

Suitable Reparation Standards for Thailand
For the Victims of Human Rights Violations by the State *
หลักเกณฑ์การเยียวยาที่เหมาะสมแก่เหยื่อที่ถูกละเมิดสิทธิมนุษยชนโดยรัฐสำหรับ
ประเทศไทย

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บทคัดย่อ

บทความนี้เป็นการสรุปใจความสำคัญจากดุษฎีนิพนธ์ที่ผู้เขียนได้ศึกษาโดยมีวัตถุประสงค์ในการศึกษาปัญหาที่เกี่ยวข้องกับการเยียวยาชดใช้ความเสียหายที่เหมาะสมแก่เหยื่อผู้ถูกละเมิดสิทธิมนุษยชน ทั้งนี้ได้ศึกษาถึงปัญหาทางด้านกระบวนการในการเยียวยา รูปแบบของการเยียวยาชดใช้ค่าเสียหาย และวิธีในการคำนวณการชดใช้ความเสียหาย เพื่อเสนอแนะแนวปฏิบัติที่เหมาะสมสำหรับการเยียวยาและชดใช้ความเสียหายแก่ผู้ที่ได้รับผลกระทบจากการละเมิดสิทธิมนุษยชนโดยรัฐสำหรับประเทศไทย

จากการศึกษาพบว่า การเยียวยาชดใช้ความเสียหายผ่านกระบวนการทางบริหารโดยรัฐบาลออกหลักเกณฑ์การเยียวยาเพื่อชดใช้ความเสียหายแก่เหยื่อผู้ที่ได้รับผลกระทบจากการละเมิดสิทธิมนุษยชนโดยรัฐอย่างรุนแรงและกว้างขวาง ประเทศไทยควรออกแบบหลักเกณฑ์การเยียวยาที่เหมาะสมโดยพิจารณาถึงปัจจัยดังต่อไปนี้ ความครอบคลุม (ในแง่ของคำนิยามของเหยื่อและผู้ได้รับประโยชน์) ความซับซ้อน (ในแง่ของความหลากหลายของรูปแบบการเยียวยาชดใช้ความเสียหาย) การสื่อสาร กระบวนการมีส่วนร่วมของเหยื่อ และการติดตามผลของหลักเกณฑ์การเยียวยาชดใช้ความเสียหายที่ได้มีการบังคับใช้ไปแล้ว สำหรับการละเมิดสิทธิมนุษยชนโดยรัฐ เช่น เหตุการณ์ความรุนแรงทางการเมืองนั้น การเยียวยาที่เหมาะสมจำต้องประกอบด้วย การเยียวยาที่เป็นตัวเงิน อัน

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ประกอบด้วยค่าเสียหายที่คำนวณเป็นตัวเงินได้ และค่าเสียหายเชิงศีลธรรม ซึ่งคำนวณโดยวิธีการคำนวณตามมาตรฐานสากล นอกจากนี้ยังจำเป็นต้องประกอบด้วยการเยียวยาชดใช้ความเสียหายในรูปแบบที่มีใช้ตัวเงิน และการเยียวยาเชิงสัญลักษณ์อีกด้วย

คำหลัก: การละเมิดสิทธิมนุษยชน การเยียวยาชดใช้ความเสียหายผ่านกระบวนการทางบริหาร ความรุนแรงทางการเมือง รูปแบบของการเยียวยา

ABSTRACT

Thailand has confronted prolonged political conflict since 1973, which many times led to serious violations of human rights by state agencies. Thus, like other transitional states, Thailand has been attempting to bring peace and reconciliation through the concept of transitional justice. However, pathway to national reconciliation is not possible without one essential element, “reparations” for the victims who suffered by the human rights violations.

The research was conducted by means of qualitative research which emphasized on legal analysis of the laws related to the issue of reparations, forms of reparations, and the calculation method of both monetary and non-monetary reparations to answer the main research question of what would be considered as appropriate reparations for the victims of human rights violations by the state for Thailand.

According to the study, transitional administrative reparations program is a preferable approach to reparations for the victims of massive and serious violations of human rights by the state. A well-crafted reparations program shall be designed by considering the factors namely comprehensiveness, complexity, participatory process, and healing effect of the reparations providing. Administrative reparations in terms of monetary and non-monetary shall be granted to the injured victims and beneficiaries.

Keywords: Human Rights Violations, Administrative Reparations, Remedy, Political Violence, Forms of Reparations

Introduction

Traditionally, where there is a damage caused by other person's wrongful acts, tort laws are at the heart of two crucial issues: liability and compensation. The notion of "damage" lies in the scope of traditional judicial court-hearing approach in tort cases. Specifically speaking, when people's civil or political rights are abused in incidents of massive human rights violations by the state which accrued during state or political violence in Thailand, there are two remedial approaches that the victims could receive reparations: judicial approach and administrative approach under the Civil and Commercial Code and the Act on Liability for Wrongful Act of Official B.E. 2539 consecutively.

However, there are numerous problems that the injured victims faced with if they intend to get access to reparations through court hearing of civil or administrative litigations because of the provisions provided in substantive and procedural laws. For the victims to prove the state perpetrator directly liable in the prosecution process through the civil or criminal litigation in to get compensation from the perpetrator, they must specify the tortfeasor, which in such chaotic circumstances is very difficult to do so.

Another problem is that the victims must be innocent persons. Therefore, if the victim is part of or involved in initiating the violence, it is possible that the court will reject the case. Also, during transitional or the aftermath of political violence, judicial process could be delayed and court decisions in such cases could be unpredictable and inconsistent because of politic factors. Most importantly, many serious and massive human right abuses by the state were not treated as crimes because impunity is guaranteed according to Thailand's Emergency Decree on Public Administration in Emergency Situations and the officials are protected under such law guaranteed immunity from criminal, civil, and disciplinary liability for officials acting under the decree.

Regarding calculation method of judicial compensation, the principle is that Thai court awards the indemnity based on the provable actual damage that the victim has suffered to restore the victim back to the original state before any infringement took place. It is up to the discretion of the court to calculate the compensation claim based on the seriousness and severity of the offense according to the general principles of reparation that could be lower than the plaintiffs urged for and the form of compensation is limited only to monetary compensation. Therefore, in case that the victims were brutally abused physically and/or mentally by the state in political

violence or massacre incidents or were tortured by state officials, monetary form of reparations is not enough to bring justice to the victims.

1. General Principles and Theories of Human Rights Violations by the State

Human Rights has a broad meaning from being a natural right for the cause of humanity to being a right that is guaranteed and protected by domestic laws and international treaties. Human rights are defined as the freedoms, immunities, and benefits that, according to modern values (especially at an international level), all humans should be able to claim as a matter of right in the society in which they live.

Even though there is no single definition of “human rights”, it could be assumed from the concept of human rights that human rights are the rights that acknowledge every single human being to enjoy his or her rights without distinction as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.¹ Also, it is commonly understood as being those rights, which are inherent to every individual.² Such rights belong to all mankind and must be universally recognized and respect by all. Additionally, the states must recognize their citizen’s human rights by not violating such rights both by action and inaction except for certain condition and limitation.³ Human rights are universal, meaning that they are applied equally and without discrimination to all people; human rights are inalienable, in that no one can have his or her human rights taken away other than in specific situations.

After the formation of the United Nations and the adoption of the Universal Declaration of Human Rights, there was an attempt to create human right treaties both at the international and regional levels to promote and protect human rights effectively. Eleanor Roosevelt, who

¹ "Universal Declaration of Human Rights." United Nations. <http://www.un.org/en/universal-declaration-human-rights/>. (Accessed May 24, 2017).

² U.S. Department of State. <https://www.state.gov/j/drl/rls/c16069.htm>, (Accessed May 24, 2017).

³ Igorevich, Golubev Stanislav. "Human Rights in a Globalized Modern World." *Mediterranean Journal of Social Sciences*, 2014.

spoke on behalf of the US delegation, suggested that UDHR could one day be akin to the Magna Carta or the French Declaration of the Rights of Man.⁴

Therefore, the idea of human rights is not novel. It is a consequence of a philosophical discussion that has been debated for over two thousand years within the European countries and their colonial progenies. During the period before the establishment of the United Nations, the idea of human rights relied on the ancient idea of natural rights and natural laws. Additionally, even though there were several bodies of law enacted to recognize human rights by the process of struggling of the people in the society including English Bill of Rights, the U.S. Bill of Rights, and The Declaration of the Rights of Man and of the Citizen.

In principle, the concept of “human rights” protect individuals from state action that would abuse or harm certain fundamental rights and freedoms, such as the right to life and the right to physical integrity. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfill human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfill means that States must take positive action to facilitate the enjoyment of basic human rights.⁵

It can be concluded that the duty to protect human rights belongs to the state. In terms of domestic law, human rights law places an obligation on states to act in a particular way and prohibits states from engaging in specified activities that violate its people’ rights. Moreover, state has an obligation to guarantee that the people’s rights will be protected from violations committed by other individual via the enactment and enforcement of domestic laws. This may be referred to as the doctrine of horizontality. Under the doctrine of horizontality, it is not necessary for the state to have committed the breach itself. This horizontal obligation is one of

⁴ "Eleanor Roosevelt, First Lady of the World, Social Justice & Human Rights Champion." United for Human Rights. <http://www.humanrights.com/voices-for-human-rights/eleanor-roosevelt.html>, (Accessed May 24, 2017).

⁵ Dinah Shelton, Righting Wrongs: Reparation in the Articles 011 State Responsibility, 96 AM.J. INT’L L. 833 (2002).

due diligence: states must take reasonable measures against human rights abusers, and if possible, prevent human rights violations.

2. General Principles and Theories of Reparations

Principle of tort law lies at the heart of two major issues, which are “liability” and “compensation”. A tort or wrongful act is a civil wrong committed against an individual. The heart of tort law is that a person has certain rights protected by law. If such protected rights are infringed, a court awarding a sum of money payment to protect the injured party known as “damages”, for infringement of a protected right.

Theories of conflict and violence are also important to consider in terms of reparations in this research topic. Conflict is ordinary where there is a society. Conflict could be resolved in two major ways; using violence to resolve conflict or resolving conflict in a peaceful manner. Indeed, there will be no solid peace and democratization without a national reconciliation. Therefore, when conflict led to violence, the means such as reconciliation could be used to resolve such conflict and violence. Various political processes and procedures managed political conflict without resort to violence. However, there are many times those political conflicts led to political violence, which involves concerted, affective actions, by individuals in a social context. Many countries have experienced conflict and violence and many of them had undergone transitions to democracy or post-conflict situations.

“The Right to Remedy and Reparation” is also crucial. The right to remedy refers to the right to claim reparations. It is about permitting those who have been wronged in the relevant sense to have an avenue of recourse against the wrongdoers. The right to a remedy gives the victims a possibility to effectively defend themselves against human rights violations. For victims of gross human rights violations, the above-mentioned different obligations of states to adopt all necessary legislative and other measures to give effect to rights, to investigate human rights violations, to provide effective remedies against violations, to bring perpetrators of gross human rights violations to justice, and to provide reparation to victims – can be formulated into three main rights that have been asserted by victims of human rights violations: the right to truth, the right to justice, and the right to reparation.

Governments often award reparations to victims of serious and mass human rights violations committed during political violence. Although the right to effective remedy and

reparations can be found in various international laws including the Universal Declaration of Human Rights, the ICCPR, and the CAT which require the governments compensate the injured victims of such violations, in practice some states award reparations while others do not. Until 2005 when the United Nations approved the “Basic Principles and Guidelines” which is constituted as the first uniform international codification that set up the standard and guideline to reinforce the right to remedy and reparations by binding the state members to have an obligation to repair to the injured individuals under the treaty and customary law.⁶

“Theories of Justice” especially “Transitional Justice” are considered important a primary aim of the victims. Basically, when there is a gross and serious human rights violation, the right to justice belongs to individuals. The state, therefore, has a duty to investigate, prosecute, and punish the guilty perpetrators. The rights to justice together with the right to truth are considered emerging norms in international human rights law and are guaranteed by many international human rights treaties.⁷

Theory of transitional justice aims at recognizing the victims’ dignity as citizens and as human beings. This theory does not believe that the past must be forgotten in order to start a new chapter. Rather, it is believed that by ignoring massive violations, which indeed is an easy way to stay out of the problems, it could destroy the values of decent society that can be built. Transitional justice is considered a victim-centered approach because victims and their dignity are recognized to make sure that there will be a renewed commitment by the state to ensure that people will be free from the abuses.⁸

De Greiff criticized that corrective justice tends to focus on mechanisms of restitution or compensation and to focus on some relationship between compensation and injury whether they are proportionated to each other.⁹ When “proportionality” is emphasized in corrective justice,

⁶ "General Assembly resolution 60/147 of 16 December 2005 ...". http://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_ph_e.pdf, (Accessed May 31, 2017)

⁷ Barry, Brian. Theories of justice. Harvester Wheatsheaf, 1991.

⁸ Simic, Olivera. An introduction to transitional justice. Abingdon, Oxon: Routledge, 2017.

⁹ Greiff, Pablo De. "Introduction Introduction Repairing the Past: Compensation for Victims of Human Rights Violations." The Handbook of Reparations, 2006, 1-16. doi:10.1093/0199291926.003.0001.

there are some difficulties when it must deal with in massive violence cases where very large numbers of victims involved and where reparations compete for limited resources which often occurred in many transitional contexts. Also, it is not only “money” that is necessary to the victims of serious human rights violations, many victims need “symbolic” form of reparation due to their interests of political feasibility and social solidarity. Especially, in several cases, such as slavery, sexual enslavement, or genocide, the meaning of compensation, from the victims’ views are in the larger frame than a sole monetary compensation. Recognition, acknowledgment, memorializing, social support and guarantees of non-recurrence are necessary to fix the past injustice.¹⁰

A combination of various theories of justices mentioned previously including restorative justice, civic justice, socio-economic justice, and most importantly transitional justice. It focuses on the process of victim consultation, which requires localization, individualization, participation, and government’s commitment to respectful engagement with victims. Additionally, participation of the victim-survivors is required from the consultation process until the process of government’s implementation of the reparation program.

3. Remedial Approaches to Reparations in Case of Human Rights Violations by the State

(A) Judicial Remedial Approach (Tort Approach)

Judicial remedial approach is the means with which a court of law, usually in the exercise of civil law jurisdiction, enforces a right, imposes a penalty, or makes another court order to impose its will. In principle, judicial remedy could be proceeded in international (through international courts) and national (through domestic courts).¹¹ Regarding judicial reparations, where there is a case of human rights abuse, there must be just and proportionate reparations provided to the victims according to the public law and international law perspectives. In

¹⁰ "GUIDANCE NOTE OF THE SECRETARY-GENERAL.",

https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf, (Accessed May 31, 2017).

¹¹ Cell, MintValley Legal Division Legal. "An introductory note by Prof. Dr. Theo van Boven." Reparation Law Resources, <http://www.reparationlaw.com/resources/treaties-international-law-scholars-experts/>, (Accessed June 01, 2017).

accordance with tort approach, there are three purposes of awarding damages. Firstly, it is considered as compensation (reparation) which is similar to traditional tort cases that the injured victim must be put to the position where she would have been in if the wrongful act causing the damage not accrued. Secondly, it works as deterrence function, which is the function that prevents the recurrence of the same mistake. Awarding non-pecuniary damages could do deterrence function. And, lastly, punishment function that could be done by granting punitive damages that is higher than the actual damage suffered by the injured victims.¹²

(B) Administrative Remedial Approach

In general, administrative remedy is a form of remedy that provides by the administrative branch.¹³ In other words, it is a non-judicial remedy provided by an agency, board, commission, or other like mechanisms. In terms of human rights, administrative remedy in a form of “administrative reparation program” is normally designed and enforced in the aftermath of gross and serious human rights violations, after conflict and violence between nations and between state and its civilian people. Administrative reparation program is also proceeded in country during transition to democracy after authoritarian regime. Various administrative reparation programs were proposed in foreign countries to address historical periods of gross and systematic human rights violations tolerated or committed by the State.¹⁴ These types of cases refer to the field of “transitional justice,” which generally applied as justice mechanisms to confront and redress past injustice and atrocities.¹⁵

¹² Malamud-Goti, Jaime E., and Lucas Sebastián Grosman. “Reparations and Civil Litigation.” *The Handbook of Reparations*, Jan. 2006, pp. 539–557.

¹³ Beyond Intractability, <http://www.beyondintractability.org/essay/compensation/>, (Accessed April 01, 2017).

¹⁴ Slyomovics, Susan. *How to accept German reparations*. Philadelphia, PA: Univ. of Pennsylvania Press, 2014.

¹⁵ Abramovich, Víctor. "From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System." By Víctor Abramovich :: SSRN. November 13, 2010, <http://papers.ssrn.com/abstract=1706715>, (Accessed June 01, 2017).

Chile designed and implemented one of a good examples of a national reparations program. Article 24 of the 19.123 was enacted to grant a monthly reparations pension for the families of the victims of human rights violations or political violence in the Commission's report. The detail of monetary reparations pension program includes the total monthly pension amounted to 537 USD. Beneficiaries who were entitled to reparation pension consists of (1) 40% of the total (215 USD) will be granted to the surviving spouse; (2) 30% of the total (161 USD) will be granted to the mother or in her absence, the father of the petitioner; (3) 15% of the total (80 USD) will be granted to the surviving mother or father of a victim's out-of-wedlock children; and (4) 15% of the total (80 USD) will be granted to each of the children of a disappeared person until the age of 25, or no age limit in the case of handicapped children. The remarks regarding the reparations pension are that each beneficiary would be granted the pension in the proportion stated by the law, even though there were no other beneficiaries in the family. Also, each beneficiary will receive the percentage according to the law even if the total amount received by the family exceeded the reference amount.

Reparations programs initiated by Chilean government were considered comprehensive because they attempted to repair the victims of the crimes according to the report of the Truth and Reconciliation Commission, which covered (1) the wide range of beneficiaries of the victims who were killed from political violence, political executions, and disappearance while in detention under the previous dictatorship regime and (2) other measures attempting to repair groups of victims suffered from being exiled, political prisoners, and others.

Additionally, after the Retting Commission to the President proposed the 1,800-page report, he announced the report to the public and apologized the victims on national television. The program of reparations and Comprehensive Health Care for Victims of Human Rights Violations (PRAIS) was also initiated from the recommendations by The Truth and Reconciliations Commission to give direct assistance to the victims-survivors and their family members who psychosocially and psychologically suffered as consequences of human rights violations, especially from torture and the disappearance of family members. The Commission recommended that it was the State's responsibility to provide apart from monetary reparations

mentioned above the form of reparations for the victims and beneficiaries to access to health care services and initiate mental health program via the Ministry of Health.¹⁶

4. Forms of Reparations

(A) Monetary and Non-Monetary Reparations

According to theories of justice mentioned above, monetary form of reparations per se has a small reparative effect, yet important. It is believed that the amount of money that is granted to the injured victims must be proportionate to the harm they had suffered. Also, there are many times that the beneficiaries found that administrative reparation program is dissatisfied because reparations awarded are insufficient. However, when we talk about monetary reparations in cases of serious or massive violations of human rights, there is no amount of money that can repair the loss of a parent, a child, or a spouse or could adequately compensate for pain and suffering caused by the trauma of torture. Although the amount of monetary reparations is very high, monetary reparations alone could be deemed as “blood money” or a way to buy the silence of the victims. Benefits of individual grants of monetary reparations include showing respect of personal autonomy, promoting the recognitions of individual, and improving the quality of life of the beneficiaries. Granting monetary reparations is easier to administer comparing with other forms of reparations.

Non-monetary reparations could be distributed by different measures. It could be designed in a form of providing service packages to the injured victims and beneficiaries. Service packages may cover medical and educational assistance. Free health care services, which include both physical and mental health assistance. Service packages could satisfy real needs of the victims and may cause positive consequence in terms of equal treatment. However, the quality of service packages depends on the institutions that provide services.

¹⁶ The Commission recommended that “(A)ccording to our previous experience and suggestions we have received, we propose that all persons who were subject to extreme mental and physical traumas as a consequence of severe violations of their human rights by agents of the State or individuals acting for clear political ends should be the beneficiaries of these programs. We suggest that access be provided to the resources and programs of the private health sector to be able to offer a wide range of alternatives to the beneficiaries”.

(B) Material and Symbolic Reparations

Material reparations are quite similar to pecuniary damages granted by the court in tort or wrongful act cases such as individual grants of compensations, medical expenses, funeral expenses, and medical service packages. Symbolic measures of reparations on the other hand, are designed to show respect and recognition, which are important objectives of administrative reparation program for healing victims suffered from massive violations of human rights. Personal letter of apology by the head of the state, publishing of truth commission reports, establishment of museum or monument, etc. are examples of symbolic reparations, which could be done individually or collectively. Also, equal amount of monetary compensation to each victim-survivor could be considered as a symbolic measure of equality especially in case of reparations for past historical injustice.¹⁷

(C) Individual and Collective Reparations

Individual and collective reparations are explained as the way reparations are distributed to the victims and beneficiaries. For instance, symbolic measures of reparations could be distributed to the victims individually as personal letter of apology or the apology could be done via national broadcast television. Individual symbolic reparations are constituted as a way to show respect for individuals and a way to show recognitions for the harm they have suffered. Collective reparations can promote the development of collective memory to the whole society. Collective measures of reparations could also develop social solidarity and knowledge.

(D) Micro and Macro Reparations

Individual and collective reparations could also be understood as micro and macro dimensions of reparations. However, in the context of extreme political trauma, which is the impact of political violence, psychological approach should be used to define the term

¹⁷ In post-conflict and post-dictatorship countries, symbolic reparation is very important especially for those victims who were affected by political violence such as political suppression or massacre under transitional justice concept. Formal apology from the state is a form of symbolic reparation that has been used widely together with a material reparation to create a successful national administrative reparations program in many countries.

reparations and types of reparations that should be granted to the injured victims. In terms of micro reparations, it concerns about an individual's perspective toward reparations. Therefore, reparations for human rights violations are attempting to repair the irreparable according to the direct victims of political violence. Reparations, together with justice, and truth seeking are crucial combinations for being “good enough” form of reparations for victims at individual (micro) level.¹⁸

5. Reparations to the Victims in Cases of Human Rights Violations by the State at International Level

The right to compensation has also been recognized in numerous resolutions of the UN Commission on Human Rights¹⁹ and its special procedures.²⁰ The “Working Group on Enforced or Involuntary Disappearances” has stressed that the compensation must be adequate, i.e. proportionate to the gravity of the violation.²¹ In practice, the right to remedy guaranteed in, among other international human rights treaties, the ICCPR and the CAT and effective civil remedies serves several important purposes including deterring future violations, deterring torture, making victims whole, and serving as an accountable truth-telling function. Therefore, apart from the “Universal Declaration of Human Rights” which is the milestone human rights document recognized by almost all countries over the world, the concept of “right to remedy” in the “ICCPR” and the “CAT” are examined together with the ideas of deterrence mechanism and remedies to redress gross human rights violations in the UN Basic Principles and Guidelines.

The UN Basic Principles and Guidelines emphasize the importance of monetary compensation to remedy “physical or mental harm; Lost opportunities, including employment,

¹⁸ Hamber, Brandon. “16. Chapter Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition.” *The Handbook of Reparations*, pp. 560–589.

¹⁹ Resolution E/CN.4/RES/2003/63 (extrajudicial, summary and arbitrary executions), 24 April 2003, para 4; E/CN.4/2003/32 (torture), 23 April 2003, para 10.

²⁰ Report of the Special Rapporteur on violence against women on cultural practices in the family that are violent towards women, E/CN.4/2002/83, 31 January 2002, paras 116, 119; Report of the Special Rapporteur on torture, E/CN.4/2003/68, 17 December 2002, para 26 (l).

²¹ General Comments on Article 19 of the Declaration on the Protection of All Persons from Enforced Disappearance, 12 January 1998, E/CN.1/1998/43, para 73.

education and social benefits; Material damage and loss of earnings, including loss of earning potential; [and] moral damage” and such idea was implemented widely in many international and regional human rights courts such as the Inter-American Court of Human Rights and the European Court of Human Rights.²²

6. Reparations for the Victims of Human Rights Violations by the States in the United States and in the Republic of South Korea

The Japanese American Internment was considered as one of the successful reparation program repairing the past injustice in terms of both material and psychological reparative measures. The roots that caused the reparations movement among Japanese Americans in the United States came from the internment of 120,000 innocent Japanese Americans (most of them were US citizens). The reparations movement came to the enactment of Congressional legislation of “the Civil Liberties Act of 1988” in 1988.

The forms of reparations provided as a result of this act consist of the presidential letter of apology (a letter from President George Bush to each person who is entitled to reparations)²³, reparations payment (reparations check attached to the letter of apology), along with the

²² Gaeta, Paola. "Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation?" *International Humanitarian Law and International Human Rights Law*, 2011, 305-27. Tomuschat, Christian. "Reparation in Favour of Individual Victims of Gross Violations of Human Rights and International Humanitarian Law." *Promoting Justice, Human Rights and Conflict Resolution through International Law / La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international*: 569-90.

²³ The statement in presidential apology letter on behalf of the USA is as follows: “A monetary sum and words alone cannot restore lost years or erase painful memories; neither can they fully convey our Nation’s resolve to rectify injustice and to uphold the rights of individuals. We can never fully right the wrongs of the past. But we can take a clear stand for justice and recognize that serious injustices were done to Japanese Americans during World War II.

In enacting a law calling for restitution and offering a sincere apology, you fellow American have, in a very real sense, renewed their traditional commitment the ideals of freedom, equality, and justice. You and your family have our best wishes for the future”.

establishment of “Civil Liberties Public Education Fund Board” to sponsor public educational research and activities publish the documents of the CWRIC.

The Act for Restoring the Honor of Democratization Movement and Providing Compensation for Them (“Democracy Act”) was enacted in 2000 with the purpose to enhance welfare of persons who have sacrificed themselves in the cause of democratization movements and their bereaved family members by having the State to restore their honor and award compensation to them to contribute to the development of democracy and national harmony.²⁴

The “Democracy Act” was the result of the long period of “The Republic of Korea’s democratization movement” and it was the product of the injured parties who had been struggling for settling the account of history as a form of reparation instead of receiving only consolation money from the government. Before passing the “Democracy Act”, the military regime paid certain amount of money as “consolation money” to victims and their families right after Gwangju uprising and massacre.²⁵

7. Reparations to the Victims in Cases of Human Rights Violations by the State in Thailand

(1) Law of Torts under the Thai Civil and Commercial Code

Tort law under the Civil and Commercial Code is the heart of liability and reparations for the injured parties. Determining compensation for violation of Section 438 of the Thai law is based on the theory of obligation which states that civil liability shall be determined similar to countries that use the civil law system for reparation or compensation for the actual damages where the injured party who is the plaintiff is obliged to present to the court how much damage he or she has suffered. It is then up to the discretion of the court to determine the claim based on the seriousness and severity of the offense according to the general principles of reparation. The court

²⁴ Article 1 of the Democracy Act.

²⁵ Right after the Gwangju Uprising on June 6th, 1980, the regime paid 4.2 million won (4 million won in "consolation money" and 200,000 won for funeral costs) for each civilian death. The injured received 100,000 won each and their medical costs until their full recovery came out of the government treasury. The families of 36 victims who were classified as rioters were not eligible for the consolation money.

is required to consider the actual damage for the victim to return to his original state as much as possible.

(2) The Act on Liability for Wrongful Act of Official B.E. 2539 (1996)

The objectives of enacting this act are that When state official commits a wrongful act, “The Act on Liability for Wrongful Act of Official B.E. 2539” is considered as a legal ground to file a civil lawsuit against the wrongdoer to claim monetary compensation. The term “public authorities” means the ministries of the government agency, provincial local government enterprises established by law and the agency that has determined by the decree which state official is authorized to work for.²⁶

(3) Laws Declared in Emergency Situations

The Government generally declared State of Emergency and enforced laws that give the State power to increasingly control the right and liberty of the people especially when people initiate political protest. Some of the legal regulations that will be used are the Emergency Act B.E. 2548 or the Internal Security Act B.E. 2557. It basically restricts the responsibility of the State in case damage to civilians occurs during that period.

8. Examples of Reparations Guidelines Approved by Cabinet Resolutions in Thailand

There are several administrative reparations programs approved by different governments in different period to grant monetary relief for the victims who were affected by political violence. The government approved the “Guideline on Compensation to those Affected by the Events of October 14th, 2516” and awarded compensation for persons who were affected by the October 14th, 1973 incident proposed by the Ministry of Social Development and Human Security according to the Cabinet Resolution.²⁷ Relief for Victims due to Government Aid, National Servant or Humanitarian Obligation Act B.E. 2543 was approved by the cabinet resolution on July 26th, 2005. In death case, the government approved to award commutation in the amount of 195,900 THB

²⁶ Section 4 of The Act on Liability for Wrongful Act of Official B.E. 2539.

²⁷ Consideration on Compensation to those Affected by the Events of October 14th, B.E. 2516 see: <http://www.ryt9.com/s/cabt/51658>, (Accessed June 01, 2017).

per case (minimum salary of government official (level3) = 6,530 × 30), funeral expenses in the amount of 20,000 THB per case. Therefore, the total amount of money is 215,900 THB per case.

According to the Cabinet Resolution on December 30th, 2003 Approval on Compensation to the Victims Affected by the Bloody May in 1992, the government approved awarding compensation for the victims in the lump sum amount of 500,000 THB for the injured and disabled victims. Also, the family of the deaths and disappeared victims were granted the similar amount of compensation in accordance with the December 30th, 2003's Cabinet Resolution and the building of "Black May Monument" in Ratchadamnoen Klang Avenue as a reminder that violence must never again be used to settle political differences.²⁸

Within the past decade, there are two different reparation guidelines approved by two different governments. The first reparation guideline was approved in 2009 by citing four irrelevant bodies of law and it granted 400,000 THB (approximately 11,000 USD) amount of money in case of loss of life. Another reparation program was the program approved by the Cabinet Resolution in 2011. It granted each family of those who were killed compensation of 7.75 million THB (approximately 220,000 USD) for all the victims of political unrest between 2005 and 2010. The government's criteria of reparation were based on an initiative studied by the Truth for Reconciliation Commission of Thailand. This program gained the most arguments including the monetary compensation was granted without legal basis.

Apart from the fact that the amounts of compensation in the two reparation guidelines were significantly different, the cabinet resolutions approved both to award the "lump-sum" amount of "Ex Gratia" or "Consolation" money to the eligible claimants depending on what type of damage they were suffering. Additionally, there was no standard calculation formula or explanation why it must be that exact amount of money for every victim. Most importantly, both failed to provide "non-monetary form of reparations" which is recognized as essential element of reparations according to transitional justice.

²⁸ "Cabinet Resolution" - eppo.go.th." <http://www2.eppo.go.th/admin/cab/cab-2546-12-30.html#7>, (Accessed February 17, 2017).

Conclusion

The principle of “transitional justice” which was introduced to associate with period of political change characterized by legal responses to confront the wrongdoing of perpetrators during conflict or repressive regimes shall be applied to design and implement national administrative reparations program with primary purpose to create appropriate reparations for the victims who were affected by human rights violations by the state in Thailand. That means, instead of focusing on only finding the solutions to the fundamental issues of a conflict, the ideas of using reparations as a mechanism to rebuild the relationships between opposites were emerged to promote peace and reconciliation in transitional or post-conflict period.

According to the concept of transitional justice, there are five major mechanisms that could lead a country to peace and reconciliation including prosecutions, truth commission, amnesty, institutional reform, and reparations. Even though each mechanism gives the states with several measures to bring justice to the injured victims, reparations is considered only mechanism that could satisfy the victims’ needs and help them in repairing and rehabilitating because of violations of human rights and crimes against humanity. According to the research study, there are several reasons why the traditional court-hearing mechanism does not effective after the conflict and during transition period. The alternative justice measure like administrative reparation program was used with the purposes both to restore the injured parties and to bring sustainable peace and reconciliation to the countries. Through the process of designing the reparations program, the injured victims will have a place to reveal among other things what they have been suffering and what were the past injustices they have been confronting in their perceptions which could be one of a justice strategy in post-conflict or during the aftermath of the conflict violence. By having an opportunity to share their feelings, victims can mentally and psychologically heal themselves.²⁹

Regarding forms of reparations, there are two main forms of reparation which are monetary and non-monetary. Both must be provided to the human rights abused victims to satisfy their “right to remedy and reparation” with the sense of justice and appropriateness. Unlike judicial

²⁹“Post-Conflict Justice and Sustainable Peace.”,

<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/PostConflict.pdf>, (Accessed June 1, 2017).

remedy, the scope of eligible claimants under administrative reparation program must not be too strict to the innocent bystanders but includes ones who committed certain crimes with political motivation during the chaotic incidents.

In terms of monetary reparation, Thailand should instead of proposing one fixed amount of money, establish the standard calculation method which could be applied to every case including the one that might happen in the future. Indeed, there is no so-called “perfect” method of calculation but what the state must concern about the method, among other matters, are healing effect, victims’ perspectives, national budget constraints and its complexity.

For non-monetary form of reparation, what is considered challenging for the government is to design a customized reparation program for the prospective victims who were affected in that particular incident without strengthening existing or generating new conflicts or discriminatory practices. Since just and appropriate reparation must be “felt” and depends on victims’ perspectives, “Integrational Approaches of Justice to Reparations” is recommended as a tool to create a “victim-oriented” reparation program which allowed the prospective victims to participate with the state in the processes of creating and implementing the program.

The participatory process will allow the state to ask a set of questions to the prospective claimants individually and locally to gather information whether what type of reparations will make they “feel” repaired. Also, the government will have an opportunity to engage in an educational process that help educating victims regarding reparations, manage expectations, and giving information to protect future misunderstanding. Also, there could be a chance for the government to inform, negotiate, and compromise that there will be several constraints that they might face with in practice, such as budget limitations and other factors that make full repair difficult. Most importantly, while the line between victims and state perpetrators is less blurred during the participatory process, there could be a chance for them to start moving the country forward together and the possibility of national reconciliation could be expected. To be more specific, the injured victims of torture during political violence should continue their lives with the trauma hallucinated for the rest of their lives. Indeed, time could not heal all wounds and of course anger and hatred.

In sum, since the effectiveness of protecting the rights of people in the country must be guaranteed by the state according to both international human rights law and international

humanitarian laws, the state shall protect the rights of its citizen both in reparative and deterrence measures. Regarding reparative measure, reparations could play a crucial role in bringing transitional country close to peace and reconciliation. Reparations shall manifest that the state has responsibility to the its injured civilians as it directly caused harm to the people or it fails to provide security to protect its citizens from harm. Also, reparations provided by the state, as a non-persona entity, could demonstrate some moral expression and effort to heal the injured victims and the community. Most importantly, Thailand shall provide administrative reparations to the injured victims when the country is in transition according the important elements proposed in the guideline attached with the research study as follows: comprehensiveness, complexity, communication, process, and progress.

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