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Taking Trade Union Discrimination to Court: A Sociology of Support and Resources for Legal Action☆

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Abstract

This article examines the rise in the number of court cases related to discrimination against trade union workers in France since the late 1990s. It identifies the sources of support for victims of discrimination that allow them to file complaints in court. The judicialization of union-related cases of discrimination has been made possible by a new discourse linking the recognition of individual merit to the common cause of re-unionizing. Developing a special method of bringing evidence and the specialization of certain union actors and lawyers have helped make legal action against discrimination routine. But the historical roots of this strategy leave the question open as to how it can be applied to workers in secondary labor markets, particularly precarious workers.

Keywords: Discrimination; Trade-Unions; Judicialization; Justice; Equality; Strategy; Evidence

Over the past decade in the French social sciences much has been written on the judicialization of social relations, and scientific productions on the subject since the 1990s abound. What mainly interests researchers is to verify the reality of that reliance on the courts and on judicial means, to discover the limits of the process and the social contexts and conditions that have made it possible. Judicialization has been variously defined, either by applying a quantitative approach — *e.g.* stressing the growing proportion of conflicts settled in a tribunal — or a more qualitative one, concerning the growing importance of the courts in political regulation (Commaille et al., 2000;

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Kaluzynski, 2007; Commaille et Dumoulin, 2009). The explanations given also vary, alternately pointing to the pressure groups who use the tribunals as a strategy to further their demands (Israël, 2009), the weakening of those intermediate bodies supposed to ensure the regulation of conflicts without going to court (Jobert, 2000), the fact that giving justice more leverage makes public policy more democratic, and/or judicialization as one of the consequences of neo-liberal politics (Commaille, 2007). Other analysts have noted the extraordinary diversity of situations and domains and how they relate to judicialization, putting that diversity down to the local parameters of concrete systems of action (Contamin et al., 2008; Sayn, 2007).

"The universe of labor is directly implicated by judicialization, a phenomenon frequently incriminated by those calling for the «pacification» of labor relations (Leroy, 2011)". Yet, the overall number of cases sent up to the Labor Tribunals (*Conseils de Prud'hommes*)[1] has been diminishing for twenty years: if judicialization exists, it is not so much in the number of cases taken to court as in the mental representation shared by many that the importance of the law in regulating labor relations — directly or indirectly — has considerably increased (Pélisse, 2007). Therefore, judicialization cannot be considered a standardized phenomenon that merely reflects the critical state of traditional modes of regulation in wage-earning societies (Castel, 1995) — linked in particular to the crisis trade-unions are experiencing. More subtly, it must be analyzed as an uncertain process whereby legal norms become part of a formal infrastructure (Soubiran-Paillet, 1989), furthered by the mediation of more or less institutionalized groups (Pélisse, 2009), a process that requires both the material and linguistic resources allowing tests of labor to be transformed into tests of justice.[2]

Analyzing the litigation over trade-union discrimination — defined as the specifically detrimental treatment of an individual due to his/her union affiliation — warrants inquiring into the social conditions that surround the judicialization of an injustice. Trade-union discrimination since the end of the 1990s has been present in a considerable number of legal issues, accompanied by a massive development of jurisprudence (Spire, 2006),[3] despite the generic obstacles produced by non-discrimination laws, such as the difficulty to provide proof of discrimination (Lanquetin, 2000), as well as the difficulty French magistrates have in accepting the legal category (Metayer-Clutzel et al., 2011), or again the fact that employers use the theme of diversity as a strategy to de-judicialize a dispute (Bereni, 2009). That contrast is all the more surprising as — contrary to other types of discrimination — union discrimination did not particularly receive much publicity over the past ten years.[4] In this article, we will attempt to grasp the conditions leading to the

[1] Labor tribunals (*Conseils de prud'hommmes*) are Tribunals of First Instance where disputes connected to employment contracts under private law can be settled. Operating on a basis of equal representation, the magistrates are elected representatives of employees or employers, *i.e.* non-professional judges from the working world. Decisions are made by a bench of four *conseillers* (two "employees" and two "employers"). In the event of a tie, a professional judge is appointed to reach a decision. For a multidisciplinary analysis of the justice carried out by the *prud'hommes*, see Michel and Willemez (2008).

[2] We define the concept of test as the moment when "the powers" of the individuals taking part in it "are revealed" (Boltanski and Chiapello, 1999, p. 74). Tests of labor thus concern all the events "of selection, promotion, matching of persons and posts, deciding on remunerations, etc." during which the greatness of an employee is determined and possibly their well-being (*Idem*, p. 400). Tests of justice therefore designate the rephrasing of labor tests in the formal grammar of legal language; they no longer take place in the privacy of the parties concerned but are externalized to the level of the judiciary and the tribunal (Thévenot, 1992).

[3] Precise figures for this litigation are not available in the official statistics at the level of the first instance of the French legal institution. However, all the specialists on discrimination note that cases are escalating.

[4] The discriminations "publicized" since the start of the years 2000, *e.g.* racial or sexist discrimination, did not result in a corresponding increase in the number of litigations, though their number is hard to estimate (Lanquetin and Grévy, 2005).