

CHALLENGES ENCOUNTERED BY MALAYSIAN PROSECUTORS IN HUMAN TRAFFICKING



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ABSTRACT

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Anti-Trafficking in Persons and Smuggling of Migrants Act 2007 is the federal anti-trafficking and anti-smuggling legislation in Malaysia. Ten years after its enactment, fewer cases on human trafficking were identified. Statistics showed that the number of the victim saved and perpetrators prosecuted before the courts have reduced, although some commentators suggested that the original estimates of the cases are higher due to recent modern approaches in slavery. Some scholars claimed that the act by its nature is already a comprehensive set of laws to prevent the crime since its first introduction compared to other Tier 1 countries in Trafficking in Persons (TIP) report such as Australia which has gradually enhanced its legislation. However, the comprehensiveness of the act does not guarantee the prevention of human trafficking due to the ineffectiveness of prosecution officers in prosecuting the perpetrators, thus denying the rights of the victims to be protected as reported in TIP reports from 2010 until 2017. This is a qualitative and legal studies adopting doctrinal and legal research approaches. This paper analyzed the prosecution of human trafficking cases in Malaysia. The findings revealed the obstacles faced by the prosecution officers in carrying their duties against the perpetrators, contributed by enacted legislation, non-governmental organizations, judiciary officers, and enforcement bodies.

1. INTRODUCTION

Trafficking in Persons report 2017 reported that the Malaysian government was upgraded to Tier 2 from its previous position at Tier 2 watch list in 2016. Among the affective efforts taken by the government is by increasing the number of prosecution and conviction cases against the perpetrators. The efforts taken also is in line with the “3P” paradigm introduced by the United Nation (UN) which give it focus on prevention of human trafficking, protection of the trafficking victim and prosecution of the perpetrator. In regards with the third paradigm, the UN in its written guidelines¹ has further outlined the needs of the UN state members to have legislation and laws to provide offence of trafficking,² to efficiently prosecute and resolve the trafficking³ and to provide proper sentence

¹ Office of the High Commissioner for Human Rights, 2013. Recommended principles and guidelines on human rights and human trafficking. Available from <http://www.ohchr.org/Documents/Publications/Traffickingen.pdf> [Accessed December 2, 2013].

² No. 12 of Criminalization, Punishment and Redress, Recommended Principles and Guidelines on Human Rights and Human Trafficking.

and punishment for the person who is found guilty of the trafficking offence.⁴ In response to the guidelines, the Malaysian government is making some significant effort in prosecuting the perpetrator. There are 52 trafficking-specialist deputy public prosecutors⁵ have been appointed throughout Malaysia. There were 38 prosecutions initiated against 175 alleged traffickers in 2016. From the number, the government convicted 35 traffickers. All the traffickers received prison sentences of less than one year and up to ten years. Majority of prosecutors engage with victims at least two weeks prior to trial to better understand and address victims' concerns about the trial process in court. The prosecutors also have undergone numerous trafficking training programs with human trafficking.

Regrettably, instead of having the extensive efforts by the prosecution team, TIP report, NGOs and the media continuously reported that Malaysia's prosecution team failed to carry out their duty diligently. The TIP report 2016 disclosed that the investigations into the discoveries of migrant camps and mass graves yielded four migrant smuggling convictions in Malaysia but no Malaysian nationals were among those convicted even though it was claimed that the incident involving some Malaysian corrupt officers. The Malaysian government revealed a group of immigration officials has manipulated the country's passport control system to allow smugglers and traffickers to run their activities, but none of them is prosecuted before the court for criminal offence.

Therefore, this article is carefully examined the obstacles faced by the Malaysia prosecutors in prosecuting human trafficking cases against the perpetrators. To achieve this, the decided cases has been closely studied and some prosecution officers have been interviewed. This article aims to find the root cause of their ineffectiveness and to highlight avenues to improve the prosecution success in complying with the "3P" outlined by the UN.

2. OBSTACLE FACED BY THE PROSECUTORS

There are a few obstacles faced by the prosecution officers in Malaysia. The obstacles are contributed by enacted legislation, non-governmental organizations, judiciary officers, and enforcement bodies.

2.1. High Burden of Proof in Human Trafficking Cases

Like other criminal cases, the prosecution need to prove his case beyond reasonable doubt. In the case of *Mat v PP*,⁶ the court decided that the onus of proving the accused guilt lies throughout on the prosecution. If upon the whole evidence you are left in a real state of doubt, the prosecution has failed to satisfy the onus of proof which lies upon it. However, the judge in *PP v Foo Jua Eng*⁷ in his opinion stated that, the "beyond reasonable doubt" standard does not mean beyond the "shadow of doubt".

To prove whether there is a trafficking case or not, the prosecution needs to prove three (3) important elements; there is an "exploitation" of victim by the perpetrator, there must be a "trafficked person" as defined under Section 2 of ATIPSOM 2007, and the "trafficking in persons" is existed. Among the three, the third element has always caused difficulty in the prosecution's case. Even though the element does not strictly require that the act of trafficking is resulted only from "coercion", it seems to contradict when it comes to practice. The word "coercion" has been interpreted as involving the element of threat of serious harm or physical restraint against the victim. The judicial officer failed to consider any scheme, plan or pattern intended to cause victimisation and that the failure to perform an act would result to the harm as defined by section. The court tends to ignore the other acts not related

³ No. 13 of Criminalization, Punishment and Redress, Recommended Principles and Guidelines on Human Rights and Human Trafficking.

⁴ No. 15 of Criminalization, Punishment and Redress, Recommended Principles and Guidelines on Human Rights and Human Trafficking.

⁵ Section 376 of Malaysia Criminal Procedure Code defines the meaning of Public Prosecutor which having control and direction of all criminal prosecutions and proceedings.

⁶ See *Mat v PP*, 1963. 29 MLJ 263.

⁷ See *Foo Jua Eng, P.v.*, 1966. 1 MLJ 197.

to the cause of the exploitation such as transferring or recruiting of the victim by the trafficker.⁸ Besides, they disregarded the fact of the case which the victim has been mentally and psychologically controlled by the accused. This differs from what has been practiced by Tier 1 countries such as Australia. In response to the TIP report in 2012, Australia has expanded the definition of coercion to include non-physical forms such as psychological oppression, abuse of power, and taking advantage of a person's vulnerability.⁹ So, the burden of proof on its prosecution is lighter compare to the Malaysia prosecutors.

2.2. Lack of Evidence

2.2.1. Cooperation from the Human Trafficking Victims

It was also satisfied that the low conviction rate is due to the lack of testimony by the victim. This happens when a victim is placed at the shelter for a long period of time while waiting for a trial. When the time comes, he has been in an emotionally unstable and stressful situation. His credibility becomes compromised and his testimony not useful evidence in court. His statement would be easily challenged by the defence counsel. The situation becomes worse if he was traumatised which will disturb his testimony, especially when he sees the offender in the accused dock during the trial.

In some cases, the victim is not interested to give evidence. Some victims tend not to cooperate during the trial by just giving false or confusing statements. They are not interested to help the prosecution in punishing the trafficker. Their only concern is to go back or to have work which can produce money. This is different with the victim which is forced to be a prostitute where they will give strong cooperation to the prosecutor to convict the accused person. This can be seen as in the case of *PP v Nelson*,¹⁰ the traumatised underage victim, who was forced to prostitute since she was twelve (12) till sixteen (16) years old. She has given a strong testimony against the trafficker. She managed to deliberate the testimony clearly against the accused by telling the court how terrible her life was when she was forced to give sexual service to ten (10) men per day, including while she was in menstruation. She was only fed one time per day, locked in a home, tied up, and was physically abused by the trafficker.

2.2.2. Supporting Evidence to Support Prosecution Case

The other factor is due to the lack of supporting evidence in a prosecution case. Most of the victims of human trafficking come from low educational background. They are ignorant about the laws in the foreign countries and tend to be easily cheated. In certain criminal cases, the lack of primary evidence especially verbal evidence can be strengthened by the secondary evidence such as in the documentation. For example, in the case of labour exploitation, the absence of a legal agreement between the victim and his employer will cause difficulty to the prosecution in proving the case especially when verbal evidence is not convincing enough. In this case, the victim is normally recruited by an illegal agent. In contrast, with a legal agent there will be an agreement between the employer and employee which covers salary, leave and other benefits. The failure of an employer to fulfil the agreement will amount to exploitation. The case can be proved by the agreement, testimony by the victim and the agent.

2.3. Withdrawal of Offence by Public Prosecutor

The lack of conviction also could be caused by the withdrawal of the offence under ATIPSOM 2007 by DPP when a few factors have weakened the case. Practically, the defence counsel will submit a representation letter to

⁸ Noor Fadzlin Zawawi, Interviewed by Author, Ampang Sessions Court, Selangor, 8 April 2014.

⁹ U.S Department of State, 2014. Australia. Retrived from <http://www.state.gov/j/tip/rls/tiprpt/countries/2013/215390.htm> Accessed June 18, 2017..

¹⁰ Some information about the case remains undisclosed due to the request made by respondent, an expert DPP.

the DPP, asking for the case to be reviewed, the offence to be reduced or the accused to be freed. The DPP will thoroughly consider the application based on the existing evidence and testimony. Normally, the offence under ATIPSOM 2007 will be reduced to the offence in the Penal Code. For example, the charge under Section 13 of ATIPSOM 2007 will be reduced to Section 340 of the Penal Code for wrongful confinement if it is found that the existing evidence is not strong enough to support the offence of trafficking in persons by means of threat and force. There is also a case where the accused person is charged together with other offences in the supplementary Act, such as under Section 323 of the Penal Code. In this case, the charge under ATIPSOM 2007 is withdrawn after the accused pleaded guilty for the second offence. In this situation, the victim can be compensated with the amount of RM6000 and above.

The withdrawal also is done due to the death of the accused person before the case is settled. For example, at Sessions Court Ampang, Kuala Lumpur, there were a few cases where the accused died during the process of trial. As in the case of *Yap Chee Hong*¹¹ and *Alin Athu*,¹² one of accused persons in both cases died during the trial. Therefore, there is no case against the dead accused, but the offence only stands for the remaining accused.

2.4. Lack of Specialised and Experienced Judicial Officer

Non-existence of a specialised judge on a human trafficking case has also contributed to the failure. The enforcement of human trafficking laws is not only depending on the enforcement officer and DPP, but also on the judiciary. The understanding of the sitting judges and magistrates in hearing the human trafficking cases may differ even though the cases have the same nature of offence. Some of them tend to be too rigid, which sometimes has led to the misunderstanding of the cases. They have no expertise and specialisation in handling the human trafficking cases. This is different from the DPP and some enforcement bodies, which have their own experts.

The principal Act has given guidelines on how to handle the human trafficking cases. The investigation officer needs to apply an IPO for the victims in order to carry out an investigation and enquiry under Section 51 of the ATIPSOM 2007. At the expiry of the fourteen (14) days, a further application needs to be made by the investigating officer of the immigration department to extend the protection order up to three (3) months for the purpose of recording the statement or deposition of the victims. During these processes, the enforcement officers might experience some problems with the judiciary officers in obtaining or extending the IPO. The situation becomes worse when the problem occurs due to the lack of knowledge and experience of the judicial officers.

In *Public Prosecutor v Zhao Jingeng & Ors*¹³ the enforcement officer from the Immigration Department of Malaysia has arrested the accused at the KLIA. Later, the accused has been charged before the court under Section 12 of the ATIPSOM 2007. During the operation, there were about twenty six (26) victims, Chinese citizens, have been rescued by the officer. The investigation officer has succeeded in obtaining an IPO for fourteen (14) days for the victims to be placed safely and for the officer to carry on with an investigation as under Section 51 of the Act. At the expiry of the fourteen (14) days, the investigation officer has applied for an extension of IPO for three (3) months for the purpose of deposition or recording victims' statements regarding the case. In complying with section 52 of the Act, the investigation officer tendered a report of his investigation of all twenty six (26) victims claiming that the victims were trafficked. The evidence from the forged passports showing that they were from Hong Kong, however, their genuine passport showed that they were from China. In addition, all of the victims were confined in their accommodation. The report submitted by the investigation officer contradicted with the report provided by the Protection Officer. The latter showed that the nine (9) female victims were not trafficked, but were on their way from Hong Kong to Argentina or Brazil for several reasons. However, the report was silent about the

¹¹ Yap Chee Hong, P.v. and Anor, n.d. Sessions court Ampang, Selangor, Case. No: S3-62-43-2009.

¹² Noor Fadzlin Zawawi, Interviewed by Author, Sessions Court Ampang, Selangor, 8 April 2014.

¹³ See *Public Prosecutor v Zhao Jingeng and Ors*, 2010. 7 MLJ 306.

remaining victims. After hearing the application, the Magistrate agreed with the investigating officer and made an order under section 51 (3) (b) (ii) of the Act where all the victims were to be handed over to the Immigration Department. Dissatisfied with the order, the prosecution applied for the order to be revised at the High Court. The application was allowed by the High Court and the IPO was extended for the next three (3) months. The High Court judge has decided that in determining whether trafficking existed or not, the investigation's report should have prevailed.

Another case that illustrates the problem is *PP v Nam Oithantip*. On 24 March 2008, the Magistrate has granted the IPO under Section 44 (2) of the ATIPSOM 2007 for seventeen (17) citizens of Thailand, for the purpose of an investigation by the investigation officer under Section 51 of the Act. On 6 April 2008, the case was referred to the Magistrate's Court by the investigating officer to obtain a PO under Section 51 (3) of the Act for the seventeen (17) people on suspicion that the Thai citizens were trafficked. Unfortunately, the application was dismissed after the Magistrate examined the reports issued by the Protection Officer under Section 51 (2) of the Act which has shown that all of the nominees were not trafficked victims. The prosecution then reviewed the order. The court held that in deciding whether a person was a trafficked person or not under the Act, the report of the investigating officer was more relevant as compared to the report prepared by the protection officer.

2.5. Interference from Other Parties

The interference of NGOs and foreign embassy which tend to participate in a prosecution's case has made the situation become worse. Interference might come from the embassy of the victim's country of origin. There is a case where a victim has been referred to his embassy before the case was brought for the enforcement attention. The embassy provided documentation relating to the victim such as his personal information and the picture was taken on the first day he was handed over to the embassy. In other cases, the NGOs and embassy have the tendency to push and put pressure on the prosecution to settle the case quickly because the victims want to go back to their countries of origin as soon as possible. These kind of actions do not help the cases since prosecution requires time to prove their cases.¹⁴

2.6. Lack of Knowledge and Ignorance of Investigation and Prosecution Officer

In some cases, the prosecution loses his case due to lack of knowledge and expertise of the enforcement bodies. In some cases, the officer tends to neglect the procedures while collecting the evidence. For example, in the case where the trafficking activity was successfully dismantled based on the accused information which led to the discovery of other material evidence, the investigation officer failed to comply with the procedures stipulated in Section 27 of Evidence Act 1950. The lack of knowledge and ignorance might lead to the inadmissibility of the evidence.¹⁵

2.7. Lack of Knowledge and Experience of Public Prosecutors

The case which illustrates this problem is *Siti Rashidah binti Razali & Ors*.¹⁶ There were seven adult men, two adult women and three female children were arrested at the premise. Four of them were charged in the session's court with two charges under Section 12 and 14 of the ATIPSOM 2007. They pleaded guilty to the charges and the magistrate sentenced them with imprisonment. The conviction and sentence was then appealed by the accused. The

¹⁴ Anonymous, Interviewed by Author, Ampang, Selangor, 15 May 2014. The respondent is a Deputy Public Prosecutor. The respondent's identity remains undisclosed upon her request.

¹⁵ See *Basri bin Salihin, P.v.*, 1994. 2 MLJ 476.

¹⁶ See *Siti Rashidah, b.R. and v.P. Ors*, 2011. 6 MLJ 417.

Judge decided to allow the appeal and set aside the order of the previous session judge on the ground that the prosecution failed to prove the accused persons committed a criminal offence constituting “exploitation” as stipulated in Section 2 of the ATIPSOM 2007. After considering the facts of the case and the available evidence, the judge found that the offence was proven under Section 56 (1) (d) of the Immigration Act 1959/63 for harbouring illegal immigrants in the premise. In addition, the judge in his obiter advised the prosecution to include the form of “exploitation” when framing any trafficking charge. The judge also advised the prosecution to not simply charge the accused under the principal Act because it would ruin the image of the country as human trafficking is widely occurring in Malaysia. In fact, the offence is actually committed under the other Act.

3. CONCLUSION

Malaysia has successfully proven that they are really committed in preventing the human trafficking. However, it is insufficient due to the obstacles faced by the prosecutors in handling their cases, thus will lead to freedom of the accused person and injustice to the victims. Therefore, Malaysia should take some effective efforts in resolving the issues. Among the crucial effort that can be taken by the government of Malaysia is by having good cooperation and training by all the relevant stakeholders, regardless whether they are government officers or NGOs. This cooperation can be done through an intensive trainings, effective communication between all the parties and joint-operations. For the purpose of exchange trainings, the prosecutors can share information regarding any methods used by the organised criminal groups in human trafficking activities¹⁷ with other stakeholders.

Besides, a serious consideration must be given by the suggestions given by TIP report 2017. It is urged that the government of Malaysia should ensure their prosecution officers to improve case management. The improvement of the case management can be done if the prosecutors received a complete investigation paper by the investigation officers and cooperation from the competent court to ensure the case goes smoothly. The TIP report further suggested to the prosecutors to increased prosecutor-victim interaction at least two weeks prior to trial in compliance with the attorney general’s directive.¹⁸

Malaysia also may consider Australia, which currently positioned at Tier 1 country in TIPs report as a good example. The government of Australia encouraged the victims to participate in trafficking investigations which resulted in (68) percent of them participating in an investigation or prosecution in 2013.¹⁹ They also has granted (11) Permanent Witness Protection (Trafficking) visas to the victims and their family in return for their cooperation to the investigation or prosecution process. There will be no legal punishment is imposed on victims for unlawful acts that resulted from being trafficked. Trafficking victims whose prosecution cases were successful are eligible to visa option and compensation. Australia also having good cooperation with various stakeholders regardless whether it is a government body, private body or individuals.

The strong cooperation can be seen by the establishment of Anti-Slavery Australia²⁰ in 2003. It is the only specialist legal research and policy centre in Australia which focuses on the abolition of slavery, trafficking and extreme labour exploitation. The aim of its establishment is to eradicate all forms of trafficking and slavery through

¹⁷ Inger, O., 2007. International countermeasures” in Human Trafficking and Human Security, Edited by Anna Jonsson. New York: Routledge Taylor & Francis Group,74.

¹⁸ “U.S Department of State, 2018. 2017 Trafficking in Persons Report. Available from <https://www.state.gov/documents/organization/271343.pdf> [Accessed January 2, 2018].

¹⁹ “U.S Department of State, 2013. Trafficking in persons report 2013. Available from <http://www.state.gov/j/tip/rls/tiprpt/2013/210548.htm> [Accessed September 24, 2017].

²⁰ “University of Technology Sydney, 2010. Anti-slavery project- Strengthening Australia’s Response to Human Trafficking, Report to Australian Women’s Coalition, March 2010. Sydney: Author.

research, policy development, law reform, professional practice, education and advocacy to support the human rights of trafficked, enslaved and exploited people.

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