INFORMATION TECHNOLOGY AND WORKERS' PRIVACY: PUBLIC AND PRIVATE REGULATION

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This analysis of the regulations created in order to protect the right to privacy[1] is intended as a basis for reflection upon the legislative techniques which have been chosen.[2] In particular, we shall examine the ways in which the legislators of different countries have decided to act in order to satisfy the new and increasingly pressing requirements for privacy that have emerged as a result of the development of information technologies: technologies which have transformed both quantitatively and qualitatively the effects of the processing of personal data. These reflections—inserted in a wider context—also aim to help in the evaluation of the regulatory techniques used in different legal systems to protect the rights of data subjects. In other words, the purpose is to identify the methods that legislators have used to enforce personal rights and so prevent such rights from being assertable only *post facto*—that is, only after they have already been infringed.[3]

In order to put this analysis into a proper framework, distinctions must first be made between civil law and common law systems, and between laws that are derived from European Community law and those that are not. These distinctions must be made in order to evaluate the different national laws while at the same time bearing in mind the different legal traditions and the extent to which European law has affected the laws of the Member States of the European Union (EU). Comparison of the law on data protection in different

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1. See the national studies in this collection.

2. *See also* Christophe Vigneau, *Information Technology and Workers' Privacy: Regulatory Techniques*, 23 COMP LAB. L & POL'Y J. 505 (2002).

3. *See* B. Caruso, Gli Esiti Della Globalizzazione: Disintegrazione o Trasformazione del Diritto del Lavoro? (paper presented at the meeting in Trento on Globalisation and Employment Rights: The Role of Super-national Legislation, Nov. 22-23, 2000), the proceedings of which were edited and published by S. SCARPONI, GLOBALIZZAZIONE E DIRITTO DEL LAVORO (2001); in more general terms, *see* U. BECK, IL LAVORO NELL'EPOCA DELLA FINE DEL LAVORO 99 (2000).

countries immediately brings to light one significant distinction: All the EU Member States now have comprehensive data protection legislation, which harmonizes the rules across the EU and guarantees the free movement of such data, whereas the two countries in our study that are not part of the European Union, the United States and Brazil, have no such legislation. In the Brazilian legal system, the need to protect the privacy of data subjects has, to some extent, been met by the development of caselaw: the courts having applied the general principles of privacy that are guaranteed by the Constitution (and which, in employment cases, may also be guaranteed by collective agreements). Nonetheless, not only does Brazilian law not have comprehensive data protection legislation, but there are not even any regulations governing particular aspects of this problem, or covering specific fields of application (such as employment). The situation is similar in the United States where there is no federal legislation which affirms a general right to privacy in data processing: that is, there is none that goes outside a particular sector in which this right is to be enforced. There are, however, some federal laws that create protection for specific types of data, such as the Occupational Safety and Health Act and the Americans with Disabilities Act; and some individual states—although only a few, such as Colorado, Illinois, Indiana, Michigan, and South Dakota—have adopted laws on data protection in specific areas (of employment) where the need for privacy has drawn specific legislative attention.

It is, however, not very useful to compare the positions in these two countries because the reasons behind the development of their laws are profoundly different. In Brazil, the lack of data protection legislation may mainly be due to the fact that, compared with some other countries, the process of computerization of personal data is only just starting, so that the need has not yet been felt for the protective legislation that some other countries provide. The situation in the United States is significantly different. Here, the absence of comprehensive data protection legislation seems due to a conscious policy choice by legislators: In conformity with the Anglo-Saxon tradition, which tends to rely on caselaw for guidance, such legislation as has been enacted tends narrowly to focus on specific problems; the legislatures resting largely content to leave it to caselaw to define the scope of the right to privacy in this context and the procedures for its enforcement.

As regards the legislation in the EU Member States, it seems helpful first of all to look at the position in these countries both before and after they were required to implement Directive 95/46/EC into

their national legal systems; this should show us whether the legislatures in these countries altered their approach to data protection legislation as a result of the Directive. We should, of course, also note that, before being obliged to do so by Community law, some Member States had not adopted any legislation on data privacy. So, while in some countries a right to data privacy that covered workers was expressly recognized, such as in Germany (with the *Betriebsverfassungsgesetz* of 1972) and in France (with the *Loi Informatique et Liberté* of 1978), in other countries, such as the United Kingdom, this right was implicit (in the *Data Protection Act 1984*); and in some countries privacy was only incidentally protected as part of the application of regulations of wider scope. Indeed, workers' privacy was protected only by certain provisions of the *Statuto dei lavoratori* of 1970 in Italy and of the *Estatuto de los Trabajadores* of 1980 in Spain: general charters whose purpose was to regulate individual and collective employment relations as a whole.

Although these differences are important, the aspect that most interests us here is the strongly public nature of all these national regulations. All lay down rigid and specific limits on the collection and further processing of personal data and none allow for derogations to be agreed by individual data subjects or by organizations representing them. Thus, unlike the United States, European law-makers fashioned a complete system of safeguards that we may define as restrictive, in that it is based on laws which impose limitations and prohibitions. In this respect, the first observation that comes to mind is that, while this type of protective legislation conformed with the traditions of the civil law countries, it was unusual in the United Kingdom. The *Data Protection Act 1984* was based on the Council of Europe convention and thus regulated this area through obligatory, specific, and detailed regulations, moving away from the traditional approach in that country whereby the law left greater scope for the parties themselves to decide how to regulate their behavior. In this way, the system of data protection in the United Kingdom was already coming closer to the type of legislation found in the civil law Member States before Directive 95/46/EC was created. In other words, in this area, even the U.K. Legislature chose to create laws that set out specific obligations rather than to leave space for the parties concerned to decide the matter for themselves: the law was thus essentially public, rather than private in nature.

Important changes were, however, made in the legislative techniques used by the Member States when they adopted legislation to implement Directive 95/46/EC. In accordance with their

obligations, each Member State adopted a comprehensive body of law which protects the privacy of the data subject in every possible situation where their personal data are processed. The main novelty in the approach taken in the Directive, and thus in these laws, is that their protective function is pursued through the use of different techniques: in addition to the restrictive prohibitions which were characteristic of the first generation of privacy protection laws, we now have a permissive type of protection, based on the active participation of the person directly involved (the data subject); of collective organizations (such as worker representatives); and of a public body (the national Guarantor or Commissioner). The lawfulness of the processing of personal data is, therefore, no longer exclusively to be achieved by requiring the data subject to adhere to a system of rigid and precise rules defined in legislation: the definition and application of these rules has now to some extent been devolved to the data subject and to these other bodies.

First, the data subject has been granted autonomous decision-making powers. In the legislation of all EU Member States the consent of the data subject may be required before personal data can lawfully be submitted to any form of processing, whether electronic or not. The right to privacy is not seen simply as a right which must not be infringed by third parties, but rather as a right of data subjects to decide and to supervise the use that is made of their own personal data: the legislature clearly wishes to give the data subject an active role. This is reinforced by the measures that ensure that data subjects are fully informed before they exercise their powers of data self-determination; the legislation makes it clear that consent is only valid if data subjects have first been told why and how their data are to be processed. A series of rights (such as the right to rectify erroneous data) has also been given to data subjects in order to make their decision-making powers effective.

The participation of data subjects may, however, be ineffective in some circumstances. Data controllers do not always have to seek consent; and, even where they do, in the context of an employment relationship, where there is disparity of power between the employer (data controller) and the worker (data subject), the situation in which the latter is asked to give consent is not always such as to allow it to be concluded that this consent was freely given. Similarly, the workers' powers of intervention and supervision may, for the same reasons, prove to be inadequate to prevent the indiscriminate use of their data. Self-protection may then not be enough on its own and, for this reason, the Community Legislature created a second possible level of

supervision, which is to be exercised by third parties, including organizations. This is only an option that Member States may choose to adopt if they wish, and so Directive 95/46/EC does not specify how these representative bodies should act.

The possibility of supervision by representative bodies was also set out in the Council of Europe's Recommendation R(89)2 on the protection of employees' personal data; and the idea has been taken up to a significant extent in many member States. For example, the Works Councils in France and Germany, by exercising their rights to be informed and consulted with respect to procedures for the processing of personal data about the workforce, take on an active role in the overall system of protection for workers. By contrast, in the laws of Italy, Spain, and the United Kingdom, no collective body is granted specific powers to intervene in the protection of workers' personal data. In implementing Directive 95/46/EC, the Legislatures did not consider ways in which representative bodies can play a part in the overall system for protecting the data privacy of workers. Thus, workers' representatives in those countries have powers to intervene only to the extent that previously existing legislation required them to be informed or to consent to the installation of equipment for supervision. Representative bodies are not given any specific rights, and there is not even any reference to the role these bodies might play after the initial phase in which the supervision equipment is installed. It is true that this possibility is not ruled out, even if it is not expressly contemplated; it is, for example, possible that data subjects could assert their rights by assigning them to the workers' representative body. Indeed, as Javier Thibault argues,[4] the effectiveness of data privacy laws at the workplace may depend on the part played by representative bodies in their capacity as defenders of the interests of the workers. The failure of some countries to grant specific rights of representation to workers' representatives should not, however, be taken as a deliberate rejection by these legislatures of the role that workers' representatives may play; it seems rather to relate to the overall scope of the legislation, which applies to all data processing, and so was not drafted specifically to deal with data processing within the employment relationship. The possibility that workers' representatives may participate in these systems should not, therefore, be excluded; and if this does in fact occur, it will be a further stimulus to the private regulation of this area.

4. Javier Thibault Aranda, *Information Technology and Workers' Privacy: The Role of Worker Representatives*, 23 COMP LAB. L & POL'Y J. 533 (2002).

Last, in addition to the function of private parties in supervising the lawfulness of data processing, all EU Member States have made provision for a third form of action. Article 28 of Directive 95/46/EC specifically requires each state to give one or more independent public authorities the power to supervise the application of the laws that have been passed to implement the Directive. This is highly significant because directives usually set out general objectives, but do not specify the mechanisms that the Member States should use in order to achieve those objectives. Although the national laws on the structure and procedures of the supervisory authorities are quite different, a comparison of the bodies themselves reveals many aspects in which they are alike in function and in competences. Thus, in contrast to the United States and Brazil, which have no such bodies, all EU Member States have passed laws that give a public authority the duty to supervise all processing of personal data and that give those authorities the powers to play a decisive part in the process of ensuring that such processing is lawful: the legislation requires them not just to investigate infringements of the law, but also to actively promote compliance.

Within the overall system of enforcement, these provisions on the powers and duties of public authorities work in parallel with the powers granted to the data subject (and possibly to collective organizations). The most striking feature of this combined system is the mixture of the public and the private dimensions. Indeed, one of the most innovative aspects of these new laws is the adoption of a model of data protection that is not centered exclusively on a rigid system of non-negotiable rules, where private persons are unable to make their own judgments and decisions. This legal approach is a novel departure from the European positivist tradition, which is based largely on the creation of an exhaustive and structured body of rules, within which little room is left for private autonomy.[5] The data protection laws in the EU Member States should not, therefore, be thought of as traditional legal provisions (those which usurp or replace private autonomy), but rather as measures that promote just such autonomy;[6] the peculiarity of these laws may reside in the fact

5. On the present trends in labor law in the field of collective bargaining *see* B. Caruso, *Patti Sociali Decentrati, Sindacato e Contrattazione Collettiva: un Osservatorio sui Cambiamenti del Diritto del Lavoro*, *in* DIRITTO DELLE RELAZIONI INDUSTRIALI 429 (2001); B. Caruso, *Decentralised Social Pacts, Trade Unions and Collective Bargaining (How Labour Law is Changing)*, *in* TOWARDS A EUROPEAN MODEL OF INDUSTRIAL RELATIONS? BUILDING ON THE FIRST REPORT OF THE EUROPEAN COMMISSION (M. Biagi ed., 2001).

6. This terminology is based on that used by M D'Antona, who writes of "*provvedimenti 'espropriativi' o 'sostitutivi'*" and of "*interventi 'preformativi.'*" *See* M. D'Antona, *L'autonomia*

that they do not predetermine the content of regulation, but instead establish the foundations for the exercise of free individual choice. We might thus infer that the legislators wished to encourage a movement away from protective laws based on obligatory models of behavior towards flexible legislative models, away from what has been defined as "rigid over-protection" toward protection through more flexible means.[7]

This would seem to be an indication of a more general tendency which appears to be developing within the European Union: the creation of a new relationship between individuals and regulations. This new relationship does not focus on individuals and sanctions and it does not have the result of encouraging a subordinate or passive attitude on the part of individuals with regard to the legal provisions which protect them; instead, it encourages individuals to approach the law in a spirit of seeing what opportunities it may offer them. Such laws intentionally leave room for individuals to make their own decisions, so that they no longer find themselves in possession of rights concerning which all the possible choices have already been made for them. Individuals now have rights that enable them to choose among various possibilities. Thus, the way in which these legislatures deal with problems has been transformed. Instead of the old mechanisms for protective regulations, which were instruments that set the individual in a fixed position within rigid and predetermined categories, a new, "re-regulatory"[8] process is now developing in which the State sets general rules that other parties (including private parties) must then apply.

Some commentators see this as evidence of a crisis in legal regulation, brought about by a willingness to consider new forms of regulation to the detriment of the traditional model of comprehensive legislative guarantees: the new regulatory model will be the product of the interaction of the different forms of regulation—the combination of both public and private sources. But, in fact, the inclusion of elements of private and autonomous decision-making within a system of predetermined legislative regulations does not imply a change in the predominantly public nature of such laws.

Individuale e le Fonti del Diritto del Lavoro, *in* GIORNALE DI DIRITTO DEL LAVORO E DELLE RELAZIONI INDUSTRIALI 472 (1991).

7. These terms were first used in Italy as early as in 1977 in a paper on labor policy presented at a meeting organized by the Italian Federation of Mechanical Engineering Unions on *Innovazione e crescita. See* R. de Luca Tamajo, *"Garantismo" e "controllo sindacale" Negli Sviluppi Recenti della Legislazione del Lavoro*, *in* I RIVISTA GIURIDICA DEL LAVORO E DELLA PREVIDENZA SOCIALE 662 (1978).

8. M. D'Antona, *supra* note 6, at 473.

Although these laws allow a part of the rules to be determined by parties other than the Legislature, the role of private parties is nevertheless complemented by that of the independent administrative authority with a public status, which has the duty to define the requirements of the law on the processing of personal data and to ensure compliance with these requirements. And it should also be remembered that the national legislation in each Member State guarantees compliance with the law through a system of sanctions that includes penal sanctions. The establishment of such systems by all the EU Member States is a strong acknowledgement of the predominantly public nature of the data protection laws, for Article 24 of Directive 95/46/EC only requires the adoption of suitable measures to ensure the full implementation of its provisions: Although Community law can and does require Member States to give data subjects a right to compensation for damages suffered as a result of unlawful processing, it cannot require laws that establish criminal liability, as Community bodies have no competence in this area. Nonetheless, each EU Member State, in addition to creating civil liability with respect to the unlawful processing of personal data, has created provisions for penal and administrative sanctions.

The public dimension of the legislative structure therefore continues to prevail over the private dimension. Indeed, a more private approach would not be able to ensure the effective protection that the national laws of the Member States must provide: whatever the context in which data protection laws are applied—and especially in the context of employment relations—there is usually so great a disparity of contractual power between the data controller and the data subject that there is a need for a legally-imposed, minimum standard of privacy protection that cannot be derogated from by private agreements. In contexts such as these, the determination of the protective rules cannot be left wholly or mainly to the decisions of the private parties involved; if it were, the effectiveness of the entire system of legal protection would be severely prejudiced. The very aim of protecting the weaker party would be undermined if the rules that govern the way in which personal data are processed were to be determined through decisions taken exclusively or mainly by a private power. And, for the same reasons, the function of enforcement cannot be conferred exclusively on the private parties who are involved in the processing.

The data protection laws in the EU Member States are thus not remarkable for the public or private nature of the mechanisms of enforcement, but rather for the way in which the laws have moved

away from the rigid formulae of the continental European legal tradition. Instead of following the more usual models of legal regulation, the Member States have instead established a system of general guidelines and given greater importance to the legal instruments and techniques that promote and support a new legal dynamic.[9] The fact that data privacy regulations allow private parties elements of autonomy in the decision-making process is important, not so much in terms of any "privatisation" of legal regulations, as in terms of the way in which the rules have been made more flexible. Legislators wish to move away from the rigidity of an exclusively public form of regulation, thus allowing the autonomous powers of private parties to take its place alongside the strong regulatory hierarchy of the law. In this way, the legal provisions constitute a boundary within which private autonomy can develop and, at the same time, a guarantee for the free exercise of this autonomy.

The conclusion of this comparison is then that we may be witnessing a process whereby the Community legal system is moving closer to Anglo-Saxon legal models. As a necessary consequence of the assimilation of Community law into the domestic laws of the Member States, this would involve the intermingling of the principles that are at the root of common law and civil law systems. From a wider perspective, one might then wonder whether the advent of an open system of rules to which various parties, even private parties, can make a contribution, is the beginning of a trend in Community law towards models of regulation that are more typical of the Anglo-Saxon legal systems.

9. M.R. FERRARESE, LE ISTITUZIONI DELLA GLOBALIZZAZIONE (2000).