



ARTICLE

The opportunity and limitation of legal mobilisation for social struggles: a view from the Argentinian factory recuperation movement

Jack Meakin* 

Senior Research Associate (ESRC Postdoctoral Fellow), University of Bristol, UK and Lecturer in Law, University of Leeds, UK
*Corresponding author. E-mail: j.meakin@leeds.ac.uk

Abstract

This paper examines the tension between law's opportunity to deliver social transformation and the normative limitations that shape its effectiveness as a tool of social struggle. The role of law's normative limitations on legal mobilisation strategies, or the effect of entrenched social interests on permissible legal claims, has not been properly conceptualised in legal mobilisation scholarship. In response, this paper presents a conceptual framework that comprehends the opportunity and limitation of legal mobilisation as caught in the tension between the interpretive opportunity to redetermine legal meaning and the normative deficit inherent to this task. By re-engaging with the theoretical underpinnings of legal mobilisation, we will evaluate the potential for certain types of social transformation using law and revisit the rationale for *strategic* legal action. We will bring together our conceptual treatment of legal mobilisation with a sobering analysis of the Argentinian factory recuperation movement's mobilisation of legal demands. The movement's relative success in confronting the legal system's commitment to private property rights and winning protections for worker co-operatives presents an opportunity to learn about the effective potential of legal strategy and the extent to which it can be used to confront the normative commitments of a legal system.

Keywords: socio-legal studies; legal theory; legal mobilisation; labour; social movements; Argentina

1 Introduction

The role of legal mobilisation by social movements has been a key subject of analysis in interdisciplinary sociological, political and legal studies. Throughout the past half-century, this field of study has produced a range of scholarship from which to evaluate the effectiveness of legal mobilisation. It is not possible to summarise such an extensive field but we can say that these studies have focused broadly on two main issues. The first is the barriers that social movements will face in legal systems, including: the political resistance that strategic litigation might face through counter-mobilisation or the lack of judicial enforcement (Rosenberg, 2008; Scheingold, 2010); the structural challenges of access to justice and the role of judicial attitudes on the outcome of litigation (Hilson, 2002; Anderson, 2005); and the material barriers to achieving justice in the courts (Galanter, 1974; Tarrow, 1994).

Second, how can law be mobilised to the benefit of political objectives in spite of structural and material challenges? Famously, Michael McCann's *Rights at Work* (McCann, 1994) shifted the focus of legal mobilisation scholarship away from scepticism to recognise the continued potentiality that resides in legal mobilisation for social struggles. The legal mobilisation approach – as it is presented by McCann (1994, p. 12; 2006, p. 24), Sally Engle Merry (1990) and more recently Lisa Vanhala (2010; 2012) – recognises that law can be both a resource for social struggles and a constraint on it. This means accepting the critical insights about the structural and material limitations of legal

mobilisation whilst holding onto its potential importance as a tool in social struggles. Indeed, McCann encourages legal mobilisation scholars to recognise ‘how law does and does not matter’ (McCann, 2006, p. 19) depending on the complex legal, social, political and economic factors that will affect a movement’s struggle in a given context. Similarly, Vanhala encourages legal mobilisation scholarship to focus on the dynamic interaction between agents and structures, arguing that legal mobilisation opportunities are shaped by both the legal and political landscape (structures) *and* the organisational and strategic decisions of movements (agency) (Vanhala, 2012).

These studies provide essential guides for social movements attempting to use law effectively, signalling the challenges inherent to strategic litigation and the ways they might be militated against in practice. However, this paper proposes that structural and material critiques, as well as practical analyses of mobilisation strategies, must be paired with an understanding of the way that law’s normative interests shape the opportunity and limitation of legal mobilisation. While the structural and material limitations provide important insights about specific challenges to mobilising law, an understanding of law’s normative limitations reveals a fundamental obstacle to the articulation, never mind effectiveness, of certain legal claims and underpins the rationale for strategic engagements with law. By normative limitations, I am referring to the entrenched social interests and relations that a legal system constitutes and reproduces over time, such as the fundamental protections afforded to private property regimes, free market exchange and inequalities on the basis of race, sex and gender. Before we can begin to unpack this assertion, let us briefly distinguish the focus on normative limitations from structural and material challenges.

By material and structural factors, we are referring to the key limitations as identified by the legal opportunity structures (LOS) approach to legal mobilisation studies. The central aim of this approach is to grasp the conditions for mobilising law in a given context and to evaluate the extent to which a legal system is an effective site of struggle. As we have seen, the concern for structural limitations has focused on: the costs of litigation, procedural factors affecting access to justice and the judicial receptiveness to certain legal arguments (for a detailed summary of this vast LOS approach literature, see Vanhala (2010; 2012)). In contrast, our concern for normative limitations is focused on the interpretive challenge that legal arguments face when they confront law’s normative interests. While structural and material limitations might be avoided by more receptive procedural rules or by crowdfunding resources, the normative issue taps into the boundaries of what legal claims are permissible within a legal system. In other words, we are concerned for legal arguments that cannot be effectively mobilised or recognised by a legal system because it is committed to the protection of alternative social interests.

In spite of its explanatory capacity, I argue that legal mobilisation scholarship has not directly conceptualised the relation between law as an opportunity for political struggle and its limitations vis-à-vis arguments that confront a legal system’s normative interests. As a result, socio-legal scholarship risks either underestimating what is at stake when social and political demands confront the content and aims of legal rules or overestimating the potential of legal mobilisation to deliver social transformation. The former refers to the inclusionary and exclusionary effect that legal processes exert on social conflicts and the respective risk of failing to present a recognisable legal claim. Law rationalises conflicts in relation to existing legal categories, which has the effect of ordering antagonistic demands towards consensus and the stabilisation of social relations. Therefore, the stake of legal mobilisation is the identification of a legal problem and the articulation of a legal argument that can be recognised, included and ordered by law in a manner that provides some legal benefit to the political struggle. The latter prevails where we fail to recognise the limitations that law imposes on the horizon of social and political possibilities and, as a result, legal mobilisation is approached from the perspective that ineffectiveness is due to unfavourable structures or the absence of adequate resources.

Legal mobilisation scholarship ought not work from the basis that any social demand can be inserted into law so long as they effectively negotiate the legal system’s structural and material obstacles. On the contrary, the legal claims of certain groups have historically failed to receive adequate recognition and protection in liberal constitutional orders. For example, we can see the legal disenfranchisement of labour, indigenous groups, women, LGBTQ people, environmental

campaigners and many others. Each of these has engaged in strategic litigation with varying degrees of success and will continue to do so in the future. This begs central questions in legal scholarship about what determines the inclusion and exclusion of these claims and what prevents law from delivering the promise of social emancipation for all social groups. In response to these concerns, this paper seeks to contextualise legal mobilisation within the broader tension between law as a tool of social emancipation and the limiting effects of law's entrenched normative interests. This will provide theoretical tools from which to observe the ways that legal mobilisation's 'opportunity' is accommodated within the normative boundaries of liberal legal systems and, critically, will examine the implications for the potential effectiveness of law as a tool of social struggle.

To comprehend the normative limitations of a legal system and its impact on the potential effectiveness of legal mobilisation, this paper will explore the practical example of the worker-recuperated factories (*empresas recuperadas por sus trabajadores*, hereafter ERTs) movement in Argentina and their engagement with law. The worker-recuperated factories of Argentina provide a sober and pragmatic account of the transformative potential and limitations of legal mobilisation. The ERT movement has occupied private property and mobilised law to win temporary and permanent legal rights to control their workplaces. The ERTs' legal claims draw upon constitutional rights and ordinary legislative provisions to confront the property rights of former employers and block the return of capital to bankruptcy creditors. As such, this labour movement's mobilisation of law confronts the fundamental tension between the normative interests of capital and labour in liberal constitutionalism (Thomas, 2011; Harvey, 2012; Mezzadra and Neilson, 2013). Indeed, Honor Brabazon has described the ERTs as having engaged in 'radical legal praxis' (Brabazon, 2017, p. 24) that reveals the opportunities that strategic engagements with law present for emancipatory resistance against neoliberalism. Given the antagonistic nature of the ERTs' engagement with law, its experience presents an opportunity to examine the ways in which legal mobilisation strategies confront and are shaped by law's normative boundaries.

While this movement has been cited as a social struggle that indicates the possibility for alternative political, social, economic and legal futures, there has been little legal analysis of the ERTs' legal mobilisation strategies. In section 2, we will provide a sober and pragmatic case-study analysis of the BAUEN Cooperative's legal strategy. The Hotel BAUEN is arguably the best-known workers' co-operative in the Argentine recuperation movement. The duration and complexity of the BAUEN's legal struggle provides a rich case-study from which to examine the ways in which an organic labour movement has both redetermined the content of Argentine law and been contained by it.

Section 3 will provide a conceptual framework that rationalises the opportunity and limitation of legal mobilisation within law's normative boundaries. We will begin by returning to the origin of law's interpretative opportunity – *determinatio* – and draw a key conceptual distinction between law's *excess of meaning* and its *deficit of task*. This theoretical examination of legal mobilisation will consider why law remains a key site of opportunity for social struggle, and yet one that must be approached strategically where a social movement's demands confront the normative commitments of a legal system. These twin concepts explore the continual opportunity to redetermine the meaning and scope of law, whilst also highlighting both the practical limitations on this interpretive practice and how law's reproduction of entrenched social relations limits what claims can be presented and rationalised in law. Importantly, this paper argues that strategic engagements negotiate a tension between law's excess of meaning (interpretive opportunity) and the deficit in law's capacity to recognise all normative demands. This tension shapes the effectiveness of legal mobilisation as a tool of social struggle and provides a critical perspective from which to evaluate legal strategy. In order to demonstrate and evaluate the explanatory insight of this conceptual framework, we will refer back to and apply its insights to the legal experience of the Hotel BAUEN Cooperative. By analysing the BAUEN's legal arguments, we will explore how the tension between law as an opportunity for social transformation and its normative commitment to upholding entrenched social interests (e.g. extant property regimes) shapes the potential effectiveness of legal mobilisation strategies.

2. Between opportunity and normative limitation: the ERT movement's experience of legal mobilisation

The ERTs is a grassroots labour movement in Argentina that formed in response to the social, political, legal and economic conditions brought about by the financial crisis at the end of the 1990s that reached a crescendo in 2001 (Rebón, 2004; Dinerstein, 2014; Ozarow and Croucher, 2014; Ruggeri, 2014). The ERT movement constitutes workers who resisted the condition of unemployment and sought to recuperate their workplaces. A factory or enterprise is recuperated by its workers when they: (1) occupy and take control of the production of goods or the provision of services and (2) establish a model of worker self-management and/or form of co-operativism and resume the production or provision of services. Today, the ERT movement continues to be an important labour movement in Argentina with the number of worker recuperations having grown exponentially since 2001 from a modest thirty-six pre-2001 to 251 by 2010 and 384 in 2018 (Ruggeri, 2018, p. 6).

Two legal instruments have dominated the ERTs' interactions with law: first, the use of a provision of the Bankruptcy Law (La Ley de Quiebras, 1995) that has allowed workers to remain in control of property for the express purpose of continuing production; and second, provincial, regional and national legislatures have passed expropriation laws where they have interpreted the worker co-operatives' use of property as sufficient to satisfy the test of 'public utility' and trigger an exception to the constitutional right to property.

'La Cooperativa Hotel Buenos Aires Una Empresa Nacional' (also known as Cooperativa Hotel B.A.U.E.N., hereafter Hotel BAUEN Cooperative) is arguably the best-known worker co-operative in the Argentine recuperation movement. The hotel was first occupied by thirty-two former employees on 21 March 2003 (Ranis, 2010, p. 92). The Cooperative restarted the hotel's operations and, by 2006, 80 per cent of the 160 rooms had been refurbished and comprised 150 workers (Ranis, 2016, p. 71). At the time of writing, the Cooperative does not have a legal right to retain control over the property, although it remains in physical control and its legal and political struggle continues.

2.1 Bankruptcy law

At the end of the 1980s, Argentina was suffering the effects of hyperinflation and was heavily indebted to foreign parties (Postilloni, 2013). In an attempt to galvanise the economy, Argentina's new democratic governments liberalised market regulations in the hope of stimulating growth. The bankruptcy-related consequences of deregulation excluded the conduct of business owners from consideration in bankruptcy proceedings and the 'cram down' (or preventative bankruptcy) technique became a usual escape route for bankrupt owners. The cram down involves the reorganisation of debts owed to creditors and the contractual terms of the original credit agreement. Preventative bankruptcy mechanisms prevent the failure of large corporations by forcing creditors to accept a debt-restructuring plan and block creditors' attempts at foreclosure. This involves presenting an application for the reorganisation or restructuring of debts to bankruptcy courts requesting the imposition of new conditions in spite of the claims and rights held by secured creditors.¹ In the context of 1990s Argentina, this technique became a mechanism that enabled business owners to engage in the circular practices of stripping assets and/or money laundering, failing to repay creditors, declaring bankruptcy and reaching an agreement to restructure debts and recapitalise their corporations (Vieta, 2010).

The Bankruptcy Law (1995) sought to introduce a regulative framework that would wrest back control over unregulated business owners (Postilloni, 2013). Ordinarily, Argentine bankruptcy law gives primacy to the rights of creditors; employees' claims for unpaid wages, severance pay and other social benefits owed by their employer are secondary. As a result, bankruptcies favour previous owners, creditors and court-appointed trustees because property rights and the law's protection of contractual agreements (that provide creditors with a right to recover credit through the sale of assets) take priority. However, the Bankruptcy Law gave debtors the opportunity to apply for a preventative

¹See further <https://www.investopedia.com/terms/c/cramdown.asp> (accessed 11 February 2022).

insolvency and avoid bankruptcy. Importantly for the recuperation movement, third parties were listed along with business owners as permitted to present orders to continue production. The legislation utilises the cram-down technique by giving parties that are committed to maintaining a viable business an opportunity to restructure debts. Unlike the usual operation of the cram-down technique that is utilised by debtors, the Bankruptcy Law extends the opportunity to suspend bankruptcy proceedings to third parties that are not responsible for, or parties to, the defaulted credit agreements. While the 1995 Law's inclusion of the third-party clause appears to give workers an opportunity to take legal possession of their workplace, legislators had not intended to provide the legal framework for workers to legalise their occupations of bankrupt companies and launch a nationwide labour movement committed to establishing the conditions of worker control. In fact, the legislation's aims were an attempt to kick-start the economy and enable viable enterprises capable of contributing to economic growth.

Worker co-operatives have used this opportunity to commence commercial litigation and secure a temporary right to control their factory or enterprise and resume operations (Dinerstein, 2007). The strategic importance of the legal protection provided by the Bankruptcy Law to an ERT cannot be underestimated for two reasons. First, from a practical perspective, orders for continued production halt the sale of property and assets, and prevent the loss of 'basic property, machinery, patents, and copyrights from the auctioneers' gavel' (Ranis, 2010, p. 79). Control over property and the protection of assets are essential to the ERTs because, due to their lack of financial resources, it would have otherwise proved impossible for workers to start the recuperation process from the beginning. Second, the Bankruptcy Law enabled the recuperation movement to have legal traction and provided the necessary legal protection for their use of the property.

The tactical opportunity presented by the Bankruptcy Law begins with Article 21, which legislates for preventative bankruptcy proceedings. This allows a judge to suspend the usual practice of asset liquidation and transform the proceeding into an application for preventative bankruptcy. The Bankruptcy Law enabled bankruptcy judges, acting as trustees, to grant short-term lease agreements to third-party applicants. As such, the legislation provided workers with a legal right to control the property against the rights of creditors or holders of property title. Moreover, Article 195 sets out the conditions under which mortgage creditors cannot make an order for the return of capital, including authorisation for bankruptcy judges to suspend any return of capital for two years.

The key evidential requirements for any successful engagement with the Bankruptcy Law are provided in Article 190's general conditions for an application to *resume* production: the resumption of production must not involve the creation of new contractual liabilities except those strictly necessary in the operations of the company, and two-thirds of the workforce must constitute former employees. Also, the following information must be presented to the judge for consideration: the potential benefit to creditors and effect on third parties, an operations plan including budget requirements, current contractual obligations, and the works required to restart (recuperate) the enterprise and make production economically viable.

In 2003, the former BAUEN employees occupied the hotel and successfully applied for a forty-day tenancy by the commercial court under an Article 21 application for preventative bankruptcy. The workers were recognised as a third party 'in training' and met the conditions for continued production (Art. 190). The Cooperative established production and successfully renewed their short-term lease for the hotel.² On the expiration of their tenancy, the Cooperative's control over the property came under renewed judicial attack from both the former owners and supposed holders of legal title to the property and its assets. However, on 11 February 2005, the BAUEN Cooperative was given a further temporary order granting the right to remain for two years under Article 195 (*Solari S.A. S/ Quiebra (Indirecta)*, 2007, p. 4; Ruggeri *et al.*, 2014, p. 157). This was granted by a commercial court judge's injunction in favour of the BAUEN's appeal against a restitution order made by a company, Mercoteles S.A. (hereafter, Mercoteles), that claimed to be holders of legal title to the hotel. The judgment

²The lease would have been for an initial four-month period under Art. 186 and subject to renewal followed by a two-year lease under Art. 190.

ruled in favour of the BAUEN Cooperative due to uncertainty about the actual holders of property title, concern that closure of the Cooperative would have a high social cost with around 160 jobs to be lost, and the evidential requirements to continue production under Article 190 having been satisfied.

At the expiration of the two-year lease, the case returned to the commercial court (*Solari S.A. S/ Quiebra (Indirecta)*, 2007). The judgment considered whether the property should be returned to the legal title-holder or the BAUEN Cooperative should have its lease period for the property extended. The case was resolved by ordering the restitution of property to the legal title-holder – Mercoteles – subject to certain obligations.

While the 2007 judgment acknowledged that there was a precedent for judicial and legislative protection of ERTs at the expense of legal title-holders' right to property (*Solari S.A. S/ Quiebra (Indirecta)*, 2007, pp. 9–10), the court did not accept that there was a public interest in preserving their employment over the rights of property owners. The judgment distinguished the present case on the grounds that the legal title-holder to the Hotel BAUEN was a third party to the bankruptcy. The decision to uphold Mercoteles' claim for restitution of property is based on the following reasoning: the judgment acknowledges that the rightful holder of legal title is Mercoteles by reference to the principle of *res judicata*³ and the judgment (29 August 2001) that ordered the return of legal title to the original owner Bauen SACIC following the bankruptcy of Solaris S.A.

The key to the decision is that, unlike the initial decision to grant the BAUEN a lease, it involved the return of a party with a legal claim to control the property that trumped that of the worker co-operative. The Bankruptcy Law had extended an opportunity to third parties capable of establishing a viable business to gain legal control over a property ahead of the holders of property title. However, in the present case, the holders of property title were also found to be third parties to the bankruptcy proceedings, which meant that the worker co-operative could not take advantage of the third-party clause.

In the Hotel BAUEN case, the issue of property ownership is controversial with multiple claims. To summarise a confusing history of title transfers: the hotel was sold by BAUEN SACIC to Solari in 1997 but, having failed to pay the sale price at the time of bankruptcy, the property title was returned (from Solari) to Bauen SACIC, who in turn 'sold' the property to Mercoteles (Ruggeri *et al.*, 2017). The initial two-year lease and its renewal were granted to the Cooperative on the understanding that the holder of property was, legally, also the debtor in the bankruptcy proceedings. However, this was largely due to the fact that Mercoteles was engaged in a separate legal challenge that sought to recognise the sale of the property (Ruggeri *et al.*, 2017, p. 78). Once this had been recognised (in early 2006) (*Solari S.A. S/ Quiebra (Indirecta)*, 2007, p. 6), Mercoteles returned to challenge the Cooperative's attempt to extend their lease. This prevented the Cooperative from relying on favourable precedents for ERTs, as the court distinguished the BAUEN case: 'It is not an occupation of a bankrupt property by its former employees because due to a transaction of sale that has already been resolved, the property is currently owned by a third party' (*Solari S.A. S/ Quiebra (Indirecta)*, 2007, p. 10).

The rationale behind previous decisions that granted legal protections to ERTs has been 'to prioritise the social interest in the continuation of an enterprise through a cooperative's conservation of employment, without causing harm to the rights of creditors' (*Solari S.A. S/ Quiebra (Indirecta)*, 2007, p. 10). While the judgment recognised that other bankruptcy cases have accepted the arguments about the 'social value' in the conservation of business and protection of work, it found that the social importance of work does not supersede the constitutional right to property of third parties to the bankruptcy.

The BAUEN Cooperative appealed the decision to reject its claim to continue production and remain in control of the hotel. Despite an amicus curiae brief from the Secretary for Human Rights, Eduardo Luis Duhalde, in support of the Cooperative's use of the property and concerns about the social effects of their eviction (Ruggeri *et al.*, 2017, p. 108), the Commercial Court of Appeal rejected the appeal and upheld the first instance decision (*Solari S.A. S/ Quiebra 323–4028*, 2008; Ruggeri *et al.*, 2017, p. 107). The only

³The principle affirming that a decision has been settled by a competent court (*Solari S.A. S/ Quiebra (Indirecta)*, 2007, p. 7).

remaining avenue for redress was an appeal to the Supreme Court but this was blocked by both the Court of Appeal and the Supreme Court, citing an absence of sufficient constitutional grounds (*Solari S.A. Y Otro S/Quiebra*, 2009; *Solari S.A. Y Otro S/ Quiebra*, 2011).

2.2 Expropriation laws

A number of ERTs have been granted the legal rights to permanently remain through expropriation legislation passed by provincial, regional and national legislatures (Ruggeri *et al.*, 2014).⁴ The legal test for expropriation is grounded in Article 17 of the Argentine Constitution: ‘Article 17 – Private property is inviolable, and no inhabitant of the Nation can be deprived of it except as defined by law. Expropriation for reasons of public utility must be determined by law with prior indemnity.’

This establishes the right to property and the protection holders of legal title enjoy from state interference, but it also inserts an exception to the rule. As a result, Article 17 has provided the basis for a strategic engagement with the Constitution and legislative provisions that aims to expropriate occupied property on behalf of an ERT. The process for an authorised expropriation by the National Congress of Argentina is detailed by *La Ley de Expropiaciones* 21.499 (1977). The normative basis for an expropriation is defined by the legislative test of ‘public utility’ in Article 1: ‘Public utility is the legal foundation for expropriation, it includes all cases that the common good is sought, whether it be material or spiritual in nature.’

The determination of something as of public utility and the satisfaction of the legal test requires answering two questions: What actions provide utility? And who is the beneficiary of those actions? The test for public utility and the conditions that satisfy it – materially and spiritually – are not predefined by objective standards. There have been several legislative attempts to expropriate the Hotel BAUEN. The first expropriation bill presented to the National Congress (20 July 2006) (Ruggeri *et al.*, 2017, p. 94) did not mobilise constitutional rights claims, instead arguing that the hotel was already owned by the state. The supporting evidence highlighted that the hotel’s former owners owed debts from unpaid taxes to the City of Buenos Aires government and that the hotel was built using an unpaid loan given by the now extinct National Development Bank. The proposal failed to gain traction and was unsuccessfully re-presented on several occasions to members of Congress (Ruggeri *et al.*, 2017, p. 95).

New legislation was initiated and on 30 November 2016, a bill was passed in favour of expropriation in the Senate (Ruggeri *et al.*, 2017, pp. 120–1). The legislation declared the hotel building and all of its fixtures to be of public utility and subject to expropriation by the state of Argentina (Art. 1). The expropriated assets were to be transferred to the Cooperative BAUEN on the basis of a gratuitous bailment that is conditional upon the obligations set out in Articles 7–9: the Cooperative’s cultural activities must continue; they should reach agreements with public universities for the provision of career training programmes related to tourism, gastronomy, co-operativism, and event management; and 30 per cent of the hotel should be made available for social-tourism.

The legislative success was due to an argumentative shift away from claims about debts and state ownership towards a robust expropriation claim grounded in constitutional rights that satisfied both prongs of the public utility test. In order to answer both parts of the public utility test affirmatively, the Cooperative defined the utility of its actions and its beneficiaries in broad terms. The requirements of *public utility* led the Cooperative to frame the utility of expropriation beyond the importance of work and its benefit for the Cooperative’s members. Given the ‘inviolability’ of property rights and the need to build a broad coalition of support in Congress, pitting the constitutional right to work against the right to property was always unlikely to evidence a sufficient material and spiritual contribution to the common good. Therefore, the Cooperative bootstrapped a range of other public services (educational, cultural and social contribution to the community) that were recognised as constitutional rights to their claim that the BAUEN Cooperative’s actions represented a public utility that trumped the private property rights of Mercoteles.

⁴The last available figures provided in 2014 show that, of the 311 ERTs (at that time), 16 per cent had been subject to an expropriation law.

For those opposed to the expropriation, the BAUEN was a private group and any expropriation by the state would mean the use of taxpayers' (public) money for the benefit of a private group. Despite having passed the final legislative hurdle in the Senate, the 'Law of Expropriation for the Hotel BAUEN' was vetoed by President Mauricio Macri. The executive order stipulated three objections: (1) the expropriation would not benefit the community in general; it would benefit an exclusive group; (2) the 'obligations' that would arise from the purchase of the hotel would be burdensome for the state; and (3) the expropriation would prejudice the national executive's ability to allocate economic resources for other basic needs of the entire population and provide a benefit only to those engaged in the activities of the Cooperative (President Macri, *Decreto 1302/2016*, available at <https://www.boletinoficial.gob.ar/#!DetalleNorma/156616/20161227> (accessed 11 September 2020)).

The veto challenges the legislature's interpretation and application of the legal threshold of 'public utility' and inserts an additional argument about the financially burdensome nature of the legislature's proposal. This stands in contrast to and challenges the legislature's claim that the public services provided by the Cooperative contribute either materially or spiritually to the common good. According to the Argentine legislative procedure, the veto does not represent the last word and the bill must pass back to the Senate who have the possibility to overturn the veto. At the time of writing, the legislation remains at this stage.

In spite of the BAUEN's innovative interpretation of provisions in both bankruptcy and expropriation law, it remains unclear whether the Argentine legal and political systems will grant the Cooperative legal rights to control the property. We have identified certain structural and material limitations that have shaped the BAUEN's struggle. These include both procedural rules that have prevented the BAUEN from appealing against the outcome of bankruptcy proceedings and the limited scope of the Bankruptcy Law for the provision of permanent legal rights. And, while the BAUEN has benefitted from financial resources provided by ad hoc trade unions (Ranis, 2016), other material resources in the form of explicit support for the ERT movement from political representatives have been in short supply. A recurring challenge for the BAUEN's legal struggle and a fundamental limitation on its success has been the inability to either dislodge the supremacy of private property rights in Argentine law or elevate the importance of work as a fundamental and inviolable right. This begs key questions about the role of normative interests on the effectiveness of legal mobilisation strategies.

3. The opportunity and limitation of legal mobilisation: a theoretical perspective

To put it crudely, legal mobilisation is an interpretive battle over what human goods law ought to recognise and protect. The aim of this section is to contextualise legal mobilisation within law's internal tension between its capacity to respond to social demands and its commitment to entrenched interests. In order to comprehend what is at stake for labour movements on this terrain, we will comprehend this tension as one between law's excess of meaning and deficit of task. I argue that these twin concepts provide critical insights into both the interpretive opportunities and normative limitations in law that determine the effectiveness of legal mobilisation as tool of sociopolitical struggle. This section will apply these conceptual insights to the BAUEN case to develop our conception of their legal strategy and to illustrate the effect of law's normative interests on legal mobilisation. To conclude, we will consider how law's normative limitations underpins the rationale and necessity for a strategic approach to legal mobilisation.

The interpretative opportunity lies in the fact that there are multiple possible conceptions of what law ought to be. For Boaventura de Sousa Santos, this 'excess of meaning' refers to law's 'symbolic expansion through abstract promises' (Santos, 2002, p. 469). Santos refers here to the way legal systems manage social complexities using abstract rules that are applicable to a range of scenarios. Importantly, the abstract form means that law can be continually reinterpreted and re-articulated over time. This indicates that the opportunity in law for social struggles occurs in the determination of legal meaning, intended application and associated remedies. In order to unpack this idea of excess as opportunity, we will consider two central and interrelated elements: first, the moment of determination as a

battleground for reinserting new meaning into law; and second, the practice of interpretation in which social struggles are necessarily involved in attempts to redeem excess meanings.

First, in legal theory, the *determinatio* is the act of positive law-making required to implement general principles as rules that can be understood, abided by and implemented (Finnis, 1985, p. 23; 2011, p. 284). In short, it is the determination of what a given right, duty, principle or value equates to in practice. This refers to the creation of positive law whereby law-makers must continually engage in 'practical reasoning' (Finnis, 1985, p. 38) and interpret what the law ought to be (Waldron, 2008, p. 4). The interesting point about *determinatio* for social struggles is it highlights the process of including and excluding normative social programmes as belonging to a legal system. This is the critical moment in which a social struggle's proposed interpretation of what the law ought to be is either included in a redefined implementation of the law or it is excluded.

We can now say that excess legal meaning also refers to the fact that something is left outside of law at the moment of its determination. We will turn to the challenge of exclusion later; for now, let us recognise the continuity that is implicit in law's excess through the practice of *determinatio*. While the *determinatio* determines what is included in law, it also creates an excess of possible meanings that are excluded but can be included. The continual reinterpretation of what actions law ought to prescribe or proscribe is made possible precisely because previously excluded interpretations could be included in the future. This is what Christodoulidis has described as the 're-entry' moment in the determination of law where what was previously excess will become part of law (Christodoulidis, 2009, p. 21). The 're-entry' of legal meaning can be understood as the 'redetermination' of the aims and content of a law, and it is this opportune moment – the determination of legal meaning – that is targeted by social struggles engaged in legal mobilisation.

The BAUEN's engagement with both bankruptcy law and expropriation laws are practical examples of the opportunity presented by *determinatio*. The interpretation of the Bankruptcy Law in a manner that recognised the Cooperative's recuperation of their workplace as included within the scope of legislative protections was a key tool in the ERT struggle. This involved an interpretive conflict over the meaning of 'third parties' that could make applications under the preventative bankruptcy provisions. It is important to note that 'worker co-operatives', 'recuperations' or 'employees' were not explicitly listed in the 1995 legislation. On the contrary, it was the redetermination of the scope of Article 21's application to third parties – or the implementation of new legal meaning – that provided an opportunity for worker co-operatives to develop a favourable judicial precedent. The new interpretation ensured that the Cooperative's applications for short-term control over the property provided direct legal protections.

Having identified the opportunity to insert new meanings into law as located in the moment of determination, it is necessary to consider the second element: how social struggles that mobilise litigation or confront legislative processes are engaged in making new legal meanings. The idea that law contains an excess of meaning that is not currently represented in concrete legal protections signals both the plurality of legal meaning and the opportunity to redeem certain values and insist on their application. Robert Cover deploys the concept of jurisgenesis to describe the practice of exploiting excess: how social movements are engaged in challenging law's current determination by presenting alternative conceptions of what it ought to be (Cover, 1983). Moreover, Cover insisted that law can be interpreted in a multitude of ways, whether that is grounded in the constitutional text or claims about the normative purposes or values that underpin a legal system. On this terrain, the interpretive opportunity (or practice of jurisgenesis) will lead to the deployment of constitutional values, rights and a range of creative claims about what law ought to recognise and protect. For example, if in constitutional abstraction the law promises dignity when workers are treated with indignity, the law ought to offer a remedy.

And yet, we must not lose sight of the fact that interpretive opportunities presuppose and will necessarily involve interpretive conflict. For example, where a legal rule about the redistribution of property aims to satisfy constitutional principles about dignity and minimum subsistence, it simultaneously threatens to infringe the rights of property owners. The challenge for social struggles is to negotiate such legal conflicts effectively and secure necessary protections. For socio-legal scholars, it is necessary to comprehend the ways in which interpretive opportunities are curtailed not just by

material or structural impediments, but also by hierarchies between values and rights and the differing protections afforded to certain social interests. Indeed, the practice of interpretation and legal meaning-making is a battleground for competing normative visions of society that ought to be recognised and protected by law.

The opportunity to engage in excess meaning-making through jurisgenesis can be seen explicitly in the BAUEN's engagement with the Expropriation Law. From its failed legislative attempts that focused too heavily on the constitutional importance of work or arguments challenging ownership on the basis of debts owed to the state, both represent excess meaning that could not be recognised as belonging to the Argentine legal system. In response, the BAUEN engaged in a process of pragmatic jurisgenesis that sought to balance the constitutional protection of private property with the broader social rights claims of the ERT movement. The 'effectiveness' of the BAUEN's struggle for an expropriation law is located in its direct engagement in interpretive conflicts and the production of new legal claims that were capable of being recognised as belonging to the Argentine legal system. Arguments about the public utility of expropriation that would have previously registered as excess meaning and excluded from law due to their conflict with the fundamental protections afforded to property ownership were now capable of being included.

While the opportunity presented by law's excess of meaning was exploited by the BAUEN, its case also highlights the limitations of this opportunity. Since 2007, the supremacy of title-holders' rights to property have been recognised and prioritised ahead of the economic rationale of protecting viable businesses, the constitutional right to work or the public interest in securing the continued employment of Cooperative members. The BAUEN's engagement with the Bankruptcy Law ultimately failed because the Cooperative's claims could not supersede the constitutional right to property of other parties to the case.

The limited effectiveness of legal mobilisation in the BAUEN case raises significant questions: How far can the opportunity presented by legal mobilisation extend? And what are the factors that limit the opportunity to reinterpret and redetermine the content of law? In answering these questions, we will confront a key tension in law between the opportunity to continually reinterpret legal meaning and the limit at which new meaning cannot be included in law. Indeed, this brings us to the central contention of this paper that legal mobilisation operates within the context of a fundamental tension in law between its excess of meaning and deficit of task.

Before introducing the concept of deficit, we must first attend to an inherent limitation in the idea of law's excess meaning. Until this point, the concept of excess has been discussed in positive terms, as providing an interpretive opportunity at the moment of determination. However, the idea of an excess of legal meaning also identifies what is outside law and that which *cannot* be accommodated within law when general principles are determined as a concrete set of rules (Christodoulidis, 2009, p. 17). In a passage describing the interpretative opportunities of human rights, Christodoulidis grasps the contingency of excess as both capable of being inserted into law and yet always outside of it:

'[a] right cannot be contained or exhausted in any one determinate content, we are reminded, any one definitive interpretation or conclusive *determinatio*. Instead it renews itself as responsive to our humanity. Note the double movement here. Law creates determinate effects, but those determinations forever leave a remainder, which as *excess* invokes further responses from the law, the irrepressible and inassimilable margin of deconstruction forever dislocating (though never in fact superseding) the context that "harbours" it. To put it differently, more simply: a residue remains even in the most successful co-optation of human rights, an impetus in the aspiration—to protect dignity, personality, speech, whatever—that disturbs every actualisation and thus, intriguingly, leaves the right standing above (beyond) and against its institutionalisation.' (Christodoulidis, 2009, p. 17)

This passage is rich in its allusion to critical theoretical and post-structuralist discussions about law's responsiveness to social demands that cannot be given their due in these pages. Nonetheless, important lessons can be extracted about the inexhaustibility of excess both as an opportunity to insert new

meanings and as a repository for those who seek to contest the normative content and aims of law. The lesson is not simply that there is always an excess of meaning left outside of law that cannot be exhausted by law's determinations. On the contrary, the 'double movement' of the *determinatio* exemplifies how any redetermination of law both includes and excludes and, as such, any claim simultaneously remains as a normative claim that cannot be wholly subsumed, elucidated or excluded by the *determinatio*. For example, while a new interpretation of the 'right to work' might extend current worker protections, the legal implementation of the right cannot live up to the political promise contained in a 'right to work'. This means that there is a continual opportunity to redefine inadequate labour provisions in the future; but, it also shows that any claims about what the law ought to be can only be implemented in law as definable rights, duties and remedies. Therefore, for each reinterpretation of a right that fails to grasp the extent of possible legal interpretations, there is an inexhaustible excess of meaning that can both deepen or negate our enjoyment of a right. It is in this irreconcilable relation between determination and excess legal meaning that there resides both the promise that law can respond to social demands and an inherent limitation. This should serve as both an encouragement and a warning to social struggles engaging in legal mobilisation.

If law cannot include all interpretations, it must determine which actions are permissible and which are proscribed. This begs a fundamental question: What prevents law from recognising certain interests and not others? For instance, if the Constitution is committed to the principle of equality before the law and promises to protect both the right to work and to private property, why have liberal legal systems offered greater protections to private property and the productive interests of capital than to labour? One possible answer is revealed in the tension between law's excess of meaning and its deficit of task.

For Santos, law's deficit of task resides in the 'the narrowness of concrete achievements' (Santos, 2002, p. 469). Unfortunately, Santos does not elucidate further the meaning behind this intriguing statement. To develop its insight, I will suggest that the idea of law's deficit of task draws out two limitations on the opportunity presented by law's excess of meaning: (1) the practical limits on interpretation imposed by available legal rules and the requirement of decision-making and (2) the effect of entrenched interests on law's emancipatory promises.

First, the scope for social transformation is limited to the legal rules and remedies that are already prescribed by law. While it is possible to use law as a tool of social struggles, this is limited to the implementation of existing law. In other words, there is a practical deficit in law's task that means it can only respond to a social demand by reference to an existing legal rule or constitutional value. For example, a perceived violation of labour standards and/or claim that law ought to provide a higher level of protection at work needs to be grounded in either a statute that guarantees a certain regulatory standard or, as we have previously seen, in the constitutional value of dignity and the right to work. Moreover, in practical terms, law cannot include all normative aims and demands without succumbing to the pressures of contradictory social expectations.

We can extend the practical fact that not all legal claims can be included to recognise the gatekeeping role of judges in the process of inclusion/exclusion. Cover's concept of 'jurisgenesis' and its mirror, the 'jurispathic' (Cover, 1983, p. 40), which requires judges to 'kill off' alternative legal meanings, is indicative here. While a multitude of legal interpretations (jurisgenesis) are possible, a court's judgment 'shuts down the creative hermeneutic of principle that is spread throughout our communities' (Cover, 1983, p. 44). In Coverian terms, the determining of law is an act of violence in so far as it imposes certain limits upon the interpretation of legal meaning in a given community. For the purposes of the present argument, the judicial role in resolving the tension between jurisgenesis and jurispathic tendencies in law identifies a practical deficit in law's task where judgments foreclose the interpretive opportunity.

In the BAUEN case, we can see jurispathic effects in the rejection of bankruptcy and expropriation claims, the absence of legal rules protecting worker co-operatives, the exhaustion of time-limited remedies and the presence of fundamental rights provisions whose protection run counter to the BAUEN's legal claims. While Cover's concepts illuminate the challenge of presenting new legal meanings and the practical realities of producing clear legal rules within a coherent legal system, we must now turn to consider the normative context in which legal mobilisation operates.

Second, the idea of law's deficit of task provides an understanding of law's normative incapacity to deliver unfettered social transformation. Law is organised around the protection of vested (or entrenched) social, economic and political interests. Law might contain the promises of dignity and equality, but the actual interpretation and implementation of these values in the form of regulation will be shaped by these interests. For example, the liberal constitutions of modernity maintain the social and economic interests of productive capital through the inviolability of private property, the enforcement of contractual obligations and individual rights that promote formal (cf. substantive) freedom and equality (Hardt and Negri, 1994, pp. 57–58). This means that modern law has been organised around the protection of property title and the productive interests of capital, and not the emancipation of the subaltern. Indeed, historical materialist analysis has insisted on the role played by legal and political institutions in the reproduction of economic and social conditions and, in turn, how law necessarily entrenches certain political and economic interests at the expense of others. For Ellen Wood, legal and political systems are 'implicated' in facilitating and constituting relations of production and domination through the provision of juridical forms that enable the enforcement of contractual obligations and the institution of property (Wood, 2016, pp. 26–29). This means recognising the historical and material forces that constitute capitalist social relations, how these social experiences and expectations have shaped the development and content of liberal legal systems, and what this might mean for the interpretive trajectory of law in the future.

And yet, in addition to structuring productive relations, law has also facilitated and been organised around multiple social, political and economic interests that have recognised and redistributed rights protections. We might argue that modern law has entrenched interests in civil liberties, social rights and the rule of law. Universal suffrage and the establishment of the welfare state are indicative, but so too are the contemporary challenges faced by claims for social rights, the absence of legal protections for care workers and the privileged position of market indicators in politico-legal decision-making. The concept of deficit encourages an understanding of which dominant social interests have been institutionalised in law and how these shape the reproduction of certain social structures and relations at the expense of others. Therefore, the constitutional promises of social emancipation, as well as quotidian legal struggles for the enforcement of rights protections, are limited to, or must be re-presented as, demands that do not compromise the expectations of dominant social interests. And, in practice, social struggles will have to accept certain normative restraints when engaging with law.

If a legal system is organised around the entrenched interests of capital, then we can assume that the deficit of task will arise in relation to legal claims that seek to radically reform legal rules relating to economic individualism, private property and the productive conditions of capital generally. Workers might demand improved labour standards in line with the Constitution's commitment to dignity, but a labour movement whose legal strategy interprets the Constitution as advocating emancipation from the conditions of capitalist exploitation is unlikely to be recognised in a liberal legal system. There are several reasons why such a strategy is likely to fail. However, for our purposes, we can quickly recognise the practical challenges noted above that require legal claims to be grounded in existing law and for litigants to have a cause of action. For example, workers in the so-called gig-economy may contest the indignity of their work but their legal claims are formulated through the lens of employment status claims that categorises workers not in the political language of emancipation, but as 'workers', 'employees' or 'self-employed' with corresponding rights protections.

The stake for social struggles engaging in legal mobilisation is to identify the potential between law's protection of vested interests and the existence in law's excess of meaning for opportunities to challenge law's current trajectory and redeem certain values – such as dignity – and insist upon their legal protection. These insights do not reveal any silver bullets for social struggles seeking to confront entrenched social interests, but, against despair, inaction or false promises, it provides some explication of the difficult terrain on which legal mobilisation operates.

Accordingly, to better comprehend the BAUEN's experience, we need to consider the role of normative interests in the construction of legal rationality and how the tension between the opportunity and limitation of legal mobilisation shapes their strategic approach to law. As we have seen, the

opportunity in the BAUEN case lies in the capacity to register Article 21 bankruptcy claims and to reinterpret the Cooperative's actions as a public utility protected by the Constitution. The limitation is highlighted by the failure to convert these opportunities into permanent legal protections and, in both cases, the law's protection of private property rights and economic interests.

The attempts to negotiate this tension between opportunity (excess) and limitation (deficit) are explicit in the BAUEN's struggle for an expropriation law. The BAUEN could have framed its legal claims by accentuating how public service provision is part of the intrinsic importance and ideological superiority of factory recuperations. Indeed, the recuperations are not simply hotels that provide accommodation to guests or ceramic factories that make tiles, but social enterprises that are inextricably engaged in their local communities (Magnani, 2009). However, in order to have legal traction and avoid the dangers of excess and deficit, the Cooperative presented claims within the boundaries of what is comprehensible to the legal system and politically defensible for elected representatives. Therefore, the Cooperative relied on the Constitution's own conception of public goods – employment, education and health care. Rather than dispensing with the normative foundations of the Argentine legal system, the BAUEN framed its actions according to the legal requirement that an expropriation contributes to the common good, either materially or spiritually.

The normative limitations on legal interpretation have been the key determinant of effectiveness in the BAUEN's legal struggle. Notwithstanding the specific political context in Argentina and the fact that legislative opportunities are affected by the changing ideological sympathies of elected representatives, we cannot de-emphasise the role of fundamental rights protections as indicative of law's normative boundaries and the effect on legal mobilisation strategies. Indeed, even if the BAUEN's expropriation bill had been ratified by the president, the exceptional nature of the BAUEN's claims means that law's normative interests remain central to our understanding of their legal struggle. Recognise, for example, that the BAUEN's legislative claims hinge on an *exception to* the inviolability of private property and, similarly, the opportunity in the Bankruptcy Law was an *exception to* the usual rights of property owners and creditors. The BAUEN's struggle faced a series of normative challenges, from the absence of legal rules that directly protect the aims of the recuperation movement and the fact that its claims confront the expectations guaranteed by property rights, but also the politically sensitive nature of its legal demands, which we will return to below.

The key point provided by our theoretical framework is that legal argumentation and interpretive opportunities are shaped by legal rules and rights that correspond to normative commitments, such as private property regimes and credit markets. The theoretical framework of law's excess of meaning and deficit of task explores the tension between the opportunity to reinterpret the scope of legal protections and the law's apparent commitment to certain fundamental sociopolitical interests. Indeed, we can see both from the failures of the BAUEN and the way it reframed its political demands as legal claims the effect of law's deficit of task on the opportunity presented by its excess of meaning. What this reveals for law's effectiveness as a tool of social struggle is both a continual opportunity to redetermine the content and scope of law and, against unfettered enthusiasm for the potential of legal reform, a normative barrier to what can be said and understood in law. In other words, social struggles that engage with law encounter interpretive battles that occur within and are determined by what claims can be rationalised by a legal system that guarantees and reproduces experiences and expectations in a social, political and economic context.

To conclude this section, we need to clarify the role of politics in the concept of law's deficit of task. The aim of the analysis in this paper is to comprehend how the BAUEN workers' demands to remain in control of the property that houses their co-operative have been presented as legal demands and the extent to which such claims confront law's normative boundaries. An important question that flows from this scheme is: To what extent is the insight about *law's* deficit of task determined by the limits of what does or does not have *political* support in a given time and place?

The dynamics of electoral politics constructed the possibility for an expropriation bill to pass through Congress, which indicates that politics' normative interests are, along with law's normative interests, critical in determining the effectiveness of a given legal mobilisation strategy. In the context of legislative law-making, political interests are particularly important. For example, the BAUEN was

all too aware of the cost of failing to generate sufficient support in Congress and the need to reconsider their initial legislative strategy by presenting a claim that draws on the opportunity of law-making. By focusing on the role of normative interests in law, I am concerned with the effect upon law-making of sociopolitical interests that (re)produce certain conceptions of what law, politics and society ought to be. Indeed, the insights from the concepts of deficit and excess is that law is not an autonomous field, but is subject to arguments drawn from and shaped by its social, political and economic context.

This does not mean collapsing legal arguments into political demands, nor does it mean that any legal reform is necessarily possible under specific political conditions. Political demands must be presented in a legal form and ought to be capable of being defended against procedural and substantive legal challenges. However, the important insight from the theoretical framework presented in this paper is that social relations, political demands and economic conditions have shaped legal systems in a manner that allows us to identify certain normative interests that are entrenched in and protected by law. The protection of private property in liberal legal systems has been central to our analysis because it is representative of a normative interest whose protection by law militates against antagonistic political demands and legal struggles. The protection of property is not rooted in the legal system's autonomous interest in reproducing the status quo; it is in the continual redetermination of the law that social experiences, expectations and normative interests are reproduced. This means that legal systems are both open to interpretation and always already structured according to conceptions of what law is that prescribe the limits of interpretation and decision-making. Social struggles, like the recuperation movement in Argentina, attempt to dislodge and reshape these givens through innovative forms of legal and political action. Drawing upon their experience and a conceptual analysis of legal rationality, we have seen how the political aims and legal demands of social struggles confront and exist in tension with the limitations of law as a site of sociopolitical struggle.

3.1 Law's deficit and strategic actions

Having set out the tension between excess and deficit, I argue that labour movements must embrace a strategic approach to legal mobilisation where their legal claims challenge law's normative boundaries. Whether these legal claims radically transgress present boundaries or encourage reform, a strategic approach ensures that legal mobilisation proceeds with an awareness of the inclusionary and exclusionary effect of the *determinatio*. The rationale for a strategic approach to legal mobilisation follows from our understanding of law's normative commitments and their effect upon legal mobilisation.

This concern for strategic action as a means to engage with law confronts an important cleavage in legal theory between a conception of law as a communicative practice and its rejection of the strategic rationality (Habermas, 1984; 1998; Alexy, 1989). In discourse theory, there is a distinction between communicative and strategic action. Jürgen Habermas's conception of communicative rationality is premised on the commitment to reaching understanding through language and is based on a common rationality between both parties so that an addressor can understand an addressee (Habermas, 1984, pp. 29–38). Whereas strategic action is understood as instrumentalising communication to achieve certain ends, when applied to law, the communicative approach assumes a common set of norms and rationalities that are seen to underpin communication and enable legal argumentation about what belongs to a legal order.

For our purposes, the communicative approach and its imposition of a common rationality prevent certain claims from having traction in law. For instance, where a set of permissible norms and procedures structure communication, there is an inevitable narrowing of what can and cannot be said in law (Christodoulidis, 2004, p. 191). As Scott Veitch describes it, rationality in law is a process that limits the range of discursive opportunities because law must make a decision about what is and is not included in law (Veitch, 1999, p. 161). This means that a social movement's range of recognisable legal claims is limited to the normative and procedural consensus that grounds the communicative rationality of the legal order. The critique of communicative action aligns with our understanding of the limiting role of entrenched interests in determining law's deficit of task. From this vantage point, only a strategic approach to legal communication, or argumentation, can attempt to effectively negotiate law's internal tensions.

We have already considered how the BAUEN identified opportunities to reinterpret the communicative rationality of constitutional rights protections and bankruptcy law in a manner that benefits workers ahead of private property or capital interests. To conclude this section, let us consider a second understanding of strategic action critical to the BAUEN experience: the role of political mobilisation in confronting the limitations of legal mobilisation.

Two key political tactics provided critical protection to the Cooperative's control of property that legal actions could not. Importantly, these actions ensured the survival of the Cooperative and its longer-term political strategy when legal remedies failed to provide protection. First, the recuperation of a company by workers begins with 'the take' or occupation. The initial act of occupation is essential to aims of worker control and their legal strategy because, once physically in control of the property, the workers can demonstrate its capacity to continue production in their Article 21 claim. The importance of controlling the means of production is such that ERTs must first act illegally – occupation of private property – to become legally relevant to the Bankruptcy Law. The second strategy that has played a role in the survival of the BAUEN Cooperative is mass demonstrations. Acts of solidarity by civil society have physically prevented the enforcement of eviction orders (Ruggeri *et al.*, 2017, p. 104). These demonstrations and the vast political mobilisation behind the BAUEN's struggle explain how the Cooperative has managed to remain in control of property and continue production in spite of judicial orders for their eviction.

The interesting insight here is found in the BAUEN's ability to sustain a long-term strategic engagement with Argentine law even when legal mobilisation could not provide immediate protections. The BAUEN has been able to pursue normative objectives that challenge Argentine law not simply by engaging in a strategic (cf. communicative) approach to law, but also by situating legal mobilisation within a political strategy with normative objectives. In other words, the effectiveness of the BAUEN's legal mobilisation lay not simply in its strategic approach to legal rationality, but by insulating its political objectives against the inevitable limitations of legal mobilisation. While engagement with law is essential to provide long-term security and institutionalise its objectives, the BAUEN's strategic engagement with law operates with an awareness of its normative conflict with the present constellation of Argentine law. The lesson from the ERT/BAUEN experience is that the potential of legal strategy to deliver either short- or long-term legal protections is found in the pragmatic interaction between the articulation of effective legal claims, law's excess of meaning, its deficit of task and the concurrent mobilisation of political tactics.

4. Conclusion

The ERT experience of legal mobilisation illustrates both the interpretive opportunities in legislative rules and constitutional provisions, and the effect of law's normative boundaries on legal mobilisation strategies. The effectiveness of the BAUEN Cooperative's legal strategy has been rooted in its ability to win tangible legal protections that enabled it to pursue normative aims of worker control and co-operativism. Rather than making political demands that law ought to recognise the ERT movement, the BAUEN presented legal and constitutional claims that could be recognised as belonging to the Argentinian legal system. The ERTs' reinterpretation of legislative and constitutional provisions was shaped by the varying capacity and receptiveness of the judiciary and legislature. For example, arguments that were effective before commercial court judges relied on meeting strict evidential requirements and implementing legislative provisions, whereas broader claims about the right to work in bankruptcy proceedings were largely ineffectual when confronted with fundamental rights claims or the procedural limitations of bankruptcy legislation.

The scope for interpretive creativity was increased when presenting expropriation bills before the Argentine Congress. The BAUEN sought to take advantage of a Centre-Left majority in the Senate that did not explicitly support the ERTs' radical conception of work but defended its provision of employment and public services at a time of financial crisis. However, subsequent elections changed the political dynamics of the Senate and with it the potential effectiveness of the BAUEN's legal claims. The BAUEN's experience of legal mobilisation highlights the delicate balance that needs to be struck

between the normative boundaries of a legal system, opportunities for reinterpretation of existing legal provisions and the political receptiveness to legal reform when engaging in interpretive conflicts before either judicial or political institutions.

In order to better comprehend the types of interpretive conflicts that can be harnessed through legal mobilisation, this paper has argued that strategic engagements with law are caught between the opportunity to reinterpret and redetermine the content of law, on the one hand, and the practical and normative limitations of law to recognise certain legal claims, on the other. Drawing on the twin concepts of excess of meaning and deficit of task, I have provided a conception of legal mobilisation as an interpretive conflict over what can and cannot be included within law. Social struggles will be drawn to law as a site capable of redetermining social experiences, but law is also a site of reproduction in which social expectations are guaranteed and social interests become entrenched norms backed by material and symbolic power. This tension has been traced through the BAUEN's engagement with Argentine law and constitutional provisions, and provides a practical conception of the impact of law's normative interests on the effectiveness of legal mobilisation, such as the unequal application of the constitutional right to work compared to the right to property in Argentine law. Attempts to insert protections for labour over capital have been thwarted by the legal system's entrenched normative interest in the inviolability of private property rights. Therefore, the challenge in mobilising law has been to interpret available legal rules and constitutional rights strategically so as to effectively negotiate the tension between law's opportunity and its normative limitations.

For legal mobilisation scholarship, a fundamental challenge remains: to recognise the role of normative boundaries and consider the extent to which they shape law's capacity as a tool of social struggle. The conceptual tools deployed in this paper provide a framework from which to comprehend the tension between opportunity and limitation; however, this must be paired with empirical and case-study analysis of the types of legal arguments that can be recognised as belonging to a legal system, the sites of effective legal action and the important role of political tactics in supporting a movement's legal struggle. For social struggles whose claims confront the entrenched interests of liberal legal systems, like labour, any strategic mobilisation of law will be shaped by these questions and the challenge of mitigating their vulnerability to law's normative boundaries.

Conflicts of Interest. None

Acknowledgements. I am very grateful to Marco Goldoni, Emiliós Christodoulidis, Jiří Příbáš, Alan Bogg, Giedre Jokubauskaite, Katie Cruz and the anonymous reviewers for their comments on earlier drafts of this paper. I would also like to thank Federico Szczeranski for the endless discussions that were critical in the development and sharpening of the arguments in this paper. The research for this paper was supported by the Economic and Social Research Council (ESRC) Postdoctoral Fellowship scheme (grant number ES/V009990/1).

References

- Alexy R** (1989) *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification*. Oxford: Clarendon Press.
- Anderson EA** (2005) *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation*. Ann Arbor, MI: University of Michigan Press.
- Brabazon H** (2017) Occupying legality: the subversive use of law in Latin American occupation movements: occupying legality. *Bulletin of Latin American Research* 36, 21–35.
- Christodoulidis E** (2004) The objection that cannot be heard: communication and legitimacy in the courtroom. In Duff A *et al.* (eds), *The Trial on Trial*, Vol. 1: *Truth and Due Process*. Oxford: Hart, pp. 179–202.
- Christodoulidis E** (2009) Strategies of rupture. *Law and Critique* 20, pp. 3–26.
- Cover RM** (1983) The Supreme Court, 1982 Term. *Harvard Law Review* 97, 1–306.
- Dinerstein A** (2007) Workers' factory takeovers and new state policies in Argentina: towards an 'institutionalisation' of non-governmental public action? *Policy and Politics* 35, 529–550.
- Dinerstein A** (2014) *The Politics of Autonomy in Latin America: The Art of Organising Hope*. London: Springer.
- Finnis J** (1985) On 'the critical legal studies movement'. *American Journal of Jurisprudence* 30, 21–42.
- Finnis J** (2011) *Natural Law and Natural Rights*. Oxford: Oxford University Press.

- Galanter M** (1974) Why the 'haves' come out ahead: speculations on the limits of legal change. *Law & Society Review* 9, 95–160.
- Habermas J** (1984) *The Theory of Communicative Action: Reason and the Rationalization of Society*. Cambridge: Polity Press.
- Habermas J** (1998) *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Cambridge, MA: MIT Press.
- Hardt M and Negri A** (1994) *Labor of Dionysus: A Critique of the State-form*. Minneapolis, MN: University of Minnesota Press.
- Harvey D** (2012) *Rebel Cities: From the Right to the City to the Urban Revolution*. London: Verso Books.
- Hilson C** (2002) New social movements: the role of legal opportunity. *Journal of European Public Policy* 9, 238–255.
- Magnani E** (2009) *The Silent Change: Recovered Businesses in Argentina*. Buenos Aires: Teseo.
- McCann M** (2006) Law and social movements: contemporary perspectives. *Annual Review of Law and Social Science* 2, 17–38.
- McCann MW** (1994) *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*. Chicago, IL: University of Chicago Press.
- Merry SE** (1990) *Getting Justice and Getting Even: Legal Consciousness Among Working-class Americans*. Chicago, IL: University of Chicago Press.
- Mezzadra S and Neilson B** (2013) *Border as Method, or, the Multiplication of Labor*. Durham/London: Duke University Press.
- Ozarow D and Croucher R** (2014) Workers' self-management, recovered companies and the sociology of work. *Sociology* 48, 989–1006.
- Postilloni F** (2013) Ley de Quiebras y Concursos. Argentina 1995–2011. Recorrido histórico de la normativa y papel de las empresas recuperadas por sus trabajadores. Interescuelas/Departamentos de Historia. Departamento de Historia de la Facultad de Filosofía y Letras. Universidad Nacional de Cuyo, Mendoza, p. 30.
- Ranis P** (2010) Argentine worker cooperatives in civil society: a challenge to capital–labor relations. *WorkingUSA* 13, 77–105.
- Ranis P** (2016) *Cooperatives Confront Capitalism: Challenging the Neoliberal Economy*. London: Zed Books Ltd.
- Rebón J** (2004) *Desobedeciendo al desempleo: la experiencia de las empresas recuperadas*. Buenos Aires: La Rosa Blindada.
- Rosenberg GN** (2008) *The Hollow Hope: Can Courts Bring About Social Change?*, 2nd edn. Chicago, IL: University of Chicago Press.
- Ruggeri A** (2014) *¿Qué son las empresas recuperadas? autogestión de la clase trabajadora*. Buenos Aires: Peña Lillo : Ediciones Continente.
- Ruggeri A** (2018) Las empresas recuperadas por los trabajadores en el gobierno de Mauricio Macri. Estado de situación a octubre de 2018. Programa Facultad Abierta/Centro de Documentación de Empresas Recuperadas, pp. 1–20. Available at: <http://www.recuperadasdoc.com.ar/VI-Informe-Situacion-ERT-2018.pdf> (accessed 4 December 2019).
- Ruggeri A, et al.** (eds) (2014) *Crisis y autogestión en el siglo XXI: cooperativas y empresas recuperadas en tiempos de neoliberalismo*. Buenos Aires: Peña Lillo: Ediciones Continente.
- Ruggeri A et al.** (2017) *Bauen: el hotel de los trabajadores*. Buenos Aires: Callao Cooperative Cultural.
- Santos B de S** (2002) *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*. Cambridge: Cambridge University Press.
- Scheingold SA** (2010) *The Politics of Rights: Lawyers, Public Policy, and Political Change*. Ann Arbor, MI: University of Michigan Press.
- Solari S.A. S/ Quiebra (Indirecta)** (2007) Juzgado Comercial N9 Sec N 18 69699.
- Solari S.A. S/ Quiebra** (2008) 323-4028 La C mara Nacional de Apelaciones en lo comercial, Sala C.
- Solari S.A. Y Otro S/ Quiebra** (2009) Suprema Corte 898/901.
- Solari S.A. Y Otro S/ Quiebra** (2011) 993.
- Tarrow S** (1994) *Power in Movement: Social Movements, Collective Action and Politics*. Cambridge: Cambridge University Press.
- Thomas D** (2011) Cooperativism in a credit crisis: lessons from the Argentine worker takeovers. *Northern Ireland Legal Quarterly* 62, 505.
- Vanhala L** (2010) *Making Rights a Reality? Disability Rights Activists and Legal Mobilization*. Cambridge: Cambridge University Press.
- Vanhala L** (2012) Legal opportunity structures and the paradox of legal mobilization by the environmental movement in the UK. *Law & Society Review* 46, 523–556.
- Veitch S** (1999) *Moral Conflict and Legal Reasoning*. Oxford: Hart.
- Vieta M** (2010) The social innovations of autogestión in Argentina's worker-recuperated enterprises: cooperatively reorganizing productive life in hard times. *Labor Studies Journal* 35, 295–321.
- Waldron J** (2008) The concept and the rule of law. *Georgia Law Review* 43, 1–62.
- Wood EM** (2016) *Democracy Against Capitalism: Renewing Historical Materialism*. London: Verso Books.