

SECTION II

ASPECTS OF LAW AND RELIGION

REVITALIZING THE LAW AND DEVELOPMENT MOVEMENT

A Case Study on Land Law In Thailand

PHILIP VON MEHREN, J.D.

MILBANK, TWEED, HADLEY AND McCLOY
WASHINGTON, D.C.

TIM SAWERS, J.D.

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR
BUFFALO, N.Y.

ABSTRACT

While echoing criticism of the now dormant law and development movement, the authors suggest an analytical approach to revitalization of the energies behind the movement. Von Mehren and Sawers fault members of the law and development movement for failing to focus on a central tenet of its theoretical underpinnings: the causal interaction between law and development. If the movement is to continue in any form, explication of this central tenet is necessary.

The vehicle for explication is a case study. The authors outline the history of the development of land law in Thailand. The historical analysis proceeds from a conceptual basis which posits a causal relationship between law and development, Max Weber's famous typology of legal systems. The authors contrast the Weberian explanation of the evolution of Thai land law with alternative analyses based on theories of social change which see law as epiphenomenal—the Marxist and World System approaches.

The case study shows how legal changes facilitated (but in no sense caused) the emergence of commercialized agriculture in Thailand. The authors conclude that law serves as a reinforcing variable in the process of social change. Thus, with a central tenet intact, the way is open for recrudescence of the scholarly energy behind the law and development movement. Von Mehren and Sawers show that the proven explanatory power of Weber's theories merits more attention from scholars in this field.

In addition to an original history of Thai land law, this article includes original translations from the ancient Thai Law of the Three Seals. The appendix comprises translations of sections from this important body of laws which are cited in the case history. These are the only translations into any language of the Law of the Three Seals.

CHAPTER I

Theoretical and Methodological Issues

I. INTRODUCTION

The law and development literature was already teetering on the edge of irrelevance when, more than a decade ago, Merryman and Burg raised fundamental and discouraging observations about it. Merryman criticized law and development practitioners on several scores: for failing to develop a paradigm to focus research on generally agreed-upon questions and purposes, for neglecting to elucidate a theory of how law interacts with social change, and for ignoring the specific cultural background of "target" societies. His over-arching solution was to place law and development in the field of "comparative law and social change" in order to re-energize "efforts at theory-building that characterize the best aspects of the law and development movement."¹ Burg built on many of Merryman's criticisms, yet, at least in one respect, came to a fundamentally different conclusion.² He suggested that instead of using theoretical models as a starting point for analysis, a potentially more fruitful country-by-country case study approach should be adopted with the emphasis on "culturally specific phenomenon." Eventually, these studies, through an inductive process, might provide the basis for a general theory of law and development.

Both authors acknowledged that theory as well as case studies are necessary to propel the law and development movement forward, yet Merryman's emphasis on linking it to comparative law and social change makes more sense given both the availability of a rich source of sociological theory on social change and the difficulties that case-study authors within the movement seem to have when they focus solely on empirical historical data.³

A major problem with the work within the movement is that it fails to state explicitly the causal interaction between law and development. Few authors of case studies directly address this fundamental issue. Yet, if the law and development movement is to play an important role in the literature on social change, law needs to be envisioned as at least an important reinforcing variable in the process of social change. If law is merely a product of social change, the analysis of its development will at best yield a reflection of the underlying process of social change. Thus, the movement's revitalization depends partly on whether, and to what extent, law is conceptualized as an important variable in the process of social change.

We shall summarize three theoretical approaches to social change—Marxian, World Systems, and Weberian—which differ in their conceptualization of the interaction between social change and law. We shall apply only the Weberian perspective to the case study for the simple reason that, in our interpretation, it sees law as more important in the process of social change than do the other theories. The Marxian and World Systems are included to demonstrate their perspectives' conceptualization of law as relatively unimpor-

tant in the process of social change, and to suggest plausible alternatives to the Weberian analysis.

Our central purpose throughout is to explain, through the application of a Weberian approach, the relationship between the adoption of the concept of title and the commercialization of agriculture in Thailand. Our objective is not to show that legalism was wholly responsible for, but rather that a close interrelationship exists between, the introduction and acceptance of title in Thailand and the commercialization of agriculture. We explain this process in terms of the development of a "formally rational" legal system in Thailand. Our basic thesis is that the development of legalism in general, and the specific conceptual innovation of title in particular, has had an important impact on the economic development of Thailand's agricultural sector. Title fostered capitalist development in agriculture by clarifying ownership rights in land and thereby creating a context in which capital could be invested into agricultural production at lower interest rates based on the debtor-mortgagor giving the lender-mortgagee a security interest in land. This displaced, in areas suitable for capitalist agriculture, the traditional system of land tenure which was characterized by considerable uncertainty and was associated with the *khafak* mortgaging system inherently characterized by high interest rates.⁴

II. THE THEORIES

Many richly suggestive and heretofore apparently untapped theoretical propositions exist on the relationship between law and development. These propositions can serve to guide researchers in organizing facts into important case studies. The examination of theoretical concerns should take place in the context of applying a theoretical framework to a specific case study because historical data are ultimately the best test of a theory's propositions. This study will, thus, serve both to demonstrate and to refine specific theoretical propositions. Our goal in this section is to derive theoretical propositions from an interpretation of Weber on the relationship between law and capitalist development. These propositions will then be applied to the historical data in subsequent chapters.

A. The Weberian Approach

Weber's work is much more complicated than many analysts acknowledge. Both Trubek and Kronman portray Weber as a thinker, who at least on the subject of law, was fraught with internal contradictions and tensions.⁵ As a result of these contradictions, interpretations of Weber are ironically, to use Trubek's description, "delphic."⁶ At stake here is whether Weber can be construed as presenting a coherent theory on the interaction between law and society. We shall strive in this sub-section to show that a plausible interpretation of Weber does provide a solid theoretical framework for studying the interaction between law and society, although one which is historicist in the sense that the specific relationship varies from country to country.

Weber focused on the increasing rationalization and differentiation of various dimensions of society, including law, religion and the economy. The central question that animated all of his work was what were the unique factors in Europe, specifically Northern Europe, that accounted for the historically unprecedented development of capitalism in those societies.⁷ In his examination of religion, he argued forcefully in *The Protestant Ethic and the Spirit of Capitalism* that culture, specifically religion, is an important independent variable in understanding the direction of social change. Thus, in England the development of a Protestant ethic, displacing Catholicism with its negative normative judgements concerning capital accumulation, facilitated the emergence of a spirit of capitalism, without which the technological innovations necessary for industrialization and capitalism would not have developed as strongly as they did. His *Rechtssoziologie* (*Sociology of Law*) applies the same type of methodological approach.⁸ He begins with the question of what is different about European law. He then asks what is the causal relationship between the particular features of Western law and the development of capitalism.⁹ These features, and their impact on a society's development, become the basis for his explanation of the development of capitalism in Europe.

Within the framework of his analytical system, which is characterized by the use of ideal types, by examination of the spread of rationalism, and by a normative assumption about the advanced nature of capitalism¹⁰, Weber espoused a typology with four categories of legal thought.¹¹ He used a typology to isolate by juxtaposition the unique features of Western Law.

The first type, "formal irrational," is characteristic of systems that depend on primitive procedures for deciding disputes, such as the Delphic oracle in ancient Greece. Stringent observance of procedural rules is of utmost importance, but the rules have no relationship to the rational determination of the rights and liabilities of the parties in the particular case. One imagines a priest examining the viscera of a goat and proclaiming the guilt or innocence of the accused.

A second type of legal system is the "substantively irrational." Kronman cites as an example "khadi-justice" of the Mideast. Weber characterizes these systems as using an *ad hoc* process to determine the outcome of a particular case. The system is "irrational" because it espouses no general rules; it is "substantive" because of its willingness to consider the widest range of considerations in determining the outcome of a case. The picture of a Bedouin chief handing out rough-and-tumble justice springs to mind.

The third type of judicial system is "substantively rational." This type is exemplified by theocratic or patriarchal legal systems. These systems are "rational" in the sense of adherence to fixed principles rather than in their mode of thought.

The final type is called "formally rational" and corresponds to the European model of legal thought. These systems give precedence to the general over the particular and to the secular over the moral. Formally rational systems stress "the logical analysis of meaning" which corresponds to the

view that law contains neutral principles which are discoverable through the application of techniques of legal reasoning.¹² The European system is also characterized by differentiation of roles within law, and between law and politics.¹³

According to Kronman and Trubek an apparent problem or contradiction emerges in Weber's discussion of "formal rationality."¹⁴ They argue that Weber's own definition of "formal rationality" led him to find its highest expression in the Pandectist system of Germany. Thus, if "formal rationality" in law is an important variable in capitalist development, the more strongly it manifests itself, the sooner and more successful capitalist development should be. Yet England was the first country to develop capitalism and was significantly ahead of the continent economically until the post World War period. The inability of Weber to solve the so called "English problem" is a central tension that both Kronman and Trubek see as undermining his analysis of law's relationship to capitalist development. Yet, at least two solutions to the apparent contradictions are possible. Ewing argues that Kronman and Trubek misinterpreted Weber. She suggests that a one-to-one correspondence between economic and legal rationality is not an underlying assumption of Weber's schema.¹⁵ Thus, the most rational legal system is not necessarily the most economically successful. Essentially this argument rests on an analysis which recognizes the relevance of several independent variables in the rise of capitalism but realizes that the relative mix and importance of these variables may vary from case to case. Thus, even if England did have a less rational legal system, other variables, e.g. religion, could have been stronger than on the Continent or its legal system could have been more rational at an earlier point in time. Yet Ewing essentially takes another tack to untangle the contradiction:

...a legal order is formally rational in the *sociological* rather than the juridical sense when it is based on formal justice. Such a system is abstract and bound by strict procedures, and guarantees the legal certainty essential for calculability in economic transactions, all of which applies both to civil and common law countries.¹⁶

Ewing's analysis successfully saves Weber's conceptual schema from Kronman's and Trubek's more pessimistic interpretation by distinguishing between formal rationality in the sociological and in the juridical sense. Thus the doctrinal drive for meta-rationality in the Civil Law is viewed as irrelevant, or at least not totally determinative, to the relationship between legalism and capitalism. Both the civil and common law systems provide a context of certainty and predictability sufficient for capitalist activity. Thus, the so called "English problem" is a red herring.

Ewing's analysis essentially preserves the coherence of Weber. She has convincingly shown that Weber can be fairly construed so as to preserve the theoretical integrity of his framework from the alleged contradictions uncovered by Kronman and Trubek. Given that Weber's framework is co-

herent, how did he view the specific causal interaction between law and social change? Kronman has called Weber's approach "causal agnosticism."¹⁷ Yet he points to two different ways in which Weber claimed that "formally rational" law could influence capitalist development. The first is both the most important and the most general. Legal rules that protect individual entitlements, especially in the context of contracts, promote economic activity:

By guaranteeing that contracts will be enforced in accordance with fixed rules known in advance by the contracting parties, the legal order significantly increases the probability that promises, once made, will be kept and thereby encourages promissmaking and the forms of economic activity that depend on it (most importantly, market exchange).¹⁸

The legal order also promotes capitalism through the development of concepts that are useful in certain specific situations. Weber specifically mentioned title in this regard. Business organizations require "a method by which transfers can be made legally secure [while eliminating] the need of constantly testing the title of the transferor."¹⁹ These concepts serve to solve the practical problems that foster economic development.

Yet Weber did not view the relationship between law and capitalism as merely the former affecting the latter. He also saw the economic order affecting law. As Trubek explains, "Legalism supported the development of capitalism by providing a stable and predictable atmosphere: capitalism encouraged legalism because the bourgeoisie were aware of their own need for this type of governmental structure."²⁰ Legalism and capitalism could be both cause and effect for each other. Furthermore, the specific relationship between law and development seems to vary with the given historical case.

Weber's conclusions regarding both the relationship between law and capitalism, as well as what legalism requires, provide a framework for the study of law's role in social change on a comparative basis. In the context of the emergence of Thai concepts of title, Weberian analysis offers several clear propositions. The first is that there is a relationship between the development of formally rational law and capitalist development. Formally rational law is characterized, in the sociological sense, by (1) the emergence of formal justice, composed of strict procedures, and the use of legal reasoning applied through logical procedures to the facts of the case, and (2) the differentiation of legal from purely political institutions, as well as the differentiation within the legal profession of various functions. The second proposition is that formal justice can have an impact on capitalism in two ways. The first is the general effect of predictability and calculability that formal justice provides capitalists. The second is the proclivity for a formal system of justice to solve practical legal problems through the elaboration of specific legal concepts, such as title to land, which function to foster capitalist development. The third proposition is that a causal

relationship exists between the development of formally rational law and capitalism but that the exact relationship is problematic, and may depend on the specific historic context. The second and third chapters of this paper will explore these propositions on the basis of Thai legal and economic development.

B. The Marxist Approach

Briefly stated, Marxian analysis of social change focuses on the "mode of production" in a society. The mode of production is comprised of (1) the "relations of production," i.e., the groups into which society is organized to produce goods and services, (2) the "forces of production," i.e., the technology used to produce goods and services, and (3) the "means of production," e.g. the land used for production. The dialectical evolution of the mode of production through various stages of history,²¹ from primitive communism to capitalism, has had a dominant causal effect on the "superstructure," e.g., on institutions, ideas, and, most importantly for our purposes, on law. Writers have debated the extent to which Marx permitted super-structural factors to have a feedback relationship or effect on the development of the mode of production; but, in the last analysis, material factors are the independent variables that guide the course of history and social change.

Marx saw, at least in his earlier writings, the development of capitalism as unleashing historically progressive productive forces wherever it spread:

The bourgeoisie cannot exist without constantly revolutionizing the instruments of production and thereby the relations of production, and with them the whole relations of society...Constant revolutionizing of production, uninterrupted disturbances of all social conditions, everlasting uncertainty, and agitation distinguish the bourgeois epoch from all earlier ones. The bourgeoisie...draw all, even the most barbarian nations into civilization. The cheap prices of its commodities are the heavy artillery with which it batters down all Chinese walls...It compels all nations, on pain of extinction, to adopt the bourgeois mode of production; it compels them to introduce what it calls civilization into their midst, to become bourgeois themselves. In a word, it creates a world after its own image.²²

Marx thus saw capitalism forcing developing nations to follow or to converge on the model presented by European history.²³ Capitalism would be a dynamic, progressive force,²⁴ unleashing the productive capacities of developing countries and leading to a capitalist mode of production and to social organization reminiscent of European development.

Implicit in Marx's analysis of the effect of the spread of capitalism—and fundamental for our purposes—is the view that law, as a superstructural phenomenon, will also converge along models first created in Europe. In other words, all law

will become "capitalist" as a bourgeois mode of production is introduced. How literally specific legal rules will correspond to the model is a difficult question. For this Marxian approach to have explanatory power for our purposes, a progressively growing similarity between European and Thai legal conceptions of title suffices. One would also expect convergence to occur in non-legal dimensions in society, e.g. politics. As compared to the Weberian approach, the traditional Marxist's perspective resolves Weber's agnosticism by emphasizing the imposition of the needs of the commercial classes on the legal system.

C. The World Systems Approach

A Neo-Marxist approach, World Systems, is propounded by A. Gunder Frank and I. Wallerstein.²⁵ This group fundamentally rejects Marx's view that capitalism would unleash productive forces in the developing world, leading to convergence between the developed and underdeveloped countries. They instead focus on the structural underdevelopment of the underdeveloped world caused by world capitalism, and the mechanisms by which developed nations appropriate an economic surplus from these societies. They view social change in developing countries—or peripheral countries, to use Frank's and Wallerstein's jargon—as determined by the role which a country plays in the international division of labor. As Frank states, "Economic development and underdevelopment are the opposite face of the same coin."²⁶ The exploitation of resources and markets in the underdeveloped world, dating back to the Spanish colonization of America, and the transfer of this surplus to Europe, led to divergent paths of development for individual states within the capitalist world system. Thus social change occurs within a single unit, the world capitalist system, and leads to growth in the developed countries—the core—and to underdevelopment in the periphery.

These authors see the transfer of economic surplus as a function of the role played by specific nation states within the international division of labor. As Wallerstein explains, the hierarchy of occupational tasks characteristic of the world capitalist system allocates higher rewards to those nation states that carry out the most complex tasks.²⁷ Most importantly, this international division of labor is conceptualized as a whole; one element in the structure cannot exist without the other. Furthermore, these hierarchical relationships are ordered as a zero-sum game: development in one area of the hierarchy necessarily leads to underdevelopment in another area. Thus, the development of the center would not have been possible without the incorporation and underdevelopment of the Third World. Once placed—in the periphery either forcibly through colonization or passively through market demands—a country's role can change but only with difficulty; the status quo is self reinforcing through the exercise of individual state power on a global level and the process of unequal exchange.²⁸

It is difficult to tease out the World System view of the role of law in social change because of the approach's

somewhat confused meta-theoretical characteristics. Yet some general statements can be ventured. Unlike Marx, Wallerstein does not view capitalism as unleashing productive forces that lead inextricably to the emergence of free labor and the commercialization of land. His approach, unlike Marx's, would emphasize the structural constraints of Thailand's role in the international division of labor and that, through the process of unequal exchange, the Thai agricultural sector, however it was economically and legally organized, channeled economic surplus to the center through price terms favoring the center. Ultimately, Thai legal concepts, practices, and social change in general would be determined by Thailand's role in the international division of labor. Thus, Thai legal concepts would not necessarily converge on the Western model but would instead follow a Third World model.

Although quite popular during the mid-seventies to early eighties, methodological problems have plagued the world system or dependency analysis of development. None of the authors ever gave a clear definition of capitalism or provided a detailed historical case study of exactly how the surplus from the periphery is channeled to the center. As a result, the theory provided no specific propositions that could be tested in terms of empirical data in a case study approach.²⁹ Frank, for example, speaks only of concentric circles of exploitation beginning with the peasant producers and the urban underemployed in the periphery and ultimately benefiting the capitalists at the center.

III. THE CASE STUDY

Our choice of legal concepts of title for study was influenced by several factors. Land is of fundamental importance in all societies, especially those attempting to develop economically. The changing legal definition of people's relationship to land was an important element of the European transition from feudalism to capitalism. Specifically, the development of a concept of individual title and the ability to transfer and mortgage land are a fundamental aspect of the commercialization of agriculture. Furthermore, the increasing realization that agricultural development must, to a certain extent, precede and support industrialization, requires a thorough understanding of the legal techniques that might support that process. Thailand is an appropriate case study for two basic reasons. The first is that the authors are both familiar on a first-hand basis with the society. The second is that Thailand has not received detailed academic attention despite its on-going economic success.

The second chapter of the case study will outline the evolution of Thai notions of title. It will focus on the development of the Thai legal system from a "formally irrational" system—characterized by the King simply announcing the law—to a "formally rational" system. The third chapter will tentatively test our basic proposition that legalism did support economic development by importing a concept of title which facilitated the commercialization of agriculture. We shall show that title only displaced the traditional Thai notion of "ownership" in areas susceptible to commercialization. We

then analyze the current pattern of land holdings, showing how a continuum exists from mere occupation of land to full title ownership. We then explain why the traditional credit mechanism associated with non-titled lands is a less efficient means to harness capital for agricultural development. We conclude with general remarks about the law and development movement as well as an assessment of our explanation of the case study as compared to both the Marxist and World System approaches.

CHAPTER 2

I. BACKGROUND: THAI HISTORY AND THE THAI LEGAL SYSTEM

Thai history is usually divided into three epochs named for the capital at the time. The chronological progression from the Sukhothai period (about 1250 to 1350) through the Ayudhya period (about 1350 to 1767) to the Bangkok period (1767 to present) also reflects a continuation in the Chao Phya River basin of the Thais' generally southward movement from their original home traditionally identified as in Yunnan.¹ When the Burmese sacked Ayudhya in 1767 they destroyed ninety percent of the code of laws then in use.² So there is almost no primary source material prior to the Bangkok period. For our purposes in this chapter we divide Thai history into the modern and the ancient periods using a traditional line of demarcation between these two periods, the Anglo-Siamese Treaty of 1855. In Weberian terms this chapter depicts the shift from a "substantively irrational" system during the Sukhothai period to a "substantively rational" system during the Ayudhya and early Bangkok periods to a "formally rational" system in the modern era.

The Thai legal system has historically revolved around the monarchy. The traditionally accepted Thai view of the monarchy during the Sukhothai period, when the population and the area of the kingdom were both relatively small, was of a familial, patriarchal king.³ This changed as the Thai capital moved south and Thai kings controlled more land and people. The Thai view of kingship which was adopted during the Ayudhya period retains astonishing power even today, as Thailand prepares to join the ranks of developed countries.

In Ayudhya Thai thought on kingship was influenced by the Mon, an indigenous people, and the Khmer, against whom the Thai frequently waged war. The legal systems of both the Mon and the Khmer had been developed from the Hindu dharma-sastras. The Thai *thammasat*⁴ is a Buddhist interpretation of the dharma-sastras as the Thais received them from the Mon and the Khmer.⁵ The *thammasat* was central to the Thai legal system until the reforms of King Chulalongkorn in the late 19th and early 20th centuries. Its view of the king as a righteous god who embodies the law continues to influence the common Thai's concept of kingship.

The *thammasat* was considered sacred or natural law. It was deemed to be the supreme expression of truth and equity as revealed by a supernatural source; its provisions

were sacred and eternal.⁶ Thai kings, although regarded as divine, could not make a law which was not in harmony with the *thammasat*. Laws made by kings (*rachasat*) tended to be considered temporary reflections of the power of the king, while the natural law of the *thammasat* was regarded as eternal.⁷ The *thammasat* "changed the basis of political leadership from an intimate and informal paternalism to an idealized monarch who was expected to rule his subjects with justice and moderation."⁸

Although common Thai people continue to think of the monarch as a god-king, the legal system no longer revolves around the king. Beginning with the reforms of King Chulalongkorn the Great (Rama V, 1868-1910), Thai law has moved increasingly towards Western models. The first small law school was started in 1897⁹ and there are now four universities granting law degrees: Chulalongkorn University, Thammasat University, Ramkhamheng University and Sukhothai University. In 1901 King Chulalongkorn introduced a Western system of title in land.¹⁰ Civil and Criminal codes based on continental European models were adopted early in this century. The demise of the absolute monarchy in 1932 seems to have confirmed the inevitability of this movement toward a Western system of law.

II. HISTORY OF THAI LAND LAW

A. Ancient law

1. Before Sukhothai

As was the case in most Asian societies, religious and cultural influences regulated the relationship between ancient Thai rulers and the people over whom they reigned. Before the Sukhothai period (roughly 1250-1350 A.D.) the Thai generated no form of legalism comparable to that of Ch'in Shih Huang-ti, who developed a detailed administrative system, with provisions for enforcement, during the Ch'in dynasty (255-206 B.C.).¹¹

Virapol Sarasin states that in their original home in Yunnan the Thais were constantly at war with the Mongols.¹² Traditional opinion holds that war was a central factor in the Thais' migration south and, once in present day Thailand, they engaged in frequent wars with Pagan to the west and Angkor to the east. The Thai tradition that all land belongs to the leader (later the king) developed over the centuries as the Thais moved south in relatively small bands of people clustered about a leader or chief.¹³

Robert Lingat, the foremost scholar of Thai legal history, distinguishes the early Thai tradition of royal ownership of all land from theoretically similar legal traditions in Europe and Asia. He compares ancient Chinese law, Islamic law and European law of the Middle Ages. All of the land theoretically belonged to the monarch (or the imam) in these systems, but the actual practice did not reflect this theory. Lingat gives two reasons for this gap, one theoretical and the other practical. First, there had not yet developed a distinction between control (in the hands of the husband, the father,

the monarch etc.) and private rights. So, because the husband, the father and the monarch had control, they were theoretically the holders of private rights as well. It was impractical to implement the theory that the monarch (or imam) had ownership rights in all the land in these societies because the land area "owned" by the monarchs was too large.¹⁴

The ancient Thais apparently had a very strong tradition of rights in the land residing in the leader or monarch.¹⁵ This, along with the small area of land actually under the control of any one leader or monarch prior to the Thais' movement into the Chao Phya River basin, allowed them to put into actual practice what was only theory elsewhere. The king or tribal leader, as owner of all the land, awarded land to his followers according to how they had served him.

2. Sukhothai period (about 1250-1350)

The ancient Thai legal system traditionally began to take shape during the Sukhothai period. When the Thais emerged into the Chao Phya River basin and began to control more land the ancient tradition of royal ownership of all the land came with them, but it began to change perforce. A famous stone inscription in the Bangkok National Museum traditionally accepted as being from the Sukhothai period gives the flavor of law during this era:

In the gateway of the palace a bell is hung; if anyone in the kingdom has some grievance or some matter that is ulcerating his entrails and troubling his mind, and wishes to lay it before the king, the way is easy: he has only to strike the bell hung there. Every time King Rama Khamheng hears this appeal, he interrogates the plaintiff about the matter and gives an entirely impartial decision.¹⁶

This can be seen as a public relations offering by a kingdom rich in land and starved for manpower. In order to continue to control the land the king had to attract more people to live on it and work it. A few lines further down on the stone inscription is the first inkling of Thai land law:

(the king) comes when he hears the bell and decides the case, so the people of Sukhothai praise him. They plant areca groves and betel groves all over Sukhothai; cocoanut groves and jackfruit groves are planted in abundance here, mango groves and tamarind groves are planted in abundance. Anyone who plants them gets them for himself and keeps them.¹⁷

Thus, although there is really very little material on the Sukhothai period, we may infer that during that time the king claimed ownership of all the land, but commoners were given or allowed to use land rather freely and the product of the land was not taxed. The fledgling kingdom was ruled with a light hand by a paternalistic monarch who controlled more land than he had subjects to farm it.

3. Ayudhya and early Bangkok periods (about 1350-1855)¹⁸

As we have noted, the Burmese sacked Ayudhya destroying almost all legal materials in 1767. King Phra Phutthahyotfa (Rama I, 1782-1809), the founder of the present (Chakri) dynasty, decided to compile all the traditional law and remove from it aberrations such as unfair or inappropriate king-made law (*rachasat*). This task was completed in 1805 and the resulting code is commonly known as the Law of the Three Seals.¹⁹ This code, because it is virtually the only extant evidence of classical Thai law,²⁰ represents the ancient traditional law of Thailand.²¹ There is no translation into any language except modern Thai.

Because there is almost no primary source material except this 1805 recension, it is difficult to give a chronological picture of the gradual accretion of farmers' rights in land. We offer our interpretation based upon what we find in the Law of the Three Seals. See the appendix of this paper for our translations of the provisions of the Law of the Three Seals cited below.

The ancient Thai tradition of royal ownership of all land had been relaxed and was perhaps on its way to extinction during the Sukhothai period because the Thais were holding more land and suffered chronic shortages of manpower. The adoption of the Hindu theory of kingship during the early Ayudhya period prevented any change in the actual law because the notion of royal ownership of all land comported so well with the idea of the king as god. It was seen as a logical corollary of divinity that the king should own the source of all sustenance. Thus ironically the adoption of a "substantively rational" system of law based on *thammasat* (natural law) by the Thai kings perhaps forestalled legal recognition of farmers' ownership rights in land.

But the economic forces present in Sukhothai were also at work in Ayudhya. The area controlled by Thai kings grew, and manpower was always in short supply. The tension created by Thai kings' need to attract more people to farm the land they controlled while maintaining the theoretical ownership of all land is readily apparent in the Law of the Three Seals. While section 52²² of the miscellaneous book declared that all land belonged to the king and section 54²³ prohibited the buying and selling of land, section 54 also required officials to encourage people to farm the land and granted a one-year tax holiday for newly cleared lands.

Given the policy of encouraging the people to clear and settle more land implicit in section 54, it seems inevitable that the prohibition of the sale of land would lose its potency. Thus section 61²⁴ limits to ten years the seller's right of redemption in a sale of land with the right of redemption (*khaifak*)²⁵ and section 62²⁶ prohibits the sale of land by an unlawful occupier. We may infer from these sections that borrowing against and selling land were common practices during the Ayudhya period. Indeed, it is difficult to understand why section 54's prohibition on the sale of land was retained through the years and in the 1805 recension if not in order to keep the law in harmony with the prevailing theory of kingship; many sections of the miscellaneous laws book²⁷ seem to assume regular buying and selling of land.

Further indications of farmers' gradually increasing rights in the land include punishments stipulated in the Law of the Three Seals for occupation of another's land (miscellaneous laws book §§ 34-41)²⁸ and for clearing and farming wild land without first notifying the proper authority (crimes against government book § 47).²⁹ It seems likely that the purpose of the latter provision was to facilitate collection of land taxes.

The king collected taxes on paddy land and on other sources of bounty such as fruit trees. Before the end of the Ayudhya period the government issued documents to the farmers showing how much land they farmed, how many mango trees they had, etc. These tax documents came to represent de facto proof of the farmers' land-holding right.³⁰ At least by the end of the Ayudhya period commoners exercised ownership rights in land as against other commoners; they bought and sold land, devised and inherited land and borrowed against it. But if a farmer did not make beneficial use of his land, he lost any claim he had to that land.³¹ As Lingat points out, this "use it or lose it" policy helped to maximize land tax revenue, an important financial resource throughout this period.³²

Thus throughout the Ayudhya period (about 1350-1767) and during the period leading up to the Anglo-Siamese treaty of 1855, farmers' rights in the land they tilled gradually increased. By the dawn of the modern era farmers exercised virtually complete ownership rights over their land. But the legal system, which was based upon the *thammasat* (natural law) and recognized the king as the divine embodiment of law, held the king to be owner of all land. Certainly this legal fiction represented no threat to the farmer's tenure by 1855.³³ If political and economic events had been different after 1855 perhaps the Thai legal system might have developed its own distinctive approach to the "use it or lose it" problem. But, as the next section of this chapter shows, the events of the second half of the nineteenth century forced Thailand to adopt many western ideas, including a European legal system and a western theory of title. The Thai farmer's ancient usufructory right was further refined, but was then pushed to the periphery.

B. Modern law

1. 19th Century

The Anglo-Siamese Treaty of 1855, commonly known as the Bowring Treaty after the governor of Hongkong who negotiated it,³⁴ opened up Thailand to foreign trade on London's terms. Because he saw this treaty as the only way to avoid colonization, King Mongkut (Rama IV, 1851-1868) agreed, among other things, to limit import duties to three percent ad valorem and export taxes to an average of five percent.³⁵ Similar commercial treaties with many foreign countries followed the Bowring Treaty. All of these treaties called for extraterritoriality for nationals of the foreign country in Thailand because of the perceived backwardness of the Thai legal system. The Bowring Treaty was the death knell

for the traditional order, including the self-sufficient economy and the evolving system of land tenure based on usufruct. Extraterritoriality and the threat of colonization combined to move the Thai monarchy toward modernization of the legal system.

Thai rice became very popular abroad.³⁶ As the price of rice rose dramatically,³⁷ the demand for land increased.³⁸ This caused problems with the farmer's traditional mode of borrowing against his land, one of his main sources of loans. The principal method of borrowing against land was the old Chinese financing instrument *khaifak*, often translated into English as "sale with right of redemption." Professor Feinerman has shown that the *khaifak* transaction is not really captured when translated into western languages because western legal systems have no equivalent of *khaifak*.³⁹ He has also conveyed the rich variety of forms this Chinese instrument took in China and Vietnam. For instance, in China and Vietnam there was sometimes a period of time after the exchange of money and rights in land before the "seller" could exercise his right to redeem.⁴⁰ Also, because title did exist in these two societies, the "seller" sometimes had the right to redeem the land even after the end of the redemption period.⁴¹

We believe the Thai *khaifak* transaction was simpler than its Chinese and Vietnamese cousins. There is no evidence at all of any interval between the *khaifak* transaction and the beginning of the redemption period. Furthermore, ancient Thai law clearly gave the land to the "buyer" if the "seller" failed to redeem within the redemption period (see appendix, page x). While it is clear from Professor Feinerman's article that in China and Vietnam the "buyer" took possession of the land,⁴² in the Thai context it is not clear at all whether the "buyer" or "seller" had possession of the land after the *khaifak* transaction. We believe that because of the abundance of land and shortage of manpower in Thailand at this time the "seller" usually continued to farm his land. For our present purposes it is not necessary to resolve this puzzle, but for clarity of presentation we assume the "seller" remained on his land. Despite its drawbacks we sometimes refer to the *khaifak* transaction as "sale with right of redemption" for the same reason.

So under the *khaifak* instrument the borrower-vendor remained on the land and paid a large portion of its bounty to the lender-purchaser as interest or rent. The borrower thus transformed himself from an owner to a tenant, but retained the right to repurchase the land for a maximum of ten years (see footnotes 24 & 25 and the text accompanying them, this chapter). We presume that the *khaifak* financing instrument, as applied in Thailand, was quite informal by western standards. We believe, since land was readily available and still relatively cheap, that the amount of money secured by the land was linked not so much to the value of the land as to the value of the product of the land. Probably the amount of money which changed hands using this old instrument was rather small and the interest rate was high.

The increased demand for land caused the value of land to rise in the second half of the nineteenth century. As

the price of land went up the need for clarification of exactly who had rights in the land under the traditional financial instrument rose with it.

King Chulalongkorn (Rama V, 1868-1910) accomplished a complete transformation and modernization of the Thai government using Western advisors and many Western concepts. Threatened by the colonizing powers on all sides and stung by the extraterritoriality granted foreign nationals on Thai soil, Chulalongkorn moved the legal system out of its orbit around the king and set it on the road towards a "formally rational," Western system. At the heart of Chulalongkorn's Chakri Reformation was the restructuring of the judiciary. He reasoned that only by showing the colonizers that Thailand was a "civilized" country (that is, that it had a Western legal system) could he rid Thailand of the insulting extraterritorial rights enjoyed by foreign nationals in Thailand.⁴³ Chulalongkorn hoped that by Westernizing the legal system he would take away from England and France an often repeated excuse for colonization, bringing "civilization" to "backward" countries, and thereby avoid the fate of all of his neighbors. It also seems certain that, as Engel points out,⁴⁴ Chulalongkorn hoped to improve the lot of his subjects by Westernizing his legal system.⁴⁵

Included in Chulalongkorn's Chakri Reformation were many proclamations (*prakat*) and royal decrees (*phraratchabanyat*) designed to clarify rights to land in an *ad hoc* manner. A series of two proclamations and a decree spanning the last third of the nineteenth century shows the Thai legal system grappling with the problem of rights in land. The rising price of rice and land gave farmers who had sold their land with the right of redemption great incentive to redeem at the original price. Farmers who had sold their land outright also attempted to redeem at the original price. King Mongkut's *Prakat khai suan khai na fak kae kan*⁴⁶ (Proclamation on sale and *khaifak* of paddy and garden), acknowledged in 1866 the increased usage of land and the consequent rise in the cost of land. It went on to declare that in disputes regarding purchase, mortgage and purchase with right of redemption (*khaifak*), holders of certain land tax documents (*tra daeng*) would be deemed by the courts to have ownership rights in the land.

This did not solve the problem; it substituted possession of the tax documents for possession of the land as the determinative factor. So lenders took the tax documents as collateral. King Chulalongkorn's *Phraratchabanyat kan khaifak lae kan jamnam thidin*⁴⁷ (Royal decree on the sale with right of redemption and the mortgaging of land, 1896) addressed problems arising with the 1866 proclamation when the mortgagor or the landowner who sold land with a right of redemption (*khaifak*) had a contract attesting to his right of redemption but had given the tax document to his creditor as security. Many cases were backed up in the legal system because officials did not know how to resolve this legal conflict. The contracts indicated a right of redemption in the debtor, but the earlier proclamation dictated that the holder of the documents, the creditor in this situation, owned the land. The 1896 royal decree announced that King Mongkut's

proclamation was out of step with the times; since contracts were now commonly made in the presence of government officials the old proclamation was eliminated and deciding officials were instructed to resolve such cases on the basis of current law, including contract law. In 1899 *Prakat reuang jamnam lae khaifak thi din*⁴⁸ (Proclamation concerning the mortgaging and the sale with right of redemption of land) proclaimed that in these land transactions a written contract was necessary. The purchaser (in a *khaifak* transaction) or mortgagee had no legal remedy unless there was a written contract made in the presence of a government official. With such a contract the vendor who succeeded in redeeming his land freed himself both of the obligation to give a portion of his crop to the money-lender and from the threat that after the ten year statutory period the money lender would claim possession and sell or rent the land to another party. By giving legal effect to a contract made in the presence of a government official these laws increased the security of the *khaifak* credit mechanism.

Thus by the end of the nineteenth century the Thai legal system had granted the farmer virtually complete rights in his land. Through the implementation of contract law⁴⁹ it had developed a partial response to the "use it or lose it" rule. That is, the traditional legal system generated a solution (contract law or, in the absence of a written contract, the land tax document) to instances where the owner (the purchaser in a *khaifak* transaction or the mortgagee) of the land was not actually in possession and control of the land. Money-lenders were not in possession of the land they "owned," but the legal system had evolved in such a way as to protect them; they didn't "use it," but nor did they "lose it."⁵⁰ The only remaining hurdle for the Thai legal system's land law was abandonment of land.

This customary system of land tenure had evolved over the centuries to a point where it functioned well within the traditional Thai economic setting and also offered a modicum of social justice to the farmer. Farmers could take up as much vacant land as they could cultivate. The law provided sufficient security for traditional informal methods of borrowing against land. We view Thai land law at the end of the nineteenth century as having evolved to a point of near perfection within Thailand's "substantively rational" legal system. Any further significant "improvement" would require abstraction possible only within a "formally rational system." One might ask at this point, why did the Thai legal system adopt a Western system of title in land at the beginning of the twentieth century?

2. Western system of title

In 1901 King Chulalongkorn separated the concept of ownership from actual occupancy and use of the land⁵¹. He made provisions for a cadastral survey, a Torrens registration system and title deeds giving full legal ownership rights to the person holding the title deed. It was assumed that in almost every case the head of the family that had been farming the land would get title to the land.

There are no source materials available in this country which shine any light on the question with which we concluded our discussion of late nineteenth century Thai land law: why did Thailand adopt a Western system of title in land? It is possible that the king and his advisors chose to adopt a Western system of land tenure in order to solve the traditional system's problem with abandonment of land (the "use it or lose it rule"). But this seems implausible: land was still plentiful and relatively inexpensive; any rational public policy would surely encourage the use of arable land.

A more likely explanation for the shift to a Western model views the land tenure law as simply swept away toward the new system along with most of traditional Thai law: all law had to be "modern." We know that King Chulalongkorn himself thought that by "adopting certain practices of the prosperous and developed countries, ...Thailand itself could become prosperous and developed."⁵² We also know that the great king saw adoption of a Westernized legal system as a means of fending off colonization and as the only way to rid his country of extraterritoriality. Perhaps Chulalongkorn decided to adopt a Western system of title as part of his complete overhaul of the Thai legal system, hoping at the same time that the Western system would facilitate greater agricultural development and better the lot of his subjects.

It is also possible that Thailand adopted a Western system of title in order to accommodate a new species of rural land owner. As rice farming became profitable, businessmen and royalty from Bangkok began to purchase land and engage in the business of rice farming. Of course these members of the urban elite did not live on the land; to them rice farming was not a traditional way of life, but a source of income. Because they were foreigners in rural Thailand, because they did not live on or even near the land and because they wanted bigger loans and lower interest rates than the traditional methods of securing debt with land provided, the urban elite demanded a land law which provided as much security of tenure as possible.

Western systems separate ownership rights from possession and control of the land. But because of this abstraction they also take measures aimed at assuring full security of tenure to the land owner. The land is surveyed and accurately described in words on a document symbolizing the land. The owner of the land is named on the document and a copy of it is recorded or registered with a government agency. Perhaps because of the new, politically influential land owners' desire for increased security of tenure, Thailand adopted a Western system of title in land.

Regardless of the reason for Thailand's adoption of a Western system, we believe that the extent of the cadastral survey, and thus the Western system of title in land, correlates very closely in rural Thailand to the spread of commercial agriculture. We also believe that, like the perception of the king as a divinity, the old natural law land system is alive in areas of traditional self sufficient agriculture.

3. Epilog: current law

Many other laws and regulations followed the establishment of the Western system in Thailand. For instance, in 1904 *Phraratchabanyat awk tra jawng chuakhraw* (Royal decree on the issuance of temporary title deeds) made provisions for government officials to issue temporary title deeds (*tra jawng chuakhraw*) in areas where permanent title deeds had not yet been issued. The new laws and regulations which followed the establishment of the Western system of title were compiled in *Phraratchabanyat kan awk chanot thi din R.S. 127* (Royal decree on the issuance of title deed to land of 1906). This Land Act of 1906 was Thailand's first modern land code. It made provisions for procedures in litigation of cases concerning land, set down how the cadastral survey was to proceed, established procedures for the transfer of land which had already been surveyed but for which title deeds had not yet been issued, explained how to correct a mistake on the Torrens registration, etc.

Because not only the land title system but the entire judicial system and indeed virtually the whole government were changed by King Chulalongkorn, it was necessary to make many modifications to the Land Act of 1906. *Phraratchabanyat awk chanot thi din chabap thi 2* (Royal decree on the issuance of title deed to land #2) mandated registration of the new owner upon the death of a landowner and provided for escheat of land with a title deed which was left unoccupied and unused for nine years. *Phraratchabanyat awk chanot thi din chabap thi 3* (Royal decree on the issuance of title deed to land #3) gave Ministry of Agriculture officials the power to issue replacement ownership documents to tax officials who wanted to seize and sell the land for back taxes. It also made provisions for release of a mortgage when there were multiple mortgagors or mortgagees and designated a method for entering the name of the executor of a will on the title deed while the executor was administering the estate.

As might be expected in an agricultural society with a traditional system of de facto ownership rights in the possessor, the new title deed system's protection of ownership rights rather than occupancy gave rise to much confusion. *Phraratchabanyat awk chanot thi din chabap thi 6* (Royal decree on the issuance of title deed to land #6) represented both a culmination of the bureaucracy's adjustment to the new system and an attempt to alleviate the confusion that new system had caused. With this 1936 decree a more flexible system began to emerge. Its provisions recognized three different stages in the acquisition of land: occupancy, utilization and legal possession. This basic scheme is still in use today.

Where the Land Act of 1906 (part 4, chapter 11) had provisions for acquiring full legal rights over any amount of vacant land of which one could make beneficial use, the 1936 decree (section 5) reduced the amount one could claim to 50 or 100 *rai*⁵³ (depending upon what government official gave his approval). The 1936 law also required more extensive participation by government officials in the squatting procedure. This is the first legal limitation of the Thai peasants' ancient squatting right.

With the *Pramuan kotmai thi din* 2497 (Land Code of 1954) the Thai government for the first time moved to limit the amount of land an individual could hold. Section 34 of that act allowed an individual to hold a maximum of 50 *rai* for agricultural purposes. More severe limits were established for industrial, commercial and residential holdings. This section of the 1954 Act was summarily eliminated by Field Marshall Sarit after his 1957-8 revolution.⁵⁴

As a result of the Land Code of 1954, which (with Book IV [Property] of the Thai Civil and Commercial Code) regulates land ownership today, there are now five documents concerning occupation and ownership of land. The claim certificate or *so ko* 1 merely represents the government's acknowledgement of occupancy of the land. The supreme court of Thailand ruled in 1966 that the claim certificate shows not ownership, but that the holder claims ownership (Dika 676\2509). Every farming family must have the claim certificate for tax purposes. Farmers who live within forest preserves get an analogous document, the *so ko to* or SKT.⁵⁵

Articles 30 and 33 of the Land Code of 1954 perpetuate the earlier statutory provisions for taking up vacant land. A farmer must ask the appropriate government office to inspect and conduct a survey of the land and to post public notice. After 30 days, if no one objects, the farmer will receive a *bai jong* or preemption certificate granting permission to occupy and cultivate the land. If the farmer starts clearing the land within six months and can show, after three years, that he is making beneficial use of the land, the district office will issue a *no so 3 or*, since 1972, *no so 3 ko* (certificate of use).

The certificate of use is the first step on the path to full legal ownership of the land. The final two documents in use today are the *bai tai suan*, issued by the Land Department and the *chanot thi din* (land title deed), which is issued by the Land Department and the provincial governor. The *bai tai suan* is documentary proof of inspection and survey of the land and the *chanot thi din* (form *no so 4*) represents, of course, full legal title. But even land held under full title is subject to prescription under articles 77 and 78 of the Land Code of 1954 and clause 1382 of the Thai Civil and Commercial Code if abandoned for ten years.⁵⁶

We should note that despite these provisions for acquisition of vacant land, the main thrust of the Land Code of 1954 was to achieve increased governmental control over the land rather than to rectify any social problem. Verachai Tantikul, for instance, has said that the Land Act was promulgated because of concern for tax revenue.⁵⁷

The land Code of 1954 represents the consummation of the Westernization of Thai land law, the completion of the move to a "formally rational" land law. Ownership rights are separate from possession and control, land is scientifically surveyed, there is a Torrens registration system and provisions have been made for the taking up of any vacant land. But it also limits Thai farmers' ancient right to squat and requires extensive participation of government officials in the squatting process. These last two considerations probably outweigh concerns about security of tenure and help to explain why there is no popular demand for full title deeds in

an area where farming is not yet commercialized. In these areas where the traditional economy reigns the "new" law must seem abstract and foreign to the farmer. The traditional land law, the product of a legal system based on what the Thais perceive as natural law, certainly appears just that to these rustic Thais: nature.⁵⁸ Thus it is no surprise that in rural areas, where life is governed by the passing of the seasons, nature and not abstract law regulates land tenure.

CHAPTER III

Analysis of the Relationship Between Title and Commercialization

I. INTRODUCTION

In this chapter we shall show the interrelationship between (1) areas in Thailand where secure ownership rights exist, (2) the availability of credit for investment in agriculture, and (3) the commercialization of agriculture. Our analysis will emphasize that, for most of the arable land in Thailand, the traditional tenurial system still survives; mere occupation coupled with the possession of one of the several non-title documents is considered sufficient to prove "ownership" of land. Yet the lack of secure ownership rights essentially relegates these farmers to credit from traditional sources. Conversely, for those farmers that have secure ownership rights, commercial or institutional credit is available that provides the farmer both with more total credit and lower interest rates than traditional mechanisms.¹ As a result, these latter farmers have an ongoing advantage as the commercialization of Thai agriculture proceeds. Our central thesis, again, is that the development of a formally rational legal system, especially the introduction of the legal concept of title, helped to spur the process of commercialization of Thai agriculture by fostering more efficient credit mechanisms.

The first section of this chapter explores the early spread of title and shows the close association between access to ports and the initial spread of title documents. The second section describes the differences between—and the relative importance of—various types of land "ownership" in Thailand. The third section, argues that a strong correlation exists between those regions that have the highest percentage of *rai* titled and those that have the highest yield per *rai* for rice. The fourth section describes how secure ownership rights foster commercialization by providing the farmer with access to greater amounts of cheaper credit than is available from traditional sources. The fifth section evaluates this case study in terms of what it shows about the relationship between law and development and of its contribution to the revitalization of the law and development movement. We conclude with a discussion of the utility of the Weberian approach in the context of this case study.

II. THE EARLY INTRODUCTION AND SPREAD OF TITLE

As we saw in the last chapter, the Thai legal system in successive decrees grappled with the problem of "ownership" of land inherent in the traditional tenurial system. These efforts led to King Chulalongkorn's 1901 "Proclamation on the issuance of land title deeds."² At this point in Thai history one might have expected that, within a matter of decades, all farmland in Thailand would be surveyed, registered and a title deed issued to the owner. Yet this did not occur. Instead, only in some areas were lands registered, and title deeds issued.

The different rates of title issuance for various areas in Thailand is probably best explained by the relative abilities of some areas to take advantage of the world market demand for rice. Those areas near to or with access to Bangkok and, to a lesser extent, Phuket, were able to export rice more economically than other areas due to high transportation costs within Thailand. Yet the acceptance of title in areas where commercialization of agriculture was feasible probably indicates that title served, as Weber thought it would, a useful legal and economic purpose: the clear description and definition of what land was owned and by whom added a significant degree of calculability to what the mortgagor was pledging and what the mortgagee was securing. As a result, more credit became available for investment in the agricultural sector. Thus, the legal concept of title helped to further a process of commercialization which had already begun in the aftermath of the Bowring treaty.³

The early Thailand Yearbooks show the limited geographical spread of titles during the first half of this century. By 1933, only 645,906 titles had been issued in Thailand.⁴ The 1932-33 Thailand Year Book mentions only six areas—Bangkok, Ayuthya, Prajinburi, Rachaburi, Phitsanulok and Phuket—in all of Thailand where title was issued by the government.⁵ Thus, more than thirty years after King Chulalongkorn's attempt to create a registration system and to introduce title, the Thai Government had issued few titles, and those were concentrated in a geographical location with access to Thailand's major ports.

By the 1940's, the Thailand Yearbooks began to report issuance of titles in all the regions of the country.⁶ Yet the total amount of titled land still only accounted for a small percentage of all land in Thailand. The slow spread of title was probably due to a combination of interrelated factors. In many areas of Thailand land was still plentiful. As a result, new land was constantly being cleared, creating additional demands on the already overburdened administrative capacity of the Thai government. Secondly, the expense of the ground survey could be justified only for land ripe for commercialization. Farms without access or any prospects of access to commercial markets had less to gain from receiving title because they had a lower demand for capital. In sum, the main benefits of title, access to larger amounts of capital and to lower interest rates, were not as important to non-commercialized as to commercialized farms. Yet, as the growth of the internal market incorporated more areas of

Thailand's agricultural sector, the demand and need for clear ownership rights grew.

III. A DESCRIPTION OF THE PRESENT TENURIAL SYSTEM

The landholding system in Thailand is characterized by a several different types of documents embodying a spectrum of rights, running from full title to mere occupation. On one end of the spectrum, are farmers who occupy government land, called forest reserves, without any documentation except a tax certificate. As much as 30 million *rai* (5.3 million hectares) of the forest reserves are occupied by Thai farmers.⁷ On the other end of the spectrum, are the farmers who occupy the roughly 20 million *rai* (3.2 million hectares) who hold "title deeds." Between these extremes, are several other types of documents that give the holder greater or lesser "ownership" rights.

A description of the various types of "ownership" rights in Thailand is difficult because of disagreement among commentators as to the exact rights which a specific document confers on a holder. As is developed below, these differences may be due to the geographical scope of specific studies or simply reflect a change over time in the acceptability of certain documents. What then are the various documents in use, and the rights embodied in them?⁸

The "Land Title" (NS-4) or *chanot thi din* gives the holder unrestricted title to the land. The holder has a legal right to sell freely, transfer and, most importantly for our purposes, mortgage the land. The document has its origins in King Chulalongkorn's 1901 "Proclamation on the Issuance of Land Title Deeds." It was reaffirmed in the Land Code of 1954. The title deed is granted on the basis of a cadastral survey which marks the land by a stone boundary. The deed is registered by the holder in the provincial land registry.⁹

The "Certificate of Use" (*no so 3 & no so 3k*) or *nor sor sarm* gives the holder something slightly less than "Land Title" and something more than mere occupation. The Land Code of 1954 created the "Certificate of Use" and saw it as a transitional document which would lead to "Land Title" ownership. Nonetheless, a substantial amount of land never completed the transition from "Certificate of Use" to "Land Title". These documents were issued on the basis of tape surveys until 1972; thereafter they were issued on the basis of unrectified aerial photographs.¹⁰ In view of the less systematic quality of the surveys on which these certificates are based, a transferor must advertise a transfer for thirty days prior to a transfer at the District Office.¹¹

Feder argues that the "Certificate of Use" is valid security for a mortgage whereas Kemp states that it either is not valid security or at most limits the total amount of credit available to 60% of the value of the land.¹² We cannot resolve this debate but can suggest two possible explanations for the discrepancy. The first is that regional practices of commercial lenders may vary depending on the relative proportion of the type of "ownership" rights in the area. Such variations would account for the different observations of these authors. Add-

ing support to this argument is that Feder's study was done in the Northeast, where full title is extremely rare (none were reported in their study areas), and Kemp's and Lin and Esposito's study seems to be based on data from the Central Plains where more agricultural land has full title. In areas where both types of documents are prevalent, banks may prefer to lend to fully titled farmers rather than those with "Certificates of Use." Another possibility is that commercial and institutional lenders have only recently accepted the "Certificate of Use" as collateral. Kemp's study rests on data from 1970 and Lin and Esposito's from data collected in 1971, while Feder's study was based on data from the mid-1980s. Our sense is that a "Certificate of Use" is probably valid security but for identical land is worth less than a "Full Title" because of the added time and difficulty that the posting requirement adds to the foreclosure process for the former type of "ownership" right.

The "Preemption Certificate" (*NS-2*) or *bai jong* merely authorizes temporary occupation of the land. The land described by a certificate is in theory not transferable except by inheritance. All of the commentators agree that the land held under a "Preemption Certificate" is not accepted as legal collateral for a commercial loan. The "Preemption Certificate" was created by the 1936 Land Code. In theory, the document is merely a transitional status, which the holder will eventually transform into full title ownership or a "Certificate of Use" when a proper survey is completed. The certificate is distributed on the basis of a metes and bound description.

The "Claim Certificate" (*SK-1*) or *sor-ko 1* was created by the 1954 Land Code. It was designed, like the "Preemption Certificate," to grant to the holder a transitional status, permitting farmers who merely occupied their land—for at least six months—to obtain some documentation for their tract which would later, subsequent to a proper survey, be upgraded into a "Land Title" document or "Certificate of Use." The "Claim Certificate" was also distributed on the basis of a metes and bounds description of the property. Land owned under a "Claim Certificate" is not acceptable collateral for a commercial bank loan.

The "Certificate of Occupation" or *bai yiab yam* is a relic of the Land Act of 1906. In some parts of Thailand this document still exists, although in theory it may be converted to a "Certificate of Use."¹³ Commercial lenders do not accept land held under a "Certificate of Occupation" as collateral.

The final type of land document is called a "Usufruct Document" (*STK*). Except for the "Certificate of Use," the *STK* is probably the most prevalent type of "ownership" right in Thailand. In 1964, the Thai government passed the Forest Reserve Act which designated large areas (166 million *rai*) of Thailand as forest reserves.¹⁴ In many instances this land was already occupied by squatters who had followed the traditional practice of simply clearing new land and farming it. Since 1964, substantially more individuals have entered the forest reserves as population pressure has grown. Roughly 30 million *rai* (5.3 million hectares) of this land is now occupied by squatters.¹⁵ These areas are indistinguishable from privately held land and major roads, villages, schools and

government offices are found on this land. Prior to 1981 this land was undocumented, except for tax documents. Since 1981, the Royal Forestry Department has issued *STK*'s or usufruct documents to land in the Forest Reserves. *STK* documents are only given for plots up to 15 *rai* (2.4 hectares). Conversion of the document to any of the documents that cover privately owned land is prohibited. Nor are these plots in theory transferable except by inheritance.¹⁶ As a result, they are not accepted by commercial or institutional lenders as collateral.

The percentage or relative importance of each type of "ownership right" in Thailand's agricultural sector is difficult to assess precisely. Kemp, relying on a 1970 Annual Report of the Department of Lands, which gives a figure of 84.8 million *rai* (13.3 million hectares) of arable land in Thailand, divides the various "ownership rights" in Thailand as a whole as follows:

Fully titled land covering 14.7 million *rai* (2.4 million hectares) or 17.3% of the total arable land;

"Certificate of Use" covering 18.2 million *rai* (2.9 million hectares) or 21.4% of the total arable land;

The "Preemption Certificate" covering 4.5 million *rai* (0.7 million hectares) or 5.3% of the total arable land;

The "Certificate of Occupation" covering 4.4 million *rai* (0.7 million hectares) or 5.1% of the total arable land;

The "Claim Certificate" covering 43.0 million *rai* (6.9 million hectares) or 50.7% of the total.

Kemp's figures ignore the substantial amount of land occupied by squatters in the forest reserves. The Feder study indicates roughly how many *rai* of land are occupied in forest reserves by farmers (33.1 million *rai* or 5.3 million hectares) but gives no figure for the total arable land in Thailand.¹⁷ Instead the study divides ownership rights on the basis of privately owned land which includes urban as well as rural property. The study uses Department of Land figures to estimate that the total privately owned land is 121.3 million *rai* (19.4 million hectares). If we add the privately occupied but government owned land figure to the privately owned land, the data indicate that 154.4 million *rai* (24.7 million hectares) are privately utilized in Thailand. If we estimate that roughly 15 percent of the privately utilized land is urban or simply non-agricultural, then the total arable land in Thailand is 131.2 million *rai* (21.0 million hectares).¹⁸

A more difficult problem is determining which type of ownership rights are overstated and by how much in the Feder study because its calculations are based on all privately owned land instead of on arable land. No precise figures are available; however, urban land, because of its greater value, is probably more likely to be registered under a "Land Title" deed or a "Certificate of Use" than rural land. As a result,

reliance on the Feder study to assess the relative proportion of each type of "ownership" in rural areas would probably overstate the proportion of privately owned arable land that has either a "Land Title" deed or a "Certificate of Use." Nonetheless, the Feder study does provide useful information on the overall amount of land in each category and the proportional amount of growth in each category. The study's data indicate the following proportion of "ownership" documents based on 154.4 million *rai* (24.7 million hectares) of privately utilized land:¹⁹

Title deeds account for 18.4 million *rai* (2.9 million hectares) or 11.9% of all privately utilized land in Thailand;

"Certificates of Use" account for 64.0 million *rai* (10.2 million hectares) or 41.5% of all privately utilized land.

The "Preemption and Claim Certificates" account for 38.9 million *rai* (6.2 million hectares) or 25.2% of all privately utilized land.

Land occupied in forest reserves account for 33.1 million *rai* (5.3 million hectares) or 21.5% of the privately utilized land. Of this total an undisclosed amount is covered by the STK certificates described above.

In comparing these data with Kemp's, several conclusions are possible about the changes over time in the relative importance of various types of "ownership" rights in Thailand. The first is that the amount of land accounted for by full scale title is growing at a very slow pace. Less than four million *rai* was registered in the interim between Kemp's and Feder's surveys. The second is that the "Certificate of Use" has grown from 18.2 million *rai* to 64.0 million *rai*. This growth mirrors the decline in the importance of the "Claim Certificate," the "Preemption Certificate" and the "Certificate of Occupation." They have declined in importance from a total of 52.9 million *rai* to only 38.9 million *rai*.

Yet, despite progress in upgrading ownership rights, fully 60.4% of the privately utilized land (land occupied in forest reserves and land privately "owned" but without at least a Certificate of Use) in Thailand is still unacceptable as collateral for commercial loans.²⁰ This figure is probably even higher for arable land given that urban land would tend to have a higher proportion of either full title deeds or Certificates of Use. We now turn to an analysis of the relationship between secure ownership and the commercialization of agriculture.

IV. PRODUCTIVITY AND TITLE

Demonstrating a correlation between the prevalence of secure ownership and the commercialization of agriculture is the focus of this section. In the next section, we shall focus on causal interaction; how security of ownership helps to foster

and support commercialization. The data used here are from Thailand Yearbooks. Unfortunately, the only type of "ownership right" compiled in the Yearbooks is "Land Title." Thus, to the extent that a "Certificate of Use" is also valid security for commercial or institutional loans, the data here may be misleading. Moreover, although the data are presented in the agricultural section of the Yearbooks, the figures on total *rai* titled may include "Land Titles" issued in urban areas. Thus, any conclusions reached here are extremely tentative.

Although the Yearbooks do not provide any clear information on what types and sizes of land holdings were issued titles or any information on "ownership" rights besides titles, they do provide evidence that the average size of plots was larger in earlier years. For example, by 1955 a total of 844,345 "Land Titles" had been issued. The area covered by the titled land was 12,528,516 *rai*. Thus, the average size of a plot was 14.8 *rai* (2.4 hectares).²¹ The large average size of the plots indicates that, at least for early years, most of the plots were probably used for agricultural purposes rather than for urban dwellings. Yet by the sixties, and continuing into the eighties, the average plot size was between 2.0 (1965) and 3.4 (1971) *rai*.²² The earlier issuance of "Land Title" deeds for larger plots indicates that large farms were the first to go through the process of surveying and registration leading to the issuance of a "Land Title" deed.

The data collected by the Thai government do not lend themselves to a direct analysis of which lands were more productive. Nonetheless, calculations made by us seem to indicate that a higher percentage of land was titled in those Regions that had greater productivity per *rai*. Based on figures in the 1983 Yearbook, we think that the productivity (yield per *rai*) of land planted with rice is related to the proportion of total lands titled in a given region. Obviously, both the level of aggregation of the data and the universal unreliability of government statistics present serious problems.

Table 1 shows that the Central Region is by far the most productive in Thailand. This region corresponds to the area which first received "Land Titles" in the country.²³ The least productive is the Northeast. Table 2 shows the number

Table 1: Yield per *rai* in Kilos of Rice by Region

Region	Yield per <i>rai</i> (Kg.)	Rank
Central	406.06	1
Eastern	331.94	4
Western	378.63	3
North-East	275.67	6
Northern	380.67	2
Southern	308.09	5
TOTAL	320.13	

Source: Thailand Yearbook 1985-86, p. 175.

of *rai* that is titled by region. Once again the range is defined by the Central Region, with the most *rai* titled, and the North-East, with the least. Table 2 also shows that for the Central, Eastern and Western regions, three of the top four in productivity per *rai* for rice, are also the top 3 in total lands titled.²⁴ While our conclusions are tentative, the data seem to

Table 2: Total Number of *rai* Titled and Planted by Region

Region	Total <i>rai</i> Titled*	Total <i>rai</i> with Rice**
Central	5,949,476	4,731,869
Eastern	4,058,055	3,291,309
Western	4,119,936	3,040,541
North-East	1,963,067	32,289,643
Northern	3,423,188	14,266,280
Southern	799,514	4,257,944
TOTAL	20,236,389	61,877,586

Source: Thailand Yearbook 1985-86, p. 203.

* Note: May include rural and urban land.

** Note: All figures were calculated by dividing total rice production by yield per *rai*; thus the column represents the total number of *rai* harvested with rice.

support our thesis that an interrelationship exists between commercialization, represented here by higher yields per *rai*, and the total amount of titled land in a region.

V. COMMERCIALIZATION, OWNERSHIP RIGHTS AND ACCESS TO CREDIT

In this section we shall describe the enormous credit advantages that a farmer holding land with secure ownership rights has over another farmer with less secure rights. We also will explore the specific reasons why these advantages exist.

Imagine two farmers. Both hold identical plots of land and are equal in all relevant ways, e.g. socio-economic status, accumulated household wealth, etc. except that Farmer A holds his land either with a "Land Title" or a "Certificate of Use" and Farmer B has either no document for his land, an STK certificate, or any of the other documents that do not give the holder an officially recognized right to alienate his land.²⁵

Farming is typically characterized by several months of negative cash flow, followed by a short period of marketing during the harvest.²⁶ As a result, at the beginning of the growing season Farmers A and B need a loan to cover the costs of inputs such as seeds, fertilizers and tools. The greater the capital investment that each farmer can make now, the higher his output per *rai* and, thus, the agricultural surplus he will produce and be able to market.²⁷

Both Farmers A and B live in the same community. Yet, since they are aware that the local money lender charges higher interest rates, both farmers attempt to get a loan from a nearby commercial bank or the government's Bank for Agriculture and Agricultural Cooperatives (BAAC).²⁸ Although it is possible that Farmer B will get a loan from one of these institutional sources, it will be, at most, a short-term unsecured loan and he will not receive as much principal.²⁹ On the other hand, Farmer A will receive a loan by pledging his land as security.

Why will Farmer A receive a loan from an institutional lender whereas Farmer B probably will not? Lenders base their decision to loan funds to borrowers on the basis of the risk inherent in the loan. Two basic categories of loans are possible, either secured or unsecured. A unsecured loan is given on the basis of the general credit worthiness of the borrower. Farmer B is less credit worthy than Farmer A, all other factors being equal, because he has less implicit collateral due to the lower value of his land. Farmer B is thus less likely to receive a unsecured loan than Farmer A from institutional sources and if he does, it will be for a smaller amount.³⁰

A secured loan has important advantages for the lender. The first is that without collateral, a lender may have difficulty in forcing a borrower to pay; however, upon default of a secured loan, the lender is legally entitled to accelerate the loan and demand payment. If the lender fails to pay the whole amount, the lender may foreclose on the secured asset by selling it a foreclosure sale. The process of foreclosure depends on three essential factors: the property right secured by the lender must be legally alienable; the lender must be able to confirm easily that the borrower actually owns the secured property at the time the loan is made; and the legal system must provide a relatively efficient mechanism for the lender to enforce his right to foreclose on the secured asset.³¹

Unfortunately for Farmer B, he cannot offer the institutional lenders his land as security because it is not legally freely alienable.³² Nor will the bank accept B's land as collateral because his "ownership" rights in the land are too indefinite. In Thailand, as we have seen, roughly 64.4% of the privately utilized land is not legally marketable. These farmers, like Farmer B, cannot use their land to secure loans from institutional lenders. As a result, they are generally relegated to traditional credit mechanisms such as *khafak*.

Traditional credit mechanisms charge a higher interest rate than institutional lenders.³³ Three basic reasons explain the higher rate of interest. The first is that traditional sources of capital are generally a last resort for borrowers deemed too great a risk for a loan by institutional sources. The higher rate of interest reflects this greater risk. The second is that these lenders hold an unregulated—traditional lenders are not subject to usury laws—monopoly.³⁴ Interest rates are high because these farmers have no choice.³⁵ The third reason is that traditional lenders have a high degree of covariability on their loans.³⁶ In a given loan portfolio, a high degree of covariability means that the chances are higher that either all loans will be paid or all will be in default. Since traditional creditors make loans of essentially a local charac-

ter to agricultural producers, the lenders are exposed to the risk of local crop failure. Institutional lenders, by diversifying their loans geographically and to different types of enterprises, have a lower covariability or overall risk on their loan portfolio.

From these factors it follows that the traditional lender—more specifically, the "mortgagee" in the *khaiyak* system—would demand a higher rate of interest, given the greater risk of the loan. Moreover, traditional lenders will also limit the amount of capital a borrower will receive to well under the full market value of the property. Thus the traditional credit system has two effects. The first is to increase the cost of capital to those farms without secure ownership rights. The second is to cap or limit the total amount of the loan. A third possible effect that specifically relates to a *khaiyak* transaction is that the mortgagor is deterred from investing the funds he receives into the land because he is uncertain that he will be able to redeem his land. To this extent, we would expect that most farmers relying on a *khaiyak* system for cash would probably use the funds for current consumption rather than capital investment. All of these effects will inevitably impede agricultural development by increasing the cost of needed capital and diverting capital away from capital investments. As a result, our analysis indicates that the Thai government should emphasize the issuance of secure ownership rights on all privately utilized lands in order to support the commercialization of agriculture.

VI. TOWARDS THE REVITALIZATION OF THE LAW AND DEVELOPMENT MOVEMENT

In the first chapter of this paper we criticized authors within the law and development movement for failing to address and to state explicitly the causal interaction between law and development.³⁷ We have attempted to untangle the Gordian knot of the relationship between law and development, but have only partially succeeded. Our analysis has shown that the historical process of Thailand's emergence into the world market played a crucial role in creating the context for the emergence of commercialized agriculture; without the Bowring Treaty and the concomitant increase in the price of rice and of land, the process of commercialization probably would have been delayed indefinitely. But, given these changes, the legal innovation of title imposed by King Chulalongkorn helped to further and to deepen the process.

The impact of our analysis on the possibility of the revitalization of the law and development movement is also qualified. Earlier we argued that the relevance of the movement depended on the extent to which one could conceptualize law as an independent, or at least a re-enforcing, variable in the process of socio-economic change.³⁸ Our case study has shown that law cannot be convincingly seen as an independent variable. Instead law plays a more modest, yet still important, role as a re-enforcing variable in the process of social change. These observations are important for advocates of law and development to keep in mind. Overstating

the importance of law leads to absurd practical results and academic scorn. Yet, practitioners can do important work at both a practical and theoretical level if we are sensitive to our field's inherent limits.

Our analysis of the emergence of commercialized agriculture in Thailand has demonstrated our basic theoretical propositions respecting the causal relationship between law and development; in general, law, through the development of a formally rational legal system, and in particular by providing the legal concepts required to provide secure ownership rights, spurred or reinforced the process of the commercialization of agriculture in Thailand. Yet, without increasing demand for rice, the innovation of title would not have led to the commercialization of agriculture. The major way in which law fostered development was through the increased legal certainty and calculability which the title system afforded in the context of mortgages. Secure ownership rights reduced, for those plots of land in Thailand where they was adopted, the hold of traditional credit mechanisms such as *khaiyak* mortgaging and thereby removed them as a barrier to the commercialization of agriculture.

VII. THE EXPLANATORY POWER OF THE THEORETICAL APPROACHES

We have used our understanding and interpretation of the Weberian approach to organize the historical data and to analyze the case materials. While other theoretical approaches are not discredited merely by suggesting the plausibility of one approach, we are satisfied that the Weberian approach has greater explanatory power, at least in this context, than either the Marxist or World System approaches.

A Marxist approach would have stressed the alternative explanation that the innovation of title was simply the legal system adjusting in an epiphenomenal manner to the introduction of a capitalist mode of production in the agrarian sector and to the concomitant emergence of a nascent bourgeoisie. While one could understand our case study in this manner, two basic problems plague this type of explanation. The first is that the reforms of King Chulalongkorn were not a culmination of the political ascendancy of the Thai bourgeoisie. Indeed, the reforms have the same flavor as those undertaken in Japan following the Meiji Restoration. In both Thailand and Japan, the traditional elite seems to have led the process of social change for mainly nationalistic reasons in order to ensure their society's independence from colonial power and their continued social and political dominance. Thus, the innovation in title is better understood not as the epiphenomenal adjustment of the legal system to the new economic and social reality of commercialization of agriculture and the political ascendancy of a Thai bourgeoisie, but rather as an attempt by traditional elites to force feed the economy to avoid loss of national autonomy.

The second major problem with a Marxist explanation for this case study is that Thailand has not witnessed a generalized convergence of land tenurial systems along a capitalist model as Marx presumably would have predicted. In-

stead, as we have seen,³⁹ Thailand has a continuum of tenurial systems. One can compare the Thai reality with the land holding pattern in the United States, where virtually all privately held land is titled. Perhaps one could defend the Marxist approach by arguing that the process is still under way in Thailand and that, eventually, the Thai system will have only titled land as well. Yet this would hardly conform to Marx's description of a revolution in productive forces—and, thus, in law—that capitalism would inevitable bring to the Third World to knock down "Chinese walls." The Weberian approach yields the more plausible explanation that the legal innovation of secure ownership rights, acting as a re-enforcing variable, will only be adopted where the underlying context for commercialization already exists.

The Weberian theory also seems more persuasive than an explanation based on the World System's theoretical framework. While the continuum in the Thai tenurial system seems to support the general proposition we teased out of the World System approach—that legal systems in the Third World would follow their own model and would reflect the status of the given country's role in the international division of labor⁴⁰—considerations exogenous to the examination of title seem to undermine the whole approach. While the World System approach does not deny some adjustment in the role of a given nation state in the international division of labor, its advocates argue that all gains are essentially a zero sum game. Yet the dynamic capitalist development that has occurred in Asia and, for that matter, in Thailand throughout the last twenty years amounts to more than one area of the world system gaining at the expense of another.

In comparison to both the Marxist and World System approaches, the application of a Weberian perspective to the case study demonstrated the latter's relatively greater explanatory power. Weber's typology of legal systems provided a powerful analytical framework with which we could meaningfully organize the historical data. Kronman's discussion of the ways in which Weber saw law as affecting social change provided us with the main analytical tools with which to show how title had promoted the commercialization of agriculture. We think that the Weberian approach, envisioning law as a reinforcing variable, has utility in the context of case studies on comparative law and social change.

APPENDIX

INTRODUCTION

To the best of our knowledge, Siam's 1805 recension, the Law of the Three Seals, has never been translated into any language. We offer below our translations of the 1805 recension provisions cited in chapter two of this work. In preparing these translations we have used Robert Lingat's definitive edition of the Law of the Three Seals published by Thammasat University in the late 1930s. Titled *Pramuan kotmai rachakan thi 1 julasakarat 1166* (The Siamese Code of 1166 C.S.¹), this work, now out of publication, contains the original forty-one Thai-style books in three volumes. Lingat arranged the order in which the original forty-one volumes are presented

and renumbered the provisions to facilitate scholarly research. The arabic numerals in the translations are Lingat's; the original Thai numeration is indicated in brackets.

We have translated sixteen provisions from the miscellaneous book of the Law of the Three Seals and arranged them in numerical order following Lingat's numeration. A seventeenth and final provision, from the crimes against government book of the Law of the Three Seals, is added at the end. Under each of Lingat's arabic numerals is first a close translation of the original and then, in boldface type, a more fluent translation. We have attempted to keep comments, which are interspersed among the translations, and footnotes to a minimum.

The close translations are as accurate as possible. But it is often difficult to convey in English the ambiguity of the original Thai; to do so accurately is to risk incoherence in the English translation. Pronouns, number and articles contribute heavily to this ambiguity. In these provisions the antecedent of a pronoun is rarely self-evident and the same pronoun may be second or third person, singular or plural, depending upon the context. Classifiers are used to indicate (sometimes rather precisely) number in Thai. But without these classifiers, which are scarce in the provisions translated, the reader is left to infer from the context whether a noun is singular or plural. Furthermore, Thai has no equivalent of the English articles "a," "an" and "the," so inference from the context is that much more difficult.

We have tried to address the problem presented by the ambiguity of the original Thai by liberal use of parentheses. Inferences made in translation are in parentheses in the close translations. While most of these inferences are routine and present little danger of misinterpretation, many of them could be challenged. Thus we ask that the reader first read the close interpretation omitting words within parentheses and then read the entire close interpretation ignoring the parentheses. In this way the reader will get a feel for the style and ambiguity of this ancient law and see clearly the inferential leaps made in translation.

Our goal in offering the more fluent translation is to present to the reader as succinctly as possible the meaning of the translated provision to a contemporary lawyer. Thus in addition to involving further (and more questionable, if one is concerned with the literal accuracy of the translation) inferences, the fluent translations exclude information from the original which is not relevant from the point of view of current law. By first reading the close translation excluding the phrases in parentheses, then reading the close translation including the phrases in parentheses and finally consulting the fluent translation, lawyers and scholars will be able to form their own opinions about the legitimacy of inferences made in translation. This should give rise to many differences of opinion and, we hope, inspire further research into Siam's Law of the Three Seals and the society which generated it.

We owe a great debt to Khun Jitraporn Leelawat for her gracious help and guidance in the preparation of the translations that follow.

TRANSLATIONS

LAW OF THE 3 SEALS, MISCELLANEOUS BOOK

34

[Thai numeral 25]. One person is plowing paddy. One person challenges (him by) plowing (the same paddy). If (the interloper) plows (the entire) field, levy a fine of 330,000 cowrie shells. If (he) plows two furrows, levy a fine of 110,000. If (he) plows three furrows, levy a fine of 220,000.

A fine will be levied for plowing over again where another person is plowing.

35

[Thai numeral 26]. (If) anyone intrudes with water buffalo (and) plows the rice which you have just sown, levy a fine of 330,000.

A fine will be levied for plowing under another person's newly sown rice.

36

[Thai numeral 27]. (If) anyone intrudes with water buffalo (and) plows your rice when it is a stalk (or) leaf, *thammasat*² says levy a fine of 440,000. If the rice is young,³ levy a fine of 550,000; if the rice is ripe, levy a fine of 660,000. If (he) plows as much as 1, 2, 3 *rai*⁴ or more, levy a fine of 110,000 and have the wrongdoer prepare one pig, one duck, one jar of liquor, candles, incense and other ceremonial accessories to pay obeisance to the rice goddess in accordance with the tradition of the community.

The fine for plowing under another persons' rice varies according to how much land is so plowed and the point in the growing cycle of the rice when it is plowed under.

37

[Thai numeral 28]. (If) anyone dares to plant rice in your paddy saying it is his own paddy, levy a fine of 110,000.

A fine will be levied for seizing and planting rice in another person's paddy.

38

[Thai numeral 29]. (You have) plowed the paddy (but) not yet sown the rice. A person comes and plows (the same paddy) again. Whether (he) plows (the same) furrow deeper or plows on either side (of the furrow), levy a fine of 220,000 three times. Also fine (him) by reducing (his) rank once. If there was no boundary marker, levy a fine of 33,000 three times.

A fine will be levied for plowing over again where another person has plowed. The fine will include a demotion in rank. But the fine will be reduced if the land was not marked.

39

[Thai numeral 30]. (There is) paddy which you have formerly worked. (Someone) comes and challenges (you by) plowing (and) working your paddy. *Thammasat* says that person transgresses, levy a fine of 110,000.

A fine will be levied for seizing and working land formerly worked by another person.

40

[Thai numeral 31]. (If) anyone dares to rake over⁵ (the furrows) you plowed, fine (him) 3 times for a total of 220,000.

A fine will be levied for filling back in the furrows plowed by another person.

41

[Thai numeral 32]. (If) anyone dares to pile up a mound of dirt (for) building a hut (and) putting up paddy dikes and takes your paddy as his own paddy, *thammasat* says levy a fine of 110,000.

A fine will be levied for seizing and settling on the land of another person.

Comment

Sections 34-41 all deal with intentional invasions of another's land, but none of these provisions says "don't invade or seize your neighbor's land." In attempting to make these provisions meaningful for current lawyers we have resorted, in §§ 37, 39 and 41, to the word "seize" in the fluent translation. But these sections show clearly that what was important in rural Thai society at that time was the labor already expended or the crop, not the seizure of the land.

Note the extensive articulation in these provisions. There are many different provisions for actions which current law subsumes under the rubric trespass.

52⁶

The land in the area around Bangkok and Ayuthya is the land of the king. Although (the king) allows the populace, people who are tied to the land, to live (on the land), the populace cannot own (it). There are disagreements about this because the people are already living (on the land and) each has his own house, his own garden. Then another person comes to live (on the land). And (he) fences in, plants and builds on (the land). (The king) gives (this) right to him.

Also, if (that) person hasn't abandoned that land and he has fenced (it) in as evidence (of his claim to the land), but he leaves, whether for business or pleasure, and returns (intending) to enter and live (on the land), give (the land) back to him to live on because he did not abandon that land. If he abandons the land as long as 9 (or) 10 years, have the local government arrange to give (the land to) those people who cannot find any land to live on. Do not allow that land to be unoccupied.

Furthermore, if (that person) planted fruit trees on that land, have the person occupying (his land) give him the price of those trees.⁷ If he piled up dirt into mounds (for fill), pay him an appropriate price. As for the land, do not buy and sell it at all.

All land belongs to the king. Sale of land is prohibited. The people may occupy land and are encouraged to do so in populated areas. People may abandon their land temporarily if it is fenced in. If someone uses the land in their absence, that person must return the land and pay an appropriate price for the use of the land. However, if people leave the land for nine or ten years, they lose their right of usufruct.

54

[Thai numeral 42]. If land around the capital city of Ayuthya is an area (where) the people (live), do not allow them to buy (and) sell (land there). Do not leave (land) unoccupied; have the village headman, the district chief, the local official and the tax collector arrange for people to live there.

Also, (If) there is (formerly cultivated) land outside the city, even if it has long been abandoned, and a man comes and works that land as his farm (or) garden and plants fruit trees there, reduce taxes for him for one year. After that (the land will be subject to) royal taxes.⁸

Sale of land is prohibited. Local officials should find people to work vacant land. There will be a one year tax holiday for a person who takes up and works abandoned land.

61

[Thai numeral 49]. (If) there is a contract selling with the right of redemption farm land, paddy or a house, *thammasat* says redeem within ten years. If the owner does nothing for more than ten years (and then wants to) redeem (the land), *thammasat* does not allow (him to) redeem the farm land, paddy or house. (It) is the right of the purchaser.

The right to redeem of a vendor of land who retains the right of redemption expires after ten years. Such a vendor has no more rights in the land after ten years.

62

[Thai numeral 50]. (There is a) purchase of farm land, paddy or a house (and) there is a document as evidence. Someone comes (and) claims that farm land, paddy or house was originally his ancestor's. (You) consider (and decide) that it was not the owner of the land who sold (it to the purchaser). *Thammasat* says leave things as they originally were.⁹ As for the purchase money, take it from the seller.

A claim to land based on ancestry takes precedence over the claim of one who purchased the land from a vendor who did not own the land, even if the purchaser has a sales document.

Comment

This section deals with a problem that every legal system faces: sale of property by a vendor who has no rights in the property. Compare it with U.C.C. § 2-403 (1977), which addresses this problem by articulating "no rights in the property" into "voidable claim" and "void claim." In § 2-403 itself one must infer "void claim" to understand correctly. For modern Thai supreme court cases reaching the same result as this section see Dika 1076-1079\2510 (1967) and Dika 2031\2514 (1971).

Observe the ambiguity of § 62: it says not that the claim based on ancestry was valid, but that the vendor's claim was invalid; not that the purchaser gets his money back, but that the vendor may not keep the money. Even the command to "leave things as they originally were" is unclear. Our footnote resolving this last ambiguity in favor of the ancestral claimant is based on the use of the Thai word "original" (*doem*) in the description of the ancestral claim.

66

[Thai numeral 54]. Someone buys land for a house or garden that overlaps (with land claimed by his neighbor). (Both parties) knew and no one objected. There was no notification of officials. Afterwards there is controversy. If a man, wife, child, elephant, horse (or) buffalo dies, that is the karma of the deceased. *Thammasat* gives no punishment because there was no notification at first.

If both parties know of conflicting claims to land but do not notify the appropriate authorities, then a dispute arises and a person or animal dies, there is no legal recourse because there was no notification.

67

[Thai numeral 55]. Someone buys land for a house or garden. If (the claim to the land) overlaps (with someone else's claim and) one faction knows, (that faction) should have elders (or) officials go to announce the return of the land. The other side is arrogant, disdainful (and) refuses to return (the land) and puts in a wooden stake to mark the land. If a

person, elephant, horse or buffalo of theirs¹⁰ dies, have (the arrogant and disdainful faction) replace their loss¹¹ and levy a fine according to royal ordinance.

Also, (claims to) land for a house or garden overlap (and) one faction finds out the other faction won't listen (as above). If (you) investigate (and find that) (the claim to land of one faction) indeed overlaps (with the claim to land of the other faction) and (within) three days a person, elephant, horse or buffalo of theirs¹² dies, levy a fine (of) treble (damages). If (a person or animal) dies (within) five days, levy a fine (of) double (damages). If (a person or animal) dies (within) seven days, fine the cost of the damage. If (a person or animal) dies (within) three months, levy a fine (of) half (the damages). If (a person or animal) dies within one year, (levy a fine of) one third (the damages). When levying a fine use the cost of the dead (person or animal) to determine the fine. If (a person or animal) dies within three years, have (them) make amends with flowers.

If one party, learning of conflicting claims to land, notifies the appropriate authorities and sends elders to reclaim the land from the other party, but the second party refuses and then a person or animal belonging to the first party dies, the second party must replace the deceased person or animal and pay a fine. If after investigation it is determined that there are indeed conflicting claims and a person or animal belonging to the first party dies within three days of the notification, the second party will be fined treble damages. The second party's fine grows smaller as the length of time between the notification and the death increases.

69

[Thai numeral 57]. Someone buys land to farm and build a house. (The claimed land) overlaps (with a neighbor's claim), but there is not yet any danger (of death of a person, elephant, horse or buffalo). Have officials (or) elders go to prohibit them. If (they) do not listen, fine (them) for the transgression.

Furthermore, if they do not know of the overlapping (claims to land), (you) can't find elders and (someone) dies, have the person (whose claim) overlaps simply help to burn the ghost¹³ because (you) can find no fault. It was his karma.

Where there are conflicting claims to land but not yet an open dispute, officials or elders should prohibit an open dispute. Those who disregard the prohibition will be fined. Where the parties do not yet know of their conflicting claims to land and a person or animal dies, there is no liability.

70

[Thai numeral 58]. Someone buys land to farm and (his claim) overlaps (his neighbor's claim). The owners see (that their claims to the land) indeed overlap and have elders (or) officials go announce the return (of) that land, then (the owners) mark the boundary. If a slave, a person, an elephant,

a horse, a cow (or) a buffalo dies (some) other day, do not punish (them) at all.

If conflicting claims to land are peaceably resolved and later a person or animal dies, there is no liability.

Comment

Sections 66, 67, 69 and 70 all deal with situations where one party has bought land and it is later discovered that a portion of the land he claims is also claimed by a neighbor. The probability of feuding in such a situation is implicit, but never explicitly stated. Counterbalancing this potential for feuding is a very Thai-like preference for surface orderliness and deference to authority. Officials must be consulted. Arrogance and refusal to submit to authority apparently are independent factors which may weigh heavily in the decision on the merits (§ 67, first paragraph). This is anathema to Western systems of law, but anyone familiar with modern Thai society (and, one is tempted to add, human nature) has witnessed it. Perhaps Thai law, left to its own devices, would have developed along lines which placed more emphasis on outward peace and tranquility in the community and submission to authority than on the "correct" solution to a given legal problem.

The diminution of damages as time passes under § 67 seems to represent a policy similar to our statute of limitations, but it is probably more closely related to our notion of proximate cause. The reasoning behind § 70, which is aimed at avoiding over-inclusiveness, seems to be modern legal reasoning. Previous knowledge or *scienter* is obviously an important element in § 66, 69 and 70, but its significance in § 67 is lost to the modern lawyer.

LAW OF THE THREE SEALS, CRIMES AGAINST GOVERNMENT BOOK

47

[Thai numeral 47]. Someone clears land to farm. *Thammasat* says to go inform the local officials, have (them) go to look at the cleared land so (they will) know how much (land was cleared). Have the officials write a document and leave it with the person who cleared (the land) so they will know that person lives at that house and (the land) was newly cleared in that canton in that year. If any person surreptitiously clears (land) following only his own wishes (and) does not inform the officials, whether he is caught (in the act) or someone comes to complain, *thammasat* says punish (him) six ways. If the king forbids you to kill (him), hang the tax which (he) avoided (around his neck) for three days to disgrace (him), then fine him quadruple (the amount of the tax).

A person who clears land to farm must notify the appropriate authorities. Anyone who clears land to farm without such notification commits a crime subject to severe, perhaps capital, punishment.

NOTES

CHAPTER I

1. Merryman, "Comparative Law & Social Change", 25 *Am. J. Comp. L.* 457, 483 (1977).
2. Burg, "Law and Development: A Review of the Literature & a Critique of 'Scholars in Self-Estrangement' ", 25 *Am. J. Comp. Law*, 492, 528-30 (1977).
3. Our observation is based on an overall impression of case studies gained through the Merryman and Burg articles as well as the D.S. Lev article in the readings. See Lev, "Judicial Institutions and Legal Culture in Indonesia" in *Culture and Politics in Indonesia* 246 (F. Holt ed. 1972).
4. See *infra*, pp. 40-41, for a full description of the *khafjak* system. Although we emphasize the *Khafjak* system in our discussion of traditional credit in rural Thailand, other mechanisms no doubt also existed.
5. Trubek, "Reconstructing Max Weber's Sociology of Law" 37 *Stanford Law Review* 919, 935 (1985); A. Kronman, *Max Weber* 185 (Stanford Univ. Press 1983).
6. Trubek, *supra* note 5, at 919.
7. *Id.* at 925.
8. *Id.* at 925.
9. *Id.* at 925.
10. Many analysts have criticized modern sociologists who have followed Weber's lead in using ideal types as a framework for analyzing development in Third World countries. See Portes, "Modernity and Development: A Critique" in *Studies in Comparative International Development* 3 (1973). It is interesting that most of the new sociological literature on development has been based on structural or Marxian analysis of underdevelopment.
11. See A. Kronman, *supra* note 5, at 76-79. I draw heavily here on Kronman's description of Weber's typology.
12. See Trubek, *supra* note 5, at 927-933. Trubek claims that a central contradiction exist in the discussion of "the logical interpretation of meaning" between Weber as a positivist and as a "precursor of what we today call 'critical legal studies' ." While an interesting view, perhaps the delphic qualities of Weber's writings have led Trubek to impose his own ideas, sympathetic to a Critical Legal Studies perspective, onto Weber.
13. Trubek, "Max Weber and the Rise of Capitalism," 3 *Wis. L. Rev.* 720, 724 (1972).
14. A. Kronman, *supra* note 5, at 87-92 and 120-124; Trubek, *supra* note 13, at 746.
15. Ewing, "Formal Justice and the Spirit of Capitalism: Max Weber's Sociology of Law," 21 *Law and Society Rev.* 489 (1987).
16. *Id.* at 489 (emphasis added).
17. See A. Kronman, *supra* note 5, at 126. Kronman argues that there are two grounds on which Weber's agnosticism can be defended. The first is that Weber is essentially pointing out the inadequacy of any theory that attempts to account for the interaction between law and capitalism. A second ground is that Weber essentially is arguing a historicist position in which the causal interaction between law and capitalism varies with the historical context. See *id.* at 129-130.
18. *Id.* at 125.
19. Quoted in *id.* at 125.
20. Trubek, *supra* note 13, at 736-37. Note that the second portion of this quote is entirely consistent with a Marxian analysis of social change.
21. The Marxist dialectic, simply put, fundamentally rests on the notion that social development is compelled by contradictions, e.g. between capital and labor, within the given mode of production and that, over time, quantitative changes eventually become qualitative.
22. K. Marx, "The Communist Manifesto" (New York 1964).
23. Meyer et. al., "Convergence and Divergence in Development," 1 *Annual Rev. of Soc.* 222, 224-25 (1975).
24. Marx used the term "progressive" in the sense of moving the dialectic to a new level, and ultimately closer to the achievement of a Communist society.
25. Many analysts might object to labeling these authors as Neo-Marxist. Some would argue, for example, J. Womack, that neither Frank's nor Wallerstein's works fall within the Marxist tradition. Indeed, one can argue that Frank and Wallerstein owe their intellectual debt to structuralist economists such as R. Prebisch and C. Furtado. While some important differences exists between these authors and Marxists, they do seem to us to share fundamental similarities in their treatment and focus on the disarticulation of class structures in the developing world, and the process of capitalist expropriation of surplus value by the developed countries. For a renowned critique of Frank from a Marxist perspective, see Laclau, "Feudalism and Capitalism in Latin America" 67 *New Left Rev.* 19 (1977). Laclau argues that Frank's emphasis on exchange is fundamentally non-Marxist.
26. A.G. Frank, *Capitalism and Underdevelopment in Latin America* 9 (New York 1969).
27. I. Wallerstein, *The Modern World-System II* 9 (Academic Press 1980).
28. I. Wallerstein, *The Modern World-System I* 350 (Academic Press 1974).
29. See P. von Mehren, "A Historical Structural View of the Emergence of Reform Movements in Bolivia and Peru" unpublished manuscript, Reed College Library. (Author's own flawed attempt to write a detailed case study from the perspective of World System analysis.)

CHAPTER 2

1. Chinese records from the sixth century B.C. contain the first mention of the Thais. From that time on frequent references to the Thais as the "barbarians" south of the Yangtse are found. Hall, D.G.E. (1977) *A History of South-East Asia* 169.
2. Ishii, Yoneo (1986) "The Thai Thammasat" in Hooker, M.B., ed., (1986-88) *The Laws of South-East Asia* vol. 1 pg. 143.
3. Engel, David M. (1975) *Law and Kingship in Thailand during the Reign of King Chulalongkorn* 1.

4. There is no satisfactory system for transliteration of Thai to English. In transliterating we have attempted to approximate, using the roman alphabet, the sound (as opposed to the spelling) of the Thai word. We have indicated aspiration of dentals, velars, palatals and bilabials by use of the English letter "h." We have abandoned this admittedly loose system where tradition or a cited author's transliteration of his own name dictates: Chulalongkorn would be "Julalongkawn" in our system; Viraphol Sarasin would be "Wiraphon Sarasin."
5. See Ishii, Yoneo (1986) "The Thai Thammasat" in Hooker, M.B., ed., (1986-88) *The Laws of South-East Asia* vol. 1 pp. 143-203 for more information about the *thammasat*.
6. Thanin Kraivichien (1965) "The Legal System," *Thailand 1964* (official government publication) 2. Quoted in Darling, Frank C. (1970) "The Evolution of Law in Thailand," *Review of Politics*, 32 (2): 199. Thanin served as prime minister of Thailand 1976-7 and is a justice of the Dika (supreme court). Thai authors are cited by their given names in this paper; all others are cited by their surnames.
7. Engel, David M. (1975) *Law and Kingship in Thailand during the Reign of King Chulalongkorn* 6.
8. Darling, Frank C. (1970) "The Evolution of Law in Thailand," *Review of Politics*, 32 (2): 199.
9. *Id.* at 217.
10. We define a western system of title in land as a system of title in land which includes recordation or registration at a government office and separates possession and control of the land from ownership rights in the land. An accurate survey is a necessary concomitant of this type of title system. We have been unable to determine what systems of title in land Chulalongkorn studied before enacting Thailand's westernized system.
11. Darling, Frank C. (1970) "The Evolution of Law in Thailand," *Review of Politics*, 32 (2): 197.
12. Viraphol Sarasin (1977) "Law in Traditional Siam and China: a Comparative Study," *Journal of the Siam Society*, 65 (1): 83.
13. Lingat, Robert (1935-40) *Prawatsat kotmai thai* (History of Thai Laws) vol. 2 pp. 299-305.
14. *Id.* 309-10.
15. *Id.* 299-305.
16. Engel, David M. (1975) *Law and Kingship in Thailand during the Reign of King Chulalongkorn* 2, citing Coedes, G. (1969) *The Making of South East Asia* 145, translated from the French by H.M. Wright. [But see also *The Ram Khamhaeng Controversy*, J.R. Chamberlain, ed., Bangkok: The Siam Society, 1991, for modern comments challenging the traditional opinion regarding this stone inscription.—Ed.]
17. Griswold, A.B. and Prasert na Nagara (1971) "The Inscription of King Rama Gamhen of Sukhodaya (1292 A.D.)," *Journal of the Siam Society*, 59 (2): 208. [But see addendum to note 16.—Ed.]
18. We exclude from this paper any discussion of *sakdina*, the ancient Thai social system which some authorities contend was based on land, not only for purposes of brevity but also because of the current state of scholarship on *sakdina*. There are such disparate interpretations and so much work still to be done on *sakdina* that we feel incapable of drawing any conclusions at this point. See Lysa, Hong (1984) *Thailand in the Nineteenth Century* for a good account of the current state of scholarship on *sakdina*.
19. This name comes from the three official seals on the original copies. The standard version of this recension, the version we have used, is Lingat, Robert, ed., (1938) *Prawuan kotmai rachakan thi 1 julasakat 1166* (The Siamese Code of 1166 C.S.) 3 volumes. C.S. is an old Burmese dynastic dating system.
20. Hooker, M.B. (1978) "The Indian-Derived Law Texts of Southeast Asia," *The Journal of Asian Studies*, 37 (2): 206.
21. *But cf.* Lingat, Robert (1929) "Note sur la Revision des Lois Siamois en 1805," *Journal of the Siam Society*, 23 (1): 22 (Law of the Three Seals, strictly speaking, can only be considered to be the law in force at the time of the recension [1805]).
22. Lingat, Robert, ed., (1938) *Prawuan kotmai rachakan thi 1 julasakat 1166* (The Siamese Code of 1166 C.S.) vol. 2 pp. 215-6.
23. *Id.* at 217.
24. *Id.* 219-20.
25. That is, ten years after the sale with right of redemption, farmers who sold their land with a right of redemption (*khaifak*) would have to leave the land and the money-lender could then sell or rent the cleared and arable land to another farmer. See section B (Modern Law), subsection 1 (19th Century) of this chapter for a fuller discussion of this Chinese financing instrument (*khaifak* in Thai) as it was applied in the Thai context.
26. Lingat, Robert, ed., (1938) *Prawuan kotmai rachakan thi 1 julasakat 1166* (The Siamese Code of 1166 C.S.) vol. 2 pg. 220.
27. See, e.g., §§ 66, 67, 69 and 70. *Id.* 221-3. These sections all open with the phrase "someone who buys land." They deal with situations where two parties each claim the same land.
28. *Id.* 210-211.
29. *Id.* 401-2.
30. Lingat, Robert (1935-40) *Prawatsat kotmai thai* (History of Thai Law) vol. 2, 328.
31. *Id.* 317-24.
32. *Id.*
33. Indeed, in 1861 King Mongkut admitted in a backhanded manner that he did not actually own all the land. On April 7th of that year King Mongkut issued a royal decree declaring that if the king wanted to expropriate the land of any commoner the king would have to pay the fair market price. For an English translation of this royal decree see Chatthip Nartsupha and Suthy Prasartset (1978) *The Political Economy of Siam, 1851-1910* vol. 1 pp. 291-6.
34. This treaty is known to Thais as "the unequal treaty with England" (*santhisanya may samoepak kap angrit*). Lingat, Robert (1935-40) *Prawatsat kotmai thai* (History of Thai Law) vol. 1, 3rd page of introduction (no pagination in introduction).
35. Wyatt, David K. (1984) *Thailand: a Short History* 183.
36. Child, Jacob T. (1892) *The Pearl of Asia* 144.
37. *Prakat ngoen kha na tra daeng prot hai tang khang* (Proclamation allowing delayed payment of certain paddy taxes, 1864). Sathian Laiyalak et al., comp., (1935-53) *Prachum kotmai prajam sok* (Collected Laws Arranged Chronologically, hereafter cited as PKPS) vol. 7 pg. 124. The Thai legal system has no official citation system. We have cited Sathian Laiyalak's work wherever possible, but it covers a limited period and Harvard's collection does not include the entire 69-

volume set. Where we have been unable to cite *Prachum kotmai prajam sok* we have depended upon the Thai custom of dating the law or naming it after a previous law which it amends (e.g. *Phraratchabanyat awk chanot thi din chabap thi 2* [Royal decree on the issuance of title deed to land #2] in this chapter's epilog).

38. Tomosugi, Takashi (1969) "The Land System in Central Thailand," *Developing Economies*, 7 (3): 291.

39. Feinerman, James "The Dien Transaction in China and Vietnam" 29-35 (unpublished manuscript).

40. *Id.* 26-7.

41. *Id.* at 8.

42. *Id.* 23-4.

43. Engel, David M. (1975) *Law and Kingship in Thailand during the Reign of King Chulalongkorn* 59. A Harvard Law School professor (and son-in-law of President Woodrow Wilson), Francis B. Sayre, negotiated the treaties which gained Thailand judicial autonomy in 1927. See Darling, Frank C. (1970) "The Evolution of Law in Thailand," *Review of Politics*, 32 (2): 205.

44. Engel, David M. (1975) *Law and Kingship in Thailand during the Reign of King Chulalongkorn* 59.

45. *Id.* at 16.

46. 7 PKPS 226.

47. 15 PKPS 267.

48. 17 PKPS 199.

49. We leave for another paper the question of the extent of the influence of modern western contract law on Thai law at the end of the 19th century. While it is clear that later 19th century western legal notions of contract as king influenced Chulalongkorn's decision to instruct officials to decide the cases mentioned with reference to the law of contract (rather than follow the old proclamation), it is not necessary here to delineate the form of contract law applied to these cases.

50. Of course an economist would say that the money lenders certainly were "using" the land. Our rather simple point here is that the "substantively rational" legal system evolved to a point of near perfection within the traditional Thai economy and did develop a partial solution to the "use it or lose it" problem by recognizing limited owner-

ship rights in those not actually in possession of the land.

51. *Prakat awk chanot thi din* (Proclamation on the issuance of land title deeds) 18 PKPS 84. See Sharp, Lauriston and Hanks, Lucien M. (1978) *Bang Chan: Social History of a Rural Community in Thailand* 129 for an anecdote showing the effect of the new law on villagers near Bangkok.

52. Engel, David M. (1975) *Law and Kingship in Thailand during the Reign of King Chulalongkorn* 16. Chulalongkorn was not alone among Thai leaders in his belief that law could lead development. Prime Minister Field Marshal Phibun Songkhram, apparently in hopes of modernizing Thailand, passed a law during the 1940s forcing women to wear hats while on the street and forbidding anyone not wearing coat, hat and shoes from entering a building. MacDonald, Alexander (1950) *Bangkok Editor* 84. See also Sharp, Lauriston and Hanks, Lucien M. (1978) *Bang Chan: Social History of a Rural Community in Thailand* 156 (anecdote about the effect of this law on villagers' lives).

53. About 2 1/2 *rai* equal one acre.

54. *Kham sang khana patiwat* 49 (Revolutionary Council Proclamation No. 49), January 13, 1959.

55. Feder, G. et al. (1988) *Land Policies and Farm Productivity in Thailand* 18.

56. Most of the discussion of the acquisition of land under the Land Code of 1954 is taken from Yano, Toru (1968) "Land Tenure in Thailand," *Asian Survey*, 8 (10): 853-863.

57. Verachai Tantikul (1973) "Land Tenure in Thailand," School of Law, University of California, Berkeley 12. Cited in Kemp, Jeremy H. (1981) "Legal and Informal Land Tenures in Thailand," *Modern Asian Studies*, 15 (1): 7.

58. See O'Connor, Richard A. "Law as Indigenous Social Theory: a Siamese Thai Case," *American Ethnologist*, 8 (2): 223-37. O'Connor makes an intriguing argument that traditional Thai law served as a culturally constituted mode of analysis that projected an indigenous theory of society.

CHAPTER III

1. Throughout this chapter, when we speak of title or secure ownership rights we are referring to land held with a "Full title" document or a "Certificate of Use." We explain our reasons below for categorizing these right as secure. See pp. 44-45.

2. See *supra*, pp. 44-45.

3. See *supra*, at p. 40.

4. 1932-33 Thailand Year Book, 429 (table unnumbered). Unfortunately the early Yearbooks do not present any data on how many *rai* of land was covered by the titles issued.

5. *Id.* Except for Phuket, which served as a port for trade with India at the time, all of these areas are in close proximity to Bangkok, the major port for rice shipments.

6. The Thailand Yearbook 1954-55 at 185. This is the first yearbook which contains data on the number of titles issued outside the Central Region (near Bangkok) and the Phuket areas.

7. G. Feder, T. Onchan, Y. Chalamwong and C. Hongladarom, *Land Policies and Farm Productivity in Thailand* 14-15 (The Johns Hopkins University Press 1988). (Hereinafter referred to as G. Feder.)

8. The following description of "ownership" rights in Thailand is based on the works of Kemp, "Legal and Informal Land Tenures in Thailand," 15 *Modern Asian Studies* 1 (1981); Yano, "Land Tenure in Thailand," 8 *Asia Survey* 853 (1968); Lin and Espisito, "Agrarian Reform in Thailand: Problems and Prospects," 49 *Pacific Affairs* 425 (1976); and G. Feder, *id.*

9. G. Feder, *supra* note 7, at 11.

10. G. Feder, *id.* at 15.

11. *Id.* at 14. Land held under a "Full Title" or a "Certificate of Use" that is left fallow for more than either 10 years or 5 years respectively is subject to an ownership challenge by another farmer wishing to utilize the land. This form of challenge is reminiscent of the traditional Thai concept of "use it or lose it" and differs from Western, common law concepts of land ownership, which stress—through the doctrine of "adverse possession"—an attitude of "protect it or lose it." Thus, at least to this extent, an important continuity exists in tradi-

tional and modern Thai concepts of land ownership. *See supra*, at p. 43.

12. *Id.* at 16. Kemp, *supra* note 8, at 9. Lin and Espisito, *supra* note 8, at 426, agree with Kemp.

13. Kemp, *supra* note 8, at 8.

14. G. Feder, *supra* note 7, at 17-18.

15. *Id.* at 17.

16. *Id.* at 16.

17. *Id.* at 16.

18. The 131.2 million *rai* is not completely out of proportion with Kemp's figure of 84.8 million *rai*. If we add to Kemp's figures the 33 million *rai* for land occupied by squatters and permit some expansion of privately owned land placed under cultivation (13 million *rai*) since Kemp's study, we arrive at roughly the same figure for total arable land in Thailand under the adjusted figures in the Feder study.

19. G. Feder, *supra* note 7, at 16. Although no date is given for the data used in the study, the figures must be from sometime in the mid 1980's.

20. *See supra*, at pp. 44-45, for a discussion on the acceptability of "Certificates of Use" as collateral to commercial and institutional lenders.

21. Thailand Yearbook (1954-55) at 185. This average was typical for the preceding years. In 1954, the average plot was 15.1 *rai* and, in, 1953 15.3 *rai*. (All figures rounded to nearest tenth).

22. Calculations based on data from the Thailand Yearbook 1985-86 at 202.

23. *See supra*, p. 44.

24. The exception that the Northern Region presents is somewhat puzzling. The area's productivity success may be due to natural factors such as good rains and rich soils.

25. *See supra*, pp. 44-46, for a discussion of whether a "Certificate of Use" is valid security for commercial loans in Thailand.

26. G. Feder, *supra* note 7, at 44.

27. At some specific level of investment, the marginal utility of the added input will be less than its cost. At this point, the farmer, assuming he acts rationally, will not purchase the input.

28. Data presented in G. Feder, *supra* note 7, at 56, indicate that the mean interest rate for traditional credit mechanisms for untitled farmers varies in the four Districts where the field work was done from 42.5% to 56.8% per annum. For farmers with secure title, interest rates varied for traditional credit mechanisms from 38.5% to 54.0% per annum. Conversely, the mean interest rate for all loans from commercial or institutional sources was 13.8% to 17.1%. For a borrower such differences between interest rates are highly significant.

29. In the Feder study, commercial banks rarely made any loans to untitled farmers. BAAC and some cooperatives make loans to untitled farmers but the average amount of these loan is considerably less than for titled farmers and are for shorter periods of time. The average amount of loan per *rai* owned varies by district from 324 *baht* to 114 *baht* for untitled farmers. Titled farmers receive considerable more per *rai* of land. The average varies from 319 *baht* per *rai* to 776 *baht* (26 *baht* is equal to one dollar). *Id.* at 54-56.

30. In G. Feder, *id.* at 57, the authors state that "...while untitled borrowers without loan security obtained an average of only 262 *baht* per *rai* from institutional sources, titled borrowers without loan security obtained almost twice that amount, 515 *baht* per *rai*. These findings suggest that even when land is not formally offered as collateral, titled land is more valuable as implicit collateral, allowing farmers to obtain more institutional credit than untitled farmers can obtain."

31. G. Feder cites evidence that the legal system in Thailand does have an orderly process for foreclosure by lending institutions on mortgaged property. *Id.* at 49.

32. All of the commentators agree that, despite legal prohibitions on alienation of

land held under many of the various types of "ownership" rights, all types of land are sold in Thailand. But land prices reflect the type of "ownership" right under which the plot of land is held. The Feder study shows that the mean land price per *rai* varies depending on whether the seller holds a "Certificate of Use" or some other less secure document. For example, in Nakhon Ratchasima the mean price per *rai* for low-land plots varied from 4,210 *bahts* for plots without a "Certificate of Use" to 11,085 *baht* for plots with a "Certificate of Use." While in other Provinces the differences are not as great, it seems clear that the market is placing a higher value on land held under a "Certificate of Use" principally because of its value as collateral. *Id.* at 35. The formal illegality of sales of land held under insecure "ownership" rights prevents banks from allowing farmers to use this type of land as collateral.

33. *See supra*, note 29.

34. G. Feder, *supra* note 7, at 47-48.

35. Traditional credit mechanisms offer farmers some important advantages over institutional loans despite their high interest rates. The most important is that these loans have a generally low transaction cost associated with them. Traditional money lenders are usually from the same community as the borrower and, as a result, have a good idea of the credit worthiness of the borrower. Consequently, loans are processed more quickly and the farmer does not have to travel to a outside the community. Furthermore, these costs are roughly the same for large and small loans. If we factor these transaction costs into institutional loans, traditional loans for small amounts may actually be less expensive for a farmers. *Id.* at 45.

36. *Id.* at 48.

37. *See supra*, at p. 34.

38. *See supra*, p. 34.

39. *See supra*, at pp. 44-46.

40. *See supra*, at p. 47.

APPENDIX

1. C.S. is an old Burmese dynastic dating system. The recension was completed in the year 1166 of the C.S. system.

2. Throughout these translations we frequently translate the pronoun *than* as *thammasat*. *Than* is an honorific pronoun used in these instances to refer to the *thammasat*. We have omitted the article to convey more forcefully the Thai conception that the *thammasat* is not just a book or an anthropomorphic angel, but omnipresent natural law. For more information on the *thammasat* see Ishii, Yoneo (1986), "The Thai

Thammasat," in Hooker, M.B., ed., (1986-88) *The Laws of South-East Asia* vol. 1 pp. 157-8.

3. *I.e.* not yet transplanted.

4. *Rai* is a measure of land area. About two and a half *rai* equal one acre.

5. *I.e.* fill back in.

6. We omit from the translation of this provision an introductory passage containing mythological references and a quote in Pali from the theravadan scriptures.

7. *I.e.* the value of the fruit of those trees.

8. This section is cited in many modern supreme court prescription decisions. *E.g.* Dika 1000\2493 (1950), 181\2508 (1965), 756\2509 (1966), 812\2509 (1966).

9. The land goes to the person with ancestral rights.

10. *I.e.* the faction which announced the return of the land.

11. *I.e.* the dead person or animal.

12. *I.e.* the reasonable faction.

13. *I.e.* attend the cremation.

