

## Article

# Teleworking: A New Reality Conditioned by the Right to Privacy

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**Abstract:** Faced with protecting the right to privacy and, with it, the inviolability of homes, the development of new technologies and the possibility of developing work from home has opened the door to a series of new conflicts that require us to provide a specific legal framework by which such situations can be addressed. In the Spanish case, we speak of Law 10/2021 from 9 July on remote working. The objective of this study is to assess the scope as well as the problems that this law generates during its application, regarding controlling the provision of services. However, we not only identify the incidental factors, but also provide a necessary reinterpretation of the right to privacy from the perspective of the inviolability of homes, especially when its current articulation may operate to the detriment of employees' rights, as contradictory as this may seem.

**Keywords:** remote working; teleworked; flexibility; privacy; freedom of enterprise; fundamental right; market economy; place of residence; control channels



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## 1. Introduction

*"( . . . ) the conclusion of an employment contract does not imply, in any way, the deprivation for one of the parties, the worker, of the rights that the Constitution recognizes as a citizen [ . . . ]. Neither business organizations form separate and watertight worlds from the rest of society, nor does the freedom of enterprise, established by article 38 of the Constitutional text legitimizes that those who provide services in those on behalf of and under the dependence of their owners must bear transitory dispossession or unjustified limitations of their fundamental rights and public freedoms, which have a central and nuclear value in the constitutional legal system" <sup>1</sup>*

The labor relations framework has undergone constant transformation since the incorporation of new technologies into production processes. This transformation, however, has accelerated in recent years due to growing technification, resulting in a production metamorphosis from a concentrated production framework model to a highly technical production framework model that can be developed via its individual units of production as well as the whole network. With this, it is absurd to maintain univocal and hieratic discourses in the literature and in interpretations of the labor market, and even more absurd to maintain rigid regulatory frameworks in the face of productive realities that demand flexibility.

The repercussions derived from this metamorphosis are thus evident in the competencies of organizational and labor policies, especially when traditional work models are eroded, giving way to new forms of entrepreneurship and cooperativity within work-on-demand.

Until recently, the conclusion to this had exclusively been reorganization under the criteria of greater temporality; however, in the last two years, a new factor, flexibility, with a direct impact on the productive relocation of jobs has acquired special relevance compared with traditional work models anchored to physical work centers.

<sup>1</sup> STC 88/1985 of 19 July (F. J. 2<sup>o</sup>).

Precisely for this reason, we can neither start from a lack of knowledge on the current regulatory frameworks, even if we strengthen their validity, nor ignore the need to identify the elements that require necessary reformulation.

Within the context of the formulation and reformulation of production models and, therefore, of the labor market, we have experienced the re-evaluation of work spaces in which remote work, understood as work carried out outside the usual establishments and centers of a company, and teleworking are considered from the pre-eminent use of computer, telematic, and telecommunication means: they have achieved outstanding recognition, both from a perspective of modernization and from flexibility in the organization of work.

Are we heading towards a new morphology of work that includes all existing work modalities, or are we heading towards new technological, contractual models?

Possibly, at least in these early stages and exclusively with regard to teleworkers, we consider flexibility compared with traditional models of employ.

Thus, we intend to identify the problems that telework generates: first, work schedules and the impact on availability; second, the impact on physical locations for the provision of services and on guarantees for the worker; and third, company control over work performed outside a work center.

From a methodological point of view, we do not merely carry out a descriptive work of the legal framework, but based on this, we perform a critical analysis that identifies the problems associated with remote working.

We start from two limiting criteria: firstly, our analysis remains within the framework of contractual relationships within the private sector, not so much because Law 10/2021 from 9 July is not applicable to the public sector, but because we do not contemplate other regulations that are applicable in such a sector and because we contextualize such a norm, and secondly, our analysis is performed from the exclusive space–time perspective of the provision of services, so we do not assess other factors subject to regulations regarding remote working.

The flexibility referred to in this new legal framework is based on strict respect for the legal framework, both with regard to the identification of work and rest periods and in the application of the time registration system provided in Article 34.9 of Royal Legislative Decree 2/2015, from 23 October, approving the revised text of the Workers' Statute Law<sup>2</sup>.

Similarly, we consider the protective standards that Article 18.2 of the Spanish Constitution recognizes for private housing, with a premise based on the inviolability of homes, by virtue of which any entry or registration requires express authorization from the owner or a judicial entity. With this, inspections conducted not only by the company but also by external entities are especially complex if it does not go hand in hand with judicial authorization or authorization by the employee themselves.

## 2. Business Control over the Tele-Employee Job Service

Historically, the tools of business control were considered as simple instruments of control of business orders as well as means of justification for the subsequent use of disciplinary power. This justified that the regulatory framework of this control capacity was legally very blurred despite the fact that it could lead to a manifest interference in the personal sphere of the worker (Villalón 2019, p. 16).

With the passage of time and the incorporation of the technological framework for work, such tools have been reconfigured, allowing a control not only more efficient but even adapted to a variety of new factors, especially when the fulfillment of work obligations is linked to configurations of a flexible work space and time.

<sup>2</sup> The company will guarantee the daily record of the working day, which must include the specific starting and ending times of the working day for each worker, without prejudice to the flexible hours established in this article. Through collective bargaining or company agreement or, failing that, the employer's decision after consulting with the legal representatives of the workers in the company, this record of working hours will be organized and documented. The company will keep the records referred to in this precept for four years and they will remain at the disposal of the workers, of their legal representatives and of the Labor and Social Security Inspectorate.

On one hand, if we understand that teleworking constitutes a tool that generates an organizational change in the company, as it enables the ordinary content of the labor provision to be referred to it, making its organizational structure more flexible (Ereñaga de Jesús 2019), and, at the same time, we understand that, despite being a flexible tool, it does not imply a reduction or alteration in the rights and obligations of employees, a question is obligatorily opened to us regarding the time to delimit the channels of legal control which the company can provide itself.

For these purposes, it is obvious to understand that the technification of work itself makes it possible not only to provide work remotely, but also to control it by the employer. However, this control cannot be articulated on the basis of interference in the private life of the employee. Additionally, it is that, according to Molina Navarrete “the guarantee of effectiveness of the private life of people in general, and of employees in particular, is not only a fundamental right of the personality (individual aspect), but constitutes, at the same time, a public mission necessary to guarantee a truly free and democratic society (general or collective aspect)” (Navarrete 2018, p. 129). In this way, the right to privacy does not have a differentiated perspective from the labor framework to the personal framework. In both cases, it is linked to the sphere more reserved of the person, with incidence both on their dignity and on their free personality development.

### 3. Limits to the Right to Free Enterprise

Business freedom constitutes a subjective right that finds its origin in the old freedom of commerce and industry, which was already recognized in the Decrees of the Cadiz Cortes of 8 August 1813 (Menéndez 1986). Beyond its recognition within the framework of the market economy, as expressly stated in article 38 of the Spanish Constitution, freedom of enterprise is expressed as a generic formula lacking any qualitative specification, which, in any case, finds its justification in the necessary neutrality that every constitutional text must express. Starting from such neutrality, it is still necessary to look for a specific value or meaning to the market economy, because this can justify the dikes or the borders used to recognize to the effectiveness of the freedom of enterprise.

There are various theories about the significance of the market economy. If the liberal market economy system recognizes the prominence of private initiative, positioning the public initiative in a subsidiary framework, the socialized market economy system imposes a socialist economic framework as a means of achieving a democratic society. Faced with these two systems, the mixed system, also known as the social market economy, intersperses the freedom of decision of the Company with State intervention<sup>3</sup> (García-Pelayo 1979).

In the Spanish case, as in the majority of neighboring European countries, the economic model adopted does not respond to a unitary model. Now, this statement is not equivalent to admitting that the economic model is linked to the free interpretative criteria of our rulers. To affirm this would be equivalent to understanding that the free enterprise model is constantly subject to changing ideological considerations.

As Escribano Collado states, “our fundamental text starts from the «crisis» situation ( . . . ), in which the economic model is found ( . . . ), and a change is proposed, a transformation of its traditional characteristics, offering for this, not another different model, nonexistent, but a series of instruments and diverse materials (of legal and political significance) that can/should make it possible ( . . . ). From this perspective, there is neither a constitutional antinomy nor a specific economic model or system. The Constitution basically formulates an economic order within which all constitutionally legitimate actions must take place to achieve the various interests that coexist in the economy” (Escribano 1985, p. 99).

Definitely, the economic order that the Spanish Constitution identifies does not dispense with any of the economic interests that may appear in conflict, but simply proceeds

<sup>3</sup> In which, to the freedom of decision of the companies through market mechanisms, the intervention of the State is added to correct the “cases in which self-regulation is unsatisfactory” or to meet certain “national economic purposes whose realization cannot be ensured by the simple mechanism of the market, but by state action”.

to determine the legitimate areas of action in which they can concur and coordinate for the achievement.

The configuration of an economic order does not constitute a limiting element of the freedom of enterprise. This acquires the same flexible character as the character of the market economy on which it is formed. Such configuration together with its coexistence and other socioeconomic norms that condition the scope of the constitutional precept justify the need to understand this precept, not in an abstract way, but within the framework of the different contexts on which it operates, which allows, on the one hand, recognition of a flexible meaning of it, although, at the same time, it makes us understand that we are facing a reality of special practical complexity that, from the outset, is only applicable to the field of the private entrepreneur. The framework of action of the public entrepreneur is relegated to article 128.2 of the Spanish Constitution<sup>4</sup>.

At this point, it is necessary to ask ourselves a question. Should the freedom of enterprise be understood as a right or a power immune to any type of limitation (absolute theory) or, on the contrary, should it respond to an open and therefore conditioned reality, as is deduced not only from the fact of identifying itself in an economic and productive context, but also in the framework of a social and democratic State of Law?

The first thing we have to consider is that fundamental rights, except for the right to life, cannot be considered as absolute rights, so their reading and interpretation must be conditioned on the rest of fundamental rights. This rule is, therefore, fully applicable to the right to free enterprise. Thus, freedom of enterprise will have to be weighed by the principle of proportionality.

The principle of proportionality in a broad sense is composed of three elements, namely, utility, necessity and *strictu sensu* proportionality. The three elements, in turn, are subject to prosecution on the basis of the convergence of three elements, which are necessity, suitability and proportionality.

In accordance with the principle of proportionality, the limitation that the law imposes on the freedom of enterprise must find its justification in the relevance of the implementation of the constitutional principle pursued with such limitation. Thus, as Alexi shows, "the end pursued must be worthy of the limitation of the fundamental right because they are interests that have the same abstract rank" (Alexi 2007, p. 72).

In this way, the legislative norm is proportionate in the strict sense if the benefit obtained with the limitation is greater than the cost that it implies for the freedom of enterprise. The result of the consideration between constitutional principles will, therefore, lead us to a conditional preference rule in favor of the constitutional principle that wins out (Cidoncha 2004).

The exercise of the freedom of enterprise is accompanied by a series of responsibilities and duties that force its configuration to be modalized (De Otto y Pardo 1992). This, at the same time, is justified by the different factors that intervene within the production process, as the organization of these factors is situated exclusively within the business power.

From the recognition of the competence of the company over the organization of the production elements, of which the material elements and the tools used by the staff are part, we cannot assume a simplistic and linear vision by which the meaning that is given the use of such means is oblivious to the ups and downs of the market, especially when such a market is altered by a technological change that ends up modifying the production objectives.

A highly globalized market economic system imposes highly competitive policies from which a constant analysis and control over fixed costs is derived, of which working conditions are part. Additionally, on account of this, the control mechanisms of working times also make up adequate control mechanisms over the productivity ratios of employees.

<sup>4</sup> It recognizes the public initiative in economic activity. By law, essential resources or services may be reserved for the public sector, especially in the case of monopoly, and also agree to the intervention of companies when the general interest so requires.

The provision of labor personnel, in short, is linked to the realization of a doubly attributive legal business in favor of the employer. On one hand, a basic, purely patrimonial attribution is materialized in the obligation of the employee to “give” and “do”, and, on the other, an instrumental or derivative attribution, linked to the power of business management (Uriarte 2013), through which the parent obligation is conditioned to “give” and “do”. However, despite this instrumental power being an essential and exclusive element of freedom of enterprise, insofar as it is non-negotiable, it must at the same time be, as we have already expressed, the object of consideration in relation to other fundamental rights recognized by the employee. It is in this sense that we come to understand the need for the exercise of such power to be practiced in a “regular”<sup>5</sup> manner, as long as it is respectful of the rights of employees.

Such rights “remain within the scope of the employment contract, without prejudice to certain adaptations or modalizations that seek to balance the interests of the worker and the employer” (Melgar 2018, p. 311).

Now that the necessary consideration of the freedom of enterprise is raised in relation to the individualized rights in each of the contractual relationships that the company has, it is not equivalent considering that the purpose that constitutionally justifies the limitation on the freedom of enterprise is of particular interest.

#### 4. The Right to Privacy in the Framework of the Provision of Services

Fundamental rights, within the framework of the labor provision of services, can be classified into two levels: specific fundamental rights and non-specific fundamental rights. Within these, we place the right to privacy. Under the premise already enunciated previously, by which each fundamental right does not constitute an absolute whole but must be reassessed under the principle of proportionality in relation to the rest of fundamental rights, the evaluation of the right to privacy, a principle with a clear connotation of personality, from the perspective of the right to freedom of enterprise, means that this second must always be exercised under criteria of suitability, necessity and proportionality in the strict sense. Thus, only by taking into consideration such performance criteria, assessable rules and conditions for the exercise of the right to privacy can be extracted from the freedom of the company.

The restriction that, in this way, begins to experience the privacy of the worker in the framework of a productive organization, is due to the presence of a legitimate and proportionate purpose that, in any case, does not cease to be respectful of the essential content of the right to privacy.

The recognition of privacy becomes visible, within the framework of remote work, and specifically teleworking, in a double perspective:

Right to privacy in the spatial context of the provision of services.

Right to privacy in the context of communications made by the remote worker.

This double perspective has not been contemplated from a parallel and contemporary jurisprudential and doctrinal development, especially when privacy in the context of the use of new information technologies has been present prior to the development of remote work as a formula for the provision of services.

In short, we already recognize defined and limiting privacy criteria within the framework of the use of new technologies, but not within the framework of the control of spaces outside the traditional areas of production.

##### 4.1. The Channels of Control over the Space and Time Worked within the Framework of Teleworking

As we have come to analyze, new communication technologies are altering organizational models, thereby enabling a reduction in production and transaction costs by

<sup>5</sup> Art. 20.2 ET. “In complying with the obligation to work assumed in the contract, the worker owes the employer the diligence and collaboration in the work established by the legal provisions, the collective agreements and the orders or instructions adopted by him in the regular exercise of his management powers and, failing that, by habits and customs”.



suppressing or reducing production units with a specific organization materialized (which is understood as the traditional physical work centers) and replaced with virtual communication models that operate from a single management unit to a diversity of production units (Navarrete 2017).

Although it is true that this diversification process presents positive elements in a framework of improvement of production objectives, it is still true that, from a strict labor perspective, it brings together a whole series of problems whose resolution raises numerous practical controversies by implying, in the context of the current legal framework, a confrontation with constitutionally protected rights. One of these problems, if not the most important one, connects with the control to be carried out over the outsourced production units. This is both with regard to spatial control and temporary control.

As the Sentence of the Higher Court of Justice of Castilla y León, Social Chamber of Valladolid, Section 1, of 3 February 2016<sup>6</sup> stated, “the control of the labor exercise by means of the verification of the connection of the employee to the intranet of the Company and its activity on the network does not, in principle and under normal conditions, imply an invasion of the protected space under the concept of place of residence and is also subject to inspection and control by the Labor Administration”. However, the verification by electronic means is one thing; physical verification is another.

It is true that articles 7.h and 22 of Law 10/2021 of 9 July recognize the right to business control concerning the provision of remote services. Now, the legislator has not wanted to raise directly or expressly how the exercise of this control is materialized, so it is manifested in a generic way. From such a generic exposition, one can even deduce a contradictory development between the two referenced articles. Thus, if article 7 conditions the means of control of the activity to the agreement adopted between the parties<sup>7</sup>, article 22 recognizes the power of control as an exclusive power of the employer<sup>8</sup>.

In this regard, despite the fact that it is true that conceptualizing a means of control is not the same as executing the control activity, it is still true that the second option is strongly conditioned by the criterion adopted in the choice of means, it being understood that the latter should be incorporated into the scope of the control activity itself.

To the apparent contradiction of criteria is added the absence of the specification of limits on the channels of control. In this way, the recognition of the right to privacy and the inviolability of home in article 18 of the Spanish Constitution, will absolutely condition the possibility of a face-to-face control of the employer. Such control, therefore, will be entirely linked to the employee’s own voluntary nature, because only the latter is responsible for authorizing the practice of the visit within their own home.

Recognizing this limit to the business control policy, the options for the control of work activity by the Labor and Social Security Inspectorate remain to be seen.

The Inspection has recognized the power of vigilance in the fulfillment of the norms of social order, understanding that, within these, we place the norms related to labor matters. Now, this supervisory power collides with the same limit that we previously stated for the employer. Thus, article 13.1 of Law 23/2015, of 21 July, Organizing the Labor and Social Security Inspection System<sup>9</sup>, recognizes that inspectors, as a public authority, have the right to freely enter, at any time and without prior notice, any center of work, establishment or place subject to inspection. Now, if such place coincides with an address of a natural person, it will be mandatory to have the prior and express authorization of the resident person or, failing that, the appropriate judicial authorization, in order to carry out the inspection action.

<sup>6</sup> AS 2016/99.

<sup>7</sup> It will be the minimum content of the distance work agreement.

<sup>8</sup> The Company may adopt the measures it deems most appropriate of surveillance and control to verify compliance by the worker of his obligations and work duties.

<sup>9</sup> <BOE> Boletín Oficial del Estado [State Official Bulletin] no. 174 of 22 July 2015.

Regarding the supervisory position, the Judgment of the Supreme Court, Third Chamber, of the Contentious-administrative, Section 2, Sentence 1231/2020 of 1 October 2020<sup>10</sup>, clearly defines the position of our courts regarding:

“( . . . ), it should be remembered that the need for judicial authorization so that the public Administration can enter a property to forcibly execute a previous action of its own constitutes a constitutional and legal exception to the principle of administrative self-supervision, recognized by our legal system in favor of public administrations, due to the necessary effectiveness of the subjective fundamental right to domiciliary inviolability enshrined both in the constitutional and international order (see articles 18.2 of the Spanish Constitution, 12 of the Universal Declaration of Human Rights, 7 of the Charter of Fundamental Rights of the European Union, 17 of the International Covenant on Civil and Political Rights, and 8 of the European Convention on Human Rights)”.

The limitation in the capacity for control, not only business but even administrative, makes it necessary to answer two questions:

- What is the meaning when we constitutionally recognize a place of residence?;
- Does the meaning of a place of residence of a natural person recognized in the aforementioned article exclude any option of place of residence of a legal person?

The Spanish Constitutional Court has considered every home as a place of residence, even if it is not inhabited at the time of registration. Now, the constitutional consideration that is made of the place of residence not only affects the place of residence of natural persons, but also occasionally it has in relation to legal persons. For these purposes, it will enjoy the constitutional protection granted by article 18 of the Spanish Constitution, the places used by representatives of legal persons for the development of their internal activities, either because they exercise the usual management and administration of the Company, or because they serve as custody of documents or other supports of the daily life of the company or its establishment, and all this regardless of whether the tax home address is the main headquarters or the secondary headquarters (Judgment of the Supreme Court, 3rd Chamber, of the Cont. Adm., of 24 January 2012).

Therefore, it is obvious that the supervisory capacities of both the company and the Labor Inspectorate itself are currently constrained by the insurmountable limit of the right to the inviolability of the home, only being able to flank such a wall through the worker's own authorization (embodied in an agreement detailing the days, hours, frequency, duration and need or not to give advance notice before carrying out the control visit<sup>11</sup>) or through the judicial authorization that, on the other hand, must specify, through the order authorizing entry, the temporary aspects thereof, because they cannot be left to the unilateral discretion of the Administration.

Now, just as we refer to the recognition or authorization of the worker in cases of business visits or administrative interventions, we do not require such consent within the framework of judicial authorization. To this end, as stated in the Supreme Court ruling 1231/2020 previously referenced, “it is not necessary, in principle and in any case, the prior and contradictory hearing of the owners of the places of residence or buildings concerned by the entry, given that the possible judicial authorization is not the result of a jurisdictional process (Constitutional Court Orders numbers 129/1990 of 26 March, and 85/1992 of 30 March and Constitutional Court Ruling number 174/1993 of 27 May), nor is said prior hearing expressly required by Articles 18.2 of the Constitution, 91.2 of Organic Law 6/1985, 8.6 of Law 29/1998 or 113 and 142.2 of Law 58/2003.

Recognizing all of the above, we have to assess the possibility that the current limiting criterion may be altered in the near future, whereas the definition of the private sphere

<sup>10</sup> Rec. 2966/2019.

<sup>11</sup> Judgment of the National Court (Social Chamber) no. 42/2004 of May 31 (AS/2004/2637).

made by the Spanish Constitutional Court takes into account the prevailing social pattern (Ocón 2018).

Therefore, it is the owner of the right to privacy who is empowered by the legal system to configure its limit (Zabala 2015), although this power goes beyond the individual sphere and is interpreted from a social or collective dimension.

The rule of self-availability and social use according to which “it is up to each person to limit the scope of personal and family privacy that is reserved for the knowledge of others” (Giménez 2008, p. 299), can pose a serious risk to entail a subjectivation of the right that would not violate the principle of the non-wavering of rights because what would be changing is the meaning of the right itself and not its availability.

However, we have to think that the contemporary principles of legality and proportionality are powerful enough to avoid any interpretation or assessment which is not accompanied by broad social and jurisprudential recognition.

Once the interpretive limits have been established, and the problems that pivot on the spatial scope of the provision of the service have been identified, it is appropriate to contemplate the channels of control over working times, i.e., the working day.

With the entry into force of Royal Decree-Law 8/2019 of 8 March, it proceeded through its article 10 to modify article 34 of Royal Legislative Decree 2/2015 of 23 October, which approves the revised text of the Employees’ Statute Law (onwards ET), adding, for this purpose, a new ninth section.

This section imposes on the company the obligation to keep a daily record of the working day, through which the starting and ending times of the working day are specified. At the same time, such obligation also affects the duty of conservation of the control registration documents for a period of four years. These documents, in any case, remain at the disposal of the workers, their legal representatives and the Labor and Social Security Inspectorate.

Additionally, the standard links the setting of the criteria through which the channels of control of the working day are organized, to collective bargaining or to the company agreement (in the absence of both, to the decision of the employer after consultation with the legal representatives of the employees).

The new wording of article 34 ET does not foresee differentiated treatment for remote workers, in general, and teleworkers, in particular; therefore, it is to be understood that the criteria referenced in the standard apply to them as, on the other hand, our courts<sup>12</sup> have endorsed.

Now, having endorsed the ability to control working hours over remote workers and acknowledging the absence of differentiation with face-to-face workers, we arrive at an obvious consequence which, however, entails an effective control problem, namely, the linking of a job, which is increasingly linked to an execution by objectives, to a strict working day that can only be altered through the irregular distribution game (article 34 ET) or by the increase through the execution of overtime. Of these two options, however, the technological control that the company can practice provides greater justification for the figure of irregular distribution in that it allows the workday to be permanently redirected to more productive periods.

The obligatory nature of the recognition of rest periods and, therefore, the disconnection of the teleworker (see article 18.1 Law 10/2021 of 9 July<sup>13</sup>) would impose that the control mechanisms over such a day be subjected to a special inspection. This responds in essence to the impossibility of guaranteeing an effective rest for a teleworker if it is not through an effective digital disconnection that guarantees respect for rest time, paid leave and annual leave. However, the digital disconnection does not conform a simple reality. As stated by García González, “the right to digital disconnection is presented as a multidimensional reality with innumerable edges and connotations, which makes it

<sup>12</sup> See the Judgment of the Superior Court of Justice of Castilla y León, Valladolid Social Chamber, Section 1, of 3 February 2016. AS 2016/99.

<sup>13</sup> People who work remotely, particularly teleworking, have the right to digital disconnection outside of their working hours in the terms established in Article 88 of Organic Law 3/2018, of 5 December.



difficult to define the scope and content of the legal rights to whose guarantee it is directed” (González 2020, p. 57).

Thus, the assessment of disconnection will have to consider the double variant of the worker not receiving communications or instructions outside of their working day, and not executing tasks outside of it, despite the possibilities offered by ICT; and from the business perspective, of the prohibition or non-execution of communications that imply control by means of digital instruments of their rest times (Tárrega and Blanco 2020, p. 66).

The approach will come, therefore, from the hand, of how to understand the method to put into practice the enunciated digital disconnection, especially when “technology eliminates the coordinates of time and place, and blur the boundaries between work and rest, until the point of causing a perpetual connection” (Cuesta 2020, p. 186), which translates into the consideration of the ideal or most valuable professional as the one who presents a greater capacity for availability, as well as a more transparent availability. This is despite the fact that the right to rest has, for years (see that the right to annual leave was already set forth in ILO Convention No. 132/1970), been at the very heart of the employment relationship (regardless of its consideration within the sphere of the public or the private).

Thus, from article 88 of the LOPDP, we can understand that the right to digital disconnection is going to protect different legal assets of both workers and public employees, namely, “rest time, leave and vacations”, “personal and family privacy”, the “right to reconcile work and personal and family life” and the “risk of computer fatigue”.

Based on all the above, how would the interrelation between the duty of business control and the worker’s right to privacy operate? In other words, how do we weigh the framework of action of article 20 ET against the right to privacy recognized in Art. 18 of the Spanish Constitution when the Constitutional Court has ruled (see Constitutional Court rulings 292/1993 and 186/2000) that “the employer is not covered to carry out, under the pretext of the powers of surveillance and control conferred on him by article 20.3 of the Employees’ Statute, illegitimate interference in the privacy of its employees in the workplace?”

To answer this question, it is necessary to link the analysis of the time control factor to the workspace control factor, under a management power adapted to the technological context.

#### 4.2. *The Means of Control of the Provision of Services*

Article 20.3 WS recognizes the employer’s ability to adopt “the measures it deems most appropriate” in controlling compliance with labor obligations. Such power does not present any limit other than respect for the condition due to the human dignity of the employee<sup>14</sup>. Now, we are faced with a diluted limit, at the moment in which we do not enter to reference which are those means of control and, what is more pernicious, assess the restrictive nature or not that such means can present. In this way, we start from a rhetorical statement that leaves in the hands of the employer, despite the fact that an agreement can be defined to specify the means to be used, and the effects that the use of such means can present to the employee. This reality, which can be criticized from a legal perspective on the premise of the legal uncertainty that it can generate, is not exclusive to the Spanish legal system. Thus, article 4 of the Italian Labor Code, together with the explicit reference to audiovisual installations, make a generic reference to “other control instruments”. Such a generic reference will also be found in article 20 of the Portuguese Labor Code, which uses the formula “remote surveillance means”.

If the right to privacy constitutes a limit to the setting of the means and the control over them, we can affirm that the business control is subject to the impossibility of meddling in the sphere that exceeds the fulfillment of the labor obligation, which translates into the impossibility of installing and making use of equipment that extends the control of the work

<sup>14</sup> STC (First Chamber), no. 98/2000, of 10 April (RTC 2000.98).

activity beyond it (Villar 1992). This limitation does not operate exclusively on the employer, but also on all the workers or middle managers that make up the company's chain of command, given that their activity is conditioned to a prior delegation of management power by the company.

The problem, in this way, will come from the need to assess whether the installation of control equipment is adjusted to the law, when these, beyond establishing control over the organizational and productive guidelines set by the company, affect "at one time" in a more general and remote control of the employee's activity. The "computer privacy", therefore, should generally conform with the framework of the use of telephones, emails, WhatsApp and computer equipment.

Now, how can understand computer privacy be understood when the very concept of privacy, due to lack of unambiguous conceptualization, is difficult to specify (Pérez 1991, p. 327) (even more so, when Article 18 of the Spanish Constitution does not constitute the only precept dedicated to privacy, but constitutes, together with Articles 20.4 and 105.b) of the Spanish Constitution, a "peculiar hermeneutical circle" (Pérez 1991, p. 341).

If we take as a point of reference article 4.2.e) ET, where the worker is recognized "respect for their privacy and the consideration due to their dignity, including protection against harassment on the grounds of racial or ethnic origin, religion or beliefs, disability, age or sexual orientation, and in the face of sexual harassment and gender-based harassment", it is still true that this conceptualization is poor to accommodate the right to "computer privacy" of the employee, especially when it is often confused with the right to secrecy in the communications.

In any case, the scope of the right to privacy has changed considerably as a result of technological development, because it cannot be denied that computer programs to assist in business control today enable an almost exhaustive monitoring of the normal work of employees (Padrón 2017).

At this point, it is crucial to analyze the impact that the judgments of the ECHR, of 3 April 2007 (Copland case against the United Kingdom<sup>15</sup>) and of 12 January 2016 (Barbulescu case against Romania<sup>16</sup>) have had on the right to computer privacy. Both judgments are limited to the world of work inasmuch as they affect the effectiveness of business control over the monitoring of workers' communications.

#### 4.3. *The Right to Computer Privacy and Its Assessment by the Doctrine of the ECHR*

The function of the European Court of Human Rights is to ensure that the member States integrated into the Council of Europe comply with the European Treaties on Human Rights and their additional protocols, to the extent that non-compliance with their resolutions may lead to expulsion from the State of the Council of Europe.

Spain, as a member State of the Council of Europe, accepts the jurisdiction of an ECHR, which, by reason of the right to private and family life, recognizes the full applicability of article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. This standard, entered into force in 1950, sets out the civil and political rights and freedoms that the European States ensure are guaranteed to citizens under their jurisdiction.

This statement allows us to give maximum relevance to the different resolutions issued by the ECHR in this matter, as they will condition the iteration of both the interpretive criteria applied by our courts and the meaning to be recognized in our regulatory framework.

Starting from the stated premises, there are three judgments of the ECHR that we understand should be analyzed: on one hand, and interrelated, are the judgments of 3 April 2007 and 12 January 2016; and on the other, is the judgment of 17 October 2019.

<sup>15</sup> Judgment of the ECHR (Section 4), of 3 April 2007(ECHR 2007,23).

<sup>16</sup> Judgment of the ECHR (Section 4), of 12 January 2016(ECHR 2016,1).

Through the judgment of the ECHR of 3 April 2007, a restrictive criterion was articulated in the control and monitoring of workers' telephones, in such a way that the control was conditioned to the following rules:

- Telephone calls made by the worker from the workplace, are part of their private life, in the terms indicated by article 8.1 ECHR (Carrizosa 2016). In this sense, it will be understood that there is interference in the private life of the employee if, without the consent of the latter, personal information related to telephone calls, emails and Internet browsing is collected and stored;
- The right to privacy cannot be understood as an absolute right, which is why it is recognized that the employer is entitled to establish control channels during work, provided that the employee is notified of the performance of such controls;
- The control channels will be legally articulated. Thus, the channels through which interference in the worker's privacy can be admitted, as well as the purpose pursued with it, will have to be expressly referenced (Carrizosa 2016).

These rules are extended to the control channels being articulated under criteria of suitability, necessity and proportionality in the strict sense, criteria that we have already stated previously.

The judgment of the ECHR of 12 January 2016 proceeded to modify the criteria of the previously referenced judgment while the business control over the provision of services was expanded.

For this, control over the media and computer equipment was related to the presence of internal company regulations that expressly prohibited the use of such media for purposes other than the strict provision of services.

In any case, the criterion referenced by the new judgment of the ECHR cannot be considered as a jurisprudential milestone with the significance presented by the preceding 2007 judgment, although the monitoring of communications in the company had already been contemplated by different national courts as respectful of Directive 95/46/CE of the European Parliament and of the Council of 24 October 1995, regarding the protection of natural persons with regard to the processing and free circulation of personal data.

In this sense, the Judgment of the Constitutional Court, First Chamber, no. 115/2013 of 9 May, formulated that, in relation to the access of the company to the emails issued and received by the worker, it comes to recognize within its FJ 5:

"It was, first of all, a justified measure, since ( . . . ) its practice was based on the existence of suspicions of irregular behavior by the employee. Secondly, the measure was suitable for the purpose sought by the company, consisting of verifying whether the worker was actually committing the suspected irregularity ( . . . ). Thirdly, the measure could be considered necessary, given that, as an instrument for transmitting said confidential information, the content or text of the e-mails would serve as evidence of the aforementioned irregularity in the event of a possible judicial challenge to the business sanction".

Therefore, the regularity of the auditing action will be conditioned to its being justified and suitable.

It is precisely here where the third of the judgments to comment comes into play, namely, the judgment of the Grand Chamber of the ECHR of 17 October 2019, which, revoking its previous judgment of 9 January 2018, comes to recognize before a particular case, the extinction action taken by the company against some employees whose control and recording had not been made known to them.

The ruling, as we have indicated, revokes a previous ruling (López Ribalda Case), according to which it was considered that the surveillance adopted was not proportional inasmuch as it did not comply with the Organic Law on Data Protection (prior to the current Organic Law 3/2018), and it was at the same time discriminatory (in that the recordings continued throughout the entire day).

What leads to understand that such reasoning is lacking is the seriousness of the facts that made it possible to detect the commission of an offense such as the presence of video surveillance posters. That said, the key for us is to know if such criteria can be extrapolated to teleworkers, especially when article 89.1, second paragraph of LO 3/2018 of 5 December, on Protection of Personal Data and Guarantee of Digital Rights, recognizes that “in the event that the flagrant commission of an illegal act by the employees or the public employees shall be deemed to have fulfilled the duty to inform when there is at least the device referred to in article 22.4 of this Organic Law”.

The referenced Art. 22.4 recognizes that the duty of information will have been fulfilled provided that the Company proceeds to place an information device in a sufficiently visible place. Now, at this end, it recognizes that “a connection code or internet address to this information may also be included in the information device.” Does this mean that the information device must always be physical, or does it open the door for such a device to appear as a reference notice through a computer or telematic work medium?

Analyzing a possible extrapolation to the field of workers would raise new questions such as access to the image or, exclusively, access to the movements presented by the company accounts employed by the worker.

From the onset, it could be affirmed that the capture of images inside the employee’s home would break the prevalence of the right to privacy so that they could not be recognizable despite the commission of an offense, because any control in such a case would go through the necessary judicial authorization. Another element of debate would be how to assess the traffic carried out by the employee who was subject to control through channels outside the control of the image as long as the commission of illegal acts was deducted from such traffic.

## 5. Conclusions

If the mutability that accompanies labor relations has already been recognized, the incipient technological development in all productive phases has ended up leading to a reformulation of the productive framework which is not present exclusively at the scale of means of production.

This next context has justified the entry into force of a regulatory framework which, however, does not end up providing legal certainty to the field of remote working. The fear of setting up rigid regulatory frameworks within a global technological sphere can lead to a slowdown in the configuration of regulatory frameworks or to a configuration of vague or extremely generic frameworks (not so much for opening regulation to social agents, but rather for legislator’s insecurity). In both cases, the damage affects both productive activity and the activities of the employees themselves.

These extremes have materialized in the figure of the tele-employee; therefore, it is essential to articulate control mechanisms that, coexisting with the right to privacy, can be truly effective at the same time. With this, we are not only faced with the need to form a technological regulatory framework, but also to reformulate the constitutional scope of the fundamental right to privacy (and specifically to the inviolability of the home) because, otherwise, we may find ourselves faced with new production models that end up consolidating effective losses of rights in the face of a manifest impossibility of auditing them.

Therefore, I consider it appropriate to propose a critical review of the recently configured regulatory framework for the following reasons:

1. The consideration of the flexibility factors of the provision of services, conditioned to computerized and telematic channels; just as the incidence of these flexible modes of provision outside the traditional work centers cannot be articulated with regard to the strict configuration of working times in models of absolute equality to the traditional face-to-face provision of services;
2. The configuration of a diversity of control channels as well as the confirmation of the principles or criteria under which the practice of such controls should be ordered

(remember, principles of proportionality, suitability and necessity), collide with the physical impossibility of executing, through face-to-face channels, an effective control of such benefits when it comes to being practiced within the employee's home. It is understandable that the right to inviolability of the place of residence prevails over other rights with a lower degree of constitutional protection; however, such protection not only limits the possibility of business control, but extends such a limiting effect on the capacity that public administrations and specifically the Labor and Social Security Inspectorate have to carry out their supervisory powers.

It is essential to articulate channels that enable the effective development of the inspection action regarding the areas or zones enabled for work, and not to allow such controls to be linked on the basis of circumstantial factors to procedures articulated through requests for the appearance of which makes it complex to identify the fraud committed.

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