

# Collective Bargaining and The Irish Constitution—Barrier or Facilitator?

Dr Alan Eustace and Professor David Kenny



Coimisiún na hÉireann  
um Chearta an Duine  
agus Comhionannas  
Irish Human Rights and  
Equality Commission

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The Irish Human Rights and Equality Commission was established under statute on 1 November 2014 to protect and promote human rights and equality in Ireland, to promote a culture of respect for human rights, equality and intercultural understanding, to promote understanding and awareness of the importance of human rights and equality, and to work towards the elimination of human rights abuses and discrimination.

# Contents

Foreword.....	1
Executive Summary.....	4
Introduction .....	5
Part I: Legal and Constitutional Context .....	7
General Legal Context.....	7
Constitutional context.....	8
Part II: A Constitutional Right to Collective Bargaining?.....	13
A facet of a right to freedom of association .....	13
A derived constitutional right .....	16
Interpretation of constitutional rights in line with EU Charter/ECHR .....	18
Conclusion on recognition of constitutional rights.....	21
Part III: Constitutionality of a statutory right/protection .....	22
Conflicting rights objections .....	24
Delegation objections .....	27
Conclusion.....	31
Constitutional right to collective bargaining.....	31
Statutory Right .....	31

## Foreword

On behalf of the Irish Human Rights and Equality Commission, I'm delighted to present this research report which makes an important contribution to knowledge on the right to collective bargaining in Ireland. It provides insight, through an analysis of Irish and European law, on whether there is a constitutional right to collective bargaining and/or whether the Irish Constitution protects a statutory right to collective bargaining.

This research ties in with our ongoing work under our strategic priority on economic equality.<sup>1</sup> Advancing economic equality involves challenging and changing policies and laws that exacerbate income and wealth inequalities, to build an inclusive Ireland, in which equality and human rights are respected. This includes improving equality of access to decent work and fair remuneration, in particular for groups facing high or systemic labour market discrimination and barriers.

This report builds on our ongoing work on labour rights including our policy statement on the incorporation of economic, social and cultural rights into the Irish Constitution;<sup>2</sup> code of practice on equal pay;<sup>3</sup> submission to the mid-term review of the Pathways to Work Strategy 2021-2025;<sup>4</sup> policy statement on the index-linking of welfare payments;<sup>5</sup> submissions to the Review of the Equality Acts;<sup>6</sup> submissions on the implementation of the European Social Charter in Ireland<sup>7</sup> and our joint research report with the ESRI on monitoring decent work.<sup>8</sup>

Exercising the right to collective bargaining provides an essential basis to the realisation of other fundamental human rights, particularly in relation to the protection of structurally vulnerable groups in the workplace. While the Irish Constitution confers the right of freedom of association to join a trade union, these organisations currently have no legislative right to be recognised in the workplace for collective bargaining purposes, and employees have no right to make representations to their employer through their union. We have regularly highlighted that issues

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<sup>1</sup> IHREC, [Strategy Statement 2022–2024](#) (2022) pp. 10–11.

<sup>2</sup> IHREC, [The Incorporation of Economic, Social and Cultural Rights into the Irish Constitution](#) (2023).

<sup>3</sup> IHREC, [Code of Practice on Equal Pay](#) (2022).

<sup>4</sup> IHREC, [Public consultation on the mid-term review of the Pathways to Work Strategy 2021 – 2025](#) (2023)

<sup>5</sup> IHREC, [Policy Statement on the Index-Linking of Welfare Payments \(Welfare Indexation\)](#) (2023).

<sup>6</sup> IHREC, [Submission on the Review of the Equality Acts](#) (2023); IHREC, [Submission on the Review of the Equality Acts](#) (2021).

<sup>7</sup> IHREC, [Comments on Ireland's 20th National Report on the Implementation of the European Social Charter](#) (2023);

IHREC, [Comments on Ireland's 19th National Report on the implementation of the European Social Charter](#) (2022).

<sup>8</sup> IHREC/ESRI, [Monitoring Decent Work in Ireland](#) (2021).

relating to decent work in Ireland exist against the backdrop of weak protection of collective bargaining in Ireland and the lower uptake of trade union membership among structurally vulnerable groups.

This report provides a valuable and informative discussion of the constitutional position of the right to collective bargaining. While the authors contend that the Irish courts may recognise a constitutional right to collective bargaining, a key finding of the report is that a statutory framework and protection for collective bargaining is essential, whether this constitutional right is recognised or not. The authors conclude that the Constitution is not a barrier to a statutory right to collective bargaining if safeguards, which respect relevant constitutional rights and principles, are included in the legislation. We are of the view that immediate action by the State is required to address the lack of statutory provision for the right to collective bargaining in Ireland and the imbalance of power in the labour market.

The publication of this report comes at a time when there are significant developments on labour rights at a European and international level. The State is required to transpose the Directive on Adequate Minimum Wages in the European Union by November 2024.<sup>9</sup> This Directive includes a legal obligation on Member States with less than 80% of the workforce covered by collective bargaining agreements to adopt measures to increase coverage. We will engage with the State on the Directive as it is transposed into Irish law. Through our membership, along with the Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission, of the Article 2 Dedicated Mechanism Working Group, we will monitor any diminution and divergence of labour rights across the island of Ireland.

The State will be reviewed by the United Nations Committee on Economic, Social and Cultural Rights in early 2024. We will engage in this process by attending the review and making a submission to the Committee examining the implementation of the rights of the International Covenant on Economic, Social and Cultural Rights in Ireland. We will raise with the Committee our ongoing concerns on the lack of statutory protection for collective bargaining along with other aspects of access to decent work and fair remuneration. We will advocate for the State's full implementation of the Committee's Concluding Observations.

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<sup>9</sup> [Directive \(EU\) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union.](#)

I'd like to thank Dr Alan Eustace and Professor David Kenny for preparing this important research report, which identifies the importance of statutory protection for collective bargaining, whether that exists alongside a constitutional right or not. We hope that the insights presented in this report will be of use not only to those working in the protection and promotion of labour rights and human rights and equality more generally, but will be brought to bear in the wider legislative and policy-making sphere.

A handwritten signature in black ink, appearing to read 'Sinéad Gibney', written in a cursive style.

Sinéad Gibney

Chief Commissioner

## Executive Summary

This research paper considers the constitutional position in respect of a right to collective bargaining, in order to assess whether the Irish Constitution might protect such a right, and/or facilitate the protection of such a right in statute. It begins by offering a constitutional and legal context in respect of this right, and outlines relevant constitutional provisions. It continues by assessing whether there is a right to collective bargaining protected in the Irish Constitution, either as a facet of a textually-protected right to freedom of association, or as a separate derived constitutional right. It then considers if there are any constitutional impediments to the protection of such a right in statute, and considers possible conflicting rights and objections based on delegation of legislative power. It finally offers a series of conclusions based on this analysis.

The paper draws several core conclusions. First, the Irish Constitution, as interpreted up to this point, does not protect a right to bargain collectively. Secondly, there is a reasonable argument that the Irish courts would recognise a right to collective bargaining either as an element of freedom of association, or as a derived constitutional right. However, since this has not been successfully argued previously, there is uncertainty as to whether the courts would accept this argument. Thirdly, a statutory framework and protection for collective bargaining is in any event essential to protect the right effectively. Any such proposal would need to be closely assessed as to its constitutionality. However, there is a presumptive ability for the Oireachtas to legislate in this field and protect such a right. Fourthly, there are no conflicting rights recognised in the Constitution that are likely to render such a statutory protection unconstitutional. Finally, though there were previously constitutional barriers to such a protection related to delegation of legislative power, these were greatly reduced in a landmark Supreme Court judgment in 2021. The paper therefore suggests that a statutory right of this sort can be enacted in a constitutional manner, provided appropriate safeguards are in place in the legislation.

## Introduction

The question of whether and how to protect a right to collective bargaining in Irish law is a major issue in Irish law and policy.<sup>10</sup> This research paper explores the crucial but under-explored question of the constitutional status of a right to collective bargaining in order to consider how, if at all, the constitutional framework protects this right, and/or might facilitate or hinder the protection of such a right in statute.

Despite the fact that constitutional case law has had a significant impact on collective bargaining in practice, the question of a right to collective bargaining is surprisingly underdetermined in Irish constitutional law. The courts have suggested that collective bargaining does not form part of the constitutional right to freedom of association. However, the courts have never considered whether the Constitution might in fact protect an entitlement to collective bargaining as a derived or implied right. Nor has the constitutionality of a statutory right to collective bargaining (or, concomitantly, a ‘duty to bargain’ on employers) been considered. Such a statutory entitlement and duty might be upheld by reference to some constitutional rights; be protected as an area of valid legislative action (without reliance on constitutional rights); or be invalidated by virtue of other constitutional rights or other limitations on state power. Here, we seek to provide a contextual account of the constitutional law relevant to these questions, and draw conclusions about how these matters might be resolved.

This research paper seeks to give a sense of the constitutional law of Ireland as it is, and as it might develop, in this important area. We offer our considered academic views here as experts in constitutional and/or labour law to help inform policy and advocacy on this topic. Since the question has not been determined by the courts, we can only offer tentative answers, and it is always possible that the courts will rule in another way.

The research paper will proceed in three parts. In Part I, we canvass the general legal context of this right in Ireland, and the specific constitutional context, considering relevant constitutional

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<sup>10</sup> A High-Level Group, formed under the auspices of the Labour Employer Economic Forum (LEEF) and chaired by leading labour law academic Professor Michael Doherty, reported in October 2022. *Final Report of the LEEF High Level Working Group on Collective Bargaining*, October 2022.

rights and principles. This contextual analysis shows that there is no currently-recognised constitutional protection for the right to collective bargaining in Ireland.

In Part II, we consider whether an argument can be made that the Constitution does protect such a right, looking first at the possibility of protecting this as part of the right to freedom of association; secondly, at the possibility of such a right being 'derived' from this and other parts of the constitutional text; and thirdly, at the possible influence of the EU Charter of Fundamental Rights and European Convention on Human Rights on this analysis. We conclude that there is a good case to make in favour of a right to collective bargaining, and that it is very possible that the courts might recognise it. However, as with any such novel protection of rights, it is far from certain that the courts would agree to recognise this right, and we can only say that there is a good case in its favour.

In Part III, we consider the protection of a statutory right to collective bargaining, and ask whether there would be any constitutional objections or obstacles to such a protection. We look in detail at possible objections based on such a protection violating other constitutional rights, and/or offending constitutional rules about delegation of law-making/policymaking power. Following detailed analysis, we think that rights-based objections are unlikely to render such a statutory protection unconstitutional, and any potential constitutional issues with delegation could be addressed with careful design of the statutory scheme. We also comment briefly on the idea of a constitutional right, if recognised, being used in support of such a measure. Finally, we reach a series of conclusion based on the preceding analysis.

## Part I: Legal and Constitutional Context

### General Legal Context

Before we begin, it is important to define the subject of our discussion: what do we mean when we say ‘collective bargaining’?

We will use the definition employed by the International Labour Organisation:

‘[T]he term ‘collective bargaining’ extends to all negotiations which take place between an employer, a group of employers or one or more employers’ organisations, on the one hand, and one or more workers’ organisations, on the other, for:

- a) determining working conditions and terms of employment; and/or
- b) regulating relations between employers and workers; and/or
- c) regulating relations between employers or their organisations and a workers’ organisation or workers’ organisations.’<sup>11</sup>

This broad definition includes trade union (or similar organisations) bargaining with an employer/a group of employers/sector of employers on behalf of workers. Ireland is something of an outlier among European peer countries in not protecting an entitlement to engage in collective bargaining, and in terms of low rates of collective bargaining.<sup>12</sup> The reasons for this are contestable, but it is possible that the EU-IMF bailout was responsible for some erosion (or at least stymied progress that might otherwise have taken place).<sup>13</sup> There has also traditionally been a widely-held belief in Irish labour relations that state and legal intervention was not the best means to promote collective bargaining and posed risks to the independence of trade unions and employers – an approach known as ‘voluntarism’.<sup>14</sup> However, there has been some legal

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<sup>11</sup> ILO Convention 154, Article 2.

<sup>12</sup> Alan Eustace, *Collective Benefit: Harnessing the power of representation for economic and social progress*, Report for Fórsa, May 2021, 14ff.

<sup>13</sup> Alan Eustace, *Collective Benefit: Harnessing the power of representation for economic and social progress*, Report for Fórsa, May 2021, 17-18; Torsten Müller, Kurt Vandaele and Jeremy Waddington (eds), *Collective Bargaining in Europe: Towards an Endgame*, Volume II (ETUI 2019) 319-20. This is disputed by the European Commission: see *Industrial Relations in Europe 2014* (Publications Office of the European Union 2014) ch 3.

<sup>14</sup> See Alan Eustace, *Collective Benefit: Harnessing the power of representation for economic and social progress*, Report for Fórsa, May 2021; Oisín Quinn, ‘Existing Duties on Employers to Consult with Trade Unions’ (1999) 4(6) *The Bar Review* 305.

regulation of collective bargaining, notably the Industrial Relations Act 1946 and its successors, creating a sort of ‘back door’ collective bargaining system.<sup>15</sup> As discussed below, there is some potentially-hostile case law of the Irish courts on the constitutionality of such measures.

## Constitutional context

It is important, in order to ground our analysis, to set out the prevailing position in Irish constitutional law related to this topic.

### Constitutional rights relevant to collective bargaining

The Irish Constitution protects the right to freedom of association in Article 40.6.1°:

‘The State guarantees liberty for the exercise of the following rights, subject to public order and morality:

...

iii. The right of the citizens to form associations and unions. Laws, however, may be enacted for the regulation and control in the public interest of the exercise of the foregoing right.’

There is some case law of the Irish courts interpreting the association rights in Article 40.6.1°, but not as much as might be anticipated given the importance of the rights in question and the long period in which these rights have been in force. In this case law, the Irish courts have not, in short, treated this right in a collective manner, focusing on a highly individualised entitlement to associate. The constitutional guarantee has been held to defend some voluntary union activity, with (probably) a right to strike, but without compelled union membership and without (so far at least) a right to collective bargaining.

Indeed, a striking feature of the existing case law is that the focus on a right to *disassociate*. The right has been held to prevent existing workers being forced to join a union.<sup>16</sup> Conversely, it has also been held to prevent a union being forced to accept anyone into membership, unless such

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<sup>15</sup> See Alan Eustace, ‘The Electrical Contractors Case: Irish Supreme Court Illuminates Collective Bargaining and Delegated Legislation’ (2022) 85(4) *Modern Law Review* 1029.

<sup>16</sup> *Educational Co of Ireland v Fitzpatrick (No 2)* [1961] IR 345; *Meskeil v C oras Iompair  ireann* [1973] IR 121.

membership is essential for vindication of the constitutional right to work.<sup>17</sup> This essentially constitutionally prohibits a closed shop, at least for existing employees.<sup>18</sup> (It is worth noting this is in keeping with jurisprudence of the European Court of Human Rights under Article 11 ECHR.)<sup>19</sup> The courts have also held that union members have a right to participate in union decision making.<sup>20</sup>

There are several cases where the courts have suggested *obiter* (that is, in a non-binding comment that was not central to the precedential holding of the case) that there is a constitutional right to strike.<sup>21</sup> The Supreme Court has held strike action, taken with due notice, cannot be held to be a breach of a contract of employment.<sup>22</sup> This would also strongly suggest a constitutionally protected right to strike. There may, however, be constitutional limits on this right. The Supreme Court in one case granted interlocutory injunction to prevent industrial action interfering with the rights of third parties, though this is not perhaps the best quality of legal authority.<sup>23</sup> It is also not entirely clear whether the right to strike is part of freedom of association, or a corollary of the right to work (*i.e.*, the right to withdraw one's labour). This is relevant for present purposes because the latter implies that the courts view the rights relating to trade union activity as fundamentally *individual* rights, rather than inhering in the collective (the union itself). Such an approach poses a conceptual barrier to the recognition of a positive right to bargain collectively. An individualised right to collective bargaining might prevent the state disproportionately restricting self-standing bargaining processes to the detriment of an individual, but is unlikely to require positive state action to support bargaining by a collective entity like a trade union.

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<sup>17</sup> *Murphy v Stewart* [1973] IR 97. However, see *O'Connell v BATU* [2016] IECA 388 on the question of union membership being essential to vindicate a right to work.

<sup>18</sup> In *Becton, Dickinson & Co Ltd v Lee* [1973] IR 1, Henchy J considered whether the Constitution could prohibit a closed shop at the point of entry, but the point was not formally decided in that case, or subsequently.

<sup>19</sup> See, for example, *Sørensen and Rasmussen v Denmark* Applications nos 52562/99 and 52620/99, (2008) 46 EHRR 29

<sup>20</sup> *Rogers v ITGWU* [1978] ILRM 51.

<sup>21</sup> *Brendan Dunne Ltd v Fitzpatrick* [1958] IR 29; *Educational Co v Fitzpatrick (No 2)* [1961] IR 345. See Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution (5th edn, Bloomsbury 2018)* [7.3.267] (hereinafter *Kelly*).

<sup>22</sup> *Becton Dickinson and Co Ltd v Lee* [1973] IR 1; *Bates v Model Bakery Ltd* [1993] 1 IR 359. See *Kelly* (n 21) [7.3.267].

<sup>23</sup> *Talbot (Ireland) Ltd v Merrigan (30 April 1981) SC (ex tempore)*. This was an *ex tempore* judgment, delivered from the bench at the conclusion of argument rather than reserved and carefully written, and the injunction was interlocutory (that is, a provisional injunction, pending the full hearing of the matter) rather than final. It also did not involve a strike simpliciter, but rather a goods boycott being advanced to complement other industrial action. Cf *Crowley v Ireland* [1980] IR 102 where a High Court judge awarded damages to children whose education was affected by a teacher not enrolling them in school in solidarity with teachers striking in their original school.

More importantly for our purposes, the Irish courts have also held on several occasions that the right to freedom of association of employees does not create a legal duty on employers to negotiate with their union.<sup>24</sup> To put that another way, the constitutional right of freedom of association has been not been interpreted as encompassing a right to collective bargaining.

It is important to note some possible sources of constitutional opposition to collective bargaining rights. Employers have rights to private property over their business interests, which could be argued to be limited by collective bargaining in some circumstances. There is a related right to earn a livelihood, on the part of either employers or other workers, that could be engaged if collective bargaining could be shown to undermine this.

There is also one *obiter* (that is, not binding) suggestion of one judge of the Supreme Court that employers may have a right *not* to be compelled to recognise a trade union, or a right to operate a non-unionised enterprise. This comment, from Geoghegan J in *Ryanair v Labour Court*,<sup>25</sup> would act as a significant restriction on collective bargaining if it were endorsed by the Supreme Court in future. However, for reasons we discuss below, we think such an endorsement is unlikely.

### Legislative power/non-delegation issues

Article 15.2.1<sup>o</sup> states:

‘The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.’

The effect of this vesting of legislative power in the Oireachtas alone is to limit the extent to which subordinated bodies can, even with legislative authorisation, make policy choices in implementing legislation. One significant effect of this has been to place constitutional restrictions on some mechanisms that facilitated collective bargaining. In several major decisions, the Irish courts invalidated certain collective bargaining measures as infringements upon the legislative power. This was because the laws empowered a delegate to make broad decisions about regulating a trade/profession/sector in a way that amounted to making policy, and this these delegated

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<sup>24</sup> *El Co Ltd v Kennedy* [1968] IR 69; *Dublin Colleges Academic Staff Association v City of Dublin Vocational Education Committee* [1981] 7 JIC 3101; *Abbott and Whelan v the Irish Transport and General Workers Union* (1982) 1 JISLL 56, where McWilliam J said ‘The suggestion ... that there is a constitutional right to be represented by a union in the conduct of negotiations with employers ... in my opinion could not be sustained. There is no duty placed on any employer to negotiate with any particular citizen or body of citizens.’ See Kelly (n 21) [7.6.194].

<sup>25</sup> [2007] 4 IR 199 [35], per Geoghegan J.

decisions ultimately were given the force of law.<sup>26</sup> More recently, however, the Supreme Court seems to have relaxed the stricture of this case law.

Under the Industrial Relations Act 1946, any party to a collective labour agreement could apply to the Labour Court for ‘registration’ of the agreement. Such a Registered Employment Agreement (REA) would then bind all operators in the sector. The Act also provided for Joint Labour Committees (JLCs) for specific industries that could, in conjunction with the Labour Court, produce Employment Regulation Orders (EROs) that would mandate pay and conditions in that industry. In 2011, the High Court invalidated as unconstitutional the JLC/ERO mechanism, on the basis that it excessively delegated power to the Labour Court to ‘make law’ without sufficient guidance in terms of ‘principles and policies’ in the parent Act.<sup>27</sup> In 2013, the Supreme Court held that the system of REAs was unconstitutional on the same basis.<sup>28</sup> The core issue was that these agreements and orders made policy, and operated in a binding manner on third parties, and could even attract criminal sanction for breach. Yet they were not made by the legislature, the holder of the sole and exclusive power to make laws, and were not sufficiently governed by legislative *direction* for the delegate not be effectively given policymaking power.

This pair of decisions ended these the legal regimes, and invalidated orders and agreements made under them.<sup>29</sup> These cases were also the high-water mark of the ‘principles and policies’ test, as it was known: the constitutional rule that statutes delegating rulemaking power must include in the statute itself all principles and policies needed to use the delegated power, with only the details of the policy left for the delegate to decide.<sup>30</sup>

Legislative change followed both of these judgments to attempt to solve these constitutional problems, which resulted in somewhat weaker protections that attempted to offset the courts’

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<sup>26</sup> See *Kelly* (n 21) [4.2.23] et seq.; Daryl D’Art, ‘Freedom of Association and Statutory Union Recognition: A Constitutional Impossibility?’ (2020) 63 *Irish Jurist* 82. Interestingly, one of the first times that the possibility of a ‘principles and policies’ test for delegation was seriously considered was in relation to collective bargaining measures; see *Burke v Minister for Labour* [1979] IR 354.

<sup>27</sup> *John Grace Fried Chicken v Catering JLC* [2011] IEHC 277.

<sup>28</sup> *McGown v Labour Court* [2013] IESC 21.

<sup>29</sup> See Michael Doherty, ‘New Morning? Irish Labour Law Post-Austerity’ (2016) 39(1) *Dublin University Law Journal* 51; Michael Doherty, ‘Battered and Fried? Regulation of Working Conditions and Wage-Setting after the *John Grace* Decision’ (2012) 35(1) *Dublin University Law Journal* 97.

<sup>30</sup> It was never really the case in practice that the courts required all principles and policies to be in the statute. It is more accurate to say that *some* principles and policies—some significant guidance—had to be included at statutory level. See *Kelly* (n 21) [4.2.48]-[4.2.49].

concerns.<sup>31</sup> These new measures were then subject to constitutional challenge on the same basis in the case of *Náisiúnta Leictreach Contraitheoir Éireann (NECI) v Labour Court*.<sup>32</sup> Part III of the Industrial Relations (Amendment) Act 2015 gave the Labour Court statutory authority to issue a ‘Sectoral Employment Order’ (SEO) that would set terms and conditions across a sector of the economy. A ‘substantially representative’ trade union or employers’ organisation can request such an order, which can be recommended by the Labour Court after a process of consultation if it believes this will ‘promote harmonious relations’ and avoid industrial unrest in the sector, and once various other consequences are considered.<sup>33</sup> The Minister may then lay the recommendation before the Houses of the Oireachtas as a statutory instrument, and if approved, it applies to all workers in the sector.

This was a substantially more rigorous process for approval of these measures than the JLC/ERO and REA systems that preceded it. Despite this, NECI—representing electrical contractors, an industry that was subject to such an order—challenged it on the same grounds that invalidated the previous system. The High Court held that the new measures were also unconstitutional on the basis of excessive delegation of legislative powers, not in conformity with the ‘principles and policies’ test. This decision was widely criticised.<sup>34</sup> The Supreme Court, however, reversed the High Court determination and upheld the Act as constitutional (while agreeing with a less significant determination of the High Court that the statutory process had been imperfectly complied with). This was not only ‘one of the most important decisions in Irish labour law in decades’,<sup>35</sup> it also represented a significant shift in the Supreme Court’s case law on delegation of legislative power, signalling the beginning of a more permissive approach.<sup>36</sup> This is discussed further in Part III.

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<sup>31</sup> See Industrial Relations (Amendment) Act 2015, 2012 Act. This limited REAs, for example, to parties to the agreements rather than making them more general.

<sup>32</sup> [2020] IEHC 303; [2021] IESC 36.

<sup>33</sup> See Section 15. Section 16 sets out various factors the Labour Court must consider, including the impact on employment and competitiveness; any existing agreement on pay and conditions; and remuneration levels in similar sectors. It must also consider that the order will ensure fair and sustainable rates of remuneration.

<sup>34</sup> Alan Eustace, ‘A Shock to the System: Sectoral Bargaining Under Threat in Ireland’ (2021) 12(2) European Labour Law Journal 211.

<sup>35</sup> See Eustace (n 15).

<sup>36</sup> Conor Casey, ‘The Supreme Court and the Reformation of the Non-Delegation Doctrine: Náisiúnta Leictreach v. Labour Court’ (2021) 4 ISCR.

## Part II: A Constitutional Right to Collective Bargaining?

The first major question to address is whether it could be successfully argued that there is a constitutional right to collective bargaining in Ireland that has not yet been recognised. There are three facets to this, that will be dealt with in turn: arguing the right to be a part of textual freedom of association rights; arguing the right to be a ‘derived’ constitutional right; and, a facet to these first two enquiries, arguing that the right should be recognised as part of the Constitution based on the protection of such a right in the EU Charter of Fundamental Rights or the ECHR. These will be dealt with in turn.

### A facet of a right to freedom of association

There is a reasonable case, on the face of text, to say that collective bargaining should be seen to be part—indeed, a hugely important part—of the constitutional guarantee of freedom of association. The right expressly envisages the forming of unions; it is a short leap to go from the formation of a union to the idea that there is a right to bargain collectively. That, indeed, is what unions are for: they address the inequality of bargaining power between employer and employee. Many academic commentators talk about trade unions as having an inherently ‘regulatory’ purpose: that they exist precisely to help determine the working conditions in businesses and across sectors of the economy, alongside employers and the state.<sup>37</sup> The way they accomplish this function is primarily through collective bargaining; therefore, protecting a right to join a union strongly suggests a right to bargain collectively. The right to freedom of association in Article 40.6.1° is obviously qualified by reference to public order and morality, and expressly can be delimited by law, so there are clear possibilities for limitation. But the right to associate is strongly protected in the first instance, before allowing that qualifications may be made by law. There is a very credible case that this should be read as including a right to bargain collectively, though this right would of course be subject to statutory regulation and balancing with other rights.

Persuasive as this seems to us, the current precedents of the Irish courts are somewhat averse to this reading. As discussed above, the Irish courts have on several occasions refrained from recognising an entitlement to compel one’s employer to engage with a union, therefore denying a

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<sup>37</sup> KD Ewing, ‘The Function of Trade Unions’ (2005) 34(1) *Industrial Law Journal* 1.

right to collective bargaining as part of the Article 40.6.1° right to associate.<sup>38</sup> The focus of the case law on association on *disassociation*, and the still somewhat limited recognition of a right to strike, make the constitutional right to associate relatively weak in terms of labour rights. There is also the sole (and questionable) comment of Geoghegan J suggesting there may be a conflicting right in the Constitution not to be compelled to engage with unions in bargaining.<sup>39</sup>

However, we suggest that this matter cannot be regarded as settled. The Supreme Court might be willing to reconsider the meaning of the freedom of association in Article 40.6.1° and its inclusion of a right to collective bargaining. There are several reasons for this. First, there has not been a great deal of case law in this area seeking to use Article 40.6.1° to protect workers. As Whyte sums it up:

‘[M]ost of the constitutional case law on freedom of association in the context of industrial relations has been taken by individual workers against trade unions, rather than by workers or unions seeking to counter the exploitation of workers by employers’<sup>40</sup>

The major case law of the courts on this topic is several decades old. This means that there is a lack of rich contemporary case law that considers these questions in proper context, or by reference to subsequent international legal developments. Further cases might elucidate the issue more effectively. We would therefore say, like Whyte, that the issue is ‘not yet authoritatively settled’.<sup>41</sup>

Secondly, there is a real sense in which the protection of the right to associate in unions in Article 40.6.1° does not make sense if collective bargaining is not protected to some degree as part of this. As the authors of *Kelly: the Irish Constitution* put it:

‘the traditional justification for protecting the right of workers to associate together in trade unions is that such collective action is necessary to offset the inherent inequality of bargaining power that exists between the individual employer and the individual employee.’<sup>42</sup>

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<sup>38</sup> See (n 24) above.

<sup>39</sup> [2007] 4 IR 199 [35], per Geoghegan J.

<sup>40</sup> Gerry Whyte, ‘Catholic Social Teaching and Freedom of Association in Ireland’ (2019) 108 *Studies* 421.

<sup>41</sup> *Ibid* 428.

<sup>42</sup> See Kelly (n 21) [7.6.195].

If the right to form a union does not require that employers engage with the union, they continue, this might ‘undermine fatally the purpose of protecting the right of workers to form unions’.<sup>43</sup> The right to unionise without the right to bargain collectively is Hamlet without the Prince. This argument could be made to suggest to the Supreme Court that its past case law needs to be revisited and reconsidered.

The above does not necessarily overcome the issue raised earlier, that the right to collective bargaining might be a negative, individual right that does not require the state to support bargaining. However, our final reason the courts may reconsider the case law on freedom of association does lean in the direction of greater state involvement in collective bargaining to the benefit of the collective. There was some indication in the landmark *NECI* case in 2021 that the Supreme Court considers the right to association to at the very least be engaged in this area. In upholding the legislation in this case, MacMenamin J noted that ‘whilst not directly invoked’ in the case, ‘the constitutional right of freedom of association may well arise for consideration’ in this context,<sup>44</sup> that context being one which explicitly involved a system of public infrastructure for involving trade unions and employers in the regulation of economic sectors. The Supreme Court also noted in a 2019 case, in the context of considering freedom of association with regard to political parties, that freedom of association may have to be thought of in a collective rather than individual manner, which again might suggest a potentially changing attitude on the Court.<sup>45</sup>

All this means, we think, that there is a good case for suggesting that the interpretation of Article 40.6.1<sup>o</sup> should be reconsidered, and it should be reinterpreted as including a constitutional right to collective bargaining.

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<sup>43</sup> Ibid.

<sup>44</sup> [2021] IESC 36 [138].

<sup>45</sup> *Mohan v Ireland* [2019] IESC 18 [31]: ‘The strongest argument that can be made in this regard, in relation to the position of the political party, is perhaps the suggestion that freedom of association is a collective rather than an individual right, and the proceedings claiming an impact on freedom of association can only be brought by that collective body. This argument is not made directly or elaborated upon, but it seems to be an underlying theme of the respondents’ argument.’

## A derived constitutional right

A different approach would be to say that, while not immediately or directly protected by Article 40.6.1<sup>o</sup>'s protection of freedom of association, the right to bargain collectively is a *derived* right under the Irish Constitution.

The doctrine of derived right was formulated by the Supreme Court in 2020 in *Friends of the Irish Environment v Ireland*.<sup>46</sup> The Court held that there may be rights in the Constitution not stated in the Constitution text, but that—distinguishing this doctrine from the preceding unenumerated rights doctrine—such rights must be *derived* from the constitutional text and its provisions, structure, and values. As Clarke CJ put it for a unanimous Court:

‘there must be some root of title in the text or structure of the Constitution from which the right in question can be derived. It may stem, for example, from a constitutional value such as dignity when taken with other express rights and obligations’.<sup>47</sup>

In the later case of *Fox v Minister for Justice*, Clarke CJ said of the doctrine:

‘any right not expressly identified in the Constitution might nonetheless be found to be recognised by the Constitution having regard to the express provisions of the text itself together with the structure (for example, the democratic nature of the State) and values (for example, dignity) which the express terms of the Constitution recognise.’<sup>48</sup>

This relatively new doctrine therefore allows the courts to recognise rights that are not in the constitutional text once a link to the text, structure, or values of the constitutional order can be established.

In the event that the courts were unwilling to recognise a right to collective bargaining within Article 40.6.1<sup>o</sup>—perhaps because this would involve the overruling of past precedents of the courts, which is not done lightly—they might be willing to recognise collective bargaining as a right derived from this provision of the Constitution, as well as certain other textual provisions and

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<sup>46</sup> [2020] IESC 49.

<sup>47</sup> [2020] IESC 49 [8.6].

<sup>48</sup> [2021] IESC 61 [12.1].

values. One could argue, for example, that the right to bargain collectively derives from the right to freedom of association taken together with some or all of the following:

- the right to equality in Article 40.1 (being necessary to secure equality of bargaining power, and because there is evidence correlating high levels of collective bargaining with, for example, a smaller gender pay gap<sup>49</sup>);
- the constitutional right to earn a livelihood (a right previously recognised by the courts<sup>50</sup>);
- the right to strike (again, previously recognised by the courts, as discussed above);<sup>51</sup>
- the constitutional value of dignity (helping to secure working conditions compatible with that value);<sup>52</sup>
- the constitutional value of true social order, guaranteed by the Preamble, in helping to manage employer and employee relations in an ordered fashion;<sup>53</sup>
- the constitutional value of vocationalism, found in the constitutional structure in Article 15 and in the Seanad electoral system in Article 18 and 19, which includes organised Labour amongst its vocational panels;<sup>54</sup> and
- perhaps the Directives of Social Policy in Article 45 which, while not legally enforceable, have on at least one occasion been used (somewhat controversially) to interpret the scope of other rights in the Constitution.<sup>55</sup> These principles commit the state to 'direct its policy

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<sup>49</sup> OECD, 'Can collective bargaining help close the gender wage gap for women in non-standard jobs?' (July 2020) <<https://www.oecd.org/gender/collective-bargaining-and-gender-wage-gap-2020.pdf>> accessed 23 March 2023.

<sup>50</sup> See *Murtagh Properties v Cleary* [1972] IR 330.

<sup>51</sup> Most commentators in this field consider the right to strike as a way to make collective bargaining more effective; that is, the right to strike stems from collective bargaining, as one goes on strike to force employer to agree to one's collective bargaining position. If the Irish Constitution protects the right to strike, we think it is an obvious inference that it protects some right to bargain collectively as well.

<sup>52</sup> See Kelly (n 21) [2.1.34]-[2.1.41].

<sup>53</sup> See Kelly (n 21) [2.1.42]-[2.1.44].

<sup>54</sup> On the vocational design of the Seanad, see David Kenny, 'The Failed Referendum to Abolish the Ireland's Senate: Rejecting Unicameralism in a Small and Relatively Homogenous Country' in Albert, Baraggia & Fasone (eds.), *Constitutional Reform of National Legislatures: Bicameralism under Pressure* (Edward Elgar, 2019) 163, 165-167; on the decline of vocational thinking in the early years of the state, see Donal Coffey, 'The union makes us strong: National Union of Railwaymen v. Sullivan and the demise of vocationalism in Ireland' in Cahillane, Hickey & Gallen (eds.), *Politics, Judges, and the Irish Constitution* (Manchester University Press, 2017) 136. There could be a lengthy debate about the extent to which vocationalism supports collective bargaining or undermines it through centralising the forces of labour into vocational bodies, but it seems clear that it supports the underlying idea of compulsion to engage with organised labour to mediate social disputes about work.

<sup>55</sup> *Murtagh Properties v Cleary* [1972] IR 330. This case involved the industrial relations context, and recognised a right to earn a livelihood. However, in few other cases have been willing to regard the principles even in this limited way,

towards securing... that the ownership *and control* of the material resources of the community may be so distributed amongst private individuals and the various classes as best to subserve the common good'<sup>56</sup> and to 'endeavour to secure that private enterprise shall be so conducted... as to protect the public against unjust exploitation'.

These factors essentially build on the argument for recognising the right as part of freedom of association outlined above. The protection of unions in Article 40.6.1° is a strong 'root of title' for the right to collective bargaining, given how essential it is to making union membership meaningful, and to address the social problems which unions exist to ameliorate. The other constitutional text and values discussed here serve to further bolster that case. We think, based on all of this, that there is at the very least a good, reasonable case that such a right should be recognised in the Irish Constitution as a derived right.

### Interpretation of constitutional rights in line with EU Charter/ECHR<sup>57</sup>

An important additional factor in each of the foregoing enquiries is the relevance of the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights. The former, as a part of the fundamental law of the EU, is binding and directly applicable in Ireland, but only in respect of application of EU law.<sup>58</sup> The ECHR has effect in Irish law by way of the ECHR Act 2003, but while this has a range of effect in domestic law, it is not equivalent to constitutional protection. This being so, how could these bodies of law affect the recognition of a *constitutional* right to collective bargaining?

The EU Charter has several relevant provisions in this respect. In Article 12(1), the Charter states:

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and some judges have been critical of the *Murtagh* case. See Kelly (n 21) [7.10.11] et seq; dissenting judgment of Hogan J in *NHV v Minister for Justice* [2016] IECA 86 at [54].

<sup>56</sup> Emphasis added. Returning to the 'regulatory' model of trade unionism discussed above, collective bargaining allows for 'control' of material resources to be distributed between employers and workers, without disturbing the 'ownership' of such resources.

<sup>57</sup> We have declined to consider other international legal instruments to which Ireland is a party which more directly concern the right to collective bargaining, such as the European Social Charter. Instead, we have focused on the EU Charter and the ECHR because these have had the strongest influence on Irish constitutional law, and because they are more easily enforced both domestically and internationally.

<sup>58</sup> See Suzanne Kingston, 'Two-Speed Rights Protection? Comparing the Impact of EU Human Rights Law and ECHR Law in the Irish Courts' in Egan, Thornton and Walsh (eds), *Ireland and the European Convention on Human Rights: 60 years and beyond* (Bloomsbury Professional, 2014).

‘Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.’

Article 27 states:

‘Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.’

Article 28<sup>59</sup> states:

‘Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.’

Based on these provisions, we can say that the EU Charter of Fundamental Rights contains a strong protection in principle of collective bargaining. There are, of course, other principles of EU law (including Charter rights) that protect the interests of employers,<sup>60</sup> but as one of the present authors has elaborated elsewhere, the Charter nevertheless clearly envisages member states providing for collective bargaining in domestic law.<sup>61</sup>

There is also some case law of the ECtHR suggesting that the ECHR defends a right to collective bargaining. In *Demir v Turkey*, for example, the Court stated that the right to bargain collectively was an essential element of a right—protected in Article 11 of the Convention—to form and join trade unions.<sup>62</sup> Article 11.1 reads: ‘Everyone has the right to freedom of peaceful assembly and to

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<sup>59</sup> See further Filip Dorssemont and Marco Rocca, ‘Article 28 – Right of Collective Bargaining and Action’ in Filip Dorssemont, Klaus Lörcher, Stefan Clauwaert and Mélanie Schmitt (eds), *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Hart Publishing, 2019).

<sup>60</sup> See, for example, the freedom to conduct a business in Article 16 of the Charter, and the interpretation of the Treaty provisions on free movement of workers and freedom of establishment within the internal market evident in C-341/05 *Laval* EU:C:2007:809, [2007] ECR I-11767 and C-438/05 *Viking Line* EU:C:2007:772, [2007] I-10779, respectively.

<sup>61</sup> See Eustace (n 14).

<sup>62</sup> [2008] ECHR 1345. This case was noted by the Supreme Court in *NECI* [2021] IESC 36 [139], per MacMenamin J. Cf *Enerji Yapi-Yol Sen v Turkey* [2009] ECHR 2251. See Alan Bogg and Ruth Duke, ‘Article 11 ECHR and the Right to Collective Bargaining’ 2017 46(4) *Industrial Law Journal* 543.

freedom of association with others, including the right to form and to join trade unions for the protection of his interests’.

It must be stressed that neither of these rights instruments—the Charter or the ECHR—have any direct effect on the interpretation and meaning of the Irish Constitution.<sup>63</sup> However, they are clearly relevant, being persuasive sources of guidance for the courts engaging in rights interpretation.<sup>64</sup> The Supreme Court has recently noted that while interpretation in line with the ECHR, for example, is appropriate in some areas of constitutional rights,<sup>65</sup> it is certainly not the case that the Constitution must be ‘read in accordance with’ the Convention.<sup>66</sup> Any argument that ‘the Constitution was required to be interpreted in line with the ECHR to the greatest extent possible, is simply not tenable.’<sup>67</sup> Close analysis of constitutional text, and significant parallels between the provisions of the Convention and the Constitution, would be necessary in to persuade a court that the Constitution should be interpreted as having the same meaning as the Convention. Though it has not been subject to the same formal consideration, one can take it that the Charter has the same persuasive authority that the Convention has, but again there can be no argument that interpretation of the Constitution *must* track this instrument.

This means that though these European human rights instruments would likely be considered by the Irish courts in analysing the meaning of Article 40.6.1<sup>o</sup> or the possibility of a derived constitutional right, their influence in shaping the courts’ decision on collective bargaining right would be limited. They could operate as a reason to recognise the right, but a close analysis of the texts and their similarity of purpose and meaning would be needed for a court to persuaded of this.<sup>68</sup>

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<sup>63</sup> See *Fox v Ireland* [2021] IESC 61.

<sup>64</sup> See generally James Rooney, ‘International Human Rights as a Source of Unenumerated Rights: Lessons from the Natural Law’ (2017) 41(2) DULJ 141.

<sup>65</sup> The Court in *Fox* gave the example of the right to presence of a lawyer before questioning as elaborated in *DPP v Gormley and White* [2014] IESC 17 as an instance where there was very close alignment, but noted other case law of other systems was relevant in that case also. [2021] IESC 61, [12.12]- [12.15]. Cf *O’Callaghan v Ireland* [2021] IESC 68.

<sup>66</sup> [2021] IESC 61 [9.5].

<sup>67</sup> *Ibid* [12.10].

<sup>68</sup> The text of Article 11 of the Convention is fairly similar to Article 40.6.1. Text of the EU Charter is less so.

## Conclusion on recognition of constitutional rights

We believe there is a reasonable and arguable case that a right to collective bargaining is protected in the Constitution either as a facet of freedom of association, or as a derived constitutional right. Obviously, the context of a case claiming such a right would be important; the circumstances of the case would have to illustrate the importance of this interest to the other rights and values in the Constitution, and make a compelling case for its protection.

It is important to stress that, while predicting the outcomes of constitutional law cases is always challenging, there are possibly particular difficulties when it comes to novel rights claims. Asking the courts to recognise a new constitutional right, or a very important new facet of a right, is a significant request; courts would not make such a finding lightly, and so the outcome of such a claim is always highly uncertain. That said, we think there is at least a reasonable chance of success if an appropriate case were to arise.

The effect of such a claim succeeding is also hard to outline with any certainty. If the courts recognised a right of this sort, how strong would it be, and what effects would it have? This is highly context dependent, changing with the facts of the case. It is unlikely that the courts would recognise a right so strong as to mandate a particular employer engage with a particular union in the absence of some statutory framework regulating this. It is more likely that the courts would declare such a right to exist and perhaps that the absence of a statutory framework to facilitate collective bargaining violated this right, without mandating what sort of statutory framework should be implemented to vindicate it. Indeed, we think that this is the most one could expect from such a constitutional protection, making statutory protection essential as well. At best, a constitutional right upholds, facilitates, and enables a robust statutory approach.<sup>69</sup> It is not a replacement for nor an alternative to statutory protection.

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<sup>69</sup> This level of protection would also be in line with international human rights law on this topic; see e.g. *Demir v Turkey* [2008] ECHR 1345

## Part III: Constitutionality of a statutory right/protection

The second major part of our analysis is to consider the constitutional position of a statutory right to collective bargaining. The statutory framework has long been very important in this area in Ireland, and a statutory protection can be specific and actionable in a defined way that a constitutional protection—which would by nature be somewhat general—cannot. It would be essential, even were a general constitutional entitlement to be recognised, to make this right concrete and actionable with a robust legislative framework. Therefore, seeking to defend this entitlement primarily at the statutory level is a prudent course.

Statutory protection for collective bargaining could take two different forms: the protection of a *right* in statute, and/or a legislative regime that protected the substance of such a right—that enabled collective bargaining in practice with a series of statutory powers and mechanisms—without using rights language.

Rights can be recognised in terms in a statute. It is the primary means by which we recognised the ECHR, and the means by which other international rights commitments could be vindicated absent constitutional incorporation.<sup>70</sup> It is entirely possible to recognise a right in statute that is to have very concrete policy consequences.<sup>71</sup> In practice, Ireland has tended to avoid rights language in such statutory measures, even where it might be suitable.<sup>72</sup>

It is beyond the scope of this paper to consider the terms in which statutory protection might be sought, and the advantages and disadvantages that might come with using rights language in such a statute. Conducting this analysis would require very concrete objectives to be set out so that the effectiveness of different approaches could be adequately considered.<sup>73</sup> Here, we consider

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<sup>70</sup> There is a difference between statute and the Constitution vis rights protection, and there are some things that cannot be done without constitutional incorporation. It is somewhat telling that Ireland implemented several rights from the United Nations Convention on the Rights of the Child via constitutional change, and that proposals for protecting ESC rights focus on constitutional change rather than statutory implementation. See IHREC, *The Incorporation of Economic, Social and Cultural Rights into the Irish Constitution*, Policy Statement, February 2023.

<sup>71</sup> The statutory right to housing in Scotland is a good example of this; see Mercy Law Resource Centre, *The Right to Housing in Comparative Perspective* (2018).

<sup>72</sup> The Disability Act 2005, as one of many examples, does not use any rights language when it might. Limited exceptions would be information rights; data privacy; and brief mention of rights in the Education for Persons with Special Educational Needs Act 2004.

<sup>73</sup> The Labour Employer Economic Forum has proposed a possible statutory model; see *Final Report of the LEEF High Level Working Group on Collective Bargaining*, October 2022. Though the group did consider legal and constitutional

whether there could be constitutional objections to such measures. In all constitutional analysis of this sort, the devil is the details of the proposal, and different proposals would fare differently in court. However, we feel it is possible to make clear, general observations about the possible constitutional objections to such measures, and how they could be overcome.

The legislature enjoys a general power to legislate under Article 15 which gives it the authority to legislate on any matter, subject to any limits imposed by the Constitution. Therefore, there is a presumptive entitlement of the legislature to provide for this matter in law unless there is a concrete constitutional objection to this. This manifests in a presumption of constitutionality that is enjoyed by all legislative enactments, presuming their constitutional validity unless and until the contrary is established.<sup>74</sup> Added to this is the fact that the constitutional framework around freedom of association expressly envisages the regulation of this area by law, which gives some additional constitutional imprimatur to legislation in this area. The Constitution is express in affording legislative latitude in this respect.<sup>75</sup>

Another factor at play is that legislation of this sort would be vindicating and giving effect to the EU Charter right to ‘negotiate and conclude collective agreements’.<sup>76</sup> That this statutory entitlement would be upholding a fundamental right might afford additional legitimacy to the law, though the extent of this would have to be worked out in careful argument.<sup>77</sup> In particular, it is worth observing at this point that Ireland is obliged to transpose the EU Directive on Adequate Minimum Wages by November 2024. This Directive includes a legal obligation on member states with less than 80% of the workforce covered by collective bargaining agreements (Ireland currently has 34% coverage) to adopt measures to increase coverage.<sup>78</sup> The Irish courts have taken the view that legislation that is necessary to implement obligations of EU law is entitled to much

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impediments in very general terms, more detailed analysis of any proposed statutory model would be necessary to give firm opinions on constitutionality.

<sup>74</sup> Kelly (n 21) [6.2.198].

<sup>75</sup> Article 40.6.1(iii), having guaranteed the right of citizens to form associations and unions, states: ‘Laws, however, may be enacted for the regulation and control in the public interest of the exercise of the foregoing right.’

<sup>76</sup> Article 28, EU Charter of Fundamental Rights.

<sup>77</sup> A question that needs substantial further exploration is whether the existence of national protections for collective bargaining is envisaged by Article 28; whether enacting such protections would be necessitated by EU membership; and therefore whether such measures would be immune to any constitutional argument of invalidity. See generally on this rule Kelly (n 21) [5.3.69] et seq.

<sup>78</sup> For discussion of the potential impact of this Directive in Ireland and strategies for implementation, see Alan Eustace, ‘EU Directive on Adequate Minimum Wages: The Impact on Ireland’ (2023) 2 *Revue de droit du travail* 137.

greater deference in respect of review for compliance with the Constitution, because the Constitution itself provides for EU membership, the application of EU law in Ireland, and the supremacy of EU law over national law.<sup>79</sup>

We think these factors all suggest that a legislative measure to provide for a right to collective bargaining (whether expressed in terms of rights or not) is clearly within the constitutional competence of the Oireachtas, even more so if it is used to implement an EU Directive. There are then two possible objections that might be made about the unconstitutionality of such a measure: that there are other conflicting rights in the Constitution that would make this statutory protection unconstitutional; and that the non-delegation doctrine discussed above might make certain statutory measures constitutionally problematic. We will address these issues in turn.

### Conflicting rights objections

As noted above, there is one Supreme Court comment that suggests that there could be a right for employers *not* to negotiate with a union.<sup>80</sup> This right, if recognised, would likely frustrate statutory protections for collective bargaining. However, there are several reasons that we think this is not a concern. First, the only support for this right comes from a non-binding comment of one judge; this is a far cry from established law. Secondly, we think that the courts would not recognise this right because, far from having a basis in the constitutional text, the purported right cuts against the constitutional text. The Constitution gives a clear and unambiguous right to form unions in the text itself. If there were a countervailing right to not deal with unions at all, this would necessitate a denial of the right to strike, a strike being an attempt to force negotiation. This has not been done. Moreover, recognising this right would undermine the purpose of forming unions—which is protected in the constitutional text—in the first place. Whyte has offered a similar critique of this postulated right, with which we would agree.<sup>81</sup> We suggest, therefore, that Geoghegan J's comment in *Ryanair* cannot be correct, and the courts would not follow it to recognise this right.

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<sup>79</sup> Article 29.4.6. For discussion of the scope of this constitutional safeguard for EU law, see *Crotty v An Taoiseach* [1987] IR 713 and *Lawlor v Minister for Agriculture* [1990] 1 IR 356. See also Kelly (n 21) [5.3.70] et seq, and Gerard Hogan, 'Ireland: The Constitution of Ireland and EU Law: The Complex Constitutional Debates of a Small Country' in Anneli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (Springer 2019).

<sup>80</sup> [2007] 4 IR 199 [35], per Geoghegan J.

<sup>81</sup> Whyte (n 40) 427. Cf Kelly (n 21) [7.6.195].

In the event that the courts were to recognise such a right, we would suggest that the right would fundamentally clash with the express textual right to form a union. Where rights clash, the courts have held that the legislature is given a very wide latitude in how they are to be reconciled in statute.<sup>82</sup> This is because there is no way that both rights can be respected at the same time; one must be limited so that the other can be enjoyed. Legislative solutions to such clashes have to be general, and cannot be expected to perfectly balance the rights in every possible case. The Oireachtas is thus entitled to favour one right over another in many cases, and the courts will very rarely say that the legislature's chosen balance is incorrect or unconstitutional: only if the legislation is irrational will be invalidated. In *Tuohy v Courtney*, the landmark case on this point, the Supreme Court said:

'The Court is satisfied that in a challenge to the constitutional validity of any statute in the enactment of which the Oireachtas has been engaged in such a balancing function [in respect of two constitutional rights], the role of the courts is *not to impose their own view of the correct balance in substitution for the view of the legislature* as displayed in their legislation but rather to determine from an objective stance whether the balance contained in the impugned legislation is *so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights.*'<sup>83</sup>

This doctrine means that even if the questionable 'right' to not negotiate with a union were recognised, it would probably not be sufficient to render collective bargaining legislation unconstitutional. The courts would likely defer to a legislative solution balancing these conflicting rights in line with the *Tuohy* case, unless the legislation were contrary to reason and fairness.

We do not think there is a strong case that any other constitutional rights—such a property rights or rights to earn a livelihood—could credibly be said to be violated by a statutory protection on collective bargaining. These rights are qualified in the common good, and the legislature would be given leeway in determining that protecting collective bargaining was in the common good. The courts have long held that the Oireachtas has significant room to manoeuvre in making legislation in the social policy sphere and on contentious social and economic matters. In the landmark case of *Ryan v Attorney General*, Kenny J stated, in a widely quoted passage:

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<sup>82</sup> *Tuohy v Courtney* [1994] 3 IR 1.

<sup>83</sup> [1994] 3 IR 1, 47. Emphasis added.

‘None of the personal rights of the citizen are unlimited: their exercise may be regulated by the Oireachtas when the common good requires this. When dealing with controversial social, economic and medical matters on which it is notorious views change from generation to generation, the Oireachtas has to reconcile the exercise of personal rights with the claims of the common good and its decision on the reconciliation should prevail unless it was oppressive to all or some of the citizens or unless there is no reasonable proportion between the benefit which the legislation will confer on the citizens or a substantial body of them and the interference with the personal rights of the citizen. Moreover, the presumption that every Act of the Oireachtas is constitutional until the contrary is clearly established applies with particular force to this type of legislation.’<sup>84</sup>

Since collective bargaining may fall into the Kenny J’s category of ‘controversial’ social and economic matters, the legislature would enjoy significant deference in its determination to limit other rights in the common good. Moreover, it seems to us that any such limitation of other rights would be minor. In summary, we do not think that there are any strong rights-based objections to a statutory right to collective bargaining.

One important qualification should be made: though we do not think there are any rights sufficient to defeat legislation promoting collective bargaining in principle, the design of any such legislation must account for constitutional rights that might be infringed by it. The primary way in which this may arise is that any legislative scheme or public body that promotes or facilitates collective bargaining must follow fair procedures. There is a well-established individual right to fair procedures protected by the Constitution, and the Supreme Court observed in *NECI*:

‘It is not the task of this Court to engage in a detailed description of how the Labour Court [perform] each step of its statutory role... At the very minimum, it can be said that, in order for there to be constitutional compliance on a fair procedures basis, objectors are entitled to be dealt with in an even-handed way, by the observance of the substance of fairness in procedure, and, in particular, by a recommendation and report which set out clear reasons for the conclusions.’<sup>85</sup>

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<sup>84</sup> [1965] IR 294, 312.

<sup>85</sup> [2021] IESC 36 [144], per MacMenamin J.

Secondarily, any limitations on other rights must be proportionate. The legislation ought to demonstrate the Oireachtas has considered questions such as the least restrictive means of achieving the goal of the legislation, and the appropriate scope of application.<sup>86</sup>

Finally, it should be noted that if a law protecting collective bargaining were passed and later challenged on constitutional rights grounds, it could be argued in defence of the law that it protects and vindicates a constitutional right to collective bargaining of the sort discussed in Part I. If this argument were successful, it would afford the legislature the extra deference suggested in *Tuohy* in balancing two constitutional rights, and make it very unlikely that the courts would intervene to invalidate the law. This would be an apt context in which to mount the arguments discussed in Part I.

## Delegation objections

The other possible constitutional objection to a statutory protection of collective bargaining is that it might amount to unconstitutional delegation of lawmaking power. This, as discussed in Part I, was used on several occasions to invalidate as unconstitutional laws that provided for sectoral bargaining, as these laws empowered delegated bodies to make policy in the setting of pay and other working conditions. Any statutory mechanism similar to this would be open in principle to these objections. However, the landmark 2021 Supreme Court case of *NECI* has signalled a much more permissive approach to this constitutional question.

In the *NECI* case, the Supreme Court endorsed the constitutionality of Part III of the Industrial Relations (Amendment) Act 2015,<sup>87</sup> which suggests that similar mechanisms can be used to advance collective bargaining interests in future. The judgment suggests that the hostile past case law of the Irish courts said more about the absence of procedural safeguards and controls in previous legislative regimes than about any constitutional bar to collective bargaining.<sup>88</sup> As one of us summarised the effect of this case elsewhere:

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<sup>86</sup> Comparable legislation in other jurisdictions sometimes provides for exemptions for certain employers, such as small businesses, from the scope of a duty to engage in collective bargaining: see, for example, the UK Trade Union and Labour Relations (Consolidation) Act 1992, Schedule A1, s 7. This may be relevant to the proportionality assessment: see, for example, *Re Article 26 and the Employment Equality Bill* [1997] IESC 6. Of course, any such exemptions would have to work within the requirements of the EU Directive discussed above.

<sup>87</sup> [2020] IEHC 303. [2021] IESC 36.

<sup>88</sup> [2021] IESC 36 [28], [90], per MacMenamin J.

‘the Supreme Court has recognised the legitimacy of: (a) setting common standards for industry, even if that has differential effects on some employers and compromises the freedom of contract on the part of businesses and individuals; (b) assigning the setting of those standards to specialist, subsidiary institutions outside the parliamentary political process (albeit with political oversight); and (c) involving the social partners in the setting of those standards (subject to procedural safeguards for affected parties, and democratic accountability).’<sup>89</sup>

First, the Court accepted that the goal of collective bargaining is a legitimate legislative aim, and indeed that ‘protection and preservation of harmonious relations between employers and employees’ is a facet of the common good that the Constitution seeks to advance.<sup>90</sup> Secondly, the Court held that delegated bodies of this sort are entitled to make ‘difficult policy choices’<sup>91</sup> when the legislature authorises and requires this. This is a far cry from the former standard of all principles and policy choices being included in the statute itself. These holdings suggests that the most serious current constitutional bar to collective bargaining in legislation is readily surmountable.

The Supreme Court appeared to be on a trajectory of relaxation of the rules on delegation of legislative power since shortly after the Court’s invalidation of the REA system.<sup>92</sup> In two major cases, the strength of the principles and policies test for delegation—that all principles and policies necessary to exercise delegated power must be embodied in the parent legislation—seemed to be relaxed.<sup>93</sup> Instead, the Court focused on ongoing Oireachtas oversight and certain statutory safeguards for use of delegated powers.<sup>94</sup> *NECI* confirmed this trend, and offered a clearer reformulation of the approach to delegated legislation. The core of the enquiry should be about whether there had been abdication of the Oireachtas’ constitutional function as sole legislator rather than any strict requirement about the specificity of principle and policy.<sup>95</sup> While

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<sup>89</sup> Eustace (n 15).

<sup>90</sup> [2021] IESC 36 [94] per MacMenamin. Charleton J in his concurrence calls it a ‘key value’. [2021] IESC 36 [34] per Charleton J.

<sup>91</sup> [2021] IESC 36 [90]- [91]

<sup>92</sup> *McGowan v Labour Court* [2013] IESC 21.

<sup>93</sup> See *Bederev v Ireland* [2016] IESC 34; *O’Sullivan v Sea Fisheries Protection Authority* [2017] IESC 75; Kelly (n 21) [4.2.50]

<sup>94</sup> See Casey (n 36).

<sup>95</sup> [2021] IESC 36 [57].

the determination would have to be holistic, important factors to determine if the delegation is appropriate—if it is legislative or regulatory—would be:<sup>96</sup>

- Does the statute provide boundaries, in form of guidelines and policies, for the delegated power?
- Are the objectives of the delegation clear?
- Is there a defined subject matter for the delegated rulemaking power?
- Is there some safeguard on the power in the form of ministerial or legislative review?

*NECI* further suggests that the choice of delegate, and the form of any public body created or chosen for this purpose, matters. In that case, it was noted that labour relations are a subject that requires specialist expertise and experience, which the Labour Court had developed over the course of decades. It may be expressly in the common good and a justifiable objective of public policy that decisions be delegated to specialist bodies with greater expertise and legitimacy in a particular field than the Oireachtas itself. The high regard in which the Labour Court is held by industrial relations actors would thus lend it constitutional legitimacy in the event of a statutory right to collective bargaining that invoked its jurisdiction. Moreover, the structure of the Labour Court system, and the procedures set down in the relevant Act, require the active participation of trade unions and employers in decision-making and the formulation of policy. There are strong principled reasons of subsidiarity to favour the integrated involvement of the parties affected by regulation into the process of its creation, which collective bargaining is particularly apt to do.<sup>97</sup> This principle of subsidiarity is reflected elsewhere in the Constitution, in respect of families, education, religious and other social organisations, and the Directives of Social Policy.

The Court would also regard the fact that the Constitution is a ‘continuously operative charter of government, which does not, and cannot, require the Oireachtas to predetermine every choice made by a subordinate or delegate’.<sup>98</sup> Summing up the constitutional position, MacMenamin J

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<sup>96</sup> [2021] IESC 36 [62]- [69].

<sup>97</sup> See further Alan Bogg, ‘Subsidiarity or Freedom of Association? A Perspective from Labor Law’ (2016) 61(1) *American Journal of Jurisprudence* 143.

<sup>98</sup> [2021] IESC 36 [69].

said: 'What is necessary... is to lay down basic, discernible rules of conduct or guidelines which the subordinate body must observe'.<sup>99</sup>

Considering the legislative scheme in question, MacMenamin J concluded:

'The legislation does not trespass on the function of the legislature. It cannot be denied that the extent of the delegation here is significant. The power to make a recommendation which may have the force of law is nothing if not substantial. But the recommendation must take place in conformity with the statutory procedure, each step of which is laid down by the Oireachtas. The Chapter sets out both rights and duties for the protection of the parties, and for objectors. The deliberations are to take place in public. Objectors may appear and make their case. When considered closely, the statutory criteria are perhaps more subtle and nuanced than might first be thought. This analysis concludes that, in fact, the sections just analysed do set out discernible and intelligible goals; they express a set of legal principles whereby the policy of the Oireachtas is to be achieved.'<sup>100</sup>

Based on this analysis, it can be concluded that—provided safeguards of the sort found in the legislation upheld in *NECI* are included—delegation problems are unlikely to arise with legislation protecting collective bargaining entitlements.

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<sup>99</sup> [2021] IESC 36 [69].

<sup>100</sup> [2021] IESC 36 [137].

## Conclusion

The conclusions that follow from the foregoing analysis are as follows.

### Constitutional right to collective bargaining

- The Irish Constitution, as heretofore interpreted, does not protect a right to collective bargaining, though the EU Charter and European Convention on Human Rights have such a protection.
- It is possible that the Irish courts would be willing to recognise a constitutional right to collective bargaining either as a facet of the Article 40.6.1<sup>o</sup> protection of freedom of association or as a derived constitutional right, drawing from this Article and other textual provisions and values in the Constitution.
- We think that there is an arguable and reasonable case for recognition of such a right, notwithstanding certain adverse past holdings of the Irish courts. We think, therefore, that it can credibly be argued the Irish Constitution may be a facilitator and even a driver of protecting these rights.
- However, since this is not the current constitutional position, this has to be argued for, and established in a decision of the superior courts. The uncertainty surrounding any such claim is significant, as it is rare for courts to recognise a new right. Much would also depend on the facts of the case, and the way that the issue was presented to the courts.
- This might be an advantageous way to bolster and protect a statutory right to collective bargaining, but the difficulty and uncertainty around it makes pursuing judicial recognition of the right burdensome.

### Statutory Right

- A statutory protection for collective bargaining is any event essential, as a constitutional right would be hard to enforce or make real without a statutory framework.
- There are many ways that this might be approached, and the particular effects of specific proposals would have to be considered carefully in terms of their legal consequences and possible constitutional implications.

- That said, the plenary constitutional power of the Oireachtas to legislate on any matter not otherwise constitutionally proscribed means that a statutory protection is presumptively possible, and such a law would enjoy a presumption of constitutionality.
- This is further bolstered by the express constitutional authorisation to regulate freedom of association, which might be thought to envisage legislation of this sort, and the fact that this legislation would uphold and vindicate an EU Charter right and otherwise implement EU law.
- We do not think that there are any conflicting rights recognised by the Irish Constitution that would frustrate such a statutory protection, or we think their limitation by the Oireachtas would be found constitutional by the courts.
- While past case law on delegated powers suggests significant constitutional obstacles to laws of this sort, we think the recent judgment of *NECI* represents a significant reformulation of the constitutional position which vastly reduces these concerns, and provides a roadmap for design of a constitutionally-compatible law.
- We therefore conclude that Constitution is not a barrier to a statutory right to collective bargaining, and that no constitutional change would be necessary to facilitate a statutory right of this sort.<sup>101</sup> The legislature is free to pursue such a course, having careful regard to safeguards that would ensure all other relevant constitutional rights and principles are respected.

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<sup>101</sup> If we are incorrect in this, and there were insuperable constitutional issues with such a right, we think a simple textual addition to the Constitution would overcome this objection. The details of this would depend in part on the nature of the constitutional objection, but in most instances the express recognition of a right to collectively bargain in similar terms to the EU Charter would address the issue.



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