

THE LAW OF WORKPLACE BULLYING: AN INTERNATIONAL OVERVIEW

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This issue brings together eight contributions from legal scholars and specialists in workplace bullying from four continents, who report on the state of the law governing a specific form of workplace abuse alternatively described as workplace bullying, psychological harassment, moral harassment, victimization, or mobbing.

I. WHAT'S IN A NAME? THE IMPORTANCE OF UNDERSTANDING WHO'S DEFINING AND WHY

As many researchers in a variety of fields have noted,¹ the naming of the phenomenon is itself the subject of controversy, both because of disciplinary differences but also because of geo-cultural differences. Anglo-Saxon jurisdictions, including the United Kingdom,² the United States,³ and Australia,⁴ tend to use the term “workplace bullying,” while French-speaking jurisdictions, heavily influenced by the work of Marie-France Hirigoyen,⁵ refer to

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1. See, e.g., C. Caponecchia & A. Wyatt, *Distinguishing between workplace bullying, harassment and violence: a risk management approach*, 25 J. OCCUPATIONAL HEALTH & SAFETY—AUSTL. & N.Z. 439 (2009); Laura Crawshaw, 61 CONSULTING PSYCHOL. J.: PRAC. & RES. 263(2009).

2. Charlotte Rayner, *The Incidence of Workplace Bullying*, 7 J. COMMUNITY & APPLIED SOC. PSYCHOL. 199 (1997).

3. David Yamada, *Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment*, 32 COMP. LAB. L. & POL'Y J. 251 (2010).

4. Joan Squelch & Robert Guthrie, *The Australian Legal Framework for Workplace Bullying*, 32 COMP. LAB. L. & POL'Y J. 15 (2010).

5. MARIE-FRANCE HIRIGOYEN, *LA MALAISE DANS LE TRAVAIL, HARCÈLEMENT MORAL: DÉMÊLER LE VRAI DU FAUX* (Syros, 2001); MARIE-FRANCE HIRIGOYEN, *LE HARCÈLEMENT MORAL: LA VIOLENCE PERVERSE AU QUOTIDIEN* (Syros, 1998).

“harcèlement moral,” or moral harassment,⁶ as in France and Belgium or “harcèlement psychologique” or psychological harassment, as in Québec.⁷ Spanish-speaking scholars, also influenced by Dr. Hirigoyen’s work,⁸ use the term “acoso moral” or moral harassment, as well.⁹ Scandinavian researchers, starting with Heinz Leymann,¹⁰ whose work first drew scholars’ attention to the phenomenon, use the term “mobbing,”¹¹ a term also used in Germany.¹²

After some initial hesitation, most scholars agree that these varying terms designate the same phenomenon.¹³ Then a second level of debate arises: providing a universal definition of that phenomenon. Leading scholars in the field have suggested the following definition:

Bullying at work means harassing, offending, socially excluding someone or negatively affecting someone’s work tasks. In order for the label bullying (or mobbing) to be applied to a particular activity, interaction or process it has to occur repeatedly and regularly (e.g. weekly) and over a period of time (e.g. about six months). Bullying is an escalating process in the course of which the person confronted ends up in an inferior position and becomes the target of systematic negative social acts. A conflict cannot be called bullying if the incident is an isolated event or if two parties of approximately equal ‘strength’ are in conflict.¹⁴

For scientific purposes this definition may well be the object of a broad consensus, that allows researchers to build scales and measure the prevalence of the same phenomenon in cross-cultural settings.

6. Loïc Lerouge, *Moral Harassment in the Workplace in French Law and European Perspectives*, 32 COMP. LAB. L. & POL'Y J. 109 (2010).

7. Rachel Cox, *Psychological Harassment Legislation in Québec: The First Five Years*, 32 COMP. LAB. L. & POL'Y J. 55 (2010).

8. MARIE-FRANCE HIRIGOYEN, *EL ACOSO MORAL: EL MALTRATO PSICOLÓGICO EN LA VIDA COTIDIANA* (1999); MARIE-FRANCE HIRIGOYEN, *EL ACOSO MORAL EN EL TRABAJO: DISTINGUIR LO VERDADERO DE LO FALSO* (2001).

9. Diego López Fernandez, *Legal Protection for Victims of Workplace Harassment in Chile*, 32 COMP. LAB. L. & POL'Y J. 91 (2010); Manuel Velázquez, *The Spanish Code of Practice on Work-Related Bullying: Reflections on European Law and its Impact on a National Strategy For Labor Inspectors*, 32 COMP. LAB. L. & POL'Y J. 185 (2010).

10. HEINZ LEYMANN, *MOBBING I ARBEIDSLIVET* (1987). Leymann’s book was translated into French, HEINZ LEYMANN, *MOBBING: LA PERSÉCUTION AU TRAVAIL* (Seuil, 2002) and his published work in English also had a significant impact on the development of understanding of the phenomenon. See, e.g., *Mobbing and Victimization at Work*, 5 EUR. J. WORK & ORG. PSYCHOL. 161 (Dieter Zapf & Heinz Leymann guest eds., 1996).

11. Helge Hoel & Ståle Einarsen, *The Swedish Ordinance Against Victimization at Work: A Critical Assessment*, 32 COMP. LAB. L. & POL'Y J. 225 (2010).

12. Philip S. Fischinger, “*Mobbing*”: *The German Law of Bullying*, 32 COMP. LAB. L. & POL'Y J. 153 (2010).

13. DUNCAN CHAPPELL, & VITTORIO DI MARTINO, *VIOLENCE AT WORK* (3d ed. 2006); Crawshaw, *supra* note 1; Ståle Einarsen et al., *The Concept of Bullying and Harassment at Work: The European Tradition*, in STÅLE EINARSEN ET AL., *BULLYING AND HARASSMENT IN THE WORKPLACE: DEVELOPMENT IN THEORY, RESEARCH AND PRACTICE* 3, 39 (2d ed., forthcoming 2011).

14. Einarsen et al., *supra* note 13, at 22.

However, for laymen and practitioners who seek to promote prevention strategies, a broader definition of the concept is often used. Lay participants studied by Saunders and colleagues¹⁵ most frequently included two criteria in their concept of workplace bullying: the perpetration of negative behavior and perpetration of a behavior that causes some form of harm to the target. The authors found that relatively few participants indicated that a power imbalance must exist between the perpetrator and the target or that the behavior perpetrated must occur frequently and persistently.

Practitioners preoccupied with prevention have emphasized the importance of intervention before the severity of the behavior is such that it occurs weekly over a period of six months, and for this reason encourage the scientific community to consider a broader range of behaviors within the scope of the definition.¹⁶ While prevention should, by its very nature, take place before there exists evidence of bullying, it has been suggested that a strict definition of bullying that includes repeated exposures and high frequency of exposures may be used as a pretext to justify doing nothing before evidence of these conditions is in place.¹⁷ It is nonetheless clear that prevention of bullying requires intervention on organizational factors that are precursors to bullying behavior. Workplace parties need to address issues such as role conflict, job insecurity, leadership, and role ambiguity before workplace bullying manifests itself.¹⁸

Legal scholars will be quick to admit that legal definitions do not exist for the purpose of validating scientific concepts, but rather for the purpose of regulating behavior. In those jurisdictions having explicit legislation on the phenomenon, be it labeled bullying, harassment, mobbing, or even victimization,¹⁹ legislators are sovereign and may choose to define the concept in any way they like. This

15. Paula Saunders et al., *Defining Workplace Bullying Behaviour Professional Lay Definitions of Workplace Bullying*, 30 INT'L J.L. & PSYCHIATRY 340, 348 (2007).

16. Crawshaw, *supra* note 1. While most legal frameworks are not specific about the degree of frequency, the Spanish National Institute for Safety and Hygiene at Work has included requirements as to frequency and duration (weekly incidents over a period of six months) drawn from the work of Leymann. See Velázquez, *supra* note 9.

17. See, e.g., Crawshaw, *supra* note 1. See generally Cox, *supra* note 7 (explaining that it may also serve to trivialize the significance of discriminatory harassment).

18. See, e.g., Elfi Baillen & Hans De Witte, *Why is Organizational Change Related to Workplace Bullying? Role Conflict and Job Insecurity as Mediators*, 30 ECON. & INDUS. DEMOCRACY 348 (2009); Guy Notelaers, Hans De Witte & Stale Einarsen, *A Job Characteristics Approach to Explain Workplace Bullying*, 19 EUR. J. WORK & ORG. PSYCHOL. 487 (2010); Michel Vézina & Julie Dussault, *Au-delà de la Relation "Boureau-victime" Dans l'Analyse de'une Situation de Harcèlement Psychologique au Travail*, 7 PISTES (2005), <http://www.pistes.uqam.ca/v7n3/articles/v7n3a14.htm> (last visited July 20, 2010); Einarsen et al., *supra* note 13.

19. See Hoel & Einarsen, *supra* note 11 (using this term, commonly used in Sweden).

choice will be dictated by the political context in which the legislation is introduced, the regulatory environment, including the existence or absence of provisions already regulating other forms of workplace abuse, and a broad range of other considerations that may have little to do with science. For example, when the Belgian legislation on moral harassment was introduced in 2002, there were separate provisions on occupational violence prohibiting persecution, threats, and psychological or physical aggression at work,²⁰ so that there was no need to stretch the definition of moral harassment to include verbal violence or significant, one-off events, behavior that already had a name and a remedy. On the other hand, no such protections existed in Québec when the legislation on psychological harassment was introduced, and the need to ensure legal protection to those workers who left the workplace after the occurrence of one significant intimidating or verbally violent event led the National Assembly to include serious single events in the definition of psychological harassment.²¹

A variety of legal provisions are studied here, ranging from the broad, and some suggest overbroad,²² Swedish provisions to the very narrow technical provisions adopted in Québec and South Australia. Those provisions suggested in the Healthy Workplace Bill, the proposed legislation discussed by Professor Yamada in this issue, are even more narrow than the existing examples of strictly worded legislation, as, for instance, they require evidence of intention, something that is not required in most legislation discussed in this issue. Perhaps in the context of the United States, aspiring to ideal definitions is a luxury that cannot be afforded in a country with a strong resistance to state regulation of working conditions.²³

Vocabulary and definitions, be they scientific, social, or legal, are sometimes influenced by the evolution of the legislation itself, and this

20. Arrêté royal relatif à la protection contre la violence et le harcèlement moral ou sexuel au travail (Arrêté royal du 11 juillet 2002), *Le Moniteur belge* du 18/07/2002; see also J. Jacquain, *La Loi relative à la protection contre la violence et le harcèlement moral ou sexuel au travail*, 137 BULLETIN SOCIAL DU GUIDE SOCIAL PERMANENT 1 (2002).

21. Katherine Lippel, *Le Harcèlement Psychologique au Travail: Portrait des Recours Juridiques au Québec et des Décisions Rendues par la Commission des Lésions Professionnelles*, 7 REVUE PISTES (2005), <http://www.pistes.uqam.ca/v7n3/articles/v7n3a13.htm> (last visited July 20, 2010). On the significance of this provision, see Cox, *supra* note 7. For another illustration, see the article by Velázquez, *supra* note 9, which shows how a broad variety of remedies for various manifestations of negative acts can be available.

22. Hoel & Einersen, *supra* note 11 (reporting that some stakeholders felt the Swedish definition to be overbroad).

23. *But see* Jerry Carbo, *Strengthening the Healthy Workplace Act: Lessons from Title VII and IIED Litigation and Stories of Targets' Experiences*, 14 J. WORKPLACE RTS. 97 (2009) (suggesting that the Healthy Workplace Bill does not go far enough).

may lead to confusion. The interface between discriminatory harassment and psychological harassment/bullying/mobbing/victimization is a case in point. In most Anglo-Saxon jurisdictions, legislation prohibiting discriminatory harassment, based on a prohibited ground such as gender, race, ethnicity, sexual orientation, has existed for a long time, often introduced in human rights legislation. Sexual harassment in particular has often been the subject of prevention campaigns in workplaces in English-speaking countries. This has led some to suggest that the word “harassment” is the term that refers exclusively to discriminatory harassment, while “bullying” refers to a different phenomenon, similar to that described in the scientific literature referred to above.²⁴ This analysis may well reflect linguistic practices in Australia, but clearly doesn’t work in French-speaking jurisdictions, or even in Canada, where the term “harassment,” or “workplace harassment,” is used both in collective agreements and legislation²⁵ to designate what Caponecchia and Wyatt would call “bullying.”

As several contributions in this issue show, legislative definitions are the product of political compromise; they are often intentionally convoluted, and should not be used by occupational health and safety or social psychology practitioners as guides to determine when prevention interventions are justified. The requirement that employers take action to reduce or eliminate negative behavior should not be exclusively guided by legal definitions of workplace bullying, and perhaps the most eloquent demonstration of this is the fact that all of the nine jurisdictions studied, through a variety of legal mechanisms, require employers to prevent behaviors that scientific literature recognizes as workplace bullying, even though only five of the nine jurisdictions have legislation that explicitly mentions the phenomenon.

II. LEGAL PROTECTION AGAINST BULLYING: IS THERE A NEED FOR SPECIAL LEGISLATION OR ARE GENERAL PROVISIONS ADEQUATE?

Articles in this issue show the broad range of legal strategies used to protect workers from bullying in nine countries and the European

24. See Caponecchia & Wyatt, *supra* note 1.

25. The English speaking province of Saskatchewan explicitly regulates the prevention of both discriminatory and non-discriminatory harassment in the term “harassment.” See The Occupational Health and Safety (Harassment Prevention) Amendment Act, 2007, S.S. ch. 34 (2007).

Union.²⁶ Specific legal prohibitions on workplace bullying exist in France,²⁷ Belgium,²⁸ Québec,²⁹ South Australia,³⁰ and Sweden,³¹ while in other jurisdictions examined in this issue targets must rely on more general legal frameworks to obtain protection and remedies. This is notably the case in Spain,³² Germany,³³ Chile,³⁴ other Australian states,³⁵ and the United States.³⁶

A few other jurisdictions not represented in this issue have adopted specific legal provisions on workplace bullying. This includes other Scandinavian countries³⁷ and in specific states in Brazil,³⁸ and specific Canadian provinces other than Québec.³⁹

Contributors to this issue from jurisdictions having specific legislation describe the legal frameworks applicable and the context in which they were enacted. As we have seen, the first were influenced by the work of Heinz Leymann and Marie-France Hirigoyen, while others reacted to legal developments in other jurisdictions. Some were influenced by the emergence of other legal provisions designed to protect workers' mental health. Such is the case with the legislation described in the contributions examining the situation in Spain, Belgium and France, where the 1989 European Commission Council Framework Directive 89/391/EEC on Safety and Health of Workers at Work, which introduced constraints on members of the European

26. Lerouge, *supra* note 6; Velázquez, *supra* note 9

27. Lerouge, *supra* note 6.

28. *Id.*

29. Cox, *supra* note 7

30. Squelch & Guthrie, *supra* note 4.

31. Hoel & Einarsen, *supra* note 11.

32. Velázquez, *supra* note 9

33. Fischinger, *supra* note 12

34. López Fernandez, *supra* note 9

35. Squelch & Guthrie, *supra* note 4.

36. Yamada, *supra* note 3.

37. Aside from Sweden, Finland, and Denmark, have some form of protective legislation on mobbing or bullying. See, e.g., Mette Bøgehus Rasmussen, Tom Hansen & Klaus T. Nielsen, *New Tools and Strategies for the Inspection of the Psychosocial Working Environment: The Experience of the Danish Working Environment Authority*, SAFETY SCI. (forthcoming 2010) (explaining that labor inspectors in Denmark have tools and strategies that explicitly address bullying and harassment); Denise Salin, *Organizational Measures Taken Against Workplace Bullying: The Case of Finnish Municipalities* (Working Paper Series, Hanken School of Economics, No. 521, 2010), <http://econpapers.repec.org/paper/hhbhanken/0521.htm>.

38. Julia Gitahy da Paixao, Address at the Law and Society association Annual Meeting: Regulation of Bullying and Psychological Harassment in the Workplace in Brazil: A Socio-Legal Perspective (May 27–30, 2010), <http://convention3.allacademic.com/one/lsla/lsla10/index.php?cmd=lsla10&id=>.

39. See, e.g., *supra* note 25 (describing the provisions of Saskatchewan). Ontario and the federal jurisdiction have included some provisions on psychological harassment in their anti-violence regulations. See generally K. Lippel & A. Sikka, *Access to Workers' Compensation Benefits and Other Legal Protections for Work-Related Mental Health Problems: A Canadian Overview*, 101 REVUE CANADIENNE DE SANTÉ PUBLIQUE/CAN. J. PUB. HEALTH 16 (2010).

Union to address both the physical and mental health of workers,⁴⁰ had a significant influence on the development of either explicit legislative provisions, as in France and Belgium, or Codes of Practice on Bullying, as in Spain. The Swedish ordinance, the very first explicit legislation on victimization, enacted in 1993, appears to have emerged through a very different dynamic, attributable to the work of Heinz Leymann, a researcher at the Swedish National Board of Occupational Safety (SNBOSH).⁴¹ The Québec legislation was influenced in particular by the new legislation introduced in France and Belgium in 2002.⁴²

It is not surprising that jurisdictions that recognize mental health problems to be compensable under workers' compensation legislation have more quickly addressed the issue of workplace bullying from a prevention perspective.⁴³ Compensation for disability attributable to exposure to bullying has been covered by workers' compensation in Québec,⁴⁴ Saskatchewan,⁴⁵ and Australia⁴⁶ for years, a situation that no doubt has made the phenomenon more visible to regulators, insurers, and workplace actors. In Spain, one of the first turning points in the recognition of the phenomenon of moral harassment arose in the context of social security legislation, where workers sought recognition of their disability as being caused by work.⁴⁷ Yet many jurisdictions where workers' compensation is, at least in theory, available for mental health problems, such as the majority of Australian states,⁴⁸ Chile,⁴⁹ and many American states,⁵⁰ have failed to

40. See Stavroula Leka et al, *The Role of Policy for the Management of Psychosocial Risks at the Workplace in the European Union*, SAFETY SCI. (forthcoming 2010); Lerouge, *supra* note 6; Velázquez, *supra* note 9.

41. Hoel & Einarsen, *supra* note 11.

42. Lippel, *supra* note 21.

43. Gary Fooks, David Bergman & Bethan Rigby, *International Comparison of (a) Techniques Used by State Bodies to Obtain Compliance with Health and Safety Law and Accountability for Administrative and Criminal Offences and (b) Sentences for Criminal Offences*, Centre for Corporate Accountability for the Health and Safety Executive No. RR607 (2007).

44. Cox, *supra* note 7.

45. Lippel & Sikka, *supra* note 39.

46. Squelch & Guthrie, *supra* note 4.

47. Velázquez, *supra* note 9.

48. Squelch & Guthrie, *supra* note 4. LaMontagne and colleagues have shown that, in Australia, despite legal coverage for work-related depression under workers' compensation legislation, only a small percentage (one in thirty) of those suffering from depression because of workplace stress actually access compensation. Anthony D. LaMontagne et al., *Job Strain—Attributable Depression in a Sample of Working Australians: Assessing the Contribution to Health Inequalities*, 8 BMC PUBLIC HEALTH 181 (2008).

49. Marcelo Trucco Burrows, *El Estrés y la Salud Mental en el Trabajo: Documento de Trabajo de la Asociación Chilena de Seguridad*, 6 CIENCIA Y TRABAJO 185 (2004); López Fernandez, *supra* note 9; Magdalena Echeverría, *El Reconocimiento de los Trastornos de la Salud Mental en el Trabajo en Chile* (2007), available at <http://www.proyectoaraucaria.cl>.

enact anti-bullying legislation. Furthermore, in countries like France⁵¹ and Sweden,⁵² the first to enact legislation on bullying, are nonetheless hesitant in their recognition of mental health problems as occupational diseases, perhaps because in those countries sickness or disability insurance is available regardless of the cause of the disability.

In this issue, the application of legislation explicitly targeting bullying is examined in detail, and two papers also report on an empirical analysis of the effects of legislation. Contributions from France, Belgium,⁵³ and Australia (where explicit legislation exists only in South Australia),⁵⁴ provide classic legal analysis of a variety of legal frameworks including those explicitly targeting bullying. The Swedish regulatory framework is the oldest, and the only one to have been the subject of a previous study as to its effectiveness;⁵⁵ some of the results of that study are discussed here in the contribution by Hoel and Einarsen, who reiterate the importance of the existence of the legislation while underlining potential shortcomings that could be avoided by other regulators. The study of the Québec legislation by Cox provides an overview of decisions from the first five years of application of the law, and shows how the political compromises made at the time of the enactment of the anti-harassment provisions have led to a highly litigious environment that, on the one hand, provides a voice and remedies for targets, but on the other, erects some significant barriers.

Legislation and policy are a form of “intervention,” in the case of bullying designed, in theory, to reduce exposure to the phenomenon, a known health hazard. Empirical analysis of interventions, and more particularly of policy interventions, is a perilous endeavor. Contexts are always in transition, and it is always possible that studies that conclude that the intervention (legislation) has had little effect fail to acknowledge that, without the policy, things may have deteriorated to a far greater extent than they would have done without the policy intervention.⁵⁶

50. Robert Hamm et al., *Knocking at the Wrong Door: Insured Workers' Inadequate Psychiatric Care and Workers' Compensation Claims*, 30 INT'L J.L. & PSYCHIATRY 416 (2007); Yamada, *supra* note 3.

51. Lerouge, *supra* note 6.

52. Hoel & Einarsen, *supra* note 11.

53. Lerouge, *supra* note 6 (covering both jurisdictions).

54. Squelch & Guthrie, *supra* note 4.

55. Helge Hoel & Ståle Einarsen, *Shortcomings of Anti-Bullying Regulations: The Case of Sweden*, 19 EUR. J. WORK & ORG. PSYCHOLOGY 30 (2010).

56. See Albert Espelt et al., *Inequalities in Health by Social Class Dimensions in European Countries of Different Political Traditions*, 17 INT'L J. EPIDEMIOLOGY 1095 (2008). See Oile

Germany, Chile, most Australian states, and the United States have no particular legislation regarding bullying and the contributions from those countries provide detailed portraits of the ways that targets and their advocates have cobbled together a variety of legal instruments to seek redress. Most of the remedies discussed in these papers are initiated by the individual targets, and while there is some variation in the opinions of the authors as to the adequacy of current remedies, an overview suggests to readers that little effort is being made for prevention in those countries with no specific legislation.

This is in sharp contrast to the situation described in the Spanish contribution. The article by the Chief of the Labor Inspectorate in Bilbao, Manuel Velázquez stands out among the contributions from those countries without specific legislation on bullying, largely because that Inspectorate has taken an important lead in framing bullying as an occupational health and safety hazard and in developing a Code of Practice for the labor inspectorate. The legal remedies discussed by other authors also exist in Spain, but it is the important role taken by the labor inspectorate that shows the potential for occupational health and safety legislation, available in most if not all countries studied, to provide not only sanctions but tools for prevention of bullying.

III. CROSS CUTTING AND DIVERGENT THEMES

Given that legal systems from four continents are described in this issue, there are some remarkable similarities between the situations described, but also some important differences.

In all jurisdictions, employers may argue, successfully, that the impugned behavior constitutes a form of legitimate management practice, although where the line must be drawn between legitimate and abusive management strategies varies from one jurisdiction to the next. Remedies for constructive dismissal have also been used by targets of bullying in a variety of countries, including Australia, Chile, and Germany.

Lundberg, *Commentary: Politics and Public Health—Some Conceptual Considerations Concerning Welfare State Characteristics and Public Health Outcomes*, 17 INT'L J. EPIDEMIOLOGY 1105 (2008); Tage S. Kristensen, Presentation at EPICOH Conference: Intervention Studies: Usefulness and Good Practice (Aug. 20–22, 2001), available at <http://www.ami.dk/presentations>.

Most, but not all,⁵⁷ of the authors underline the important power disparity between targets of bullying and their employers, and we have noted earlier that, by definition, in the scientific literature, power disparities are intrinsic to bullying situations. A few countries, like France and Spain, have criminal or penal recourses that explicitly target bullying by employers.

Even in the absence of anti-bullying legislation, those countries where workers' right to dignity is consecrated in the Constitution, as in Spain and Chile, appear to provide more accessible remedies to targets of bullying than in those where the Civil Code (Germany) or tort law (United States, Australia) are the primary roads to court. Several authors emphasize the importance of the concept of dignity in the pursuit of redress for targets of bullying,⁵⁸ and explicit legislation on bullying often defines it to include the violation of the workers' dignity, as in Québec, Belgium, and France. Dignity is a concept that is also included in the European Social Charter, and as such can color interpretation of labor legislation throughout the European Union.⁵⁹

In some countries, like Spain, use of occupational health and safety legislation has led to promising intervention tools for labor inspectors, empowered to intervene before the health problems of the targets arise. Other countries, while in some cases mandating labor inspectors to intervene actively⁶⁰ appear to focus less on prevention, but rather on remedies for individual targets. France and Belgium have developed an intricate series of mechanisms to promote prevention within organizations, notably by mandating key actors within those organizations to manage the claims by targets and bystanders.

Finally it is of note that a careful reading of the Spanish contribution, and those from Québec and Australia, and to some extent France, suggest that having too many alternative remedies and recourses may be as problematic as a dearth of recourses.

The interface between anti-bullying legislation and regulatory frameworks governing discriminatory harassment is also examined in most of these papers, and geo-cultural differences are of a major

57. All submissions but one, from Germany (see Fischinger, *supra* note 12), conclude in one way or another that the power disparity is an important element in the evaluation of targets' ability to seek justice, whether explicit legislation exists or not.

58. See Velázquez, *supra* note 9; Yamada *supra* note 3; see also Carbo, *supra* note 23.

59. Velázquez, *supra* note 9.

60. Labor inspectors have an explicit role to play in several jurisdictions studied. See Cox, *supra* note 7; Squelch & Guthrie, *supra* note 4. For a more detailed study of labor inspection and psycho-social hazards in Québec, see Katherine Lippel, Michel Vézina & Rachel Cox, *Protection of Workers' Mental Health in Québec: Do General Duty Clauses Allow Labour Inspectors To Do Their Job?*, SAFETY SCI. (forthcoming 2010).

importance in this regard. As mentioned in several articles in this issue, the first recourses available to many victims of bullying, in some countries, were those provided for in human rights legislation. These statutes prohibit sexist or racist harassment, for example, but the target is required to prove they were targeted because they belong to a group protected by the prohibition of discrimination on specific grounds.

Anti-discrimination legislation pre-existed anti-bullying legislation in Australia, Québec, Chile, and the United States. This was not necessarily the case in Europe. For example, France's legislative prohibition of discriminatory harassment came after the enactment of anti-bullying legislation.⁶¹ North American authors preoccupied with discriminatory harassment have criticized the European approach, suggesting that by regulating harassment in general, rather than discriminatory harassment, European legislators have trivialized or eclipsed the discriminatory nature of many incidents of harassment.⁶² Yet in those jurisdictions where the only recourse is to prove discriminatory harassment, most targets of bullying remain without recourse, and prevention of bullying is not on the employers' agenda.⁶³

The importance of organizational factors in the emergence of situations of bullying is well documented and addressed in many papers in this issue, including those from Sweden, Spain, and France. Successful prevention requires a focus on organizational factors, yet, outside of the European jurisdictions, the legal contexts in which bullying is discussed do little to address those factors, and even when the legislation exists, some decision-makers, as in Québec,⁶⁴ seem particularly reticent to address organizational issues, key to an adequate prevention strategy.

A related issue raised in several papers is the importance of ensuring that legal frameworks are in place not only to prevent or to provide remedies related to workplace bullying, but more generally to protect workers' mental health from a broad range of psycho-social hazards. This is being attempted in several European jurisdictions, including France and Spain, but in some of the other countries represented in this issue, it appears that the importance of addressing

61. Lerouge, *supra* note 6.

62. Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law: Discrimination versus Dignity*, 9 COLUM. J. EUR. L. 241 (2003).

63. Yamada, *supra* note 3.

64. Cox, *supra* note 7.

psycho-social hazards' other than bullying is not yet on the radar screen.

The actual content of the legislation on workplace bullying, if there is to be legislation, requires reflection. Most legislation does not require evidence of the intention of the perpetrator of harassment (see for instance the interpretation and application of the legislation in France and Québec, and the Code of practice in Spain), and while malicious intent may lead to an increased award in Germany, evidence of intent is not required in the application of remedies provided for either in contract or tort liability contexts. It is of note that efforts to have legislation adopted in the United States seem to raise the bar far higher than would be acceptable in any of the other countries studied here. The requirement of malicious intention is of particular concern, and is not a requirement in the other legislation studied in this issue. Similarly, the proposed Healthy Worker Bill imposes an evidentiary requirement that has been critiqued as being "an over-high standard of severity,"⁶⁵ requiring evidence of tangible harm to the plaintiff.⁶⁶ It is understandable that the difficult context applicable in the United States with regard to rights of workers may favor a more restrictive legislative approach for purposes of political expediency, yet even some authors from the United States have expressed concern with the restrictive conditions proposed in the Healthy Workplace Bill.⁶⁷

IV. CONCLUSION

While some targets occasionally manage to obtain redress and compensation in countries without special legislation, some authors feel that the silence of the legislator sends the wrong message to employers and society,⁶⁸ and those who have studied jurisdictions with specific legislation emphasize the increased legitimacy this gives to the

65. Corbo, *supra* note 23, at 109.

66. In Québec, the Bill in first reading required evidence of physical or mental harm to the target. This was changed in the final version, the Minister underlining the importance, for prevention purposes, of providing remedy for those whose right to dignity was violated, even in the absence of evidence of health or economic consequences. Consequences will, of course, affect the quantum of damages, but need not be integrated in the definition of harassment itself. See Lippel, *supra* note 21.

67. Carbo, *supra* note 23.

68. This appears clearly to be the case in the United States, as shown by Yamada, *supra* note 3. In Germany (Fischinger, *supra* note 12) and Chile (López Fernández, *supra* note 9), the authors suggest that the status quo provides sufficient remedies, but it is important to compare the status quo in those countries, which include the protection of workers' dignity, with the status quo in the United States.

issue.⁶⁹ Regardless of the label, be it bullying, harassment, victimization, or mobbing, these articles, when read together, show that legislative and other policy interventions that name the phenomenon and send the political message that it is wrong are more likely to ensure implementation of active measures for prevention and mechanisms to provide redress for targets.

69. This was mentioned in particular in the contributions from Sweden (Hoel & Einarsen, *supra* note 11) and Québec (Cox, *supra* note 7).



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