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## **The Construction of Workers' Rights Consciousness Through Legal Intermediations: the case of employment discrimination in Belgium**

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### **Abstract**

Through their different encounters with union, court, and government equality agency lawyers, workers report diverse understandings of their personal experience of injustice in the workplace. This paper examines workers' experiences of discrimination and the role legal professionals play in litigating these issues in Belgium. Bringing together legal and rights consciousness studies and the sociology of intermediation and tracking different stages in the construction of discrimination cases, from the moment when a future litigant describes an event as an injustice to the moment when the judge recognises a discriminatory behaviour (or conversely, dismisses a case), we suggest several possible empirical explanations of the way in which interactions with legal intermediaries affect workers' rights consciousness. Because we refer to socio-legal studies from common law countries, this paper also calls into question how best to import these studies to assist in analysing legal consciousness in continental Europe.

### **Key words**

Consciousness, discrimination, intermediation, lawyering, litigation, workplace

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## Introduction

*Stephanie, 33, was working as an engineer for a large private company in a small-town in Belgium when she fell pregnant. Several days after she told her employer she was pregnant, Stephanie received a negative assessment and was subsequently dismissed. She did not want to fight her dismissal because she felt she was partly in the wrong for her handling of the situation. She relates: 'I announced my pregnancy when I was almost three months pregnant. Maybe I should have done that before. But you know... I did not want to tempt providence by disclosing the news too early'. Nevertheless, her father (a former union activist) contacted his union for advice. A union lawyer advised that Stephanie would benefit from the statutory protection afforded to pregnant women under the 1971 labour law.*

*After her father convinced her, Stephanie met a private labour lawyer who works in collaboration with her union. 'When I met the lawyer for the first time, I was not sure I wanted to fight my dismissal. I went there because my father wanted to. But the lawyer told me that what my employer did was not fair. He convinced me that I was not in the wrong for my action'. Through this litigation, Stephanie wanted her former employer to recognise that she did a good job in the company. She did not want her job back, but did want the negative assessment to be changed. A few weeks later, one of Stephanie's friends told her about the Belgian Institute for Equality of Women and Men, a government agency empowered to enforce newly enacted anti-discrimination legislation. She went there to meet with a lawyer specialising in anti-discrimination law who offered support from the Institute to begin an additional action explicitly directed against the discrimination she experienced. The lawyer explained to Stephanie that a lot of women are fired – or not hired in the first place – when their parenting plans become clear. The Institute expressed interest in her case because they were trying to develop a strategy concerning pregnancy and the workplace. Stephanie agreed to proceed with the case, realising that her personal story could result in a positive impact on other women's lives. Stephanie explains: 'The lawyer made me realize that my case could benefit other women. My misfortune can have positive consequences; the situation can change at a broader level.' In addition to Stephanie and her lawyer's vindication, the Institute hired another attorney to defend the cause of women at work on a wider scale. The Institute got in touch with national media, such as newspapers and TV, and brought the case to the attention of the public.*

Through her different encounters with union, court, and government equality agency lawyers, Stephanie reported diverse understandings of her personal experience of injustice in the workplace. Mirroring Millie Simpson's

story, as told by Patricia Ewick and Susan Silbey in their book *The common place of law. Stories from everyday life* (1998), Stephanie's narrative illustrates that ordinary citizens' experience of the law is an evolving process. In this paper, we analyse how private, union, and government equality agency lawyers qualify complaints as "employment discrimination" in Belgium. Tracking different stages in the construction of discrimination cases, we analyse how interactions with various legal professionals shape workers' experiences and representations of injustice in the workplace and, more broadly, how these interactions shape workers' legal and rights consciousness. Instead of focusing on ordinary citizens' experience of the law in their everyday lives (Ewick and Silbey 1998, Engel and Munger, 2003), we focus on moments when ordinary citizens interact with lawyers or other legal professionals. More precisely, we investigate how people experience the law as a process and what role those legal intermediaries play in such a process.

We specifically argue that private lawyers, union lawyers, and lawyers working for government equality agencies do not all refer to or invoke the same legislation when they face a discrimination case. Our field investigations and empirical data show two concurrent ways of translating injustice at work: one based on the labour legislation negotiated by unions and employers' organisations, the other on the anti-discrimination legislation, passed to translate European directives into national laws. While the former contributes to the protection of vulnerable workers, the latter produces new frameworks for understanding injustices at work by referring to discrimination legislation.

By analysing workers' experiences of unfair treatment and the role lawyers play in litigating these issues, this study reveals broader changes that have occurred in Belgian courts within the last few decades. While in the US and other common law countries, courts have traditionally been used to vindicate rights, this has not been the case in civil law countries. Under European pressure, discrimination policies and laws have brought with them new ways of using the Belgian courts. Through this paper, we question whether these changes have tended to broaden the framework Belgian citizens use to consider their rights, and additionally explore how these two models shape workers' rights consciousness. Through their interactions, legal intermediaries and plaintiffs both contribute to qualifying the individual's experience of injustice into a legal context.

Bringing together legal and rights consciousness studies and the sociology of intermediation (Section 1) in the case of employment discrimination in Belgium (Sections 2 and 3), we examine the processes of legal translation and qualification (Section 4), as well as the construction of workers' rights consciousness (Section 5). Focusing on lawyers' and plaintiffs' interactions and tracking different stages in the construction of discrimination cases, from the moment when a future litigant describes an event as an injustice to the moment when the judge recognises a discriminatory behaviour (or, conversely, dismisses a case), we are left with the following question: **how do interactions with legal intermediaries shape workers' experience of injustice and understanding of discrimination?** Through the course of this

paper we suggest several possible empirical explanations of the way in which interactions with legal professionals affect workers' rights consciousness.

### **1. Bringing together a sociology of intermediation and legal consciousness studies**

To analyse the way in which interactions with lawyers and legal professionals shape the rights and legal consciousness of workers, we have sought to bring together two theoretical frameworks: legal and rights consciousness studies and the sociology of intermediation.

Legal consciousness studies have been carried out in the United States and in the United Kingdom at a particular moment in the history of the Law and Society tradition. Research in this field shifted away from an instrumental conception of the law that views law as a tool for producing social change, towards a constitutive perspective that views law as one of many competing forces that affect and shape social life. Over the last 20 years, Law and Society scholars have placed an increasing emphasis on cultural dimensions of the law. The concept of "legal consciousness" illustrates this shift in socio-legal research (Ewick & Silbey 1998). Scholars have highlighted the conditions under which citizens are able to resist the law, at a cultural level (Sarat 1990), community level (Greenhouse 1989; Ygnvesson 1989), or individual level (Ewick & Silbey 2003)<sup>i</sup>. One of their main concerns was to understand how legal consciousness is translated into actions and decisions, referred to by some scholars as "legal mobilisations" (McCann 1994; Nielson 2000; Stryker 2007).

One of the main criticisms levelled at legal consciousness scholars has been the assertion that they pay too much attention to ordinary citizens and neglect the role professionals can play in framing legal consciousness<sup>ii</sup>. Some researchers suggest that legal consciousness studies should integrate legal professionals in the scope of study, as they mobilise both the law and the use of legal language in their routine commitments to citizens. According to Jerome Pelisse, lawyers' interactions with ordinary people contribute to shaping how citizens experience the law in their everyday life (2005:125). Other scholars have already highlighted the influence lawyers wield in shaping ordinary citizens' perception of the law. In the 1960s, Jerome Carlin, Jan Howard, and Sheldon Messinger (1967) showed that people who have directly experienced standing trial have a markedly different perception of the law compared with those who have never experienced lawyers and courts (see also: Galanter 1974; Curran 1977; Sarat & Felstiner 1986; Conley & O'Barr 1990). In *Rights at Work*, Michael McCann brings together legal mobilisations and rights consciousness. He demonstrates that legal mobilisations for equal pay in the United States, even if they do not have a significant impact in changing social structures, have transformed the way women understand payment equity at work. "Perhaps the most important achievement of the movement has been the

transformations in many working women's understandings, commitments, and affiliations." (1994:230)

This paper explores, in one setting, the results of these changed conceptions and understandings. It pays particular attention to the role played by interactions with legal professionals in the construction of workers' experience of the law. To this end, we have utilised a second theoretical framework: the sociology of intermediation. This framework has been developed in France over more than 20 years by two groups of scholars: the CSI (Centre de Sociologie de l'Innovation), producing studies in the sociology of sciences and techniques (Callon 1986; Latour 1987; Hennion 1983; Vinck 1999) and the CEE (Centre d'Etudes de l'Emploi) exploring the "Economy of conventions" (Bessy & Eymard-Duvernay 1998; Eymard-Duvernay & Marchal 1997; Meyer 1998; De Munck 2006).

The sociology of intermediation takes its roots in Harold Garfinkel's epistemology (1967). Rather than focusing on factual occurrences, Garfinkel instead studied the processes through which those facts – or social events – are built. He showed that the meaningful, patterned and orderly character of everyday life is something that people must constantly work to achieve. In Garfinkel's view, members of society must have some shared methods that they use to mutually construct the meaningful orderliness of social situations (1967:5). "In line with this assumption, the goal of ethno-methodological investigations becomes the description of the methods and practices employed in the production of the orderly character of everyday life. These methods and practices are embedded in the work that people do, and realised in local settings by the people who are party to those settings" (Garfinkel 1967:6).

Two main hypotheses structure the sociology of intermediation and intermediaries: the hybrid nature of the social world and the reflexivity of the actor. Firstly, this sociology postulates a plurality of pragmatic arrangements, conventions (or *cités*), normative supports, etc. Secondly, those concerned are able to describe and evaluate situations in which they are involved and to account for their normative choices in those situations. The order, or the orderly character, of social life is the result of this interactive process.

According to Susan Sturm's discourse on employment discrimination, "legality emerges from an interactive process of information gathering, problem identification, remediation, and evaluation." (2001: 463; 2005). In her work, she emphasises the crucial role of intermediaries. Who are these intermediate parties? Broadly, they constitute multiple public, private, and non-governmental actors: experts and lawyers in private sector; labour unionists; advocacy groups; professional networks; non-profit organisations, etc. They play a normative role in translating and mediating the relationship between formal law and workplace practice, in brokering the relationship between judicial elaboration and workplace innovation. They are go-betweens or coordinators who get people interested and negotiate the terms of their involvement (Callon 1986). It is important to emphasise that we are not speaking specifically about those who play the role of the official third party in formal dispute resolution processes that go by the name mediation. More generally, *legal intermediaries* are here

defined as legal professionals active in a range of transactions as intermediaries, between citizens, government agents, organisational members including employers, and the law as a body of texts and set of processes and practices. It seems necessary to take into account the multiple intermediations of law (De Munck, Orienne, 2008). At the symbolic level, antidiscrimination law opens a space of intermediation which can undoubtedly prove fertile and progressive. Indeed, it could play a part in reconfiguring the meaning of work. However, that possibility presupposes a huge cultural task of interpretation, as much in the strictly legal sphere as in the *lifeworld* of workers. This task necessarily consists of discussion and communication involving trade unions, agencies, employers, lawyers, etc.

In short, by cross-referencing the sociology of intermediation and legal consciousness studies, this paper examines the processes of intermediation by which plaintiffs, employers, trade unionists, advocacy coalition, lawyers, bridging the gap between legal institutions and workplaces, translate and qualify uncertain facts into legal language. This process involves a multiplicity of actors, norms (at National and European level), and conventions or worlds (private, domestic, juridical, public, etc.). We will show how this process of intermediation affects workers' rights consciousness.

## **2. Employment, discrimination, and the Belgian legal system**

In Belgium, civil society is structured around a number of socio-political pillars (*piliers / verzuiling*), which historically played a significant role in the construction of the Belgian welfare state. These pillars are sub-systems that bring together political parties, labour unions, education networks, health insurance policy, leisure organisations etc. sharing a similar set of values: namely the Socialist, the Christian and the Liberal pillars. While in the US and other common law countries, courts have traditionally been used to vindicate rights, this has not been the case in civil law countries. Since the constitution of the state in 1831, Belgium has evolved through a very complex system of labour negotiation and dialogue among the state, labour unions, and employers' federations as well as among those pillar organisations listed above. Courts were not a significant player in the process of vindicating workers' rights at a collective level. We argue here that discrimination policies and laws bring with them new ways of using the Belgian courts, promoting strategic litigation to vindicate civil rights.

Unions have always been a strategic player in these negotiations, and the 52 percent unionisation rate is relatively high (union membership is around 12 percent in the United States and 8 percent in France.)<sup>iii</sup> Most of the labour legislation aims at protecting workers who are generally viewed as the weaker, more vulnerable party in relationships with employers. The 1971 labour law, the 1991 law on the protection of workers, and the 2002 law against harassment in the workplace are major parts of this workers' protection movement. This corpus of legislation affords certain protections (i.e. against harassment or

dismissal) to all workers. Since the 1970s, this rhetoric has been increasingly present in political and legal speeches. Even so, the anti-discrimination laws became truly significant only in the early 2000s, under European Union pressure (Guiraudon, 2009). The first Belgian legislation against discrimination was enacted in 2003 and two additional statutes were enacted in 2007: the Law against Discrimination and the Law against Discrimination between Men and Women. In comparison with labour law, anti-discrimination law specifically protects members of minorities and/or structurally oppressed groups who are likely to be discriminated against according to one of the criteria defined by the law. While anti-discrimination has been an issue for a long time in the United States where the Title VII of the Civil Rights Act of 1964 already protected most American employees from employment discrimination based upon race, colour, religion, sex, or national origin (Burstein 1985; Donohue and Siegelman 2005; Nielson and Nelson, 2005), anti-discrimination is a fairly new debate in Belgium (see table 1).

Belgian legislation enacted in 2003, 2007, and 2009 has enlarged the list of categories for which discrimination is prohibited, extending the list of protected characteristics to include race, gender, union affiliation, political commitment and disabilities. Indeed, differential treatment or hostile attitude is not considered discrimination if it does not refer to one of these categories established and protected by law. The definition of discriminatory behaviour was also broadened, including *indirect discrimination* (when the effect of certain requirements, conditions or practices imposed by an employer has an adverse and disproportional impact on one group or another) or *declaration of discriminatory intent in a public statement* (when, for example, an employer declares in the media that, under its recruitment policy, he will not recruit any employees from certain ethnic or racial groups) (for the French case, see: Bereni & Chappe 2011; Chappe 2013)<sup>iv</sup>.

Through legislation, legal mobilisations or protective actions by victims of discrimination were also simplified. Crucially, the onus of proof was reversed: employers must now prove that they have not discriminated their employees. Additionally, two specific organisations were dedicated to the anti-discrimination issues: the Centre for Equal Opportunity and Opposition to Racism (*Centre pour l'égalité des chances et la lutte contre le racisme*, CECLR) created in 1993 and the Institute for the Equality of Women and Men (*Institut pour l'égalité des femmes et des hommes*, IEFH) created in 2002<sup>v</sup>.

Lawyers and social workers employed by these equality-promoting organisations, and therefore functioning as legal intermediaries, have two main tasks. Firstly, they support and assist plaintiffs who claim to have experienced an injustice at work, and secondly, they promote the aspirations of anti-discrimination law among Belgian workers. They attempt to convey non-discriminatory norms and values and, in this way, to give rise to new demands. By encouraging legal mobilisation and socialization of social groups, they legitimize their position and mission.



**Table 1. Anti-discrimination legislation in Belgium and Europe**

**2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012**



**2000** - European Directive 2000/43/CE implements the principle of equal treatment between persons irrespective of racial or ethnic origin

**2000** - European Directive 2000/78/CE establishes a general framework for equal treatment in employment and occupation

**2003** - Law against discrimination enacted

**2007** - Law against different kinds of discrimination enacted

**2007** - Law against discrimination between men and women enacted

**2009** - Amendment of the 2007 law

Europe

Belgium

### 3. Data collection and analysis

Through investigation techniques consisting primarily of open-ended interviews, observations and supporting archival work in litigants' records, we examined how legal intermediaries and plaintiffs themselves interpret and describe workers' experiences of injustice in the workplace.

We conducted twenty-five open-ended interviews with lawyers in private practice (N=6), union lawyers (N=7), government equality agencies lawyers (N=8), and judges (N=4) in three Belgian towns: Brussels, Liège, and Charleroi. In order to analyse legal intermediations, we selected lawyers and legal professionals who collaborate in their everyday practice. Firstly, we asked lawyers to speak generally about their work and about their recent cases. We then asked them to speak about specific cases involving an injustice in the workplace, as well as to define what they consider to be an "injustice" or "unfairness". Following this, we asked specific questions about their use of discrimination legislation. We also conducted in-depth interviews with eight workers who had made a complaint for disparate treatment on the basis of their pregnancy, race, transgender status, or religious belief. We asked them to tell their own story and experience of what they thought was an injustice at the

workplace, and then to speak about their interactions with lawyers in private practice, in unions, or in government equal agencies, as well as with judges. Following this, we asked them to speak about their beliefs, hopes, and knowledge about the litigation that was underway. At the end of the interview, we asked both lawyers and litigants to speak about equality, fairness, and justice in the workplace. We selected these plaintiffs because they were all represented by several lawyers from different organisations (equality agency, private law firm, or labour union), working together to build the case. It seemed to us that, in the act of collaboration, lawyers would have to justify their decisions and choices in front of the others. In order to analyse the construction of rights consciousness in interaction, we always met people who were involved in the same litigation process: the litigant, her/his private lawyer, the lawyer in charge of this case at the union, and so on.

In addition to interviews, we also observed legal intermediaries at work, as well as interactions between legal professionals and their clients. According to Sarat and Felstiner, interaction between lawyers and ordinary citizens is “one important setting where law and society meet and where legal norms and folk norms come together to shape responses to grievances, injuries, and problems” (1986:94). Observations have been conducted in courts, government equality agencies, private lawyers’ chambers, and unions. We also completed analysis of forty case records. We tried to secure simultaneous access to all records related to a particular claim of injustice: records from the private lawyer, from the union, from the equality agency, and the judicial record.

In order to focus our study, we inquired about a specific kind of problem, with a particular set of specified legal categories and limited the scope of our study to a particular location. For this reason, our study of legal and rights consciousness makes reference to a particular social phenomenon (employment discrimination) within a particular location (the workplace). Through this analysis, we have studied legal consciousness in situations where workers meet and interact with legal professionals (Merry 1990). Because each stage of the litigation process may influence development of the law, we chose to look at the entire process of constructing a complaint, rather than focusing on outcomes in the final judgment on the case (Albiston 1999). However, while we have examined interactions and exchanges between lawyers and their clients, we have not gone back to the genesis, when one or more parties first named a situation as an injustice (Felstiner, Abel & Sarat 1981). The collected data do not allow us to uncover how ordinary citizens do or do not refer to the law when they experience an injustice, prior to legal professionals’ intervention (Marshall 2003).

We analysed the transcripts of observations and interviews to investigate how legal intermediaries qualify an injustice into legal language and how they mobilise competing legal frames when they address unfairness in the workplace. In addition, we examined the transcripts for recurring patterns in the way that workers understand their own experience over time. Analysing workers’ narratives has allowed us to highlight the construction of workers’ rights consciousness through legal intermediations.

#### 4. Two models of translating workers' complaints into legal language

When employees experience an injustice in the workplace and decide to seek advice from a lawyer, they are encouraged to tell their own story. A labour lawyer in private practice explains:

*"Sometimes, our work is not easy... People come and expose all their problems and misfortune. Their stories are sometimes very hard and disturbing. We have to find out what is legally relevant and what is not, which staples can be useful for the case we are building" (November 2010).<sup>vi</sup>*

Through this process, lawyers translate workers' complaints into legal language. Listening to the plaintiff's narrative (composed of anecdotes, feelings, and impressions about their experience), lawyers select which aspects or pieces of the stories are relevant to build a legal case. In this way, lawyers help clients by redefining their situation and restructuring their perceptions to facilitate reconciliation between client objectives and the needs of legal institutions (Sarat & Felstiner 1986).

Our empirical data have highlighted two models of translating clients' complaints into legal discourses, which we call the workers' protection model and the workers' non-discrimination model. Both legal mobilisation models can be distinguished by three main characteristics: legal qualification; range and specificity of protection; and the role of jurisprudence and mobilisation of courts. In order to distinguish between these models, we have sought to highlight the differences as if they were ideal types (Weber, 1949[1904]), but in most cases legal qualification does not exclusively refer to one model or the other, instead often combining elements from both models, leading to a hybrid qualification. Before expanding on the two models and their characteristics, one should be clarified: the professional or organisational context does not determinate lawyers' choice of one model over the other. Rather, as we will explain, lawyers' identities, areas of specialisation and socialisation, as well as clients' objectives and needs, play a significant role in shaping the legal qualification<sup>vii</sup>.

##### 4.1. Legal qualification

In most cases, union lawyers, private labour lawyers and labour judges refer to what we have termed the workers' protection model. When translating clients' requests into legal language, they give an individual response to an unfair experience at work by applying the terms of the relevant legislation. A private lawyer who works in close collaboration with the main socialist left-wing union and is in charge of union members' defence in court says:

*"I have never used anti-discrimination legislation. When a woman is dismissed because she is pregnant, why should I use anti-discrimination*

*legislation while we have a whole bunch of laws in Belgium to protect pregnant women against dismissal?” (November 2010)*

Through legal qualification, this particular lawyer gives an individual answer to injustice at work, according to a principle of workers' protection guaranteed by the 1971 Labour Law or 1991 Law on the Protection of Workers. Labour legislation protects different kinds of workers who are likely to be victims of unfair treatment in the workplace, including pregnant women or labour union representatives. Most of the legislation protecting workers was enacted in the 1970s, 1980s, and 1990s as a result of collective bargaining and negotiation between labour unions and employers' organisations.

Supported by government equality agencies such as the Centre for Equal Opportunity and Opposition to Racism or the Institute for Equality of Women and Men, but also by some private labour lawyers and judges or non-governmental organisations<sup>viii</sup>, a new model of workers' non-discrimination has been challenging the workers' protection model since the early 2000s. A lawyer from the Institute for Equality of Women and Men explains:

*“When a young woman who has just announced her pregnancy to her employer is fired, what can we do? We have two options. First option: we defend this woman according to the 1971 law on labour which protects pregnant women from dismissal. If we win, she receives compensation. This is what most lawyers do. Second option: we consider that, beyond that particular case and story, this case reveals an accurate and societal issue which is the inclusion of women between 25 and 40 years old in the labour market. Mobilising anti-discrimination legislation adds appreciation to the litigation because we can publicly state: “Firing a woman because she is pregnant is unfair and discriminatory”. Women are discriminated against in the labour market and we have to change this situation, based upon the idea of equality between men and women” (December 2010).*

Interestingly, they do not refer to the same legislation. A lawyer who works in a government equality agency says:

*“We had a case of discrimination, a woman who was wearing the veil [hijab] at work. Her employer informed her that she would get fired if she didn't remove her veil. She was member of a union so she had rights to be defended by her union lawyers. Her union decided they did not have to intervene in such a case because the labour regulations [negotiated between unions and employers' organisations in this particular company] say that the veil is not allowed in the workplace. We [Centre for Equal Opportunity and Opposition to Racism] consider that, in private sector, they don't have any reason to make neutrality in appearance a compulsory principle. According to us, banning of the veil is not justified” (November 2010).*

This lawyer highlights the difference between their organisation's action and the line pursued by unions. In this case, while the union refers to the labour agreement signed both by employees and employers' organisations, the government equality agency argues that the prohibition of the veil (hijab) at

work is not justified and decided to take on the case on this basis. Thus, the agency lawyers ignored previous collective bargaining between workers and firms to mobilise the more general anti-discrimination principle.

This example shows that legal intermediaries do not all refer to the same legislation in response to a client's problem. While some refer to protective legislation negotiated by unions and employers' organisations, others refer to the 2007 anti-discrimination legislation. The former approach uses labour legislation to protect vulnerable workers, while the latter, by referring to discrimination legislation, produces a new conceptual framework to address injustices at work. In short, the same problem can be translated into legal language in different ways. As Mather writes, "Lawyers are not simple conduits for client interests, faithfully translating preconceived goals into legal language and shepherding client through the legal process. Rather, lawyers frequently add their own goals, ideas, and values to clients' problems and conflicts." (2009:49)

Importantly, while the first approach focuses on the application of Belgian internal law and norms, the second resorts to European legislation and encourages the translation of international directives into Belgian internal positive law. A private lawyer specialising in discrimination law explains:

*"I am deeply convinced that we have to think about European legislation, not only about Belgian positive law. European law widens understandings and interpretations of discrimination. [...] We don't have so many cases but I am utterly convinced that we miss lots of them because internal Belgian law lacks appropriate qualifications for discrimination."* (November, 2010)

#### 4.2. Range and specificity of protection

Lawyers who refer to the workers' protection model apply legislation that is specific to labour and employment relationships, although the range of protections may be very broad. Specialising in labour legislation, such lawyers only defend workers and employers. A labour lawyer in private practice explains:

*"I am specialised in labour and employment law. I only plead on behalf of employers and workers in labour jurisdictions. Discrimination is only a very small part of my activity. Until now, I have had only a few cases, two or three. Most of the cases are related to workers' protection, unfair dismissal, moral and sexual harassment at work, and so on."* (November 2010)

Conversely, agency lawyers tend to refer to legislation which is not limited to the employment field, but instead exclusively restricts application to anti-discrimination for a restricted list of legal criteria: sex, race, and disability. A lawyer from the Centre for Equal Opportunity and Opposition to Racism explains:

*"We can only go to courts when one of the criteria mentioned in the anti-discrimination legislation is not respected. And our action can*

*only focus on anti-discrimination. Unions can go further; they can highlight non-respect of labour legislation. We cannot do that. Our action is confined to the anti-discrimination law” (November 2010).*

Another difference between the two models relies on the specificity of the site of the targeted action and the breadth of the protections afforded.

#### *4.3.Strategic mobilisation of courts*

The protection model is based upon the defence of workers’ individual rights, as members of a category of people considered relatively weak in their relationship with their employer. A labour lawyer in private practice says:

*“My professional task is... advising employees, defending their rights, pleading on behalf of them in courts. Each employee has a particular story, and a particular problem. I listen to them, try to understand what they want, explain what I can do and what I can’t do, and try to do my best to defend their rights.” (October 2010)*

Through legal qualification, this lawyer gives an individual answer to an injustice at work. He adds:

*“I have an example in mind. My client was a labour union representative. He had got fired and had received compensation for his dismissal. But he demanded compensation for unfair dismissal because he believed that he got fired because he is a labour union representative. We could have mentioned antidiscrimination legislation but we did not. We focused our action on the law on protected workers which allowed us, in that particular case, getting compensation for unfair dismissal” (October 2010)*

According to a principle of workers’ protection guaranteed by the 1991 law on the protection of workers, this lawyer seeks to protect his clients from unfair dismissal.

On the other hand, when legal intermediaries who refer to the non-discrimination model translate clients’ requests into legal language, they also give an individual response to an experience of injustice at work. However, unlike those using the workers’ protection model, they pursue a goal of *strategic litigation, leading to social and market change*. A strategic litigation is a case undertaken as part of a strategy which identifies criteria for involvement in litigation. Such cases are often linked to other organisational projects including, for example, inquiries, policy proposals, research, and public communication (Reading, 2010; Lejeune and Oriane, 2014). This strategic litigation seeks to achieve broad social change in key areas of human rights rather than merely individual justice. A lawyer explains:

*“When we met her last time [a woman who was fired after her pregnancy], we were very clear. Her case is very important for us because it enables us to modify legislation. Thus, even if her former employer suggests giving her compensation, we cannot give up. We need litigation, not transaction... because litigation creates case law and*

*jurisprudence. We were clear and I think she understood our concern. We have a strategic interest to carry on with this case!” (December 2010)*

Therefore the goal is not only to apply the law, but also to create case law in order to transform the law. A lawyer from the Centre for Equal Opportunity and Opposition to Racism explains:

*“In the field of employment and labour, jurisprudence about discrimination is very weak, even if employment is numerically the most important field. Sometimes, the Centre for equality decides to go to court, when we think that we can create positive jurisprudence and we can clarify some aspects of the legislation which were left unresolved. Defending an individual case if there is no goal of strategic litigation behind it... well... we will do that but it is not our main objective.” (November 2010)*

If lawyers referring to the protection model mobilise legislation that has been used for several decades, those who refer to the non-discrimination model strive to create jurisprudence which clarifies or modifies a new legislative corpus.

With this goal, legal intermediaries who refer to the non-discrimination model *choose from among workers’ stories only those which are relevant for collective action legislation and case law*. The selection does not imply a desire to ignore stories that do not lead in these jurisprudential directions; in most cases, victims do not wish to go to court and legal intermediaries try to find alternative ways of resolving dispute outside the courts. As “repeat players”, equality organisations and lawyers tend to strategically choose cases deemed likely to produce precedent rules to promote their own interests (Galanter 1974). In this way, they “secure legal interpretations that favor their interests” (Albiston 1999:870). This selection allows equality agencies to reinforce their legitimacy, and underline their usefulness.

From a union perspective, mobilisation of courts may undermine their own action, as unions have historically negotiated compromises with employers’ organisations without resorting to litigation. The regulation of the relationship between employers and employees has traditionally resulted from collective bargaining between labour-related organisations and players. The increasingly pivotal role of courts and equality agencies, as well as the constraint of generalization implied by such a judicial process, may weaken unions’ power.

The difference between union and agency lawyers highlights a trade-off between individual rights and collective power. Nevertheless, this distinction is not absolute. For some legal intermediaries, mobilising discrimination legislation is a second option, used only when labour legislation is not directly applicable to the particular situation experienced by their client. A labour lawyer in private practice relates the case of a woman who was pregnant but was not protected by the 1971 labour law because she was on a training session:

*“I have had a case, a woman who was on a pre-employment training session, prior to starting work with a company. Actually, training sessions are for people who are unemployed. They are trained in a*

*particular company while they are paid by the state. They are trained to a particular task, and then they are supposed to sign a labour contract with the company. This woman was trained in a small grocery where she had to supply different counters with vegetables and fruits. So she had to carry heavy crates. She got pregnant and her pregnancy turned out badly so she could not carry crates anymore. The employer said: 'Well, she is trained for one particular task. If she cannot do that anymore, she has to leave, we cannot hire her'. She got in touch with me. We asked for compensation according to the 1971 labour law that protects pregnant woman. But it was unsuccessful because the law protects women with labour contracts and my client was unemployed, on a training program. On appeal, we are going to invoke discrimination based upon gender. We refer to European legislation. Again, discrimination was not the first argument, but came later." (October 2010)*

From this perspective, the primary goal of this lawyer is not to campaign for collective justice. The anti-discrimination legislation is rather mobilised in order to protect the interests of his client individually because, in this particular case, other laws were not appropriated to protect his clients' rights<sup>ix</sup>.

While Belgium traditionally handled social problems through bureaucratic regulation and the welfare program and rejected the principle of access to courts to vindicate rights<sup>x</sup>, this second model shows that anti-discrimination issues bring with them new ways of using the courts. According to Bruno de Witte, "courts in European countries have been reluctant to recognise that constitutional rights (such as the right to equality) are directly binding on private persons. The dominant approach is, rather, that it is for the legislator to decide whether there is a need to take action against fundamental rights violations committed by private persons and groups" (2009: 1722).

This model relies on strategic litigation and the mobilisation of courts to achieve broader social change through jurisprudence (Lejeune, 2011). It is clearly a model imported from the common law countries, where courts and litigation play a significant role in shaping discrimination issues. This second model therefore raises questions around the globalization of law and litigation processes. Membership of the European Union tends to broaden the framework Belgian citizens use to consider rights issues.

Both the protection and non-discrimination models are based upon an ideal of "legal protection" which believes, according to Bumiller, "the law to be a powerful and effective instrument because it provides victims with a tool by which they can force perpetrators of unlawful conduct to comply with socially established norms." (1988:2; see also Merry, 1995; Israël, 2009, Bumiller and al., 2011). This approach, based upon legal protection, does not take into account potential victims' ability to label their experience as discrimination or injustice. Workers' experiences of law include the interpretation and comprehension of the role of the law in promoting social change, as well as the barriers and constraints workers individually face. Their understanding of injustice both shapes and is shaped by legal intermediations with professionals.



**Table 2. Two models of translating complaints**

	<i>Workers' protection</i>	<i>Workers' non-discrimination</i>
<i>Legal qualification</i>	Protection legislation Internal positive law and norms Defined by collective bargaining between labour-related organisations and players	Non-discrimination legislation European law and internal positive law Produced by international actors, outside the labour field
<i>Range and specificity of protection</i>	Single location: workplace  Narrow range of people: workers  Wide range of protection: discrimination, harassment, unfair dismissal, etc.	Wide range of locations: workplace, housing, health care, etc.  Wide range of people: workers, citizens, customers, etc.  Narrow range of protection: discrimination according to the criteria defined by the law
<i>Strategic mobilisation of courts</i>	Application of the law  One particular case  Protection of individuals	Strategic mobilisation of courts and production of jurisprudence  One particular case which reveals collective implications  Collective justice

## 5. Workers' understanding of injustice

Do different legal intermediaries' various interpretations of workers' complaints play a role in the way workers themselves experience their injustice at work? How do their interactions with legal professionals shape workers' rights consciousness? Conversely, how does their understanding of injustice influence legal qualification by the legal professionals? In this section, we put forward the idea that interactions among legal intermediaries and plaintiffs influence the way in which workers experience, qualify, and comprehend their own stories of injustice. Instead of showing how the former influences the latter, we examine how workers think about law generally, and about specific discursive terms associated with anti-discrimination law. We also investigate how workers' representations and their lawyers' interpretation and qualification are mutually constructed through their interactions. Legal intermediations rely on a plurality of professional cultures and values, on a plurality of norms

(national and supranational, labour law and antidiscrimination law), and on a plurality of individual subjective perception of law and (material and immaterial) living conditions. Furthermore, plaintiffs' interpretations of the law are not consistent over time; their rights consciousness changes and becomes more complex during the course of their litigation. Characterising a problem into legal terms transforms the personal stories of victims into legal cases. Through this process, workers experience not only hope and faith in the "force of law" but also identity feelings of tension and deception toward the law. Several tensions and contradictions in workers' rights consciousness can be highlighted.

First, socio-legal scholars shed light on a barrier that impedes workers' mobilisation of law: litigants have to be able to name the situation or their experience as injurious (Felstiner, Abel & Sarat 1981; Bumiller 1987; Bumiller 1988; Marshall 2003)<sup>xi</sup>. Our empirical data demonstrate that workers' consciousness of an injustice is ambiguous. Most of the time, victims' narratives refer to three elements: an offence against his or her fundamental rights (unfairness), an unequal behaviour or treatment in comparison with standards (inequality), or an attitude resulting from complex societal processes (fatalism).

Second, workers have to view themselves as victims and assume this role (Bumiller 1988). Most litigants express two different and contradictory definitions of their own responsibility. If they consider themselves to be a victim of an injustice, they also view themselves as partly responsible for the situation. A female worker explains:

*"Litigation is important because I want to make it clear that I did not do anything wrong. I did a good job in the company; I had good assessments from my clients. I have gone through depression and I had no self-esteem anymore. I felt guilty to be pregnant, you know... I felt guilty and I even thought: "You should not have been pregnant; you have been away for three months. Your employer's reaction is understandable". Now I want my former employer to recognise that what he did to me was unfair." (November 2010)*

Third, workers have to view their employer's behaviour as inappropriate and perceive their experience as the result of an intentional behaviour from their employer. Litigants express different points of view about their employer. Some workers view their employer as "tyrannical" or "crazy". Attributing the inappropriate behaviour to the anger of one particular person contributes to "strengthen the illusion that institutions are fair and that discrimination is not prevalent as long as the victims of discrimination believe that their individual misfortune stem from the acts of aberrant individuals and from business practices" (Bumiller 1988:93). Other workers consider that their employer's behaviour is understandable. A black female worker explains:

*"I will not assume that discriminating black people is normal. But I think I can understand employers, they are afraid of the difference." (November 2010)*

If these three conditions come together (naming a situation, viewing themselves as victims, and considering the injustice to be the result of an intentional behaviour), workers are likely to mobilise law and legal mediators to solve their employment problem. As for other plaintiffs, after Stephanie's father convinced her that she was not in the wrong but that her employer was, she then decided to meet a lawyer for the first time and to implement a legal process.

At this stage, when initially meeting one or several legal intermediaries, workers' rights consciousness is based upon the idea that law protects workers because they are the more vulnerable participants in the employment relationship. They conceive the law as a coherent body of norms and values that regulates their employment relationships while protecting workers individually. Here the legality was shaped by the history of negotiated labour rights. Their individual access to court and litigation does not lead to any kind of apprehension or vindication of new rights beyond their own situation.

Therefore, mobilisation of the law and legal professionals does not systematically incite workers to view their own litigation as a particular means to fight general inequalities among workers on the basis of race, origin, disability or gender. Given this, under what conditions do workers interpret their own stories in the light of anti-discrimination legislation? How do they view the law as a resource to fight discrimination generally? Generalisation process and anti-discrimination rights consciousness requires workers to traverse additional barriers.

In some cases, workers view the law as a resource to fight discrimination generally, and consider their own litigation as a particular means to fight general inequalities among workers on the basis of race, origin, disability or gender. A young woman who was wearing the veil was not hired in a bank after a job interview. She took a recording of the interview, in which the employer told her why she could not be hired; firmly convinced that the employer refused to hire her because of her veil, she got in touch with her union and the Centre for Equal Opportunity and Opposition of Racism and showed them the recorded interview. She was determined to sue the bank, but if her union and the Centre did not refer to anti-discrimination legislation, she did not want to follow up the procedure. She explains:

*"If litigation merely means asking for compensation because my employer unilaterally breached my contract, I am not interested at all! But if litigation also means bringing up the discrimination as an aggravating circumstance, I am in! The discrimination against veil is what matters!" (December 2010)*

In such cases, workers tend to see their individual case as relevant to understanding how other workers experience the same unfair treatment in the workplace and see their own case as part of larger strategy through which they recognise themselves as part of a larger group. Legal intermediaries promote the idea that a worker's personal story is relevant in creating new jurisprudence which will in turn affect many other people. In this way, litigants do not consider their own case in isolation but rather conceptualize it as a part of broader challenges, generalising their story and speaking on behalf of a group

(Boltanski 1994;2009). A transgender woman was fired when she began the medical process of gender transition. She explains:

*“Courts and litigation are the only option to make him [her former employer] understand that he was wrong. Even through litigation, I am not sure he is going to understand. He was totally blind and impervious to my situation. So litigation is essential, especially for all the others like me, all the women and men who are afraid to show who they really are, all those who live a hidden life. [...] Nowadays, the law does not say anything particular about transgender people’s rights. My case is one of the first cases litigated in Belgium. It is crucial to clearly say: ‘The law exists, people must respect it’. If it is not the case, if the law has no power, it is laughable.” (December 2010)*

Litigation also brings the cause to the attention of the public. Through this process, a singular misfortune becomes a part of broader injustice patterns. However, this process of generalisation requires that workers understand their own experience as the result of their belonging to one particular group who share a legally protected characteristic. They have to consider that the inappropriate behaviour of their employer or colleague is linked to the fact that they are a member of a structurally oppressed group, for instance women, ethnic minority groups, or disabled workers.

This process of generalisation is also frustrating for plaintiffs. Litigants sometimes feel deprived of their own story because they think that their individual story is being exploited by legal intermediaries for their own ends. While legal intermediaries are likely to use individual cases to fight for general goals, some litigants think legal intermediaries are exploiting their individual story for its own ends. A woman working as assistant manager in a private company, who discovered that a male employee with the same title and less experience was making higher income than she was, says:

*“Since the beginning, the equality agency has been very clear. If they support my case, if they help me, if they pay for my litigation, it is because they do believe they can create innovative jurisprudence. But sometimes, I think that everything is going too far... and it takes so many months and years. I would sometimes prefer running a transaction with my employer. It would be faster than the litigation, courts and so on. But they need my case, because my record is what they call “an excellent record with all the proofs needed”” (December 2010).*

Furthermore, although some litigants celebrate the general purpose that strategic litigation can serve, they also adopt a very pessimistic point of view about the power of law to change the society. They express a “double consciousness” (Matsuda 1987) which embodies both contradiction and ambiguity. The abovementioned transgender woman expresses the idea that law is powerful but ineffective:

*“I do believe that litigation is important. It is the only way to create a law to protect transgender people like me... We have to change the law in order to change the society. But I am also convinced that I will*

*not enjoy those changes. I will be dead before that. Even if the law changes, I am not sure the society is going to change.”(December 2010)*

In short, if interactions with legal mediators generate new commitments, attachments, and capacities of enduring political significance among workers, generalisation also has pernicious effects for the workers themselves.

## **Conclusion**

Legal intermediaries play a significant role in promoting alternative ways of mobilizing the law to deal with employment discrimination issues. While lawyers have historically interpreted individual cases in the light of legislation protecting workers in their employment relationship with employers, alternative legislation enacted in the last ten years has provided additional resources. Government equality agencies were created to deal with such issues. Legal intermediaries who work in these organisations mobilise legislation specifically outlawing discrimination not only in the workplace but also in a broader social context.

In this article, we have brought together rights and legal consciousness studies and the sociology of intermediation to argue that legal intermediaries influence the way workers experience, qualify, and comprehend their own stories of injustice. We have examined the way in which workers think about law generally and about specific discursive terms associated with anti-discrimination law. As Ewick and Silbey demonstrated, “the same person may express vastly different understandings of the law.” (1998:228). Legal intermediaries generate new commitments, attachments, and capacities of enduring political significance among workers. Workers’ rights consciousness changes and becomes more complex throughout the course of their litigation.

We have highlighted tensions and contradictions in workers’ rights consciousness. If workers view the law as a resource to fight discrimination, they also adopt a very pessimistic point of view about the power of the law to change society. In addition, workers tend to conceive of their individual case as relevant in understanding how other individual workers experience the same unfair treatment at work. Nevertheless, they sometimes feel simultaneously deprived of their own story through this generalisation process.

Most importantly, our empirical investigation demonstrated that anglo-saxon scholars’ observations about mobilisations of law and legal consciousness among workers in common law countries can be extended to civil law countries. In the specific field of employment discrimination, international regulations have penetrated and shaped local social arenas (Merry, 1992). This finding reveals changes to the way in which lawyers and legal intermediaries conceptualise the goal and meanings of courts and litigation in Belgian society. Workers are also likely to experience and understand the law differently, as they are encouraged by legal intermediaries to view their personal story as relevant

to lead broader action for social justice and to consider that litigation promotes social change.

This exploratory paper suggests several lines of research for further investigations which currently remain under-examined, specifically regarding the way in which lawyers can use courts to vindicate rights in civil law countries (Commaille and Dumoulin, 2009; Vanhala, 2009). If recent works show new strategic and political mobilisations of courts in Europe (Kelemen, 2003; Soennecken 2013; Cichowski, 2007; Conant, 2002), a deep empirical analysis must be built in order to highlight the stakes and consequences on civil rights' vindication and on ordinary citizens' rights consciousness.

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<sup>i</sup> Many scholars have mobilised the concept of legal consciousness and attributed it with diverse meanings. Susan Silbey suggests that the debate around this term should move on and that as such it is more useful to invoke other concepts to develop our understanding of how people experience law (2005).

<sup>ii</sup> For further critical comments on legal consciousness studies, see García Villegas (2003), Israël and Pelisse (2004).

<sup>iii</sup> Organisation for Economic Cooperation and Development (OECD).

<sup>iv</sup> This paper focuses on experiences of individuals with claims of disparate intent and does not analyse claims about disparate impact or indirect bias (Sturm 2001; Gertner 2012).

<sup>v</sup> European directive 2000/43/CE requires each state to create an independent organisation dedicated to helping and supporting victims of discrimination.

<sup>vi</sup> Interviews were conducted in French and then translated by the authors.

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<sup>vii</sup> The impact of lawyers' socialisation and identities in shaping their practice is outside the scope of this paper, although this is a highly relevant and significant topic of research (Boigeol 1980; Cam 1978; Roussel 2002).

<sup>viii</sup> Heyer (2002) and Gleeson (2009) showed the positive role that civil society may play in promoting collective justice for vulnerable workers, respectively in Germany and in the United States.

<sup>ix</sup> Vindication for rights through the courts demonstrates how the symbolic power of the law can contribute to promote change, although the symbolic dimension of law is outside the scope of this paper (see: García Villegas 1995).

<sup>x</sup> Marie Doris Provine, who compares French and American courts mobilisations (French models being very similar to Belgian ones), says: "American rights consciousness and litigiousness are, of course, controversial in United States, as well, and many believe the United States has gone too far in permitting courts to shape public policy. France provides anyone concerned about these issues a fascinating alternative vision of the role of courts in society." (1996:247-248)

<sup>xi</sup> Other scholars have highlighted a complex social process in action, revealing several factors preventing people from lower social-economic groups from mobilising the courts: because they do not recognise something as a legal problem with legal solutions, because legal fees are too high, or because they are suspicious of lawyers for cultural reasons (Ladinsky 1963; Carlin, Howard & Messinger 1967; Galanter 1974; Abel 1985).