

## **Problems Concerning Treaty Implementing Legislation as Sources of Administrative Law under the Thai Legal System**

The purpose of this thesis dissertation is to study the problems relating to treaty implementing legislation as sources of administrative law in the Thai legal system. It was found from studies that treaties concluded under international law become effective as Thai law only upon their adoption into domestic laws. This is consistent with the implementation theory. Therefore, sources of law which pose limits on the acts of the administration imply laws which implement treaties, viz. Acts and delegated legislation. A treaty, on the other hand, does not constitute a source of administrative law under the Thai legal system.

Nevertheless, studies on the application of treaty implementing legislation under the Thai legal system has revealed certain problems which may be separately considered under two headings:

The first heading comprises problems arising from the application of treaty implementing legislation in the judicial context, which may be further divided into two issues.

Firstly, problems could arise from the application of treaty implementing legislation which might be void under domestic laws. One important cause of such defect is the lack of clarity in the provisions of the Constitution on the treaty implementation process into national laws, thus resulting in problems on the constitutionality of such treaty and implementing legislation.

Moreover, where the National Assembly enacts an Act which pre-accepts treaty obligations, and thereby unconditionally and without limits, delegates the powers to

determine the substances of the Act to the executive, such an event also gives rise to questions of constitutionality.

Secondly, there have been problems on the application of domestic laws implementing treaty obligations due their force and status which are equal to the legislation concerned, i.e. an Act or delegated legislation as the case may be. As a consequence, a problem may arise in the event where a treaty implementing legislation becomes contrary to or inconsistent with a subsequently enacted law. In such a case, Thai courts are bound to apply and interpret laws in accordance with the rule of law under which subsequent laws repeal prior laws. The treaty obligations on such matter are thus rendered unenforceable domestically.

As a result of the two problems above, Thailand might have to bear responsibility at the international level to other state parties to the treaty under the *pacta sunt servanda* doctrine. This dissertation proposes recommendations for remedying such problems. It is proposed that the conclusion of treaties by the executive which require ratification by the National Assembly must always be presented to the National Assembly together with a draft law, regardless of whether there is an existing law on that matter. Treaty implementing legislation would therefore acquire the status of a specific law, whereas other laws on the same matter would remain as general laws. As a result, treaty implementing legislation would be effective under the State's domestic laws without any concerns for subsequent enactments, pursuant to the rule of law that specific laws are an exception to general laws.

The bills which would be proposed alongside the treaty to the National Assembly for approval should be drawn up by the executive either in the form of a treaty implementing bill containing an annex of the treaty's translation in Thai or an adaptation of the entire text of the treaty into Thai in the form of a Thai Act. This would confer the status of special laws to

the Acts and the Thai courts would be bound to apply these Acts to cases before other general laws. However, this special law status would not arise if the executive chooses to adopt treaty obligations by amending various Acts in accordance with the treaty obligations, or enact an Act which pre-accepts treaties. Following the above recommendation would ensure not only compliance with treaty obligations and protection against infringement by the State's internal agencies, but also that acts of the legislature and the executive are consistent with the rule of the legal state.

The second heading comprises problems arising from judicial bodies applying treaties in the absence of treating implementing legislation.

Studies have revealed that the practice of Thai courts in certain cases show recognition and application of treaties even where Thailand has not yet become parties to the treaties concerned if it is found that such treaties possess the characteristics of law-making treaties prescribing legal rules on human rights, international customary laws and general principles of law applicable in international law. The view of this dissertation is that rules in the law-making treaties should only be applied by the administrative courts as general principles of administrative law. However, the extent of the administrative court's awareness of the existence of customary international laws and general principles of international law essentially depends on the specific knowledge and expertise of the particular judge. Such inconsistencies could potentially prejudice the protection of rights and liberties of the people from the exercise of administrative powers.

Thus, in order to improve efficiency in the protection of rights and liberties of the people from wrongful acts of the administration, this dissertation proposes that the Constitution should be amended to recognize customary international laws and general principles of international law as forming part of domestic laws analogous to that of the

German Constitution. In this case, the administrative court would be able to apply general principles of international law, which may be recognized or formed as a result of treaties, directly to the cases. This method extends the scope of sources of administrative law which provides the administrative courts with definitive criteria for assessing the legality of administrative acts pursuant to the law-making treaties, even if Thailand is neither a party to the treaty nor enacted domestic laws to implement such a treaty. In consequence thereof, efficiency in the protection of rights and liberties of persons domestically would be improved. Nevertheless, as Thailand follows the code law system, the application of general principles of international law by the administrative courts must still be made pursuant to the hierarchy of laws of the state, i.e. the administrative courts may apply general principles of international law only where there are no written provisions of domestic law dealing with such matter.