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# Mobilizing anti-discrimination law: the litigation strategies of UK and French trade unions compared

CÉCILE GUILLAUME<sup>1</sup> | VINCENT-ARNAUD CHAPPE<sup>2</sup>

<sup>1</sup>Surrey Business School, University of Surrey, Guildford, GU2 7XH, England

<sup>2</sup>Centre d'étude des mouvements sociaux, EHESS, 54 Boulevard Raspail, Paris, 75006, France

## Correspondence

Cécile Guillaume, Surrey Business School, University of Surrey, Guildford, GU2 7XH, England

Email: [c.guillaume@surrey.ac.uk](mailto:c.guillaume@surrey.ac.uk)

## Abstract

Based on cross-national comparative research conducted in France and the United Kingdom, this article explores to what extent and under what conditions trade unions situated in different legal systems have turned to the courts to challenge discrimination at work. It investigates the interplay between a broad range of structural factors that offer specific opportunities, and the way in which trade unionists interpret contexts to promote legal mobilization in addition to or in place of other repertoires of action. In so doing, the article contributes to the understanding of anti-discrimination law enforcement and the role of micro-level actors in enabling litigation strategies.

## 1 | INTRODUCTION

The use of litigation, and more broadly of the law, by trade unions remains under-researched. Notwithstanding remarkable seminal work<sup>1</sup> and recent developments,<sup>2</sup> legal scholars have rarely

<sup>1</sup> M. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (1994); M. McCann with G. I. Lovell, *Union by Law: Filipino American Labor Activists, Right Radicalism, and Racial Capitalism* (2020).

<sup>2</sup> V.-A. Chappe, *L'égalité au travail: justice et mobilisations contre les discriminations* (2019); C. Guillaume, 'Legal Expertise: A Critical Resource for Trade Unionists? Insights into the Confédération Française Démocratique du Travail' (2022) 51 *Industrial Law J.* 38; F. Gutierrez Crocco, 'Contesting the Neoliberal Order through Legal Mobilisation: The Case of Chilean

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studied trade unions as ‘legal intermediaries’.<sup>3</sup> Industrial relations scholars, for their part, have continued to focus on more conventional repertoires of action, such as collective bargaining or industrial disputes, echoing the trade union movement’s suspicion of judicial institutions.<sup>4</sup> Factors, such as the high financial and emotional costs for plaintiffs and their trade union reps, the risk of movement fragmentation linked to the claim for individual rights, the necessary reliance on lawyers<sup>5</sup> or other actors,<sup>6</sup> and the feeling that the law provides only limited (individual) remedies have traditionally deterred union activists from going to the courts. Yet trade unions have frequently participated in individual and collective litigation to obtain or enforce statutory rights at the national and European Union (EU) levels.<sup>7</sup> The juridification of employment relations and workers’ rights has been noted in both decentralized and corporatist industrial relations systems.<sup>8</sup> While the mobilization of the courts has been positioned counter to collective labour relations,<sup>9</sup> previous research has considered the ‘radiating effects’<sup>10</sup> of ‘strategic litigation’<sup>11</sup> and the prospect of using ‘recombinant legal strategies’ to enforce employment rights.<sup>12</sup>

This article focuses on two remarkable, albeit different, legal mobilizations<sup>13</sup> that took place in France and the United Kingdom (UK). These legal battles emerged in the 1970s and developed in the following decades, one on union discrimination and the other on equal pay. While trade union membership is not a protected characteristic under the 2010 Equality Act in the UK, both

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Unions’ (2020) 52 *J. of Latin American Studies* 575; E. Kirk, ‘Contesting “Bogus Self-Employment” via Legal Mobilisation: The Case of Foster Care Workers’ (2020) 44 *Capital & Class* 531; A. Lejeune and H. Yazdanpanah, ‘Face au handicap: action syndicale et cadrages juridiques’ (2017) 30 *Politix* 55; J. Louis, *La Confédération Européenne des Syndicats à l’épreuve du droit et de la justice* (2019).

<sup>3</sup> S. Tالش and J. Pélisse, ‘How Legal Intermediaries Facilitate or Inhibit Social Change’ (2019) 78 *Studies in Law, Politics, and Society* 111.

<sup>4</sup> T. Colling, ‘Droit individuel du travail et mobilisation du droit par les syndicats britanniques’ (2011) 182 *L’Homme et la Société* 109.

<sup>5</sup> McCann, op. cit., n. 1.

<sup>6</sup> M. O’Sullivan et al., ‘Is Individual Employment Law Displacing the Role of Trade Unions?’ (2015) 44 *Industrial Law J.* 222.

<sup>7</sup> C. Guillaume, *Organizing Women: A Study of Gender Equality Policies in French and British Trade Unions* (2022); Louis, op. cit., n. 2; Kirk, op. cit., n. 2; J. Pélisse, ‘Les usages syndicaux du droit et de la justice’ in *La fonction politique de la justice*, eds J. Commaille and M. Kaluszynski (2007) 165; L. Willemez, ‘Quand les syndicats se saisissent du droit: invention et redéfinition d’un rôle’ (2003) 52 *Sociétés Contemporaines* 17; L. Willemez, *Le travail dans son droit: sociologie historique du droit du travail en France (1892–2017)* (2017).

<sup>8</sup> A. Bondy and J. Preminger, ‘Collective Labor Relations and Juridification: A Marriage Proposal’ (2021) *Economic and Industrial Democracy* 1.

<sup>9</sup> T. Colling, ‘No Claim, No Pain? The Privatization of Dispute Resolution in Britain’ (2004) 25 *Economic and Industrial Democracy* 555; T. Colling, ‘What Space for Unions on the Floor of Rights? Trade Unions and Enforcement of Statutory Individual Employment Rights’ (2006) 35 *Industrial Law J.* 140; E. Heery, ‘Debating Employment Law: Responses to Juridification’ in *Reassessing the Employment Relationship: Management, Work and Organisations*, eds P. Blyton et al. (2011) 71; B. Giraud, ‘“Quand on va au juridique, c’est qu’on a perdu”: le droit comme contrainte dans les mobilisations syndicales’ (2017) 118 *Politix* 131; A. Pollert, ‘Britain and Individual Employment Rights: “Paper Tigers”, Fierce in Appearance but Missing in Tooth and Claw’ (2007) 28 *Economic and Industrial Democracy* 110.

<sup>10</sup> McCann, op. cit., n. 1; Colling, op. cit., n. 4.

<sup>11</sup> A. Lejeune and J. Orianne, ‘Choisir des cas exemplaires: la *strategic litigation* face aux discriminations’ (2014) 38 *Déviante et Société* 55.

<sup>12</sup> Colling, op. cit., n. 4.

<sup>13</sup> E. Lehoucq and W. K. Taylor, ‘Conceptualizing Legal Mobilization: How Should We Understand the Deployment of Legal Strategies?’ (2020) 45 *Law & Social Inquiry* 166.

mobilizations (on equal pay in the UK and trade union membership in France) fall under anti-discrimination law, which has been found to offer a good vantage point from which to study legal mobilization variations between different countries.<sup>14</sup> This comparison therefore provides an original and longitudinal analysis of the conditions for the development and implementation of anti-discrimination law in France and the UK. Moreover, in both cases, trade unions were involved in the process as part of the solution, but also as part of the problem.<sup>15</sup>

Few studies have examined unions' legal mobilizations in different countries<sup>16</sup> and over a long period of time. This article addresses this gap by undertaking a comparative study that examines the following research questions:

1. What explains the likelihood that trade unions situated in different legal systems will turn to the courts to fight against workplace discrimination?
2. What are the impacts and limitations of these litigation strategies?
3. What are the prospects for trade unions to continue to act as 'legal intermediaries' in the fight against discrimination at work?

Addressing these questions will help to shed light on debates about anti-discrimination law enforcement, and the compatibility between juridified and collective forms of employment relations in the fight against discrimination at work.

Part 2 describes how mobilization theory can help us to understand unions' choice of specific repertoires of action, including legal mobilization. The methodology section (Part 3) presents the research design and discusses case selection and methods. The findings section (Part 4) draws on extensive qualitative data, including 80 semi-structured interviews, to explore the development of trade unions' legal mobilizations over time and in two different countries. The article concludes with a discussion of the main findings, reflecting on the relationships between structural factors and agency in the shaping of unions' legal mobilizations and evaluating how this mediation has impacted law enforcement.

## 2 | MOBILIZATION THEORY, TRADE UNIONS, AND LITIGATION STRATEGIES

Central to the sociology of collective mobilizations,<sup>17</sup> the concept of a 'repertoire of action' has been used to examine open, collective, confrontational, and innovative forms of mobilization.<sup>18</sup>

<sup>14</sup> A. Lejeune, 'Litigating with or against Other Groups? The Influence of Inter-Organisational Relations on Legal Mobilisation in Europe' (2020) 18 *Comparative European Politics* 840.

<sup>15</sup> H. Conley, 'Trade Unions, Equal Pay and the Law in the UK' (2014) 35 *Economic and Industrial Democracy* 309; H. Conley et al., 'Decentralisation and the Gender Pay Gap in the UK Context' in *The Gender Pay Gap and Social Partnership in Europe: Findings from 'Close the Deal, Fill the Gap'*, eds H. Conley et al. (2019) 24; C. Guillaume, 'Understanding the Variations of Unions' Litigation Strategies to Promote Equal Pay: Reflection on the British Case (1970–2000)' 39 *Cambridge J. of Economics* 363.

<sup>16</sup> Lejeune, op. cit., n. 14; A. Lejeune, 'Mobilisations du droit, dans ou hors des tribunaux? La lutte contre les discriminations au travail en Suède et en Belgique' in *L'Etat des droits: politique des droits et pratiques des institutions*, eds P. Y. Baudot and A. Revillard (2017) 61.

<sup>17</sup> C. Tilly, *From Mobilization to Revolution* (1978).

<sup>18</sup> V. Taylor and N. Van Dyke, "'Get Up, Stand Up": Tactical Repertoires of Social Movements' in *The Blackwell Companion to Social Movements*, eds D. A. Snow et al. (2004) 262.

In applying mobilization theory to industrial relations, Kelly presents the forms of collective action that are the focus of his discussion: strikes, overtime bans, go-slows, work-to-rule, petitions, lobbies, and collective appeals.<sup>19</sup> This definition incorporates legal strategies in their most explicit, formal, and strategic aspects, which are often put in the same category as litigation.<sup>20</sup> Moreover, unlike traditional institutional perspectives, the use of social movement theory concepts to study union approaches<sup>21</sup> acknowledges that collective action is shaped by the dialectical interplay between a broad range of structural and institutional factors that offer specific opportunities,<sup>22</sup> and the way in which leaders and activists interpret structural contexts, identify potential strengths and limitations, and mobilize different collective action frames to promote specific repertoires.

Among the structural factors that can explain why social movements or organizations pursue their goals through the courts, political opportunities<sup>23</sup> and legal opportunities<sup>24</sup> have been the subject of extensive literature. The polymorphic concept of 'legal opportunity structures' includes judicial receptivity/resistance to policy argument and legal stock,<sup>25</sup> material and organizational resources,<sup>26</sup> and procedural variables.<sup>27</sup> However, studies have shown that structural factors alone fail to explain why activists perceive opportunities.<sup>28</sup> As scholars have pointed out, they tend to choose options that conform to who they are or the ideas for which they stand.<sup>29</sup> Repertoires of action express specific organizational cultures that embody a set of values and practices. The fact of privileging one repertoire over another tends to reinforce beliefs and the attachment to shared cultural and gendered frames of meaning and action.<sup>30</sup> Conversely, studies have shown that the adoption of a legal framing has specific effects on the cause/situation that it seeks to define or defend, notably because of the abstract and universalizing nature of the law,<sup>31</sup> thus

<sup>19</sup> J. Kelly, *Rethinking Industrial Relations: Mobilization, Collectivism and Long Waves* (1998) 37–38.

<sup>20</sup> Lehoucq and Taylor, op. cit., n. 13.

<sup>21</sup> Kelly, op. cit., n. 19.

<sup>22</sup> S. Tarrow, *Power in Movement: Social Movements and Contentious Politics* (1998); Tilly, op. cit., n. 17.

<sup>23</sup> H. Kitschelt, 'Political Opportunity Structures and Political Protest: Anti-Nuclear Movements in Four Democracies' (1986) 16 *Brit. J. of Political Science* 57; Tarrow, id.

<sup>24</sup> E. A. Andersen, *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (2005); C. Hilson, 'New Social Movements: The Role of Legal Opportunity' (2002) 9 *J. of European Public Policy* 238.

<sup>25</sup> Hilson, id.

<sup>26</sup> V.-A. Chappe, 'Taking Trade Union Discrimination to Court: A Sociology of Support and Resources for Legal Action' (2014) 56 *Sociologie du Travail* 69; C. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (1998); M. Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law & Society Rev.* 95.

<sup>27</sup> K. J. Alter and J. Vargas, 'Explaining Variation in the Use of European Litigation Strategies: European Community Law and the British Gender Equality Policy' (2000) 33 *Comparative Political Studies* 452; Andersen, op. cit., n. 24; Hilson, op. cit., n. 24.

<sup>28</sup> L. Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK' (2012) 46 *Law & Society Rev.* 523.

<sup>29</sup> B. Doherty and G. Hayes, 'Having Your Day in Court: Judicial Opportunity and Tactical Choice in Anti-GMO Campaigns in France and the United Kingdom' (2014) 47 *Comparative Political Studies* 3; A. Lejeune, 'Fighting for Sheltered Workshops or for Inclusive Workplaces? Trade Unions Pursuing Disability Rights in Belgium' (2021) *Disability & Society* 1.

<sup>30</sup> F. Poletta and M. Jasper, 'Collective Identity and Social Movements' (2001) 27 *Annual Rev. of Sociology* 283.

<sup>31</sup> D. Sabbagh, *Equality and Transparency: A Strategic Perspective on Affirmative Action in American Law* (2007).

excluding other (political) categories of interpretation and restricting the panoply of means to combat it.<sup>32</sup>

Some repertoires of action might therefore be seen as more controversial than others, depending on identity politics.<sup>33</sup> While trade unions have frequently resorted to litigation to obtain and implement rights, the reliance on the courts has often been described as a last resort<sup>34</sup> associated with multiple challenges, including the risks of the individualization and depoliticization of disputes,<sup>35</sup> and the chances of undermining the autonomy of collective actors.<sup>36</sup> Ideologically, recourse to the courts has also been contested because of the conservative nature of the judiciary and the perception of a (male-dominated) *justice de classe* that favours the interests of employers.<sup>37</sup> Trade unions, like other subaltern groups, have usually fought defensively in the courts because this institutional terrain has been historically shaped by dominant groups.<sup>38</sup> Studies have shown that the habitual approaches to dispute resolution taken by union representatives ('reps') therefore continue to rely on historically successful pressure-building strategies, with negotiation leading to balloting.<sup>39</sup> Furthermore, the law is often perceived by trade unions as a set of institutional practices and norms that compete with or undermine the production of alternative norms through collective bargaining.

However, in a context of reduced structural and organizational power,<sup>40</sup> trade unionists may choose to extend their strategic capacity<sup>41</sup> and resort to a combination of repertoires of action,<sup>42</sup> including ones that are not preferred by their organization, such as legal mobilization. Understanding the conditions that can push trade unions to act as 'support structures'<sup>43</sup> for legal battles raises questions about the role of 'strategy entrepreneurs',<sup>44</sup> who may be in-house legal experts,<sup>45</sup> local trade unionists,<sup>46</sup> or 'cause lawyers'.<sup>47</sup> Moreover, as Vanhala puts it, there is 'a recursive

<sup>32</sup> V.-A. Chappe and N. Keyhani, 'La fabrique d'un collectif judiciaire: la mobilisation des cheminots marocains contre les discriminations à la SNCF' (2018) 68 *Revue Française de Science Politique* 7.

<sup>33</sup> L. Vanhala, 'Anti-Discrimination Policy Actors and Their Use of Litigation Strategies: The Influence of Identity Politics' (2009) 16 *J. of European Public Policy* 738.

<sup>34</sup> Guillaume, op. cit., n. 15; Colling, op. cit. (2004), n. 9; Colling, op. cit. (2006), n. 9; Giraud, op. cit., n. 9.

<sup>35</sup> E. Rose and N. Busby, 'Power Relations in Employment Disputes' (2017) 44 *J. of Law and Society* 674.

<sup>36</sup> G. Mundlak, *Fading Corporatism: Israel's Labor Law and Industrial Relations in Transition* (2017).

<sup>37</sup> J.-M. Denis, 'Les syndicalistes de SUD-PTT: des entrepreneurs de morale?' (2003) 45 *Sociologie du Travail* 307; S. Doumenc, 'Anarcho-syndicalisme et nettoyage: l'improbable politisation de la lutte par le recours juridique' (2019) 61 *Sociologie du Travail* 1.

<sup>38</sup> Galanter, op. cit., n. 26; McCann with Lovell, op. cit., n. 1.

<sup>39</sup> C. Bond, 'Trade Union Officers' Preferences and Attitudes towards Dispute Resolution: A Qualitative Follow-Up Study with Non-Users of Acas Collective Conciliation' (2011) 9 *Acas Research Paper*.

<sup>40</sup> S. Schmalz et al., 'The Power Resources Approach: Developments and Challenges' (2018) 9 *Global Labour J.* 113.

<sup>41</sup> M. Ganz, 'Resources and Resourcefulness: Strategic Capacity in the Unionization of California Agriculture, 1959–1966' (2020) 105 *Am. J. of Sociology* 1003.

<sup>42</sup> V.-A. Chappe et al., *La fin des discriminations syndicales? Luites judiciaires et pratiques négociées* (2019).

<sup>43</sup> Chappe, op. cit., n. 26; Epp, op. cit., n. 26.

<sup>44</sup> L. Vanhala, 'Is Legal Mobilization for the Birds? Legal Opportunity Structures and Environmental Nongovernmental Organizations in the United Kingdom, France, Finland, and Italy' (2018) 51 *Comparative Political Studies* 380.

<sup>45</sup> C. Guillaume, 'When Trade Unions Turn to Litigation: "Getting All the Ducks in a Row"' (2018) 49 *Industrial Relations J.* 227; L. Edelman, *Working Law: Courts, Corporations, and Symbolic Civil Rights* (2016); Lejeune, op. cit., n. 14.

<sup>46</sup> Guillaume, op. cit., n. 15.

<sup>47</sup> A. Sarat and S. Scheingold, *Cause Lawyering: Political Commitments and Professional Responsibilities* (1998).



relationship between activists and legal opportunities'.<sup>48</sup> Actors create their own opportunities and help to shape socio-legal structure,<sup>49</sup> but legal mobilizations can also be constrained by the legal and organizational response that they generate,<sup>50</sup> whether it be the evolution of legislation or the 'rights practice'<sup>51</sup> developed by organizations. While there has been some research on the conditions that lead activists to adopt litigation strategies, the effectiveness of these tactics, and employers' organizational responses to the threat of litigation,<sup>52</sup> less is known about the impact of legal mobilization on activists' organizations, which in this case are trade unions.

### 3 | METHODOLOGY

To test the explanatory value of these various theoretical perspectives, this article undertakes a comparative study of trade unions' legal mobilization to fight against workplace discrimination in France and the UK. The two countries were selected because they offer consistency in terms of the legal stock; as members of the EU (at the time of the study), a large proportion of their anti-discrimination legal provisions is influenced by EU legislation and case law. They also offer variation in terms of whether they operate under a common law legal system (the UK) or follow a civil code system (France). Furthermore, while French trade unions have repeatedly resorted to the law to have their rights recognized, it is the cause of equal pay that has been the subject of different waves of litigation in the UK. There are several reasons for these differing battlegrounds, including legislation and industrial relations traditions. Despite these differences, these two legal mobilizations have common features. They span several decades, have had fluctuating fortunes, have been played out on national and EU terrain, and have involved multiple actors, both legal professionals and activists acting as 'legal intermediaries'.<sup>53</sup>

In the UK, anti-discrimination law does not include trade union membership as a protected characteristic under the 2010 Equality Act.<sup>54</sup> Claims relating to trade union discrimination can be brought under Sections 146 and 152 of the Trade Union and Labour Relations (Consolidation) Act 1992 and trade unionists have repeatedly fought against victimization such as black-listing,<sup>55</sup> but individual claims remain limited. Furthermore, collective *laissez-faire* has been the main paradigm for industrial relations policy, relegating the state and the law to a secondary or

<sup>48</sup> Vanhala, op. cit., n. 28.

<sup>49</sup> Andersen, op. cit., n. 24.

<sup>50</sup> Edelman, op. cit., n. 45.

<sup>51</sup> J. Barnes and T. Burke, 'Making Way: Legal Mobilization, Organizational Response, and Wheelchair Access' (2012) 46 *Law & Society Rev.* 67; C. Guillaume et al., 'The Promises and Pitfalls of Collective Bargaining for Ending Union Victimization: Lessons from France' (2018) 39 *Economic and Industrial Democracy* 536.

<sup>52</sup> Chappe et al., op. cit., n. 42; Edelman, op. cit., n. 45; Barnes and Burke, id.

<sup>53</sup> Talesh and Pélisse, op. cit., n. 3.

<sup>54</sup> Under the 2010 Equality Act, there are nine protected characteristics: age, disability, gender reassignment, race, religion or belief, sex, sexual orientation, marriage and civil partnership, and pregnancy and maternity.

<sup>55</sup> In 2009, following an investigation by the Information Commissioner's Office, it was alleged that 44 employers within the construction industry had been paying to use a blacklist of more than 3,000 individuals provided by a third-party organization. Many of these organizations had been or currently were the subject of legal action. The Employment Relations Act 1999 (Blacklists) Regulations is a UK labour law regulation that penalizes a practice of listing trade union members for the purpose of discrimination against them, and potentially leads to criminal sanctions for employers and agencies who do so. D. Smith, and D. Chamberlain, *Blacklisted: The Secret War between Big Business and Union Activists* (2015).

coercive role when it comes to defending union rights.<sup>56</sup> UK trade unions have long been able to rely on the strength of their membership to enforce their rights. It was not until the 1990s that, following the suggestion of some lawyers,<sup>57</sup> unions began to take their case to the European Court of Human Rights, leading to the first pro-union judgment in 2002.<sup>58</sup> By contrast, due to the historically low level of union membership and the weak culture of social partnership in France, French trade unions have relied heavily on legislation to obtain and enforce their rights. French anti-discrimination law now recognizes 25 criteria, including trade union membership.

When it comes to equal pay, the two countries have followed different institutional paths.<sup>59</sup> Whereas in France there has been a repeated reliance on state intervention and mandatory collective bargaining,<sup>60</sup> the implementation of equal pay rights in the UK has relied on a limited number of (admittedly) pioneering items of legislation, the intervention of equality agencies (which have seen their powers weakened over time), and an ‘embedded voluntarism’<sup>61</sup> that leaves open the question of the implementation of rights.<sup>62</sup> These structural factors partly explain the particular terrain of unions’ legal mobilizations in the two countries but say nothing about the conditions under which unions have mobilized the courts.

In the UK, 40 interviews were conducted in 2012 and 2015 with union officers from different unions (including UNISON, the GMB, UNITE, and PCS) and with lawyers and experts who have been involved in equal pay claims since the 1970s. These interviews were supplemented by various secondary sources, including reports published by the Equal Opportunities Commission (EOC), internal union documents, and the archives gathered on the website *Winning Equal Pay: The Value of Women’s Work*. In France, the research draws on 25 interviews with Confédération Générale du Travail (CGT) union reps and officials and 15 interviews with Confédération Française Démocratique du Travail (CFDT) union officers (some retired) and other individuals involved in union anti-discrimination litigation since the 1990s (lawyers, legal experts, and labour inspectors), some of whom were interviewed several times between 2011 and 2017. We also analysed parliamentary debates on anti-discrimination law and various documents relating to the topic: tribunal decisions and rulings, lawyers’ submissions, CGT internal documents, and issues of the CFDT magazines *Synicalisme Heddo* and *Action Juridique* covering union rights and discrimination since 1965.

During the interviews, respondents were asked a series of questions on the circumstances of their engagement with anti-discrimination litigation, the history and development of the various legal battles, the legal hurdles and potentialities of anti-discrimination law, the relations between trade unionists, legal experts, and claimants, and their views on the relationships between

<sup>56</sup> C. Howell, *Trade Unions and the State: The Construction of Industrial Relations Institutions in Britain, 1890–2000* (2005).

<sup>57</sup> See for example Lord (John) Hendy, who is ‘best known for his work in industrial relations and employment law, having appeared in most of the UK’s leading collective labour law cases in the last 36 years’. Old Square Chambers, ‘Lord (John) Hendy QC’ *Old Square Chambers*, at <<https://oldsquare.co.uk/people/lord-hendy-qc/>>.

<sup>58</sup> *Wilson v. United Kingdom* [2002] ECHR 552.

<sup>59</sup> C. Guillaume, ‘Overcoming the Gender Pay Gap: Equal Pay Policies in France and the United Kingdom’ in *Gender and Family in European Economic Policy: Developments in the New Millennium*, eds D. Auth et al. (2017) 63.

<sup>60</sup> S. Milner and A. Gregory, ‘Gender Equality Bargaining in France and the UK: An Uphill Struggle?’ (2014) 56 *J. of Industrial Relations* 246; S. Milner et al., ‘Bargained Equality: The Strengths and Weaknesses of Workplace Gender Equality Agreements and Plans in France’ (2019) 57 *Brit. J. of Industrial Relations* 275.

<sup>61</sup> R. Verdin and J. O’Reilly, ‘What Future for Gender Equality Policy in the UK after Brexit?’ (2020) 70 *The Northern Ireland Legal Q.* 1.

<sup>62</sup> L. Dickens, *Making Employment Rights Effective: Issues of Enforcement and Compliance* (2012).



litigation and other unions' repertoires of action. All interviews were recorded and transcribed verbatim. Qualitative data was stored, organized, and thematically coded using research software NVivo and Atlas-Ti.

## 4 | FINDINGS AND ANALYSIS

This section is divided into two parts. The first investigates the multi-faceted and complex legal mobilization that has sustained the making and implementation of equal pay legislation in the UK since 1970. It describes the different waves of litigation, linked to the evolution of the national and EU legal opportunities, and the key role of 'critical actors'<sup>63</sup> such as the EOC, created in 1975, and 'insider feminists'<sup>64</sup> within various institutions, and the more contested role of trade unions. This case highlights the rather defensive nature of this legal mobilization, from the trade unions' perspective, despite the increase in the number of women members (and potential claimants) and the difficulties of linking litigation strategies with more traditional repertoires of action such as collective bargaining. However, it also shows how this experience of mobilizing the courts has contributed to the strengthening of trade unions' legal expertise.<sup>65</sup>

The second part examines the increased use of the courts that has sustained the improvement of union anti-discrimination legislation in France since the 1970s. It describes the evolution of unions' legal strategies, depending on legal and political opportunity structures. It also points to the role of 'strategy entrepreneurs'<sup>66</sup> who have promoted the use of legal tactics within trade unions and contributed to the development of robust methods of assessing and correcting union discrimination. However, this example also points to the mediating effect of the way in which victims of discrimination experience themselves as legal subjects<sup>67</sup> in the mobilization of the law. Though trade unionists have benefitted directly from the new legal provisions against union discrimination, this legal categorization has clashed with the sacrificial representation that some of them had of their commitment, as well as their aversion to the professionalization of trade unionism that more protective collective agreements represent.

### 4.1 | Equal pay and UK trade unions: litigation '*malgré soi*'

#### 4.1.1 | The impact of second-wave feminism on the development of legal opportunities

In the UK, the first Equal Pay Act was introduced in 1970 as the country was about to join the EU and following a memorable strike led by female workers at the Ford factory in Dagenham in 1968. The legislation gave employers five years to correct the most blatant direct forms of discrimination. Subsequent to the enforcement of the Equal Pay Act in December 1975, numerous claims

<sup>63</sup> S. Childs and M. L. Krook, 'Analyzing Women's Substantive Representation: From Critical Mass to Critical Actors' (2009) 44 *Government and Opposition* 125.

<sup>64</sup> L. A. Banaszak, *The Women's Movement: Inside and Outside the State* (2010).

<sup>65</sup> Guillaume, op. cit., n. 45.

<sup>66</sup> Vanhala, op. cit., n. 44.

<sup>67</sup> Chappe, op. cit., n. 2; McCann with Lovell, op. cit., n. 1.

were lodged by low-paid women. However, early studies of the use of the equal pay legislation highlighted the unsympathetic attitude of judges, Advisory, Conciliation and Arbitration Service (Acas) experts,<sup>68</sup> and trade unionists towards complainants.<sup>69</sup> Between 1975 and 1982, the number of claims dropped sharply from 1,800 in 1976 to 39 in 1982, notably because employers abolished separate male and female pay scales. However, the maintenance of gendered job segregation and separate collective bargaining for different groups made use of the law more difficult, as the Equal Pay Act stipulates equal pay only for 'like work' or 'work rated as equivalent'.<sup>70</sup>

In the early 1980s, the EOC, which considered the Equal Pay Act to be too limited in its scope, adopted a litigation strategy that sought to take advantage of EU legislation in order to counter the narrow rulings from the Employment Appeal Tribunal (EAT)<sup>71</sup> and campaigned for the introduction of an 'equal value' amendment in 1984.<sup>72</sup> Though it was not described as feminist in the early years of its existence,<sup>73</sup> the EOC used its independence and narrow mandate to develop strategic litigation with the help of trade unions and backed the first 60 claims for equal value.

Most of the complaints that we supported at that time we did so with the women's union. Unlike equal pay for equal work, equal value allows for a collective approach to problems. Unions were also looking for ways to combat union decline. They saw equal pay as a way to attract new members – in this case, women. It was also a time when women's voices were beginning to be heard in some unions and there were a few women regional officers and one or two national officers who were strong supporters of the cause of equality. The complaints took only two or three years to be adjudicated. The EOC provided legal expertise, trained activists, and covered half the costs. And this benefitted the members and the unions, which in turn had a good image with the employees. (woman, former legal expert, EOC)

This strategy helped to build a strong body of case law and gradually attracted the support of the judiciary,<sup>74</sup> with more competent judges than in the past. The number of claims began to rise again (from 380 in 1986, to 570 in 1987, to 1,000 in 1988). By the end of the 1980s, the number of multiple claims started to increase. However, these cases rarely involved more than 50 people.<sup>75</sup> Many were supported by local trade unionists who could find good reasons to get involved, including the need to unionize women as well as a form of 'male protectionism', as one lawyer put it, 'by ensuring

<sup>68</sup> Acas is a **non-departmental public body** devoted to preventing and resolving employment disputes.

<sup>69</sup> A. Leonard, *Judging Inequality: The Effectiveness of the Industrial Tribunals System in Sex Discrimination and Equal Pay Cases* (1987).

<sup>70</sup> By law, 'equal work' counts as either 'like work' (work where the job and skills are the same or similar) or 'work rated as equivalent' (work rated as equivalent, usually using a fair job evaluation).

<sup>71</sup> C. Barnard, 'A European Litigation Strategy: The Case of the Equal Opportunity Commission' in *Dynamics of European Integration*, eds J. Shaw and G. Moore (1996) 253.

<sup>72</sup> According to the Equality and Human Rights Commission, the third way in which a woman can claim 'equal work' with a man is if she can show that her work is of equal value to his in terms of the demands made on her, such as the effort involved, the training or skills necessary to do the job, the conditions of work, and the decision making that is part of the role.

<sup>73</sup> J. Gregory, *Sex, Race and the Law: Legislating for Equality* (1987).

<sup>74</sup> Alter and Vargas, *op. cit.*, n. 27.

<sup>75</sup> There were 120 cases for 'equal value' between 1984 and 1988.

that women did not cost less than men' (woman, lawyer). Their appetite for legal mobilization was also fuelled by the influence of the first female union leaders and the 'insider feminists' emerging in public-sector unions in the wake of the development of 'municipal feminism'<sup>76</sup> in large cities. In 1988, the Trades Union Congress (TUC) set up an equal rights unit and developed training and negotiation expertise. The role of some female job evaluation experts, such as Sue Hasting, was also key to embedding equal value in trade union practices. Used as experts in court cases, in the implementation of new job classification agreements, and in trade union training, these women, whose names were often mentioned in interviews, played a critical role in understanding and implementing equal value legislation.<sup>77</sup> However, these cases often took a very long time to be settled and were very costly.

I am this awkward combination of a feminist and unionist ... Firstly, I worked for Lewisham Council near London in 1984. Back then, it was not yet the Greater London Council, and it was basically lots of lefties like me. I was an advisor on women's employment, or something like that. I was in personnel, which was quite interesting, because I was inside. My whole job was gender equality in employment, which meant developing equal pay policies, but also developing training for women in traditionally male professions. Basically, it was an affirmative action programme. Later, I was hired by the TUC. I managed to persuade them to organize a series of training sessions over two years, on the 'equal value amendment' voted in 1984. We went around regional areas. We invited experts, but also quite a lot of lawyers. I knew all the high-flying progressive lawyers who worked in the area. And they were very generous with their time and expertise. (woman, former senior officer, TUC)

#### 4.1.2 | The central role of EU law and courts

While the legal mobilization of the 1980s allowed for the growth of case law thanks to the importing of EU legal concepts such as indirect discrimination<sup>78</sup> and the development of innovative job evaluation methods,<sup>79</sup> it also showed the difficulty of integrating these notions into the individualistic framework of the Equal Pay Act.<sup>80</sup> Furthermore, in drafting the regulations, the government had introduced a (genuine) 'material factor defence' that allowed employers to argue that there was another explanation for the differences in pay than the difference in sex,<sup>81</sup> which resulted in repeated appeal strategies and lengthy legal procedures.

<sup>76</sup> I. Bruegel and H. Kean, 'The Moment of Municipal Feminism: Gender and Class in 1980s Local Government' (1995) 44/45 *Critical Social Policy* 147.

<sup>77</sup> Conley et al., op. cit., n. 15.

<sup>78</sup> 'Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.' Council Directive 2000/43/EC Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin [2000] OJ L180/22.

<sup>79</sup> K. Gilbert, 'Promises and Practices: Job Evaluation and Equal Pay Forty Years On!' (2012) 43 *Industrial Relations J.* 137.

<sup>80</sup> S. Fredman, 'Reforming Equal Pay Laws' (2008) 37 *Industrial Law J.* 193.

<sup>81</sup> Examples of genuine material factor defences that employers have used to defeat equal pay claims include market forces and skills shortages, geographical differences, and different skills, qualifications, and experience.

In the early days, the judicial process was much less formal, and complaints were handled by the trade unionists themselves. Then employers started to appeal and were assisted by lawyers. It became much more 'legalistic'. Things became more technical and more expensive. (woman, former legal officer, APEX/GMB)

In the 1990s, a third wave of litigation arose from the discriminatory nature of the classification agreements negotiated in the public sector in the 1980s. The major unions pushed employers and the government to undertake a wide pay and grading review for manual workers in local government in 1988.<sup>82</sup> The new classification improved the situation of certain categories of female employees in exchange for more flexibility but did not affect the bonuses routinely granted to male-dominated jobs (such as refuse collectors and gardeners) and maintained the principle of separate negotiations for the different job groups.

What's amazing when you look at my political background is that it seemed to me that it was also in the nature of things that men get bonuses and women don't. I was working in a 100 per cent male team. I wasn't responsible for negotiating for women. After a while, I still thought it was unfair and I went to see the Deputy General Secretary who was responsible for all the negotiations and he told me that it was the 'Winter of Discontent'<sup>83</sup> that had brought us to this point, but that none of the unions had any intention of going to court. (man, former union officer, NUPE)

By the mid-1990s, the discriminatory nature of this review that maintained 'productivity' bonuses for male-dominated jobs had become very apparent. Following the settlement of the speech therapists' case in 1993, where the European Court of Justice (ECJ) ruled that separate collective bargaining arrangements could not be used as an argument against an equal pay claim,<sup>84</sup> a GMB female regional organizer initiated a group claim against Cleveland County Council with the help of a lawyer, Stefan Cross, who became quite famous (and criticized) for his commitment to large-scale equal pay litigation.

I started the first litigation in 1995 when I worked at Thompsons. In Cleveland City Hall, the employer had implemented a series of measures to reduce jobs and wages. Ironically, one of the UNISON trade unionists had suggested cutting budgets and wages for female canteen workers, rather than for male jobs. In the spirit of inter-union competition, the GMB, which was a minority union, decided to oppose the UNISON proposal and came to me. They wanted to fight against wage cuts, not for equal pay. I was the one who told them that there was potentially a gender discrimination complaint, because only women's wages were being reduced, and an equal pay complaint. And we won. (Stefan Cross)

To avoid further litigation, the Conservative government decided to launch negotiations on harmonizing the conditions of former administrative, professional, technical, and clerical (APT&C)

<sup>82</sup> L. Dickens et al., *Tackling Sex Discrimination through Collective Bargaining: The Impact of Section 6 of the Sex Discrimination Act 1986* (1988).

<sup>83</sup> During the winter of 1978–1979, more than 2,000 strikes erupted across the UK as workers rejected the then Labour government's attempts to curtail wage increases with an incomes policy.

<sup>84</sup> Case C-127/92 *Enderby v. Frenchay Health Authority* [1993] IRLR 591.

staff and manual workers in local government (the Single Status Agreement 1997). In addition, a new job evaluation scheme was developed to address grading and equal pay issues. However, contrary to the Agenda for Change Agreement 2004 negotiated in the National Health Service, the government did not allocate special funding for local authorities to implement Single Status, placing a huge financial burden on them and possibly threatening jobs. Moreover, councils were given a great deal of flexibility in relation to the choice of job evaluation scheme,<sup>85</sup> which led to variable implementation. Many councils dragged their feet on it, which left the door open for litigation.

Once again, recourse to the ECJ contributed to the increase in the number of disputes. The removal of a provision in the Equal Pay Act 1970 limiting compensation for breach to two years' back pay<sup>86</sup> and the extension in some cases of the six-month period after employment<sup>87</sup> has ended during which a claim must be brought<sup>88</sup> helped to boost the fourth wave of multiple claims. Though class action is not permitted in UK employment law, claims can be grouped in such a way that the courts manage a multiplicity of claims via the use of test cases. By this time, Cross had launched his own law firm. He organized information campaigns in local councils and hospitals, recruiting former union reps to raise rights awareness and trigger individual claims. Between 2004 and 2005, he alone generated 10,000 claims, forcing unions to take on new cases. His litigation activity then increased steadily, followed by that of UNISON and the GMB (Table 1).

These equal pay claims (mostly for the same or equivalent work) accounted for a large number of the multiple claims submitted to employment tribunals in the years between 2008 and 2013. The volume of employment tribunal complaints has decreased since 2011, notably because Cross has ceased his activity in England (but not in Scotland) and most of the litigation in local authorities has dried up. A few remaining group claims, sometimes supported by strikes, such as the one initiated by a coalition of actors including large unions and various law firms against Glasgow City Council,<sup>89</sup> have recently ended in massive settlements. However, it seems that the attention of lawyers is now focused on the private sector.

I spoke to a very big law firm recently and said, you know, 'We are really keen to pick up this fight in local authorities' and they said 'We thought that was kind of done so we've moved on to supermarkets', and while it's really important to move on to the supermarkets because they have such grievous equal pay issues clearly in these supermarkets, it is not done in local authorities. There's no appetite for a fight, because everyone just thinks 'We did Single Status and we did all these settlements – please don't make us live through that again'. (woman, union official, GMB)

Major litigation in the retail sector is still in progress. A lawsuit involving 35,000 Asda employees initiated in 2016<sup>90</sup> (with the initial support of the GMB) has paved the way for similar claims

<sup>85</sup> Conley et al., op. cit., n. 15.

<sup>86</sup> This followed two ECJ rulings: Case C-246/96 *Magorrian and Cunningham v. Eastern Health and Social Services Board and Department of Health and Social Services* [1998] IRLR 86; Case C-326/96 *B. S. Levez v. T. H. Jennings (Harlow Pools) Ltd* [1998] IRLR 36 (effective 2000 in the UK).

<sup>87</sup> This followed the ECJ decision on Case C-78/98 *Preston v. Wolverhampton Healthcare NHS Trust* [2000] IRLR 506.

<sup>88</sup> This was implemented with effect from 19 July 2003 by the Equal Pay Act 1970 (Amendment) Regulations 2003 SI 2003/1656.

<sup>89</sup> *Glasgow City Council & Ors v. UNISON Claimants & Ors* [2014] ScotCS CSIH 27.

<sup>90</sup> *Asda Stores Ltd v. Brierley* [2016] EWCA Civ 566.

TABLE 1 Equal pay litigation in the UK

	1999– 2000	2000– 2001	2001– 2002	2002– 2003	2003– 2004	2004– 2005	2005– 2006	2007– 2008	2008– 2009	2009– 2010	2010– 2011
Equal pay claims received	4,712	17,153	8,762	5,053	4,412	8,229	17,268	62,700	45,700	37,400	34,600
Jurisdictions disposed	590	1,288	2,252	1,158	1,563	3,943	11,323	9,471	20,148	20,100	25,600
Withdrawn	233	936	665	484	668	1,493	4,373	4,899	16,335	14,300	15,300
Acas conciliated settlements	229	208	381	173	578	1,559	1,441	1,512	2,000	2,300	3,000
Struck out not at a hearing (disposed of otherwise)	18	89	1,021	409	240	778	1,614	2,189	1,629	3,100	5,300
Successful at tribunal	9	11	149	47	51	20	3,722	678	36	200	280
Dismissed at preliminary hearing (dismissed at hearing – out of scope)	26	9	8	3	3	17	23	83	62	110	36
Unsuccessful at hearing (dismissed at hearing – other reasons)	75	35	28	43	23	76	124	105	82	77	1,700
Default judgment	N/A	N/A	N/A	N/A	N/A	N/A	26	5	4	10	7

Source: Employment tribunal and EAT statistics reports, Ministry of Justice, 1999–2011.

Note: Since 2012, the quarterly reports on statistics released by the Ministry of Justice no longer include the number and type of employment cases being filed.



in the sector made by employees of Tesco, Sainsbury's, Morrisons, Co-op, and Boots. However, unsurprisingly, these claims face the same legal hurdles as other equal value battles, particularly in relation to comparators and comparability, disclosure of information, and remedy. Again, EU law has been useful in advancing some of the private-sector claims, including that of Tesco employees.

We ended up in the European Court with Tesco. And it's really about the employers' drive to keep these cases delayed and prolonged and in the foothills for as long as possible. But we've shown that actually comparability can be a very simple test. And in most cases where there is one employer you're probably going to be able to compare yourself. So in the supermarket cases, you know, they make all sorts of clever arguments around common sense, being complex, and us having to create hypothetical scenarios, but it's been incredibly helpful having the EU being able to intervene in the last case in the UK actually. So we're really happy that we managed to get that reference in. And the reason why we did was because EU law has had such a significant impact on the progression of equal pay in this country. So the treaty on the functioning of the European Union provides us with a fundamental right to equal pay. And the phrasing is incredibly simple. (woman, lawyer)

However, this leverage provided by EU law will disappear following Brexit.

#### 4.1.3 | A selective and professionalized trade union approach to litigation

Trade unions have professionalized their legal services<sup>91</sup> and continue to support individual claims, such as that of the BBC *Newsnight* presenter Samira Ahmed.<sup>92</sup> With the backing of the National Union of Journalists, Ahmed recently successfully claimed that she was owed almost £700,000 in back pay because of the difference between her £440-an-episode rate and the £3,000 an episode that Jeremy Vine received for hosting *Points of View*, a similar programme to *Newsnight*. However, trade unions have now reverted to their defensive stance and put their efforts into the negotiation and implementation of job evaluation schemes, supported where necessary by organizing campaigns and industrial disputes. While they consider legal support as a service for their members, unions' engagement in equal pay litigation has been *malgré soi*, driven by external and internal 'critical actors' such as local trade unionists ahead of their time,<sup>93</sup> the first female leaders, or feminist lawyers who have sometimes reached agreement around a feminist-classist framing of the cause (such as advocacy for low-skilled women).<sup>94</sup> While union reps have developed close and collaborative relationships with lawyers, sometimes forming partnerships, they have, nevertheless, pointed to the differences in their positions in the long fight for equal pay.

When lawyers enter the landscape, all the stakes change, and we lose all bargaining power. Some negotiations in local government have been going on for years, with

<sup>91</sup> Guillaume, op. cit., n. 45.

<sup>92</sup> *Samira Ahmed v. BBC* [2020] 1 WLUK 16.

<sup>93</sup> Guillaume, op. cit., n. 15.

<sup>94</sup> L. Oliver et al., 'Equal Pay Bargaining in the UK Local Government' (2014) 56 *J. of Industrial Relations* 228.

strikes by male employees and all sorts of employer strategies to ‘protect men’s pay’. We have to continue representing male members, while maintaining a good relationship with the employer. Lawyers don’t have this problem. They come and go. (woman, union officer, UNISON)

The experience of litigation itself – with its share of financial constraints, adversarial appeal strategies, and emotional support for complainants – has rarely convinced union reps to integrate legal mobilization into their conventional repertoires of action. Most have returned to more usual union activities and the memory of the legal battles fought sometimes seems forgotten.

At times, it was almost impossible. I worked many weekends and evenings because we had deadlines. It was interesting, but I wouldn’t say I enjoyed it. I was always afraid that we would lose and that my hierarchy would do the accounts and say ‘Do you realize how much money we spent?’ (man, union officer, PCS)

Furthermore, the relationships between litigation and collective bargaining have proved complex and controversial.<sup>95</sup> Litigation has developed on the back of discriminatory collective bargaining practices but, without the existence of collective agreements, it is doubtful that pay arrangements would have been sufficiently transparent for litigation to be launched. It has delivered tangible gains for some highly disadvantaged groups – white women from the 1970s to the 1990s and Black, Asian, and minority ethnic women in the 2000s – who are over-represented in low-skilled jobs in the public sector and whose interests had been neglected by trade unions.<sup>96</sup> It has also helped to secure bargaining outcomes by forcing employers to negotiate large-scale grading and pay agreements in the public sector. However, some scholars have argued that the threat of litigation has led to an increase in employers’ intransigence and the cost of equal pay settlements has constrained and stalled implementation.<sup>97</sup> Unions are afraid to renegotiate equal pay agreements that have now aged. Furthermore, contrary to what one might have hoped, these battles have not paved the way for a re-evaluation of women’s work, which has deteriorated under the combined effect of austerity measures, privatization, and lack of expertise in and commitment to the implementation of job evaluation schemes.

We did not fix the problem. What I’ve been going through recently is speaking to local authorities, getting information, speaking to workers, and what I’m finding is time and time again the people I speak to, whether it’s from HR [human resources] or the job evaluation team, they aren’t trained, they aren’t an analyst, they’ve not got any expertise in what they’re doing. You’re asking for basic information – they don’t have it. They don’t keep rank orders anymore. They can’t provide you with basic information like decent up-to-date job roles. There is an HR company – they do some equal pay audits in a number of local authorities, and these are equal pay audits that don’t mention equal pay once, they don’t look at equal pay. And it’s extraordinary – there

<sup>95</sup> Conley et al., op. cit., n. 15; S. Deakin et al., ‘Are Litigation and Collective Bargaining Complements or Substitutes for Achieving Gender Equality? A Study of the British Equal Pay Act’ (2015) 39 *Cambridge J. of Economics* 381; C. Guillaume, ‘Les syndicats britanniques et le recours au contentieux juridique’ (2015) 7 *Nouvelle Revue du Travail* 25.

<sup>96</sup> M. Beirne and F. Wilson, ‘Running with “Wolves” or Waiting for a Happy Release? Evaluating Routes to Gender Equality’ (2016) 30 *Work, Employment and Society* 220.

<sup>97</sup> Oliver et al., op. cit., n. 94.

is a collective unwillingness to deal with these issues because it's so hard. (woman, union official, GMB)

## 4.2 | Union victimization and French trade unions: litigation *'pour soi'*

### 4.2.1 | Unions going to court to obtain the right to perform their role

In France, freedom of association is enshrined in the preamble to the 1946 Constitution. The law of 16 April 1946 reinstated union reps, who had been prohibited during the war, and criminalized employers who refused to recognize trade unions' role. Ten years later, the law of 27 April 1956, known as the 'Moisan Act', provided broader legal resources against trade union victimization, preventing employers from taking union membership into consideration when making decisions regarding recruitment, promotion, wage, disciplinary measures, and dismissal. Later, during the May 1968 strikes, the three major unions – the CGT, the CFDT, and the Force Ouvrière – asked for recognition of shop stewards, a request that was finally enacted in the law of 27 December 1968. Despite these positive developments, analysis of the CFDT trade union press attests to the frequency of trade union victimization,<sup>98</sup> including unfair dismissals, in the 1970s.<sup>99</sup> This was a decade characterized by numerous strikes<sup>100</sup> and a succession of right-wing governments reluctant to give more power to trade unions. In this tense social and political context, the CFDT's legal department devised a distinctive judicial strategy<sup>101</sup> aimed at protecting trade unionists from victimization and unfair dismissal,<sup>102</sup> at a time when employment law was developing and becoming more politicized.

All the preliminary work on union discrimination began under the authority of Jean-Paul Murcier, who was the head of the CFDT's legal services. At that time, there were about ten emblematic cases brought by the CFDT and their lawyers, notably on the issue of unfair dismissals. (man, lawyer)

This strategy succeeded in creating an extensive case law that, among other things, gave union reps a special status that overrides ordinary law and distinguishes their situation from the 'normal' employment relationship, allowing their reinstatement when dismissed.<sup>103</sup> While the CFDT played a leading role in this legal mobilization, it also involved the CGT and legal professionals

<sup>98</sup> V.-A. Chappe et al., *L'évolution de la conflictualité et des usages du droit dans les organisations syndicales* (2018).

<sup>99</sup> This was despite the legal requirement that had existed since 1945 to apply for an administrative authorization to dismiss a union rep, which companies circumvented by preferring to pay the associated financial penalties.

<sup>100</sup> Between 1976 and 1980, 3,241,580 days of strike were reported, twice as many as between 1980 and 1985. See S. Sirot, *La grève en France: une histoire sociale (XIXe–XXe siècle)* (2002).

<sup>101</sup> Chappe et al., op. cit., n. 98; Willemez, op. cit. (2003), n. 7.

<sup>102</sup> Willemez, op. cit. (2017), n. 7.

<sup>103</sup> Various decisions have helped to establish the principle of this protective status: the Cour de Cassation in the *Perrier* judgments of 21 June 1974 (Bull. 1974, Ch. mixte, No. 3, Appeal No. 71-91.225; Bull. 1974, Ch. mixte, No. 2, Appeal No. 72-40.054; Bull. crim. 1974, Ch. mixte, No. 236, Appeal No. 71-91. 225); the Conseil d'Etat in 1976 and 1977 (Safer d'Auvergne judgment of 5 May 1976; Abellan judgment of 18 February 1977); and the Conseil Constitutionnel in 1988 (Decision No. 88-244 DC of 20 July 1988; Decision No. 91-284 DC of 16 January 1991).

who helped to develop labour and anti-discrimination laws using new procedural tools and techniques.

There were the CFDT lawyers who met with the CFDT legal service. The lawyers of the CGT met with the CGT. And then there was a larger group, from the moment the French lawyers' union [Syndicat des Avocats de France, SAF] was created. It was a collective forum for socializing knowledge and practice in the field of labour law. It was not just an intellectual exercise – we talked about methodology, all sorts of procedural techniques such as the use of fast-track hearing procedures, that have been gradually refined by each and every one of us. (man, lawyer)

The election of François Mitterrand and the passing of the Auroux Laws in 1982 served as a turning point for the CFDT's judicial strategy. The aim of these laws was to enhance the role of trade unions at the workplace level by restricting employers' disciplinary power, creating a right of expression for employees, strengthening union reps' rights, and requiring annual negotiations on wages and working time. Partly involved in the formulation of these laws, the CFDT dropped its litigation strategy and decided to focus on the implementation of the new rights obtained and to support the decentralization of collective bargaining.<sup>104</sup> However, during the 1980s, many union reps, including some in the CFDT, experienced and accepted wage and career discrimination as the price of their union work.<sup>105</sup> This acceptance was gradually called into question as union power declined sharply.

One of the reasons I joined this legal battle is that being committed to the trade union is difficult. I thought this fight against discrimination could be rewarding if the message we sent to the new generation was that we were not going to be penalized by our commitment to the union. Otherwise, they would have needed to have a very strong sense of vocation to take over. (man, former union officer, CGT)

#### 4.2.2 | Developing a method for obtaining redress with the help of cause lawyers

In the mid-1990s, a landmark case against Peugeot-Citroën (PSA) known for its repressive policy against union members,<sup>106</sup> was brought by CGT union reps with the support of a labour inspectorate and an in-house CGT legal expert with a view to obtaining redress in terms of wage and career development after years of blatant discrimination. The CGT's victory, which resulted in the awarding of financial compensation to 169 claimants, clearly anticipated the EU directives – in particular, regarding the burden of proof – and served as a model, generating a flood of claims filed before the courts<sup>107</sup> and shifting the demand for protection from trade union rights to the interests of unions reps as individuals. Helped by famous 'cause lawyers' such as Tiennot Grum-

<sup>104</sup> Chappe et al., op. cit., n. 98.

<sup>105</sup> Chappe, op. cit., n. 26.

<sup>106</sup> N. Hatzfeld, 'An Exemplary Legal Battle against Union Discrimination at the Peugeot-Sochaux Plant (1995–2000)' (2017) 5 *Travail et Emploi* 31.

<sup>107</sup> Chappe, op. cit., n. 26.

bach,<sup>108</sup> who was affiliated to the left-wing lawyers' union,<sup>109</sup> a former PSA plaintiff, François Clerc, organized a national anti-discrimination group within the CGT that acted as a 'support structure'<sup>110</sup> for an increased number of complaints in other large companies.

We had to find a lawyer. We asked François Clerc. We asked him everything. Our lawyer was one of the young labour lawyers. He told us 'She has the right profile – go for it'. That was in 2004–2005. He explained his methods to us and we said 'We are at the CGT, it's the official method, we're going to follow it'. (man, union rep, CGT)

Clerc formed a lasting partnership with Emmanuelle Boussard-Verrecchia, a specialist lawyer who has conducted many lawsuits for the CGT; she was trained by Grumbach, along with other lawyers who call themselves the 'Tiennot babies'. The systematization of litigation was clearly helped by their growing expertise and the design of a specific statistical method that made it possible to identify the extent of the wage discrimination suffered by trade unionists.<sup>111</sup> As shown in Figure 1, this method is based on the diachronic comparison of a control group panel and one or more employees who may have suffered discrimination to reveal the growing salary gap between the potential victim and the comparators and to calculate the accumulated shortfall.

Clerc and Boussard-Verrecchia's efforts to disseminate this method within the CGT's networks and to convince other lawyers of its usefulness, coupled with the media coverage of successful cases and the level of compensation obtained, contributed to the increase in the number of litigation cases. The growing case law progressively incorporated EU legal concepts and arguments, notably at the level of the Cour de Cassation.<sup>112</sup> In 2001, the enactment of a new

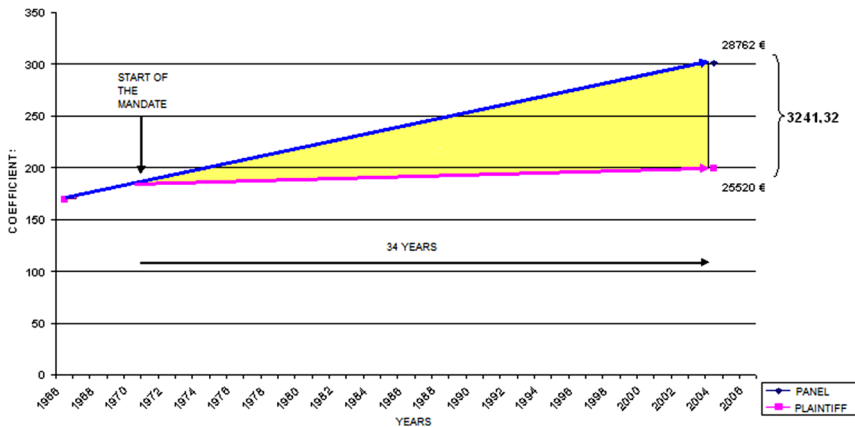


FIGURE 1 The CGT comparative method

<sup>108</sup> J.-P. Tonneau, 'Les pratiques militantes d'un avocat travailliste contre des restructurations d'entreprises: cinq cas de contestation judiciaire (1990–2000)' (2017) 118 *Politix* 77.

<sup>109</sup> The SAF was created in 1974.

<sup>110</sup> Chappe, op. cit., n. 26.

<sup>111</sup> V.-A. Chappe, 'La preuve par la comparaison: méthode des panels et droit de la non-discrimination' (2011) 23 *Sociologies Pratiques* 45.

<sup>112</sup> Soc. 30 April 2009, No. 06-45.939; Soc., 28 March 2000, Bull. 2000, V, No. 126, Appeal Nos 97-45.258 and 97-45.259; Soc., 15 March 2005, Bull. 2005, V, No. 86, Appeal Nos 02-43.616 and 02-43.560; Soc., 23 November 2005, Bull. 2005, V, No. 332, Appeal No. 03-40.826; Crim., 9 November 2004, Bull. crim. 2004, No. 279, Appeal No. 04-81.397.

anti-discrimination law also helped to sustain litigation efforts, as Boussard-Verrecchia noted in interview: '[T]he 2001 law has been a great breath of fresh air. The shift of the burden of proof made things a lot easier for us.' However, many of these collective claims took a long time to settle and benefitted only a few of the plaintiffs. Despite its successes, this litigation *pour soi* remained controversial within the CGT. The meritocratic framing<sup>113</sup> of the judicial battle aiming at recognizing 'the right to average career progression' for union reps has been (and continues to be) difficult to accept for activists attached to a class struggle framing, within the CGT and other radical unions.

We used to say that we were late in getting promoted, but there were so many other things that I thought were unfair. As soon as a minister came, I had the police around the corner from my house. We had friends who were employed at the tax office – they used to tell me 'You are good for a tax inspection every year'. I don't even mention the insults. Wage discrimination was accepted and was less painful than being treated like terrorists. (man, former convenor, CGT)

#### 4.2.3 | Reverting to (contested) collective bargaining practices

Eventually, the CGT joined the CFDT in its demand to find remedies through collective bargaining, in the shadow of existing claims. This demand was enacted in the 20 August 2008 law on union representativeness, which made it mandatory for (large) employers to negotiate measures to help union reps to 'reconcile' their professional and union lives.<sup>114</sup> The Rebsamen Law on social dialogue, which came into force on 17 August 2015, extended these preventive measures by making it compulsory for companies with more than 300 employees to conduct negotiations on union reps' career development and wage increases at least every three years.<sup>115</sup> These changes in legislation, strongly criticized by some radical unions, put an end to the perception of a commitment to union activism as a sacrifice but raised other controversial issues, such as the prospect of the professionalization of union reps, further enhanced by the 2017 Macron *ordonnances* leading to profound changes in employee representation.

We are not going to criticize the fact that the company gives trade unionists access to training, but I regret the perverse effect of the professionalization of trade unionists. I remain convinced that this is far from a laudable intention. There is a legal obligation, but through this we are in the process of creating professionalized union reps. (man, union rep, CGT)

Moreover, this formal recognition of the unions' role coexists with continued evidence of the prevalence of discrimination against trade unionists. In 2019, according to a survey commissioned by the Défenseur des Droits, 46 per cent of union members had suffered discrimination.<sup>116</sup> However, while there is no longitudinal data to accurately quantify litigation on trade union discrimination, research based on a database of Court of Appeal rulings on such discrimination estimates

<sup>113</sup> Chappe, *op. cit.*, n. 111.

<sup>114</sup> Labour Code, Art. L. 2141-5.

<sup>115</sup> *Id.*, Art. L. 2242-13.

<sup>116</sup> The Défenseur des Droits is an independent administrative authority, established in 2008, responsible for defending the rights of citizens and combating discrimination.



that between 2012 and 2014 there were on average 660 employment tribunal decisions per year, 65 per cent of which were appealed.<sup>117</sup> This volume of litigation seems relatively low when compared to a population estimated, at the time, as 767,000 elected or appointed union reps.<sup>118</sup> Trade union discrimination appears to be rarely brought before the courts, with most cases resulting in other types of dispute resolution, such as recourse to the intervention of the labour inspectors or the Défenseur des Droits, or not contested at all. Though they are few,<sup>119</sup> individual union discrimination claims nevertheless remain a regular feature of the work of the CFDT's legal service.<sup>120</sup> Until recently, the CGT also remained involved in a series of similar individual claims in the same workplace.<sup>121</sup> Some of these collective litigation strategies were launched to fight for the negotiation of preventive collective agreements, which all large companies have now implemented, following mandatory legislation.

However, as in the UK, the link between litigation and collective bargaining remains a matter of debate. Negotiated agreements seem to benefit full-time shop stewards or national union reps who are well known to HR departments and who play the game but leave unprotected the most radical local union reps who are most exposed to victimization by middle management.<sup>122</sup> Furthermore, the 'right practices'<sup>123</sup> by which anti-discrimination law was internalized have given rise to a form of 'managerialization'<sup>124</sup> that has reframed union activity as a lever to improve organizational efficiency through effective social dialogue,<sup>125</sup> while leaving aside many aspects of union reps' experience and failing to enhance the (low) social value attributed to the trade unions' role.

## 5 | CONCLUSION

This comparative study provides valuable insights into the making and implementation of anti-discrimination law in the UK and France, which represents one of the most significant advances for employees' rights in recent decades. In many countries, including France, anti-discrimination legislation constitutes a crucial lever for the assertion of employees' rights against weakened labour law and limited access to employment tribunals, including the capping of awards and compensations from which cases of discrimination often escape.

First, this comparison highlights the crucial role of litigation in obtaining and enforcing rights over time. Uneven depending on the period in question, sometimes individual or collective, and brought before national or EU courts, legal mobilization is an original feature of the fight against discrimination in the workplace in both countries. In contrast to the situation in the United

<sup>117</sup> F. Guiomard and I. Meftah, 'Entre égalité de traitement et harcèlement, quel fondement juridique de la discrimination syndicale ? État des lieux et analyse du contentieux entre 2012 et 2014' (2016) 145 *Travail et Emploi* 59.

<sup>118</sup> M. Pak and M. T. Pignoni, 'Les représentants du personnel: quelles ressources pour quelles actions?' (2014) 84 *Dares Analyses* 1.

<sup>119</sup> Guiomard and Meftah, op. cit., n. 117.

<sup>120</sup> Chappe et al., op. cit., n. 98.

<sup>121</sup> Guiomard and Meftah, op. cit., n. 117.

<sup>122</sup> V.-A. Chappe et al., 'Négocier sur les carrières syndicales pour lutter contre la discrimination: une appropriation sélective et minimaliste du droit' (2016) 145 *Travail et Emploi* 121.

<sup>123</sup> Barnes and Burke, op. cit., n. 51.

<sup>124</sup> Edelman, op. cit., n. 45.

<sup>125</sup> Chappe et al., op. cit., n. 42.

States,<sup>126</sup> and despite differing legal traditions and legal opportunity structures,<sup>127</sup> litigation strategies have become established over a longer period in the UK and France, no doubt due to the stronger presence of trade unions and the resources provided by EU law.<sup>128</sup> However, while UK trade unions had recourse to the ECJ as early as the 1980s, the influence of EU law only became visible in France from the early 2000s.

Second, these legal mobilizations are the result of complex and dynamic interactions between contextual factors and micro-level agency,<sup>129</sup> emphasizing the role of institutions – in particular, equality agencies<sup>130</sup> and trade unions – and their relations<sup>131</sup> in mediating law enforcement. This research highlights the role of individual ‘critical actors’ in the ‘naming, blaming, claiming’ process<sup>132</sup> that underlines the emergence of litigation. Through their first-hand knowledge of employment and HR practices as union reps or through investigations with respect to the EOC, these individual actors were able to name and evidence discrimination and to blame discriminatory employment policies, which were often negotiated with trade unions when it comes to equal pay, and employers’ repressive practices against union reps. Working on the boundaries of institutions, they were also able to mobilize allies in the legal field to assess the legal opportunities available to them<sup>133</sup> and to build their cases, designing judicial strategy and gathering evidence. Both cases also highlight the role of politicized lawyers and, in the UK, of job evaluation and EOC experts, who at times have formed narrow circles bound by shared feminist and/or social justice beliefs. These individuals are hardly substitutable. Many of them have now retired (or died), leaving open the question of the transmission of not only their experience, but above all their commitment.

Third, this longitudinal study clearly illustrates how litigation strategies have helped to shape the structure of legal opportunities by increasing the judicial acceptability of certain legal arguments and proceedings, such as those based in EU law.<sup>134</sup> These legal developments have contributed to building a strong body of case law, raising awareness of rights, and increasing claimants’ chances of having their cases heard and settled, even though group claims and potentially costly individual claims continue to be strongly contested by employers. Conversely, while they have often dragged their feet on mobilizing the courts, especially in the case of equal pay, trade unions have gradually developed their own financial and legal resources to deal with the influx of individual complaints<sup>135</sup> and to avoid accusations of failing to defend the interests of their (female) members. This enhanced legal expertise is now clearly being used by large UK trade unions to develop formal litigation strategies,<sup>136</sup> which are seldom related to anti-discrimination

<sup>126</sup> McCann, *op. cit.*, n. 1.

<sup>127</sup> H. P. Glenn, ‘Comparative Legal Families and Comparative Legal Traditions’ in *The Oxford Handbook of Comparative Law*, eds M. Reimann and R. Zimmerman (2006) 421.

<sup>128</sup> L. Conant et al., ‘Mobilizing European Law’ (2018) 25 *J. of European Public Policy* 1376; Lejeune, *op. cit.*, n. 14.

<sup>129</sup> Vanhala, *op. cit.*, n. 44.

<sup>130</sup> Barnard, *op. cit.*, n. 71.

<sup>131</sup> Lejeune, *op. cit.*, n. 14.

<sup>132</sup> W. Felstiner et al., ‘The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...’ (1980) 15 *Law & Society Rev.* 631.

<sup>133</sup> Hilson, *op. cit.*, n. 24.

<sup>134</sup> Conant et al., *op. cit.*, n. 128.

<sup>135</sup> Guillaume, *op. cit.*, n. 45.

<sup>136</sup> Such expertise is also being used by small public-sector trade unions facing restructuring (see G. Kirton and C. Guillaume, ‘When Welfare Professionals Encounter Restructuring and Privatization: The Inside Story of the Proba-

law, to defend employees' rights in the public sector and to obtain new rights for workers in the less regulated sectors of the economy.<sup>137</sup> In an attempt to build up societal power, litigation is being used in combination with other repertoires of action, such as strikes and media campaigning.<sup>138</sup> For their part, French trade unions – in particular, the CFDT – seem to have opted for a significant but more informal use of the law embedded within collective bargaining or representation work,<sup>139</sup> with a view to consolidating what remains of their institutional power at the workplace level. These contrasting developments emphasize the mutually constitutive character of the law and 'rights practices'.<sup>140</sup>

Fourth, despite acting as 'support structures' for legal mobilizations, unions have constantly sought to explore alternative political opportunities, whether these are campaigning for more progressive legislation or searching for a solution through collective bargaining or social partnership practices (sometimes combined with industrial action). Recourse to justice may have been more or less systematic, but it has always been conceived as a stop-gap or provisional moment in the balance of power aimed at producing the conditions for favourable negotiations. This preference for more conventional repertoires of action can be interpreted as a normative belief<sup>141</sup> or as a pragmatic choice aimed at regaining control over dispute resolution through institutionalized mechanisms that still exist in the public sector in the UK and in large companies in France.

In addition to bringing only individual remedies,<sup>142</sup> trade unions have found the management of discrimination cases extremely costly and challenging, notably when it comes to providing evidence. Whether it is a question of proving unequal pay or union discrimination, both investigations require stable and large organizational contexts where careers and wages are evolutive and organized according to collective classification systems;<sup>143</sup> such conditions give rise to many gender, class, and race biases. Furthermore, this prerequisite is increasingly difficult to satisfy in workplaces characterized by restructuring, privatization, and the individualization of employment contracts, including in public services. In that respect, the legal mobilizations studied in this article have benefitted from exceptional circumstances. Thus, it seems unlikely that unions' strategic litigation will be extended to other cases of discrimination such as disability, where evidence is less tangible,<sup>144</sup> or to more precarious, less unionized workplaces, significantly reducing the prospects of 'radiating effects'.<sup>145</sup>

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tion Service of England and Wales' (2019) 33 *Work, Employment and Society* 929) and independent unions such as the [Independent Workers' Union of Great Britain](#) that notably backed claims against Uber and other gig economy companies.

<sup>137</sup> Kirk, op. cit., n. 2.

<sup>138</sup> G. Coderre-LaPalme and I. Greer, 'Dependence on a Hostile State: UK Trade Unions before and after Brexit' in *Rough Waters: European Trade Unions in a Time of Crises*, eds S. Lehdorff et al. (2018). 245; Gutierrez Crocco, op. cit., n. 2.

<sup>139</sup> Guillaume, op. cit., n. 2.

<sup>140</sup> Barnes and Burke, op. cit., n. 51.

<sup>141</sup> Poletta and Jasper, op. cit., n. 30.

<sup>142</sup> L. Dickens, 'The Road Is Long: Thirty Years of Equality Legislation in Britain' (2007) 45 *Brit. J. of Industrial Relations* 463; Fredman, op. cit., n. 80.

<sup>143</sup> V.-A. Chappe and S. Pochic, 'Battles through and about Statistics in French Pay Equity Bargaining: The Politics of Quantification at Workplace Level' (2018) 25 *Gender, Work and Organisations* 650.

<sup>144</sup> Lejeune and Yazdanpanah, op. cit., n. 2.

<sup>145</sup> McCann, op. cit., n. 1.

Finally, echoing trade unions in their preferred pattern of thinking, industrial relations experts have argued that the collective bargaining route is de facto preferable.<sup>146</sup> Beyond the question of the weakening of collective bargaining in the two countries, the analysis of the content of existing agreements leaves room for doubt. Those on equal pay are at best standardized,<sup>147</sup> dated, or controversial.<sup>148</sup> Those on trade union rights are non-existent in the UK and in France have been reframed from a managerial perspective that ignores the ordinary victimization suffered by whistleblowers and overly militant union reps. In this context, it seems that only a combination of repertoires of action, including responsive regulation,<sup>149</sup> and renewed strategic legal mobilization can open new perspectives in a context in which class actions have recently been authorized (2016), at least in France.

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<sup>146</sup> Dickens, op. cit., n. 62; G. Healy et al., 'Avoiding Gender Bias: The Role of the Social Partner' in Conley et al., op. cit., n. 15, p. 114.

<sup>147</sup> M. Charpenel et al., 'Égalité négociée, égalité standardisée?' (2017) 37 *Travail, Genre et Sociétés* 143; Milner et al., op. cit., n. 60.

<sup>148</sup> Conley et al., op. cit., n. 15.

<sup>149</sup> T. Wright and H. Conley, 'Advancing Gender Equality in the Construction Sector through Public Procurement: Making Effective Use of Responsive Regulation' (2018) 41 *Economic and Industrial Democracy* 975.