Berlin conference speech

The cause of labour is the cause of Ireland

The cause of labour is the cause of Ireland, the cause of Ireland is the cause of labour. They cannot be dissevered. Ireland seeks freedom. Labour seeks that an Ireland free should be the sole mistress of her own destiny, supreme owner of all material things within and upon her soil. Labour seeks to make the free Irish nation the guardian of the interests of the people of Ireland, and to secure that end would vest in that free Irish nation all property rights as against the claims of the individual, with the end in view that the individual may be enriched by the nation, and not by the spoiling of his fellows.

James Connolly

The Irish Flag

From Workers' Republic, 8 April 1916.

Introduction

The above quote provides a fundamentally important insight into the right to strike in Ireland in theory and practice. As most of the attendees at this conference are from or are living in Member States of the European Union, you will be aware that the Republic of Ireland, i.e. the Twenty Six of the Thirty-Two Counties of Ireland (RoI) is also a Member State and subject to EU law, including its labour laws. You may therefore expect that this speech will proceed to outline the right to strike in RoI under the auspices of EU law. You would be wrong.

Rather, this speech will make the fundamental political point that Six of the Thirty-Two Counties of the North East of Ireland (also known as Northern Ireland or NI) remain under British occupation and that I will refuse to consider the right to strike in Ireland without outlining the similarities and differences of the law in both of these legal jurisdictions. As a socialist lawyer and the International Secretary of the Socialist Lawyers Association of Ireland, I do not consent to the political legitimacy of the legal position that Ireland is partitioned arising from the UK's Government of Ireland Act 1920 and the Anglo-Irish Treaty of 1921. The Treaty ended the Irish War of Independence and established the Irish Free State as a dominion within the British Empire. The treaty was signed on December 6, 1921, and took effect a year later.

It is in this context that this speech does not focus on the right to strike in the RoI legally without considering the political position affecting the right to strike shaped by the consequences of partition and ongoing colonisation in one part of the country. Accordingly, I challenge the legitimacy of the assumption that the right to strike in NI should be curtailed by being subjected to the weakness of the UK's 'unwritten' constitution (and NI's inherently contingent place within it under the Northern Ireland Act 1998, a legislative consequence of the Belfast / Good Friday Agreement), especially when compared to the written constitution of the RoI.

In considering the right to strike in the RoI, I must briefly allude to the failure of Irish law-making sovereignty to properly distinguish labour law and industrial relations in an appropriate manner from the principles and operation of UK labour law. As the Irish labour historian, Emmet O'Connor remarked in his seminal book, 'A Labour History of Ireland 1824 – 2000), "*the vast gulf in political culture, economy, and employment structure between a highly advanced country and 'undeveloping' region on its western periphery, makes it impossible to understand how anyone could have thought of applying the British model to Ireland without an immersion in mental colonisation*." I will not concentrate in this speech on the fetters to Irish sovereignty posed by the failures of the neoliberal EU legal order, as I understand that others at this conference will allude to such failings, but I will concede that Irish workers are better protected under EU law and I will refer to some of the key challenges and opportunities created by Brexit for workers' rights in NI.

A snapshot of the labour movement in Ireland

The most important development for the labour movement in Ireland was the legal recognition and protection of trade unions and their activities, including (in principle, the right to strike). Historically, trade union activities were considered unlawful under UK common law (when the Thirty-Two Counties of Ireland were part of the UK). However, the Trade Union Act 1871, and the Conspiracy and Protection of Property Act 1875, provided significant legal immunities for trade unions, including protection from prosecution for criminal conspiracy and for picketing in furtherance of a trade dispute.

One of the other most significant developments in trade union law in the RoI is the provision for amalgamations and transfers by members of certain trade unions as outlined in the Trade Union Act 1975. This Act allows members of a trade union, which is headquartered in another country, to amalgamate with or transfer their engagements to another trade union if a majority

of the members residing in the RoI and NI so decide. This has reinforced the organisation of British trade unions, such as Unite the Union, in the RoI.

The right to strike in NI

In NI, historically, the right to strike was generally governed by the same laws as the rest of the UK, as labour laws are largely similar across the UK, including NI. Therefore, the key framework for the right to strike is based on UK employment law. The legal framework for industrial action (such as strikes) is primarily governed by the Trade Union and Labour Relations (Consolidation) Act 1992 and subsequent amendments. This legislation sets out the conditions under which strikes, or other forms of industrial action can legally occur.

For a strike to be legally protected, unions must conduct a formal ballot of their members. A majority of union members must vote in favour of the strike action. This vote must be conducted in a secret ballot, and the union must inform employers of the result. Failure to properly carry out the ballot process can result in the action being deemed unlawful.

Once a union has held a ballot and received a majority vote for strike action, they must give notice to the employer before the strike can proceed. The law requires at least 14 days' notice to the employer before industrial action begins. If the correct legal procedures are not followed - such as failing to conduct a proper ballot or give the required notice - the strike can be considered unlawful. Employees who participate in an unlawful strike may face legal action from their employer, including disciplinary measures or dismissal.

While employees participating in a legally protected strike are generally not entitled to pay from their employer, they are still protected from dismissal during the initial period of industrial action (usually up to 12 weeks). However, if the strike continues beyond that period, employees may lose this protection and could face dismissal.

The right to strike in the RoI

In the RoI, the right to strike is generally recognised, but it is governed by specific legal frameworks, and there are requirements regarding how industrial action is taken. There is no express legal right to strike. The Constitution of Ireland of 1937 provides inter alia that *'(the) State guarantees liberty for the exercise of...the right of the citizens to form associations and unions*' (Article 40.6.iii).

Therefore, unlike the legal position in some other countries, the Constitution of Ireland does not explicitly provide a "right to strike." However, Irish labour law generally permits industrial action, and strikes are legally *recognised*, especially when they are part of a dispute involving employment conditions. The key piece of legislation that governs industrial action in Ireland is the Industrial Relations Act 1990 (IRA 1990).

It amends and extends the traditional immunity for trade union activity and industrial action, which had been in place since 1906, but in terms that sought to reinforce democratic control within the unions. The Act redefined a trade dispute as "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." It also provides a framework for ensuring that industrial disputes are managed in a way that does not unnecessarily disrupt public services or essential industries. Therefore, this legal framework is similar to the UK law applicable in NI.

The significance of HA O'Neil Ltd v Unite the Union and others [2024] IESC 8

I will briefly outline the significance of the Irish Supreme Court judgment in *HA O'Neil Ltd v Unite the Union and others* (HA O'Neil), particularly its interpretation of the IRA 1990 and the criteria for granting interlocutory injunctions in trade disputes. This is to emphasise the potential of positive divergence between the law on the right to strike in the RoI compared to NI, partly underpinned by the limited constitutional protection of Article 40.6.iii.

The defendants (Unite the Union, and three of its members employed by the plaintiff company) proposed industrial action involving picketing at construction sites where HA O'Neil Ltd was working as a sub-contractor. The underlying dispute related to a claim by Unite for payment of the first hour of "travel time" to its members employed by HA O'Neil Ltd. A Sectoral Employment Order (SEO) made in 2018 under the Industrial Relations (Amendment) Act 2015 included a dispute resolution procedure and a "no-strike" clause, requiring the exhaustion of the procedure before any industrial action. Unite had conducted a secret ballot in accordance with section 14 of the IRA 1990, which favoured industrial action, and had given the required notice to HA O'Neill Ltd. The High Court granted an interlocutory injunction restraining the proposed industrial action, finding an arguable case that it breached the "no-strike" clause in the SEO, and that the balance of convenience favoured the plaintiff.

The judgment emphasised that a permanent injunction should only be granted if the plaintiff would be entitled to such relief at trial. This principle underlines the necessity of meeting a

high threshold for injunctive relief in such cases.
The court affirmed a broad interpretation, stating that the genuineness of a dispute does not depend upon what are the true facts of the dispute, but rather it depends on the bona-fides of the parties. This approach aligns with previous case law and reinforces the scope of the IRA 1990's protections for trade union activities.

Furthermore, the HA O'Neil Ltd case has had a notable impact on subsequent cases involving trade disputes and injunctive relief. Courts have referenced the judgment to underline the necessity of meeting the high threshold for granting injunctive relief, as established in HA O'Neil Ltd. This demonstrates the case's enduring significance in shaping the legal landscape in this area and is much stronger protection for the right to strike in the RoI compared to NI.

The right to strike in NI and Brexit

The Northern Ireland Protocol (now known as the Windsor Framework) has had significant implications for the application of European Union (EU) law in NI, including areas related to labour law. It highlights the absurdity of partition and the legal and mental gymnastics to maintain this imperial order in Ireland, albeit it helps to ameliorate the generally weaker protections for workers under UK (and thus NI) law than under EU (and thus RoI) law.

The Protocol, which is part of the Brexit agreement, was designed to address the unique situation of NI after the UK left the EU. One of its key provisions is that NI remains aligned with certain EU regulations, including those that relate to the single market for goods. While the Protocol is primarily concerned with trade and customs, it also impacts some aspects of EU law in NI, including labour laws that are linked to the regulation of goods and services.

Some relevant elements include:

- Employment Rights Derived from EU Legislation

  EU-derived employment laws that are relevant to the movement of goods and services, like those regulating working hours, health and safety standards, and protections for posted workers, still have an effect in NI.

- EU Directives

  Certain EU directives related to employment law and workers' rights are still in force in NI due to its alignment with EU standards for goods. For example, the Working Time

Directive, which governs maximum working hours, paid leave, and rest periods, continues to apply.

Accordingly, NI remains in alignment with some EU regulations, while the rest of the UK has diverged from the EU's framework following Brexit. This means that there could be differences in employment law between NI and the rest of the UK, especially as the UK introduces changes to its domestic labour laws. For example, any amendments or new laws passed in the UK related to employment rights that do not affect NI directly could create a situation where workers in Northern Ireland are subject to different rights compared to their counterparts in Great Britain (GB).

NI's continued alignment with EU laws means that protections around trade union activities and collective bargaining remain tied to EU principles. In the future, the EU might introduce further laws or guidelines protecting the rights of workers to organise and engage in collective bargaining. These protections would apply in NI but may not be mirrored in the rest of the UK.

In short, NI is still subject to key EU regulations that ensure the protection of workers' rights, collective bargaining, and safety standards, even as the broader political and legal landscape changes post-Brexit. This creates a complex legal environment where NI's employment law may differ from that in GB, leading to potential challenges in aligning practices and policies across the UK.

Conclusion

It is not possible to consider the right to strike in Ireland without recognising the original sin of partition of the country and the ongoing legacy and reality of British imperialism, including Brexit and the Protocol. The legal theory would suggest that the right to strike in the RoI is stronger than in NI because of the Constitution of Ireland. The political and industrial reality is different, as the exercise of the right to strike very much depends on the willingness of the trade unions in either jurisdiction to use their collective bargaining power to obtain statutory immunity for such strike action. In this sense, the labour movement in Ireland is truly united … united in its weakness and inability to organise through a fully realised and constitutionally protected right to strike to help truly challenge the power of Capital in the country, whether this manifests in the Six Counties of NI, the Twenty-Six Counties of RoI or RoI's voluntary limitation of sovereignty under EU law (via the freedom of capital under the EU's Internal Market).

As Connolly suggested over 100 years ago, “Ireland free should be the sole mistress of her own destiny.” Irish sovereignty exercised in a reunified Thirty-two County republic is the optimal constitutional relationship to allow its citizens in NI and the RoI to be in control of their own destiny to provide a constitutionally protected right to strike. In the interim, we remain subject to the regulatory arbitrage and competition between the UK and the EU to the detriment of workers in both jurisdictions.