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## Fundamental Rights of workers in the Digital Age: A methodological approach from a case study

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## **Fundamental Rights of workers in the Digital Age: A methodological approach from a case study<sup>1</sup>**

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## **I. THE DIGITAL AGE: A NEW STAGE FOR LABOR RELATIONS AND LABOR LAW**

We are living in an era characterized by multiple interconnected transformations that decisively alter our social environment and the manner in which we exist and act within it<sup>2</sup>. One indicator of the multiplicity of processes of change comes about by the diverse nomenclatures spread by sociology to characterize our time, according to the analytical point of view used and the changes that are emphasized<sup>3</sup>. Despite the difficulty of seizing present and constantly mutating events<sup>4</sup>, a series of processes at the base of these changes can be identified<sup>5</sup>, amongst which should be emphasized, for purposes of this investigation, globalization and digital revolution.

### **1. Globalization: effects on the social rights and debates raised to eradicate them**

One of the fundamental and more complex changes that characterize modern societies is imposed by globalization<sup>6</sup>. Normally the

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<sup>2</sup> Tezanos (2002: 35).

<sup>3</sup> Regarding the changes in the production models, Bell (1976) and Touraine (1972) referring to the advent of a "post-industrial society". Focusing on the information as a structural element of today's societies, there are references made to "information age" (McLuhan, 1964), "computer society" (Masuda, 1984) and to "information age" (Castells, 1998a, 1999 & 2000). From the point of view of the technological treatment of the information and its communication, it mentions "cyber age" (McLuhan, 1964), "telematic society" (Nora & Minc, 1978) or a new "digital world" (Negroponte, 2000). I am referring to the actual context as Digital Age, thus the ICT constitute a central element in our societies and, especially in the production processes. In this line, "the central role of computers" leads Stone (2004: 5) to talk about "the era of digital production"

<sup>4</sup> As stated by Stone (2004: vii) "it is difficult to comprehend social change when living in the midst of it. It is easier to study periods of social change in the past – to describe the elements, evaluate the impact, search for linkages, and adumbrate the unintended consequences of change".

<sup>5</sup> Castells (2000: 31 and ff.) distinguishes six basic aspects: 1) the technological revolution of the ICT; 2) the globalization of multiple relations, especially the economic and financial ones; 3) the network, as a new organizational form characterized by being horizontal, flexible, fast and effective; 4) the globalization of determined socio-cultural aspects and the local reactions that resist that pressure by building their own identity; 5) the increased participation of women in the socioeconomic life that progressively dilutes patriarchal societies; and 6) the power crisis of the Estate faced with economic globalization.

<sup>6</sup> A "period change" of which we have to be conscious of its reach and effects (Romagnoli, 2003: 11) and Baylos Grau, 2001: 71). Globalization is a multifaceted, ambiguous matter and it makes references to diverse dimensions that in many occasions are not easily

term alludes to its economic aspect. Despite being the most important one, the circumstances upon which it acts are diverse<sup>7</sup>. Amongst all of them<sup>8</sup>, the following must be highlighted for their relevance from a labor perspective.

The neoliberal ideology that underlies globalization must be emphasized, with the maxim of the free market, and the objective of obtaining the best benefits possible<sup>9</sup>. Its defense of a minimal State, non interventionist, leads to globalizing a certain type of formal and procedural democracy<sup>10</sup> to the detriment of Welfare State, which suffer a notable set back<sup>11</sup>.

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distinguishable (Beck, 1998: 11). In regards to this, be aware of the existence of other terms like "mondialisation" (Robertson, 1992; Auby, 2001; Squella, 1997), internationalization (Spota, 1999: 1; Grun, 1999) and transnationalization (Fariñas Dulce, 2004: 10), attest to the difficulty of discerning the reality they are trying to delimit (in general, regarding this topic, see Beck, 1998: 25 and ff.). Although the term globalization begins to spread during the sixties, it is not recognized academically until the mid eighties (Walters, 1996: 1-2).

<sup>7</sup> The diverse definitions offered regarding the topic are a good example. For Giddens (1999: 64) it's about the worldwide intensification of the social relations that allow the linking of States, regions and different localities, so that the events that take place at a local level interact and mold to one another. For Martin & Schumann (1999) different fields are denationalized (the markets, the law, politics) interrelating regions and individuals for the common good. Beck (1998), alludes to the fact that "the sovereign national States intermingle and intertwine by means of transnational players and their respective power possibilities, orientations, identities and various networks". Stiglitz (2002: 34) also focuses on the integration process between countries and regions, pointing as explanatory causes "the huge reduction in transport and communication costs, and the dismantlement of artificial barriers of the flow of goods, services, capital, knowledge and (to a lesser degree) people through borders".

<sup>8</sup> Fariñas Dulce (2004: 11 and ff.) recognizes the following globalized fields: 1) formal and procedural democracy; 2) global capitalism; 3) a global capitalist class (the multinationals); 4) the productive flexibility and the legal deregulation; 5) the individual rights of liberal nature; 6) the ICT, and 7) a global culture.

<sup>9</sup> Ramos Quintana (2002: 31).

<sup>10</sup> This is how the production of a "dangerous democratic deficit" is marked (Fariñas Dulce, 2004: 11) and the degradation of politics as a characteristic of contemporary capitalism (Fernández Buey, 2005: 230).

<sup>11</sup> In this sense, see De Sebastián (1997) or Castells (1999). To Baylos Grau (2001: 71) the globalization imposes a political project whose consequence is "the inversion of the terms in which law, politics and the market economy related to each other" to reconcile "the logic... of the capitalist system... and the democratic logic of equality". The basis and function of the Welfare State is questioned, which is worrisome because of the important role in the correction of inequalities imposed by the market system (Ramos Quintana, 2002: 30-31) and because it is essential for social stability and production, fundamental elements of a developed economy (Castells, 2001a: 19). In this line Beck (1998: 97) also sustains that "when the global capitalism of the more developed countries destroys the vital nerve of the labor society, the historic alliance between capitalism, the welfare state and democracy is also cracked". A common idea exists in broad sectors about the need to reduce public

In relation to the previously mentioned, we are witnessing a new phase of capitalism in which the global market is where the economic relations take place<sup>12</sup>, and the basic variables of actions in it are productivity and competitiveness<sup>13</sup>. The State loses, in this context, control over the economic and financial flow, relegated to the background as a political unit and a space of development of the government and sovereignty<sup>14</sup>, in the face of transnational companies that appear as a new capitalist global class, that accumulate power and capital along with the banking entities<sup>15</sup>. Paradoxically, that importance that the transnational companies experience is supported in part by the action of the States. On the one hand, the companies benefit from the liberalization of the goods and services markets, and especially financial assets, that States allow. On the other hand, many States inject capital into the companies, amongst other very diverse formulas with financial incentives, to attract or maintain those that create jobs<sup>16</sup>.

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spending and, consequently, to trim the welfare state derived from the globalization of the economy and the mobility of the capital markets. On the contrary, Navarro (2000) questions these statements based on the empirical data from the reality of most of the Scandinavian countries. Human rights of a liberal and individual nature, that don't pose any limitations to the fundamental principle of free markets, are globalized. On the contrary, together with the setback that the welfare states are experiencing, human rights of redistributed content are not part of the catalog of rights globalized (Fariñas Dulce, 2004: 15).

<sup>12</sup> Thus, the "de-regionalization" of production and the diminishing power of collection of the state and the impact that it can have over the levels of social protection are connected (De Julios-Campuzano, 2003: 24). On the other hand, the economic interdependence that globalization imposes, makes the negative effects of the economy in one part of the world spread through the planet.

<sup>13</sup> It's what Wallerstein (1979) designates as "global capitalist economy". Even so, Alarcón Caracuel (2002: 20) affirms that its international nature is a genetic fact of capitalism; the differentiating characteristic is the increased speed of the exchanges. Regarding the principle of profit maximization, see (De Julios-Campuzano, 2003: 20). For a brilliant explanation about the making of that global capitalism that can be seen at the beginning of the millennium, impregnated by neoliberal postulates that lead toward a minimal state, see Negri (1992: 52).

<sup>14</sup> Even though, the States maintain control over the labor market and labor relations (Fernández Buey, 2005: 111). In this "flight" from the national law pretended by the transnational companies, they progressively turn into a "typical place of rules for labor relations at a global level" away from the classic coercions of the legal system (Baylos Grau, 2001: 79).

<sup>15</sup> The multinational companies and their subsidiaries create, in terms of work force, 30% of the global gross product and 2/3 of the international commerce, half of it being developed within the networks of a multinational (Castells, 2001a: 17). Each of the thirty largest companies in the world creates an economic movement superior to the GDP of ninety countries represented in the UN (Habermas, 1999).

<sup>16</sup> Ramos Quintana (2002: 30). Castells (1999) indicates two important questions: on one hand, the international financial transactions make up almost 97% of the global commerce;

It is very important to note also, how the flexibility of productive activity is globalized, which together with the processes of deregulating law and making it more flexible, consolidate a new international labor division<sup>17</sup>. A scene of fragmentation and inequality at different levels can be observed<sup>18</sup>. First, between central and peripheral countries, the latter constituting a source of low skilled workers at low cost<sup>19</sup>. Secondly, in the central countries, it can be observed a fragmentation of the workforce, upon which greater formative demands are imposed<sup>20</sup>. However, there are views that consider that globalization per se has no social dumping but this possibility must be contextualized<sup>21</sup>.

Lastly, and without prejudice to what will be seen ahead, the technological revolution played out by the ICT is also subject to globalization and, furthermore, has a decisive influence in the globalization of other aspects noted previously<sup>22</sup>. Especially, regarding the previous, they allow in their application to companies new production models, exceeding the Fordist and Taylorist production models. In these systems of flexible production, the advantages of artisanal production (product quality) can be combined with the advantages of mass

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on the other hand, the progressive loss of the state's control over the conditions of production, beneficial from a tax point of view, leads to competition between states to attract investment. Lastly, Held (2000) is worried about the risks generated for the financial global system, while the states cannot neutralize its effects or remain at a distance from them.

<sup>17</sup> Fröbel, Heinrichs & Kreye (1980). Fernández Buey (2005: 44) places its origin in the imposition of the multinationals, indicating that its consequences come from the combination of the underdevelopment of those countries and the runaway industrialism.

<sup>18</sup> This fragmentation is joined by the strong inequalities at a global level: the three richest people in the world have assets equivalent to the annual GDP of the 600 million inhabitants from the less developed countries (United Nations Development Program, 1999).

<sup>19</sup> What connects with the migratory processes to which the regrettable living and working conditions lead to for its citizens (Fernández Buey, 2005: 77).

<sup>20</sup> See essays by Alonso (1999 and 2000). Globalization has a diverse impact in developed and developing countries but also in regions of the first (Arthurs, 2006: 51). This issue is linked with the increased demand for training as a distinguishable feature in labor relations in the digital age, not only in the development of the vital experience but also as an essential piece of information in a professional career (Castells, 1996 and 1998b; Drucker, 2001). In this regard, there will be an opportunity later on to deal with the topic in the thread of flexicurity and employability.

<sup>21</sup> Alarcón Caracuel (2002: 20) understands that the possible production of a social dumping must be qualified, keeping in mind which countries engage in economic exchanges and the high services sector importance of the western economies that limits the possibility of relocating the activity.

<sup>22</sup> Castells (2001a: 14) and Ramos Quintana (2002: 30). In fact, the ICT reduce geographical spaces and at the same time it creates a new cyber space (De Julios-Campuzano, 2003: 22). See essay by Downes & Janda (1998) regarding the new way of acting and interacting that the ICTs make possible.

production (speed and low unit cost), through the organization in network they allow.

There are multiple negative consequences of globalization for citizens, which doesn't allow us to declare "an intrinsic kindness in all that is globalized"<sup>23</sup>. The main negative effect of globalization, as we have seen, is the deepening of the planetary inequalities, as a result of the relations between the economy, the state and society<sup>24</sup>. The current situation is characterized by an ever growing economic inequality that affects the exercise of civil rights and increases the risks of social exclusion, both in the developed as well as the underdeveloped societies<sup>25</sup>. However, the "beneficial force" of globalization cannot be denied, since it can mean the enrichment of the poorest. But it is necessary to raise again the point, rethink globalization from the citizen's point of view and for the citizen, to be presented as "a globalization with a human face"<sup>26</sup>.

The lack of adequate supervision and control by supranational institutions to adapt to the new situation is perhaps the most important deficit attributed to globalization. Because of it, there is a stronger need to establish and develop a transnational legal system that will govern globalization<sup>27</sup>. This is one point of view where the actual debate about

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<sup>23</sup> Globalization is not a "neutral" process, nor are its effects 'innocent' (Fariñas Dulce, 2004: 20). In this regard, globalization has not allowed for a reduction in poverty or a guarantee of stability (Stiglitz, 2002: 28-31). According to Castells, (2001a: 24) "what multinationals do is to lean on the demands of the countries and governments of the south to block the equalization of living and working conditions, relative, between north and south".

<sup>24</sup> Castells (2000: 111 and ff.) and Stiglitz (2002). In this line, Faria (1996) highlights how the global economy produces two status; those that "include" themselves in it, and those that see themselves as "excluded".

<sup>25</sup> It is necessary to limit the loss of autonomy of the state in order to avoid serious social problems derived from the poverty that capitalism aggravates (Ramos Quintana, 2002: 31).

<sup>26</sup> Stiglitz (2002: 11, 250 and ff.). It is necessary to consider a widely ignored topic: the globalization of man's freedom (Hongju Koh, 2002: 310). Fernández Buey (2005: 132) understands that the famous slogan "another world is possible" expresses a conviction in regards to the existence of attainable alternatives, since that, as Valiño believes (1998), a "more free and egalitarian" society is possible.

<sup>27</sup> The problem is a lack of connection between sovereign states and a political organization that controls the economy (Hobsbawm, 2000: 101-102) since, in spite of possessing a global system "we are deprived of a global government" (Stiglitz, 2002: 5), inasmuch as there isn't a "parallel tendency" between the globalization of economic and political institutions (Ramos Quintana, 2002: 31). This need is emphasized also in the labor field. Arthurs (2006: 51) connects that supranational institution with the need for a "Global Labor Right", which is important because "globalization makes evident that its protectionist purpose is not attainable unless it takes place in a dimension that exceeds state sovereignty" (Romagnoli, 1999: 19).

how to govern globalization focuses. It brings up<sup>28</sup> the need to redefine the role of the states, within a global context in which a global supranational authority would build up, under which countries and citizens would develop harmoniously and strengthen their bond.

Even so, the problem of the previous proposal resides in how to be able to accumulate enough social strength for its introduction, insomuch that democracy is a power implemented from the ground up. In this sense, another trend understands that the establishment of a democracy beyond national borders must take place at the bases, from the citizens themselves and their organizations, and not via the establishment of supranational powers<sup>29</sup>.

This proposal is interesting for the construction and articulation of transnational democratic levels, but as a last resort it must lead to formulas that will embody global democratic powers, as a first step to the establishment of that new democratic model. Even with its flaws, from the perspective of social policies, the European Union can be an example of the possibility of transnational authorities<sup>30</sup>. Meanwhile, is important that the "answer of the [national] legal systems evolves into a larger role of the international standards in the acknowledgement of rights"<sup>31</sup>.

## **2. Information and communication, protagonists of a new technological revolution**

The current technological revolution is not a novel circumstance in regards to preceding processes of intense technological innovation<sup>32</sup>.

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<sup>28</sup> In this sense Held (1999 and 2000), defends a "cosmopolitan democracy" under an international authority, to which the traditional state and regional sovereignties would be subordinates, which would allow to determine principles and measures capable of demanding responsibility from power centers which in reality operate beyond the control of the state. Given that, he believes, democracy should allow, in this new millennium, that the citizens participate, mediate, and demand responsibility in the social, economic and political processes, providing a voice at an international level to social movements and NGO.

<sup>29</sup> In this sense a "joint and participatory reinvention of the state" is suggested, where the local revitalization is very important, through a "globalized localism" (De Sousa Santos, 1998: 56-57). Along the same lines, Fernández Buey (2005: 166) and Baylos Grau (2001: 72), provide globalization perspectives that allow social groups to develop a reflection process and interact beyond national borders.

<sup>30</sup> Romagnoli (1999: 9 and ff.).

<sup>31</sup> López López (2001: 20). For abundant bibliography about labor standards, see UCLA's webpage, directed by professor Stone: <http://www.laborstandards.org/>

<sup>32</sup> Diverse and successive technological revolutions have existed in the social evolution (Masnatta, 1990: 581), with which the current one shares some common facts. Regarding this issue, see the interesting comparative analysis between the digital and the industrial revolution, and the role of the computer and the steam engine respectively, in the essay by Drucker (2001). A common fact, that some have highlighted as differential of the digital

Nonetheless, three differentiating circumstances can be highlighted<sup>33</sup>. On one hand, its aim (the processing, management and communication of the information) and the mechanism in which it is based (digitalization). On the other hand, the mutation of the material bases of the society they produce<sup>34</sup>. Finally, the "full awareness" of living during an "age of transformation, and not in a transformed society"<sup>35</sup>

In effect, the digital revolution is supported in the ICT, a concept under which are included a large quantity "of services, applications and technologies that utilize various types of computer equipment and programs, and that are often transmitted through the telecommunication networks"<sup>36</sup>. Therefore, the existence of a multiplicity of technical elements<sup>37</sup> that present a series of basic common characteristics must be emphasized<sup>38</sup>. Without harming the existence of multiple instruments of a physical nature that allow to handling and communication of the information, this one is, in essence, something intangible, immaterial<sup>39</sup>. Furthermore, other more important notes must be added, like its interactivity, automation, and interconnectivity that negate the concept of the user as a mere passive subject of the information. In this sense, the existence of computer networks notably increment the possibilities that the computer provides on its own. This way, the internet appears as the network of networks, the interconnectivity paradigm, and "the infrastructure of the society of knowledge"<sup>40</sup>.

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revolution, is the larger degree of feedback of the ICT in the creation of new instruments (Champaud, 1990: 815-816). Along these lines, Alarcón Caracuel (2004: 9) emphasizes not so much the novelty but the generalization of the ICT since the nineties.

<sup>33</sup> Castells (2000: 32).

<sup>34</sup> Binary code allows for the handling and communication of different information formats (voice, image, data) by converting it to the language of the digital age (Forester, 1987: 13). This digital conversion allows for the storing of large quantities of information with minimal hardware space, and it even frees information from the physical object, so that it can be accessed in real time in cyberspace, making distance something intangible, which also changes habits in relation to knowledge, learning, and way of thinking (Adell, 1997; Pérez Luño, 1987: 17 and ff.; Nora & Minc, 1978: 29 and ff.; Fernández Esteban, 1998: XIX; Thery, 1987: 35; Sartori, 2006: 14-19).

<sup>35</sup> Masnatta (1990: 581).

<sup>36</sup> European Commission (2001: 3).

<sup>37</sup> Echeverría Ezponda (2002: 77) recognizes seven relevant technologies within the concept of the ICT: telephone, television, e-money, computer networks, multimedia technology, videogames and virtual reality. A special feature of the ICT is that, by its nature, a process of convergence takes place of the different utilities they make possible.

<sup>38</sup> Cabero (1996).

<sup>39</sup> Barlow (1994).

<sup>40</sup> Adell (1997) and Serra (1999). Regarding the origin (in the project ARPAnet), evolution and the Internet expansion, specifically regarding the important role of the interaction, between science, the North-American military research programs and business culture, see,

Even so, in spite the fact that the computerization of societies began decades ago, the impact of the ICT, with the soaking they are currently experiencing, is still incipient and the uncertainty of its true reach, makes it necessary to channel its potential effects to benefit the public good<sup>41</sup>, especially if we keep in mind that its ductility allows it to affect a plurality of boundaries and levels<sup>42</sup>. Along these lines, is necessary a "technology assessment"<sup>43</sup>; that is to say, to appraise the consequences or the social impact that the ICT produce, as a prior and necessary element to channel them legally. And it, insomuch is not certain that we are in the presence of some type of technological determinism<sup>44</sup>. It's imprecise to consider that the ICT, on their own, are positive or negative. The emphasis must be, in contrast, on the fact that their effects, because of their ductility, affect various life facets in society in very different ways and depend on how they are used<sup>45</sup>.

Based on this outlook, the jurists are faced with the challenge of adapting the legal concepts and the doctrinal constructions thought for an "analogical" reality to the new "digital" environment to which they have to be applied<sup>46</sup>. In conclusion, it's about "trying to adapt that new global

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amongst others, the essays by Castells (2001b and 2000), Berners-Lee (2000), Lessig (1999) and Forester (1987).

<sup>41</sup> International Labor Organization (2001: 51), Klare (2002: 29) and Drucker (2001).

<sup>42</sup> Pérez Luño (1987: 47) established a classification in five large areas in which he warned about potential risks derived from technological innovation: ecology, economy, society, culture and politics. The debate over the effects of the ICT is only possible in industrialized societies (Lucas Murillo de la Cueva, 2003: 48 and Castells, 2000: 549 and ff.) due to the diverse impact in those and the developing countries. The existence of a "digital gap" adds to the differences in basis between both realities, intensified by globalization which will increase if economic development depends on the ICT (Campbell, 2001). A relevant fact related to the ICT is revealed here: they are a factor that, depending on its implementation and its use can contribute to the reduction of inequalities, or their increase. Even so, to be seen later, the most important challenges take place in the legal field (Martínez González-Tablas, 2002: 97).

<sup>43</sup> Pérez Luño (1987: 23). In a similar way, Fernández Esteban (1998: XXVII). The prior understanding of technology and the need for a conceptual agreement was highlighted by the German doctrine during the first steps of information technology (Garsta, 1973).

<sup>44</sup> Connecting the possible effects of the ICT with their uses can be seen the essay by Lucas Murillo de la Cueva (2003: 35); specifically about the internet and the positive opportunities as a way of acquiring information and knowledge: Sartori (2006: 67).

<sup>45</sup> Neffa (1990: 866-867) estates how today exists a generalized consensus in the absence of a technological determinism, in contrast to what was taking place during the sixties where some sectors declared that all the effects of the introduction of the scientific and technological change were going to be positive: "the technical process is the result of a social relationship". Prieto, Zornoza & Peiró (1997: 37) express themselves along the same lines.

<sup>46</sup> Fernández Esteban (1998: XXVI).

reality to our conceptions or even prior prejudices that come from a very different past"<sup>47</sup>.

The preoccupation with privacy becomes a central issue, as it couldn't be any other way in a society that revolves around information<sup>48</sup>, and this is a field that presents a good example of the legal adaptation to the new technological reality. The potential affectation to the citizen's privacy that characterize the ICT, cannot lead us to the conclusion that these are an insuperable threat to privacy. So, as we will see later, together with technical instruments for its safeguard, at a legal level the concept of privacy has experienced an evolution to mold to this new reality, considering itself a right of "informative self-determination that predominates the participation and control of the people and social groups of the flow of information that affects them"<sup>49</sup>.

## **II. THE FLEXIBILITY: A NEW PARADIGMATIC VALUE OF THE LABOR RELATIONS IN THE DIGITAL AGE**

### **1. Globalization, ICT, and flexicurity: determining factors of the contemporary labor relations**

This globalized and highly digitalized scenario has notably influence to the labor relations and the labor law<sup>50</sup>, generating various

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<sup>47</sup> Peccei (1982: 162). The role of judges in the characterization of the legal answers given to technological advances is highlighted by Lucas Murillo de la Cueva (2003: 78). In this sense, as he states, the legal interpretation "that isn't to say which is the rule that solves each concrete litigation, makes possible the gradual suitability of the legal system to the new circumstances, extending the foresight of the rules to suppositions not contemplated when the regulations that apply were drawn up. That lively right, although it cannot take care of all the social requirements, can take on a good number of them. This way, the application of the principles that, in last resort, corresponds to the judges, offers solutions to the problems that scientific progress poses and the technological changes that accompany it and paves the way for the formal recognition of the new figures of law".

<sup>48</sup> Which states that the faint line between censorship and respect for privacy is "stepped on" constantly (Bates, 1989: 24).

<sup>49</sup> Pérez Luño (1984: 317 and ff.) that later added that the conceptual reconstruction of the right to privacy responds to "historic realization of the basic values of freedom, liberty, equality and dignity of the human being" (Pérez Luño, 1987: 125).

<sup>50</sup> In fact, "we are now undergoing another fundamental transformation of the workplace" that illuminates a new "production regime... [that] is neither static nor predetermined" (Stone, 2004: vii). The globalization brings a new shape to the national economies (Arthurs, 2006: 51), and causes "visible transformations to the Labor Law" (Ramos Quintana, 2002: 44) since it changes the reality object of regulation (Baylos Grau, 1999: 29). In addition, the EUROPEAN UNION stands out this impact and the need to adapt to the labor market

transformations that, as we will later on see, alter in favor to the companies the “power relations” with the workers<sup>51</sup>. The “worship market” tendency<sup>52</sup> needs to connect with the “environmental flexibility” imposed during decades to our discipline<sup>53</sup>; a kind of “magic formula”<sup>54</sup> presented as “requirement for our time”<sup>55</sup> that needs to increase<sup>56</sup>, that is a very broad concept that allows different formulas and that acts in different areas<sup>57</sup>.

Since the European Union, through the Luxembourg (1997), Lisbon (2000) and Stockholm (2001) Strategies, in relation to employment and competitiveness, the goal is to impose to the labor markets of the European Union countries the requirement of flexibility as to ensure, moreover, the employment growth. This context sets out the flexicurity as the last flexibility formulation<sup>58</sup>. It combines two conflicting aspects: on one hand, mechanisms that allow flexible labor markets, cutting or removing guarantees in working conditions; on the other hand, a high level of unemployment protection of Social Security systems that guarantee the workers coverage in job transitions<sup>59</sup>. This last aspect emphasizes constant learning and active employment policies. The European Union sustains that it would favor “a more equitable, responsive and inclusive labor market” to allow an improved competitiveness<sup>60</sup>. Notwithstanding the above, this social policy consolidates the transition from a labor relations system based on a

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(European Commission, 2006b: 6), being necessary to balance the production needs and the juridical solutions (González Ortega, 2004: 9).

<sup>51</sup> Durán López (1998) and Arthurs (2006: 51).

<sup>52</sup> Romagnoli (1999: 11).

<sup>53</sup> D'Antona (1990: 11).

<sup>54</sup> Caruso (2004a: 11).

<sup>55</sup> Mercader Uguina (2002: 64). Flexibility is “a natural element (...) in which we need to coexist” (Martín Valverde, 1996: 410).

<sup>56</sup> Due to the introduction of the ICT, the competition imposed by the globalization, the evolution of the goods and services market, and the expansion of the services sector (European Commission, 2006a: 4).

<sup>57</sup> Caruso (2004a: 11). In this respect, Recio (1997: 161 and on) distinguish three fields: the economic, productive and work flexibility. In relation to the last one, there are two different types of the most common adjustment mechanisms: external (worker's company volume, temporary contract and firing) and internal (new production processes that impact the working conditions).

<sup>58</sup> López López (2006b: 2-3). According to the European Union, conciliation regarding flexibility requirements with the demands to offer maximum guarantees to all, is a major challenge faced (European Commission, 2006a: 3).

<sup>59</sup> See Social Agenda (2006: 15 and ff.).

<sup>60</sup> European Commission (2006a: 4).

model of stability, to another in which the basic principle is employability as the ability of workers to get a job easily<sup>61</sup>.

The above policies reinforce the companies' position of power, since not only they benefit with the flexibility tools allowed by the legislation, but also the absence of training workers obligations in order to guarantee their employability. The worker and the social protection systems are the ones that withstand the burden of the system in order to guarantee the safety, acting "as a clear mechanism ... for shifting companies' responsibilities to other subjects"<sup>62</sup>.

## **2. The post-fordism: a new form of productive organization**

The seventieth economic and productive crisis meant a crisis in the fordism production model, introducing major organizational changes to obtain more flexibility, which is the "idea-motor" of the current model<sup>63</sup>. The traditional model, based on mass production and widespread consumption, presents a strongly hierarchical organization of work, and a clear and strict delimitation of the tasks depending on the qualifications of the worker<sup>64</sup>.

In the Digital Age, the correlation flexibility-competitiveness-globalization makes it easier with the generalization of the ICT, allowing new productive systems, with a decentralized and coordinated production, adapted to the market and that reduces costs that impact on the individualization of work, organizing it less stiffly<sup>65</sup> and modifying

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<sup>61</sup> López López (2006b: 3).

<sup>62</sup> López López (2006b: 5), who warns about the difficulties of implementing the model nationwide.

<sup>63</sup> Mercader Uguina (2002: 51). The diverse impact of the flexibility can be seen in the plurality of denominations of the new model: "flexible production" (Piore & Sabel, 1990), "neotaylorism" (Lipietz, 1997), "post-industrial" (Bell, 1976: 57), "post-fordism" (Moreno Márquez, 2003: 158), "post-modern" (Mercader Uguina, 2002: 52) or "networked" (Castells, 2000: 201).

<sup>64</sup> See Moreno Márquez (2003: 158 and ff.) and Mercader Uguina (2002: 49-52), who notes that "history of industrialization has been the history of the transformations and changes in methods of work organization".

<sup>65</sup> According to González Ortega (2004: 22), the work becomes "horizontal" because the ICT simplifies the production phases. The organization supports various technological options (Finkel, 1994: 139), what connects to what Zanelli (1986: 88) called "decentralization of the electronic age". This relocation may be external (subcontracting to other companies) and internal ("displacing" workers outside the workplace through forms such as telework) (Alarcón Caracuel, 2004: 13). It generates a "new concept of work" characterized by the disappearance of the traditional labor division and a major employment in the services sector, which produces "structural changes" in the labor market as the increase in atypical contracts (Mercader Uguina, 2002: 49-58). On these new production models, see: López

terms of working conditions<sup>66</sup>. In this way, "decentralization and diversity" substitutes "centralization and homogenization"<sup>67</sup>. This new model represents in some cases "a revolution"<sup>68</sup>. However, it is not an indeed majority, but coincides with traditional structures<sup>69</sup>, being the impact of the ICT on business organization very diverse, allowing the coexistence of models in the same company<sup>70</sup>.

Major risks for workers' rights in this model and in a globalized world are fragmentation and relocation of the production process. Many companies adopt complex structures, relocating some productive stages without affecting the unit process, and seeking codes of laws that represents less costs<sup>71</sup>. There are different effects of these practices. On the one hand, influences in negotiations between the company and the workers, reducing the power of these ones. On the other hand, it is state that it can lead to Western labor standards disappearance<sup>72</sup>, with the danger of creating a "race to the bottom" to reach competitive regulations that attract investors<sup>73</sup>. As a consequence, it causes an

Peña (1996: 41 and on), Belzunegui Eraso (2002: 80 and on), Pérez de los Cobos (1990: 15 and on); Prieto, Zornoza & Peiró (1997: 9-22); Castells (1996).

<sup>66</sup> González Ortega (2004: 22), requiring higher levels of qualification (Ramos Quintana, 2002: 73).

<sup>67</sup> Ramos Quintana (2002: 32). To Pérez de los Cobos (1990: 17), the ICT encouraged, in the eighties and nineties, decentralizing to adapt the organization to market fluctuations, dividing the production, keeping the most profitable and externalizing the rest.

<sup>68</sup> González Ortega (2004: 19-21). The impact is greater depending on the subject of the production process, especially in the ICT based companies (Champaud, 1990: 818 y Cruz Villalón, 2000: 256), whose most obvious example is the "virtual corporation", organized at a distance and with different employers (Castells, 1996), since this information model is a "fundamental element" of the ICT and "the axis of this system" (Moreno Márquez, 2003: 157-158) and its characteristics the intangibility and the juxtaposition of space and time (Ribera, 1997: 11).

<sup>69</sup> Alarcón Caracuel (2004: 9-10).

<sup>70</sup> Belzunegui Eraso (2002: 77 and ff.).

<sup>71</sup> The ICT contribute to dissolving the traditional corporation, "enabling widespread subcontract and the search for geographical areas... more competitive" (Ramos Quintana, 2002: 36). As rightly observed by Alarcón Caracuel (2004: 11-13) this is a constant practice of capitalism; the originality is that the ICT greatly facilitates it, especially in the services sector; the potential problems of social dumping is not anything new, but can develop in that area. He points, as a matter of concern, the loss of "economic equilibrium of a definite society" when it eliminates the "worker-consumer equation".

<sup>72</sup> Stone (2006a: 83 and ff.), as Cooke (1997) and Scott (1998) demonstrate empirically that US companies assigned jobs requiring little preparation in countries with low wages and low union density, leading to lower wages and increased unemployment. See Stone (1995: 987 and ff.). Arthurs (2006: 54), suggests another result of relocations: create a "new international labor division" in the meaning of Portes & Walton (1981: 189).

<sup>73</sup> As Ramos Quintana (2002: 35) notes that "since the management of each State, in guidance to legislative review and reduce the social status of implementation".

international fragmentation of the labor union movement<sup>74</sup> and political power diminishes<sup>75</sup>.

### 3. The concept of worker in the Digital Age

The organization of production is directly linked to the type of worker<sup>76</sup>, thus the variation of those requires examining what happens with the worker definition<sup>77</sup>. The industrial worker, the one who renders services for an indefinite term and full-time, is the prototype in which Labor Law is based, and is characterized by subordination and the "behalf of another" note. It is a model in crisis for different reasons<sup>78</sup>, and that leads to blur the Labor Law boundaries due to the increase of "atypical forms of work"<sup>79</sup> and for the extension of their protection to collectives that do not have those distinctive notes, which provide conceptual complications and fragment the subjective traditional model<sup>80</sup>.

In the productive structures that make intensive use of the ICT, we can notice the attenuation of some of the expressions in which traditionally the "behalf on another" note has been interpreted<sup>81</sup>. Nonetheless, its traditional conception is still valid due to its "neutral

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<sup>74</sup> Strategies and objectives which are national, and differ mainly between developed and developing countries, which advocates a strategy based on a single transnational organization to negotiate for parity (Stone, 2006a: 86).

<sup>75</sup> By limiting state with respect to economic decisions (Ramos Quintana, 2002: 34).

<sup>76</sup> Mercader Uguina (2002: 77-78). Regarding this, Freedland (2006: 3) defends a wide category (personal work nexus) set up by a family of contracts where the traditional employment contract is not anymore the predominant and absolute paradigm. To go deeper into this debate: Langille & Davidov (2006) and Freedland (2003).

<sup>77</sup> The Workers' Statute, provides in section 1.1 its subjective scope of application on "the workers voluntarily rendering their services for compensation on behalf of another party, within the scope of the organization and management of another, physical or legal person, called the employer or entrepreneur".

<sup>78</sup> In comparison to traditional organizations, the current ones are flexible, decentralized and with great autonomy in the execution of work, making difficult the use of signs that those allowed (González Ortega, 2004: 23); in this way, Ramos Quintana (2002: 45) states that the greater degree of autonomy may facilitate the escape of labor law. Other reasons are: the introduction of the ICT (Carinci, De Luca Tamaio, Tosi & Treu, 1998: 12); the importance of services sector or more heterogeneous composition of the workforce (Mercader Uguina, 2002: 77).

<sup>79</sup> The difference between worker and self employed "no longer accurately reflects the economy and social reality of work" (European Commission, 2006a: 12).

<sup>80</sup> Romagnoli (1999: 17-18) and Mercader Uguina (2002: 77). The ILO (2006) has urged its members states, after consultation with social partners, to take steps to regularly review the scope of labor law and, if necessary, to clarify and adapt an effective protection of workers.

<sup>81</sup> González Ortega (2004: 23).

character" and the huge degree of abstraction given by the academic contributions<sup>82</sup>.

With regard to the characteristic of subordination, the new productive organization changes it completely<sup>83</sup>, because its application is difficult for highly skilled workers that have great autonomy<sup>84</sup> and for the proliferation of the ICT that allow a more flexible time and location work<sup>85</sup>. In this way, the new subordination forms reassessed, especially digital, as the ICT allow the control of the work activity<sup>86</sup>.

Another identification criteria is needed, focusing the attention, as supported by González Ortega<sup>87</sup>, in "a more comprehensive idea, symbolizing the true existence of an economic organization of a third person in which the worker collaborates with assistance by integrating their services in a production structure [that]... offers the entire product to the [market for goods and services]". This vision connects with the macro concept of "behalf on another" suggested by Alarcón Caracuel, to match with the legal-employment guardianship the different forms of

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<sup>82</sup> Mercader Uguina (2002: 86-88). Spanish academic contributions to explain the concept of belonging to others are made by Alonso Olea (1967: 117 and ff.), Bayón Chacón (1961: 451 and ff.), Montoya Melgar (1972), Albiol Montesinos (1971: 41 and ff.) and Alarcón Caracuel (1986: 495 and ff).

<sup>83</sup> Because they suffer a "de-naturation" (Montoya Melgar, 1999: 62), a "gradual dissolution" (Supiot, 2000: 139).

<sup>84</sup> Mercader Uguina (2002: 82). According to Sennet (1998: 117) is a "culture of cooperation" over authoritarian conceptions. According to Hammer & Champy (1994: 75), the worker is no longer controlled but entitled. We face a "new stereotype of a semi self-employed salaried working", where the emphasis is on quality work and not on the time, the remuneration is linked to outcome and the priority in general orders instead of specifics (González Ortega, 2004: 23).

<sup>85</sup> That evidences "the widespread phenomenon of the weakening of the dependence in the classic sense of direct subordination of the worker... to the power of management and organization of the employer" (González Ortega, 2004: 23). In a similar vein, Mercader Uguina (2002: 83-84), raise the matter of reconstruct the indications, many of which are put in doubt (Pérez de los Cobos, 1990: 35).

<sup>86</sup> The ICT influences mainly in the forms of control of the activity (Alarcón Caracuel, 2004: 13). ICT and the integration of the worker in the company through them, determined by the employer, replaces the decrease or disappearance of the traditional direct control of the work (Veneziani: 1987: 18), since "the distance is not synonymous of lack of supervision" (Thibault Aranda, 1998: 97). Telework is an area that allows a dangerous escape of labor law (Ramos Quintana, 2002: 36). Gaeta (1998: 348) also emphasizes the control of work by the employer: a continuous and direct control, leading to say that this is subordinate employment.

<sup>87</sup> González Ortega (2004: 23).

provision of work that reduce their subordination with the introduction of the ICT<sup>88</sup>.

Finally, we need to point out that the boundaries between self-employed and subordinated work weaken and fade. For this reason, the labor law raises the challenge of clarifying its borders if it does not want "to be a victim of itself". It should be a regulation that protects the situations of need in the current socio-economic systems<sup>89</sup>.

#### **4. Working conditions in the Digital Age: a model of uncertainty, fragmentation and inequality.**

The current production model also influences the performance of work, leading to new labor practices<sup>90</sup>. Below is a discussion of some aspects processed in the Digital Age. Departing from a traditional model based on the stability of the "company- universe" to a precarious one that takes place in the "labor market-universe", we will indicate how the paradigm of flexibility is projected on the determination of working time and content of working provision, to end by pointing out how employability becomes the compass that workers must use to navigate the "labor market-universe".

##### **A. From a (traditional) model of stability to a (new) model of precariousness**

During the twentieth century, the full-time long-term contract became the "polar star of European Labor Law"<sup>91</sup>. Career took place in what I call the "company-universe" that formed the internal labor markets<sup>92</sup>, which offered an "implicit promise of long-term labor"<sup>93</sup>.

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<sup>88</sup> Alarcón Caracuel (2004: 9 and 1986: 495). This idea is also supported by González Ortega (2004: 24), who points out that insertion in the organization removes all control of direct relationship of the worker with the market.

<sup>89</sup> Mercader Uguina (2002: 88), Ramos Quintana (2002: 46) and Cruz Villalón (1999: 52). On the direction of regulation, Pedrazzoli (1988: 119) argues that labor law does not attract its core protective these realities, but fragments its tutelage. The economically dependent self-employed worker is shown as a concept of "border" between subordinate employment and self-employed (European Commission, 2006a: 13). See the proposals made by Freedland (2003).

<sup>90</sup> Stone (2004: ix).

<sup>91</sup> Romagnoli (1998: 12).

<sup>92</sup> Fordism production model is the one that "contributed" to the creation and maintenance of these internal labor markets, characterized by restrictions on access to new employees, reserving jobs for senior employees (Mercader Uguina, 2002: 51).

<sup>93</sup> Economic and professional career rights: a career structured, hierarchical, where each position provides the skills necessary to develop the following (Stone, 2006a: 76).

At present, the flexibility has resulted in a change to the "market-universe", reflecting a greater vulnerability of the worker as it leaves the job stability as a traditional value that built the labor law. Economic change leads companies to dismantle their internal labor markets and implicit promises of stability and replaced by a boundaryless career and training to enhance employability, to be consolidated as a paradigm of the employment relationship<sup>94</sup>.

Flexicurity policies have as their object the boundaryless career that runs the "market-universe", combining flexibility and security to achieve a dual purpose: eliminate rigidities in the labor market and to allow transitions from one job to another<sup>95</sup>. However, it raises the problem of the degree of protection of national systems and the worker training configuration as a right weak, as a worker responsibility, resulting in better utilization of corporations of the margin of flexibility established by public policy<sup>96</sup>.

In the new framework of the "universe-market", flexibility leads to an increase in atypical forms of contracts<sup>97</sup>, promoted since the nineties by the European Union, replacing the long-term contract for temporary types of contracts, because they can generate more employment<sup>98</sup>. There is a danger that this process will lead to a fragmentation of the labor market between insiders (workers with long-term employment) and outsiders<sup>99</sup>. However, it also fits the classic

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<sup>94</sup> Stone (2004 and 2006a), who argues that one of the main problems detected in the employment structure and regulatory and legal North American labor is that empirical basis in which it was built has disappeared. Ramos Quintana (2002: 37) attributed to the impact of globalization on labor relations, the erosion of security value.

<sup>95</sup> European Commission (2005).

<sup>96</sup> López López (2006b: 5). Indeed, in the boundaryless career is expected to be the workers who turn their career (see Arthur & Rousseau, 1996).

<sup>97</sup> In this way, Castells (1998b), who shows percentage changes experienced by these modalities.

<sup>98</sup> The objective of this process is the dissolution of guarantees, linking to the guidelines of the market duration and termination of contract (López López, 2006b: 2). While job stability is generating higher productivity (ILO, 2005: 214), it is challenged that argument in the EU. According to Mercader Uguina (2002: 139), job insecurity resulting from term contracts imposes an "uncertainty principle". Explains this pattern because of the strong demand for employment allows the employer to increase his power as far as the duration of the relation and because the most qualified workers, when offering their services in the labor market, they have the ability to control the rendering of the services. In the same sense, Stone (2006a: 80) considers that the work is strongly marked by the sign of the contingency, for short duration and the loss of linkage between employee and company.

<sup>99</sup> Employment Taskforce (2003: 9). In relation to the problems of equality between the two collectives, it can produce a "substitute on equity" (Verkindt, 1995: 873). This information is linked to the level of qualification, depending on the area (Castaño Collado, 1994: 82),

contract with the aim of giving companies and workers more flexibility. Nevertheless, the European Union proposals are paradoxical, since it facilitates a regulatory flexibility from a unique business perspective (reviewing the definition, notice periods, costs and dismissal procedures)<sup>100</sup>. Thus, a manifestation of loss of stability value is the elimination of the traditional rigidities to the contractual extinction<sup>101</sup>, reducing or eliminating their cost, which is worrying because it separates "the mechanism of obligations and rights under the contract"<sup>102</sup>.

## **B. Fragmentation of working time**

Opposite to the tradition trend of limiting the working day, strongly homogenized, at present the flexibility promotes to adapt this labor condition to the market needs. Several formulas are provided by law<sup>103</sup>, resulting in a model characterized by fragmentation and diversity (between sectors, companies and within them), which makes working time one of the most important elements for the labor relations system<sup>104</sup>. Additionally, in connection with the proliferation of atypical forms of contract, there are policies to encourage the part-time contract, which allows companies to more flexible and efficient adjustments<sup>105</sup>.

The ICT do not necessarily influence in this matter, although in some cases, such as teleworking, it has "extreme" consequences, blurred as work time available to the employer, who through that controls direct

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which affects the increase in contractual power or on the precarious link to the "weight of subordination" (Mercader Uguina, 2002: 140-142).

<sup>100</sup> See Employment Taskforce (2003: 30).

<sup>101</sup> Romagnoli (1998: 13), who explains how the law was working in his field including the constitutional right to work, through interpretation enforced with a "deformed" tied to limitations on the contract termination. The current model allows its correction, and requires focus on the right to work, using that training obligations and allowing an effective employability of workers as they need security in the new world-market.

<sup>102</sup> López López (2006b: 1-6), that reducing costs is a goal in itself and not a formula to generate employment, which together with the parallel diversification of contractual modalities with negative balances for the employee, together make a reduction of guarantees for workers.

<sup>103</sup> Annual working time, flexible hours, week low, shift work, night or day continued. For a discussion of their advantages and disadvantages: Albizu Gallastegui (1997: 53 and ff.).

<sup>104</sup> Ramos Quintana (2002: 40). From the business point of view, (Mercader Uguina, 2002: 142-144) flexibility of working time is ideal, in a context of continuous technological evolution with high adaptability to the production process, to cope with fluctuations in prices of production factors and demand for products and services. This process was observed in all areas, including industry, which approximates to the services sector (Bosch, 1998: 15).

<sup>105</sup> Also advocated as a means of allocating employment and to facilitate reconciliation of work and family life. Compared to other countries such as Holland, Spain has a very limited use due to more regulation in the social rights of those (López López, 2006a: 10-12).

and immediately the work and performance<sup>106</sup>. It is therefore necessary to link results and time needed to achieve them, which can be accomplished through multiple direct and indirect forms. This new parameter of control can assume beneficial consequences for the worker, enjoy more autonomy and manage their performance of the services through a flexible schedule that allows them to combine work and personal life<sup>107</sup>.

On the other hand, we need to point out that the increased productivity implied by the ICT, raises the technical possibility of reducing working time. However, it does not automatically convert the rules and it is not considered in the strategies and business practices. The companies eject traditional responsibilities to the market and do not take these new ones associated with the flexibility. It is necessary to make the most of the advantages of working time allowed by the ICT, since despite the relative effectiveness as a means of job sharing is a "good in itself: the conquest of time-released from the yoke of work to man"<sup>108</sup>. This line should guide the European Union policies to adapt its contents, enabling a "perspective" of the flexibility of working time for worker as a real option<sup>109</sup>, enabling them to exercise "sovereignty over time"<sup>110</sup>.

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<sup>106</sup> Without taking into account the time needed to achieve the outcome and timing blurring of work and not work which can lead (González Ortega, 2004: 32-34) to a dangerous "temporal dispersion of the obligation to work for ... the lack of debt work." In connection with the need for continuous training of employees requires a time commitment that typically takes place outside of working time, increasing an "invisible work" that causes not to match actual working time and actual duration (Ramos Quintana 2002: 40 and Mothé, 1994: 52)

<sup>107</sup> However, this autonomy is free only "fictitious" since it is not immune to corporate control (Ramos Quintana, 2002: 41), which advocates the need to understand not only the time as working time, which measures the wage-work trade, "but as a subjective experience in relation to the time of the person's life," such considerations support the individualization of working hours imposed by Directive 93/104, based on the principle of adapting work to man. It is, in short, a change in the forms: flexibility gives a new power, despite the apparent freedom offered to the employee, "not free of restrictions" (Sennett, 1998: 61). See, on the individual and collective control of working time, training and leisure: Supiot (1999: 136 and ff.).

<sup>108</sup> Alarcón Caracuel (2004: 10). In this vein, among the proposals made by Gorz (1997: 245 and ff.), It affects the need to reduce working time, changing the way we work, improve it.

<sup>109</sup> Establishing a "greater connectivity and proximity between working time and personal life time, between economy and society", correctly noting that "technology does not determine a unique sense of flexibility", connecting it with the possibilities through collective bargaining about the use of the ICT as a mechanism for allocating employment through the reorganization of working time (Mercader Uguina, 2002: 138)

<sup>110</sup> Rocher, Fynes & Morrissey (1996: 142).

### **C. Changes imposed by the flexibility over the professional qualification**

There is a connection between productive model and the content of labor provision, which assumes that changes in production loosen the required qualifications<sup>111</sup>. The traditional model is built on a strong division of labor, creating jobs whose content is specific and concrete routine; requires highly skilled workers in a context in which different skills are unimportant, and therefore reduces the training levels and necessary skills and abilities<sup>112</sup>.

The current model is built on the budget of horizontality and flexibility transforming the "disciplined worker" in a "flexible man"<sup>113</sup>. Its main characteristics are evaluation of aptitudes, skills and behaviors: it requires a more versatile and general knowledge that creates inter-functional or "invisible" tasks and more extensive career profiles. Compared to traditional rigid systems of job classification that allow the worker to determine their contractual obligations and limit the power of direction, this is hardly compatible with the current organization, which promotes the versatility (even requires) functional mobility, which facilitates a broader exercise of the employer power<sup>114</sup>.

The specific content of work activity changes modifying the qualifications required for their development, leading to overflow of the professional categories, which accentuate their obsolescence, being replaced by the broader concept of professional group<sup>115</sup>. Reconsidering the classificatory system and integrate mobility as part of the contract may involve an increase of the employer power. But it also has potential

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<sup>111</sup> There is a cause-effect relationship between the means of production used, how to organize the work and the design of the tasks on the one hand, and on the other, qualifications required (González Ortega, 2004: 25).

<sup>112</sup> Smith (1994: 115 and ff.). The division of tasks involve monotonous routine of work affecting the worker's career potential (see Taylor, 1970), leading to "individual robot"(Ramos Quintana, 2002: 39). Templates are higher than those strictly necessary and the worker is much less prepared to challenge the conditions of supply. See Mercader Uguina (2002: 125-126), who asserts that one of the main objectives was to limit the negotiation power and the capacity of workers to claim.

<sup>113</sup> Mercader Uguina (2002: 125).

<sup>114</sup> González Ortega (2004: 26-27); Mercader Uguina (2002: 127-128), who warned that support for versatility should not detract from professional qualification, so techniques are needed for maintenance, improvement and adaptation; Pérez de los Cobos (1990: 96-97), who detects, together with Butera (1987: 37) a crisis of the present conception of professionalism, job classification as an organizational system that organizes it and the legal tutelary instruments. Ramos Quintana (2002: 32). Stone (2006a: 80 and ff.) also emphasizes the increase of functional mobility and the disappearance of hierarchy leading to an increase in the power of discretion into lowers level categories.

<sup>115</sup> See Mercader Uguina (2002: 128-129) and González Ortega (2004: 27).

benefits for the worker, through integration into the logic of contractual trade and trade-offs between functional mobility and compensation and may not impose a decision to change<sup>116</sup>.

With the changes described, the impact of the ICT on the labor systems is important, though with a different degree of impact on workers, connecting "technical change and flexible qualification"<sup>117</sup>. In addition, they have the ability to generate new jobs aimed at the information, characterized by flexible working conditions and high mental component information<sup>118</sup>.

Finally, we should talk about the connection between job classification system and retribution, working condition that it relaxes<sup>119</sup>. Compared to traditional pay systems, collectively set uniformly, there is an individualization based on multiple criteria, which is linked to results<sup>120</sup>. In some cases, the goal is to reward the contributions of workers to the company and its value in the labor market, to influence their abilities, skills and knowledge and keep them in the company<sup>121</sup>.

#### **D. The importance of training to the demand of employability**

The boundaryless career that runs the "universe-market", causes the worker is doomed to travel on uncertain pathways. The traditional career, sitting on the edge of the "company-universe", -oriented over a maximum of two degrees or levels of training, is subject to fluctuations, conditioned by the need to take other jobs, not always better from the point of view of the level of training required<sup>122</sup>.

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<sup>116</sup> González Ortega (2004: 28-30): the "normalization" of mobility would be to establish guarantees linked to training, promotion, compensation of various kinds and the defense of "professional worker's assets".

<sup>117</sup> Mercader Uguina (2002: 127). The ICT can also allow to eliminate repetitive, routine and boring tasks, increasing autonomy and responsibility (González Ortega, 2004: 26), although this would depend on the capacity to manage them, allowing those who receive it have his work as a profession, but degrading the work of the rest (Prieto, Zornoza & Peiró, 1997: 21-22 and 101-102 and Pérez de los Cobos, 1990: 97-98).

<sup>118</sup> Prieto, Zornoza & Peiró (1997: 103-104).

<sup>119</sup> This impact has a "hidden hand": the increase of judicialization (López López, 2008).

<sup>120</sup> The ICT revitalized the importance of working time as a criterion for evaluating the work effort, being moved by the result, which together with the individualization of pay leads to the need for objective tools that offer security to make sure that this diversity action does not mask the discretionary actions (González Ortega, 2004: 30-32). In relation to compensation systems in general, see Uguina Mercader (1996).

<sup>121</sup> See Stone (2006a: 81) and Drucker (2001).

<sup>122</sup> See Ramos Quintana (2002: 41-42).

The importance of training is evident<sup>123</sup>. Regarding the traditional production model, where the required knowledge is static, task-based, currently requires dynamic knowledge-based processes. It is the productive context which forges concept of employability, which transforms the worker as "server loyal" to a "committed professional"<sup>124</sup>. Thus, the fragmentation seen in previous pages joins the derivative from the degree of employability to reach the worker, as a capacity to work<sup>125</sup>, which aims primarily at a general awareness that it can carry as capital for use in the "universe-market"<sup>126</sup>.

It is argued, from a broader perspective, the need to redefine the capabilities of general education to adapt to the productive system. They must rely on the ability to process information, to associate ideas and know each time what qualifications are needed, how to access them, learn and apply, installing walkways between work and education, as the market demands requiring fast changes<sup>127</sup>.

The worker must take responsibility for their own training, assuming the risks of not responding to the demands of the ICT. Workers must claim to get training through the company, a new conception of the training content of the contract as a employer obligation, which compensates for the expansion of corporate power and scope of work that use the ICT, connected with the professional structure and adapted to the demands of mobility and versatility<sup>128</sup>. It will contribute to the

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<sup>123</sup> The importance of the training in the employment relationship is interesting de Stone (2006b) states (2006a: 81) that the new model gives a new role to the knowledge and skills of the worker. The EU also insists on its relevance (European Commission, 2006a: 3).

<sup>124</sup> Mercader Uguina (2002: 131); De la Poza (1998: 4); Sáez & Torres (2000: 4).

<sup>125</sup> In this sense Castells (1998b) distinguish between two types of workers: a generic worker who executes instructions needed for a basic level of education and that are associated to job positions easy to remove; and a worker "autoprogrammable" able to "re define his capabilities", allowing it to adapt to technological change and aspirations for new occupations (see also Mercader Uguina, 2002: 130). Fragmentation in relation to training is also planned in different ways between developed and developing countries but which thanks to the ICT, they can also help to overcome historical gaps (De la Torre, 2002: 36).

<sup>126</sup> Stone (2006a: 92-95). The "explicit knowledge", knowledge of the business and development work, is reduced in this new model (Castells 1998).

<sup>127</sup> See Castells (1996 and 1998b). However, notwithstanding the importance of a degree of adequacy, we must not forget that the main objective of the education and training policies does not only relate to the development of work, but is much broader (De la Torre, 2002: 36)

<sup>128</sup> González Ortega (2004: 35-36). According to Mercader Uguina (2002: 129-137), the right to participate in this training must be linked to different issues than the age range, such as job characteristics or profile of the worker. In this sense, Stone (2006a: 90) means that companies may be pressured to contribute to human capital of employees in one location, through different pathways.

employability of providing a genuine worker's advocacy role to the new demands placed upon it, which would reduce the risk of exclusion.

### **III. METHODOLOGICAL PROPOSAL FOR THE EFFECTIVENESS OF WORKERS FUNDAMENTAL RIGHTS FROM A CASE STUDY**

#### **1. Rethinking fundamental rights in the Digital Age**

The relationship between employer and worker is not only obligatory but, above all, "a relationship of power"<sup>129</sup>, that juxtaposes with the economic asymmetry from the start. As we have seen, in the Digital Age, this different position between the parties regarding power, favors the companies, weakening labor rights and the capacity of union pressure. On one hand, because they can adopt new strategies more easily<sup>130</sup>, and on the other, because flexicurity dissolves the stability value<sup>131</sup>. All these issues are inserted within a more global debate regarding the notions of labor, worker and the legal titles of interchange of work and salary<sup>132</sup>.

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<sup>129</sup> Sinzheimer (1984: 75).

<sup>130</sup> Global companies affect labor rights due to their large proportions and economic power: they can acquire diverse legal personalities, maintain long lawsuits and endure strikes (Arthurs, 2006: 55). For Stone (2006a: 81-83) "while we cannot see globalization directly, its imprint is evident in the spread of foreign plants across domestic landscapes, the telecommunications and computer technologies that enable firms to produce, distribute, and market all over the world, falling trade barriers, and the fading foreign exchange restrictions. National borders are becoming permeable to products made all around the globe and to global capital flows", stating furthermore that the unions' loss of power is linked to the upholding of traditional practices, removed from the new digital productive reality. Regarding the impact of globalization in production and work: Hepple (2003: 28). Castells (1998b) explains the fall of affiliation because of globalization, although Navarro (2002: 30) understands that it is not globalization, but the political will to facilitate or hamper it.

<sup>131</sup> For Caruso (2004a: 15) "it appears, however, to be a general fact that we have passed from an excess of rigidity in organization and management – which was typical of the Fordist social and production model (in the 60s and 70s) – to an excess of flexibility, which is at time useless and economically expensive, as well as harmful from a social and human viewpoint". For Freedland (2007: 19-20), ILO Recommendation No. 198 and EU Green Book present similar aspirations, but their political orientation is subtly different: the first tries to modernize labor rights "by making them more robust"; the second one, "adapting it", through flexicurity.

<sup>132</sup> "One consequence of this transformation is that it is necessary to rethink the nature of employment regulation at a fundamental level" (Stone, 2004: ix), for the joint action of technological evolution, economy and ideology (Loy, 2005: 66).

It must be emphasized how the current sources of the law are characterized by its complexity, since instruments of soft law and supranational collective agreements coexist and combine, with multilevel regulation headquarters (international, transnational and national)<sup>133</sup>. Especially worrisome are the codes of conduct of transnational companies that present themselves as alternatives to the legal rules<sup>134</sup>. In this framework, begins an intense debate about the role of labor rights as human rights<sup>135</sup>, with the object of establishing minimal standards and limit the power of companies and the regulator role they intend to play, along the lines of reducing inequalities<sup>136</sup>. The Charter of Fundamental Rights of the European Union, the ILO Declaration on fundamental principles and rights at work<sup>137</sup> and the United Nations Global Compact<sup>138</sup> are prominent declarations of that recognition.

This field of research connects with central themes of our discipline, as the exercise of fundamental rights and the right to dignity as limits to the employer's power that must be reevaluated with the introduction of the ICT<sup>139</sup>. Its technical characteristics resize again the

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<sup>133</sup> Caruso (2004b: 810), talks about "osmotic integration" of the legal sources with others of a different nature, highlighting the "light sources", whose combination with hard law are useful for Hepple (2005). For Arthurs (2006: 56), the impact of globalization is "formative, not normative": it does not change the contents of labor law, but other aspects, like the institutions, structures and the regulations' creation processes. The connection globalization-system of sources is worrisome because of the difficulty of establishing controls over the effects of it on labor relations (Ramos Quintana, 2002: 44). A paradigmatic example of collective transnational bargaining is the Frame Agreement about Teleworking, reaching for the CES, UNICE/UEAPME and CEEP in 2002, implemented in Spain by the Inter-confederation Agreement for Collective Bargaining of 2003.

<sup>134</sup> Gradually, companies become a place "of labor rule production", escaping from national and international legal "constraints" that guarantee minimum rights for the workers (Baylos Grau, 2001: 79).

<sup>135</sup> The academic analysis that studies workers' rights as human rights from a human dignity point of view, is a clear manifestation of this debate: Gross (2003), Alston (2005), Woodiwiss (2003) and Ewing, Gearty & Hepple (1994). For Freedland (2007: 17) the labor right must be considered interwoven with the social security legislation and human rights, and with the regulation and practices in regards to employment, in a way that the employability of the work force is elevated.

<sup>136</sup> In regards to countervailing workers' power, see Klare (2002: 3-29).

<sup>137</sup> Does not innovate the recognized rights but it does mean a compromise enlarging its efficacy since it can be an element of political and moral pressure over the States that break the regulation of the ILO: Ramos Quintana (2002: 52) and Rodríguez-Piñero (1999: 5-6)

<sup>138</sup> Even though it does not present itself as soft law (its idea is to remove it from any normative frame) it possesses some of its characteristics like the absence of sanctioning mechanisms (Mörth, 2004: 193), which makes legitimate the privatization process of labor rights (Arthurs, 2006: 59).

<sup>139</sup> Especially regarding "unspecified" fundamental rights (Palomeque López, 1991), those which the worker holds, also in the workplace, whereas citizen (in particular dignity and

possibilities of company control, which means a new channel "of technological intrusion that puts the injured worker in a situation of further inferiority". This is explained by two reasons: they favor constant control, intense and detailed, that provides information about the work done and also personal information, which allows for a very detailed profile of both facets; and many ICT are at the same time, indissociably, an instrument of work and control<sup>140</sup>. It is necessary, then, to guarantee the effectiveness of the worker's fundamental rights, limiting the companies' control power in the Digital Age<sup>141</sup>. To such end, the use and control of e-mail is analyzed as a case study.

## 2. E-mail as a case study

### A. Reasons that explain its judicialization

From my point of view, this litigious nature is explained by three connected causes: the technical characteristics of email, the conditions of the exercise of the fundamental rights in labor relations and the absence of express regulation.

E-mail is one of the ICT most used, allowing, due to digitalization, to communicate instantaneously and efficiently all kinds of information, independent of its volume<sup>142</sup>. Notwithstanding, communication can be monitored without the knowledge of the interlocutors in various ways: while it circulates on the network, directly from to the server or by retrieving deleted messages<sup>143</sup>. In spite of the sums invested, it is very

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privacy: Rodríguez-Piñero, 2004: 93), since the existence of a legal-labor version of most of them is possible (Alonso Olea, 1982), that allow for a "citizenship" in the company" (Jeammaud, 1992: 179).

<sup>140</sup> Goñi Sein (1998: 33). It's about the "most colorful change" of the ICT (Pérez de los Cobos, 1990: 72), that achieves a "(re-)configuration of the power of control" (Fernández Domínguez & Rodríguez Escanciano, 1997: 80), showing the parallel advance of that power and technological evolution (Loy, 2005: 61). With the massive incorporation of computers into the company, the "recomposition of fragmentary news and... apparently innocuous" it was already emphasized previously (Zanelli, 1993: 7).

<sup>141</sup> Otherwise the company would turn "into some type of jail with transparent walls" (González Ortega, 2004: 48).

<sup>142</sup> Since its invention in the sixties, its gradual increment becomes exponential beginning in the nineties with the popularization of the Internet: Landham (1993: ix), Anderson, Bikson, Law & Mitchell (1995) and García (1996).

<sup>143</sup> Lerner (2002). De Vargas (1999: 2-3) states that "the little confidentiality of the system seems like a structural fact". The ILO (1993: 20), points out the difficulty for the worker to detect monitoring and the simple execution for the employer. Regarding the operation of the Internet and the circulation of information, see: Casanovas Romeu (2004) and Payeras Capella & Ferrer Gomila (2004). The system administrators can access e-mail that remains in the server in spite of being deleted from the inbox (Landham, 1993). Also, there are

difficult to maintain the total inaccessibility of the messages; even so, there are multiple formulas that provide increased security of the information<sup>144</sup>.

The legal system grants the employer a series of powers to direct and control the execution of the work, and punish any failures of the worker. Its existence and ownership are not questioned, but its basis is<sup>145</sup>. Traditionally, two theories have been provided in this regard: institution and contract based. For the first, the basis of the companies' power possesses a native character, linked to productive organization: it emerges because it exists and it's held by whoever is in charge. A link of fidelity between employer and worker is established<sup>146</sup>. The second ones, by contrast, understand that a work contract, in connection with the legal and conventional regulations, is the basis and limit of such power<sup>147</sup>. This last position agrees most with our democratic model of labor relations taking into account the function of labor law in order to correction of inequalities between the parties protecting the weaker one<sup>148</sup>.

Nevertheless, the legal authority that the legal system grants the employer in regards to the direction and control of the labor provision, and the disciplinary measure for the failure of the workers, are limited by the legal-labor system and especially the fundamental rights of the worker<sup>149</sup>. In this regard we have to keep in mind the horizontal and immediate efficiency of the fundamental rights<sup>150</sup>. Thus, they form as

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many applications that recover deleted emails for a more integral control of the computer remotely (Spector, E-Blasster, Ethereal, Ettercap, filters Websense, Firewalls)

<sup>144</sup> Behar (1997). Passwords between servers, test keys or algorithmic test code, encrypted messages (Dichter & Burkhardt, 2001 and Back, 2002).

<sup>145</sup> Román de la Torre (1992: 71).

<sup>146</sup> Loy (2005: 62). For Von Gierke (1982: 39), that link of fidelity derives from the hiring out of services. See Montoya Melgar (1965: 44), Fernández López (1991: 27), Martín Valverde (1978: 81).

<sup>147</sup> Fernández López (1991: 25) and (Blasco Pellicer, 1995: 41). There is a warning, in its first formulations in the genesis of labor law, about the fictitious "freedom of the parties" (Baylos Grau, 1991: 71). It must be remembered that our discipline "is the first Law that rebels against the free play of the relations of power and its risky power" (Sinzheimer, 1984: 96), serving as a "counterweight" that balances unequal power inherent to the labor relation (Kahn-Freund, 1987: 52-57).

<sup>148</sup> Ortiz Lallana (1998: 19). Regarding the function of labor rights: Constitutional Court Decision 3/1983.

<sup>149</sup> Rivero Lamas (1986: 81)

<sup>150</sup> Efficiency between particulars that derive from the German doctrine of *Drittwirkung der Grundrechte* (Pérez Luño, 1979: 218-219) that, as explained by Von Münch (1997: 32) "its born in opposition to the vertical relevance, that is to say, of the contrast between equalization and subordination", which explains why Martín Valverde (1998: 13) declares the breakthrough of the Spanish Constitution has become for labor rights a "magnetic field". The Spanish Constitution does not express itself regarding the matter, but it is the

insurmountable limits for the employer, as our Constitutional Court has indicated repeatedly, that has developed a vital role in its consolidation of labor relations<sup>151</sup>. No organizational interest can void generically its exercise since "the execution of a labor contract does not imply in any way the deprivation for [the worker]... of the rights that the Constitution grants him as a citizen", that hold a core place in the constitutional system; the opposite would suggest a manifestation "of 'industrial feudalism' [that] the social and democratic State of Law and the superior values of liberty, justice and equality find repugnant through which that State takes shape and is realized (section 1.1)"<sup>152</sup>.

Fundamental rights limit the employers' power, but they also experience "adaptations or modulations that try to balance the interests of the worker and employer"<sup>153</sup>. Along these lines, the technique employed to determine the efficacy of the fundamental rights and the resulting limitation of the companies' power is the judgment of proportionality. The company must prove a rightful interest to adopt the measure, that must pass a triple test<sup>154</sup>: it must be appropriate to achieve the intended purpose; it must be indispensable, that is to say, that there are no others that serve the same purpose with the same efficiency and are less intrusive in the limited fundamental right; and finally the judgment of proportionality in the strict sense, that consists on checking if from the measure more benefits are derived for the common interest than damages over other assets or securities in conflict, that is to say, if the measure is adjusted and balanced.

Even so the constitutional recognition of fundamental rights is a necessary condition for its exercise in labor relations; a specific legal development is needed so as to not hamper its exercise, something that is lacking in our legislation<sup>155</sup>. This connects with the third detected problem: the absence of a regulation that specifies what must be its use

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Constitutional Court, beginning with its Decision 18/1984, that consecrates such doctrine in Spain, since that in a democratic and legal system, the holder of the fundamental rights also is "in social life" (Constitutional Court Decisions 88/1985 and 126/2003).

<sup>151</sup> Valdés Dal-Ré (1990: 292 and 1992: 32) and Román de la Torre (1992: 306). See Constitutional Court Decisions 96/1989, 126/1990 and 99/199.

<sup>152</sup> Constitutional Court Decisions 88/1985 and 186/2000.

<sup>153</sup> Montoya Melgar (1998: 309). Constitutional Court Decisions 197/1998 and 213/2002.

<sup>154</sup> Constitutional Court Decision 98/2000 that deepens in the necessity or indispensability of the measure. Regarding the judgment of proportionality, see Terradillos Ormaetxea (2004) and Casas Baamonde (2004).

<sup>155</sup> Nonetheless, the power of control is recognized without nuances and with poorly defined limits. See García-Perrote (1998: 64), Rodríguez-Piñero (1990: 283), Baylos Grau (1991: 96) and Goñi Sein (1988: 172).

and how should the control be developed<sup>156</sup>. On one side, section 20.3 Workers' Statute recognizes for the employer the adoption of the measures of surveillance and control that it sees fit, to verify that the worker is meeting his job obligations, which limit is the respect for the worker's human dignity in its adoption and application. On the other hand, section 4.2.e) recognizes for the worker the right "in regards to his privacy and the given consideration of his dignity". This open formulation leads to a strong judicial sense and its necessary interpretation in light of the fundamental rights the Spanish Constitution recognizes, specially the right to privacy, the secrecy of communications and the protection of data (section 18 Spanish Constitution), according to the Constitutional Court's doctrine<sup>157</sup>.

In this sense, the courts are destined for casuistry solutions that give raise to inconsistent pronouncements by Superior Courts. One of the main disagreements is the protection of the use of email for the secrecy of communications: for some it is not so, since it is the property of the employer; for others, as far as it allows for the communication of information, it would be protected<sup>158</sup>. Even so, the application of the Constitutional Court's doctrine regarding the principle of proportionality for most is a common fact<sup>159</sup>.

That jurisprudential diversity is explained by the difficulty of putting forward the unification of doctrine submitted to the Supreme Court. However, the recent Supreme Court Ruling 26-september-2007 (RJ 7514) has reduced the margins of legal insecurity to when determining two basic questions: the employer can control the computer used by the worker, based on section 20.3 Workers' Statute; is necessary that the employer informs about the existence of controls and applicable measures<sup>160</sup>. On the other hand, regarding the use of electronic mail by the unions to carry out their functions, the Constitutional Court Ruling 281/2005 establishes the following parameters: the company is not

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<sup>156</sup> Feature highlighted in a majority way (Mercader Uguina, 2001: 112) and common in other national legislations (Biagi & Treu, 2002: 17). It must be pointed out that existed a proposal for legislative reform in 2001 that was not considered by the Senate.

<sup>157</sup> Which brings up a necessary balance of power (Aragón Reyes, 1998: 161).

<sup>158</sup> Superior Court Castilla y León (Burgos) 10-05-2006 [AS 2007, 682].

<sup>159</sup> Superior Court Andalucía (Sevilla) 9-05-2003 [AS 2840], Superior Court Castilla y León (Burgos) 20-05-2006 [AS 2007, 682], Superior Court Galicia 2-10-2001 [AS 3366] and Superior Court Madrid 13-05-2003 [AS 3649].

<sup>160</sup> In spite of highlighting its importance, especially in regards to the existence of previous warnings, its understood that "is less convenient that the controls respect the principle and criteria of proportionality, according to the terms established by constitutional jurisprudence and followed and required by the labor courts, especially if the results of the control want to be shown as legal proof" (García-Perrote, 2008: 9).

obligated to provide the infrastructure of information technology to be used by the unions; if it already exists, it must allow its use to relay union information, as long as it does not affect the normal development of the productive activity.

Perhaps this is the most important circumstance explaining the judicialization<sup>161</sup>, by which the benefits of an autonomous regulation are pointed out<sup>162</sup>. In this sense two adopted solutions stand out. On one hand, the unilateral establishment of rules by the companies, that is beginning to break new ground in the Spanish companies, even though they are deeply rooted in other countries<sup>163</sup>, insisting on its convenience<sup>164</sup>.

On the other, collective bargaining has shown a relative, although increasingly growing interest to regulate the issue<sup>165</sup>. Its analysis allows us to identify three large groups of social bargaining content. A first group<sup>166</sup> receives a very detailed regulation. The workers' representatives are acknowledged the opportunity to use the ICT to carry out their functions; some even recognize it at an individual level, for private matters, providing two email. The setting of technical limits for its correct use stands out, which offers great legal security. Another group of agreements also recognizes the use of the ICT by the unions, even though its meager and porous limits allow for an ample discretionary margin for the company to determine the illicitness of its use<sup>167</sup>. Lastly, the majority gather the use of email in a strictly reactive way, from a

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<sup>161</sup> Amongst many others, Sempere Navarro & San Martín Mazzuconi (2002). Regarding the judicialization of social rights: Sciarra (2001) and López López (2008). Ramos Méndez (1978: 202) defends a monist theory of the process according to which the law does not exist until it's not applied by the judge in the specific case.

<sup>162</sup> Since prevention is preferred for the employer over the detection of abusive use of the ICT (DPWP, 2002: 4-5). Along the same lines Ford (2002: 153) and, the national authorities of data protection of Italy, UK and Germany.

<sup>163</sup> Thus, in the United States, it is notes its restrictive character (McIntosch, 2000: 542 and Lerner, 2002). In Spain, "La Caixa" corporate code stands out, where workers have two e-mail accounts: a professional, without "any expectation of privacy", checked by the company; and a personal account, free and managed by an external company which cannot affect the development of production and which control requires judicial authorization.

<sup>164</sup> Baum (1997: 1036). It is advised by various associations, like the Electronic Messaging Association in the US (Johnson & Patterson, 1994) or the Italian corporations association Confindustria, through some recommendations (Biagi & Treu, 2002: 14).

<sup>165</sup> Regarding the importance of its regulation by collective bargaining, the union CCOO (2003: 34-36) becomes evident. See, amongst others: Rodríguez-Piñero Royo & Lázaro Sánchez (2005) and Rodríguez-Piñero Royo, Pérez Domínguez & Lázaro Sánchez (2005).

<sup>166</sup> Collective agreements of RENFE (BOE 22-03-2005) and Telefónica (BOE 16-10-2003) stand out.

<sup>167</sup> Amongst others, collective agreement of the construction of Barcelona (DOGC 14-04-2008) and the chemical industry (BOE 29-08-2007).

sanctioning level, including it in their catalog of labor offenses<sup>168</sup>. If we understand law as an instrument to reach certain social goals, more than as a repressive order, we must insist on this path, not only from a sanctioning perspective<sup>169</sup>.

## **B. About the methodological proposal**

As we have seen, our system does not offer an express solution for the raised conflicts of the use of electronic mail in a company<sup>170</sup>. The necessary search for answers in the constitutional precepts presents a second obstacle, since the statements that recognize the fundamental rights are formulated by principles, and not rules<sup>171</sup>.

The methodological proposal of this research feeds from the tools of Law Theory. In the first place, I use a discursive variant of the notion of "relevant property" of the Normative Systems Theory of Alchourrón and Bulygin<sup>172</sup>: which I denominate "eventually relevant property"; that is to say, those circumstances of fact that can be present in a litigious supposition, whose existence could determine its normative solution in one or another sense. To determine which circumstances can eventually be relevant is necessary to analyze the reality of reference that is being analyzed; in it converge two basic elements: one technological (email, as a work tool that has other uses) and another legal (the labor relation, in which a conflict is produced between the power of the employer and the fundamental rights of the worker). Once those eventually relevant properties are selected, its legal assessment and its meaning are needed, to determinate its effective juridical relevance.

This methodology is interesting because it objectifies which facts are taken into consideration and makes visible its legal assessment for the establishment of some clear limits of employer's powers<sup>173</sup> that can be used by collective bargaining. This one, keeping in mind the

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<sup>168</sup> Amongst others, collective agreement wood industry of the state (BOE 7-12-2007) or of department stores (BOE 27-04-2006)

<sup>169</sup> Atienza (2001: 38).

<sup>170</sup> The system, at this point, is partially incomplete, since we face one case not expected and not regulated, as explained by Hart (1980: 5).

<sup>171</sup> Law is composed of rules and principles, in the sense of policies or directives (Atienza, 2001: 74-77). Both establish a legal consequence to a supposition of fact; but differ in the application mode to the specific case: the rules are applied as all-or-nothing, by setting a series of properties; and the principles must be pondered between themselves.

<sup>172</sup> The relevant property is that whose presence or absence become determinant in order to the normative solution that must be given to a precise regulation problem (Alchourrón & Bulygin, 1987: 3 and ss.).

<sup>173</sup> Since the "directive power limits constitute and important instrument for the protection of the workers' fundamental rights" (Loy, 2005: 81).

productive and technological reality of the its application field, will, taking the eventually relevant properties as a starting point, configure different suppositions that could take place. At this level, it is proposed to turn to the Theory of fundamental Rights of Alexy<sup>174</sup>, according to which, in the consideration of the principles in conflict in specific cases, rules can be deduced whose supposition of fact is determined by the case it resolves, the same way as when the legislator states the rules<sup>175</sup>.

The previous methodology could be useful, with the proper modifications, for the rest of the ICT. It is trying to reconstruct or reaffirm environments of guarantee of rights taking as a starting point the interpretation of the existing legislation, tending to the "social reality in which [the regulations] must be applied" according to their spirit and goal" (section 3.3 Civil Code)<sup>176</sup>.

### **C. Legal assessment of the eventually relevant properties**

The properties eventually taken into consideration, are systemized in two blocks, relative to the use and control, including all those possible circumstances of reality, objective and subjective, that could take place in a supposition. In each one, when it proceeds, it is marked at the beginning, in a frame, all logically possible cases before its legal assessment.

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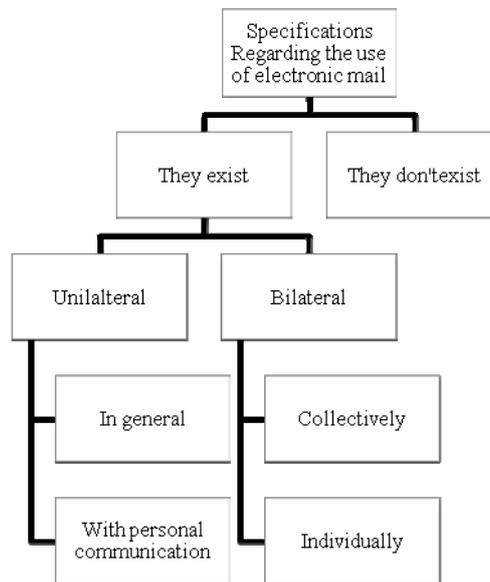
<sup>174</sup> Alexy (1993).

<sup>175</sup> In reality, Aienza defends (2001: 80-81) that the rules "are, at the same time, the result of pondering between principles (carried out by the legislator)". One must keep in mind, also, in the pondering analysis "the enormous plurality of factors that must be considered" (Mercader Uguina, 2002: 95).

<sup>176</sup> This position is defended by: Colàs Neila (1999: 42-43) and Sempere Navarro & San Martín Mazzuconi, (2002: 23).

## REGARDING THE USE OF EMAIL

### 1. Use settings

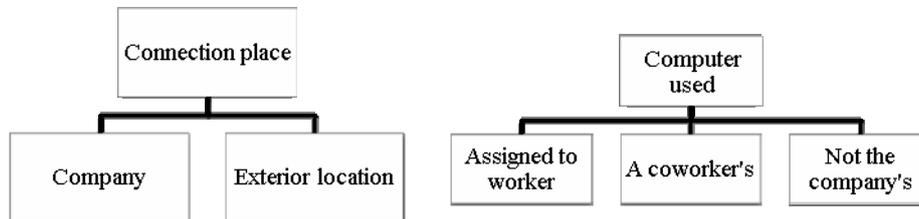


It is a relevant legal circumstance since, if a specification exists, would complement the principle of legal security. If it sets the prohibition of non work related use, it would allow in principle the sanction of its failure to comply (at the margin of its company's tolerance). Furthermore, as we will see, it has the capacity of contributing with other circumstances, like the appreciation of the good faith of the worker, since it could point out its non-existence, when deducing if he possesses enough objective elements to know the illegality of his act.

Faced with the company's silence, the worker could fully interpret the possibility of non professional uses; if committing a work related offense, it would be of a lesser nature, without detriment to the

suppositions limit of abuse<sup>177</sup>. In this sense, we should keep in mind what is the use generally employed in the company and its lack of opposition or tolerance (for not having sanctioned any previously)<sup>178</sup>.

## 2. Locative elements: place and access equipment



Email is characterized by its ubiquity, which is why the place in the strict sense must be combined with computer equipment from which it takes place.

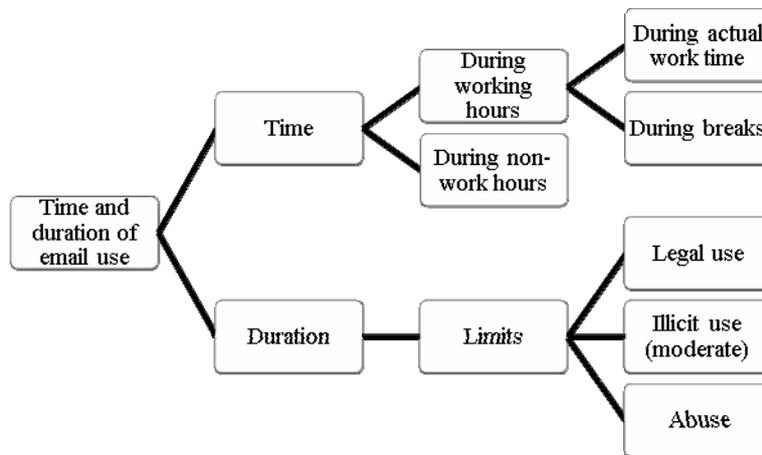
Both suppositions are irrelevant from a legal point of view, since the specific supposition given would not determine a legal solution or another. What matters is that a communication mechanism is used that belongs to the company, circumstance that resides implicitly in the supposition being studied.

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<sup>177</sup> Superior Court País Vasco 21-12-2004 [JUR 2005, 61132] and Superior Court Comunidad Valenciana 29-10- 2007 [JUR 2008, 85736]. The suppositions would be left to one side in which email is a simple medium to commit other illicit ones (revealing of industrial or commercial secrets, sexual harassment): Superior Court Comunidad de Madrid 20-10-2008 [AS 3147] or Superior Court Comunidad de Madrid 9-07-2007 [AS 2893].

<sup>178</sup> National Audience Court Decision 6-02-2001 and Superior Court Comunidad de Madrid 9-12-2004 [AS 3577].

### 3. Temporary circumstances: time and duration of use



Since service rendering is a fundamental object of the contract, the use of email during standard work time is relevant<sup>179</sup>. Even so, it must be linked to the time spent. Determining its relevance confronts the problem of its specific objective determination since it is difficult to establish fixed univocal criteria, in time units, that allows considering which uses are sanctionable<sup>180</sup>. Because of it, collective bargaining must realize that assessment to set specific criteria that will allow concluding the opportune description to the sanction. The specific time employed must be made relative connecting it with the effects about the performance of the work obligation, in particular the possible decrease in work performance<sup>181</sup>.

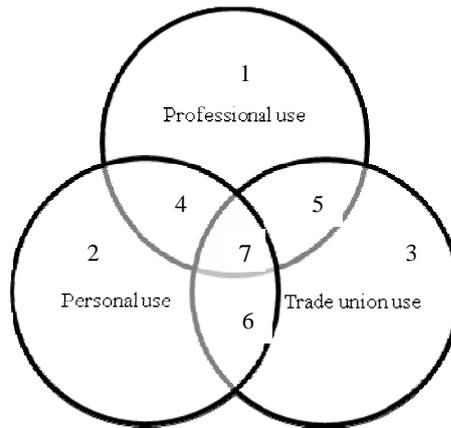
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<sup>179</sup> Superior Court Castilla y León (Valladolid) 30-09-2002 [JUR 256385] y Superior Court Comunidad de Madrid 31-01-2002 [AS 916], Superior Court Castilla-La Mancha 6-07-2006 [JUR 229745] and Superior Court Cataluña 10-10-2006 [AS 2007, 1668].

<sup>180</sup> Superior Court Galicia 4-10-2001 [AS 3366] and Superior Court Comunidad de Madrid 9-12-2004 [AS 3577].

<sup>181</sup> Superior Court Comunidad de Madrid 9-12-2004 [AS 3577] and Superior Court Castilla y León (Valladolid) 29-01-2001 [JUR 122571].

#### 4. Uses or purposes



Flexible work hours involve many workers work long hours so it cannot be expected to completely leave their private lives and the need to manage their tasks at work; it is therefore unreasonable to prohibit all personal communications<sup>182</sup>.

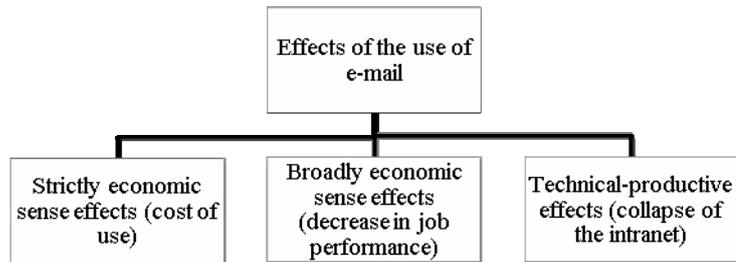
With regards to their use with union purposes, the possibilities offered by the ICT are obvious, and the use of e-mail particularly in a globalized context<sup>183</sup>. In this regard, case law has not been univocal in

<sup>182</sup> Oliver (2002: 326), Morgan (1999: 901) and Privacy Commissioner of Canada (2000: 9-10). González Ortega (2004: 48) indicates how workplace is, increasingly, an area of personal development dimensions (sociality, communication) not specifically working" promoted by ICT. Even in the cases of prohibition, in the comparative law exist case law that prevail secrecy of communications (Decision of the French Court of Cassation (chambre sociale) of 2-10-2001). But the Spanish case law understands that the professional computer purpose prevents its use for other purposes, without considering as personal the files (Superior Court Andalucía (Málaga) 25-02-2000 [AS 562]).

<sup>183</sup> According to the ILO (2001: 16) "could help trade unions to restore the balance of power in the workplace ... accentuate the 'symmetry of information' at the negotiating table", which is very important in the described context where "globalization directly undermined domestic labor standards. It also does so indirectly by undermining the strength of domestic labor organizations" (Stone, 2006a: 85). Given the proliferation of transnational corporations, it is also proposed to use in those with a community dimension (Chacartegui Jávega, 2004). For the Union Network International, in a labor world increasingly computerized, unions should have recognized a right of access to e-mail to contact their members and workers, which launched the campaign on-line rights for On-line workers in 1998, understanding that ILO Workers' Representatives Convention number 135 (1971)

recognizing the workers' representatives the right to use the ICT<sup>184</sup>. However, it should be noted an important tendency in the recognition of that right. Constitutional Court Ruling 281/2005 means an important milestone law of precedent, recognizing the right to use the technology that existed previously in the company as a manifestation of the right of freedom of association; nevertheless, the company is free from the additional burden of having to acquire them. It is not configured as an absolute right, because it is limited by not causing any damage to company systems, subordinating the right of operation of the organization<sup>185</sup>.

## 5. Effects of the use



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should be extended to new forms of electronic communication. Highlights Bibby (2001) that a case of the Federal Court of Australia in April 2000 in which a dismissal of a union representative based on the use of ICT were considered that contravened the freedom of association, and Biagi & Treu (2002: 17) the Pret. Milano Decision 3-04-1995 that recognized the possibility of a "virtual association board."

<sup>184</sup> In favor: Social Court 25 Madrid 13-10-2000 [AS 3180]; against: STS 13-01-1995 [RJ 7749], STS 26-11-2001 [RJA 2002, 3270] or Superior Court Cataluña 2-12-2005 [AS 2006, 427] (in the opposite direction to the previous CCD 281/2005).

<sup>185</sup> Follow this doctrine of the Constitutional Court: SAN 26-03-2007 [JUR 248341], STS 23-07-2008 [RJ 7212], Superior Court Aragón 25-10-2006 [AS 2007, 806] and Superior Court Castilla y León 23-03-2006 [AS, 1488]. Superior Court Comunidad Valenciana 15-02-2007 [AS 2007, 2083] concludes that it does not violate the freedom of association and to the extent that there were no sufficient forms and the capacity of line was overwhelmed.

Relevant facts are harmlessness or affectation to wealth and rights or interests of the company<sup>186</sup>. As for the economic loss in the strict sense, in many cases the company does not claim them, which is logical for the spread of flat rates for internet connection<sup>187</sup>.

On the other hand, it is suggested economic damages in its broadest sense, linking it with the lost of time during its use that should devote to fulfilling the labor obligations because "it represents an economic cost to the Company given the number of working hours lost"<sup>188</sup>. However, it points out how some case law moves away from the real parameters when considering the personal use of the ICT as something strange and little everyday<sup>189</sup>.

Finally, misuse of e-mail, even on a strictly business, can cause distortions in the functioning of the corporate network, affecting the normal development of the production. As with duration of use, it is difficult to discern the consequences of the collapse, so here collective bargaining must also evaluate this information from a disciplinary perspective, based on a gradualist approach that takes into account all the circumstances (if there is a personal or professional use, if it meant the loss of any data, the time that the activity has been stopped).

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<sup>186</sup> This idea does not take into account cases where the e-mail was merely an immediate tool to make other illicit: Superior Court Cantabria 24-01-2005 [AS 13] and Superior Court Cantabria 6-07-2001 [ED 55755].

<sup>187</sup> Social Court 3 Vigo 29-04-2001 [AS, 3653] shows how the flat fee, personal use of the Internet did not involve additional expenditure. Other pronouncements do not give legal significance to this fact, considering the dismissal for the personal use of e-mail proper "regardless of their specific economic and time cost" (Superior Court Cataluña 14-11-2000 [AS 3444]).

<sup>188</sup> Superior Court Galicia 4-10-2002 [AS 3366]. Superior Court Castilla y León 29-01-2001 [JUR 122571] and Superior Court País Vasco 23-01-2007 [AS 1723] take as a relevant element to consider the dismissal proper the personal use of the ICT, which means the decrease of its capacity that leads to consider the dismissal appropriate. Superior Court Comunidad de Madrid 9-12-2004 [AS 3577] understands that the abuse of the ICT is not punishable with particular purposes since it does not stop its rendering. Regarding the relationship between personal use of the ICT and lower productivity we can see an study carried out by the University of Meolbourne, that questions this last information: <http://uninews.unimelb.edu.au/news/5750/>

<sup>189</sup> Cardenal Carro (2001: 32-33), considers that it is illogical for anyone to understand that disrupts the development of the work, as one could conclude that this may also effect things like drinking coffee or talking about sports scores. This everyday thing leads him to suggest the need to reverse the burden of proof in cases of dismissal, as it may be covering the true motivation of it, leading to justify on objective data its decision (mailing lists, connection time). See Superior Court Asturias 17-12-2004 [JUR 2005, 189,664] on the disproportionate punishment for the doubtful breach of good faith of the performance of the worker.

## 6. Good faith of the worker

Contractual good faith is an important factor considered by the legislator, as its violation, when it supposes a serious and guilty noncompliance, legitimate dismissal of the worker, what has happened regarding the personal use of e-mail<sup>190</sup>. However, it must necessarily connect with the specification of the use to give, since the reasonable use for personal purposes "fits to a general use and socially acceptable"<sup>191</sup>. It is, therefore, necessary to analyze the concept of good faith objectively in connection with this fact, considering that it is imposed not only to the worker but also to the employer<sup>192</sup>. Moreover, it is not a principle protected by the Spanish Constitution, and therefore cannot impose more limitations than those derived from the principle of proportionality<sup>193</sup>.

## 7. Individual or collective account

The e-mail account can be an individual or collective account. This is an important factor because in the latter case, the main problem would be to identify who uses it and when. I understand that the company could not proceed to punish indiscriminately to all users or one in particular, without evidence or clear indication of its authorship. Contractual good faith would fall on the company the establishment of identification mechanisms to avoid such problems<sup>194</sup>.

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<sup>190</sup> Superior Court Asturias 1-03-2002 [AS 630] or Superior Court Galicia 4-10-2002 [AS 3366].

<sup>191</sup> Commission nationale de l'informatique et del libertés (2001: 11).

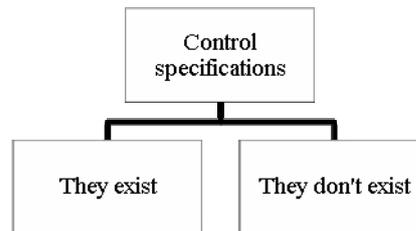
<sup>192</sup> The jurisprudence has been reluctant to demand them (Cardona Rubert, 2001: 29).

<sup>193</sup> Naranjo de la Cruz (2000: 446-447).

<sup>194</sup> With regards to a case of collective account: Superior Court Comunidad de Madrid 17-10-2000 [JUR 2001, 24276]; also about group access to Internet: Superior Court Comunidad de Madrid 23-03-2004 [AS 2220]; about stolen identity: Superior Court Navarra 21-06-2005 [AS 1981] and Superior Court Comunidad de Madrid 16-12-2004 [AS 2297].

## THE CONTROL OF THE E-MAIL

### 1. Control specifications



Absence of warnings about the possibility to control would suppose a "reasonable expectation of privacy"; it could turn in illegal the employer control and it could be understood that exist an employer tolerance that would minimize or make impossible a sanction<sup>195</sup>. It has been noted a double meaning in that concept: normative (general expectations of privacy in society) and empirical (which suggests the employer)<sup>196</sup>.

It is based on the principle of "legitimate confidence" of the worker in relation to respect for his privacy, which would qualify with "adequate information" by the employer<sup>197</sup>, a manifestation of the duty of

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<sup>195</sup> For the Spanish data protection authority, the Personal Data Protection Law would require to report to employees (AEPD, 2008: 10). Supreme Court Decision 26-09-2007 indicates that it is required to inform about the use, control, and intent for verification and measures for its security, connecting with the "existence of a widespread social habit of tolerance"; also the European Court of Human Rights in Halford v. UK. Therefore, the clear possibility of control would exclude that expectation (Freiburn, 1994). In opposite sense, Nord-American case law, in Smyth v. Pillsbury Co., it shows the permissibility of dismissal stating that the e-mail has no expectation of privacy and the interception is not "highly offensive", despite the numerous business communications regarding confidentiality, absence of controls and sanctions (Baum, 1997: 1031).

<sup>196</sup> Regarding the Nord-American case law (Oliver, 2002: 321 and 332), which shows the tendency to allow the exclusion of intimacy in the work relation.

<sup>197</sup> DPWP (2002: 9) directs and exemplify legitimate activities of control and limits, starting from section 8 European Convention on Human Rights, case law from European Court of Human Rights and Directive 95/46/CE. In the same sense, French data protection authority: CNIL (2001 and 2004).

good faith of him. And would comply with the principle of transparency<sup>198</sup>, which would prevent the secret surveillance, except in essential circumstances, and that means the employer's obligation to inform about the control, establishing a detailed policy on private use, and clarify reasons for monitoring purposes; determine surveillance measures taken, report the breach and mechanisms of reaction. It is recommend the immediate notice for worker's abuse which, in combination with the above, plays an important deterrent role, as well as to inform others in the communication.

## 2. Circumstances that allow control

Section 20.3 of the Workers' Statute prohibit any investigation that is not linked to technical and organizational issues and all those that almost completely eliminates "space of freedom of the person that is the very essence of the right to privacy"<sup>199</sup>, imposing as limit the respect for the human dignity of workers, since it has "priority to all other considerations"<sup>200</sup>. However, it cannot be invoked independently, but linked to other fundamental rights, in this case, the worker's rights at stake are: privacy of communications (section 18.3 Spanish Constitution), protection from the computer uses (section 18.4 Spanish Constitution) and right to privacy (section 18.1 Spanish Constitution)<sup>201</sup>.

It is essential to use the judgment of proportionality applied by the Constitutional Court to deduce the employer control of lawfulness and the scope of the exercise of the fundamental right<sup>202</sup>. In that respect, it

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<sup>198</sup> DPWP (2002: 15). Bilsen (1992: 111) insists in that it cannot be carried out a secret control.

<sup>199</sup> Goñi Sein (1988: 115).

<sup>200</sup> DPWP (2002: 6).

<sup>201</sup> The right to privacy means an area reserved for itself and against the knowledge of others, according to existing cultural guidance, to maintain a minimum quality of life (Constitutional Court Decision 231/1988). The privacy of communication has as a purpose the "opacity" of communication, regardless the content and the violation of the intimacy (Fernandez Esteban, 1998: 126-127), regardless of the medium, since the constitutional enumeration is open (Segado Fernández, 1992: 217), which would include e-mail (an argument in favor is the consideration as an offense the discovery of secrets by intercepting e-mail: section 197.1 Criminal Code). Section 18.4 Spanish Constitution protects privacy against the advances of ICT, which involves extending beyond the traditional areas (home and correspondence) and leads to a reformulation of that in a positive sense, as the right to informational self (Constitutional Court Decision 110/1984). Its development occurs in the Personal Data Protection Law (1999), which implements Directive 95/46/EC. On this concept, see: Rodotà (1994, 102) and Goñi Sein (1988: 34).

<sup>202</sup> Fundamental rights are not absolute, although the limitations to impose by the existence of an employment contract must be necessary (Constitutional Court Decision 73/1982). The

should be remembered that this technique operates on the specific case. Should therefore be taken into account the circumstances in each case, the legal analysis is performed in the remaining paragraphs. Thus, in general, the employer must demonstrate a legitimate, objective and reasonable interest for the control<sup>203</sup>. This interest must exceed three phases: it must be suitable for the intended purpose (in cases where the work is carried out through e-mail); be indispensable, because there are no other ways to achieve that goal with the same efficiency and less intrusion into the fundamental right (it could be established a filter that would prevent sending or receiving emails with certain content); and lastly, to assess the proportionality in the strict sense, that is, the weight or balance of the extent, as they derive more benefits for the general interest than losses on other assets in dispute.

However, there must be an important distinction: if it is expected to verify the performance of the work or the use that is made of the ICT. In the latter case, it should be applied section 18 Workers' Statute, with clear indications of that use, with the additional procedural guarantee of the presence in the record of the worker affected and the representatives of the workers established by the mentioned section. This is supposed to check irregularities in the development of work, and not its normal rendering<sup>204</sup>.

### 3. Location elements: place of inspection




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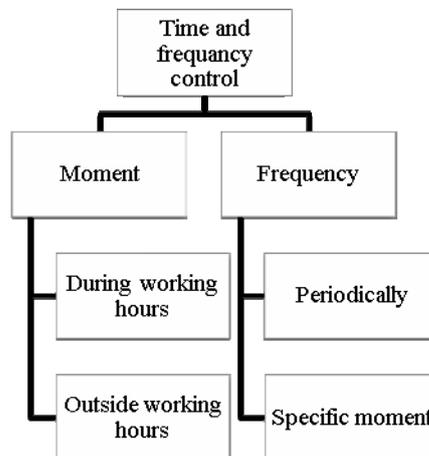
principles that DPWP (2002: 13-17) provides for the legitimacy of control match up with the judgment of proportionality of Constitutional Court (see i.e. Constitutional Court Decision 98/2000).

<sup>203</sup> Companies monitor e-mail in general: In 2000, 77% of the companies in the United States monitored e-mail and 88% of these had information policy to the employee (American Management Association, 2001); in UK, about 55% according to the IRS (Espinosa & Furriol, 2000). Reasons alleged to control, among others, to confirm the correct use of the ICT (Freiwald, 1991: 1899 and Kesan, 2002: 290); security of the system and business responsibility in the maintenance of the appropriate work environment (Osborn, 2000 and Dichter & Burkhardt, 2001); in the same direction, although claiming the benefits in terms of cost savings and increased competitiveness (Rogers, 2000), examples of the importance of corporate responsibility for the use of electronic mail in Nord-American case law: Affairs Pamper vs. Calsonic International and US vs. Baker).

<sup>204</sup> González Ortega (2004: 43-46).

The ubiquity of the ICT allows control from anywhere and from any computer, so it would be a legally irrelevant circumstance. However, it should be questioned the control carried out from other countries as to the law applicable to possible sanctions. With this regard, I understand that it would be applied the law of the employment relationship<sup>205</sup>.

#### 4. Temporal elements: time and frequency



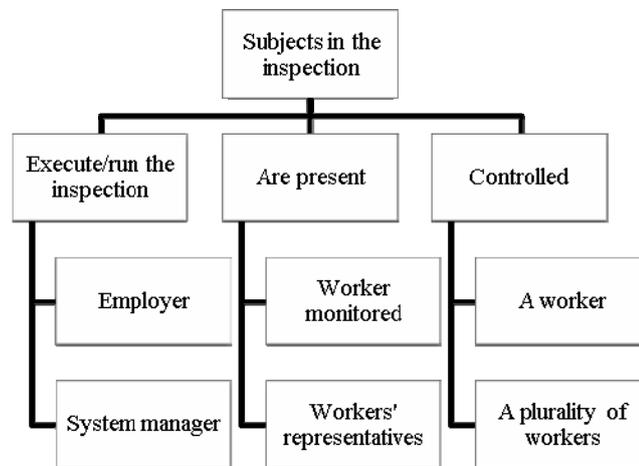
Regarding the time of control, it is an irrelevant property. Not the frequency, being eligible only inspections in specific moments and not frequently; the principle of proportionality would exclude general and

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<sup>205</sup> "The telecommunications and computer technologies... enable firms to produce, distribute, and market all over the world, falling trade barriers, and the fading foreign exchange restrictions" (Stone, 2006a: 83), and also their organization is transnational: in the case resolved by Superior Court Comunidad de Madrid 31-01-2002 [AS 916], controls were produced from the central corporation in the USA. On the law applicable to Internet use, see: Boele-Woelki & Kessedjian (1997). The commission of other illicit by e-mail generates more doubts, as the person affected may file judicial proceeding in the country the act was performed or where it has its effects.

frequent inspections, except for security of the system and at the unique level of data traffic<sup>206</sup>.

### 5. Subjects in the activity of inspection

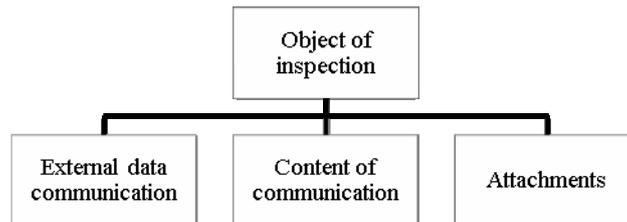


It is indifferent who run the control, as long as it has, directly or indirectly, the power to do it. In addition, it is irrelevant the number of workers monitored; it would be in any case, the existence of an organizational interest that exceeds the judgment of proportionality. A different question is the presence of the employee concerned and / or their representatives. It would require the presence of workers and their representatives in the monitoring, as it is a guarantee of non-infringement of the dignity of the worker, although section 20.3 Workers' Statute does not require it to proceed to inspect<sup>207</sup>.

<sup>206</sup> DPWP (2002: 17). According to D'Antona (1988), the subordination does not cover continuous monitoring of the worker; the purpose is to ban the corporation meddling in gestures or behavior irrelevant for purposes of assessing the work performed.

<sup>207</sup> On the significance of the presence of workers and its representatives: Superior Court Galicia 20-10-2006 [JUR 2007, 207642], Superior Court Comunidad de Madrid 31-05-2005 [JUR 162259], Superior Court País Vasco 21-12-2004 [JUR 2005, 61132]. It would be useful to establish "joint technology committees" to analyze the problems arising from the ICT that

## 6. Object of inspection



The secret of correspondence is applicable to e-mail and attachments. On the other hand, privacy covers, to some extent, the right to engage in work relations, which limits the legitimate need of surveillance<sup>208</sup>. Moreover, it is possible to obtain sensitive data of the worker at all described levels<sup>209</sup>. However, it is important to carry out a stepped access: first level should be controlled only from the external data communications, which enable to deduce if there is an abuse or not running properly work (number, date and time of sending / receiving, recipient / sender, if there are attachments and its capacity, time of use...); only if it is to control the normal development of work, and if there is some indication from previous data, it would be possible to find out about the content and attachments of the e-mail, but only those which are strictly related to work<sup>210</sup>.

## 7. Purpose and use of data

In order to consider the inspection legitimate, a proportional treatment of the data must be carried out: its purpose must be

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formulate programs and propose protective solutions to workers (Neffa, 1990: 870). Despite its poor implementation, section 64.4.d) Workers' Statute recognizes a right of consultation with employee representatives before implementing or revising the organization and control systems of work. Superior Court Comunidad de Valencia 19-07-2005 [AS 3205] describes as important the absence of this consultation.

<sup>208</sup> DPWP (2002: 9) following the case law of European Court of Human Rights. Recognition in section 18.3 Spanish Constitution has "formal character": It refers to the content regardless its belonging to the sphere of privacy (Calsamiglia Blancafort, 1999).

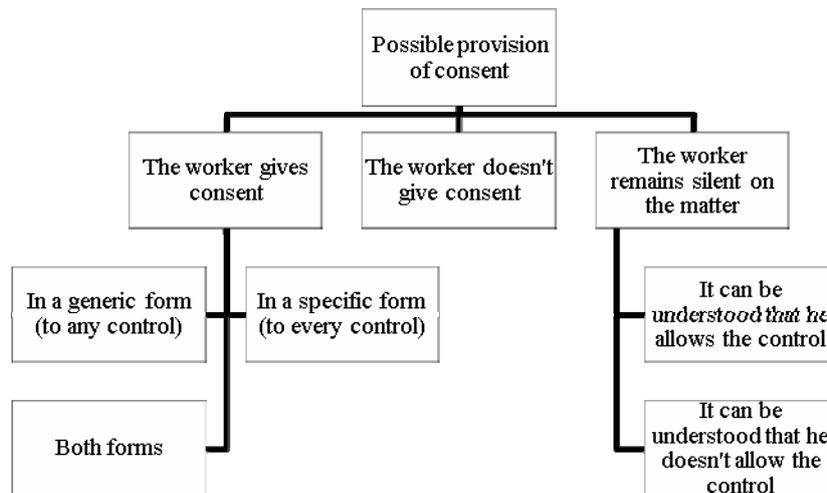
<sup>209</sup> Zanelli (1986) argues that data obtained during the performance of the work allow to conclude about professional and personal profile of the worker; with only the traffic data (sender or emissary, title) it is possible to obtain data about politic tendencies, sex orientation, etc. (Colàs Neila, 1999: 50). In that respect: Oliver (2002, 329) and Craig (1999: 19), warns about the possibility to obtain data not specifically sought.

<sup>210</sup> DPWP (2002: 15) reduces the control of personal e-mail only to security system reasons.

determined, explicit and legitimate, without any further different use. Moreover, the principle of transparency includes the right of access, correction, suppress or blocking of data processed without compliance with data protection legislation, without restriction and with reasonable frequency. It is a "powerful tool" for workers to verify the fairness and legitimacy of surveillance. Finally, data retention should be made by the indispensable time (more than three months would be difficult to justify)<sup>211</sup>.

Its subsequent use should be linked to the purpose of control, which has particular procedural relevance with regard to the validity of the evidence. Thus, according to the procedural rules, if obtained in violation of fundamental rights, it would have no effects, which would happen if the e-mail control does not to exceed the judgment of proportionality<sup>212</sup>.

## 8. Worker's consent



<sup>211</sup> DPWP (2002: 13-17).

<sup>212</sup> Sections 11 Judicial Power Act, 90 Labor Procedure Law and 287 Civil Procedure Law. See Baylos Grau (1998: 15 and ff.). The lack of validity of evidence leads to consider the dismissal without cause; I think it should be qualified as null, since it cannot overlook the grounds of their invalidity: the violation of a fundamental right.

There is a common point to potentially violate fundamental rights in the control of e-mail: its availability by the owner, being his consent relevant<sup>213</sup>. That would mean to qualify as legitimate the control of e-mail and the knowledge of its data<sup>214</sup>. However, as a manifestation of the asymmetry of the parties, the necessary and sufficient freedom in the worker may lack and therefore, it would be important that the workers' representatives ensure its existence<sup>215</sup>.

In order to provide greater legal certainty to the consent, it should be express and in writing. In its absence (expressly or by silence of the worker) to be aware of what is being communicated it is essential judicial authorization; however, in the employment relationship, while e-mail is a mechanism of the company, I understand that this requirement would not be necessary, but the presence, and where appropriate the provision of an alternative consent made by the representatives of workers, would be necessary<sup>216</sup>. On the other hand, it would be desirable to provide such consent in a double time: general and specific; although it would be desirable for greater legal certainty, the existence of one or the other would be valid<sup>217</sup>.

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<sup>213</sup> On the relevance e-mail's consent of control: Superior Court País Vasco 21-12-2004 [JUR 2005, 61132] and Superior Court Cataluña 5-07-2000 [AS 3452].

<sup>214</sup> According to Privacy and Honor Protection Law (1982) and Personal Data Protection Law (1999). Alfandari (1990: 554): "no attack on the privacy of men ... can be done without their consent." The secrecy of communications doesn't operate if it is authorized by the interested party (Constitutional Court Decision 110/1984). According to Tascón López (2005: 104) is a "cardinal principle" of data protection legislation, which reflects the new dynamic sense of privacy as a control of information concerning by its holder (Lopez Carrillo, 1987: 58 and Rodotà: 1994 102).

<sup>215</sup> Martínez Fons (2002: 87).

<sup>216</sup> Marín Alonso (2005: 159-168) understands that judicial authorization is required in the absence of consent: otherwise it can only be controlled complimentary aspects of communication.

<sup>217</sup> Colàs Neila (1999: 40). Many times there are warnings on the screen regarding the possibility of control which must be accepted to be able to work; In relation to this, notwithstanding the obligation to be informed, I understand that we should give it relevance to the provision of consent, as it becomes a reflex.

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