



Novitz, T. A. (2023). A just transition for labour: how to enable collective voice from the world of work. *GIORNALE DI DIRETTO DEL LAVORO E DI RELAZIONI INDUSTRIALI*, 2023(177-178), 55-73.
<https://doi.org/10.3280/GDL2023-177005>

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A JUST TRANSITION FOR LABOUR: HOW TO ENABLE COLLECTIVE VOICE FROM THE WORLD OF WORK

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ABSTRACT

This article addresses the ways in which domestic, regional and international collective labour norms may need to be revisited, if those at work are to have any meaningful voice in the design of ‘just transitions’. It is argued that these transitions can be understood as dynamic processes, the outcomes of which cannot be simply pre-determined or their justice merely assumed. It therefore makes sense for associated procedures and mechanisms to be as inclusive as possible, representing interests of the wider ‘world of work’ in the project of recrafting the manufacture of goods and delivery of services to meet environmental needs, including the reduction of carbon emissions. Participatory engagement is likely to lead to better policy design, ensuring effectiveness and commitment. This approach also follows from appreciation of the dignity of labour and the legitimate concerns of those at work with the welfare of the communities in which they work and live. Moreover, the nature of ecological harms require attention to not merely one locality (the workplace or the community) but potential for transborder effects. The case for labour representation in just transitions is now accepted in many quarters, including the European Union (EU), and receives international recognition in the Paris Agreement, but is only likely to be realisable if national level collective labour law is changed accordingly. In Europe, that may require prompts from the International Labour Organization (ILO), but also the European Court of Human Rights. This article argues that an appropriate beginning for any process of revision and remodelling would have three dimensions. Firstly, I advocate addressing the identity of collective voice at work, reconsidering the legitimate objectives of collective bargaining and industrial action, and rethinking the methods by which collective voice can be exercised in the realisation of sustainable development. The potential implications of such changes are considered here.

I. INTRODUCTION: WHAT DO WE MEAN BY A ‘JUST TRANSITION’ FOR LABOUR?

In the most simple terms, as defined by Greenpeace, ‘a just transition is about moving to an environmentally sustainable economy ... without leaving workers in polluting industries behind’.¹ Preserving the ecology of the planet demands change and the language of ‘just transition’ acknowledges that some sectors of the labour market are more likely to bear the burden of that change than others, which has to be managed to create ‘a fairer and more equal

¹ This is the definition adopted by Greenpeace at <https://www.greenpeace.org.uk/challenges/environmental-justice/just-transition/> (last accessed 19 February 2022).

society’.² This definition offers a useful point of departure for the analysis in this article, and chimes with the recognition in the preamble to the 2015 Paris Agreement of the ‘imperatives of a just transition of the workforce and the creation of decent work’.³ Nevertheless, the limitations of the Greenpeace treatment of ‘just transition’ should also be highlighted.

For example, this statement from Greenpeace adopts the apparent presumption that it is only a segment of the current workforce, ‘in polluting industries’, who will be affected. If we accept the United Nations (UN) Resolution on the 2030 Agenda,⁴ which established seventeen Sustainable Development Goals (SDGs) and targets, as a statement of universal intent by the international community, we need to consider the relevance of working practices across all industries, insofar as they affect for example water (SDG 6), energy (SDG 7), climate change (SDG 13), the marine environment (SDG 14), and terrestrial ecosystems (SDG 15). Polluting industries will be only a small part of this greater whole. The need for change to working practices is much more extensive and pervades almost all jobs in numerous ways.

Secondly, the Greenpeace definition seems to assume that what is ‘an environmentally sustainable economy’ is self-evident. Rather, it is important to acknowledge that evidence for the requirement for certain changes and the types of changes necessary will need to be interrogated and debated. In the Greenpeace statement ‘workers in polluting industries’ are placed in an apparently passive position – they are not to be ‘left behind’. However, their claims to active engagement in evaluation of evidence and policy design could be addressed.

The case for recognising the entitlement of labour to a fuller democratic process follows if we understand those at work, not as atomistic and individual entities to be factored into production, but rather in relational terms connected to their community and environment, and their social roles as family members, consumers and citizens.⁵ Those at work in more (or less) polluting industries are not only invested in their wage and other terms and conditions at work but also the impact of their work on the places where they live and the people they care about (including themselves).

² Ibid.

³ Available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf (last accessed 19 February 2022).

⁴ United Nations (UN), Transforming our World: The 2030 Agenda for Sustainable Development, General Assembly, 70th Session, A/Res/70/1, New York, 2015 (‘UN 2030 Agenda’).

⁵ Sara Seck, ‘Transnational Labour Law and the Environment: Beyond the bounded autonomous worker’ (2018) 33(2) *Canadian Journal of Law and Society* 137, 141.

The portrayal of labour as inherently resistant to environmental change which previously dominated debates is no longer likely to ring true, given the information now available in the public domain regarding not only climate change, but also environmental harms to health and the consequences of ever-increasing loss of biodiversity. There remain relatively isolated voices opposing decarbonization policies, such as the Polish mineworkers' union, but current researchers are hard pressed to find other examples.⁶ Credit must go to the persistent lobbying from non-governmental organisations (NGOs) like Greenpeace for spreading this message, but the issue now is not merely whether there should be climate and other environmental action but rather how action is to be targeted and also managed to achieve social justice. Dimitris Stevis has observed that 'social environmentalism' is 'consistent with labor's affinity for solidarity and equity', ultimately making longer-term commitments to the environment and society.⁷

Indeed, it has been observed that the inequalities dominant in current modes of capitalist production have perpetuated forms of environmental harm and merit attention.⁸ In this context, it will be important to move beyond the narrow parameters of the Paris Agreement and instead embrace a wider participatory vision for labour in transformative ways.⁹ From a sustainability perspective, one might expect attention not only to intra-generational justice concerning the welfare of current generations of those at work and in the wider community, but also inter-generational justice, namely the well-being of future generations and longer-term life on the planet.¹⁰ In the wake of UN adoption of the SDGs, an

⁶ Adrien Thomas and Nadja Doerflinger, 'Trade Union Strategies on Climate Change Mitigation: Between opposition, hedging and support' (2020) 26(4) *European Journal of Industrial Relations* 383, who at 388-390 set out the Polish mineworkers' position and the refusal of the International Trade Union Confederation (ITUC) to support their stance.

⁷ Dimitris Stevis, 'Unions and the Environment: Pathways to global labor environmentalism' (2011) 14(2) *Working USA: The Journal of Labor and Society* 145, 146; see also Dimitris Stevis, Edouard Morena and Dunja Krause (eds), *Just Transitions: Social justice in the shift towards a low-carbon world* (Pluto Press 2020).

⁸ Anna Grear, 'Towards "Climate Justice"? A critical reflection on legal subjectivity and climate injustice: warning signals, patterned hierarchies, directions for future law and policy' (2014) 5 *Journal of Human Rights and the Environment* 103; Paolo Tomassetti, 'From Treadmill of Production to Just Transition and Beyond' (2020) 26(4) *European Journal of Industrial Relations* 439 at 441 and 452.

⁹ Dimitris Stevis and Romain Felli, 'Global Labour Unions and Just Transition to a Green Economy' (2015) 15(1) *International Environmental Agreements* 29, 32; Béla Galgóczi, 'Just Transition on the Ground: Challenges and opportunities for social dialogue' (2020) 26(4) *European Journal of Industrial Relations* 367.

¹⁰ As outlined in the 'Brundtland Report', see World Commission on Environment and Development (WCED), *Our Common Future* (Oxford University Press 1987), 51.

International Labour Organization (ILO) Tripartite Meeting of Experts on Sustainable Development, Decent Work and Green Jobs adopted ILO Guidelines on Just Transitions 2015.¹¹ Those Guidelines recommend the consultation of trade unions, which are anticipated to exercise influence as social partners, with the possibility of engaging in ‘collective bargaining’ and entering into ‘collective agreements’ too.¹² The question is how trade unions can perform the function of engaging with the wider welfare of their community and the future of environmental protection under current labour laws, regional systems for the protection of labour rights, and international labour standards.

This article considers the preconditions for effective collective worker voice in the just transitions process and the role that legal reform can play in realising these. It is conceded that it is problematic to over-generalise and make solutions sound simple and straightforward. Complexities are raised by contextualization. Labour markets can differ and countries may be very differently placed within the global economy. However, there are some common problems that have emerged and which have yet to be tackled by the ILO, through the Council of Europe or European Union (EU), or in certain national laws and industrial relations frameworks. These are highlighted here in an endeavour to offer a preliminary framing for the kinds of reform which could be explored. I suggest that these could be focussed on: (1) the identity of collective voice at work; (2) the legitimate objectives of such voice; and (3) the methods that may be used by those at work for the achievement of those objectives.

Currently in many countries, those delivering services in the wider ‘world of work’ receive no legal recognition or protection as ‘employees’ or ‘workers’. The result is that they may have no entitlement to engage in trade union activity, thereby precluding their engagement in consultation or negotiation on environmental issues. The identity of worker voice in collective labour legislation is therefore crucial and is the focus of the next part of this article.

Moreover, legitimate objectives of collective labour voice are limited both in national labour laws and even at the ILO. The scope of lawful aims of collective bargaining and industrial action may need to be extended beyond ‘economic and social’ interests to environmental concerns. Moreover, it may not be appropriate to limit consultation, bargaining

¹¹ Guidelines for a Just Transition Towards Environmentally Sustainable Economies And Societies For All (ILO 2015) available at: https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_432859.pdf (accessed 19 February 2023).

¹² Ibid., paras 16 – 18.

rights or strikes to a dispute between an employer and their workers in a particular country. Coordinated bargaining across corporate subsidiaries supported, for example, by sympathy strikes and even transnational cross-border action may be appropriate. Pollution does not neatly stay in one geographical location and ecological harms in one place may well have impact elsewhere. There may also be a need for workers' objectives to transcend their immediate self-interest to take account of communities outside the workplace or in another country, but also future generations if intra-generational justice is to be considered. This question of the objectives of voice is the subject of the third part of this article.

Finally, the article considers the methods of voice suitable for meaningful participation in 'just transitions'. There is a tendency to limit collective worker voice to consultation, rather than making provision for bargaining and genuine negotiation (which could include recourse to strikes). Reliance solely on consultative mechanisms presents a problematic potential power imbalance in shaping just policies for transition. The absence of reference to a right to strike in current policy documents is highlighted and challenged here.

II. IDENTITY OF VOICE

Paying attention to the identity of collective worker voice in the participatory mechanisms established for designing just transitions entails considering who (at work) is represented in the process, which is likely to impact the content of any representations and even, potentially, how such representations are made. The potential danger is that only those who are in a standard employment relationship that are designated 'employees', and who are able to claim protection from dismissal under national employment laws, will be meaningfully able to participate.¹³ An understandable fear of dismissal, and thereby losing one's livelihood, when speaking out can act as a deterrent to engagement in both individual representations and collective assertion of voice through a trade union.¹⁴ Moreover, domestic legislation in certain countries makes trade union membership and engagement in collective bargaining

¹³ For example, on the rise of precarious work in Europe, see Jeff Kenner, Izabela Florczak, and Marta Otto (eds), *Precarious Work: The challenge for labour law in Europe* (Edward Elgar Publishing 2019); for more international analysis, see Deirdre McCann and Judy Fudge, 'Unacceptable Forms of Work: A multidimensional model' (2017) 156(2) *International Labour Review* 147.

¹⁴ Cf. Matthew Finkin, 'Employee Self-Representation and the Law in the United States' (2012) 50 *Osgoode Hall Law Journal* 937; and Alan Bogg and Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (Oxford: OUP, 2014), 30-31.

contingent on status as a ‘worker’.¹⁵ Where someone has devoted their services to another but does not meet these formal requirements, or is otherwise vulnerable due to the nature of the work they perform and the terms on which this is performed (such as immigration requirements), their capacity to engage collectively with just transitions would seem to be unduly limited.

The ‘worker’ problem has long been an issue globally regarding treatment of the those engaged in service delivery in the informal economy, particularly in the global South.¹⁶ Recent research has highlighted the vulnerabilities of those who are ‘self-employed’, for example running their own street stalls as market vendors,¹⁷ or operating as ‘waste-pickers’,¹⁸ but who are subject to certain stringent requirements imposed by others as to the ways in which their work is performed. Protection of their livelihoods and the terms on which they access the sites on which they work and sell their wares are the current subject of dispute. These people are also likely to be exposed in their work to environmental hazards, such as street pollution or toxic substances on waste dumps, and have limited means to challenge or change this.¹⁹ Their ability to access trade union representation or its equivalent through membership-based associations can make a difference, providing strength in numbers and scope for coordinated resistance, but remains likely to be limited. NGOs which are non-

¹⁵ An approach exemplified by the UK, regarding which see most recently *National Union of Professional Foster Carers v The Certification Officer* [2021] EWCA Civ 548 and *IWGB v CAC and Roo Foods Ltd* [2021] EWCA Civ 952, discussed by Alan Bogg and Michael Ford, ‘Employment Status and Trade Union Rights: Applying Occam’s Razor’ (2022) 51(3) *Industrial Law Journal* 717.

¹⁶ Claire La Hovary, ‘The Informal Economy and the ILO: A Legal Perspective’ (2014) 30(4) *International Journal of Comparative Labour Law and Industrial Relations* 391; Supriya Routh, ‘Informal Workers’ Aggregation and Law’ (2016) 17(1) *Theoretical Inquiries in Law* 283.

¹⁷ Debdulal Saha, *Informal Markets, Livelihood and Politics: Street vendors in urban India* (Routledge India, 2017); Ilona Steiler, ‘The Intersectionality of Informal Employment: Insights from Street Vending and Domestic Work in Tanzania’ (2021) 24(1) *Journal of Labor and Society* 107.

¹⁸ Demet Ş Dinler, ‘New Forms of Wage Labour and Struggle in the Informal Sector: The case of waste pickers in Turkey’ (2016) 37(10) *Third World Quarterly* 1834; Jutta Gutberlet, ‘Grassroots Waste Picker Organizations addressing the UN Sustainable Development Goals’ (2021) 138 *World Development* 105195.

¹⁹ For e.g. see discussion in Catherina J. Schenck, Phillip F. Blaauw, Jacoba MM Viljoen, and Elizabeth C. Swart, ‘Exploring the Potential Health Risks faced by Waste Pickers on Landfills in South Africa: A socio-ecological perspective’ (2019) 16(11) *International Journal of Environmental Research and Public Health* 2059; and Anna Barford and Saffy Rose Ahmad, ‘A Call for a Socially Restorative Circular Economy: Waste pickers in the recycled plastics supply chain’ (2021) 1 *Circular Economy and Sustainability* 761.

membership based may be helpful, but are not a simple substitute for the agency that a collective organisation representing members can offer.²⁰ Rather, combined engagement and representation from NGOs and trade unions or other membership-based associations seems to be emerging, which is discussed further below.

Issues have arisen in Europe and around the world in relation to forms and sectors of labour commonly excluded from standard mechanisms for collective bargaining. An example is agricultural work, which has been a longstanding concern regarding scope for collective organisation,²¹ but was further exposed during the Covid-19 pandemic as lying outside the coverage of trade union engagement and representation.²² A common problem was the use in this sector of temporary seasonal work, where those hired were vulnerable in terms of their immigration status as well as their employment status. Contractual documents could designate these agricultural workers self-employed, albeit falsely, but that designation would be unlikely to ever be challenged, given the geographical and linguistic isolation of the workers concerned. Without laws enabling trade union access to the site of the work, which is for example not a matter of entitlement in the UK without order of a ballot under a statutory recognition procedure or formal recognition of the union by the employer,²³ the scope for representation of this most vulnerable set of workers has not been possible. The scale of exploitation of seasonal agricultural workers in the UK was highlighted by the independent

²⁰ Gerard Clarke, 'Non-Governmental Organizations (NGOs) and Politics in the Developing World' (1998) 46(1) *Political Studies* 36; cf. Martha Chen, Renana Jhabvala, Ravi Kanbur, and Carol Richards (eds), *Membership Based Organizations of the Poor* (Routledge 2007).

²¹ Eric Tucker, 'Migrant Workers and Fissured Workforces: CS Wind and the dilemmas of organizing intra-company transfers in Canada' (2020) 41(2) *Economic and Industrial Democracy* 372; and Manoj Dias-Abey, 'Justice on Our Fields: Can "Alt-Labor" Organizations Improve Migrant Farm Workers' Conditions?' (2018) 53(1) *Harvard Civil Rights-Civil Liberties Law Review* 167.

²² Dionysis Bochtis, Lefteris Benos, Maria Lampridi, Vasso Marinoudi, Simon Pearson, and Claus G. Sørensen, 'Agricultural Workforce Crisis in Light of the COVID-19 Pandemic' (2020) 12(19) *Sustainability* 8212; Vivianne Landry, Koorosh Semsar-Kazerooni, Jessica Tjong, Abla Alj, Alison Darnley, Rachel Lipp, and Guido I. Guberman, 'The Systemized Exploitation of Temporary Migrant Agricultural workers in Canada: Exacerbation of health vulnerabilities during the COVID-19 pandemic and recommendations for the future.' (2021) 3 *Journal of Migration and Health* 100035; Michael Lauzardo, 'An Outbreak of COVID-19 among H-2A Temporary Agricultural Workers' (2021) 111(4) *American Journal of Public Health* 571, 573; Ella Haley, Susana Caxaj, Glynis George, Jenna Hennebry, Eliseo Martell, and Janet McLaughlin, 'Migrant Farmworkers face Heightened Vulnerabilities during COVID-19' (2020) 9(3) *Journal of Agriculture, Food Systems, and Community Development* 35.

²³ K D Ewing, John Hendy and Carolyn Jones (eds), *A Manifesto for Labour Law: Towards a comprehensive revision of workers' rights* (UK Institute of Employment Rights, 2016), 22.

Anti-Slavery Commissioner shortly before she resigned; she has not been replaced.²⁴ This matters also from a just transitions perspective because agricultural workers are most likely to be aware of environmental and ecological issues, being best placed to act as whistleblowers but perhaps more importantly advocates for change.²⁵ Without their collective engagement, just transition processes are unnecessarily impoverished.

Also on the rise in Europe and elsewhere is platform work, consisting of task-based hire of services. This has been the subject of controversy, synonymous with insecurity of income, unregulated hours of work and wider health and safety concerns.²⁶ Familiar issues with employment status arise, such that those who work in this sector find themselves outside standard employment law protections. Analysis in a recent World Employment Social Outlook (WESO) report, compiled with the advice of experts and published by the International Labour Office, advocated sustainable (in the sense of durable) regulation, which would entail ensuring access to freedom of association and collective bargaining rights.²⁷ I have argued that issues of environmental importance arise here too, linked to the work performed (for example, in transport) and the relevance of the streets or home as a place of work.²⁸ Health and safety concerns and awareness of the need for environmental protections connect here.

Again, while there is nascent trade union engagement here, for example the Independent Workers Union of Great Britain (IWGB) and the App Drivers and Couriers Union (ADCU) in the UK, there are also significant legal obstacles to recognition of ‘gig’ or platform workers as having ‘worker status’ which enables them to be counted for the

²⁴ ‘Dame Sara Thornton Raises Concerns Over Labour Exploitation Risk for Migrant Workers in the Agricultural Sector’ (AntiSlavery Commissioner 2022) available at <https://www.antislaverycommissioner.co.uk/news-insights/iasc-raises-concerns-over-labour-exploitation-risk-for-migrant-agricultural-workers/> (last accessed 19 February 2023).

²⁵ On migrant workers’ experience in organic farming, see Lydia Medland, ‘Working for Social Sustainability: Insights from a Spanish organic production enclave’ (2016) 40(10) *Agroecology and Sustainable Food Systems* 1133.

²⁶ Antonio Aloisi and Valerio De Stefano, *Your Boss is an Algorithm: Artificial intelligence, platform work and labour* (Bloomsbury Publishing 2022); Anthony Forsyth, *The Future of Unions and Worker Representation: The digital picket line* (Bloomsbury Publishing 2022); José María Miranda Boto and Elisabeth Brameshuber (eds), *Collective Bargaining and the Gig Economy: A traditional tool for new business models* (Bloomsbury 2022).

²⁷ ILO World Employment and Social Outlook (WESO) Report, *The Role of Digital Labour Platforms in Transforming the World of Work* (ILO 2021) available at: https://www.ilo.org/global/research/global-reports/weso/2021/WCMS_771749/lang--en/index.htm (last accessed 19 February 2023).

²⁸ Tonia Novitz, ‘Gig Work as a Manifestation of Short-termism: Crafting a sustainable regulatory agenda’ (2021) 50(4) *Industrial Law Journal* 636.

purposes of trade union recognition.²⁹ This is despite a more sympathetic statutory purposive approach advocated by the UK Supreme Court in the 2021 *Uber* judgment, which recognised the powerful controls which platforms can exercise over those who work for them.³⁰

There are potential solutions to this employment status problem which so heavily impacts the identity of voice within just transitions processes. For example, at the ILO there have been important statements to the effect that employment status matters less than decent treatment of those in the ‘world of work’, broadly understood. The term ‘world of work’ emerged at the ILO in the preamble to the 2008 ILO Declaration on Social Justice for a Fair Globalisation.³¹ Article 2 of the 2019 ILO Convention No. 190 expressly stated that this ‘world of work’ should be understood to include ‘persons working irrespective of their contractual status’ and extends to ‘both the formal and informal economy’.³²

ILO supervisory bodies have long recommended that trade union and collective bargaining rights, including the right to strike, be made available to even ‘self-employed’ workers.³³ The ILO Conference Committee has likewise advocated paying particular attention to how collective voice could be achieved in relation to more precariously employed workers, whether in the platform economy or elsewhere.³⁴ This has become a matter of increasing importance, and the compelling nature of such workers’ claims to collective

²⁹ See Bogg and Ford n.15 above; also Joe Atkinson and Hitesh Dhorajiwala, ‘IWGB v RooFoods: Status, Rights and Substitution’ (2019) 48(2) *Industrial Law Journal* 278.

³⁰ *Uber v Aslam* [2021] UKSC 5, judgment of 19 February 2021 available at: <https://www.supremecourt.uk/cases/docs/uksc-2019-0029-judgment.pdf> (last accessed 19 February 2023).

³¹ Preamble to ILO Declaration on Social Justice for a Fair Globalization adopted by the International Labour Conference at its Ninety-seventh Session, Geneva, 10 June 2008 available at: http://staging2.ilo.org/wcmsp4/groups/public/---dgreports/---cabinet/documents/publication/wcms_099766.pdf (accessed 19 February 2023).

³² ILO Convention No. 190 on Violence and Harassment 2019 available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190 (accessed 19 February 2023).

³³ CEACR, *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; and CFA *Compilation of Decisions* (ILO 2018), para. 330. See also discussion in Claire La Hovary and Jordi Agustí Panareda, ‘What Is Work? A Malleable Notion in the ILO’s Legal Pursuit of Social Justice’ in George P. Politakis, Tomi Kohiyama and Thomas Lieby (eds.), *ILO 100: Law for Social Justice* (ILO 2019).

³⁴ Discussed in Tonia Novitz, ‘Collective Labour Rights for Working People: The legal framework established by the International Labour Organization’ in Sanjukta Paul, Shae McCrystal, and Ewan McGaughey (eds), *The Cambridge Handbook of Labor in Competition Law* (Cambridge University Press 2022), 23-25.

bargaining, seems to be most recently reflected in a recent EU initiative. The European Commission Guidelines on ‘Collective Agreements regarding the Working Conditions of Solo Self-employed Persons’ state that even self-employed workers can be permitted to engage in collective negotiation of terms and conditions of hire without breach of competition law, albeit in certain limited circumstances in which they are at a disadvantage due to a clear power imbalance.³⁵ The question then is how these nascent measures can be fostered in order to achieve greater representation of those in this wider world of work in deliberations concerning ecological, environmental and climate change issues, encompassing but also potentially extending beyond decarbonisation.

One barrier at present is the judgment of the European Court of Human Rights in the *Pastoral Cel Bun* (Romanian Priests) case,³⁶ which curiously used the ILO Employment Relationship Recommendation No. 198³⁷ as a key reference point for determining whether those at work can access rights to freedom of association under Article 11 of the European Convention on Human Rights, including trade union representation. This is a problematic use of an ILO soft law recommendation aimed at setting the parameters for each member state to adopt a ‘national policy’ to enhance access to employment law;³⁸ it is also an obvious contravention of ILO supervisory norms established over a considerable period of time.³⁹ Such an approach also has the potential to thwart political commitments now being made at the ILO and now in the EU.⁴⁰ This is disappointing because, to be effective and legitimate participants in decision-making concerning just transition, trade unions need to be representative and inclusive of a wider world of work.

One possibility, suggested by James Brudney in the US, is that where we cannot secure access to trade union representation of those who are most vulnerable in the world of

³⁵ European Commission, Guidelines on the Application of Union Competition Law to Collective Agreements regarding the Working Conditions of Solo Self-employed Persons C(2022) 6846 final, 29.9.22.

³⁶ Application no. 2330/09 *Sindicatul ‘Pastorul Cel Bun’ v. Romania* judgment of 9.7.2013; available in English at [2014] IRLR 49.

³⁷ ILO Employment Relationship Recommendation No. 198 2006 available at: https://ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312535 (accessed 19 February 2023).

³⁸ See ILO, *The Employment Relationship: An annotated guide to ILO Recommendation No. 198* (ILO 2007) available at: www.ilo.org/wcmsp5/groups/public/-ed_dialogue/-dialogue/documents/publication/wcms_172417.pdf (accessed 19 February 2023); and Mark Freedland, ‘Application of Labour and Employment Law Beyond the Contract of Employment’ (2007) 146 *International Labour Review* 3.

³⁹ See n.33 above.

⁴⁰ See ns 31, 32 and 35 above.

work, alliances or ‘co-governance’ will have to be forged with NGOs who do at least represent their interests.⁴¹ That said, as observed above, more membership-based organisations for those whose services are so precariously hired seems preferable, as it is likely to prevent ‘capture’ of their claims and more direct representations to be made;⁴² the difficulty however lies both with securing their legal recognition as ‘trade unions’ and enabling them to speak out on the issues that are of importance to them.

III. OBJECTIVES OF VOICE

Even when workers can form and join what are formally recognised as trade unions, a further series of constraints can be placed on trade union organising and bargaining activities under national legislation, especially as regards the legitimate aims of their activities. Indeed, this may be a deterrent for membership-based social movement organisations representing atypical workers to define themselves as trade unions. For, by doing so, they become subject to a series of legal constraints and potential civil liability where they cross these boundaries, which are not conducive to voicing concerns regarding sustainable development or just transitions.

There have been longstanding fears that trade unions will pursue in collective bargaining and industrial action objectives which present obstacles to (or even derail) environmental, digital and other labour market transformations. There may be a temptation to seek to protect jobs and terms and conditions for current members, rather than the kind of restructuring, relocation and retraining which just transition may require. This is a rational concern and reflects trade union conduct at certain times in various parts of the world.⁴³

⁴¹ James J. Brudney, ‘Hiding in Plain Sight: An ILO Convention on Labor Standards in Global Supply Chains’ (2023) 23(2) *Chicago Journal of International Law*, forthcoming, 78-79 available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4130450 (last accessed 19 February 2023). For examination of the manifestation of such alliances in the context of dock work, see Katy Fox-Hodess, ‘Global Solidarity on the Docks’ (2022) 31(1) *New Labor Forum* 50.

⁴² See n.20 above.

⁴³ Béla Galgóczi, ‘The Changing Role of Trade Unions in the Sustainable Development Agenda’ (2014) 24(1) *International Review of Sociology* 59, 63; and Béla Galgóczi, ‘Just Transition on the Ground: Challenges and Opportunities for Social Dialogue’ (2020) 26(4) *European Journal of Industrial Relations* 367; Areli Valencia (ed), *Human rights trade-offs in times of economic growth: The long-term capability impacts of extractive-led development* (Palgrave Macmillan 2016).

However, as observed in the introduction, the trend in trade union representation has been towards advocating longer term environmental protections. Concerns have been raised relating to the demography of trade union membership, and their perceived limitations linked to age, gender and race.⁴⁴ Ironically, such limitations could be overcome if trade unions were permitted to represent those engaged in the wider ‘world of work’ outside a standard employment relationship, which now remains the preserve of only the more privileged members of the workforce.

The introduction of ‘green reps’ (representatives) by the UK Trades Union Congress (TUC) was beneficial, but their struggle continues to ensure that they have the same rights to time off as trade union health and safety representatives.⁴⁵ More generally, trade union pursuit of broader environmental aims in collective bargaining and action, departing from their so-called traditional and more limited functions, remains blocked by legislation and even international labour standards. Even where trade unions seek to broaden the ambit of their activities, to act more responsibly within the communities in which their members live, and to take a longer term view of the need for preservation of the environment and cutting emissions, they are prevented from doing so. Instead, they need to demonstrate compelling issues directly confronting their members in the workplace affecting their members’ immediate material interests, for example, regarding health and safety, rather than the longer term effects of the work they do and its implications.

In the UK, for example the Trade Unions and Labour Relations (Consolidation) Act 1992 places limitations, not only on which organisations may be registered as trade unions (under Chapter I),⁴⁶ but also their status and management of their property (in Chapters II and

—. 2014. “Human rights trade-offs in a context of ‘systemic lack of freedom’: The case of the smelter town of La Oroya, Peru”, in *Journal of Human Rights*, Vol. 13, No. 4, pp. 456–479.

⁴⁴ John V. Kane and Benjamin J. Newman, ‘Organized Labor as the New Undeserving Rich?: Mass media, class-based anti-union rhetoric and public support for unions in the United States’ (2019) 49(3) *British Journal of Political Science* 997; and Guglielmo Meardi, Melanie Simms, and Duncan Adam, ‘Trade Unions and Precariat in Europe: Representative claims’ (2021) 27(1) *European Journal of Industrial Relations* 41.

⁴⁵ See UK TUC resources available at: <https://www.tuc.org.uk/resource/go-green-work-union-effect> (accessed 19 February 2023). For the evolution of this policy at the TUC, see Paul Hampton, ‘Trade Unions and Climate Politics: Prisoners of neoliberalism or swords of climate justice?’ (2018) 15(4) *Globalizations* 470.

⁴⁶ Limiting access to those organisations which are not understood to represent ‘workers’. See discussion of the operation of this legislation in *National Union of Professional Foster Carers* judgment n.15 above; although in that case reference to Article 11 of the European Convention on Human Rights enabled a more generous approach.

VI), and their administration (I the terms set out in Chapters III, IV and V and VII). Section 178 places constraints on the legitimate subject matter of collective bargaining;⁴⁷ while section 244 sets out the legitimate aims of industrial action. Section 178 defines a ‘collective agreement’ and ‘collective bargaining’ by virtue of whether they relate to or are connected with one or more of the following matters:

- (a) terms and conditions of employment, or the physical conditions in which any workers are required to work;
- (b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;
- (c) allocation of work or the duties of employment between workers or groups of workers;
- (d) matters of discipline;
- (e) a worker’s membership or non-membership of a trade union;
- (f) facilities for officials of trade unions; and
- (g) machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers’ associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures.

‘Physical conditions’ may be relevant to a safe and healthy working environment, but do not obviously embrace environmental concerns that reach beyond the workplace and the workers’ immediate self-interest. So, if in the UK, workers and trade unions seem to bargain only on matters in this list, this is not due to the self-absorption or self-centredness of the membership, or a lack of altruism or sympathy for the wider community. Their limited ambitions can be linked to these statutory limitations.

There are even greater constraints on the legitimate aims of strikes and other industrial action in section 244, which repeats this list but also requires that there is a ‘dispute between workers and their employer’ which relates ‘wholly or mainly’ to one or more of these matters. A mere relationship or connection, as per section 178, is not even sufficient. The requirement that a lawful trade dispute is focused on the relationship between workers and their employer, with a corresponding express statutory provision barring ‘secondary action’,⁴⁸ prevents the kind of sympathetic strikes which could enable solidarity in a single

⁴⁷ Cf. Ania Zbyszewska and Marie Pillon, ‘Labour and Environmental Sustainability: UK Report’ (ADAPT University Press 2020), 15.

⁴⁸ See section 224 of the Trade Union and Labour Relations (Consolidation) Act 1992.

workplace where, in an era of subcontracting and fissured employment relations, different workers are notionally hired by different employers.⁴⁹ This statutory bar is also problematic in that secondary strikes could be of assistance in addressing the transnational activities of subsidiaries in corporate groups which operate across borders that have social, economic and environmental effects beyond any single national jurisdiction.⁵⁰ The capacity to use collective bargaining and industrial action as a corrective is thereby limited in problematic ways.

Key ILO supervisory bodies, such as the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the tripartite Governing Body Committee on Freedom of Association (CFA) have recognised that workers are entitled to engage in collective bargaining and take industrial action in defence of broadly understood ‘economic and social interests’.⁵¹ There is no doubt that this would encompass action to preserve a safe and healthy working environment, particularly after the 2022 Resolution amending the 1998 ILO Declaration on Fundamental Principles and Rights at Work, and giving ‘core’ Convention status to Conventions Nos 155 and 187.⁵² It is also notable that in July 2022, the UN General Assembly adopted a more far-reaching Resolution to the effect that access to a clean, healthy environment is a universal human right.⁵³ However, there is no explicit consideration within the ILO, either at the political or supervisory level, of how that entitlement translates into the legitimate scope of collective bargaining or the right to strike. While it is acceptable, in the view of the ILO supervisory bodies, to organise

⁴⁹ For example, the action taken by British Airways (BA) baggage handlers in support of the mass dismissal of catering staff by a BA subcontractor, Gate Gourmet; regarding which see Eurofound, ‘British Airways’ Heathrow flights grounded by dispute at Gate Gourmet’ (2005) available at: <https://www.eurofound.europa.eu/publications/article/2005/british-airways-heathrow-flights-grounded-by-dispute-at-gate-gourmet> (last accessed 19 February 2023).

⁵⁰ Paul Germanotta and Tonia Novitz, ‘Globalisation and the Right to Strike: The Case for European-Level Protection of Secondary Action’ (2002) 18(1) *International Journal of Comparative Labour Law and Industrial Relations* 67; Valerio De Stefano, ‘Non-Standard Work and Limits on Freedom of Association: A Human Rights-Based Approach’ (2017) 46(2) *Industrial Law Journal* 185, 204-5.

⁵¹ See CEACR *General Survey: Freedom of Association and Collective Bargaining* International Labour Conference, 81st Session (ILO 1994), paras 147-148. See also CFA *Compilation of Decisions* (ILO 2018), paras 758 and 766.

⁵² 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 June 2022 available at: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_848632.pdf.

⁵³ UNGA Resolution A/76/L75; see also Resolution by the Human Rights Council in October 2021 A/HRC/RES/48/13.

internationally,⁵⁴ and to participate in secondary action, provided the initial strike being supported is itself lawful,⁵⁵ there is scope to expand further on the relevance of these types of action in relation to collective bargaining around just transition.

At European level, the picture remains problematic. In the Council of Europe, this is due to the legacy of the judgment of the European Court of Human Rights in *UNISON v UK*,⁵⁶ which endorsed restriction of industrial action aimed at securing undertakings regarding future terms and conditions and treatment of future employees. Constraints on forward-looking objectives, extending beyond the concerns of the current concerns of existing employees, could be justified under Article 11(2) of the European Convention on Human Rights. This poses problems for collective bargaining or action aimed at securing just transitions, which may entail objectives aimed at inter-generational justice, namely the well-being of future generations.⁵⁷ The judgment of the Court in *RMT v UK* is also problematic,⁵⁸ in that there was a refusal to follow the steer of either the ILO supervisory bodies or that of the European Committee of Social Rights under the European Social Charter, which could have led to the finding that the UK was in breach of Article 11 when barring sympathy strikes. Instead, secondary action was treated as merely an accessory (and not necessary) to the right to strike as a facet of freedom of association.⁵⁹

In a comparable fashion, the European Court of Justice, were not convinced by the rationale of cross-border solidarity action called by the International Transport Workers Federation (ITF) addressed in the *Viking* case.⁶⁰ That judgment recognised the right to take collective action,⁶¹ and stated that ‘it is common ground that collective action, like collective negotiations and collective agreements, may, in the particular circumstances of a case, be one of the main ways in which trade unions protect the interests of their members’.⁶² However, the interference with freedom of establishment in that case could not be justified where reflagging of vessels did not have immediately obvious harmful effects on a particular group

⁵⁴ CEACR n.51, paras 189-198; and CFA n.51, para. 232, para. 738 and para. 1036 et seq.

⁵⁵ CEACR n.51, para. 168; CFA n.51, para. 770.

⁵⁶ Application No. 53574/99, Decision of 10 Feb. 2002 [2002] IRLR 497.

⁵⁷ See n.12 above.

⁵⁸ Application No. 31045/10 *The National Union of Rail, Maritime and Transport Workers (RMT) v UK*, 8 April 2014.

⁵⁹ See paras 77 and 87; also discussion in Alan Bogg and K.D. Ewing, ‘The Implications of the RMT Case’, 43(3) *Industrial Law Journal* 221.

⁶⁰ Case C- 438/ 05 *International Transport Workers’ Federation (ITF) and Finnish Seamen’s Union (FSU) v Viking Line* [2007] ECR I-10779.

⁶¹ *Ibid.*, paras 42–44.

⁶² *Ibid.* at para. 86.

of workers.⁶³ The employers' undertaking that terms and conditions of existing workers would not be affected as a result seems to have been taken largely at face value.⁶⁴ The ITF could not rely on the 'protection of workers' justification in respect of its 'flags of convenience' policy and the circular issued, despite evidence that ship owners across the world had progressively eroded seafarers' terms and conditions of employment through such reflagging tactics. This does not bode well for future coordinated trade union action aiming to address social sustainability issues in corporate global supply chains or responses to potential for transboundary pollution in seas and other waterways.⁶⁵ Again, the scope for effective collective voice in just transitions seems unnecessarily limited.

IV. METHODS OF VOICE

Finally, it is important to consider the most effective means of feeding collective voice of those in the world of work through to the decision-making processes concerning just transition. The ILO Guidelines seek to facilitate 'social dialogue' and, as such, they focus extensively on government 'consultation with social partners',⁶⁶ namely representatives of 'employers and workers' who are not to be seen as 'passive bystanders'.⁶⁷ In particular, there is to be consultation over 'macro-economic and growth policies',⁶⁸ 'industrial and sectoral policies',⁶⁹ 'enterprise policies',⁷⁰ 'skills development policies',⁷¹ 'occupational safety and health policies',⁷² and 'social protection policies'.⁷³ There has been consensus on information and consultation from the 1970s, in the European Community (EC) and later the European Union (EU), as an effective mode of regulating industrial relations through collective voice

⁶³ *Ibid.*, para. 89.

⁶⁴ *Ibid.* at, para. 19

⁶⁵ Erik Ytreberg et al., 'Environmental Impacts of Grey Water Discharge from Ships in the Baltic Sea' (2020) 152 *Marine Pollution Bulletin* 110891; and Maciej Tarkowski, *Towards a More Sustainable Transport Future: The cases of ferry shipping electrification in Denmark, Netherland, Norway and Sweden* 'Innovations and Traditions for Sustainable Development' (Springer 2021) 177-191, available at: https://link.springer.com/chapter/10.1007/978-3-030-78825-4_11 (accessed 19 February 2023).

⁶⁶ ILO Guidelines n.11, para. 13(a) and para. 15(g).

⁶⁷ *Ibid.*, para. 9..

⁶⁸ *Ibid.*, para. 19.

⁶⁹ *Ibid.*, para. 20.

⁷⁰ *Ibid.*, para. 21.

⁷¹ *Ibid.*, para. 24.

⁷² *Ibid.*, para. 26.

⁷³ *Ibid.*, para. 28.

mechanisms, which are largely non-conflictual, preserve employer's commercially sensitive information, and which are conducted in good faith.⁷⁴ However, there are concerns as to the efficacy of such consultative voice mechanisms, given the enduring weaker bargaining power of workers relative to their employers, and the difficulty of making employers not just respond to concerns raised, but listen to alternative possibilities. This has led some scholars, such as Keith Ewing, to place information and consultation low in a ladder of participation,⁷⁵ while others recognise the limitations of this method of voice within a 'regulatory pyramid'.⁷⁶

Similarly, trade union education campaigns and training can have empowerment effects, through the achievement of knowledge and coordination of campaigning. It is possible in this sphere to envisage branching out from occupational safety and health campaigns to consideration of wider environmental effects. Trade union campaigns in the UK in recent decades have also sought to promote inclusivity, so the concern is less with representation of existing members but reaching out to other marginalised groups, whether they be from sectors which struggle to organise (such as agricultural workers),⁷⁷ or migrant workers whose temporary stay in a country can militate against joining a union.⁷⁸ This chimes with the observations made by Stevis as the operational pressure within trade unions towards inclusion.⁷⁹ The TUC initiation of green reps has had a promising start,⁸⁰ but requires legal authority and legislative effect to ensure employer cooperation. The difficulty for organised labour, again, lies in extracting concessions from employers without legal endorsement or some other form of bargaining power.

The techniques of voice itemised above are clearly useful but, as Alan Bogg and I identified in our Leverhulme Trust funded project on 'Voices at Work' not likely to be

⁷⁴ Elisabeth Brameshuber, 'Information and Consultation Rights' in Beryl Ter Haar and Attila Kun (eds), *EU Collective Labour Law* (Edward Elgar 2021).

⁷⁵ Keith D. Ewing, 'Trade Union Recognition – A Framework for Discussion' (1990) 19 *Industrial Law Journal* 209, 212; discussed in Tonia Novitz, 'A Revised Role for Trade Unions as Designed by New Labour: The representation pyramid and 'Partnership' (2002) 29(3) *Journal of Law and Society* 487.

⁷⁶ Colin Fenwick and Tonia Novitz, 'Regulating to Protect Human Rights at Work' in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart 2010).

⁷⁷ See n.21 above.

⁷⁸ See Heather Connolly, Stefania Marino, and Miguel Martínez Lucio, *The Politics of Social Inclusion and Labor Representation: Immigrants and trade unions in the European context* (ILR Press 2019), ch 5.

⁷⁹ Stevis n.7

⁸⁰ See n.45 above.

sufficient to exercise meaningful influence in the just transition process.⁸¹ Voice must also be seen as ‘power’ and the capacity to be heard, such that ‘collective begging’ without potential recourse to genuine bargaining is to be avoided. It is the potential threat of industrial action which has operated as a vital mechanism to encourage employers to make concessions.⁸²

If there is to be collective bargaining for just transitions, which the ILO tripartite experts agreed in their Guidelines,⁸³ and which the International Labour Office has advocated in their thematic report, *Time to Act for SDG8*,⁸⁴ then there will have to be an accompanying right to take industrial action. This is the aspect of labour’s potential arsenal missing from International Labour Office statements at present. For example, the thorough and in many ways exemplary ILO Social Dialogue Report 2022 refers to connections between sustainability and collective bargaining, but not the *right* to strike.⁸⁵ Of course, that entitlement has been sustained in ILO supervisory jurisprudence, which is still readily available through the current CFA Compilation of Decisions and online,⁸⁶ but there does not seem to be the political impetus after 2012 to enhance its content to address contemporary social and labour market developments.

In the EU, there has been political agreement prompted by the green ambitions of the von der Leyen Commission on the need for social dialogue and social sustainability in the context of just transition.⁸⁷ The right to collective action is explicitly recognised in Principle 8 of the European Pillar of Social Rights, although this entitlement has not received explicit acknowledgement in key initiatives promoting collective bargaining, such as the Adequate

⁸¹ Alan Bogg and Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (Oxford University Press 2014).

⁸² See Eric Tucker ‘Can Worker Voice Strike Back? Law and the Decline and Uncertain Future of Strikes’ in Bogg and Novitz n.81.

⁸³ ILO Guidelines n.11, paras 13(e), 16(e) and 18(d).

⁸⁴ International Labour Office, *Time to Act for SDG 8: Integrating decent work, sustained growth and environmental integrity* (ILO 2019 available at: https://www.ilo.org/global/publications/books/WCMS_712685/lang--en/index.htm (accessed 19 February 2023)).

⁸⁵ ILO *Social Dialogue Report 2022: Collective bargaining for an inclusive, sustainable and resilient recovery* (ILO 2022) available at: https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_842807.pdf (accessed 26 February 2022). Strikes are mentioned in reporting on national case studies and incidents, but not in normative terms.

⁸⁶ See ns 51 - 55 above.

⁸⁷ European Commission Communication on a Strong Social Europe for Just Transitions COM(2020) 14 final 14.1.20; and European Commission Communication on the Power of Trade Partnerships: together for green and just economic growth COM(2022) 409 final, 22.6.2022.

Minimum Wage Directive or the Commission Guidelines enabling collective bargaining by the solo self-employed.⁸⁸ For example, the Porto Declaration of 2021 sought ‘an enabling environment for collective bargaining’ but did not mention strikes, except as an annex referring to Pillar principles.⁸⁹

Without direct attention to the ways to prevent environmental harms across national boundaries and corporate subsidiaries and supply chains, such as multi-employer sectoral bargaining and transnational engagement, this will be difficult to achieve. Without explicit engagement with the need of workers to threaten and, when necessary, take lawful industrial action, it will be impossible. Regulators may also wish to attend to how alliances between NGOs and trade unions can be forged and supported by legal tools.⁹⁰ What is appropriate and what forms of recognition can law offer, which would be supportive of a wider world of work? There is also the question, linked to the previous section of this article, as to how can we re-shape the scope and relevance of industrial action, enabling for example engagement in work strikes instead of just school strikes against climate change.⁹¹

V. CONCLUDING THOUGHTS

This article has considered the preconditions for effective collective worker voice in just transitions, which it argues can be understood in terms of identity, objectives and methods. All are ripe for legal reform. There is a tendency to blame trade unions for intransigence or inaction in response to the need for just transitions, when organised labour can only do so much within legal confines, which are demarcated at the international, regional and national (sometimes even local) levels.

Trade unions have been confronted with new demands for transitions, and have been increasingly creative in the efforts they make to facilitate change. They have run inclusive

⁸⁸ Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union; European Commission, Guidelines on the Application of Union Competition Law to Collective Agreements regarding the Working Conditions of Solo Self-employed Persons C(2022) 6846 final 29.9.22.

⁸⁹ Porto Social Summit, Porto Social Commitment, 7 May 2021 available at: www.2021portugal.eu/en/porto-social-summit/porto-social-commitment/ (accessed 19 February 2022).

⁹⁰ See n.41 above.

⁹¹ Ruwan Subasinghe and Jeffrey Vogt, ‘Unions Must Join the Global Climate Strike to Avert Climate Catastrophe’ *Equal Times*, 5 September 2019 available at: <https://www.equaltimes.org/unions-must-join-the-global?lang=en#.Xxmw0p4za72> (accessed 19 February 2023).

campaigns promoting knowledge and local representation; they have sought to utilise works councils and other information and consultation mechanisms to shift corporate conduct in ways which respects environmental protections; they have lobbied government to incentivise and fund de-carbonisation and other ecological ambitions, while also assisting those at work in retraining and relocation, offering social security and other forms of funding.

However, the core function of trade unions is collective bargaining, which both the ILO and EU have recognised in a variety of political statements in recent years. Those statements reveal an appreciation of the utility of collective bargaining and collective agreements in securing just transition, but they say very little about how collective labour relations can be operationalised and its regulation revised to achieve the changes needed. This requires some attention to the scope and dynamics of collective bargaining, but also the current restrictions on the right to strike. The outstanding question then is what legal framework is now needed to bolster collective labour voice and thereby promote intra- and inter-generational justice. My intention here is to prompt this process of deliberation around policy- and law-making by asking these core questions about identity, objectives and methods of collective voice.