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Mobilising Transnational Labour Law in Search of Transformation in Europe

JACK MEAKIN*

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ABSTRACT

This paper provides a critical map of trade unions' strategic engagements with transnational legal mechanisms in Europe. Despite high profile defeats and challenges faced by workers and trade unions before supranational courts, they have continued to mobilise complaint and supervisory mechanisms at the transnational level. This raises questions about the reasons why and how law is mobilised in the industrial relations context and over the transformative potential of transnational labour law. Legal argumentation has been mobilised to defend and redetermine legislative rights to protect vulnerable workers and provide the conditions for democracy at work. The experience of legal mobilisation detailed in this paper encourages a sceptical and pragmatic approach to social transformation via legal mobilisation. It will set out the legal opportunities that shape the effectiveness of transnational labour law mobilisation, as well as the structural limitations and competing normative interests that delimit the interpretive trajectory, recognition, and enjoyment of collective labour rights in contemporary Europe.

1. INTRODUCTION

The present continues to be characterised by the absence of adequate political representation for workers, threats of anti-trade union labour reforms, and employers who openly facilitate hostile working conditions or run

*School of Law, University of Leeds, United Kingdom, email: j.meakin@leeds.ac.uk

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rough shod over employment protections. There are, at the same time, legal systems and normative regimes which contain worker-protective norms and the promise of an alternative vision of work grounded in dignity and social justice. In this space trade unions and workers navigate the tension between the opportunity to recognise collective labour rights as fundamental rights and the limitations on their application in practice.

Workers and trade unions have mobilised transnational labour law (TLL) in Europe with mixed results. Litigation has expanded the scope of fundamental collective labour rights recognised by the ECHR. ILO Conventions have provided a wealth of normative standards and international law obligations. At the same time, the elevation of economic freedoms over workers' rights to freedom of association in the European Union has led to a significant limitation on the exercise of collective bargaining and industrial action within its jurisdictional boundaries. Despite this uncertain terrain, TLL mechanisms continue to be mobilised to defend against gross injustices, secure workplace protections, and to enjoy fundamental rights. As trade union lawyers attempt to realise worker-protective legal transformations under these conditions, there are significant questions about the use of multi-scalar mobilisation strategies to guarantee the exercise and enjoyment of collective rights.

The aim of this article is to investigate the effectiveness of transnational legal mobilisation in the labour law context and respond to the following questions: Why do trade unions engage at the transnational level? How can they mobilise labour law mechanisms effectively? And, what does their experience of legal mobilisation mean for the transformative potential of TLL?

To comprehend the effectiveness of mobilising transnational labour law in Europe, I will analyse the following mechanisms: Preliminary references before the Court of Justice of the European Union, individual applications to the European Court of Human Rights, and the role of the complaint and supervisory mechanisms of the European Social Charter and the International Labour Organisation. In order to unpack the use of these mechanisms, I will present a nuanced and pragmatic conception of how each has been mobilised and their relative effectiveness in securing fundamental collective labour rights. This analysis will illustrate how trade unions in Europe have engaged creatively and stubbornly with legal mechanisms in order to defend freedom of association rights.

Labour law scholarship has pointed towards the potentially transformative character of TLL. Take, for example, the ILO's normative prescriptions

which challenge current legal rules and structural inequalities that limit access to collective labour rights in national and international law.[1] And yet, while the ILO has played a significant role in the elevation of collective labour rights in international labour law, including the recognition of a right to collective bargaining and to strike under Article 11 ECHR, and subsequent reforms to national labour laws; there remain significant limitations on both the recognition and enjoyment of collective labour rights in Europe. There is then a need to think critically about the nature and limits of TLL in Europe and build a nuanced and contextual picture of its transformative potential.

To investigate the transformative aspiration of TLL, I will adopt a legal mobilisation approach which examines its interpretive opportunities, the interaction between competing TLL institutions, and the ways that fundamental rights have been recognised and/or undermined by legal orders with more or less emancipatory visions of work. Therefore, while providing key insights about the strategic uses of TLL, this article contributes to a broader debate about the extent to which legal mobilisation can deliver fundamental changes to existing legal categories or reshape social relations that facilitate the conditions of injustice at work.

It will be argued that the transformative potential of TLL in Europe is bounded by structural and normative factors as well as strategic decision-making. Transnational legal mobilisation does present interpretive opportunities to redetermine the content of contemporary labour law, but this is limited by commitments to existing rules, principles, interests, and expectations in each legal order. Therefore, effective mobilisation of TLL is contingent upon factors such as available legal norms, judicial and normative receptiveness to worker-protective claims, procedural rules, access to resources, the institutional capacity of institutions, and the strategic interplay between different TLL regimes. This will underpin a conception of TLL mobilisation whose in/effectiveness is located in the tension between worker-protective and worker-repressive elements of TLL. It will highlight the boundaries of transnational labour law in Europe, what it cannot do and should not be expected to deliver, as well as the reasons why it remains a key site of action for trade unions.

The next section will begin with a descriptive account of transnational law before considering the nature and extent of TLL's transformative potential.

[1] Adelle Blackett, 'Introduction: Transnational Futures of International Labour Law' (2020) 159 *Int Lab Rev* 455.

I will then set out the need for a legal mobilisation approach which explores and critically evaluates this transformative potential as a question of effectiveness. This will be followed by a critical evaluation of the CJEU, ECtHR, ESC and ILO as TLL mechanisms that are mobilised by workers and trade unions in Europe (EU countries and Council of Europe members) to secure access to collective labour rights. The conclusion will reflect on the transformative potential of transnational labour law mobilisation, its capacity to confront unjust working practices and construct alternative futures of labour law.

2. TRANSNATIONAL LABOUR LAW AND LEGAL MOBILISATION: A TRANSFORMATIVE PRACTICE?

The practice of defining transnational law has been subject to much debate and reflection. Historically, the need for a definition came with the development of 'legal' systems whose norms do not regulate actions within one jurisdiction or the relations between states.[2] Jessup's foundational work defined transnational law as that which transcends the nation-state, including public and private international law and all other cross-border regulatory regimes.[3] More recently, Halliday and Shaffer have conceptualised the process of transnational legal ordering to explain how norms are created, institutionalised, and contested across different legal fields. They have sought to demonstrate the reach of transnational law today and the role of different actors and institutions in authoritatively ordering the understanding and practice of law across national jurisdictions.[4] In contrast, for Zumbansen, the definition and study of transnational law is less certain and unfixed. Rather than approaching it as a distinct legal field, such as contract or environmental law, Zumbansen encourages a method which seeks to better comprehend the contemporary politics and practice of transnational law-making, norm development, institutions, and the agency of various actors.[5] The significance

[2]Michael W Dowdle, 'Do We Really Need a 'Pluralist Jurisprudence?'' (2017) 8 *Transnatl Legal Theory* 381.

[3]Phillip Jessup, *Transnational Law* (New Haven: Yale University Press, 1956) 2.

[4]Terence C Halliday and Gregory Shaffer, 'Transnational Legal Orders' in Gregory Shaffer and Terence C Halliday (eds), *Transnational Legal Orders* (Cambridge: Cambridge University Press, 2015) 7.

[5]Peer Zumbansen, 'Transnational Law, With and Beyond Jessup' in Peer Zumbansen (ed.), *The Many Lives of Transnational Law: Critical Engagements with Jessup's Bold Proposal* (Cambridge: Cambridge University Press, 2020) 32–36. See also, Halliday and Shaffer (n 5) 4–16.

of Zumbansen's method is that it cautions against merely mapping transnational legal orders, but argues for the need to understand their normative underpinnings and interests and subject them to critique.[6] It is this tension between identifying the sites of transnational labour law and the extent to which such orders are capable of recognising and adequately defending freedom of association that guides the present investigation into the transformative potential of TLL in Europe. Before evaluating these mechanisms, this section will set out what a transformative TLL might look like and how critical analysis of TLL mobilisation uncovers a more pragmatic conception of this potential.

Transnational labour law (TLL) has developed in response to economic globalisation, the rise of transnational corporations and the need to regulate work beyond the nation state.[7] It includes national, international, and other institutions involved in the regulation of work across national borders, as well as the advocacy and organising of trade unions, lawyers, and international organisations who seek to re-constitute and enforce labour law norms.[8] As Adelle Blackett has identified, TLL is 'fragmentary' and moves beyond the formal legal order of institutions and norms at the national level. This approach relies upon Jessup's definition and includes public international law bodies, regional human rights regimes, CSR initiatives, and national courts under a broad category of transnational labour law.[9] While international labour law provides its normative core, TLL is a constellation of international legal systems which contest the present regulation of work, produce norms, and adjudicate disputes across jurisdictions.[10]

[6]Peer Zumbansen, 'Where the Wild Things Are: Journeys to Transnational Legal Orders, and Back' (2016) 1 *UC Irvine J Int, Transnatl, Comp Law* 161.

[7]Adelle Blackett and Anne Trebilcock, 'Conceptualizing Transnational Labour Law' in Adelle Blackett and Anne Trebilcock (eds), *Research Handbook on Transnational Labour Law* (Cheltenham: Edward Elgar Publishing, 2015).

[8]Tonia Novitz, 'Protection of Workers under Regional Human Rights Systems: An Assessment of Evolving and Divergent Practices' in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Oxford: Hart Publishing, 2010) 2.

[9]Blackett and Trebilcock (n 7) 2.

[10]Adelle Blackett, 'Theorizing Emancipatory Transnational Futures of International Labor Law' (2019) 113 *AJIL Unbound* 390; Tonia Novitz, 'Multi-Level Disputes Relating to Freedom of Association and the Right to Strike: Transnational Systems, Actors and Resources' (2020) 36 *Int J Comp Labour Law Ind Relat* 471. Novitz's analysis of the actions of the International Trade Union Confederation and the Organization of Employers has shown how 'transnational' labour law emerges from interactions between public international law bodies, such as the EU, CoE, and the ILO, and the actors that engage with TLL institutions.

TLL is multi-scalar as it operates and shapes the content and experience of law at the international, regional, national, and local level. For Blackett, TLL does not function outside of or independently from national legal systems, but, following Halliday and Schaffer, the norms of transnational legal orders are deeply embedded at the national level.[11] This also means that transnational law is semi-autonomous.[12] It exists not just in the institutions that promulgate norms but is applied and given meaning in their application and enforcement by national institutions. Consider, for example, the effect of treaty obligations, as well as the judgments of supranational courts and supervisory bodies upon national labour law regimes.

TLL is also defined by communication and conflicts between institutions at the national, regional, and international level.[13] The content of labour norms, their role in (re)distributing power to workers and the potential impact on managerial prerogatives, employers' obligations, and workers' voice in the global economy are hotly contested in juridical and political arenas. Such contestation varies in level and scale, from the employers' group walkout over the right to strike to anti-trade union laws at the national level and high-profile litigation in Strasbourg and Luxembourg.[14] At the same time, regional human rights courts have drawn upon and 'integrated' norms from other TLL institutions.[15] In both cases, transnational legal resources have been mobilised to bolster or undermine, permit and restrict access to collective labour rights. At the normative level, a 'distinctive' characteristic of TLL, for Blackett and Trebilcock, is 'its capacity to be counter-hegemonic, and promote social justice'.[16] This reflects the ILO's founding ambition to realise social justice and decent working conditions for all and recognises transnational institutions as 'sites for social justice'.[17] Moreover, drawing on the idea of law's indeterminacy, TLL is understood as a key tool in attempts to shape the interpretive trajectory of labour law at multiple levels.[18] In

[11] Blackett (n 10) 457.
[12] Sally Falk Moore, 'Law and Social Change: The Semi-autonomous Social Field as an Appropriate Subject of Study' (1973) 7 *Law Soc Rev* 719.
[13] Novitz (n 10).
[14] Claire La Hovary, 'The ILO's Employers' Group and the Right to Strike, Transfer: European Review of Labour and Research' (2016) 22 *Transfer: European Review of Labour and Research* 401.
[15] Virginia Mantouvalou, 'Is There a Human Right Not to Be a Trade Union Member? Labour Rights under the European Convention on Human Rights' in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Oxford: Hart Publishing, 2010).
[16] Blackett and Trebilcock (n 7) 2.
[17] Blackett (n 1) 461.
[18] Ibid.

other words, it is understood as having the capacity to contest the present boundaries of contemporary labour law by including new voices, enabling worker and trade union participation, and the enjoyment of international labour standards.

The above is desirable, but a counter-hegemonic and normatively autonomous TLL stands in sharp contrast with the conflicts wrought in the preceding paragraph and the distinct histories and normative orientations of the European Union, Council of Europe, and the ILO. Therefore, in addition to a positivist project that describes the constellations of TLL or a normative project which states what it ought to be, there needs to be continued efforts to ask critical questions about the structure of transnational regulatory regimes and the extent to which they can be counter-hegemonic and transformative. This is especially pressing in the context of strategic action in legal orders that are not ideologically or normatively committed to the protection of workers but seek to balance competing values and interests. If Zumbansen's provocations mean anything here it is that we need to reflect upon the historic, social, political, and economic context of TLL.[19] Whilst, at the same time, recognising the ways that actors, such as trade unions, 'engage in legal-ordering processes often through a mix of cooperation, competition, and conflict';[20] In light of which we might build a more nuanced picture of the 'transformative' nature of TLL that says something about the reasons why collective labour rights are constrained, balanced with competing economic freedoms, and reliant on institutions whose 'judgments' are not legally binding.

The idea of law's transformative capacity, and the challenge of demonstrating its potential, is not new to labour lawyers. This comes with scepticism about the competing rationales which underpin labour law and justifiable concerns about law's wider role in entrenching inequalities and disempowering workers and trade unions. At the same time, there is a deep-rooted recognition of labour law's potential to facilitate redistribution and representation.[21] In this respect, TLL continues a critical tradition within labour law scholarship which diagnoses how law constitutes the

[19] Zumbansen (n 6) 188.
[20] Halliday and Shaffer (n 4) 181.
[21] Karl Klare, 'Horizons of Transformative Labour Law' in J Conaghan, R M Fischl and K Klare (eds), *Labour Law in an Era of Globalisation: Transformative Practices and Possibilities* (Oxford: Oxford University Press, 2002); Ruth Dukes, 'Critical Labour Law: Then and Now' in E Christodoulidis, R Dukes and M Goldoni (eds), *Research Handbook on Critical Legal Theory* (Cheltenham: Edward Elgar Publishing, 2019).

contemporary challenges facing workers and proposes how legal structures and rules ought to be reformed.

The broader question of law's transformative potential tempts and occupies much interdisciplinary, progressive, and critical legal scholarship. The idea or hope that law can be transformed, that it can inscribe or redeem obligations and prohibitions relating to social justice, gives it a central role in efforts to achieve social change. This approach to socio-legal transformation recognises the constitutive role of law in structuring, reproducing, and guaranteeing social relations.[22] For Poul Kjaer, the transformation of social phenomena is one of the two core functions of law, alongside upholding normative expectations.[23] The former is achieved, we are told, as a result of law's capacity to bring about or give form to social phenomena through legal institutions such as property or contract law. This, Kjaer notes, is reflected in the meaning of *trans-formation* as referring to the act of changing or going beyond the current form of law.[24] Therefore, a transformation of labour law is premised on re-determining its present content and boundaries to include entitlements to fundamental rights and workplace protections.

Transformation could be more or less synonymous with a change to current labour law. However, a thin approach to transformation doesn't hold for long, especially for scholarship with critical aspirations. The TLL project envisioned above contains a strong normative commitment to an alternative vision of society founded upon a commitment to social justice.[25] Importantly, as Kampourakis has highlighted elsewhere,[26] critical approaches to transformative law must also examine the content and substance of legal transformations, the normativity of existing rules, the value which law appears to ascribe to certain social relations and not others, and the material demands which underpin transformative projects. If transformation means fundamentally re-forming current legal categories and social relations, this leads to questions about the strategy required to move beyond existing labour laws, the rules and structures which can be transformed, the normative aspirations which might be included, and to what extent.

[22] Simon Deakin, David Gindis, Geoffrey Hodgson, Huang Kainan, and Katharina Pistor, 'Legal Institutionalism: Capitalism and the Constitutive Role of Law' (2015) 45 *J Comp Econ* 2017.

[23] Poul F Kjaer, 'What Is Transformative Law?' (2022) 1 *Eur Law Open* 760.

[24] Ibid. 769.

[25] Blackett and Trebilcock (n 7).

[26] Ioannis Kampourakis, 'Legal Theory in Search of Social Transformation' (2022) 1 *Eur Law Open* 808, 814–20.

In response, this article contributes to current TLL scholarship by critically evaluating the ways that TLL mechanisms in Europe have been mobilised by workers and trade unions to defend and protect their freedom of association rights. I will map the complaint and supervisory mechanisms of TLL in Europe that have been used by workers and trade unions to defend and recognise their rights to organise and take collective action. This will present a nuanced picture which reframes the question of TLL's transformative potential to one about the opportunities and limitations of legal mobilisation at the transnational level. Or, how various mechanisms can be used to redetermine the present constitution of European labour law in practice.

By centring analysis on *legal mobilisation* as a means to transform contemporary labour law, this article draws upon and contributes to a field of study that is concerned with the strategic use of law by social movements.[27] For Michael McCann, legal mobilisation scholarship embraces a critical approach to law, which recognises its structural and material limitations without dismissing its potential effectiveness.[28] This methodological approach will provide a number of useful concepts that will guide my analysis of the nature and character of TLL's transformative potential. In particular, the concept of legal opportunity structures (LOS)[29] is a useful frame for analysing the factors that motivate strategic uses of law and its effectiveness, including legal stock, judicial receptiveness, and access to courts.[30] Legal stock identifies suitable mechanisms of redress, relevant legal rules, and interpretive opportunities. In addition to the types of legal argument that trade unions might articulate, I will reflect on whether a legal system is normatively open or receptive to worker-protective claims. Judicial receptivity captures the willingness of courts to actively develop worker-protective legal

[27] Scott L Cummings, 'The Social Movement Turn in Law' (2018) 43 *Law Social Inquiry* 360.

[28] Michael McCann, 'Litigation and Legal Mobilization' in G. Caldeira, D. Kelemen and K. Whittington (eds), *The Oxford Handbook of Law and Politics* (New York: Oxford University Press, 2008). Legal mobilisation has recently become a useful frame for interdisciplinary analysis in socio-legal studies and labour law. See, Manoj Dias-Abey, 'Mobilizing for Recognition: Indie Unions, Migrant Workers, and Strategic Equality Act Litigation' (2022) 38 *Int J Comp Labour Law Ind Relat* 137; Jack Meakin, 'Labour Movements and the Effectiveness of Legal Strategy: Three Tenets' (2022) 38 *Int J Comp Labour Law Ind Relat* 187.

[29] Chris Hilson, 'New Social Movements: The Role of Legal Opportunity' (2002) 9 *J Eur Public Policy* 238.

[30] Rhonda Evans Case and Terri E Givens, 'Re-Engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive' (2010) 48 *JCMS: J Common Market Stud* 221; Virginia Passalacqua, 'Legal Mobilization via Preliminary Reference: Insights from the Case of Migrant Rights' (2021) 58 *Common Market Law Rev* 751.

precedents, or the factors which have restrained or shaped judicial interpretation. Finally, procedural considerations such as admissibility rules, costs and time taken to deliver a judgment. Furthermore, in spite of the apparent focus on structural analysis, I will consider the role of agency in legal mobilisation strategies to show how labour movements respond to structural limitations and even reshape the available legal opportunities by exploiting the interactions between complaint and supervisory mechanisms.[31]

The *strategic* use of TLL refers both to actions which contribute to a wider socio-political aim or objective and actions which are defensive or opportunistic. The decision to engage with TLL mechanisms may be driven by a broader aim to redress workplace injustice, defend or extend the enjoyment of fundamental rights, and/or contribute to TLL's ambition to realise social justice at work. Moreover, as we shall see, trade unions may be unable to bring legal action domestically, have limited avenues to present political demands, or to engage in dialogue with employers or government. In this context, I refer to the *strategic* ways that TLL has been navigated by workers and trade unions and the decision-making which shapes approaches to legal mobilisation.

The mechanisms of TLL which will be analysed in this paper are: The preliminary reference procedure of the CJEU, individual applications to the ECtHR, and the supervisory and complaint mechanisms of the ESC and the ILO, focusing on the latter's role in Europe. As the major institutions of transnational labour law in Europe each has had a disparate impact on the recognition and restriction of collective labour rights at the national, international, and transnational level. While these are sites of public international law, they fall within the broad definition of TLL. This paper is not concerned with the propriety of such a broad categorisation. Instead, the aim is to critically analyse the transformative character of 'transnational' labour law, as set out above, to comprehend how trade unions have mobilised its interpretative and dialogic functions. I argue that this requires analysis of the opportunity structures and normative constraints which characterise 'transnational' labour law mobilisation in Europe. Indeed, it is necessary to consider how and to what extent trade unions are capable of mobilising judicial and quasi-judicial mechanisms in order to transform the content and enjoyment of labour law at the local, national, regional, and transnational level.

[31] Lisa Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK' (2012) 46 *Law Soc Rev* 523.

The following treatment of these mechanisms cannot be exhaustive but will provide a nuanced account of trade union's pragmatic mobilisation of these complaint and supervisory mechanisms. Due to the vast scope of potential labour law claims that can and have been brought before these institutions, I will focus on collective labour rights. While TLL includes governance regimes, including the OECD Guidelines and a range of global framework agreements, which play a significant role in contemporary labour relations, the scope of this paper is limited to post-national legal systems of the European Union, Council of Europe, and the ILO.

3. TRANSNATIONAL LABOUR LAW MECHANISMS IN EUROPE

A. Court of Justice of the European Union (CJEU)

The preliminary reference procedure enables national courts to refer, where necessary, questions on EU law to the CJEU with the aim of ensuring uniform interpretation and application of EU law across member states. The supremacy and direct effect, horizontal and vertical, of EU law places an obligation on national courts to apply labour rights and set aside national laws which fall below EU standards.[32] Thus opening the door to complaints against both the national government for having failed to implement social policy directives and against employers who fall short of the rights and duties laid out in the treaties. As Passalacqua has noted, the preliminary reference procedure appears as an opportunity structure where EU legal stock and the CJEU's interpretive approach confers a 'comparative advantage' over national law.[33] As we shall see, trade union engagement with the court has been severely restricted due to the potential disadvantages of its approach to EU collective labour law.

The Charter of Fundamental Rights of the European Union (CFREU) contains a number of labour law provisions, including rights to collective bargaining and to take industrial action (CFRU Article 28).[34] In *Bosman* and *Albany*, the CJEU drew upon the Charter to recognise and extend the

[32] Case 26/62 *Van Gend en Loos v Nederlandse Tariefcommissie* () [1963] ECR 1; Zoe Adams, Catharine Barnard, Simon Deakin, and Sarah Fraser Butlin, *Deakin and Morris' Labour Law* (7th edn, Oxford: Hart Publishing, 2021) 61.

[33] Passalacqua (n 30) 21.

[34] Since the Lisbon Treaty, the CFREU enjoys legal force and the same status as other EU Treaties (Art 6(1) TFEU)

freedom of association to include a right to form and join a union.[35] However, the rights found under Title IV of the Charter, such as the right to information and consultation, collective bargaining, and protection against unfair dismissal, have not been independently enforced by the ECJ.[36] Moreover, the CJEU has found that the Charter does not directly confer such rights on individuals.[37]

While the court in *Albany* signalled the need to balance competition law rules in the common market with concern for employment and social protection,[38] the *Viking* and *Laval* cases prioritised market access and freedom of movement in EU law. The CJEU recognised in both cases that the right to take collective action (including strike action) is a 'fundamental right' in EU law, subject to rules governing free movement in the internal market. The decision in *Viking* found that the right to take collective action—against Viking Line's decision to reflag a ferry in order to pay lower wages in a different jurisdiction—was restricted where it prevented the exercise and enjoyment of the freedom on establishment. In *Laval*, industrial action which sought the extension of collective agreements to posted workers employed from another member state restricted the freedom to provide services in the Union as protected by Article 56 TFEU. The infringement could not be justified because it demanded employers to accept terms which went beyond the minimum standards set out in the Directive and, importantly, the requirement to engage in collective bargaining affected the certainty required by service providers from other member states when deciding whether or not to bid for contracts.[39]

These decisions and subsequent cases[40] confirmed that the exercise of collective rights, such as the promotion or enforcement of collective agreements, could not infringe the fundamental freedoms of establishment, provision of services, or movement enshrined in EU law. The effect of which

[35] Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* [1995] ECR I-4921; Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751

[36] Michael Ford, 'Workers' Rights from Europe: The Impact of Brexit' (2016) 45 <https://www.tuc.org.uk/research-analysis/reports/workers-rights-europe-impact-brexit> accessed 7 June 2023.

[37] C-176/12 *Association de Médiation Sociale* v Union Locale des Syndicats CGT [2014] IRLR 310; Case C-117/14 *Nisttahuz Poclava v Ariza Toledano* [2015] IRLR 403

[38] *Albany* (n 35) 54–55.

[39] Directive 96/71/EC [1996] OJ L18/1, Art 3

[40] C-346/06 *Rüffert v Land Niedersachen* [2008] IRLR 467, C-319/06 *Commission v Luxembourg* [2009] ECR I-4323, Case C-426/11 *Alemo-Herron and others v Parkwood Leisure Ltd* [2013].

is to severely limit enjoyment of the rights guaranteed in ILO Convention 87, despite the CJEU in *Viking* affirming that the fundamental rights found therein formed part of the principles of EU law and are recognised in the CFREU.[41] Any expectations that the Court might uphold national labour laws which restrict the enjoyment of such freedoms and re-balance economic and social policy within the European Union would almost certainly be disappointed.

Recent changes to the Posted Workers Directive have limited the impact of *Laval* by allowing host states to apply and extend national and regional labour laws to posted workers to prevent companies from undercutting national laws.[42] The extent to which this is a drastic shift with respect to collective labour rights remains to be seen, but the CJEU has ruled that such amendments to the Directive are not incompatible with the freedom to provide services.[43]

The court's receptiveness to collective labour rights is, arguably, a reflection of the historical development of the EU's political and economic programme and its uneasy relationship with the idea of a 'social Europe'.[44] For Christodoulidis, the project of negative market integration has followed a particular logic, one where 'total-market thinking' has facilitated the substitution of fundamental social and political rights for the protection of capital's freedom of movement.[45] The effect is the loss or demotion of constitutional rights, values and principles which might insist upon the importance of industrial action or enforcement of a nationally agreed collective agreement in a social democracy.[46] In other words, there are entrenched normative interests and ideological commitments that restrict ambitions for transformative labour laws within the European Union, at least one that values organised labour and its capacity to engage in democratic decision-making over the conditions of work.

[41] C-438/05 *International Transport Workers' Federation (ITF) and Finnish Seamen's Union (FSU) v Viking Line* [2008] IRLR 14, 43–4.

[42] *Directive 2018/957 [2018] OJ L173/16;* Adams and others (n 32) 80; Ford (n 36) 47–48.

[43] C-620/18 *Hungary v European Parliament* [2020] ECLI:EU:C:2020:1001 & C-626/18, *Poland v European Parliament* [2020] ECLI:EU:C:2020:1000; See also C28/20 Airhelp Ltd v Scandinavian Airlines System Denmark—Norway—Sweden [2021] for a recognition of the right to strike and the conditions under which industrial action can be taken.

[44] Ruth Dukes, *The Labour Constitution: The Enduring* Idea *of Labour Law* (Oxford: Oxford University Press, 2014).

[45] Emilios Christodoulidis, 'The European Court of Justice and 'Total Market' Thinking' (2013) 14 *German Law J* 2005.

[46] Emilios Christodoulidis, *The Redress of Law: Globalisation, Constitutionalism and Market Capture* (Cambridge: Cambridge University Press, 2021) 388.

Given the serious limitations on the development of collective labour law within the EU, it is unsurprising that this has affected trade union's legal strategies. The European Trade Union Confederation's (ETUC) ETUCLEX programme's focus on alternative mechanisms, such as using the ECtHR to challenge the approach in *Viking* and *Laval*,[47] is indicative of the shift of resource towards arenas in which legal mobilisation can be effective. In other words, the structural and normative barriers to effectively mobilising EU law in support of collective labour rights is reflected in the strategic decision-making and actions of trade unions, as we shall see in the following sections.

Before moving on from the EU legal order, there are mobilisation opportunities in the legislative arena that need to be accounted for. Outside of the CJEU, there has been a counter-movement with respect to collective labour rights in the EU, particularly in the recent legislative initiatives of the Commission. I do not want to overstate the effect of these measures, nor do I want to suggest that they repair the right to strike element in EU labour law, but it is worthwhile acknowledging the role of legislative processes and how they might affect legal stock and the CJEU's receptiveness to freedom of association arguments. While the focus of this paper is on the actions taken by trade unions, it is important to acknowledge the role of the European Commission in shaping legal opportunity structures within the EU legal order.

For example, it has been suggested that the European Pillar of Social Rights (EPSR) represents a shift in EU social policy and a renewed political and legal commitment to strengthening the enjoyment of fundamental social rights in Europe.[48] For this article's purposes, the EPSR includes an ambiguous reference to initiatives which encourage social partners to develop collective agreements, but it does not expressly outline or bolster collective labour rights, including the right to collective bargaining or to strike.[49] The EPSR's uncertainty over the exact legislative measures that will

[47] Julien Louis, 'The Judicialisation of European Trade Union Confederation Action' (2023) *ETUC* <https://www.etui.org/publications/judicialisation-european-trade-union-confederation-action>.

[48] Sacha Garben, 'The European Pillar of Social Rights: An Assessment of Its Meaning and Significance' (2019) 21 *Cambridge Yearbook Eur Legal Stud* 101. On this shift, recent developments can be compared with the Commission's role in launching action to ensure member state compliance with the PWD in C-319/06 *Commission v Luxembourg* [2009]. Future research could track the effect of the Commission and other agencies on legal mobilisation, either by trade unions, employers organisations, or the Commission itself.

[49] Klaus Lörcher and Isabelle Schömann, 'The European Pillar of Social Rights: Critical Legal Analysis and Proposals' (Brussels: ETUI, 2016) 69.

be taken and lack of explicit provision for collective rights, not to mention a lack of legal force, suggest a need for caution. At the same time, subsequent reforms, such as the aforementioned revised Posted Workers Directive, the Platform Work Directive, and the more recent Minimum Wages Directive (MWD) indicate some opportunity to transform access to collective labour rights within the EU legal order. For example, the MWD has sought to increase collective bargaining coverage in member states by providing a greater role for social partners in wage bargaining.

We might well point toward such social policies and recognise a promising direction of travel, but it is the dominance of competing normative considerations and functions that require continued scepticism over their implementation and effect. Concerns remain about the extent to which these new directives will secure the enjoyment of collective labour rights in practice and how the CJEU might deal with any challenge to them. A thorough investigation into these legislative developments is beyond the scope of this paper, but we can suggest that any significant reform of collective labour law within the EU appears more likely to stem from lobbying and/or advising the Commission regarding its policy objectives than via references to the CJEU.

B. European Court of Human Rights (ECtHR)

The story of the ECtHR's approach to fundamental labour rights is defined both by the incremental development of fundamental labour rights jurisprudence, which has shaped labour law at the national and transnational level, and a litany of missed opportunities to provide robust legal protections for collective rights at work. Today, I will argue, trade unions in Europe cannot ignore the normative standards recognised by the court but are wary of how and when to mobilise its resources. While the ECHR and the court's Article 11 case law recognises a set of fundamental collective labour rights, current judicial reticence to further expand the scope of Article 11 and willingness to invoke a wide margin of appreciation represent key challenges. In this respect, the ECtHR simultaneously recognises collective labour rights as fundamental human rights and fails to adequately address serious violations of those rights. From the perspective of TLL, it is a site for contesting the boundaries of international labour law and building normative support for fundamental rights, but, as analysis of its LOS will show, it is an unpredictable and limited arena.

The principal convention right of concern in collective labour disputes is Article 11 ECHR. In order to evaluate its strategic mobilisation, I will set out the trajectory of Article 11 jurisprudence to identify the court's expansive interpretation of the right, subsequent restraint, and its particular approach to labour disputes in certain jurisdictions. I will also reflect on the ECtHR's role in settling conflicts between the ECHR and the CJEU as well as the procedural challenges which curtail the court's effectiveness as a site of redress.

The ECtHR's approach to Article 11 began cautiously with limited treatment of collective labour rights before the turn of the millennium. In *National Union of Belgian Police*,[50] Article 11 was found to protect the right to form and join a trade union, the right to be heard, and to take trade union action to protect the occupational interests of members. It did not stipulate which activities were required or would be afforded specific protections for the enjoyment of such rights, including a right to be consulted as was at stake in the case.[51] Part of the reason for this limited interpretation of collective labour rights was a concern about extending the ECHR into the domain of social and economic rights.[52]

Wilson and Palmer represented a breakthrough in attempts to recognise collective labour rights as fundamental human rights before the ECtHR.[53] The court recognised within Article 11 a right to be represented by a trade union in attempts to regulate relations with employers without fear of suffering detriment or discrimination.[54] Importantly, regarding the potential effects of ECtHR applications, the case led to reforms of national law in the shape of the Employment Relations Act 2004.[55]

[50] *National Union of Belgian Police v Belgium* Application no 4464/70 (ECtHR 27 October 1975).

[51] Ibid. para 39; See also, *Schmidt and Dahlstrom v Sweden* Application no 5589/72 (ECtHR 6 February 1976).

[52] *Swedish Engine Drivers' Union v Sweden* Application no 5614/72 (6 February 1976), para 39; On the historical aims of the ECHR, see Novitz (n 8) 5–7.

[53] *Wilson and the National Union of Journalists; Palmer, Wyeth and National Union of Rail, Maritime and Transport Workers; Doolan and others v UK*, Application no 30668/96, 30671/93, 30678/96 (ECtHR 2 July 2002); Keith Ewing, 'The Significance of Wilson and Palmer' in *Building Worker Power: Essays on collective rights 20 years after the Wilson and Palmer case established the right to be represented by a trade union,* (2022) TUC https://www.tuc.org.uk/sites/default/files/Wilson%20and%20Palmer%20Collection%20High%20Res.pdf (last accessed 24/07/2024).

[54] Ibid., para 46.

[55] The Act amended the Trade Union and Labour Relations (Consolidation) Act 1992 ss. 145A-F.

It was not until *Demir and Baykara* that the court re-determined the scope of Article 11 to include a right to collective bargaining.[56] The case concerned the retrospective annulment of a collective agreement covering municipal civil servants and a prohibition on their forming trade unions. In finding a violation of Article 11 on both counts, the court acknowledged that there had been a shift in national and transnational jurisprudence in relation to the right to bargain collectively such that it should now be understood as an 'essential element' of the right to form and join trade unions as guaranteed by Article 11.[57] Importantly, or not as we shall see below, the court stated that the doctrine of margin of appreciation ought not to apply with respect to essential elements of trade union freedom.[58] Furthermore, in *Enerji Yapi-Yol Sen*, the court recognised a right to strike under Article 11.[59] While the right was not deemed to be absolute, it is necessary for any restrictions to meet a 'pressing social need'.[60]

From this high-point, judicial receptiveness appeared to signal the likelihood of continued transformation of Article 11's content and scope. However, subsequent case law has taken a more uncertain approach. The court has continued to affirm collective labour rights under Article 11(1) but has been reluctant to adjudicate on the 'necessity' of measures which violate these rights under 11(2) and instead invoked a wide margin of appreciation. The margin of appreciation doctrine, which developed from the principle of subsidiarity, is premised on the understanding that national governments are best placed to determine the necessity of a given measure.[61] In the Article 11 context, the effect has been a growing tendency to defer to national authorities over measures which severely limit access to and enjoyment of fundamental labour rights.

In *RMT v UK*,[62] the ECtHR recognised that the right to strike was protected under Article 11(1), but relied upon a wide margin of appreciation to find that UK legislation banning secondary strike action did not amount to

[56] *Demir and Baykara v Turkey* Application no 34503/97 (ECtHR,12 November 2008).
[57] Ibid., para 144–45
[58] Ibid.
[59] *Enerji Yapi-Yol Sen v Turkey* Application no 68959/01 (ECtHR 21 April 2009).
[60] See *Karacay v Turkey* Application no 6615/03 (ECtHR, 27 March 2007); *Kaya and Seyhan v Turkey* Application no 30946/04 (ECtHR, 15 September 2009).
[61] First developed in *Belgian Linguistics Case* Application no *1474/62; 1677/62; 1691/62; 1769/63; 1994/63;* 2126/64, (ECtHR, 23 July 1968), see also *Handyside v UK* Application no 5493/72 (ECtHR, 7 December 1976), para 49.
[62] *National Union of Rail, Maritime and Transport Workers v United Kingdom* Application no 31045/10, (ECtHR, 8 April 2014).

a violation under 11(2).[63] The court constructed a distinction between activities that are core and accessory in order to avoid the narrow application of the doctrine in cases concerning 'essential elements' of trade union activity.[64] Secondary action was defined as an accessory activity whose necessity ought to be determined at the national level.

The carving-out of specific categories of non-/essential activities and range of proportionate restrictions has led some to consider that Article 11 is now triggered only for the most serious of violations, such as blanket-bans on the enjoyment of collective rights.[65] Therefore, where a national authority balances rights as opposed to prohibiting the right to strike in certain sectors the ECtHR is more likely to defer to a margin of appreciation. For Novitz, the critical factor in such cases will be whether national law did (not) provide the conditions for trade unions to strive to protect members' interests.[66]

For example, in *Ognevenko*,[67] legislation which removed a train driver's right to take industrial action and protection from dismissal was not deemed proportionate or necessary in a democratic society. However, in *Association of Academics v Iceland*,[68] legislation which imposed compulsory arbitration to resolve an industrial dispute in the health sector was considered proportionate. The court noted that the legislation had afforded trade unions and their members the opportunity to be heard, to engage in collective bargaining and take strike action before the imposition of compulsory arbitration.[69] As Arabadijeva has pointed out, if only excessive restrictions justify a narrow margin of appreciation, it would appear that the court has moved towards a 'thin' conception of Article 11.[70] The orthodoxy of this approach has been further entrenched in *Case of Association of Civil Servants and Union for Collective Bargaining and Others v. Germany,* which affirms a wide margin of appreciation for national governments in the regulation of trade union activity and enjoyment of Article 11.[71]

[63] Ibid. para 77–84.
[64] Alan Bogg and Keith Ewing, 'The Implications of the RMT Case' (2014) 43 *I L J* 221, 16–20.
[65] Kalina Arabadjieva, 'Another Disappointment in Strasbourg: Unite the Union v United Kingdom' (2017) 46 *ILJ* 289, 7–8.
[66] ibid; See also, *Matelly v France* Application no 10609/10 (2 October 2014).
[67] *Ognevenko v Russia* Application no 44873/09 (ECtHR, 20 November 2018).
[68] *Association of Academics v Iceland* Application no 2451/16 (ECtHR, 15 May 2018).
[69] Ibid para 31.
[70] Arabadjieva (n 65) 298.
[71] *Case of Association of Civil Servants and Union for Collective Bargaining and Others v. Germany* Application no 815/18 (ECtHR, 5 July 2022).

A concerning aspect of the court's LOS profile is the apparently contextual nature of judicial receptiveness to Article 11 claims. Keith Ewing and John Hendy have argued that the court has applied an additional Article 11(3) to cases brought from the UK which were found not to violate Article 11 or to be inadmissible.[72] The effect of which has been the widening of the exceptions listed under 11(2) and a general attempt to avoid finding the UK government to have violated the ECHR. Despite the factual and legal situations appearing analogous to cases in which the court had previously found measures to violate Article 11.[73] The proposed explanation is that the court does not want to further antagonise a Tory government which has long threatened to withdraw the UK from the ECHR. This has significant implications for British workers and trade unions attempting to hold governments to account, exercise their right to a fair hearing, and defend their Article 11 rights.

A final mobilisation opportunity is the ECtHR's capacity to resolve, or influence, conflicts between the CJEU and the ECHR over the exercise of collective labour rights.[74] In the recent *Holship* case,[75] the ECtHR had the opportunity to challenge the *Viking* and *Laval* jurisprudence and its effect on workers and trade unions within the European Union. The case concerned a boycott of Holship's ships by a trade union due to the company's failure to abide a collective agreement covering the pay and working conditions of dockworkers. The case was first taken to the EFTA Court for an Advisory Opinion which followed the approach in *Viking* and *Laval* and found the boycott infringed the freedom of establishment set out in Article 31 EEA. The Norwegian Supreme Court followed a similar line of reasoning in prioritising free movement over collective bargaining rights.[76] The question for the ECtHR was whether the Norwegian Supreme Court's ruling that the boycott was unlawful could be seen as a justifiable interference with the trade union's rights under Article 11. The court's response made clear that when assessing an interference with a fundamental freedom or right, equal consideration ought to be given to the rights protected under Article 11 ECHR and the economic freedoms guaranteed by the Treaties. The court

[72] Keith Ewing and John Hendy, 'Article 11(3) of the European Convention on Human Rights' (2017) 4 *EHRLR* 356.
[73] Ibid. 11–20.
[74] The use of the ECtHR to confront the Viking and Laval case law is a strategic objective of the ETUC. See, Louis (n 47).
[75] *LO and NTF v. Norway*, Application no. 45487/17 (ECtHR, 10 June 2021).
[76] John Hendy QC and Tonia Novitz, 'The Holship Case' (2018) 47 *ILJ* 315.

viewed this as a re-balancing which would provide additional space for consideration of workers' rights.

This shows a key limitation of the court. It lacks the willingness to confront the economic rationality which undermines the protection of fundamental social rights in Europe. The court could have insisted upon the fundamental nature of the ECHR and Article 11 jurisprudence.[77] The court could have taken steps to recognise the aims of the collective agreement and set out the conditions under which collective bargaining agreements can be protected under Article 11.[78] To the benefit of workers in Europe and their capacity to agree and enforce collective agreements which protect conditions of employment and stem deregulatory efforts driven by market rationalities. Although the judgment acknowledges the fundamental importance of Article 11 rights, it has practically elevated economic freedoms to a par with Convention rights at a time when workers and trade unions have limited legal or political means to protect their fundamental human right to bargain over and enforce collective agreements.

For Ellingsen, the ECtHR was involved not only in a delicate balancing of fundamentally irreconcilable freedoms and rights but also the conflict between two legal orders.[79] Given its approach, it seems that the ECtHR is not prepared for a 'high noon conflict'[80] with the CJEU. It may be that *Holship* 'nudges'[81] the CJEU further away from the repressive approach to trade union rights taken in *Viking* and *Laval*, but any expectations that the ECtHR could offer a more robust defence of collective labour rights ought to be fettered.

There are also significant procedural limitations which affect attempts to bring claims before the ECtHR. Recent labour cases have been declared inadmissible having (allegedly) already been examined by another international investigation mechanism,[82] failing to meet time limitations,[83] and not exhausting domestic remedies.[84] For example, the first part of the *RMT* case

[77] Christian Joerges, 'Will the Welfare State Survive European Integration?' (2011) 1 *Euro J Social Law* 4

[78] Hendy and Novitz (n 76) 334.

[79] Hilde Ellingsen, 'Reconciling Fundamental Social Rights and Economic Freedoms: The ECtHR's Ruling in LO and NTF v. Norway (the Holship Case)' (2022) 59 *Common Market Law Rev* 19.

[80] Keith Ewing and John Hendy QC, 'The Dramatic Implications of Demir and Baykara' (2010) 39 *ILJ* 2, 4.

[81] Ellingsen (n 79) 21.

[82] *Prison Officers' Association v United Kingdom,* Application no 59253/11 (ECtHR, 21 May 2011).

[83] *Roffey v UK* Application no 1278/11 (ECtHR, 21 May 2013).

[84] *Brough v UK* Application no 52962/11 (ECtHR, 30 August 2016).

was concerned not with secondary action but pre-strike notices, which the court refused to review on the basis that the trade union had managed to meet those requirements in the present case.[85] This ignored the fact that the union had been delayed by an earlier injunction and financially burdened by legal proceedings.[86] Strikingly, the procedural requirements in question had been deemed incompatible with the right to strike by the ECSR[87] and seen to place 'intolerable' burdens on trade unions by the ILO.[88] An arguably more concerning procedural limitation involves the Court declaring applications inadmissible and failing to provide reasons for their decision.[89] As Ewing and Hendy have argued, this would appear to be in violation of the requirement to provide reasons explaining inadmissibility under Article 45(1) ECHR, as well as raising significant Article 6 ECHR concerns due to the applicant's inability to access or respond to the substance of a decision.[90]

Finally, applications to the ECtHR take time and may only be heard years after the original injustice was suffered. While the Court aims to deal with cases within 3 years, it is overwhelmed by applications and decisions are often not provided within reasonable time limits.[91] This prevents applicants from benefitting from decisions or relying upon the court to resolve perceived injustices in the short-term. In *RMT* and *Unite* the Court reached a decision in around 3–4 years, *Wilson and Palmer* took closer to 7 years, and the applicants in *Demir and Baykara* waited at least 10 years. The precedent set in the latter is undoubtedly important; however, if it takes nearly a decade to receive a decision, it would be understandable for trade unions to allocate resources towards alternative forms of action.

The implication of the ECtHR's Article 11 jurisprudence for the strategic mobilisation of TLL is necessarily nuanced, with any claim about its 'transformative' potential requiring serious qualification. The court must consider and balance competing interests and values, whilst remaining vigilant and protective over its own legitimacy. It does not offer opportunities for

[85] *RMT* (n 62), para 45.
[86] For the not insignificant sum of £87,000, Bogg and Ewing (n 64).
[87] ECSR Conclusions XIX-3 (2010).
[88] *RMT* (n 62), paras 28–29..
[89] *Svenska Transportarbetareförbundet and Seko v Sweden* Application no 29999/16 (ECtHR, 1 December 2016).
[90] Keith D Ewing and John Hendy QC, 'The Strasbourg Court Treats Trade Unionists with Contempt: Svenska Transportarbetareförbundet and Seko v Sweden' (2017) 46 *ILJ* 435.
[91] See, https://www.echr.coe.int/documents/50questions_eng.pdf; There were 64,100 individual applications pending at the end January 2021, https://www.echr.coe.int/documents/admissibility_guide_eng.pdf

transformative TLL in the sense of transcending the conditions of waged labour or presenting an immanent critique of capitalist social relations, but it is not clear which authoritative site of TLL would. Instead, it provides a strategic opportunity to contest and communicate the content and scope of fundamental labour rights set out in the ECHR. And, significantly, it is a site for challenging violations and instigating reforms at the national level. There are justifiable concerns about the limits of its ambition as a defender of fundamental labour rights, particularly its (uneven) record of challenging governments who regularly infringe labour rights and confronting sites of TLL who undermine the enjoyment of collective rights in Europe. In spite of this, trade unions will continue to bring cases that promise to expand and defend the content and scope of Article 11, but they are by no means rushing to Strasbourg due to significant concerns over the court's LOS.

C. International Labour Organisation (ILO) and the European Committee on Social Rights (ECSR)

The principal reasons why trade unions engage with the supervisory systems of the ILO and European Social Charter (ESC) are twofold. First, they highlight the ways that national law and/or employer practices fall short of international standards in order to initiate remedial procedures and place pressure on national governments. Second, ILO and ESC jurisprudence serves as guidance on the interpretation and implementation of labour rights and standards which can be relied upon before national and international courts. I will begin by considering their respective complaint and supervisory mechanisms and outline their authoritative and dialogic roles as well as the critical interaction between their 'jurisprudence' and the case law of the ECtHR. Finally, given the latter's recent failures to integrate ILO and ESC standards, I will conclude by critically evaluating the effectiveness of integrated jurisprudence. This will illustrate how each of these mechanisms play a key role in the diffusion of TLL norms, provide opportunities for trade union participation in law-making and supervision of national governments, as well as the structural constraints and boundaries of their normative reach.

Several reporting and complaint procedures constitute the ILO's supervisory mechanisms, including the annual reporting system of the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the individual complaints mechanism of the Committee on

Freedom of Association (CFA).[92] The CEACR requires member states to submit annual reports on their compliance with ILO Conventions.[93] The Committee draws up reports on these submissions which are considered at the annual International Labour Conference (ILC) by the tripartite Conference Committee on the Application of Standards (CAS). Importantly, national trade unions can submit comments on national government's reports to the Committee.[94] And, as is established practice, employer and worker organisations can submit observations directly to the Committee in addition to commenting on government reports.[95]

The CEACR plays an essential role in the production of authoritative international labour standards. The 'jurisprudence'[96] of the Committee flows from its interpretations of the International Labour Code and Conventions to provide guidance on the meaning and scope of ILO conventions. While the CEACR's interpretations of conventions are not legally binding, they are considered to be 'valid and generally recognised',[97] 'quasi-judicial', and have been relied upon in national and regional courts.[98] For La Hovary, the value of the ILO's interpretations does not stem from its legal authority but its wider legal effects, such as guiding the interpretative practices of national and international courts and stimulating wider social dialogue.[99]

An additional reason for compiling reports is to apply political pressure on national governments. This not only draws international attention to their failures to abide by their obligations. Reporting also indicates to governments which consistently and egregiously infringe labour rights that trade unions will challenge actions which infringe labour rights and the failure to protect them. For example, the TUC's 2022 report on Convention's

[92] See, https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang--en/index.htm; Louis (n 47) 13–14.

[93] ILO Constitution Article 19-22.

[94] ILO Constitution Art 23.

[95] 'Monitoring Compliance with International Labour Standards: The Key Role of the ILO Committee of Experts on the Application of Conventions and Recommendations' International Labour Office, ILO, (2019) 25–27.

[96] Claire La Hovary, 'The ILO's Supervisory Bodies' 'Soft Law Jurisprudence'' in Adelle Blackett and Anne Daguerre (eds), *Research Handbook on Transnational Labour Law* (Cheltenham: Edward Elgar Publishing, 2015) 4–6.

[97] Ibid. 2–3. The crisis which enveloped the ILO and ILC in 2012 was down to the growing importance of the CEACR's 'soft law jurisprudence' so-called. On the dispute between IOE and ITUC, see Novitz (n 10).

[98] Keith D Ewing 'International Regulation: The ILO and Other Agencies' in Carola Frege and John Kelly (eds), *Comparative Employment Relations in the Global Economy* (Oxford: Routledge, 2013) 432.

[99] La Hovary (n 96). For a practical example, see *BALPA* (2008) in Louis (n 47) 16–17.

87 and 98 highlighted the government's anti-union rhetoric and the conflict between its proposed trade union law reform and obligations as an ILO signatory state. The intended audience of the TUC's submission was not just ILO committees, but the national discourse on industrial policy. In this sense, reporting is not just a legal mechanism but a part of the wider political strategies of trade unions and provides an authoritative avenue for communicating grievances.

The CFA is a specific supervisory body responsible for individual complaints relating to freedom of association.[100] Following a dialogue between the Committee and the government concerned, the CFA will decide whether there has been a violation of ILO principles. This is followed by a report setting out recommendations to the national government who is required to report on the measures taken to rectify their non-compliance. For example, the CFA's recent response to a joint complaint relating to the dismissal of P&O workers and the failure of British labour law to abide its international obligations relating to freedom of association provides a clear and authoritative set of recommendations for legislative reform.[101]

The potential effectiveness of this mechanism can be seen in the complaint made by the Irish Congress of Trade Unions (ICTU) regarding Ryanair's refusal to engage in good faith collective bargaining, the lack of national measures guaranteeing workers' rights to engage in collective bargaining, and the absence of adequate legislative protections against acts of anti-trade union discrimination.[102] In response to the Committee's observations and following dialogue with the CFA, the Irish Government passed the Industrial Relations Act 2015 and the Workplace Relations Act 2015, which brings Irish law further into line with the commitments set out in Convention 98, including an explicit prohibition on inducements to forego trade union representation and an improved collective bargaining framework.[103]

The collective complaints and reporting procedures of the ESC are seen by the ETUC as mechanisms which can secure fundamental rights to freedom of association.[104] The collective complaints procedure can be initiated by social partners, including domestic trade unions and non-governmental

[100] The CFA considers breaches of principles cf. of conventions, see Ewing, (n 98) 438.
[101] ILO CFA Case 3432 Report No 404 (United Kingdom)—Complaint date 11 June 2022.
[102] ILO CFA Case No 2780 (Ireland)—Complaint date 4 May 2010.
[103] https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3329835
[104] ETUC Action Programme 2019–2023 paras 230 and 403.

organisations with the aim of challenging perceived non-implementation of the ESC by a signatory state.[105] The UK is not a signatory to the Collective Complaints Protocol, but it has been used extensively by national trade unions in signatory states.[106]

While the ECSR provides an opportunity to recognise and develop legal standards, it lacks direct enforcement and implementation powers.[107] In the event of a violation, the Committee of Ministers issues a resolution and, if necessary, a recommendation to the state party indicating the need for appropriate measures to bring the national situation into conformity with the Charter.[108] The final decisions of the Committee are not legally binding upon signatory states to the Protocol, and, as with the reporting mechanism, they are not directly enforceable in domestic setting and a victim cannot be awarded just satisfaction.[109] The recommendations of the ECSR do not carry the same authority or binding status as decisions of the ECtHR,[110] but as a quasi-judicial body it provides authoritative interpretations of the ESC and facilitates the application of international human rights obligations in national jurisdictions.[111] As per the character and potential of TLL, such opportunity structures are central to the diffusion of authoritative labour law norms, enabling social partners to participate in the development of norms and to enter into dialogue in/directly with national governments over their implementation.

For example, an ICTU case challenging Irish legislation excluding certain categories of self-employed workers from engaging in collective bargaining affirmed the important normative point that Article 6 ESC includes a right to engage in collective bargaining for the self-employed.[112] Indeed, the

[105] The collective nature of the procedure means that it is concerned with non-compliance of national law measures or practices as opposed to individual cases. See Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (1995), Article 1; Rule 32 ECSR Rules, https://rm.coe.int/rules-rev-328-en-06-07-22-final/1680a72b88

[106] Louis (n 47) 31–37.

[107] Robin Churchill and Urfan Khaliq, 'The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?' (2004) 15 *EJIL* 417.

[108] Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (1995), Arts 8–9.

[109] Churchill and Khaliq (n 107) 21.

[110] Novitz (n 8) 9.

[111] Holly Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights' (2009) 9 *Human Rights L Rev* 61.

[112] *Irish Congress of Trade Unions (ICTU) v. Ireland* Complaint no123/2016 (ECSR); Bas Rombouts, 'ICTU v Ireland: Expanding the Scope of Self-Employed Workers Entitled to Collective Bargaining Rights in Relation to Competition Law Prohibitions' (2019) 5 *Int Lab Rights Case Law* 17.

authoritative statement that a complete ban on collective bargaining for the self-employed is not justifiable because it is excessive and not necessary in a democratic society could be mobilised in other legal and political fora.[113]

A second ESC mechanism is its reporting process.[114] National governments are required to share copies of their report with national trade unions affiliated with the ETUC who are then entitled to submit comments and further information to the ECSR.[115] The ECSR publishes a report on each state's compliance with the provisions of the ESC and a yearly activity report of the ECSR, including statements on the correct interpretation of the ESC. If the state party fails to bring measures into conformity, the Committee of Ministers (CoE) may send certain recommendations relating to measures required to comply with the ESC. As with the ILO, effectiveness is dependent upon engagement and requires a longer-term assessment of the potential impact of the ECSR's authoritative and dialogic role in the development of trans/national labour law.

(i) Integrated Jurisprudence

The 'integrated' approach to interpretation involves the ECtHR drawing upon the specialist knowledge and jurisprudence of the ILO and the ECSR.[116] As Mantouvalou has shown, this approach has been used to expand the scope of civil and political rights and bring socio-economic rights into the interpretation of the ECHR.[117] From a strategic perspective, the aim is to develop a body of rights and jurisprudence in the ILO and ESC which can later be relied upon before the ECtHR, as opposed to being merely a tool for publicising violations and putting pressure on national governments.[118] Interpretive guidance on the content and scope of collective rights has been used to re-determine the right to freedom of association and country-specific reports have been referred to when deciding whether measures restricting Article 11 rights can be justified under 11(2). In other words, as sites of TLL both the ECSR and ILO can be seen as essential

[113] ibid para 98.
[114] Adams and others (n 32) 72.
[115] Arts 23(1) and 27(2).
[116] Mantouvalou (n 15); Martin Oelz and Franz Christian Ebert, 'Bridging the Gap between Labour Rights and Human Rights: The Role of ILO Law in Regional Human Rights Courts' (2014) *Int Inst Lab Stud*.
[117] Mantouvalou (n 15).
[118] Ewing and Hendy (n 80) 8.

to the diffusion of authoritative labour law norms which might be used to challenge the current boundaries and enjoyment of freedom of association rights at the trans/national level.

While we can identify an opportunity to drive-up labour rights protections through integrated jurisprudence, there is also a risk which flows from the court's failure to properly integrate ILO norms and specialist knowledge. There has been inconsistent engagement with ILO and ESC jurisprudence by the ECtHR to the detriment of worker-protective interpretations of Convention rights. The *Wilson* case is notable for the court's embrace of the integrated approach. ILO and ESCR jurisprudence and reports criticising domestic arrangements informed the court's decision that the measures amounted to a violation of Article 11.[119] Again, in *Demir*, the ECtHR recognised the right to collective bargaining as an essential element of the Convention right in line with the 'consensus emerging from specialised international instruments' and the practices of Contracting States.[120]

Positivity around the potential of the integrated approach has not lasted. Concerns about the court's autonomy have led to a reconsideration of its reliance upon norms from other authoritative sources to guide interpretation of the ECHR.[121] Arabadijeva has argued that the court's approach in *Unite* marks a shift away from the ESC's and ILO's role in recent case law.[122] In *Unite*, the ECtHR stated that the obligations owed by States under Article 6 ESC and Article 11 ECHR 'cannot be considered synonymous' before distinguishing the ESC's concern for social and economic rights from the ECHR's specific role in the protection and guarantee of civil and political rights.[123] This recasts the ESC as a useful but not definitive guide to the interpretation of Article 11. Similarly, in *RMT*, the court set aside ILO and ESC jurisprudence which could have provided the basis for finding restrictions on secondary action to violate Article 11 without recourse to any justification under 11(2). As in *Wilson and Palmer*, ILO and ECSR reports had raised concerns about UK legislation banning secondary strikes.[124]

Finally, returning to *Holship*, the court's approach raises grave concerns about the effect and continued influence of the ILO in ECtHR

[119] *Wilson and Palmer* (n 53) para 48; Ewing (n 53) 16.
[120] Paras 85–6, 153–54.
[121] Oelz and Ebert (n 116) 18.
[122] *Unite the Union v United Kingdom* Application no 65397/13 (ECtHR, 3 May 2016); Arabadjieva (n 65) 300.
[123] Ibid para 61.
[124] *RMT* (n 62) paras 30–34 and 36–37.

decision-making. In particular, it raises serious questions about the ECtHR's capacity to draw upon specialist labour law knowledge and issue judgments defending the exercise of industrial action by vulnerable workers in the global economy. To recap, the case concerned a boycott by the Norwegian Transport Workers' Union in defence of a collective agreement covering the pay and working conditions of dockworkers based upon ILO Convention 137. The ECtHR agreed with Norwegian Supreme Court's ruling that the trade union's boycott was unlawful and a justifiable interference with rights under Article 11.[125]

Following the Norwegian Supreme Court, it found the purpose of the boycott—the implementation of the collective agreement—to be 'irregular' and its proposed protection to be 'relatively indirect'.[126] The Norwegian court determined that the 'primary effect' of industrial action would be to deny Holship market access and violate its rights under the EEA.[127] Article 11 provides a right to participate in trade union activity for the purpose of protecting workers' rights, but this did not cover the boycott because the framework agreement was not seen as providing a sufficient level of protection to workers.[128]

This is a perverse decision. The framework agreement responds to the threat of insecure employment, increased mechanisation of dock work, and business practices which seek to bypass permanently employed local dockworkers through the use of cheap in-house labour. In order to protect dockworkers, the agreement provides secure employment, pay and conditions as well as a priority right of engagement to discharge and load ships.[129] The judgment suggests that the ECtHR is either unwilling or incapable of relying upon the ILO's specialist knowledge of industrial relations, labour standards, and sector-specific collective agreements. The court's reasoning appears to have underestimated or failed to properly consider the purpose of the ILO agreement and the ways it protects workers in practice. Instead, it relies once again on a wide margin of appreciation when ceding to the Norwegian Supreme Court's assessment of the boycott and its impact on Holship's market access.

[125] Ellingsen (n 79) 591.
[126] *Holship* (n. 76) paras 35–6, 100.
[127] Ibid. para 109.
[128] Ibid.
[129] Hendy and Novitz (n 76) 4–5.

As Hendy and Novitz have outlined, the decision to afford market freedoms a higher level of protection has the almost certain effect of severely undermining the purpose of a widely ratified Convention. Having unpicked the threads of an agreement which provided vital protection for vulnerable workers, it leaves MNCs free to undermine collective agreements and invites signatory states to bend to corporate demands for deregulation in the hope of attracting global trade. We should be concerned by this latest example of the ECtHR's reluctance to protect the enjoyment of Article 11 rights and its implications for the status of collective agreements which protect vulnerable workers. As *Holship* shows, integration of ILO jurisprudence represents an opportunity to secure worker-protective labour law; the failure to integrate undermines the ECtHR's capacity to protect fundamental collective labour rights.

The reporting and complaint mechanisms of the ILO and ECSR provide ways to challenge labour rights violations at the trans/national level and stage future claims before the ECtHR by preparing the normative landscape. These are strategic routes to confronting the impact of the CJEU, shaping ECtHR jurisprudence, and pressuring national governments to reform collective labour law. In the language of TLL, these mechanisms are, first, sites of contestation where social partners can challenge, albeit indirectly, the interpretation of collective labour norms by more authoritative sites of TLL. Second, thanks to their accessibility, responsiveness to worker-protective claims, and the relative speed in which complaints are considered, they provide opportunities for workers' voices to be heard and for trade unions to participate in standard setting. Third, in their dialogic role, they communicate authoritatively about the content and scope of collective labour law.

At the same time, such opportunities must be placed in a broader context which accounts for the intensity of conflict over the content and scope of TLL in Europe. Soberingly, the trajectory of the ECtHR's reliance on the ILO and ECSR reveals the limits of their capacity to influence the content of TLL outside of their own competence and structures. As this section has argued, their capacity to influence and enforce transformative change is restricted by the politics of TLL and LOS. And yet, in this space of opportunity and limitation, the strategic agency of trade unions becomes clear. They map the LOS of TLL and seek to secure the enjoyment of collective labour rights by targeting receptive judicial sites, developing jurisprudence and applying pressure in legal and political arenas over the short and long-term.

4. CONCLUSION

This paper has provided a map of the strategic ways that workers and trade unions in Europe have mobilised transnational law to secure access to fundamental collective labour rights. In the absence of alternative political or legal mechanisms of redress, and the displacement of work from the confines of national jurisdictions, the transnational sphere has become a key site of contestation over the content and scope of labour law. The strategic use of the CJEU, ECtHR, ILO and ESC suggests the need for a sceptical and pragmatic approach to the effective mobilisation and transformative capacity of TLL. To do so, the analysis in this paper provides an account of TLL according to the legal opportunity structures provided by TLL in Europe. This recognises TLL's normative and structural constraints, its ability to redress complaints, and deliver broader socio-legal transformation. This has shown how the effectiveness of transnational labour law mobilisation is located in the complex and dynamic interactions between several context-dependent factors. For instance, a legal regime's capacity to include or exclude worker-protective claims, the prospects for legal transformation over time, judicial receptiveness to the recognition and protection of collective labour rights, procedural rules, the socio-political effects of legal mobilisation, and the union's broader strategic objectives.

This conception of TLL mobilisation has wider implications for our understanding of the transnational sphere in the labour law context and its potential to deliver socio-legal transformation. I have argued that TLL ought to be understood as a site of conflict over the content and scope of labour rights as much as it is potentially transformative and aspirational. The constellation of TLL offers competing visions and priorities in the regulation of work and distribution of rights and freedoms. Therefore, any assessment of a legal order's 'transformative' potential needs to be considered alongside the ways it has been mobilised, its institutional capacity, and relation with other TLL regimes. For instance, the ILO provides authoritative international labour law standards which can be used to re-determine the ECHR and impose obligations on national governments. However, the ILO is not the only institution concerned with labour law at the transnational level, the EU and CoE also have a significant effect on labour law and industrial relations in Europe.

The analysis presented in this paper details a transnational sphere weighted against transformative labour law reform in Europe. Workers and trade unions are largely outgunned, in terms of their capacity to rely upon

material power. The coercive power of TLL in Europe is largely reserved to institutions of the EU, with the ECtHR and ILO relying on more limited enforcement functions. Moreover, the indeterminacy of TLL is delimited by the treatment of collective labour law before the CJEU and the recent trajectory of the ECtHR's Article 11 case law which has narrowed the scope of interpretive opportunities.

Nonetheless, there remain key battles to be won over the content, scope, and relative weight afforded to rights which facilitate democracy at work and the right to take industrial action. Certain legal mechanisms have the capacity to stem encroachments on fundamental labour rights and play a meaningful role in strategic attempts to recognise and expand their enjoyment. For example, litigation before the ECtHR has secured the recognition of collective labour rights as fundamental human rights by redetermining the content and scope of Article 11. In addition, the supervisory mechanisms of the ESC and ILO have been mobilised to challenge violations of international labour law obligations and facilitate reforms to national law. Moreover, trade unions have navigated the potentially productive interplay between TLL mechanisms through a commitment to building soft law jurisprudence which can be relied upon before the ECtHR.

The effect of legal mobilisation extends beyond the successful re-interpretation of a right's content, finding a violation, or direct enforcement of obligations and remedies. As we have seen, actions before the ECSR and ILO have placed governments under sufficient pressure to reform national labour laws. In such cases, TLL's effectiveness lies in its instrumental value or capacity to generate leverage at the national level, if not in its direct effectiveness as a tool which recognises and enforces labour rights.

The transformative nature of TLL is found in its ability to contest and diffuse authoritative jurisprudence, as well as include, depending on the institution, marginalised voices and enable trade union participation in the development and application of norms. On the broader question of transformation, I have encouraged a contextual and longer-term assessment of TLL's transformative potential. Rather than answering this zero-sum question directly, it is necessary to think about how engagements with law (via, for example, litigation or reporting mechanisms) contribute to a transformative agenda. This is grounded in an understanding that transformation, which requires a fundamental challenge to existing law and even to its framing of social relations, is rarely delivered in a judgment or legislative text. On the contrary, the legal mobilisation approach set out in these pages turns to the limits of what can and cannot be done in different legal orders

and the impact of certain legal mechanisms on a trade union's broader strategic objectives. In the short term, it may be that TLL struggles to realise a transformative project which fundamentally restructures capitalist social relations, but it might deliver significant reforms to collective bargaining machinery and expand the enjoyment of trade union representation. While it is important not to reduce transformation to mere legal change and hold onto normative aspirations grounded in solidarity, dignity, and democracy at work; the realisation of those goals is likely to be incremental, interspersed with seemingly less radical reforms, defensive actions, and (most likely) frustrating legal defeats or setbacks.