




THE PROTECTION OF HUMAN TRAFFICKING VICTIMS BY THE ENFORCEMENT BODIES IN MALAYSIA



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ABSTRACT

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United States is a self-appointed country which monitors the issue of human trafficking. In 2001, the U.S Department of State introduced the Trafficking in Persons (TIP) report as an effort to eradicate human trafficking. The country oversees 187 state governments on their progress in addressing human trafficking by collecting relevant information from the United Nations High Commissioner for Refugees, the consulates and embassies around the globe, the United Nations Children's Fund, and media reports. In the period of 2012 until 2017, the TIP reports highlighted that the Malaysian government did not manage to protect the trafficking victims effectively. As a result, Malaysia is not included among the Tier 1 countries and it has to ensure strict compliance with Section 108 of the Trafficking Victims Protection Reauthorization Act. The protection of victims in Malaysia is entrusted to a number of stakeholders, namely five enforcement bodies led by the Royal Malaysian Police. This paper examined the protection provided to the human trafficking victims by these enforcement bodies. The findings revealed that the enforcement bodies comply with the guidelines and legal framework in Malaysia, despite the claim that they provide inadequate protection. As a recommendation, Malaysia may reflect on the efforts undertaken by the Australian government to protect victims in their country. This approach is anticipated to catapult Malaysia into the Tier 1 ranking in TIP by the year 2020.

Contribution/ Originality: This study contributes to the existing literature for human trafficking since there is a lack of empirical research on this topic. The study gives it focus on the protection of trafficking victims by the enforcement bodies and addresses some lacuna not only Malaysia's benefit, but also for other countries.

1. INTRODUCTION

The quality of law implementation is a fundamental benchmark in determining the success of enforcement bodies addressing the issue of human trafficking. In Malaysia, there are five enforcement bodies responsible to tackle this issue. They are the Royal Malaysian Police (RMP), the Immigration Department (Immigration), the Malaysian Maritime Enforcement Agency (MMEA), the Department of Labour, and the Customs Department (Customs). In general, these five bodies are entrusted with four key functions in addressing human trafficking: to prevent, to investigate, to rescue, and to arrest. Similarly, the designated roles are parallel with UN Nations' "3P" paradigm (Milivojevic and Segrave, 2010) which includes the protection of the trafficking victims. Section 2 of the

Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act (ATIPSOM) 2007 confirmed that these five enforcement bodies serve as the law enforcers for trafficking cases (Zuraini, 2017). In the section, an “enforcement officer” is defined as any officer indicated in Section 27 and this signifies all officers in the five enforcement bodies.

In the period of 2014 (New Straits Times Online, 2017) until 2017 (United States Department of State, 2013) the Trafficking in Persons (TIP) reports outlined that the Malaysian government did not fully comply with the minimum standards of the Trafficking Victims Protection Act (TVPA) effectively, particularly in terms of victim’s protection. Consequently, the status of Malaysia is in jeopardy and the country is faced with United States (US) government’s sanctions. Under the sanctions, the US could withhold or withdraw non-humanitarian and non-trade-related foreign assistance to Malaysia.

2. THE PROCEDURES FOR INVESTIGATION OF HUMAN TRAFFICKING CASES

As opposed to other criminal cases, the case of human trafficking is more complex and challenging due to the distinctive procedural compliance and laws involved. Notably, the main officer who has a vital role in ensuring the protection of trafficking victim at a shelter after his or her rescue is known as the Investigation Officer (IO).

RMP outlines three scenarios for a victim to be deemed as successfully rescued. In the first scenario, a trafficking victim manages to escape from the people or syndicate exploiting him, and has obtained aid from the law enforcement. Second, police officers may identify a trafficking victim when implementing operations or raids that are not related to trafficking. Finally, facilitation or information provided by third parties like agency, organisation, or individual may bring the attention of police officers towards particular trafficking victim. Typically, the public, non-governmental organisations (NGOs), and the embassies provide invaluable insights from their engagement with domestic violence and trafficking victims. After rescuing a victim, the IO has to follow a number of procedures to handle the case effectively (Royal Malaysian Police, 2013).

Under the investigation process, the IO needs to abide to specific procedures (Malaysia Anti-Trafficking in Persons and Smuggling of Migrants Act 2007 [Act 670], 2007) which cover to rescue and protect a prospective victim. Once the IO receives complaint, information,¹ or report (Malaysia Criminal Procedure Code [Act 593], 2006) about exploitation, he needs to take prompt action. If the victim or other parties did not lodge any police report, a formal report will be done after the rescue of the victim. According to Section 34 of the ATIPSOM 2007, the IO is responsible of recording the statements from the victim or the witness in line with his or her jurisdiction. Furthermore, Section 45 of the Act states that the IO needs to bring the victim for medical treatment or examination should the need arises. Additionally, Section 48 of the Act stipulates that the enforcement officer is responsible for protecting the victim if he is hospitalised.

Section 44 (1) of the Act outlines that within 24 hours of the victim’s rescue, the IO has to apply for an interim protection order (IPO) from a Magistrate. In the event that the Magistrate is convinced about the victim’s status as a trafficked person, he shall award an IPO to place the victim in an adult male shelter, adult women shelter, or children shelter, respectively. In line with Section 44 (2) of the Act, this stage facilitates the IO’s investigation. Over the course of 14 days in the respective shelter, the IO will conduct a comprehensive investigation on the case, whereas the protection officer will determine the victim’s background. Consecutively, Section 51 (2) of the Act requires both IO and protection officer to submit their combined findings and reports to the Magistrate.

After judging the findings and reports, the Magistrate will determine whether the victim is trafficked or not. If a local victim is determined to be not trafficked, he or she is ordered to be released. On the contrary, a foreign victim who is not trafficked will be passed to an Immigration officer in compliance with the Immigration Act 1959/63 for relevant processes. Moreover, Section 51 (3) of the Act outlines that a victim determined to be trafficked would be stationed in a shelter. According to the Protection Order (PO), a local trafficking victim could

¹ Information could be received via phone call, oral information, informant, or a piece of paper.

be stationed at the shelter for a maximum of two years. In contrast, a foreign trafficking victim could reside at the shelter for up to three months. Nevertheless, Section 52 of the Act stipulates that the IO may apply for an extension to the Magistrate for the purpose of gathering the evidence or any other special conditions.

The offender will be arrested under Section 117 of the Criminal Procedure Code. Additionally, a migrant offender will be investigated under Immigration Act 1959/63. Section 34 of the ATIPSOM 2007 outlines that the statement of the offender has to be recorded. The IO is responsible of recording the statement and collecting relevant evidences. Upon completion of the investigation, the IO will submit the investigation report to the Public Prosecutor or Deputy Public Prosecutor (DPP) for evaluation and instructions.

If the investigation convinces the DPP of a prosecution case, he will grant an order for prosecution. A specialised DPP will charge the offender before the Sessions Court. However, the offender could be bailed out during the prosecution process. Nonetheless, foreign human trafficking offender may not be bailed out as there is a risk for him or her to flee to other country. The enforcement officers would be faced with difficulty to locate and arrest the offender again. Conversely, local offender is usually allowed to be bailed out but few conditions must be met, namely surrender of passport to the court and large sum of bail. Besides, a number of offenders are required to report to the nearest police station at least once per month (Yong and Anor, n.d).

Over the course of the trial process, the IO is tasked with ensuring smooth case proceeding. He will collaborate with the DPP to oversee the presence of victim and witnesses, as well as the safety of exhibits. In case that the prosecution indicates the suspect to be a non-trafficker and merely a foreign migrant, the suspect is passed to an Immigration officer to undergo the deportation process. Accordingly, the Immigration officer will cooperate with the embassy of the migrant's origin country. On the contrary, the suspect will be released in accordance with Section 117 Criminal Procedure Code if he or she is proven to have legal documentation for his or her stay in Malaysia, or to be a local citizen.

3. THE PROCEDURES OF VICTIM MANAGEMENT FOR HUMAN TRAFFICKING CASE

Apart from the ATIPSOM 2007, the enforcement bodies are also required to abide by other procedures provided by Anti-Human Trafficking and Anti-Migrant Smuggling Council (MAPO) for the management of trafficking victims.

3.1. Placement of Victim at Shelter

Regardless of the documented procedures outlined earlier, the enforcement officer has to observe several rules to ensure the protection of the victim.² Prior to placing trafficking victim at particular shelter, the IO needs to inform the MAPO regarding the victim. Consecutively, the IO has to perform a physical examination on the victim to detect the presence of any dangerous weapon in his or her possession. This is to ensure the safety of both the victim and other people in the shelter. Moreover, the belongings of the victim including all tools for communication like hand phone are surrendered to the shelter's protection officer. Notably, the Search List³ needs to be completed at this stage.

Notably, any information about the shelter is highly confidential. The victim may be visited by only the IO or his representative throughout his stay in the shelter. In particular, it is the IO's responsibility to make sure that the victim is safe during all procedural matters such as attendance at the court proceeding and hospital visit.⁴

² Leutenant Noraizan bin Md Noh, Interviewed by Author, Malaysia Maritime Enforcement Agency, Sabah, 5 May 2014. At the time the interview was conducted, he is the Maritime IO for cases of human trafficking.

³ The Search List comprises the information regarding the belongings gathered by the officer and the respective owners of such items.

⁴ Inspector Mazlan bin Ali, Interviewed by Author, Police Head Quarters, Ampang, Selangor, 21st April 2014. During the interview, he is one of the specialised IOs who handles human trafficking cases in Selangor.

3.2. Procedure for Gathering Evidence from the Victim

In the investigation process, the IO deems two kinds of evidences⁵ to be highly essential. The first type of evidence refers to the testimony and statement of the victim. The officer will record the statement by the victim in order to evaluate whether the case involves human trafficking or not. The questions covered include (i) the victim's entrance to Malaysia, (ii) the contact person, (iii) the victim's situation in the country, (iv) the victim's nature of work in the country, (v) the person responsible for the victim's presence in Malaysia, (vi) the victim's feelings towards the situation, and (vii) the existence of any coercion or threat elements.

Besides, the IO will confine their investigation to the issue of recruitment, transportation, and exploitation. In order to qualify as a human trafficking case, all three criteria must be fulfilled. The IO needs to investigate a number of aspects in effort to determine the existence of recruitment element by the offender towards the victim. In general, the IO will inquire about (i) the victim's reason for coming to Malaysia, (ii) the person responsible to manage the victim's entrance to the country, (iii) the presence of any force, and (iv) if anyone promised anything about wage or occupation.

In order to examine the transportation aspect, the IO will scrutinise (i) the victim's mode of transportation into Malaysia, (ii) the person managing the transportation process, and (iii) the possession of any legal document for stay in the country. Under the exploitation's investigation, the questions revolve around (i) the victim's job in Malaysia, (ii) the victim's work manager, (iii) any payment for the tasks performed, and (iv) the possession of any legal document to perform the occupation. The victim provides all evidences, with the support of other witnesses and material evidences like documents, medical report, and pictures.

Another kind of evidence is circumstantial evidence which refers to material and physical evidences found during the rescue operation. The IO may collect or confiscate such evidences to support the case, including relevant materials such as written agreement and passports. Apart from that, the IO will also gather pictures that show the victim's confinement spot and other relevant details.

3.3. Procedure after the Lapse of IPO or the Trial

If an IPO has lapsed or the victim does not require further trial, he will undergo the repatriation process as per Immigration Act 1959/63. The Immigration Department may seek the cooperation of the victim's country of origin to smoothen the repatriation process. This echoes Article 8 of the UN TIP Protocol (United Nations, 2000) which underlines that the state parties need to expedite the repatriation of citizens from other nationalities with due regard. The victim has to be returned without irrational postponement in order to ensure his or her safety.

Under the protocol, the victim's voluntary agreement is recommended for repatriation. Malaysia has been receiving criticism due to its regulation for compulsory deportation of the victims to the country of origin upon the case settlement, regardless of his or her refusal to go home. Nonetheless, Malaysia's approach does not contradict the UN TIP Protocol; no term in the protocol forbids the state countries from imposing mandatory repatriation on the victim (UNODC, 2004).

4. ANALYSIS ON THE ENFORCEMENT BODIES' COMPLIANCE WITH THE LEGAL FRAMEWORK

Malaysian enforcement bodies follow a set of procedures which demonstrate their compliance with the ATIPSOM 2007; Universal Declaration of Human Rights (UDHR) 1948, and MAPO guidelines. Article 7 of the declaration indicates that everyone is equal under the law, hence, all individuals are entitled to equal protection

⁵ Rhymie bin Ramli, Interviewed by Author, Department of Labour Peninsular Malaysia, Putrajaya, 21 February 2014. At the time of interview, he is the Senior Assistant Director, Enforcement Division, Department of Labour Peninsular Malaysia.

without any discrimination. Accordingly, Malaysian enforcement bodies have to consistently exert valiant effort to rescue the trafficking victims from their perpetrator despite their nationality.

These bodies do not merely rescue the victims, instead, they also leverage on their expertise and authority to protect the victim from the moment that he or she is rescued up to his or her return to the country of origin. During the victim's time in Malaysia, protection is provided at the shelter. Moreover, the local legal framework serves to provide justice for the victim against the offender. For instance, if the offender did not pay the victim the wages earned, the Labour Department acts to facilitate the victim in recovering his or her expenses with court proceedings.

5. AUSTRALIA'S EXPERIENCE IN BATTLING HUMAN TRAFFICKING

In this research, Australia is chosen as the benchmark country for the efforts taken to battle human trafficking crime. The TIP reports from 2012 (USDS, 2013) until 2017 revealed that the Australian government had allocated certain amount of funding for victim support programmes. Under these programmes, victims are protected through the provision of living expenses, accommodation, health services, legal advice, and counselling. Only a small number of Australian NGOs run shelters and the country does not have shelter facilities, thus, a majority of the victims were stationed in hotels.

A total of 68 per cent of the victims were reported to participate in prosecution or investigation in the year 2013 (USDS, 2013). This was because the victims were encouraged by the Australian government to be involved in trafficking investigations. Notably, the victims and their family members were given Permanent Witness Protection (Trafficking) visas to reward their cooperation with the prosecution or investigation process. Besides, the victims did not receive any form of legal punishment for illegal actions that occurred as a result of them being trafficked.

Apart from that, trafficking victims who were successful in their prosecution cases were eligible to few visa options, as well as compensation. Additionally, NGOs were appointed by the government to give pro bono legal services to the victims of human trafficking (USDS, 2012). These efforts were undertaken by the Australian government to encourage the victims' cooperation with the prosecution and enforcement officers. As a result, the country mainly managed to achieve successful protection of the human trafficking victims.

6. CONCLUSION

Malaysian enforcement bodies have demonstrated their capability to battle human trafficking via legal enforcement. This paper outlines that the bodies are in compliance with the country's legal framework which incorporates MAPO's standard operation procedures, ATIPSOM 2007's documented guidelines, and recommendations from relevant associations. On top of that, departments such as Customs and MMEA are also guided by their own related rules and regulations. These enforcement bodies are dedicated to provide full protection to the victim starting from the moment he or she is rescued up to the day of his repatriation.

Nonetheless, several aspects may be improved to enhance the enforcement bodies' achievement in eradicating human trafficking. For instance, the local laws may be extended to cover the foreign victim as well. The foreign victim may receive similar treatment to a Malaysian victim which includes the right for shelter, basic necessities such as food and water, and to recover any financial loss from the perpetrator. Furthermore, all related stakeholders must be aware of the responsibilities of the enforcement officer which only cover the care of the victim during the investigation process and repatriation. In reality, the enforcement officer is not responsible to provide access to work for the victim over the course of the PO. Upon the victim's placement in a government shelter, he falls under the responsibility of the Department of Social Welfare, Ministry of Women, Family, and Community Development. Moreover, the Ministry of Home Affairs is responsible to decide on other matters related to the victim. Hence, all

stakeholders have to fully comprehend their essential roles in addressing the issues, and execute their responsibilities diligently.

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