LEGAL TRANSPLANTATION OFFOREIGN PRIVATE LAW IN THAILAND: A CASE STUDY OF CONCEPT OF THINGS AND PROPERTY

BY

WIRIYA KONGSIRIWONG

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF LAWS IN BUSINESS LAWS (ENGLISH PROGRAM)
FACULTY OF LAW
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: A CASE STUDY OF CONCEPT OF THINGS AND PROPERTY

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ABSTRACT

Throughout the period from Roman law to the establishment of national legal systems in European countries, the concept of things and property has remained a fundamental concept in the civil law system. During that period, the French Civil Code and the German Civil Code served as the primary templates for codifying civil codes in numerous countries, including Thailand.

During the codification process of the Thai Civil and Commercial Code ('CCC'), the drafters employed a technique of transplanting foreign private law from various countries such as French, German, and Japanese, along with provisions pertaining to the concept of things and property. This approach resulted in unforeseen repercussions and discrepancies within the existing Thai legal framework.

This study examines the problems and controversies surrounding the legal transplantation of foreign private law into the Thai CCC, specifically focusing on the concept of things and property. It aims to understand why Thai scholars encounter difficulties in this process and why it continues to be a contentious matter in the present day.

The study demonstrates that the inconsistencies in the Thai CCC system arise from the reception of legal principles from various countries that approach the same issue from different legal frameworks, as well as the fragmented process of enacting the code at different times.

Therefore, there is a need for a comprehensive revision of the Thai CCC. This revision should thoroughly analyse the issues and interdependencies among its provisions, as well as compare them to their counterparts in foreign private laws. The

objective is to rectify the unfavourable consequences resulting from the current provisions.

Keywords: Things and Property, Legal transplant, Thai Civil and Commercial Code

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This thesis is a study of the history and comparison of law, which is subject to numerous constraints in document analysis. To all readers of this thesis, I apologize for any errors.

Wiriya Kongsiriwong

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LIST OF ABBREVIATIONS

Symbols/Abbreviations	Terms
A.D.	Anno Domini
Arg.	Argentine
B.C.	Before Christ,
B.E.	Buddhist Era
BGB	German Civil Code (*Bürgerliches Gesetzbuch*)
CC	Civil Code
CCC	Civil and Commercial Code
R.E.	*Rattanakosin* Era

CHAPTER 1
INTRODUCTION

1.1 Background and Legal Problems

In civil law systems, the concepts of things and property are fundamental principles. These can be traced to Roman law's Law of the Twelve Tables, which has been extensively studied in civil law history. During the 19th century, the concepts of things and property were included in European countries' modern civil codes. Subsequently, the concept of things and property in the European Civil Code, specifically the French Civil Code and German Civil Code, spread to other continents worldwide and influenced their civil codes until the present day.

In the Thai Civil and Commercial Code ('CCC'), the definitions of things and property appear in Book I of General Principles. The definition of 'things' (*Sap*: ทรัพย์) is provided in Section 137,[1] while the definition of 'property' (*Sap-Sin*: ทรัพย์สิน) is provided in Section 138.[2]However, the concepts of things and property not only appear in Book I of General Principles but also appear in Book IV of Property, where they specifically relate to property rights, for example, ownership and possessory rights. [3] Moreover, in Book III of Specific Contracts, the concept of things and property appears as the subject-matter of many types of contracts, including the sale-purchase, the hire of property, and the gift.[4]

Although the concepts of things and property appear to be solid legal dogmas in Thai law, their interpretation remains problematic. They are controversial in many aspects, primarily due to theoretical debates between academics. For instance, there is an ongoing debate among Thai scholars regarding the concepts of '*Sap*' (things)

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[1] Thai Civil and Commercial Code Section 137.

[2] Thai Civil and Commercial Code Section 138.

[3] See, อานนท์ มาเม้า, *กฎหมายทรัพย์สิน: ความรู้พื้นฐานทางความคิด หลักทั่วไป และบทเบ็ดเสร็จทั่วไป* (พิมพ์ครั้งที่ 3, วิญญูชน 2562) 33-34 [Arnon Mamout, *Property Law: Fundamental Idea, General Principle, and General provision* (3rd edn, Winyuchon 2019) 33-34].

[4] See, ศนันท์กรณ์ โสตถิพันธ์, *คำอธิบายกฎหมายลักษณะทรัพย์สิน* (วิญญูชน 2566) 20 [Sanunkorn Sotthibandhu, *Textbook on Property Law* (Winyuchon 2023) 20.

and '*Sapsin*' (property) in the Thai CCC, [5] for example, whether things must 'be susceptible of having a value' or 'being appropriated' likewise property, [6]or whether the Thai CCC considers all types of things as property. [7].

Moreover, there are further debates regarding concepts of things and property in other provisions of the Thai CCC relevant to property rights issues. For example, there are problems with the adverse possession of incorporeal property under Thai Supreme Court precedents. According to the Decision of the Thai Supreme Court No. 677/2532 (A.D. 1989), the Thai Supreme Court ruled that [Translated by Author] "*Trademarks are one of the intellectual properties. It is neither movable property nor immovable property that can be acquired by adverse possession, according to Section 1382 of the CCC*". [8] This precedent was confirmed again by Thai Supreme Court Decision No. 9544/2542 (A.D.1999), which ruled that [Translated by Author] "*The copyright of the music cannot be owned by adverse possession. This is due to the fact that one cannot possess copyright in order to acquire rights through adverse possession*". [9] In addition, the Decision of the Thai Supreme Court No. 9544/2542 (A.D.1999) also ruled in the same ways that [Translated by Author] *"Trademarks are a type of intellectual property, which is neither movable nor immovable property, has no physical form [incorporeal], and cannot be held and possessed like ordinary property as provided in the [Thai] CCC, Book IV*".[10] These three precedents reflect that according to Thai law, intellectual property cannot be acquired by adverse possession, according to Thai CCC Section 1382. Intellectual property is incorporeal property, which has no physical form and cannot be held or possessed. Moreover, there is no ownership of the intellectual property. Therefore, it will be impossible to acquire ownership rights from the adverse position, as supported by the

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[5] See, เสนีย์ ปราโมช, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์* กฎหมายลักษณะทรัพย์ (พลสยามพริ้นติ้ง 2551) 9-24 [Seni Pramoj, Explanation of Civil and Commercial Code on the Law of Thing], (Pholsiam Printing 2008) 9-24].

[6] Arnon Mamout (n 3) 145-146; Seni Pramoj (n 5) 16-18; เทพวิทูร, พระยา (บุญช่วย วณิกกุล), *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ บรรพ. 1-2* (ไทยพิทยา 2509) 333 Thepwitoon, Phraya (Bunchuay Vanikkul), *Explanation of Civil and Commercial Code Book I – II, Section 1-240* (Thaipittaya 1966) 333].

[7] Sanunkorn Sotthibandhu (n 4) 43-44.

[8] Decision of the Thai Supreme Court no. 677/2532 (A.D.1989).

[9] Decision of the Thai Supreme Court no. 9544/2542 (A.D 1999).

[10] Ibid.

principle of the civil law traditions, in which ownership (dominium) and possession (possession) are only on corporeal things.

On the other hand, the Thai Supreme Court ruling in the shares case was contradicted with the logic in Intellectual property case, even though shares are also incorporeal property. Both the Decision of the Thai Supreme Court, No. 3395/2529 (A.D.1986)[11] and the Decision of the Thai Supreme Court, No. 2475-2476/2566 (A.D.2023)[12] ruled under the same precedent. Namely, the court ruled that shares are immovable property according to the Thai CCC; when the person openly possesses a share certificate belonging to another with the intention to be its owner for an uninterrupted period of more than five years, the possessor shall acquire the ownership of the share according to Section 1382 of the Thai CCC. [13]

From this precedent, it will be questioned why both intellectual property and shares, which are considered as incorporeal property by law, have different results from the decision by the Thai Supreme Court. In particular, the issues of incorporeal property, ownership of property, and possession of property. This raised concern regarding the issues of incorporeal property, ownership of property, and possession of property. In addition, problems regarding concepts of things and property were not only in the case of property rights in Book IV of the Thai CCC but also in the specific contracts in Book III as well.

For example, according *to Pornperm Srisawat* in *Problems of Meaning of Property in Specific Contract,*[14] The root of various debates and problems of the specific contract provision in Book III was that it used the words' property' in several provisions, which is contrary to the principles of property rights on such subject-matter of contract. For example, the sale contract was defined in the Thai CCC Section 453 as "*a contract whereby a person, called the seller, transfers to another person, called the buyer, the ownership of property, and the buyer agrees to pay the seller a price for it.*"[15] The problem was the interpretation of the phrase 'ownership of property'. If

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[11] Decision of the Thai Supreme Court no. 3395/2529 (A.D.1986).

[12] Decision of the Thai Supreme Court, No. 2475-2476/2566 (A.D.2023)

[13] Decision of the Thai Supreme Court no. 2475-2476/2566 (A.D.2023).

[14] พรเพิ่ม ศรีสวัสดิ์, ปัญหาความหมายของทรัพย์สินในเอกเทศสัญญา (วิทยานิพนธ์ปริญญานิติศาสตร์มหาบัณฑิต จุฬาลงกรณ์มหาวิทยาลัย 2560) [Pornperm Srisawat, *Problems of Meaning of Property in Specific Contract* (Master of Laws Thesis, Chulalongkorn University 2017)].

[15] Thai Civil and Commercial Code Section 453.

the ownership covers only the corporeal thing, in theory, the sale-purchase contract under Thai CCC will also cover only the things that are corporeal objects. [16]

In contrast, the sale-purchase contracts in Thai law cover both corporeal and incorporeal. Various Thai Supreme Court recognised sale contracts, even though the properties that were the objects of sale did not have ownership of them, such as obligations and rights. For example, according to the Decision of the Thai Supreme Court, No. 5466/2539 (A.D. 1996), "The right to hire-purchase contract of land and buildings of the National Housing Authority is a type of property that can be purchased and sold "[17] and the Decision of the Thai Supreme Court, No. 4503/2540 (A.D.1998) both were ruled under the same precedent. Namely, 'hire-purchase rights are a type of property that can be bought and sold according to a contract of sale-purchase.' [18]

These are only samples of the sales contract issue from the concept of things and property. In addition, there are still many debates and problems with the use of the word property in another specific contract, such as the use of the word property in gift contracts under Section 521 due to the definition of property under Section 138, which can include property rights as well. This leads to the issue of the fact that the transfer of property rights as gifts must be enforced in accordance with the gift contract or must be enforced in accordance with the transfer of claim under Section 306. [19]

From the aforementioned problems, when considering the concept of things and property under traditional Thai law, the development of these concepts in Thai law dates back to the Sukhothai period. [20] Later on, they began to appear clearly in the Law of Three Seals since the Ayutthaya era to the early *Rattanakosin* era. [21] The concepts subsisted in the Modernisation of Siam (Thailand) in the reign of *King Chulalongkorn*, modernized Thai law leading to the first legal code in Thailand, the Thai Penal Code R.E. 127, and further efforts to draft the Thai CCC. [22]

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[16] Pornperm Srisawat (n 14) 182.

[17] Decision of the Thai Supreme Court, no. 5466/2539 (A.D.1996).

[18] Decision of the Thai Supreme Court no. 4503/2540. (A.D.1997).

[19] Pornperm Srisawat (n 14) 82-83.

[20] See, Arnon Mamout (n 3) 73.

[21] ibid 74-78.

[22] มุนินทร์ พงศาปาน, *ระบบกฎหมายซีวิลลอว์: จากกฎหมายสิบสองโต๊ะสู่ประมวลกฎหมายแพ่งและพาณิชย์* (พิมพ์ครั้งที่ 3, วิญญูชน 2563) 238-239 [Munin Pongsapan, *Civil Law System: From*

According to *Alan Watson*, the definition of 'Legal Transplant,' as mentioned in 'Legal Transplants: An Approach to Comparative Law, 1974,' is the phenomenal process of "*moving a rule or a system of law from one country to another*." [23] In other words, it is the process of reception of the law from the exported country to the received country.

The researching of the primary document found that in the codification of the Thai CCC of 1925, many provisions were transplanted from various foreign laws by the process of copying provisions from various foreign private laws, such as the French Civil Code, German Civil Code, Argentine Civil Code, Japanese Civil Code, etc.[24] Even though all of the exported laws are the civil law system countries, the legal basis behind each country's provisions reflects that country's view on certain matters. Accepting laws from foreign countries by copying may create compatibility problems among concepts received from different countries. Therefore, the sequence of the legal transplantation in the Thai CCC may be one of the significant factors that affect the understanding of Thai law in the current situation. In particular, the understanding of concepts of things and property is still problematic in use and interpretation today.

1.2 Literature Review

In 2017, *Pornperm Srisawat* conducted a Master of Laws thesis at Chulalongkorn University on the subject of *'Problems of Meaning of Property in Specific Contracts'*. This thesis examined the same subject matter in numerous aspects, including the concepts of things, property, and contracts in Roman law, French law, and German law, as well as the concepts of things, property, and specific contracts in Thai law.

However, this thesis differs significantly from Srisawat's Master of Laws thesis in four key areas:

Firstly, this thesis delves into the historical concepts of things and property, tracing their development in Thai law both before and after the codification of the modern Thai legal code. The study entails codifying the Thai CCC using historical and

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Law of the Twelve Tables to Civil and Commercial Code, (3rd edn, Winyuchon, 2020) 238-239].

[23] Alan Watson, *Legal Transplants and Law Reform* (University of Georgia Press 1993) 22.

[24] Munin Pongsapan, (n 22) 259-260.

comparative approaches, examining the integration of foreign private laws into the Thai CCC and the resulting issues.

Secondly, this thesis delves into the interpretation of the term's 'things' and 'property' in the context of their evolution in Thai and English, as well as the problems that arise when translating provisions from other foreign languages into English.

Thirdly, in this thesis, the author has only considered three specific contracts: sales-purchase, gift contract, and hire of property.

Fourth, this thesis examines four types of foreign private law: French law, Argentinian law, German law, and Japanese law. The Thai CCC's drafters used these foreign private laws as a model when drafting provisions related to the definition of objects and property. The thesis also includes historical studies of the development of the concept of property in Roman law as well as the concept of property between the 13th and 18th centuries by various schools of thought before the promulgation of the French Civil Code.

Therefore, in the literature review of this thesis, the author has primarily examined the background and concepts of objects and property, focusing on four major areas:

Firstly, the general concepts of things and property[25] and their overall development in three eras: the tribal period, the casuistic period, which focuses on Roman law, [26] and the conceptual period [27] following to the classification of Boudewijn Bouckaert.[28]

Secondly, the concepts of things and property in foreign civil codes in the civil law system; this thesis studies concepts thereof in the civil codes of France, Argentina, Germany, and Japan in the version of the period that Thailand was drafting

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[25] Arnon Mamout, (n 3).

[26] See, for examples, Paul J. du Plessis, *Borkski's Textbook on Roman Law* (6th ed, Oxford University Press 2020); Peter Stein, *Roman Law in European History* (Cambridge University Press, 2004); Barry Nicholas, *An Introduction to Roman Law* (Clarendon Press 1962); Munin Pongsapan, (n 22).

[27] See, for examples, Jean Domat, *Civil Law in Its Natural Order Vol. I*, (Translated by William Strahan, Fred B. Rothman & Co.,1980); Francesco Giglio, '*Pandectism and the Gain Classification of Things'* (2012) 62 University of Toronto Law Journal 1; Munin Pongsapan (n 22).

[28] Boudewijn Bouckaert, 'What Is Property' (1990) 13 Harv J L & Pub Pol'y 775, 778.

the Thai CCC, including an overview of the background and methods for drafting the civil codes thereof. [29]

Thirdly, the concepts of things and property in Thai law, from the era before and after the modernisation of Siamese law up to the present Civil Code, including background methods for drafting through literature and primary documents regarding the drafting of the CCC from the Thai National Archives. [30]

Fourthly, the theoretical and practical problems regarding the concepts of things and property in current law are examined through the literature of academics

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[29] See, for examples, Konrad Zweigert & Hein Kotz, *An Introduction to Comparative Law Volume I : The Framework*, (Translated by Tony Weir, North Holland Publishing, 1977); Marcel Planiol, *Treatise on The Civil Law Volume 1, Part 2 Nos.1610 to 3097* (12th ed, Translated by Louisiana State Law Institute, 1959); George L. Gretton, 'Ownership and its Objects' (2007) 4 The Rabel Journal of Comparative and International Private Law 802 ; M.C. Mirow*, Latin American Law A History of Private Law and Institutions in Spanish America* (University of Texas Press 2004); Ernest J. Schuster, *The Principle of German Civil Law* (Clarendon Press, 1907); Basil S Markesinis, Hannes Unberath, and Augus Johnston, *The German Law of Contract* (2nd ed, Hart Publishing, 2006 ; Hiroshi Oda, *Japanese Law* (2 ed Oxford University Press, 1999); Munin Pongsapan (n 22).

[30] See, for examples, มหาวิทยาลัยวิชาธรรมศาสตร์และการเมือง, *ประมวลกฎหมายรัชกาลที่ 1 จุลศักราช 1116 พิมพ์ตามฉะบับหลวง ตรา 3 ดวง เล่ม 2* [University of Moral and Political Science, *Code of King Rama I Chunlasakkarat 1116 Printed According to the Royal Tree Seals Version, Vol.2*]; ชาญชัย แสวงศักดิ์, อิทธิพลของกฎหมายฝรั่งเศสในการปฏิรูปกฎหมายไทย (พิมพ์ครั้งที่ 2 วิญญูชน 2558) [Chanchai Sawaengsak, *Influence of France on Thai Legal Reformation*(2nd edn, Winyuchon, 2015)].; Arnon Mamout (n 3);Sanunkorn Sotthibandhu (n 4); Munin Pongsapan (n 22); สำนักหอจดหมายเหตุแห่งชาติ, ม ร.6 ย./18 เอกสารกรมราชเลขาธิการ รัชกาลที่ 6 กระทรวงยุติธรรม 'รายงานประชุม 1/161 ถึง 21/189 (24 ก.ค - 7 พ.ย. 2468) [National Archive, Mor Ror 6 Yor/18 Meeting Record, 1/161 to 21/181 (24 Jul – 7 Nov 1925)]; สำนักหอจดหมายเหตุแห่งชาติ, ม. สคก 3/4 สำนักงานคณะกรรมการกฤษฎีกา 'การประชุมกรรมการร่างกฎหมาย ณ กรมท่าช่างวังน่า ตั้งแต่วันที่ 19 พฤษภาคม ถึง 31 กรกฎาคม พ.ศ.2468' 388 [National Archive, Mor-Sor Kor Gor 3/4 Office of the Council of State 'Legislative Drafting Committee Meeting at Tha Chang Wangna Law Drafting Department from May19, to July 31, 1925'].

who have debated and given their opinions,[31] including relevant Supreme Court judgements for discussion.

In terms of studying the foreign private laws and Thai Civil Code, the author has studied and mainly focused on the concepts of things and property in the Thai CCC in three parts of the law: (I) the definition of things and property in the code; (II) the objects of ownership and possessory rights; and (III) the objects of specific contracts in the provisions of sale, hire of property, and gift contracts in comparative study with the foreign law.[32]

1.3 Research Question

The main question in this thesis is whether and how the transplantation of foreign laws affects the understanding and development of the concepts of things and property in Thai law.

1.4 Hypothesis

The different aspects of the foreign laws that were transplanted in the Thai CCC resulted in the concept of things and property in the Thai law being inconsistent and controversial. Therefore, the resolution to this problem involves reviewing and revising the provisions of the CCC, including relevant law, to create a clarified and consistent understanding of the concept of property.

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[31] See, for examples, Arnon Mamout (n 3);Sanunkorn Sotthibandhu (n 4); Seni Pramoj (n 5).

[32] See, for examples, Pornperm Srisawat (n 14).;Sanunkorn Sotthibandhu (n 4); ศนันท์กรณ์ โสตถิพันธุ์, *คำอธิบายกฎหมายลักษณะ ซื้อขาย แลกเปลี่ยน ให้* (พิมพ์ครั้งที่ 10, วิญญูชน 2566) [Sanunkorn Sotthibandhu, *Explanation of Sale-Purchas, Exchange and Gift Contract* (10th edn, Winyuchon, 2023)] ; ไผทชิต เอกจริยกร, คำอธิบาย ซื้อขาย แลกเปลี่ยน ให้ (พิมพ์ครั้งที่ 11 วิญญูชน 2564) [Pathaichit Eagjariyakorn, *Textbook on Sale-purchase, Exchange, and Gift* (11th edn, Winyuchon 2021).

1.5 Objectives of the Study

1. To examine the historical background and fundamental principles of the concepts of things and property, both in general terms and specifically in the context of the civil law system.

2. To investigate the development of the concepts of things and property in Thai law.

3. To comprehend the problems with the concepts of things and property in the current Thai legal system.

4. To conduct a comparative analysis to determine similarities and disparities between Thai and foreign private laws.

5. To examine the problems arising from the legal transplantation of foreign private law into Thai law.

6. To identify solutions and provide suggestions for Thai law's current problems.

1.6 Methodology

This research is focused on analysing documents in order to investigate the reasons for the inconsistencies and controversies regarding the idea of things and property in Thai law.

Thus, the historical method is applied to examine the development of the concepts of things and property in Thai law. This includes conducting a comparative analysis between foreign civil codes, which were referenced by Thai drafters, and the Thai CCC. The aim is to identify similarities and differences, as well as to uncover the root causes of problems and propose solutions for current legal problems in Thailand.

CHAPTER 2
THEORETICAL CONCEPTS OF THINGS AND PROPERTY IN CIVIL LAW SYSTEM

In the civil law system, concepts of things and property were fundamental and related to many laws. In order to comprehend the correlation between the concepts of things and property in the civil law system, it is necessary to understand the fundamental concept of each topic as a basis for further discussion. In this section, the author will provide a theoretical and historical background to develop the understanding in the concepts of things, property, and civil law systems. The aim is to facilitate the subsequent discussion on the concept of things and property in foreign civil law in Chapter 3 and the concept of things and property in Thai law in Chapter 4.

2.1 General Concept of Things and Property

The words ‘things’ and ‘property’ may be ordinary words, but they can have different meanings and background concepts in different contexts, as well as understandings of people from different places and the laws of each country. In addition, the translation from the process of reception of law from one country to another country, or legal transplant, was one of the reasons for the different understanding and the changing of the meaning from original concepts. Thus, in this chapter, the author will explain the general concept of things and property, which consists of the meaning of the words, the historical background, and the significance of these concepts to the civil law system.

2.1.1 General Concept of Things

In general, 'things' means physical objects. They can either exist in nature or man-made. When considering what an object is, in fact, it can be said that an object is a collection of various substances, which are electrons, atoms, and molecules, by an identifiable boundary through progressively more complex structures, and when the substances are assembled into objects that have a form that occupies space in itself, whether it is possible for humans to touch and see with the naked eye or not,[33] these may be called 'corporeal objects' or 'physical objects' that have a shape or 'tangible objects' which may also be called one of the names' things'.

[33] Seni Pramoj (n 5) 13.

This concept has been understood and undertaken by humans for a long time. [34] Later on, when human society developed and the laws emerged, the definition and classification of things was introduced in law to link them with the legal principles, attaching various types of things to the status of 'objects of rights' under the law, [35] for example, the ownership right on things, the possession right on things, etc. Notwithstanding, the word things likewise has a concrete meaning; the legal term or definition in the law may have a different meaning or more elements to be things in the legal sense, which will be discussed further.

2.1.2 General Concept of Property

On the other hand, 'property' is a word that can be interpreted in various meanings depending on context. Namely, the word property can be referred to not only as an object of rights, likewise things, but also as property rights themselves, for example, ownership rights, which are one of the property rights and also property at the same time.

The word property in English was derived from the French language '*properté*' (*Anglo-Norman*) or '*proprieté*' (*Old French*), which has appeared since the Middle English period (A.D. 1150–1500).[36] However, according to the understanding in French, the meaning of the word *proprieté* in French does not correspond to the word property in English directly, but it has a meaning that corresponds more to the word 'ownership' (*dominum*) in English, and the word that corresponds to the meaning of property in French is the word '*Biens*' [37], which will be discussed further. (Please see topic *3.1.2 Definition of Things (Chose) and Property (Biens) in French law*.)

According to Black's Law Dictionary, property has various meanings. However, the author selected only two significant meanings relating to this paper, as follows:

The first meaning is property as ownership or property right, namely:

> More specifically, ownership; the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it,

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[34] Ibid 1.

[35] Arnon Mamout, (n 3) 26,33.

[36] Oxford English Dictionary, 'Property'<https://www.oed.com/dictionary/property_n?tab=etymology> accessed 2 January 2024 accessed 2 January 2024.

[37] George L. Gretton, 'Ownership and its Objects' (2007) 4 The Rabel Journal of Comparative and International Private Law 802, 809.

> to use it, and to exclude everyone else from interfering with it... That dominion or indefinite right of use or disposition which one may lawfully exercise over particular things or subjects. .[38]

On the other hand, the second meaning is property as the object of rights; namely:

> The word is also commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate. It extends to every species of valuable right and interest, and includes real and personal property, easements, franchises, and incorporeal hereditaments. [39]

In summary, the word 'property' is a word that can be translated with more than one meaning, namely property rights, ownership, or an object of rights, same as things. This depends on the context of language, law, and understanding of the concepts of each country, and this thesis will discuss the concept of property in various contexts up to the discussed topic further. However, the author will state the meaning of each topic when it has been discussed and which meaning of property was mentioned.

2.2 Development of Concept of Property

After discussing the meaning of the word 'property', it became clear that this definition was developed and defined after the emergence of modern law. However, the concept of property has been developed for a long time and has been coupled with humankind's history, which has different aspects, interpretations, and definitions depending on the era. As a result, the concept of property was understood based on its historical background, which the author will discuss below.

According to *Boudewijn Bouckaert* in 'What Is Property', property development can be classified into three main periods: first, the tribal period; second, the causal period; and third, the conceptual period.[40] The concept of property was different and developed continuously in each period, which will be explored in the following discussion.

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[38] Henry Campbell Black, *Black's Law Dictionary* (4th ed West Publishing 1968) 1382.

[39] Ibid.

[40] Boudewijn Bouckaert (n 28) 778.

2.2.1 Tribal Phase

The relationship between property and humanity has been enduring and predates the establishment of legal systems.[41] During tribal times, the concept of property served as a fundamental and customary means of resolving conflicts amongst tribes, with authority derived from mythical and ancestral roots and closely intertwined with religious obligations and rituals. [42] During that age, there was no overarching or theoretical concept of property.[43] However, tribal communities had a clear understanding of resource ownership and were adept at safeguarding them, particularly natural resources.[44] Thus, in the tribal era, the concept of property revolved around the management of resources that were vital to their daily lives, including land, animals, gold, tools, weapons, and slaves.[45]

Furthermore, tribal societies perceive property as 'property rights' that pertain to families and kinship groups, rather than the property rights of independent individuals as understood in the present-day concept.[46] Subsequently, as human civilization progresses and society grows, the concept of property becomes progressively intricate, leading to an urban society with more elaborate restrictions.[47]

2.2.2 Casuistic Phase

After the formation of political units and intertribal trade, customary rule tended to disappear under pressure from the abovementioned factors.[48] Humans knew how to exchange and trade things between groups and tribes,[49] which resulted in the emergence of money, particularly coins, which were used as a medium for

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[41] อานนท์ มาเม้า, *กฎหมายทรัพย์สิน: ความรู้พื้นฐานทางความคิด หลักทั่วไป และบทเบ็ดเสร็จทั่วไป* (พิมพ์ครั้งที่ 3, วิญญูชน 2562) 26 [Arnon Mamout, *Property Law*: *Fundamental Idea, General Principle, and General Provision'* (3rd edn, Winyuchon 2019) 26].

[42] Boudewijn Bouckaert (n 28) 779-780.

[43] Ibid 779.

[44] Ibid.

[45] Ibid.

[46] Ibid 780.

[47] Arnon Mamout (n 3) 26.

[48] Boudewijn Bouckaert (n 28) 780.

[49] ฟิลิป ค็อกแกน, *More: เปิดประวัติศาสตร์เศรษฐกิจหมื่นปี* (แปลไทยโดย พลอยแสง เอกญาติ, มติชน 2565) 63 [Philip Coggan, *More: 10,000 Years Rise of World Economy* (Thai translation by Ploysang Akeyat, Matichon 2022) 63].

exchange and trade on a broader scale and cross border trade.[50] Furthermore, the establishment of a political unit or state also triggers the initiation of a legislative process by priests, kings, or state assemblies.[51] The emergence of the ancient state paved the way for the rise of great civilizations such as the Hellenistic empires, Pax Romana, the Islamic Empire, and the High Middle Ages in Europe.[52] However, Roman law, which incorporates the concept of property, significantly influenced the civil law system. This thesis will examine Roman law for further discussion. (*See Topic 2.3.2 Things and property in Roman law.*)

2.2.3 Conceptual Phase

The conceptual phase started with the era of the C*ommentator.* The meaning of property was defined by *Bartolus* (A.D. 1313-1357), [53] one of the famous commentators on Roman law,[54] who defined property as the "an *absolute right to dispose of things which is not prohibited by law"*[55] During the thirteenth century, the concept of property was elevated to the realm of theology through the development of Canon Law, which was influenced by Christianity.[56] This development persisted until the Natural Law School emerged. *Hugo Grotius* (A.D. 1583–1645), the first jurist to compose the textbook of *Hollandic Jurisprudence*,[57] defined the definition of property, which includes various types of real rights such as ownership and servitude[58]

The concept of property was extensively discussed in the sixteenth century by the French jurists *Hugues Doneau* (A.D. 1527–1591) and Francois Hotman (A.D. 1524–1590), as well as the Spanish *Jesuit Gabriel Vásquez* (A.D. 549–1604).[59] They defined property as a private right and a liberal and individualistic property system that viewed property as "*the right to keep a good, to use it, to benefit from its yields, to*

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[50] Ibid 67.

[51] Boudewijn Bouckaert (n 28) 780.

[52] Ibid 781.

[53] Ibid.

[54] Munin Pongsapan (n 22) 168.

[55] Boudewijn Bouckaert (n 28) 785-786.

[56] Ibid 786.

[57] Munin Pongsapan (n 22) 190.

[58] Boudewijn Bouckaert (n 28) 787-788.

[59] Ibid 788.

exclude anybody else from its use, to alienate it, and even to destroy it." [60] Subsequently, these liberal and individual property system concepts were perpetuated and expanded to encompass the concept of private property system organization, resulting in the systematic subdivision of rights and things, such as personal rights or real rights, by modern rationalist jurisprudence. .[61] This systematisation was further elaborated by French jurists, such as *Jean Domat* (A.D. 1625-1696) and *Robert Joseph Pothier* (A.D. 1699–1772), and German jurists, for example, *Samuel Pufendof* (A.D. 1632-1694), *Christian Thomasius* (A.D. 1622–1684), and Christian Wolff (A.D. 1679–1744), for whom the concept of property became the direct source of the French Civil Code [62] and could be regarded as the official beginning and starting point of the definition of property in the modern civil code [63] which this thesis will focus on the concept of things and property. (See Topic 3.1 of the French Civil Code.)

2.3 Things and Property in the Civil Law System

After the concept of property developed into a legal concept, the concepts of things and property became fundamental to private law in most countries, each with its own unique legal system. According to the civil law system, the concepts of things and property have shaped various aspects of the law, including its principles and structure. These two aspects have significantly influenced the understanding of the concepts of things and property in each country's civil law system.

2.3.1 Nature of Civil Law System

In general, the civil law system, or *Romano-Germanic* legal family system, relies on written laws as its primary source of jurisdiction and typically incorporates private law into the civil code. The legal principle in the civil code was either developed from the Roman law principle or can be traced back to the Roman law principle.[64]

The term '*civil law*' originates in Roman law as '*ius civile*'. At first, the term *ius civile* was intended to denote the law that was exclusively applicable to

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[60] Ibid (emphasis added).

[61] Ibid.

[62] Ibid.

[63] Ibid.

[64] Munin Pongsapan (n 22) 40-41.

Roman citizens. [65] This law encompassed the private law of Roman law, which included the law of persons (*Persones*), property (*Res*), obligation (*Obligato*), succession (*Hereditas*), and the law of procedure (*Actiones*).[66] In the Middle Ages, the term civil law was employed to differentiate Roman law from canon law and to refer to Roman law. In the present context, the term civil law is primarily used to refer to private law; however, it is also employed in comparative law to refer to the civil law system.[67] Since the rediscovery of the *Digest* of Justinian in Italy in the eleventh century, this principle of Roman law has been influenced and developed by European continental law.[68]

This had an impact on the Glossator's study of Roman law and the development of canon law, which included the emergence of the *Ius commune*. [69] Subsequently, the Commentators have also been studying Roman law continuously since the fourteenth century, and it has become one of the foundations of European continental law.[70] The legal humanism school emerged in the fifteenth and sixteenth centuries following the study of Roman law by the Glossator and the Commentator. This development had a substantial influence on the study of Roman law, as the legal humanism school employed humanistic concepts to analyse Roman law, attempting to comprehend its logic and reasoning. Consequently, the study of Roman law was systematised.[71] In the seventeenth and eighteenth centuries, the Natural Law School continued and expanded the study of Roman law through legal humanisms. The concept of the natural law school was widely embraced and influenced in numerous European countries. The French Civil Code of 1809,[72] , which was the most advanced legal code of its era and had a substantial impact on the development of modern legal codes in the nineteenth and twentieth centuries, was a significant framework in the emergence of the modern civil code.[73]

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[65] Alan Watson, *Making of the Civil law* (Harvard University Press 1981) 2.

[66] Alan Watson, (n 65) 1.

[67] Ibid 2.

[68] Peter Stein, *Roman Law in European History* (Cambridge University Press 2004) 43

[69] Munin Pongsapan (n 22) 166-167.

[70] Ibid 171.

[71] Ibid 291.

[72] Ibid.

[73] Ibid 291-293.

2.3.2 Things and Property in Roman law

Roman law relied on the concepts of things and property, particularly in structuring and categorising its principles. According to the Institute of Roman Law, there were three subjects, namely: the law of persons (*Persones*), the law of things (*Res*), and the law of actions or procedures (*Actiones*).[74]

2.3.2.1 Meaning of *res* in Roman law.

The term 'Res' in Roman law could refer to both the words 'things' and 'property'. Nevertheless, the meaning of the word *res* seems controversial when having to classify it with the current property system. According to Roman law, the term '*res*' was initially intended to be used with corporeal things (*res corporales*). However, after the principle of *res* had been developed by the Roman jurists, the word *res* was developed and interpreted to include not only corporeal things but also property rights (*ius in re*) and obligations (*obligato*), which are incorporeal things (*res incoporales*) later.[75] Such circumstances influenced the classification of things in the Roman classic period and subsequently in the Code of Justinian. Consequently, the interpretation of the term *res* in Roman law can vary depending on the context of law and its era.

2.3.2.2 Classification of Things in Roman law

Roman law divided the concept of res into various classifications. However, this thesis will focus on only three classifications, as outlined by Barry Nicholas in *An Introduction to Roman Law*:

The first classification was the classification of *res into res corporales* (corporeal things), such as organs, human beings, gold, and silver,[76] and *res incorporales* (incorporeal things),[77] for example, inheritance, usufruct rights, utility rights, and obligations.[78] This classification continues to influence the classification and definition of things in the modern civil code[79], for example, article 2345 [2311] and

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[74] Ibid 113.

[75] Barry Nicholas (n 26) 98.

[76] George L. Gretton (n 37) 805

[77] Barry Nicholas (n 26) 106.

[78] George L. Gretton (n 37) 805.

[79] Ibid 807.

article 2346 [2312] of the Argentine Civil Code 1871[80] or section 137 and 138 of the Thai CCC.[81]

The second classification involved dividing res *res mobiles* (movable things), and *res immobiles* (movable. Things)[82] for example, land and house. This classification still appears in modern civil code classifications, for example, French Civil Code article 516,[83] or Thai CCC section and section 139 and 140.[84]

The third classification involved dividing *res mancipi* and *res nec manicipi.* [85] *Res mancipi* refers to the things that were considered important and required transferring formally by law (*mancipatio*, or *inure cession*), which may only be transferred formally, for example, slaves, beasts of draft and burden, and Italian land,[86] which still appear in the modern civil code regarding the things that need to be registered to the official to transfer, namely immovable property and beasts and burden, for example, sections 1299 paragraph one[87] and section 1302[88] of the Thai CCC.

2.3.2.3 Real Rights in Roman law

In Roman law, the concept of real rights, or rights *in rem*, is usually related to the acquisition of things. Examples include the concepts of ownership (*Dominium*), possession (*Possessio*), and servitude (*Servitus*).[89] However, this

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[80] Argentine Civil Code of 1871 Article 2345 and Section 2346.

[81] Thai Civil and Commercial Code Section 137 and Section 138.

[82] Barry Nicholas (n 26) 105.

[83] French Civil Code Section 516

[84] Thai Civil and Commercial Code Section 139 and Section 140.

[85] Barry Nicholas (n 26) 105-106.

[86] Ibid.

[87] Thai Civil and Commercial Code Section 1299 paragraph one *"Subject to a provision of this Code or other laws, no acquisition by juristic act of immovable or of real right appertaining thereto is complete unless the juristic act is made in writing the acquisition is registered by the competent official"*.

[88] Thai Civil and Commercial Code Section 1302 *" The provisions of the three foregoing sections shall apply mutatis mutandis to ships or vessels of six tons and over, to steam-launches or motorboats of five tons and over, to floating houses and to beasts of burden"*.

[89] Munin Pongsapan (n 22) 118.

thesis will focus on only ownership and possession rights to compare with the modern civil code.

(1) Ownership (*Dominium*)

Ownership rights, or '*dominium*', had not been mentioned in Roman law since the beginning. On the other hand, the concept of ownership rights originated from the procedure law known as 'action in rem,' which granted the owner of property the right to file a case with the court to recover their possessions from those who had taken them illegally. Then, the concept of action in rem was developed into the concept of '*Dominium*', which is the absolute rights of the owner over the corporeal things in Roman law. [90]

(2) Possession *(Possessio)*

According to Roman law, the concept of possession (*possessio*) developed from a land dispute to distinguish the person who has ownership (*dominium*) from the person who actually possesses the land. The elements of possession consist of two things, namely: *corpus,* which means the physical relation of the possessor to the object, and *animus,* which means the intention of the possessor to exercise dominion over it.[91] Therefore, as stated in things, possession over *res corporales* (corporeal things) is essentially possible due to the possessor's possession of physical or corporeal objects.[92]

2.4 Things and Property in the Modern Civil Code

According to *Konrad Zweigert* and *Hein Kötz*, in *An Introduction to Comparative Law*, there were various legal families, e.g., Romanistic family, Germanic family, Nordic family, Common Law family, Socialist family, Far Eastern family, Islamic system, and Hindu law [93]. However, when focusing solely on the legal families in the civil law system, the Romanistic legal family and the Germanic legal family emerged as the most significant.[94], These families have distinct histories, concepts, and

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[90]Sanunkorn Sotthibandhu, (n 4) 162.

[91] Arnon Momout (n 3) 32.

[92]Sanunkorn Sotthibandhu (n 4) 441.

[93] Konrad Zweigert & Hein Kotz, *An Introduction to Comparative Law Volume I : The Framework*, (Translated by Tony Weir, North Holland Publishing, 1977) 67.

[94] Munin Pongsapan (n 22) 41.

perspectives, and their civil codes reflect these differences in terms of things and property.

Moreover, the French civil code, which served as the primary model in the Romanistic family, and the German BGB, which served as the primary model in the Germanic family, were the two most influential civil codes in the civil law system.[95] Not only in European countries but also in Latin American civil codes, such as the Brazilian Civil Code and the Argentinian Civil Code (see *topic 3.2 Concept of Things and Property in Argentine Law*), these models influenced a variety of codifications worldwide. Other Asian countries have their own civil codes, including the Japanese Civil Code (see topic *3.4 Concept of Things and Property in Japanese law*) and the Thai CCC (see topic *4.2 Concept of Things and Property in the Thai Civil and Commercial Code*).

2.4.1 Romanistic Legal Family

The Romanist Legal Family was employed by Zweigert and Kötz to classify the group of civil codes that comply with the structure and were influenced by the French Civil Code as the model [96], which included the French Civil Code itself. As a result of their codification, the French civil codes were organized according to the *Institutes* of Justinian, which were further divided into three primary categories.

2.4.1.1 Structure of Romanistic Civil Code

In general, the Romanistic family's civil codes are codified into three books, following the French civil code. According to the French Civil Code model, the structure was divided into three books: (1) the Book of Persons, which pertains to the status of persons and family law; (2) the Book II of Property, which pertains to the kinds of property, ownership, and other real rights; and (3) the Book III of Acquisition of Property, which pertains to succession, gifts, wills, contracts, obligations, and limitations of time.[97]

2.4.1.2 Things and Property in Romanistic Civil Code

According to the structure of Romanistic family codes, property was the first criteria to be codified and separated from the law regarding personal rights and property rights. The property law provisions were compiled and codified into Property Book II. Both provisions on the general concept of things and

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[95] Ibid.

[96] Konrad Zweigert & Hein Kotz (n 68) 68.

[97] O F Robinson, T D Fergus, and W M Gordon, *European Legal History* (Butterworths 2000) 265.

property, such as the kinds of property, the classification of movable and immovable property, the definition of things outside commerce, and the provisions on property rights such as ownership, possession, servitudes or usufruct, or the right of user and occupation, are codified in the same book.[98]

2.4.2 Germanic Legal Family

Zweigert and Kötz posit that the Germanic Legal Family was employed to classify the group of civil codes, which utilised the German civil code, or German BGB, as a model for codification. In contrast to the French Civil Code, the German BGB does not adhere to the directives of the *Institutes* of Justinian.[99] The structure of the German BGB was based on the idea of the *Pandectists*, which involved the division of the civil code into five books: the general parts, obligations, property, family, and succession.[100]

The civil code's 'General Part' or 'General Principle' is the most significant signature of the Germanic family and is largely traceable to them.[101] This general part was influenced by the Christian geometric systems and the ideas of *Pufendorf* and *Domat*. [102] The General Part establishes the common rules for a variety of general concepts in the civil code, including definitions, civil rights, the juristic method, and time and limitation restrictions. When the specific or special law (*ius specialale*) provisions do not explicitly state the case, all provisions in the civil code, as well as the general law (*ius generale*), apply to these general parts.

2.4.2.1 Structure of Germanic Legal Family

According to the German BGB, the model is made up of five books of code. The general part of the civil code commences with Book I, which is typically followed by Book II of Obligation, Book III of Property (or Real Rights), Book IV of Family, and Book V of Succession (or Inheritance).[103] However, the order or number of books may not necessarily follow the German civil code or be limited to five books. For instance, the Japanese Civil Code established the Book of Real Rights before the Book of Obligations. Although this order is distinct from the German BGB's, it is still

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[98] Ibid.

[99] Peter Stein (n 68) 123.

[100] O F Robinson, T D Fergus, and W M Gordon (n 97) 277.

[101] Konrad Zweigert & Hein Kotz (n 6829) 107.

[102] Peter Stein (n 68) 123.

[103] O F Robinson, T D Fergus, and W M Gordon (n 97) 227.

regarded as a member of the Germanic family.[104] Furthermore, the Thai CCC created Book III of Specific Contracts, a commercial code classified as a Germanic family and situated between Book II of Obligations and Book IV of Property.[105]

2.4.2.2 Things and Property in Germanic Civil Code

Things and property play a significant role in codifying Germanic family codes. In particular, the Book of General Principles typically defines the definition and classification of things. This book pertains to the general concepts and principles that apply to all provisions in the civil code, such as the definition of things.[106] Meanwhile, the Book of Property or Real Rights complies with and codifies the provisions on property rights, for example, the concepts of ownership rights,[107] possession,[108] and servitude.[109]

Moreover, further observations of the Germanic family's influence on property law reveal that the civil code in the Germanic legal family code typically clearly distinguishes between the Book of Obligation and the Book of Property, in line with the *Pandectists* idea.[110] Even obligations are regarded as incorporeal properties. This classification in the Germanic Family Civil Code was similar to that of *res* in the *Institutes* of Justinian, which also separated property law from obligation law.[111]

However, for the German legal family, the separation of the Book of Property and the Book of Obligation in the civil code cannot be considered an

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[104] Munin Pongsapan (n 22) 9.

[105] Munin Pongsapan (n 22) 58.

[106] German Civil Code Section 90; Japanese Civil Code Article 85; Thai Civil and Commercial Code Section 137.

[107] German Civil Code Section 903; Japanese Civil Code Article 206; Thai Civil and Commercial Code Section 1336.

[108] German Civil Code Section 854; Japanese Civil Code Article 180; Thai Civil and Commercial Code Section 1367.

[109] German Civil Code Section 1018; Japanese Civil Code Article 280; Thai Civil and Commercial Code Section 1387.

[110] ศนันทร์กรณ์ โสตถิพันธุ์, *คำอธิบายหลักพื้นฐานของกฎหมายเอกชน* (วิญญูชน 2562) 325 [Sanunkorn Sotthibandhu, *Explanation on Introduction to Private law* (Winyuchon, 2019) 325].

[111] Paul J. du Plessis, *Borkski's Textbook on Roman Law* (6th ed, Oxford University Press 2020) 254.

absolute criterion. For example, the Argentine Civil Code of 1871 received this separation concept from German *Pandectists* but lacked the Book of a General Principle, which is the German legal family's signature. Other books in the Argentine Civil Code of 1871, such as the Book of Person, followed the French Civil Code, combining the law of person and the law of family without the presence of the Book of General Principles. Therefore, the Argentine Civil Code of 1871 was considered the Romantic legal family, not the Germanic legal family.[112]

2.5 Thai Civil and Commercial Code as the Civil Law System

The Thai CCC is composed of six books, including Book I of General Principles, Book II of Obligation, Book III of Specific Contracts, Book IV of Property, Book V of Family, and Book VI of Succession.[113] As a result, the Thai CCC is unquestionably a member of the Germanic family and adheres to the German BGB model. Additionally, the Thai CCC shares definitions with the German BGB in Book I of General Principles (General Part) and mirrors the structure and order of the German BGB.[114]

However, just because the structure of the civil code appears similar to that of the German BGB and is part of the same legal family, it does not necessarily mean that the content or concept of the law within will be similar. For instance, while the structure and definition of things in the Thai CCC Section 137 are similar to those in the German BGB Section 90,[115] the Thai CCC provides a definition of property in its general principal Section 138.[116] which the German BGB does not have. In contrast, the Argentine Civil Code of 1871, which is considered the Romanistic family, also included a definition of property, as does the Thai CCC, despite having a different legal family structure.

2.6 Conclusion

In summary, since Roman law, the concepts of things and property have been important to the civil law system.

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[112] Konrad Zweigert & Hein Kotz (n 6829) 107.

[113] Munin Pongsapan (n 22) 58

[114] German Civil Code Section 90; Thai Civil and Commercial Code Section 137.

[115] German Civil Code Section 90.

[116] Thai Civil and Commercial Code Section 138.

The concept of things is closely related to and focuses on corporeal objects. It is evident that the concept of things tends to be objective, stemming from a shared understanding of the corporeal objects that humans encounter in their daily lives. However, when the concept of things became a legal concept, it was interpreted to encompass the value of the objects and the ability to appropriate them. This concept may be interpreted more broadly; at times, the concept of things is defined to cover only physical things. However, the concept of things can be interpreted more broadly to encompass incorporeal objects or property rights with economic value, such as obligation rights, property rights, or inheritance rights, which was previously the case with the interpretation of *res* in Roman law. However, the idea that things must only be associated with corporeal objects in order to be subject to property rights persisted throughout the evolution of Roman legal thought.

The concept of property is more subjective and abstract than the concept of things. It can be concluded that the concept of property has undergone a transformation in conjunction with the advancement of human society. Nevertheless, they share a common property, which includes possession, ownership, and property rights. This applies to both the linguistic definition and the interpretation of the term. At this theoretical level, it is possible to tentatively conclude that property can have two main meanings: either it refers to an object of rights over both corporeal and incorporeal objects, or it can also refer to ownership and possessory rights over the property itself.

In the civil law system, the concepts of things and property have a significant role in the structure and organisation of civil law codes. Historical studies dating back to Roman law have found that property (res) was one of Roman law's classifications. Property is still one of the important matters affecting the structure of the civil code, whether it be Romanistic family law or Germanic family law. Nevertheless, a number of significant observations lead to several critical assumptions. Differences in legal families impact the structure of the property system, potentially influencing attitudes and understandings of property within each system. Second, even though it's a family civil code, there may be property or specific differences. If the process of codifying and transplanting laws is derived from a variety of family sources, to clarify the differences between the various concepts.

CHAPTER 2
CONCEPT OF THINGS AND PROPERTY IN FOREIGN LAW

The concept of things and property are appeared in every private law in the civil law system country. The concept of things and property can appear in more than in the book of General principle, or the Book of Property or Real Rights. In fact, the concept of things and property also appeared in the contract law of the civil code as the subject matter of the contract and how the understanding of each country has their perspective on the concept of things and property to their contract law provision. The phenomenon of the legal transplant or reception of the foreign law are occurred with the codification of the civil code. In comparative law area, the comparative on the provision of the civil code is one of the methodologies to find the similarity and dissimilarity between two laws or more than that to find the original provisions with the process of historical research.

According to the *Phraya Manavaratchasevi's* Index of the Civil Code *in* the book '*A Recording of an Interview with Phraya Manavaratchasevi'* by the Department of Social Legal Studies, Philosophy, and History, Faculty of Law Thammasat University, the provisions of the Thai CCC have been identified with the provisions of foreign civil codes which the drafting commission was used as references in the drafting of the Thai CCC. In this research, seven topics have been quoted, including provisions regarding the definition of property, the definition of property, contents of ownership, acquisition of possession rights, the definition of sales law, the definition of hiring of property, and the definition of gift, which appear as follows.

Table 1 Phraya Manavaratchasevi's Index of Civil Code [117]

Topic	Thai CCC	Frech CC	Arg. CC 1871	German BGB	Japanese CC
Things	98 [137]	-	-	90	85
Property	99 [138]	-	2349	-	-
Ownership	1336	544, 546	-	903	206
Possession	1367	-	-	-	180
Sale-Purchase	453	1582	-	433	555
Gift/Donation	521	711, 894	-	516	549
Hiring of Property/Lease	537	1709	-	535	601

Therefore, in this chapter, the author will explain the concept of thigns and property in the civil law codes of all four countries, namely France, Argentina, Germany, and Japan, in order to study the overview of the background and essential characteristics of the legal codes and the concept of things and property which appear in provisions of the civil codes regarding definitions, possession, ownership, and contracts namely sale, lease, and gifts.

3.1 Concept of Things and Property in French Law

In this part will discusses on the concept of things and property in French law according to the French Civil Code (*Code Civil*) in four topics which are the background of the French Civil Code, the definition of things and property in French law, relation of things and property to property rights in French law, and relation of

[117] ภาควิชานิติศึกษาทางสังคม ปรัชญา และประวัติศาสตร์, *บันทึกคำสัมภาษณ์พระยามานวราชเสวี* (วิญญูชน 2557) 147,165, 170, 171,228, 230 [Department of Social Legal Studies, Philosophy, and History, Faculty of Law Thammasat University, *Recording of an Interview with Phraya Manavaratchasevi* (Winyuchon 2014) 147,165, 170, 171,228, 230].

thing and property to contracts in French law. For the provisions in French law, the author will use the French Civil Code in English, translated by *E. Blackwood Wright*.[118]

3.1.1 Background of the French Civil Code

French Civil Code or *Code Civil* was promulgated in 1804, and also knows as the name 'Napolean Code.' Due to when Napoleon Bonaparte became to power. Napoleon was instrumental in pushing for the codification of the French Civil Code by appointed the new civil code drafting committee to draft a French civil code, and he also closely participated the codification of the civil code.[119] At the time of promulgated French Civil Code was consisting of four books namely, Persons (*Personne*), Property (*Biens*), Acquisition of Property (*Acquiert la propriété*), and Procedure (*Procédur*). After that in 1807 the book of civil procedure was moved to separate code. Then French Civil Code remained three books following the structure of *Institute* of *Corpus Iuris Civilis*,[120] and became the model of the Romanistic or Romanist Legal family which the author already discussed in the Chapter 2.[121]

The French Civil Code was highly influenced by the idea of Natural Law School and was one of the fruits from the French Revolution in 1789, in particular the work of *Robert Joseph Pothier* namely 'The Treaty of Civil Law' (*Traités de Droit Civil*), and some provision of the civil code also was influenced from the work of *Jean Domat*. The French civil code has been one of the most significant models for the modern civil code since 19th century, and also influenced to European countries which was conquered by France e.g., Italy and influenced to other civil code of European countries e.g, Spain or some states in Germany. [122]Not only influenced to European countries, but at the 19th century the French Civil Code also influenced to Latin Americas e.g., Argentina which was the oversee colonies of Spain at that time, which the author will disused further in this chapter topic *3.2.1 Background of the Argentine Civil Code*[123]. Moreover, the French Civil Code also influenced to some Asian Countries which wanted to revolution the legal system e.g., Japan and Thailand which the author

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[118] E. Blackwood Wright (trs), *The French Civil Code Translated into English with Notes Expandatory and Historical, and Comparative References to English Law* (Stevens and Sons 1908).

[119] Konrad Zweigert & Hein Kotz (n 68) 76-77.

[120] Munin Pongsapan (n 22) 200.

[121] See, Topic 2.4.1 Romanistic Legal Family.

[122] Munin Pongsapan (n 22) 200-201.

[123] See, Topic *3.2.1 Background of the Argentine Civil Code.*

will disused further in this chapter topic *3.4.1 Background of Japanese Civil Code* and in the chapter 4 Topic *4.2 Concept of things and property in the Thai CCC.* Now, the Frech Civil Code was amendment in 2006 and changed the structure of the code from three Book Civil code into five books, by adding the Book IV of Securities and Book V Provisions applicable to Mayotte. [124]

3.1.2 Definition of Things (*Chose*) and Property (*Biens*) in French Law

According to the French Civil Code Structure, property is one of the concepts which is the significance criteria for categorized the provision in the code. Concept of property was appeared clearly in Book II of Property, for example the classification of property, possession, or ownership. Moreover, it also was appeared in the Book III of Acquisition of property, which the subject matter of the contract was the things or property for example, Sale contract, Hiring of things Contract, and Donation contract.

There was not the definition of things (*chose*) in the French Civil Code. According to the French legal textbooks thing in general was defined as a corporeal object following the concept of *res corporales* in Roman law and the classification of things by *Gaius*.[125] However, the concept of things in French Civil Code is not the exactly the same with the *res corporales* in Roman law. The concept of things in French law had developed to related to the concept property by the classification between '*Thing by Nature*' for example the sun, moon, sea or river, and 'Things in Civil law' which limited things into as things that human able to belong or appropriated them or called things which became property.[126] Thus, the term things in French civil code were refer to things that become property.[127] On the other hand, things in French Civil Code referred to corporeal property or *Biens corporels.*

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[124] Ordinance No. 2006-346 of March 23, 2006, art. 1 JORF March 24, 2006.

[125] George L. Gretton (n 37) 809.

[126] Jean Domat, *Civil Law in Its Natural Order Vol. I*, (Translated by William Strahan, Fred B. Rothman & Co. 1980) 148-156.

[127] Marcel Planiol, *Treatise on The Civil Law Volume 1, Part 2 Nos.1610 to 3097* (12th ed, Translated by Louisiana State Law Institute, 1959) 280.

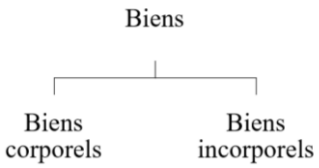

Figure 1 Classification of Property (Biens) in the French Civil Code[128]

According to French law, property In French law, there is no property (*Biens*) in the French Civil Code (FCC). However, the concepts of things and property are mentioned in French legal textbooks and appear in various provisions of the civil code.[129] For example, the classification of property in article 516 of the FCC which states that '*All property is movable or immovable.'*[130] However, in French legal textbook the definition of things was explained to be objects which are corporeal object which able to be appropriated by human which also called 'Things in Civil law'[131] or things as property',[132] Likewise things, there was not the provision for the definition of property in the Frech law. The definition of property was explained by the following quote: "*The word 'Property,' therefore, includes, besides material things, a certain number of kinds of incorporeal property which are rights, such as credits, income from investment, office and trade mark, etc.*"[133] On the other words, the concept of property in French law was both object of right which are things as corporeal object and incorporeal property which able commerce by law. Therefore, if considering to the term things in French law it had to considered that whether such things are corporeal property according to the French concept or not. On the contrary, if considering to the term property in French law, it able to refer to both corporeal and incorporeal property which included things, rights, or other property rights by law.

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[128] George L. Gretton (n 37) 809.

[129] Henry Dyson, *French Property and Inheritance Law Principle and Practice* (Oxford University Press 2003) 13.

[130] Article 516, French Civil Code. Translated by E. Blackwood Wright, *The French Civil Code Translated into English with Notes Expandatory and Historical, and Comparative References to English Law* (Stevens and Sons 1908) 89.

[131] Jean Domate (n 126) 148-156.

[132] Marcel Planiol (n 127) 280.

[133] Ibid.

3.1.3 Relation of Things and Property to Property Rights in French Law

3.1.3.1 Ownership (*Propriété*)

According to French law, the concept of ownership (*propriété)* was defined in the article 544 of the French Civil Code.[134] In general, ownership is an absolute right of the owner to use or to abuse to the thing[135],or the right of enjoyment and disposing of an owned thing under forbidden by law or regulation. The owner of the thing also has an accession right from what the thing produces both nature of artificial according to the article 546.[136]According to *Planio*l, Ownership is the real rights and the right of ownership assurers '*exclusive enjoyment of given piece of property'.* [137] Thus, the object of rights for ownership in French law are things (*Choses*) which are able to be appropriated by human under the concept of property (*Bines*). On the contrary, not all property is able to be an object of ownership, only corporeal property for example lands, cars, goods are able to have ownership on them, while no ownership which is real rights on incorporeal property for example rights or claims.

3.1.3.1 Possession

The definition of possession in French Civil Code had been defined in article 2228 since 1804 until 2008, [138] After the promulgated of *LOI n°2008-561 du 17 juin 2008 art. 2*, the article of definition possession was moved from article 2228 to article 2225 until present.[139] The definition of referred to the detention or the enjoyment of a thing or a right. In the eighteenth century, *Pothier* as the one of the

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[134] French Civil Code Article 544 "*Ownership is the right of enjoyment and disposing of a thing in the most unlimited manner, provided the thing is not made use of in a manner forbidden by law or regulation*".

[135] Marcel Planiol (n 127) 380-381.

[136] French Civil Code Article 546. "*The ownership of thing whether it is movable or immovable, gives the owner right to all that it produces, and to that which unites to it as an accession, whether it has become united to it by nature causes or artificial cause. This right is caked the right of accession*".

[137] Marcel Planiol (n 127) 378-379.

[138] French Civil Code Article 2255 [2228] "*Possession means either the detention or the enjoyment of a thing or of a right by a person who actually has or enjoyment the same personality or else through another who acts on his behalf*".

[139] *LOI n°2008-561 du 17 juin 2008 art. 2*.

most influenced to the drafting of French Civil Code cited the works of Medieval jurists to compare the customary law in the middle age with the Roman law. However, the after the promulgation of the French Civil Code in 1804. The concept of possession in French law was influenced by the Savigny's theory of possession or 'Subjective Theory', which separated between possession and detention.[140] According to Savigny, possession can be both rights and state of fact in the same time, however, in general possession is the state of fact and it can be rights in exceptional case.[141] This idea was also appeared in the *Treaties on Civil Law* by *Marcel Planiol* which stated that possession in French law is a state of fact.[142] Regarding the objects which may be possessed, according to *Domat*, the objects which can be possesses are things (*choses)* which are corporeal objects whether they are movable or Immovable,[143] while according to *Planiol,* beside corporeal object whether movable or immovable, things which are able to possessed must *'susceptible of private ownership'*[144] and not included the public domain or the things which are common. However, in French law, the concept of quasi- possession was accepted in the French law as well Therefore, the concept possession in French law was include the incorporeal things for example rights (*droit*), claim, or even the status by law. Therefore, according to *Planiol,* the concept of possession in French law '*was removed from the domain of the real rights and has extended to other rights*.'[145] On the other hands, possession in French law concept was also considered as one of the property rights, and not the real rights for the reasons that incorporeal object also can be the object of possession in French law.

3.1.4 Relation of Things and Property to Contracts in French Law

The provision on contracts and donation was stated in the Book III of acquisition of the property in the French Civil Code. In this topic will be discussed on the definition, general concept, and the object subject matter and other observation of the sale, hiring of things and donation in French law.

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[140] สมเกียรติ วรปัญญาอนันต์, 'ข้อความคิดว่าด้วยการครอบครองตามกฎหมายลักษณะทรัพย์สิน' (2564) 1 วารสารนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 1, 21 [Somkiat Worapunyaanun, 'The Idea of Possession According to The Property law' (2021) 1 Thammasat Law Journal 1, 21].

[141] Somkiat Worapunyaanun (n 140) 28.

[142] Marcel Planiol (n 127) 340.

[143] Jean Domate (n 27) 846.

[144] Marcel Planiol (n 127) 342.

[145] Ibid.

3.1.4.1 Sales (*Vente*)

The definition of sale contract (*Vente*) in French law was defined in the article 1582 in the French Civil Code.[146] Sale in French law is an agreement between the seller which has a duty to deliver a things or registration transfer of the document depends on type of a thing to the buyer and the seller has to pay a price for it. Even the article stated that in sale contract the buyer has to deliver a thing, however, the objects which are the subject matter of sale contract in French law was specially stated in the article 1598,[147] which stated that '*Everything which may be the subject-matter of commerce.'*[148] It can be seen that in Frenc law whether it corporeal or in corporeal objects, movable or immovable, if such object is the subject-matter of commerce it is able to be sold in French law, and the concept of sale in French law did not mention to ownership of the thing or property which the parties agreed to sale. Thus, in case of rights which has no ownership on them are able to be sold. Therefore, sale in French law is focusing on deliver the sold object with the intention to transfer the belonging on it, and the objects which is the subject-matter of sale in French law is property or '*Biens*' in the French concept, which are things and incorporeal object which able to be appropriated or in commerce in the French law for example, claim, property rights, office (business). They are able to be an object of subject-matter of sale.

3.1.4.2 Hiring of Things (*Louage des choses*)

In the French law, lease was appeared as one of the hiring contracts which separated to hiring labour and hiring of things according to article 1708.The concept of hiring of things (*Louage des choses*) contract was defined in article 1709 of the French Civil Code.[149] The essential of the contract is the agreement whereby one party binds himself to let other party to enjoy the use of property for a

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[146] French Civil Code Article 1582 "*A sale is an agreement by which the one person binds himself to deliver a thing, and the other party agrees to pay for it. A Sale may be carried out by a document drawn up by a notary or by one merely signed by the parties*."

[147] French Civil Code Article 1598 *"Everything which may be the subject-matter of commerce may be sold, unless special laws have prevented its sale*."

[148] Ibid.

[149] French Civil Code Article 1709 "*The hiring of thing is a contract whereby one of the parties binds himself to let the other party enjoy the use of a thing for a certain period in exchange for certain price which the other party bind himself to pay him*."

certain period, and another party binds himself to pay a certain price in exchange on the other hand the rent. The objects which are subject matter of hiring of things in French law was stated in the article 1713 which are *'every kind of property* (*Biens*)'[150] Thus, according to the definition of *Biens in* French law both corporeal and incorporeal property are able to be hired or leased in the hiring of things contract. However, in case of things they are also under the definition of property (*Biens*) not all things that can be hired, in case of incorporeal property, it depends on the nature of each property that whether it possible transfer for another party to enjoy such property and able to transfer by law or not. If it was not prohibited by law or limited by their nature, incorporeal objects also be hired in French law.

3.1.4.3 Donation *inter vivos* (*Donation entre vifs*)

According to French law article 711, the transferring and acquiring of ownership of property can be occurred in three ways namely, donation *inter vivos* (among living), will (testamentary donation), and contract.[151] Focusing on donation *inter vivos* (*donation entre vivos)* according to article 894 , the essential of the donation *inter vivos* is the irrevocable transfer of a thing (*chose*) by divest the thing in fact (*ipso facto)* to the donee.[152] However, not only things that able to the subject matter of the Donation *inter vivos*, Moreover, in French law, the donation in French law is not only the donation *inter vivos* according to article 894. They are others type of acts which are considered as donation in French law namely, manual gift which is the French customary of gift ,donation by transfers, indirect donation, accessory donation or disguised donation, which real rights or claim able to be the subject matter of donation [153] Thus, for the objects which able to be the subject matter of the donation in French law is property (*Biens*) which both of things and rights, including others incorporeal property.

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[150] French Civil Code, Article 1713 "*Every kind of property may be let, whether movable or immovable."*

[151] French Civil Code Article 711 "*Ownership of property is acquired and transferred by succession, by donation inter vivos, by will, and by a contract*."

[152] French Civil Code Article "*894 A donation inter vivos is an irrevocable act of transfer whereby the donor ipso facto divest himself, in favour of the donee, of the subject-matter of the things*."

[153] Pornperm Srisawat (n 14) 154 -159.

3.2 Concept of Things and Property in Argentine Law

In this part will discusses on the concept of things and property in Argentine law according to the Argentine Civil Code in four topics which are the background of the Argentine Civil Code, the definition of things and property in Argentine law, relation of things and property to property rights in Argentine law, and relation of thing and property to contracts in Argentine law. However, in this thesis will focusing and discussing on the Argentine Civil code of 1871 which was the vision that be used to one of the models for drafting the Thai CCC of 1925 for comparative in the Chapter 5. Moreover, the number of articles which mentioned in this topic will be the new provision number of the Argentine Civil Code and the old provision number will be bracketed. For the provisions in Argentine Civil Code, the author will use the ArgentineCivil Code in English, translated by *Frank L. Joannini.*[154]

3.2.1 Background of the Argentine Civil Code

Argentina was a colony of the Spanish Empire in the 16th century after Critofer Columbus discovered the Americas. Then, Argentina declared its independence from Spain in 1861 and became a federation until the present day. The most important contributor to the Argentine Civil Code was *Dalmacio Vélez Sársfield* (1800-1875), the famous Argentinian jurist who drafted and promoted the 1871 Argentine Civil Code. This jurist led to the Argentinean Civil Code, also known as the Vélez Code (Código de Vélez). Vélez was born in Córdoba, a province in Argentina. He graduated from law school and became a Buenos Aires barrister in 1823.[155] Vélez was proficient in both mathematics and languages, for example, English, Spanish, Italian, and Latin. After that Vélez entered the political path. as a member of the lower house of the Argentine National Congress; moreover, In academia, Vélez was appointed professor of economics at the University of Buenos Aires and became the governor of Buenos Aires. Vélez later drafted the Buenos Aires Commercial Code, which was passed through the Argentine National Congress in 1864. The Buenos Aires Commercial Code was an important milestone in the codification of the Argentine Civil Code. Later, while Vélez served as Minister of Internal Affairs, Velez drafted the Argentinian Civil Code by modifying his idea in the Buenos Aires Commercial Code and brew on principles from

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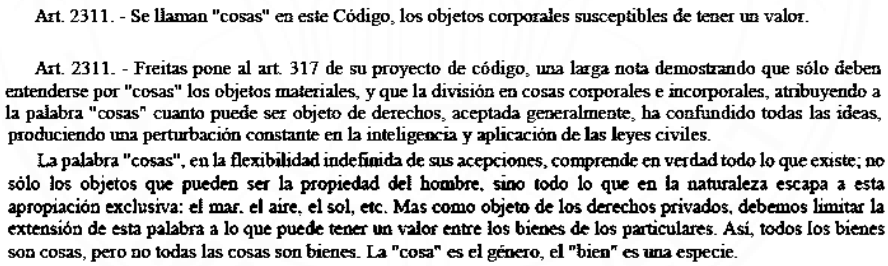
[154] Frank L. Joannini (trs), *The Argentine Civil Code Together with Constitution and Law of Civil Registry* (Boston Book Company 1917).

[155] M.C Mirow, *Latin America Law: A History of Private Law and Institution in Spanish America* 138.

Roman law, Canon law, the French Civil Code, and important writings such as "*Consolidation of the Civil Laws*" (*Consolidação das Leis Civis*) by Augusto Teixeira de Freitas, a famous Brazilian jurist who wrote about Brazilian private law. Freitas's work was influenced by *Pandectist* ideas, which made the civil law code Vélez's Argentinian was influenced by combining both the French civil code and German jurisprudence. One evidence that *Pandectist* influence indirectly influenced the Argentine Civil Code is that the 1871 Argentine Civil Code was not divided into three sections like the French Civil Code (at that time). But the topic of the legal code has been divided into four chapters, namely Book I of Persons (*Libro Primero, De Las Personas*), Book II of Personal Rights in Civil Action (*Libro Segundo, De Los Derechos Personales en Las Relaciones Civiles Seccion Primera*), Book III of Real Rights (*Libro Tercero, De Los Derechos Reales*), and Book IV of Real and Personal Rights (*Libro Cuarto, De Los Derechos Reales y Personales - Disposiciones Comunes*) In 1869, the Argentine National Congress approved the draft of the Argentine Civil Code (Código Civil de la República Argentina), which went into effected in 1871.[156] One of the signatures of the Argentine Civil Code (official version in Spanish) has the official annotation by Vélez, which was one of the essential explanations for interpreting and understanding the Argentine Civil Code.



Art. 2311. - Se llaman "cosas" en este Código, los objetos corporales susceptibles de tener un valor.

Art. 2311. - Freitas pone al art. 317 de su proyecto de código, una larga nota demostrando que sólo deben entenderse por "cosas" los objetos materiales, y que la división en cosas corporales e incorporales, atribuyendo a la palabra "cosas" cuanto puede ser objeto de derechos, aceptada generalmente, ha confundido todas las ideas, produciendo una perturbación constante en la inteligencia y aplicación de las leyes civiles.

La palabra "cosas", en la flexibilidad indefinida de sus acepciones, comprende en verdad todo lo que existe; no sólo los objetos que pueden ser la propiedad del hombre, sino todo lo que en la naturaleza escapa a esta apropiación exclusiva: el mar, el aire, el sol, etc. Mas como objeto de los derechos privados, debemos limitar la extensión de esta palabra a lo que puede tener un valor entre los bienes de los particulares. Así, todos los bienes son cosas, pero no todas las cosas son bienes. La "cosa" es el género, el "bien" es una especie.

Figure 2 Annotated of Argentine Civil Code 1871 Article 2311 [157]

After had been enforced for 144 years, the Argentine Civil Code 1871 was repealed by the new Argentine Civil and Commercial Code (*Código Civil y Comercial de la Nación*) on 1st August 2015 by Law No. 26.994 of October 1, 2014.[158]

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[156] Ibid 139.

[157] Annotated of Article 2311, Argentine Civil Code 1871 (Official version).

[158] Argentina AR149 Law 27.077 of December 18, 2014 on the entry into force of the Civil and Commercial Code of the Argentine Republic (approved by Law No. 26.994 of October 1, 2014).

3.2.2 Definition of Things and Property in the Argentine Civil Code

According to Argentine Civil Code, the definition of things (*cosa*) was defined in article 2345 [2311][159] as the corporeal objects (*objetos corporales*) which susceptible of having a value. While the definition of property (*bienes*) was defined in the next provision in article 2346 [2312][160] as Immaterial objects (*objetos inmateriales*) susceptible of having a value, likewise things. The concept of things was aslo understanded as everything that can be the object of rights and was explained further in the official annotated of the provision that only corporeal objects that *have a value among the goods of individuals'*[161]are considered as things in the Argentine Civil Code. In the event of property, in Argentine law, property is Intangible object which can be goods in Argentine law for example claim or personal rights, and the sum of property of person called 'patrimonial' (*patrimono*). However, there is the explanation that property also include things as well.[162]

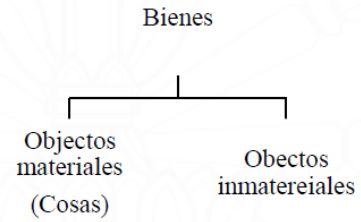

Figure 3 Classification of Things and Property in Argentine Civil Code [163]

It can be seen that, the relation between things and property in Argentine civil code was in line with the concept of things and property in French law. Thus, from the objects which was considered as things in Argentine law excluded the corporeal objects by nature that cannot be the property of a human, e.g., the sea, the

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[159] Argentine Civil Code Article 2345 [2311] "*Corporeal objects susceptible of having a value are called things in this Code*."

[160] Article 2346 [2312] "*Immaterial objects susceptible of having a value, and likewise things, are called property. The aggregate of the property of the person constitutes his patrimony*."

[161] Article 2311, Argentine Civil Code 1871.

[162] George L. Gretton (n 37) (Footnote 79), 817.

[163] Ibid 817.

air, the sun,[164] and similar to the concept of 'things in civil law' (*Chose*) French law which referred to only things which become property.

3.2.3 Relation of Things and Property to Property Rights in the Argentine Civil Code

The provision on property rights in Argentine law was stated in the Argentine Civil Code Book III of Real Rights (*Libro Tercero, De Los Derechos Reales*). In this research will be focused on only two of property rights namely, ownership (*domino*) and possession (*Posesió*n) and will be discussed on the definition of the rights, general concept of the rights, and the object of the rights.

3.2.3.1 Ownership (*Domino*)

The concept of ownership (*domino*) in the Argentine was defined in article 2540 [2506] as the '*real right by virtue of which thing is subject to the will and action of a person'*[165] According to the content note of the article 2540 [2506] mentioned to concept of ownership (*la propiedad*) in the article 544 of French Civil Code and the concept of '*jus utendi et abutendi'* in Roman law. Focusing to object which are the subject matter of the ownership in Argentine law, the article used to word 'things' (*cosa*) and state clearly that ownership is the 'real right' (*derecho real*) in Argentine law.[166] The concept of ownership in Argentine law also appeared in the article 2547 [2513] which also stated that "*The right to possess the thing, to dispose of or benefit there from, to use and enjoy it according to the will of the owner, is inherent in ownership. The owner may change its nature, degrade it or destroy it…*",[167] which similar to the concept of enjoyment in French Civil Code article 544,[168] and also

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[164] Annotated of article 2311, Argentine Civil Code 1871 (offficial version).

[165] Argentine Civil Code Article 2540 [2506] "*Ownership is the real right by virtue of which thing is subject to the will and action of a person."*

[166] CODIGO CIVIL - SU APROBACION Ley N° 340. Sanción: 25/9/1869. Promulgación: 29/9/1869. B.O.: Publicado en Registro Nacional 1863/69, pag. 513. Código Civil. Su aprobación art. 2506.

[167] Argentine Civil Code Article 2547 [2513]. "*The right to possess the thing, to dispose of or benefit there from, to use and enjoy it, according to the will of the owner, is inherent in ownership. The owner may change its nature, degrade it or destroy it; he has the right of accession, of revendication, of constituting real rights therein, of collecting all its fruits, of prohibiting another person from making use thereof, or collecting its fruits; and to dispose thereof by acts inter vivos*."

[168] French Civil Code Article 544.

stated that the owner "*has the right of accession, of revendication, of constituting real rights therein, of collecting all its fruits" which similar to the French Civil Code article 546*[169]*.* Thus, if considering to these factors it can be seen that Argentine Civil Code received the idea of ownership in line with French civil code and Roman law which ownership only existed over a corporeal thing. Therefore, the objects which are subject matter of ownership in Argentine are limited on only things according to the principle of real right.

3.2.3.1 Possession (*Posesión)*

The concept possession (*posesión)* was stated in Argentine Civil Code article 2385 [2351] namely possession is acquired by the apprehension (*aprehensión*) of the thing (*cosa*) with the intention of having it as one's own, except for the provisions on the acquisition of things by succession. [170] From the study found that the concept of possession in Argentine law was heavily influenced from the concept of possession in French Civil Code, according to the official annotated of such article was mentioned to the article 2228 of the French Civil Code and stated that [Translated by Author] "*..French is not contrary to ours, since he defines what is commonly called natural possession, and we define what is commonly called civil possession (posesión civil)..*" Moreover, the official annotated also state that.

> [Translated and emphasized by Author] From this practical point of view, the idea has seemed susceptible to being extended to other real rights, especially rights of servitude, which are dismemberments of property rights; and the person who exercises the powers contained in the right of easement has been considered the holder of an easement. This is the "*juris possessio*" or the "*quasi possessio*."[171]

Therefore, even the provisions of article 2385[2351] used the term thing (*cosa*) which was limited only corporeal object according to the definition of things in article 2345 [2311], the interpretation of such article was interpreted boardy to included property right likewise possession in French law as well.

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[169] French Civil Code Article 546.

[170] Argentine Civil Code Article 2385 [2351] "*There is possession of things when a person has a thing in his power, for himself or for another, with the intention of subjecting it to the exercise of a right of property.*"

[171] Annotated of Article 2351, Argentine Civil Code 1871 (Spanish version)

3.2.4 Relation of Things and Property to Contracts in the Argentine Civil Code (1871)

The provision on contracts and obligation in Argentine law was stated in the Argentine Civil Code, Book II of Personal Right in Civil Action (*Libro Segundo, De Los Derechos Personales en Las Relaciones Civiles Seccion Primera*). In this research will disused on three contracts which are Purchase and Sale (*Compraventa*), Lease and Hire (Locación), and Donation (*Donaciones*), which things and property are the subject matter of the contract.

3.2.4.1 Purchase and Sale (*Compraventa*)

The definition of purchase and sale was defined in article 1357 [1323]. Of the Argentine Civil Code, the essentials of the purchase and sale in the Argentine are the paying the money as a price and the transfer to another the ownership of things[172] One of the important signatures of purchase and sale in the Argentine law was the definition which states that the term 'transfers of ownership of thing' which is dissimilar to the concept of sale in French law which focused on deliver of things or transfer property rights which is not specific to ownership of thing. On the contrary, the concept of purchase and sale in Argentine Civil Code quite similar to the concept of Sale in German BGB which the seller has to specific transfer the ownership of the things to the buyer.[173] For, the subject matter of purchase and sale, according to article 1361 [1327] stated that *'all thing which can be the object of the contract may be sold…'*[174] When considering to the article 1361 [1327] in the original version used the word '*cosa*' which mean things which was defined as the corporeal object according to Argentine civil code article 2345 [2311]. However, the official explained note stated that to explained that [Translated and added original term by the Author]

> The word "thing" [cosa] is taken in the broadest sense, encompassing everything that may be part of a patrimonial [patrimonio], corporeal things [cosas corporals] or rights [de rechos], as long as they are susceptible to alienation and transfer.[175]

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[172] Argentine Civil Code Article 1357 [1323]. "*There is a purchase and sale when one of the parties engages to transfer to another the ownership of a thing, and the latter engages to receive it and pay therefor a certain price in money*."

[173] German BGB Section 433

[174] Argentine Civil Code Article 1361 [1327].

[175] Annotated of article 2327, Argentine Civil Code 1871 (Spanish version).

Therefore, the meaning of things in article of 1361 [1327] as the subject matter of sale in Argentine law was boarder than the term of thing according to the article 2345 [2311] of the Argentine Civil Code and included to rights and incorporeal property for example, mortgage right or usufructuary right.[176] However, the object which able to be and subject matter still under the limited by the definition of property in the Argentine civil code.

3.2.4.2 Lease and Hire (Locación)

Likewise French Civil Code, the, concept of lease and hiring was defined together in Argentine law, according to Argentine Civil Code the article 1527 [1493] [177] Focusing on lease, in Argentine Civil Code lease was the contract whereby the party called lessor by himself to let other party called lessee to enjoyment of a thing and the lessee has to pay the price called lease or rental. This concept of lease was similar to the concept of hiring of things in French Civil Code according to article 1709[178] The essential of Lease in Argentine law was the '*use or enjoyment of a thing'* (*el uso o goce de una cosa*) in line with the concept of lease in French law. When considering to the subject's matter of lease in Argentine law according to article 1533 [1499] state that *'Non-fungible movable things and real property without exception can be the subject of the lease.'* In other words, the subject matter of lease in Argentine law are movable things according to article 2352 [2318][179] which exclude fungible things according to article 2358 [2324] of the Argentine

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[176] Ibid.

[177] Argentine Civil Code Article 1527 [1493]. "*There is a lease or hire when two parties mutually bind themselves, one to grant the use or enjoyment of a thing, or to do a piece of work, or to render a service; and the other to pay a stated price in money for such use, enjoyment, work or service.The person who pays the price, is called in this Code the lessee, tenant, or hirer, and the person who receives it, the lessor or owner. The price is also called lease or rental."*

[178] French Civil Code Article 1709 "*The hiring of thing is a contract whereby one of the parties binds himself to let the other party enjoy the use of a thing for a certain period in exchange for certain price which the other party bind himself to pay him*."

[179] Argentine Civil Code Article.2352 [2318] "*Movable things are those that can be transported from one place to another, either moving by themselves or only moving by an external force, with the exception of those that are accessory to real estate*."

Civil Code [180] and the real property which referred to land and house. Considering to definition of movable thing in Argentine law,

3.2.4.3 Donation (*Donaciones*)

The concept of donation *inter vivios* in Argentine law was defined in the Argerntin Civil Code in article 1823 [1789],[181] as the act of transfer the ownerhip of thing from one party to another party. If considering to the subjetcs matter of the donation *inter vivios,* according to article 1833 [1799] stated that *'[t]hing which can be sold can be donate'*[182] Thus, back to the sale contract, even the provision in sale contract used the term 'things' (*cosa*) as the subject matter of the sale, but accoring to official annotated, the term things in sale contract refered to things in the boarder sense which include to rights as well. On the other words, the subject matter of donations in Argentine civil code was both of things and rights. Moreover, according to the aricle 1834 [1800] stated that the subject matter of donation must be the 'present property' (*bienes presentes*) of the donor.[183] Therefore, the subject matter of donation in Argentine law was refered to property (Bienes) according to the artice 2325 [2312].

3.3 Concept of Things and Property in German Law

In this part will dicusses on the concept of things and property in German law according to the German Civil Code (*Bürgerliches Gesetzbuch*; BGB) in four topics which are the background of the German Civil Code, the definition of things and property in German law, relation of things and property to property rights in German law, and relation of thing and property to contracts in German law. For the provisions in German law, the author used the German BGB in English, translated by *Christian Tomuschat, David P. Currie, Professor Donald P. Kommers*, and *Raymond Kerr* in

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[180] Argentine Civil Code Article 2358 [2324].

[181] Argentine Civil Code Article 1823 [1789]. "*There is a donation when a person by an act inter vivos, transfers the ownership of a thing to another gratuitously of his own free will*."

[182] Argentine Civil Code Article 1833 [1799].

[183] Argentine Civil Code Article 1834 [1800].

cooperation with the Language Service of the German Bundestag and published by the German Federal Ministry of Justice.[184]

3.3.1 Background of the German Civil Code

After French Civil Code became famous instead the Corpus Iuris Civil, the idea of modern stated and nationalism spreader among European country. Resulting the German reunification and the attempt to codification the national civil code of Germany. In nineteenth century, the idea of '*Volksgeist*' from the work of *Savigny* and the studies of Roman law from the *Pandectists* in the German historical school was the important factor for codification of German Civil Code. In the process of codefined the German Civil Code began in 1874, the legal principles that the *Pandectists* extracted from Roman law were inserted into the Code and drafting committee followed the idea of classification of the code to five topics from the idea of the *Pandectists* as well. The structure of the German Civil Code was divined into Book I of General Part (*Allgemeiner Teil*), Book II of Law of obligation (*Recht der Schuldverhältnisse*), Book III Law of property (*Sachenrecht*), Book IV Family law (*Familienrecht*) and Book V Law of succession (*Erbrecht*) and this structure which also knew as the 'Germanic Style' and become the model of the Germanic legal family code in the comparative law. The drafting of German Civil Code was finished in 1895 and approved by the German lower house parliament (*Deutscher Reichstag*) in 1896 and then became effected on 1 January 1900. The promulgation of the German Civil Code made it one of the most influential civil codes in other countries along with the French Civil Code. It also influenced to the codification of private law codes in other countries for example Greece, Poland, Yugoslavia, countries in South America such as Brazil and Peru or in Asian countries [185] for example Japan and Thailand, which some countries have been influenced by the German Civil Code since before the German Civil Code was promulgated or came into effected. This was due to the study of the drafting of the German Civil Code that took many years. This makes draft of the German codes widely studied in other countries private code drafting committee, with examples such as the drafter of Argentine Civil Code 1871 which promulgated before

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[184] Christian Tomuschat, David P. Currie, Donald P. Kommers and Raymond Kerr, in cooperation with the Language Service of the German Bundestag (trs), German Federal Ministry of Justice, 'German Civil Code' <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html&gt>; accessed 24 June 2024).

[185] Munin Pongsapan (n 22) 215.

the draft of the German Civil Code was finished or the Japanese Civil Code in 1898 which became in to effected before the German Civil Code in 1900.

3.3.2 Concept of Things and Property in the German Law

The definition of things (*Sache*) was defined in BGB section 90 as corporeal object (*körperliche Gegenstände*) [186] In German law the definition of corporeal objects by German jurists referred to the *'the tangible and occupy space'*[187] while there are others opinion seen that things included energy of all sort for example electricity, water power, or heat.[188]

Dissimilar to things, there is no definition of property in the German BGB, the word property is one of word which is abstract and more difficult to define clearly or has the solid definition in the German law. There are many words in German BGB which can translated to property in English. For example, *Eigentum*, *Besitsz*, or *Eigenschaft* [189] However, if focusing on the legal term of property in English as an object of rights likewise things including property rights similar to the concept of property in or Thai law, French law, and Argentine law, it has to analyse the words in the German law which has related meaning. According to the German law, they are many words that can be translated to the term 'property' in legal English for example, '*Sache*', '*Eigentum'*, or '*Vermögen*' as follow.

3.3.2.1 *Sache*

'*Sache*' in the singular from of '*sachen*' in German, as mentioned above, in general provision of BGB, *sachen* was defined as things according to BGB section 90. However, if considering to the meaning of the term '*Sache*' itself is not only able to be translated to the term thing but also translated in the sense of 'object' or 'matter' in English. Moreover, consideration to Section 356 b paragraph 2,[190] Section 491 paragraph. 1[191] and several other provisions in BGB the words of *Sache* was translated into the word property in English as well.

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[186] Ernest J. Schuster, *The Principle of German Civil Law* (Clarendon Press, 1907) 58-60.

[187] Ernest J. Schuster (n 186) 58.

[188] Ibid.

[189] Cambridge Dictionary, 'Property' (Translated from English to German) <https://dictionary. cambridge.org/dictionary/english-german/property?q=Property> accessed. 2 May 2024.

[190] German Civil Code Section 356 paragraph 2.

[191] German Civil Code Section 491 paragraph. 1.

3.3.2.2 *Eigentum*

The word *Eigentum* in German was translated as property according to German Basic Law Article 14[192] and also was translates as ownership according to BGB section 903 [193] according to the translation by the Ministry of Justice of Germany. Sometime the German scholars also define the meaning of property in German law by using the definition of Eigentum (ownership) in Section 903. (Please see topic *3.3.3.1 Ownership (Eigentum)*. Moreover, according to BGB Section 491 paragraph 3 sentence 1 No. 2[194] the word '*Eigentumsrechte*' was translated to 'property right' in English. On the other hand, *Eigentumsrecht* can also translate to 'property law' as well. But for, if considering to the meaning of the word in German, *Eigentum* is word is used to refer as the absolute right of owner, which is more directed transfer to ownership in English. But it cannot deny that *Eigentum* is one of the words which can translated to property.

3.3.2.3 *Vermögen*

According to the German BGB, '*Vermögen*' was translated to 'asset' in English and appeared in various provisions in German BGB. For example, according to section 45 of German BGB '*Anfall des Vereinsvermögens'* was translated as Devolution of the assets of the association, or according to section 1085 of German BGB '*Bestellung des Nießbrauchs an einem Vermögen'* was translated to Creation of usufruct in assets However, according to BGB section 343 paragraph 1, '*Vermögensinteresse*' was translated to 'Property interests', while. '*interesse*' is mean interests in English. Thus, in some circumstance the word '*Vermögen*' also able to be translated to property according to the translation of German Federal Ministry of Justice.

Inconclusion, when discussing to the definition of property in German law, it can be seen that the meaning or the concept of the word property in German law has the board meaning in German, due to the concept and the dissimilar of the language and the inconsistencies from in the translation of legal term. It may be seen that, in German law the concept of property as the objects of rights, which combining the things as corporeal objects and other incorporeal objects which have value and can be appropriated by humans, is not attended or defined clearly similar to the concept of *Biens* in the French law. In contrast, German law clearly distinguishes

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[192] German Basic Law Article 14.

[193] German Civil Code Section 903.

[194] German Civil Code Section 491 paragraph 3.

between 'things' as objects and 'rights', including the concept of real rights that can only be exist over things, which German law was heavily influenced by Roman law. According to the definition of things (*Sache*) in Article 90 of the BGB, this section also affected to the principle of classification of things and property. When only corporeal objects are things in German BGG, on the other hand, incorporeal objects for example real rights, claims, or others incorporeal property also be classified as property implicationally. However, sometimes *Sache* be interpreted by some jurists to include incorporeal objects. This is a phenomenon that rarely occur in countries that have a clear definition of property and define that both corporeal and incorporeal things. Therefore, it does not have to interpret the term things to cover incorporeal objects.

3.3.3 Things and Property to Property Rights in the German law

According to the German BGB, the provision on property rights was codified in the Book IV of Property rights (*Sachenrecht*) for example of possession (*Besitz*) ownership (*Eigentum*), servitudes (*Grunddienstbarkeiten*), usufruct (*Nießbrauch an Sachen*), Mortgage (*Hypothek*). However, in this research will be focused on only two property rights namely ownership and possession on the topic of definition or general concept of the rights and the object of these property rights.

3.3.3.1 Ownership (*Eigentum*)

According to German law the concept of ownership (*Eigentum*) was defined in the section 903 of the German BGB as the 'Powers of the owner'.[195] The owner of a thing has the absolute right to exclude others from his owned things and deal with his owned things if it is not conflict to third party rights and the law. The object of rights or the subject matter of ownership is only things according to the German BGB section 90 which limited only on the corporeal objects (*Körperliche Gegenstände*), whether movable and immovable things, however ownership in German law not included to property rights for example right of pledge, right of usufruct, or other incorporeal property for example intellectual property. Therefore,

[195] German Civil Code Section 903 "*The owner of a thing may, to the extent that a statute or third-party rights does not conflict with this, deal with the thing at their discretion and exclude others from exercising any influence whatsoever. In exercising their powers, the owner of an animal is to take into account the special provisions for the protection of animals*".

ownership in German law considered as one of the real rights[196] and was the right that has the complete dominion on the things[197]

3.3.3.1 Possession (*Besitz*)

The concept on acquisition of possession (E*rwerb des Besitzes*) in German law was stated in section 854 of the German BGG.[198] Which refered to the 'action control over the thing' (*tatsächlichen Gewalt über die Sache*). A person which acquired the possession on things by the thing that delivered or abandoned or lost by a former possessor, or acquired the possession of such thing by has the new action control on the thing and become a new possessor.[199] However, dissimilar to the concept of possession in French or Argentine law, the possession in German law does not required the intention of the person who holding the things for possession. The concept of possession in German law following to the concept of *posseesio* in Roman law, the objects of possession in German law are limited on things (*scahen*) not covered to the real rights or property rights. Thus, possession in German law are considered as the real rights.

3.3.4 Relation of Things and Property to Contracts in the German Civil Code

One of the signatures of German law of contracts (*vertrag*) is the principle of abstraction (*Abstraktionsprinzip*) and the principle of separation (*Trennungsprinzip*). According to the principle of separation, the contract in German law is separated the legal transaction or juristic act into the obligation contract (*Verpflichtungsgeschäfte*) and the disposition contract (*Verfügungsgeschäft*). Thus, the obligation contract does not transfer the possession of things in German law, but only create the legal ground or claim for the possession from the disposition contract between two parties. While the principle of abstraction is used to explained that the obligation contract and obligation contract in separated. Even the obligation contract was void, it does not affect to the validity of the disposition contract. However, when the claim or of disposition contact was no longer from the void of the obligation

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[196] Ernest J. Schuster (n 186) 367.

[197] Ibid. 384.

[198] German Civil Code Section 854 "*Acquisition of possession*

(1) Possession of a thing is acquired by obtaining actual control of the thing.

(2) Agreement between the previous possessor and the acquirer is sufficient for acquisition if the acquirer is in a position to exercise control over the thing"

[199] Ernest J. Schuster (n 186) 371-372.

contract. Thus, the transfer from the disposition contract will have no clause and become the Unjust Enrichment (*Herausgabeanspruch*) accrodinf to the section 812 of the BGB. Therefore, the party who received the things from the disposition contract which the obligation contract has been void has no legal ground and had the statutory duty to return the things to another party.[200]

In this research will be discussed only on the obligation contract which stated in the Book II of Obligation, Division 8 of Particular types of obligations (*Buch 2 Recht der Schuldverhältnisse Abschnitt 8 Einzelne Schuldverhältnisse*) which this research will focused on the agreement of purchase (*kauf*), lease (*Mietvertrag*), and donation (*schenkung*), to see that what is the definition and general concept of these contract, and what are the objects which are the subject matter of the contract.

3.3.4.1 Purchase (*Kauf)*

The concept of purchase agreement (*Kaufvertag)* in German law was stated in the German GBG section 433.[201] The general concept of purchase agreement is the agreement whereby the seller sale transfer the ownership of the sale thing to the purchaser and has a duty deliver such thing. However, according to the principal of abstraction and separation. the purchase agreement in German law does not transfer the ownership until transfer the thing under the property rules according to German BGB section 929[202] for movables, and section 973 [203] and section 925 [204] for immovable.[205] In the part of subject matter of purchase, even though section 433 used the word 'thing' (*sache*) which according to section 90 referred to corporeal objects, in practice the subject matter of the purchase agreement in German law may '*refer to*

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[200] Basil S Markesinis, Hannes Unberath, and Augus Johnston, *The German Law of Contract* (2nd edn, Hart Publishing, 2006) 27-30.

[201] German Civil Code Section 433 "*Contractual duties typical for a purchase agreement*

(1) By a purchase agreement, the seller of a thing is obliged to deliver the thing to the buyer and to procure ownership of the thing for the buyer. The seller is to procure the thing for the buyer free from material defects and defects of title.

(2) The buyer is obliged to pay the seller the agreed purchase price and to accept delivery of the thing purchased."

[202] German Civil Code Section 929.

[203] German Civil Code Section 973.

[204] German Civil Code Section 925.

[205] Basil S Markesinis, Hannes Unberath, and Augus Johnston (n 200) 147.

movable or immovable things or to rights'[206] However, after the amendment of BGB since 2002, the provision on purchase of rights (*rechtskauf*) was revised in the section 453[207] separated from the purchase of things, and used the provision on purchase of things agreement to apply *mutatis mutandis* to the purchase of rights and other objects.

3.3.4.2 Lease (*Miet*),

The definition of lease agreement (*mietvertrag*) in German law was defined in the German BGB Section 535. [208] The general concept of lease agreement in German law was the agreement whereby the party callled lessor imposes the lessee to grant the used of the leases property (*Mietsache*) by make the leased property available in the condition suitable for the use while the lessor has the duty to pay the rent in exchange. Considering to the subject matter of the lease agreement, the term which usesd in section 535 was the term '*Mieatsache*' which come from a word '*Mieat*' which means 'lease or rent, and a word '*sache'* which means thing or object in German. However, the meaning of *Mieatsache* is not translated to 'leased thing' but in this sense is translated to 'lease objects' or 'lease property' according to the translation of German BGB from Germany Federal Ministry of Justice. Moreover, when considering to section 581 on Usufructuary lease (*Vertragstypische Pflichten beim Pachtvertrag*),[209] usufruct which is the real rights is also able to be the subject

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[206] Ernest J. Schuster (n 186) 209.

[207] German Civil Code Section 453.

[208] German Civil Code Section 535 "*Contents and primary duties of the lease agreement*

(1) A lease agreement imposes on the lessor a duty to grant the lessee use of the leased property for the lease period. The lessor is to make available the leased property to the lessee in a condition suitable for use as contractually agreed and maintain it in this condition for the lease period. The lessor is to bear all costs to which the leased property is subject.

(2) The lessee is obliged to pay the lessor the agreed rent"

[209] German Civil Code Section 581 "*Contractual duties typical for a usufructuary lease*

(1) A usufructuary lease imposes on the usufructuary lessor the duty to allow the usufructuary lessee, for the lease period, the use of the leased object and the enjoyment of its fruits to the extent that they are deemed to be the yield under

matter of the lease agreement as well. For all reason, it was therefore accepted that rights able to also be objects of lease. German law.[210]

3.3.4.3 Donation (*Schenkung*)

The concept of donation (*schenkung*) in German law was defined in the Germa BGB Section 516,[211] the general concept of the German law is the agreement whereby one party called donor dispose their own asset (*Vermögen*) by enriched (*aus*) to another person asset for free of charge. The subject matter of donation in German law, section 516 used the term '*Vermögen'* which translated by Germany Federal Ministry of Justice to asset in English which referred to the monetary value of the property of the person in economic or financial. However, the term *Vermögen* also translated to property as well [212] Thus, the subject-matter of donation are both things and rights which donor has to transfer the donated object according to the rule property in the BGB and make the enrichment to the donee.[213]

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the rules of proper management. The usufructuary lessee is obliged to pay the lessor the agreed rent.

(2) The provisions on leases are to be applied accordingly to usufructuary leases with the exception of farm leases, to the extent sections 582 to 584b do not lead to a different conclusion."

[210] Basil S Markesinis, Hannes Unberath, and Augus Johnston (n 200) 149.

[211] German Civil Code Section 516 "*Concept of donation*

(1) A disposition by means of which someone, using their own assets, enriches another person is a donation if both parties are in agreement that the disposition occurs gratuitously.

(2) If the disposition has occurred without the intention of the other party, then the donor may, specifying a reasonable time limit, request the other party to make a declaration as to acceptance. Upon expiry of the period of time, the donation is deemed to be accepted unless the other party has previously rejected it. In the case of rejection, surrender of what has been bestowed may be demanded in accordance with the provisions on the surrender of unjust enrichment."

[212] See, Chung Hui Wang *The German Civil Code: Translated and Annotated with An Historical Introduction and Appendices* (Stevens and Sons, Limited, 1907) 112.

[213] Basil S Markesinis, Hannes Unberath, and Augus Johnston (n 200) 148.

3.4 Concept of Things and Property in Japanese Law

In this part will discusses on the concept of things and property in Japanese according to the Japanese Civil Code (民法: *Minpo*) in four topics which are the background of the Japanese Civil Code, the definition of things and property in Japanese law, relation of things and property to property rights in Japanese law, and relation of thing and property to contracts in Japanese law. In this thesis, the author will use the Japanese Civil Code translated in English by the Japanese Ministry of Justice. [214]

3.4.1 Background of the Japanese Civil Code

After the Meiji Revolution in Japan in the late 19th century, Japan reformed its bureaucracy in many areas, including legal affairs and the justice system. Including the preparation of a modern legal code under the guidance of a foreign legal advisor. Japan codefined and promulgated the Criminal Code and Criminal Procedure Code in 1882 and the Constitution of the Empire of Japan 大日本帝国憲法 (*Dai-Nippon Teikoku Kenpo*), which came into effect in 1890. The Japanese Civil Code was initially drafted in 1889; the Japanese government appointed *Gustave Boissonade* (1825-1910), a French academic, to draft the civil code, for the reason that Boissonade had been an important participant in the codification of the Criminal Code and the Code of Criminal Procedure. The first draft of the Japanese Civil Code has another name, the 'Boissonade Code', in which Boissonade used French legal principles as the primary model for drafting the civil code.[215]

However, although the Japanese Parliament approved the Boissonade Code and came into effect in 1892, Japanese politics and academics at the time were strongly opposed to the Boissonade Code, and the Boissonade Code was widely criticized for being too French, and its contents which had controversial inside the code. It has sparked opposition from academics and lawyers who graduated from other countries, as well as concerns over nationalism, leading to an internal political and academic conflict in Japan and ended with Parliament having the resolution to delay the date of effect of the Boissonade Code and appointing the committee to draft a new Japanese Civil Code.[216]

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[214] Japanese Ministry of Justice (法務省) (trs), 'Japanese Civil Code' <https://www.moj.go.jp/content/000056024.pdf>> accessed 24 June 2024.

[215] Hiroshi Oda, *Japanese Law* (2 ed Oxford University Press, 1999) 128.

[216] Munin Pongsapan (n 22) 276-278.

After the appointment of the committee to draft the new Japanese Civil Code, prominent members of the drafting committee included *Nobushige Hozumi* (1855-1926), a leading opponent of the Boissonade Code, and *Kenjiro Ume* (1860-1910), a leading supporter of the Boissonade Code, who were appointed to the same committee. The drafting committee was aware of the conflicts that might arise if principles from one country's law were applied. Therefore, it was agreed that the advantages of each country's law should be studied in order to apply them. The committee drafting the new Civil Code has decided that the new Civil Code will be divided into five topics following the guidelines of the German Code, namely Book I of General Principles, Book II of Real Rights, Book III of Obligations, Book IV of Family and Book 5 of Inheritance.[217] According to the model of the law, the drafters studied legal principles from German law, French law, and English law to draft provisions in the Japanese Code. After that, the Japanese Civil Code (*民法*: *Minpo*) has been promulgated in 1896 and went into effect in 1898[218] and followed with the Commercial Code in 1907.

However, later there was a misunderstanding among Western scholars that the first three volumes of the Japanese Civil Code were almost entirely copied and translated from the German Civil Code, such as *Frederick William Maitland*, *Konrad Zweigert*, *Hein kötz* or *Alan Watson*, as well as Thai lawyers in the past such as *Phraya Manavaratchasevi*. which used the Japanese Civil Code as a model in drafting the Thai CCC with the understanding that the Japanese Civil Code was also a copy of the German Civil Code.[219] Furthermore, J. E. De Becker's Annotated Civil Code of Japan in 1890, an essential textbook for studying the Japanese Civil Code in English, contains only one reference to the German Civil Code. This further causes such misunderstandings.[220]

Therefore, the Japanese Civil Code adopts principles from various countries' laws not only German law. The drafting committee members, *Ume* and *Hozumi*, confirmed that the influence of French law on the Japanese Civil Code was no less than that of the German Civil Code.[221] However, the topic of the Japanese Civil Code was divided following the guidelines of the German Civil Code. Thus, many

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[217] Hiroshi Oda (n 215) 127.

[218] Munin Pongsapan (n 22) 279-280.

[219] Munin Pongsapan (n 22) 271.

[220] Ibid 287.

[221] Ibid 284.

scholars and lawyers in the past believed that the Japanese Civil Code was copied from the German Civil Code. Later, after Eiichi Hoshino published his work on the subject. 'The Influence of French Civil Law in Japan' in 1965 and Zentaro Kitagawa's PhD dissertation on adopting German law into the Japanese Civil Code. The misunderstanding of Japanese Civil Code has been changed. It found that the understanding that the Japanese Civil Code was copied from the German Civil Code was caused by the phenomenon of Germanization after the enactment of the Japanese Civil Code. This was caused by Japanese jurists interpreting Japanese law as German civil law. In some sections, the Japanese legal code has adopted principles from other laws.[222]

3.4.2 Concept of Things and Property in the Japanese Law

According to Japanese law, things (物：*Mono*), the definition of thing was stated in the Part I of General Provision (総則: *Sosoku*) in article 85[223] which is the object of right in Japanese law[224] Likewise German law, the Japanese civil code has only the definition of things which was defined as tangible things (有体物: Yutaibutsu). [225] The definition of things used to distinguished material things from right and other immaterial things.[226] Even though the definition of things was defined only tangible things, however, the factor to considering that whether an objects are things not must considering to the nature of such things that whether it able to be appropriated my human or not for example the Sun and Moon even they are corporeal things, they are not things in this definition[227] However, the term of 'thing' according to article 85 of the Japanese civil code was restricted only in the Japanese Civil Code not expressed to the meaning of 'things' in other laws of Japan for example the Civil execution, according to the Supreme Court of Japan Decision on 14 June 1906[228]

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[222] Ibid 284-287.

[223] Japanese Civil Code Article 85 The term "Things" as used in this Code shall mean tangible thing.

[224] J.E. De Becker, *Annotated Civil Code of Japan* (Butterworth & Co. 1909) 77.

[225] Japanese Civil Code Article 85 The term "Things" as used in this Code shall mean tangible thing.

[226] J.E. De Becker, *Element of Japanese law* (Boston Book Company 1916) 211.

[227] J.E. De Becker (n 224) 78.

[228] J.E. De Becker, *The Principles and Practice of the Civil Code of Japan* (Butterworth & Co. 1921) 52.

According to Japanese Civil code, there was not the definition of property, However, according to the translation of Japanese Civil law in English, the word '財産' (*Zaisan*) was translated to property in English and appeared in various articles in the Japanese Civil Code for example article 167 (2) the term property rights was translated from 財産権. (*Zaisan-ken*)[229] or article 306 the term all property was also transated from 総財産 (*So-zaisan*).[230] However, there was some translation that translated the term (物*: Mono*) to property as well. However, in Japanese Civil Code provision also used the term 'objects' (目的*: Mokuteki*) which used instead of the term *thing and right in the Japanese law as well*[231]

According to the concept and understanding of property is the objects of right likewise things. Property is including things, and others incorporeal objects which can be appropriated or belonging to human for example claim, intellectual property, shares, etc. Which is similar to the concept of *Biens* in French law. The provision in Japanese Civil Code is look similar to the provisions in German BGB at the first glance, in particular the definition of things between the German BGB section 90 [232]and the Japanese Civil Code article 85, but it can be seen that even these two provisions are almost the same, but the concept of them and the ways to interpret them are different. The concept of property may be one of the pieces of evidence to support the statement that Japanese law also influenced from French law when the time of drafting their civil code. Moreover, dissimilar to German law, the word in Japanese law between property and ownership are clearly separated namely, the term for property is '財産' (*Zaisan*) while the term for ownership is '所有権' (*Shoyu-ken*) and each of words has its meaning.

3.4.3 Relation of Things and Property to Real Rights in the Japanese Law

When focusing to the relation of things and property to real rights in the Japanese law, the provision on real rights in Japanese Civil Code Book II of Real Rights (物権: *Bukken*). For finding the relation of things and property to real rights in the Japanese law, in this topic will be discussed only on the provisions on ownership

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[229] Japanese Civil Code Article 167 (2).

[230] Japanese Civil Code Article 306.

[231] J.E. De Becker (n 224) 78.

[232] German Civil Code Section 90 "*Only corporeal objects are things as defined by law*".

and possessory rights which related to the definition and the concept of them to linked to the concept of things and property in Japanese law.

3.4.3.1 Ownership (所有権：*Shoyu-ken*)

According to Japanese Civil Code, the definition of Ownership (所有権：*Shoyu-ken*) was stated in the article 206 of the Japanese Civil Code. [233] In Japanese law, Ownership is the rights of the owner over the owned things to use it freely, obtain the profit from the owned things under the restriction the law and regulations. Therefore, ownership is one of the rights in the Japanese law and can be exist only on the corporeal objects or things (*物：Mono*), which is in line with the concept of *dominion* in the Roman law and Ownership in German law. [234]

3.4.3.2 Possessory Right (占有権 *Senyu-ken*)

In general, Possession in Japanese law is appeared as possessory right or (占有権 *Senyu-ken*) according to the Japanese Civil Code. The objects of possessory right in general are only corporeal object or things[235] according to the article 180 of Japanese Civil Code.[236] The person can acquire the possessory right on a thing by holding with the intention for own behalf of it. Thus, possessory right in Japanese law is considered as the real rights.[237] However, in Japanese law also has the provision of Quasi-possession according to the article 205 of Japanese Civil Code, in the case of property rights.[238] There is one observation that, the concept of objects of possession in the Japanese law was in line with the concept of possession in the French law namely, the objects of possessory right in Japanese law not only things are able to has the possession but also the rights in term of quasi possession, which is similar to the concept of possession in French law which both things and

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[233] Japanese Civil Code Article 206 "*An owner has the rights to freely use, obtain profit from and dispose of the Thing owned, subject to the restrictions prescribed by laws and regulations*."

[234] J.E. De Becker (n 224) 199.

[235] Hiroshi Oda (n 215) 151.

[236] Japanese Civil Code Article 180 "*Possessory rights shall be acquired by holding Thing with an intention to do so on one's own behalf*."

[237] J.E. De Becker (n 224) 173.

[238] Japanese Civil Code Article 205 "*The provisions of this Chapter shall apply mutatis mutandis to cases where a person exercises his/her property rights with an intention to do so on his/her own behalf".*

rights are able to has the possession on them while in the German law, only things are able to has the possession. However, Japanese law was separated clearly between possession of things from the original meaning of *Possessio* in Roman law which only existed on *res coporalres*, and the concept of *Quasi- Possessio* which included *res incorporales and* was developed later.

3.4.4 Relation of Things and Property to Contract in the Japanese Law

The concept of things and property in Japanese law not only appeared in the Book I of General Part or Book II of Real Rights, but also appeared in the Book III of Obligation in the Japanese Civil Code. Therefore, in this topic will discussing on the subject-matter of three contracts in the Japanese Civil Code which are the fundamental contracts and things or property.

3.4.4.1 Purchase and Sale (売買: *Baibai*)

According to Japanese law, the concept of Sale Contract is appeared as '(売買： *Baibai*)' following the definition on article 555 of Japanese Civil Code.[239] The concept of Purchase and Sale Contract in Japanese law focused on transferring of the property rights from one party to other party which was boarder than deliver a thing which is the object of sale or transferring the ownership on the things likewise other foreign law. Thus, the objects of sale can be things, property rights, or other property for example intellectual property, shares etc. The objects of sale can be both corporeal on incorporeal objects which are not prohibited or limited by law or regulations. However, the seller still has the obligation to satisfy the requirements for perfection of the transfer of the property right according to the article 560.[240] Therefore, it can be seen that the concept of property as the subject-matter of sale contract in Japanese law is not related to the delivery of things likewise French law or German law, and neither the ownership on things likewise Argentine Civil Code, but Japanese law only focused to only the type of rights that if they are property rights which transferable, then they can be the subject-matter of sale contract.

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[239] Japanese Civil Code Article 555 "*A Sale takes effect when one of the parties agrees to transfer a property right to the other party, and the latter agrees to pay him the purchase money for it*."

[240] Japanese Civil Code Article 560.

3.4.4.2 Leases (賃貸借: *Chintaishaku)*

Leases contract or hiring of things[241] (賃貸借: *Chintaishaku*) in Japanese law was defined in the article 601 of the Japanese Civil Code.[242] The subject-matter of the contract is the use and take the profit of the leased things for the rent. The objects of lease are only things which are corporeal objects, for example land, house, tools etc. In general, after the lessor let the lessee to use and the profit from them, the lessor also has the obligation to deliver the leased things back to the lessor. However, in the case of immoveable property Dissimilar to German BGB, Japanese Civil code has no provision for usufructuary lease likewise German law. Thus, the object which able to be the subject-matter of the lease contract under Japanese law is not including to the property right or other type of incorporeal property.

3.4.4.3 Gift (贈与: *Zoyo*)

Gift or 贈与: *Zoyo)* in the Japanese law was the contract in the Japanese law which need both offer from the donor and the acceptance of the donee according to the article 549 of Japanese Civil Code.[243] The essential of gift is the give of property of the donor with the intention to give their property to the donee by expressing of such intention. Considering to the object for the subject matter of gift, when considering to the article 551 (1) stated that *'[t]he donor shall not be liable for any defect or absence of the things or right that is the subject matter of the gift…'* Thus, the objects which can be the subject-matter of the gift can be every type of property both corporeal objects which are things and incorporeal objects for example property right, share or other incorporeal property. Moreover, the concept of gift contract in Japanese law, ownership of the things is not the factor of the contract similar to French law, only the donor is belonging on such property then donor also give it to the donee by gift.

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[241] According to J.E De Becker in *the Annotated Civil Code of Japan* (n 224), the lease contract was translated to "*hiring of things*".

[242] Japanese Civil Code Article 601 "*The Hiring takes effect when one of the parties agree to let the other party use and take the profit of a things belonging to him and the other party agree to pay him a rent for it*".

[243] Japanese Civil Code Article 549 "*Gift take effect when one of the parties concerned express his intention to give property gratuitously and the other party accepts it*".

3.5 Conclusion

From all mentioned above in this chapter, it can be concluded into four issues as follow.

For the historical background, it was found that The French Civil Code and the German Civil Code are both private law codes that developed from Roman law principles and were important models for the preparation of civil codes for other countries in the civil law system later, such as the Argentine Civil Code. Japanese Civil Code. However, the influence of French or German law, which appeared prominent in countries that received legal principles from other countries into their civil codes, may lead to the phenomenon of domestic jurists interpreting the provisions of the codes by principles of French or German law, even though some provision of them may not have been received from that country and leading to the phenomenon of Francization or Germanization occurred in provisions that brought principles from other countries for example, the phenomenon of the Germanization in Japanese Civil Code and the phenomenon of the Francization in Argentine Civil Code. Both French law and German law also influenced both civil codes.

For the part of the concept of things and property, the definition of thing in the laws of each country has a common point: it refers to something that has a physical form, corporeal or tangible objects. This concept can be traced back to the concept of res corporates and the classification of thing by Gaius in Roman law. However, the subtle details or interpretations of 'what is property' may be different. The concept of property may be different from the different perspectives, norms, or languages. It is initially noted that the concept of property (*Biens*) of France considerably affects the concept of property in other countries in the civil law system, especially Argentina, where it was defined as the provision in the Argentinian Civil Code (*Bienes*).

However, even though Japanese law has only defined things as the German Civil Code, French concept of property also influenced the concept of property law in Japanese law and the interpretation of things and property in Japan. On the contrary, German law definition of property was abstract and not mentioned in other laws. The term used to refer to property in German has various terms and does not have a definition of property. However, German law clearly classifies things and rights; therefore, in general, the object of rights in German law focuses on corporeal things and has a common idea with Roman law more than the French civil code and other codes.

For the case of property rights, the definition and concept of ownership in each country is the same namely, there is the real rights over corporeal things only, which is consistent with Roman law '*dominion*'. On the other hand, the concept of possession varies from country to country due to the concept of quasi-possession. The concept of possession has always been debated in the work of Savigny and other jurists.

As a result, different countries have different concepts of possession and choose to enact different laws. For example, in France, possession can include both things and rights. It is noted that such possession may not be considered a property right but is a personal right in that legal system. In Argentinian law, although the provision of possession used the term things as the possession of things, the interpretation was based on French law to include rights as well. Meanwhile, the Germans retained the Roman legal concept '*possessio*' that objects under their possession must be corporeal objects. As a result, under German law, coverage can only be applied to physical objects. Alternatively, some countries, such as Japan, may adopt both concepts, with possession still only of corporeal things and separate provisions on the quasi-possession for rights and other incorporeal property.

For the case of contracts, the subject matters of leases and donations are similar in the general idea; the subject matter of the contracts can be both a thing and a right, depending on the form of the contract. In other words, the subject matter of the lease and donation are property. However, the sales contract was different. The concept of sale can be divided into three types of concepts. The first concept is that any property can be obtained, whether it is property, rights, or other assets. It can be sold if it is not restricted under the law, and the seller has an obligation to deliver the things or property to the buyer, which appeared in the concept of sale according to French law. The second concept is the concept that the contract of sale is related to the ownership of the thing; in other words, the sale is the act of transfer of ownership over the thing in exchange for the price; for example, Argentinian and German law. However, the difference between Argentinian and German law was the ways to apply the concept of sale for the incorporeal property for example rights; namely, in Argentine law used the method of interpretation of the term 'thing' to the border sense for including rights following the principle of French law. While in German law, separate provisions regarding the purchase of rights are applied by applying the provisions regarding the sale of property *mutatis mutandis*. The third concept was the concept of sale, which is defined as the transfer of property rights without specifying specific types of property in the Japanese Civil Code, which can be applied to both shaped

objects by transferring ownership and shapeless objects such as various rights by transferring that right to the seller.

CHAPTER 4
DEVELPOMENT OF THE CONCEPT OF THINGS PROPERTY IN THAI LAW

4.1 Concepts of Things and Property in Thai Law

Initially, the term ‘things’ in Thai was translated to '*Sap*' (ทรัพย์), which denotes money or corporeal objects[244], It was derived from the Sanskrit words '*Dravya*' (द्रव्य), which refer to a substance thing or object,[245] and the word '*Sin*' (สิน) in Thai, which means money or things.[246] The root of the word *Sin* in Thai is from the word 'Qián' (錢), which means money in Middle Chinese and developed into the Tai family language, of which Thai is one of the branches.[247] As a result, the current Thai word '*Sapsin*' (ทรัพย์สิน) is the result of a fusion of words with origins in Chinese and Sanskrit.

In current Thai, the word *Sapsin* is mostly translated to ‘property’ in English. However, not only the word ‘property’ in English can translate to *Sapsin*, but also the word ‘asset' can translate to the word *Sapsin* in Thai as well. Notwithstanding, legal terms and business practice usually translate the word ‘Asset’ to ‘*Sinsap*’ (สินทรัพย์) more than *Sapsin*, e.g., ‘Digital Asset’ was translated to ‘Sinsap Digital’ (สินทรัพย์ดิจิทัล)[248] or ‘Asset Management’ was translated to ‘*Garn Boriharn Sinsap*’ (การบริหารสินทรัพย์) [249] etc. Nevertheless, the term '*Sapsin*' was employed in the context of

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[244] สำนักงานราชบัณฑิตยสภา, ‘ทรัพย์’ ใน พจนานุกรมฉบับราชบัณฑิตยสถาน <https://dictionary.orst.go.th/> สืบค้นเมือ 22 กุมภาพันธ์ 2023 [Thai Royal Institute, ‘ทรัพย์’ in Royal Institute Dictionary B.E.2558 (2015) <https://dictionary.orst.go.th/> accessed 22 February 2023].

[245] Monier-Williams, ‘Sanskrit-English Dictionary’ (1899) <https://www.sanskrit-lexicon.uni-koeln.de/scans/MWScan/2020/web/webtc/indexcaller.php> accessed 22 February 2023.

[246] Thai Royal Institute (n 244)

[247] See, เมชฌ สอดส่องกฤษ, ‘การศึกษาภาษาศาสตร์แขนงจ้วง-ไตกลุ่มภาษาพบใหม่ใน ประเทศสาธารณรัฐประชาชนจีน’ (2562) 14 วารสารศิลปศาสตร์ มหาวิทยาลัยอุบลราชธานี 41, 44 [Metcha Sodsongkrit, ‘A study of recently discovered Chinese ethnic language linguistics of Zhuang-Dai branch’ (2019) 14 Liberal Arts, Ubon Ratchathani University 41, 44].

[248] Emergency Decree on Digital Asset Business B.E.2561 (A.D. 2018) Section 3.

[249] Emergency Decree on Asset Management company B.E.2541 (A.D.1998) Section 3.

property in Thai law during the codification of the Thai Civil Commercial Code. Consequently, the term *sap* (which is currently translated as "things") was able to be used to refer to property and things in the previous laws.

This chapter will examine the evolution of Thai law's concept of property and things from the late Ayutthaya era to the early *Rattanakosin* era. This chapter will focus on the Law of Three Seals, the pre-modern law prior to the codification of the Thai CCC, and the concepts in the Thai CCC.[250]

4.1.1 An Overview of the Ayutthaya Legal System

In the past, before Thailand (Siam) had reformatted the legal system, the concept of Thai law was under the concept of '*Phra Dhammasat*' (พระธรรมศาสตร์), which Siam received and developed from the belief of '*Dhammasatra scriptures'* from the Brahmin religion, which has the original concept from India.[251] *Since the Ayutthaya period* [252], the rulers have used the *Phra Dhammasat* as the kingdom's basic law. The *Phra Dhammasat* contained both public and private law, as well as the king's royal

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[250] Thailand uses the 'Buddhist Era' (B.E.) for official era counting, which is based on the year the Lord Buddha passed away and attained nirvana. Originally, Thailand celebrated the Thai New Year on April 1 every year, marking the beginning of the Buddhist era. However, 2483 brought about a change in Thai New Year's Day to align with the international tradition, starting from January 1. Normally, the method of converting from B.E. to A.D. involves subtracting 543 years from the B.E. However, in this research, which focuses on laws prior to B.E. 2483 (1940), the standard method of converting Buddhist eras to A.D. by subtracting 543 years is not applicable in certain situations. Specifically, Thailand still considers the date before April 1 of every year prior to B.E. 2483 as the previous year. Thus, this research will convert B.E. to A.D. with these factors. Moreover, before Thailand used the Buddhist era Moreover, prior to Thailand adopting the Buddhist era as its official era, the country used the '*Rattanakosin* Era' (R.E.), which is a count of years starting from the year of *Rattanakosin*'s founding in the year B.E.2325. Additionally, certain older laws may utilize the 'Culsakaraj era,' which is a count of the years of the era in ancient times in some Southeast Asian kingdoms, such as Burma, Lanna, late Sukhothai, and the Ayutthaya. d like to place 'A.D.' in parentheses after the names of laws or important events specified in other eras.

[251] แสวง บุญเฉลิมวิภาส, ประวัติศาสตร์กฎหมายไทย (พิมพ์ครั้งที่ 19 วิญญูชน 2563) 55 [Sawaeng Boonchalermvipas, *The Thai Legal History* (19th ed, Winyuchon 2020) 55].

[252] Ibid.

power to rule the country.[253] Moreover, the ruler of the kingdom also had to follow the principle of '*Tossapit-Rajjatham'* (ทศพิธราชธรรม, Pali-Sanskrit: *Dasavidha-rajadhamma),* which is the 10 rules following the Buddhist dhamma for rulers of people. For this reason, the kingdom's ruler had to be the *'Dhamma Raja'* (ธรรมราชา) [254] ,which referred to the moral king in line with the concept of divine rights in the Ayutthaya period.

Besides *Phra Dhammasat and Tossapit-Rajjatham,* other laws, which are the main laws of the Ayutthaya kingdom, are applicable to the cases for people called *'Phra Rajjasart'* (พระราชศาสตร์), which were the laws from the King's decision. *Phra Rajjasart* came from two main sources, namely, if the dispute was resolved and ruled by the king, the judgement of the case also became the law called '*Phra-Rajja-Ban-Yat* (พระราชบัญญัติ), which means the 'Royal Stated' and such ruled would expire after the death of the ruling. However, if the new king continued the *Phra-rajja-ban-*yat of the old late king, it would be transferred to '*Phar-Rajja-Kum-Nod*' (พระราชกำหนด), which means the 'Royal Prescribed'.[255] In addition to these two types of laws, the King's royal order during the Ayutthaya Era (when Thailand was an absolute monarchy) was also regarded as law. This was known as '*Phar Rajja-Ongkarn*' (พระราชโองการ) which means 'Royal Command'. If any royal command was not waived by the modern law in the present, it was affected, as the law in the current system, according to the decision of the Thai Supreme Court no. 2372/2535 (1992), ruled that:

[Translated by Author] "*...[T]he royal command of the king during the period of absolute monarchy has been considered the law. When there is no specific royal command of His Majesty himself or any other absolute power to revoke it, that royal command is still effective...*"[256]

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[253] Munin Pongsapan (n 22) 221.

[254] Sawaeng Boonchalermvipas (n 251) 91.

[255] Sawaeng Boonchalermvipas (n 251) 96; In this part, the terms '*Phra-Rajja-Ban-Yat'* (พระราชบัญญัติ) and '*Phar-Rajja-Kum-Nod*' (พระราชกำหนด), which the author has translated directly by the term and sense in the past. However, after the modernisation of the Siam legal system, the meaning of the term '*Phra-Rajja-Ban-Yat'* (พระราชบัญญัติ)' has been changed and used to refer to the 'Act' (legislative law), and '*Phar-Rajja-Kum-Nod'* (พระราชกำหนด) has been used to refer to the 'Emergency Decree' (executive law) until the present.

[256] Decision of the Thai Supreme Court no. 2372/2535 (1992).

The Law of Ayutthaya was compiled and categorised into various topics following the content of the law and called the ‘*Phra Aiyakarn*’ (พระไอยการ or พระอัยการ), where the word ‘*Aiyakarn*’ means ‘*the task of an almighty*’ and is used in the sense of the word ‘the law'[257] in the ancient Thai.[258] According to *Phra Aiyakarn*, various areas of law, such as civil law, criminal law, procedure law, public law, and martial law, have their own compilations of provisions. The title used to describe the category of laws is 'Laksana' (ลักษณะ), for example, '*Phra Aiyakarn Laksana Pua-Mia'* (พระไอยการลักษณะผัวเมีย) which means 'the laws on husband and wife' (family law) or *'Phra Aiyakarn Laksana Jone'* (พระไอยการลักษณะโจร) which means 'the laws on thief.' (criminal law).

4.1.2 Law of Three Seals

The war between Ayutthaya and the Burma Kingdom led to the fall of Ayutthaya in 1767 AD. After that, *Phraya Tak* (พระยาตาก) expelled the Burmese soldiers from the Ayutthaya area and then crowned himself as *'Somdej Phra Baromh Raja IV'* (สมเด็จพระบรมราชาที่ 4), also known as *'King Taksin the Great*' (สมเด็จพระเจ้าตากสินมหาราช) along with the establishment of Thonburi It is the new capital. However, after fiffteen years since his reign, there was an internal conflict and coup d'état that led to the change of dynasty, with *Chao Phraya Chakri* (เจ้าพระยาจักรี) crowned himself as the new king and also known as the name ‘*King Buddha Yodfa Chulalok the Great*' (สมเด็จพระพุทธยอดฟ้าจุฬาโลกมหาราช) or another name: King Rama I of the *Chakkri Dynasty*. During King Rama I's reign, the Ayutthaya law prevailed, but its hand-copied discrepancies from generation to generation prompted revisions.[259] The code law, known as the 'Law of Three Seals,' came from the seals of three key nobles in the kingdom: the Minister of Civil Affairs (*Samuha-Nayok*: สมุหนายก), the Minister of Defence (*Samuha-Kalahome*: สมุหกลาโหม), and the Minister of Finance (*Phra-Klang:* พระคลัง).[260]

In academics, the Law of Three Seals was also called by a different name, for example, ‘The Code of King Rama I’ or in the period of codification of the

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[257] สำนักงานราชบัณฑิตยสภา, ‘อัยการ’ ใน พจนานุกรมฉบับราชบัณฑิตยสถาน <https://dictionary.orst.go.th/> สืบค้นเมื่อ 22 กุมภาพันธ์ 2023 [Thai Royal Institute, ‘อัยการ’ in Royal Institute Dictionary B.E.2558 (2015) from <https://dictionary.orst.go.th/> accessed 22 February 2023].

[258] In current Thai, the term '*Aiyakarn'* (อัยการ) usually refer to a public prosecutor (พนักงานอัยการ: *Panak Ngan Aiyakarn*) and is not used in the sense of law.

[259] Sawaeng Boonchalermvipas (n 251) 152-153.

[260] Ibid 153.

modern code in Thailand, the Law of Three Seals was also mentioned by the name '*Kodmai Derm*' (กฎหมายเดิม), which referred to the old law or the original law in Thai for distinguished with the modern law in that time, which was called '*Kodmai Mai*' (กฎหมายใหม่).

4.1.3 Concept of Things and Property in the Law of Three Seals

Dissimilar to the modern civil code, the Law of Three Seals does not codify the concepts of things and property in a single book. However, the Law of Three Seals, also known as *'Laksana Bedsed'*, primarily pertains to the concept of property. It encompasses the exercise of property rights in relation to land, fields, fraud, and diverse forms of contracts, including pledges, deposits, hiring of things, loans, and sale-purchase, as we will delve into below. [261]

4.1.3.1 Things and Property

According to the Three Seals Law, the word sap already appeared in the *Phra Aiyakarn Laksana-Bedsed*, which is a law arising from past judgements and dealing with various property disputes. According to the Law of Three Seals, the classification of things in the law was classified into 'Things With Soul' (วิญญาณกะทรัพย์: *Winyan-Naga-Sap* or สวิญญาณกะทรัพย์: *Sa-Winyan-Naga-Sap*) and 'Thing Without Soul'. (อวิญญาณกะทรัพย์) which influenced by the Buddhist believe. However, the Law of Three Seals did not provide a definition for the terms 'things' and 'property.' Thus, considering the Buddhist scripture, the commentary on these types of things was mentioned in the '*Suttanta Pitaka*' (สุตตันตปิฎก), which stated that: [Translated by the Author] "*No refined jewel in heaven or this world can compare to the Tathagata* (ตถาคต: Lord Buddha)."[262]

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[261] วรภักดิ์พิบูลย์, พระ (ม.ล. นภา ชุมสาย), *ประวัติศาสตร์กฎหมายไทย* (คณะรัฐศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย 2512) 141-142 [Worapakpibul, Phra (M.L. Napa Chumsai), *Prawattisart Kodmai Thai* [The Thai Legal History] (Faculty of Political Scient, Chulalongkorn University 1969) 141-142].

[262] มหาวิทยาลัยมหาจุฬาลงกรณราชวิทยาลัย, พระสุนตันตปิฎก (รัตนสูตร) เล่ม 25-9 (ฉบับมหาจุฬาลงกรณ์ราชวิทยาลัย) 543 ใน <https://tripitaka-online.blogspot.com/2016/07/tpd25-09.html> <accessed 3 January 2024> [Maha Chulalongkorn Universit, *Suttanta Pitaka (Rattana Sutra) Volume 25-9* (Maha Chulalongkorn University version) 543 in <https://tripitaka-online.blogspot.com/2016/07/tpd25-09.html> <accessed 3 January 2024>].

According to Buddhist belief, the soul serves as the criterion for classifying objects. In other words, classify the type of thing as living or non-living. In the legal sense, if such things are living items, for example, animals or slaves, they are considered 'things with souls' or *Winyan-Naga-Sap*. On the other hand, non-living items like money, gold, or jewelry fall under the category of things without soul, also known as *A-Winyan-Naga-Sap*. Thus, there are provisions in the Law of Three Seals. For example, *Laksana Bedsed* referred to and used such classifications in Thai law.

> [Translate by the Author] Section 99 of *Phra-Aiyarkarn Laksana Bedsed*: If [whoever] transfers any 'things with soul', [or] 'thing without soul' which is not owned by him, to sale or pledge. He shall pay the compensation as a price that he got from sale or pledge [to the buyer or pledgee] then such thing shall be returned to the owner. [263]

However, besides the terms things with soul and things without soul in the Law of Three Seals, there are other terms that refer to things that are '*Sap*' (ทรัพย์) and '*Sap Sing Khong*' (ทรัพย์สิ่งของ) as the subject matter of the contract, for example, the contract of pledge according to Section 77 of *Laksana Bedsed.*[264]

4.1.3.2 Concept of Thing and Property to Contracts

(1) Sale-Purchase (ซื้อขาย: *Sue-Khai*)

The Law of Three Seals mentioned a sale-purchase contract, as stated by *Laksana Bedsed*. The Law of Three Seals referred to a sale-purchase contract in which the seller and the purchaser exchange goods and money. However, the Law of Three Seals does not introduce the concept of ownership. The seller's obligation only extends to delivering the goods to the buyer. If the buyer fails to deliver the goods, the following provisions may be applicable:

> [Translated by the Author] Section 98 of *Phra-Aiyarkarn Laksana Bedsed* [Translated by Author] When a buyer buys a 'thing with soul' or 'thing without soul' from a seller, the seller receives the money and pledges to deliver the goods to the buyer but fails to deliver any of them. The buyer has made a request, but the seller has denied this and asserts that

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[263] มหาวิทยาลัยวิชาธรรมศาสตร์และการเมือง, *ประมวลกฎหมายรัชกาลที่ 1 จุลศักราช 1116 พิมพ์ตามฉะบับหลวง ตรา 3 ดวง เล่ม 2,* 242 [University of Moral and Political Science, *Code of King Rama I Chunlasakkarat 1116* Printed According to the Royal Tree Seals Version, Vol.2, 242].

[264] Ibid 226.

he neither sold nor received the money from the seller. If the facts emerge after this section, they are considered misappropriated and should be calculated by multiplying the money price. [265]

Therefore, the Law of Three Seals restricts the subject matter of sale to only corporeal objects, excluding rights and other incorporeal objects.

(2) Hire of Things (เช่าทรัพย์: *Chow Sap*)

In the law of Three Seals, the concept of a hire-of-things contract developed from that of a loan contract. The borrower utilised or accrued benefits from the borrowed non-consumable things and was subsequently required to pay the lender. [266] Under the Law of Three Seals, the subject matter of the hire of things contract encompasses both movable and immovable items, including the rental of farmland or other assets. When it came to the subject matter of the hire of things contract, the Law of Three Seals did not contain any provision regarding the hiring of incorporeal property or rights. The concept of incorporeal property is not made widely apparent in the Three Seal Acts, which is why there is no provision for the hiring of incorporeal things, despite the fact that the mentioned Law of Three Seals was drafted and enforced from the Ayutthaya period to the early *Rattanakosin* period.

(3) Gift (ให้: *Hai*)

Donation contracts have appeared in Thai law since the Three Seals; they appear under another name called 'gift' (ให้โดยเสน่หา: *Hai Doy Sane-ha*), with the essence being that the donor must be the owner of the thing given to others and the item must be delivered in order to be complete. Once the donor delivers the given item, they cannot later change their mind or take it back.[267]

4.2 The Concept of Things and Property During the Modernisation Period of the Thai Legal System.

From the reign of *King Buddha Yodfa Chulalok* (King Rama I) until the reign of *King Chulalongkorn* (King Rama IV), the Law of Three Seals served as the primary legal framework in the country. Over a span of 103 years, the legal system and court system in Thailand (Siam) underwent reforms due to the loss of extraterritorial rights,

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[265] Section 99, Phra-Aiyarkarn Laksana Bedsed.

[266] Pornperm Srisawat (n 14) 72.

[267] Pornperm Srisawat (n 14) 79.

causing the European legal concept of private laws and the contemporary concept of property to supplant the original Thai law concept. This shift had a significant impact on the understanding of property, property rights, and contracts, as we will delve deeper into this topic.

4.2.1 An Overview of the History of the Modernisation of the Thai Legal System

Following the signing of the 'Treaty of Friendship and Commerce between Great Britain and Siam' (Anglo-Siamese), also known as the ‘Browring Treaty’ in 1855,[268] , during the reign of King Rama IV, Thailand lost its extraterritorial rights for the first time. to British empire. [269] The British Empire's primary assertion that it possessed extraterritorial freedoms was predicated on the fact that Thai laws were outdated and barbaric. In particular, Thai procedure law establishes rigorous standards for the evaluation of witnesses and the hearing of evidence. The erosion of extraterritorial rights is the primary concern. The laws of Siam are not accepted by the Western powers due to their antiquated nature. Article II of the Bowring Treaty mandates that Britain be granted extraterritorial rights by Siam.[270]

> ARTICLE II.
>
> The interests of all British subjects coming to Siam shall be placed under the regulation and control of a Consul, who will be appointed to reside at Bangkok: he will himself conform to and will enforce the observance, by British subjects, of all the provisions of this Treaty, and such of the former Treaty negotiated by Captain Burney in 1836, as shall still remain in operation. He shall also give effect to all rules or regulations that are now or may hereafter be enacted for the government of British subjects in Siam, the conduct of their trade, and for the prevention of violations of the laws of Siam. Any disputes arising between Siamese and British subjects shall be heard and determined by the Consul, in conjunction with the proper Siamese officers; and criminal offences will be punished, in the case of English offenders by the Consul, according to English laws, and in the case of Siamese offenders, by their own

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[268] ชาญชัย แสวงศักดิ์, อิทธิพลของกฎหมายฝรั่งเศสในการปฏิรูปกฎหมายไทย (พิมพ์ครั้งที่ 2 วิญญูชน 2558) 31 [Chanchai Sawaengsak, *Influence of France on Thai Legal Reformation*(2nd edn, Winyuchon, 2015) 31].

[269] Ibid.

[270] Ibid.

> laws, through the Siamese authorities. But the Consul shall not interfere in any matters referring solely to Siamese, neither will the Siamese authorities interfere in questions which only concern the subjects of Her Britannic Majesty.[271]

This treaty led to Thailand opening its borders and relinquishing its extraterritorial rights to the British Empire. Others are moving to Thailand. This led to the creation of a consular court to consider disputes between Siamese subjects and other national subjects.[272] After the loss of the extraterritorial rights, other western countries, when they came to Siam, were also required to meet the conditions of such extraterritorial rights in the same way as the British Empire, e.g., the United States (1856), France (1856), Denmark (1858), Portugal (1859), the Netherlands (1860), Germany (1862), Sweden, Norway, Belgium, Italy (1868), Austria-Hungary (1869), Spain (1870), and Russia (1899).[273] Such a loss of extraterritorial rights was an important reason for Siam's administrative reforms during King Rama V's reign, [274] including reforming the justice system and modernizing the legal system to make it acceptable to foreign countries.

4.2.2 Reformation of the Thai Justice system

King Chulalongkorn's (Rama V) reign played a significant role in transforming Siam into a modern state, implementing reforms in both the administration of state affairs and the establishment of the Ministry of Justice coincided with the Thai legal system's reform. This was due to the fact that Siam had not yet undergone the same level of judicial reform as it does today. Prior the centralization of the justice system in the reign of King Chulalongkorn, before A.D. 1891 (B.E. 2434), Siam had many different courts, with courts separated by different ministries and

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[271] National Archives (United Kingdom), *Treaty of Friendship and Commerce between Great British and Siam* (หนังสือสัญญาทางพระราชไมตรีประเทศอังกฤษแลประเทศสยาม) (concluded and signed at Bangkok 18 April 1855).

[272] Chanchai Sawaengsak (n 268) 31.

[273] พรรคดี ผกากรอง, ‘การจัดร่างประมวลกฎหมายแพ่งและพาณิชย์แห่งสยาม: พ.ศ.2451-2478’, (วิทยานิพนธ์ อักษรศาสตร์มหาบัณฑิต สาขาวิชาประวัติศาสตร์เอเชียตะวันออกเฉียงใต้ ภาควิชาประวัติศาสตร์ บัณฑิตวิทยาลัย มหาวิทยาลัยศิลปากร 2537) 15 [Pakdi Phagagrong, ‘The Drafting of Siamese Civil and Commercial Code: 1908-1935 A.D.’(Master of Art in History Thesis, Silpakorn University 1994) 15].

[274] Ibid 39

departments, as it has been since the reign of *King Songtham*.[275] King Chulalongkorn issued the royal announcement establishing the Ministry of Justice. Following such an announcement, existing courts were dissolved and reorganized. In the early *Rattanakosin* period, Siam still followed the Law of the Three Seals. Thus, there are decentralized courts depends to the government agency.

Moreover, they also had the special settlement courts, for instances the Court of the Department of Agriculture (ศาลกรมนา), the Court of the Ministry of Royal Treasury (ศาลในกระทรวงมหาสมบัติ), the Court of the Department of the Royal Household (ศาลกรมวัง), the Court of the Department of Superstition (กรมการแพทยา), the Court of the Department of Religion and Education (ศาลกรมธรรมการ), the Internal Revenue Court (ศาลสรรพากรใน), the External Revenue Court (ศาลสรรพากรนอก) the *Krom Sussadee's* Court (ศาลกรมสัสดี), or the Court of *Krom Phra Saraswati* and the Court of Royal Family (ศาลกรมพระสุรัสวดีและศาลราชตระกูล), and the *Kasem* Civil Code (ศาลแพ่งเกษม)[276]

As a result of the establishment of the Ministry of Justice, it has been dissolved into only seven courts, namely the Court of Appeal for Public Cases (ศาลอุทธรณ์คดีหลวง), the Court of Appeal for People's Cases (ศาลอุทธรณ์คดีราษฎร์), the Criminal Court (ศาลพระราชอาญา), *Kasem* Civil Court (ศาลแพ่งเกษม), the Central Civil Court (ศาลแพ่งกลาง), the Revenue Court (ศาลสรรพากร), the Foreign Court (ศาลต่างประเทศ), and transferred all courts to under the Ministry of Justice.[277]

4.2.3 Law School of the Ministry of Justice and Thai Legal Education

After the establishment of the Ministry of Justice in Thailand, *Gustave Rolin-Jacquemyns,* King Rama V's general advisor, suggested sending several of King Rama V's sons to study abroad, including *His Royal Highness, the Prince of Ratchaburi* or the *Prince Raphiphat*, who went on to study law at Christchurch College, University of Oxford, during the years 1891–1894 A.D. Subsequently, Jacquemyns also suggested the establishment of a law school in Thailand to cultivate Thai lawyers and judges for the new justice system following its modernisation. After graduating from Oxford University, Prince Raphiphat was appointed Minister of Justice. On January 26, 1897,

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[275] Worapakpibul, Phra (n 261) 271.

[276] Announcement of the Establishment of the Ministry of Justice, in Royal Gazette Vol. 9] (April 10, R.E111 (A.D.1892).

[277] Ibid.

he founded the Law School of the Ministry of Justice, where he taught the law class on his own.[278]

During that period, the Law School of the Ministry of Justice was Thailand's only educational institution that provided direct instruction in legal subjects. It was also the most important institution in Thailand at the time for producing Thai lawyers and judges. Thus, Prince Raphiphat's lectures were considered significant legal texts at a time when Thailand did not have a modern legal code in force, which influenced the ideas of Thai lawyers and Thai judges during that time. The Prince Raphiphat Law Lecture was a compilation of lectures that Prince Raphiphat gave to students at the Law School of the Ministry of Justice. This lecture appears in both original Thai law (Law of Three Seals Law) and European laws. Therefore, it can be concluded that Prince Raphiphat, in his role as Minister of Justice and Prince of Siam, significantly shaped the legal principles in Thailand during that period. This research, which will be examined in the next topic, deserves careful consideration and comparison.

4.2.4 The Concepts of Property and Things in the Prince Raphiphat's lectures

The textbook 'Lectures of His Royal Highness, the Prince of Ratchaburi', also known as Prince Raphiphat's, contains a variety of legal topics that Prince Raphiphat taught at the Law School under the Ministry of Justice between R.E.118 and R.E.128 (1909 A.D.–1910 A.D.)[279] These topics include general principles of law, the law of persons, the law of contracts, the law of things, company law, criminal law, and more. The lecture on the law of things and the law of contracts will discuss this topic, which pertains to the concept of things and property in Thai law during that era.

4.2.4.1 Things and Property (ทรัพย์: *Sap*)

The term '*Sap*' (ทรัพย์) can be used to describe both things and property, as per Prince Raphiphat's lectures. However, in certain sections of the lecture, the term 'Khong' (ของ) is also used to refer to objects or things. As per Prince Raphiphat's lectures in September R.E. 118 (1909 A.D.), the term 'Sap' was defined as

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[278] Munin Pongsapan, (n 22) 233-234.

[279] ราชบุรีดิเรกฤทธิ์, พระเจ้าพี่ยาเธอ กรมหลวง (รพีพัฒนศักดิ์), *เล็คเชอร์ของพระเจ้าพี่ยาเธอกรมหลวงราชบุรีดิเรกฤทธิ์* (กรุงเทพบรรณาคาร 2468) [Ratchaburidirekrit, Prachaopiyatuer Krommaluang (Raphi Phatthanasak), *Lectures of His Royal Highness, the Prince of Ratchaburi* (Krungthep Bunnakarn 1925).

‘*everything that has a value’*[280] *Sap* was classified as corporeal, incorporeal, fungible, or immovable. Prince Raphiphat provided the example of corporeal in reference to the final classification. *Sap* was a land, whereas the example of incorporeal *Sap* was ‘a right or authority to walk pass other land’ (อำนาจเดินข้ามที่ดินของเขา*: Aumnart Dearn Kam Tee Din Khong Khao*)[281] which can be referred to as servitude in the Thai CCC.

Raphiphat's lectures introduced the concept of sap, referring to objects with value or property rights that fall under the categories of corporeal and incorporeal objects, as well as the concept of civil law. Therefore, the Thai CCC later referred to the term ‘Sap’ as property. However, Siam's promulgation of the Penal Code R.E.128 (1919 A.D.) led to a change in this description, as discussed in topic 4.2.6. *The Penal Code, R.E. 127, introduces the concept of things and property*.[282]

4.2.4.2 Ownership (กรรมสิทธิ์: *Kammasit*)

Prince Raphiphat defined ownership as “*[T]he authority which person can freely deal with a thing which the law is not prohibited”* in his lectures. [283] Furthermore, the ownership rights also encompass the ‘holder right’, denoting the entitlement of the individual who possesses such a thing.[284] The explanation reveals that the concept of 'holder rights' is significant. The concept of ‘holder rights’ bears a significant similarity to the later concepts of possession and possession rights. The sole distinction lies in the absence of any mention of the intention to seize it. Therefore, in Thai law prior to the emergence of the modern civil code, the concept of possession was recognized as one of the rights under ownership. As a result, ownership and holding rights are objects.

4.2.4.3 Sale-Purchase (ซื้อขาย: Suue-*Khai*)

According to Prince Raphiphat’s lectures, contracts specified by law are called ‘Panrana Sanya’ (พรรณาสัญญา) which can be translated as ‘Described contracts’ [Translated by author]. Prince Raphiphat’s lectures describe all eleven contracts. However, Prince Raphiphat categorizes only four contracts as part of the first group. These contracts pertain to the transfer of goods or ownership, specifically gift, exchange, sale-purchase, and transfer of rights.[285]

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[280] Ratchaburidirekrit, Prachaopiyatuer Krommaluang (n 279) 122.

[281] Ibid 123.

[282] See, Topic 4.2.6 The concept of Things and property in the Penal Code R.E.12.

[283] Ratchaburidirekrit, Prachaopiyatuer Krommaluang (n 279) 323.

[284] Ibid.

[285] Ibid 151.

The sale-purchase contract describes itself as a contract of exchange between goods and money. In other words, it is a contract between the seller, who has a duty to deliver goods to the buyer, and the buyer, who has a duty to pay the price. Ownership of things shall not be transferred to the buyer until the buyer pays the price.[286]

4.2.4.4 Gift (ของกำนัล: Khong Kumnan)

Prince Raphiphat's lecture on the gift contract explains that it is a contract where the donor delivers something to the donee. This type of contract is considered unilateral and cannot be legally enforced if it is not formalised in the presence of officials.[287]

4.2.4.4 Hire (เช่า: Chow)

Prince Raphiphat's lectures state that there are a total of three contracts out of eleven. The contracts in question were classified as the second category, which pertains to permission, or 'Yorm Anu-yart' (ยอมอนุญาติ). in Thai. What are the contracts of loan for consumption (ยืมไปบริโภค), loan for use (ยืมไปใช้) and hire (เช่า). When discussing the contract of hire, it refers to an agreement where a person loans something to another party, with the understanding that the borrower will pay rent for its use.[288] Thus, the concept of hiring items in Thai law originated from the loan agreement. The items that can be hired are non-consumable items, which are essentially treated as loans for consumption.

4.2.5 Codification of Modern Legal Code in Thailand

The Siamese government urgently needed to codify the Thai CCC. In 1923, the Siamese government promulgated the first version of the Thai CCC, which included Book I of the General Principles and Book II of Obligation, but neither book saw enforcement.[289] Subsequently, we drafted and promulgated new versions of both books in 1925.[290] Following this, the authorities promulgated the Book III of Specific

[286] Ibid 152-153.

[287] Ibid 152.

[288] Ibid 155-156.

[289] Munin Pongsapan, (n 22) 241-242.

[290] Royal Gazette Volume 42 Page 1 11 November 1925.

Contracts in 1928,[291] the Book IV of Property in 1930,[292] the Book IV of Property in 1930, and the Book V of Family and Book VI of Succession in 1938.[293]

During that period, the Siamese government collaborated with numerous foreign legal advisers, such as Belgian *Gustave Rolin-Jacquemyns*, French advisers like *George Padoux* and *René Guyon*, and Thai lawyers. that play an important role, such as Prince *Raphiphat* or *Phraya Manowaratsawi*, among other,[294] all of whom play an important role in pushing for modern laws, such as the Criminal Code, R.E. 127, or the Thai CCC of 1925, and the Act, which included many important editions at that time.

4.2.6 Thai Penal Code R.E.127 (A.D.1908)

The Criminal Code R.E. 127 (A.D. 1908), which is considered the first modern law code in Thailand, marked the beginning of Siam. The first codification of the modern Thai penal code was the Penal Code R.E.127, which was promulgated in 1908. [295] The intriguing aspect of this code is that the definition of "things" in Section 6 (10) was already established in the criminal law prior to the enactment of the civil code in Thailand. Because it had to integrate the definition of things with the provisions regarding offences against property, such as theft, [296] snatching,[297] or robbery,[298] for example.

> [Translated: by Author] "Section 6 (10): Things means objects of which a person can have ownership of or have the authority to be an owner, e.g., money, moveable things, and immovable things. They shall be considered as things defined in this section".[299]

The definition of things, as defined in Penal Code R.E. 127, is necessary to apply to the provisions on offences against property, such as theft, [300]

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[291] Royal Gazette Volume 45 Page 1 1 January 1928.

[292] Royal Gazette, Volume 47 Page 442 18 March 1930.

[293] Royal Gazette, Volume 52 Page 474 29 May 1935; Royal Gazette, Volume 52 Page 529 7 June 1935.

[294] Ibid 50-52,79.

[295] Ibid.

[296] Thai Penal Code R.E.127 (A.D.1908) Section 288.

[297] Thai Penal Code R.E.127 (A.D.1908) Section 297.

[298] Thai Penal Code R.E.127 (A.D.1908) Section 301.

[299] Thai Penal Code R.E.127 (A.D.1908) Section 6 (10).

[300] Thai Penal Code R.E.127 (A.D.1908) Section 288.

snatching,[301] or robbery.[302] Moreover, there is an explanation in Section 6 (10) that the definition of things in the Penal Code R.E. 127 is different from the definition of things in the Thai CCC, because 'things' according to the Penal Code R.E. 127 include not only corporeal things but also anything for which a person has ownership rights or belongs to them.[303]

However, after the promulgation of the new Thai Criminal Code in 1956, there was no longer a definition for the term things for the reasons that the definition of things was defined in the Thai CCC and had already been promulgated before in 1925 before the new Thai Criminal Code was promulgated. (*See topic 4.3.2 CCC B.E.2468*).[304] This occurred, resulting in complications in the interpretation of criminal cases. For instance, the application of provisions to cases of stealing electricity[305] and other incorporeal property is still a topic of debate in the current Thai law, as the definition of 'things' in the Thai CCC is more restrictive than that of 'things' in the penal code R.E.127.[306]

4.3 Concepts of Things and Property in the Thai Civil and Commercial Code

Following the promulgation of Criminal Code R.S. 127, the Siamese government appointed Padoux to chair the committee for drafting the Thai CCC. The committee also appointed René Guyon, a French jurist. However, numerous factors, including the drafting method and committee replacement, have caused delays in the preparation of the Thai CCC. The outbreak of World War I halted the drafting of the

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[301] Thai Penal Code R.E.127 (A.D.1908) Section 297.

[302] Thai Penal Code R.E.127 (A.D.1908) Section 301.

[303] หยุด แสงอุทัย *คำอธิบายกฎหมายลักษณะอาญา ร.ศ. 127* (พิมพ์ครั้งที่ 7 วิญญูชน) 51 [Yud Sanguthai, *Textbook on Penal Code R.E.127* (7th edn, Winyuchon) 51].

[304] See, Topic 4.3.2 Civil and Commercial Code B.E.2468.

[305] See, The Decision of the Thai Supreme Court no. 877/2501 (1958 A.D)

[306] See, สุเนติ คงเทพ, 'ความผิดฐานลักทรัพย์: ศึกษาการเอาไปซึ่งพลังงาน' (วิทยานิพนธ์ นิติศาสตร์มหาบัณฑิต มหาวิทยาลัยธรรมศาสตร์ 2543) [Suneti Kongthep, 'Theft Offense: A Case Study of Energy Taking' (Master of Laws Thesis, Thammasat University 2000)]; อรุโณทัย ชื่อสุวรรณ 'ความผิดฐานลักทรัพย์: ศึกษากรณีการลักลอบใช้กระแสไฟฟ้า' (วิทยานิพนธ์นิติศาสตร์มหาบัณฑิต มหาวิทยาลัยธุรกิจบัณฑิต 2559) [Arunotai Sueuwan, 'Theft Offense: A Case Study of Illegal Use of Electricity' (Master of Laws Thesis, Dhurakij Pundit University 2017)].

Thai CCC, prompting Padoux to return to France. In lieu of Padoux, the committee appointed another French jurist as chairman, and three Thai lawyers, including Phraya Manavaratchasevi, who later played a significant role in the creation of the Thai CCC.[307]

4.3.1 Thai Civil and Commercial Code B.E.2466 (A.D.1923)

Guyon based the first preliminary draft of the Thai CCC on the French Civil Code.[308] This draft does not contain the provision of the definition of things and property, as the drafting committee followed the approach in the French Civil Code. However, after the first draft was submitted, discussed, and edited, the definition of things was added in section 97 as "*corporeal objects only and are either immovables or movables,"* [309] which is similar to the concept of Article 516 of the French Civil Code, while the definition of property was defined in Section 98 as *'movable things which, in the ordinary course of transaction, are customarily determined by number, weight or measure.'*[310] It can be seen that the definition of property in the Thai CCC B.E. 2466 (1923 A.D.), Section 98, refers to only movable things, not immovable things.

According to Title VIII, Things of the draft, under the consideration of the Revising Committee of the Draft of Thai CCC, who was entitled to revise and translate the draft from CCC in English to Thai. The word 'things' was translated to *'Sạp Sing Không'* (*ทรัพย์สิ่งของ*) in Thai when the first draft from the drafting committee was submitted. Such a term is the combination of the words *'Sap' (ทรัพย์)* and *'Sing Khong' (สิ่งของ)*, which means objects in Thai. On the other hand, the word 'property' was translated to *'Sap' (ทรัพย์).*[311] However, the Committee of Revising had changed the term for things in Thai by cutting off the word '*Sing Khong*,' leaving only 'Sap' (ทรัพย์)

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[307] Munin Pongsapan, (n 22) 239-242.

[308] Chanchai Sawaengsak (n 268) 81.

[309] Thai Civil and Commercial Code B.E.2466 (1923 A.D.) Section 97.

[310] Section 98, Thai Civil and Commercial Code B.E.2466 (1923 A.D.).

[311] สำนักหอจดหมายเหตุแห่งชาติ, ม ร.6 ย./17 เอกสารกรมราชเลขาธิการ รัชกาลที่ 6 กระทรวงยุติธรรม 'ร่างรายงานประชุม ตอนตรวจแก้ร่างและคำแปลลักษณบุคคล ครั้งที่ 1, ที่ 2 และที่ 3 กับแก้บรรพ 1-2 ตามบันทึกของ ดร.เยมส์') 50 [National Archive, Mor Ror 6 Yor /17, Documents from the Department of the Secretariat of King Rama VI, Ministry of Justice 'Draft of Meeting Report Concerning Correcting and Translate Law of Person 1st, 2nd and 3rd Time with the Correcting of Book I and II Following the Record of Dr. James' 50].

as the translation of things in the Thai CCC, and changed the translation of property from *'Sap'* (ทรัพย์) to *'Sapsin' (ทรัพย์สิน)*, which has been in used until now.[312]

4.3.2 Thai Civil and Commercial Code B.E.2468 (A.D.1925)

In 1925, following the failure of the Thai CCC B.E. 2466 due to inconsistencies in its provisions,[313] the drafting committee opted to use a grafting method to draft the Thai CCC, incorporating provisions from foreign laws to create the new Civil Code. We drafted the code by replicating other foreign private codes, such as the BGB and JCC, which were the most influential civil codes. We also blended some provisions from Swiss law[314] and Latin American laws, such as Brazilian and Argentine law.[315] This version redrafted Book I, General Principle, and Book II, Obligation, of the Thai CCC. The initial draft of the Thai CCC B.E. 2468 only defined 'things' in Section 98. The drafting committee revised this definition from Section 97 of the Thai CCC B.E. 2466[316] to *"'Things, in the legal sense, are corporeal objects"*,[317] The drafting committee also used the Section 90 of the BGB and Article 85 of the JCC as a model for section 98.[318]

Moreover, the drafting committee examined the draft of Section 98 and discovered that it only defined 'things', leaving the term 'property' undefined. Therefore, the committee drafted the definition of property[319] in Section 98 Bis as *"Property includes things as well as incorporeal objects susceptible of having a value"*

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[312] Ibid.

[313] Chanchai Sawaengsak (n 268) 96-97.

[314] Munin Pongsapan (n 22) 263.

[315] Department of Social Legal Studies, Philosophy, and History, Faculty of Law Thammasat University (n 117) 141-142.

[316] สำนักหอจดหมายเหตุแห่งชาติ, ม ร.6 ย./18 เอกสารกรมราชเลขาธิการ รัชกาลที่ 6 กระทรวงยุติธรรม 'รายงานประชุม 1/161 ถึง 21/189 (24 ก.ค - 7 พ.ย. 2468) 12 [National Archive, Mor Ror 6 Yor/18 Documents from the Department of the Secretariat of King Rama VI, Ministry of Justice Meeting Record, 1/161 to 21/181 (24 Jul – 7 Nov 1925) 12].

[317] สำนักหอจดหมายเหตุแห่งชาติ, ม. สคก 3/4 สำนักงานคณะกรรมการกฤษฎีกา 'การประชุมกรรมการร่างกฎหมาย ณ กรมท่าช่างวังน่า ตั้งแต่วันที่ 19 พฤษภาคม ถึง 31 กรกฎาคม พ.ศ.2468' 388 [National Archive, Mor-Sor Kor Gor 3/4 Office of the Council of State 'Legislative Drafting Committee Meeting at Tha Chang Wangna Law Drafting Department from May19, to July 31, 1925' 388].

[318] Ibid 385-386.

[319] Ibid 390.

in accordance with the principle outlined in Arg. CC 1871 Section 2346 [2312] and the legal textbook named '*Répert Carpentier Vo. Biens No. 1*.'[320] Which was drafted as "*Section 99 bis Property includes a thing as well as incorporeal objects susceptible of having a value*"[321]. In a subsequent meeting, the committee changed the order number from section 98 *bis* to section 99.[322] Moreover, *René Cazeau,* the Frech jurist, raised in the meeting that the definition of property in the draft should include the term "*and of being appropriated*" following the principle of French law.[323] Then the definition section 99 was drafted as "*Property includes things as well as incorporeal objects, susceptible of having a value and of being appropriated.*" [324] which had been in effect for 67 years, underwent revision in 1992, becoming sections 137 and 138 in the current Thai CCC.[325]

4.3.3 Thai Civil and Commercial Code B.E.2535 (A.D.1992)

In 1991, the *National Peace Keeping Council* executed a coup d'état in Thailand, leading to the promulgation of the *Constitution of the Kingdom of Thailand*, *B.E. 2534* (A.D.1991).[326] Following the promulgation of the Constitution of the Kingdom of Thailand, B.E. 2534, Section 7[327], the *National Legislative Assembly* replaced the Parliament from March 15, 1991, to March 21, 1992. Towards the end of the National Legislative Assembly term, the *Anand Panyarachun* Cabinet proposed a Bill of Act Promulgation of the Revised Provisions of Book I of the Thai CCC, which was a revision of the provisions of the Civil and Commercial Code, Book I, to the National

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[320] Ibid 390-391.

[321] Ibid 392.

[322] Ibid 397.

[323] Ibid 399.

[324] Ibid 403.

[325] Act Promulgation the Revised Provisions of Book I of the Civil and Commercial Code B.E. 2535 (A.D.1992) Section 16.

[326] บีบีซี นิวส์ ไทย, 'พฤษภาทมิฬ: ครบรอบ 30 ปี เหตุสลายการชุมนุมประท้วงขับไล่ พล.อ. สุจินดา คราประยูร' สืบค้นจาก <https://www.bbc.com/thai/thailand-60963045> สืบค้นเมื่อ 26 มิถุนายน 2567 [BBC NEWS Thai, 'Black May': 30th anniversary of the dispersal of the protests to oust General Suchinda Kraprayoon from <https://www.bbc.com/thai/thailand-60963045> accessed 26 June 2567.

[327] Constitution of the Kingdom of Thailand, B.E. 2534 (A.D.1991) Section 7.

Legislative Assembly, which accepted the principle on January 10, 1992,[328] and established the Extraordinary Committee Considering the Bill of Act Promulgation of the Revised Provisions of Book I of the Thai CCC. Such a bill had been considered by the Extraordinary Committee.

According to the Act Promulgation of the Revised Provisions of Book I of the Thai CCC B.E. 2535 (A.D. 1992), parts of Book I of the Thai CCC were changed and revised, such as the parts that explain what things are and what property is. The Thai CCC B.E. 2468 (1925 A.D.) slightly modified the definition of things, changing it from "*Things, in the legal sense, are corporeal objects*" to "*Things are corporeal objects*."[329] Section 137 [136] of the revised version includes the definition of property. Section 138 [137] of the revised version replaces section 99 in the Thai CCC B.E. 2468 (1925 A.D.) with the definition of property.[330]

From the examination of the annexes of the bills and the minutes of the Bill of Act Promulgation of the Revised Provisions of Book I of the Civil and Commercial Code B.E. 2535 (A.D. 1992), there is no explanation regarding the reason for removing the term 'in the legal sense' from the definition of things according to Section 137 [136] nor the definition of property according to Section 138 [136] of the Thai CCC B.E. 2535 (A.D. 1992).[331]

Thus, it is necessary to revisit and review the Office of the Council of State's report proposal, which proposed a draft law to amend Thai CCC Book I in 1991. The revised definition of things is in Section 136, and property is in Section 137 in the

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[328] สำนักงานเลขาธิการสภาผู้แทนราษฎร, *รายงานการประชุมสภานิติบัญญัติแห่งชาติ ครั้งที่ 14/2534-2535 วันที่ 28 กุมภาพันธ์ 2535* (กองการพิมพ์ สำนักงานเลขาธิการสภาผู้แทนราษฎร) 17 [The Secretariat of The House of Representatives, *Report of the National Legislative Assembly Meeting No. 14/1991-1992, 28 February 1992* (Printing Division the Secretariat of The House of Representatives) 17.

[329] Thai Civil and Commercial Code (Revised B.E 2535, A.D.1992) Section 137.

[330] สำนักงานเลขาธิการรัฐสภา, อ.พ.80/2535 (เอกสารประกอบการพิจารณา ร่างพระราชบัญญัติให้ใช้ประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 1 ที่ได้ตรวจชำระใหม่ (ฉบับที่...) พ.ศ. ....) 57. [Secretariat of the Parliament, Or Por 80/2535 (Attachment Annexes for Considering the Bill of Act Promulgation of the Revised Provisions of Book I of the Civil and Commercial Code (Vol ...) B.E. ....) 57].

[331] The Secretariat of The House of Representatives (n 328) 137.

report before being changed to Sections 137 and 138, respectively, before being announced.[332]

Regarding the definition of things, when examining the reasons for the draft, it was found that the drafting committee debated two issues:

The first issue involves expanding the term 'things' to encompass electricity, natural power, and other controllable and appropriated energy. However, this issue was debated in the committee, and there were two sides of opinion. The first side did not agree with the amendment because electricity and natural power are already to be considered movable property (according to the Thai CCC Book I of 1925). Furthermore, electricity does not qualify as an incorporeal object. Thus, it is property, not a thing. The second side thought that it should be revised to cover electricity and energy because there was a problem in theory from the Thai Supreme Court's ruling on the theft of electricity, whether electricity is considered a thing or not. Finally, the committee decided to maintain the original principle and agreed to state the offence of theft of electricity in the special law on theft of electricity.[333]

The second issue pertains to whether the term 'in the legal sense' should remain in the definition of things. On this issue, the drafting committee had the opinion that:

> [Translated by the author] Retaining the term 'in the legal sense' will lead to the understanding that a thing in common language is one characteristic, while a thing in the legal sense is another, both of which are distinct. Therefore, retaining it would be redundant. In addition, this definition is already a legal one.[334]

As a result, the drafting committee proposed to remove the word "legally defined" from the definition of things,[335] including slightly adjusting the Thai wording, but it did not affect the principle.[336]

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[332] สำนักงานคณะกรรมการกฤษฎีกา, *ข้อเสนอแก้ไขเพิ่มเติมประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 1* (สำนักงานคณะกรรมการกฤษฎีกา 2534) 34. [Office of the Council of State, *Proposal on Revising Civil and Commercial Code Book I* (Office of the Council of Sate 1991) 34].

[333] Ibid 309.

[334] Ibid.

[335] Ibid.

[336] Ibid 311.

4.4 Relation of Things and Property to Real Rights in the Thai Civil and Commercial Code

4.4.1 Ownership (กรรมสิทธิ์: *Kammasit*)

According to the Thai CCC, there is no provision for the definition of ownership,[337] However, there is a provision in the Thai CCC that describes the concept of ownership rights in Section 1336 of the Thai CCC as the right of the owner of the property to use and dispose of a property under the limited scope of the law, including the right to acquire fruits from the property. Moreover, ownership rights include the right to follow and recover property from another person who detains it, as well as the right to prevent unlawful interference.[338]

According to *Phraya Manawaratchasewi's Index of the Civil Code*, the reference foreign private laws for Section 1366 are Article 884 of the Finch Civil Code, Section 757 of the German BGB, and Article 261 of the Japanese Civil Code.[339] Ownership rights in Thai law are considered property according to Section 138 of the Thai CCC. However, it is important to note that the provisions in Book IV of Property, specifically Section 1336, refer to 'ownership of property' rather than 'ownership of things'. This is because Section 138 defines 'property' to include both corporeal and incorporeal property. Therefore, this term choice in the ownership provision presents challenges in interpreting the nature of ownership rights under Thai law.[340]

According to *Seni Pramoj*, regarding the objects of ownership rights in his legal textbooks on property. [Translated by author]

> Although Section 1336 regarding the power of ownership mentions the ownership of property, Section 99 [138] included rights as incorporeal objects; Sections 100 [139] and 101 [140] refer to rights that relate to ownership rights in land or immovable property as well. According to the terms used, it may be understood

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[337] อานนท์ มาเม้า, *กรรมสิทธิ์* (พิมพ์ครั้งที่ 2 โครงการตำราและเอกสารประกอบการสอนคณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2562) 65 [Arnon Mamout, *Ownership* (2nd edn, Textbook and teaching Materials Project, Faculty of Law Thammasat University 2019) 65].

[338] Thai Civil and Commercial Code Section 1336.

[339] Department of Social Legal Studies, Philosophy, and History, Faculty of Law Thammasat University (n 117) 230.

[340] Arnon Mamout (n 337) 91-97.

> that a person may have ownership of an incorporeal object... Considering this, it should be understood that ownership under Section 1336 is a real right to a corporeal object. Some of the powers listed are powers that can be exercised only on corporeal objects, for example, the power to follow and recover and the power to prevent. It is impossible to think of returning an incorporeal object. Real rights in incorporeal objects cannot occur without a doubt.[341]

This Pramoj's opinion that the object of the ownership right according to Section 1336 is only referred to as corporeal objects was also accepted among Thai scholars, for example Arnon Mamout,[342] and Sanankorn Sotthibandhu[343]

However, some legal texts in Thai property law do not explicitly address the concept of object of ownership, for instance:

According to Banyat Sucheewa mentioned that [Translated by author] "*Ownership right is the real rights that shows the belonging of the property; a person can have ownership rights on every type of property...*"

Thai law explains and accepts the concept of ownership as a real right, mirroring the *Donimium* concept in Roman law. However, not all things under Thai law have ownership rights; for example, 'the lands with a certificate of land use' or, in Thai, Nor. Sor.3 (น.ส.3) land, which is the land to which the state allowed people to belong and use, but there is no ownership right to the land. The person who owns land under Nor.Sor.3 only has possessory rights over their land. The Supreme Court of Thailand's precedents, particularly the judgements on sale-purchase contracts and adverse possession, have influenced the concept of ownership in Thai law. There are cases of company shares and intellectual property that have the most problems with the concept of ownership.

The Thai CCC defines shares as a subsidiary investment unit of a company. [344] In other words, shares are the equity of the company to which the shareholder belongs; the company has acquired the rights of being a shareholder, for

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[341] Seni Pramoj (n 5) 190-191.

[342] Arnon Mamout (n 337) 91

[343]Sanunkorn Sotthibandhu (n 4) 168.

[344] โสภณ รัตนากร, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยหุ้นส่วนและบริษัท*, (พิมพ์ครั้งที่ 11 นิติบรรณาการ 2551) 209 [Sopon Rattanakorn, *Textbook on Civil and Commercial Code on Partnership and Limited Company* (11th edn, Nitibannagarn 2008) 209].

example, the right to vote in the shareholder meeting or the right to receive dividends from the company's profits. Thus, company shares can be considered incorporeal property according to Section 138[345]. The principle of real rights should not grant ownership over them. However, the Thai Supreme Court's decisions accept the existence of ownership rights, for example, on company shares.

> **Decision of the Thai Supreme Court No. 2391/2529 (A.D.1986)** [Translated by Author] Trading shares on the stock exchange on behalf of customers is a common practice. Both the company handling the customer's share trading and the customer agree to abide by the agreed-upon type, quantity, and price of shares for purchase or sale. The act of trading shares on the stock exchange is legally distinct from the registration of share transfers. The transfer of **ownership of the shares** occurs immediately upon their trade. [Emphasis added][346]
>
> **Decision of the Thai Supreme Court No. 3395/2529 (A.D.1986)** When a petitioner knew and accepted a share transfer, it can be assumed that he intended to keep it. Even though the transaction was void, the petitioner has owned the shares for more than five years. Thus, the petitioner shall acquire **ownership of the shares** by acquiring them**.** Therefore, the official receiver must demand full payment of the partnership's value from the petitioner. [Emphasis added] [347]
>
> **Decision of the Thai Supreme Court No. 695/2534 (A.D.1991)** The fact that M. possessed of the said shares was an act of concealment, not disclosure, not meeting the criteria that would allow M. to gain **ownership of the shares** through adverse possession according to Civil and Commercial Code, Section 1382. [Emphasis added][348]

According to Phraya Mananratchasewi's Civil Code index, the provisions on company law in the Thai CCC originate not only from foreign private laws but also from countries with civil law systems. Conversely, 'The Companies Consolidation Act 1908', an English common law system, serves as a reference for the concept of written law. Furthermore, the Thai drafter utilised the 'Bill of Exchange Act

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[345] Ibid 278.

[346] Decision of the Thai Supreme Court No. 2391/2529 (A.D.1986).

[347] Decision of the Thai Supreme Court No. 3395/2529 (A.D.1986).

[348] Decision of the Thai Supreme Court No. 695/2534 (A.D.1991).

1882' as a model for the provision of a bill of exchange within the Thai CCC.[349] Therefore, even though there is no explicit provision on the concept of instruments, it's possible that the Thai law also adopted the concept of 'instruments (ตราสารเปลี่ยนมือ)'.

Sahathon Rattanapaijit defines an instrument as a legal document that encompasses both obligation rights and property rights. According to Section 1336 of the Thai CCC, the owner of an instrument possesses both obligation and property rights, enabling them to claim the obligation from the person who owes them. They also hold ownership of the instrument, enabling them to transfer, recover, or prevent its use by another individual.[350] thus, a share certificate is considered one of the instruments in Thai law.[351]

4.4.2 Possession (ครอบครอง: *Krobkrong*)

According to Thai law, the concept of possession appears in the form of possessory rights. Section 1367 states that "*A person acquires possessory right by holding a property with the intention of holding it for himself.*"[352] Thus, the concept of possession in Thai law consists of two elements: the external element, which is the action of holding, and the internal element, which is the intention to hold for the possessor themselves. This concept is in line with Roman law's concepts of *corpus and animus*.[353] Thai scholars continue to debate the nature of possessory rights in Thai law due to the interpretation of '*holding the property*' in Section 1367 of the Thai CCC, which encompasses both corporeal and incorporeal property as defined by Section 138.

The initial view was that, when Section 1367 employs the term 'property', it encompasses both corporeal and incorporeal objects. This means that in Thai law, rights can also be the objects of possession, even if they are not corporeal.

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[349] See, Department of Social Legal Studies, Philosophy, and History, Faculty of Law Thammasat University (n 117)141-142, 196-224.

[350] สหธน รัตนไพจิตร, กฎหมายว่าด้วย ตราสารเปลี่ยนมือ, (โครงการตำราและเอกสารประกอบการสอน คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, 2558) 12 [Sahathon Rattanapaijit, *Law on Negotiable instruments* (Textbook and Teaching Materials Project, Faculty of Law, Thammasat University, 2015) 12].

[351] Ibid.

[352] Thai Civil and Commercial Code section 1367.

[353] Seni Pramoj (n 5) 427-428.

This is because the law's definition of property includes rights. Thus, it can be considered that incorporeal objects can also be objects of possessory rights.[354]

However, the second opinion argues that Section 1367 uses the term 'holding' itself to refer to the act of holding physical objects, a concept that can only be applied to corporeal objects. Furthermore, if the term "property" encompasses incorporeal property, which includes property rights, it will result in the phenomenon of "right over right." Thus, the term ‘holding property’ according to Section 1367 shall refer to only corporeal property (things) according to Section 137.[355]

4.5 Concept of Things and Property to Specific Contracts in the Thai Civil and Commercial Code

The Thai CCC codified the provisions on specific contracts in Book III of Specific Contracts (เอกเทศสัญญา: *Eakkatest-Sanya*) For instance, the provisions on sale-purchase (ซื้อขาย: *Sue-Khai*), Hiring of property (เช่าทรัพย์: *Chow-Sap*) or Gift (ให้: *Hai*). This subject will include a discussion of the definition, general concept, object subject matter, and other observations of sale-purchase, leasing of property, and gift in the current Thai CCC.

4.5.1 Sale-Purchase (ซื้อขาย: *Sue-Khai*)

In Thai law, the definition of Sale-Purchase (ซื้อขาย: *Sue-Khai*) is defined in Section 453 of the Thai CCC.[356] In Thai law, the concept of sale-purchase refers to the transfer of ownership of the property from the seller to the buyer, and the buyer is obligated to pay the prices to the seller in exchange.

When focusing on the subject matter of a sale-purchase contract, according to Section 453, the term ‘property’ can refer to both corporeal and incorporeal property, according to Section 138.[357] However, Section 453 also states

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[354] Seni Pramoj (n 5) 453-454.

[355]Sanunkorn Sotthibandhu (n 4) 450-451.

[356] Thai Civil and Commercial Code Section 453 “*Sale is a contract whereby a person, called the seller, transfers to another person, called the buyer, the ownership of property, and the buyer agrees to pay to the seller a price for it.”*

[357] ไผทชิต เอกจริยกร, คำอธิบาย ซื้อขาย แลกเปลี่ยน ให้ (พิมพ์ครั้งที่ 11 วิญญูชน 2564.) 52 [Pathaichit Eagjariyakorn*, Textbook on Sale-purchase, Exchange, and Gift* (11th edn, Winyuchon 2021) 52].

that the seller agrees to transfer ownership of property to the buyer, which is leading to the problem of interpretation in Thai law.

The first view is that when the provision refers to 'ownership of property', it implies that only corporeal objects can be the subject matter of a sale-purchase contract.[358] According to the principle of real rights, Therefore, the Thai CCC's sale-purchase provision does not apply to contracts involving incorporeal objects, such as property rights and intellectual property, or non-ownership entities like Nor.Sor.3 Gor. Land. The innominate contract[359] or the law's most closely applicable provision, as per Section 4 Paragraph 2, will apply to a contract that includes other property but lacks ownership as its subject matter of sale. [360]

However, the second opinion suggests that under Thai law, the subject matter of a sale-purchase contract can encompass both corporeal and incorporeal objects [361] and is not restricted to the ownership of the subject matter of sale, as Section 456 also includes provisions for both movable and immovable objects.[362] Thus, selling the incorporeal property is not contrary to the law, public morals, or public order according to Section 150 of the Thai CCC.[363] Moreover,

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[358] Sanunkorn Sotthibandhu, Kam Athibai Kodmai Laksana *Sue Khai Laek Plean Hai* [Textbook on Sale-Purchas, Exchange and Gift Contract] (Winyuchon, 2023) 133-134 (ศนันท์กรณ์ โสตถิพันธุ์, *คำอธิบายกฎหมายลักษณะ ซื้อขาย แลกเปลี่ยน ให้* (พิมพ์ครั้งที่ 10, วิญญูชน 2566) 133-134.

[359] Ibid 129-130.

[360] Thai Civil and Commercial Code Section 4 "*The law shall be applied in all cases which fall within its provisions in accordance with the letter or the spirit of such provision.*

Where there exists no provision of law for application to a case, such case shall be decided by reference to local custom. In the absence of such local custom, the case shall be decided by analogy to the provision of law most closely applicable thereto and, in the absence of such provision, by general principle of law." [Translated by Pinai Nanakorn, *English Translation of the Civil and Commercial Code of Thailand Book I and Book II (With the official Thai Text* (Winyuchon 2021) 29.]

[361] วิษณุ เครืองาม, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ ซื้อขาย แลกเปลี่ยน ให้* (พิมพ์ครั้งที่ 10 นิติบรรณาการ 2549) 39 [Wissanu Krea-ngam, *Textbook on Civil and Commercial Code: Sale-purchase, Exchange, and Gift* (10th edn, Nitibannagarn) 39].

[362] Thai Civil and Commercial Code Section 456.

[363] Thai Civil and Commercial Code Section 150.

according to Thai Supreme Court precedent, the Supreme Court has ruled on cases involving sale-purchase contracts on incorporeal property, specifically contractual rights. This ruling was made by applying the provisions on sale-purchase contracts found in Book III of the Thai CCC.

> **Decision of the Thai Supreme Court no 1562/2530**
> [Translated and emphasized by the Author] Regulations of the Telephone Organisation of Thailand on the telephone as the letter of the telephone do not prohibit the transfer of telephone-hired rights. When the defendant has agreed to transfer and sell telephone hired rights to the petitioner, the transfer of telephone hired rights is complete since both parties have agreed to buy and sell hired rights and deliver the telephone to the transferee...[364]

> **Decision of the Thai Supreme Court no. 5466/2539**
> [Translated and emphasized by the Author] The National Housing Authority's right-to-hire-purchase contract allows for the purchase and sale of land and buildings. As a result, an agreement is a sale of rights, even if it is not in writing. However, once the parties have made the required payment for the sale-purchase contract, it becomes legally binding. The plaintiff, therefore, has the power to sue to enforce the contract...[365]

> **Decision of the Thai Supreme Court no. 4503/2540**
> [Translated and emphasized by the Author] One can purchase and sell a type of property known as hire-purchase rights. As a result, the contract for the sale of a hire-purchase right between the plaintiff and the defendant is complete. The purchase contract is not a sale-purchase contract that is subject to a subsequent condition...[366]

The majority of Thai scholars believe that the provisions of a sale-purchase contract do not apply to intellectual property in the case of intellectual property, as a result of the specific form of intellectual property that is outlined in the

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[364] Decision of the Thai Supreme Court no 1562/2530 (A.D.1987)

[365] Decision of the Thai Supreme Court no 5466/2539 (A.D.1996).

[366] Decision of the Thai Supreme Court no. 4503/2540 (A.D.1998).

specific laws on intellectual property[367] for example, the Copyright Act B.E.257 (A.D 1994), Trademark Act B.E.2534 (A.D. 1991), and Patent Act B.E.2522 (A.D. 1979). However, there is the opinion on the contract of sale of exclusive rights of intellectual property that could be applied with the sale-purchase contract by analogy as the provision of law which is most closely applicable.[368]

4.5.2 Hiring of Property (เช่าทรัพย์: *Chow-Sap*)

Section 453 of the Thai CCC established the definition of "Hiring of property" in Thai law.[369] A hire of property contract in Thai law is a contract in which the hirer consents to the letter's use or advantage from the leased property for a specified period. Nevertheless, Thai law does not mandate that the hirer must possess ownership of the hired property.[370] A loan contract or deposit contract is defined as a contract that permits another individual to use or benefit from the property without compensation, as per Thai law.[371]

In accordance with Thai law, Section 537, the term "property" is employed in relation to the subject matter of the hire of property contract, which encompasses both corporeal and incorporeal objects. The hire of property is classified as either movable property or immovable property under the law, which specifies various contract forms. For instance, Section 456 paragraph 1 mandates that the sale or purchase of immovable property be documented and registered by the appropriate official.[372]

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[367] Wissanu Krea-ngam (n 361) 44;Pathaichit Eagjariyakorn (n 357) 57;Sanunkorn Sotthibandhu (n 358) 127.

[368]Sanunkorn Sotthibandhu (n 358) 127.

[369] Section 537 Thai Civil and Commercial Code, A hire of property is a contract whereby a person, called the letter, agrees to let another person, called the hirer, have the use or benefit of a property for a limited period of time and the hirer agrees to pay rent therefore.

[370] ไผทชิต เอกจริยกร, คำอธิบาย เช่าทรัพย์ เช่าซื้อ (พิมพ์ครั้งที่ 22 วิญญูชน 2563.) 22-23 [Pathaichit Eagjariyakorn, *Textbook on Hire of property and Hire-purchase* (22nd edn, Winyuchon 2020) 22-23].

[371] Ibid 15.

[372] Thai Civil and commercial Code Section 456. A sale of immovable property is void unless it is made in writing and registered by the competent official. The same rule

When examining the subject matter of the hire of property in the context of movable property, it is important to note that the movable property in question must be predominantly non-consumable things that are either destroyed or damaged during use,[373] such as rice, oil, and charcoal. This is due to the fact that a contract is considered a loan for consumption rather than a contract for the hire of property in Thailand if it transfers consumable things to another party for use or benefit.[374] Previously, the Thai CCC defined consumable things in Section 103. The 1992 amendment,[375] removed the definition of consumable things; however, Thai continues to regard the hire of property as the fundamental concept.[376]

The following matter to be addressed is the determination of whether objects are corporeal or incorporeal. When the term "property" is employed, the subsequent question is whether incorporeal property, such as intellectual property or various property rights, can be rented, as per Section 537. There is no specific law stating that such rentals of corporeal things are comparable to those in other countries. However, there are opinions in Thai law that incorporeal property can also be hired, as indicated by the interpretation.[377] As per the definition of Section 537, property serves a purpose or provides an advantage. For commercial purposes, the lessee may use and profit from incorporeal property such as copyrights or trademarks.[378]

At present, there are special laws for some type of incorporeal property; in the case of trademarks, a particular procedure has been specified according to Section 68 of the Trademark Act B.E. 2522 (A.D. 1979), which must be made in writing and registered with the officials.[379] Moreover, in 2019, Thailand promulgated the Leasehold Property Act B.E.2562 (A.D.2019), which established a new

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applies to ships or vessels of six tons and over, to steam launches or motorboats of five tons and over, to floating houses and to beasts of burden.

[373] ศนันท์กรณ์ โสตถิพันธุ์, *คำอธิบายกฎหมายลักษณะ เช่าทรัพย์ เช่าซื้อ* (พิมพ์ครั้งที่ 9, วิญญูชน 2566) 75 [Sanunkorn Sotthibandhu, *Textbook on Hire of property and Hire-pirchase* (9th edn, Winyuchon, 2023) 75].

[374] Ibid 33-34

[375] Act Promulgation the Revised Provisions of Book I of the Civil and Commercial Code B.E. 2535 (A.D.1992).

[376] Pathaichit Eagjariyakorn (n 370) 34.

[377] Sanunkorn Sotthibandhu (n 373) 74.

[378] Ibid 79.

[379] Trademark Act B.E. 2522 (A.D.1979) Section 68.

type of real rights called ‘leasehold’ (ทรัพยอิงสิทธิ์: Sap-Ing-Sit) in Thai law. According to Section 3 of the Leasehold Property Act B.E. 2562 (A.D. 2019), a leasehold property is property based on the right to use immovable property in the act thereof [380] and has to make a request to the competent officials to establish the leasehold.[381]

4.5.3 Gift (ให้: *Hai*)

Section 521 of the Thai CCC defines a gift contract in Thai law.[382] In Thai law, a gift contract is a contract in which the benefactor transfers a property of his own gratuitously to the donee. Contrary to a sale-purchase contract, the definition of a gift contract in Section 521 of the Thai CCC does not specify the property's ownership. Rather, it employs the term ‘property of his own,’ which has a distinct meaning from ownership.[383] Therefore, the majority opinion among Thai academicians is that the subject matter of a gift contract can be both corporeal and incorporeal objects[384] in accordance with the term ‘property’ in Section 521, as prescribed by Section 138 of the Thai CCC. As per Decision No. 321-322/2505 of the Thai Supreme Court [Translated and emphasised by the author] “The mortgage land right is an immovable property." The competent official must register this form of mortgage rights grant in writing…”

In case the gift is an instrument, such as a bill of exchange, it is required to deliver the instrument and inform the debtor of the right in writing in accordance with Section 524.[385] However, there is a problem with certain incorporeal property, specifically the obligation rights, particularly in the context of claims. This is due to the provision on the transfer of claims in Thai CCC Section 303-313, which outlines a specific procedure and form for the transfer of claims. In this instance, Thai academicians are of the opinion that it must be applied to the provision regarding the transfer of claims, rather than the gift contract. The transfer of property is the sole

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[380] Leasehold Property Act B.E.2562 (A.D.2019) Section 3.

[381] Leasehold Property Act B.E.2562 (A.D.2019) Section 4.

[382] Thai Civil and Commercial Code Section 521 “*A gift is a contract whereby a person. Called the donor, transfers gratuitously a property of his own to another person, called the donee, and the donee accepts such property*.”

[383] Sanunkorn Sotthibandhu (n 358) 413.

[384] Pathaichit Eagjariyakorn (n 357) 383.

[385] Thai Civil and Commercial Code Section 524. *“If a right represented by a written instrument is given, the gift is not valid unless such instrument is delivered to the donee and the gift is notified in writing to the debtor of the right*.”

requirement of Section 521, whereas the transfer of a claim necessitates a written document, as stipulated in Section 306, Paragraph 1.[386]

Furthermore, in the case of intellectual property, the donor and the transferor must follow the process in the specific laws, not the gift contract. For example, if the donor is the patent holder, when transferring the patent right to another person, Section 38 of the Patent Act B.E. 2522 (A.D. 1979) must also be followed.

In conclusion, Section 521 of the Thai CCC allows both corporeal and incorporeal objects to be the subject matter of a gift contract, as it pertains to the donor's property and does not specify the specific process through special laws. However, some Thai scholars have suggested that the gift contract should only apply to corporeal objects, as there is no ownership of incorporeal objects. In the case of incorporeal property, such as a claim or instrument, a specific law governs their transfer.[387]

4.6 Conclusion

The table below illustrates the development of the definition of things and property in Thai law, based on everything previously discussed.

[386] Thai Civil and Commercial Code Section 306 paragraph 1. " *The transfer of an obligation performable to a specific creditor is not valid unless it is made in writing. It can be set up against the debtor or third person only if a notice thereof has been given to the debtor, or if the debtor has consented to the transfer. Such notice or consent be in writing.*"

[387] Sanunkorn Sotthibandhu (n 373) 414.

Table 2 Development of the Concept of Things and Property in Thai Law

Name of the Law	Definition of Things	Definition of Property
Law of Three Seals	- No definition of Things and property - Only classification of things to 'thing with soul' and 'thing without soul'	
Thai Penal Code R.E.127 (A.D.1908)	Section 6 (10) Things mean objects, which person can have ownership, of or have the authority to be an owner e.g., money, moveable thing, and immovable things., it shall be considered as things defined in this section.	
Thai CCC B.E.2466 (A.D.1923)	Section 97 Things are corporeal objects only and are either immovables or movables.	Section 99 "*Property in Genere*" means those movable things which, in the ordinary course of transaction, are customarily determined by number, weight or measure.
Thai CCC B.E.2468 (A.D.1925)	Section 98 Things, in the legal sense, are corporeal objects.	Section 99 Property includes things as well as incorporeal objects susceptible of having a value and of being appropriated
Thai CCC B.E.2535 (A.D.1992)	Section 137 Things are corporeal objects.	Section 138 Property includes things as well as incorporeal objects susceptible of having a value and of being appropriated.

The table above reveals that in the past, there was a lack of clear separation between the definitions of property and other laws. The legal concept places more emphasis on corporeal objects than incorporeal ones. Therefore, the definition of 'Sap' in Thai law in the past refers to a corporeal object that was valued according to the common sense of the general public at the time. The Law of Three

Seals did not incorporate the concept of incorporeal property. On the other hand, the Law of Three Seals focused on the division of things by separating things into living things or non-living things as a benchmark.

However, the definition of things (Sap) in modern law was first defined in the Criminal Code R.E.127 (A.D.1908) Section 6 (10) as an "*objects, which a person can have ownership of or authority over*," referring to corporeal objects that a person can have ownership rights over, including incorporeal objects that a person may own. Therefore, it is evident that during that period, the concept of the Thai word '*Sap*' emerged and broadened to encompass incorporeal object for examples, shares or electricity.

The phenomenon of interpreting the word things to include incorporeal objects. In Roman law, the interpretation of the word res encompasses *ius in re* (property rights). This interpretation also appears in modern law, particularly in private law systems such as French law, Argentine law, and German law. This phenomenon also manifested in the definition of things in the Penal Code R.E.127 (A.D.1908). Later, in 1923, the Thai CCC clearly separated the definitions of things (*Sap*) and property (*Sapsin*) for the first time, as stated in Sections 97 and 99, this is also considered the first definition of the word property. It is important to note that the definition of property in the Thai CCC of A.D. 1923 refers only to movable property; not every type of thing is considered property.

However, the Thai CCC B.E. 2466 (A.D. 1923) was not enforced from the reasons of contexts of law and political issues. In Thai CCC B.E. 2468 (A.D. 1925) Section 98, the drafter of the Thai CCC B.E. 2468 (A.D. 1925) revised the original Section 97 of the Thai CCC B.E. 2466 (A.D. 1903). This revision included drafting new provisions regarding Section 99's definition of property. These provisions continue to appear in Section 137 and Section 138 of the current Thai CCC, with an important observation namely:

First, Section 98 of the Thai CCC B.E. 2468 (A.D. 1925) includes the term 'in the legal sense' in the definition of things, whereas section 137 of the current Thai CCC omits it. This broadens the interpretation of things beyond their previous definition. This further complicates the theoretical interpretation of what constitutes corporeal objects under current Thai law.

According to the definition of things, if the definition of things is defined only as ‘things are corporeal things’, everything that is a corporeal object, whether the sun, the moon, or seas (things by nature) or illegal things, will be considered a thing in the Thai CCC. However, these types of things are considered things outside of

commerce according to the Thai CCC of 1925, Section 106, and the Thai CCC's revised version of 1992, Section 143, which is contrary to the intention of the provision.

Moreover, both the Thai CCC from 1925 and its new revised version from 1992 adhere to the French concept of property, which considers things as one type of property. The term ‘in the legal sense’ is significant to separate between things that are considered property and things outside of commerce. In other words, ‘in the legal sense’ refers to property in the definition of things and implies that things can have value and be appropriated and considered property. Thus, the things outside of commerce and property will be in opposition.

The second is the definition of property according to Section 99 of the CCC B.E. 2466 (A.D. 1923) and Section 137 of the present Thai CCC characterises things as property, implying that for something to qualify as things under Section 137, it must share the same susceptibility to value and appropriateness likewise property under Section 138. Conversely, the Thai CCC does not provide whether things need to be "*susceptible to having a value*" or *"of being appropriated*," likewise property, is a matter of debate. This leads to debates about whether all types of things under Section 137 are considered property under Section 138 or not until today.

In conclusion, it can be divided the development of the concept of things and property into three significant eras. The first era is the ancient law era. The three enacted laws divide the concept of things into 'things with soul' and 'things without soul', based on religious principles and local custom. The second era was a period of legal transition, during which foreign concepts of things and property began to influence Thai law. It appears in the definition of things in the Penal Code, R.S. 127, as well as the CCC, B.E. 2446 (A.D. 1923). The third era, the current legal era, directly transplanted the concept of things and property from foreign private law. The CCC B.E.2468 (A.D.1925) and the current Thai CCC, which underwent revision in 1992, both uphold this legal framework today.

CHAPTER 5
ANALYSIS AND DISCUSSION ON
THE CONCEPT OF THINGS PROPERTY IN THAI LAW

5.1 Comparative Analysis

From the Chapter 3 and this Chapter 4, The comparative analysis between the concept of thing and property in Thai law and Foreign private law can be outlined as follow.

5.1.1 Definitions

Table 3 Comparative on Definition of Things and Property Between Thai and Foreign Laws

Name of the Law	Definition of Things	Definition of Property
French Law French Civil Code	- Corporeal Objects corporeal object which able to be appropriated by human.	- Things and incorporeal objects which able to be appropriated by human. *Section 516 All property is movable or immovable*
Argentine Civil Code of 1871	Section 2345 Corporeal objects susceptible of having a value are called things in this Code.	Section 2346 Immaterial objects susceptible of having a value, and likewise things, are called property (*bienes*).
German BGB	Section 90 Only corporeal objects are things as defined by law.	-
Japanese Civil Code	Article 85 The term “things” as used in this Code means corporeal objects.	-
Thai Penal Code R.E.127 (A.D.1908)	Section 6 (10) Things mean objects, which person can have ownership, of or have the authority to be an owner e.g., money, moveable thing, and immovable things., it shall be considered as things defined in this section	

Name of the Law	Definition of Things	Definition of Property
Thai CCC B.E.2466 (A.D.1923)	Section 97 Things are corporeal objects only and are either immovables or movables.	Section 99 “Property *in Genere*” means those movable things which, in the ordinary course of transaction, are customarily determined by number, weight or measure.
Thai CCC B.E.2468 (A.D.1925)	Section 98 Things, in the legal sense, are corporeal objects.	Section 99 Property includes things as well as incorporeal objects susceptible of having a value and of being appropriated
Thai CCC B.E.2535 (1992)	Section 137 Things are corporeal objects.	Section 138 Property includes things as well as incorporeal objects susceptible of having a value and of being appropriated.

Regarding things, the definition of things in Thai law was first enacted in the Thai Penal Code of R.E. 127 (A.D.1908). However, the definition of 'things’ in such code has a broader meaning than the definition of 'things' in the current Thai CCC, as ‘things’ covers things as well as incorporeal objects, which person can have ownership, of or have the authority to be an owner.

Section 97 of the Thai CCC of B.E. 2466 (A.D.1923), which is also the classification of things provision, is comparable to the classification of property according to Article 516 of the French Civil Code. This similarity can be supported by historical fact. French Law influenced the Thai CCC of B.E. 2466 (A.D.1923), as evidenced by the involvement of a French drafter during the drafting period. Section 97 of the Thai CCC of B.E. 2466 (A.D.1923), contains regulations for corporeal things that are identical to Section 90 of the German BGB. The definition of things in the CCC of B.E. 2466 (A.D.1925), was evidently influenced by the French Civil Code and the German Civil Code. While the origin of Thai CCC of B.E. 2468 (A.D.1925), evidently

shows that it directly adopted from Section 90 of the German Civil Code and Article 85 of the Japanese Civil Code.

The definition of property in the CCC B.E. 2466 (A.D.1923) Section 99 exclusively pertains to only movable things, which are corporeal objects in the ordinary course of transaction and are customarily determined by number, weight, or measure, but the definition of property did not include immovable things and incorporeal objects.

In opposition, Section 99 of the CCC, B.E. 2468 (A.D.1925), and Section 138 of the revised Thai CCC, B.E. 2535 (A.D.1992), defined property differently. Both laws transplanted the issue regarding "*susceptibility to having a value*" from Article 2346 of the Argentine Civil Code and the definition of corporeal and incorporeal objects that are "*able to be appropriated*" from the French legal principle. This is the current definition of property in Thai law.

An observation can be made that the definition of things in the current Thai CCC was received from legal systems in the Germanic legal family, specifically German law and Japanese law. Interestingly, both of such laws do not provide a definition of property in their civil codes. However, Thailand received the concept of property from countries that follow the Romanistic legal family, which is influenced by the French concept of property (*Biens*). Specifically, Thailand was inspired by from the French Civil Code and the Argentine Civil Code and adopted the definition of property from the Argentine Civil Code combined with the French legal principle.

5.1.2 Property Rights

5.1.2.1 Ownership

Table 4 Comparative on Provisions of Ownership Right Between Thai and Foreign Laws

Name of the Law	Definition of ownership
French Civil Code	Article 544 Ownership is the right of enjoyment and disposing of a thing in the most unlimited manner, provided the thing is not made use of in a manner forbidden by law or regulation. Article 546. The ownership of thing whether it is movable or immovable, gives the owner right to all that it produces

Name of the Law	Definition of ownership
Argentine Civil Code	Article 2540 [2506] Ownership is the real right by virtue of which thing is subject to the will and action of a person. Article 2547 [2513]. The right to possess the thing, to dispose of or benefit there from, to use and enjoy it, according to the will of the owner, is inherent in ownership. The owner may change its nature
German Civil Code	Section 903 Powers of the owner. The owner of a thing may, to the extent that a statute or third-party rights does not conflict with this, deal with the thing at their discretion and exclude others from exercising any influence whatsoever. In exercising their powers, the owner of an animal is to take into account the special provisions for the protection of animals.
Japanese Civil Code	Article 206 An owner has the rights to freely use, obtain profit from and dispose of the Thing owned, subject to the restrictions prescribed by laws and regulations
Thai CCC	Section 1336. Within the limits of law, the owner of property has the right to use and dispose of it and acquires its fruits; he has the right to follow and recover it from any person not entitled to detain it, and has the right to prevent unlawful interference with it

Regarding the provisions on the concept of ownership, it has been observed that Section 1336 of the Thai CCC is the only provision that employs the term ‘property’ to denote the object of ownership in the Civil Code. In contrast, other countries' laws utilize the term ‘things’ aligned with the principle of Real Rights, stating that the object of rights must be a corporeal object. Ownership, being a type of Real Rights, falls under this principle as well.

5.1.2.2 Possession

Table 5 Comparative on Provisions of Possession Between Thai and Foreign Laws

Name of the Law	Definition of ownership
French Civil Code	Article 2255 [2228] Possession means either the detention or the enjoyment of a thing or of a right by a person who actually has or enjoyment the
Argentine Civil Code	Article 2385 [2351] There is possession of things when a person has a thing in his power, for himself or for another, with the intention of subjecting it to the exercise of a right of property.
German Civil Code	Section 854 Acquisition of possession (1) Possession of a thing is acquired by obtaining actual control of the thing. (2) Agreement between the previous possessor and the acquirer is sufficient for acquisition if the acquirer is in a position to exercise control over the thing
Japanese Civil Code	Article 180 Possessory rights shall be acquired by holding Thing with an intention to do so on one's own behalf. Article 205 The provisions of this Chapter shall apply mutatis mutandis to cases where a person exercises his/her property rights with an intention to do so on his/her own behalf.
Thai CCC	Section 1367. A person acquires possessory right by holding a property with the intention of holding it for himself

A comparison of the provisions on the acquisition of possessory rights reveals that French Civil law, Argentine Civil law, Japanese Civil law, and Thai CCC share similar characteristics. Possession must consist of both holding and physical control over the object to be possessed (*corpus*), as well as the intention to

possess for oneself (*animus*). Conversely, in Germany, possessory rights are not acquired through intention.

However, when it comes to the object of possession, French law explicitly stipulates in Article 2225 [2228] that rights can also be the object of possession, which is consistent with the concept of quasi-possession in Roman law.

Japanese law has accepted this concept by dividing it into two articles: Article 201 for the possession of physical property and Article 205 for the *mutatis mutandis* application of possession requirements to property rights. In the case of Argentine Civil Law and German Civil law, both countries employ the phrase 'things' as the object of possession, but in interpretation, the term 'things' in Argentine law includes rights, whilst in German law, it solely refers to corporeal objects.

It is important to observe that Thailand derived the provisions of Section 1367 from the draft of Article 180 of the Japanese Civil Code in the context of Thai law. Nevertheless, the Thai CCC does not contain distinct provisions regarding the ownership of rights, as does Japanese law. Instead, it employs the term ‘property’ (ทรัพย์สิน) as the object of possession in Section 1367, the sole law that employs the term "property" in its provisions regarding this matter.

5.1.3 Specific contracts

5.1.3.1 Sale Contract

Table 6 Comparative on Definition of Sale-Purchase Contract Between Thai and Foreign Laws

Name of the Law	Definition of ownership
French Civil Code	Article 1582 A sale is an agreement by which the one person binds himself to deliver a thing, and the other party agrees to pay for it. A Sale may be carried out by a document drawn up by a notary or by one merely signed by the parties
Argentine Civil Code	Article 1357 [1323]. There is a purchase and sale when one of the parties engage to transfer to another the ownership of a thing, and the latter engages to receive it and pay therefor a certain price in money.

Name of the Law	Definition of ownership
German Civil Code	Section 433 Contractual duties typical for a purchase agreement (1) By a purchase agreement, the seller of a thing is obliged to deliver the thing to the buyer and to procure ownership of the thing for the buyer. The seller is to procure the thing for the buyer free from material defects and defects of title. (2) The buyer is obliged to pay the seller the agreed purchase price and to accept delivery of the thing purchased
Japanese Civil Code	Article 555 A Sale takes effect when one of the parties agrees to transfer a property right to the other party, and the latter agrees to pay him the purchase money for it.
Thai CCC	453. Sale is a contract whereby a person, called the seller, transfers to another person, called the buyer, the ownership of property, and the buyer agrees to pay to the seller a price for it.

The provisions defined contract of sale can be classified into two categories. The initial category pertains to a sales agreement that emphasizes the 'transfer' of the property being sold, specifically, Article 1582 of French Civil Law and Section 433 of German Civil Law. The second category pertains to a contract of sale in which the seller is obligated to transfer property rights to the buyer. This category can be further divided into two subcategories. The first subcategory involves a contract of sale, where the seller must transfer ownership of the specific object being sold, as stated in Article 1357 [1323] of Argentine Civil law and Section 453 of Thai Civil and Commercial law. The second subcategory involves a contract of sale, where the seller must transfer property rights without specifying the type of right, as outlined in Article 555 of Japanese Civil law. However, it is worth mentioning the uniqueness of the use of the term 'property' in Thai Civil and Commercial law.

This is in the section that defines a contract of sale, specifically referring to 'ownership of property'. In contrast, other laws in the same category, like Argentine Civil law, use the term 'ownership of a thing'.

5.1.3.2 Hiring of Property (Lease)

Table 7 Comparative on Definition of Hire of Property (lease) Between Thai and Foreign Laws

Name of the Law	Definition of ownership
French Civil Code	Article 1709 The hiring of thing is a contract whereby one of the parties binds himself to let the other party enjoy the use of a thing for a certain period in exchange for certain price which the other party bind himself to pay him.
Argentine Civil Code	Article 1527 [1493]. There is a lease or hire when two parties mutually bind themselves, one to grant the use or enjoyment of a thing, or to do a piece of work, or to render a service; and the other to pay a stated price in money for such use, enjoyment, work or service. The person who pays the price, is called in this Code the lessee, tenant, or hirer, and the person who receives it, the lessor or owner. The price is also called lease or rental.
German Civil Code	Section 535 Contents and primary duties of the lease agreement (1) A lease agreement imposes on the lessor a duty to grant the lessee use of the leased property for the lease period. The lessor is to make available the leased property to the lessee in a condition suitable for use as contractually agreed and maintain it in this condition for the lease period. The lessor is to bear all costs to which the leased property is subject. (2) The lessee is obliged to pay the lessor the agreed rent

Name of the Law	Definition of ownership
Japanese Civil Code	Article 601 The Hiring takes effect when one of the parties agree to let the other party use and take the profit of a things belonging to him and the other party agree to pay him a rent for it.
Thai CCC	537. A hire of property is a contract whereby a person, called the letter, agrees to let another person, called the hirer, have the use or benefit of a property for a limited period of time and the hirer agrees to pay rent therefore.

The table reveals a shared characteristic among the definitions of hire of property (lease) in different countries, which is the granting of the lessee's right to utilize or derive advantages from the leased item, while the lessor receives remuneration. However, while contemplating the subject matter of the leasing agreement, it can be categorized into two distinct groups: The first category consists of legal systems that employ the term ‘things’ as the subject of the lease agreement. This category encompasses French Civil Code, Argentine Civil Code, and Japanese Civil Code. Another group consists of countries, such as German Civil Code and Thai CCC, that utilize the term ‘property’ as the object of the lease contract in their respective legal systems. Nevertheless, within the legal framework of the countries that employ the term ‘things’ in lease agreements, the term is understood to encompass not only physical possessions but also the associated rights and assets. Ultimately, it is discovered that the laws of all the sample countries allow for the object of a contract to encompass both physical objects and incorporeal rights.

5.1.3.3 Gift (Donation)

Table 8 Comparative on Definition of Gift (donation) Contract Between Thai and Foreign Laws

Name of the Law	Definition of ownership
French Civil Code	Article 711, Ownership is acquired and transferred by succession, by donation *inter vivos*, by will, and by a contract. Article 894 A donation *inter vivos* is an irrevocable act of transfer whereby the donor *ipso facto* divest himself, in favour of the donee, of the subject-matter of the gift.
Argentine Civil Code	Article 1823 [1789]. There is a donation when a person by an act *inler vivos*, transfers the ownership of a thing to another gratuitously of his own free will. Article 1833 [1799]. Things which can be sold can be donated. Article 1834 [1800]. Donations can comprise only the present property of the donor, and if they also include future property, they are void as to the latter. Donations of all present property are valid if the donors reserve the usufruct, or an adequate amount to provide for their needs, and reserving the rights of their creditors and of their heirs, descendants, or legitimate ascendants. Article 1835 [1801]. The donor may reserve for himself the usufruct of the property donated or dispose thereof in favor of a third person.

Name of the Law	Definition of ownership
German Civil Code	Section 516 Concept of donation (1) A disposition by means of which someone, using their own assets, enriches another person is a donation if both parties are in agreement that the disposition occurs gratuitously. (2) If the disposition has occurred without the intention of the other party, then the donor may, specifying a reasonable time limit, request the other party to make a declaration as to acceptance. Upon expiry of the period of time, the donation is deemed to be accepted unless the other party has previously rejected it. In the case of rejection, surrender of what has been bestowed may be demanded in accordance with the provisions on the surrender of unjust enrichment.
Japanese Civil Code	Article 549 Gift take effect when one of the parties concerned express his intention to give property gratuitously and the other party accepts it.
Thai CCC	Section 521. A gift is a contract whereby a person. Called the donor, transfers gratuitously a property of his own to another person, called the donee, and the donee accepts such property.

From the table above, it can be seen that gift contracts in all countries have common elements. It must be a donation during life (donation *inter vivos*), not a donation after death because, in such a case, it must be in accordance with the provisions regarding wills. There must be an acceptance from the donee to such giving. However, some elements may differ in each country's law. In particular, there is the different in the time when the contract will be considered valid. For Thai law, French law, and Argentine law, the contract will be valid when the donor delivers the property to the recipient.

Japanese law, on the other hand, states that the gift contract is effective when the donor expresses his intention to give the property to the donee and the donee expresses the intention to accept such property. The object of the gift

contract is property. It can be either corporeal or incorporeal objects which. In Thai law, the word 'property' is used in Section 521 as well.

5.2 Discussion on Problems on the Concept of Things and property in Thai Law

5.2.1 Discussion on Definition of Things and Property

An issue with the definitions of things and property in the current Thai CCC arises from the incorporation of distinct foreign private laws in the provisions that define ‘things’ and the provisions that define ‘property’ .When the drafters of the Thai CCC incorporated the French legal concepts and laws that define property into Thai law, they should have ensured that the provisions defining things were aligned with the French conceptions of ‘Things as property’ and ‘Things in the civil law’. Nevertheless, when it comes to defining things, the drafters made the decision to adopt the law from the German Civil Code (BGB) and the Japanese Civil Code, both of which lack sections that explicitly define property. Therefore, the Thai CCC definition of things does not require it to be "able to be appropriated" or "susceptible of having a value" in order to align with the definition of property. This is contrary to Article 2345 of the Argentine Civil Code, which explicitly states that things must be "susceptible of having a value" similar to property defined in Article 2346, and that things are considered a part of property.

Furthermore, with regards to the subject of ‘Things in the Civil Law’, the existing Thai CCC, which underwent revision in 1992, provides a definition of things in Section 137. The definition was revised by removing the words ‘in the legal sense’, leading to a wider understanding of things. If an individual focusses on just one clause, it may be interpreted that corporeal things are considered things based on the definition provided in Section 137. However, in fact, the scope of things as defined in Section 137 should be restricted to things that are considered property, specifically referring to things in the legal sense that the law recognises and considers as things in commerce implicitly. By implementing this approach, a precise differentiation can be established between the definitions of things in commerce or things as property and things outside commerce, as already defined in Section 143 of the Thai CCC.

The issue with the definitions of things and property in Thai CCC stems from the discrepancy between the concepts of the countries that influenced the reception of legal principles in the provisions on things, and the provisions that define property in the Thai CCC.

5.2.2 Discussion on Objects of Right in Property Rights

The issue of objects of rights under Thai property law is primarily rooted in the provisions of the Thai CCC, Book IV. These provisions use the term 'property' as the object of rights in various provisions, without considering the nature of rights or the principles of real rights. Essentially, a corporeal object is the only thing that can be the subject of real rights. Section 1336 of the law refers to ownership as 'property', resulting in the Thai Supreme Court having to apply and make judgements regarding incorporeal objects such as shares. This means that shares can be acquired for ownership rights by adverse possession, even though the law does not explicitly state that company shares have ownership. However, when it comes to other forms of property, such as intellectual property, the Thai Supreme Court firmly maintains that there is no ownership over intellectual property for the reason that there are incorporeal objects. This is despite the fact that both types of incorporeal objects should not be subject to ownership or acquisition through legal or factual means.

The issue of possession is another significant concern. While the term ‘property’ is employed in the provisions of Section 1367 regarding the acquisition of possessory rights, which encompasses both corporeal and incorporeal objects, it is crucial to note that the Thai CCC drafters did not incorporate Article 205 regarding the *mutatis mutandis* application of possession to property rights when they adopted Article 180 of the Japanese Civil Code as a model for drafting. Rather, the drafters opted to employ the term "property" as the object of possessory rights under Section 1367. From this perspective, the law may be extended to encompass intangible property; however, the application of the law in accordance with the provisions and mutatis mutandis may differ. The application of the Thai CCC's provisions on the *mutatis mutandis* application of possession provisions to property rights, similar to the Japanese Civil Code, would not be a matter of consideration in the event that there is no physical holding. Conversely, the interpretation of the fact that rights cannot be physically held is complicated by the application of Section 1367 to both things and rights simultaneously. It becomes a matter of interpretation within the legal system.

5.2.3 Discussion on Subject-Matter of Specific Contracts

Among the provisions about specific contracts, the contract under Thai CCC that gains the most concern is the sale contract. he reasons for this is that the definition outlined in Section 453 of the Thai CCC is specifically tied to the transfer of ownership of the property involved in the contract. However, the inclusion of property types that lack inherent ownership, such as property rights or other incorporeal property, including cases where legal ownership is absent, such as land

with Nor Sor 3 Gor, will inevitably lead to complications in the application of Section 453's definition. French and German law employ the phrase 'deliver' rather than 'transferring ownership' in their definition of sales legislation, in contrast to Thai law or Argentine law. The selection of such terminology offers versatility, allowing it to encompass more than only property that is owned. Furthermore, the utilization of the term 'things' in legal methods can be understood to encompass rights or other entities that are the focus of a sales agreement, without impacting the fundamental concept of actual rights. Thailand's use of the term "transfer of ownership" in property has resulted in a situation where certain scholars and court rulings believe that shares, being incorporeal property, can be owned. This perspective contradicts the concept of real rights.

According to the Japanese Civil Code, it appears that describing a sale as a 'transfer of property rights' is a more intriguing and suitable description than defining it as a transfer of ownership in a property. The absence of a requirement to describe the sort of property rights being transferred enables greater flexibility in the use of the sale definition and minimizes issues in interpretation. Hence, it might be imperative to reassess the meaning of a sales contract according to the Thai CCC.

In practice, Things, rights, corporeal objects, or incorporeal objects, can all be the subject of a sale contract without being exclusively associated with the transfer of ownership. It is imperative to revise the definition of Section 453 in the Thai CCC to align with the prevailing business and technology circumstances.

From the author’s viewpoint, the current laws concerning leasing contracts may already be adequate. Nevertheless, the present application of the term 'property', which encompasses a wider scope than 'things' , may engender arguments in specific instances. Moreover, Thailand lacks explicit regulations on the leasing of rights or incorporeal objects. As technology breakthroughs, incorporeal objects or digital assets have the potential to disrupt the use of different properties.

Presently, agreements for the use of these property frequently take the form of unspecified contracts or contracts for services, which may be enhanced with clauses addressing situations where the leased object has a right on intellectual property to enhance clarity. The author posits that there may be inherent systemic difficulties with the current requirements of gift contracts. Section 521 employs the term 'property' to encompass a range of property rights, including intellectual property rights and claims. Each of these rights has distinct regulations governing their transfer. One possible approach to enhance user comprehension is to include provisions

explicitly stating that the transfer of indicated rights must adhere to specific legislation or include provisions that provide clarification on current regulations.

5.3 Conclusion

Considering the discussions in this chapter, it might be concluded that the concept of things (*Sap*) and property (*Sapsin*) in Thai CCC faces problems in three main areas: definitions, provisions on property, and provisions on specific contracts.

The primary source of difficulties in comprehending the concepts of things and property in Thailand arises from the definitions of things and property, which are somewhat incongruous due to the design of laws that borrowed templates from countries with divergent views.

An extensively discussed matter is the classification of different forms of energy, such as electricity, in relation to the legal definition of things as outlined in the Criminal Code R.E. 127. (A.D.1908) It has been discovered that the definition of things in this code is more boarder than the term in the Thai CCC.

Presently, there is a contentious discussion on the definition of the term 'corporeal object' and the appropriate criteria for its classification. This is because if it satisfies the criteria outlined in Section 6 (10) of the Criminal Code R.E. 127 (A.D.1908), which encompasses a wide range of objects, which person can have ownership, of or have the authority to be an owner, it would be more appropriate than the current definition of things in the Thai CCC for application in the context of criminal law.

The utilization of the term ‘property’ in multiple provisions of the Thai CCC, specifically in Book III of Specific Contracts and Book 4 of Property, poses challenges in both theoretical and practical interpretation. In the foreign civil codes for examples, the French Civil Code, the German Civil Code, or the Japanese Civil Code, where the term ‘property’ is not defined, interpreting it to include rights over things or property is a method of interpreting a narrower term to be broader in accordance with the intent of the law. This approach is consistent with the civil law legal methodology, rather than using a broad term like ‘property’ and leaving it up to the users to determine whether it refers only to things, rights, or incorporeal property. The latter approach appears to facilitate the departure from legal principles, as seen in the case of Thai Law where the term ‘property’ is used in different provisions. This leads to the application of the law in a manner that contradicts other legal principles, such as ownership of incorporeal property for examples, shares, or adverse possession of shares.

The issues mentioned stem from the fact that the Thai CCC consistently employs the term property in various laws without considering the real rights associated with the property in question. Furthermore, Thai legislation lacks provisions for quasi-possession or possession of rights based on the principle of quasi-possession, comparable to the approach taken by Japanese law, which served as a reference during the development of Section 1367. This is an additional issue contributing to the ongoing dispute on the object of possession.

Furthermore, regarding the provisions in specific contracts, the definition of a sale-purchase contract in Thai CCC law appears to be more troublesome than the definitions of other contracts mentioned. This is because Thai CCC stipulates that a sale must 'transfer the ownership of property'. This phrasing is incongruous with current circumstances and fails to accommodate other contractual subjects that may lack ownership, regardless of whether they are corporeal or incorporeal objects. Essentially, a sale involves the complete and direct transfer of property from the seller to the buyer in exchange for a mutually agreed-upon price. The purchaser will have the ability to utilize, transfer, dispose of, or terminate ownership of the said property, regardless of whether it is corporeal or incorporeal objects. When examining the concept of a sales contract according to Article 555 of the Japanese Civil Code, it appears more suitable and adaptable for future property sales contracts to employ the word ‘property rights’ rather than ‘ownership of property’.

CHAPTER 6
CONCLUSION AND RECOMMENDATIONS

6.1 Conclusion

The concept of things has been deeply interconnected with the human race for an extensive duration. Humans acknowledge and appreciate the possession of their resources and tools, therefore developing a sense of value and importance towards these belongings. While the concept of property has changed throughout history, particularly throughout the tribal and kingdom eras. Notably, the concept of things and real right in Roman law has played a vital role in its systematic development. The concept of Property has been progressively refined in the Conceptual Phase through many schools of thought, leading to its current existence.

Following this, the concept of things and property as appeared in Roman law and the Conceptual Phase were incorporated into modern civil codes, beginning with the creation of the French Civil Code and the German BGB. These two codes, namely the Romanistic legal family and the Germanic legal family, are widely regarded as the most influential civil codes for the development of current civil codes in the civil law system worldwide. They have served as prototypes for several civil codes, including the Argentine Civil Code and the Japanese Civil Code.

In Thai law before the modernisation of legal system, the concept of things and property was rooted in traditional Thai customs and influenced by Brahminism and Buddhism. This can be seen in the Law of Three Seals, which introduced the distinction between ‘things with soul’ and ‘things without soul’. However, the concept of property rights did not encompass the ideas of ownership or possessory rights as found in modern law. Nevertheless, fundamental contracts pertaining to property, such as sales contracts, property leases, and gifts, have existed since the era of the Law of Three Seals.

Nevertheless, Thailand's losing extraterritorial powers to foreign countries subsequent to the signing of the Bowring Treaty played a pivotal role in prompting the country to initiate a comprehensive overhaul of its bureaucratic structure. This encompassed reforms in the legal system, judicial system, and legal codes. During the initial phase, Thailand enlisted the services of European legal advisers to offer guidance on setting up the administrative framework and formulating legislation. With the establishment of the Ministry of Justice's law school, the government started producing Thai legal professionals domestically. During that period, Western legal principles of

things and property began to be introduced into the Thai school system, coinciding with the development of legal codes in Thailand.

In the initial phase of Thai legal codification, the Thai government used European legal jurists who were largely tasked with authoring the codes. The process of incorporating foreign laws into Thai written law commenced during this period, commencing with the introduction of the Thai Penal Code of R.E. 127 (A.D.1908), which served as Thailand's first modern legal code. This code successfully integrated the original provisions from the Law of the Three Seals with modern legal principles and term ‘things’ was initially defined in the Penal Code of R.E. 127.

Subsequently, the Thai government formed a commission of French drafters to prepare the Thai CCC. The process of creating a draft was postponed and encountered difficulties. Subsequently, the CCC B.E. 2466 (A.D.1923) was finalized, encompassing the initial two volumes: Book I: General Principles and Book II: Obligations. Nevertheless, the Thai CCC B.E. 2466 (A.D.1923) faced opposition from several sectors due to its substance and political reasons, primarily because it exhibited a significant influence from French law. As a result, there was a postponement in implementing the CCC B.E. 2466 (A.D.1925), the request was made to create a new CCC, specifically the new CCC B.E. 2468 (A.D.1925), with the majority of the committee members being Thai. Consequently, the concepts of things and property as defined in the CCC B.E. 2466 were effectively terminated.

The Thai drafters utilized the method of legal transplantation from various foreign laws, such as French law, German law, Japanese law, Argentinian law, English law, etc., as models for promptly drafting the new Thai CCC, given the time constraints. This measure was implemented to mitigate the excessive dominance of French law influence in Thai law, as exemplified by the CCC B.E. 2466 (A.D.1923) The Thai CCC of 1925 could be described as nearly identical to the English translations of foreign laws that were incorporated into the initial draft of the Thai CCC, which was originally composed in English and later translated into Thai.

An important issue that emerged was that the Drafting Committee used laws from different countries as models for legal transplanting in the Thai CCC B.E. 2468 (A.D. 1925). While it successfully addressed the issue of excessive influence from any one foreign law, it led to certain sections becoming incongruous as a result of transplanting laws from countries with divergent concepts or belonging to distinct legal lineages. For instance, the provision that establish the definition of things were transplanted from the German Civil Code (*Bürgerliches Gesetzbuch*) and the Japanese Civil Code, both of which lack provisions explicitly defining the term ‘property’.

Nevertheless, the provision regarding property were transplanted from the French Civil Code and the Argentine Civil Code, which have distinct definitions of things compared to the German and Japanese Civil Codes. This has resulted in difficulties in describing the correlation between things and property in the existing Thai legal framework.

Furthermore, following the enactment of the new Thai Criminal Code in 1956 (B.E. 2499) as a replacement for the Thai Penal Code of R.E. 127 (A.D.1908), the definition of things was no longer included in the new Criminal Code. This matter has resulted in difficulties in comprehending criminal offences, particularly those relating to things, as many offences specify the object of protection as 'things,' akin to the stipulations in Thai Penal Code R.E. 127. The concept of things in Section 6 (10) of the Thai Penal Code encompasses a wider scope than the definition of things in Section 98 of the Thai CCC B.E. 2468 and Section 137 of the Thai CCC B.E. 2535 (A.D.1992).

Consequently, the extent of legal enforcement in relation to offences against property has become more limited. According to the principle of *Nullum Crimen Nulla Poena Sine Lege* (no crime, no punishment without law), the term in the Thai criminal code used the term 'things' not 'property which has to interpret following the definition of things in the Thai CCC. As a result, there have been controversial and debated instances of electricity theft and other energy-related substances to this day.

An important concern arises regarding the identification of the object of rights entitlements in Books III and IV. These books employ the term 'property' without considering the real rights over objects or extracting only certain provisions from foreign laws without considering other relevant provisions in those laws. This leads to skewed interpretations and currently poses issues in interpretation. One explanation for this is that the Thai CCC was divided into different books, with Books I to Book III being drafted and published before Book IV, which deals with Property. Consequently, numerous expressions in Book III exhibit contradictory usage of the word 'property' in relation to the principles of property law. Subsequently, while Book IV on Property was being compiled, the term 'property' was included in the provisions to maintain consistency with the prior provision found in other books.

The final issue pertains to the revision of the CCC, specifically Book I, which took place in 1992. The revision made in Section 137, which removed the phrase 'in the legal sense,' had an impact on the understanding and interpretation of the concept of things within the legal framework. Section 143 of the Thai CCC includes a provision regarding things outside of commerce. Retaining the phrase 'in the legal sense' in this provision enhances systematic comprehension. It allows for a clear explanation that

all property referred to in the Thai Civil Code pertains to only legal things, excluding other corporeal objects that are considered things outside of commerce.

In conclusion, the Legal transplantation of foreign laws into the Thai CCC has resulted in difficulties when it comes to implementing and understanding existing Thai legislation. The drafting committee had a restricted timeframe to compose the CCC due to Thailand's loss of extraterritoriality. As a consequence, legislation from different foreign countries with varying perspectives on the same matter was transplanted without thorough examination of their coherence. Furthermore, the individual publication of each Book of the Thai CCC led to a lack of consistency in the treatment of property across the Book and prevented a comprehensive examination of the topic in the CCC. This has led to difficulties in the interpretation of the concept of things and property in the existing Thai legislation.

6.2 Recommendations

It is evident that all the issues addressed stem from sections in the Thai CCC. Based on the aforementioned findings, the author proposes the following recommendations for enhancing the regulations pertaining to things and property:

1) Revise Section 137 of the Thai CCC by incorporating the guidelines outlined in Section 98. Specifically, include additional text that aligns with the definition of property as stated in Section 138.

Previous

"Section 137 Things are corporeal objects."

Suggested

"Section 137 Things, in the legal sense, are corporeal objects susceptible of having a value and of being appropriated

2) Amend the provisions of Thai Criminal Code on the provision on definition or the provisions on offense on theft

2.1) Suggesting the new provision on Section 1 (19) in accordance with Section 6 (10) of the Penal Code R.E 127, which defines property, for the purpose of addressing property-related offenses. The inclusion should encompass the following:

Suggested (1)

"*Section 1 (19) Things mean objects, which person can have ownership, of or have the authority to be an owner e.g., money, moveable thing, and immovable things, it shall be considered as things defined in this section*."

2.2) Suggesting the inclusion of supplementary clauses in Section 334, Paragraph 2 of the Criminal Code pertaining to the act of unlawfully obtaining energy or incorporeal property.

Previous

"Section 334 Whoever, dishonestly taking away the thing of other person or which the other person to be co-owner to be said to commit the theft, shall be imprisoned not out of three years and fined not out of six thousand Baht".

Suggested (2)

"Section 334 Whoever, dishonestly taking away the thing of other person or which the other person to be co-owner to be said to commit the theft, shall be imprisoned not out of three years and fined not out of six thousand Baht".

Whoever, dishonestly stealing the electricity, energy, or incorporeal property of other person or which the other person to be co-owner to be said to commit the theft according to the first paragraph."

3.) Revise or add to Section 453 of the Thai CCC to clarify the definition of a contract of sale. This can be done by either replacing the phrase 'the ownership of property' with 'the property right' as stated in Article 555 of the Japanese Civil Code, or by substituting the word 'property' with 'things' and including the provisions of Article 453, paragraph two, for the sale of property rights.

Previous

"*Section 453. Sale is a contract whereby a person, called the seller, transfers to another person, called the buyer, the ownership of property, and the buyer agrees to pay to the seller a price for it*."

Suggested (1)

"*Section 453. Sale is a contract whereby a person, called the seller, transfers to another person, called the buyer, the property right, and the buyer agrees to pay to the seller a price for it*."

Suggested (2)

"Section 453. Sale is a contract whereby a person, called the seller, transfers to another person, called the buyer, the ownership of things, and the buyer agrees to pay to the seller a price for it.

The provisions of this chapter shall apply mutatis mutandis to cases where a person sell his/her property rights with an intention to sell and purchase such property rights.

4.) Revise or add to the Thai CCC, specifically Section 1336, which pertains to the definition of ownership, as well as other relevant sections found in Book 4 of the Thai CCC. This revision should involve replacing the term 'property' with the term 'things'.

Previous

"Section 1336. Within the limits of law, the owner of property has the right to use and dispose of it and acquires its fruits; he has the right to follow and recover it from any person not entitled to detain it and has the right to prevent unlawful interference with it."

Suggested

"Section 1336. Within the limits of law, the owner of things has the right to use and dispose of it and acquires its fruits; he has the right to follow and recover it from any person not entitled to detain it and has the right to prevent unlawful interference with it."

5.) Revise or add to modify Section 1367 of the Thai CCC by either substituting the term 'property' with 'a thing or a right' as done in Article 2255 [2228] of the French Civil Code, or by replacing the use of 'property' with 'things' and introducing provisions on the possession of rights similar to Article 205 of the Japanese Civil Code.

Previous

"Section 1367. A person acquires possessory right by holding a property with the intention of holding it for himself."

Suggested (1)

"Section 1367. A person acquires possessory right by holding a thing or a right with the intention of holding it for himself."

Previous

"*Section 1367. A person acquires possessory right by holding a property with the intention of holding it for himself.*"

Suggested (2)

"Section 1367. A person acquires possessory right by holding a thing with the intention of holding it for himself.

The provisions of this chapter shall apply mutatis mutandis to cases where a person exercises his/her property rights with an intention to do so on his/her own behalf."

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APPENDICES

APPENDIX A

Code of King Rama I' Chunlasakkarat 1116 (1754 AD)

Printed According to the Royal Version, Vol. 2

ประมวลกฎหมาย รัชกาลที่ ๑

จุลศักราช ๑๑๖๖

พิมพ์ตามฉะบับหลวง ตรา ๓ ดวง

เล่ม ๒

พระอายการเบดเสร็จ[๑]

จักกล่าวลักษณไร่นาเปนมูลคดีวิวาท ให้เกิดความตามบาฬีมีในคำภีร์พระธรรมสาตรว่า เขตฺตาทิ อารามวฺหาทิ ถานำ อันโบราณราชกระษัตรจัดเปนบทมาตรา คือพระราชอธิบายสืบๆมาดั่งนี้

ศุภมัศดุ ๑๒๖๓ อัชฉะสังวัชฉะระ เชษฐมาศศุขปักษยบันจะมีดิถีชื่อวาร พระบาทสมเด็จพระเจ้ารามาธิบดีศรีวิสุทธิสุริยวงษองคบุริโสดมบรมจักรพรรดิราชาธิราชตรีภูวะนาธิเบศบรมบพิตรพระพุทธิเจ้าอยู่หัว เสดจ์ออกณะพระธินั่งเบญจรัตนมะหาปราสาท มีพระราชโองการมานพระบันทูลสุระสีหนาทดำหรัศสั่งแก่ขุนกระเสตราธิบดีให้ตราพระราชกฤษฎีกาโฆษนาคำนับประหญัติเผดียงแก่มุขลูกขุนเจ้าราชนิกุลขุนหมื่นพันทนายฝ่ายทหารพลเรือนจ่าผู้ดามเสมียนักการแลราษฎรทั้งหลายแต่นสืบไปเมื่อหน้า

1

๑ มาตราหนึ่ง ถึงเทศการเดือน ๖ ๗ ๘ ๙ } เข้าเปนต้นเปนลำ ให้ขุนกระเสตราธิบดีมีตราสารประหญัติออกไปเมืองนอกขอบ

(๑) ฉะบับหลวงเหลือแต่ฉะบับเดียว คือ L 14 ส่วนฉะบับรองทรงเหลือแต่เล่ม ๒ ซึ่งเริ่มต้นแต่มาตรา ๗๔ (88)

มีผู้รู้เหน แลฝ่ายผู้ได้ที่เย่าเรือนนั้นตาย เจ้าของจะกล่าวเอาที่เย่าเรือนคืนเล่า ท่านว่าให้คืนให้แก่ท่านโดยคำนับเพราะที่เย่าเรือนนั้นท่านให้แก่เขาผู้ตาย แลญาติผู้ตายจะกล่าวเอาที่เย่าเรือนนั้นมิได้เลย เหตุว่าผู้ตายกับผู้ให้เขาให้แก่กันถ้าแลผู้ได้ที่กับผู้ให้ที่ถึงแก่มรณะภาพทั้งสองฝ่าย บุตรพี่น้องญาติผู้ให้จะกล่าวเอาที่เย่าเรือนนั้น ท่านว่ามิได้เลย

57

๔๕ มาตราหนึ่ง มาขอทำที่ {ไร่ นา} เรือกสวนป่าน้ำละหาร หว้ยหนองคลองบึงบางที่ใด ๆ เจ้าของให้ทำแล้วแลจะเอาของตนคืนนั้น ท่านว่าให้เอาคืนแต่ใน ๓ ปีลงมา ถ้าแลผู้ขอทำ ๆ พ้นกว่า ๓ ปีขึ้นไป ให้สิทธิแก่ผู้ขอทำแต่ในที่จะทำกินไปนั้น ถ้ามิทำกินต่อไป จะขายจะจำนำแลจะให้แก่พี่น้องลูกหลานทำกินสืบไปนั้นมิได้ ที่นั้นให้เปนสิทธิแก่เจ้าของเดิม

58

๔๖ มาตราหนึ่ง เช่าที่ {บ้าน เรือน} ท่านอยู่ ถ้าถึงขวบหนึ่งก็ดีสองขวบก็ดี ให้เจ้า {บ้าน ที่} ว่าแก่ผู้เช่าที่นั้นเอาค่าเช่าให้ครบค่าที่นั้น ถ้าแลละเลยไว้พ้นขวบหนึ่งสองขวบแล้วแลเจ้าที่เจ้าบ้านมิได้ตักเตือนพ้น ๓ ขวบไปเล่า ให้เอา(๑)ค่าเช่ากึ่งหนึ่งแลที่นั้นให้คงแก่ผู้เช่าแล

(๑) ต้นฉะบับ : เอ่า

59

๔๗ มาตราหนึ่ง ผู้ใดเช่าที่ ไร่/นา } ว่าจะทำกินแลให้ค่าเช่าแก่เจ้าของนั้นแล้ว เมื่อถึงเทศการจะทำนายังไปมิได้ทำนา ถ้าเจ้านาเอานาไปให้ผู้อื่นเช่าเล่า ควรให้เรียกเอาค่านานั้นคืนเปนทวีคูน ถ้าหาฝนมิได้ผู้เช่ามิได้ทำ ผู้เช่านาจะคืนเอาค่านานั้นมิได้ เมื่อมีฝนพายหน้าจึ่งให้ทำ เพราะเหตุทำนานั้นเอาฝนเปนประมาณ

60

๔๘ มาตราหนึ่ง ผู้ใดทำหนังสือสัญาเอกสารเช่าถือที่ ไร่/นา } เรือกสวนจะให้ทรัพยสิ่งใดแก่ท่าน ครั้นถึงสัญามิได้ให้แก่ท่านๆ ให้เรียกหาออกมา ถ้าต่อสู้เจ้าที่ ไร่/นา } เรือกสวนเมื่อพิจารณาเปนสัจว่าเช่าถือที่ ไร่/นา } เรือกสวนของท่านจริงมิได้ให้แก่ท่านตามสัญา ท่านว่าให้เอาทรัพยซึ่งสัญาว่าจะให้แก่ท่านนั้นตั้งไหมทวีคูน ยกค่าเช่าให้แก่เจ้าของ เหลือนั้นเปน สินไหม/พินัย } กึ่ง

61

๔๙ มาตราหนึ่ง มีกรมธรรกำแหงแกงใดว่าขายฝากที่ ไร่/นา } เรือกสวนไว้แก่กัน ท่านให้ไถ่ถอนกันแต่ใน ๑๐ ปี

แม้นใครผู้ใดมากล่าวพิภาษสิ่งสิ้นสรรพเหตุช้างม้าข้าคนโคกระบือซึ่งพระราชทานนั้น ท่านมิให้ว่าเลย แม้นเขาผู้ได้สิ้นพัทยานั้นล้มตาย แลพี่น้องลูกหลานเขายัง ได้สิ้นนั้นเปนสิทธิแล

อนึ่งที่ถานก็ดีเรือกสวนก็ดี รกร้างอยู่สามปี แลผู้เข้าอยู่คำนับ บมิให้มีโทษแก่เขานั้นเลย แลเจ้าไร่สวนเจ้าที่จะว่าเอาภายหน้าเล่าก็ให้คงเดิม เพราะมันเสียเดิมมิได้เพราะที่เดิมเขาแต่ก่อน

ว่าด้วยที่บ้านที่สวนไร่นาสิ้น ๑๑ มาตราเท่านี้

66

ทีนี้จะกล่าวลักษณเกะหนาบคาบเกี่ยวสืบสาขคดีต่อไป

๕๔ มาตราหนึ่ง ผู้ใดซื้อที่ปลูกเรือนทำสวนเกี่ยวคาบกันรู้แล้วแลมิได้ว่าแก่กัน มิได้ให้กระลาการกำนันพันที่รู้ อยู่มาหาความว่าซื้อที่บ้านทำสวนปลูกเรือนเกี่ยวคาบเล่า ถ้าแลลูกเมียผู้คนช้างม้าโคกระบือล้มตาย เปนกำมแก่ผู้ตาย ท่านมิให้มีโทษแก่มันเลย เพราะมิได้ว่าแต่แรก

67

๕๕ มาตราหนึ่ง ผู้ใดซื้อที่บ้านเรือกสวน ถ้ากะหนาบคาบเกี่ยวกัน ฝ่ายข้างหนึ่งรู้ให้ผู้เถ้าผู้แก่นายระวางกำนันพันนายบ้านเจดร้อยอายัดไปว่ากล่าวมอบเวนที่แดน ฝ่ายข้างหนึ่งทนงศักดิสำหาว่ามิรับมอบเวนแลบ่ก็ไม้หมายแดนกัน

ถ้าปลูกไม้มีผลไว้ ให้คิดเอาค่าปลูกแก่เขาตามสมควร ถ้าแลผู้รับจำนำยังอยู่ก็ดี ผู้จำนำยังมิได้ล้มตาย อันจะคืนให้เขาผู้เปนลูกหลานนั้นมิได้เลย

76

๖๔ มาตราหนึ่ง ผู้ใดเอาทรัพยสิ่งใด ๆ ไปจำนำไว้แก่ท่าน แลสัญาอานัด ๑๐ วันก็ดี เดือนหนึ่งก็ดี ปีหนึ่งก็ดี จะไถ่เอาทรัพยนั้นคืนเล่า ถ้าแลพ้นกว่าสัญาอานัดแล้วมิได้มาไถ่เอาทรัพย ๆ นั้นเปนสิทธิแก่ผู้รับ ถ้ายังมิถึงสัญาอานัดแลผู้รับจำนำนั้นบังเกิดอุบัติเหตุทรัพยนั้นเสียด้วย { ราช / โจร / อุทก / อัคคี } ไภย พิจารณาเปนสัจ จะเอาแก่ผู้รับนั้นมิได้เลย

ว่าด้วยลักษณ { ตู้ / จำนำ } ทรัพยสิ้นแต่เท่านี้

77

ทีนี้จักกล่าวด้วยลักษณฝากทรัพยสิ่งของสาขคดีต่อไป

๖๕ มาตราหนึ่ง ท่านฝากผ้าผ่อนเงินทองแก้วแหวนแพรพรรณไว้ ถ้าเจ้าของจะเอา ให้คืนให้ อย่าได้ประบัดสินท่าน ถ้าผู้รับฝากนั้นเอาไปนุ่งห่มขาดเสร้าหมองก็ดีแลแหวนเอาไปถือเบาตราชั่งไปก็ดี ให้ใช้ของท่าน

อนึ่งผู้รับฝากนั้นเอาทรัพยอื่นภอประมาณเปลี่ยนให้แก่ท่าน ทรัพยท่านใหญ่เอาทรัพยอันน้อยเปลี่ยนให้แก่ท่าน

ของท่านก็ควรส่งให้แก่ท่าน แลทรัพยอันเปลี่ยนให้แก่ท่านนั้นก็ควรให้เสียแก่ท่านด้วย

78

๖๖ มาตราหนึ่ง ผู้ใดท่านเอาทรัพยมาฝากไว้ อยู่มาผู้ฝากไว้นั้นจะคืนเอา ผู้รับนั้นเอาทรัพยอื่นกอประมาณเปลี่ยนให้แก่ท่าน ทรัพยท่านใหญ่เอาทรัพยอันน้อยเปลี่ยนให้แก่ท่าน ของท่านก็ควรส่งให้แก่ท่าน แลทรัพยอันเปลี่ยนให้แก่ท่านนั้นก็ให้เสียแก่ท่านด้วย

79

๖๗ มาตราหนึ่ง ผู้ใดฝากทรัพยสิ่งของทองเงินไว้แก่ท่าน เจ้าของมิได้มาตักเตือนเอาของนั้นก่อน ท่านห้ามมิให้ผู้รับฝากนั้นซื้อขายของนั้นเสีย ถ้าผู้รับฝากเอาของท่านไปขายเสีย ให้ใช้ของท่าน

80

๖๘ มาตราหนึ่ง ผู้ใดฝากของไปให้แก่กันแลผู้รับเอาของฝากนั้นมิได้ไปถึงที่ท่านฝากไปนั้น แลทรัพยนั้นมีผู้ชิงเอาไปก็ดี โจรชิงเอาก็ดี เพลิงไหม้เสียก็ดี เรือล่มเสียก็ดี เมื่อพิจารณาเปนสัจ บมิให้ผู้รับของฝากนั้นใช้ทรัพยนั้นเลย ถ้าผู้รับของฝากหากอำพรางไว้ ควรให้ไหมเท่าค่าทวีคูน

81

๖๙ มาตราหนึ่ง ฝากของแลทรัพยแก่ท่านในกลางตลาดแลหาย ให้ใช้กึ่งหนึ่งแลช่วยกันหาเอาผู้ร้าย ถ้า

เจ้าของ เหลือนั้นเปนสิ่นไหมกึ่งพิไนยกึ่ง ถ้าพิจารณามิเปนสัจ มักได้ท่านฉันใด ให้ท่านได้ตนฉันนั้นบ้าง

113

๙๙ มาตราหนึ่ง ท่านซื้อวิญาณกะทรัพยอวิญาณกะทรัพยของตน ๆ รับเอาเงินไว้ สัญาว่าจะไหทรัพยสิ่งของแก่ท่านมิได้ให้แก่ท่าน ๆ ทวงถามมิรับว่ามิได้ว่าจะขาย มิได้รับเอาเงินของท่านไว้ เมื่อพิจารณาเปนสัจดั่งนั้น ท่านว่าประบัดสิ่นท่านให้เอาทรัพยนั้นตั้งไหมทวีคูน

114

๑๐๐ มาตราหนึ่ง ซื้อของขายของแก่กันในตลาดก็ดีในเรือนสถานแห่งใด ๆ ก็ดี แลมันผู้ซื้อหลีกหนีเร้นซ่อนบให้เหนตัวมัน ผู้นั้นทำเพโทบายแกล้งลวงเอาสิ่นท่าน ถ้าได้ตัวมันให้เกาะจำเอาสิ่นนั้นจงทวน แล้วให้เอาไปประจานแลตีด้วยลวดหนัง ๑๐ ที

115

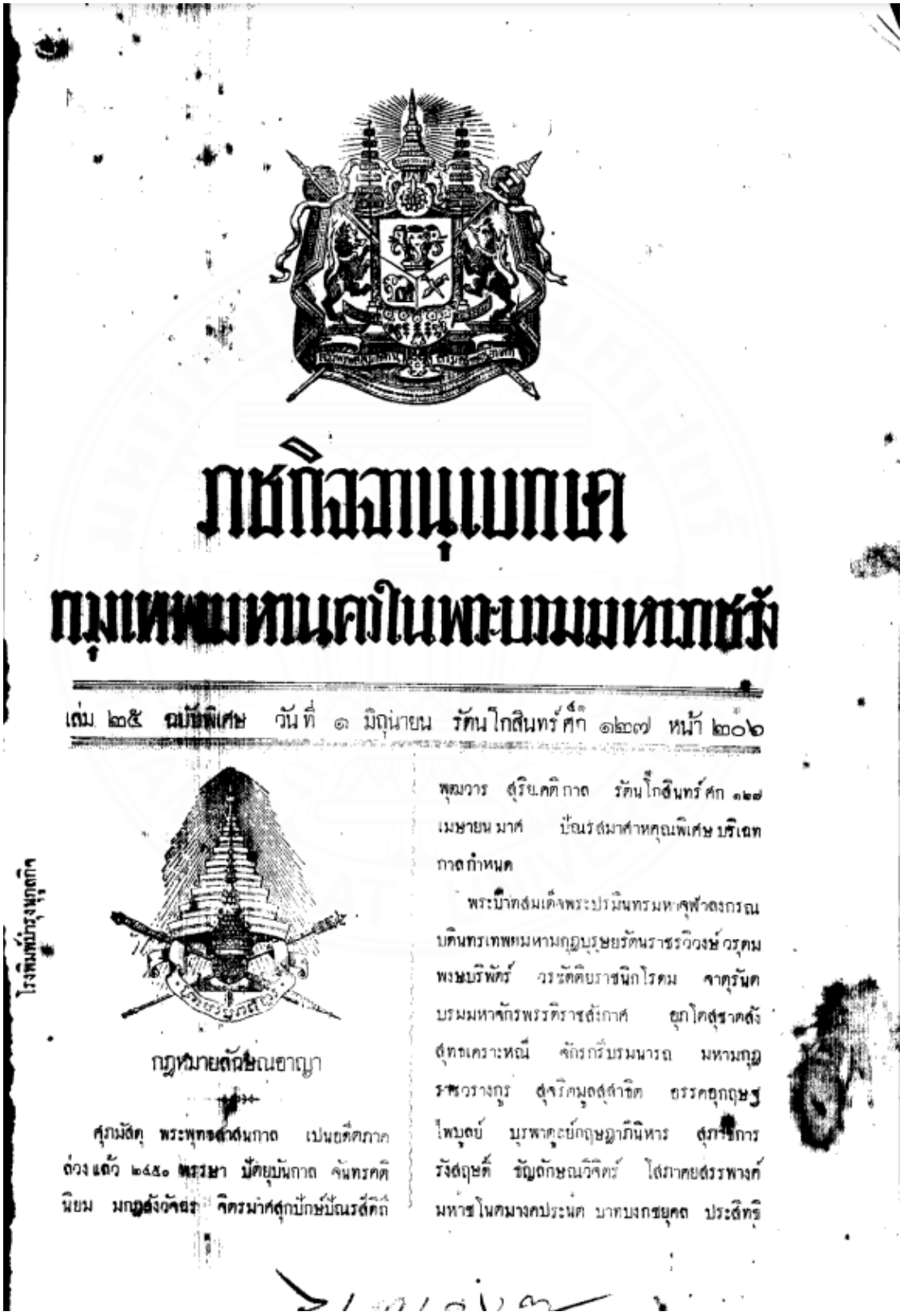
๑๐๑ มาตราหนึ่ง ราษฎรทังหลายชักชวนเข้าทุนกันไปค้าขายออกกำไรให้แบ่งบันกันตามมากแลน้อย ถ้ามิได้ซื่อสัจต่อกันเกบเอาทุนแลกำไร ซึ่งจะได้เปนส่วนของท่านนั้นไว้ ท่านว่าประบัดสิ่นท่าน ให้เอาทุนแลกำไรซึ่งเปนส่วนของท่านนั้นตั้งไหมทวีคูน

116

๑๐๒ มาตราหนึ่ง ไปค้าด้วยกันแลตกศึกแลผู้หนึ่งเอา

APPENDIX B

THAI PENAL CODE R.E.127 (A.D.1908)



กฎหมายลักษณอาญา

ศุภมัสดุ พระพุทธศาสนกาล เปนยุคลีศภาค
ล่วงแล้ว ๒๔๕๐ พรรษา ปัตยุบันกาล จันทรคติ
นิยม มกฎสังวัจฉร จิตรมาศสุกปักษ์ปัณรสีดิถี
พุธวาร สุริยคติกาล รัตนโกสินทร์ศก ๑๒๗
เมษายน มาศ ปัณรสมาสำหคุณพิเศษ บริเฉท
กาลกำหนด

พระบาทสมเด็จพระปรมินทรมหาจุฬาลงกรณ
บดินทรเทพยมหามกุฎบุรุษยรัตนราชรวิวงษ์วรุตม
พงษบริพัตร์ วรขัตติยราชนิกโรดม จาตุรันต
บรมมหาจักรพรรดิราชสังกาศ ยุภโคสุชาตลัง
สุทธเคราะหณี จักรกรีบรมนารถ มหามกุฎ
ราชวรางกูร สุจริตมุลสุสำอิต ธรรคอุกฤษฐ
ไพบูลย์ บุรพาคุตย์กฤษฎาภินิหาร สุภาชิการ
รังสฤษฏ์ ธัญลักษณวิจิตร์ ไสภาคยสรรพางค์
มหาชโนตมางคประเทศ บาทบงกชยุคล ประสิทธิ์

(๒) ข้อความ ใน พระราช กำหนด กฎหมาย แต กฎ ข้อ บังคับ อื่น ๆ บรรดา ที่ กฎหมาย นี้ บัญญัติ ว่า ต้อง มี โทษ หรือ ยก เว้น ไม่ ต้อง มี โทษ ให้ ใช้ กฎหมาย นี้ แทน

(๓) บรรดา พระราชกำหนด กฎหมาย แต กฎ ข้อ บังคับ อื่น ๆ ที่ มี เนื้อ ความ ขัด กับ กฎหมาย ลักษณ อาญา นี้

มาตรา ๔

กฎหมาย ลักษณ อาญา นี้ ไม่ ลบ ล้าง กฎหมาย ที่ ใช้ เฉพาะ ใน ศาล กระทรวง วัง ศาล กระทรวง ธรรมการ ศาล ทหาร บก แต ศาล ทหาร เรือ

ภาค ๑

ว่า ด้วย ข้อ บังคับ ต่าง ๆ

หมวด ที่ ๑

คำ อธิบาย

มาตรา ๕

เพื่อ จะ มิ ให้ เกิด มี ความ สงสัย ใน บท กฎหมาย นี้ ท่าน จึง ให้ อธิบาย คำ สำคัญ ต่าง ๆ ไว้ เป น หลัก ฐาน ใน มาตรา ๖ ต่อ ไป นี้ แล ให้ ถือ ตาม ความ อธิบาย นั้น เสมอ ไป เว้น ไว้ แต่ เมื่อ คำ สำคัญ เหล่า นี้ คำ ใด ไป ปรากฏ ใน ที่ ใด ซึ่ง มี เนื้อ ความ ขัด กัน กับ ความ อธิบาย ใน มาตรา ๖ นี้ ใช้ จึง ให้ ถือ เอา เนื้อ ความ ใน ที่ นั้น เป น ใหญ่

มาตรา ๖

(๑) คำ ว่า กระทำ นั้น ท่าน ให้ ถือ ว่า ไม่ หมาย ความ แต่ เฉพาะ การ ที่ บุคคล กระทำ ให้ หมาย ความ ได้ ตลอด ถึง การ ละเว้น การ ซึ่ง กฎหมาย กำชับ ให้ กระทำ แล ผล แห่ง การ ที่ ละเว้น นั้น ด้วย

(๒) ผู้ ใด กระทำ การ อัน ใด ที่ ตน มิ ได้ มี อำนาจ จะ ทำ ได้ โดย ชอบ ด้วย กฎหมาย ท่าน ว่า ผู้ นั้น กระทำ มิ ชอบ

(๓) ผู้ ใด กระทำ การ แสวง หา ประโยชน์ เพื่อ ตน เอง ก็ ดี เพื่อ ผู้ อื่น ก็ ดี อัน เป น ประโยชน์ ที่ มิ ควร ได้ โดย ชอบ ด้วย กฎหมาย แล เกิด เสีย หาย แก่ ผู้ อื่น ด้วย ใช้ ท่าน ว่า ผู้ นั้น กระทำ การ ทุจริต

(๔) ผู้ ใด กระทำ การ อย่าง หนึ่ง อย่าง ใด โดย เจตนา จะ ให้ ผู้ อื่น ขาด เสีย ความ ชอบ ธรรม ที่ เขา ควร มี ควร ได้ ท่าน ว่า ผู้ นั้น กระทำ การ ฉ้อโกง

(๕) ผู้ ใด ทำ สิ่ง ของ เทียม โดย เจตนา จะ ให้ ผู้ อื่น หลง ว่า เป น ของ แท้ ท่าน ว่า ผู้ นั้น ทำ ของ ปลอม

(๖) ผู้ ใด กระทำ การ อัน ใด ซึ่ง กฎหมาย ที่ ลง ใช้ อยู่ ใน เวลา นั้น บัญญัติ ว่า จะ ต้อง ถูก ทำ โทษ ท่าน ว่า ผู้ นั้น กระทำ ความ ผิด

(๗) คำ ว่า ความ ผิด ต่อ ส่วน ตัว นั้น ท่าน หมาย ความ ว่า บรรดา ความ ผิด ที่ จะ ร้อง ขอ ให้ ศาล พิจารณา ทาง อาญา ได้ แต่ เมื่อ ผู้ ที่ ต้อง ประทุษร้าย หรือ เสีย หาย นั้น ได้ มา ร้อง ทุกข์ ขอ ให้ ว่า กล่าว

(๘) ถ้า บุคคล ตั้งแต่ สอง ขึ้น ไป สม รู้ ด้วย กัน เพื่อ จะ กระทำ ความ ผิด ท่าน ว่า คน เหล่า นั้น สม คบ กัน

(๙) บุคคล เอา ทรัพย์ หรือ ประโยชน์ อย่าง ใด ๆ อัน มิ ใช่ เป น ของ ที่ ต้อง ให้ ตาม กฎหมาย

ไปให้แก่ เจ้าพนักงาน เพื่อให้เจ้าพนักงาน กระทำ หรือ ละเว้น ไม่กระทำ การ อย่าง หนึ่ง อย่าง ใด ใน หน้าที่ เช่น นี้ ท่าน ให้ถือ ว่า เป็น การ ให้สินบน

(๑๐) ทรัพย์ นั้น ท่านหมายความ ว่า บรรดา สิ่ง ของ อัน บุคคล สามารถ มี กรรม สิทธิ์ หรือ ถือ อำนาจ เป็น เจ้า ของ ได้ เป็น ต้น ว่า เงิน ตรา และ บรรดา สิ่ง ของ อัน พึง เคลื่อน จาก ที่ ได้ ก็ ดี และ เคลื่อน จาก ที่ มิได้ ก็ ดี ท่าน ก็ นับ ว่า เป็น ทรัพย์ อัน กล่าว มา ใน ข้อ นี้

(๑๑) ทาง หลวง นั้น ท่าน หมาย ความ ว่า บรรดา ทาง บก และ ทาง น้ำ ทั่วไป ซึ่ง ใช้ เป็น ทาง สัญจร สำหรับ สาธารณชน และ นับ รวม ตลอด ถึง ถนน หลวง ด้วย

(๑๒) ถนนหลวง นั้น ท่านหมายความ ว่า ที่ หรือ ถนน และ ทาง บก ต่าง ๆ ซึ่ง สาธารณ ชน มี ความ ชอบ ธรรม ที่ จะใช้ เป็น ทาง สัญจร และ นับ รวม ตลอด ถึง ทาง รถไฟ และ ทาง รถ ราง ที่ มี รถ เดิร สำหรับ ให้ คน โดย สาร นั้น ด้วย

(๑๓) ที่สาธารณสถาน นั้น ท่านหมายความ ว่า บรรดา ที่ ต่าง ๆ จะ เป็น ที่ มีเคหสถาน ก็ ดี หรือ เป็น ที่ ว่าง เปล่า ก็ ดี ซึ่ง สาธารณชน มี ความ ชอบ ธรรม ที่ จะ เข้าไปได้

(๑๔) ที่ อาไศรย นั้น ท่านหมายความ ว่า เคหสถาน ที่ คน อยู่ อาไศรย เช่น เรือน โรง เรือ แพ และ ชุม รุม เป็น ต้น และ นับ รวม ตลอด ถึง ที่ ซึ่ง อยู่ ใน บริ เวณ เกี่ยว เนื่อง กับ เคหสถาน นั้น ด้วย

(๑๕) สาตราวุธ นั้น ท่าน หมาย ความ ว่า เครื่อง ประ หาร อัน สำ มารถ จะ ใช้ กระ ทำ แก่ ช่าง กาย ให้ แตก หัก บุบ ฉลาย ได้ ถึง สำหรับ ยิง ดาบ หอก แหลน หลาว มีด และ กระบอง เป็น ต้น

(๑๖) ที่เรียกว่า ปสุสัตว์ และ สัตว์ พาหะนะ นั้น ท่าน หมาย ความ ตลอด ถึง ช้าง ม้า โค กระบือ ล่อ แพะ แกะ และ สุกร ด้วย

(๑๗) จดหมาย นั้น ท่าน หมาย ความ ว่า เครื่อง หมาย แทน ถ้อย คำ หรือ จำนวน เลข ไม่ ว่า ทำ ด้วย กิริยา ที่ ขีด เขียน จาริก หรือ พิมพ์ และ ถ่าย ด้วย วิธี อย่าง ใด ๆ เครื่อง หมาย เช่น ว่า มา นั้น นับ ว่า จดหมาย

(๑๘) หนังสือ นั้น ท่าน หมาย ความ ว่า บรรดา จด หมาย ที่ จะใช้ เป็น พยาน แห่ง ถ้อยคำ ที่ เขียนไว้ ใน นั้นได้

(๑๙) หนังสือราชการ นั้น ท่านหมายความว่า บรรดา หนังสือ ที่ เจ้า หน้าที่ เรียบ เรียง หรือ รับ ว่า เป็น ของ แท้ และ หมาย ความ ตลอด ถึง หนังสือ ที่ เจ้า หน้า ที่ รับ ว่า เป็น สำเนา อันแท้ จริง ของ หนังสือ นั้น ๆ ด้วย

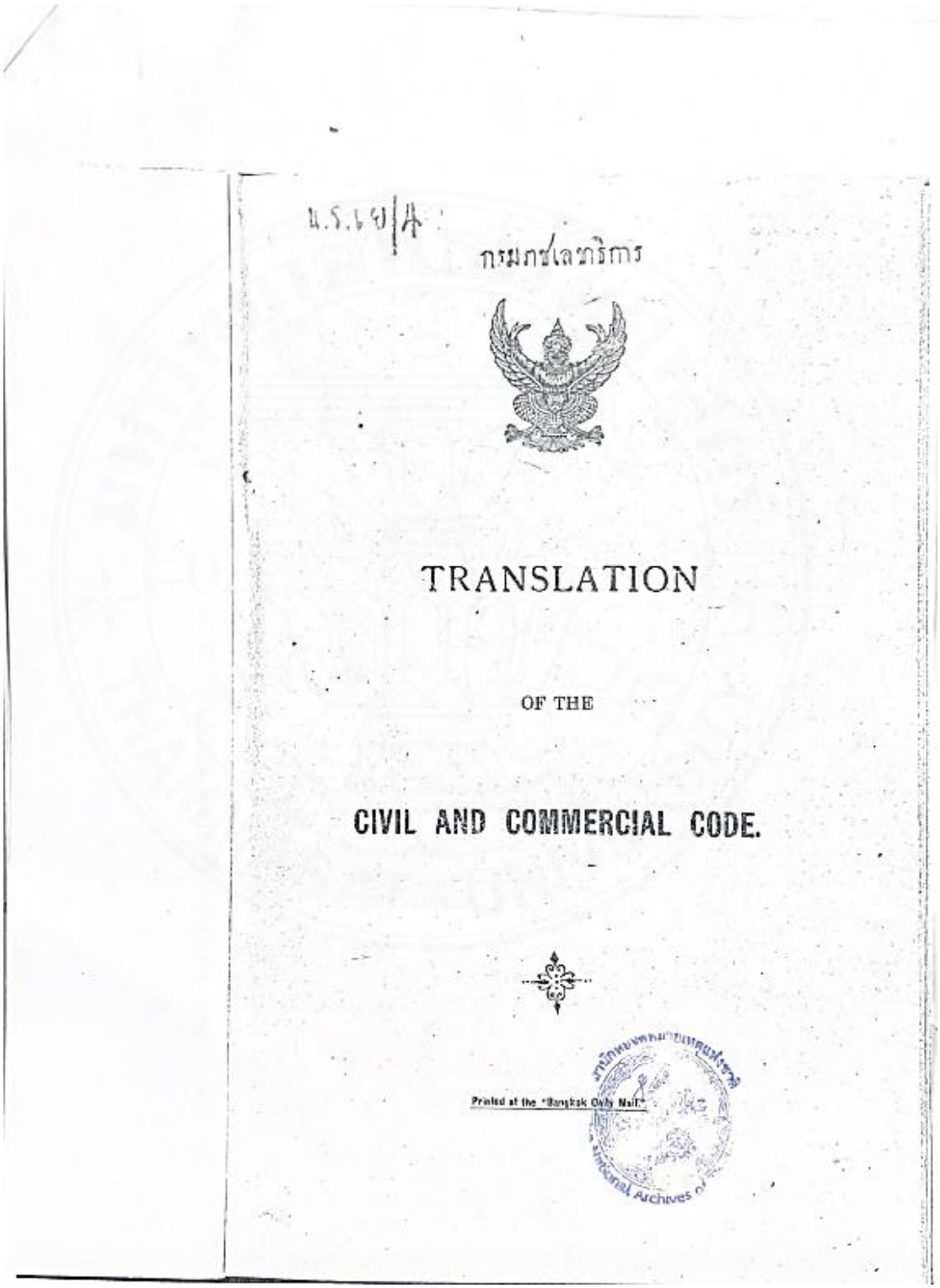
(๒๐) หนังสือ สำคัญ นั้น ท่าน หมาย ความ ว่า บรรดา หนังสือ ซึ่ง เป็น สำคัญแก่ การตั้งกรรมสิทธิ์ หรือ หนี้สิน และ บรรดา หนังสือ ที่ เป็น หลักฐาน แก่ การ เปลี่ยน แก้ หรือ เลิก ล้าง โอน กรรมสิทธิ์ หรือ หนี้สิน ทุก อย่าง

(๒๑) ลาย มือ นั้น ท่าน หมาย ความ ทั้ง ที่ ลง ชื่อ เป็น ตัว อักษร และ ลง แกง ใด ลาย นิ้ว มือ

APPENDIX C

Mor Ror 6 Yor /4 TRANSLATION OF

THE THAI CIVIL AND COMERCIAL CODE B.E.2466 (A.D.1923)



น.ร.๖ย/๔

กรมราชเลขาธิการ

TRANSLATION

OF THE

CIVIL AND COMMERCIAL CODE.

Printed at the "Bangkok Daily Mail"

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94.—The provisions of law concerning Liquidation of Partnerships and Companies apply to the liquidation of foundations *mutatis mutandis*.

95.—When a foundation comes to an end, its properties shall be transferred to such juristic person as may have been designated by the instrument creating the foundation.

In the absence of such juristic person, the Court shall, on application of the Public Prosecutor or of any interested person, appropriate the properties to such other juristic persons the purpose of which appears to be as near to the former foundation as possible.

Provided that if such appropriation cannot be made or if the foundation has been suppressed on account of its being contrary to the law or public policy, the Court shall order that its properties shall devolve upon the State.

96.—Regulations for the authorization, registration and supervision of foundations within the meaning of the present Chapter may be issued by the Minister responsible for the local administration.

CHAPTER VII

OF THINGS.

97.—Things are corporeal objects only and are either immovables or movables.

An accessory is subject to all the dispositions which may be made of the principal thing.

103.—If an accessory is attached to a thing by a person other than the owner of the principal thing, it may be removed by such person provided that the principal thing must be put in its former condition or compensation paid therefor.

104.—Trees when planted for an unlimited period of time are deemed to be component parts of the land on which they stand.

Trees which grow only for a limited period of time and crops which may be harvested one or more times a year are not component parts of the land and are to be regarded as movables.

105.—By fruit or fruits of a thing is meant :

1) Natural fruits, that is to say all that which is obtained in the use of such thing according to its nature, such as the fruit of trees, and milk, hair, wool, and offspring of animals ; these are capable of acquisition at the time when they are severed from the thing ;

2) Legal fruits, that is to say interest, profits, rents, dividends or other gains obtained periodically by the owner from another person for the use of the thing ; these are calculated and may be acquired day by day.

98.—Land and things fixed thereto are immovables.

All other things are movables.

99.—"Property *in genere*" means those movable things which, in the ordinary course of transactions, are customarily determined by number, weight or measure.

100.—Consumable things consist of those movable things which, in the course of their intended use, are consumed or disposed of.

101.—When two things are so connected that they cannot be severed from one another without destroying or essentially changing the one or the other, they are said to be component-parts. No separate right can exist or be created in or with regard to component parts as such.

Things temporarily fixed to land or to a building do not become component parts. The same rule applies to a building or other structures which in the exercise of a right over another person's land has been fixed to the land by the person who has such right.

102.—Accessories are movables which, without being component parts of a thing, are attached to such thing for permanent use in connection with it.

Even though an accessory may be temporarily severed from the principal thing, it does not cease to be an accessory.

An accessory is subject to all the dispositions which may be made of the principal thing.

103.—If an accessory is attached to a thing by a person other than the owner of the principal thing, it may be removed by such person provided that the principal thing must be put in its former condition or compensation paid therefor.

104.—Trees when planted for an unlimited period of time are deemed to be component parts of the land on which they stand.

Trees which grow only for a limited period of time and crops which may be harvested one or more times a year are not component parts of the land and are to be regarded as movables.

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2) Legal fruits, that is to say interest, profits, rents, dividends or other gains obtained periodically by the owner from another person for the use of the thing ; these are calculated and may be acquired day by day.

APPENDIX D

Lectures of His Royal Highness, the Prince of Ratchaburi

เล็กเชอร์

ของ

พระเจ้าพี่ยาเธอ เจ้าฟ้ามหาจักรีดิเรกฤทธิ์

กรุงเทพมหานคร

รวบรวมพิมพ์ขึ้น

เมื่อ

พุทธศักราช ๒๔๖๘

ราคาเล่มละ ๖ บาท

...

พิมพ์ที่ โรงพิมพ์ โสภณพิพรรฒธนากร

ขอกันทนาก

ดาค

ว่าคนอยู่ในเกณฑ์อายุระยะหลุดค่าตัว ในลักษณ
เกณฑ์อายุให้ใช้ลักษณทาย ม, ๑๕ ให้ดูคำพิพากษา
ฎีกาเรื่องอิมโพทย์

ทรัพย์

ทรัพย์ตามวิชาเรื่องเงินในบ้านเมือง แปลว่าสิ่ง
ทั้งหลายที่มีราคา

วิธีแบ่งทรัพย์ในกฎหมาย

๑ ทรัพย์เคลื่อนจากที่ได้และไม่ได้ ที่เคลื่อนจากที่
ไม่ได้นั้นคือที่ดิน บ้านเรือนต้นไม้ (ตามภาษาโรมัน
มีสุภาษิตว่า ของที่ยึดลงไปในดินแล้ว เป็นทรัพย์ที่
พึงเคลื่อนจากที่ไม่ได้) เช่นขายสวน ถ้าต้นไม้ปลูก
อยู่ในเวลาขายแล้ว เป็นสิทธิแก่ผู้ซื้อ ต้องสันนิษฐานว่า
ของที่อยู่ในที่ดินนั้น ต้องขายเสร็จไปกับที่ดิน

๒ ของที่สูญไปโดยใช้ และไม่สูญไปโดยใช้
เช่นเข้าที่เรายืมเขามากินเป็นต้น เรียกว่าสูญไปโดยใช้
ของที่ไม่สูญไปโดยใช้ เช่นเรายืมสมุดเขามาเล่มหนึ่ง
ต้องใช้สมุดเล่มนั้นอย่างนั้นเขา

๓ ทรัพย์ที่รับได้และรับไม่ได้ ฤาจะเรียกว่าเป็นตัว
ก็ได้ เช่นที่ดินเรารับรู้ได้ว่าแขง แต่เมื่อที่ดินของ

เขานั้น มีที่ดินผู้อื่นล้อมอยู่ข้างนอก แลเรามีอำนาจเดินข้ามที่ดินของเขาได้ อำนาจที่เดินในทางเขานั้นเป็นทรัพย์ของเราที่ยึดไม่ได้

(ก) ทรัพย์ที่เป็นของแผ่นดิน

(ข) ที่ไม่เป็นของใคร

(ค) ที่เป็นของบุคคล

(ฆ) ในทะเลวัดจากตลิ่งออกไป ๓ ไมล์ ไม่ใช่ของใคร

(ก) ของแผ่นดินหวงห้าม แลไม่หวงห้าม ของที่หวงห้าม เช่นในท้องสนามหลวงเป็นต้น ฤาเช่นช้างโขลงหลวงเป็นต้น เป็นของหวงห้าม แม้ว่าเป็นเนื้อกวางกต่ายเช่นนี้แล้ว ไม่เป็นของหวงห้าม

กรรมสิทธิ์

กรรมสิทธิ์ในทรัพย์นั้นคือ อำนาจที่เราจะทำแก่ทรัพย์นั้น โดยอำเภอใจเราได้ ที่กฎหมายไม่ห้าม เช่นไม้ท้าวของเรา ๆ มีอำนาจที่จะทำได้ทุกอย่าง จะหักฤาตัดได้ทั้งสิ้น เว้นไว้แต่จะเอาไปที่หัวคนเล่นไม่ได้ เพราะกฎหมายห้าม

ในกรรมสิทธิ์นั้น มีอำนาจที่รวมอยู่อย่างหนึ่งคือ อำนาจผู้ถือ, คนที่จะถือสิ่งของที่อยู่ในกรรมสิทธิ์ของผู้อื่นไม่จำเป็นที่จะต้องรวมกันในคนเดียวเสมอ, ถึงแม้ว่าเราแยกกันแล้วก็ดี กรรมสิทธิ์อยู่แก่ใครก็ยังคงอยู่อย่างนั้น

ผู้ถือนั้นคือผู้ที่ได้ทรัพย์ไว้ในมือ, แต่ย่างตามหลังนาย ถือของ ๆ นายก็ยังคงเรียกว่านายเป็นผู้ถือ, เราเป็นเจ้าของกรรมสิทธิ์

วิธีที่จะได้ทรัพย์นั้นมีหลายอย่าง ดังจะกล่าวต่อไปนี้

จับของ

จับของทรัพย์แบ่งเป็น ๒ คือ ๑ ที่ดิน ๒ ทรัพย์อื่น ๆ

คือรวมเอาทรัพย์เป็นของเรา แลทรัพย์นั้นไม่ได้เป็นของใครแต่ก่อน

จับของแท้นั้นคือ เช่นเราขึ้นบนเกาะกลางมหาสมุทที่ไม่ได้เป็นของใคร แลใช้อำนาจเช่นเจ้าของ ฤๅเช่นเราจับปลากลางมหาสมุทเป็นต้น เพราะเหตุฉนี้การจับของจึงมีใจความว่า ของนั้นไม่เป็นของใคร แม้ว่าเป็นของใครแล้วต้องเป็นลักฤๅแย่งฤๅฉ้อ

ข. เมื่อไม่ได้เจาะจงของสิ่งนั้น พ้องเรียกไหมได้ เช่นสัญญาจะให้ช้าม้าตัวหนึ่ง แม้ม้าตาย ต้องหาม้ามาแทน ไม่มีใครสามารถทำได้ในโลกย์แล้ว เช่นม้าตายหมดทั่วโลกย์ จึงจะพ้องร้องไม่ได้

ค. สัญญารับทำการด้วยกำลังตนเอง แม้ว่าเจ็บทำไม่ได้แล้ว พ้องร้องไม่ได้

๕ เลิกสัญญาโดยกฎหมายบังคับ เช่นสัญญาจะส่งเข้าสารไปเมืองนอก ภายหลังมีกฎหมายห้ามไม่ให้ส่งเข้าสารเช่นนั้น เปนเลิกสัญญา

พรรณาสัญญา

สัญญาแย่งออกเช่น ๑๑ จำพวก จำพวกที่ ๑ คือทรัพย์เปลี่ยนมือกัน ฤๅเปลี่ยนกรรมสิทธิ์ สัญญาอย่างนี้แย่งออกอีกเปน ๔ อย่าง คือ

๑ ให้ของแก่กัน ฤๅของกำนัน

๒ แลกเปลี่ยน

๓ ซื้อขาย

๔ ยกอำนาจอันชอบธรรมให้แก่กัน

(๑) ของกำนัน

การที่ให้ของแก่กันแลรับของกันในทันใด จะเรียกว่ามีสัญญาแก่กันนั้นยาก เพราะเปนการเสร็จกันไปในเดี๋ยวนั้น ผิดกับการที่ว่า จะให้แต่ยังหาได้ให้ไม่ ซึ่งเปนสัญญาตามคำอธิบาย เปนสัญญาที่ไม่มีสิ่นค้างแก่กัน

สัญญาจะให้ของกำนัน ต้องทำต่อหน้าอำเภอกำนัน จึงจะฟ้องร้องกันได้ เมื่อไม่ทำต่อหน้าอำเภอกำนันฟ้องไม่ได้ ด้วยเหตุว่าเปนประโยชน์ฝ่ายเดียว

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(๒) แลกเปลี่ยน

แลกเปลี่ยนนั้น คือแลกทรัพย์สิ่งของแก่กัน เว้นไว้แต่เงิน ผิดกันกับซื้อขายด้วยเหตุว่าซื้อขายนั้นของฤๅที่ฤๅอำนาจกับเงิน จึงมีบัณหาว่าฝ่ายหนึ่งให้ของ ฝ่ายหนึ่งให้เงินแลของ จะเปนแลกเปลี่ยนฤๅซื้อขาย

ในการที่ว่าสัญญาจะแลกเปลี่ยน ฤๅซื้อขายนั้นคล้ายกันมาก แต่ตามกฎหมายโรมันแบ่งแยกแลกเปลี่ยนแลซื้อขายเปนต่างกัน คือ ผู้ขายให้ของผู้ซื้อให้ราคา คือเงิน

ในกฎหมายไทย ข้อยังคัยในเรื่องแลกเปลี่ยน ฤๅซื้อขายนั้นเหมือนกันโดยมาก จึงไม่เป็นการสำคัญที่จะต้องรู้ว่าเป็นสัญญาแลกเปลี่ยน ฤๅซื้อขายอย่างไร จะสำคัญอยู่ก็แต่ในส่วนที่กฎหมายยังคัยให้มีหนังสืออย่างใดอย่างหนึ่งเป็นหลักฐาน เช่นคังนายแดงกับนายคำจะแลกเปลี่ยนที่ดินแก่กัน แต่ที่ดินของนายแดงราคาน้อย นายแดงต้องแถมเงินให้นายคำเพิ่มขึ้นอีก เช่นนี้ต้องวินิจฉัยว่าเป็นการแลกเปลี่ยน ฤๅซื้อขาย เพราะเหตุว่าเมื่อเป็นการซื้อขายแล้ว ต้องทำหนังสือต่อหน้าอำเภอกำนัน มิคัวอย่างเรื่องความพระยามหิยาลที่ทำหนังสือธรรมคาใช้ได้ แต่ที่จริงในเรื่องนี้คำพิพากษาไม่ได้แสดงข้อนี้

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(๓) ซื้อขาย

สัญญาซื้อขาย ฤๅ จะซื้อขาย บางอย่างต้องทำต่อหน้าอำเภอกำนัน คือซื้อขายที่ดิน เมื่อไม่มีหนังสืออำเภอกำนันแล้ว ไม่เรียกว่าได้ซื้อขายแก่กันเลย

ในการซื้อขายและการแลกเปลี่ยน จะเรียกว่าเปลี่ยนกรรมสิทธิ์เมื่อไร ฤๅอีกนัยหนึ่งของ ๆ ผู้ขาย

ระเปนของ ๆ ผู้ซื้อเมื่อไรพูดยากในกฎหมายไทย แม้ว่าผู้ขายส่งของให้ผู้ซื้อไปแล้ว ถึงผู้ซื้อยังไม่ได้ใช้เงินราคาให้แก่ผู้ขายก็ดี ของนั้นคงเรียกว่าเปนของๆผู้ซื้อ เงินที่ติดกันนั้น เรียกว่าเปนหนี้สินติดกัน แต่แม้ยังไม่ได้ส่งของให้แก่ผู้ซื้อมา ฤาส่งให้ถึงมือผู้ซื้อแล้ว ผู้ซื้อยังหอบมาไม่ได้ ๆ กลับฝากผู้ขายไว้อีกดังนี้ ไม่เปนการง่ายระวินิจฉัย

ถึงนี้ก็สำคัญอยู่แต่อย่างเดียว เพราะเมื่อผู้ขายเอาของที่เราซื้อแล้วนั้น ไปขายให้แก่คนอื่นต่อไป ข้อที่ระวินิจฉัยก็ระเปนข้อนี้ ว่าได้เปลี่ยนกรรมสิทธิ์แล้วฤายัง แม้ว่าเปลี่ยนกรรมสิทธิ์กันแล้ว ผู้ขายไม่มีอำนาจขายต่อไป ต้องเรียกของนั้นกลับคืนมาจากคนที่ ๓ ให้คนที่ ๓ ไปฟ้องร้องเอาแก่ผู้ขายต่างหาก แม้ว่ากรรมสิทธิ์ยังไม่ได้เปลี่ยนมือผู้ซื้อก็ดี ต้องฟ้องเรียกสินไหมแก่ผู้ขายเท่านั้น

(๔) ให้อำนาจซอยธรรมแก่กัน

ให้อำนาจซอยธรรมแก่กัน โดยสเนหา ฤาโดยแลกเปลี่ยนซื้อขายก็ดี ต้องอยู่ในข้อบังคับสัญญานั้น ๆ แลอำนาจซอยธรรมอย่างไรจะยกให้แก่กันได้แลไม่ได้ ได้กล่าวไว้แล้วในมูลคดี

ตามกฎหมายไทย อำนาจของธรรมที่จะได้รับ
มรฎกนั้นยกให้แก่ใครไม่ได้ เมื่อมรฎกอยู่ในมือคน
แล้ว จึงจะยกให้คนอื่นได้

เรื่องยืมอนุญาต

จำพวกที่ ๒ ในสัญญานั้นมี ๓ อย่าง
๑ ยืมไปบริโภค
๒ ยืมไปใช้
๓ เช่า

(๑) ยืมไปบริโภค

ยืมไปบริโภคนั้น คือยืมสิ่งของไปเป็นที่เข้าใจว่า
จะเอาไปใช้ แลในการที่ใช้นั้น ของจะสูญเปนธรรมดา
เช่นยืมเข้าสารหนึ่งไปรับประทาน ฤๅอีกนัยหนึ่งจะ
เรียกว่ายืมของอัญมณี การที่จะคืนของที่ยืมมานั้น
มิได้จะเอาของอันที่ยืมคืนให้ คือเอาของอันอื่นชนิด
เดียวกันคืนให้แทน

สัญญายืมไปบริโภคบางทีก็มีสินจ้างบางทีก็ไม่มี
ที่มีสินจ้างนั้นจะเรียกว่ายืมก็ไม่สู้เหมาะนัก เพราะคล้าย
กับเช่ามาก แต่จะพูดว่าเช่าเข้าไปกินก็เขินเหมือนกัน

ที่มีสินข้างนั้น คือกู้หนี้ให้ตอกเบี้ย กู้หนี้ต้องมีหนังสือเป็นหลักฐาน เมื่อเงินที่ยืมไปกว่า ๔ บาทขึ้นไป หนังสือนั้นไม่จำเป็นต้องทำต่อหน้าอำเภอถ้ำนั้น

(๒) ยืมไปใช้

ยืมไปใช้ คือยืมของไปต้องให้สิ่งนั้นคืน จะเอาอันอื่นที่เหมือนกัน มาคืนแทนไม่ได้ เช่นยืมม้าไปขี่ จะเอาม้าอื่นมาโยนให้ไม่ได้ ยืมอย่างนี้เป็นสัญญาที่ไม่มีสินข้าง แม้ว่ามีสินข้างให้แก่กันแล้ว ต้องเรียกว่าเช่า

(๓) เช่า

เช่านั้นคือยืมของไปรับว่าจะให้ค่าเช่า

เช่าที่ดิน ต้องมีหนังสือสัญญาเป็นสำคัญไม่มีหนังสือแล้วไม่เรียกว่าเช่า จะฟ้องเรียกค่าเช่าไม่ได้ ตามพระราชบัญญัติรัชกาลที่ ๕

ของกลางสูญ

อนึ่งในเรื่องสัญญายอมอนุญาต แลสัญญาอื่นที่คล้ายเช่นฝาก ฤๅรับทำของ ๆ เขา ฤๅรับจำนำ มี

รถไฟฝากน้ำ บริษัทขุดคลองคูนาสยาม ทั้ง ๓ รายนี้ รัฐบาลได้รับรองว่าเป็นบุคคลแล้ว บริษัทที่จดทะเบียนนั้น คือ รถรางไทย แยงก์สยามกำมาจน เป็นต้น

บริษัทต่างประเทศ ถ้าได้จดทะเบียนถูกต้อง เป็นบุคคลในเมืองของเขาแล้ว ถึงจะไม่ได้จดทะเบียนในเมืองไทยก็ดี กฎหมายไทยรับว่า ๆ เป็นบุคคล

วันที่ ฉันวาคม รัตนโกสินทรศก ๑๒๗

หุ้นส่วนค้าขาย เช่นอย่างจีน ๒ คน ๓ คนเข้าหุ้นกันค้าขายไม่ออกชื่อผู้ใด ใช้ยี่ห้อเป็นสำคัญ หุ้นส่วนเช่นนี้ไม่เป็นหุ้นส่วนในกฎหมาย ตามธรรมดาแล้วออกชื่อยี่ห้อเป็นโจทฟ้องความไม่ได้ แต่เพื่อประโยชน์ให้สดวกแก่การค้าขาย ในวิธีพิจารณาความแพ่งอนุญาตให้ฟ้องร้องในนามของยี่ห้อนั้นได้เป็นบางอย่าง ยี่ห้อจะเป็นโจทย์ได้เพียงใดจะเป็นจำเลยได้เพียงใดต้องพิจารณาคำสำนวน ในวิธีพิจารณาความแพ่งนั้น

ทรัพย์

คำที่ว่าทรัพย์นั้น ต้องเข้าใจว่าความกินหรือไม่กิน กระโดน ขันน้ำ หรือที่เรียกว่าของเคลื่อนที่ได้ เงิน

ตัวเงิน ช้าง ม้า สัตว์พาหนะ แต่ไม่ใช่ลูกร้างรัย เงินล่วงน่า และมีความกินถึงอำนาจอันชอบธรรมที่จะฟ้องร้องผู้ใดให้ใช้ผลมาเป็นทรัพย์ ไม่ใช่อำนาจอันชอบธรรมที่จะฟ้องร้องทุกอย่างไป เป็นต้นอำนาจอันชอบธรรมที่จะโวัดเลือกผู้ใหญ่บ้านได้ ตามวิธีปกครองท้องที่นั้นไม่เรียกว่าทรัพย์ แต่อำนาจอันชอบธรรมที่จะฟ้องเรียกเงินจากลูกฉนี้นั้นเรียกว่าทรัพย์

ศัพท์ที่ว่าของใช้ได้ต่าง ๆ ต้องสังเกตว่าผู้เขียนต้องการประสงค์ ให้เราเข้าใจอย่างไรเสมอไปทุกเรื่อง แต่อย่างไรก็ดี ของแล้วต้องเข้าใจว่าทรัพย์อันเคลื่อนที่ได้ และที่เอามือจับได้ และไม่มีชีวิตร์ อย่างน้อยที่สุดคำที่ว่าของนั้นต้องเข้าใจความดังนั้น และโดยมากต้องเข้าใจความกินถึงสัตว์พาหนะ และสัตว์เลี้ยงด้วย และไม่เสมอไป

ทรัพย์ที่เคลื่อนที่ไม่ได้ คือ ที่ดิน และต้นหมากรากไม้ที่ปลูกเป็นประจำในที่ดิน เป็นต้น ผลไม้ในสวนเป็นต้น อำนาจอันเกี่ยวกับที่ดิน เช่นอำนาจที่จะเดินข้ามที่ดินของคนอื่นไปนั้น เรียกว่าทรัพย์อันเคลื่อนที่ไม่ได้เหมือนกัน

บ้านเรือนโรงระเปนทรัพย์อันเคลื่อนที่ได้ หรือเปนทรัพย์อันเคลื่อนที่ไม่ได้ ต้องพิจารณาเปนเรื่อง ๆ สุภาสิตที่เปนหลักนั้น คือ มีความว่า สิ่งใดที่ยึดติดลงไปในที่ดินแล้วรวมอยู่ในที่ดิน แต่สุภาสิตนี้มีข้อยกเว้นบ้าง เช่นดังในเมืองไทย เรือนโรงทำด้วยกระดานหรือไม้อื่น ๆ ถึงแม้ระยึดอยู่ในที่ดิน ถือว่าเช่นของเคลื่อนที่ได้

หลักเขตร์ถัดรั้วที่แบ่งเขตร์ที่ของเรากับของคนอื่นนั้น ถือว่าเปนส่วนของที่ดิน แต่รั้วชายคาหลังเรือนที่ได้ปลูกไว้สำหรับกันคนขึ้นเรือนนั้น ไม่ถือว่าเปนส่วนที่ดิน ถือว่าเปนส่วนของเรือน

วันที่ ๑๘ พฤศจิกายน รัตนโกสินทรศก ๑๒๗

APPENDIX E

Ley N° 340. Sanción: 25/9/1869 (CODIGO CIVIL)

Definition of Things (*Cosa*)

Art. 2311. - Se llaman "cosas" en este Código, los objetos corporales susceptibles de tener un valor.

Art. 2311. - Freitas pone al art. 317 de su proyecto de código, una larga nota demostrando que sólo deben entenderse por "cosas" los objetos materiales, y que la división en cosas corporales e incorporales, atribuyendo a la palabra "cosas" cuanto puede ser objeto de derechos, aceptada generalmente, ha confundido todas las ideas,

Definition of Property (Bienes)

Art. 2312. - Los objetos inmateriales susceptibles de valor, e igualmente las cosas, se llaman "bienes". El conjunto de los bienes de una persona constituye su "patrimonio".

Art. 2312. - Véase el proemio del tít. 17, Part. 2ª. Duranton, t. 4, núm. 3. Toullier, t. 5, núm. 510. Marcadé, sobre el art. 543, núm. 402. Hay derechos y los más importantes, que no son bienes, tales son ciertos derechos que tienen su origen en la existencia del individuo mismo a que pertenecen, como la libertad, el honor, el cuerpo de la persona, la patria potestad, etc. Sin duda, la violación de estos derechos personales puede dar lugar a una reparación que constituya un bien, jurídicamente hablando; pero en la acción nada hay de personal: es un bien exterior que se resuelve en un crédito. Si, pues, los derechos personales pueden venir a ser la causa o la ocasión de un bien, ellos no constituyen por sí mismos un bien "in jure". Lo mismo se puede decir de las facultades del hombre, de su aptitud, de su inteligencia, de su trabajo. Bajo una relación económica, las facultades del hombre constituyen sin duda la riqueza; mas jurídicamente, ellas no hacen parte de sus bienes. Así, el que hace cesión de sus bienes a sus acreedores, no comprende en la cesión, ni su libertad, ni sus facultades personales. El poder jurídico que se puede tener sobre una persona, y los derechos que de él le resulten no son bienes, aunque las ventajas que obtenga, den nacimiento a bienes. En la jurisprudencia sólo se considera "bien" lo que puede servir al hombre, lo que puede emplear éste en satisfacer sus necesidades, lo que puede servir para sus usos o placeres, lo que puede en fin entrar en su patrimonio para aumentarlo o enriquecerlo, aunque consista en un mero derecho, como un usufructo, un crédito.

El "patrimonio" de una persona es la universalidad jurídica de sus derechos reales y de sus derechos personales, bajo la relación de un valor pecuniario, es decir, como bienes. Es la personalidad misma del hombre puesta en relación con los diferentes objetos de sus derechos. El patrimonio forma un todo jurídico, una universalidad de derechos que no puede ser dividida sino en partes alícuotas, pero no en partes determinadas por sí mismas, o que puedan ser separadamente determinadas. Una pluralidad de bienes exteriores tal, que pueda ser considerada como una unidad, como un todo, se llama "una universalidad" en este código. Si es por la intención del propietario, es "universitas facti", si por el derecho, "universitas juris". El patrimonio de una persona presenta una universalidad de la segunda especie. Una universalidad de derecho puede ser transformada en una universalidad de hecho por la voluntad del propietario, por ejemplo, cuando un testador lega, a título singular, una parte de su sucesión.

El Derecho romano distinguía el patrimonio del peculio. El patrimonio era "pecunia hominis sui juris", el peculio era "pecunia hominis alieni juris". La teoría del peculio es extraña a este código. Véase Zachariæ, § 251.

Ownership (*Domino*)

TITULO V

Del dominio de las cosas y de los modos de adquirirlo

Art. 2506. - El dominio es el derecho real en virtud del cual una cosa se encuentra sometida a la voluntad y a la acción de una persona.

Art. 2506. - La L. 1, tít. 28, Part. 3ª, define el dominio o la propiedad: "poder que ome ha en su cosa de facer de ella o en ella lo que quisiere, según Dios e según fuero"; pero otra ley dice: "maguer el home haya poder de facer en lo suyo lo que quisiere, pero débelo facer de manera que non faga daño ni tuerto a otro". L. 13, tít. 32, Part. 3ª. El cód. francés, art. 544, define, la propiedad diciendo que: "la propiedad es el derecho de gozar y de disponer de las cosas de la manera más absoluta". Este artículo, en lugar de dar una verdadera definición, hace mas bien por una enumeración de los principales atributos de la propiedad, una descripción dé ese derecho. Los romanos hacían una definición empírica de la propiedad, "jus utendi et abutendi", definición que no tiene relación sino con los efectos y no con las causas, ni con los orígenes, porque ellos debían ocultar los orígenes de sus propiedades. La propiedad debía definirse mejor en sus relaciones económicas: el derecho de gozar del fruto de su trabajo, el derecho de trabajar y de ejercer sus facultades como cada uno lo encuentre mejor. Para la legislación aceptamos la definición de los jurisconsultos Aubry y Rau, § 190.

Possession (*Posesión)*

TITULO II

De la posesión y de la tradición para adquirirla (a)

(a) Savigny en el párr. 6 de su obra "De la posesión", pregunta a qué clase de derechos pertenece la posesión. Expone y discute las diversas opiniones de los jurisconsultos antiguos y modernos de Alemania, sosteniendo los unos que la posesión es un derecho real por relación de las cosas sobre que versa, y otros que es un mero derecho personal." Dice que la cuestión no puede presentarse sino respecto a las acciones posesorias, pues que en cuanto a la prescripción, la posesión no es más que una parte, lo mismo que la "justa causa" no es sino una parte de la tradición que transfiere la propiedad; y que seria absurdo preguntar a qué especie de derechos pertenece la "justa causa". Lo mismo sería querer determinar a qué clase de derechos pertenece la posesión mientras se la considere como uno de los elementos de la prescripción para adquirir. La cuestión no se presenta pues, sino respecto a los interdictos, a las acciones posesorias, y como éstas nacen de las obligaciones "ex maleficiis", deben colocarse entre las obligaciones "ex delictis". En apoyo de su opinión, cita la L. 1. tít. 1, lib. 43, Dig. donde se dice "interdicta omnia, licet in rem videantur concepta, vi tamen ipsa personalia sunt". En cuanto a la posesión misma, como ella no es sino una condición requerida para el ejercicio de las acciones posesorias, no es un derecho, y no puede por lo tanto pertenecer a ninguna clase de derechos.

Lo contrario de Savigny, enseñan: Maynz, lib. 2. § 162. Demolombe, t. 9, desde el núm. 479. Zachariæ y Belime, sosteniendo que la posesión es un-derecho real. Troplong, sobre el art. 2228 trata extensamente esta materia.

Molitor en su tratado "De la posesión", no sigue ni una ni otra de las opiniones expresadas. Dice que la posesión no es un derecho puramente real, porque aunque la cosa esté inmediatamente sometida al poseedor, este derecho no puede ser demandado contra los terceros poseedores, sino sólo contra aquellos que han violado la posesión. Si B ha despojado a A y en seguida B ha sido despojado por C, B tendrá sólo el "interdicto unde vi" contra C, A no lo tendrá sino contra B. L. 1, tít. 16, lib. 43, Dig.

Por otra parte, la posesión no es un derecho puramente personal: no es más que un "jus ad rem", en este sentido, que para tener la cosa es preciso el hecho, es preciso el intermediario de una tercera persona obligada a entregarla o a darla. La posesión, por lo tanto, no es así, ni un derecho puramente real, ni un derecho puramente personal; pero como el derecho manifiesta sobre todo su carácter y su energía por la acción, diremos que pertenece más bien a la clase de los derechos personales. Podemos llamarlo un derecho real personal, real porque el derecho sobre la cosa es directo e inmediato, motivo por el cual las acciones posesorias son o aparecen ser "concepta in rem", y personal, porque la acción posesoria no se intenta sino contra el autor de un hecho, del hecho del despojo o de la turbación en la posesión, sin que pueda dirigirse contra terceros poseedores.

Art. 2351. - Habrá posesión de las cosas, cuando alguna persona, por sí o por otro, tenga una cosa bajo su poder, con intención de someterla al ejercicio de un derecho de propiedad.

Art. 2351. - Véase L. 47, tít. 28, Part. 3ª. La L. 1, tít. 30 de la misma Partida dice que "posesión es tenencia

derecha que ome ha en las cosas corporales, con ayuda del cuerpo e del entendimiento". Esta definición está enteramente conforme con la nuestra. El cód. francés, art. 2228, dice: La posesión es la tenencia o goce de una cosa o de un derecho que tenemos, o que ejercemos por nosotros mismos, o por otro que lo tiene y ejerce en nuestro nombre". "El código, dice Troplong, toma la posesión en el sentido más general, y en su elemento más simple, es decir, es el primer grado, que tiene por resultado poner al individuo en relación con la cosa. En cuanto a las variedades de esa relación, que son muy numerosas, por ejemplo, posesión a título de propietario, posesión precaria, etc., el código aun no se ocupa. En los artículos siguientes, el legislador designará las cualidades de que ella debe revestirse a medida que venga a ser la fuente de derechos particulares".

Nosotros seguimos el orden inverso: definimos la posesión por la que tiene la mayor importancia Jurídica, la que presenta todos los caracteres indispensables para los derechos posesorios, la posesión que sirve para la prescripción y la que da acciones posesorias "adversus omnes", dejando para otro lugar tratar de la posesión que sólo sirve para los interdictos o acciones posesorias. La definición, pues, del cód. francés no es contraria a la nuestra, pues él define lo que regularmente se llama posesión natural, y nosotros definimos la que por lo común se dice posesión civil.

La definición del cód. francés supone que la posesión puede no ser de cosas corporales, sino de meros derechos, lo que en la jurisprudencia se llama "cuasi-posesión". Las leyes romanas declaraban que sólo podían poseerse las cosas corporales... "quia nec possideri intelligitur jus incorporale" (L. 4, § 27, tít. 3, lib. 41, Dig.). "Possidere autem possum", decía otra ley, "quoe sunt corporalia" (L. 3, tít. 2, lib. 41, Dig.). Pero mirada la posesión en sus relaciones con el derecho de propiedad, la posesión se manifiesta como el ejercicio de los poderes comprendidos en ese derecho. Bajo este punto de vista practico, la idea ha parecido susceptible de ser extendida a otros derechos reales, especialmente a los derechos de servidumbre, que son desmembraciones del derecho de propiedad; y se ha considerado como poseedor de una servidumbre al que ejerce los poderes contenidos en el derecho de servidumbre. Esta es la "juris possessio" o la "quasipossessio". Los romanos habían restringido la cuasi-posesión a las servidumbres, y no la habían extendido a otros "jura in re", y menos a los derechos personales y a los derechos de las obligaciones, respecto de los cuales la idea del ejercicio de un poder físico no es admisible bajo relación alguna. El cód. francés, como se ha visto, extiende la posesión a todos los derechos. Molitor se empeña en demostrar que la cuasi-posesión no puede extenderse sino a las servidumbres. ("De la posesión", núm. 14).

Savigny, en su "Tratado de la posesión", desde el núm. 7, enseña que la posesión no es sino un hecho, y sólo un derecho por sus efectos, que son la prescripción y las acciones posesorias: "Así, dice, la posesión es un hecho y un derecho a la vez". Molitor ha combatido está opinión, a nuestro juicio victoriosamente, demostrando que toda posesión es un derecho.

Purchase and Sale (*Compraventa*)

TITULO III

Del contrato de compra y venta

Art. 1323. - Habrá compra y venta cuando una de las partes se obligue a transferir a la otra la propiedad de una cosa, y ésta se obligue a recibirla y a pagar por ella un precio cierto en dinero.

Art. 1323. - LL. 1 y 9, tít. 5, Part. 5a. Cód. francés, arts. 1582 y 1591; italiano, 1447; de Nápoles, 1427 y 1436. Instit., §§ 1 y 2, tít. 24, lib. 3

Habiéndose publicado el cód. italiano en 1865, dejamos las concordancias con el cód. sardo, y las haremos con el nuevo cód. de Italia, continuando sin embargo siempre con el de Nápoles.|

Capítulo I

De la cosa vendida

Art. 1327. - Pueden venderse todas las cosas que pueden ser objeto de los contratos, aunque sean cosas futuras, siempre que su enajenación no sea prohibida.

Art. 1327. - LL. 20, 21 y sigts., tít. 11, Part. 5ª.

La palabra "cosa" se toma en el sentido más extenso, abrazando todo lo que pueda ser parte de un patrimonio, cosas corporales o derechos, con tal que sean susceptibles de enajenación y de ser cedidos. El derecho de hipoteca puede así ser vendido; pero solamente con el crédito del cual es accesorio. Una consideración análoga se aplica a las servidumbres prediales que no pueden cederse sino con el predio a que son inherentes. Las servidumbres personales no son enajenables, porque son inherentes a la individualidad del titular; mas el usufructuario puede ceder el ejercicio de su derecho, y si lo hace por un precio, esta cesión constituye una verdadera venta. Lo mismo decimos de la convención por la cual se constituye una servidumbre cualquiera por un precio en dinero.

La venta de las cosas futuras, como los frutos que nacerán, o los productos de una fábrica, es una venta condicional, si los frutos llegan a nacer, entonces ella produce un efecto retroactivo al día del contrato (Pothier, "Vente", núm. 5. L. 8, Dig. "De cont. empt.").

Lease and Hire (Locación)

TITULO VI

De la locación

Art. 1493. - Habrá locación, cuando dos partes se obliguen recíprocamente, la una a conceder el uso o goce de una cosa, o a ejecutar una obra, o prestar un servicio; y la otra a pagar por este uso, goce, obra o servicio un precio determinado en dinero.

El que paga el precio, se llama en este Código "locatario", "arrendatario" o "inquilino", y el que lo recibe "locador" o "arrendador". El precio se llama también "arrendamiento" o "alquiler".

Art. 1493. - Cód. de Chile, art. 915. Cód. francés, arts. 1709 y 1710; italiano, 1569 y 1570: napolitano, 1555 y 1556. LL. 1 y 6, tít. 8, Part. 5ª. L. 2. tít. 2, lib. 19, Dig. y Proemio, § 2. tít. 25, lib. 3, Instít. Maynz, "Derecho romano", § 298.

Marcadé, en el comentario al art. 1708 del cód. francés, trata extensamente de la denominación en el contrato de "locador" y "locatario", la única, dice, que evita todos los equívocos en las leyes, y las falsas doctrinas de los escritores sobre la materia.

La definición que forma este artículo, evita la confusión que regularmente se hace de locación con otros contratos nominados o innominados.

Si una de las partes transfiere a la otra por título oneroso el uso o goce temporario de una cosa, con derecho real, el contrato será de usufructo.

No será locación la entrega de bienes al acreedor, para que use o goce de ellos por un tiempo determinado en pago de su crédito. Una deuda que se pagase de esa manera, debía regirse por las reglas relativas al pago.

Si el usufructuario, locatario, o sublocatario del usufructo tratasen con el propietario de la cosa la transferencia del uso o goce de ella por tiempo igual al del usufructo, aunque el precio fuera pagadero en prestaciones periódicas, y aunque en el contrato se expresase que el usufructuario arrendaba la cosa al propietario, no sería un contrato de locación, sino de consolidación del usufructo. Puede también haber un distracto de locación, bajo todas las apariencias de arrendamiento, pero no por eso el contrato sería de locación. El contrato por el cual una de las partes transfiriese a otra por un precio cierto, y en prestaciones sucesivas, y por tiempo determinado, los frutos o productos de un bien raíz, no será locación, sino venta de frutos.

El contrato por el cual una de las partes transfiriese por un precio en dinero, el derecho de percibir temporalmente rentas o cualesquiera prestaciones periódicas, aunque las partes lo llamen arrendamiento, como lo llaman las leyes de España, no sería en realidad sino una cesión de créditos. Se hallan en este caso los contratos de los particulares con los gobiernos para percibir algunas rentas públicas. Lo mismo decimos que sería una cesión judicial de crédito, el remate o adjudicación, en virtud de una sentencia, del derecho a percibir alquileres, rentas o cualesquiera otras prestaciones.

Si el precio en un contrato de arrendamiento consistiera en una cantidad de frutos de la cosa, no sería locación sino un contrato innominado. Si la cantidad de frutos fuese una cuota proporcional, respecto al todo que produzca la cosa, sería un contrato de sociedad, aunque las partes lo llamaran arrendamiento.

Si una de las partes transfiriese el uso o goce temporal de una cosa, y la otra parte le transfiriese el uso o goce de otra cosa, sería un contrato innominado.

Si una de las partes transfiere el uso o goce de una cosa, transfiriéndole la otra el goce de otra cosa, sería también un contrato innominado.

Si la transferencia del uso o goce que hiciera una de las partes, fuese porque la otra se obligará a prestarle un servicio, o por un servicio que le hubiese prestado, también sería un contrato innominado.

Si la transferencia del uso o goce temporario de una cosa, se hiciese, no obligándose la otra parte a pagarle un precio, ni a entregarle cosa alguna, ni a prestarle un servicio, el contrato sería un comodato.

Capítulo I

De las cosas que pueden ser objeto del contrato de locación

Art. 1499. - Las cosas muebles no fungibles, y las raíces sin excepción pueden ser objeto de la locación.

Donation (*Donaciones*)

TITULO VIII

De las donaciones

Art. 1789. - Habrá donación, cuando una persona por un acto entre vivos transfiera de su libre voluntad gratuitamente a otra, la propiedad de una cosa.

Art. 1789. - L. 1, tít. 4, Part. 5ª. L. 7, tít. 1, lib. 10, Nov. Rec. L. 29, tít. 5, lib. 39, Dig. Cód. francés, art. 894; napolitano, 814; holandés, 1703. Savigny, en el t. 4 del "Derecho romano", destina el § 176 a comparar las legislaciones principales de Europa sobre las donaciones, que en verdad son muy diferentes las unas de las otras.

Capítulo I

De las cosas que pueden ser donadas y bajo qué condiciones

Art. 1799. - Las cosas que pueden ser vendidas pueden ser donadas.

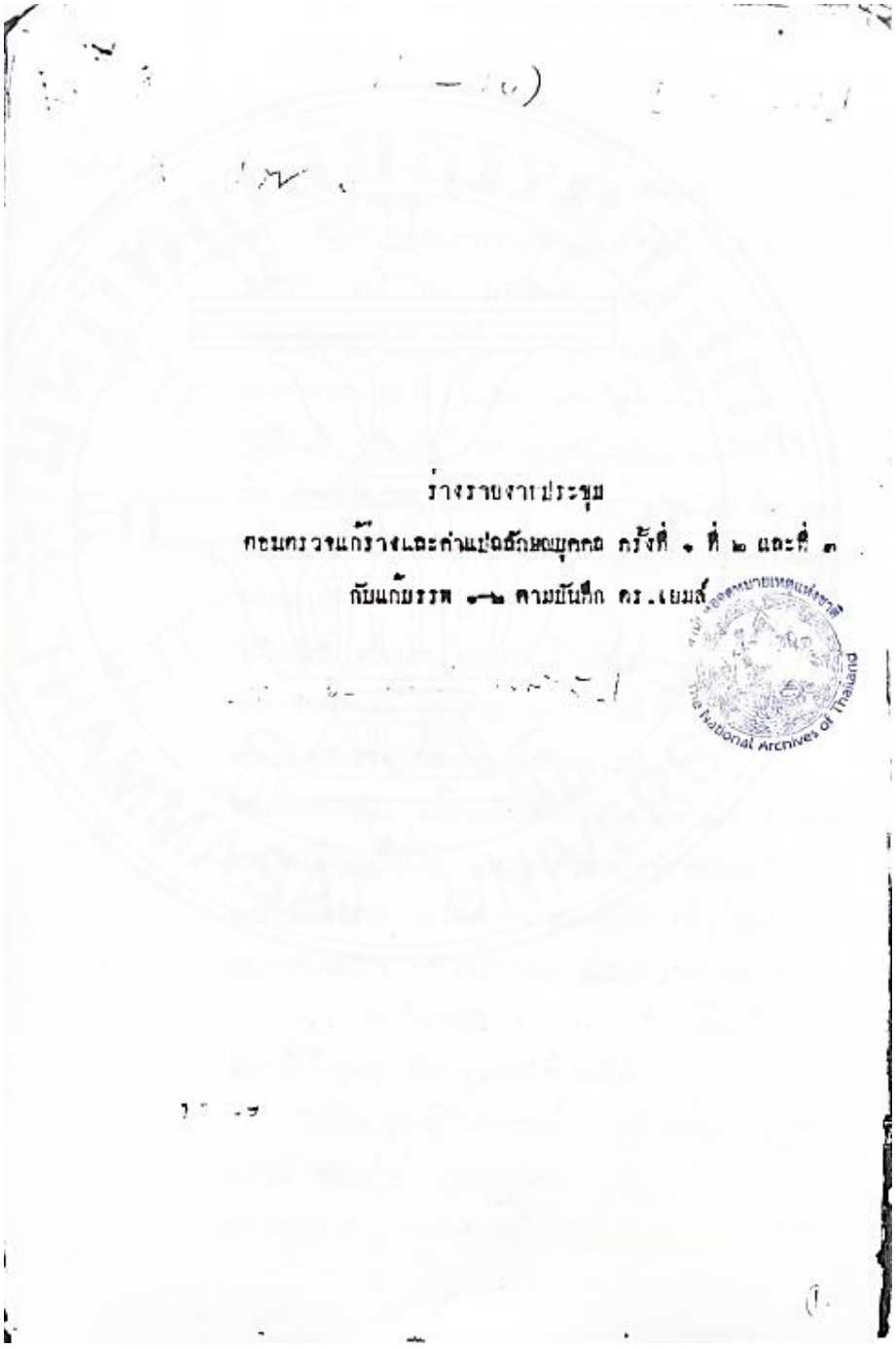
Art. 1800. - Las donaciones no pueden comprender, sino los bienes presentes del donante, y si comprenden también bienes futuros, serán nulas a este respecto. Las donaciones de todos los bienes presentes subsistirán si los donantes se reservaren el usufructo, o una porción conveniente para subvenir a sus necesidades, y salvo los derechos de sus acreedores y de sus herederos, descendientes, o ascendientes legítimos.

Art. 1800. - Cód. francés, art. 943; napolitano, 867; holandés, 1704. La L. 8. tít. 4, Part. 5ª, supone válidas las donaciones de todos los bienes: lo mismo la L. 35, tít. 54, lib. 8, cód. romano. La L. 7, tít. 12, lib. 3, F. R. no permite la donación de todos los bienes. La L. 2, tít. 7, lib. 10 de la Nov. Rec., prohibió la donación de todos los bienes. Véase Savigny, "Derecho romano", t. 4, desde la p. 146. Demolombe, t. 20, núm. 409. Por el artículo, queda prohibida la donación de los bienes futuros, porque el donante no puede desprenderse de la propiedad de unos bienes que no tiene, ni hacer tradición de ellos. Regularmente los escritores llaman bienes presentes aquellos sobre los cuales hay acción para adquirirlos, o que son producto de los bienes presentes, como el parto de los animales: pero aun la donación de éstos sólo sería una promesa, pues que no había tradición por parte del donante, ni posesión actual por parte del donatario.

APPENDIX F

Mor Ror 6 Yor/17

Draft of Meeting Report Concerning Correcting and Translate Law of Person 1st, 2nd and 3rd Time with the Correcting of Book I and II Following the Record of Dr. James



ร่างรายงานการประชุม

คณะกรรมการแก้ไขและตรวจชำระกฎหมายบุคคล ครั้งที่ ๑ ที่ ๒ และที่ ๓

กับแก้ไขมาตรา ๑-๒ ตามบันทึก ดร.เจมส์

ร่าง

รายงานประชุม

ครั้งที่ ๔๓ วันศุกร์ ที่ ๑๔ มกราคม พ.ศ. ๒๔๖๕

วันนี้นัดประชุมตรวจร่างประมวลแพ่งที่วังสมเด็จพระเจ้าน้องยาเธอ เจ้าฟ้ากรมหลวงนครสวรรค์วรพินิต เวลา ๙.๐๐ น.ท. อย่างที่เคย กรรมการมาครบคณะ

สมเด็จเจ้าฟ้ากรมหลวงนครสวรรค์ฯ ทรงแถลงพระดำริห์ในมาตราต่าง ๆ แห่งลักษณบุคคลที่ได้ทรงตรวจ ดังต่อไปนี้

มาตรา ๔๔ กับมาตรา ๔๕ ข้อ ๓ นั้น ทรงเห็นว่ายังมีความขัดกันอยู่ สมเด็จกรมพระยาเทวะวงศ์ฯ ทรงเห็นควรแก้ ตกลงแก้มาตรา ๔๔ กับมาตรา ๔๕ เป็นดังนี้

"มาตรา ๔๔ การให้อำนาจแก่มูลนิธินั้น ย่อมสุดแล้วแต่อำเภอใจของรัฐมาตุ และจะยังคับให้มีข้อไขอย่างไร ๆ แล้วจึงอนุญาตตามที่เห็นควรก็ได้

อนึ่ง เมื่ออนุญาตให้อำนาจแล้ว ให้เก็บไขความข้อสำคัญของมูลนิธินั้นประกาศในราชกิจจานุเบกษา"

"มาตรา ๔๕ เมื่อพนักงานอัยการฤๅผู้ใดผู้หนึ่งซึ่งมีส่วนได้เสียด้วย ยื่นคำร้องขอต่อศาล ๆ จะมีคำสั่งให้เลิกมูลนิธินั้นเสีย และแต่งตั้งผู้ชำระบาญชีนายหนึ่งฤๅหลายนาย ในกรณีที่กล่าวต่อไปนี้อย่างหนึ่งอย่างใดก็ได้ คือ

(๑) ถ้ามูลนิธินั้นตั้งขึ้นขัดต่อบทบัญญัติในหมวดนี้ ฤๅว่ามูลนิธินั้นทำการขัดต่อกฎหมายก็ดี รัฐประศาสโนบายก็ดี ฤๅความปลอดภัยของบุคคลฤๆทรัพย์ก็ด้วย เหมือนกัน

(๒)

(49)

(๒) ถ้ามูลนิธินั้นจะนำการกุศลต่อไปอีกก็ไม่ได้ ไม่เลิกว่าเพราะเหตุใด

(๓) ถ้ามูลนิธิทำการขัดต่อความในมัตรีกหรือมูลนิธินั้น ฤๅขัดต่อข้อใดซึ่งรัฐบาลได้อนุญาตให้อำนาจไว้ "

มาตรา ๕๓ เติมคำ ได้ เข้าในประโยคที่ ๓ ระหว่างคำ มูลนิธิ กับ ใน

มาตรา ๕๔ คำ "things" ที่แปลว่า "ทรัพย์สิ่งของ" นั้น ควรใช้ว่า "ทรัพย์" ส่วนคำ "Property" ที่เคยแปลว่า "ทรัพย์" เช่นมาตรา ๖๒ วรรค นั้น แก้เป็น "ทรัพย์สิน" ที่ประชุมเห็นชอบ และให้คงวงสารานุกรรจงกันศัพท์ ๒ คำนี้ซึ่งมีใช้อยู่ในมาตราอื่นมาเสนอ (ได้ค้นมาแล้ว)

มาตรา ๖๐ วรรค ๑ ที่แปล "Land and things" ไว้ว่า "ที่ดินกับทรัพย์สิ่งของ" นั้น ควรแก้เป็น "ที่ดินกับทรัพย์" และควรแก้ความในวรรค ๒ เสียใหม่เป็นว่า "ทรัพย์อื่น ๆ นั้นเป็นสังหาริมทรัพย์ทั้งสิ้น" ที่ประชุมเห็นชอบ (ได้พิจารณาที่แก้ใหม่ดังไว้ด้วย)

"มาตรา ๖๐ ที่ดินกับทรัพย์ที่ติดอยู่กับที่ดินนั้น นับว่าเป็นอสังหาริมทรัพย์

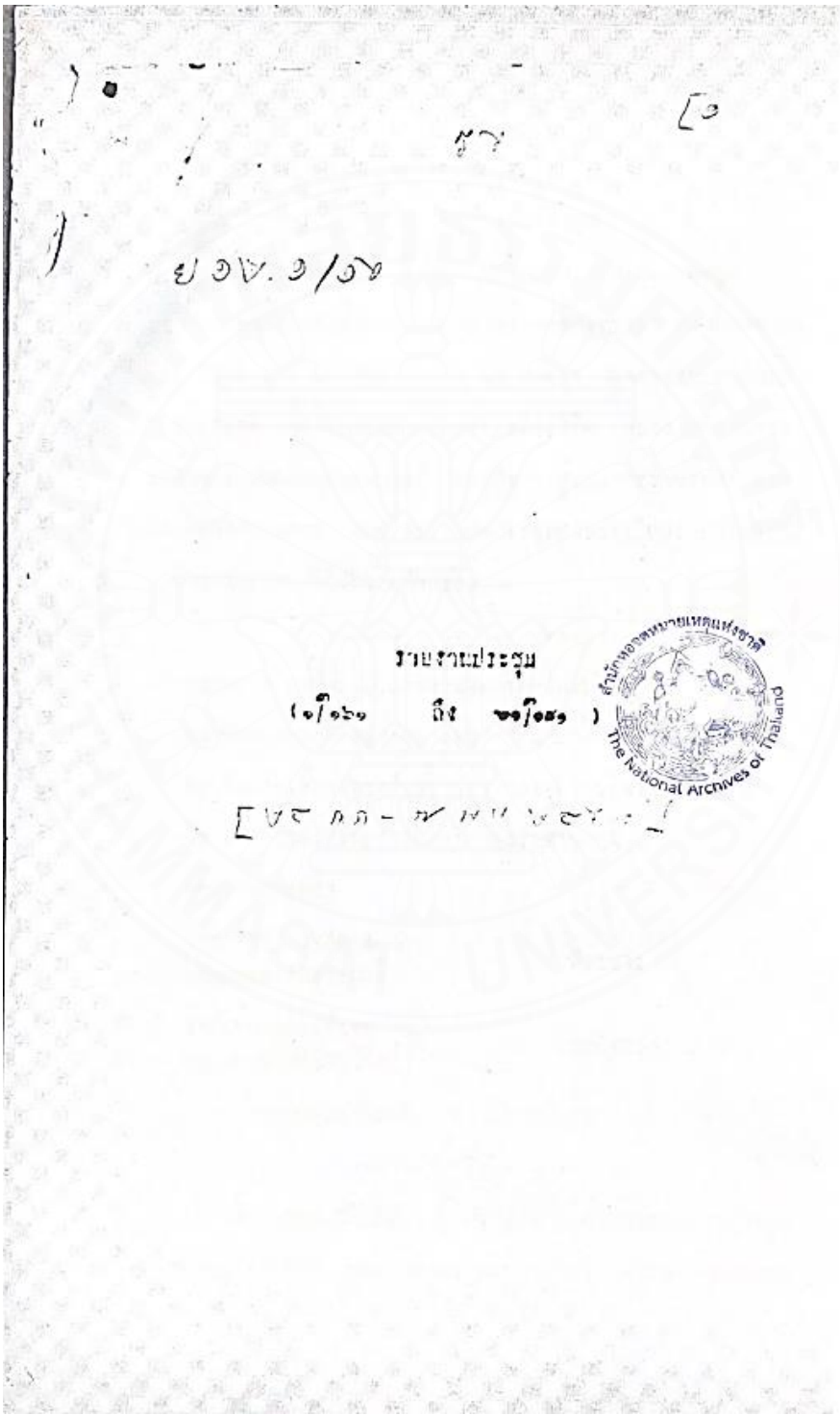
ทรัพย์อื่น ๆ นั้นเป็นสังหาริมทรัพย์ทั้งสิ้น"

เมื่อพิจารณามาถึงมาตรา ๖๒ กรมหลวงสวัสดีฯ รับสั่งว่า คำ "Consumable things" ที่แปลไว้ว่า "อุปโภคทรัพย์" นั้น ทรงขอแก้เป็น "โภคยทรัพย์" และคำ Inconsumable things ———ซึ่งคู่กันนั้น ทรงเห็นควรใช้ว่า "อโภคยทรัพย์" ที่ประชุม

APPENDIX G

Mor Ror 6 Yor/18

Meeting Record, 1/161 to 21-181 (24 Jul – 7 Nov 1925)]



รายงานประชุม

ครั้งที่ ๗/๒๓ วันศุกร์ ที่ ๕ มิถุนายน พ.ศ. ๒๔๖๘

กรรมการที่ประชุมตรวจแก้ประมวลกฎหมายแพ่งและพาณิชย์ฉบับนี้วันนี้ คือ

สมเด็จพระเจ้าน้องยาเธอ เจ้าฟ้ากรมหลวงนครสวรรค์วรพินิต

สมเด็จพระเจ้าบรมวงศ์เธอ เจ้าฟ้ากรมพระนริศรานุวัดติวงศ์

พระเจ้าบรมวงศ์เธอ กรมพระกำรงราชานุภาพ

เจ้าพระยามหิธร

พระเจ้าบรมวงศ์เธอ กรมพระนเรศรวรฤทธิ์ } ประชวร

พระเจ้าบรมวงศ์เธอ กรมพระสวัสดิวัดนวิศิษฏ์ } เสด็จชวา

พระยามานวราชเสวี กรรมการติดต่อ

.....

เมื่อสมเด็จพระเจ้าน้องยาเธอ ฯ ผู้เป็นประธาน ทรงตรวจรายงานวันก่อนแล้ว ได้ทรงยักย้ายไปแก้คัดคำว่าน่าลักษณ ๒ (ก่อนมาตรา ๑๕) แห่ง ๑ ดังนี้ "ว่าด้วยบุคคล" ให้เข้าน่าที่แก้ลงในฉบับที่กรรมการได้ตรวจปฤกษาตกลงไปแล้วนั้นด้วย

ได้ปฤกษาตรวจแก้ต่อไปทั้งแต่หมวด ๒ ว่าด้วยนิติบุคคลมาตรา ๖๘ ตกลงดังต่อไปนี้

(ส่วนที่ ๑ บทเบ็ดเสร็จทั่วไป)

มาตรา ๖๘ เอาความในมาตรา ๗๘ เดิมมาปรุงใหม่ ตกลงให้

ที่ประชุมได้ปฏิญาตรวจแก้ต่อไป เป็นดังนี้

มาตรา ๔๔ เอาความในมาตรา ๔๓ เพิ่มมาปรุงใหม่

มาตรา ๔๔ ร่างใหม่

มาตรา ๑๐๐ เอาความในมาตรา ๔๓ และ ๔๔ เพิ่มวรรค ๑ มาปรุงใหม่

มาตรา ๑๐๐ เอาความในมาตรา ๔๓ และ ๔๔ เพิ่มวรรค ๒ มาปรุงใหม่

มาตรา ๑๐๒ ร่างใหม่

มาตรา ๑๐๓ เอาความในมาตรา ๑๐๐ เพิ่มมาปรุงใหม่

มาตรา ๑๐๔, ๑๐๕,และ ๑๐๖ ร่างใหม่

มาตรา ๑๐๗ เอาความในมาตรา ๑๐๐ เพิ่มมาปรุงใหม่

มาตรา ๑๐๘ ใช้ความเพิ่มมาตรา ๑๐๔

มาตรา ๑๐๙ ใช้ความเพิ่มมาตรา ๑๐๐ แต่เฉพาะวรรคที่ ๒ และมีศัพแก้บ้างบางแห่ง

มาตรา ๑๑๐ เอาความในมาตรา ๑๐๒ เพิ่มมาปรุงใหม่

มาตรา ๑๑๑ คงใช้ความเดิมมาตรา ๑๐๕

วันนี้ได้ตรวจปฏิญาแล้วไปถึงมาตรา ๑๑๑ ขอลักษณะรัฐธรรมนูญที่แก้ใหม่ได้ลิมพ์แนบไว้ท้ายรายงาน

นัดประชุมต่อไป วันเสาร์ ที่ ๘ สิงหาคม เวลาตามเคย

เลิกประชุม เวลา ๗.๔๐ น.

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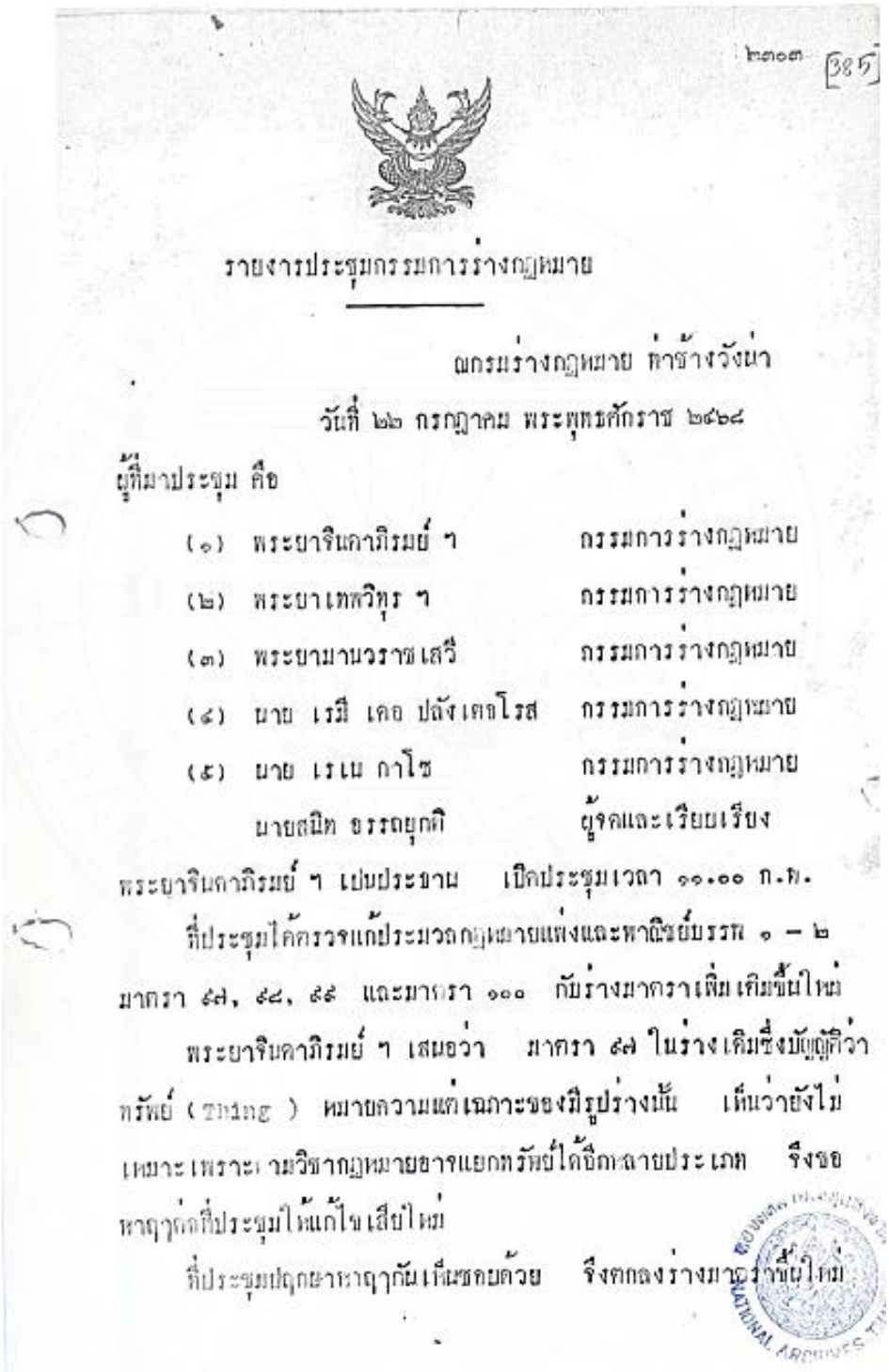
(12)

APPENDIX H

Mor Sor Kor Gor 3 /4

Legislative Drafting Committee Meeting at Tha Chang Wangna Law Office of The Juridical Council from May 19to July 31, 1925



๒๓๐๓ [385]

รายงานประชุมกรรมการร่างกฎหมาย

ณกรมร่างกฎหมาย ท่าช้างวังน่า

วันที่ ๒๒ กรกฎาคม พระพุทธศักราช ๒๔๖๘

ผู้ที่มาประชุม คือ

(๑)	พระยาจินดาภิรมย์ ฯ	กรรมการร่างกฎหมาย
(๒)	พระยาเทพวิทุร ฯ	กรรมการร่างกฎหมาย
(๓)	พระยามานวราชเสวี	กรรมการร่างกฎหมาย
(๔)	นาย เรมี เดอ ปลังเดอโรส	กรรมการร่างกฎหมาย
(๕)	นาย เรเน กาโซ	กรรมการร่างกฎหมาย
	นายสนิท อรรถยุกติ	ผู้จดและเรียบเรียง

พระยาจินดาภิรมย์ ฯ เป็นประธาน เปิดประชุมเวลา ๑๐.๐๐ น.ฯ.

ที่ประชุมได้ตรวจแก้ประมวลกฎหมายแพ่งและพาณิชย์บรรพ ๑ – ๒ มาตรา ๔๗, ๔๘, ๔๙ และมาตรา ๑๐๐ กับร่างมาตราเพิ่มเติมขึ้นใหม่

พระยาจินดาภิรมย์ ฯ เสนอว่า มาตรา ๔๗ ในร่างเดิมซึ่งบัญญัติว่า ทรัพย์ (Thing) หมายความแต่เฉพาะของมีรูปร่างนั้น เห็นว่ายังไม่เหมาะ เพราะตามวิชากฎหมายอาจแยกทรัพย์ได้อีกหลายประเภท จึงขอหารือที่ประชุมให้แก้ไขเสียใหม่

ที่ประชุมปฤกษาหารือกันเห็นชอบด้วย จึงตกลงร่างมาตราขึ้นใหม่

ตามหำนองประมวลกฎหมายเยอรมันมาตรา ๕๐ และประมวลกฎหมายญี่ปุ่นมาตรา ๘๕ (คูมาตรา ๕๘ ในสำเนาข้างท้าย)

ที่ประชุมได้ตรวจพิจารณามาตรา ๕๘ ในร่างเดิม ซึ่งได้ร่างตามหำนองประมวลกฎหมายญี่ปุ่นมาตรา ๘๖ ที่ประชุมเห็นว่าเป็นหลักถูกต้องดีแล้ว จึงตกลงกันไม่แก้ไข (คูมาตรา ๕๕ ในสำเนาข้างท้าย)

ที่ประชุมได้ตรวจพิจารณามาตรา ๕๕ ในร่างเดิม เห็นว่าถ้อยคำที่ใช้ในมาตรานั้นผิด จึงตกลงกันร่างขึ้นใหม่ตามหำนองประมวลกฎหมายบราซิลมาตรา ๕๐ ประมวลกฎหมายเยอรมันมาตรา ๕๑ เทียบกับคำอธิบายหลักกฎหมายของโบตรี เล่ม ๖ ข้อ ๑๔ (คูมาตรา ๑๐๐ ในสำเนาข้างท้าย)

ที่ประชุมได้ตรวจพิจารณามาตรา ๑๐๐ ในร่างเดิม เห็นว่ามีถ้อยคำบกพร่อง จึงตกลงกันร่างขึ้นใหม่ตามหำนองประมวลกฎหมายบราซิลมาตรา ๕๑ ประมวลกฎหมายเยอรมันมาตรา ๕๒ เทียบกับคำอธิบายหลักกฎหมายของแปลนนวล เล่ม ๑ ข้อ ๑๒๗๕ (คูมาตรา ๑๐๑ ในสำเนาข้างท้าย)

นาย เรเน กาโซ เสนอว่า ในหมวดว่าด้วยมูลนิธินั้นควรจะร่างมาตราก้ำหนดให้เจ้าน่าที่ประกาศการยกเลิกมูลนิธิในหนังสือราชกิจจานุเบกษาให้สาธารณชนทราบไว้ด้วย

๒๓๐๕ [38ฐ]

ที่ประชุมปฤกษาหาฤๅกัน เห็นชอบด้วย จึงตกลงร่างมาตราเช่นนั้น ขึ้น และลำดับเปนมาตรา ๕๔ ในร่างใหม่ (คูมาตรา ๕๔ ในลำเนาข้างท้าย)

ปิดประชุมเวลา ๑.๒๐ น.ท.

จดแลสาธิยมเรียง

ม้วน.พิมพ์.

ตรวจทาน.

[224]

98. - Things, in the legal sense, are coporeal objects.

(G. 90; J. 85).

99. - Land and things fixed thereto are immovables.

All other things are movables.

(Old text 98; c/p J. 86).

100. - Fungible things are those movables which can, and non-fungible those which cannot, be substituted by others of the same kind, quality and quantity.

(Br. 50; G. 91; Rand. vol. 6 No. 15).

101. - Consumable things are movables, the use of which implies the immediate destruction of their substance or consists in being disposed of.

(Br. 51; G. 92; Plan. volI No 1220)

[390]

รายงานประชุมกรรมการร่างกฎหมาย

ณกรมร่างกฎหมาย ท่าช้างวังหน้า

วันที่ ๒๓ กรกฎาคม พระพุทธศักราช ๒๔๖๘

ผู้ที่มาประชุม คือ

(๑)	พระยาจินดาภิรมย์ ฯ	กรรมการร่างกฎหมาย
(๒)	พระยาเทพวิทุร ฯ	กรรมการร่างกฎหมาย
(๓)	พระยามานวราชเสวี	กรรมการร่างกฎหมาย
(๔)	นาย เรมี เดอ ปลังเตอโรส	กรรมการร่างกฎหมาย
(๕)	นาย เรเน ดาโซ	กรรมการร่างกฎหมาย
	นายสนิท อรรถยุกติ	ผู้จดและเรียบเรียง

พระยาจินดาภิรมย์ ฯ เป็นประธาน เปิดประชุมเวลา ๒.๓๐ น.

วันนี้ประชุมตรวจแก้ประมวลกฎหมายแพ่งและพาณิชย์ บรรพ ๑ – ๒ กับร่างมาตราขึ้นใหม่

ที่ประชุมได้ตรวจพิจารณามาตรา ๔๔ ในร่างใหม่ยืดครั้งหนึ่ง ที่ประชุมเห็นว่ามาตรานี้ได้อธิบายคำว่าทรัพย์ (things) ไว้แล้ว แต่หาได้อธิบายคำว่าทรัพย์สิน (property) ไว้ด้วยไม่ จึงตกลงกันร่างมาตรา ๔๔ ทิว อธิบายคำว่าทรัพย์สิน (property) ตามคำนิยามประมวลกฎหมายอาเยนไตน์มาตรา ๒๓๑๖ เทียบกับคำอธิบายในกฎหมายของ

เรอแปต์การ์บังเคีย (ดูมาตรา ๙๘ ทิว ในสำเนาข้างท้าย)

ที่ประชุมได้ตรวจพิจารณามาตรา ๙๙ ในร่างใหม่ ซึ่งได้ร่างตามมาตรา ๙๘ ในร่างเดิมเทียบประมวลกฎหมายยี่ปุ่นมาตรา ๘๖ นั้นอีกครั้งหนึ่ง ที่ประชุมเห็นว่าไม่ควรแก้ไข

ที่ประชุมได้ตรวจพิจารณามาตรา ๑๐๐ ในร่างใหม่ ที่ประชุมตกลงกันให้เติมคำว่า "in ordinary dealings" ไว้ด้วย (ดูมาตรา ๑๐๐ ในสำเนาข้างท้าย)

ที่ประชุมได้ตรวจพิจารณามาตรา ๑๐๑ ในร่างใหม่ ที่ประชุมเห็นว่าถ้อยคำยังไม่เหมาะ จึงตกลงกันแก้ไขถ้อยคำใหม่ และตัดตอน ๒ ของมาตรานี้ออก (ดูมาตรา ๑๐๑ ในสำเนาข้างท้าย)

ปิดประชุมเวลา ๔.๓๐ ล.ท.

จดและเรียบเรียง

ม้วน.พิมพ์.

ทาน.

93 bis. - Property includes a thing as well as incorporeal objects susceptible of having a value.

(Arg. 2346 Répert Carpentier. Vo. Biens. No.1).

100. - Fungible things are those movables which can, and non-fungible those which cannot in ordinary dealings, be substituted by others of the same kind, quality and quantity.

(Br. 50; C. 81; Baud. vol. 3 No. 10).

101. - Consumable things are movables, the use of which implies the immediate destruction of their substance or whose ultimate use consists in being disposed of.

(Br. 51; C.82; Plan. vol I No. 1270).

ค.ศ.
K.Y.

98 bis. - Property includes a thing as well as incorporeal objects susceptible of having a value.

(Arg. 2346 Répert Carpentier. Vo. Biens. No.1).

100. - Fungible things are those movables which can, and non-fungible those which cannot in ordinary dealings, be substituted by others of the same kind, quality and quantity.

(Br. 50; C. 81; Baud. vol. 3 No. 18).

101. - Consumable things are movables, the use of which implies the immediate destruction of their substance or whose ultimate use consists in being disposed of.

(Br. 51; C.82; Plan. vol I No. 1279).

ค.ศ.
ก.ร.

TITLE III.

THINGS.

98. - Things, in the legal sense, are corporeal objects.

(G. 90; J. 55)

99. - Property includes things as well as incorporeal objects susceptible of having a value.

(Arg. 2346; Répert. Carpentier Vo Biens, No1)

100. - Immovables are land and things closely attached to land or forming a body therewith. They include rights connected with ownership of land.

(Huebner, No 25 p 161; Op G. 94; J 56)

101. - Movables are things which can be carried from one place to another, whether moving by their own motion, or being moved by an external force. They include forces of nature susceptible of appropriation as well as rights connected with movables.

(Arg. 2352; Br 47, s.c. 713)

APPENDIX I

Proposal on Revising Civil and Commercial Code Book I (1991)

บันทึกหลักการและเหตุผล
ประกอบร่างพระราชบัญญัติให้ใช้บทบัญญัติบรรพ 1
แห่งประมวลกฎหมายแพ่งและพาณิชย์ที่ได้ตรวจชำระใหม่
พ.ศ. ....

หลักการ

แก้ไขปรับปรุงบทบัญญัติบรรพ 1 แห่งประมวลกฎหมายแพ่งและพาณิชย์

เหตุผล

เนื่องจากบทบัญญัติบรรพ 1 แห่งประมวลกฎหมายแพ่งและพาณิชย์ ซึ่งได้ใช้บังคับโดยพระราชกฤษฎีกาให้ใช้บทบัญญัติแห่งประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 1 และบรรพ 2 ที่ได้ตรวจชำระใหม่ พ.ศ. 2468 ได้ใช้บังคับมาเป็นเวลานาน และบทบัญญัติหลายประการล้าสมัย ไม่เหมาะสมและสอดคล้องกับสภาพสังคมปัจจุบัน สมควรปรับปรุงแก้ไขให้เหมาะสมยิ่งขึ้น จึงจำเป็นต้องตราพระราชบัญญัตินี้

มาตรา 134 ผู้ใดประสงค์จะขอตรวจเอกสารเกี่ยวกับมูลนิธิที่นายทะเบียนเก็บรักษาไว้ หรือจะขอให้นายทะเบียนคัดสำเนาเอกสารดังกล่าวพร้อมด้วยคำรับรองว่าถูกต้อง ให้ยื่นคำขอต่อนายทะเบียน และเมื่อได้เสียค่าธรรมเนียมตามที่กำหนดในกฎกระทรวงแล้ว ให้นายทะเบียนปฏิบัติตามคำขอนั้น

มาตรา 135 ให้รัฐมนตรีว่าการกระทรวงมหาดไทยรักษาการตามบทบัญญัติในส่วนนี้ และให้มีอำนาจแต่งตั้งนายทะเบียนกับออกกฎกระทรวงเกี่ยวกับ

(1) การยื่นคำขอจดทะเบียนและการรับจดทะเบียน

(2) ค่าธรรมเนียมการจดทะเบียน การขอตรวจเอกสาร การคัดสำเนาเอกสาร และค่าธรรมเนียมการขอให้นายทะเบียนดำเนินการใด ๆ เกี่ยวกับมูลนิธิ รวมทั้งการยกเว้นค่าธรรมเนียมดังกล่าว

(3) แบบบัตรประจำตัวของนายทะเบียนและพนักงานเจ้าหน้าที่

(4) การดำเนินกิจการของมูลนิธิและการทะเบียนมูลนิธิ

(5) การอื่นใดเพื่อปฏิบัติให้เป็นไปตามบทบัญญัติในส่วนนี้

กฎกระทรวงนั้น เมื่อประกาศในราชกิจจานุเบกษาแล้ว ให้ใช้บังคับได้

ลักษณะ 3

ทรัพย์

มาตรา 136 ทรัพย์ หมายความว่า วัตถุมีรูปร่าง

มาตรา 137 ทรัพย์สิน หมายความรวมทั้งทรัพย์ และวัตถุไม่มีรูปร่างซึ่งอาจมีราคาและอาจถือเอาได้

มาตรา 138 อสังหาริมทรัพย์ หมายความว่า ที่ดินและทรัพย์อันติดอยู่กับที่ดินเป็นการถาวรหรือประกอบเป็นอันเดียวกับที่ดินนั้น และหมายความรวมถึงสิทธิอันเกี่ยวกับที่ดินหรือทรัพย์อันติดอยู่กับที่ดินหรือประกอบเป็นอันเดียวกับที่ดินนั้นด้วย

มาตรา 139 สังหาริมทรัพย์ หมายความว่า ทรัพย์สินอื่นนอกจากอสังหาริมทรัพย์ และหมายความรวมถึงสิทธิอันเกี่ยวกับทรัพย์สินนั้นด้วย

มาตรา 140 ทรัพย์แบ่งได้ หมายความว่า ทรัพย์อันอาจแยกออกจากกันเป็นส่วน ๆ ได้จริงถนัดชัดแจ้ง แต่ละส่วนได้รูปบริบูรณ์ลำพังตัว

มาตรา 141 ทรัพย์แบ่งไม่ได้ หมายความว่า ทรัพย์อันจะแยกออกจากกันไม่ได้นอกจากเปลี่ยนแปลงสภาวะของทรัพย์ และหมายความรวมถึงทรัพย์ที่มีกฎหมายบัญญัติว่าแบ่งไม่ได้ด้วย

มาตรา 136

บทบัญญัติปัจจุบัน

มาตรา 98 ว่าทรัพย์นั้น โดยนิตินัยได้แก่วัตถุมีรูปร่าง

ร่างที่ผ่านการพิจารณา

มาตรา 136 ทรัพย์ หมายความว่า วัตถุมีรูปร่าง

ผลการพิจารณา

คงหลักการเดิม และปรับปรุงถ้อยคำเล็กน้อย

ประเด็นในการพิจารณา

(1) ควรขยายความคำว่า ทรัพย์ ให้รวมถึงไฟฟ้า พลังงานธรรมชาติ และพลังงานอย่างอื่นอันอาจควบคุมได้ และถือเอาได้ หรือไม่ ในปัญหาดังกล่าวนี้ คณะกรรมการมีความเห็นเป็นสองฝ่าย โดยฝ่ายแรกเห็นว่าไม่ควรเพิ่มคำว่า "ไฟฟ้า พลังงานธรรมชาติ และพลังงานอย่างอื่น" เพราะจะขัดกับคำนิยามในเรื่องทรัพย์ ซึ่งเป็นเรื่องสิ่งที่มีรูปร่างเท่านั้น นอกจากนี้ พลังงานธรรมชาติตามกฎหมายปัจจุบัน ก็เป็นสังหาริมทรัพย์อยู่แล้ว และโดยสภาพพลังงานเป็นทรัพย์สินไม่ใช่ทรัพย์ ส่วนฝ่ายที่สองเห็นว่าศาลฎีกาได้วินิจฉัยว่า การลักกระแสไฟฟ้าเป็นความผิดฐานลักทรัพย์จึงควรบัญญัติไว้ให้ชัดเจน มิฉะนั้นต่อไปภายหน้าอาจมีปัญหายิ่งกว่า กระแสไฟฟ้าไม่ใช่ทรัพย์ เพราะไม่มีรูปร่าง การลักกระแสไฟฟ้าหรือพลังงานอย่างอื่นก็จะไม่ผิดฐานลักทรัพย์ ในที่สุดคณะกรรมการเห็นว่า ไม่ควรขยายความคำว่า "ทรัพย์" ให้รวมถึงไฟฟ้าและพลังงานอื่น ๆ เพราะโดยสภาพแล้ว "พลังงาน" เป็นทรัพย์สิน ส่วนกรณีที่เกรงว่าจะมีปัญหาตีความกฎหมายในเรื่องลักกระแสไฟฟ้านั้น เห็นควรบัญญัติในเรื่องการลักกระแสไฟฟ้าไว้ในกฎหมายพิเศษ

(2) ควรคงคำว่าโดยนิตินัยไว้ในบทนิยามของคำว่าทรัพย์สินหรือไม่ คณะกรรมการเห็นว่า หากคงคำว่า "โดยนิตินัย" ไว้จะทำให้เข้าใจว่าทรัพย์ตามภาษาสามัญเป็นลักษณะหนึ่ง และทรัพย์โดยนิตินัยเป็นอีกลักษณะหนึ่งแตกต่างกัน ดังนั้น หากคงคำว่าโดยนิตินัยไว้จะเป็นการใช้คำซ้ำซ้อน ประกอบกับบทบัญญัตินี้เป็นนิยามในกฎหมายอยู่แล้ว

มาตรา 137

บทบัญญัติปัจจุบัน

มาตรา 99 ทรัพย์สินนั้น ท่านหมายความรวมทั้งทรัพย์ ทั้งวัตถุไม่มีรูปร่าง ซึ่งอาจมีราคาได้และถือเอาได้

ร่างที่ผ่านการพิจารณา

มาตรา 137 ทรัพย์สิน หมายความรวมทั้งทรัพย์และวัตถุไม่มีรูปร่าง ซึ่งอาจมีราคาและอาจถือเอาได้

ผลการพิจารณา

คงหลักการเดิม และแก้ไขด้อยคำให้เหมาะสมยิ่งขึ้น

ประเด็นในการพิจารณา

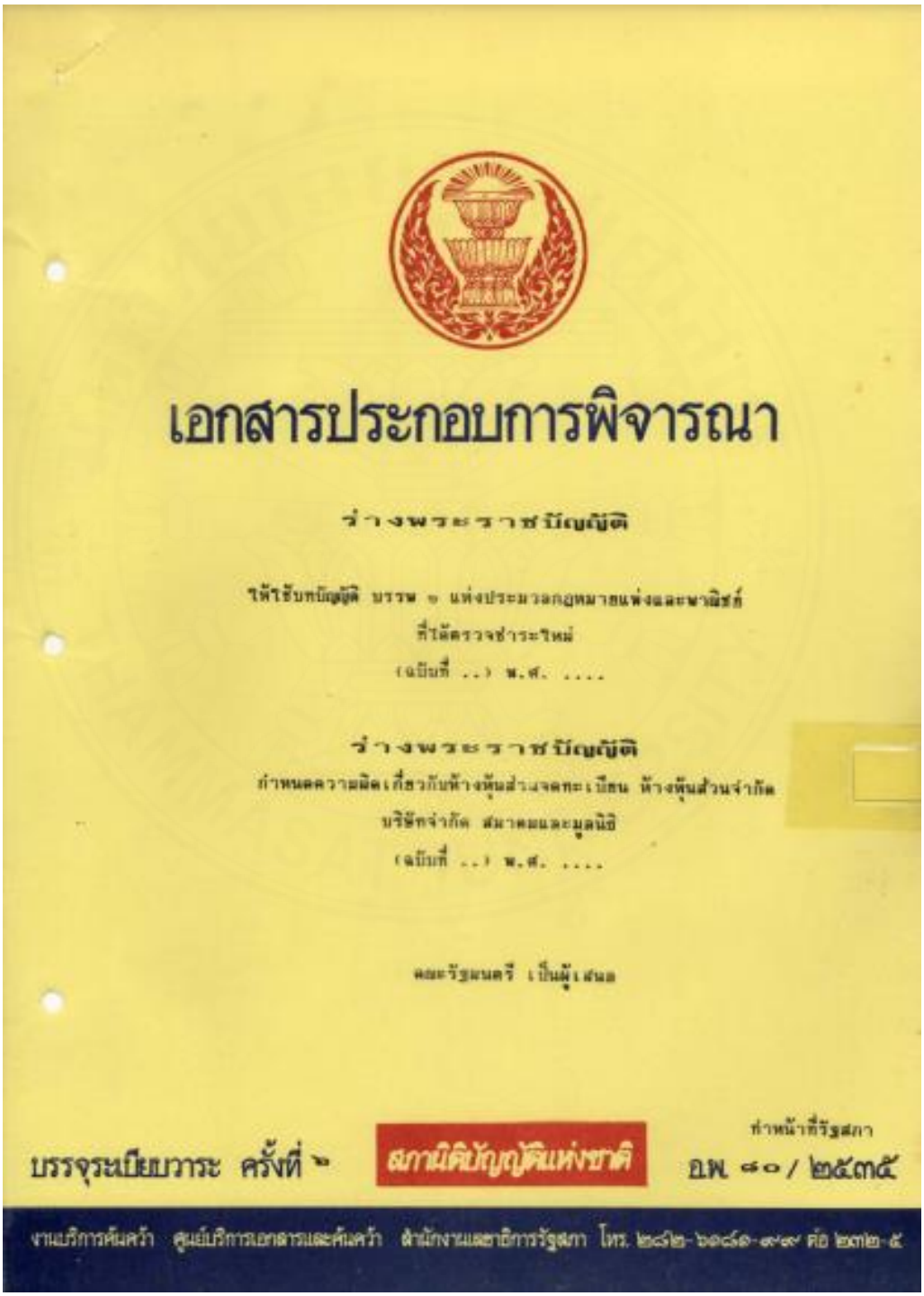
<u>ทรัพย์จำเป็นต้องเป็นทรัพย์สินด้วยหรือไม่</u> กรรมการบางท่านเห็นว่า ถ้าเป็นทรัพย์แล้วต้องเป็นทรัพย์สินด้วย เนื่องจากคำว่า "ทรัพย์" ต้องพิจารณา มาตรา 98 และมาตรา 99 ประกอบกัน ดังนั้น ทรัพย์ต้องเป็นวัตถุที่มีรูปร่างซึ่งอาจมีราคาได้และถือเอาได้ด้วย แต่กรรมการส่วนมากเห็นว่า "ทรัพย์" ไม่จำเป็นต้องเป็นทรัพย์สินเสมอไป เพราะทรัพย์ที่ยังไม่อาจถือเอาได้ย่อมไม่เป็นทรัพย์สิน คณะกรรมการจึงคงแนวการบัญญัติกฎหมายไว้เช่นเดิมโดยคงข้อความว่า "อันอาจมีราคาได้และอาจถือเอาได้" เพื่อมุ่งหมายให้ขยายทั้งคำว่า "ทรัพย์" และคำว่า "วัตถุไม่มีรูปร่าง"

ข้อมูลประกอบการพิจารณา

- ป.พ.พ. ม.36, ม.99
- ปพ.เกาหลี, ม.810

APPENDIX J

Or Por 80/2535 (Attachment Annexes for Considering the Bill of Act Promulgation of the Revised Provisions of Book I of the Civil and Commercial Code (Vol...) B.E. ....)



ประมวลกฎหมายแพ่งและพาณิชย์	ร่างพระราชบัญญัติให้ใช้บทบัญญัติบรรพ 1 แห่งประมวลกฎหมายแพ่งและพาณิชย์ที่ได้ตรวจชำระใหม่ พ.ศ. ....
ให้รัฐมนตรีจัดการให้มีบัญชีรายนามมูลนิธิทั้งหลาย อันได้ให้อำนาจแล้วนั้น รักษาไว้พร้อมทั้งรายการข้อสำคัญอันได้โฆษณาในราชกิจจานุเบกษา	เอกสาร และค่าธรรมเนียมการขอให้นายทะเบียนดำเนินการใด ๆ เกี่ยวกับมูลนิธิ รวมทั้งการยกเว้นค่าธรรมเนียมดังกล่าว (3) แบบบัตรประจำตัวของนายทะเบียนและพนักงานเจ้าหน้าที่ (4) การดำเนินกิจการของมูลนิธิและการทะเบียนมูลนิธิ (5) การอื่นใดเพื่อปฏิบัติให้เป็นไปตามบทบัญญัติในส่วนนี้ กฎกระทรวงนั้น เมื่อประกาศในราชกิจจานุเบกษาแล้ว ให้ใช้บังคับได้
ลักษณะ 3 ทรัพย์	**ลักษณะ 3 ทรัพย์**
มาตรา 98 อันว่าทรัพย์นั้น โดยนิตินัยได้แก่วัตถุมีรูปร่าง	มาตรา 136 ทรัพย์ หมายความว่าวัตถุมีรูปร่าง
มาตรา 99 ทรัพย์สินนั้น ท่านหมายความรวมทั้งทรัพย์ทั้งวัตถุไม่มีรูปร่าง ซึ่งอาจมีราคาได้และถือเอาได้	มาตรา 137 ทรัพย์สิน หมายความรวมทั้งทรัพย์ และวัตถุไม่มีรูปร่าง ซึ่งอาจมีราคาและอาจถือเอาได้
มาตรา 100 อสังหาริมทรัพย์ ได้แก่ที่ดินกับทรัพย์สินอันติดอยู่กับที่ดินนั้น หรือประกอบเป็นอันเดียวกับที่ดินนั้น อนึ่ง คำว่าอสังหาริมทรัพย์ท่านหมายความรวมถึงสิทธิทั้งหลายอันเกี่ยวกับกรรมสิทธิ์ที่ในดินด้วย	มาตรา 138 อสังหาริมทรัพย์ หมายความว่า ที่ดินและทรัพย์อันติดอยู่กับที่ดินเป็นการถาวรหรือประกอบเป็นอันเดียวกับที่ดินนั้น และหมายความรวมถึงสิทธิอันเกี่ยวกับที่ดินหรือทรัพย์อันติดอยู่กับที่ดินหรือประกอบเป็นอันเดียวกับที่ดินนั้นด้วย

APPENDIX K

Report of the National Legislative Assembly

Meeting No. 14/1991-1992, 28 February 1992

(สำเนา)

ที่ 263/2535

สภานิติบัญญัติแห่งชาติ
ทำหน้าที่รัฐสภา
ถนนอู่ทองใน กท. 10300

20 กุมภาพันธ์ 2535

เรื่อง ร่างพระราชบัญญัติให้ใช้บทบัญญัติ บรรพ 1 แห่งประมวลกฎหมายแพ่งและพาณิชย์ที่ได้ตรวจชำระใหม่ พ.ศ. ....

กราบเรียน ประธานสภานิติบัญญัติแห่งชาติ

สิ่งที่ส่งมาด้วย ร่างพระราชบัญญัติดังกล่าวข้างต้น พร้อมด้วยรายงานของคณะกรรมาธิการวิสามัญพิจารณาร่างพระราชบัญญัติให้ใช้บทบัญญัติ บรรพ 1 แห่งประมวลกฎหมายแพ่งและพาณิชย์ที่ได้ตรวจชำระใหม่ พ.ศ. .... 1 ชุด

ตามที่ที่ประชุมสภานิติบัญญัติแห่งชาติ ทำหน้าที่รัฐสภา ได้ลงมติรับหลักการแห่งร่างพระราชบัญญัติให้ใช้บทบัญญัติ บรรพ 1 แห่งประมวลกฎหมายแพ่งและพาณิชย์ที่ได้ตรวจชำระใหม่ พ.ศ. .... (คณะรัฐมนตรี เป็นผู้เสนอ) และตั้งกรรมาธิการวิสามัญขึ้นคณะหนึ่งเพื่อพิจารณา ซึ่งกรรมาธิการวิสามัญคณะนี้ประกอบด้วย

1. นายไกรเมน ภัทรภิรมย์
2. นายเสียง บุญเฟื่อง
3. นายจรัญ หัตถกรรม
4. นายชัยวัฒน์ วงศ์วัฒนศานต์
5. คุณหญิงนันทกา สุประภาคะนันทน์
6. พลเรือเอก ประทิพย์ ศิวรักษ์
7. นายประสพสุข บุญเดช
8. นายประเสริฐ บุญศรี
9. นายวิชัย ตันศิริคุลานันท์
10. นายวิษณุ เครืองาม
11. นายสรรเสริญ ไกรจิตติ
12. พลตำรวจโท องอาจ ผุดผาด
13. นายอรรถนิติ ศิษฐอำนาจ
14. นายอัครวิทย์ สุมาวงศ์

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บัดนี้ คณะกรรมาธิการได้พิจารณาร่างพระราชบัญญัติดังกล่าวเสร็จแล้ว จึงกราบเรียนมาเพื่อได้โปรดนำเสนอที่ประชุมสภานิติบัญญัติแห่งชาติ ทำหน้าที่รัฐสภา พิจารณาต่อไป

ขอแสดงความนับถืออย่างยิ่ง

(ลงชื่อ) สรรเสริญ ไกรจิตติ

(นายสรรเสริญ ไกรจิตติ)

ประธานคณะกรรมาธิการวิสามัญ

รายงานของคณะกรรมาธิการวิสามัญ

ตามที่ที่ประชุมสภานิติบัญญัติแห่งชาติ ทำหน้าที่รัฐสภา ครั้งที่ 6/2535 วันศุกร์ที่ 10 มกราคม 2535 ได้ลงมติรับหลักการแห่งร่างพระราชบัญญัติให้ใช้บทบัญญัติบรรพ 1 แห่งประมวลกฎหมายแพ่งและพาณิชย์ที่ได้ตรวจชำระใหม่ พ.ศ. .... (คณะรัฐมนตรี เป็นผู้เสนอ) และตั้งคณะกรรมาธิการวิสามัญพิจารณาร่างพระราชบัญญัติให้ใช้บทบัญญัติ บรรพ 1 แห่งประมวลกฎหมายแพ่งและพาณิชย์ที่ได้ตรวจชำระใหม่ พ.ศ. .... กำหนดการแปรญัตติภายใน 7 วัน นั้น บัดนี้ ได้ดำเนินการแล้ว ปรากฏผลดังนี้

1. ที่ประชุมคณะกรรมาธิการวิสามัญได้เลือก นายสรรเสริญ ไกรจิตติ เป็นประธานคณะกรรมาธิการวิสามัญ นายโกเมน ภัทรภิรมย์ เป็นรองประธานคณะกรรมาธิการวิสามัญ และนายชัยวัฒน์ วงศ์วัฒนศานต์ เป็นเลขานุการคณะกรรมาธิการวิสามัญ

2. ผู้ซึ่งคณะรัฐมนตรีได้มอบหมายให้ชี้แจงแสดงความคิดเห็นคือ

2.1 นายชัยวัฒน์ วงศ์วัฒนศานต์ กรรมการร่างกฎหมายประจำ (นิติกร 9) และนายนิพนธ์ อะกีมี นิติกร 5 สำนักงานคณะกรรมการกฤษฎีกา สำนักนายกรัฐมนตรี

2.2 นายจรัญ ภักดีธนากุล รองเลขาธิการส่งเสริมงานตุลาการ นายเกริก วณิกกุล ผู้พิพากษาหัวหน้าศาลประจำกระทรวง ทำงานธุรการในตำแหน่งรองเลขาธิการส่งเสริมงานตุลาการ นายพงศ์เทพ เทพกาญจนา ผู้พิพากษาศาลจังหวัดสมุทรปราการ ช่วยทำงานธุรการในตำแหน่งผู้อำนวยการกองวิชาการ และ

นายกมลชัย รัตนสกาววงศ์ ผู้พิพากษาประจำกระทรวง ช่วยราชการกองวิชาการ สำนักงานส่งเสริมงานตุลาการ กระทรวงยุติธรรม

2.3 นายดารา การุณยวาณิช ผู้อำนวยการกองการทะเบียน นายวิชัย ประพันธ์โรจน์ หัวหน้าฝ่ายบริหารการทะเบียน นายมนัส นิลสุข หัวหน้างานทะเบียนมูลนิธิและศาลเจ้า และนายภิญโญ หงษ์ทอง เจ้าพนักงานปกครอง 4 กองการทะเบียน กรมการปกครอง กระทรวงมหาดไทย

2.4 นายคุสิต อุชุพงศ์ลมร ผู้อำนวยการกองทะเบียนธุรกิจ 2 กองทะเบียนธุรกิจ 2 และนายสุรเดช พหลภาคย์ หัวหน้าฝ่ายกฎหมาย กองนิติการ กรมทะเบียนการค้า กระทรวงพาณิชย์

3. ผู้ชี้งคณะกรรมาธิการวิสามัญได้เชิญมาชี้แจงแสดงความคิดเห็น คือ

3.1 นางวารุณี สุรนิวงศ์ นิติกร 6 กองนิติกร นายผจญ วีระ เจ้าหน้าที่ทะเบียนวิชาชีพ 6 และนางยุวดี ชอบวัฒนา เจ้าหน้าที่ทะเบียนวิชาชีพ 5 กองการประกอบโรคศิลปะ สำนักงานปลัดกระทรวงสาธารณสุข กระทรวงสาธารณสุข

3.2 นายบุญมาก ปุราสะเก หัวหน้าฝ่ายจัดตั้งและควบคุม นายไวโรจน์ ใจอารีรอบ นักวิชาการวัฒนธรรม 5 กององค์กรสัมพันธ์ และนายวันชัย เณรบำรุง นิติกร 6 สำนักงานเลขานุการกรม สำนักงานคณะกรรมการวัฒนธรรมแห่งชาติ

4. นายบัญญัติ สุชีวะ กรรมาธิการวิสามัญ ขอลาออกจากคณะกรรมาธิการวิสามัญพิจารณาร่างพระราชบัญญัติให้ใช้บทบัญญัติ บรรพ 1 แห่งประมวลกฎหมายแพ่งและพาณิชย์ที่ได้ตรวจชำระใหม่ พ.ศ. .... ตั้งแต่วันที่ 1 กุมภาพันธ์ 2535

5. ร่างพระราชบัญญัติฉบับนี้มีสมาชิกผู้เสนอคำแปรญัตติ จำนวน 2 คน คือ นายพารณ อิศรเสนา ณ อยุธยา และนายธรรมนูญ ลัดพลี

6. ผลการพิจารณา

6.1 คณะกรรมาธิการวิสามัญได้พิจารณาร่างพระราชบัญญัติให้ใช้พระบัญญัติบรรพ 1 แห่งประมวลกฎหมายแพ่งและพาณิชย์ที่ได้ตรวจชำระใหม่ พ.ศ. .... โดยเริ่มพิจารณาตั้งแต่ชื่อร่างพระราชบัญญัติ คำปรารภ และพิจารณาเรียงตามลำดับมาตราจนจบร่าง (มาตรา 1 ถึง 18) แล้วปรากฏผลดังนี้

ชื่อร่างพระราชบัญญัติ	ไม่มีการแก้ไข
คำปรารภ	ไม่มีการแก้ไข
มาตรา 1	ไม่มีการแก้ไข
มาตรา 2	มีการแก้ไข
มาตรา 3	ไม่มีการแก้ไข
มาตรา 4	ไม่มีการแก้ไข
มาตรา 5	ไม่มีการแก้ไข
มาตรา 6	ไม่มีการแก้ไข
มาตรา 7	ไม่มีการแก้ไข
มาตรา 8	มีการแก้ไข
มาตรา 9	ไม่มีการแก้ไข
มาตรา 10	ไม่มีการแก้ไข
มาตรา 11	มีการแก้ไข
มาตรา 12	มีการแก้ไข

มาตรา 122	ไม่มีการแก้ไข
มาตรา 123	ไม่มีการแก้ไข
มาตรา 124	มีการแก้ไข
มาตรา 125	ไม่มีการแก้ไข
มาตรา 126	ไม่มีการแก้ไข
มาตรา 127	ไม่มีการแก้ไข
มาตรา 128	มีการแก้ไข
มาตรา 129	ไม่มีการแก้ไข
มาตรา 130	ไม่มีการแก้ไข
มาตรา 131	มีการแก้ไข
มาตรา 132	มีการแก้ไข
มาตรา 133	ไม่มีการแก้ไข
มาตรา 134	ไม่มีการแก้ไข
มาตรา 135	ไม่มีการแก้ไข
ลักษณะ 3 ทรัพย์	ไม่มีการแก้ไข

นายพารณ อิศรเสนา ณ อยุธยา ขอแปรญัตติไว้

โดยแก้ความในบทบัญญัติ ลักษณะ 3 ทรัพย์

โดยให้ใช้บทบัญญัติตามความในมาตราต่าง ๆ

ที่มีบัญญัติไว้เพิ่ม

คณะกรรมาธิการได้ชี้แจงแล้ว ผู้แปรญัตติพอใจ

และค่าธรรมเนียมการขอให้นายทะเบียนดำเนินการใด ๆ เกี่ยวกับมูลนิธิ รวมทั้งการยกเว้นค่าธรรมเนียมดังกล่าว

(3) แบบบัตรประจำตัวของนายทะเบียนและพนักงานเจ้าหน้าที่

(4) การดำเนินกิจการของมูลนิธิและการทะเบียนมูลนิธิ

(5) การอื่นใดเพื่อปฏิบัติให้เป็นไปตามบทบัญญัติในส่วนนี้

กฎกระทรวงนั้น เมื่อประกาศในราชกิจจานุเบกษาแล้ว ให้ใช้บังคับได้

ลักษณะ 3

ทรัพย์

มาตรา 136 ทรัพย์ หมายความว่า วัตถุมีรูปร่าง

มาตรา 137 ทรัพย์สิน หมายความรวมทั้งทรัพย์และวัตถุไม่มีรูปร่าง ซึ่งอาจมีราคาและอาจถือเอาได้

มาตรา 138 อสังหาริมทรัพย์ หมายความว่า ที่ดินและทรัพย์อันติดอยู่กับที่ดินมีลักษณะเป็นการถาวรหรือประกอบเป็นอันเดียวกับที่ดินนั้น และหมายความรวมถึงทรัพย์สิทธิอันเกี่ยวกับที่ดินหรือทรัพย์อันติดอยู่กับที่ดินหรือประกอบเป็นอันเดียวกับที่ดินนั้นด้วย

มาตรา 139 สังหาริมทรัพย์ หมายความว่า ทรัพย์สินอื่นนอกจากอสังหาริมทรัพย์ และหมายความรวมถึงสิทธิอันเกี่ยวกับทรัพย์สินนั้นด้วย

มาตรา 140 ทรัพย์แบ่งได้ หมายความว่า ทรัพย์อันอาจแยกออกจากกันเป็นส่วน ๆ ได้จริงถนัดชัดแจ้ง แต่ละส่วนได้รูปบริบูรณ์สำพังตัว

มาตรา 141 ทรัพย์แบ่งไม่ได้ หมายความว่า ทรัพย์อันจะแยกออกจากกันไม่ได้นอกจากเปลี่ยนแปลงสภาวะของทรัพย์ และหมายความรวมถึงทรัพย์ที่มีกฎหมายบัญญัติว่าแบ่งไม่ได้ด้วย

มาตรา 136	ไม่มีการแก้ไข
มาตรา 137	ไม่มีการแก้ไข
มาตรา 138	มีการแก้ไข
มาตรา 139	ไม่มีการแก้ไข
มาตรา 140	ไม่มีการแก้ไข
มาตรา 141	ไม่มีการแก้ไข
มาตรา 142	ไม่มีการแก้ไข
มาตรา 143	ไม่มีการแก้ไข
มาตรา 144	ไม่มีการแก้ไข
มาตรา 145	ไม่มีการแก้ไข
มาตรา 146	ไม่มีการแก้ไข
มาตรา 147	ไม่มีการแก้ไข
ลักษณะ 4 นิติกรรม	ไม่มีการแก้ไข
หมวด 1 บทเบ็ดเสร็จทั่วไป	ไม่มีการแก้ไข
มาตรา 148	ไม่มีการแก้ไข
มาตรา 149	ไม่มีการแก้ไข
มาตรา 150	ไม่มีการแก้ไข
มาตรา 151	ไม่มีการแก้ไข

BIOGRAPHY

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Publications	Wiriya Kongsiriwong, 'An Overview of Problems with the Act on Imposition of Non-Criminal (*Pinai*) Regulatory Fines, B.E. 2565 (2022)' (2023) 3 Thai Legal Study 109.