

# Thailand Feature

## Incentives and Obstacles to the Implementation of ILO Convention No. 87

### *Labour Relations Provisions in the Thai Public Sector*

According to the International Law of Treaties principle in the Vienna Convention, “[a] treaty does not create either obligations or rights for a third State without its consent.”<sup>1</sup> However, the International Labour Organisation (ILO) is different from other International Organisations in terms of its complaints procedure that allows workers to challenge the violation of treaties that have not been ratified by a member state.<sup>2</sup> Moreover, the ILO member states adopt a Declaration and a special mechanism that provide workers with fundamental labour rights, even in countries that have not acceded to the treaties that protect those rights.<sup>3</sup> This grants the ILO the distinctive authority to monitor compliance with the unratified conventions of member states that other International Organisations lack. Thus, it could be concluded that ILO member countries are obliged to comply with unratified treaties to a certain degree.

Thailand became a member of the ILO when it was first founded in 1919, since then, the number of ILO member states has grown from 44 to 186, and the number of adopted conventions has increased from 6 to 189.<sup>4</sup> The 189 conventions currently adopted include 8 fundamental conventions, 4 governance conventions, and 177 technical conventions; however, only 33 of the 44 founding member countries have ratified all 8 of the fundamental conventions.<sup>5</sup> Thailand, for example, has only ratified 15 ILO conventions to date.<sup>6</sup> These are 5 fundamental conventions, 1 governance convention, and 9 Technical conventions.<sup>7</sup>

The fact that Thailand has not ratified all 8 of the fundamental conventions creates a great deal of pressure for the Thai government. Although the ILO Constitution does not force member states to ratify the treaty if they ultimately decline to do so,<sup>8</sup> before they refuse to ratify it, they are required to submit treaties to their political branches to consider the enactment of legislation or other actions.<sup>9</sup> In addition, members are required to disclose the details of their submission process. If a member state declines to ratify a treaty, it needs to explain whether it intends to implement any of its provisions by legislation, administrative actions, collective agreement, or otherwise.<sup>10</sup> It also has to indicate the difficulties that prevent

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1 *Vienna Convention on the Law of Treaties*, art. 34, May 23, 1969, 1155 U.N.T.S. 331.

2 Laurence R. Helfer, ‘Monitoring Compliance with Unratified Treaties: The ILO Experience’ (2008) 71 *Law & Contemp. Probs*, 193.

3 *Ibid.*

4 *Ibid.*

5 *Ibid.*

6 *Ibid.*

7 *Ibid.*

8 *Constitution of the International Labour Organisation*, art. 405, June 28, 1919, 49 Stat. 2712, 225 C.T.I.A. 373.

9 The 1919 ILO Constitution, above n 9, art. 405.

10 *Ibid.*, art. 19 § 5cl. (e).

or delay the ratification of the convention.<sup>11</sup> Therefore, Thailand has been required to submit a report to the ILO every two years to explain why it has failed to ratify the remaining three fundamental conventions.

However, since many of the world's superpowers, such as the United States,<sup>12</sup> Canada,<sup>13</sup> China,<sup>14</sup> and India,<sup>15</sup> have not yet ratified all 8 of the fundamental conventions, they are in no position to urge the Thai government to prioritise ratification. Furthermore, although the ASEAN Economic Community (AEC) plans to establish a single market and production base by 2015,<sup>16</sup> this is also not a key factor for Thailand to ratify the remaining fundamental conventions because the majority of ASEAN members have not done so either.<sup>17</sup> In fact, only three ASEAN members have ratified all 8 of the fundamental conventions (Cambodia, Indonesia and the Philippines); thus, apart from the ILO itself, Thailand is not experiencing much pressure from superpowers or neighbouring countries in Southeast Asia. This issue has often been overlooked by the Thai government; however, globalisation makes the market more competitive and it is no longer merely controlled by superpowers and neighbouring countries. As a result, Thailand needs to create an appealing atmosphere to attract trading partners and investors from all over the world in order to survive in the global market and legal provisions related to labour protection play a major role in determining this atmosphere. Studies have shown that foreign investors rank the quality of the workforce and political and social stability more than labour costs when they are choosing a country in which to invest.<sup>18</sup> There is also little evidence that countries that fail to respect labour standards are more competitive in the global economy.<sup>19</sup> Thus, "pressure" no longer comes only from the ILO, but also from the home countries of trading partners and investors; therefore, Thailand should take immediate action to ratify the remaining fundamental conventions before it is too late.

According to a preliminary review of the literature, there are a number of concerns related to the ratification of Convention no. 87.<sup>20</sup> However, this article only focuses on the main concern regarding the scope of application, which is that Thai laws, i.e. the Thai Constitution, the Thai Labour Relations Act B.E. 2518, and the Act on State Enterprise Labour Relations B.E. 2544, are inconsistent with the provisions in Convention no. 87. This is the main factor that restrains Thailand from ratifying the convention, since it is not ready to commit to the obligation and amending the law could be burdensome for the Thai government.

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11 Ibid.

12 The United States has ratified 2 fundamental conventions: Convention no. 29 and 182.

13 Canada has ratified 6 fundamental conventions: Convention no. 29, 87, 100, 105, 111, and 182.

14 China has ratified 4 fundamental conventions: Convention no. 100, 111, 138, and 182.

15 India has ratified 4 fundamental conventions: Convention no. 29, 105, 100, and 111.

16 *Declaration on the ASEAN Economic Community Blueprint*, the ASEAN Leaders, Nov. 20, 2007.

17 Malaysia and Singapore have ratified 6 fundamental conventions, Lao and Viet Nam have ratified 5 fundamental conventions, Myanmar has ratified 3 fundamental conventions, and Brunei Darussalam has ratified 2 fundamental conventions.

18 David Kucera, 'Core Labour Standards and Foreign Direct Investment' (2002) 31 *International Labour Review*, 141.

19 Ibid.

20 Sakdina Chatkul na Ayudthaya, *ILO Convention no. 87 and 98: Why Should We Ratify?* (Friedrich Ebert Stiftung, 2010); also see Bundit Tanachaisetwut, *Labour Relations Provisions which are Inconsistent with ILO Convention no. 87 and 98*, Arom Pongpangan Foundation.

As mentioned earlier, the Thai legal provisions regarding labour relations, which are inconsistent with the provisions in Convention no. 87, can be divided into 2 levels; the Constitution level and the Act level. Although amending a constitution is a more complex process than amending an Act, there are still ways in which it can be done. Especially at this time, when Thailand is in the middle of drafting a new constitution, this issue should be seriously considered during the drafting process.

According to Part 11 of the 2007 Constitution of Thailand, liberty to assemble and associate is only provided for Thai people, particularly under the terms of Article 64, in which it is stated that *only Thai citizens* are entitled to enjoy the “liberty to unite and form an association, union, league, cooperative, farmers’ group, private organisation, private development organisation, or any other group.”<sup>21</sup> The Constitution contradicts ILO Convention no. 87, in which it is stipulated that everyone should be treated equally, *without distinction whatsoever*, regardless of nationality.<sup>22</sup> As a consequence, this particular part of the Constitution needs to be amended in a way that enables non-Thai citizens to enjoy their rights.

Nevertheless, only allowing non-Thai citizens to enjoy the freedom of expression under the Constitution is inadequate to meet the ILO standards because the scope of application not only focuses on the nationality of workers, but also their occupation. The interpretation of exceptions under Article 9, paragraph 1<sup>23</sup> of the Convention, namely the armed forces and the police, and more generally, the application of the Convention to public servants and certain other categories of workers, creates another major problem related to the scope of application.<sup>24</sup>

In the second paragraph of Article 64 of the 2007 Constitution of Thailand, it is stated that “[s]tate officials and employees, like other citizens, have the right to join groups.”<sup>25</sup> It is further stated that the right to join groups “shall have no impact on the administration of the country and consistency in the provision of public services as provided by law.”<sup>26</sup> Although the recent Constitution recognises the right of state officials more than any previous constitutions, it is still far behind the requirement of Convention no. 87. It is understandable that the government may hesitate to give state officials equal rights due to concerns regarding the limited administration and consistency of public service. Therefore, the current constitutional provision related to civil servants’ “right to join groups” is inadequate to be equally considered as the right to freedom of association in the ILO convention.

When taking a closer look at the standards contained in Convention no. 87, the phrase, “without distinction whatsoever”, should give all civil servants and state officials the general freedom of association. Any distinction in trade union matters between workers in the private sector and public servants is considered to be unequal, since workers in both sectors should have the right to organise themselves to defend their interests.<sup>27</sup> Putting the rights of regular

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21 The Constitution of Thailand 2007, art. 64.

22 ILO Convention no. 87, art. 2.

23 *Ibid.*, art. 9.

24 International Labour Organisation, *Giving Globalisation a human face*, at 20, ILC.101/III1B.docx (1st ed. 2012).

25 The Constitution of Thailand 2007, art. 64.

26 *Ibid.*, art. 64.

27 See Freedom of Association: The 2006 digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed, para. 218 [hereinafter the 2006 Digest]; also see the 1996 Digest, para. 212; 300th Report, Case no. 1844, para.240.

Thai citizens and civil servants into two separate paragraphs could imply that there is a distinction between these two groups, which violates the provisions of Convention no. 87.

In order to resolve this problem, all civil servants and state officials should be included in the same paragraph of Article 64 of the Constitution as other workers, with the exception of the armed forces and the police. Furthermore, some restrictions could also be applied to high-level employees whose functions are normally considered to be policy-making or managerial, or employees whose duties are of a highly confidential nature.<sup>28</sup> Concern for the impact on the country's administration and the consistency of public services should not be a reason to deprive all civil servants and state officials of freedom of association. Apart from exceptions such as the armed forces, police, and high-level employees, other civil servants should have the right to establish and join any organisation they choose. According to the ILO's reports and cases, freedom of association should be applied to civil servants and employees in the public sector,<sup>29</sup> including civilian staff in the armed forces,<sup>30</sup> local public service employees,<sup>31</sup> firefighters,<sup>32</sup> prison staff,<sup>33</sup> customs officials,<sup>34</sup> employees in the labour inspectorate,<sup>35</sup> teachers,<sup>36</sup> and locally-recruited personnel in embassies.<sup>37</sup> The provisions of Convention no. 151, which specifically regulate labour relations in public service could also be very helpful as a guideline for Thailand to amend its domestic laws. Besides, when Thai legal provisions comply with Convention no. 87, Thailand will be ready to ratify Convention no. 151.

It could be said that the above recommendations to amend the Constitution are uncomplicated; however, they may not be as easy as they appear to be in practice. It has been almost seven decades since Convention no.87 was adopted in 1948 and the hidden factors related to Thailand's non-ratification of this Convention may not be as simple as they seem.

According to the history of Thai bureaucracy, the concept of civil servants originated from "servant of the King" after which the status of civil servants informally shifted to "employees". However, the status of civil servants was still ambiguous before the enactment of the Civil Service Act B.E. 2471.<sup>38</sup> They were sometimes perceived as being employees who worked for compensation, while they were sometimes still recognised as servants of the King.<sup>39</sup> Prince Kitiyakara Voralaksana, Chairman of the Civil Service Bill drafting committee, commented that the status and role of civil servants should be clarified in order to draft a legal provision

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28 See the 2006 Digest, para.253; also see the 1996 Digest, para. 230; 327th Report, Case no. 1865, para.484.

29 See the 2006 Digest, para.218-22; also see the 1996 Digest, para. 212-16; 300th Report, Case no. 1823, para.428; 338th Report Case no. 2364, para. 979; and 327th report, Case no. 1865, para. 485.

30 See the 2006 Digest, para.227-29; also see 330th Report, Case no. 2229, para.941; and 338th Report, Case no. 2387, para. 868.

31 See the 2006 Digest, para.230; also see the 1996 Digest, para. 217.

32 See the 2006 Digest, para.231; also see 338th Report, Case no. 2187, para.170.

33 See the 2006 Digest, para.232; also see 329th Report, Case no. 2177/2183, para.633.

34 See the 2006 Digest, para.233; also see 333rd Report, Case no. 2288, para.829.

35 See the 2006 Digest, para.234; also see 302nd Report, Case no. 1823, para.444.

36 See the 2006 Digest, para.235-37; also see 309th Report, Case no. 1865, para.143; and 326th Report, Case no. 2013, para.416.

37 See the 2006 Digest, para.238; also see 334th Report, Case no. 2197, para.130.

38 Panthip Pruksacholavit, *Civil Servant and Labour Law 2* (LLM Thesis, Chulalongkorn University, 2009) (in Thai).

39 Ibid.

to determine the extent of cover of the protection.<sup>40</sup> During the drafting process, he suggested that Thailand should follow the concept of the United Kingdom, where civil servants were regarded as employees, who were designated by the government as educated citizens to serve in the public sector throughout their lives.<sup>41</sup>

When the Bill was presented to the King and officially approved, the status of civil servants was formally changed from “servant of the King” to “employee in the public sector.”<sup>42</sup> Consequently, the rights of civil servants began to be recognised more as those of employees. Provisions regarding civil servants no longer limited their duties to serving the country; they also covered the rights and protection of civil servants. As a result of the Civil Service Act, civil servants were allowed to enjoy their rights, challenge the administrative order, or even leave their job before they were due to retire. Notwithstanding the fact that the King lost absolute control of civil servants for many decades, the traditional concept of a civil servant still reflects the culture of the system today. Civil servants in Thailand rarely ask for higher wages, despite being paid much less than their counterparts in the private sector; moreover, Thai civil servants hardly ever seek recognition of their right to freedom of association. Although the rights of civil servants in Thai legal provisions are not as extensive as the rights of employees in the private sector, it is not the lack of such provision that prevents civil servants from rarely asking the state to recognise their rights, but the belief that they are servants of the King and the concept of scarifying for the country.

Although there is little evidence that Thai civil servants are suffering from a lack of legal provisions related to freedom of association, they still deserve to be able to enjoy such a right. The first step Thailand should take may not be to ratify this Convention, but rather to clarify the status and role of civil servants to everyone, especially the legislature. It will be easier to amend legal provisions and take other steps when everyone is focusing on the same page. Of course, there are other legal provisions that the Thai government needs to amend and a number of provisions related to details of how civil servants and state officials should join organisations must be enacted. However, since the Thai Constitution is the supreme law of Thailand, action should first be taken against the Constitution to establish the right direction for other lower-ranking laws.

It is absurd that the reason Thailand needs to recognise the right to freedom of association for civil servants does not originate from the request of civil servants themselves; it is more related to the country’s economic benefits than the protection of individuals’ rights. Nevertheless, there should be provisions related to freedom of association in the public sector. While amending the legal provisions is significant, it is more important for Thailand to blur the traditional concept of civil servants from society and urge civil servants to recognise their right to freedom of association too.

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40 Office of Civil Service Commission, *History of Drafting the Civil Service Act B.E. 2517*, in Phrabat Somdet Phra Pokklao Chao Yuhua and Civil Servant: Section 1 Founding the Civil Service System\_192-93 (1993) cited in Pruksacholavit, above n 39.

41 Ibid.

42 Ibid, at 221.