

Received: 31 December 2022

Revised: 31 January 2023

Published: 10 February 2023

LEGAL QUESTIONS ABOUT PROTECTION OF VICTIMS' RIGHTS TO RESTITUTION BY OFFENDER OF COMPUTER AND TECHNOLOGY CRIMES

Supatra PHANWICHIT¹ and Samrieng MEKKRIENGKRAI²

1 School of Law, Sukhothai Thammathirat Open University, Thailand;
thailawresearch@gmail.com

2 School of Law, Sripatum University Khonkaen, Thailand; samrieng@yahoo.com

Handling Editor:

Professor Dr. Attapol KUANLIANG

MSU Texas, USA.

Reviewers:

1) Associate Professor Dr. Kanathip THONGRAWEWONG

KBU, Thailand

2) Associate Professor Pinit TIPMANEE

DPU, Thailand

3) Assistant Professor Dr. Nattapat LIMSIRITONG

AU, Thailand

Abstract

Presently, crimes have been transformed from offenses of ordinary-law crimes to more high-tech, complicated and ingenious crimes, especially computer and technology crimes, but mechanisms and measures for redressing the victims in the computer and technology crimes under the statutes are the same as the ordinary-law crimes, particularly in issues of rights to be redressed by the offenders. Restrictions are found within rights to institute civil cases in relation to criminal cases under the Criminal Procedure Code, which lacks clarity in terms of claims on mental distress damages that is significant damages in the computer and technology crimes. As a result, a study is conducted into approaches to protect the victims under Declaration of Basic Principle of Justice for Victims of Crime and Abuse of Power 1985, in order to recommend approaches to further amending the law, as to be suitable for Thailand.

Keywords: Protection of Rights, Computer Crimes, Technology Crimes

Citation Information: Phanwichit, S., & Mekkriengkrai, S. (2022). Legal Questions about Protection of Victims' Rights to Restitution by Offender of Computer and Technology Crimes. *International Journal of Crime, Law and Social Issues*, 9(2), 45-51. <https://doi.org/10.14456/ijclsi.2022.11>

Introduction

The international standard of protection and assistance for victims are prescribed in international declarations and conventions, which are universally recognized international laws on victims' protection. At the present, protection of the victims' rights under the international principles needs to improve forms and scopes of protection, as to be more modern, because the crimes have been transformed from offenses of ordinary-law crimes to more high-tech, complicated and ingenious crimes, especially computer and technology crimes. In Thailand, mechanisms and measures for remedying the victims in cases of the computer and technology crimes are provided similar to the ordinary-law crimes, whereas rights of the victims are stipulated in several statutes, such as the Constitution of the Kingdom of Thailand, the Criminal Procedure Code, law on computer-related crimes, law on remunerations for victims and compensation for and expenses of the offenders in criminal cases, law on official information, law on witness protection in criminal cases, law on the justice fund, law on loans of money amounting to public cheating and fraud, and law on consumer protection, which are ordinary laws, and do not particularly focus on protecting rights of the victims in the more high-tech criminal cases. Specifically in issues relating to rights to redress, restrictions are found within rights to institute civil cases in relation to criminal cases for protecting the victims under the Criminal Procedure Code, Section 43 and Section 44/1, whereas Section 43 limits to some categories of offenses, but does not include Act on Commission of an Offence relating to Computer, 2007, while Section 44/1 lacks clarity of mental distress damages, which are significant in the computer and technology crimes. As a result, determining compensation does not cover the actually arising damage, and cannot truly remedy the victims.

Declaration of Basic Principle of Justice for Victims of Crime and Abuse of Power 1985

As the concept of ordinary criminal proceedings focuses on protecting the rights and liberty of the offenders, the victims need to help themselves in claiming the damages on the offenders. And in many cases, the damages cannot be claimed, because the offenders have not been apprehended and convicted, or the offenders cannot pay the damages. In turn, justice is not dispensed to the victims. Therefore, Resolution 40/34 of the General Assembly of the United Nations on Prevention of Crime and the Treatment of Offenders, Session 7 in 1985, adopted Declaration of basic Principles of Justice for Victims of Crime and Abuse of Power, as to protect basic rights of the victims of crimes, whose core principles are to treat victims of crimes with compassion and respect for their dignity of human beings (Chaiyanukit, 1996: 90-91).

Declaration of Basic Principle of Justice for Victims of Crime and Abuse of Power 1985) (United Nations, 1985) provides that a victims of crimes should be treated with compassion and respect for their dignity, and it stipulates basic measures for protecting the victims of crimes in 4 items, comprising of: Access to Justice and Fair Treatment; Restitution by the Offenders; Compensation by the State; and Assistance. Essential matters are as follows.

1) Access to Justice and Fair Treatment

1.1) Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered. (Chaiyanukit, 1996: 90-91)

1.2) Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

1.3) The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

1.3.1) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;

1.3.2) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused person

and consistent with the relevant national criminal justice system;

1.3.3) Providing proper assistance to victims throughout the legal process;

1.3.4) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;

1.3.5) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

1.4) Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.

2) Restitution

Declaration of Basic Principle of Justice for Victims of Crime and Abuse of Power provides standards of restitution as follows.

2.1) Offenders or third parties responsible for their behavior should, where appropriate, make fair restitution to victims, their families or dependents. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.

2.2) Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.

2.3) In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community.

2.4) Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims.

3) Compensation

According to the concept of compensation for damage to victims of crimes, the State is obliged to protect its own citizens, as to be safe in terms of lives, bodies, properties and rights under the laws, which are basic needs of living as human beings in the society. The State has these responsibilities, as it is delegated to exercise the power to protect the citizens. Therefore, if any damage arises to victims of crimes, the State is responsible, in cases where it fails to duly protect and defend the rights of the people (Watthanavanit, 1981: 72). Apart from this, there is a concept supporting the State to compensate for the victims of crimes, namely Preparatory Colloquium of the Eleventh International Congress on Penal Law in 1974. It summarized that compensation for the victims of crimes should be a legal right, not a civil right (Schafer, 1977: 127-128), and rights of the victims of crimes result from the State's failure to perform its obligation, thus, the victims of crimes suffer the harm in place of other people in the society. Therefore, society should help the victims who live in the same community. Rupert Cross, an English lawyer, supports this concept, and has said "Compensation for victims of crimes is deemed to be social welfare, because basic needs of humans are obligations of the State, if we are to recognize that human suffering should be intervened by the State" (Watthanavanit, 1981:

80). Therefore, the Declaration of Basic Principle of Justice for Victims of Crime and Abuse of Power prescribes the principles of compensation by the State for damage suffered by the victims of crimes, which corresponds to the aforementioned concept: "When compensation is not fully available from the offender or other sources, States should endeavor to provide financial compensation to:

3.1) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;

3.2) The family, in particular dependents of persons who have died or become physically or mentally incapacitated as a result of such victimization."

Apart from that, in compensation by the State for damage suffered by the victims of crimes, the State must establish a source of funds for such persons, whereas the said source of funds will enable compensation to attain its goals. That is to say: (Kitthawee, 2003: 24)

- The State must directly allocate taxes collected from the citizens as the Government's annual budget, such as in Australia and Japan;

- The State must establish a fund to provide with compensation for victims of crimes, whereas the fund obtains money from fines in criminal cases, such as in England and the United States of America.

4) Assistance

Providing assistance for victims of crimes in criminal cases has significant goals to mentally and emotionally support the victims and involve the victims in the criminal justice system. As such, the Declaration of Basic Principle of Justice for Victims of Crime and Abuse of Power stipulate the criteria for assisting the victims of crimes as follows:

4.1) Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.

4.2) Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.

4.3) Police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid.

4.4) In providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in paragraph 3 above.

Discussion

The standard of restitution by the offenders under the Declaration of Basic Principle of Justice for Victims of Crime and Abuse of Power stipulates the principle that offenders or third parties are responsible for their behavior. As such, each country should prescribe remedy measures for victims of crimes, and their families or descendants, and provide assistance for the victims of crimes, and compensation for the injured rights.

Considering legal issues, it is found that Thailand has laws providing with rights to institute civil cases in relation to criminal cases, in order to protect the victims in the criminal cases. Such rights include the right to claim on properties or their prices, or compensation in criminal cases. These are prescribed in the Criminal Procedure Code, Section 43 and Section 44/1, whereas Section 43 is the victim's right to claim for recovering a property or the price of the property, which is lost as a result of the offense commission. The Section prescribes that, in cases of theft, snatching; robbery, gang robbery, piracy, extortion, cheating and fraud, criminal misappropriation and receiving stolen property, where the injured person has the right to claim the restitution of the property he has been deprived of through the offence, or the value thereof, the Public Prosecutor, when instituting the criminal prosecution, shall, on behalf of the injured person, apply for restitution of the property or the value thereof. However, a restriction of

Section 43 is that it limits particular categories of offenses and does not include Act on Commission of an Offence relating to Computer, 2007.

Section 44/1 prescribes that a victim has the right to be compensated by the accused person in a criminal case of any category, for loss of life, body, mind, freedom, reputation or damaged property, if the public prosecutor is a prosecutor of the case. The victim can file a request with the court to hold civil proceedings for compensation, in order that the civil proceedings can be conducted expeditiously, and the civil proceedings are exempted from the court fee, in order to save the costs of the victim. The law requires the victim to furnish proper details of the damage and the compensation amount, and the victim, who is to exercise the right under Section 44/1, does not need to be a legal victim, according to the Supreme Court's Decision No.5400/2017 (General Assembly), which adjudges that the Criminal Procedure Code, Section 44/1 prescribing "For the case of which the public prosecutor is a prosecutor, if the injured person is entitled to claim the compensation for causing death, bodily harm, mental harm or getting loss of bodily freedom, reputation, or getting property injury arisen from the accused person's the offence commission, the injured person can file a request with the court holding the criminal proceedings to enforce the accused person to reimburse compensation to the accused person.", is provisions, whose spirit is to help a party injured in a civil matter to receive compensation in an expeditious and convenient manner, and not to pay the costs of the civil proceedings as another case. The civil proceedings and the criminal proceedings can be conducted in the same occasion, whereas the victim is entitled to file a civil request for the accused person to pay the compensation in a criminal case of any category, which is conducted by the public prosecutor, in a seamless manner, in order that the civil proceedings will be swift, as appearing in the note attached to Act Amending the Criminal Procedure Code (No.24), 2005. Even though the Criminal Procedure Code has a definition of the term "Injured Person" in Section 2 (4), meaning "a person who has received injury through the commission of any offence. This includes any other person who has the power to act on his behalf as provided in Section 4, 5 and 6", the provisions of Section 44/1, which entitled the injured person to claim for compensation, refers to any person, who has the right to claim for compensation, thus its meaning is different from and contradict the definition of the term "Injured Person" in Section 2 (4). Therefore, interpretation of the term "injured person" under Section 44/1 does not need to refer to the same definition as in Section 2 (4), provided that the Criminal Procedure Code, Section 1 prescribes "In this Code, if there is a definition of any term, such term is to be construed in the sense defined, unless the wording of the text is repugnant to such definition." As such, to determine whether or not any person is entitled to file a request for conducting civil proceedings is not a case to which the definition of the injured party in a criminal matter is applied, for example, an injured person by operation of law or a person, who has the power to act on behalf of the injured person, under the Criminal Procedure Code, Section 5 (2) is applied. In this case, compensation is claimed in 2 parts, the damage to the motor vehicle of P. and the loss of support. As for the damage to the motor vehicle, P. is the injured person, as the owner of the motor vehicle. Once P. is dead, the right to claim the damage is passed on to the descendant. The applicant is a lawful wife of P., thus she can exercise the right, as the descendant, to claim compensation in this part. As for the loss of support, the applicant, as a lawful wife of P., is an injured person in her own right, under the Civil and Commercial Code, Section 443, the third paragraph, and Section 1461, the second paragraph. Therefore, the applicant is also entitled to claim compensation in this part. With respect to the negligence of P., it is a fact which must be taken into consideration for determining the amount of the compensation but does not forfeit the applicant's right to claim compensation.

However, when cases of computer and technology crimes are analyzed, it is found that the majority of the cases inflict mental distress, as a result of commission of offenses against reputation of the injured persons or victims of the crimes, for example, bring into the system

nude or obscene images of the injured persons, romance scams luring the victims or injured persons to fall in love. Nevertheless, rights of the injured persons under the Criminal Procedure Code, Section 44/1, lack clarity with respect to the mental distress, because the Civil and Commercial Code, Section 420, requires a person, who committed a wrongful act, to pay compensation for the wrongful act, if the act was willfully or negligently, committed in an unlawful manner, injuring the life, body, health, liberty, property or any right of another person, whereas the injured person is entitled to claim for compensation, only in a case of damage prescribed in Section 420, but not including mental distress. A basis, on which mental distress is claimed, has been provided by precedence in the Supreme Court's decisions, which adjudged that an injured person was entitled to claim for mental distress, only if it was connected to damage on the body, health or hygiene of the injured person, for example, suffering pain or agony, or being disfigured, etc. With respect to damage in a form of anxiety, grief, sorrow, shame or other mental damage, the Court rationalized that there was no law prescribing for such claim, resulting in determination of compensation not covering actual damage, and being unable to remedy the damage. (Jankaew, n.d.: 1) An example of judgments in these cases include the Supreme Court's Decision No.811/2015, which deliberated that damages for mental distress was compensation for non-monetary damage, whereas the Civil and Commercial Code, Section 446, provided with a procedure for claiming, only in a case where the damage was inflicted upon the injured person's body, health or freedom. Other examples are the Supreme Court's Decision No.447/1971, which deliberated that, in a case of a wrongful act, resulting in grief and disappointment, the Civil and Commercial Code did not provide with a procedure for claiming on compensation, regardless of whether or not the claimant was the lawful father, or the Supreme Court's Decision No.2816/1985, which deliberated that the plaintiff's grief and sorrow, was just emotion arising from learning the bad news, and there were no legal provisions entitling the plaintiff to claim the damages with respect to this matter, or the Supreme Court's Decision No.1447/1980, which deliberated that damages for mental distress suffered by the plaintiff, as a result of emotional shock or trauma, were not covered by any legal provisions for claiming, etc. Therefore, the author is of an opinion that protection measures should be provided under the principle of restitution by the offenders, by explicitly prescribing the law on the matter of procedures and obligations of the public prosecutor to claim for compensation on behalf of the injured persons, as well as empowering the court to determine damages for mental distress, resulting from concrete injuries, and providing with a definition of the term "mental distress".

Recommendation

The author recommends an approach to solving the legal problems, by preparing Draft Act on Commission of an Offence relating to Computer (No....), ..., prescribing provisions, whose essential matters are as follows:

- 1) prescribing that, in a case where the injured person is entitled and wishes to claim for compensation, as a result of commission of an offense under this Act, the public prosecutor shall claim for the compensation on behalf of the injured person, without prejudice to the right of the injured person to institute civil proceedings against the accused person for the compensation in the lacking amount;
- 2) prescribing that the court is empowered to determine the amount of the compensation for mental distress, as a result of damage on the injured person's private right to life, body, property, reputation or freedom, apart from the compensation for a wrongful act prescribed in the Civil and Commercial Code;
- 3) prescribing the definition of the term "mental distress", as to mean hurt, affliction, torment, fear, anxiety, sorrow, grief, shame or other damage to the mind of similar nature.

The aforementioned recommendations will help solving the legal problems in the issue of restitution by the offenders, as to be concordant with Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, elevating Thailand's standards of protecting the injured persons or victims in cases of the computer and technology crimes.

Acknowledgement

This article is a part of issues, which are analyzed in the project on Approaches to Developing Laws on Protection and Assistance for Victims in Cases of Computer and Technology Crimes, conducted by Sukhothai Thammathirat Open University, and funded by Thailand Science Research and Innovation (TSRI.), whereas the author is the lead researcher and responsible for the article. This research is headed by Thawatchai Suwanphanit, and other researchers comprise of Phongjira Chardchoo, Wanwipa Muangtham, Lawan Ho-Nopharat, Natthaphong Suwanphanit, Yada Kasayapanan and Phornmapha Udomwatthawee.

References

- Chaiyanukit, C. (1996). Victims of Crimes, Dispute Mediation and Justice System. *Public Attorney Supervision Journal*, 58(4), 90-91.
- Jankaew, S. (n.d.). *Compensation in Cases of Mental Distress*. Retrieved from <http://web.krisdika.go.th/data/activity/act225.pdf>.
- Kitthawee, C. (2003). *Compensation by the State for Victims of Crimes*. Master of Laws Thesis, Dhurakij Pundit University.
- Schafer, S. (1977). *Victimology: The Victim and His Criminal*. Virginia: Reston Publishing.
- United Nations. (1985). *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*. Retrieved from www.ohchr.org/en/instruments-mechanisms/instruments/declaration-basic-principles-justice-victims-crime-and-abuse.
- Wattanavanit, P. (1981). Law on Compensation for Victims of Crimes: Concept of State Welfare. *Thammasat Law Journal*, 9(1), 68-81.

Data Availability Statement: The raw data supporting the conclusions of this article will be made available by the authors, without undue reservation.

Conflicts of Interest: The authors declare that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

Publisher's Note: All claims expressed in this article are solely those of the authors and do not necessarily represent those of their affiliated organizations, or those of the publisher, the editors and the reviewers. Any product that may be evaluated in this article, or claim that may be made by its manufacturer, is not guaranteed or endorsed by the publisher.



Copyright: © 2022 by the authors. This is a fully open-access article distributed under the terms of the Attribution-NonCommercial-NoDerivatives 4.0 International (CC BY-NC-ND 4.0).