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Digital connection as a guarantee of the human right to the internet and its implications in labor matters

This article comprises four sections: the first one provides a brief introduction; the second one analyzes the international regulation; the third one covers its regulation in our country, and the fourth one, concludes with reflections upon its impact in labor matters.

I. The internet as a human right

In the current global crisis linked to the health emergency caused by COVID-19, the use of technology has been essential to carry out commercial transactions, maintain productivity, implement telework, acquire goods or products through electronic means, have conferences and educational activities online, among many others, presenting new opportunity areas and demanding a necessary adaptation in different areas, such as the relevance of the electronic signature, the use of digital applications, the implementation of biometric data, as well as the development of internet platforms.

The health emergency due to the SARS COV-19 virus, highlighted Internet as an indispensable resource for the conduction of the daily activities of humanity, leading to reflection on the need for it to be guaranteed to anyone regardless of their condition, since digital connectivity was one of the main solutions for the continuity of activities in the world.

The Internet is a decentralized set of telecommunications networks around the world, interconnected with each other, which provides various communication services and uses internationally coordinated protocols and addressing for routing and processing the data packets of each of the services. These protocols and addressing ensure that the physical networks that together comprise the Internet function as a single logical network[1].

Since its appearance in 1983, the Internet was recognized for the first time as a human right in 2011 thanks to Frank La Rue, then Special Rapporteur for the Promotion and Protection of the United Nations Right to Freedom of Opinion and Expression, who in his report on the promotion and protection of the right to freedom of opinion and expression, established regarding the internet that "universal access to cyberspace, which shall be understood as equitable access, at an affordable price for all citizens, both to the information infrastructure as well as to the information and essential knowledge for the human, collective and individual development"[2].

The increase and demand for digital platforms and tools has made the Internet today one of the rights that, after the health emergency, tends to become visible and its demand will surely lead to the development of new regulations in order to expand its scope and guarantee access to it.

[1] Article 3, section XXXII of the Federal Law of Telecommunications and Broadcasting (Ley Federal de Telecomunicaciones y Radiodifusión).

[2] La Rue, Frank (2011), "Report on the promotion and protection of the Right to Freedom of Opinion and Expression", United Nations Organization.

II. International regulation.

The UN Human Rights Council recognized the human right to the internet, through resolution A/HRC/RES/20/8 dated July 16, 2012, noting that "the global and open nature of the Internet as a driving force for the acceleration of progress towards development in its different forms", and requested the states to "promote and facilitate access to the Internet and international cooperation aimed at the development of the communication media and the information and communication services in all countries"[3].

On September 2, 2013, the United Nations Educational, Scientific and Cultural Organization (UNESCO) embraced the "internet universality" model to bring the world closer to peace, sustainable development and the eradication of poverty as public interest service, based on the following guiding principles: i) be based on human rights (and therefore be free); ii) openness; iii) accessibility; and iv) multisectorality (these principles are known as **R–O–A–M**, for the acronym of the initials **R**ights, **O**penness, **A**ccessibility, and **M**ultiple interested parties).

It is worth mentioning that the above was carried out based on article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, respectively, that although they do not make express reference to the internet, they protect the right to freedom of expression which is protected with the universal guarantee to internet access, in accordance with various resolutions issued by the UN Human Rights Council and several international organizations on the matter.[4].

At a regional level, in the annual report of the Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (IACHR) dated December 31, 2013, it was noted that the unprecedented potential of the internet to guarantee the right to freedom of expression, it is mainly due to "*its multidirectional and interactive nature, its speed and global reach at a relatively low cost and its principles of decentralized and open design*". In addition, he stated that the "*internet serves as a platform for the realization of other human rights such as the right to participate in cultural life and to enjoy the benefits of scientific and technological progress (Article 14 of the Protocol of San Salvador), the right to education (article 13 of the Protocol of San Salvador), the right of assembly and association (articles 15 and 16 of the American Convention), political rights (article 23 of the American Convention), and the right to health (article 10 of the Protocol of San Salvador), among others* "[5].

Subsequently, on March 15, 2017, the IACHR's Office of the Special Rapporteur for Freedom of Expression established, among others, various standards for the application and use of the internet[6] consisting of: (i) free and open internet, (ii) access, (iii) multisectoral governance, and (iv) equality and non-discrimination.

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[3] https://undocs.org/pdf?symbol=es/a/hrc/res/20/8

[4] Council resolutions 20/8, of July 5, 2012, and 26/13, of June 26, 2014, on the promotion, protection and enjoyment of human rights on the Internet, as well as resolutions 12/16, of October 2, 2009, on the right to freedom of opinion and expression, 28/16, of March 24, 2015, on the right to privacy in the digital age, and 23/2, of 13 of June 2013, on the contribution of freedom of opinion and expression to the empowerment of women, and also recalling General Assembly resolutions 68/167, of December 18, 2013, and 69/166, of December 18 of 2014, on the right to privacy in the digital age, 70/184, of December 22, 2015, on information and communication technologies for development, and 70/125, of December 16, 2015, containing the outcome document of the high-level meeting of the General Assembly on the general review of the implementation of the results of the World Summit on the Information Society.

[5] http://www.oas.org/es/cidh/expresion/docs/informes/anuales/2014_04_22_IA_2013_ESP_FINAL_WEB.pdf, 36th section.

[6] http://www.oas.org/es/cidh/expresion/docs/publicaciones/internet_2016_esp.pdf

Finally, the Rapporteurship concluded with international standards on the internet and the importance of this regarding: (i) the right to freedom of expression, (ii) the right of access to public information, as well as (iii) protection and respect for privacy.

It should be noted that regulation at the international level is sufficient, with an infinite number of pronouncements and recommendations by international organizations and courts. To cite just a few of these, is the recent ruling of the Court of Justice of the European Union in the case "*Google Spain S.L., Google Inc. vs. Spanish Data Protection Agency, Mario Costeja González*", as well as some important precedents issued by the European Court of Human Rights, such as the *Cengiz et Autres vs. Turquie case*, as well as *soft law* instruments such as the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, the Manila Principles, the UNESCO Charter on the Preservation of Digital Heritage, among others.

III. National regulation.

On June 11, 2013, were published in the Federal Official Gazette various reforms to article 6 of the Political Constitution of the United Mexican States regarding telecommunications, to regulate, among others, the right of access to information and communication technologies, as well as broadcasting and telecommunications services, including broadband and **internet**.

For its part, Article 27 of the Constitution establishes that the Nation has direct domain of the space located above the national territory. Consequently, and since the electromagnetic waves of the radioelectric spectrum can propagate in said space, their exploitation, use or harnessing, by individuals or by companies incorporated in accordance with Mexican laws, can only be conducted by means of concessions granted by the Federal Institute of Telecommunications, which necessarily includes internet services.

In this regard, the Federal Law of Telecommunications and Broadcasting, regulates in its article 9, sections V, VI, VII the authority of the Ministry of Communications and Transport (SCT) to coordinate with the Federal Institute of Telecommunications (IFT), to promote access to information and communication technologies, as well as broadcasting and telecommunications services, including broadband and the Internet, and establish broadband access programs in public places that identify the number of sites to connect each year progressively, until reaching universal coverage, in which the SCT is obliged to prepare each year a social coverage program and a connectivity program in public places, in accordance with article 210 of the law.

Also, the IFT has the authority, among others, to perform the necessary actions to contribute, within the scope of its attributions, to achieving the objectives of the universal digital inclusion and universal coverage policy established by the Federal Executive; as well as the objectives and goals set in the National Development Plan and the other programmatic instruments related to the broadcasting and telecommunications sectors, as well as to collaborate with the Ministry of Communications and Transportation in procedures before the competent international organizations, for obtaining orbital resources in favor of the Mexican State, the latter in cooperation with the International Telecommunication Union, Inter-American Telecommunication Commission and World Radiocommunication Conferences[7].

[7] http://www.ift.org.mx/espectro-radioelectrico/actividad-internacional

The Mexican Government has implemented a Digital Strategy program, to achieve the country's goals in government transformation, digital economy, educational transformation, universal and effective health, as well as civic innovation and citizen participation[8], through the legal framework[9] that regulates it through: open data[10], interoperability and digital identity[11], inclusion and digital skills[12] and connectivity[13].

Finally, the Federal Labor Law, since 2012 recognizes in its article 311 homebased work or teleworking, considering this is performed remotely using information and communication technologies, which acknowledges that the internet is today a medium to perform a job, confirming that this is a right to which anyone should have the greatest access possible.

IV. Considerations on the impact of the Internet and its regulation

The guiding principles of human rights are universality, interdependence, indivisibility, and progressivity. Therefore, it is now necessary to adopt wide-ranging measures for the State to create sufficient conditions to achieve the effective exercise of digital connection, as a guarantee of the human right to the internet.

Given the progressive evolution of the Internet derived from the pandemic, it is necessary to consider its impact, in terms of the right to privacy, privacy and personal data protection laws, both for the State, in its role as guarantor, and for individuals, in their role as users. The IACHR's Office of the Special Rapporteur for Freedom of Expression highlighted five main challenges generated or magnified by the Internet phenomenon: **a)** the protection of personal data; **b)** surveillance, monitoring and interception; **c)** encryption and anonymity; **d)** "Big Data" and **e)** the Internet of Things[14].

Regarding the **protection of personal data**, the Office of the Special Rapporteur stressed that it is essential to develop protection regimes to regulate the storage, processing, use and transfer of personal data, both between state entities and with respect to third parties, not only at the national level but also in the international regulatory framework[15].

For their part, **surveillance, monitoring, and interception** constitute an interference in the privacy of people. However, not all interference is *per se* illegitimate since there are exceptional cases (such as terrorism and fighting against organized crime). The inter-American system, in line with the European and the universal, established a tripartite test to verify the legitimacy of a state or non-state interference in private life such as electronic surveillance, which should be (i) suitable, (ii) legal (formally and materially), (iii) necessary and (iv) proportioned.

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[8] https://www.gob.mx/mexicodigital

[9] Federal Law of Telecommunications and Broadcasting; National Development Plan 2013-2018; Decree of the National One-stop Window and Open Data Decree.

[10] https://www.gob.mx/mexicodigital/articulos/datos-abiertos-95287

[11] Bases for interoperability within the government to provide better public services, and the development of digital identity as the access key for the population to these services. https://www.gob.mx/mexicodigital/articulos/interoperabilidad-e-identidad-digital

[12] It is formed, among others, by a center in each state, which offers robotics, programming, mechanics and digital training courses, https://www.gob.mx/mexicodigital/articulos/inclusion-y-habilidades-digitales

[13] It refers to the development of networks, the deployment of a better infrastructure in the national territory, the expansion of the capacity of existing networks, and the development of competition in the ICT sector to stimulate price reductions. https://www.gob.mx/mexicodigital/articulos/conectividad

[14] http://www.oas.org/es/cidh/expresion/docs/publicaciones/internet_2016_esp.pdf

[15] Organization of American States. Inter-American Juridical Committee. Privacy and Protection of Personal Data. OEA / Ser.Q CJI / doc. 474/15 rev. 2. (86th regular session, Rio de Janeiro, Brazil). March 26, 2015. Principle 11.

As mechanisms to protect personal privacy, **encryption and anonymity** arise, also constituting resources aimed at protecting the inviolability of communications, which is why they are necessary for protection against illegitimate invasions of privacy and intimacy in the digital age.

Likewise, **"Big Data"** is a term that refers to the immense amount of data generated on the network, capable of being captured, stored, managed, analyzed, and systematized in search of trends and profiles.

Finally, the IACHR Special Rapporteurship establishes its concern that in the near future, objects will be able to communicate with each other, without human intervention, calling it the **Internet of Things**, since electronic chips are incorporated into products, even in everyday objects, and each object acquires a unique individual identifier.

Furthermore, from the point of view of interdependence with other rights, the use of technological resources during teleworking can have various implications for **labor rights**. Although the Federal Labor Law already regulates teleworking, it does not define clear limits in this regard. That is, it represents an opportunity to boost the productivity of a company by incorporating remote work schemes, however, with the danger that the working hours become disproportionate, strenuous and, consequently, violating rights.

In this way, teleworking exploits to the maximum the use of technological resources, such as email, video calls, text messages via mobile phone, among others, forcing the worker to be unlimitedly available since availability is confused with the fact that the worker works from home, constituting an intrusion into the privacy and rest of the worker.

In this regard, in Spain and other European countries[16], has been necessary to regulate the so-called right to "digital disconnection". The Organic Law 3/2018 on the Protection of Personal Data and Guarantee of Digital Rights in Spain, defines in article 88 the right to digital disconnection as the means to guarantee respect for rest time, permits and vacations, as well as personal and family privacy, outside of the legally or conventionally established work time[17].

With regard to the above, our colleague, the lawyer Raúl Rojas, an expert in labor matters at ECIJA Spain, raises the following questions: "How to control that the employee is fulfilling his obligations without incurring a violation of the right to privacy in the use of digital devices? And in the event that the employee is not fulfilling his duties, how to proceed with a disciplinary dismissal with all the guarantees?, respecting other rights such as the digital disconnection, especially in telework situations"[18], proposing the need for specific action protocols and internal policies duly communicated to employees, as well as with certified digital tools that allow these processes to be carried out in accordance with the regulations.

Consequently, it is imperative to take into consideration privacy, data storage, cybersecurity and technology policies for the protection of the network and the organization systems of companies with workers, as well as rest days, reduction of working hours and vacation periods, consider electricity and physical space expenses, in order to create a balance in labor relations and mitigate any possible violation of fundamental rights, which also requires greater specificity and development of the regulation of the matter in Mexico.

[16] France and Belgium were the first two countries in the world to regulate the right to digital disconnection, and Spain later regulated this right in late 2018.

[17] Organic Law 3/2018, of December 5, on the Protection of Personal Data and Guarantee of Digital Rights in Spain. Available at the following link: https://www.boe.es/buscar/doc.php?id=BOE-A-2018-16673

[18] https://revistabyte.es/legalidad-tic/tecnologia-en-el-ambito-laboral/

Finally, it should be remembered that "*although the Internet has been and is developed and operated by a series of private companies that perform different functions, its character as a global means of communication is that of a public space and, therefore, its governance must be exercised under the principles of a public resource and not simply as a matter of private contracts*." [19]. In this sense, in light of the eminent regulation of companies for their responsibility in the commission of acts that violate human rights, the regulation of telework, as well as the use of information technologies, in the labor context, takes on special relevance since actions that could violate workers' rights in these contexts could subsequently trigger costly litigation for companies.

It should not be forgotten that, in recent years, the European Court of Human Rights has solved several cases on the matter, such as the judgments in the *Halford vs. United Kingdom* (1997), *Amann vs. Switzerland* (2000) and *Copland vs. United Kingdom* (2007) cases, on privacy and use of work emails, as well as the impact of the use of video surveillance cameras in the workplace in the recent ruling of the *López Ribalda and other vs. Spain* (2018) case.

The use of digital services has an indisputable link with the enjoyment and respect of human rights, since the use of information and communication technologies must be increasingly accessible to any sector of society regardless of their condition, to expand effective access to development opportunities that internet access naturally entails, but respecting at all times the privacy and information of users, particularly in the context of labor and consumer of services relationships.

Consequently, the business obligation to implement a policy and/or protocol of digital disconnection is observed as imminent, as well as the implementation that may eventually be required by the union representation of the workers or, failing that, by the workers themselves, since corporate non-compliance with this obligation may lead to sanctions, derived from litigation, as is already happening in other parts of the world.

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[19] IACHR. Annual Report 2016. Report of the Office of the Special Rapporteur for Freedom of Expression, Chapter III (Standards for a free, open, and inclusive Internet). OEA / Ser.L / V / II. Doc.22. March 15, 2017, paragraph fifty.