EMPLOYEES' RIGHT TO DISCONNECT OUTSIDE WORKING HOURS*

Tanawat Piyarattanakunakorn
Master of Laws in Business Laws (English Program)
Faculty of Law, Thammasat University
Email address: tanawatlegal@gmail.com

Received 6 January 23
Revised 7 June 23
Accepted 4 October 23

Abstract

The purpose of this study is to explore the new right to refuse communication under the Thai Labour Protection Act 1998 section 23/1 and compare it to the right to disconnect whether they are similar or applicable. Since nowadays, despite all the benefits of information and communication technologies, their existence also blurs the boundaries between professional and private life of people. This affects employees' health and safety. The author therefore conducted this law research regarding the right to refuse communication in Thailand and the right to disconnect in other countries in the hope of promoting Thai employees' well-being. Although the Thai Labour Protection Act 1998 section 23/1 appears to be issued to protect the employees' privacy rights, it could not fully resolve the problem of interruption outside of working hours because the wording of the right to refuse communication under Thai Law and the right to disconnect under other countries' law is not the same.

Because of this problem the author compares the existing Thai law with other countries' law through various sources regarding the right to refuse communication and the right to disconnect in order to consider which one is appropriate for Thai law.

It has been found that the right to disconnect under each country's labour law could be usefully adopted more than the right to refuse communication because the right to disconnect implies that the employer is not able to contact the employee at the outset.

Keywords: ICTs, the Right to refuse communication, the Right to disconnect, Scope of application

* This article is summarised and rearranged from the thesis "Employees' Right to Disconnection Outside Working Hours", Faculty of Law, Thammasat University, 2022.

1. Introduction

Back in the past, where there was still limited advanced technology for long distance communication, people had to communicate face-to-face only. Since people's need for communication is crucial for business and relationships, people have never stopped attempting to find an easier way of communication. They began with writing a letter. Then they invented the telegraph. But still, these methods were so complicated and difficult. People wanted their speech to be delivered immediately. They would rather not wait for 2 or 3 days for a message to be delivered. They wanted faster communication. Therefore, people tried to invent and improve better and better communication technologies to meet the endless communication needs of the whole society. But this advance in technology is not without a negative consequence.

In this regard, the author would like this thesis to focus on and prioritize the impact of information and communication technologies (ICTs) on the work environment. This leads to the remote interruption of employee's privacy rights, since ICTs enable employers to interfere with employees' privacy rights. This causes other problematic consequences. In the past, without developed ICTs, there was no problem about the relationship between employers and employees after working hours since they could not contact each other using advanced technologies. Without ICTs, work life and private life could be easily separated.

When people entered into a working life and became an employee of a company, their life changed. It seems that the technology which solved those problems of long-distant communication could become a disadvantage rather than an advantage because the employers could remotely interrupt the employees' personal life anytime. For example, during a lunch break or even outside of working hours. In the past, ICTs were not enhanced enough to have an influence on employees' life. It did not affect their private space or cause problems to their health and safety or their family time. Hence, employees had time for a full rest and their employers were not able to use ICTs to communicate with them all the time.

However, at the present time, it could not be denied that ICTs are extremely advanced and play an important role in every aspect of people's life, whether for working or entertainment. Many people cannot stand having their digital devices out of reach, let alone switching them off. People can easily use ICTs to communicate with each other via many ways, e.g., mobile phone, e-mail and application, as if they were in the same place. No matter where people are in this world, ICTs make people's life convenient and better, especially in regard to remote communication. In the perspective of life, everything sounds good, but in the perspective of work, it is not good and it is getting worse. ICTs blur the boundaries between people's working and private life. Some ICTs, e.g., email, Line or other channels for remote communication, could be used for both professional and private life. When the employers misuse them, the employees have their good quality of life compromised. This is because, by

checking their device, they are constantly reminded about work, especially the employer's assignments, and may follow the employer's request without any willingness.

However, there are a number of counties which focus on the employee's privacy right, especially countries in Europe. In those countries, it is a major issue which is widely discussed. People argued that if the right of privacy at work is important, it could be called a "right to disconnect" instead of a "privacy right". Some countries enacted legislation with respect to the right to disconnect as being one of privacy rights, while some countries may not enact such a law but rely on an agreement between the employer and the employee instead. However, the first country which enacted the right to disconnect as a specific law is the French Republic. It was deemed the pioneer of the term "right to disconnect" and its specific law is also deemed as the model for every country which is interested in the right to disconnect, e.g., the Philippines and Canada. France also inspired many international organizations, e.g., the International Labour Organization (ILO), the United Nations (UN), and even the European Union (EU). Even if those international organizations do not directly issue specific international laws for the right to disconnect, there is a number of international laws which are similar to the right to disconnect. At the present time, the existence of international laws impliedly categorized as the right to disconnect is for respecting the boundaries between professional and private life as the fundamental rights.[1]

In this regard, there is also a specific law in Thailand that entitles employees' rights similar to the right to disconnect. That is the right to refuse communication; however, such a right allows the employer to exploit the gap in the law. As a result, the Thai government should more thoroughly consider the concept of the right to disconnect like other countries; otherwise the existence of this new right will provide only minimal benefit. Specifically, the right to refuse communication implies that the employer still could contact employees. It is not the same as the right to disconnect whereby the employer realizes that he is unable to contact because of wording "disconnection". Finally, the right to refuse communication entitles the employer to make claims against the employee. if the employee fails to respond the employer's contact in accordance with the provisions of the Thai Labour Protection Act 1998 section 24 second paragraph for necessary reason because the right to refuse communication impliedly means the employee still turns on his own digital device, just not respond the employer via such digital device. Hence, the employee could not reject for the reason that his digital device is disconnected. Apart from employees' disadvantages, there is also the disadvantage for the employer. In particular, the acquisition of such a right depends on the employee's consent, not like mutual agreement. The employer may be unable to obtain the employee's consent. As a result, it causes endless argument between them.

[1] Team of the Inclusive Labour Markets, 'Working from Home from Invisibility to Decent Work' (PRODOC 2021) <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_765896.pdf> accessed 16 April 2022.

2. General Principle of the Right to Disconnect

In the past, before ICTs played an important role in people's life, whether professionally or privately, people had better mental and physical health. They can focus on their own private life after work without any disturbance. However, after ICTs were continuously developed and improved to make people's life more convenient, people's life changed, especially employees, because ICTs interrupted their private time. This is the one of disadvantages of ICTs.

However, employees can make a balance between their professional and personal life in case employers respect employees' rights. Employees can properly manage their private time for any activities during a holiday or outside of working hours because no one interrupts their rest period or the time after their working hours via ICTs. On the other hand, at the present time, ICTs seems there are more disadvantages than advantages, especially in the aspect of working, and this often happens during this period when employers cannot suitably administer the company and properly adopt the digital tools for remote communication. Therefore, the balance between the professional and personal life of employees is compromised.

2.1 Impact of Information Communication Technologies

Because of the rise of globalization and advances in ICTs mentioned which allows employers to ignore the boundaries between the employee's professional and private life, a new culture called "on call" emerged. It is a new norm in the modern workplace.[2] In other words, it is a term which clarifies the disadvantage caused by ICTs because, after working hours, the employees can finally bring their private mobile phone or even any digital tools back to their homes and the employers have a chance to contact the employees 24 hours a day. It is obviously said that the employees have no way to avoid the communication with their employers. It seems the employee must wait and follow the employer at all hours because of the private digital tools.[3] The employees have no choice.

The "on call" culture causes a lot of problems to people's metal and physical health, so it also causes the problematic consequence to the company. Humans have physical limitations. People should not be exploited over their limits. Otherwise in the perspective of work, employees will be depressed, worried, tired and, finally, fall ill. The more employees have these problems, the more a company becomes less productive. Most of problems which the company may meet are high turnover, burnout, absenteeism and presenteeism incurred

[2] Klaus Muller, 'The Right to Disconnect' (European Added Value Unit, 2020) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/642847/EPRS_BRI(2020)642847_EN.pdf > accessed 17 April 2022.

[3] Craig Dowden, 'The Perils of Our 'On-call' Work Culture' (*Psychology Today*, 27 August 2015) <https://www.psychologytoday.com/us/blog/the-leaders-code/201508/the-perils-our-call-work-culture> accessed 19 November 2022.

by the employees.[4] Thereby, the employer should thoroughly consider and study "on call" culture, otherwise the company will not be able to survive and, finally, may have to compensate the employees.

Furthermore, from the employee's standpoint, this may lead to the death of employees in case they work without knowing or realizing their own limitations. There was the first case in Japan, named "Karoshi", because the death was caused by working without limitation on the working time.[5] It is said that the limitation of working time is related to the limitation of the human body. Therefore, the body's limitation is considered as a crucial matter which every workforce should be aware of. The balance between work and life is necessary. Rather than death, however, employees may also encounter burn-out syndrome from working over the limitation of their bodies. When employees feel tired and cannot stop working, then burn-out syndrome will occur.

Moreover, apart from the problem regarding the company's status and the health and safety of the employee, there is another problem with respect to the employee's family time. As we know the phrase "work-life balance", if we take the word "life", there are many meanings of "life" whether defined by a dictionary, experience, or even common sense. However, the meaning of life also includes family. From the author's perspective, the family is deemed as the most important thing in our life. If ICTs negatively affects family much, e.g., something interferes with family time, not only our family but also our own life may be unstable. Thereby, the interruption of family time is normally deemed as one of the problems caused by ICTs when employers often contact the employees outside of working hours because of rush work or during a holiday.

2.2 Characteristic of the Right to Disconnect

According to the author's perspective, the right to disconnect should be considered as a privacy right because it protects employees from intrusion by employers outside of working hours, such as calls or messages. Employees have the right to disconnect in order to protect their privacy. The function of the right to disconnect is comparable to the function of the right to privacy.

In this sense, based on people's general perception, they believe that the privacy right is simply the right to lead a private life without interference from others, not related to professional life. Such belief may not be completely accurate because, actually, the privacy right is unavoidably related to employment concerns. Thereby, as a result of obsolete belief, the privacy right for professional life has been steadily infringed upon due to the development

[4] Emma Gallagher, 'After Hours Availability and the Right to Disconnect: An Exploratory Study into the Effect of After-Hours Availability and the Significance of Protective Legislation for the Right to Disconnect' (Master of Arts in Human Resource Management Thesis, National College of Ireland 2020).

[5] M.V. Chudnovskikh, 'The Right to Disconnect in Digital Economics' (Atlantis Press 2019) <https://www.atlantis-press.com/proceedings/iscde-19/125924711> accessed 16 April 2022.

of ICTs. Consequently, as per mentioned above, this privacy right is truly the right to disconnect. People just created a new term, "right to disconnect", to bring employers' awareness to their employees' private lives. When people are aware of their right to disconnect, they will recognize that it is tied to working time and be reminded to prioritize their right to privacy.

When the right to privacy is included in the Universal Declaration of Human Rights, it becomes one of the fundamental rights that people must respect. Therefore, both employer and employee should respect the right to disconnect, which is an element of the right to privacy. Even if the term "right to disconnect" is distinct from "privacy right," it is irrelevant to the determination of labour rights because, according to the author, the right to disconnect is a component of the privacy right. Thereby, the right to disconnect is also deemed as the one of labour rights.[6]

In the future, when the right to disconnect is determined as a specific law in each country, it will be deemed as the minimum standard which all employers should respect because it is a labour right accepted by ILO. However, there are both advantages and disadvantages for the right to disconnect. So, it depends on each country's legislation or even the agreement between employers and employees or employer and the trade union, or according to the company policy. The following Sections will determine domestic laws in some selected jurisdictions and Thai law.

3. Foreign Laws

3.1 French Labour Code 1973

In France, there are two ways which employees can truly receive the right to disconnect from employers, with provisions that explicitly specify the following obligations for the employers:

Firstly, when the French Labour Code 1973 was under the part of collective labour relations, it obviously determined that the right to disconnect must be a topic, as the terms and conditions, unconditionally negotiated between a trade union and employers or a trade union and an employer's organization. Namely, the right to disconnect must be determined through the collective bargaining agreement.

Secondly, in case that a collective bargaining agreement cannot be mutually agreed by a trade union and employers or a trade union and an employer's organization, employers are obliged to make a unilateral regulation in the company about the implementation for employee's benefits with respect to the full exercise of the right to disconnect similar to the collective bargaining agreement.

[6] Olga Chesalina, 'The Legal Nature and the Place of the Right to Disconnect in European and in Russian Labour Law' (2021) 9/3 Russian Law Journal <https://cyberleninka.ru/article/n/the-legal-nature-and-the-place-of-the-right-to-disconnect-in-european-and-in-russian-labour-law> accessed 20 April 2022.

However, employers are not required to comply with the French Labour Code 1973 for the right to disconnect in every instance, as the French Labour Code 1973 specifies that the right to disconnect is mandatory only for companies with fifty or more employees.[7]

3.2 The Ontario Employment Standard Act 2000

Ontario is one of the provinces in Canada and enacted the first law regarding the right to disconnect. It was called the Ontario Employment Standard Act 2000. It applies only to companies in Ontario. This legislation is similar to French Labour Code 1973 because France is Ontario's inspiration. The similarity can be seen through the provision regarding the scope of application.

In this sense, for the employee's advantage, the employer must establish their own written policy addressing the full use of the right to disconnect. However, it is mandatory for companies with at least 25 employees. In addition to the number of employees, this Act specifies the date of policy implementation. Specifically, if the company is eligible on January 1 of any given year, it will implement its written policy prior to March 1 of that year.[8]

3.3 The Labour Code of the Philippines 1974

The Labour Code of the Philippines 1974 clearly states that the employers have a duty to determine company policy with respect to the time which employers and employees can remotely communicate via ICTs outside of working hours. However, the company policy must be subject to the regulation determined by the secretary of labour and employment in Philippines.[9]

4. Thai Law

At present, Thailand still has no right to disconnect provision but rather the right to refuse communication under the Thai Labour Protection Act 1998 section 23/1, which was just issued and has been enforced since 18th of April 2023. It could be adopted instead. These rights, whether the right to refuse communication or the right to disconnect, have the same spirit of law. They would specifically support the well-being of employees. However, acquiring the right to refuse communication is not the same as acquiring the right to disconnect in other countries, and it comes with additional disadvantages. The author would explain the detail of such a right under the Thai Labour Protection Act 1998 section 23/1 as follows:

---

[7] The French Labour Code 1973, s L2242-8.

[8] The Ontario Employment Standard Act 2000, s 21.1.2 para 2.

[9] Suriyen Srisung, 'Disconnection Outside of Working Hours' <https://www.krisdika.go.th/data/activity/act13458.pdf> accessed 3 April 2022 (สุริเยนทร์ ศรีสังข์, 'การตัดขาดการติดต่อสื่อสารนอกเวลาทำงาน' <https://www.krisdika.go.th/data/activity/act13458.pdf> เข้าถึงเมื่อวันที่ 3 เมษายน 2565).

Firstly, the right to refuse communication will be triggered by the employee's prior consent.[10] As a result, if the employee does not consent, the employer cannot compel the employee to respond to his contact outside of working hours. Furthermore, the law does not mention any minimum number of employees, so the employee can give or not give consent in any company.

Secondly, as mentioned above, the right to refuse communication mainly depends on the employee. It differs from the other countries where the right to disconnect will be determined by the mutual agreement between both employer and employee or a policy. However, only with the employee's consent, the more influence an employee has, the less an employer is able to negotiate or enforce compliance. Finally, the employer's work would be jeopardized. On the other hand, the less influence an employee has, the more an employee cannot ignore the employer's contact even if it is regarding the employee's consent because the employee is concerned about a performance evaluation.

Thirdly, even if the right to refuse communication is under the provision for working from anywhere, it can be adopted for the employees working in both the workplace and anywhere because the Thai Labour Protection Act 1998 section 23/1 does not determine the provision used for only working from anywhere. Thereby, it also includes working from the workplace.[11]

Fourthly, the right to refuse communication still allows the employer to take action against the employees under the provision of the Thai Labour Protection Act 1998 section 24 with respect to a necessary reason even if the employee does not consent. Finally, such consent will be ineffective.

According to the author, the right to disconnect under other countries' law is more effective than the right to refuse communication because it is based on the collective bargaining agreement at the outset. This factor contributes to greater harmony between the employer and the employee. The employer must rely solely on the employee's consent because both employer and employee are entitled to negotiate with each other having the same status. In other words, because the right to disconnect implies that the employer should not contact the employee, it makes the employee feel more at ease than merely the right to refuse communication. Thereby, the author wishes for the government to prioritize the provision of right to disconnect from other countries over the right to refuse communication.

In this sense, according to the comparative review and as per mentioned above, the author believes that the provision with respect to the right to disconnect under French Labour Code 1973 is more flexible and applicable than the written laws from Canada and Philippines because such a right would be mutually agreed upon by and between both employer and

[10] The Thai Labour Protection Act 1998, s 23 para 1.

[11] Treeneat Sarapong, 'Remote Work and Right to disconnect' (1st edn, Rong Phim Duean Tula 2023) (ตรีเนตร สาระพงษ์, การทำงานทางไกล และสิทธิที่จะตัดขาดการสื่อสารนอกเวลาทำงาน (พิมพ์ครั้งที่ 1, โรงพิมพ์เดือนตุลา 2566).

employee. It is equitable for both parties. It is not like it entitles employees' rights too much as when the employer must rely solely on the employee's consent. In addition, if a collective bargaining agreement cannot be reached, the company policy will be implemented instead.As a result, the employee definitely will receive the right to disconnect.

5. Recommendations

The author would like to recommend a new regulation and provisions that entitle the employee to disconnect ICTs as follows:

(i) Thailand should issue the right to disconnect as the specific law in place of the Thai Labour Protection Act 1998 section 23/1 with respect to the right to refuse communication because although the said provision entitles employees to refuse communication, it does not mean employers are unable to contact their employees to do a job outside of working hours. This is because subject to such provision, employers perceive that their employees still have their own digital devices turned on. Furthermore, even if it appears that the employer must have the employee's consent, the employee will still be concerned that the employer will exploit the gap in the law to make a claim against the employee under the provision of the Thai Labour Protection Act 1998 section 24 second paragraph. Specifically, the employer would argue that the type of work must be constantly monitored or managed, or else it will be damaged later. Hence, the legislators should finally realize that the employee cannot refuse the employer's contact. In addition, the legislators should recognize that, nowadays, the world has changed. It has become a digital world in which everyone can communicate without boundaries and it is easier to interrupt others by the misuse of ICTs. It is impossible for the employees to avoid the employers' contact because the employers know that the employees are surely aware of their contact since the employees use their digital devices almost all of the time. In this sense, as per the author's proposition, the right to refuse communication under the Thai Labour Protection Act 1998 section 23/1 should be replaced with the right to disconnect instead because such a right makes it difficult for the employer to bring a claim against the employee because employee would be able to make an excuse he disconnects his digital device or, in other words, it means he could not perceive the employer's contact.

(ii) However, as mentioned above, it is just the difference of wording between the right to refuse communication and the right to disconnect. It makes no mention of obtaining these rights. As a result, if the provision exists stating that the right to refuse communication or the right to disconnect results from a collective bargaining agreement, an individual agreement, or a policy, the difference between these rights would be seen clearer. In case of the right to refuse communication, the employer continues to take advantage of the gap of law. Specifically, even if any type of agreement specifies that the employer cannot contact the employee at a specific time, the employer may make a claim against the employee under

the provision of the Thai Labour Protection Act 1998 section 24 second paragraph because such a right implies that the employee still recognize the employer's contact. However, in case of the right to disconnect, the employer cannot exploit the situation because the employee is deemed to have completely disconnected from all digital devices. As a result, it is clear that the phrase "the right to disconnect" is the most important and should replace the phrase "the right to refuse communication".

(iii) The author suggests that Thailand should imitate the provision regarding the right to disconnect in compliance with the French Labour Code 1973 in reference to the collective bargaining agreement. Namely, the right to disconnect will be much more useful and effective for the employees and not against the company's operation in the event that the terms and conditions regarding the exercise of right to disconnect is fairly negotiated between a trade union and employer. Moreover, if there is a collective bargaining agreement, it makes for greater harmony between the employer and the employee. Both parties will be able to collaborate without any obstacles because they have mutually agreed on their mutual benefits, particularly time for contact outside of working hours. The employer would know when he could contact, and the employee would realize the employer could contact during an agreed-upon time. Also, it will be better if there is a regulation controlling the terms and conditions. However, in the part of the individual agreement, it is another way for any companies which have no his own trade union, especially in case of Thailand, the establishment of trade union in each company is more difficult than other countries, so some companies in Thailand may not be able to have his own trade union. As a result, the individual agreement between the employee and the employer will be a good choice.

(iv) In other words, in case the collective bargaining agreement, as mentioned, is unsuccessful, the author opines that Thailand should also add the provision regarding the company policy in compliance with the Ontario Employment Standard Act 2000 and the Labour Code of the Philippines 1974. Namely, employers will issue their company's written policy which should be in line with the rules determined by the Department of Labour for the employers' and the employees' benefit as much as possible. Nonetheless, the legislature should oblige the Department of Labour to recognize that determining the rules is a duty, not an option, as stipulated in the Labour Code of the Philippines 1974. Otherwise, the company policy may not be equitable for the employees.

(v) Not all corporations should be required by Thai law to provide the right to disconnect, but rather evaluated on a case-by-case basis. Namely, the working hours of some companies may be flexible or fixed. In the author's perspective, Thai law regarding the right to disconnect should mandate the company which specifies fixed working hours as a policy, and also must determine the provision controlling the right to disconnect. In other words, while the right to refuse communication under the Thai Labour Protection Act 1998 section 23/1 may not be sufficient to respond to the employers or employees' desires, if there is new

law governing how to protect the employees from the employers' exploitation within the Thai Labour Protection Act 1998 section 24 second paragraph or even the rule of consent, which does not solely or unilaterally indulge the employees, it would be better and applicable in practice.

(vi) In accordance with the Labour Code of the Philippines 1974, Thai legislation should explicitly state that employers have no power to lay off workers who object to working overtime. The author opines that this provision causes employers to fear the amount of compensation, as the more precise the legislation is, the more employees are able to receive damages on a legal basis.

(vii) Thailand should also revise the provision regarding the establishment of trade unions because it is always based on the public sector's approval. However, trade unions in France can be freely established. Thereby, if Thailand would not revise the provision corresponding to the French Labour Code 1973, most employees would not efficiently receive the terms and conditions regarding the right to disconnect because a sole employee has no power to negotiate with his own employer.