

THAILAND AND THE PROTECTION OF VICTIMS, PARTICULARLY WOMEN AND CHILDREN AGAINST DOMESTIC VIOLENCE, SEXUAL OFFENCES AND HUMAN TRAFFICKING

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INTRODUCTION

There is a saying that crime is a phenomenon. It takes place almost everywhere, regardless of race, nationality, financial status, etc. However, records show that women and children are vulnerable to become the victims of crimes, including domestic violence, sexual offences, and human trafficking in particular. In the case of Thailand, the number of domestic violence where the victims are women and children has been soaring dramatically, from 84 cases in the year 2000 to 143 cases in the year 2003³.

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Alongside, sexual offences happened to women and children also increased from 4,036 cases in the 2000 to 4,445 cases in the year 2002, while the trafficking of women and children to and from Thailand has been increasing continuously⁴. Also interestingly, many of human trafficking cases are conducted by organized groups, both at domestic and international levels⁵.

As far as a successful prosecution is concerned, victims must be well protected as they are star witnesses whose testimony can convince the court as to who the traffickers are, and what they did to the victims. Once the court is convinced 'beyond reasonable doubt', the traffickers will be convicted, which will in turn help women and children to live in this world more safely.

This paper is divided into two parts: victim protection in general; and victim as an important witness. It begins with the review of the rights of victim in general before investigating those of women and children in particular. Throughout, the paper discusses the existing measures used in various countries, including Thailand. It also suggests the potential measures which should be adopted under the Thai laws in order to provide protection for the victims more effectively.

PROTECTION OF VICTIMS IN GENERAL

As far as the criminal justice administration is concerned, a victim of a crime has two significant roles to play i.e., as a complainant/informant, and as a witness for the prosecution. Regarding how a criminal offence becomes a 'case', a victim is usually the person who brings the case to the relevant authorities. In doing so, the victim has to give statements to the officials as a witness as well. At this stage, the investigation of a crime may not come to a logical conclusion without the victim's active participation. Further, if the case is brought to court, the victim's testimony in court is usually accepted as the best piece of evidence that can be used against the accused. More specifically to the victims

⁴ Information Center, the National Police Bureau.

⁵ Wanchai Roujanavong, 'Thailand: The Situation of Trafficking in Women', in Proceedings of the 1997 Regional Conference on Trafficking in Women and Children, Bangkok, Thailand, at 340.

who are women and children, it is likely that they are relatively sensitive to the feeling of threat unless they are well treated.

What does the term 'victim' really mean? The General Assembly of the United Nations in its 96th plenary meeting on November 29, 1985 made a Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. The declaration defines victims as "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are violations of criminal laws operative within member states, including those laws prescribing criminal abuse of power"⁶.

Ironically, despite being an important component of the criminal justice system as discussed above, it is apparent that too little attention has been paid to the rights of victims⁷, especially when compared to those of the offenders. The rigid principle that the plaintiff in a criminal case has to 'prove beyond reasonable doubt', otherwise the case will be dismissed is a good example for this argument⁸.

As the persons suffered from crime, the UN General Assembly affirmed the necessity of adopting national and international norms in order to secure universal and effective recognition of and respect for the rights of victims of crimes and victims of abuse of power. It was also declared that offenders or third parties responsible for their behavior should, where appropriate, make fair restitution to victims, their families or dependents. This declaration has been described as a "kind of Magna Carta of the rights of victims" worldwide. The declaration recognised the rights of victims of crime as follows:

⁶ Jaganncha Rao, Witness Protection, Paper presented as the keynote address at the National Consultation on the Protection of Victim of Trafficking and Other Forms of Violence, November 19, 2005, accessed through the internet at www.sabrag.com/cc/arcgve/2005/dec05/humanrights.html

⁷ Eliane Pearson, Human Traffic, Human Rights: Redefining Victim Protection, accessed through the internet at www.anti-slavery.org/archive/other/trafficking.programme.html

⁸ Under Section 227 of Thailand's Criminal Procedure Code, if there is any doubt regarding if the defendant committed the crime, that defendant will enjoy the benefit of the doubt and be acquitted from the charge accordingly.

1. Access to justice and fair treatment – This includes the mechanisms of justice and prompt redress, sufficient information of the victim's rights, the right to proper assistance throughout legal proceedings, and the right to protection of privacy and safety. As regards the victims who are women or children in sex-related offences, it must be ensured that they will not be discouraged or insulted by the government officials when they either report or give statements to the officials⁹.

It should be noted that Thailand has Memorandum of Understanding on Common Guidelines of Practices among Concerned Agencies for Operation in Case Women and Children are Victims of Human Trafficking, B.E. 2542 (1999) agreed between the Prime Minister Office, the National Police Bureau, Ministry of Public Welfare, and NGOs in place. The MOU was intended to enhance cooperation between police and public welfare officials regarding the treatment of trafficked persons (both Thai and non-Thai), and to improve chances of successful prosecution. It stipulates that foreign women and children who have been trafficked into Thailand should not be treated as illegal migrants. Moreover, the women and children trafficked to Thailand who agree to testify against traffickers can stay in Thailand throughout the trial period, and are entitled to food, cloth, housing, medical care and counseling¹⁰.

2. Restitution – This right includes return of property that the victim has suffered from harm or loss as a result of the offenders' wrongdoing. In the event that public officials or other agents are those who have committed the crime, the state should be responsible for the restitution to the victims. Then the state will claim for what it has paid to the victim from the offenders subsequently.

3. Compensation – As we all know, the victim is usually entitled to claim for compensation in civil cases in parallel with criminal cases for any damages resulted from the offenders' actions. Nevertheless, whenever compensation is not fully available from

⁹ See Nattamon Kongcharoen et al., The Rape Committed by Criminal Justice Administration, an article in the website of Midnight University.

¹⁰ Eliane Pearson, Human Traffic, Human Rights: Redefining Victim Protection, accessed through the internet at www.anti-slavery.org/archive/other/trafficking.programme.html

the offender or other sources, the state should provide financial compensation, at least in violent crimes which result in bodily injury. To make this happen, the declaration suggests that national funds be established.

In Thailand, the government has recently introduced the Act on Compensation for Victims, and Compensation as well as Expenses for Defendants in Criminal Cases, B.E. 2544. Although the Act's title carries the name 'criminal cases', the compensation for the victims is however limited to the offences specified in the Annex of the Act. For the purpose of this paper, it should be noted that the sex-related offences are ones of the cases the victims of which are entitled to such compensation¹¹.

4. Assistance – Victims should be provided with necessary material, medical, psychological and social assistance through governmental, and voluntary and community-based means. Police, justice, health and social service personnel should receive training in this regard.

In Europe, the Convention on the Compensation of Victims of Violent Crimes incorporates the essential rights of victims as stipulated in the UN declaration. The Council of Europe has recommended the revamping of criminal justice incorporating victim's rights in every stage of criminal proceedings. Following this recommendation, many countries in Europe and elsewhere enacted laws aimed at providing increased participation and more substantive rights to victims of crime. Examples include the Criminal Injuries Compensation Act, 1995 of the UK, the Victims of Crime Assistance Act, 1996 of Victoria, the Victim and Witness Protection Act, 1982 of the USA, the Victims' Rights and Restitution Act, 1990 of the USA.

With regard to assistance in human trafficking cases, it should be noted that Thailand has the Act on Measures of Preventing and suppressing the Trafficking of Women and Children, B.E. 2540 (1997). The Act stipulates that the government officials concerned must provide assistance to the victims who are women and children. The

¹¹ See Act on Compensation for Victims, and Compensation as well as Expenses in Criminal Cases, B.E. 2544, Sections 17, 18.

assistance includes food, housing, and return of the victims to their home towns or countries¹².

As regards Thailand, the country has the Memorandum of Understanding on Common Guidelines of Practices among Concerned Agencies for Operation in Case Women and Children are Victims of Human Trafficking, B.E. 2542 (1999) signed between the Prime Minister Office, the National Police Bureau, Ministry of Public Welfare, and NGOs as discussed earlier. The MOU also states that trafficked persons are entitled to food, clothing, medical care and counseling from the Thai government¹³.

VICTIMS AS IMPORTANT WITNESSES

As stated earlier, every victim is an important witness, the testimony of whom could be decisive in most of the cases. "Witnesses," as Bentham said, "are the eyes and ears of justice." If a victim himself is barred from serving as the eyes and ears of justice, the trial becomes weak and paralysed, and can no longer constitute a fair trial¹⁴. This is the reason why the victims should be protected for giving effective witnesses' testimony.

There are two important aspects as to the protection of witnesses. The first is to ensure that evidence or the statement of a victim that has already been recorded at the stage of investigation will not be distorted in court trials by the victims themselves despite under oath. This phenomenon, of victims turning 'hostile' on account of the failure to protect the victim, is one aspect of the problem.

The second aspect is the physical and mental vulnerability of the victims, especially those who are women and children. Records show they are often threatened by traffickers with an aim to discouraging them for their cooperation with the criminal

¹² See Section 11 of the Act on Measures of Preventing and Suppressing the Trafficking of Women and Children, B.E. 2540 (1997)

¹³ Eliane Pearson, Human Traffic, Human Rights: Redefining Victim Protection, accessed through the internet at www.anti-slavery.org/archive/other/trafficking.programme.html

¹⁴ Jaganncha Rao, Witness Protection, Paper presented as the keynote address at the National Consultation on the Protection of Victim of Trafficking and Other Forms of Violence, November 19, 2005, accessed through the internet at www.sabrabg.com/cc/arcguve/2005/dec05/humanrights.html

justice officials. Take Jaem case. Jaem is a Thai woman trafficked to England for prostitution. She escaped and went to the British Police. After returning to Thailand, Jaem identified the trafficker to the police who did not provide her with any protection. During the stage of investigation, she returned to her home village. At the bus terminal two men stalked her and her friend who was a witness in her case. When they arrived in her home town, a car tried to run them over. Both of them were so afraid that they hid in a hotel and contacted the Global Alliance Against Traffic in Women (GAATW), a local NGO. GAATW staff then contacted the local police for assistance. Since then, Jaem did not want to continue any legal proceedings as she felt her life was in danger¹⁵.

The protection of the victims should be provided 'from cradle to grave', i.e., at all stages of the criminal justice process till the conclusion of the case. These may include the following:

1. Anonymity of victims – In all rape trials, 'anonymity' of the victims should be maintained as far as necessary so that the name is shielded from the media and public. As many scholars suggest, the courts should avoid disclosing the name of the victims in the rape case as far as possible in order to save them from further embarrassment¹⁶. In fact, the identity of victims, along with their addresses may be kept confidential throughout criminal proceedings. This includes the process where copies of the complaint are delivered to the accused. The court also observed that the experience of giving evidence in court has been negative and destructive and the victims often expressed that they considered the ordeal of facing cross-examination in the criminal trial to be even worse than the rape itself¹⁷.

¹⁵ Eliane Pearson, Human Traffic, Human Rights: Redefining Victim Protection, accessed through the internet at www.anti-slavery.org/archive/other/trafficking.programme.html

¹⁶ Ibid.

¹⁷ Ibid. See also Nattamon Kongcharoen et al., The Rape Committed by Criminal Justice Administration, an article in the website of Midnight University.

The idea of keeping the victims' names anonymous are well responded in many countries. The New Zealand Evidence Act of 1908 contains detailed provisions regarding the maintenance of anonymity of victims and witnesses¹⁸.

In the UK, the court is empowered to withhold the name of the victim/witness in a criminal trial. Section 11 of the UK Contempt of Court Act, 1981 provides that the court may give directions to prohibit the publication of names or other matter in connection with the proceedings. In *R. vs Murphy*, 1989 it was held that the identity of the witness should be kept secret not only from the accused but also from the defence lawyer¹⁹.

In Canada, anonymity of witnesses/victims is treated as a privilege granted under common law. The European Court of Human Rights has in *Kostovski* (1990), *Doorson* (1996), *Fitt* (2000) and *Visser* (2002) recognised the need to protect the identity of victims/witnesses²⁰.

Thailand however does not have such legislation that allows the identity and addresses of the victims to be kept confidential. What exist in Thai laws in this regard are the trial in camera, and the examination of witnesses through the presiding judges, details of which will be discussed later in this paper.

2. Trial of sex-related offences in camera the trial of certain sexual offences should be conducted in camera. In the cases that the victims are women or children who are relatively sensitive to surrounding circumstances, giving testimony in front of the public and the media could create a sense of embarrassment in their mind. This would help the victims, to give their testimony more naturally. Records show that the more comfortably the witnesses feel while giving testimony, the more quality of evidence the trial can get.

¹⁸ Ibid.

¹⁹ www.belgium.iom.int/AGIS2003/PDF/Witness_protection_composite

²⁰ Ibid.

Trial in camera in the sex-related offences has become more acceptable internationally. For example, although the European Convention for the Protection of Human Rights and Fundamental Freedoms supports the right to ‘open justice’, it however suggests that the exceptions in the interests of morals, public order, national security and protecting the privacy of juveniles and others where publicity could otherwise prejudice the interests of justice be needed²¹.

Elsewhere, Section 153 of the South African Code of Criminal Procedure permits criminal proceedings to be held in camera to protect privacy of witnesses²².

Turning to Thailand, the Criminal Procedure Code provided that where the court himself thinks fit, or upon a request by any party in the case, the court is empowered to order the trial to be held in camera, providing such measure will be for the benefits of public order, morality, or national security²³. It should be noted that Thai courts often order the trial to be held in camera for the purposes stated above. For the purposes of this paper, this could guarantee that when the victims, especially those who are women and children, do their witness duty in the trial, it is very likely that the trial will be conducted in camera.

Another piece of Thai legislation involving this matter is the Act on measures of prevention and suppression the trafficking of women and children, B.E. 2540 (1997). The Act allows prosecutors to bring the victims who are women or children to give testimony in court although the accused has not been arrested. Also importantly, the testimony given by such victims is still admissible even though the accused is arrested and prosecuted later on²⁴.

²¹ Eliane Pearson, Human Traffic, Human Rights: Redefining Victim Protection, accessed through the internet at www.anti-slavery.org/archive/other/trafficking.programme.html

²² Ibid.

²³ See Section 177 of Criminal Procedural Code.

²⁴ See Section 12 of the Act on measures of prevention and suppression in the trafficking of women and children, B.E. 2540 (1997).

3. Use of screen during the victims' testimony – According to the laws in most countries, including Thailand, trials are usually conducted in the presence of the defendants²⁵. Against this background, most women or children who are victims have hesitation to give statements freely in the presence of offenders. This is especially the case for the sex-related offences. Merely a glance of the defendant may generate a feeling of extreme fear or embarrassment in the mind of the victims who are doing witness duty. In this regard, the Law Commission in its 172nd Report (2000) has recommended that where the testimony of a person below 16 years who is alleged to have been subjected to sexual assault is to be given, the court may take appropriate measures to ensure that such a person is not confronted by the defendant²⁶. Such measures include the use of a screen or some equipment that can help prevent the victims from seeing the body or face of the defendants during their testimony²⁷.

Under sections 16 to 33 of the UK's Youth Justice and Criminal Evidence Act, 1999, if a defendant in person seeks to dominate, intimidate or humiliate a complainant, or should it be reasonably apprehended that he will do so in the case where children give evidence in criminal trials about sexual abuse, the court is required to consider special measures of various kinds for protection of vulnerable and intimidated witnesses. As a result of these provisions a screen is allowed to be placed between the witness and the defendant in the above-mentioned cases²⁸.

So far, Thailand has not yet to adopt the use of screen as a legal measure to protect the victims from being confronted with the defendants.

4. Taking testimony through video conferencing – Taking testimony by way of video conferencing is another method by which the victims may avoid direct confrontation with the defendants while giving testimony. Records show that this

²⁵ See Section 172 of Criminal Procedural Code.

²⁶ Eliane Pearson, Human Traffic, Human Rights: Redefining Victime Protection, accessed through the internet at www.anti-slavery.org/archive/other/trafficking.programme.html

²⁷ Ibid.

²⁸ Ibid.

method has become more permissible as the victim would feel more comfortable and will testify without any fear or pressure²⁹.

In the UK, video conference is admissible in certain cases namely: (a) an offence which involves an assault on or injury or threat of injury to a person, (b) an offence of cruelty to persons under the age of 16 years, and (c) offences under the Sexual Offences Act, 1956 and 1967, Indecency with Children Act, 1960, Protection of Children Act, 1978, etc³⁰.

It should be noted that video conferencing has not been allowed for the victims to give testimony under the Thai laws.

5. Examination through the questions handed over to the judges - Victims, particularly who are women or children, in sex-related cases, usually feel embarrassed due to the questions put by the defense lawyer during cross-examination. Often, such questions are purposely designed to embarrass or confuse the victims of rape or child abuse. The reason is that feeling of shame or embarrassment could result in the victims not speaking out or giving details of certain acts committed by the defendants.

Against this backdrop, a suggestion has been made that in some cases, instead of directly putting questions to the witness by the defense lawyers, a set of questions may be lodged to the judge by the defense before the hearing. The presiding judge then will be able to rephrase those questions to the language which is not embarrassing when putting them to the victims during the trial. This strategy could help protect the victims from being jeopardized by the questions designed to embarrass the victims as discussed above³¹.

²⁹ Jaganncha Rao, Witness Protection, Paper presented as the keynote address at the National Consultation on the Protection of Victim of Trafficking and Other Forms of Violence, November 19, 2005.

³⁰ www.belgium.iom.int/AGIS2003/PDF/Witness_protection_composite

³¹ Jaganncha Rao, Witness Protection, Paper presented as the keynote address at the National Consultation on the Protection of Victim of Trafficking and Other Forms of Violence, November 19, 2005.

Interestingly, Thailand's Criminal Procedural Code provides that instead of allowing parties in the cases to ask questions to the victims as usual, the judges may do such things to the victims who are juveniles not over eighteen years of age either directly or through psychiatrists or social welfare officials. Alternatively, the judges may let both parties ask questions to such victims through psychiatrists or social welfare officials³². It is clear that this provision therefore could help protect the victims from being asked questions by defense lawyers directly. However, such protection is limited to the victims who are children only. This paper therefore suggests the Thai government consider expanding the provision to cover the victims who are women as well.

6. Changing venue of trial – In certain circumstances, the venue of the trial may be shifted if the victims are reluctant to testify. In India, for example, Sections 406 and 407 of the Code of Criminal Procedure, 1973 contains provisions in respect of transfer of cases. The Supreme Court in Zahira Sheikh's case has recently ordered a shift in the venue of the trial from Gujarat to Maharashtra. This measure has been done in cases in the UK and Northern Ireland also³³.

In Thailand, the Criminal Procedural Code stipulates that the court may order the trial venue be transferred if either any party or the presiding judge considers that it would be very dangerous to any party as well as witnesses if the trial is conducted in the court who has the jurisdiction over the case³⁴.

7. Providing physical and other protection to victims – If required, victims may be provided with physical and other protection. To achieve this goal, victim protection programs may be established. Such protection could be done in many forms, including police protection to victims and their family members, provision of new places to live, change of identification, financial support, transport facilities. The Law

³² See Thailand Criminal Procedural Code, Section 177 tri

³³ Jaganncha Rao, Witness Protection, Paper presented as the keynote address at the National Consultation on the Protection of Victim of Trafficking and Other Forms of Violence, November 19, 2005.

³⁴ See Thailand Criminal Procedural Code, Section 26.

Commission in its consultation paper has discussed this aspect in detail, along with the schemes prevalent in various countries.

Currently, the use of victim/witness protections programs has been in place both at the international and domestic levels. For example, Article 24 of the United Nations Convention against Transnational Organised Crime contains provisions for witness protection.

In the U.S., the Victim and Witness Protection Act of 1982 contains several provisions to aid victims and witnesses of federal crimes.

Australia is another country where the law on witness protection has been in place. The Parliament of Victoria has enacted the Witness Protection Act, 1991, which contains provisions on a witness protection programme. For the Australian Capital Territory (ACT) a separate legislation, namely, the Witness Protection Act, 1996 is in force. In Queensland, the Witness Protection Act, 2000 is also in force.

The Witness Protection law is also pervasive in many countries. These include South Africa, Portugal, and Hong Kong.

Turning to Thailand, the country has enacted the Witness Protection in Criminal Cases Act in 2003. More specifically to offences where the victims are illegally trafficked for sex-related purposes, such legislation introduces the ‘special measures for witness protection’. The measures include relocation or provision of suitable accommodation for the witness, change of identification, and provision of government officials to ensure the witness’ safety during necessary period of time³⁵.

Furthermore, the amendment of the Thai Criminal Procedural Code in 1999 also included the protection of children in the stage of investigation. The law requires that in the investigation of any case where a child is victim or witness, the inquiry must be jointly conducted by a psychiatrist or a social welfare official, a person required by the children, a public prosecutor, and a police investigator, instead of allowing a police investigator to

³⁵ See the Witness Protection in Criminal Cases Act ,2003, Sections 8 and 10.

handle the inquiry alone like in general cases³⁶. Obviously, such an amendment was conducted to improve the protection of victims who are children.

CONCLUSION

As we have seen, women and children in many countries, including Thailand have been facing the threat of being victims in domestic violence, sexual offences, and human trafficking. We also have learned that many countries introduced various measures in their legislation in order to cope with the situation such as keeping the victims' identity anonymous, trials in camera, taking testimony through video conferencing, etc. This paper argues, however, that no matter what innovative and sophisticated measures are introduced, chances of having traffickers convicted remain slim unless all agencies concerned implement and enforce the laws for which they are responsible seriously. This includes to cooperate with other agencies vigorously. The rights of the victims must be respected, and they must be fully convinced that they are, and will be protected from relevant authorities. Without the victims' cooperation, it is difficult to improve the ailing situation.

³⁶ See Section 133 bis of Thailand Criminal Procedural Code