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ORIGINAL ARTICLE

Contesting the Neoliberal Order through Legal Mobilisation: The Case of Chilean Unions

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Abstract

Scholars interested in labour in Latin America have traditionally paid little attention to trade unions' legal mobilisation. However, the increasing number of legal complaints filed by workers with labour ministries and/or the courts in countries like Argentina, Brazil and Chile calls for a more serious debate on the role that trade unions play in this process. This article focuses on the Chilean case. Drawing on various sources, it shows that Chilean unions have turned legal complaints into a weapon to gain more rights and curb employers' power. This process has involved the strongest and most combative unions, and is due to two historical conditions: (1) the obstacles placed in the way of successful resort to more disruptive tactics; (2) the increase in institutional opportunities to report infringements of the law. Overall, the article challenges the current image of the Chilean unions by foregrounding their agency and their achievements over the last decade.

Keywords: trade unions; labour movement; legal mobilisation; labour courts; Dirección del Trabajo (Chilean Labour Office); Chile

Introduction

Over the past three decades, most Latin American countries have moved towards a market economy, which has negatively impacted workers' rights and the power of labour movements. Scholars have taken an interest in the protests and political negotiations that unions have conducted to force a change in the economic model or limit the effects of neoliberal reforms. As these campaigns have had limited results scholarly works have fed the sentiment that Latin American labour movements face a crisis.[1]

[1]Enrique de la Garza Toledo (ed.), *Tratado latinoamericano de sociología del trabajo* (Mexico City: FLACSO, 2000, reprinted 2003); Francisco Zapata, *¿Crisis en el sindicalismo en América Latina?*, Kellogg Institute Working Paper, 302 (2003); Maria Lorena Cook, *The Politics of Labor Reform in Latin America: Between Flexibility and Rights* (University Park, PA: Penn State University Press, 2008); Maria

This article is part of a personal project that seeks to increase visibility of types of union agency that have been neglected in the regional scholarly debate because they do not, in the main, pursue political transformations but, rather, more modest victories for labour. This project does not intend to deny limitations on labour movements in the region, but to give significance to the role unions have played in the workplace in containing consistent attempts by companies to increase profit at the expense of workers. As neoliberal reforms have sought to ensure that companies have total control of working conditions, I start from the premise that this battle is also a struggle against the neoliberal economic model itself.

I present in particular an analysis of a form of resistance that I will call 'legal mobilisation'. I use this term to refer to all formal complaints filed by unions with the Chilean Labour Office and/or courts in processes against one or more companies involved in allegations of labour rights violations.[2] I also refer to the 'support structure'[3] role that these organisations play by encouraging and assisting workers to file such complaints on their own.

Scholars interested in labour have traditionally paid little attention to unions' legal mobilisation. In fact, I could not find any published study which discusses this matter in Latin America.[4] However, the increase in the number of legal complaints filed by workers in countries like Argentina, Brazil and Chile since the year 2000[5] calls for a more serious debate on the role that unions play in the process.

Lorena Cook and Joseph Bazler, *Bringing Unions Back In: Labour and Left Governments in Latin America*, Cornell ILR Working Paper, 2013; María Victoria Murillo, *Sindicalismo, coaliciones partidarias y reformas de mercado en América Latina* (Buenos Aires: Siglo XXI, 2005); Juan Montes Cató and Bruno Dobrusin, 'El sindicalismo Latinoamericano ante una nueva encrucijada. De la centralidad del Estado al de las empresas multinacionales', *Trabajo y Sociedad*, 27 (2016), pp. 7–22.

[2]The Chilean Labour Office (Dirección del Trabajo, DT) is an administrative agency that reports to the Ministry of Labour and Social Welfare; the courts report to the Judiciary. The Chilean system allows workers and unions to report infringements of labour law before either institution, though the two processes have different characteristics. When a worker files a complaint with the Labour Office, the agency is required to conduct an inspection and fine the company if the infringement is proven. The process does not require a lawyer and can be undertaken by a union on behalf of the affected workers, without their explicit participation. The Labour Office can also issue a ruling to clarify a specific regulation. Both the decisions and the pronouncements of the Labour Office can be opposed by any party in court, and the latter have the final word. The system allows workers to sue the company directly in the labour courts. Unions can do so on behalf of the affected parties when the complaint involves practices that go against individuals' fundamental rights. Unlike the administrative procedure, the judicial route requires the sponsorship of a lawyer and aims to restore the violated right(s) to the affected.

[3]The concept of 'support structures' for legal mobilisation was initially presented by Charles Epp in *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago, IL: University of Chicago Press, 1998).

[4]I found only 16 papers in the Web of Science database related to this topic. I used several sets of key words for this consultation, including 'legal mobilisation', 'courts', 'legal action', 'labour office' and 'legal complaints'. Most of these 16 papers describe one-off campaigns. None of them focuses on Chile. My last consultation was made on 11 April 2019.

[5]Gabriela Bensusán, 'La inspección del trabajo en América Latina: Teorías, contextos y evidencias', *Estudios Sociológicos*, 27: 81 (2009), pp. 989–1040; Adalberto M. Cardoso, 'Neoliberalism, Unions, and Socio-Economic Insecurity in Brazil', *Labour, Capital and Society*, 35: 2 (2002), pp. 282–316; Viviana Patroni, 'Structural Reforms and the Labour Movement in Argentina', *Labour, Capital and Society*, 35: 2 (2002), pp. 252–80.

The article focuses on the Chilean case in particular. Neoliberal reforms emerged in Chile during the 1980s in the context of a military dictatorship, surfacing earlier than in other parts of the region and preventing the organisation of effective resistance. A set of decrees promulgated in 1979 and known as the 'Plan Laboral' (Labour Plan) directly targeted Chilean workers;[6] it gave greater protections to employers by removing various guarantees associated with employment, limiting collective bargaining to company level and restricting the right to strike, among other changes. The return to democracy in 1990 did not bring substantial changes to these laws in spite of the 'Acuerdo Marco' (Framework Agreement) that was signed that year between the Central Unitaria de Trabajadores (Central Workers' Union, CUT), main business associations and the government.[7] Aside from increasing the minimum wage, this process of national dialogue was merely for show.[8] From being one of the strongest in Latin America, the Chilean labour movement started to be seen as one of the weakest.[9]

Since 2006, scholars have been increasingly interested in describing the attempts of Chilean unions to improve workers' conditions despite their political weakness.[10] The focus has been on strikes and collective bargaining, and legal mobilisation has remained unexplored. However, there is evidence that legal complaints occupy an important place in the activity of these organisations. Indeed, according to the latest *Encuesta Laboral* (*Labour Survey*, henceforth *ENCLA*, from its Spanish acronym),[11] 45.1 per cent of Chilean company-level unions used this tactic during the year considered in the study.[12] The previous versions of the *ENCLA* give similar data, and

[6]José Piñera, the labour minister at the time, was responsible for the design of the plan. For details of the arguments in favour of this reform, see José Piñera, *La revolución laboral en Chile* (Santiago: Zig-Zag, 1990).

[7]The Acuerdo Marco was the result of three years of dialogue and was enshrined in a text entitled 'Chile, una oportunidad histórica' ('Chile, a historic opportunity'). Rather than a concrete plan of reforms, this text laid out the general direction for future policy. It evinces a general acceptance of the market economy and the conviction that social problems would be resolved through economic activity and social peace.

[8]See Kirsten Sehnbruch, *The Chilean Labor Market: A Key to Understanding Latin American Labor Markets* (New York: Palgrave Macmillan, 2006); Peter Winn, 'The Pinochet Era', in Peter Winn (ed.), *Victims of the Chilean Miracle: Workers and Neoliberalism in the Pinochet Era, 1973–2002* (Durham, NC: Duke University Press, 2004), pp. 14–70; Volker Frank, 'Politics without Policy: The Failure of Social Concertation in Democratic Chile, 1990–2000', in *ibid.*, pp. 71–124; Patrick S. Barrett, 'Labour Policy, Labour–Business Relations and the Transition to Democracy in Chile', *Journal of Latin American Studies*, 33: 3 (2001), pp. 561–97; Louis Haagh, 'The Emperor's New Clothes: Labor Reform and Social Democratization in Chile', *Studies in Comparative International Development*, 37: 1 (2002), pp. 86–115.

[9]Cook, *The Politics of Labor Reform in Latin America*.

[10]Antonio Aravena Carrasco and Daniel Núñez, *El renacer de la huelga obrera en Chile: El movimiento sindical en la primera década del siglo XXI* (Santiago: Instituto de Ciencias Alejandro Lipschutz, 2009); Fernando Leiva, 'Flexible Workers, Gender, and Contending Strategies for Confronting the Crisis of Labor in Chile', *Latin American Perspectives*, 39: 4 (2012), pp. 102–28; Indira Palacios-Valladares, 'From Militancy to Clientelism: Labor Union Strategies and Membership Trajectories in Contemporary Chile', *Latin American Politics and Society*, 52: 2 (2010), pp. 73–102.

[11]This survey has been conducted by the Labour Office roughly every two to four years since 1998; the latest version, however, was published in 2014: DT, *ENCLA: Informe de resultados, Octava encuesta laboral 2014* (Santiago: DT, 2015). To request the 2014 database, contact the Labour Office through its website, http://www.dt.gob.cl/.

[12]Of these, 70.1 per cent filed charges with the Labour Office and/or the courts for violations of laws on health and safety, 51 per cent for problems in the calculation of wages, and 21 per cent for violations of

show that legal mobilisation has been relevant to unions for at least the past 19 years.

Specifically, the goal of this article is threefold. First, it examines the meanings that Chilean unions give to legal mobilisation. As I will show, scholars interested in the subject of labour in Latin America have traditionally conceived legal complaints as a defensive response to the violation of existing rights. However, I will demonstrate that Chilean unions mobilise legal procedures proactively and assertively: they try to turn legal complaints into a weapon to gain more rights and curb business owners' power in the workplace.

Second, the article examines the historical conditions that allowed legal mobilisation to become an offensive tactic and occupy a central space in the repertoire of Chilean unions. As I will argue, this trend is related to the obstacles that unions face to using other disruptive tactics and the expansion of institutional opportunities for workers to report infringements of labour law since 1990.

Finally, the article seeks to characterise which unions are more inclined to resort to legal mobilisation within the Chilean context. Alongside historical conditions that have globally affected unions in this country, there are local circumstances that influence the decision of these organisations to confront companies legally, either in court or at the Labour Office. As I will demonstrate, the unions' ability and opportunity to resort to striking are key in these organisations' decisions to opt for legal mobilisation, but not in the sense that the existing literature suggests.

This paper is organised as follows. In the section entitled 'Conceptual Framework' I describe how the literature on labour has interpreted legal mobilisation and how new theoretical developments in the field of social movement studies challenge this conception. In this section, I also describe the hypotheses constructed by international literature to explain the importance of legal complaints for unions. In the next section, I present the data and methods used for the empirical analysis. I discuss the results of these analyses in the following three sub-sections, which are organised around the three aforementioned goals. In the final Conclusions, I summarise the main findings and their implications for the study of labour.

Conceptual Framework

Rethinking Legal Complaints

Labour scholars have traditionally understood labour complaints as a resource that can be used by individual workers to defend their rights. This interpretation continues to dominate in Latin America. Scholars have interpreted the increasing number of labour complaints in the region as a rise in individual complaints made by workers, without considering complaints filed by the unions themselves.[13] Some studies have recognised the role that these organisations play as support structures

female workers' rights. Only 39.6 per cent of these unions denounced practices against unions or collective rights, which demonstrates that legal mobilisation is not reserved for defending the interests of the organisations. The total is over 100 per cent because unions can file charges more than once or in respect of more than one type of infringement of the law.

[13]Bensusán, 'La inspección del trabajo en América Latina'; Cardoso, 'Neoliberalism, Unions, and Socio-Economic Insecurity in Brazil'; Patroni, 'Structural Reforms and the Labour Movement in Argentina'.

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that allow workers to identify violations of their rights and provide them with motivation for and advice regarding the process before the Labour Office and the courts.[14] However, little has been said about the significance unions have in delivering this motivation and advice. Most of the time, labour complaints tend to appear in this literature as a substitute for union activity.[15]

As Adalberto Cardoso puts it:

> Labour demands tend to be individual, not collective. They do not demand association or collusion. They do not feed collective action or collective identities. They still take the state as the guardian of rights, but just as they see it[,] as a guardian of citizenship or civil rights. Instead of collectivities represented by unions in state-corporatist arrangements, we have individuals represented by lawyers in judicial courts.[16]

Recent work in the field of social movements studies challenges the defensive character that Latin American labour literature attributes to legal complaints. Since 1990, an increasing number of case studies has documented how social movements use judicial campaigns strategically to promote changes in public policy and social practices. For example, scholars have shown that decisions made by the United States' Supreme Court had critical effects on the struggle towards equal employment opportunities led by the civil rights and women's movements. By changing the interpretation of the law, these decisions expanded existing rights, encouraging changes in social behaviour and dominant ideologies.[17]

These studies have also shown that legal mobilisation has not gained importance exclusively in countries with a common-law system like the United States, where court rulings have the immediate status of law. In countries with a civil (continental) judicial system, social movements have used constitutional review procedures to block unpopular laws or settle political controversies. Scholars have observed that, since 2000, and in response to pressure from social movements, Latin American constitutional courts have started to play a more significant role in the defence of human rights and the expansion of native communities' entitlements.[18]

[14]Mark Anner, 'Meeting the Challenges of Industrial Restructuring: Labor Reform and Enforcement in Latin America', *Latin American Politics and Society*, 50: 2 (2008), pp. 33–65.

[15]See, for instance, how legal mobilisation is addressed in Cook, *The Politics of Labor Reform in Latin America*; Cardoso, 'Neoliberalism, Unions, and Socio-Economic Insecurity in Brazil'; Heleen F. P. Ietswaart, 'Labor Relations Litigation: Chile, 1970–1972', *Law & Society Review*, 16: 4 (1982), pp. 625–68; Bensusán, 'La inspección del trabajo en América Latina'; Patroni, 'Structural Reforms and the Labour Movement in Argentina'.

[16]Cardoso, 'Neoliberalism, Unions, and Socio-Economic Insecurity in Brazil', p. 310.

[17]See Epp, *The Rights Revolution*; Paul Burstein, 'Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity', *American Journal of Sociology*, 96: 5 (1991), pp. 1201–25; Michael McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago, IL: University of Chicago Press, 1994).

[18]Rachel Sieder, Line Schjolden and Alan Angell (eds.), *The Judicialization of Politics in Latin America* (New York: Palgrave Macmillan, 2005); Alexandra Huneeus, Javier Couso and Rachel Sieder, 'Cultures of Legality: Judicialization and Political Activism in Contemporary Latin America', in Javier Couso, Alexandra Huneeus and Rachel Sieder (eds.), *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge: Cambridge University Press, 2010), pp. 3–23.

Scholars agree in that the effects of legal mobilisation on social movements' campaigns can also be indirect. Judicial campaigns can help social movements to raise the visibility of their claim, engage new allies, amass new supporters and leave a legacy.[19] This argument implies that judicial campaigns may favour social movements even when the courts' rulings are not as favourable as these organisations might expect, or when they take place at the lower levels of the judicial system without scaling to high courts. This argument supports the idea that complaints filed with administrative agencies such as the Labour Office may have a similar empowerment effect on the social movements' campaigns.

The interpretation of legal complaints as an offensive approach that can be used by social movements has not been free of controversy within this field of study. The enthusiasm that it initially generated was followed by a moderate stance which recognises that legal mobilisation can be a tactic of resistance like others, but notes the dangers that this strategy may bring with it. Exclusively using legal campaigns without considering other forms of mobilisation that involve a more active commitment of the grassroots may affect the radicalism of the social movement in the long run and thus its ability to bring about more substantial social change.[20] Legal mobilisation can be used to transform society, but the depth and duration of these changes 'depends on the complex, often changing dynamics of the context in which struggles occur'.[21]

In any case, studies on social movements' legal mobilisation challenge the notion of legal mobilisation implicit in Latin American labour literature. Even though this tactic plays by the rules, it is not entirely 'part of the system' or harmless to the inherited social order. As Kevin O'Brien notes, legal mobilisation is 'a form of popular contention that (1) operates near the boundary of an authorised channel; (2) employs the rhetoric and commitments of the powerful to curb political or economic power; and (3) hinges on locating and exploiting divisions among the powerful'.[22] Most experts in labour recognise organised workers as 'protesting' when they resort to tactics that directly imply some degree of disruption of the working process – such as strikes, demonstrations and boycotts. Although some of these tactics are legally authorised in Western democracies, they tend to be considered naturally 'anti-systemic'. But the struggle against neoliberal logic may also take place unremarkably, in the background, using socially accepted practices that provoke disruption in less obvious ways. This is the case with legal mobilisation.

Certainly, unions differ from social movements in many ways. Firstly, unions tend to be institutionally recognised and enjoy legal guarantees which most social movements must fight for. This may explain a possible difference in the ways unions and social movements use legal mobilisation. However, it is important to keep in mind that unions are not only defined by their institutional position, as they are also militant organisations that, from time to time, fight for broader social

[19]Michael McCann, 'Law and Social Movements: Contemporary Perspectives', *Annual Review of Law and Social Science*, 2 (2006), pp. 17–38.

[20]Tomiko Brown-Nagin, 'Elites, Social Movements, and the Law: The Case of Affirmative Action', *Columbia Law Review*, 105: 5 (2005), pp. 1436–1528.

[21]McCann, *Rights at Work*, p. 70.

[22]Kevin J. O'Brien, 'Rightful Resistance', *World Politics*, 49: 1 (1996), pp. 31–55.

changes. In other words, unions have a dual nature: they are simultaneously recognised as interest groups and as organised social movements.[23] This argument supports the idea that the understanding of unions can be enriched by the study of social movements, and that differences found in the use of legal mobilisation between the two actors should be empirically assessed rather than assumed.

Explaining Legal Mobilisation by Unions

Conditions that motivate unions to file complaints against companies with the Labour Office and/or the courts are far from obvious. Unlike individual workers, unions can use various tactics to force companies to comply with the law. These tactics range from a strike warning to workplace occupations. This is why legal mobilisation cannot be explained as unions' automatic reactions to possible increases in legal infractions. The limited international literature available on unions' legal mobilisation offers some alternative hypotheses that can be used to understand the importance of this phenomenon in Chile.

An initial hypothesis points to the importance of existing institutional resources. Filing complaints against companies with the Labour Office and/or the courts would become an option for unions if these procedures were readily available and effective for these organisations. With such resources, legal mobilisation would gain significance in countries or during times in which the entities responsible for labour law enforcement had sufficient resources to provide a speedy response to workers' complaints[24] or if they had a tradition of passing judgements against companies.[25]

A second hypothesis focuses on the difficulties that unions face when they resort to striking. The right to strike has suffered setbacks over the past few decades, even in countries with a long tradition of social dialogue, and this is thought to force unions to seek out new mechanisms for applying pressure against companies.[26] Filing a complaint with the Labour Office and/or the courts against a company for violating rights could substitute for or strengthen strikes in the context in which the latter have become inaccessible or excessively risky.

The third and final hypothesis links the increasing importance of legal mobilisation to unions' organisational weakness. Union officials can force the Labour Office to inspect the company or engage in litigation against the employer without

[23]Vincent Chambarlhac and Georges Ubbiali (eds.), *Épistémologie du syndicalisme: Construction disciplinaire de l'objet syndical* (Paris: L'Harmattan, 2005).

[24]See, for example, Myron Roomkin, 'A Quantitative Study of Unfair Labor Practice Cases', *Industrial and Labor Relations Review*, 34: 2 (1982), pp. 245–56 and Vincent-Arnaud Chappe, 'Dénoncer en justice les discriminations syndicales: Contribution à une sociologie des appuis conventionnels de l'action judiciaire', *Sociologie du Travail*, 55: 3 (2013), pp. 302–21.

[25]This argument is clearly developed in Holly J. McCammon, 'Labor's Legal Mobilization: Why and When Do Workers File Unfair Labor Practices?', *Work and Occupations*, 28: 2 (2001), pp. 143–75 and Roomkin, 'A Quantitative Study of Unfair Labor Practice Cases'.

[26]See for instance, Robert P. Hebdon and Robert N. Stern, 'Tradeoffs among Expressions of Industrial Conflict: Public Sector Strike Bans and Grievance Arbitrations', *Industrial and Labor Relations Review*, 51: 2 (1998), pp. 204–21; McCammon, 'Labor's Legal Mobilization'; Roomkin, 'A Quantitative Study of Unfair Labor Practice Cases'; Feng Chen, 'Legal Mobilization by Trade Unions: The Case of Shanghai', *The China Journal*, 52 (2004), pp. 27–45.

needing workers to actively participate in these processes. In this sense, legal mobilisation requires less commitment or mobilisation of union grassroots to be successful than do other traditional forms of protest such as striking, demonstrations, boycotts or workplace occupations. For this reason, the literature has connected the increase in legal mobilisation to the decline in union density (membership rate) and class consciousness among workers.[27]

The literature tends to use similar hypotheses to explain the differences that exist in the use of legal mobilisation within a single context. Specifically, it suggests that the difficulty of using a strike and organisational weaknesses are key elements that unions consider when choosing their tactics. Aware of their limitations, unions with fewer opportunities to engage in effective strikes or actively mobilise workers would be more inclined to use legal mobilisation than organisations without these disadvantages.[28] Filing a complaint with the Labour Office and/or the courts would be an intermediate strategy for unions falling somewhere between not responding to employers' mistreatment and striking.[29]

In this article, I will discuss the applicability of these hypotheses to the Chilean case, in order to explain, on the one hand, the offensive nature of and the place that legal mobilisation occupies in the country and, on the other, the differences between unions in this respect.

Data and Methods

In order to achieve the three goals of the article, I use data from various sources gathered in two stages during research conducted between 2009 and 2015. During the first stage, I interviewed 36 union leaders on various aspects of labour relations in Chile. The interviews were analysed in accordance with the Grounded Theory strategy,[30] using sequential coding. The importance of legal mobilisation was one of the unexpected findings during this stage. In order to explore the issue, I held follow-up meetings with 15 of the union officials originally interviewed. I also interviewed six additional union leaders, two labour court judges, five lawyers, and eight Labour Office officials (for more details on the sample, see Tables 1 and 2). Both phases of the interviews were conducted in Santiago. They lasted between 45 minutes and two hours and were transcribed in their entirety. I also gathered articles from online newspapers (*El Mostrador* and *Emol*) that mentioned legal complaints filed by the CUT or another union.

During the second stage, I searched for administrative data that would allow me to measure the level of legal mobilisation in Chile and to conduct a quantitative analysis to explain the variations in this practice throughout the country's history. The search for this data was ultimately unsuccessful because the Labour Office did not differentiate between complaints filed by workers or by unions, or note whether the

[27]Cardoso, 'Neoliberalism, Unions, and Socio-Economic Insecurity in Brazil'.

[28]Chen, 'Legal Mobilization by Trade Unions'.

[29]Jérôme Pélisse, 'Judiciarisation ou juridicisation? Usages et réappropriations du droit dans les conflits du travail', *Politix*, 89 (2009), pp. 73–96.

[30]Grounded theory is a methodology that helps to build theory and understand phenomena using inductive reasoning. Data are revised several times, in an iterative process, to identify and construct the concepts that guide the analysis.

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Table 1. Interviews with Union Officials: Data

Categories	Number
Gender	
Women	9
Men	33
Trade union structure[a]	
Company union	15
Inter-company union	5
Federation	7
Confederation	8
Central (Congress of unions)	3
Independent workers' union	4
Economic sectors	
Agriculture, fishing and hunting	0
Mining	4
Industry	3
Electricity, gas and water supply and distribution	6
Building	0
Commercial	10
Transportation and communications	7
Financial services	2
Services (exc. financial)	7
Education	3
Year	
2009	14
2010	21
2014	7
Total number of interviews	**42**

Note: [a] The union official's highest post (in terms of trade union structure) is considered when s/he fulfils more than one function in the union apparatus.

organisations provided support to complainants, until 2006. According to interviewed officials, data have been recorded on this matter since then, but not systematically. Furthermore, there is no historical information on complaints filed by unions with the courts or in regard to the organisations' participation in said processes.

In the end, *ENCLA* was the only source of quantitative data on unions' legal mobilisation, though it also presents some limitations. First, the issue of legal mobilisation does not distinguish between complaints filed with the Labour Office and complaints filed before the courts. I therefore decided to discuss the

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Table 2. Interviews with Other Stakeholders

Function	Number
Company lawyers	2
Workers' lawyers	3
Labour Office employees	8
Judges	2
Total	**15**

two forms of legal mobilisation without differentiating between them, though future research on the topic should examine the differences. Second, the sampling strategy, information gathering and formulation of the questions of the survey have changed since they were first applied in 1998. Consequently, these data cannot be used for an historical analysis. Third, the survey includes three forms: one that is self-administered by the company and two that are completed by a trained enumerator alongside a representative of the company and a union leader, if the latter exists. This makes it difficult to utilise information when there are clear disagreements between the company and union leaders. Finally, the information on unions is not statistically representative of the universe of unions in Chile, because the survey includes the responses of only the largest union in each company even if there are several organisations. Despite this, *ENCLA* provides the most comprehensive source of information about unions' tactics available today.

Considering these limitations, I use the following strategies to address the questions proposed in this article:

- In order to demonstrate that legal mobilisation can be interpreted as an offensive tool, I use the qualitative data gathered through interviews, the press and academic literature. The strength of the argument is warranted by the triangulation of information gathered from interviews with different social actors and other sources.
- In order to explain the historical conditions of legal mobilisation in Chile, I discuss the three hypotheses presented in the previous section on the basis of a logical rationale derived from empirical data extracted from: (a) the academic literature on the Labour Office and labour justice in the country; (b) the database built by the Observatorio de Huelgas Laborales (Labour Strike Observatory, OHL) at UAH and the COES; and (c) the Labour Office's records on unionisation. I complement the debate with the information extracted from the interviews.
- In order to explain the variations in legal mobilisation within the Chilean union field, I discuss existing hypotheses based on three binary logistical regression (BLR) models calculated using the data from the latest *ENCLA* (2014), which includes information on 590 company-level unions.[31] 'Legal

[31]Cases without valid information in response to the question about legal mobilisation or with extreme values in the variable 'average wage' (<180,000 and >4,000,000 Chilean pesos) were not considered in the analysis.

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mobilisation', the dependent variable in the three models, is a dichotomous variable scored as 1 for the unions that used this tactic during the 12 months studied during the survey, and 0 for those that did not.

The influence of the real possibility of striking during legal mobilisation is the hypothesis tested in the first model. The independent variable is represented by a dichotomous variable scored as 1 for the unions that went on strike in the period under study and 0 for those that do not report striking. If the hypothesis developed in the international literature applies to the Chilean case, it is expected that unions that strike are less likely to resort to legal mobilisation. The tendency of unions to engage in legal mobilisation can be influenced by the propensity of companies to violate the law. Unions in companies responsible for committing violations with greater frequency may be more likely to resort to legal mobilisation, regardless of whether they go on strike or not. In order to control for the influence of this variable in the first model, three proxies are included: company size, union size and the average wage within the company. (The average wage is the result of dividing the total amount of the monthly base salary by the number of employees.) The assumption is that companies with inferior labour conditions – generally, the smallest companies with small unions and lowest average wage – are also those where employers commonly tend to break the law.[32]

The influence of organisational strength on the likelihood of unions to turn to legal mobilisation is the hypothesis analysed in the second model. Union density is the proxy most frequently used in the scholarly literature to measure the unions' organisational strength. Unfortunately, *ENCLA* does not collect information about the size of the company from union officials, which impedes the precise calculation of this indicator.[33] Three other indicators of union strength are included in this model: union size, control and network. The first indicator refers to the number of workers affiliated with the union. The second designates the degree of control the union has over a company's workers and is measured by the number of unions within the company. The more numerous the unions within the company, the weaker the control, and therefore the power of the union to mobilise workers. Finally, the union network is a dichotomous variable scored 1 for the unions that are affiliated with a broader union structure such as a federation, a confederation or a trade union centre, and 0 for those that are not. The assumption is that unions with a broader network can more easily mobilise workers who do not necessarily belong to the same company and are therefore stronger. This model uses control variables of company size and average wage, given that union size is included as an independent variable. If the literature is right, it is expected that the stronger the unions are, the lower the likelihood of these unions resorting to legal mobilisation, controlling for other variables.

[32]It is plausible that small companies are more likely to break the labour law given the nature of the links between the workers and the employer in these contexts. The face-to-face relationship and 'familiarity' that tends to develop in these spaces may favour greater tolerance of legal abuses on the part of the workers.

[33]A preliminary calculation of union density showed that there were problems with the data (e.g. union density over 100 per cent in at least five cases). It is plausible that this problem comes from the fact that the information about the size of the company and the size of unions comes from different sources (managers in the first case, and union officials in the second case). For this reason, I opted to forgo calculating union density to work only with the data collected from the union officials.

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Table 3. Descriptive Statistics of the Variables

	Valid cases	Min.	Max.	Mean	SD
Union control (number of unions)	590	1	76	2.35	5.506
Average wage (in Chilean pesos)	590	181,227	3,456,078	531,344	348,763
Company size (number of employees)	590	7	23,827	692.890	1,950.853
Union size (number of affiliated members)	590	3	9,000	182.720	529.591
		% Yes		% No	
Union legal mobilisation	590	43.39		56.61	
Strikes	590	14.57		85.42	
Union network	590	41.35		58.64	

The third BLR model measures the influence of strikes and union strength in the dependent variable, considering both independent variables simultaneously. It includes the same control variables as the first model.

Table 3 describes the main characteristics of all the variables used in the analyses.

Analysis

The Meanings that Chilean Unions Give to Legal Mobilisation

As the interviews conducted suggest, Chilean unions file charges against companies primarily before the Labour Office and secondarily before the labour courts. When these organisations encourage workers to file charges by themselves, they recommend the same path. Unions' campaigns at higher levels of the judicial system, such as the Supreme Court, as well as constitutional or international courts, are infrequent. Regardless, these forms of legal mobilisation do not always have a defensive purpose. In contrast to what Latin American literature on labour suggests, unions resort to this tactic not only to restore a right that has been violated by the company; they also do so to promote changes in labour relations at the political and local levels.

First, union officials conceive legal mobilisation as a means to pressure authorities to expand existing labour rights. They use the Labour Office and court rulings to translate their claims into a language of rights, and to gain symbolic and social support for their political cause. As one interviewee put it, 'The pronouncements are points of reference that can be used to give [unions'] arguments more weight.'[34] In the campaign to obtain new rights, this tactic acquires just as much value as strikes or protests. For instance, a federation leader in the transport sector described how his organisation convinced the government to pass a law in 2008 which established the maximum number of hours that drivers can work, in the following terms:

[34]Interview with federation leader in the waste management sector conducted in Oct. 2009.

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'And we gained the law almost without protesting; simply by taking the employers to the courts.'[35]

With a similar purpose, the CUT has reinforced its pressure on the courts since 2003 as part of a shift toward a more confrontational strategy with the government. For instance, the union filed a case with the Inter-American Court of Human Rights in 2005 in which it accused the state of prohibiting union officials from holding public office. In the same vein, the CUT took the private Administradoras de Fondos de Pensiones (Pension Fund Administrators, AFPs) to the Supreme Court in 2008 with the purpose of forcing changes on the Chilean pensions system. More recently, the CUT announced a centralised legal campaign against the state because of the list of companies that were defined as 'strategic' by the government in 2017 and, thus, would be protected against workers' strikes over the next two years.[36] Bringing the state or employers to court, and helping other unions to do so, is part of the strategy that the CUT deploys to support its political lobbying and mobilisation.

The degree to which legal mobilisation has been effective on the political level is a complex question that deserves to be considered from various angles. On the one hand, there is a broad consensus among scholars that labour law has not really undergone substantial changes since the Labour Plan mentioned earlier. This clearly shows that unions' legal mobilisation has not brought about a 'rights revolution'.[37] Moreover, legal mobilisation has sometimes resulted in rulings unfavourable to unions, as in the recent pronouncement of the Labour Office in favour of recognising 'negotiation groups': groups of workers created to engage in collective bargaining with the company without the mediation of a union.[38] However, it is also true that legal mobilisation has been fundamental to campaigns that have achieved small victories for workers over the past few decades. As the lawyers, judges and union officials interviewed stated, most of the advances in labour legislation since 1990 have been preceded and shaped by the gains made by workers in the Labour Office or the courts. For instance, the law that explicitly recognised Chilean workers' 'fundamental rights' in the workplace in 2006,[39] substantially expanding opportunities for workers to defend their constitutional rights, drew on a legal precedent set by the Labour Office. Indeed, this law facilitated the denunciation of violations of workers' constitutional rights by creating a specific legal procedure (the 'Procedimiento de Tutela Laboral' or 'Labour Protection Procedure')

[35]Interview with federation leader in the transport sector conducted in Aug. 2014.

[36]The Chilean Labour Code (see note 43) prohibits strikes in 'strategic' companies providing public health, security or infrastructure services. These companies are listed by the government every two years, after evaluation at the request of the companies concerned. For the list of companies that were declared strategic in 2017, see https://www.economia.gob.cl/2017/08/01/gobierno-informa-listado-de-empresas-estrategicas-excluidas-de-la-huelga-en-el-proceso-de-negociacion-colectiva.htm (last accessed 3 March 2020). For details on the unions' legal campaign, see Karen Peña, 'CUT prepara ofensiva para llegar a tribunales por empresas estratégicas', *Diario Financiero* (Santiago), 9 Aug. 2017; or Rodrigo Fuentes, 'Sindicatos de empresas estratégicas inician camino judicial para recuperar el derecho a huelga', *Diario UChile* (Santiago), 19 Aug. 2017.

[37]Epp, *The Rights Revolution*.

[38]See Ruling No. 3938/33 dated 27 July 2018.

[39]Law No. 20,087 (3 Jan. 2006). These fundamental rights include the protection of private life, freedom of expression and the guarantee against discrimination.

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whereby workers could bring charges before the Labour Office and/or the labour courts rather than before higher courts of law. Yet as far back as 1993, the Labour Office had produced legislation on the limits that fundamental rights set on employer control of workplace processes.[40]

Another illustrative case of successful legal mobilisation is the passing of Law No. 20,760 in 2014 limiting the '*multirut*',[41] a practice that allowed companies to avoid labour and pension laws by splitting themselves into more than one entity. Among other things, this law explicitly recognised the right of unions to bargain with the management of disparate enterprises with the same owner or parent company. As Chilean law recognises collective bargaining only within a company, this type of negotiation had not been explicitly guaranteed. However, unions obtained recognition of this right in the Labour Office and the courts years before the law was finally passed.[42]

More recently, the Supreme Court played a central role in unions' struggle to lift the restrictions that the 1979 Labour Plan set on the subject of striking. The bill that the administration of Michelle Bachelet planned to submit to Congress for reforming the Labour Code in 2015 did not clearly prohibit the right of employers to replace workers during strikes with internal staff.[43] The President's advisors justified the omission by explaining that this could result in stiffer resistance to the reform by the right wing, as had happened in the past. But the CUT and its political allies drew on Supreme Court rulings to pressure the government and Congress to include this point in the new law. These rulings strengthened the idea that the right to strike is 'fundamental'.[44] In the end, the bill was modified in favour of the unions' claim.

For some, these achievements may be perceived as insignificant. However, this position does not do justice to the unions since it ignores the fact that the corporate world has systematically opposed any policy that limits employers' liberties in handling their business, such as the expansion of labour rights. In other words, the situation of workers in Chile would be even more precarious if it were not for these achievements.

[40]See, for example, Ruling No. 4842/300, 15 Sept. 1993 about the limits on the right of employers to implement a system of surveillance and control at the workplace. For a further discussion on the Labour Office's jurisprudence on fundamental rights, see Eduardo Caamaño Rojo, 'La eficacia de los derechos fundamentales en las relaciones laborales y su reconocimiento por la dirección del trabajo', *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso*, 27: 1 (2006), p. 22.

[41]The RUT is a number that identifies the firm for all legal purposes. The concept of '*multirut*' is used to refer to firms which belong to the same owner or group but have different identification numbers.

[42]For details on the pronouncements that support this interpretation, see Irene Rojas Miño, 'La evolución de los grupos de empresas en el derecho del trabajo en Chile: Desde su irrelevancia hasta la Ley No. 20.760 de 2014', *Revista Chilena de Derecho*, 43: 1 (2016), pp. 148–50.

[43]The bill, intended to 'modernise the system of labour relations', was presented to Congress on 29 Dec. 2014 and was finally promulgated as Law No. 20, 940 on 29 Aug. 2016. For details, see https://www.leychile.cl/Navegar?idNorma=1094436 (last accessed 3 March 2020). The current Labour Code was promulgated in 1994 (replacing the Code of 1987), and was restructured in 2003. See 'Código del Trabajo', https://www.leychile.cl/Navegar?idNorma=207436 (last accessed 3 March 2020).

[44]For instance, see Case No. 28919–2015, 'Unificación de la Jurisprudencia' ('Unification of Jurisprudence').

Secondly, interviews show that Chilean unions also use legal mobilisation as a tactic of resistance at a more local level to modify power relations within the workplace. On the one hand, this effect is achieved by forcing employers to follow the legislation and showing them that they are not above the law. In the context of Chile, where the violation of labour laws is a common economic strategy for many companies, as interview participants stated, the fact that an effort is made to require them to actually follow the law is not a defensive action. On the contrary, it constitutes a symbolic and material challenge to the *status quo*. In the words of one of the union officials interviewed: 'Today, we are completely subjected to mercantilism and to the market. The only way to fight against this is to try to engage the worker who is being manipulated by the firm and give these guys [the business class] what they deserve by continuously filing lawsuits.'[45]

On the other hand, legal action can bring about changes in local relationships because it offers unions a means to pressure employers and make them more susceptible to accepting demands. Judges, Labour Office officials and union leaders who participated in the interviews stated that unions control the timing of the allegations, strategically reserving some accusations for moments when they need to apply more pressure on employers, such as before or during the collective bargaining period.

Assessing the extent to which legal mobilisation has helped unions to change the balance of power in the workplace also requires nuance. There is abundant evidence of the difficulties that unions face concerning efforts to modify labour conditions.[46] Furthermore, the interviews conducted during the study help identify some aspects that weaken the impact of legal mobilisation at this level. For example, the union leaders criticise the low level of the fines imposed by the Labour Office on companies that break the rules, which does not always encourage them to change their practices. Even so, the unions believe that this type of legal mobilisation has had positive effects for workers, and employers seem to share this impression. In fact, the latter have systematically opposed policies that increase the powers of the Labour Office. As a lawyer representing one of the companies stated, 'There is a bias in favour of the worker. We expect neutral treatment, but that is not guaranteed.'[47] Legal mobilisation has not been revolutionary, but nor has it been without harm to labour relations in the workplace. Regardless of the results of the complaints, legal mobilisation questions employers' freedom to organise the labour process, disturbing the way in which neoliberalism has traditionally operated in Chile.

The Historical Conditions for Legal Mobilisation in Chile

Why does legal mobilisation adopt an offensive approach, and why does it play a relevant role in Chilean unions' repertoire? The explanations that the international literature offers seem useful for this case. Legal mobilisation has gained importance in this country in a context of expansion of institutional guarantees for this type of

[45]Interview with union leader of company in telecommunications sector conducted in Oct. 2009.

[46]See, for example, Claudio Ramos Zincke, *La transformación de la empresa chilena: Una modernización desbalanceada* (Santiago: Ediciones Universidad Alberto Hurtado, 2009), pp. 365–90.

[47]Interview with a lawyer, Aug. 2014.

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procedure, the placing of limits on the right to strike, and the organisational weakening of the unions.

The Expansion of Institutional Opportunities: The Chilean labour law enforcement system has substantially improved since the return to democracy. Sketching the history of the Labour Office and the labour courts helps to illustrate this trajectory.

The Labour Office can be traced back to 1907, when the government created an agency to generate statistics on different aspects of the labour market for the use of employers and the state. As part of the first Código del Trabajo (Code of Labour Laws), the functions of the Labour Office were expanded in 1931 and the agency was charged with supervising the implementation of labour law and other social legislation. In the beginning, the emphasis was on strict control of unions. The idea that labour law was a tool meant to protect the weakest party in labour relations took time to permeate the Labour Office's work. Moreover, the activity of the Labour Office was limited because it was given very few resources.[48]

With the victory of the left-wing Unidad Popular (Popular Unity, UP) government in 1970, the Labour Office gained confidence. Its formal authority did not significantly expand, but its informal power to defend workers substantially increased along with the number of workers who reported companies to the institution.[49] But the military coup of 1973 halted this trend. The military regime sought to re-establish employers' control over the work process by limiting the intervention of the Labour Office; its officials were purged and its budget reduced. The members of staff who remained were overworked and underpaid, which made them vulnerable to pressure from companies.[50]

After the restoration of democracy in 1990, the governments of the Concertación de Partidos por la Democracia (Coalition of Parties for Democracy) made significant efforts to restore the power of the Labour Office. Almost every new labour statute after 1990 came with a mandatory clause that expanded its functions.[51] Along with inspecting companies, advising social agents and interpreting the law, the Labour Office was tasked with mediating and arbitrating labour disputes and supervising subcontracting activities, among other new tasks. Its funds and staff were also substantially increased. For the officials interviewed, these resources continue to be insufficient in light of the demand placed on and the new responsibilities assigned to the Labour Office. Even so, the policies implemented over the past few decades have allowed the Chilean Labour Office to become one of the strongest in the region,[52] compared with its counterparts in developed nations.[53] Furthermore,

[48]Ietswaart, 'Labor Relations Litigation', p. 634.

[49]*Ibid*., p. 641.

[50]Winn, 'The Pinochet Era', p. 36.

[51]José Luis Ugarte, 'Inspección del trabajo en Chile: Vicisitudes y desafíos', *Revista Latinoamericana de Derecho Social*, 6 (2008), pp. 187–204; here p. 193.

[52]Bensusán, 'La inspección del trabajo en América Latina', p. 1021.

[53]For instance, the ratio of Labour Office inspectors per 10,000 workers in Chile is higher than in developed countries such as the United States, France and the United Kingdom (1.6 versus 0.1, 0.8 and 0.5 respectively in 2013). See International Labour Organization (ILO) dataset 'Inspectors per 10'000 employed persons - Annual' at https://www.ilo.org/shinyapps/bulkexplorer2/ (last accessed 4 March 2020).

the number of charges filed against companies with the Labour Office almost tripled from 31,840 to 89,124 between 1990 and 2014.[54]

The labour courts underwent a similar process following the return of democracy, though this occurred a bit later than for the Labour Office. The country has had specialised courts for dealing with labour disputes since 1924. By creating special procedures, the legislature recognised the unique nature of labour relationships in which parties are in positions of inequality and endorsed the intention of making up for the economic vulnerability of workers through their legal superiority. However, until the 2000s, the labour courts rarely served this purpose for many reasons. First, the Supreme Court assumed control of the labour courts. Its prerogative to review the rulings of the labour judges through a *Recurso de queja* (complaints procedure) was legalised in 1953.[55] As the interventions of the Supreme Court were not guided by the same criteria as those that inspired the special labour court, this assumption of control actually led labour courts to become more similar to ordinary civil courts.[56] Second, labour courts maintained a relatively unfriendly attitude towards workers' claims even during the UP government, when the conditions for taking on a more active role in labour disputes were more favourable than they had been previously.[57]

The system was dismantled after the coup. The military government eliminated the labour courts in 1981 only to restore them five years later, though their numbers were significantly diminished.[58] When democracy was restored, the labour courts worked under such difficult conditions that workers rarely enjoyed real access to this medium. In 2005, the state took the first step towards addressing this, approving reforms designed to extensively modify the system.[59] These substantially simplified the procedures and increased the number of courts and judges, along with other practical measures. The impact of these laws on the length of proceedings was remarkable: the average duration dropped from four to five years to only a few months.[60] There was also a major shift in the labour courts' culture that favoured workers. As the lawyers and judges interviewed noted, the quality of rulings improved and tended to benefit workers, partly due to the fact that judges were better prepared to manage the unique characteristics of labour law.[61] The change in the composition of the Supreme Court chamber that handles labour disputes in

[54]DT, *Compendio estadístico de 1990 a 2014* (Santiago: DT, 2015).

[55]Law No. 11,183, 10 July 1953.

[56]Ietswaart, 'Labor Relations Litigation', p. 657.

[57]*Ibid*., p. 658.

[58]Consuelo Gazmuri, 'La reforma a la justicia laboral. Contenidos, implicancias y perspectivas para una modernización de las relaciones laborales', in Jaime Ensignia (ed.), *Mitos y realidades del mercado laboral en Chile* (Santiago: Fundación Friedrich Ebert, 2005), p. 63.

[59]The package included Law No. 20,022 (30 May 2005) which created labour courts, wage deductions and social security payments courts in several municipalities; Law No. 20,023 (31 May 2005) which modified Law No. 17,322, the Labour Code, and Decree No. D.L. 3,500 from 1980, enacting a new system of implementation of social security entitlements; and Law No. 20,087 (3 Jan. 2006), which replaced the labour procedure included in Chapter V of the Labour Code.

[60]The length of proceedings in labour court averaged 76 days in 2013. Ministerio de Justicia, *Anuario Estadístico Justicia Laboral* (Santiago: Ministerio de Justicia, 2013), p. 18.

[61]Interviews with judges and lawyers, 2014.

2014[62] reinforced this tendency because it changed the direction of the rulings at this level as well.[63]

Unions have not remained indifferent to improvements in the courts. As one union official explained: 'Before, we encouraged workers to sue the firm [at court] only when they were fired in a serious breach of contract […] But when the law changed, we began to tell all workers to sue.'[64] It is thus not surprising that the number of labour cases filed at labour courts increased from 221,720 in 2010 to 367,357 in 2016.[65]

Given the lack of historical data, it is impossible to measure the degree to which the changes in the Labour Office and the labour courts increased the unions' legal mobilisation after 1990. However, it is fair to think that the expansion of institutional opportunities for workers to file complaints has allowed this union tactic to become more common.

The Limitation of Opportunities to Use Alternative Tactics: The central role that legal mobilisation holds in the Chilean unions' repertoire and their offensive approach today also can be linked to the limited opportunities that exist to turn to as alternative means of resistance. Institutional obstacles to effective strikes established by the 1979 Labour Plan and the organisational weakening of the unions during the 1990s forced changes in unions' tactics.

The other face of the policies that strengthened the system of labour law enforcement was the failure of the Concertación governments to restore protections for workers to really exert their right to strike. The Labour Plan seriously limited the abilities of unions to engage in this type of tactic. It strictly regulated the process and prohibited striking outside of the confines of company-level collective bargaining. Moreover, if workers conducted a strike, their jobs were guaranteed for only 59 days, after which the employer could fire them without any justification. Furthermore, the Plan allowed employers to hire workers to replace strikers during conflict, which clearly weakened the impact of the tactic.

The governments that came into power after the dictatorship did little to radically change these rules. A set of reforms that was approved in 1991[66] failed to introduce major improvements in regard to strike protections. The package set some conditions for the replacement of workers during a conflict, but it did not eliminate the practice or ensure that strikers would be able to keep their jobs. Indeed, the new law stated that

[62]Carlos Cerda Fernández replaced Patricio Valdés, who was known for his connections to business world (see Marcela Jiménez, 'El hombre clave del mundo empresarial en la Corte Suprema', *El Mostrador*, 6 Nov. 2013: http://www.elmostrador.cl/noticias/pais/2013/11/06/el-hombre-clave-del-mundo-empresarial-en-la-corte-suprema/, last accessed 12 Feb. 2020).

[63]See Luis I. Díaz García Díaz *et al.*, 'La Corte Suprema, ¿un tribunal para los empleadores?: Estudio empírico del recurso de unificación de jurisprudencia laboral', *Revista de Derecho*, 28: 1 (2015), pp. 101–22; Malú Urzua, 'Corte Suprema se distancia de fallos "pro empresa" en materia laboral', *La Segunda*, 14 June 2014; Sandra Radic, 'Suprema favorece la huelga sin derecho a reemplazo, ni siquiera con trabajadores internos', *El Mostrador*, 5 Dec. 2014.

[64]Interview with a leader of an inter-company union in the transportation sector, Oct. 2014.

[65]These numbers are extracted from the 2016 annual report on the justice system published by the Instituto Nacional de Estadísticas (National Institute of Statistics, INE). See https://www.ine.cl/estadisticas/sociales/seguridad-publica-y-justicia/justicia (last accessed 3 March 2020).

[66]Law No. 19,069, 'Normas sobre organizaciones sindicales y negociación colectiva' ('Rules on Trade Union Organisations and Collective Bargaining').

employers had the right to hire replacement workers from the first day of any strike by including in their final offer (a) stipulations identical to those set out in the previous collective bargaining agreement; (b) a wage readjustment to at least the inflation level; and (c) a cash bonus paid to each replacement worker. If their last offer did not meet these criteria, the law authorised them to replace workers at the start of the 15th day of the conflict.[67] Moreover, the new law did not explicitly prohibit the replacement of workers with internal staff, which became a common business practice. Finally, the reform forced employers to provide explanations for firings, as was the case before the Labour Plan. Nevertheless, this measure was rendered ineffective as the law allows employers to use the principle of 'company needs' to justify dismissals.[68] As this excuse is sufficiently ambiguous to make it difficult to challenge in court, it allows employers to easily get rid of strikers.

Chilean unions would have to wait until the labour reform of 2016 for the actual removal of the employers' right to replace workers during strikes.[69] However, this reform created a new system of 'minimal services' to guarantee the functioning of companies during conflicts, which some union leaders viewed as a trick designed to limit the power of strikes. Moreover, the restriction of strikes to those unions that are in a collective bargaining process and the ability to fire recent strikers due to 'company needs' were kept.

Along with the legal restrictions, the unions began to face difficulties mobilising workers to strike or engage in tactics involving an active commitment on their part. Once considered among the strongest in Latin America, Chilean unions suffered a significant membership decline between 1973 and 2006. Neoliberal policies made it difficult for workers to participate in unions, as they limited the incentives to organise, promoted flexibility in the labour market and dismantled national industry – once the core of union membership. The cultural shift accompanying the development of the market economy and class identity crisis also contributed to this trend. The largest drop in union density occurred during the dictatorship. In the early 1970s, approximately 30 per cent of the labour force was affiliated with a union.[70] That number dropped to just 16 per cent by the end of military rule[71] and did not improve as expected following the return to democracy. During the 1990s, union density fell almost as sharply as it had during the previous years. It slightly increased from 14.5 in 2006 to 17 per cent in 2014, but did not recover to the level that it had reached prior to the coup.

The difficulty of mobilising workers to strike has also been exacerbated by divisions within the unions. Since 1990, it has become common to create a company-level union without any affiliation to one of the top three levels of union organisation.[72] Numerous divisions, many of which continue to this day,

[67]Labour Code Article No. 381.

[68]Labour Code Article No. 161.

[69]See note 43.

[70]Mario Garcés and Pedro Milos, *FOCH CTCH CUT: Las centrales unitarias en la historia del sindicalismo chileno* (Santiago: ECO, 1988), p. 127.

[71]All the measures for the democratic period are extracted from DT, *Compendio Estadístico de 1990 a 2014*.

[72]Less than a third of the Chilean company unions belonged to the top three levels of union (federation, confederation or *central* [congress]) in 2014. See DT, *ENCLA 2014*.

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also occurred at different levels of the union structure. Even the CUT, which maintained its cohesion despite significant internal political differences throughout the twentieth century, has suffered two critical schisms that gave rise to new peak unions since 1990.[73] The lack of organic connections to other union structures and disputes among leaders caused company-level unions to lose the capacity to seek out external support for their mobilisations or to coordinate massive strikes aimed at broader goals.

These legal and organisational changes have had a negative impact on strike activity. While 1,130 strikes occurred in the private sector in 1970, just 330 took place in 2016.[74] The downward trend in strike activity ended in 2005, and the total number per year jumped from 195 to 330 in 2016. A similar turn was observed in the number of strikes that were voted for but not launched, which increased from 538 to 824 during the same period.[75] However, these numbers continue to be much lower than those observed prior to the coup.

While there are no data for precisely measuring the degree to which the weakening of the right to strike and union organisation favoured legal mobilisation on the part of Chilean unions, it is true to say that these trends have occurred simultaneously. In this sense, it is logical to think that there is a connection between these phenomena, as the international literature suggests.

Differences between Unions

The historical conditions that support the central place of legal mobilisation in Chile do not necessarily explain the differences that can be observed between the unions within this country. Which unions are more likely to resort to legal mobilisation? Analysis of the *ENCLA* data, analysed in BLR models, helps us to answer this question.

Table 4 summarises the BLR models. (See the section 'Data and Methods' above for details of the parameters used.) As the first model shows, the influence of strikes on legal mobilisation is statistically significant when this influence is controlled for company size, average wage and union size. However, in contrast to what is anticipated in the literature, the influence is positive. The probability of unions filing complaints against a company is 3.68 times higher if they hold a strike. Therefore, the evidence does not support the hypothesis of a trade-off between strikes and legal mobilisation. Chilean unions will not necessarily choose between the two tactics.

[73]The first important schism took place in 1995 when a sector of the CUT founded the Central Autónoma de Trabajadores (Autonomous Workers' Union, CAT). A similar process took place in 2004 when members of the CUT formed the Unión Nacional de Trabajadores (National Workers' Union, UNT). For details on these divisions, see Patricio Frías Fernández, *Los desafíos del sindicalismo en los inicios del siglo XXI* (Buenos Aires: CLACSO, 2008).

[74]All measures of the number of strikes include legal and illegal conflicts. They are taken from the strikes database created by the OHL.

[75]The number of the voted-for strikes has been registered from 1997 by the Labour Office. It has slightly increased between then and 2005, from 401 to 444. The annual variation of this indicator during this period was, however, much wider than that of the number of strikes actually carried out. DT, *Compendio estadístico de 1990 a 2014*.

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Table 4. BLR Models

	Model 1	Model 2	Model 3
Intercept	0.80	0.75	0.64**
	(0.17)	(0.18)	(0.18)
Striking: yes/no	3.68***		3.55***
	(0.25)		(0.26)
Union control		0.97	
		(0.03)	
Union network: yes/no		1.84***	1.74*
		(0.17)	(0.18)
Union size	1.00	1.00	1.00
	(0.00)	(0.00)	(0.00)
Company size	1.00	1.00	1.00
	(0.00)	(0.00)	(0.00)
Average wage	1.00	1.00	1.00
	(0.00)	(0.00)	(0.00)
N	590	590	590
Log-likelihood	−386.35	−393.91	−381.35
Akaike information criterion (AIC)[a]	782.71	799.83	774.70
Bayesian information criterion (BIC)[b]	804.61	826.11	800.98

Notes: See the text for the model parameters.
The probability and associated errors are reported.
*p < 0.01, **p <0.05, ***p < 0.005.
[a]Estimator of out-of-sample prediction error.
[b]Criterion for model selection among a finite set of models.

This result can be interpreted as a reflection of the institutional difficulties that unions face when defending workers' interests in the Chilean context. The weakness of the right to strike in Chile leads unions that still use this tactic to pursue complementary actions in order to strengthen their cause. Legal mobilisation may be a tool for reversing a strike result that was relatively unfavourable to the workers or for forcing companies to meet the terms of agreements reached during the conflict. In other words, legal mobilisation can be used to continue the strike by other means. Furthermore, legal mobilisation may allow unions to combat sanctions issued by the company against the organisation or the strike participants. The interviews conducted in the context of this research offer examples of all these cases.

The reciprocal relationship between legal mobilisation and strikes can also be understood in another way. Unions can see in a strike a means to impose a demand on employers to respect a decision made by Labour Office or a judge when the fine or the sanctions are not enough to force the companies to change their behaviour. Moreover, unions can find in strikes a tool to give visibility to their cause and add pressure to courts and the Labour Office. This does not mean unions decide to go

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on strike primarily for these reasons – normally the main motives are financial[76] – but that they harness the opportunity opened by the strike to bolster legal mobilisation. Nor does the complementarity between the two tactics imply that legal mobilisation increases the probability of a strike. In fact, in the Chilean context, legal restrictions regarding striking are too strong to make this course of action likely. It is more reasonable to think that the causal relationship goes the other way: strikes encourage legal mobilisation.

Model 2 tests the hypothesis that unions with weaker organisation turn to legal mobilisation more frequently. The model includes union size, control and network as independent variables. As in the previous analysis, the average wage and the company size are used as a control variable.

As this model shows, union size and control do not significantly affect the likelihood of unions resorting to legal mobilisation. Keeping the other variables constant, only the union network has a statistically relevant influence over the dependent variable. However, contrary to expectations, this influence is positive. The probability of unions resorting to legal mobilisation is 1.84 times higher if they are affiliated with a broader union structure.

This result suggests that company unions opt for legal mobilisation when they have sufficient external support to guarantee positive results through this tactic. It is not weakness but strength that leads them to choose resistance through filing labour complaints. On the one hand, federations, confederations and peak unions offer company-level unions a network of workers who can potentially be mobilised to support their cause. This gives weight to the company-level unions' claims and can be key for the success of the complaint filed with the Labour Office or the courts. Alternatively, legal expertise is important for the unions to frame their cause in terms of a rights conflict and to successfully present and defend it throughout the different stages of the judicial processes. Broader union structures can provide company-level unions with access to a lawyer, legal information, and even financial resources to pay the costs of these processes, while isolated company-level unions normally have difficulties obtaining these resources on their own.

Model 3 compares the influence of 'striking' and 'union network' on the dependent variable. Controlling for union size, company size and average wage, the influence of both variables on the likelihood that the union will turn to legal mobilisation remains, although the variable 'striking' seems to have a greater effect. This suggests that the need to sustain pressure on the company over time better explains the unions' inclination towards legal mobilisation.

Conclusions

Labour scholars in Chile have paid little attention to legal mobilisation. The high percentage of unions that currently file complaints against companies before the Labour Office or/and courts has been a phenomenon that is rarely discussed. When this analysis has been conducted in other countries, legal mobilisation has

[76]The number of the voted-for strikes has been recorded by the Labour Office since 1997. It has slightly increased between then and 2005, from 401 to 444. The annual variation of this indicator during this period was, however, much greater than that of the number of strikes actually carried out. DT, *Compendio estadístico de 1990 a 2014*.

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been usually interpreted as a defensive reaction on the part of unions to the employers' propensity to infringe the law. In this article, I suggest an alternative interpretation. Drawing on different sources, I show that Chilean unions have tried to turn legal complaints into an offensive tactic to expand labour rights and curb corporate power. They have resorted to legal mobilisation as part of their campaign to contest the inherited labour order.

Why does legal mobilisation entail such an offensive approach and play a central role for unions in Chile? I answer this question by pointing to the obstacles that unions have faced to using more disruptive tactics since 1973. The neoliberal orientation of labour policies and the organisational weakening of unions have made these tactics riskier and less effective than in the past. In reaction, Chilean unions have searched for new strategies for putting pressure on companies. Legal mobilisation became an attractive tool for this latter purpose thanks to policies that have increased the ways for workers to report companies' infringements of the law before the Labour Office and the courts between 1990 and 2009.

In the article, I also explore the characteristics of the unions that resort to legal mobilisation within the Chilean context. In contrast to what is suggested by the international literature, I show that stronger unions that resort to strikes are more likely to use this tactic than those organisations where these conditions are not met. This does not mean weak unions that do not engage in strikes never resort to legal action. It is important to note that only a fraction of the unions in the sample go on strike, while the majority of them resort to legal action. Rather the data shows that participating in a strike increases the chances of unions engaging in legal mobilisation.

The latter finding has at least three important implications for the understanding of legal mobilisation. First, it supports my thesis that this tactic is an offensive weapon in Chile since it shows that this tactic is frequently used by the most combative unions, that is, those that are willing to assume the costs of a strike. Second, it challenges the distinction between legal mobilisation and strikes. Traditionally, labour scholars in Latin America have supported the idea that the two tactics fall into two opposing categories. While the first would serve to defend the interest of workers 'within-the-system', the second would naturally destabilise the given order. The data indicate that the two tactics can be used together for similar purposes. They also suggest that each of these tactics frequently needs to be complemented by the other in order to be effective: neither strikes nor legal mobilisation alone guarantee the result of a struggle. Third, this finding gives additional information about the historical process by which legal mobilisation has gained importance for the Chilean unions. As I said, legal mobilisation has become important in an historical context of union weakening and the decrease in the number of strikes. The empirical analysis suggests that those unions which have better resisted attempts by global forces to weaken unions and hinder strikes in Chile have actively participated in transforming legal mobilisation into a central tool for workers. Moreover, legal mobilisation may be interpreted as a strategy of these unions to fight against the aforementioned global forces: it helps them to strengthen strikes and obtain otherwise improbable gains, however modest.

Overall, this article puts in evidence the agency of the Chilean unions over the past three decades. By focusing on traditional tactics, scholars have provided only a partial picture of the efforts that unions have made to contest the neoliberal order in this country. At the same time, they have underestimated the gains that these

organisations have obtained. Although these gains are modest and far from revolutionary, they should not be taken for granted, as if they were spontaneous concessions by employers or governments. Chilean business has constantly pushed for a reduction in labour costs to the detriment of workers' conditions during the last decades, and the political authorities have rarely opposed these attempts without being pressured by the mobilisation of organised workers. The very survival of unions and the maintenance of labour conditions in such an inhospitable context can be considered as a 'gain' for workers and deserve to be explained. As I suggest in this article, unions' legal mobilisation has been key in this struggle, although frequently in tandem with more disruptive tactics.

Lastly, I would like to conclude by inviting scholars to carry out further research on unions' legal mobilisation. Two goals could orient this research. First, to better measure the outcomes and impacts of this tactic in Chile: new and better empirical evidence is needed to learn precisely what legal mobilisation has obtained for workers, and how this tactic has affected organised labour. This latter question is particularly relevant for the discussion. As the social movements show (see section 'Conceptual Framework', above), a continued resort to legal mobilisation may affect the long-term ability of social movements to survive and provoke substantial social changes, because it does not require the active engagement of the rank and file. New research should assess whether Chilean unions are actually at a similar risk. Second, further studies could test whether the conclusions that this article presents apply to other countries in the region. Special attention should be given to countries like Argentina and Brazil where a similar increase in labour complaints during the last decades has been detected. Given the differences between these countries and Chile in terms of the right to strike and union strength, it is reasonable to expect that legal mobilisation has a different meaning and plays a different role for unions in those contexts. In any case, this hypothesis should be empirically verified.

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Spanish abstract

Los académicos interesados en la fuerza de trabajo en Latinoamérica tradicionalmente han prestado poca atención a las movilizaciones legales de los sindicatos. Sin embargo, el creciente número de quejas legales interpuestas por trabajadores ante las oficinas del trabajo y/o juzgados en países como Argentina, Brasil y Chile llaman a un debate más serio sobre el papel que los sindicatos juegan en este proceso. Este artículo se enfoca en el caso chileno. A partir de fuentes diversas, se muestra que los sindicatos chilenos han convertido las quejas legales en armas para obtener mayores derechos y debilitar el poder de sus empleadores. En este proceso han estado involucrados los sindicatos más fuertes y combativos, lo que se explica por dos condiciones históricas: (1) los obstáculos para recurrir exitosamente a tácticas más disruptivas; (2) la expansión de oportunidades institucionales para denunciar infracciones legales. En general, el artículo desafía la imagen existente de los sindicatos chilenos al hacer más visible su agencia, así como sus logros, durante la última década.

Spanish keywords: sindicatos; movimiento laboral; movilización legal; cortes laborales; Dirección del Trabajo chileno; Chile

Portuguese abstract

Os acadêmicos interessados em trabalho e mão de obra na América Latina deram, tradicionalmente, pouca atenção às mobilizações legais de sindicatos. No entanto, o crescente número de reclamações submetidas por trabalhadores a Fiscais de Trabalho ou tribunais em países como Argentina, Brasil e Chile exige um debate mais sério sobre o papel dos sindicatos neste processo. Este artigo analisa o caso chileno. Baseando-se em múltiplas fontes, o artigo mostra que os sindicatos do Chile têm transformado denúncias legais em instrumento para obter mais direitos para trabalhadores e restringir o poder dos empregadores. Este processo têm envolvido os sindicatos mais fortes e combativos e é explicado por duas condições históricas: (1) os obstáculos para a utilização bem sucedida de táticas mais disruptivas; (2) a expansão das oportunidades institucionais para denunciar infrações legais. Mais amplamente, este artigo contesta a imagem atual dos sindicatos chilenos ao fazer mais visíveis suas ações e suas conquistas ao longo da última década.

Portuguese keywords: sindicatos; movimento trabalhista; mobilizações legais; justiça trabalhista; Dirección del Trabajo (Fiscal de Trabalho do Chile); Chile

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