

*A Comparative Legal Study between the Common Law and the Civil legal tradition of
Thailand*

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Introduction

There are more than two legal traditions in the world, but the civil law system and the common law system are predominant in the legal world. The common law has originated in England and then many English colonial countries such as the USA, Canada, Australia, Singapore and Malaysia adopt it while the civil law system is applied and developed in many countries in Europe, Africa and Asia. However, each country has its own way to develop their legal system based upon the history, economy and society of individual countries. The aim of this paper is to discuss and compare the common law tradition as a whole and the civil law tradition in Thailand in terms of the legal evolution in the modern period of the Thai law, formal law and practices, and the common law influence on Thai legal system.

The Evolution of the Thai modern legal system

King Rama I decided to amend the *Thammasat* used in Ayuthaya period and to codify laws into three divisions called the Code of Three Seals (1805). The Code of Three Seals as the classical Thai law which was influenced by the Indian Law; therefore, employed during the beginning of *Rathankosin* period and it regulated the relations between the state and state officials, and the state and individuals. However, in the turning point of the mid-1800s, Thailand or Siam was more related to overseas countries, especially western countries than in the past. Westerners were not confident in the Thai legal system as it seemed confused and severe. This lead to exempting foreigners from Thai law and they were bound by their own national law and tried by special Counselor which had no Thai judges to participate.¹

King Chulalongkorn or King Rama V (1868-1910) was concerned legal privileges of foreigners in Thailand. In order to relieve Thailand from the extraterritorial legal right, his majesty founded the current court structure and obtained assistance from England, France, German, Belgium, and Japan to reform the Thai modern law. King Chulalongkron chose to

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¹ Ted L. McDorman, The Teaching of the Law of Thailand, (1988) 11 no. 3 Dalhousie Law Journal p 916

draft codes and legislation like those in civil law countries, as it looked familiar to Westerners. Another reason why Thailand adopted the European civil law system is a political reason. It is found that before the adopting of the legal codes in the period of law reform, the Thai judges adapted the English common law principles to adjudicate cases side by side with Thai law because the English common law seemed flexible in response to local needs.² This was a worry of the French about the “uncivilized” nature of Thai common law. By suggestion, the Continental system was more suitable to adopt than the other system in preventing the influence of the common law. However, the English law still influences many areas of Thai modern law such as the Civil and Criminal Procedure Codes founded upon the English model. The Penal Code (1908) was also drafted in English before translating into Thai. As the court structure was based upon French style, the Civil and Commercial Code, completed in 1935, was the “multi-national” code based on many countries such as Japan, Germany, France and Swiss except family law was based upon the Thai law.³

Sources of Law and the Judicial Process

Codes and Customs

The legal system of Thailand is classified as a civil law country where law is codified in the form of Codes. There are four fundamental significant codes which are well known as “the four-column law” namely the Civil and Commercial Code (amended 1992), the Penal Code (1956), the Civil Procedure Code (1934), and the Criminal Procedure Code (1934). The codes are respected as the primary source of law in the civil law theories. The codes are contained general legal principles systematically and there are relevant contents to refer to each other in the same code or another code.⁴ Take one example from the structure of Thai Civil and Commercial Code (TCCC) which is entirely comprised of private relations: persons, properties, juristic acts, contract, wrongful acts, sale, exchange, hires, agency, partners and companies, marriage, parents and child, and inheritance, wills and so on. The definition in the Civil and Commercial Codes will be used generally if those terms are not defined specially in other laws.⁵

² Ibid n 1 p 918

³ Ibid above

⁴ Somyoth Chauthai (ed.) , *Introduction of civil law vol. 1*,(4th ed,1999) 20.

⁵ Yood Sangauthai, *Introduction of Laws*, (14th ed, 1999) 121.

The codes are *jus generale*⁶ which is derived from commonly practice of people or custom which people feel to be bound by (*opinio juris*).⁷ In civil law tradition, local customary laws are considered as having binding force.⁸ The Thai also permits custom to be used where there is no written law to apply to. As can be seen, Article 4 para 2 provides that “Where no provision is applicable, the case shall be decided according to the **local custom**.” One may raise a question whether written law prevails over the local custom. While the German allow custom to be greater than written law, the French consider the customary law to supplement, but not to abrogate.⁹ According to one Thai legal scholar, he thinks that the customary law in Thailand is not only the supplementation, but also Thai customs are employed alongside written law .¹⁰ The author also says that custom is the shadow of written law. However, another Thai scholar indicates that written law or positive law succeeds customs as it can set aside inappropriate custom.¹¹ Although today written law seems to play greater role than customary law as the supremacy of parliament, custom is growing slowly, but strongly in many areas of Thai law such as commercial, administrative and family law.

Enacted Law

Another primary source of law is enacted law or statues. The Thai classified enacted law into four categories having its hierarchy as follow: legislation by parliaments at the first place, followed by executive decrees, then by administrative regulations and finally by local ordinances. The Constitution of Thailand (1997) is the highest hierarchy of these laws and it is legal authority source of other enacted laws. According to Article 6 of the Constitution (1997), any laws or legal provisions stipulating unconstitutional are void. Thailand is governed by a Constitutional monarchy headed by the King¹²; the King is named as the lawmaker which depends upon advice and consent of either the parliament or the executive. According to Article 3 and 92 of the Constitution, the King signs on legislation by the advice and consent of the parliament whereas his majesty signs the bill by advice and consent of the executive called the decrees under Article 181 and 220 of the Constitution.

⁶ Chauthai above n 4, 21

⁷ Above p 77

⁸ Mary Ann Glendon et al, *Comparative Legal Tradition*, (1999) 129.

⁹ Glendon A M p 129

¹⁰ Ibid n 6

¹¹ Ibid n 95 p 54

¹² See Article 2 of the Constitution of Thailand 1997

Furthermore, the doctrine of legislative supremacy is adopted by the Thai Constitution which authorizes the parliament to make such legislation.¹³ Not only does legislation of parliament has higher status than other executive decrees, but also it can delegate legislative power to the executive. It can be found that executive decrees may be authorized according to the Constitution¹⁴ or by particular legislation of parliament. The executive decrees can be divided into two types such as monetary decrees or emergency decrees and general executive decrees subject to delegation of legislative power according to particular legislation. The aim of executive law is that such decrees or administrative regulations are providing detail of parliamentary laws which usually draft briefly and look like blueprints of the executive decrees.¹⁵ Moreover, passing laws in the form of executive law is more convenient to update or amend laws because they do not have to be approved by the parliament. Notwithstanding, the court has decided that the executive decree or administrative regulation which is unconstitutional or not passed according with the legal principle set forth in legislation is annulled.¹⁶

Case Law

In civil law countries, case law may be considered as a secondary source of law as it is overruled by codes and enacted law. However, one may find that many Thai legal textbooks are full of the summary of court decisions, especially the Supreme court's decisions. Thai law students learn court judgments as the example of application law or the explanation of codes. Nevertheless, this shows the significant role of case law in a civil law country like Thailand.

There is no the doctrine of *stare decisis* in the civil law theories. Neither judges in lower courts nor courts in the same hierarchy are bound by the decision of Supreme Court. However, one cannot refuse the important role of judges as they apply and interpret the law to solve disputes and some decisions may become precedents. The question of certainty of legal application may be raised because of not being bound by the previous decision. In fact, the Supreme Court's decisions have influence on the lower court's decisions as a result of bureaucratic judicial system. This is because the promotion and punishment of judges could be approved by the Judicial Commission¹⁷ which consists of Chief judges and judges in high

¹³ See Article 42 of the Constitution of Thailand 1997

¹⁴ See Article 88 para 1 of the Constitution of Thailand (1997)

¹⁵ Ibid n 5 p 60

¹⁶ Ibid above

¹⁷ See s 273 para 2 of The Constitution of Thailand (1997)

courts. As Gilles¹⁸ illustrates, the role of Thai senior judges in the judicial system is significant as supervisors, educators, controllers or even interveners. Therefore, the inferior court's decision is likely to decide disputes in the same way as the high court decision because of fear of reversal and bureaucratic influence.

However, the court decision in Thailand is not respected as being as important as the court decision in common law countries. It is likely that judges may adjudicate the case like the previous case, but not binding. Unlike writing of common law decisions, Thai judges apply legal provision either in codes or by any written laws with the summary of fact without other law case citations. This is because the past decision is not considered to have legal authority which should be referred to like case law in common law system. Yet court decisions in the Thai legal arena are used for academic purpose because legal scholars are used to analyzing cases whether law is applied correctly with the case. The analyzing of cases by legal scholars is mostly published in legal periodicals which judges and law students pay attention the analyzing closely, rather than studying pure court decisions.

On the other hand, the primary source of law in the common law countries such as England, Australia, and the USA is case law. In common law tradition, judges are bound by the principle of *stare decisis* that means if there are previous decisions decided in the same issue, the inferior court is bound to follow those previous decisions. Not every thing stated in previous decisions binds judges to follow the decisions given in the previous cases, but only the *ratio decidendi* or the reason of case relating directly to the case is binding.¹⁹ Therefore, the court has to distinguish between *ratio* and *obiter* from the precedent before making decisions.

However, *obiter*, the principles of law stated by the common law court to attach to facts is not binding on judges in a subsequent case, but may be persuasive.²⁰ According to Cappalli, common lawyers match the case at hand with precedents by having identified the relevant group of precedents and having examined their law whether rules seem to fit with the current case.²¹ In an "unprecedented" situation, the author also points out that common law jurists can use analogy by comparison of the significant facts of relevant precedents and use them to test cases. With this law application, therefore, one can say " the common law process of law

¹⁸ Peter Gilles, *Thai-German respective Asian-European Problems*, (Working Paper No. 19, Chulalongkorn University European Studies Program and the European Commission, School of Law, Chulalongkorn University, 1999) 15.

¹⁹ Cook Creyke et al., *Laying down the Law*, (5th ed, 2001) p.76

²⁰ *Ibid* p. 94-95

creation never ends because each case precedent adds to the corpus of case law, whether minutely or mightily”.²² Thus, One can say that the new precedent is laid down either on the *ratio* or *obiter* of previous precedent.

Interpretation and Application law in Thailand

So Thailand adapted civil law system from Europe and also accepted its techniques of interpretation. The Thai also develop their own ways of interpreting law which is to respond to the need of its people and social ideologies. One can find the approach of interpreting law in the Thai Civil and Commercial Code (TCCC) under Article 4 para 1 which provides that “ the law must be applied in all cases with the **letter** or the **spirit** of any of its provisions.”²³ This indicates that the literal and purposive techniques are permitted for use in interpreting codes or written law. It is questionable whether the letter should be considered first, or have to be considered together with the purpose of the law. One Thai legal scholar points out that both literal and purposive approaches have to be used together because the text itself is ambiguous and it needs to be considered in the context, and also look beyond the text to find the purpose of the law so that its meaning will be clear.²⁴ Yood also says that one should consider the letter and the spirit of law together in order to interpret the law and if the outcome of both approaches is different, the meaning of purposive approach is more important than the meaning of the text itself.²⁵

However, both literal and purposive approach may fail to resolve the ambiguity or not be able to fill a gap in legislation. This situation could take place because of changed circumstances in which law is not appropriate to be applied to new problems such as technological or commercial problems. In this problem, Thai law also provides the solution, where the usual gap-filling method fails. Article 4 para 2 and 3 of the TCCC states that “Where no provision is applicable, the case shall be decided according to the **local custom**. If there is no such customs, 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**.” Phonchai

²¹ Richard B. Cappalli, *Open forum: At the point of decision: The common law's advantage over the civil law*, Temple international and comparative law Journal, Spring, 1998 p. 92

²² Cappalli above p 92

²³ See Article 4 of the Civil and Commercial Codes of Thailand

²⁴ Ibid n 4 p 149

²⁵ Ibid n 5 p 126

indicates that general clauses in Article 4 should be applied systematically.²⁶ If the court can choose any methods in this Article, results of a decision may become uncertain and unpredictable. Thus, one should understand the aim of Article 4 which provides the solution, but not the way for judges to create law.

Statutory Interpretation of the common law system

In the common law system, common law judges also experience statutory interpreting problems. One can say the more statutes are made the more judges have to interpret them. Although the main task of judges is solving disputes, those disputes today usually involve ambiguity of the text in statutes. Therefore, common law court cannot avoid interpreting the parliament law and its decisions become the precedent. Common law judges, however, are more concerned with their use of statutory interpretation which should not interfere with the doctrine of parliament supremacy and the separation of powers. In other words, courts only give effect to the law of parliament or reflect statutory meaning based on the intention of parliament, but courts themselves will not create law.

In order to interpret statutes, common law courts have developed three significant rules namely the literal rule, the golden rule and the mischief rule. Firstly, the literal rule is used where the word of statute is clear and unambiguous.²⁷ As the words have plain meaning, courts do not have to interpret or look for the intention of a statute.²⁸ According to the *Engineer's case*²⁹, Higgins J says that “ [I]n its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable.”³⁰ However, the second rule so-called the golden rule may be applied by modifying the grammatical and ordinary sense of the words to avoid an absurdity, injustice, abnormality or contradiction.³¹ If the ordinary meaning seems nonsense, courts will interpret the word by giving effect what ‘parliament must have intended’.³² The last method is known as the mischief rule which is firstly established in the *Heydon's case*. By this rule, judges determine the meaning by considering what was the mischief the common law did not deal with and the

²⁶ The Court of Intellectual Properties and International Trade of Thailand , *Cases and Materials on International Trade Law*, 1998 p 98

²⁷See Redmond D W P, *General Principles of English Law*, p 31

²⁸See Peter de Cruz, *Comparative Law in Changing World*, 1995 p 268

²⁹ See *Amalgamated Society of Engineer v Adelaide Steamship Co Ltd* [1920] 28 CLR 129 at 161-2

³⁰ Ibid n 19 p 208

³¹ Ibid n 28 p 270

³² Ibid p 270

statute is passed to remedy.³³ Apart from these three common law approaches, there is also the legislation of statutory interpreting which assist the court to apply the law as the parliament has intended.

Legal Procedures

The significant difference in legal procedures between the common law system and the civil law system is the role of judges during proceedings and the jury system which is employed only in the court of the common law system. There are no jury trials in a civil law country like Thailand. Thai judges play an active role as a fact finder by questioning witnesses or by asking them to tell stories and then the lawyer may be allowed to examine witnesses.³⁴ The role of Thai judges in the inquisitorial style may be to reduce the disadvantage of having skilled lawyers who play on crossing-examination. Unlike Thai legal procedure, where common law judges and juries are only a passive audience, lawyers of the disputed parties have responsibilities to present the case. Whereas a jury makes the judgement in the question of fact and common law judges make the judgement in the question of law, Thai judges examine both witnesses and evidence, and apply those facts to the law. It is difficult to indicate whether the accusatorial system of the common law system is better than the inquisitorial system used in Thai legal procedures. One may say the umpire role of common law judges could cause injustice to the party if one party has a very good lawyer who knows and uses legal techniques to induce jurors who usually do not quite understand legal procedures and the law, especially even the facts in the complex case like commercial cases. The other, however, may concern a prejudice of single judges rather than a peer of people. Moreover, it is likely that single judges may miss some relevant fact if lawyers in the case are limited in their opportunities to examine witnesses and evidence by the court.

The common Law influences on the civil law tradition of Thailand

“The legal profession, the legal education and the paradoxes of a civil law type of legislation and theory is on one side and a common law type of jurisdiction and practice is on the other”³⁵ This sentence illustrates the reality of the Thai legal system which is also influenced by the common law system, especially English law. It is interesting to note that

³³Michael K Meek, *The Australian Legal System*, (2nd ed, 1994) p 58

³⁴ See Article 116 of the Thai Civil Procedure Code

³⁵ Ibid n 18 p 13

English law such as the law of contract and tort was taught in the Thai law school by Prince Rajaburi known as “the Father of Thai modern law” before Thailand adopted European code system.³⁶ Prasit exemplifies that the law of agency of Thailand was copied from German law; however, in practical application, most Thai court decisions seem to follow the English law of agency.³⁷ Some Thais call their legal system as the Anglo-European system since the decision of Supreme court are strongly persuasive upon lower courts which rarely adjudicated differently, and the decisions play a vital role in developing the law.³⁸

For some reasons why common law has a high influence in practical ways on the Thai legal system, many Thai legal scholars including Prince Rajaburi, who found the modern legal structure in Thailand, have been educated and trained in common law countries like England or the USA. Another reason is a linguistic problem because Thai jurists seem to have more mastery and fluency in English rather than other foreign languages. Moreover, most foreign legal textbooks are in English, and German, French, or Italian legal textbooks can be rarely found in Thai law schools. Currently, there is a new channel of legal information by which the common law concept could influence on the young generation of Thai lawyers as they can access into a vast source of the common law database either from American or English web site.

Conclusion

In conclusion, Thai legal system has been developed uniquely within the legal structure of civil law system. As can be found in Thai codes and enacted laws, the form of drafting, hierarchy of law and interpreting methods are common in the civil law style. However, the way of legal practices of Thai lawyers, including judges seems to be a combination of the common law and the civil law styles. After examination, one may consider the Thai legal system is only one example of reconciliation between two main legal traditions. This legal convergence of the common law and the civil law is may be also taking place in other countries as well as Thailand.

³⁶ Ibid n 5 p 3

³⁷ Chakrapong Leksagulchai, *Problems in the Law of Agency*, Thammasat Law Journal vol. 30 no. 2 , June 2000 p 293

Bibliography

- Adams N J and Brownsword R, *Understanding Law*, 2nd ed., Sweet & Maxwell, London, 1999.
- Cappalli B R, 'The common law's advantage over the civil law', (1998) 12 *Temple International and Comparative Law Journal*
- Chauthai S (edited), *Explanation of Civil Law: General Rules vol. I*, 4th ed., Winyuchon Publication House, Bangkok, 1997.
- Chularathana A, *Interpretation Law*, Thai Law Publication, Bangkok, 1999.
- Creyke C and Holloway G, *Laying Down The Law*, 5th ed., Butterworths, Chatwood, 2001.
- Cruz D P, *Comparative in a Changing World*, Cavandish Publishing, London, 1995.
- Engel M D, *Code and Custom Thai Provincial Court*, the University of Arizona Press, Arizona, 1978.
- Gilles P, *Comparative Law: Thai-German respective, Asian-European Problems*, Chulalongkron University, Bangkok, 1999.
- Glendon M A et al., *Comparative Legal Tradition*, 2nd ed., WestGroup, St. Paul Minn., 1999.
- Leksagulchai C, 'Problems in the Law of Agency', (2000) 30 no 2 *Thammasat Law Journal*
- McDocman L T, 'The Teaching of the Law of Thailand', (1988) 11 no.3 *Dalhousie Law Journal*
- Meek K M and Young, *The Australian Legal System*, 2nd ed., The Law Book Company, Erskineville, 1994.
- Sangauthai Y, *Introduction of Laws*, 14th ed., Praguypauk Publishing, Bangkok, 1999.
- Slapper G and Kelly D, *English Legal System*, Cavendish Publishing, London, 1996.
- Suthipong T, *Cases and Materials on International Trade Law*, The Court of Intellectual Properties and International Trade Law, Bangkok, 1999.
- The LawAsia Committee (edited), *The Legal System of Thailand*, The Thai Bar Association, Bangkok, 1981.
- Electronic sources
- Cockatoo Press online, *Constitution of The Kingdom of Thailand 1997*
Avialable:http://www.cockatoo.com/thailand_laws/thailand_1997_constitution.htm
Access 18 May, 01
- Law Faculty, Chaulalongkrong University, *Thai legal History*
Available: <http://www.chula.ac.th/college/law/tth.htm>
Access 18 May, 01

³⁸ Ted L. McDorman, *The Teaching of the Law of Thailand*, (1988) 11 no. 3 *Dalhousie Law Journal*

