

The Effectiveness of Sexual Harassment Law in Chile: From Theory to Practice

By

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Abstract

This study examines the theoretical framework underlying Chilean legislation on sexual harassment in the workplace, notably to determine if the legislation has succeeded in uncovering and addressing the gender injustice and inequality involved in sexual harassment.

This study further reviews whether the legislation adopted in 2005 is meeting its intended goal of protecting targets from harm by providing effective relief, penalizing perpetrators, and promoting adequate labour relations and climate.

A combination of research methods were employed, notably a review of the legal scholarship, of Chile's regulatory framework for sexual harassment, and of administrative and court system jurisprudence involving targets and perpetrators from the period prior to the enactment of the legislation in March 2005 through to October 2014. Quantitative sexual harassment data were drawn from a nationwide household survey conducted in 2011 by Proyecto Araucaria ("Research, Policy and Practice With Regard to Work-Related Mental Health Problems in Chile: A Gender Perspective") The study also included interviews with key informants and focus groups with female workers.

This study concludes that the debate between the equality versus protection of personal dignity paradigms is an abstract discussion not reflected in the practices of justice system actors, and that for the law to be effective, a sociopolitical and legal context facilitating recourse to it is required. Rather than considering only the formal resort to the relief provided in the law, it is crucial to examine the actual practices of individuals seeking to advance the protection of their rights.

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GLOSSARY

Contraloría General de la República: Office of the Comptroller General

Desafuero: Action requesting court permission for dismissal

Juzgado de Letras: Trial court

Fuero: Worker reinforced protection

Inspección del Trabajo: Labour Inspectorate

Mutual de seguridad: It is an occupational health and safety institution which offers insurance services for occupational illnesses and injuries to employers.

Servicio Nacional de la Mujer (SERNAM): Directorate of Women's Services

Recurso de protección: Writ for the protection of constitutional rights

Tutela: Writ for the protection of constitutional rights in the workplace

Abstract

This study examines the theoretical framework underlying Chilean legislation on sexual harassment in the workplace, notably to determine if the legislation has succeeded in uncovering and addressing the gender injustice and inequality involved in sexual harassment.

This study further reviews whether the legislation adopted in 2005 is meeting its intended goal of protecting targets from harm by providing effective relief, penalizing perpetrators, and promoting adequate labour relations and climate.

A combination of research methods were employed, notably a review of the legal scholarship, of Chile's regulatory framework for sexual harassment, and of administrative and court system jurisprudence involving targets and perpetrators from the period prior to the enactment of the legislation in March 2005 through to October 2014. Quantitative sexual harassment data were drawn from a nationwide household survey conducted in 2011 by Proyecto Araucaria ("Research, Policy and Practice With Regard to Work-Related Mental Health Problems in Chile: A Gender Perspective") The study also included interviews with key informants and focus groups with female workers.

This study concludes that the debate between the equality versus protection of personal dignity paradigms is an abstract discussion not reflected in the practices of justice system actors, and that for the law to be effective, a sociopolitical and legal context facilitating recourse to it is required. Rather than considering only the formal resort to the relief provided in the law, it is crucial to examine the actual practices of individuals seeking to advance the protection of their rights.

Résumé

Cette étude analyse le cadre théorique à la base de la législation chilienne sur le harcèlement sexuel dans les milieux de travail, en particulier dans le but de déterminer si la loi actuelle a réussi à mettre en lumière et confronter l'injustice et l'inégalité entre les sexes impliqués dans le harcèlement sexuel.

Elle examine également si la législation adoptée en 2005 par le Chili atteint son objectif de protéger les victimes en offrant une réparation effective, en pénalisant les harceleurs et en favorisant des relations de travail appropriées.

Une combinaison de méthodes de recherche ont été utilisés, notamment un examen exhaustif de la doctrine juridique, du cadre réglementaire chilien sur le harcèlement sexuel, et de la jurisprudence des organes administratifs et judiciaires impliquant les victimes et les auteurs du harcèlement sexuel, jurisprudence rendue entre la période avant l'adoption de la législation en mars 2005 jusqu'en octobre 2014. Les données quantitatives sur le harcèlement sexuel utilisées pour l'étude ont été obtenues à partir d'une enquête nationale auprès des ménages menée en 2011 par *Proyecto Araucaria* ("Research, Policy and Practice With Regard to Work-Related Mental Health Problems in Chile: A Gender Perspective"). Le portrait a été complété par des entretiens avec des informateurs-clés et des groupes de discussion avec des travailleuses.

La conclusion propose que le débat entre les paradigmes de l'égalité et de la protection de la dignité personnelle est une discussion abstraite qui ne se reflète pas dans les pratiques des acteurs du système de justice. On a également conclu que, pour que la loi soit efficace, il faut un

contexte socio-politique et juridique facilitant les recours. Plutôt que de restreindre l'examen au seul recours officiel à la réparation prévue par la loi, la considération des pratiques effectives de ceux et celles qui se battent pour leurs droits restent un facteur crucial.

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INTRODUCTION

Women experience many forms of workplace discrimination and inequality, including segregation, wage disparity, and even violence. Physical and psychological mistreatments are rife. Sexual harassment, a subset of violence, is a reflection of the subordinate condition of women in many workplaces. Sexual harassment in the workplace is a recognized form of violence against women under Art. 2(b) of the 1993 Declaration on the Elimination of Violence against Women.¹ The Special Rapporteur on Violence against Women, for her part, defines gender violence as a “systemic, widespread and pervasive human rights violation, experienced largely by women because they are women.”²

While both sexes can be targets of sexual harassment, the gender dimension is clear. Gender determines the extent, unidirectionality, and unbalanced impact of the phenomenon on women. Most workplace sexual harassment involves men targeting women, and research amply confirms that women are disproportionately more affected.³ Sexual harassment detracts from enjoyment of many rights, notably to physical and mental integrity, to work, and most certainly, to health.

As an instrument of societal regulation, the law is meant to protect, secure, and guarantee the fulfillment of rights. Compliance is expected to protect all from harm and provide redress when harm is done. Internationally, normative development has repeatedly stated that States are under

¹U.N. General Assembly, *Declaration on the Elimination of Violence against Women*, vol. A/RES/48/104 (United Nations, 1993). Article 2: Violence against women shall be understood to encompass, but not be limited to, the following: (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution.

²Human Rights Council, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Rashida Manjoo*, vol. A.HRC.20.16 (New York: United Nations, 2012) at para. 61.

³*Ibid.* para. 16.

an obligation to provide redress for victims of violence against women, including, inter alia, victims of sexual harassment by agents of the State and private individuals, in both public and private settings.

The legislation designed to fulfill this obligation that was adopted by Chile took a gender-neutral stand on sexual harassment and penalties. For more than a decade, Chilean feminists fought hard for Congress to enact a sexual harassment ban based on a discourse on equality and non-discrimination against women that borrowed the language and legal categories of North American feminists.

In 2005 the Chilean Congress adopted legislation banning sexual harassment in the workplace based on non-discrimination and the protection of worker dignity, both fundamental principles of the *Código del Trabajo*, henceforth *Labour Code*, and labour law.⁴ The bill took a gender-neutral approach to make it palatable to politicians who felt that the gender case was overstated and could open the floodgates to groundless allegations. Congressional debate became a locus for some politicians to express and reinforce stereotypes as others strove for normative cultural transformation.

Congress ultimately adopted a pragmatic approach, anchoring the bill on a narrative of the protection of dignity while recognizing that sexual harassment mostly targets women. While this made it possible for the bill to pass and to provide mechanisms in labour legislation to protect all workers, the notion that its deeper purpose should be to achieve greater gender justice continued to linger throughout the debates, in subsequent administrative interpretations, and in scholarly

⁴*Ley No 20.005* (Chile: 2005) and *Código del Trabajo* (Chile: 1980).

work. Did the dignity approach make the gender dimension invisible and take away the transformative potential of the law?

The issue of the transformative potential of the law and its utility in preventing harm should be considered in the light of current use. Laws must be living instruments, lest they become dead letter law. Implementation is an important step towards assessing effectiveness and there are many factors involved in making law a reality. One is the legislation itself, another the available recourses and legal architecture enabling people to use the law, yet another the socio-legal context in which litigants and judges use the law. As noted by the Special Rapporteur on Violence against Women, there is a need to consider a “holistic approach is based on the notion that, unless women can achieve economic independence and be socially and politically empowered, the realization of all human rights will remain abstract”.⁵

This project deals with the socio-legal culture in which sexual harassment as a legal phenomenon takes place, and with its relationship with the effectiveness of the law. Although it first implies defining effectiveness, this is not a conceptual question because it requires to look into concepts embraced by legal scholars, especially in continental legal tradition that distinguish from the validity of the enacted legislation (formal production of legislation given by the procedures set out in the Constitution), the efficacy as described as a feature that “men’s real behaviour generally to abide by the law”⁶; or the individuals and the courts generally to abide by the law⁷. But these terms are used at times interchangeably, sometimes effectiveness is simply related to

⁵Human Rights Council, *supra* note 2 at para. 58.

⁶Jaime Araujo Rentería, *Filosofía o teoría del Derecho Constitucional* (Bogotá: Grupo Editorial Ibáñez, 2015) at 40.

⁷María José Falcón y Tella, "La pretendida eficacia de las sanciones" in Angel Sánchez de la Torre & Isabel Araceli Hoyo Sierra, eds., *Eficacia del derecho (Teorías y aplicaciones)* (Madrid: Editorial Dykinson 2010) 89-112 at 90; Agustín Squella, *Introducción al Derecho* (Santiago: Editorial Jurídica de Chile, 2001) at 342.

the fact the legislation is obeyed⁸ and efficacy examines whether the legislation achieved the envisioned aims.⁹ Neither conceptual distinctions offer a way to measure effectiveness because this will necessitate empirical methods to measure. The study of effectiveness and culture is not well served by traditional legal methods, as these are often unable to grasp a legal system's cultural components and are of little help in understanding the interactions of actors and institutions. Traditional methods are also of limited help in capturing the voices of legal players and sexual harassment targets. Decisions and reports are mediated means that contain "transcribed" voices that have been rewritten, translated, or codified –hence the importance of the "interrogation", "questioning", and "listening" experiences of all involved. This is not to say that researchers themselves do not use codified language. Lawyers and the legal community speak the rights language, yet often do so for purely strategic reasons.

My research aims to fill a gap at two levels. First, document the connection between the conceptualization of sexual harassment and discrimination against women as psychosocial hazards and identification of such hazards as violations of worker dignity. Because of the strong gender component of sexual harassment, there is a need to connect discrimination against women and the way work-related psychosocial hazards are understood. The thesis aims to examine how integrated legal approaches can attempt to both protect dignity in the workplace and confront the cultural misrecognition of sexual harassment, and how legal actors appropriate these frameworks in litigation.

⁸ This is the case in Araujo Rentería, *supra* note 6 at 40.

⁹Falcón y Tella, *supra* note 7 at 90.

Second, this work aims to assess the effectiveness of sexual harassment law through the study of formal mechanisms of redress, of administrative and judicial routes, of the opinions of those who use the law or work with it, and of the perceptions of female workers concerning their experience and understanding of the law. A decade after sexual harassment was banned under the Chilean *Labour Code*, no effectiveness assessment or legal analysis has ever been conducted. This research aims to address this gap.

Because targets confront sexual harassment through a range of strategies, this research aims to generate new knowledge on Chilean workplaces and worker strategies in dealing with this experience. The practices and experience of the numerous actors involved speak to specific beliefs about the opportunities and disadvantages the system provides. Paraphrasing the language of the literature on domestic violence, they may point to a critical route for access to justice. They may also involve power relations and the effects of sexual harassment on health and day-to-day working life. Differently from domestic legislation where there are two individuals, sexual harassment legislation seeks to protect workers from a behaviour that harms the workplace climate involving more players: the workers -the doers and the targets- in conflict because of the harassment and the employers that have to protect workers' dignity, rights and working climate. The tension is not only to address the harm but resolve the issue within the rights conferred to the alleged target. In the Chilean legal tradition, labour inspectors, lawyers and judges are highly concerned with job stability and security –a mantle of protection which targets of sexual harassment may lose and allege perpetrators will invoke when sanctions are potentially imposed.

The research questions guiding this study are manifold and involve the issues raised above. The literature notes that some jurisdictions have adopted the dignity approach to sexual harassment while common-law countries have tended to favour the U.S. discrimination and equality model. Given the feminist contribution to legal reform and doctrinal elaboration, Chapter 1 will examine the theoretical underpinnings of sexual harassment in order to elucidate the values—i.e., equality, non-discrimination, dignity- that Chile’s sexual harassment law sought to protect. It will also review international normative developments on sexual harassment and provide a framework to understanding effectiveness.

Chapter 2 examines the legislative sexual harassment framework and case law in order to assess the use of the equality and dignity approaches and whether the distinction has any practical implications for litigants and judges. Legal research often tends to focus on rules, doctrinal opinion, and case law. As a process, it reviews how the law is translated into decided cases and how legal scholars receive, process, and give meaning to rules. This study reviews the case law to assess legal actors’ understanding of sexual harassment and how it permeates their reasoning and rulings through traditional legal analysis. It looks into both targets and alleged perpetrators as plaintiffs. The result is a thorough review of case law that sheds light on the nuances of the tensions embedded in protecting workers from wrongful dismissal vis-à-vis the right of employers to discharge or protect workers from harm. It also incorporates a quantitative approach that looks at actors and at how they fare in the judicial process, as the remedies pursued by targets reveal both the opportunities and challenges posed by their use of the law.

Chapter 3 reports on results drawn from interviews and a survey looking at sexual harassment in Chile. The guiding questions seek to document women's experience of sexual harassment, their ability to recognize the phenomenon, how they confront and use the various procedures, and how these procedures are perceived by legal scholars, union representatives, workers, and policymakers.

This study assesses effectiveness from the standpoint of women workers, their perceptions and experiences in the workplace and with the legal system. It is not intended to be an examination from the standpoint of management or the courts. Legal system actors tend to operate under the assumption that they are neutral and that procedures are sensitive to worker rights and serve to level the playing field for those who lack power.

This review is anchored in the experiences of those who use the law—litigants, judges, labour inspectors, and female workers. The actions of each provide meaning insofar as they inform their understanding of the law. The workers who participated in the interviews—all of them women—provide insights into the experience of confronting sexual harassment. An additional guiding question is the strategies workers use to deal with the experience and how labour inspectors who supervise employer compliance and the lawyers who litigate assess the law in practice when targets make use of the law. The thesis is rooted in Araucaria, an overarching research project with partners from a broad range of sectors excluding employers who were not represented in the partnership.¹⁰

¹⁰Araucaria Project, “Research, Policy, and practice with regard to work related mental health problems in Chile: a Gender Perspective”, grant from the International Development Research Centre, on behalf of Global Health Research Initiative. See, <http://www.proyectoarucaria.cl/proyecto.php>.

As Friedman suggests, effectiveness is not an abstract question.¹¹ It implies measuring the law based on certain markers, which usually requires empirical data. Purely describing the objectives of rules and the mere interpretation of the law seldom provides adequate answers. The choice of methods and methodology is not just a question of approach—it provides a political platform for an academic enterprise. The law is comprised of different structures and possesses substantive and cultural components that are often the expression of divergent viewpoints and interests.

How claims are filed, the forms to be filled out, the rituals of investigation and conciliation—all express rules and policies. Institutional ethnographers write that while relationships are built around power structures, they involve more than the imposition of rules.¹² This is similar to procedures that express the organizational interests of management, the Labour Inspectorate, and sexual harassment policy.¹³ Claims of objectivity in social research are often suspect, as scholars are unlikely to come into a field bereft of values. It is often worse not to recognize that objectivity is defined by those who control knowledge.¹⁴

The law also presupposes that there are rulers and the ruled, and that power plays an important role in the functioning of the legal system. As such, in this thesis I combine a gender perspective and feminist methodology to reveal power structures and relationships.¹⁵ It is not an uninterested

¹¹Lawrence Friedman, "Legal Culture and Social Development" (1969) 4 *Law & Soc'y Rev.* 29. 101.

¹²Sandra Harding, "Is There a Feminist Method?" in Sandra Harding, ed., *Feminism & Methodology* (Bloomington: Indiana University Press, 1987) 1-14.

¹³Marie Campbell & Frances Gregor, *Mapping Social Relations. A Primer in Doing institutional Ethnography* (Toronto: The University Toronto Press, 2008) at 15.

¹⁴Alan Bryman & James J. Teevan, *Social Research Methods. Canadian Edition* (Don Mills, On: Oxford University Press, 2005) at 17-20.

¹⁵Harding, *supra* note 12.

project, inasmuch as it does not claim to be neutral, and indeed raises explicit questions about power interests within political, social, and organizational contexts.¹⁶

Thus I have chosen to reflect upon the definition of effectiveness of the law from a female worker's experiential standpoint, in contrast with the views of management, labour inspectors, and judges. Although it is customary to speak of powerless individuals, we will show the ways in which people [and women] resist and contest the rules and their contexts.¹⁷ They invoke the law, even as they do not necessarily avail themselves of the legal recourses it provides.

This research attempts to capture the voices of women and the multiplicity of their individual and collective experiences. Although men are potential targets as well, this research is anchored on the belief that women's voices must be heard if their condition in the workplace is to improve.¹⁸ Its underlying political commitment is to make a contribution to scholarly investigation capable of shaping public policymaking.

This research uses a mixed-method approach. It reviews primary and secondary sources and employs traditional legal analysis to study legislation, case law, doctrine, and literature (Chapters 1 and 2). It uses qualitative and quantitative social research methods based on focus groups and individual interviews conducted across three Chilean cities, in addition to quantitative analysis of a national survey of psychosocial hazards in the workplace conducted jointly in 2011 by Chilean

¹⁶Campbell & Gregor, *supra* note 13 at 15.

¹⁷Patricia Ewick & Susan Silbey, "Millie Simpson", *The Common Place of Law: Stories from Everyday Life* (Chicago: University of Chicago Press, 1998) 3-14.

¹⁸ This idea follows what Harding posits as feminist social inquiry. See Harding, *supra* note 12.

NGO *Centro de Estudios de la Mujer* and the Chair on Occupational, Health and Safety Law of the University of Ottawa¹⁹ (Chapter 3). Methods are explained separately in each chapter.

¹⁹ See Proyecto Araucaria at <http://www.proyectoarucaria.cl/equipo.php>. *Supra* note 10.

CHAPTER 1

FRAMING SEXUAL HARASSMENT FROM THEORY TO THE LAW

Introduction

This chapter is divided into two sections. The first provides the theoretical framework that underpins the understanding of sexual harassment and how it is translated in laws and policies, while the second provides a review of literature discussing the meaning of regulatory effectiveness and how this could be studied in light of legislation in Chile. In the first part of the first section, the theoretical framework of sexual harassment in different legal systems is presented from its inception within the feminist and legal reforms of North America (1.1). Then, in the second part, I describe and assess standards under international human rights law, and how they have encapsulated and treated sexual harassment in the U.N. and in the regional European and American systems for the protection of human rights (1.2.). The third section deals with the process of transposing legal concepts and categories to other jurisdictions, particularly in Europe. There, the dignity paradigm has been eclipsed by the discrimination–equality paradigm, but most of the time both paradigms are integrated into anti-discrimination, labour, and criminal statutes (1.3.)

In the fourth part (1.4), there is a review of legislation in the Americas– specifically Latin America– and the approach that legislation on sexual harassment has taken. Finally, I examine the approach taken in Chile in the context of discrimination versus dignity and labour rights to ensure safe and healthy working conditions. The objectives and values of sexual harassment laws and policies cannot be examined narrowly, given that these different orientations are often interrelated.

The second section discusses conceptions of effectiveness and how they will be applied in my examination of sexual harassment laws in Chile, including issues relating to access to justice for targets of sexual harassment. Finally, it looks at the legal institutions, architecture and actors involved to examine how targets could obtain access to justice.

The guiding questions are whether sexual harassment in Chile is understood as a question of discrimination and/or harm to a person's dignity, and what are the necessary conditions to have an integral working understanding of legal effectiveness.

1. Understanding Sexual Harassment Law

1.1. Feminist Movement Conceptualizations of Sexual Harassment: Towards a Legal Understanding

The feminist movement introduced the term sexual harassment and provided a definition in an attempt to name an experience many women shared across different situations.²⁰ In the early seventies, feminist activists in the United States called sexual harassment “little rapes”. Canadian feminists followed suit in an attempt to politicize a personal experience that has adverse consequences for women. They conceptualized sexual harassment as a subtle form of violence against women; Backhouse and Cohen called it “secret oppression”.²¹ Sexual harassment was explained as a pervasive behaviour on a continuum ranging from sexual innuendo to attempted

²⁰Catharine A. MacKinnon, *Sexual Harassment of Working Women: a Case of Sex Discrimination* (New Haven: Yale University Press, 1979). [Sexual Harassment of Working Women]

²¹Constance Backhouse & Leah Cohen, *The Secret Oppression of Working Women. Sexual Harassment of Working Women* (Toronto: Macmillan of Canada, 1978).

rape or rape and arising from asymmetrical power structures.²² Sexual harassment was not thought of as an issue of sexual desire, and was instead portrayed as an expression of bullying²³ whereby women's sexual agency and autonomy are subject to unwanted sexual attention which they are compelled to endure in order to survive in schools, workplaces, jails, or the streets. To be hired or promoted, women risked experiencing sexual exploitation and unwanted sexual attention and demands -and reprisals if they did not relent. Societal power relations that made women sexual objects and second-class citizens, particularly in the workplace, facilitated harassment.

The term coined in North America traveled across the world, influencing responses in the political and legal arenas.²⁴

The process of naming -politicization- provided an agenda for change and made demands visible, but also made use of the law to define but also recognize or alternatively disqualify situations that are relevant to feminists.²⁵ This explains what transpired at the international fora like the United Nations where feminist demands -many of which fall within the scope of legal reform- were advanced and later articulated to become standards at the domestic level up to this day.

The law has strong symbolic power. There is a symbiotic relationship between the social world that shapes the law and how the law influences social interaction, social organization, and the

²²Ibid. at 38-39.

²³Ibid. at 42.

²⁴Jane Aeberhard-Hodges, "Sexual Harassment in Employment: Recent Judicial and Arbitral Trends" (1996) 135:5 *The International Labour Review* 499.

²⁵Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989) at 162-165.

political order.²⁶ The law is a place where individuals gain recognition but can institutionalize non-recognition through silence. The law provides or denies agency to persons as equals possessing equal worth, and self-realization²⁷ and as such can be both a vehicle for emancipation or oppression.²⁸

The law and legal institutions are both central aspects of dealing with sexual harassment. Sexual harassment of women has been historically pervasive. The legal order is a constant in modern and contemporary societies to deal with societal conflicts and harms. What's penalized and what is silenced or neglected is equally important. Even if the law is devoid of specificity, it has the potential to capture and reprimand the behaviour that sexual harassment represents and produces through interpretation of existing legislation.

In feminist legal thinking, the law is also a constraint. Once playing by the rules is accepted, even for instrumental acts of social transformation, it provides limited space for legitimacy.²⁹ Feminist scholars also note that the law continues to be centered around a male paradigm. Even when it considers women as rights holders, decentering the model is difficult.³⁰

In that light, the law presents complexities and limitations in responding to the requests for protection and promotion of women's rights. Legal recourses act as vehicles but they also frame demands in such ways that radical demands for transformations may not be met. The array of

²⁶Pierre Bourdieu, "The Force of Law" (1986-1987) 38 *Hastings Law Journal* 814.

²⁷Denise Réaume, "Harm and Fault in Discrimination Law: The Transition from Intentional to Adverse Effect Discrimination" (2001) 2:1 *Theoretical Inquiries in Law* 1 at 13-14 and 22. [Harm and Fault in Discrimination Law]

²⁸Anne Marie Mooney Cotter, *Gender Injustice. An International Comparative Analysis of Equality in Employment* (Cornwall: Ashgate, 2004) at 19-20.

²⁹Smart, *supra* note 25.

³⁰*Ibid.*, see also Frances Olsen, "The Sex of Law" in David Kairys, ed., *The Politics of Law* (New York: Pantheon, 1990).

legal remedies available at the outset was a limitation in terms of its scope and opportunities for advancement. Hence, political strategies and the use of the law by the feminist movement have been contingent on the given legal structures and on whether specific types of violations are included in the definition of sexual harassment. If rape, attempted rape or sexual assault are part of the sexual harassment narrative, criminal remedies seem a natural option. If it is a behaviour that becomes a barrier for promotion or access to employment, it could be a question of discrimination or tort. As Mackinnon and Backhouse point out,³¹ remedies should be seen as vehicles that can either be fruitful or not.

To build sexual harassment protection into existing legal categories or to create new ones, the law also requires the engagement of many players, including judges, lawyers, legal academics, politicians, lawmakers, and the community at large. Each player, at different moments of the legal phenomenon, takes or plays a role, be it in the enactment of legislation, in shedding light on the legal approaches taken in legal reform and later in scrutinizing the adjudication and implementation of the law. In some legal orders, like the continental tradition, legislative bodies and stakeholders are key to promoting legal change, more so than lawyers and judges involved in legal activism through litigation. In contrast, it seems that in common law systems shaping legal categories for greater inclusion of social phenomena can be a creative exercise for lawyers and activists where judges play a pivotal role but even those efforts have their limits.

MacKinnon's sexual domination paradigm explains sexual harassment as a form of sexual domination and economic exploitation of women.³² As such, the law should be required to deal

³¹ For instance, see MacKinnon, *supra* note 20, at 143-213 and Backhouse & Cohen, *supra* note 21, at 106-144.

³² MacKinnon, *supra* note 20.

with and eradicate dominance and exploitation in the workplace. If sexual harassment is a question of dominance, the law is only one aspect of the solution. Promoting women's equality in order to reduce the incidence of harassment is a key academic and political undertaking. If the basis of sexual harassment is the unequal condition of women, one venue is to pursue equality and the end of male sexual dominance across all spheres. If sexual harassment is seen as negating the equal opportunities of target groups, then the goal should be to promote equal opportunity for all. Borrowing from some of the debates in the literature, it could be argued that more equality would reduce harassment. But as Larrauri points out, the correlation between violence against women and degrees of inequality in some societies does not explain violence in more egalitarian societies.³³

Feminist scholar, Vicki Schultz, made a contribution to the sexual harassment dominance model, which she called the competence paradigm.³⁴ She argued this model best captures the full sexual harassment experience of working women and men, both as targets and perpetrators. She does not deny that harassment is a violation of equality, or that sexual advances take place, but holds that not all harassment is sexual dominance or sexual exploitation of women as portrayed by MacKinnon.

Schultz argues that if the driving force is sexual dominance and sexual requirements, MacKinnon's theory fails to capture the harm embedded in discrimination. Men harass women not just for sexual dominance but because of ingrained workplace sexism, where women are seen

³³Elena Larrauri, *Criminología crítica y violencia de género* (Madrid: Editorial Trotta, 2007) at 25-27.

³⁴Vicki Schultz, "Reconceptualizing Sexual Harassment" (1998) 107:6 Yale Law Journal 1683. [Reconceptualizing Sexual Harassment]

as inferior and as potential competitors for the better jobs.³⁵ The hostile work environment captures the unease some men feel when women assume jobs in male-dominated work milieux where women could be seen as threats or when men simply do not take women seriously as workers. Male unease can translate into sexually explicit actions or sexually discriminatory treatment. In this perspective, the sex or sexual component is almost accidental, as sexual harassment deals with discriminatory treatment on the basis of sex. This is clearly noted in male-dominated workplaces where women are seen as threats to a job market that was previously controlled by men as pointed out by Messing et al.³⁶ and Mueller and his colleagues.³⁷ The hostile working environment depicts the situation of many workers where the sexual element can be compounded with other forms of discrimination as pointed out by Bannerji.³⁸

But then, the competence paradigm is not totally different from a view that patriarchy relates to power relations, making the subordination of women similar in terms of how Mackinnon could view it.³⁹ Bannerji and others bring to light the intersectionality or different layers of oppression: racial, ethnic, class, and many others. However, legislation that is confined to the sexual dominance model where sexual advances only come from a superior and have detrimental

³⁵Vicki Schultz, "Sex is the Least of it: Let's Focus Harassment Law on Work, Not Sex" in Linda LeMoncheck & James Sterba, eds., *Sexual Harassment. Issues and Answers* (New York: Oxford University Press, 2001) 269-273 at 270. [Sex is the Least of It]

³⁶Karen Messing, Ana María Seifert & Vanessa Couture, "Les femmes dans les métiers non-traditionnels: le général, le particulier et l'ergonomie" (2006) 1:15 *Travailler*. See also Myrtle P. Bell, Mary E. McLaughlin & Jennifer Sequeira, "Discrimination, Harassment and the Glass Ceiling: Women Executives as Change Agents" (2002) 37 *Journal of Business Ethics* 65 at 68.

³⁷Charles W. Mueller, Stacy De Coster & Sarah Beth Estes, "Sexual Harassment in the Workplace Unanticipated Consequences of Modern Social Control in Organizations" (2001) 28:4 *Work and Occupations* 411.

³⁸Himani Bannerji, "In the Matter of 'X'", *Thinking Through Essays on Feminism, Marxism, and Anti-Racism* (Toronto: Women's Press, 1995) 121-158. Also Krieger et al. studied the workers experience of psychosocial hazards taking into account racial/ethnic and gender in the United States. Nancy Krieger *et al.*, "Social Hazards on the Job: Workplace Abuse, Sexual Harassment, Harassment, and Racial Discrimination. A Study of Black, Latino, and White Low Income Women and Men Workers in the United States" (2006) 36:1 *International Journal of Health Services* 51.

³⁹Kathryn Abrams, "The New Jurisprudence of Sexual Harassment" (1998) 83:5 *Cornell Law Review* 1169.

impacts on career advancement, job loss or security does not respond to the needs of many workers who are harassed by coworkers. If men as perpetrators are formally in equal employment status as women as targets and they cannot influence women's career advancement then the scope of a sex dominance model would not capture this harassment unless the interpretation of law envisions a larger context of dominance where any male harassment represents the power of the patriarchy.⁴⁰

Sexual harassment targets tend to be women, but not exclusively. It is a gendered phenomenon in terms of experience and prevalence among the sexes.⁴¹ Research conducted in the European Union from 1987-1997 indicates that 30 to 50 percent of all female workers have experienced some form of sexual harassment or unwanted sexual behaviour in their life time, whereas prevalence among male workers is 10 percent.⁴² The 2007 European Foundation for the Improvement of Living and Working Conditions Survey reports that bullying and sexual harassment in the workplace are the exception and not the rule. Bullying affected 5% of workers while sexual harassment affected less than 3 percent of female workers in the 12 previous months.⁴³ However, when sexual harassment is present women make up a greater proportion of the targets, being three times more likely than men.⁴⁴ Although there are variations among countries, sexual harassment remains a gendered phenomenon. The *Québec Survey on Working*

⁴⁰Ellen Franckel Paul, "Sexual Harassment as Sex Discrimination: a Defective Paradigm" (1990) 8 Yale Law & Policy Review 333. The author focus the critique to the model whether to deal with sexual harassment with tort or discrimination legislation.

⁴¹Duncan Chappell & Vittorio Di Martino, *Violence at Work*, 3 ed. (Geneva: International Labour Office, 2006).

⁴²European Commission, *Sexual Harassment in the Workplace in the European Union* (Luxemburg: 1999) at 5.

⁴³The European Foundation, *Women and Violence at Work. Background Paper* (Brussels: The European Foundation for the Improvement and Working Conditions, 2007) at 3.

⁴⁴*Ibid.* at 4.

and Employment Conditions and Occupational Health and Safety shows that 3.8% of women but only 1.4% of men were targets of sexual harassment in the previous 12 months.⁴⁵

The fact that women are targeted for sexual harassment because they are women could be explained in terms of subordination and other social constructions of female social inequality. While this could be referred to as the gender phenomenon, it should not obscure or limit the examination of sexual harassment at work. Indeed, if we are to be consistent with a power or domination theory, it should be acknowledged that workers confront unwanted sexual advances from either sex, and that male workers are harassed by women and may also experience same-sex harassment when confronted in situations of subordination.

When it comes to same-sex sexual harassment, feminist theories attempt to deal with the phenomenon in existing legal categories but such approaches beg questions as to the basis of the harm, that is if sexual harassment in that context is an issue of sex discrimination or a question of desire, and how to deal with it. Some may respond that same-sex harassment is closer to the sexual [desire] domination theory, while others may explain it happens in order to belittle sexual diversity and hence sexual harassment is a form of sex and gender discrimination,⁴⁶ because of non-conformity. But if the law is framed using “sex” as a category, sexual harassment as an offence committed against women leaves the unresolved issue that sexual minorities may not be

⁴⁵Katherine Lippel *et al.*, "Violence au travail: Harcèlement psychologique, harcèlement sexuel et violence physique" in M. Vézina *et al.*, eds., *Enquête québécoise sur des conditions de travail, d'emploi, et de santé et de sécurité du travail (EQCOTESST)* (Québec: Institut de Recherche Robert-Sauvé en Santé et Sécurité du Travail, Institut National de Santé Publique du Québec, Institut de la Statistique du Québec, 2011) 325-399 at 370-371. [Violence au travail]

⁴⁶ See Abrams, *supra* note 39 at 1225 and Katherine M. Franke, "What's Wrong with Sexual Harassment?" (1997) 49 *Stanford Law Review* 691.

protected at all unless the conduct is discriminatory harassment demeaning the target because of his/her sexual orientation.⁴⁷

In any case, legal reforms and the enactment of regulations tend to trail social and political processes, and public debate is often subject to numerous and compelling contradictions and compromises as the Chilean case reveals.

1.2 International Human Rights Framework on Sexual Harassment

Different international human rights instruments have addressed sexual harassment, from the UN declarations and treaties and its soft law to the regional European and American instruments.

The normative content provides an array of perspectives that borrow from the North American doctrinal development but it took almost twenty years before it was mentioned in the U.N. declarations and instruments. All of them recognize sexual harassment as a barrier for the advancement of women.

The early gender justice efforts in the international human rights standards in the area of employment involved the need to lift the barriers to equal access to employment, training and promotion opportunities that women encounter in paid labour and the recognition of women's reproductive capacity and how it impacts employment and working conditions.

⁴⁷Franke, *supra* note 46.

The First World Conference on Women convened in Mexico in 1975, emphasizing the need for women to enter the labour force and to be able to have equal pay for equal work, equal working conditions, and opportunities for advancement that should not be based on discriminatory grounds such as sex or marital status. The Conference document was explicitly linked to international labour standards established by the ILO.⁴⁸ The Second World Conference that took place in 1980 did not elaborate on women's working conditions, and violence was limited to that taking place within the family context or when directed against women because it was politically motivated.⁴⁹

It was the Third World Conference on Women held in Nairobi in 1985 that placed much emphasis on issues of *de jure* and *de facto* discrimination and how it affects women in different areas of life, including employment opportunities and equal access to employment.⁵⁰ Sexual harassment again was not identified as a barrier to work. It was in 1995 that the Report on the Fourth World Conference on Women held in Beijing first included sexual harassment in the chapter on violence against women.⁵¹

While seemingly natural today, the connection between sexual harassment and discrimination in employment contexts was not visible as an issue in the drafting of the 1979 Convention on the Elimination of all forms of Discrimination Against Women, CEDAW or Women's Convention.⁵²

⁴⁸ UN, *Report on the World Conference on the International Women's Year, 16 June-9 July 1975*, vol. E/CONF.66/34 (New York: United Nations, 1976) at para. 88-107.

⁴⁹ UN, *World Conference of the United Nations Decade for Women: Equality, Development and Peace: Copenhagen (14 to 30 July 1980)* (New York: United Nations, 1980).

⁵⁰ UN, *Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace* (Nairobi: 1985), para. 54.

⁵¹ UN, *Report on the Fourth World Conference on Women, Beijing* (New York: 1996) at para. 112.

⁵² Christine Chinkin, "Sexual Harassment. An International Human Rights Perspective" in Catharine A. MacKinnon & Reva B. Siegel, eds., *Directions in Sexual Harassment Law* (New Haven: Yale University Press, 2004) 655-671.

At that stage, discrimination was mostly connected to wage disparity, maternity, marital status, and the right of women to choose their employment or occupation.⁵³ Positioning gender discrimination in relation to violence provided women's rights not only with political legitimacy, but also with a new way of relating both phenomena when it happens in the workplace.

The Convention on the Elimination of Discrimination against Women adopted in 1979 deals with employment in article 11.⁵⁴ It was the Committee of the Elimination of Discrimination against Women in 1992 that addressed sexual harassment as a concern in the 19th General Comment on violence against women. It provided a definition of what should be considered sexual harassment,

Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.⁵⁵

In that light, sexual harassment was conceived as an expression of women's inequality in relation to men and as a matter of women's subordination impairing women's equality in the workplace. It encompasses the *quid pro quo* and harassment that produces a hostile working environment. Although considered a form of violence the Committee's understanding integrates sexual harassment as a psychosocial hazard when it frames it as a health and safety problem. There are

⁵³Lars Adam Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of all Forms of Discrimination against Women* vol. 29 (Dordrecht: Martinus Nijhoff Publishers, 1993) at 122-143. Needless to say, CEDAW did not refer directly to violence against women except for prostitution under article 6.

⁵⁴UN, *Convention on the Elimination of Discrimination against Women* (United Nations, 1979). It came into force in 1981.

⁵⁵CEDAW Committee, *General Recommendation No. 19. Violence against women* (1992) at para. 18.

evident implications in terms of policy design and remedies because it does not give pre-eminence to criminal or civil law remedies or administrative venues.

In a later development, the United Nations General Assembly issued a Declaration on Violence against Women which stated that sexual harassment is an expression of violence against women.⁵⁶ It called upon states to adopt penal, civil, labour and administrative sanctions to punish and redress the wrongs of violence perpetrated against women.⁵⁷

The first preliminary report of the *Special Rapporteur on Violence against Women, its causes and consequences*, in 1994, dealt with sexual harassment by establishing the difficulties of reaching a single definition.⁵⁸ The report indicated that misconduct could be captured by different definitions of sexual offenses and that how misconduct is addressed at the national level will depend upon cultural norms and values ranging from anti-discrimination legislation to criminal, civil or labour legislation. However, any definition should encompass two elements: that sexual harassment constitutes an unwanted sexual advance, and that it is offensive or threatening to the target.⁵⁹ This understanding has been fragmented, preventing human rights bodies from learning from each other.⁶⁰

The Women's Convention was an important integration of civil, political, and social rights, which have often been treated differently in international human rights law due to the political

⁵⁶UN, *Declaration on the Elimination of Violence against Women*, vol. A/RES/48/104 23 February 1994 (New York: United Nations, 1994).

⁵⁷Ibid. Art. 4 (d)

⁵⁸UN, *Preliminary Report Submitted by the Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights Resolution 1994/45* (New York: United Nations, 1994) at para. 190-204.

⁵⁹Ibid. para. 190.

⁶⁰Chinkin, *supra* note 52 at 657-658.

objectives of the drafters and the inclusion of discrimination by non-State agents in the public and private domain.

The Special Rapporteur on violence against women has criticized States' responses when dealing with human rights violations that more commonly target women, including violence against women. The gender neutrality in norms is said to provide an opportunity for reinforcing the invisibility of gender,

61. Violence against women is a systemic, widespread and pervasive human rights violation, experienced largely by women because they are women. The concept of gender neutrality is framed in a way that understands violence as a universal threat to which all are potentially vulnerable, and from which all deserve protection. This suggests that male victims of violence require, and deserve, comparable resources to those afforded to female victims, thereby ignoring the reality that violence against men does not occur as a result of pervasive inequality and discrimination, and also that it is neither systemic nor pandemic in the way that violence against women indisputably is. The shift to neutrality favours a more pragmatic and politically palatable understanding of gender, that is, as simply a euphemism for “men and women”, rather than as a system of domination of men over women. Violence against women cannot be analysed on a case-by-case basis in isolation of the individual, institutional and structural factors that govern and shape the lives of women. Such factors demand gender-specific approaches to ensure an equality of outcomes for women. Attempts to combine or synthesize all forms of violence into a “gender neutral” framework, tend to result in a depoliticized or diluted discourse, which abandons the transformative agenda. A different set of normative and practical measures is required to respond to and prevent violence against women and, equally importantly, to achieve the international law obligation of substantive equality, as opposed to formal equality.⁶¹

In terms of specificity to the employment context, the International Labour Organization standards were the first to address equality in the workplace, ratifying prohibition of discrimination on the basis of sex in close connection with economic and social rights. However,

⁶¹Human Rights Council, *supra* note 2.

ILO Convention 111 does not refer to violence in relation to discrimination⁶² nor does the General Comment No 16 by the U.N. Committee of the Social, Cultural and Economic Rights dealing with the equality between the sexes of that covenant of the same name.⁶³ Later the same committee deals with the right to non-discrimination and does not refer to sexual harassment and discrimination.⁶⁴

In the Americas, the adoption of the Convention on the Prevention, Punishment and Eradication of Violence against Women in 1994, also known as the Belém do Pará Convention,⁶⁵ deals with violence in all spheres of women's lives including the workplace. It does specify that sexual harassment is a form of violence but falls short of saying what it is. In Article 7(c), it calls upon the State Parties to adopt in their domestic legislation, whether it be criminal, civil, administrative and/or of any other type, provisions to prevent, punish and eradicate violence against women and to adopt appropriate administrative measures where necessary.⁶⁶

In 2011 the Inter-American Commission issued a report on economic, social and cultural rights in the Americas stating that harassment and sexual harassment constitute barriers for women's enjoyment of, inter alia, the right to work.⁶⁷ Although the Commission welcomed the efforts to

⁶²International Labour Organization, *Convention C 111 Convention concerning Discrimination in Respect of Employment and Occupation* (Geneva: 1958).

⁶³Social and Cultural Rights Committee of the International Covenant on Economic, *General Comment 16. The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights)* (New York: United Nations, 2005).

⁶⁴Social and Cultural Rights (CESCR) UN Committee on Economic, *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)* 2009).

⁶⁵Organization of American States, *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women "Convention of Belem do Para"* Organization of American States, 1994).

⁶⁶Ibid.

⁶⁷Inter-American Commission of Human Rights, *The Work, Education and Resources of Women: The Road to Equality in Guaranteeing Economic, Social and Cultural Rights* (Washington, D.C.: Organization of American States, 2011) at para. 161.

deal with sexual harassment it found scant legislation and significant gaps in relation to the penalties imposed.⁶⁸ The expert body supervising the Convention's compliance created in 2004, known as the Follow-up Mechanism to the Implementation of the Convention (MESECVI),⁶⁹ builds upon CEDAW General Recommendation No. 19 stating that sexual harassment is “a violation of the principle of employment equality” and stated it was not thoroughly treated in any international human rights instrument.⁷⁰ In reading the MESECVI Second Report, it appears this expert body preferred the criminal approach, as it criticized instruments where sexual harassment is treated as a minor offense because it is only sanctioned with job termination or a fine to the perpetrator.⁷¹ It also criticizes the mechanisms that incorporate sexual harassment as grounds for constructive dismissal when the harassment comes from the employer. It is plausible this critique is tainted due to a lack of understanding of the way labour laws confront incivility and rights violations in the workplace, including sexual harassment, and to overreliance by the feminist movement on criminal law to deal with sexual harassment.⁷²

European international human rights instruments treat sexual harassment as an expression of discrimination in their Directives, first 2002/73/EC that amended the Equal Treatment Directive⁷³ and then the Recast Directive 2006/54/EC.⁷⁴

⁶⁸Ibid. para. 165.

⁶⁹ As stated by the OAS, the MESECVI is a systematic and permanent multilateral evaluation methodology that is based on exchange and technical cooperation between the States Party to the Convention and a Committee of Experts, analyzing progress in the implementation of the Convention. See, <<http://www.oas.org/en/mesecvi/default.asp>>

⁷⁰Inter-American Commission of Women, *Second Hemispheric Report on the Implementation of the Belém do Pará Convention. (MESECVI)* (Washington: Organization of American States, 2012).

⁷¹Ibid. at 25.

⁷² The Report provides the example of Belize's Protection from Sexual Harassment Act (1996) that makes criminally liable the employer or supervisor that knows about the harassment but fails to take action. Ibid. at 25.

⁷³*Directive 2002/73/EC* (European Union: 2002).European Union Council, *Directive 2002/73/EC of the European Parliament and of the Council* 2002).

⁷⁴*Recast Directive 2006/54/EC* (European Union: 2006).

Directive 2002/73/EC on equality in the workplace and other occupational contexts defines sexual harassment as “any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.”⁷⁵

The European human rights framework provides a dual or double approach in which sexual harassment is both a discriminatory practice and a harm to a person's dignity.⁷⁶ It encompasses verbal, non-verbal and physical conduct of a sexual nature with the purpose or effect of violating the dignity of the person including creating a hostile work environment.⁷⁷ The definition emphasizes the working conditions and climate that sexual harassment produces, which can then lead to health risks for those involved.

1.3 The Theoretical Underpinnings of Sexual Harassment Law and Its Implications for Legal Doctrine and Remedies

The early strategic experiences in naming sexual harassment and later shaping the law moved into the doctrinal stage of conceptualizing sexual harassment. This has influenced the way in which harm is defined, what the law aims to protect, and what remedies seem best for that purpose. It seems that choosing a route provides different layers of meaning, where activists, legal reformers and academics attempt to frame the debate in terms of a political agenda while also discussing how legal strategies should fit into such an agenda. This has guided different

⁷⁵European Union Council, *supra* note 73 article 2.

⁷⁶Ann Numhauser-Henning & Sylvaine Laulom, *Harassment Related to Sex and Sexual Harassment in 33 European Countries. Discrimination Versus Dignity* (European Union of Justice, 2012).

⁷⁷*Recast Directive 2006/54/EC*, *supra* note 74.

feminist approaches to social change, from legal reforms aimed at achieving formal equality under a liberal paradigm to the approach of socialist feminists who place their analysis within a larger political and economic order.⁷⁸

Many approaches have been rehearsed and tried in the U.S. and Canada in regard to sexual harassment. One approach is to group it as a form of sex discrimination in anti-discrimination legislation. In Canada, the process has been twofold: first, litigation using existing legal categories -discrimination on the basis of sex- before human rights commissions, and later in the amendment of legislation to specifically include sexual harassment.⁷⁹ This has not stopped at human rights legislation and has moved into labour, minimum labour standards, and health and safety law as outlined by Langevin in the case of Québec, each providing a different framework and set of solutions.⁸⁰ In the case of Québec labour standards, Lippel points out that the legislative debate incorporated discriminatory harassment into the new concept of “psychological harassment” a process that integrated sexual harassment as well. In Saskatchewan and Manitoba the Health and Safety Law explicitly incorporates discriminatory harassment.⁸¹ The incorporation of discriminatory harassment in occupational health and safety law entails a

⁷⁸Nancy Fraser, *Qu'est que la justice sociale? Reconnaissance et distribution*, trans. by Estelle Ferrarese (Paris: Éditions La Découvert, 2005). [Qu'est que la justice sociale]; Nancy Fraser, "Identity, Exclusion, and Critique. A Response to Four Critics" (2007) 6:3 *European Journal of Political Theory* 305; Lucie Lamarche, "Les droits sociaux et la Charte canadienne des droits et libertés: quelques réflexions indisciplinées et prospectives" in Marc Versussen, ed., *Les droits culturels et sociaux des plus défavorisés* (Bruxelles: Bruylant, 2009) 495-524. In the latter, she discusses how the role of the State has been transformed and social rights became individualized social risks.

⁷⁹ See, Arjun Aggarwal & Madhu Gupta, *Sexual Harassment in the Workplace*, 3rd ed. (Markham: Butterworths, 2000); Backhouse & Cohen; Katherine Lippel & Diane Demers, *Access to Justice for Sexual Harassment Victims: the Impact of Béliveau-St. Jacques* (Ottawa: Status of Women Canada, 1998) [Access to Justice for Sexual Harassment Victims]; Louise Langevin, "Progrès ou recul: réflexions sur l'accessibilité à la justice pour les victimes de harcèlement sexuel au travail au Québec" (2005) 17:1 *Canadian Journal of Women and the Law* 197.

⁸⁰ In Québec, Langevin outlines the route of naming sexual harassment as a harm to obtain the redress through different remedies since the 1980's, and the advantages and disadvantages that each remedy represents for the targets. See, Langevin, *supra* note 79 at 199-200.

⁸¹ Katherine Lippel, "Law, Public Policy and Mental Health in the Workplace" (2011) 11:Special Issue *Healthcare Papers* 20. [Law, Public Policy and Mental Health]

preventive approach, as employers are compelled to reduce the exposure to psychosocial hazards.

As such, the ill-treatment based on discrimination that a worker receives could be no different than when a female technician is asked to do clerical work or another task not within her job description. This analysis is somewhat similar to what Caponecchia and Wyatt discuss in reference to discriminatory harassment.⁸² The same can be said with respect to legislation in Spain, where both sexual harassment and discriminatory sex or gender harassment are defined in separate categories.⁸³ In Québec a distinction is made between sexist harassment and sexual harassment.⁸⁴ However, Howes notes that there are some problems associated with the treatment of sexual harassment within the larger category of discriminatory or psychological harassment that have implications in terms of political visibility.⁸⁵

Sexual harassment laws that explicitly protect dignity exist in a variety of quite distinct legal regimes, like in Germany⁸⁶, Israel⁸⁷ and India⁸⁸ where discrimination is referred to in association with the violation of dignity.

⁸²C. Caponecchia & A. Wyatt, "Distinguishing Between Workplace Bullying, Harassment and Violence: a Risk Management Approach" (2009) 25:6 *Journal of Occupational Health Safety*, Australia and New Zealand 439.

⁸³Salvador Perán Quesada, "Sexual and Gender Harassment in the Workplace in Spain" (2013) 9:11 *European Scientific Journal*.

⁸⁴Katherine Lippel, Rachel Cox & Isabelle Aubé, "Interdiction du harcèlement et protection de la vie privée et des droits fondamentaux" in Guylaine Vallée & Katherine Lippel, eds., *Rapports Individuels et Collectifs du Travail* (Montreal: LexisNexis, 2009) 183. Fasc. 23, para. 323.

⁸⁵Victoria Howes, "The Law of Harassment in the UK: a Growing Concern" (2009) 25:2 *The Journal of Comparative Labour Law and Industrial Relations* 191.

⁸⁶Susanne Baer, "Dignity or Equality? Responses to Workplace Harassment in European, German and U.S. Law" in Catharine A. MacKinnon & Reva B. Siegel, eds., *Directions in Sexual Harassment Law* (New Haven: Yale University Press, 2004) 582-661.

⁸⁷Orit Kamir, "Israel's Sexual Harassment Law" in Catharine A. MacKinnon & Reva B. Siegel, eds., *Directions in Sexual Harassment Law* (New Haven: Yale University Press, 2004) 561-581.

⁸⁸Ramni Taneja, "Sexual Harassment of Working Women in India" in Linda LeMoncheck & James P. Sterba, eds., *Sexual Harassment. Issues and Answers* (New York: Oxford University Press, 2001) 327-336. See also Martha C.

The European Directives on discrimination and sexual harassment were later transplanted into labour and occupational health and safety laws whose primary objective is to prevent conduct that harms workers,⁸⁹ rather than applying penalties after the fact. Numhauser-Henning reports that in the 33 member countries of the European Union, States take a variety of approaches: the integration of discrimination and dignity; the discrimination or dignity approach leading to different results, which she concludes to be a blurred approach when sexual harassment encompasses both discrimination and dignity.⁹⁰ She argues that the inclusion of the concept of dignity makes systemic discrimination against women invisible while dignity as a claim could trigger complaints from those who are alleged perpetrators and were wrongfully accused whose dignity is infringed.⁹¹

Workers' dignity and its protection under the law is an elusive concept used in different ways in legal thought, hence it is problematic. The term 'dignity' borrows from the Universal Declaration of Human Rights, where it was purposely left as an open concept that could draw adhesion from different points along political and ideological spectrums.⁹² It is an overarching value ingrained in all international treaties on human rights.⁹³ Rao identifies three different meanings: the intrinsic social and human worth, intrinsic dignity, and dignity as recognition.⁹⁴ In defining

Nussbaum, "The Modesty of Mrs. Bajdaj. India's Problematic Route to Sexual Harassment Law" in Catharine A. MacKinnon & Reva B. Siegel, eds., *Directions of Sexual Harassment Law* (New Haven: Yale University Press, 2004) 633-654.

⁸⁹Manuel Velázquez, "The Spanish Code of Practice on Work-Related Bullying Reflections on European Law and its Impact on a National Strategy for Labor Inspectors" (2010-2011) 32:1 Comparative Labor Law & Policy Journal 185.

⁹⁰Numhauser-Henning & Laulom, *supra* note 76.

⁹¹*Ibid.* at 33-34.

⁹²Neomi Rao, "Three Concepts of Dignity in Constitutional Law" (2011) 86 1 Notre Dame L. Rev. 183. at 185.

⁹³Paolo Carozza, "Human Dignity" in Dinah Shelton, ed., *The Oxford Handbook for International Human Rights Law* (Oxford: Oxford University Press, 2014) 345-359.

⁹⁴Rao, *supra* note 92 at 183.

inherent moral and social worth, she writes that “in its most universal and open sense, dignity focuses on the inherent worth of each individual. Such dignity exists merely by virtue of a person’s humanity and does not depend on intelligence, morality, or social status. [...] each person is born with the same quantum of dignity.”⁹⁵ This definition embraces the full potential of all human beings regardless of whether or how they exercise their rights.

Another meaning of dignity is a vehicle to enforcing substantive values, such as self-control, courage or modesty, in which dignity relates to specific ideals of appropriateness.⁹⁶ Rao argues that this meaning of dignity is evident in French decisions on dwarf-throwing or use of the burqa.⁹⁷

The last form of dignity is the way in which an individual is recognized by others. It is relational in nature, as it depends on how the self is constituted by the broader community and on the worth thus afforded. It requires respect from and concern for others.⁹⁸ This is connected to Fraser’s theory on recognition and how certain groups have struggled to gain recognition, particularly women, First Nations, and individuals who are identified as deviating from heterosexual models.⁹⁹

Dignity may refer to upholding purely sexual mores, or as upholding a series of values. These values can be both dangerous and attractive to enhancing the women’s rights agenda, as Siegel points out in the United States context where dignity could justify two competing sides of the

⁹⁵Ibid. at 187.

⁹⁶Ibid. at 187-188.

⁹⁷Ibid.

⁹⁸Ibid. at 188.

⁹⁹Fraser, *Qu'est que la justice sociale? Reconnaissance et distribution.*, [Qu'est que la justice sociale] *supra* note 78 at 44.

same debate, namely the protection of fetal life versus women's reproductive rights.¹⁰⁰ If one would have to compare the expression of self-realization, reproductive autonomy and dignity, the latter sounds neutral, objective, devoid of a feminist agenda. Hence, dignity as a value is more easily embraced by different political and ideological discourses. For some, it is dangerous because it can infuse into sexual harassment laws a level of sexual puritanism that sanctions *gallantry* and loses sight of sexual domination and violence.¹⁰¹ Dignity may also obliterate the gender component because it "promises a neutral and objective way to define injustice while apparently leaving enough space for individual differences."¹⁰² Unlike terms like sexual harassment or violence it also eschews the naming of specific harms,¹⁰³ a key part of the battle to render the gender component visible.

For Friedman and Whitman, the questions for the continental European context is what "[...] evil does the law forbidding 'harassment' aim to combat?" or "what class of persons is threatened by 'harassment'?"¹⁰⁴ Although most European statutes declare that discrimination is forbidden, in fact, most continental lawyers frame the question of sexual harassment in terms of dignity because it affects all employees and not just women.¹⁰⁵ It is construed in such a way that sexual harassment is subsumed under the general concept of harassment, thus losing the gender dimension. These scholars borrow from Susanne Baer, a German feminist, in suggesting that these competing paradigms refer to different concepts and harms which are anchored in different

¹⁰⁰Reva B. Siegel, "La dignidad y el debate del aborto", *Derecho y Sexualidades. SELA 2009* (Buenos Aires: Librería Ediciones 2010) at 186.

¹⁰¹Gaby Oré-Aguilar, "The Regulation of Sexual Harassment in International Treaties and Documents" in Linda LeMoncheck & James P. Sterba, eds., *Sexual Harassment. Issues and Answers* (New York: Oxford University Press, 2001) 336-342 at 335.

¹⁰²Baer, *supra* note 86 at 587.

¹⁰³*Ibid.* at 587.

¹⁰⁴Gabrielle S. Friedman & James Whitman, Q., "The European Transformation of Harassment Law: Discrimination versus Dignity" (2003) 9:2 *Columbia Journal of European Law* 241 at 242.

¹⁰⁵*Ibid.*

job markets and economic structures, ranging from the North American “fluid job market” to the European “stable job market” where workers’ relations in a stable job market are of the essence.¹⁰⁶

In the case of France, sexual harassment became a legal issue under the influence of two developments: European Union Directives on discrimination against women, and the demands made by the French feminist movement.¹⁰⁷ These played an instrumental role in finding room for change within an existing movement to reform the *Criminal Code*. Sexual harassment was included as a misdemeanour in 1992 and the reform went into effect in 1994.¹⁰⁸ The *Labour Code* was immediately revised to protect workers from dismissal over reporting or blowing the whistle on sexual harassment.¹⁰⁹ In this early conception, limited to *quid pro quo* sexual harassment, it was considered an individual attack rather than a form of group discrimination.¹¹⁰ The French *Labour Code* reform of May 27, 2008 later construed sexual harassment as a form of discrimination.¹¹¹

Discrimination and sexism were not part of the political negotiations to amend the French Criminal Code and the Labour Law. Sexual harassment was instead understood as sexual

¹⁰⁶Ibid. at 244-246. In addition Zippel incorporated yet another factor, where unions play a significant role in the design of labour conditions and policy implementation, Kathrin S. Zippel, *The Politics of Sexual Harassment: a Comparative Study of the United States, the European Union, and Germany* (New York: Cambridge University Press, 2006).

¹⁰⁷Loic Lerouge, "Moral Harassment in the Workplace: French Law and European Perspectives" (2010-2011) 32:1 Comparative Labor Law & Policy Journal 109; Abigail Saguy, "French and American Lawyers Define Sexual Harassment" in Catharine A. MacKinnon & Reva B. Siegel, eds., *Directions in Sexual Harassment Law* (New Haven: Yale University Press, 2004). [French and American Lawyers Define]

¹⁰⁸Abigail C. Saguy, "Employment Discrimination or Sexual Violence? Defining Sexual Harassment in American and French Law" (2000) 34:4 Law & Soc'y Rev. 1091 at 1098. [Employment Discrimination or Sexual Violence?]

¹⁰⁹Saguy [French and American Lawyers Define] *supra* note 107 at 605.

¹¹⁰Ibid. at 607.

¹¹¹Lerouge, *supra* note 107 at 113.

violence, as domination, rather than as a form of discrimination.¹¹² The negotiators felt that sexual harassment was not a form of discrimination because it could happen to all workers, regardless of sex.¹¹³ In 2012, the *Conseil Constitutionnel* repealed a provision on sexual harassment in the *Criminal Code* on the grounds that its inclusion violated a criminal law principle that the nature of the criminal offense must be well described to avoid any vagueness.¹¹⁴

Discrimination, as conceived by the Americans -from a European point of view- places obstacles in the way of people who seek or gain employment and advancement. By contrast, harassment [and sexual harassment] in the ordinary sense involves subjecting people to painful and injurious comments or situations regardless of whether the victims are in pursuit of a job or career advancement.¹¹⁵ Historical context also proves that dignity is an overarching value throughout continental Europe in most if not all areas of law where dignity refers to the protection of individuals from denigrating treatment and lack of due respect.¹¹⁶ This explains why dignity is a core value in the psychological harassment legislation that emerged in Europe and was later transplanted to North America.¹¹⁷

¹¹²Saguy [Employment Discrimination or Sexual Violence?], *supra* note 108 at 1114-1115.

¹¹³*Ibid.* at 1115.

¹¹⁴*Décision n° 2012-240 QPC* Conseil Constitutionnel, 2012. It stated: “2. Considérant que, selon le requérant, en punissant «le fait de harceler autrui dans le but d'obtenir des faveurs de nature sexuelle» sans définir précisément les éléments constitutifs de ce délit, la disposition contestée méconnaît le principe de légalité des délits et des peines ainsi que les principes de clarté et de précision de la loi, de prévisibilité juridique et de sécurité juridique [...]” This decision is important because it sheds light on how criminal legislation must comply with certain standards.

¹¹⁵Friedman & Whitman, *supra* note 104 at 244.

¹¹⁶*Ibid.* at 267.

¹¹⁷*Ibid.*

Baer argues that an interrelated approach to dignity and gender discrimination can be found in Canada's treatment of sexual harassment.¹¹⁸ This is the case when dignity refers to recognition and social worth afforded by others while sexual harassment occurs because of the lack of perceived social worth afforded to women impinging on the self-realization.

It is unclear to me at this stage whether the dignity protection approach in sexual harassment legislation is incompatible with an equality and discrimination analysis of some legal models, or whether this is more of a political stance than a legal proposition with different consequences. It seems plausible that these models co-exist and interrelate among each other within a country's legal system. However, the benchmark or legal standard for a dignity approach versus a discrimination/violence against women approach could be different. In the Canadian context, Réaume concedes that the concept of dignity in Canadian case law can be vacuous, where judges can "dress up decisions" to give deference to Parliament or conservative gut reactions, however later developments by the Canadian Supreme Court show that substantive equality and non-discrimination concerns can be strongly connected to dignity.¹¹⁹ She argues that dignity as the need to afford respect, self worth and realization for individuals and groups was crystallized in the judges' reasoning in *Law v. Canada* (1999).¹²⁰

¹¹⁸Baer, *supra* note 86.

¹¹⁹Denise Réaume, "Discrimination and Dignity" (2003) 63:3 Louisiana Law Review 645 at 646. [Discrimination and Dignity]

¹²⁰*Ibid.* at 646. She quotes Iacobucci J. in the case of (Minister of Employment and Immigration) 1999 (Law, [1999] 1 SCR, 497, para. 53. *Law v. Canada*.

This notion of dignity as self-worth and self-respect is consistent with Fraser's theory.¹²¹ Not only is sexual harassment based upon stereotypes and prejudice but it has a direct impact on redistribution because it impacts women's right to full participation in the workplace on equal terms with men.

Another way to envision sexual harassment is as a sub-category of violence at work. This approach does not negate the dignity dimension. Chappell and Di Martino make the case that psychological violence could have a greater impact than physical violence.¹²² Sexual harassment as described by the authors could include a wider scope of behaviour ranging from physical to psychological violence. If we follow the idea that psychological violence, and hence sexual harassment, is a psychosocial hazard, then employers would have a duty of care to provide healthy and safe working conditions. This would include an environment that is free from violence.

At present there is less attention being paid to sexual harassment and its remedies as an issue of health and safety. If the dignity approach causes misgivings among some feminists, it is likely that the same would happen and even to a greater extent with the health and safety approach. The apprehension could be attributable to the fear of losing the gender dimension of sexual harassment. Naming has been a powerful driving force for the recognition of the special harm that sexual harassment represents for women. This is not to say that the literature does not identify sexual harassment as a psychosocial hazard. In the work of Brown and her colleagues in the United States, they study a population of male and female workers with respect to exposure

¹²¹Fraser, *Qu'est que la justice sociale? Reconnaissance et distribution*, *supra* note 78.

¹²²Chappell & Di Martino, *supra* note 41 at 17.

to harassment, sexual harassment, racial discrimination and assault in the workplace and have shown that those hazards impact occupational illnesses and accidents.¹²³ These hazards also impact job performance, absenteeism and satisfaction.¹²⁴ Krieger and colleagues show the results of a study that combines multiple layers of social markers (class, race, ethnic origin and sex) with instances of harassment, sexual harassment, and racial discrimination in the greater Boston area.¹²⁵ The work of Hasle looks into the opportunities that collective agreements offer to engage unions and companies in addressing psychosocial hazards (including psychological harassment and sexual harassment) in the workplace environment.¹²⁶

Chinkin argues that the ILO approach combining components of social justice and discrimination can be a proper starting point because it conceptualizes sexual harassment as impinging on a range of internationally-protected rights pertaining to equality, non-discrimination, and healthy and safe working conditions. Chinkin claims that key human rights treaties do not affirm the social justice language component as much as international labour standards have done.¹²⁷

One example of how international standards are evolving can be found in European legislation, which strives to combine social justice and discrimination. European Directives are in place that treat violence at work- including sexual harassment- within the frameworks of occupational

¹²³Lezah P. Brown *et al.*, "Evaluating the Association of Workplace Psychosocial Stressors with Occupational Injury, Illness, and Assault" (2010) 8:1 *Journal of Occupational and Environmental Hygiene* 31.

¹²⁴Diane Crocker & Valéry Kalemba, "The Incidence and Impact of Women's Experiences of Sexual Harassment in Canadian Workplaces" (1999) 36:4 *Canadian Review of Sociology and Anthropology* 541.

¹²⁵Krieger *et al.*, *supra* note 38.

¹²⁶Peter Hasle & Jens Petersen, "The Role of Agreements Between Labour Unions and Employers in the Regulation of the Work Environment" (2004) 2:1 *Policy and Practice in Health and Safety* 5.

¹²⁷Chinkin, *supra* note 52 at 657. In this respect, Article 5 of the recently adopted Convention 189 on decent work and domestic workers includes the obligation to protect domestic workers from abuse, harassment and violence, terms that would include sexual harassment. *C 189 Convention Decent work for domestic workers Convention*, International Labour Organization, *C 189 Convention concerning Decent Work for Domestic Workers* (Geneva: 2011).

health and safety or human resource management.¹²⁸ Under the European Social Charter, sexual harassment and violence at work constitute a violation of dignity under provisions on equal treatment of all workers.¹²⁹ The protection of dignity is what drives psychological harassment legislation.

Employing social justice considerations as a way of protecting working conditions and the dignity of workers could be seen as a pragmatic approach that has the potential to grasp the gender dimension while also acknowledging discrimination against and/or subordination of women. The value of such an approach adds would be to place the phenomenon within the context of working conditions. In this light, sexual harassment is harmful to human dignity and constitutes a psychosocial hazard in the workplace. From there, the problem is addressed within a prevention framework that could foster as much cultural change as the approach based on deterrence of discrimination/violence against women. Providing decent, respectful working conditions for women has meant, in the case of maternity protection laws, demanding minimum benefits that are much more closely associated with a class condition- that of workers- as well as including a gender dimension. It recognized that all human reproduction happens within women's bodies, and that traditionally women have assumed the role of rearing their children, which impacts not only their working conditions but their ability to pursue continuous paid employment.

¹²⁸Velázquez, *supra* note 89 at 190.

¹²⁹ Article 26. *Ibid.* at 191.

Despite the research discussed above, sexual harassment literature is scant on legal remedies¹³⁰ and on the conceptualization of sexual harassment as a breach of health and safety laws.

1.4. Transposing Sexual Harassment in the Legislation of the Americas

As portrayed by Numhauser-Henning the variety of legislative approaches in Europe also exists in the Americas. Some countries frame the issue based on women's subordination while others resort to labour legislation or anti-discrimination law.¹³¹ Some of them use both criminal and labour law like the Dominican Republic, Panama, and Paraguay.

In Mexico, for instance, the male sexual domination paradigm seems to have had a stronger influence on the law than the discrimination paradigm. The Federal Law on Violence against Women (*Ley General de Acceso de las Mujeres a una Vida Libre de Violencia*) treats sexual harassment as a question of general violence against women.¹³² It states that such violence violates human dignity and can occur either in the private sphere -domestic violence- or in the public sphere, including educational and workplace environments.¹³³ The law makes a

¹³⁰Lippel & Demers, *supra* note 79; Langevin, *supra* note 79.

¹³¹Inter-American Commission on Women & punishment and eradication of violence against women (MESECVI) Mechanism to follow up on the Implementation on the prevention *Second hemispheric report on the implementation of the Belém do Pará Convention* (Washington: Organization of American States MESECVI, 2012) at 24-26 and Table 1 at 111-119.

¹³²*Ley General de acceso de las mujeres a una vida libre de violencia* (México: 2007). Federal Government of Mexico, *Ley General de Acceso de las Mujeres a una Vida Libre de Violencia*, Official Gazette 1 February 2007 online: <http://www.diputados.gob.mx/LeyesBiblio/pdf/LGAMVLV.pdf>.

¹³³ It distinguishes between sexual harassment (*quid pro quo* as *hostigamiento sexual*) and horizontal harassment (*acoso sexual*), though both words mean the same thing in English and Spanish: "Artículo 13.- El hostigamiento sexual es el ejercicio del poder, en una relación de subordinación real de la víctima frente al agresor en los ámbitos laboral y/o escolar. Se expresa en conductas verbales, físicas o ambas, relacionadas con la sexualidad, de connotación lasciva.

El acoso sexual es una forma de violencia en la que, si bien no existe la subordinación, hay un ejercicio abusivo de poder que conlleva a un estado de indefensión y de riesgo para la víctima, independientemente de que se realice en uno o varios eventos."Ibid.

distinction between employment discrimination as a form of violence and sexual harassment in the workplace, which requires explicit sexual content.¹³⁴ It calls for state and municipal regulations as well as the adoption of administrative procedures within schools and workplaces to investigate and sanction violence and sexual harassment using a range of administrative, criminal, or labour law remedies.¹³⁵ Men are not considered potential targets of sexual harassment, an approach that departs from the ILO definition and generic treatment of Chappell and Di Martino,¹³⁶ because its law encompasses harms against women to mirror the statement of the Special Rapporteur on Violence against Women to adopt laws for the protection of women, avoiding gender neutrality.¹³⁷ Such legislation therefore falls short of considering same-sex sexual harassment. Other laws, such as the Peruvian sexual harassment law enacted in 2003, do recognize that it violates the dignity of workers of either sex.¹³⁸ But it limits its scope to hierarchical type of harassment.¹³⁹

In Argentina where there was an attempt to incorporate sexual harassment in the *Criminal Code*, such efforts were opposed by feminist scholars who argued against the use of criminal legislation. Sexual harassment remains a prohibited behaviour in some municipal or provincial pieces of legislation governing civil servants,¹⁴⁰ but not in the general labour legislation.

¹³⁴ Article 11 of the Law which states “Constituye violencia laboral: la negativa a contratar a la víctima o a respetar su permanencia o condiciones generales de trabajo; la descalificación del trabajo realizado, las amenazas, la intimidación, las humillaciones, la explotación y todo tipo de discriminación por condición de género.” Ibid.

¹³⁵ The question is whether or not in fact a general statement of a law on violence against women does translate into practical rules to investigate and sanction sexual harassment at different levels.

¹³⁶ Chappell & Di Martino, *supra* note 41 at 266-267.

¹³⁷ Human Rights Council, *supra* note 2

¹³⁸ José Balta Varillas, *Acoso sexual en las relaciones laborales privadas* (Lima: ARA Editores, 2005) at 69.

¹³⁹ Inter-American Commission of Women, *supra* note 70; article 4 *Ley de Prevención y Sanción del Hostigamiento Sexual* (Peru: 2003).

¹⁴⁰ Paola Bergallo, "Algunas enseñanzas de "El lugar del trabajo higienizado"" (2006) 7:1 *Revista Jurídica de Universidad de Palermo* 223; María Victoria Famá, "Argentina: la construcción de redes locales de conocimiento" in Diane Alméras & Coral Calderón Magaña, eds., *Si no se cuenta, no cuenta* (Santiago: Comisión Económica para América Latina y el Caribe, 2012) 179-237.

However, legislation that is confined to the sexual dominance model, where sexual advances only come from a superior and have detrimental impacts on career advancement, job loss or security, does not respond to the needs of many workers who are harassed by co-workers. This is the case in Peru and Venezuela. In the latter, legislation not only places sexual harassment in the Act on Violence against women, but the harassment must come from someone with a higher rank than the target.¹⁴¹ On the other hand, in El Salvador there is legislation on discriminatory harassment in the workplace and sexual harassment is not found in the Violence against Women Act.¹⁴² In the Second Hemispheric Report on the Compliance with the Belém do Pará Convention, Guatemala reported that although sexual harassment was not established as an offense –neither in criminal or labour law- it could be prosecuted under the General Act of Violence against Women.¹⁴³

1.5. Sexual Harassment Law in Chile Between Dignity and Discrimination?

Chile enacted a specific sexual harassment law in 2005 in the Labour Code. The provision is inserted into the Code's principles such as non-discrimination and protecting the dignity of workers. It states that

[...] Labour relations should be based on treatment that is compatible with human dignity. Are inimical to human dignity, *inter alia*, sexual harassment which is any and all unwanted, unconsented sexual advances detrimental to the victim's employment status or employment opportunities.¹⁴⁴

¹⁴¹Inter-American Commission of Women, *supra* note 70 at 119. Likewise happens in Colombia where the inclusion of sexual harassment involves a criminal offense from someone in a hierarchical position, *Ley sobre normas de sensibilización, prevención y sanción de formas de violencia y discriminación contra las mujeres* (Colombia: 2008).

¹⁴²Inter-American Commission of Women, *supra* note 70 at 114.

¹⁴³Ibid.

¹⁴⁴Article 2 "...Las relaciones laborales deberán siempre fundarse en un trato compatible con la dignidad de la persona. Es contrario a ella, entre otras conductas, el acoso sexual, entendiéndose por tal el que una persona realice

The harm of sexual harassment is spelled out and affirmed in a separate subsection from the discrimination prohibition that states that discrimination is contrary to the principles ingrained in the labour law. The Code distinguishes many forms of discrimination, exclusion and preferences based on race, colour, sex, age, marital status, union membership, religion, political opinion, nationality, and national or social origin. However, doctrine has argued that this provision must be read in harmony with the constitutional principle of non-discrimination.¹⁴⁵ Moreover, sexual orientation is not mentioned in the 2005 legislation, although general anti-discrimination legislation adopted in 2012 prohibits discrimination based on gender and sexual orientation provisions that complement the labour legislation.¹⁴⁶

A consideration of the harm of sexual harassment existed, but it was not central to the adoption of the law. The original bill presented by lawmakers in 1991 provided that workers of either sex could be targets of sexual harassment, but it was limited to situations of *quid pro quo* and provided cause for tort action as remedy for redress to the targets.¹⁴⁷ In terms of legislative models, the bill mentioned and reviewed the U.S. case law emphasizing its aim was not to sanitize the workplace from social interaction.¹⁴⁸ This proposal did not progress in the legislative agenda.

In 1995, the Executive used its legislative prerogatives to issue a full replacement of the bill. The Government incorporated the idea that sexual harassment was a form of serious sex

en forma indebida, por cualquier medio, requerimientos de carácter sexual, no consentidos por quien los recibe y que amenacen o perjudiquen su situación laboral o sus oportunidades de empleo.”

¹⁴⁵Eduardo Caamaño Rojo, *El Derecho a la no discriminación en el empleo* (Santiago: LexisNexis, 2007) at 48.

¹⁴⁶*Establece Medidas Contra la Discriminación* (Chile: 2012).

¹⁴⁷Biblioteca del Congreso Nacional, *Historia de la Ley 20.005*, online: Biblioteca del Congreso Nacional <<http://www.bcn.cl/histley/lfs/hdl-20005/HL20005.pdf>>. At 4-5.

¹⁴⁸*Ibid.* at 7.

discrimination.¹⁴⁹ The preamble and the Ministry of Labour stated that either men or women could be targets of sexual harassment, but the gender dimension was clear and considered sexual harassment an expression of the discrimination women experience in the workplace.¹⁵⁰ The Executive agency for women rights' agenda, SERNAM - the Directorate on Women's Services- recommended the inclusion of sexual harassment coming from peers and gave consideration to the importance of the role workplace regulations: the employer must confront the issue, dissuade people from going to Court and foster cultural transformation.¹⁵¹

There were many arguments opposing the bill, mostly on sexist attitudes, stereotypes and fear of how women could use or misuse the law. Different procedural and substantive issues were raised: it was going to be difficult to prove discrimination in court, and it would make it easier for workers to be accused of sexual harassment as grounds for dismissal (and constructive dismissal); however some lawmakers warned that everyone should keep in mind the alleged false accusation would impact the family life and dignity of the accused worker.¹⁵²

The bill produced heated and bitter debates even among those in government ranks. One Senator apologized to one of SERNAM's lawyers for the offensive comments and behaviour directed to them from some Deputies in the Chamber.¹⁵³ One congressman from the government coalition and former trade union president opposing the bill argued it will become a “good moral law but its effectiveness must be assessed later [...] This will become the law of revenge, women will accuse their employers just to shame them, and what will SERNAM [Directorate on Women

¹⁴⁹Ibid. at 22.

¹⁵⁰Ibid. at 17.

¹⁵¹Ibid. at 41.

¹⁵²Ibid. at 18-19

¹⁵³Ibid. Deputy Juan Pablo Letelier proponent of the first attempt to legislate at 76-77.

Services] do when the accusation is proven to be unfounded? Will the government place an addendum to state it was a mistake and the harassment never happened?”¹⁵⁴ The Deputy further argued that labour rights in Chile were not respected, and that the adoption of the law was aimed at demonstrating Chile was a politically correct country for having one, but the law would be ineffective and result in employers, managers and supervisors being blackmailed, declaring those who have promoted the bill would regret it.¹⁵⁵ Another argued the law will impact women’s employment and fewer will be hired.¹⁵⁶ Another Congresswoman said if women were assertive and were educated to be assertive, sexual harassment would not take place because they would set the limits and say no is a no when invited to go out.¹⁵⁷

A female legislator and former trade union president responded, stating she had hoped for a harsher law and confided that as a former president in a trade union she defended female targets by telling the harasser (a supervisor) that his wife will know what he is doing, as she stated this was the tool trade union women had to fend off sexual harassment.¹⁵⁸ Another Deputy posited the bill was aimed to protect sexuality free from coercion and discrimination.¹⁵⁹

The right/left wing political divide provided a colourful debate, where the gender justice agenda was mixed with quotes from far-apart historical characters like Lenin or Montesquieu. One left-wing parliamentarian said “I never thought I would ever quote something coming from the Americans in politics to vote in favour of this law, but I could not find a quote on Lenin because

¹⁵⁴Ibid. Deputy Rodolfo Seguel at 54-55.

¹⁵⁵Ibid. Deputy Seguel at 150.

¹⁵⁶Ibid. Deputy René García at 59 and Deputy Cubillos at 137.

¹⁵⁷Ibid. Deputy Angélica Cristi at 92. The paradox she is a conservative woman who supported the original bill in 1991 and has been a strong opponent in sexual and reproductive rights including sex education in school.

¹⁵⁸Ibid. Deputy María Rozas at 69.

¹⁵⁹Ibid. Deputy Leal at 157.

beyond promenades he did with Alexandra Kollontai, he never wrote on sexual harassment.”¹⁶⁰

One Senator referred to the effectiveness of the law, as he mentioned that Montesquieu, when visiting other countries, did not ask about the laws in effect in the country but rather what laws in that country were obeyed.¹⁶¹ He argued the law would be pure symbolic power.

The most vocally-opposed lawmaker argued politicians were not in favour of the proposal but it was politically incorrect to be in overt opposition, so he observed that his colleagues were leaving the plenary session to avoid voting. This was true: even if a majority voted in favour in the Chamber of Deputies, at the moment of voting less than 50 percent of the Deputies were present. The legislative debate revealed all the difficulties in adopting a law prohibiting sexual harassment as a form of discrimination, but the government was successful in the Chamber of Deputies.

By the time the bill reached the Senate in 2004, the discrimination versus harm to dignity became the focus of debate. Workers' constitutional rights in the workplace were part of the narrative and discrimination was not seen as central to the harm but rather dignity.¹⁶² In fact, it was not clear to them why sexual harassment was an issue of discrimination.¹⁶³ The so-called consequences of transplanting U.S. legislation was made evident, and legislators were wary of following that model claiming that in the U.S. men could not even look at a woman or get into an elevator with a woman.

¹⁶⁰Ibid. Deputy Antonio Hales at 143.

¹⁶¹Ibid. Senator Ávila at 271.

¹⁶²Ibid. Senator Viera Gallo at 187.

¹⁶³Ibid. at 187.

Without any major sophistication, dignity became an appealing narrative as Senators conceded that sexual harassment and its harms could be directed not only at women but men as well. It was mentioned that labour law is organized under the dignity paradigm. When the bill was finally approved in the Senate, the Minister of the Women's Directorate Services applauded a major step by adopting an instrument to protect women from violence.¹⁶⁴

It can be argued that the language included in the Code has proved to be a hybrid between the sexual dominance model and the protection of dignity model and is distinct from discrimination. This articulation will be a starting point for my analysis presented in Chapter 2, its implications for the remedies available to the targets and how the doctrine and case law perceive and treat sexual harassment. The question remains: does it really matter in the end, if the gender component is lost in the process and in the phenomenon of developing the law?

2. Effectiveness: What it is and How It Can Be Studied

2.1 What Does Regulatory Effectiveness Mean? An Overview of the Literature

Law plays an important role in establishing behaviour that is socially acceptable, determining the boundaries of social acceptability and the sanctions expected when the desired behaviour is not followed.¹⁶⁵ This role is important because the law, paraphrasing Bourdieu, has the power to create and recreate reality.¹⁶⁶ Bourdieu refers to the cultural underpinnings of the creation of law by noting the dialectical relationship between the social world, the field, and the system that regulates human behaviour in the social world. The law creates categories and redefines the

¹⁶⁴Ibid. at 322.

¹⁶⁵Saguy [French and American Lawyers Define], *supra* note 107 at 605.

¹⁶⁶Bourdieu, *supra* note 26.

world around us. This happens, for instance, through naming, as when legitimized or naturalized violence becomes known as marital rape, or through making the subjection of someone to unwanted sexual advances or sexist behaviour at work unacceptable, so that it is no longer part of a normal working environment. As Smart notes, the law made what was seen as harmless flirtation into sexual harassment.¹⁶⁷

The law is instrumental and contextual in terms of power relations, and Bourdieu illustrates this in examining social welfare law.¹⁶⁸ But it is not just about power in political theory terms as neo-Marxists such as Kennedy like to posit.¹⁶⁹ Instead, there are practices in the legal field that make cultural values evident, and not simply the power relations in society referred to by Bourdieu.¹⁷⁰

Social practices illustrate Bourdieu's concept of effectiveness when he refers to the correspondence between the law as created and the social world it regulates. He states that the law is effective when it "is socially recognized and meets with agreement, even if only tacit and partial, because it corresponds, at least apparently, to real needs and interests."¹⁷¹ Whether conscious or not, there is a sense of compliance or social legitimacy.¹⁷² Compliance may mean, for instance, that men refrain from sexual harassment practices because they no longer consider it as acceptable, while employers realize that they cannot fail to notice and reprimand such

¹⁶⁷Smart, *supra* note 25 at 165.

¹⁶⁸Bourdieu, *supra* note 26 at 817.

¹⁶⁹Duncan Kennedy, "Adjudication in Social Theory", *A Critique of Adjudication (fin de siècle)* (Cambridge: Harvard University Press, 1997) 264-296. See chapter 6 on Policy and Ideology.

¹⁷⁰Bourdieu, *supra* note 26 at 814-817.

¹⁷¹Ibid. at 840.

¹⁷²Lascombes and Serverin refer to the "degré de réalisation dans les pratiques sociales, des règles énoncées par le droit", Pierre Lascombes & Evelyne Serverin, "Théories et pratiques de l'effectivité du Droit" (1986) 2 *Droit et Société* 127 at 139-141.

practices. Women, on the other hand, realize that sexual harassment is not a natural act, that they no longer have to accept it, and that they can demand that it stops.

This concept of effectiveness is useful because it examines the degree of implementation of the law in social practices.¹⁷³

Another way of looking at effectiveness is to examine the use of the law when a violation of the rule occurs. If workers [and employers] identify a violation, do they censure those who breach the law? The question as to the “reach” or penetration of the law determines the level to which the command represented by the law is successfully imposed.¹⁷⁴ Following this idea, we must determine the extent to which the law on sexual harassment is complied with? As we have seen in section 1.4, this idea was clearly considered in the approval of the law, although it was raised as a possible reason to oppose the law.

The question as to the effectiveness of sanctions, on the other hand, relates to the degree to which the breach is identified and whether it leads to consequences, due to either the exercise of the right to request reparation or the use of any other legal recourse (or remedy) to prosecute the breach.¹⁷⁵

¹⁷³Pierre Lascoumes, *Dictionnaire encyclopédique de théorie et de sociologie du droit* (Paris: Librairie générale de droit et jurisprudence, 1993) at 217.

¹⁷⁴Friedman *supra* note at 44.

¹⁷⁵Lascoumes and Serverin define as “l’effectivité des sanctions: la norme indicative ou prescriptive peut être connue et reçue, sa violation n’est pas pour autant automatiquement sanctionnée.”, see Lascoumes and Serverin, *supra* note 172.

Effectiveness has a counterpart: ineffectiveness.¹⁷⁶ Ability to identify the breach is key; if it is absent, the law becomes ineffective. This concept is well developed in criminal law and criminology in reference to unreported crime. Identification is an important step but it is not the whole concept in this reading of effectiveness/ineffectiveness. When a violation of the rule has taken place, identification is required to assess whether sanctions should follow, or whether there are no consequences because prosecutors, judges, or other agents with the capacity to take “a case” tend to do a poor job or drop charges. When cases get lost in the shuffle on issues such as admissibility, then the question of access to justice becomes critical for effectiveness. A related question is the type of sanctions imposed when a rule is breached. If sanctions are of little or no consequence, then the law becomes merely a symbolic act of naming with limited potential for cultural transformation. A law on sexual harassment requires all three levels of effectiveness: implementation of the law, identification of breaches of the law, and consequences (or sanctions) that follow from the violation of the law.

Galanter’s analytical model depicts implementation and its relation to effectiveness. As he notes, the legal order is comprised of four parts: players in strategic positions who use their relative power to leverage the legal system for their particular ends (litigants, who can be repeat players [RP] or one-shotters [OS]); institutional arrangements, which involve the courts and their own players or legal specialists; rules; and normative alternative dispute resolution (ADR).¹⁷⁷ The informal dispute resolution system can shed light on the architectural structures and power relations that impede exercise of the remedies the law provides, especially if they relate to

¹⁷⁶Lascoumes, *supra* note 173.

¹⁷⁷Marc Galanter, "Why the "Haves" Come out Ahead: Speculations on the Limits on Legal Change" (1974-1975) 9 *Law & Soc’y Rev.* 95.

‘dumping it’¹⁷⁸ –either forgoing a claim altogether or searching for other venues to resolve the issue because the rules are not culturally shared or the remedies are not practical as far as individuals’ lives or social practices are concerned.

While Galanter is concerned with claim-making and social reform outcomes in the formal adjudication system, Lascoumes and Severin look at compliance when the law is breached. To them, the law is a given.¹⁷⁹ They take a three-stage approach to effectiveness: how a breach is identified, how the system handles it once identified, and whether punishment is meted out.¹⁸⁰ At each of these levels there may be a failure of the law to meet its goals. As I have argued, the enactment of a rule is the starting point of the examination of legal effectiveness in the continental tradition. This would explain why Lascoumes and Severin take law as a given while Galanter, who comes from the Common law tradition sees law as malleable as it can change through case law.

Langevin looks into the effectiveness of sexual harassment remedies in Québec,¹⁸¹ while Hoel and Einersen examine effectiveness in the area of moral harassment.¹⁸² There are other studies that could also fall into the same school of thinking that provide reflections about conceptualization and the study of legal effectiveness.¹⁸³

¹⁷⁸Donna Shestowsky & Jeanne M. Brett, *Disputants' Perceptions of Dispute Resolution Procedures: a Longitudinal Empirical Study* (Davis: University of California Davis School of Law, 2008) at 34.

¹⁷⁹Lascoumes & Severin, *supra* note 172 at 139.

¹⁸⁰*Ibid.* at 141-145.

¹⁸¹Langevin, *supra* note 79.

¹⁸²Helge Hoel & Stale Einarsen, "Shortcomings of Antibullying Regulations: The Case of Sweden" (2010) 19:1 *European Journal of Work and Organizational Psychology* 1, [Shortcomings of Antibullying Regulations] and see also Helge Hoel & Stale Einarsen, "The Swedish Ordinance Against Victimization at Work: a Critical Assessment" (2010-2011) 32:1 *Comparative Labor Law & Policy Journal* 225 -250. [The Swedish Ordinance]

¹⁸³Rachel Cox, "Psychological Harassment Legislation in Québec: The First Five Years" (2010-2011) 32:1 *Comparative Labor Law & Policy Journal* 55. [Psychological Harassment Legislation in Québec]; Rachel Cox &

The literature contains studies on effectiveness of the law that address the above issues, such as that of Saguy on implementation and effectiveness of the French model of sexual harassment law. This idea of effectiveness corresponds to the second stage in the law; that is the use of the law when there is an identification of a violation of the rule and, a determination as to whether the act is legally censured or not.

The French law required employers to have internal regulations under terms similar to health and safety law.¹⁸⁴ Saguy concludes these regulations could be framed within an occupational health and safety setting, allowing but not requiring employers to discipline instances of sexual harassment. She refers to a French commentator who claims this approach is weak in enforcing employer liability,¹⁸⁵ although no evidence is provided regarding why that is so.

Saguy found that few large French companies surveyed considered sexual harassment to be an important issue or felt compelled to design and implement sexual harassment policies as stated in the law. In addition, many lawyers considered the use of the criminal sanctions (imprisonment) to be excessive.¹⁸⁶ When it came to labour litigation, judges were more prone to rely on wrongful dismissal provisions than on sexual harassment remedies. In the case of Belgium, the

Katherine Lippel, "Falling Through the Legal Cracks: The Pitfalls of Using Workers' Compensation Data as Indicators of Work-related Injuries and Illnesses" (2008) 6:2 Policy and Practice in Health and Safety.

¹⁸⁴Saguy [French and American Lawyers Define], *supra* note 107 at 605 and 610.

¹⁸⁵*Ibid.* at 605.

¹⁸⁶*Ibid.* at 610.

effectiveness of the law has been assessed in the context of prevention and handling complaints within the context of psychosocial hazards.¹⁸⁷

Friedman and Whitman state that the approach taken to sexual harassment litigation in Germany is a mystery. Cases focus upon the fired harasser claiming there was not statutory cause for the dismissal. For them, the continental approach is centered around a paradigm of protecting job stability for all workers, as opposed to the protection of women in the workplace, which is an American paradigm in a fluid job market.¹⁸⁸

Although my work deals primarily with effectiveness at the level of the law and its implementation, one cannot fail to consider social practices and how they relate to an understanding of the law.

If the law is contextual, it relies on a variety of factors to become an instrument of social control, including political and social interests, cultural representations, and other interests, such as the social understanding of sexual harassment. Law provides a cognitive framework in the ways certain social behaviours are understood.¹⁸⁹

Since acceptance and lack of disapproval of a certain class of behaviours will also impact effectiveness of the law, the degree of social legitimacy of legal rules is crucial. Studies seem to indicate exactly that point, as illustrated in another of Saguy's works on sexual harassment in

¹⁸⁷Travail et Concertation sociale SPF Emploi, *Evaluation de la législation relative à la prévention de la charge psychosociale occasionnée par le travail. Dont la violence et le harcèlement moral, ou sexuel au travail. Statistiques et évaluation complémentaire* (Bruxelles: SPF Emploi, Travail et Concertation sociale, 2011).

¹⁸⁸Friedman & Whitman, *supra* note 104 at 63.

¹⁸⁹Bourdieu, *supra* note 26 at 605.

France.¹⁹⁰As she points out, a survey found that 45 percent of male and 47 percent of female respondents stated that they did not consider a supervisor asking out a female employee in order to discuss a promotion as an act of sexual harassment. She implies that French perceptions would be quite different from those in the U.S. She contrasts the results of the survey with the fact that U.S. lawyers support the idea of keeping any sexual contact out of the workplace, including flirtation and romance, because workers lose focus and the ability to concentrate on their jobs: “I don’t think it would be a bad thing [to get flirtation out of the workplace]. I’d love to see that. We want to create an environment where anyone who comes into work can do the best kind of work possible. In most instances, that [means] removing nonsense that’s going on around them and the harassment so they can focus on their work.”¹⁹¹

Culture plays a role in understanding the harm. As Hilbrert argues, Mexican women may have difficulty drawing the line between *Latin charm* and harassment.¹⁹² As such, they may have problems in identifying harassment in a Latin American context, where flirtation is natural for women and men. The question, as Smart stated, is when flirtation (and I would argue, what kind of flirtation) becomes sexual harassment in a given context. If the law is not there to repress or if it assesses human behaviour puritanically, then sexual harassment must be culturally contextualized. Interestingly, MacKinnon notes that the concept of sexual harassment moves from moralism to equality because moralism is gendered in terms of good or decent women.¹⁹³

¹⁹⁰Saguy [French and American Lawyers Define], *supra* note 107 And see also Saguy [Employment Discrimination or Sexual Violence?], *supra* note 108.

¹⁹¹Saguy [French and American Lawyers Define], *supra* note 107 at 608.

¹⁹²Pia Hilbrert, "Shameful Silence: Professional Women in Mexico Are talking More than Ever About Sex Harassment" in Linda LeMoncheck & James P. Sterba, eds., *Sexual harassment: Issues and Answers* (Oxford: Oxford University Press, 2001) 332-336 at 332.

¹⁹³Catharine A. MacKinnon, "Beyond Moralism. Directions in Sexual harassment Law" in Catharine A. MacKinnon, ed., *Women's Lives Men's Laws* (Cambridge: The Belknap Press the University of Harvard Press, 2005) 184-205 at 187. [Beyond Moralism.]

This is the critique that French policymakers advanced in legislative debate and even in the implementation of the law. They believed the law defined sexual harassment under a sexually-repressed American cultural model. In one study, French female lawyers said that women were lucky to attract unwanted sexual attention and that complaints were from *prudish women in need of a good fuck*. As such, sexual harassment was perceived to be part of French idiosyncrasy.¹⁹⁴ Sexism under this reasoning was not equated or made equivalent to racist remarks because the latter were considered to be part of an ideology,¹⁹⁵ while a sexist climate was not.

Interestingly, sexist remarks and jokes in bad taste may both at times be perceived as natural by the sender or annoying by the recipient, while still part of the freedom of expression of people relating to each other in a relaxed working atmosphere.

The cultural factor is key to understanding readings on the prevalence of sexual harassment in different countries or the number of cases identified in any given institution.¹⁹⁶ Chile would not be an exception.

2.2 Access to Justice and Exercising Rights: the Use of Remedies

Legal effectiveness as outlined above depends on, *inter alia*, the institutional architecture of a given adjudication system, where courts, administrative bodies and employer- employee conflict resolution schemes provide an array of opportunities to hear or deal with sexual harassment complaints. Langevin discusses the effect of the remedies and institutions that can deal with

¹⁹⁴Saguy [French and American Lawyers Define], *supra* note 107 at 612-613.

¹⁹⁵*Ibid.* at 612-613.

¹⁹⁶Chappell & Di Martino, *supra* note 41 at 41.

sexual harassment in Québec.¹⁹⁷ Belgium has an intricate system for handling complaints where they work within the workplace and the intervention of other parties in higher adjudication process.¹⁹⁸

Legal scholars tend to focus exclusively on these factors, but such an analysis is incomplete if it is not contextualized within a social and economic order, including unemployment, precarious employment and social protection conditions, as well as general public policies on labour markets and power relations between workers and employers.¹⁹⁹ An Australian survey demonstrated that precarious employment arrangements combined with the young age of the worker were linked to greater exposure to sexual harassment.²⁰⁰ Likewise the same link was found in a Québec survey.²⁰¹ In this light, effectiveness of the law is not only provided by questions of cultural perception and legitimacy, but by the macro- and micro-structural framework in which any law is to be found and the opportunities to use it.

Chinkin feels that remedies and their possible effectiveness are always contextual. They must respond to the diversity of current labour relations across the world. Even within the same country women will be affected differently depending on the presence of conditions such as vulnerability, sexual degradation, sweatshop labour, or isolation.²⁰²

¹⁹⁷Langevin, *supra* note 79.

¹⁹⁸SPF Emploi, *supra* note 187.

¹⁹⁹Joan Benach, Carles Muntaner & Vilma Santana, *Employment Conditions and Health Inequalities. Final Report to the WHO Commission on Social Determinants of Health (CSDH)* Universitat Pompeu Fabra, Universidade Federal da Bahia, University of Toronto, 2007, at 30-33.

²⁰⁰Anthony D. LaMontagne *et al.*, "Unwanted Sexual Advances at Work: Variations by Employment Arrangement in a Sample of Working Australians" (2009) 33:2 *Australia New Zealand Journal of Public Health* 173 at 177.

²⁰¹Lippel *et al.*, *supra* note 45 at 376.

²⁰²Chinkin, *supra* 52 note at 656.

The legislation's approach will also impact its effectiveness, likewise the remedies, evidentiary rules, and the socio-legal culture. Multiple laws to deal with the same issue may not necessarily entail greater access to justice or effectiveness, in fact, they could become barriers to obtain satisfactory redress. When this occurs in relation to sexual harassment, the laws differ in their orientation, varying from a violence against women approach to a health and safety approach even within the same jurisdiction. Each piece of legislation has to be assessed in terms of effectiveness in its own merits, such as the aims of the law and reparation.

For example, anti-discrimination legislation in employment contexts can play a significant role in defining sexual harassment as a harm and a source of discrimination.²⁰³ This is the case notably in the United States and Canada, even though in Canada, particularly in Québec, there are several avenues for addressing sexual harassment beyond human rights legislation.²⁰⁴ But as the literature shows, in some cases the variety of remedies is not an indicator that victims can achieve a sense of justice or of ability to meet their needs.²⁰⁵

One question that should be considered, as discussed in the literature, is whether the prevalence of a phenomenon can be measured by the filing of a complaint or by the use of other available remedies, as it is clear that these are distinct phenomena. Studies about targets of sexual harassment in the European Union indicate that the targets typically responded by ignoring the behaviour or demanding that the harasser stop. Few contacted a supervisor and even fewer filed a complaint.²⁰⁶ The same results were found in an Australian survey.²⁰⁷ Recourse to legal

²⁰³ See Aggarwal & Gupta, *supra* note 79.

²⁰⁴ Lippel & Demers, *supra* note 79 and Langevin, *supra* note 79.

²⁰⁵ Langevin, *supra* note 79.

²⁰⁶ European Commission, *supra* note 42 at 21.

remedies and other informal mechanisms will depend on many contextual factors that cannot necessarily be attributed to the adjudication system, such as a separate law that protects the workers from psychological harassment, union membership, or the identity of the harasser.²⁰⁸

Pryor and Fitzgerald discuss results of other studies showing that targets of sexual harassment withdraw from their workplaces as a strategy for escaping the social context, and very few resort to formal complaint mechanisms for fear of reprisal.²⁰⁹ A Portuguese study found that targets of sexual harassment seldom report because complaining may carry a stigma.²¹⁰ As such, remedies and their use account for only a fraction of the information needed to assess the effectiveness of a law.

Targets of sexual harassment can be quite conscious of their rights. Remedies may be spelled out, but when conducting a cost-benefit analysis targets refrain from complaining: it might take too much emotional energy, or perhaps the result is too uncertain to risk job stability. The symbolic power of the law may foster sexual harassment prevention, if workers -men and women- become aware that sexual harassment is not an innocuous behaviour. If there are workplace regulations, protocols and information campaigns in place, it is possible that the working environment could change. Effectiveness of the law at this level is harder to measure, as it would require a measurement of before and after the “intervention” in the workplace and the control of certain variables beyond the scope of this dissertation.

²⁰⁷LaMontagne *et al.*, *supra* note 200 at 173. The authors referred to the 2003 Australian survey.

²⁰⁸Lippel *et al.* *supra* note 45 at 378-379.

²⁰⁹See John Pryor & Louise Fitzgerald, “Sexual harassment research in the United States” in Stale Einarsen *et al.*, eds., *Bullying and Emotional Abuse in the Workplace: International Perspectives in Research and Practice* (London/New York: Taylor and Frances, 2003) 79 at 92.

²¹⁰Vittorio Di Martino, Helge Hoel & Cary Cooper, *Preventing Violence and Harassment in the Workplace* (Dublin: European Foundation for the Improvement of Living and Working Conditions, 2003 at 36.

Galanter notes that in order to assess the effectiveness of the law, i.e., to achieve distributive justice goals, the architectural arrangements of the legal system and culture in which reforms will be implemented must be reviewed. As such, it is not only a question of a shared understanding of the rule, but also the scope of protection, the quality of the language in drafting laws, implementation of the law, and structures and relative power relations that allow the use of such rules.²¹¹

Mechanisms to bring out complaints can facilitate or deter access to justice or the resolution of a problem through other means. Some feel that court or administrative procedures can be cumbersome and that informal systems of adjudication are better options than formal routes. Data on the use of remedies is interesting in this respect because they speak to different readings of effectiveness: the use -or not- of available remedies, and the outcome when remedies are used.

In a European study that surveyed how targets reacted to sexual harassment the responses were organized in four categories: non intervention (ignoring the behaviour), personal response (where it could mean avoiding the harasser or confronting him to make him stop), informal strategies (talking to friends/partners and colleagues) and formal strategies (speaking to a counsellor, or supervisor or filing a complaint). The latter, the formal strategy of filing a complaint, was used by 9 percent of German respondents -the highest level of response reported - compared to 4 and

²¹¹Galanter, *supra* note 177. In the same light, one could say that Bernstein et al. use this holistic approach when examining three regulatory failures in relation to precarious employment in Québec. See Stephanie Bernstein *et al.*, "Precarious Employment and the Law's Flaws: Identifying Regulatory Failure and Securing Effective Protection for Workers" in Leah Vosko, ed., *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal & Kingston: McGill-Queen's University Press, 2006) 203-220.

5 percent in the Netherlands and the UK, respectively.²¹² The decisive factor in filing a complaint is whether the procedure achieves a desirable result for a complainant. This is what the EU report refers to as effectiveness. In this case, the data is not conclusive as to whether formal complaint mechanisms are more effective in dealing with sexual harassment. In the UK, the complaint procedure is the least popular response, but once used it is highly effective, improving the situation of the complainants in 80 percent of cases. Similar results were reported in Germany (70%). However, the Austrian national study showed the opposite: female complainants saw no improvements in 50% of cases: in 162 cases, only 24 harassers were reprimanded or warned and complainants suffered negative consequences as a result of the complaint. Ten women lost their jobs compared to two male harassers, and nine were transferred as opposed to three males forced to relocate.²¹³

The researchers identify some of the many factors influencing these results, including the hierarchical position of the perpetrator, lack of awareness within the organization, male-dominated management, unions or workplaces, or difficulty in the relocation of affected workers.²¹⁴ On the other hand, a detailed sexual harassment policy seems to work as a catalyst in bringing complaints forward. The evidence suggests that complaints in workplaces that have policies in place are higher than in those lacking one. In other words, having a policy acts as a facilitating or protective measure to complain about abuse, thereby improving effectiveness.²¹⁵ I would argue that, as discussed above, national culture and possibly organizational culture as well impact the use of existing remedies.

²¹²European Commission, *supra* note 42 at 21.

²¹³*Ibid.* at 24.

²¹⁴*Ibid.* at 40.

²¹⁵*Ibid.* at 40.

Similar to Québec, Chile's Labour Code spells out a remedy and names sexual harassment as a harm. The legal system also provides a set of remedies that can be equally applicable to a sexual harassment case, although as it was recognized they might not have the strength of a law that named the harm.²¹⁶

The approach to sexual harassment using the *tutela* is possibly distinct from a claim based on the violation of dignity or with regard to the duty to provide a healthy working environment. In any event, the above analysis relies on the premise that the worker's contractual arrangement falls under the purview of the *Labour Code*.

A preliminary assessment of the remedies -and their effectiveness- seems a straightforward question in the case of Chile, based on the number of cases, how the cases are handled (internal employer procedures, administrative bodies, the courts), and their outcomes by type of remedy. Where do workers who are targets of sexual harassment fare better in terms of outcome? But such an approach is limited.

There is some indication that naming the harm through a specific remedy that explicitly addresses sexual harassment has different consequences and possibly less effective results in identifying the breach and handling and penalizing the conduct. The law enables the employer to deploy protection measures in favour of the target and impose penalties, including dismissal of the perpetrator if the complaint is corroborated. If the context in which labour law and the courts

²¹⁶Vivián Delorme Genneville & Francisco Wálker Errázuriz, "El trabajo de las mujeres: de la protección de la maternidad y las salas cunas" (1999):Febrero-Marzo 1998 Revista Laboral Chilena.

operate is job stability and the protection of all workers, the standard practice to impose disciplinary measures, including the dismissal of the perpetrator, might be less viable.

2.3 Legal institutions, architecture and actors: how these influence access to justice

The handling of cases and complaints is a key aspect of effectiveness, as the legal actors involved hold perceptions and beliefs key to the aims of the law. Some of them relate to the way they perceive sexual harassment, whether or not they trivialize sexism or gender discrimination, and whether they hold stereotypes about women or other workers who are deemed different or deviate from certain ideals or stereotypes of workers.²¹⁷ Through the treatment of complaints, legal actors can restrict or broaden the legal concepts, the scope of protection, and the like. They are part of the essential portrait to understanding the effectiveness of legal rules.

These players can act either as barriers or facilitators for targets to get their demands and complaints heard, processed and resolved. Legal players are not comprised only of legal professionals, including judges, but include any employee/public servant who handles the procedures within a judicial or quasi-judicial adjudication system.

The literature indicates that while formal mechanisms provided by the legal system through administrative procedures, mediation processes or the courts are important, equally so are the

²¹⁷ Sometimes those perceptions leak into the way the law is formulated and read, as in British Columbia where occupational health and safety law “labels [physical violence perpetrated by a worker, as opposed to a third party] as ‘improper activity or behaviour’”. See, Lippel, *supra* note 81 at 23.

established internal procedures to deal with sexual harassment complaints within the firms or unions.

Each of these procedures (and the settings where they are located) presents its own tensions and challenges, in determining if and how they represent access to justice. The most familiar environments to lawyers and legal advocates are the courts and administrative bodies like labour inspection offices or human rights institutions when those are available. Litigation usually represents a situation where there is no middle ground between winning or losing, except for settlement out of court or within the process of litigation, or when there is mandatory mediation or conciliation in the courts.

These locations, especially the courts, are not familiar to the targets nor sometimes, to employers. Targets do not, for the most part, share the codified languages and behaviour ingrained in the judicial system. The process also involves financial costs to those affected because it implies retaining legal counsel, or for the lucky ones obtaining legal representation through legal clinics or legal aid when available.

The working poor traditionally have difficulty in getting reparation because of the costs and the unavailability of free legal services; it is less a question of a lack of knowledge about the rights or remedies involved, which can be the initial problem for the effectiveness of the law. Lack of resources to litigate is a problem even for the middle classes as Trebilcock has pointed out. He has documented the lack of access to justice in Canada when socioeconomic thresholds bar the

middle class from receiving legal aid.²¹⁸ Mossman et al arrived at the same conclusion.²¹⁹ Gender analysis of access to justice is mostly discussed in relation to domestic violence; and little attention has been given to other areas of law.²²⁰

Howes refers to problems of legal effectiveness of sexual harassment law in the United Kingdom due, *inter alia*, to issues of legal representation.²²¹ In her empirical work assessing cases heard in tribunals across the U.K. on harassment, where sexual harassment is included, fewer than 5 percent of cases were decided in favour of claimants.²²² The vast majority of cases never reach a decision because of settlements or claim withdrawal. She argues that because of lack of legal representation, claimants “get cold feet and choose to surrender before trying”.²²³ Langevin found that claimants in sexual harassment cases in Québec face similar obstacles.²²⁴ There are several factors that hinder the success of a claim: having a lawyer or not and long delays in the proceedings.²²⁵ The Human Rights Commission [Commission des droits de la personne et des droits de la jeunesse], given its limited resources decides which cases will be referred to the Tribunal. Sexual harassment cases seldom get to the Tribunal, and combined with lack of counsel and long delays in resolving a complaint there exists, in fact, a denial of justice.

²¹⁸Michael Trebilcock, *Report of the Legal Aid Review* (Toronto: 2008).

²¹⁹Mary Jane Mossman, Karen Schucher & Claudia Schmeing, "Comparing and Understanding the Priorities of Legal Aid: Paper Prepared for Legal Aid Ontario" (2010) 29 Windsor Rev. Legal & Soc. Issues. 149.

²²⁰ Today, there is growing concern for armed conflict and other situations in which women are targets of violence. See, UN Women, *In Pursuit of Justice. 2011-2012 Progress of the World Women* (New York: UN Women, 2011); *ibid.*

²²¹Howes, *supra* note 85.

²²²*Ibid.* at 202.

²²³*Ibid.* at 202. In any case, Howes implies that a favorable decision is the only good outcome of a case, and does not discuss the advantages or disadvantages of settlements out of court.

²²⁴Langevin, *supra* note 79.

²²⁵*Ibid.* at 204-208.

Langevin makes reference to a review of 25 decisions rendered by the Québec Tribunal of the Rights of the Person (TDPQ) that showed it took an average of 44 months to get a decision.²²⁶

Race, ethnicity and gender are compounding factors that deepen structural problems in accessing justice. Laws exist on paper but are not effectively implemented, as stated in the U.N. report on Justice for Women and the OAS Report on violence against women.²²⁷ The United Nations report states that the judicial systems become sites to achieve rights, make governments accountable and possibly promote change through litigation.²²⁸

In the case of Latin America, many of the problems in relation to precarious judicial systems and legal services are both chronic and acute to the point that they weaken democratic institutions and lead to a sense of loss of citizenship for vast segments of the population.²²⁹ The literature indicates that if free counsel is precarious for criminal matters, in the case of non criminal litigation the situation could be worse. The poor and certainly middle class users have to demonstrate a lack of financial means to pay for a lawyer, which translates into “poverty

²²⁶Ibid. at 204 and see accompanying text note 25.

²²⁷UN Women, *supra* note 220, Organization of American States, *Access to Justice for Women Victims of Violence in the Americas* (Washington, D.C.: Interamerican Commission of Human Rights, Rapporteurship of Women Rights, 2007).

²²⁸UN Women, *supra* note 220 at 9.

²²⁹Jorge Correa Sutil, "Judicial Reforms in Latin America: Good News for the Underprivileged?" in Juan E. Méndez, Guillermo O'Donnell & Paulo Sérgio Pinheiro, eds., *The (Un) Rule of Law and the Underprivileged in Latin America* (Indiana: University of Notre Dame Press, 1999) 255-277, Juan E. Méndez, "Institutional Reform, Including Access to Justice: Introduction" in Juan E. Méndez, Guillermo O'Donnell & Paulo Sérgio Pinheiro, eds., *The (Un) Rule of Law and the Underprivileged in Latin America* (Indiana: University of Notre Dame Press 1999) 221-226; Alejandro Garro, "Access to Justice for the Poor in Latin America" in Juan E. Méndez, Paulo Sérgio Pinheiro & Guillermo O'Donnell, eds., *The (Un) Rule of Law and the Underprivileged in Latin America* (Indiana: University of Notre Dame Press, 1999) 278-302; Jorge Correa, María Angélica Jiménez & Héctor León Moncayo, *Acceso de los pobres a la Justicia en América Latina* (Santiago: Programa de Gestión Urbana, UNCH, PNUD, Banco Mundial, Ediciones Sur 1995), Alda Facio Montejó & Rodrigo Jiménez, *La igualdad de género en la modernización de la Administración de Justicia* (Washington: Banco Interamericano de Desarrollo, 2007).

certification".²³⁰ A study conducted in the early nineties in Chile found that women users of legal aid services were the majority, most of them homemakers, and that there were few women workers.²³¹ The findings of that study also indicate that although women could learn about their rights and how to access the remedies they could resort to, which indicates a dimension of legal effectiveness, women are frustrated because their expectations are not fulfilled by the legal system when there is no access.²³²

In Chile, the Constitution establishes that all persons should have access to counsel, and that the law must regulate how those services should be provided. In order to fulfill such a mandate, judicial reform over the last ten years has included the provision of legal representation by professional counsel in certain areas of law. This leaves behind some of the structural problems that occurred when counsel was provided by law students doing their compulsory internship with legal aid.²³³ In the area of labour litigation, the reform includes professional labour defenders. Yet, the current system in Chile has in place a means test, hence some workers may pay, at the end of the day, for their representation. There are no studies about the client profile and the type of cases which public defenders take on. The provision of legal services to the poor can partially alleviate problems of social injustice, but it is court-driven on a case by case basis, and lacks a strategic aim to resolve structural and collective problems unless there is a political commitment to conceive of it as a tool to promote public interest litigation.²³⁴

²³⁰Garro, *supra* note 229.

²³¹Nancy De la Fuente Hernández *et al.*, *Asistencia jurídica a mujeres de bajos ingresos* (Santiago: Corporación de Promoción Universitaria, 1993) at 23.

²³²*Ibid.* at 23.

²³³Macarena Vargas, "Acceso a la justicia" in Nicolás Espejo, ed., *Informe anual sobre de derechos humanos en Chile 2008* (Santiago: Facultad de Derecho Universidad Diego Portales, 2008) 175-206 at 187.

²³⁴Garro, one of the critics of the Latin American legal aid programs, reflects that there is a need for lawyers to take a wider role in legal education, a point that could be relevant in terms of informing students about the rules and the impact of law reforms. This is a point that could impact access to justice in another dimension, that of empowering

Administrative bodies (such as labour inspectors and human rights commissions) represent middle-of-the-road alternatives between the courts and less formal adjudication. The users do not require legal counsel, and language codes are more familiar to the users. Nowadays these institutions, as well as the courts, use alternative methods for conflict resolution that are supposed to expedite and permit a negotiation between the aggrieved and the respondent.²³⁵ Shestowsky reminds us that they can also obtain redress that could be different from that imposed by the courts as in the Chilean experience. These methods also present some disadvantages in terms of awards, which could be smaller than what targets could receive through litigation. People may have a sense that they obtain second-class adjudication, and even if this is only a misconception it can still reinforce the idea that the poor may not receive proper adjudication.²³⁶ In Chile there is pre-trial and compulsory mediation integrated in the new labour procedure carried out by the labour inspection office, which aims to correct fundamental rights breaches in the workplace. The correction of a breach, according to an interpretation of the labour office, is to obtain *restitutio ad integrum*.²³⁷ There are guidelines to the proposed settlements where monetary awards are the last resort, and the procedure should promote

by knowing one's rights and having the ability to exercise them. See, Garro, *supra* note 229 at 285-287. Lamarche discusses how poverty law litigation was an important strategy to advance social justice in Québec, see Lamarche, *supra* note 78.

²³⁵ The work of Shestowsky and Brett on people's perceptions before and after choosing their procedure for dispute resolution is of interest. They did an empirical study and found no correlation between non adjudicative choice preference and case outcome. They found the choice over adjudicative procedure is a better predictor about satisfaction of the process and case outcome. They argue that if people have control and a choice of procedure to use, there will more likely be better compliance on the resolution of the case and also the overall legitimacy of the system. If people are steered away from court procedures into ADR they think that the system does not want to deal with them, hence the users are dissatisfied and lose faith in the system. See, Shestowsky & Brett, *supra* note 178.

²³⁶ Some of this has been referred to by Méndez as ADR used to lighten the backlog of the courts. See, Méndez, *supra* note 299 at 225-226.

²³⁷ Macarena Vargas Pavez, "Reflexiones en torno a la incorporación de la mediación en el procedimiento de tutela de derechos fundamentales" (2010):5 Estudios laborales / Sociedad Chilena de Derecho del Trabajo y de la Seguridad Social 99.

changes in practices, including amendments to the internal workplace regulation.²³⁸ In this context mediation could open a window of opportunities, but it could also generate apprehension if sexual harassment is analogous to domestic violence (or is perceived as being analogous), where mediation cannot be utilized.²³⁹

Another locus in the process of sexual harassment resolution is the workplace, when firms have internal regulations to deal with complaints. This site must be contextualized in relation to working relationships, the existing working climate, staff management, and the participation of unions in the workplace. Knowledge of what goes on in these settings is less well-documented. Although targets could feel more at ease, it is likely that they could be insecure or suspicious because the workplace is where the aggression has taken place, particularly in cases where the aggression involves a supervisor who could be implicated either by action or omission. These key players could be management staff or union representatives who may lack training or sensitivity to deal with sexual harassment. Internal regulations could also sometimes act as a barrier to resolution.

The work of Hoel and Einersen shows that supervisors and union representatives in Sweden feel at odds in handling complaints on bullying, that unions are in a conflict because they perceive they have to take sides between two workers, and that the employer often decided to transfer the target in an effort to keep everyone in their jobs. However, transfer decisions leave targets with a

²³⁸Ibid.

²³⁹Lidia Casas B, Macarena Vargas P & María José Azócar, *Mediación Familiar y Género*, vol. 18 (Santiago: Facultad de Derecho Universidad Diego Portales, 2008).

feeling of being mistreated.²⁴⁰ Langevin likewise found in Québec that unions have the same problem when both parties –the sexually harassed and the harasser- are both union members and the union does not know what side to take.²⁴¹

The Chilean model for dealing with sexual harassment displays all the architectural arrangements already described. Cases are handled with different levels of *sophistication* in terms of the response. There are specialized labour courts where it is highly likely that the judges and lawyers who participate have no training on either a gender perspective in relation to the law or on sexual harassment, unlike what has happened in other areas of law including mediation.²⁴² Although a new institution, the Labour Defense, (Defensoría Laboral), that provides legal representation, reducing some of the barriers that targets experience, attorneys might be more familiar with representing harassers who have been fired because of their behaviour than with representing workers who have been targets. An additional question is the role that labour lawyers have in representing workers. Horizontal sexual harassment may represent a challenge if it is perceived to be a personal feud, as representatives may seek to avoid a conflict between workers that could result in someone losing a job. The lawyer's role and how they perceive and handle sexual harassment cases are crucial to ensuring access to justice for the targets.

²⁴⁰Hoel & Einarsen, "The Swedish Ordinance Against Victimization at Work: a Critical Assessment", [The Swedish Ordinance] *supra* note 182.

²⁴¹Langevin, *supra* note 79 at 207.

²⁴² This was in fact the case when the new criminal justice system came into force in 2000, and later the new family courts in 2005. Neither judges, prosecutors or lawyers were trained in domestic violence law that was and is an important component of the case-load. See, Lidia Casas *et al.*, *La Defensa de casos de violencia intrafamiliar* (Santiago: Defensoría Penal Pública, 2007), Lidia Casas B & Alejandra Mera B, *La reforma procesal penal desde la perspectiva de género. Delitos sexuales y lesiones*, vol. 17 (Santiago: Facultad de Derecho y Centro de Justicia de las Américas, 2004), Casas B, Vargas P & Azócar, *supra* note 239.

Labour inspectors are an important component in the process of settlement of grievances through mediation. They provide an entry point into the adjudication, where targets can find a rapid response and solution at that level.²⁴³ It appears that the majority of complaints on sexual harassment are dealt with at this stage, even more so than in the courts. The study conducted by the Labour Inspectorate shows that 9 percent of the investigations were carried out by the employer.²⁴⁴

There is little information on what unions do, except for a study filed by the Chilean Ministry of Labour indicating that 87 percent of the complaints lodged with the labour inspectorate are done by targets and/or unions without differentiating between the two.²⁴⁵ Our study on the case law (Chapter 2) and interviews (Chapter 3) suggests that it is likely that the majority are launched by targets and not unions. It seems that their role is relevant in providing a channel for targets to trigger the investigation.

Conclusions

Feminists are succeeding in naming and creating legal categories for sexual harassment. These travel around the globe. However, in different legal and cultural contexts, the harms imbedded in sexual harassment were framed in terms of discrimination or violation of dignity. In some cases there has been a dual approach. The discrimination or equality paradigm is the one that makes the gender dimension visible, while it has been argued that dignity neglects the gender

²⁴³Celina Carrasco Oñate & Patricia Vega López, *Acoso sexual en el trabajo ¿Denunciar o sufrir en silencio?* (Santiago: Dirección del Trabajo, 2009).

²⁴⁴*Ibid.* at 42.

²⁴⁵ Carrasco & Vega, *supra* note 243 at 42.

component presented under a traditional labour or social justice paradigm. Sometimes legislation has been shaped to protect solely women, moving away from an approach of violence at work, as Chappell and Di Martino point out.²⁴⁶

Determining effectiveness means looking at a variety of factors, acquiring a full portrait of enabling conditions to recognize harms and using the mechanisms available to targets of sexual harassment.

²⁴⁶Chappell & Di Martino, *supra* note 41 at 17-20.

CHAPTER 2

THE LAW ON SEXUAL HARASSMENT

Introduction

This chapter is based on an analysis of legislation, case law and doctrine. The legislation discussed includes Chilean laws and regulations in force at the time of writing (November 2015), most which have existed since the enactment of the *Labour Code* of 1931 and its amendments,²⁴⁷ although the sexual harassment provisions were adopted in 2005.²⁴⁸ The case law analysis follows, in which we will present the methodology used to retrieve the cases, followed by an assessment of who is suing and what are the judicial remedies for the targets and alleged perpetrators. This analysis also examines how other actors such as employers, the Labour Inspectorate, and unions participate in litigation, including the outcomes of the cases that reach the Courts or the Contraloría General de la República (National Comptroller) for workers in public administration.

One of the leading questions in Chapter 1 was to examine whether in the statutes the focus of sexual harassment followed the dignity paradigm or the equality and non-discrimination paradigms. This Chapter will assess how the Courts adopt any of those frameworks.

1. Methods

Chile belongs to a continental legal tradition where prior decisions do not set precedent. As such, and unlike common law jurisdictions, there are no comprehensive, systematic public or

²⁴⁷ The *Labour Code* assembles all existing statutes governing labour relations.

²⁴⁸ *Ley No 20.005*, *supra* note 4.

commercial databases indexing decisions.²⁴⁹ The search for sexual harassment case law was therefore conducted using a range of strategies, engines and databases in order to collect pertinent decisions and ensure results as comprehensive as possible. Each database will be explained in full.

I used the term *acoso sexual* [sexual harassment] as keywords, then examined and retrieved cases. Although the Spanish language has additional terms for harassment, including *hostigamiento* and *asedio*, Chilean law and doctrine use *acoso*, which was used throughout to maintain consistency. All cases pertaining to sexual harassment targets or alleged perpetrators were retrieved.

The retrieval period extended from 2005 through October 2, 2013. Cases reported in commercial databases prior to passage of the law on sexual harassment in 2005 were included for comparison.

1.1 The Judiciary Database

The Chilean judiciary case database at www.pjud.cl has a rudimentary search function and inclusion of cases and decisions is far from systematic and comprehensive. A search using *acoso sexual* as keywords returned 140 results from 2007 to 2011.²⁵⁰ Eleven were actual sexual

²⁴⁹ Although a recourse unification of labour case law was introduced in 2008, to this day parties must themselves furnish the upper court decisions that set judicial doctrine. Article 483-A *Código del Trabajo*, *supra* note 4.

²⁵⁰ These results could be driven by the fact that the Chilean legal system does not rely on precedents.

harassment cases,²⁵¹ including six not reported in commercial engines. In the other 129 decisions, use of the term *acoso* was unrelated to sexual harassment in the workplace.²⁵²

Due to the limitations of commercial and judiciary search engines, to obtain complementary information on lower court decisions a manual search was carried out in the judiciary case-tracking system for 2011 (Figure 1). Divisional court cases are seldom reported in commercial databases. The judiciary enters all cases into a public web-based platform designed to facilitate litigant access to case information. Locating lower court cases helped capture the overall treatment of sexual harassment in the justice system.

Figure 1



²⁵¹ Cases No. 9313-10 of 20 October 2011; 9051-10 of 22 June 2011; 3500-10 of 1 September 2010; 8026-09 of 24 November 2009; 5939-09 of 15 October 2009; 5428-09 of 8 September 2009; 5531-09 of 7 September 2009; 80-09 of 18 March 2009; 6569-08 of 14 January 2009; 5299-08 of 16 October 2008; 3868-08 of 11 September 2008, and 848-08 of 28 September 2007.

²⁵² For example, a search for divorce case law, an everyday family court proceeding, yielded 29 decisions by 2013. Yet, the Justice Ministry’s Annual Report for 2011 shows over 58,000 divorce cases. Instituto Nacional de Estadísticas, *Justicia Informe Anual 2011* Instituto Nacional de Estadísticas, (2012) at 26.

At the time information was retrieved, the case-tracking system was organized by specialized and non-specialized divisional, Appellate, and Supreme Court levels. By the end of 2014 the judiciary overhauled its web platform, segmenting data for the old and reform labour system across two portals. The new system provides more information, including written and respondent pleadings and settlements reached in court. It tracks the main landmarks of proceedings and appeals filed, if any, and reports, for example, on hearing length and settlements the parties may have agreed to in the hearing.

The system is comprehensive but it has limitations, such as not allowing for retrieval by case category. Its advantages include access to valuable information about the steps a case follows through litigation.

Every case in the *procedimiento ordinario* and *procedimiento de tutela* categories was reviewed. Sexual harassment targets or alleged perpetrators in wrongful or constructive dismissal cases can use the general procedure –*ordinario*– or the fundamental rights protection procedure –*tutela*– independently. The facts and grounds of each case were carefully reviewed in order to identify relevant cases. If the nature of the case was not evident, the respondent’s defence was examined.

To provide a sense of regional differences, divisional labour courts in the cities of Valparaíso, Concepción and Santiago were searched for all of 2011. The first two cities had one labour court each, while as a much larger jurisdiction, Santiago had four. The Second Divisional Labour Court under the jurisdiction of the Santiago Court of Appeals²⁵³ was selected for Santiago. Cases

²⁵³ The populous south end of Metro Santiago is served by the San Miguel Court of Appeals.

retrieved from these three courts for use in this dissertation are a census, not a sample, of all labour disputes involving sexual harassment.²⁵⁴

The year 2011 was selected because cases would have been concluded by the time of examination. Additionally, in 2012 moral harassment was added as grounds for dismissal under the *Labour Code*, the type of amendment that, as studies done in Québec show, could have the effect of distorting the legal cause of action used by targets.²⁵⁵

Examination, identification and retrieval of information was an extremely laborious, time-consuming process. It meant examining, one by one and in numerical order, cases filed by plaintiffs and the defendant pleas to determine if sexual harassment was involved. Moreover, the judiciary website shuts down nightly, cutting down on search time. Figure 2 shows how information on individual cases is presented in the tracking system.

²⁵⁴Bryman & Teevan, *supra* note 14 at 216.

²⁵⁵Rachel Cox, "From Sexual to Psychological Harassment: One step Forward Twenty-five Years Back from Women's Equality at Work?" in Shelagh Day, Lucie Lamarche & Kent Norman, eds., *14 Arguments for Human Rights Institutions in Canada* (Toronto: Irwin Law, 2014) 237-278.

Figure 2

The screenshot displays the 'CONSULTA ATENCIÓN DE PÚBLICO' interface. On the left, there is a sidebar with navigation options: 'Sistema Tribunales Laborales ver. 1.5.0.0', 'Consulta Causas', 'Consulta Audiencias', 'Ingreso de Causas', and 'Volver'. The main content area shows case details for 'JARA CON REDBUS URBANO SA' with the following information:

RIT : T-4-2009	JARA CON REDBUS URBANO SA	F. Ing.: 04/09/2009
RUC: 09- 4-0018685-2	Proc.: Tutela	Forma Inicio: Denuncia
Est. Adm. : Archivada	Etapas: Terminada	Estado Proc.: Concluido
Tribunal : 2º Juzgado de Letras del Trabajo de Santiago		Texto Denuncia : [icon]

Below the case details is a table with tabs for 'Historia', 'Litigantes', 'Notificac.', 'Diligencias', 'Liquidacion', and 'Materias'. The 'Historia' tab is active, showing a table of case history:

Doc.	Etapas	Trámite	Desc. Trámite	F. Trámite
[icon]	Terminada	Resolución	Archivar, oficio DT	09/03/20
[icon]	Terminada	Actuación	Sentencia Ejecutoriada	12/04/20
[icon]	Impugnación	Resolución	Cúmplase	08/04/20
[icon]	Impugnación	Actuación	DOCUMENTO CORTE	07/04/20
[icon]	Impugnación	Resolución	Tengase presente pago	25/03/20
[icon]	Impugnación	Escrito	Da cuenta de pago	24/03/20

Below the history table is a section titled 'Remisiones en la Corte' with a table showing court referrals:

Rol Corte	Desc. Trámite	F. Trámite
[icon]	Concede Recurso de nulidad	30/11/2009

The manual search involved reviewing nearly 7,000 cases. To cover all cases in a reasonable time and sort out relevant cases, technical assistance was required. One assistant was trained to select one subset of the cases (July-Dec. 2011) according to specific guidelines that included searching by judicial remedies used as outlined above, and looking at the written pleadings of the plaintiffs, found in the facts of the case, for any grounds for their claims related to an issue of sexual harassment. The assistant was supervised for accurate retrieval of the data. Cases, by court and type of proceeding, are outlined in Table 1.

Table 1			
Cases Per Court - Manual Search, 2011			
Court	Proceeding		Total
	<i>Tutela</i>	General	
Second Court of Santiago	557	4,274	4,831
Valparaíso	208	1,005	1,213
Concepción	88	838	926
Total	853	6,117	6,970

Despite the vast number of cases reviewed, few related to sexual harassment. In Valparaíso the search turned up three *tutelas* and two general proceedings. In the Concepción Divisional Labour Court, out of 926 cases for 2011, there was one *tutela* action on sexual harassment. In the Second Court of Santiago there were 29 sexual harassment cases, two of which were excluded because the targets were students, not workers.

1.2 Commercial Databases

Several commercial databases were also used, including LexisNexis (later Thomson Reuters Legal Publishing), Microiuris, and Westlaw. After vLex became available in September 2013, further searches found new relevant cases. Duplicates were excluded.

Searches using commercial engines had their drawbacks. Some decisions were not identified by party name. Case ID numbers and classification system were their own, making it harder to

segregate duplicates. I noted all information and used NN (John Doe / Jane Doe) until I was able to fill in the gaps.

Lack of party identity made understanding who filed the lawsuit complex. Moreover, higher court decisions often made little or no reference to harassment type and other crucial facts. Although these databases provided little information, cases were traced back to lower courts wherever possible. Careful reading of decisions helped to fill in some of the gaps.

Party names posed an additional problem. When more than one worker was involved, information was shown under any one name, depending on the particular database. As such, noting down the facts in order to exclude duplicates when processing the data became crucial. All of these factors made classification and indexing somewhat more difficult and time-consuming than expected.

1.3 Other Labour Databases

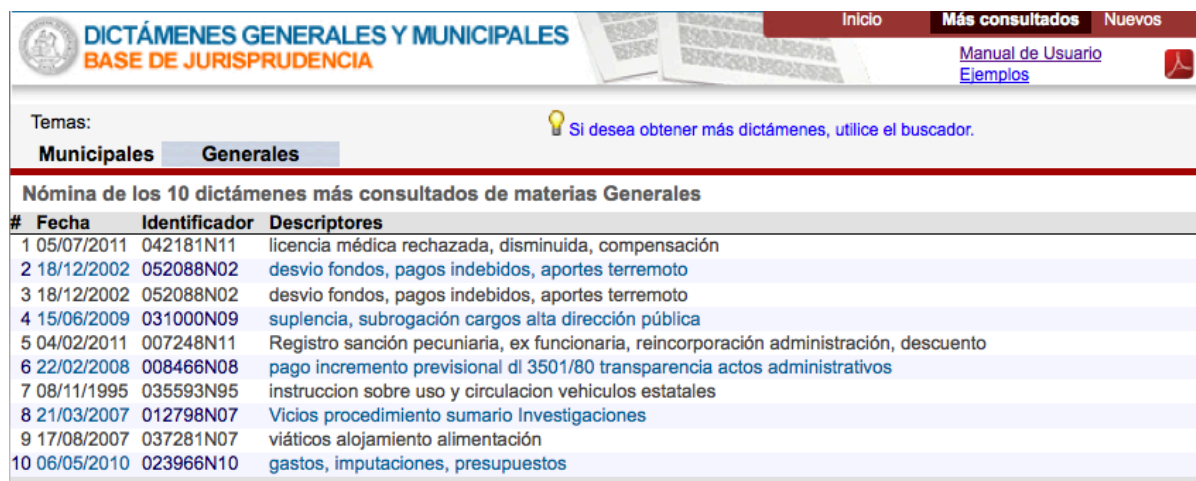
I was able to secure access to a private database of new labour justice system case law maintained by labour law professor César Toledo Corsi.²⁵⁶ Prof. Toledo Corsi reports divisional court cases throughout Chile with a focus on *tutela* proceedings in *Labour Code* contexts. His database listed 25 cases of sexual harassment with a cutoff date of October 2013. Many were duplicates or moral harassment cases misclassified as sexual harassment.

²⁵⁶<http://sentenciasreformalaboral.blogspot.com>.

1.4 Database of the Office of the Comptroller General

The Chilean public service is governed by the Public Service Employment Act (*Estatuto Administrativo*),²⁵⁷ a statute that reaffirms the *Labour Code*'s sexual harassment provisions and complements the rights and obligations of public servants. In addition to the courts, public employee complaints can also be adjudicated by the Comptroller General (*Contraloría General de la República*), which has its own database at www.contraloriageneral.cl (see Figure 3). Search keywords were again *acoso sexual*. There is no certainty that all relevant cases were found, as under administrative law sexual harassment can be correlated with other grounds such as dishonesty, lack of moral integrity, or misconduct (which includes theft, misappropriation of public funds, etc.). Decisions have a call number. Some identify the worker and agency involved, while others use worker initials only to maintain anonymity of those affected.²⁵⁸

Figure 3



The screenshot shows the website interface for 'DICTÁMENES GENERALES Y MUNICIPALES BASE DE JURISPRUDENCIA'. It includes navigation links for 'Inicio', 'Más consultados', and 'Nuevos', along with a 'Manual de Usuario' and 'Ejemplos' link. Below the navigation, there are tabs for 'Municipales' and 'Generales', and a search prompt: 'Si desea obtener más dictámenes, utilice el buscador.' The main content area displays a table titled 'Nómina de los 10 dictámenes más consultados de materias Generales'.

#	Fecha	Identificador	Descriptores
1	05/07/2011	042181N11	licencia médica rechazada, disminuida, compensación
2	18/12/2002	052088N02	desvio fondos, pagos indebidos, aportes terremoto
3	18/12/2002	052088N02	desvio fondos, pagos indebidos, aportes terremoto
4	15/06/2009	031000N09	suplencia, subrogación cargos alta dirección pública
5	04/02/2011	007248N11	Registro sanción pecuniaria, ex funcionaria, reincorporación administración, descuento
6	22/02/2008	008466N08	pago incremento previsional dl 3501/80 transparencia actos administrativos
7	08/11/1995	035593N95	instruccion sobre uso y circulacion vehiculos estatales
8	21/03/2007	012798N07	Vicios procedimiento sumario Investigaciones
9	17/08/2007	037281N07	viáticos alojamiento alimentación
10	06/05/2010	023966N10	gastos, imputaciones, presupuestos

²⁵⁷ Ley N° 18.834 sobre el Estatuto Administrativo (Chile: 1989).

²⁵⁸ As will be discussed in Chapter 3, section 3.5.1, not all sexual harassment investigations in the public service are reported, as some may never lead to sanctions. Cases are reported if the target, alleged perpetrator or government agency appealed the decision.

Contraloría decisions are binding. A search for 2005-2012 found 34 cases with a cutoff date of January 2013.²⁵⁹ Excluded were three from before sexual harassment legislation came into effect and one relating to psychological harassment.

1.5 Organization of Data

All cases were indexed in an EndNote library and managed in a FileMaker 10 Advanced database. Some 267 cases were collected in all, although fifteen were excluded because the targets were third parties such as students, clients or patients. The final number of cases examined was 252.

The FileMaker database underwent several changes and additions to allow for new data or create new categories. The database identified parties, court, sex of plaintiff and defendant, procedures used, case outcome, type of evidence produced, references to rights and type of harassment, and other remedies ordered by the courts (see Figure 4).

²⁵⁹ On 28 April 2015, while this chapter was in revision, the same search yielded 35 decisions. For analytical reasons I did not include the new cases as doing so would not have produced any new results.

Figure 4

The screenshot shows a web application window titled 'Case law database completa depurada'. The main content area displays a case entry for 'Carolina Lehner Carrasco con la Policía de Investigaciones', filed on July 30, 2013. The case details include the court (Contraloría General de la República), ID (Dictamen 067599), and year (2011). The type of procedure is 'Apelación' (Appeal), and the plaintiff is 'Acosada' (Harassed). The type of reference is 'Tercero' (Third party). A list of legal references is provided, including 'Vulneración de la dignidad', 'Problemas de igualdad o discriminación', 'Chacota o bromas subidas de tono', 'Piropeo o flirteo', 'Denuncia por desquite', 'Tocamientos', 'Acoso verbal', 'Relación sentimental', 'Derecho a la honra', 'Derecho a la integridad', 'Derecho a la libertad de trabajo', 'Derecho al debido proceso', 'Indemnidad sexual', 'Injuria', 'Derecho a la vida privada', 'Sana crítica', and 'Standard probatorio'. The interface also includes a 'Remedies' section with the text 'Nulidad de la no renovación del contrato'.

Preliminary case law results were presented at a specially convened colloquium held at the Faculty of Law of Diego Portales University in January 2014 as well as to judges who attended a lecture in May 2014. Some of the resulting discussions are included in the analysis below.

2. Legislation

Chile belongs to the continental legal tradition where statutes are paramount sources of law. In March 2005, the Chilean *Labour Code* was amended to include sexual harassment as a legitimate ground for dismissal of those who sexually harass others, and a ground for constructive dismissal

for targets.²⁶⁰ Prior to 2005, employers seeking to fire sexual harassers cited other legal grounds on lack of honesty or moral integrity.

Sexual harassment encroaches on many fundamental rights, including to mental health, privacy and equality, and sexual autonomy. Although constitutional protections can be invoked in sexual harassment cases, the *Labour Code* remains the main regulatory statute.

While Congress is currently reviewing a proposal to make sexual harassment a criminal offense,²⁶¹ *Criminal Code* provisions already apply to behaviour such as rape, attempted rape or sexual abuse. Below is an examination of sexual harassment provisions in workplace contexts.

2.1 The Labour Code

The definition of sexual harassment is embedded in the principles and values enshrined in the *Labour Code*, such as non-discrimination and protection of worker dignity.

“[...] Labour relations should be based on treatment compatible with human dignity. Conduct inimical to human dignity includes, inter alia, sexual harassment, which is any and all unwanted, unconsented sexual advances detrimental to a victim’s employment status or opportunities.”²⁶² [translated by author]

²⁶⁰*Ley No 20.005, supra* note 4.

²⁶¹*Boletín 7606-07 Tipifica el acoso sexual en público 2011; Boletín 8802-08 Incorpora normas sobre acoso sexual 2013.*

²⁶² Article 2 “...Las relaciones laborales deberán siempre fundarse en un trato compatible con la dignidad de la persona. Es contrario a ella, entre otras conductas, el *acoso sexual*, entendiéndose por tal el que una persona realice en forma indebida, por cualquier medio, requerimientos de carácter sexual, no consentidos por quien los recibe y que amenacen o perjudiquen su situación laboral o sus oportunidades de empleo.” *Código del Trabajo*.

The legislation sees sexual harassment as a violation of worker dignity,²⁶³ not an issue of discrimination, even if most of the doctrine recognizes the gender impact and inequality at its root.²⁶⁴

The Labour Inspectorate, whose role includes interpreting the scope of legislation, has written that its mandate includes sexual harassment by coworkers and employers as well as hostile work environments.²⁶⁵ Although there are no indications that sexual harassment from clients is actionable against employers for lack of protection, in a study about sexual harassment complaints filed at the Labour Inspectorate, the Inspectorate dismissed a case of a domestic worker who was sexually harassed by the employer's father. It was deemed there was no contractual relationship between the perpetrator and the target in spite of the fact the harassment occurred in the employer's home.²⁶⁶ The *Labour Code* requires establishments employing more than ten permanent workers to have internal regulations on sexual harassment in place.²⁶⁷

²⁶³ See below in this chapter section 2.2.3 for more on this topic at 110.

²⁶⁴ Sergio Gamonal Contreras & Caterina Guidi Moggia, *Manual del contrato de trabajo*, 3 ed. (Santiago: AbeledoPerrot Legal Publishing Chile, 2012), Sergio Gamonal, *Trabajo y Derecho* (Santiago: Legal Publishing Chile, 2010), Eduardo Caamaño Rojo, "Acoso sexual: concepto, clases y bien jurídico protegido", *El acoso sexual en la empresa* (Santiago: LexisNexis, 2005), Eduardo Caamaño Rojo, *Mujer, Trabajo y Derecho. Hacia Relaciones Laborales con Equidad de Género y Corresponsabilidad Social* (Santiago: AbeledoPerrot Legal Publishing Chile, 2011). [Mujer, Trabajo y Derecho]; Luis Lizama & José Luis Ugarte, *Nueva Ley de acoso sexual* (Santiago: LexisNexis, 2005), Luis Lizama Portal & José Luis Ugarte Cataldo, *Interpretación y Derechos Fundamentales en la Empresa* (Santiago: Editorial Jurídica ConoSur Ltda., 1998).

²⁶⁵ Dirección del Trabajo, *Fija sentido y alcance de las normas contenidas en la Ley N° 20.005, sobre prevención y sanción del acoso sexual*, ORD. N° 1133/36 (Chile: 2005).

²⁶⁶ Lidia Casas B, "Un estudio sobre las quejas por acoso sexual ante la Inpección del Trabajo: desafíos y oportunidades de la Ley 20.005" (2012) 7 Estudios laborales / Sociedad Chilena de Derecho del Trabajo y de la Seguridad Social 25 at 35.

²⁶⁷ Articles 153-154 *Código del Trabajo*, *supra* note 4; Dirección del Trabajo, *Reglamento Interno. Modificaciones. Acoso Sexual*, N° 3127/86 (Chile: 2005). The internal regulations –*Reglamento interno de orden, higiene y seguridad*– is a set of rules that govern the rights and obligations between the employer and the workers in relation to work duties and behaviour observed in the workplace. The regulations must stipulate provisions that encourage a respectful working environment among workers, prohibited behaviour and sanctions that an employer can impose when there is a breach notwithstanding the application of the *Labour Code*.

Sexual harassment is grounds for termination of perpetrators under article 160(1)(b) of the *Code*. Prior to enactment of sexual harassment legislation, employers could fire alleged perpetrators or workers file for constructive dismissal using generic provisions on lack of honesty or moral integrity or immoral behaviour affecting company performance.²⁶⁸ Sexual harassment provisions also allowed targets to file for constructive dismissal.²⁶⁹

2.1.1 Wrongful Dismissal

In Chilean labour law, job protection and contract stability are overarching principles.²⁷⁰ That said, provided that severance is paid and the grounds are reasonable, i.e., restructuring or downsizing, the *Labour Code* lets employers lay off workers. These principles are not absolute, as employers have latitude to dismiss by paying adequate compensation,²⁷¹ refuse to renew fixed-term contracts, or decline retaining staff hired for time-specific projects.

Employers may dismiss workers on the grounds set out in the *Code*,²⁷² limited by the fundamental rights established in the case law.²⁷³ As noted, businesses employing ten permanent workers and up must have regulations outlining health and safety obligations as well as

²⁶⁸ Article 160(1)(a) “falta de probidad del trabajador en el desempeño de sus funciones” and (e) “conducta inmoral del trabajador y que afecte a la empresa donde se desempeña”. *Código del Trabajo*, *supra* note 4.

²⁶⁹ Article 171, *ibid*.

²⁷⁰ Gamonal Contreras & Guidi Moggia, *supra* note 264; Sergio Gamonal Contreras, *Fundamentos del Derecho Laboral* (Santiago: LexisNexis, 2008) at 115-120. Héctor Humeres Noguera, *Derecho del Trabajo y de la Seguridad Social* vol. I, 17 ed. (Santiago: Editorial Jurídica de Chile, 2004) at 270.

²⁷¹ Lourdes López Cumbre, "El principio de la estabilidad en el empleo como principio en el ordenamiento laboral" in Luis Enrique De la Villa Gil & Lourdes López Cumbre, eds., *Los principios del Derecho del Trabajo* (Madrid: Centro de Estudios Financieros, 2003) 287-337 at 287; Humeres Noguera, *supra* note 270 at 270; Diego López, *Derechos, trabajo y empleo* (Santiago: LOM, 2004) at 138-139.

²⁷² Article 160 *Código del Trabajo*, *supra* note 4.

²⁷³ Eduardo Caamaño Rojo, *Código del Trabajo. Sistematizado con Jurisprudencia*, vol. I (Santiago: AbeledoPerrot. Legal Publishing Chile, 2012) at 92.

procedures for investigating sexual harassment complaints and related sanctions.²⁷⁴ Employers can impose verbal or written reprimands or fines of up to 25 percent of daily wages.²⁷⁵ If there are serious breaches not spelled out in the internal workplace regulations, the Supreme Court has noted those infringements are added to the ones already explicit in the law.²⁷⁶ Company regulations help employers organize, manage and regulate the workplace. While staff do not participate in drafting them, regulations cannot undermine the rights enshrined in the law.²⁷⁷

Under some circumstances employers can lawfully discharge a worker for cause, without having to provide severance pay.²⁷⁸ Termination requires written notice setting out the facts and grounds. Failure to do so, or invoking the wrong grounds, does not invalidate the notice but leaves the employer open to having to prove his grounds in court. If a worker challenges those grounds, the onus is on the employer to adduce the evidence. The statutory limitation to file suit is sixty days after termination, deferrable for up to ninety days after dismissal if a complaint is filed with the Labour Inspectorate.²⁷⁹

Union officials and pregnant women are protected individuals²⁸⁰ under vulnerable worker provisions²⁸¹ and can only be fired for cause and with court permission.²⁸²

²⁷⁴ Article 154(12). *Código del Trabajo*, *supra* note 4.

²⁷⁵ Article 154(10), *ibid.* *supra* note 4.

²⁷⁶ William Thayer Arteaga, *Texto, comentario y jurisprudencia del Código del Trabajo*, 2 ed. (Santiago: Editorial Jurídica de Chile, 2010).

²⁷⁷ Gamonal Contreras & Guidi Moggia, *supra* note 264 at 99.

²⁷⁸ Article 160, *Código del Trabajo*, *supra* note 4.

²⁷⁹ Article 168, *ibid.*

²⁸⁰ Article 174, *ibid.*

²⁸¹ Gamonal Contreras & Guidi Moggia, *supra* note 264 at 268.

²⁸² Article 174, *Código del Trabajo*, *supra* note 4.

2.1.2 Constructive Dismissal

Constructive dismissal is termination of the employment contract by a worker who nonetheless retains all rights, including to severance pay, provided the termination came about because the employer has gravely breached his/her obligations.²⁸³ The legal effect is akin to discharge without just cause, as regulated in the law.²⁸⁴ The circumstances or working conditions must clearly entitle a worker to resign. In a constructive dismissal action, the onus is on workers to prove their case and offer arguments in law showing that the breach was egregious enough to support the conclusion that they had no option but to “resign”.²⁸⁵ Only a single Supreme Court decision reported states that employers must prove that a breach did not occur.²⁸⁶ As sexual harassment is grounds for constructive dismissal²⁸⁷ and the law seeks to protect employers from false claims, courts may award damages if a complaint lacks plausibility.²⁸⁸

²⁸³Gamonal Contreras & Guidi Moggia, *supra* note 264 at 317 and Alfredo Sierra Herrero, "Acción de tutela laboral y despido indirecto. Comentario a la sentencia "Gómez Cattini con Camilo Ferrón Chile SA". Segundo Juzgado del Trabajo de Santiago 3 Diciembre de 2009, RIT T-11-2009." (2010) 17:2 Revista de Derecho Universidad Católica del Norte.

²⁸⁴Gamonal Contreras & Guidi Moggia, *supra* note 264 at 317-318.

²⁸⁵ Eduardo Caamaño Rojo, *Código del Trabajo. Sistematizado con Jurisprudencia*, vol. III (Santiago: AbeledoPerrot. LegalPublishing Chile, 2012) at 1528-1529.

²⁸⁶*Ibid.* Citing Supreme Court Case No. 1084-2006, 26 June 2007, at 1529.

²⁸⁷ Art. 171 on constructive dismissal cross-references grounds for dismissal under Art. 160: “1. Proven gross misconduct, such as (a) Unethical conduct; (b) Sexual harassment; (c) Physical altercations with the employer or coworkers; 5. Acts, omissions or criminal negligence affecting the safety or operation of the firm or worker safety or health; 7. Breach of contractual duties.”, *Código del Trabajo*, *supra* note 4. Translated by author. “Art. 160. El contrato de trabajo termina sin derecho a indemnización alguna cuando el empleador le ponga término invocando una o más de las siguientes causales:

1. Alguna de las conductas indebidas de carácter grave, debidamente comprobadas, que a continuación se señalan:

a) Falta de probidad del trabajador en el desempeño de sus funciones;

b) Conductas de acoso sexual;

c) Vías de hecho ejercidas por el trabajador en contra del empleador o de cualquier trabajador que se desempeñe en la misma empresa;

d) Injurias proferidas por el trabajador al empleador;

e) Conducta inmoral del trabajador que afecte a la empresa donde se desempeña, y

f) Conductas de acoso laboral. [...]

5. Actos, omisiones o imprudencias temerarias que afecten a la seguridad o al funcionamiento del establecimiento, a la seguridad o a la actividad de los trabajadores, o a la salud de éstos. [...]

6. El perjuicio material causado intencionalmente en las instalaciones, maquinarias, herramientas, útiles de trabajo, productos o mercaderías.

To sustain the action brought by a target, my analysis of the cases reveals a three-tier test that is not offered or elaborated in the doctrine. First, the target provides sufficient evidence that sexual harassment did occur.²⁸⁹ What need to be verified are the facts using the preponderance of evidence standard, and not just a mere probability the facts may have occurred.²⁹⁰ Second, is employer's liability. Did the employer breach standards of care? Is the employer liable directly, or due to inaction? Workers can file over failure to act²⁹¹ or use a generic serious breach of contract clause, such as failing to protect worker dignity, health or safety.²⁹² López Perán makes an argument about moral harassment and the lack of due diligence in the protection of worker health and safety.²⁹³

Third, judges consider the nature of the breach. Trial judges must determine whether the conduct was serious enough to leave the target with no other option but to quit. Humeres Noguier argues that as this is equivalent to the grounds used by employers to dismiss, then an employer's breach must be of an equal magnitude.²⁹⁴

In constructive dismissal, the onus of proof is on workers. On a case predating enactment of the law in 2005, Lizama and Ugarte write that the Supreme Court agreed that sexual harassment was present and ruled the case upheld. Closer examination shows that the target was able to prove a

7. Incumplimiento grave de las obligaciones que impone el contrato.”

²⁸⁸ Article 171 *ibid.*

²⁸⁹ Lizama & Ugarte, [Nueva ley de acoso] *supra* note 264 at 50-54.

²⁹⁰ Caamaño Rojo, *Código del Trabajo. Sistematizado con Jurisprudencia*. Vol. III, *supra* note 285 at 1349.

²⁹¹ Article 160 No 5 *Código del Trabajo*, *supra* note 4.

²⁹² Article 160 No 7 *ibid.* López Perán makes an argument with respect to moral harassment and the lack of due diligence in the protection of health and safety of workers. Andrés López Perán, "El autodespido como mecanismo de tutela frente a las conductas de acoso laboral" (2012) 7 *Estudios laborales / Sociedad Chilena de Derecho del Trabajo y de la Seguridad Social* 203.

²⁹³ López Perán; *ibid.*

²⁹⁴ Humeres Noguier, *supra* note 270 at 279.

type of perpetrator conduct that the Court deemed inappropriate declaring it was sexual harassment. The suit was ruled in favour of the target because the employer knew of the circumstances but failed to act pre-emptively.²⁹⁵

If the employer is the perpetrator and harassment is proven, this would satisfy parts one and two of the test, i.e., breach and liability. If the culprit is a co-worker, a different set of questions must be considered. Did the employer know? If so, were steps taken to prevent or investigate the complaint or the circumstances? Evidence must be adduced to prove that an employer knew formally, i.e., a written complaint pursuant to company regulations, or informally.²⁹⁶ If complaint procedures are in place, the question is whether the target observed them –just as firing is a last resort, workers cannot use constructive dismissal at will. For a court to uphold a claim, employers must have seriously breached their obligations and undermined working conditions.

As to whether the conduct at issue did indeed leave a target no option but to quit, scholars note that most courts assess the facts on a case-by-case basis.²⁹⁷ As such, workers may provide evidence of harassment but the conduct is not found to be serious enough to support constructive dismissal. Qualifying the severity of sexual harassment is therefore a question of both fact and interpretation of the law.

²⁹⁵Lizama & Ugarte,[Nueva ley de acoso] *supra* note 264 at 51 and accompanying note 22 where they recognize that prior to this case, the Supreme Court requested proof of sexual harassment. See, *Dginnia Giovanna Riveri Cerón con Fundación Comunicaciones Cultura Capacitación Agro* Corte Suprema, 2003).

²⁹⁶Thayer Arteaga, *supra* note 276.

²⁹⁷Caamaño Rojo, *Código del Trabajo. Sistematizado con Jurisprudencia*. Vol. III, *supra* note 285 at 1349.

2.1.3 Protection of Fundamental Rights and *Tutela* Actions

Since 2009, Chilean labour law provides a new recourse: *tutela*, or writ for the protection of fundamental rights.²⁹⁸ *Tutela* actions help protect designated constitutional rights during and after an employment contract²⁹⁹ and operate as injunctions preventing further harm including the reinstatement of a fired worker. They are used to challenge dismissals or claim constructive dismissal if the firing or breach encroached on the rights to life and bodily and mental integrity, privacy and honour, political or religion opinion, union membership, or equality and non-discrimination. Dignity is not protected under the *tutela*.

The innovation is in protecting the citizen rights of workers in the workplace, as the scope of rights protection and enforcement extends beyond traditional standards such as wages and work hours. Instead, these are understood as linked to the rights to non-discrimination, privacy, reputation, freedom of expression and bodily and mental integrity. As Caamaño writes, they are guiding principles for interpretation and protection of worker rights.³⁰⁰

While dignity is recognized as a fundamental value in the Constitution³⁰¹ and the labour law, doctrinal and normative development is poor, especially from scholars who relate dignity to the right to life as a gift from God.³⁰² Dignity, in fact, is more closely tied to the twin notions of

²⁹⁸ Article 485, *Código del Trabajo*, *supra* note 4.

²⁹⁹ Article 19(1) of the Constitution, Right to life and bodily and mental integrity; Article 19(4) and (5) Right to reputation, privacy and the protection of private communications; Article 19(12) Freedom of expression; Article 19(16) Right to be hired and the freedom to choose employment.

³⁰⁰ Caamaño Rojo, *Código del Trabajo. Sistematizado con Jurisprudencia*. Vol. I, *supra* note 273 at 106.

³⁰¹ Article 1, *Constitución Política de la República* (Chile: 1980).

³⁰² José Luis Cea Egaña, *Derecho Constitucional Chileno*, vol. II, 2 ed. (Santiago: Ediciones UC, 2012) at 43 and Enrique Evans de la Cuadra, *Los derechos constitucionales*, vol. I, 3 ed. (Santiago: Editorial Jurídica de Chile, 2004) at 113.

freedom and respect.³⁰³ On the issue of privacy, the doctrine holds that the right to non-interference with private life, including sexual preference and lifestyle,³⁰⁴ does not extend to unlawful behaviour.³⁰⁵ Honour, for its part, refers to one's good name, including in professional and workplace contexts.³⁰⁶

Rights protection also comes under the purview of the general writ for the protection of constitutional rights (*recurso* or *acción de protección*), which also works as an injunction.³⁰⁷ These were shown to be ineffective and seldom upheld in employment rights cases, necessitating creation of the *tutela* action.³⁰⁸ In the rare instances where a writ for the protection of constitutional rights was used, the case was dismissed.³⁰⁹

From a procedural standpoint, *tutela* actions provide an extra layer of protection. They enable use of indirect evidence, and once presented, employers seeking to refute a rights violation must produce additional proof.³¹⁰ Targets face significant barriers, as sexual harassment often happens outside public view where direct evidence is rare.

³⁰³Cea Egaña, *supra* note 302.

³⁰⁴Mario Verdugo Marinkovic, Emilio Pfeffer Urquiaga & Humberto Nogueira Alcalá, *Derecho Constitucional*, vol. I, 2 ed. (Santiago: Editorial Jurídica de Chile, 2012) at 250; Evans de la Cuadra, *supra* note 302 at 214.

³⁰⁵Evans de la Cuadra, *supra* note 302 at 214; Rodolfo Figueroa, *Privacidad* (Santiago: Ediciones Universidad Diego Portales, 2014) at 414.

³⁰⁶Caamaño Rojo, *Código del Trabajo. Sistematizado con Jurisprudencia*. Vol. I, *supra* note 273 at 120.

³⁰⁷Gastón Gómez Bernales, *Derechos fundamentales y recurso de protección* (Santiago: Ediciones Universidad Diego Portales, 2005) at 42-43.

³⁰⁸Ugarte notes that most fundamental rights litigation involves property rights. José Luis Ugarte Cataldo, *Tutela de Derechos Fundamentales del Trabajador* (Santiago: LegalPublishing, 2009) at 10.

³⁰⁹Luisa Cabal, Monica Roa & Julieta Lemaitre, eds., *Cuerpo y Derecho. Legislación y Jurisprudencia en América Latina* (Bogotá: Center for Reproductive Rights and Policy, Universidad de los Andes and Temis S.A., 2001) at 147-188.

³¹⁰Article 493, *Código del Trabajo*, *supra* note 4.

Workers whose rights are violated can choose to file a *tutela* action alone or concurrently with a constructive or wrongful dismissal claim, as applicable. Under the law, workers choosing the first alternative are precluded from filing another judicial remedy if unsuccessful with the *tutela*.³¹¹ *Tutela* is an innovative remedy in that it lets fired workers choose reinstatement or damages.

2.2 Severance Pay and Compensation

Severance pay is set out in law and paid on termination³¹² to eligible workers who have been on the job for at least a year. Pay equals a month's wages per year of seniority, or portion thereof greater than six months, with a 330-day ceiling.³¹³ Workers fired for cause are not eligible. However, after year seven in the life of a contract, employers and workers can agree that severance will be paid regardless of termination grounds.³¹⁴ Unions can negotiate more favourable provisions in their collective agreements, provided the minimum standards set out in the law are met.

The *Labour Code* provides for punitive damages when termination is deemed unfounded or discriminatory, and factors in proceeding type and whether a court agreed that a breach of fundamental rights occurred (see Table 2). Punitive damages can rise only under *tutela* actions.

Under the general procedure, a worker falsely accused of sexual harassment (or if the allegation

³¹¹ Article 489, *ibid*.

³¹² Art. 163 “Si el contrato hubiera estado vigente un año o más y el empleador le pusiere término en conformidad al artículo 161, deberá pagar al trabajador al momento de la terminación, la indemnización por años de servicios que las partes hayan convenido individual o colectivamente [...] el empleador deberá pagar al trabajador una indemnización equivalente a treinta días de la última remuneración mensual devengada por cada año de servicio y fracción superior a seis meses, prestados continuamente a dicho empleador. Esta indemnización tendrá un límite de trescientos treinta días de remuneración.”, *ibid*.

³¹³ Article 163, *ibid*.

³¹⁴ Article 164, *ibid*.

could not be substantiated) will receive double severance pay if the employer did not carry an internal investigation or transfer the investigation to the Labour Inspectorate.³¹⁵

Table 2		
Increased Severance and Other Compensation per Type of Wrongful Dismissal Action Upheld		
General Procedure		Percent from legal baseline³¹⁶
Wrongful Dismissal unsubstantiated Ground that could invoke target or allege perpetrator		
Article 161	Dismissal due to staff reductions	30%
Article 159	Forced Resignation or no legal ground invoked	50%
Article 160	1. Proven gross misconduct, including: (a) Unethical conduct; (b) Sexual harassment; (c) Physical altercations with the employer or coworkers (d) Malicious or defamatory remarks against an employer (e) Immoral behaviour affecting company performance 5. Acts, omissions or criminal negligence affecting the safety or operation of the firm or worker safety or health 6. Deliberate damage to machinery, tools, supplies or production	100%
Article 160	2. Engaging in personal transactions in the same line of business 3. Miss two Mondays or three days in a month, or unauthorized absence affecting machinery or processes 4. Unauthorized absence or refusing to perform a task 7. Serious breach of contractual conditions	80%
Constructive Dismissal³¹⁷		
Article 171 ³¹⁸		a. Up to 80% ³¹⁹ b. Others
Tutela		
Wrongful and constructive dismissal		a. 30-100% ³²⁰ b. Additional 6-11 months' wages ³²¹ c. Moral damages d. Others

³¹⁵ Articles 153.16 and 168 *ibid*.

³¹⁶ The baseline is calculated from what severance pay ought to correspond given the worker's seniority pursuant to article 163 of the Code.

³¹⁷ Constructive dismissal would usually be used by targets but it is also available for the alleged perpetrator. See below *Section 2.3.2.* at 128.

³¹⁸ Article 171, *Código del Trabajo*, *supra* note 4.

³¹⁹ Art. 162, *ibid*.

³²⁰ Art. 162, *ibid*.

³²¹ Article 489, *ibid*.

Employers are not required to pay additional severance to alleged sexual harassers even if they win their case, provided the dismissal was founded on an investigation and/or measures to protect the target of sexual harassment were adopted.³²² The worker has the option to request reinstatement or compensation pursuant to the law.³²³

The doctrine regards the general severance pay system as pre-assessed compensation for damages to workers that also serves the purpose of penalizing employers.³²⁴

One question of interpretation asks whether moral damages can also be awarded. Some scholars feel that moral damages and *tutela* actions are not mutually exclusive.³²⁵ Others disagree,³²⁶ but current case law does not consider them mutually exclusive.³²⁷ However, as Gamonal notes, moral damages must be proven using civil law provisions.³²⁸

2.3 The *Public Service Employment Act*

As noted, labour relations in the Chilean public service are governed by the *Public Service Employment Act*,³²⁹ and the *Labour Code*, when applicable.³³⁰ In 2005 sexual harassment was added as grounds for disciplinary measures applicable to both public servants and municipal

³²² Article 211-A-211-E, *ibid.*

³²³ Article 489, *ibid.*

³²⁴ Ugarte Cataldo, [Tutela de derechos fundamentales] *supra* note 308 at 92 and Irene Miño, Manual de Derecho del Trabajo, Irene Rojas Miño, *Manual de Derecho del Trabajo. Derecho Individual* (Santiago: LexisNexis, 2004) at 274. She notes that Supreme Court case law on constructive dismissal holds that increased severance pay stands as damages for job loss, at 258.

³²⁵ Ugarte Cataldo, [Tutela de Derechos Fundamentales] *supra* note 308 at 89-90.

³²⁶ Sergio Gamonal Contreras, *El daño moral en el contrato de trabajo*, 2nd ed. (Santiago: LexisNexis, 2007) at 151 [El daño moral].

³²⁷ Personal communication with Ugarte, July 2014.

³²⁸ Sergio Gamonal Contreras, *El procedimiento de tutela de derechos laborales*, 2 ed. (Santiago: LegalPublishing, 2008). [El procedimiento de tutela]

³²⁹ *Ley N° 18.834 sobre el Estatuto Administrativo*, *supra* note 257.

³³⁰ *Nolvia Tapia Villalobos y otra con Sociedad Comercial Jeria Hermanos Limitada* Juzgado de Letras del Trabajo de Iquique.

employees.³³¹ The *Act* distinguishes between permanent and contract workers, with implications for the level of protection available. The latter serve at pleasure and may or may not be rehired annually, at the discretion of the agency involved.³³²

The Office of the Comptroller General is an administrative body overseeing the legality of general disciplinary measures and complaints³³³ and sexual harassment investigations. It reviews penalties levied or recommended and examines appeals when sanctions against sexual harassers include dismissal. Comptroller General decisions may be appealed in court. Disciplinary measures range from written reprimands and docking up to 25 percent of monthly wages, to outright dismissal.

The Office of the Comptroller General has interpreted the scope of obligations under sexual harassment legislation in cases involving everything from the Army³³⁴ to public health care services.³³⁵ Administrative law has been complemented by Executive Orders directing senior public servants to implement good labour practices that include sexual and moral harassment.³³⁶

³³¹*Ley N° 18.834 sobre el Estatuto Administrativo, supra* note 257.

³³²Jorge Bermúdez Soto, *Derecho Administrativo General* (Santiago: Thomson Reuters LegalPublishing, 2014) at 441.

³³³*Ibid.*

³³⁴Contraloría General a Ejército de Chile de la República, *Dictamen 035349* Contraloría General de la República, 2005.

³³⁵Contraloría General de la República, *Dictamen 056100* Contraloría General de la República a Directora del Servicio de Salud Occidente con Contraloría General de la República, 2010.

³³⁶Dirección Nacional del Servicio Civil, *Instructivo presidencial sobre buenas prácticas laborales en la administración central del Estado*, Of. Ord. 1115 2008.

3. Case Law Findings

As discussed in Section 2 on methods, cases pertain both to public servants and workers in the regular labour market and include targets and alleged perpetrators.

The case law research in trial court involved a review of all decisions at three levels: trial courts, Appeals Courts, and the Supreme Court, including settlements reached at the pretrial and trial stages.³³⁷ The labour procedure law requires a call for participation in a conciliation process so that a case may not necessarily lead to a ruling.³³⁸ As such, not all cases examined involved decisions, as some were settled in or out of court. A settlement is considered as a decision solely for quantitative analytical purposes when all decisions are counted, but is analyzed qualitatively in a separate section.

Some cases are a chain of decisions from the trial court to the Supreme Court. Some decisions are linked to other cases within the framework of the same conflict. For example, perpetrators who bring claims for wrongful dismissal, targets who bring claims for constructive dismissal, and employers who take legal action against the Labour Inspectorate and vice versa.³³⁹

Whenever possible, upper court cases were traced to lower courts in order to identify all arguments, pleas by all parties throughout the case, and court decisions. This was not always

³³⁷ *Código del Trabajo*, article 453, *supra* note 4.

³³⁸ Article 453, *ibid*.

³³⁹ For example, *Sony Chile Limitada con Carol Medel Arias* Segundo Juzgado de Letras del Trabajo de Santiago, 2011; *Carol Daffmy Medel Arias con Sony Chile Limitada* Primer Juzgado de Letras del Trabajo, 2010; *Carlos Donoso Pérez con Sony Chile Limitada* Segundo Juzgado de Letras del Trabajo de Santiago, 2010; *Carla Balboa y otra con Cencosud* Primer Juzgado de Letras del Trabajo de Santiago, 2011; *Natalia Cortés Mendez y otra con Cencosud* Segundo Juzgado de Letras del Trabajo de Santiago, 2011; *Luis Valenzuela Vargas con Municipalidad de Santiago* Segundo Juzgado de Letras del Trabajo de Santiago, 2011.

possible, as some cases predated the labour justice system reforms that allow for case-tracking. Our interest, in any case, lied in decisions, the decision-making process, and identifying reasons and possible factors leading to a verdict or settlement.

In 2008, the Chilean labour justice system underwent major reforms that included new procedures and introduced labour defenders.³⁴⁰ The distinction is critical, as the *tutela* action came into effect³⁴¹ as part of reforms that were gradually rolled out across the country. The new procedure provides new evidentiary rules.³⁴² As such, our findings encompass cases and decisions under both the old and new labour justice systems.

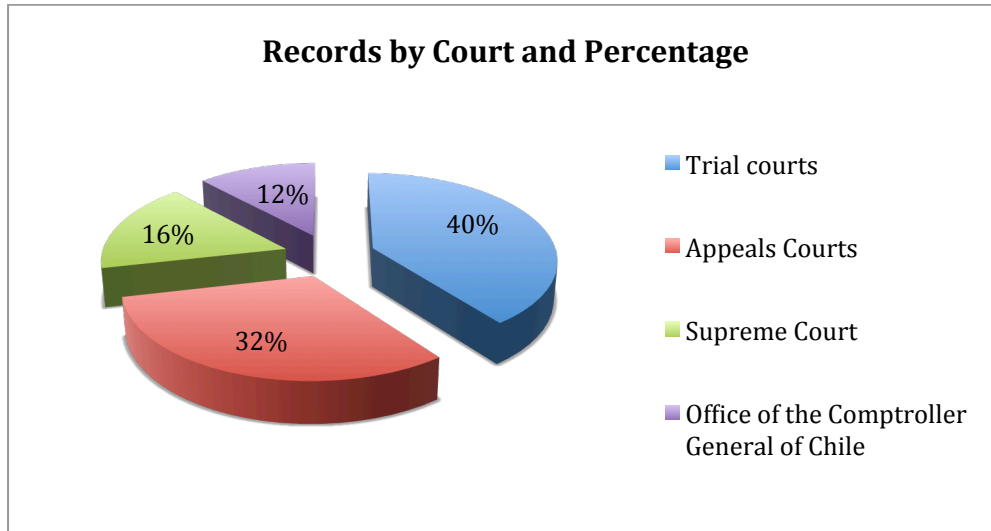
The search yielded 267 cases in all. Fifteen were excluded, as they pertained to workers fired over sexually harassing clients, patients, or students. Some 252 decisions/cases were examined. The largest share (100) were from lower courts, eighty were from appellate courts, and forty-two from the Supreme Court (see Figure 5).

³⁴⁰*Modifical el Libro V del Código del Trabajo y la Ley 20.087, que establece un nuevo procedimiento laboral* (Chile: 2008).

³⁴¹Gamonal Contreras, *El procedimiento de tutela de derechos laborales*,*supra* note 328; Ugarte Cataldo.[Tutela de derechos fundamentales], *supra* note 308.

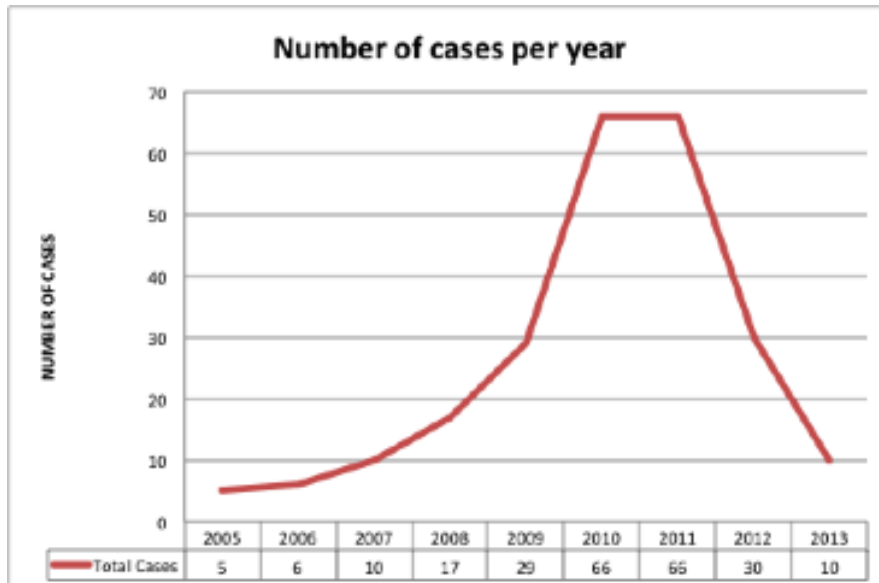
³⁴²Ugarte Cataldo, [Tutela de derechos fundamentales],*supra* note 308; José Luis Ugarte Cataldo, "Tutela laboral de derechos fundamentales y carga de la prueba" (2009) XXXIII:2 *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso*. [Tutela y carga de la prueba]

Figure 5



Most cases are clustered around 2008-2012. There was a slow but growing litigation trend as the law came into effect in 2005, a plateau in 2010 and 2011, and a slide since 2012 (see Figure 6). Two cases date back to the nineties, when no sexual harassment laws were in effect and cases were adjudicated under general *Labour Code* rules.³⁴³

Figure 6

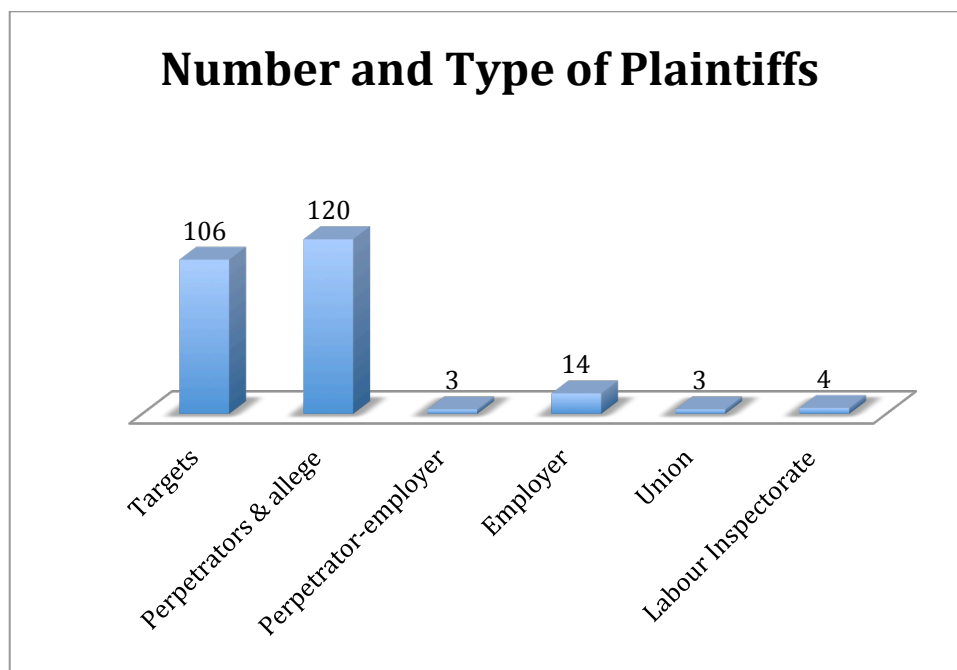


³⁴³ For a detailed explanation of the law, see discussion at Section 2.1 above.

3.1 Actors: Who is Suing?

Sexual harassment is clearly a gendered phenomenon: in our study all targets are women, and 96% of perpetrators are male. However, female targets account for only 44 percent of plaintiffs (see Figure 8).

Figure 8



A few cases involved neither a target nor a perpetrator. In one, two government agencies asked the Comptroller General for an opinion on implementation of sexual harassment law in the internal regulations.³⁴⁴ Another was an appeal by a whistleblower penalized for helping a target,

³⁴⁴*Ejército de Chile con Contraloría General de la República* Contraloría General de la República, 2005, *supra* note 334 and *Directora del Servicio de Salud Occidente con Contraloría General de la República* Contraloría General de la República, 2010, *supra* note 335.

a paramedic, file a complaint against a hospital director.³⁴⁵ A third involved a criminal libel suit brought by an employer against a witness in a sexual harassment case.³⁴⁶

Some 19 cases were actions filed by unions, the Labour Inspectorate, or employers. Employers appealed penalties arising from poor or nonexistent sexual harassment rules³⁴⁷ or investigations where employers had failed to protect a target³⁴⁸ or prevent harassment.³⁴⁹ One employer asked the court's permission to sue a union president for sexual harassment.³⁵⁰

I will first look at decisions regarding target complaints, then examine decisions in cases brought by perpetrators and other players.

3.2 Targets as Plaintiffs

Targets brought 106 actions (see Table 3). As noted in section 2.1, the doctrine holds constructive dismissal -resignation due to employer noncompliance with obligations, tantamount

³⁴⁵ *Waldo Brunetts con Servicio de Salud Metropolitano Sur* Contraloría General de la República, 2011.

³⁴⁶ *Hans Patricio Heyer González con Leandro Alfonso Aillón Flores*, vol. Gaceta Jurídica 291, Año 2004 Juzgado de Letras de Linares, 2001.

³⁴⁷ *Álamo Telefonía Limitada contra Inspección Provincial del Trabajo de Temuco* Corte de Apelaciones de Temuco, 2010, *Santander Gestión de Recaudación y Cobranza Limitada con Dirección Provincial del Trabajo de Valdivia* Corte de Apelaciones de Valdivia, 2008; *Santander Gestión de Recaudación y Cobranza Limitada con Dirección Provincial del Trabajo de Valdivia* Corte Suprema, 2009; *Falabella Corredora de Seguros con Dirección del Trabajo* Corte de Apelaciones de Santiago, 2010.

³⁴⁸ *Empresa Agrícola Apaltagua Limitada con Inspección del Trabajo de Talca* Corte de Apelaciones de Talca, 2012; *Empresa de Vigilancia y Aseo Industrial Fudu Ltda. con Inspección Provincial del Trabajo de Antofagasta* Juzgado de Letras del Trabajo de Antofagasta, 2010, *Empresa de Vigilancia y Aseo Industrial Fudu Ltda. con Inspección Provincial del Trabajo de Antofagasta* Corte de Apelaciones de Antofagasta, 2010; *Directora Regional del Trabajo de la Región Metropolitana con Jueza titular del 3° Juzgado de Letras del Trabajo de Santiago* Corte de Apelaciones de Santiago, 2007, *Dirección del Trabajo con Juez Titular del Noveno Juzgado del Trabajo de Santiago* Corte de Apelaciones de Santiago, 2008, *JASA S.A. con Inspección Provincial del Trabajo de Chiloé* Corte Suprema, 2009, *JASA S.A. con Inspección Provincial del Trabajo de Chiloé* Corte de Apelaciones de Puerto Montt, 2009.

³⁴⁹ *Jorge Alarcón Salazar con Inspección Comunal del Trabajo de Tomé* Corte de Apelaciones de Concepción, 2008.

³⁵⁰ *Inversiones Alsacia S.A. con Barney Antonio Apablaza Basalto* Segundo Juzgado de Letras del Trabajo de Santiago, 2010.

to wrongful dismissal- as the most significant action a target can pursue. Another action preferred by the doctrine is *tutela* for the protection of fundamental rights. Targets also file for wrongful dismissal once fired for complaining about or resisting sexual harassment.³⁵¹

	Trial Court	Win	Lose	Settle	Appeals	Win	Lose	Supreme	Win	Lose	Total
Constructive Dismissal	19	5	8	6	13	7	6	11	4	7	43
Wrongful Dismissal	18	7	1	10	7	4	3	8	5	3	33
<i>Tutela</i>	8	2	5	1	9	1	8	2	1	1	19
Moral Damages	2	1	1								2
Annulment of Termination*	6	0	6								6
Invalidation of Hiring Process*	1	0	1								1
Administrative Inquiry*	1	0	1								1
Sanction*	1	0	1								1
Total	56	15	24	17	29	12	17	21	10	11	106

* Reviewed by the Office of the Comptroller General.

In 35 percent of decisions targets won, in 16 percent they settled in trial court, and in 49 percent of cases they lost. In all cases reviewed by the Comptroller General, targets lost their claims that their contracts had not been renewed as a consequence of a sexual harassment complaint. The Comptroller General confirmed these decisions, but ordered sexual harassment claims

³⁵¹Carrasco Oñate & Vega López, *supra* note 243 and Casas B.[Un estudio sobre las quejas], *supra* note 266.

investigated. The same was true for requests to void a hiring process because a perpetrator sat in the hiring committee.³⁵² These overall results in some cases involved the same people; as noted earlier, a single case could lead to several decisions that could zigzag from trial court to the Supreme Court.

Three trial court cases involved several targets. In two such cases, four workers filed against the same employer –a supermarket chain- over being fired after lodging sexual harassment complaints against a manager. In both cases a settlement was reached.³⁵³

It must be noted that four out of 19 *tutela* decisions were favourable to the target. One possible explanation is that lawyers fail to provide arguments on the causality between the loss of employment, the harm and the violation of fundamental rights, and merely cite legal provisions.³⁵⁴

3.2.1 Constructive Dismissal

In constructive dismissal workers retain all rights, including to severance pay, as is the case with dismissal without just cause, as discussed in Section 3.2.1. In a first-tier test, plaintiffs must prove sexual harassment. In a second-tier test, they must also prove that it amounted to a breach of the employment contract, and in a third-tier test, that the employer failed to protect the target or adopt appropriate measures. The threshold was met in only five cases out of 19 at the trial

³⁵²*Andereya Pinto con Ministerio de Hacienda* Contraloría General de la República, 2008; *Héctor Ovidio Vera Vásquez con Municipalidad de Temuco* Juzgado de Letras del Trabajo de Temuco, 2010; *Carolina Lehner Carrasco con la Policía de Investigaciones* 2011; *Soledad Andrade con Defensoría Penal Pública* Contraloría General de la República, 2012.

³⁵³*Carla Balboa y otra con Cencosud*, *supra* note 339; *Natalia Cortés Méndez y otra con Cencosud*, *supra* note 339.

³⁵⁴See below, Section 3.2.3 at 110.

level. On appeal targets won in seven out of 13 cases, but as Table 3 shows at the Supreme Court more than one third of targets won.

Once proven, employer negligence is evident if, although aware of sexual harassment, they do nothing to prevent it, or if an investigation does not meet minimum standards.

In *Órdenes con IDK Group*,³⁵⁵ the employer claimed there was nothing he could do to prevent the inappropriate conduct. The trial judge disagreed, noting that rather than a single incident, there was a serial conduct the employer had failed to stop. This involved making lewd comments about the target's breasts and watching her constantly on CCTV. The perpetrator used the PA system to alert her she was being watched. Despite her complaints, the harasser –the owner's nephew- did not stop. The same reasoning is found in *Aliste con Comunidad de Edificios Imago Mundi*,³⁵⁶ where the trial judge chastised a labour inspector and the union. The employer had made the target testify in front of the perpetrator, then transferred her to another location. At the Labour Inspectorate, she was warned that she had no case because there were no witnesses, and that she could be sued for slander if she persisted. The perpetrator, a union leader, bragged about his power.³⁵⁷

In *Jalil con Constructora Angostura*,³⁵⁸ the employer claimed that harassment could not be prevented because no formal complaint was filed. The judge reasoned that the formalities were

³⁵⁵*Daniela Órdenes con IDK Group* Segundo Juzgado de Letras del Trabajo de Santiago, 2011.

³⁵⁶*Silvia Aliste Miño con Comunidad de Edificios Imago Mundi* Tercer Juzgado del Trabajo de Santiago, 2008.

³⁵⁷ See in this chapter section 2.1.1 on the special protection to union leaders.

³⁵⁸*Sergio Villalobos Jaure con Comercial Valencia Limitada* Juzgado de Letras de Colina, 2012 and *Jimena Jalil Ponce con Constructora Angostura Limitada* Primer Juzgado de Letras del Trabajo de Santiago, 2012. The target also reported degrading treatment after rejecting the perpetrator's sexual advances. In the last incident before she

immaterial relative to the infringement of fundamental rights, especially considering that the target had apprised the employer by e-mail. The judge found an evident lack of pre-emptive measures, as the investigation followed the target's constructive dismissal letter.

In *Proboste con Hotelera Santa Magdalena*, employer negligence in handling the internal investigation was clear.³⁵⁹ As the decision noted, the investigation -limited to asking coworkers to answer a questionnaire- did not meet the minimal standards of due process. The target was not interviewed and her coworkers' answers were not taken into account. The judge also found the Labour Inspectorate's investigation wanting, as it did not include the target's testimony and interviewed the individuals the employer presented in court. The target presented indirect evidence, including sexual harassment e-mails sent by the perpetrator to a former employee and a medical certificate from another target. The judge ordered moral damages.

In *Villarroel con Instituto de Seguridad del Trabajo*,³⁶⁰ the perpetrator was a medical doctor and the target a nurse. The employer's investigation concluded there was no sexual harassment and dismissed the complaint. The target was reprimanded. The target filed for constructive dismissal and the Labour Inspectorate fined the employer for failing to protect the target. The trial court dismissed her claim, stating that it could not believe that a trained professional would endure harassment for eight months and not use the remedies at her disposal.³⁶¹ The decision was reversed on appeal. The court wrote that full and complete (direct) evidence of sexual

filed a lawsuit, the perpetrator made and exhibited a video mocking her foreign accent. The employer downplayed the video as a prank.

³⁵⁹*Carolina del Carmen Proboste Ortúzar con Sociedad Hotelera Santa Magdalena S.A.* Primer Juzgado de Letras del Trabajo de Santiago, 2010.

³⁶⁰*Ximena Alejandra Villarroel con Instituto de Seguridad del Trabajo* Juzgado de Letras del Trabajo de Puerto Montt, 2010.

³⁶¹*Ibid.*

harassment, usually a furtive conduct, would rarely be available, further noting that the target had informed management before she filed a formal complaint.³⁶² The Court of Appeal awarded moral damages. The employer lost his appeal to the Supreme Court.³⁶³

When targets lost, the cases reveal harassment was generally proven but the courts found that it did not amount to a fundamental breach, or the courts found that employers had taken suitable steps once a complaint was filed and therefore were not liable, dismissing the claim for constructive dismissal.

In *González con Sociedad Rodríguez*, the judge reasoned that although remarks were made that could be construed as sexual innuendo, they were best interpreted in the context of a laid-back, jovial work environment. The double entendre at issue was to be understood as a witticism not directed at any one person, he wrote in dismissing the case.³⁶⁴ The Appeals Court reversed this decision, noting that both the language and unwanted physical contact in question had been offensive and in violation of the target's dignity and privacy. The Court added that it would be excessive to require targets to submit unequivocal evidence, finding that when fundamental rights are at stake, the standard ought to be that in balancing the probabilities the harassment

³⁶²*Ximena Alejandra Villarroel con Instituto de Seguridad del Trabajo* Corte de Apelaciones de Puerto Montt, 2010. "atendido a que las conductas de acoso sexual, normalmente, se efectúan en un ambiente privado entre dos personas, por lo que evidentemente una prueba directa es de suyo difícil de obtener. Además, parece razonable desde el punto de vista de la lógica, que un trabajador que haya efectuado denuncias previas a la denuncia formal tendientes a obtener de su empleador la debida protección, unido a la confesión del acosador en cuanto al reconocimiento de actos de significación sexual, acreditan el no consentimiento de la trabajadora a los mismos."

³⁶³*Ximena Alejandra Villarroel Carrizo con Instituto de Seguridad del Trabajo* Corte Suprema, 2011.

³⁶⁴*Lisbeth Gonzalez Miranda con Sociedad Rodríguez, Peñaloza y Cía Ltda.* Cuarto Juzgado de Letras del Trabajo de Santiago, 2006.

took place.³⁶⁵ The Supreme Court in turn reversed this decision, writing that constructive dismissal does require unequivocal evidence that the target was unable to provide.³⁶⁶

In *Evelyn Valenzuela Pérez con Farmacología en Acuicultura Veterinaria*, the employer investigated per company regulations and fired the perpetrator, so that it could not be said that no steps were taken.³⁶⁷ In *Ángela Vera Quezada con Corporación de Asistencia Judicial*,³⁶⁸ the court noted that the perpetrator was fired prior to the target's filing a claim and found her resignation unfounded and prompted by unrelated motives.

Most targets could not pass the first-tier test of proving in court that harassment did occur, even when the Labour Inspectorate concurred. *Rowlands con Comercial Fashion's Park*³⁶⁹ was dismissed due to inconsistencies between the allegations and the Inspectorate report:

The documentary evidence presented was irrelevant: a copy of the contract, pay stubs ... the Labour Inspectorate's report does not describe in any respect a violation of fundamental rights. It reported harassment by a co-worker, not from the employer, which could not be proven in these proceedings. Merely submitting a report of investigation does not amount to meeting standards of proof. Furthermore, the misconduct alleged in the suit came from the employer, not a co-worker.³⁷⁰ [translated by author]

³⁶⁵*Lisbeth Gonzalez Miranda con Sociedad Rodriguez, Peñaloza y Cía Ltda.* Corte de Apelaciones de Santiago, 2008.

³⁶⁶*Lisbeth Gonzalez Miranda con Sociedad Rodriguez, Peñaloza y Cía Ltda.* Corte Suprema, 2008.

³⁶⁷*Evelyn Valenzuela Pérez con Farmacología en Acuicultura Veterinaria FAV S.A.* Juzgado de Letras del Trabajo de Puerto Montt, 2011 [Valenzuela Pérez]. Also in *Marcela Pérez Laguna con Centro Médico 18 de Septiembre* Segundo Juzgado de Letras del Trabajo, 2011 and *Teresa Jacqueline Calquín Torrejón con Recursos Externos Ltda* Primer Juzgado de Letras del Trabajo de Santiago, 2009.

³⁶⁸*Ángela Vera Quezada con Corporación de Asistencia Judicial* Segundo Juzgado de Letras del Trabajo de Santiago, 2011.

³⁶⁹*Ruth Rowlands Higuera con Comercial Fashion's Park S.A.* Juzgado de Letras del Trabajo de Puente Alto, 2009.

³⁷⁰*Ibid.* at para. 15: "DÉCIMO QUINTO: Que en lo que respecta a la ponderación de la prueba los hechos contenidos en la demanda no han alcanzado una estándar mínimo para crear convicción en ésta [sic] sentenciadora de su real existencia, atendida la prueba rendida en autos, ya que con la prueba documental rendida en autos por ambas partes no ha puede llegar a la convicción de la vulneración de garantías fundamentales, ya que nada dicen al respecto, sólo son contratos y anexos de contratos de trabajo, liquidaciones de remuneraciones, informe de la

In *Ponce Rojas con Sindicato No. 3*, the target, a union office receptionist, quit as, in spite of her complaints about a member of the union executive, the conduct did not stop and the union leadership did nothing to prevent it.³⁷¹ The Court ruled that the plaintiff had not provided evidence of sexual harassment. Apologetic union leaders testified about their fellow officer's inappropriate conduct, but the trial judge did not find their testimony indicative of unwanted sexual advances and disallowed a witness who attested to the perpetrator's lewd remarks about the target. The judge reasoned that given the work environment and perpetrator attitude the remarks might indeed have occurred but did not rise to the level of sexual harassment, as they were *about her* rather than made *to her*.

3.2.2 Wrongful Dismissal

Wrongful dismissal actions shift the onus onto employers, who must prove worker fault. The *Labour Code* spells out grounds for termination, which include "malicious or defamatory remarks against an employer".³⁷²

Thirty-three wrongful dismissal cases were examined. At the trial court level, seven workers' claims were upheld, one was dismissed, and ten were settled.³⁷³ At the Appellate and Supreme Court level, targets won eight of fifteen cases.

inspección del trabajo, que nada manifiestan en lo que respecta a la vulneración de garantías constitucionales por parte del empleador; sólo en lo que respecta al informe de la inspección del trabajo, en él se señala una situación de acoso, pero por parte de un compañero de trabajo, no su empleador, situación que no se pudo comprobar ni probar en la presente causa, por lo que no basta para crear convicción el acompañar un informe, y por lo demás de una falta de un compañero, y no de parte del empleador, como es el tenor de la demanda de autos."

³⁷¹*Erica Ponce Rojas con Sindicato No 3 de la Empresa Minera Sur Andes Ltda. Planta El Cobre y Mina El Soldado* Juzgado de Letras de La Calera, 2011.

³⁷²*Labour Code* Article 160(1)(d), supra note 4. See above Section 2.1.1.

³⁷³ See Table 3.

Targets filing for wrongful dismissal must provide sufficient evidence to challenge the grounds, and alternatively provide a possible link between termination and sexual harassment.

Results show that targets who complain to employers or the Labour Inspectorate risk losing their jobs, as in *Bravo Ranimán con Transportes Occoa*.³⁷⁴ In *Jara con Redbus Urbano*,³⁷⁵ a fixed-term worker reported being sexually harassed by a supervisor. There was no investigation, she was transferred to another location, and her contract was not renewed. Union officers testified to at least one other worker opting to transfer rather than file a complaint. The Court found that whether or not a worker complains in writing employers are still required to investigate, and agreed that termination had been a reprisal.

Targets may also be fired if sexual harassment is not proven. In one such case, *Guerra Díaz con Ecovesa*, the target wrote a letter informing about the sexual harassment of a supervisor and the woman was fired for cause, citing slander against the employer. The Supreme Court wrote that while the target's letter of complaint did not provide detailed supporting evidence about the complained situation, her forthright, non-offensive language clearly showed that she was not motivated by vindictiveness. After the facts were discussed at trial and details of the supervisor's behaviour were reviewed, her dismissal on grounds of slandering her employer was disallowed.³⁷⁶

³⁷⁴*Jessica Bravo Ranimán con Transportes Occoa Limitada* Segundo Juzgado de Letras de Santiago, 2011.

³⁷⁵*Andrea Italia Jara Miranda con Redbus Urbano S.A* Segundo Juzgado de Letras del Trabajo Santiago, 2009.

³⁷⁶*Claudia Guerra Díaz con Ecovesa* Corte Suprema, 2000.

In *Bolados con Véliz*,³⁷⁷ the employer argued that the complainant was not a contract worker and called allegations that she was fired over rejecting sexual advances defamatory. The target proved a contractual relationship in court. On appeal, the employer made no mention of libel, and the Court confirmed the decision as the charges of libel were not at issue. On further appeal, the Supreme Court dismissed the employer's claim.

In *Mallea con Corporación Educacional San Agustín*,³⁷⁸ a case predating sexual harassment legislation, the target, a teacher, filed criminal charges against her employer, a school owner and principal. Claiming defamation of character, the employer fired the target after she filed suit. Both the Appeals and Supreme courts disallowed the discharge and agreed that it was in reprisal against a target who had stood up for her rights.³⁷⁹

Accounting for some unsuccessful cases was the statute of limitations, which precluded judgment on the substance of harassment claims.³⁸⁰ In other cases, a link between dismissal and sexual harassment could not be proven³⁸¹ or allegations were only brought up in a subsequent lawsuit.³⁸² In *Lincheo con BBVA*, a court found that the worker had not used the sexual harassment procedures in place, did not report the circumstances to management while still an

³⁷⁷*Graciela Bolados Pizarro con Bernabé Véliz Tabilo* Corte Suprema, 2005.

³⁷⁸*Patricia Inés Mallea Bustos con Corporación Educacional San Agustín de Melipilla* Juzgado de Letras de Melipilla, 2004.

³⁷⁹*Patricia Inés Mallea Bustos con Corporación Educacional San Agustín de Melipilla* Corte de Apelaciones de San Miguel, 2005 and *Patricia Inés Mallea Bustos con Corporación Educacional San Agustín de Melipilla* Corte Suprema, 2006.

³⁸⁰*Francisca Pallares Carrasco con Comercializadora de Servicios Limitada* Corte Suprema, 2010, *Katherine Barrueto Garrido con Administradora Plaza Vespucio S.A.* Primer Juzgado de Letras del Trabajo de Santiago, 2009.

³⁸¹*Maribel Medina con Sociedad Amancay Limitada* Corte de Apelaciones de Coihaique, 2008, *Susana Troncoso Capilla con Inmobiliaria Lomas de San Andrés Ltda.*, Corte Suprema, 2009.

³⁸²*Ana Pueyes Carvacho con A.G. Taxis Colectivo Rinconada Los Andes* Corte de Apelaciones de Valparaíso, 2010.

employee, and that the mental health issues she attributed to sexual harassment were, in light of expert testimony, not work-related.³⁸³

In *Bastías con Fábrica y Recuperación de Filtros Caro*,³⁸⁴ the Court rejected the plaintiff's wrongful dismissal case. She had been fired after leaving without permission, allegedly to attend a family court date, a claim she failed to prove. *Pueyes con Colectivo de Taxis Los Andes*,³⁸⁵ involving a former common-law couple disputing ownership of a taxicab company, was also dismissed.

3.2.3 *Tutela* or Writ for the Protection of Fundamental Rights in the Workplace

Chilean doctrine and law define sexual harassment as a violation of multiple human rights, inter alia, to dignity, non-discrimination, equality, mental and physical integrity, and privacy.³⁸⁶ Labour statutes refer to those as fundamental rights. The legislation clearly states that sexual harassment violates dignity, but dignity is not protected under the scope of the *tutela* actions are formulated in terms of the violation of other human rights in addition to dignity.

³⁸³*Carolina Eugenia Salas Lincheo con Banco Bilbao Vizcaya Argentina Chile BBVA* Juzgado de Letras del Trabajo de Arica, 2010.

³⁸⁴*Ana María Bastías Espinoza con Fábrica y Recuperación de Filtros Caro Limitada* Corte Suprema, 2009.

³⁸⁵*Ana Pueyes Carvacho con A.G. Taxis Colectivo Rinconada Los Andes*, *supra* note 382.

³⁸⁶Lizama & Ugarte, [Nueva ley de acoso] *supra* note 264; Gamonal, *supra* note 326; Caamaño Rojo, "Acoso sexual: concepto, clases y bien jurídico protegido", *supra* note 264; Ugarte Cataldo, *Tutela de Derechos Fundamentales del Trabajador*, *supra* note 308; Rojas Miño, *supra* note 324; Claudio Palavecino, "El nuevo ilícito de acoso sexual en el Derecho del Trabajo chileno" (2006) 19:1 *Revista de Derecho* (Valdivia) 105.

Tutela actions let workers ask a court to find that termination violated their fundamental rights.³⁸⁷ As described in Section 3.1.3, while protected rights are limited to those expressed in the constitutional framework, some pleadings and decisions make explicit reference to international human rights covenants, also a source of law under Chilean constitutional provisions.³⁸⁸ A finding of violation requires employers to pay increased severance, although workers can also require reinstatement and additional compensation.

When target pleadings allege infringement of human rights, they often –and somewhat mechanically- merely recite the relevant sections in the Constitution. Only a few cases build a fuller legal argument. The commonest claim is that the conduct of the employer or perpetrator violated physical and mental integrity rights protected under Article 19(1) of the Constitution.³⁸⁹ Few targets claim human rights violations. The same complainant can allege several rights violations. Table 4 shows the leading legal arguments raised concurrently by targets. In some cases targets raise multiple fundamental rights and cite all rights protected by *tutela* actions.

If the centrality of sexual harassment legislation is the protection of dignity, this is not expressed with the same emphasis in litigation. In only two cases did targets make reference to dignity and sexual autonomy.³⁹⁰

³⁸⁷ Chilean doctrine that makes reference to fundamental rights instead of constitutional or human rights. In some cases, human right treaties are also invoked.

³⁸⁸ Article 5, *Constitución Política de la República*, *supra* note 301.

³⁸⁹ *Ibid.*

³⁹⁰ *Nolvia Tapia Villalobos y otra con Sociedad Comercial Jeria Hermanos Limitada*, *supra* note 330.

Table 4					
Human Rights Violations Alleged in Lawsuits by Targets					
	Dignity	Equality & Discrimination	Personal Integrity ³⁹¹	Good Name & Reputation	Privacy
Dignity	1	2	4	1	0
Equality & Discrimination	2	1	2	0	0
Personal Integrity	3	1	8	2	0
Good Name & Reputation	0	0	7	0	0

Human rights claims are led on the grounds that sexual harassment impinges upon personal integrity rights. Targets of sexual harassment submitted evidence such as medical records, doctor’s certificates, and even expert testimony attesting to stress, anxiety or depression. Outcomes varied. Some 37 cases cited absenteeism and sick leave, eight a diagnosis of anxiety, and five a diagnosis of depression.

In *Baeza con Pastelería y Confitería Nino*, a target submitted a forensic report from the Medical Examiner’s Office (Instituto de Medicina Legal) confirming depression in reaction to harassment at work. Her claim was upheld and the employer was found to have infringed personal security rights in the context of general health and safety obligations in the *Labour Code*.³⁹² The judge

³⁹¹ Pursuant to Article 19(1) of the Chilean Constitution, everyone has a right to the protection of physical and mental integrity. This is understood as the right to security of person under article 5.1 of the American Convention on Human Rights: “Every person has the right to have his physical, mental, and moral integrity respected.”

³⁹² *Labour Code* Article 184. *Código del Trabajo*, *supra* note 4.

framed the harassment as an issue of discrimination, stating that exclusion, favouritism and restrictions of rights had clearly amounted to discrimination on the basis of sex.³⁹³

In *Jalil con Constructora Angostura*, the target claimed violation of personal integrity rights, compounded by discrimination on the basis of nationality.³⁹⁴ The judge wrote about inconsiderate treatment but not in the language of human rights. Still, the judge ordered reparations that involved staff education on women's rights and sexual harassment.

In *Pacheco con Supermercado San Francisco*,³⁹⁵ the target's mental health condition was recognized as work-related but insufficient to prove sexual harassment. Her complaint was disallowed. In *Moya con Empresa Tres Montes Lucchetti*,³⁹⁶ a case involving an employer's refusal to process a sick leave application over work-related depression, the judgment made reference to the broader impact of the alleged conduct on the target's mental health, but did not find that this was necessarily related to the sexual harassment allegations. In addition, the target's private health insurer refused to reimburse her because her depression was work-related. The Mutual de Seguridad, Occupational Health and Safety institution to which her employer was affiliated provided mental health services once the lawsuit was served.³⁹⁷

In addition to mental and physical integrity claims, some cases also raised the violation of dignity. At least one cited the Inter-American Convention on the Prevention, Punishment and

³⁹³ *Jacqueline Baeza Piñones con Pastelería y Confitería Nino Ltda. y otro* Corte de Apelaciones de Valparaíso, 2011.

³⁹⁴ *Jimena Jalil Ponce con Constructora Angostura Limitada*, *supra* note 358.

³⁹⁵ *Cynthia Pacheco Plaza con Supermercado San Francisco Buin* Corte Suprema, 2010.

³⁹⁶ *Erika Moya Gutiérrez con Empresa Tres Montes Luchetti* Segundo Juzgado de Letras de Santiago, 2011.

³⁹⁷ *Mutual de Seguridad* is an institution that offers insurance services for occupational hazards and labour accidents to employers. It also provides medical care through its own hospital and medical centres. All workers are insured through their employers' affiliation.

Eradication of Violence Against Women, but discrimination or equality were seldom the core arguments.³⁹⁸

Other claims brought up mentioned the rights to privacy, to honour and reputation, and to freely choose an employment position.³⁹⁹

Of nineteen targets who filed a *tutela* as the main action, fourteen lost. Five lost in trial court after being unable to provide evidence of harassment.⁴⁰⁰

In one case, the target claimed the perpetrator transferred her to a different shift in retaliation, and requested her original shift back.⁴⁰¹ In dismissing her claim, the Court noted that she had refused to testify during the investigation, could not prove her allegations, and that the employer had diligently placed perpetrator and target on alternating shifts.

In *Evelyn Valenzuela Pérez con Farmacología en Acuicultura Veterinaria*, a target who filed suit after the perpetrator was fired requested preventive measures and compensation for violation of her rights. The Court dismissed her case, noting that she had reported the circumstances after

³⁹⁸*Carlos Arturo Quezada Vallejos con Empresa de Transporte de Pasajeros Metro S.A.* Corte de Apelaciones de Santiago, 2011; *Bravo con Transportes Occoa*, *supra* note 374.

³⁹⁹ The Chilean version of the right to work.

⁴⁰⁰*Erika Moya Gutiérrez con Empresa Tres Montes Luchetti*, *supra* note 396; *Sandra Figueroa con ASMAR* Juzgado de Letras del Trabajo de Concepción, 2011, *Sandra Figueroa con ASMAR* Corte de Apelaciones de Concepción, 2011, *Sandra Figueroa con ASMAR* Corte Suprema, 2012; *Monica Viviana Carrasco Soto con Gendarmería de Chile* Segundo Juzgado de Letras del Trabajo de Santiago, 2010.

⁴⁰¹*Teresa Jacqueline Calquín Torrejón con Recursos Externos Ltda.*, *supra* note 367.

the perpetrator was gone. Given that the situation had not been reported on time, the employer was found not liable for remedial measures.⁴⁰²

In *Mónica Viviana Carrasco Soto con Gendarmería de Chile*,⁴⁰³ the trial court found changes to the claimant's working conditions, claimed by her to be deleterious, to be within the law. At issue there were two issues to be resolved, whether the harassment was affecting her career advancement and whether there was a sexual hostile work environment against her. The Court found that as a corrections employee, the claimant had to be appointed by a special administrative procedure, yet she held a post to which she was never formally appointed so she did not have an entitlement to the post. The court further found that the harassment at issue involved instead a toxic work environment, with many coworkers participating in the hostilities and not a sexual hostile environment towards her.

In *Daniela Gutiérrez Cañulef con Tecnología y Maquinarias Ltda.*, *tutela* proceedings were disallowed due to the limitation period but the claim was upheld for constructive dismissal purposes.⁴⁰⁴

⁴⁰²*Evelyn Valenzuela Pérez con Farmacología en Acuicultura Veterinario FAV S.A.* Corte de Apelaciones de Puerto Montt, 2011.

⁴⁰³*Monica Viviana Carrasco Soto con Gendarmería de Chile*, *supra* note 400.

⁴⁰⁴*Daniela Gutierrez Cañulef con Tecnología y Maquinarias Ltda y otro* Juzgado de Letras del Trabajo de San Bernardo, 2011.

3.2.4 Compensation, Damages and Reparation

Under the law, employers seeking to fire must pay severance according to seniority amounting to a month's wages per year, or portion thereof greater than six months, with a 330-day ceiling.⁴⁰⁵

Severance pay is increased if the dismissal is unjustified.

Cases dating from 2000 to 2013 show that most targets received increases, usually around the maximum 80 percent allowed (see Table 2).⁴⁰⁶ The only case showing a smaller increase (20%) predated enactment of sexual harassment provisions in the *Labour Code*.⁴⁰⁷ Targets can also be awarded the additional damages that the doctrine deems equivalent to compensation-sanction. Compensation is measured in terms of a proportion of monthly wages and the largest amount found exceeded the equivalent of CAD\$54,000.⁴⁰⁸

In addition to increased severance pay, six targets were awarded pain and suffering. Moral damages went from CAD\$1,500 to up to CAD\$30,000.

These cases reveal severe harm inflicted by both the nature of harassment and employer handling of the situation. In *Jacqueline Baeza Piñones con Pastelería y Confitería Nino Ltda.*, the court found that, considering the pain and suffering involved, the amount awarded (close to CAD\$10,000) was minor.⁴⁰⁹ In *Aliste Miño con Comunidad de Edificio Imago Mundi*,⁴¹⁰

⁴⁰⁵ See above section 2.2

⁴⁰⁶ See above section 2.2 at 93

⁴⁰⁷ *Dginnia Giovanna Riveri Cerón con Fundación Comunicaciones Cultura Capacitación Agro*, *supra* note 295.

⁴⁰⁸ It was calculated from the exchange rate taken the Bank of Canada conversion in July 2015. At: <http://www.bankofcanada.ca/rates/exchange/daily-converter/?page_moved=1>

⁴⁰⁹ *Jacqueline Baeza Piñones con Pastelería y Confitería Nino Ltda. y otro*, *supra* note 393.

⁴¹⁰ *Silvia Elena Aliste Miño con Comunidad de Edificio Imago Mundi* Corte de Apelaciones de Santiago, 2010.

involving an employer who forced a target to confront a perpetrator who, among other things, had exposed himself, the Appeals Court increased damages from some CAD\$4,000 to CAD\$10,000.

In *Carolina del Carmen Proboste Ortúzar con Sociedad Hotelera Santa Magdalena S.A.*, moral damages were set at the equivalent of CAD\$12,000. In *Villarroel Carrizo con Instituto de Seguridad del Trabajo*, the target was reprimanded by an employer who felt that her allegations were unfounded. Damages awarded were the equivalent of CAD\$14,000.

In *Bravo con Transportes Occoa*, the trial judge personally inspected the facilities where harassment took place, qualified the facts as sexual assault⁴¹¹ (generic language that could include attempted rape and other equally serious sexual offenses), and awarded moral damages in the equivalent of CAD\$39,000. Both the Appeals and the Supreme Court confirmed the decision.

Tutela actions also provide for innovative remedies that may lead to cultural change. *Jalil con Constructora Angostura*⁴¹² included such remedies. In *Bello con I. Municipalidad de Talcahuano*,⁴¹³ the judge reprimanded the municipal Department of Education and ordered it to wrap up its sexual harassment investigation within fifteen days. These kinds of reparations are also found in a settlement⁴¹⁴ and in cases brought by the Labour Inspectorate.⁴¹⁵

⁴¹¹*Jessica Bravo Ranimán con Transportes Occoa Limitada*, *supra* note 374.

⁴¹²*Jimena Jalil Ponce con Constructora Angostura Limitada*, *supra* note 358.

⁴¹³*Verónica Bello Bustos con I. Municipalidad de Talcahuano* Juzgado de Letras del Trabajo de Concepción, 2013.

⁴¹⁴*Elizabeth Esquerra con Jazzplat Chile Call Center Limitada* Segundo Juzgado de Letras del Trabajo de Santiago 2011.

3.2.5 Settlements

As noted above, judges are mandated by law to issue a call for conciliation.⁴¹⁶ Three out of four settlements found (17 out of 22) involved targets, with just two receiving severance significantly lower than demanded⁴¹⁷ and nine receiving full pay.⁴¹⁸ While moral damages were not awarded, settlements often included supplemental pay.⁴¹⁹ Some targets also received a differently-worded termination notice⁴²⁰ stating that the employee had been laid off due to staff cuts, which helped the target find work elsewhere.

A review of amounts awarded, exception made of moral damages, shows that all targets received severance increases in the range of 30 percent to 100 percent.

⁴¹⁵*Dirección del Trabajo con Sociedad Subiabre Díaz* Juzgado de Letras del Trabajo de Castro, 2013, *Inspección del Trabajo de Santiago Poniente con Mario Edison Méndez Soto* Segundo Juzgado de Letras del Trabajo de Santiago, 2010.

⁴¹⁶Art. 453 *Código del Trabajo*, *supra* note 4.

⁴¹⁷*Amparo Bruna con Comercializadora Selmax Ltda.* Segundo Juzgado de Letras del Trabajo de Santiago, 2011; *Pilar Ramos con Sociedad de Gestión Inmobiliaria Luis Toledo Martínez Ltda.* Segundo Juzgado de Letras del Trabajo de Santiago, 2011.

⁴¹⁸*Cynthia Echeverría con Adeco Recursos Humanos* Juzgado de Letras del Trabajo de Valparaíso, 2011; *Carolina Zambrano con Publimetro S.A.* Segundo Juzgado Laboral de Letras de Santiago, 2011; *Macarena Larrañaga con Importadora y Distribuidora Macrotel S.A.* Segundo Juzgado de Letras del Trabajo de Santiago, 2011; *Romina Quezada Galaz con Empresa Daclima S.A.* Segundo Juzgado de Letras del Trabajo de Santiago, 2011; *Sandra Araneda Miranda con Sociedad Educacional Araucaria Ltda.* Segundo Juzgado de Letras del Trabajo de Santiago, 2011.

⁴¹⁹*Natalia Restrepo con Natural Salads* Segundo Tribunal de Letras de Santiago, 2011; *Mariela González con Worldwide Security* Segundo Tribunal de Letras de Santiago, 2011; *Elizabeth Esquerra con Jazzplat Chile Call Center Limitada*, *supra* note 414; *Ximena Gómez con Corpbanca* Segundo Juzgado de Letras del Trabajo de Santiago 2011; *Bárbara Castillo Farias con Gerex Ltda.* Segundo Juzgado de Letras del Trabajo de Santiago, 2011; *Natalia Cortés Méndez y otra con Cencosud*, *supra* note 339; *Sandra Yarza con Sociedad de Inversiones Genesys S.A.* Segundo Juzgado de Letras de Santiago, 2011; *Eloina Gallardo con Corporación de Capacitación y Educación Industrial y Minería* Segundo Juzgado de Letras del Trabajo de Santiago, 2011; *Carla Balboa y otra con Cencosud*, *supra* note 339.

⁴²⁰*Macarena Larrañaga con Importadora y Distribuidora Macrotel S.A.*, *supra* note 418; *Elizabeth Esquerra con Jazzplat Chile Call Center Limitada*, *supra* note 414; *Carolina Zambrano con Publimetro S.A.*, *supra* note 418.

As noted in the case-tracking system, in all cases save one conciliation took place within half an hour during the pretrial hearing. One case settled for an unknown amount was filed with the court before the hearing.⁴²¹

3.3 Perpetrators as Plaintiffs

Perpetrators filed 120 cases (see Table 5), most claiming wrongful dismissal, as well as *tutela* actions also related to dismissals. Cases involving employer-perpetrators are not examined in this section, but will be treated in section 3.4.1.

Some 92 cases involved wrongful dismissal, nine involved infringement of fundamental rights – *tutelas*-, two involved constructive dismissal, one was a constitutional writ asking the court to invalidate a termination of employment, two requested dismissal of sexual harassment findings by the Labour Inspectorate, and one was permission to lay off a union official.⁴²²

⁴²¹ *Camila Ibacache Marín con Francisca Guerrero Catalán* Juzgado de Letras del Trabajo de Valparaíso, 2011.

⁴²² Union officers can only be fired with court permission. See above section, 2.1.1.

	Trial	Win	Lose	Settle	Appeals	Win	Lose	Supreme	Win	Lose	Total
Wrongful Dismissal	44	21	18	5	32	11	21	16	10	6	92
Constructive Dismissal	1		1		1		1				2
Dismissal of Labour Inspectorate Finding	1		1								1
Strip Immunity*	1		1								1
Constitutional Writ					6	5		1			6
Moral Damages	2	1	1								2
Discharge**	10	4	6								10
Reprimand**	1		1								1
Administrative Inquiry**	4	4									4
Total	64	30	28	5	39	16		17	10	6	120

* Dismissal proceedings against union executive members.

** Comptroller General decisions.

3.3.1 Wrongful Dismissal

Close to 47 percent of alleged perpetrators (56 of 120) won their wrongful dismissal cases, while 4.1 percent agreed to settle.

Employers firing on sexual harassment grounds are required to provide evidence of having complied with company regulations by investigating the complaint. Alternatively, they can submit a Labour Inspectorate finding of sexual harassment.

A review of rulings shows some cases where employers proved the facts but the court found that the conduct did not rise to the level of sexual harassment. In reversing the trial judge's decision in *Bravo con Constructora Ecomac*,⁴²³ the Appeals Court wrote:

[...] to substantiate sexual harassment allegations, conjectures do not suffice. The conduct in question must be serious enough to adversely impact the victim and harm the employment relationship. Yet, the facts exhibited in the notice of dismissal and the testimony of the alleged victim do not prove sexual harassment, as no sexual demand or bodily contact was involved. Importantly, the complainant said during the investigation that she did not mean for her manager to lose his job, but only that his conduct be stopped. [author translation]

In *González con Nexxo*,⁴²⁴ the trial judge similarly concluded that sexual misconduct must adversely impact a target's working opportunities. Although not explicit, the essence of the reasoning was that the perpetrator, caught by a security camera offering a co-worker the equivalent of CAD\$20 to perform oral sex in a company parking lot, did not have the power to adversely impact the target's working conditions. The Appeals Court confirmed the decision.⁴²⁵ In *Ulloa con La Cuarta*, the court found that even if the allegations were true, the misconduct by the perpetrator, an older reporter at a popular tabloid, did not adversely impact the professional prospects of the target, a young intern who continued her placement otherwise undisturbed.⁴²⁶

⁴²³*Jaime Bravo Díaz con Constructora Ecomac S.A.* Corte de Apelaciones de La Serena, 2011 at para 2: "SEGUNDO: Que, en efecto, no bastan meras suposiciones sino que conductas comprobables y probadas sin asomo de dudas, de una grave entidad que afecte a la presunta víctima y quiebre la relación laboral. Los hechos expuestos en la aludida carta y lo declarado por la testigo María Paz Villablanca (la supuesta víctima) no prueban el acoso denunciado, las expresiones proferidas por el denunciante, no tienen petición ni exigencia de una conducta sexual, que son ciertamente impropias de un jefe a una subordinada; pero, que no constituyen un acto de exigencia de carácter sexual, de aproximamiento tangible al cuerpo de la denunciante. De otra parte, útil es consignar que la denunciante explicó en la investigación que motivó el despido que no busca que se desvincule de su jefatura, pero sí que termine el trato que se formó desde el principio, lo que aleja un trato humillante o intimidatorio de parte del actor con ésta".

⁴²⁴*Paulo González Pérez con Nexxo S.A.* Juzgado de Letras del Trabajo de Valparaíso, 2012.

⁴²⁵*Paulo González Pérez con Nexxo S.A.* Corte de Apelaciones de Valparaíso, 2012.

⁴²⁶*Víctor Ulloa García con La Cuarta S.A.* Segundo Juzgado de Letras del Trabajo de Santiago, 2009 at para. 7 (d) "[...]para estimar que estamos frente a un acoso sexual, ya que ninguna de las personas que declara ni siquiera la víctima, dan cuenta que la conducta "indebida" del actor, pudiese amenazar o perturbar la situación laboral o las oportunidades de empleo de la denunciante Andrea Tassara Morales, a mayor abundamiento si bien la denunciante

In *Marín con Chilexpress*,⁴²⁷ the Court downplayed the unwanted bodily contact claimed, requiring evidence of a physical reaction to the perpetrator's behaviour and a clearer link to negative effects on the target's working conditions. The judge examined security video showing the perpetrator touching the target's body while she, a teller, was reconciling the cash drawer at closeout time. The judge wrote that he did not disbelieve the target's testimony, but added:

The Court understands the feelings the plaintiff's behaviour (invading her personal space, holding her hands, hugging and commenting on her personal appearance) could trigger, especially if not everyone will react the same way. All these actions can certainly be vexatious, bothersome and irritating, but in no way do they amount to sexual harassment. [...] As the complainant recognized, there were no sexual demands and no effect on her job opportunities as she continued to climb the ladder.⁴²⁸ [translated by the author]

The decision was upheld on appeal⁴²⁹ and the Supreme ruled the employer's request for review inadmissible.⁴³⁰

In *Martínez Mardones con A.F.P. Hábitat*,⁴³¹ the employer had two grounds for dismissal: showing up intoxicated and telling a female co-worker that she was "more beautiful than ever"

de acoso sexual en su declaración señala tener que haberse retirado de su practica [sic] profesional por los problemas suscitados con el actor, lo cierto es que de el documento acompañado por la demandada, correspondiente a Certificado de Practica [sic] Profesional, se desprende que ésta realizó su practica [sic], obteniendo el certificado respectivo"

⁴²⁷*Manuel Marín Aroca con Chilexpress S.A.* Juzgado de Letras del Trabajo de Temuco, 2010.

⁴²⁸*Ulloa García con La Cuarta S.A. supra note 426* at para 10, "DÉCIMO: Que este tribunal no tiene motivos para cuestionar el testimonio de la Srta. Muñoz y los sentimientos que pueda albergar ante la conducta incurrida por el actor (acercamiento más allá del espacio individual, tomadas de la mano, abrazos, y comentarios acerca de la apariencia física,) ya que considerando que no todas las personas reaccionan de la misma forma ante este tipo de actitudes y en general ellas pueden resultar francamente molestas y no pueden sino calificarse de hostigosas, insoportables, y si se quiere en un lenguaje más coloquial, cargantes, pero en ningún caso califican para ser constitutivas de conducta de acoso sexual, [...] esto, porque de los elementos que se desprenden del concepto legal a los que se ha hecho referencia en el fundamento anterior, ninguna prueba obra en autos respecto de la existencia de algún requerimiento efectuado por el actor a la señora Mónica Muñoz Flores que haya sido de carácter sexual, además lo reconoció la denunciante, al señalar que nunca fue objeto de presión laboral alguna y que nunca se le hizo algún requerimiento que excediera de lo ya relatado.[...] Que por lo demás tampoco se desprende que las conductas del actor, hayan ocasionado perjuicio a la trabajadora o hayan amenazado su actividad laboral, tanto es así que ingresando en el año 2004 como operadora comercial en el año 2008 llegó a ser jefe de oficina."

⁴²⁹*Manuel Marín Aroca con Chilexpress S.A.* Corte de Apelaciones de Temuco, 2010.

⁴³⁰*Manuel Marín Aroca con Chilexpress S.A.* Corte Suprema, 2010.

and that “he liked it even more when she smiled”. The employer opted to dismiss on sexual harassment and inappropriate conduct grounds, presenting e-mails sent to the target as evidence. The trial judge noted that the target did not say if these comments were unwelcome, adding “that sexual harassment must be clear and evident if it is to be told apart from mere compliments and gallantries, so infrequent nowadays”.⁴³²

In reversing the trial court’s decision in *Terziján con Banco Corpbanca*,⁴³³ an Appeals Court found that sexual harassment required a series of actions rather than an isolated incident.⁴³⁴ Although it was proven that during an office party a drunken bank manager had used double entendre and other vulgar language towards women, the court found that the single incident did not amount to a serious breach of contract, ruling the dismissal unjustified. Both the Labour Inspectorate and the employer had made a finding of sexual harassment.

The Courts also suggest that even if sexual misconduct is verifiable and admitted to by the plaintiffs, dismissal should be a last resort. This is clear in *Ulloa con La Cuarta*⁴³⁵, *Marín con Chilexpress*⁴³⁶, and *Mandiola con Inmobiliaria*.⁴³⁷ In *Reyes con Jumbo*, the court reiterated that

⁴³¹ *Francisco Javier Martínez Mardones con A.F.P. HABITAT S.A.* Segundo Juzgado de Letras del Trabajo, 2010.

⁴³² *Ibid.* It states, “es que el actor le dijo hoy te ves más hermosa que nunca, me gusta más cuando sonríes, te ves preciosa con tus nuevos lentes, en el resto de los correos le pregunta si estaba enojada con él, nada de ello podría constituir por sí mismo una situación de acoso, tampoco la receptora manifiesta en ningún caso que dichos correos le molestan o que le incomodan, lo que impide una calificación de ese tipo, máxime si por sus efectos, la configuración de una conducta acosadora debe ser clara, notoria, para distinguirla de las meras cortesías y galanterías, tan escasas en el mundo actual.”

⁴³³ *Emilio Elías Terziján Tuchia con Corpbanca S.A.* Juzgado de Letras del Trabajo Osorno, 2010; *Emilio Elías Terziján Tuchia con Banco Corpbanca* Corte de Apelaciones de Valdivia, 2010.

⁴³⁴ *Emilio Elías Terziján Tuchia con Banco Corpbanca* Corte de Apelaciones de Valdivia, 2010.

⁴³⁵ *Ulloa con La Cuarta*, *supra* note 426.

⁴³⁶ *Manuel Marín Aroca con Chilexpress S.A.*, *supra* note 427; *Manuel Marín Aroca con Chilexpress S.A.*, *supra* note 429.

⁴³⁷ *Claudia Mandiola Durán Inmobiliaria Inversalud S.A.* Juzgado de Letras del Trabajo de Temuco, 2011.

dismissal is the gravest consequence a worker can face.⁴³⁸ The trial judge rejected the conclusion that the behaviour at issue constituted sexual harassment. While he did find corroborated evidence of constant invitations and sexual innuendo aimed at the target and other female workers, he concluded that this did not rise to the level of sexual harassment. The Appeals Court reversed the ruling, finding that the perpetrator's actions provided clear indication of sexual harassment.⁴³⁹ The employer had followed procedure and sent its report to the Labour Inspectorate, which confirmed the findings.

Courts also factor in job stability, a key principle in labour law.⁴⁴⁰ In *Donoso con Sony*,⁴⁴¹ the court wrote that while employers have some latitude as to penalties meted out in sexual harassment cases, dismissal was excessive given the perpetrator's twelve years of employment with the firm. In *Olivares con Agua Potable Rural El Sobrante*,⁴⁴² the judge stated that the grounds for dismissal were not clearly outlined, but if true, dismissal would be too harsh a penalty given the number of years the female perpetrator had been with the firm.

⁴³⁸*Edison Reyes con Jumbo Administradora Norte S.A* Juzgado de Letras del Trabajo de Valparaíso, 2010.

⁴³⁹*Edison Reyes con Jumbo Administradora Norte S.A* Corte de Apelaciones de Valparaíso, 2011.

⁴⁴⁰María Luz Vega Ruiz & Daniel Martínez, "Fundamental Principles and Rights At Work: Value, Viability, Incidence and Importance as Elements For Economic Progress and Social Justice", online: (2003) Harv. Hum. Rts. J. < <http://digitalcommons.ilr.cornell.edu/freedom>>. at 35; Gamonal Contreras, *Fundamentos del Derecho Laboral*, *supra* note 270 at 119 and Sebastián Serrano Alou, "La estabilidad en el empleo es un derecho humano fundamental" in Luis Enrique Ramírez, ed., *Relaciones laborales. Una visión unificadora* (Buenos Aires: Editorial B de F, 2010) 343-359 at 351-357. As Vega Ruiz argues, job stability is part of working conditions. Gamonal in Chile notes that employers cannot terminate a contract unilaterally and without legal justification, while Serrano writes that the law must ensure that there are no arbitrary dismissals.

⁴⁴¹*Carlos Donoso Pérez con Sony Chile Limitada*, *supra* note 339.

⁴⁴²*Patricia Olivares Olivares con Agua Potable Rural El Sobrante* Corte Suprema, 2009.

In *Ulloa con La Cuarta*, the court noted that there were no witnesses to the alleged sexual harassment, and even if the event had occurred, the perpetrator's spotless thirty-year record of employment had to be taken into account.⁴⁴³

In *Heredia San Martín con Servicios Prosegur*, a target's credibility was challenged for taking a day to report the incident, even though the Labour Inspectorate did make a finding of sexual harassment. Moreover, the court noted that while the plaintiff admitted to making inappropriate jokes (i.e., using improper language), his conduct ought to be balanced against an unblemished sixteen years' record of employment.⁴⁴⁴

In *Mandiola con Inmobiliaria*, the employer was reproached for firing a worker with special needs instead of conducting a proper investigation or considering other options. The judge took a stand for the perpetrator, a vulnerable, under-privileged, socially excluded individual who had been with the firm for over eleven years. While the court agreed that the perpetrator had hugged, kissed and declared her infatuation to a female co-worker, it also noted that she had a mental condition.⁴⁴⁵

In *Flores Mena con Sociedad T.J.C.*,⁴⁴⁶ the court did find that sexual harassment had occurred but chastised the employer for forcing the perpetrator to resign instead of conducting an investigation.

Some decisions were overturned based on divergent views on what constitutes serious incivility

⁴⁴³*Ulloa con La Cuarta*, *supra* note 426.

⁴⁴⁴*Félix Heredia San Martín con Servicios Prosegur Ltda.* Corte Suprema, 2009.

⁴⁴⁵*Claudia Mandiola Durán Inmobiliaria Inversalud S.A.*, *supra* note 437.

⁴⁴⁶*Rolando Flores Mena con Sociedad T.J.C. Chile S.A.* Primer Juzgado de Letras del Trabajo de Santiago, 2012.

and expected workplace behaviour.

In *González con Cesmec*,⁴⁴⁷ after an investigation and corroboration of sexual harassment, the employer fired the perpetrator, an engineer who had slapped a co-worker's buttocks. The plaintiff admitted the incident, arguing that it was a lark with no sexual connotations, and that no sexual advances or demands were made. He said he had meant to warn the target that she was answering the phone while manipulating a flask of hazardous chemicals. The target and other female staffers testified that although the engineer was shy, he was overly affectionate even with women with whom he was not close, and was known to shift his face in an attempt to turn the customary Chilean peck on the cheek into a kiss on the lips. The judge found that the employer had other options and ruled the events an isolated incident with no impact on the target's job opportunities or working conditions. The Appeals Court reversed the ruling, writing that the conduct of an educated, university-trained professional was expected to be more compatible with the dignity of his coworkers.⁴⁴⁸

In *Collao Galdames con Banco París*, the trial judge balanced the allegations of several targets against those of three other female staffers who said they had never been sexually harassed at work.⁴⁴⁹ The Court of Appeals overturned this ruling, noting that not all women in that workplace needed to have been sexually harassed and that the internal investigation had verified the allegations.⁴⁵⁰

⁴⁴⁷*César González Pezoa con Cesmec* Primer Juzgado de Letras del Trabajo de Santiago, 2011.

⁴⁴⁸*César González Pezoa con Cesmec* Corte de Apelaciones de Santiago, 2012. "Que quien realiza el acto es un profesional calificado, su nivel de instrucción le impone una exigencia mayor en el trato laboral compatible con la dignidad de las personas".

⁴⁴⁹*Luis Collao Galdames con Banco París* Segundo Juzgado de Letras del Trabajo de Santiago, 2009.

⁴⁵⁰*Luis Collao Galdames con Banco París* Corte de Apelaciones de Santiago, 2010.

*Rival Poblete con Contraloría General de la República*⁴⁵¹ is an interesting case involving both the Office of the Comptroller General and the court looking into due process and discharges in the public service. In the administrative investigation, several workers charged a municipal supervisor with both sexual harassment and maladministration.⁴⁵² The Appeals and Supreme courts, answering a writ for the protection of constitutional rights, agreed that even if the charges were true, the Comptroller General had no legal jurisdiction over sexual harassment cases, and found its decision *ultra vires*. Such dismissals could not be ordered by the town mayor alone, wrote the Court, but had to be cleared with the full city council. The Comptroller General had argued that sexual harassment was within the scope of moral integrity in public service standards, an argument shared by a dissenting Supreme Court justice. The recommendation for dismissal was presumably cleared by city council, as the targets had also enlisted the support of the district representative in Congress.

When perpetrators lose, in general the requirement to properly investigate has been met and the facts of the case have been corroborated. In *Hernández con Equipos Hidráulicos*,⁴⁵³ the plaintiff claimed absence of due process after the employer required staff to submit handwriting samples to identify the author of sexually violent, anonymous notes sent to two female staffers. Management reasoned that the workforce was male-dominated (14 women and over 110 men), the firm was located in an isolated part of town, it was dark at night, and there was an urgent need to protect the female staff. The judge upheld the argument that due process had been

⁴⁵¹*Luis Francisco Rival con Contraloría General de la República* Contraloría General de la República, 2006; *Luis Francisco Rival Poblete con Contraloría General de la República* Corte Suprema, 2007; *Luis Francisco Rival Poblete contra Contraloría General de la República* Corte de Apelaciones de Santiago, 2007.

⁴⁵²*Luis Francisco Rival con Contraloría General de la República*, *supra* note 451.

⁴⁵³*Silvio Alberto Hernández Zapata con Equipos Hidráulicos Santa Rosa Limitada* Juzgado de Letras del Trabajo de San Miguel, 2009.

infringed, but ordered a forensic handwriting test by a police expert. The test confirmed the plaintiff's handwriting and the judge found that the requirements for dismissal had been met.

In *Castillo con Corporación Educacional, Salud, Cultura y Recreación de La Florida*,⁴⁵⁴ *Núñez con Andes Foods*,⁴⁵⁵ and *Donoso con Banco Santander*,⁴⁵⁶ the courts confirmed that the employer or the Labour Inspectorate had investigated. While fired workers often claim lack of due process, such arguments tend to be dismissed.

One trial judge found the accounts of several targets inconsistent and ruled that the investigation had not met standards.⁴⁵⁷ The ruling was reversed on appeal and confirmed by the Supreme Court, which found that the judge failed to weigh the evidence and that complaints and target accounts at the trial depicted a pattern that proved harassment.⁴⁵⁸

3.3.2 Constructive Dismissal

At least one constructive dismissal case was filed by a perpetrator. In *Arrigo con Comercial Carrasco*,⁴⁵⁹ a perpetrator transferred to a different location during a sexual harassment investigation claimed loss of income, as his commission on sales at the new location were lower. The employer countered that these were preventive measures while an investigation unfolded.

⁴⁵⁴*Luis Castillo Dublas con Corporación Educacional Andes* Juzgado de Letras del Trabajo de Temuco, 2012.

⁴⁵⁵*Luis Arrigo Gutiérrez con Comercial Carrasco y Hernández Limitada* Juzgado de Letras del Trabajo de Osorno, 2012.

⁴⁵⁶*Francisco Donoso Díaz contra Banco Santander* Corte de Apelaciones de Santiago, 2008.

⁴⁵⁷*Iván Romero Pinilla con Empresa Programación y Explotación de Sistemas Computacionales Ltda.* Noveno Juzgado de Letras del Trabajo de Santiago, 2009.

⁴⁵⁸*Iván Romero Pinilla con Empresa Programación y Explotación de Sistemas Computacionales Ltda.* Corte de Apelaciones de Santiago, 2010; *Iván Romero Pinilla con Empresa Programación y Explotación de Sistemas Computacionales Ltda.* Corte Suprema, 2010.

⁴⁵⁹*Luis Arrigo Gutiérrez con Comercial Carrasco y Hernández Limitada*, *supra* note 455.

Sexual harassment allegations were subsequently proven and the claim was dismissed, a ruling later confirmed on appeal.⁴⁶⁰

3.3.3 *Tutela* or Writ for the Protection of Fundamental Rights in the Workplace

Some perpetrators and alleged perpetrators claimed that their rights were infringed by the investigation or firing process. Due process requires informing perpetrators of charges against them and investigating allegations fairly, which includes providing alleged perpetrators an opportunity to defend themselves.

Shown below are leading arguments raised concurrently by plaintiffs, including due process, personal reputation, and personal integrity. The right to choose employment –construed in Chilean law as equivalent to the right to work- was raised in combination with other rights.

Table 6			
Fundamental Rights Claims Made by Perpetrators and Alleged Perpetrators			
	Due Process	Personal Integrity	Good Name & Reputation
Due Process	12	0	10
Personal Security	0	8	2
Good Name & Reputation	10	4	6

In *Valdés con Sociedad Farmacéutica Cruz Verde*, the judge examined if the accused’s notice, tendered after his employer advised that the Labour Inspectorate had been notified, had been voluntary or coerced. The plaintiff appeared before counsel to review text messages he had sent

⁴⁶⁰*Luis Arrigo Gutiérrez con Comercial Carrasco y Hernández Limitada* Corte de Apelaciones de Valdivia 2012.

to the target, but the company did not otherwise investigate. The plaintiff claimed he had been driven by fear that his pregnant girlfriend would find out.⁴⁶¹ The judge wrote that as employers must investigate, failure to do so rendered a resignation invalid. The Appeals Court disagreed, noting that while true, the plaintiff did admit to texting the target and conceded that he could have waited until the probe was complete.⁴⁶² A dissenting justice reasoned that the plaintiff had been forced to quit after his employer threatened to fire him on the disgraceful grounds of sexual harassment.

Notices of termination on sexual harassment grounds must describe the facts and name names. The rationale is that respondents may not be able to mount a proper defense unless accusers are identified. In most cases reviewed, employers did (see Figure 7). Of 120 cases filed by perpetrators, fifteen (12%) were not investigated. When there was no investigation, three out of four cases were won by the plaintiff.

⁴⁶¹*Pablo Valdés Farias con Sociedad Farmacéutica Cruz Verde Ltda.* Sexto Juzgado de Letras del Trabajo de Santiago, 2008.

⁴⁶²*Pablo Valdés Farias con Sociedad Farmacéutica Cruz Verde Ltda.* Corte de Apelaciones de Santiago, 2009.

Figure 7



When employers do not investigate but still win a case, it is often because they are able to prove harassment, as in *Gaete con Adidas*,⁴⁶³ where a foreman was found to have harassed three cleaning ladies.

Some investigations were mishandled. In *Corona con Empresa Comercializadora del Sur*⁴⁶⁴ and *Flores Mena con Sociedad T.J.C.*,⁴⁶⁵ fired workers' complaints were upheld in trial court because employers had failed to give alleged perpetrators an opportunity to provide their side of the story. In both cases, however, their claims that their reputation and good name had been

⁴⁶³ *Adolfo Gaete Catrileo con Adidas Chile* Primer Juzgado de Letras del Trabajo de Santiago, 2012.

⁴⁶⁴ *Moisés Víctor Corona Cárcamo con Empresa Comercializadora del Sur Seis* Juzgado de Letras del Trabajo de Osorno, 2009.

⁴⁶⁵ *Rolando Flores Mena con Sociedad T.J.C. Chile S.A.*, *supra* note 446.

besmirched were dismissed. The court found that evidence that the charges were true was clear, as was the deleterious effect on targets.

In two cases the court had to rule if the evidence met standards of due process. In *Hernández con Equipos Hidráulicos*⁴⁶⁶ and *Bravo con Constructora Ecomac*,⁴⁶⁷ judges found that a recording of a conversation between target and plaintiff was not unlawfully obtained and did reveal inappropriate behaviour, although not of an extent supporting dismissal on sexual harassment grounds.

Some perpetrators additionally claim that termination on sexual harassment grounds has a detrimental effect on their reputation, good name, and community perceptions of themselves and their families. In *Corona con Comercializadora del Sur*⁴⁶⁸ and *Huichacura con Mr. Pizza*,⁴⁶⁹ perpetrators argued that the allegations also impacted their employment opportunities and right to work. In the former case, both the trial court and the Court of Appeals argued that is not possible to infringe the right to honour and reputation simply by conducting an inquiry into sexual harassment if the law stipulates a complaint must be investigated. In the latter, the worker accepted a settlement.⁴⁷⁰

⁴⁶⁶*Silvio Alberto Hernández Zapata con Equipos Hidráulicos Santa Rosa Limitada*, *supra* note 453.

⁴⁶⁷*Jaime Bravo Díaz con Constructora Ecomac S.A.* Juzgado de Letras del Trabajo de La Serena, 2010.

⁴⁶⁸*Moisés Víctor Corona Cárcamo con Empresa Comercializadora del Sur Seis*, *supra* note 464.

⁴⁶⁹*Hernán Huichacura con Mr. Pizza* Segundo Juzgado de Letras del Trabajo de Santiago, 2011.

⁴⁷⁰ The quantum was slightly over two months wages considering if the claim was upheld he had a right to 11 months of wages on severance pay in addition to any increase above that.

In *Llanos con Inmobiliaria e Inversiones Central de Abastecimiento*,⁴⁷¹ an employer's notice of termination mistakenly cited Code provisions on sexual harassment, a lapse the fired worker considered extremely serious. As he worked in a male-only shop and he stated he was not gay claiming the error had tarnished his honour and reputation.

In *Ramos con Consorcio CVC*,⁴⁷² a plaintiff claimed that he had not been given a chance to be heard and clear his name during the investigation, an issue compounded by the fact that his wife subsequently heard about the sexual harassment grounds claimed for dismissal.

3.3.4 Compensation, Damages and Reparation

As discussed above, workers can be fired if sexual harassment is proven, but if the allegations are not corroborated, severance payments can increase by at least half. If a case is found to have no plausible basis, courts can double severance.

In most cases involving added severance, workers were awarded an 80 percent increase.⁴⁷³ If a sexual harassment case does not stand up in court but can be shown to have been properly investigated under the law and company regulations, the employer is not required to pay an increase. This was the case in *Ulloa con La Cuarta*,⁴⁷⁴ *Donoso con Sony*,⁴⁷⁵ *Sánchez con Porta*

⁴⁷¹*Mario Llanos Carpenetto con Inmobiliaria e Inversiones Central de Abastecimiento S.A.* Juzgado de Letras del Trabajo de Valparaíso, 2009.

⁴⁷²*Juan Humberto Ramos Perez con Consorcio CVC Comao Ingeniería Ltda y otro* Primer Juzgado de Letras del Trabajo de Santiago, 2010.

⁴⁷³*Marcos Bilbao Sverlij con Café Plaza Victoria* Juzgado de Letras del Trabajo de Santiago, 2012; *Rolando Flores Mena con Sociedad T.J.C. Chile S.A.* Corte de Apelaciones de Santiago, 2013; *Jaime Bravo Díaz con Constructora Ecomac S.A.*, *supra* note 467.

⁴⁷⁴*Víctor Ulloa García con La Cuarta S.A.*, *supra* note 426.

⁴⁷⁵*Carlos Donoso Pérez con Sony Chile Limitada*, *supra* note 339.

*Nuova*⁴⁷⁶ or *Reyes con Jumbo*, all overturned on appeal by rulings that sexual harassment had indeed occurred.⁴⁷⁷

*Flores Mena con Sociedad T.J.C.*⁴⁷⁸ is somewhat contradictory. The court agreed that sexual harassment occurred and on the damaging impact it had on the target, but since the employer failed to investigate, it found for the perpetrator and ordered an 80 percent increase in severance pay. All parties appealed, but the ruling was confirmed and no moral damages were awarded.

3.3.5 Settlements

Five alleged perpetrators out of 22 agreed to settle. In four cases, employer and/or Labour Inspectorate investigations confirmed the allegations. In one case the perpetrator received almost full severance;⁴⁷⁹ the rest received lower amounts than requested,⁴⁸⁰ including two who received a month's notice plus a month's severance after eleven years of service⁴⁸¹ and one who only received his wages and a month's notice plus vacation and overtime.⁴⁸²

⁴⁷⁶*Wilson Eduardo Sánchez Soto con Porta Nuova S.A.* Primer Juzgado de Letras del Trabajo de Santiago, 2011. This is a hiring process case.

⁴⁷⁷*Edison Reyes con Jumbo Administradora Norte S.A.*, *supra* note 439

⁴⁷⁸*Rolando Flores Mena con Sociedad T.J.C. Chile S.A.*, *supra* note 473.

⁴⁷⁹*Ximena Reyes con Arcos Dorados Restaurantes de Chile Ltda. (McDonald Restaurants)* Segundo Juzgado de Letras del Trabajo de Santiago, 2011 (O-3340-2011). The claim had an error because it did not request severance pay.

⁴⁸⁰*Héctor Alvarez Espinoza con Cruz y Compañía Limitada* Segundo Juzgado de Letras de Santiago, 2011; *Ximena Reyes con Arcos Dorados Restaurantes de Chile Ltda. (McDonald Restaurants)* Segundo Juzgado de Letras del Trabajo de Santiago, 2011 (O-3710-2011).

⁴⁸¹*Hernán Huichacura con Mr. Pizza*, *supra* note 469.

⁴⁸²*José Barra con Alimentos Pomona* Segundo Juzgado de Letras del Trabajo de Santiago, 2011.

Reyes con Arcos Dorados is a same-sex sexual harassment case with two suits filed. In one, an agreement was reached, followed at a later time by another claim over unpaid social security deductions, settled by payment of an extra month's wages.

3.4 Other Actors: Labour Inspectorate, Unions

Cases reviewed show that both the Labour Inspectorate and unions play important roles as plaintiffs, respondents, or supporters.

3.4.1 The Labour Inspectorate

In cases of noncompliance with health and safety regulations on sexual harassment, the law allows the Inspectorate to go beyond administrative penalties. If fundamental rights are breached in the workplace, it can also file a *tutela* action.⁴⁸³ This is especially relevant when the employer is the perpetrator and constructive dismissal is a target's only remedy available, or when the employer has no sexual harassment regulations in place.⁴⁸⁴

The Inspectorate acted as plaintiff against employers in five cases⁴⁸⁵ and brought action against a labour judge who reversed a fine levied on an employer.⁴⁸⁶ One Inspectorate *tutela* action was

⁴⁸³ Article 486 of the *Labour Code. Código del Trabajo*, *supra* note 4.

⁴⁸⁴ *Álamo Telefonía Limitada contra Inspección Provincial del Trabajo de Temuco*, *supra* note 347.

⁴⁸⁵ *Dirección del Trabajo con Sociedad Subiabre Díaz* Corte de Apelaciones de Puerto Montt, 2013; *Dirección del Trabajo con Sociedad Subiabre Díaz*, *supra* note 415; *Inspección del Trabajo de Santiago Poniente con Mario Edison Méndez Soto*, *supra* note 415; *Inspección del Trabajo Santiago Sur Oriente con Envases Exportables Ltda.* Segundo Juzgado de Letras de Santiago, 2010.

⁴⁸⁶ *Dirección del Trabajo con Juez Titular del Noveno Juzgado del Trabajo de Santiago*, *supra* note 348.

framed as a case of gender discrimination and another as a case of both gender and racial discrimination.

In *Inspección del Trabajo Santiago Poniente con Méndez*, the Court was asked to reinstate a target fired after refusing a shift change ordered by a perpetrator after his sexual advances were rebuffed.⁴⁸⁷ The judge agreed, ordering the employer to organize a non-arbitrary, non-discriminatory shift, rotation and scheduling system. The employer was also fined and required to conduct two education sessions on sexual harassment and women's rights for all workers. The judge reasoned:

Fundamental rights limit an employer's ability to organize his operation as he may see fit. The case at hand shows an abusive, arbitrary exercise of power intended to control the target and other female workers. This impinges on worker dignity and exceeds what is reasonable or permissible. The evidence shows that female workers are subject to discriminatory treatment their male colleagues do not have to endure. [...] This treatment includes sexual advances to be consented to on pain of dismissal.⁴⁸⁸ [translated by author]

In *Inspección del Trabajo Santiago Sur Oriente con Envases Exportables*,⁴⁸⁹ the Inspectorate framed its case as an issue of sex, gender, and ethnic or racial discrimination. It argued that the employer and perpetrator had a history of mistreating female staff and had been fined in a similar case. To buttress its argument, the Inspectorate noted that up to four other secretaries had quit in

⁴⁸⁷*Inspección del Trabajo de Santiago Poniente con Mario Edison Méndez Soto*, *supra* note 415.

⁴⁸⁸*Ibid.* at para 8, [...] el empleador en caso alguno podría justificar su actuar en el legítimo ejercicio de su potestad de mando [...], ya que el empleador con su conducta, pretende someter a la víctima y también a las demás trabajadoras del establecimiento, a una sumisión que excede con creces de aquella que es permisible y razonable, en el ámbito del contrato de trabajo, caracterizado justamente por la subordinación y dependencia del trabajador al empleador, por cuanto afecta la dignidad de las trabajadoras, quienes además, son sometidas a un trato discriminatorio, ya que según se desprende de la prueba rendida, los trabajadores del local (varones), no son sometidos a este grado de sumisión, que se concreta no sólo en la obligación de acatar las órdenes e instrucciones relativas con el ejercicio de las labores contratadas, sino que además, se concreta en la obligación de aceptar los avances y requerimientos sexuales del empleador, como requisito o condición, para mantener su puesto de trabajo.”

⁴⁸⁹*Inspección del Trabajo Santiago Sur Oriente con Envases Exportables Ltda.*, *supra* note 485.

the previous year alone (the claimant was a secretary). The judge dismissed the sexual harassment claim, writing that the target had complained about a single incident -the employer grabbed her buttocks- but that from that point on she had kept her distance. The judge further felt that the evidence was hearsay and relied on the target's testimony, which failed to convince the court. She also declined to consider the perpetrator's previous fines and noted that high secretarial turnover was not necessarily indicative of harassment. However, she did uphold the racial discrimination charges, as the target had been made to clean floors and bathrooms and been called "a morose Indian who needed a man". Yet, although she fined the accused the equivalent of CAD\$3,900, the judge failed to make the connection that his groping and comments about the target's Mapuche ethnicity were part of the same discriminatory behaviour and that the hostile work environment was the product of both sex and race.

In *Dirección del Trabajo con Sociedad Subiabre Díaz*,⁴⁹⁰ the Labour Inspectorate framed its case as an infringement of fundamental rights, including to personal integrity, privacy, and honour. Writing that sexual harassment is an expression of sex discrimination, the court ordered the perpetrator, a school owner, to apologize to the target and her family before an assembly of students and staff, sponsor two training sessions on women's human rights, and pay the target's medical bill. The Appeals Court confirmed the decision but found the public apology to be *ultra petita*, as the Labour Inspectorate had only sought a private apology.⁴⁹¹

⁴⁹⁰*Dirección del Trabajo con Sociedad Subiabre Díaz*, *supra* note 415.

⁴⁹¹*Dirección del Trabajo con Sociedad Subiabre Díaz*, *supra* note 485.

3.4.2 The Labour Inspectorate as Respondent

The Labour Inspectorate was the respondent in thirteen cases. Ten were filed by employers who unsuccessfully appealed fines levied over posting regulations on the company Intranet instead of in a conspicuous place,⁴⁹² transferring and firing a worker after a sexual harassment complaint to the Inspectorate,⁴⁹³ and failing to take action to protect a target.⁴⁹⁴

In *Empresa de vigilancia con Inspección Provincial del Trabajo de Antofagasta* and in *Empresa Agrícola Apaltagua con Inspección del Trabajo de Talca*, the courts addressed the nature of Inspectorate reports. In the first case a judge agreed with the presumption of accuracy in a report and its findings, but an Appeals Court contested the Inspectorate's power to make definitive findings on allegations.⁴⁹⁵ In the second case⁴⁹⁶ an employer appealed a fine, claiming absence of due process during an investigation. The court ruled that the findings and resulting fine should have been challenged at the appropriate time, further noting that Inspectorate reports are presumed accurate under the law⁴⁹⁷ since inspectors are officers of the labour administration system, their reports are enforceable.

⁴⁹²*Empresa de Vigilancia y Aseo Industrial Fudu Ltda. con Inspección Provincial del Trabajo de Antofagasta*, *supra* note 348.

⁴⁹³*Ibid.*

⁴⁹⁴*Empresa Agrícola Apaltagua Limitada con Inspección del Trabajo de Talca*, *supra* note 348.

⁴⁹⁵*Empresa de Vigilancia y Aseo Industrial Fudu Ltda. con Inspección Provincial del Trabajo de Antofagasta*, *supra* note 348.

⁴⁹⁶*Empresa Agrícola Apaltagua Limitada con Inspección del Trabajo de Talca*, *supra* note 348.

⁴⁹⁷ Article 23, *Código del Trabajo*, *supra* note 4; *Dispone la reestructuración y fija funciones de la Dirección del Trabajo* (Chile: 1967).

In *Alarcón con Inspección Comunal del Trabajo de Tomé*,⁴⁹⁸ at issue were workspaces that facilitated unwanted same-sex physical contact. The Labour Inspectorate interviewed 25 workers and did not make a finding of sexual harassment, but did impose a fine for absence of segregated locker rooms and narrow aisles that had enabled unwanted physical contact between the target and the employer's sister. The Court reversed the fine because it found that the Inspectorate lacked the technical expertise to judge whether the layout of the premises did have a detrimental effect on the worker's right to life or health.

Two perpetrators brought actions against the Inspectorate. In one action, a medical doctor and director of a safety and occupational health insurance institution lodged a constitutional writ over the Inspectorate's refusal to turn over the records of an investigation that made a finding of sexual harassment. As the case reached the local media in a small town, the perpetrator claimed that the allegations were libellous and that withholding the record of investigation had hindered his efforts to clear his name. The Court ordered the Inspectorate to surrender the records.⁴⁹⁹ The decision was confirmed in the Supreme Court, although a dissenting judge agreed that the Inspectorate withheld the records to protect the target's privacy.⁵⁰⁰ The target was able to prove sexual harassment and won a constructive dismissal case in both the Appeals and Supreme courts.⁵⁰¹

⁴⁹⁸ *Jorge Alarcón Salazar con Inspección Comunal del Trabajo de Tomé*, *supra* note 349.

⁴⁹⁹ *Alvaro Escobar Borie con Inspector Provincial del Trabajo de Puerto Montt* Corte de Apelaciones de Puerto Montt, 2009.

⁵⁰⁰ *Alvaro Escobar Borie con Inspección del Trabajo de Puerto Montt* Corte Suprema, 2009.

⁵⁰¹ *Ximena Alejandra Villarroel con Instituto de Seguridad del Trabajo*, *supra* note 362; *Ximena Alejandra Villarroel Carrizo con Instituto de Seguridad del Trabajo*, *supra* note 363.

Another perpetrator requested the courts to declare an Inspectorate report that concluded that he had sexually harassed a target null and void.⁵⁰² The case was dismissed.

Pivotal in investigating sexual harassment complaints, the Labour Inspectorate is charged with conducting its own investigations or evaluating those carried out by employers.⁵⁰³ The Inspectorate investigated in 71 of 252 cases and confirmed sexual harassment allegations in 85 percent of cases.⁵⁰⁴

Some cases reveal shortcomings in the Labour Inspectorate's role and procedures, notably in target testimony and court decisions critical of how it handled complaints. As noted earlier, in *Aliste con Comunidad de Edificios Imago Mundi*⁵⁰⁵ the Court castigated the Inspectorate's initial refusal to allow the complaint because the target had no witnesses. In *Gaete con Adidas*, the Inspectorate shelved the case after it unsuccessfully sought to have the targets, three cleaning company employees, provide written confirmation of a complaint filed by their supervisor. One target withdrew the complaint, another desisted, and only one pressed on.⁵⁰⁶ Other female staff corroborated the harassment towards both the targets and other female staff who had quit.

In *Baeza con Pastelería y Confitería Nino*,⁵⁰⁷ the trial judge upbraided the Labour Inspectorate for limiting its investigation to questioning the perpetrator, who denied the allegations, and

⁵⁰² *Alejandro Pizarro Cisternas con Inspección Provincia del Trabajo de Antofagasta* Juzgado de Letras del Trabajo de Antofagasta, 2010.

⁵⁰³ Articles 211-A to 211-E *Código del Trabajo*, *supra* note 4.

⁵⁰⁴ Public service investigations are conducted by the unit employing the target or perpetrator and/or the Comptroller General. In 13 such cases there was an investigation; allegations were confirmed in 12.

⁵⁰⁵ *Silvia Aliste Miño con Comunidad de Edificios Imago Mundi*, *supra* note 356.

⁵⁰⁶ *Adolfo Gaete Catrileo con Adidas Chile*, *supra* note 463.

⁵⁰⁷ *Jacqueline Baeza Piñones con Pastelería y Confitería Nino Ltda. y otro*, *supra* note 393.

concluding on that basis that no sexual harassment had occurred. The judge awarded the target close to CAD\$10,000 in moral damages.

3.4.3 Unions

Under the law, unions can be plaintiffs as well as intervenors in *tutela* proceedings.⁵⁰⁸ Cases examined show that union involvement can take many forms, sometimes on behalf of the target,⁵⁰⁹ sometimes on behalf of the perpetrator.⁵¹⁰ Targets often request union intervention or seek their advice or help.

A union can trigger a sexual harassment investigation by making a formal or informal complaint to the employer.⁵¹¹

Cases where union officials are witnesses are quite relevant for the courts, as they can provide context for the management styles or working conditions under which the alleged harassment took place.⁵¹² In *Quiroz con Berries Patagonia* and *Aguilar con Berries Patagonia*, a union brought formal complaints against an abusive foreman, charging that harassment –both

⁵⁰⁸ Article 486 *Código del Trabajo*, *supra* note 4.

⁵⁰⁹ *Andrea Italia Jara Miranda con Redbus Urbano S.A.*, *supra* note 375; *Hugo Omar Morales Castillo con Corporación Municipal de Educación Salud Cultura y Recreación de La Florida* Corte de Apelaciones de Santiago, 2011; *Elizabeth Esquerra con Jazzplat Chile Call Center Limitada*, *supra* note 414; *Carolina del Carmen Proboste Ortúzar con Sociedad Hotelera Santa Magdalena S.A.*, *supra* note 359; *Luis Núñez Ramírez con Chile Andes Foods S.A.* Corte de Apelaciones de San Miguel, 2008.

⁵¹⁰ *Eloina Gallardo con Corporación de Capacitación y Educación Industrial y Minería*, *supra* note 419; *Erica Ponce Rojas con Sindicato No 3 de la Empresa Minera Sur Andes Ltda. Planta El Cobre y Mina El Soldado*, *supra* note 371; *Sindicato Nacional de Empresa Tres Montes Luchetti con Empresa Tres Montes Luchetti* Corte de Apelaciones de Santiago, 2012.

⁵¹¹ Article 220.3 *Código del Trabajo*, *supra* note 4; *Elizabeth Esquerra con Jazzplat Chile Call Center Limitada*, *supra* note 414; *Luis Aguilar Vidal con Berries Patagonia S. A.* Juzgado de Letras del Trabajo Osorno, 2010.

⁵¹² *Hugo Omar Morales Castillo con Corporación Municipal de Educación Salud Cultura y Recreación de La Florida*, *supra* note 509; *Andrea Jara Miranda con Redbus Urbano S.A* Corte de Apelaciones de Santiago, 2010; *Carolina del Carmen Proboste Ortúzar con Sociedad Hotelera Santa Magdalena S.A.*, *supra* note 359.

psychological and sexual- was part of a pattern of vicious behaviour towards all staff.⁵¹³ The same was true in *Martínez con Abastecedora del Comercio*,⁵¹⁴ where the union repeatedly complained about a co-worker who, despite union mediation and written notices from management, persisted in creating a toxic work environment that included physical violence and ill-treatment of female workers. In *Mella Bórquez con Compañía Chilena de Tabacos*, on the other hand, the employer limited its evidence to a target affidavit and a letter of complaint from the union, and did not ask the targets or union officials to take the stand. The court dismissed the union's role as immaterial.⁵¹⁵

In *Figueroa con ASMAR*⁵¹⁶ and *Spano con Sindicato de Trabajadores de ASMAR*,⁵¹⁷ the union, the unionized target and the harasser, a manager, were all part of a tangled web. The target lost her constructive dismissal case, as confirmed by the Supreme Court. The perpetrator was cleared by his employer –the Navy shipyards-, then lodged a constitutional writ against both the union and a local daily over a paid name-and-shame advertisement exposing him as a sexual harasser. He lost the case on the arguments that the law protects the media from revealing its source of information.

⁵¹³*Luis Aguilar Vidal con Berries Patagonia S. A.*, *supra* note 511; *Damaris Quiroz Robles con Berries Patagonia S.A.* Juzgado de Letras del Trabajo de Osorno, 2009; *Damaris Quiroz Robles con Berries Patagonia S.A.* Corte de Apelaciones de Valdivia, 2010.

⁵¹⁴*John Martínez Mancilla con Abastecedora del Comercio Ltda* Corte de Apelaciones de Puerto Montt, 2011; *John Martínez Mancilla con Abastecedora del Comercio Ltda* Juzgado de Letras del Trabajo de Puerto Montt, 2011.

⁵¹⁵*Juan Alejandro Mella Bórquez con Compañía Chilena de Tabacos SA* Juzgado de Letras de Casablanca, 2002.

⁵¹⁶*Sandra Figueroa con ASMAR*, *supra* note 400.

⁵¹⁷*Fernando Miguel Spano Sazo con Sindicato de Trabajadores de Asmar Talcahuano* Corte de Apelaciones de Concepción, 2012.

Some cases also show the additional difficulties faced when perpetrators are union officials,⁵¹⁸ whom unions tend to formally or informally help protect. Such was the case in *Ponce con Sindicato Empresa Minera Sur Andes*,⁵¹⁹ where the target was a union employee and executive members testified that the harasser another union official had engaged in inappropriate behaviour but not sexual harassment.

Unions were the plaintiffs in four cases.⁵²⁰ In *Gutiérrez, Tapia y Manríquez con Inspección Comunal del Trabajo Santiago Norte*,⁵²¹ union executive members brought action against the Labour Inspectorate for accepting the resignation of a union official investigated for sexual harassment. *Sindicato Tres Montes con Empresa Tres Montes*⁵²² involved a target harassed by a member of the union executive and the counter-allegation that casting aspersions on union officials amounted to union busting. The target had filed her lawsuit unassisted by the union.⁵²³ In another case, a nurses' union requested that a former employee be investigated for, *inter alia*, sexual harassment.⁵²⁴ The Court in *Sindicato Tres Montes con Empresa Tres Montes* dismisses the allegation by the union that the complaint was instigated by the company's anti-union practices and declared that the employer is under a legal obligation to carry out an investigation. In the target's case *Moya Gutiérrez con Empresa Tres Montes Luchetti* the trial court also

⁵¹⁸*Eloina Gallardo con Corporación de Capacitación y Educación Industrial y Minería*, *supra* note 419; *Silvia Aliste Miño con Comunidad de Edificios Imago Mundi*, *supra* note 356; *Inversiones Alsacia S.A. con Barney Antonio Apablaza Basoalto*, *supra* note 350.

⁵¹⁹*Erica Ponce Rojas con Sindicato No 3 de la Empresa Minera Sur Andes Ltda. Planta El Cobre y Mina El Soldado*, *supra* note 371.

⁵²⁰*Colegio de Enfermeras con Servicio de Salud Metropolitano Sur* Contraloría General de la República, 2009; *Sindicato Nacional de Empresa Tres Montes Luchetti con Empresa Tres Montes Luchetti*, *supra* note 510; *Leonardo Gutiérrez, María Soledad Tapia y Gladys Manríquez con Inspección Comunal del Trabajo de Santiago Norte* Corte de Apelaciones de San Miguel, 2009.

⁵²¹*Leonardo Gutiérrez, María Soledad Tapia y Gladys Manríquez con Inspección Comunal del Trabajo de Santiago Norte*, *supra* note 520.

⁵²²*Sindicato Nacional de Empresa Tres Montes Luchetti con Empresa Tres Montes Luchetti*, *supra* note 510.

⁵²³*Erika Moya Gutiérrez con Empresa Tres Montes Luchetti*, *supra* note 396.

⁵²⁴*Colegio de Enfermeras con Servicio de Salud Metropolitano Sur*, *supra* note 520.

dismissed the sexual harassment claim because of lack of evidence. With respect to the nurses' union, *Colegio de Enfermeras con Servicio de Salud Metropolitano Sur*, the National Comptroller states if there is any evidence about sexual harassment, there must be an inquiry.

Legal arguments made in Labour Inspectorate cases were more elaborate, citing CEDAW,⁵²⁵ the American Convention on Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights.⁵²⁶

In *Inspección del Trabajo Santiago Poniente con Méndez*⁵²⁷ and *Inspección del Trabajo con Envases Exportables*,⁵²⁸ the facts spoke of a pattern of ill-treatment consisting of offensive language, lewd remarks and name-calling, all considered violations of personal integrity rights and of the right to honour and reputation. In the first case the court ordered the target reinstated to her shift, that had been changed in retaliation by the employer.⁵²⁹

In *Inspección del Trabajo Santiago Poniente con Méndez*, the judge agreed that behind the incident at issue was an ongoing pattern of ill-treatment by an employer who indulged in calling female workers “sluts”. The judge wrote that in addition to tolerating their employer’s obnoxious disposition, female workers were expected to act submissively, a context in which employer behaviour placed an additional burden on them. The judgment found an attitude of “contempt” in employer language that was scornful of women.

⁵²⁵*Dirección del Trabajo con Juez Titular del Noveno Juzgado del Trabajo de Santiago*, *supra* note 348.

⁵²⁶*Inspección del Trabajo Santiago Sur Oriente con Envases Exportables Ltda.*, *supra* note 485.

⁵²⁷*Inspección del Trabajo de Santiago Poniente con Mario Edison Méndez Soto*, *supra* note 415.

⁵²⁸*Inspección del Trabajo Santiago Sur Oriente con Envases Exportables Ltda.*, *supra* note 485.

⁵²⁹*Inspección del Trabajo de Santiago Poniente con Mario Edison Méndez Soto*, *supra* note 415.

In *Inspección del Trabajo con Envases Exportables*, the Labour Inspectorate framed its case under gender and racial discrimination parameters, as a hostile work environment was compounded by racial slurs. The trial judge deemed the employer's language pejorative and harmful to the target's dignity, but dismissed the sexual harassment complaint. After an isolated incident, he noted, the target had successfully prevented further unwanted physical contact by eschewing close proximity. The judge did not ponder the sexualized language used against the target, thereby obscuring the issue of gender discrimination.

4. Discussion

Labour courts are a key mechanism for redress of sexual harassment. Other potential remedies, such as the writ for the protection of constitutional rights, do not apply to violations in the context and course of employment. And in some cases, the nature of sexual harassment may fall under the purview of criminal law.

The data shows that a decade after sexual harassment legislation was introduced in Chile, litigation has dwindled. The number of cases rose just before enactment, peaked in the following two years, then dropped noticeably afterwards. The same is true for complaints processed by the Labour Inspectorate.⁵³⁰ While reasons remain unclear, a plausible explanation may be that efforts by women's organizations and government institutions such as the Department on the Women Services (SERNAM) lost momentum in the wake of the vigorous information, prevention and education drives that complemented legislative enactment. Another explanation may well be that

⁵³⁰ See below Chapter 3, section 3.8.

lawyers are warning clients of the barriers and costs associated with the constructive dismissal option.

Decreases in litigated cases have also been noted in the United States and Germany.⁵³¹ In Australia, human rights commissions report fewer complaints,⁵³² while some French women have been sued for libel after losing a sexual harassment case.⁵³³ A German study reports that in a decade a mere 21 targets brought actions through the labour courts.⁵³⁴ In Belgium, in a 2011 report on the use of law on violence at work including psychological and sexual harassment, the specialized units on prevention of psychosocial hazards received many more informal than formal complaints.⁵³⁵ While German unions play a pivotal policy role and have internal grievance processes in place to foster prevention, education sessions are voluntary and as such have little effect. German unions have not actively taken up the cause of sexual harassment, considered divisive in a male sexist culture pervaded by union politicking, demobilization, and resistance to change.⁵³⁶ Yet, as seen in Chilean cases, union involvement can be crucial when they resolve to support legal action or otherwise protect workers from discriminatory treatment.

a. The Gender Dimension

There are clear gender differences in how sexual harassment cases are handled, perceived, and legally structured. Player composition shows that all cases involved female targets and most

⁵³¹Zippel, *supra* note 106

⁵³²Anita Mackay, "Recent Developments in Sexual Harassment Law: Towards a New Model" (2009) 14:2 Deakin Law Review 189.

⁵³³Zippel, *supra* note 106 at kindle loc. 168.

⁵³⁴*Ibid.* at loc. 2507.

⁵³⁵SPF Emploi, *supra* note 187 at 30-31.

⁵³⁶*Ibid.* and Zippel, *supra* note 106 at kindle loc. 2547 and 3610.

perpetrators were men. Also shown is that reporting sexual harassment had a chilling effect on targets. Most were reprimanded, fired or forced out for reporting or refusing unwanted sexual advances, yet only some perpetrators lost their jobs.

The conducts described matched the literature. Targets endured lewd or obscene language, unwanted physical contact, unwelcome solicitation, sexual innuendo, or even attempted sexual assault.⁵³⁷ Culprits included colleagues, supervisors, and employers. Also evident is the toll sexual harassment takes on mental health. The evidence shows that once sexual advances were first declined harassment changed in nature, often resulting in a toxic work environment.

The literature also shows that mortified targets tend to conceal their experience.⁵³⁸ Most also fear the reaction of their male partners, the targets feeling are that they somehow encouraged or were to blame for perpetrator behaviour. Perpetrators, for their part, dread sexual harassment allegations being made public because of the impact on their reputation, spouses, and families.

Interestingly, more perpetrators than targets opt to litigate. Whether more are fired than targets using legal remedies is difficult to ascertain. Zippel notes that Pflügger and Baer reviewed a decade's worth of litigation in German labour courts and found that fully 77 percent involved

⁵³⁷Perán Quesada, *supra* note 83; Amy Blackstone, Christopher Uggen & Heather McLaughlin, "Legal Consciousness and Responses to Sexual Harassment" (2009) 43:3 Law & Society Review; Paula McDonald, "Workplace Sexual Harassment 30 Years on: A Review of the Literature" (2012) 14:1 International Journal of Management Reviews 1, MacKinnon, *Sexual Harassment of Working Women: a Case of Sex Discrimination*, *supra* note 20 among others.

⁵³⁸Hilbert, *supra* note 192; Carrasco Oñate & Vega López, *supra* note 243.

fired harassers claiming wrongful dismissal.⁵³⁹ In Canada, Faraday found perpetrators successfully reversing disciplinary action.⁵⁴⁰

Just as important is understanding sexual harassment in workplace contexts and the legal scope on quid pro quo and hostile work environments. Sexual harassment is a relatively new concept in Chilean law. As opposed to other jurisdictions, it is limited to the workplace and governed by labour relations. It is framed as a violation of worker dignity and, as both women and men can be targets of unwanted sexual advances, it has no explicit gender dimension. The Chilean doctrine, on the other hand, situates sexual harassment as an issue of discrimination against women, leaving it to judges to grapple with legal texts and doctrinal positions to build a judicial understanding of it.

In contrast with the American model transplanted elsewhere,⁵⁴¹ Chilean women do not have to prove membership in a protected class; i.e., that the reason for sexual harassment is their gender and that the harassment is a form of gender discrimination and violence.⁵⁴² Gamonal and Guidi⁵⁴³ as well as Caamaño argue that only under certain circumstances can sexual harassment be an issue of sex or gender discrimination⁵⁴⁴ and that same-sex harassment is not an issue judges are asked to confront.

⁵³⁹Zippel, *supra* note 106 citing Pflügger and Baer's review of labour court litigation in 1994-2004, at Kindle location 2504.

⁵⁴⁰Fay Faraday, "Dealing with sexual harassment in the workplace: the promise and limitations of human rights discourse" (1994) 32:1 Osgoode Hall Law Journal 33-63.

⁵⁴¹For instance, India and Israel, see Daphne Barak-Erez & Jayna Kothari, "When Sexual Harassment Goes East: Feminism, Legal Transplantation, and Social Change" (2011) 47:1 Stanford Journal of International Law.

⁵⁴²Abrams, *supra* note 39.

⁵⁴³Gamonal Contreras & Guidi Moggia, *supra* note 264 at 217.

⁵⁴⁴Caamaño Rojo, *Código del Trabajo. Sistematizado con Jurisprudencia*. Vol. I, *supra* note 273 at 122.

Same-sex harassment cases do not entail heterosexual discrimination of gays or lesbians because of nonconformity, as Halley describes,⁵⁴⁵ and may instead be explained using the theory of desire, power, or heterosexist dynamics.⁵⁴⁶ While perpetrators are fired,⁵⁴⁷ constructive dismissal is not upheld if harassment or employer liability is not proven.⁵⁴⁸

Gendered constructions of sexual harassment are put to the test in *Mandiola con Inmobiliaria Inversalud*, where a judge had to assess both the complexities of same-sex harassment and a perpetrator's reduced mental competence.⁵⁴⁹ The plaintiff was accused of making lewd comments and attempting to kiss a co-worker. While the facts were proven, the case was dismissed because the judge considered dismissal excessive due to mental health issues and the internal investigating procedure. *Obiter dictum*, he noted:

Had the interaction taken place between individuals of unequal standing, or between man and woman, sexual harassment would be plain to see. But in the case at hand, the harasser is an individual who is not normal. To this writer, the harassment was not so serious as to warrant dismissal, having due regard to the offender's diminished mental and intellectual abilities. Rather than deliberate or conscious, her conduct appears impulsive and driven by her condition. She needs appropriate health care treatment, re-education and support. The incident is undeniably serious when it happens between any two normal individuals, but in this case the offender's mental condition lessens her liability.⁵⁵⁰

⁵⁴⁵Janet Halley, "Sexuality Harassment" in Wendy Brown & Janet Halley, eds., *Left Legalism/Left Critique* (Durham: Duke University Press, 2002) 80-104.

⁵⁴⁶Abrams, *supra* note 39 at 1225-1229 and accompanying notes. Abrams examines U.S. doctrine on how to offer a theoretical frame and assess the legal constructions for litigation purposes.

⁵⁴⁷*Marcela Pérez Laguna con Centro Médico 18 de September*, *supra* note 367; *Ximena Reyes con Arcos Dorados Restaurantes de Chile Ltda. (McDonald Restaurants)*, *supra* note 479.

⁵⁴⁸*Marcela Pérez Laguna con Centro Médico 18 de September*, *supra* note 367; *Giselle Maturana Lastra con Sociedad Comercial Maicao Limitada* Corte de Apelaciones de Santiago, 2008.

⁵⁴⁹The worker had been hired under a special program for persons with disabilities.

⁵⁵⁰*Claudia Mandiola Durán Inmobiliaria Inversalud S.A.*, *supra* note 437 at para 9, "Que si dicha conducta se hubiere producido entre personas de diversa jerarquía, o de un hombre a una mujer o viceversa, se configuraría claramente un acoso sexual. Pero en la especie, se trata del acoso de una persona que no es normal. Que a juicio de este sentenciador, el hecho descrito no tiene la gravedad suficiente que ameritara la drástica sanción de despido unilateral de la trabajadora, atendida su condición mental e intelectual disminuida, no se trató de un *acoso* premeditado o efectuado en forma consciente por la actora, fue un acto impulsivo producto de su condición

This case may also be representative of Fraser's dilemma between cultural recognition and socioeconomic redistribution.⁵⁵¹ Given a vulnerable perpetrator with mental health issues, the judge stood for redistribution. Cultural recognition or group identity –being a lesbian, same-sex harassment– were not the issue. The concern seemed to be that a sense of duty in protecting the class of the disenfranchised will prevail in labour courts.

Preliminary results in this chapter were presented to a panel of Chilean judges in May 2014. One, noting that same-sex harassment has an elevated level of complexity, related having had a hard time figuring out whether a perpetrator was fired because she was a lesbian, as she claimed, or because of sexual harassment, as her employer claimed. As she recounted her efforts to get the parties to settle,⁵⁵² the judge said that she was well aware that, as described in the literature, gays and lesbians are more vulnerable to discrimination.⁵⁵³

Most judges agree that *quid pro quo* renders sexual harassment cases more clear-cut. As such, proving the conduct is the crux of the issue. Sexual harassment runs the gamut of physical and non-physical contact, but when unwanted physical contact or remarks come with no explicit threats to job security, judges may have a hard time recognizing them as sexual harassment. The same holds true for hostile work environments. Many factors are balanced when adjudicating

subnormal, por lo que se necesitaba del establecimiento de salud un tratamiento más acorde a su estado de salud, pudiendo ejercer acciones de reeducación y encauzamiento de su afección mental, más bien una acción de apoyo a las personas involucradas. El hecho objetivamente es grave entre personas normales, pero resulta atenuado por la condición mental de la actora."

⁵⁵¹Nancy Fraser, "Penser la justice sociale: questions de théorie morale et de théorie de la société", *Qu'est-ce que la justice sociale? Reconnaissance et distribution* (Paris: Editions La Découverte, 2005) 43-69.

⁵⁵² Discussion during presentation of preliminary results to judges. May 12, 2014. Instituto de Estudios Judiciales.

⁵⁵³Halley, *supra* note 545.

target and perpetrator claims. Once objectionable conduct is determined, courts ponder pervasiveness, extent, and target and perpetrator rank.

Some decisions are illustrative of perceptions about target-perpetrator power dynamics and threats to employment opportunities or working conditions.⁵⁵⁴ For example, if they feel that a perpetrator lacks the power to promote or fire a target or otherwise manage the workplace, judges tend to dismiss claims. Perpetrators in *Mandiola con Inmobiliaria Inversalud*,⁵⁵⁵ *Ulloa con La Cuarta*,⁵⁵⁶ *González con Nexxo*,⁵⁵⁷ *Ponce con Rojas*,⁵⁵⁸ and *Bravo con Constructora Ecomac S.A.*⁵⁵⁹ were all found to have been wrongly dismissed because their conduct, while substantiated, did not involve quid pro quo. Judges narrowly read that working conditions are only damaged when the power to control is present. This is echoed in the literature, which shows that some judges fail to grasp the role of entrenched sexism in creating a hostile work environment.⁵⁶⁰ As such, from a gender perspective, not enough attention is paid to how workplace structures and organization can result in informal mechanisms intended to control and subordinate women.

When reviewing constructive dismissal decisions argued on sexual harassment grounds, judges must gauge if the conduct was vexatious enough to leave the worker no other option. No clear

⁵⁵⁴*Labour Code*, Article 2: “[...] el acoso sexual, entendiéndose por tal el que una persona realice en forma indebida, por cualquier medio, o requerimientos de carácter sexual, no consentidos por quien los recibe y que amenacen o perjudiquen su situación laboral o sus oportunidades de empleo.”

⁵⁵⁵*Claudia Mandiola Durán Inmobiliaria Inversalud S.A.*, *supra* note 437.

⁵⁵⁶*Victor Ulloa con La Cuarta*, *supra* note 426.

⁵⁵⁷*Paulo González Pérez con Nexxo S.A.*, *supra* note 424.

⁵⁵⁸*Erica Ponce Rojas con Sindicato No 3 de la Empresa Minera Sur Andes Ltda. Planta El Cobre y Mina El Soldado*, *supra* note 371.

⁵⁵⁹*Jaime Bravo Díaz con Constructora Ecomac S.A.*, *supra* note 467.

⁵⁶⁰Carrie Bond, "Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace" (1997) 65 *Fordham L. Rev.* 2489; Schultz, [Sex is the Least of It], *supra* note 35; Emily A. Leskinen & Lilia M. Cortina, "Dimension of Disrespect: Mapping and Measuring Gender Harassment in Organizations" (2014) 38:1 *Psychology of Women Quarterly* 107.

trend emerges on what “vexatious enough” may be, bringing to mind the standard of reasonable endurance and tolerance of ill treatment discussed in North American doctrine and common law jurisdictions.⁵⁶¹ Chilean case law and doctrine do not state what *unwelcome* entails or how vexatious a conduct must be.⁵⁶² As noted, certain behaviours found unacceptable by some judges⁵⁶³ do not rise to the level of harassment for others. For some, the issue seems to turn around labels: inappropriate, inadequate, vexatious, but not enough to be labelled sexual harassment. A case in point is *Marín con Chilexpress*, where the trial judge considered unwanted physical contact vexatious but, since the perpetrator made no sexual demands, not sexual harassment.⁵⁶⁴ This is described by Hébert in recent U.S. case law that considers that some degree of distress in workplace relations is to be expected.⁵⁶⁵ In non-sexual harassment cases, the courts and the doctrine require serious consequences to allow an employment relationship to end.⁵⁶⁶

Humour, double entendre and sexist language are normalized and imposed under the pretext of a relaxed work environment. Targets are expected to take it in their stride to show they are part of the crowd or risk being called too straitlaced for the workplace.⁵⁶⁷

⁵⁶¹Abrams, *supra* note 39; Kaitlyn Matulewicz, "Law and the Construction of Institutionalized Sexual Harassment in Restaurants" (2015) May 2015 Canadian Journal of Law and Society/Revue Canadienne Droit et Société 1; Howes, *supra* note 85; Bond, *supra* note 560.

⁵⁶²Gamonal argues that the Courts must use a reasonable woman standard to assess the severity and effect of harassment. Gamonal Contreras & Guidi Moggia, *supra* note 264.

⁵⁶³*González Miranda con Rodríguez Peñaloza Cia. Ltda.*, Corte de Apelaciones de Santiago, 2008 and *César González Pezoa con Cesmec*, *supra* note 448.

⁵⁶⁴*Manuel Marín Aroca con Chilexpress S.A.*, *supra* note 427.

⁵⁶⁵L. Camille Hébert, "Conceptualizing Sexual Harassment in the Workplace as a Dignitary Tort" (2014) 75 Ohio St. L.J. at 1345 footnote 60.

⁵⁶⁶Humeres Noguera, *supra* note 270; Caamaño Rojo, *Código del Trabajo. Sistematizado con Jurisprudencia*. Vol. III *supra* note 285 at 1357.

⁵⁶⁷Beth A. Quinn, "The Paradox of Complaining: Law, Humor, and Harassment in the Everyday World" (2000) 25:4 Law & Social Inquiry; Justine E. Tinkler, "Resisting the Enforcement of Sexual Harassment Law" (2012) 37:1 Law & Social Inquiry 1.

Some judges downplay the conduct under scrutiny in order to preserve a perpetrator's job, noting that sexual harassment allegations impose a burden of proof similar to that of criminal offenses. The problem seems to be more acute when sexual harassment becomes entangled with criminal law, as happened in Israel with a high-ranking officer convicted of kissing a young officer in the Prime Minister's Office. Detractors criticized using criminal law and the courts to prosecute an innocent kiss and bring a romance to an end.⁵⁶⁸

Target and perpetrator positions are clearly different when the significance and magnitude of the harassment endured are assessed. The combination of the applicable legal rules and the principles behind those rules make targets defending their rights vulnerable. The breach claimed must be extremely serious before an employer can discharge a perpetrator, just as serious as that asserted by targets who quit and claim redress and severance pay. Length of employment of the perpetrator in sexual harassment and other cases, is important for labour courts that consider dismissal a last resort.⁵⁶⁹

Targets use constructive dismissal to extricate themselves from a state of affairs they can't or won't suffer any longer. As described, the test that workers must satisfy for a court to declare resignation a consequence of employer breach is strict.⁵⁷⁰

Targets must prove both the severity of the misconduct and employer liability. If the employer knew of the misconduct, were measures adopted to stop it? Was it investigated? Was the target

⁵⁶⁸Barak-Erez & Kothari, *supra* note 541 at 189-196.

⁵⁶⁹Caamaño Rojo, *Código del Trabajo. Sistematizado con Jurisprudencia*. Vol. III, *supra* note 285 at 1347-1360.

⁵⁷⁰Charles Dale, *Sexual Harassment and Violence Against Women: Development in Federal Law* (New York: Nova Science Publishers, Inc., 2005).

complaint ignored? Employers who provide evidence that they ordered or conducted an inquiry, changed target or perpetrator shifts or duties, or directed alleged perpetrators to keep away from the target can meet standards of care. Whether a target considers any such steps unsatisfactory is for the judge to decide. If a target does not avail herself of internal mechanisms, employers will be less likely to be found at fault. The same applies if management has followed company regulations and procedure. As such, it works to a firm's advantage to have regulations in place and their purpose should be central to the effectiveness of dealing with sexual harassment.⁵⁷¹

Chilean firms are required by law to have harassment regulations in place, but procedures designed to diminish liability or dismiss staff at will rather than address gender inequality, discrimination or violence in the workplace, do not serve the intended purpose. As in *Riveri con FUCOA*,⁵⁷² employers are required to prove having gained knowledge of a relevant situation either informally or through a written complaint under company regulations.

Studies in the United States indicate that the primary line of employer defense is to dispute liability by arguing that a complaint system which the target failed to use was in place,⁵⁷³ as in the Chilean case of *Evelyn Valenzuela Pérez con Farmacología en Acuicultura Veterinaria*, where the trial judge awarded costs to the employer.⁵⁷⁴ Employers also claim to have taken the steps established in policy, including investigations or in-house sexual harassment prevention

⁵⁷¹ See Gamonal, *supra* note 440, Gamonal Contreras & Guidi Moggia, *supra* note 264.

⁵⁷² *Dginnia Giovanna Riveri Cerón con Fundación Comunicaciones Cultura Capacitación Agro*, *supra* note 295.

⁵⁷³ Dale, *supra* note 570, David B. Oppenheimer, "Employer Liability for Sexual Harassment by Supervisors" in MacKinnon Catherine & Reva B. Siegel, eds., *Directions in Sexual Harassment Law* (New Haven: Yale University Press, 2004) 272-289.

⁵⁷⁴ *Evelyn Valenzuela Pérez con Farmacología en Acuicultura Veterinaria FAV S.A.*, *supra* note 367.

and training, even if their effectiveness is not properly ascertained.⁵⁷⁵ In Uruguay, before special provisions on sexual harassment were enacted, the courts found employers liable if they knew of the harassment but failed to address it.⁵⁷⁶ As noted, in recent U.S. case law, Hébert found some judges declare that workplace relations entail some forms of distress, dismissing tort liability.⁵⁷⁷

When constructive dismissal is the only true remedy available, targets are unlikely to win as the onus is on them to convince judges of serial breaches. As such, the criteria to succeed in constructive dismissal cases creates a major barrier for access to justice in a legal system and culture disinclined to use tort law against perpetrators. If there is cause for tort action, why not follow the U.S. or Canadian model of suing perpetrators and letting targets recover from employers as well as perpetrators.⁵⁷⁸ Litigating against coworkers seems futile in terms of costs and actual recovery of damages, but also because it depoliticizes and transforms sexual harassment from a structural workplace issue in sore need of addressing into an individual responsibility. This is not to say that targets should not pursue the civil or criminal liability of perpetrators,⁵⁷⁹ as some have indeed done.⁵⁸⁰

⁵⁷⁵Hébert, *supra* note 565, Bond, *supra* note 560, Susan A. Munkres, "Claiming "Victim" to Harassment Law: Legal Consciousness of the Privileged" (2008) 33:2 *Law & Social Inquiry* 447; MacKinnon, [Beyond Moralism], *supra* note 193, Dale, *supra* note 570. Oppenheimer discusses how vicarious liability could be reduced but not eliminated, see Oppenheimer, *supra* note 570.

⁵⁷⁶María Cristina Mangarelli, "La ley de acoso sexual en el Uruguay y su aplicación práctica" (2012) 7 *Estudios laborales / Sociedad Chilena de Derecho del Trabajo y de la Seguridad Social* 51 at 54-55.

⁵⁷⁷Hébert, *supra* note 565 at 1359 and accompanying note 60.

⁵⁷⁸For Canada, Demeyere discusses why tort lawsuits offer more advantages than human rights agencies. Gillian Demeyere, "Common Law Actions for sexual harassment. The jurisdiction question revisited" (2002-2003) 28 *Queen's Law Journal* 637-664.

⁵⁷⁹Gamonal Contreras & Guidi Moggia, *supra* note 264 at 223. The authors explicitly mention harasser liability.

⁵⁸⁰Demeyere, *supra* note 578; Barak-Erez & Kothari, *supra* note 541. See also, below Ch. 3, section 3.3.

In Uruguay, tortious damages against employers were admitted first in the doctrine, then accepted by labour courts.⁵⁸¹ A study on U.S. case law on compensation and punitive awards on sexual harassment cases indicates that targets sue employers with no correlation concerning harassment type or severity.⁵⁸² In fact, awards are lower for harassment involving physical contact. The authors conjecture that this could be because the mere fact of touching women is devalued and fired workers get lower awards than those forced to quit.⁵⁸³ Sunstein and Shih propose a schedule of damages resembling workers' compensation or graded civil fines administered by an agency,⁵⁸⁴ while in the U.S. Resnik looks into having the Equal Employment Opportunity Commission and the Occupational Safety and Health Administration join forces to address discrimination, violence and sexual harassment as key to a safer workplace.⁵⁸⁵

Another essential issue is the legal architecture of sexual harassment. In common-law jurisdictions, cases are dealt with by human rights commissions or special administrative agencies under anti-discrimination and/or criminal litigation and torts law.⁵⁸⁶ In Chile, most cases are handled within a labour dispute resolution system whose guiding principle is protecting

⁵⁸¹Mangarelli, *supra* note 576 at 54.

⁵⁸²Cass R. Sunstein & Judy M. Shih, "Damages in Sexual Harassment Cases" in Catharine A. MacKinnon & Reva B. Siegel, eds., *Directions in Sexual Harassment Law* (New Haven: Yale University Press, 2004) 324-344. Although the introduction does not state a time frame, examination shows results from 1983 to 1997. As the authors note, the limitation is that most are appellate-level decisions.

⁵⁸³*Ibid.* at 332.

⁵⁸⁴*Ibid.* at 337.

⁵⁸⁵Judith Resnik, "The Rights of Remedies: Collective Accountings for and Insuring Against the Harms of Sexual Harassment" in Catherine MacKinnon & Reva B. Siegel, eds., *Directions in Sexual harassment law* (New Haven: Yale University Press, 2004) 247-271 at 264.

⁵⁸⁶For example, administrative agencies in Australia, Canada or the United States Sara Charlesworth *et al.*, *Formal Complaints of Workplace Sexual Harassment Lodged with Australian Human Rights and Equal Opportunity Commissions 1 July 2009 – 31 December 2009* (Adelaide: Centre for Work + Life, University of South Australia., 2012); Paula McDonald & Sara Charlesworth, "Workplace Sexual Harassment at the Margins" (2015) *Work, Employment and Society* 1; Arjun Aggarwal & Madhu Gupta, *Sexual harassment: A Guide to Understanding and Prevention*, 2nd ed. (Markham: LexisNexis Butterworths, 2006); Langevin, *supra* note 77; Mackay, *supra* note 532.

both the weak, i.e., workers, and job stability.⁵⁸⁷ As such, it is a system that regards dismissal as a last resort –which is why, if an employer had other, less serious disciplinary options, judges may not agree that dismissal was justified. In France, Saguy also notes that, unlike the United States, the main form of target redress is labour dispute adjudication and criminal prosecution.⁵⁸⁸ That said, in France criminal sexual harassment provisions were repealed in 2012 by the Conseil d’État.⁵⁸⁹ President Hollande presented an amended bill that was able to overcome the constitutional issues raised by the Conseil d’État. Sexual harassment in France is now a criminal offense that could lead to two years imprisonment and a fine of 30 thousand euros.⁵⁹⁰ In Mexico, 20 years after sexual harassment became a criminal offense, González posits there has not been a single indictment nor judgment on that count, questioning the usefulness that the criminal approach may have.⁵⁹¹ In Belgium, judges and labour auditors interviewed to evaluate the law declared that too many recourses, including anti-discrimination legislation, give a false sense of hope for the workers.⁵⁹²

Employers who fear that conducting an investigation is too cumbersome, that they may face a protracted court fight, or that the perpetrator has a chance to win, may be more inclined to refrain from firing, effectively leaving targets with the option to put up or shut up. This issue is raised in Carrasco and Vega.⁵⁹³ Labour laws structured on asymmetrical power relations can stand to

⁵⁸⁷Gamonal Contreras, *Fundamentos del Derecho Laboral*, *supra* note 270 at 115-120.

⁵⁸⁸Saguy, [French and American Lawyers Define], *supra* note 107.

⁵⁸⁹*Décision n° 2012-240 QPC*, *supra* note 114

⁵⁹⁰*Loi n° 2012-954 du 6 août 2012 relative au harcèlement sexuel* (France: 2012).

⁵⁹¹Gerardo González Ascencio, "Cuarenta notas sobre el delito de hostigamiento sexual en México" (2011):77 *Alegatos* 63 at 68-69.

⁵⁹²SPF Emploi, *supra* note 187 at 62.

⁵⁹³Carrasco Oñate & Vega López, *supra* note 243; Kelly Woodford & Harry Rissetto, "The Best Advice for Sexual Harassment Victims: Don't Complain, Just Quit and Sue, Take Two" (2004) 55:4 *Labour Law Journal* 213; Stephen F. Befort & Sarah J. Gorajski, "When Quitting Is Fitting: The Need for a Reformulated Sexual

benefit harassers who challenge dismissal more than women who struggle for equality.⁵⁹⁴ If judges see firing as a last resort, constructive dismissal on sexual harassment grounds could also be seen as a last resort.

This study shows that court settlements are also gendered. As noted in Table 2, three out of four times, they involved targets. In terms of monetary awards, the difference over perpetrator settlements is qualitative as well as quantitative. These numbers may indicate that women are more willing to settle than men or that they have “better cases”. Male plaintiffs may be less disposed to settle because awards fall short of expectations, while employers may be less likely to negotiate with perpetrators, trusting on the strength of their cases. In a cohort of sexual harassment cases filed in England as discrimination cases, Howes found that 46 percent had been withdrawn and 36 percent agreed to settle.⁵⁹⁵ Howes ventures that the high rate of withdrawals may be the result of out-of-court settlements.⁵⁹⁶

Although lawyers may not always like conciliation or alternative dispute resolution,⁵⁹⁷ the fact remains that significant numbers of plaintiffs across jurisdictions do settle.⁵⁹⁸ My own results show that even when targets in constructive dismissal cases are unsuccessful, conciliation within a litigation strategy is an effective alternative. In practice, judges propose certain terms to reach

Harassment/Constructive Discharge Standard in the Wake of *Pennsylvania State Police v. Suders*" (2006) 67 Ohio State Law Journal 593.

⁵⁹⁴Zippel, *supra* note 106.

⁵⁹⁵Howes, *supra* note 85 at 205.

⁵⁹⁶*Ibid.*

⁵⁹⁷Shestowsky & Brett, *supra* note 235; Bond, *supra* note 560; Galanter, *supra* note 177.

⁵⁹⁸Howes, *supra* note 85, Charlesworth *et al.*, *supra* note 586, Sandy Welsh, Myrna Dawson & Elizabeth Griffiths, *Sexual Harassment Complaints to the Canadian Human Rights Commission* (Ottawa: Status of Women Canada, 1999).

an agreement; if judges perceive the target as a victim it is likely they will be prone to giving a more sympathetic treatment to the target when making the basis for the proposal.⁵⁹⁹

Tutela was envisioned as a legal option with the potential to transform workplace culture by facilitating adoption of measures intended to change interactions among -and between- workers and employers. As the Labour Inspectorate was vested with litigating powers, its actions show *tutela* actions being increasingly used as a transformative tool whenever employers are called to account beyond immediate harm to the target.⁶⁰⁰ Yet, *tutela*'s full transformative potential, at least as far as the Inspectorate is concerned, is diminished as only a handful of cases have been litigated.

Tutela actions were also designed as a means to safeguard working conditions. Yet, results reveal little such use, with litigants tending rather to avail themselves of *tutela* actions after employment is terminated, a point where reparations are equated with monetary compensation. This is in line with the views of labour scholars.⁶⁰¹

Information sessions on sexual harassment and women's rights are indicative that sexual harassment is a public harm that negates the enjoyment by women of civil, healthy workplaces. While sometimes expressed in the settlement⁶⁰² or during trial pleadings,⁶⁰³ the fact remains that few private litigants incorporate a collective dimension into their claims.

⁵⁹⁹ See below in Chapter 3 section 3.5.2.2 on judges' opinions on the use of conciliation.

⁶⁰⁰ For example, *Dirección del Trabajo con Sociedad Subiabre Díaz*, *supra* note 415.

⁶⁰¹ Daniela Marzi, *La garantía y reparación no monetaria de los derechos fundamentales en el trabajo. Un estudio del sistema español en relación con el caso chileno*. (PhD Thesis, Universidad Autónoma de Madrid, [unpublished]. and Chapter 3 section 3.5.2.2.

⁶⁰² *Elizabeth Esquerra con Jazzplat Chile Call Center Limitada*, *supra* note 414.

⁶⁰³ *Jimena Jalil Ponce con Constructora Angostura Limitada*, *supra* note 358.

Some writers feel that mandatory training and education may have limited community impact. In an empirical U.S. study, Tinkler found that employer-led sexual harassment education and training may detract from the political transformation process.⁶⁰⁴ Munkres further argues that lectures on civil rights and sexual harassment may dilute the notion of rights, and can be used to advantage by employers looking to reduce liability.⁶⁰⁵ Although the risks exist, the rights-based discourse is so underrepresented in Chile that any training session is a potentially powerful tool for workers to become aware of laws designed to protect them as we have seen in Table 4.

That said, employers do try to circumvent the spirit of the law. A case in point was my own participation as speaker in a court-ordered seminar in May 2014. The case involved two law professors who sued their former law school on sex discrimination grounds. The terms of the agreed settlement called for the law school to host a seminar entitled “The Role of Women in the 21st Century: Fundamental Rights and Discrimination”.⁶⁰⁶ The school scheduled the event at 6:30 pm on a Friday and charged admission. One of the plaintiffs sought to have her counsel challenge the school’s good faith in court. Her counsel declined, she did it on her own, and won.⁶⁰⁷

One of the key questions in this dissertation was whether under Chilean doctrine and case law sexual harassment tended to involve claims founded on arguments of gender equality, worker dignity, or both. The results reveal scant legal arguments from litigators and judges. Dignity

⁶⁰⁴Tinkler, *supra* note 567.

⁶⁰⁵Munkres, *supra* note 575.

⁶⁰⁶La valorización de la Mujer en el Siglo XXI. Vulneración de Derechos Fundamentales y Discriminación Femenina.

⁶⁰⁷M. S., *Lawyer* 2014. May-July 2014.

captures the nature of the harm done because pleas make a straightforward case that sexual harassment affected a plaintiff's mental health or her right to privacy and sexual autonomy. There is insufficient development of legal arguments connecting sexual harassment to questions of discrimination or women's equality. Dignity as a value is recognized throughout case law, but it lacks prescriptive value and most judges do not build a gendered approach into their decisions. When perpetrators defend themselves, there are few competing rights claims, as in U.S. doctrine, between equality and free speech.⁶⁰⁸

It may be that long-standing practices of formulating arguments based on the *Labour Code* make it easier for labour lawyers to build a case without the need to go beyond reciting legal provisions or proposing constitutional arguments to make the links between sexual harassment and the infringed human rights—take the law professors' counsel who disagreed with them on how to frame their case.⁶⁰⁹ In Galanter's words it would mean making a distinction between what the claimant wants to pursue and how this could be framed in legalese depending on the remedy.⁶¹⁰ As such, the theoretical debate on equality, discrimination and dignity advanced by numerous scholars does not seem to be at issue here.⁶¹¹ With litigation driven by specifics, it would appear that tangible harm to mental health and equality requires arguments that are more political than formal in scope. The inclusion of dignity in a definition of sexual harassment, as stated by Numhauser-Henning, does not provide any added value to substantive sex

⁶⁰⁸Faraday, *supra* note 540; Jack M. Balkin, "Free-Speech and Hostile Environment " in Catharine A. MacKinnon & Reva B. Siegel, eds., *Directions in Sexual Harassment Law* (New Haven: Yale University Press, 2004) 437-454, Barak-Erez & Kothari, *supra* note 541.

⁶⁰⁹Interview S. and personal observation, May 2014.

⁶¹⁰Galanter, *supra* note 177.

⁶¹¹Abrams, *supra* note 39; Saguy, *supra* note 108; Oré-Aguilar, *supra* note 101, Demeyere, *supra* note 578, Friedman & Whitman, *supra* note 104, Baer, *supra* note 86, Kamir, *supra* note 87; Linda Clarke, "Sexual Harassment Law in the United States, the United Kingdom and the European Union: Discriminatory Wrongs and Dignitary Harms" (2007) 36:2 *Commonwealth Law Review* 79; Hébert, *supra* note 565.

discrimination, and consequently amending definitions would not necessarily lead to greater gender justice.⁶¹²

Conclusions

Litigation is costly and targets of sexual harassment face a range of barriers, from recognizing themselves as such to using a variety of strategies to cope and endure. But legislation does not provide structural policy guidance for the workplace. Sexual harassment remedies have been limited to workplace and labour legislation contexts, which limits action against perpetrators other than, in some cases, criminal prosecution.

In labour legislation designed to protect workers from wrongful dismissal, termination is an ultima ratio measure.

Workplace regulations⁶¹³ could be more creative. Rather than be content with labelling and pigeon-holing the nature of misconduct, they could provide a range of penalties for perpetrators of sexual harassment. This could be a more helpful option, as it might allow employers to raise a timely red flag without resorting to dismissal. And if the law is to truly protect employment stability, judges ought to ponder the extent of the harm inflicted and issue a proportionate response. Moreover, specifying in the workplace regulations details about the range of conducts constituting sexual harassment such as offensive remarks or sexualized language would help

⁶¹²Numhauser-Henning & Laulom, *supra* note 76 at 33.

⁶¹³The internal regulation is a set of rules that govern the relations between employers and workers in the workplace, which all companies with ten or more workers must have. The law states the regulations must foster a respectful work environment. See, Art. 153, *Código del Trabajo*, *supra* note 4.

reduce discretion of employers when making a finding and would provide for a wider range of penalties, with dismissal as the last, harshest, resort.

As noted, while employers may follow procedures, it does not follow that workplace regulations have deterrent value, especially if they merely reiterate what the law states, without adding any particular value or when they are unknown to the workers. Although dignity is at the basis of many rulings, the rulings lack prescriptive value because the case law has not developed a theory on dignity and even less so in relation to equality and gender justice.

CHAPTER 3
UNDERSTANDING OF THE LAW

Introduction

The research questions outlined in chapter one deal with the aims and values that the Chilean sexual harassment law seeks to protect. Do the legal actors understand sexual harassment to be a question of equality, of non-discrimination, of dignity, or of all three? What, if anything, is implied by a preference for one of these definitions over the others? Given the array of recourses that exist, what opportunities do these remedies actually offer to targets according to the views of legal actors? What are the strategies that workers resort to when faced with the experience of sexual harassment? If sexual harassment is understood as a psychosocial hazard, what role could a firm's internal regulations play in preventing harassment in the workplace and resolving harassment claims? These questions will be addressed in this chapter.

These research concerns cannot be approached through traditional legal analytical methods, focused as these often are on doctrinal questions and normative content of legislation and case law. Instead, for present purposes, understanding of the law must reach beyond purely legal sources to incorporate consideration of how people feel about, use, and understand the law. Accordingly, socio-legal research is called for, drawing particularly on legal consciousness theories.⁶¹⁴ Traditional types of legal analysis must, then, be complemented by the use of empirical research to assess the perceptions of those who operate and experience the law. Thus workers, union representatives, labour inspectors, lawyers, judges who investigate or adjudicate

⁶¹⁴Patricia Ewick & Susan Silbey, "The Common Place of Law", *The Common Place of Law: Stories from Everyday Life* (Chicago: Chicago University Press, 1998) 15-32; Patricia Ewick & Susan Silbey, "The Social Construction of Legality", *The Common Place of Law: Stories From Everyday Life* (Chicago: University of Chicaho Press, 1998) 33-56; Susan Silbey & Austin Sarat, "Critical Traditions in Law and Society Research" (1987-1988) 21 *Law & Soc'y Rev.* 165-174; Susan Silbey, "Ideals and Practices in the Studies of Law" (1985) IX:1 *Legal Studies Forum* 7-22; Laura Beth Nielsen, "Situating legal consciousness: experiences and attitudes of ordinary citizens about law and street harassment" (2000) 34:4 *Law & Soc'y Rev.* 1055.

claims, and policymakers who determine or assess public policy implementation, are all important sources. Their opinions will be used to shed light on the usefulness and effectiveness of the law, and on the need for possible public policy reform. Similar assessment of the views and experiences of employers, while certainly relevant, lies outside the scope of the present thesis.

This chapter presents the results of empirical analysis of how sexual harassment is experienced and dealt with by women workers and by those who work with the law around sexual harassment, such as judges, lawyers, and labour inspectors. It will also discuss legal scholars' opinions and perceptions about uses and understandings of the sexual harassment law in Chile, its accomplishments, and its failures.

In this chapter, an initial methodological discussion is followed by the presentation of results from the Araucaria household survey on psychosocial hazard, conducted in Chile in 2011. A section draws on interview data, summarizing and analyzing respondents' perceptions of the prevalence of, meanings of, and responses to, sexual harassment. Finally, I will discuss the results in light of literature review.

1. Methods

Qualitative and quantitative methods of research were used for this study. The former involved individual semi-structured interviews with key informants, plus interviews with three focus

groups of women workers. An interview protocol was applied to each type of interaction.⁶¹⁵ A total of twenty individual interviews were conducted in Chile's three most populous cities⁶¹⁶ between December 2013 and March 2015. The case law for two of these cities, Santiago and Concepción, was thoroughly examined for one year.⁶¹⁷ The individual interviews explored perceptions and opinions of workers, lawyers, judges, labour inspectors, trade union leaders, labour specialists, and policymakers (see Table 1). Each participant was solely classified under one occupation or post held at the time of the interview. Several, however, held additional jobs at time of interview, or had previous experience under other categories relevant to the study (viz. having formerly or concurrently operated as policymakers, litigants under legal aid, or advocates for women's organisations and/or trades unions). Interview protocols and recruitment strategies were approved by the ethics committee of the University of Ottawa, and all participants agreed to sign a document certifying the granting of informed consent.⁶¹⁸ Interviews were conducted in Spanish, audiotaped, transcribed, and later manually coded for analysis. Two of the 19 interviews were conducted with workers –public servants- whose roles required them to conduct investigations into allegations of sexual/psychological harassment.⁶¹⁹

One was invited to participate in the focus group and was not able to arrive at the convened place but later interview as she contacted me when she was appointed to lead an investigation on sexual harassment. The second participated in one of the focus groups in Santiago and later contacted me as she had been appointed for the third time to do an investigation.

⁶¹⁵ See below annex 1, interview guide.

⁶¹⁶The country's capital, Santiago, and its second and third largest cities (Valparaíso and Concepción, respectively).

⁶¹⁷ See above, Chapter 2, Section 1.1

⁶¹⁸ See below annex 2, Ethics Committee approval.

⁶¹⁹See below annex 3, interview guide for group discussion.

Informant	N	Women	Men	Santiago	Valparaíso	Concepción
Judges	4	3	1	2	1	1
Litigants	4	3	1	3		1
Labour Inspectors	6	4	2	2	1	3
Union Representatives	1	1				1
Labour Law Specialist	1		1		1	
Policymaker	1	1		1		
Worker	2	2		2		
Total participants	19	14	5	10	3	7

Participants in the focus groups were all women workers. The focus groups were carried out in Santiago, on the premises of the Diego Portales University Law School, and in Concepción, in the meeting room of a local labour law firm's offices. The workers were drawn from both unionized and non-unionized workplaces, spread between public and private sectors, and from a range of occupational sectors including health, manufacturing, retail, services, and transport and telecommunications. They included professionals alongside qualified and unqualified workers.

Focus groups were organized in Santiago and Concepción. The focus group held in Concepción solely comprised trade union leaders, who were recruited for the study through an open invitation sent by a trade union attorney. The participants in the Santiago groups were also recruited by invitation. Invitations were sent to a union mailing list,⁶²⁰ as a general mailing to the women (only) included on a high-school parents' mailing list that was accessible to me that included women from a variety of industrial sectors, and as personalised invitations to workers in

⁶²⁰ Law students from Diego Portales Law School organize a trade union school which provides training and discussion spaces for trades unions and their workers. The school agreed to allow their mailing list to be utilised to request volunteers willing to be interviewed for the present dissertation.

the service industry attached to a particular university (namely to cleaners, security guards, and cafeteria attendants and staff). Initial planning suggested that four focus groups would be carried out, involving separate meetings with public sector and with private sector workers in each of the two target cities. However it proved unnecessary in the case of Concepción to preserve this distinction, and a single focus group sufficed to provide fluid conversation with trade union leaders from both the public and private sector. Table 2 indicates the number of participants and type of workplace the participants came from.

	Santiago	Concepción	Total
Public Health sector		1	1
Public sector other than health	2		2
Retail		1	1
Education	3		3
Telecommunication	1	1	2
Supply worker services*	2	1	3
Transportation		1	1
Lottery		1	1
Gas		1	1
Textile		1	1
Food services	2		2
Total	10	7	17

* These are not temporary agency workers, but full-time permanent workers who are supplied on a permanent subcontracting basis by agencies. In this case, the workers provided services in the retail industry.

This qualitative data was supplemented by the analysis by the author of data collected by the Araucaria household survey.⁶²¹ The survey was approved, prior to its implementation, by the

⁶²¹ Araucaria Project, “Research, Policy, and practice with Regard to Work Related Mental Health Problems in Chile: a Gender Perspective”, grant from the International Development Research Centre, on behalf of Global Health Research Initiative. See, <http://www.proyectoaraucaaria.cl/proyecto.php>. Katherine Lippel *et al.*, *Proyecto Araucaria: Work-Related Mental Health Problems in Chile: A Gender Perspective. Final Technical Report 2012*, [Araucaria Final Report]

ethics committee of the University of Ottawa and Universidad Diego Portales in Chile, as it was carried out in Chile in the context of the NGO the Centro de Estudios de la Mujer (Center for Women's Studies, CEM), and the University of Ottawa research (2007-2012).⁶²² The survey design was transversal, and it was applied at household level between 20 April and 6 July 2011.

The response rate was 57%.⁶²³ The sample design was probabilistic and stratified in four levels: i) municipalities in Chilean regions; ii) city blocks in municipalities; iii) households in city blocks, and iv), people in households. The national and representative sample included 3,010 wage-earning male and female workers (20 to 65 years of age) belonging to all socio-economic levels and residing in urban areas of Chile. The data were weighted according to the sampling frame and information from the Chilean National Institute of Statistics. Females were over-represented in the sample in order to obtain an equivalent ratio for both genders.

In interpreting survey results for the purposes of the present study, the question of privacy had to be taken into consideration. The survey was applied at the level of the household. A household survey does not guarantee an individual respondent's privacy if other members of a family are present or close by during questioning. Hence respondents' answers, particularly around sensitive issues, could be influenced by the level of privacy actually enjoyed during the interview. Disclosure of delicate information about personal or intimate issues is by definition not easy for many individuals, and a person who has been the object of sexual harassment may

⁶²² See below, Annex 2 *infra* note 5.

⁶²³ As discussed in the final report of this research project to IDRC, the requirement by the Ethics Committee of the University of Ottawa to have a signed consent form for a survey proved to be an obstacle in obtaining a larger percentage of response compared to similar surveys conducted in Chile where such requirements have not been required. Surveys in social, cultural and political context where people feel they could be identified prove to be troublesome if respondents are asked to sign a document and will have a direct impact on any social research making unfeasible, placing many burdens and even making research so costly that could not be viable.

wish to conceal the fact from the rest of his or her family. Hence it is likely that this method is better at obtaining information about harm identified as having been done to third parties, rather than directly to survey respondents.

As part of this dissertation project, I was invited to participate in the drafting of several questions included in the survey instrument as administered in 2011. Six specific questions were formulated on sexual harassment and were analyzed in cross-reference with others using Strata 12 software.⁶²⁴

Some preliminary findings of this chapter were presented at a roundtable discussion held in January 2014 at the Diego Portales Law School. This validated some of the outcomes described in this chapter.

2. Araucaria Survey Results

The Work and Mental Health Conditions Survey (the Araucaria Survey) measured psychosocial hazards in the workplace in 2011. It included questions on employment type, industry sector, working conditions, contract type, and socio-demographic data.⁶²⁵

Average sample age was 39 for both men and women, and 12 percent were of low socioeconomic status.⁶²⁶ A high share of respondents (49% of men and 51% of women) were in

⁶²⁴ See below, the Araucaria questionnaire both in Spanish and English translation in Annex 4. Professor Elisa Ansoleaga from the Universidad Diego Portales School of Psychology was awarded a Ph.D. scholarship in the context of Araucaria project has access to the full data and helped me with the statistical analysis using Strata 12 software.

⁶²⁵ Lippel *et al.*, [Araucaria Final Report] *supra* note 621.

the C3 middle socioeconomic group; 28% of men and 22% of women were in the poorest (DE) group; and 16.6% of men and 19% of women were in the upper-middle (ABC1) group.

Some 7% of the sample were in the group with the highest income level (7% of men and 7.9% of women).⁶²⁷ Less than a third of respondents reported that their family income was insufficient or were experiencing some or major trouble meeting their needs (35% of women, 29% of men).⁶²⁸

Information on women's remuneration revealed monthly personal incomes lower than men's across all occupations in spite of higher levels of education. Most women worked in the health and education, financial services and commerce sectors (33%, 26%, and 26%, respectively), while men were in the construction and transportation sectors (17%, 8%) and 11% worked in manufacturing (8% of women).⁶²⁹

A general examination of employment conditions for men and women in Chile suggests a high level of compliance with labour standards. Most workers have a signed contract (90%); an open-ended contract (80%), and social security (92%); 88 percent were directly hired by a company, and 87 percent have permanent work. However, the working conditions of women were more precarious, as were those in lower socioeconomic groups noted for more informal working

⁶²⁶Elisa Ansoleaga, Rosa Montaña & Michel Vézina, "Validation of Two Complementary Instruments for Measuring Work Stress in Chilean Workers" (2013) 5:2 *Scandinavian Journal of Organizational Psychology* at 8. Since the mid '80s in Chile major institutions that carry out market and opinion polls and studies developed criteria to categorize individuals by socio-economic status. The purpose was to avoid categories such a "class" as the expression was considered too vague, tainted with certain political narratives, and did not provide a description of the individual socio, economic and cultural conditions. Individuals are categorized according to quintiles in relation, inter alia, to access to certain good and services, education, income. See, Asociación chilena, de empresa de estudios de mercado, "Grupos socioeconómicos 2008", online: <http://www.aimchile.cl/wp-content/uploads/2011/12/Grupos_Socioeconomicos_AIM-2008.pdf>.

⁶²⁷Lippel *et al.*, [Araucaria Final Report] *supra* note 621.

⁶²⁸*Ibid.*

⁶²⁹*Ibid.*

conditions, including fewer written contracts (no gender differences), fewer indefinite contracts, and fewer workers benefitting from health insurance and pension plans.⁶³⁰

2.1 Working Climate at Work

Respondents were asked to identify a range of experiences and feelings about workplace climate and treatment (Table 3). Questions included feeling helpless in the face of unfair treatment,⁶³¹ being discriminated against or treated unjustly,⁶³² or being treated in violent or authoritarian ways.⁶³³

⁶³⁰Ibid.

⁶³¹ The Spanish question was formulated as follows: ¿Se siente indefenso/a ante el trato injusto de su superior?

⁶³² The Spanish question was formulated as follows: ¿Considera que lo/a tratan en forma discriminatoria o injusta?

⁶³³ The Spanish question was formulated as follows: ¿Considera que lo/a tratan en forma autoritaria o violenta?

Table 3 Experiences and feelings about workplace climate and treatment by sex (Percent)			
Do you feel powerless to deal with unfair treatment from superiors?			
	Men	Women	Total
Never/almost never	74,3	70,7	73,1
Some times	19,3	19,8	19,5
Many times	3,0	4,7	3,6
All the time	3,4	4,2	3,7
Do you feel you are treated unfairly or being discriminated against?			
Never/almost never	83,9	81,6	83,1
Some times	12,2	14,3	12,9
Many times	2,4	2,6	2,5
All the times	1,5	1,4	1,5
Do you feel treated violently or in an authoritarian way?			
Never/almost Never/almost never	83,5	81,2	82,7
Some times	13,5	13,2	13,4
Many times	1,9	3,5	2,5
All the time	1,1	1,9	1,4
Are workers subjected to humiliating treatment, taunts, malicious statements, verbal attacks?			
Never/almost Never/almost never	80,8	83,2	81,6
Some times	15,6	12,6	14,6
Many times	1,7	2,3	1,9
All the time	1,7	1,4	1,6

There was no significant difference between men and women in terms of feeling helpless due to mistreatment from supervisors. Some 7.7 percent of men and women felt powerless “all the time” and “many times”, 19 percent felt helpless sometimes, and 73 percent never felt powerless. About 83 percent felt to have never been the object of discrimination or treated unjustly, 3.7 percent reported discriminatory treatment “all the time” and “many times”, and 12.6 percent reported such treatment “sometimes”.

More than 5 percent of women felt treated violently or despotically “all the time” and “many times”, compared to 3 percent of men, a statistically significant ($p=0.03$) difference. Respondents who reported being treated violently “sometimes” were spread equally between men and women.

The perception of being discriminated against or treated unfairly does not reveal a gender component. Most (83.64%) reported never feeling discriminated against or treated unfairly. Some 4 percent of women and 3.83 percent of men felt treated in a discriminatory manner “all the time” and “many times”. The differences are not statistically significant.

Most workers (82.4%) reported never having experienced humiliating or demeaning treatment. Some 14.1 percent reported such treatment “sometimes”, while “all the time” and “many times” were level at 4.0 percent. There were no gender differences.

2.2 Sexism

Participants were asked to identify a sexist climate, manifested in gossip and the language used.⁶³⁴ Results do not reveal significant differences between men and women; most (78.2%) stated never to have experienced a sexist workplace climate. In similar response ratios, 7.6% of men and 7% of women noted a sexist climate “all the time” and “many times”. Close to 15 percent of men and 14 percent of women stated that sexism was sometimes present in the workplace, with no statistically significant differences along gender lines.

The data suggests that fewer workers in the upper socioeconomic group (a good proxy for higher education) reported being exposed to sexist workplace comments “all the time” and “many times” (2.3 percent in the fifth quintile) relative to the lowest socio-economic quintiles, where

⁶³⁴ The Spanish question was formulated as follows: ¿En su lugar de trabajo hay un clima sexista, circulan comentarios o rumores machistas?

the ratio rises three or four times (Table 4). The quintiles are represented by ABC1, being the most affluent, to the DE, the poorest.⁶³⁵

Table 4 Sexist climate and male chauvinist comments or rumours in the workplace and socio-economic status (Percent)							
		Sex		Socio-economic status			
	Total	Men	Women	ABC1	C2	C3	DE
No	91.9	91.9	92	97.6	93.2	91.4	90.6
Yes	7.4	7.6	7.1	2.3	6.4	7.9	8.5
NR	0.7	0.7	0.5	0.9	0.1	0.4	0.7

p= 0,000

The data shows a link between industry size and age and perception of sexism in the workplace. More than twice the number of respondents in workplaces employing 49 or fewer workers reported sexism relative to companies employing 50 or more. More younger women (20-29) reported more sexist comments in the workplace (26.18%) than did older women (50 and up, 17.61%). All values were statistically significant (p=0.002).

2.3 Perceptions of Prevalence of Sexual Harassment

The question on respondents' experiences and perceptions of sexual harassment during the past 12 months revealed 98.5 percent of workers state they did not experience any situation of sexual harassment. The number of respondents who identify as targets of sexual harassment was so small it is not possible to assert that statistically more women than men are affected. More than 4

⁶³⁵ See, *supra* note 626 on the explanation on the use of socio-economic quintiles.

percent of respondents knew about sexual harassment in the workplace, women heard about sexual harassment more than men, 5.1 percent and 3.7 percent, respectively.

2.4 Knowledge About the Internal Regulations on Sexual Harassment

The survey inquired about knowledge of workplace regulations, Table 5.⁶³⁶ Lack of awareness is a cross-cutting problem between men and women in both the public and private sectors. Overall, 37 percent of respondents in the private sector and 34.5 percent of respondents in the public sector reported not being familiar with in-house regulations.

	Public	Private	Total
It has regulations	51,7	41,3	43,5
It does not have regulation	13,9	21,0	19,6
It does not know	34,5	37,6	37,0
Total			

* The differences are significant $p= 0,000$

Some 75 percent of respondents worked in businesses employing 11 or more workers, where such regulations are required. From those (2,275 workers) almost 50 percent said their place of work had such regulations, 15.4 percent reported none, and 35.1 did not know. (Table 6). It is interesting that 22 percent of workers in small businesses declared knowledge about workplace sexual harassment regulations, when it is highly likely that if not mandated by the law the employers would not institute them. Although the differences in level of knowledge among

⁶³⁶ Internal regulations required of employers with 10 or more workers, Art. 154 *Código del Trabajo*. See above Chapter 2 section 3.1.

workers in small and medium and large companies are significant, the lack of knowledge among all workers (37 percent, Table 5) and among those in workplaces with 11 or more workers (Table 6) reveal similar results.

	≤10 workers	≥ 11 workers	Total
It has regulations	21,9	49,5	43,7
It does not have regulation	35,4	15,4	19,6
It does not know	42,7	35,1	36,7

* The differences are significant $p= 0,000$

Results reveal important gender differences. Almost 40 percent of women did not know about regulations, compared to 34.8 percent of men, a statistically significant difference ($P=0.041$).

Awareness is gender- and education- (class) sensitive (Table 7). As respondents have more years of formal education, their level of awareness increases accordingly. Almost 50 percent of workers with a primary-school education reported no knowledge, relative to workers with a university education (26.3%, $p=0.00$).

Table 7				
Does the workplace have specific provisions about sexual harassment in the internal regulation? by worker education (Percent)				
	Primary schooling	Secondary	Uncompleted Technical or University education	University education
It has regulations	27,1	38,4	47,0	56,7
It does not have regulation	23,5	21,9	16,9	17,0
It does not know	49,3	39,7	36,0	26,3

* The differences are significant $p= 0,000$

Table 8 reveals the same responses by sex of the worker. “Don’t knows” were 39 percent compared to close to 35 percent among male workers. The differences are statistically significant ($p=0,041$).

Table 8			
Does the workplace has specific provisions about sexual harassment in the internal regulation? by sex of the worker (Percent)			
	Men	Women	Total
It has regulations	45,4	41,5	43,5
It does not have regulation	19,7	19,3	19,5
It does not know	34,8	39,2	37,0

$p= 0,041$

The responses examined in male-dominated and female-dominated workplaces reveal “Don’t knows” were 36.3 percent in male-dominated workplaces and 40.4 percent in female-dominated workplaces (Table 9). In workplaces with an equal ratio of male and female workers, there is an almost equal number of those who are aware (51 %) with those unaware of regulations.

Table 9				
Does the workplace have specific provisions about sexual harassment in the internal regulation? by male or female dominated workplace				
(Percent)				
	Male dominated	Female dominated	Equal ratio men and women	Total
It has regulations	42,0	38,6	51,0	43,6
It does not have regulation	21,6	21,0	14,6	19,4
It does not know	36,3	40,4	34,4	37,0

p=0,000

2.5 Feeling of Fear

Vulnerability in the workplace can be expressed in fears that influence how workers perceive their own ability to interact with employers and supervisors. There are questions about standing up for their rights, fear of losing their jobs or not having their contracts renewed, or feeling that they can be easily replaced. The last two questions are direct representations of job loss while the former is associated with work relations, i.e., making trouble for oneself, yet not necessarily resulting in being fired.⁶³⁷

The responses from the Araucaria questions on the feeling of fear will be presented first to examine if overall workers are afraid, then whether there are any gender differences, then with respect to workers in the public or private sector and by socioeconomic status taking into account responses from all participants. Because of the importance of these variables, we will assess how

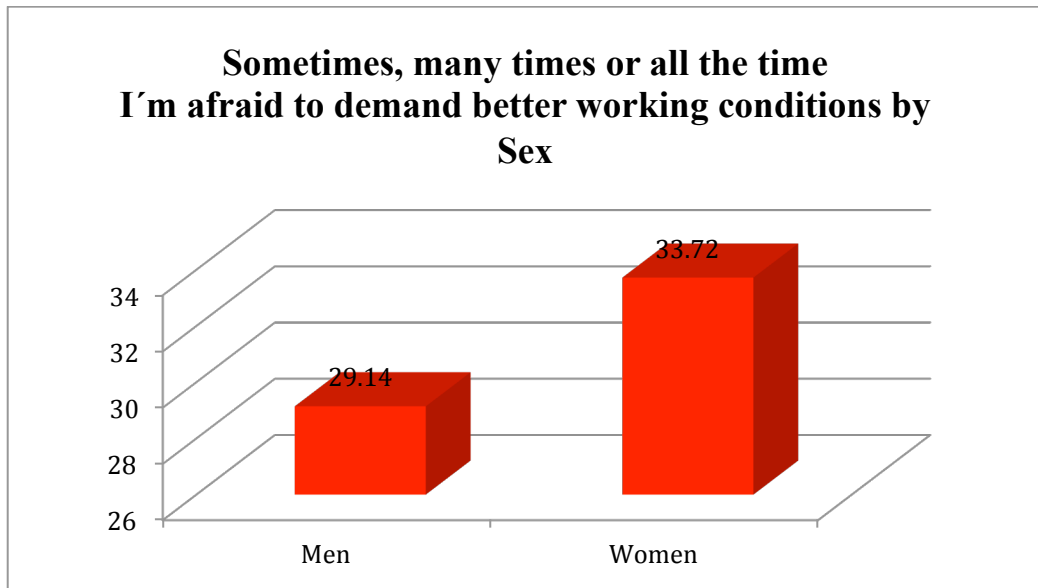
⁶³⁷ These are a sub-set of questions, question 44, Nos 1 and 5. See below, Annex 4 on the Araucaria questionnaire.

they behave in an analysis intra group, in other words treating women and men as separate samples to see if the differences are statistically significant.

Close to 23 percent of workers mentioned being sometimes afraid of demanding better working conditions while 31.5 percent were afraid “many times” and “all the time”.

Disaggregating the responses by sex, one in three workers feel “Sometimes, many times or all the time the need to demand better working conditions.” Although more women express fear for standing up for their rights with respect to men (Figure 1), the differences are not statistically significant.

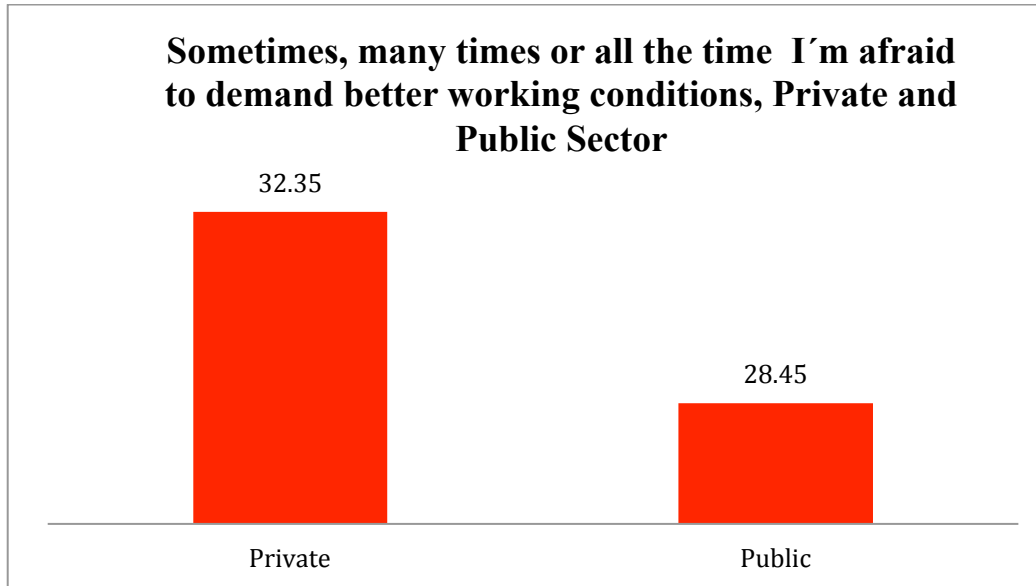
Figure 1



p=0,07

When it comes to workers who are employed in the public vs. private sector, the feeling of fear is somewhat higher in the private sector but the differences are not statistically significant, Figure 2.

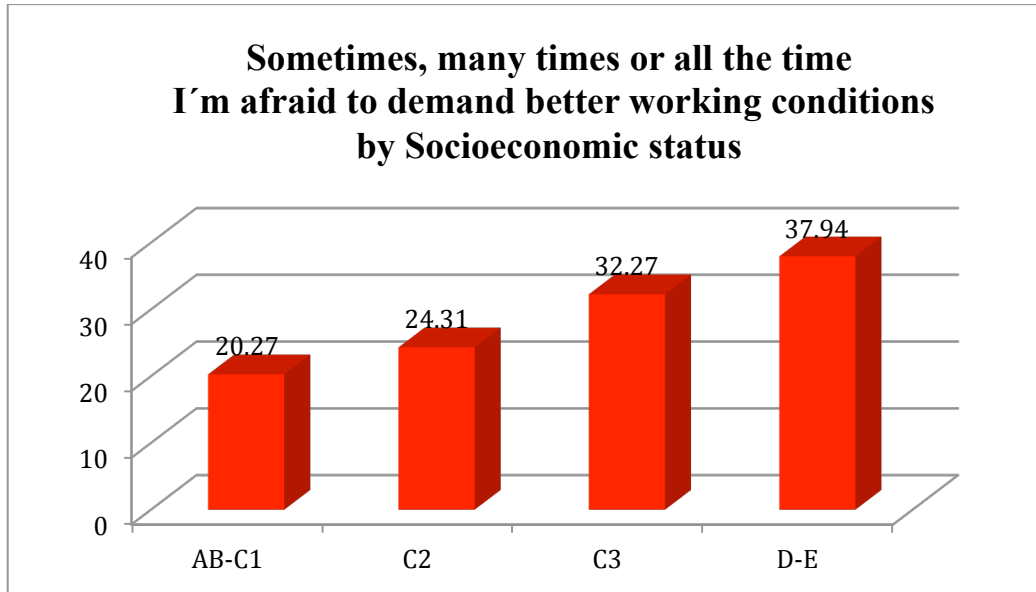
Figure 2



p=0,06

However, fear is sensitive with regards to socio-economic status (class). Twenty percent of workers who belong to the richest quintile (ABC1) compared to 38 percent of the poorest (D-E) are afraid to demand better working conditions, (Figure 3). As socio-economic status decreases, the curve reveals fear is more frequent.

Figure 3

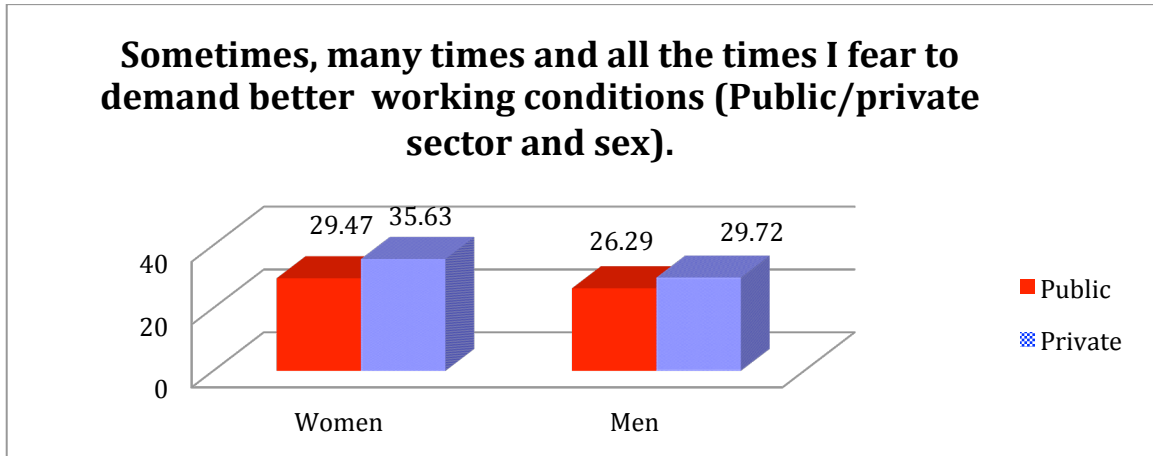


p=0,000

The question is whether these findings are different when women and men are treated as separate groups.

Fear of exercising labour rights is more gender-sensitive across the private and public sectors, albeit much more so in the private sector and always affecting more women (Figure 4). All differences were statistically significant.

Figure 4

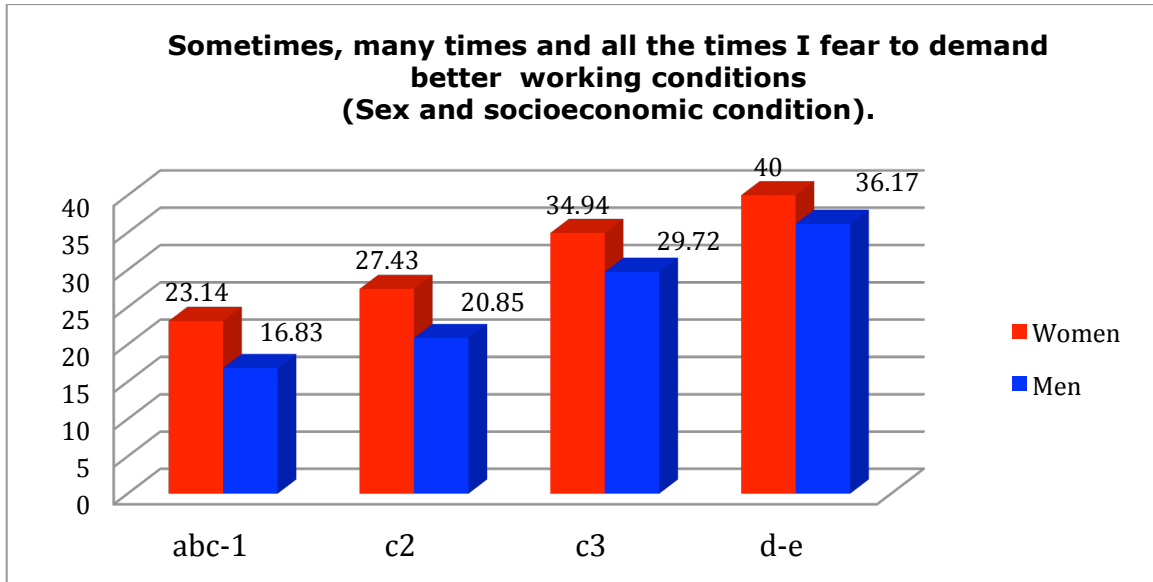


p= 0,327 for males and p=0,025 for females

Among male workers there are no significant differences on the fear to demand better working conditions between public and private sector while for women the differences are significant between those who work in the private and public sector.

Fear is more prevalent among the working poor than middle- or upper-middle class workers, as noted in Figure 3. Women across all social groups are more afraid; those differences are statistically significant for women and men (Figure 5). As described in Figure 1, although there is not a major difference among men and women, fear is more frequent among women.

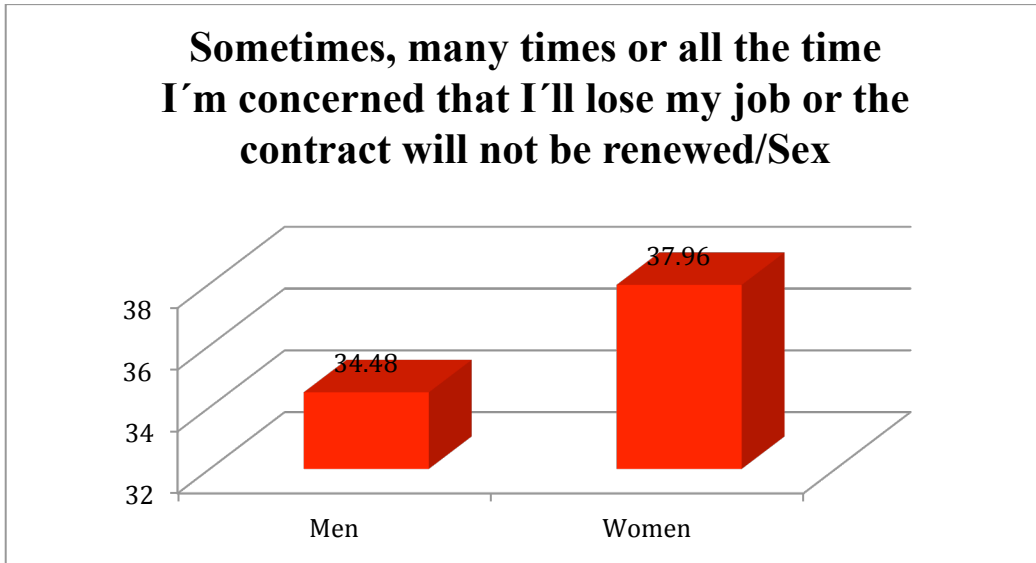
Figure 5



p= 0,000

Participants were explicitly asked about fear of losing their jobs, 36.2 percent declared sharing that feeling. There are significant differences between men and women and their concern about being fired or seeing their contracts not being renewed was more frequent among women than men (Figure 6).

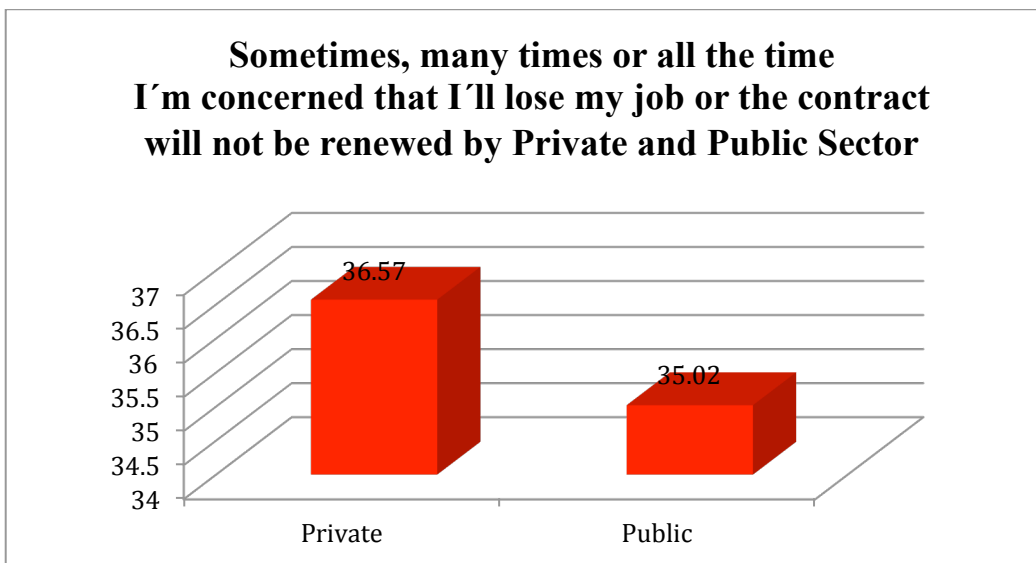
Figure 6



p= 0,047

Concern about job loss or nonrenewal of contract for people working in the public or private sectors does not reveal statistically significant differences, although fear is more frequent in the private sector, Figure 7.

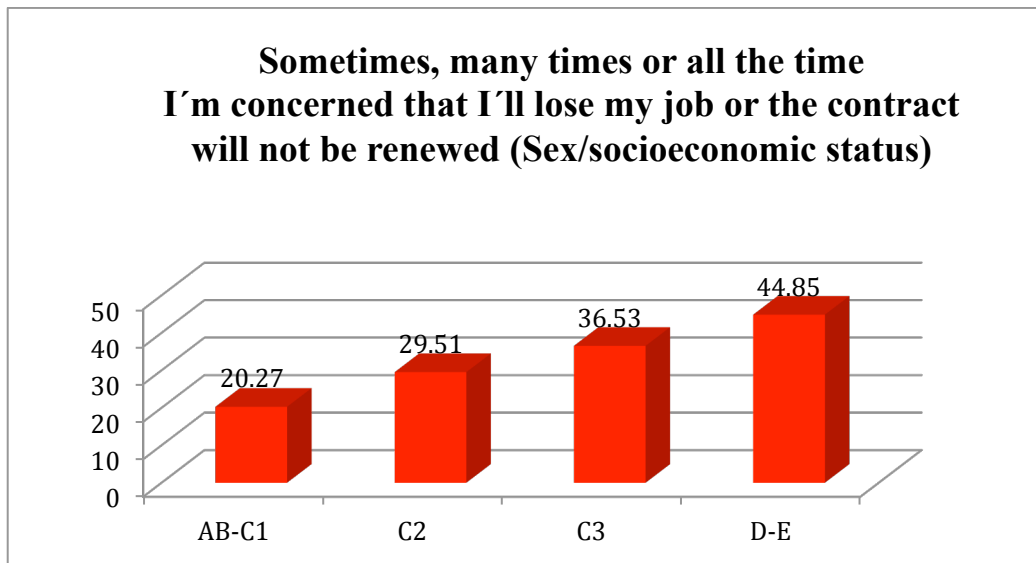
Figure 7



p= 0,479

As described fear about job loss is class sensitive (Figure 8) and the differences are statistically significant. There is a sharp increase in fear from the lower middle class (C1) to the poorest population (D-E).

Figure 8

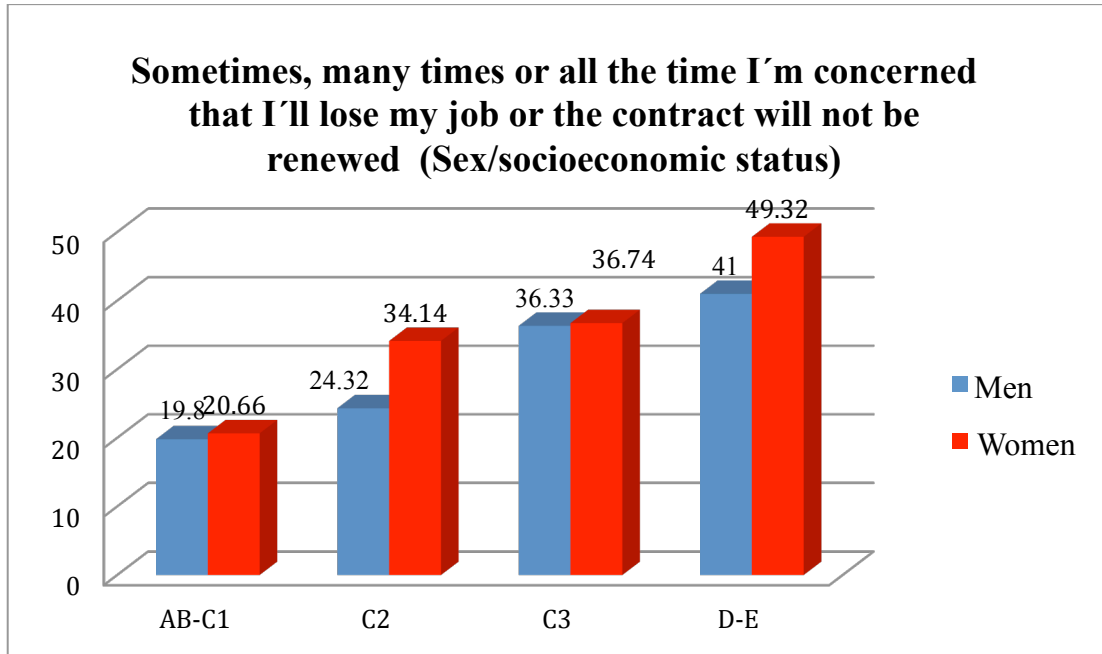


p= 0,000

Treating women and men as separate groups reveals there are differences in fear of job loss in the public and private sector. For men in the private sector fear reaches 34.63 percent and in the public sector is 33.67 percent. For women the level of fear is 38.8 percent in private and 35.67 percent in the public sector. None of these differences are statistically significant.

When the responses are disaggregated by socio-economic status, all differences are significant among men and women. (Figure 9). As observed the proportion of women feeling fear of job loss is always higher than men except for the richest quintile.

Figure 9



p=0,000

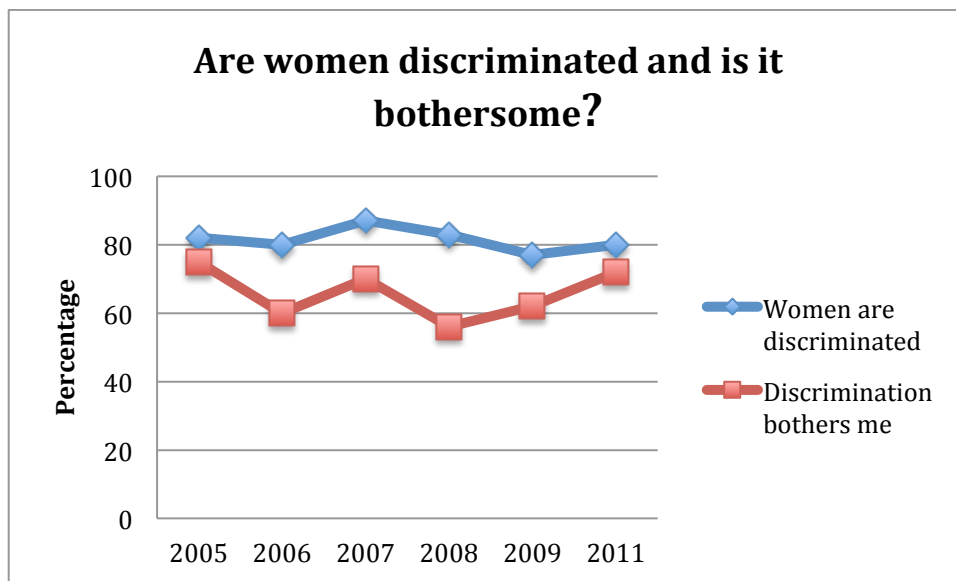
The feeling of vulnerability in Chile, a highly segregated society, is evident in all the responses, where gender is not the driving variable but class. This is expected given weak social policies to support workers in cases of unemployment. Feelings of discrimination on the basis of socioeconomic status, as we will see, are also prevalent.

2.6 Discussion

Several studies concerning feelings and opinions on discrimination have been conducted in Chile. The instruments used are not comparable, but they shed light about the social context in which such readings were taken. Corporación Humanas, a Chilean feminist organization, has been running a nationwide survey of women's perceptions since 2005. While in 2005-2011 close

to 80 percent of respondents felt discrimination against women existed, cognizance does not equal concern (Figure 10). In some cases, the associated gap is greater than 20 percentage points.

Figure 10



Source: Corporación Humanas. Available at http://www.humanas.cl/wp-content/uploads/2014/encuestas%20/07_Encuesta%20Humanas%202011.pdf

In 2013, the perception of discrimination in the Humanas survey had dropped to 71 percent, although 87 percent agreed that Chile is culturally sexist and 96 percent agreed that women are discriminated in the workplace.⁶³⁸ The same question scores higher in the 2014 poll, with 83.8 percent feeling that women are discriminated.⁶³⁹ Disparities across years could be influenced by public events that make inequality more blatant.⁶⁴⁰

⁶³⁸ Corporación Humanas Corporación, "Novena Encuesta Nacional Percepciones de las mujeres sobre su situación y condiciones en 2013", online: Corporación Humanas <http://www.humanas.cl/wp-content/uploads/2014/encuestas%20/08_IX%20Encuesta%20Corporacion%20Humanas.pdf>.

⁶³⁹ Humanas Corporación, "Décima Encuesta Nacional Percepciones de las mujeres sobre su situación y condiciones en 2014", online: Corporación Humanas <<http://www.humanas.cl/?p=14017>>.

⁶⁴⁰ The 2014 survey was conducted during public and legislative debate on improving working conditions for domestic workers. In the previous months there was heated debate in the media on the case of a young woman prosecuted over an illegal abortion.

Diego Portales University (UDP) also runs a nationwide survey that includes workers and people who are not in the labour market.⁶⁴¹ Questions on discrimination have been asked but not consistently over the years. In the 2006 survey, respondents were asked if they have felt discriminated. Some 33.9 percent agreed, with 7.1 percent of women and 1.4 percent of men reporting experiences of gender-based discrimination.⁶⁴² In the 2008 UDP survey, respondents ranked women sixth (5%) among the discriminated, after native groups, Peruvian immigrants, sexual minorities, the elderly, and persons with disabilities.⁶⁴³

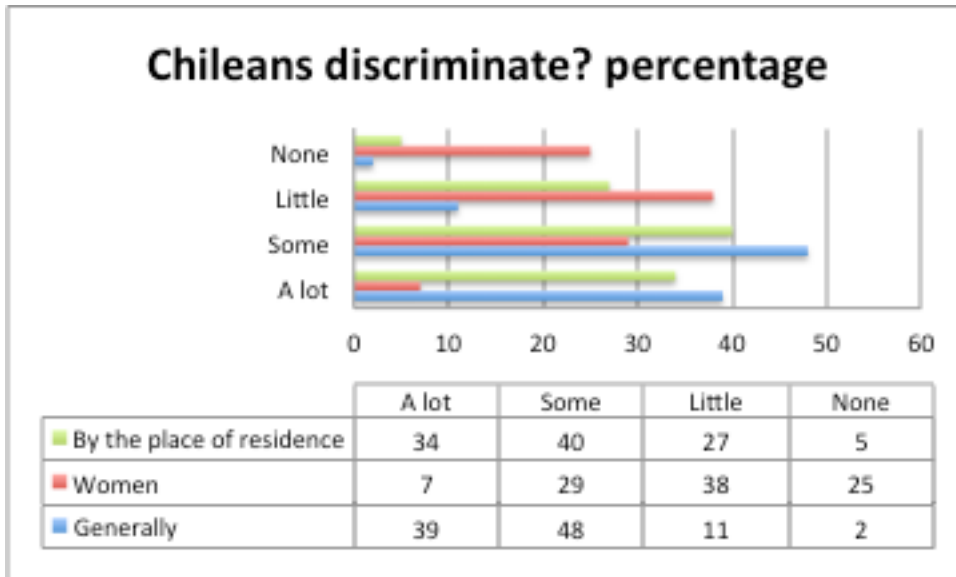
In 2011, people were asked about the discrimination and social practices in Chile. It found that 87,3 percent participants believe Chilean society is discriminatory, 73,6 declare that people are the object of discrimination based on the place of residence and 36,6 percent that women are discriminated (Figure 11). Discrimination because of place of residence is a proxy for socio-economic discrimination and gender is not visible as a criteria for vulnerability as this would be a class issue.

⁶⁴¹ See <http://encuesta.udp.cl>.

⁶⁴² Instituto de Investigaciones en Ciencias Sociales, "Segunda encuesta nacional de opinión pública UDP", online: ICSO <<http://encuesta.udp.cl/descargas/banco%20de%20datos/2006/Principales%20Resultados%202006.pdf>>.

⁶⁴³ Instituto de Investigación en Ciencias Sociales, "Cuarta encuesta nacional de opinión pública UDP", online: Instituto de Investigación en Ciencias Sociales <<http://encuesta.udp.cl/descargas/banco%20de%20datos/2008/Principales%20Resultados%202008.pdf>>.

Figure 11



Variations in measurements make comparisons far from straightforward. Questions that *prima facie* appear to inquire about a certain issue are not equivalent, which leads to dissimilar results. In addition, some surveyed only one population (women only rather than both women and men). Questions are also posed differently. The Humanas survey asks for general opinions on women and discrimination —i.e., —Do you believe women are discriminated?— whereas the UDP and Araucaria polls ask respondents to identify whether they have felt discrimination as a personal experience. UDP and Araucaria survey results are more coterminous on discrimination and Araucaria is more specific in terms of perceptions of ill treatment in the workplace. In the workplace context, women and men report with similar frequency being the object of unfair and discriminatory treatment, but the UDP survey would indicate that social experiences with discrimination are greater for women than for men.

While results from the Araucaria survey on prevalence of sexual harassment are in line with surveys in Quebec⁶⁴⁴, in México,⁶⁴⁵ and Europe.⁶⁴⁶ In Québec, 2,5 of the surveyed population declared to have experienced unwanted sexual attention,⁶⁴⁷ in Mexico, 2,83 percent of respondents.⁶⁴⁸ The results from Araucaria survey stand in contrast with a nationwide Chilean survey of occurrences of sexual harassment done in 2001.⁶⁴⁹ In this study, 11.8 percent of female respondents stated to have been targets of sexual harassment compared to 3.8 percent of males, while 20 percent had personal knowledge of someone affected by sexual harassment.⁶⁵⁰

The results of the Araucaria survey on prevalence of sexual harassment—1.5 percent among all respondents— are unexpectedly low. Several possible concurrent factors could explain these outcomes compared to previous studies asking respondents if they were targets of or knew about sexual harassment in the workplace. The 2001 survey provided a list of examples intended to help respondents identify instances of unwanted sexual attention. The Araucaria survey did not provide examples of such behaviour or of any other sexist acts for respondents to identify. Participants in the 2001 survey were asked to identify acts or events of sexual harassment from the list, then state their frequency.

As noted by Hastels et al., asking about having experienced sexual harassment is not quite the same as inquiring about particular forms of sexual harassment, so participants asked to name

⁶⁴⁴Lippel *et al.*, *supra* note 45.

⁶⁴⁵Sonia M. Frías, "Hostigamiento, acoso sexual y discriminación laboral por embarazo en México" (2011) 73:2 *Revista mexicana de sociología* 329 at 331.

⁶⁴⁶Chappell & Di Martino, *supra* note 41.

⁶⁴⁷Lippel *et al.*, *supra* note 45 at 405.

⁶⁴⁸Frías, *supra* note 645.

⁶⁴⁹Universidad de Chile Departamento de Economía & Centro de Estudios de la Mujer, *Habla la gente: situación de las mujeres en el mundo laboral* (Santiago: Servicio Nacional de la Mujer, 2002), at 36.

⁶⁵⁰*Ibid.*

specific behaviours are more likely to return positive answers.⁶⁵¹ Workers may have experienced or known about unwanted sexual attention but would not have a name for that behaviour, or their understanding of the term could be restricted to the most serious forms of sexual harassment. As will be discussed later, sexual and moral harassment may sometimes be difficult to distinguish.

Another consideration is that measuring prevalence of sexual harassment is culture- and even class-sensitive. Certain behaviours, language and interactions between men and women could be construed as vulgar, offensive, perfectly natural or even innocuous, depending on context at both the micro and macro levels. Pando et al., for example, note the dissimilar measures of workplace violence and psychosocial hazards in Latin America.⁶⁵² Disparities can be attributed to different cultural thresholds on violence in the workplace, and the same holds true for sexism and sexual harassment. In Brazil, measurement of sexual harassment among domestic workers and secretaries led to dissimilar results, leading DeSouza and Serqueira to argue that responses could vary with knowledge of legal definitions.⁶⁵³

As noted above in the description of the methods, an additional factor is privacy. Respondents not assured full privacy might withhold information on matters considered too personal or private. Also, many targets of sexual harassment may wish to conceal this from family members.

⁶⁵¹Nelien Haspels *et al.*, *Action Against Sexual Harassment at Work in Asia and the Pacific* (Bangkok: International Labour Office, 2001) at 58.

⁶⁵² Results reveal important country differences using the same instrument. Manuel Pando Moreno *et al.*, "Determinación del mobbing y validación del Inventario de Violencia y Acoso Psicológico en el Trabajo (IVAPT) para Colombia" (2013) 29:3 Salud Uninorte 525.

⁶⁵³Eros DeSouza & Elder Cerqueira, "From the Kitchen to the Bedroom. Frequency Rates and Consequences of Sexual Harassment Among Female Domestic Workers in Brazil" (2014) 24:8 Journal of Interpersonal Violence 1264.

When individuals have trouble acknowledging sexual harassment it becomes harder to identify them as targets and it is perhaps easier to ask about harm done to others.⁶⁵⁴ In the Humanas survey, for instance, the open question on the existence of discrimination against women may elicit a different response than asking respondents if they have been the target of discrimination. This would explain the disparity between general perceptions –the Humanas survey- and personal experiences of discrimination in the UDP nationwide survey.

It may also be that the context and scope of research could influence responses. In the Araucaria survey, sexual harassment questions were part of a larger survey on psychosocial risks in the workplace, an approach that differs from the 2001 Chilean study on the working conditions of women. Asking about workplace experiences could make women more willing to answer sexual harassment questions posed in the context of overall working conditions. The literature reveals that instruments specifically designed to measure sexual harassment, such as Fitzgerald et al.'s sexual experience questionnaire,⁶⁵⁵ could lead to results at variance from questions on sexual harassment asked in a wider context, such as the Araucaria survey.⁶⁵⁶ But as Leskinen and Cortina warn, many questionnaires cannot be sensitive to men-on-men sexual harassment or to specific workplace scenarios.⁶⁵⁷

⁶⁵⁴ Pando et al., *supra* note 652. They also found that when individuals were asked about experiencing violence, the response ratio was lower than when asked about having witnessed someone else experiencing violence.

⁶⁵⁵ John Pryor & Louise Fitzgerald, "Sexual Harassment Research in the United States" in Stale Einarsen *et al.*, eds., *Bullying and Emotional Abuse in the Workplace: International Perspectives in Research and Practice* (London/New York: Taylor and Francies, 2003) 79-100, *supra* note 209.

⁶⁵⁶ Kimberly A. Lonsway, Rebecca Paynich & Jennifer N. Hall, "Sexual Harassment in Law Enforcement, Incidence, Impact, and Perception" (2013) 16:2 *Police Quarterly*.

⁶⁵⁷ Leskinen & Cortina, *supra* note 560 at 118.

All of these elements —individual concepts or understanding of sexual harassment, the cultural context, and the scope of the research and instrument used— lead to variations in survey responses and render findings non-comparable.⁶⁵⁸

The Araucaria questions on knowledge of workplace regulations bear closer scrutiny. Responses may correctly confirm that the obligation is met or reveal unawareness of such regulations. i.e., employers may have a regulation in place but it is unknown to workers. Ignorance about regulations is most evident in the public sector, where specific good labour practices under the Public Sector Law (*Estatuto Administrativo*) require since 2006 that moral and sexual harassment issues be addressed in the context of equal employment.⁶⁵⁹

Workers unaware that rules protecting them exist may have a hard time asserting their rights. Workplace regulations may work as a symbolic shield, explaining why workers may feel more vulnerable when regulations are nonexistent or unknown or both. Fear of confronting situations such as harassment and ill treatment goes beyond the fear of job loss, as it includes the risk of being branded a troublemaker or facing reprisals. This seems consistent with the overall feeling of fear that permeates surveyed workers, where class and gender intertwine. Noncompliance with formalities such as a signed contract is more prevalent among the lowest socio-economic quintile and reinforces feelings of vulnerability.

As public sector workers enjoy job security, dismissal is not a circumstance they confront often — but they still show similar fear of reprisals if they were to demand better working conditions. The

⁶⁵⁸Pryor & Fitzgerald, *supra* note 209.

⁶⁵⁹Dirección Nacional del Servicio Civil, *supra* note 336.

same cannot be said about term-workers in the public administration whose contracts are renewed at the end of every calendar year.

3. Individual and Focus Group Findings

In individual interviews (19) and three focus groups, participants expounded on general working conditions, discrimination, and sexual harassment and their perceptions of prevalence and intensity thereof. Lawyers, judges and labour and policy specialists were asked about the who gets targeted, who does the harassment and framing of sexual harassment in the workplace. Issues of sexism, discrimination and working conditions emerged in the conversations.

3.1 Sexism

While all focus group participants described their workplaces as having a good labour climate, they recognized that male colleagues did make sexist remarks to varying degrees.

In some cases, interviewees revealed how they experienced or observed sexism. Male-dominated workplaces were mentioned spontaneously either because participants worked there (i.e., a train operator)⁶⁶⁰ or had conducted investigations or adjudicated cases in those sectors.⁶⁶¹ A train operator and union leader recounted her experience in her male-dominated workplace as “feeling

⁶⁶⁰G., *President of the Union of South Train workers (Ferrocarriles del Sur)* 2014. Concepción focus group participant. Train operator.

⁶⁶¹Labour Inspector 5, *Lawyer, Labour Inspectorate Concepción* 2014; Labour Inspector 3, *Lawyer, Labour Inspectorate Talcahuano* 2014; Labour inspector 6, *Lawyer Dirección del Trabajo Valparaíso* 2014; Judge 4, *Labour Judge-Valparaíso* 2014.

like a square peg in round hole”.⁶⁶² A labour inspector said women in those contexts have a tough time.⁶⁶³

Sexism is also present in working environments where the ratio of male/female workers was more balanced. Two focus group participants commented on the age of perpetrators, implying that in older men use of sexist language is a natural behaviour, even among white-collar workers, especially those with less education. Both participants were targets of sexual harassment and the perpetrators were older men. One recalled comments about a female employee who, according to a male co-worker, needed “pills” to help her through “her days”. This came to the attention of managers, who responded with an educational talk on “gender and feminism”.⁶⁶⁴ Another participant in a different focus group and a public service lawyer, both young, referred to “dirty old men” who persistently used sexist language. An older union officer commented about the inappropriate conduct of an older physician in the hospital where she worked, which led her to take it upon herself to warn young nurses and keep an eye on the doctor.⁶⁶⁵

A Labour Inspectorate lawyer concurred that older men see their behaviour as perfectly natural. She recalled the case of an older male who was shocked and teary-eyed during an investigation she conducted. The worker said he did not realize his behaviour could be considered serious misconduct and dreaded the potential loss of employment and trouble for his family.⁶⁶⁶

⁶⁶²Concepción focus group participant.G., train operator, *supra* note 660.

⁶⁶³Labour inspector 5, *supra* note 661.

⁶⁶⁴Santiago focus group participant T.C. Lawyer, *Lawyer* 2014.

⁶⁶⁵B.V., *President of APRUSS Hospital Las Higuera-Asociación de funcionarios de profesionales universitarios Hospital de Higuera* 2014. Health sector. Concepción focus group participant.

⁶⁶⁶Labour inspector 6, *supra* note 661.

3.2 Perception of Prevalence of Sexual Harassment

Most participants agreed that sexual harassment includes sexualized behaviour such as propositions to have sex and unwanted advances or bodily contact, but seldom if ever did they perceive a hostile working environment as a form of sexual harassment.

Questions about the prevalence of sexual harassment varied. For judges, lawyers and most workers, sexual harassment occurs often,⁶⁶⁷ but a male judge said that it was “not an epidemic”.⁶⁶⁸ Some workers at first did not identify it as “an issue,” except when it emerged as other participants spoke about personal situations or events in which they were involved or that they knew of personally.⁶⁶⁹

Organizational conditions, management styles and a male-dominated workforce facilitate or promote sexism and sexual harassment. All of these were factors mentioned by respondents in the interviews.

Some respondents spoke of sexual harassment being especially pervasive in high-turnover sectors such as the retail and labour supply industries.⁶⁷⁰ A male lawyer from the Labour Inspectorate in Santiago conjectured that in retail businesses such as supermarket chains, middle

⁶⁶⁷ For instance, Judge 1, *Labour Law Judge-Santiago* 2014; Judge 4, *supra* note 661; Litigant 1-Santiago, *Former policy maker, labour law professor* 2013; Litigant 2-Santiago, *Litigant* 2014; Scholar, *Professor of Labour Law* 2014; Labour Inspector 1, *Lawyer, Labour Inspectorate Office Santiago* 2014; Labour inspector 5, *supra* note 661; F.R., *Lawyer* 2014; M.M., *Cashier* 2014.

⁶⁶⁸ Labour Judge 3, *Labour Judge-Concepción* 2014.

⁶⁶⁹ A.Q., *President of Textile manufacturing Flores Workers Union - Sindicato de empresa manufacturas textiles Flores y Cia S.A. Zona Sur* 2014; B.F., *Secretary of the Gas Sur workers Union-Sindicato de trabajadores de empresa GAS SUR S.A.* 2014; Judge 3, *supra* note 668.

⁶⁷⁰ Labour Inspector 1-Santiago, *supra* note 667.

managers tend to hire staff with a certain profile that facilitates sexual harassment, i.e., young women with little work experience.⁶⁷¹

A female lawyer in the Labour Inspectorate noted that more horizontal working relations provide fewer chances for sexual harassment to occur.⁶⁷² A female judge related how power relations in the workplace could be a triggering factor for mistreatment. She cited health services, theoretically built on collaboration yet in fact highly hierarchical, where physicians hold all the power and much ill-treatment takes place.⁶⁷³

It became evident during an interview that responses to an open question on sexual harassment prevalence depended on participants' definitions of the concept. If sexual harassment was construed only as a *quid pro quo*, unwanted body contact or sexual advances, leaving out sexist remarks or a hostile working environment, the response was that prevalence was low. A case in point was an interview with a Labour Inspectorate lawyer. At first she said that sexual harassment was not a common issue, but in elaborating her response she recognized she was thinking about *quid pro quo* and forgetting about other forms of harassment such as the sexist remarks and climate prevalent in certain industries.⁶⁷⁴

During the focus group interviews it was clear that most respondents had suffered or seen sexual harassment in the workplace at the hands of peers, supervisors, and employers. One participant spoke in an individual interview about being harassed by a fellow union officer. She felt she may

⁶⁷¹Labour Inspector 1, *supra* note 667.

⁶⁷²Labour Inspector 5, *supra* note 661.

⁶⁷³Labour Judge 4, *supra* note 661.

⁶⁷⁴Labour Inspector 5, *supra* note 661.

have been a target because she was a widow with no male around to look out for her.⁶⁷⁵ The participant later joined a group discussion with other union leaders, where she spoke in general about her work as union president in stopping harassment against a colleague. Despite her own experience, she preferred to sidestep the issue in the group discussion.

3.3 Understanding Sexual Harassment

Understanding what constitutes sexual harassment could be unclear not only for those who must adjudicate cases, as noted in chapter 2, but also for those who confront the experience in person or as a workplace issue to be dealt with.

Sexual harassment could be a continuum of unwanted sexualized behaviour ranging from sexual to moral harassment after a rejection, to sexual attacks within the purview of criminal law.⁶⁷⁶ In fact, group discussion participants made comments and posed questions in an attempt to ascertain whether certain situations they had experienced could be construed as sexual harassment.

⁶⁷⁵Focus group participant L.T., *supra* note 667.

⁶⁷⁶One prosecutor recalled a current case against a criminal judge. The case began as a complaint filed by four female court staffers under general sexual harassment rules in the *Labour Code*, Ethical Code of the Judiciary and the *Código Orgánico de Tribunales* [Organic Courts Code], Corte Suprema, *Auto Acordado 262-2007 sobre Principios de Etica Judicial y Comisión de Etica* (Chile: Corte Suprema, 2007); *Código Orgánico de Tribunales* (Chile: 1943). At the end the complaint became a sexual abuse case under the *Criminal Code*. The boundaries are not clear. Had the appellate judge receiving and investigating the complaint done a proper job, the case may have remained away from the purview of the criminal justice system. It was reluctance to investigate that compelled the targets to lay charges. Lawyer-prosecutor, *Prosecutor* 2014. In July 2015, a three-female judge criminal court found the judge non guilty on the ground the facts did not correspond to a criminal offense but they unanimously declared the behaviour had taken place and it was declared inadequate.

One participant –a union worker in the public service– had been recently appointed to investigate a psychological harassment complaint. The complaint was received, processed and summarized by other staffers in the human resource department. While there was a sexual component, she was conflicted as to how to proceed. The report described two incidents where a female supervisor became physically too close for comfort to a female worker, but the rest of the allegations referred to a controlling, authoritarian management style. There was a long list of complaints made against the accused that caused our participant to ask herself many questions: Was this an issue of sexual harassment? Was the complaint untrustworthy and fostered by anti-lesbian attitudes? Or was it a plain case of psychological harassment, as it had been framed by the complainant? The accused’s possible sexual orientation was mentioned in passing in the complaint. At that point our participant had not done an interview, but from the gist of the complaint it appeared that the accused was a very intrusive, sometimes obnoxious boss.⁶⁷⁷ The participant is a department supervisor, although she said this is not a requirement. She was told she was chosen because she is a union member and regarded as a reasonable, fair individual.⁶⁷⁸

A participant in a focus group discussion, a union president from a service subcontractor company, spoke about abusive behaviour with sexual overtones such as bodily searches by security guards in supermarkets or other retail establishments at the end of a shift. The alleged purpose of the bodily searches is theft prevention.⁶⁷⁹ She did not describe the searches as sexual harassment per se, but emphasized its sexual overtones. She recounted when a guard asked her to unbutton her blouse and she shot back whether he wanted to see her bra up close. For her, the

⁶⁷⁷I.N. Worker-investigating officer, *biochemist* 2014.

⁶⁷⁸Ibid. In November 2015, the participant approached me to tell me the investigation was closed with no findings of sexual or psychological harassment because there were no witnesses. During the process the alleged perpetrator recognized she was a workaholic, which made her be perceived as controlling. The complainant’s contract term ended before the end of the investigations and no other action was taken against the accused.

⁶⁷⁹ These practices have been found to infringe privacy rights. Dirección del Trabajo, *ORD. N°: 4936 / 092 / 2010*.

searches were offensive and a violation of personal dignity. Bodily searches as an antitheft measure may result in many violations, and as a practice, are in a continuum of harms where it may be difficult to discern if or when the behaviour becomes sexual harassment. Clearly, bodily searches facilitate a (subjective) sense of sexual harassment because of the physical (objective) personal invasion involved.

Interviews revealed another issue. Women who had experienced sexual harassment wondered if their perceptions were correct —whether they had simply misread a gesture, an accidental touch, a particular glance, and wondered if they were just being “a difficult broad”.

What individuals consider sexual harassment could be influenced by knowledge of the law, or lack thereof, which may or may not match a legal definition. Some participants had no previous knowledge of the law or what it regulates. Most had little or no knowledge of the law to shape or influence their understanding of the concept.⁶⁸⁰ Even a young lawyer was loath to frame her experience as sexual harassment. She was new at work, made friends with an older staff member who invited her out for lunch and, as she said “fresh from law school, you don’t turn down a free lunch.” The co-worker –an older male in human resources- later took to sending her videos of scantily clad women running in a beach. She was not sure whether the behaviour could be construed as sexual harassment, but asked him to stop.⁶⁸¹

⁶⁸⁰ One focus group included two young lawyers and a law student/teacher. One said she knew perfectly well what sexual harassment was while the other perceived remarks by a guard at work as sexual harassment. As she put it, the man was prone to complimenting “exotic women”.

⁶⁸¹ Focus group participant T.C. Lawyer, *supra* note 664.

The interviews made references to romance turning to sexual harassment, a situation that the emotional rapport individuals establish in the workplace makes more problematic to identify or deal with. A labour inspector recalled that an investigation revealed a situation that could be called “a courtship,” where a worker attempted but failed to establish a romantic relationship and the target felt pestered. Or, as the interviewee added, she knew the case of a woman who reported sexual harassment after a workplace romance went sour.⁶⁸² These encompass situations in which the accused insists in establishing a sentimental rapport after the target has said no. The behaviour the target calls “pestering” may amount to unreciprocated sexual attention.

A lawyer from the Labour Inspectorate in Santiago emphasized the difficulties involved in investigating sexual harassment because of misunderstood romances. Cases cited included targets who invited the accused on dates or a worker who complained against her boss, also her former lover and the father of her baby and who had declined to pursue a relationship with the target. In these cases the informant refrained from making a finding of sexual harassment because of the potential fallout for the accused and cognizant of the romance break-up. In a similar vein, another Labour Inspectorate informant gives out instructions –absent written policy- to handle such cases cautiously and attempt to ascertain whether the allegation is vindictive.⁶⁸³ This informant was cognizant that rejection of sexual advances –believed to be a romantic proposal- can also trigger other types of harassment. A litigant recalled a client who did not realize that her boss was making romantic advances that later became unwanted harassment, including patting her buttocks.⁶⁸⁴

⁶⁸²Labour inspector 2-Santiago, *Lawyer, Labour Inspectorate Santiago* 2014.

⁶⁸³Labour inspector 6, *supra* note 661.

⁶⁸⁴Litigant 2-Santiago, *supra* note 667.

3.4 The Perception of Women's Contribution to Their Own Harassment

Gender constructions about a woman's appropriate sexual behaviour affects perceptions of harassment and are crucial for assessing whether it has occurred, why it happens, and whether the behaviour in question was unwarranted. In group discussions and individual interviews, some workers indicated that some women allow harassment to occur through lack of propriety or the way they dress. Expressions such as "she was parading her breasts" or "she was moving her tail" were used in one of the groups and were agreed to or shared by some participants. One female informant from the Labour Inspectorate described in nearly similar terms the reactions and expressions used by her colleague male inspectors and sometimes the target's colleagues when conducting an investigation.⁶⁸⁵

A participant in a focus group discussion denied the existence of sexual harassment in her workplace and recounted an event, making critical comments about a co-worker who was the target. She told of asking her "Why do you let him hug you like that?, to which the target responded that it was just a friendly gesture. The participant continued: "The harassment happened because the woman did not set clear boundaries".⁶⁸⁶ She added that men could also be harassed, as her brother had.

Gender stereotypes affect the perception of sexual harassment and influence how targets react towards unwanted behaviour. Targets hesitate to report precisely because of fear they may have

⁶⁸⁵Labour inspector 5, *supra* note 661.

⁶⁸⁶A.Q. Focus group participant, *supra* note 669.

done “something” for harassment to happen.⁶⁸⁷ As one participant put it, someone prone to flirting might enable harassment.⁶⁸⁸

Participants used the expression “feeling guilty,” because they would have to overcome their questions about their own conduct and also confront peer perceptions if sexually harassed.

3.5 Responding to Sexual Harassment

3.5.1 Informal Responses

Individuals respond in different ways when confronted with ill treatment at work. Some can tolerate it, hoping it goes away because of feelings that they cannot do much about it, or would endure unpleasant working conditions and quit when they became unbearable. Others may use all remedies available, including formal and informal methods of resolving vexatious issues.

Some interviews revealed fear of reprisals and other consequences, such as the associated stigma, following a complaint against a supervisor or co-worker.

The fear of job loss appears to be a primary consideration, as expressed by judges,⁶⁸⁹ litigants,⁶⁹⁰ and labour inspectors,⁶⁹¹ who note other reprisals, such as unwanted transfers, being denied

⁶⁸⁷Labour inspector 5, *supra* note 661; M.H.A., *President of the Lotería de Concepción workers Union-Sindicato de trabajadores de Universidad de Concepción establecimiento Lotería de Concepción* 2014.

⁶⁸⁸P.M., *President of the Supermarket union- Sindicato de empresa comercial Coronel Ltda.* 2014.

⁶⁸⁹Judge 4, *supra* note *supra* note 661; Judge 2, *Labour Judge-Santiago* 2014.

⁶⁹⁰Litigant 1-Santiago, *supra* note 661.

⁶⁹¹Labour inspector 1, *supra* note 667; Labour Inspector 4, *Head of Labour Inspectorate Supervision Unit-Concepción* 2014; Labour inspector 3, *supra* note 661.

overtime work, or lower production or sales bonuses. The quantitative results of the Araucaria survey about fear of losing a job and demanding better working conditions are in line with the findings coming from the interviews.⁶⁹² More than 35 percent of women in the private sector expressed fear of reprisals compared to 30 percent of females working in public administration.

A labour lawyer agreed that fear exists but is sometimes overstated: “Workers don’t understand that supervisors are also human beings who can listen to what they need to say.”⁶⁹³ She asserted that in many workplaces there is an authoritarian management style reminiscent of the care and control required of the *pater familias* in the *Civil Code*. As she noted, some management styles are good, some are bad.

Individually and collectively, workers deal with unwanted sexual attention in different ways. An attorney recalled that her only sexual harassment case was advising a supermarket union on handling a situation. The target did not want to lodge a formal complaint against a supervisor, but did inform the union. She was afraid of her partner’s reaction if he thought she had provoked the situation. According to our informant, it took a lot of convincing for her to do something, as the woman was young and new to the supermarket. She and the union finally agreed to lodge an informal complaint and inform management. The worker was transferred to a different section for protection and returned to her original post only after the supervisor was gone. The transfer had a negative impact on the target’s wages, as she did not earn the same amount of sales

⁶⁹² See above Chapter 3, Section 2.5

⁶⁹³ Litigant 3-Concepción, *Labour lawyer and former legal aid labour law defender* 2014; *ibid.*

commission in the new section.⁶⁹⁴ Protective measures in favour of targets were taken but not as part of formal procedures.

Strategies for resisting sexual harassment emerged clearly across all focus group discussions. Some women warn their peers about males with a reputation as womanizers, while union leaders ask perpetrators to cease and desist or help “empower” a target to speak out.

A focus group participant who had been a middle management worker said that in her workplace she was unaware of a formal complaint ever having been lodged. However, she recalled a situation in which she helped a young female worker deal with a co-worker who gave her “lewd” looks that made her feel uncomfortable to the point of avoiding all contact with him. The participant escorted the target to the aisles until they found the perpetrator and told him –in the presence of the participant- that she did not appreciate the way he looked at her and to stop. The man never received a formal warning, but he changed his attitude and became resentful of our respondent.

A union president told of being harassed by a co-worker for almost a year, but paid little attention to his comments. One day a new worker came clearly shaken out of a room and told her that she had been sexually harassed by the same co-worker. The union leader confronted the perpetrator and warned him that if he did not stop she was going to lodge a formal complaint, even if it meant being transferred out. The man took a hostile stance but never harassed other women while the participant was in the unit.

⁶⁹⁴Ibid.

A supermarket cashier who was also union president responded to a new manager's lewd comments about female workers, her own physical attractiveness and the beauty of her sister, also a worker in the same store. The manager, a known womanizer, constantly suggested going out with her or her sister. The participant said she would be happy to go out with him after she asked his wife. The man reacted belligerently and ordered a supervisor to monitor any fault in her sister's attendance sheet and schedule. The participant was happy to note that the story ended with the philandering manager being fired, although not as a result of sexual harassment complaints. Women in the focus group cheered.⁶⁹⁵

Other respondents simply quit. A participant who had worked in a bakery could no longer stand the owner's obnoxious sexist comments. She felt that as a young woman with no family obligations, she could resign. Another saw a friend and co-worker endure mistreatment; the woman was under a lot of stress and feeling sick, but the pay was good. Another participant said she had not noticed the company owner's intentions towards her until they had to travel to a conference. The owner suggested a change of hotels so they could work "closer together" and have breakfast meetings. She did not change hotels, felt scared and quit her job after talking to her husband as soon as she returned home.⁶⁹⁶

Focus group respondents included two lawyers and a law student, by definition all familiar with the law. Their reactions to unwanted sexual attention speak to the dilemma faced even by targets who know the legal remedies. One did not report the occurrence because she was unsure it could be called sexual harassment. Whatever it was, she said, made her very uncomfortable and she

⁶⁹⁵P.M., *supra* note 688.

⁶⁹⁶R.P., *Public Relations* 2014. Focus group participant.

told the perpetrator to stop. Although she worked for an organization led by a prominent woman and was surrounded by feminists, she was shy, young and new on the job, and she told no one.⁶⁹⁷

Another young lawyer, a public servant “with a strong personality”, as she said, was cornered by a co-worker. She yelled, but felt paralysed. She pushed him away but decided not to complain. She thought about the nature of the sexual harassment inquest and the need for witnesses –there were none– realizing that such a case would hinge only on credibility.⁶⁹⁸ Later, unease and fear of the perpetrator led her to speak to her supervisor. While she did not lodge a formal complaint, the supervisor, a woman, warned the culprit to stop, adding that a formal complaint would follow if he reiterated his conduct. In the discussion, the respondent was asked whether her supervisor being a woman had played a role in her decision to bring it up. She said that the key issue was talking to someone who would believe her, not gender.

The same participant expressed some trepidation about formal procedures based on her own experience investigating sexual harassment complaints in the public service. In one case she followed protocol but found that coworkers would not get involved and felt they were forced to take sides. The process was cumbersome and in theory anonymous, but in small workplaces word travels fast. She issued a strong reprimand but proceeded no further for lack of information. In a second case, inspired by what her own supervisor had once done for her, she steered clear of formal procedure and directly ordered the accused to cease all unwanted behaviour towards the target or any other female staff.

⁶⁹⁷Focus group participant T.C. Lawyer., *supra* note 664.

⁶⁹⁸Focus group participant and later individual interview, F.R., *supra* note 667.

Several months later this respondent was re-interviewed individually for more details on the shortcomings of internal investigations. Her impression was that the law was found wanting, which required direct action. Formal procedure calls for an investigating officer and a committee comprised of representatives from the civil servant union and the fixed contract worker union, plus someone from human resources. This committee does not conduct an inquest and only examines the admissibility of the complaint. She felt this procedure was illegal, violated the rights of both the target and the accused, and the required secrecy undermined the very intent of the law. She has never used it.⁶⁹⁹ As she argued, the law allows for precautionary measures, but in her experience these are sometimes not feasible. In March 2015, faced with a new complaint, her supervisor asked her to review the procedure and propose a new course of action.⁷⁰⁰ But this involved a small unit serving a rural community, and neither party could be transferred out.

The law student, who was also a teacher, lodged a written complaint against a staff security guard who often made flirtatious remarks to female staff. She noted that she and other affected women just wanted him to stop, not necessarily be fired.⁷⁰¹ During the discussion she solicited advice about a new colleague who had been fired from another school for sexually harassing his students. While in his new post the man had not harassed anyone as far as she knew, she wanted school staff to be aware of his past.⁷⁰²

⁶⁹⁹Ibid.

⁷⁰⁰Ibid.

⁷⁰¹ See above, Chapter 2 Section 3.3.1 where a judge upheld the perpetrator's lawsuit because the target declared at trial she did not want him fired but only to stop the harassment. *Jaime Bravo Díaz con Constructora Ecomac S.A.*, *supra* note 423.

⁷⁰²Focus group participant. P.A., *Teacher* 2014.

3.5.2 Using Formal Remedies

3.5.2.1 The Labour Inspectorate

The Labour Inspectorate handles formal complaints from unions, workers or employers who ask for an investigation or a review of a previous investigation. Labour Inspectorate lawyers concurred that a complaint often involves an intolerable situation whereby the target wants out and wants to negotiate an agreement with the employer, such as severance pay.⁷⁰³ None of the workers present had had recourse to an administrative or court procedure in sexual harassment cases.

Most Labour Inspectorate clients are the working poor.⁷⁰⁴ A judge noted that professional women, who have too much to lose in terms of career advancement, seldom report.⁷⁰⁵ In the course of the focus group interviews, a young lawyer confided away from the rest of the group that her friend another lawyer had been a target of sexual harassment by a senior lawyer. The friend thought of filing a complaint but her father's friend, also a lawyer, advised her to refrain from doing so, as the legal community is small, word travels fast and a complaint may jeopardize future job opportunities.⁷⁰⁶

⁷⁰³Labour inspector 3, *supra* note 661; labour inspector 4, *supra* note 691; labour inspector 5, *supra* note 661.

⁷⁰⁴Labour inspector 4, *supra* note 691.

⁷⁰⁵Judge 2, *supra* note 689.

⁷⁰⁶Focus group participant, T.C. Lawyer, *supra* note 664.

Labour inspectors can enter premises and as such play a crucial role. A judge called them “privileged observers” who are in on the ground floor.⁷⁰⁷ But few sexual harassment complaints are lodged. An interviewee said that cases of psychological harassment were much more numerous than sexual harassment cases, which “remain taboo”.⁷⁰⁸

Workers felt that the Labour Inspectorate was a ponderous institution that works at a glacial pace. Interviewed participants noted that months could go by before a labour inspector arrived at the workplace. Labour Inspectorate lawyers countered that most sexual harassment investigations are conducted within sixty to ninety days of filing. That said, one of them conceded that sexual harassment investigations do not get the same priority as moral harassment cases. Indeed, their in-house caseload monitoring system does not even consider sexual harassment cases.⁷⁰⁹ A litigant noted that Labour Inspectorate staff are committed public servants who are strained beyond capacity,⁷¹⁰ a view echoed by a judge in another city.⁷¹¹

A Labour Inspectorate respondent said that while the sexual harassment workload is not overly large, it is qualitatively very different.⁷¹² Related investigations are a strong departure from the traditional method and take much more time and special skills to conduct. As opposed to routine cases, inspectors need to do good interviews and observe individuals and their reactions and not simply review files and payroll records.

⁷⁰⁷Judge 4, *supra* note 661.

⁷⁰⁸Labour inspector 5, *supra* note 661.

⁷⁰⁹Labour inspector 3, *supra* note 661.

⁷¹⁰Litigant 3-Concepción, *supra* note 693.

⁷¹¹Judge 4, *supra* note 661.

⁷¹²Labour inspector 3, *supra* note 661.

Another participant felt that Inspectorate staff lacked the skills required to conduct investigations involving more than paperwork. In his view, collaboration with Women's Directorate (SERNAM) was needed for a more integrated gender and psychosocial approach.⁷¹³

3.5.2.2 Using the Courts

Litigants, lawyers, judges and labour scholars interviewed emphasized the benefits of litigating and the use of *tutela* remedies instead of the administrative options offered by the Labour Inspectorate process. They advanced several arguments that make litigation preferable. Significantly, some litigants and a judge had previously worked for the Labour Inspectorate or the Labour Directorate (a unit of the Labour Ministry), or been legal aid labour defense lawyers. *Tutela* remedies are recommended because they allow for indirect evidence, which lightens the burden of proof for plaintiffs. Moreover, use of the courts is a stronger deterrent than intervention from the Labour Inspectorate. It was argued that employers fear court judgments, as they build a *corpus juris* on the scope of obligations.⁷¹⁴ They also offer a range of reparations beyond monetary compensation, including educational workshops and publication of guidelines and procedures.⁷¹⁵ The rationale is that the courts provide the most effective forms of redress. Some even go as far as arguing that the administrative procedures offered by the Labour Inspectorate have a degree of discretion that reduces their impact. A Labour Inspectorate lawyer agreed that recourse to the courts yielded better results than the administrative process, noting that in her experience fining employers did not seem to have a deterrent effect. Nevertheless, she

⁷¹³Labour inspector 4, *supra* note 691.

⁷¹⁴Scholar, *supra* note 661; Litigant 1-Santiago, *supra* note 667. Chile follows a continental legal tradition. There is no rule on precedent, but a new recourse in labour law to unify case law could discourage employers from going to court.

⁷¹⁵Litigant 2-Santiago, *supra* note 667.

argued that the Labour Inspectorate's work was crucial for workers, as it could produce investigative reports and other evidence that workers could in turn use in court.⁷¹⁶ A litigant said that a proper administrative investigation is of significant assistance in court.⁷¹⁷ In sum, recourse to court and administrative remedies seems complimentary, with the latter greatly assisting the former.

A judge praised the *tutela* process but warned that some litigants have abused its potential. As she argued, the process is intended to protect workers while an employment contract is in effect and that is not happening, which turns every such case into a wrongful dismissal case.⁷¹⁸ By way of contrast, a litigant from a different city complained about judges dismissing most *tutela* cases.⁷¹⁹

Legal aid takes on an insignificant volume of sexual harassment cases. A legal aid lawyer repeatedly said she saw no use in being interviewed, as her office had never taken on such a case. Although she eventually agreed to an interview, she failed to show up at the appointed time. A judge in the same city said such cases were so rare, getting one from the legal aid office was a treat.⁷²⁰

Even if most litigation strategy arguments were true, lawyers focus on litigation and seldom think of other venues, including alternative conflict resolution. In contrast, participating workers did not see the advantage and none had ever considered going to court to seek redress. During

⁷¹⁶Labour inspector 5, *supra* note 661.

⁷¹⁷Litigant 2-Santiago, *supra* note 667.

⁷¹⁸Judge 4, *supra* note 661.

⁷¹⁹Litigant 3-Concepción, *supra* note 693.

⁷²⁰Judge 4, *supra* note 661.

interviews, two judges said pre-trial mediation was a useful tool that provided a chance to examine the weaknesses and strengths of a case and allowed them to depart from evidentiary rules that make rendering a judgment in equity more difficult.⁷²¹

For workers, litigation has clear barriers: Cost, time, access to a labour defender, and the need for witnesses. Although in theory all needy workers have access to legal aid, admissibility tests are in place. A former Labour Defender lawyer related being unable to take a case as the target could not produce the required two witnesses.⁷²² She said that in small towns few private lawyers will take a case on a contingency basis. If legal aid won't take the case, the worker is left with no legal representation.⁷²³

Most interviewees related that co-workers are rarely willing to testify, whether in court or in administrative investigations. One focus group participant recalled having a hard time obtaining testimony after being appointed to investigate a sexual harassment case. The colleagues of the target repeatedly stated to have heard and seen nothing.⁷²⁴ Individuals reluctant to be part of a conflict won't testify in the administrative process, much less in the court. As a lawyer recalled, appearing in court takes a toll and can change the workplace dynamics for the worse, including ostracism and retaliation.⁷²⁵ Individuals take sides and often excuse the perpetrator on grounds that he is a provider who cannot afford to lose his job.

⁷²¹Judge 2, *supra* note 689; Judge 4, *supra* note 661.

⁷²²Litigant 2-Santiago, *supra* note 667.

⁷²³Ibid.

⁷²⁴Focus group participant, F.R., *supra* note 667.

⁷²⁵Litigant 3-Concepción, *supra* note 693.

3.6 Framing the Case: Discrimination or Violation of Dignity?

Litigants, lawyers, policymakers, judges and scholars were asked to set the framework for analysis of sexual harassment. In interviews, sexual harassment emerged as a clear gender equality and non-discrimination issue. In addition, other legal frameworks situated sexual harassment as a violation of human dignity. As a participant argued, sexual harassment violates a range of rights, notably the principle of equality.⁷²⁶

Views among judges varied. For some, while sexual harassment was a clear issue of sex discrimination and gender inequality, it was also a violation of human dignity.⁷²⁷ Men permit or are permitted to behave in ways that demean women.

A male judge retorted that if sexual harassment were to be conceived as a violation of the equality principle, the question is what would be required to meet the standard of proof. He could not see how targets could prove discrimination in relation to someone in particular. Instances of sexual harassment would be better termed lust rather than discrimination, he argued, as the perpetrator, “unless he was a serial harasser, would only sexually harass a woman he likes and not all women. In this situation, the perpetrator affects some of the worker’s fundamental rights but falls short of discrimination”.⁷²⁸ The theoretical framework used by this judge is based on formal categories. He fails to note that sexual harassment, rather than an individual issue, is a symptom of a wider, more structural question of subordination –exactly the point a litigant made. Although for her there was a clear connection between sexual harassment, equality and gender

⁷²⁶Scholar, *supra* note 667.

⁷²⁷Judge 4, *supra* note 661; Judge 2, *supra* note 689.

⁷²⁸Judge 3, *supra* note 668.

discrimination, judges wanted to assess equality based on a comparison test instead of looking at the structural issues around discrimination, including mistreatment and scorn directed towards the target.⁷²⁹

The lack of an equality doctrine on working conditions and standards within the larger labour and legal context leads litigants to use other arguments involving the fundamental rights trampled by sexual harassment, particularly personal integrity. Anxiety, depression or a nervous breakdown could be measurable effects of harassment and could be used to build a legal claim.⁷³⁰ However, a judge cautiously noted that some litigants submitted medical records with no connecting evidence, as if one process was automatically triggered by the other.⁷³¹

A judge complained that some lawyers failed to make a good case, as if the mere mention of the applicable law constituted a full argument.⁷³²

3.7 Policy and Legal Reform

Lawyers, labour inspectors, judges, policymakers and scholars were queried in individual interviews on the effectiveness of the law and the need for policy changes, including legal reform. Some of these issues were also raised by participants themselves in the context of other questions. For one, effectiveness meant institutional arrangements that allowed workers to ensure their rights are respected. A participant felt that Chileans are not used to exercising their rights.

⁷²⁹Litigant 2-Santiago, *supra* note 667.

⁷³⁰*Ibid.*; Litigant 1-Santiago, *supra* note 667; Litigant 3-Concepción, *supra* note 693; Scholar, *supra* note 667. See above, Chapter 2, Section 3.2.3 on *Tutela* or the Writ on Protection of Fundamental Rights in the Workplace.

⁷³¹Judge 4, *supra* note 661.

⁷³²Judge 3, *supra* note 668.

As such, beyond formal adoption, true change requires stronger public awareness policies, specialized investigative units, and research and design intervention by the Labour Ministry, especially on gender issues. She felt this is the reason laws such as pay equity legislation remain somewhat ineffective, since mechanisms in place fall far short of intended goals.⁷³³

A key criticism related to the insufficient powers vested in labour inspectors. Employers can, with impunity, destroy or refuse to turn over material evidence such as video recordings and telephone records. The law allows for the Inspectorate Office to request any documents for the investigation of any complaint however refusal to comply leads only to a monetary fine.⁷³⁴

Some areas of legal reform emerged from the interviews, some substantive, some related to procedural matters.

Participants opposed the concept of allowing employers to conduct investigations.⁷³⁵ Most felt that employers should be prevented from conducting any investigations whatsoever, and only one argued that organizations should take responsibility for investigating workplace incidents.⁷³⁶ The need for reform rested on the idea that some managers might seek to influence investigations and the law ought to protect due process. The concern is to protect workers from unfounded allegations and prevent employers from taking on the dual role of judge and party.

⁷³³Litigant 2-Santiago, *supra* note 667.

⁷³⁴*Ley Orgánica de la Inspección del Trabajo*, D.F.L. No 2 (Chile: 1967), Articles 31 and 32. The fine could amount to anywhere from as high as \$180 Can to \$600 Can calculated using the November Exchange rate from the Central Bank of Canada currency converter.

⁷³⁵ For instance, Litigant 1-Santiago, *supra* note 667.

⁷³⁶Scholar, *supra* note 667.

Some proposed that workplace investigations be handled by a tripartite committee consisting of representatives of the accused worker, union and management. A judge warned that while having union representatives was desirable, she was not holding her breath as most unions are out of sync with worker protection issues, let alone gender issues. Indeed, save for female-dominated workplaces, unions seldom include gender issues in collective bargaining.⁷³⁷ As mentioned previously, a lawyer appointed to lead a sexual harassment inquest had additional arguments against large investigating committees.⁷³⁸

A litigant felt that restricting redress to in-house venues leaves workers in a vulnerable position, as individuals filing a complaint with their employer do not have the protection from dismissal afforded by the court system or the Labour Inspectorate.⁷³⁹ A judge agreed that in such circumstances employers could simply fire complainants without any legal consequences.⁷⁴⁰

A female judge who had worked in SERNAM felt that attempting to solve cultural issues through legal reform was ill-advised. Cultural and attitudinal changes require public education, and criminal penalties do not educate or prevent.⁷⁴¹ To be effective, the law needs comprehensive public education and policy that provides room for cultural change. A lawyer suggested that both the Labour Defender and the Labour Inspectorate should put in place a gender division to articulate the specific challenges women face in the workplace.⁷⁴²

⁷³⁷Judge 4, *supra* note 661.

⁷³⁸F.R., *supra* note 667.

⁷³⁹Litigant 2-Santiago, *supra* note 667.

⁷⁴⁰Judge 3, *supra* note 668.

⁷⁴¹Judge 4, *supra* note 661.

⁷⁴²Litigant 2-Santiago, *supra* note 667.

Judges, lawyers and policymakers agreed that while the law could stand improvement, the issues were not scope, what it covered or the definition of sexual harassment.

3.8 Discussion

The 2001 nationwide study found that 62 percent of female respondents felt that sexual harassment was a common occurrence.⁷⁴³ That study revealed broad consensus –almost 90 percent- that unwanted touching and threatening job loss if sexual demands are not met is sexual harassment. Still, the hostile working environment created by sexist language is not recognized to the same extent. Consistent with studies in the United States,⁷⁴⁴ identification of unwanted and unreciprocated sexual behaviour as harassment is class- and age-sensitive. In a study in Chile, individuals over 50 did not feel sexual harassment to be as prevalent as younger respondents. The gender dimension is evident when measuring perceptions in scientific, professional and academic circles, where 63.1 percent of women and only 38 percent of men reported sexual harassment as a common occurrence.⁷⁴⁵ Individuals make distinctions between sexual propositions and dates and sexual harassment. Even if it is clear that the invitation is made with the intent of a sexual encounter, if the sexual attention can be reciprocated and is a part of courtship rituals then people do not perceive it as sexual harassment.

⁷⁴³Departamento de Economía de la Universidad de Chile & Centro de Estudios de la Mujer, *supra* note 649.

⁷⁴⁴Anna-Maria Marshall, "Injustice Frames, Legality, and the Everyday Construction of Sexual Harassment" (2003) 28:3 Law & Social Inquiry 659 at 684-685, Lonsway, Paynich & Hall, *supra* note 656.

⁷⁴⁵Departamento de Economía de la Universidad de Chile&Centro de Estudios de la Mujer, *supra* note 649 at 34.

Focus group perceptions on sexism in the workplace correlate with the Araucaria survey findings, where younger women referred to sexist remarks by peers more often than older women.

The literature indicates that women are reportedly more harassed in male-dominated workplaces. Mueller and others have found evidence that, as proposed by Schultz, men see women as threats in the workplace.⁷⁴⁶ Messing et al. use a Québec Ministry of Education definition of male-dominated workplace whenever the presence of women falls below 33 percent. In a study with telephone industry technicians, they found that women encountered sex discrimination and sexual harassment by both colleagues and clients, compounded by discrimination on racial, ethnic and sexual orientation grounds.⁷⁴⁷ In Europe, the prevalence of sexual violence varies between industrial sectors.⁷⁴⁸ Organizational conditions⁷⁴⁹ or management styles,⁷⁵⁰ in addition to a more male-dominated workforce⁷⁵¹, facilitate or promote sexual harassment.⁷⁵²

Participant narratives reveal a gap between social understanding and the naming of sexual harassment, referred to in the literature as legal consciousness. When common citizens think about the law, their understanding constructs a legality wherein the law is invoked, ignored or

⁷⁴⁶Mueller, De Coster & Estes; Schultz, "Reconceptualizing Sexual Harassment", *supra* note 37.

⁷⁴⁷Messing, Seifert & Couture, *supra* note 36.

⁷⁴⁸Chappell & Di Martino, *supra* note 41 at 41.

⁷⁴⁹ For instance Bannerji and the discussion of supervisors who permit harassment to occur, Bannerji, *supra* note 38; Sandy Welsh & James Gruber, "Not Taking it Any More. Women Who Report or File complaints of Sexual Harassment" (1999) 36:4 *The Canadian Review of Sociology and Anthropology*.

⁷⁵⁰ Begany discusses how the acceptance of stereotypes, myths and authoritarianism facilitates harassment, Joseph J. Begany & Michael A. Milburn, "Psychological Predictors of Sexual Harassment: Authoritarianism, Hostile Sexism, and Rape Myths" (2002) 3:2 *Psychology of Men & Masculinity* 119, Daganais, examining psychosocial hazards, argues that violence could be external i.e. clients, while others are ingrained in the workplace culture. Lucie France Daganais, *La face cachée des conditions de travail: les situations d'atteintes a la santé psychologique* (Cowansville: Editions Yvon Blais, 2007).

⁷⁵¹Messing, Seifert & Couture, *supra* note 36; Lonsway, Paynich & Hall, *supra* note 656; European Commission, *supra* note 42; Welsh, Dawson & Griffiths, *supra* note 598.

⁷⁵² Pryor discusses all of them as risks factors, Pryor & Fitzgerald, *supra* note 209.

resisted.⁷⁵³ Grasping the social phenomenon depends on education, class, and age. As such, group discussions became a space for consciousness-raising. As conversations proceeded and participants related incident of sexual harassment, others joined in to say they had experienced the same things although minutes before they may have claimed to be unaware of sexual harassment either as an individual experience or as something affecting their peers. Be that as it may, some participants saw such behaviours as no more than another facet of an abusive boss with a penchant for yelling and bullying underlings.

The interviews reveal that workers knew about unwanted sexual attention but had no particular name for it or restricted their definition to serious cases. Focus group participants felt sexual innuendo was part of a relaxed labour climate, with men and women participating equally. The question was when and how teasing goes from being in poor taste to being obnoxious. Focus group participants intimated that the point at which women incorporate or appropriate a definition of sexual harassment is demarcated by sexual demands, soliciting sexual contact or feeling that their job was on the line.

The sexist climate that makes for a hostile working environment is much more difficult for workers to identify as sexual harassment or gender harassment, as also noted in the literature.⁷⁵⁴ Jokes, sexual bantering and lewd comments directed to no one in particular are seen as annoying but not necessarily as sexually harassing behaviour.⁷⁵⁵ The use of coarse language and hounding

⁷⁵³Nielsen, *supra* note 614; Kristin Bumiller, "Victims in the Shadow of the Law: a Critique of the Model of Legal Protection" (1987) 12:3 Signs 421; Silbey & Sarat, *supra* note 634.

⁷⁵⁴ For instance, Lonsway, Paynich & Hall, *supra* note 656; Sara Charlesworth, Paula McDonald & Anthea Worley, *The Workplace Context of Sexual Harassment in Australia: Policing the Gender Borders* (Surfers Paradise, Australia: 2012; Charlesworth *et al.*, *supra* note 586; Anne M. O'Leary *et al.*, "Sexual Harassment at Work: a Decade (Plus) of Progress" (2009) 35:3 Journal of Management 503.

⁷⁵⁵ This is clear in rulings where judges refer to behaviour as "inappropriate".

after a sexual advance is rejected are a clearer sign of harassment, but are not necessarily perceived as sexual in nature. The consequences entailed in rejecting sexual advances make it difficult to draw the line; in fact, they intersect to the point of being indiscernible. Sexual harassment could be a continuum of actions that evolve from courtship to personal attacks to moral harassment, but whose basis is sexual. The thin line between the two types of harassment should be examined in greater detail, the better to confront and prevent.⁷⁵⁶

Marshall points out that targets may take notice of sexual harassment after a personal experience perceived as harmful.⁷⁵⁷ As such, even if the behaviour in question could be labeled as sexual harassment, it would go unnoticed unless it caused injury to the target.⁷⁵⁸ Identification of such personal experiences depends on degree of distress, frequency of the behaviour, and perception of harm relative to workplace status.⁷⁵⁹ This was evident in the story of the union officer who confronted the sexual harassment and harm done to a co-worker but who had been largely unresponsive when it happened to her.

Some mistreated workers have difficulty recognizing their experience as discrimination because it would entail seeing themselves as victims.⁷⁶⁰ Similarly, women asked about discrimination against women in general tend to respond much more positively than if asked about personal

⁷⁵⁶ Cox looks into the use of legal recourses for psychological and sexual harassment and finds use of the former renders the gender component of harassment invisible. Cox, "From Sexual to Psychological Harassment: One step Forward Twenty-five Years Back from Women's Equality at Work?"; [From Sexual to Psychological Harassment] *supra* note 255.

⁷⁵⁷ Anna-Maria Marshall, *Confronting Sexual Harassment: the Law and Politics of Everyday Life* (Burlington: Ashgate Publishing Company, 2005), at 121-140.

⁷⁵⁸ *Ibid.*

⁷⁵⁹ *Ibid.*

⁷⁶⁰ Bumiller, *supra* note 753.

experience.⁷⁶¹ Berdahl found that minority women were more sensitive to ethnic/racial discrimination than sexual harassment.⁷⁶²

In the Marshall study, women had a narrow label or operational definition for sexual harassment that was limited mostly to unwanted physical contact, unless non-physical behaviour was so invasive as to cause significant distress.⁷⁶³ Opinions expressed by focus group participants are fully in line with Marshall's findings.

The 2001 Chilean survey on women's working conditions, which polled men and women aged 18 to 65, asked respondents about their perception of sexual harassment, the frequency of the occurrence, personal knowledge, personal experience and the effects of harassment on working conditions.⁷⁶⁴ Respondents were asked to identify sexual harassment from a list of examples. Responses indicate that individuals do recognize the worst forms of sexual harassment, including unwanted physical contact, quid pro quo, and sexual assault (Table 10).

⁷⁶¹Lonsway, Paynich & Hall, *supra* note 656, Marshall, *Confronting Sexual Harassment: the Law and Politics of Everyday Life*, *supra* note 757 at 123-124. See also Corporación Humanas Survey on women's perception of discrimination and being discriminated, Chapter 3 above section 2.6

⁷⁶²Jennifer Berdahl & Celia Moore, "Workplace Harassment: Double Jeopardy for Minority Women" (2006) 91:2 *Journal of Applied Psychology* 426.

⁷⁶³Marshall, *Confronting Sexual Harassment: the Law and Politics of Everyday Life*, *supra* note 757.

⁷⁶⁴Departamento de Economía de la Universidad de Chile & Centro de Estudios de la Mujer, *supra* note 649.

	Total	Men	Women
Annoying flirtatious remarks, suggestive jokes or gestures	22.2	21.6	22.8
Touching and unwanted fondling	89.9	90.1	89.4
Seducing a co-worker	27.3	28.1	26.4
Making sexual demands in exchange for benefits at work ⁷⁶⁵	78.7	77.3	80.0
Pressure to have sex to avoid penalties at work ⁷⁶⁶	86.9	85.7	88.1
Making sexual advances using position or hierarchy ⁷⁶⁷	78.9	76.3	81.5
Dates with sex in mind	31.3	27.6	34.9

Source: SERNAM 2001.

As the survey shows, seducing, being seduced or inviting or being invited on a date with sex in mind are not necessarily construed as sexual harassment –and should not automatically be so. There is the risk of sanitizing the working environment by substituting a moralistic discourse that could reinforce gender stereotypes.⁷⁶⁸ The guiding principle ought to be power relations and unwanted sexual behaviour. However, a law on sexual harassment is perceived negatively, as in Colombia, because the critics argue it eliminates gallantry and courtship in the workplace.⁷⁶⁹

⁷⁶⁵ The original question in Spanish was “Apremiar a mantener relaciones sexuales para evitar sanciones laborales”.

⁷⁶⁶ The original question in Spanish was “Presionar a mantener relaciones sexuales para evitar sanciones laborales”.

⁷⁶⁷ The original question in Spanish was “Propuesta sexual usando posición o jerarquía”.

⁷⁶⁸Tinkler, *supra* note 567.

⁷⁶⁹ Enrique del Rio, "Acoso sexual: delito en Colombia" El Universal (July 10, 2009) online: <<http://www.eluniversal.com.co/opinion/columnas/acoso-sexual-delito-en-colombia>>..

Although sexual harassment-romance tales could be dismissed as merely anecdotal, they do emerge in the literature.⁷⁷⁰ The evidence in the United States suggests a strong link between harassment and the end of a workplace romance. Indeed, a quarter to one-third of human resources studies found harassment with origins in a previous romance.⁷⁷¹ Pierce's study revealed that a prior history of workplace romance influences investigator decisions and reinforces feelings of injustice among co-workers in the context of an accusation.⁷⁷² As such, it sounds like a reasonable apprehension for Labour Inspectorate staff. But rather than dismissing such charges out of hand, inspectors should be especially cautious, as sexual harassment could reflect a refusal to accept the end of a relationship, similar to domestic violence cases. Harassment can be unleashed after a breakup or when a *Latin seducer* keeps on pestering because he won't take no for an answer. Some doctrine questions the whole basis of consensual relationships in the face of a power imbalance,⁷⁷³ but taking this argument to its full extent risks undermining any agency women may have.

Resisting and Complaining

The interviews reveal that targets use a range of strategies to confront sexual harassment, including avoidance and confrontation beyond the scope of legal remedies.⁷⁷⁴ The power of the law goes beyond the use of legal and formal recourses. When targets give notice that if the

⁷⁷⁰Charles A. Pierce *et al.*, "Responding to Sexual Harassment Complaints: Effects of a Dissolved Workplace Romance on Decision-Making Standards" (2004) 95 *Organizational Behavior and Human Decision Processes* 66.

⁷⁷¹*Ibid.* at 67.

⁷⁷²*Ibid.*

⁷⁷³Carol Sanger, "Consensual Sex and the Limits of Harassment Law" in Catharine A. MacKinnon & Reva B. Siegel, eds., *Directions in Sexual Harassment Law* (New Haven: Yale University Press, 2004) 77-93.

⁷⁷⁴O'Leary *et al.*, *supra* note 754; V. Kelly Keane, "Sexual Harassment in Paid Employment in the European Union" (2004) 4 *Baltic Y.B. Int'l L.* 111; Marshall, *Confronting Sexual Harassment: the Law and Politics of Everyday Life*, *supra* note 757.

behaviour does not stop consequences can follow, they are also using the law. In fact, Quinn found that women may invoke but not use the legal recourses.⁷⁷⁵

In other jurisdictions and legal cultures, including Australia,⁷⁷⁶ Quebec⁷⁷⁷ and Mexico, targets also do not seem to use existing remedies. In 2012, Mexico's Federal Supreme Court issued a directive on psychological and sexual harassment within the judiciary; to date, all of 23 complaints have been lodged.⁷⁷⁸ Tinkler suggests that reasons for lack of interest in enforcing sexual harassment policies differ for men and women. Men fear losing privileges while women fear being perceived as irrational and oversensitive and reinforcing gender stereotypes that women are quick to take offense.⁷⁷⁹

Interviews and data support the assertion that workers do not make formal complaints and use other ways of responding to sexual harassment, such as quitting. Two focus group participants did and others knew of more cases. The law facilitates the feeling of helplessness because workers can be fired easily, even if severance must be paid.⁷⁸⁰ Individuals complain and quit as part of a process of resistance.⁷⁸¹

Labour Directorate statistics collected through access to information requests for the period between January 2005 and June 2014 (Table 11) reveal that the workload impact of sexual

⁷⁷⁵Quinn, *supra* note 567 at 1115.

⁷⁷⁶Mackay, *supra* note 532.

⁷⁷⁷Cox, "From Sexual to Psychological Harassment: One step Forward Twenty-five Years Back from Women's Equality at Work?", *supra* note 255 at 240.

⁷⁷⁸ Personal communication with A.O.O., lawyer of the *Gender Division of the Mexican Federal Supreme Court* 2015.

⁷⁷⁹Tinkler, *supra* note 567 at 18.

⁷⁸⁰ See below Chapter 2, section 2.1.1 on the rules about dismissal and severance pay.

⁷⁸¹Befort & Gorajski, *supra* note 593.

harassment cases is minute. While there are some inconsistencies in the data presented at various times for this dissertation,⁷⁸² it does show that complaints have shrunk to one third or half the volume in the three first years (2005-2008) following passage of the law.

Table 11											
Sexual Harassment Complaints Lodged with the Labour Directorate											
2005 to June 30, 2014											
Year Data requested	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	Total
2014					200	133	149	150	167	101	
2013		334	330	330	220	139	161	91			
2011							175				
2009⁷⁸³	238	318	344	344							

Source: Carrasco & Vega, *supra* note 243; data provided directly by the Labour Directorate Research Department through access to information requests in 2011, 2013 and October 2014.

There is no clear explanation for the decline. Some have suggested that under the right-wing government in office from March 2010 to March 2014, the Labour Directorate did little in terms of providing information or formulating policy.⁷⁸⁴ Yet, a decline was evident prior to this. Sexual harassment has not been on the SERNAM agenda since 2000-2005, when it spearheaded efforts to push related legislation through Congress.

⁷⁸² Despite an access to information request for the series from 2005 until June 2014, information provided covered only 2009 to June 2014.

⁷⁸³ Data reported in Carrasco Oñate & Vega López, *supra* note 243.

⁷⁸⁴ Opinions expressed when I presented preliminary results of this chapter in a roundtable held in January 2014 at Diego Portales University Law School in Chile.

An interviewee suggested that many more cases of psychological than sexual harassment existed because the latter “remains taboo”.⁷⁸⁵ Cox found similar results in a study in Québec, with workers using psychological harassment remedies, inter alia because of a 90-day period to make a claim versus the two years needed to present a complaint on sexual or racial harassment cases using the human rights commission.⁷⁸⁶ In the Chilean context, some management policies give priority to psychological harassment despite the law requiring an investigation within 30 days.

In 2011, prior to passage of legislation, the Labour Inspectorate received some 2,251 psychological harassment complaints and only 161 or 149 sexual harassment complaints, depending on the source.⁷⁸⁷ In 2012, the Labour Directorate reported either 52, 91 or 150 sexual harassment cases⁷⁸⁸ compared to 2,234 on discrimination, out of a total number of 186,548 complaints.⁷⁸⁹ The number of reported sexual harassment cases is minuscule relative to the overall Inspectorate caseload.

Whether this trend is matched by a reduction in sexual harassment lawsuits is hard to say. It may also be that targets are having recourse to the remedies in the psychological harassment legislation passed in July 2012 by combining both types of harassment.⁷⁹⁰ Information about the number of sexual harassment cases reaching the courts could not be obtained. Court statistics use broad categories in relation to specific issues, i.e., overtime, workplace injuries, rights violations, or constructive and wrongful dismissals (Table 12).

⁷⁸⁵ Labour inspector 5, *supra* note 661.

⁷⁸⁶ Cox, "From Sexual to Psychological Harassment: One step Forward Twenty-five Years Back from Women's Equality at Work?" at 242.

⁷⁸⁷ Data received from the Labour Inspectorate research department in October 2014 through access to information request is different for 2011.

⁷⁸⁸ Again, due to inconsistencies in the data provided.

⁷⁸⁹ Dirección del Trabajo, *Anuario Estadístico 2012* (Santiago: 2013) at 30.

⁷⁹⁰ *Ley 20.087 Modifica el Código del Trabajo, sancionando las prácticas de acoso laboral* (Chile: 2012).

Table 12						
Cases Filed and Concluded, by Reason (2011-2013)						
	Filed	Settled	Conciliation	Out of Court Settlement	Sentence	Dropped
2013	284,737	29,414	112,362	2,118	69,461	11,467
Tutela for the protection of rights	3315	362	1669	27	837	155
Constructive dismissal	3,320	299	1,241	29	1,126	97
Wrongful dismissal	23,792	2,715	10,225	176	5,103	897
2012	265,689	26,696	102,821	2,239	61,591	9,226
Tutela for the protection of rights	3,223	302	1,562	23	784	98
Constructive dismissal	3,177	265	1,166	21	953	76
Wrongful dismissal	22,843	2,606	9,381	196	4,981	672
2011	238,975	22,722	95,338	1,738	63,634	9,114
Tutela for the protection of rights	2,978	247	1,335	25	806	79
Constructive dismissal	2,158	191	862	19	753	76
Wrongful dismissal	20,802	2,130	9,001	133	5,017	613

Lawsuits can be filed under any the above three categories, and the data shows that sexual harassment cases are a minute fraction of the total number. This also holds true for legal aid and labour defenders. As a judge commented, cases were so few, when legal aid brought one it was a

treat.⁷⁹¹ Data obtained through access to information requests to the country's five legal aid divisions bear out that the Labour Defender's offices received all of eight cases in 2008-2014.⁷⁹²

Other issues emerged. Women being blamed for their behaviour corroborates the stigma around sexual harassment. Targets could be branded "decent" and "not so decent", or be unable to distinguish unwanted or inappropriate behaviour, thus shifting responsibility from perpetrator to target. Women are blamed because of failure to clearly establish an appropriate rapport with men, or for behaviour such as dressing seductively.⁷⁹³ This replicates stereotypes observed in sex offenses whereby women are perceived to be at fault for the harm inflicted on them.⁷⁹⁴ Marshall also found that some women become resentful when a woman's behaviour facilitates sexual harassment.⁷⁹⁵ The literature ascribes the phenomenon to a sexist culture that subordinates women,⁷⁹⁶ including construction of gender roles embedded in stereotypes that cause and reinforce discrimination and inequality.⁷⁹⁷

Conclusions

Chappell and Di Martino refer how some societies recognized sexual harassment as normal and others as a serious issue. Those where surveys identify it as a problem are criticized for high prevalence rates, when it might only be a matter of lifting the cover off a hidden

⁷⁹¹Judge 4, *supra* note 661.

⁷⁹² Although not all offices provided this information, Santiago and Bio-Bío.

⁷⁹³Tinkler, *supra* note 567 at 14.

⁷⁹⁴Casas B & Mera B., *supra* note 242.

⁷⁹⁵Marshall, *Confronting Sexual Harassment: the Law and Politics of Everyday Life*, *supra* note 757.

⁷⁹⁶MacKinnon, *Sexual Harassment of Working Women: a Case of Sex Discrimination*, *supra* note 20.

⁷⁹⁷Rebecca J. Cook & Simone Cusack, *Gender Stereotyping. Transnational Legal Perspectives* (Philadelphia: University of Pennsylvania, 2010).

issue.⁷⁹⁸Measurements and perceptions of sexual harassment across cultures make for difficult comparisons. Researchers ought to be cognizant that methodologies and questionnaire type could result in additional variations.

In Chile, the understanding of what sexual harassment is could explain low response levels, not to mention higher cultural tolerance for overall sexist and discriminatory treatment towards women. The perception of being a target of mistreatment is different from identifying social injustice and discrimination affecting specific social groups. The perception gap between discrimination against women and being discriminated oneself is eloquent.

Targets of sexual harassment must also overcome the stigma and gender stereotypes. Legal scholars emphasize the need to clarify the theoretical frameworks for dealing with sexual harassment at the normative level. Needless to say people do have many times a sense what is proscribed and what might be acceptable behaviour and under those understandings right or wrong shape their behaviour to confront harmful situations that go beyond the use of legal remedies.

Using the law and its remedies to confront incivility in the workplace must be contextualized. Legal frameworks facilitate the feeling of helplessness that become a barrier to better working conditions or respect for worker rights. While gender and class do compound feelings of vulnerability, it is beyond our scope to examine in detail the subjective and objective elements surrounding gender-based injustice in the workplace.

⁷⁹⁸Chappell & Di Martino, *supra* note 41 at 53 and 59.

CONCLUSIONS

1. Searching for and Building a Legal and Theoretical Framework

A key question driving this dissertation was the theoretical framework underpinning sexual harassment legislation in Chile and the attendant implications for gender justice. In the 1970s, North American feminists provided a name for and made sexual harassment visible as a phenomenon women experience, whereby the gender construct of subordination and inequality contributes to unwanted sexual attention and manifests itself as a form of discrimination and violence. The movement proved useful in building legal categories highlighting the harm brought about by sexual harassment and found a niche in anti-discrimination legislation in the United States, Canada, and other common-law countries. Then, the gender equality paradigm, as I call it, traveled to other jurisdictions. The transplantation of legal categories found fertile soil in the context of a larger political movement that verbalized violence against women as a violation of human rights. Sexual harassment became another form of the violence and cultural injustice women experience because they are women.

In Chapter 1 I have examined the theoretical underpinnings of sexual harassment from its inception as legal categories and elucidated the values –i.e., equality, non-discrimination, dignity- that Chile’s sexual harassment legislation embraced. Chapter 2 reviewed the Chilean legislative sexual harassment framework and case law assessing if the equality and dignity approaches are embraced and whether the distinction had any practical implications. Lastly, chapter 3 reports on workers’ perceptions of sexual harassment looking at the results of the

Araucaria survey, women's experience understanding and dealing with sexual harassment captured through interviews to show how legal scholars, union representatives, workers, labour inspectors and policymakers understand the phenomenon and the use of the law.

The process of legal transplantation or translation is a process that poses challenges and certainly this was the case in Chile. As it is often behind the times and encompasses a wide diversity of cultural and legal contexts, making the transition viable requires adjustment.⁷⁹⁹ Other cultures bring in their own histories, values, and lessons learned from the shortcomings of earlier legal reforms. This was the case in Europe, where other political values were considered in an attempt to stay away from perceived North American prudishness, from flaws in the protection of worker rights, and from a different political-economy perspective on job security.⁸⁰⁰ European feminists were torn between approaches based on dignity and equality, and their dignity framework attempted to account for those dimensions. Dignity as a framework, it was argued, was more inclusive, as affording protection to targets of sexual harassment would not depend on sex/gender categories. The dignity paradigm also speaks to a class paradigm –equal worth and respect for all workers- but its shortcoming is that the legal construct could conceal the gender dimension of the harm. Writing from the German experience and giving a more nuanced reading of equality and dignity, Baer proposed combining both.⁸⁰¹ In the case of Chile, I examined

⁷⁹⁹ As explained by Alan Watson, legal transplantation refers to the process whereby societies borrow legal institutions, such as common law did from Roman law, which greatly influenced many legal systems with slight modifications. Alan Watson, "Comparative Law and Legal Change" (1978) 37:2 Cambridge Law Journal 313; Máximo Langer conceptually prefers legal translation to transplantation, as meanings are taken and adjusted to local contexts. See Máximo Langer, "Legal Translation of American Plea Bargaining" (2004) 45:1 Harvard International Law Journal 1. It is beyond the scope of this dissertation to examine how and whether in Chile the process of taking sexual harassment as a legal construct followed any of those theoretical frameworks.

⁸⁰⁰ That was the discussion in France, see *Saguy. [Employment Discrimination or Sexual Violence?]*, *supra* note 108. See also with respect to Germany *Zippel*, *supra* note 106, *Baer*, *supra* note 86.

⁸⁰¹ *Baer*, *supra* note 86.

whether framing sexual harassment under either of these categories had specific implications, and whether those two paradigms could be merged.

Chilean feminists followed in the steps of their North American counterparts who fought for law reform based on the gender equality paradigm. As soon as Chile returned to democratic rule in 1990, they proposed to prohibit sexual harassment in labour legislation.⁸⁰² But concepts and categories in the legal order must make sense to the receiving culture. Opposing forces wanted to keep the status quo as noted by Watson.⁸⁰³ Cultural mistrust towards women became evident and resistance stiffened.⁸⁰⁴ Reluctance to accept new legislation took many forms. Some argued that legal transplantation would bring in foreign values. Opponents said it would mirror the problems it was reputed to have caused in American workplaces, with managers wary of closing their office door for fear of being falsely accused of sexual harassment.⁸⁰⁵ Horror stories proliferated after a prominent Chilean TV presenter was invited by Congress to speak in closed session about the intricacies of a sexual harassment case he faced in the U.S.⁸⁰⁶

Government efforts were driven by the gender equality paradigm while they were concurrently promoting domestic violence and divorce bills.⁸⁰⁷ SERNAM, the Directorate on Women

⁸⁰²They also proposed to include sexual harassment in the Criminal Code, but this bill was never debated.

⁸⁰³Watson, *supra* note 247.

⁸⁰⁴When discussing U.S. plea bargaining in other jurisdictions, Langer refers to mistrust and corporate opposition from those whose power would be threatened and fear of introducing institutions from a different legal culture. Langer, *supra* note 247 at 3.

⁸⁰⁵Biblioteca Nacional, online, *supra* note 147 at 106. Address by Hon. Deputy Mora.

⁸⁰⁶*Ibid.*

⁸⁰⁷Chile had no divorce legislation until 2005. See, Cabal, Roa & Lemaitre, eds., *supra* note 309 at 137-152 and 155-176. Teresa Valdés E., "Acción política de mujeres 1990-2006: institucionalizando la equidad de género" in Claudia Mora, ed., *Desigualdad en Chile: la continua relevancia del género* (Santiago: Ediciones Universidad Alberto Hurtado, 2013) 243-274, Lidia Casas B, "Derechos humanos de las mujeres" in Felipe González, ed., *Informe Anual sobre Derechos Humanos en Chile 2003. Hechos 2002* (Santiago: Facultad de Derecho Universidad Diego Portales, 2003) 247-293, Lidia Casas Becerra, "Reformas de género en familia" (2009) XIII:13 *Revista de Derecho Universidad Finis Terrae* 101.

Services, framed the political agenda on the indignities and discrimination caused by sexual harassment, but found in Congress outspoken legislators who were familiar with and used the language and tools of labour law. The legislative process took more than a decade. It originally conceived of sexual harassment as a form of discrimination, but it was reshaped in the Senate as harm to dignity as it was described in Chapter 1.

Dignity is familiar language in Chilean labour law, and is enshrined in the Constitution. As labour legislation is organized under a class paradigm, dignity became an appealing narrative because sexual harassment could affect not just women but also men, and could be explained as a psychosocial hazard.⁸⁰⁸ This is not to say that those who embraced the dignity approach relinquished the gender dimension of sexual harassment. The question was whether such a theoretical divide in the approach was relevant in the long run, and whether it had any consequences for application of the law. In chapter 1 I concluded that neither dignity nor equality were the central arguments in legal claims on sexual harassment.

Chapter 2 of this study examined how legal actors translated legal categories into legal practice. I found that neither dignity as enshrined in the statute or the gender equality narrative were an influence in litigation strategies or court reasoning. Litigants seldom framed or used the language of women's inequality or the dignitary harm embodied in sexual harassment. As such, the aim of pursuing gender equality was lost because those who had to use the law were unfamiliar with the gender perspective. The narrative of the equality paradigm did not influence the language or the legal frameworks of those who used the law, although there is ample scholarly recognition that sexual harassment is a gender phenomenon relating to both cultural and redistribution

⁸⁰⁸Biblioteca Nacional, online, *supra* note 147 at 106. Address by Hon. Deputy Exequiel Silva.

injustice.⁸⁰⁹ Discussion then for this thesis became a more basic issue of how a law can be effective, and on what terms.

Lawyers are rational agents hired to represent clients and win cases, not to safeguard the purity of reforms, and this includes labour defenders and legal aid practitioners. Their efforts in using the law require adapting pre-existing practices to the new legal text so that if inequality, discrimination or dignity do not add value to wrongful or constructive dismissal actions, the new language will fail to make what the law envisioned visible. Interestingly, other rights came to the fore during the legislative debate. Some asserted that sexual harassment violated further fundamental rights, *inter alia*, to personal and mental integrity and the right to work. Introduction of *tutela*, a new procedure and a key component of the culture of fundamental rights protection, facilitated filing cases on rights infringement rather than equality or non-discrimination grounds. Practitioners and judges were found to be familiar with the right to the personal integrity framework, which is used in other constitutional procedures as well.

However, such familiarity does not deconstruct the legal practices that act as barriers. When every job loss is seen as a violation, litigation practices detract from the meaning of a breach of fundamental workplace rights. Conceptual density is lost if practitioners simply check off a list of the rights violated by sexual harassment. In addition, lawsuits are deprived of a gender dimension in reading those rights. The interaction between actors -judges and litigants- is a challenge, because if litigants do not raise the issues, there is no reason judges will. But judges

⁸⁰⁹Fraser, *Qu'est que la justice sociale? Reconnaissance et distribution*, [Qu'est que la justice sociale?] *supra* note 78.

could be challenged if litigants take the role observed in some cases led by the Labour Inspectorate.

The Inspectorate plays two important roles in protecting worker rights, and one is as a plaintiff. Its practices reveal a narrative potential which helps connect gender equality, dignity and class. However, the Inspectorate's chances of influencing the Courts and legal practices in an inclusive, systematic interpretation of the law are limited because of the insignificant number of legal proceedings it takes on. This forces us to pay attention to the role of other actors, such as labour defenders -legal aid lawyers- whose presence could be crucial for targets.

2. Effectiveness and Use of the Law

Enactment of laws presupposes that they will serve a purpose and be used by targets requiring redress. Once adopted, the law is a fact that legal players can work with in the process that helps make statutes into living instruments.⁸¹⁰ But in Chile there were no promotion or awareness drives to let workers know about the new law and the protections it afforded, so it was not surprising to find that workers knew little about sexual harassment and the law or were unaware that sexual harassment was covered in workplace regulations.

Chile, not unlike most Latin American countries, is noted for protracted processes of law reform, but the momentum gained is seldom followed by communication and implementation. The small number of complaints filed with the Labour Inspectorate and cases filed with the court system

⁸¹⁰ The language is from the Inter-American Court of Human Rights, when it argued that the American Convention should be interpreted hand in hand with evolving times and current living conditions. See *Case of Atala Riffo and Daughters v. Chile (Merits, Reparations and Costs)* Inter-American Court of Human Rights, 2012). para. 83

has many plausible explanations, but what is clear is that the engine behind the reform was not present during implementation. The lack of a concerted effort by the Labour Ministry, its oversight services and the women's department –SERNAM– to give a gender dimension to an important, culturally resisted *Labour Code* reform led to its having little impact in terms of use and knowledge thereof. As a result, application of the sexual harassment law came under the purview of a government agency that failed to appropriate the reform's gender dimension. Although the Ministry issued directives on correct interpretation of the law, especially on the scope of the obligation to enact workplace regulations, the law was mostly left on the books and it was up to employers to make use of it in their internal procedures. The supervisory routine in the Labour Inspectorate did not change much, save for the fact that sexual harassment was included in new fundamental workplace rights litigation.

Women workers were not seen as a constituency or helped to become one. The law stood in a no man's land when it came to designing policy to inform workers about sexual harassment and how they are protected. Weak women's NGOs on service contracts with the government did not take up the gauntlet of overseeing application. Their political agenda was also constrained by foreign assistance priorities, and the impact of sexual harassment on women is not one of them.

If the reform is to become more than symbolic, it requires enabling conditions for its actual use. There is a gap between the efforts to adopt legislation and the feminist or gender justice discourse promoted by SERNAM and later with the efforts to put the law into action. In Chile, feminist-driven law reforms provide numerous examples where the movement moved on once a particular legal hurdle was surmounted. Currently there is advocacy for inclusion of sexual

harassment in the *Criminal Code*. Women's NGOs are engaged in public campaigns, and the government has shown some interest in including harassment in larger legislative proposals on violence against women. These reforms could become symbolic if enabling conditions are not implemented. Failing that, reform could face the déjà vu of defeat and ineffectiveness. After a decade of sexual harassment legislation in the *Labour Code*, there has been no critical assessment by SERNAM –now the Ministry of Women's Affairs- or the Labour Ministry. Political actors have moved on to a new political agenda, neglecting the need to mend what they have already amended.

Effectiveness means identifying a breach and making use of the law to demand redress or impose sanctions, as needed. The law is neither effective or ineffective *per se*, as it can be used and lead to results over and above procedural and evidentiary hurdles. It has been used by targets, perpetrators, employers, and the Labour Inspectorate alike.

Insecure employment that translates in job security protection because of the ability that facilitates dismissal has a direct impact on the ability of workers to assert their rights.⁸¹¹ In the Chilean context, precariousness manifests itself in a legal framework that helps employers to dismiss. Structural conditions of social and economic injustice are further compounded by the cultural injustice women experience. Access to justice does not operate in a vacuum, and the filing of a complaint over violation of labour rights, including sexual harassment, must be read within the political, economic, and legal context. Legislation addressing the wage gap is a case in point. It was not intended to be a mere nod to gender equality. Although conceived as a tool to bridge the gap, few cases have been litigated. Fear of reprisals is a recurring factor that must be

⁸¹¹See above Section 2.1.1, Chapter 2.

studied in the context of redistributive injustice and cultural misrecognition given the opinions of some actors that such fear is over stated.⁸¹²

I write that the exercise of rights in an understanding of complaining when needed requires enabling conditions, not merely the text of a statute, because it involves both cultural transformation and a remedy to attain redress. There is a need for stronger frontline institutions, such as the Labour Inspectorate whose personnel needs to move beyond its traditional oversight role to emphasize new forms of training.⁸¹³ This must be both technical and political, since legal tools must be used within the political dimension of gender justice. This training and potentially the inspection may involved, as some actors argued, joined efforts between SERNAM and the Labour Inspectorate.

It also requires union involvement that places violence in the workplace and sexual harassment on the agenda. They should be included as psychosocial hazards and treated as such, included as a form of workplace violence. It requires women's participation in unions, because they play a key role and targets can resist sexual harassment and invoke the law through their union.

If we believe statutes are living instruments where litigants, judges and scholars have a role in shaping the best possible reading, ingrained stereotypes must be challenged. Sexual harassment is still trivialized and normalized, but paradoxically, when an allegation is made, disbelief and outrage emerge because the matter is perceived as tantamount to accusing someone of being a

⁸¹² See above Section 2.5, Chapter 3.

⁸¹³ See above Section 3.5.2.1 in Chapter 3 and on the experience of Denmark developing tools for inspection, Mette Bogehus Rasmussen, Tom Hansen & Klaus T. Nielsen, "New Tools and Strategies for the Inspection of the Psychological Working Environment: The Experience of the Danish Working Environment Authority" (2011) 49 Safety Science 565-574.

sex offender. Harassment is downplayed while strict legal safeguards operate in the handling of allegations.

Labour law embraces the ideal of protecting all irrespective of sex, gender, sexual orientation or any other dimension. It is conceived in terms of worker interests opposing those of employers. Sexual harassment poses challenges to labour law, which must protect both targets from unwanted sexual advances and alleged harassers from arbitrary dismissal. Those committed to labour rights often overlook the tensions involved in protecting workers from incivility and the employer obligation to provide safe, secure working conditions and due process. As the ultimate penalty a worker must endure, dismissal is seen as a last resort.⁸¹⁴ In cases of conflict, judges and litigants unintentionally or unconsciously borrow from criminal evidentiary standards, where victims or targets are the means to proving the violation. Once a conduct is proven, judges must ponder the magnitude of that violation. If self-discharge –constructive dismissal- is treated as the ultimate recourse that targets have, it places targets at a disadvantage, sexual harassment has to be intolerable. Judges' criteria must be re-oriented in this regard if the law is to protect targets.

Litigation, at least that initiated by harassers, makes harm to the target invisible because the conflict stands between the dismissed worker and the employer. It is unlikely that labour law would be interpreted much differently when dealing with dismissal. The challenge is to refocus the role of the law in protecting workers from sexual harassment and the negative impact on women of gender-neutral rules and doctrine. The law still provides room to further rights protections because some workplace regulations, as long as they do not mimic the statutes, could

⁸¹⁴ This is equivalent to the criminal law paradigm, where criminal provisions and incarceration must be used *ultima ratio*. In addition, to reach a guilty verdict, a judge must have reached conviction beyond reasonable doubt.

be an important tool in workplace management. The options include avoiding a zero-sum approach –with dismissal as the main measure- and replacing it with graduated responses to sexual harassment. Such an enterprise could empower targets, enable a better workplace climate, and foster transformative gender relations. Future research ought to focus on human resources professionals and unions, the convenience of internal procedures, and potentially recognizing compliance from within the organization.

The language of rights is powerful and appealing⁸¹⁵ yet constrained when it does not deconstruct rigid legal and cultural traditions or change political and economic structures. The risk is for rights to become a mirage or a tool for the strong and powerful to appropriate.⁸¹⁶ Rights are important in the struggle by and for the historically disenfranchised. In a context where political and legal actors are familiar with the rights language but have not seized the non-discrimination and dignity narrative, the equality versus dignity conflict is almost academic, because neither provides tools to overcoming structural barriers.

One does not need to overemphasize gender to assert workplace equality and dignity. In Chile, the horror stories spread during the legislative debate did not materialize. The law did not become a barrier to employment opportunities and did not lead to unbridled retaliation against male coworkers, supervisors, or employers. Chile did not become an imagined caricature of the U.S., where relationships and labour peace were purportedly destroyed as women and men could not enter the same elevator or be in an enclosed office for fear of facing sexual harassment

⁸¹⁵Patricia Williams, "La dolorosa prisión del lenguaje de los derechos" in Isabel Jaramillo Sierra, ed., *La crítica de los derechos* (Bogotá: Universidad de los Andes, Instituto Pensar, Siglo del Hombre Editores, 2003) 43-73; Patricia Williams, "The Pain of Word Bondage" in Patricia Williams, ed., *The Alchemy of Race and Rights: Diary of a Law Professor* (Cambridge: Harvard University Press, 1991) 147-165.

⁸¹⁶Wendy Brown & Janet Halley, *Left Legalism/Left Critique* (Durham: Duke University Press, 2002).

allegations. None of that happened. Many challenges remain ahead; certainly many more than are covered by legal texts.

ANNEXES

ANNEX 1
GUIDE TO SEMI STRUCTURED INTERVIEWS

General topics

These questions should guide and be covered in the conversation.

1. The relevance of sexual harassment in their area of work:
 - a. How important is sexual harassment in your work?
2. The relationship of sexual harassment and discrimination:
 - a. Do you see any relationship between sexual harassment and discrimination?
3. Understanding sexual harassment: quid pro quo, hostile working environment:
 - a. How do you understand sexual harassment to occur? Can you explain what is sexual harassment?
4. How do they perceive the findings and sanctions on perpetrators, do they relate to type of harassment, severity and the organizational ladder in the workplace.
 - a. Do you perceive that sexual harassment is a problem? How prevalent do you think it is?
 - b. When do you think a law is effective?
 - c. Do you think that perpetrators are sanctioned?
 - d. If there are sanctions can you relate to what type of sexual harassment and severity?
 - e. How do you think it influence sexual harassment the organizational of the workplace and the position in the ladder of the target?
5. The usefulness of the law, assessment of effectiveness: issues of evidence, type of remedies
 - a. How do you perceive the effectiveness of remedies?
 - b. In your, opinion, what type targets use, what are difficulties they face with those remedies, including issues with proving the case?
6. Any policy change that would be required to make the law effective or more effective. Their role, as players in this respect .

- a. Would you implement or envision policy changes to make the law more effective?
- b. Would that make your work easier?

ETHICS APPROVAL

File Number: 04-12-02

Date (mm/dd/yyyy): 09/19/2012



Université d'Ottawa **University of Ottawa**
 Bureau d'éthique et d'intégrité de la recherche Office of Research Ethics and Integrity

Ethics Approval Notice

Social Science and Humanities REB

Principal Investigator / Supervisor / Co-investigator(s) / Student(s)

<u>First Name</u>	<u>Last Name</u>	<u>Affiliation</u>	<u>Role</u>
Katherine	Lippel	Law / Civil Law	Supervisor
Lidia	Casas Becerra	Others / Others	Student Researcher

File Number: 04-12-02

Type of Project: PhD Thesis

Title: The Effectiveness of the Sexual Harassment Law in Chile: From Theory to Practice

<u>Approval Date (mm/dd/yyyy)</u>	<u>Expiry Date (mm/dd/yyyy)</u>	<u>Approval Type</u>
09/19/2012	09/18/2012	Ia

(Ia: Approval, Ib: Approval for initial stage only)

Special Conditions / Comments:
 N/A



Université d'Ottawa
Bureau d'éthique et d'intégrité de la recherche

University of Ottawa
Office of Research Ethics and Integrity

This is to confirm that the University of Ottawa Research Ethics Board identified above, which operates in accordance with the Tri-Council Policy Statement and other applicable laws and regulations in Ontario, has examined and approved the application for ethical approval for the above named research project as of the Ethics Approval Date indicated for the period above and subject to the conditions listed the section above entitled "Special Conditions / Comments".

During the course of the study the protocol may not be modified without prior written approval from the REB except when necessary to remove subjects from immediate endangerment or when the modification(s) pertain to only administrative or logistical components of the study (e.g. change of telephone number). Investigators must also promptly alert the REB of any changes which increase the risk to participant(s), any changes which considerably affect the conduct of the project, all unanticipated and harmful events that occur, and new information that may negatively affect the conduct of the project and safety of the participant(s). Modifications to the project, information/consent documentation, and/or recruitment documentation, should be submitted to this office for approval using the "Modification to research project" form available at:
<http://www.research.uottawa.ca/ethics/forms.html>

Please submit an annual status report to the Protocol Officer four weeks before the above-referenced expiry date to either close the file or request a renewal of ethics approval. This document can be found at:
<http://www.research.uottawa.ca/ethics/forms.html>

If you have any questions, please do not hesitate to contact the Ethics Office at extension 5387 or by e-mail at: ethics@uOttawa.ca

Signature:

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Protocol Officer for Ethics in Research
For Barbara Graves, Chair of the Social Sciences and Humanities REB

2

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First Name

Last Name

Affiliation

Role

Katherine Lippel

Law / Civil Law

Supervisor

Lidia Casas Becerra

Others / Others

Student Researcher

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INTERVIEW GUIDE FOR GROUP DISCUSSION

1. Presentation
 - a. Purpose of the discussion, consent, privacy and possibility to withdraw from the discussion at any time.
 - b. Ask about age, type of employment, industry sector and workplace gender composition, size of the establishment, unionization
2. Questions on perception of discrimination at work:
 - a. How is the climate at the workplace, for instance verbal or physical abuse?
 - b. How is the relationship between men and women workers? And for supervisors?
 - c. Are there sexist comments or jokes?
3. Understanding sexual harassment law
 - a. What they understand to be sexual harassment
 - b. Do they know there is a law?
4. Ask about their own experience or other people with unwanted sexual behavior at work
 - a. What type of sexual harassment: make sexual advances, touching, grabbing, etc.
 - b. From whom: supervisor, employer, co-worker, clients
 - c. What were the strategies have they used to confront the sexual harassment: talk to/confront the perpetrator, supervisor, employer, co-workers, partner, friends, do nothing.
 - d. What was the experience of confronting the issue: dismissal, nothing happened, ostracism.
5. Remedies and their exercise
 - a. Do they know the remedies the law provides? Any use of the Labour inspector office, constructive dismissal in the Courts.
 - b. Do they think the law is effective to change the work climate

ANNEX 4

ARAUCARIA QUESTIONNAIRE SURVEY

WORKING CONDITIONS AND HEALTH STUDY		
Question N	Question	
6	Aproximadamente, ¿Cuántas personas trabajan en total en esa empresa (en Chile)? (Incluya al/la entrevistado/a)	
	Menos de 5	1
	De 5 a 10 personas	2
	Entre 11 y 49	3
	Entre 50 y 199	4
	200 y más personas	5
	No sabe	99
	How many people in total work in the company or organization you work for (include interviewed)	
	Less than 5	1
	5 to 10	2
	11 to 49	3
	50 to 199	4
	200 or more	5
	DK	99
26	En su trabajo, ¿su superior inmediato es hombre o mujer? 1. Hombre 2. Mujer 9. No responde	
	Is your immediate boss a man or a woman?	
	Man 1	Woman 2
	No response 9	
28	Sus colegas o compañeros de trabajo son:	
	1. Mayoritariamente hombres	1
	2. Mayoritariamente mujeres	2
	3. De ambos sexos por igual	3
	4. Sólo hombres	4
	5. Sólo mujeres	5
	9. No responde	9
	Your colleagues are...? (READ OUT ALTERNATIVES)	
	1. Majority men	1
	2. Majority women	2
	3. Both sex	3
	4. Only men	4
	5. Only women	5
	9. No response	99

30	<p>En los últimos 12 meses, en su trabajo ¿usted ha sido víctima de conductas o actitudes de acoso sexual? Es decir, ¿ha sido objeto de palabras o gestos de carácter sexual no deseado?</p> <p>1. Sí → Pase a P.39 2. No → Pase a P.41 9. No responde → Pase a P.41</p> <p>Over the past 12 months, have you been subjected at work to unwanted sexual attention?</p> <p>1. Yes Go to Q39 2. No Go to Q41 9. No response Go to Q4</p>																				
31	<p>¿Con qué frecuencia ocurre esto? Leer las elecciones de respuesta</p> <table border="1" data-bbox="423 527 712 678"> <tr><td>1</td><td>A Veces</td></tr> <tr><td>3</td><td>Seguido</td></tr> <tr><td>4</td><td>Muy seguido</td></tr> <tr><td>9</td><td>NR</td></tr> </table> <p>How often does this happen? Read out choices</p> <p>1 = Some time 3 = Often 4 = Very often 9 = NR</p>	1	A Veces	3	Seguido	4	Muy seguido	9	NR												
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32	<p>¿De quién fue víctima de acoso sexual?</p> <table border="1" data-bbox="423 898 1089 1115"> <tr><td>De sus superiores</td><td>1</td></tr> <tr><td>De sus compañeros/as</td><td>2</td></tr> <tr><td>De clientes o usuarios</td><td>3</td></tr> <tr><td>De otras personas</td><td>4</td></tr> <tr><td>No respond</td><td>9</td></tr> </table> <p>Who subjected you to unwanted sexual attention at work?</p> <table border="1" data-bbox="423 1150 1089 1367"> <tr><td>Boss</td><td>1</td></tr> <tr><td>Coworkers/colleagues</td><td>2</td></tr> <tr><td>Clients</td><td>3</td></tr> <tr><td>Other individual/ someone else</td><td>4</td></tr> <tr><td>No response</td><td>9</td></tr> </table>	De sus superiores	1	De sus compañeros/as	2	De clientes o usuarios	3	De otras personas	4	No respond	9	Boss	1	Coworkers/colleagues	2	Clients	3	Other individual/ someone else	4	No response	9
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Other individual/ someone else	4																				
No response	9																				
33	<p>¿En los últimos 12 meses, en su trabajo ha sabido de conductas o actitudes de acoso sexual? Es decir, ¿algún(a) compañero(a) ha sido objeto de palabras o gestos de carácter sexual no deseado?</p> <p>1. Sí → Pase a P.34 2. No → Pase a P.35 9 No sabe/no responde → Pase a P.35</p> <p>Over the past 12 months, have you in your work become aware of unwanted sexual behaviour or attitudes directed at your coworkers?</p> <p>1. Yes GO to Q34 2. No Go to Q35 9. No response Go to Q35</p>																				
34	<p>¿De quién proviene particularmente el acoso sexual?</p> <table border="1" data-bbox="423 1703 1089 1873"> <tr><td>De sus superiores</td><td>1</td></tr> <tr><td>De sus compañeros/as</td><td>2</td></tr> <tr><td>De clientes o usuarios</td><td>3</td></tr> <tr><td>De otras personas</td><td>4</td></tr> </table>	De sus superiores	1	De sus compañeros/as	2	De clientes o usuarios	3	De otras personas	4												
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35	<p>¿En su trabajo, ha sido víctima de agresión verbal o física? 1. Sí → Pase a P.36 2. No → Pase a P.38 9. No responde → Pase a P.38</p> <p>Have you been subjected to verbal or physical aggression at work? 1. Yes Go to Q36 2. No Go to Q38 9. No response Go to Q38</p>																				
36	<p>¿Con qué frecuencia ocurre esto? Leer las elecciones de respuesta</p> <table border="1"> <tr> <td>1</td> <td>A Veces</td> </tr> <tr> <td>3</td> <td>Seguido</td> </tr> <tr> <td>4</td> <td>Muy seguido</td> </tr> <tr> <td>9</td> <td>NR</td> </tr> </table> <p>How often does this happen? Read out choices 1 = Sometimes 3 = Often 4 = Very often 8 = DK 9 = NR</p>	1	A Veces	3	Seguido	4	Muy seguido	9	NR												
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38	<p>En el curso de los últimos 12 meses, en su empleo principal actual, ¿ha sido alguna vez objeto de acoso psicológico, es decir de palabras o actos repetidos</p>																				

	<p>que atacan su dignidad o integridad?</p> <table border="1"> <tr> <td>Sí</td> <td>Pase a P.39</td> <td>1</td> </tr> <tr> <td>No (nunca)</td> <td>Pase a P.41</td> <td>2</td> </tr> <tr> <td>No responde</td> <td>Pase a P.41</td> <td>9</td> </tr> </table>	Sí	Pase a P.39	1	No (nunca)	Pase a P.41	2	No responde	Pase a P.41	9											
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	<p>Over the past 12 months, have you in your current main job been subjected to psychological harassment, i.e., repeated words or acts that hurt your dignity or integrity?</p> <table border="1"> <tr> <td>Yes</td> <td>Go to Q39</td> <td>1</td> </tr> <tr> <td>No (never)</td> <td>Go to Q41</td> <td>2</td> </tr> <tr> <td>No response</td> <td>Go to Q41</td> <td>9</td> </tr> </table>	Yes	Go to Q39	1	No (never)	Go to Q41	2	No response	Go to Q41	9											
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No (never)	Go to Q41	2																			
No response	Go to Q41	9																			
39	<p>¿Con qué frecuencia ocurre esto? Leer las elecciones de respuesta</p> <table border="1"> <tr> <td>1</td> <td>A Veces</td> </tr> <tr> <td>3</td> <td>Seguido</td> </tr> <tr> <td>4</td> <td>Muy seguido</td> </tr> <tr> <td>9</td> <td>NR</td> </tr> </table> <p>How often does this happen? Read out choices 1 = Sometimes 3 = Often 4 = Very often 8 = DK 9 = NR</p>	1	A Veces	3	Seguido	4	Muy seguido	9	NR												
1	A Veces																				
3	Seguido																				
4	Muy seguido																				
9	NR																				
40	<p>¿De quién proviene particularmente el acoso psicológico?</p> <table border="1"> <tr> <td>De sus superiores</td> <td>1</td> </tr> <tr> <td>De sus compañeros/as</td> <td>2</td> </tr> <tr> <td>De clientes o usuarios</td> <td>3</td> </tr> <tr> <td>De otras personas</td> <td>4</td> </tr> <tr> <td>No respond</td> <td>9</td> </tr> </table> <p>From whom in particular?</p> <table border="1"> <tr> <td>Boss</td> <td>1</td> </tr> <tr> <td>Coworkers/colleagues</td> <td>2</td> </tr> <tr> <td>Clients</td> <td>3</td> </tr> <tr> <td>Other individual/someone else</td> <td>4</td> </tr> <tr> <td>No response</td> <td>9</td> </tr> </table>	De sus superiores	1	De sus compañeros/as	2	De clientes o usuarios	3	De otras personas	4	No respond	9	Boss	1	Coworkers/colleagues	2	Clients	3	Other individual/someone else	4	No response	9
De sus superiores	1																				
De sus compañeros/as	2																				
De clientes o usuarios	3																				
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No respond	9																				
Boss	1																				
Coworkers/colleagues	2																				
Clients	3																				
Other individual/someone else	4																				
No response	9																				
41	<p>La empresa o institución donde usted trabaja, tiene un reglamento (específico) sobre acoso sexual o está incluido en algún reglamento interno?</p> <table border="1"> <tr> <td>Sí, está incluido</td> <td>1</td> </tr> <tr> <td>No está</td> <td>2</td> </tr> <tr> <td>No sabe</td> <td>3</td> </tr> <tr> <td>Está, pero no se aplica</td> <td>4</td> </tr> </table>	Sí, está incluido	1	No está	2	No sabe	3	Está, pero no se aplica	4												
Sí, está incluido	1																				
No está	2																				
No sabe	3																				
Está, pero no se aplica	4																				

	No respond	9
	Does the company or organization you work for have internal rules about sexual harassment?	
	Yes	1
	No	2
	No response	3
	Yes, but they don't put into practice	4
	No response	9

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