Corporatism, industrial relations and labour law in Ireland

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Introduction

The relevance of collective bargaining and industrial relations to economic welfare has been emphasised increasingly over the last two decades. Given rising inflation rates, unemployment and declining competitiveness, industrial relations activities have assumed an important role in economic policies designed to respond to these problems. In the following paper, the approaches followed by governments in Ireland in relation to economic policy and labour relations are outlined, focussing on the development of corporatist arrangements and the use of labour law as an instrument of economic policy.

The system of industrial relations in Ireland has a number of features which are usually associated with quite diverse systems in other countries. Given the historical political links with Britain, the Irish system is largely based on the British voluntarist tradition (Flanders, 1974). However, where the Irish system differs from the British is in the relatively persistent attraction of Irish governments to corporatist economic policy, deriving 'in part from the influence of Roman Catholic social teaching and in part from continental European models' (Von Prondzynski, 1992). Thus, although governments varied in the degree to which they adhered to corporatism over the period under discussion, nonetheless, industrial relations in Ireland has shown both corporatist and voluntarist characteristics, often simultaneously. In other words, while resorting to tripartite agreements on wage and social policy has been a feature of Irish industrial relations over the past two decades, industrial relations in Ireland also operates under the ideal of state abstention, where collective bargaining and industrial action at shopfloor level is a matter for employers and unions alone. The tension between these two features has surfaced on a number of occasions throughout the past two decades, leading to a period when corporatism was abandoned in favour of market forces in collective bargaining and proposals for increased legal restriction on industrial action (1982–1987) and to a more recent period of corporatism once again finding favour in government policy (1987–1994), but supported by greater legal restrictions on trade unions' ability to take industrial action. These developments will be explored below.

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I

1.1. The development of corporatism: economic expansion
In 1959, Ireland began its First Programme for Economic Expansion (Programme for Economic Expansion, 1958; Lee, 1989). A number of consultative bodies were established by government with the intention of inducing trade unions to co-operate in planning industrial development. While collective bargaining per se was to remain outside of such institutional frameworks until the 1970s, the inclusion of trade unions on national advisory bodies amounted to a gradual redefinition of the role of unions in Irish political and economic life. Union acquiescence to initial tripartite arrangements occurred because such arrangements were promoted with the aim of industrialisation, rather than conflict control. Thus the bodies in which unions became involved in the 1960s were primarily concerned with the development of the industrial sector, the promotion of employment and the attraction of foreign investment. Consequently, the perception was less that of the unions being coerced by the state than that the consultative and later corporatist arrangements between the social partners were the way to promote the interests of the trade unions' own constituency (Roche, 1992).

However, in the 1970s this situation changed as the tension between the auxiliary role of the state in industrial relations (see Kahn-Freund, 1977) and the Keynesian policies it followed began to increase. As in other Western countries, it was recognised in Ireland that unrestrained collective bargaining had adverse economic implications, especially in the form of wage-inflation (McCarthy, O'Brien and O'Dowd, 1975). Moreover, once the state embarked on Keynesian economic policies, industrial relations became politicised to the extent that trade unions and employers came under pressure from the state to behave in a manner consistent with state economic policies.

In 1967, the National Industrial and Economic Council (NIEC) had advanced the idea that incomes policy was necessary for economic growth and stability (NIEC, 1967). In 1970 the government commissioned a further report from the NIEC on prices and incomes policies (NIEC, 1970). The subsequent report placed considerable emphasis on the establishment of a tripartite Income and Prices Committee, which would take a leading role in monitoring pay levels. Although the Irish Congress of Trades Unions (ICTU) executive initially approved the report, the Annual Delegate Conference of the ICTU rejected it out of hand (McCarthy, C., 1973). This resulted in the government introducing the Prices and Incomes (Temporary Provisions) Bill, 1970. The choice for the trade unions and employers was clear: either to join in national level incomes agreements or face restrictive legislative control. In response to this dilemma, the trade union movement 'voluntarily' came to an agreement with the employers, through the Employer-Labour Conference, as to the relevant pay increases to be sought (Hillery, 1987).

During the remainder of the 1970s eight more such agreements were to be implemented, but with a significant difference between the scope of the earlier agreements and the latter versions of the 1977–1980 period. In effect, the difference was between simple wage restraint agreements and agreements which touched on
broader societal interests such as taxation, welfare spending and the legal rights of employees. One of the problems with the early agreements arose from the adverse effect of taxation levels on nominal pay increases, which caused increased pressure for higher nominal wage raises in order to achieve an increase in the level of real wages. The Federated Union of Employers (FUE)\(^1\) pressured the government to involve itself more in the National Wage Agreements, so that wages, taxation and levels of social welfare could be further integrated. The unions also sought faster responses from government in relation to taxation bands and allowances, requiring that government alter these so as to keep them in line with inflation.

Government was initially reluctant to involve itself in the agreements, preferring to see bipartite agreements created without an official government input. One reason given for this arm’s length position was that to engage the unions and employers in negotiations with government on national economic planning might amount to the usurping of the role of the Oireachtas\(^2\) (O’Brien, 1981). However, by June of 1975 the government found itself able to offer a series of budgetary proposals intended to prevent the continuance of the wage spiral, contingent on the renegotiation of the 1975 National Wage Agreement.

In the 1976 Green Paper *Economic and Social Development* and the 1978 White Paper *National Development 1977–1980* the government became more open to recognition of the role of tripartite agreements for economic planning. In 1977 the pattern of budgetary inducements on the basis of an agreed National Wage Agreement was repeated. In 1978, union acceptance of the National Wage Agreement was approved by a narrow majority. In 1979, the unions rejected the possibility of a new National Wage Agreement. Rather than threaten the unions with legislative control of incomes, the then Fianna Fail government induced union participation through a series of tax reforms and a commitment to public sector employment creation. In addition, the government invited the unions to discussions on a National Agreement for National Development. Consequently, employment creation, taxation and welfare policies were designated as issues for discussion with government by a special delegate conference of the ICTU, leading to a new agreement, the ‘National Understanding’ of 1979, which broadened the role of tripartite negotiation to the areas of employment, pay, taxation, health, education and social welfare policies. This expansion of the role of the trade union and employer organisations was, however, overshadowed by the statement in the White Paper *Programme for National Development 1978–1981* which, in the context of requiring prices and incomes moderation, threatened legislative intervention if such moderation was not forthcoming. Consequently, the expansion of the role of the ‘social partners’ was on the understanding that wage restraint, if not forthcoming voluntarily, would be imposed.

\(^1\) The Federated Union of Employers changed its name in 1990 to the Federation of Irish Employers. In 1992 it merged with the Confederation of Irish Industry to form IBEC—the Irish Business and Employers Confederation. References in this paper will be made to the FUE for the most part, as this is historically more appropriate for the discussion.

\(^2\) ‘Oireachtas’ is the Irish term for Parliament. The Irish Parliament consists of two chambers: the lower chamber, known as the Dáil (Assembly); and the upper chamber, known as the Seanad (Senate).
I.3. The National Agreements—assessment

Incomes policies have been important in Ireland for two reasons: to keep labour costs down so as to attract foreign industrial investment, in addition to aiding the competitiveness of exports; and to combat the wage-inflation/unemployment spiral (Stanton, 1979; Roche, 1982). Yet the implementation of incomes policies presents difficulties, especially where the chosen method is the social contract as opposed to the legal coercive method.

The 1970s saw a change in the traditional voluntarist approach to collective bargaining as the State sought to ensure the acquiescence of the trade unions to its economic policies. The origins of the change away from the auxiliary state lay in the desire to expand industrialisation and in the later attempts to respond to the economic problems of the 1970s. The increased competition from free trade in Europe required the creation of a stable industrial relations environment in order to attract the foreign investment necessary to replace domestic industries adversely affected by the removal of tariff barriers (NESC, 1983). To achieve these objectives, as well as maintaining low labour costs through restraint on wages, the state had to abandon its nightwatchman mode in relation to industrial relations and collective bargaining. While still favouring voluntary agreements, government directly interfered with established collective agreements through legislation, where those agreements deviated from the national norm as settled by the National Agreements. After the first oil crisis of 1973, placing restraints on inflation became a government priority. In this regard the adherence of trade unions to the National Agreements was seen as essential. However, there were two significant problems to maintaining trade union adherence: the first being the inability of either the ICTU or the FUE due to their consensual nature to ensure that their constituent members adhered; the second being the existence of trade unions and employers which were neither affiliated to the ICTU or the FUE, nor signatories to the National Agreements. In particular, it was the existence of such unions and employers in the financial sector which endangered the future of the National Agreements, as these unions had no obligation to follow the terms of the National Agreements when seeking pay increases.


In 1973 widespread trade union disavowal of the National Agreements was seen to be probable by government and opposition due to the activity of the Irish Bank Officials Association (IBOA). Neither the IBOA nor the banks had signed the National Agreement. Consequently, the IBOA and the banks entered a collective agreement in 1973 which allowed for pay increases above the rate established in the National Agreement. In response, the government directly intervened in that collective agreement by passing the Regulation of Banks (Remuneration and Conditions of Employment) (Temporary Provisions) Act, 1973. This intervention served a dual purpose: to enforce the provisions of the National Agreements ‘in the national interest’; and to demonstrate to those unions, both ICTU-affiliated and non-affiliated, that government would not allow
independent action in this area which might undermine the Agreements. The ICTU did not object to this legislation (Hillery, 1987). The Minister for Labour justified the need for such legislation on the basis of the national interest and the need to prevent breaches of the National Agreement (Vol. 267 Dáil Debates, col. 296). However, the Minister for Labour stated that the Act did not represent a ‘general principle of intervention by the Government in free collective bargaining’, but was a ‘temporary measure designed to meet a unique situation’ (Vol. 267 Dáil Debates, col. 490).

Under section 3 of the 1973 Act, the Minister was empowered to prohibit improvements in remuneration or terms and conditions of employment in the banking sector if these were at variance with the purposes or provisions of the National Wage Agreements or of the Act itself. To aid in enforcing compliance with the Act, payment by the banks of such increases or the granting of improvements in the terms and conditions of employment of bank officials were declared to constitute an offence (s. 4). However, no liability was to lie against the trade union or the workers involved in the event of such payment or improvement being carried out, as ‘it would be both undesirable and ineffective that any fines or penalties be directed against the bank officials or their organisation’. The Minister for Labour further stated that ‘[i]n our industrial relations system, whether we like it or not, the management are the people who have to make the final decision. This legislation is directed towards making it impossible for banking management to breach the national agreement’ (Vol. 267 Dáil Debates, cols. 812–824). Instead, stringent financial penalties were imposed on the banks and their officers (s. 5). The penalties imposed were said to be so rigorous as the Minister’s aim was ‘to bring the banking authorities to a true recognition of their obligations both to the people and to the economy’. However, section 10 of the Act provided immunity from suit for the banks for failure to implement agreements already entered into, as a result of the operation of the Act. No reason was given in the debates as to why this immunity was provided.

In both 1975 and 1976 the same government thought it advisable to re-enact the provisions of the 1973 Act. Again this was because the IBOA and the banks had entered agreements which contravened the National Wage Agreements of 1975. A suggestion that bank workers were being singled out by the government, perhaps as an example to other unions or workers considering breaching the National Agreements, was rejected by the Minister for Labour (Vol. 286 Dáil Debates, cols. 1089–1157).

Since 1976 no similar form of interference with collective agreements has taken place in Ireland. This can be partly explained on the basis of the cessation of corporatist agreements during the period 1982–1987 and, secondly, on the basis of the opposition shown to the 1976 Act by Fianna Fail while in opposition, although it should be noted that Fianna Fail threatened further legislation in the 1978 White Paper Programme for National Development 1978–1981. A third factor may be the frequency of governmental change in the period from 1976. Instead, government and employer attention switched to the issue of the reform of industrial relations and trade dispute legislation.
II

II.1. The reform of industrial relations law—genesis

The beginning of the 1970s was distinctive due to the commitments given by the unions to discourage unofficial action. Yet, during the 1970s unofficial strikes had amounted to approximately two thirds of all strikes (Report of the Commission of Inquiry on Industrial Relations, 1981 para. 312; Von Prondzynski, 1982). The continued decline in the effectiveness of union commitments to restrain unofficial action resulted in the employers looking to the State to supply the required restraints (Wallace and O'Shea, 1987). Moreover, the decision of the Supreme Court in 1977 in the case of Gouldings Chemicals v. Bolger had caused considerable concern to the FUE as there the Supreme Court had stated that unofficial industrial action enjoyed immunity from suit under the Trade Disputes Act, 1906 (FUE Bulletin, March and May 1977).

In addition to rising labour costs, the FUE was also alarmed by the growth in employment protection legislation in the late 1970s and early 1980s. Three substantial legislative changes had been introduced in 1977: the Unfair Dismissals Act, the Protection of Employment Act, and the Employment Equality Act. The FUE had opposed each of these measures on the basis of the alleged disincentive effect of the legislation to further employment growth (FUE Bulletin October 1976–March 1977). Moreover, it was unhappy with the commitment to introduce statutory maternity leave in the second National Agreement.

In its 1980 Annual Report the FUE advanced a cost/benefit analysis argument in relation to employment legislation, to the effect that although certain legislation may be socially desirable, its provision had to be tempered by the state of the economy and the effect of the legislation on employment growth. Although much of the legislation introduced in the 1970s and early 1980s was necessitated by EC Directives, the FUE viewed the legislation as being inappropriately timed and, in some cases, as exceeding the requirements for compliance with the Directives.

While in the 1970s the FUE had encouraged government to become involved in centralised agreements, by 1981 the FUE had become disappointed with the agreements, seeing them as too political in nature and, ultimately, as disadvantageous to employers as they did not take into account sufficiently the individual employer’s trading position (Fogarty et al., 1981). Coupled with what were viewed as unacceptable levels of industrial action, this dissatisfaction with national wage agreements led by the beginning of the 1980s to an end to the existing consensus in favour of legal abstentionism in industrial relations. Employers now wanted reform of the Trade Disputes Act, a desire which found favour in government circles. Moreover, the Department of Labour had begun to initiate a number of studies concerning the macro-economic effects of both labour law and industrial relations practices (Williams and Whelan, 1986; Wallace and O’Shea, 1987).

1 The Trade Disputes Act 1906, passed by the British Parliament, remained the central legislation on industrial action in Ireland until 1990. The Act provided a system of immunity from certain common law liabilities arising from industrial action. On the operation of the Trade Disputes Act in Ireland, see Kerr and Whyte (1985).
II.2. The reform of industrial relations: the decade of discussion

In the period 1981 to 1990, three different sets of proposals for the reform of trade disputes law were advanced. The first set of proposals came from the Commission of Inquiry on Industrial Relations in 1981; the second set took the form of proposals for a 'right' to strike, issued by the Department of Labour in 1986; the third set of proposals came in the Industrial Relations Bill, 1989 and were subsequently enacted in the Industrial Relations Act, 1990.

Reforming the Immunities—1978–1981: In May 1978, the government established a Commission of Inquiry on Industrial Relations. The Commission was comprised of members appointed by government, the FUE and the ICTU. Its terms of reference were to enquire into (1) the practice of employers and their organisations and of workers and their trade unions under the system of free collective bargaining; (2) the relevance of statute law to industrial relations; and (3) the operation of institutions, structures and procedures.

In July, 1979, as a result of a disagreement with the Government concerning the extension of the Trade Disputes Act, 1906, to public service workers then excluded from the Act, the ICTU withdrew from the Commission. Rather than discontinuing proceedings, the remaining members of the Commission noted with regret the withdrawal of the ICTU, sought to establish a consensus from the remaining members, and proceeded to recommend certain reforms. The absence of the ICTU led to these recommendations being seen as at least heavily influenced by employer opinion, resulting in their being discredited in subsequent discussions. As the Commission's report has been criticised in detail elsewhere (Bonnar, 1987; McCarthy and Von Prondzynski, 1982; Kelly and Roche, 1983; Murphy and Kelly, 1989), the discussion here will focus on the rejection by the Commission of the voluntarist approach to industrial relations. Although an influence from developments in Britain cannot be definitively identified, it is of interest that at the same time as the Conservative government began to embark on its restrictive union legislation, restrictions on trade unions and an increased role for law were also being proposed in Ireland.

The Commission justified the need to move away from voluntarism on both economic and industrial relations grounds. Pointing to unquantified lost investment opportunities (paras. 322–323) and the delay involved in voluntary processes, legal intervention was proposed (para. 621). In essence, the Commission viewed the voluntarist tradition of industrial relations and the absence of legal intervention as being outmoded. While recognising that 'where at all feasible, reforms should be effected voluntarily', the Commission ultimately discounted those views which either rejected an active role for law, or which questioned the effectiveness of legal regulation on industrial relations practices.

The reasons for this may be surmised both directly and indirectly from the Report. At one stage the majority of the Commission stated that 'doubt may ... realistically be expressed as to the capacity of the main parties to the industrial relations process to effect the necessary reforms'. Moreover, on a pragmatic basis, given the economic importance which the Commission recognised as attaching to the reform of industrial relations in Ireland, such voluntary reforms, if they were to
occur, would ‘take a considerable length of time’. Consequently, ‘it would be unrealistic to view them as practical solutions in the short-term’ (paras. 207–209). However, the Commission was sensitive to the need to deal with arguments which objected to legal reforms:

It can of course be argued that, while the problems facing us are serious and might not be tackled adequately by voluntary means, legal remedies are equally unlikely to contribute to their solution. Some believe, in fact that a greater degree of legal intervention in industrial relations might make matters significantly worse (para. 622).

Consequently, the Commission outlined two arguments concerning law and industrial relations, i.e., that law has no role in industrial relations and that law will not work in industrial relations, proceeded to expose the flaws in these positions, and then advanced their proposed reforms.

To support its view that law has a role in industrial relations, the Commission asserted that the State had not maintained an abstentionist position in industrial relations. To support this view it looked at such legislation as the Trade Board Acts, 1909 to 1918, and the development of trade union law from the Conspiracy and Protection of Property Act, 1875 to the Trade Disputes Act, 1906. The Commission thus concluded that by the beginning of this century there was an ‘abundance of labour law’ (para. 625) a significant proportion of which was concerned with industrial relations and collective bargaining.

The Commission argued that the ‘absence’ of law from collective bargaining could only be understood through the presence of law: through such legislation as the Trade Union Acts, 1871 and 1876, the Conspiracy and Protection of Property Act, 1875 and the Trade Disputes Act, 1906, which had removed certain activities from the ambit of the criminal law and the law of tort (para. 628). While conceding that the legislative measures referred to were primarily enacted to reverse judicially-created liabilities, nonetheless, the Commission advanced the argument that the legal position of unions under such provisions could not ‘be easily reconciled with certain commonly held interpretations of the extra-legal character of the collective bargaining process and of the parties to it’ (para. 629). Moreover, pointing to the growth in employment legislation, the Commission concluded that it was not possible to distinguish between the realm of individual employment and collective industrial relations in such a way as to say that law should intervene in one area but not in the other. The support of trade unions for employment legislation represented ‘an acceptance that the law may make a more significant contribution to industrial relations generally than had previously been recognised’. These developments ‘certainly justify . . . an increase in the general degree of legal intervention in industrial relations’ (para. 635).

The second argument which the Commission addressed was the objection that ‘the law will not work in industrial relations’. The Commission stated that it neither hoped nor proposed that good industrial relations would proceed from law. Rather, it sought to cope with bad industrial relations and to plan for better industrial relations. In this respect law could contribute to the objective of curbing the ‘most undesirable consequences of bad industrial relations. Were this to be achieved, it might then, by, for example, strengthening the position of the official trade union
leadership, provide a basis from which more positive and widespread improvements could proceed’ (para. 637).

The Commission stated that arguments advanced against legal intervention in industrial relations are often exaggerated (para. 644). Consequently, it felt able to propose legal intervention *per se* and specific proposals for the reform of industrial relations and trade dispute law. An additional basis for these proposals was the impact of the problems in the current industrial relations on the community and the economy (para. 645). Pointing to the European origin of many of the recent employment law measures, the Commission argued that the provisions ‘which are seen as their natural counter-balance’ in such countries should also be introduced in Ireland. The success of EC countries in maintaining low levels of industrial unrest was attributed in part to ‘the greater respect for orderly procedure which characterises the conduct of industrial relations in these countries—a compliance with procedure assisted in many of these cases by a greater degree of legal regulation than has traditionally been the case here’ (para. 649).

Referring to the voluntarist basis of Irish industrial relations, the Commission acknowledged that there were limits to the extent to which legal reforms could be effective and practicable. Therefore the proposed changes were characterised as striking ‘as equitable a balance as possible between the fundamental rights of trade unions and employers to take certain forms of action to further their respective ends and the requirement to regulate the exercise of those rights in such a way that the equally important needs of the community, and on many occasions of other workers and employers, are not impaired to an intolerable extent’ (para. 651). Inter alia, it proposed mandatory procedures prior to industrial action or a lockout occurring; the removal of immunity from industrial action caused through inter-union disputes, or concerning individual statutory entitlements; and the resolution of disputes about union recognition by conciliation or the recommendation of an appropriate tribunal. Industrial action should only be allowed as a course of last resort in recognition disputes where a tribunal had recommended that an employer should recognise the union and the employer had failed to comply with the tribunal’s decision (para. 639). The Commission also recommended restrictions on picketing; secret ballots prior to industrial action; and ultimate union executive control as to whether industrial action should proceed, irrespective of a favourable ballot.


The 1981 election resulted in a coalition government between Fine Gael and the Labour Party, and although the coalition fell in February 1982, it returned to power again in November of the same year. The coalition administration decided against following the previous pattern of national centralised agreements on economic policy and wage restraint. While earlier governments had attempted to induce the acquiescence of the unions through economic concessions and public expenditure, the economic situation in 1981 and 1982 was such that these methods could no
longer be sustained (for details see Hardiman, 1988). The expansionist policies of
the 1960s and early 1970s which had been the source of corporatist arrangements
had suddenly given way to a period of recognised economic crisis. Consequently
there was a reaction against corporatism, with increased calls for reliance on the
market in relation to pay determination. During this period, the reform of industrial
relations law and practices was still seen as an important issue (White Paper on
Industrial Policy, 1984, paras. 3.15 and 4.16). In 1986, following two discussion
documents issued in 1983 and 1985 which again pointed to the economic need for
reform and discussed the role of law in industrial relations reform (Dept. of Labour,
1983; Dept. of Labour, 1985), further proposals for reform were introduced.

In January 1986, in a document entitled Outline of Principal Provisions of New
Trade Dispute and Industrial Relations Legislation, the Department of Labour issued
its alternative proposals. The Department advocated a shift from a system based on
immunities to one based on the concept of a legal right to strike, to be statutorily
regulated. This proposal found a certain degree of favour in academic circles
(Ewing, 1986; 1988) and was championed by the then Minister for Labour as a
necessity (Quinn, 1986).

The system was to give workers and unions a ‘complete defence’ where the right
was exercised in accordance with the statutory conditions. This combination of
a rights system and the ‘complete defence’ was intended to overcome the inade­
quacies of the immunities under the Trade Disputes Act, 1906 (Dept. of Labour,
1986, para. 10). Yet the new right to strike was intended to apply in quite restricted
situations. The right would have applied to a ‘trade dispute’ which was defined as a
dispute:

between employers and workers which is connected wholly or mainly with one or more of the
following, namely, employment or non-employment, terms and conditions of employment,
physical conditions in which workers are required to work, matters of discipline, facilities for
trade union officials and machinery for negotiation and consultation or other procedures
relating to the foregoing (Dept. of Labour, 1986, para. 37).

This definition was a significant reduction of the protection provided under the
Trade Disputes Act, 1906 as it removed dispute between workers and between unions
from the protection such disputes then enjoyed, and also required that the action
taken be ‘wholly or mainly’ in connection with the dispute. The latter formula
resembles events in British legislation which substantially set back the protection
given to workers (Employment Act, 1982, s. 18; Simpson, 1983). A further reason
for the proposed change was given when the same Minister stated that:

[G]iven the serious nature of our economic and budgetary problems, given, in particular, our
grade unemployment situation, we must do everything in our power to improve the industrial
relations environment still further and to make this country a more attractive location for
foreign and domestic enterprise (Quinn, 1986, p. 6).

However, the positive rights system could not have been absolute: while it would
have provided a ‘complete defence’ against civil legal proceedings in both public and
private law (paras. 11 and 21), the availability of the defence would have been
restricted by legal necessity:
The comprehensiveness of the 'complete defence' which is proposed is such that it clearly could not be conferred in a manner entirely free of limitation. If it were, it would have scant chance of withstanding legal challenge. It is obvious that the legitimate rights and interests of other parties to the industrial relations process and of the broader community must also receive due recognition (para. 13).

Despite this limitation, the 'complete defence' was described by the Department as 'a qualitative extension of the relatively limited protections granted against a number of specified heads of liability under the 1906 Act'. Thus, according to the Department, switching to a positive rights system would have resulted in a substantial reinforcement of both the degree and the effectiveness of legal protection for industrial action (cf. Wilkinson, 1989).

While the concept of a change to a positive rights system was of interest, a far more interesting issue is to compare the extent of the limitations on the 'complete defence' and to consider whether these rendered the changes substantially different from the proposals of the Commission of Inquiry. A similar comparative analysis will be made of the provisions of the Industrial Relations Act, 1990. The similarity between the three series of reforms, proposed and actual, is marked. The limitations on the availability of the 'complete defence' as proposed by the Department of Labour in 1986 bore a noticeable similarity to the restrictions on the availability of immunity as envisaged by the Commission. The 'complete defence' would not have applied to cases involving personal injury, trespass, occupations or damage to property (para. 30); nor to cases of unlimited picketing; nor to industrial action or picketing by or concerning one individual worker where the agreed procedures normally availed of in the employment concerned had not been resorted to and exhausted and where the employer concerned had not acted in disregard of such procedures (para. 28); nor to industrial action by a minority of workers when a ballot had resulted in a formal rejection of such action (para. 27); nor to a strike or industrial action arising from a dispute between 'workmen and workmen' unless the dispute otherwise met the definition of 'trade dispute' in the legislation (para. 14).

Moreover, it was proposed that trade unions would be required to have a provision in their rule books requiring a secret ballot to be held prior to engaging in any strike or other industrial action (para. 33). However, only other members of the trade union would be allowed to enforce the ballot requirement (para. 15). As with the proposals from the Commission of Inquiry, rather than the secret ballot being the sole determinant of whether a strike or other industrial action would be held, the Department proposed that 'executive committees of trade unions may decide not to call a strike or other industrial action even where the results of a secret ballot favours strike or other such action' (para. 32).

To emphasise that the limitations on the 'complete defence' were not intended to reflect a strategy of increased legal regulation, the Department proceeded to outline its intentions concerning injunctions (paras. 16-18, 34-36). The Department proposed to prevent employers using ex parte interim injunctions, but only where the union held a secret ballot and the employer received notice of at least one week of the strike or other industrial action. Interlocutory injunctions would not be granted where (i) a secret ballot had been held, (ii) notice of at least one week had been given to the employer, and (iii) the trade union concerned had established a
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‘fair case’ that it was exercising the right to strike or to take industrial action in accordance with the legislation. Moreover, under the proposed legislation the courts would be required to take into consideration the likelihood of a ‘complete defence’ being established at the full hearing of the action, or where appropriate, to an employer’s disregard of normal procedures (para. 17).

New legislation: the Industrial Relations Act, 1990: Following its election in 1987, the new Fianna Fail administration adopted corporatism again under the Programme for National Recovery, partly in response to union calls for the resumption of such an approach to economic planning (Artley, 1986). During this period, the new administration engaged in discussions with both the employer and union organisations concerning the reform of industrial relations law. In 1990, following these discussions, the Industrial Relations Act was finally passed, bringing the decade of discussion to a close.

The degree of legal protection from liability for the effects of dispute activity to be given to trade unions, and the format it should take, proved to be contentious in the aftermath of the 1981 Commission’s proposals. In the Industrial Relations Act, 1990, the right-to-strike approach was not adopted. Reasons advanced for this decision by the then Minister for Labour included that the ‘best hope for success was to pursue the immunities line’ and that ‘the trade union side were less than enthusiastic about a positive right to strike ... in some degree from a fear of the unknown’ (Vol. 397 Dáil Debates, col. 377). Therefore, the Act continued with the approach based on legal immunities.

The provisions of the Industrial Relations Act have been described in detail elsewhere (Wilkinson, 1991). Basically the Act provides immunity for (a) action which induces others to break their employment contracts; (b) threats to induce others to break their employment contracts or threats to breach one’s own employment contract; and (c) action which interferes with the trade, business, or employment of some other person, or the right of some other person to dispose of his capital or labour as he wills (s. 12). The Act does not provide protection for workers who actually breach their own employment contracts by engaging in trade disputes. The Act also prevents ex parte interim injunctions being granted to employers where one week’s notice of the industrial action has been given (s. 19). The Act does not prevent interested third parties from obtaining ex parte interim injunctions.

Restrictions have been placed on the circumstances and the extent to which the protection will apply. The definition of ‘trade dispute’ has been restricted to ‘any dispute between employers and workers which is connected with the employment or non-employment, or the terms or conditions of or affecting the employment of any person’ (s. 8). Disputes between workers or between unions no longer benefit from the immunities. The definition of ‘worker’ embraces ‘any person who is or was employed whether or not in the employment of the employer with whom a trade dispute arises’. An interesting problem is whether persons seeking employment for the first time can be the subject of a valid labour dispute. In 1983, McWilliam J. in

1 The 1987 Fianna Fail minority government was returned to power in 1989 in coalition with the Progressive Democrats.
the High Court stated that he could not accept that unsuccessful job applicants could take industrial action under the Trade Disputes Act, 1906 (J. Bradbury v. Duffy). The definition of 'employer' in the new Act seems to support that opinion. 'Employer' is defined as a person for whom one or more workers work or have worked or normally work or seek to work having previously worked for that person (s. 8, emphasis added). The impact of this on union attempts to support equal opportunity at workplace level and on employment practices must be raised, given the criticisms which equal employment opportunity legislation has recently received (Curtin, 1989). It also raises the issue whether an employer can avoid the consequences of dispute activity by using the fiction of the corporation, as occurred in Roundabout Ltd. v. Beirne, where an employer closed his business during a trade dispute, and incorporated as a new company. The 'company' then reopened the business under a lease from the employer in his personal capacity. The company successfully obtained an injunction against the disputants on the ground that as the company was a legal entity distinct from the owner, and as yet employed no employees, it could not be held to be an employer within the meaning of the Trade Disputes Act, 1906. The possibility of this type of use of incorporation recurring was dismissed by the then Minister for Labour (Vol. 398 Dáil Debates, col. 329).

Grievances concerning one individual worker are excluded where procedures are not followed nor exhausted. The range of procedures can be quite time consuming. An individual dispute could be the subject of determinations by rights officers, tribunals, and the Labour Court. The Act adds another institution to the list, that of the Labour Relations Commission. The procedures may derive from custom and practice in the industry, or from a collective bargaining agreement. Under the original Bill, the procedures could have included resorting to the ordinary courts of law. Following strong parliamentary opposition, the Act now precludes this (s. 9(4)).

Even where the dispute otherwise complies with these conditions, the immunities will apply where the action is taken in the 'reasonable belief' that it is taken in contemplation or furtherance of a trade dispute (s. 13[2]). Where workers do engage in industrial action, the type of permissible action is limited by the Act. With one narrow exception, workers are confined to 'primary' picketing, as the Act allows them to picket their employer's place of work or business.¹ No indication is given as to how certain workers should be that the employer's purpose was to frustrate their action, before the immunities will apply to secondary picketing. Moreover, the current restrictions on picketing remain, i.e., workers are allowed to picket 'merely for the purpose of peacefully obtaining or communicating information or of

¹ S.11(1). Note that this allows picketing where the employer's place of work or the location where the employer carries on business is different from the workers' own workplace. However, secondary picketing is now lawful 'if, but only if, it is reasonable for those who are so attending [the secondary premises] to believe at the commencement of their attendance and throughout the continuance of their attendance that employer has directly assisted their employer who is a party to the trade dispute for the purpose of frustrating the strike or other industrial action'. (s.11[2]). Again, the issue of whether reasonableness is to be viewed as a subjective or objective issue is not specified. Note that in s.11(3) the Act provides that any action taken by an employer in the health services to maintain life-preserving services during a strike or other industrial action 'shall not constitute assistance for the purposes of subsection (2)'.
peacefully persuading any person to work or abstain from working’ (s. 11[2]; Kerr and Whyte, 1985).

As with the 1986 proposals, the 1990 Act requires unions to have rules providing for secret ballots prior to industrial action, enforceable by the membership only (s. 14[2]). It should also be noted that the definition of ‘industrial action’ in the Act is so wide that a secret ballot will be required before any significant form of protest is undertaken:

‘Industrial action’ means any action which affects, or is likely to affect, the terms or conditions whether express or implied, of a contract and which is taken by any number or body of workers acting in a combination or under a common understanding as a means of compelling their employer, or to aid other workers in compelling their employer, to accept or not to accept terms or conditions of or affecting employment (s. 8).

A strike is defined as a cessation of or a refusal to work or continue to work for one’s own employer in order to compel one’s own employer. An attempt to narrow the definition of industrial action was rejected by the Minister on the basis that ‘[i]t is necessary to include this broad definition to ensure all industrial action, short of a strike, will be preceded by a secret ballot under section 14. I would like to point out... that we see this as a fundamental part of the Bill’ (Vol. 398 Dáil Debates, cols. 371–372). Should workers or the union proceed with industrial action in disregard of the outcome of the secret ballot, the immunities will not apply to the action (s. 17[1]). Moreover, unions are legally prohibited from supporting a strike organised by another trade union without the prior sanction of the Irish Congress of Trade Unions (s. 14[2][e]). This gives a legal basis to what had previously been a consensual policy on the part of the unions. It also places the responsibility on the ICTU to decide whether, prima facie, the immunities will apply to a union’s activities or not. The Act also provides that the rules of the union are to contain a provision giving the union’s committee of management full discretion in relation to the organisation, sanctioning and support of industrial action, irrespective of a vote by secret ballot favouring such action. This would appear to negate any concern for democracy in union affairs, in favour perhaps of the idea of ‘responsible’ trade unionism. Finally, failure on the part of a union to provide for a secret ballot in its rules will result in the loss of its negotiation licence (s. 16[2]). The effect of losing the negotiation licence is that the union cannot then gain the benefits of the immunities as s. 9 of the Act restricts the application of the immunities to unions holding a negotiation licence.

III

Whereas industrial relations was subjected to increased legal control in Britain, especially since 1979 (Auerbach, 1990; Deakin, 1992), in Ireland primarily political solutions were sought by government. It has been argued that one reason why Irish governments did not follow the British example during the 1980s was the non-ideological basis of Irish politics and the lack of an electoral benefit from such a course of action (Breen et al., 1990). Yet legal intervention was never excluded by government; rather, such intervention was both the impetus for

The Irish economy is very susceptible to the rigours of competition at an international level. For employers and government in the 1980s, reducing the level of industrial unrest was a primary objective. This objective may be achieved by isolating the trade unions, as did the Thatcher government in Britain, or by co-opting them in an attempt to limit industrial unrest. The latter option was followed by successive Fianna Fail governments (Hardiman, 1988, 1992). However, the consequences of earlier attempts at corporatism were primarily a change in the nature, rather than the level, of industrial unrest (Schregle, 1975, p. 353). It is contentious as to whether the 1987–1990 Programme for National Recovery was a success (Durkan, 1992). Although industrial action levels have declined significantly since the introduction of the 1987 Programme (Dept. of Labour, 1990) this decline may also be explained on the basis of fears for job security, and other factors such as continuing high unemployment and emigration rates during the period.

The success of Irish government economic policy depends to a large extent on maintaining control of inflation and interest rates, increasing competitiveness and attracting further foreign investment. Peaceful industrial relations and the acquiescence of the trade unions to economic policy are a prerequisite. In 1989–1990 negotiation of a new version of the Programme was seen as proving difficult. In the context of calls for the abandonment of such corporatist agreements by some unions (European Industrial Relations Review 1989; Don’t be Conned Again, 1990), reform of the trade disputes law acquired a certain urgency in an effort to prevent an increase in industrial action once again. In 1991 I argued elsewhere that the Industrial Relations Act represents a stick with which to control the unions in the event that they should reject centralised agreements (Wilkinson, 1991). This assessment was immediately challenged on the basis that Irish industrial relations policy operates by consensus, not compulsion and that the legislation was introduced in consultation with the ICTU (Kerr, 1991). Nonetheless, it is submitted that the Industrial Relations Act is an attempt to limit the effectiveness of industrial action by workers and trade unions. According to the then Minister for Labour

[t]he present climate of industrial peace and calm provides the ideal opportunity to put workable structures and procedures in place. We must ensure that, should industrial relations tensions resurface in the future, disputes can be processed in an orderly way and with the minimum of disruption . . . No Government can legislate for industrial peace but the existence of a legislative arrangement can provide a framework within which the interaction of the social partners can take place in an orderly way (Vol. 396 Dáil Debates, cols. 740–741).

Moreover, even though the Act was introduced following consultation with the unions, the operation of the Act has since proven contentious, with union calls for reform of the Act prevalent at subsequent ICTU conferences (ICTU Annual Reports, 1992, 1993).
Having laid the legal foundation for new trade disputes law, in the spring of 1991 the Irish government succeeded in continuing with its corporatist approach to economic planning and industrial relations when it negotiated a three-year Programme for Economic and Social Progress \textit{(European Industrial Relations Review and Report, 1991; Von Prondzynski, 1992)}. This in turn has been followed by the Programme for Competitiveness and Work.

Whether corporatist approaches to economic planning will continue in Ireland remains to be seen. While the 1987 Programme for National Recovery was accepted as successful in reducing inflation, the subsequent PESP was negotiated against significant opposition within the union movement. Moreover, the government found it necessary to attempt to renegotiate its terms due to budgetary problems and increasing levels of unemployment, the latter partially caused by a decline in the level of emigration due to the recession in Britain (Roche, 1992; OECD, 1993).

A future challenge to the longevity of corporatist economic planning is the impact of the Single Market on the Irish economy. Although the Cecchini Report (Emmerson, 1988) advised that gains would be felt by the economies of all the twelve members of the EC, less optimistic analyses have been advanced by other commentators (Peck, 1989; European Trade Union Institute, 1989). Two immediate effects of the Single Market are likely to influence industrial relations and the role of the state in Ireland. The first is the degree to which existing employment is adversely affected by competition and relocation of industry to lower-wage countries. The second is the degree to which there will be pressure brought to bear on the unions to accept lower wages in order to maintain existing investment in Ireland and attract further foreign investment to Ireland as opposed to other European countries. Such arguments were advanced unsuccessfully by the Federation of Irish Employers in 1991 in relation to the alleged disincentive effects and increased labour costs of employment legislation designed to protect part-time workers (Wilkinson, 1992). According to Peck:

\begin{quote}
[t]he impact on wages of a single European market could be substantial, given the wide disparity in wages between the northern and southern member states. . . . The elimination of trade barriers will make low-wage countries more attractive locations for production. Higher-quality labor and a better national infrastructure that results in higher labor productivity have historically offset wage differences. Labor quality is more important, however, in some industries than in others. One would expect the gradual migration of lower skill production to the low-wage countries of the Community. These are the industries in which imports from third world countries have been increasing, and so production in Spain, Portugal, and Greece may be substituted for such imports (Peck, 1989, pp. 293–4).
\end{quote}

In relation to the Irish economy, a report issued in 1989 also questioned the extent of the benefit of the Single Market (NESC, 1989; Teague, 1991; and see generally Foley and Mulreany, 1990). Predicting a negative impact, at least in the short term, it seems likely that an increase in industrial disputes may occur. Consequently, the progress of corporatist collective bargaining in Ireland should remain of interest. It remains to be seen whether further legal intervention, whether in the nature of a statutory incomes policy or further revision of trade disputes law, will be resorted to by government. On the basis of past interventions, such responses cannot be ruled out in the future.
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