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Academic Contribution

Contribution to the study on the 'right to disconnect' from work. Are France and Spain examples for other countries and EU law?

Recto running head : *Lerouge and Trujillo Pons*

Verso running head : *European Labour Law Journal XX(XX)*

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[GQ1]

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ABSTRACT

[GQ2] [GQ4] [GQ5] France and Spain were pioneer countries in regulating the right to 'disconnect from work'. Indeed, this right has been recognised in these countries since 2016 and 2017 within the framework of the right to privacy in respect to the use of digital devices in the workplace. In accordance with the law, employees are protected if they do not use their digital devices (computer, mobile phone, tablet, smart watch, etc.) during periods of rest, thereby, ensuring that their right to rest is enshrined within the regulations of their country; especially in light of the Working Time Directive 2003/88/EC. Therefore, from an analysis of French and Spanish legislation, the aim is to suggest pathways that could enable other countries to better regulate the right to disconnect, but also to develop EU law on the subject.

KEYWORDS

- Right to disconnect
- workplace
- pandemic
- labour law
- occupational health
- EU law
- comparative law

Introduction

 *A new or old labour law?* **[AQ1]** The development of new information and communication technologies (ICT) and the constant updating of them has made life easier for many people. The Internet has become a window from people's homes

to the world. Just a few years ago, tasks such as videoconferencing, shopping, checking e-mails, carrying out banking transactions, doing public administration tasks online, measuring one's heart rate or monitoring sleep or oxygen levels remotely seemed to be the stuff of science fiction writers. However, today, it has become a reality.

In addition, this **society digital transformation** is a window from the workplace into the home and from home into the workplace. This **society** ~~society digital transformation~~ **[AQ2]** is already part of the present and part of the future development at both social and economic levels. But the non-ethical use of ICT has jeopardised basic rights like the right of employees to rest, to a private life and to health at work. Indeed, people live their daily lives connected to a mobile phone, receiving calls, live messages and emails. For instance, according to Eurofound, people who regularly work from home are more than twice as likely to work in excess of the requisite maximum 48 hours per week and are at risk of resting for less than the requisite 11 hours between working days. Almost 30% of these teleworkers report working in their free time every day or several times a week, compared to less than 5% of office-based workers. Teleworkers are also more likely to work irregular hours.² Nowadays, the office is everywhere - in airports, train stations, restaurants, etc. To better understand this environment that is constantly evolving and in order to regulate the use of digital tools at work, a policy on the right to digital disconnection is an interesting option to consider.

ICT in society in general and, by logical extension, in the workplace, purports to improve the quality of life. Teleworking has also been used in the context of a pandemic to stop the spread of disease. However, in other cases, it can also impede the enforcement of some labour rights in national **legislations** ~~regulations~~ **[AQ3]**, when it is important that such rights are always guaranteed in their entirety and without exception.³ In the new digital era and in the context of the global Covid-19 pandemic, preference has been given to provisions for remote working, which have been used to prevent contagion and have been emphatically promoted.⁴ Indeed, the current technological architecture enables people to work from anywhere. Remote work provides a way of working that has become difficult to contain because of the increasing use of ICT during the last decade, and with the onset of the Covid pandemic.⁵ In this new global labour reality, the employee's right to disconnect from technology has become an essential guarantee for work-life balance in order to prevent occupational health hazards.

Today, digital tools play a major role in everyday work, particularly now with the pandemic crisis and the way work has penetrated the home. The emergence of new ways of working in the Covid crisis has led to new controversies in the fields of labour relations and law on health and safety at work. Thus, how does the law ensure that digital tools, which are generally identified as something positive in the hands of employees, do not become dangerous? How do we ensure that labour law can perform its protective function? The right to disconnect from work, although not new, becomes essential in order to respond to new labour issues linked to the development and increasing use of ICT which has accelerated in the context of the pandemic.⁶

For all these reasons and in order to respond to these issues, it appears necessary to highlight the need to define the minimum content of the right to disconnect from work. The aim of this right is to prevent workers from being overworked, to ensure the right to rest and the right to private life, and also to promote work-life balance. The right to disconnect from the workplace comes into play as a safeguard. The aim is also to ensure that employees cannot be punished or suffer the scorn of their employer or supervisor if they refuse to respond to an email or a telephone call outside of their working hours.

However, the aim is not to claim that there are no other legal bases that may protect employees against unlawful connections to work. In other words, and in particular in the European Union (EU) because of the transposition of Directive 2003/88/EC⁷ concerning certain aspects of the organisation of working time, the enforcement in each Member State of the legislation on working hours, breaks, holidays, leave (paid or unpaid), etc. already prevents employees from responding to messages or answering calls outside of their working hours. The same approach applies to the enforcement and transposition into national law of the Article 5(1) of Directive 89/391/EEC⁸ on the introduction of measures aimed at encouraging improvements in the safety and health of employees at work: 'The employer shall have a duty to ensure the safety and health *in every aspect related to the work* **[AQ4] (emphasis added)**'. But, in practice, and because of the acceleration in the development of new ways of working due to the pandemic, the boundaries between personal and professional life are weakened every day that passes.

The right to disconnect from work then comes in to reinforce these boundaries. To keep abreast of developments, including the recent European Parliament resolution of 21 January 2021 containing recommendations to the Commission on the right to disconnect,⁹ and in order to get a better legal definition, approach and content for this right, the aim of our study is to make a critical analysis and comparison of pioneering legislation in this field, in particular in France and Spain, where such legislation was enacted on the right to disconnect in 2016 and in 2017, respectively. Beyond the issue of working hours, it is also necessary to highlight the strong link with health and safety regulations before focusing on remote working. The idea is

equally to study which way is the most suitable for implementing the right to disconnect from work, through legislation or collective bargaining. Is the right to disconnect one that is recognised for all employees or does it need to be adapted to their job and hierarchical position? Is a legal approach the only way to tackle connection and disconnection issues? Ethics and education also seem worth exploring. The comparative analysis of the French and Spanish rights to disconnect from work will enable us to propose an appropriate legal framework for countries that would like to tackle connection and disconnection from work and introduce a policy in this field through the recognition of a right to disconnect from work.

That being said, these positions reinforce the need to establish a legal framework for European workers to enjoy the right to disconnect from work without any prejudice. The EU regulation on working time contained in Directive 2003/88/EC protects workers so that they can rest after their working day and sets out the following obligations:

- *A limit to weekly working hours:* Average working time for each seven-day period must not exceed 48 hours, including overtime. According to national legislation and/or collective agreements, the 48-hour average is calculated over a reference period of up to four, six or 12 months.
- *A break during working hours* if the worker is on duty for more than six hours.
- *A minimum period of daily rest:* Every 24 hours, a worker is entitled to a minimum of 11 consecutive hours of rest.
- *A minimum weekly rest period for each seven-day period:* a worker is entitled to a minimum of 24 uninterrupted hours in addition to 11 hours of daily rest.
- *Annual paid leave* of at least four weeks a year.

Directive 2003/88/EC establishes clear maximum working times and minimum resting periods, specifically. This is justified, in particular in point (4), which states: 'The improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations'. In addition, on 21 February 2018 in the *Ville de Nivelles vs. Rudy Matzak* case, the Court of Justice of the European Union (CJEU) ruled very clearly that the timeframe during which a worker at home is obliged to respond to employer calls in a short period must be regarded as working time, according Article 2 of Directive 2003/88/EC.¹⁰ This CJEU ruling can be considered as an important argument in favour of the creation of a right to disconnect.

The EU does not have its own specific regulation on digital disconnection. In this context, Members of the European Parliament are committed to a future regulation that specifies this right for workers at the EU level to ensure that they are protected. The aim is to prevent companies from requiring workers to be connected even during rest periods or when they are with their family. If this is not the case, future Community regulations must protect workers so that their rights are not infringed upon and to ensure that they can invoke their rights through complaints mechanisms and specific sanctioning regimes. A detailed and concrete regulation is not enough for the EU legislator, which also advocates for considering technological disconnection as a fundamental right of the European Union.¹¹

The text of the draft Directive reveals a significant regulatory deficit within the European Union given that there is no specific and explicit regulation on workers' right to disconnect from digital tools, including ICT, for employment reasons.¹² One of the purposes of the draft presented is to balance the labour relationship, so as to avoid employers exploiting workers for their own economic gain through the abusive use of digital tools and teleworking. With the minimum requirements set out in the text of the initiative to guarantee the right of digital disconnection, the intention is to respect everything that overlaps with the exercise of the right, namely, fair remuneration, limits on working time and, consequently, the achievement of an equilibrium in the work-life balance of the worker, effective equality between men and women (the Directive is correct in stating that the gender perspective must be taken into account in the drafting of internal policies) and an improvement in health and safety conditions, given that as has previously been pointed out, the lack of digital disconnection has a clear impact on the physical and mental health of the worker.

In the face of these proposals for a new Directive, it will be necessary to remain on the lookout, since if the Directive is issued it will compel the Member States to transpose the right to disconnect into their domestic legal systems. Through the examples mainly from the French and Spanish legislation and practices, completed by **examples from** other countries **[AQ5]**, using a critical approach, the aim is to show how they could be the working basis for the next Directive. The text of the Directive will be in draft form, so will not be the final version. Undoubtedly, while this option is crystallised, governments must adopt all measures and policies required to guarantee breaks and rest for workers.

Right to disconnect from work and occupational health law

Work is a human activity through which the human being develops his/her physical, intellectual and cognitive capacities but, at the same time, work can be a health hazard. A paradoxical relationship is established between health and

work **which can be summarized as follows:** 'we need work to be healthy whereas working can likely affect health'.¹³ [AQ6] In respect of the right to disconnect, a manifestation of this paradox is found, for instance, in remote working which undoubtedly brings benefits to **employers/companies** and employees [AQ7], but also has likely a negative impact on **employee/workers'** health. This negative effect on health, among other conditions, is a consequence of the requirement for permanent connectivity through ICT and long working hours.

Occupational risks and occupational health depend on the characteristics of the work at hand and the conditions in which it is carried out. From a technical point of view, working conditions are understood to be the set of variables that define the performance of a specific task and the environment in which it is performed, that determine the physical, mental and social health of the worker. According to this definition, working conditions can be any characteristic (environmental and technical) that may have a significant influence on the production of risks to the safety and health of the worker (e.g., the state of the premises or work equipment; the presence of physical or chemical agents; organisation of work, etc.). Moreover, the development and increasing use of ICT has made possible new forms of provision and decentralisation of professional services **which that** do not require, in many cases, the presence of the individual in the workplace. In addition, the demand for labour flexibility and the reconciliation of the personal and professional lives of employees increases.

The world of work has become globalised and the information necessary to carry out a large number of tasks is currently available in real time through an Internet connection. This means that the spatial and temporal borders on which it has been legislated to date and which previously constituted insurmountable barriers for business management no longer exist, allowing this new competitive advantage to be developed to the maximum, in turn making it possible to meet demand from any part of the world as well as allowing professionals to be settled in multiple places. On the other hand, the companies themselves promote new work organisation systems that allow them to save costs, increase efficiency, accelerate decentralisation and achieve sustainable growth. Many of these companies already have staff located all over the world who are interconnected, which brings with it a significant increase in the use of new technologies in business management and in homes.

Disconnection from work is thus necessary **in** for health, well-being, happiness and personal satisfaction. For these reasons the right to disconnect is part of occupational health law. In France, in order to ensure their health and safety obligation, the employer (Article L. 4121-1 of the Labour Code) cannot ignore the impact of constant connection on employee health. The key is to consider it as an occupational risk that also requires referral to the general principles of prevention within the article L. 4121-2 of the Labour Code. The employer is under the obligation to adapt work to the individual (principle 4) and also to take into account the development of technologies (principles 5). In this area and in order to take the necessary measures to ensure the safety and to protect the physical and mental health of workers, the employer shall provide information and training sessions (Article L. 4121-1 of the Labour Code).

In Spain, as is the case in other EU countries (such as France, Belgium and Italy) and nonEU countries (such as Peru and Chile), labour law guarantees the rest periods for workers in the framework privacy and work-life balance. The basic legal framework is very broad due to its multidisciplinary nature. Thus, labour law is accommodated in the following set of regulations:

- 1 Organic Law 3/2018, of December 5, on Personal Data Protection and guarantee of digital rights as a worker's right in accordance with its Articles 88 (digital disconnection), 91 (collective bargaining), 13th final provision (Art. 20 bis ET for workers of private companies) and 14th final provision (Art. 14 j bis for workers of public companies);
- 2 Royal Legislative Decree 5/2015, of October 30, which approves the revised text of the Law of the Basic Statute of Public Employees with the inclusion of the aforementioned Article 14 bis;
- 3 Royal Legislative Decree 2/2015, of October 23, which approves the revised text of the Workers' Statute Law with the more specific inclusion and directly from a new addition (in the form of a bis) in Article 20 and indirectly in its fifth section (Arts. 34 -day, 37 -weekly rest, holidays and permits- and 38 -annual holidays-);
- 4 **More recently, the right has been reflected in Law 10/2021, of July 9, on distance work (BOE, July 10, 2021, LTD) in its Article 18 which is limited practically to refer to what is already established in the aforementioned Article 88 of the LOPDPGDD.** More recently, the right has been reflected first, in Royal Decree-Law 28/2020, of September 22, on remote work in its Article 18 which is limited practically to refer to what is already established in the aforementioned Article 88 of the LOPDPGDD and, second and more recent, in Law 10/2021, of July 9, on distance work (BOE, July 10, 2021, LTD) that traces Article 18 of its previous RDLTD. [AQ8]

This approach is confirmed by Article 5(1) of Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work, and to promote well-being at work, which states: 'The employer

shall have a duty to ensure the safety and health of workers in every aspect related to the work'. The phrase 'in every aspect related to work' must be emphasised.

The global pandemic, with the lockdown regime and the different phases experienced, the new world reality has forced many employees to provide services remotely. In the conditions that the labour market is experiencing due to the health crisis, the stress that may come with the use of ICT must be the exception and not the norm. The situation has highlighted a labour law that has been in force in France and Spain since 2017 and 2018, respectively, namely, the right to disconnect, which today is an ethical and educational issue.

Right to disconnect from work: an ethical and educational issue

Periods of rest and disconnection are necessary for employees. There is a trend in remote working and work-life imbalance in society. There is a feeling that this trend is incompatible with the right to disconnect. However, the right to disconnect is more than necessary in the current technological age. Very few employees manage to disconnect from their work once the day is over. This causes them to find themselves constantly remembering pending tasks, thinking about the next day's tasks, etc., which generates anxiety and constant stress. If we add to this the continuous connectivity to emails, SMS, instant mobile messages or calls from the employer or the supervisor after working hours, some employees never rest from work. Rest periods must be ensured because, otherwise, employees experience greater psychological and occupational exhaustion. Excessive connections to work imposed by certain management approaches result workplace psychological harassment, as the French *Court of cassation* ruled on 10 November 2009.

The European Parliament has clearly understood the urgency and the gravity of the situation in a resolution adopted Tuesday, 1 December 2020. The MEPs of the Employment Committee affirmed that the EU countries must guarantee that the employees can exercise the right to disconnect effectively, including through collective agreement. They argued that this right is vital to protect the health of employees, especially when there are European countries without their own legislation on this labour matter. In the Netherlands and Portugal, legislative proposals have been made but the process is stalling. In eight other countries (Germany, Finland, Ireland, Luxembourg, Lithuania, Malta, Sweden and Slovenia) a relatively intense debate is taking place on the right to disconnect, the most advanced discussions taking place in Germany, Malta and Ireland. In some states, the debate has resurfaced in the context of the pandemic. In the 13 remaining Member States of the European Union there is no debate on legislation. Existing legislation is perceived to be sufficient, flexible ICT-based work is not widespread, as in most Eastern European countries, or collective bargaining is preferred when it comes to improving work-life balance, as in the Scandinavian countries. The Employment Committee is of the opinion that outside working hours, European employees should be able to turn off digital devices without suffering consequences. The 'always-on' culture and the growing expectation that employees must be available at any time can negatively affect work-life balance and physical and mental health and well-being. In the same resolution, the committee asked the Commission to propose an EU Directive on the right to disconnect, as this right is not explicitly enshrined in EU law. The same MEPs even stressed the possibility of disconnecting from work must be considered as a fundamental right, which allows employees to refrain from work tasks and electronic communication outside working hours without suffering repercussions.

The objective is to encourage the development of a health-promoting work organisation, based on values such as cooperation and justice. The aim is to understand the ways in which ethics and occupational health are articulated and even complement each other in order to open up a new way of understanding occupational health from a legal point of view in the light of the economic, political and social evolution of today's world. The frame of reference will not be that of morality, but law in relation to occupational health. Thus, the "righteousness" that we seek to achieve is that which is consistent with respect for the rule. The ethics conceived here as a basis for our reflection is not a set of values or principles, but a reasoned reflection with a view to acting effectively in the service of well-being at work. The conditions have to be created to make possible the questioning of the meaning and spirit of decisions and of work organisations with regard to the respect of rules.

The focus is on supporting decision-making in the face of concrete issues relating to decision-making processes, and on the values and principles involved and their relationship with each other in the context of the legal framework. The spirit that accompanies the enactment of legal norms and the meaning of their application are not hermetic to the juxtaposition of ethical values. For example, speaking of the human being in the context of work is opposed to the commodification of the person of the worker, denying his or her humanity in the way work is managed. The ethical approach will guide the implementation of legal norms relating to the powers of the employer in matters of management and health at work. Ethics in the workplace refers to the meaning of the decisions made, the values and the spirit associated with them. It justifies the action of the actors in the world of work at the individual and collective levels, but also their responsibility. Ethical reflection

aimed at questioning or raising awareness about the impact of decisions made, in terms of control and surveillance, on the health of the targeted workers could be another approach. The objective here is to bring future stakeholders to a better understanding of the world of work in which they will evolve but cannot be achieved without education at school on ITC use and its possible consequences (stress, discrimination, bullying, addiction, etc.). It is a matter of showing that, individually and collectively, health is in perpetual construction and development. Education in occupational health could therefore be a means of involving workers in the promotion of health. The pupils of today are the future workers who will be in the world of work of tomorrow.

French and Spanish regulations of the right to disconnect from work: comparative approach

Based on the above, at this point it is interesting to ask whether, prior to the right to disconnect from work, French and Spanish workers had legal coverage that guaranteed their right to compulsory rest outside of their working hours. The answer is in the affirmative; it is enough to apply the traditional right to rest enshrined in labour regulations and it protects the worker outside of their working hours. In other words, in France and in Spain, labour law and health and safety law endorse the regulations regarding both the EU right to rest in the application of Articles 34 and following of the European Treaty (working hours, breaks, leave, permits, etc.), and Article 31 of the Charter of Fundamental Rights of the EU and Directive 2003/88/EC. This allows workers to choose not to answer messages or calls outside of their working hours.

However, in reality, the issue is quite different regarding the use of ICT. The exercise of the right to disconnect must address the nature and purpose of the employment relationship and therefore enhance the right to reconcile work activity and personal and family life. The issue is not only to determine a protocol of action but also to encourage and even compel companies to develop a real internal policy. In the field of labour law, the means to reach this goal is through the law, collective bargaining or, if that fails, an agreement between the employer and the employees' representatives.

Therefore, France and Spain have developed specific regulations on the right to disconnect from work. Law n° 2016-1088, of August 8, 2016 on work, the modernisation of social dialogue and the securing of professional careers places France as a pioneering country¹⁴ in regulating on the right to disconnect. For its part, Spanish regulations result from the transposition in 2018 of the EU General Data Protection Regulation (GDPR)¹⁵ Prior to discussing the current regulation in Spain, it is convenient to add that a normative approach was taken in the proposal¹⁶ (brought by the political group *Unidos Podemos-En Comú Podem-En Marea*) presented in March 2017 on the right to disconnect from work outside working hours for discussion in the Employment and Social Security Committee. Likewise, at this point, on the occasion of the current coalition government of the *PSOE* and *Unidas Podemos*, and in line with the aforementioned non-legal proposal, highlights, on December 30, 2019, the programmatic document¹⁷ that they signed as part of the coalition that formed and that ultimately, at the beginning of 2020, led to the current Government. Among other matters, in its programmatic content, such as a declaration of intentions, it is addressed in point 1.10: "Right to disconnect and proper management of working time within labour regulations, as well as effective protection in cases of pregnancy and lactation." ~~The content of the Law proposition would be relevant in the close future because it can be an incentive for the legislator in this sense; especially when *Unidas Podemos* is in the current coalition government. However, this text was not considerate for the Govern but it could be an impetus in a future.~~ [AQ9]

As a consequence, the legislator first published the Organic Law 3/2018, of December 5, on Personal Data Protection and guarantee of digital rights (LOPDPGDD) and after that the Law 10/2021, of July 9, on remote work (LTD). Among other measures, this law aimed to reinforce the privacy of workers when using audio-visual or geolocation systems at work, and guarantees the right to digital disconnection outside working hours, both for salaried workers (including those hired by senior management)¹⁸ and for public employees. Among many other aspects, the recognition of labour law in the framework of the right to privacy in the use of digital devices in the workplace stands out. Apart from the level relating to the right to privacy, digital disconnection is defined as an element that enhances the reconciliation of work and personal life. On its normative content, Article 88 LOPDPGDD states that it is dedicated to the 'Right to digital disconnection in the workplace' and the final thirteenth and fourteenth provisions modify the content of the Workers' Statute (ET, adding a new precept: Art. 20 bis)¹⁹ and the Basic Statute of Public Servants, respectively. For its part Law 10/2021 provided for the same thing in its Article 18 by regulating the rights of remote teleworkers. ~~According to those articles it is significant~~ [AQ10] ~~in view of all of this, there is a lot of literature written about it.~~ ~~to say that there is a lot of literature written about it.~~²⁰ There is agreement that the right to disconnect from work is not new but rather a right that implies a guarantee of rest, and a right that was legislated on years ago at EU level through the aforementioned Directive and at the national level through the Statute of Workers. However, despite not being new, a review is required to ensure that the law will be applied effectively

by companies internally, within the collective regulation that each company makes with its workers and in a flexible way according to the sector and the concrete type of activity being pursued.

On the other hand, the right to disconnect was introduced in France in the legal draft on the modernisation of labour law. Its introduction into the Labour Code in 2016 was presented as a guarantee of the effectiveness of the right to rest and portrayed in collective bargaining as a criterion relating to the quality of working life. Parliamentary debates have shown the topics that have caused the most discussion pertain to the threshold of the company's workforce to which the right to disconnect should be applied. In the end, the threshold of 50 employees was dropped, and the right to disconnect applies to all companies. The other major point of discussion concerned the application - or not - of the right to disconnect to employees subject to a '*forfait jours*' agreement, i.e., employees whose working time is determined according to the number of days worked.²¹ The final text includes them in the right to disconnect, but senior executive managers, who are not subject to working time law, are not covered by the right to disconnect.

The authors who previously demanded the recognition of a 'right to disconnect', faced with the extent of the phenomenon of connection and the effects upon health which already exceed the scope of the 2016 law, are now demanding the recognition of a 'duty to disconnect'.²² Other authors believe that the right to disconnect should remain a choice an autonomy [AQ11], in other words, when the employee feels compelled to stay connected. To avoid this situation, the possibility to connect to ICT work tools outside of working hours must therefore remain a right, that is to say, the freedom to work differently provided that it does not encroach upon the freedom of others should be guaranteed.²³ In 2016, the Director General of the National Agency for the Improvement of Working Conditions (ANACT), Hervé Lanouzière, added that the right to disconnect does not concern all employees. Those whose tasks and responsibilities do not require them to be particularly available are not supposed to connect to their professional tools and respond to their employer's requests outside their working hours. Three main subjects should be addressed in the agreement or charter evoked by the law to implement the right to disconnect: the organisation of work in the company, professional relations and individual behaviour. The organisation of work in the company refers to the question of workload.

The terms and conditions under which French employees exercise their right to disconnect are defined by collective bargaining that must be initiated by companies with at least one trade union delegate (a company with 50 employees or more) during the annual negotiations on professional equality between women and men and quality of life at work (Article L. 2242-8 of the Labour Code). However, the employer is not compelled to sign an agreement.

If bargaining is not successful, or for companies without a trade union delegate, Law n° 2016-1088 states that the employer must still implement the right to disconnect, but in the form of a charter for employees and managers. The charter will cover training and awareness-raising measures on the 'reasonable use' of ICT and will be submitted to the social and economic council of employees' representatives for its opinion or, failing that, to the staff representative in companies with fewer than 11 employees. The employer remains in control of the decision, however, and is not bound by the opinion of the staff representatives. Moreover, unlike the penalty for non-compliance with the obligation to negotiate of up to one year imprisonment and a fine of EUR 3,750 (Article L. 2242-8 of the Labour Code), the absence of a charter is not penalised.

The meaning of the text is firstly that an employee cannot be punished or reprimanded by his or her employer when he or she refuses to answer an email or a call outside working hours. Article L. 3121-64 of the Labour Code clearly states that the procedures for exercising this right to disconnect are determined by collective agreement. However, in the absence of a conventional provision, the procedures for exercising the employee's right to disconnect are defined by the employer and communicated by any means to the employees concerned (Article L. 3121-65 of the Labour Code). Furthermore, according to Article L. 3111-2 of the Labour Code, if senior managers are not subject to the law on working hours and rest, they must nevertheless respect the right to disconnect of their employees.

Employees must have a daily rest period of at least 11 consecutive hours and a weekly consecutive rest period of at least 35 hours (Article L. 3131-1 and following of the Labour Code). During the employee's rest period, but also during periods of leave (sickness, paid leave, etc.), it is up to the employer to ask them to avoid, as far as possible, sending emails or using their smartphones for professional purposes. Extreme cases of continuous solicitation of employees without respecting the boundaries of their personal life are likely to be qualified by the judge as moral harassment. Some companies have also thought of setting up an alert system to identify employees who are connected outside of working hours or who do not respect the 11-hour daily rest period. Employers are in fact subject to a safety obligation (Article L. 4121-1 of the Labour Code) which requires them to implement the general principles of prevention or risk being held liable (Article L. 4121-2 of the Labour Code).

Specifically, in an innovative way, it regulates the right of all employees to be disconnected from work and to ensure

work-life balance, granting a fundamental role to companies in defining the working environment(s) and working limits through a collective agreement or, failing that, by means of a statute like in Spain, which grants a preponderant role to the internal protocols of companies as well as to collective bargaining. In accordance with the iuslabouralist doctrine, this Law is born both from conventional experience and from the existence of reports that largely inspired its content. As can be seen, the right is modulated by collective bargaining, providing, thus, a very high level of autonomy for companies to adapt to the right to disconnect in consideration of their organisational culture and their employees.

Thus, two deductions are made from the content of Article 88. The first is that the Spanish legislator, like its French namesake (the El Khomri Law), gives a prominent role to collective bargaining²⁴ (among other things, by stable measures and good practices). So that, in a decisive way, it intervenes in the realisation of the regulation of digital disconnection (which is logical, because only collective bargaining can modulate or qualify the enjoyment of the right according to the nature and purpose of the employment relationship). The second, through its third section, succinctly, is that the employer is obliged to develop an internal policy in which the modalities of the exercise of the right must be defined. It is a protocol that must always be carried out, following the postulates obtained, where appropriate, in collective bargaining. However, it can be foreseen that the legislator, in the genesis of the wording of its third section, used it as a safe-conduct in the event of a possible lack of agreements, thus opening the door to unilateral regulation by the employer. In practice, the aim is not merely to repeat in the protocol or in the collective agreement the terms of the working time law. To get good results, the employer has to put in place the necessary means in order to implement the right to disconnect from work.

Although it is a labour law aimed at 'employed employees', senior executives should not be ignored. They are employees who, on many occasions, due to their high levels of responsibility and trust with the employer, are not restricted in extending their working hours unreasonably (from their home anywhere in the world). Then, effective from 13 October 2020, the aforementioned Royal Decree Law 28/2020, of 22 September on remote work was introduced in Spain, which will be analysed in-depth later.²⁵ Its content, briefly, its Article 18 in which it is stated that the right to digital disconnection also applies to 'teleworking', thus guaranteeing that employees have the right to digital disconnection outside of their working hours, under the terms previously analysed in Article 88 of the LOPDPGDD. However, in France senior executives are part of a regime that allows not to be subject to working time law.

The company's duty to ensure disconnection entails a limitation on the use of technological means of business and work communication during rest periods, as well as respect for the maximum duration of the working day and any limits and precautions in terms of working hours set out in legal or conventional regulations. In this sense, the company, after hearing the legal representation of the employees, will prepare an internal policy²⁶ for workers, including those in managerial positions, in which it will define the modalities for exercising the right to disconnect and the training and awareness-raising actions for staff on the reasonable use of technological tools to avoid the risk of 'computer fatigue'. In particular, the right to disconnect will be preserved in cases of total or partial use of remote work, as well the use of technological tools in the home of the employee for work purposes. The collective agreement may establish the appropriate means and measures to ensure the effective exercise of the right to disconnect in the case of remote working and the adequate organisation of the day so that it is compatible with rest periods ensured by labour law.

The French and Spanish are not the only legal systems to tackle digital disconnection labour issues. Following the introduction of the French regulation, Belgium, a country very close to France, also introduced, by means of the Law of March 5, 2017, 'Loi concernant le travail faisable et maniable', a series of provisions^{precepts} related to working hours and digital workshocks [AQ12] that can disturb the balance of workers' rights^{interests}. The Portuguese Parliament adopted very interesting new legislation on remote working on 6 December 2021.²⁷ Even if the law No. 83/2021, which modifies the Portuguese Labour Code, does not mention the 'right to disconnect', it refers to the employer's duty 'to refrain from contacting the employee during the rest period, except in situations of force majeure'.²⁸ This provision applies to all workers and not only to those who work remotely, with the exception of 'force majeure' cases limited to unforeseen or urgent situations. The breach of this duty by the employer constitutes a 'serious administrative offence'.²⁹ Any disadvantageous treatment, in terms of working conditions and professional development, of a worker for exercising this right constitutes a discriminatory action.³⁰ In other words, without stating as much, Portugal has recently chosen to recognise a stricter right to disconnect than other countries. Likewise, as many internal protocols of digital disconnection are followed in Spain, in Portugal, thanks to its Article 169-A on organisation, direction and control of work: 'remote work meetings, as well as tasks that, by their nature, they must be carried out at precise times and in coordination with other workers, they must take place within working hours and should preferably be scheduled 24 hours in advance'.

The countries which tackle digital disconnection labour issues have done so to guarantee the classic and necessary rest periods for employees, as enacted in Directive 2003/88/CEE. Responding to issues relating to remote work will also help

other countries to legislate on those terms. The constant technological developments in society cause irreparable change in the framework of international labour relations. Labour regulations face multiple challenges in order to strengthen their protective function so that the rights of employees are not violated.

An example of the growing international concern is the use of ICT – it is global and knows no borders – in the workplace and in the eventual breach of basic labour rights (rest, privacy and health and safety). It is interesting to highlight, on the one hand, the regulations of countries which, like France and Spain, have specific labour law regulations and, on the other hand, regulations from other countries that tackle the issue indirectly. In Asia, in January 2018, India, taking the French regulation as a clear example, promulgated the The Right to Disconnect Bill, 2018 No. 211, giving each employee the freedom to detach himself from the communication networks that link him to his job, that is, emails or phone calls, outside working hours and on holidays.

Going to the South American continent, Argentina normatively contemplates labour law through the recent Law No. 27,555 on the legal regime of the teleworking contract, which regulates the legal regime of the teleworking contract. More specifically, Article 5 of the legislation is of particular interest: 'Article 5 - Right to digital disconnection. The person who works under the modality of "teleworking" will have the right not to be contacted and to disconnect from digital devices and/or information and communication technologies, outside of their working hours and during leave periods. You cannot be penalized for making use of this right. The employer may not require the person who works to carry out tasks, or send him communications, by any means, outside of working hours.' As can be seen, the Argentinian legislator makes an analogy with the Spanish LOPGDD without going into further detail.

Staying in South America, Chile recognises the right to disconnect in its Law No. 21.2020 amending the Labour Code on distance work (published on 26 March 2020), expressly specifying in its Article 152 quater J the following content: in the case of remote employees who freely **decide distribute** **[AQ13]** their schedule or teleworkers excluded from working time limits, the employer must respect their right to disconnect, guaranteeing the time in which they will not be obliged to respond to communications, orders or other requirements. The disconnection time must be at least 12 continuous hours in a 24-hour period. Likewise, in no case may the employer establish communications or formulate orders or place other requirements on employees during rest days or annual holidays. As can be seen, the duration of the right to disconnect is 12 continuous hours in a 24-hour period. In comparison with the Spanish regulation, the precept is equated to the daily rest provided in Article 34.3 of the ET, where it is established that between the end of one day and the beginning of the next there will be at least 12 hours.

In Brazil, they are also aware of the momentum that technological progress has and the communication technology in places of work that has been exponentially maximised, even making it possible for employees to connect with their work all the time. It is true that there is still no legislation that implies the right to disconnect from work, however, after much debate, the amendment of Article 6 of the Consolidação das Leis do Trabalho (CLT) was introduced by Law No. 12,551, of 2011, which stipulates that the availability of the employee by telematic means, whether by email, WhatsApp, telegram or any other remote communication application, is regarded as remote work and is not distinguished from work performed in the employer's establishment. Consequently, it equates both modes of provision of services and guarantees the right to rest to the Brazilian worker employed remotely. Undoubtedly, these are advances that can serve as an incentive for the Brazilian Government to publish a normative provision that guarantees the right of employees to disconnect technologically from work.

There are also countries which, although they do not have specific legal regulations, do try to avoid excessive working hours and the abuse of digital media through other indirect regulations. In Italy, Legge 22 maggio 2017, No. 81 (in force since 14 June 2017) was published regarding measures to protect self-employment and measures to favour a flexible articulation of time and place of employment for others, incorporates a precept, initialled as "agile work" as a form of flexible activity performance where physical presence in the company alternates with remote work and **made possible by** **since** this form of work **which** incorporates multiple technological tools. **[AQ14]** Colombia, through its Law 1221 of 2008, has established norms to promote and regulate telework, providing that teleworkers should not be given excessive workloads, and their rest spaces and privacy should be respected. According to its Article 6, section five: 'the assignment of tasks for teleworkers must be done in a way that guarantees their right to have a rest of a creative, recreational and cultural nature'.

However, the main issue is not only legally recognising the right to disconnect, but to giving content to the right. The aim is also not only to uphold working time law and support rest periods in collective agreements or internal protocols, which is a weakness of the French regime.³¹ In this regard, the concept of 'computer fatigue' (*fatiga informática*) is very interesting with the reference to the reasonable use of digital devices as defined in Article 88.3 of the Spanish Data Protection Act in order to give content to the right to digital disconnection. The Spanish approach directly links digital connection issues to

occupational health issues and gives greater content to them.

Conclusion: suggestions for an enhanced right to disconnect from work

Through an ethical and educational approach, the aim is to create the conditions for a responsible commitment, for humane ways of organising work and to respond to the principle of adapting work to the individual, as promoted by the framework Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work and to promote well-being at work. Taking this approach, it is also about noting that the right to health has to be recognised as a fundamental right³² and to ensure there is no confusion between health promotion and health prevention.

In addition, employees cannot become more productive without being able to act in respect of their working environment and the purpose of their work. The issue is a democratic one. The approach to occupational health also responds to a collective logic that takes into account all aspects of work. Occupational health is a complex issue nowadays. Health and work are part of a system that requires a collective and holistic approach to prevention in order to make working conditions safe and respectful of health. According to the 'global call to action for a human-centred recovery from the COVID-19 crisis that is inclusive, sustainable and resilient' resolution from the ILO International Labour Conference in June 2021, these conditions are fundamental to ensure decent work.

The right to disconnect forms part of this scheme. Simplifying the dialogue on the quality of working life, on working conditions and their impact on occupational health, promoting educational approach and awareness-raising at school are some of the keys of implementing the right to disconnect from work. Situations where, exceptionally, the right is invalidated (serious organisations damages [AQ15] etc.) have to be identified in order to find a response to this deficiency. Also, addressing the right to disconnect in the workplace should begin with an analysis of the current situation, highlighting the work habits of all staff. How many emails are sent after hours? What about calls and other messages? Are there differences between different departments or between different groups of employees? Is it a permanent feature, seasonal, or linked to certain events like product launches? Both official work tools, such as emails and phone calls, as well as unofficial or private communication methods, such as WhatsApp, should be analysed. Based on this initial data, indicators can be developed for the workplace as a whole and/or for different teams and departments.

France and Spain must better specify the law, succinctly providing more specific information for workers, detailing the protection mechanisms and the sanctioning regime. In this field, both the reform of the current labour law regulation that may eventually occur in Spain, as well as the future Directive, must reinforce the protection mechanisms so that workers can enjoy this labour right and not suffer reprisals and be sanctioned for invoking it. For the effectiveness and guarantee of this protection mechanism, the reversal of the burden of proof should be included, so that if a worker is sanctioned for invoking this right, it is the employer that must prove that it was not at fault.

In addition, we need to go beyond the strictly quantitative approach to working time. Replacing the monitoring of working time by an assessment of the workload would enable employers to better guarantee rest periods for employees. It would also allow better control of the workloads of senior executives who have unlimited working hours. The aim is to open a dialogue about the link between the use of digital tools and overworking with respect to the employer's safety obligations. This is also linked to the necessity of defining the notion of the workplace. The delimitation of the spaces where we work today has evolved considerably and the law is struggling to tackle it.

The detailing, in the collective agreements, of the competent bodies and the sanctioning regime in respect of the right to disconnect is the outline of a solution. We have to keep in mind that work is part of a person's dignity, but without health he or she will not be able to give of his or her best, and will be deprived of the means to realise himself or herself as a human being. That is priceless.

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Footnotes

1. Many thanks to Mr Kieran Van der Bergh from COMPTRASEC UMR 5114, CNRS-University of Bordeaux, for having checked our English style. ✘
2. See EUROFOUND, (2020), 'Industrial relations Right to disconnect in the 27 EU Member States', *Working paper*, Available at: <https://www.eurofound.europa.eu/sites/default/files/wpef20019.pdf> ✘
3. See Lerouge, L. (ed.). 'Droits du travail et systèmes nationaux de protection sociale au prisme de la crise sanitaire. Adaptations ou changements profonds?' ('National labour law and social security systems through the lens of the health crisis. Adaptations or fundamental changes?'), *Revue de Droit Comparé du Travail et de la Sécurité Sociale*, 2021/3, 6-175 (2021). ✘
4. See Rodríguez-Modroño, P., & López-Igual, P. 'Job Quality and Work – Life Balance of Teleworkers'. *International Journal of Environmental Research and Public Health*, 18(6), 3239 (2021). <http://dx.doi.org/10.3390/ijerph18063239>. ✘
5. See Buomprisco, G., Ricci, S., Perri, R., & De Sio, S. 'Health and Telework: New Challenges after COVID-19 Pandemic'. *European Journal of Environment and Public Health*, 5, 2 (2021), <https://doi.org/10.21601/ejeph/9705>. ✘
6. See Trujillo Pons, F. *El derecho a la desconexión digital* (2ª edición), Tirant lo Blanch (Valencia) España (2021). ✘
7. OJ L 299, 18.11.2003, p. 9–19. ✘
8. OJ L 183, 29.6.1989, p. 1–8. ✘
9. See https://www.europarl.europa.eu/doceo/document/TA-9-2021-0021_FR.html; also: Trujillo Pons, F., 'Un estudio acerca de la eventual directiva comunitaria sobre el derecho a la desconexión digital en el trabajo', *IUSLabor*, 1/2021, 66-96 (2021). <https://doi.org/10.31009/IUSLabor.2021.i02.3> ✘
10. Judgment of the Court (Fifth Chamber) of 21 February 2018, *Ville de Nivelles vs. Rudy Matzak*, Case C-518/2015, OJ C 414, 14.12.2015. ✘
11. See European Parliament resolution of 21 January 2021, *op. cit.* ✘
12. See the draft Directive from the Committee on Employment and Social Affairs and the rapporteur Mr Alex Agius Saliba, recommendations to the Commission on the right to disconnect (2019/2181(INL)), 18 Jul. 2020. It should also be noted that Committee on Employment and Social Affairs is working on 'Mental health and well-being in the digital world of work post COVID', and Ms Maria Walsh is the Rapporteur. ✘
13. See also 'Health at Work' by the OECD, <http://www.oecd.org/els/emp/health-and-work.htm> ✘
14. Known as the El Khomri Law because of the name of the Minister of Labour at that time, and in force since 1 January 2017. ✘
15. Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, 2016, regarding the protection of natural persons regarding the processing of personal data and the free circulation of these data and by which repeals Directive 95/46 / EC (General Data Protection Regulation) - DOUE of May 4, 2016-. ✘
16. Code: 161/001559 pages 52-54 available at: https://www.congreso.es/public_oficiales/L12/CONG/BOCG/D/BOCG-12-D-127.PDF ✘
17. Text available at https://izquierdaunida.org/wp-content/uploads/2019/12/Programa-Gobierno-Coalicion-PSOE_UP.pdf ✘
18. Regulated under Royal Decree 1382/1985, of August 1, which regulates the employment relationship of a special nature for senior management personnel. Of relevance to this study is its Art. 7 concerning working time. Regarding the precept, no reference to digital disconnection is made, limiting itself to noting that 'the working time in terms of working hours, hours, holidays and permits, as well as for vacations, will be the one set in the clauses of the contract, insofar as non-configured benefits payable by the employee that notably exceed those that are usual in the corresponding professional field'. ✘
19. Article 20 bis. 'Workers' rights to privacy in relation to the digital environment and to disconnection. Workers have the right to privacy in the use of digital devices made available to them by the employer, to digital disconnection and to privacy from the use of video surveillance and geolocation devices in the terms established in current legislation on protection of personal data and guarantee of digital rights'. ✘
20. See, among others, Trujillo Pons, F. & Toscani Giménez, D. (ed.) (2020). *La desconexión digital en el trabajo*, Aranzadi Thomson Reuters; Molina Navarrete, C. (2017). El tiempo de los derechos en un mundo digital: ¿Existe un nuevo 'Derecho humano a la desconexión' de los trabajadores fuera de la jornada? *Revista de la Facultad de Derecho de México*, (269),

- 1-30; Molina Navarrete, C. (2017). Jornada Laboral y Tecnologías de la Incomunicación: desconexión digital, garantía al descanso. *Temas laborales*, núm. 138/2017, 249; Tascón López, R. (2018). El derecho de desconexión del trabajador (potencialidades en el ordenamiento español). *Trabajo y derecho: nueva revista de actualidad y relaciones laborales*, No. 41, 45; Reche Tello, N. (2019). La Desconexión digital como límite frente a la invasión de la privacidad, *IUSLabor*, No. 3, 31. ✘
21. See Lemoyne, J.-B., Gabouty, J.-M. & Forissier, M. Rapport fait au nom de la Commission des affaires sociales du Sénat sur le projet de loi, considéré comme adopté par l'assemblée nationale en application de l'article 49, alinéa 3, de la constitution en nouvelle lecture, relatif au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels, Sénat, Report n. 790, registered at the Presidency of the Senate on 13 July (2016). ✘
22. Ray, J.-M. Grande accélération et droit à la déconnexion, *Droit social*, n. 11, 912 (2016). ✘
23. Isard, S. Le droit de se connecter en toute liberté!, *Semaine Sociale Lamy*, n. 1755, 5 (2017). ✘
24. On the role of collective bargaining in the development of digital law, it is meant that in the current global pandemic situation it may be difficult for the parties to sit down to negotiate and reach agreements. Hence, if there is a regulatory development of the law in the near future, everything can be legally specified and not left to conventional treatment. ✘
25. See Trujillo Pons, F. La desconexión digital en el ámbito laboral. 2nd edition. Tirant lo Blanch, Spain (2021). ✘
26. This policy must respond to the needs of the specific sector, as well as to existing technological means such as types of employment. There is special emphasis on the right to disconnect in cases of the total or partial use of 'telework', as well as the use of technological tools in the home of the employee for work purposes. ✘
27. Ley n. 83/2011, Modifica o regime de teletrabalho, alterando o Código do Trabalho e a Lei n.º 98/2009, de 4 de setembro, que regulamenta o regime de reparação de acidentes de trabalho e de doenças profissionais, Diário da República, 1.ª série, n. 235, 6 December 2021, p. 2. ✘
28. Article 199-A (1). ✘
29. Article 199-A (3). ✘
30. Article 199-A (2). ✘
31. See Lerouge, L. 'The right to disconnect from the workplace: strenghts and weakness of the French legal framework' in Carby-Hall J., Mella Méndez L. (ed.), *Labour law and gig economy. Challenges posed by the digitalisation of labour process*, Routledge, 222-229 (2020). ✘
32. The recognition of health at work as a fundamental right is discussed at the International Labour Conference (ILC) in 2022. ✘