



ORIGINAL PAPER

When constitutional custom is stronger than the constitutional text

Muhammad Khairy Qsair¹⁾, Sarab Thamer Ahmed²⁾

Abstract:

The aims: This paper aims to prove that constitutional custom in practice has become stronger than the constitutional rule, and it also aims to shed light on a very important point, which is that those in power or ruling parties in countries sometimes impose a constitutional custom despite the existence of a constitutional text.

Purpose of the paper: The paper attempts to draw attention to the fact that the process of imposing constitutional custom practically in the face of the constitutional text will gradually eliminate the idea of the supremacy of the constitution and the superiority of the constitutional text. This paper also attempts to show the extent of the possibility of restoring authority and powers to the constitutional text and thus returning the matter to its correct place and true constitutional status in the face of constitutional custom.

Methodology: The researcher relied on the method of analyzing the constitutional text and the extent of its binding, as well as the method of comparing cases witnessed by many countries' practices.

Main results and conclusions: The paper concluded an important basic result, which is that constitutional custom has become stronger than the constitutional rule due to the practices of the ruling authorities. The other result is that custom is usually stronger in countries whose constitution is brief and lacks some details in the provisions.

Keywords: *constitutional custom, constitutional rule, equal opportunities.*

¹⁾ Associate Professor, PhD, University of Thi-Qar, Faculty of Law. Private international law. Iraq, Phone: 9647810408635, Email: lawp1e20@utq.edu.iq; legalur@yahoo.com.

²⁾ Associate Professor, PhD, University of Thi-Qar, Faculty of Law. International organizations, Iraq, Phone: 9647808081003, Email: lawp1e208@utq.edu.iq; sarabthamer@yahoo.com

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Introduction

If the constitutional custom consists of the frequency of action by public authorities on a specific custom or on a subject of a constitutional nature, then it takes on a character close to being obligatory among those who work with it, but it does not rise, at least from the theoretical aspect, to the level of a constitutional text that imposes... Its influence, presence, and obligation over all public authorities, and even imposes its supremacy over legislation, regulations, and instructions, both those that preceded it and those that follow it in time, such that there is no survival of a law that includes what contradicts the constitutional text, and there is no life for legislation whose texts contain anything that conflicts with the constitutional text.

However, the practical reality is different. The constitutional custom began to gain more binding force on the one hand. On the other hand, it began to displace the constitutional text from its competition, which made the constitutional custom take precedence in practical status over the constitutional text. In Iraq - the subject of the study - it became a custom. Constitutionally, the President of the Republic represents a specific party, and the matter applies to the selection of the Prime Minister and the Speaker of the House of Representatives, although the constitutional text in Article 68 states that the candidate for the Presidency of the Republic is required to be an Iraqi by birth and of Iraqi parents. However, with this constitutional text and its implementation, Any Iraqi individual cannot obtain this position unless he is from the party appointed according to the constitutional custom and the matter also requires running for the positions of Prime Minister and Speaker of Parliament.

This paper attempts to show the extent of the possibility of restoring power and authority to the constitutional text, thus returning the matter to its proper place and its true constitutional place in the face of constitutional custom.

I. the definition of the constitutional custom

It is not surprising if we say that constitutional custom appeared before constitutional rule. The customary rule is the first legal rule that came into existence because it is linked to the need of individuals to organize their social relations and it is a matter linked to the lives of individuals in every society. Rather, it came into existence with the existence of individuals on earth.

Constitutional custom can be defined as a term to express the situations that the public authorities in the state have become accustomed to following in carrying out their activities in one aspect of their work related to a constitutional issue over a period of time, and with the belief of the individuals in that authority that this repetition has become binding on them and has the force of a constitutional rule (Ehsan Hameed & Qatran Zqeer 2011: 60).

In other words, constitutional custom is a set of rules and practices followed by public authorities, which derive their legitimacy from continuous and repeated use, despite the absence of written legal texts governing them. Constitutional custom is considered one of the sources of constitutional law, and expresses the political and legal traditions that develop within society (Naaman Ahmed Al-Khatib 2009:465).

The meaning of constitutional custom must be clarified in terms of concept and function. In terms of concept: Constitutional custom is an unwritten rule that is formed as a result of consensus of opinions and practices over a long period, and is accepted as part of the legal system.

This definition can be well explained by the concept of material constitution , elaborated by the Italian constitutional scholar Costantino Mortati. It refers to what the dominant political force decides. Mortati argues, in ways that were interpreted to be compatible with the Italian fascist regime in the 1920s and 1930s, that political choices coming from the dominant political party are the real content –the political content– of the constitution. The material constitution is the fundamental constitution, the concrete constitution opposite to the formal one(Eleonora Bottini 2020).

In terms of function: Constitutional custom works to fill legal gaps that may arise in constitutional texts, and enhances the stability of the political system. Examples of constitutional custom include the fact that in many systems, the government is formed after elections according to certain traditions, such as negotiations between parties. Although the negotiation process is not stipulated in the constitution, most constitutions stipulate a mechanism for forming the ministry, for example, through the largest parliamentary bloc (Article of the Iraqi Constitution of 2005).

II. The difference between constitutional custom and customary constitution

The customary constitution is a set of rules arising from customs, customs and precedents that have not yet been written down in a written document. It is specific to countries that do not have written constitutions, such as England. As for constitutional custom, it is also A set of rules arising from customs, traditions and precedents, but within the framework of a written constitution and These rules have a role that explains, complements, or modifies the provisions of the constitution. They are found in countries with written constitutions next to the constitutional documents(Al-Zubair Hamza Al-Zubair 2023 :32) .

III. Elements of constitutional custom

There are two basic elements for us to be faced with a constitutional custom, the material element and the moral element , First, the material element: Some people believe that the material element is the actions and behaviors issued by one of the governmental bodies, such as the king when his work is legislative or executive authority, or those actions issued by the prime minister regarding political matters exclusively (Numan Ahmed Al-Khatib 2009 :466). We agree with this opinion if it is only intended for matters related to political affairs and not those related to other executive powers, because constitutional custom must result from the texts of the constitution only. In other words, constitutional custom, even if the work or behavior is in a legislative or executive matter, cannot be described as constitutional custom unless it is based on a clear constitutional matter that is without doubt.

It is clear that the material element requires the following elements to be fulfilled.

1-Repetition of the act or action, whether the repetition is positive or negative, because the act being done once does not mean that we are facing a constitutional custom (Othman 1952 :98).

2-The second condition is that it be issued by a public authority, whether legislative, executive or judicial. What is important here is that it be related exclusively to constitutional issues. Regarding the research idea, we say here that this element has been available since 2003 through the Provisional Coalition Authority, which was originally formed based on the components of Iraqi society.(The Coalition Provisional Authority in Iraq was the first authority established to administer Iraq after April 2003. The CPA based its governance of Iraq on UN Security Council Resolution 1483 of 2003).

The second element / the moral element;

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In order to be faced with a constitutional customary rule, the moral element must be present, which means the binding characteristic, and the binding here is the belief among the governmental, legislative and concerned parties that this customary rule has become a binding rule that cannot be violated. This element is an internal feeling among the parties of the necessity of commitment, and some jurists call it the psychological element (Perlot, M 1972: 203).

It is always required that the actions or behavior of the public authorities must not be in violation of an existing and explicit constitutional text based on the principle of good faith (Duverger, M, 1980: 204).

Referring back to the idea of the research, we find that this element is present in the authorities' dealings with the distribution of senior positions in the state, we mean here the presidency of the House of Representatives, the presidency of the republic and the presidency of the Council of Ministers. In Iraq, for example, there is a constitutional custom among most political forces that the position of The President of the Republic is for a specific political party that represents one of the nationalities that make up Iraqi society, and the same applies to other presidencies.

IV. Types of constitutional custom

The type of constitutional custom is determined according to the task it performs towards the constitution, or a text of the written constitutional document. It may remove ambiguity surrounding the constitutional text, or it may complete a deficiency in the constitution by bringing up issues that the constitution did not address in the organization, or it may amend an existing constitutional text, whether the amendment is by deletion or addition. Accordingly, the constitutional custom varies into an interpretative custom, complementary custom, and a modified custom (Ahmed Jad Raslan, 2013: 89).

1- The interpretive custom

It is a custom whose effect is limited to interpreting a written text in the constitution, by clarifying its meaning, as it does not create anything new, but rather stops at the level of interpretation and clarification. Jurisprudence holds that this type of custom has the force of the constitutional legislation that interpreted it (Ibrahim Darwish, 2007:92). Among the examples that jurisprudence mentions of interpretive custom are the customs that were formed in the French Third Republic Constitution, which was brief and general, as one of its articles stipulated that the President of the Republic guarantees the implementation of laws), but the text did not specify the means by which the President of the Republic can guarantee the implementation of laws, and for this reason an interpretive custom arose for this text that included granting the President of the Republic the right to issue executive decrees despite the absence of an explicit text in the constitution granting him this right; and based on custom as well, the principle of universal suffrage introduced by the Constitution of the Third Republic was interpreted, without specifying whether this universal suffrage was direct or indirect, as custom determined it and made it direct and secret; It is noteworthy that the interpretation of the ambiguous constitutional text raises an important issue, which is knowing the body qualified to carry out the task of interpretation (Hamed Jawad Muhammad, 2022: 13) . The Federal Supreme Court in Iraq used this type of custom when a dispute arose over the meaning of the term “the largest parliamentary bloc” in the Iraqi Council of Representatives, as the constitution did not clarify the meaning of this term contained in Article 76 of the Iraqi constitution. The court decided that the meaning of the term is the bloc that is formed after the elections within parliament. Noting that the Federal Supreme Court in Iraq issued more than one decision on the same subject, including Decision No. 45 of 2014, and the content of its decisions

(and their content is that the expression (the largest parliamentary bloc) mentioned in Article (76) of the Constitution means either the bloc that was formed after the elections through a single electoral list, or the bloc that was formed after the elections from two or more electoral lists and entered the House of Representatives and its seats became, after entering the Council and its members taking the constitutional oath in the first session, the largest in number of the rest of the blocs, so the President of the Republic is responsible for assigning its candidate to form the Council of Ministers in accordance with the provisions of Article (76) of the Constitution.

It can be said here that constitutional texts can usually be described as brief and general, which in certain cases raises difficulties in interpreting some articles of the constitution, which are those that are shrouded in ambiguity. The interpreted constitutional custom is the one whose effect is limited to merely interpreting and clarifying an ambiguous constitutional text. The following elements are inferred from this definition: 1- The interpreted constitutional custom is always based on a constitutional text. 2- The interpretation must not contradict the constitutional text positively or negatively. 3- The interpretation may not amend the interpreted text, but its effect is limited to removing ambiguity. 4- The interpreted constitutional custom does not introduce any new legal rule. 5- The interpreted constitutional custom has the same legal value as the constitution. 6- The interpretation becomes part of the constitution and acquires a binding character(Suleiman Batarseh Constitutional Custom between Theory and Practice, Jerash for research and studies journal, volume 3 , issue 2,2002, p21).

2- Complementary custom

It is a custom that is based on organizing some topics that the constitution did not address, meaning that it completes the deficiency that may exist in the constitutional document. Thus, the supplementary custom differs from the interpretative custom in that it is not based on a constitutional text included in the constitutional document, but rather is created to complete a deficiency in its texts, and it also creates new legal rules to organize what these texts omitted. Some believe that the supplementary custom completes a deficiency in a rigid constitution (Mohammad abo Zaid Mohammad,1870:55). In other words, the “complementary constitutional custom” differs from the “explanatory constitutional custom”: if the explanatory custom is limited to interpreting what is ambiguous in the texts and provisions of the constitution, that is, it is based on existing constitutional texts that it interprets and clarifies what is ambiguous and vague in them, then the supplementary custom, on the contrary, creates a new rule that completes the deficiency that has befallen the constitution. It addresses a specific topic related to the system of government in the state that the constitutional legislator neglected to organize, and therefore it is not based on an existing text or one that is present in the core of the constitutional document. In this regard, we can refer to Article 124 of the Iraqi Basic Law issued in 1925, which states that: {Constitutional traditions that are not provided for in this law, and there is no text that prohibits their adoption, and were followed in constitutional states, may be adopted and applied as a constitutional rule by a decision of the national assembly in a joint session}. This text, it seems, acknowledges the role of custom in complementing constitutional texts (Hassan bahrey,2018:79).

3- The amended constitutional custom

The amended constitutional custom is the custom that amends a provision of the written constitution. The danger of the amended custom is that it contradicts a text of the constitution, because the amendment necessarily includes the meaning of contradicting the text, and this is in contrast to the custom that interprets the text of the constitution or

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that completes its silence. Hence we understand the reason for the controversy that the amended custom can raise and that it actually raised among jurists. It has become customary in constitutional jurisprudence to distinguish between two types of amended constitutional custom: the custom amended by addition, and the custom amended by deletion (Mohsen Khalil, 1969:56).

1-The custom amended by addition:

By virtue of its name, it adds a new rule or a new rule to the existing constitutional texts. In this respect, it is similar to the supplementary custom. However, the custom amended by addition differs from the supplementary custom in that the supplementary custom assumes that the constitution is silent about regulating a specific topic, so the supplementary custom comes to complete and fill this deficiency and establish the organization that the constitution was silent about. While the custom amended by addition assumes that the constitution has included a specific organization for a specific topic, and the amended custom comes to add to this constitutional organization provisions that would amend this organization. This addition that this type of custom brings is often in the form of granting the governing bodies a new jurisdiction that was not decided for them according to the texts of the constitution, and such that the interpretation of these texts does not allow for the creation of this new jurisdiction. Here the importance of the custom amended by addition appears because it establishes this new jurisdiction in a way that represents an amendment in addition to the existing constitution. One of the most prominent examples of the additionally modified custom in France under the Third and Fourth Republics was the custom of the French Parliament authorizing the government to issue decisions or decrees that had the force of law. This was an additionally modified custom, because the texts of the Constitution of 1875 (Third Republic) and the Constitution of 1946 (Fourth Republic) gave Parliament exclusive jurisdiction in legislation and did not allow any legislative authorization for the government.

2-The custom modified by deletion:

It means neglecting a text of the constitution in application for a sufficient period, in a way that allows it to be said that this text has fallen and been deleted due to disuse. The custom here is represented by the continued neglect of the application of the text and its non-use, which leads to the deletion of this text from the constitution as a result of the custom. One of the examples that jurisprudence gives of the custom modified by deletion is the failure of the President of the Republic in France to use his constitutional right to dissolve the House of Representatives, despite the establishment of this right in one of the texts of the 1875 Constitution of the Third Republic (Ramzi Al-Shaer, 1981:85).

Returning to the subject of our research, we find that the amended constitution almost applies to the idea through the fact that what is happening in terms of distributing senior positions on the basis of the components of society and not on the basis of the principle of equal opportunities contained in the constitution means that this amended custom has violated the text, because even if the door to nomination is open to everyone, there is no opportunity to occupy the position as long as what is customary in dealing is the division on the basis of components.

V. Applications of the superiority of constitutional custom over constitutional text

One of the important applications that we have observed in practical reality is the process of selecting the three presidencies in Iraq. The selection of the President of the Republic, the Prime Minister and the Speaker of Parliament is based on population distribution. In other words, since 2005, the President of the Republic is selected from the

Kurdish nationality, and the Prime Minister is from a specific sect of the Arab nationality, as is the Speaker of Parliament. This division has made dealing with it a clear form in which no one can compete for the above positions, and even the nomination for those positions is competition between one sect exclusively. This means that the position of President of the Republic is for the Kurdish nationality, so no one from the other sect can run, and even if he runs, he will not get more than his vote only, so the result is inevitably decided.

Conclusion

We conclude from the above research that constitutional custom has become in practical reality and application in a stronger position than the constitutional text, although the latter has supremacy and superiority in all constitutional law literature. The strength of constitutional custom at the expense of the constitutional text comes from two points: The first is that the constitution is sometimes not comprehensive in its formulation or the intended provision is not detailed in a way that prevents circumventing it or interpreting it according to the desires of those in power. The second point is that politicians attempt to achieve a balance between the components of society, but at the expense of the texts of the constitution. We believe that the optimal solution is to respect the texts of the constitution and the principle of equal opportunities for all.

Authors' Contributions:

The authors contributed equally to this work.

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