HOW DISCONNECTED IS DISCONNECTION? : A CRITICAL ANALYSIS OF THE EMPLOYEE RIGHT TO DISCONNECT

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Abstract*— The research examines the efficacy of the recent global trend of employee right to disconnect.The proliferation of Information and Communication Technologies (ICT) and Mobile use has compelled the employees to continue working even after the regular working hours, jeopardizing the work-life balance and the right to leisure. To make the matter worse, this supplemental teleworking is often unpaid overtime. However, the international legal regime has hardly addressed this problem. The deleterious impacts of this culture of permanent availability made France introducing employee right to disconnect, creating a global push towards implanting this digital right to their legal contexts. This is qualitative research primarily rooted in international conventions, agreements and labor legislation, agreements and case law in France, Italy, Spain, and Germany. Secondary sources such as commission reports, texts of authority and research studies have been used in finding answers to the research problem. The paper critically evaluates the efficacy of prevalent international legal framework in overcoming the challenges of permanent availability and assesses the efficacy of the recent legislative approaches in assuring the right to disconnect. The paper further explores the alternative mechanisms available in the global context to the prevalent legislative responses. By way of comparative analysis, reforms are suggested for a sustainable right to disconnect.*

Keywords*—* **Over-connectivity, right to disconnect, ICT**

I. INTRODUCTION

Technological advances have transformed the work-life dramatically. It has fostered the evolution of the telework in different stages. The traditional routine task jobs were revolutionized with the use of telework and different forms of working cultures came into play such as regular home-based teleworking, occasional teleworking, high mobile working with a high frequency of working in various places outside the employer's premises. (Nam, 2014, p.1018)Information Communication Technology (ICT) and mobile use facilitate a better work- life balance for workers. On the other hand, technology and ICT have increased the permeability of work- life boundaries. (Leung, 2011) Employers electronically contact their

employees through text messages, chats or e-mails after-work to attend to some task, duty, project or assignment. (WHO, 2018)This trend has carried the worker into a culture of permanent availability.

This significant pressure to continue working unpaid even after the proverbial whistle has blown on the workday is detrimental to employee health. (Becker, Belkin, Conroy, 2016) Recent studies reveal how this always- on culture can lead to employees experiencing chronic stress and emotional exhaustion, anxiety, job dissatisfaction and burnout. (Feintzeig, 2018)To be clear, overwork, and stress have led to increased workplace suicides in the industrialized economies in recent years. (Feintzeig, 2018) On the other hand, the encroachment of non- working time reduces the productivity of workers.

This qualitative research concentrates on the global responses towards reducing the culture of permanent availability due to the ICT use. The paper explores the availability of International Labour Organization (ILO) responses to address the problem of over- connectivity, assesses the efficacy of the employee 'right to disconnect' from workplace communication devices in France, the first advanced industrial economy which addressed the problem through a legislation and evaluates the global push towards implanting this digital right in jurisdictions. The paper also appraises the competence of the self-regulation model, an alternative to the legislative response in addressing the 'always-on' work culture due to ICT and mobile usage. The researcher intends to provide suggestions for improvement of the prevalent measures to redress the problem of over connectivity by using the analytical methodology.

II. ARE THE INTERNATIONAL LEGAL RESPONSES ADEQUATE?

It is interesting to note that at the international level, the question of the permanent availability of workers through ICT and mobile use after work has hardly been addressed. Tracing the history of ILO standards of the working time it can be observed a downward trend in hours of work which moved in tandem with increases in wages and productivity.(Adams,2014,p.232) The first international labour standard, the ILO Hours of Work (Industry) Convention, 1919 (No. 1) accomplished a long-sought trade union objective, the eight-hour workday, into international law, alongside a 48-hour weekly limit

on working time , a radical notion at a time when 60-plus hour workweeks were still common everywhere. Similar rules were established by the Hours of Work (Commerce and Offices) Convention, 1930 (No. 30). However, these conventions don't reflect the modern realities of world work such as work-life balance, flexible work arrangements by prescribing overly rigid standards.

Workers with Family Responsibilities Convention, 1981 (No. 156), introduced with the wave of work-life balance at the end of the twentieth century, highlighted the necessity of enabling the workers to engage in employment without conflicting employment with family responsibilities. The convention was supplemented by the Workers with Family Responsibilities Recommendation, 1981 (No. 165) which recommended that particular attention should be given to general measures for improving working conditions and the quality of working life, including measures aiming at the progressive reduction of daily hours of work and the reduction of overtime, and more flexible arrangements as regards working schedules, rest periods and holidays, account being taken of the stage of development and the particular needs of the country and of different sectors of activity.

It must be noted that ILO 156 was an innovative effort in augmenting 'growing consciousness on work-life balance'. However, the adequacy of the direction provided by it for reforming the regulation of work and family meeting the realities of the twenty-first century is a moot point. The open-endedness of the instrument likely reflected a desire to permit the widest flexibility possible for member states. (Adams, 2014, p.234) But this too vague flexibility is not adequate at all to redress the problem of over connectivity in the workplaces due to technological advancement. Even the groundbreaking European Framework Agreement on Telework 2002 which provided a general European Framework for doing telework focuses only on telework carried out on a 'regular basis' mostly the home-based telework. The global trend in using ICT outside the workplace on an occasional and informal basis is not covered by the framework agreement. (Eurofound,2017 ,p.45) Thus the international legal regimes don't provide a satisfactory legal response to address the problem of over connectivity of modern workplaces due to ICT and mobile use.

III. France, the trailblazer

The first sign of the necessity to sever connections from the workplace after working hours emerged in a decision issued by the French Supreme Court (Labor Chamber of the *Cour de Cassation*) in 2001. It stated that 'the employee is under no obligation either to accept working at home or to bring there his files and working tools'(Labor Chamber of the Cour de Cassation, February 17, 2004 n°01-45.889) This decision was subsequently confirmed by a decision handed down on February 2014 by the *Cour de Cassation* which ruled that 'the employee was not reachable on his cell phone outside working hours cannot be considered as a misconduct' (Labor Chamber of the Cour de Cassation, February 17, 2004 n°01-45.889)

On this backdrop, the French government initiated in designing a legal framework protecting the digitally victimized employees due to over connectivity. In November 2015 the government started groundwork to undertake a more general overhaul of the Labour Code making it "fit for the 21st century". (Clauwaert et al, 2016 p.3) The proposed reforms were based on consultations with social partners and the proposals of the commission on the foundation of Labour law instituted from the beginning of 2016. Despite the massive demonstrations triggered by the proposed changes, the government however, managed to push forward the reforms and secured adopting the labour law reforms in January 1 2017.

Article L.2242-8 of the French Labor Code, in its version applicable as from January 1, 2017 stipulates the determination of agreements within the company for arrangements ensuring the right of employees to disconnect from work and the implementation by the company of mechanisms to regulate the use of digital tools to ensure the compliance with the rest periods and vacation time and respect for personal and family life. In the absence of any agreement, employers will have to establish a charter to the same effect.

It is evinced that the new legislative approach expanded the right to disconnect to all employees who use digital and telecommunication tools in their professional lives and heightened the consciousness among both the employers and employees on the negative impacts of 'always on' work culture. A study by French research group Eleas showed that more than a third of French workers used their devices to do work out of hours every day. (Newswires, 2016) Around 60 percent of workers were in favor of the new law. (The Telegraph,2018) Some famous companies incorporated the right to disconnect to their internal regulations. For instance, the renowned Insurance Company Allianz France, with about 10,000 employees, decided not to send work emails after 6 p.m., or to organize staff meetings in the late afternoon. Also the KEDGE Business School, which has seven campuses in France, designed to send an automatic email letting employees know the email is "out of schedule," and so can wait until the next workday begins. (Time,2017)

Further, the ruling ordering the French wing of British pest control and hygiene giant Rentokil Initial to pay a former employee €60,000 as it failed to respect his "right to disconnect" was a welcoming response to this new legislative approach. (The telegraph,2018) So it can be argued that this legal design invited the corporation to draft internal corporate practices that would respond to the modern day scourge of compulsive out-of-hours email and message checking.

A. How disconnected is disconnection?

Are the boundaries and the effectiveness of the law reform resilient enough to meet the business realities? Is this legislative move a successful attempt to inoculate life back to the work-life formula of the 21st century French world?

It is noteworthy that the French disconnection law exempts smaller employers, only because there is no evidence that these smaller employers contact their employees through electronic communications any less after work. (Secunda, 2019, p.28) But given the realities of life in a workplace with fewer employees to conduct the necessary tasks these kinds of employees may be the most vulnerable victims of this 'all-time' work culture.

Further, the new provisions provide only an obligation to negotiate on the right to disconnect and the failure to comply with this obligation to negotiate is punishable by a one-year term of prison and a 3,750 euros fine. (Secunda,2019,p.110) But the new law doesn't impose an obligation to reach an agreement. In the absence of reaching an agreement, the employer must draw up a charter that will set forth the terms and conditions in which employees can exercise their right to disconnect and provide for the implementation of actions to educate and raise the awareness of employees regarding a reasonable use of digital tools.(Walt,2017) However, the new provisions do not provide for any sanction against companies that do not draw up this charter. Thus the concept of charter lacks its legal force in this scenario and will be considered as an appendix to the company's internal rules and regulations. The efficacy of toothless, cracked up right to disconnect law in France in redressing over-connectivity is highly questionable.

IV. The Global push towards the right to disconnect

Subsequent to the French legislation, the global push towards the introduction of the right to disconnect steered several industrialised economies to consider establishing the right to disconnect. Following the French lead, the Italian parliament introduced the right to disconnect to workplaces by article 19 of Law No. 81/2017. The provision specifies that the written agreement between worker and employer must also regulate the rest periods of the employee and indicate

the technical and organizational measures taken by the parties to assure the worker the right to disconnect from company devices. Therefore in Italy, the legislator directly referred to an individual agreement between workers and employers, even if this provision doesn't seem to prevent collective agreements to disciple right to disconnect (James, 2018) However this legislation was limited to smart working regime and same as the France legislation Italian law doesn't provide for a strict regulation of this right ultimately making the legislation a toothless tiger.

Spain too following the lead of France introduced a number of digital rights for employees including the right to disconnect through the new Data protection act which entered into force on 6th December 2018. Previously Spanish law didn't expressly regulate an employee's right to disconnect. However, article 40.2 of the Spanish constitution assured the obligation of public authorities to ensure safety in the workplace by guaranteeing necessary rest time through limits on working hours. Further the duty of the employer to consider work stress caused by digital appliances was impliedly recognized through article 34 of the Spanish Workers' Statute which stated that the distribution of working hours must respect mandated daily and weekly rest periods, and employers must respect their employees' time off and article 14.2 of the Law 31/1995 on Occupational Risk Prevention which provided that employers must guarantee the health and safety of employees during work in every way, and that work equipment refers to any machine, apparatus or instrument used in the work place. Yet the newly enacted Spanish data protection act expressly assures the employee right to disconnect.

However, the provision concerning how the right should be exercised under the act is general. The application of an employee's right to disconnect must observe the nature of their particular employment relationship and promote their right to a work-life balance. This requirement implies that with regard to the particularities of each employment relationship, the implementation of the right to disconnect may be flexible or even inapplicable where the employer-employee relationship does not allow it. (Albinana, Lezo, 2019) Further, the same as the previously discussed legislative initiatives, the absence of an enforcement mechanism of the digital rights is the main hiatus of the Spanish right to disconnect.

Therefore it can be evinced that the introduction of the right to disconnect legislation in France has created a global impulsion towards the introduction of this digital right to their legal context. Apart from the aforementioned initiatives, the Netherlands, Luxembourg,

India, Québec, and the federal government of Canada have all proposed or considered adopting such a right.(Rose,2019) Philippines' legislature has introduced a bill providing a right to disconnect after normal hours. Most surprisingly the New York Legislature has presented a bill prohibiting employers with over ten employees from requiring their employees to respond to calls or emails outside of normal work hours (except in emergencies) despite being the "city that never sleeps,". Importantly, noncompliant employers could face fines of up to $250 for requiring employees to answer after-hours emails and even higher fines for punishing employees who refuse to do so. (Rose,2019)

Designing a legislation on the right to disconnect would be advantageous as it would heighten the consciousness around the problem of 'hyper-connectivity' on both parties namely employers and employees.(Moulton,2017) Especially the employees might be in a better position when they can pinpoint a law that supports their disinclination to connect after work. This sense of awareness has indirectly resulted in the recent judicial inclination of the aforesaid countries towards acknowledging the stress and interruptions to personal time incurred by after- hour's communication.

It is axiomatic that countries do not just transplant other countries' legal frameworks into one's own. (Hershkoff, Loffredo, 2011, p.968) However, it can be seen that the French legislation has been cherry plucked by most of these countries. Most of the defaults in the French legislation are ostensible in the later adopted legislation's on right to disconnect. Most importantly the absence of a mechanism to reprimand the violators in France is apparent in all most all the other legislations which implanted France right to disconnect.

On the other hand can 'one size fit for all' legislation be a potential solution to over connectivity to the workplace? Are these legislative responses retort to the modern realities and trends in the work world? The possibility of regulating the gig economy workers, working on-call, working across time zones and deviations from routine task job system such as opt-out mechanism through a one size fit for all legislative approach is highly questionable. Thus, there is a risk of pushing lawmakers to legislate regulations that are too simplistic to apply with clarity and leave or developing comprehensive rules which apply in every conceivable situation but risk becoming too difficult to apply or enforceable.

IV. LEGISLATIVE MODEL V SELF-REGULATION

Therefore, it is important to consider whether there are any other alternative mechanisms that can be employed to address the problem. Germany apart from adopting legislation, have opted to regulate after- hours work through a self- regulation model. Under this mechanism the social partners namely the confederation of the German Employers' Association together with the German Trade Union Confederation and the Federal Ministry of Labour and Social Affairs develop regulations that meet the needs of both employees and employers. (Secunda, 2019, p. 29) They create unique regulations functional within the specific industry tailored to meet the unique industrial needs.

The German labor ministry following this approach introduced a 'minimum intervention in leisure time policy' assuring the right to disconnect of its' employees. It provides that the managers can contact employees outside of their normal working hours only to deal with exceptional situations requiring action that cannot be postponed until the start of the next working period. Further, the employees would not be penalized for switching off their mobiles or failing to pick up messages out of hours. (Vasagar,2013) The move follows similar restrictions on out-of-hours email imposed by German firms including Volkswagen, BMW, and Puma. Volkswagen initiated not to forward any e-mails to an employee after thirty minutes of the end of the working day. This move of Volkswagen respects both the employee's right to have time with family while assuring the need of the employer to contact an employee regarding something done at the end of the day.

Though the self-regulation would benefit the parties to create dynamic regulations that address the unique needs of the industry, there is a risk of self- regulation to be employee favorable on the surface but failing to provide substantive protection. (Legace, 2007) So in order to prevent these self- regulations becoming more of a marketing ploy than a substantive effort, initiatives of third party verification of the self-regulations must be present. But they can be enormously complicated to implement and it can dramatically increase the cost of adoption (Legace, 2007)

V. CONCLUSION: FOR A VIABLE DISCONNECTIVITY

It must be admitted that the recent legislative responses welcoming the right to disconnect raised with the introduction of France employee right to disconnect are an innovative measure to address the grievance of over connectivity of digitally victimized employees. It has heightened the consciousness around the problem of 'hyper-connectivity' on both parties namely employers and employees. However, in practical terms, the efficacy of the disconnection provided by the prevalent legislative responses is highly doubtful. On the other hand, cherry plucked legislations would never be a sustainable solution

for the problem at hand.

Generally, Social partners are well positioned to address this question of over- connectivity through ICT and mobile usage. National, sectoral, organizational, company-specific collective agreements designed dynamically to ICT advancements addressing the different needs and preferences of workers and employers functioning under regular Governmental surveillance are axiomatic for an overall, sustainable right to disconnection.

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