

Abstract

Donation which shall take the effect when the donor is dead (Donation Mortis Causa) is the donation where the transfer of ownership of the property to be donated is made only when the donor is dead. Donation in this form had been developed since the Roman period and because of the transplant ability of the Roman law principle, the entire common law and civil law systems both accepted the principle on this matter for the interpretation and adapted for use since it will take the effect only when the donor is dead. It has the complicated law characteristics between the donation during the donor is still alive and the bequeath of property by wills which shall have the effect against the two legal ideas. The first idea should be limited to allow the parties to act in this form as the provision on the bequeath of property by will is wide open for practice. The second idea, the opportunity should be open for the donor to practice in this form, subject to the real intents of both parties but they must act in compliance with the appropriate form in order to protect the interested persons and to maintain peace and order of the society.

In Thailand, donation would take the effect only when the donor is dead as provided in the Civil and Commercial Code, Section 536, Stating that “Donation to be taken into effect only when the donor is dead shall be enforced by the statutory law on the inheritance and will”. This can be seen that such provision of law statements are short and compacted written, so the law interpretation is required to enable it to be adapted for use properly and suitably to the situation. According to the textbook study of qualified persons, most of them are found to explain about the said mater, deeming as the donation of property by will, so the principle of law on the inheritance and will shall be enforced and for this reason, as long as the donor has not died, the donor could solely revoke the donation at all time. This can be seen that if the interpretation was made in the said manner the provision of law, Section 536, would have no place to be enforced and worthless in term of jurisprudence.

According to the study, the author found that the donation shall take the effect only when the donor is dead. The group drafters had drafted the law since they had seen the problem from the judgement of the Supreme Court No. 297/120 by comparing with the Japanese Civil Code, Section 554, to provide the opportunity to the donor to be able to donate property during the donor is still alive but to take the effect only when the donor is dead. Such donation with the delay of ownership transfer shall be benefited in term of flexibility and can induce the donee to act or refrain from acting something improperly. From the study, it was found that us judgement of the Supreme court was delivered by directly laying down this kind of principle and the academic circle was not found to raise the problem of this Section for the consideration. So that it is the duty of the later generation of lawyers to study and understand the background, character of law as well as the effect of the donation in this form and can be opted for use properly.

For this, in order that the provisions in Section 536 can be applied, the author proposed that there should be interpreting of the provisions into two cases; first if the donor agrees to give and the receiver agrees to receive during the life of the donor; but the result should be effective when the donor dies. It can be seen that it is almost in the event that the donor gives the properties by inheritance and testament; so the provisions on inheritance and wills should be enforced with the gift contract in this form *mutatis mutandis*; in the status of legal provision that is close to the event. Creating obligation by preparing wills shall create obligation in personal right. The donor cannot withdraw the gift arbitrarily; and the receiver has no offence and the receiver has no concern in case the donor shows intention to reserve the right to withdraw the gift. In the second case, if the donor performs every thing; so that the gift is finished during life time and the ownership of properties that are given is delayed until the donor is dead; it can be seen that it is almost in the event that the donor gives the properties during the donor is alive; in the status of legal provision that is close to the event, for adapting *mutatis mutandis*. In this case the donor cannot withdraw the gift arbitrarily; except that the receiver has ingratitude or there is clear agreement other wise.

However, when scholars and legal professional have understanding on the gift which will take effect at the death of the donor, thoroughly; modifying of legal provisions is the secondary important thing; so that both parties who are general ordinary people can access to the channel for management of their own properties, in this form; it is suitable to modify the provisions of the Law, Section 536, comparing with German Civil Law, Section 2301, as follows:

“The gift to take effect at the death of the donor is governed by the provisions of law concerning inheritance and wills, *mutatis mutandis*.”

“If the donor performs everything so that the gift is finished, the provisions on the donor giving the gift while the donor is alive, will be adapted *mutatis mutandis*.”