

Guardianship Systems and Aging Populations: A Comparison of Thailand and Japan

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Abstract

In Thailand, where population aging is progressing at a faster pace than in developed countries, it is expected that elderly persons who possess inadequate judgment will face an increasing number of contractual disputes in the future. Therefore, with regards to the guardianship system that is expected to play an important role in solving such problems, this study analyzes the current status and problems of such system in Thailand by comparing it with the Japanese system, which was used as a reference when drafting the Civil and Commercial Code. In Thailand, if a person who is incapable of judgment is declared incompetent by a court, the person is not only unable to perform property acts independently but also, unlike in Japan, cannot perform personal status acts such as marriage and wills. It is clear that the rights of persons with inadequate judgment are greatly restricted and that they must live only under the protection of their guardian. This paper thus proposes that it is necessary to replace the current system of substitute decision-making with a system of supported decision-making that respects the right to self-determination.

Keywords: Population aging — Guardianship — Self-determination — Supported decision-making system

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I. INTRODUCTION

Population aging is now a global trend. *The 2019 Revision of World Population Prospects* placed the percentage of the world's population aged 65 years and above at 9.1% in 2019. The aging rate in more developed regions was 18.9%, while that of less developed regions was 7.2% in 2019. The aging rate in more developed regions is estimated to rise to 23.9% by 2030, indicating that these regions will evolve into super-aged societies, while that of less developed regions will increase to 21.7% by 2100, indicating that they will also become super-aged.¹

Within the global trend of aging, the East Asia and Pacific region is attracting attention in light of reports that the populations in this area are aging at an unprecedented rate. The pattern and pace of aging across East Asia and the Pacific is not uniform, but diverse. It ranges from richer countries with an aged population (such as Japan and the Republic of Korea), to rapidly aging middle-income countries (such as China, Thailand, and Vietnam), and to poorer countries with a younger population (such as the Lao People's Democratic Republic).²

Japan, which is an example of a super-aged society in the Asian region, began to face an aging society in 1971, i.e., the percentage of the population aged 65 years and above exceeded 7% of the total population. In 1995, it reached an aging society, with over 14% of the total population comprising persons aged 65 years and above, and in 2008, it entered a super-aging society, with this figure exceeding 21%.³ Thailand, the focus of this paper, is also experiencing an aging population. After entering an aging society in 2002, Thailand is expected to become an aged society by 2022 and a super-aged society by 2032.⁴ Compared to Japan, the time taken to transition from an aging society to an aged society is expected to be four years shorter, and the time taken to transition from an aged society to a super-aged society is expected to be three years shorter. In other words, Thailand's population is expected to age faster than Japan's.

The speed of population aging is not the only problem that Thailand is facing. Differences in economic conditions at the stage of entering an aging society can also be cited as a problem. For example, Thailand is estimated to enter an aged population in 2022, and its GDP per capita (current US\$) in 2020 was \$7,186.9.⁵ Even though the GDP per capita fluctuates from year to year, Thailand will enter an

¹ "World Population Prospects 2019, Volume II: Demographic Profiles" *United Nations, Department of Economic and Social Affairs, Population Division* (2019) (ST/ESA/SER.A/427) <https://population.un.org/wpp/publications/Files/WPP2019_Volume-II-Demographic-Profiles.pdf>.

² "Live Long and Prosper: Aging in East Asia and the Pacific" *World Bank* (2016) xv <<https://openknowledge.worldbank.org/handle/10986/23133>>.

³ "World Development Indicators" *World Bank* (2022) <<https://databank.worldbank.org/source/world-development-indicators>>.

⁴ *ibid.*

⁵ *ibid.*

aged society at about one-fifth of the GDP per capita compared to Japan.⁶ This economic perspective is an important factor that will become more serious as the pace of aging increases. Accordingly, Thailand will need to respond more quickly to solve the problems associated with aging.

In response to the aging of its population, which is certain to continue, Thailand is currently focusing on the provision of incentives, including income security and service provision. Knodel et al. highlights the issues of income security and care support.⁷ The focus on care support stems from the projected difficulty that Thailand's family-centered care system will face in catering to an increasing number of elderly persons as the birthrate declines; and the attention to income security seeks to address the serious problem of insufficient savings among the elderly in Thailand.⁸

However, successfully tackling the problem of aging populations is not merely a matter of benefits. As the number of elderly persons increases, the number of people with inadequate capacity to make decisions is also expected to increase. Persons with inadequate judgment will need support to prevent them from suffering property damage in their daily lives and economic activities, and they will also require support in choosing the treatment they should receive when they become ill. Until now, the guardianship system has dealt with persons who possess insufficient capacity to make decisions. It then follows that understanding what the current guardianship system entails and what problems exist is indispensable when considering how to deal with the impending super-aged society.

The purpose of this paper is to clarify the problems that Thailand's guardianship system presents when evaluated from the perspective that the elderly are not objects to be protected, but subjects who exercise their rights on their own and to provide a viewpoint that can be used as a reference when revising the system. The reason for the comparison with Japanese law is as follows: when the Civil and Commercial Code of Thailand (CCCT), Japanese law had a major impact on the drafting of the capacity system, which constitutes an important part of the guardianship system. However, the Japanese system was not legally able to withstand the changes in society due to its rigidity and lack of consideration for human rights, nor did it make allowance for the aging society. This led to Japan making a major revision in 1999. Accordingly, the kind of legal amendments made in Japan will be important when considering future amendment work in Thailand. The relevant part of the Civil Code of Japan (CCJ), which is the subject of comparison,

⁶ In 1995, when Japan entered an aged society, the GDP per capita (current US\$) was \$44,197.60, World Bank (n 3).

⁷ John Knodel, Baussarawan Teerawichitchainan, Vipana Prachuabmoh, and Wiraporn Pothisiri, "The Situation of Thailand's Older Population: An Update Based on the 2014 Survey of Older Persons in Thailand" *HelpAge International* (2015) <<https://ageingasia.org/?p=8063>>.

⁸ Kobsak Pootrakool, Kiatipong Ariyaprichya, and Thammanoon Sodsrachai, "Long-term Saving in Thailand. Are We Saving Enough and What are the Risks?" *Bank of Thailand* (2005) <https://www.bot.or.th/Thai/MonetaryPolicy/ArticleAndResearch/SymposiumDocument/paper5_2548.pdf>.

has undergone significant changes due to the 1999 amendment and differs greatly from how it was when Thailand referred to it as a model. Therefore, in the part explaining the outline of the Japanese law, I will focus on the content at the time of its establishment, so that the pre-and post-amendment content of the model law can be clarified.

II. THE GUARDIANSHIP SYSTEM IN JAPAN

The CCJ, which Thailand referred to when drafting the CCCT, was promulgated in 1896 (Part 1 General Provisions, Part 2 Real Rights, and Part 3 Claims) and in 1898 (Part 4 Relatives and Part 5 Inheritance). All five parts came into effect in 1898. In 1999, the CCJ was amended to harmonize “respect for the right of self-determination” and “protection of the person,” and has been in effect since 2000. The following descriptions are divided into the contents of the 1898 law, after which the CCCT was modeled, and the law that was enacted in 2000. The reason for dealing with the old law, the 1898 law, is to clarify whether the current differences between the Japanese and Thai laws are due to the amendment of the Japanese law.

A. The Law of 1898

1. Incompetence.

The CCJ differentiates the categories of incompetence and quasi-incompetence according to a person’s capacity to make decisions. This provision was influenced by the French Civil Code. Article 7, which stipulates the criteria for incompetence, provides as follows:

Article 7. With regard to a person who is in a habitual state of unsound mind the Court may, in accordance with the application of such person himself (or herself) of his wife (or her husband), of a relative within the fourth degree, of the head of his (or her) house, of his (or her) guardian or curator, or of a public procurator, adjudge such person incompetent (interdict).⁹

Unsound mind, as used in this article, refers to the inability to make rational judgments regarding the consequences of one’s actions; in other words, the lack of volitional capacity.¹⁰ It is not necessary to be in a state of unsoundness all the time to be of unsound mind; it is sufficient to be in a state of unsoundness most of the time,

⁹ For the translation of the 1898 law, I used Joseph Ernest de Becker, *Annotated Civil Code of Japan* (University Publications of America 1979, 1st edn 1909) because it contains copious information about Japanese law when drafting the CCCT.

¹⁰ 我妻榮『新訂 民法總則（民法講義Ⅰ）』（岩波書店 1965）[Sakae Wagatsuma, *Updated General Principles of Civil Law (Lecture Notes on Civil Law I)* (Iwanami Shoten 1965)] (Japanese) 65.

even if a normal state of mind is occasionally recovered. This is clearly stated in the model law, Article 489 of the French Code.

a) Adjudication of incompetence. An adjudication of incompetence cannot be made *ex officio* by the court,¹¹ but must be requested by a person entitled to request it. The persons who have this right are the person himself or herself, a spouse, relatives within the fourth degree of kinship, a head of the house,¹² a guardian, a curator, and a public prosecutor.

For the court to issue an adjudication of incompetence, an expert opinion by a physician is required; an adjudication of incompetence based solely upon a physician's medical certificate is illegal.¹³ When an adjudication of incompetence is issued, the incompetent person is placed under guardianship.¹⁴

The acts of an incompetent person may be revoked.¹⁵ In the respective article, only the word "act" is defined, but this means a juristic act concerning property, and there are exceptions for other types of acts. In other words, an incompetent person can be involved in marriage,¹⁶ divorce by mutual consent,¹⁷ recognition,¹⁸ adoption,¹⁹ dissolution of adoption by mutual consent²⁰ and wills,²¹ without the need for representation. All of these are acts that are not personally familiar to the representative, and the intention of the person and the manner in which the act is executed are considered to be of decisive importance. Therefore, these acts, when carried out by an incompetent person according to his or her true intentions, are completely valid.²²

The CCJ disqualifies an incapacitated person from being a guarantor in cases where the debtor is obliged to have a guarantor,²³ a guardian,²⁴ a curator,²⁵ a

¹¹ The competent court was initially the District Court, but in 1948 it became the Domestic Relations Tribunal, and from 1949 the Family Court.

¹² The head of the house had the right to consent to changes in the family register due to marriage, etc., and the right to designate the residence of family members, etc. The head of the house system was abolished in the 1947 amendment because it was contrary to the principles of individual independence and equality held by the Japanese Constitution enacted after World War II.

¹³ Osaka High Court decision of April 25, 1962, Kasai Geppo 14.9.90.

¹⁴ Civil Code of Japan 1898, art 8.

¹⁵ *ibid* art 9.

¹⁶ *ibid* art 774.

¹⁷ *ibid* art 810, which applies *mutatis mutandis* to art 774.

¹⁸ *ibid* art 828.

¹⁹ *ibid* art 847, which applies *mutatis mutandis* to art 774.

²⁰ *ibid* art 864, which applies *mutatis mutandis* to art 774.

²¹ *ibid* art 1062.

²² 篠原弘志「第 9 条」谷口知平編『注釈民法 (1) 総則 (1)』(有斐閣 1964) [Hiroshi Shinohara, "Article 9" in Tomohei Taniguchi (ed) Chushaku Minpo(1) Sosoku(1), *Annotated Civil Code (1) General Provisions (1)* (Yuhikaku 1964)] (Japanese) 207.

²³ Civil Code of Japan 1898, art 450 para 1 item 1.

²⁴ *ibid* art 908 item 2.

²⁵ *ibid* art 909, which applies *mutatis mutandis* to art 908.

guardian supervisor,²⁶ a witness or witnesses to a will,²⁷ and an executor of a will.²⁸

b) Selection of a guardian and guardian supervisor. The CCJ provides that the number of guardians shall be one.²⁹

Guardians shall be appointed as legal guardians in the following order of preference:

- (i) A spouse;³⁰
- (ii) A person with parental authority;³¹ and
- (iii) A head of the household.³²

With the abolition of the “*Ie*” (House) system under the 1947 amendment, only the spouse was left to be the legal guardian.

After a guardian has been selected, a guardian supervisor must be selected. In this regard, the guardian supervisor is an essential body charged with supervision of the guardian. But with the 1947 amendment, establishing a guardian supervisor became voluntary, and if it is necessary to establish one, the appointment shall be made by the court upon the request of a relative or guardian of the ward.³³

c) Affairs of guardianship. The duties of a guardian of an incompetent person include taking care of the incompetent person’s medical treatment and managing his or her property. First of all, the guardian must take care of the medical treatment and nursing of the incompetent person, in keeping with the incompetent person’s financial resources.³⁴ The method of medical care and nursing must be determined in accordance with the incompetent person’s resources.³⁵

Another task fulfilled by the guardian is the management of property. The guardian manages the ward’s property and represents the ward in juristic acts concerning property.³⁶ However, as an exception, the guardian must always obtain the consent of the ward in cases where debts are incurred as a result of the ward’s acts.³⁷

²⁶ *ibid* art 916, which applies *mutatis mutandis* to art 908.

²⁷ *ibid* art 1074 item 2.

²⁸ *ibid* art 1111.

²⁹ *ibid* art 906.

³⁰ *ibid* art 902 paras 2 and 3.

³¹ *ibid* art 902 para 1.

³² *ibid* art 903.

³³ *ibid* art 849 (revised in 1947).

³⁴ *ibid* art 922 para 1.

³⁵ 梅謙次郎『民法要義卷之四』(和佛法律學校 1899) [Kenjiro Ume, *Civil Law Essentials Volume 4* (Wafutsu Horitsu Gakko 1899)] (Japanese) 467.

³⁶ Civil Code of Japan 1898, art 923 para 1.

³⁷ *ibid* proviso of art 884 applies *mutatis mutandis* according to art 923 para 2.

2. Quasi-incompetence system.

Article 11, which provides for quasi-incompetence, provides as follows:

Persons of weak intellect, deaf, dumb, or blind persons, and spendthrifts (prodigals) may be placed under curatorship as quasi-incompetent (demi-interdict).

The term “person of weak intellect” here refers to a person who has not completely lost the ability to will, but has an incomplete ability to judge. Where deaf, dumb or blind persons are concerned, it is extremely rare for a petition for quasi-incompetence to be filed or for adjudication of quasi-incompetence to be issued based on a petition for quasi-incompetence due solely to deafness, dumbness, or blindness.³⁸

a) Adjudication of quasi-incompetence. An adjudication of quasi-incompetence, like an adjudication of incompetence, may not be made *ex officio* by the court. The persons entitled to make a request are a person himself or herself, a spouse, relatives within the fourth degree of kinship, a head of the house,³⁹ a guardian, a curator, and a public prosecutor.⁴⁰

The consent of a curator is required when a quasi-incarcerated person performs acts involving important property.⁴¹

Furthermore, the court may declare that the curator’s consent is required for acts other than those listed in Article 12, Paragraph 1.⁴²

Any act carried out without the consent of the curator can be revoked.⁴³ However, a curator was not provided for in Article 126, which defines the persons with the right of revocation. There was considerable criticism surrounding the fact that the curator was not included among the persons with a right of revocation; in response to this criticism, the 1999 amendment provides that the curator can revoke an act performed without the consent of the curator, as described below.

b) Selection of a curator. The process of the selection of a curator shall be the same as the selection of a guardian, as Article 909(1) applies *mutatis mutandis* to Articles 902 to 908.

c) Affairs of curatorship. Unlike the case of a guardian, there is no separate section governing the affairs of a curator. Consent is required to be given for the acts

³⁸ 鈴木ハツヨ「第 11 条」谷口知平編『注釈民法（1）総則（1）』（有斐閣 1964）[Hatsuyo Suzuki, “Article 11” in Tomohei Taniguchi (ed) Chushaku Minpo(1) Sosoku(1), *Annotated Civil Code (1) General Provisions (1)* (Yuhikaku 1964)] (Japanese) 215.

³⁹ Deleted in 1947.

⁴⁰ Civil Code of Japan 1898, art 7 applies *mutatis mutandis* under art 13.

⁴¹ *ibid* art 12 para 1.

⁴² *ibid* art 12 para 2.

⁴³ *ibid* art 12 para 3.

listed in Article 12, Paragraph 1, as well as for the acts added under Section 2 of the same Article. A curator also acts as a claimant for the adjudication of incompetence, as provided in Article 7.

3. Protection of the other party.

a) Right to demand. When an incompetent or quasi-incompetent person can annul a juristic act on the ground of limited capacity, the other party is placed in a precarious position because the validity of the juristic act depends on the exercise of the right of revocation. Article 126 provides that the right of revocation shall be extinguished by prescription within five years from the time that it can be ratified and within twenty years from the time of the act. Therefore, if the other party waits for revocation, he or she may be placed in a precarious position for a long time. Consequently, the Japanese Civil Code recognized the right of demand. With the recognition of this right, the other party can finalize the legal relationship without waiting for the extinction of the right of revocation due to lapse of time, as stipulated in Article 126. In other words, the other party may specify an act that can be annulled, and request that the action be either ratified or annulled. In this case, a grace period of at least one month shall be given. The respondent to the demand is limited to the person who is capable of receiving the demand⁴⁴ and who is capable of annulling or ratifying it.⁴⁵ If the demand is to be made of a quasi-incompetent person, the consent of the curator is necessary for the ratification.

b) Exclusion of the right of annulment. If an incompetent person uses fraudulent means to mislead the other party into believing that he or she is competent, the incompetent person does not deserve protection. Therefore, if the act of the incapacitated person cannot be revoked in such a case, since the act is complete as expected by the other party, the problem is solved. Accordingly, Article 20 of the Civil Code states that if the incompetent person uses fraudulent means in an attempt to mislead the other party, the act cannot be annulled.

B. Laws Enacted in 2000

In Japan, the rapid aging of the population with a declining birthrate and the nuclear family that preceded it had made nursing care and guardianship of the elderly a serious problem. The problems associated with ageing were no longer a family issue as it had been in the past, but a societal problem.

In addition, the social welfare system in Japan, which had been instituted after World War II, had become incapable of responding to social changes. Social welfare no longer belonged to the economically and socially vulnerable people, but to

⁴⁴ *ibid* art 98.

⁴⁵ *ibid* art 120 and 122.

all citizens in need of welfare services. With the aging of the population and the declining birth rate, those who had accumulated wealth for their retirement were unable to spend it properly due to their declining decision-making abilities.

In response to those who lacked the capacity to make decisions, a system governing a person's incompetence or quasi-incompetence was instituted. However, it was rigid, lacked consideration for human rights, and was legally incapable of withstanding social change. Specifically, the following problems were pointed out:⁴⁶

1. Limitation of the capacity to act

The system of adjudication of incompetence was based on the idea of assigning a guardian instead of restricting the capacity to act of a person with diminished judgment. This often unnecessarily restricted a person's capacity to act and may deprive them of their freedom of juristic action, which did not amount to true protection of the person.

2. Entry in the family register

When an adjudication of incompetence was issued, the mayor of the municipality of the person's legal domicile was notified through the court, and the fact that the adjudication had been issued was entered in the family register. However, there was a tendency among relatives not to like this, which led to a situation where they did not want to be declared.

3. Restrictions on eligibility

Since the declaration of incompetency was a cause of disqualification under many laws, the incompetent person was disqualified from various capacities.

4. Strictness of procedures

The procedures, including appraisal procedures, were strict, and the period before the adjudication was made was long.

5. Guardianship between husband and wife

Under the 1898 law, if one spouse was to have a guardian, the other was supposed to be the guardian. However, the aging of society has often made it difficult to appoint an appropriate spousal guardian.

6. Limitation on who has the right to submit a petition

Due to the declining birthrate and nuclear families, there were an increasing number of cases in which relatives within the fourth degree of kinship were unable to submit a petition for adjudication. The number of cases that caused difficulties at the start of the proceedings had increased because the prosecutor is also unable to file a petition.

7. Number of guardians

As the quality of adult guardianship improved, it became necessary to have specialists as guardians, and a multiple guardianship system was necessary for this purpose.

⁴⁶ 田山輝明『成年後見読本』(第2版, 三省堂 2016) [Teruaki Tayama, *Seinenkoken Dokuhon Adult Guardianship Reader* (2nd edn, Sanseido 2016)] (Japanese) 47–49.

8. Appraisal costs

The cost of appraisals was high and was a major burden for users. Therefore, a fixed cost was considered by streamlining the appraisal method.

The system governing a person's incompetence or quasi-incompetence, with its above-described problems, had not been appropriately comprehensive in addressing the increasing number of elderly people with insufficient capacity to make decisions, especially those with dementia. In particular, there were many cases where people with inadequate capacity to make decisions still had the capacity to make decisions to a certain extent and engage in transactions. Therefore, it was desirable to respect their right to self-determination. In addition, there was a growing international movement for the protection of the human rights of people with disabilities. As a result, the adult guardianship system was substantially revised in 1999, and came into effect the following year.

The basic principles of the revised adult guardianship system are: respect for the right to self-determination, utilization of residual capacity, harmonization of normalization and protection of the individual. The purpose of the adult guardianship system is to provide users with a flexible system based on these principles that are easy to use according to their circumstances, from the perspective of responding to an aging society and enhancing the welfare of people with intellectual and mental disabilities, etc.⁴⁷

In line with this objective, the legal guardianship system has undergone seven significant changes.

First of all, the system of capacity to act stipulated in the Civil Code has been subject to a major change. Instead of the two categories of incompetence and quasi-incompetence, there are now three categories: assistance, curatorship, and guardianship. In addition, a new "Voluntary Guardianship System" has been established under a special law, which allows a person to select a guardian and pre-determine the acts of representation that he or she wishes to have in case his or her judgment capacity declines in the future.

1. Assistance (Persons under Assistance).

The newly established assistance system is for those who have insufficient capacity to make decisions due to mental disabilities, but who are not yet at the level of curatorship or guardianship.⁴⁸ An assistant is appointed for an assisted person, together with a trial for commencement of assistance by the family court, and one or both of the rights of representation⁴⁹ or the rights of consent and revocation⁵⁰ are

⁴⁷ 渡辺朗子『身上監護の成年後見』（信山社 2015）[Akiko Watanabe, *Adult Guardianship for Personal Care* (Shinzansha 2015)] (Japanese) 3.

⁴⁸ Civil Code of Japan 1999, art 15.

⁴⁹ *ibid* art 876/9.

⁵⁰ *ibid* art 17.

granted to the assistant by the trial with respect to specific legal acts selected by the parties through a petition. From the viewpoint of respect for self-determination, the petition of the person concerned or the consent of such person to the petition is a requirement for the proceedings.

2. Curatorship (Persons under Curatorship).

Curatorship is a system for those whose capacity to make decisions is extremely inadequate, and is equivalent to the former system addressing quasi-incompetency, excepting that spendthrifts are excluded from the subjects concerned. The deaf, dumb, and blind had already been removed in 1979.

A person who has been adjudicated for commencement of curatorship needs the consent of the curator for important property acts as listed in Article 13, Paragraph 1. Furthermore, an additional right of annulment is granted to the curator for “certain juristic acts” selected upon the petition of the parties concerned.⁵¹ In addition, with the petition or consent of the person concerned, the curator can be granted representation.⁵²

3. Guardianship (Adult Ward).

A guardianship is for the benefit of a person who, due to mental disability, most of the time but not all the time lacks the capacity to appreciate his or her own situation. The guardianship system is equivalent to the old system of incompetence. With the 1999 amendment, the purchase of daily necessities cannot be revoked.⁵³ The purpose of the proviso in Article 9 is as follows: (i) to provide exceptions to revocations by limiting the types of juristic acts; (ii) to respect the fact that the person is not completely incapable of making a judgment, but can purchase daily necessities, i.e., to respect existing capacities; (iii) to recognize that for elderly people with dementia, it is important not only to return to social life but also to have a social life as long as possible; and (iv) in many cases, if an act is repeatedly performed in daily life, to recognize that the person has the necessary judgmental capacity to perform it.⁵⁴

The second amendment relates to the appointment of appropriate guardians, curators, and assistants. The spousal legal guardianship system was abolished and the family court can appoint a suitable person as an adult guardian, curator, or assistant, depending on the case at hand.⁵⁵ In addition, it is now possible to appoint more than one guardian for an adult, and corporations can also be appointed as adult guardians, etc.⁵⁶ In addition, to procedurally ensure that a reliable individual or legal

⁵¹ *ibid* art 13 para 2.

⁵² *ibid* art 876/4.

⁵³ Proviso to *ibid* art 9.

⁵⁴ Tayama, *Adult Guardianship Reader* (n 46) 130–131.

⁵⁵ Civil Code of Japan 1999, art 859/2, art 876/5 para 2, art 876/10 para 1.

⁵⁶ *ibid* art 843 para 3; art 876/2 para 2; art 876/7 para 2.

entity that does not pose a risk of conflict of interest with the said person is appointed as a guardian, curator, or assistant, the circumstances to be considered by the family court are specified.⁵⁷

The third amendment relates to the duty of personal care and respect for the wishes of the individual. In this regard, a general provision has been established that adult guardians, curators, and assistants must respect the intentions of the individual and give consideration to the individual's physical and mental condition as well as living conditions when conducting their duties.⁵⁸ Moreover, a provision on personal care was added, requiring permission from the family court for the adult guardian to dispose of the adult ward's residential real estate.⁵⁹ The scope of the guardian's duties is limited to juristic acts related to daily life, medical treatment and nursing care, and the management of property; factual acts are not permitted, on the basis of Article 858. The guardian's duties also do not include the provision of consent to surgery, hospitalization, compulsory medical checkups, compulsory institutionalization, organ transplants, sterilization, life-prolonging treatment or the cessation of such, or death with dignity. The legislators did not make any provision on the right of consent to medical treatment because they thought it was premature, as there is no general consensus on this subject in society.⁶⁰

The fourth amendment relates to the power of the mayor of a city, ward, town, or village to file a request. This was established for the elderly who live alone and cannot be expected to file a petition with their relatives.⁶¹

The fifth amendment relates to the enhancement of the supervision system. In addition to adult guardianship supervisors, a new system of supervisors for curatorship and assistance was established.⁶² The various supervisors can be appointed by legal entities.

The sixth amendment relates to the establishment of a guardianship registration system to replace the family register. As mentioned above, entry into the family register was stopped, in consideration of relatives who do not want to be included in the family register. Instead, the guardianship registration system was introduced to harmonize the safety of transactions.

The seventh amendment relates to the elimination of the disqualification clause. While the Civil Code had disqualifications for incompetent and quasi-incompetent persons, the 1999 amendment abolished the disqualification clause in the Civil Code, except for a guarantor in cases where the debtor is obliged to provide a guarantor. In this case, the guarantor must be a person with capacity to act. Most of

⁵⁷ *ibid* art 843 part 4; art 876/2 para 2; art 876/7 para 2.

⁵⁸ *ibid* art 858.

⁵⁹ *ibid* art 859/3.

⁶⁰ 小林昭彦・大門匡編『新成年後見制度の解説』（きんざい 2000）[Akihiko Kobayashi and Tasuku Daimon (ed), *Explanation of the New Adult Guardianship System* (Kinzai 2000)] (Japanese) 145.

⁶¹ Art 32 of the Elderly Welfare Act, art 28 of the Mentally Retarded Welfare Act, and art 51/11/2 of the Mental Health and Welfare Act.

⁶² Civil Code of Japan 1999, art 876/3, art 876/8.

the disqualification clauses that existed in the special laws continued to exist after the 1999 amendment, but they were highly criticized. Therefore, in 2019, the “Act on the Improvement of Relevant Laws to Ensure Appropriate Measures for Restricting the Rights of Adult Wards, etc.” was enacted. Under this law, if a system contains provisions that uniformly exclude adult wards etc. from qualifications, jobs, and duties, etc. (disqualification clauses), these will be adjusted to provisions that individually and substantially examine the state of the ward’s mental and physical disabilities, and it will be determined whether the system has the necessary capacities.

4. Voluntary guardianship.

In addition to the system of legal guardianship described above, a new voluntary guardianship system has been introduced. The voluntary guardianship system ensures maximum respect for self-determination by allowing the parties concerned, especially the person entrusted with the voluntary guardianship, to establish their own norms for their future voluntary guardianship affairs through a contract, and also harmonizes the principle of protection of the individual by making a voluntary guardian supervisor appointed by the family court a mandatory supervisory body.

A voluntary guardianship contract is a contract in which the delegate entrusts the recipient with all or part of the affairs relating to his or her life, medical treatment and nursing care, and management of his or her property in a situation in which he or she has insufficient capacity to reason due to a mental disability. The contract grants the voluntary guardian the right to represent the delegate in the affairs covered by the entrustment and includes a provision that the contract shall take effect from the time a voluntary guardian supervisor is appointed according to the provisions of Article 4, Paragraph 1.⁶³

The required form is to be signed by notarial deed.⁶⁴ The involvement of a notary public, a legal professional, is intended to ensure the accuracy and legal stability of the contract.

When a voluntary guardianship contract is completed as a notarial deed, the contract is registered at the guardianship registry office.

As with adult guardians, in conducting their affairs, voluntary guardians should respect the intentions of the principal and take into consideration the principal’s physical and mental condition as well as living situation.⁶⁵ The scope of affairs of a voluntary guardian is limited to the delegated affairs as juristic acts subject to the granting of power of representation, and does not include independent factual acts.⁶⁶

⁶³ Voluntary Guardianship Act, art 2 item 1.

⁶⁴ *ibid* art 3.

⁶⁵ *ibid* art 6.

⁶⁶ *ibid* art 2 item 1.

Under the Voluntary Guardianship Act, a supervisor for the voluntary guardian is required. A guardianship supervisor is required in order to prevent the voluntary guardian from abusing his or her supervisory power against the well-being of the principal, who has lost the capacity to make decisions and thus cannot fully control the voluntary guardian.⁶⁷ The duties of the supervisor are: (i) to supervise the affairs of the voluntary guardian; (ii) to report regularly to the family court on the affairs of the voluntary guardian; (iii) to make necessary dispositions within the scope of the power of representation of the voluntary guardian in urgent cases; and (iv) to represent the interests of the person against those of the voluntary guardian or his or her representative.⁶⁸ In addition, if there are doubts about the eligibility of the voluntary guardian, the guardian supervisor may request the family court to dismiss the voluntary guardian.⁶⁹

III. THE GUARDIANSHIP SYSTEM IN THAILAND

The system of capacity and guardianship in Thailand is stipulated in the CCCT. According to the documents left by Praya Manawarachasewi, one of the drafters of the CCCT, the CCJ was consulted when the article on the capacity of natural persons was drafted.⁷⁰ Hence, references to Japanese law can be found in the overview of the CCCT. However, the current laws of the two countries cannot be simply compared. As we have seen in the previous section, in Japan, when the voluntary guardianship system was introduced in 1999, the system of capacity to act was extensively modified. In Thailand, on the other hand, the capacity system remained unmodified except for the abolition of the limitation of the capacity of wives in 1979, and minor amendments to the part on general provisions in 1992. However, major amendments have been made in the chapter on guardianship.

In this section, I would like to give an overview of the systems of incompetence, quasi-incompetence, and persons of unsound mind stipulated in the CCCT.

⁶⁷ 新井誠「第 5 章 任意後見制度」新井誠編『成年後見-法律の解説と活用の方法』(有斐閣 2000) [Makoto Arai, “Chapter 5: Voluntary Guardianship” in Makoto Arai (ed), *Adult Guardianship - Explanation of the Law and How to Use It* (Yuhikaku 2000)] (Japanese) 119.

⁶⁸ Voluntary Guardianship Act, art 7 para 1.

⁶⁹ *ibid* art 8.

⁷⁰ ภาควิชานิติศึกษาทางสังคม ปรัชญา และประวัติศาสตร์ คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, บันทึกคำสัมภาษณ์พระยามานวราชเสวี (ปลอด วิเชียร ณ สงขลา) (วิญญูชน 2557) [Social Legal Studies, Philosophy and History at the Faculty of Law, Thammasat University, *A Record of Interview with Praya Manawarachasewi (Plot Wichian Na Songkla)* (Winyuchon 2014)] (Thai).

A. Incompetence System

The CCCT defines the categories of incompetence and quasi-incompetence according to capacity of judgment. This system is based on Japanese law, which in turn is derived from French law. Article 28 provides for incompetent persons.

In the case of a person of unsound mind, the court may order that such a person be adjudged incompetent upon the request of the person themselves.⁷¹ The definition of unsound mind is not given in the article. In terms of academic discipline, a mental disorder must meet two conditions.⁷² The first is that it is serious in degree. This is generally a condition in which the person does not behave normally, is not fully conscious, and is unaware of what he or she is saying or doing due to psychosis or a poor mental state. Second, that it is a continuous state. However, the continuity does not have to be constant and uninterrupted but can include the occasional return to normalcy.

This division of the conditions for an unsound mind has long existed. For example, it had already been adopted in Setthabut's textbook in 1940. It also states that the continuity within the required state does not have to be unbroken, considering the provisions of Article 32 of the CCCT.⁷³ This idea is the same as the interpretation of Japanese law and Article 489 of the French Civil Code, which the Japanese used as a reference. It is not known whether this was due to the influence of Japanese law, which was the direct model, or to the influence of French law, but it is thought that this interpretation would have been easy to derive for Setthabut, as he obtained his degree in France.

The Supreme Court provided a definition of persons of unsound mind in Decision 490/2509. According to this judgment, the term includes not only those who are in an unusual mental state or have a diagnosed mental disorder, but also those who display unusual behavior or a mental condition caused by an out-of-the-ordinary state of consciousness, such as loss of memory or inability to be aware of responsibility. This definition of persons of unsound mind includes elderly dementia patients dealt with in this paper.

1. Adjudication of incompetence.

The adjudication of incompetence is not made *ex officio* by the court; the procedure is initiated by a request from certain persons. According to Article 28, Paragraph 1, the persons entitled to make a request are (i) a spouse, (ii) lineal ascendants (father,

⁷¹ Civil and Commercial Code of Thailand, art 28 para 1.

⁷² ประสิทธิ์ โขวิไลกุล, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ ว่าด้วย บุคคล (พิมพ์ครั้งที่ 6, นิตินธรรม 2562) [Prasit Kowilaikul, *Explanation of the Civil and Commercial Code Regarding Persons* (6th edn, Nititham 2019)] (Thai) 155–156.

⁷³ จิด เศรษฐบุษ, คำสอนชั้นปริญญาตรี กฎหมายแพ่งและพาณิชย์ว่าด้วยบุคคล (มหาวิทยาลัยวิชาธรรมศาสตร์และการเมือง 2483) [Jid Setthabut, *Lecture at the Bachelor Level on the Civil and Commercial Code Regarding Persons* (University of Moral and Political Sciences 1940)] (Thai) 169.

mother, grandfather, grandmother, great-grandfather, great-grandmother), (iii) lineal descendants, (iv) a guardian of a minor, (v) a curator, (vi) a person who is currently taking care of the person in question, and (v) a public prosecutor.

With regard to an incompetent person's capacity to act, all acts performed by an incompetent person may be voidable.⁷⁴ In drafting Article 29 (formerly Article 31), only Article 9 of the CCJ was referred to.⁷⁵ Article 9 also does not limit the subject of revocation in the text but is interpreted to be limited to juristic acts on property, and exceptions are made for other types of acts.⁷⁶

On the other hand, the CCCT also uses the term “act” in its articles, but here it is limited to juristic acts.⁷⁷ However, in the case of an incompetent person, there is no act that the incompetent person can perform independently because the law does not provide any exception.⁷⁸ As a general rule, acts performed by an incompetent person can be annulled, but in some cases, such as marriage⁷⁹ and wills,⁸⁰ they are invalid.

The person who has the right of revocation is the person who has become competent to act or the guardian.⁸¹

2. Selection of a guardian.

An incompetent person must be under the guardianship of a guardian. The appointment of a guardian, the powers and duties of a guardian, and termination of a guardianship shall be effected under the provisions of Book 5.⁸² With regard to the selection of a guardian, if the incompetent person has a spouse, the spouse will be the guardian in principle. However, upon the request of an interested person or the public prosecutor, the court may appoint another person as the guardian.⁸³

If the incompetent person does not have a spouse, the parents—father or mother—shall be the guardians, but if the court deems them unsuitable, another person may be appointed as the guardian.⁸⁴ If the incompetent person does not have a spouse or parents, another person shall be appointed as the guardian.

As a general rule, there shall only be one guardian, but the court may appoint more than one guardian if requested by the petitioner for proper reasons.⁸⁵

⁷⁴ Civil and Commercial Code of Thailand, art 29.

⁷⁵ *A Record of Interview with Praya Manawarachasewi* (n 70) 144.

⁷⁶ Shinohara (n 22) 206.

⁷⁷ Prasit, “*Explanation of the Civil and Commercial Code*” (n 72) 176.

⁷⁸ อังคณาดี ปิ่นแก้ว, คำอธิบายกฎหมายแพ่งและพาณิชย์ว่าด้วยบุคคล (พิมพ์ครั้งที่ 2, วิญญูชน 2560) [Angkhanawadi Pinkaew, *Explanation of the Civil and Commercial Code Regarding Persons* (2nd edn, Winyuchon 2017)] (Thai) 237.

⁷⁹ Civil and Commercial Code of Thailand, art 1449 (former art 1445 para 1 item 5), art 1496 (former art 1490).

⁸⁰ *ibid* art 1704 para 1 (former art 1704 para 1).

⁸¹ *ibid* art 175 para 1 item 2.

⁸² *ibid* art 28 para 2.

⁸³ *ibid* art 1463.

⁸⁴ *ibid* art 1569/1 para 2.

⁸⁵ *ibid* art 1590.

3. Powers and duties of a guardian.

Concerning the powers and duties of a guardian, according to Article 1598/18, the provisions concerning the rights and duties of a guardian of a minor, except Article 1567(2) and (3), apply *mutatis mutandis*. The powers and duties of a guardian of a minor are the same as those of a person with parental authority.

Looking specifically at the powers and duties of persons with parental authority and guardians of minors, they can be categorized into two aspects: personal custody and property management.

Where personal custody is concerned, a person with parental authority has the duty to raise the minor and ensure that he or she receives an appropriate education.⁸⁶ The same applies to the guardian of a minor.⁸⁷

The powers possessed by a person with parental authority include: (i) designating the place of residence; (ii) disciplining the child in an appropriate form with the purpose of training and education; (iii) giving the child appropriate work according to his or her abilities and living conditions; and (iv) requesting the return of the child from a person who has illegally detained him or her.⁸⁸ The same applies to guardians of minors.⁸⁹

Where property management is concerned, the person with parental authority or the guardian of a minor are usually the legal representatives. Therefore, they can express or receive intentions on behalf of the minor.⁹⁰ Parental authority also includes the right to manage the property held by the child, which must be managed with the care that a person of ordinary prudence would exercise.⁹¹

Based on Article 1571, the legal representative can manage the property independently, but there are exceptions to this rule. A contract in which the child is the obligor may not be concluded without the child's consent.⁹²

In addition, Article 1574 prohibits a legal representative from performing specific juristic acts independently for property held by a minor; this requires prior permission of the court.⁹³

No provision exists for the effect of failure to obtain permission from the court to perform juristic acts. Currently, there are two judgments made by the courts: one is that the legal act in question is invalid, and the other is that the effect does not

⁸⁶ *ibid* art 1564 para 1.

⁸⁷ *ibid* art 1598/2 applies *mutatis mutandis* to art 1564.

⁸⁸ *ibid* art 1567.

⁸⁹ *ibid* art 1567 applies *mutatis mutandis* pursuant to art 1598/2.

⁹⁰ *ibid* art 1570 for those with parental authority, and art 1570 for those with guardianship of a minor, pursuant to art 1598/3 para 1.

⁹¹ *ibid* art 1571; for guardians of minors, art 1571 applies *mutatis mutandis* pursuant to art 1598/3 para 1.

⁹² *ibid* art 1572. Art 1572 applies *mutatis mutandis* to a guardian of a minor under art 1598/3 para 1.

⁹³ *ibid* art 1574 applies *mutatis mutandis* to a guardian of a minor pursuant to art 1598/3 para 1.

extend to minors.⁹⁴

A point that must be considered in situations of representation, including legal representation, is a conflict of interest. Representation is a system in which the effect of an act by an agent is attributed to the principal, therefore the agent must act in the interest of the principal. Therefore, if a conflict of interest arises between the principal and the agent, it is necessary to adjust the conflict. So, if the interests of the minor conflict with the interests of a person with parental authority, a spouse or child of a person with parental authority, the person with parental authority must obtain permission from the court to perform an act. Any act performed without such permission shall be void.⁹⁵

The powers and duties of an adult guardian are the same as those of a person with parental authority and a guardian of a minor, as described above, except for disciplinary authority and labor engagement. This is because the incompetent person is an adult.

In addition, an adult guardian can revoke a juristic act performed by an incompetent person, and can also ratify it.⁹⁶

B. System of Quasi-incompetence

In the case of a person who is unable to manage his or her affairs due to physical or mental infirmity, habitual wastefulness, continuous intoxication, or any other cause, or whose unsupervised acts of management would cause damage to his or her property or that of his or her family, the court may, upon the request of the person concerned to the court, order that such person is declared quasi-incompetent.⁹⁷

Two conditions must be met to be adjudged quasi-incompetent. First, there must be physical or mental infirmity, daily waste, continuous drunkenness, or other determining grounds. Second, the inability to manage one's affairs must be present, or a situation in which one's management of one's own affairs would result in damage to one's own or one's family's property. The mere existence of problems related to physical, mental, and daily activities as defined by the former condition does not mean that the person is recognized as a quasi-incompetent; the latter condition is also required.

1. Adjudication of quasi-incompetence.

A quasi-incompetence order by the court, like an incompetence order, is not made *ex officio* but is initiated at the request of designated persons. The persons entitled to

⁹⁴ Angkhanawadi, "Explanation of the Civil and Commercial Code" (n 78) 210–13.

⁹⁵ Civil and Commercial Code of Thailand, art 1575. Art 1575 applies *mutatis mutandis* to a guardian of a minor in accordance with art 1598/3 para 1.

⁹⁶ *ibid* art 177.

⁹⁷ *ibid* art 32 para 1.

request the order are the same as those listed in Article 28.⁹⁸

Concerning the limitation on a quasi-incompetent person's capacity to act, the consent of a curator is required when a quasi-incompetent person performs important acts on property.⁹⁹

In addition to the acts legally prescribed in Paragraph 1, the court may order additional acts to be consented to by the curator, at the time of the issuance of the quasi-injunction order or upon the subsequent request of the curator.¹⁰⁰

Furthermore, in cases where the curator's consent is required under Paragraphs 1 and 2 and the quasi-incompetent person is unable to perform such acts due to physical or mental incapacity, the court may order the curator to act as the quasi-incompetent person's representative in such acts.¹⁰¹

The court may order the curator to act as the representative of the quasi-incompetent in the act¹⁰² and may revoke any act performed in violation of the provisions of this Article.¹⁰³

2. Selection of a curator.

Since a quasi-incompetent person must be under the conservatorship of a curator,¹⁰⁴ it is required to select a curator. The criteria in the appointment of a guardian also applies in the selection of a curator.

3. Powers and duties of a curator.

The powers and duties of a curator are not specifically provided for in the CCCT. The curator has the right of consent when the quasi-incompetent performs the acts specified under Article 34, Paragraphs 1 and 2. However, since it is possible to grant the right of representation to the curator under Article 34, Paragraph 3, the provisions concerning the guardian shall apply *mutatis mutandis* to cases where the curator has the right of representation.

The consent of the curator is required for some juristic acts carried out by a quasi-incompetent person. Therefore, the curator is granted the right of consent. If the curator does not give consent to a juristic act for which consent is required, the curator has the right of revocation.¹⁰⁵ The person who has the right of revocation also has the right of ratification,¹⁰⁶ so the curator also has the right of ratification.

If the curator does not consent to an act being carried out by the quasi-

⁹⁸ *ibid.*

⁹⁹ *ibid* art 34 para 1.

¹⁰⁰ *ibid* art 34 para 2.

¹⁰¹ *ibid* art 34 para 3.

¹⁰² *ibid.*

¹⁰³ *ibid* art 34 para 5.

¹⁰⁴ *ibid* art 32 para 2.

¹⁰⁵ *ibid* art 175 para 1 item 2.

¹⁰⁶ *ibid* art 177.

incompetent on unreasonable grounds, upon the application of the quasi-incompetent, the court may permit the act to be performed without the consent of the curator, if the act will benefit the quasi-incompetent.¹⁰⁷

C. Persons of Unsound Mind

Next to be dealt with are persons of unsound mind who have not yet received an order of incompetence from the court. If the person is of unsound mind at the time of the act and the other party acts in bad faith, the act may be revocable.¹⁰⁸ The burden of proof to establish the other party's bad faith lies on the person of unsound mind.¹⁰⁹

IV. COMPARISON WITH JAPANESE LAW

A. Categories

In Thailand, since the enactment of the CCCT, there have been two categories, incompetence and quasi-incompetence; while in Japan, as of the 1999 amendment, three categories are specified: assistance, curatorship, and guardianship. The purpose of this amendment was to add the assistance category to cover those with insufficient capacity to make decisions, but who are still able to make decisions to a certain extent and engage in transactions.

In Thailand, there is a provision regarding the stage before court adjudication. In Japan, for a long time, there was no provision for this in the articles, and the concept of incapacity was recognized in court precedents. According to the precedents, a legal act by an incompetent person is invalid. When the part regarding the law of obligations in the CCJ was revised,¹¹⁰ the precedent was made into an article.¹¹¹

In addition, under the Voluntary Guardianship Act in Japan, there is a type of guardianship that allows the right of representation only for acts stipulated in the setting contract.

In Thailand, since the enactment of the CCCT, two types of guardianship have been maintained, namely that of incompetents and quasi-incompetents, and it can be said that it remains difficult to respond to the differences between the two when in a decision-making capacity.

¹⁰⁷ *ibid* art 35.

¹⁰⁸ *ibid* art 30.

¹⁰⁹ Prasit, "Explanation of the Civil and Commercial Code" (n 72) 181.

¹¹⁰ Revised in 2017, effective in 2020.

¹¹¹ Civil Code of Japan 2017, art 3/2.

B. Scope of Persons Entitled to File a Petition

In Japan, in addition to the persons specified in the Civil Code, the mayor of a city, town, or village is also specified. In Thailand, the problem of the elderly living alone has not yet reached the level of Japan, but it is necessary to take measures to prepare for such a situation arising in the future.

C. Capacity to Act

In the CCCT, an incompetent person is treated as a person who is incapable of performing acts, which at first glance appears to be the same as in Japan before the 1999 amendment. However, the CCJ restricts the acts subject to rescission to acts of property, and concerning acts related to personal status, Part 4 of the Code that concerns relatives stipulates the acts that can be performed by an incompetent person independently. On the other hand, Thai law restricts the capacity to perform all juristic acts, including acts related to personal status. Therefore, an incompetent person cannot independently determine the validity of a juristic act, and Thai law is more restrictive where the capacity to act is concerned. As a result of the overarching purpose of protecting those with insufficient capacity, their social activities are restricted. This is evident from the existence of numerous disqualification clauses in various fields.

D. Selection of a Guardian or a Curator

As for the selection of a guardian or a curator, as in the 1898 law, the principle is to have a legal guardian. However, in Thailand, exceptions are allowed for reasons other than disqualification, which allows for flexibility. One of the reasons why Japan abolished legal guardianship in the 1999 amendment was the issue of guardianship for the aged; in other words, in an aging society, if one spouse is adjudged incompetent, the other spouse, also elderly, has no choice but to become the guardian. To solve this problem, the legal guardianship system itself was abolished so as to make it a principle to appoint an appropriate person as a guardian, although a method like Thailand's could be adopted.

The selection of a guardian in Thailand is made by the court according to the provisions of the CCCT. Generally, the spouse or the parents are appointed, in that order. For this reason, the will of the ward is not respected in the selection of the guardian. The same applies to legal guardianship under the CCJ, but in the case of voluntary guardianship, the will of the ward as the mandator is respected and the ward can choose the guardian. This is a major difference from Thailand, which only allows selection by the court.

E. Powers and Duties of Guardians

Where the powers and duties of guardians are concerned, there are significant differences between the two countries. In the CCJ, the role of the guardian is centered on the management of property, and there are few provisions regarding personal custody. In particular, the 1898 law states that the guardian's duty of care and custody shall be to provide for the medical treatment and nursing of the incompetent person according to his or her financial resources, which is a very strong aspect of property management. Even under the current law, guardians are only allowed to act on behalf of the adult ward in contractual matters and are not granted the right to consent to medical treatment. The lack of the right to medical substitution is evident from the discussion of the revision of the law. This point should have been thoroughly discussed and dealt with, but there is a sense that the discussion is being postponed.

In Thailand, on the other hand, the powers and duties of guardians are very broad. Where the management of property is concerned, the guardian acts as an agent for the incompetent, who cannot act independently. From the fact that the provisions for guardianship of minors are applied *mutatis mutandis*, with the exception of disciplinary rights and labor engagement, it is clear that guardians are granted the right to manage personal custody.

As we can see from the above, the current system in Thailand does not have the exceptions that Japanese law provides concerning an incompetent person's capacity to act, so that all legal acts are subject to revocation, making the person more thoroughly incompetent than under Japanese law before the 1999 amendment. Therefore, this guardianship system is based on the premise of representation by a guardian, and is truly a full guardianship system and a substitute decision-making system. In addition, as a result of this thoroughly incapacitating system and substitute decision-making system, a situation has arisen in which a person is not able to perform a personal act which is not suitable for representation. As we have discussed, incompetent persons are not allowed to marry; this would be a ground for nullity. In Thailand, the incapacity to act is defined as including acts related to personal status, for which there is no provision under the system of representation, thus creating a vacuum in which neither the individual nor the adult guardian is able to act.

In Thailand, the capacity of the incompetent person to act is not fully recognized, so the authority of the adult guardian can be evaluated as correspondingly strong. To prevent the abuse of that authority, there are many types of legal acts that a guardian cannot perform independently. In Japan, the permission of the family court is required regarding the premises used as an adult ward's residence,¹¹² but in Thailand, the permission of the court is not limited to residential premises but is also required for other specific types of legal acts, in order to prevent

¹¹² Civil Code of Japan 1999, art 859/3.

the dissipation of the incompetent person's property. It can be said that Thai law is superior to Japanese law in terms of preventing the abuse of the right of representation by guardians.

In the case of a quasi-incompetent person, since the curator is able to consent to certain legal acts being performed independently, the decisions of the quasi-incompetent person are more likely to be respected; but according to Article 34, Paragraph 2, acts requiring the consent of the curator can be added, and according to Article 34, Paragraph 3, the curator can be granted the right of representation for acts requiring the consent of the curator. Therefore, if the granting of the right of representation to the curator is expanded unnecessarily, there is a risk that it will become very close to a substitute decision-making system.

Furthermore, there is an issue in Japan regarding the right of adult guardians to consent to medical treatment. In Thailand, since the authority of the guardian of an adult applies *mutatis mutandis* to the provisions concerning the authority of a person with parental authority, it can be said that the guardian of an adult has the legal right of substitution, since the same rights are granted to the guardian of an adult as to a person with parental authority carrying out their duties towards a child. In addition, Article 21, Paragraph 3 of the Mental Health Act (2008) provides for adult guardians and curators, as well as spouses and persons with parental authority, as having the right of substitution for persons under 18 years of age and persons who lack the capacity to make decisions, regarding consent to medical treatment.

F. Supervisors

Since the guardian holds the powerful authority of representation, there is concern about the abuse of this authority. To address this problem, external supervision is necessary. In Japan, the court is involved in the appointment of residential property and approval of its sale. In addition, a guardian supervisor can be appointed to supervise a legal guardian, and this was extended to include curators and assistants when the law was revised in 1999. In the case of voluntary guardianship, a guardian supervisor is mandatory.

G. Protection of the Other Party

Where the protection of the other party is concerned, the other party is not granted the right of demand as in Japanese law, or the right of rescission as in German law. Therefore, annulment due to a limitation of capacity is only possible from the side of the person with limited capacity.¹¹³ The other party becomes dependent on the exercise of the right of rescission on the part of the person with restricted capacity to

¹¹³ กิตติศักดิ์ ปรกติ, คำอธิบายกฎหมายลักษณะบุคคล: บุคคลธรรมดาและนิติบุคคล (พิมพ์ครั้งที่ 9, วิทยุชน 2561) [Kittisak Prokkati, *Explanation on the Law of Persons: Natural Persons and Legal Persons* (9th edn, Winyuchon 2018)] (Thai) 128.

act, resulting in a precarious situation. This is evidence of priority being given to the protection of persons with restricted capacity to act.

H. Evaluation through Comparison

Thus, even though the Thai system has some similarities with the Japanese law, the capacity of an incompetent person to act is more limited as compared to the 1898 law, which was used as a model law. It also gives strong powers to guardians and curators and adopts a substitute decision-making system. In this system, it can be said that the court's involvement is largely allowed, so as to prevent abuse of the guardian's rights. The Thai system can be evaluated as having a continuously strong idea of protection from the time of its establishment to the present.

V. AN INCREASING NUMBER OF ELDERLY PEOPLE AND THE GUARDIANSHIP SYSTEM IN THAILAND

As the aging of Thailand's society progresses, it is expected that a large number of people with insufficient capacity to make decisions will emerge. The question is how to deal with the increasing number of elderly people with inadequate judgment capacity, especially those with dementia. So far, Thailand has concentrated its attention on income security, with little interest in the guardianship system. This can be attributed to the severity of the problem of insufficient savings among the elderly in Thailand.¹¹⁴ The Completed Report for the Project on a Comparative Study on the Laws Regarding the Appointment of a Guardian for the Elderly¹¹⁵ is one of the few works that focus on the property management of the elderly, and includes the guardianship system in its scope.

However, in Japan and some other countries, guardianship systems are attracting attention due to their aging populations, not only in terms of property management but also in terms of personal custody. Therefore, even if there is a problem of insufficient savings among the elderly in Thailand, the guardianship system is an issue that must be considered from the perspective of property management and personal care.

¹¹⁴ Kobsak, "Long-term Saving in Thailand" (n 8).

¹¹⁵ ภูมิ มูลศิลป์และคณะ, "รายงานฉบับสมบูรณ์ โครงการการศึกษาเปรียบเทียบกฎหมายเกี่ยวกับการตั้งผู้ปกครองทรัพย์สินผู้สูงอายุ" มูลนิธิสถาบันวิจัยและพัฒนาผู้สูงอายุไทย (2561) [Poom Moolsilpa and others, "Completed Report for the Project on a Comparative Study on the Laws Regarding the Appointment of a Guardian for the Elderly" *Foundation of Thai Gerontology Research and Development Institute* (2018) <<https://thaitgri.org/?wpdmpo=%e0%b8%a3%e0%b8%b2%e0%b8%a2%e0%b8%87%e0%b8%b2%e0%b8%99%e0%b8%89%e0%b8%9a%e0%b8%b1%e0%b8%9a%e0%b8%aa%e0%b8%a1%e0%b8%9a%e0%b8%b9%e0%b8%a3%e0%b8%93%e0%b9%8c%e0%b9%82%e0%b8%84%e0%b8%a3%e0%b8%87-22>>] (Thai).

As we have discussed so far, the Thai system of capacity and guardianship has a very strong character of protecting those who have insufficient capacity to make decisions. This character has not changed since the time of legislation. In Japan, as mentioned above, the law was also amended to respect the right to self-determination, utilize remaining capacities, and harmonize normalization and protection of the individual. Some European countries are also reforming their guardianship systems.

Regarding this issue, Thailand has already been required to change its system concerning the rights of people with disabilities. For a long time, the international community viewed people with disabilities as objects of protection, welfare, treatment, and rehabilitation. Therefore, various human rights treaties have guaranteed the human rights of people with disabilities in theory, but have not protected them in reality. However, as the concept of normalization spread around the world, the right to self-determination also came to be emphasized. In response to these developments, the view of people with disabilities as “subjects” of human rights, rather than “objects” of treatment and protection, has become stronger. Based on this shift in the view on people with disabilities, the Convention on the Rights of Persons with Disabilities was adopted in 2006.

Thailand ratified the Convention on July 29, 2008. Article 35 of the Convention requires the Thai government to submit a comprehensive report on the measures it has taken to fulfill its obligations under the Convention and the progress it has made. In response to Thailand’s first report since the Convention entered into force, the Committee on the Rights of Persons with Disabilities adopted its concluding observations at its fifteenth session, held in March and April 2016.¹¹⁶

The Committee, in the summary of findings adopted at its fifteenth session, expressed deep concern about substitute decision-making and guardianship regimes in Article 12.¹¹⁷ And in the light of General Comment No. 1 on equal recognition before the law, the Committee urged the Thai government to repeal substitute decision-making regimes, especially those provided for in Articles 28 and 1670 of the CCCT, and replace them with supported decision-making systems that uphold the autonomy, will and preferences of persons with disabilities.¹¹⁸

The Committee also referred to involuntary medical measures, including forced sterilization and abortion, which are relevant to the issue of the right of

¹¹⁶ For more information on the discussion on guardianship and involuntary medical measures in Session 15, see 西澤希久男「タイにおける障害者の法的能力の現状とその問題点」小林昌之編『アジアの障害者の法的能力と成年後見制度-障害者権利条約から問い直す』生活書院 2021 [Kikuo Nishizawa, “Current Status of Legal Capacity of People with Disabilities in Thailand and its Problems” in Masayuki Kobayashi (ed), *Legal Capacity of Persons with Disabilities and Adult Guardianship System in Asia: Review from the Convention on the Rights of Persons with Disabilities* (Seikatsushoin 2021)] (Japanese).

¹¹⁷ United Nations Committee on the Rights of Persons with Disabilities (CRPD), *Concluding Observations on the Initial Report of Thailand* (CRPD/C/THA/CO/1) (2016) para 25 <<https://digitallibrary.un.org/record/830768>>.

¹¹⁸ *ibid* para 26.

substitute consent to medical care, in parts of Article 17 of the Convention. This states that even now, persons with disabilities are subject to involuntary medical measures, including forced sterilization and abortion. Therefore, the Committee recommends the Thai government to take effective measures to protect persons with disabilities, including women, girls, and boys, from coercive measures, in particular sterilization and abortion, and to ensure that the individual right to free, prior and informed consent is upheld and that a system of supported decision-making is provided.¹¹⁹ It has been reported that forced sterilization of persons with disabilities is still practiced in Thailand.¹²⁰ In this regard, during the 237th meeting held during the 15th session of the Committee on the Rights of Persons with Disabilities, a Thai government official acknowledged cases of forced sterilization of children with disabilities. There, it was held that parents can decide regarding sterilization after being informed about the risks and consequences of the operation and about alternative methods.¹²¹ The Thai government official also stated that the procedure for sterilization must be approved by a team composed of a psychiatrist, general practitioner, nurse, lawyer, social worker, etc., but noted that in practice it may not be consistent with the method prescribed by law, especially in rural areas.¹²²

Regarding involuntary sterilization, an involuntary medical measure noted by the Committee, the publication by Asaree Thaitrakulpanich focused on children with disabilities,¹²³ and thus there is little mention of sterilization of adults with disabilities. However, Article 21, Paragraph 3 of the Mental Health Act (2008) provides for adult guardians and curators, along with spouses, as persons with the right of substitution for those who lack the capacity to make decisions regarding consent to medical procedures. As a general rule, women with mental disabilities are able to give informed consent to undergo sterilization,¹²⁴ but if they are found to be incapable of making decisions regarding consent, their guardian has the right to decide on their behalf and can ignore their intentions.

The Mental Health Act grants the right of consent to the curator of a quasi-incompetent person who lacks the capacity to consent. Although there is a big difference between the powers of guardians and curators in property contracts, it is a characteristic and current situation in Thailand that adult guardians and curators are granted the same right to consent to medical treatment, albeit only in cases where the incapacity to consent is present.

Based on the above examples, a guardian who has the right to substitute consent for medical care can have a great deal of power over the medical care of an

¹¹⁹ *ibid* para 36.

¹²⁰ Asaree Thaitrakulpanich, "For Developmentally Disabled Girls, Sterilization Cast as Protection" *Khaosod English* (6 November 2018) <<https://www.khaosodenglish.com/news/2018/11/06/for-girls-sterilization-cast-as-protection/>>.

¹²¹ United Nations Committee on the Rights of Persons with Disabilities (CRPD), *Summary Record of the 237th Meeting* (CRPD/C/SR.237) (2016) para 11 <<https://digitallibrary.un.org/record/835378>>.

¹²² *ibid* para 12.

¹²³ Asaree, "Developmentally Disabled Girls" (n 120).

¹²⁴ CRPD, *Summary Record* (n 121) para 11.

incompetent person, and there are concerns about the abuse of that power. Although the involvement of the court is provided for in the management of property, such involvement is not provided for in personal custody issues, especially with regard to the right of substitute consent for medical care. As the system is designed with property issues in mind, medical issues are not included in the scope of the system. As the aging of the population progresses, the issue of medical care is expected to become more important, and this will need to be addressed.

VI. CONCLUSION

An aging population is not an issue faced by only a few countries; it has become a global trend—also encompassing Thailand. The increasing number of elderly people calls for a variety of institutional responses, and the guardianship system is one of them. Japan and Western countries are reforming their guardianship systems. There have been constant calls for reform of the guardianship system due to revelations of misconduct by guardians and other abuses within the systems of developed countries. A greater respect for the right to self-determination and normalization has also demanded that the guardianship system be reformed. In Thailand, a reform was implemented in 1990 to prevent abuse of parental authority, and this reform has been applied to guardians as well, so there has been some institutional response to address guardian misconduct. However, since it is limited to certain property contracts, it does not address the issue of medical care, which is expected to become more important as the population ages. In addition, respect for the right to self-determination and normalization are at present also missing.

The current form of guardianship system adopted by Thailand and other countries around the world, i.e., a substitute decision-making system that limits the legal capacity of those with inadequate ability to make decisions and allows the guardian to act in their place, has been the subject of criticism. That criticism has arisen in the context of disability issues.

Thailand needs to revise its guardianship system to accommodate the expected aging society and comply with the Convention on the Rights of Persons with Disabilities. The central principles of the revision are respect for the elderly and disabled as human rights subjects and the right to self-determination.

Based on these principles, the following issues need to be discussed:

Increase the number of activities that an adult ward can perform independently. The number of acts that an adult ward can perform independently should be increased, including the purchase of daily necessities and other acts related to daily life. Further, personal acts such as marriage and wills should be made possible.

Replacement by a supported decision-making system. Replace the current system of substitute decision-making with a system of supported decision-making, reducing as

much as possible the extent to which guardians can exercise their power of representation.

Respect for the wishes of the people themselves in the appointment of guardians, curators, and assistants. Allow people to choose their guardians, curators, and assistants, not only have them appointed by the court. This should include the diversification of guardians, to include legal entities.

Elimination of the qualification clause. Examine the conditions of physical and mental disabilities individually and practically, rather than disqualifying all those who have been adjudicated incompetent or quasi-incompetent.

Flexibility of the system according to the degree of decision-making capacity. In order to use the remaining capacity of the individual and to maximize the use of that capacity, acts for which the consent of a curator is required should be determined on an individual and specific basis.

In addition to the above, the following two issues also need to be considered:

Prevention of abuse of the powers of guardians, etc. It should be possible to appoint a supervisor to oversee the guardian, etc. In addition, the court will be required to examine the guardian, curator, or assistant after a certain period has passed, even after the respective person has been appointed.

Protection of counterparties in transactions. Introduce a new method of early determination of a contractual relationship, in cases of uncertainty as to whether or not the contract can be revoked by an initiative from a guardian or a curator. The method may be the right of demand or the right of rescission.

Traditionally, civil law has focused on individuals who can think rationally and economically and establish legal relationships. Those with insufficient capacity to make decisions were seen as exceptions, and were subject to protection through substitute decision-making by those with the capacity to make decisions. As suggested above, the replacement of the substitute decision-making system with the supported decision-making system means that those who are protected as exceptions are reconsidered as subjects of acts. This shift will force a revision in the fundamental thinking of civil law. This revision is expected to be a tough challenge. However, to enable all members of society, including the elderly and disabled, to live independently in the coming super-aged society, it is necessary to overcome this challenge. If Thailand takes swift action, its achievements will serve as a model for other countries around the world to follow.