

The Principle of the Protection of Legitimate Expectation: Analysis the Adjudications of Thailand Court

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Abstract—In reference to the legal state in the Thai legal system, most people understand the minor principles of the legal state form, which are the principles that can be explained and understood easily and the results can be seen clearly, especially in the legitimacy of administrative acts. Therefore, there is no awareness of justice, which is the fundamental value of Thai law. The legitimacy of administrative acts requires the administration to adhere to the constitution and legislative laws in enforcement of the laws. If it appears that the administrative acts are illegitimate, the administrative court, as the court of justice, will revoke those acts as if they had never been set in the legal system, this will affect people's trust as they are unaware as to whether the administrative acts that appoint their lives are legitimate or not. Regarding the revocation of administrative orders by the administrative court as if those orders had never existed, the common individual surely cannot be expected to comprehend the security of their juristic position. Therefore, the legal state does not require a revocation of the government's acts to terminate its legal results merely because those acts are illegitimate, but there should be considerations and realizations regarding the "The Principle of the Protection of Legitimate Expectation," which is a minor principle in the legal state's content that focuses on supporting and protecting legitimate expectations of the juristic position of an individual and maintaining justice, which is the fundamental value of Thai law.

Keywords—Legal state, Rule of law, Protection of legitimate.

I. INTRODUCTION

IN the period that the administration uses their administrative control to interfere with the private sector's activities more and more as they want to maintain justification in society and to stop both monopolization and exploitation [1]. The administration has become a part of complicated living in societies, such as using state power to control people's freedom or undertake any activities to fulfill people's needs. Thus, the usage of administrative control is a very crucial part in superintend people's lives [2]. If the direction of power of the administration is not reliable, it will affect people's behavior. As a result, the idea of the protection of people's legitimate expectations from administrative control was established, and the administration is forbidden to use their power without constraint unless they first consider people's trust. Therefore, security and stability is one of the principles of the legal state, which results in its mandatory consideration of the juristic position of the people before brandishing any state power.

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The principle of the protection of legitimate expectations is a legal principle indicating that individual who is under the state's power can indeed trust in the clarity and security of any decisions performed by any government officer, and that trust must be protected. In general, the principle of the protection of legitimate expectations has to be enforced together with legitimate principles as these two concepts are minor principles of the legal state [3]. However, in the situation when the principle of the protection of legitimate expectations contradicts the legitimacy principle, it will be the responsibility of the supreme authority of the government to assay the two principles in order to determine whether to expel or delete the administrative act that is illegitimate, to protect legitimate expectations of individuals based on that administrative act, or to use any approach to create a justified equality between those two principles. Nevertheless, the principle of legitimacy and the principle of the protection of legitimate expectations are minor principles under the legal state, as both are similar in equality, so the supreme authority of the government cannot ignore to consider one of these two principles in the situation when they contradict each other.

II. OBJECTIVE OF THE STUDY

This research is for the purpose of studying ideas concerning the principle of the protection of legitimate expectations and the methods in pursuing the principle of the protection of legitimate expectations under administrative orders of the administrative court.

III. RESEARCH METHODOLOGY

To study this research, a researcher collects both domestic and international paper from books, research, academic document, and laws and then conducts comparison analysis and concludes by means of depiction.

IV. RESULTS OF THE STUDY

The study reveals that the principle of the protection of legitimate expectations and legislative laws implemented by the principles of legitimacy and expectations is as follows;

A. The Idea of Legitimacy and Expectations

The idea of legitimacy and expectations contains three ideas which are;

1. The Legal State

The legal state is the idea that the government must govern by using laws, whose laws must be reasonable and able to protect people's freedom from the arbitrary use of power by the administration. As a result, laws and administrative acts must be predictable and stable, which principle refers to the security and stability of law. Nevertheless, in order to establish the security of rights, there is a requirement to protect people's legitimacy and expectation towards the administrative acts so that the legal state will be more secure.

2. The Reliance Theory

The reliance theory is the idea that when a person fosters trust in another person; therefore, that person must act under the dictates of that trust. When this idea is applied to the administrative laws principle, it mandates responsibility in the use administrative power. Even though the administration has control of any operation for the benefit of public purposes, there are limitations that forbid causation of immoderate difficulties or damages to the people, especially breaking the principles of legitimacy and expectation under riding the existence of administrative acts. For when people do not trust in the legitimacy of and expectations for administrative acts, it will cause confusion and disorder in society, except in such cases when legitimacy and expectations are broken for the benefit of the public more so than the damage done to an individual.

3. The Principle of Good Faith

The principle of good faith is the principle of general laws developed from private laws. The purpose of this principle is to create genuine justice, not only relying on legal processes. The principle of good faith exists in order to protect innocent person in case there is a loop hole in the law that might cause injustice [4]. When applying this principle to administrative law, the administration then must consider people's sincerity of intention towards executing administrative acts. Although in some cases, some administrative acts are illegitimate, the administration is not allowed to commit any acts that affect innocent people.

B. Laws in Relation with the Principle of Legitimacy and Expectations

Thailand has established the principle of legitimacy and expectations in the Administrative Procedure Acts of 1996, which act originates in the Law of Administrative Procedure 1976 of Germany. The rule is about the revocation of administrative order; administrative order that results in impotence for the administrative order receiver, then it does not create legitimacy and expectations to people because it does not bring the security of rights or any juristic position. However, if there be any acts that bring benefits to people, the administration then must consider the legitimacy and expectations of the people, of which there might be a revocation for both legitimate and illegitimate administrative orders.

1. Concerning the revocation of legitimate administrative order, it is possible to do so if situations or conditions of

that order can be changed within the limits of order in order to maintain the people's legitimacy and expectations. [5]. As mentioned in Article 53 Paragraph 2 of the Administrative Procedure Acts of 1996, which matches up with Article 49 of the Law of Administrative Procedure 1976 of Germany that "...administrative order that is legitimate, which is useful for the administrative order recipient may be all revoked, or only some parts, to be effective during the revocation or in the future at some period. Only when following cases..." This shows that the revocation of a legitimate administrative order focuses on only the cases that are indicated by law; the administration is not allowed to do anything arbitrarily.

Regarding the reasons of the above cases, The Administrative Procedure Act of 1996 of Thailand has been summarized as follows;

- (1) In the case that the truth and behavior in issuing an administrative order has been changed at the point where if there already exists such truth and behavior during the issuance of that order, the administration will not issue that administrative order, and if there is no revocation of that administrative order, it will cause damages to public benefits.
- (2) In the case that an existing provision of law that relates to issuance of administrative order has been changed, consideration of the provision of laws that cause benefits to that person will be changed. If there is such a provision during issuance of an administrative order, the administration will not complete such an order. If no revocation is applicable, it might cause damages to public benefits. However, such revocation is doable when the recipient of benefits has not utilized the benefits or has not received the benefits from such an administrative order. If the recipient of benefits has taken the benefits or used them already, the revocation can only be revoked on the portion that has not been used.
- (3) In the case of protecting or deleting the issues that might cause damage to public benefits or the people, the administration is able to revoke administrative orders using the required laws; however, the administration shall pay money to compensate the damages that have been caused by the revocation of legitimacy and expectations of the administrative order.
2. For the illegality of revocation of administrative orders, in general, the administration shall be bounded to the law in action, which means, any action of administration shall be made under the law authorizing or under the scope of law [6]. The illegality of revocation of administrative orders can be cancelled. In this case, it is to provide remedy for the result obtained from the violation of the provisions of the law; however, if the administrative action has not been revoked by the organization with the authority to make an inspection, the results of the administrative order shall remain in effect until it is withdrawn according to the stability.

For the illegality of revocation of administrative orders in order to maintain the principle of legality of administrative act

is the principle to face the fairness to those who have been affected if the revocation of administrative order is illegal as it is very difficult that general people will know the illegality of revocation of administrative order in such action, and people tend to rely on the action of the administration where the officers are reliability.

For guidelines on the protection, reliability, and credibility of people in public towards the administration action can be summarized as follows:

- (1) The administrative order is characterized as a manner which provides benefits to person, and it can be divided into the administrative order with the characteristic in providing benefits to the command recipient, and this right can be used only once or it can be paid anytime according to the specific time, or the benefits can be divided, or it can have the similar nature and command that is useful for other benefits.
- (2) The beneficiary has a reliable and credibility the existence of the administrative order, which is the case that the beneficiary has received benefits from the administration order or the operation related to the properties without making any changes. In this case, the administration cannot cancel the administrative order or if it is needed to be cancelled, it is fine, and if the cancellation is made to the administrative order, unless, the administrative order is not honest, and the damage compensation shall be identified in order to pay the compensation to the beneficiary or the beneficiary is a person causing defection in administrative order.
- (3) The protection on reliability and credibility of the illegal administrative order recipient who has the manner of the advantage utilization provided in Article 51 of the Administrative Procedure Act B.E. 2539, with the prototype from Article 48 of the Administrative Procedure A.C. 1976 from Germany. It can be summarized that the administrative order with the manner of advantage utilization for the order recipient by providing only single right, by providing payment at any given time, by separating gained benefits, or any similar cases. This type of the cancellation of the revocation of the administrative order is needed to weigh the protection between reliability and the public interest and find out which one has more weight. The administration cannot cancel the administrative order, but if the public interest has more weight on it, the administrative order can be cancelled. However, the reliability and credibility are needed to be taken into account. It can be cancelled as a whole or in some parts, or it can take an effect retroactively. However, the honesty should be taken into consideration.

In case that the administrative orders that appear to benefit the recipients by other rights such as gun license issuance or the order of appointment, etc. This type of order provides advantage which cannot be separated, and if it is needed to be revoked, it shall be cancelled as a whole, or else, it cannot be cancelled.

- (4) For the time limit for the cancellation of the revocation of the administrative orders and the administrative orders' recipient protection with the advantage manner, Article 49, paragraph two of the Administrative Procedure Act B.E. 2539 regulated about the fixed time limit. It can be prescribed that the administration will cancel the administrative orders with the advantage manner for 90 days. If it exceeds such period, the administrative orders is the final and cannot be re-cancelled, except there is an illegal action occurred by a dishonest recipient.

Later, the Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 is announced, and this act supports the enforcement of the administrative court in case there is a cancellation on the administrative orders. The Article 72, paragraph two is the power of court's discretion to make a consideration whether or not the cancellation shall have retrospective effect or not, and it shall affect to the future at any times, or, it can be specified with any conditions. In this case, the court shall consider the fairness of the case.

V. DISCUSSION

The protection of legitimate expectation for administrative act existence requires that the Administration shall protect legitimate expectation of individuals who are beneficial from administrative act against overruled administrative act. Administrative courts are required to strike the balance between legitimate expectation of those who receive administrative act and legality of administration actions. For this reason, administrative courts cannot decide to have revocation of wrongful administrative act with only the ground of unlawful administrative act.

However, there has been still a wide range of decisions made by Thai administrative courts regardless of protection of legitimate expectation concerning with individuals who receive administrative act on the decision of revocation of wrongful administrative act that is actually beneficial for them despite the fact that the principle of protection of legitimate expectation has been deep-seated in Thai administrative law as appeared in the Administrative Procedure Act, B.E. 2539. Administrative courts have often decided to have a retroactive revocation of administrative act in order to be legally terminated as if it never exists despite such a revocation has an unfairly negative impact on beneficiaries of administrative act. It also destroys the security of their juristic position or *modusvivendi*, for instance, the Supreme Administrative Court's judgment No.89/2549 (2006) decided to quash the notification on appointment of Deputy Director of Revenue Department. The Supreme Administrative Court judged that the notification of appointment of 4 officials for the position of deputy director was the wrongful administrative act and the Supreme Administrative Court hereby decided to have a retroactive revocation of such act to be legally valid since the date of appointment. In the process of hearing, the 4 mentioned officials had availed of notification of appointment and in that point of time; they never knew what kind of judgment would be made by the Supreme Court. And when

the Supreme court made a final decision, the 4 mentioned officials was appointed up to the higher rank than the position of Deputy Director but later, the Court judged that Defendant was required to perform duty to issue notification of appointment of 4 mentioned officials back into the former position or equivalent prior to be appointed as Deputy Director and was held to be as if they never take a position of Deputy Director or higher position at all. That decision has a considerably negative impact on juristic position of 4 mentioned officials.

The second case is the Supreme Administrative Court's judgment No. 33/2557 (2014). The Court judged that the notification of transferring Mr. Thawin Pliansri from the office of Secretary General of the National Security Council (NSC) to an office of Prime Minister Advisor was legal but the discretion exercised thereon was unreasonable because it did not appear that Mr. Thawin had carried out his duties ineffectively or erroneously or he failed to abide by the policy of the government. The court thus revoked such an administrative act and ordered the OPM to transfer Mr. Thawin back to his former office with retroactive effect to the date of announcement (30 September 2011) - almost over 3 years.

It is found that after transferring Mr. Thawin Pliansri from the office of Secretary General of the National Security Council (NSC), subsequent 2 officials were appointed to hold office instead of Mr. Thawin. Lieutenant General Paradorn Pattantabutr hold office as a position of National Security Council chief in the period of the Supreme Court's Judgment was made. He is considered as a third party not involving with this case and besides he took this position in good faith because it appears that no one requested the Court to revoke the notification of appointment of Lieutenant General Paradorn Pattantabutr. Thus, the Supreme Court's Judgment to revoke the transfer of Mr. Thawin Pliansri with the retroactive effect since the date that the notification is inured has a negative impact on taking position of National Security Council chief of Lieutenant General Paradorn Pattantabutr and continuities of tasks assigned by the Office and government in that position. Moreover, the revocation of transferring Mr. Thawin Pliansri with the retroactive effect since the date that the notification is inured is only effective in legal sense but not effective de facto because in reality we cannot cut back anymore.

With regard to the Judgment, researcher argues that administrative court has rights to revoke administrative act according to Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 in section 72 paragraph 2. It obviously stipulates that the Court is able to exercise its own discretion whether it is suitable to revoke with retroactive effect or nor or even determine to have futuristic effect in the designated point of time or even formulate certain conditions on the consideration of specified justice. Furthermore, another significant matter of general principle of administrative law is that in administrative hearing and trial, administrative courts are required to maintain administrative justice by striking the balance

between taking care of individual interest of plaintiff and impact that may occur on public interest and Administrative Organization of the State exercised by administrative officials. There are many ways to revoke wrongful administrative act depending on what extent severity of the wrongful. If that administrative act is obviously severely wrongful, it shall be assumed that such an administrative act never exists or invalid at the beginning. The Court only judged its void regardless of revocation of administrative juristic act. In the event that regulations or directives that are considered as wrongful are in the normal level or are quite ambiguous, it shall be held that such a regulation or directive is legal valid until revocation is made. If no one requests the Court to determine that regulation or directive is wrongful within the legally designated period, regulations or directives shall continue to inure and never to be revoked anymore, of which based on the protection of legitimate expectation in administrative juristic act.

Hence, the Supreme Court's judgment in this case has a negative impact on juristic position of those involved when the Court decided to have a retroactive revocation of wrongful administrative act. Worse, the Court had not decided why those involved in this case was not protected by legitimate expectation of individuals who receive administrative act. Taking into account basic principle of Rule of law, the Supreme Court's judgment in this case is only consistent with principle of legality that is in fact a subordinate pattern of principle of Rule of law. It significantly causes unfairness against individuals who are beneficiaries of administrative actions.

In the light of Rechtsstaat or Rule of law, problems and conditions concerning with judgment and decision of judiciary based upon the fact that judiciary is solely prone to give more priority to principle of legality when it decides to have revocation of wrongful administrative act that is beneficial for individuals who receive that act. In this regard, it is considered as a question of justice and legality and even Rule of law. Furthermore, certain faults and misconception of Thai legal system with regard to contents of Rechtsstaat or Rule of law would occur. In other words, it would be formalized as a norm in the event of wrongful administrative act, judiciary potentate tacitly decide to have a retroactive revocation of such an administrative act as if it never exists or even legally validated at all. Regardless of results emerging from revocation, it causes unfairness in the fact that individuals' interests concerning with their position or *modus vivendi* are considerably depreciated. Worse, it would have more negative impact if such an administrative act is integral of mechanism or basis of public administration system.

VI. CONCLUSION

In Thailand, the concept of Legitimate Expectation has been adopted and formulated primarily in the Administrative Procedure Act, B.E. 2539. This notion originated from the principal of legitimate expectation in administrative as appeared in the German Administrative Procedure Act (*Verwaltungsverfahrensgesetz*) of 1976 which was gradually developed from the notion of the protection of legitimate

expectation of individuals who have received, or been affected by administrative decisions. And when Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 is enacted, it authorizes the administrative courts to have their own judgment on whether formulating retroactive revocation of administrative decisions or not, or even formulating to what extent that such a decision will have been affected in the future, or they have their rights to define certain conditions with regard to fairness of specified case. In the event that administrative courts are entitled to have a revocation of administrative act that is beneficial for individuals who receive such a decision with legitimate expectation and in good faith, the court and public administration will be distrusted by people. Consequently, if the revocation of administrative that is beneficial for individuals who receive such an act, administrative courts should also take into account the legitimate expectation.

However, there is still be quite few application of legitimate expectation into case since the notion has just been adopted in Thailand compared with principle of legality of Administration Action that has been widely known and understood and based upon to decide the revocation of administrative act by legal officials. And if the revocation of administrative act causes any damage for those who receive administrative act with legitimate expectation, they shall be compensated for liability for wrongful act of official. Thus, the principle of legitimate expectation should be taken into account in case of administrative court's decision to revoke administrative act with regard to public interest.

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