Human Rights as a Regulatory Tool for 'Just Transition' in Europe (and Beyond)

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In the context of increasing human rights litigation on climate change, this article examines the potential to include labour-related concerns regarding just transitions. Taking the European Convention on Human Rights (ECHR) as a case study, the argument is made that there is potential to do so, not only utilizing Articles 2 and 8, but also Articles 10 and 11. The scope of the European Court of Human Rights (ECtHR) case law is examined in this respect. The article examines case law which is indicative of the potential application of Articles 2 and 8 to work and the environment, alongside the prospects of combining claims under Articles 10 and 11. Emerging jurisprudence on Articles 10 and 11 may be significant, as recent study of 'human rights experimentalism' indicates, since efficacious engagement in human rights litigation requires collective voice from those most affected, both in terms of crafting claims and implementing judgments. Their recognition in the context of combined environmental and labour concerns would be an important step towards transformational structural change relating to 'just transition'.

Keywords: Human Rights, Climate Change, Just Transition, European Convention on Human Rights (ECHR), European Court of Human Rights (ECtHR), Freedom of Association, Worker Status, Human Rights Experimentalism

1 INTRODUCTION

The broad field of regulatory theory indicates there may be myriad methods for enhancement and protection of workers' interests in 'just transition', namely transformations of contemporary working practices to pre-empt and mitigate environmental harms while preserving social justice.[1] This article analyses the implications of an increase in use of human rights litigation to prompt action on climate change.[2] My aim is to consider whether such litigation could acknowledge and protect the interests of those at work. It has been established at the

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1 Compare Alexandra R. Harrington, *Just Transitions and the Future of Law and Regulation* (Palgrave Macmillan 2022); David J. Doorey & Ann Eisenberg, *The Contested Boundaries of Just Transitions*, in *Labour Law and Ecology* (Consuelo Chacartegui ed., Thomson Reuters Arazandi 2022), https://ssrn.com/abstract=4181820 (accessed 27 Jul. 2023).

2 *See* John H. Knox, *Climate Change and Human Rights Law*, 50(1) Va. J. Int'l L.163 (2009) and Riccardo Luporini & Arpitha Kodiveri, *The Role of Human Rights Bodies in Climate Litigation*, EUI Working Paper LAW2021/12 (2021).

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International Labour Organization (ILO) and in the Paris Agreement that just transitions addressing climate change can and should have regard to labour conditions and those whose work is affected,[3] but this has yet to be represented or recognized in that litigation or even recent academic analyses of climate change and human rights.[4]

The article begins by considering the ways in which workers' claims regarding climate action and just transition can be framed in human rights terms, observing both their potential and limitations in the context of the European Convention on Human Rights (ECHR). While current climate change litigation relies on Articles 2, 8 and 14, my suggestion is that Articles 10 and 11 are also important to labour-related human rights claims. The article goes on to examine the jurisprudence of the European Court of Human Rights (ECtHR) to date which may be relevant. Limitations of previous case law are identified and compared with more recent judgments, which are indicative of further potential for workers' interests to be represented. My argument, presented in the final part of the article, is that Articles 10 and 11 of the ECHR are significant, given the importance of collective voice in forging action, as well as alliances and coalitions that may be needed to make human rights claims for a richer 'just transition' encompassing both environmental and labour claims. Human rights activism has the potential to enable a large precarious workforce in Europe and around the world to be given due consideration in litigation and to play a meaningful role in the implementation of the judgments that emerge.

2 COMBINING CLIMATE CHANGE AND LABOUR CLAIMS IN HUMAN RIGHTS LITIGATION

Before 2015, only 19 human rights based climate change claims had been filed anywhere in the world, but from 2015 to 2021 148 climate cases were brought using 'rights-based' language globally.[5] At the time of writing, there are several significant cases pending before the Grand Chamber regarding action that can be compelled by the ECtHR under the ECHR on climate change. They include claims brought by Cláudia Duarte Agostinho and five other young persons who

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[3] ILO, *Guidelines for a Just Transition Towards Environmentally Sustainable Economies and Societies for All* (ILO 2015). *See also* the preamble to the 2015 Paris Agreement, https://unfccc.int/sites/default/files/english_paris_agreement.pdf (accessed 27 Jul. 2023).

[4] For example Margaretha Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights under International Law* (Bloomsbury 2019).

[5] César Rodríguez-Garavito, *Litigating the Climate Emergency: The Global Rise of Human Rights-Based Litigation for Climate Action*, in *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (César Rodríguez–Garavito ed., Cambridge University Press 2021).

are challenging the lack of state action on greenhouse gas emissions, which is leading to climate change;[6] concerns raised by elderly women whose health is affected by excessive heat due to climate change;[7] and a case brought by a past mayor who had requested (unsuccessfully) that national French government authorities take steps to prevent emission of greenhouse gases.[8] To date, there is little evidence that trade unions and workers are combining climate change and labour claims in human rights litigation and an interesting question is why that may be.

One explanation is that the experience of labour lawyers has been that human rights can be a 'blunt instrument', oriented often toward protection of the individual at the expense of the community. For example, the trend has been for civil and political liberties to gain preferential protection, at the expense of economic, social and cultural rights.[9] There is also the longstanding issue that the ECtHR has allowed a wide-ranging margin of appreciation to states when labour rights are invoked, particularly on freedom of association matters and cases concerning the UK.[10] Further, while a human rights complaint can expose blatant unjust actions and omissions, human rights mechanisms are seldom designed to craft policies. For example, the ECtHR will find a breach (or not) of the ECHR and, if there is a breach, will consider financial compensation in the form of 'just satisfaction'. While the Court can make other orders, it may be reluctant to grapple with multi-faceted aspects of just transitions.[11]

Nevertheless, the reluctance of collective labour to engage with strategic human rights litigation relating to environmental issues could be revisited. It is evident that human rights claims are advantageous in that they can highlight inequities and injustices; retaining considerable authority and political resonance. A human rights narrative offers a way of attracting attention to key issues, embarrassing governments for a lack of action; and can prompt changes in the behaviour of, not only public, but also private actors. This matters in the context of labour-related claims relating to climate action and just transition, where the relevant actors are not only the state but employers.

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6 Appn No. 39371/20 *Cláudia Duarte Agostinho and others v. Portugal and 32 other States*.

7 Appn No. 53600/20 *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*.

8 Appn No. 7189/21 *Carême v. France*.

9 As discussed in a labour rights context by contributors to *Human Rights at Work: Perspectives on Law and Regulation* (Colin Fenwick & Tonia Novitz eds, Hart/Bloomsbury/Oñati International Series in Law and Society 2010); *Voices at Work: Continuity and Change in the Common Law World* (Alan Bogg & Tonia Novitz eds, Oxford University Press 2014).

10 K. D. Ewing & John Hendy, *Article 11 (3) of the European Convention on Human Rights*, 4 Eur. Hum. Rts. L. Rev. 356 (2017).

11 Béla Galgóczi, *Just Transition on the Ground: Challenges and Opportunities for Social Dialogue*, 26(4) Eur. J. Indus. Rel. 367, 369 (2020), doi: 10.1177/0959680120951704; Ann M. Eisenberg, *Just Transitions*, 92 S. Cal. L. Rev. 273 (2019).

There is moreover a 'universal' dimension to human rights claims: namely, the underlying assumption that that 'everyone' matters in a way that spans national borders and can forge international action. This chimes with the impact of ecological disruption and pollution, which also has no respect for national boundaries.[12] The latter is exemplified by the *Duarte Agostinho* case,[13] brought against thirty-three states alleging that they were all responsible for lack of action on greenhouse gases. This allegation of collective state responsibility alleged in climate change litigation could perhaps promote international political cooperation on such matters.[14]

Additionally, the use of human rights terms is an important explanatory device. The ECHR does not, at least at present, contain any explicit environmental protections, but placing environmental concerns within a human rights framework can assist in explaining why they are so compelling and significant. For example, Cláudia Duarte Agostinho and her fellow applicants relied on ECHR Article 2 (on the basis that policy inaction endangered their right to life), on Article 8 (as their private and family life would be affected by climate change), and on Article 14 (on the ground that their generation would be disproportionately affected so that inaction had a discriminatory effect).[15] This is a helpful explanation of the compelling circumstances in which the litigation was brought. Workers might also claim that the failure of their employer and/or the state to address environmental pollution and carbon emissions has endangered their health and thereby their right to life under Article 2, as well as their private and family life linked to their employment under Article 8, and if these omissions by an employer has particular impact on any given group of workers, whether for example they are female (affecting fertility) or elderly (being more vulnerable to toxins), Article 14 might become relevant. In this way, claims can be made that the crafting of climate action policies should be sensitive to the needs of particular groups of workers.

Claims relating to Articles 2 and 8 of the ECHR may be bolstered by events in June 2022, when the entitlement to 'a safe and healthy working environment' was included as a fifth 'core labour standard' in the 1998 ILO Declaration on Fundamental Principles and Rights at Work at the International Labour Conference, while giving 'fundamental' status also to Conventions Nos 155 and 187.[16] This is consistent with the constitutional obligation to promote 'adequate

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12 Tonia Novitz, *Sustainability as Solidarity Unbound: Labour Rights and Collective Voice in the United Nations Sustainable Development Goals and the European Union* 27 (Julia López López ed. 2022).

13 *See* Appn No. 39371/20, *supra* n. 6.

14 Compare John Vogler, *The International Politics of COP26*, 136(1–4) Scot. Geographical J. 31 (2020), doi: 10.1080/14702541.2020.1863610.

15 Compare Appn No. 53600/20, *supra* n. 7; and Appn No. 7189/21, *supra* n. 8, which at the time of writing are due to be heard with the *Duarte Agostinho* case before the ECtHR Grand Chamber.

16 Resolution on the inclusion of a safe and healthy working environment in the ILO's framework of fundamental principles and rights at work, ILC.110/Resolution1, 10 Jun. 2022. *See* Zahra Yusifli &

protection for the life and health of workers in all occupations' in Article III(g) of the 1944 ILO Declaration of Philadelphia, following extensive political prompting,[17] particularly in the wake of the Covid-19 pandemic.[18]

A broader right to a clean, healthy and sustainable environment for everyone has been recognized at the United Nations (UN),[19] which will also be of interest to many workers. The 'workplace' is becoming increasingly an anachronism given that the sites of work now include the wider communal environment for couriers, drivers, municipal workers and many others.[20] The pandemic demonstrated that the home may also be a workplace.[21] If the ECHR is to be a 'living instrument' sensitive to changes in the world of work and in the international legal environment,[22] recognition of workers' engagement with their wider environment would be appropriate.

Even more significant may be claims under Articles 10 and 11 of the ECHR for those at work to speak and organize on environmental issues. Article 14 could also be used, in this context, to prevent discrimination on grounds of trade union membership and activities when they do so.[23] One might further envisage human rights litigation, not just requiring governments to take action on climate change, but claiming that such action should (at a minimum) respond to the needs of a just transition consistent with Articles 10 and 11, including social dialogue or collective bargaining envisaged in the ILO 2015 Just Transition Guidelines.[24]

Colin Fenwick, *Workers' Rights and Human Rights: Toward a New Fundamental Principle?* (Kimberley Elliott ed. 2022).

17 *See* Sustainable Development Goal (SDG) target 8.8 that aspires to 'safe and secure working environments' in United Nations (UN) (2015) General Assembly Resolution, *Transforming Our World: The 2030 Agenda for Sustainable Development*, 25 Sep. 2015 A/Res/70/1 (the 2030 Agenda); International Labour Organization (ILO) Global Commission on the Future of Work, *Work for a Brighter Future* (ILO 2019); and supplementary Resolution on the ILO Centenary Declaration adopted on 21 Jun. 2019. Discussed in Tonia Novitz, *Engagement With Sustainability at the International Labour Organization and Wider Implications for Collective Worker Voice*, 159 Int'l Lab. Rev. 463 at 469 and 474 (2020), doi: 10.1111/ilr.12181.

18 ILO Resolution 2022, *supra* n. 16, preamble.

19 Resolution by the Human Rights Council in Oct. 2021 A/HRC/RES/48/13 and the UN General Assembly Resolution in Jul. 2022 A /76/L.75. Compare UNGA Report, A/73/188, 19 Jul. 2018.

20 Paolo Tomassetti, *Labor Law and Environmental Sustainability*, 40 Comp. Lab. L. & Pol'y J. 61, 63 (2018).

21 Ambareen Beebeejaun & R. P. Gunputh, *A Critical Analysis of the Mauritius Workers' Rights (Working from Home) Regulations 2020 in the Wake of COVID-19*, 51(1) Indus. L.J. 174 (2022), doi: 10.1093/indlaw/dwab036.

22 Appn no. 34503/97 *Demir and Baykara v. Turkey*, 12 Nov. 2008; Keith D. Ewing & John Hendy, *The Dramatic Implications of Demir and Baykara*, 39 Indus. L.J. 2 (2010), doi: 10.1093/indlaw/dwp031; and Klaus Lörcher, *The New Social Dimension in the Jurisprudence of the European Court of Human Rights (ECtHR): The Demir and Baykara Judgment, Its Methodology and Follow-up* (Filip Dorssemont, Klaus Lörcher & Isabelle Schömann eds 2013).

23 Appn no. 4464/70 *National Union of Belgian Police v. Belgium*, 27 Oct. 1975, even though the claim for discrimination was not successful on the facts of the case.

24 ILO, *supra* n. 3, paras 16–18.

Already, the Inter-American Commission on Human Rights has adopted a Resolution on Climate Emergency, which recognizes the significance of freedom of association for environmental and climate advocates, as well as protection of trade union rights.[25] This suggests that in the Council of Europe, reliance on Article 11 ECHR could further provide a basis for entitlements to take industrial action responding to pollution and other forms of ecological degradations which lead to climate change.[26] Such litigation could provide a basis for criticism of national laws, which do not permit strikes which go beyond a dispute between workers and their employer,[27] even though the present margin of appreciation applied regarding state policy in the sphere of labour relations under Article 11 presents an obstacle to those claims.[28]

It may be more difficult for workers and their organizations to bring claims arguing against state intervention addressing climate change, even when this affects jobs and livelihoods. The government defending its climate change policies could rely on their democratic legitimacy, as well as the protection of the rights and freedom of others, such as private enterprise under Article 8(2). It is even possible that a 'climate emergency' declared by a government under Article 2 could justify suspension of protection of certain human rights under Article 15 ECHR.[29] This is a question that arose in the Covid-19 pandemic, which involved adoption of emergency powers across Europe.[30] Nevertheless, it seems unlikely that the ECtHR would recognize a climate emergency that enables governments to bypass human rights protections (such as freedom of speech and freedom of association under Articles 10 and 11), when there may be still sufficient time to enable the inclusive participatory engagement (consistent with Article 14) encouraged by the Aarhus Convention.[31] The ECtHR remains likely to be sensitive to UN binding human rights instruments in that respect. What is less clear is whether they will

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25 *See* Resolution No. 3/2021 Climate Emergency: Scope of Inter-American Human Rights, paras 27, 48 and 50, https://media.business-humanrights.org/media/documents/Res-3-21_EN.pdf (accessed 27 Jul. 2023).

26 Ruwan Subasinghe & Jeffrey Vogt, *Unions Must Join the Global Climate Strike to Avert a Climate Catastrophe*, Equal Times (2019), https://www.equaltimes.org/unions-must-join-the-global?lang=en#.Y3jk_sfP02z (accessed 27 Jul. 2023); *see* for their reference to international human rights instruments on workers' entitlements in just transitions, Ruwan Subasinghe & Jeffrey Vogt, *A Just Transition Guaranteed by International Law is Within Reach – Here's How*, Equal Times (2023), https://www.equaltimes.org/a-just-transition-guaranteed-by (accessed 27 Jul. 2023).

27 *See* for e.g., the UK Trade Union and Labour Relations (Consolidation) Act 1992, s. 244.

28 *See* Ewing & Hendy, *supra* n. 10 above and *infra* n. 56.

29 *See* Council of Europe ECtHR Registry, *Guide on Article 15 – Derogation in Time of Emergency* (revised 31 Dec. 2021), https://www.echr.coe.int/documents/Guide_Art_15_ENG.pdf (accessed 27 Jul. 2023).

30 Sanja Jovičić, *COVID-19 Restrictions on Human Rights in the Light of the Case-Law of the European Court of Human Rights*, 21(4) ERA F. 545 (2021).

31 The UN Economic Commission for Europe Convention on Access to Information, *Public Participation in Decision-Making and Access to Justice in Environmental Matters* (25 Jun. 1998), https://unece.org/environment-policy/public-participation/aarhus-convention/introduction (accessed 27 Jul. 2023).

respond to the call for social security and training measures, which arguably follow from soft law Sustainable Development Goals (SDGs) 1 (poverty) and 4 (education and lifelong opportunities for learning) which should follow the closure of any polluting industry, even though such a requirement would adhere to the European Social Charter 1961 (and as revised in 1996).[32] The hope is that collective worker voice could secure those benefits and training options.

3 THE CASE LAW OF THE ECtHR

It seems evident that the ECtHR can and will protect workers' rights to life, as well as their health and safety and well-being in terms of private and family life under Articles 2 and 8 ECHR. There is scope for extension of those principles and, in particular, the right of workers to access information that would inform consent to environmental risks at work. It also seems possible that reliance on Articles 10 and 11 can be combined to give those at work greater voice on climate change policies and just transition.

ECtHR assessment of state decision-making processes relating to environmental policies under the ECHR can be rigorous. State processes should 'involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights and to enable them to strike a fair balance between the conflicting issues at stake'. There must then be 'public access to the conclusions of such studies and to information which would enable members of the public to assess the danger to which they are exposed'. Finally, those 'individuals concerned must be able to appeal to the courts against any decision, act or omission where they consider that their interests or comments have not been given sufficient weight in the decision-making process'.[33] Where those procedural requirements are met, the ECtHR has been more reluctant to intervene on more substantive grounds,[34] but after an environmental catastrophe causing death, the ECtHR can insist on positive action to prevent future events, as well as compensation and investigation of the causes.[35]

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[32] *See* the 2030 Agenda, *supra*, n. 17. For the text of the Social Charter and Revised Social Charter, *see* https://www.coe.int/en/web/european-social-charter/charter-texts (accessed 27 Jul. 2023). Note the capacity for states to select obligations under the Charter (even as revised) and the soft law status of the 2030 Agenda.

[33] Appn no. 46117/99 *Taşkin v. Turkey*, 10 Nov. 2004 (final 30 Mar. 2015), para. 119; cited in Knox, *supra* n. 2, at 174.

[34] Jurisprudence summarized by Knox, *supra* n. 2, at 174–175.

[35] Appn nos 17423/05 et al., *Kolyadenko and Others v. Russia*, 28 Feb. 2012; Appn nos 15339/02 et al. *Budayeva and others v. Russia*, 20 Mar. 2008.

Even without any fatality, in the 1994 judgment in *López Ostra v. Spain*[36] the ECtHR found there could be a successful claim under Article 8 ECHR in relation to pollution from a waste-treatment plant which had severe effects on the health of the applicant and her daughter. The ECtHR accepted that 'regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole' and conceded that 'the State enjoys a certain margin of appreciation',[37] but nevertheless found there to be a breach of Article 8. Subsequently, the majority of an ECtHR Grand Chamber in *Hatton v. UK* opined that 'Article 8 may apply in environmental cases whether the harm is directly caused by the State or whether State responsibility arises from failure to regulate private industry properly',[38] so we might assume that state failure to regulate an employer's conduct should be covered. However, on the facts of that case, and with deference to national authorities' 'direct democratic legitimacy',[39] the 'fair balance' struck between individual and broader economic objectives was accepted as sufficient, despite the forceful dissenting opinion of five judges.[40] By way of contrast, in *Fadeyeva v. Russia*, despite a wide margin of appreciation being recognized for states, pollution from a steel plant was found unanimously to 'fail to strike a fair balance between the interests of the community' and breached the applicant's Article 8 rights in relation to her home.[41]

In 2022, the unanimous ECtHR judgment in *Pavlov v. Russia* made clear that failure to act to address air-borne pollution which had a significant risk of damaging human health would constitute a breach of Article 8.[42] Notably, in a concurring opinion, Judge Serghides emphasized that 'the protection of the environment and human rights are … closely interconnected',[43] advocating for adoption of an additional protocol on the right to a healthy environment. He also cited findings of the European Committee of Social Rights under the European Social Charter relating inter alia to health and safety at work,[44] which indicates the potential for engagement with Charter jurisprudence relating to labour standards in this context.

The significance of access to information regarding risks has been emphasized in the context of employment. In the *Vilnes* case, the ECtHR indicated that

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36 Appn no. 16798/90 *López Ostra v. Spain*, 9 Dec. 1994.
37 *Ibid*., paras 51 and 58.
38 Appn no. 36022/97 *Hatton v. UK*, para. 98.
39 *Ibid*., paras 97, 98 and 129.
40 *Ibid*., Joint Dissenting Opinion of Judges Costa, Ress, Türmen, Zupančic and Steiner.
41 Appn no. 55723/00 *Fadeyeva v. Russia*, 9 Jun. 2005, para. 134.
42 Appn no. 31612/09 *Pavlov v. Russia*, 11 Oct. 2022.
43 *Ibid*., Concurring Opinion of Judge Serghides, para. 4.
44 *Ibid*., para. 5; citing *Marangopoulos Foundation for Human Rights (MFHR) v. Greece* Complaint No. 30/2005, 6 Dec. 2006.

Article 2 could be engaged where information was not provided regarding 'life-threatening experiences', although this was not relevant on the facts.[45] When Norwegian divers engaged in oil exploration were not fully and adequately informed of the risks they were taking on decompression tables, such that they could give informed consent to the long-term effects on their health, this constituted a violation of their Article 8 rights. That judgment did not discuss collective representation or information and consultation requirements in relation to trade unions. In future, the ECtHR might be expected to apply ILO Convention No. 155, now a designated 'fundamental' Convention post the 2022 ILO Resolution, Article 19(c) of which requires 'representatives of workers' to be 'given adequate information on measures taken by the employer to secure occupational safety and health' who 'may consult their representative organisations about such information provided they do not disclose commercial secrets'.

Trade union engagement in advocacy on environmental matters could further be framed in terms of a combination of Articles 10 and 11 ECHR. Previously, freedom of expression has been juxtaposed with positive freedom of association in ECtHR cases.[46] However, the potential for their intersection is evident in another judgment of the ECtHR delivered in 2022, *Straume v. Latvia*.[47] The chairperson of the Latvian Air Traffic Controllers' Trade Union had been disciplined by her employer for sending a letter on behalf of (and authorized by) the union regarding working conditions which could pose a danger to health and safety. It was found that this disciplinary action was an interference with Straume's Articles 10 and 11 rights and was disproportionate. The ECtHR observed that:

> the question of freedom of expression is closely related to that of freedom of association within a trade union context. The protection of personal opinions, as secured by Article 10, is one of the objectives of freedom of assembly and association, as enshrined in Article 11.[48]

That statements were made to an employer and in the context of employment did place particular constraints on the speech and speaker, since the employer had legitimate interests to protect.[49] Yet, at the same time, trade union speech was recognized as having particular protection by virtue of Article 11: 'One of the essential elements of the right of association is the right for a trade union to seek to persuade an employer to listen what it has to say of behalf of its members'.[50]

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45 Appns nos 52806/09 and 22703/10 *Vilnes and Others v. Norway*, 5 Dec. 2013. Compare App no. 14967/89 *Guerra and Others v. Italy*, 19 Feb. 1998.

46 Appn 7601/76 and 7806/77 *Young, James and Webster v. UK*, 13 Aug. 1981; Appn 47355/06 *Redfearn v. UK*, 6 Nov. 2012.

47 Appn no. 59402/14 *Straume v. Latvia*, 2 Jun. 2022.

48 *Ibid*., at 89.

49 *Ibid*., paras 100–101 and 103.

50 *Ibid*., para. 91.

Notably, the judgment cited repeatedly the case of *Ognevenko*,[51] which has been notable for its reliance on ILO standards and supervisory findings. This may indicate that these could be considered relevant by the ECtHR in the context of trade union advocacy on working environment issues.

There are, however, two difficulties regarding reliance on Article 11 in relation to strategic litigation. One is the determination in the 'Romanian Priests' case that there should be some form of 'employment relationship'.[52] This requirement, in reliance on ILO Recommendation No. 198, does not cohere with the findings of ILO supervisory bodies to the effect that even 'self-employed workers' and those whose services are hired in the informal economy are entitled to trade union membership, engage in collective bargaining and exercise a right to strike.[53] It also deviates from an understanding of 'the right to form and join trade unions' as 'an aspect of the wider right to freedom of association, rather than a separate right'.[54] This has the unfortunate effect of potentially excluding the most vulnerable members of the workforce, more likely to be exposed to the effects of climate change and 'unjust' transitions, from collective bargaining rights, and it is to be hoped that the principle will be revisited. The other difficulty is the margin of appreciation applied under Article 11.[55] This was once again made manifest in *Case of Association of Civil Servants and Union for Collective Bargaining and Others v. Germany*, which emphasized the 'wide margin of appreciation' afforded to states as to how trade union freedom and protection of the occupational interests of union members may be secured, being a matter primarily for national parliaments, rather than 'the international judge'.[56] Nevertheless, we have seen that even a wide margin of appreciation can be overcome in cases of environmental concern like *Fadeyeva*, so there may yet be potential for trade union activity aimed at addressing environmental concerns to be protected.

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51 *Ibid*., paras 91, 93 and 111. *See* Appn no. 44873/09 *Ognevenko v. Russia*, 20 Nov. 2018.

52 Appn no. 2330/09 *Sindicatul 'Pastorul Cel Bun' v. Romania* judgment of 9 Jul. 2013, paras 57 and 142.

53 *Committee on Freedom of Association Compilation of Decisions* (ILO 2018), para. 330; and Committee of Experts on the Application of Conventions and Recommendations, *General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization* (ILO 2012), paras 53 and 209; discussed by Tonia Novitz, *Collective Labour Rights for Working People: The Legal Framework Established by the International Labour Organization* (Sanjukta Paul, Shae McCrystal & Ewan McGaughey eds 2022).

54 Appn no. 16130/90 *Sigurdur A. Sigurjónsson v. Iceland*, 30 Jun. 1993, para. 32. *See* Mark Freedland & Nicola Kountouris, *Some Reflections on the Personal Scope of Collective Labour Law* 46 ILJ 52, 55 (2017), doi: 10.1093/indlaw/dww041; and Joe Atkinson & Hitesh Dhorajiwala, *IWGB v. RooFoods: Status, Rights and Substitution*, 48 ILJ 278, 283 (2019), doi: 10.1093/indlaw/dwz009.

55 Appn No. 31045/10 *RMT v. UK*, paras 86–89.

56 Appn Nos. 815/18 and 4 others, *Case of Association of Civil Servants and Union for Collective Bargaining and Others v. Germany*, 5 Jul. 2022, 55; citing Appn No. 31045/10, *supra* n. 55.

4 ALLIANCES AND COALITIONS FOR HUMAN RIGHTS CLAIMS

Combining free speech and freedom of association claims to address environmental harms is likely to matter in practice, possibly as much or even more than Articles 2 and 8. They are vital to the empowerment of those at work, so that they can exercise meaningful influence on the conditions that affect their daily lives.[57] Environmental lawyers and activists have advocated making claims 'from below' to maximize participation of those most affected.[58] Grainne de Búrca has advocated 'human rights experimentalism', observing that strategic litigation can be helpful where the project is a dynamic one, which is 'activated, shaped, and given its meaning and impact through the ongoing mobilization of affected populations, groups and individuals, and through their iterative engagement with an array of domestic and international institutions and processes over time'.[59] Achieving a favourable judgment from the ECtHR, on this view, is merely one part of a larger process. What matters is how claims are constructed by the civil society organizations acting as litigants, and then how the judgments delivered are translated into practice to reshape and regenerate human rights norms at multiple levels: nationally, regionally and internationally.[60]

Legal mobilization scholarship, to which de Búrca refers, has a long legacy. Recently, its relevance to labour has been examined by scholars such as by Jack Meakin[61] and Claire Kilpatrick.[62] Kilpatrick, in particular, challenges the ostensible limitations of reference to 'civil society' in this literature, observing that the purported difference between NGOs and trade unions 'is overstated', given their complementary claims and activism in the field of labour rights during the global financial crisis.[63] Moreover, NGOs may now act as important advocates for those in the informal economy without official trade union support, given the legal constraints on them joining and being represented by a trade union currently

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57 Kalina Arabadjieva, *Worker Empowerment, Collective Labour Rights and Article 11 of the European Convention on Human Rights*, 22(1) Hum. Rts. L. Rev. 192 (2022), doi: 10.1093/hrlr/ngab019.

58 Compare Alex Arnall, Chris Hilson & Catriona McKinnon, *Climate Displacement and Resettlement: The Importance of Claims-Making from Below*, 19(6) Climate Pol'y 665 (2019), doi: 10.1080/14693062.2019.1570065.

59 Grainne de Búrca, *Reframing Human Rights in a Turbulent Era* 3–4 (Oxford University Press 2021).

60 *Ibid*., at 46 and *see* 210 et seq.

61 *See* the special issue edited by Jack Meakin on *Labour, Strategy, and the Constitutional Protection of Work: On the Effectiveness of Legal Strategy*, 38(2) Int'l J. Comp. Lab. L. & Indus. Rel. (2022), doi: 10.54648/IJCL2022004. *See also* Jack Meakin, *The Opportunity and Limitation of Legal Mobilisation for Social Struggles: A View from the Argentinian Factory Recuperation Movement*, 18 Int'l J.L. Context 196 (2022), doi: 10.1017/S1744552322000106.

62 Claire Kilpatrick, *Taking the Measure of Changing Labour Mobilization at the International Labour Organisation in the Wake of the EU Sovereign Debt Crisis*, 68 Int'l & Comp. L. Q.665 (2019), doi: 10.1017/S0020589319000113.

63 *Ibid*., at 688–689.

permitted seemingly under ECtHR case law. Recognition of what has been termed at the ILO a wider 'world of work'[64] will be significant.

More difficult are the issues of power that human rights litigation raises. De Búrca acknowledges that civil society can be bureaucratic,[65] 'illiberal, exclusionary, repressive',[66] and concedes that the Global North can be over-represented in NGO activities,[67] but does not state in detail how these concerns relating to power can be overcome, for example to achieve a transformative 'socio-ecological' approach to 'environmental justice'.[68] From a labour perspective, processes of collective bargaining, industrial action and social dialogue designed to address power imbalances in the labour market will need to be retained.[69] Strategic litigation can complement those processes but would be a poor substitute for them.[70]

In the context of just transition, Margherita Pieraccini and I have proposed utilizing Jacques Rancière's process of 'dissensus', namely breaking down the boundaries between public and private spheres (such as environmental policy and labour law) and redistributing power by allowing knowledge from those who have been situated outside decision-making (re-partitioning).[71] Others have drawn on Rancière's work to argue that, as both environmental and social crises arise from systemic inequalities, socio-environmental injustice requires radical redistributive reforms requiring mobilization.[72] This would include drawing on the experience of the most vulnerable and precarious workers who are systemically disadvantaged or excluded, such as women or migrants. Their knowledge or epistemic truths in terms of how they relate to their environments and their priorities could radically reshape what is sought through litigation or policy pressures and *how* it is requested.[73] In this respect, litigation in a regional human right courts will have its limitations, given the ways in which supply chains operate globally.

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64 *See* for e.g., ILO Convention No. 190 on Violence and Harassment, Art. 2.

65 de Búrca, *supra* n. 59, at 30.

66 *Ibid*., at 32.

67 *Ibid*., at 218.

68 Dimitris Stevis & Romain Felli, *Global Labour Unions and Just Transitions to a Green Economy*, 15(1) Int'l Envtl. Agreements 29, 38–39 (2015), doi: 10.1007/s10784-014-9266-1.

69 As advocated in Mehtap Akgüç, Kalina Arabadjieva & Béla Galgóczi, *Why the EU's Patchy 'Just Transition' Framework Is Not Up to Meeting Its Climate Ambitions*, ETUI Policy Brief 2022.6 (2022).

70 Kevin Kolben, *Labor Rights as Human Rights*, 50 Va. J. Int'l L. 449 (2009); Manoj Dias-Abey, *Bridging the Spaces In-Between? The IWGB and Strategic Litigation*, University of Bristol Law Research Paper Series 1:17 (2021).

71 Margherita Pieraccini & Tonia Novitz, *Sustainability and Law: A Historical and Theoretical Overview* 29 (Margherita Pieraccini & Tonia Novitz eds 2020).

72 Irina Velicu & Stefania Barca, *The Just Transition and Its Work of Inequality*, 16(1) Sustainability: Sci., Prac. & Pol'y 263 (2020), doi: 10.1080/15487733.2020.1814585.

73 Ania Zbyszewska, *Regulating Work With People and 'Nature' in Mind: Feminist Reflections*, 40 Comp. Lab. L. & Pol'y J. 9 (2018); and Sara Seck, *Transnational Labour Law and the Environment: Beyond the Bounded Autonomous Worker*, 33(2) Can. J.L. & Soc'y 137 (2018), doi: 10.1017/cls.2018.15.

Representation of the formal and informal labour market transnationally[74] will also be vital in designing new alliances and with them new imaginaries.[75] This takes us beyond the sphere of human rights litigation in Europe and into other global domains.

5 CONCLUSION

This article has considered the potential for the entry of labour concerns in human rights litigation on climate change, as a means for 'just transition'. Such a regulatory strategy is potentially viable, in reliance on Articles 2, 8 and 14 of the 'living instrument' that is the ECHR. Claims based on Articles 10 and 11 may also be feasible, despite the generous margin of appreciation allowed on collective labour rights issues, and apparent exclusion of claims from those not formally in an 'employment relationship'. Certainly, ECtHR jurisprudence will still need to shift and develop to realize the transformative potential for coalitions amongst those at work which could enable socio-environmental justice and catalyse social, political and legal reform.[76] A further aim may be 'the multi-level co-creation of human rights law and practice'[77] that could enable structural change to tackle climate change responding to transnational concerns and alliances.

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74 Supriya Routh, *Informal Workers' Aggregation and Law*, 17(1) Theoretical Inquiries L. 283 (2016), doi: 10.1515/til-2016-0011.

75 Paolo Tomassetti, *Energy Transition: A Labour Law Retrospective*, 52(1) ILJ 34, 67 (2023), doi: 10.1093/indlaw/dwac008 citing Supriya Routh, *Embedding Work in Nature: The Anthropocene and Legal Imagination of Work as Human Activity*, 40 Comp. Lab. L. & Pol'y J. 29 (2018).

76 de Búrca, *supra* n. 59, at 12.

77 *Ibid*., at 46.