

THE LOCAL CUSTOM AS A LAW

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Abstract: Thai Civil and Commercial Code, Section 4 allows the court to take. "Local custom" is used in judicial decisions as a legal norm. The problem is what kind of local customs that Thai legal system will be accepted as a law? This research has been carried out using the permissive theory (*Gestaltungstheories*) and the statutes interpretation theory. The preliminary results of this research show that local customs are the legal status in the Thai legal system. It is the same with customary law.

According to studies, it has been found that local customary law is compound of 5 elements as follow; (1) It is a long-standing practice. (2) People who behave themselves feel the need to do so and will be bad for themselves if they do not behave that way (*opinio juris*). (3) Local custom must not conflict with the provisions of applicable law in the country. It must not be against the public order and good morals of the people. (4) Local custom is a fact-creating law, so whoever claims its existence must has a burden of proof and (5) The court accepts enforcement as a law applicable to the case.

Keywords: Local Custom, Customary Law, Juristic Method, Law Interpretation.

I. INTRODUCTION

In the Thai legal system, there has a method to fill a gap of law in the Civil and Commercial Code, Section 4, provided that.

"The law must be applied in all cases which the letter or the spirit of any of its provisions.

Where no provision inapplicable, the case shall be decided according to the local custom. If there is no such custom, the case shall be decided by analogy to the provision most nearly applicable, and, in default of such provision, by the general principles of law."

It is show that the law provides for the adoption of "Local custom" is used as a tool to fill legal gaps. However, the explanation for local customary law in the Thai legal system is ambiguous.

According to a survey of academic work in the legal field found that most descriptions are always describe the concept concerning "Customary law" not the local customary law or even more, some of them explain that either customary laws and local customs are the same thing, with the same form, composition, condition, and appearance, however, in some works, explain that both local customary law and customary law are not the same thing. This condition is classified as "Theoretical conceptual problem."

Another problem is the enforcement of "local custom" as a legal norm by a judicial organ, it appears that the courts of justice have issued a judgment setting the norms of local custom in the independent consideration different from the influence of the description of the academic.

Both academic clarity issues and enforcement issues lead to the need for this research to be clear and organize the system in both theoretical and practical ways to find the meaning, character and condition of "Local Custom as a Law."

II. OBJECTIVE

1. To understand the meaning and character of local customs as a legal entity.
2. To understand what is the factor which establishes the local custom to the legal norm.
3. To clarify on how to implement the local custom is used by the court.

III. RESEARCH METHODOLOGY

The methodology in this research is the document research by compiling a lot of information from treatise, books, legal explanations as well as Supreme Court Judgment and the report of the Civil and Commercial Code Commission.

IV. LITERATURE REVIEW

1. Theory concerning legal sanction of the customary law.

Nowadays there have two theories that explain how customary rule can be enforced as a law¹.

A. Permissive theory (*Gestaltungstheories*)

This theory is rooted in the power of the state, that is, if the power of the state to adopt the custom is explicitly enforced through the legislative process or the judiciary's judicial power. The customary law will come into force in the state.

Hans Kelsen sees that² custom can become law by the Constitution must explicitly endorse and prescribe the process, i.e., the establishing process of customary law, government organizations that have specific functions in issuing and enforcing customary

law, including the relationship between the customary law and the law by the legislature clearly.

For the Thai legal system Consistent with this theory because the legal system allows the court to take "Local custom" shall be applicable in accordance with the provisions of the Civil and Commercial Code, Section 4.

B. The will theory (*willenstheorie*)

This theory explains that customary law has its own value. It does not originate from creation but from natural human processes³. It is based on the will of the people in society⁴, so the custom that people accept as law is sufficient to have legal force in that society.

2. Theory of law interpretation

The general principle of the interpretation of the provisions in the Romano-Germanic family law system, which is currently accepted, is classified in four approaches⁵:

A. Textual, verbal or grammatical interpretation

The interpretation of the law in this way focuses on the meaning of words that appear in two aspects: the general meaning used in society and the legal meaning through the use of lawyers and judges in the case⁶.

It is sometimes found that words which are understood in the general sense may have a meaning different from the legal meaning, such as the word "building" in the ordinary meaning. People may understand that it must be a building where human beings can live but in the legal sense, The Thai Building Control Act requires the term "building" to cover the radio and cellular towers, so the interpretation of the word "building" must be careful not to be misunderstood in general terms.

B. Systematic, structural or contextual interpretation

It is interpreted by taking into account the relationship of norms and legal institutions as unity⁷. The interpretation of the law in this way is based on the consideration of the interconnectedness of the law including the position where the provisions appear, section, topic or title, or legal system.

C. Historical interpretation

It is interpreted by searching the historical context of that provision as well as what the founders of a legal document wanted to regulate when they used certain words and sentences⁸. However, there are those who oppose interpretation by historical methods⁹. Considering the purpose of the lawmakers

interestingly. "We rule by law, not by the minutes of the drafting committee."¹⁰

D. Teleological interpretation or purposive interpretation

Rodolf von Jhering said, "The purpose is to build the legal system. There is no law that does not owe the purpose." If the lawyer understands the objectives of the law, they are able to know the true meaning behind the law¹¹.

The law, however, has its own purpose and duty in accordance with the legal policy of the country, such as accommodation political, reinforcing the democratic process, securing substantive justice, etc.¹²

V. RESULT AND DISCUSSION

According to Thai legal system Local customs have the power of permissive theory (*Gestattungstheories*). It is provided in Section 4 of the Civil and Commercial Code that.

"The law must be applied in all cases which the letter or the spirit of any of its provisions.

Where no provision inapplicable, the case shall be decided according to the **local custom**. If there is no such custom, the case shall be decided by analogy to the provision most nearly applicable, and, in default of such provision, by the general principles of law."

So, when there is a problem in the court, the fact that the claimant claims to be "Local custom" can be used as a legal rule in a case. First of all, the court will have to process the interpretation of the Civil and Commercial Code, Section 4 that the term "local customs" in accordance with this Section What meaning and characteristics? Then it will apply the criteria resulting from that interpretation to consider whether the fact that was claimed in the case falls on the basis of the norm of the court from the interpretation or not. Then the court brought the results to the judgment.

In the process the court interpreted the terminology. "Local custom" under Section 4 of the Civil and Commercial Code. According to the researcher's opinion, the interpretation of the law should be used as a framework for interpreting the law of the court to determine the true meaning and meaning of the local customs. The results are as follows:

(1) When considered by the textual. Verbal and grammatical interpretation, it is found that the term "local custom", as understood by society in general and by law, is very different. We should focus on the legal implications. This can be divided into meanings given by scholars. And the meaning given by the court passed the judgment.

Considering the theoretical meaning, although there are some differences, there is a consistent consensus that "local custom" to be legal is, at the very least, complementary two elements are;

First of all, it is a repeatable and longstanding practice.

Secondly, people who practice such practices must adhere to this practice as legal. If they do not do it will have a bad effect on themselves (*opinio juris*).

For the appearance and meaning given by the court through that judgment. The study found that the court laid down the principles and characteristics of "Local custom" in accordance with Section 4 of the Civil and Commercial Code as follows:

-Local customs have existed for a long time¹³.

-The custom is generally accepted by the people¹⁴.

- The custom must not conflict or contradict the law and public order or public morality¹⁵.

- who claims the existence of the "custom" in the case shall has a burden to proof it¹⁶.

(2)When considering the meaning of "Local custom", based on systematic, structural and contextual interpretation, found that the local custom as provided for in paragraph two of Section 4 of the Civil and Commercial Code shall be in the form of a subsidiary law, which will be used if the court cannot find the written law to be applied to the case as provided in Article 4 Therefore, the court must interpret it in the context of the first paragraph. Local customs may not conflict with written provisions since Section 4 has already established that, if the applicable law is applicable to the case, the court shall use the written law to force the case.

In addition, considering the context of Section 150 of the Civil and Commercial Code It is stated that.

"An act is void if its object is expressly prohibited by law or is impossible, or in contrary to public order or good morals."

Therefore, local customs cannot violate the provisions of the law, and cannot violate public order or good morals.

(3) Considering based on the principle of interpretation based on history, it was found that from the minutes of the commission drafted and amended the Civil and Commercial Code. Originally, the word was used. "Customary" before in Section 13 of the Civil and Commercial Code later changed to the word. "Local customs", as in the present.

The legislator has the opinion that. Local customs include the whole of Siam. It is a local as well, so it is concluded that. "Local customs" and "customary law" have the same meaning.

(4) Considering the principle of interpretation of the objective or purpose of the provisions found that the provisions of Section 4 of the Civil and Commercial Code. The purpose of the law is to determine the juristic method, the source of the law and how to use the Civil and Commercial Code.

So, the interpretation of the word. "Local customs" and the enforcement of such local customs. It is the jurisdiction of the court to accept a fact as a legal norm that fills the gap of law in the absence of any provision of applicable law.

CONCLUSIONS

1. The Thai legal system recognizes that "local custom" is legally binding according to the theory permissible by the provisions of the Civil and Commercial Code, Section 4. Thus, every time the court applies "Local custom" to determine which case the court cannot inevitably have to "interpret" written provisions that are permissible. The researcher considers that the method can be applied to the legal system with all permissive theory¹⁷.

2. When the court interpreted the terminology "Local customs" must be based on the general principle of the interpretation of the law. From the synthesis, it is found that the nature of "local custom" that the court can enforce as a law is characterized by the following;

(1) It is a long and continuous practice.

(2) People accept and feel obligated to do things. If they do not behave, the consequences will be bad or not good for them.

(3) Such custom must not be contrary to the written law or public order and good morals.

(4) Any person who claims the existence of a local custom has a burden to proof the existence of such custom to the court, and

(5) The court admits and enforces such mere custom to the case as a legal norm.

It has been noted that the research results on the features of "Local custom as a legal norm" by the theory of legal interpretation. The results are in line with the way the Supreme Court of Thailand has ever come to judge.

Consequently, this empirical result confirms that the process of using "local custom" in past court decisions is based on assumptions and is consistent with the conclusions of this research.

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