'Lawdust' Gets in Your Eyes

By Tom Hayes

Summary: *Lawdust is a trade union's mistaken belief that legislators can solve their problems for them. it is a denial of the reality that labour relations is about the balance of power in the workplace. This "balance of power" depends on both parties having power. But with declining membership, the unions are losing power So, instead of "membership power" unions increasingly rely on "institutional power" derived from the law.*

I want to introduce a new word into the language of labour relations: lawdust. Not the most elegant of words, but it captures the point I make in this paper. (If someone thinks of a better word, I'll happily substitute it). Sprinkle stardust in the world of imagination and all your problems are solved. Likewise, with lawdust. If you are a union, you can ask legislators to sprinkle a little "lawdust" to solve your problems for you.

But what problems do the unions want solved? Their membership is declining, and they are finding it difficult to recruit new ones. This means that their industrial power and leverage is not what it once was. They want the law to both help them recruit members and to give them leverage to force employers to the bargaining table. A new law, on some issue or other, with force employers to give them what they want.

But "lawdust", like stardust, has never existed and it never will. It is as real as Harry Potter.

Balance of Power

A belief in "lawdust" denies the reality of labour relations, that they are about the balance of power in the workplace. Historically, unions got to negotiate with management over terms and conditions because they had the membership strength to give them power and leverage. The leverage was industrial action. No agreement, we strike and stop production. Hit the bottom line. Hit the employer where it hurts, in the pocket.

Employers pushed back, and often brutally. They still do. Look at how union organising campaigns can play out in the US. But across much of Europe, often as a result of long and sometimes violent strikes, a "balance of power" produced labour settlements that became institutionalised, formalised, and proceduralised.

But in recent years, those "balance of power" settlements have been increasingly hollowed out. A "balance of power" depends on both parties having power. But with declining membership, the unions are losing power. And there comes a point where the other party says: is this worth it anymore? A balance of power implies a balance. What happens when the pendulum swings away from one party?

So, instead of "membership power" unions increasingly rely on "institutional power" derived from the law, and often from historic laws at that. For example, look at both France and Germany where union density is 8% and 14% respectively and yet, employees' representatives through works councils, and the unions by association, have power and influence out of all proportion to these numbers.

Dangerous to Depend on the Politicians

But the long-term issue is that real union strength comes from having members. Institutional strength, lawdust, depends on a third party, government, giving it to you. And what governments can give, governments can take away. Look at the history of trade union law in the UK under successive Conservative governments. Yes, an incoming Labour government may change things, but a future Conservative government could simply change things back. All the time, union membership in the UK continues to shrink.

The Labour government in New Zealand gave unions the sectoral bargaining arrangements they wanted. The current right-of-centre government just took it away. Abolished it at a stroke, before it had a chance to bed in and get established.

Or take Finland where a right-of-centre government is currently pushing through laws curtailing the right to strike. I am not commenting on the rightness or wrongness of what the Finnish government is doing. I just want to make the point that if unions depend on politicians, then politicians take as well as give.

Cash and Control

In the world of labour relations, issues break down into two: cash and control. It is a very crude distinction. Cash issues are everything that involve costs. Minimum pay rates, holidays, equal pay, and anything that gives rights and entitlements to individual employees. The law can and does award such entitlements and obliges management to deliver on them.

Such laws set a floor of decency. Rightly so, in my opinion. But they are a cost, nonetheless, and this cannot be forgotten. In the past, sometimes such outcomes were delivered through wages boards or joint labour committees in the UK and Ireland. In mainland Europe, through sectoral bargaining. But there is less and less political willingness on the part of governments today to impose or support such structures where they do not already exist, the EU Directive on an *Adequate Minimum Wage* notwithstanding.

Control issues are a very different matter. Control issues involve entrepreneurial decisions about what the business is, who it does business with, and how it is organised and run. In a market economy, whether a liberal market economy or a social market economy, the government cannot make these decisions for management or impose laws on them to force them to make particular decisions.

Yes, I know this has been tried from time to time and it has generally turned out to be a failure. And, of course, there will always be exceptions, such as preventing a company from doing business with some country or company on the grounds of national security. But in the normal, day-to-day functioning of the market, it is best for governments to stand back. And they do. Except, perhaps, when it comes to certain essential services where monopolies are involved. But that is another argument.

The best the government can do when it comes to control issues is to require companies to follow certain procedures. But the law can never require management to agree to particular outcomes. For example, the EU's *Collective Redundancies Directive* has been in place since the 1970s. It requires management to inform and consult with employees' representatives when collective redundancies are being considered. It requires management to explore, with the employees' representatives, how the redundancies might be avoided or minimised. But the law cannot stop the redundancies going ahead if management considers them necessary.

It is clear that while over the years the *Collective Redundancies Directive* may have led to some adjustment to management plans and maybe some improvement in redundancy settlements, it has rarely, if ever, stopped such plans from going ahead. Certainly, the law can make the procedures to be followed more onerous and maybe more time-consuming. But the law will rarely, if ever, change the outcome. If governments in market economies tried to impose labour relations outcomes on companies, then they would simply up and leave.

Where employees, and their representatives, have been able to impose economic outcomes on companies is where unions have the membership strength that gives them the leverage to do so. But that is less and less the case.

Examples of Lawdust

So, instead, unions turn to lawdust. Give us a law that will enable us to impose a collective outcome that we like in the teeth of opposition from management. Here are a few examples.

- One that most readers of this short paper will be familiar with is the push by the European Parliament, as the behest of the ETUC, to allow European Works Councils (EWCs) to be able to go to court to seek injunctions to block management decisions where they believe they have not been "properly" informed and consulted. The power to seek injunctions is *de facto* codecision power. If an injunction is secured, then it can only be lifted if the party looking for the injunction gets satisfactory terms from the other party. It is a way of imposing an outcome. Which is why it is unlikely to happen.

- Issues around trade union recognition and collective bargaining have long been contentious in Ireland. While the Constitution allows for workers to form and join unions, neither the Constitution nor the law imposes any obligation on employers to recognise, still less, negotiate with unions. Based on comments by Owen Reidy, the general secretary of the Irish Congress of Trade Unions (ICTU) the unions appear to believe that the transposition of the EU's *Adequate Minimum Wage Directive* into Irish law will magically change this.

  It won't. While the Directive sets an indicator for 80% collective bargaining coverage, it does not mandate that collective bargaining can be imposed on employers. At best, governments can put in place processes and procedures to facilitate collective bargaining if the parties mutually agree. Sectoral collective bargaining, for instance, cannot be imposed on employers who will not agree to bargain alongside competing companies. While the law *could* require an employer to meet with a union which has a certain percentage of employees in membership, it cannot require the employer to agree anything with the union.

  Want proof? Look at the US where unions can be certified as bargaining agents by the NLRB. But that is no guarantee that the union will ever get a contract/agreement. What will deliver for unions is membership strength, not "lawdust". Want recognition and a collective agreement? Get enough members to oblige the employer to engage.

- What sparked this train of thought was this post on the IndustriAll Europe website: here. Apparently, talks between IndustriAll and Eurogas who, as the names suggests, represents European gas employers, did not end with an agreement on "just transition" in the gas sector. No doubt, unions in the gas sector across Europe will have a significant membership. But does anyone think these members are going to hit the streets anytime soon demanding a "just transition European sectoral agreement"? No, didn't think so.

  So, IndustriAll calls on "... the Belgian presidency (of the EU Council) and European Commission to put forward a proposal for a Just Transition Directive without further delay." More "lawdust". Even if such a Directive was to be introduced, all it could do is to mandate a procedure for discussions between management and employees' representatives, and maybe list topics for discussion. Maybe give a right for paid time off for retraining. What it could not do is to preordain outcomes. As an aside, it is worth making the point that European social dialogue is just that, dialogue. It is not negotiations. Negotiations only take place when the parties to the negotiations have the ability to impose sanctions in the absence of agreement, lockouts or strikes being the classic such sanctions.

  In the words of the late UK academic, Brian Bercusson, social dialogue can only take place "in the shadow of the law" by which he meant that in the absence of an agreement the law would impose a settlement. But, as we say in this paper, the law will never impose a settlement. Only a procedure. And shadows fall

differently as the sun moves across the sky. You may be in the political sun today. You can be in a cold shadow tomorrow.

- Another example. European trade unions are now demanding changes to EU Public Procurement laws that would restrict public authorities to only awarding contracts to undertakings with collective bargaining agreements. Such a development would exclude many excellent pay and working conditions from tendering for public contract's because their employees choose not to join a union. It goes without saying that public contracts should not go to substandard employers. But the presence of a union and/or collective bargaining coverage is not the only guarantee that an employer is a good employer. The unions should not expect the law to recruit members for them.

- NGOs in Germany have asked a German court to instruct two non-German companies, Ikea and Amazon, Swedish and US respectively, to sign the union-led Bangladesh Accord on Fire and Safety. The case in taken under the German Supply Chain Act. While it is not unions behind the complaint, the point is the same. An attempt to use the law to force companies into a collective bargaining agreement that they were not party to negotiating.

To Wrap it Up

Lawdust is what it is. Use the law to force employers to deal with unions even if the unions are unable to recruit sufficient members to give them the leverage to oblige employers to bargain. The problem with lawdust is that it gets in your eyes and blinds you to the harsh realities.

Across much of Europe, the unions have deep historic links with left-of-centre social democratic parties. This paid dividends when the social democrats were the parties of a mass, manufacturing working class. That is no longer the case today. Workforces are increasingly fragmented. Social democrats are a pale shadow of their former selves. Centre and centre-right parties owe the unions no favours.

After the June elections to the European Parliament, the unions could find that the political landscape is less to their liking than it was with the outgoing Parliament.

Want to grow the union movement and negotiate collective bargaining agreements? Don't depend on the politicians. Develop a value proposition that appeals to today's workforce, not yesterdays.

Forget lawdust. Recruit members.

May 28, 2024