A shock to the system: sectoral bargaining under threat in Ireland

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Abstract
In Náisiúnta Leictreach Contraitheoir Éireann v Labour Court, the Irish High Court struck down as unconstitutional a key component of Ireland’s industrial relations system for the third time in recent years. The Court determined that the extension of collective agreements erga omnes breaches the constitutional prohibition on the delegation of legislative power. This note explains the background to that decision and critiques the Court’s reasoning from the perspective of a ‘labour constitution’ model of labour law, and in light of international and European legal principles. The decision appears to misunderstand the place of collective bargaining at a sectoral level within European internal market and competition law. It also seems to rule out any form of meaningful participation by workers, employers and their representatives in collective bargaining on a sectoral basis or through dedicated industrial relations machinery. According to the vision of Irish constitutional law put forward in this case, decisions relating to the administration of production and economic life more broadly must be reserved to the legislature. This is a significant loss for the autonomy of the social partners and represents an impoverished understanding of democracy and legitimacy within the constitutional order, and risks leaving Ireland even more of an outlier in Europe than it already is on the issue of sectoral collective bargaining.

Keywords
Collective bargaining, sectoral bargaining, sectoral agreement, erga omnes, trade union, social partner, constitutional

Introduction
There are ‘older constitutional currents’ underlying modern labour law,¹ according to which labour law should give workers a role in administering the productive process and the economy

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¹. Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds), The Autonomy of Labour Law (Hart Publishing 2015) 16.
in a broad sense, rather than merely fixing particular standards for working conditions. This approach to labour law focuses on the participation of economic actors (from trade unions, to works councils, to employers and their representative organisations) in the administration of economic affairs.

Participation in economic governance varies widely across jurisdictions, in both extent and form, and international debate rages over the appropriate place of the social partners in policy-making. This case note examines the recent decision of the Irish High Court in Náisiúnta Leictreach Contraiteoir Éireann v Labour Court (hereafter ‘Electrical Contractors’). In declaring the legislative framework for mandatory sectoral collective agreements unconstitutional, the Court favoured a model of constitutionalism that reserves the legitimacy to govern economic life to legislative organs of the state, at the expense of workers’ and employers’ representative organisations. This undermines the autonomy of both those economic actors and dedicated administrative bodies in the sphere of industrial relations, revealing a potential source of tension between labour law and constitutional law over the legitimacy of social partnership. The present case is not only important from the perspective of Irish industrial relations and constitutional law, but will be of interest to observers from jurisdictions with similar mechanisms of erga omnes extension for collective agreements. As will be discussed below, this subject assumes particular relevance in the context of the European Commission’s proposals to extend collective bargaining coverage within the Member States of the EU.

This article will first set out the context of sectoral collective bargaining in Ireland, and establish the immediate background to Electrical Contractors and the impugned statutory framework. It will then explain the case at hand and situate it in international context, before turning to the fallout from the decision and anticipated future developments.

### Background

There is a long history in the labour movement of aspirations towards ‘industrial democracy’, a notable example of which is the model of the ‘labour constitution’ first developed by Hugo Sinzheimer and recently revived by Ruth Dukes. For scholars in this tradition, labour law should support participation by workers and their representatives in economic and productive decision-making for two reasons: first, as instrumental to securing better material protections for workers; and second, to recognise the agency of workers, an inherent benefit of participation. It seeks to position the employment relationship within a ‘democratized economy ... governed by capital and labour acting together in furtherance of the public good.’ The democratic credentials of labour law and industrial relations come from the participation of workers, employers and their respective organisations in decision-making; this gives such decision-making machinery constitutional legitimacy within the
state. In this way, the ‘labour constitution’ complements the ‘political constitution’ that facilitates participation by citizens and their representatives in political processes.

Different jurisdictions give effect to these ideas of worker participation to varying extents and through diverse institutional frameworks: collective bargaining, co-determination, works councils, employee representatives on corporate boards, election of managerial staff, up to full workplace democracy. In some jurisdictions, the principle of worker participation in the governance of economic life is expressly enshrined in the national constitution: for example, the preamble to the French Constitution of 1946 proclaims: ‘All workers shall, through the intermediary of their representatives, participate in the collective determination of their conditions of work and in the management of the work place.’ Likewise, the Italian Constitution mandates: ‘It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain . . . the effective participation of all workers in the political, economic and social organisation of the country.’

There is no such reference made in the Irish Constitution, which merely protects ‘the right of the citizens to form associations and unions’, subject to ‘public order and morality’ and ‘regulation and control in the public interest’. In terms of legislation, the Industrial Relations Act 1946 established a form of mandatory sectoral collective agreements. Part III of the 1946 Act allowed for any party to a collective agreement to apply to the Labour Court to have that agreement ‘registered’, which made it binding on all parties operating in that sector, both by incorporation into individual contracts of employment, and by criminal sanctions on employers who fail to abide by the collective agreement.

Part IV provided for sectoral regulation through tripartite bodies called Joint Labour Committees (JLCs) under the auspices of the Labour Court. These could produce Employment Regulation Orders (EROs), which had similar status to the Registered Employment Agreements (REAs) provided for under Part III. The ten JLCs were responsible for setting wages and conditions in specific industries which were historically low-paid, labour-intensive, with low trade union density.

8. Dukes (n 5) 13 ff.
9. Dukes (n 5) 18.
10. Paul Davies, ‘Efficiency Arguments for the Collective Representation of Workers: A Sketch’ in Bogg et al (n 1); Nien-hê Hsieh, ‘Rawlsian Justice and Workplace Republicanism’ (2005) 31(1) Social Theory and Practice 115; Inigo González-Ricoy, ‘The Republican Case for Workplace Democracy’ (2014) 20(2) Social Theory and Practice 232; Elizabeth Anderson, ‘Equality and Freedom in the Workplace: Recovering Republican Insights’ (2015) 31(2) Social Philosophy and Policy 48 and Private Government (n 6); Dukes (n 5); Alex Gourevitch, From Slavery to the Cooperative Commonwealth (CUP 2015).
11. § 8. Translation provided by the Conseil constitutionnel: see <https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/cst3.pdf> accessed 25 January 2021. The status of the 1946 preamble is reaffirmed by reference within the preamble of the Constitution of 1958.
12. Article 3. Translation provided by the Parliamentary Information, Archives and Publications Office of the Senato della Repubblica: see <https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf> accessed 25 January 2021.
13. Article 40.6.1.iii.
14. Article 40.6.1.
15. Article 40.6.1.iii.
16. For further information, see Doherty (n 2) 54-55.
17. Kady O’Connell and Ronnie Neville, ‘The Industrial Relations (Amendment) Act 2012 and the Future of JLCs and REAs Post-McGowan’ (2015) 12(2) Irish Employment Law Journal 50; Michael Doherty, ‘Battered and Fried? Regulation of Working Conditions and Wage-Setting after the John Grace Decision’ (2012) 35(1) Dublin University Law Journal 97, 101-02.
Rather than viewing these subsidiary, autonomous regulatory mechanisms as ‘complementary’ to the political process, as envisioned by Sinzheimer and Dukes, a series of decisions of the Irish superior courts over the past decade have explicitly considered a ‘labour constitution’ approach to be rivalrous to, and ultimately incompatible with, the political constitution. In John Grace Fried Chicken v Catering JLC, the High Court struck down as unconstitutional the system of JLCs and EROs, on the basis that it amounted to an impermissible delegation of legislative power to the Labour Court. Two years later, in McGowan v Labour Court, the Supreme Court determined that the registered employment agreements (REA) scheme was also an unconstitutional delegation of legislative power.

A full exposition of the doctrine of non-delegation of legislative power in Irish constitutional law is beyond the scope of this article, but a very brief summary is required to understand John Grace Fried Chicken, McGowan, and the case at hand, Electrical Contractors. The Irish Constitution provides that the ‘sole and exclusive power of making laws for the State is hereby vested in the Oireachtas [the Irish Parliament]’. This has been interpreted to require that primary legislation set out the ‘principles and policies’ in accordance with which a delegate legislator must act. The delegate may do no more than ‘fill in details’, although in practice there is some flexibility given to ministers and administrative agencies.

The Supreme Court in McGowan characterised the delegation in Part III of the 1946 Act as ‘unusual and possibly unique’, in that it granted broad power to private actors (trade unions and employers) to create norms binding on third parties (employers who did not sign up to the original collective agreement), contravention of which could be a criminal offence. This, according to the Court, amounted to legislation. The parent Act, the Court held, ‘provides no limitation on, or guidance for, the exercise of the power by the regulation-making parties.’ As such, the REA scheme (and every REA concluded thereunder) was struck down as unconstitutional.

The effect of these two decisions was to lob a bomb into Irish industrial relations. Between 2011 and 2013, in the depths of the Great Recession and while Ireland was subject to an IMF-EU bailout and Troika supervision, 17 EROs and 70 REAs were invalidated, throwing the pay and conditions of thousands of workers across swathes of the economy into uncertainty. Quite apart

18. [2011] IEHC 277.
19. [2013] IESC 21.
20. [2013] IESC 21, [19] ff.
21. See further Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, Kelly: The Irish Constitution (5th edn, Bloomsbury 2018) 523 ff.
22. Article 15.2.1.
23. Cityview Press Ltd v An Chomhairle Oiliúna [1980] IR 381; McDaid v Sheehy [1991] 1 IR 1; Laurentiu v Minister for Justice [1999] 4 IR 26; John Grace Fried Chicken v Catering Joint Labour Committee [2011] IEHC 277.
24. For example, see Cityview Press Ltd v An Chomhairle Oiliúna [1980] IR 381, 399.
25. Indeed, various commentators have condemned the inconsistent judicial approach to Article 15.2.1; see, for example: Eoin Carolan, ‘Democratic Control or “High-Sounding Hocus-Pocus”? A Public Choice Analysis of the Non-Delegation Doctrine’ (2007) 29 Dublin University Law Journal 111; Hogan et al (n 21) 306; Oran Doyle and Tom Hickey, Constitutional Law: Text, Cases and Materials (2nd edn, Clarus Press 2019), [8-32]-[8-35].
26. [2013] IESC 21, [25].
27. [2013] IESC 21, [27]. In this, of course, the legislation was only respecting the autonomy of the social partners.
28. Doherty (n 2) 59 ff.
29. Doherty (n 2) and (n 17). The employment agreements continued to have legal effect insofar as they had been incorporated into individual contracts of employment prior to McGowan; see O’Connell and Neville (n 17) and Cathy Maguire, ‘The Enforceability of Collective Agreements’ (2016) 13(4) Irish Employment Law Journal 92.
from the economic impact, the strictness of the non-delegation doctrine led some commentators to wonder whether mandatory collective agreements could ever be constitutionally-compliant.\(^\text{30}\) After \textit{McGowan}, the government introduced the \textit{Industrial Relations (Amendment) Act 2015}. This reformed the system of REAs in response to \textit{McGowan} to take into account the concerns expressed by the Supreme Court, and carried over the reforms of the JLCs put into effect after \textit{John Grace Fried Chicken}. The need to accommodate these decisions necessitated a significant weakening of the REA and JLC/ERO systems. In particular, section 6 of the 2015 Act specifies that REAs are now ‘binding only on the parties to the agreement’.\(^\text{31}\)

In other words, it was no longer possible for trade unions and employers to conduct collective bargaining with a view to creating a mandatory sectoral agreement through the REA system. To compensate for this, the 2015 Act introduced a new form of regulation: the Sectoral Employment Order (SEO).\(^\text{32}\) Under this mechanism, a trade union or an employers’ organisation which was ‘substantially representative’ of any given sector of the economy could ask the Labour Court to ‘examine the terms and conditions relating to the remuneration and any sick pay scheme or pension scheme, of the workers of a particular class, type or group in [an] economic sector . . .’\(^\text{33}\) The Labour Court was obliged to hear submissions from ‘any interested parties’ (typically other trade unions or employers operating in the same industry).\(^\text{34}\) Upon conclusion of its investigation, the Labour Court could submit a report to the Minister for Business, Enterprise and Innovation\(^\text{35}\) recommending the introduction of an SEO covering the matters detailed in its report, by means of statutory instrument. In an effort to allay concerns about delegation of legislative power, the Minister was obliged to obtain the approval of Parliament for a proposed SEO in the form of a resolution of both Houses.\(^\text{36}\)

Like REAs and EROs, SEOs were automatically incorporated into contracts of employment, overriding any provisions to the contrary that were less favourable to employees, and breach of an SEO by an employer was a criminal offence.\(^\text{37}\) It was this new system that was subject to challenge in the \textit{Electrical Contractors} case.

### Facts of Electrical Contractors

Although clearly presented as a form of state regulation, the SEO system could be, and was, used as a means of ‘bargaining by the back door’. Under section 14, trade unions and employers’ organisations could submit \textit{joint} applications to the Labour Court calling for an inquiry into their sector, to present a pre-agreed collective bargain, inviting the Court to recommend an SEO adopting the terms of the agreement. This would effectively extend the agreement \textit{erga omnes}.

This is exactly what happened in the \textit{Electrical Contractors} case. Connect, the largest trade union representing electricians, and two organisations representing employers in the electrical contracting industry concluded a collective agreement setting the terms of pay, sick leave and

\(^{30}\) O’Connell and Neville (n 17) 55.

\(^{31}\) Maguire (n 29).

\(^{32}\) \textit{Industrial Relations (Amendment) Act 2015}, chapter 3.

\(^{33}\) \textit{Industrial Relations (Amendment) Act 2015}, section 14.

\(^{34}\) \textit{Industrial Relations (Amendment) Act 2015}, section 16.

\(^{35}\) Now the Minister for Enterprise, Trade and Employment.

\(^{36}\) \textit{Industrial Relations (Amendment) Act 2015}, section 17.

\(^{37}\) \textit{Industrial Relations (Amendment) Act 2015}, section 19.
pension requirements. Since the REA system had been struck down in McGowan, a number of operators within the electrical contracting industry had been ‘undercutting’ the businesses who were party to that agreement. The applicants explicitly wanted to obtain an SEO for the purposes of forcing non-party employers to adhere to the terms of this collective agreement. The Labour Court adopted the terms of the collective agreement into its report more-or-less in their entirety. It was ‘satisfied that the proposed SEO . . . will reasonably reflect the terms of the national collective agreement concluded between employers and the trade unions on pay and conditions of employment for the time being in place in the sector.’ Having received the Labour Court report in April 2019 and obtained the consent of Parliament in the form of resolutions of both Houses, the Minister promulgated the SEO in accordance with the Court’s recommendations in June 2019.

The SEO was subject to immediate challenge by way of judicial review. The applicant, Náisiúnta Leictreach Contraitheoir Éireann, is an organisation of small operators in the electrical contracting industry. It had appeared as an ‘interested party’ at the Labour Court hearings which led to the report, and had made submissions to the effect that it was unfair to impose the same wage rates on large and small electrical contracting companies, and that any SEO (or, for that matter, collective agreement) applied to the industry would be anti-competitive. These arguments had been rejected by the Labour Court in its recommendation to the Minister. Náisiúnta Leictreach Contraitheoir Éireann applied to the High Court for an order striking down the new SEO, and further applied for an order striking down the underlying legislation (the 2015 Act) as unconstitutional.

Decision of the High Court

The case was heard in the High Court by Mr. Justice Simons, who divided the case into two parts: the non-constitutional challenge to the specific electrical contracting SEO, and the constitutional challenge to the SEO system as established in the 2015 Act. This article will focus more on the constitutional issues, but it is worth recounting the non-constitutional component first.

Challenge to SEO. The Court held the Minister had acted ultra vires the 2015 Act in promulgating the SEO, because the procedure followed by the Labour Court, and the report it submitted to the Minister, had not complied with the procedure set out in Chapter 3 of the 2015 Act.

First, the Labour Court had not had regard to all the submissions of interested parties, as required by statute. It was necessary for the Court to include in the report a ‘fair and accurate summary’ of all the submissions it received, and provide reasons for why any submissions were rejected. Second, the Labour Court could only recommend the adoption of an SEO where it had formed the view that an SEO was ‘reasonably necessary’ to achieve certain specified policy

38. [2020] IEHC 303, [30].
39. [2020] IEHC 303, [34]-[36], [41].
40. [2020] IEHC 303, [45].
41. Sectoral Employment Order (Electrical Contracting Sector) 2019 (SI no 251/2019).
42. [2020] IEHC 303, [41]. It appears the organisation’s name is supposed to be an Irish-language translation of ‘National Electrical Contractors of Ireland’. Regrettably, there are a number of flaws in the construction adopted: it should be ‘Contraitheoirí Leictreacha Náisiúnta na hÉireann’.
43. [2020] IEHC 303, [41].
44. [2020] IEHC 303, [46].
45. [2020] IEHC 303, [49], [55]-[59].
objectives, in particular to ensure ‘fair and sustainable rates of remuneration’ in the sector. Here, it was open to the Minister to conclude that the SEO would help achieve those policy goals, rather than being necessary to achieve them.\textsuperscript{46} Third, it was unclear from the wording adopted whether ‘in-house’ electricians employed in public sector bodies, who had been expressly excluded from the collective agreement on the basis that their working environment was sufficiently differentiated from that of private-sector electrical contracting, were covered by the scope of the SEO. Precision was particularly important in the context of criminal sanctions for breach of an SEO.\textsuperscript{47} Finally, the SEO violated the principle of delegatus non potest delegare. The Labour Court had recommended that the rates of pension contributions required of employees and employers in the sector be benchmarked according to the rates required under the Construction Workers Pension Scheme (CWPS), a private trust. This effectively sub-delegated the power to set pension rates for the sector to the CWPS.\textsuperscript{48}

For these reasons, the SEO was struck down as \textit{ultra vires}. It is unnecessary to analyse these grounds in much detail; it does seem as if the Labour Court was deficient in its procedure in this instance. However, the evidence before the Court was that if the SEO was struck down, the parties would apply again to the Labour Court for a new SEO in much the same terms (with whatever adjustments were necessary to avoid the vagueness and sub-delegation problems), which the Labour Court and the Minister were inclined to approve after following the proper procedure. Furthermore, the non-party employers intended to challenge any future SEOs on a constitutional basis. Therefore, the constitutional issues raised are of much greater significance, because the decision of the High Court on these matters seems to preclude any further SEOs, or any other form of extension of collective agreements.

\textbf{Challenge to legislation.} Recall that in \textit{John Grace Fried Chicken} and \textit{McGowan}, the courts had struck down in quick succession two pillars of Irish industrial relations – Employment Regulation Orders issued by Joint Labour Committees, and Registered Employment Agreements, respectively – both on the basis that they amounted to an unconstitutional delegation of legislative power from Parliament: the former to the Labour Court and its JLCs; the latter to autonomous parties to collective bargaining. The 2015 Act was a response to this dismantling of the industrial relations machinery. It re-established REAs and EROs, but neutered the mandatory nature of both. To compensate, it also created the SEO system, whereby the Labour Court could recommend binding terms for the industry to the Minister. Trade unions and employers could ask the Labour Court to recommend an SEO adopt the terms of a pre-existing collective agreement, thereby effectively extending that agreement to the whole sector.

The core of Judge Simons’ decision was that the SEO system was also an impermissible delegation of legislative power, because the Labour Court was empowered to make ‘policy choices’ in recommending the terms of an SEO.\textsuperscript{49} In particular, he was concerned at the potential for SEOS to ‘distort competition’, and devoted much of the judgment to this issue.\textsuperscript{50} While not explicitly invalidating the Act for breaching EU law, Judge Simons drew on EU law to inform his

\textsuperscript{46} [2020] IEHC 303, [50]-[54].
\textsuperscript{47} [2020] IEHC 303, [81].
\textsuperscript{48} [2020] IEHC 303, [84]-[90].
\textsuperscript{49} [2020] IEHC 303, [124]-[126].
\textsuperscript{50} It was brought to my attention that C-426/11 \textit{Alemo-Herron} might also be relevant to the circumstances of this case. This was not mentioned in the judgment in \textit{Electrical Contractors}, so will not be discussed here.
understanding of the policy issues at stake. He also referred to submissions from the applicant to the effect that ‘an anti-competitive [collective] agreement ought surely to fall foul of competition legislation’ as it would amount to employer parties acting as a ‘cartel’; 51 while not expressly approving that view, he held that the Labour Court must have regard to it in its report. More generally, Judge Simons commented that ‘[t]he setting of sectoral-specific minimum rates of remuneration has, almost by definition, the potential to distort competition.’ 52

Analysis

The High Court decision may be criticised as being out of step with EU and international law. In particular, it may well have been possible to interpret the Irish Constitution in light of international law, had the Court referred to international law in its judgment. Of course, it might be the case that the Irish Constitution inevitably demands a divergence from international law in these circumstances – but the Court ought to have explained why this is the case. Its reasoning would have benefitted from comparison of the Irish position with the constitutional position of extension mechanisms among other European democracies, in order to highlight what, in the Court’s view, about the Irish constitutional order dictates this significant divergence. Each of these points will be elaborated below.

EU law dimension. Judge Simons expressed concern that non-state actors had been given authority to make decisions that may affect competition within the economy, potentially in conflict with EU law. With respect, it appears he misunderstood the position of collective bargaining in EU competition law. The State and the parties to the collective agreement argued that one of the reasons the SEO system had been established in the first place was to prevent employers based in other EU Member States ‘undercutting’ prevailing wage rates by the use of posted workers. 53 Reference was made by the State to the need to offset the consequences of the Laval decision of the CJEU. 54 Judge Simons held that if Parliament wanted sectoral wage rates to apply to posted workers, it must do so through primary legislation. 55 However, the CJEU in Laval expressly approved the setting of sectoral pay and conditions by means of state regulation or mandatory application of sectoral collective agreements. 56 Indeed, the revised Posted Workers Directive provides that not only may Member States regulate the terms of employment of posted workers by mandatory collective agreements, but also by ‘collective agreements . . . which [although not mandatory] are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or collective agreements which have been concluded by the most representative employers . . . ’ 57 Nor did Judge Simons make any reference to the Albany decision, 58 in which the CJEU held:

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51. [2020] IEHC 303, [41], [133].
52. [2020] IEHC 303, [132].
53. [2020] IEHC 303, [134]-[137].
54. C- 341/05 Laval.
55. [2020] IEHC 303, [138].
56. C- 341/05 Laval, [57]-[58], [62]-[68].
57. Directive (EU) 2018/957, article 1(2)(d); emphasis added. See discussion in the recent opinion of Advocate-General Bobek in C-815/18 Federatie Nederlandse Vakbeweging, [123] ff.
58. C-67/96 Albany.
It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to [Article 101 TFEU] when seeking jointly to adopt measures to improve conditions of work and employment. [Therefore] agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of [Article 101 TFEU]. 59

The Labour Court probably should have pointed out in its report that collective agreements are simply outside the scope of competition law, rather than ignoring the submissions of the objecting employers altogether (ill-founded as those objections were). However, it is a stretch to conclude the fact that collective regulation of employment conditions has an effect on competition renders it constitutionally suspect. Although not referred to by Judge Simons, Article 45.2.iii is the only provision of the Irish Constitution which refers to competition policy:

The State shall, in particular, direct its policy towards securing . . . that, especially, the operation of free competition shall not be allowed so to develop as to result in the concentration of the ownership or control of essential commodities in a few individuals to the common detriment . . .

It is by no means apparent from this provision that there is any constitutional impropriety about sectoral collective bargaining. In any event, as one of the ‘Directives of Social Policy’, this provision is explicitly stated to ‘not be cognisable by any Court under any of the provisions of this Constitution’. 60

In its substance, Irish competition law is based entirely on Articles 101 and 102 TFEU, 61 and the CJEU has long held that mandatory collective agreements fall outside the scope of competition law. In fact, in the same month the High Court published this judgment, the European Commission launched a consultation process to expand collective bargaining rights, explicitly repeating that collective agreements are outside the scope of competition law. 62 Subsequently, the Commission has published its proposal for a Directive on adequate minimum wages, which would require Member States to introduce mechanisms to enhance collective bargaining coverage to at least 70% of the workforce. 63

It was acknowledged by all parties to the case that the purpose of the SEO, and of the collective agreement underlying it, was ‘that labour costs should be taken out of competition’ in an industry marked by high labour-intensity. 64 It appears from the judgment that such an approach came as a surprise to Judge Simons, or that he considered it a flaw in the SEO system, rather than the point of both collective agreements and state regulation of wages. 65 The Labour Court noted that taking

59. C-67/96 Albany, [59]-[60].
60. Bunreacht na hÉireann, Article 45.
61. Competition Act 2002 (as amended).
62. Press release of the European Commission, ‘Competition: The European Commission launches a process to address the issue of collective bargaining for the self-employed’ (30 June 2020), <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1237> accessed 7 Oct 2020.
63. Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, COM(2020) 682 final 2020/0310 (COD), Article 4.
64. [2020] IEHC 303, [134]-[135].
65. [2020] IEHC 303, [34], [135].
labour costs ‘out of contention’ would oblige employers to compete instead in terms of the efficient deployment of capital and labour, and innovation in project management, a conclusion which Judge Simons considered ‘unjustified’. Given that this might well be considered the very purpose of the SEO scheme, it is difficult to see what sort of justification is required. Indeed, similar concerns to those expressed by Judge Simons were dismissed by an investigation by the Dutch Parliament into the effects on competition of the extension of collective agreements in 2016.66

**International law dimension.** The Court, in *Electrical Contractors*, insisted on referring to competition and economic policy concerns, while being unplugged from what is actually going on in that space at a European level. It is also unclear from the judgment whether any international legal material was pleaded, which may explain the obvious disconnect between the decision and its international context. Although not specifically required by any convention,67 the ILO has repeatedly expressed support for *erga omnes* extension of sectoral agreements.68 Recommendation 91 provides:

Where appropriate, having regard to established collective bargaining practice, measures, to be determined by national laws or regulations and suited to the conditions of each country, should be taken to extend the application of all or certain stipulations of a collective agreement to all the employers and workers included within the industrial and territorial scope of the agreement.69

It should also be observed that Ireland has recently been subject to criticism from the European Committee on Social Rights for its weak protection for collective bargaining rights under Article 6 of the European Social Charter.70 Furthermore, there is no reference made in the High Court’s decision as to whether jurisprudence of the European Court of Human Rights in the areas of freedom of association and collective bargaining have any bearing on this case. To the extent that *Electrical Contractors* undermines the ability of trade unions to bargain collectively, its impact should be assessed by reference to the Strasbourg position that ‘the right to bargain collectively with the employer [is] one of the essential elements of…Article 11 of the Convention’.71

Meanwhile, the undermining of the Labour Court and the reservation of employment regulation to Parliament is arguably in conflict with Ireland’s obligations under the ILO Convention on Tripartite Consultation.72 At the very least, it represents an unusually restrictive view, in comparative perspective, of the legitimacy of social partners and specialist bodies in setting labour

66. Robbert van het Kaar, ‘The Netherlands: Parliamentary debate on collective bargaining and extension of collective agreements’ (Eurofound, 25 May 2016), <https://www.eurofound.europa.eu/publications/article/2016/the-netherlands-parliamentary-debate-on-collective-bargaining-and-extension-of-collective-agreements> accessed 27 January 2021.
67. The Committee on Freedom of Association has remarked that a failure to make collective agreements binding on third parties ‘does not appear to violate the principles of freedom of association, [and] is practised in many countries’; see Compilation of decisions of the Committee on Freedom of Association (6th edn, ILO 2018), [1287], [1313] ff, [1350] ff.
68. For example: Report of the Committee of Experts on the Application of Conventions and Recommendations on the Application of International Labour Standards 2020 (ILO 2020) 114, 173; Report of the Committee of Experts on the Application of Conventions and Recommendations 2016 (ILO 2016) 115, 117. See also Gaye Baycik, ‘Extension in European Union Member States and Recommendations for Turkey’ (ILO 2019).
69. ILO Recommendation no 91 of 1951, Article 5(1). It appears as if the Irish statutory scheme complied with the conditions contained in Article 5(2).
70. See, for example, *Irish Congress of Trade Unions v Ireland* (complaint no 123/2016).
71. *Demir and Baykara v Turkey* (application no 34503/97), [154].
72. Tripartite Consultation (International Labour Standards) Convention 1976 (no 144); see also Committee on Freedom of Association (n 65), [1311].
standards and regulating aspects of the economy. The Court would have been well-served by reference to the international and European context in making this decision. It might be observed that Irish courts are generally more willing to refer to relevant provisions of international and European law in interpreting the fundamental rights provisions of the Constitution, rather than the more ‘formal’ provisions like delegation of legislative power; since this case was not argued under the ambit of freedom of association per se, it may not have occurred to Judge Simons that international and comparative legal material was relevant.

**Comparative dimension.** Most countries in Europe provide some mechanism for sectoral collective agreements to be given *erga omnes* effect. It is beyond the scope of this article to conduct a comprehensive survey of the extension of collective agreements in other European countries; suffice to say that Ireland is now one of only seven EU Member States ‘where no legal mechanism exists for the extension of collective agreements to the whole sector’. 74

Recall that the Irish courts, in *John Grace Fried Chicken*, *McGowan*, and now *Electrical Contractors*, have repeatedly held that the extension of collective agreements is an inherently legislative act, and as such must be reserved to Parliament for reasons of democratic legitimacy and accountability. Setting sectoral wages and working conditions requires such contentious policy choices that it simply cannot not be delegated by Parliament. 75 In this regard, the ‘procedural safeguards’ of Labour Court and Ministerial involvement, and a resolution approving the SEO by each House of Parliament, were deemed insufficient. 76 The approach of the Irish High Court to this issue may be compared unfavourably to that of the German *Bundesverfassungsgericht*. In a comparable case, 77 that Court held:

No far-reaching constitutional objections can be raised against the balance struck by the legislature between the indispensable requirements of the principle of democracy [and freedom of association]. [In principle] the state may not leave its norm-setting power to an arbitrary extent to non-governmental bodies and may not hand over citizens without restriction to the norm-setting power of autonomous bodies which are not democratically legitimised . . . [but] this deficit of the state’s freedom of decision is sufficiently compensated for by the requirements of the declaration of general applicability and the procedure preceding it . . . 78

In that case, the procedure in question involved the relevant Minister taking into account the interests of non-parties to the agreement after providing them with an opportunity to advance their views – remarkably similar to the impugned legislation in *Electrician Contractors*. The *Bundesverfassungsgericht* held in that respect: ‘The generally binding collective bargaining

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73. Michael Doherty, ‘When You Ain’t Got Nothin’, You Got Nothin’ to Lose . . . Union Recognition Laws, Voluntarism and the Anglo Model’ (2013) 42(4) Industrial Law Journal 369, 394. See also Baycik (n 70).

74. Doherty (n 75) 394.

75. [2020] IEHC 303, [155].

76. [2020] IEHC 303, [158] ff.

77. BVerfG, decision of 24 May 1977 - 2 BvL 11/14, BVerfGE 44, 322.

78. BVerfG, decision of 24 May 1977 - 2 BvL 11/14, BVerfGE 44, 322. Translation provided by DeepL (<http://www.deepl.com>). Original text available at <https://www.servat.unibe.ch/dfr/bv044322.html>, both links accessed 25 January 2021.
standards are still sufficiently democratically legitimised vis-à-vis the outsiders through state involvement.’

By contrast, it should be noted that in some jurisdictions, the extension of collective agreements is considered an **administrative** rather than **legislative** matter. Non-state actors are entitled to regulate areas of economic life, with the state merely **recognising** this by means of extension of the collective agreements reached by means of their autonomous bargaining process. The extension of collective agreements does not amount to the state exercising a legislative function (notwithstanding that it has the result that norms are applied to actors who did not sign up to the initial collective agreement).

Even accepting that the extension of collective agreement to cover all actors within an economic sector is a ‘legislative’ act (which is by no means obvious in comparative perspective), it is undoubtedly true that a ‘decision to impose minimum terms and conditions of employment upon an entire economic sector necessitates making difficult policy choices’. However, it may well be **precisely** the complicated nature of the policy choices involved that led Parliament to delegate the power to set standards to specialist industrial relations bodies and collective organisations representing the operators in that industry. This was not considered by Judge Simons. Furthermore, the fact that the ‘interests of the principal stakeholders’ are not ‘aligned’ is reflected by affording them far greater opportunity for participation by means of Labour Court hearings than there would be in the parliamentary process; not only the bargaining partners but also the applicants who objected to the agreement were heard before the Labour Court. Indeed, in the context of collective bargaining at the EU level, which has binding force **erga omnes**, the CJEU has recognised the contribution autonomous bargaining makes to ‘the principle of democracy on which the Union is founded’.

The High Court decision in *Electrical Contractors* leaves no room for any mandatory sectoral application of collective agreements. Any future reformed SEO system will not only have to significantly constrain the decision-making powers of the Labour Court to devise suitable regulations, but will also be subject to the weaknesses in the new REA and ERO systems. In this respect, *Electrical Contractors* is the latest rejection of a ‘regulatory’ model (in Ewing’s terminology) of collective bargaining in Ireland, and an apparent repudiation of a ‘labour constitution’ approach to labour law. It is difficult to accept that Ireland is constitutionally required to be an outlier in Europe in terms of the autonomy of social partners and the extension of collective agreements, and that conflict between the Irish Constitution and the state’s obligations under the ILO Conventions it has ratified is inevitable, without an explanation from the Court of what is so distinct about the Irish constitutional order. An interpretation of the constitutional provisions must surely be available that allows the state

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79. BVerfG, decision of 24 May 1977 - 2 BvL 11/14, BVerfGE 44, 322.
80. France, for example: see discussion in Baycik (n 70) 8.
81. I am indebted to an anonymous reviewer for directing me towards the work of Santi Romano on legal pluralism: in this vein, see *The Legal Order* (Mariano Croce tr, Routledge 2017) and Mariano Croce, ‘Whither the State? On Santi Romano’s *The Legal Order*’ (2018) 11(1) Ethics & Global Politics 1.
82. [2020] IEHC 303, [124].
83. Stijn Smismans, ‘The European Social Dialogue Between Constitutional and Labour Law’ (2007) 32(3) European Law Review 341, 342, 346 ff, citing T-135/96 UEAPME, in particular [89]. Of course, there are important differences between European and national legislative processes, which are beyond the scope of this article to examine.
84. Keith Ewing, ‘The Function of Trade Unions’ (2005) 34 Industrial Law Journal 1.
85. See Doherty (n 75) 371.
to comply with international law, and brings Ireland more in line with its European neighbours. If the Supreme Court fails to adopt such an interpretation when the appeal against this decision is heard, a constitutional amendment may be required, as discussed below.

**Subsequent developments**

Judge Simons ordered that the Sectoral Employment Order (Electrical Contracting Sector) 2019 be struck down immediately, but placed a stay on the invalidation of the 2015 Act. Notwithstanding this temporary reprieve, the principal judgment in *Electrical Contractors* generated significant political controversy. It should be recalled that the 2015 Act had itself been an attempt to salvage Ireland’s industrial relations architecture after *John Grace Fried Chicken* and McGowan. Prominent opposition politician Bríd Smith drew criticism in the media and from parliamentary colleagues for a post on social media which condemned Judge Simons for ‘put[ting] the boot into workers’; this incident was the subject of an investigation by the parliamentary Committee on Privileges and Procedures. Separately, an opposition Bill was introduced in Parliament to give SEOs the force of primary legislation; at time of writing, this has not progressed, and is unlikely to without the support of the government.

In September, Connect trade union balloted its members for industrial action in response to the judgment. The SEO which was struck down in *Electrical Contractors* had provided for a 2.7% pay rise from October, which Connect demanded be paid notwithstanding that the SEO was no longer binding on employers. Connect reported that over 94% of its members voted in favour of strike action if the terms of the SEOs were not honoured, and ballots were also called in other construction-sector unions. Employers initially signalled intention to defer pay increases until March 2021 at the earliest (to reflect the changed business conditions during the Covid-19 pandemic), but after Connect served notice of industrial action on employers’ representatives, the scheduled increases were paid. At time of writing, the position of Connect trade union remains that it will resort to industrial action if the Supreme Court upholds the decision in *Electrical Contractors* and no alternative mechanism can be found to enforce collective agreements across the relevant sectors.

**Conclusion**

*Electrical Contractors* seems to preclude the very idea of a ‘labour constitution’ as posited by Dukes, whereby economic activities would be regulated collectively by workers and employers, participating on a parity basis in dedicated industrial relations machinery. Seen in this light, the decision is not only disappointing for labour lawyers, but reveals a very limited perspective on

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86. [2020] IEHC 342, [32].
87. [2020] IEHC 342, [32].
88. Mark Hilliard, ‘People Before Profit TD defends comments about judge’, *The Irish Times*, 24 June 2020.
89. Sandra Hurley, ‘Dáil committee to investigate Bríd Smith remarks about judge’, RTÉ News, 9 July 2020.
90. Industrial Relations (Sectoral Employment Orders Confirmation) Bill 2020.
91. Martin Wall, ‘Thousands of workers across building sector back strikes if employers cut pay, conditions’, *The Irish Times*, 14 September 2020.
92. Ingrid Miley, ‘Construction worker strike action looming over pay row’, RTÉ News, 15 September 2020.
93. From correspondence between the author and Brian Nolan, Assistant Secretary-General of Connect trade union (25 January 2021).
constitutionalism. It limits democratic participation to the political process *stricto sensu*, with inevitable losses for the autonomy of trade unions and employers’ organisations, and subsidiarity in the administration of economic life. It rejects the idea that the social partners have any legitimacy to set general standards for the sectors of the economy in which they operate, a highly unusual position within the European context, and difficult to reconcile with the position of the European Court of Human Rights since *Demir and Baykara v Turkey* that ‘the right to bargain collectively with the employer [is] one of the essential elements of… Article 11 of the Convention’.95

It seems the ‘constitutional currents’ of labour law in Ireland have hit a circuit breaker. If trade unions are to have a meaningful say over pay and conditions, it appears they must focus their efforts on political activity – perhaps even campaign for a constitutional amendment to overturn this decision. Readers may be aware that the Irish Constitution can be amended by simple majority in a popular referendum.96 In response to *Electrical Contractors*, it may be necessary to seek a referendum to amend the Constitution: either to qualify the reservation of legislative power to Parliament in Article 15 in a way that allows social partners to regulate economic conditions (in the model of the French or Italian provisions referenced above), or to insert a countervailing provision explicitly protecting the right to bargain collectively (including at a sectoral level). The latter approach might have other beneficial consequences for trade unions in Ireland, which were significantly hampered in their ability to bargain collectively long before the *Electrical Contractors* case – but these are beyond the scope of the present article.97

As indicated above, the State has appealed the *Electrical Contractors* decision to the Supreme Court; at time of writing, there is no indication of when that appeal will be decided.98 At stake are the pay and conditions of thousands of workers covered by SEOs, industrial harmony in critical sectors of the economy – and more fundamentally, a vision for labour law that embraces participation by workers and employers in the regulation of working life, and empowers their organisations to set standards for industry through autonomous collective action and subsidiary democratic processes.

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94. I defer to constitutional lawyers as to whether the non-delegation doctrine jurisprudence does, in fact, support Judge Simons’ decision; as noted above, there is some disagreement as to what that doctrine requires. If necessary, the *Electrical Contractors* appeal offers the Supreme Court an opportunity to amend or clarify that doctrine; this would be desirable from the perspective of labour law outlined above.

95. Application no 34503/97, [154].

96. *Bunreacht na hÉireann*, Article 26.

97. For a discussion of the relative weakness of Irish trade unionism, see Adam Elebert, ‘Striking a Balance: Freedom of Association in Ireland and Germany’ (2020) 38(6) Irish Law Times 80.

98. It is anticipated that the Supreme Court will hear the case in mid-February 2021, but final judgment is not expected for some months afterwards. Given the political sensitivity of the case, it may be that the Court takes a longer time than usual for its deliberations.
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