Can I Switch Off? I Can't Breathe!¹

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ABSTRACT

The digitalization of workplaces is a 'double-edged sword'. While information communication technology (ICT) can enhance flexibility at workplaces enabling work-life balance, the constant availability of workers due to electronic access during off-hours has caused several deleterious impacts on industrial relations, health and well-being, work-family balance, autonomy, and the privacy of modern-day workers. A wave of global legislative responses occurred as a response to hyper-connectivity to workplaces enabled by ICT in industrialized countries. This article explores these legal responses against the growing overwork pandemic because of electronic communication. It appraises the efficacy of international labour standards on the right to disconnect and offers a critical examination of the French legislative model, the first express legislation on the right to switch off, and the global push for disconnection created with its enactment. Legislative responses stimulate intense debate, placing the problem of over connectivity at the centre of the discussion. However, diversity of workplaces, types and modes of working, and the absence of enforcement mechanisms raise questions on the efficiency of the legislative model. The article explores the efficacy of the self-regulation model as an alternative to the legislative model. Such a model that supports national, sectoral, organizational, company-specific collective agreements designed to address the different needs and preferences of workers and to respond dynamically to ICT advancements and industrial regulations are preferable to assure a viable switch off from workplaces in the modern work world.

KEY WORDS:

The right to disconnect, hyper-connectivity, workplace, information communication technology, overwork

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Introduction

Twenty-first century office work is often supported by teleworking, and thus can be done from anywhere and at any time (Nam, 2014). Information communication technology (ICT) and mobile use facilitate a better work-life balance for workers (Feintzeig, 2018). On the other hand, technology and ICT have increased the permeability of work-life boundaries (Leung, 2011). Employers contact their employees electronically through text messages, chat or emails after work to attend to some task, duty, project, or assignment (World Health Organization, n. d.). In many workplaces, there is an explicit or implicit expectation for quick answers, and workers who stay connected off-hours would be defined as productive and ideal workers. This trend has carried the worker into a culture of permanent availability.

The substantial pressure to continue working unpaid even after the proverbial whistle has blown on the workday is detrimental to employee health. Recent studies reveal how this always-on culture can lead to employees experiencing chronic stress, cognitive overflow syndrome, emotional exhaustion, anxiety, sleep disorders, burnout, and overall deterioration of well-being (Belkin et al., 2016). The *Heath and Well-Being at Work* survey report issued by the Chartered Institute of Personnel and Development (CIPD) reveals a rising culture of *leaveism* (workers using allocated time off, such as annual leave, to work or if they are unwell, or working outside contracted hours) and *presenteeism* (employees coming to work when unwell) in the United Kingdom (2018; p. 35). This unhealthy trend of presenteeism and leaveism exposes the workers to stress and depression, which also can lead to suicide (Feintzeig, 2018). Hyper-connectivity also raises grave concerns regarding employee privacy and autonomy. On the other hand, the encroachment of non-working time also reduces the productivity of workers and this, together with job dissatisfaction due to hyper-connectivity to the workplace and associated work stress, can also pave the way to constructive dismissal.

After-hours connectivity deleteriously affects the employer-employee relationship at workplaces. An employer owes a duty of care to ensure their employee's health and safety at work, including safety from work-related stress injuries (Power, 2019). When an employer breaches this duty of care, he is liable for negligence. However, the law on claims arising from stress at work is still a developing area of law. Though courts have long recognized an employer's liability for physical injury suffered by employees as a result of employer liability or vicarious liability, it is only in recent years that the psychological hazards and injuries connected with stress at work were acknowledged by the judiciary and lawmakers (Crowley, 2004). Colman J pointed out in *Walker v Northumberland County Council* (1995 1 All ER 737), a landmark decision in this area of law, that "although there has been little judicial authority to the extent of which an employer owes to his employees a duty not to cause them psychiatric damage by the volume or character of the work which the employees are required to perform, there is no logical reason why the risk of psychiatric damage should be excluded from the scope of an employer's duty of care or the co-extensive implied term in a contract of employment". Despite this recognition, evidential issues of foreseeability and causation could arise in the adjudication of liability of employers for psychiatric injuries of workers due to stress at work. Notwithstanding issues of producing evidence, it

is well-known that over-connectivity exploits the employer-employee relationship, thereby hindering the possibility of maintaining an equitable power balance in labour relations.

Considering the adverse impact on employees' health and well-being, privacy and autonomy, work-family balance, and labour relations due to the culture of permanent availability through ICT, the right to disconnect is designed to establish boundaries around the use of electronic communication after working hours and to provide employees with the right to not engage in any work-related activities at home. The right to disconnect entails not only the right of an employee not to perform outside regular working hours but also the right not to suffer any negative consequences due to non-responsiveness to calls and messages received after working hours. It also includes the duty of others to respect the right to disconnect. Overall, this helps in building a healthy, safe, and sustainable work culture in the work world. The right to disconnect from the workplace has new relevance with the "new normal" created with the Covid-19 pandemic. Cases reported on burnout and depression associated with the always-on culture faced during remote working heightened the necessity of recognizing a sustainable work culture, including the right to disconnect (Work in Mind, 2020).

This article discusses global responses to reducing the culture of permanent availability through ICT. First, it explores international labour instruments that address the problem of over-connectivity. Second, it assesses the efficacy of the employee's right to disconnect from the workplace as upheld in France, the first advanced industrial economy to address the problem through legislation. It also evaluates the global push towards implanting this right in relation to digitalized workplaces in jurisdictions. In conclusion, the article evaluates the competence of the self-regulation model as an alternative to the legislative response in addressing the "always-on" work culture due to ICT and mobile usage.

Are 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 has hardly been expressly addressed. The international labour standards on working time, rest and leisure time, and occupational health and safety designed by the International Labour Organization (ILO), the key labour organization setting up the international labour instruments, were investigated in order to identify the implicit measures that have been taken to bar hyper-connectivity to workplaces.

In tracing the history of ILO standards on acceptable working time, a downward trend in hours of work which moved in tandem with increases in wages and productivity can be observed (Adams, 2014). The first international labour standard, the *ILO Hours of Work (Industry) Convention*, 1919 (No. 01) (hereinafter "Convention No. 01") adopted a long-sought trade union objective – the eight-hour workday – into international law, alongside a forty-eight-hour weekly limit on working time. This was a radical notion at a time when sixty plus hour workweeks were common. Similar rules were extended to salaried employees in commerce and offices by the *Hours of Work (Commerce and Offices) Convention*, 1930 (No. 30) (hereinafter "Convention No. 30"). Convention No. 01, however, does not include

a definition of *hours of work* whereas Article 2 of Convention No. 30 provides that the term hours of work means the time during which the persons employed are at the disposal of the employer. It does not include rest periods during which the persons employed are not at the disposal of the employer. Conventions No. 01 and 30 do not explicitly provide for minimum daily rest periods either. However, by limiting the daily number of hours allowed for work, both Conventions implicitly recognize a minimum period of daily rest. Neither Convention No. 01 nor Convention No. 30 contain explicit provisions on periods of *stand-by* or *on-call* work.

These regulations have traditionally provided a countervailing force against excessively long hours. However, the overly rigid standards adopted in both Conventions conflict with modern demands for flexible work arrangements at workplaces. They also do not address the predictability or variability of working hours. Variable and unpredictable supplemental work as a result of ICT is left unattended. Nevertheless, the human rights perspective reflected in the international regulation of hours of work continues to be valid today.

The *Workers with Family Responsibilities Convention*, 1981 (No. 156) (hereinafter “Convention No. 156”), which was introduced on the wave of advocacy on work-life balance at the end of the twentieth century, highlighted the necessity of enabling workers to engage in employment without harm to family responsibilities. Convention No. 156 advocates, furthermore, for equality of opportunity and treatment between men and women workers with family responsibilities and between workers with family responsibilities and “other workers.” Though these two aims of family responsibility and gender equality reflect distinct underlying causes of inequality and thus require different strategies, the Convention incorporates a formal conception of equality. In order to create effective equality of opportunity and treatment for both men and women workers, Article 3 of the Convention stipulates that each member State should make it an aim of national policy that persons with family responsibilities who are engaged or wish to engage in employment are enabled to exercise their right to employment without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities. Nevertheless, the absence of a specific mechanism or process for achieving this aim of enabling worker-carers to engage in employment without conflict between their family and employment responsibilities renders the Convention little more than a statement of good intentions.

The Convention was supplemented by the voluntary, non-binding *Workers with Family Responsibilities Recommendation*, 1981 (No. 165) (hereinafter referred to as “Recommendation 165”). Under Article 18 of Recommendation 165, it was recommended that particular attention be paid to general measures for improving working conditions and the quality of working life including measures aimed at the progressive reduction of daily hours of work, the reduction of overtime, and more flexible arrangements as regards working schedules, rest periods, and holidays. It was also recommended that when changing the terms and conditions of employment account be taken of the stage of development, particular needs of the country, different sectors of the country, and special needs of workers including those arising from family responsibilities.

Given the breadth and open-endedness of Convention 156, its accompanying Recommendation 165 offers state parties more specific guidance on how to fulfil the aims of the Convention. However, although these recommendations are necessary for the protection of workers' work-family balance, they do not add the specificity necessary to the Convention. Further, the language appears linked to a model of formal equality, rather than substantive equality, as a standard against which to measure discrimination. On the other hand, the open-endedness of the instruments reflects a desire to permit the broadest flexibility possible for member states (Adams, 2014). Therefore they remain inadequate to redress the problem of workplace-related over-connectivity.

By August 2020, forty five countries had ratified Convention 156 including industrialized countries such as France, Spain, and Japan. However, none of the South Asian countries have ratified the Convention. Only two countries located in the Asian region, namely the Russian Federation and Kazakhstan, have ratified the Convention. The lackadaisical attitude in Asian developing countries including Sri Lanka about work-life balance is reflected in this lack of enthusiasm for legislation on flexible work and work-life balance of employees.

The core values reflected in the ILO standards on occupational safety and health are expressed in three main principles: namely, that work should take place in a safe and healthy working environment; conditions of work should be consistent with workers' well-being and human dignity; and that work should offer real possibilities for personal achievement, self-fulfilment, and service to society (Alli, 2019). In particular, the ILO core *Convention on Occupational Safety and Health*, 1981 (No. 155) and its accompanying Recommendation (No. 164) provide for the adoption, implementation, and review of a coherent national policy on occupational safety and health, as well as measures for its application at national and workplace levels. These measures are geared towards protecting workers' physical and mental health, well-being from accidents, and diseases arising out of, linked to, or occurring during work by minimizing, as far as is reasonably practicable, the causes of hazards inherent in the working environment. As per Article 5 of Convention No. 155, the national policy on occupational health and safety should account for the main spheres of action that include the relationships between the material elements of work and the persons who carry out or supervise the work, as well as the adaptation of machinery, equipment, working time, organization of work and work processes to the physical and mental capacities of the workers.

The ILO standards on occupational safety and health that aim to protect the mental health of workers and the impact of work hours on workers should be considered in this context. Special consideration is required because the stress and burnout due to the use of ICT outside the workplace on an informal basis after regular working hours are not directly addressed in the ILO standards on occupational safety and health.

There are no ILO legal instruments relating to teleworking, or in other words, work made possible outside work hours due to ICT. Even the ground-breaking European Framework Agreement on Telework 2002, which provided a general European Framework for telework, focused only on telework carried out on a "regular basis", mostly home-based

telework (Messenger et al., 2017). The global trend in using ICT outside the workplace on an occasional and informal basis was not covered by the Framework Agreement. Thus, international legal regimes failed to provide a satisfactory legal response to the problem of over-connectivity of modern workplaces due to ICT and mobile use.

France, the Trailblazer

The first sign of recognition that severing connections from the workplace after working hours was necessary 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/her files and working tools” (*Labor Chamber of the Cour de Cassation*, February 17, 2004 no. 01-45.889). This decision was subsequently confirmed by a decision handed down on February 2014 by the *Cour de Cassation* which ruled that “[t]he fact 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 no. 01-45.889).

In this context, the French government developed a legal framework to protect digitally victimized employees suffering from over connectivity. In November 2015, it started groundwork on a more general overhaul of the Labour Code making it “fit for the 21st century” (Clauwaert et al., 2016). Despite the massive demonstrations triggered by the proposed changes, the government managed to push forward the reforms and adopted a legal framework to protect digitally victimized employees on 1st January 2017. Section L.2242-8 of the French Labour Code (in its version applicable from 1st January 2017), stipulated 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 compliance with rest periods, vacation time, and respect for personal and family life. In the absence of any agreement, employers would have to establish a charter to the same effect.

The new legislative approach expanded the right of all employees who use digital and telecommunication (ICT) tools in their professional lives to disconnect and heightened awareness among both employers and employees on the negative impacts of an “always on” work culture. A study by the French research group Eleas showed that more than a third of French workers used their devices to do work out of hours every day and around 60 percent of workers were in favour of the new law clarifying their rights (Samuel, 2018). Some famous companies incorporated the right to disconnect into 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, while the KEDGE Business School, which has seven campuses in France, designed an automatic email letting employees know the email was “out of schedule,” and could wait until the next workday began (Walt, 2017). Furthermore, the legal ruling ordering the French wing of the British pest control and hygiene giant Rentokil Initial to pay a former employee €60,000 for failing to respect his “right to disconnect” was seen as a welcome response in this new legislative approach (Samuel, 2018). It could be argued,

therefore, that this law pressured corporations to draft internal corporate practices that mitigated compulsive out-of-hours email and message-checking.

How Disconnected is the French Disconnection?

It is imperative to consider whether the boundaries set by the reformed laws were effective and resilient enough to meet business realities. It is also important to see whether this legislation was a successful attempt to infuse life back to the work-life formula of 21st century France. The companies that come under the purview of the law are companies with a workforce of at least 50 employees and as such, are subject to the annual mandatory negotiation between employers and employees on professional equality and quality of life at the workplace. Based on the lack of evidence of small scale employees contacting their workers after hours, the French disconnection law exempts employers with less than 50 employees from its purview (Secunda, 2019). Nevertheless, given the realities of life in such workplaces with fewer employees for necessary tasks, employees remain vulnerable to the culture of “all-the-time” work. Due to the lack of accurate monitoring of small scale workplaces, the evidence on the exploitation of such workers would not be revealed.

Further, the new provisions provide only an obligation to negotiate on the right to disconnect, and the failure to comply with this obligation is punishable by a one-year term of prison and a fine of 3750 Euros (Secunda, 2019). The new law does not 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 raise employee awareness on the reasonable use of digital tools (Walt, 2017). The law also does not provide for any sanctions against companies that do not draw up this charter. Thus, the concept of a charter lacks legal force and could be considered as a mere appendix to the company’s internal rules and regulations.

The efficacy of the disconnect law in France for redressing over-connectivity is, therefore, highly questionable. The drawbacks discussed above have resulted in a situation of having legislation that does not have the teeth to bring any real shift in the power balance of labour relations between employers and employees.

The Global Push towards the Right to Disconnect

Following the French legislation, there was a global push within several industrialized economies to consider establishing the right to disconnect. The Italian parliament introduced legislation on the right to disconnect via 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 to assure the worker of the right to disconnect from company devices. Therefore in Italy, the legislation directly refers to individual agreements between workers and employers (James, 2018). This legislation, however, is limited to smart working regimes² and as with the French legislation, does not provide for strict regulation of the right to disconnect.

Spain too followed France’s lead and introduced several digital rights for employees, including the right to disconnect through the Organic Law 3/2018 on Protection

of Personal Data and Guarantee of Digital Rights which came into force on 6th December 2018. Previously, Spanish law did not 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 implicitly 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. Employers had to respect their employees' time off, and Article 14.2 of the Law 31/1995 of 8 November on Prevention of Occupational Risks ruled that employers must guarantee the health and safety of employees during work in every way and that work equipment referred to any machine, apparatus or instrument used in the workplace.

The Spanish Data Protection Act enacted in 2018, moreover, expressly provides for the employee's right to disconnect through Article 88 of the law. However, the application of an employee's right to disconnect is based on the nature of employment. This implies that the right to disconnect is reliant on the particularities of each employment relationship and may even be inapplicable, where the employer-employee relationship does not allow it (Albinana & Lezo, 2019). Further, similar to the Italian legislation discussed above, the absence of an enforcement mechanism on digital rights constitutes a major stumbling block.

It can be evinced, therefore, that the introduction of legislation on the right to disconnect in France created a global movement towards its inclusion in other legal contexts. Apart from the initiatives mentioned above, the Netherlands, Luxembourg, India, Québec, and the federal government of Canada have all proposed, or are considering, adopting such a right (Rose, 2019). Philippines' legislature has also introduced a bill providing the right to disconnect after regular hours. Most surprisingly, the New York State Legislature has also presented a bill prohibiting employers with over ten employees from requiring them to respond to calls or emails outside of normal work hours (except in emergencies) despite being the "city that never sleeps". Importantly, non-compliant 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 legislation on the right to disconnect would be advantageous as it would heighten consciousness around the problem of hyper-connectivity of both parties, namely employers and employees (Moulton, 2017). Employees would be in a better position if there were a law supporting their disinclination to connect after work. Awareness of this issue has indirectly influenced recent judicial interventions in the aforesaid countries which acknowledge the stress and interruptions to personal time from after-hours communication. While it is axiomatic that countries do not just transplant other countries' legal frameworks into their own (Hershkoff & Loffredo, 2011), it is the case, nonetheless, that the French legislation has been cherry picked by most of these other countries. Most of the loopholes existing in the French legislation have been reproduced in the later adopted legislation on the right to disconnect. Most importantly, the absence in the French law of a mechanism to reprimand violators repeats itself in these other legal frameworks as well. All these cases point to the need to consider whether a one-size-fits-all legislation is the most effective

means of responding to the diverse issues of ICT-enabled over-connectivity to work that has become a grave concern of modern society. All the cases discussed above, again point to well-meaning measures that have been introduced by States, and that result in a heightening awareness of the issue at hand, with little real impact on labour relations in work places.

Some organizations, especially customer-driven businesses, believe that legislating the right to disconnect is not realistic as certain types of employees are legitimately required to be on call. The possibility of regulating gig economy workers, those working across different time zones, workers deviating from routine task job systems such as those that have opt-out mechanisms through a one-size-fits-all legislative approach is highly questionable. If attempted, there is a risk of pushing lawmakers to legislate regulations that are too simplistic or that are too minutely detailed to support enforcement.

The Legislative Model versus Self-Regulation

In this context, it is essential to consider whether any other mechanisms can be employed to address the problem. Germany, apart from adopting legislation, has opted to regulate after-hours work through a self-regulation model. Under this mechanism, the Confederation of the German Employers' Association together with the German Trade Union Confederation and the Federal Ministry of Labour and Social Affairs, has developed regulations that meet the needs of both employees and employers (Secunda, 2019). They have created unique regulations for specific industries tailored to meet their particular industrial needs.

Following this approach, the German labour ministry introduced a “minimum intervention in leisure time policy”, assuring employees of their right to disconnect (Secunda, 2019). Under this policy, the employers would only be entitled to contact employees after hours in exceptional and urgent situations which require immediate action without postponing to the next working day. It also provides that employees cannot be penalized for failing to respond to the messages sent after hours (Vasagar, 2013). The move follows similar restrictions on out-of-hours email imposed by German firms including Volkswagen, BMW and Puma. Volkswagen undertook not to forward any emails to an employee after thirty minutes of the end of the working day. This move respects the employee's right to have time with family while allowing the employers to contact an employee only immediately after work. The “Mail on Holiday” email policy adopted by some German companies such as Daimler offers the employees to set their emails to auto-delete option. This preference delivers the sender an auto-generated message that the person contacted is out of the office and offers contact information of another employee for urgent matters (Kremer, 2014). Despite these progressive initiatives of a few large scale companies in Germany, small and middle scale private companies in the country are still reluctant to follow any minimum free time intervention policies (Secunda, 2019).

Though self-regulation benefits the concerned parties in creating dynamic regulations that address the unique needs of each industry, there is a possibility that self-regulation looks favourable to employees on the surface but fails to provide substantive protection (Lagace, 2007). There is also the possibility of companies creating regulations as a marketing ploy

with the sole intention of attracting consumers and employees who are particular about corporate culture. For instance, self-regulation mechanisms promoted from 1997 to 2007 as a solution to consumer privacy issues in the US were short-lived. An analysis of the life span of self-regulation schemes to ensure privacy such as Individual Reference Services Group, Privacy Leadership Initiative, Online Privacy Alliance, Network Advertising Initiative, and BBB Online Privacy Program show that they survived for a few years and then disappeared when pressure faded (Gellman & Dixon, 2011).

Co-regulation mechanisms would be helpful in avoiding the anomalies of self-regulatory structures related to the right to disconnect. If States establish broad parameters for work norms and allow the industry to develop detailed regulations, they can force industries to adhere to high standards of employee welfare, including the right to disconnect. Government scrutiny and oversight of the development and application of industrial rules would also provide external accountability on such regulations. Nevertheless, this process too, can be complicated to implement (Doelker, 2010).

Conclusion: For Viable Disconnectivity

The recent wave of legislative responses supporting the right to disconnect has been a welcome trend in addressing the grievance of over-connectivity by digitally-victimized employees. It has heightened consciousness around the problem of hyper-connectivity involving both employers and employees. However, this dialogue has been mostly limited to developed industrialized countries. Further, in practical terms, the efficacy of the legislative response is questionable. Cherry-picked legislation can never provide sustainable solutions to contextualized problems. Generally, social institutions such as workers' organizations, employer organizations, and ministries of labour and industrial relations are well-positioned to work together to address the question of over-connectivity through ICT and mobile usage. National, sectoral, organizational, company-specific collective agreements and industrial regulations designed to address the preferences of workers and employers functioning under regular governmental surveillance are an axiomatic part of a sustainable right to disconnection.

The right to disconnection from the workplace has still not received the attention of developing countries, including Sri Lanka. The lackadaisical attitude towards the regulation of over connectivity may be due to outdated, overly rigid work hours. However, today, with the invasion of ICT, and the transformation of work due to the pandemic, over-connectivity is not uncommon in developing countries. Thus, State and self-regulatory mechanisms on the right to disconnect from workplaces that account for both the unique features of labour relations and different types of industries need to be designed and enforced.

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1. "I can't breathe" is a slogan associated with the Black Lives Matter movement in the United States. The phrase originates from the last words of Eric Garner, an unarmed black man who was killed in 2014 after being put in a chokehold by New York City Police. Again in May 2020 with the death of George Floyd, his last words "I can't breathe," became the slogan of nationwide protests in the United States of America. The author connects this slogan with the

title of the paper with the intention of evoking the vulnerability of the worker who is over connected to their workplaces through ICT.

2. As per the second edition of the Smart Working Handbook published by the UK Department for Business, Innovation and Skills, Smart Working is the term used “to refer to the new ways of working made possible by advances in technology and made essential by economic, environmental and social pressures.”

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