



Implementation of Convention on Rights of Persons with Disabilities (2006): A Case Study on Legal Capacity of Persons with Disabilities

Sattra Keawphang* and Thanakon Komonwanit

Faculty of Law, Thaksin University, Songkhla, Thailand

*Corresponding author, E-mail: drsattrakeawphang2018@hotmail.com

Abstract

The objective of the research is to suggest and develop the law on the legal capacity of persons with disabilities in the Thai Civil and Commercial Code (“the Thai CCC”) to protect the rights of persons with disabilities for consistency with the Convention on Rights of Persons with Disabilities (2006) (CRPD). The study included a study of documents and interviews (key informants). The authors found that some articles in “the Thai CCC” unnecessarily limit the legal capacity of persons with disabilities, which causes the inequality between the rights of other persons and persons with disabilities, and inconsistent with the CRPD and Constitution of the Kingdom of Thailand (2017), which recognizes that persons with disabilities shall enjoy legal capacity on an equal basis with others in all aspects of life. The authors suggest that amendments of “the Thai CCC” shall include the changes related to grant legal capacity for persons with disabilities instead of restricting legal capacity, which may enhance equal rights between other persons and persons with disabilities and makes the law on the legal capacity of persons with disabilities in Thai consistent with CRPD and the Constitution of the Kingdom of Thailand (2017).

Keywords: *Legal capacity, Rights of persons with disabilities, persons with disabilities*

1. Introduction

The adoption of the United Nations Convention on the Right of Persons with Disabilities (2006) by the United Nations General Assembly on December 13, 2006, marked global recognition of the rights of persons with disabilities (Srisuppaphon, Sriboonroj, Riewpaiboon, & Tangcharoensathien, 2017), which is international law. The purpose of the Convention is to protect the rights of persons with disabilities and enhance equal rights between other persons and persons with disabilities and shall not permit unjust discrimination. Thailand has ratified the CRPD on July 29th, 2008, and has binding effects on Thailand on August 28th, 2008 (Suksumek, 2009). Thailand shall comply with the obligations of rights of persons with disabilities subject to the Convention. Even though, Thailand has improved and amended laws, measures, or procedures of public organizations and private organizations, which limit the legal capacity of persons with disabilities to be consistent with the CRPD.

Although, there are some laws, which content and procedure is inconsistency with CRPD, particularly, “the Thai CCC” Section 28-36 provided that a person with disabilities may be adjudged as an incompetent person or quasi-incompetent person by the court to limit legal capacity, which person with disabilities cannot make juristic act and contract by himself or herself.

Court order regulation as an incompetent person is as follows:

“the Thai CCC” “Section 28

A person of unsound mind may be adjudged incompetent by the Court on the application of any spouse, ascendants, descendants, guardian or curator, a person taking care of the person, or the Public Prosecutor.

The person adjudged incompetent under paragraph one must be placed under guardianship. The appointment of guardian, power, and duties of guardian and termination of guardianship shall be in accordance with provisions of Book V of this Code.

The order of the Court under this Section shall be published in the Government Gazette.”

“Section 29

An act done by a person adjudged incompetent is voidable.”



Explanation of court order regulation as an incompetent person as follows: (Kovilaikool, 2008)

1) Person of unsound mind means any person has been found usually as a lunatic or a mental defective and is incapable of managing his own affairs

2) A person of unsound mind may be adjudged as an incompetent person by the court on the application of family members or public prosecutor.

Even though, academics refer to a person of unsound mind means any person has been found usually as a lunatic or a mental defective, in practice, (particular court of the first instance), a person of unsound mind may be extended interpretation including a person with disabilities without psychotic symptoms, which causes a person with disabilities, who has physical infirmity and is capable of managing his own affairs as equal as others, maybe adjudged as an incompetent person by the court.

Civil Court Decision No. 120/2557 "...the court ordered that Miss A and Mr. B, who were deaf-mute from birth and were incapable of managing her and his own affairs, shall be incompetent persons and ordered Miss C as a guardian who takes care of those persons."

Civil Court Decision No. 34/2557 "...the court ordered that Mrs. A, who has paresis and was incapable of managing her own affairs, shall be incompetent and ordered Mr. B, Mr. C, and Mr. D as guardians who take care of that person."

A person of unsound mind may be adjudged as an incompetent person by the court, however, "the Thai CCC" has no clear definition of a person of unsound mind and in practice, a person of unsound mind may be extended interpretation including a person with disabilities with psychotic symptoms and physical infirmity, for example, person, who was deaf-mute and paresis patient, which causes a person with disabilities, who was disabilities without psychotic symptoms, maybe adjudged as an incompetent person by the court.

Court order regulation as a quasi-incompetent person as follows:

"Section 32

A person, who has a physical or mental infirmity, or habitual prodigality or habitual intoxication or other similar causes that make him incapable of managing his own affairs, or whose management is likely to cause detriment to his own property or family, maybe adjudged as quasi-incompetent by the Court upon an application by any of the persons specified in Section 28.

The person adjudged quasi-incompetent under paragraph one must be placed under curatorship.

The appointment of curator shall be in accordance with the provisions of Book V of the Code.

The order of the Court under this Section shall be published in the Government Gazette."

Explanation of court order regulation as a quasi-incompetent person as follows: (Kovilaikool, 2008)

1) A person, who is incapable of managing his own affairs or whose management, is likely to cause detriment to his own property or family.

2) The reasons why a person is incapable of managing his own affairs or whose management is likely to cause detriment to his own property or family are as follows:

2.1) Physical infirmity, for example, a person who has paralysis, blind or mute.

Supreme Court Decision No. 912/2520 "...the court ordered that Mr.A, who had paralysis and was incapable of managing her own affairs, shall be quasi-incompetent because physical infirmity and ordered curator to take care of that person."

Civil Court Decision No.157/2556 "...the court ordered that Miss A who had a physical infirmity in childhood, had slurred speech, could not walk, was capable of writing and communication, but, cannot make some juristic acts, shall be quasi-incompetent and ordered Mr.B as a curator who takes care of that person."

2.2) Mental infirmity means a person, who has a mental disorder and was not an unsound mind, for example, a person with forgetfulness.

2.3) Habitual prodigality refers to pay money unnecessarily without knowing the value of money, for example, abused payment.



2.4) Habitual intoxication means a person with drug addiction, for example, liqueur, marijuana, and heroin.

2.5) Similar causes refer to other similar causes that make him or her is incapable of managing his or her own affairs or a person whose management is likely to cause detriment to his or her own property or family

According to section 32 of “the Thai CCC,” the authors found that the court may order as quasi-incompetent whether or not as follows; 1) is capable of managing his or her own affairs or not? 2) is capable of managing likely to cause detriment to his or her own property or family or not. If court opinion that a person, who is incapable of managing his own affairs or is incapable of managing likely to cause detriment to his or her own property or family, the court may order as quasi-incompetent, even though, quasi-incompetent has normal brain function and normal intellectual abilities as equal with others.

After court order as a quasi-incompetent person, the quasi-incompetent person shall be a limited legal capacity to make juristic acts by himself or herself, such as, subject to section 34 of “the Thai CCC,” person adjudged quasi-incompetent by the court must obtain the consent of his or her curator for doing important juristic acts, for example, investing his or her property, contracting a loan or lending money borrowing or leasing, value movable or constructing modifying building or other structures.

In “the Thai CCC” and in court practice, the law on the incompetent and quasi-incompetent person in “the Thai CCC” and in court practice allows a judge to order a person with disabilities without psychotic symptoms as an incompetent person or quasi-incompetent person. The person with disabilities, who may be adjudged as quasi-incompetent by the court, cannot make juristic acts as equal as others, which is inconsistent with CRPD (principle of equality). Thus, it is necessary to suggest and develop laws related to “the Thai CCC” to consistency with CRPD.

2. Objectives

1) To examine concepts, theories, and articles in CRPD related to the legal capacity of persons with disabilities

2) To suggest and develop law related to the legal capacity of persons with disabilities in “the Thai CCC” for consistency with CRPD

3. Research Methodology

This research is based on a qualitative study and analysis from documents and interviews as follows:

3.1 The study included a study of documents, concepts, and theories as a basis for research. For example, principles related to the principle of equality, CRPD, laws on rights of persons with disabilities in Thailand and foreign countries were studied from books, textbooks, research reports, theses, using the library and library databases.

3.2 An informal interview was conducted with a key type of informants as follows:

The study involves executives in both private and public sector organizations, who have missions on the rights of persons with disabilities protection including collect suggestions and data to develop law related to the legal capacity of persons with disabilities principle for consistency with CRPD.

4. Results and Discussion

From the study of CRPD and laws on the legal capacity of persons with disabilities in Thailand and foreign countries, the authors found that CRPD and the Constitution of the Kingdom of Thailand (2017) recognize that the legal rights of persons with disabilities and other persons shall be equal and shall not permit unjust discrimination based on disabilities. Moreover, CRPD recognizes that persons with disabilities shall enjoy legal capacity on an equal basis with others in all aspects of life. However, in “the



Thai CCC,” there are some laws that have content and interpretation guidelines, which are inconsistency with CRPD as follows:

1) Law in CRPD related to quasi-incompetent provides that States Parties shall undertake legal capacity for all persons with disabilities without discrimination. States Parties shall ensure that all measures relating to the exercise of legal capacity respect the rights, will, and preferences of the persons and in a foreign country, for example, according to the German Civil and Commercial Code, the person who is incapable of managing his own affairs, shall under custodianship and shall have legal capacity excluding a person of unsound mind. However, in “the Thai CCC,” a physical or mental infirmity person, who is incapable of managing his own affairs, or whose management is likely to cause detriment to his own property or family, may be adjudged as quasi-incompetent by the court. A person adjudged quasi-incompetent must obtain the consent of his curator for doing important juristic acts. It can be seen that the law on quasi-incompetent in Thailand limits the legal capacity of persons with disabilities for doing juristic acts, which disrespects the rights, will, and preferences of the person. Then, persons with disabilities have an unequal right with others for doing juristic acts, which is inconsistent with CRPD.

2) Law on an incompetent person in “the Thai CCC” provides that a person of unsound mind may be adjudged as an incompetent person by the court and is undertaking the care of a guardian and juristic acts done by an incompetent person is voidable. A person adjudged quasi-incompetent must obtain the consent of his guardian for doing important juristic acts. Even though the law on an incompetent person in Thailand may limit the legal capacity of the person with disabilities related to the juristic act, this is not against equality principle, will, and preferences principle the exercise of legal capacity respect the rights, will and preferences of the person in CRPD, which is due to an adjudged incompetent person by the court need a guardian to act as legal representatives of incompetent person for doing juristic acts because the incompetent person cannot understand nature and consequences of juristic acts. Civil code in a foreign country, for example, in the German Civil and Commercial Code, the person of unsound mind has no legal capacity to make juristic act as in “the Thai CCC.”

However, the law on incompetent person has no clear definition of a person of unsound mind, which causes, in practice, Thai court interprets “a person of unsound mind” including person, who is incapable of managing his own affairs. For example, Buriram Juvenile and Family Court (Civil Court Decision No.120/2557) decided that a person, who was deaf-mute from birth was incapable of managing his own affairs, maybe adjudged as incompetent by the court and Ratchaburi Juvenile and Family Court (Civil Court Decision No.34/2557) decided that person, who has paralysis and was incapable of managing his own affairs, maybe adjudged as incompetent by the court. It showed that a person, who has no mental disorder and is capable to manage his own affairs because he or she can understand the nature and consequences of his or her acts, may limit legal capacity for doing juristic acts. In this case, interpretation of the law on an incompetent person in Thailand may be inconsistent with respect and will and preferences of the person with disabilities principle, equality principle, and non-discrimination principle in CRPD.

3) According to CRPD, Article 12 providing that measures related to the exercise of legal capacity of persons with disabilities shall respect rights, will, and preferences of the persons and in a foreign country, for example, in Germany, the court shall respect person under guardianship’s will in the appointment of a guardian, except it is against the well-being of person under guardianship. However, in “the Thai CCC,” there has no law related to rights, will, and preferences of persons with disabilities to select guardians, which is inconsistent with CRPD.

5. Conclusion

From the study of relevant concepts, theories, articles of CRPD related to the legal capacity of persons with disabilities and comparative study of laws on the legal capacity of persons with disabilities in “the Thai CCC” and foreign countries, the authors found as follows:



1) Law on a quasi-incompetent person, person, who has physical and mental infirmity and is incapable of managing his own affairs or whose management, is likely to cause detriment to his own property or family, may need a curator to act as a legal representative. In this case, the appointment of the curator shall not limit the legal capacity of persons with disabilities. A person with disabilities shall have legal capacity for making juristic as others and the curator has a duty to make juristic act as representatives relying upon the will and preferences of the person with disabilities.

2) Law on an incompetent person shall determine the clear definition of a person of unsound mind, for example, a person of unsound mind means any person has been found usually as a lunatic or a mental defective and is incapable of managing his own affairs.

3) The amendments of law on measures related to the exercise of legal capacity of persons with disabilities including the appointment of a guardian shall include the changes concerning to court shall respect person under guardianship's will, except it is against the well-being of person under guardianship.

6. References

Buriram Juvenile and Family Court Order (Civil Court Decision No.120/2557).

Convention on Rights of Persons with Disabilities. (2006). Retrieved from

<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>

Constitution of the Kingdom of Thailand. (2017). Retrieved from http://web.krisdika.go.th/data/outsitedata/outside21/file/Constitution_of_the_Kingdom_of_Thailand.pdf

German Civil and Commercial Code. (2002). Retrieved from https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html

Kovilaikool, P. (2008). *Civil Law Textbooks*. (pp. 142-143). (5th ed). Bangkok: Nititham Publishing House.

Kovilaikool, P. (2008). *Civil Law Textbooks*. (pp. 174-178). (5th ed). Bangkok: Nititham Publishing House.

Ratchaburi Juvenile and Family Court Order (Civil Court Decision No.34/2557)

Srisuppaphon, D., Sriboonroj, A., Riewpaiboon, W., & Tangcharoensathien, V. (2017). Effective implementation of the UNCRPD by Thailand State Party: challenges and potential remedies. *BMC International Health and Human Rights*, 17, 15. doi: 10.1186/s12914-017-0123-5

Suksumek, P. (2009). *Implementation of the Convention on Rights of Persons with Disabilities (2006) by Thailand State Party*. A thesis for the degree of Master of Law. Thammasat University.

Thai Civil and Commercial Code. (n.d.). Retrieved from <https://www.samuiforsale.com/law-texts/thailand-civil-code-part-1.html>