

LEGAL TRANSPLANT ON THE THAI CIVIL AND COMMERCIAL CODE:
A CASE STUDY OF DEFINITION OF THINGS AND PROPERTY *

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Received 20 April 24

Revised 7 July 24

Accepted 22 July 24

Abstract

Despite being perceived as one of the fundamental concepts in the Thai Civil and Commercial Code (TCCC), the definition of ‘things’ (*Sap*) and ‘property’ (*Sapsin*) remains a subject of controversy in current Thai law.

A key factor contributing to this controversy is the codification process of the TCCC. In this process, drafters adopted foreign private law from various countries, influencing the definitions and concepts of ‘things’ and ‘property’ in the TCCC. Unfortunately, this approach has led to problematic consequences and inconsistencies within the Thai legal framework.

This research addresses why the reception of foreign private law into the TCCC poses challenges for Thai scholars and continues to be a source of controversy, where the study focuses specifically on the definitions of ‘things’ and ‘property.’

The findings of the study underscore that the reception of legal principles on the same issue but from different countries has resulted in inconsistencies within the Civil Code system. This inconsistency arises from each country’s diverse backgrounds, concepts, aspects, and legal developments. Consequently, the research emphasizes the importance of Thai lawyers, particularly those involved in drafting the Civil Code or any law, thoroughly investigating the background, concepts, relations, and applications of foreign legal concepts before transplantation. This precautionary measure is crucial to prevent undesirable outcomes and maintain consistency within the Thai legal system.

Keywords: Things, Property, Legal Transplantation

* This article is summarised and rearranged from the thesis “Problems of Legal Transplantation of Foreign Private Law in Thailand: A Case Study of Concept of Things and Property”, Faculty Law, Thammasat University, 2023.

1. Introduction

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.*’¹ In other words, it is the process of reception of the law from the exported country to the received country.

The concepts of things and property are among the most fundamental ideas of civil law and appear in various provisions of the TCCC. Such concepts also directly affect the composition of other provisions of the TCCC, such as specific contracts in Book III and the provisions regarding rights over property in Book IV of the TCCC.

However, the concepts of ‘*Sap*’ (things) and ‘*Sapsin*’ (property) in the TCCC are still controversial and problematic, including the definition of things and property in the TCCC. The definition of things is defined in section 137, and the definition of property is defined in section 138. However, there still are ongoing debates among Thai scholars regarding these concepts, e.g., whether things must be susceptible of having a value and of being appropriated like property,² and whether all kinds of things are considered property in the TCCC,³ etc.

Moreover, there are further debates regarding concepts of things and property in other provisions of the TCCC relevant to the concepts of property rights, e.g., adverse possession of incorporeal property,⁴ ownership right over incorporeal property,⁵ and the problems of interpretation of the specific contracts regarding things or property as the subject-matter of contract,⁶ etc.

This study found that one of the causes is, in the process of codifying the TCCC, the provisions on the definition of things and property in the TCCC were transplanted from various foreign private laws.

In this article, the author applies historical and comparative approaches in conducting the analysis. The pivotal points are on the definitions of things and property in the TCCC and

¹ Alan Watson, *Legal Transplants and Law Reform* (University of Georgia Press 1993) 22.

² Arnon Mamount, [Kodmai Sapsin: Kwam Roo Puen Tan Tang Kwam Kid Lak Tua Pai Lae Bod Bed Sed Tua Pai [Property Law: Fundamental Idea, General Principle, and General provision] (3rd edn, Winyuchon 2019) 145-146 (อานนท์ มาเม้า, กฎหมายทรัพย์สิน: ความรู้พื้นฐานทางความคิด หลักทั่วไป และบทเบ็ดเสร็จทั่วไป (พิมพ์ครั้งที่ 3, วิญญูชน 2562)) 145-146.

³ Sanunkorn Sotthibandhu, Kam Athibai Kodmai Laksana Sapsin [Textbook on Property Law] (Winyuchon 2023) 43-44 (ศันนักรณ โสทธิพันธ์, คำอธิบายกฎหมายลักษณะทรัพย์สิน (วิญญูชน 2566)) 43-44.

⁴ The Decision of the Thai Supreme Court no. 677/2532 (A.D.1989); The Decision of the Thai Supreme Court no. 9544/2542 (1999 A.D.).

⁵ The Decision of the Thai Supreme Court no. 3395/2529 (1986 A.D.).

⁶ Pornperm Srisawat, Pan Ha Kwammai Khong Sabsin Nai Eakkatest Sanya [Problems of Meaning of Property in Specific Contract] (Master of Laws Thesis, Chulalongkorn University 2017) (พรเพ็ญ ศรีสวัสดิ์, ปัญหาความหมายของทรัพย์สินในเอกเทศสัญญา (วิทยานิพนธ์ปริญญานิติศาสตรมหาบัณฑิต จุฬาลงกรณ์มหาวิทยาลัย 2560)).

foreign private laws, which were used as the drafting models of the TCCC, i.e., French law, Argentine law, German law, and Japanese law.

Therefore, this research will answer the question of how the provisions on the definition of things and property in the TCCC are similar or dissimilar to the provisions on the definition of things and property in foreign laws used as a model for drafting. Also, the author further observes the concepts of things and property in Thai law and analyses the influences of the concepts of things and property in foreign private laws on the definitions of things and property in the TCCC.

2. Definition of things and property in foreign laws

In general, ‘things’ means physical objects or corporeal objects. They can either exist in nature or be created by men. When human society developed and the laws emerged, the definition and the classification of things began to be established in law to link them with the legal principles, attaching various types of things to the status of ‘objects of rights’ under the law.⁷

On the other hand, ‘property’ appears to be an abstract concept that developed after humans began possessing and owning various things, giving rise to various rights over them. It was later that humans had a legal system. The concept of property can be understood from many perspectives, which may be objects of rights, including both corporeal and incorporeal objects.⁸

However, in another aspect, property is also defined as the exclusive right over things to use, sell, or permanently withhold from others, which has a description similar to the meaning of ‘ownership,’ which is another concept of law.⁹

According to the TCCC, the definitions of things and property are defined in sections 137 and 138, respectively, after the revision in the year B.E. 2535. In the previous version, the TCCC B.E. 2468, such definitions are in sections 98 and 99, respectively. From historical research, the minutes of the TCCC drafters show that the drafters transplanted the definition of things from Japanese and German law, while the definition of property was transplanted from Argentine law and French legal texts, which will be explained further in the topic 3.5.

2.1 Roman law

In Roman law, Gaius, a significant jurist in the Roman period, classified civil law into three subjects: Law of Persons (*Persones*), Law of Things (*Res*), and Law of Actions (*Actiones*).¹⁰

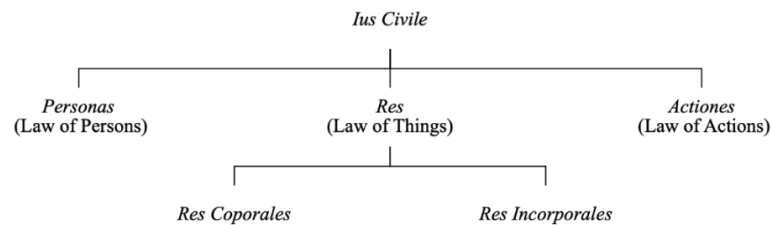
⁷ Mamont, (n 2) 26,33.

⁸ Ibid 26.

⁹ Henry Campbell Black, *Black's Law Dictionary* (4th edn, West Publishing Co. 1968) 1382.

¹⁰ Alan Watson, *Making of the Civil law* (Harvard University Press 1981) 2.

When considering the *Res*, Gaius has classified *res* into corporeal things (*res corporales*), such as organs, human beings, gold, silver, and incorporeal things (*res incorporales*), such as inheritance, usufruct rights, utility rights, and obligations.¹¹ This classification is still influential to the classification and definition of things in the modern civil code.¹²



Roman Law Structure and Classification Things in Institute of Gaius¹³

2.2 French law

In French law, there is no definition of things (*Choses*) and 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.¹⁴ For example, the classification of property in article 516 of the FCC states that ‘*All property is movable or immovable.*’¹⁵ Nonetheless, according to the French legal texts, the definition of things was explained to be objects which are corporeal able to be appropriated by men which also called ‘things in civil law’¹⁶ or ‘things as property’,¹⁷ while 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.*”¹⁸ Moreover, there is an explanation for the relationship between things and property in French law, such that things that become property are only things in civil law which humans can appropriate. Therefore, it does not include

¹¹ Paul J. du Plessis, *Borkowski’s Textbook on Roman Law* (6th edn, Oxford University Press 2020) 153; George L. Gretton, ‘Ownership and its Objects’ (2007) 71 (4) *The Rabel Journal of Comparative and International Private Law* 805.

¹² Gretton (n 11) 807.

¹³ *Ibid* 805.

¹⁴ Jean Domat, *Civil Law in Its Natural Order Vol. I*, (William Strahan tr, Fred B. Rothman & Co., 1980) 148-156; Marcel Planiol, *Treatise on The Civil Law Volume 1, Part 2 No.1610 to 3097* (Louisiana State Law Institute tr, 12th edn, 1939) 134-135.

¹⁵ French Civil Code, s 516 (E. Blackwood Wright (trs), *The French Civil Code Translated into English with Notes Explanatory and Historical, and Comparative References to English Law* (Stevens and Sons 1908) 89).

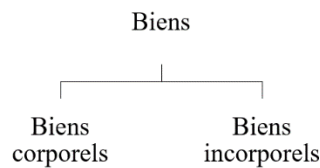
¹⁶ Domat (n 14) 148-156.

¹⁷ Planiol (n 14) 280.

¹⁸ *Ibid*.

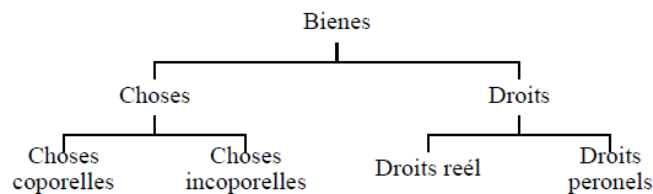
natural things that humans cannot appropriate, such as the sea, the atmosphere, or the sun which called ‘thing by nature’.¹⁹

One another important observation of French law is that the English word ‘property’ is derived from the Old French ‘*properté*’ or ‘*propriété*,’²⁰ but the current French word ‘*propriété*’ is a word that refers to ‘ownership’ in French law,²¹ and the word which refers directly to property in the sense of civil law is the word ‘*Biens*,’ which is an interesting observation in etymons. Therefore, in French law, property (*Biens*) can be classified into corporeal property (*Biens corporels*) which is things (*Choses*) and incorporeal property (*Biens incorporels*)²² following the Gaian classification as follows:



Classification of property (*Biens*) following Gaian classification²³

On the other hand, it is also possible to classify property (*Biens*) to things (*Choses*), which are classified into corporeal and incorporeal things, and rights (*Droits*), which are classified into real rights and personal rights.²⁴



Classification of property (*Biens*)²⁵

¹⁹ Domat (n 14) 148-156.

²⁰ Oxford English Dictionary, ‘Property’ <https://www.oed.com/dictionary/property_n?tab=etymology> accessed 2 January 2024.

²¹ Gretton (n 11) 802, 809.

²² Ibid 809.

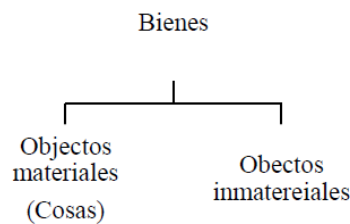
²³ Gretton (n 11) 809.

²⁴ Ibid 814.

²⁵ Ibid.

2.3 Argentine law

The Argentine Civil Code of 1874 (Arg. CC 1871) was promulgated in 1871 AD,²⁶ which the drafters of the TCCC used as one of the drafting models for the definition of property under the TCCC. The definition of things (*Cosa*) is defined in article 2345 [2311], defined as “corporeal objects susceptible of having a value.”²⁷ Meanwhile, property (*Bienes*) is defined in article 2346 [2312] as “Immaterial objects susceptible of having a value, and likewise things.”²⁸



Classification of things and property in Argentine Civil Code 1871²⁹

The unique trait of the Arg. CC 1871 is that this code, in the official Spanish version, provides the explanatory notes of the provisions by the drafter (*Dalmacio Vélez Sársfield*). The code explains the concepts of things and property as follows.

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 incorpóreas, 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.

Article 2311 of Argentine Civil Code 1871 and Note Expansatory³⁰

In terms of things, it has been explained in Arg. CC 1871 that only corporeal objects that [Translated by author] “have a value among the goods of individuals”³¹ are considered as things. The definition excludes corporeal objects in nature that cannot be the property of

²⁶ F. Bower, ‘War Taxes’ (1941) 23(4) Journal of Comparative Legislation and International Law 172, 174.

²⁷ Argentine Civil Code 1871, Art 2345 [2311] (Frank L. Joannini (trs), *The Argentine Civil Code Together with Constitution and Law of Civil Registry* (Boston Book Company 1917) 363).

²⁸ Argentine Civil Code 1871, Art 2346 [2312], (Frank L. Joannini (trs), *The Argentine Civil Code Together with Constitution and Law of Civil Registry* (Boston Book Company 1917) 363).

²⁹ Gretton (n 11) 817.

³⁰ Expansatory Note of Article 2311, Argentine Civil Code 1871 (Official version in Spanish).

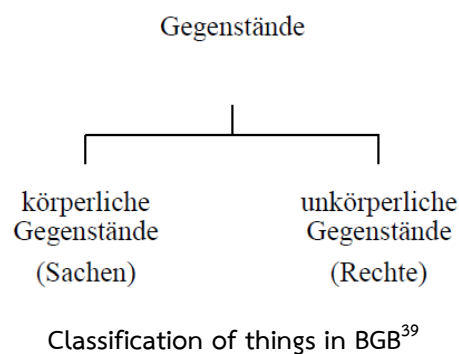
³¹ Ibid.

a human, e.g., the sea, the air, the sun,³² similar to the concept of property (*Biens*) in French law.

2.4 German law

According to the German Civil Code (BGB), the term things (*Sachen*) is defined as corporeal objects³³ (*körperliche gegenstände*) in section 90 of the BGB.³⁴ According to German law, real rights can be acquired only over corporeal objects,³⁵ and there is a classification between things, which are corporeal objects, and rights (*Rechte*), which can be considered as incorporeal objects (*unkörperliche Gegenstände*).

However, the definition of property is not directly defined in the BGB; there are various words in German which translated to property in English, for example, *Sache*,³⁶ *Eigentum*,³⁷ or *Eigenschaft*.³⁸ The term ‘property’ in German law also is one of the terms which is abstract and difficult to define clearly or have a solid definition in German law. However, incorporeal objects, such as real rights, claims, or other incorporeal property, can also be classified as property implicational.



³² Footnoted of Article 2311, Argentine Civil Code 1871 (Spanish version).

³³ Ernest J. Schuster, *The Principle of German Civil Law* (Clarendon Press, 1907) 58-60.

³⁴ German Civil Code, s 90 (Langenscheidt Übersetzungsservice (trs), German Federal Ministry of Justice) <https://www.gesetze-im-internet.de/englisch_bgb/> accessed 24 June 2024.

³⁵ Schuster (n 33) 67.

³⁶ German Civil Code, s 356b para 2; s 491 para 1 (Professor Christian Tomuschat, Professor David P. Currie, Professor Donald P. Kommers and Raymond Kerr, in cooperation with the Language Service of the German Bundestag (trs), German Federal Ministry of Justice, <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html> accessed 24 June 2024).

³⁷ German Basic Law, Art 14 (Professor Christian Tomuschat, Professor David P. Currie, Professor Donald P. Kommers and Raymond Kerr, in cooperation with the Language Service of the German Bundestag (trs), German Federal Ministry of Justice, <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html> accessed 24 June 2024).

³⁸ Cambridge Dictionary, ‘Property’ (Translated from English to German) <<https://dictionary.cambridge.org/dictionary/english-german/property?q=Property>> accessed 2 May 2024.

³⁹ Gretton (n 11) 819.

2.5 Japanese law

For the Japanese Civil Code (JCC), it is heavily influenced by German law and French law.⁴⁰ In the JCC, the term ‘things’ (物: *Mono*) is defined in article 85⁴¹ such that, “The term ‘Things’ as used in this Code shall mean tangible thing.”⁴² However, the definition of property is not defined in the JCC, which is similar to the German BGB.

According to Japanese law, the classification of things begins by classifying objects (物体: *Buttai*) into tangible objects (有体物: *Yutaibutsu*) and incorporeal objects (無体物: *Mutaibutsu*), which is similar approach to the German concept.



Classification of things in Japanese Civil Code

3. Definition of things and property in Thai law

3.1 Ancient customary Thai law

In the past, before Thailand or Siam enforced a modern legal code during the reign of King Rama V, the primary law that Siam used was the ‘Law of Three Seals,’ which had been in use since the Ayutthaya period before its revision in the reign of King Rama I.⁴³

According to the Law of Three Seals, the classification of things in the past was influenced by Buddhist and Brahmin beliefs; they classified things by using the ‘soul’ as the indicator, i.e., if those things are an organism, they will have their soul, e.g., animals or slaves. Thus, they were called ‘Things with Soul’ (วิญญาณกทรัพย์ or สวิญญาณกทรัพย์). On the other

⁴⁰ Munin Pongsapan, Rabob Kodmai Civil Law: Jak Rabob Kodmai Sibsong Toe Soo Pramual Kodmai Pang lae Panid [Civil Law System: From Law of the Twelve Tables to Civil and Commercial Code], (3rd ed, Winyuchon, 2020) 287 (มุนินทร์ พงศาปาน, ระบบกฎหมายซีวิลลอว์: จากกฎหมายสิบสองโต๊ะสู่ประมวลกฎหมายแพ่งและพาณิชย์ (พิมพ์ครั้งที่ 3, วิญญูชน 2563) 287.

⁴¹ J.E. De Becker, *Annotated Civil Code of Japan* (Butterworth & Co. 1909) 77.

⁴² Japanese Civil Code, Art 85, (Japanese Ministry of Justice (法務省) (trs)) <<https://www.moj.go.jp/content/000056024.pdf>> accessed 24 June 2024.

⁴³ Sawaeng Boonchalermvipas, Prawattisart Kodmai Thai [The Thai Legal History] (19 edn, Winyuchon 2020) 152-153. (แสวง บุญเฉลิมวิภาส, ประวัติศาสตร์กฎหมายไทย (พิมพ์ครั้งที่ 19 วิญญูชน 2563) 152-159.

hand, if they are not an organism but a material object, e.g., gold, silver, money, etc., they are called a ‘Thing without Soul’ (อวิญญาณกะทรัพย์).⁴⁴

[Translated by Author] Section 99: If a thing with soul (วิญญาณกะทรัพย์) or a thing without soul (อวิญญาณกะทรัพย์) had been purchased, if he [the seller] took the money and promised to deliver the thing but does not deliver it, and if [the other party] makes a demand but he [the seller] denies and claims that the sale was not made, or the money was not received [and] the facts appeared as truth, it was considered as fraud, and the price of the product is calculated as compensation in multiples.⁴⁵

3.2 Modernization of Siam legal system

After Siam made the Treaty of Friendship and Commerce between the British Empire and the Kingdom of Siam (Bowring Treaty) with the British Kingdom in 1855, Siam lost its extraterritorial rights for the first time according to the conditions of the treaty. Later, Siam continuously lost extraterritorial rights to other countries, leading to the attempt to modernize Siam and the Justice system, including the Legal system in Siam.⁴⁶

3.3 Thai Penal Code R.E.127 (1908)

Siam started the modernization process by drafting the Thai Penal Code R.E.127 (B.E. 2451), which was considered the first modern law code in Thailand. In 1908,⁴⁷ the interesting thing about this code was that the definition of ‘things’ (*Sap*) had already been stated in this code before Thailand had the civil code. The definition of things (*Sap*) was defined in section 6 (10) as an “*object 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*”⁴⁸ However, after the promulgation of the new Thai Criminal Code in 1956, there was no longer a definition for the term ‘things’ for the reason that the definition of things was defined in the TCCC, which had already been promulgated before in 1925. This caused problems in the interpretation of criminal cases, due to the scope of meaning of things in the Thai Penal Code Section 6 (10) was boarder than the scope of

⁴⁴ University of Moral and Political Science, Pramual Kodmai Ratchakarn Ti 1 Chunlasakkarat 1116 Chabab Pim Luang Tra Samduang Lem 2 [Code of King Rama I Chunlasakkarat 1116 Printed according to the royal tree seals version, Vol. 2], 242 (มหาวิทยาลัยวิชาธรรมศาสตร์และการเมือง, ประมวลกฎหมายรัชกาลที่ 1 จุลศักราช 1116 พิมพ์ตามฉบับหลวง ตรา 3 ดวง เล่ม 2) 242.

⁴⁵ Ibid 248-249.

⁴⁶ Chanchai Sawaengsak, Itthipol Khong Kodmai Frances Nai Karn Partiroop Kod Mai Thai [Influence of France on Thai Legal Reformation] 31-33,41-43 (2 edn, Winyuchon, 2015) (ชาญชัย แสวงศักดิ์, อิทธิพลของกฎหมายฝรั่งเศสในการปฏิรูปกฎหมายไทย (พิมพ์ครั้งที่ 2 วิญญูชน 2558) 31-33,41-43.

⁴⁷ Ibid, 69.

⁴⁸ Thai Penal Code R.E.127 (1908 A.D.), s 5(10)

meaning of things according to the TCCC.⁴⁹ For example, applying provisions on the cases of stealing electricity⁵⁰ and other incorporeal property because the meaning of the word ‘things’ in the Civil and Commercial Code was narrower than the definition of things in the penal code (R.E.127), a matter which is still debated in the current Thai law.⁵¹

3.4 Civil and Commercial Code B.E. 2466 (1923)

In the first preliminary draft of R. Guyon, the draft of the TCCC follows the French Civil Code.⁵² This draft does not contain a provision for 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, a definition of ‘things’ was added in section 97 as “*corporeal objects only and are either immovables or movables*,”⁵³ which is similar to article 516 of the FCC, and 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*.”⁵⁴

For Title VIII, the Revising Committee of the Draft of the Thai Civil and Commercial Code was entitled to revise and translate the draft from English to Thai. The word ‘things’ was translated to ‘*Sap Sing Khong*’ (ทรัพย์สินของ) in Thai when the first draft from the drafting committee was submitted. Such term is the combination of the word ‘*Sap*’ (ทรัพย์สิน) and ‘*Sing Khong*’ (สิ่งของ), which means objects in Thai. On the other hand, the word ‘Property’ was translated to ‘*Sap*’ (ทรัพย์สิน).⁵⁵ However, the Committee of Revising edited them by cutting off

⁴⁹ Yud Sanguthai, Kam Athibai Kodmai Laksana Arya Ror Sor 127 [Textbook on Penal Code R.E.127] (7 ed, Winyuchon) 51. [หยุด แสงอุทัย คำอธิบายกฎหมายลักษณะอาญา ร.ศ. 127 (พิมพ์ครั้งที่ 7 วิญญูชน) 51].

⁵⁰ The Decision of the Thai Supreme Court no. 877/2501 (1958 A.D)

⁵¹ See, Suneti Kongthep, Kwampitt Than Laksap Suksa Goranee Karn Aow Pai Sueng Palangngan [Theft Offense: A Case Study of Energy Taking] (Master of Laws Thesis, Thammasat University 2000) (สุนิติ คงเทพ, ความผิดฐานลักทรัพย์: ศึกษาการเอาไปซึ่งพลังงาน (วิทยานิพนธ์นิติศาสตร์มหาบัณฑิต มหาวิทยาลัยธรรมศาสตร์ 2543)) ; Arunotai Sueuwan, Kwampitt Than Laksap Suksa Goranee Karn Lak Lob Chai Krasae Fire Far [Theft Offense: A Case Study of Illegal Use of Electricity] (Master of Laws Thesis, Dhurakij Pundit University 2017) อรุณทัย ชื้อสุวรรณ ความผิดฐานลักทรัพย์ : ศึกษากรณีการลักลอบใช้กระแสไฟฟ้า (วิทยานิพนธ์นิติศาสตร์มหาบัณฑิต มหาวิทยาลัยธุรกิจบัณฑิต 2559)).

⁵² Sawaengsak (n 46) 81.

⁵³ Thailand Civil and Commercial Code B.E.2466 (1923 A.D.), s 97

⁵⁴ Thailand Civil and Commercial Code B.E.2466 (1923 A.D.), s 98

⁵⁵ National Archive, Mor Ror 6 yor /17, Eakkasarn Krom Rachlekatikarn Ratchakarn Ti 6 Krasueng Yuttitham ‘Rang Rai Ngan Prachum Torn Trued Kae Rang Lae Kum Plae Laksana Bukkol Kab Kae Baap 1-2 Tam Ban Tuek Khong Dor Ror James [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. (สำนักหอจดหมายเหตุแห่งชาติ, ม.ร.ว.ย./17 เอกสารกรมราชเลขาธิการ รัชกาลที่ 6 กระทรวงยุติธรรม ‘ร่างรายงานประชุม ตอนตรวจแก้ร่างและคำแปล ลักษณะบุคคล ครั้งที่ 1, ที่ 2 และที่ 3 กับแก้บรรพ 1-2 ตามบันทึกของ ดร.เจมส์’) 50.

the word ‘Sing Khong,’ leaving only ‘Sap’ as the translation of ‘things’ in the TCCC and changed the translation of ‘property’ from ‘Sap’ to ‘Sapsin’ (ทรัพย์สิน), which has been in use until now.⁵⁶

3.5 Civil and Commercial Code B.E. 2468 (1925)

In 1925, after failures of the TCCC B.E.2466 arose due to the inconsistencies of the provisions in the code,⁵⁷ the drafting committee decided to use a grafting method for drafting a revised TCCC by transplanting foreign laws into it. The code was drafted through the method of copying other foreign private codes, where the most influential civil codes were the BGB and JCC, blending with some provisions from Swiss law⁵⁸ and Latin American laws, e.g., Brazilian law and Argentine law.

The TCCC Book I, General Principles, and Book II, Obligations, were redrafted in this version. The first draft of the TCCC B.E.2468 only provides the definition of ‘things’ in section 98, which the drafting committee revised from section 97 of the TCCC B.E.2466,⁵⁹ and amended it to “*Things, in the legal sense, are corporeal objects,*”⁶⁰ which the drafting committee received and followed section 90 of the BGB and article 85 of the JCC.⁶¹

Moreover, the drafting committee considered the draft of section 98, and found that the draft only provided the definition of ‘Things’; the word ‘Property’ was undefined. Thus, the committee drafted the definition of property in section 98 Bis as “*Property includes things as well as incorporeal objects susceptible of having a value,*” following the principle of the Arg. CC 1871 article 2346 [2312] and Frech legal principle. Later on, section 98 Bis was changed to section 99 in the subsequent meeting.⁶²

⁵⁶ Ibid.

⁵⁷ Sawaengsak (n 46) 96-97.

⁵⁸ Pongsapan (n 40) 263.

⁵⁹ National Archive, Mor Ror 6 Yor/18 Eakkasarn Krom Rachlekatikarn Ratchakarn Ti 6 Krasueng Yuttitham Rai Ngan Prachum 1/161 Tueng 21/181 (24 Gor Kor – 7 Por Yor 2468) (Meeting Record, 1/161 to 21-181) 12. (สำนักหอจดหมายเหตุแห่งชาติ, ม. ร.6 ย./17 เอกสารกรมราชเลขาธิการ รัชกาลที่ 6 กระทรวงยุติธรรม ‘รายงานประชุม 1/161 ถึง 21/189 (24 ก.ค - 7 พ.ย. 2468) 12.

⁶⁰ National Archive, Mor-Sor Kor Gor 3/4 Samnak Ngan Kana Gammakarn Krissadeeka ‘Garn Prachum Gammakarn Rang Kodmai Na Krom Tha Chang Wangna Tangtae Wanti 19 Pluedsapakom Tueng 31 Karakgadakom Porsor 2468’ [Mor-Sor Kor Gor 3/4 Office of the Council of State ‘Legislative Drafting Committee Meeting at Tha Chang Wangna Law Drafting Department from May 19 to July 31, 1925’], 385 (สำนักหอจดหมายเหตุแห่งชาติ, ม. สดก 3/4 สำนักงานคณะกรรมการกฤษฎีกา ‘การประชุมกรรมการร่างกฎหมาย ณ กรมท่าช้างวังนา ตั้งแต่วันที่ 19 พฤษภาคม ถึง 31 กรกฎาคม พ.ศ.2468’ 385).

⁶¹ Ibid 386,388.

⁶² National Archive, (n 60) 397.

After being promulgated for 67 years, sections 98 and 99 were revised in 1992 to be sections 137 and 138 in the current TCCC.⁶³ There exists a minor change in section 137 by the deletion of the phrase “*in the legal sense.*”

3.6 Overviews on development of the concept of things and property in Thai law

From a study on the definitions of ‘things’ and ‘property’ according to Thai law, the similarities and differences in each period can be compared, as shown in the tables below.

Name of the Law	Definition of Things	Definition of Property
Law of Three Seals	- No definition of Things or property - Only classification of things to ‘things with soul’ and ‘things without soul’	
Thai Penal Code R.E.127 (A.D.1908)	Section 6 (10) Things mean objects 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.	
TCCC B.E.2466 (A.D.1923)	Section 97 Things are corporeal objects only and are either immovables or movables.	Section 99 ‘Property <i>in Genere</i> ’ means those movable things which, in the ordinary course of transaction, are customarily determined by number, weight or measure.
Thai Civil and Commercial Code 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 Civil and Commercial Code 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.

⁶³ Act Promulgation the Revised Provisions of Book I of the Civil and Commercial Code B.E. 2535 (A.D.1992).

4. Analysis

From the comparative study of the definitions of ‘things’, and ‘property’ according to Thai and foreign laws. the similarities and differences in each law can be compared, as shown in the table below.

Law / Provision of	Things	Property
French law	Corporeal Objects susceptible of being appropriated (things in civil law)	Things and incorporeal susceptible of being appropriated. (<i>Biens</i>) FCC article 516 <i>All property is movable or immovable.</i>
Arg. CC 1871	Article 2345 Corporeal objects susceptible of having a value are called things in this Code.	Article 2346 Immaterial objects susceptible of having a value, and likewise things, are called property (<i>bienes</i>).
BGB	Section 90 Only corporeal objects are things as defined by law.	-
JCC	Article 85 The term " <i>Things</i> " as used in this Code shall mean tangible thing.	-
TCCC B.E.2468 (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.
TCCC 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.

The comparative study shows that the definitions of ‘things’, and ‘property’ in each country share some commonalities. The definitions of things, generally, are defined with reference to corporeal objects, adhering to general principles passed down from Roman law to the civil law system. However, the specific details vary in each country.

On the contrary, the definition of ‘property’ is not defined in the BGB and JCC. The definition of property is in section 138 of TCCC and was transplanted from the concept of property (*Biens*) from the French legal textbook and Arg.CC 1871 article 2346 [2312] as corporeal and incorporeal objects, which are susceptible to having a value and being appropriated. The most significant problem in the Thai codification is that the German concept totally separated ‘things’ (*Sachen*) from ‘rights’ (*Rechte*), and only things are subjected to the law of property (*Sachenrecht*), whilst the concept of ‘property’ in French law governs both corporeal objects (*Biens corporels*) and incorporeal objects (*Biens incorporels*), including rights (*Droits*). Adopting two conflicting principles into the same legal system created incompatibility between two terms and further relevant provisions. When speaking of ‘things’ under Thai law, it should be interpreted in the German approach as *Sachen*, while when speaking of ‘property,’ it should be interpreted in the French approach as *Biens*. However, the *Biens incorporels* of the latter, including *Droits*, are excluded from the former *Sachenrecht*, leading to ambiguity in the interpretation of Thai provisions in connection to the terms ‘things’ and ‘property.’

One important observation is that, according to Argentine law, there was a definition of ‘things’ in article 2345 [2311], which stated the definition of things corresponds to the definition of property in article 2346 [2312]. However, the drafters of the TCCC did not receive the definition of things from article 2345 [2311] of Arg.CC 1871 but received the definition of things from German and Japanese laws, which do not define ‘property’ in their Civil Code. This phenomenon results in the controversial interpretation of the concept of ‘things and ‘property’ in Thai law due to their origins, as the definition of things and property in the TCCC were transplanted from different countries and had different aspects.

Moreover, as the current section 137 does not contain the phrase ‘in the legal sense,’ this elimination of words may cause more problems in interpretation for the reason that it makes the definition of property broader than in section 98 of the TCCC B.E.2468.

5. Conclusion and Recommendation

5.1 Conclusion

From the research question, it can be concluded that the definitions of ‘things’ and ‘property’ in the TCCC were transplanted from foreign private laws through the process of codification of the TCCC after the modernization of Siam. The study found that the definition of things in the TCCC section 137 [98] was transplanted from section 90 of the BGB and article

85 of the JCC. In contrast, the definition of property in the TCCC section 138 [99] was transplanted from the textbooks on the principle of French law and section 2346 [2312] of the Arg. CC 1871.

The study shows that the concept of ‘property’ between German law and French law, which were the original concepts, are dissimilar. German law has only the definition of ‘things,’ which are the objects of real rights under the German legal concept in general; the concept of ‘property’ as an object of right is rarely mentioned in German law and has an abstract meaning,

On the other hand, the term ‘property’ (Biens) in French law is explained as the ‘objects of rights,’ including both things and rights, which have been classified systematically. These concepts were received and clearly defined in section 2346 [2312] of the Arg. CC 1871.

Therefore, when the drafters of the TCCC transplanted the concepts of things and property by copying the provisions from the different countries' laws, which contain different concepts of property, it caused some inconsistencies and unsystematic parts of the definitions of things and property in the TCCC, especially in its classification. Subsequently, this led to debates among Thai lawyers about the status quo.

5.2 Recommendation

In section 138 of the TCCC, when the definition of ‘property’ is broader than ‘things’ (in the legal sense), according to the French and Argentinian concepts, ‘things’ to be ‘property’ must be things that can be appropriated. The author suggests that Thai law should revise section 137 of TCCC by defining ‘things’ in the same way as section 2345 [2311] of the Arg. CC 1871, which clearly defines that ‘things’ must be susceptible of having a value, like ‘property’: *‘Section 137 Things, in the legal sense, are corporeal objects susceptible of having a value and of being appropriated.’*⁶⁴

Amending the above provisions would help reduce problems in interpreting the relationship between ‘things’, and ‘property’ in the TCCC and positively affect the understanding of education and the practice of Thai law.

⁶⁴ This recommendation was only one of the recommendations in the part of the definition of things and property in the TCCC due to the limited content of the article published. Please find the full content and recommendations in the entire thesis.