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## ผู้สนับสนุนร่วม



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# A Need for Sexual Requirement in Thai Family Law?<sup>\*</sup>

## ความ (ไม่) จำเป็นของเงื่อนไขการร่วมประเวณี ในกฎหมายครอบครัวไทย

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### Abstract

The aim of this article is to discuss the need to include the sexual requirement in Thai family law, beginning with the development of sexuality in family law to demonstrate that the sexual elements of family law have become less significant. Then, the response of Thai family law to the sexual relationship of married couples is explored by considering the provisions in the Thai Civil and Commercial Code that are associated with the sexual requirement; for example, Section 1461 requires spouses to reside together and have sexual intercourse with each other and, according to Section 1516 (10), the inability of a spouse to have sexual intercourse is a ground for divorce. The possible interpretation of those provisions as amended by the Civil and Commercial Code Amendment No. 24 Act (Marriage Equality Law) is also discussed. The current

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positions of the family laws in the chosen jurisdictions, namely, England, Germany, and Japan, are then compared. Finally, the abolition of the sexual requirement in Thai family law is analysed and recommended.

**Keywords:** sexual relationships, sexual intercourse, sexual requirement

## บทคัดย่อ

บทความนี้มีวัตถุประสงค์ในการอภิปรายโต้แย้งถึงความจำเป็นของ “เงื่อนไขการร่วมประเวณี” ในกฎหมายครอบครัวไทย โดยเริ่มต้นจากการสำรวจพัฒนาการของกฎหมายครอบครัวและปฏิสัมพันธ์ระหว่างกฎหมายและการร่วมประเวณีของคู่สมรสตั้งแต่อดีตจนถึงปัจจุบัน จากนั้นจึงศึกษาปฏิสัมพันธ์ระหว่างกฎหมายครอบครัวไทยกับความสัมพันธ์ในทางประเวณีของคู่สมรส ทั้งนี้ โดยพิจารณาบทบัญญัติที่สะท้อนถึงความสัมพันธ์ดังกล่าว เช่น ประมวลกฎหมายแพ่งและพาณิชย์ มาตรา 1461 ฉบับปัจจุบันซึ่งถูกตีความในทางตำราว่าคู่สมรสมีหน้าที่ในการอยู่อาศัยและร่วมประเวณีกัน หรือมาตรา 1516 (10) ซึ่งกำหนดให้ความบกพร่องทางกายของคู่สมรสจนไม่สามารถร่วมประเวณีได้ตลอดกาลเป็นเหตุฟ้องหย่า อีกทั้งยังพิจารณาถึงบทบัญญัติเหล่านั้นซึ่งถูกแก้ไขภายใต้กฎหมายสมรสเท่าเทียมด้วย นอกจากนี้ บทความนี้ยังทำการศึกษาเปรียบเทียบกฎหมายครอบครัวไทยกับกฎหมายต่างประเทศ ได้แก่ อังกฤษ เยอรมนี และญี่ปุ่น จากนั้นจึงวิเคราะห์ความเป็นไปได้และเสนอแนะแนวทางในการยกเลิกเงื่อนไขการร่วมประเวณีในกฎหมายครอบครัวไทย

**คำสำคัญ :** ความสัมพันธ์เชิงคู่สมรส การร่วมประเวณี เงื่อนไขการร่วมประเวณี

## 1. Introduction

Families have been defined as sexual unions established by couples of the opposite sex, who cohabit with each other and cement their relationship by having a child.<sup>1</sup> Family law has traditionally recognised these relationships by focusing on heterosexual couples' marriage and cohabitation, as well as parenthood, established by their biological link.<sup>2</sup> This is why sex and blood ties are perceived as the meat and bones of family law.<sup>3</sup> Apart from the requirement of marriage that couples must have different genders, what reflects the sexuality of family law is the "sexual requirement", i.e., the requirement for couples to have sexual intercourse with each other. This requirement can be seen in the law on marriage in many past or even current jurisdictions.<sup>4</sup> Its purpose is understood as being to perform essential social functions, namely, human reproduction and the accommodation of religious belief.<sup>5</sup>

However, the hallmark of the family has moved beyond the traditional understanding, and the major themes of family law are no longer restricted to opposite-sex relationships and biological parenthood. The law has now reached a position in which same-sex relationships are recognised and accorded the same legal rights as opposite-sex ones.<sup>6</sup> It is also possible for a child and his or her parents to have no biological connection with each other due to advanced assisted reproductive technologies.<sup>7</sup> Moreover, some scholars have attempted to reduce the emphasis on sexual relationships by contending that the focus of family law should not be based on

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<sup>1</sup> Sherif Girgis, Robert George and Ryan Anderson, 'What is marriage?' (2010) 34 *Havard Journal of Law & Public Policy* 245, 256.

<sup>2</sup> Jonathan Herring, 'Making Family Law More Careful' in Julie Wallbank and Jonathan Herring (eds) *Vulnerabilities, Care and Family Law* (Routledge 2013) 50.

<sup>3</sup> *ibid.*

<sup>4</sup> Matrimonial Causes Act 1973 Section 12. For further details, see section 4.1.

<sup>5</sup> Jonathan Herring, 'Why Marriage Needs to be Less Sexy' in Joanna Miles and others (eds) *Marriage Rites and Rights* (Bloomsbury 2015) 278.

<sup>6</sup> E.g. Thailand is about to complete the full integration of same-sex relationships into family law by allowing same-sex couples to marry based on the Civil and Commercial Code Amendment Act (No.24) 2024 (B.E. 2567).

<sup>7</sup> E.g. in Thailand, married couples can undertake surrogacy by using an embryo formed from the sperm or oocyte of a donor. See Protection of a Child Born by Medically Assisted Reproductive Technology Act 2015 (B.E. 2558) Section 22.

sex.<sup>8</sup> These changes indicate that the sexual elements of family law have become less significant.

The current Thai family law appears to regard sexual intercourse of spouses as an essential component of marriage. For example, Section 1461 of the Thai Civil and Commercial Code, which deals with spouses' duties, requires them to cohabit as husband and wife.<sup>9</sup> Thai scholars have interpreted this provision to mean that spouses must not only live together but also have sexual intercourse with each other.<sup>10</sup> The sexual requirement is also emphasised in Section 1516 which entitles a party to file for divorce if the other is permanently unable to have sex with him or her.<sup>11</sup> Although same-sex marriage has been legalised under the Civil and Commercial Code Amendment No. 24 Act (Marriage Equality Law), those sexual elements will likely continue to exist.<sup>12</sup> This raises the important question of whether the sexual requirement should still be an essential component of marriage in Thai law.

## 2. Historical Development of the Sexual Requirement in Family Law

The development of how family law has responded to sexual relationships is explored in this section to demonstrate the change in people's attitude toward the family as a sexual union. It also explores the development of Thai family law to determine how the sexual requirement in Thai family law has been established and developed.

### 2.1 Historical development of the sexuality of family law

The development of the sexual requirement in family law can be examined through two perspectives within family law: the traditional viewpoint and the modern approach.

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<sup>8</sup> E.g. Jonathan Herring proposes that the law on marriage should focus on care rather than sex; see Jonathan Herring 'Why Marriage Needs to be Less Sexy' (n 5) 288.

<sup>9</sup> Thai Civil and Commercial Code Section 1461.

<sup>10</sup> ไพโรจน์ กัมพูศิริ, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 5 ครอบครัว (พิมพ์ครั้งที่ 11, วิญญูชน 2566) 131. For a detailed account, see section 3.1.

<sup>11</sup> Thai Civil and Commercial Code Section 1516 (10).

<sup>12</sup> The current Sections 1461 and 1516 of the Thai Civil and Commercial Code are amended by the Civil and Commercial Amendment Act (No.24) 2024 (B.E. 2567). For a detailed account, see section 3.4.



### 2.1.1 Traditional Family Law: Sexual Family Law

The family has historically been viewed as a fundamental institution, created to perform certain essential state functions, namely, human reproduction and the accommodation of religious belief.<sup>13</sup> Therefore, the institution of the family has been strictly defined by the authorities as a privilege, both in terms of its constitution and function.<sup>14</sup> For example, a family had to be in the form of the marriage of a heterosexual couple, whose roles were divided by gender: the husband was the economic provider and head of the family, while the wife was the caretaker of the family and subservient to her husband.<sup>15</sup> The couple was also expected to have children to complete their relationship.<sup>16</sup> Therefore, any couple seeking to marry had to accept and comply with these requirements to show that they provided the state with sufficient benefit to justify the given privilege.

Since traditional family law has focused on heterosexual relationships which are based on formal marriage, it is not surprising that one of the legal requirements is that both parties must have different genders. Apart from that, another essential requirement that reflects the sexuality of the traditional family law is the sexual requirement, i.e., sexual intercourse of married couples.<sup>17</sup> This requirement may exist in many forms, for example, it may be in the form of a spouses' duty and the lack of such duty can lead to the end of the marriage. Also, it may be a requirement for the validity of marriage, i.e., the marriage has not become a secure legal entity until the couple completes having sexual intercourse with each other.<sup>18</sup> The latter, as known as "the requirement of consummation", still exists, for example, in current English family law.<sup>19</sup>

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<sup>13</sup> Jonathan Herring, 'Why Marriage Needs to be Less Sexy' (n 5) 278.

<sup>14</sup> Martha Albertson Fineman, 'Progress and Progression in Family Law' (2004) 1 University of Chicago Legal Forum 1, 1-2.

<sup>15</sup> *ibid* 2.

<sup>16</sup> Sherif Girgis, Robert George and Ryan Anderson (n 1) 245, 256. It is explained that "*marriage is a comprehensive union of two sexually complementary persons who complete their relationship by the generative act —by the kind of activity that is by its nature fulfilled by the conception of a child*".

<sup>17</sup> In this article, the term "sexual requirement" refers to the legal obligation of a married couple to have sexual relationships with each other. In traditional family law, it was always in the form of sexual intercourse between a heterosexual couple.

<sup>18</sup> Jonathan Herring, 'Why Marriage Needs to be Less Sexy' (n 5) 275.

<sup>19</sup> Matrimonial Causes Act 1973 Section 12. For a detailed account, see section 4.

In theology, the sexual requirement is justified by traditional and religious values. For example, the consummation requirement was established in English law by the ecclesiastical courts, explaining that sexual intercourse reflects and completes a couple's spiritual union.<sup>20</sup> It was also believed that there is something special about heterosexual sexual intercourse that naturally marks marriage as separate from all other relationships.<sup>21</sup> However, the purpose of the sexual requirement in law is unclear in itself. It is usually justified by reference to the original purposes of marriage. For example, in *Dickinson v Dickinson*<sup>22</sup>, considering the Book of Common Prayer of the Church of England, the English court explained that the requirement of consummation can be justified by three reasons. Firstly, it serves the family function of the procreation of children; secondly, it helps to promote social solidarity; and lastly, it aims to be a remedy against sin by avoiding fornication.<sup>23</sup>

### 2.1.2 Modern Family Law: Moving Beyond the Traditional Understanding

The understanding of the family has changed rapidly over the past decades, as the family's traditional formations and functions, which were once strictly defined by the authorities, have been challenged.<sup>24</sup> It is now believed that marriage should be seen as a fundamental right,<sup>25</sup> and the state's role is no longer to preserve the value of the traditional family, but instead, to support all individuals who form a marital relationship, regardless of how it is formed.<sup>26</sup> The major themes of modern family law are no longer restricted to opposite-sex marriage and biological parenthood. The law has reached a position where same-sex couples are granted the same marital rights as opposite-sex ones.<sup>27</sup> It is also now possible for a child and his or her parent to have no biological connection due to advanced assisted reproductive technologies.<sup>28</sup>

<sup>20</sup> Jonathan Herring, 'Why Marriage Needs to be Less Sexy' (n 5) 279.

<sup>21</sup> Sherif Girgis, Robert George and Ryan Anderson (n 1) 256, 287.

<sup>22</sup> *Dickinson v Dickinson* (1913) P 198, (1913) 109 LT 408.

<sup>23</sup> Jonathan Herring, 'Why Marriage Needs to be Less Sexy' (n 5) 278.

<sup>24</sup> Martha Albertson Fineman (n 14) 1-2.

<sup>25</sup> For a detailed account, see Article 16 of the UDHR and Article 23 of the ICCPR.

<sup>26</sup> Martha Albertson Fineman (n 14) 4-5.

<sup>27</sup> E.g. Thailand is about to complete the full integration of same-sex relationships into family law by allowing same-sex couples to marry according to the Civil and Commercial Code Amendment Act (No.24) 2024 (B.E. 2567).

<sup>28</sup> E.g. in Thailand, married couples can undertake surrogacy by using an embryo formed from the sperm or oocyte of a donor. Protection of a Child Born by Medically Assisted Reproductive Technology Act 2015 (B.E. 2558) Section 22.



Moreover, sexual intercourse is no longer regarded as an essential requirement of legal marriage in many jurisdictions, as evidenced by, for example, German family law by which married couples have not imposed the duty to have sex, and there is no clear ground for divorce stemming from the inability or refusal of a party to have sex with the other.<sup>29</sup>

The traditional justifications for the sexual requirement and even marriage itself, as a means of recognising sexual relationships, have also been challenged. Traditional and religious values of marriage seem to be the only factors that support the sexual requirement in modern society. The law has gradually broken away from the traditional view of the institution of family. The view that having children is an essential part of family life has been firmly rejected, for example, by the English court in *Baxter v Baxter*.<sup>30</sup> Moreover, as the sexual requirement was originally defined in the context of heterosexual relationships, it is challenging to acknowledge it in the context of same-sex marriage in those jurisdictions in which it exists.<sup>31</sup> As a result, some scholars propose that family law should move beyond its traditional focus on sexual relationships.<sup>32</sup>

### 2.1.3 New Approach: Sexless Family Law

There has been an attempt to define the sexuality of family law in a way that includes other values, such as mutual trust. For example, Crompton suggests the term “sexual intimacy” to justify the requirement of consummation in the context of same-sex marriage under English law, explaining that “*the goal of marriage as a sexual relationship is to foster the intimacy that sexual expression affords within the context of a faithful lifelong relationship based on mutual trust and respect.*”<sup>33</sup>

<sup>29</sup> BGB Sections 1353, 1359, 1360, and 1564-1568; Saskia Lettmaier and Moritz-Philipp Schulz, *Family and Succession Law in Germany* (4th edn, Wolters Kluwer 2022) 53, 60. For a detailed account, see section 4.

<sup>30</sup> *Baxter v Baxter* (1948) AC 274; “...it is not the consent of marriage as it relates to the procreation of children that is requisite; for it may consist ... but it is the consent ... which may have the conjunction of bodies as well as of minds as the general end of the institution of marriage is the solace and satisfaction of man.”

<sup>31</sup> This is according to paragraph 4 of Schedule 4 of the Marriage (Same-Sex Couples) Act 2013. For further details, see section 4.

<sup>32</sup> For a detailed account, see section 2.1.3.

<sup>33</sup> Jonathan Herring, Rebecca Probert and Stephen Gilmore, *Great Debates in Family Law* (2nd edn, Palgrave MacMillan 2015) 171; Lucy Crompton, ‘Where’s the Sex in Same-sex Marriage?’ (2013) 43 *Family Law* 564, 564.



Some commentators have also attempted to completely break away from the focus on sexual relationships by arguing that marriage should not be thought of as a sexual union at all. For example, Brake contends that sexuality in family law should be abolished as the current family law regime is based on the assumption that a sexual relationship is a goal universally shared by all humans and should be aimed for before other relationships.<sup>34</sup> She argues that this assumption, which she calls “*amatonormativity*”, devalues other non-sexual relationships such as friendship.<sup>35</sup> Hence, she suggests a new marriage regime, called “minimal marriage”, in which individuals would be allowed to design the rights and responsibilities exchanged within the marriage and exchange them with whomever they choose.<sup>36</sup> Similarly, Herring argues that the sexual requirement should be abandoned as it is based on the presumption that sex is central to marriage, which is wrong.<sup>37</sup> He proposes that marriage should be reconceptualised as being about “caring” rather than “sex”, and that there is no benefit for the modern state in promoting sexual relationships above others. Instead, it is caring relationships that are “key to societal well-being” and deserve to be protected and promoted by the law on marriage.<sup>38</sup>

## 2.2 Historical development of the sexual requirement in Thai family law

The history of Thai family law can be categorized into two distinct periods, namely, (i) the ancient Thai family law and (ii) the modern Thai family law. The latter is marked by the promulgation of Book 5 of the Thai Civil and Commercial Code in 1935.

### 2.2.1 Ancient Thai Family Law: Law of Husbands and Wives

Before the Thai Civil and Commercial Code was established in 1935 (B.E. 2478), Thai family customs governed marital relationships.<sup>39</sup> Some of these customs,

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<sup>34</sup> Elizabeth Brake, *Minimizing Marriage: Marriage, Morality, and the Law* (Oxford University Press 2013) 89-90.

<sup>35</sup> *ibid.*

<sup>36</sup> *ibid.* 156.

<sup>37</sup> Jonathan Herring, Rebecca Probert and Stephen Gilmore (n 33) 288.

<sup>38</sup> *ibid.* 288, 290.

<sup>39</sup> ชาติชาย อัครวิบูลย์ และสมบุรณ์ ชัยเดชสุริยะ, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 5 ว่าด้วยครอบครัว (ที่ได้ตรวจชำระใหม่ พ.ศ. 2519) (มหาวิทยาลัยธรรมศาสตร์ 2521) 1.



which were dominated by the Indian culture,<sup>40</sup> were transformed into written laws, such as the Law of Three Seals, a collection of legal texts from the Ayutthaya era.<sup>41</sup> According to the Law of Husbands and Wives,<sup>42</sup> there is no provision about the personal relationship between husbands and wives,<sup>43</sup> and how they cohabit with each other is not clearly stated. Instead, it is focused on when the marital relationship begins and ends.<sup>44</sup> Before the application of the marriage registration system, the marital status was legally recognised as when a man and a woman agreed to take each other as husband and wife, and declared their status to the public.<sup>45</sup> They could declare that they were married, for example, by having a wedding ceremony and cohabiting with each other as husband and wife.<sup>46</sup> In this sense, sexual intercourse could not indicate the beginning of the marriage.<sup>47</sup> To illustrate, if a man and a woman were having sex with each other, they may not be legally recognised as spouses unless the woman's parents had given their consent.<sup>48</sup> On the other hand, even if they were not having sex with each other, they could be treated as spouses if the marriage had been declared to the public, for example, by having a wedding ceremony.<sup>49</sup>

Although the duties of husband and wife were not clearly articulated in the Law of Husbands and Wives, they were evidenced by disputes over property. For

<sup>40</sup> แสวง บุญเฉลิมวิภาส และอดิรุจ ต้นบุญเจริญ, *ประวัติศาสตร์กฎหมายไทย* (พิมพ์ครั้งที่ 18, วิญญูชน 2562) 52.

<sup>41</sup> ขาดิขัย อัครวิบูลย์ และสมบุญ ณ ชัยเดชสุริยะ (n 39) 1.

<sup>42</sup> Part of the Law of Three Seals which collects the ancient Thai law regarding marital relationships.

<sup>43</sup> ทองเปลว ชลภูมิ และคณะ, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 5 (ครอบครัว)* (โรงพิมพ์อักษรนิติ 2478) 106-107.

<sup>44</sup> *ibid.*

<sup>45</sup> เขียง, *กฎหมายแพ่ง: ดำเนินความตามกฎหมายลักษณะแพ่งและลักษณะอื่น ๆ ในกฎหมายราชบุรี ประกาศ พรบ รัชกาลที่ 4 ที่ 5 และที่ 6 และคำพิพากษาศาลฎีกา 117 ถึง 131* (พิมพ์ครั้งที่ 2, โรงพิมพ์พาณิชย์กุล 2456) 4.

<sup>46</sup> *ibid* 5; กำธร เลี้ยงสังธรรม (บรรณาธิการ), *กฎหมายตรา 3 ดวง: ฉบับพิมพ์มหาวิทยาลัยวิชาธรรมศาสตร์และการเมือง เล่ม 2* (สถาบันปริทัศน์ พนมยงค์ 2548) 15.

<sup>47</sup> ภาวิณี บุญนาค, 'เรื่องผัว ๆ เมีย ๆ ในสมัยรัชกาลที่ 5 ถึงรัชกาลที่ 7 ผ่านกฎหมาย คดีความและฎีกา' (2554) 5 ศิลปวัฒนธรรม 80, 82.

<sup>48</sup> *ibid* 82; กำธร เลี้ยงสังธรรม (n 46) 39-40, 54, 58. Since an unmarried woman must remain under her parents' protection, a man who had a sexual relationship with an unmarried woman violated her parents' protective power and hence, was responsible for paying damages. It was provided in Sections 81, 82, 126, and 135 of the Law of Husbands and Wives that "เมื่อหญิงใดยังอยู่ได้อำนาจอิสระของพ่อแม่ การที่ชายมาลอบทำชู้ด้วย หรือลักพาเอาไปนั้นเป็นการละเมิดอำนาจพ่อแม่ เขาอาจฟ้องร้องเรียกสินไหมได้".

<sup>49</sup> กำธร เลี้ยงสังธรรม (n 46) 51. It was provided in Section 119 of the Law of Husbands and Wives that "ชายใดพึงใจลูกสาวหลานสาวท่าน ให้ผู้เฒ่าผู้แก่ไปสู่ขอเป็นค่านับแก่บิดามานดาหญิง บิดามานดาหญิงลูกสาวหลานสาวนั้น ให้แก่ชายผู้สู่ขอ ทำกรรมมงคลแล้วชายนั้นมิกระทำการไป ยังมีได้มาอยู่ด้วยหญิง ถ้าชายกลับมาได้ ท่านให้ส่งตัวหญิงนั้นให้แก่ชาย".

example, a wife may have sued her husband, claiming that property she had acquired after the marriage was not matrimonial property and hence, her husband was not entitled to part of it, by showing that her husband did not support or maintain her.<sup>50</sup> On the other hand, the husband may have argued that he was not required to maintain a wife who lacked the duties of a good wife, such as the duty of care<sup>51</sup> and the duty to respect and support her husband.<sup>52</sup> These arguments suggest that, in order to maintain their marital status, spouses were obliged to cohabit as husband and wife. Interestingly, although it was commonly known that husbands and wives were morally obliged to have sexual relationships, no such obligation existed in the Law of Husbands and Wives.

### 2.2.2 Modern Thai Family Law: Civil and Commercial Code Book 5

The sexual requirement was first introduced in Section 1453 para 1 of the Thai Civil and Commercial Code 1935 (B.E. 2478), in which it was provided that “*husband and wife shall cohabit as husband and wife*”.<sup>53</sup> This provision was adopted from Articles 789<sup>54</sup> of the (old) Japanese Civil Code,<sup>55</sup> and Thai scholars have interpreted the duty to cohabit as husband and wife to include the duty to have a sexual relationship, which should be regarded as an essential element of married life.<sup>56</sup> Why married couples’ “sexual intercourse” was transformed into a clear legal duty is

<sup>50</sup> ภาวิณี บุณนาค (n 47) 84; See also หอจดหมายเหตุแห่งชาติ, ร.5 ย.13.10/32 เรื่องที่ดิน ระหว่างพระยาภาณุวงศ์ แลสู่่น (19 กรกฎาคม ร.ศ.122 - 24 กุมภาพันธ์ ร.ศ.127).

<sup>51</sup> ภาวิณี บุณนาค (n 47) 85. This refers to the duty as “housewife and housekeeper”, e.g., to manage affairs of the house, welcome guests, and take care family's income and expenses appropriately; See also หอจดหมายเหตุแห่งชาติ, ร.6 ย.8.2/1 หม่อมแสงมณีกับหม่อมเจ้าทองเชื้อ (3 กรกฎาคม พ.ศ. 2463 - 10 มกราคม พ.ศ. 2464).

<sup>52</sup> ภาวิณี บุณนาค (n 47) 86-87. This includes the duty to refrain from committing any misconduct such as gambling, habitual intoxication, clubbing addiction, habitual prodigality and behaving badly to the husband and his relatives; See also หอจดหมายเหตุแห่งชาติ, ร.7 รล.20/182 ฎีกานางม้วน สงปรังค์ ร้องทุกข์ขอให้พระสรลักษณ์ ลิขิตสงค้ำเลี้ยงบุตร (21 ธันวาคม พ.ศ.2474 - 6 มิถุนายน พ.ศ. 2475).

<sup>53</sup> Act Promulgating the Civil and Commercial Code Book 5 1934 (B.E. 2477).

<sup>54</sup> Japanese Civil Code (1898) Article 789 “*The wife is bound to live with her husband. The husband must permit the wife to live with him*”.

<sup>55</sup> อิศรภักดี ธรรมวิเทศ, ‘คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์บรรพ 5’ (2478) 11 วารสารนิติศาสตร์; See also สภาผู้แทนราษฎร, รายงานการประชุมสภาผู้แทนราษฎร ครั้งที่ 29 (2 มีนาคม 2477) 2040-2041. According to the draft proposed by the government, Section 1453 para 1 was provided the same as the (old) Japanese Civil Code Article 789 However, it was amended by the committee.

<sup>56</sup> เสนีย์ ปราโมช, *ประมวลกฎหมายแพ่งและพาณิชย์ ว่าด้วยครอบครัว มฤตก พุทธศักราช 2508* (จุฬาลงกรณ์มหาวิทยาลัย 2508) 70-71; อิศรภักดี ธรรมวิเทศ (n 55) 1044, 1045.



questionable as the Law of Husbands and Wives, as well as the old Japanese Civil Code, which was the origin of this provision, had nothing to do with it. The duty to cohabit as husband and wife only appeared in Section 1461 when the Thai Civil and Commercial Code was amended in 1976.<sup>57</sup> The term, “*cohabit as husband and wife*”, has remained until now, along with its sexual interpretation, which has been included in commentaries on family law from time to time.

The sexual requirement was also reflected in Section 1500 (9), in which it was stipulated that, “*if a husband or wife has a defective genital organ so as to be permanently unable to cohabit as husband and wife, the other can bring an action for divorce*”.<sup>58</sup> Despite the use of the term, “*unable to cohabit as husband and wife*”, it is clear that, in this context, it referred to “being unable to have sexual intercourse”.<sup>59</sup> Interestingly, unlike other grounds for divorce that can be traced to their origins,<sup>60</sup> there is no evidence that Section 1500 (9) originated from the ground for divorce due to the inability to have sex, which did not exist in the Law of Husbands and Wives,<sup>61</sup> BGB<sup>62</sup> or the Japanese Civil Code.<sup>63</sup> The ground for divorce based on the inability to have sex was then provided in Section 1516 (10) due to the amendment of the Thai Civil and Commercial Code in 1976.<sup>64</sup> The term, “*defective genital organ*”, was turned into “*a physical disadvantage*”, and the term “*unable to cohabit as husband and wife*” was clarified by changing it into “*unable to have sexual intercourse*”.<sup>65</sup> The sexual

<sup>57</sup> Act Promulgating the Reviewed Provisions of Book 5 of the Civil and Commercial Code 1976 (B.E. 2519).

<sup>58</sup> Act Promulgating the Civil and Commercial Code Book 5 1934 (B.E. 2477).

<sup>59</sup> เสนีย์ ปราโมช (n 56) 200-201.

<sup>60</sup> ไชยพัฒน์ ธรรมชุตินันท์, ‘ปัจจัยสำคัญอันมีอิทธิพลต่อการจัดทำและการแก้ไขเพิ่มเติมประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 5 ในส่วนที่เกี่ยวกับการสมรส’ (วิทยานิพนธ์ นิติศาสตรมหาบัณฑิต มหาวิทยาลัยธรรมศาสตร์ 2566) 137. A number of divorce grounds were inherited from the Law of Husbands and Wives such as (1) that deals with adultery, (2) that deals with serious misconduct, or (3) that deals with intentional desertion. However, some were adopted from foreign laws such as (5) that deals with disappearance, (6) that deals with legal incompetency, and (8) that deals with serious illness.

<sup>61</sup> พิจารณาปฤชามาตย์, *คำอธิบายลักษณะผิดเมีย* (โรงพิมพ์พิศาลบรรณินดี 2461) 118-122, 133, 136-141, 146-150. The relevant provisions (regarding grounds for divorce) under the Law of Husbands and Wives are Sections 37, 38, 39, 50, 51, 55, 57, 58, 60, 62, 67, 69, 74, 108, and 112.

<sup>62</sup> BGB Sections 1564-1568; BGB (original version) Sections 1564-1576.

<sup>63</sup> Japanese Civil Code Article 770; Japanese Civil Code (1898) Article 813.

<sup>64</sup> Act Promulgating the Reviewed Provisions of Book 5 of the Civil and Commercial Code 1976 (B.E. 2519).

<sup>65</sup> Thai Civil and Commercial Code Section 1516 (10).

requirement was also reflected in Section 1500 (3), in which it was stated that one spouse was allowed to claim for divorce if the other had committed an act that was seriously adverse to the conjugal relationship to such an extent that the latter could not be expected to continue the marriage.<sup>66</sup> In fact, this is the fundamental ground for divorce in many jurisdictions,<sup>67</sup> which enables a court to determine which case is so serious that the couple cannot continue their marriage. However, it seems that Thai scholars interpreted this provision very broadly at that time to include cases in which a wife refuses to have sex with her husband.<sup>68</sup>

Apart from the Civil and Commercial Code, the sexual requirement was also stressed in the Penal Code of Siam 1908, in which a husband was not punished for raping his wife.<sup>69</sup> In this way, the duty to have sex was strongly imposed on married couples, particularly women, and wives were obliged to allow their husbands to have sex with them. The rule that excused a husband from punishment if he raped his wife was adopted by the Thai Penal Code<sup>70</sup> until it was abolished by the Penal Code Amendment Act 2007 (B.E. 2550).

### 3. Sexual Requirement in Thai Family Law

The response of the current Thai family law to the sexual intercourse of married couples is explored in this section by considering the provisions on marriage related to the sexual requirement. The focus is on the interpretation of the current provisions under the Civil and Commercial Code in the context of opposite-sex marriage, but the possible interpretation of the related provisions in the context of same-sex marriage is also discussed as the Marriage Equality Law is about to become effective.

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<sup>66</sup> Act Promulgating the Civil and Commercial Code Book 5 1934 (B.E. 2477). It is currently provided in Section 1516 (6).

<sup>67</sup> The same rule applied in German law (BGB (original version)) Section 1568; Ernest Joseph Schuster, *The Principles of German Civil Law* (Clarendon Press 1907) 526.

<sup>68</sup> เสนีย์ ปราโมช (n 56) 192-193.

<sup>69</sup> Penal Code of Siam 1908 (Ratanakosin Era 127) Section 243 “Whoever, by doing any act of violence or by threatening, has sexual intercourse with a woman, who is not his wife, shall be punished...”.

<sup>70</sup> Thai Penal Code (in effect before 2007) “Whoever has sexual intercourse with a woman, who is not wife, against her will, by threatening by any means whatever, by ... shall be punished...”.

### 3.1 Duty to cohabit as husband and wife

The first provision that reflects the sexual requirement is found in Section 1461 of the Civil and Commercial Code, which deals with the duties of a husband and wife.<sup>71</sup> According to this provision, married couples are required to “*cohabit as husband and wife*”, which has been traditionally interpreted by leading Thai family law scholars in the context of heterosexual marriage to mean that the couple must reside together and have sexual intercourse with each other.<sup>72</sup> This interpretation is said to correspond to the nature of marriage, which has the aim of procreating children.<sup>73</sup> Hence, if one party fails to perform this duty, the other may be entitled to action for divorce under Section 1516.<sup>74</sup> Moreover, this duty is regarded as being so important that married couples are not allowed to agree otherwise, e.g., an agreement not to have sex for a while, such as two years, is unenforceable as it violates the public order.<sup>75</sup>

Although no Supreme Court decision has imposed a clear general duty to have sex on married couples, such a duty can be implied. For example, in Supreme Court Decision No. 2185/1987 (B.E. 2530), the claimant brought an action to cancel the marriage, claiming that the defendant, who was his wife, refused to have sexual relationships with him on the first night after their wedding ceremony.<sup>76</sup> The court was likely to accept that married couples had a duty to have sex with each other and the party who failed to do so would be in breach. However, in this case, the court held that the defendant had not breached this, as she had reasonable excuses, i.e., it was her first marriage, and she was tired after the long ceremony that had lasted all day, making her afraid and not in the mood to participate in any sexual activity.<sup>77</sup>

<sup>71</sup> Thai Civil and Commercial Code Section 1461.

<sup>72</sup> ประสพสุข บุญเดช, *คำอธิบายกฎหมายครอบครัว* (พิมพ์ครั้งที่ 26, เนติบัณฑิตยสภา 2565) 167; สหส สิงหวิริยะ, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 5 ว่าด้วยครอบครัว* (พิมพ์ครั้งที่ 9, นิติบรรณการ 2551) 72; ไพโรจน์ กัมพูศิริ (n 10) 131-133.

<sup>73</sup> ประสพสุข บุญเดช (n 72) 167. It is explained that it is a commonly known custom that couples need to share a domestic life by living in a common home and having a sexual relationship. The fact that they live together without having sex is insufficient to comply with the duty under Section 1461.

<sup>74</sup> *ibid* 168-169. For further details, see section 3.3.

<sup>75</sup> ขาดิชา อัครวิบูลย์, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 5 ว่าด้วยครอบครัว* (พิมพ์ครั้งที่ 4, วิญญูชน 2552) 142-143, 186; ไพโรจน์ กัมพูศิริ (n 10) 217.

<sup>76</sup> Supreme Court Decision No. 2185/1987 (B.E. 2530). It should be noted that, in fact, this case dealt with the cancellation of a marriage on the basis that it was fraudulent. However, interestingly, the court explained the duty of couples to have sex.

<sup>77</sup> *ibid*.

However, the scope of sexual duty is limited to the common practices of a reasonable spouses.<sup>78</sup> To determine its scope, e.g., how and how frequently spouses should cohabit and have sexual relationships, factors such as their age, health, or job, must be considered.<sup>79</sup> For example, it is unreasonable to expect older spouses, who may have less sexual desire, or some couples in a long-distance relationship, to have sex regularly.<sup>80</sup> Also, one party does not need to accept unusual sexual practices of the other that may harm him or her.<sup>81</sup>

### 3.2 Consent to cohabit as husband and wife

At the formation stage of the marriage, Section 1458 requires each party to “*consent to take each other as husband and wife*”,<sup>82</sup> otherwise, the marriage is void.<sup>83</sup> It seems that this provision has been interpreted based on the duties of husband and wife under Section 1461, meaning that persons who are entering into a marriage must intend to “*cohabit as husband and wife*”. This seems to suggest that persons who intend to marry need to have the intention to perform the duty of having sexual intercourse with each other.

However, unlike Section 1461, this provision has not been interpreted in a way that clearly shows the sexual requirement. There is no Supreme Court decision or commentary that clearly explains that persons who intend to enter into a marriage need to have the intention to have sex at the time of registration. In practice, this provision has been simply interpreted to mean that both parties need to have a true intention to marry, and it is usually applied to a case of a “sham marriage”, i.e., a situation in which either party enters into the marriage with the sole intention of deriving any secondary benefit as a result of the married status.<sup>84</sup> For example, in Supreme Court Decision No. 1067/2002 (B.E. 2545), where the court held that the marriage between them was void based on Sections 1458 and 1495 because the defendant had

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<sup>78</sup> ชาติชาย อัครวิบูลย์ (n 75) 164.

<sup>79</sup> *ibid.*

<sup>80</sup> *ibid.*

<sup>81</sup> *ibid* 164-165.

<sup>82</sup> Thai Civil and Commercial Code Section 1458.

<sup>83</sup> Thai Civil and Commercial Code Section 1495.

<sup>84</sup> ประสพสุข บุญเดช (n 72) 138; ไพโรจน์ กัมพูศิริ (n 10) 120-121; ชาติชาย อัครวิบูลย์ (n 75) 152.



registered the marriage with C without the intention of living together as husband and wife, but merely to receive the pension.<sup>85</sup>

### 3.3 Sexual grounds for divorce

There are two grounds for divorce based on married couples' sexual relationship. The first ground on which a party is entitled to bring an action for divorce, according to Section 1516 (10), is that the other party is permanently unable to have "sexual intercourse" due to his or her physical disadvantage.<sup>86</sup> For example, if a party has lost or has unusual genitals so that he or she cannot have sex, the other can sue him or her for divorce.<sup>87</sup> However, this does not include cases where a party is infertile, provided he or she can still have sexual intercourse.<sup>88</sup> The only exception to this ground for divorce, which is provided in Section 1517, is that if the inability to have sex is caused by the other party, he or she is not entitled to bring an action for divorce under Section 1516 (10).<sup>89</sup>

The other ground found in Section 1516 is that if one party commits "*an act seriously adverse to the relationship of husband and wife*", the other can bring an action for divorce.<sup>90</sup> In fact, this "*act*" need not be directly connected to the sexual misconduct of a party. It has a broad meaning that the court can interpret by considering the relevant circumstances. It generally refers to any act committed by one party that prevents the couple from living their usual family life.<sup>91</sup> However, some scholars have interpreted the "*act*" under this provision to include the refusal of one party to have sex with the other, which is a duty under Section 1461.<sup>92</sup> Hence, in cases where a wife refuses to have sex with her husband or a husband refuses to have sex

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<sup>85</sup> Supreme Court Decision No. 1067/2002 (B.E. 2545). The court also highlighted that the consent under Section 1458 means both parties agree to "*become one part in the family, to cohabit as husband and wife both in a natural and legal sense, to share happiness and sadness, and to care and support each other as much as they can*". This is questionable whether the sexual duty was included.

<sup>86</sup> Thai Civil and Commercial Code Section 1516 (10).

<sup>87</sup> ประสพสุข บุญเดช (n 72) 476.

<sup>88</sup> *ibid.*

<sup>89</sup> Thai Civil and Commercial Code Section 1517.

<sup>90</sup> Thai Civil and Commercial Code Section 1516 (6).

<sup>91</sup> ประสพสุข บุญเดช (n 72) 466.

<sup>92</sup> *ibid* 168, 467; สหส สิงหวิริยะ (n 72) 72; ชาดิชา ยักรวิบูลย์ (n 75) 403.



with his wife without any valid reason, the latter may be entitled to bring an action for divorce.<sup>93</sup>

### 3.4 Possible interpretation in the context of same-sex marriage

According to the Marriage Equality Law, which was published in the Government Gazette on 12 August 2024 and shall come into force after one hundred and twenty days from the date of its publication,<sup>94</sup> same-sex marriage will be legalised by turning gendered terms (such as man and woman, or husband and wife) into neutral-gender ones (such as persons or spouses). However, the provisions regarding the sexual requirement will not be substantially affected, meaning that the sexual requirement is likely to continue to exist under the new law.

#### 3.4.1 Duty to cohabit as spouses

The term “*cohabit as husband and wife*” in Section 1461 para 1<sup>95</sup> becomes “*cohabit as spouses*” under the Marriage Equality Law, which raises the question of how this provision will be interpreted under the new law, especially in the context of same-sex marriage. Would the duty of cohabitation as spouses be interpreted in a sexual way, i.e., to include the duty to have sexual intercourse or any other sexual activities?<sup>96</sup>

#### 3.4.2 Consent to cohabit as spouses

The terms “*man and woman*” and “*husband and wife*” under Section 1458<sup>97</sup> become “*two persons*” and “*spouses*” under the Marriage Equality Law; hence,

<sup>93</sup> ประสพสุข บุญเดช (n 72) 168, 467; สหส สิ่งวิริยะ (n 72) 184.

<sup>94</sup> Civil and Commercial Code Amendment Act (No.24) 2024 (B.E. 2567) Section 2.

<sup>95</sup> Thai Civil and Commercial Code Section 1461 para 1 (amended by the Civil and Commercial Code Amendment Act (No.24) 2024 (B.E. 2567) Section 18) “*Spouse shall cohabit as spouse*”.

<sup>96</sup> During the consideration of the draft bill introduced by the Move Forward Party, there was a discussion regarding the term “*cohabit as husband and wife*” in Section 1461. It was proposed that that term needed to be amended and re-interpreted. An assistant of a committee pointed out that living family life does not only have sexual issues but involves other household aspects. Unfortunately, due to the dissolution of the former government, the draft bill lapsed and there has been no further discussion about this issue. See คณะกรรมาธิการวิสามัญ สภาผู้แทนราษฎร, บันทึกการประชุมพิจารณาร่างพระราชบัญญัติคู่ชีวิต พ.ศ. .... ครั้งที่ 8 (4 สิงหาคม 2565) 16-18.

<sup>97</sup> Thai Civil and Commercial Code Section 1458 (amended by the Civil and Commercial Code Amendment Act (No.24) 2024 (B.E. 2567) Section 15) “*A marriage can take place only if two persons consent to take each other as spouse*”.

like Section 1461, it is questionable how this provision will be interpreted in the context of same-sex marriage. Would the consent “*to take each other as spouses*” be defined as the intention to have sexual intercourse or to engage in other sexual activities during the marriage?

### 3.4.3 Sexual grounds for divorce

In terms of divorce, the requirement that couples need to have the ability to have sex is extended to the context of same-sex relationships under the Marriage Equality Law. The term “*permanently unable to have sexual intercourse*” under Section 1516 (10)<sup>98</sup> becomes “*permanently unable to have sexual intercourse, or to perform or accept any other sexual act*”. While the ability to have sexual intercourse is undoubtedly still considered to be important for opposite-sex marriage under the current law, it is questionable how the term “*to perform or accept any other sexual act*” will be interpreted under the new law, both in the context of opposite-sex or same-sex marriage. As for refusing to have sex, which is said to be a ground for divorce under Section 1516 (6),<sup>99</sup> like Section 1461, the term “*husband and wife*” becomes “*spouses*”. This raises the question of how this provision will be interpreted under the new law, especially in the context of same-sex marriage. Would the term “*acts seriously adverse to the relationship of husband and wife*” be interpreted to include the refusal to have sexual intercourse or the refusal “*to perform or accept any other sexual act*”?

## 4. Sexual Requirement in Foreign Family Laws

The sexual requirement in the family laws of three chosen jurisdictions, namely, England, Germany, and Japan, will be explored in this section. For the sake of comparison with Thai law, the sexual requirement in each jurisdiction will be divided

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<sup>98</sup> Thai Civil and Commercial Code Section 1516 (10) (amended by the Civil and Commercial Code Amendment Act (No.24) 2024 (B.E. 2567) Section 45) “*One spouse has a physical disadvantage so as to be permanently unable to have sexual intercourse, or to perform or accept any other sexual act, the other may enter a claim for divorce*”.

<sup>99</sup> Thai Civil and Commercial Code Section 1516 (6) (amended by the Civil and Commercial Code Amendment Act (No.24) 2024 (B.E. 2567) Section 45) “*One spouse has ... committed acts seriously adverse to the relationship of spouse to such an extent that the other has been in excessive trouble where the condition, position and cohabitation as spouse are taking into consideration, the other may enter a claim for divorce*”.

into three points, namely, (i) that deals with the validity of marriage, (ii) that deals with the general duty of cohabitation, and (iii) that deals with the grounds for divorce.

## 4.1 Sexual requirement in English family law

The English family law is a notable example of a discussion about the sexual requirement as it is steeped in history and has been developed for a long time. More importantly, the English law on marriage is inherent to traditional and religious values, as evidenced by the current law, which still clearly requires married couples to have sexual intercourse to complete their marriage.

### 4.1.1 Requirement of consummation

The requirement of consummation in English law has a long historical development, rooted in both ecclesiastical and common law traditions. It originates from ecclesiastical law which considered “*consummation*” as an essential part of the marriage, i.e., a marriage was not seen as fully completed until the couple engaged in sexual relations.<sup>100</sup> By the time of the development of common law, the idea of consummation had become entrenched, and the common law courts began to recognise that a lack of consummation could be a valid ground for annulment.<sup>101</sup> Although the jurisdiction over marriage law was then transferred to civil courts, the ground for non-consummation remained in effect.<sup>102</sup> In terms of justification, the court referred to the Book of Common Prayer of the Church of England, arguing that its purpose is to procreate children, encourage mutual support in society, and accommodate religious belief.<sup>103</sup>

The requirement of consummation is currently provided in Section 12 of the Matrimonial Causes Act 1973 that a marriage shall be voidable if; (a) it has not been consummated due to the incapacity of either party; and (b) it has not been consummated due to the wilful refusal of the respondent.<sup>104</sup> There only needs to be

<sup>100</sup> Jonathan Herring, ‘Why Marriage Needs to be Less Sexy’ (n 5) 279.

<sup>101</sup> See e.g. *D-E v A-G* (1845) 1 Rob Ecc 279.

<sup>102</sup> The authority over marital disputes was transferred from ecclesiastical courts to civil courts by the Matrimonial Causes Act 1857. However, the non-consummation ground was still regarded as a ground for annulment by civil courts, and it was then governed by legislation, e.g. the Matrimonial Causes Act 1937 and the Nullity of Marriage Act 1971.

<sup>103</sup> Jonathan Herring, ‘Why Marriage Needs to be Less Sexy’ (n 5) 278; *Dickinson v Dickinson* (1913) P 198, (1913) 109 LT 408.

<sup>104</sup> Matrimonial Causes Act 1973 Section 12 (1).



one act of consummation for a marriage to be consummated, but it must take place after the solemnisation of the marriage.<sup>105</sup> In this context, the term “consummation” is defined as an act of sexual intercourse, i.e., it can only be done by the penis penetrating the vagina.<sup>106</sup> No other form of sexual activity amounts to consummation.<sup>107</sup> The intercourse needs to be “ordinary and complete”, i.e., there must be full penetration, but there is no need for an ejaculation or orgasm.<sup>108</sup> It should be noted that consummation can take place, even if the man wears a condom,<sup>109</sup> because the potential production of children is irrelevant. However, there is no consummation without penetration, even if there is a pregnancy as a result of any other sexual acts.<sup>110</sup>

It should be noted that although same-sex couples can now marry under the Marriage (Same-Sex Couples) Act 2013,<sup>111</sup> there are some notable differences between same-sex and opposite-sex marriage in terms of sexual matters. It is stated in paragraph 4 of Schedule 4 of the Act that same-sex couples will be unable to have their marriage annulled based on the consummation ground.<sup>112</sup> This means that the requirement of consummation does not apply in the context of same-sex marriage.<sup>113</sup> In fact, the UK government initially intended to apply the consummation requirement to same-sex marriage but, it was not applied to same-sex couples.<sup>114</sup> Unfortunately, it was not clearly explained why same-sex couples would be treated differently, and the refusal of the UK government to explain has been criticised as indicating homophobia, or at least an unwillingness to openly acknowledge gay and lesbian sexuality.<sup>115</sup>

<sup>105</sup> Jonathan Herring, *Family Law* (11th edn, Pearson 2023) 103.

<sup>106</sup> *ibid.*

<sup>107</sup> *ibid.*

<sup>108</sup> *D-E v A-G* (1845) 1 Rob Ecc 279; *R v R* (1952) 1 All ER 1194.

<sup>109</sup> Jonathan Herring, *Family Law* (n 105) 103; *Baxter v Baxter* (1948) AC 274.

<sup>110</sup> Jonathan Herring, *Family Law* (n 105) 103; *Clarke v Clarke* (1943) 2 All ER 540.

<sup>111</sup> Marriage (Same-Sex Couples) Act 2013 Section 1.

<sup>112</sup> Marriage (Same-Sex Couples) Act 2013 Schedule 4 paragraph 4.

<sup>113</sup> Jonathan Herring, *Family Law* (n 105) 120.

<sup>114</sup> Jonathan Herring, ‘Why Marriage Needs to be Less Sexy’ (n 5) 277. It was suggested in the Equal Marriage Consultation Paper (HM Government 20212a) that the definition of consummation in the context of same-sex marriage would not be specifically provided. Rather, the courts would interpret and develop its meaning through case law.

<sup>115</sup> *ibid.*

#### 4.1.2 General duty to have a sexual relationship

There is no general duty for married couples to live together or have sexual activity in English family law. Despite making many attempts to define marriage, including a relationship between married couples,<sup>116</sup> it seems that the English law does not intend to do so.<sup>117</sup> Instead, it focuses on the requirements for entering and ending a marriage but says very little about the explicit content of the relationship.<sup>118</sup> In fact, it would be possible for a couple to be legally married but never have lived together under English law.<sup>119</sup> In *Re X*,<sup>120</sup> where a married couple had never had sex and had no intention of doing so, it was said that their marriage was a perfectly valid one, even with no sexual element.<sup>121</sup> In *P v P*,<sup>122</sup> a husband had only had sexual relations eight times in 18 years. However, the court held that the marriage was not voidable on the grounds of non-consummation, provided that it had been consummated by a single act of “ordinary and complete” intercourse.<sup>123</sup>

#### 4.1.3 Sexual grounds for divorce

There is also no ground for divorce connected to the couple’s sexual relationship under the current English family law. The Matrimonial Causes Act 1973 has been substantially amended by the Divorce Dissolution and Separation Act 2020, which now governs the law on divorce.<sup>124</sup> The court will make a divorce order following an application by one party on the ground that the marriage has irretrievably broken down. The court will take the party statement as conclusive evidence to determine whether a marriage has been irretrievably broken down without requiring him or her to prove any particular fact.<sup>125</sup>

<sup>116</sup> Jonathan Herring, *Family Law* (n 105) 84; *Hyde v Hyde* (1866) LR 1 PD 130.

<sup>117</sup> Jonathan Herring, *Family Law* (n 105) 85.

<sup>118</sup> *ibid.*

<sup>119</sup> *ibid*; *NB v MI (Capacity to contract Marriage)* (2021) EWHC 224 (Fam).

<sup>120</sup> *Re X* (2018) EWFC 15.

<sup>121</sup> Jonathan Herring, *Family Law* (n 105) 84.

<sup>122</sup> *P v P* (1964) 3 All ER 919.

<sup>123</sup> Jonathan Herring, *Family Law* (n 105) 103.

<sup>124</sup> *ibid* 158.

<sup>125</sup> Jonathan Herring, *Family Law* (n 105) 159-160. Under the old law, the party needs to prove one of five facts under Section 1 of the Matrimonial Causes Act 1973, for example, adultery, unreasonable behaviour, desertion, and separation.



## 4.2 Sexual requirement in German family law

The German family law is a good example of a law in which the sexual requirement does not clearly exist. Since the Thai Civil and Commercial Code has been greatly influenced by the German legal system and is about to recognise same-sex marriage, German family law, in which same-sex marriage has been legalised, is worth investigating in this article.

### 4.2.1 Mutual intention to marry

A marriage shall be voidable and, hence, able to be annulled by the court due to the lack of either party's true intention on the grounds provided in Section 1314 (2) of the German Civil Code (BGB). The first ground is where a spouse was in an unconscious state at the time of marriage registration. The second is where a spouse did not know that he or she was getting married at the time of its constitution. The third is where the declaration of a party is tainted by fraud, which means that, without such fraud, the marriage would not have been entered into by the deceived spouse.<sup>126</sup> The fourth is a marriage can be annulled if it was made by the spouses on account of duress. The last ground of annulment is that the couples have no intention of living in a conjugal community with each other, including the case of fictitious marriage, i.e., a marriage entered into for the sole purpose of achieving secondary benefits.<sup>127</sup> It seems that German family law does not require married couples to have a mutual intention to have sex with each other during the marriage. Although Section 1314 contains a ground of annulment that relies on the intention to perform the duty of a conjugal union, no sexual element is included in determining the validity of marriage as this provision was not sexually interpreted in the first place.

### 4.2.2 Duty of conjugal union

The effects of marriage are provided in Book 4 Division 1 Title 5 of the German Civil Code (BGB). The law imposes a number of marital duties. The most important two duties are the duty to maintain and support each other based on Section 1360 of the BGB<sup>128</sup> and the duty to cohabit as a conjugal union, i.e., to live in a "conjugal community" based on Section 1353.<sup>129</sup> Although the law does not clearly define a

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<sup>126</sup> Saskia Lettmaier and Moritz-Philipp Schulz (n 29) 48-49.

<sup>127</sup> *ibid* 49.

<sup>128</sup> BGB Section 1360.

<sup>129</sup> BGB Section 1353.

conjugal community, it has been interpreted by the court as a “*consortium omnis vitae*”, which relates to many aspects of spouses’ lives.<sup>130</sup> This includes the establishment of a joint home, the duty of marital fidelity, and joint responsibilities for common tasks, such as household chores or child-rearing.<sup>131</sup> The duty of conjugal union also requires spouses to respect each other during the marriage.<sup>132</sup> This may apply to a variety of circumstances; for example, if a spouse follows a chosen career path contrary to the other spouse’s wishes, the former is granted the right to inform the latter of his or her needs.<sup>133</sup>

However, whether one spouse owes the duty to have sexual intercourse with the other has been the subject of debate. This issue was first determined by the Federal Court of Justice when a husband, the plaintiff, sought to divorce his wife due to her refusal to have sex,<sup>134</sup> and the court held that the wife had failed to comply with the spouses’ duty under Section 1353. It was explained that a wife had no right to refuse to have sexual intercourse with her husband and that, even if she was unable to find satisfaction in doing so, the conjugal union still required her to do it with a sense of duty and readiness to sacrifice.<sup>135</sup> The same rule was applied by the District Court in a case of a wife’s refusal to have sex in 2000,<sup>136</sup> when the court emphasised the sexuality of marriage by pointing out that the sexual relationship of spouses was an essential part of marital life.<sup>137</sup> However, it was also admitted that this duty did not exist “*at all times and under all circumstances*,” e.g., spouses could refuse to have sex, provided they were incapable of doing so due to physical or emotional illness at the time.<sup>138</sup>

The interpretation of the duty of conjugal union under Section 1353 has changed since 2000 due to a rapid change in the understanding of sexuality as a result of the development of individuals’ right to self-determination and the notion of gender

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<sup>130</sup> Saskia Lettmaier and Moritz-Philipp Schulz (n 29) 53.

<sup>131</sup> *ibid.*

<sup>132</sup> *ibid.*

<sup>133</sup> *ibid.*

<sup>134</sup> BGH, Urteil v. 2 November 1966, Az. IV ZR 239/65.

<sup>135</sup> *ibid.*; See also Ernest Joseph Schuster (n 67) 492.

<sup>136</sup> AG Brühl, Urteil v. 24 March 1999, Az. 32 F 65/98.

<sup>137</sup> Valérie Suhr and Dana-Sophia Valentiner, ‘Sex in der Ehe als rechtliche Erwartung’ (2014) 2 Forum Recht Journal 54, 54-55.

<sup>138</sup> *ibid.*



diversity in German society.<sup>139</sup> This significant change began in 2001 when the Registered Partnership Act<sup>140</sup> made civil partnerships available to same-sex couples, and then same-sex marriage was legalised by the Same-sex Marriage Act 2017.<sup>141</sup> Although there has been no court decision that has overruled those of 1966 and 2000, it is currently accepted that a conjugal union does not mainly relate to physical cohabitation but refers to spouses' inner attitude, e.g., mutual care and support in the joint participation in all the affairs of life.<sup>142</sup> Also, Section 1352 (2) of the BGB, along with Articles 1 (1) and 2 (1) of the Basic Law, has been interpreted to protect spouses' right to dignity and autonomy, explaining that the obligation to engage in sexual relationships devalues their dignity and self-determination.<sup>143</sup> Therefore, one spouse should have the right to refuse to have sex with the other.<sup>144</sup> Hence, it can be concluded that the requirement to have sex is not a general duty of spouses under the current German family law.

#### 4.2.3 Sexual grounds for divorce

According to German law, other than by death, the court can only dissolve a valid marriage upon the petition of one or both spouses.<sup>145</sup> There is now only one ground for divorce, which is the "failure of the marriage."<sup>146</sup> The law considers the marriage to have failed if the conjugal union of the spouses no longer exists and they are not expected to restore it.<sup>147</sup> The law presumes that the marriage has failed in two circumstances, according to Section 1565. Firstly, there is a presumption that the marriage has failed if the spouses have been living apart for a

<sup>139</sup> Dana-Sophia Valentiner, 'The Human Right to Sexual Autonomy' (2021) 22 German Law Journal 703, 703-717 <<https://rb.gy/flokm0>> accessed 15 September 2024. The concepts of autonomy and consent gained importance during the 20<sup>th</sup> Century and, as a result, sexuality in the legal aspect has been challenged and debated.

<sup>140</sup> Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften (the Registered Partnership Act) 2001 (BGBl.I 226).

<sup>141</sup> Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts (the Same-Sex Marriage Act) 2017 (BGBl.I 2787).

<sup>142</sup> Valérie Suhr and Dana-Sophia Valentiner (n 137) 54-55; See also Dieter Martiny and Dieter Schwab, 'Grounds for Divorce and Maintenance Between Former Spouses: Germany', Commission on European Family Law (2002), 9-10.

<sup>143</sup> Valérie Suhr and Dana-Sophia Valentiner (n 137) 55.

<sup>144</sup> *ibid.*

<sup>145</sup> BGB Section 1564.

<sup>146</sup> BGB Section 1565 (1); Saskia Lettmaier and Moritz-Philipp Schulz (n 29) 60.

<sup>147</sup> Saskia Lettmaier and Moritz-Philipp Schulz (n 29) 60.



year, provided that both spouses petition for divorce or one party petitions, but the other party consents.<sup>148</sup> Secondly, a marriage is presumed to have failed if the spouses have been living apart for three years.<sup>149</sup> Hence, it seems that there is also no ground for divorce connected to the couples' sexual relationship in German family law. This is consistent with the duty of conjugal union based on Section 1353, which does not impose the duty to have sex on married couples.

### 4.3 Sexual requirement in Japanese family law

Japan and Thailand are influenced by the Romano-Germanic legal system. They also share the familial tradition, as evidenced by similar legal structures, provisions, and their interpretations on which the sexual elements are reflected. Hence, Japanese family law is worth mentioning, even if it has not yet recognised same-sex marriage.

#### 4.3.1 Mutual intention to marry

Under Japanese family law, the true intention of both parties to marry is an essential requirement.<sup>150</sup> A marriage is void on the ground that, at the time of marriage, one or both of the parties did not have the mutual intention to enter into the marriage due to a mistake as to the identity of the person or any other reason.<sup>151</sup> The lack of the true intention of one party to marry includes a “sham marriage”, i.e., a case where one or both of the parties enter into a marriage for the purpose of achieving any particular benefit, for example, to obtain Japanese nationality or to give their child a legitimate status. Although the law regards the intention of the parties to live together as an essential requirement in determining the validity of the marriage, it is likely that it does not require married couples to have the intention to have a sexual relationship with each other at the time of entering the marriage.

#### 4.3.2 Duty to cohabit as husband and wife

The general duties of married couples are provided in Article 752 of the Japanese Civil Code that husband and wife are obliged to live together, cooperate with and assist each other.<sup>152</sup> Firstly, both parties must live together when entering into the

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<sup>148</sup> BGB Section 1566 (1).

<sup>149</sup> BGB Section 1566 (2).

<sup>150</sup> Japanese Civil Code Article 736.

<sup>151</sup> Japanese Civil Code Article 742.

<sup>152</sup> Japanese Civil Code Article 752.



marriage. In cases where one party refuses to live with the other without a reasonable excuse, the latter can claim either maintenance or damages.<sup>153</sup> Moreover, as this refusal can be regarded as abandoning the other party based on Section 770 (1) (ii), it can constitute a ground for divorce.<sup>154</sup> The parties can live apart legally based on court mediation or even their private agreement.<sup>155</sup> Secondly, married couples have to cooperate with each other in everyday life. Despite no obvious definition, this duty is interpreted to include various activities which are necessary for maintaining a stable family life, for example, the fact that a party neglects to carry out most of his or her domestic chores can constitute good grounds for divorce.<sup>156</sup> Lastly, couples are also responsible for supporting each other. This means mainly financial support in practice.<sup>157</sup>

In addition, it has been interpreted that married couples have a duty of chastity to each other under the currently recognised institution of monogamy.<sup>158</sup> If one spouse commits adultery, the other can bring an action for divorce based on Section 770 (1) (i).<sup>159</sup> The latter is also entitled to sue the former and/or the person with whom he or she commits adultery for compensation.<sup>160</sup> However, it is not clear that the general duty includes the duty to have sexual intercourse with, or respond to the sexual desire, of the other party. The duty of living together under Section 752 has likely been literally interpreted to mean that married couples need to reside in the same accommodation.

### 4.3.3 Sexual grounds for divorce

Under Japanese law, married couples can obtain a divorce either by mutual consent or by the court's determination, i.e., judicial divorce. There are five grounds for judicial divorce.<sup>161</sup> The first four grounds need to be proved with certain facts to satisfy the court. The first ground is that one party has been guilty of unchaste conduct, usually in the form of adultery.<sup>162</sup> The second ground is malicious desertion.

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<sup>153</sup> Satoshi Minamikata, *Family and Succession Law in Japan* (4th edn, Wolters Kluwer 2022) 84.

<sup>154</sup> *ibid.*

<sup>155</sup> *ibid.*

<sup>156</sup> *ibid.* 85.

<sup>157</sup> *ibid.*

<sup>158</sup> *ibid.* 86.

<sup>159</sup> *ibid.*; Japanese Civil Code Article 770 (1) (i).

<sup>160</sup> Satoshi Minamikata (n 153) 86; SD 30 Mar. 1979 Minshu 33-2-303.

<sup>161</sup> Japanese Civil Code Article 770 (1).

<sup>162</sup> Satoshi Minamikata (n 153) 102-103.

The court will grant a divorce if one party intentionally abandons the other without reasonable cause.<sup>163</sup> The third ground is the disappearance of one party, i.e., one party has not been heard of for three years or more.<sup>164</sup> The fourth ground is that one party is suffering from severe mental illness, and there is no prospect of recovery.<sup>165</sup> These four grounds do not reflect the sexual requirement, as there is no clear ground resulting from one party not having a sexual relationship with the other.

The last ground is the “irretrievable breakdown of the marriage”, i.e., other serious situations in which a spouse acts in a way that would make it difficult to continue the marital relationship.<sup>166</sup> The court will grant a divorce if it is satisfied that the marriage has irretrievably broken down after taking all the relevant circumstances into account. Despite the absence of a clear rule, the court may find that a marriage has irretrievably broken down in the following circumstances: (a) cruelty or violence on the part of one party is found, (b) one party has seriously insulted the other, (c) one party has wasteful habits such as unwillingness to work or running into debt without reasonable cause, (d) one party involves in a criminal offence, (e) serious discord between one party and the relatives of the other is found, (f) one party’s sickness, physical defect, or lack of emotional communication seriously affects the other, and (g) there is a problem with the parties’ sexual relationship, e.g., the fact that one party cannot engage in sexual intercourse due to a physical defect,<sup>167</sup> or is inclined to demand abnormal sexual practices,<sup>168</sup> or is homosexual.<sup>169</sup>

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<sup>163</sup> *ibid.*

<sup>164</sup> *ibid.*

<sup>165</sup> *ibid* 103-104.

<sup>166</sup> *ibid* 104-105.

<sup>167</sup> SD 6 Feb. 1962 Minshu 16-2-206. The Supreme Court pointed out in a case that the couple’s sex life is an important issue that should be the basis of their marriage. In that case, the wife, the respondent, brought an action for divorce, claiming that her husband, the appellant, had become unable to have sexual intercourse as a result of an orchidectomy, i.e., surgery to remove the testicles. She had married her husband believing the doctor’s words that the removal of her husband’s testicles would not have a significant effect on their married life, i.e., he would only lose the ability to reproduce, but would still be able to have sex. However, as it turned out, the husband’s sexual impotence did not improve during the year and a half they had been living together. Hence, the court held that this constituted the ground for divorce under Section 770 (1) (v).

<sup>168</sup> Osaka DD 23 Jun. 1960 Hanji 237-27.

<sup>169</sup> Satoshi Minamikata (n 153) 106-107.



**Table showing the sexual requirement  
in the current family laws of England, Germany, and Japan**

Jurisdiction	Types of sexual requirement		
	Validity of marriage	Duty of spouse	Ground for divorce
England	<p align="center">/</p> <p>- The law requires opposite-sex couples to have (ordinary and complete) sexual intercourse to valid their marriage.</p>	<p align="center">x</p> <p>- The law only requires couples to consummate their marriage. - There is no general duty of spouses to have sexual relationship.</p>	<p align="center">x</p> <p>- A divorce action can be brought on the ground of irretrievable breakdown of the marriage.</p>
Germany	<p align="center">x</p> <p>- The law does not require couples to valid their marriage by having sexual relationship.</p>	<p align="center">x</p> <p>- The duty of spouses is not interpreted to include sexual cohabitation. - A spouse is free to participate in a sexual activity with the other or not.</p>	<p align="center">x</p> <p>- A divorce action can be brought on the ground of failure of the marriage.</p>
Japan	<p align="center">x</p> <p>- The law does not require couples to valid their marriage by having sexual relationship.</p>	<p align="center">x</p> <p>- The duty of spouses is interpreted to mean physical living together but not clearly interpreted to include sexual relationship.</p>	<p align="center">x</p> <p>- There is no direct ground relating to sex relationship of couples but it is possible to claim that a sexual problem is sufficiently serious and constitute a divorce action on the ground of irretrievable breakdown of the marriage.</p>

## 5. Analysis: Need for the Sexual Requirement in Thai Family Law

The need for the sexual requirement in Thai family law is analysed in this section. It is argued that the sexual requirement is unjustifiable and should be abolished. Then, the way how it should be removed will be discussed.

### 5.1 Unnecessity of the sexual requirement in Thai family law

The sexual requirement in Thai law is reflected in two provisions of the current Thai Civil and Commercial Code, the first is Section 1461,<sup>170</sup> which concerns the duty of spouses to cohabit as husband and wife, which has been interpreted to include the duty to have sex.<sup>171</sup> The second is as a ground for divorce under Section 1516,<sup>172</sup> based on the inability and refusal of married couples to have sexual intercourse.<sup>173</sup> The sexual requirement was first introduced in 1935, along with the promulgation of the Thai Civil and Commercial Code,<sup>174</sup> but there is no evidence of how it became integrated into Thai law. Although Thai society has long been dominated by the traditional belief that marriage is a sexual union and that married couples are expected to engage in sexual relationships, it seems that the Law of Husbands and Wives did not intervene with the sex life of Thai spouses, and the status of sexual intercourse was a moral obligation of spouses at best.<sup>175</sup> In the author's opinion, the personal relationship of spouses did not need to be legally regulated because the ancient Thai family law, which was influenced by paternalism, allowed the husband, as the head of the family, to be entitled to have power over his wife and children and hence, solve marital issues himself.<sup>176</sup> Also, there is no evidence showing that the sexual requirement, e.g., the ground for divorce based on the inability to have sex, was borrowed from foreign laws.<sup>177</sup> Hence, it is argued in this article that the sexual requirement is unjustifiable and should be abolished from Thai family law for the following reasons;

<sup>170</sup> Thai Civil and Commercial Code Section 1461.

<sup>171</sup> ไพโรจน์ กัมพูศิริ (n 10) 131-133; ประสพสุข บุญเดช (n 72) 167; สหส สิงหวิริยะ (n 72) 72.

<sup>172</sup> Thai Civil and Commercial Code Section 1516 (6) and (10).

<sup>173</sup> ขาดิชา อัครวิบูลย์ (n 75) 403; ประสพสุข บุญเดช (n 72) 168, 467; สหส สิงหวิริยะ (n 72) 72.

<sup>174</sup> Act Promulgating the Civil and Commercial Code Book 5 1934 (B.E. 2477).

<sup>175</sup> ทองเปลว ชลภูมิ และคณะ (n 43) 106-107.

<sup>176</sup> เสนีย์ ปราโมช, *กฎหมายสมัยอยุธยา* (พิมพ์ครั้งที่ 2, วิญญูชน 2559) 91.

<sup>177</sup> See e.g. Japanese Civil Code (1898) Article 813 and (old) BGB Sections 1565-1569 which are provisions regarding divorce grounds that were in effect at that time.

**(1) The sexual requirement can no longer be justified by the traditional purpose of the procreation of children**

It appears to the author that the sexual requirement in Thai law stems from the effort of the drafters of the Code to represent the traditional expectation of marriage that regards the sexual relationship of the spouses as an essential part of marital life. This expectation has been highlighted by Thai scholars who have always justified the sexual requirement by referring to the purpose of marriage, which is for heterosexual couples to procreate children.<sup>178</sup> According to historical facts, it was true that marriage was regarded as a sexual union, and one of its functions was to procreate children. Hence, it is not surprising that Thai society has long been dominated by the belief that the sexual relationship is superior to other relationships and married couples are morally obliged to engage in it. However, it can be argued that the traditional function of procreation has become less important over time, as people's attitude toward having children has changed, especially the younger generation. The traditional image of the family as a unit that consists of a father, mother, and child has gradually faded away from Thai society, as evidenced by a decline in the birth rate in Thailand.<sup>179</sup> Many couples today, whether entering into a legal marriage or not, no longer regard the "ultimate goal" of family life as having children but believe that their family can be satisfied and complete without them.<sup>180</sup> In fact, marriage and children are currently perceived to be two separate issues. To illustrate, entering into marriage and having sex does not necessarily lead to the conception of a child, as illustrated by many couples using many types of contraception to plan their family. On the other hand, a woman may become pregnant and/or become the mother of a child without having sexual intercourse, for example, by undertaking surrogacy or artificial insemination.<sup>181</sup> Moreover, the purpose of marriage to procreate children will become irrelevant with the legalisation of same-sex marriage under the Marriage Equality Law, which

<sup>178</sup> อิศรภักดี ธรรมวิเทศ (n 55) 1044; ประสพสุข บุญเดช (n 72) 167.

<sup>179</sup> ศิริพงษ์ ไช้มุก และกิงกาญจน์ เกษศิริ, 'สังคมไทยจะทำอะไร เมื่อคนรุ่นใหม่ไม่อยากมีลูก' (ธนาคารแห่งประเทศไทย, 18 กันยายน 2566 <<https://www.bot.or.th/th/research-and-publications/articles-and-publications/articles/article-2023sep18.html>> accessed 4 July 2024; See also ระบบสถิติทางการทะเบียน กรมการปกครอง กระทรวงมหาดไทย <<https://stat.bora.dopa.go.th>> accessed 22 July 2024.

<sup>180</sup> กานต์ธีรา ภูริวิกรัย, "ถ้าโลกวนวายแบบนี้แล้วจะมีลูกไปทำไม?" : มองครอบครัวรุ่นใหม่ เมื่อ 'ลูก' ไม่ใช่คำตอบของคน Gen Y' (The 101 World, 17 เมษายน 2563) <<https://www.the101.world/gen-y-no-child>> accessed 4 July 2024.

<sup>181</sup> Protection of a Child Born by Medically Assisted Reproductive Technology Act 2015 Section 22.

is expected to become effective at the beginning of 2025.<sup>182</sup> These scenarios suggest that the sexual requirement can no longer be justified by the purpose of reproduction.

**(2) The sexual requirement would depreciate the dignity and the right to self-determination of the spouses.**

One of the law's important roles is to reflect society's expectations, but just how much the law can and should reflect those expectations is questionable. If the majority's view is excessively stressed, i.e., it becomes a legal obligation, individuals' rights will risk being ignored and violated. This particularly applies to sexual matters, which are highly personal to each individual. Attempts to enforce social norms regarding sexual relations within marriage seem increasingly out of touch in contemporary society due to evolving modern values, such as the notions of private autonomy and gender diversity.<sup>183</sup> In this sense, spouses' right to sexual self-determination, i.e., the right to decide to engage in a sexual relationship, of the spouses should be protected and cannot be simply overridden by social expectations, i.e., which require spouses to have sex with each other.<sup>184</sup> Hence, spouses should not be legally compelled to engage in sexual activities against their will. A spouse's right to refuse to have sex of the spouse is now commonly accepted in German law based on the interpretation of Articles 1 and 2 of the Basic Law<sup>185</sup> and Section 1353 (2) of the BGB.<sup>186</sup> Additionally, as every couple has a unique perspective on marital issues, it would be wrong to assume that all relationships are similar in nature and should be regulated by the same set of fixed rules. This is particularly true in the context of very private issues, including how couples cohabit and have sexual relationships. To illustrate, many couples may treat sex as an essential part of their family life and intend to end their relationship if their partner cannot respond to their sexual desire, while others, such as those who define

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<sup>182</sup> Civil and Commercial Code Amendment Act (No.24) 2024 (B.E. 2567).

<sup>183</sup> Valérie Suhr and Dana-Sophia Valentiner (n 137) 54-55.

<sup>184</sup> *ibid.*

<sup>185</sup> Basic Law (Grundgesetz) Article 1 (1) "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority." Article 2 (1) "Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law".

<sup>186</sup> BGB Section 1353 (2) "A spouse is not obliged to comply with the demand of the other spouse to create the union if the demand constitutes an abuse of their right or if the marriage has broken down".

themselves as “asexual”,<sup>187</sup> may regard sex as a trivial matter that does not affect their relationship. Hence, the sexual requirement is not suitable for the latter. Therefore, it seems natural to treat couples’ sex life, i.e., whether and how they cohabit with each other, as a private matter that they can negotiate without the state’s intervention.

**(3) The sexual requirement may make it difficult to define spouses’ sexual duty.**

Imposing an obligation on couples to have sexual intercourse can also be problematic due to its unclear content. In other words, it raises questions such as what sexual activities are included, how frequently couples need to be engaged in them, and what the excuses are for either party not to engage in them. This issue becomes more complex in the context of same-sex relationships as their sexual activities cannot be covered by the term “sexual intercourse”, which is used in the context of heterosexual relationships, i.e., the penile sexual penetration of a vagina. An attempt was made under the Marriage Equality Law to extend the scope of sexual activities under Section 1516 (10) of the Thai Civil and Commercial Code.<sup>188</sup> Apart from the inability to have sexual intercourse, the inability “*to perform or accept any other sexual acts*” can also constitute a ground for divorce. This may have been intended to refer to same-sex couples’ sexual activities, in which case, it deserves to be complimented. However, the new term is too broad, which may make it difficult to determine which activities are included. This is because it may be interpreted to mean any act that results in sexual satisfaction, which can vary depending on each couple’s sexual preferences. Moreover, as those activities normally take place in private and are not easy to prove, it is unrealistic to include them in legal requirements, especially those regarding the validity of the marriage, which needs to be clearly determined.<sup>189</sup> Hence, it would be better to remove the sexual requirement from marriage altogether instead of attempting to introduce an appropriate definition of spouses’ sexual duty.

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<sup>187</sup> In this article, asexual refers to persons who do not experience sexual attraction or have a desire to have sexual relationships. However, they may still experience romantic attraction and form relationships but do not feel the need for sexual intimacy.

<sup>188</sup> Section 1516 (10) uses the term “การกระทำเพื่อสำเร็จความใคร่”, which literally means any act resulting in sexual satisfaction. Due to its broad and unclear meaning, it is tricky to translate into English. Thus, in this article, the phrase “to perform or accept any other sexual act” is used.

<sup>189</sup> Jonathan Herring, ‘Why Marriage Needs to be Less Sexy’ (n 5) 276.



#### (4) The sexual requirement seems to play a small role in current foreign family laws

It can be found from exploring the sexual requirement in foreign laws that the development of the law on marriage in Thailand is consistent with that of Germany, except for the sexual requirement. Like the current position of Thai family law, German law regarded marriage as a sexual community in the past, and imposed a legal duty on spouses to have sex based on interpreting Section 1353 (1) of the BGB, as evidenced by the court decisions in 1966<sup>190</sup> and 2000.<sup>191</sup> However, since 2000, due to the development of the notions of private autonomy and self-determination, as well as the evolution of societal values like gender diversity, as demonstrated by the attempt to recognise same-sex relationships,<sup>192</sup> the sexual requirement has gradually become less important and has eventually impliedly been abolished.<sup>193</sup> Therefore, in the author's view, the position of the sexual requirement in the current German family law should be adopted in Thai law, in which same-sex marriage is about to be recognised.

Although the sexual requirement is found in England, it seems to be less strongly emphasised than it is in Thai law. Since marriage is steeped in the history of English law, and is inherent to traditional and religious values, the sexual requirement continues to exist in the form of the consummation requirement. However, it appears to the author that the consummation requirement is merely a “sign” that reflects the traditional value of marriage in English history rather than strongly reflecting the sexuality of marriage. This reflection can be evidenced by some facts. Firstly, there is no general duty for couples to live together and have sex,<sup>194</sup> and the failure to do so is not a ground for divorce.<sup>195</sup> The marriage can be validated by a single act of “ordinary and complete” intercourse.<sup>196</sup> In this sense, the traditional purpose of the procreation of children is also rejected.<sup>197</sup> Secondly, the legal consequence of the failure to

<sup>190</sup> BGH, Urteil v. 2 November 1966, Az. IV ZR 239/65.

<sup>191</sup> AG Brühl, Urteil v. 24 March 1999, Az. 32 F 65/98. “...even today, marriage is not just a household community, but also a sexual community”.

<sup>192</sup> See e.g. Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften (the Registered Partnership Act) 2001 (BGBl. I 226).

<sup>193</sup> Valérie Suhr and Dana-Sophia Valentiner (n 137) 54-55.

<sup>194</sup> Jonathan Herring, *Family Law* (n 105) 84-85; See *P v P* [1964] 3 All ER 919 and *Re X* [2018] EWFC 15.

<sup>195</sup> Matrimonial Causes Act 1973, as amended by the Divorce, Dissolution and Separation Act 2020, Section 1 (1).

<sup>196</sup> Jonathan Herring, *Family Law* (n 105) 103.

<sup>197</sup> *Baxter v Baxter* [1948] AC 274.



consummate the marriage is just “voidable”, i.e., it only constitutes the right to avoid the marriage, i.e., the marriage is seen as valid until it is annulled by the court.<sup>198</sup> Lastly, the consummation requirement only applies to opposite-sex marriage.<sup>199</sup> This illustrates the difficulty in justifying the sexual requirement in the context of same-sex marriage, which leads to some criticisms in terms of gender discrimination<sup>200</sup> and the proposal to abolish the consummation requirement by some commentators.<sup>201</sup>

The notion of gender diversity, particularly LGBTQ+ people’s legal rights and freedoms, has been developed a little more slowly in Japan than in Thailand, as evidenced by the fact that Japanese family law still does not recognise same-sex marriage.<sup>202</sup> However, the sexual requirement does not clearly exist in the Japanese Civil Code. Although the provision in Article 752,<sup>203</sup> which refers to the duty of spouses to cohabit as husband and wife, is similar to that in Section 1461 of the Thai Civil and Commercial Code, it does not impose a clear duty on spouses to have sex. Also, the inability or the refusal to have sex is not a clear ground for divorce.<sup>204</sup> The sexual requirement is only reflected by the court’s interpretation of a ground for divorce, i.e., “irretrievable breakdown of the marriage” in some exceptional cases, e.g., where a husband cannot engage in sexual intercourse due to an orchidectomy.<sup>205</sup> However, it should be noted that only the simple fact that one spouse is unable or refuses to have sex with the other would be insufficient to constitute a ground for divorce. There must be concrete evidence indicating that the disputed sexual problem has an adverse effect on the parties’ marital life.<sup>206</sup>

In view of the foregoing, it appears to the author that the only reason for the continued existence of the sexual requirement is to accommodate the traditional belief

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<sup>198</sup> Matrimonial Causes Act 1973 Section 12 (1).

<sup>199</sup> Marriage (Same Sex Couples) Act 2013 Schedule 4 paragraph 4.

<sup>200</sup> Jonathan Herring, ‘Why Marriage Needs to be Less Sexy’ (n 5) 275, 277.

<sup>201</sup> *ibid* 275, 290.

<sup>202</sup> Equaldex, ‘LGBT Rights in Japan’ <<https://www.equaldex.com/region/japan>> accessed 13 July 2024.

<sup>203</sup> Japanese Civil Code Article 752 “Husband and wife are obliged to live together, cooperate with and assist each other”.

<sup>204</sup> Japanese Civil Code Article 770 (1).

<sup>205</sup> Satoshi Minamikata (n 153) 106-107; SD 6 Feb. 1962 Minshu 16-2-206.

<sup>206</sup> In SD 6 Feb. 1962 Minshu 16-2-206, the parties’ expectation of a normal sex life was indicated by the fact that, before entering into the marriage, they were informed by the doctor and believed that the removal of the husband’s testicles would not have a significant effect on their married life.

that marriage is a sexual union, and the couples' sexual relationship is the essence of marriage, which distinguishes it from other kinds of relationships. However, this belief is based on a particular view of sex and gender roles, which reflects and reinforces the ideology of patriarchy.<sup>207</sup> Since this is an outdated belief, it can hardly justify a legal requirement in a modern secular state that promotes the notion of gender diversity and individuals' personal autonomy. Hence, the sexual requirement should be abolished from Thai family law due to the absence of justification.

## 5.2 Abolition of the sexual requirement in Thai family law

Thai family law clearly includes the sexual requirement, as evidenced by the provisions in the Civil and Commercial Code and their interpretation, which imposes the duty to have sex on married couples. The way in which the sexual requirement can be removed from Thai family law will be discussed in this section.

### 5.2.1 Duty to cohabit as spouses

There is consensus among Thai family law scholars that married couples have a general duty under Section 1461 of the Civil and Commercial Code to live together and have sexual intercourse with each other, even if this is not clearly stated in the provision.<sup>208</sup> Considering the purpose of the Marriage Equality Law, which is only focused on gender equality with regard to marriage, and the new provision on the grounds for divorce based on the ability to have sex, it is likely that this interpretation will continue to exist and also apply to same-sex marriages.<sup>209</sup>

Therefore, when abolishing the sexual requirement that is inherent in this provision, the duty to “cohabit as spouses” must not be interpreted to include the duty of spouses to engage in sexual activities with each other. This interpretation seems to be aligned with the law in the three chosen jurisdictions in which the sexual duty is not imposed on spouses. Ideally, the author suggests that para 1 of this provision should be amended to avoid using the misleading term “*cohabit as spouses*”, which can be sexually interpreted, i.e., to relate to the spouses' physical cohabitation. The phrase “*live in conjugal union/community*” in German law<sup>210</sup> which literally means “ใช้ชีวิตสมรส”

<sup>207</sup> Jonathan Herring, ‘Why Marriage Needs to be Less Sexy’ (n 5) 287.

<sup>208</sup> ไพโรจน์ กัมพูศิริ (n 10) 131-133; ประสพสุข บุญเดช (n 72) 167; สหส สิงหวิริยะ (n 72) 72.

<sup>209</sup> Civil and Commercial Code Amendment Act (No.24) 2024 (B.E. 2567) Section 45.

<sup>210</sup> BGB Section 1353.

in Thai would be more appropriate to describe the general relationship between married couples.<sup>211</sup>

### 5.2.2 Consent to cohabit as spouses

The meaning of the clause “*agree to take each other as husband and wife*” under Section 1458 of the Civil and Commercial Code can be misunderstood due to Thai scholars’ interpretation that the general duty of cohabiting as husband and wife includes the duty to have sexual intercourse. In other words, Section 1458 can possibly be interpreted to mean that persons intending to marry need to intend to perform the duty of having sexual intercourse with each other. However, it seems evident that this provision has not been interpreted in a way that clearly shows the sexual requirement; instead, it usually applies to the case of sham marriage.<sup>212</sup> This interpretation is also consistent with the law in the three chosen jurisdictions.<sup>213</sup> However, this raises the question of how the court would decide a case in which a couple intends to form a family, but neither of them has the intention or ability to have a sexual relationship during the marriage in the first place. The author proposes that a simple answer to this question may be that they should be allowed to marry despite having no intention to have sex. For example, it is unreasonable to prevent impotent or asexual individuals from marrying because they have no sexual intention.

In fact, if the general duty of spouses under Section 1461 was appropriately defined and interpreted, Section 1458 did not need to be amended. However, it is suggested that this provision could be amended by changing the term “*consent to take each other as spouses*” to “*consent to live in conjugal union (ยินยอมที่จะใช้ชีวิตสมรสร่วมกัน)*” to make it consistent with the first suggestion to amend Section 1461, and to avoid the sexual interpretation of the term “*consent to take each other as spouses*”.

### 5.2.3 Sexual grounds for divorce

The inability to have sexual intercourse is regarded as a ground for divorce in Thai family law, as clearly reflected in Section 1516 (10) of the Civil and Commercial

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<sup>211</sup> It is admitted by the author that changing the term as recommended may not have a significant impact on how Section 1461 has been sexually interpreted. Nevertheless, such a change would at least reflect less sexual element (compared to the current term which relates to sexual cohabitation) and encourage interpreters to depart from the traditional interpretation.

<sup>212</sup> ประสพสุข บุญเดช (n 72) 138; ไพโรจน์ กัมพูศิริ (n 10) 120-121.

<sup>213</sup> Satoshi Minamikata (n 153) 86; Saskia Lettmaier and Moritz-Philipp Schulz (n 29) 49.

Code.<sup>214</sup> As mentioned earlier, despite an attempt to extend the scope of sexual activities with the expectation that it will cover all the sexual activities of same-sex couples,<sup>215</sup> the new broad term “*to perform or accept any other sexual activities*” can be problematic, and more strongly emphasise the sexual requirement in Thai family law. Therefore, in the author’s opinion, it would be better to abolish this ground for divorce once and for all, rather than trying to find an appropriate definition of the required sexual activities.

However, this does not mean that problems with couples’ sex lives are always regarded as being unimportant and cannot constitute a ground for divorce at all.<sup>216</sup> Based on Japanese law, even if spouses are not legally obliged to have sex with each other, it may be possible to grant a divorce to couples who have a sexual problem on the ground that the marriage has irretrievably broken down. Hence, the ground for divorce under Section 1516 (6) of the Thai Civil and Commercial Code can be applied to solve problems related to spouses’ sex lives. However, a sexual matter can only constitute this ground in exceptional circumstances. The mere fact that one party refuses to have sex with the other should not generally constitute a ground for divorce. There must be concrete evidence that one party is adversely affected by a sexual issue, and the marriage cannot continue as a result.

## 6. Conclusion and Recommendations

### 6.1 Conclusion

The legal requirement that imposes the duty on married couples to engage in sexual relationships, i.e., the sexual requirement, is currently reflected in two provisions in the Thai Civil and Commercial Code. The first is Section 1461 para 1, which deals with spouses’ duty to cohabit as husband and wife, and which has been interpreted to

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<sup>214</sup> Thai Civil and Commercial Code Section 1516 (10) “Husband or wife has a physical disadvantage so as to be permanently unable to have sexual intercourse, the other may enter a claim for divorce”.

<sup>215</sup> Under the Civil and Commercial Code Amendment Act (No.24) 2024 (B.E. 2567) Section 45, Section 1516 (10) is amended into “One spouse has a physical disadvantage so as to be permanently unable to have sexual intercourse, or to perform or accept any other sexual act, the other may enter a claim for divorce”.

<sup>216</sup> This is also consistent with the German law, as sexual matters can have legal implications if they are deemed to be a fundamental aspect of marriage. For example, the refusal to engage in sexual intercourse may be viewed as the destruction of the marital relationship, leading to the reduction of maintenance under Section 1579 of the BGB.



include the duty of one spouse to have sexual intercourse with the other.<sup>217</sup> The second is Section 1516, which entitles one spouse to file for divorce if the other is permanently unable, or even intentionally refuses, to have sex with him or her.<sup>218</sup>

The sexual requirement was first introduced in Thai law in the original version of the Thai Civil and Commercial Code,<sup>219</sup> but its origin is unclear. The law had never intervened in the sex life of Thai spouses before the promulgation of the Code. Sexual intercourse was deemed to be a spouse's moral obligation at most.<sup>220</sup> It appears to the author that the sexual requirement stemmed from an attempt to legally reflect the traditional expectation of marriage, which regards a "sexual relationship" as an essential part of marital life. This is highlighted by leading Thai scholars, who always justify the sexual requirement by referring to the purpose of marriage, which is connected to the procreation of children.<sup>221</sup>

It is argued in this article that the sexual requirement is no longer justifiable, and it should be abolished from Thai family law for a number of reasons. Firstly, the sexual requirement is not aligned with the contemporary social reality, particularly in terms of the procreation of children. This used to be regarded as an important function of marriage, but it is no longer deemed to be an essential component of family life; in fact, it can be completely separate from marriage in today's world, as evidenced by the attempt to legalise same-sex relationships under the Marriage Equality Law.<sup>222</sup> Secondly, it undermines spouses' right to self-determination of the spouses and the notion of diversity. Given that sexual matters involve a highly personal aspect of each person, it would be wrong to assume that all relationships are similar in nature and impose a sexual obligation on them due to the expectations of the majority groups in society.<sup>223</sup> Doing so would violate the individuals' freedom to engage in sexual activities<sup>224</sup> while ignoring those who have a different perspective of marital life. Thirdly, the attempt to include the sexual requirement in the law on marriage is likely to make

<sup>217</sup> ไพโรจน์ กัมพูศิริ (n 10) 131-133; ประสพสุข บุญเดช (n 72) 167; สหส สิงหวิริยะ (n 72) 72.

<sup>218</sup> ขาดิชา อัครวิบูลย์ (n 75) 403; See also ประสพสุข บุญเดช (n 72) 168, 467; สหส สิงหวิริยะ (n 72) 72.

<sup>219</sup> See Thai Civil and Commercial Code Sections 1453 and 1500 (9) under the Act Promulgating the Civil and Commercial Code Book 5 1934 (B.E. 2477).

<sup>220</sup> ทองเปลว ชลภูมิ และคณะ (n 43) 106-107.

<sup>221</sup> อิศรภักดี ธรรมวิเทศ (n 55) 1044; ประสพสุข บุญเดช (n 72) 167.

<sup>222</sup> Civil and Commercial Code Amendment Act (No.24) 2024 (B.E. 2567).

<sup>223</sup> Valérie Suhr and Dana-Sophia Valentiner (n 137) 54-55.

<sup>224</sup> *ibid.*

it difficult to define the scope of spouses' legal duty. This is particularly true in the context of same-sex relationships in which sexual activities cannot be covered by the term "sexual intercourse".<sup>225</sup>

In addition, it was found that sexual requirement plays a small role in the family law of the three chosen jurisdictions, namely, England, Japan, and Germany. This is evidenced by the current family law in these jurisdictions, which does not impose a clear obligation on spouses to have a sexual relationship with each other,<sup>226</sup> nor does it provide a clear ground for divorce based on the fact that a spouse is unable or refuses to have sex with the other.<sup>227</sup> Specifically, the development of German family law is the best example of the change in the way in which family law should respond to sexuality. "Sex" was once regarded as an essential element of marriage in German law, both in terms of the gender requirement and the spouses' duty to have sexual intercourse.<sup>228</sup> However, as the former has proved to be unnecessary due to the legal recognition of same-sex relationships,<sup>229</sup> the latter, i.e., the sexual requirement, has also become less important and has eventually disappeared.<sup>230</sup>

The fact that Thailand is about to treat same-sex relationships the same as heterosexual ones is a matter of great pride and pleasure. This is a significant accomplishment for equality and diversity in Asia, and Thailand is somewhat of a forerunner in this respect. However, unlike the German law, it remains stuck in a "sexual trap", i.e., the traditional view that marriage is a sexual union connected to a sexual relationship. This notion is outdated and can hardly be said to justify the sexual

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<sup>225</sup> Under the Marriage Equality Law, there is an attempt to extend the scope of sexual activities by introducing the new term "*to perform or accept any other sexual acts*". However, it is questionable how this broad term should be interpreted.

<sup>226</sup> For English law, see Jonathan Herring, *Family Law* (n 105) 84-85; For German law, see BGB Section 1353 (1) and Valérie Suhr and Dana-Sophia Valentine (n 137) 55; For Japanese law, see Japanese Civil Code Article 752 and Satoshi Minamikata (n 153) 86.

<sup>227</sup> For English law, see Matrimonial Causes Act 1973 as amended by the Divorce, Dissolution and Separation Act 2020, Section 1 (1); For German law, see BGB Section 1565 (1) and Saskia Lettmaier and Moritz-Philipp Schulz (n 29) 60; For Japanese law, see Japanese Civil Code Article 770.

<sup>228</sup> See BGB (original version) Section 1353 (1); BGH, Urteil v. 2 November 1966, Az. IV ZR 239/65; AG Brühl, Urteil v. 24 March 1999, Az. 32 F 65/98.

<sup>229</sup> See Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften (the Registered Partnership Act) 2001 (BGBl.I 226); Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts (the Same-Sex Marriage Act) 2017 (BGBl.I 2787).

<sup>230</sup> Valérie Suhr and Dana-Sophia Valentiner (n 137) 54-55.

requirement in a modern secular state, in which gender diversity and personal autonomy are promoted. Hence, the author believes that Thai family law should move beyond the traditional focus on the sexual relationship in order to achieve the goal of promoting equality and diversity and that, following the legalisation of same-sex marriage, the abolition of the sexual requirement is the second step toward achieving that goal.

## 6.2 Recommendations

The sexual requirement should be removed from Thai family law by amending the relevant provisions in the Thai Civil and Commercial Code so that they are interpreted in a non-sexual way.

### (1) Section 1461 para 1

As for the general duty of a spouse under Section 1461 para 1, it should not be interpreted to include the duty to have sex. Ideally, it is suggested that para 1 of this provision should be amended to avoid using the misleading term “*cohabit as spouses*”, which can be sexually interpreted. The phrase “*live in conjugal union*”, which literally means “ใช้ชีวิตสมรส” in Thai, would be more appropriate to generally describe the relationship between married couples.

Amended provision (Marriage Equality Law)	“Spouses shall <u>cohabit as spouses.</u> ”
Suggested provision	“Spouses shall <u>be bound to live in conjugal union.</u> ” <sup>231</sup>

### (2) Section 1458

With regard to consent to take each other as spouses under Section 1458, the current provision has been interpreted appropriately, i.e., the intention to sexually cohabit is not clearly regarded as a legal requirement for a valid marriage. However, to be consistent with the first suggestion and to avoid the sexual interpretation of the term “*consent to take each other as spouses*”, it is suggested amending this provision by changing the term “*consent to take each other as spouses*” to “*consent to live in conjugal union*”.

<sup>231</sup> The suggested Thai texts for Section 1461 para 1: “คู่สมรสมีความผูกพันในชีวิตสมรสร่วมกัน”.



Amended provision (Marriage Equality Law)	“A marriage can take place only if two persons consent to <u>take each other as spouses</u> , and such consent must be declared publicly before the Registrar in order to have it recorded”
Suggested provision	“A marriage can take place only if two persons consent to <u>live in conjugal union</u> , <sup>232</sup> and such consent must be declared publicly before the Registrar in order to have it recorded”

### (3) Section 1516

In terms of grounds for divorce, Section 1516 (10), in which the inability to have sex is regarded as a ground for divorce, should be completely abolished. However, Section 1516 (6) still makes it possible for a party who is unhappy with his or her family life due to a serious sexual problem to bring an action for divorce on the basis that the marriage has irretrievably broken down under Section 1516 (6), but only in exceptional circumstances.

<sup>232</sup> The suggested Thai texts for Section 1458: “การสมรสจะทำได้ต่อเมื่อบุคคลสองคนยินยอมที่จะใช้ชีวิตสมรสร่วมกันและได้แสดงความยินยอมนั้นให้ปรากฏโดยเปิดเผยต่อหน้านายทะเบียนและให้นายทะเบียนบันทึกความตกลงนั้นไว้ด้วย”.