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The promises and pitfalls of collective bargaining for ending the victimization of trade union activists: Lessons from France

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Abstract
The broadening of the anti-discrimination legislation and the growing use of litigation have put pressure on organizations to respond to the law by elaborating formal rules and, in the case of France, negotiating collective agreements on union rights. This article addresses the issue of union victimization by investigating the various organizational responses to anti-discrimination law. By focusing on in-depth case studies over a long period of time, it offers new insights into the processes whereby law is internalized and how they interact with litigation over time, and also highlights the active, contested and changing role of HR professionals and trade unionists in the shaping of organizational responses.

Keywords
Collective bargaining, law, litigation, trade union, victimization

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Introduction

Contrary to other European countries, France has explicitly recognized 'trade union activity' within its anti-discrimination legislation. This legal framework, which was established in 1946 and further developed in the 2000s, contains a wide range of provisions on union recognition. This strengthening of the legal framework has not automatically created a more secure environment for trade unionists, as they still suffer from wage inequalities and can still be victimized. Over the last decade, the development of statutory individual rights and successful litigation have contributed to an underestimation of union victimization practices that persist in private sector industries well known for their anti-union attitude (Chappe, 2013; Hatzfeld, 2014) and have spread to other areas, such as the public services in a context of economic restructuring and privatization. In France, union victimization remains hard to objectivize. Thomas Breda estimates that, under plausible assumptions, union representatives' wages are on average 10% lower than that of their unionized and non-unionized co-workers (Breda, 2014).

Few studies have looked into union strategies to combat victimization and seek redress when their members or representatives are bullied or unfairly dismissed. Whereas the unions' most visible strategies rely on industrial action or campaigning, some unions have also had recourse to the law in order to enforce their rights and to oblige companies to provide organizational responses to legal norms. The broadening of the anti-discrimination legislation and the growing use of litigation have put pressure on organizations to respond to the law by elaborating formal rules and procedures (Edelman, 1992) and, in the case of France, negotiating collective agreements on union rights. This article aims to address the issue of union victimization by investigating the various organizational responses to anti-discrimination law and the role played by trade unions and HR professionals in these processes. Building on a considerable literature on 'organizational mediation' of civil rights in the US (Edelman et al., 2010), we want to examine how industrial relations have been impacted on by the greater emphasis put on legal enactment and compliance (Colling, 2006). This focus on the processes by which organizations respond to law and eventually produce new legal norms allows us to better examine the interaction between organizational and legal norms and to address some of the shortcomings of descriptive and institutionalized approaches to industrial relations.

This article is intended to complement previous analyses of organizational response to anti-discrimination law (Dobbin, 2009; Edelman, 1992; Edelman et al., 1999) in three ways. First, whereas previous studies have focused on the role of equality agencies or HR professionals, this study introduces trade unions as important players in the interpretation and enforcement of law (Chappe, 2013, 2015; Guillaume, 2015a; Pélisse, 2014). We acknowledge that, in the French context, no single entity has a monopoly on legal interpretation and that organizational responses to law are the result of complex and sometimes contested relations between external and internal 'legal intermediaries'. We argue that HR professionals and trade unionists can be seen as 'symmetrical' actors, both engaged in a process of legal interpretation. Second, whereas previous studies have proposed a generic model of 'legal endogeneity' (Edelman, 2011), we seek to scrutinize the production of distinct 'rights practices' (Barnes and Burke, 2006) and to analyse their tangible and symbolic outcomes. More specifically, our aim is to examine the extent to

which the legal category of union victimization has itself been reframed and to understand how managerial thinking has influenced this process (Edelman et al., 2001). Finally, by focusing on in-depth case studies over a long period of time, we seek to offer new insights into the processes whereby law is internalized and how these processes interact with litigation over time. We address the issue of the homogenizing force of the law, but also seek to understand the active, contested and changing role of HR professionals and trade unionists in the shaping of organizational responses.

Our analysis draws on three original case studies of the response of large private and public companies to union anti-discrimination regulations. These case studies were selected because the companies concerned, in their efforts to address the anti-union discrimination issue, offered a range of more or less 'proactive' organizational responses to the law (Barnes and Burke, 2006), resulting in more or less 'cooperative' relations with trade unions. In all cases, different approaches to mobilizing the law have prevailed, but all these companies have ended up negotiating several collective agreements on union rights. Therefore, we envisage these agreements as specific processes of legal compliance that are co-constructed by HR professionals and trade unionists, most of the time under pressure from other legal actors. Our aim in comparing these three cases is to investigate: (1) the conditions under which these processes emerge and the dynamics between collective bargaining and litigation; (2) the effects of different routes to the internalization of law on union victimization and recognition; and (3) the incorporation of managerial thinking into the interpretation of legal categories.

The internalization of law: Processes, actors and meanings

Law and organizations theories argue that organizations actively participate in the shaping and meaning of legal compliance by responding to and constructing the law that regulates them (Edelman and Stryker, 2005; Edelman et al., 1999). Organizations are both responsive *to*, and constitutive *of*, their rule environment. Studies on equal opportunity and affirmative action laws in the United States have shown that law is especially open to 'organizational mediation' because of its ambiguity with respect to the meaning of compliance, its procedural orientation and the weakness of enforcement mechanisms (Edelman, 1992). More generally, law can be conceptualized as a source of uncertainty in organizational life that 'creates room for manipulation, interpretation, and enactment on the part of actors both within and outside of organizations' (Suchman and Edelman, 1996: 935). Organizations mediate the impact and meaning of the legal mandate and respond to law in complex ways. These patterns of the 'internalization of law' (or, in practice, of norms) interact with more formal uses of law, such as litigation. Whereas high levels of legal mobilization can generate strong organizational responses to law, this is not always the case (Barnes and Burke, 2012). Conversely, institutionalized organizational structures can gradually be incorporated into legal doctrine (Edelman et al., 2011), thereby restricting claimants' ability to litigate. These processes are mutually constitutive. Their interactions are often complicated and can vary over time. Studies on equal pay have demonstrated that litigation can be a trigger for more proactive 'rights practices' in the UK public sector (Deakin et al., 2015; Guillaume, 2015b), but it also develops on the back of existing collective agreements. Moreover, organizations can respond

to legal constraints in very different ways depending on other internal and external pressures such as the proximity to the public sphere, the presence of a human resource department and the level of unionization (Edelman, 1992).

Previous studies have stressed the role of professions in the advocating of particular organizational solutions to legal problems. HR professionals, in particular, have been identified as adopting cultural and value-based approaches that induce a process of normative isomorphism. Other external actors, such as consultants in labour discrimination (Stryker et al., 2012) or professionals specializing in the design of 'reasonable accommodations' for disabled workers (Barnes and Burke, 2006), also play a key role in the production of legal organizational responses. American studies have also looked into unionization as one of the factors influencing organizational responses to law. They have shown that unions can resist civil rights laws by overlooking the full implications of equality legislation on job classification systems and work rules set by collective bargaining as they conflict with employment relations' institutions, but they may also encourage employees to take legal action (Edelman, 1992) and they can also organize legal mobilization as an effective tool for attracting female members (McCann, 1994). We argue that, in France, collective bargaining has gradually become a standard (partly coercive) form of compliance with discrimination legislation, legitimating the role of professionalized HR managers and trade unionists as 'legal intermediaries' (Chappe, 2013, 2015; Guillaume, 2015a; Pélisse, 2014). This emphasis on collective bargaining is not specific to discrimination matters, as the French industrial relations system has changed significantly in recent decades. While industrial relations have traditionally been dominated by a high level of involvement on the part of the state, the social partners have become increasingly committed to negotiation at the branch and more recently workplace levels. Since the 1998 and 2000 '*Aubry* laws' on working time, several pieces of legislation have extended the rights for companies to sign collective agreements that depart from national sector-specific agreements. Moreover, companies are now obliged to negotiate on a range of topics, either annually (wages, working time and work organization) or on a multi-annual basis (gender equality). Union rights are not a mandatory topic for negotiation but numerous agreements have been negotiated and updated following the development of a complex system of employee representation at the workplace level since 1968. However, France is also well known for its very low level of union density (8% on average) and the traditional anti-union stance of many employers. Whereas union recognition is secured through mandatory elections in every company with more than 50 employees, the weakness and divisions of the union movement cast doubt on the prospect of collective regulation to enforce trade unionists' rights.

If law has become a stronger homogenizing force, previous studies have pointed to the need to situate legal awareness and rights mobilization in relation to particular sets of social interactions and the experience of different groups (Nielsen, 2000). Elizabeth Hoffmann has called attention to the impact of divergent organizational structures (cooperative *versus* hierarchical) on the creation of different 'grievance cultures' which in turn produce alternate visions of the appropriate means for resolving issues (Hoffmann, 2003). In another study, Catherine Albiston pointed out that preferences on law mobilization emerge from an interactive social process that is shaped both by existing cognitive and normative structures and power relations (Albiston, 2005). Deeply entrenched

expectations about employment relations and the role of the 'social partners' may influence unions' and employers' interpretation of law and their ideas on how to implement it (or not).

If contextualization might help us to understand the ways in which law is implemented, it may also account for its outcomes. The law's ability to bring about social change is a vast and contested subject. Litigation has been identified as playing a significant part in creating proactive rights practices (McCann, 1994), but other conditions are required to obtain tangible results. Compliance 'from above' often hides an absence of routinization in daily managerial practices (Barnes and Burke, 2012). Likewise, routinization and professionalization can conceal a form of depoliticization of legal norms. This issue of how rights are reframed in the process of discrimination law enforcement has been considered through a process of 'managerialization', whereby legal ideas are refigured by managerial ways of thinking and issues of 'business case' (Edelman et al., 2001; Kelly and Dobbin, 1998). If verified, this reframing of union activity as a lever to improve organizational efficiency is likely to be contested within the trade union movement and within managerial ranks. Whereas professionalized HR managers and senior managers may advocate 'social dialogue' as a condition for economic performance, middle managers might be less inclined to recognize trade unionists' contribution. Likewise, the reframing of union activity is likely to be discussed between trade unions with differing political stances and may have different implications for trade unionists depending on their level of professionalization.

This article seeks to combine insights from these different aspects of the 'internalization of law' as it investigates the relationships between organizational responses to law and the use of litigation, the role of trade unionists and HR departments in the shaping of negotiated solutions and the reception accorded to the reframing of union activity resulting from implementation of the law. Our main contribution is to show how different models of social relations and grievance cultures combine with organizational responses to law to shape right practices and reframe representations of anti-union discrimination. Before presenting our methods and fieldwork, we start by giving a brief overview of anti-union discrimination legislation in France since 1946.

Anti-union discrimination and the law

In France, union affiliation was the first legally protected right, long before the introduction of specific anti-discrimination legislation in the 1970s and 1990s. Trade union freedoms were enshrined in the preamble to the 1946 French Constitution. Five general trade unions (CGT, CFDT, FO, CFTC and CFE-CGC) were recognized as 'representatives' by law (1946, 1966), without having to go through specific election processes at the workplace level, contrary to other minority unions that had to gain recognition. Since 1946, hindering or obstructing union officials going about their normal business has become an offence under criminal law (*délit d'entrave)*. Another law passed in 1956 prohibited union victimization *per se*. However, the framing of legislation in France has evolved over time.

From 1946 to 1995, the legal framework was designed to protect trade unions after they had been prohibited during the war under the *Vichy* regime and to restrict employers' power. It was also intended to create the conditions for a renewed social partnership,

which was seen as necessary to address postwar economic and social concerns. Later on, in May 1968 and in the following decade, trade unions succeeded in using the law to gain more rights and more protection. Thanks to the legal mobilization of CFDT's lawyers, union representatives were accorded a specific status (*salarié protégé*/'protected employee') in labour law that set them apart from the 'normal' contractual relationship and made termination of their contract a criminal offence (Willemez, 2003). In 1982, a new set of laws (*Auroux laws*), drafted by the newly elected socialist government to give more power to trade unions in labour regulation (Moss, 1988), introduced the notion of discrimination into the Labour Code. According to the new legislation, 'no employee can be sanctioned or dismissed due to his/her origin, sex, family situation, membership of an ethnic group, nation or race, political opinion, trade-union activities or religious beliefs'. During this period, litigation concerned only illegal forms of dismissal and penalties or remedies were enforced through the criminal courts. Under pressure from the government, large public companies started to negotiate union rights agreements that included preventive measures against unequal treatment for union officials in terms of career and wage progression, as in the case of a public utilities company that we will develop more fully later on.

In the second time period (1995–2008), against the background of a huge decline in union density (from 30% in 1946 to 8% in 2008; Amossé and Pignoni, 2006), less confrontational relations with employers and more professionalized HR departments in large companies, the implicit assumption that employees were willing to 'accept' slower career progression because of their union activities started to be challenged by union members, who sometimes managed to obtain the support of their national organizations to lodge employment tribunal claims. By comparison, in low unionized sectors (hotels, retail and construction industries), union activists enjoyed less protection and were easily fired with the approval of administrative judges (Weidenfeld, 2003). In the mid-1990s, one legal claim brought by CGT activists on behalf of six union claimants in one of the largest French automotive companies helped to reframe anti-union discrimination and develop trade unionists' (individual) rights. This Automobile.inc case, which we will examine in greater detail later, was the first one that dealt directly with wage inequality due to slower career progression. It was very innovative both in its legal approach and its technicalities, as the claimants developed a specific statistical method (see Box 1) to meet the burden of proof using comparative quantitative and longitudinal data (Chappe, 2011) that could also be used to assess compensation.

This successful legal case, which resulted in a settlement on behalf of 169 claimants, helped to legitimize union activists' claim to equal treatment. Within CGT, the case helped to heighten activists' awareness of their legal rights and made the use of litigation in employment tribunals more frequent. The litigation that grew on the back of this case was then facilitated by the introduction of the first Anti-Discrimination Act in 2001 and the 2008 Act that transposed EU legislation on 'indirect discrimination' and partial 'reverse burden of proof' (close to the *prima facie* rationale). Contrary to other discrimination cases brought on the grounds of sex or equal pay, union litigation was backed by multiple decisions by the Supreme Court (*Cour de Cassation*). Whereas 'class actions' are not allowed in France, access to courts is facilitated by two factors. First, bringing a case to an employment tribunal is quite straightforward and free (apart from lawyers' fees). Second, many CGT trade unionists also sit as elected judges in employment tribunals and are

Box 1. The CGT method.

The 'CGT method' – or 'triangle method' – is a method used for bringing proof in discrimination legal cases. It was named after one plaintiff in the anti-union discrimination case against Automative.inc who worked on it and improved it. The method works thanks to the diachronic comparison between a control group panel and one or more employees who may have suffered discrimination in order to reveal the gaps in their careers. It makes it possible to visualize the growing salary gap between the potential victim and the others. It is a particularly enlightening way of demonstrating the effects of time on stalled careers and it also makes it possible to calculate the loss of income because of discrimination. Since the end of the 1990s, many anti-union discrimination cases have been built on this method. It is also used for gender discrimination cases.

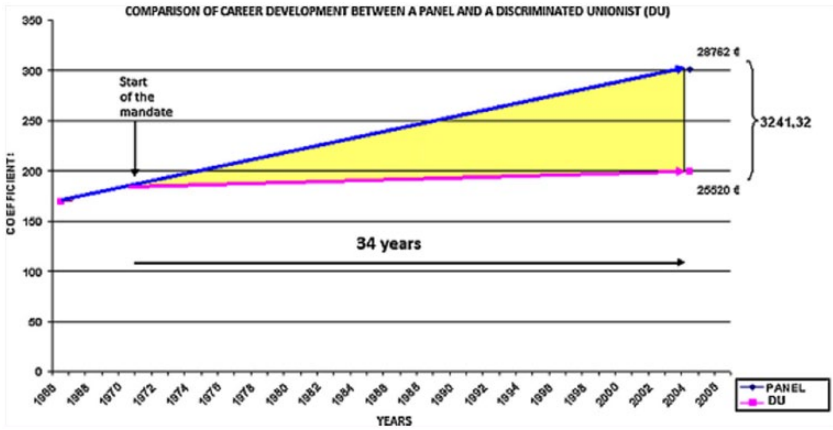

Figure 1. Visual of salary discrimination over the course of a career applying the panel method. Anonymous excerpt from the claim of a CGT Discriminated Unionist (DU) in 2006 employed by a private agency delivering public services.

therefore able to advise their comrades on litigation strategy (Willemez, 2012). During this period, the legal framing of union busting as a 'criminal offence' was then gradually supplemented by the recognition of the (civil) rights of individual union members to obtain compensation for the discrimination suffered and even reinstatement in cases of unfair dismissal, helping the negotiation of organizational preventive measures.

In 2008, in a context in which collective bargaining was being extended and decentralized, a new law introduced new criteria for union recognition, which is now based on elections organized at the workplace level. All trade unions must reach a 10% threshold of employees' votes to gain bargaining power at the company level (8% at national and industry levels). In anticipation of the fact that some trade unionists were to lose their mandates or elected seats following the first elections and in order to boost social dialogue,[1] this law also imposed a mandatory duty on companies with more than 300 employees to negotiate on trade unionists' ability to 'reconcile' work and union activity, a rather vague provision that leaves open any type of interpretation. Partly spurred by the threat of litigation, as in

the Navy.inc or Energy.inc cases that we will examine in greater detail below, and partly pressured by a new generation of professionalized HR managers and external consultants (some of them former trade unionists converted to the promotion of social dialogue), many large companies renegotiated their collective agreements on union rights. Most of them introduced preventive measures against anti-union discrimination as well as 'proactive' measures, such as access to specific training courses or the right to a 'professional' skills assessment for full-time trade unionists wishing to go back to work. Moreover, a new law designed to develop social dialogue was signed in 2015, creating an official list of union competencies that can be validated and utilized by trade unionists in order to obtain further professional qualifications. This new law also seeks to extend employers' obligations in terms of minimum levels of wage progression for trade unionists with more than 30% facility time. These new regulations explicitly recognize the issue of the recognition of trade unionists' competencies and their right to an average wage increase.

Case selection and methodology

Contrary to other studies, we have chosen cases that display certain similarities: large industrial companies, high union density, union pluralism but CGT as the leading trade union, male-dominated industrial sectors, semi-skilled workers, collective grading and pay systems, career progression relying on seniority rules, recent privatization and/or corporate restructuring and financial difficulties. These resemblances stem from the economic sectors (automotive, utilities and shipbuilding industries) that are all well covered by national collective bargaining and utilize a comparable workforce. The fact that we ended up with quite similar working environments is linked to our research question and the methodology we chose to address it. We wanted to look into the relationship between litigation and collective bargaining in the shaping of organizational responses to union victimization. Consequently, we selected companies where litigation occurred, which happens to be in typical CGT unionized workplaces that are dominated by (male) blue-collar workers. It is very important to understand these common characteristics, since they tell us a lot about the conditions under which a specific type of legal consciousness that involves the use of litigation has developed among a specific group of unionized workers (Nielsen, 2000).

Our three cases were also chosen because they allow us to examine the evolution of organizational responses to law over time. Our assumption is that organizational responses to law and union litigation strategies should reflect the gradual diffusion of greater normative and legal pressures. The three companies have a long social history. Their human resource management practices and structures are likely to have developed in 'the shadow of the law' (Mnookin and Kornhauser, 1978) even if their sensitivity to the legal environment is different. In two of these companies (Energy.inc and Navy.inc), which were formerly public companies, anti-discrimination provisions had existed since 1953 (and 1968) in the case of Energy.inc – a privatized subsidiary of the former public utilities company EDF-GDF – and 1982 (and 1992) in Navy.inc – now a privately owned multinational, the successor to the French arsenals and the Ministry of Defence's shipbuilding department. In the third case (Automobile.inc), the company has a long history of union victimization and had no collective agreement on union rights before 1998. Furthermore, while CGT took

legal action on behalf of union claimants in all three cases, the actions occurred at different periods of time and resulted in different relationships between litigation, collective bargaining and formal organizational procedures as well as different outcomes. In each company, we interviewed all the recognized unions, HR department managers, lawyers and claimants involved in litigation. Besides these 45 interviews (15 in each company), we also analysed union archives and legal documents. Thanks to her role as tutor on a training programme designed to 'enhance' union reps' competencies that has been delivered by a prestigious university (*Sciences Po Paris*) since 2008, one of the authors was also in contact with more than 100 union reps from the companies we studied and others. She had an opportunity to exchange views with trainees on the issue of anti-union discrimination and the conditions for a possible recognition of union competencies in the workplace.

Findings

Our three cases vary in terms of their responses to legal regulations. Looking at six dimensions – existing formal HR provisions, industrial relations model, grievance cultures, management recourse to law, union recourse to law and outcomes – we will take a close look at the trajectory and dynamic of organizational responses to the law. Table 1 gives an overview of the three case studies.

Automobile.inc: The archetype of union discrimination

Automobile.inc is one the largest French automotive companies. For a very long time, it was known for its tradition of organized union repression, especially during the 1980s and 1990s. Yet in the mid-1990s, six CGT union members, all skilled blue-collar workers, went to the courts to denounce the fact that their careers and wages were stagnating because of their union affiliation. The decision to take legal action was spurred by a meeting with one CGT legal officer, who was considering possible ways of fighting union victimization. He decided to adopt a new 'fast track' legal strategy and obtained an initial employment tribunal victory in 1996. The six claimants then decided to ask for the help of a very well-known lawyer who enlarged the circle of plaintiffs and lodged a criminal complaint on behalf of 80 workers. Twenty other employment tribunal claims were also lodged by another lawyer. Following the appointment of a new CEO, these legal actions ended in 1998 with a settlement in favour of 169 claimants, including financial compensation. This case is now recognized as decisive because: (1) it was the first time that anti-union discrimination had been measured through wage differentials over an entire career, (2) this case provided the basis for developing a new judicial strategy, which was later systematized and (3) was also the starting point for developing a method of meeting the burden of proof and calculating compensations and back pay by setting up comparative panels of union and non-union members (cf. Box 1). At the same time, the trade unions managed to negotiate an agreement on union rights at Automobile.inc that emphasized the importance of the unions' role in maintaining industrial 'peace and harmony' and introduced new training provisions, more facility time and resources for union activity. While this agreement was not very progressive, as it merely ensured

Table 1. Fieldwork description.

	Automobile.inc	Navy.inc	Energy.inc
Sector	Automotive industry	Shipbuilding	Utilities
Number of employees in 2014	100,000 (France) 200,000 (world)	13,000 (France)	46,000 (France)
Union density	Medium (10% on average)	High (30% in large production sites)	High (20% on average)
Recognized unions (> 10%)	Multi-union context	Multi-union context with CGT as majority union in large production sites	One majority union (CGT, 50.7%)
Formal HR provisions or previous agreements before litigation	None	State legal provisions on union rights for civil servants introduced in 1982, detailed in 1992 for the Ministry of Defence. Union rights agreement negotiated in 2004.	Statutes for the whole utilities industry established in 1953 and reinforced in 1968. Union rights agreement negotiated in 2008.
Industrial relations model	History of union repression	Confrontation	Corporatism
Grievance cultures (Hoffmann, 2003)	Informal	Formal	Formal
Management recourse to law (Barnes and Burke, 2006)	No rights and then little commitment to implementing rights. Recent professionalization of HR procedures. No routinization within daily managerial practices.	Formal commitment to implementing rights. Recent professionalization of HR procedures. No routinization within daily managerial practices.	Real commitment to implementing rights. Professionalization of HR and routinization of HR tools in daily practices.
Union recourse to law	1990s: Litigation on behalf of more than 100 CGT claimants. 2000s: Threat of litigation on behalf of one trade unionist.	Litigation on behalf of 10 CGT claimants. Informal negotiation with the Ministry of Defence.	2000s: Litigation on behalf of 20 CGT claimants, and threat of litigation on behalf of 1500 at EDF-GDF.
Outcomes	1998: Settlement in favour of 169 claimants, negotiation of the first union rights agreement, renegotiated in 2001. 2009: First 'trade unionists' career development' agreement. Regrading of one claimant.	2008: State legal provisions modified. 2012: 2 successful tribunal cases out of 10. Regrading of all claimants.	2005: Settlement and regrading of 400 claimants at Energy.inc. 2014: 'Trade unionists career development' agreement negotiated.

Table 1. (Continued)

	Automobile.inc	Navy.inc	Energy.inc
	New training programme (45 trainees).	2015: Renegotiation of the 2004 agreement, but no proactive provisions in terms of recognition of union competencies. New training programme (36 trainees).	New training programme (8 trainees).

minimum compliance with the law, it was seen as a symbolic victory in terms of acknowledgement of a need to pay greater attention to trade unionists' professional career development.

> In terms of rights we gained almost nothing, but this agreement was a sign that the management agreed to comply with the law. The real turning point for us was that the company agreed to deal with career discrimination against trade unionists. (Full-time male CFDT union official, Automobile.inc)

Shortly after, in 2001, a second collective agreement gave more resources and facility time to trade unions and introduced measures to prevent anti-union discrimination, such as bi-annual union–HR meetings at plant level to monitor wages and career differentials for trade unionists (by comparison with the average progression of employees in the same category). This decision to secure trade unionists' careers needs to be understood in the context of the changes in employment regulations in France. By the late 1990s, labour legislation was starting to impose more and more obligations on the 'social partners' to negotiate at company level on many topics (including wages, working time, training and equality). In large companies, a newly framed 'social dialogue' narrative replaced other more confrontational representations of management–unions relations, with the help of a new generation of qualified HR managers. In their search for more professionalized trade unionists, companies like Automobile.inc concentrated all their efforts on training full-time union officers, which in turn made it difficult to reconcile their union and work careers.

> The company has managed to find me a job that is compatible with my union duties. It is good for the company because it can benefit from social partners who have more time to deal with issues and have more distance from employees' daily concerns. However, it is not so good for me because I had to put my professional career on hold. We need to be honest, when you start to be an almost full-time trade unionist, you need to be available all the time. (Male CFTC union officer, Automobile.inc)

Following the 2008 Act on trade union recognition, a new agreement was signed in 2009. It confirmed the company's intention of evaluating trade unionists' competencies with a view to enabling them to acquire a degree or other professional

qualification after leaving their union role. A course run over a three-year period by a prestigious university (*Sciences Po Paris*) was to be provided for 45 full-time trade unionists from different unions. This training course, designed by former CGT officials now working as consultants, is run by academics and professionals. Its aim is to enhance trade unionists' understanding of the dynamics of 'social dialogue' drawing on European law and its implementation in countries where social partnership is strong. It also seeks to broaden trainees' understanding of economic and financial constraints so that they can better appreciate management's position when negotiating with the employer. After the completion of a small dissertation, a formal academic certificate is awarded that can be used by trainees if they want to further their education. However, whether or not trainees will be able to use this certificate internally to apply for higher professional positions within Automobile.inc remains uncertain. Only one of them, the national CGT discrimination expert, who threatened Automobile.inc with further legal action, was promoted to managerial status (labelled '*cadre*' in France). For the others, the training was disappointing and somehow seen as deceptive in terms of its tangible outcomes, even if getting a certificate from an elite university is seen as a great achievement for mostly low qualified workers. The training course ceased in 2013 and the HR department now seems to be lacking inspiration in its handling of union recognition issues.

Despite the difficulties it faces, this particular pattern of internalization reflects both a reframing of anti-union discrimination in terms of the right of full-time union representatives to have a career and a redefinition of union activity, which is seen as legitimate and useful only if attenuated to some degree by a management perspective (Chappe, 2015). This redefinition, which became quite evident during the training course, was contested by a few of the trade unionists but seemed to be accepted by the others, who identified with the idea of themselves as 'social dialogue professionals'. However, this social dialogue narrative, imposed from above by senior management and HR professionals, with the consent of full-time union officials, is not always understood and shared by middle managers or local union representatives, who can still be experiencing 'good old-fashioned' French confrontational union–management relationships. In a difficult economic context, the routinization of organizational responses to law in the daily practices of both unions and management remains to be achieved.

Navy.inc: A tradition of union militancy

Our second case is a highly unionized (CGT) shipbuilding company (military and civil submarines) owned by the state until 2004. One of the complex characteristics of this company is that part of the workforce is still employed and paid by the Ministry of Defence while they are now working for a private company. The number of these *salariés à statut*, who have a status similar to that of employees in state-owned companies (Cartier et al., 2010), has been declining since the closure of the state vocational schools that trained them and because of the recruitment of a new generation of employees directly hired by Navy.inc on private contracts. However, they are still quite numerous (2000 out of 13,000 employees) and are overrepresented among CGT members, especially in the

three largest naval dockyards (Cherbourg, Brest and Toulon). Over the years, the CGT has lost its majority position at the company level, but it is still dominant among production workers. The CGT has a high level of union density (more than 30%), which is quite atypical in the French context, where the average union density is 8%. Relations between CGT representatives and managers at Navy.inc are known to be very confrontational. The number of strikes and the level of activism are still quite high within the naval dockyards. Until recently, stigmatization of CGT members was accepted as 'part of the game'. Most CGT activists were banned from certain positions in strategic departments and experienced slower career progression. Union rights were obtained and maintained through confrontational power relations with management.

> We have a long tradition of union repression in Cherbourg. We have protected zones. These are parts of the dockyard where CGT trade unionists are not allowed to enter or work. (Male full-time CGT official, Navy.inc)

However, union activists have benefited both from the rules on career development for state employees, which are based on seniority and ensured minimal wage progression, and from legislation on union rights for state employees, which was introduced in 1982 following the election of a socialist government. The principle of non-discrimination for state employees because of their political, union or religious opinions was established by legislation in 1984. In 1992, furthermore, the Ministry of Defence decided that full-time union officials were to have their evaluations, productivity bonuses and promotion based on the average for other employees in the same category. This legal framework did not change until 2004, when the company was privatized. A new union rights agreement was then negotiated, allowing generous facility time and resources for all union activists, whether employed by the state or by Navy.inc. It also reaffirmed that the company would allow union representatives to carry out their union duties while still having a professional role. HR monitoring of their career and wage progression would ensure that their progression was no slower than the average for employees in the same category. A committee was set up to discuss grievances on the matter. In view of all these preventive measures, some trade unionists now believe that discrimination is unlikely to happen.

> Since 2004, we have had a procedure that ensures that if any union member feels he is being discriminated against, he can take his case to a national joint committee. We had a few cases in Cherbourg, but they were state-employed workers and the discrimination occurred before 2004, so it was not Navy.inc's responsibility. Besides, they were complaining that their careers were slower than their colleagues', but there were also issues of absenteeism and compared to other workers employed by the Ministry of Defence, their careers progressed much faster. (Male full-time UNSA official, Navy.inc)

This opinion was not shared by a CGT Cherbourg activist who had been sitting for a number of years on the local committee that decides on state-employed workers' promotion. For him, legal provisions that ensure average career progression were not sufficient to address the fact that the careers of most of his CGT colleagues had stagnated (although not his). There are many arguments against this 'average' provision. It raises the question

of how you do the comparison. How do you take into account variables of grade, position, age and seniority? So, convinced that his fellow CGT comrades had been systematically rejected for promotion or had had to wait longer than non-union members, he persuaded his local union to ask the Ministry to consider regrading 10 CGT activists. After the Ministry refused to consider their request and inspired by the Automobile.inc affair, the union lodged a formal employment tribunal claim in 2008 on behalf of 10 workers who, it was alleged, had suffered discrimination because of their union activity. Only two of these claims were partly successful because of a number of legal hurdles linked to the fact that there were virtually no legal precedents in the public sector and that the company had been privatized, which made it difficult to identify a single employer. In the meantime, moreover, the Ministry of Defence had decided to introduce new measures to address anti-union discrimination. Full-time trade union officials were to be offered more training opportunities and more generous overtime allowances and productivity bonuses, while the need to appraise trade unionists' competencies was to be recognized. Although seen as a great collective improvement, this internalization of law has weakened individual legal cases as the new provisions have been used by the employer to defend its case successfully in the courts. Interestingly, the courts' reliance on organizational responses to law is linked to the fact that anti-union discrimination cases had rarely been brought under administrative law. As previous research has shown, when the law is clear and less contested, the courts defer less to the internal procedures of organizational actors (Edelman et al., 1999). All claimants were also gradually regraded. One of them was even promoted to a managerial position.

These developments gave rise to many debates, both within CGT and between unions. Other moderate unions (CFDT, UNSA) saw this action as an attempt to seek redress for state-employed workers who were already well protected compared to other employees on private contracts. As in the two other cases, CGT argued that its motivation for resorting to litigation lays in a desire to change the image of trade union activism and attract new members.

> For state-employed workers, we have a formal joint commission to discuss cases. It's quite simple to be vigilant. For the other union members, employed by Navy.inc, it is more complicated. Nothing is written. The HR department organizes 'career committees' with management, but we are not invited, we are not informed. For the moment we do not see too many problems, but it is more difficult to assess any kind of discrimination when the system is not transparent. (Male full-time CFDT union official, Navy.inc)

Whereas the Ministry has responded to law in a proactive manner, Navy.inc seems to be more cautious in the way it handles its legal obligations. A new agreement that takes into account some of the courts' recommendations in terms of full-time union officials' wages and career progression was signed in 2015 but no provisions have been negotiated in respect of the appraisal or development of trade unionists' competencies. In 2013, Navy.inc decided to offer the same prestigious and costly *Sciences Po* training course as Automobile.inc to trade unionists, but CGT is very reluctant to participate in what it sees as an attempt to managerialize and professionalize union activity. In many naval dockyards, especially Toulon and Cherbourg, CGT–management relations remain difficult

and a very militant conception of trade unionism prevails among CGT members. Other trade unions seem to be more willing to engage in negotiated responses to law.

Energy.inc: A corporatist model of industrial relations

Our third case, Energy.inc, is a subsidiary of the formerly publicly owned utilities company EDF-GDF, which was privatized in 2004 and separated into different companies and subsidiaries in 2008. This highly unionized workplace, with the CGT as the main union, has been described as the archetype of 'company corporatism', where trade unions are mainly committed to the defence of occupational interests and craft identity. Union–management relations have been very difficult, with numerous strikes and radical actions, but, in the 1990s, a much less militant approach to unionism developed and an effort was made to build a cooperative social partnership (Wieviorka and Trinh, 1989). The company is also well known for its very formal way of handling employment relations. Most employees are still hired under a specific statute established in 1946 by a communist minister, Marcel Paul, former leader of the CGT electrical trade union. These provisions cover many aspects of the employment relationship: job security, grading and pay, seniority rules for promotion, health insurance and leisure activities (and pension scheme until 2004). Similarly, this subsidiary is covered by multiple national collective agreements negotiated at the industry or parent company levels.

In terms of anti-union discrimination, the legal rules stem both from the 1946 statute and two specific regulations enacted in 1953 and 1968 that established a process for comparing trade unionists' wages with employees in the same grades. This comparison was facilitated by the existence of a common grading and pay system that covered all categories, with the exception of senior executives, in every company in the sector. As in the two other cases, a stable workforce and the importance of seniority rules in career progression made it relatively easy to develop a comparative method of dealing with anti-union discrimination. Well before the invention of the *CGT method*, two internal regulations introduced in 1953 and in 1968 established the conditions under which trade unionists' careers needed to be monitored by management. At each production site, in a local works council where all wage advancement and promotion were discussed by management and trade union reps, an internal rule of 1953 authorized the comparison of trade unionists' careers with the average wage progression of employees in the same grade. In cases of discrimination, management was allowed to use positive measures to increase their wages. For union representatives with more than 50% facility time, since 1968, a list of 10 'comparators' with similar seniority, occupation, grade and level of qualification was created. Trade unionists were allowed to apply for regrading each time five of their comparators were promoted to a higher grade (which until 2008 resulted in an immediate wage increase).

However, as in the Navy.inc case, these formal rules frequently failed to protect union representatives. Many local managers had negative attitudes towards CGT activism and disciplinary action was taken against trade unionists on numerous occasions, particularly in periods of massive strikes against managerial reforms (1986, 1995, 2005, 2009) and against activists with little facility time. Moreover, these lists were themselves the source of much controversy because managers were opposed to promoting CGT shop stewards

and suspected that these measures would accelerate trade unionists' career progression. In this male-dominated and highly segregated workplace, these rules also reproduced gender inequalities, as male skilled workers usually ended up with better comparators than semi-skilled women. More recently, this method was openly criticized by HR because of the difficulties in implementing it in a context of constant corporate restructuring and a shrinking internal labour market, which makes it complicated to redeploy trade unionists on higher grades than the average of their colleagues when they quit their union roles.

> This comparative method is extremely difficult to handle. It is an obsolete system where you compare trade unionists with comparators from the same place of work. Our organization and trades have changed so much. Besides comparison is based on the same starting point, which is not always the most advantageous way to compare career progression. If we make a mistake, trade unionists can be unduly promoted and we have difficulties in finding them a corresponding position when they go back to work. Each time comparators retire or leave the company we need to recreate the list of comparators, it is time consuming and not very efficient. (HR manager, Energy.inc)

By the end of the 1990s, following the 1996 Automobile.inc case that heightened awareness of the possibilities of legal action within CGT, one trade union official who had experienced discrimination (and who was also an elected judge who had won a groundbreaking sexual harassment case) persuaded other activists who had sometimes pursued individual legal battles and lost to take a group action. Thirteen cases were successful at the employment tribunal level and the Supreme Court (*Cour de Cassation*) corroborated the judgement in 2001. Appointed as national legal officer for his federation, this union activist then launched an internal campaign through the union press and union annual conference to identify 1500 possible discrimination cases in the two public companies (EDF and GDF). His aim was to have the internal regulations (wage increase at minimum average) extended to part-time union representatives. As in the other two cases, the CGT decision to embrace litigation is indicative of a change in the framing of union activity, which could no longer be seen as a sacrifice if trade unions were to attract young skilled workers as members.

> When I became union rep, the first type of victimization I had to endure was the end of my training programme. As a technician it became difficult to do my job without being properly trained, so I chose to become a full-time union officer. Since 2003, our federation has decided to look after its members and protect them. It is important to show that union activists no longer have to sacrifice themselves. (Male full-time CGT legal national official, Energy.inc)

This legal threat, coupled with a desire to improve relations with the CGT after two very long strikes, facilitated the negotiation of a settlement in 2005. Out of a total of 1500 union plaintiffs from EDF-GDF, 1000 were regraded. By 2014, a couple of other cases had been settled, but a new agreement was then reached to replace the comparative system with individual 'comparators'. Full-time union representatives now negotiate an individual three-year 'contract' with the company that defines precisely the conditions of their union activity, access to training and wage and career progression during and after

completion of the union mandate. Part-time representatives do not benefit from this system and their career progression remains linked to their manager's appraisal of their professional activity and skills. This agreement, negotiated with an HR director (who used to be a union member in the white-collar union CFE-CGC), is seen as very good by CGT leaders, as they obtained a guaranteed minimum wage and career progression (including productivity bonuses) and a new bonus for union negotiators to compensate for their overtime proportional to their responsibilities. Only the white-collar CFE-CGC union refused to sign it because an 'average progression' can be detrimental for union members with managerial positions and fast-track career paths.

The recognition of union skills, which was partly addressed by this agreement, also remains a very controversial issue. Elements within CGT, as well as other minority unions, accepted the idea of a psychometric test to be used by an external agency to evaluate union representatives' skills and personalities before and after their union mandate, but other unions think that this test is not well suited to assessing union competencies and expertise. Energy.inc has also decided to offer the same *Sciences Po* training course to full-time representatives, but the first session of the training offered to only a few national union leaders (8) revealed the ambivalent position of CGT towards what it sees as a managerial reframing of union activity in a difficult social dialogue context. Whereas the HR department dreams of a more efficient partnership with professionalized and centralized union representatives, trade unions are fighting against the forthcoming reduction in the number of part-time local representatives (who represent an equivalent of 1000 full-time employees out of a total of 13,000). Furthermore, this emphasis on 'moderate' professionalized union reps ignores the issue of the routine victimization of more radical local representatives (CGT or SUD) who fight against corporate restructuring and cost-cutting with local managers and who have to endure new forms of union repression, including criminal charges and unfair dismissals, particularly in case of strikes or around health and safety issues.

Discussion

Our three cases fall into the category of organizations with high internal capacities that are faced with adversarial modes of legal mobilization (Barnes and Burke, 2006). Hence, they have developed proactive practices in order to address union victimization issues. However, these organizational responses to law proceed from different relationships with litigation over time, seen as a substitute or complement to collective bargaining (Deakin et al., 2015). In the Automobile.inc case, the internalization of law is a direct result of litigation (group action in the 1990s and one individual case in the 2000s), whereas for Energy.inc and Navy.inc organizational responses existed before legal action. In the case of Energy.inc, litigation took different forms (individual actions and a group action), whereas only one group claim was lodged by CGT against Navy.inc. In these companies, litigation was used as a complement to existing provisions. Furthermore, these legal actions resonate, as they are all linked to the action taken by a small number of trade unionists acting as 'legal entrepreneurs'. Outstanding among them was an Automobile.inc CGT union officer, who helped both to legitimize litigation as a tactic that can be collectively framed and combined with other long-standing union practices

and to diffuse best legal practices within CGT. The development of case law that followed the Automobile.inc case in 1996 provided the impetus for the adoption of offensive litigation strategies by local CGT branches in the 2000s. In the case of union victimization, unions and CGT in particular appear to have expedited organizations' response to law (Edelman, 1992), maybe because they were to benefit from legal compliance, but also because organizational and legal remedies respect industrial relations institutions such as seniority rules, job classification systems and work rules set by collective bargaining.

The use of litigation has contributed to the homogenization of corporate responses to law, but other variables need to be taken into account. In order to understand the characteristics of organizational measures – more or less proactive or cooperative (Barnes and Burke, 2006) – we need to examine not only management and HR attitudes but also trade unions' views and representations of employment relations and their own role in them (Albiston, 2005). Employers' commitment to comply with the law, their proximity with the public sphere and the level of HR professionalization are three important factors, but industrial relations dynamics and grievance cultures (Hoffmann, 2003), which may be more or less confrontational and/or formalized, also play an important part in the formation of organizational responses to law. Whereas Energy.inc has benefited from a long history of industrial relations characterized by extensive union rights and formal provisions combined with the early professionalization of HR managers specializing in industrial relations and the shift to a more moderate CGT leadership, the two other cases involve a more confrontational industrial relations model. In the case of Automobile.inc, union power has long been undermined by management's anti-union views and very weak HR provisions, whereas Navy.inc had formal HR provisions that stemmed from its proximity to the public sphere (Edelman, 1992) but in a context of powerful and very adversarial union strategies. In the Navy.inc case, the low level of HR professionalization echoed the very militant representations of the union's role. These different union and industrial relations cultures explain both the different organizational responses to law and their outcomes. However in the three cases, the formal convergence of organizational responses to law demonstrates a diffusion of greater normative pressures.

Apart from the fact that litigation was more successful in the Energy.inc and Automobile.inc cases than in the Navy.inc case, the content of the collective agreements negotiated with trade unions is more or less proactive. In all three cases, trade unionists' right to demand a normal (fair) career progression has been recognized as, more recently, has their right to have their union competencies recognized for their professional value. On this matter, the law itself is quite vague and leaves room for interpretation. Many large companies have tried to reframe the new legal provisions into a 'social dialogue' narrative that emphasizes how professionalized and moderate 'social partners' contribute to the improvement of organizational efficiency. In our study, only Energy.inc seems to have really engaged with a 'professionalized' process for managing trade unionists' careers and competencies. In all three cases, however, the organizational responses to law have been controversial. Although the implicit reframing of rights into a managerial redefinition of union activity has helped lift the taboo on union activity being implicitly framed as a sacrifice, it has met with resistance both from trade unions and managers. The fact that only those union skills that are seen

as contributing to the enhancement of social dialogue are recognized (negotiation skills, ability to understand and discuss economic statistics, team management skills, etc.) has led to a refusal by CGT members to attend the training course or to engage in negotiations on the matter. In all three cases, moreover, trade unions report that the routinization of preventive HR procedures in daily managerial practices remains very limited. In a context of financial difficulties and constant corporate restructuring, anti-union attitudes persist at the local level, especially for part-time trade unionists who have to deal with grievances and routine union representation work. The 'social dialogue' narrative promoted by HR managers (and some trade unions) to legitimize proactive measures in favour of trade unionists is obviously resisted by middle managers. Besides, these new internal procedures have led to inequalities in treatment: while full-time trade unionists are well recognized and legitimized by central HR departments and senior managers, local trade unionist representatives responsible for day-to-day union work, difficult to combine with their official job position, sometimes have contentious relations with local managers.

Conclusion

This research has sought to achieve a better understanding of the role of unions and HR professionals in the co-construction of internalized responses to union victimization, depending on organizational context and time period. Whereas previous research has emphasized a process of professionalization for HR managers that encourages the promotion of anti-discrimination policies (Dobbin, 2009), our research also identifies a contested trend towards the professionalization of union leaders as well (Guillaume and Pochic, 2009). Organizational responses to anti-discrimination legislation need to be understood within the broader context of the dynamics of employment relations. In France, the State has encouraged the promotion of a 'social dialogue culture' that has taken the shape of an incentive for employers to formally engage with trade unions in the implementation and creation of legal norms and rules through collective bargaining at the workplace level. This process, which has taken place in a context of declining union density, has been welcomed by trade unions, apart from minority radical ones, but it relies on a very small number of full-time union activists and is often described as more formal than effective. Apart from the depoliticization of the unions' role that it entails, this situation tends to produce two different organizational responses to law. In the first, anti-discrimination norms are interpreted and mediated through the framing of a 'social dialogue' narrative that can be described as a 'symbolic compliance' that benefits a small number of trade unionists only. In the other, formal recourses to law are used to discipline and dismiss local union activists. These results provide a more nuanced appraisal of union's ability to end victimization through collective means and help to explain the persistence of a high level of litigation on the part of both employers and trade unions.

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Note

1. New rules were also introduced on the legitimacy of collective agreements. Bargaining power is not restricted to recognized unions but agreements need to be signed by one or more trade unions representing more than 30% of the workforce.

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