

INFORMATION TECHNOLOGY AND WORKERS' PRIVACY: OLD AND NEW PARADIGMS

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I. INTRODUCTION

In their discussion of the impact of new information technologies upon the employment relationship the Italian and Spanish studies in this collection seem to suggest that it may be necessary to rethink current legal structures because the new issues cast doubts upon the vitality of existing law. In contrast, the French study argues that the surveillance of workers, and the processing of their personal data by the employer, are old problems and the main novelty is in the means of surveillance and processing that are now at the employer's disposal. Between these positions—the old and the new—arises a conceptual question of fundamental importance: Are we facing the emergence of a new paradigm of surveillance and data processing in the employment relationship or is there only a reframing of old questions related to the employer's power of command and its limits, especially in relation to employee privacy?

Employment relations have indeed undergone a series of changes due to the impact of the new information and communications technologies and these may have caused a significant change in the framework that we use to analyze the surveillance of workers and the processing of their personal data. Certainly, this is a question that cannot be disconnected from the debate on the transformation of work in contemporary societies. So the use of the notion of paradigms may be extremely valuable in developing a better conceptualization and framework for analysis of this research area, as it may allow a better understanding of these transformations. A paradigm, as

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defined by Thomas Kuhn,¹ should be thought of in two different and complementary ways: On the one hand, it indicates a constellation of values, beliefs, and techniques that are shared by the members of a given community; and, on the other, it refers to one element of this same constellation—a concrete solution to a particular problem that, when used as a model or example, may enable members of that community to find solutions to other problems (and thus take the place of explicit rules). In other words, the second meaning shows that a paradigm constitutes a general theoretical model where the extrapolation of the solution to a particular problem leads to the development of an all-purpose formula that defines the responses to other problems.

As a universally-recognized understanding (at least during a particular period of time), a paradigm provides a means of analyzing problems and of finding solutions. In allowing the problem to be presented in a particular way, the paradigm sets out a framework of notions, concepts, and logic that makes it possible to develop a solution. In doing this, it sets the problem and its solution within the same conceptual framework. As we shall see below, this is of crucial importance in trying to determine whether or not we are now facing a new problem in labor relations.

Nevertheless, a paradigm goes beyond the instrumental representation described above. Because it constitutes a consensus among the members of group who use it, the paradigm helps to create and define a certain representation of society; it establishes the legitimacy *vel non* of research (by defining what may or may not be a valid object for scientific study and by defining how such a study should be done); and it affects the group's conception of the world and of community values. In sum, it provides a disciplinary matrix for all the analyses done by the (scientific) community. Thus, when we approach our national studies from a comparative perspective, the notion of paradigms may be extremely useful as a tool to determine whether we are looking at a new problem (which would probably involve new concepts, new values, new forms of regulation, and new lines of judicial decisions), or whether we are looking at the reformulation of old problems whose answers are still shaped in the same conceptual and theoretical structures, established (and limited) by the same academic disciplines.

1. THOMAS KUHN, A ESTRUTURA DAS REVOLUÇÕES CIENTÍFICAS 218 (5th ed. 2000).

II. AN OLD OR A NEW PROBLEM?

The national studies show that issues concerning the surveillance of employees and the processing of their personal data are in no way new concerns in the context of the employment relation. However, the discussion in these papers demonstrates that, in all the legal systems involved, there is a certain absence of answers (in terms of judicial decisions) and a certain difficulty in the formulation of an adequate judicial response (in terms of the application of the existing law to individual cases). It would, therefore, seem reasonable to infer that the use of new technologies may be leading to the development of new forms of subordination in labor relations. Consequently, new problems are arising and these require new (judicial) solutions. If these new solutions are not to constitute a new paradigm, they must not go beyond the parameters established by the old question: What are the limits of the employer's powers of command when this comes into conflict with the protection of the employee's privacy?

The phrasing and logic of this question—that is, the manner in which the question is conceived—implicitly delimits the possible answers. As solutions are developed they will have to take for granted the existence of two differentiated and reasonably well-defined spaces: that of privacy and that of the world of work. In other words, because of the way in which the question is formulated, it does not relate directly to the legitimacy of surveillance and of data processing at the workplace, but rather to the extent to which one of these spaces may legitimately encroach upon the other. The problem would appear in a totally different light if we were to break away from this logic—if the analysis of both the problems and their solutions were not conceived using the same conceptual approach. For example, if the two spaces were amalgamated, it might not be easy to find solutions which resulted in the limitation of surveillance and data processing by the employer.

Indeed, the national studies indicate that, as the way in which societies are organized becomes increasingly related to information and communication, the use of the computer, and the possibilities provided by it, blur the frontier between the private and the professional worlds, so enabling the workplace to become a space of total disciplinary control. As a consequence, it is possible to conclude that we are now facing forms of control and of employee subordination that differ substantially, not only in quantity but above all in quality, from those that we have known until now. An idea that also appears in the national studies where they discuss the creation of

a more flexible borderline between the spaces dedicated to working life and to private life. This change has had an impact on the structures of these spaces which have (at least until recently) been well-defined and which have thus been important in setting a limit upon the employer's power of control. The blurring of the border between these spaces is ever more common because of the developments in information technology; and if this development is not followed by a change in the conceptual approach to the problem—that is, if we continue to think about the question in the manner in which it is conceived under the current paradigm—it will be increasingly difficult for courts to impose limits upon the expansion of control by employers.

The national studies also show that the development of this gray area in the border between professional and private spaces is an important factor in the development of more absolute and totalitarian forms of control. Indeed, as the new technologies of information and communication allow the workplace to be broken up into smaller fragments, the controller's physical presence gets both diluted and strengthened at the same time. This apparent paradox can easily be explained: although controllers are physically further away, technology has enabled them to increase the range of their control, and to improve its quality, to the point that they are now able to practice everywhere a total form of control.²

This trend is related to another area that, even if it was not explicitly considered in the national studies, implicitly permeates all of them: the issue of citizenship and of the exercise of citizens' rights by the employee in the workplace. One may also note (albeit from a different perspective) elements of the debate on the increasing lack of distinction between two other spaces that have previously been very clearly demarcated: the public and the private spheres.³ It is important to stress that the separation between citizen and employee (categories which are taken in this paper to relate specifically to the public and private spheres, respectively) is not seen here in a limited and specific national context; nor for that matter is it historically

2. These practices of control may be even further strengthened by the reactions to the events of September 11, 2001. In a context in which potential threats to Western societies may lead to demands for stronger order, civil liberties appear to give way to the perceived needs of the state. In this way, the private sphere (which is already being structurally transformed through its increasing assimilation into the professional sphere) could also be undermined by the security policies imposed even by countries with a long tradition of guaranteeing individual liberties.

3. On this, see Claudia Faleri, *Information Technology and Workers' Privacy: Public and Private Regulation*, 23 COMP. LAB. L. & POL'Y J. 517 (2002).

limited.⁴ If this were the case, it would not have been one of the common (although implicit) elements in the national studies. In fact, it points to a more general discussion about employment relationships and modernity, that is related not only to the long history of workers' struggles for specific rights at work, but also connected to the protection of their status (and rights) as citizens, a status that should not be lost when they enter their workplace.

In other words, subordination in employment is not necessarily incompatible with the status of citizen. How this is possible? The answer could be by moving away from the idea that there is only one way of exercising one's citizenship: that is, in a political, participative, and individual manner. Instead of this, workers could be thought of as constituting a collective body which enjoys citizenship rights of its own (rights which differ from those enjoyed by individuals). This different approach would have two important consequences. First, it would become possible to think of citizenship in a plural manner and thus overcome the limits imposed by an approach based on the individual. And second, our problem would change from "how do we extend citizenship rights into the workplace?" to "how do we acknowledge that certain citizenship rights do not disappear in the workplace?"

Citizenship embodies several different dimensions that address specific civil, political, and social issues. These are historical constructions that are not subject to a logical and chronological development (that is, they are not the result of a linear process), but that, nonetheless, give rise to a harmonious and coherent whole.⁵ However, the combination of civil, political, and social rights does not result in a concept of citizenship that is a monolithic bloc, immune to setbacks and to internal contradictions within its historical development. It is important to stress this because, within a wider consideration of the surveillance of workers and of the processing of their personal data, we should deal with issues of rights and civil liberties that are closely connected to citizenship. Indeed, in our

4. A good example of a specific national context is the debate within the French political, academic, and social spheres during the first half of the 1980's. Indeed, in 1982, the expression citizenship in the enterprise was used to explain the creation of a variety of employees' rights and duties inside the enterprise (under the *Auroux laws*). See Étienne Cricqui, *La Citoyenneté Dans l'Entreprise*, in *L'ÉTAT DE DROIT* (D. Colas ed., 1987); Jacques Le Goff, *La Citoyenneté Dans l'Entreprise à l'Épreuve de la Crise*, in *CITOYENNETE ET NATIONALITE* (D. Colas, C. Emeri & J. Zylberberg eds., 1991).

5. The concept of linear processes was developed by T.H. Marshall. See T.H. MARSHALL, *CIDADANIA, CLASSE SOCIAL E STATUS* (1967). For a criticism of this evolutionary perspective, see Patrick Hassenteufel, *L'État-Providence ou les Métamorphoses de la Citoyenneté*, in 46 *L'ANNE SOCIOLOGIQUE: NATION, NATIONALISME, CITOYENNETE* n.1 (1996).

conceptualization of these problems, we should be dealing with a citizen who is also an employee, and not with an employee who also happens to be a citizen.

Going back then to the question that we set ourselves at the start of this section—whether this is an old or a new problem—it is clear that we must ask not only whether, in this new technological era, we are witnessing the prevalence of private issues over public ones, or the extension of a public status—citizenship—to somewhere usually conceived as a private environment—the workplace. We must also ask whether these changes represent the emergence of a new paradigm in which—and this is the most worrying aspect—the frontiers between public and private spheres have disappeared.

III. CONCLUSION

The different national studies confirm the existence of new dilemmas related to the old confrontation between the employer's powers of command (in our case, specifically the power to conduct surveillance of workers and to process their personal data) and the protection of the employees' privacy. In a complex environment, where labor relations have undergone major changes, we must define the scope of this question very carefully in order to see whether we are still using the same conceptual framework; that is, whether we are still using the same paradigm of employment relations, or whether, in the absence of adequate answers to current problems, we are actually facing the emergence of a new paradigm, which may be used in order to forge new solutions.

The new means of control at the employer's disposal and the possibilities created by the rapid development of computer technologies (such as surveillance through web cameras, the monitoring of electronic mail and Internet access, and the computer processing of personal data) are directly connected to the new characteristics of employment relations. These may be grouped under three different headings: the blurring of the boundaries between the private sphere and the employment sphere; the development of the workplace as a space of total disciplinary control; and, the expansion of the status of citizenship (as upheld in the public sphere) to the employment relationship (which remains in the private sphere). These characteristics are potential sources of conflict, and indeed they seem to be mutually contradictory (especially the last with the first two). It is clear, therefore, that employment relations are going through a very important change. Whether this in fact constitutes the

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development of a new paradigm is, however, something that we shall have to wait to see because, after all, ambiguity and confusion are the principal characteristics of a time of change.

