

XX WORLD CONGRESS OF LABOUR AND SOCIAL SECURITY LAW.**Santiago de Chile, September 2012****GENERAL REPORT THEME II.****SEXUAL AND MORAL HARASSMENT IN THE WORKPLACE.****SERGIO GAMONAL C. (Professor of Labour Law, University Adolfo Ibáñez) and JOSÉ LUIS UGARTE C. (Professor of Labour Law, University Diego Portales)****SEXUAL HARASSMENT****Introduction**

The centrality of labour in the life of modern societies and its essential role in the current production models makes the experience of "labour matters" as one of the most significant spaces of socialization of individuals, both in the amount of time devoted to work, and the quality of the experiences that occur within the places where it is performed.

Workplaces then become a unique space of positive experiences and growth for human development ¹. But at the same time is a particularly delicate stage for problematic situations that stress that space, especially those affecting the exercise of the people's fundamental rights. ²

¹ As said by Méda , it is evident to express that currently the exercise of a work is the principal condition to be a part of the society, the essential factor of identity, and that an unemployed person is, at the same time, a deprived person; or that labour is the only collective activity and that remaining activities belong to the private sphere. Vid. Méda, 1996: 693.

² As said by Sinzheimer, the labour contract's demands are of such a nature to workers that from its accomplishment depends their subsistence. Vid. Sinzheimer, 1984: 53 and 54.

Since the seventies, working systems have been emphasizing the defense of human rights or fundamental rights of workers.³ The labor doctrine refers to Enterprise Citizenship or Nonspecific Labour Rights.⁴

Along with proper labor rights (for example, the right to work and freedom of association), we find human rights held by the worker as a person and citizen, civil rights should not be delayed by the fact that he is part of a labour contract, subject to be adapted, restricted or modulated to comply with the contract.

A key stress situation regarding worker's personal rights is precisely sexual harassment. In it, we can clearly see the prevailing difference of power in labour relations, far exceeding the contractual framework to give way to public interest committed in labour relations.⁵

Sexual harassment occurs, in principle, in all those relationships where there is the exercise of power (e.g., academics). But it is in the context of labour, where you have a demonstration specially qualified, which makes this problem of sexual harassment the most outstanding one for labor law in recent years.

The answer of the law has not kept waiting. To the lack of regulation a few years ago, the legal landscape in the early Twenty First century is different: there are numerous legal systems that have decided to legally punish the offense of sexual harassment and establish various mechanisms of repression and repair (responsibilities, compensation, fines, etc.).

This Report is based on information provided by 25 National Reports elaborated by distinguish authors: Argentina⁶, Australia⁷, Austria⁸, Brazil⁹, Canada¹⁰, Chile¹¹,

³ For purposes of this Report we will use without distinction the terms human rights and fundamental rights.

⁴ Gamonal, 2004, and Ugarte, 2009. About the origin of the term “nonspecific labour rights” vid. Palomeque, 1991. For a comparative vision, vid. Valdes Dal-Ré, 2003: 37 and ss., and Siqueira Neto, 2003: 161 and ss.

⁵ As highlighted by Kahn-Freund “the relation between the employer and an isolated worker is typically a relation between a power’s titular and someone without any power (...) It is originated by an act of submission and produces a situation of subordination, despite the fact that it can be disguised by a juridical fiction known as the <<labour contract>>. The principal aim of Labour Law has always been –and we can say, will be- to constitute a counter balance to equilibrate the inequality of negotiating power inherent to the labour relation.” Vid, Kahn-Freund, 1987: 52. Supiot also highlights that the labour relation has been defined as “a relation in which one can order and the other has to obey. That is to say: the question of power is in the heart of Labour Law”. Vid, Supiot, 1996: 133.

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⁷ Anna Chapman and Beth Gaze.

⁸ Anna Ritzberger-Moser.

⁹ Ivette Ribeiro.

Colombia¹², Spain¹³ United States of America¹⁴, Philippines¹⁵, Finland¹⁶, France¹⁷, Great Britain (for England and Wales)¹⁸, Holland¹⁹, Italy²⁰, Japan²¹, Lithuania²², Poland²³, Czech Republic²⁴ Dominican Republic²⁵, Romania²⁶, Sweden²⁷, Turkey²⁸, Uruguay²⁹ and Venezuela³⁰, and by an European Union Report³¹. Consequently, in mentioning these countries and the European Union in the text of this Report, we are referring to these National Reports.

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To systematize the essentials points of sexual harassment, we have divided our work in the following sections: (1) notion and regime, (2) subjects and classification, (3) responsibility systems, (4) obligations of the employer, and (5) repairs.

1. Notion and regime.

As notion, we allude to the concept of sexual harassment in different countries, whatever their source, legal, jurisprudential or doctrinal were. For regime, we understand the regulatory system, which may be legal, jurisprudential or doctrinaire in countries that do not have yet a specific legal regulation, etc.

At the Reports we can appreciate that the concept of sexual harassment is present in all legal systems.

We have to note the importance of fundamental rights in this matter, since in those orderings where the legislature has not enacted specific regulations; we find equally reception to the figure of harassment given its character of attack to the personal rights of the victim.

The basis of protection against sexual harassment is based on the dignity persons and in fundamental rights that are severely violated by this practice, such as, the right to privacy, the right to non-discrimination³² as well as the right to life and physical and mental integrity of the woman worker.³³

Sexual harassment can be defined as an unwanted sexual conduct by the victim and that affects or threatens her/his dignity at work, negatively impacting their labour situation. Sexual harassment involves unwanted sexual behaviors or actions, non-reciprocal, which almost always are repeated over time; despite the fact that a single behavior, by its entity or gravity, also constitutes harassment.

It can be a physical behavior, verbal or non-verbal or any other based on sex.

This behavior affects or threatens the dignity at work, impacting negatively on the labour status of the victim. For this purpose, a threaten is enough to alter the situation.

One of the most popular definitions of sexual harassment is given by the Committee of Equal Opportunities in Employment Act of the USA, which postulates that unwanted propositions, requests for sexual concessions and other verbal or physical conducts constitute sexual harassment when: (i) submission to such conduct is made either explicitly or implicitly as a condition of employment, (ii) the acceptance or rejection of such conduct by an individual is used as the basis of a decision that affect to the labour relationship itself,

³² Caamaño, 2005: 23 and 24, and Lizama and Ugarte, 2005: 5.

³³ Rojas, 1998: 16 and ss.

or (iii) such conduct has the purpose or effect of unreasonably interfering with the labour performance of the individual or creates a labour environment offensive, hostile or frightening. Later in 1986 the U.S. Supreme Court in *Meritor Savings Bank with Vinson* regarded sexual harassment as a sex-discriminatory conduct prohibited by Title VII of the Civil Rights Act of 1964.³⁴

In the European Union (EU), the Recommendation 92/131 of 1991, on the protection of the integrity of women and men at work, defined sexual harassment in Article 1 as: "The conduct of a sexual nature or other conduct based on sex affecting the dignity of women at work, including conduct of superiors and colleagues if: (i) such conduct is unwanted, unreasonable and offensive to the person subject of it, (ii) the refusal or subjection of a person to such conduct by enterprises or workers (including superiors and colleagues) is explicitly or implicitly used as a base for a decision that has effects on that person's access to vocational training and employment, the continuation of the same, promotions, wages or any other employment decisions, (iii) such conduct creates an intimidating labour environment, hostile or humiliating for the person who is the subject of it, and that such conduct may be, in certain circumstances, contrary to the principles of equal treatment."³⁵

Then, according to Directive 2002/73/EC on equitable treatment, sexual harassment is defined as discrimination and is prohibited in employment, including the stages of recruitment, training and professional practice. Then, Directive 2006/54 /EC abolished Directive 2002, but remaining identical definitions of sexual harassment. Moreover, Directive 2004/113EC extended the prohibition of sexual harassment outside the labor market, protecting all providers of goods and services, both in the public and private sectors. These guidelines are general in the sense that each Member State chooses how to implement them in their domestic law and to establish the respective sanctions.

In the national reports, we can appreciate different approaches or trends to the notion of sexual harassment. In some countries there is a special law that expressly defines harassment. In some others the harassment had been subsumed within the laws relating to non-discrimination and fundamental rights, although they are not explicitly referred to. In the latter case, it has been the jurisprudence and the work of doctrine which have shaped the notion of sexual harassment.

In turn, these regulations can be of labour, civil and even criminal character. Let see some examples.

Regarding to the first trend, we can mention France, where the law N° 92-684 of July 22nd, 1992 imposed criminal sanctions against sexual harassment by amending the Penal Code and also introducing this figure in the labour relationship to protect the worker harassed.

³⁴ Lizama and Ugarte, 2005: 3.

³⁵ Lizama and Ugarte, 2005: 12.

France was one of the first European country (together with Belgium, Finland, Switzerland and Spain) to introduce this type of legislation. Actually harassment is defined in art 1153-2 of the French Labor Code as the actions of harassment of any person with the purpose of obtaining sexual favors for his/her benefit or for the benefit of another. In addition, this article defines protection for workers in the sense that, any worker, a candidate to a job, or a person in training cannot be sanctioned, dismissed or be discriminated, directly or indirectly, particularly in remuneration, training, reclassification, assignment, qualification, classification, promotion, mutation or renewal of contract because of refusing sexual harassment behaviors.

Meanwhile, article 222-33 of the French Penal Code condemn with one year in prison and a fine of 15,000 Euros to the one who harasses another in order to obtain sexual favors. These definitions of the French Law were complemented, by the law of May 27th, 2008, including sexist's behaviors, understanding as discrimination any conduct of a sexual nature involving a person and affecting her/his dignity or creating a hostile environment, degrading, humiliating or offensive for the victim.

Similarly, in Austria sexual harassment is enshrined in labor and criminal law, but with different interpretations. Sexual harassment is treated in the Austrian Law on Equal Treatment which defines it as conduct calculated to diminish the dignity of the person, being unwanted, inappropriate and offensive to the victim, creating one (1) hostile or humiliating work environment, (2) affecting the victim who rejects these actions respect his/her employer, superiors or colleagues, in their vocational training, employment, promotion, salaries, or different decisions in the area of employment. This definition covers the verbal language, corporal, images or actions. This behavior does not depend on the notion of culpability of the victimizer (abuser). This concept focuses on the dignity of the victim. In criminal law, sexual harassment is conceived as a violation of sexual integrity and sexual self-determination. The Penal Code punishes with imprisonment from six months to 360 days.

In Uruguay, Law No. 18,561 (11/09/2009) defines sexual harassment as follows: "Sexual harassment is understood as any behavior of sexual nature made by a person of the same or opposite sex, unwanted by the person to whom it is addressed, whose rejection would cause or threaten to cause harm in his/her work situation or his/her teacher's relationship or creates an intimidating work environment, hostile or humiliating for who is the recipient "(art. 2).

The art 3 of this Uruguayan law says that sexual harassment can occur, among others, by means of the following behaviors:

1. - Requirements for sexual favors involving: implicit or explicit promise of preferential treatment in regard to the current or future employment of the recipient; implicit or explicit threats of harm related to the current or future employment of the receivers , requiring a behavior whose acceptance or rejection is implicitly or explicitly a condition of employment.

2. - Corporal approaches or other physical conducts of a sexual nature, unwelcome or offensive to those who receive them.

3. - Using expressions (written or oral) or images of a sexual nature that are humiliating or offensive to the receivers.

Finally, it states that it is not required a repeated behavior: a single serious incident may constitute sexual harassment (art. 3).

In the Dominican Republic while the Labour Code punishes sexual harassment as a legal figure, it does not properly define it. However, the Domestic Violence Law (which amends the Criminal Code) in Article 333-2, defines the sexual harassment stating that "constitutes sexual harassment any order, threats, constraint or offering intended to obtain favors of a sexual nature, made by a person (man or woman) who abuses of the authority conferred by his functions.". The criminal sexual harassment's sanction can reach one year in prison and a fine.

In the Philippines Law N° 7. 877 of February 14th, 1995 guarantees the respect for the dignity of all individuals and punish sexual harassment affecting workers, employees, applicants for employment, students, people in training and in the educational system. Sexual harassment involves an improper exercise of authority over another at work or in other environments, demanding sexual favors of the subordinated.

In Romania sexual harassment was defined by art. 4 of Law No. 202/2002, as a situation where an unwanted behavior manifests a sexual connotation demonstrated in physical, verbal or non-verbal manners, with the object or result of a damage to the dignity of the person, and especially, the creation of an intimidating, hostile, degrading, humiliating or offensive environment. Harassment can be manifested in looks, touching, gestures, language with sexual connotations, in requiring sex in exchange of promises; reaching also to most serious threats to the victim. For the Penal Code is a crime when it consists in a threat or pressure in order to obtain sexual favors, by a person who abuses his/her authority or influence because of the role that holds at work. In this case may result from 3 months to 2 years imprisonment. (art. 203).

In the case of Australia, sexual harassment is enshrined in law and it is prohibited in all jurisdictions (Commonwealth, States and Territories). Each one has its own legislation. A good example is the Sex Discrimination Law of 1984, which defines sexual harassment as making unwanted sexual advances or when sexual favors are required from the harassed, or when performing other unwelcome conduct of a sexual nature about the harassed, in circumstances that a reasonable person, weighing all the circumstances, would estimate that the victim will be offended, humiliated or intimidated. Conduct of a sexual nature is defined as statements or actions, verbal or written. The prohibition of sexual harassment also includes other sectors such as education, the provision of goods and services, public servants, etc. It also covers the case of applicants for a job, commission agents and

harassment in employment agencies. These guidelines are followed by the laws of the Territories.

In Lithuania the concept of sexual harassment was enacted in 1998. It was originally defined as an offensive conduct of a sexual nature, verbal or physical, with respect to people in the workplace, in business or in other relationships of subordination. After the Directive of the UE 2002/73/EEC, on Equal Treatment of Men and Women, the 2005 Act of Equality redefined sexual harassment. Currently this notion include any unwelcome and offensive conduct, verbal, written or physical, of sexual nature, with which a person intends to violate the dignity of a person, especially creating an intimidating, hostile, humiliating or offensive environment. The sexual harassment is also considered in the statutes of the armed forces and in the Penal Code.

In Finland, sexual harassment is regulated in the Man/Woman Equality Law N° 609/1986, defining it as an unwanted conduct of sexual nature, verbal or nonverbal, or physical, which aim is to violate the dignity of a person or creating an intimidating environment, hostile, degrading or offensive.

Another country with a regulation and explicit notion of sexual harassment is Italy, where the Legislative Decree N° 198 of April 11th, 2006 (Code of Equal Opportunities) systematized all the rules concerning the promotion of equality of opportunities and of prevention and fight against discrimination based on sex. In its Article 26, defines harassment and sexual harassment. In general, harassment is considered as a form of discrimination when it is manifested as undesirable behavior based on sex, and it has the purpose or effect to attempt against the dignity of a worker or and to create an intimidating, hostile, degrading, humiliating or offensive environment. Meanwhile, sexual harassment is defined as a form of discrimination when unwanted conduct based on sex is manifested through a physical attitude, verbal or otherwise, and which object or effect is to attempt against the dignity of a worker or creating an intimidating environment, hostile, degrading, humiliating or offensive. In addition, any treatment is considered discriminatory or unfavorable to the worker (men or women) by having rejected behaviors described before. The law considers as null the acts, agreements or provisions related with the victim of these violations, originated on these situations.

In Great Britain, the legislation is remarkable: Section 26 of the Equality Act of 2010, broadly covers sexual harassment in the workplace as well as outside it.

In the case of Colombia, the sexual harassment is only provided in the Penal Code, amended on December 4th, 2008, and whose Article 210-A, in the Chapter on Offenses Against Honor and Sexual Reserve, defines it in this way: "Sexual harassment: The one who in his benefit or to a third party and using his evident relationship of superiority, or authority or power, age, gender, job position, social, family or economic relationships, harass, pursue, press or besiege physically or verbally, for non-agreed sexual favors, to another person, without his/her accepting, will fall into imprisonment of one (1) to three (3) years." However, although not expressed in, Law No. 1010 of 2006 -whereby measures

are taken to prevent, correct and punish bullying and other harassment in the context of labor relations- determined that harassment or press could arise when there is abuse, persecution, discrimination, interference, inequity or unprotected labour. At the same time - and within the category of labor abuse- are considered all acts of violence against the worker's physical or moral integrity, physical or sexual freedom or property.

We find it in the United States (USA) an example of the second approach or trend in which the harassment has been subsumed within the laws relating to non-discrimination or to fundamental rights. In the USA sexual harassment constitutes labour discrimination at the Federal level and in some States. In the first case labour discrimination based on sex (among other reasons) is covered by Title VII of the Civil Rights Act of 1964.

In this country, the meaning of "discrimination based on sex" has been discussed in part due to the lack of legislative history on the meaning of this provision, although the Supreme Court has understood that Title VII is not limited to economic or tangible discrimination, but to any differential treatment between women and men. With the development given in the late seventies to the issue of sexual harassment, its prohibition is founded on discrimination based on sex.

At the State level, in the USA exists regulations more explicit, as it is the case in New York and in other States where sexual harassment has been sanctioned through civil liability.

In Canada it was estimated that sexual harassment is a form of discrimination by sex reasons. The Supreme Court of this country defined it as "unwanted conduct of sexual nature that affects the work environment or leads with adverse consequences at work for victims of harassment." Subsequently, laws who explicitly have defined sexual harassment have adopted this jurisprudential notion.

In Sweden originally the Equal Opportunities Act, of 1979, did not include sexual harassment, but it was amended in 1991 expressly contemplating it. Later, in 1998, there was introduced an explicit definition of sexual harassment. In 2005 this law was amended again to implement the European Directive 2002/73/EC. on equal treatment between men and women. Currently sexual harassment is defined in the Swedish Discrimination Act, of 2008.

In the case of Brazil, jurisprudence and doctrine have shaped the notion of sexual harassment, which is punishable by the way of fundamental rights, since there is no a specific legislation (but several law projects in the States). For the labor doctrine, the sexual harassment notion is wide (hierarchical superiors and colleagues) and to exist it is only needed a real threat of losing the job, promotions or to be improperly transferred or any prejudice, to be configured. For some authors it is needed just one harassing behavior without need of reiteration. The Courts have also recognized sexual harassment in its judgments.

It should be noted, in any case, that in criminal matters expressly exist legislation in Brazil. The Brazilian Penal Code (art. 216-A) criminalizes the conduct of sexual harassment defining it as the constrain of someone in order to take advantage or sexual favor, taking advantages of his superior position in the hierarchy, or his influences inherent in the exercise of his employment, position or function. The penalty is one month to two years in prison. This standard covers criminal harassment only vertically.

Also in Japan the jurisprudence has recognized and sanctioned sexual harassment, since 1992. In cases of mental illness caused by the harassment, it compensates the worker through the law of labour accidents' insurance. Foregoing it is without prejudice to the duties of prevention considered by the Japanese law that we will allude later.

In Argentina, although it is not legislated specifically, the doctrine and jurisprudence have included sexual harassment as a form of violence in the workplace. Law No. 26485 of Comprehensive Protection of Women (comprehensive protection law to prevent, punish and eradicate violence against women in areas where they develop their interpersonal relationships (Official Gazette 14.04.09), defines sexual violence as "any action involving the violation in all its forms, with or without genital access, the women's right to decide voluntarily about their sex or reproductive life, through threats, coercion, use of force or intimidation, including rape within marriage or other relationship or attachment relationships, whether or not living together, as well as forced prostitution, exploitation, slavery, harassment, sexual abuse and trafficking women" (art. 5.3). In this country there is consensus that sexual harassment is consumed with independence of its results. At the level of public employment, labour violence has been regulated labor violence in many jurisdictions (Provinces) and in all of them has been included sexual harassment in the workplace as a supposition, form or modality of punishable violence. At the same time, in the field of national public employment, numerous collective agreements specifically regulates this matter.

In connection to the relationship between the notions of sexual harassment and mobbing, several Reports indicate the differences between these two figures. For example, in Austria, Brazil, Finland, France, the Netherlands and Romania, mobbing involves repeated acts over time while sexual harassment can be configured in a single act. Reports from Austria and France state that mobbing can involves sexual harassment and in the Czech Republic's Report sexual harassment is a form of bullying. The U.S. Report establishes that sexual harassment and bullying can involve bullying in certain cases. In Argentina, it is stated that workplace violence is the gender; violence is understood by all intentional behavior that causes or may cause physical or psychic damage to the person and that mobbing and sexual harassment are types within the genus violence.

Finally, sexual harassment is treated in a preventive form in collective agreements (for example, Brazil, the Philippines, France, Romania and Uruguay) and in "codes of conduct" of the same enterprises (Finland). In the USA since 2009 the Supreme Court has allowed unions to intervene in situations of sexual harassment by the procedures specified in

collective agreements. Previously, it was estimated that there could be conflicts of interest if both the harasser and the victim belonged to the same union.

2. Subjects and Classification

The subjects involved in sexual harassment can be varied. Both victim and the harasser can be of either sex and have any sexual orientation. Even in sexualized jobs such as exotic dancer or prostitute, we can talk about sexual harassment situations.³⁶ However, there is consensus on the fact that sexual harassment is one of the worst forms of discrimination against women: in the social practice, sexual harassment at the workplace lies - overwhelmingly- on women.³⁷

From a perspective of "gender"³⁸ sexual harassment is a manifestation of violence against women, constituting a serious social problem and discrimination since, by the mere fact of being a woman, the worker must take more precautions than a man, considering the high rate of harassment of women compared to the male group.

Discrimination against women is expressed in an unequal salary, sexual segregation in vertical (women concentrated in subordinate positions to bosses (chiefs who are mostly men), and horizontal (works proper of women).³⁹

The United Nations Convention about the Elimination of All Forms of Discrimination Against Women, 1979, provides in its art. 5 point 1), that the States Parties of the Convention shall take appropriate measures to modify social and cultural patterns of conduct of men and women, with a view to achieve the elimination of prejudices and customary practices, and all other practices which are based on the idea of inferiority or superiority of either of the sexes or on stereotyped roles for men and women.

For the International Labour Organization (ILO), sexual harassment is a behavior of a sexual nature that is unwanted by the person concerned and that negatively affects their labour situation causing damage.⁴⁰

³⁶ McGinley, 2006: 78 and ss.

³⁷ Gamonal, 2007: 68.

³⁸ We understand "gender" as a cultural construction based on sex, and so, goes further than biologic differences, having links with values attributed by the culture to sexual differences. In our culture men and women are attributed different roles with different functions and responsibilities, affecting different action's spheres in public or private spaces. Vid. Fernández Revoredo, 2001: 132 to 135.

³⁹ MacKinnon, 1979: 9 and ss.

⁴⁰ Caamaño, 2005: 8

The ILO Convention 111, considers as discrimination, among other acts, any distinction, exclusion or preference made on the basis of sex which has the effect of nullifying or impairing the equality of opportunities or treatment in employment or occupation (Article 1 point 1 letter a).

The harassers can be the superiors of the victim, employer representatives, co-workers, clients, family and friends of the employer. Also, it can be practiced by persons of inferior rank of the victim.⁴¹ as it is said in the Brazil's Report.

In Philippines sexual harassment may be made by the employer, workers, managers, supervisors, and other agents of the employer with authority, influence or moral ascendancy over another in the workplace.

In Austria, harassment can be committed by the employer, its agents, co-workers or third parties (customers and competitors). It also covers job interviews. It is contemplated widely, in cases of vocational assistance, job training, education and retraining.

In France the definition of harassment includes third parties, such as customers of the company.

Sexual harassment can occur with subcontracted or supplied workers, being responsible for these situations the main employer or the user enterprise, depending on the case, as happens, for example, in Uruguay, Finland, Brazil, Australia, Austria and Lithuania.

Sexual harassment can be classified in different ways, distinguishing between vertical harassment (made by the employer or supervisor) and horizontal (peers and even lower ranked workers). It is spoken of harassment or *quid pro quo* blackmail; intimidating harassment and hostile's environment.

The blackmail or *quid pro quo* involves sexual demands in exchange for any advantage or continuation of employment or working conditions. In these cases it must be a hierarchical relationship and a threat or actual lose of rights. This type of harassment can also include indirect harassment, which occurs when the victim is not directly harassed but realizes that the only workers promoted are those who have accepted a type of sexual invitation from his/her superior.

Sexual harassment by intimidation, hostile environment or environmental, occurs when the affected is subjected to a sexual harassment behavior that adversely affects the environment in which he/her performs the contracted duties, causing insecurity or fear. This kind of harassment produces unwanted effects although not direct negative consequences. It consists, for example, in repeated jokes of sexual connotation, inappropriate and offensive language, nudity illustrations on the walls of the office, which finally make up a work environment totally intimidating, hostile or humiliating for the sensibility of the victim.

⁴¹ Lizama and Ugarte, 2005: 14.

This environmental sexual harassment is product of male chauvinist visions in the workplace and it is used in a way to "keep women in their place." This type of harassment can be, in turn, vertical or horizontal.

In National Reports, we find all these classifications of sexual harassment, for example, in Argentina, Australia, Brazil, Chile, France, Philippines, Holland, Japan, Lithuania, Poland, Uruguay and the USA.

In Sweden although the terms do not address to vertical or horizontal harassment, equally distinguish two categories depending on whether the harassment is done by (a) the employer or management, or (b) workmates.

In the Czech Republic these types of harassment are not classified.

In Japan is very common the hostile environment, since the power of direction lies more in the personnel department than in the direct chief.

In Romania only vertical harassment is recognized.

3. Responsibility systems.

The responsibility for workplace's sexual harassment follows the course of the employer's power to order and the subordination of the worker. Thus, although the direct harasser is another worker or a superior that does not represent the employer, the employer will be equally responsible.

Sexual harassment is a subject matter that allows to appreciate the interactions of contractual and extra contractual responsibilities within the enterprise. However, the governing power of the employer sets up a responsibility for the health of workers and makes him the imputation's center of responsibility for the attempts against the dignity of his subordinates.

This responsibility is preceded by a duty of prevention. Sexual harassment, especially towards women, carries a cultural and sexist male view that is important to remove and to re-educate through prevention measures within the company (see next paragraph).

Regarding liability, the responsibility can be labour and civil, administrative and criminal. Procedures may be of labour (within the company), administrative or judicial nature.

Many laws enshrine labour and civil responsibility. The victim of sexual harassment may require protective measures by the employer and, if not, she/he can finish the labour contract for the breach of employer duties. Together it is contemplated the compensation of damages, especially the labour moral damages or extra contractual (civil) for the direct harasser. In addition, sanctions to the direct harasser are contemplated to the perpetrator, who can even be dismissed.

Labour responsibility is contemplated, for example, in Austria, Australia, Brazil, the Philippines, France, Japan, Romania, Lithuania and Uruguay. In the case of Finland, the minimum compensation provided is of 3.240 Euros.

In some cases, among other responsibilities, sexual harassment is considered as an occupational hazard, as happens in Finland, unless the harassment has involved violence, situation covered by other types of responsibility and compensation.

Similarly, in Italy a sexual harassment that creates a psychological dysfunction can be understood as an occupational disease, whether derived from a type of coercion or organizational constraint.

In Japan, sexual harassment can generate the application of compensation insurance for mental illness, including suicide attempts. Yet it is difficult to determine when a mental illness is caused by harassment. The Japanese Ministry of Labor and Social Affairs, has classified the incidents causing mental illness in three levels: Level 1, the incident is not of such entity of causing it, Level 2 the incident can cause disease and is covered by insurance when detected, in addition, some other abnormal situation in the workplace, Level 3 the incident clearly causes mental illness. Sexual harassment is Level 2 and severe mobbing is level 3. It is in discussion, if, in some cases, continuous sexual harassment would be level 3.

In the case of the Dominican Republic, although neither the Labor Code nor the Law on the Dominican Social Security System 87-01 establish sexual harassment as a labour risk (occupational disease or labour accident), it is possible to consider sexual harassment as an occupational disease or a labour accident, since Article 185 of Law 87-01 states that occupational illness or accident is "... any corporal injury and any morbid condition that the worker suffers with occasion or as a consequence of the alien work provided"; it is estimated that this area covers sexual harassment.

We also find administrative responsibility, especially with regard to the institutions responsible for overseeing the compliance of legal standards and by any fines or penalties to the employer, as in the Philippines' case.

Some systems also establish criminal responsibility, as in Austria, up to 6 months imprisonment or a fine, or Finland or France with imprisonment up to one year or a fine.

Procedures may be of labour (claim within the company), administrative or judicial nature. For example in the case of France there is an alert procedure through the staff representative, to compel the employer to initiate an investigation and to take actions. In case of disagreement (between the employer and the staff representative) the judge intervenes. In addition, the health and safety committee and working conditions can receive the complaint of the victim and investigate the case. Also, the labor inspector may receive the claim and -as sexual harassment is a crime- the inspector can send the records to the criminal prosecutor. Finally, as sexual harassment is a form of violating the equality

between men and women, the victim may appeal to the Defender of Rights, as administrative authority entitled to combat discrimination. In this case, the victim can present a request which will finish with a recommendation or an administrative sanction.

In Austria the harassed may request the intervention of the Ombudsman Office of Equal Treatment, given that sexual harassment is seen as gender discrimination. Thus, charges can be presented against the employer before starting the procedure in courts, or the case can be presented in the Austrian Commission for Equal Treatment. This Commission makes recommendations but has no empire or power. Due to the above mentioned situation the affected can go directly to the court and request an economic compensation.

In the Czech Republic the worker can also present the case to the Ombudsman for discrimination.

In the USA the process is run by the EEOC,⁴² that investigates, negotiates and may present the case to the Justice Department.

In Finland are provided an extra judicial procedure and a pre-judicial procedure. Harassment can occur within the competence of the representative worker of safety or the shop steward), depending on the case. The employee or his representative notifies the employer of the problem and begin to discuss and negotiate the case. In other situations the institutions responsible for occupational health study the case and tries to reach an agreement between the parties. Anyway, the employer is responsible for taking the measures to stop the harassment. Administratively, the duty of prevention lies in the authorities on gender equality: the Equality Ombudsman (equity) and the Commission of Equality.

Furthermore, in Finland a similar procedure exists to determine damages to be compensated or to impute criminal responsibility. The victim has active legitimation to sue, and if there are criminal charges, the demand can be supported by the Public Ministry. The investigation is initiated by the labor inspector, who will be heard in court.

In Romania it is provided the assistance of the union in a lawsuit to the harasser and the employer, for sexual discrimination

Also, it can be procedures derived from collective agreements, as in Canada, in the case of arbitration referred to collective agreements when workers are unionized. The arbitrator is free to adopt its own procedure, but must respect the principles of "natural justice" as the due process. If the arbitration knows matters submitted to tribunals by another statute, for example, human rights, both instances can continue their own procedures, though the first which decide will produce the effect of res judicata respect of the parallel procedure.

⁴² Equal Employment Opportunity Commission (EEOC)

In Austria there is not interest about the culpability of the harasser: the interest is focused in the subjective feeling of the harassed. In other words, a behavior can be neutral to the harasser but cannot be neutral for the harassed.

As for the standard of proof, in Uruguay -in 1992- the Supreme Court upheld a judgment of the Court of Appeals, stressing the criterion of admitting as evidence "a picture of indicatives and direct presumptions, related and unambiguous, which together lead to the firm conviction that the facts occurred as the victim recounts," given the difficulty of a direct proof in such cases. Other decisions have followed the same criteria mentioned, making an overall assessment of the evidence produced: antecedents of sexual harassment behaviors of the harasser. the medical certification of psychological damages caused to the victim of sexual harassment at workplace.

In Austria the victim must demonstrate a probable cause of harassment. The defendant can demonstrate that the probable cause is due to other events. However, in case of equality proofs, the victim will be more believed.

In Italy, art. 40 from of the Code of Equal Opportunities contemplates a lightened proof system based on consistent and accurate factual information provided by the plaintiff, that allow to presume the existence of discrimination (which also includes sexual harassment) and where the employer, in presence of this presumption, must prove that there has not been discrimination.

The Directives of the European Union expressly establish standards less intensive standards of proof in matters of discrimination and harassment. (art 19, Directive of 2006 and art 9, Directive of 2004).

4. Obligations of the employer.

The employer has obligations to prevent, investigate and sanction sexual harassment.

Prevention duties are, for example, in Canada, Chile, Japan, Austria, Australia, Philippines, Great Britain, the Netherlands, Turkey, France, Sweden, Lithuania, Italy, Poland, Czech Republic, Spain, Romania, Uruguay and the European Union.

Obviously prevention is not only the responsibility of the employer. For example, in Canada the government agencies (human rights commissions) seek to promote among employers, workers and the general public compliance and respect for human rights. Similarly, in Canada the unions and employers implement agreements in the workplace in order to prevent these behaviors.

In Great Britain prevention is contemplated in the Equality Law, in the Health and Safety Law and in the guide adopted by the social partners in 2009, on violence and harassment at work, implementing, in this way, the EU Framework Agreement on Harassment and Violence at Work, 2007.

In the USA, although the law does not provide a specific duty, the Equal Employment Opportunity Commission (EEOC) urges employers to prevent sexual harassment. The Commission has published voluntary guidelines for these effects.

In Italy the prevention of the employer is directly linked to the duty of the employer to protect the health and safety of workers, avoiding any physical or psychological damage within the enterprise (art 2087 of the Civil Code).

In the case of Brazil this duty of prevention has been developed especially in some collective bargaining and in Finland the prevention is a duty of the Labor Inspectorate.

In the case of Italy it can be distinguished five different approaches from clauses related to sexual harassment included in collective agreements. One type, the phenomenon is treated marginally. The second refers to harassment in article related to safeguard the dignity of workers, assuming that role the national and regional joint committees for equal opportunities, responsible for making proposals and indications oriented to the awareness, prevention and elimination of this phenomenon. The contracts of the third group, addressed the issue in the context of national and regional observatories, created by the organizations of employers and workers, which provoked the rising of the Parity National Joint Committee on Equal Opportunities. In the fourth group although sexual harassment is expressly addressed, the contracts are limited to forward the issue to the Committee on Equal Opportunities. Finally, in the fifth group, sexual harassment is treated within the disciplinary measures..

In Holland some collective agreements address the issue of sexual harassment and certain enterprises and governmental departments have adopted codes of preventive conduct of sexual harassment, for example, at the University of Twente.

Generally prevention's obligations are accompanied by powers of investigation of harassment in case of complaints. Undoubtedly, this is a fairly complex power of the employer, which is only an individual and not a State body, but such action is necessary because in the workplace is the employer who has the power and over him weighed the workers' security duty. Similarly, an investigation faculty -of a pre-police type- requires clear boundaries that assure the respect of fundamental rights of those involved, especially the subordinate workers.

During the investigation and once proved the harassment, the employer may warn in a verbal or written form (Brazil, Lithuania and USA), can provide the relief or temporary transfer pending the conclusion of the research phase (Australia and USA), may suspend those involved in the case (in Philippines from 30 to 90 days), degrade the harasser and bring down his/her remuneration (in the USA). The adopted should be proportionate, for example in the case of Austria

In Japan the measures available to the employer are broad; from warnings and reprimands until bringing down the remuneration, degradation and dismissal.

In regard to the sanctions, obviously the employer may dismiss the harasser, as in Argentina, Austria, Australia, Canada, Chile, Spain, Britain, France, Germany, Poland, Czech Republic, Turkey, the Netherlands, Sweden and Uruguay.

If the employer is negligent, the harassed worker may terminate the contract (constructive dismissal) and demand compensation from his/her employer, as in Argentina, Chile, Italy, Uruguay, Dominican Republic, France and Brazil. In the case of Poland, the employer after compensating the victim can sue the harasser to recover the amounts paid.

Swedish law expressly prohibits the employer or representatives take reprisals with the worker that denounces sexual harassment.

5. Repairs.

A violation as serious as sexual harassment involves repairing the damages, especially the moral damage, as happens for example in Argentina, Romania or Uruguay, besides the right to proper labour compensations (advance notice and years of service), as in the case of France.

In Uruguay, the law sets a minimum amount for moral reparation, up to 6 monthly installments according to the harassed worker's last remuneration.

In the U.S.A the Congress approved the Civil Rights Act in 1991 expanding the penalties for sexual harassment, including compensation and punitive damages. In this last case, the law limits the amounts to be paid according to the size of the company (US\$ 300.000 maximum in enterprises with 500 or more workers, and US\$ 50.000 in enterprises with more than 15 and up to 100 workers).

In the Philippines, the worker may also request the compensation of punitive and nominal damages (recognition of rights),

If a worker has been fired for resisting sexual harassment, she or him may be readmitted or reinstated to his position, as in Brazil and Australia.

In Western Australia the compensation is limited to the top of \$ 40.000 Australian dollars and in New South Wales to no more \$ 100,000 Australian dollars. In other jurisdictions the compensation is not limited. Conciliations tend to contemplate higher amounts, but they are confidential.

In Italy it is contemplated the repair of patrimonial and non-patrimonial damages, including the biological damage (which attempts against the psycho-physical integrity and is susceptible to a forensic evaluation and causally linked to the vexatious conduct), the existential damage (the injury caused to the personality and relational life of the victim) and the moral damage (moral sufferings of the victim, "disorder of the soul" in words of the

Italian Cassation Court). It is also available for reparations, the publishing of the sentence, in the extent that permits repair the damage.

In Holland the harassed worker can claim moral and material damage and there are no limitation about their amounts.

Finally, in the case of Austria, the compensation for damage in general and for moral damages in sexual harassment is for a minimum amount of 1.000 Euros. The responsibility is accumulative between employer and harasser.

MORAL HARASSMENT

LABOUR HARASSMENT

I. Reception of Labour Harassment.

The figure of labour harassment is no longer unknown to the Labor Law. Gradually, it has been incorporated into the legal horizon the notion of moral harassment at work, *mobbing* or labour harassment, either by the hand of the legislature, jurisprudence or doctrine.

Of course, unlike other figures, such as sexual harassment, it is a fundamentally articulated reception from the doctrine and jurisprudence. With few exceptions, the labour harassment has not been the subject of legislative incorporation expressed in the various Reports analyzed. In this sense, the reception of the figure is widespread -practically all general relevant comparative experiences contemplate it- but only by exception this harassment has been incorporated through the enactment of legal provision. But in many countries there are projects of law on this subject.

Thus, first, there are those countries where labour law legally enables the figure: the legislature has incorporated in either common standards or in specific standards on safety and health at work, the notion of labour harassment. This is the case of Colombia, France and Poland.

Second, in the majority of countries labor law does not include an explicit reception of labour harassment, but that figure has been built by other sources of law, especially the jurisprudence and the scientific doctrine. This is the case of Argentina, Uruguay, Spain, Chile, Brazil, Venezuela, Sweden, Finland and Italy.

Third, there are some legal traditions where the concept of labour harassment is intimately linked to discrimination and violence against women. This situation include, among others, Romania, Spain and Venezuela.

In Romania, Law 202 (article 4) of 2002, which establishes rules against discrimination, it is stated that harassment means an unwanted conduct related to the sex of the person, which

has the purpose or effect of damaging the dignity of a person and creating an environment intimidating, hostile, degrading or humiliating.

In turn, in the Czech Republic *mobbing* is recognized in the Law No. 198/2009 on equal treatment and legal means of protection against discrimination, and is defined as the unwanted conduct, related to discriminatory grounds (race, ethnicity, nationality, gender, sexual orientation, age, deteriorated health, creed, religion and political beliefs), with the intent or effect of reducing a person's dignity and creating intimidating labour, hostile, degrading, humiliating or offensive, or which may reasonably be understood as a prerequisite for a decision to influence the exercise of the rights and obligations arising from legal relations.

Thus, in Spain for example, article 7 of Law 51/2003 considers harassment all attitudes directed to people with disability, that have "the purpose or effect of violating personal dignity or creating an intimidating environment, hostile, degrading or offensive ".In turn, the art. 28 of Law 62/2003, which introduced into the Spanish legal system the Directive 2002/73/EC of September 23th, on the principle of equality between men and women, includes a reference to harassment, defining it as "unwanted conduct" affecting the victim for his "racial or ethnic origin, religion or belief, disability, age or sexual orientation".

In another link especially interesting, are those juridical systems where, despite not having an express and general figure of harassment, it has been recognized partially by the rules that sanction violence against women. In Argentina, Law 26.485 (Comprehensive protection to prevent, punish and eradicate violence against women in areas where they develop their interpersonal relationship - BO 14/4/09-) defines violence against women as "any conduct, act or omission, directly or indirectly, whether in public or private sector, based on an unequal power relationship, affecting her life, liberty, dignity, physical integrity, psychological, sexual, economic and / or patrimonial, as well as its personal safety. " It includes, as said in the Argentine Report, as one of the forms of labour violence, the systematic psychological harassment to a given worker in order to achieve her social exclusion (article 6 of Law 26,485).

The same occurs in Venezuela, where the regime against gender violence, contains the prevention of harassment in article 15.2 of the Organic Law on the Right of Women to a Life Free of Violence (LODMVLV), which states that "are considered forms of gender violence against women, the following: [...] *Harass or harassment*: is any abusive behavior, especially behaviors, words, acts, gestures, written or electronic messages directed to persecute, intimidate, blackmail, urge, importune and watch a woman that can attempt against her emotional stability, dignity, prestige, physical or psychological integrity, or could jeopardize her employment, promotion, recognition in the workplace or elsewhere".

II. Concept and Notion.

From the point of view of the concept of labour harassment, it is possible to determine that there is a strong influence of psychology, in some cases because the legislator has had in

mind its concepts when legislating, or because the judicial reception using notions from such knowledge.

The route appears, with slight modifications, the same: the original use of the idea of harassment comes from the biological sciences, specifically of the studies of the behavior of animals made by LORENZ. From there it jumps to the study of the labour of LEYMANN, who applied for the first time the concept of labour harassment to human organizations. He originally defined harassment as a "situation in which a person exerts extreme psychological violence, in a systematic and recurrent way for a long time on another person or people in the workplace in order to destroy communication networks of the victim or victims, destroy his/her reputation, disrupt the performance of their duties and finally to get that the person or people end up abandoning the work."⁴³

Hence, the definition of labour harassment has passed to the law, whether by the way of legislative definitions, either by the way of inclusion as part of the case law that begins to exist in almost all countries.⁴⁴

From this perspective, in the few countries where labour harassment has been expressly regulated by law, it has followed in the footsteps of psychology. An interesting definition is that of the European Framework Agreement on Violence and Harassment at Work (2007): "situation where one or more workers or managers are ill-treated, threatened or humiliated, repeatedly and deliberately, in circumstances related to work".

The concept of labour harassment has been defined, among other rules, in art 943-2 of the Polish Labor Code. In accordance with this provision, it is understood by labour harassment any behavior in relation to a worker or against a worker, consisting in a persistent harassment and long lasting harassment, or an intimidation of a worker as a result of decreasing evaluation of his/her professional skills. as well as the harassment resulting from the intention of humiliating or ridiculing a worker, isolating him or her or removing him or her from the work-team.

In France, the figure of harassment is subject to a double definition. In accordance with article L. 1152-1 of the Labour Code, "no worker will suffer repeated acts of harassment that has the purpose or the effect of deteriorating working conditions, which could harm his/her rights and dignity, altering his/her physical or mental health or jeopardize his/her professional future." This definition was supplemented by the Law of May 27th, 2008, which assimilated labour harassment to a discrimination related to be a part -really or supposed- of an ethnic group, race, religion, creed, age, disability, sexual orientation or gender, and any action of a sexual nature suffered by a person whose objective or result is the violation of dignity or the creation of a hostile environment, degrading, humiliating or

⁴³ Leymann, 1996.

⁴⁴ On the notion of labour harassment in the doctrine, Vid. Gamonal and Prado, 2006, and Mangarelli, 2008.

offensive. As noted, unlike the definition of harassment provided in article L1152-1 of the Labour Code, the latter does not require of the repetitive nature of the acts: and an isolated act when is linked to a discriminatory motive, may constitute discrimination.

In Colombia, according to article 2 of the Law 1.010 of 2006, labour harassment is "any persistent demonstrable conduct on an employee or worker, by an employer, a chief or an immediate or mediate superior, a co- worker or a subordinate, designed to instill fear, intimidation, terror and anguish, to cause a labour damage, to generate lack of motivation at work, or to induce the resignation of it".

It seems useful in this context, before various definitions of profiles that do not always coincide and with diffuse boundaries, to use the distinction between the concept and the conceptions of labour harassment. Thus, on the common idea that is handled in comparative labor law -the concept- it is possible to find, as we shall see, different ideas about it. In that sense, beyond understanding a particular definition as correct, considering the difficulty of learning a phenomenon conceptually as polymorphic as labour harassment, it seems reasonable to expose the central elements that have been in mind in the different legal systems at the moment of applying this notion.

From this perspective, and from the reviews of the Reports, is possible to detect that in a greater or lesser extent, the design of the legal concept of labour harassment has revolved around certain elements:

First, the existence of a persistent behavior. One of the requirements that were incorporated, from the origins of the concept of labour harassment, is the need that the behavior is persistent or recurrent. Some countries have explicitly welcomed it, as the case of Colombia or Poland and others have implicitly accepted this requirement through jurisprudential or doctrinal elaborations.

Within countries that incorporate this element to the concept, we find some considering as a parameter, the Leymann's appointed time, this is, the behavior is systematic (at least once a week) and recurrent (at least six months). A clear example of this occurs in Venezuela, where its Constitutional Chamber of the Supreme Court has a rigid view of the phenomenon, demanding that the *mobbing* behaviors must be systematically checked (at least once a week) and for a long time (over six months).

In Colombia article 2 of the Law 1.010 of 2006, expressly states that labour harassment is "any persistent conduct."

Others, such as Italy, while sharing this parameter, have eased it. In this country, the notion of labour harassment states -as a fundamental element- that the behavior is repeated over a long period of time, and even the Report refers to the time estimated by psychology, this is, six months. However, recent case law has estimated that in some cases there are annoying or vexatious behaviors that occur in a shorter period, due the material circumstances in

which they develops, can configure a moral harassment. (Court of Montepulciano, October 26th, 2006).

At this same point, we must mention France, because although the law in this country specify repetition as a constitutive element of labour harassment (article L. 1152-1 of the Labor Code), after the entry in validity of Law of May 27th, 2008, has been incorporated the concept that an isolated act, when is attached to a discriminatory motive, may constitute labour harassment.

These cases show that in some countries isolated cases are recognized as constituent acts of labour harassment, if they that have a discriminatory motive or purpose.

Another interesting example of flexibility is the requirement of reiteration is the Colombian Law 1,010 of 2006, which article 7 provides that "an exceptionally single act is enough to prove hostile labour harassment. The competent authority will appreciate that fact, depending on the severity of the conduct complained and its ability to offend by itself human dignity, life and physical integrity, sexual freedom and other fundamental rights".

In the same line, the Labour Standards Act of Quebec, in Canada (article 81.18), provides that "one serious conduct may also constitute psychological harassment if it supposes a damage and produces continued adverse effects on worker ".

Second, the conduct is systemic. The labour harassment is verified by the occurrence of a number of different events that degrade, and are able, by their intensity and consistency, to create a labour environment degrading and humiliating.

Much of the international comparative experience, as certified by the Reports, have demanded that labour harassment has to involve a systemic and complex behavior, issue which is explained by the influence that in many of them have had the concepts of psychology. Particularly relevant is the use of the concept of Leymann putting emphasis on this point: "situation in which a person exerts extreme psychological violence, in a systematic and recurrent way and for a long time on a person or people in the workplace".

From that concept has been taken the requirement of "systematicity" of the harassment, in many labour systems, as Spain, Argentina, Chile, Sweden and Brazil. In none of there is a legal definition labour harassment and, therefore, the jurisprudence has used concepts from the psychology and with them, the requirement of complexity of the various behaviors that constitute it.

The meaning of this element is obvious: to distinguish the labour harassment of ordinary occurrence at work, such as the lack of compatibility between coworkers, job stress, challenges, cries and others, but by their nature of isolated incidents do not allows the setting of a real labour harassment situation.

Third, the existence of a particular purpose or intent. The requiring of a subjective element-or purpose-in the labour harassment, is a very important trend in comparative labor law.

There are countries that consider as a subjective element of the labour harassment. The intentionality refers only to get that the harassed worker resigns. So in Austria it is stated that the essential feature of labour harassment -in addition, of being a systematic and repeated behavior- is the deliberated intention to exclude the person from labour.

A similar approach is seen in the Italian jurisprudence, where the subjective element, as the Report notes, "requires, necessarily the form of a fraud, when a vexatious conduct is designed to isolate and devalue the victim." (TAR Rome, 1 Chamber, N°, 2.907, April 1st, 2011).

Elsewhere, intentionality is conceived not only focused on the exclusion of the worker, but includes assumptions where the intent or purpose of the harasser is merely to damage or diminish the harassed. In Australia, the Statute on Security and Health at Labour, establishes that labour harassment seeks to victimize, humiliate, undermine or threaten the worker to whom the conduct is directed and creates a risk to health or safety. Also in Poland it is recognized as a purpose of harassment "to humiliate or ridicules an employee, to isolate or exclude the worker from the team."

In that sense, for the majority of jurisprudence in Argentina, the labour harassment has "a specific direction to the victim with the subjective and perverse intentionality to generate psychological harm or discomfort and the consequent subjugation, or the abandon from the business organization or group."

And finally, we should refer to those countries where it is not necessary to prove intentionality to set up the phenomenon. So in Uruguay, although there are sentences that establish intentionality as an integral element of the structure of the harassment, the legal trend is to "objectify" the behavior, which must also be serious, from the perspective of an "ordinary or average citizen".

In Japan, it is only needed the breach of the employer of his duty to ensure the safety of his employees, without any reference to the intentionality as an element in the creation of a labour harassment. Also, according to the Report, in France the labour harassment and also the discriminatory labour harassment, can be configured without the intentionality of the harasser.

In turn, the Labor Standards Act of Quebec in Canada its (article 81.18) it is established that "it is understood as psychological harassment a vexatious behavior manifested by behaviors, words, repeated acts or gestures, that are hostile and unwanted and involving damage to the dignity or psychological or physical integrity of the worker, or it is -in itself- a disastrous working environment".

Fourth, labour harassment involves the production of a certain outcome of harm to workers' rights. Whatever the route of implementing the concept of labour harassment - legislative, jurisprudential or doctrinal- this should produce a harmful result and the relevant point here, not very prominent in the Reports, is to determine which character should have that result.

There is, by one side, the ability to understand that labour harassment requires a certain psychic damage -accredited by the victim- derived from the injurious behavior from the harasser- which is, then, as an additional matter, the proof of that damage in particular, as the causal link between the conduct and the damage.

But there is another option consisting in the understanding that the harmful outcome relates with the affectation of one or more fundamental rights of the victim, and not to a specific psychic damage, so that, the injured is a set of protected rights that revolve around the dignity of workers, such as moral integrity, honor, privacy and non-discrimination.

It is obvious that the required type of detrimental results is a matter of a juridical policy, but with significant practical resonances for the victim, in the field of judicial proofs. As it is highlighted among others, in the Venezuelan report, to require a psychic damage seems rather an excessive influence of the world of psychology on the law, because from a legal perspective seems more relevant the protection of certain assets and rights considered as fundamental.

III. The Typology of Labour Harassment : Vertical and Horizontal, Moral and Sexual

Regarding the distinction between vertical and horizontal labour harassment, it is possible to count with a relative unanimity in connection with the recognition of both types of labour harassment in the jurisprudential and doctrinal level. Indeed, several reports indicate that both -the scientific doctrine and jurisprudence- have recognized as agents of harassment both the employer or superiors in the hierarchy, and co-workers.

There is a common language in comparative labor law: descending vertical harassment is understood as one where the harassment comes from the employer or superiors, upward vertical harassment, in turn, as that goes in the opposite direction of lower workers harassing a superior, and horizontal harassment, finally, as one in which the harasser perpetrator and the harassed are coworkers or approximately of the same hierarchical level.

Interesting is the introduction, together with the typology of labour harassment already mentioned, of the notion that relates to the establishment of enterprise organization's methods that generate extremely aggressive, hostile environments and degrading work. References to this typology, are made, among others, in the Report of Argentina, under the name of "organizational harassment", and in the Report from Brazil, under the name of "collective moral harassment".

In Canada it is called "toxic labour environment", which is defined as a work environment in which the comments and behaviors create an environment unwelcoming, hostile or offensive to a person or a group of persons. Such environments affect communication and productivity and may cause that the individual or the group feels marginalized, isolated and / or vulnerated. In countries such as Austria and Spain, third parties, including clients, are recognized as possible harassers.

Regarding the distinction between labour harassment and sexual harassment it may be noted that it is present in most of the experiences of comparative law. That distinction can be explained in the classic distinction of genus (type) and specie.

Indeed, labour harassment seems to be a larger figure and more extensive content, as it relates to all kind of harassment that is triggered against a worker, while sexual harassment is constructed as a more severe and limited figure, where the harassment content has a determined nature as the sexual. Somehow, then, bullying is a residual and generic figure of harassment on the employee, while sexual harassment labour harassment is a residual and generic figure of harassment over the worker, while sexual harassment is an insular figure that cuts a part of the reality of harassment, particularized through the sexual connotation of the behaviors.

In Venezuela, both the Organic Law of Prevention, Conditions and Environment at Work (article 56), and the Organic Law on the Right of Women to a Life Free of Violence (article 15), distinguish both types of harassment, according to the content of the behavior (sexual or not), each one with an independent regulatory treatment. In Uruguay, Law 18.561 (2009) exclusively penalizes sexual harassment and excludes any other harassing behavior in the workplace.

In the United States both figures are differentiated: sexual harassment must be based on the sex of the victim and is a form of discrimination prohibited by law, which is not the case with labour harassment (*workplace bullying*) that is not related to the sex factor. In Poland, labour harassment and sexual harassment are legally as differentiated forms of harassment. The same happens in Chile where the Law 20.005 of 2005, indicates an explicit definition for this last figure with special reference to the sexual character of the harassment, excluding labour harassment.

From the reports it is possible to note that the line drawing the difference would be the content of the conduct, in which sexual harassment seems a figure more specific and narrower than labour harassment, the latter always conceived as a wide and multipurpose figure, with contours more vague.

However, there are important cases where the distinction has not permeated the policy level, such as Colombia, where both figures, according to the Report, are considered as a single type of gender harassment in labor standards. In Law 1.010 of 2006, which wanted to include all the possibilities of harassment in the workplace, it was determined that harassment could arise if there is abuse, persecution, discrimination, interference, inequality

or lack of labour protection; and in the first of these categories (labor abuse or ill-treatment) were included "all acts of violence against the physical or moral integrity, physical or sexual freedom and the property of workers and employees." A similar situation exists in the Netherlands, where these figures are not clearly distinguished, and under the Working Conditions Act, it is required that the employer has to take measures against harassment in the workplace in general, without making distinctions.

In the same perspective, the European Framework Agreement on Violence in the Workplace (2007) includes a broad notion of harassment, including sexual harassment behaviors.

IV. Juridical Responsibility.

Regarding responsibility, it should be noted what kind of punishment derives as a legal consequence of labour harassment. In comparative labor law this responsibility presents various modalities.

A. Constitutional Responsibility.

In several countries, workplace harassment is directly treated as a problem linked to fundamental rights of a maximum rank. This qualification allows the victim to try the exercise of constitutionally protected procedural actions.

Beyond the procedural means that each system provides for the protection of such rights, there are several countries that recognize the option to seek "*iusfundamental protection*". For example, in Venezuela, the victim may exercise the *constitutional protection* procedure (in accordance with the provisions of article 27 of the Constitution and the Law on Protection of Rights and Constitutional Guarantees), for the violation of the fundamental rights to moral integrity (article 46 CRBV) and dignity (articles 3, 237 and 87), demanding the restitution of the breached juridical situation, that is, the immediate cessation of humiliating and degrading treats that produce the labour environmental degradation, and also the adoption of effective measures aimed to prevent its repetition.

Similarly, in Chile, the worker could seek protection from harassment, by the way of the so-called *labour tutelage* (article 485 of the Labor Code), that allows the presentation of a complaint to a Labour Judge, based on the infringement, among others, of the fundamental rights related with this type of harassment: physical and psychological integrity, right to honour, privacy, etc.

What is relevant is that this type of action allows the cessation of the breach and also reparation measures beyond financial penalties. In fact, some legal provisions compel the judge, as it occurs in Chile, to "take concrete steps" to re-establish the exercise of the concerned right or rights. (article 495 of the Labour Code).

B. Labor Responsibility

It seems to be a widespread tendency to establish labour responsibility mechanisms in the case of harassment. In many national experiences, such responsibility consists in labour compensations. Indeed, in this context it should be noted that most of the remedies set in front of the behavior, are pecuniary.

A particularly relevant mechanism in many countries is the figure of the self-dismissal or indirect dismissal, where the worker can finish the labour contract on the grounds that labour harassment constitutes a violation of the employer to the labour contract and also to labour law. Whether in the case of vertically harassment - the employer does not comply with the duty to respect and not affect the life and health of the worker - or in the case of horizontal harassment - the employer does not comply with the duty to protect the worker's life and safety against third parties.

As noted in the report of Uruguay, in this case, a worker who considers that is hostile the climate in which the labour relationship is developed, he/she can finish the contract by using the figure of indirect dismissal. In this case the worker shall have the burden of proof to prove the matters of fact on which it is based the claim to end the dependency. The same applies, among others, in Argentina, Brazil, Chile and Poland.

In the case of United Kingdom, the jurisprudence has established that when an employer has committed a harassment (*bullying*), this could constitute a breach of a contractual duty of confidence and the worker is entitled to a self-dismissal judicial procedure.

An interesting situation is that which occurs with the worker who has participated as a harasser -in a hypothesis of horizontal labour harassment. In such situations, some legal systems allow his dismissal for disciplinary reasons: in Sweden, it is understood that *mobbing* against another workers is an objective cause for the termination of the labour relation (section 7 of the Employment Protection Act).

Similar penalty is provided by law 1.010 in Colombia, which states as a just cause for dismissal the harassment exercised against a colleague. In Brazil, in turn, the employee can be fired for violating the dignity and psychological integrity of another worker, which can be framed as a just cause for dismissal for assault against the honour, reputation or physical integrity (Section 482 letters j and k of the Consolidated Labour Laws).

C. Civil Responsibility for Damages.

In most of the cases, the victim is allowed to seek compensation for damages for civil responsibility derived from the labour harassment, applying the common law rules on damages.

In Italy, if the employer is author of a vexatious conduct, he is liable for the lack of security referred to in art. 2087 CC, in relation to the provisions of the art. 1218 CC, applicable when a contractual obligation is breached; he must compensate the victim for any damage caused by the harassment. In these cases, the burden of proof is particularly favorable for

the worker, who must provide evidence only about the existence of the labour relationship and the damage, and not on the fault of the employer.

In France exists civil responsibility of the employer from damages for harassment and the jurisprudence of the Court of Cassation has *condemned "in solidum"*, both the harasser and the employer, for damages caused to the worker. In Holland, in turn, the victim can seek compensation for damages "under general responsibility laws" and the employer shall be condemned if he did not take reasonable steps to prevent harassment, even if he is not the harasser.

In Japan, the Court has ordered indemnification for punitive damages, under the Civil Code, in serious cases of bullying who finished with victims committing suicide, condemned the employer for breach of his security obligations to his employees.

An interesting question at this point is the origin of moral damages in compensation of workplace bullying. In Italy, the compensation must cover all the damages caused by the harassment, and among them are the biological damage, existential damage - that is, the damage caused in personality and social life of the victim - and the moral damage - as a result of the emotional distress of the victims. The latter was defined by the term "disorder of the soul" in the jurisprudence of the Supreme Court (Case numbers 26972 and 26973 in 2008).

In some cases, the regular action for civil damages may be the only mechanism of responsible expected for these hypotheses, as noted in the Dutch case, the absence of a specific labor liability system; the victim must attempt a lawsuit by damage in the regular Courts, under the general rules of liability.

D. Criminal Responsibility.

Exceptionally, the legal systems considers labour harassment as a specific penal type or crime, so originating criminal responsibility eventually subject to the application of more general types of crime. Exceptions are cases like that of Spain, which in a recent reform introduced the crime of harassment in the following terms: "those who, in the scope of any employment or civil service relationship and by making use of advantages related to their superiority, made against another consistently hostile or humiliating acts that without constituting a degrading treatment, suppose severe harassment against the victim. (article 173 of the Penal Code). The generality of legislations do not contemplate this situation.

In all other cases, criminal responsibility for labour harassment is deemed to the behaviors that constitute criminal offenses, as contained in common criminal types. This is true in many cases, as defamation in Sweden (Chapter Five, Section I of the Criminal Code), injuries in Argentina (article 89 of the Penal Code), or injuries, defamation and lesions in the case of Uruguay (articles 333, 334 and 316 of the Penal Code)

E. Administrative Responsibility

A general trend in comparative law is the existence of administrative sanctions applied by labour harassment's behavior, whether for breach to general labour laws, or for breach of the duty concerning health and safety of workers.

Thus, in Turkey the Labour Code (art. 77) requires the obligation of the employer to protect the health and safety of his workers, and labour harassment -understood as a breach of that duty- can be sanctioned by the Ministry Labor. The same occurs in Poland, in relation to the Labuor Inspection and its competence on standards of occupational health and safety.

Similarly, in Finland the Occupational Health Law and Safety of 2002, provides in Section 28 the employer's obligation to take measures against harassment and inappropriate treatment that threaten the health of workers, rules that must control and punish the Labour Inspection.

Finally, in a similar situation of administrative penalties for labour harassment behavior is, among others, the Uruguayan case, where legislation - Decree No. 186/2004 of June 8th, 2004, concerning breaches of international labour conventions, laws, decrees, resolutions, awards and collective agreements, in its Article 9 lit. D, qualified as very serious "offenses involving breaches of legal requirements, regulations or conventional whenever there is a very serious risk or imminent to the physical integrity or health of the workers concerned."

The General Labour Inspection is in charge of the penalty's application, the legally protected matter is the hygiene, safety and health at work, and the penalty falls on the individual offender, as provided in Section 13 of the same Decree; and, as it is the general rule in comparative law, the penalty consists in a fine.

V. - Claims and Procedures.

Regarding the existence of grievance procedures to deal with a bullying situation, it is possible to distinguish different situations.

In relation to claims at the enterprise, the general rule is that there are not specific channels for reporting cases of labour harassment. The victim must use, then, the general means that the law or collective bargaining agreements contemplated for labour-related claims. An interesting exception is France where art. L.2313-2 of the Labor Code provides that the worker may submit a complaint through the staff representative, in order that the employer is obliged to take necessary measures to remedy the harassment.

In some cases, the law requires the express obligation of the enterprise to adopt specific measures against labour harassment when the worker place it to the employer, as occurs in Finland with the Occupational Health and Safety Law (Sec. 28), or in Canada (provinces of Saskatchewan, Manitoba and Ontario), where legislation of Occupational Health and Safety at Work expressly requires regulations and policies in relation to labour harassment, including internal procedures for workers' claims.

In connection to claims relating to the administrative authority, there is a general tendency to recourse to state authority either concentrated (Labor Inspection) or to specific authorities in matters of health and non-discrimination.

From the Reports can be understood that even when labour harassment is not explicitly covered in the legislation, legal systems recognize the possibility that the worker can recur to administrative authorities, claiming the infringement of a specific rule - the labour harassment law, if it exists- or general rules as those who requires worthy labour environments and proper health and hygiene conditions.

In countries like Uruguay, Chile, Turkey, France, Finland, Spain, harassed workers may resort to the Labour Inspection to request administrative supervision, and in others, like Sweden, they can resort to the Labour Environment Department, in application of the Labour Environment Law.

Finally, there usually exists the recourse to the Courts to seek protection in labour harassment, either strictly -as labour cases of violation of the rules of health or prevention at work or damages of workers' rights- or, as common cases of harassment or discrimination. An example of this is the United Kingdom where cases of labour harassment - often called bullying – are treated as cases of harassment under a general law of Harassment Prevention (2007), which can be fully implemented on labour matters under the view of jurisprudence.

FINAL COMMENTS

From the pattern of the national reports can draw some trends regarding sexual harassment.

First, sexual harassment is a figure that is quite consolidated in a comparative level. Through different channels, the countries sanction and seek to prevent this figure. In the generality of cases, regimes enacted are based on the fundamental rights of workers, in particular, non-discrimination and equal treatment.

Secondly, the typology of sexual harassment is wide. It tends to include the subject of the employment relationship (employer and worker) and the other participants in the labour's environment, such as peer co-workers, subcontracted and supplied workers, clients, family members of the employer, etc. It even protects workers seeking employment and those in education and training processes.

In this perspective, although responsibility systems are extensive or wide (labor, civil, administrative and criminal), there is tendency to charge and to make the employer responsible for the labour environment although not being the direct harasser. Thus, labour legislations recognize the power relationship underlying to the labour contract, a relationship that is recognized by the law through the employer's power of direction.

Third, sexual harassment can affect anyone but preponderantly afflicts the working woman. So it is not enough legal prohibition and punishment of this figure: this subject matter is approached from a gender perspective and mechanisms of education and prevention in this area are sought. These mechanisms tend to involve all actors: governments, employers, unions, etc.

Fourth, it should be noted that as sexual harassment is linked to the defense of workers' fundamental rights, legislations enshrine specialized procedures for prosecution, combining research inside the enterprise, administrative inspection procedures, actions of the Ombudsman in some cases, arbitrations arising from collective agreements, and finally judicial intervention in the matter. The jurisdictional intervention has as a characteristic, the consecration of lightened proof systems, on basis of circumstantial evidence and presumptions.

The effects of harassment tend to involve a wide repair of damage caused, especially the moral damages to the victim.

The review of Reports on labour harassment makes it possible to present some critical considerations:

First, there is no an explicit and generalized legal recognition labour harassment, which has not prevented that this figure has been received though different ways, especially the doctrine and jurisprudence. In any case, there is a marked influence of psychology in the construction of the legal concept of labour harassment.

Second, that despite the various formulas used by the law to build the figure of labour harassment there is a minimum and common concept in the matter -considered as a situation of bullying and harassment of some intensity on the worker or the victim.

About this minimum concept there are different concepts of labour harassment in comparative law, which can be described from two fundamental extremes according to the configurative elements that get attention: one subjective and one objective.

In the concept that we call subjective, the labour harassment is designed with the special request of such elements: the intent of the harasser and the accreditation of psychic harm to the victim. In the case of the objective conception, the fundamental request is shifted to the persistence and systematization of the labour harassment behavior.

Third, and closely linked to the above, to sustain a subjective conception of labour harassment, becomes more urgent and pressing to solve the proof problem that harassment present: by one side, how the victim can prove the existence of a labour harassment situation if it requires a proof of a specific intentionality or a determined subjective element -the mood to exclude or offend- and, by another side, how to prove the existence of psychic damage and the respective relation of causality.

The objective concept seems to relieve the victim of these challenges, but this purpose requires moving away from the notion of psychological harassment and to build a figure with more juridical dyes, from a law's particular perspective: the fundamental rights.

Fourth, what is relevant to the figure of labour harassment -understood as essential typical elements- is the existence of a conduct that is revealed as "pluri-offensive" of certain fundamental rights of the victim. Thus, labour harassment should not be strictly constructed as an "*activity's illicit*", but, as something different, as a "*result's illicit*", as they affect the legal positions protected by rights considered as fundamentals for the worker as a citizen, between them, privacy, non-discrimination, physical and psychical integrity.⁴⁵

⁴⁵ On the notion of involvement and restriction of "non labour" workers' fundamental rights Vid. Ugarte (2011).

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