personnel manager as human resource manager. In weakly organised or non-union workplaces, the effect was corrosive of collectivism and prospects of future union organisation. For capital, its servants, or agents, HRM was a useful ideological weapon in its renewed war on collectivism and the de-legitimatisation of trade unions. Yet beyond this interested group it is remarkable that HRM attained any credibility or acceptance. Incredibly, some unions gave it a guarded welcome. They may have feared characterisation as myopic un-regenerates trapped in the past, unable to see the beauty of the king's new clothes.

Even a cursory examination of HRM shows it to be shot through with contradictions, its claim to novelty spurious, its assertions of mutuality delusionary. Among its proponents

[75] Michael Beer and Bert Spector, eds. *Readings in Human Resource Management*. (New York: Free Press, 1985).
[76] Richard E. Walton, "From control to commitment in the workplace," *Harvard Business Review* (1985). See also: Karen Legge, *Human Resource management: rhetorics and realities* (London: Red Globe Press, 1995).

there is no agreement on its definition and it remains dogged by that unresolved problem. The emphasis on individualism and the workers individual relation with the employer is hardly novel. It featured as a weapon in the arsenal of early nineteenth employers in their opposition to trade unions. In any event the individualist emphasis is undercut by a simultaneous promotion of team working: a managerialist version of collectivism. Even in its contradictory variants stubborn continuities can be detected. For instance, the "soft" version of HRM proclaims that employees are unique organisational resource unlike any other and it is only their effort or labour that creates value for the organisation,[77] a claim that would receive wholehearted assent from proponents of the Marxian labour theory of value. Somewhat confusingly the "hard" version of HRM makes the contrary claim that labour is a commodity just like any other of the organisation's bought-in resources and as a consequence should be obtained as cheaply as possible and used accordingly.[78] Of course, it was this treatment of labour as a commodity that brought trade unions and labour movements into being and inspired the Marxian critique of capitalism.

The above critique of HRM, focussing on its incoherence, its contradictions, its denial that conflict and cooperation are inherent features of the employment relationship in a market system, may miss the mark. Highlighting the gap between image and reality is of little use, commentators observe, if the business of HRM is to shift perceptions of that reality or to "manage meaning." Once, it was deemed sufficient, they remark, to redesign the organisation so as to make it fit human capacity and understanding. Now it is better to redesign human understanding to fit the organisation's purpose.[79] Two factors militate against the success of such a strategy. First, the intelligence of subordinates and their capacity for resistance or covert rejection. Second, the cloudy obscurantist rhetoric of HRM remains continually vulnerable to exposure by market operations. For example, during the 1990s many large firms in the US under the slogans of "doing more with less" or "lean and mean" shed many employees. Senior managers and large shareholders were the chief beneficiaries of the resultant rise in share values. Little sign here of a relationship of mutual advantage. Those workers who allowed their "realities" or "meanings" to be managed but nevertheless lost their job in the "downsizing" required by HRM's "tough love" may have seen themselves as victims of a cruel confidence trick.

[77] Chris Brewster and Ariane Hegewisch, *Policy and Practice in European Human Resource Management* (London: Routledge, 1994).
[78] Brewster and Hegewisch, *Policy and Practice.*
[79] Tom Keenoy and Peter Anthony, "HRM: metaphor, meaning and morality," in *Reassessing human resource management* eds. Paul Blyton and Peter Turnbull (London: Sage Publications, 1992).

Trade Unions and Collective Bargaining – Time Expired and consigned to the dustbin of history?

Since the 1980s, sizeable falls in union membership and a corresponding decline in the role and influence of collective bargaining have been recorded in many countries.[80] For technocrats, union decline is largely due to long-term socio-economic change. This structural explanation focuses on shifts in employment from manufacturing to the service sector, changes in product markets, intensifying international competition, and globalisation. Also, occupational transformation from manual to mental work requires higher levels of education. This encourages, it is claimed, the diffusion of individualist orientations detrimental to the tradition of union solidarity and collectivism.[81] For a growing number of employees in new sectors of the economy and workplaces unions no longer appear relevant or necessary but functionless and redundant.

There are a number of problems with this analysis. First, it is not new. As early as 1932 US union decline was ascribed to occupational and industrial shifts in employment. This downward trend was predicted to continue.[82] Yet after the passage of the Wagner Act (1935) there was a dramatic increase in union membership and density. Second, the factors identified by the structural thesis - shifts in employment, competition, globalisation, etc. - have been experienced by all developed economies. It might be expected that unions in all countries would experience similar rates of decline. This is not the case. Certainly, union density levels have registered sharp declines in the UK and the US. Yet density levels in Sweden and Finland increased, while Norway, Belgium, and Denmark experienced only marginal fluctuations. In Canada, which experienced the same structural changes as its US neighbour and where many of the same firms and union operate, the percentage of unionised workers has remained consistently higher.[83]

As an encompassing explanation of union decline the structural thesis is not convincing. Indeed, the effect of structural change may be greatly exaggerated. Nevertheless, it comforts the comfortable. Union decline, it implies, is not the result

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[80] Jelle Viser, "Union membership statistics in 24 countries," *Monthly Labor Review* 129, no. 1 (2006).
[81] Patrick Gunnigle, Michael Morley, and Thomas Turner, "Challenging collectivist traditions: individualism and the management of industrial relations in greenfield sites," *Economic and Social Review* 28, no. 2 (1997). Rainer Zoll, "Modernisation, trade unions and solidarity," in *The challenges to trade unions in Europe: innovation or adaptation*, eds. Peter Leisink, Jim Van Leemput and Jacques Vilrokx (Cheltenham: Edward Elgar, 1996).
[82] Bruce E. Kaufman, "The future of US private sector unionism, Did George Barnet get it right after all?" *Journal of Labour Research* 22, no. 3 (2001).
[83] See: D'Art and Turner, "Union Growth and Recognition" p.125, Table 1.

of intensifying employer opposition and its sometime facilitation by the state. Rather, unions are simply the unfortunate victims of social and economic change. The reality is altogether more unpleasant. In Britain, it is claimed, the Thatcher government's labour laws and the consequent adverse change in the legal environment for industrial relations account for the vast bulk of union decline in the 1980s.[84] State de-legitimisation of trade unions facilitated and made respectable managerial strategies of opposition or de-unionisation. In the US the growing intensity of legal and illegal managerial opposition, ineffectively checked by a supine state, have been identified as the principal reason for union decline.[85]

A more plausible and nuanced explanation for union growth or decline considers the institutional context in which unions operate. It looks to the effect of a country's historical development and the specific national institutions governing industrial relations. The supply or availability of unions at the workplace and the supporting legislation for a union presence are the key elements in the institutional explanation. Union membership is a function not only of the individual demand for membership but crucially dependant on the availability of a union to join. From this perspective a country's institutional arrangement and the extent of legitimacy accorded to worker collectives is the most important factor in union growth and decline. Certainly, the institutional perspective goes a long way to explaining the varying fortunes of trade unions in the US, Britain and Scandinavia.[86] Yet what of the claim that union decline is essentially due to their increasing irrelevance and falling demand from the majority of employees in the new economic order?

Do Workers see a need for Unions?

A European Social Survey of 2002/3 surveyed over thirteen thousand workers in 15 member states. All the respondents were in paid employment and 27% of those were union members. They were asked if they agreed or disagreed with the statement "employees need strong trade unions to protect their working conditions and wages." An overwhelming majority (74%) agreed that employees need the protection of strong trade unions. Even among the non-union respondents a

[84] Richard Disney, "Explanations of the decline in trade union density in Britain: an appraisal," *British Journal of Industrial Relations* 28, no. 2 (1990); Richard Freeman and Jeffrey Pelletier, "The impact of industrial relations legislation on British union density," *British Journal of Industrial Relations* 28, no. 2 (1990).
[85] Kochan and Weinstein, "Recent Developments in US Industrial Relations' *British Journal of Industrial Relations* (Vol. 32, No.4 1994).
[86] Sabine Blaschke, "Union Density and European Integration: Diverging Convergence," *European Journal of Industrial Relations* 6, no 2 (July 2000).

substantial majority (69%) were in agreement. Only 12% of respondents disagreed with the statement. Positive attitudes towards unions were consistently in the majority. This applied irrespective of sectoral location, the extent of job autonomy, or the income satisfaction of respondents. With regard to age and gender there was no support for the proposition that women and younger workers would be more negatively disposed towards unions. Compared to their male counterparts and older employees, women and younger workers were more likely to perceive a need for unions. The 2002/3 survey compared its finding with two previous European wide surveys (1984 and 1996) of employee attitudes to unions. There was no evidence of a decline in demand for unions. On the contrary, the comparison demonstrated a growing recognition of the necessity for unions.[87]

In 1999 the American Federation of Labour and Congress of Industrial Organisations (AFL-CIO) commissioned Hart Research Associates Inc. to conduct a survey of workers' attitudes to trade unions. It found that since 1993 there had been a drop in negative attitudes to unions from 34% to 23%. A majority of those polled (52%) believed it would be good for the country if more workers had union representation. When non-union workers were asked how they would vote if a union election were held in their workplace tomorrow, 43% said they would definitely or probably vote for a union. Furthermore, young workers, the survey showed, were increasingly likely to vote for union representation. Finally, a majority of American workers (69%) were of the opinion that employees were more successful in getting problems resolved with their employer when they bring these problems as a group rather than individuals.[88] In the context of the active aggression of anti-union employers along with an unfavourable cultural and political climate, these findings are both remarkable and encouraging. Despite powerful forces promoting a contrary view, a belief in the utility, necessity, and effectiveness of collective representation persists among the workers surveyed. Since that time positive attitudes to unions among US workers and the general public have continued to grow. A recent survey found that over 50% of American workers would vote for a union at work. Americans born after 1975 were found to have particularly strong positive feelings towards labour unions.[89]

Since the 1980s capitalist triumphalists, dedicated but unthinking followers of fashion, and the bleating of defeatists have combined in chorus to declare the actual or soon

[87] Daryl D'Art and Thomas Turner, "Workers and the demand for trade unions in Europe: still a relevant social force?" *Economic and Industrial Democracy* 29, no.2 (2008).
[88] Hart Research Associates, *American Workers' Views on Key National Issues* (Washington DC: American Federation of Labour and Congress of Industrial Organisations, 1999).
[89] Emily DiVito and Aaron Sojourner, "Americans are more pro-union – and anti-big business – than at any time in decades," *The Guardian*, May 13, 2021.

to be accomplished withering away of trade unions and collectivism. The evidence of the above surveys flatly contradicts such assertions and predictions. Among a majority of workers in Europe and even in the US a conviction persists of the necessity for trade union representation. Evidently the facilities provided by trade unions – employee voice, the emphasis on the human essence of the labour commodity, and the protection against arbitrary management action – are still very much in demand. Among workers generally, the conviction of the necessity and utility of union representation not only persists but has grown in strength since the early 1980s.

This is hardly surprising and is easily explained. First, there is the workers' experience of the employment relationship in a market system. Conflicting interests inherent in that relationship, such as conflict around the wage/effort bargain, the sometime treatment of labour as a commodity, and asymmetrical power relations create the basis for trade union demand. Though these elements may vary in intensity or starkness depending on the particular market and variety of capitalism they remain constants of any market system.[90] Consequently, trade unions retain a continuing relevance for the majority of workers.

Second, the growing conviction among workers of the need for strong trade unions can be explained by the impact of developments since the early 1980s. Intensified international competition and deregulation have increasingly threatened the post-1945 arrangements of job security, social welfare and regulated labour markets. As workers become more exposed to the operation of market forces, the protection provided by trade unions becomes more apparent. European trade unions, at any rate, can take heart from the above survey. There appears to be a large pool of potential union members. Organising these workers is the challenge for trade unions. The harvest is great and there is, it seems, still a world to win.

Union Legitimacy and Recognition in the Irish Republic: An Exceptional Case?

It might be expected that the Irish trade union movement would escape the mauling by employers, the state, and judiciary visited upon their counterparts in Britain and the US. After all, the official policy of the Irish state is supportive of trade unions and

[90] D'Art, "Managing the Employment Relationship in a Market Economy"; Daryl D'Art and Thomas Turner, "New working arrangements: changing the nature of the employment relationship?" *The International Journal of Human Resource Management* 17, no. 3 (2006).

collective bargaining.[91] Indeed, recognition of unions in the state sector is largely uncontested. Furthermore, from 1987 to 2008, Irish trade unions were involved in a partnership arrangement with the employers and successive governments. Partnership seemed likely to enhance union legitimacy and make unacceptable or paradoxical employer opposition. Finally, freedom of association or the right of workers to form independent trade unions is a right guaranteed by Article 40.6.1 of the Irish constitution. With these protections in place Irish trade unions seemed well-placed to ride out the anti-union storms of the 1980s and beyond. The next section will consider if that turned out to be the case.

[91] Patrick Gunnigle, Michelle O'Sullivan and M. Kinsella, "Organised labour in the new economy: trade unions and public policy in the Republic of Ireland," in *Irish employment relations in the new economy* eds, Daryl D'Art and Thomas Turner (Dublin: Blackhall, 2002).

SECTION 3

Partnership, Union Legitimacy and Recognition in the Republic of Ireland

"It is difficult if not impossible to achieve a bargaining relationship with a party who would prefer you did not exist."

John Kelly (1996)[92]

"The lion and the lamb may sometimes lie down together but when the lion gets up the lamb is usually missing."

J. Billings, Humourist (1818-1885)

The all-out attack on British trade unions in the 1980s did not go unnoticed by their counterparts in the Republic of Ireland. A fear developed that Irish trade unions might become the next victims. It was a reasonable apprehension in the context of the time. The liberatory virtues of neo-liberalism were being daily celebrated by some economists and newspapers. Initially led by the Irish Independent, it was later taken up by the Irish Times. The "new" economics would free entrepreneurial talent and creativity from the dead hand of the state, its regulation, red tape, and bureaucracy. Impediments to the working of the market mechanism would be dismantled. The wider application of market principles to economy and society would benefit all. Also, 1985 saw the formation of a new political party: the Progressive Democrats. The party was dedicated to the implementation of the neo-liberal policies of low taxation, privatisation, and welfare reform.[93] Despite the Progressive Democrats' short political life and status as junior coalition partner, it was extremely influential, functioning as

[92] John Kelly, "Union militancy and social partnership," in *The new workplace and trades unionism*, eds. Peter Ackers, Chris Smith and Paul Smith (London: Routledge, 1996).
[93] David Harvey, *A brief history of neoliberalism* (Oxford: Oxford University Press, 2005); Robert Pollin, *Contours of descent: US economic fractures and the landscape of global austerity* (London: Verso, 2003).

an ideological and policy powerhouse of governments. Even beyond its demise, the party's ideological influence persisted.

Mindful of the fate of unions in Britain and the developing situation at home, the Irish Congress of Trade Unions (ICTU, often referred to simply as "Congress") leadership urged engagement in a tripartite agreement between government, employers and trade unions. Such an arrangement, the ICTU argued, would act as a bulwark against the neoliberal policies of deregulation, privatisation, and union marginalisation.[94] Though purely defensive, these were worthwhile objectives. Yet without a strong political ally or union associated party, in or even out of government, a defence against the essentially political projects of privatisation and deregulation might prove difficult to sustain. With regard to the maintenance of union legitimacy, recognition and growth, the prospect appeared brighter. Commentators on corporatism agree that the presence of centralised tripartite bargaining between employers, unions, and government works to neutralise employer opposition and give an impetus to union density and growth.[95] This consensus is based on the experience of European trade unions and their associated political allies, usually the governing social democratic party, operating centralised bargaining. The close and mutually reinforcing connection between Swedish unions and the social democratic party are a classic example. Their long engagement in centralised bargaining produced benign outcomes for the labour movement and society generally. The ICTU may have hoped that Irish trade union involvement in centralised bargaining would produce similar positive outcomes. An obstacle to such a happy consequence was the nature of the Irish political landscape. Centre and conservative parties had dominated Irish politics since the state's foundation. Opposition was provided by a weak and fragmented left whose potentially more radical elements were diverted by attempts to solve the conundrum of the national question. In these circumstances, realisation of the political goals of the ICTU - the prevention of privatisation and deregulation - while not impossible, was certainly problematic.

An equally if not more important ICTU objective was the prevention of union marginalisation and membership decline. In the state sector at any rate, the maintenance of existing levels of union density and membership presented no great

[94] Kieran Allen, *The Celtic Tiger: The Myth of Social Partnership in Ireland* (Manchester: Manchester University Press, 2000); Niamh Hardiman, "The State and economic interests: Ireland in comparative perspective," in *The Development of Industrial Society in Ireland: the Third Meeting of the Royal Irish Academy and the British Academy*, eds. J. H. Goldthorpe and C. T. Whelan (Oxford: Oxford University Press, 1994).
[95] Giacomo Corneo, "Social custom, management opposition and trade union membership," *European Economic Review* 39, no. 2 (1995); Coen Teulings and Joop Hartog, *Corporatism or competition?: labour contracts, institutions and wage structures in international comparison* (Cambridge: Cambridge University Press, 1998).

difficulty. State policy, though occasionally grudging, accorded a level of legitimacy or acceptability to unions in state and semi-state sectors. This was not the case in the private sector. From the early 1980s, employer opposition and suppression of union recognition campaigns intensified.[96] Yet a tripartite or partnership arrangement between the state employers and trade unions seemed likely to neutralise or reduce such opposition. Once engaged in such an arrangement it would be paradoxical, amounting to action in bad faith, for employers to deny legitimacy or recognition to their union partners. From a union perspective, the extent of employer adherence to the spirit of partnership would determine the success of the agreements. Employer good faith was particularly crucial for the consolidation or even survival of trade unions in the private sector.

From National Wage Agreements to Partnership 1987-2008

In 1987 a tripartite wage agreement was concluded between employers, unions, and the state. Successively renewed, these agreements eventually evolved into a more wide-ranging partnership programme. They were to last for more than two decades.

From the outset, ICTU and many associated unions welcomed the re-engagement in national agreements. A development that seemed to promise that Irish unions would escape the savaging visited on their brothers and sisters in the neighbouring island. Deliverance and the prospect of a safe haven may have generated a measure of euphoria. This may explain the high level of cooperation, conciliation, and enthusiasm displayed by the ICTU and many trade union leaders which marked their engagement in the partnership process. One of its first fruits was the Industrial Relations Act 1990.

Industrial Relations Act 1990

The stated purpose of the 1990 Act was to make better provision for promoting harmonious relations between workers and employers. To that end, it would amend the existing industrial relations and trade union legislation. In conformance with the spirit of partnership, the 1990 Act was not simply imposed on trade unions. Rather, its final form was shaped by negotiation and consultation with unions, government, and employers.

[96] William Roche and John Geary, "The attenuation of host-country effects? Multinationals, industrial relations and collective bargaining in Ireland," Working Paper IR-HRM No. 94-5 (Dublin: University College Dublin, 1995).

The Trade Disputes Act 1906 was repealed in its entirety. However, its main provisions were re-enacted by the 1990 Act though with significant amendments. Sit ins or strikes in defence of a single worker were no longer protected. Solidarity action or secondary picketing was severely restricted. Every union rule book had to contain a provision that no strike or industrial action could take place without a secret ballot and at least one week's notice to the employer. The Act detailed how the ballot would be conducted, the votes counted, and the circumstances in which a result could be regarded as valid. It was an astonishing interference in union autonomy and in breach of Articles 3 and 8 of ILO convention 87.[97] Furthermore, political strikes were declared illegal, but what constituted such a strike was not defined. This left open the possibility that any strike could be labelled a political strike.

Nevertheless, the Act was welcomed by the union leadership as strengthening trade union authority. A minority within the union movement and TDs from the Workers' Party and Socialist Party were critical of the Act. Its operation, they warned, would facilitate increased legal intervention in industrial disputes to the detriment of workers. Critics focussed on the balloting provisions, predicting they would delay industrial action of any type, extend the grounds on which injunctions could be granted, and discourage strikes and industrial action generally. Such predictions were either ignored or dismissed as the paranoia of class warriors, incapable of recognising the 'new realities' of co-operation and partnership. Anyway, Congress and union leaders had been assured by their legal advisers and politicians that such predictions would never come to pass. Once the Act was tested in court they did. By the middle of the 1990s, a majority of unions officials (73%) believed that the 1990 Act should never have been accepted in its present form and was in need of major amendment or repeal.[98] This did not augur well for partnership as a vehicle for union consolidation, effectiveness, or defence.

The expansion of Partnership

During the 1990s, centralised or national pay bargaining morphed into partnership agreements. There was a corresponding expansion of objectives beyond purely industrial relations matters to embrace broader socio-economic goals. In return

[97] See: Daryl D'Art, *Untying Workers' Hands: Trade Unions and the 1990 Industrial Relations Act* (Dublin: The Workers' Party of Ireland, 2018), 11; Pat Rabbitte and Eamon Gilmore, *Bertie's Bill* (Dublin: The Workers' Party, 1990); Dáil speeches of Joe Higgins TD.

[98] Joseph Wallace and Michelle O'Sullivan, "The Industrial Relations Act 1990: a critical review," in *Irish employment relations in the new economy* eds, Thomas Turner and Daryl D'Art (Dublin: Blackhall, 2002).

for wage restraint and cooperation with government and employers, unions would supposedly gain additional influence over public policy. This was to be in areas of critical concern to their members such as social welfare, taxation, and the maintenance of employment. It led to an upsurge in optimism. Among the generality of union officials, a perception developed that the partnership agreements negotiated during the 1990s represented a new departure, a move towards the Swedish model of corporatist centralised bargaining.[99] It was a perception that was little short of delusionary.

In fact, from 1987 to 2005 the gap between high- and low-income earners widened considerably.[100] An analysis based on the distribution of household income confirms the trend. During that time, the share of income of the bottom 50% of households fell from 25% to 23%. Most of the measures of income dispersion indicated a growing inequality.[101] Apparently, Irish social partnership presented no challenge to the policies and practice of neo-liberalism. Its standard policies of cutting taxes and social spending, deregulation of labour and financial markets, eliminating barriers to free trade, and the privatisation of state companies were implemented in full. The union movement's failure to prevent these outcomes should not, given the Irish political context, be judged too harshly. Without support from a strong political arm, willing and able to challenge these policies at a practical and ideological level, there was scant hope of success. There may be more appropriate criteria by which to measure the success or failure of partnership. First, the extent of its contribution to the growth or at least the maintenance of union membership levels in the private sector. Second, how much it modified or reduced employer opposition to union recognition making it relatively easier to achieve.

Partnership in the Workplace

From the early 1990s ICTU and senior union officials became enthusiasts for the concept of workplace partnership. National partnership, one union leader claimed, is unsustainable unless supported by partnership at workplace level.[102]

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[99] Paul Teague, "Pay determination in the Republic of Ireland: towards social corporatism?" *British Journal of Industrial Relations* 33, no. 2 (1995).
[100] Terrence McDonough and Jason Loughrey, *The HEAP Chart: hierarchy of earnings, attributes and privileges analysis* (Dulin: ICTU, TASC, SSRC, 2009).
[101] Christopher T Whelan, et al, *Monitoring poverty trends in Ireland: results from the 2001 living in Ireland survey* (Dublin: ESRI, 2003). See also: Kieran Allen "Neither Boston or Berlin; Class Polarisation and Neo-Liberalism in the Irish Republic," in *The End of History; Critical Reflections on the Celtic Tiger* eds. Colin Coulter and Steve Coleman (Manchester: Manchester University Press 2003).
[102] Billy Attley, "Towards Social Partnership at the Enterprise Level," *Employment International* (May 1994).

Box 5. Workplace Partnership

"An active relationship based on recognition of a common interest to secure the competitiveness, viability and prosperity of the enterprise. It involves a continuing commitment by employees to improvements in quality and efficiency and the acceptance by employers of employees as stakeholders with rights and interests to be considered in the context of major decisions affecting their employment."

Partnership 2000.

The adoption and pursuit of workplace partnership by the ICTU and the trade union leadership had an unsettling effect. Partnership appeared to stimulate the growth of utopian sentiment inspiring the project of purging the employment relationship of conflict or adversarialism, as it was now called.[103] It was a project that was both foolish and damaging. Foolish in that it was impossible to realise; damaging in that it was potentially subversive of union legitimacy and rationale.

Partnership, ICTU and New Forms of Work

The ICTU document *New Forms of Work Organisation* exemplifies the error and confusion central to the ideology of workplace partnership. Commissioned by Congress, the document was compiled by two consultants.[104] They identified conflict at work between capital and organised labour as arising from the way in which work is organised. In support, they cited the example of mass production industry, its production lines, time and motion systems, and close supervision, as conducive to high levels of industrial conflict and strikes. That method of production was now largely redundant. New forms of work organisation and management had developed in response to the intensifying pressure of globalised competition.[105]

[103] See: Des Geraghty, *The Seventeenth Countess Markeivicz Memorial Lecture: World Class Participation* (Dublin: Irish Association for Industrial Relations, 1992).
[104] ICTU John O'Hehir and Flor O'Mahony, *New forms of work organisations: options for unions* (Dublin: ICTU, 1993).
[105] ICTU. O'Hehir and O'Mahony, *New forms,* 14-17.

Box 6. New Forms of Work Initiatives

Inspired by HRM, the object of these initiatives was improvement in the management, motivation, and productivity of employees. They were also expected to increase employee commitment and identity with the firm and took the following forms:

- improved communications programmes;
- increased employee involvement (e.g. consultation, quality circles, suggestion schemes);
- shift from a collective to an individual engagement with employee;
- greater worker flexibility and multi-skilling;
- more use of temporary part-time workers (the flexible firm), a core of permanent pensionable employee and a periphery of temporary or contingent employees; and
- new payment systems, including performance related pay and profit sharing or share ownership schemes.

These novel forms of working facilitated and required increased employee involvement, consultation, and cooperation with management. Yet successful engagement with these new working arrangements, the document claimed, would require a change in attitude and behaviour of unions and their members. Traditional "them and us" attitudes would have to be left aside. Unions would have to move from "an adversarial pluralist culture" to a more cooperative relationship with the employer and adopt a "more unitarist perspective."[106] This had already occurred, the document asserted, in Japan and the US. In Europe, however, certain issues or barriers prevented the new forms of work initiatives realising their full potential. The document identified these barriers or issues as "a prevailing high level of union influence and unions having their own agenda on employee participation and work design."[107] What should have been a cause for celebration - union possession of influence and an agenda of its own - was seen as an obstacle to progress. It was unbelievably bizarre topsy turvy thinking.

One example of the document's many misconceptions is the suggestion that conflict or adversarial relations between labour and capital originates from the way work is organised. Certainly, particular working arrangements can exacerbate or alternatively moderate or obscure conflict between these parties. Yet the root of

[106] ICTU. O'Hehir and O'Mahony, *New forms,*16. See also: Daryl D'Art and Thomas Turner, "An attitudinal revolution in Irish industrial relations: the end of 'them and us?" *British Journal of Industrial Relations* 37, no. 1 (2002).
[107] ICTU. O'Hehir and O'Mahony *New forms,* 17.

conflict lies not in the way work is organised, but in the nature or characteristics of the employment relationship in a market economy. These are: conflicts of interest between the buyers and sellers of labour; differences between worker and employer regarding the amount of effort to be expended in return for a wage; resistance to the treatment of labour as a commodity; and attempts to redress the power imbalance between the individual worker and employer.[108] It was these conflicts, permanent and persistent, that brought trade unions into being and testify to their continuing relevance. As Miliband observes, the term industrial or employee relations is a euphemism for the permanent conflict, now acute, now subdued, between capital and labour.[109] Consequently, the Congress recommendation that unions move away from adversarialism was nonsensical. It was also damaging, giving credence to a long-standing claim by employers, their agents, and propagandists that unions are the source of conflict at work. Congress had forgotten the old adage that "unions do not cause conflict; they are merely its organised expression."

Confusion was also evident in the Congress recommendation that unions establish a more cooperative relationship with employers. Unions and their members cooperate daily with the employer. Without such cooperation the enterprise could not function or survive. Usually, enterprise survival is an interest shared by all: the employer, the workers, and the union representing them. There are many examples of workers and their unions foregoing wage increases or conceding wage reduction to maintain employment and the firm as a going concern. Yet cooperation can never be unconditional. It is always qualified by the conflictual elements of the employment relationship, the firm's primary goal of profit maximisation and the market system in which it operates. Where workers are organised, cooperation cannot function on terms dictated solely by the employer. Rather, the terms on which cooperation proceeds must rest on a negotiated understanding between the parties. Cooperative behaviour based on negotiated terms may be more durable. The strength of this position is a recognition of the ongoing tension between those inherent elements of the employment relationship, conflict and cooperation. Thus cooperation, taking place in a context of structured antagonism, can only be antagonistic cooperation.[110]

Finally, the document suggested that effective engagement with the new forms of work would require unions to move from an "adversarial pluralist culture" to a "more

[108] D'Art, "Managing the Employment Relationship"; D'Art and Turner, "New Working Arrangements."
[109] Ralph Miliband, *The state in capitalist society: the analysis of the western system of power* (London: Quartet Books, 1973).
[110] See: P. K. Edwards, *Conflict at work: a materialist analysis of workplace relations* (New York: Blackwell, 1986), 77. See also: Tony J. Watson, *Sociology, work and industry* (London: Routledge, 1986).

unitarist perspective."[111] It was an astonishing recommendation. Implementation could only serve to de-legitimise and subvert union justification. This will be evident from a brief outline of the pluralist and unitarist perspectives. (see Box 7)

Box 7. Pluralist and Unitarist Perspectives[112]

Pluralism
Pluralist democratic theory emphasises the importance of group competition for power and scarce resources in society. In this arrangement the role of government is to protect the freedom of factions to further their interests while preventing any faction undermining the freedom of others. Essentially, pluralist democratic values recognise the right of interest groups to combine (freedom of association) to secure an effective voice in decision affecting their destiny.

Pluralism and the Enterprise: Pluralist see the enterprise as a coalition of interest groups presided over by management, which is supposed to hold the right balance between different and conflicting interests. However, under pressure from the market or shareholders management may ignore the needs of employees. Given the disparity in power between individual employees and management their grievances may go uncorrected. To guard against this outcome, pluralists accept the right of employees to organise collectively in unions so they can bring their complaints more forcefully to the attention of management. Pluralists see unions as a necessary counterweight to the exercise of absolute managerial power.

Unitarist Perspective
Essentially a managerialist ideology and a distinguishing feature of HRM, the unitary view sees the enterprise, its employees, and management as a team united by a common purpose. There is only one source of authority: the owner or chief executive who acts as the captain of the team. As with any team, strong leadership or management is essential in pursuing organisational effectiveness. There is no conflict of interest between the owners supplying capital and the workers supplying labour. The possibility that conflict may arise from the nature of the employment relationship is denied. If conflict does arise it is ascribed to poor communication, misunderstanding, stupidity, or the machinations of external forces i.e., trade unions, manufacturing grievances to justify their existence.

[111] ICTU, O'Hehir and O'Mahony *New forms,* 16.
112 Alan Fox, *A sociology of work in Industry* (London: Collier and Macmillan, 1971; David Held, *Models of democracy* 2nd ed. (Oxford: Blackwell, 1996); Wallace, Gunnigle and McMahon, *Industrial relations in Ireland* (2020).

For unions to adopt a unitary perspective would be utterly self-defeating. It would in effect deny the existence of conflicting interests or the structured antagonism integral to the employment relationship which gave rise to unions if the first instance. On accepting a unitarist perspective it would be difficult for unions to justify their role beyond acting as an arm of management urging members on to greater productive effort. Nonetheless, Congress advised unions and their members to cooperate or seek accommodation with management bent on the installation of HRM or new forms of work.[113] One particularly optimistic union official saw in these developments "the possibility for a growing convergence of interest between progressive employers and progressive trade unions in the modern enterprise."[114] Indeed, two commentators though it likely that as partnership evolved and deepened within the organisation it should replace collective bargaining as the preferred approach for management union interaction.[115]

Partnership and Participation at work FIE/ICTU Joint Declaration

The rhetoric of the New Forms of work document had already been anticipated in a joint declaration by the Federation of Irish Employers (FIE, later IBEC) and ICTU on employee involvement in the private sector. Its declared objectives were enterprise development, maximisation of competitiveness, increased job satisfaction, and a closer identification of employees with the organisation. Employee involvement or participation was to be realised by a plethora of schemes such as communication or information sharing, consultation, schemes of profit sharing or employee shareholding, and quality of work life programmes.[116] The declaration privileged the employer or managerialist conception of employee participation at work over a union or labour movement view. Employers see employee involvement or worker participation as essentially productivist. That is the maximisation of employee productivity output and cooperation, a view articulated by industrial sociologists of the 1920s but still shared by the vast majority of employers across the industrialised world. For unions or labour movements worker participation is concerned with democratic principles, accountability, and the sharing of power, influence and control. Employer and labour movement objectives may not necessarily be mutually exclusive. During the 1970s, industrial democracy or election of worker directors to

[113] ICTU O'Hehir, and O'Mahony, *New forms.*
[114] Geraghty, *World class participation.*
[115] Rory O'Donnell and Paul Teague, *Partnership at work in Ireland: an evaluation of progress under Partnership 2000* (Dublin: Department of the Taoiseach, 2000).
[116] Federation of Irish Employers and Irish Congress of Trade Unions, *Joint Declaration on Employee Involvement in the Private Section* (1991).

company boards was an attempt to marry the two. European employers' defeat of that project was briefly considered in section 2 of this document.

In the joint declaration on employee involvement Congress wholeheartedly embraced the employer version of worker participation. Furthermore, Congress seemed anxious to signal its disenchantment and abandonment of the industrial democracy project. A Congress official announced his discovery that there was now "no real demand for worker directors."[117] This may have been premature. Recently, the European Trade Union Institute has again taken up the promotion of industrial democracy.[118] The two documents, New Form of Work and the FIE/ICTU Joint Declaration on Employee Involvement, could be seen as a treaty between organised labour capital. If so, then it represented an unconditional surrender on the part of Congress.

The National Center for Partnership (NCP)

A survey carried out between 1996 and 1997 found partnership arrangements between employers and unions were rare. Employers remained firmly attached to unilateral management decision-making,[119] a finding that was neither novel or surprising. For partnership to become a reality it apparently needed some form of institutional support. The National Centre for Partnership (NCP) was established in July 1997 under the terms of the 1997-2000 national agreement, Partnership 2000.[120] Yet within a few years the promoters of partnership became dissatisfied with the lacklustre performance of the NCP. It had failed, they concluded, "to spread the gospel into the wider workplace or policy agendas."[121] It seemed a more dynamic, high-powered, better-funded organisation was required.

The National Centre for Partnership and Performance

Another national wage agreement, the Programme for Prosperity and Fairness (2000-2002), saw the establishment of the National Centre for Partnership and Performance (NCPP) in 2001. A former general secretary of the ICTU, Peter Cassells,

[117] Patrick Nolan, "No real demand for worker directors," *The Irish Times* [undated].
[118] ee papers from conference: European Workers' Participation Competence Centre of the European Trade Union Institute, *Reviving economic democracy in Ireland after the crisis* (Dublin: 23 January 2020).
[119] William Roche and John Geary, "'Collaborative production' and the Irish boom – work organisation, partnership and direct involvement in Irish workplaces," *The Economic and Social Review*, 31, no. 1 (2000).
[120] Tony Dobbins, "New National Centre for Partnership and Performance established," *Eurofound*, April 27, 2001.
[121] Padraig Yeates, "Partnership as model of choice for business," *The Irish Times*, February 8, 2002.

was appointed executive director. The appointment was believed "likely to bolster the clout and status of the NCPP," as Mr Cassells had promoted partnership since 1987. A report in the Irish Times revealed that the former general secretary "was fashioning a crowbar to break out of the industrial relations ghetto."[122] To that end, the paper reported, he had appointed Ms Lucy Fallon-Byrne, a prominent educationalist, as a co-director of the NCPP. According to the newspaper, Ms Fallon-Byrne's objective was "to make partnership the way we do business in Ireland." She saw partnership "as a very powerful ideology to implement organisational change." Furthermore, she sternly rejected "the cynical view of some workers" that partnership was just another word for cutbacks. Central to the success of the NCPP, she concluded, was "developing interpersonal skill to complement business and organisational ones."[123] Ultimately, the crowbar wielded by Mr Cassells proved brittle and ineffective. As will be seen, there was no sign from employers that they would be joining any union breakout from the industrial relations ghetto. On the contrary, they seemed content with the place to which God, the market, or their natural commercial instincts had called them.

The Collapse of Partnership

The last pay agreement, optimistically titled Towards 2016, was signed in November 2008. It was the year of the international banking crisis. In Ireland, its effects were manifested by the bursting of the speculative property bubble and the launching of a massive state rescue of the failing indigenous banking sector. Early in 2009 the agreed pay increases for public sectors workers were suspended. As the crisis deepened, government decided to seek a €4 billion adjustment from current expenditure by cutting public sector pay. Unions proposed that the required adjustment could be achieved through a combination of taxation increases and public sector reform. The ICTU advocated a ten-point plan for a more balanced approach between taxation and expenditure cuts.[124] Maybe in reliance on the spirit of partnership and its ethos of harmony and cooperation, the Public Services Committee of ICTU were optimistic that a deal could again be concluded. It was not to be. Early in December the government withdrew from discussions with the unions and announced a unilateral pay cut across the public service. Astonishment and deep regret, it was reported, characterised the public pronouncements of union officials at the collapse of talks.[125] Partnership was at an end.

[122] Padraig Yeates, "Partnership as model – Irish Times February 8, 2002
[123] Yeates, "Partnership." *Irish Times*
[124] Irish Congress of Trade Unions, *There is a Better, Fairer Way* (Dublin: Irish Congress of Trade Unions, 2009).
[125] Stephen Collins and Mary Minihan, "Public sector workers face pay cut of up to 6%, says Cowen," *The Irish Times*, December 6, 2009.

From a union perspective, partnership can only be judged as a miserable failure. None of its objectives - the prevention of privatisation, deregulation, and union marginalisation - were realised.[126] As it crawled from the wreckage of partnership, the Irish union movement presented a pathetic spectacle of weakness and demoralisation. The 1990 Act, accepted by unions, had since been used by employers and the courts to progressively hobble industrial action in defence of workers. In telecommunications, the initially strong union resistance to privatisation ended in acquiescence. The supposedly "dense set of institutions" supporting partnership at work quickly withered away, leaving not a trace behind. Seemingly, the only fleeting achievement of the NCP and NCPP was the provision of employment and perks for its advocates and consultants. While partnership was in being, many commentators emphasised the extent of union influence on economic and social issues.[127] If influence means the power to modify beliefs or actions and produce change then the commentators claims of union influence were grossly exaggerated if not baseless. Interviewed in 2010 the general secretary of ICTU addressed these claims. If we had that much influence, he observed, we would not have the enduring level of inequality. As for domestic social policy, he continued, it is hard to point to any great achievement. Partnership, he concluded, gave us access but not a lot of influence.[128] It was a fitting epitaph. More than twenty years of union government negotiations and the service of union officials on many committees had little if any positive tangible result. For unions in the private sector strongly negative outcomes were much more in evidence.

The dismissal of the Congress proposals for tackling the crisis and the unilateral termination of partnership underscored the weakness of the Irish union movement. Yet the unions' tribulations were not at an end. Their former government partner now attempted to fit them up as national saboteurs. The Minister for Finance announced that a report from his Department had identified the social partnership process as damaging for the state's finances.[129] It was a far-fetched allegation. If partnership figured as a factor in the catastrophic deterioration in the state's finances it was far

[126] Daryl D'Art and Thomas Turner, "Irish trade unions under social partnership: a Faustian bargain?" *Industrial Relations Journal* 42, no. 2 (2011).
[127] See: Paul Teague and Jimmy Donaghey, "Why has Irish social partnership survived?" *British Journal of Industrial Relations* 47, no. 1 (2009); Rory O'Donnell and Colm O'Reardon, "Social partnership in Ireland's economic transformation," in *Social pacts in Europe: New dynamics*, eds. Giuseppe Fajertag and Philippe Pochet (Brussels: ETUI, 2000); Tim Hastings, Brian Sheehan, Padraig Yeates, *Saving the future: how social partnership shaped Ireland's economic success* (Dublin: Blackhall, 2007).
[128] Interview with David Begg quoted in Carl O'Brien, "Searching for answers in wake of collapsed partnership," *The Irish Times* January 25, 2010.
[129] An unpublished report on the role of the Department of Finance identified the dominance of the social partnership process in damaging the state's financial system. See: Mary Minihan, "Union leaders reject Lenihan's criticism of social partnership," *The Irish Times*, December 15, 2010.

outweighed by the actions of government and the advice of Department of Finance mandarins. Both promoted the neoliberal ideology of the unrestricted play of market forces. Deregulation or light touch minimal regulation was the order of the day. Freed from restrictive state supervision bankers, property developers, and speculators would create a vibrant expanding economy in which all citizens would benefit. Or as Minister Ahern put it, the boom would become 'boomier'. The subsequent crash demanded explanation and identification of culprits. Unions presented an ideal scapegoat as they are usually an easy target at which to direct public anger. On this occasion such a transparent ploy could only fail. It was evident to all that government, bankers and speculators were the true authors of the crisis. Yet such an attempt to shift blame appeared to devalue the effort expended by the harmonic co-operators of partnership since 1987. Some dedicated union co-operators may have felt duped, discarded, and betrayed.

Employers, Partnership, Union Legitimacy and Recognition

The enthusiasm displayed by the Irish trade union leadership for partnership and cooperation left Irish employers unmoved. Even the hopes expressed by the visionary SIPTU official for a growing convergence of interest between progressive employers and unions got no response.[130] Perhaps, progressive employers, rare exotic if not mythical creatures, were in short supply. Irish employers remained irreconcilably old fashioned. It was not for them to whore after the false gods of harmony and cooperation. They remained steadfast in their faith, pursuing still the holy grail of union eradication. Indeed, between 1980 and 2019 there was a sharp decline in overall union density levels. It fell from a high of 62% to 28%. Ironically, the sharpest rate of decline was registered during the period of partnership. Beyond its demise, decline continued but at a slower rate. Union decline in the private sector was particularly stark falling from 41% in 1990 to an all-time low of 14% in 2019. (see Table 1)

[130] See Geraghty at footnote 114.

Table 1. Union density 1980 to 2019

	Union density[a] %	Union Density Public Sector[b] %	Union Density Private Sector %
1980	62	/	/
1985	61	/	/
1990	57	80	41
1995	45	82	36
2000	38	85	26
2005	33	62	25
2010	32	62	20
2015	25	55	14
2019	25	54	14

Source:

Union density: 1980-1995: Roche and Ashmore (2002); 2000-2019: Quarterly National Household Survey (QNHS) and Labour Force Surveys.

Public and private sector density: 1990-2000:

Figures for public and private sector density: 1990-2000: QNHS and ICTU; 2005-2019 Labour Force Survey.

[a] Union density refers to the proportion of employees who are members of a trade union in the employed labour force (usually referred to as employment density). The number of employees in the labour force is calculated by subtracting the employed, self-employed and assisting relatives from the employed labour force.

[b] As there is no direct question on employment in the public and private sector in the Labour Force Survey, public sector density is estimated for the years 2005 to 2019 by combining the three sectors Public Administration, Education and Health. This underestimates the true density level in the public sector as there are considerable numbers of private sector employees in Health and education.

Employer indifference regarding the new order cannot be ascribed to their adverse experiences under partnership. Of all the parties involved in the process, employers were the chief beneficiaries.[131] Between 1987 and 1996 the profit share of business in the Irish private sector sharply increased from 25.1% to 34.8%. The rate of return on capital doubled. In the same period the wage share declined from 74.9% to 65.2%. The general picture was one of a radical income shift away from labour towards capital.[132] Furthermore, not only had employers benefited from very moderate wage growth but there was a steady decline in industrial conflict with the strike rate at a historically low level. In addition, as noted above, unions were extremely conciliatory, urging member cooperation with employer initiatives such as HRM or new forms of work. Moderate wage demands, militancy eschewed in favour of cooperation, unions had abided by the letter and spirit of partnership. What more could employers desire? Consequently, some moderation in employer attitudes to unions might be expected. Even if employers could not come to regard their union partners in a favourable light, they would, at the very least, take up a position of neutrality. Indeed, as noted above, the consensus among commentators is that the presence of tripartite bargaining or partnership between employers, unions, and government works to neutralise employer opposition and give an impetus to union growth.[133] These outcomes were not replicated in this jurisdiction. Ireland, it seems, is an exceptional case. Far from softening, Irish employer opposition to union organising and recognition in the private sector increased in intensity. It was the paradox of partnership.

The weight of the available evidence suggests that beginning in the 1980s and continuing during the period of partnership and beyond, there was increasing employer resistance to granting recognition to trade union for collective bargaining in the workplace.[134] Indicative of this development was the volume of recognition disputes being referred to third party institutions and the number of strikes related

[131] John Bradley, "The Irish Economy in Comparative Perspective," in *Bust to boom? The Irish experience of growth and inequality*, eds. Brian Nolan, Philip J. O'Connell, and Christopher T. Whelan (Dublin: Institute of Public Administration, 2000). See also: John Fitz Gerald, "The story of Ireland's Failure – and belated success" in the same collection.

[132] Philip Lane, "Profits and wages in Ireland, 1987-1996," *Economics Technical Papers* Trinity College Dublin (1998), 3-4

[133] See footnote 95.

[134] Patrick Gunnigle, Jonathan Lavelle and Anthony Mcdonnell, "Subtle but deadly? Trade union avoidance through 'double breasting' among multinational companies," *Advances in Industrial and Labor Relations* 16 (2009); Roche and Geary, "Host Country Effects"; Juliet McMahon, "Owner manager, employment relations and the growth potential of Irish small firms: an exploratory study (PhD thesis (unpublished), University of Limerick, 2001); Thomas Turner, Daryl D'Art, and Patrick Gunnigle, "Pluralism in retreat? A comparison of Irish and multinational manufacturing companies," *The International Journal of Human Resource Management* 8, no. 6 (1997).

to union recognition. A survey of union officials and members of a general union in the late 1990s confirms this general trend. Of union members, 37% believed that the capacity of unions to gain recognition from employers had decreased compared to 16% who believed it had increased. In attempting to defeat union organising drives, employers increasingly resorted to coercive tactics. According to the officials surveyed, 48% of employers victimised union activists, 38% threatened plant closure while a further 22%, acting illegally, sacked union activists. Such opposition, officials reported, had intensified over time.[135] Case study evidence graphically illustrates management hostility towards unions and the difficulties experienced by workers attempting to secure recognition for collective representation in small and medium sized enterprises.[136] It appears that Irish employer resistance to union organising drives was even more intense than that of their UK counterparts.

Table 2. Employer Responses to Union Recognition as reported by union officials in Republic of Ireland and the UK

	Irish Republic Employer Responses	United Kingdom Employer Responses
Positive Responses		
Provision of employee list to aid union recruitment	2%	24%
Allow union organisers access to workplace	27%	63%
Encourage employees to join union	5%	23%
Permitting a union presence at induction	8%	26%
Offering facilities for union recruitment	10%	44%

[135] D'Art Turner, "Union Recognition and Partnership at Work."
[136] Daryl D'Art and Thomas Turner, "Union organising, union recognition and employer opposition: case studies of the Irish experience," *Irish Journal of Management* 26, no. 2 (2006).

Table 2. Employer Responses to Union Recognition as reported by union officials in Republic of Ireland and the UK (continued)

	Irish Republic Employer Responses	United Kingdom Employer Responses
Negative Responses		
Denying union organisers access to workplace	56%	29%
Discouraging workers from joining the union	66%	35%
Campaign process		
Distribution of anti-union literature	15%	17%
Victimisation of activists	48%	19%
Managers briefing workers against union	63%	34%
Use of management consultants to avoid recognition	44%	23%
Employer action during recognition campaign		
Dismissal of union activists	22%	10%
Install union substitute	65%	38%
Resolving grievances to reduce demand for union	71%	26%
Improve pay and conditions	52%	15%
Threatening closure or relocation	38%	18%

UK data is supplied by Prof. Ed. Heery, Cardiff Business School, and is based on a 2002 survey of union full time officials with over 500 responses from officials in 19 unions. Respondents were asked for information on latest recognition campaign they had been involved in. A total of 375 officials responded.

Vigorous employer resistance to union organising and recognition in the private sector is a major factor in union decline. Employers disclaim any responsibility. Rather they assert modern workers have no interest in joining unions. According to a spokesman for the Irish Business and Employer Confederation (IBEC), "the vast majority of private sector workers choose not to be in trade unions." Laws, he continued, should be enacted to reflect this reality.[137] Survey evidence flatly contradicts these assertions. In a national survey of employee attitudes, 79% of non-union respondents in unionised companies reported that they would vote for continued union representation in their companies. Evidence from the European Social Survey, considered above, shows substantial agreement (77%) among union and non-union employees on the need the for strong trade unions. This points to a significant representation gap. That is the gap between the percentage of the workforce who wish to be represented by trade unions and the percentage actually represented by unions, a gap that is particularly acute in private sector services and among younger workers in low-skill occupations across many countries including Ireland.[138] If, as Irish employers claim, workers freely choose not to be in trade unions, then opposition to recognition would be a waste of effort and resources. Where employee demand for unions is supposedly absent, then opposition could hardly be considered a rational activity.

Employers, their partisans, and apologists continually raise doubts as to the necessity or utility of unions for employees and deny the existence of employee demand. Often, the freedom of employees to exercise choice in joining a union and seek recognition is severely circumscribed or overridden by employer preference and superior power. A simple and effective recognition process would establish a "level playing field" on which workers are truly "free to choose" between union collectivism and recognition or an isolated individual relationship with the employer. Such a facility would definitively answer the vexed questions of union demand, relevance, or necessity in the modern economy.

The Industrial Relations (Amendment) Act 2001/4

By the late 1990s the extent of employer resistance to recognition obliged unions to seek some remedial measure. Prior to that time two courses of action were open to

[137] Mr. Brendan McGinty IBEC Director of Industrial Relations. He went on to call for an exemption for small and medium sized firms from working time directive, unfair dismissals and other legislation damaging to the competitiveness of these firms. Reported by Chris Dooley, "IBEC calls for law to reflect current work practices," *Irish Times* November 5th, 2003.
[138] See footnote 86. Also, Thomas Turner and Daryl D'Art Is there a Union representation gap in Ireland in *The State of the Unions* ed. Tim Hastings (Liffey Press, Dublin 2008)

a union refused recognition by the employer. The union could strike or alternatively refer the matters to the Labour Court under section 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. Of these, 59 (or 88%) favoured recognition. But only 16 firms acted on the recommendation and granted recognition, a success rate of just 27%.[139] As a route to recognition the Labour Court appeared ineffective. The court, it seemed, required some form of additional legislative support.

In searching for a remedy Congress sought assistance from its government and employer partners. Under Partnership 2000 a working group was established comprised of government, trade unions, employers, and the Industrial Development Agency (IDA). The final report of this so-called High-Level Group on Trade Union Recognition was produced in 1999. Despite its title, group members agreed to rule out legislation for statutory recognition. Such an enactment, they believed, would be contrary to the voluntarist system of Irish industrial relations and discourage multi-national inward investment. This misunderstanding of voluntarism and the questionable assumption regarding multi-national investment are examined in Section 7 of this document. Instead of statutory recognition the group recommended the establishment of two mechanisms to deal with dispute situations in firms where collective bargaining is absent: a set of voluntary procedures and a fall-back statutory mechanism. The proposed statutory mechanism covered disputes relating to pay, working conditions or workplace procedures. No provision was made for either a voluntary or statutory recommendation on union recognition.

These recommendations were embodied in the Industrial Relations (Amendment) Act 2001.[140] It had two objectives: first, to lessen the increasing difficulties experienced by unions seeking recognition; and second, to counter the growing disregard by a majority of employers of Labour Court recommendations supporting such requests. Though the contested question of recognition prompted the legislation, the Labour Court was precluded from issuing a determination on collective bargaining or recognition. The Act operated as follows. Union members in a non-union company could, if dissatisfied with pay, conditions, or the fairness of procedures, seek assistance from the Labour Court. Where the employer was willing to address the issues in dispute, the Court would disengage. If the dispute could not be

[139] Gunnigle, O'Sullivan, Kinsella, "Organised Labour and Public Policy in Republic of Ireland." In D'Art and Turner eds. (2002)

[140] For a comprehensive examination of the Act and union responses see: Tish Gibbons, "The Industrial Relations (Amendment) Act of 2001: its effects and the implications for workers and trade unions in Ireland" (PhD thesis, London Metropolitan University, 2014).

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. Although the Act did not define collective bargaining, this should not have been a source of difficulty. 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.[141]

Some commentators described the 2001 Act as a back door to union recognition. If so, it was a door that was securely locked, barred, and bolted. As a route to recognition the Act was totally ineffective, and in some cases could work to legitimise a firm's non-union status. Furthermore, there was no legal protection for union members involved in recognition disputes. Union organising drives are vulnerable to employer dismissal of union activists. In the UK some organising drives have collapsed as a result of such action.[142] The subsequent 2004 amendment of the Act was designed to remedy this vulnerability and provide some protection for employees actively pursuing union recognition. Some indication as to the usefulness of the Act is provided by a survey of union officials experienced in its operation. The provisions of the 2001/4 Act were regarded as ineffective by a majority of officials (52%). A small minority (9%) believed the Act was effective in securing recognition. Continuing to operate the Acts code of practice was the least preferred option. The majority of officials (72%) favoured the introduction of a statutory right to recognition.[143]

Apparently, the introduction of statutory recognition in the Republic of Ireland is an impossibility. Formidable constitutional and other obstacles supposedly bar the way. As will be seen, on examination these turn out to be of little consequence or substance, mere paper tigers, but a terror to the credulous.[144] It will be argued here that the Irish Constitutional guarantee of freedom of association or the right of workers to form trade unions implicitly involves a corresponding right to recognition.[145] Since 2008, judgements of the European Court of Human Rights have adopted and applied this interpretation of freedom of association.[146]

[141] ILO, *Collective bargaining*. See also Gernigon Bernard. Alberto Odero and Horacio Guido. 'ILO principles concerning collective bargaining' International Labour Review vol 139 (2000) No.1
[142] Kelly, *Rethinking Industrial Relations,* 49.
[143] D'Art and Turner, "Union Recognition and Partnership at Work"; See also: Gibbons, *The Industrial Relations Act*. (2015).
[144] See Section 7 of this document.
[145] See Section 4 of this document.
[146] See Section 6 of this document.

SECTION 4

Freedom of Association, Recognition and the Irish judiciary

"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."

Brian Dickson, Chief Justice of Canada in *Re Public Service Employees Relations Act*

Freedom of Association

Article 40.6.1.iii of the Irish Constitution 1937 guarantees the "right of the citizens to form association and unions" but with the proviso that "laws 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. Nevertheless, the Constitution specifies the right of citizens to from association and unions.[147] Freedom of association or the right to associate in unions is a hallmark of a democratic state.[148]

A distinctive feature of freedom of association is that it can be only exercised collectively. 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.[149] As we have seen, workers join unions for two principal reasons: first, to deploy their collective strength in bargaining with the employer for improved

[147] The following Sections 4,5,6 and 7 have already been published in Daryl D'Art, "Freedom of association and statutory union recognition: a constitutional impossibility?" *Irish Jurist* 63 (2020).
[148] 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 unions for the protection of his [or her] interests." See also: Gerard Hogan, Gerry Whyte, David Kenny, and Rachael Walsh, *Kelly: The Irish Constitution* 5th edition (Dublin: Bloomsbury, 2018), 2153-2154.
[149] Ferdinand von Prondzynski, *Freedom of association and industrial relations: a comparative study* (London: Mansell, 1987). 84.

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."[150] Collective bargaining is the union's prime motivator or *raison d'etre*. In Ireland, it is claimed, State policy is "supportive of trade unions and the concept of collective bargaining."[151] Yet joining a union without the right to recognition from the employer renders the exercise of the right to associate meaningless.[152] Likewise, it has been suggested that in the absence of a right to bargain collectively with the employer the freedom to associate is largely illusory.[153] Indeed, the ILO holds that "collective bargaining cannot begin until a union is recognised for that purpose." 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."[154] 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 Chief Justice of Canada Dickson 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."[155]

For unions to bargain effectively they may need legal support[156]. Such support usually involves statutory recognition. In the US, Canada, and the UK statutory recognition involves the State legislating so as to enable a majority in a grade, group, 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.[157] As will be seen, the proposition that union recognition is the logical corollary of freedom of association has not won universal acceptance. Acceptance or rejection of the proposition is contingent on the adoption of a particular perspective on freedom of association.

[150] Webb, *The History of Trade Unionism*.
[151] J. Horgan, "The future of collective bargaining," in *Industrial relations in Ireland: contemporary issues and developments* (Dublin: University College Dublin, 1987), 168. See also: Gunnigle, O'Sullivan, Kinsella, "Organised labour."
[152] Irene Lynch, "Lawyers and unions: the right to freedom of association in the Irish constitution," in *Ireland's evolving constitution 1937-1997* eds. Tim Murphy and Patrick Twomey (Dublin: Hart Publishing, 1998).
[153] J. P. Casey, "Reform of collective bargaining law: some constitutional implications," *Irish Jurist* 7 (1972).
[154] ILO, *Collective Bargaining,* 28.
[155] Chief Justice Dickson in *Re Public Services Employees Relations Act* (Alberta), [1987] 1 S.C. R.313 at 38.
[156] A.C.L. Davies, *Perspectives on Labour Law* (Cambridge University Press, 2004) 198
[157] Deakin and Morris, *Labour Law*, 875.

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 or literal interpretation, 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.[158] 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.[159] Limited though it may be, this interpretation of freedom of association sits quite comfortably within the common law tradition. Many Irish judges subscribe to and apply this formalist understanding of freedom of association as a review of case law will show.[160]

A second way of interpretating freedom of association is the purposive or functional approach. This view sets freedom of association in the context of the nineteenth century Europe-wide workers struggle against anti-union laws and the pursuit of legal acceptance.[161] Given that context, the eventual granting of freedom to associate reflects the political and legal acceptance of trade unions. Freedom of association in the Irish Constitution, one Chief Justice commented was "designed to make clear that trade union were accepted and not alone accepted but guaranteed protection." Irish trade unions, he continued, were the main, if not the only type of union contemplated by Article 40.6.1 iii.[162] Thus, freedom of association is a functional guarantee which is protected to secure a clearly defined social purpose.[163] That social purpose is the attainment of some parity in bargaining power between employers and workers. 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.[164] It follows that a functional or purposive interpretation of freedom of association necessarily involves recognition and negotiation with independent trade unions.

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[158] Von Prondzynski, *Freedom of Association,* 225.
[159] Brian Wilkinson, "Workers, constitutions and the Irish judiciary: a jurisprudence of labour liberty?" *Irish Jurist* 24 (1989) 198-226, 211-3.
[160] See footnotes 180-184.
[161] Antoine Jacobs, "Collective self-regulation," in *The making of labour law in Europe: a comparative study of nine countries up to 1945* ed. Bob Hepple (Oxford: Hart Publishing, 2010).
[162] Maguire C.J.in *Educational Company of Ireland v Fitzpatrick (No 2)* [1961] I.R, 345 at 379-80.
[163] Von Prondzynski, *Freedom of Association,* 225.
[164] Von Prondzynski, *Freedom of Association,* 232.

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 be only 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, it has been remarked, 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.[165] Neither by logic or implication is this negative right part of the positive right to associate.[166]

The above reasoning is at odds with decisions of the Irish courts and the ECtHR. In *Educational 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.[167] Neither the Irish or German constitutions specifically mention a right of dissociation, yet that negative right has been deduced from the positive right to associate.[168] Likewise, in a number of judgements the ECtHR has concluded that Article 11 of the European Convention on Human Rights (freedom of association) encompasses a negative right of association.[169] 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 employers of the right of unions to exist – a reasonable construction – then no implied right to dissociate is necessary.[170]

[165] Von Prondzynski, *Freedom of Association,* 232.
[166] Deakin and Morris, *Labour Law*, 805. See also: Sheldon Leader, *Freedom of association: a study in labor law and political theory* (New Haven: Yale University Press, 1992), Ch. 7. Also, the dissenting judgment of Maguire C.J. in *Educational Company of Ireland v Fitzpatrick (No 2)* [1961] I.R, 345.
[167] James P. Casey, "Some implications of freedom of association in labour law: a comparative survey with special reference to Ireland," *The International Comparative Law Quarterly* 21, no. 4 (October 1974), 704-5.
[168] Casey, "Some implications," 703.
[169] *Young, James and Webster v UK* (No. 7806/77); *Sigurjonsson v Iceland* (No. 16130/90); *Sorenson and Ramussen v Denmark* (No. 52562/99 and 52620/99).
[170] Casey, "Reform of collective bargaining," 707-8.

Box 8. Interpretations of Freedom of Association

Formalist or literal interpretations of Freedom of Association	Functional or purposive interpretation of Freedom of Association
Derives from the libertarian notion that everyone is entitled to associate or not to associate with other people of their choice in a non-coercive way.	Sees freedom of association in the context of its historical development, function and purpose.
For followers of this approach freedom of association has two aspects: ● a positive right to associate, with other individuals as active participants in a collective social activity; and ● a negative right to dissociate, a safeguard protecting individuals being grouped together with others with whom they disagree with and for purposes they don't approve. Freedom of association applies to members of political parties, social clubs, and trade unions. It grants the right of association but nothing beyond that.	Workers join or associate in unions to exercise through their collective some control and influence over their working lives The function and purpose or freedom of association is not to protect individual interests but to secure for the collective a more equitable distribution of power and influence within the working environment and society. This purpose can only be realised when the employer agrees to recognise the union chosen by the workers to negotiate on their behalf. Consequently, to be a substantial right, freedom of association must involve union recognition.
The above interpretation adopted and applied by the Irish courts. (See Section 4)	This interpretation adopted and applied by the European Court of Human Rights since 2008. (See Section 6)

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 relations with trade unions rather than the protection of organised labour in its relationship with the State or with employers pursuing anti-union policies."[171] 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.[172]

Two factors have been identified to explain this individualist focus: traditional union distrust of the law and a preferential reliance on industrial muscle.[173] Certainly, union wariness regarding the law has substantial historical and some contemporary justification. Union experience with the operation of the 1990 Act and its interpretation by the courts is an example.[174] 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 object 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.[175] It was the last resort of a strike than brought eventual recognition.

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.[176] Nonetheless this individualist view of the contract of employment

[171] Hogan and Whyte, *J. M. Kelly; The Irish Constitution*, 4th. ed. (2003) 1793.
[172] Wilkinson, "Workers' constitutions." See also: *O'Connell v BATU* [2014] IEHC 360.
[173] Hogan and Whyte, *J.M. Kelly*, 4th. ed. (2003) 1793.
[174] See: D'Art, Untying,14-16.
[175] Michelle O'Sullivan and Patrick Gunnigle, "Union avoidance in Euopre's largest low-cost airline: bearing all the hallmarks of oppression," in *Are trade unions still relevant?: Union recognition 100 years on*, eds. Thomas Turner, Daryl D'Art, and Michaelle O'Sullivan (Dublin: Orpen Press, 2013).
[176] Otto Kahn-Freund, *Labour and the law* 3rd edition (London: Stevens, 1977), 6.

reinforces a common law stance that is unsympathetic if not hostile to collectivism.[177] The Irish judiciary, Wilkinson claims, continue to harbour the hostility of the common law to collective labour.[178] This in turn may influence judicial interpretation of freedom of association.

Irish courts have consistently found that the workers' right of association does not involve a corresponding obligation on an employer to negotiate with the workers association or union.[179] In *El 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 discussing any demand the worker may make."[180] 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."[181] Again, in *Abbot and Whelan 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."[182]

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." 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.[183]

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[177] Ferdinand von Prondzynski and Charles McCarthy, *Employment Law* (London: Sweet & Maxwell, 1984), 2-3; David Gwynn Morgan, *A judgement too far? Judicial activism and the constitution* (Cork: University College Cork, 2001), 2-22.

[178] Wilkinson, "Workers," (1989) 200. In support Wilkinson cites J. P. Casey, "The injunction in labour disputes in Eire," *International and Comparative Law Quarterly* 18, no. 2 (1969). See also: Ferdinand von Prondzynski, "Trade disputes and the courts: the problem of the labour injunction," *Irish Jurist* 16 (1981); Anthony Kerr, "The problem of the labour injunction revisited," *Irish Jurist* 18 (1983); Anthony Kerr and Gerry Whyte, *Irish Trade Union Law* (Oxford: Abingdon, 1985), Chapter 11.

[179] Hogan and Whyte, *The Irish Constitution*, 4th. ed. (2003) 1803

[180] *El Co Ltd v Kennedy* [1968] IR 69, at 68.

[181] Unreported, High Court, 31st. July 1983 at 5 cited in Hogan and Whyte, 4th. ed. 1803-4.

[182] *Abbot and Whelan v ITGWU* [1982I] 1 JISLL 56, 59.

[183] *Association of General Practitioners v Minister for Health* [1995] 1.I.R.382 at 391 see C. Maguire, "Trade unions and the constitution," in *Employment law* ed. Niamh Reagan (Dublin: Tottel Publishing, 2009).

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, or incidental 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."[184] Legislation facilitating recognition, the practical embodiment of freedom of association, was apparently an impossibility.

[184] *Ryanair v The Labour Court* [2007] 4 I R 199, 215.

SECTION 5

Ryanair v Labour Court, the Supreme Court and the Industrial Relations (Amendment) Acts 2001/4 and 2015

"It is not in dispute that as a matter of law Ryanair is perfectly entitled not to deal with trade unions nor can a law be passed compelling it to do so."

Justice Hugh Geoghegan n *Ryanair v Labour Court*

Ryanair, a litigious anti-union employer, was in disputes 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.

Box 9. Excepted body

The "excepted body" is a creation of the Trade Union Act 1941 Section 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."

Commenting on the above provision, Kerr and Whyte noted that it afforded some protection for "house unions" and might infringe Article 2 of the ILO Convention No. 98.[185]

Under the 2001 Act, the Labour Court could only investigate complaints where collective barging was absent. Consequently, Ryanair argued, the Labour Court was acting beyond its authority as the company already carried on collective bargaining. The Labour Court rejected these claims. While acknowledging the probability that

[185] Kerr and Whyte, *Irish trade union law*, 52.

the company communicated and consulted with its employees, the Labour Court nevertheless concluded that the company did not engage in collective bargaining.[186] Ryanair sought and was granted judicial review. Its application to quash the Labour Court decision was refused in the High Court.[187] The company's appeal to the Supreme Court was allowed. It concluded that Ryanair carried on collective bargaining through its employee representative council or excepted body.[188]

A number of difficulties emerge from this judgement. In the absence of an Irish statutory definition of collective bargaining, the Supreme Court settled for a dictionary definition.[189] The particular dictionary and the definition on which the court relied remains unclear.[190] 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 definition had already been provided in *Ashford Castle v SIPTU*. In that case the court gave the term collective bargaining a meaning "it would normally bear in an industrial relations context."[191] Furthermore, there was ready-to-hand a long-standing, internationally-accepted definition of collective bargaining in ILO Recommendation 91. Ireland 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 only be established 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.[192] 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

[186] Labour Court Decision DEC-P-051 reported in 16 E.L.R. (January 25, 2005).
[187] *Ryanair (applicant) v Labour Court* (respondent) [2005] IEHC 330.
[188] *Ryanair v The Labour Court* [2007] IESC 6, 17 para 38; 221-2 para 46.
[189] *Ryanair v The Labour Court*, 217-18 para. 40; 221-22. 46.
[190] Anthony Kerr, "Industrial relations law," in *Employment law* ed. Niamh Reagan (Dublin: Tottel Publishing, 2009), 668, footnote 19.
[191] *Ashford Castle Hotel v SIPTU* [2006] IEHC 201. See: Anthony Kerr, *The Trade Union and the Industrial Relations Acts* 5th ed. (Dublin: Round Hall Press, 2015), 278.
[192] *Ryanair v The Labour Court* at p. 211 paragraph 29 and p. 217 paragraph 39. While employee withdrawal was of no consequence to the continuing existence of an excepted body a different rule applied to the employer. *Iarnrod Eireann v Holbrooke* [2001] 1. I.R. 237 held "a body cannot be an excepted body if the employer refuses to negotiate with it'. See: C. Maguire, "Trade unions and the constitution," in *Employment law* ed. Niamh Reagan (Dublin: Tottel Publishing, 2009), 643; Brendan Ogle, *Off the rails: the story of the ILDA* (Dublin: Currach Press, 2004).

organisations. Indeed, company or house unions have long been stigmatised as an unfair labour practice. In Canada and the US, employer-dominated bodies or house unions have been declared illegal since 1935.[193] 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.[194] Whatever negotiations might have gone on with the excepted body or the 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 accepted body could not as a result be denied. Employers who made such a declaration could easily evade the operation of the 2001/4 Act. In the wake of the Ryanair judgement applications under the Act sharply declined.[195] The Act was effectively emasculated.[196] Admittedly, the 2001/4 Act was a fairly innocuous piece of legislation neither burdensome to employers or a facilitator of union recognition. Nonetheless, its nullification left "Irish law offering perhaps the weakest protection for trade union bargaining rights in the Western industrialised world."[197]

The Industrial Relations (Amendment) Act 2015

In 2012 complaints by the ICTU to the ILO prompted Irish government action.[198] The Committee of the ILO noted the Irish Government's commitment to reforming the current law on employees' right to engage in collective bargaining and to ensure

[193] Anthony Kerr and Gerry Whyte, *Irish Trade Union Law* (Oxford: Abingdon, 1985), 52. See also: D'Art and Turner "Ireland in breach of ILO Conventions on freedom of association, claim academics," *Industrial Relations News*, March 20, 2007.
[194] ILO, *Collective bargaining*, 6-7. See also: ILO Recommendations (No. 91) *Collective Agreements and ILO Conventions* and (No 98) *Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively*.
[195] Niall Cullinane and Anthony Dobbins, "Considering the impact of the 'right to bargain' legislation in Ireland: a review," *Industrial Law Journal* 43, no. 1 (2014), 79.
[196] Michael Doherty, "Representation, bargaining and the law: where next for the unions?" *Northern Ireland Legal Quarterly* 60, no. 4 (2009).
[197] Michael Doherty, "Emergency exit? Collective bargaining, the ILO and Irish law," *European Labour Law Journal* 4, no.3 (2013), 186.
[198] ILO Governing Body 363rd Session, Geneva, 15-30 March 2012, Case No. 2780 (Ireland*) Complaints against the Government of Ireland presented by ICTU,* 207-231, paragraphs 723-815. See also: Doherty, "Emergency exit," 180-2.

compliance by the State with recent judgements of the ECtHR. In the light of the Ryanair judgement 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.[199]

The result was the Industrial Relations Amendment Act 2015. It sought to remedy the defects of the 2001/4 Act that were highlighted and compounded by the Ryanair judgement. To that end it provided a statutory definition of collective bargaining.

Box 10. Definition of Collective Bargaining 2015 Act

"Collective bargaining comprises voluntary engagement or negotiations between any employer or employer's organisation on the one hand and a trade union or workers or excepted body to which this Act applies on the other, with the object of reaching agreement regarding working conditions or terms of employment or non-employment of workers."

The ILO definition of collective bargaining is set out in Box 1.

The definition of collective bargaining in the 2015 Act is broadly similar to that of the ILO (See Box 1). However, there is one notable difference. When defining collective bargaining in the 2015 Act the drafters inserted the additional word "voluntary." That word now precedes and qualifies the phrase "engagement and negotiation."

This interpolation by the Irish legislature raises two questions. First, why did the State, a long-time signatory to many ILO Conventions, not simply transpose the ILO definition of collective bargaining into the 2015 Act? Second, why was it thought necessary to insert the novel qualifying word "voluntary" before "engagement and negotiation," a word absent from both the ILO and Eurofound definitions of collective bargaining? Elucidation of these minor mysteries can only be speculative. It may be the insertion of "voluntary" was a ritual obeisance to the voluntarist fetish, or as a talisman, warding off any prospect of statutory recognition.

In Ireland, voluntarism is a concept frequently misunderstood, sometimes wilfully, and amounting to little more than an unexamined cliché. Nevertheless, it is continually cited or deployed as an insuperable obstacle to legislating for union recognition.[200] Some may regard the above commentary as "much ado about nothing," overstating the significance of the single word 'voluntary'. Yet take the case where an employer flatly refuses voluntary engagement in collective bargaining. If the workers involved stage a successful strike obliging the employer to recognise and collectively bargain with their union(s), this could hardly be considered as voluntary engagement. Would

[199] ILO Governing Body, Case No. 2780 (Ireland), 230, paragraphs 815 (a) (b) and (c).
[200] See examination of Voluntarism in section 7 of this document.

it still come under the rubric of collective bargaining as defined by the 2015 Act? Resolving that question might become a matter for the courts. In that event one can only hope the unions fare better than they have done under the 2001/4 Act or the 1990 Act.

The 2015 Act also amended or redefined the nature of an excepted body, bringing it within the ILOs conception of freedom of association. An excepted body now became one that is independent and *not* under the domination or control of the employer.[201]

Operation of 2015 Act

The 2015 Act focussed on two types of situation that might arise in the non-union firm. The first involved firms in which some employees are union members 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 the 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.[202] Even so, intervention will not necessarily issue in a determination. It will be contingent on a comparison between the wages and conditions of 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 new hearing of the case.[203]

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 investigation. 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 minimum logistical

[201] Industrial Relations (Amendment) Act 2015 s. 27 1A and 1 B.
[202] Industrial Relations (Amendment) Act 2015 s. 28 and s. 31.
[203] Kerr, *The Trade Union and the Industrial Relations Acts*, 286.

support.[204] 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 legal representatives are precluded from scrutinising or interrogating the declaration.[205] 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 Act 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.[206] Dismissal apart, other form of victimisation such as reduced access to particular work, training opportunities, shift work, overtime etc. will be dealt with by enhanced enforcement of Sections 9, 10 and 13 of the Industrial Relations (Miscellaneous Provisions) Act 2004. Finally, Ministers Bruton and Nash amended the Codes of Practice on Victimisation (S.I. No. 139 of 2004) to incorporate the ECtHR judgement in *Wilson* into Irish law.[207] In that case the ECtHR ruled that employer inducements to workers to relinquish union membership infringed the right of freedom of association.[208]

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 can be assessed through the agency of the excepted body and/or the Labour Court.[209]

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[204] Industrial Relations (Amendment) Act 2015 s, 28 (10) and 11.
[205] Industrial Relations (Amendment) Act 2015 s 29 (2A) 1-5.
[206] Industrial Relations (Amendment) Act 2015 s. 34 (11A).
[207] *Wilson v UK* ECtHR app Nos 30668/96, 30671/96, July 2 2002. See also: [2002] I.R.L.R.568; See Kerr, The Trade Unions (2015) p.266 and 302. See also: Workplace Relations Commission, "Ministers Bruton and Nash to reform the Industrial Relations (Amendment) Act," last modified on December 16, 2014, https://www.workplacerelations.ie/en/news- dia/workplace_relations_notices/ministers_bruton_and_nash_to_reform_the_industrial_relations_amendment_act.html.
[208] *Wilson v UK* para 47. For commentary see: Keith Ewing, "The implications of Wilson and Palmer," *Industrial Law Journal* 32, no.1 (2003).
[209] For review and commentary on the 2001 Act and the subsequent amendments made by the 2004 and 2015 Acts see Kerr, *The Trade Union and the Industrial Relations Acts*, 269-94, 301-232.

As such, it may provide a partial remedy for the difficulties experienced by workers seeking to bargain collectively with their employer.[210] 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.[211] Indeed, it was these conditions, still operative today, that gave rise to the struggle for freedom of association in the first instance. Second, there is the individualist orientation of the common law and its insensitivity, if not hostility, to collectivism.

It is suggested here 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 *Re Haughey* the right to fair procedures or natural justice attained the status of a constitutional right.[212] 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

[210] See Tish Gibbons, "The industrial Relations (Amendment) Act of 2001: a useful organising tool for Irish trade unions or last refuge of the powerless?" *Industrial Law Journal* 44, no. 3 (2015). See also: Caroline Murphy and Thomas Turner, "Tipping the scales for labour in Ireland? Collective bargaining and the Industrial Relations (Amendment) Act 2015, *Industrial Law Journal* 49, no.1 (2020); S. Zimmer, "The impact of the Industrial Relations (Amendment) Act 2015 on collective bargaining in Ireland," (Master's thesis, HRM DCU Business School, 2017).
[211] D'Art, "Managing the employment relationship."
[212] *Re Haughey* [1971] I.R.217. See: Hogan and Whyte, *Irish Constitution*, 4th. ed. 1121-22; Ailbhe O'Neill, "Fair procedures – an inviolable constitutional requirement?" *Dublin University Law Journal* 33 (2011).

against powerful corporate entities. Given that context, Ryanair's application seeking the disclosure of 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.[213] 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.[214]

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, 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 Act should not be required to identify themselves to the employer in the early stages of the process.[215] 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.[216]

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

[213] Ryanair made a similar request during its judicial review in the High Court. It was refused by Justice Hanna, 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, 23-4. 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 Sections 226A (2G) and 234A (3F), unions are not required to give names. See: Keith Ewing and John Handy, "The dramatic implications of Demir and Baykara," *Industrial Law Journal* 39, no. 1 (2010).

[214] *Ryanair v The Labour Court* [2007] 4 I.R. 199, 200; 207; 210; 225.

[215] Explanatory Memorandum to the Industrial Relations (Amendment) Bill 2015, 6 section 25: Insertion of New Section 2A into Principal Act.

[216] See: D'Art and Turner, "Union recognition"; "Union organising."

law individualism in judicial thinking. Thus, it is hardly surprising that judicial interpretation of freedom of association is narrowly construed, focussing as it does on the individual's right of association or dissociation. 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.[217] It represents a radical departure from the precedents set by the ECtHR previous case law on freedom of association.

[217] There has been a similar development in Canada. See: Judy Fudge, "'Labour is not a commodity': the Supreme Court of Canada and freedom of association," *Saskatchewan Law Review* 67, no. 2 (2004); Alan L. Bogg and K. Ewing, "A Muted Voice at Work? Collective Bargaining in the Supreme Court of Canada," *Comparative Labor Law and Policy Journal* 33, no. 3 (2012). 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," 302.

SECTION 6

The European Court of Human Rights and Irish Judicial Interpretations of Freedom of Association

"Rights must be interpreted in a manner that renders the rights practical and effective not theoretical and illusory."

ECtHR judgment in *Demir and Baykara v Turkey*

"The ability to engage in collective bargaining is a necessary precondition for (the) meaningful exercise of freedom of association."

Canadian Supreme Court in *Mounted Police Association of Ontario v Canada*

Two interpretative approaches to freedom of association, the classic liberal or formalist interpretation and the purposive or functional interpretation, have been outlined above. The liberal formalist interpretation of freedom of association holds that once workers are free to form associations or unions then the right to associate is fully realised. Those espousing the functional or purposive interpretation regard this approach as inadequate, being literal and simplistic, conferring merely a partial unfulfilled right. From the functional perspective, freedom of association encompasses both the right to organisation and recognition. Yet, as we have seen, Irish judges adopt and apply the formalist interpretation of freedom of association. In their rulings on the constitutional right to associate they have consistently denied any connection between the right to organise and the right to recognition for collective bargaining.[218]

Irish courts were not unique in this regard. Up to 2008, the rulings of the ECtHR were substantially similar. However, in *Demir and Baykara v Turkey* the ECtHR made a radical departure from its existing case law.[219] The court rejected the liberal formalist

[218] See Section 4 subsection *Freedom of Association Recognition and Irish case law*.
[219] *Demir and Baykara v Turkey* No.34503/97 Strasbourg, November 12, 2008 ECtHR (2009) 48 E.H.R.R. See also: European Convention on Human Rights, Strasbourg 2013.

interpretation of freedom of association. Instead, it adopted and applied the functional or purposive interpretation. Freedom of association, it ruled, now encompassed not only the right to form and join unions but a concomitant and indivisible right to recognition and collective bargaining. This may have implications for Irish judicial interpretation of the constitutional guarantee of freedom of association given the Irish state is a signatory to the European Convention on Human Rights.

Freedom of Association, Union Recognition, the European Court of Human Rights, Demir and Baykara v Turkey

In *Demir and Baykara v Turkey*, the applicants complained of a breach of Articles 11 and 14 of the European Convention on Human Rights.

Box 11. European Convention on Human Rights

Article 11 Freedom of Association and Assembly

"Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unios for the protection of his or her interests."

Article 14 Prohibition of Discrimination

"The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The applicants alleged their domestic courts had denied them the right to from a trade union and enter into collective agreements. 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.[220]

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 document, it laid down the manner in which these rights should be interpreted. Interpretation must be

[220] *Demir v Turkey*, paragraph 8.

in a manner which renders the rights practical and effective, not theoretical and illusory.[221] 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.[222] Turning to Article 11 the ECtHR identified its essential objective as the protection of freedom of association from interference by the State. However, it also observed that there may be an additional positive obligation on the State to secure the effective enjoyment of such rights.[223] This observation the ECtHR conceded was at variance with its 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 Article 11.[224] These judgments, the ECtHR held, should now be reconsidered.[225] 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. Yet a failure by the ECtHR to maintain a dynamic evolutionary approach would risk it becoming an obstacle to reform and improvement.[226] Consequently, having regard to developments in labour law nationally and internationally and the practice of member states, the ECtHR concluded that the right to bargain collectively with the employer had become an essential element of freedom of association.[227]

It is difficult to overestimate 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 include a concomitant right to union recognition and collective bargaining – is now at a discount. An interpretation long applied by the Irish courts and culminating 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 make the right to freedom of association "practical and effective." This ECtHR judgment necessarily encompasses not only the right to from and join trade unions but a concomitant and indivisible right to union recognition and collective bargaining.[228] In short, the ECtHR unanimously rejected the formalist interpretation of freedom of association. It follows as a result that contracting states acting in good faith and wishing to implement the spirit and

[221] *Demir v Turkey* paragraph 66.
[222] *Demir v Turkey* paragraph 68.
[223] *Demir v Turkey* paragraph 110.
[224] *Demir v Turkey* paragraph 153. *Schmidt and Dahlstrom v Sweden* app. No. 5589/72, February 6, 1976. *Swedish Engine Drives' Union v Sweden* app No. 5614/72 6th. February 1976.
[225] *Demir v Turkey* paragraph 153.
[226] *Demir v Turkey* paragraph 153.
[227] *Demir v Turkey* paragraph 153.
[228] *Demir v Turkey* paragraph 139.

letter of Article 11 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 trade 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."[229] Such a "monumental pronouncement of principle" seems likely to influence interpretations of domestic law by contracting states.[230] It would appear that those unhappy with the judgement and its ramifications must abandon hope that it constitutes a temporary aberration.[231] 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.[232] 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.[233]

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 the ILO Committee of Experts on freedom of association and with the European Committee of Social Rights.[234] The 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.[235] Article 6(2) of the Charter holds that "all

[229] Ewing and Hendy, "The Dramatic Implications," 20.
[230] Ewing and Hendy, "The Dramatic Implications," 47
[231] Ewing and Hendy, "The Dramatic Implications," 48
[232] Ewing and Hendy, "The Dramatic Implications," 48.
[233] *Enerji Yapi-Yol Sen v Turkey* app. No. 68959/01 April 21, 2009, cited in Ewing and Hendy, "The Dramatic Implications," 48.
[234] John Hendy and Keith Ewing, *Article 11(3) of the European Convention on Human Right: an outline of the engagement of British trade unions with the European Court of Human Rights* (Liverpool: Institute of Employment Rights, 2008), 362.
[235] *European Social Charter* Article 5 Council of Europe November 2016, 9.

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 with a view to the regulation of terms and conditions of employment by means of collective agreements.[236]

The judgment of the ECtHR in *Demir* along with Articles 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, Article 28 of the Charter of Fundamental Rights of the European Union enshrines the right to negotiate collective agreements.[237] Nonetheless, according to the ILO collective bargaining cannot begin until a union is recognised for that purpose.[238] 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 of collective bargaining and its concomitant of union recognition then statutory support for the realisation of that right becomes a necessary option. At first glance Article 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, Article 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 voluntarily engage in negotiations. A refusal to recognise and negotiate with the union denies in effect the workers right to collective bargaining contained in Article 6 of the Social Charter and Article 28 of the EU Charter.

ECtHR resiling from a progressive development in labour law jurisprudence?

A solution to this perceived problem is offered in a recent publication by the ECtHR.[239] 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.[240] Nonetheless, it goes on to note

[236] *European Social Charter* Article 6(2) Council of Europe November 2016, 9.
[237] *European Charter of Fundamental Rights* EU (2012/2/c 326/02) Official Journal of the EU Article 28 Right of Collective Bargaining and Action at p.C326/401.
[238] ILO, *Collective Bargaining,* 28.
[239] ECtHR, *Guide on Article 11 of the European Convention 31st.December 2019*
[240] ECtHR, *Guide on Article 11,* 40/53 G para 248.

this reinterpretation or expansion of Article 11 leaves unaltered a state's positive obligation under the Convention on Human Rights.[241] There is no additional obligation on states "to provide for a mandatory statutory mechanism for collective bargaining."[242] Under a voluntary system of collective bargaining a trade union refused recognition can, the ECtHR suggests, take industrial action to persuade the employer to enter into a collective agreement.[243]

This is hardly a satisfactory solution. There is a reluctance to accept the obligation that logically flows from the recognition of a right. The Social Charter, the EU Charter of Fundamental Rights, and the ECtHR hold that the right to freedom of association is a fundamental or human right. Under the Irish Constitution freedom of association is a constitutional right. According to the ECtHR the right to freedom of association comprises not only the right of workers to form and join trade unions but a concomitant and indivisible right to collective bargaining and union recognition. It is an old legal maxim that a right without a remedy is no right at all. Consequently, where powerful interests deny or obstruct the realisation of a human or fundamental right it is necessary, and indeed usually expected by bodies protecting human rights, that a contracting state will act or legislate to protect and uphold that right.[244] Yet in the case of union recognition, the ECtHR appears to make an exception to this general rule. Where the employer refuses to recognise the union for collective bargaining then, the court suggests, workers can take industrial action to enforce the right.

It is surely remarkable that a court of human rights should recommend collective action by workers rather than action by a contracting state to uphold a human right. This apparent abdication by the court is potentially problematic. If the workers' industrial action or strike succeeds in securing recognition then the employer, it seems, could legitimately complain that this does not constitute voluntary engagement. Alternatively, as sometimes happens, if collective action for recognition and collective bargaining is unsuccessful, then the workers involved are deprived of a human right. The practical realisation of the right has been overridden and set at nought by superior employer power. In the absence of state support then there is no remedy for the abrogation of the workers right to recognition and collective bargaining. Thus, without a positive obligation on contracting states to

[241] ECtHR, *Guide on Article 11,* 40/53 G para 251.
[242] ECtHR, *Guide on Article 11,* 40/53 G paragraph 252. See observation on the use of the word "mandatory| as a prefix to recognition in Section 7 of this document under subheading *statutory recognition and inward investment*.
[243] ECtHR, *Guide on Article 11,* 40/53 G paragraph 252.
[244] 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).

uphold the practical realisation of freedom of association then it remains a mere paper right or as the ECtHR would put it "theoretical and illusory."

The *laissez faire* stance adopted by the ECtHR appears tailored to certain contracting states, namely those operating a voluntary system of collective bargaining or voluntarism. For such states there is no positive obligation to provide for what the court pejoratively terms "mandatory statutory recognition." Apparently, the assumption here is that statutory recognition is incompatible with a voluntary system of industrial relations. This is a muddled and erroneous understanding of voluntarism. Statutory recognition, it will be shown below, far from being incompatible with voluntarism, complements and strengthens that tradition.[245]

For those who have long held that the right to form and join unions and the right to recognition and collective bargaining are indivisible elements of freedom of association, the ECtHR judgement in *Demir* judgment is a vindication.[246] Undoubtedly, in that and a subsequent confirmatory case, the court's judgement represents an important and progressive development in labour law jurisprudence. However, the court's failure to follow the logic of its own judgements by not requiring positive state action in support of recognition falls short of an alignment with ILO principles.[247]

Ireland the ECtHR and *Demir*

According to the ECtHR, a contracting state is obliged to take account of elements regarded as essential by the ECtHR case law.[248] Following the judgement in *Demir*, this suggests that Irish courts dealing with contested cases on recognition might be obliged to abandon their traditional formalist approach and apply a purposive interpretation of freedom of association. It is a requirement of Section 4 of the European Convention on Human Rights Act 2003 that "a court shall when interpretating 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,

[245] See the discussion in Section 7 under the subheading *Voluntarism and statutory recognition*. See also in Section 7 the discussion of the use of the word "mandatory" as a prefix to describing legislation on recognition under subheading *Statutory recognition and inward investment*.
[246] See Casey, "Reform," footnote 162; Lynch, "Lawyers and unions," footnote 148; Wilkinson, "Workers," footnote 154.
[247] As the ILO notes, "Employers will grant recognition only if they believe it is in their interests to do so or if they are legally obliged to do so," ILO, *Collective Bargaining*, 28.
[248] *Demir v Turkey* paragraph 144.

then the Irish Constitution will have primacy.[249] 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.[250] Thus, the question arises, does the 1937 Constitution constitute an insurmountable obstacle to statutory union recognition? The supposed constitutional and other obstacles to a legislative enactment on statutory recognition are considered in the next section.

[249] Irish Human Rights and Equality Tribunal, *Human Rights Explained: A Guide to Human Rights Law* (Dublin: IHREC, 2015), 11. See also: 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," *Irish Judicial Studies Journal* (2007).
[250] On this see: Hogan, Whyte, Kenny, Walsh, *The Irish Constitution*, 5th. ed. 2147-48.

SECTION 7

Constitutional and other Obstacles to Statutory Recognition Considered

"In legislative and pre-legislative deliberations, constitutional considerations are typically invoked only as obstacles to political action, rather than as arguments for or against specific policies [...] an over-constitutionalised politics will operate only in a negative way, as a barrier to legislative change [...] it will likely have an anti-reformist, conservative orientation."

Eoin Daly[251]

Often, when the possibility of legislating for statutory recognition is raised it evokes a standard response from many legal councillors. Their eyes narrow, there is sharp intake of breath, and then the exhalation of the words "legal difficulties" dooms the project in its cradle. Its proponents fall silent, amazed by their audacious folly in raising a project so radically unsound and constitutionally repugnant.

It will be argued here that the oft-cited constitutional and other obstacles to statutory recognition are without substance, mere paper tigers or painted devils. As Lady Macbeth observed "only the eye of childhood fears a painted devil."

The Constitution Review Group and Statutory Recognition

In 1994 the government of the day set up an all-party parliamentary committee to review the 1937 Constitution. To assist in this endeavour, it appointed an expert review group (the Constitution Review Group) composed mostly of lawyers, some

[251] Eoin Daly, "Reappraising judicial supremacy in the Irish constitutional tradition," in *Judges, politics and the Irish constitution*, eds. Laura Cahillane, James Gallen, and Tom Hickey (Manchester: Manchester University Press, 2017), 40.

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.[252] When published in 1996, the report ran to 700 pages.[253] The focus here will be on the section dealing with Article 40.6.1 iii on freedom of association and statutory recognition.[254] Objections or obstacles to statutory recognition raised by the group proved very influential. They were subsequently deployed with little critical examination by commentators and the high-level group appointed by the government to consider union recognition.[255] The deliberations of this latter group took concrete from 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 judgement 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.[256] Even so, it was not convinced that the right to recognition be given constitutional status. As an issue of industrial relations policy, it could be more appropriately resolved by the Government and the Oireachtas.[257] 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 of freedom of association while the judgement 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 right of an employer

A potential obstacle to statutory recognition identified by the Review Group was Article 40.6.1 iii of the Constitution guaranteeing the right to form associations and unions. It is surely bizarre that the right to form unions could become a barrier to

[252] Andrew Butler and Rory O'Connell, "A critical analysis of Ireland's Constitutional Review Group Report," *Irish Jurist* 33 (1998), 237.
[253] Constitution Review Group, *Report of the Constitution Review Group* (Dublin: Stationary Office, 1996).
[254] Constitution Review Group, 312-317.
[255] See: Niamh Howlin and Robert C Fitzpatrick, "The feasibility of mandatory trade union recognition in Ireland," *Dublin University Law Journal* 29 (2007).
[256] Constitution Review Group, 316.
[257] Constitution Review Group, 316.

union recognition. It is a paradox, Lynch remarks, that the right to associate and form unions has often served to work against collective organisation.[258] An explanation for this Gilbertian "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."[259] 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 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.[260] Extensive legal regulation of the employment relationship testifies to the fact. Historically, some of these legislative enactments originated in workers exercising the right of freedom of association. The Review Groups treatment of "horizontality" has been characterised as "extremely facile" given that it deals with "neither the philosophical merits or de-merits of the concept."[261]

Recognition and the employers right of dissociation

Another obstacle to statutory recognition identified by commentators is the obligation that it would place on employers to recognise and negotiate with the workers' union(s).[262] This might conflict with the employers' right to dissociate. The employers' right of dissociation, it is claimed, must be regarded as a genuine constitutional impediment to statutory recognition.[263] In the Irish courts, questions concerning the right to dissociate are almost exclusively focussed 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 employers' right of dissociation has been

[258] Lynch, "Lawyers and unions," 226.
[259] Constitution Review Group, 316.
[260] Not only in regard to the regulation of the employment relationship but in many areas. See for instance the remark of Hanna, J, 'the days of laissez faire are at an end'. *Pigs Marketing Board v Donnelly* [1939] I.R. 413 at 417-8 cited in Thomas Murray, *Contesting economic and social rights in Ireland: constitution, state and society, 1848-2016* (Cambridge: Cambridge University Press, 2016), .209.
[261] Butler and O'Connell, "Critical analysis," 248-50.
[262] Howlin and Fitzpatrick, "Mandatory trade union recognition," 196.
[263] Howlin and Fitzpatrick, "Mandatory trade union recognition," 196.

characterised as meaningless. In hiring workers, the employer has already chosen to associate.[264] 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 creates a collective aspect to the employment relationship. The employer has, as a consequence, chosen to associate with the individual and his or her organisational group.

While remaining in conformity with individualist common law orthodoxy emphasis on the employer as an individual private person may obscure 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 enterprises managerial agents represent an accumulation of material and human resources. In this sense the enterprise is a collective power.[265] Usually 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 the 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.[266] Against this background, raising the employer's right of dissociation as an obstacle to statutory recognition carries little weigh or substance and 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 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 a 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.[267] It is undoubtedly

[264] Caroline Fennell and Irene Lynch, *Labour law in Ireland* (Dublin: Gill & Macmillan, 1993), 39.
[265] Kahn-Freund, *Labour and the Law*, 6.
[266] Kahn-Freund, *Labour and the Law*, 6-7.
[267] McDonnell and McIntosh, *The Right to Manage,* 113.

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.[268] 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 commit the State to protect from unjust attack the property rights of its citizens. Yet many of the rights in the Constitution are qualified rather than absolute. 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.[269] Indeed, Article 43.2.2 empowers the State to delimit these rights with a view to reconciling their exercise with 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 Article 43 have to be read in conjunction.[270] In *Cafolla v O'Malley*, Costello J. listed examples of legislative restrictions 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, limiting the nature and size of the catch, restricting the hours of trading in licensed premises, and regulating princes at which goods can be sold or services remunerated.[271] 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.[272] Indeed a US observer has doubted the

[268] On this see: Kahn-Freund, *Labour and the Law*, 6-7: "The main object of labour law," Kahn-Freund claims, "has always been [...] and will always be [...] a countervailing force to counteract the inequality of bargaining [...] 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 and sex discrimination, on unfair dismissal [...] most labour legislation must be seen in this context. It an attempt to infuse law into a relation of command and subordination."

[269] See: Rachel Walsh, "Private property rights in the drafting of the drafting of the Irish constitution: a communitarian compromise," *Dublin University Law Journal*, 33 (2011).

[270] For various cases cited, see: Hogan and Whyte, *The Irish Constitution*, 4th.ed. p.1989; Gerard Hogan, "The constitution, property rights and proportionality," *Irish Jurist* 32 (1997).

[271] *Cafolla v O'Malley* [1985] I.R. 486 cited in Hogan, Whyte, *The Irish Constitution*, 4th. ed. p. 1990.

[272] Hogan, Whyte, *The Irish Constitution*, 4th. ed. p. 1970. See also: Morgan, *A Judgement too far?* 41-9.

effectiveness of the protection afforded to property rights by the Irish Constitution. 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.[273]

To the extent that there is a popular perception that property rights are constitutionally sacrosanct, that perception, it seems, is mistaken.[274] This being so, the assumption that statutory recognition would automatically attract constitutional infirmity is ill founded. It is more likely that such recognition would come within the shelter of the constitutional qualifications of property rights. This will be particularly so if it can be shown that trade unions facilitate social justice, contribute to the common good, and enhance the democratic nature of the State. The beneficial effect of unions in the enterprise and wider society have already been considered at some length.[275] However, they can be briefly summarised as follows.

At firm level unions assert the human essence of the labour commodity, impose some check on the arbitrary exercise of power, and by seeking participation and accountability in decision-making strengthen democratic culture, values, and practice. In the wider society union membership promotes citizen engagement and political participation. Also, unions act to promote values of social solidarity and counter the socially corrosive effects of atomistic market individualism. 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. 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 Article 43.2.2 likely remain valid as a "delimitation" of that right.[276] Second, it could be argued that an implicit unenumerated right latent in the constitutional guarantee of freedom of association is the right to union

[273] Francis X. Beytagh, *Constitutionalism in contemporary Ireland: An American perspective* (Dublin: Round Hall Sweet & Maxwell, 1997), 194-5.
[274] Hogan and Whyte, *The Irish Constitution*, 4th. ed. p. 1970.
[275] See Section 1 under subheadings *Worker and Unions in the Firm, Unions and the Market, Unions and Democracy*, and *Unions and the Wider Society*.
[276] Casey, "Reform."

recognition. Many commentators, and the Review Group itself, have noted that without a concomitant right to recognition the constitutional guarantee of freedom of association remains an illusory or mere paper right.[277] 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 employees' independent trade union would be contrary to the voluntary nature of Irish industrial relations.[278] This is also an objection perennially raised by employers.[279]

Voluntarism is usually understood to mean that trade unions and employers are opposed to legal intervention in industrial relations and that the parties remain free to regulate the substantive and procedural terms of the employment relationship without State intervention.[280] 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.[281] Again, with the Industrial Relations (Amendment) Act 2015 which imposed limitations and duties on employers 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

[277] Casey, "Reform"; Constitution Review Group; Fennell and Lynch, *Labour Law in Ireland*; Lynch, "Lawyers and Unions."
[278] Constitution Review Group (1996), 316 paragraph 3; Howlin and Fitzpatrick, "Feasibility"; Alastair Purdy, "The Industrial Relations (Amendment) Act 2001 and the Industrial Relations (Miscellaneous Provisions) Act 2004 – have they helped?" *Irish Employment Law Journal* 1, no. 5 (2004).
279 See: IBEC, *Proposal for a directive on adequate minimum wages in the European Union: IBEC submission to the Department of Enterprise, Trade and Employment* (Dublin: Department of Enterprise, Trade and Employment, 2021).
[280] Ferdinand von Prondzynski and Charles McCarthy, *Employment Law* (London: Sweet & Maxwell, 1984), 28-9. See also: Kerr, "Industrial Relations Law," 665; Joseph Wallace, "The Industrial Relations Act 1990: an industrial relations perspective," *The Industrial Relations Act 1990; 20 years on,* ed. Tony Kerr (Dublin: Round Hall, 2010); See further: Joseph Wallace, Gerard McMahon and Patrick Gunnigle, *Industrial relations in Ireland* (Dublin: Gill & Macmillan, 2004).
[281] D'Art, *Untying Workers' Hands.*

is perceived to support their interests. Consequently, the primary issue in respect of the Government's role in industrial relations is not whether it should intervene but rather what the degree of intervention should be, in what areas and for what objective.[282] 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."[283] However, it may on occasion be a useful bogeyman deployed by those opposing a particular legislative enactment.[284]

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 description of voluntarism have it, the

[282] Michael Salamon, *Industrial relations: theory and practice* (London: Prentice Hall, 1987), 219-20.
[283] *Report of the Commission of Inquiry* (Stationery Office, Dublin July 1981), 11 paragraph 28.
[284] See: Frances Meenan, *Working within the law: a practical guide for employers and employees* (Dublin, Oak Tree Press, 1999): Voluntarism, Meenan claims, "is becoming more of a misnomer because individual employment rights are increasingly protected by statute" (p.151). Later in discussing a failed bill on statutory union recognition Meenan suggests that "its introduction would have undermined the voluntarism of Irish industrial relations" (159-60).

parties remain largely free to regulate the substantive and procedural terms of the employment relationship without State intervention.[285] The contention that statutory 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's 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."[286] This concern was also repeated by the IDA representative on the High-Level group on union recognition.[287] Before addressing the substance of this claim, the language in which it is couched needs examination.

"Effectively 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."[288] 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.[289] 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,

[285] See footnote 280 sources for various but similar definitions. .See also the definition contained in the *Report of the Committee of Inquiry*, 10: "It is generally assumed that our system is a voluntary one, by which we mean that the parties to industrial relations 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 intervention of the State [...] it is a shorthand term for a variety of attitudes and principles."
[286] Constitution Review Group, 316, paragraph 3.
[287] See: D'Art and Turner, "Union recognition."
[288] See Howlin and Fitzpatrick, "Mandatory trade union recognition"' Purdy, "The Industrial Relations (Amendment) Act 2001."
[289] H. L. A. Hart, *The Concept of Law* 3rd edition (Oxford: Oxford University Press, 2012), 18-25.

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. It is surprising that the question of who decides – employer or employees – the identity or acceptability of the negotiating union(s) should resurface in the late twentieth century. That question was at the heart of the 1913 strike.[290]

Owing to the 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 have already 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.[291] 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.[292] The prospect of statutory recognition may be of more concern to domestic private sector firms than foreign multinationals.[293]

[290] Yeats, *Lockout; Dublin 1913*.
[291] D'Art and Turner, "Trade union growth." See also: Taft Hartley Act 1947.
[292] Jonathan Lavelle, Anthony McDonnell and Patrick Gunnigle, *Human resource practices in multinational companies in Ireland: a contemporary analysis* (Dublin: Government Publications Office, 2009), 99-120.
[293] Doherty notes that the majority of cases (72%) taken under the 2001/4 Acts involved indigenous employers. Doherty, "Representation."

The Ryan Air 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."[294] 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.[295] In the UK, there is a statutory mechanism in place to facilitate recognition.[296] 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.[297] 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, it was noted above, the law governing statutory recognition survived a constitutional challenge and remains on the statute book.

The claim that a law cannot be passed obliging Ryanair or by implication any employer to recognise and negotiate with a trade union is, it seems, mistaken. According to one authority, existing legislation already imposes a series of miscellaneous duties of consultation and recognition on certain employers.[298] The Universities Act 1997, the Education Act 1998, and the Institutes of Technology Act 2006 are examples cited in support. However, the strongest and 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.[299] 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 Section 46 of the Transport Act

[294] Ryanair v Labour Court [2007] 4 I.R.199, 215.
[295] Co-Determination Act (MBL) 1985. See also: D'Art, *Economic Democracy*, 156-158.
[296] Trade Union and Labour Relations (Consolidated) Act 1992 and Employment Relations Act 1999. It should be noted that the UK operates a voluntarist system of industrial relations.
[297] National Labour Relations (Wagner) Act 1935 (USA). War Decree Bill 1944 (Canada) incorporates Wagner Act into Canadian law.
[298] Kevin Costello, *Labour law in Ireland* (Netherlands: Kluwer Law International, 2016), 212.
[299] Costello, *Labour Law in Ireland*, 211.

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.[300] That being so, it renders much of the argument in this section somewhat superfluous. The supposed solidity of the 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.

In Summary

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

[300] Kerr and Whyte, *Irish Trade Union Law*, 19. Originally CIÉ was the body responsible 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 independent trade unions through collective bargaining.

The question arises as to what practical effect the ECtHR *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 fact 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 into S.I. No. 139 of 2004 "to remove any doubt as to Ireland's full compliance with the judgment."[301] Extrapolating on that willingness, the judgment in *Demir* would have the salutary effect of opening the road to statutory recognition thereby given 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 judgements of the ECtHR conflict with the Constitution there is no requirement, they be incorporated in Irish law.[302] 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 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, mere painted devils. Even so the effort expended in dismantling the supposed or perceived obstacles 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 remains. 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 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

[301] S.I. No. 139/2004 Industrial Relations Act 1990 (Code of Practice on Victimisation) Order 2004. See: WRC, "Ministers Bruton and Nash to reform Industrial Relations (Amendment) Act."
[302] IHREC, *Human rights explained*, 11.

and/or the accepted 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* judgement but with other Conventions and Charters. He points to the obligations on Member States under Article 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 Article 4 of the ILO's Convention 98 and art 28 of the Charter of Fundamental Rights of the European Union.[303] 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 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' attempt 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.

[303] Kerr, *Trade Unions and the Industrial Relations Acts*, 54.

SECTION 8

There is a world still to win

"*Hell will freeze over before Ryanair recognises a union.*"

Apocryphal remark attributed to Michael O'Leary, Ryanair

A principal object of this document was to clear perceived obstacles supposedly blocking the road to statutory recognition. That task is now complete. The open road beckons. Only confusion, de-moralisation, or agnosticism regarding the benefits of recognition and collective bargaining for workers and society generally can inhibit the drive forward. A restatement of some old truisms may serve as an antidote to the malaise of passivity.

Union recognition is a key determinant of union growth. It creates a virtuous circle. The more unions obtain recognition, the more workers are likely to join. Also, recognition by enhancing union legitimacy can incentivise union joining while making employer opposition more difficult. The importance of recognition for union survival and growth cannot be overestimated. It has been suggested that collective bargaining can be carried on without union recognition. This is fundamentally erroneous and damaging as it falls far short of ILO principles. According to the ILO, collective bargaining cannot begin until a union is recognised for that purpose.[304] This must be the watchword of the Irish trade union movement.

Approaches to Recognition

Historically, within trade unions and labour movements there has been debate as to the best method of achieving recognition. Some argued for union direct action while others favoured legislative state support. For instance, during the 1960s the British TUC did not take up a government offer to legislate for statutory recognition but preferred to rely on union action. In the Ireland of the 1960s and 1970s, recognition was mainly achieved through union actions or strikes. Later, advocates of

[304] ILO, *Collective Bargaining*, 28.

partnership tended to deplore such "adversarialism," or worker militancy, as lacking in sophistication. In their estimation, old fashioned militants failed to comprehend the strategic imperative of cooperative behaviour, necessary for survival in the neoliberal order. Nonetheless "old fashioned trade union militancy" was not without its achievements. By the beginning of the 1980s union density or the percentage of public or private sector workers in recognised trade unions was at its highest level since the foundation of the state. After more than two decades of partnership, union density had plunged to a historic low. These observations should not be taken as an outright rejection of tripartite agreements or arrangements between government employers and trade unions. The achievements of the Scandinavian labour movements under these arrangements have already been acknowledged.[305] Rather they are directed at those among the Irish trade union leadership who gave ear to or, worse, acted upon the debilitating guff of post modernists and end of history merchants, the superficial blather of followers of fashion and the millenarian utopianism of harmonic co-operators. The unintended consequence was to de-legitimise, demoralise, and unbend the springs of union action. It was as if elements of the union leadership were intent on sawing through the branch on which the movement sat.

Solidarity and a willingness to take action in defence or advancement of workers' interest within firms or beyond is the very lifeblood of effective trade unionism. Though sometimes costly and disruptive, it also empowers workers and gives notice that their interests cannot be ignored or dismissed with impunity. As a method of securing recognition this approach has a long and heroic history. Ingredients essential for its success are a strong, confident trade union movement willing and able to take solidaristic action in support of those striking for recognition. Unfortunately, within the contemporary Irish trade union movement these ingredients seem to be in short supply. In any event, strikes or industrial action in individual firms or solidaristic action supporting workers in other firms seeking recognition are, from the outset, hampered and hobbled by the 1990 Industrial Relations Act. Indeed, the Act undermines the cardinal union principle of solidarity, an injury to one is an injury to all. In these circumstances an attritional campaign for recognition, even with the odd hard-won victory, is unlikely to meet with overall success. The most viable option suited to the temper of the time is the strenuous pursuit by the entire trade union movement of a legislative enactment on recognition.

Statutory union recognition

Legislative approaches to achieving recognition is not without its critics. A US academic suggests that statutory recognition can be counterproductive because it is perceived as indicative of managerial failure. Consequently, companies that

[305] See Section 2.

might under other circumstances have been willing to grant recognition are pushed towards union avoidance.[306] This is not a credible argument. Whether before or after the New Deal of 1935 the exceptional and persistent hostility of American management towards independent trade unions is well established. The deep rooted and dominant culture and ideology of American individualism engenders suspicion if not antipathy to collectivism. With regard to labour collectivism, it is particularly pronounced among employers. Thus, the presence or absence of a statutory procedure, beyond possibly a change in tactics, is unlikely to have any effect on the existing level of employer hostility. For the generality of US employers statutory or voluntary recognition is equally unpalatable.

The advent of statutory recognition in Britain raised similar concerns. Critics worried regarding its potentially regressive effect on labour management relations. Statutory recognition they claimed "cannot create the goodwill on which a meaningful bargaining relationship depends."[307] Yet the necessity for statutory recognition only arises in the absence of employer good will and the refusal of voluntary recognition against the expressed preference of employees. A statement by the ILO cuts through this gordian knot of nonsense. Employers, it holds, will give recognition "only if they believe it to be in their interests or if they are legally required to do so."[308] Few if any Irish private sector employers appear to believe union recognition is in their interest.

A more substantial and less superficial critique of statutory recognition is that developed by Gall.[309] Using the examples of three Anglo-Saxon countries, America, Britain and Ireland, he advances a paradoxical contention. In periods of union weakness, mostly resulting from intensified employer opposition facilitated by a hostile or supine state, unions campaign for legal provisions to ease the path to recognition. In the British and Irish examples of the late 1990s, where such campaigns succeed and enabling provisions or procedures were enacted they produced unintended consequences. These are the provocation and deepening of existing employer anti-unionism making the achievement of recognition more difficult and less likely. As examples Gall cites the recognition procedures in the US and to a lesser extent Britain.[310] The American historical record provides no support for this contention. Rather, it suggests persistent and continuing employer opposition to recognition, be it voluntary or statutory. The Wagner Act of 1935 by its institutionalisation of conflict round recognition may have made its pursuit a less bloody affair. Generally, in the Anglo-Saxon countries employer opposition

[306] Roy J. Adams, "Why statutory union recognition is bad labour policy: the North American Experience," *Industrial Relations Journal* 30, no.2 (2003).
[307] William Brown, Simon Deakin, Maria Hudson, Cliff Pratten, "The limits of statutory trade union recognition," *Industrial Relations Journal* 32, no. 3 (2003). 191-2.
[308] ILO, *Collective Bargaining*, 28.
[309] Gregor Gall, "Statutory union recognition provisions as stimulants of employer anti-unionism in three Anglo-Saxon countries," *Economic and Industrial Democracy* 31, no. 1 (2009).
[310] Gall, "Statutory union recognition."

to recognition, irrespective of its form, is a common and recurring phenomenon. In Ireland this is illustrated by the fate of the Industrial Relations (Amendment) Act 2001/4. By any standard it was an innocuous piece of legislation. It neither provided for statutory recognition or even a non-binding recommendation on the question from the Labour Court. Nevertheless, it was effectively neutralised and emasculated by employer opposition funnelled through the courts.[311] This is not surprising. Since the industrial revolution and throughout the industrialised capitalist world conflict between capital and organised labour remains endemic and permanent.[312] Consequently, statutory recognition, far from intensifying this ongoing conflict, merely involves a change in employer tactics.

Pitfalls of Statutory Recognition

On the nature of statutory recognition and the counter tactics of employers, Gall is on firmer ground. Indeed, his observations go some way to explain the sometime disappointing outcomes from the recognition process for unions. Statutory recognition in the US and UK, he points out, are enabling provisions.[313] Unlike the automatic provision in Scandinavia, they do not guarantee recognition. Rather they provide for a series of procedural steps through which unions seeking recognition must progress. Successful progression will depend on meeting certain criteria, a requirement that opens the way for employer interference, wrangling as to proportion of workers involved and the use of legal counsel and the courts. Within the enterprise where employer power is dominant, he or she is free to weaken worker support for the recognition process. Strategies that may be deployed, either singly or in combination, are the velvet glove of union substitution or the mailed fist of union suppression.[314] Saddled with a recognition process facilitating or encouraging employer interference, unions lack sufficient political influence to secure appropriate corrective amendments.

Aspects of the above scenario are illustrated by the following examples. In Ireland the Industrial Relations Act 1990, though not directly concerned with recognition, shows how procedural requirements or hurdles, by providing opportunities for employer intervention, work to disadvantage unions. Ostensibly the balloting provision of Section 14 of the Act laying out a set of procedural requirements

[311] See: *Ryanair v Labour Court* [2007] 4 I.R.
[312] Miliband in *The State in capitalist society* describes the term industrial relations as 'the consecrated euphemism for the permanent conflict, now acute, now subdued, between capital and labour'. See also: D'Art, "Managing the employment relationship"; Niall Cullinane and Tony Dundon, "Unitarism and employer resistance to trade unions," *The International Journal of Human Resource Management* 25, no. 18 (2014).
[313] Gall, *Industrial and Economic Democracy*.
[314] Gall, *Industrial and Economic Democracy*. See also: D. F. Roy, "Repression and Incorporation. Fear stuff, sweet stuff and evil stuff: management's defences against unionisation in the south," in *Capital and labour: studies in the capitalist labour process* ed. Theo Nichols (London: Fontana, 1980).

were supposed to enhance the working of union democracy. In many cases legal challenges by employers, interrogating minutely the conduct and administration of the ballot, successfully halted the industrial action the ballot originally endorsed.[315] The effect of Section 14 was to subvert rather than enhance union democracy. Apparently once legislation facilitates or enables employer intervention in the recognition process the outcome for unions and members is usually negative. The statutory recognition process in the US provides a classic example. As we have seen, the Wagner Act of 1935 gave American workers the right to join trade unions and bargain collectively with the employer through representatives of their own choosing. Employer interference, coercion, or discrimination against workers exercising that right was declared illegal. An employer counter offensive exercising powerful political influence succeeded with the passage of the Taft Hartley Act 1947. The so called "free speech" provision of that Act allowed employer interference in all union recognition elections. Since that time, its effect on union successes has been extremely detrimental.[316] To date a number of attempts by the American union movement to amend the Act have failed.[317] With the election of Biden another campaign for reform has been launched. As the tail or appendage of the Democratic Party, unions hope again, despite previous disappointments, that support from their political ally will win the day. Undoubtedly the cultural, ideological and political terrain on which American unions manoeuvre is bleak and hostile. This can account for the union movement organisational and political weakness. It may be compounded by the internalisation of the dominant value system by many union members and leaders.[318] While Irish trade unions are not as badly circumstanced as their American counterparts, they mirror to some extent their political weakness. This was evident in the aftermath of the Supreme Court Ryanair judgment nullifying the 2001/4 Act. As already noted, it left "Irish law offering perhaps the weakest protection for trade union bargaining rights in the Western industrialised world."[319] Nonetheless, the governing parties of the day remained untroubled by this outcome adopting instead a policy of masterly inactivity. It may have been the embarrassment of the ICTU complaint to the ILO that spurred government action. The resultant 2015 Act, while it brought some improvements in rectifying the defects of the 2001/4 Act, did not grant union recognition.

Overall, Gall's analysis locates US, UK and Irish unions in the Slough of Despond. Lacking sufficient political influence, they cannot push forward to shape legislation on recognition in a union friendly way. That is by minimising procedural complexity

[315] D'Art, "*Untying Workers' Hands.*"
[316] Fossum, *Labour Relations;* HRW, *Unfair advantage*.
[317] Great hope was placed in the presidency of Barak Obama and the slogan "yes we can." Sadly, the outcome was "no we can't." See: Denis Staunton, "Obama approves reform to bolster workers' rights," *The Irish Times*, January 31, 2009.
[318] Janice Fine, "A marriage made in Heaven? Mismatches and misunderstandings between worker centres and unions," *British Journal of Industrial Relations* 45, no. 2 (2007), 356-7.
[319] Doherty, "Emergency Exit?" 186.

and prohibiting employer interference. Organisationally weakened by membership decline, they cannot go back, barring opportune conditions in individual firms, to a general policy of militancy to secure recognition. Such an analysis suggests a policy of paralysis, defeatism and despair.

Union Recognition a Constitutional and Hurman Right

Since the late 1990s Irish unions have sought legal support for union recognition. The resulting Acts of 2001/4 and 2015 have proved disappointing, amounting in effect to unions being "sold a pup" or buying "a pig in a poke." Now, nearly quarter of a century later, the government is to establish another High-Level Group. Once again, like its predecessor, it will consider the question of union recognition and collective bargaining coverage. If as a result of these deliberations Irish unions are successful in securing legal support for recognition, can they avoid the unsatisfactory outcome of such processes experienced by their brother and sisters in the US and UK? They remain mired in a swamp of procedural complexity and impeded by obstacles raised by the ingenuity of the employer's legal counsel. Irish unions experience with the 1990 Act is an indigenous example. Alternatively, might Irish unions be fobbed off with legislation supposedly extending collective bargaining coverage but without the crucially concomitant right to recognition? Happily, all these pitfalls can be avoided. Irish trade unions are advantaged in this regard by the constitutional guarantee of freedom of association. The practical realisation of that right involves the recognition of the workers trade union for collective bargaining. Consequently, Irish trade unions can demand a constitutionally-based automatic legal right to recognition.

Justification for this claim has been developed at length in sections of this document.[320] It will be briefly summarised here. Freedom of association or the right to form and join unions is a right guaranteed by Article 40.6.1 iii of the Irish Constitution. Workers join unions for two principal reasons. First, to seek improvements in wages and conditions and secondly to exercise some influence on employer decision-making affecting their working lives. This legitimate but modest aspiration can only be realised when the employer agrees or is obliged to recognise the workers union for collective bargaining. Commentators who consider the question agree that a right to associate in unions without a corresponding right to recognition renders the right to associate meaningless or illusory. To grant freedom of association but provide no legal support for the concrete realisation of that right - union recognition – amounts to empty legal formalism, the conferring of a mere paper right. It is an old legal adage that a right without a remedy is no right at all.

Nonetheless, Irish courts have consistently found that the constitutional right to associate in unions does not involve a concomitant right to recognition. Their

[320] See Sections 4, 6 and 7. See also: D'Art, D. "Freedom of Association," 82-112.

interpretation of freedom of association sharply delineates and denies any connection between the right to associate in unions and a right to recognition. Since 2008 this interpretation of freedom of association has been comprehensively rejected by the European Court of Human Rights. It is described by the court as "theoretical and illusory" in failing to make the right to associate "practical and effective." The ECtHR now holds that the right to freedom of association encompasses not only the right to form and join unions but a concomitant and indivisible right to union recognition and collective bargaining. A decision affirmed and re-affirmed in two unanimous judgments by the court.

As a contracting party to the European Convention on Human Rights the Irish state is obliged to take account of elements regarded as essential by ECtHR case law. Therefore, the Irish constitutional guarantee of freedom of association must now be interpreted as embodying not only the right to form and join unions but a corresponding indivisible right to union recognition and collective bargaining. Of course, this interpretation can only be applied in the absence of constitutional obstacles. Putative obstacles, constitutional and otherwise, to statutory recognition have been examined in detail by Section 7 of this document. They were found to be mere shadows without substance. In any event a form of statutory recognition has been on the Irish statute book since 1924 and remains good law. Consequently, Irish trade unions can legitimately demand an automatic legal right to recognition based on the constitutional guarantee of freedom of association and the interpretation of that right by the ECtHR.

A way forward?

After nearly three decades of defeat, demoralisation and declining union memberships long-term union survival may be under threat. This seems to be particularly so in the private sector. We suggest two measures that may assist union revival or at the very least consolidation.

(1) Legislation that confers an automatic unequivocal legal right to union recognition
There is already in existence a Trade Union Representation (Miscellaneous Provisions) Bill 2017. Though now lapsed, it remains a model of simplicity and elegance. It provided that an authorised trade union representing members for collective bargaining shall be recognised by the employer. Had it been enacted, it would have established an automatic legal right to recognition when sought by the workers' union(s). In doing so the constitutional guarantee of freedom of association would become practical and effective and in alignment with ECtHR jurisprudence.

(2) A series of amendments to the Industrial Relations Amendment Act 1990 along the lines suggested in our document *Untying Workers Hands*. Unions may regard these necessary amendments as beyond their capacity to achieve or that due to political weakness they are unable to exercise sufficient influence on the amendment process and so end up with something worse. Yet at the very least the ICTU could take a complaint to the ILO. The balloting provisions of Section 14 of the 1990 Act are in direct and flagrant contravention of Articles 3 and 8 of ILO Convention 87, which protects internal union governance and autonomy from state interference or direction.

The fullest implementation of these recommendations would not provide a panacea for the present ills of the Irish trade union movement. However, they might serve to consolidate a base on which to regroup and eventually move forward. Any success in this endeavour will, as always, depend on a committed and active engagement with the principles and practice of agitation education and organisation.

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