

# THE BASIC CONCEPT OF CONSTITUTIONAL CUSTOMARY LAW IN THAI LEGAL SYSTEM

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**Abstract**— Thailand faces with a big constitutional gap. In another sense, there is no crystal clear what "Constitutional Customary Law" means in the Constitution. Nevertheless, this problem can be solved by studying the meaning of which through the concept based on three group of scholars to find out its meaning in order for filling the gap. As a result, the term "Constitutional Customary Law" means mere practices, concerning political institutions and citizen rights, which has binding force of law.

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**Keywords**— Custom, Customary Law, Constitutional Customary Law, Constitutional Convention.

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## I. INTRODUCTION

Nowadays, in Thailand, the study of the convention of constitution and the constitutional customary law in Thailand is based on Borwornsak-Uwanno's concept which appear on his most famous treatise "**Public Law book 3: the source of law and juristic method**". Before this treatise was published in 2538 B.E., Thai academics only focus on the explanation about the category of the constitution between unwritten constitution and written constitution. These descriptions can be confusing and unclear in the concept of "constitutional customary law" and "customary constitution". Hence, this article aims to study on exactly concept of the constitutional customary law in Thai legal system.

## II. THE THREE CONCEPTS OF CONSTITUTIONAL CUSTOMARY LAW IN THAILAND

From the researching concerning constitutional customary law in Thailand found that there's diversity in terms of vocabulary. Such as constitutional law tradition, constitutional custom, constitutional conventions, etc. and the difference in terms of which can be summarized in three concepts as follows;

### *2.1. The concept was influenced by the doctrine of the source of law theory and the legal system in Germany.*

The theory of "source of law" and German legal theory influenced the idea of this school. The source of law shall be contained only legal norms that can be able to apply as the law. So, only customary law can be enforced as a law of state<sup>1</sup> and refuse to accept anything other than the law applied to the case. This means that the scholars in this group do not accept the concept "constitutional conventions" because it is not a law.

For their view, the constitutional customary law arises from two main elements<sup>2</sup>

1) **Psychical elements**; when the practice was repeated for a long time, known in Latin as "*longa consuetudo*".

2) **Psychological elements**, when there is the feeling that the practice is mandatory, known in Latin as "*opinio necessitatis*". Thus, the concept of this school admitted to regard "constitutional customary law" in the legal system, which is a law that used to apply in the case.

### *2.2. The concept has been directly influenced by the doctrine of constitutional law and political institutions in French legal system.*

This concept was influenced by the French legal theory of constitutional custom<sup>3</sup> (*coutume constitutionnelle*) come from famous French scholars: **Bernard Chantebout** and **Julien Laferrière** said that the constitutional custom is a set of usage arising from the practice of the Constitution and has binding force. For custom to be recognized as such, it must present four characters<sup>4</sup>.

1. There must have been "*repeat*" the same interpretation of constitutional texts over a period of time. An isolated act constitutes a "precedent" and a one time precedent has no binding force; custom arises only from the precedent repetition.

2. There must have been "*consistent*" in this interpretation. If the precedent results in divergent and conflicting interpretations of the same text, custom obviously cannot be fixed in a definite direction.

3. There must have "*clarity*" concerning the reasons for this interpretation. If the constitutional organ is that it takes the position justifies the existence of very special circumstance, the precedent will not be considered clear and cannot enter into account for the formation of custom.

4. It is, not least, there is "*consensus*" of constitutional organs concerned and the opinion. The legal force of custom can only come from the fact that the parties consider to be a law. Interpretation of texts that have been denounced as a violation of a

substantial fraction of public opinion cannot be the starting point for a constitutional custom.

**2.3. The concept that the constitutional customary law is the same as the constitutional convention in the British legal system.**

This concept has influenced Thai legal academic as mainstream, with a law book and several copies of the thesis took this concept as a central idea to the study, which are influenced by **BorwornsakUwanno** and his book “*Public Law book 3: the source and method of law*”. The idea is to explain constitutional customary law and constitutional convention is the same thing. But the word "constitutional convention" is a well-known word and used widespread in the common law world<sup>5</sup>.

This concept is explained the nature of the constitutional custom has two factors.

1. The practice or usage used in political behavior of the people although the law not explicitly force.

2. The practices are binding political organs and feel that they are bound by these practices<sup>6</sup>.

In addition, the constitutional custom may result in the *de facto* changing to the written law but the law still *de jure* exists. If there is a breach of custom to use the powers under the provisions of the written law provided, although the act is legal, the political sanction will follow soon. The example in Thailand such as if the King vetoes the bill, parliament will not vote on confirmation that bill. If parliament, according to the constitutional provisions, votes for affirmative that bill, they may be criticized and opposed by the public<sup>7</sup>.

**III. THE SOME PROBLEMS OF THE THREE CONCEPT OF THE CONSTITUTIONAL CUSTOMARY LAW IN THAILAND.**

Firstly, the concept was influenced by the theory of the source of law and the German legal system explain the meaning and nature of the constitutional customary law as well as to explain the concept of customary law in private law; the fact that happened completely by the two main elements; repeated continuously for a long period and practitioners believe that their binding as a law. This concept is denying the legal status of the constitutional conventions that did not have the force of law.

In my view, this concept has some problems as follow;

The first of all, the psychological element in the conditions for the emergence of constitutional customary law lack of any clear guidelines because of the nature of the elements is in people’s mind. It is difficult to assess the clearly explanation in such context by using a tautology; “it is a law because we see it as a law”<sup>8</sup>.

In addition, the explanation by using tautological reason (it is law because we think it is a law) does not

have the certainly legal status for a constitutional custom. Thus, if the mere custom that satisfy two elements had not been proven by the court whatever, none of the case or a court consider the dispute is a matter of purely political problem, the constitutional custom could not be proved the existence truly in the legal system.

Secondly, the concept of the constitutional custom or *coutume constitutionnel* which influenced by the doctrine of constitutional law and political institutions in France. It found that;

(1) This group accept the existence of the constitutional customary law in Thai legal system that have the force of law.

(2) The interpretation of the constitution by the constitutional organization but it is lacking of some elements e.g. *opinion juris*, it is not a constitutional custom.

The problem of this concept is an ambiguous legal status of the constitutional custom when it satisfy the four factors that said above. In my view, mostly, French scholars were confused by a misunderstanding concept between constitutional custom (*coutume constitutionnelle*) and the political practice (*pratique*) which is not a law because it cannot enforce as a law by the court.

Lastly, the mainstream concept in the Thai legal school is the concept that constitutional convention is same as constitutional custom. In my opinion, this concept has several issues as follow;

In the concept and doctrine of constitutional law in the British legal system, the source of the constitution can be divided into two major categories: the law of the constitution and the conventions of the constitution both these criteria have a legal status in the classification. The convention of the constitution does not a law; however, in the British legal system, constitutional convention is the part of the Constitution that can be seen from the metaphors of Sir Ivor Jennings in the popular textbook said that "conventions provide the flesh which clothes the dry bones of the law"<sup>9</sup>.

When returning to the basic concepts and the legal system in Thailand. We respect only the legal norm that will be considered as source of law. Including statutory law, customary law, and general principles of law by the third thing there is a law in the legal system of Thailand. Hence, adoption of such concept shall be violation to the juristic method of the Thai legal.

**CONCLUSIONS**

In summarize, the concept of constitutional customary law that has been influenced by the German and French legal system is consistent with Thai juristic method and legal system. The constitution customary law shall have a fundamental element at least three factors.

Firstly, a practice repeated in the sequel for so long and

Secondly, they have a consensus that it bound to follow such practice.

Lastly, mere custom shall be a legal norm (*Rechtsnorm*). The court can apply this custom as law in the case or when violate customary law it lead to legal liability too.

It is noted that the concept of constitutional customary law in Thailand not has originality idea. However, the mainstream concept is constitutional conventions and constitutional custom is the same thing and can be enforced as law. This creates a problem in theory and concepts. So, to avoid problems in the Thai law and legal system we may define the constitutional customary law as follow;

The constitutional customary law is “a set of unwritten law in constitution concerning political

institutions and citizen rights, which has binding force of law.”

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