

A Critical Analysis of the Proposed Law on the Employees' Right to Disconnect in Kenya

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Abstract

The right of employees to "disconnect" from work-related communications has emerged as a concern in employment laws in recent times. Many employees find it increasingly challenging to disconnect from their duties at the end of the workday, and in Kenya, this is no exception. In the contemporary era of advanced technology, employees are tethered to their workstations beyond regular working hours. Employers regularly request or direct employees to complete assignments, activities and other projects beyond their contractual working hours in modern workplace environments. This supplemental teleworking is often unpaid overtime. The practice significantly undermines employees' time for rest and privacy, jeopardises their safety and health, and hampers productivity and remuneration. Kenya has taken steps to address this increasing workplace hazard by proposing stringent regulatory measures to grant workers the right to disconnect from their workplace environment beyond the contractually agreed working hours. Although all employees deserve the right to disconnect, the question is whether the new legislation is necessary. This article analyses the recent draft of the bill that seeks to introduce the right to disconnect in Kenya in regard to its scope, efficiency and implications for employees. The article argues that the "right to disconnect" or "connect" is catered for under the current provisions of the *Employment Act* of 2007 in the scope of overtime regulation. The passage of the *Employment Act (Amendment) Bill* of 2022 into law in Kenya would, therefore, be an unnecessary duplication of the law.

Keywords

Right of employees to disconnect; overtime regulation; workplace challenges of advanced technology; working beyond contractual hours; *Employment Act (Amendment Bill)* of 2022.

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1 Introduction

Achieving a proper equilibrium between the workplace and private life is crucial to enabling digital transformation's beneficial impact on employees' well-being.¹ The widespread use of information and communication technology and increased mobile usage have significantly influenced workers to work beyond their traditional working hours. This has resulted in a potential disruption of the work-life balance and the right to rest.² Consequently, an increasing number of employees work beyond their contractual working hours, gradually limiting the boundary between their jobs and their time to rest after work.³

Along with the exponential growth of portable networked wireless gadgets, this has been instrumental in driving changes in work-related behaviours.⁴ The notion of an "always on" culture depicts a societal environment characterised by constant hyper-connectivity enhanced by digital technologies and means of interactions.⁵ In the past, forecasts that there would be such things as video-conferencing, online shopping, electronic mail, digital banking and online work management were perceived to be unreal.⁶ They have now become realities that are constantly evolving and extending their scope of influence.⁷ Working environments have not been left out in the process. Technological advancements have shifted the contemporary work environment from the conventional physical office space to a more adaptable and flexible environment.⁸ But this is not without consequences. A notable trend of blurring boundaries between workplaces and personal lives has emerged as an ongoing concern in the context of the

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¹ Mankins 2017 <https://hbr.org/2017/01/why-the-french-email-law-wont-restore-work-life-balance>.

¹ Mankins 2017 <https://hbr.org/2017/01/why-the-french-email-law-wont-restore-work-life-balance>.

² Boswell and Olson-Buchanan 2007 *Journal of Management* 592-610.

³ Moore *Challenges of Achieving Work-Life Balance* 34.

⁴ Ágota-Aliz 2021 *Studia Universitatis Babes-Bolyai Sociologia* 29-50.

⁵ Staunton and Devlin "Actions to Mitigate Digital Overload" 127-143.

⁶ Turkle *Alone Together* 54.

⁷ Hill *et al* 1998 *Personnel Psychology* 667-683.

⁸ Knoll, Feldt and Zacher 2022 *Management Revue* 1-42. Also see Davis, Leach and Clegg 2012 *International Review of Industrial and Organizational Psychology* 193-235.

modern workplace.⁹ The growing popularity of videoconferencing during the COVID-19 era brought the realisation that businesses could expand their services well beyond the geographical limits of the country in which they have a physical presence.¹⁰ This expansion comes with differences in time zones across different countries, justifying why some meetings must be accommodated beyond regular working hours.

Consequently, employees found themselves working over and above their regular working hours. Accordingly, the practice meant that employees only physically leave their workplace premises but remain connected to their work-related duties by some technological tether.¹¹ The question that arises is at what point employers cease to have the right to intrude upon their employees' private space and time.

The research done by the World Health Organization (WHO) has revealed that the consistent connection with workplace duties, including even just the mere apprehension of such duties, has adverse effects on the health of employees.¹² In contemporary workplace settings it has become standard practice for supervisors to regularly contact employees via email or telephonically beyond the conventional working hours, including evenings, weekends and holidays.¹³ There is a widespread expectation in practice, whether explicit or implied, for employees to continuously track their email communications beyond regular working hours.¹⁴ This expectation is particularly prevalent for those employees in managerial or supervisory roles.¹⁵ This pattern of behaviour leads these employees to be endlessly aware of unfinished workplace duties. This includes worrying about forthcoming duties, assignments and similar cognitive processes, resulting

⁹ Van Wijk 2023 <https://www.askcody.com/blog/what-is-a-modern-workplace>.

¹⁰ Karl, Peluchette and Aghakhani 2022 *Small Group Research* 343-365.

¹¹ Johnson, Robertson and Cooper *Well-Being* 35.

¹² WHO 2020 http://www.who.int/occupational_health/topics/stressatwp/en/. The research findings show that the most stressful type of work involves making excessive demands on workers that are not matched with workers' knowledge and capacity, where there is little opportunity to exercise any choice or control, and where there is little support from others.

¹³ Challenger, Gray and Christmas Inc 2017. <https://www.challengergray.com/press/press-releases/are-you-digital-dictator> (noting how employers can now easily contact employees with workplace concerns outside of the regular working period on platforms such as text messaging, e-mail, and social media) discussing how some employees take their work with them on vacation and most employees feel the need to answer their bosses promptly, worrying about the issue until it is handled. Also see Secunda 2019 *Notre Dame Journal of International and Comparative Law* 32.

¹⁴ Agerholm 2018 <https://www.independent.co.uk/news/world/americas/work-email-free-timebanned-new-york-rights-rafael-espinal-a8275336.html>.

¹⁵ Secunda 2019 *Notre Dame Journal of International and Comparative Law* 32.

in anxiety and stress.¹⁶ As a result, employees are deprived of adequate opportunities to rest, and have no respite from their duties as employees.¹⁷

2 The right to disconnect in other jurisdictions

The detrimental effects of the "always on" culture of permanent availability have prompted some European Union countries¹⁸ to implement the employee right to disconnect, prompting a worldwide effort to include this digital right into the general legal framework. Despite being relatively recent in African countries, Kenya included, the concept has garnered international attention.¹⁹ It has been mainly incorporated into workplace policies.²⁰ It is worth noting that the statutory recognition of the right to disconnect originated in France with a ruling²¹ which was delivered by the Labour Chamber of the French Supreme Court of Labour in the *Chamber of the Cour de Cassation*.²² In this judgment the court established that the employee is under no obligation either to accept working at home or to take his files and working tools home.²³ In 2004 the Supreme Court upheld this ruling and determined that the fact that the employee was not reachable on his cell phone outside working hours could not be considered misconduct.²⁴

Subsequently, in Spain²⁵ the inclusion of a right to disconnect was incorporated in the *Data Protection Act*,²⁶ mirroring the French effort to

¹⁶ Emilie 2017 <https://www.soulier-avocats.com/en/is-the-right-to-disconnect-about-to-become-an-effective-right-for-employees-in-france/?pdf=33887>. Also see Thomée, Harenstam and Hagberg 2011 *BMC Public Health* 1-12.

¹⁷ Kotwinski 2017 <https://www.peoplemanagement.co.uk/voices/comment/managers-make-sure-employees-disconnect-work>.

¹⁸ These countries include France, Belgium, Italy and Spain, among others. Messenger 2010 *Cambridge Journal of Economics* 295-316. Also see Burke 2022 <https://onlabor.org/the-right-to-disconnect-emerging-issues-and-ways-to-overcome-them/>; Samuel 2018 <https://www.telegraph.co.uk/news/2018/08/01/british-firm-ordered-pay-60000-french-court-breaching-employees/>.

¹⁹ The "right to disconnect" is defined under s 27A(9)(b) of the *Employment Act* as amended to mean an employee's entitlement not to be contacted by the employer during out-of-work hours as per the employer's policy. Also see Emilie 2017 <https://www.soulier-avocats.com/en/is-the-right-to-disconnect-about-to-become-an-effective-right-for-employees-in-france/?pdf=33887>.

²⁰ Dima and Högbäck 2020 <https://library.fes.de/pdf-files/bueros/bukarest/17025.pdf>.

²¹ Moulton 2017 <https://www.thelawyersdaily.ca/it/articles/2859/the-problem-with-a-right-to-disconnect-law>. Also see Avogaro 2017 *Revista Brasileira de Previdência* 97-115.

²² Labour Chamber of the *Cour de Cassation*, February 17, 2004 n 01-45.889.

²³ Labour Chamber of the *Cour de Cassation*, October 2, 2001 n 99-42.727.

²⁴ Labour Chamber of the *Cour de Cassation*, February 17, 2004 n°01-45.889.

²⁵ In December 2018 Spain created a remote working law, which includes the right to disconnect to promote a proper work/life balance. The law requires employers and employees to agree on a specific time of day to limit all work-related communication.

²⁶ The *Spanish Data Protection and Digital Rights Act* 3 of 2018.

protect the right to disconnect. Likewise, in Italy²⁷ the concept of a right to disconnect was considered in relation to smart working.²⁸ Several other jurisdictions have also initiated discussions on the introduction of a right to disconnect at either the national or the state level.²⁹ Examples of these nations include Belgium, Germany, Canada,³⁰ Luxembourg,³¹ Philippines,³² Ireland, Portugal³³ and Slovakia³⁴ with the latter two joining the movement in late 2021. Accordingly, Kenya has also expressed its intention to adopt a similar approach by amending the *Employment Act*. Notably, the concept of the right to disconnect is implicit in other extant human rights. One of the most prominent examples is the right to rest and leisure, as stipulated in

²⁷ Article 19(1) of Law No 81 of 22 May 2017 of Italy refers to the concept of "smart working" (*lavoro agile*) or flexible working arrangements for subordinate employees. This provision promotes flexible adaptation concerning working hours and location. It offers a framework for employees to carry out their duties from home or other suitable locations outside the traditional workplace. It ensures that employees maintain the same rights and protections as those working in an office. The aim is to foster a modern, adaptable workforce while safeguarding employees' rights, regardless of where they perform their work.

²⁸ Lerouge and Pons 2022 *ELLJ* 450-465.

²⁹ Heuvel 2017 <https://www.peoplemanagement.co.uk/article/1745558/limiting-email-access-boosts-wellbeing>.

³⁰ The Province of Ontario passed Bill 27, *Working for Workers Act*, 2021, which requires some employers to define their expectations in relation to disconnecting from work. The law defines disconnecting from work as "not engaging in work-related communications, including emails, telephone calls, video calls or the sending or reviewing of other messages, so as to be free from the performance of work." Only small employers are exempt from this requirement; employers with more than 25 employees on January 1 of a given year must implement a policy by March 1 of the same year.

³¹ On 24 July 2018 Petition 1057, *Chambre des Députés du Grand Duché du Luxembourg*, called for the introduction of the right to disconnect in the labour law in Luxembourg. Luxembourg's Chamber of Deputies approved legislation in June 2023 regarding the right of employees to disconnect outside of working hours. Also see Jacob 2023 <https://www.luxtimes.lu/luxembourg/luxembourg-workers-gain-right-to-disconnect-after-work-hours/1659271.html>.

³² *House Bill 4721* was introduced to the Seventeenth Congress of the House of Representatives of the Philippines in January 2017. The long title of the proposed Act is "An act granting employees the right to disconnect from work-related electronic communications after work hours". It seeks to amend *the Labour Code of the Philippines (Presidential Decree No 442)*, specifically, Arts 48-A and 48-B, which relate to the "right to disconnect" to stipulate that "an employee shall not be reprimanded, punished, or otherwise subjected to disciplinary action if he or she disregards a work-related communication sent after work hours, subject to the terms and conditions of the policy to be established by the employer as required in Article 84-B hereof" (emphasis added).

³³ In terms of Law No 83/2021 (amending the *Labour Code Law No 7/2009*), since January 2022 employers in Portugal with ten or more staff members may face a penalty if they contact their employees outside of regular work hours. This Act also allows employees to work from home if they have children under eight years old.

³⁴ On 19 February 2021, the National Council of the Slovak Republic passed an amendment to the *Slovak Labor Code 311 of 2001 (311/2001 Coll)* which introduces a right to disconnect for employees working remotely.

Article 24 of the *Universal Declaration of Human Rights*.³⁵ This Article notes that the right to disconnect broadens and adapts this provision's clear limitations on how long employees can work. The right to disconnect is also closely related to Article 23 of the *Universal Declaration of Human Rights*, which asserts that all individuals have the right to engage in profitable employment, earn a fair salary, and participate in trade unions to safeguard their best interests.³⁶

New research approved by the International Labour Organisation (ILO) has shown that employees must have the right to disconnect from technological devices.³⁷ This right to disconnect is critical for preventing the erosion of boundaries between work and personal life.

3 The adverse effects of post-work electronic communications on the safety and health of workers

The pervasive nature of "always-on" work is the primary trigger and accelerator of ill health, both mental and physical.³⁸ Barber and Jenkins believe that people who respond to work communications after 9 pm have worse sleep quality and are less engaged the next day.³⁹ Butts, Becker and Boswell also suggest that the mere expectation of being in contact 24/7 is enough to increase strain on employees and their families.⁴⁰ According to the WHO, the establishment of a healthy working environment necessitates the presence of several health-promoting conditions.⁴¹ By the end of 2020 the prevalence of mental distress among employees was 49% higher than in 2017-2019 and had increased across all major sectors.⁴²

These conditions include anxiety, depression and burn-out among employees.⁴³ It is submitted that the continued imposition of excessive

³⁵ Article 24 of the *Universal Declaration of Human Rights* (1948).

³⁶ Hesselberth 2017 *New Media and Society* 1994-2010.

³⁷ ILO 2017 https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_544108/lang-en/index.htm.

³⁸ According to Trevelyan 2020 <https://www.ibanet.org/article/7bba6da1-a70a-440c-8506-9c27134683bf> one of the biggest impacts for companies would be the loss of employees doing unpaid overtime. This exists in many guises, from employees catching up on emails on the daily commute to workers staying late in the office to finish a project.

³⁹ Barber and Jenkins 2014 *Stress and Health* 259-264.

⁴⁰ Butts, Becker and Boswell 2015 *Academy of Management Journal* 763-788. Also see Sonnentag 2012 *Current Directions in Psychological Science* 114-118.

⁴¹ WHO 2020 http://www.who.int/occupational_health/topics/stressatwp/en/.

⁴² Murray 2020 https://policycommons.net/artifacts/3450616/6a142f_4028ab32aecf4f49970c7e65d3bc0869/4250873/.

⁴³ Becker, Belkin and Tuskey 2018 *Academy of Management Proceedings* 51-72. See Gilkerson, Anderson and Swenson 2018 *Public Relations Journal* 13-14 recounting an observation from a social media professional: "No job should expect you to be 'on' 24/7 unless you are a doctor which clearly, you're not. We are not curing cancer. No one will die if we don't answer an email until 9:00 a.m. the next day. Any job that

work-related ties by some management styles and practices eventually results in psychological harassment in the workplace. For example, in Japanese culture there is a term, "karoshi", which refers to those employees who tragically succumb to self-inflicted harm as a result of excessive work-related pressures.⁴⁴ A recent publication reported on the untimely demise of a 31-year-old Japanese employee whose cause of death was attributed to cardiac arrest resulting from excessive work exhaustion and fatigue.⁴⁵ This employee reportedly accumulated a total of 159 hours of overtime and availed herself of a mere two days of leave during the month before her death.⁴⁶

In addition, stress associated with work develops when employees encounter unmanageable demands, deadlines and pressures in their employment environment resulting in their having challenges and difficulties in developing coping mechanisms.⁴⁷ The tension that results from post-work electronic contact that employers initiate negatively impacts on employee happiness and job quality.⁴⁸ This persistent pressure makes employees believe that they should always be available, leaving them with little time for rest.⁴⁹ It is unsurprising that employers who communicate with employees outside regular working hours contribute to heightened stress levels for staff members, thus fostering a detrimental working atmosphere.⁵⁰ According to reports of conditions like chronic fatigue, health issues affect employees' mental and emotional well-being and physical health.⁵¹

4 Existing laws relating to working hours in Kenya

The standard working hours in Kenya are typically 52 hours per week, while the usual practice is to allocate 45 hours per week for regular work.⁵² For instance, the duration may span 8 hours on weekdays (Monday to Friday) and 5 hours on Saturdays. An individual engaged in night-time work is

makes you feel that way doesn't value you as a person." Also see Dembe *et al* 2005 *Occupational and Environmental Medicine* 588.

⁴⁴ McCurry 2017 <https://www.theguardian.com/world/2017/oct/05/japanese-woman-dies-overwork-159-hours-overtime>.

⁴⁵ Yonhap 2017 <http://www.koreaherald.com/view.php?ud=20171018000212>.

⁴⁶ Yonhap 2017 <http://www.koreaherald.com/view.php?ud=20171018000212>.

⁴⁷ Challenger, Gray and Christmas Inc 2017 <https://www.challengergray.com/press/press-releases/are-you-digital-dictator>.

⁴⁸ Shaw 2017 <https://www.peoplemanagement.co.uk/article/1741832/help-disconnect-technology>.

⁴⁹ WHO 2020 http://www.who.int/occupational_health/topics/stressatwp/en/. Also see Mogilner, Chance and Norton 2012 *Psychological Science* 1233-1238.

⁵⁰ Galinsky *et al* *Overwork in America* 34. The authors suggest that many American employees are near a breaking point, and that this will bring the issue of overwork to the attention of business leaders and policymakers throughout the country.

⁵¹ Park *et al* 2001 *Industrial Health* 250.

⁵² Cheruiyot 2023 <https://intasend.com/payments/labor-laws-in-kenya-a-comprehensive-guide/>.

subject to a maximum weekly working limit of 60 hours.⁵³ However, collective agreements may amend the established working hours, often stipulating 40 to 52 hours per week. According to section 27A(1) of the *Employment Act* of 2007 it is impermissible for an employer to compel a worker to perform overtime work unless there is a mutually agreed arrangement. Furthermore, this agreement cannot include an employee being forced to work more than 12 hours on any given day.⁵⁴ According to the provisions outlined in section 27C (4) of the *Employment Act*, it is within the Cabinet Secretary of Labour's purview to establish flexible working hours.

5 The scope of the right to disconnect under the *Employment Act (Amendment) Bill, 2022*

The Kenyan legislature is considering an amendment in terms of the *Employment Act (Amendment) Bill* of 2022 regarding the right to disconnect. One notable provision is the inclusion of provisions regarding this right. This article observes that the proposed amendments aim to enhance the work/life balance by granting employees the option of refraining from responding to emails or messages beyond their designated working hours.

The Bill under consideration has been viewed as a potential solution to the abovementioned problems and as seeking to enhance workers' work/life balance.⁵⁵

This right is defined as employees' right to decline to receive communications or be contacted by their employers outside of the working hours designated by the companies' established policy.⁵⁶ To ensure compliance the draft Bill requires employers to establish a comprehensive policy encompassing three key areas including:

- specific conditions under which employers are permitted to initiate contact with employees outside of normal working hours;⁵⁷
- guidelines governing the use of electronic devices for transmitting or receiving work-related information;

⁵³ Park *et al* 2001 *Industrial Health* 250.

⁵⁴ Section 27A(1) of the *Employment Act* of 2007.

⁵⁵ Section 27A(2) of the *Employment Act (Amendment Bill)* of 2000 (the *Amendment Bill*).

⁵⁶ Section 27A(1) of the *Amendment Bill*.

⁵⁷ "Out of work hours" is defined under s 27A(9)(a) of the *Amendment Bill* to mean hours other than the hours of work agreed upon between an employer and an employee in the contract of employment.

- messages or digital communications during non-working hours and the limited instances when employees may be exempted from their right to disconnect.

In cases where a company employs more than ten individuals, the proposed Bill will mandate the company to formulate the specified policy in collaboration with its employees or the relevant trade union representative, if appropriate.⁵⁸ The legislation will allow employers to communicate with employees outside their regular working hours only in cases where such communication is essential for resolving an "emergency" related to employment in the worker's scope of duty.⁵⁹

Employees who ignore work-related communications outside regular working hours shall not face disciplinary action.⁶⁰ Additionally, this article notes that the employer must clearly define the employees' compensation for working outside of working hours, as required by the Bill. The Bill defines out-of-work hours as any that fall outside the agreed working hours specified in the employment contract between an employer and an employee.⁶¹ In the absence of a mutually agreed upon arrangement about work hours outside of the regular schedule, the employee can choose not to reply and choose to disconnect or reply. In the latter case the employee is entitled to remuneration.⁶² An employer who violates the preceding regulations may face legal consequences, including a fine of up to five hundred thousand Kenyan shillings, imprisonment for a maximum of one year, or both sanctions concurrently upon conviction.⁶³ The aforementioned restrictions shall not apply to employees who provide essential services⁶⁴ as defined by the *Labour Relations Act*.⁶⁵

6 Challenges of the application and relevance of the right to disconnect in Kenya

Consideration of the purpose of the Bill raises the question of whether it is necessary to introduce new legislation.

⁵⁸ Section 27A(3) of the *Amendment Bill*.

⁵⁹ Section 27A(1) of the *Amendment Bill*.

⁶⁰ Section 27A(6) of the *Amendment Bill*.

⁶¹ Section 27A(3)(10) of the *Amendment Bill*.

⁶² Section 27A(7) of the *Amendment Bill*.

⁶³ Section 27A(9) of the *Amendment Bill*.

⁶⁴ Section 27A(8) of the *Amendment Bill*.

⁶⁵ Section 81 of the *Labour Relations Act* of 2007 defines essential services as services "the interruption of which would probably endanger the life of a person or health of the population or any part of the population and include water supply services, hospital services, air traffic control services, civil aviation telecommunication services, fire services of the government or public institutions, post authority and local government authorities and ferry services."

Should the Bill be implemented, Kenya would emerge as the only African nation to do so and the first one throughout the entire region of the Southern Hemisphere to adopt such a legal framework. It is important to mention that if the law is enacted, Kenya might find itself in a state of isolation. Another question could be whether or not Kenya has thoroughly examined the comprehensive ramifications of the proposed legislation, along with its suitability, practicability and applicability to an economy like Kenya's.

While noble aspirations drive the Bill, this article observes that it has encountered significant resistance from a faction of employers. For example, the Federation of Kenyan Employers (FKE), a leading employer organisation, has expressed concerns and reservations over the proposed legislation.⁶⁶ According to the Memorandum issued by the FKE on 7 January 2022, it is argued that the proposed law lacks appreciation and acknowledgement of the evolving nature of work, workspaces and working hours, in which context the modern workplace prioritises productivity outcomes above inflexible employment frameworks.⁶⁷ It may be argued that the proposed law may impede efforts to adequately address the many difficulties brought about by the COVID-19 outbreak.

The authors contend that the main problem with bestowing the proposed right on workers through legislative initiatives is the absence of certainty, clarity and precise demarcation associated with the right to disconnect. As noted above, the proposed *Amendment Bill* stipulates that employers are permitted to contact employees in a work-related emergency only provided that the duty of addressing the issue falls within the purview of the employee being called.⁶⁸ However, the proposed legislation fails to define an emergency, making it open to different readings and interpretations. As a result, it creates ambiguity for every party concerned regarding its scope.

In addition, the proposed amendment seeks to oblige employers to develop a policy outlining the conditions under which they are permitted to communicate with or contact their employees outside their designated working hours. The policy shall also have to specify the situations in which the employer might reject or disregard the employee's right to disconnect. However, the draft Bill fails to provide direction and guidelines about the specific limitations imposed in the policy and the circumstances under which employees may choose not to respond.

Furthermore, the proposed legislation puts the onus on employees to exercise the right to disconnect by granting them the right to ignore any

⁶⁶ Owino 2023 <https://nation.africa/kenya/news/employers-oppose-bill-seeking-to-block-them-from-calling-workers-beyond-working-hours-4371590>.

⁶⁷ MMAN Advocates 2022 <https://mman.co.ke/content/employees-right-disconnect>.

⁶⁸ Section 27A(3)(5) of the *Amendment Bill*.

work-related communication outside of working hours and exempting them from any possible disciplinary action associated with exercising this right.⁶⁹ While the objective of this initiative is to provide employees with the power to assert their autonomy by deciding whether or not to disconnect or exercise this right according to their preferences, its implementation may present difficulties.⁷⁰ It is submitted that using this right might create conflicts between employees and the employer. Further, some employees in the workplace might choose to exercise this right whereas others may not. This article notes that one potential consequence of this situation is that employees who decide not to exercise this right may be viewed more favourably than those who choose to do so. In other words, there is a possibility that certain employees may be targeted for future termination of their employment contracts at the workplace, especially if they are viewed as employees who do not exceed the expectations outlined in their job descriptions. Arguably, those who are more inclined to be receptive to the demands of their employers or those who possess a strong drive for success may choose to forgo exercising the right to gain a competitive advantage over their fellow employees. The outcome may negatively impact the employees the proposed legislation aims to protect.

Similarly, a right framed in this manner will probably be ineffective in Kenya's current employment rights landscape. The current system of individualised complaints to the Labour Officer needs to do more to address the power imbalance between employees and employers.⁷¹ When it is left to individual employers' workers to enforce their rights, many employees may be cautious about the risk of damaging the employment relationship or harming their prospects of employment by asserting their legal rights. This article opines that this poses a serious question about whether the right to disconnect could be workable under current circumstances. The article argues that the proposed right to disconnect may further challenge several employers to manage their daily operations at their businesses effectively. For instance, the prevention of employers from reaching out to employees outside of working hours may lead to employer worries, fear and anxiety in initiating any form of communication, which could be crucial for the employer in making urgent decisions, for instance, about meeting a client or customer deadline, that would not necessarily be categorised as emergencies.

The growing popularity of videoconferencing during the COVID-19 era led to the realisation that businesses could expand their services well beyond the geographical limits of the country where they have a physical presence. This expansion comes with different time zones across various countries,

⁶⁹ Section 27A(3)(6) of the *Amendment Bill*.

⁷⁰ Section 27A(3)(7) of the *Amendment Bill*.

⁷¹ Section 47 of the *Amendment Bill*.

which is why some meetings must be accommodated beyond normal working hours.

7 The epidemic of unrecorded, hidden and unaccounted-for overtime

Modern workplaces and homes are digital spaces.⁷² The fact that employees can send and receive messages, emails and online content twenty-four hours a day, seven days a week, means that it is increasingly complex to disconnect, enjoy leisure time and develop a healthy work/life balance.⁷³ This has created an unrecorded, hidden, unaccounted for overtime epidemic, where employees never switch off their phones and continue to work throughout the evening and weekend.⁷⁴ This study observes that being switched back on by an employer after the working day has ended differs from standard overtime, whereby an employee is usually required to stay on or stay connected. Instead, a call from an employer followed by the response it requires expands the working day fragmentation; this means the employee is never quite off or disconnected from work-related duties. A report by the ILO that synthesised research across ten European Union nations found that this problem particularly impacts on those employees working remotely.⁷⁵ In Kenya the lack of clear boundaries between periods of work and rest means that employees are more likely to take calls, respond to emails, and return to work throughout the evening, effectively spreading the working day over a more extended period, but outside of the parameters of official overtime. One can reasonably speculate from this that once an employee is switched back "on" s/he is more likely to do other bits of work unrelated to that mentioned during the phone call or e-mail.⁷⁶

8 A critique of the right to disconnect

The right to disconnect relates to a legal framework in labour and employment law that grants employees the right to avoid work-related contacts beyond their agreed working hours.⁷⁷ Accordingly, this may be viewed as a response to the growing demand that workers ought to be constantly accessible and available when needed by their employer, a trend

⁷² Hawley 2023 <https://www.reworked.co/digital-workplace/what-is-a-digital-workplace-definition-benefits-best-practices/>.

⁷³ Autonomy 2021 <https://www.futureofworkhub.info/allcontent/2021/8/18/the-right-to-disconnect>. Also see Hellard 2021 <https://www.itpro.com/business-strategy/flexible-working/360582/working-from-home-overtime-epidemic-report>.

⁷⁴ Prospect 2021 <https://prospect.org.uk/news/right-to-disconnect/>.

⁷⁵ Eurofound and ILO *Working Anytime, Anywhere*.

⁷⁶ Froger-Michon and Jordan 2018 https://www.cms-lawnow.com/ealerts/2018/09/switching-on-to-switching-off-disconnecting-employeesin-europe?cc_lang=fr.

⁷⁷ Section 27A(3)(5) of the *Amendment Bill*.

that has been amplified and intensified by the widespread acceptance of technology and the surge in remote work. The positive steps undertaken by the French government, alongside other pioneer nations such as Spain, indicate a genuine need to critically examine the adoption of digital technology in the context of the future of labour.⁷⁸ While implementing legislative measures to protect employees against the negative consequences and the unreasonable behaviour of overly demanding employers is not new, it has not garnered widespread approval worldwide.⁷⁹

Although it is important to expose, condemn and prevent such oppressive behaviour by employers, the authors are of the opinion that it is redundant and arguably unnecessary to enact new laws relating to the right to disconnect, given that the current employment and labour law framework in Kenya already provides adequate protections. Accordingly, section 27 of the *Employment Act* currently stipulates the maximum permitted working hours and the corresponding overtime compensation. The *Employment Act* declares slavery or coerced labour to be illegal and punishable.⁸⁰ Furthermore, laws pertaining to health and safety in the workplace such as the *Occupational Safety and Health Act*⁸¹ have been generally effective in promoting health and safety in the workplace but not, apparently, in preventing the demand for ongoing online accessibility. This legislation obliges employers to safeguard the well-being and safety of employees in all work-related matters. Adherence to regulations pertaining to the duration of hours of work is widely recognised as essential to protecting the well-being and safety of employees. In broad terms, the need for legal recognition of the right to disconnect is not imperative, and the absence of such a specific individual right is not a serious problem under the current law, as there is currently adequate protection for workers under the employment law. Be that as it may, the recognition and protection of the right to disconnect represent a positive advancement toward resolving this issue and could be achieved through the mechanism of collective bargaining agreements (CBAs). However, it is crucial to recognise this right in the broader framework of overtime regulations and to strike a balance between employees' flexibility and autonomy.

A notable issue with the existing scope of the proposed legislation lies in its recognition of the right to disconnect as a key aspect but its failure to establish a corresponding obligation to disconnect. This imposes the burden of deciding to disconnect on an employee. Whereas the objective may be to empower employees by giving them a choice to disconnect or remain

⁷⁸ Lerouge and Pons 2022 *ELLJ* 450-465.

⁷⁹ Cheruiyot 2023 <https://intasend.com/payments/labor-laws-in-kenya-a-comprehensive-guide/>.

⁸⁰ Sections 30(1) and (2) of the *Employment Act* of 2007.

⁸¹ *Occupational Safety and Health Act* 15 of 2007.

connected, the situation is much more complex. This study argues that employees may, for example, feel pressure from their supervisors or have a personal ambition to advance their careers by being more accessible, which may lead them to choose to connect and reply to online correspondence outside of regular working hours. This might place those who choose to exercise their right to disconnect at a disadvantage while deterring others who otherwise would. To address this concern, it is recommended that the proposed legislation incorporate more explicit details about the requirements and, most importantly, shift the burden of disconnecting to the employer rather than the employee. In Germany⁸² there has been a noticeable shift towards adopting such an approach in the company's rules and regulations.⁸³ Likewise, the *Labour Code* of Portugal obliges employers to refrain from contacting employees outside their designated working hours.⁸⁴ Kenya may want to follow suit.⁸⁵

The Kenyan *Amendment Bill* provides that in the absence of a mutually agreed arrangement about work hours outside of the regular schedule, the employee can choose not to reply and disconnect, or the employee can decide to respond, in which case s/he is entitled to remuneration. This right is currently provided for under the provisions of the *Employment Act* of 2007 dealing with the scope of overtime regulation. The passage of the Bill into law would therefore be an unnecessary duplication of the law.

9 Conclusion and recommendations

The proposed amendment to the *Employment Act* aims to create and safeguard the entitlement of workers to disengage from work-related contacts beyond their designated work hours. Its objective is to address the escalating problem of staff burn-out. Persistent and uninterrupted electronic communication is slowly intruding into workers' free time, thereby affecting the delicate balance between their work and their personal lives. As a result, the proposed amendment attempts to balance the demands of a person's work or career and personal life. This notion has become increasingly prevalent due to the growing popularity of remote work and the increased reliance on technology, which has increased employers' ability to reach out

⁸² Froger-Michon and Jordan 2018 https://www.cms-lawnow.com/ealerts/2018/09/switching-on-to-switching-off-disconnecting-employeesin-europe?cc_lang=fr.

⁸³ Chudinovskikh 2019 <https://www.atlantis-press.com/proceedings/iscde-19/125924711>.

⁸⁴ Section 24 of the *Labour Code Law* No 7/2009. Also see Mendes 2021 <https://www.theguardian.com/commentisfree/2021/nov/18/portugal-bosses-work-hours-right-to-disconnect>.

⁸⁵ Morango 2021 <https://www.thenewfederalist.eu/no-more-boss-after-working-hours-portugal-s-new-right-to-disconnect-law?lang=fr>.

to workers at any time, obscuring the distinction between work and personal life.

Even so, the draft Bill needs to be revised regarding its practicality and implementation. Firstly, the amendments impose drastic and harsh laws that severely restrict employers' power to supervise their businesses, and impose barriers to sound labour relations in Kenya. This article underscores the importance of not restricting employers' managerial power via law. The proposed amendments undermine the fundamental principles of freedom and the realities of the labour market while also intruding upon employers' prerogative to effectively run their business from day to day. Furthermore, if enacted the Bill would establish two hubs of administrative authority, leading to discord and lack of discipline in the workplace.

This article highlights that a fundamental contradiction between flexibility and the right to disconnect may occur if the proposed legislation is enacted. Labour market specialists maintain that exercising and enforcing employees' rights to disconnect at certain times would lead to greater expectations and demands for complete responsiveness and engagement throughout contractual working hours.⁸⁶ Furthermore, adhering to fixed and strict working hours might stop employees from fully experiencing the flexibility that could have been provided by their being able to work remotely.⁸⁷ This includes the freedom to attend to personal errands, to fetch children from school, or to structure work time around tasks that occur on that particular day.⁸⁸ The proposed legislation fails to acknowledge the common practice of compensating employees for after-hours work through either time off during regular working hours or overtime pay, enabling flexibility and adaptability in executing job tasks.⁸⁹ Consequently, implementing legislation that prohibits non-emergency commercial activities outside of contracted working hours will hinder an enterprise's ability to effectively compete internationally.⁹⁰

The existing *Employment Act* and the ILO have established effective measures to regulate working hours and provide adequate overtime payment mechanisms. Furthermore, it is crucial to note that the General Wages Order already includes provisions for compensating workers for

⁸⁶ Henshall 2021 <https://www.bbc.com/worklife/article/20210517-can-the-right-to-disconnect-exist-in-a-remote-work-world>.

⁸⁷ Autonomy 2021 <https://www.futureofworkhub.info/allcontent/2021/8/18/the-right-to-disconnect>. Also see Hellard 2021 <https://www.itpro.com/business-strategy/flexible-working/360582/working-from-home-overtime-epidemic-report>.

⁸⁸ Hellard 2021 <https://www.itpro.com/business-strategy/flexible-working/360582/working-from-home-overtime-epidemic-report>.

⁸⁹ Section 27 of the *Employment Act* of 2007.

⁹⁰ Davis, Leach and Clegg 2012 *International Review of Industrial and Organizational Psychology* 193-235.

working overtime. Moreover, the interaction between an employer and employee, both within and outside of working hours, is a matter of management and should not be subject to legislation. Overall, the CBA and workplace policies and practices may effectively address all the issues the Bill covers.

Given the preceding, achieving a healthy equilibrium is better than introducing a new law. Employers are responsible for ensuring their employees' well-being by managing the work environment and mitigating any hazards that may infringe on their free time and rest periods. Promoting a work environment that allows employees to exercise flexibility while simultaneously fostering the importance of maintaining a harmonious equilibrium between their work and private home life is extremely important.

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List of Abbreviations

CBA	collective bargaining agreement
ELLJ	European Labour Law Journal
FKE	Federation of Kenyan Employers
ILO	International Labour Organisation
WHO	World Health Organisation