

# Emerging threats and opportunities for collective labour rights in the digital age – The Spanish Case

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## ABSTRACT

Information and communication technologies (here in after, ICTs) open new opportunities for collective labour rights but they also are a source of emerging threats. On the one hand, ICTs can develop a role in the renewal of collective activism exceeding increasingly more flexible and dispersed production structures. Beyond corporations, social networks open new collaborative spaces to trade unions and other organizations as NGOs, consumers' organizations or neighbourhood associations. These links may enable a coordinated actuation, transmitting information about the conflict, labour claims, and calling for demonstrations, as a complement or instead of going on strike. However, on the other hand, ICTs allow the continuity of production process and, thereby, reduce or void the effectiveness of traditional forms of expression of conflict as the strike. Companies can develop a sort of a virtual strike-break activity as Spanish Courts have recognized. This paper is intended to be an approach, from a legal point of view and considering the Spanish case as a reference, to possibilities and threats that ICTs offer to unions and workers to reinforce social rights in the current recessionary scenario.

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## 1. Introduction: the digital age as a new scenario

Our societies are in the middle of an era whose main feature is the existence of multiple interlinked transformations that not only modify our social environment but also the way that people act and relate to each other within in (Tezanos, 2002). An evidence of the plurality of these changes are the different nomenclatures spread by sociology to characterize our time, according to the analytical point of view used and the alterations that are emphasized<sup>2</sup>. Regarding the changes in the production models, Bell (1973) and Touraine (1972) indicate the advent of a 'post-industrial society'. Focusing on the information as a structural element of current societies, there are references to 'information age' (McLuhan, 1964), 'computer society' (Masuda, 1984) and 'information age' (Castells, 1998a, 1999 & 2000). From the point of view of technological treatment of information and its communication, there are also several ways used to call our societies: 'cyber age' (McLuhan, 1964), 'telematic society' (Nora & Minc, 1978) or 'digital world' (Negroponte, 2000).

Certainly, as Stone (2004) argues, 'it is difficult to comprehend social change when living in the midst of it'; however, a series of processes at the basis of these changes can be identified<sup>3</sup>. Among them, there are three factors that must be highlighted: the globalisation of economy and production, the impact of the new technological revolution and the spread of the neoliberal ideology. These are the central elements that act in synergy exerting pressure over Labour Law (Loy, 2005). One of the most important impacts of this current transformations on Labour Law and industrial relations is the growth of companies' power, understood in it

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<sup>3</sup> Castells (2000: 31 and ff.) distinguishes six basic aspects: 1) the technological revolution based on ICTs; 2) the globalisation 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 some 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 crisis of the Estates' power faced with economic globalization.

a very broad sense, not only juridical. As Sinzheimer (1984) noted nearly a century ago, the relationship between employer and employee is not only an obligatory relationship; it is, above all, 'a relationship of power'. This relationship of power overlaps the economic asymmetry of both subjects in the labour market; and, in the digital age, these relationships of power have been upset in favour of companies (Durán López, 1998; Arthurs, 2006).

### **1.1. A new technological revolution**

We are currently undergoing another technological revolution. However, this is not a novel circumstance in regards to preceding processes of intense technological innovation. There have been diverse and successive technological revolutions in the social evolution that share some common facts with the current one (Masnatta, 1990)<sup>4</sup>. Nonetheless, according to Castells (2000) it can be mentioned two differentiating circumstances. On the one hand, this revolution is based on ICTs, whose aim is the processing, management and transmission of information, through a process of digitalization<sup>5</sup>. On the other hand, transformations favoured by ICTs have as a consequence the mutation of material bases of societies. May be the most characteristic feature of this new technological revolution is, as Masnatta noted (1999), the 'full awareness' of living during an 'age of transformation, and not in a transformed society',

Computerization of societies began decades ago. Despite this, the real impact of ICT, with the broad and deep range they are currently experiencing, still cannot be fully assessed and its scope is uncertain. That is why it is necessary to channel its potential effects to benefit the public good (ILO, 2001), especially if we keep in mind that there is no a kind of technological determinism (Neffa, 1990)<sup>6</sup>; ICT are not per se positive or negative. Insomuch, ICTs ductility made them to affect a plurality of areas and levels; it depends on the use given to them<sup>7</sup>.

Norms were made for an 'analogical' world and law-makers, judges and scholars face the challenge of their adaptation to our new 'digital' environment in which they have to be applied (Fernández Esteban, 1998; Peccei, 1982). Concern about privacy becomes a central issue, as it couldn't be any other way in a society based on information. The potential affectation to the citizen's privacy that characterize ICTs, cannot lead us to the conclusion that these are an insuperable threat to privacy<sup>8</sup>. In this field, there is an effective expression of that legal adaptation to the new technological reality. The legal concept of privacy has evolved from a negative conception (the 'right to be alone') to a positive formulation as a self-determination of data 'that prevails participation and control of people and social groups on data flow that affects them' (Pérez Luño, 1984).

### **1.2. The ICTs impact on industrial relations**

ICTs offer many advantages to companies in different aspects, mainly a higher efficiency of the production process and a cost reduction (to a greater or lesser extent depending on the activity). On the other side, as Loy (2005) highlighted, 'the value of the acquisition of new technologies... does not take a unique sense, as the worker can obtain a profit'. Certainly, from employee's perspective, ICTs can also act positively, making

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<sup>4</sup> 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).

<sup>5</sup> Binary code allows the convergence of different information formats, becoming for Forester (1987) the language of the digital age.

<sup>6</sup> Neffa states that there is today a generalized consensus about the absence of a technological determinism, in contrast to the sixties when there were a generalized idea about the positive effects of scientific and technological change.

<sup>7</sup> Pérez Luño (1987: 23 and 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. He pointed out that it was needed a 'technology assessment'; that is, to appraise the consequences or the social impact of ICT as a prior and necessary step to their legal adaptation. 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). The debate over the effects of the ICT is only possible in industrialized societies (Lucas Murillo de la Cueva, 2003: 48) due to the different 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.

<sup>8</sup> There is a very recent case of secret collect of personal data by the NSA and the FBI alleged obtained directly from nine top Internet companies' servers (Microsoft, Yahoo, Google, Facebook, PalTalk, AOL, Skype, YouTube and Apple). See The Washington Post (June 7, 2013) at [http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497\\_story.html?hpid=z1](http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html?hpid=z1)

possible to balance working and personal and familiar life. Nevertheless, there is a unidirectional ownership of all the benefits that ICTs offer by companies.

ICTs also can bring negative consequences for rights and interests of both, companies and employees. On the one hand, they can be an instrument which affects the interests of the business organization. In practice, the paradigm is the excessively use of some instruments –such as email or Internet– for personal or non-productive purposes. Hence the interest claimed by companies to monitor their use by employees. Among the different reasons alleged, there is the possible incidence on company's economic interests<sup>9</sup>; the preservation of the system security<sup>10</sup>; to elude corporate responsibility in maintaining an appropriated workplace environment (Osborn, 2000; Rogers, 2000); and, finally, to avoid its non work related use (Freiwald, 1991).

From an empirical point of view, technical characteristics of ICTs make them a new way 'of technological intrusion that places workers in a position of greater inferiority' (Goñi Sein, 1988: 33). Indeed, they give companies the ability to subject worker to a 'much more permanent, intense, contrasted and detailed control of his working activities' (González Ortega, 2004). As a consequence, one can assert that there has been a *de facto* increase of corporate power. There are two circumstances to support this conclusion. First, it must be considered that many technological instruments used to work activity enable control in parallel; in other words, the working tool cannot be separated from the control instrument, being configured as a single whole. Secondly, ICTs allow obtaining multiple data from different ways regarding the work performance; but they also give important data about the worker as a person. In this aspect, it should be noted that ICTs can treat all these data and, consequently, obtain a detailed profile of the individual worker, as Zanelli (1993) warned two decades ago; doing so the right to privacy can be violated, not only by collecting data directly, but also 'by the reconstruction of fragmented and apparently innocuous news'. One of the main important features of companies control over workers in the digital age is its execution through the working instruments and, most of cases, with lack of information to workers.

As we noted before, companies' power have increased. One of the most visible expressions of the strengthening of this power has to do with the introduction of ICTs in productive organizations, mainly regarding 'non-specific' fundamental rights of workers (Palomeque López, 1991: 31), those that the Constitution grants them as a citizen and that let the existence of a 'citizenship at the corporation' (Jeammaud, 1992). Respect for the dignity and privacy of the employee regain prominence in the digital age in so much ICTs are a way to temper or override (Rodríguez-Piñero, 2004).

## **2. Unions and collective rights in the digital age**

### **2.1. The current decline of trade unions**

Trade unions play a very important role in order to limit the power of corporations as they develop a function to counter balance it not only inside but also outside the workplace. Alongside collective rights, both are instruments to guarantee human rights in our globalized world. As Spanish Constitutional Court has stated in its Decision 134/1994, May 9, unions are in an objective dialectic position of countervailing power regarding employers and... the defence of their goals is not based on formulas of composition of interest or collaboration, but self-defence'. In this respect, for Palomeque López (1991) one of the main pillars of the industrial relations system that Spanish Constitutions recognizes is the 'dialectic conception of industrial relations and the assignment to conflict of a functional role in the constitutional scheme'; thus, it is possible to identify Labour Law as an attempt to integrate the different and faced interests of employers and employees.

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<sup>9</sup> Indirectly, by a decrease on job performance due to time dedicated to non-work related activities using ICTs; or directly, by collapsing the company's intranet that may have a negative impact on the productive process.

<sup>10</sup> ICTs are a potential way to obtain unlawfully some data from the company (trade secrets, production processes or strategies).

Currently, there is an ideological stream that questions the role of unions in political and media arenas. In addition, its institutional function as a main player in industrial relations is eroded by legislative reforms as recent Spanish reform shows<sup>11</sup>.

Furthermore, nowadays the work performance can be individualized and production can be networked, facilitating geographic dispersion of different production units of companies. Thus, one can see a spread of transnational corporations; as Arthurs (2006) argues their large scale and high economic power, let them to face easily litigations and strike actions. Along with this, for Stone (2006a), flexibility and neoliberal ideology, are causes that contribute to the decline of union power; she also adds to these considerations that this capacity of companies' resistance can be focused on union inability to adapt themselves to new flexible workplaces<sup>12</sup>. Certainly, traditionally unions have been sustained their power and performed their role of labour rights protection on workplaces, understood as a physical place; decentralization of productive activity leads to the breakdown of this base and face them to rethink their organization and actuation in the digital age.

On this union decline, in many cases traditional mechanisms for collective action and representation of workers in the company become inefficient to get the objectives to which they serve. The context in which unions were consolidated as an organization is very different from current and they have not experienced an evolution and adaptation to the reality in which they must carry out their duties. Consequently, it is necessary to rethink new strategies and collective action formulas that strengthen collective rights and restore union's power, as a condition for the effectiveness and respect for fundamental principles and rights at work. Thus, the unions may be more effective in carrying out its function of protecting the working class<sup>13</sup>. For this purpose, ICTs can be a necessary instrument. Some cases are discussed below.

## **2.2. ICTs as tools to improve/to erode collective rights**

Trade unions are present in the net, not only by having their own website, by also by participating in social networks as a way to be enhanced with society. That is what indicates the Second Annual Survey of Trade Unions Use of the Net (2012) made by LabourStart among trade unionist of UK, Canada, USA, Australia, New Zealand, Ireland, France and Belgium. It reveals an increase of unions' use of Facebook and Twitter, while the use of other social networks, as YouTube, LinkedIn or MySpace, is quite limited.

### **2.2.1. Electronic communications between unions and workers in the workplace**

Beyond that macro approach, ICTs enables trade unions and workers' representatives to develop their functions more effectively in the workplace, being e-mail an instrument commonly used. In this regard, it has been very important the role that Spanish Constitutional Court has developed since its Decision 281/2005, November 7, which recognized the right union to send information through the company network from a progressive interpretation of the freedom of association which adapts it to the new digital scenario<sup>14</sup>.

For the Spanish Constitutional Court the right to transmit information has certain concretions in the trade union legislation, specified in article 8.1, letters h) and c) of the Freedom of Association Act (*Ley Orgánica de Libertad Sindical*). However, as it is a part of the core content of the right to freedom of association, unions can exercise effectively it not only through those channels provided by law but also through those others that they freely decide to adopt. As the production process remains undisturbed, employer must assume certain burdens taxed by law and directed to enforce union information. This does not imply that the company is required to provide the technological infrastructure for its use by unions. Only if this infrastructure pre-exists, the company should allow its use to transmit union information association.

<sup>11</sup> On the power of employer as 'undisputed authority' in the Spanish labour reform of 2012, Baylos Grau (2012) argues than 'union's contractual power contract is only accepted only insofar it matches with employer's decision, with his organizational project'.

<sup>12</sup> Regarding the decline of unions in many western countries, which is sometimes accompanied with a decrease of union density, Castells (2002) thinks that it is due to the current socioeconomic context; however, Navarro (2002) holds that variations on union density is not because of economic globalization but other causes, outstanding among which are 'Governments' political will to make it easy or not'. It is also interesting the essay of Baylos (2001) about causes of unions decline and possible actions with the challenges of globalization.

<sup>13</sup> On importance and possibilities of action at collective level to balance employer's power see Conaghan, Fischl and Klare (2004).

<sup>14</sup> This argument has been repeated since then by Courts; i. e. Supreme Court Decisions May 17, 2012 and July 23, 2008.

The conditions set up by Constitutional Court to exercise this right are clear. This electronic communication cannot alter the normal development of the productive process. To that extent, it is not considered as this kind of alteration when the worker receives an e-mail in his professional account during working time. Secondly, the specific purpose of the production mean used to these communications may not be affected; the achievement of business objectives that imposed its implementation and its use by trade unions must be harmonized. And finally, this unionized use may not cause additional charges to the employer, mainly by not assuming significantly higher costs. So, that recognition to a reasonable use is prohibited to unions when there were bit previously technological means or there were alternative media<sup>15</sup>.

### **2.2.2. ICTs as an instrument to erode the strike efficacy**

ICTs have a remarkable effect in relation to the development of workers' claim actions, but we should do not forget that its orientation can be ambivalent. So, in current industrial relations the effectiveness of traditional forms to expression the conflict is sometimes reduced, if not entirely overturned, especially in highly digitized organizations. That is not only due to the fact that ICTs allow the continuity of the production process avoiding this way the negative consequences of strike, but also because sometimes ICTs provide a sort of virtual strike-breaking.

The paradigmatic case is that of strikes in media corporations, such as radio or television, which can continue their production process modifying, if it necessary, the planned program, broadcasting recorded programs in place. However, examples can be found in other kind of highly digitalized companies that shows us new concerning employers' practices regarding the exercise of the right to strike, as the one resolved by the Superior Court of Catalonia in its Decision of March 9, 2006.

In this case, the Court resolves a practice developed by Telefonica-Movistar, a prominent Spanish transnational corporation of telecommunications, facing a strike on a subcontracted company which provided them an information service. Telefonica-Movistar redirected this information service to another section of his own productive organization. Doing so, it was completely bypassed and erased the effects of the strike on the main corporation. This case demonstrates as well as seen before, the important role of case law. The Court stated that 'the situation described is a new expression of an external strike-breaking without precedents, as all cases treated until now always were about new hires of outside workers to replace strikers, their replacement by other workers involved in the company or by mobilizing productive resources. In this case, the company not only has mobilized its own technology, in order to minimize the effects of the strike in this last company, but also has its own workers to perform an activity that they usually did not play'.

### **2.2.3. ICTs and collective action**

As seen, there are many ways to disjoint the pressure that worker exercises on a strike. For this reason, beyond the usual unidirectional utility of ICTs in the workplace –addressed to satisfy employer's interests as means of production- it should be interesting to consider the appropriation of its utility by workers and their representatives in a conflicting context. It is something basic in many cases to an appropriate defence of workers' rights and interests and in order to limit employers' power.

This temporary expropriation could give a real efficacy to the right to strike. In this sense, according to Baylos (1998), in order to develop the strike action it could be necessary to use the means of production in a way that there were 'a kind of transitory expropriation of its function'. Thus, the strike would have not as the only effect the 'anesthesia' of employer's organizational powers during the conflict' in the labour force use arena, 'but also with respect to the means of production, the use of which must be applied, in a participatory manner, to the intended purpose of the conflict' and thus contribute to its effectiveness.

In this it should be rethought the regulation of the right to strike to take into account, among other factors, the new corporation organization, to maintain its effectiveness in terms of adequate externalization of conflict and achieving real pressure.

ICTs potential in order to take actions to express industrial conflicts is well-known. The new digital and virtual ground can be very useful to overcome the obstacles that traditionally mechanisms as strike have many times, trough the adoption of new digitalized forms to improve their efficacy or, alternatively, as a

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<sup>15</sup> Superior Court of Madrid Decision June 4, 2008 and Superior Court of Basque Country Decision January 16, 2008.

new path for dissemination and information as a pressure instrument, thought the exercise of other rights as freedom of expression. In this sense, it should be highlighted as a trend in unions and workers claims practice the existence of porosity between rights; that is to say, many times, there are different rights exercised jointly or alternatively as freedom of association, right to strike, and freedom of speech. In this sense, as López, Chacartegui and G. Cantón (2012) has noted, there exists 'networking of solidarities between strikers and others [that] implies that the right to strike creates a constellation of related rights – such as freedom of expression – to protect the rights, not only of workers, but also of other groups to protest'.

It is possible to take advantage of the immediacy that the interconnection of ICTs allows to transmit information about the conflict situation, labour claims or to mobilize to demonstrations. Social networks as Facebook or Twitter, the use of blogs, let a widely visualization of the conflict, regardless which right is exercised that is not always strike. We can find a good example of a labour conflict spread through social networks in Spain. They demanded the reinstatement of a co-worker fired due to sick leaves and they developed different actions to this purpose as a hunger strike during November 2012 or different flash-mobs in front of the corporation headquarters. They used Twitter to inform daily about their actions, Bambuser to live broadcast them or YouTube to upload these videos, and they also opened a blog; all these strategies helped them to overcome the media silence due to the pressure that the company exercised over the press (it should be noted that this company is an important advertiser who reports them important benefits)<sup>16</sup>.

### **3. Conclusion**

ICTs have become a very important social instrument, which is present almost in every aspect of our lives. As a consequence, we must approach the analysis of collective rights taking it into consideration and define what the real impact of ICTs on them is. At this very first stage of this research it is possible to note that there is a real impact in two divergent directions: one reinforcing and another one weakening them.

Courts have made a progressive adaptation of collective rights to the new technological environment. In this regards we can consider the recognition of a right to use employer's ICTs to transmit information as an expression of the freedom of association; and the conceptualization as strike-break of some practices in order to assure the effectiveness of the right to strike –which efficacy can be reduced or eliminated in some high digitalized activities-.

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<sup>16</sup> See Twitter account @HHTelefonica and <http://huelgadehambretelefonica.blogspot.com.es/>.

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