Development of Social Enterprises in Thailand: A Critical Investigation of the Social Enterprise Promotion Act 2019 within a Theoretical Framework of Law and Development

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Abstract

From 2000 onwards, social enterprises (SEs) are growing in number in several countries around the world (e.g. United Kingdom, South Korea, Singapore). In some countries, legislation was passed to ensure the promotion of SEs as well as their good governance. This paper adopts qualitative methodology to investigate the role of law in promoting the development of SEs. It contributes theoretically by adopting a general theory of law and development established by Yong-Shik Lee for analysing how the introduction of SE law in general, and the enforcement of the Social Enterprise Promotion Act (SEPA) of Thailand in particular, may pose challenges to the development of SEs. From the perspective of the general theory of law and development, the "regulatory impact mechanisms" comprising of 'regulatory design,' 'regulatory compliance,' and 'quality of implementation' are of crucial importance for achieving desirable outcomes, particularly sustainable development. Distilled from the theory, we argue that the key challenges of Thailand's SEPA in facilitating development of SEs in the country are consisted of the issues on regulatory design and quality of implementation.

Keywords: Social Enterprises, Social Enterprise Legislation, Law and Development

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พัฒนาการของวิสาหกิจเพื่อสังคมในประเทศไทย: การศึกษาพระราชบัญญัติส่งเสริมวิสาหกิจเพื่อสังคม พ.ศ. 2562 ด้วยกรอบทฤษฎีกฎหมายกับการพัฒนา

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บทคัดย่อ

นับตั้งแต่ปี ค.ศ. 2000 เป็นต้นมา วิสาหกิจเพื่อสังคมในหลายประเทศทั่วโลก (เช่น สหราชอาณาจักร เกาหลีใต้ สิงคโปร์) เติบโต และเพิ่มจำนวนมากขึ้นเรื่อย ๆ ในบางประเทศ มีการตรากฎหมายขึ้นบังคับใช้เพื่อเป็นหลักประกันในการส่งเสริมวิสาหกิจเพื่อสังคมและการกำกับดูแลกิจการที่ดีของวิสาหกิจดังกล่าว บทความนี้ใช้ระเบียบวิธีวิจัยเชิงคุณภาพในการศึกษาบทบาทของกฎหมายในการส่งเสริมพัฒนาการของวิสาหกิจเพื่อสังคม การศึกษาบทบาทของกฎหมายตามที่กล่าวข้างต้นสร้างคุณูปการในเชิงทฤษฎีผ่านการประยุกต์กรอบทฤษฎีกฎหมายกับการพัฒนาซึ่งพัฒนาขึ้นโดย Yong-Shik Lee มาใช้ในการวิเคราะห์ว่าการตรากฎหมายเฉพาะสำหรับวิสาหกิจเพื่อสังคมในภาพรวม และการบังคับใช้พระราชบัญญัติส่งเสริมวิสาหกิจเพื่อสังคม พ.ศ. 2562 ของประเทศไทยอาจนำมาซึ่งความท้าทายในการพัฒนาวิสาหกิจเพื่อสังคมได้ จากแนวคิดของทฤษฎีกฎหมายกับการพัฒนากลไกการสร้างผลกระทบทางกฎหมาย ซึ่งประกอบไปด้วย การออกแบบกฎหมาย การปฏิบัติตามกฎหมาย และคุณภาพของการนำ (กฎหมาย) ไปสู่การปฏิบัติ ล้วนแต่มีความสำคัญส่งผลต่อการบรรลุผลลัพธ์ที่ปรารถนาได้ จากการวิเคราะห์ทฤษฎีดังกล่าว ผู้เขียนมองว่า ความท้าทายสำคัญของ พ.ร.บ. ส่งเสริมวิสาหกิจเพื่อสังคมในการขับเคลื่อนการพัฒนาวิสาหกิจเพื่อสังคมในประเทศไทย ประกอบไปด้วยประเด็นปัญหาในด้านการออกแบบกฎหมาย และคุณภาพของการนำ (กฎหมาย) ไปสู่การปฏิบัติ

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Introduction

Social enterprises (SEs), entrepreneurial entities adopting a market-based approach for addressing social (and/or environmental) issues, are no longer new in many societies (Kerlin, 2009). From 2000 onwards, SEs are growing in number in several countries around the world (e.g. United Kingdom, South Korea, Singapore) (Social Enterprise UK, 2019; Bidet & Defourny, 2019). Notably, the development of SEs in recent years is closely in concert with the driving of Sustainable Development Goals (SDGs) implementation as the fact demonstrates that many SEs (e.g. the Big Issue Foundation, UK) around the globe contribute to employment opportunities and poverty reduction especially for the people who are socially disadvantaged while some others (e.g. Soft Landing Mattress Recycling, Australia) contribute to waste management and environmental protection (see Prateeppornnarong, 2021).

Originally evolved from the non-profit sector, nowadays, SEs in many countries vary in forms and legal statuses. In some jurisdictions, legislation was passed to ensure the promotion of SEs as well as their good governance. Until now, Thailand is one of a few countries to have enacted specific legislation – the Social Enterprise Promotion Act (SEPA), B.E. 2562 (2019) – governing SEs activities in the country. It is argued, however, that having a specific legislation may become a double-edged sword posing challenges to the development of SEs especially in case where the law is not carefully crafted (Nuchpiam *et al*., 2018) – noting that most SEs in Thailand have started their businesses for less than a decade to date.

This paper adopts qualitative methodology to investigate the role of law in promoting the development of SEs in Thailand. In so doing, it bases the examination and analysis upon a general theory of law and development established by Yong-Shik Lee (2019). The findings of this research, arguably, bring about wider implications for future development of SEs in Thailand as although a marked increase in the numbers of SEs in the country can be noticed in recent years, there is a dearth of comprehensive research on this subject. As a result, the findings of this research could serve as a spur for serious consideration and action of those who involved with SEs, especially the regulator of SEs in Thailand, namely the Office of Social Enterprise Promotion (OSEP) and the government, to formulate a package of policies that would promote and govern SEs in Thailand more effectively.

Following on from this introduction, in Part 2, we briefly review key literature on SEs in general, the development of SEs in Thailand in particular, the SEPA 2019 and other regulations governing SEs in Thailand, and a general theory of law and development established by Yong-Shik Lee. Then, the research method adopted for this paper is explained in Part 3. Next, we analyse the findings from in-depth interviews in Part 4. Finally, in Part 5, the discussion and conclusion are presented.

Research Objectives

1. To briefly examine the concept and practice of social enterprise
2. To investigate the role of law in promoting the development of SEs by adopting a general theory of law and development
3. To offer some recommendations on the promotion and governance of Thai SEs under the Social Enterprise Promotion Act 2019

Literature Review

SEs: Concept and Practice

As noted, in many countries, the practice of SEs is no longer a new phenomenon. Presumably, SE as a concept originated in the European continent in the 1970s; particularly the term "social enterprise" was first coined after *Nikhilesh Dholakia* and *Ruby R. Dholakia* published their article titled – *Marketing planning in a social enterprise: A conceptual approach* – in the European Journal of Marketing. Conceptualizing SE may not be straightforward as the nature, characteristics, forms and practices of numerous SEs around the world are somewhat different (Ridley-Duff & Bull, 2016). That said, in this paper, we argue that SE as a concept refers to an entrepreneurial activity seeking to facilitate social and/or environmental development; thus, SE as an organisation can be simply defined as a business venture with social/environmental purposes. Nevertheless, it should be noted that while the running of SEs is based on a market approach similar to normal business, the ultimate goal of SEs is not profit maximization that would please the owner(s) and/or stakeholders as the majority of profits has to be utilized for the purposes of the running of that particular SE (Prateeppornnarong, 2021).

The emerging of SEs stemmed from that fact that the non-profit sector is financially constrained while several non-profit organisations are arguably operated in a paternalistic

fashion – an individual influence of the organisational direction – all of which result in voluntary failure (Salamon, 1987). To enable non-profit organisations to stand on their own feet, a market-based approach was adopted for making these organisations more financially independent so that they can continue to create positive impacts on wider society (Teasdale, 2011; Khieng & Dahles, 2015; Nuchpiam *et al*., 2018). In the present, however, SEs do not necessarily have their historical roots in the non-profit sector as many of them have registered as commercial entities from the outset. It should also be noted forms and legal statuses of SEs in the countries and jurisdictions without a specific legislation governing SEs are more diverse and varied than those countries having a specific legislation; for example, in the UK, the forms of SEs range from a sole proprietorship to a public limited company (see Richardson, 2015).

In Asia, the concept of SE was well accepted as a trend since 2000 particularly in East Asia (Bidet & Defourny, 2019). South Korea is, arguably, the country that has gone furthest among other Asian countries in terms of promoting SEs as the Social Enterprise Promotion Act (SEPA) was enacted in 2007 with a view to promoting and governing SEs in the country (Bidet *et al.*, 2019). In Southeast Asia, SEs have begun to burgeon in the last five years in Singapore, the Philippines, Malaysia, Indonesia and Thailand (British Council *et al*., 2021). In Singapore, for instance, SEs are on the rise every year. According to the annual report of Singapore Centre for Social Enterprise (raiSE) (2020), the revenue generated by Singapore's SEs in 2019 was almost double of that of in 2018 with 176 million Singapore dollars (SGD). Overall, SEs in Southeast Asian countries are increasing significantly and are contributing most to social development particularly employment opportunities (British Council *et al*., 2021).

The Development of SEs in Thailand

Even though SE as a concept and the law have only recently been introduced in Thailand, SE-like organisations have been around in the country for a few decades (Nuchpiam & Punyakumpol, 2019). Established in 2002 as a traditional non-profit body, the Chaophraya Abhaibhubejhr Hospital Foundation has registered with the OSEP as a non-profit-sharing SE[1] in 2019 following the adoption of the SE-like approach for more than a decade. The core objectives of the foundation are to promote the development

[1] See the differences between profit-sharing and non-profit-sharing SEs in the next subsection.

of Thai traditional medicine and to subsidise the Chaophraya Abhaibhubejhr Hospital through the production and sale of herbal medicine/ cosmeceuticals (Prateeppornnarong, 2021). Notably, most Thai SEs apparently developed from traditional non-profit organisations. To date, there are 179 SEs and another 52 SE-related groups registered with the OSEP (Office of Social Enterprise Promotion, 2022), while there are many other unregistered SEs running their businesses throughout the country.

Although the number of registered SEs in Thailand increases every year following the introduction of the SEPA, the concept of SE is still something of a novelty in Thai society; thus, some people who are not already familiar with the term mistakenly conflate the concept of SE with that of Corporate Social Responsibility (CSR) while some others conflate SEs with Community-based Enterprises (CBEs) taking root in the country for more than two decades (Nuchpiam & Punyakumpol, 2019; Page & Katz, 2020). Prateppornnarong (2021) explained, however, that SE and CSR are different in terms of concepts and approaches. First, SE as a concept places importance on addressing social issues which an enterprise does not create from the first place while CSR as a concept distilled from business ethics emphasizing on how a corporate organisation should prevent from creating the impacts, mostly negative ones (e.g. environmental damage), or pay responsibility for the damage it caused. Second, SEs are commercial entities aiming at fulfilling their social purposes while CSR are activities organised by private profit-oriented organisations.

In the Thai context, comparing and contrasting between SEs and CBEs proves much more difficult as these two types of enterprises overlap each other in characteristics and goals (Nuchpiam & Punyakumpol, 2019). In several countries, the differences between SEs and CBEs do not exist as the practice of SEs is predominantly associated with the involvement of local communities; Goodwill Industries, an American SE, for example, can be indicative of how the running of an SE involves the roles of members of local communities its branches located (see Gibbons & Hazy, 2017). Nevertheless, comparing Thailand's SEPA with Community Enterprise Promotion Act (CEPA) B.E.2548 (2005), a number of differences between SEs and CBEs in Thailand can be identified. First, Thailand's CBEs do not have to be a legal entity. Second, the key objective of CBEs in accordance with the CEPA is to improve standard of living, generating income for members of a CBE. Third, the scope of SEs is much wider while the scope of CBEs is concerned with producing and selling goods (Prateeppornnarong, 2021).

SEPA 2019 and Other Regulations Governing SEs in Thailand

Effectively, the Rule of the Office of the Prime Minister on Thai Social Enterprise Promotion B.E. 2554 (2011) was the first law of the land aimed at promoting SEs in Thailand. The introduction of such regulation brought about the establishment of the Thai Social Enterprise Promotion Board (TSEPB) and the Thai Social Enterprise Office (TSEO) as key pillars for promoting SEs. It should be noted that the promotion of SEs under the regulation was mainly concerned with raising public awareness on the concept of SE and SEs as entrepreneurial activities. Noting that, during which time, SE was a novel concept in the country, this was one of the reasons as to why SEs were mostly referred to as "social business" [*Kitchakan Phuea Sangkhom*] in Thai (Nuchpiam *et al*., 2018).

Modelling on Korea's SEPA, Thailand's SEPA has been passed in 2019 as the first statutory law of the country aimed for both the governance and the promotion of SEs. There followed the establishment of the Office of Social Enterprise Promotion (OSEP) as a responsible body for monitoring and promoting SEs in the country. The SEPA introduces the certification system for the governance of SEs. Any organisations practicing SE are encouraged to register with the OSEP as an SE (Section 8).[2] The organisations eligible to register as SEs should satisfy the following key requirements:

- being a juristic person registered under Thai laws (Section 3);
- having its main purposes for paid employment; or addressing social and/or environmental issues; or contributing to the wider society (Section 5(1));
- spending 70 percent of distributable profits gained in each fiscal year for social/environmental purposes (Section 5(3));
- having good corporate governance (Section 5(4)).

Under the Thai law, however, SEs can be certified as profit-sharing SEs or non-profit-sharing SEs (Section 6). This means only the profit-sharing SEs that are bound by the requirement on distributable profits spending.

When it comes to the promotion of SEs in Thailand, Section 59 of the SEPA prescribes that SEs may be eligible to receive financial aid from the Social Enterprise Promotion Fund, exemption of taxes, preferential procurement terms, and other benefits

[2] As of February 2022, there are 179 business ventures certified as SEs, see https://www.osep.or.th/#pll_switcher

as prescribed in other laws and regulations. In terms of the Promotion Fund, the core objective of it is to assist SEs with loans within a minimum and maximum period of two to four years. For the exemption of a corporate tax, it is only the non-profit-sharing SEs that are eligible to receive such benefit while the profit-sharing ones are essentially subjected to regular tax rules. In addition, in 2021, the Ministry of Finance has just passed a ministerial regulation promoting the procurement of goods and services delivered by SEs. Finally, the Thai Capital Market Supervisory Board (CMSB) issued the notification in 2020 allowing SEs to proceed with public offering without being a listed company in the Thai Stock Market. Not only benefits, Thai SEs are also bound to comply with certain duties. First, SEs have to submit to the OSEP a financial report and an impact report annually. In addition, SEs need to contribute to the Social Enterprise Promotion Fund (Prateeppornnarong, 2021).

In respect of SEs governance, there are Social Enterprise Promotion Board (SEPB) and the OSEP. The SEPB governs SEs affairs in Thailand at the macro level, devising policies and laws in relation to both promotion and governance of SEs. As regards the OSEP, its role primarily is concerned with monitoring the operation of SEs on a day-to-day basis. For instance, the OSEP acts as a registrar for Thai SEs. It also has the authority to monitor and inspect whether SEs run their businesses in compliance with the SEPA (Prateeppornnarong, 2021).

Overview of Law and Development

The idea behind law and development can be traced back at least to Max Weber (Krevor, 2018).[3] Even without invoking such an earlier root, we can say that law and development has a relatively longstanding disciplinary basis. Launched more than half a decade ago – though as "more of an adjunct to development policy institutions than an autonomous academic field" (Trubek, 2016: 302) – law and development has now become, as Trubek (2016) characterizes it, "alive and well" as a field of study. However, its academic status has admittedly been far from well established. There is very little clarity as to what this field of study encompasses (Prado, 2010). According to Tamanaha, law and development is better not seen as a field since its work is "more aptly described

[3] In Weber's view, the operation of a capitalist market must be supported by a high level of predictability and calculability for actors in the market. This is the product of what Weber called "legal rationality".

as an agglomeration of projects advanced by motivated actors and supported by external funding" (Tamanaha, 2011: 220). It is therefore imperative that we make clear how law and development can serve as an approach for this study.

In doing this, we propose to provide a brief account of the evolution of law and development, which is generally understood as comprising three stages or "moments", and assess its relevance to the subject matter of this study. The three-stage evolution of law and development has been well documented. Despite continuing contention over its disciplinary status, we will, following Trubek, designate law and development as a field of study. Trubek sees this academic field as getting started in the 1960s with the start of support for legal reform projects by international development agencies. Though its evolutionary path came to a halt in the late 1970s, the field experienced a revival in the late 1980s and early 1990s, before entering its current stage at the beginning of the twenty-first century (Trubek, 2016). He calls the three different stages "moments", though the timeline of the evolutionary path has been differently identified in some of his other articles. This is a difference in minor detail (Trubek & Santos, 2006). The main contour of the timeline is unmistakably clear – the period starting roughly from the 1950s to the present.

We will not address the numerous issues being considered or debated in law and development, such as the question why a country like China has achieved impressive economic growth despite its dismal rule of law situation in this brief account of the evolutionary path of law and development. We will only roughly examine the three "moments" along this path, and the associated ideas and reform programs. The three moments have been known, respectively, as the "law and development movement", the "good governance programs", and the "rule of law and development", among other designations (Tamanaha, 2011).

First Moment: The law and development movement

Known as the law and development movement, the first moment focused on the role of the state in managing the economy and transforming traditional societies. Conceived in this way, law simply served as a tool for economic management and a catalyst for social change (Trubek & Santos, 2006). The 1950s and 1960s witnessed rapid decolonization, from which an academic interest in the development of the newly

independent states emerged. Also known as "modernization theory", the academic interest focused on their economic and political development, with legal development forming an integral aspect of both (Tamanaha, 2011). According to Lawrence Friedman, the idea is that "a more highly developed legal system leads to a more highly developed economy and polity" (Friedman, 1969: 58).

The idea led to the initiation of law reform projects, whose number was still small, and which targeted only a few parts of the world. The law and development movement thus took shape on the basis of the assumption that "transplanting law from advanced countries was a shortcut to legal modernization" (Trubek, 2016: 5). This involved transplanting both legal institutions and codes into the developing countries, as well as establishing and/or reforming legal education and professional organizations in accordance with the western models.

The project came to a failure, for which various explanations have been offered (Trubek, 2016). However, it should be noted in this connection that the law and development movement already collapsed at the formative stage of its development as a field; that is, it had no chance to further develop. According to Trubek (2016: 8), "[t]he reason the field declined in the 1970s was that it lost the support of the development agencies before it could build a sustainable base in the academy". Moreover, in academia itself, the movement could not take hold as an academic field, given its tentative and experimental quality that did not fit the current models of authoritative legal scholarship. There was also an absence of an academic career path for this field in U.S. law schools, and students' interest remained limited and critical, especially at the tumultuous time of students' opposition to U.S. intervention abroad.

Second Moment: The good governance programs

The late 1980s ushered in new ideas, which moved law back to the center of development policy making. Under the influence of the neoliberal theory, what is called "the project of markets" came to the fore. Economists who stressed the importance of markets to development came to "rediscover" the significance of institutions (Davis & Trebilcock, 2008: 902);[4] this, in turn, led them to focus on legal institutions needed both

[4] The "rediscovery" of law by economists coincided with the emergence of the New Institutional Economics (NIE), which incorporates a theory of institutions – laws, rules, customs, and norms – into economics.

to facilitate the operation of markets and limit state intervention in the economy.

> For many who promoted the project of the markets, growth would be best achieved if the state stayed out of the economy except to the extent that – through law – it now provided the institutions needed for the functioning of the market. These include guarantees for property rights, enforcement of contract, protection against arbitrary use of government power and excessive regulation. All this was packaged as "good governance" and deemed important both to stimulate domestic growth and attract foreign investment (Trubek, 2006: 85).

During this second moment the idea was clearly for law to foster private transactions. The focus was naturally on private law that would protect property, facilitate contractual exchanges, impose strict limits on state intervention, and ensure equal treatment for foreign capital. Most notably, this was the moment of a massive increase in both the size and scope of investment and projects to support legal reform: law and development indeed became a "big business".

> The projects of this new second moment in law and development covered all aspects of the legal system from courts and legislatures to bar associations and law schools with reform of the judiciary the top priority. The size and scope of these projects dwarfed the investments in the L&D in the first moment (Trubek, 2016: 12).

Many developing countries actually suffered from the neoliberal policy prescriptions they had to adopt as a condition for receiving development assistance. On the intellectual front, critiques of the neoliberal perspective on development resulted in new ideas about development, particularly the recognition of the limits of the markets and the expansion of the definition of development. Markets could fail and compensatory intervention was required, and development came to mean more than economic growth (Trubek & Santos, 2006). Such new ideas partly provided a basis for the third moment in law and development, which will be dealt with below.

Third Moment: The rule of law and development

The third moment in the evolution of the law and development doctrine still remains in its formative stage (Trubek & Santos, 2006), particularly in so far as it is yet to gain the status of a sub-field of law. Nonetheless, despite its existing affiliation with an amalgam of various ideas on the place of law in development, the emergence in the 1990s of novel views of both law and development has resulted in the transformation of the discipline, especially making it more answerable to the broader challenges of the world today and no longer focused simply on economic growth. In practical terms, the law and development scholarship has actually gone "beyond the instrumental view of law as a tool for development", and "a functioning legal system with basic guarantees" is being regarded as "an element of what should properly be called 'development'" (Trubek, 2016). We will next consider some important aspects of the transformation that has occurred.

The change leading to our current understanding of development is of particular importance. A highly influential view has been presented by Amartya Sen, whose conception of development shifts our focus from economic growth to "freedom" (Sen, 1999). Prado (2010: 5-6) has concisely summarized Sen's conception of development as follows:

> [Proceeding from the] idea that wealth is not an end in itself but a means to realize more choices and therefore more freedom, Sen elaborates on the distinction between the ends and means of development. Thus, economic growth is important because it allows us to live the lives we have a reason to value, which is the end of development. But wealth alone does not guarantee that we will be free. Indeed, there is a series of instrumental freedoms that directly or indirectly allow people to choose to live as they would like. According to Sen, development as freedom requires political freedoms, economic facilities, social opportunities, transparency guarantees, and protective security.

In roughly the same period of time, the legal scholarship also underwent very significant change. In particular, there was a move away from "one-size-fits-all" recipes based upon western models. This led to the broadening of the scope of the legal scholarship to include "socio-legal studies" of all kinds and the "law-and-society" idea – the idea that "law must be studied in its social context using tools of the social sciences"

(Trubek, 2016: 14). This change in the legal scholarship also significantly resulted in a shift in the role of law, which had traditionally been a tool for attaining some other goal, such as economic growth, individual liberty, or social protection. As a result of this important change, law has become an integral part of the new conception of development – this is what we call "law as development".

> [R]ecently, scholars inspired by the work of Amartya Sen have argued that the existence of the rule of law is a goal in itself, a necessary part of the process of empowerment and capability-enhancement that constitutes development. This means that legal protection for constitutional values and human rights, including economic and social rights, must form part of the law and development agenda along with economic law and judicial reform (Trubek, 2016: 20).

Evidently, the new law and development scholarship has come to recognize the role of law not simply as a tool for creating and protecting markets but also as a mechanism for limiting market access, while at the same time catering to social benefits and reliefs for the poor. The neoliberal doctrine of private and development would understandably still be upheld, but the new scholarship at the same time strives to initiate proper regulatory frameworks for market behavior (Trubek & Santos, 2006). Most significantly, it must be emphasized that law as development is intrinsically connected with the concept of development as freedom. As such, legal reforms and rule of law become ends in themselves (Prado, 2010). Citing Trebilcock and Daniels, Prado (2010: 5) provides the following elaboration on this point:

> [In so far as] freedom, in its various dimensions, is both the end and means of development, various freedoms, such as freedom from torture and other abuses of civil liberties by tyrannical rulers, freedom of expression, freedom of political association, freedom of political opposition and dissent, are defining normative characteristics of development; rule of law, to the extent that it guarantees these freedoms, has an intrinsic value, independent of its effect on various other measures of development and does not need to be justified solely on instrumental terms.

Notably, we consider that law and development conceived in this manner is particularly relevant as an approach to the study of the development of social enterprise in Thailand. We found that the general theory of law and development developed by Yong-Shik Lee well serve our purpose. Therefore, we discuss the development of our conceptual framework in the next section.

A General Theory of Law and Development

As mentioned in the previous section, the ultimate goal of law and development, particularly the current third moment, is to prove that the role and impact of law are relevant to sustainable development. Despite five decades of efforts to do so, law and development has yet to become a robust academic field. According to Yong-Shik Lee, the failures of law and development is partly but significantly caused by the lack of an adequate analytical framework and empirical evidence (Lee, 2015). One major difficulty in creating such a framework is that it requires what Tamanaha (2011: 214) calls the "connectedness of law principle". In other words, the success of law and development does not rely only on law and legal institutions, but also on a variety of factors including

> [...] the history, tradition, and culture of a society; its political and economic system; the distribution of wealth and power; the degree of industrialization; the ethnic, language, and religious make-up of the society (the presence of group tensions); the level of education of the populace; the extent of urbanization; and the geo-political surroundings (hostile or unstable neighbors) – everything about a particular society matters (Tamanaha, 2011: 214).

Though Tamanaha believes that law and development is misleading and fated to fail, we share other scholars' views that the law and development discourse is still worth the effort (Trubek & Santos, 2006; Davis & Trebilcock, 2008). As shown in the evidence of the successful cases of Japan, South Korea, and Taiwan, law and development is not a complete disappointment. What we need is an exploration of alternative methods and more empirical studies. Lee's recently developed general theory of law and development is one good example (Lee, 2019).

In 2015, Yong-Shik Lee called for a new and comprehensive analytical model for law and development, which assesses the impact of law, legal frameworks, and institutions (LFIs) on development, in response to decades of unsuccessful attempts to advance the law and development discourse. The justification for developing such a model, which works as a legislative and institutional guidance rather than a rigid legal transplant framework adopted in the first law and development movement, is to "bridge the gaps and to establish the field more firmly as an academic discipline that contributes to the economic progress of developing countries" (Lee, 2015: 2). He thus proposed the Analytical Law and Development Model (ADM), which has later been further developed into a general theory of law and development (hereafter the "general theory") (Lee, 2017).

The main purpose of the general theory, which is shared with other law and development concepts, is to prove that the role of law is relevant to development. In doing so, the general theory provides a theoretical framework equipped with certain mechanisms explaining "dynamics among law, institutions, and the existing political, social, and economic conditions" (Lee, 2019: 38). What makes Lee's general theory different is that such a framework is flexible and analytical, rather than prescriptive like the legal transplant model (Lee, 2015). To be more specific, though the general theory has been developed based on the investigations into the successful development case of South Korea, it does not support the idea of transplanting laws and regulations which worked effectively in South Korea into other countries' legal systems.[5] Rather, the Korean case should be used as a working reference for legislation.

What is significant is that the general theory aims to develop a 'general' framework and mechanisms which could work even in other countries adopting different laws, legal frameworks, and institutions (LFIs) in their specific socioeconomic contexts. Though this definitely sounds difficult and needs empirical evidence, the general theory does not seek to dictate what LFIs be worked out and how they should operate. It aims rather to give guidance or a structure for the consideration of what adjustment should be introduced

[5] According to Lee (2017), several developing countries, including Vietnam, Cambodia, Myanmar, and Bangladesh, have adopted certain Korean laws such as the Code of Ethics for Government Officials and the Information Disclosure Act. Thailand's Social Enterprise Promotion Act B.E. 2562 (2019) has been heavily influenced by the Korean Social Enterprise Promotion Act No. 8217 of 2007.

in keeping with the local contexts. Needless to say, these local contexts, especially those involving non-economic values, are varied in nature, relating as they do to social, cultural, as well as political factors – all of which are not easy to assess. Instead of making a reluctant effort to explain the whole thing, the general theory, justified by the effective implementation basis, focuses on the economic objectives as a 'necessary condition' to achieve non-economic ones. What differentiates the general theory from the approaches adopted during the first and second law and development moments is that it embraces both economic and social values. In theory, they are both equally important, but to make it work practically, we probably need "short-term economic gain in order to meet long-term development objectives" (Lee, 2017: 456).

The general theory does not provide the default answers to all contexts but rather offers a guiding principle which allows flexibility and adaptability. Some might consider these flexible and adaptable features as limitations. There is in fact no one size that fits all. The general theory developed by Lee is not a means to *solve* developmental issues, but rather to shed some light on what we lack and where we should improve, which could probably lead us to a new framework that fits our own local contexts (Lee, 2015). In particular, as Lee has asserted, "the [law and development framework], if it is to be useful for developing countries, needs to be dynamic, rather than static, in the sense that it should be able to present different sets of LFIs adoptable in different stages of economic development" (Lee, 2015: 30). This is thus an alternative model of law and development which is worth testing.

The general theory is founded on a specific view on the relationship between law and development, one which sees that "law, as well as the policy that it advances, is relevant to development and is subject to a separate analysis" (Lee, 2019: 3). In this regard, law is neither a mere policy instrument for the achievement of development, nor a development goal in itself. Put another way, law is not subordinate to policy; nor is it expected to yield specific results. Lee has developed a general theory proposing that the impact of law on development is real, and he has taken the case of South Koreas evidence of his theoretical view. He however admits that the level of development varies, depending on numerous factors, including what he calls the determining and variable elements – the former involving the disciplinary parameters of "law" and "development", and the latter referring to the "regulatory impact mechanisms" being aimed to explain

the existing political, social, and economic conditions. These mechanisms are related to the design, the compliance and implementation of development-facilitating policies and laws (Lee, 2019). The determining and variable elements are nevertheless not mutually exclusive.

As mentioned earlier, the main elements of Lee's general theory are 'law' and 'development'. We are not trying to answer what law is from a philosophical concept of law, but rather from a practical context of law and development. Thus, the main objective of this study is to understand the role of social enterprise law in achieving development. This is because a poorly-designed law could affect development instead of promoting it. However, another important question is what type of development law should promote, whether it is an economic or social development. According to Amartya Sen (1988: 11),

> [T]he success of all [economic growth] has to be judged ultimately in terms of what it does to the lives of human beings. The enhancement of living conditions must clearly be an essential – if not *the* essential – object of the entire economic exercise and that enhancement is an integral part of the concept of development.

As already explained, the first and the second law and development moments, which primarily focused on economic growth alone, proved to be unsuccessful. They seemed to move away from non-economic values such as poverty, misery and well-being since their impact is hard to measure. They also ignored the fulfilment of basic needs and enhancing the quality of life. The general theory instead reflects the third moment of law and development which aims for a holistic and sustainable development. Its framework thus attempts to accommodate both economic and social development objectives since they are equally necessary. Such objectives are the anticipated policy outcomes which development-facilitating laws desire. To be more specific, how should a law be designed to enhance both economic and social development? And how can we prove that? To examine how law can create an impact on development, Lee has proposed a framework for assessing a regulatory impact called "regulatory impact mechanisms", comprised of three main areas: (1) regulatory design, (2) regulatory compliance, and (3) the quality of implementation.

(1) *Regulatory design* investigates the anticipated policy outcome which should be clear and purposeful. The anticipated outcomes are "the specific outcomes that are anticipated as a result of the implementation of [economic and social development] policies" (Lee, 2019: 46). This helps clarify the development objectives of applicable laws and analyze whether such objectives will advance the development expectations. In addition, an effective law needs a balanced structure between legal frameworks and institutional support, which Lee calls LFIs. It is "the quality of the institutions that administer law and not the law *per se*, that offer a chance for development" (Lee, 2015: 18-19). Last but not least, arguably, it is vital for the theoretical framework of law and development to be flexible and adaptable to the changing environment of a range of social, political, economic, and cultural conditions (Lee, 2019). According to Hadfield (2007: 4), "the key insight here is that the capacity for a legal regime to generate value-enhancing legal adaptation to local and changing conditions depends on its capacity to generate and implement adequate expertise about the environment in which law is applied". Such expertise (or socioeconomic conditions) involves legal systems, the judiciary and legal human capital. This is in fact the same as Lee's LFIs. As a result, the analysis of the adaptation of law to socioeconomic conditions cannot be conducted disjointedly from the other elements: the anticipated policy outcome and the LFIs.

(2) *Regulatory compliance* refers to "compliance with law by those who are subject to the application of law" (Lee, 2019: 50). To put it simply, to determine whether a certain law is promoting development requires an effective compliance. As Lee justifies, "a [legal] reform that does not take regulatory compliance into consideration may end up a hollow declaration without real impact...regulatory compliance is [thus] one of the key elements in determining regulatory impact on development" (Lee, 2019: 50). The rule of law is commonly used, in a form of an index, to gage the overall regulatory compliance and development progress;[6] as can be seen that there are currently more than 150 indicators of the rule of law (Versteeg & Ginsburg, 2017). Each indicator generally involves a legal system which embraces democracy, human rights, good governance and anti-corruption. Versteeg and Ginsburg compared and contrasted the rule of law indicators

[6] The rule of law, embodied in Goal 16 (peace, justice and strong institutions) of the United Nations' 2030 Sustainable Development Goals (SDGs), is a core element to the achievement of sustainable development.

proposed by four influential international organizations, namely the World Bank,[7] the Heritage Foundation,[8] Freedom House,[9] and the World Justice Project (WJP)[10] in order to identify underlying concepts of the rule of law. It was found that all four indicators were remarkably similar to each other, suggesting that they are all valid proxies of the rule of law (Versteeg & Ginsburg, 2017). However, indexes are only a means to an end, not a guarantee in itself.

(3) *Quality of implementation* considers two main factors, namely, state capacity and political will (Lee, 2019). Regulatory implementation shows the actual impact and effectiveness of the laws whether they have achieved the anticipated policy outcome. State capacity means the capability of the state to fulfil its anticipated policy objectives – economic, social, fiscal, political and so on. In his research, Dincecco (2018) points out that greater state capacity can propel economic development, but it is still somewhat difficult to achieve as there are many factors involved (Dincecco, 2018). The core duty of the state is to provide three basic public goods: domestic law and order, secure private property rights, and military defense against external attack threats. However, even though the state can properly provide all resources necessary to implement laws, it does not always guarantee the effective implementation. Political will is another important element, which generally used to describe the success or failure of development policies. Manor defines the term as "the determination of an individual political actor to do and say things that will produce a desired outcome" (Manor, 2004) while Lee refers to it as "the commitment and devotion of a country's political leadership to the implementation of law...[it] is more than a mere interest, which may be demonstrated by the continued implementation of consistent development policies for an extended period of time, allocating substantial political and economic capital" (Lee, 2019: 58). Policy inconsistency has been a major problem in Thailand for a long time. A new government always comes

[7] World Bank, *Worldwide Governance Indicators*, available online at: <https://info.worldbank.org/governance/wgi/#home>, accessed January 2, 2022.

[8] Heritage Foundation, *2019 Index of Economic Freedom*, available online at: <www.heritage.org/index/>, accessed August 2, 2019.

[9] Freedom House, *Freedom in the World Countries 2019*, available online at: <https://freedomhouse.org/report/countries-world-freedom-2019>, accessed January 2, 2022.

[10] Word Justice Project, *WJP Rule of Law Index 2019*, available online at: <https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2019>, accessed January 2, 2022.

with a new political will (as already seen in the termination of the former Social Enterprise Promotion Office), affecting the promotion of development.

Research Methods

As regards research design, this research adopts qualitative methodology to investigate the role of law in promoting the development of SEs, addressing the research objectives. Using a critical analysis as its design frame. The informants of this research are selected based on their merits; as a result, the interviewees consist of the OSEP's representatives, SEs' owners,[11] academics in the field and a number of legislators knowledgeable about Thailand's SEPA. Data collection for this research is based on an in-depth interview technique.

As yet, only a handful of people in Thailand really understand what social enterprise is all about, especially from the conceptual and legal aspects. Time constraint was another limitation; thus, the total number of interviewees are limited to five only. However, the interviewees are selected based on their depth of knowledge and relevance to the development of SEs in Thailand (Thomas, 2013). Importantly, this research complies with the principles of research ethics; hence, informed consent is given before each interview while the anonymity of all interviewees is also preserved (Prateeppornnarong, 2019). In addition to the in-depth interview, documentary sources remain important for research (Gilbert, 2008). Key documents in this research include relevant laws and regulations, research papers, official reports etc. As a result, when it comes to data analysis both primary and secondary data is used.

Research Findings

The findings of this research demonstrate that the SEPA contributes significantly to promotion and governance of Thai SEs in the way that it incentivizes not just managers of non-profit organizations but also Small and Medium-Sized Enterprises' (SMEs) owners to switch into the realms of the social business sector, offering a number of benefits

[11] SEs selected in this study are profit-sharing ones. The reason is this type of SEs neither have a strong foundation nor the same privileges like its non-profit-sharing counterparts. The experience of the owners of profit-sharing SEs are of valuable for reflecting the pros and cons of the SEPA of Thailand.

from loans from the social enterprise promotion funds to preferential purchase by public institutions. One of the OSEP's top managers interviewed for this research further explains other benefits for Thai SEs as follows:

> [Apart from the benefits prescribed by the SEPA] Our office [the OSEP] is now partnering with the Government Savings Bank so as to provide SEs with a source of microcredit. What's more, we are also collaborating with the Securities and Exchange Commission (SEC) of Thailand on giving SEs opportunities in the Stock Market (Interviewee 1, Senior Manager of the OSEP, 12 December 2021).

That said, there are a number of potential pitfalls hidden in the SEPA. Our findings point out that, first, on the whole, the concept of social enterprise and the practice of SEs are somewhat incomprehensible to a sizeable proportion of members of the Thai public as well as those people working in public institutions. As one of our interviewees has highlighted as follows:

> Making people understand what social enterprise is all about is an important task. The key question is how can we explain people to realize that the practice of SEs creates both social and financial values (Interviewee 2, Senior Officer of the OSEP, 20 December 2021).

This interview data is in line with our analysis in that, in Thailand, many people including public officials still understand SEs as "social work," helping people with disabilities, most of them are unaware of the fact that SEs are also business ventures. Add to this, our findings also suggest that, unlike promotion of SEs in other countries, the fact that Thailand's SEs can be classified into profit-sharing and non-profit-sharing SEs makes it harder for the people to comprehend what SEs are actually about. Notably, non-profit-sharing SEs are in absolute majority of all SEs certified (Prateeppornnarong, 2021).

Some SE entrepreneurs interviewed for our research highlighted that there are a number of elements in the SEPA that seem to be more of a hindrance than a help. One of them explains that:

> ...the law [SEPA] requires that, prior to being certified as an SE, the owner needs to show financial statements of the last financial year. This means

> you have to be a juristic person in any forms already before you are able to switch to an SE. I think this is not helpful. Why don't you train people how to run an SE (Interviewee 3, SE entrepreneur 1, 25 December 2021).

In addition to this, another entrepreneur also suggests that:

> I think those people wanting to run SEs are capable of facing many challenges but the key thing is when it comes to law, it is much better if we, as entrepreneurs, can co-design with the public sector (Interviewee 4, SE entrepreneur 2, 30 December 2021).

All of these data are in line with the comments made by one of the experts on Thailand's SEPA which underlines that: "In Thailand, it is governance of SEs that swings the balance" (Interviewee 5, SEPA's expert, 3 January 2022). This interview data resonates with our analysis that the public sector places emphasis on governing SEs.

Even though the SEPA already prescribes how certified SEs can be benefited from the law, the lack of secondary legislation becomes an obstacle to the implementation. For instance, the social enterprise promotion fund is not in place even though the committee that will be looking after the management of the fund has already been convened (Prateeppornnarong, 2021). In addition, the findings also highlight the fact that the OSEP has not done much in relation to training for those people wanting to run SEs.

Discussion and Conclusion

Through the qualitative research approach, this research briefly examines the concept and practice of SEs while it also investigates the development of SEs in Thailand. More importantly, a general theory of law and development developed by Yong-Shik Lee is applied for the analysis on the role of law in facilitating development, especially the development of SEs in Thailand.

Based on a general theory of law and development, it can be seen that regulatory design, regulatory compliance and quality of implementation are key components for the role of law in facilitating development. Distilled from the theory, we argue that the key challenges of Thailand's SEPA in facilitating development of SEs in the country are consisted of the issues on regulatory design and quality of implementation. First and foremost, as the findings suggest, the SEPA, arguably, promotes SEs in Thailand with very much

attachment to the non-profit sector, creating an image for SE as social work. Add to this, most benefits provided by law are available only for non-profit-sharing SEs. All of these elements will make the realms of SEs in this country less attractive to business owners or investors who want to do their business while contributing to the society at the same time.

Although we acknowledge the fact that regulating SEs in a systematic way is necessary, the current form of the SEPA which overemphasizes SEs arguably, however, deters those people from the private sector to invest in SEs. The fact shows that a number of profit-sharing SEs are now switching to non-profit-sharing ones while a few certified SEs are now seeking to stop running as SEs (see, OSEP Announcement dated 3 May 2021). Quality of implementation is another key issue of the SEPA. The fact shows that the SEPA is not in the state of readiness for the full-scale implementation as there is a lack of secondary legislation on many fronts, one of them is the operation of the social enterprise promotion fund. Our analysis points out that this boils down to the fact that the government does not fully understand what SEs are all about and how to utilize the practice of SEs to its utmost benefits. This relates to state capability and political will for propelling and encouraging the growth of SEs in this country (Nuchpiam *et al*., 2018).

Based on the findings, we offer two key recommendations. Firstly, while the non-profit organisations can make a significant contribution as non-profit-sharing SEs, it is important to note that the private sector can also do the same. We argue that greater involvement of business ventures as SEs will expand the diversity of SEs in Thailand. Noting that SEs in some countries like England, Singapore or South Korea vary considerably in their business sectors from hospitality to financial institutions (Nuchpiam *et al*., 2018). Importantly, the diversity of SEs will also bring more innovation to the field. For example, Beautiful Store in South Korea or Soft Landing in Australia are some SEs that innovatively contribute to the reduction of waste and dumping fields (see, Prateeppornnarong, 2021). Therefore, the SEPB should push forward the amendment of the SEPA adding more mechanisms for attracting the private sector investment and the across-the-board involvement.

Secondly, raising public awareness on SEs is of vital importance. Leaving aside those people who do not know what an SE is, as the findings suggest, many people

already knew SEs still have mistaken SEs as organisations attached to the non-profit sector. This is arguably another reason that may become an obstacle to the development and growth of SEs in Thailand. It is therefore recommended that the SEPB and the OSEP should put the public awareness issue on their list of priorities, putting the right image on SEs.

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