

The Irish Human Rights and Equality Commission report on the Constitution and collective bargaining – a critique

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Introduction

The Irish Human Rights and Equality Commission (IHREC) has published a research report titled *Collective Bargaining and the Irish Constitution – Barrier or Facilitator?* (Eustace & Kenny, 2023). The report concludes that there is an arguable case for a constitutional right to collective bargaining and the Constitution may function as a facilitator and even a driver of these rights (Eustace & Kenny, 2023, p. 31). The object of this article is twofold. First to offer a detailed critique of the report. Second in the light of that critique to suggest a more coherent and practical way to give concrete realisation to the constitutional guarantee of freedom of association.

Government, employers, and trade unions are presently engaged in consultations/negotiations regarding the transposition of the European Union (EU) Directive on Adequate Minimum Wages into law (Directive 2022/2041). It requires member states, where less than 80% of employed workers are covered by collective bargaining, to

establish an action plan to promote union recognition and collective bargaining. Since the late 1990s, employers, aided by some commentators and legal academics, have successfully opposed the implementation of statutory recognition. Now it is again on the agenda but is more pressing and consequential. The IHREC report was commissioned and produced in that context.

The principal object of IHREC is the protection and advancement of human rights. Consequently, it might be expected that pronouncements or reports by that body would rely heavily on judgments of the European Court of Human Rights (ECtHR).¹ Since 2008 that court has produced two unanimous judgments ruling that freedom of association encompasses not only the right of workers to form and join unions but a concomitant right to union recognition and collective bargaining. Among some employers these rulings may be regarded as both unwelcome and inconvenient (see Prendergast, 2022a and 2024). Yet that can be of little concern to IHREC. Ostensibly, its mission is to speak clearly and without fear or favour when defending or advancing human rights. However, the report avoids any detailed discussion or engagement with relevant judgments of the ECtHR regarding freedom of association and union recognition. Nowhere in the report do the words 'union recognition' appear. The debate and struggle for recognition, ongoing since the late 1990s, is ignored. Unfortunately, an unintended consequence of the report may be to deprive workers of a right to recognition, a right identified by the ECtHR as a human right. If these contentions stand up, then they point to serious failings by the report and the commissioning authority.

This paper is divided into two sections. The first section identifies and examines various weaknesses in the IHREC report. For instance, its limited understanding of collective bargaining, the discussion of inconsequential topics, the lack of engagement with important and relevant judgments of the ECtHR or the constitutional right to freedom of association and lastly, the absence of any historical contextualisation regarding the pursuit of statutory recognition in this jurisdiction. The second section focuses on the constitutional guarantee of freedom of association and the literal or formalist interpretation of the concept long applied by the Irish judiciary. It will

¹ The European Court of Human Rights (ECtHR) is an international court set up in 1959. It rules on individual or state applications alleging violations of the civil and political rights set out in the European Convention on Human Rights.

be submitted that the reinterpretation or expansion of that concept by the European Court of Human Rights and the recent Supreme Court judgment in *O'Neill v Unite* suggests that judges of that court may be open to applying a purposive interpretation of freedom of association.² Such an interpretation would likely encompass not only the right to form unions but a concomitant and indivisible right to union recognition and collective bargaining. In that event, the constitutional guarantee of freedom of association would become ‘practical and effective’.

Critique of the report

Prior to discussing the IHREC report some points of reference regarding collective bargaining and the Constitution must be established. Namely, the nature of collective bargaining and the extent of the right conferred by the constitutional guarantee of freedom of association.

Collective bargaining incorporates two essential and complementary requirements. First, the existence of freedom of association or the right of workers to form independent unions of their choice. Irish workers are fortunate in having that right enshrined in Article 40. 6. 1 iii of the 1937 Constitution. A second essential requirement is the willingness of or obligation on the employer to recognise a union. Union recognition is the formal acceptance by management of a trade union(s) as the representative of all or a group of workers for the purpose of jointly determining terms and condition of employment (Salamon, 1987, p. 408; Wallace et al., 2020). Only with the achievement of recognition can collective bargaining begin. The International Labour Organization (ILO) holds that collective bargaining cannot begin until a union is recognised for that purpose (ILO, 1978, p.28).

In advocating for a constitutional right to collective bargaining, the IHREC report is mistaken in placing the cart before the horse. As noted above, the essential preliminary to collective bargaining is recognition by the employer of the workers union. Only when that is achieved can the process of collective bargaining begin. Consequently, it would be more precise and to the point for the report to advocate for a statutory right to recognition. From the establishment of a right to recognition, the collective bargaining process would naturally

² H.A. *O'Neill v Unite the Union & Ors*. [2024] IESC 8, see discussion in footnote 35.

follow. For those workers who might wish to exercise the proposed statutory right to recognition and its concomitant of collective bargaining, that choice could not then be vetoed, overridden, or set aside by superior employer power. Advocacy for such a measure could be strongly supported by the argument that its implementation would give practical effect to the constitutional guarantee of freedom of association (D'Art, 2020). On the other hand, advocacy for a constitutional right to collective bargaining is confronted by a number of difficulties.

In this jurisdiction, collective bargaining appears to be a poorly understood, amorphous concept. For instance, Ryan Air refused to recognise or negotiate with the pilot's union. Nonetheless, it claimed to carry on collective bargaining with its internal employee representative committee. A claim subsequently upheld by the Supreme Court.³ Yet whatever negotiations that may have gone on in Ryan Air they could never, under ILO Convention 98, be considered as collective bargaining (see ILO, 1949, 1951; D'Art & Turner, 2007).

The IHREC report relies on the internationally accepted definition of collective bargaining provided by the ILO to which the Irish state is a signatory (Eustace & Kenny, 2023, p. 7; see ILO, 1948, 1949).⁴ The ILO defines collective bargaining as 'negotiations about working conditions and terms of employment between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more representative workers organisations on the other, with a view to reaching agreements' (ILO, 1978, p. 3, 1981). Yet that definition may be of little account in this jurisdiction. Apparently, authorities here take a cavalier approach to our international obligations touching on labour matters (D'Art & Turner, 2007).⁵ In any event, Ireland has produced its own unique definition of collective bargaining contained in s 27(1A) of the Industrial Relations (Amendment) Act 2015. It differs in one important respect from the ILO definition.⁶ In defining collective bargaining, the drafters inserted

³ *Ryan Air v Labour Court* [2007] 4 IR 199, paras. 38 and 55, pp. 225–6.

⁴ Both conventions containing these definitions were ratified by Ireland on 4 June 1955.

⁵ In *Ryan Air v Labour Court* [2007], the Supreme Court, in the apparent absence of an Irish statutory definition of collective bargaining, settled for a dictionary definition (D'Art, 2020, p. 91). Kerr (2022, p. 324) has questioned Ireland's compliance not only with the *Demir* judgment but with other conventions and charters.

⁶ The definition of collective bargaining in the 2015 Act appears superfluous as there was already an existing definition in section 1 of the Worker Participation (State Enterprises) Act 1977 which follows closely the ILO definition.

the additional qualifying words ‘voluntary engagement’. This could become a source of difficulty. Union recognition (and its indivisible concomitant of collective bargaining), achieved through a strike or legislative enactment obliging the employer to recognise the union, could hardly be considered as voluntary engagement (D’Art, 2022a). Resolving that conundrum might become a matter for the courts.⁷

There is a further difficulty with the IHREC report regarding the ILO definition of collective bargaining. It requires an agreement between the employer(s) and the workers’ union(s) representatives to engage in ongoing discussion or negotiations as the occasion demands. Consequently, collective bargaining must, by its nature, involve *de facto* or *de jure* union recognition (ILO, 1981). There can be no separation between the two as they are interdependent and inextricably interlinked. For an employer to engage in collective bargaining, involving as it must, continuing face-to-face negotiation, consultation, and joint decision-making, but deny that it constitutes recognition, could only be described as delusory. Yet, nowhere in the text of the report do the words ‘union recognition’ appear.⁸ The report may have a cart, but it seems, no horse.

Freedom of association

The courts in this jurisdiction have long held that the right to freedom of association is fully realised once workers are free to form unions. An interpretation that imposes no obligation on employers to recognise any of these organisations for collective bargaining (Hogan & Whyte, 2003, p. 1803; D’Art, 2020, pp. 88–9). It has been suggested that legislation imposing such an obligation would apparently be unconstitutional (Constitutional Review Group, 1996, pp. 312–7; also D’Art, 2020, pp. 100–10). A difficulty arises with this formulation given that various items of extant legislation already impose an obligation on many public sector employers to recognise and negotiate

⁷ A contradiction that could be easily remedied by amending legislation incorporating the ILO definition; in which, incidentally, there is no mention of voluntary engagement. That remains to be done. Why it was not done in the first instance epitomises the adhocery that has characterised attempts to legislate for a right to recognition since the late 1990s.

⁸ In the preface to the IHREC report, Chief Commissioner Sinéad Gibney notes that unions have no legislative right to be recognised in the workplace for collective bargaining (p. 1). However, the report itself does not address this issue or even mention union recognition.

with particular groups of organised workers.⁹ It is in effect statutory recognition. An anomaly never mentioned in the IHREC report.

Similarly, there is little engagement with judgments of the ECtHR. In footnotes, the IHREC report acknowledges the existence of two significant judgments from that court but does not discuss their content or outcome in any detail. Yet these judgments, particularly *Demir and Baykara v Turkey*, reinterpret or expand the meaning of freedom of association contained in Article 11 of the European Charter of Human Rights.¹⁰ Formerly, like the Irish courts, the ECtHR adopted a literal interpretation of freedom of association that the right was fully realised once workers were free to form and join unions. In a radical departure from its previous case law, the ECtHR now holds that freedom of association encompasses not only the right to form and join unions, but a concomitant and indivisible right to union recognition and collective bargaining.¹¹ The literal or formalist interpretation of freedom of association is now characterised by the court as 'theoretical and illusory'.¹² Rather, a purposive or functional interpretation must be applied to render the right to freedom of association 'practical and effective'.¹³ From the ECtHR perspective, the old dispensation which separated the right to form and join unions from the right to union recognition and collective bargaining has no longer any legal validity.

It should be noted that the *Demir* judgment was a unanimous decision of the seventeen judges in the Grand Chamber following the unanimous judgment of the seven judges in the second section. One year later, *Demir* was cited in another unanimous decision of the ECtHR upholding the right to recognition and collective bargaining as integral to freedom of association. Yet larger claims have been made for *Demir* beyond its validation of the purposive or functional interpretation of freedom of association. The challenge it presents to common law and judges schooled in that tradition is, it has been said, 'impossible to exaggerate' (Ewing & Hendy, 2010, p. 20). Such a

⁹ The Railways Acts 1924–1933, The Universities Act 1997, The Education Act 1998, The Institutes of Technology Act 2006. See Costello, 2016, pp. 211–2.

¹⁰ *Demir and Baykara v Turkey*, No.34503/97, Strasbourg, 12 November 2008. *Enerji Yapi-sol Sen v Turkey*, No. 68959, 21 April 2009. Also, decisions of the ILO Committee of Experts and of the European Committee on Social Rights in particular Complaint No. 123/2016.

¹¹ *Demir and Baykara v Turkey*, para. 154.

¹² *Demir and Baykara v Turkey*, para. 66.

¹³ *Demir and Baykara v Turkey*, para. 66. See also D'Art, 2020, pp. 96–8.

‘monumental pronouncement of principle’ seems likely to influence the interpretation of domestic law by contracting states (Ewing & Hendy, 2010, pp. 47–8).

Given the subject and findings of these judgments, they might reasonably be expected to figure prominently in any discussion or research project that purported to examine the Irish constitutional guarantee of freedom of association and the relation it might have to union recognition and collective bargaining. Particularly so, as section 4 of the European Convention on Human Rights Act 2003 requires that ‘a court shall, when interpreting and applying Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions, and judgments’. However, should conflict or uncertainty arise when applying these principles, the Irish Constitution will have primacy (IHREC, 2015, p. 11; see also O’Donnell, 2007). Yet would a legal obligation on the employer to recognise a union for collective bargaining be found unconstitutional? That is the key question which will be addressed in the concluding section of the paper.

Exploring inconsequential cul-de-sacs

Another, though minor weakness of the IHREC report is its exploration of many inconsequential cul-de-sacs. Examples are the right to work, the right of employers to earn a livelihood, vocationalism, Catholic social teaching, legislative power, and non-delegation issues (Eustace & Kenny, 2023, pp. 8–10). Many of these topics have at best, a very remote relationship to freedom of association, union recognition, and collective bargaining. On freedom of association and collective bargaining, the report raises doubts as to whether these constitute individual or collective rights (Eustace & Kenny, 2023, p. 15). Logically, it would be difficult to claim a right to associate with oneself or seek to bargain collectively as an individual. Exploration of this particular cul-de-sac arose from confusing the right to associate (a collective right) and the right to dissociate (an individual right) (see von Prondzynski, 1987, p. 84; Leader, 1992, pp. 27–30).

Union recognition and collective bargaining in Ireland – some history

In seeking to shape law or state policy, it is helpful to review the historical context in which the question or problem to be addressed initially arose. Unfortunately, the IHREC report’s historical contextualisation of the question of union recognition and

collective bargaining is extremely narrow, focused on developments beginning in 2021 (Eustace & Kenny, 2023, p. 5). Nonetheless, the report correctly notes that among European nations, Ireland is an outlier in failing to protect an entitlement to collective bargaining (Eustace & Kenny, 2023, p. 7; see also discussion in D'Art & Turner, 2004). The report is agnostic as to why this is so but suggests it may be the result of the EU/International Monetary Fund bailout or the tradition of voluntarism (Eustace & Kenny, 2023, p. 7). Neither of these factors are of any consequence or explanatory value.¹⁴ State failure to establish an effective right to recognition and collective bargaining can largely be ascribed to intense and sustained employer opposition. Within that group, some may have harboured an ambition to extirpate independent trade unions altogether (D'Art & Turner, 2005, 2006, 2011; D'Art, 2021, sect. 3; Geary & Belizon, 2022).

According to the chronology of the IHREC report, the question of how to protect a right to collective bargaining only arose with the establishment of the Second High-level Group in March 2021 (Eustace & Kenny, 2023, p. 5). Yet, a genuine enquiry must begin with the establishment of the First High-level Group in the late 1990s.¹⁵ It was tasked with the problem of how to provide workers with the right to union recognition and collective bargaining. Almost a quarter of a century later that identical problem has resurfaced and is again presented for resolution; this time by the Second High-level Group. Certainly, the impetus for the establishment of the two groups differ. In the former, the impetus was an internal one initiated by a change in indigenous employer behaviour.¹⁶ In the latter, the impetus is external,

¹⁴ See discussion of voluntarism as an obstacle to statutory recognition in D'Art, 2020, pp.106–8, 2022a, 2022b [correct?], p. 11.

¹⁵ Under Partnership 2000, the First High-Level Group was established to consider statutory union recognition. Membership included representatives of the Department of the Taoiseach; Department of Enterprise, Trade and Employment; Irish Congress of Trade Unions, and Ibec. Final report of Group produced in 1999. For comprehensive review on 2001 Act and subsequent amendments made by 2004 and 2015 Acts see Kerr, 2022, pp 289–93, 311, 350–63.

¹⁶ Doherty (2012, p. 97) notes that around the turn of the millennium a number of long-established indigenous companies began to engage in hitherto inconceivable conduct by effectively snubbing the state's dispute resolution agencies. Major Irish companies rejected pressure to resolve disputes from agencies such as the Labour Relations Commission and the National Implementation body and ignored non-binding recommendations of the Labour Court. Subsequently, a number of legal challenges have been launched against the joint labour committee system and sectoral employment orders, which continue to the present. It seemed a growing number of employers

the EU Directive on adequate minimum wages. Though separated in time, both groups are presented with identical tasks and objectives.

The First High-level Group

In the late 1990s, the Irish Government established the First High-level Group to consider the question of statutory recognition. Its origin lay in intensifying opposition by employers to granting recognition and their general disregard of favourable but unenforceable Labour Court recommendations. 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’. Deliberations of the group eventually took concrete form in the Industrial Relations (Amendment) Act 2001/4 (D’Art & Turner, 2003). The limitations of the legislation were subsequently confirmed by the Supreme Court judgment in *Ryan Air*, the effect of which was to emasculate the Act. According to Doherty, ‘it left Irish law offering perhaps the weakest protection for trade union bargaining rights in the western world’ (Doherty, 2013, p. 186).

Seemingly undisturbed by that outcome, the government of the day adopted a *laissez faire* policy of inactivity. However, complaints by the Irish Congress of Trade Unions to the ILO’s Governing Committee in Geneva were upheld (ILO Governing Body, 2012, pp. 207–311). The committee invited the Irish Government to consider appropriate measures, including legislative measures, to ensure respect for freedom of association and collective bargaining principles (ILO Governing Body, 2012, pp. 230, para. 815 (a–c)). The government response was the Industrial Relations (Amendment) Act 2015. It remedied many of the defects of the 2001/4 Act highlighted by the *Ryan Air* Supreme Court judgment.¹⁷ Yet the Act did not introduce a requirement on the employer to recognise the workers union. Consequently, it fell below the standard set by the ILO in which union recognition is a prerequisite for collective bargaining.

¹⁶ (*Contd.*) opposed the concept of labour market regulation either by the state or trade unions (D’Art, 2022b, pp. 3–6). Such developments were not confined to Ireland but were instrumental in the issue of the EU Directive on adequate minimum wages in the EU. It notes ‘the erosion of traditional collective bargaining structures and the growth of in work poverty’ (Directive 2022/2041).

¹⁷ The 2015 Act has a much wider focus. See Kerr, 2022, pp. 323–46.

The Second High-level Group

With the passage of the 2015 Act, the recognition question seemed finally retired or at least consigned to limbo. It was not to be. The effect of the EU Directive on adequate minimum wages was to give the recognition question renewed prominence. It requires member states, where less than 80% of employed workers are covered by collective bargaining, to establish an action plan to promote union recognition and collective bargaining (Directive 2022/2041). The task of the Second High-level Group was to consider and recommend ways to meet these requirements. The first item on the agenda for deliberation by the group was union recognition (High-level Working Group on Collective Bargaining, 2022, p. 2). While the ECtHR judgments were noted and reference made to possible constitutional difficulties, but neither were articulated or discussed. Beyond that, no more was heard on these topics. Rather the Group recommended extending the operation and scope of joint labour commissions and sectoral employment orders, strengthening a 'right to bargain' and requiring an employer to 'bargain in good faith' (High-level Working Group on Collective Bargaining, 2022, pp. 9–14, 19–23). The many problematic aspects of these recommendations have been considered elsewhere (D'Art, 2022b, pp. 10–5).

Critique conclusion

The IHREC report suggests that there may, after all, be no constitutional impediment to legislating for a right to collective bargaining. Of course, an essential, fundamental prerequisite, to any such enactment would be a clear conception or definition of collective bargaining. The Second High-level Group recommendation on the right to bargain and placing an obligation of good faith engagement on the employer may be at odds with the 2015 definition of collective bargaining as voluntary engagement. Others have suggested that collective bargaining could be carried on with the union but without recognising that organisation (Prendergast, 2022b; D'Art, 2023). That oxymoronic concept, non-union collective bargaining, (bargaining with a group of workers who are not union members) appears on the cusp of revival (Prendergast, 2022a). Lewis Carroll's character Humpty Dumpty springs to mind, 'when I use a word it means just what I want it to mean – neither more or less'. Collective bargaining is not a difficult concept to grasp and the ILO internationally accepted definition of same is easily comprehensible. There may perhaps be a

more practical but simple way to escape the labyrinth of mystification and muddle. These are discussed in the following section of this paper.

Rendering freedom of association ‘practical and effective’

Freedom of association or the right of workers to form unions is a hallmark of a democratic state and in this jurisdiction, a constitutional right. A distinctive feature of freedom of association is that it can only be exercised collectively such that all legal guarantees of this freedom necessarily protect a collective activity (von Prondzynski, 1987, p. 84). For workers, the act of association in unions is a means rather than an end. Individuals join unions for two principal reasons; first to deploy their collective strength in bargaining with the employer for improved terms and conditions; and second to exercise some influence in decision-making regulating the employment relationship and their working lives. These are legitimate objectives in any democratic polity. Collective bargaining is the union’s *raison d’être*. Yet, according to the ILO, collective bargaining cannot begin until a union is recognised for that purpose. Employers, it continues, will give such recognition only if they believe it to be in their interests or they are legally required to do so (ILO, 1978, p. 28).

Statutory recognition and the Constitution

Many commentators claim that joining a union without the right to recognition from an employer renders the right to associate meaningless or illusory, a mere paper right (Casey, 1972a & b; Lynch, 1998; Wilkinson, 1989). To grant freedom of association or the right to organise in unions but provide no legal support for the concrete realisation of that right smacks of empty legal formalism. As one Canadian Chief Justice observed ‘if freedom of association only protects the joining together of persons for a common purpose but not the pursuit of the very activities for which the association was formed then the freedom is indeed legalistic, ungenerous, indeed vapid’.¹⁸ Subsequently, the Canadian Supreme Court held that the guarantee of freedom of association protected ‘a meaningful process of collective bargaining’.¹⁹ Prior to that judgment, the ECtHR had reached a similar but more definite conclusion. In *Demir*, the court held that to

¹⁸ *Reference re Public Service Employee Relations Act (Alberta)* [1987] 1 S.C. R.313 at 38, cited in Fudge, 2004, p. 434.

¹⁹ *Mounted Police Association of Ontario v Canada (AG)* [2015] SSC

render the right to freedom of association 'practical and effective', it must encompass not only the right to form and join unions, but a concomitant right to union recognition and collective bargaining.²⁰ Yet these judgments were anticipated by the Constitutional Review Group Report of 1996, which considered freedom of association.

One section of that extensive report considered Article 40.6.1 iii on freedom of association and its relation to statutory union recognition. It acknowledged that in the absence of a duty on the employer to recognise a union chosen by employees the constitutional right to freedom of association may remain illusory. However, it was not convinced that the right to recognition be accorded constitutional status. Rather, as an issue of industrial relations policy, it could be more appropriately resolved by the Oireachtas (Constitutional Review Group, 1996, pp. 316–7). The group went on to raise a number of obstacles to statutory recognition, which subsequently proved very influential. Ever since, these objections have been routinely deployed by commentators but with little, if any, critical examination. The objections raised by the Constitutional Review Group and commentators are as follows: recognition and its supposed 'horizontal effect'; recognition and the employers' right of dissociation; recognition as interference with the employer property rights; recognition as contrary to voluntarism; recognition as deleterious to state inward investment policy; and finally the obiter remark of Justice Hugh Geoghegan in the *Ryan Air* judgment. These objections have been considered elsewhere (D'Art, 2020, pp. 101–10). They were found to be largely devoid of substance and in some instances little more than paper tigers.

Freedom of association, recognition and the courts

While the supposed constitutional obstacles raised by the Constitutional Review Group and others may be insubstantial there is a further difficulty. Irish courts have consistently found that a worker's right of association does not involve a corresponding obligation on the employer to negotiate with either a worker or the worker's union. Epitomised by Justice Brian Walsh when he said 'in law an employer is not obliged to meet anybody as the representative of his workers nor indeed is he obliged to meet the worker himself for the purpose of discussing any demand which the worker might make'.²¹ A decision

²⁰ *Demir and Baykara v Turkey*, paras. 66 and 154.

²¹ *EI Co Ltd. v Kennedy*. [1968]. I. R. 69 at 68.

later upheld in a number of judgments.²² In *Ryan Air v the Labour Court*, the Supreme Court seemed to go even further in emphasising the absence of any connection between the right to associate and union recognition. In an obiter remark, Justice Geoghegan said ‘it is not in dispute that as a matter of law Ryanair is perfectly entitled not to deal with trade unions’. This followed established precedent but, he continued, ‘nor can a law be passed compelling it to do so’.²³ Legislation facilitating recognition, arguably the practical embodiment of freedom of association, was apparently an impossibility.

The force of these judgments may be tempered by existing legislative enactments. For instance, the Redundancy Payments Act 1967 and Protection of Employment Act 1977 place an obligation on the employer to consult with an individual worker or a group of workers in a redundancy situation.²⁴ Likewise, the Safety, Health and Welfare at Work Act 2005 obliges the employer to consult and participate with employees in securing a safe working environment.²⁵ Furthermore, beyond obligations to consult an individual or groups of workers in particular circumstances, there are additional statutory provisions that place a duty on the employer to consult with unions.²⁶ Finally, Costello notes that existing legislation already imposes a series of miscellaneous duties of consultation and union recognition on certain employers. The Universities Act 1997, the Education Act 1998, and the Institutes of Technologies Act 2006 are cited in support. However, the strongest or most unequivocal examples are the Railways Acts of 1924–33. These Acts require that all terms and conditions be negotiated between the employer and the appropriate trade unions representing employees (Costello, 2016, pp. 211–2). It is, in short, statutory recognition. Though these Acts predate the 1937 Constitution they have gone unchallenged and still remain good law. While they were amended by s 46 of the Transport Act 1950, the provision remains that rates of pay, etc., of *Córas Iompair Éireann*

²² *Dublin Colleges ASA v City of Dublin VEC* unreported High Court judgment 31 July 1983. *Abbot and Whelan v ITGWU* [1982] 1 J.I.S.S.L 56. *Association of General Practitioners v Minister for Health* [1995] 1 I.R. Cited in Hogan & Whyte, 2003, pp. 1803–4; see also D’Art, 2020, pp. 88–9.

²³ *Ryan Air v The Labour Court* [2007] I.R. 199 at 215.

²⁴ Redundancy Payment Act 1967 s 17 and Protection of Employment Act 1977 s 9.

²⁵ Safety Health and Welfare at Work Act 2005 s 26.

²⁶ The Transnational Information and Consultation of Employees Act 1996. The Protection of Employment Act 1977. The Protection of Employment Order 1966. The Transfer of Undertakings Regulations 1980. See Quinn, 1999.

employees are regulated in accordance with agreements entered into by the company and the appropriate trade unions (Kerr & Whyte, 1985, p. 19).²⁷ In the light of these provisions the statement of Justice Walsh and similar judicial pronouncements may appear anachronistic.

Statutory recognition has been on the Irish statute book since the 1920s. It has been followed by legislation granting that right to workers in the state education sector. To date, no constitutional infirmity has been found attaching to such measures. Forms of statutory recognition in the public sector are, it seems, constitutionally sound. It would be difficult to convincingly argue that similar measures applied in the private sector would be constitutionally unsound.²⁸ Evidently there are no constitutional obstacles to such legislative enactments. Yet, beyond the chimerical, one formidable obstacle remains, the opposition of a powerful employer interest group.

Union recognition/collective bargaining: A constitutional and human right?

As we have seen, the courts in other jurisdictions, the Constitutional Review Group and many commentators who consider the question are in agreement that the right to associate without a concomitant right to union recognition/collective bargaining renders that right illusory or meaningless. It is an old legal adage that a right without a remedy is no right at all. In this jurisdiction, the right to associate goes beyond a right included in general liberal political principles. Rather, it has the elevated status of a constitutional right. Thus, arguably, interpretation and application of that right has enhanced importance and significance. Not just for worker citizens wishing to organise in unions and seek recognition from the employer for collective bargaining. But possibly for the rule of law itself and citizen confidence in the impartiality and effectiveness of the courts in upholding a constitutional right.

Of course, the Supreme Court is the final arbiter and ultimate authority regarding the interpretation of any constitutional provision. As yet, apart from some obiter remarks, the court has not ruled or handed down an interpretation of freedom of association as a collective right and what that might involve. Apparently, it remains very much an open question as to whether the constitutional right to

²⁷ See also Postal and Telecommunications Act 1983 s.2.

²⁸ For instance, the constitutional right to fair procedures applies even where state security and matters of national interest may be concerned. See Ryan, 2017, p. 119.

freedom of association includes a concomitant right to recognition for collective bargaining or is exclusively limited to the right of workers to organise in unions. Were the court to be presented with that question only the foolhardy would presume to predict the answer or indeed the outcome of any court case. Consequently, what follows can only be purely speculative.

A literal reading of the text of Article 40.6.1.iii would strongly support the formalist interpretation that freedom of association is fully realised once workers are free to form unions. To date, this has been the reading applied by the lower courts. Yet previous Supreme Court judgments appear to favour a purposive over a literal interpretation of constitutional provisions. In interpreting these provisions, Justice Kevin Dixon was of the view that they are not to be parsed with the particularity appropriate to ordinary legislation, rather the intention, if it can be established, should prevail.²⁹ Similarly, Justice John O'Byrne held, that the Constitution is to be liberally construed so as to carry into effect the intentions of the people embodied therein.³⁰ In the United Kingdom, Lord Diplock commenting on a Constitution and its provisions, particularly those that protect citizens' fundamental rights and freedoms, was of the view that such provisions should be given a generous and purposive interpretation.³¹ In this jurisdiction, the purposive approach reached its apotheosis in the application of the unenumerated rights doctrine, though now fallen into disuse. Nonetheless it seems that the tendency of the Supreme Court in interpreting constitutional provisions appears to favour a purposive approach. That is according some precedence to considering the spirit or intention of a provision over an exclusive focus on the letter. Applying a purposive or functional interpretation to freedom of association could perhaps broaden the scope of that right to include union recognition.

It is undoubtedly difficult to determine the effect that socio-economic or political developments in the wider society might have on legislative enactments or the interpretation of constitutional provisions. In the case of the ECtHR, such external developments seem to have influenced the court's jurisprudence. As already noted, the judgment of that court in *Demir* involved a radical departure from its previous case law regarding its interpretation of freedom of

²⁹ *O'Byrne v Minister of Finance* [1959] IR 1, cited in Hogan & Whyte, 2003, p. 6.

³⁰ *Sullivan v Robinson* [1954] IR 151 at 174, cited in Hogan & Whyte, 2003, p. 6.

³¹ *AG of Gambia v Momodou Joe*, AC 689 at 700 cited in Hogan & Whyte, 2003, p. 6.

association. Article 11 of the European Charter of Human Rights (freedom of association), it now held, encompassed not only the right of workers to form and join unions, but a concomitant and indivisible right to union recognition and collective bargaining. What is apposite here is the reasoning of the court explaining or justifying its rejection of previous case law and its expansion or reinterpretation of the scope and meaning of freedom of association. The court acknowledged that it was in the interest of legal certainty, foreseeability, and equality before the law that the ECtHR should not depart, without good reason, from established precedents. However, it continued, a failure by the court to maintain a dynamic, evolutionary approach would risk it becoming an obstacle to reform and improvement. Consequently, having regard to developments in labour law nationally, internationally and the practice of contracting states, the court concluded that the right to bargain collectively with the employer had become an essential element of freedom of association.³²

Ireland and Demir

The question now arises as to the effect of the *Demir* judgment in this jurisdiction. According to the ECtHR, a contracting state is obliged to take account of elements regarded as essential by ECtHR case law.³³ Undoubtedly, the court's reinterpretation or expansion of the meaning of freedom of association would come within that category. In addition, there are similar obligations contained in s.4 of the European Convention on Human Rights Act 2003. Apparently, the Irish state is bound to implement the outcome of judgments in the ECtHR. For instance, the ECtHR judgment in *Wilson* was incorporated by Ministers Bruton and Nash in S.I. No. 139 of 2004. An action, they explained, was designed 'to remove any doubt as to Ireland's full compliance with that judgment'.³⁴ Yet any obligation on the Irish courts to implement ECtHR judgments is a qualified one subject to the primacy of the Irish Constitution. Nonetheless, *Demir* may place the Irish judiciary under some obligation to modify or alter their long-held position separating the right to associate in unions from a corresponding right to recognition.

³² *Demir and Baykara*, paras. 139, 153, 154.

³³ *Demir*, para 144.

³⁴ S.I. No. 139/2004 Industrial Relations Act 1990 (Code of Practice on Victimisation) Declaration Order 2004. See government press release, (2014, 16 December), Ministers Bruton and Nash to reform Industrial Relations (Amendment) Act. See also D'Art, 2020, p 94.

Continuing to apply the traditional literal or formalist interpretation in the face of its unanimous and comprehensive rejection by the ECtHR might seem discourteous, appearing to set at nought, the judgments of that court. Of course, any such difficulty or embarrassment could be avoided by citing existing constitutional impediments preventing compliance. However, this paper contends that there are no constitutional obstacles. Arguments to the contrary are substantially, if not fatally, weakened by the fact that a right to recognition and collective bargaining have been on the Irish statute book since the 1920s and subsequently expanded to embrace employees in the state education sector. In the unlikely event that a constitutional infirmity was ever found to attach to such enactments it might open the possibility of their repeal.

Union recognition and its indivisible concomitant of collective bargaining, it is argued here, is both a human and constitutional right. Ultimately of course that matter can only be definitively decided by the Supreme Court. Given the tendency of that court to interpret constitutional provision from a purposive or functional perspective some modest optimism can be entertained as to the outcome.³⁵ In the meantime, assuming the presence of political will, there are no obstacles to the state legislating for a statutory right to union recognition and collective bargaining.

Conclusions

The IHREC report on the Constitution and collective bargaining has a number of weaknesses. The absence of any meaningful historical background renders the analysis presented deficient. It is sometimes characterised by the discussion of topics of doubtful relevance, the tendency of which is to promote confusion rather than clarity. The

³⁵ Two recent Supreme Court judgments appear to favour purposive interpretations over an exclusively literal reading of constitutional provisions. See *Heneghan v Minister for Housing, Planning and Local Government and Ors.* [2023] IESC 7. *O'Meara and Ors. v The Minister for Social Protection, Ireland and AG* [2024] IESC 1. In particular, the consideration by O'Donnell CJ of the Constitution as a living tree at paras. 137–46. Indeed in *H.A. O'Neil Ltd. v Unite the Union and Ors.* [2024] IESC 8. Justice Gerard W. Hogan observes that arguably implicit in these provisions (Art. 40.6.1. iii) that the right to form trade unions implies in turn at least some – perhaps as yet undefined – zone of freedom for those unions to organise and campaign. The usefulness of the constitutional provision would otherwise be compromised (para. 7). In this author's opinion, *O'Neil v Unite* seemingly expands the meaning of freedom of association to embrace the right to strike. Plausibly, it might also in time embrace the right to recognition.

report does not address important and relevant judgments from the ECtHR. This is a remarkable omission for a document commissioned by an organisation ostensibly concerned with the advancement of human rights. Likewise, the report eschews any discursive engagement with the constitutional guarantee of freedom of association, which is critical when considering the feasibility of legislating for the right of workers to collectively bargain with their employer.

Furthermore, the report has a defective understanding of collective bargaining. Though a central concern of the research, it is never examined or explained as to what it means or involves. The report refers to the ILO definition but only in passing. Union recognition, a prerequisite to collective bargaining is never mentioned or considered. For the report, it seems, union recognition is a concept that dare not speak its name. When it considers the possibility of legislating for a statutory right to collective bargaining, the report cautions that the effect of specific proposals would have to be considered carefully in terms of their legal consequences and possible constitutional implications (Eustace & Kenny, 2023, pp. 31–32). Concerns that would perhaps lead to the establishment of a third High-level Group? This is little short of absurd as statutory recognition for collective bargaining has been on the Irish statute book since the 1920s. After a century in operation no legal difficulties have arisen or constitutional infirmities emerged. The relevant section, 55, of the Railways Acts 1924–33 is worth quoting in full as it shows clearly what collective bargaining is and what it involves.

From and after the passing of this Act the rates of pay, hours of duty and other conditions of employment shall be regulated in accordance with agreements made or to be from time to time made between the trade union representative of such employees of the one part and the railways companies and other persons by whom they are respectively employed of the other part.

It should be noted that s. 55 of the 1924 Act aligns almost perfectly with the spirit and letter of the ILO definition of collective bargaining. All the components of the concept are present in s. 55; a union is present, the company agrees to recognise the union as representing its employees and to bargain with those union representatives regarding pay, hours of work, and other conditions of employment on an ongoing basis.

The confusion that has surrounded the concept is not unique to the IHREC report. It has also characterised the deliberations of the First and Second High-level Groups. The ineffective compromises and remedies adopted by these groups may perhaps have stemmed from a reluctance to discommodate group members representing the powerful sectional interest of employers. However, this possibly exculpatory explanation can hardly apply to the IHREC report. After all, the report was commissioned by an organisation dedicated to the promotion of human rights. Union recognition and collective bargaining have been identified by the ECtHR as integral to freedom of association and consequently a human right. Sometimes advocacy in the promotion of human rights may involve speaking clearly of uncomfortable truth to power. This, the report has failed to do. An unintended consequence of the IHREC report may be to retard rather than advance a collective human right at work.

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