THE SPECTRE OF STATUTORY UNION RECOGNITION — A NOTE ON THE TALISMANIC WORDS: "VOLUNTARISM", "VOLUNTARY", AND "MANDATORY" USED IN ITS EXORCISM

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In the late 1990s the Irish government established a High-Level Group to consider the question of statutory union recognition. Its origin lay in the intensifying opposition by employers to granting recognition and their general disregard of favourable but unenforceable Labour Court recommendations.[1] Ultimately the group decided against a recommendation on statutory recognition. The decision was justified, inter alia, by a claim that legislation establishing mandatory recognition would be incompatible with the tradition of "voluntarism".[2] Deliberations of the group eventually took concrete form in the Industrial Relations (Amendment) Act 2001/4. It was an innocuous piece of legislation whose insubstantiality was subsequently confirmed by the Supreme Court judgment in *Ryanair*.[3] While Part 3 of the Industrial Relations (Amendment) Act 2015 corrected many of its deficiencies, it left unresolved the question of statutory union recognition.

Now, almost a quarter of a century later the spectre of statutory recognition again haunts the land, troubling the sleep of employers and their spokespeople. Another High-Level Group has been established to again consider the question.[4] On this occasion the impetus is an external one: namely the proposed EU Directive on minimum wages and the extension of collective bargaining coverage.[5] Once again, the talismans of "voluntarism" and "mandatory" are displayed to avert the perceived calamity of legislating for a right to union recognition.[6] The object of this short note is to demystify these lucky charms and so exorcise the exorcists. First, by a restatement of the truism that all legal enactments contain a mandatory element. Secondly, by showing that statutory recognition, far from being incompatible with voluntarism, would in effect support and strengthen that tradition. Finally, by exploring the rationale for the insertion of the word "voluntary" in the Industrial Relations (Amendment) Act 2015, definition of collective bargaining.

Mandatory Recognition?

Even in the most august quarters, contemplating legislation for union recognition has an unsettling effect. For instance, the Report of the 1996 Constitutional Review Group briefly considered the effect statutory recognition might have on government inward investment policy. The policy of encouraging foreign firms to locate in Ireland might be jeopardised, the Group suggested, if these firms "were effectively coerced to negotiate with a particular trade union".[7] A concern repeated by the Industrial Development Authority representatives sitting on the first High-Level Group on union recognition.[8] The substance of this fear is examined elsewhere.[9] Here the focus will be on the language in which it is couched.

"Effectively coerced to negotiate with a particular union" is a pejorative partisan formulation. Such rhetoric is the stock and trade of those opposing legislation facilitating recognition. For example, some commentators in discussing legislation prefer the prefix "mandatory" rather than "statutory".[10] 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.[11] 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 and individual employment law can arguably be regarded as primarily facilitative. Examples include the establishment of a floor below which wages cannot fall, the requirement that employees be consulted in pursuit of improved health and safety, or the qualification imposed on the employer's prerogative of dismissal. Sanctions, however, attend failure of

implementation by the employer. Yet these legislative enactments are not, it would seem, regarded as coercive or labelled mandatory. On this basis, beyond a simple *animus*, it is difficult to comprehend how statutory recognition could be seen as any more coercive than minimum wage or health and safety legislation. Statutory recognition may be more correctly seen as facilitative rather than coercive. It gives concrete expression to the democratic decision of workers to be represented by a union or unions in negotiation with their employer. The particular union or unions designated to represent and negotiate on behalf of workers 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 employee — 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.[12]

Voluntarism and Statutory Recognition

An objection raised by the Constitutional Review Group, the first High-Level Group, some commentators and perennially by employers is that a legislative obligation on employers to recognise the workers' independent trade union(s) would be contrary to or incompatible with the voluntary nature of Irish industrial relations or voluntarism.[13] In Ireland voluntarism is a concept frequently misunderstood, sometime wilfully, and amounts to little more than an unexamined talismanic cliché.

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.[14] 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. This was despite the fact it breached International Labour Organisation principles on trade union autonomy and legislated to regulate the internal balloting procedures in trade unions.[15] 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 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.[16] 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".[17] However, it may on occasion be a useful bogeyman deployed by those opposing a particular legislative enactment.[18]

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 assumes that the Irish State policy remains supportive of trade unions and collective bargaining. Yet the International Labour Office (ILO) holds that collective bargaining cannot begin until a union is recognised for that purpose.[19] Where growing employer opposition make 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 its workers. In the negotiations and 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 might be, are not imposed by the State but remain very much within the tradition of voluntarist collective bargaining. As the definitions or descriptions of voluntarism have it the parties remain largely free to regulate the substantive and procedural terms of the employment relationship without State intervention. The contention that statutory recognition represents a shift from the voluntarist system of industrial relations does not stand up to examination. It seems much more likely that a statutory union recognition would support voluntarism or collective bargaining as the principal method regulating the employment relationship.

"Voluntary" and the Statutory Definition of Collective Bargaining

Another example of the power exerted by the voluntarist fetish can be found in the statutory definition of collective bargaining contained in the 2015 Act. Long before the drafters set to work there was readily available an internationally accepted definition of collective bargaining.

ILO Definition of Collective Bargaining

"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 employer and workers; and/or
(c) regulating relations between employers or their organisations

> and a workers' organisation or workers' organisation"
> ILO Convention No. 154 (Article 2)

Since the 1950s the Irish State has ratified various ILO principles and conventions. Consequently, it might have been expected and in conformance with our obligations, the ILO definition of collective bargaining would have been simply transposed into the 2015 Act. This was not done. Instead, the drafters of the Act produced a uniquely Irish definition of collective bargaining.

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 of 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".
>
> Part 3 s.27(1A)

Admittedly the above 2015 definition of collective is broadly similar to the ILO definition. Yet there is one notable difference. In defining collective bargaining the drafters inserted the additional word "voluntary". This now precedes and qualifies the phrase "engagement and negotiation". Why it was thought necessary to insert the novel qualifying word "voluntary" is not immediately apparent. Indeed, the word is absent in both the ILO and Eurofound definitions of collective bargaining. Elucidation of this minor mystery can only be speculative. It may be the addition of "voluntary" was a ritual obeisance to the voluntarist fetish or a talisman warding off any prospect of statutory recognition.

The above commentary may appear as "much ado about nothing". Yet previous conjuring with the words voluntary and voluntarism proved consequential. A case in point is the utterly ineffective 2001/4 Act. In that case these concepts were influential considerations in shaping its final form. The 2015 Act in defining collective bargaining as "voluntary engagement and negotiation" appears to continue that tradition. An unintended consequence may be the production of another muddle. This will become evident when the realities attending the achievement of collective bargaining and its indivisible concomitant of union recognition are considered.

As noted above, 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 to do so or if they are legally required to do so.[20] However, many Irish private sector employers apparently regard recognition and collective bargaining as contrary to their interests. As a result, they are extremely reluctant to voluntarily engage or negotiate.[21] If it were not so, a perceived need for statutory recognition would hardly arise.

These realities highlight the folly of defining collective bargaining as voluntary engagement. The implication being that collective bargaining achieved by other means, such as a legislative enactment or strike would not come within the 2015 definition of collective bargaining. Take the not uncommon occurrence where the employer flatly refuses to voluntarily engage in collective bargaining. What if the workers involved stage a successful strike obliging the employer to recognise and collectively bargain with their union? Or alternatively what if the employer is legally obliged to recognise the union for collective bargaining? In both these cases the employer's engagement in collective bargaining could hardly be considered as voluntary. The question then arises could this involuntary employer engagement come within the rubric of collective bargaining as defined by the 2015 Act. Resolving that question might become a matter for the courts. It is little wonder that the ILO definition of collective bargaining eschews any mention of voluntary engagement.

Conclusion

Of course, the use of the talismanic charms, voluntary, voluntarism and mandatory are just some among the many obstacles frequently raised against statutory recognition. These other impediments have been considered at length elsewhere.[22] They were found to be of little, if any substance. Now after the years of false starts, dead ends and patchwork amendments the second High-Level Group may, at last, be favourably circumstanced to issue a clear and unequivocal recommendation on statutory recognition. Yet this optimism is tempered somewhat on remembering Hepple's observation. Labour legislation, he observes, is always an outcome of conflict between different social groupings and competing ideologies. What any group gets is not what they choose or want but what they can force or persuade other groups to let them have. It is the power of the opponents of reform which is the decisive factor in the making of labour law.[23]

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1 *D. D'Art and T. Turner, "Union Recognition in Ireland: one step forward or two steps back?" (2003) 34(3) Industrial Relations Journal. See also A. Kerr, The Trade Union and the Industrial Relations Acts 5th edn (Dublin: Round Hall, 2015).*

2 *T. Dobbins, J. Geary and B. Sheehan, "Breakthrough on Union Recognition" EIRO Observer, Update 7–8 March 1999. See also B. Sheehan, "Union Recognition – New Dispute Settling Powers for Labour Court based on ICTU/IBEC Formula" (2000) I.R.N. 9.*

3 *Ryanair v Labour Court [2007] IESC 6. See A. Cullinane and T. Dobbins, "Considering the Impact of the Right to Bargain Legislation in Ireland" (2014) 43(1) I.L.J.; M. Doherty, "Representation, bargaining and the Law: Where Next for Unions?" (2009) N.I.L.Q. D'Art and Turner, "Ireland in breach of ILO Conventions claim academics" I.R.N. March 2007.*

4 *High Level Working Group on Collective Bargaining – established 23 March 2021 by Minister for Trade, Enterprise and Employment. The Group tasked with examining adequacy of the workplace relations framework in the determination of pay and the issue of trade union recognition.*

5 *Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union Brussels 28 October 2020 COM 682 final.*

6 *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 2021. Also see, B. McGinty, "Risks for all parties in timely Review of Collective Bargaining and IR", Stratis Consulting, Dublin 14.*

7 *Report of the Constitution Review Group (Dublin: Stationery Office, May 1996) p.316 para.3.*

8 *See D'Art and Turner, (2003) 34(3) Industrial Relations Journal.*

9 *See D. D'Art, "Freedom of Association and Statutory Recognition: A Constitutional Impossibility?" Irish Jurist (2020) 82.*

10 *N. Howlin and R. Fitzpatrick, "The Feasibility of mandatory trade union recognition in Ireland" D.U.L.J. (2007) 29. A. Purdy, "The Industrial Relations (Amendment) Act 2001 and the industrial Relations (Miscellaneous Provision) Act 2004 – Have they helped" (2004) 1(5) I.E.L.J. 143.*

11 *H.L.A. Hart, The Concept of Law 3rd edn (Oxford: Oxford University Press, 2012) pp.18–25.*

12 *P. Yeates, Lockout Dublin 1913 (Dublin: Gill and Macmillan, 2000).*

13 *Constitution Review Group (1996) p.316; for first High-Level Group see, D'Art and Turner, "Union Recognition in Ireland: one step forward or two steps back?" (2003) 34(3) Industrial Relations Journal; for commentators see Howlin and Fitzpatrick, "The Feasibility of mandatory trade union recognition in Ireland" D.U.L.J. (2007) 29; and for employers 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 2021.*

14 *See F. von Prondzynski and C. McCarthy, Employment Law (Dublin 1984) pp.28–29. Also, A. Kerr "Industrial Relations Law" in M. Reagan (ed.), Employment Law (Dublin: Bloomsbury 2009) p.665. J. Wallace, "The Industrial Relations Act 1990; An Industrial Relations Perspective" in A. Kerr (ed.), The Industrial Relations Act 20 years on (Dublin: Round Hall, 2010). J. Wallace, P. Gunnigle and G. MacMahon, Industrial Relations in Ireland 3rd edn (Dublin: Gill and Macmillan 2004) pp.70–79.*

15 *See D. D'Art, "Untying Workers Hands: Trade Union and the 1990 Industrial Relations Act" (Dublin 2018) Report commissioned by the Workers' Party.*

16 *M.W. Salamon, Industrial Relations; Theory and Practice (Prentice Hall 1987) pp. 219–220.*

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

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

19 *Collective Bargaining: A Workers Education Manual 11th impression (International Labour Office Geneva, 1978).*

20 *Collective Bargaining Geneva 1979 p.28.*

21 *D'Art and Turner, "Union Recognition and Partnership at Work: A New Legitimacy for Irish Trade Union?" Industrial Relations Journal (2005) 36(2); D'Art and Turner, "Irish Trade Unions under Social Partnership: A Faustian Bargain?" Industrial Relations Journal (2011) 42(2); D'Art and Turner, "Union organising, union recognition and employer opposition: case studies of the Irish experience" Irish Journal of Management (2006) 26(2).*

22 *D'Art, Irish Jurist 2020. D'Art, "A World Still to Win: Union Recognition – a Constitutional and Human Right" (Dublin 2021) (A Report commissioned by the Workers' Party).*

23 *B. Hepple, "The Future of Labour Law" I.L.J. (1995) 24(4)*