FROM THE HORIZONTAL TO THE DIAGONAL EFFECT OF FUNDAMENTAL RIGHTS WITHIN THE EMPLOYMENT CONTRACT: A LATIN AMERICAN PERSPECTIVE

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"BEEN THERE DONE THAT

I've even been a corpse for pay
One time they told me to hit the ground
And I, who am that I am, I obeyed
They covered me up with some newspapers
& went about their business filming a scene
For their motion picture".

NICANOR PARRA**

Abstract

This work explains the development of the direct applicability of fundamental rights in labor matters in some Latin American countries, where courts and legal doctrine postulate the validity of these rights as limits to the power of the employer. This applicability, commonly known as "horizontal effect" of fundamental rights between private individuals, is especially important in the field of labor law, as opposed to other areas of private law. Firstly, because contrary to what has been postulated by the constitutional narrative, this applicability originated within labor law at the beginning of the twentieth century, and secondly, because, with regard to labor law, this applicability does not increases judicial discretion, but, on the contrary, endeavors to limit corporate discretion. Consequently, by recognizing the particularisms of labor law, we will postulate that we are dealing with a diagonal, rather than a horizontal, effect of fundamental rights.

Keywords: *Fundamental rights, horizontal effect, validity, labor, discretion*.

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** Nicanor Parra, "Been there done that", in *Antipoems. How to look better & feel great*, antitranslation by Liz Werner, Bilingual edition, New York, A New Directions Books, 2004, p. 69.

INTRODUCTION

The European, as well as the Latin American constitutional theory usually touch upon the *Lüth* case from 1958, ruled by the German Constitutional Court,[1] as the landmark case of the so called horizontal effect, validity of applicability,[2] of fundamental rights between private individuals.

Since then, this effect has been developing to the extent that it is currently difficult to refuse that fundamental rights have some legal effect between private individuals.[3]

This applicability has been very well received in the area of labor law, giving place to a sort of "second constitutionalization" of this area of law. As a matter of fact, labor law has been enriched thanks to constitutional law, as a consequence of the enshrining of social rights in the Mexican Constitution from 1917, followed by the Weimar Constitution enacted in 1919. And, at present, it has been improved again due to the horizontal effect of fundamental rights, now more focused on those of individual, civil and political character.[4]

1 Fedtke (2007), pp. 127 and ff.

2 Peces Barba has argued that we should talk about "validity" rather than "effect" of fundamental rights. Validity, understood as to what relationships fundamental rights apply, unlike effect understood in its procedural sense, that is to say, by way of what mechanism such validity is protected, for instance, through the writ of constitutional protection (*amparo*). This author emphasizes that the word "effect" has gained popularity due to a bad translation from the original German. See Peces-Barba Martínez (1999), pp. 618 and 635 and ff.

Regarding this subject matter, we find other denominations. For example, Palomeque speaks of "unspecified labour rights", meaning that there are fundamental rights of specific labour nature (such as the right to work, weekly rest, and fair salary), as well as other fundamental rights that are not specifically labour in nature, such as wide range civil and political rights, which also are applicable within the employment contract, as it is the case with the rights to intimacy, self-image and freedom of expression. So, they are not classical labour rights of economic and social character, but rather civil and political rights and therefore unspecific from the perspective of labour law. See Palomeque López (1991), pp. 31 and ff.

Ghezzi and Romagnoli indicate that in labour matters, fundamental liberties have a "polyvalent sense or applicability", since fundamental rights linked to freedom are to be applied to relationships with employers, as well as with the state. Because, these authors ask: what good is it to protect the fundamental liberties of workers against "the big state" if they can be violated with impunity by the "small state" that is the factory? See Ghezzi and Romagnoli (1987), p. 15 f.

Couturier, Rivero and Savatier speak of "citizenship in the company", meaning that the worker does not lose citizenship when joining the company, carrying with him or her to some extent of his or her civil rights into that hierarchical organisation that we know as a company. See Couturier (1996), pp. 358ff. It is obvious that the term « citizenship » does not refer to political citizenship, but possesses a broader meaning, which means that the labour concept of citizenship in the company also applies to non-citizens, for instance to immigrants. See Gamonal C. (2004), p. 14, footnote 11.

In this article we will use the terms effect, validity and applicability as synonyms. Beyond the diverse meanings, in the area of labour law in Latin America, when the term "horizontal effect" is used, it is understood that it refers to applicability or validity. There is no such thing as an essentialism or a fixed and immutable meaning of the words. We are in agreement with Carrió, when he argues that "the meaning of the words depends on the language context in which they appear and the human situation in which they are used". See Carrió (1994), p. 29.

3 Asís Roig (2004), p. 9.

4 Baylos (1991), pp. 95-99.

This validity has had an important development in Argentina, Brazil, Chile, Peru and Uruguay, in the legal doctrine as well as in court decisions.

In the present work we are going to focus on two relevant aspects of this subject matter, putting aside other interesting issues, such as the problem of the "balancing test" of the rights between the employer and the employee,[5] or the distinction between direct (immediate) and indirect (mediate) efficacy.[6] The issues that we are going to study are the following: 1) even though it may seem counterintuitive, the idea of the horizontal effect of fundamental rights is in itself a consequence of the consolidation of labor law at the beginning of the twentieth century.[7] And, moreover, (2) unlike the problems that challenge private law, whereby the open texture of fundamental rights would broaden judicial discretion beyond reasonable limits, when it comes to labor law it is the other way around, since eventual judicial discretion directly limits the employer's power, so it is more appropriate to speak of a diagonal effect or applicability instead of a horizontal one.

In the following section, we shall focus on demonstrating how this effect has its origin one hundred years ago, during the consolidation of labor law. We shall briefly explain thereafter, how this subject has developed in some Latin American countries. Further down, in the third section, we shall review the most relevant objections to horizontal effect from the perspective of private law, emphasizing how the case of labor law is radically different. We are to finalize with some conclusions regarding what we may consider a new narrative on this matter, namely the labor one.

None of the above represents an attack on constitutional law. In fact, the evolution of constitutional law has been paramount for labor law. The present article attempts to complement the traditional view with a narrative which is attuned to the particularisms of labor law.

5 The problem of rights collision is intertwined with the issue of the horizontal effect and not exclusively with regard to labour matters, since all private persons are holders of fundamental rights, whereas regarding the vertical effect (state-private individuals) that is not the case, since the state in principle has not such rights. See Cruz Villalón (1999), p. 224 and Ugarte Cataldo (2013), pp. 41 and ff.

6 Contrary to what has been argued by some legal scholars, the indirect or mediate effect (objective order of values) can become far more "activist" than the direct or immediate one. See Gamonal C. (2015), pp. 23-27.

7 Complementing the reasons given by Pérez Luño, who invokes two reasons for justifiying the effect of fundamental rights between privates. First, the internal coherence of the legal order, which means that, if the state is required to respect these rights, private individuals in their interrelationships among themselves should also be obligated to respect them. Second, the pre-eminence of the state as the supreme power holder is no longer absolute, since factual private economic and social powers are also of great importance. See Pérez Luño (1995), p. 314.

1. THE EFFECT OF FUNDAMENTAL RIGHTS WITHIN THE EMPLOYMENT CONTRACT: A DIFFUSE ORIGIN

There is no doubt that the *Lüth* case from 1958 represents a major milestone regarding the horizontal applicability of fundamental rights.

Nonetheless, from a labor law perspective it is possible to add certain historical evolutions that will be of use, as we will see below, in order to understand the particularisms of the aforementioned horizontal effect in labor law.

Labor law slowly took shape from the nineteenth century onwards, arising as a product of the industrial revolution. During the twentieth century, it consolidated through events of great importance, such as the creation of the International Labor Organization (ILO) in 1919 and the emergence of the welfare state in Europe after World War II.

One of the essential features of labor law is that this new contract constitutes a link between two private individuals, namely the employer and the worker. That is to say, it is a private contract. Even though it is true that the state can also contract according with labor law, employers all over the world are mostly private persons, rather than public law entities.[8]

And it is precisely in this context that the consolidation of social constitutionalism came into being, coming about with the Mexican Constitution from 1917 and the Weimar Constitution from 1919. Both texts are characterized by the enshrinement of economic, social and cultural rights, for example, in the Mexican Constitution, the right to free education (Article 3°), the prohibition of monopolies (Article 28°), the immunity of family assets from seizure (Article 123 paragraph XXVIII), social utility and the promotion of social security (Article 123 paragraph XXIX), as well as the promotion of housing cooperatives (Article 123 paragraph XXX).

In the case of the Weimar Constitution, for instance, state protection of large families and motherhood (Article 119), the right to education (articles 120 and 142 and ff), support for youngsters (Article 122), state protection and assistance for artistic, historical, and natural monuments (Article 150), the organization of economic life according to principles of justice, with the aim of ensuring a dignified human existence (Article 151), property obliges, its use must serve the general good (Article 153), the social welfare (Article 161) and the protection of the middle class (Article 164).

Who are those bound by these rights? The state, obviously. Even in cases such as "property obliges" or the "prohibition of monopolies", it will be the state who shall directly ensure them.

Nevertheless, that is not the case of labor rights, and both the Mexican and Weimar constitutions establish a group of such rights which are to be looked after

8 Legal scholars consider that the protection of the fundamental rights of "civil servants" in front of the state constitutes a vertical effect. That is to say, the state acting as employer is not to be equated with a private employer. See Oliver (2011), p. 347; Young (2011), p. 23 and Gamonal C. (2015), p. 13.

not only by the state, but also by the employer, in accordance with the previously mentioned characteristic belonging to this area of law, whose cornerstone is a relationship between private individuals (employer/worker).

In the Mexican case, for example: the limits of working hours, the prohibition of child labor, the weekly rest period, the protection of pregnancy, the minimum wage, wage equality regardless of gender or nationality (Article 123 paragraphs I to VII), the share in profits, the payment of overtime hours, the housing of workers (Article 123 paragraph XII), corporate liability for workplace injuries and occupational diseases (Article 123 paragraph XIV), the duty of the employer to uphold hygiene, safety and prevention standards (Article 123 paragraph XV), the right of entrepreneurs and workers to form coalitions (Article 123 paragraph XVI), as well as the workers' right to strike and the employers' restricted right to resort to a lock out (Article 123 paragraphs XVII, XVIII and XIX).

According to the Weimar Constitution, for example, Sunday rest (Article 119), the protection of labour (Article 159), social legislation and social security (Article 161), and the protection of motherhood (Article 161).

In the Weimar case, the constitution also provides that "Every German has the right within the limits of the general laws, to express his opinion orally, in writing, in print, pictorially, or in any other way. No circumstance arising out of his work or employment shall hinder him in the exercise of this right, and no one shall discriminate against him if he makes use of such right" (Article 118), and, regarding the freedom of association stated: "For the defense and amelioration of conditions of labor and of economic life, freedom of association is guaranteed to everyone and to all professions. All agreements and provisions which attempt to limit this freedom or seek to hinder its exercise are illegal" (Article 159).

That is to say, from bilateral relations state/citizen (vertical effect), the system of fundamental rights became a model of trilateral relations state/employer/worker (horizontal effect). Who is to respect the Sunday rest, uphold hygienic conditions and respect trade-union freedom? The employer directly, regardless of state regulation on a certain matter. These constitutional labor rights impose obligations on the employer as well as on the state.

Legal scholarship indicates that there are different levels of state obligations concerning fundamental rights (civil, political, economic, social and cultural), namely: *respect*, the state must not interfere with the exercise of such rights; *protection*, governments are to prevent third parties from infringing the rights of others; *guarantee*, in certain cases, the state is to undertake concrete measures of actions in order to ensure the exercise of the right; and *promotion*, which is the adoption of long term measures which allow the full enjoyment of the corresponding right.[9] So regarding fundamental labor rights, the employer, even though it may be a private person, has the obligation to *respect* (of weekly rest, vacations, minimum wage, etc.), to *prevent* (of

9 Van Hoof quoted by Víctor Abramovich and Christian Courtis in Abramovich and Courtis (1997), pp. 9-11.

violations of dignity, such as mobbing or sexual harassment), to *guarantee* (hygiene and security in the workplace) and to *promote* (respect of dignity in the workplace). And the economic burden of financing these fundamental rights falls more on the employer than on the state (minimum wage, payment of overtime hours, Sunday rest, housing of workers, protection of motherhood, social security, hygiene and security, etc.).

The foregoing was commented by Franz Neumann regarding the Weimar Constitution at the beginning of the decade of 1930, noting that the freedom of association of workers should be enforced not only in relation to the state, but also vis-à-vis private social forces.[10]

More contemporaneously, the Weimar Constitution has been identified as a source of the horizontal effect,[11] considering that the labor relation was the first anchor point of an horizontal effect of fundamental rights, since the guiding idea was to neutralize the power asymmetries existing between employer and worker, in other words, attempting to solve the problem of social power in social and economic relations.[12]

Concerning the Mexican Constitution, it has been equally argued that this text is the first one in the world to establish the horizontality of fundamental rights.[13]

And it is very remarkable that this Constitution includes a provision that goes beyond all of the hitherto indicated rules. We are referring to Article 5° of the Mexican Constitution, with its fifth subparagraph providing that:[14] "A work contract will oblige the person only to render the service mentioned in that contract during the term established by law, which may not exceed one year in detriment of the worker. The work contract cannot include the waiver, loss or damage of any political or civil right" (our emphasis).

It is a general rule which clearly and unequivocally establishes the applicability of civil and political rights within the employment contract. Taking into account the existing power asymmetries, it is obvious that these civil and political rights cannot be waivered, lost or be undermined with detriment to the worker, that is to say, these rights constitute a limit to the power of the employer.

Consequently, it was impossible to constitutionalize labor law without broadening the scope of applicability of fundamental rights with regard to private individuals, such as the employer.

10 Neumann (1983), p. 135.

11 Lewan (1968), p. 572, note 10.

12 Seifert (2012), p. 803. In the same vein: Fedtke (2007), p. 127.

13 Gamonal C. (2014), pp. 75-76.

14 This fifth subparagraph is currently the seventh of Article 5°.

Even before social constitutionalism, it could be argued that any Constitution prohibiting slavery recognized in a certain way the horizontal effect of such prohibition, since it is not a mystery to anyone that slave owners were private citizens.[15]

A similar process takes place since 1919 in the field of international labor law, due to the work of the ILO on subjects such as child labor, equal treatment and weekly rest, the prohibition of forced labor and trade-union freedom.[16]

Now we are able to realize that this process of constitutionalization of labor law, which took place between 1917 and 1919, was not unilateral, but rather bilateral, since labor law enriched constitutional law through nothing less than the horizontal effect of fundamental rights. In other words, the labor clauses elevated to constitutional rank carried in their DNA the horizontal effects of rights. It is therefore no exaggeration to argue that the process described here was also a "laborization" of constitutional law.[17]

Then, why has this origin remained concealed or little discussed in legal doctrine? This provisions have probably been more commented by labor scholars than by constitutionalists, and the former focused on the great relevance that the mentioned provisions had on social and economic improvements on the situation of workers, rather than on constitutional technicalities that at the time might have been irrelevant for labor lawyers, if we focus on the major symbolic impact that this constitutionalization had in favor of labor law.[18]

Finally, we must note that, given the above, it cannot be surprising that the "rediscovery" of the horizontal effect due to the *Lüth* case was preceded by labor law scholarship, particularly in the works of legal scholars such as Hans Nipperdey, Walter Leisner and Franz Gamillscheg.[19]

15 The whole discussion previous to the adoption of the Amendment XIII, which was enacted in the United States of America in order to free the slaves, was focused on the obligations of the state and of the former slave owners, as well as on the condition that freedmen were to have as workers. See Zietlow (2012) and Goluboff (2009).

16 Gamonal C. (2014), pp. 73-75. The validity of human rights between private subjects is present in several human rights international treaties, such as the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Elimination of All Forms of Racial Discrimination. See Courtis (2006), pp. 412-414.

17 Gamonal C. (2014), p. 73.

18 Mexican commentators considered Article 123 as the most important one, rather than Article 5°. The latter had been proposed by President Venustiano Carranza during the discussion prior to the enactment of the Constitution of 1917 and followed a liberal philosophy, which was less favourable for workers. Regardless, the progressive or advanced faction (denominated by some as "Jacobin") ended up prevailing in the discussion, so that Article 123 was finally approved. See De Buen L. (2015), pp. 297-303.

Therefore, it follows that labour scholars were not interested in commenting an article which represented an approach hostile to workers, and had a content that was poor compared with article provision such as Article 123.

19 Lewan (1968), pp. 573-579.

2. THE HORIZONTAL EFFECT IN LATIN AMERICA

In Latin America the horizontal effect of fundamental rights in terms of labor law has represented an advancement in pursuit of a better protection of workers.

In this section, we are going to briefly refer to some experiences in our subcontinent: Argentina, Brazil, Chile, Peru and Uruguay. In all of these cases, the legal scholarship incorporates the horizontal effect of workers' fundamental rights, and the courts enforce them with recourse to the aforementioned effect.

In Argentina, the horizontal effect of fundamental rights is fully instated. As César Arese argues: "The theory of the third-party effect or horizontal effect of fundamental norms is expressed through the effect *erga omnes* displayed by human rights norms".[20]

In 1958, the Argentinian Supreme Court applied fundamental rights between private individuals in the *Kot Samuel S.R.L.* case, in which the court ruled in favor of Mr. Kot in a case of unlawful curtailment of rights by private individuals, upholding therefore a writ of constitutional protection (*recurso de amparo*) in order to vacate a factory occupied by workers who had been fired on account of a strike that had been declared illegal from the outset.[21] With this ruling, the immediate or direct effect of fundamental rights between private persons is recognized. With regard to this, the court stated: "there is no indication, neither in the letter nor in the spirit of the Constitution, that human rights protection is restricted to attacks stemming only from public authority".[22]

In the more contemporary Argentinean law, the 1994 constitutional reform has been essential, since its Article 77 subparagraph 22 granted constitutional rank to international human rights law, explicitly recognizing such character, among others, to the American Declaration of the Rights and Duties of Man, the Universal Declaration of Human Rights, the American Convention of Human Rights, as well as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.[23] Within this catalogue, the Supreme Court has emphasized that the Universal Declaration of Human Rights, as well as the American Covenant of Human Rights are adequate instruments to interpret Article 14 bis of the Constitution, which regulates labor rights.[24]

20 "La teoría del efecto entre terceros o efecto horizontal de las normas fundamentales se expresa con el efecto *erga omnes* de las normas sobre derechos humanos". See Arese (2014), p. 19.

21 Full text of the case can be consulted in Spanish in: http://todoelderecho.com/Apuntes/Fallos%20Nacionales/Apuntes/Kot%20Samuel%20S.R.L.%20.htm

22 "nada hay ni en la letra ni en el espíritu de la Constitución que permita afirmar que la protección de los derechos humanos esté circunscrita a los ataques que procedan sólo de la autoridad". See Valdés dal Ré (2003), p. 76 and Rodríguez Mancini (2004), p. 94.

23 Arese (2014), p. 14.

24 Onaindia *et al.* (2005), p. 489.

Furthermore, the employer's power of direction and organization has general limitations in dignity and equity (Article 14 bis of the National Constitution), a well as in legal statutory and conventional norms.[25]

25 Arese (2014), p. 104.

Articles 65, 68, 69, 70, 71 and 73 of the Employment Contract Act (*Ley de Contrato de Trabajo (ley N° 20.744, de Contrato de Trabajo*) provide the following:

"**Art. 65**. —Facultad de dirección.

Las facultades de dirección que asisten al empleador deberán ejercitarse con carácter funcional, atendiendo a los fines de la empresa, a las exigencias de la producción, sin perjuicio de la preservación y mejora de los derechos personales y patrimoniales del trabajador.

Art. 68. —Modalidades de su ejercicio.

El empleador, en todos los casos, deberá ejercitar las facultades que le están conferidas en los artículos anteriores, así como la de disponer suspensiones por razones económicas, en los límites y con arreglo a las condiciones fijadas por la ley, los estatutos profesionales, las convenciones colectivas de trabajo, los consejos de empresa y, si los hubiere, los reglamentos internos que éstos dictaren. Siempre se cuidará de satisfacer las exigencias de la organización del trabajo en la empresa y el respeto debido a la dignidad del trabajador y sus derechos patrimoniales, excluyendo toda forma de abuso del derecho.

Art. 69. —Modificación del contrato de trabajo - Su exclusión como sanción disciplinaria.

No podrán aplicarse sanciones disciplinarias que constituyan una modificación del contrato de trabajo.

Art. 70. —Controles personales.

Los sistemas de controles personales del trabajador destinados a la protección de los bienes del empleador deberán siempre salvaguardar la dignidad del trabajador y deberán practicarse con discreción y se harán por medios de selección automática destinados a la totalidad del personal.

Los controles del personal femenino deberán estar reservados exclusivamente a personas de su mismo sexo.

Art. 71. —Conocimiento.

Los controles referidos en el artículo anterior, así como los relativos a la actividad del trabajador, deberán ser conocidos por éste.

Art. 73. —Prohibición. Libertad de expresión.

El empleador no podrá, ya sea al tiempo de su contratación, durante la vigencia del contrato o con vista a su disolución, realizar encuestas, averiguaciones o indagar sobre las opiniones políticas, religiosas, sindicales, culturales o de preferencia sexual del trabajador. Este podrá expresar libremente sus opiniones sobre tales aspectos en los lugares de trabajo, en tanto ello no interfiera en el normal desarrollo de las tareas."

***("Art. 65**. —Power of direction.*

The powers of direction of the employer shall be exercised functionally, considering the purposes of the company and the demands of production, without disregarding the preservation and improvement of the personal and patrimonial rights of the worker.

***Art. 68**. —Terms of exercising such power.*

The employer, in all cases, is to exercise the powers conferred to it by the previous articles, as well as the faculty of providing for suspensions for economic reasons, within the limits and according to the requirements stipulated by law, professional statutes, collective labor covenants, work councils, and if there were, internal regulations dictated by the latter. The employer shall always endeavour to satisfy the demands of the organization of work in the company and to ensure the due respect which is owned to the dignity of workers and their patrimonial rights, excluding every form of abuse of rights.

***Art. 69**. —Alteration of the employment contract – its exclusion as disciplinary sanction.*

Disciplinary sanctions constituting an alteration of the employment contract are not to be imposed.

***Art. 70**. —Personal controls.*

The systems of personal control of workers destined to the protection of the assets belonging to the employer are to safeguard the dignity of the workers and shall be exercised discreetly and by means of automatic selection aimed at the entire staff.

Controls administered to female members of the staff are to be practised exclusively by members of their own sex.

Therefore, the right to life, as well as the rights to physical and psychological integrity, to dignity and freedom, to freedom of expression, to ideological and political freedom and to privacy, are acknowledged as limits to the powers of employers.[26]

In Brazil, constitutional rights display an ample effect on the employment contract. As Arion Sayâo Romita argues, the application of fundamental rights between private individuals has consolidated itself despite its critics. In this sense, it works as a negative limit to private autonomy.

Among the justifications, this author mentions that fundamental rights act as guides for interpreting general contractual terms and can be used for limiting power asymmetries in adhesion contracts, as it is the case of the employment contract, as well as a means for safeguarding dignity against abuses of power.[27]

In Brazil, dignity, as well as the rights to intimacy, privacy, honor, self-image, freedom of speech, and to the inviolability of private communications, are protected in favor of workers.[28] These rights constitute a limit on the power of employers.[29]

The 1988 Constitution, which establishes the Federal Republic of Brazil, is grounded on human dignity,[30] and on this base Brazilian scholarship has emphasized that the respect for dignity is the ground for the applicability of fundamental rights between private individuals.[31] This effect is relevant most of all in the face of private social powers.[32]

In Chile, since 1994 there has been an important development of the horizontal effect of fundamental rights as limits on the power of employers.[33] In 2001, the Article 5° of the Labor Code was emended in order to establish that the faculties of

Art. 71. —*Knowledge.*

The controls referred to by the previous article, as well as those concerning the worker's performance, are to be known by the respective worker.

Art. 73. —*Prohibition. Freedom of expression.*

The employer shall not, either at the time of recruitment, nor during the duration of the contract or in view of its termination, conduct surveys, inquiries, or carry out investigations concerning political, religious, trade union related, cultural opinions or the sexual preferences of the worker. This may freely express his or her opinions on said matters in places of work, as long as they do not interfere with the normal development of his or her duties.")

26 Rodríguez Mancini (2004), pp. 156 and ff. and Arese (2014), pp. 109 and ff.

27 Romita (2005), pp. 174-176.

28 Neto (2005), pp. 46 and ff.

29 Romita (2005), pp. 249 and ff.

30 Article 1°, III, of the Constitution from 1988 (currently in force) establishes that the Federal Republic of Brazil is a democratic state, whose fundaments are: I sovereignty, II citizenship, III the dignity of the human person, IV the social values of work and free initiative, V political pluralism. See Peduzzi (2009), p. 27f.

31 Sarlet (2009), p. 123.

32 Sarlet (2009), p. 121.

33 Lizama Portal and Ugarte Cataldo (1998), pp. 149 and ff., and Gamonal C. (2004).

the employer are limited by the fundamental rights of the worker, and since 2006 a special labor judicial procedure for the protection of fundamental rights has been in force.[34]

The 1980 Constitution (inherited from the dictatorship of Pinochet) acknowledges in its Article 6° second subparagraph that the Constitution bounds holders and members of state bodies, as well as every person, institution or group. And Article 5° second subparagraph establishes a clause incorporating internationally enshrined human rights into the internal legal order, in the following terms: "The exercise of the sovereignty is limited by the respect to the essential rights that emanate from the human nature. It is the duty of the State's organs to respect and promote those rights, guaranteed by this Constitution, as well as by international treaties which have been ratified by Chile and that are in force" ["*El ejercicio de la soberanía reconoce como limitación el respeto a los derechos esenciales que emanan de la naturaleza humana. Es deber de los órganos del Estado respetar y promover tales derechos, garantizados por esta Constitución, así como por los tratados internacionales ratificados por Chile y que se encuentren vigentes*"].

There are relevant judicial cases protecting fundamental rights of workers in matters such as privacy, honor, as well as psychological integrity, inviolability of private communications, non-discrimination and effective judicial protection.[35]

In Peru the fundamental rights of workers are also respected within the employment contract. The Peruvian Constitution, in the third paragraph of its Article 23°, provides the following: "No working relation can limit the exercise of constitutional rights, nor disavow or disrespect the dignity of workers" ["*Ninguna relación laboral puede limitar el ejercicio de los derechos constitucionales ni desconocer o rebajar la dignidad del trabajador*"]. Javier Neves, commenting this precept, argues: "Here, adequate protection is provided to the rights of workers to equality, intimacy, freedom of expression, etc., from which they cannot be deprived by their employer, since citizenship is not lost due to their incorporation to the company".[36]

The right to intimacy, the freedom of religion and of expression, as well as the right to equality are to be respected by the employer when exercising its powers.[37] The Peruvian Constitutional Court has emphasized that the rights of the person of the worker must be ensured in opposition to the powers of the employer.[38]

Moreover, the Peruvian Constitutional Court has stated that international human rights treaties are endowed with constitutional rank, notwithstanding the non-existence of an explicit norm incorporating them into the internal legal order, as is the case in Chile and Argentina.[39] The criterion for asserting this hierarchy lies in Ar-

34 Ugarte Cataldo (2009) and Gamonal C. (2007).

35 Gamonal C. (2015), pp. 79 and ff.

36 Neves Mujica (2009), p. 69.

37 Tomaya Miyagusuku (2009), p. 68.

38 Tomaya Miyagusuku (2009), p. 70.

39 The previous Peruvian Constitution from 1979 provided in its Article 105, that human rights international treaties had constitutional rank. This norm was not included in the current 1993Constitution.

ticle 3° of the Constitution, which recognizes rights beyond those explicitly established in the constitutional text, if they are either of a similar nature or grounded on human dignity, among other assumptions.[40]

Similarly, in Uruguay fundamental rights are applied as limits to the powers of employers. Héctor-Hugo Barbagelata noted that the recognition of the application of constitutional norms to private individuals has been a long process, although in a rising number of countries it is either consolidated already or about to be.[41]

Óscar Ermida has highlighted the important role played by the fundamental rights of the worker within the employment contract:

> ..the worker is not only holder of those fundamental rights typically or specifically labor-related, which are recognized as inherent to the human being as worker (trade-union freedom, rights to collective negotiation, to strike, to employment and professional training, as well as the limitation of working hours and the right to rest, etc.), but the worker is also holder of the other human rights, those that are inherent to the human person as such, from which the worker cannot be deprived because of the subscription of an employment contract or his or her incorporation into a production unit.[42]

Dignity, moral and psychical integrity, as well as personal intimacy, honor, health, ideological freedom and freedom of expression, religious freedom, self-image and physical likeness are fundamental rights which the employer is to respect in the context of the employment contract.[43] As indicated by Carolina Panizza, it is currently unquestionable that the conclusion of an employment contract does not entail deprivation of essential rights for the worker.[44]

Uruguayan legal scholarship has noted that this horizontal effect arises from human dignity, as well as from other positive rules of the Constitution of this country. Óscar Ermida has stressed that not only equality, but also dignity, the other metaprinciple or major human rights value, situates labor law in the very core of the fundamental rights system.[45]

Furthermore, Articles 54 and 72 of the Constitution substantiate the applicability of fundamental rights as a limit to the powers of the employer. The first one recognizes the moral and civic independence of every worker, as well as the physical

40 Villavicencio Ríos (2009), p. 67. Peruvian scholarship has been critical of the lack of an *ad hoc* labour procedure of fundamental rights protection and of the fact that the writ of constitutional protection is used in such matters. See Arce (2012).

41 Barbagelata (2009), p. 294.

42 See Ermida Uriarte (2004), p. 5.

43 Panizza Dolabdjian (2017), p. 31ff.

44 Panizza Dolabdjian (2017), p. 11.

45 Ermida Uriarte (2011), p. 11.

and moral hygiene. The second one explicitly states that the enumeration of rights contained in the Constitution does not exclude other rights that are inherent to the human person or that derive from the republican form of government.[46]

Lastly, we shall add two further elements to this review.

First, that in these countries the constitutional right to non-discrimination in work-related matters is widely recognized, which bares special significance for the employment contract and its application clearly serves a horizontal purpose.[47]

Secondly, the American Human Rights Court has categorically stated that in labor matters human rights produce horizontal effects.[48] The aforementioned court ruled thereon:

> In an employment relationship regulated by private law, the existence of an obligation of respect between private individuals must be taken into account. This means that third-party effects (*erga omnes*) result from the positive duty of the states to ensure the effectiveness of the protected human rights. This obligation has been developed by the legal scholarship and particularly by the *Drittwirkung* theory, according to which, fundamental rights are to be respected not only by public powers, but also by private individuals in relation to one another.[49]

As we can see, the horizontal effect theory is quite consolidated in Latin American law,[50] although it cannot be ignored that this effect is present in several legal systems from different continents.[51] In the Latin American case, the important influence of Spanish labor law is worth mentioning due to multiple reasons, such as culture, language and history. Several Spanish authors have contributed to the legal literature on the subject of the horizontal effect of rights, some of them already referred to in this article, such as Antonio Baylos, Antonio Pérez Luño, Gregorio Peces-Barba Martínez, as well as Fernando Valdés dal Ré, María Venegas Grau[52]

46 Panizza Dolabdjian (2017), p. 10.

47 Gamonal C. and Rosado Marzán (2015).

48 The Inter-American Court of Human Rights is not the only international court asserting this criterion, which has also been adopted by the European Court of Human Rights and the Court of Justice of the European Union. See Gamonal C. (2015), p. 33.

49 Consultive Opinion N. 18 from 17/9/03, on "Legal Situtation and Rights of Undocumented Immigrants" (*Condición Jurídica y Derechos de los Migrantes Indocumentados*) cited by Arese (2014), p. 19.

50 Several countries of the region, which we have not included in this article, also recognize the horizontal effect of fundamental rights in labor matters. For the cases of Colombia and Venezuela, see Sanguinetti Raymond and Carballo Mena (2014).

51 For instance, the cases of Great Britain, Denmark, France, Italy, Greece, India, Israel, South Africa, Belgium, Spain, Ireland, Japan, Luxemburg, Namibia, The Netherlands, Papua New Guinea, Sweden, and Switzerland. See Gamonal C. (2015), pp. 28-33.

Two dubious cases such as Canada and the USA are exceptions more apparent than real in the area of labor law. Gamonal C. (2015), pp. 34-36.

52 Venegas Grau (2004).

and Juan María Bilbao Ubillos.[53] The work of Manoel-Carlos Palomeque López deserves a special mention, as well as the Spanish translation of the work of the German scholar Robert Alexy.[54]

Nevertheless, we might point out that the theory of the horizontal effect has being of greater consequence in Latin America than in other latitudes of the world. Finalizing this section, we will offer some explanatory hypothesis for this assertion.

In Latin America trade union power is almost non-existent, except for the exceptional cases of Uruguay and Argentina. This deficiency or lack of trade unions,[55] has fostered individual protection through statutory law, context in which the horizontal effect of rights becomes relevant.

In addition to the former, judges tend to perform a more central protective role than in countries endowed with sophisticated trade union systems.[56] This highlights the importance of the horizontal effect of rights.

Finally, the high degree of political corruption endemic to Latin American societies, where the Constitution usually enshrines numerous rights that the legislator ignores afterwards, that is to say, in the words of Ermida[57] "when and where the dirty work is done by the statutory law", leads to the use of the horizontal effect of rights and to direct application of the Constitution as a tool for attacking the systematic abuses taking place in the context of a state where the rule of law is more apparent than real. This situation also provides an explanation as to why the American Human Rights Court asserts thesis that can be regarded as highly activists, such as the conventionality control (*Control de Convencionalidad*).[58]

53 Bilbao Ubillos (1997).

54 Alexy (2001). Other relevant European authors are: Gaeta (1992); Guastini (1999); Martín Aguado (1992) and Zagrebelsky (1997).

55 Gamonal C. (2004), p. 70.

56 With a sophisticated trade union system, endowed with powerful unions, the right to strike and a wide coverage of collective negotiation, power asymmetries between the worker and the employer are successfully averted, thus overcoming the "contractual dictatorship of the employer" and replacing it by an autonomous system governing labor relations (namely, by unions and employers). Fraenkel cited by Ruth Dukes in Dukes (2014), p. 12.

57 Ermida Uriarte (1996), p. 133.

58 Contreras (2014), p. 251.
The Inter-American Court of Human Rights, in the case *Almonacid Arellano vs. Chile* from 2006, adopted this thesis in the following way: "124. The Court is aware that internal judges and tribunals are subject to the rule of law and are therefore obliged to apply the existing legal provisions belonging to the internal legal order. But when a state has ratified an international treaty such as the Convention, its judges, as part of the state apparatus, are also subjected to it, which obliges them to ensure that the effects of the Convention are not undermined by the application of laws contrary to its object and purpose, which are devoid of legal effects from their very enactment. In other words, the judiciary is to exercise a sort of "conventionality" control, whereby it shall contrast the internal legal rules that are applicable in the concrete case with the rules and principles contained in the American Convention on Human Rights. For this purpose, the judiciary shall consider not only the treaty itself, but also the interpretation of the Convention carried out by the Inter-American Court, which is the ultimate interpreter of the aforementioned American Convention".

3. TOWARDS THE DIAGONAL EFFECT IN LABOR LAW: THE OPACITY OF POWER

There is no doubt that the applicability of fundamental rights to private individuals can affect the rules of private law.[59]

The private law of the nineteenth century was grounded on the existence of subjects operating on a relatively equal base, it was based on the autonomous will of the parties and the absence of interference by the state except in critical cases, such as nullity and defects of consent. In legal relations regulated by private law, the certainty of legal transactions and judicial decisions bears a paramount importance.

All of this is affected by the validity of fundamental rights between private individuals, especially legal certainty. That is to say, even though the parties operate freely, one of them might attempt to nullify or release himself from his obligations invoking a supposed violation of fundamental rights. And the judge might go beyond legal regulations or the civil code and rule based on open texture fundamental rights, which is closer to equity jurisdiction than to the rule of law. As we see, horizontality can be a proper nightmare for private law jurists, which is what Claus-Wilhelm Canaris clearly states when he criticizes the German Constitutional Court, that has even forced private individuals to subscribe contracts by virtue of the horizontal effect[60] (mediate or indirect).[61]

On the other hand, labor law is radically different, for it is based on the existence of subjects that are not equals, it considers as a crucial factor the power asymmetries between employer and worker, and focuses on the submission of the will[62] and the restriction of the worker's freedom.[63] Legal scholarship has not fallen short when it comes to adjectives: they speak of a contractual dictatorship in the employment relationship,[64] they say that the workplace is a species of communist dictatorship for the workers,[65] that the individual liberty of the worker could be threatened by large corporations just as it would happen if government power had no restraint.[66] Market failures have been pointed out and it has been stated that the consequences of treating workers as commodities can be very dramatic.[67] The employer's power of

59 See Ferreres Comella (2003), pp. 41 and ff; Jana Linetzky (2003), p. 53 and ff, and Venegas Grau (2004), pp. 111 and ff. A complete discussion on all the four critics and how they do not affect labor law can be consulted in Gamonal C. (2015), pp. 45-77.

60 Canaris (2006), pp. 232f.

61 See *supra* note 6.

62 Supiot (1996), pp. 133 and ff.

63 Kahn-Freund (1987), p. 48f.

64 Palma Ramalho (2000), p. 247.

65 Anderson (2017), pp. 37 and ff.

66 Blades (1967), p. 1404.

67 Sunstein (1984), p. 1049.

dismissal has been characterized as a sort of "monarchical system"[68] and companies have been described as *citadels of private power*.[69]

If we take into consideration that power is defined by the management of uncertainty,[70] then it is clear that the employer has all certainties and the worker all the uncertainties. The history of labor law is therefore the history of the limits to the uncertainty suffered by workers.[71]

All of the above stated justifies that the applicability of fundamental rights within the employment contract does not entail a threat comparable to the one it represents when applied in the field of private law. In other words, the horizontal effect does not suppress the argumentative practice of labor law, but it complements it in view of power asymmetries. And these asymmetries are precisely what underpins labor law.[72]

A similar situation takes place with regard to the judge, whose role in modern law is to uphold the law and avoid discretion.[73] But in labor matters the modern concept is either fruitless, conservative (favorable to employers) or both simultaneously.[74] Let us recapitulate what has previously been said: in sophisticated labor systems the

68 Summers (2000), p. 86.

69 Unger (1983), p. 589.

70 Michel Crozier cited by Zygmunt Bauman in Bauman (2007), pp. 61 and ff.

71 Gamonal C. (2015), p. 75.

72 Canaris (2006), p. 237 and Hesse (1995), p. 72.

73 On the differences between modern and pre-modern law, See Atria (2016), pp. 49-66.

74 Modernity, as a process of enlightenment arising from the French Revolution, ended up neglecting workers, women and the poor. The revolution was dual in nature: on the one hand, the bourgeois revolution and on the other, the revolution of the excluded (of the poor, the dispossessed, as well as the embryonic working class), even though the weak were ultimately sidelined. That is to say, the French Revolution was the first attempt of the exploited and oppressed to release themselves from oppression. See Cliff (1984).

Workers were marginalized from the very beginning through *Le Chapelier* from 1791, whose influence throughout the nineteenth century constrained them within the limits of the individual relationship and party autonomy. See Soubiran-Paillet (1998), p. 21.

It is important to point out that almost all of the "Encyclopaedists", who embodied the spirit of the Enlightenment, belonged to the Third Estate, which comprised the bourgeoisie and the urban lower classes. Their enemy was not enlightened despotism, but the Catholic Church. As Savater has expressed regarding the writers of the Encyclopaedia: "They are far from wanting to get rid of social classes and turn the ordinary folk into owners of the country". See Savater (2017), p. XI.

As for women, whose protagonism was key in the beginning of the revolution, they were quickly cast away from the public sphere. See Gamonal C. (2015), pp. 449-55. In fact, there were no women among the writers of the Encyclopaedia. See Savater (2017), p. X.

As for the poor, it is enough to note their invisibility in the Code Napoleon. See Menger (1998).

The justification argued by enlightened and liberal thinkers of the eighteenth and nineteenth centuries (Sieyès, Burke, Locke, and Bentham, among others) of the "serfs under contract" and of child labour (regarding poor children as *res nullius*) is inhuman to say the least. See Losurdo (2007), pp. 87-100. Therefore, it cannot be surprising that the law based on the hegemonic liberal philosophy of the nineteenth century would limit state power, as well as keep and reinforce (via making them invisible) relationships of private power and abuse.

role of the law has been smaller, since the bulk of labor regulation is generated by employers and workers, and trade unions negotiate on equal ground with employers, since they have the power conferred to them by the right to strike. But powerful trade union systems are dwindling and the role of the statutory law and of the courts is, in labor matters, increasingly more relevant.[75] And in Latin America, where unionism has been weak for a whole century, the statutory law and the courts have always been very relevant.

In other words, the question is the following: may the law regulate or limit a power relationship such as the employment relation? What about the case of parental relationships in the field of family law? The law can approach cases such as these in two ways. (I) it may endeavor to suppress power by forbidding such relationships. We already know this to be infeasible with regard to both labor as well as family law. It is not prohibited to work or to be parents. (II) The law can attempt to neutralize such relationships and regulate them by limiting power, and therefore restricting as much as possible the uncertainties of the dominated party, since an absolute neutralization is impossible (it would come near to power suppression, that is, to option I). But this second approach is problematic within a modern concept of law, which quite reasonably endeavors to restrict judicial discretion. In other words, the only way of regulating or "halfway neutralizing" it would be to enact some rules and several standards, evaluating the compliance of the party with the latter, accepting an important measure of discretion on part of the courts, since power is in itself related with managing uncertainty, so that limitative control of its exercise involves a relevant degree of discretion on the part of the controlling authority (the judge).

It is for this reason that family law, as well as labor law, are legal fields in which numerous standards of conduct apply, which leads to courts having much more discretion than in other areas of private law.[76]

Examples of rules aimed at restricting company power are, among others, minimum wage, the payment of overtime hours, as well as Sunday rest.

Examples of standards aimed at restricting the conduct of companies are, among others, the duty of ensuring safe working conditions, the limits to the exercise of the right to alter working conditions or *jus variandi*, the employment termination due to economic reasons, as well as the regulation of termination on justified grounds. The standardized language of labor statutory laws is expressed in terms such as: reasonable, proportionate, rational, with due care, equitable, appropriate, etc.,[77] and labor standards are usually common in matters such as subordination, the employer's powers of direction and employment termination.[78]

75 Gamonal C. (2017), pp. 255 and ff.

76 On the greater judicial discretion in family matters, due to the need of adapting judicial decisions to the realities of each individual and family, See Glendon (1986), p. 1166.
On labor law as a standardized law, see Cabrelli (2011a), p. 147 and Cabrelli (2011b), pp. 21 and ff.

77 Cabrelli (2011b), p. 23.

78 Gamonal C. (2015), p. 71.

This is the reason why private law scholarship accepts the horizontal effect of rights in the field of family law.[79] And in this area we can presume that in the great majority of cases parental power will be beneficial to the children, their education and proper development, whereas in labor matters such an assumption is not possible, since employers do not generally act in the best interest of their workers, but exercise their power in their own personal interest. Therefore, the scholars insist once and again that the most adequate protection is that provided by trade unions, since it leads to workers' empowerment.[80] Additionally, labor conflicts are usually polycentric, for they involve multiple interests on part of workers, employers, the union, the negotiating process, as well as workers that are not union members, which makes the labor of courts much more complex when compared to civil disputes, in which usually only two interested parties are in conflict, namely the claimant and the defendant.[81]

As we can see, regarding the employment contract there is nothing approaching a "horizontal" relation or a relationship of coordination between equals. We consider therefore more appropriate to speak of a "diagonal effect",[82] for the employer is a power holder, whereas the worker is subjected to such power. The employer obviously does not wield as much power as the state (except in cases such as Amazon, Google or some transnational companies), but it is not an ordinary private individual confronted with another one of similar power. Hence, it would not be adequate to speak of a vertical effect regarding the employer, as it would also be inappropriate to speak of a horizontal effect. The power of the employers is located in an intermediate zone, so that it is more suitable to use the term "diagonal effect".[83]

But could not judicial discretion affect democracy if, for instance, a constitutional court gets involved in constitutional balances where the legislator is more competent?[84] Certainly, but this matter does not concern labor courts, since they do not attempt to constitutionally evaluate a statutory law of the legislative power, but to assess the measures adopted by the employer within the employment contract, and it is obvious that a judge will have more legitimacy, act more impartially and more expertly. In this context, the counter-majoritarian argument does not apply,[85] in the

79 Jana (2003), p. 57, note 12.

80 Gamonal C. (2017).

81 Davies (2009), p. 290.

82 See Gamonal C. (2009), pp. 72-76 and Gamonal C. (2011).I am indebted to Professor Pamela Prado, who suggested me the term "diagonal effect", which was included in a Spanish case from December 25th, 2001, pronounced by the Superior Court of Valencia.

83 In the Latin American context, the Tribunal Superior do Trabalho de Brasil (Superior Labour Court of Brazil), based in Brasilia, has expressly incorporated the concept of the "diagonal effect" of the worker`s fundamental rights in two cases concerning the guarantee of indemnity (reprisals). See Processo N° TST-AIRR-77700-47.2009, from 20/09/2012, 9 and Processo N° TST-AIRR-7894-78.2010, from 20/09/2013, 5.

84 Kumm (2004), p. 594.

85 Non-elected constitutional judges can limit democratically adopted decisions taken by democratically elected parliaments. See Unger quoted by Jeremy Waldron in Waldron (2005), pp. 15 -25.
Needless to say, we concur with this critic on the excessive power of constitutional justice.

sense that the diagonal effect would limit the majority rule. What would be limited are the powers of a private individual, namely the employer, who is not a representative of the popular will.

That is to say: who would be more competent at modulating the fundamental rights of the worker, a judge or the employer? The answer is obvious: the judge. It is certainly possible that the judge could have favorable criteria to the employer and detrimental to the worker. Evidence does not allow us to suppose *ex ante* that the judge will always be sympathetic to the weak, which leads us to assert that the most effective way of protecting workers are trade unions. In the absence of strong unions, courts represent a better option than the employer, notwithstanding the possibility that there might be judges who are insensitive to the social drama of workers.[86]

Ultimately, to designate this phenomenon as diagonal effect instead of horizontal does not involve a change of paradigm, but it does allow us to visualize the particularisms of labor law, and it overcomes the critics based on the modern concept of law, since they are not pertinent to the specific context of labor law (namely, the argumentative practice of private law and the increase in judicial discretion).[87]

4. CONCLUSIONS

In this article we have studied some of the problematic aspects of the so called "horizontal effect" of human rights within the employment contract.

It is a limitation that has been very well integrated to labor law and quite developed in Latin American countries, such as Argentina, Brazil, Chile, Peru and Uruguay.

Just like in suspense novels or Hitchcock films, where the protagonist is the guilty party or the apparent victim is in reality the aggressor, labor law appears as a last minute guest when it comes to horizontal effect of rights, even though is actually one of its foundational protagonists.

As a matter of fact, horizontality did not emerge as a consequence of the *Lüth* case from 1958, decision that was about freedom of expression, but rather 42 years before, with its inclusion in the Mexican Constitution from 1917, which includes the above-mentioned Article 5°. And although the *Lüth* decision has been highly relevant in the constitutional narrative, between 1950 and 1959 an entire discussion on the horizontal effect within the contract of employment took place in Germany prior to the aforementioned judicial decision.[88]

On the other hand, the 1917 Mexican Constitution is like a "Sleeping Beauty", waiting to be discovered, since not only has its contribution to social constitutionalism

86 For instance, the difference between British and South American judges. See Gamonal C. (2017), pp. 273-275.

87 Gamonal C. (2015), p. 43.

88 Gamonal C. (2015), pp. 64 and ff.

been remarkable, as well as its great relevance to labor law,[89] but also to the horizontal effect of fundamental rights.[90] Let those words count as a long overdue homage on the occasion of its 100 years anniversary, which was commemorated in 2017.

And the dangers that the horizontal effect of fundamental rights might involve for private law are neutralized if we take into account the argumentative practice of labor law and the role of the judge in labor matters. Considering the power relationship underlying the employment contract, the horizontal effect is welcomed, as it is in the field of family law, contrary to the case of the rest of private law. For the reasons offered in this article, in labor matters it should be spoken of a diagonal, rather than a horizontal, effect.

Workers' protection obviously depends on many factors, and the diagonal effect is to be appraised on its own terms. That is, as we have stated several times on these pages, that labor law scholarship regards an empowering and strong unionism as the best way of protecting workers. It is because of this, that workers' protection in Latin America is still weak, even though the diagonal effect has experienced an important development, considering the insufficient coverage of collective negotiation, which betrays the precarious factual situation of Latin American workers.[91] In this context, the horizontal effect must be understood as a complement to the main way of protecting workers, which is a strong and autonomous unionism.[92]

Workers were invisible during the French Revolution,[93] as well as for modern law, which has reluctantly endured the consolidation of an area of law which is "*ad hoc* and anomalous", and whose aim is to protect workers and their unions. It is good to stop being invisible. We expect this work to be of help in achieving that.

89 Palacio describes Article 123 of the Mexican Constitution as "monumental" and as an example of the most complete protection of workers, never seen before 1917. And the text of the Constitution was one of the sources consulted by the Commission on International Labour constituted by the Treaty of Versailles, in the context of the creation of the ILO. See Palacio (2018), p. 24.

90 Trend followed two years later by the Weimar Constitution.

91 Collective agreements reached one average scope of 9% in 2010. See Carrillo Calle (2015), p. 5.

92 Gamonal C. (2004), 74f. In fact, Chile is a good negative example of ample development of the horizontal effect and a highly decreased union power, ultimately a system of flexible precariousness. See Arellano Ortiz and Gamonal C. (2017).

93 See *supra* note 74.

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