

‘So far as may be lawful’

Len McCluskey

Len McCluskey is the elected General Secretary of Unite the Union. His prescient address to the Industrial Law Society, ‘The Lord Bill Wedderburn Lecture’, was given in Lincoln’s Inn Fields, London in March 2015, prior to the election of the Conservative Government, which is now enacting its controversial and highly restrictive Trade Union legislation.

I’m delighted to be here with the Industrial Law Society, an organisation which helps shine a light on parts of the law which most of the media, and perhaps much of the profession itself, knows too little about. It is also a privilege to be asked to deliver the Bill Wedderburn Lecture and I would like to begin by acknowledging his substantial influence in the sphere of industrial law.

Bill was a ‘pioneer’ and one of the giants of English labour law, with an influence that is evident to this day. He is credited with curbing the Heath Government’s attempt at rewriting employment relations in the 1971 Industrial Relations Act, and going on to write large parts of the Trade Union and Labour Relations Act of 1974 and the Employment Protection Act of 1975. Whether as an academic or as a Labour spokesman in the Lords, he deployed his formidable skills and advocacy on the side of working people and their organisations.

In fact the system of employment tribunals and protection from unfair dismissal – part of Bill Wedderburn’s legacy – are two key aspects of labour law coming under renewed attack by the political Right today. Speaking as a trade union official, I can attest to Bill’s enduring influence on the British trade union movement. There must be many hundreds of trade union officials of my generation who first cut their employment law teeth on *The Worker and the Law*.

And perhaps I can draw attention, at his memorial lecture, to the frustration he felt – from the 1990s onwards – at his inability to influence Labour Party thinking on trade union matters, something I can understand all too well ... But, like Bill – I never stop trying!

I want to touch on a number of themes. In the time I have, I will first consider the current setting of modern trade unionism: the economy in which we operate; the current political and social landscape, and the challenges these realities create for trade unions today. And then I will consider the likely consequences should a future government seek to push legitimate trade union activity further outside of the law.

Let me here tell you something which no one outside Unite's Executive Council knows yet. An exclusive, as they would say in the media.

We have our rules conference coming up in a few months – we only hold one once every four years. At present our Rule 2.1 – I know many of you will know our rule book off by heart and will correct me if I get anything wrong – sets out Unite's objectives with the qualifying words 'so far as may be lawful'. Last week, our Executive unanimously agreed to recommend to the Rules Conference that those few words, so far as may be lawful, be deleted. Not because we are anarchists. Not because we are suddenly planning a bank robbery. But because we have to ask ourselves the question – can we any longer make that commitment, under any and all circumstances, to stick within the law as it stands?

I'm aware that this is a dramatic question to raise anywhere, and particularly in such learned and law-abiding company. And I am afraid there is no easy answer without quite a bit of context. First of all, let me emphasise Unite's continuing ongoing determination to operate ever more effectively within the law. An example of that is our leverage strategy, which, given the news coverage, I will say a bit more about later. But it is not a coincidence that, just as leverage has started to bear fruit – winning disputes for my union within the law as it stands – then the Tories, acting under prodding not just from employers, but *from some of the worst employers in the land*, start looking to move the legal goalposts again.

How did we get here? You will all be familiar with the story of the legal changes introduced by the Thatcher Government, consolidated in the 1992 Act under John Major. I don't need to rehearse that sorry history. The legislation restricting the right to strike, the capacity to organise, and the right to conduct our own business in line with our own rules – all this became part of the sort of national consensus, embraced by Blair's Labour Party, too.

What else was part of that consensus?

The free market.

A deregulated financial sector.

A flexible labour market.

Being intensely relaxed about the filthy rich.

Everything, in fact, which has been discredited in whole or part since the global crash of 2008. Even Tories do not now deny that inequality is a problem. Who is now intensely relaxed about bankers' bonuses? Re-regulation, not deregulation is the order of the day.

Yet, trade union law remains untouched and politically untouchable. The great unmentionable of British politics. It's time it was subjected to the same scrutiny as all the other nostrums and dogmas of the 1980s. Because trade unions do not need a change in the law – society as a whole needs a change in trade union law; or little else can change for the better.

If the crash of 2008 made one thing abundantly clear, it was that capitalism – the only global model by which we all live and work – wasn't working as promised. The world economy had seen growing inequality and few, if any, checks on the consequences of rampant greed. The crash pulled back the screen on the ugly reality. A growing number of economists have shown how capitalism is creating ever growing divides between a super-rich (the 1%) and the rest of us. Most recently, Thomas Piketty has shown that because the return on capital historically tends to outstrip growth, and is likely to continue to do so absent from purposeful political intervention, inequality grows wider and wider.

The story is a simple one: widening inequality, wealth concentrated at the top, a shrinking percentage of gross domestic product (GDP) going into the pockets of workers, and governments unable or unwilling to confront the vested interests necessary to bring about change. This is the world in which trade unions now operate, and it's not by chance that these trends have accelerated at the same time as the role and function of trade unions have been restricted and diminished. It's only by shackling the power of organised labour that it has been possible for the worst excesses of unbridled capitalism to cause such profound damage to our society.

People may say, well, perhaps that was true in the past, but not today. To which I answer – has anyone come up with a better method of levelling the playing field at work? Are bosses not as greedy for profit as they were in the past? I think we all know the answer to that. As long as companies can make more money by paying their employees less, or by sacking easily and then hiring cheaply, or by cutting corners on safety, then trade unions will need to exist. This was the case at the onset of industrialization, and it remains the case today. Bill Wedderburn would have needed no convincing.

I have said that 2008 destroyed a neo-liberal consensus of which, regrettably, New Labour was a full part. So let me say here, Labour's victory in 1997 was one of the happiest days of my life and there are many

achievements to be proud of. Not least in extending civil rights for minority groups, the minimum wage, the family friendly policies that brought about vast improvements for women and children, and significant investment in our public infrastructure and National Health Service.

But make no mistake; it was the first Labour government with a huge parliamentary majority which did nothing to touch the fundamentals of wealth and power in our society. Labour left in place just about all of the draconian restrictions placed on free trade unionism by the Thatcher Government. Indeed, Tony Blair even boasted to business audiences that Britain's labour laws were the most restrictive in Europe. New Labour's problem then – and perhaps now – is its failure to understand collectivism. Not so much anti-trade unions, but certainly ignorant of them.

It can't have helped that many in New Labour's leadership operated under the misconception that government – any government – can be all things to all people. And therefore their politics were completely detached from the realities of a divided society and of class struggle. The political scientist Francis Fukuyama, who first proclaimed the 'end of history', and therefore the end of class struggle, has recanted, acknowledging that class is an enduring feature of the 21st century.

Our history tells us that progress for working people has only ever been attained by the collective self-empowerment of organised labour, and not through the accumulation of individual rights alone, however worthy they may be. Collectivism and liberalism are not enemies. Indeed, they should be allies. But they are not identical either. Founded on this misconception, Labour's record in relation to unions was worse than a disappointment. In fact, in many respects, labour law was *worse* when Labour left office than when it came in. This was not because the Labour government passed new reactionary legislation. But it left the existing laws on the statute book, and then did nothing as the unelected judiciary tightened the vice around us – and around the right to strike in particular – through case law.

One of the slogans inscribed on Labour's banner when it was founded was taking on 'Judge-Made Law'. It is more than a shame that Blair and Brown forgot that. Because judges, at the behest of employers eager to exploit every sub-clause and nuance in the law, handed down one injunction after another to the point where it is no exaggeration to say that the right to strike in this, the first country of free trade unionism, was, and is, hanging by a thread.

Basically, the judges, using Thatcher's law, have created an environment where it is very hard for any employer to *fail* to get an injunction against a contemplated strike – even a fully balloted and

mandated strike – if they wish. And all this under a Labour government. So the question – why bother to obey a law which is based on Tory class prejudice compounded by New Labour indifference and judicial mission creep? – is bound to arise. And it has.

Is this negative legal environment about to change? The 2015 General Election is certainly the first in a generation to present a genuine political choice to the electorate. It's an election that will decide what type of economy we want and what type of society we build. Do people want a government that intervenes on their behalf and regulates big business and corporations? Do people want a government that guarantees them protections in the workplace and welfare support if they cannot find work? Every General Election tends to be billed as the most important in a generation. This time it might actually be true.

We know living standards have slumped for all working people. To the extent that there has been a recovery, it has been a recovery for the rich only. Colleagues, this is intriguing. We are living through an economic phenomenon. Two million more people are in employment according to the government and yet, astonishingly, tax receipts have fallen. Of course, we know why. The jobs created in the last few years are low paid, part-time, zero hours, no-security jobs, not the kind that's needed to have sustainable growth in the economy. Not even the kind to yield much in the way of tax revenue.

These are the social realities after five years of a Tory government without a majority, restrained to at least a certain extent by the politics of coalition. So should there be a Conservative majority in May, we know what to expect. First of all, and above all, a new attack on trade union rights and democracy, with the proposals to raise the bar for a strike ballot to a level which hardly any MPs would get over in their own constituencies. And this coming from a government which has so far refused our request to use modern and more effective balloting methods. A government elected with 35% of the vote on a turnout of just over 60%. A party which represents well under a quarter of the people.

And they plan to license Agency Labour scabs to break strikes too. This on top of their attack on check-off, on facility time, and the restrictions imposed on our campaigning role in the Lobbying Bill (the so-called Gagging Bill). They are going to make picketing outside the strictest limitations a criminal offence as well. All in the hope of frightening trade unionists into submission.

It's tempting to see this as simply a reversion to type by the Tories, scratching an ancient itch in the hope of enthusing their political right wing

base. But, I believe that's only half the story. The attack on trade unions needs to be seen in the broader context of the planned assault on our society. Because the Tories are also plotting a reduction in the scope and role of the State which even Thatcher could only have dreamed of – taking us back to the days of the 1930s, under the pretext of balancing the books – ... without, of course, asking the rich or big business to contribute.

The Tories are well aware that they can only get away with this if they neuter any potential opposition, the trade unions above all. They want to reduce us to the role of concerned spectators while they tear to bits every advance working people have secured, every protection we have built up, over the years.

I hope for – and fight for – a Labour victory. I believe a Labour-led government will be open-minded at least on these issues. But I do not believe it will make the underlying issues go away.

Against that background: *can unions stay within the law any longer?*

Let me address without delay the fundamental question: should not the law, when made by an elected parliament rather than a despot or a dictatorship, not be respected under all circumstances? We all know things are not always that simple.

To take a very stark example. Before 1967, any man who slept with another man was breaking the law, as made by an elected parliament. Who today would dare to say that they were criminals, or that they should have been obliged to obey a law which, however democratically sanctioned, represented no more than the prejudice of ages?

A more recent example. Mrs Thatcher criminalised trade unionism at the Government Communications Headquarters. Would any employee there who, in secret, maintained his or her trade union membership, be a criminal? Were they not right to break that law while it was in force?

It was, of course, a Tory – and an eminent lawyer – Quentin Hogg who first warned of 'elective dictatorship'. He swallowed his words fast enough when it was Mrs Thatcher doing the dictating, but the point stands.

The examples I have given were of a majority imposing its views – ignorant ones in the case of both gay rights and of trade unionists as a security risk – on a vulnerable minority.

So how much more starkly is the issue posed when it is a case of minority governments, with nothing like the support even Mrs Thatcher had, trying to impose their class-based outlook on a movement of millions? For the rich, such complications don't apply. Sometimes they may want to do something illegal, like tax evasion. So the law obligingly gives them the legal option of tax avoidance instead!

My argument is that people have intrinsic rights which can sometimes be violated even by democratically-elected legislatures – and that the right of working people to combine, to organise, is one of those rights. So, philosophically, I have no problem in advancing the principle of a willingness to step outside the law. But we don't do so lightly.

I have mentioned the restrictions placed ever tighter on the right to withdraw labour. Partly as a response, Unite developed leverage as a tactic in disputes – the use of corporate campaigning tools, including peaceful protests, to bring pressure to bear on employers with whom we were in dispute. To defeat global corporate giants we can't just mount the picket line and hope. The hostile employer must face a campaign of escalation in which brains as well as brawn are deployed. Unite Leverage is not an emotional outburst – it is a strategy to level the uneven playing field.

Despite the cries of the right wing press and their friends in the Tory Party, Unite Leverage is not delivered by intimidation. We fight with research, planning and the execution of tactical activity – within a strategy *and* within the law.

They want to legislate against Leverage because it wins for workers. Successful campaigns to date include:

- The Building Employers
- London Buses
- Cross Rail
- Yorkshire Ambulance, and more.

It is legal, peaceful and effective. So effective, in fact, that the Confederation of British Industry has organised conferences with employers abroad to discuss how to respond to this new menace to the god-given right of managers to manage as they please.

So, from the Tory point of view, it must be made illegal straight away. That led to the inquiry into leverage following the dispute at INEOS at Grangemouth. I suppose you could call the inquiry a Carr-crash. Certainly, it made little progress. Which is just as well, because it is no virtue to make progress if you are moving in the wrong direction.

Let me remind you that Grangemouth was about a multi-billionaire investor living on a £150m yacht in the French Riviera, threatening to shut down a vital industrial resource unless the employees accepted gross attacks on their pay and conditions, including pensions, and the state paid tens of millions to persuade him to keep it open.

So did the government launch an inquiry into this gross abuse of employer power? No. It launched, instead, an inquiry into Unite's campaign against this conduct. Led by Bruce Carr. A man who had

represented BA against Unite and who persuaded a judge that a 9-1 vote on a 90 per cent turnout in a secret ballot was not good enough to call a strike at British Airways – let me say I envy his powers of advocacy – but it's clear the inquiry faced a credibility gap right from the outset.

Wisely, everyone, even the CBI, decided not to give evidence, and Mr Carr decided to scale-down his report, refusing to make any recommendations for change once he realised that the Tories were making overt political use of the process. But the Tories will not be long deflected.

It still amazes me that the current Prime Minister never tires of calling trade unions irrelevant and outdated; like a relic of a bygone era. And yet at the same time he threatens further attacks on our ability to do our job for our members. (If he thinks we are irrelevant, why does he keep attacking us?)

However, it would be unfair not to add that at least some of the Liberal Democrats seem to have come to a more mature and balanced view of trade unions through their time in office. I respect that, but I think unions may be forgiven if we say we cannot rely on it.

At any event, it is clear that if the Tories are returned to office with a majority, they will urgently seek a way to criminalise our new tactics, in order to keep Britain absolutely safe for employers. Should we just accept that diktat? I'm not really asking the question, I'm giving you the answer. It ain't going to happen.

For a long time now I have made it clear that if partisan legislation is driven through Parliament, designed to push the legitimate democratic work of trade unions outside of the law, then we, in Unite, will not go like lambs to the slaughter. We will not go gentle into the night. We will rage against the dying of the light.

Colleagues – this is hardly a new problem. But for years many union officials have set the highest priority on avoiding legal confrontations, on 'preserving the fabric of the union' at all costs. I have a different view. The fabric of Unite is its members. It is not our buildings, our cars, or even our employees, valuable as they certainly are. If a union cannot stand up for its members at the workplace, if it cannot fight for them when they face injustice, then that infrastructure is not worth a damn. For me, the fabric serves the fight for working people's rights, and if government wants to criminalise that fight, then we cannot duck the issue.

Already, Unite is changing its approach to industrial disputes. In the past it was not uncommon for Unite and its predecessor unions to repudiate strike action when there were concerns about meeting the legal requirements for industrial action and we jumped, sometimes all too

readily, when threatened by employers. I have rejected this approach. I have refused to tell members that have in good conscience – and with a collective will – voted to take industrial action, that they are wrong. Therefore I am proud that under my leadership, and with the fantastic support of my Executive Legal Director, Howard Beckett, my union Unite has never repudiated industrial action by our members.

For me, this is a matter of principle. When working people take the tough decision to withdraw their labour, they are not doing so lightly – they are putting their livelihoods on the line. And if my members are willing to do that, I am not going to allow their union to turn its back on them because, put simply, an ‘i’ hasn’t been dotted or a ‘t’ crossed; or because we are fearful that the ‘legal tripwires’ put in place by anti-worker governments may cause us a headache in the courts. That’s not fighting-back trade unionism in my book; it’s genuflecting to our enemies. Taking such an approach has strengthened the resolve of our legal team to take on injustices against democratic trade unionism.

For example, the only injunction application Unite has lost in the last four years was during the London Buses Olympic dispute over a failure by bus companies to award an Olympic bonus payment, as had been received by other transport workers in the capital. This high court injunction, which applied to three out of the twenty bus companies, was given – typically – without any proper explanation. It was granted in the face of a massive vote for strike action. The ruling against Unite was given despite the application being made the day before the strike; no reasons for the judgment were given and the union was left to guess as to whether the judgment could be relied upon by the other 17 operators waiting in the wings. This decision was an affront to democracy – but our members walked out anyway and Unite won that dispute.

Other legal cases like *Balfour Beatty* show how Unite will fight to have its industrial action upheld. Here we successfully challenged existing case law, showing that there was a minimal or negligible impact on the ballot result due to a small number of members being left off the ballot papers. Unite presented the efforts we had taken to meet the requirements as set out in law through phone calls and emails to our members to establish a reliable register of members. We showed that we had taken more than enough steps to satisfy the statute.

Of course, we will be prudent going forward, building on the successes of our legal strategy. But we will, if we have to, look for ways to restructure our union in order to ensure that decisions taken by members in one area do not necessarily compromise the whole. We will drive

forward with modern technology and use it to increase turnouts in our ballots without being shackled by prescriptions – like postal ballots – imposed in another age. We are not going to let the Tories destroy our democracy by shackling us to archaic procedures. And we will continue to use leverage, aware that it draws on centuries-old traditions of peaceful protest. And if, in the year we mark the anniversary of Magna Carta, the government wants to challenge fundamental rights of the citizen, then I believe they will be facing not just the trade union movement, but a huge section of our civil society, too.

And so, let me be clear, if we are pushed outside of the law in such a manner, the moral argument will be with us and the consequences of our actions, and any ensuing chaos will be the responsibility of the government. And that, brothers and sisters, is why our Executive took the decision it did last week, and why I am delighted to reveal it first in such distinguished legal company.



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**“No one gossips about other
people’s secret virtues.”**

On Education [1926]

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