



Child Testimony: Between Evidentiary Requirements and the Need to Protect the Child Witness/Victim of Commercial Sexual Exploitation

Thailand's response

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Abstract

The trial phase is one of the most crucial and symbolic moments of criminal justice, which clearly reflects the state's criminal policy and social security guarantees. At the same time the process represents one of the possible features through which fundamental rights, rather than being preserved, can be compromised. This is particularly true in those cases involving child testimony, where the coexistence of the need of protection of vulnerable witnesses and evidentiary requirements imply an accurate assessment and balancing of the interests at stake. This paper will present the controversial aspects of child witness/victim of commercial sexual exploitation, within the Thai justice system. The psychological and legal aspects of hearing will be analyzed alongside with the concrete child victim/witness protection effort in Thailand.

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Introduction

Testimony is a critical phase in the criminal trial and provides potentially crucial evidence for the outcome of the process. From the investigation and its presentation in the trial phase, statements of victims/witnesses represent an essential contribution to the justice system. Several factors make the hearing particularly delicate, especially in cases where the witness is a child. Firstly, those purely related to the need of physical and psychological protection of the victims and witness, particularly a child. Secondly, the psychological aspects related to child's memory and communication capacity. Finally, the factors deriving from the precarious position witnesses hold in the trial, and the consequence of their hostility, which may arise from the intimidating trial context or the actual threats they may suffer.

This paper will first outline the international regulations regarding protection of victims and witnesses, particularly children, through analysis of special legal protection needs and the techniques elaborated subsequently: the overview will give a portrait of the international standards to which states must adapt. The psychological aspects of child testimony will be examined in chapter 2, underlying child's communication, memory and suggestibility implications to be considered in examining a child. The focus will then move to an analysis of Thailand's special mechanisms to address the aforementioned problematic aspects. Although, through recent legislative acts and amendments, Thailand is implementing mechanisms to protect children within the criminal process, two main factors undermine their efficacy: lack of clarity and completeness of specific laws (in particular the Thai Constitution, the Criminal Procedure Code and the Witness Protection Act, 2003), and lack of enforcement of those laws.

1. International Standards

1.1 Witnesses in the Criminal Justice System

The trial phase represents one of the channels through which fundamental rights can be compromised, rather than being preserved. Victims bearing witness in a trial may be at risk of: re-victimization or secondary victimization that could be suffered during the trial phase (UNODC, 2008), potential threats, both physically and psychologically, as a consequence of their deposition in court and the outcome of the trial (UNODC, 2008), and the considerable anxiety that may compromise deposition (UNODC, 2008), and consequently affect the prosecution of criminal and efficacy of the justice system. All the aforementioned may consistently increase in cases involving child witness. Therefore, victims bearing witness in a trial are in a particularly sensitive position that should imply special protection.

International documents formulate standards, principles and guidelines for the protection of victims and witnesses. Victims' positions in the justice system are protected, firstly, by the "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power", adopted by the General Assembly with resolution 40/34 in November 1985. In addition to the definition of victim,¹ the

¹ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power: Definitions, "Victims" means 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 in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

document introduced the right to be treated with compassion and respect for dignity and entitlement to “access to the mechanism of justice and to prompt redress (...) from the harm that they have suffered” (Section 4 GA Declaration for Victims). Most importantly, victims have the right to assistance throughout the legal process, particularly those who have special needs (including children).

Another document to be considered is the UNODC Good Practice to Protect Witnesses in Criminal Proceeding Involving Organized Crimes (2008), also called UN Witness Protection Manual. This identifies three main objectives states should reach for the protection of witnesses. Firstly, witness assistance before and during the trial should enable the witness “to cope with the psychological and practical implications of testifying in a court of law” (UNODC, 2008). Secondly, police measures must be provided to ensure witnesses’ physical security. Finally, special court procedures must be settled “to ensure the witness’s safety during the giving of testimony” (UNODC, 2008). Witness assistance should, therefore, cover a broad period, starting from the first identification of the vulnerable witness and potentially extending past the conclusion of the trial.

1.2 International Standards: Child Witness

Said considerations must be adhered to even more strictly if the witness in question is a minor. Primary attention should be paid to the Convention of the Rights of the Child and to the two ECOSOC Resolutions 2004/27 and 2005/20 titled “Guidelines on justice for child victims and witnesses of crime.” These documents provide impetus to states to elevate the protection of child victim and witness in the trial phase.

Article 3 of the Convention on the Right of the Child (CRC)² introduces the “best interest of the child” principle, which applies to the child victim’s treatment within the criminal justice system. This relates to states and their operators: executive authorities, law-makers (parliaments) and judicial bodies, covering decision-making by all three arms of government (legislative, administrative and judicial) as well as public or private social welfare institutions³.

In recognition of the additional hardship children may suffer when assisting in the judicial process and the need for special protection that the child is guaranteed, the two ECOSOC resolutions provide a detailed list of rights: to be treated with dignity and compassion, to be protected from discrimination, to be informed, to be heard and to express views and concerns, to effective assistance, to privacy, to be protected from hardship during the justice process, to special protective measures, to safety and to reparation. Moreover, UNICEF and UNDOC have produced a “Model of Law” (Justice in Matters involving Child Victims and Witnesses of Crime, 2009) which gives concrete examples of legal techniques and protection mechanisms in relation to child victims/witness protection.

² Article 3 CRC: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”

³ Debates on the interpretation of the term of the best interest of the child involves several issues. The vagueness of the words is one of the main critics (Zermatten, 2010), as well as the relativity of the concept in relation to time, culture (Freeman, 2011) of the country in which the child lives, and state resources. Indeed the Convention does not define the principle, leaving to the interpreter the role to fill with content what has been defined as the umbrella of the Convention.

With special reference to children victim of commercial sexual exploitation article 8 of the Optional Protocol to the Convention on the Rights of the Child, on the Sale of Children, Child Prostitution and Child Pornography (hereinafter “the Protocol” or OPCRCSC) provides specific state’s obligations and guidelines for the protection of the victim/witness.

1.3 Child victim of Commercial Sexual Exploitation

A series of concrete obligations are listed by article 8 OPCRCSC: from the recognition of the child victim’s vulnerability and the subsequent need for support,⁴ to the duty to provide information to the child and let him/her to actively participate;⁵ from the protection of the child (and his/her family) safety⁶ and privacy,⁷ to the avoidance of unnecessary delay.⁸ These obligations have two types of concrete implications: on the one hand, a series of practical precautions aimed at preserving the child’s physical and psychological integrity. Such measures will differ from the usual witness protection merely with respect to the particular vulnerability of the subject. On the other, specific child-sensitive measures, or procedural techniques, must be set in the particular time of testimony/hearing. At the basis of these obligations lies the necessity to protect the child both physically and psychologically from the particular implications that a criminal process can entail. The concrete state obligation, can vary according to a wide variety of factors: the nature of the crime, the typology of the victim (his/her personality, maturity, elaboration of trauma, degree of fear and capacity to face stressful situations), relationship between the victim and the accused person, importance of the testimony.

The decisions coming from the balancing of interests are, in practice, performed by individuals: police personnel, judges, prosecutors; and the effective actions are carried out by other professionals, such as psychologists, social services and security services personnel. This is why article 8, paragraph 4, imposes to state parties to take measures to appropriately train the persons who work with victims.⁹

After having suffered the shock of the crime, the anxiety surrounding the often long, criminal trial may depend on several factors: concrete or perceived danger to physical safety, fear of threat or even psychological retaliation, desire to forget and not re-live the crime, lack of knowledge of the dynamics of legal proceedings. These factors can consistently interfere with the deposition and require appropriate precautions to make the experience with the courts the least traumatic possible. This is particularly true in reference to children.

Concretely, some of the sources of anxiety can be reduced by creating a series of witness assistance programs, which can provide psychological assistance to analyze with the children the dynamics surrounding the court, letting the victim/witness familiarize with the trial proceedings. This

⁴ Article 8 OPCRCSC, paragraph 1 let. (a) and (d)

⁵ Article 8 OPCRCSC, paragraph 1 let. (b) and (c)

⁶ Article 8 OPCRCSC, paragraph 1 let. (f)

⁷ Article 8 OPCRCSC, paragraph 1 let. (e)

⁸ Article 8 OPCRCSC, paragraph 1 let. (g)

⁹ Article 8 OPCRCSC, paragraph 4: “States Parties shall take measures to ensure appropriate training, in particular legal and psychological training, for the persons who work with victims of the offences prohibited under the present Protocol”

support/assistance should not involve discussions related to witness evidence or coaching him/her,¹⁰ to avoid influencing the witness deposition.

Physical safety is one other aspect that can easily be compromised. This includes threat of life and, most commonly, verbal intimidation and assault. To protect the victim from this typology of aggression, States should create witness protection programs. Since these kind of programs normally are provided only for extremely important cases related to serious threat against witnesses,¹¹ and they usually imply very intrusive forms of protection (relocation and identity change), in all other situations, still potentially considerably dangerous for the victim and his/her psychological status (verbal intimidation, assault, property damages), alternative measures to witnesses protection programs should be created. The principle behind this kind of program is similar to the one guiding the witness protection program: make it more difficult to track and intimidate the witness. Experience proves that this kind of situation can easily be solved through measures including temporary change of residence (to relatives house or nearby town), close protection or escort from and to court, minimizing public contact with uniform police, monitoring mail and phone and/or change of telephone number.

The article 8 obligation, as well as the ECOSOC resolution guidelines on justice for child victims and witnesses of crime,¹² impose upon states to respect the right of (active) participation of the child. In so doing they ensure the opinion and belief of the minor to be truly taken into consideration.

2. The Search for Legal Truth in Child Testimony

Psychological study is necessary and relevant to child testimony in a criminal trial in two different but related perspectives: a child's memory, and a child's response. On one hand, psychological studies related to child memory and communication capacity give propel and prompt the understanding and improvement of the legal techniques that may be used during in the actual moment of hearing, as well as during the interrogation and investigation phase. On the other, psychological studies on the physical, emotional and psychological consequences the crime has on victims is fundamental to understanding and deciding what kinds of protection the state should provide.

The actual hearing, as well as any moment in which a child is interrogated, will propagate dilemmas related to criminal procedure, particularly the methodology of questioning, and the particular capacity of the child for communication and memory, and his/her suggestibility. The need for accurate and complete information must be weighed against the psychological factors that mitigate the credibility of the child and his/her memory and expression capacity, and with criminal procedure, such as the legal prohibition against leading questions.

¹⁰UNODC, Good practices for the protection of witnesses in criminal proceedings involving organized crime (2008), New York p. 27

¹¹ Ibid. p. 29

¹² ECOSOC resolution 2004/27, principles: “(d) *Right to participation*. Every child has the right to express his or her views, opinions and beliefs freely in all matters, in his or her own words, and to contribute especially to the decisions affecting his or her life, including those taken in any judicial processes, and to have those views taken into consideration”

The first aspect to be considered is a child's memory and suggestibility. A child's ability to provide information during interviews is related to his/her memory (Mayers 1998, p. 105). Kuehnle & Connel's research (2009) demonstrates, on the one hand, that a child's capacity to access memories starts with events which occurred from the age of 3 onwards. Furthermore, with reference to the age of the interview, even if preschool-aged children do have substantial memory capacity (Mayers, 1998), research revealed that younger children generally provide less complete narrative reports and they are more susceptible to errors (Malloy & Quas, 2009). This is also particularly true in relation with to surrounding context and typology of questions. A child's accuracy, in fact, can also depend on the way questions are expressed. Free-recall questions typically imply quite an accurate report, even in young children, whereas direct questions are more destabilising and potentially increase inaccuracies (Malloy & Quas, 2009). This is also related to the pressure the child feels and his/her tendency to answer to the interlocutor's desired response (or the one he/she perceives as desired). When confronted by high-pressure questions, children, indeed, tend to answer even if they do not know the answer or do not understand the questions, without asking for clarification or admitting they do not know (Malloy & Quas, 2009).

Direct questions, moreover, can easily be classified as leading from a legal perspective. A suggestion hidden in the question, aside from being potentially illegal, can also undermine the credibility of the witness. Another factor leading to an increase in errors is the language used for the question. Formal legal language, so called 'legalese', is often misunderstood and, consequently, prone to eliciting inaccurate responses.

Repeated interviews should be avoided because "repeatedly recounting a traumatic event may lead to heightened distress in children" (Malloy & Quas, 2009). Furthermore, the responsiveness and willingness of children (as well as adults') is substantially reduced in the presence of the accused during the testimony. The fear of the defendant makes it difficult for the child to answer the given questions. The presence of the accused person should, therefore, be avoided at all costs. Studies on the physical and psychological consequences of victimization deriving from commercial sexual exploitation and the possible re-victimization during the trial underline the necessity for prompt and effective protection from the very moment of victim identification, through the role played in the criminal process, right up to the efficient reintegration of the victim into society. If trauma can effect an aftermath even following a single event, the most common consequence of a long period of victimization is profound, indelible marks on the child.

Alongside the very literal consequences of exploitation, degenerated living conditions can compound the offence. An illicit context for living can imply any of: repeated dislocation, deprivation, malnutrition, absence of a support system, physical confinement, isolation and deprivation of food (Siwach, 2006, p. 57). From the psychological point of view the effects of such conditions can vary both in relation to the victim and to the kind and number of abuses. The degraded and isolated context combined with the traumatic experiences with the clients, involve serious mental consequences: from the sense of fear, guilt, shame, powerlessness and anxiety, to low self esteem, emotional shut down, hostility and depression (Siwach, 2006, p. 57). Self-blame may lead to re-victimization and to long-term psychological and physical health consequences (Filipas & Ullman, 2006, p. 653) such as post-traumatic disorders (PTSD), chronic suicidal preoccupation and self-injury (Robinson, 1997, p. 252). Re-victimization can also be traced in maladaptive coping strategies such as alcohol dependency and drug abuse (Filipas & Ullman, 2006, p. 654).

In this volatile context, victims bearing witness in a criminal process may, moreover, be at risk of: re-victimization or secondary victimization that could be suffered during the trial phase (UNODC, 2008), potential threats, both physical and psychological, as a consequence of their deposition in

court and the outcome of the trial (UNODC, 2008), and the considerable anxiety that may compromise deposition (UNODC, 2008), and consequently affect the prosecution of the criminal and the efficacy of the justice system. All the aforementioned may consistently increase in cases involving a child witness. Therefore, victims bearing witness in a trial are in a particularly sensitive position that should imply special protection.

3. Thai Response to the Need for Protection of Child Witness

Recently, perhaps pursuant to the ratification or signature of a number of international conventions,¹³ Thailand adopted several legislative measures aimed at implementing protection of witnesses and victims. In analyzing these measures, primary attention should be given to the Constitution of the Kingdom of Thailand (2007), the Thai Criminal Procedure Code (as amended in 1999, 2007 and 2008) and to the Witness Protection in Criminal Cases Act (2003).

This section of the paper will analyze the aforementioned legal instruments safeguarding victims and witnesses, with a special emphasis on children.

3.1 The 2007 Constitution of the Kingdom of Thailand

Thailand's response to the need for victim/witness protection should be visible in its basic form in the country's Constitution.

In Article 40, the Constitution ensures basic judicial rights in the context of the fair trial. Paragraph 4¹⁴ explicitly guarantees to the witness and to the injured person (as well as to the accused person, the plaintiff, the defendant and the concerned party of the case) the right to be treated properly and the right to a fast and expeditious interrogation. The injured person and witness (besides the defendant) have the express right to receive "protection, necessary and proper assistance from the State" (Paragraph 5). The defendant's right to accurate, swift and impartial investigation and trial is extended to the injured person (Paragraph 7).

The recognition of the special needs of children and the right to receive protection from violence and unfair treatment is directly related to the State duty to safeguard child victims and provide them

¹³ Convention on the Right of the Child, United Nations Convention against Transnational Organized Crime, Protocol to Prevent Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime Preamble, supplementing the United Nations Convention against Transnational Organized Crime,

¹⁴ Constitution of the Kingdom of Thailand (2007) Art. 40 (5): an injured person, accuse person, plaintiff, defendant, party to a case, concerned party, and the witness in a criminal case have the right to be treated properly during the judicial process which includes the right to fast and expeditious interrogation (...)

proper remedy.¹⁵ If Article 52 provides the general rights of all children and the related duty of the state, these needs require more specific provisions and attention during a criminal trial. Paragraph 6 of Article 40, repeats the child's right to "proper protection during the judicial process and proper treatment" and assures the child's right "to receive proper treatment in cases relate to sexual violence.

These articles give good, broad, first protection statements that should inspire detailed secondary laws with respect to concrete actions.

3.2 The Criminal Procedure Code

The Thai Criminal Procedure Code detail concrete actions to be taken to preserve the evidence of witness's declarations and to safeguard the witness him/herself. These measures were introduced by recent laws and/or were subject to several amendments during recent years. Following the Code's order, protective measures at the inquiry stage (to which must be added the provisions of the Witness Protection Act) will be, first, analyzed, and then followed by actual trial provisions.

3.2.1 Investigation Phase

A first manifestation of the victim/witness protection can be found in the provisions of Articles 132 and 133, amended by Act 28 B.E. 2008, in relation to the inquiry. The information given by the injured person (victim and/or possible witness) during this phase are fundamental for the initiation of a prosecution and to guide the investigative body's inquires. Corresponding to the investigators' power to examine and interrogate the victim, the injured person has a number of rights, such as: to consent to examination, a deposition free from police discouragement or use of fraud to discourage declarations. This provision is interesting in that it demonstrates the need for a law specifically directed to the police officials, barring the (apparently usual) behavior of discouraging victims from reporting a crime.

The Code gives particular attention to women in criminal cases related to sexuality. Paragraph 4 of Article 133 requires the investigation to be performed by a female inquiry official, and the right of the victim to the presence of a familiar. The only exceptions to this provision are the injured person's consent or (the easily exploited) "cause of necessity." The following article paragraph identifies the physical and psychological safety of the injured person. The injured person has a right to a proper place during the recognition of the offender or accused, so as to avoid the injured person

¹⁵ Constitution of the Kingdom of Thailand (2007) Art. 52: Children and the youth have the right of survival and the right to receive physical, mental and intellectual development in accordance with their potential in a suitable environment, having prime regard to their participation.

Children, the youth, women and family members shall have the right to be protected by the State against violence and unfair treatment and shall also have the right to receive rehabilitation in the event of such circumstances.

being seen by the offender/accused. With those two provisions, the weight (or lightness) of words begins to take shape: who will recognize the “cause of necessity”? What is a “proper place”? Which parameters ought to be considered? This kind of clause recurs throughout the Code, undermining the great potential of the ideal.

The 2007 amendment (Criminal Procedure Code Amendment Act n°26 B.E. 2007) introduced two new articles (articles 133-bis and 133-ter), specifically designed for the protection of child victims or witnesses in the inquiry stage, applicable as well during preliminary examination. Although limited to certain types of crime,¹⁶ the code outlines the obligation of the inquiring officer to examine the minor victim or witness in a suitable place and requires the presence of a psychologist or social welfare worker, and a person requested by the minor and prosecutor. However, “in case of extreme emergency with reasonable cause” (Article 133-bis, par. 5), if it is not possible to wait for said persons, the inquiry official may examine the child in the presence of only one of the persons indicated. The necessity for extreme urgency must be recorded in the file of inquiry. This provision, on the one hand, places a degree of responsibility on the officer, but on the other the evaluation is put at his sole discretion.

The Code also states that, if the psychologist or social welfare worker are of the opinion that the examination of the child could negatively impact the psyche of the child (“strong mental effect” Article 133-bis), the examination must be carried out by the psychologist or social welfare worker and “many repeated questions” (Article 133-bis) should not be permitted without reasonable cause.

The protection of the wellbeing (physical and mental) and the anonymity of the child are the reasons behind Article 133-ter. It states that the recognition (“pointing”) of the accused (or any person) by the victim or child witness should take place in a suitable location for a minor, ensuring that the child cannot be seen by the person to be recognized. The presence of a psychologist or social welfare worker, the prosecutor and a person required by the child is required at this time. However, this can be avoided if the child does not want their presence, or because of “necessary causes.” During the entire examination of the child, images and voice recording/registration should be arranged (Article 133-bis, par. 4). This provision is related to the possibility of their use in the trial phase.

The Code reveals some early weaknesses. Firstly, the articles lack clarity and are dotted with vagaries. Secondly, the great decisive power wielded by investigating officers. Furthermore, unlike the psychologist, the social welfare worker and the prosecutor participating in the examination, the investigating officer cannot be replaced due to a “challenge” by the child/witness/victim (Article 133-bis, paragraph 3).

3.2.2 Trial Phase

¹⁶ Offence relating to sexuality, life and body, which is no the offence arising from affray, the offence relating to liberty, the offence of extortion, robbery and gang-robber according to the criminal code, the offence according to the law of prostitution protection and suppression, the offence according to the law of measurement of lady and child business protection and suppression, the offence according to the law of public place of entertainment or other case having the rate of punishment with imprisonment request by the injured person or a witness who is a child not over eighteen years old

The trial is one of the most delicate moments for victims and witnesses. The Criminal Procedure Code's protection of vulnerable witness during trial is regulated by the Division III of the Code. It developed through three amendment acts: the Criminal Procedure Code Amendment Acts 20 B.E. 1999, 26 B.E. 2007 and 28 B.E. 2008.

The selection of possible techniques of protection of the child witness is largely left to judges. The court is therefore required to evaluate the concrete case and the seriousness of the circumstances, in order to apply procedure to best fit the situation. The first assessment may be whether or not to conduct the trial in open court, as normally required by law. The exception to this fundamental rule is identified in Article 177, which gives the court the power to seal the trial, considering the "public order, or good moral or in order to protect secret concerning the security of the state" (Article 177).

Before any child hearing, if the court concludes it may be detrimental for the child, or if requested by a party, the court may arrange the visual and audio reproduction of the inquiry examination (Article 172-ter, par. 2). In case of extremely necessity, where the child cannot be brought to court those recordings can be admitted as testimony (Article 172-ter, par. 3). When a child testifies in court, the judge himself may lead the hearing and ask questions to the witness (directly or by means of a psychologist or a social welfare worker). The court may also allow parties to formulate questions for the child, which a psychologist or social welfare worker may pose (Article 172-ter).

In accordance with international requirements, paragraph 3 of the Thai criminal proceedings Article 172, allows the presentation of evidence in court without direct confrontation of witnesses with the accused. The techniques used for this purpose are "closed circuit television, electronic media or any other way as prescribed by the rule of the chief of justice" (Article 172, paragraph 3). This examination may be conducted by a psychologist, a social welfare worker or other person with whom the victim has confidence. This extremely protective provision, is, however, applicable only after the evaluation of the case in relation to age, state of health, mental status and sexuality (?) of the witness and his fear of the accused person.¹⁷ The ambiguity of the provision is evident both in the definition of sexuality as one of the criteria to be evaluated and in the lack of identification of the person responsible for that evaluation.

3.3. Witnesses Protection Act

Witnesses protection programs have three linked goals: to protect the physical and mental vulnerability of victims/witnesses in a criminal proceeding, to prevent intimidation of witnesses, and to ensure that evidence or statements gathered during investigation will not be distorted at trial as a result of the witness's fear or suffered threat (Akapin & Jaemsotheen, 2006). With the aim to achieve these goals, in 2003 Thailand produced the Witness Protection Act.

The Act provides two different levels of protection, one general and one special. The act's provision claims that general protection of witnesses should be guaranteed whenever "a witness loses his/her

¹⁷ Article 172, paragraph 3: "In the taking of evidence, where the consideration of sexuality, age, status, health and mental status of a witness or his afraidness to the accused person has been made, a procedure may be made without direct confronting of a witness and the accused person. This may be made by closed circuit television, electronic media or any other way as prescribed by the rule of the chief of justice and it may be inquired through a psychologist, a social welfare worker or other person whom the witness has confidence in."

security.” In such a case a competent official for criminal investigation, interrogation, prosecution or the Witnesses Protection Bureau has the task of designing and enacting appropriate measures. These may include “a safe place for the witness; change of name/family name, domicile, identification, and information that would reveal the identity of the witness as appropriate, and the personal status of the witness and nature of the criminal case” (Section 6, paragraph 3). Where necessary, protection may be extended to the witness’s relatives (Section 7).

The measures provided for special protection are reserved for witnesses of specific crimes¹⁸ and may include the relocation of the witness, change of identity, daily living expenses not exceeding one year (extendible up to two years), help in the development of a new career, education or other means of a proper life, legal assistance and security support (Section 10¹⁹).

The Act also includes the crucial necessity for confidentiality.

If the Thai Witnesses Protection Act can be considered an important step the country took in the development of a concrete protection of its witnesses and an essential legal base for a more efficient criminal justice system, the law has, regrettably, many limits. The first evident limit is an absolute lack of specificity. For example, no guidance criteria are established on the role of the agencies that should provide concrete protection, and no explanation of how provisions should operate (ARTICLE 2, 2006). For this reason “people who are to become witnesses and also the officials responsible for providing protection of the witnesses do not fully understand the boundaries, the rights, authority and means of witness protection as there is no clear procedures to follow” (Kankaew, 2011). The concrete functionality of the program is deeply negatively affected by limited resources and capacity: at the end of 2005 the office had only 10 officers, with poor qualifications and insufficient training (ARTICLE 2, 2006) (Kankaew, 2011). Also a lack of female officials can decrease the efficacy of the program when the witness is a woman (Kankaew, 2011). Lastly, the Act provides very light penalties (imprisonment not exceeding one year or fine not exceeding 20.000 Baht) in case of disclosure of information related to the witness under protection. Those limits are reflected in the number of witnesses actually under protection. Since the beginning of the program, only 69 persons benefit from the program, of which 25 were inducted in 2010 (Kankaew, 2011). Most importantly for the purpose of this paper, no specific provision direct to children are provided.

¹⁸ Section 8: “A witness in the following [types of] cases may be eligible to the privilege of special protection measures: (1) A case under the law on narcotic drugs, money laundering law, anti-corruption law, or customs law; (2) A case related to national security under the Penal Code; (3) A sexual offence under the Penal Code relating to the luring of a person for the sexual gratification of another; (4) A criminal offence in the nature of organized crime under the Penal Code, including any crime committed by a criminal group with a well-established and complicated network; (5) A case punishable with at least ten years of imprisonment; (6) A case that the Witness Protection Bureau deems appropriate to arrange for protection.

¹⁹ Section 10: The Witness Protection Bureau shall arrange for one or more of the following special protection measures: (1) A new place of accommodation; (2) Daily living expenses for the witness or his/her dependants not exceeding 1 year, with extensions as necessary for 3 months each time, not exceeding 2 years; (3) Coordination with the relevant agencies in order to change the first name, family name and information that may contribute to knowledge of the personal identity of the witness, including arrangements for a return to original status; (4) Action to help the witness have his/her own career, and training, education and other means of proper living for his/her life; (5) Assistance or action on behalf of a witness for his/her lawful rights; (6) Arrangements for a bodyguard service for a necessary period of time; (7) Other actions to assist and support a witness with his/her security as appropriate.

Conclusion

This essay has highlighted the most problematic and delicate aspects of child testimony. International standards provide guidelines that states must follow in the formulation of procedural laws to protect victims and seeking to avoid secondary victimization that may result in the trial stage.

In examining the standards involved in protecting child witnesses during a hearing or investigation, the psychological implications of a child's capacity for memory and communication have been discussed, and the resultant repercussions for the pursuit of legal truth have followed.

Pressure from the international community's elaboration of standards and the monitoring mechanisms of the United Nations have pushed Thailand to implement its protection of witnesses and victims, especially children. Many positive steps have been made at least at the level of production of laws, as first basic steps down the long path toward full protection of child witnesses and victims.

Nonetheless there are many ways in which the concrete application of those laws and mechanisms are weakened: ambiguity of wording, the many exceptions to the protective rules, the disproportionate power entrusted to the inquiring officials in essential determinations, and a general tendency not to specify details, guidelines, criteria and practical aspects. As a result, the legal ideal is often subject to conflicting interpretations.

Nevertheless, even where the law is clear, its practical application is dependent on subjective assessments of an individual, who may be reluctant to apply new laws. For example, the opportunity to let a child testify through videotaping is often declined by the judges (who have the power to activate the mechanism) with the citation of "technical problems" (US Department of State, 2009). Judges do not implement protective measures as they doubt the "validity of video testimonies and often require the presence of the child victim during the court hearing for cross-questioning" (ECPAT, 2011). Furthermore, the police force has a tendency to avoid taking cases involving children because of the necessary involvement of multiple agents and tend to interview the child themselves (ECPAT, 2011).

The incorrect application of the law and its lack of clarity has led the Committee on the Rights of the Child to recommend, in its last concluding observation on the report of Thailand (2012), to ensure adequate legal provisions and regulations and the protection of all children victims and or witnesses of crimes. As the statement implies, Thailand's course to complete and satisfactory protection of children, victims and witnesses is still ongoing and requires, firstly, a change in the approach that certain individuals (police officers, judges, witnesses protection officers) have towards children.

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