Is Individual Employment Law Displacing the Role of Trade Unions?\textsuperscript{i}

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ABSTRACT

Trade unions have experienced significant turbulence over the past three decades. In the UK and Ireland, a key change has been a substantial increase in the individual rights-based employment legislation, raising important questions about its impact on trade unions. Based on a survey and interviews with union officials in Ireland, we examine whether individual employment law acts to undermine or enhance the role of trade unions and whether trade union officials use employment law to achieve change in the workplace and to mobilise workers. We find that while unions believe in the superiority of collective bargaining to pursue individual rights, and consider the law as having an individualising effect, they also recognise its benefits in the current environment. Given the legal restrictions on collective action in individual disputes, union officials believe that employment law can be used to support and protect vulnerable groups of workers. The increasing resort to individual employment rights in Ireland is contrasted with an alternative system in Sweden which has a strong collectivist ethos. We conclude that the dilemmas faced by unions regarding the pursuit of rights are symptoms of Ireland’s weak statutory framework.
1. INTRODUCTION

Declines in union density and collective bargaining coverage have been features of industrial relations in many countries in recent decades. In Ireland, union density fell from 57 per cent in 1990 to 29 per cent by 2013. While unionisation has declined, the amount of individual employment law has risen significantly. The requirement to transpose EU Directives means that employment law pervades many aspects of the employment relationship including parental leave, adoptive leave, fixed-term and part-time working. Heery argues in the British context that the growth of employment legal regulation is the single most important trend in industrial relations. In the context of union decline, employment law has assumed a more prominent role in determining the pay and conditions of employees. Consequently, the law is no longer confined to supporting the collective bargaining system for many workers but now provides the substantive rules which govern terms and conditions of employment. Pollert contends that even if collective regulation makes some recovery in Britain, non-union employment is the norm and the need for legislative regulation for the majority of employees has never been greater.


A focus of academic and union debate in Ireland and the UK has been on internal union adaptation to their declining circumstances, in particular on restructuring their activities and resources away from a servicing model to an organising model. There has been less attention paid to whether, and how, unions can use the law to further union objectives. It could be argued that as most employment rights are now set by legislation rather than through collective bargaining, this significantly restricts the role of trade unions. As individual employees increasingly avail of their statutory rights and make use of legal enforcement procedures, unions may be left with little practical function. Conversely, there are opportunities for unions to use employment law to their advantage by improving employee conditions, changing employer behaviour, consolidating a sense of shared grievance amongst workers and encouraging greater participation of members. In this way, the law can become a trigger for innovation in unions.

There have been some empirical studies on the role of individual employment law in union officials’ work, and on whether unions can use the law as a means of mobilising workers (legal mobilisation). However, research on the linkages between collective bargaining and legal action is still in the early stages of development and


requires further empirical research\textsuperscript{9}. This paper aims to build on work by Colling and Teague\textsuperscript{10} in particular and, based on the findings of a survey and interviews with trade union officials in Ireland, seeks to examine the following research questions: (i) does individual employment law act to undermine or enhance the role of trade unions? (ii) to what extent do trade union officials use employment law to achieve change in the workplace? and (iii) do unions use employment law as a tool to recruit and mobilise workers?

We begin with a review of the Irish context before examining the possible tensions between the functions of employment law and trade unions. We then outline the methodology and report on the findings. Our discussion of the challenges presented by individual employment law for trade unions is set in a comparative context, with particular reference to Sweden. Sweden’s system of employment rights and dispute resolution contrasts significantly with the Irish model (and UK model) and usefully illustrates how a strongly collectivist approach precludes many of the problems associated with an individualised legalistic system.

2. THE IRISH EMPLOYMENT RIGHTS SYSTEM

The traditional Irish approach to dealing with the union-employer relationship was based on ‘voluntarism’ meaning minimum intervention by the law or third parties including the state. It inherited the voluntarist principle as well as many industrial relations statutes from the British legal system. With the substantial levels of

\textsuperscript{9} Ibid; See no. 2 above.

\textsuperscript{10} Ibid; P. Teague, ‘Path Dependency and Comparative Industrial Relations: the Case of Conflict Resolution Systems in Ireland and Sweden’ (2009) 47 BJIR 499-520.
unionisation until the early 1980s, most employees’ terms and conditions were determined by collective bargaining. However, the decline in unionisation and erosion of the traditional industrial relations system has seen the emergence of a number of co-existing ‘self-contained sub-systems’\(^\text{11}\). Teague\(^\text{12}\) argues that in the unionised sub-system voluntarism is still the dominant organising principle and this sector remains relatively well regulated. When collective disputes arise in this sub-system, employers and trade unions attempt to resolve them at company level and if unresolved, they can be referred to state bodies for conciliation or a non-binding recommendation, reinforcing the voluntarist principle. Alternatively, in collective disputes, trade unions can undertake industrial action at any stage. However, the unionised sub-system is contracting and consists primarily of the public sector. In contrast in the non-union sub-system employees must rely solely on individual employment law for justice and protection and consequently, this sector, in the absence of any other source of regulation, is increasingly characterised by disorganisation\(^\text{13}\). The non-union sub-system is primarily the private sector, in which 70 per cent of employees are not covered by a collective agreement\(^\text{14}\).

Unions have little role in the legal framework as an enforcement mechanism and there is weak legal support for union representation rights. The civil courts have a lesser role in employment rights enforcement as a number of specialist bodies\(^\text{15}\) have been established by the state. Unlike the French and Scandinavian labour courts, Irish

\(^{11}\) Teague ibid, 517.

\(^{12}\) Ibid.

\(^{13}\) Ibid.


\(^{15}\) These are the Rights Commissioners, the Labour Court, the Employment Appeals Tribunal and the Equality Tribunal.
employment rights bodies hear almost all labour disputes including disputes of rights and interest. The model of enforcement of employment rights is similar to that in Britain whereby the onus is generally on individual workers to take a case against their employer to one of the state bodies with final appeals usually on a point of law to the civil courts. Unsurprisingly, very large numbers of individual employment rights cases are referred to state bodies with over 20,600 claims made in 2011\textsuperscript{16}.

Even within the unionised sub-system, unions are restricted in their ability to collectivise individual disputes. The Industrial Relations Act 1990 prohibits them from taking industrial action in support of an individual member (in a dispute of right or interest) until all stages of agreed procedures, either in writing or custom and practice, have been exhausted and these may include referral to a state body. Given the considerable length of time it can take to process a grievance in the workplace and subsequently through the state bodies, the likelihood of a union taking industrial action following exhaustion of procedures becomes remote. Thus, the nature of the institutional system has resulted in collective solidarity in individual disputes being replaced with procedural and legal regulation\textsuperscript{17}. Although it is possible to refer cases for conciliation and non-binding arbitration under industrial relations legislation to the Labour Relations Commission and Labour Court, the vast majority of individual disputes are now dealt with through legalistic employment legislation at bodies such as the Employment Appeals Tribunal and the Rights Commissioners. This has led commentators to suggest that Ireland’s industrial relations regime can no longer be

\textsuperscript{16} Derived from Annual Reports of the Labour Court, the Employment Appeals Tribunal, the Equality Tribunal (employment equality and pensions) and the Labour Relations Commission (including the Rights Commissioners; excluding the advisory service).

accurately described as voluntarist and that a new employment rights-based regime has emerged in its stead\textsuperscript{18} and has led to some debate on the effects of this legislation. The leader of Ireland’s largest union, the Services Industrial Professional and Technical Union (SIPTU), has argued, the ‘legal colonisation of industrial relations’ under the ‘guise of championing individual rights’ is one of ‘the great injustices of our time’\textsuperscript{19}. In research on the juridification effects of the Unfair Dismissals Act 1977 – one of the most significant pieces of employment legislation – Brown claims employers have put trust and faith behind the law\textsuperscript{20}. She also argues that this juridification has individualised conflict, marginalized collective bargaining and made the role of the shop steward less relevant than previously\textsuperscript{21}. On the other hand statutory employment rights, it is argued, can serve as a balancing force to counteract the inequality of bargaining power inherent in the employment relationship, curbing abusive employer power and promoting social justice\textsuperscript{22}.

3. **EMPLOYMENT LAW: DISPLACING UNIONS?**

It can be argued that increasingly employees believe they can secure their rights through law rather than by collective means and displacing the need for trade

\textsuperscript{18} Teague, No. 10 above; B. Daly and M. Doherty, *Principles of Irish Employment Law* (Dublin: Clarus Press, 2010).


\textsuperscript{21} Ibid p. 204.

\textsuperscript{22} See Heery n. 2 above; M. Redmond, ‘The Law and Workers’ Rights’ in Department of Industrial Relations, University College Dublin (ed) *Industrial Relations in Ireland: Contemporary Issues and Developments* (Dublin: University College Dublin, 1989).
unions. Teague observes that the emergence of a rights based dimension to the conflict resolution system has opened up a process which involves people interacting with employment relations issues as individual legal subjects and not as members of a collective institution such as a trade union. Workers are increasingly reliant on the law to solve their problems and this has resulted in increased demand for the services of the various dispute resolution bodies. The notion of letting workers have their day in court seems to have become a prevalent attitude within the conflict resolution system.

The expanding influence of employment law in the employment relationship has removed many issues hitherto determined by collective bargaining and regulated by collective agreements. In relation to dismissals, Dickens notes that legislation diverts grievances into a legal forum rather than a collective bargaining one. Disciplinary matters become ‘issues calling for judicial adjudication rather than as part of a wider struggle over job control, and the provision of the opportunity for legal redress acts to undermine the perceived relevance or appropriateness of collective action’. In a similar vein Piore and Safford argue that in the USA collective bargaining has been replaced by a regime of substantive employment rights specified

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23 Heery n. 2 above
24 See n. 10 above, 505
27 Ibid, 50-51.
in law, judicial opinions, and administrative rulings. The growth of employment law can have a significant negative impact on trade unions by weakening solidarity amongst members as workplace grievances are individualised and union resources are transferred away from collective to individual issues. It is for this reason that many unions in the US, Australia, UK and Ireland have restructured their operations, diverting union officials away from servicing individual grievances and focusing on fostering collectivism in workplaces.

Trade unions’ power can also be undermined by the emergence of alternative actors occupying the representation and enforcement space previously the sole prevail of unions. A decline in unionisation and an individualised legal rights system opens up opportunities for alternative actors like state enforcement bodies, citizens advice organisations, civil society organisations and solicitors. Research suggests that individuals increasingly turn to these alternative actors for advice and representation if they experience a problem at work. In the UK, Meager et al found that the Citizens Advice Bureau was the most common source of advice on work problems for employees and in Ireland, the Citizens Information Services have also experienced


increases in employment rights queries. There has also been a growing presence of solicitors and barristers in the British and Irish employment rights systems. In regard to enforcement, the Irish state body with primary responsibility for enforcing some employment laws is the National Employment Rights Authority (NERA) which in 2011, recovered almost €3m in unpaid wages and awards as a result of workplace inspections and prosecutions against employers. Despite their growth in importance alternative actors have inherent flaws which limit their capacity to represent employees. They lack a constant presence in the workplace, have an inability to harness employee collective power and, in the case of solicitors, impose costs on employees. Despite these limitations, employees may well believe that alternative actors can adequately represent their interests, and that union joining is unnecessary.

A. Unions and employment law: a complementary relationship?

In contrast to the displacement arguments, it could be contended that the law and collective bargaining are an effective combination in workplace regulation. Heery notes this recombination thesis, in which individual, substantive employment rights


35 NERA enforces minimum wage laws, young person’s employment laws and work permit laws.


38 See n. 2 above.
can complement collective activities, creating a hybrid form of regulation. There are a number of ways in which collective bargaining and employment law can complement one another. There is substantial evidence that unions can be positive mediators of the law by informing and advising members of their rights. Unions provide advice to employees on work problems and enhance members’ knowledge of their rights. Evidence also suggests that individual disputes are managed better in unionised workplaces. Additionally, unions help enforce employment law by ensuring employers meet their obligations through collective agreements and policies. Union officials can threaten to use the law in negotiations with employers and, if necessary, represent members in taking legal cases against employers. Unions can improve worker’s pay and conditions in negotiations with employers by using legislative minima as an ‘objective standard’ to justify demands or as a starting point with an expectation of better provisions. Thus, it is suggested unions can try to enhance the effectiveness of the law while the law can contribute to unions’ raison d’être of improving the pay and conditions of workers. In this complementarily model,


servicing and collective bargaining can enhance unions’ effectiveness and attractiveness to members. Indeed, research on unions’ refocus on an organising model suggests that some union officials are resistant to the notion of servicing as being ‘valueless’. In this study, a survey and interviews with union officials examines their views on whether the law has displaced trade unions or whether collective bargaining and the law are an effective combination.

B. Unions and Legal Mobilisation

Not only can unions use the law to enhance individual employee rights but also, it can be argued, as a possible way to advance their organising and mobilising activities. Unions can use the law in a way which confirms and consolidates a ‘sense of shared grievance or aspiration amongst groups of workers and providing a belief that this can be pursued successfully’. Unions can frame a legal issue to harness employees’ sense of injustice and provide the formal structures and resources to support mobilisation. It would be expected that this process would lead to a growth in new members. Research indicates that a primary reason for joining a union is a belief in its capacity to deliver material benefits. A degree of collective solidarity and a belief that acting collectively can correct a perceived injustice can encourage an employee to enter into a joint commitment to become involved in collective action. Thus, we use


44 Colling 2009 n. 5 above, 4.

Colling’s\textsuperscript{46} definition of legal mobilisation as a process which ‘unions might use legal definitions and tactics in support of their broader organising strategies’ and we exclude legal actions by individual employees against their employer which Fuller et al\textsuperscript{47} incorporate in their conception of legal mobilization. Colling notes that the law can be used to develop a shared sense of grievance as ‘an inspirational’ effect. If employees mobilise around a legal issue through for example campaigning or industrial action, then the law has a ‘radiating’ effect\textsuperscript{48}. There have been a number of high-profile examples of the law having inspirational and radiating effects in Ireland. In 2005, unions organised nation-wide protests of workers calling for more stringent enforcement of employment rights following significant breaches of law in Irish Ferries and Gama construction\textsuperscript{49}. In 2011, unions mobilised low paid workers, particularly contract cleaners, to lobby politicians and hold protests calling for legislation to re-establish a wage setting institution for low paid workers\textsuperscript{50}. In 2013, former Waterford Crystal workers successfully pursued legal action against the Irish state in the European Court of Justice over a failure to protect workers pension entitlements in insolvencies\textsuperscript{51}.

\textsuperscript{46} Colling 2009 n. 5 above, 9


\textsuperscript{48} Colling 2009 n. 5 above, 3.


\textsuperscript{51} The Waterford Crystal workers pursued an employment rights issue under the EU Insolvency Directive. A. Healy, ‘Waterford Crystal Workers on Walk for Justice Over Pensions’ (2014) 25\textsuperscript{th} August
A key objective for unions is to change employers’ behaviour not just in relation to an individual claimant but to a wider group of workers. Employees’ interests can be advanced and ‘by resorting to sustained legal action in a carefully chosen number of test cases, unions can enhance the rights of all workers’52. Thus unions can potentially mobilise workers to campaign for a change/introduction of a law, can mobilise collective support for member grievances to ensure their legal rights are vindicated and can use legal cases strategically to improve conditions for the wider group of workers.

However, the capacity of unions to use the law effectively to have inspirational and radiating effects can be impeded in a number of respects, as identified by Colling53. These include the narrow and complex nature of legislation, union officials with inadequate skills or resources to use the law strategically, and a reluctance amongst union officials to use the law to frame injustices. Even where unions’ successfully win legal cases for members, this may not translate into widespread change because of confidentiality requirements attached to settlements or because employers and the legal system treat each case on its own particular merits. These obstacles noted by Colling were developed from interviews with union officials in two unions. Using a wider sample of union officials in Ireland, this paper broadly examines officials’ perceptions whether union officials believe that employment law provides a useful mobilising tool.


53 Colling 2009 n. 5 above.
4. METHODOLOGY

The literature indicates that multiple methods strengthen a research project, offering greater theoretical insight and compensating for the weaknesses of single methods\(^5\). A mixed-methods research design was employed to provide a holistic and contextual portrayal of unions and employment law\(^5\). To gather a picture of the views of union officials across multiple unions, an on-line questionnaire was emailed to all union officials in Ireland in 2009, for whom email addresses could be obtained amounting to 688 individuals. One hundred officials from 14 trade unions responded to the questionnaire representing a response rate of 14.5 per cent. Almost three quarters of respondents were male, 60 per cent had worked as a union official for ten years or less, three quarters of respondents were responsible for representing less than 5,000 members each and there was an even split of respondents from public and private sector unions. The second data collection method involved semi-structured interviews with ten representatives (8 male, 2 female) from nine trade unions including union officials and legal officers. The interviewees were identified through purposive sampling and interviews were recorded and transcribed.

Survey and interview respondents were asked a series of questions on the process of initiating a legal case under employment law, their views on the usefulness of the law and their views on the effect of employment law on trade unions. A possible limitation of the data is that it is based solely on the perspectives of union officials who may be likely to hold positive views on the continuing role and relevance of trade unions, potentially influencing their responses. Their views may


also be influenced by their experiences in using the law. In this regard it is worth noting especially Brown’s finding in relation to the Unfair Dismissals Acts that union officials had coped poorly with the legalism of the Employment Appeals Tribunal. However, trade union officials represent employees in negotiations with employers and in legal cases pursued to state bodies, making them best placed to provide information regarding the practical impact of employment legislation on trade unions and the extent to which unions have interacted with the modern legal rights regime.

The findings of the survey and interviews are presented concurrently according to each research question. Our discussion of the findings is enlightened by a comparative review of the Swedish employment rights system, which has a collective orientation, contrasting with the Irish system. This review enriches our interpretation of union officials’ simultaneous positive and negative views of the law. Our research questions focus on whether individual employment law acts to displace or undermine the role of trade unions, the extent to which trade union officials use employment law to achieve change in the workplace and the capacity of employment law to provide a useful recruitment and mobilising tool.

5. RESEARCH RESULTS

A. Employment Law and the Displacement Thesis

Large majorities of survey respondents indicated that the law has become important in their work, that the law is useful to them and it has a positive effect on unions (table 1). There was a weak positive association between sector of activity and views on

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56 See n. 19 above.
usefulness of the law, with public sector officials slightly more likely than those from private sector unions to believe that employment law is useful to them. However, there was no difference between public and private sector officials regarding the effect of law on unions. In regard to the ways in which the law may be useful to unions, there was strong agreement in the survey with the statement that the law is useful in providing a minimum standard, which unions can improve on in negotiations. Over half of survey respondents indicated that they frequently threaten the use of the law when negotiating with employers. Four interviewees stated that the employment law provides minimum standards upon which to negotiate, citing improvements on annual leave entitlements, wage rates, maternity leave, redundancy, adoptive leave and paternity leave as examples. However, four interviewees were of a different view, believing that employment legislation set maximum rather than minimum standards. One additional interviewee drew a distinction between the public and private sectors suggesting that, in the public sector, legislative standards were often improved upon, whilst private sector members, by contrast, only obtained the basic standards established in statute.

In interviews, union officials noted that they try to enforce legal rights through workplace agreements and procedures. There was consensus amongst interviewees that the law had been especially useful on particular issues. They noted that employment laws’ transposition of EU directives provided rights which union officials believed would have been difficult to secure otherwise and they cited fixed-term work, part-time work, agency work and equality as examples in this regard. In addition, in a qualitative section, a third of survey respondents cited industrial
relations legislation as being the most ‘effective’ law followed by unfair dismissals legislation (19%). In relation to industrial relations legislation, respondents noted that it is flexible, in that disputes of interest and rights can be pursued as well as collective and individual disputes. Respondents noted that unfair dismissals legislation prevented employer abuse, required employer accountability and case outcomes are legally binding. A common theme amongst survey respondents and interviewees was that employment law is effective for protecting certain types of workers - minority groups such as migrants, part-time and young workers (table 1) and those in non-unionised employments. Employment legislation, thus, ensured that certain minimum statutory rights were available to workers in the absence of collective pressure.

Table 1 Union Officials Views’ on Employment Law (%)

<table>
<thead>
<tr>
<th>Statement</th>
<th>Agree</th>
<th>Neither agree nor disagree</th>
<th>Disagree</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employment law has become more important in helping members (n=100)</td>
<td>90</td>
<td>8</td>
<td>2</td>
</tr>
<tr>
<td>Employment law is useful in supporting their members (n=100)</td>
<td>90</td>
<td>2</td>
<td>8</td>
</tr>
<tr>
<td>Employment law generally has a positive effect on trade unions (n=100)</td>
<td>80</td>
<td>8</td>
<td>12</td>
</tr>
</tbody>
</table>

57 Industrial relations legislation is generally used in collective disputes but it can also be used in individual disputes often where individual employment law might not be available to someone e.g. where they have missed time limits for submitting cases or where an individual believes they were treated unfairly rather than illegally.
Employment law is particularly effective for protecting minority groups (n=77)  

| Employment law is useful in providing a minimum standard, which unions can improve on in negotiations (n=77) |
|---|---|---|
| Threatening the use of the law is a frequently employed tactic (n=74) |

While most survey respondents believe the law is useful, there were more mixed views on whether the law had acted to displace unions. In the survey, there was an almost even split between those who agreed and disagreed that employment law has acted to supplant the role of trade unions (table 2). All interviewees noted the increasing role played by other agents in employment rights such as NERA, the Citizens Information Service and particularly solicitors. A union official in the retail sector was concerned that employment legislation and these alternative agents had removed “some of the trade union preserve in being the champion” of employment rights. When asked if employment law is used to compensate for the limited leverage of unions, a quarter agreed while 16 per cent disagreed and the remaining 22 per cent remained neutral. Amongst interviewees, the majority rejected the view that employment law has supplanted the role of trade unions for a number of reasons. First union officials believed that despite the decline in collective bargaining coverage, it was still the dominant mechanism regulating the employment relationship at workplace level. Secondly, the considerable gap between statutory rights and their effective implementation in the workplace provides an ongoing place for unions in monitoring compliance with the law and preventing employer infringements.
Union officials claimed that an individual’s capacity to enforce their rights by themselves is extremely weak because of the requirement for detailed knowledge of employment rights and of state bodies and the expertise necessary to prepare and present employee complaints to the relevant agency. Union officials point to the vulnerability of employees who pursue legal cases against their employer with half of survey respondents and half of interviewees indicating that claimants are victimised by their employer (table 2). Examples of victimisation included workers being assigned to temporary projects, workers not being offered overtime or being made redundant. The weaknesses confronting individual employees exercising their legal rights provides a role for unions as a representative. Unsurprisingly, union officials believe that strong workplace organisation is needed to ensure employer compliance with the law. Thus, the ability of unions to bargain on pay and conditions of employment and provide instrumental benefits to their members remain key reasons for union joining and union relevance, according to officials.

Table 2 Union Officials Views’ on the Impact of the Law (%)

<table>
<thead>
<tr>
<th></th>
<th>Agree</th>
<th>Neither agree nor disagree</th>
<th>Disagree</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employment law has acted to supplant the role of trade unions</td>
<td>39.4</td>
<td>18.4</td>
<td>42.1</td>
</tr>
<tr>
<td>(n=76)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employment law is used to compensate for the limited leverage of</td>
<td>31.2</td>
<td>24.7</td>
<td>44.2</td>
</tr>
<tr>
<td>unions (n=77)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>There is a general tendency for employees who take legal cases</td>
<td>33.3</td>
<td>35.9</td>
<td>30.8</td>
</tr>
<tr>
<td>against their employer to be victimised (n=78)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Strong workplace organisation is needed to ensure employer compliance with the law (n=78)

<table>
<thead>
<tr>
<th>Opinion</th>
<th>%</th>
<th>3.8</th>
<th>0</th>
</tr>
</thead>
<tbody>
<tr>
<td>B. The Law Encourages an Individual Route</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

While many officials view the law as useful, they also point to its negative influence on individual’s perspectives on their rights, dispute resolution and the role of trade unions. A majority of survey respondents (59.2%) and half of interviewees believe employment law encourages people to use an individual rather than a collective route to protect their employment rights (table 3). Almost a third of surveyed officials indicated that employees prefer to use the law regardless of their colleagues’ support. Employees’ decision may be influenced by a belief, according to all interviewees, that they could get “justice” through the law with one interviewee commenting that employees had an “excessively optimistic view of their capacity to enforce their rights through legislation”. Despite this, over half of respondents indicate that members are satisfied even when they lose a legal case at a state body suggesting that, for at least a portion of employees, they view the law as providing an opportunity to air their grievance in an independent forum (table 3).

Interviewees believed union members expect an individualised legal service from unions and the notion of solidarity “is a language that people don’t understand anymore”. Indeed three officials suggested that statutory rights and the reliance on legal procedures had made workers more passive with some suggesting it was part of a broader trend of individualism becoming “a creeping paralysis within Irish life. So, people look at things from their own narrow perspective”. There were mixed views amongst interviewees on the extent to which collective support is available to
individuals. When asked if employees could rely on colleagues for support, 44 per cent of survey respondents agreed they could while a fifth disagreed with no discernible difference between the views of union officials from the public and private sectors (table 3). Half of interviewees, despite lamenting an overall decline in collectivism, maintained that collective support for individual claims was still available in certain situations - in strongly organised workplaces and when an individual had a ‘good cause’ and had tried other avenues for resolution without success. An official from a public sector union commented that while employment legislation does induce passivity, “if people feel strongly enough about [something], they’ll still take action”.

Table 3 Trade Union Officials Views on Individualisation (%)

<table>
<thead>
<tr>
<th></th>
<th>Agree</th>
<th>Neither agree nor disagree</th>
<th>Disagree</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employment law encourages people to use an individual route rather than a collective route to protect their employment rights (n=76)</td>
<td>59.2</td>
<td>18.4</td>
<td>22.4</td>
</tr>
<tr>
<td>Employees generally prefer to use the law to pursue their rights, regardless of the level of colleagues’ support (n=76)</td>
<td>31.5</td>
<td>34.2</td>
<td>32.9</td>
</tr>
<tr>
<td>Members are generally satisfied to have taken a legal case even when they lose (n=77)</td>
<td>50.7</td>
<td>28.6</td>
<td>20.8</td>
</tr>
</tbody>
</table>
C. Employment Law and Workplace Change

The findings suggest that unions use employment law as a means of improving workplace conditions beyond the individual employee. A majority of survey respondents (73%) agreed that legal cases can be an effective way of gaining widespread workplace change on an issue. This may be related to the fact that a majority of survey respondents (77%) and almost all interviewees reported that they generally pursue legal cases that they believe have a good chance of success. Officials in interviews noted their role in ensuring that the legal entitlements of workers are respected in the workplace is not confined to formal legal enforcement of individual claims, but also includes collective measures which are designed to secure rights for the collective rather than just single individuals. Unions negotiate policies and procedures which aim to ensure the effective implementation of rights for groups of workers within a workplace or industry. If union officials cannot secure a collective solution to a rights-based issue through the negotiation of a collective agreement, they can refer an industrial relations case to a state body with the potential for the outcome to apply to a group of employees rather than just an individual. However, industrial relations cases usually result in a voluntary recommendation and therefore require the cooperation of an employer. Another legal tactic noted by two interviewees was the submission of large numbers of individual legal claims against an employer regarding the same workplace grievance. Submitting multiple claims is an attempt to pressurise
an employer to settle and acts as a substitute for class action suits, which are not provided for in Irish law.

Seven of the interviewed officials also noted that legal cases were sometimes brought for strategic reasons and to support broader union objectives. It was suggested that favourable precedents from successful cases could be used to generate widespread change. Thus, positive outcomes could be diffused within a workplace or further afield to other organisations. One official noted, as an example, how a legal decision regarding the interpretation of the Fixed Term Workers legislation had a significant effect across the public sector. However, achieving widespread change is not always possible as difficulties can be encountered, including the complexity of the legal process, the difficulty in taking legal cases and weak remedies available under legislation. Survey respondents and interviewees were very critical of the penalties awarded in successful claims which they argued are not sufficient to be dissuasive, with a survey respondent commenting that “insufficient penalties for non compliance gives compensation not justice...”.

D. Employment Law as a Recruitment and Mobilising tool

A majority of survey respondents (78%) agreed that taking legal action on behalf of an employee can be an effective way of encouraging other employees to join a union. The majority of interviewees believed that pursuing and winning legal cases does attract people into the union but that cases are generally not pursued for that purpose. In their view, unions do not actively target non-members by advertising their capacity to provide legal advice and support, but that union legal services “speak for themselves” and non-members would join after hearing about successful claims. The officials observed that people had come to view union membership almost as an
insurance policy, and they only contact the union after things have gone wrong and one official commented, “it’s like they now see [union membership] as a cost effective alternative to full blown legal representation”.

In relation to the use of the law in an ‘inspirational’ way to foster collectivism or mobilisation on an issue, only two officials interviewed suggested that legislation could occasionally be used to emphasise and accentuate a shared sense of grievance amongst a group of workers and to stimulate collective action to address it. For example, unions can on occasion pursue legal cases expecting them to fail in state bodies but do so for the purpose of highlighting an injustice and lobbying the government to change the law. A public sector official commented

“Unions do use personal cases to try and generate some kind of collective action... but you’ve got to be selective about what cases you choose if you want to make a broader point for the collective.”

In the main, officials indicated that using the law to mobilise workers was not something they had engaged in. They indicated a preference for employees to develop their own, what Colling\(^58\) would call, ‘autonomous sense of justice’ rather than, as one official commented, have members’ aspirations or expectations set at the level of “basic legal entitlements”. Officials also refrain from using the law to frame an injustice because, they argued, the law is designed in a minimalist fashion to the favour of employers rather than employees. An interviewee commented:

\(^{58}\) Colling 2009 n. 5 above, 13.
“the law isn’t put there, and it wasn’t put there, to assist working class people to get justice within the system. In the main, if you look at the whole barrack of law that is there, it is written really from the employer’s perspective.”

In addition, interviewees noted that unions cannot take industrial action on individual disputes until they have been processed through internal company grievance procedures as required by the Industrial Relations Act 1990 and this obstructed their capacity to mobilise workers on an individual case.

6. DISCUSSION

Overall union officials believe that collective bargaining is a vastly superior mechanism for pursuing employee rights allowing employees a greater role in defining rights and justice, rather than relying on the minimum levels defined by law. Collective bargaining has the advantages of producing outcomes quicker than action through the legal route, avoids the uncertainty and loss of control involved in using a third party and provides an active role for trade unions mobilising the collective strength of the membership. Interviewees highlighted the numerous deficiencies of the law including its minimalist design, complexity and low penalties. Studies on the British employment rights system found similar weaknesses in employment law\(^\text{59}\). Some of these deficiencies can be minimised where there is strong collective bargaining. Employment law is most advantageous where strong workplace

organisation can enforce rights and incorporate them into collective agreements. While the officials surveyed here noted positive functions of the law, these comments must be viewed in the context of an environment in which unionisation has been in almost constant decline since the early 1980s. Collective bargaining coverage is now only a reality in a minority of private sector workplaces. Seventy per cent of private sector employees are not covered by a collective agreement. Indeed a third of union members in the private sector are not covered by a collective agreement and as such it can be expected that they are more likely to engage with unions in individual disputes that require the employment law services of unions. Employment law was identified as becoming more important and useful in union officials’ work, particularly to protect vulnerable groups in the labour market. Even where there is strong workplace organisation, there are limits on the extent to which this collective strength can be used in an individual dispute of right or interest since unions are prohibited from engaging in industrial action before grievance procedures are exhausted. There was little difference between the views of officials from the public and private sectors on the impact of the law. Thus, it could be argued that officials’ perceptions of the impact of employment law may be dependant on the law used, the issue in dispute, type of worker and outcome of a case.

In the context of the employment rights system, unions currently find themselves in a dilemma. A multitude of factors has contributed to unionisation decline and this has been well-documented elsewhere. While employment law is not generally considered a cause of the decline, it could be argued that it has facilitated the decline, contributing to the individualisation of disputes. However, the law is also

now a necessary tool for unions. Employers, particularly in the non-union sub-system, are in a strong negotiating position to unilaterally determine issues like discipline, grievances, pay and conditions. The law may be the only viable avenue for unions to address alleged infringements of rights where union presence is weak or non-existent or where workers are reluctant to engage in collective action. Thus, while unions view the law as an inadequate substitute for collective bargaining and recognise its individualising effect, they believe, in general, that the law is “complementary to trade union organisation as distinct from being a threat”.

Union officials have indicated that they use the law to implement workplace change, such as through the submission of hundreds of individual legal cases against the same employer. Such a strategy has been referred to as a form of ‘overt collective action’61. This strategy, interviewees argued, increases the pressure on an employer to negotiate collectively rather than face a sizeable administrative burden. If an employer does not negotiate with the union, the latter can seek to implement change through a small number of test cases, the outcome of which could be applied to the hundreds of other legal cases. Such strategies can also back-fire. In a counter-move to frustrate unions, employers can refuse to use test cases, forcing every individual case to be processed and heard by a state body. Such a strategy illustrates the flaws of a statutory framework in which employers do not have to negotiate with unions and unions are often forced to rely on the pursuit of recognition/negotiation through legal cases where the success of the outcome rests in the hands of a third party.

There is little indication from the results of our study that unions use the law as a way to mobilise workers through taking industrial action. Officials highlighted a

number of impediments including the legislative restrictions on taking industrial action on behalf of an individual but even without such restrictions, the likelihood of unions taking industrial action is questionable. The growing proceduralisation of workplace issues, in part because of employment law, encourages an expectation that disputes will be processed through workplace procedures, reducing the possibility for mobilising employees at workplace level\textsuperscript{62}. In addition, workers may be unlikely to mobilise on a legal issue if the conditions for collective action do not exist. Three social psychological processes are necessary to trigger collective commitment and action: a sense of injustice, employee belief that the source of their dissatisfaction is an identifiable significant other - normally an employer - and employee belief that acting together will provide an effective remedy for their grievances\textsuperscript{63}. While the law may be used to frame an injustice, this is not sufficient to trigger collective action. The employment relations environment which has prevailed since the 1980s has become increasingly hostile to employees acting in concert against employers. In this context, employees are less likely to have a sense of efficacy that acting collectively against their employer will change their circumstance. It is notable that many of the examples of legal mobilisation noted earlier (Waterford Crystal, low paid workers) were targeted at the government rather than against a particular employer for a change in workplace practice. Targeting the government carries much less risk for workers than if they mobilised against their employer and if a government changes a law, it can have widespread effects. Mobilising in the workplace is an exceptional and


\textsuperscript{63} V. Badigannavar and J. Kelly ‘Why are Some Union Organizing Campaigns more Successful Than Others’ (2005) 43 British Journal of Industrial Relations 515-535; D. Mc Adam, ‘Micromobilizationcontexts and Recruitment to Activism’ (1988) 1 International Social Movement Research 125-154.
contingent action and there is little evidence of the law being used to harness such action in our study. Our results point to the difficulties for workers and unions operating in an individualised legal system in the context of a weakening collectivist ethos traditionally associated with the Irish system of industrial relations. The next section points to the consequences for union, employers and society of operating under an alternative legal system, as evidenced in Sweden.

7. IRELAND IN A COMPARATIVE CONTEXT: THE SWEDISH EMPLOYMENT RIGHTS SYSTEM

Like Ireland voluntarism is also viewed as an important feature of Sweden’s system of industrial relations which is perceived to have essentially retained its strong collectivist ethos and practice. Undoubtedly the high levels of union density in both the private and public sectors are central factors in reinforcing the collectivist tradition. However this is only part of the story. The position and role of trade unions is of greater importance in Swedish law than any distinction between individual and collective disputes. Union involvement in the dispute resolution process is mandated through key pieces of legislation such as the Co-Determination Act (Medbestämmandelagen, MBL 1976:580), the Labour Disputes Act (Lagen om rättegången i arbetstvister, 1974:371) and the Employment Protection Act (Lagen om anställninsskydd, LAS 1982:80) and confers on unions a predominant role in all


dispute resolution processes. Most disputes are handled directly through bilateral negotiations between the union and employer until the dispute reaches the Labour Court as a court of last resort.

In Sweden cases are directly referable to the Court only where a union or employers' association brings an action, in its own right or on behalf of one of its members, concerning an employment relationship regulated by collective agreement. The logic in the Swedish system is that disputes should be taken care of within the channels of dialogue and negotiations that exist and are regulated by the 1976 Co-Determination Act and the parties’ collective agreement. Indeed most of the detailed regulation about individual disputes is written in collective agreements and local cooperation agreements between parties. Thus for unionised individual employees with employment rights grievances, the disputes process retains a collectivist ethos up to and including the Labour Court.

In Sweden voluntarism essentially means encouraging trade unions and employers to settle collective and individual disputes between the parties without resort to state mechanisms and agencies. However this voluntarism is situated in a regulated statutory framework that provides a relatively even balance of power and obligates employers to engage with unions in the resolution of disputes. In addition, employers are unlikely to use procedures to delay resolving a dispute because under the Co-Determination Act employers are obliged to negotiate with trade unions on

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major changes on employees’ working conditions. There are also instances such as in relation to pay disputes and disputes employees’ concerning obligation to work, where a union has a ‘priority right of interpretation’\(^{68}\). This means the union’s view prevails until the dispute is definitely settled\(^{69}\). Within this framework the parties engage with minimum intervention of the law or other third parties. This is evidenced by the low number of cases submitted to the Labour Court, averaging 400 to 450 but the annual number of judgements passed is usually between 150 and 160\(^{70}\).

In contrast to Sweden, the Irish industrial relations regime is characterised by a weak collectivist regulatory framework and a more robust individual employment rights framework. While Irish unions and employers are encouraged to solve collective and individual disputes locally, the degree to which the parties engage depends on the influence and pressure each side can bring to bear on the dispute. In the absence of an encompassing statutory framework supporting the voluntary disputes process it is easier for the stronger party to enforce its will on the weaker party through delaying tactics such as prolonging the solution of issues and pushing cases into third party agencies.

8. **CONCLUSION**

In the development of employment law public policy makers have ignored the key role that unions can play in dispute resolution at workplace level and they have


\(^{69}\) Adiercreutz and Nystrom, n. 21 above, 155

divorced individual from collective issues. Similarly in the British context, Dickens argues that governments have disregarded collective law as a mechanism through which workers could be protected and through which individual disputes could be handled effectively. The separation of individual employment law cases from the collectivist process has shifted the unionised sector away from solving individual disputes through voluntary collective bargaining mechanisms towards quasi-judicial agencies. A significant factor in the number of individual disputes of interest and right being referred to third party bodies in Ireland is the imbalance of power between employers and trade unions in the unionised sector of the economy due to the absence of statutory union recognition and an encompassing regulatory framework that compels both parties to solve disputes without recourse to a third party. The referral of over 20,000 workplace disputes in one year indicates a system that is no longer effective or efficient. The State bears much of the financial cost of resolving cases and employees and employers divert a significant amount of working time to pursuing and defending claims. Under the current legal framework this appears to be an inevitable outcome.

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