

When You Ain't Got Nothin', You Got Nothin' to Lose.... Union Recognition Laws, Voluntarism and the Anglo Model

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ABSTRACT

A number of recent works have assessed key outcomes of the third statutory union recognition procedure in Britain. A common feature of many of these is the concern that the machinery has failed to achieve positive collective bargaining outcomes for trade unions, due, in particular, to the wider policy environment into which the procedure has been inserted, and the inherent structural confines of the Anglo, 'representational', conception of collective bargaining. This article contributes further to this literature, by addressing these issues in the context of, and drawing comparisons with, Irish law on 'the right to bargain'.

1. INTRODUCTION

In 1999, the New Labour Government passed into law Schedule A1 of the Employment Relations Act, which introduced a new, statutory procedure for securing trade union recognition. The statutory recognition procedure (SRP) introduced has generated voluminous literature, focusing on, inter alia, the strengths and weakness of the legislative framework;¹ predictions as to its likely effects;² and, more recently, assessments of its outcomes to date.³

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¹For example, B. Simpson, 'Trade Union Recognition and the Law: A New Approach- Parts I and II of Sched A1 to the Trade Union and Labour Relations (Consolidation) Act 1992' (2000) 29 *ILJ* 196; T. Novitz, 'A Revised Role for Trade Unions as Designed by New Labour' (2002) 29 *J Law and Soc* 467.

²For example, R. Dukes, 'The Statutory Recognition Procedure 1999: No Bias in Favour of Recognition' (2008) 37 *ILJ* 236; S. Oxenbridge et al, 'Initial Responses to the Statutory Recognition Procedures of the Employment Relations Act 1999' (2003) 41 *BJIR* 315.

³For example, G. Gall, 'Union Recognition in Britain: The End of Legally Induced Voluntarism?' (2012) 41 *ILJ* 407; A. Bogg, 'The Death of Statutory Recognition in the United Kingdom' (2012) 54 *JIR* 409.

This article does not propose to cover this ground again, but instead builds upon recent work of two of the most perceptive, and, it must be said, critical, commentators on the British SRP, Alan Bogg and Gregor Gall. The article takes up their arguments, in particular, on the nature of the ‘representational’ conception of collective bargaining underlying the ‘Anglo model’, and the related problem of the interaction between ‘reflexive’ legal measures on collective bargaining rights and an unsympathetic wider policy context. To look at these arguments, the article focuses on the rather singular manner in which Irish legislation has sought to address the issue of collective bargaining rights. This legislation has, arguably, avoided some of the most heavily criticised features of the British SRP. Furthermore, the legislation was introduced via a social partnership process, under which Irish trade unions had a strongly institutionalised (and State-sanctioned) role in national socio-economic governance. Nevertheless, it will be argued, the influence of the same underlying factors identified by Bogg and Gall as stymieing the impact of the British SRP, and which derive from the traditions and influence of British voluntarism, have resulted in a scenario whereby Ireland offers perhaps the weakest legal protection for collective bargaining rights in the Western industrialised world.

The article proceeds as follows. First, the principal critiques of the SRP, with which this article will engage, will be presented. This will be followed by a brief overview of the Irish law on collective representation. This will include an outline of the parameters of the ‘right to bargain’ legislation, the Industrial Relations (Amendment) Acts 2001–04. This legislation seemed to have avoided some of the most criticised aspects of the representational SRP model. However, its effective ‘neutering’ following a challenge to the Acts by the airline Ryanair allowed the underlying weaknesses associated with the Anglo conception of collective representation to be laid bare once more. The article concludes by reflecting on the manner in which the features of the ‘Anglo-model’, as currently conceived, are unlikely to support robust legal measures supporting collective bargaining and looks at possibilities for reform.

2. ‘WAGNERISM’

As noted above, assessments and critiques of the procedure introduced in Britain in 1999 are many in number. This article draws upon two (albeit multifaceted) strands of criticism in particular, in order to draw some comparisons with the Irish procedure outlined. First, the dominant influence of the ‘Wagner Act’ model and ‘its theory of majoritarian consent’ which has

spread across the English-speaking common law world.⁴ Secondly, the article considers the effect of the wider policy context into which union recognition laws are inserted.

In a seminal work, Ewing has drawn the distinction between the ‘representational’ and ‘regulatory’ functions of trade unions.⁵ In terms of collective bargaining, the Anglo model of statutory recognition is grounded almost exclusively in a representational conception. This sees collective bargaining as a *private* market activity conducted by unions at the level of the enterprise (or parts thereof) as agents of a tightly circumscribed bargaining unit. This requires the consent of workers to choose to be represented by a trade union (membership alone is not sufficient to raise such a presumption) and this consent is revocable (an individual worker can choose to deal directly with the employer, notwithstanding that the majority of his or her colleagues choose to be represented by a union). By contrast, a ‘regulatory’ model of collective bargaining is premised on the idea that trade unions are involved in a process of rule-making that has an impact beyond their members (or members’ immediate colleagues). Here, collective bargaining takes on an explicit *public* role, as employment standards are set, and applied, not only for employers that recognise trade unions and union members but for enterprises which do not engage in collective bargaining. This can happen through multi-employer collective bargaining, such as where joint industrial councils set standards for an industry or sector, and, where legal mechanisms permit the extension of collective agreements to all employers in a sector, such standards may be mandatory even for employers not affiliated to sectoral or industry-level employer associations.

The British SRP, then, can be seen to squarely exhibit the core features of a representational model. The attainment of prescribed *thresholds* at various points of the procedure is its dominant feature: a clearly defined bargaining unit must first be delineated; the employer must employ a minimum threshold of workers (21, notwithstanding International Labour Organisation criticism of this);⁶ for an application to be made, a minimum threshold of workers (10%) in the bargaining unit must be members of the applicant union; the applicant union may avoid a ballot to determine its membership levels if it can demonstrate more than 50% membership

⁴Bogg, n.3 at 423.

⁵K. D. Ewing, ‘The Function of Trade Unions’ (2005) 34 *ILJ* 1.

⁶See the Committee of Experts on the Application of Conventions and Recommendations (2007) Individual Observation Concerning Right to Organise and Collective Bargaining Convention, 1949 (no 98) United Kingdom.

within the bargaining unit, but if a ballot is held, the union must receive the support of 50% of those voting and 40% of the workers in the bargaining unit. Where the union achieves recognition, but the parties cannot agree on a 'method' for collective bargaining, the Central Arbitration Committee (CAC) can specify such a method; here, though, the bargaining agenda is circumscribed (pay, hours and holidays). Any 'method' specified has effect as a legally enforceable contract (unless the parties agree otherwise); an order of specific performance is the only remedy for non-compliance with such a contract.⁷ Employers may continue to employ workers under individual contracts of employment, which are unaffected by negotiations with the recognised union (underlying the idea of revocable consent). The legislation also provides for de-recognition; the relevant provisions mirror, in broad terms, those applicable to the granting of recognition⁸ and are, again, based on the attainment of prescribed thresholds.

Moreover, Gall points to the *external policy and regulatory environment* into which the SRP was introduced in 2000. The then Prime Minister Tony Blair proudly proclaimed Britain to have one of the most lightly regulated labour markets amongst leading world economies. Thus, Dukes notes, the intention behind the legislation was to allow unions to try and effect a change in employer behaviour in the voluntary arena.⁹ The focus of the SRP, then, is exclusively *procedural*. A successful recognition application does not require (or encourage) substantive outcomes of any kind; it is a duty 'simply to meet and to talk'.¹⁰ The legislation requires unions to *trigger* the process of seeking recognition via the SRP and to *compel* employers to grant recognition by attaining the relevant thresholds. Resistant employers, however, remain free and able to employ suppression or substitution measures to stymie nascent attempts at gaining recognition,¹¹ and employers setting up new establishments remain free to do so on a 'non-union' basis.

⁷For criticism of this remedy see Dukes, n.2, at 253.

⁸S. Deakin and G. Morris, *Labour Law* (6th ed, Oxford: Hart, 2012), 897.

⁹Dukes, n.2 at 264.

¹⁰Deakin and Morris, n.8 at 894, quoting Lord McIntosh of Haringey, HL Debs Vol 601, col 1275, 7 June 1999. Contrast this, for example, with the requirements of the Information and Consultation Directive (Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the EC; (2002) OJ L80 29), which at least requires parties to meet on certain matters 'with a view to reaching agreement' (Art 4(4)).

¹¹In 2004, Sched A1 was amended by the Employment Relations Act to preclude the parties from using 'unfair practices' once they have been informed by the CAC of the arrangements for balloting (see paras 27A–27F and also the Code of Practice on Access and Unfair Practices

At this point, it might be argued that such a position is perfectly defensible; a right exists for workers to access union representation should they desire this. The declining share of workers who join trade unions and the drop off in applications for union recognition rights in Britain can be pointed to as evidence that, in fact, union representation is not desired by most workers.¹² In such an instance, the ‘reflexive nature’ of the British SRP is entirely appropriate. As Bodtke argues, the law can impose a process or procedure but for the law to seek to impose an *outcome* (mandated collective bargaining) would amount to undesirably excessive State intervention.¹³ Two related arguments can be made here. First, the seeking of union representation is an extremely costly endeavour. For the trade unions, this refers primarily to the expending of sufficient resources necessary for effective ‘organising’ of a non-union workforce (eg, the need to provide information, to access information about the organisation and employer, to support activists on the ground, etc).¹⁴ However, for workers in an organisation where their employer is hostile to trade unions, considerable further costs arise relative to perceived benefits. At one end of the scale these can amount to unfair labour practices (ranging, for example, from the engagement of ‘union busting’ consultants to the intimidation or impeding of union activists). Such practices are not felt to be widespread in the UK and Ireland (certainly by comparison with the US).¹⁵ However, the employer’s financial, communicative and organisational strength can be employed in more subtle ways to leave workers in little doubt as to potential adverse consequences of seeking representation. Again, this can take different forms, from actively seeking to shape (or re-shape) worker preferences through information (or misinformation!) campaigns to intimations of possible relocation, down-sizing or even closure. For workers conscious of employer hostility, the

During Recognition and Derecognition Ballots 2005). Acts falling under the definition of ‘unfair practices’ done by either party outside of the ballot period, however, are not caught by the legislation and the impact of the 2004 amendment seems to have been extremely limited; see A. Bogg, ‘The Mouse That Never Roared: Unfair Practices and Union Recognition’ (2009) 38 *ILJ* 390.

¹²See the data presented in W. Brown et al, ‘Competition and Retreat from Collective Bargaining’ in W. Brown, A. Bryson, J. Forth and K. Whitfield (eds) *The Evolution of the Modern Workplace* (Cambridge: Cambridge University Press, 2009).

¹³T. Brodtkorb, ‘Statutory Union Recognition in the UK: A Work in Progress’ (2012) 43 *IRJ* 70.

¹⁴E. Heery, ‘Partnership versus Organising: Alternative Futures for British Trade Unionism’ (2008) 33 *IRJ* 20.

¹⁵E. Heery and M. Simms, ‘Employer Responses to Union Organising: Patterns and Effects’ (2010) 20 *Human Resource Management Journal* 3. See also n.11, above.

seeming unlikelihood of successfully achieving collective representation rights, which is amplified where any campaign to so do is likely to take a not inconsiderable period of time, will also be a powerful deterrent.

These practical factors, however, are bound up with the reflexive nature of the regulatory model exemplified by the British SRP. As Gall argues, a reflexive law, in terms of the sense of entitlement that the existence of a law confers in workers' minds, as well as the moral and institutional legitimacy that the law provides to unions seeking rights on behalf of members, will not score as highly as a universal or automatic right.¹⁶ Bogg (drawing on the work of Thaler and Sunstein) considers the issue in terms of 'choice architectures'; the idea that regulatory structures can both frame the available options for choice and even shape preferences and choices.¹⁷ As a result, where the regulatory structures in place seem to indicate that a certain 'default' position (non-unionisation) will be unduly arduous to move from (due to the factors outlined in the preceding paragraph), workers are more likely to adapt their preferences to fit with the default position (the 'status quo bias').¹⁸ The non-union default position then becomes 'sticky' and difficult to dislodge in the absence of 'asymmetry-correcting' regulatory intervention.¹⁹ In other words, where the existing position is that workers are well disposed to union representation (or even neutral on the issue) but feel that the law (or State labour market policy) makes this difficult to achieve, their disposition is likely to change to accommodate the perceived 'reality' or 'practicality' of their situation.

The issue of whether or not the potential exists for legal reform to alter prevailing power structures then becomes significant. State support for such change in the UK was, clearly, unthinkable during the era of Thatcher's government and that of her Conservative successor. The return to power of a Labour government in 1997 held out the promise of a different form of regulatory intervention by creating a more hospitable climate for union rights, but the SRP introduced, ultimately, was not designed to fundamentally alter the prevailing regulatory and policy environment.²⁰

¹⁶ Gall, n.3 at 429.

¹⁷ Bogg, n.3 at 412 referring to R. Thaler and C. Sunstein, *Nudge: Improving Decisions about Health, Wealth and Happiness* (New Haven, CT and London: Yale University Press, 2008).

¹⁸ Bogg, n.3 at 413 quoting from C. Sunstein and R. Thaler, 'Legal Interference with Private Preferences' (2003) 70 *University of Chicago Law Review* 1129, at 1180.

¹⁹ B. Sachs, 'Enabling Employee Choice: A Structural Approach to the Rules of Union Organising' (2010) 123 *Harvard Law Review* 655, at 662.

²⁰ Deakin and Morris, n.8, at 43.

3. THE ANGLO-IRISH MODEL

The Irish system of employment relations, derived as it is from the British model, has traditionally been classified as voluntarist and adversarial.²¹ There is a preference for joint trade union and employer regulation of employment relations and the relative absence of legal intervention. The role of the State (and, in particular, the legislature) in such a system is to provide the parameters within which the key labour market actors (employer representative groups and trade unions) can operate and to aid the parties in their efforts at dispute-resolution. Under Article 40.6.1°(iii) of the Irish Constitution, the State guarantees liberty for the exercise (subject to public order and morality) of the right of citizens to *form* associations and unions. The constitutional guarantee of freedom of association underpins the rights of citizens to form trade unions and provides the framework for regulating the right to be a member of a union. However, litigation involving the role of trade unions under Article 40.6.1°(iii) has:

...[a]lmost invariably concerned the protection of individuals in their relations with trade unions, rather than the protection of organised labour in its relationship with the State, or with employers pursuing anti-union policies. This may reflect the fact that unions have a traditional distrust of the law, preferring instead to rely on their industrial muscle in order to achieve their objectives.²²

While the Irish Constitution protects the right of freedom of association, trade unions in Ireland enjoy no rights to be recognised for bargaining purposes by an employer. Thus, while employees are free to join a trade union, they cannot insist their employer negotiate with that union regarding their pay and conditions. In *Abbot and Whelan v ITGWU*,²³ for example, it was held that there was no duty placed on any employer to negotiate with any particular citizen or body of citizens. In *Ryanair v Labour Court*,²⁴ Geoghegan J, in the Supreme Court, noted that it was ‘not in dispute that as a matter of law Ryanair is perfectly entitled not to deal with trade unions’: indeed the Judge went further in suggesting that neither could a ‘law be passed compelling it to do so’.²⁵

²¹See B. Daly and M. Doherty, *Principles of Irish Employment Law* (Dublin: Clarus Press, 2010), Ch 11.

²²G. Hogan and G. Whyte, *JM Kelly: The Irish Constitution* (4th ed, Dublin: Butterworths, 2003), 1793.

²³(1982) 1 *JISLL* 56.

²⁴[2007] 4 *IR* 199.

²⁵*Ibid.*, at 215. This, rather controversial, interpretation would seem to suggest that a *legislative* right to trade union recognition would be constitutionally prohibited.

As in the UK, collective agreements reached between unions and employers are typically not legally enforceable, as they generally do not intend to create legal relations. There are two exceptions to this general rule. Under Part III of the Industrial Relations Act 1946, collective agreements made between unions and employers that are *registered* with the Labour Court²⁶ are legally binding. While many of these are company agreements, they can be applied to *all* employers and employees working in a particular sector or industry, so long as the parties to such agreements are ‘substantially representative’ of workers and employers in that sector.²⁷ The most important of these Registered Employment Agreements (REAs) are in the construction and electrical contracting sectors. These set minimum levels of pay (which exceed the national minimum wage) and other terms and conditions for workers in these industries. The second exception relates to Joint Labour Committees (JLCs), which are statutory bodies originally established under Part IV of the Industrial Relations Act 1946 to provide for the fixing of minimum rates of pay and the regulation of employment in industries and sectors where there is little or no collective bargaining and where pay and skill levels tend to be low. They are akin to the wages councils that existed in the UK until 1993.²⁸ A JLC comprises of an independent chairperson appointed by the Government and representative members of employers and employees. The most important function of a JLC is to submit proposals to the Labour Court on fixing minimum wages and regulating conditions of employment for workers covered.²⁹ If such proposals are confirmed by the Labour Court, through the making of an Employment Regulation Order (ERO), they become statutory minimum remuneration and statutory conditions of employment, which employers are not permitted to undercut in the contract of employment. The most significant JLCs exist in industries such

²⁶Note that, despite its moniker, the Irish Labour Court is not part of the regular court system, but is a statutory industrial tribunal, comprised of representatives of unions, employers and chaired by a Government nominee. The Labour Court, depending on the nature of the dispute before it, may grant legally binding ‘determinations’ or ‘recommendations’, which are *not* legally binding. Note the parallel between the Labour Court and the British Industrial Court and its successor, the Industrial Arbitration Board, at least up to the end of the twentieth century.

²⁷Industrial Relations Act 1946, s 27. Note the parallel between the underlying policy of this section and the sequence of British provisions from Order 1305 in 1940 to Sched 11 to the Employment Protection Act 1975.

²⁸M. O’ Sullivan and J. Wallace, ‘Minimum Labour Standards in a Social Partnership System: the Persistence of the Irish Variant of Wages Councils’ (2011) 42 *IRJ* 18.

²⁹Industrial Relations Act 1946, s 42. The procedures to be followed once a JLC has formulated proposals is set out in the Industrial Relations Act 1990, s 48.

as catering, hotels and retail. Recent developments in relation to the operation of both the REA and JLC systems, crucial for the argument presented in this article, will be outlined below.

Outside of these specific exceptions, no statutory procedure exists whereby trade unions can apply to obtain negotiating rights with employers. From 1987–2010, Ireland adopted a much-studied model of ‘social partnership’, whereby a series of tri-partite social pacts was concluded between the social partners; the State; the unions (represented by the only trade union confederation, the Irish Congress of Trade Unions—ICTU); and the employers (represented primarily by the main employers’ association, the Irish Business and Employers Confederation—IBEC—but also by sector-specific groups, like the Construction Industry Federation).³⁰ The social pacts each ran for three years. While not legally binding, the pacts involved all parties making a wide range of commitments on virtually all issues of socio-economic governance, including setting pay rates for the public sector and the unionised private sector. Importantly, several legislative measures affecting employment relations were agreed through social partnership (including, for example, a commitment to introduce a national minimum wage), which were then progressed through the normal legislative process. Social partnership, then, played a crucial role in setting labour standards since 1987. However, the process has effectively collapsed since early 2010, following the economic and unemployment crisis that has recently gripped the country, leaving Irish industrial relations in a state of some uncertainty and flux.³¹ During the partnership era, however, and in the context of declining trade union density in the 1980s and 1990s, as well as the Thatcherite attack on trade unionism evident in the UK, the issue of statutory recognition rights for trade unions became a key point of discussion during social partnership talks. The legislative outcome of this discussion will be discussed in the next section.

At this point, however, it should be remembered that Ireland, as a Member State of the European Union, is of course, bound to respect the

³⁰From 1996 on, what was termed the ‘community and voluntary pillar’ (CVP; a wide spectrum of civil society interest groups) became party to the process. The influence of the CVP has been the subject of some debate, with the consensus position being that the pillar was somewhat marginalised, as the ‘main business’ of partnership was concluded by the State, unions and employers; see, generally, P. Kirby, *Celtic Tiger in Collapse: Explaining the Weaknesses of the Irish Model* (Basingstoke: Palgrave Macmillan, 2010). The CVP, certainly, would have had little, if any, role in relation to the issue of collective bargaining rights.

³¹See M. Doherty, ‘It Must Have Been Love...But It’s Over Now. The Crisis and Collapse of Irish Social Partnership’ (2011) 17 *Transfer: European Review of Labour Research* 371.

provisions of Title X of the Treaty on the Functioning of the European Union (TFEU), which gives a privileged role in law-making to the social partners at both Union, and Member State, level and Article 28 of the Charter of Fundamental Rights, which protects the rights of collective bargaining and collective action. Furthermore, Ireland has incorporated the European Convention on Human Rights into domestic law.³² Article 11 of the Convention guarantees the right of freedom of association. In *Demir and Baykara v Turkey*,³³ of course, the European Court of Human Rights ruled that the right to collectively bargain with an employer in principle had become one of the ‘essential elements’ of the right to form and join trade unions, guaranteed under Article 11 of the ECHR. Finally, Ireland is also a signatory to International Labour Organisation (ILO) Conventions No 87 (Freedom of Association and Protection of the Right to Organise) and No 98 (Concerning the Application of the Principles of the Right of Organise and to Bargain Collectively).³⁴

4. A NEW APPROACH

Under the fourth social partnership agreement, *Partnership 2000*, a high-level group comprising trade union and employer representatives was set up to examine the issue of union bargaining rights. The result was the drawing up of the Code of Practice on Voluntary Dispute Resolution³⁵ and the Industrial Relations (Amendment) Act 2001. The Code of Practice and the 2001 Act explicitly exclude the imposition of any ‘arrangements for collective bargaining’, on the grounds of protecting Ireland’s voluntarist tradition. The general philosophy behind both is that disputes relating to union recognition should be dealt with within the context of voluntary engagement between unions and employers (with parties offered recourse to the advisory and conciliation services of the Labour Relations Commission-LRC). Thus, the 2001 Act does not provide for union *recognition*, but for a range of procedures to allow unions, with members in organisations where

³²Albeit at a sub-constitutional level; see U. Kilkelly (ed), *ECHR and Irish Law* (2nd ed, Bristol: Jordans, 2008).

³³Application No 34503/97, 12 November 2008.

³⁴As a dualist State, international law treaties do not become part of the Irish domestic legal system unless explicitly incorporated by the *Oireachtas* (the Irish Parliament). None of the ILO Conventions cited have been so incorporated.

³⁵Industrial Relations Act 1990 (Code of Practice on Voluntary Dispute Resolution) (Declaration) Order 2000 (S.I. No. 145 of 2000).

employers do not recognise unions for bargaining purposes, to seek to have specific disputes with regard to pay, terms and conditions of employment and dispute-resolution procedures addressed.³⁶ The provisions of the Act are used as a fall-back measure whereby, in a situation where the parties cannot come to agreement under the ‘voluntary leg’ of the process, a union or excepted body³⁷ may request a further investigation by the Labour Court, which can issue a ‘recommendation’. Should the issue remain unresolved, the Court has the power to issue a *legally binding* ‘determination’ on pay and terms of employment. If the employer does not comply with a Labour Court determination, the trade union may apply to the ordinary courts for an order directing the employer to carry out the determination in accordance with its terms.

Changes to the legislation were agreed under the *Sustaining Progress* agreement³⁸ and were enacted into law by the passing of the Industrial Relations (Miscellaneous Provisions) Act 2004. The Act repealed S.I. No. 145 and replaced it with the Industrial Relations Act 1990 (Enhanced Code of Practice on Voluntary Dispute Resolution) (Declaration) Order 2004.³⁹ The 2004 Act (implementing the changes agreed under *Sustaining Progress*) provided that the processing of disputes under the Voluntary Dispute Resolution Code should take place within an indicative overall time frame of 26 weeks, with the possibility of extending it to a maximum of 34 weeks. Under the Acts, therefore, an employer may be compelled to grant union representatives the right to represent unionised employees on workplace issues relating to pay and terms and conditions of employment, but cannot be forced to make arrangements for collective bargaining.

5. IT'S LOOKING GOOD (AVOIDING BRITISH MISTAKES?)

It may seem initially odd in this context to argue the benefits of legislation which explicitly precludes the imposition of collective bargaining

³⁶B. Ryan, ‘Leaving it to the Experts—In the Matter of the Industrial Relations (Amendment) Act 2001’ (2006) 3 *Irish Employment Law Journal* 118.

³⁷‘Excepted body’ is defined by s 6(3)(h) of the Trade Union Act 1941 (as inserted by s 2 of the Trade Union Act 1942) and refers to ‘a body all the members of which are employed by the same employer and which carries on negotiations for the fixing of wages or other conditions of employment of its own members (but no other employees)’.

³⁸See Art 8.9 of *Sustaining Progress*. Agreed in 2005, this was the sixth of the social partnership agreements concluded between 1987 and 2010.

³⁹S.I. No. 176 of 2004.

arrangements. However, in a number of respects, the Industrial Relations Amendment Acts seemed, especially as they began to be more frequently invoked, to navigate around many of the difficulties identified with the British SRP. Importantly, the ‘threshold requirements’ so crucial to a representational model of collective bargaining are absent; trade unions can process claims under the legislation irrespective of how many employees in a particular organisation are members.⁴⁰ In *Schering Plough*,⁴¹ for example, SIPTU (the Services Industrial Professional & Technical Union) claimed to represent 306 of the 700 employees at the company plant, whilst in *Finlay Breton*⁴² BATU’s (Building & Allied Trade Union) claim was in respect of three members out of a workforce of 300. Thus, in some cases the unions involved pursued a claim where they declared to have a considerable existing presence, whilst in others claims were taken on behalf of a handful of employees only. The absence of the various threshold requirements outlined above also considerably reduces the complexity of the procedure (and, consequently, delays inherent therein) and obviates the need for balloting; the verification of union members at the LRC stage of the process (at the request of employers) was ‘done in a very straightforward way by the Advisory Officer obtaining a list of members from the trade union and cross checking this against the employer’s own data such as payroll’.⁴³

Secondly, the *agenda* around which claims can be processed under the Acts is wider than under the British SRP (pay, hours and holidays), encompassing ‘terms and conditions of employment’.⁴⁴ In practice, the issues actually raised have involved traditional ‘core’ union issues (pay and protection/

⁴⁰It is interesting to remember, in this context, that under the Industrial Relations Act 1971, the UK Commission on Industrial Relations was not to consider recommending union recognition in a given situation unless the applicant union had or would have the support of a ‘substantial proportion’ of employees; a recognition order was contingent on a simple majority voting in a ballot in favour of recognition (ss 48(5) and 50). Under the Employment Protection Act 1975, the body by then charged with overseeing recognition claims (the Advisory, Conciliation and Arbitration Service—ACAS) was directed simply to ‘ascertain the opinion of workers to whom the recognition issues related, “by any means it thinks fit”. No guidance was given as to the purpose of ascertaining the workers’ opinion whether a particular level of support would be determinative of recognition, and if so, which level’ (Dukes, n.2, at 244).

⁴¹Case LCR18226 issued on 15 June 2005.

⁴²Case LCR 062 issued on 6 April 2006.

⁴³<http://www.lrc.ie/viewdoc.asp?Docid=555&Catid=28&StartDate=1+January+2008&m=n> (accessed 1 September 2013)

⁴⁴Again it is worth noting here that such a circumscribed agenda was not a feature of the 1971 or 1975 legislation.

representation in respect of grievances and disciplinary matters) but have also included a limited number of claims in respect of non-pay benefits (eg, canteen facilities), bullying and harassment, and dignity at work.⁴⁵

Thirdly, the Irish process offers the opportunity for *substantive outcomes* to be imposed in relation to the disputes at issue. The legislation promotes a voluntarist ethos in that parties are mandated to first engage with the ‘voluntary leg’ of the process, with the aid of the LRC and the Labour Court. However, ultimately legally binding determinations may be imposed by the Labour Court. A failure to comply with such a determination can result in an employer being brought before the ordinary civil courts, in this case, the Circuit Court, which can make an order directing the employer to act in accordance with the terms of the Labour Court determination. In terms of a ‘pay off’ for unions that invest the time and resources to process a successful claim, members will see, not just that their representatives have gained the right to ‘meet and talk’ with the employer, but an immediate and tangible gain.⁴⁶

Fourthly, and intriguingly, the manner in which the Acts came to be applied by the Labour Court arguably began to veer towards the legislation performing a more explicit *regulatory* and *public* function (in Ewing’s terms) than initially appeared likely. This occurred in two ways. First, until 2010, national pay agreements were in place for the public sector and unionised private sector (in the latter case binding only on private sector employers which had signed up to the deals). In a number of claims under the Acts, the Labour Court ordered that (non-covered) employers should pay the terms of the national pay agreement. For example, in *Creagh Transport*⁴⁷ the Labour Court noted that whilst the increases provided by national partnership agreements were not an automatic statutory or contractual entitlement, in the absence of any other established or agreed method of pay determination, they represented an ‘appropriate reference point’ for establishing a fair and reasonable level of pay adjustment. The Court recommended that in *future*, pay should be adjusted by reference to the increases provided by national agreements subject to the right of the company to plead inability

⁴⁵M. Doherty, ‘Representation, Bargaining and the Law: Where Next For the Unions?’ (2009) 60 *NILQ* 383, where the author notes that very few issues raised related to more ‘qualitative’ issues (for example, family-friendly working).

⁴⁶Under the SRP, the remedy offered for non-compliance with the obligation to agree a ‘method’ by which collective bargaining will be conducted is confined to the equitable and discretionary remedy of specific performance (Deakin and Morris, n.8, at 895). See, also, n.7 above.

⁴⁷Case LCR17933 issued on 18 August 2004.

to pay through the mechanisms provided by those agreements. Even more strikingly, however, in a number of cases, the Court made recommendations on remuneration based on *pay norms* in the given industry.⁴⁸ In *Bank of Ireland*⁴⁹ the Court pointed out:

The powers which are given to the Court by the Act are a far-reaching departure from the normal approach to the resolution of industrial relations disputes. They provided, in effect, that the Court may arbitrate in a dispute on the unilateral application of one party and in circumstances where the other party may not consent to the process. It seems to the Court that, having regard to the voluntary nature of our industrial relations system, such an intervention is only appropriate where it is necessary in order to provide protection to workers whose terms and conditions of employment, when viewed in their totality, are significantly out of line with appropriate standards.

Thus, the Court sought to introduce the idea of the ‘model employer’; by effectively benchmarking respondent companies against others in the sector.⁵⁰ This can be seen in *Fournier Laboratories*,⁵¹ where the Court found that the company’s pay determination system was out of line with accepted standards in that it was based solely on performance-assessment, rather than by reference to a basic ‘rate for the job’, the predominant practice in the sector. Similarly, in *Cooley Distillery*⁵² the Court accepted pay rates agreed by the union (through collective bargaining) with other employments both locally and nationally as indicative of the industry norm. It recommended the respondent increase its pay rates to this more ‘appropriate standard’. Therefore, where companies fall below the general, prevailing industry standards (as located by the Court) they have been told to raise standards to that level (frequently identified as those set down by national pay agreements). Doherty has noted that this approach of legally mandating the payment of *prevailing industry rates* (generally reached through employer-union engagement) rather than *statutory minima* has clear implications for the controversial debate set in motion by the Court of Justice (CJEU) decisions on collective rights in *Laval, Viking, Ruffert and Luxembourg*.⁵³

⁴⁸See, for example, *Galway Clinic* (Case LCR18815 issued on 18 January 2007).

⁴⁹Case LCR17745 issued on 28 January 2004.

⁵⁰The inclusion of ‘non-covered’ employers has a parallel in British experience with the procedures in s 8 of the Terms and Conditions of Employment Act 1959 and Sched 11 to the Employment Protection Act 1975.

⁵¹Case LCR18582 issued on 24 May 2006.

⁵²Case LCR17908 issued on 19 July 2004.

⁵³Doherty, n.39, at 396 et seq. Case C-341/05, *Laval v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767; Case C-438/05, *International Transport Workers’ Federation and*

In this notorious series of judgments relating to the employment conditions of posted workers, the Court has severely restricted the rights of trade unions (and Member States) to act in order to protect collective agreements in cases where cross-border rights of free movement of services or establishment are involved. The Court ruled in *Laval* that, in accordance with the free movement of services provisions of the Treaty and the terms of the Posting of Workers Directive (PWD),⁵⁴ Swedish trade unions could not take industrial action to compel a Latvian builder operating in Stockholm, and posting Latvian workers there, to observe the terms and conditions of collective agreements operating in Sweden. Similarly, in *Rüffert* a Polish contractor could not be compelled to observe collective agreements that were locally, but not nationally, applicable, and in *Luxembourg* posting employers could not be forced to observe collectively agreed minimum terms and conditions of employment beyond the mandatory matters listed in Article 3 of the PWD. At the heart of all these rulings is the view that where collective agreements are not declared universally applicable, extended *erga omnes* to non-union workplaces, or their provisions protected, in some way, by Member State legislation, they cannot be imposed on service providers from other EU jurisdictions operating in the Member State in question.⁵⁵ All that can be required of such service providers is that they observe statutory minima terms and conditions of employment. In this respect, the Irish legislation seemed to offer a mechanism to protect ‘prevailing rates’, rather than minimum standards, that would withstand CJEU scrutiny.

Finally, from a trade union perspective, the steady increase in the utilisation of the Acts is instructive. Although only two cases were heard by the Labour Court in 2002, this had risen to 31 in 2005 and 2006.⁵⁶ By comparison, in 2010–11 there were just 28 applications for statutory recognition for collective bargaining purposes in Britain.⁵⁷

Finnish Seamen's Union v Viking Line ABP [2008] IRLR 14; Case C-346/06, *Rüffert v Land Niedersachsen* [2008] IRLR 467; and Case C-319/06, *European Commission v Luxembourg* [2009] IRLR 388.

⁵⁴Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services (1996) OJ L18 01.

⁵⁵See S. Deakin, ‘Regulatory Competition after *Laval*’ (2007–08) 10 *CYELS* 581; A.C.L. Davies, ‘One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ’ (2008) 37 *ILJ* 126.

⁵⁶Note that these figures only relate to claims that reached the Labour Court; there are no official figures available for claims that may have been settled during the ‘voluntary leg’.

⁵⁷Bogg, n.3, at 409. 2010–11, it should be noted, was a low point in terms of applications under the SRP; see Gall, n.3, at 417 and Doherty, n.45 at 386 for complete figures for both

Of course, the Irish procedure was also introduced during the era of social partnership (on which many comprehensive and erudite accounts are readily available).⁵⁸ Seven agreements were concluded between 1987 and 2010 centring on trade-offs between wage moderation, fiscal restraint and tax concessions, as well as addressing other core labour market issues such as industrial peace, labour market flexibility, active labour market policy and social welfare reform. The process offered the trade union movement a highly influential role ‘reflected in a dense web of working groups, committees and task forces’, which sought to ‘involve the social partners in the design, implementation and monitoring of public policy’.⁵⁹ In addition, the trade unions sought to use their national influence to promote union organisation on the ground. This was done, not only via the legislative measures focused on in this article, but through an agreed voluntary framework promoting the diffusion of workplace partnership, based on the template of the national process. This explicit recognition of the importance of engagement with trade unions (nationally and locally), allied to the absence of any ‘Thatcherite’ attack on union rights (indeed, to date, there has never been a major anti-union public policy in Ireland, and the unions’ legitimacy has not been challenged by any political party), increasing levels of union membership (if not density) and a booming economy seemed to create an ideal public policy environment into which legislation on union bargaining rights could be introduced. The fact that legislation was so strongly desired by the union movement, of course, indicates that the industrial relations garden was not as rosy as it may have appeared.

6. IN-FLIGHTTURBULENCE

The above should not be read as presenting the Irish legislation as providing some sort of optimal workplace representation model. First and foremost, the interaction mandated by the Acts was ‘episodic’ in nature (like the SRP)⁶⁰

jurisdictions. The use of the numbers here is simply to illustrate the point that the Irish unions relatively quickly began to utilise the legislation more and more frequently.

⁵⁸W. K. Roche, ‘Social Partnership In Ireland and New Social Pacts’ (2007) 46 *Industrial Relations* 395; K. Allen, *The Celtic Tiger: The Myth of Social Partnership* (Manchester: Manchester University Press, 2000).

⁵⁹R. O’ Donnell and C. O’ Riordan, ‘Social Partnership in Ireland’s Economic Transformation’ in G. Fajertag and P. Pochet (eds), *Social Pacts in Europe-New Dynamics* (Brussels: ETUI, 2000).

⁶⁰Deakin and Morris, n.8, at 895.

rather than being ‘process-driven’;⁶¹ Labour Court determinations, if issued, only applied for one year; some employers featured in multiple hearings,⁶² meaning the process involved a considerable commitment of union time and resources; the regulatory nature of the Acts described above, clearly, cannot be overstated or equated to agreements binding *erga omnes* (of which more anon); and, most obviously, the Acts precluded the imposition of collective bargaining arrangements! Nevertheless, it is clear that the union movement hoped to use the Acts as a ‘springboard’ to achieving full collective bargaining rights with non-union employers.⁶³ Given the strong economic circumstances and the partnership model of socio-economic governance, this was not unrealistic. Indeed, some successes were reported. These ranged from outright concession of collective bargaining rights by employers (*Federal Security Services Ltd*⁶⁴ and *Hillview Nursing Home*)⁶⁵, to cases like *Ashford Castle*⁶⁶ where the employer (while not conceding union recognition) indicated to the Court that it would be prepared to facilitate the union in providing paid training for its shop stewards, who could then represent members in grievance procedures, to unions gaining the right to input into the development of employer equality policies (in *Carlingford Nursing Home*).⁶⁷ In one instance (Esker Lodge nursing home), it was reported that the IBEC may have advised the company to recognise the union on pragmatic grounds; that is, that it would be easier to simply concede recognition than to become caught up in the procedure under the Acts.⁶⁸

However, unions’ hopes (and employers’ fears) in relation to the Acts were changed utterly following the decision of the Irish Supreme Court in *Ryanair v The Labour Court*.⁶⁹ The *Ryanair* case centred on a dispute

⁶¹H. Gospel, G. Lockwood and P. Willman, ‘A British Dilemma: Disclosure of Information for Collective Bargaining and Joint Consultation’ (2003) 22 *Comparative Labour Law and Policy Journal* 327, at 346.

⁶²*Ashford Castle*, for example, was involved in four separate hearings; Case DECP 032 issued on 19 November 2003, case LCR17760 issued on 23 March 2004, case LCR17914 issued on 22 July 2004, and case LCR188220 issued on 22 January 2007, as well as a High Court hearing; [2007] 4 *IR* 70.

⁶³M. Doherty, ‘Union sundown? The Future of Collective Representation Rights in Irish Law’ (2007) 4 *Irish Employment Law Journal* 97.

⁶⁴Case LCR18621 issued on 4 July 2006.

⁶⁵Case LCR18440 issued on 22 December 2005.

⁶⁶Case LCR18820 issued on 22 January 2007.

⁶⁷Case LCR17932 issued on 17 August 2004.

⁶⁸T. Dobbins, ‘“Fear” of 2004 Act Persuades Nursing Home to Concede Full Recognition’ (2006) 36 *IRN* 8.

⁶⁹[2007] 4 *IR* 199.

between a number of pilots, members of the Irish Airline Pilots Association (IALPA, a branch of the Irish Municipal Public and Civil Trade Union), who sought to have the union negotiate with Ryanair about various issues on their behalf. Ryanair refused to negotiate with the union and, as a result, the union invoked the procedures under the Acts. When both the Labour Court and the High Court found against it, Ryanair appealed to the Supreme Court, where its complaints against the Labour Court's operation of the legislation were upheld on two key grounds. First, the Supreme Court was highly critical of the *procedures* adopted by the Labour Court in hearing claims under the legislation. In particular, the Supreme Court felt that employees on behalf of whom claims were taken should ideally give oral evidence. The Court held that the Labour Court did not adopt fair procedures by permitting complete non-disclosure of the identity of the persons on whose behalf the union was purporting to act. Furthermore, and most controversially, the Supreme Court criticised what it referred to as the Labour Court's 'mindset', which favoured the way particular expressions are used and particular activities are carried out by trade unions and which hinted that collective bargaining in a non-unionised company must take the same form and adopt the same procedures as would apply in collective bargaining with a trade union.

The second limb of the Supreme Court's criticism in *Ryanair* related to the interpretation given to key elements of the amended section 2(1) of the 2001 Act by the Labour Court. Under section 2(1), for the Labour Court to assert jurisdiction in such cases it must be satisfied that it is not the 'practice of the employer to engage in collective bargaining' with a trade union or an excepted body.⁷⁰ The Supreme Court was adamant that it would not be appropriate for collective bargaining in a non-unionised company to be equated (in terms of form and procedures adopted) with collective bargaining involving a trade union. The Supreme Court held that the term 'collective bargaining negotiations' should be given simply an ordinary meaning and not any distinctive meaning as understood in trade union negotiations. According to Geoghegan J:

if there is a machinery in Ryanair whereby the pilots may have their own independent representatives who sit around the table with representatives of Ryanair with a view to reaching agreement, if possible, that would seem to be 'collective bargaining'.⁷¹

⁷⁰See n.37, above, for the definition of an 'excepted body'.

⁷¹[2007] 4 *IR* 199, AT 218.

Furthermore, the unilateral withdrawal by employees from machinery put in place by the employer would not of itself entitle the employees to assert that there was no collective bargaining process in being; ultimately, where an employer has an internal non-union collective bargaining unit in place, this might constitute an 'excepted body' under the legislation and satisfy the requirements of section 2. The definition of collective bargaining provided by the Supreme Court indicates, therefore, that a collective bargaining unit can, it seems, amount to any group of employees as long as the group is recognised for this purpose by the employer concerned.

During the Labour Court leg of the dispute,⁷² Ryanair outlined a system (which it contended amounted to collective bargaining) whereby employees, including pilots, elect employee representatives to Employee Representative Committees (ERCs). The company claimed that the various ERCs then negotiate directly with it on an ongoing basis in relation to all terms and conditions of employment. It was accepted that the Dublin pilot representatives had withdrawn from the ERC in August 2004 and no new representatives had been appointed. The Labour Court found that the ERCs were established by Ryanair who organised and controlled the election of employee representatives to them, including specifying the criteria of eligibility for election (eg, no representative could serve more than one term). Employees were informed of the outcome of ERC discussions by Ryanair in a newsletter which it published and in respect of which it retained copyright. As a result (and by reference also to company documents) the Labour Court found that the collective bargaining did *not* take place within the company. The Supreme Court decision did not set down precise rules or offer guidelines for the operation of a non-union internal bargaining unit, but it seems from the judgment that employers would be free to determine the form, structure and organisation of any internal collective bargaining units, as long as these have a degree of permanency and are not *ad hoc*. Thus, if an employer were to set up such a unit, it could presumably decide on issues such as how employees would be elected or chosen to be members, the remit of the unit, the terms of office of its members and the rules and procedures of its operation.⁷³

The case never returned to the Labour Court for a final hearing on the substantive issue, but the decision was clearly a significant setback for the union movement, in that the Supreme Court interpretation of the legislation enables employers to pre-empt union action under the statutory procedure

⁷²Case DECP051 issued on 25 January 2005.

⁷³Doherty, n 45.

by establishing structures (the independence of which may be questionable) through which it deals with non-union representatives. Indeed, the number of claims under the legislation dropped precipitously and there were no Labour Court hearings at all in 2009.

7. REPRESENTATION AND POWER

At the time of writing in 2013, the centenary anniversary of, arguably, the seminal event in Irish labour history, the ‘Great Lockout of 1913’, Irish law offers perhaps the weakest protection for collective bargaining rights in the Western world. The coalition Government (which came to power in 2011 and includes the Irish Labour Party) has promised to reform the laws on collective bargaining. It is submitted, however, that any such reform is unlikely to escape the confines of the Anglo model.

Despite the promise held out by the 2001–04 Acts, and their operation by the Labour Court, the familiar problems of the ‘representational’ model and a wider regulatory hostility to collective labour rights have surfaced yet again. It has been pointed out in the British context that the failure of the SRP to lead to an expansion of collective bargaining in Britain is noteworthy for the lack of judicial interference.⁷⁴ In Ireland, this has not been the case. The Supreme Court in *Ryanair* was clearly exercised by the issue of verifying to what extent a union is representative of workers in dispute. Unions are, and have been, reluctant to publicly divulge information about membership *levels* in non-union companies for fear this may lead to employees being identified by employers and, potentially, being victimised or disadvantaged. The Supreme Court decision goes beyond this by explicitly requiring some identification of *individual* employees in dispute and by insisting that such employees should give oral evidence before the Labour Court. This is so even though, as the Labour Court has pointed out, there is no requirement under the legislation for unions to meet any representation threshold prior to taking a claim. Furthermore, as noted above,⁷⁵ the Labour Court had been quite satisfied that union members could be verified in a very straightforward way by cross-checking union lists against the employer’s own data.⁷⁶ This

⁷⁴Bogg, n.3, at 412.

⁷⁵See n.43.

⁷⁶This idea of pressure on unions to disclose to courts and tribunals sensitive information regarding membership has interesting parallels with the view posited by some that the result

is a real problem for unions, not only as many (most?) members will likely be unwilling to put their heads above the parapet in pursuing a claim under the legislation, but also more broadly in the sense that evidence has shown that, in the absence of employer support, many Irish workers are fearful of the consequences of joining unions at all lest union membership damage their career prospects.⁷⁷ This, of course, feeds into the likelihood of the ‘default’ position being one of non-unionisation and puts increasing pressure on unions to expend resources on organising (see below).

Secondly, the Supreme Court decision indicates a profound discomfort with the idea of substantive, rather than procedural, outcomes being imposed on employers. The Labour Court was, in no uncertain terms, ordered to focus much more clearly on whether the employer in fact fulfilled a duty ‘to meet and talk’ with employees; if so, then the issue under the legislation is largely settled. This discomfort, it is submitted, is underlain by an inability to comprehend (and, as we will see, something of a disdain for) the public function collective bargaining can play. The Supreme Court frames its view very definitely within the prism of collective bargaining as a private matter for an employer and its workforce. Thus, the identity of the ‘bargaining unit’ and individual union members becomes paramount; for how else can representativeness and consent be established?

The decision goes further than a mere preference for a ‘representational’ model; it explicitly rebukes the regulatory framework that the Labour Court has established (in its ‘model employer’ decisions, for example) and, indeed, the Court itself (a classic, regulatory tri-partite labour market actor) for being procedurally deficient in its failure to more closely replicate the evidential standards of a civil court (rather than those of an industrial tribunal).⁷⁸

of the Court of Justice’s decisions in cases like *Viking* could well be that unions, in order to defend the proportionality of industrial action in claims relating to EU free movement rights, could be forced to disclose to national courts and tribunals potentially oppressive volumes of materials on internal union strategy, tactics and policy; see K. Ewing and J. Hendy, ‘The ECJ Decisions and Trade Union Freedom: Lessons from the UK’ in K. Ewing and J. Hendy (eds), *The New Spectre Haunting Europe-The ECJ, Trade Union Rights and the British Government* (Liverpool: IER, 2009).

⁷⁷J. Geary, ‘Employee Voice in the Irish Workplace: Status and Prospect’ in P. Boxall, P. Haynes and R. Freeman (eds) *Employee Voice in the Anglo-American World* (Ithaca: Cornell University Press, 2005) 97.

⁷⁸The Supreme Court felt that factual issues in dispute should be resolved on oral evidence from parties who participated in the process or who could give first hand evidence on how the employer’s procedures operated. Therefore, direct evidence on any issue is generally to be preferred to a legal submission, or an opinion or references to documents unsupported by direct evidence. The reference here to an ‘opinion’ is particularly worrying for the unions, as it

However, if this whole tale could be explained away in terms of judicial hostility to a specific Act, things may not be so bad (judges move on; legislation can be changed). The decision in *Ryanair* must, however, be considered in the context of the wider policy environment. It was noted above that the legislation was introduced during a period of unprecedented institutional strength for the Irish union movement at national level. However, disquiet had long been expressed that social partner cooperation was lopsided or ‘truncated’, as it was never underpinned by a code of rights to guarantee social partner engagement at the enterprise level.⁷⁹ Workplace partnership structures were almost non-existent in the private sector⁸⁰ and in the public sector, in the absence of any real support from public sector management, became little more than, at best, talking shops.⁸¹ The shift in state policy regarding the securing of the foreign direct investment, on which a small, open economy like Ireland’s is so dependent, continued. Whilst in the 1970s and early 1980s, the state industrial development agencies actively encouraged incoming companies to conclude agreements with particular unions, by the mid-1980s state agencies began ‘marketing’ Ireland as a non-union environment, at least in part as a response to the refusal of US multi-national corporations (MNCs) to recognise unions, and their position that any statutory recognition measures would be unacceptable to them.⁸² Therefore, legal intervention in Irish industrial relations has become a potential threat to inward investment. The role of powerful non-state actors like the American Chamber of Commerce Ireland became ever more pronounced, reaching its zenith in relation to negotiations over the transposition of the information and consultation directive.⁸³ Thus, the ability of some

has been common practice in Labour Court hearings involving trade unions for a union official to outline the employee’s case. If direct evidence from those involved is to be preferred, this option will be no longer available.

⁷⁹W.K. Roche, ‘Between Regime Fragmentation and Realignment: Irish Industrial Relations in the 1990s’ (1998) 29 *IRJ* 112.

⁸⁰D. D’Art and T. Turner T, ‘Union Recognition and Partnership at Work: A New Legitimacy for Irish Trade Unions?’ (2005) 36 *IRJ* 121.

⁸¹M. Doherty and R. Erne, ‘Mind the Gap - National and Local Partnership in the Irish Public Sector’ (2010) 41 *IRJ* 461.

⁸²J. Lavelle et al ‘Unions on the Edge? Industrial Relations in Multinational Companies’ in T. Hastings (ed), *The State of the Unions* (Dublin: Liffey Press, 2008).

⁸³The transposing legislation, the Employee (Provision of Information and Consultation) Act 2006, allows, in s 11, for direct information and consultation arrangements (bypassing employee representative structures). This has become known in Ireland as the ‘Intel clause’ as it is believed to have been furiously lobbied for by the American Chamber of Commerce Ireland on behalf of US multinationals based in Ireland (M. Doherty, ‘Hard Law, Soft Edge? Information, Consultation and Partnership’ (2008) 30 *Employee Relations* 603).

private actors to ‘get matters onto the agenda’ has been a crucial aspect of recent Irish industrial relations history. Throughout the partnership period, evidence continued to suggest that employer hostility to collective rights was increasing, from a reluctance to engage with the State’s dispute-resolution machinery,⁸⁴ to the practice of ‘double breasting’ by MNCs,⁸⁵ to outright suppression.⁸⁶ Indeed, one of the issues at the centre of the Ryanair dispute was a stipulation by the company that training costs of €15,000 would have to be repaid by pilots to the company were it to be forced to enter into collective bargaining negotiations with a trade union within five years of the training being completed. This provision was one part of a complaint made by ICTU to the ILO Freedom of Association Committee of experts in 2010.⁸⁷ The complaint was essentially grounded on alleged breaches of Articles 1–4 of the Right to Organise and Collective Bargaining Convention of 1949 (Convention No. 98).

ICTU argued, first, that the term relating to training costs amounted to an act of anti-union discrimination and that Ireland was in breach of Convention No. 98 by virtue of the fact that Irish law does not render such terms unlawful. ICTU further contended that the effect of the *Ryanair* decision was that Irish law allows the establishment of fora with negotiation and/or consultation rights, which act as inducements to workers not to support collective bargaining with unions. ICTU also argued that the effect of the Supreme Court decision left Irish law in violation of the core principle of voluntary collective bargaining, as it allowed employers to impose a particular structure of negotiations on workers, with persons neither selected nor elected by the workforce. Essentially, according to ICTU, the *Ryanair* decision ‘consecrated a new constitutional right for companies to operate free of unions’.⁸⁸ The Committee on Freedom of Association (CFA) concluded that

⁸⁴B. Sheehan, ‘Employers and the Traditional Industrial Relations System: How the Bonds Have Been Loosened’ in T. Hastings, T (ed) *The State of the Unions* (Dublin: The Liffey Press, 2008) at 105.

⁸⁵This refers to a situation where an organisation with existing plants which are unionised opens a new plant, which is non-union; see P. Gunnigle, D. Collings and M. Morley, ‘Exploring the Dynamics of Industrial Relations in US Multinationals: Evidence from the Republic Of Ireland’ (2005) 36 *IRJ* 241. Gall (n.3, at 424) notes the increase in non-union, newly-established enterprises in the UK since 2000.

⁸⁶M. O’ Sullivan and P. Gunnigle, ‘Bearing All the Hallmarks of Oppression: Union Avoidance In Europe’s Largest Low Cost Airline’ (2010) 34 *Labor Studies Journal* 252.

⁸⁷Case 2780; see the 363rd Report of the Committee on Freedom of Association (March 2012), p 207–231 (available at: http://www.ilo.org/gb/GBSessions/GB313/ins/WCMS_176577/lang--en/index.htm, accessed 1 September 2013); hereinafter ‘the CFA report’.

⁸⁸CFA report, at 220.

if Irish law did not prohibit a term such as that relating to the training costs, which had not been at issue in the Supreme Court case, this *would* amount to ‘interference in the establishment, functioning or administration of employers’ or workers’ organisations’ under Article 2 of Convention No 98.⁸⁹ It recommended, therefore, that the Government should, with the social partners, review the relevant protective legislation to ensure such acts are prohibited. As regards the other limbs of the ICTU complaint, the CFA noted that an employer’s bypassing of representative organisations in favour of direct negotiation with employees *can* be detrimental to the promotion of voluntary collective bargaining and that the existence of elected representatives should not operate to undermine union representatives (where both are present). As a result, the CFA recommended that the Irish Government should set up an independent inquiry into the alleged acts of interference in Ryanair. The CFA further recommended that the Government, with the social partners, should review the existing legal framework and consider any appropriate measures, including legislative measures, so as to ensure respect for the freedom of association and collective bargaining principles. It also recommended that the parties review the mechanisms available with a view to promoting machinery for voluntary negotiation between employers’ and workers’ organisations for the determination of terms and conditions of employment. The Irish Government has indicated that it will *not* be setting up any inquiry into labour practices at Ryanair, nor has any review into ‘the relevant protective legislation’ been initiated. The Government has, however, pledged to reform collective bargaining law to comply with recent decisions of the European Court of Human Rights.⁹⁰

Lest the above concerns sound overly parochial (although it is submitted that the increasing global influence of MNCs on labour law and labour practices is anything but!), there is a further twist to this sorry tale. From 2008, Ireland has experienced a rapid deterioration in the public finances, a collapse in the housing market and construction sector, and a liquidity crisis for the banking system.⁹¹ In December 2009, attempts to negotiate a new social pact collapsed as employers and the Government refused to honour the agreement of a year earlier (bringing to an end the social partnership era).

⁸⁹CFA report, at 231.

⁹⁰This commitment had, in fact, been part of the *Programme for Government*, produced by the coalition parties in 2011 (predating the CFA report); see <http://per.gov.ie/wp-content/uploads/ProgrammeforGovernmentFinal.pdf> (accessed 1 September 2013, p 24).

⁹¹K. O’ Kelly, ‘The End of Social Partnership in Ireland?’ (2010) 16 *Transfer: European Review of Labour and Research* 425.

In November 2010, the Irish government accepted the terms of an International Monetary Fund (IMF)-EU rescue package and outlined a four-year austerity plan. The Irish Memorandum of Understanding (MoU) (negotiated with the ‘Troika’ of the IMF, European Commission and European Central Bank), dated 1 December 2010,⁹² unsurprisingly focuses on measures relating to fiscal consolidation and financial sector reforms. However, the MoU also addresses ‘structural reforms’ relating to the labour market. The most significant pledge, for the purposes of this article, was to commission an independent review of the REA and JLC arrangements, with terms of reference and follow-up actions to be agreed with the Commission. This review was to be carried out in order to ensure there were no distortions of wage conditions across sectors associated with the presence of *sectoral* minimum wages in addition to the *national* minimum wage. As we have seen, statutory provisions supporting collective bargaining in Ireland are almost non-existent. Thus, although Ireland already has a lightly regulated labour market,⁹³ it is required to review one of the few areas of regulation that provides for collectively bargained standards and that allows workers to benefit from collective representation without having to first ‘trigger’ their rights. Achtsioglou and Doherty point out that what is significant ‘is the extent to which labour market regulation is to be “micro-managed” by the EU institutions; even in relatively “neo-liberal” Ireland’.⁹⁴

In any case, the Troika need not have been so concerned. The Irish High Court in 2011 declared that the legislation allowing the imposition of terms and conditions of employment by means of an ERO was unconstitutional.⁹⁵ The decision, predictably, was welcomed by employer groups, with many calling for the abolition of the ERO system in its entirety.⁹⁶ Trade unions, meanwhile,

⁹²The 2010 MoU and all subsequent documents relating to Ireland’s bail-out are available at <http://www.finance.gov.ie/viewdoc.asp?DocID=6856> (accessed 1 September 2013).

⁹³In the World Bank’s *Doing Business Report 2012*, Ireland is no 15 in the ‘rankings on the ease of doing business’ list; the UK is no 7 (available at <http://www.doingbusiness.org/reports/global-reports/doing-business-2012>; accessed 1 September 2013).

⁹⁴E. Achtsioglou and M. Doherty, ‘There Must Be Some Way Out of Here...The Crisis, Labour Rights and Member States in the Eye of the Storm’ (2013) 19 *European Law Journal* (online).

⁹⁵*John Grace Fried Chicken Ltd & Ors v Catering Joint Labour Committee & Ors* [2011] IEHC 277. For full discussion of this case see M. Doherty, ‘Battered and Fried? Regulation of Working Conditions and Wage-Setting after the “John Grace” Decision’ (2013) 19 *Dublin University Law Journal* 97.

⁹⁶See, for example, ‘IBEC Welcomes High Court Ruling on JLCs’ (<http://www.ibec.ie/IBEC/Press/Publicationsdoelib3.nsf/vPages/Newsroom~ibec-welcomes-high-court-ruling-on-jlcs-07-07-2011?OpenDocument>; accessed 1 September 2013). <http://www.inarchive.com/page/2011-08-30/http://>

expressed concerns that, following the ruling, workers in sectors covered by EROs, would have their terms and conditions of employment downgraded.⁹⁷ However, the Minister for Jobs, Enterprise and Innovation moved swiftly to pledge new legislation to re-establish, with significant reforms, the ERO/REA systems; the result is the Industrial Relations (Amendment) Act 2012. The Act also reformed the procedures for REAs, in particular outlining detailed criteria by which the parties could claim to be ‘representative’ before a registered collective agreement could be extended *erga omnes*. The ink was barely dry on this legislation, when the Supreme Court declared the section of the legislation establishing the REA system (Part III of the Industrial Relations Act 1946, which the 2012 Act purports to amend) to be also unconstitutional in *McGowan & Ors v The Labour Court & Ors*.⁹⁸ The tone of the judgment and the language used by the Supreme Court are noteworthy. The Court notes (at para 8) that the provisions of part III appear ‘somewhat anomalous’ today and give rise to the ‘prospect of burdensome restraints on competition for prospective employers and intrusive paternalism for prospective employees’. It hardly needs noting that, far from being ‘anomalous’, the *erga omnes* extension of collective agreements to cover all employers and workers in a sector is a well-established feature of employment law systems in a raft of other EU States, such as the Netherlands and Germany (but not, of course, in the Anglo world).⁹⁹ It seems many workers in sectors formerly covered by JLCs and REAs (retail, construction, etc), unless contractually protected, are now covered solely by the provisions of minimum wage legislation and other statutory minima where these exist (echoes of the ‘Laval Quartet’...??). The default position of non-unionisation has, in Ireland, just become a whole lot ‘stickier’.

8. CONCLUSION

Across Europe, the current financial and economic crisis has seen the advent of publicly voiced workplace unrest, ranging from strikes to demonstrations to

www.ibec.ie/IBEC/Press/PressPublicationsdoelib3.nsf/vPages/Newsroom~ibec-welcomes-high-court-ruling-on-jlcs-07-07-2011?OpenDocument; accessed 1 September 2013).

⁹⁷‘UNITE Demands Emergency Legislation for Low Paid Workers after JLC Court Ruling’ (http://www.unitetheunion.org/regions/ireland/news_from_ireland/unite_calls_for_emergency_legi.aspx; accessed 1 September 2013).

⁹⁸[2013] IESC 21.

⁹⁹It should be acknowledged here that previous UK procedures did enable this to happen; Orders 1305 and 1371, s 8 of the Terms and Conditions of Employment Act 1959 and Sched 11 to the Employment Protection Act 1975.

workplace occupations. In such a context, and with the hegemony of neo-liberal capitalism at least being questioned, is the time ripe for collectively bargained standards to be reasserted?¹⁰⁰ Gall points out the ‘catch-22’ that unions in the UK (and, it is submitted, in Ireland) are too weak to fundamentally alter the environment in which they operate yet, without the regulatory intervention a powerful union movement could demand, cannot grow stronger.¹⁰¹ If this is so, we must look to the other key actors. It seems unlikely that support for robust collective bargaining standards will come from employers. The role of large US MNCs in the Irish story has been discussed above and, more broadly, Crouch has recently written ominously, but with typical perception, of the dominance over public life of the giant corporation.¹⁰² Even in more localised terms, employer voice appears to be fragmenting; Ryanair, for example, has long stood apart from the idea of aligning itself with Irish employer confederations (indeed the make-up of IBEC has, for some years now, shifted from a majority of members operating in a unionised environment to a solid non-union majority) and employers more and more frequently are represented in industrial tribunals by lawyers rather than industry representatives. The challenges that brought down the sectoral JLC and REA systems were, respectively, brought by ‘break-away’ groups of small employers in the catering and electrical contracting sectors; in the latter case, the ‘traditional’, bigger employers wanted to retain the JLC system.¹⁰³ Indeed, the importance of small and medium enterprises (in an era of outsourcing) is crucial to modern economies (small, like Ireland or large, like the UK); small and medium enterprises (SMEs) with fewer than 21 employees, of course, are exempted from obligations under the SRP. Moore and Reading have noted that the potential cost to individuals of framing grievances in the SME context is even higher (as often ‘informal’ management styles tend to mask power imbalances), making it more difficult for unions to gain a foothold in the absence of regulatory support.¹⁰⁴

Thus, it is to the State we must turn. Here, as long as the State sees its role as confined to ‘the aggregation of worker’s preferences’ rather than ‘promoting...collective bargaining as a public good’,¹⁰⁵ the prospects for

¹⁰⁰S. Lehdorff, *A Triumph of Failed Ideas: European Models of Capitalism in the Crisis* (Brussels: ETUI, 2012).

¹⁰¹Gall, n.3, at 436.

¹⁰²C. Crouch, *The Strange Non-death of Neo-liberalism* (Cambridge: Polity Press, 2011).

¹⁰³Doherty, n.95.

¹⁰⁴S. Moore and I. Read, ‘Collective Organisation in Small and Medium-sized Enterprises: An Application of Mobilisation Theory’ (2006) 16 *Human Resource Management Journal* 357.

¹⁰⁵A. Bogg, *The Democratic Aspects of Trade Union Recognition* (Oxford: Hart, 2009), 80.

meaningful reform are not good. This is accentuated where the European Union, through its laws (the ‘Laval Quartet’ judgments; the weak recasting of the posted workers directive,¹⁰⁶ the attempt to pass a ‘Monti II’ regulation¹⁰⁷) or policies (the labour law reforms demanded of Ireland, and in particular Greece) also falls short of its stated objective to promote collective bargaining (under the aforementioned TFEU provisions).

There are measures that could be taken even within the confines of the current Anglo model that could improve the situation. A robust duty on employers that do (voluntarily or otherwise) meet and talk to do so in good faith, backed up by meaningful duties of disclosure (breaches of which could be sanctioned) would help. In the current crisis, the role of public procurement (especially in sectors like construction) has become crucial. A strengthening of obligations on public bodies to factor in the extent to which a tenderer engages in collective negotiations before awarding contracts would have an impact, but would have to be framed carefully in light of CJEU decisions like *Rüffert and Luxembourg*, so as not to amount to a disproportionate restriction on the provision of services by service providers established in a Member State other than that in which the work is to be carried out. Under the terms of the recent Irish Public Service Agreement 2013–16 (the ‘Haddington Road’ deal) implementation of the organisational reform measures contained therein has operated under a process of ‘binding arbitration’, either involving the State’s industrial relations dispute-resolution bodies or through sectoral conciliation and arbitration mechanisms. A similar arrangement for the private sector could be established (although, again, would need to be carefully framed in light of the recent Superior Court decisions, discussed above). Finally, non-union collective representation could be the subject of statutory support. Could there be a model for a Ryanair-like ‘Employee Council’? One possible guide to what such a Council would look like might be derived from looking at the implementation of the Information and Consultation Directive. The Employee (Provision of Information and Consultation) Act 2006 provides a template of sorts in its ‘standard fall-back provisions’, which contain rules of procedure, rules on the election of employee representatives, rules on the structure of any information and consultation body to be set up and rules

¹⁰⁶Proposal for Directive concerning the enforcement of the provision applicable to the posting of workers in the framework of the provision of services (COM (2012) 131).

¹⁰⁷Proposal for Regulation on the exercise of the right to take collective action within the context of the economic freedoms of the single market (COM (2012) 130).

governing complaints and disputes.¹⁰⁸ Under the Directive, of course, information and consultation on certain matters must be with a ‘view to reaching agreement’ and in *Junk* the Court of Justice gave quite an expansive interpretation to what is to be understood as ‘consultation’.¹⁰⁹

However, more fundamental regulatory intervention will be required if genuine collective bargaining standards are to be reasserted. At present, organised labour is confronted by significant resource imbalances (financial and otherwise) and a scenario where capital appears to have a disproportionate power to shape the decision-making agenda, and with it the ‘aspirations, demands and even belief-systems’ of ordinary employees.¹¹⁰ Without a radical reordering of the ‘choice of policy priorities’,¹¹¹ the likelihood is that the default position of non-unionisation in the Anglo world will become ever more deeply embedded.

¹⁰⁸M. Doherty, ‘It’s Good to Talk...Isn’t It? Legislating for Information and Consultation in the Irish Workplace’ (2008) 30 *Dublin University Law Journal* 120.

¹⁰⁹Case C-188/03, *Junk v Kühnel* [2005] ECR I-885. The Court found that consultation ‘imposes an obligation to negotiate’, thereby driving home the point that consultation ‘with a view to reaching an agreement’ envisages compromise and change; employers who have a rigid agenda that they want to impose on the workforce without engaging in meaningful consultation will be in breach of their obligations.

¹¹⁰T. Novitz and P. Syrpis, ‘Assessing Legitimate Structures for the Making of Transnational Labour Law: The Durability of Corporatism’ (2006) 35 *ILJ* 367 at 380.

¹¹¹*Ibid.*, at 369.