

## **HUMAN TRAFFICKING: THE INTERNATIONAL, MALAYSIAN LEGAL FRAMEWORK AND SHARIAH PERSPECTIVES**

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### **ABSTRACT**

*Slavery and forced labour have been accepted to be against humanity. These practices are expressly prohibited by the Federal Constitution in Malaysia. Although the prohibition of human trafficking is not expressly mentioned in the Constitution, it could be regarded as one of the most heinous crimes according to the letter, intent and spirit of the constitution. This is related to the fact that human trafficking is much associated with modern day slavery and therefore is against the ideology of the Malaysian nation and acceptable norms of the international community and Islamic law and Shariah values. The paper will explore the available international human rights and the laws governing human trafficking in Malaysia. The research is based on the current situation and cases of human trafficking in Malaysia. By*

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*understanding and observing these, it will help to conclude that trafficking has violated human rights and governing laws in Malaysia. The paper also looks at Islamic law perspectives on human trafficking, and to a certain extent, the stand taken by Muslim countries on the issue. The paper is mainly a conceptual and doctrinal discussion combined with critical legal analysis of certain laws in Malaysia. It will also involve some comparative elements with some Muslim countries where necessary.*

**Keywords:** human trafficking; human rights; international law; Malaysian law; Islamic laws.

## **PEMERDAGANGAN MANUSIA: RANGKA UNDANG-UNDANG ANTARABANGSA, MALAYSIA DAN PERSPEKTIF ISLAM**

### **ABSTRAK**

*Perhambaan dan buruh paksaan adalah bertentangan dengan peri kemanusiaan oleh masyarakat seluruh dunia. Amalan-amalan tersebut adalah jelas dilarang dalam Perlembagaan Persekutuan Malaysia. Walaupun larangan penyeludupan manusia tidak dinyatakan dengan bertulis dalam Perlembagaan, perbuatan tersebut dianggap sebagai salah satu jenayah yang paling kejam berdasarkan nilai-nilai yang tersurat, yang tersirat, dan juga dengan semangat perlembagaan. Tanggapan tersebut berkait rapat dengan fakta bahawa penyeludupan manusia berhubung-kait dengan perhambaan zaman moden, maka dengan itu penyeludupan manusia adalah bersalahan dengan ideologi negara Malaysia, dan juga bertentangan norma-norma masyarakat antarabangsa, dan juga*

*dengan undang-undang Islam dan prinsip Syariah. Dalam artikel ini pemeriksaan dibuat terhadap undang-undang hak asasi manusia antarabangsa yang sedia ada dan undang-undang Malaysia yang berkaitan dengan jenayah penyeludupan manusia. Penyelidikan dalam artikel ini mengambil kira isu-isu semasa dan kes-kes perdagangan manusia di Malaysia. Pemahaman dan pemerhatian tersebut akan membantu untuk membuat kesimpulan bahawa penyeludupan manusia adalah melanggar hak asasi manusia dan undang-undang di Malaysia. Artikel ini juga mengambil kira perspektif undang-undang Islam terhadap perdagangan manusia, dan seboleh mungkin memuatkan perbincangan mengenai pendirian yang diambil oleh negara-negara Islam mengenai isu ini. Penulisan ini merupakan satu perbincangan konseptual dan doktrinal dan digabungkan dengan analisis kritikal undang-undang yang berkaitan di Malaysia. Ia juga akan mengandungi elemen perbandingan dengan merujuk kepada beberapa buah negara Islam.*

**Kata kunci:** Pmerdagangan manusia, hak asasi, undang-undang antarabangsa, undang-undang Malaysia, undang-undang Islam.

## **INTRODUCTION**

Nowadays, human trafficking has become the fastest growing criminal enterprise in the world. There are about 27 million adults and 13 million children worldwide who have become victims of this heinous crime.<sup>1</sup> Some reports show that nearly one-third of the world's total human trafficking originates from Southeast Asia where syndicates trafficked

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<sup>1</sup> World Youth Foundation. (2013, September). Slide Presentation on Human Trafficking. Paper presented at International Conference on Trafficking organized by World Youth Foundation, Malacca.

women and children to Australia, Thailand, Hong Kong, Singapore, Japan, and the United States.<sup>2</sup> About 2.5 million people are trafficked every year across the borders for two main purposes; labour and sexual exploitation. Out of this number, 1.2 million of the victims are under the age of 18. The global black market for human trafficking in Malaysia is enormous, in which the victims encompass men, women and children. It is estimated to generate between US\$13-US32 billion a year.<sup>3</sup>

This transnational organised crime is regarded as one of the serious threats to the world in the eyes of laws. This article will explore the available international human rights and the laws governing human trafficking. The current situation and cases of human trafficking in Malaysia will be discussed alongside the Shariah perspectives on human trafficking as well as the stand taken by some Muslim countries on the issue.

## **PERSPECTIVE ON HUMAN TRAFFICKING FROM INTERNATIONAL LAWS**

International law on human trafficking has become the main guiding framework for most of the countries around the world in combating the dreadful crime. It has comprehensive principles, guidelines and approaches. Most countries like Malaysia have opted to adopt most of the international framework in their national legislation and enforcement policy.

### **UN Universal Declaration of Human Rights 1948**

The UN Universal Declaration of Human Rights 1948 is the main international declaration that governs human trafficking in the world.

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<sup>2</sup> Kara C. Ryf. "The First Modern Anti-Slavery Law: The Trafficking Victims Protection Act of 2000," [2002], 34 *Case W.Res. J. Int'l L.* 45, 47.

<sup>3</sup> Stanslas. P.T. "Transborder Human Trafficking in Malaysian Waters: Addressing the Root Causes." *Journal of Maritime Laws and Commerce*, [2010] 41, 595, 1-9.

The introduction of the UN Universal Declaration of Human Rights 1948 is in line with its objective “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”<sup>4</sup> In the declaration, there are about thirty excellent articles available relating to human rights, of which eight articles have a major impact to human trafficking, namely article 3, 4, 5, 6, 7, 23, 13 and 24. Other than that, the rest of the articles in the declaration are still related and are relevant with trafficking, but they did not pose a major impact on the issue. In this discussion, attention will be given to the eight principal articles which is appropriate to its ulterior purposes to safeguard human freedom, justice and peace.

The following table illustrates the violation of the UN Declaration, along with some examples based on current cases and the situations of human trafficking, specifically in Malaysia:

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<sup>4</sup> Preamble, Universal Declaration of Human Rights.

BIL	ARTICLE	CONTENT OF ARTICLE	EXAMPLE OF VIOLATION
1	3	Everyone has the right to life, liberty and security of person.	The liberty and freedom of the victim are restricted. The victim is hidden in a locked home <sup>5</sup> and his passport is held by the syndicate. <sup>6</sup> The objective is to restrain the freedom of the victim.
2	4	No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.	The victim is forced to be a house slave and to do housework without being paid. This is contrary the law against servitude and forced labour.
3	5	No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.	The victim is tortured and beaten <sup>7</sup> by the syndicate. This usually occurs in prostitution cases when the victims refuse to treat the sexual needs of the customer. <sup>8</sup> Today, the detention and authority over the victims by the syndicate are done <i>via</i> debt, threat and harm. <sup>9</sup>
4	6	Everyone has the right to recognition everywhere as a person before the law.	In most cases, women's right in politics, economy, and property ownership is denied compared to man. <sup>10</sup>
5	7	All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.	This has happened when the law available in a country is not practically applied to the victim. For example, the victim is forced to work more than eight (8) hours per day while he works (5) days per week and no rest day per week is given. <sup>11</sup>

<sup>5</sup> *PP v Lim Chee Chong; PP v Kong Kok Kyt & Lee Vo Tu Uyen*. Ipoh Sessions Court, Perak. Case No: 62-127-2008.

<sup>6</sup> Royal Malaysian Police. (2013, September). Organised Crime: Government Initiatives, Laws and Investigation of Human Trafficking in Person and Smuggling of Migrants in Malaysia. Paper presented at International Conference on Trafficking organized by World Youth Foundation, Malacca.

<sup>7</sup> Ms Alex Hutton. (2010, August). People Smuggling and Trafficking Laws in Australia. Paper presented at Malaysia-Australia Workshop on Prosecuting People Smuggling and Trafficking organized by Malaysia and Australia, Kuala Lumpur.

<sup>8</sup> *Supra* no. 5.

<sup>9</sup> *Supra* no. 7.

<sup>10</sup> Louise Shelley, "Human security and human trafficking" in *Human Trafficking and Human Security*, edited by Anna Jonsson (Asia: Routledge Research, 2007), 11.

<sup>11</sup> Malaysia Employment Act 1955.

6	13	<p>(1) Everyone has the right to freedom of movement and residence within the borders of each state.</p> <p>(2) Everyone has the right to leave any country, including his own, and to return to his country.</p>	<p>The rights of the victim are infringed when their travel documents<sup>12</sup> are confiscated by the syndicate to restrain their movement and prevent them from leaving the country.</p>
7	23	<p>(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.</p> <p>(2) Everyone, without any discrimination, has the right to equal pay for equal work.</p> <p>(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.</p> <p>(4) Everyone has the right to form and to join trade unions for the protection of his interests.</p>	<p>i) The victim has no ability to choose his job. Once they arrive in the destination country, they are forced to work such as in cases where a woman is forced to prostitute herself.<sup>13</sup></p> <p>ii) In some cases, children are sold or become forced labour to the creditors to settle debts owed by the family.<sup>14</sup></p> <p>iii) The foreign worker is paid lower compared to the local citizen. In addition, they do not receive most of the basic benefits of employment. In Malaysia, both foreign workers and local citizens should have equal rights where an employer is required to provide salary and benefits package similar to a local workers.<sup>15</sup></p> <p>iv) The employer forces the victim to work with no or low income.<sup>16</sup></p> <p>v) The victim is culturally and socially isolated<sup>17</sup> from other people.</p>
8	24	<p>Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.</p>	<p>(The explanation as in no. 5 and 7 above)</p>

<sup>12</sup> University of Technology Sydney, Anti-Slavery Project- Strengthening Australia's Response to Human Trafficking, Report to Australian Women's Coalition, March 2010 (University of Technology Sydney, 2010) p. 20.

<sup>13</sup> *Ibid.*, p. 16.

<sup>14</sup> PS Ranjan, "Slavery: A Continuing Evil," *Malayan Law Journals*, vol. 4, no. 10 (1999): 2. *Malayan Law Journal* Articles, via Lexis Nexis Malaysia, < <http://www.lexisnexis.com/my/>>.

<sup>15</sup> Malaysia Employment Act 1955.

<sup>16</sup> *Supra* n.6.

<sup>17</sup> *Supra* n.12.

## **BIL    ARTICLE    CONTENT OF ARTICLE**

Any violation of the articles of the declaration is considered as an infringement of human rights especially in respect of the trafficked persons. The denial of the victim's rights as a human being is immoral practice which should be abolished.

### **Protocol to Prevent, Suppress and Punish Trafficking in Persons**

In addition to the above declaration, United Nations which consists of (147) states parties including Malaysia are guided by a multilateral treaty against transnational organised crime called the Palermo Convention, which was adopted in the year 2000. The purpose of the convention is to promote cooperation to prevent and combat transnational organized crime more actively.

There are three protocols that supplement the Palermo Convention against Transnational Organized Crime. The main protocol which is directly related to trafficking is the Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children.

Article 3 of the Protocol<sup>18</sup> defines some terms relating to trafficking. The term “trafficking in persons” is defined as:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

A further definition on “exploitation”<sup>19</sup> has been given which includes:

<sup>18</sup> United Nations. 2001. *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Woman and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, General Assembly Resolution 25, Supplement No. 49 (A/45/49). New York: United Nations.

<sup>19</sup> *Ibid.*



the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

The definition of the crime in the protocol explains some forms of trafficking which occur nowadays. The protocol has become a widely-cited document and main reference which has guided most of its members in defining and interpreting the crime, including Malaysia. In most of the cases, the syndicate has succeeded in obtaining consent from the victim to avoid punishment. Fortunately, the same article states that the consent of a victim to the exploitation is irrelevant in the situation where it involves any elements of threat, coercion, or deception.<sup>20</sup> This has proved that the crime is extremely serious, to the extent that the consent of the victim is not a defence to the offender in eluding from being punished by laws.

### **The Protocol Against the Smuggling of Migrants by Land, Sea and Air**

The protocol was ratified in Poland in 2002 and enforced in 28 January 2004. It is one of the three (3) protocols which supplements the Palermo Convention. The protocol deals with the smuggling of migrants committed by organized criminal groups. Among the objectives of the protocol are to combat the smuggling of migrants, protecting the rights of victims, encouraging cooperation among States parties, and ending the victim's exploitation.<sup>21</sup>

Nevertheless, Malaysia did not ratify the protocol. However, the amendments to the Anti-Trafficking in Persons Act of 2007 adding the provisions relating to the smuggling of migrants in Part IIIA has proved

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<sup>20</sup> "International Laws," Anti-Slavery Australia, <<http://www.antislavery.org.au/international-laws.html>> (accessed 22 May 2013).

<sup>21</sup> "United Nations Convention against Transnational Organized Crime and the Protocols Thereto," United Nations Office on Drugs and Crime, <<http://www.unodc.org/unodc/treaties/CTOC/>> (accessed 22 November, 2013).

the readiness and the intention towards ratification of the Smuggling Protocol.

## Other International Conventions and Protocols

Other than the above protocols, there are two (2) more main international protocols provided by the United Nations relating to human trafficking:

- (i) Convention for the Suppression of the Trafficking in Persons and of the Exploitation of the Prostitution of Others, ratified in Poland in 1952.<sup>22</sup>

The introduction of the convention is in line with the mission of the United Nations to abolish “slavery or practices similar to slavery.” The convention regards prostitution which link to trafficking as inappropriate to the dignity of humans and endangers the welfare of the people at large.<sup>23</sup> The Convention has entailed the signatory states to punish any person involved in running prostitution activities including the offender who exploits the prostitution of another person, runs brothels or rents out accommodation for prostitution purposes. In addition, the states also play a role in taking essential efforts for the supervision of employment agencies to avoid women and children from being exploited for the purpose of prostitution.<sup>24</sup>

- (ii) The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, entered into force on 18 January 2002.<sup>25</sup>

<sup>22</sup> Zbigniew Lasocik, in *“Human trafficking: a challenge for the European Union and its member states (with particular reference to Poland,”* edited by Leslie Holmes (Edward Elgar Publishing Ltd, 2010), 34.

<sup>23</sup> Preamble, Convention for the Suppression of the Trafficking in Persons and of the Exploitation of the Prostitution of Others.

<sup>24</sup> Article 20, Convention for the Suppression of the Trafficking in Persons and of the Exploitation of the Prostitution of Others.

<sup>25</sup> “Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography,” United Nations Human Rights, <<http://www.ohchr.org/EN/Professional>

The introduction of this protocol is to guarantee the rights of children. This is done by providing protection for children from being sold, against child prostitution and pornography. The responsibility is imposed on the state parties.

## **PERSPECTIVE ON HUMAN TRAFFICKING FROM MALAYSIAN LAWS**

### **Federal Constitution**

Article 4 (1) of Federal Constitution states that the constitution is the supreme law in Malaysia. Its supremacy is above all laws, bodies and individuals in Malaysia. Therefore, any law which is inconsistent with it will be null and void. In relation to human trafficking, so far there is no article mentions or discusses on the topic. However, Article 6 (1) and 6 (2) of the constitution prohibits that slavery and forced labour. These two (2) practices are complemented with the international definition of the crime.

The constitution does not define slavery and forced labour. The definition of slavery which is internationally accepted can be found in the International Convention to Suppress the Slave and Slavery 1926 which defines slavery as:

The status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.<sup>26</sup>

In addition to that, the convention has included forced or compulsory labour under the definition of slavery in 1930 in the International Labour Organization ('ILO') Convention as:

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<sup>26</sup> Interest/Pages/OPSCCRC.aspx> (accessed 22 November, 2013).  
*International Convention to Suppress the Slave and Slavery 1926*, 212 U.N.T.S 17, entered into force 18 June 1927, Article 1(1).

All work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.<sup>27</sup>

In this situation, it is clear that the act of slavery and forced labour are among the forms of human trafficking which are obviously prohibited internationally, including Malaysia. As established in *Barat Estates Sdn Bhd & Anor*,<sup>28</sup> any written law or state action or arrangement which deprives the right of choice for an employee as in Article 6 (2) of the constitution would fall foul of the supreme law and should be struck out.

### **Anti-Trafficking in Persons and Anti-Smuggling of Migrant Act 2007**

Even though the Constitution of Malaysia does not express the laws relating to human trafficking, Malaysia has its specific law governing the crime in Malaysia as a response to the international efforts and the report provided by the Trafficking in Persons by U.S Government since 2001<sup>29</sup> until now. Malaysia has stepped up its efforts to eliminate the crime by enacting a principal Act.

The main source of reference for the Anti-Trafficking in Persons Act 2007 in Malaysia is based on international instruments i.e. Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children and the Protocol Against the Smuggling of Migrants by Land, Sea and Air.

Article 3 of this protocol gave its first international definition of “trafficking” which has helped Malaysia in defining the crime. The definition of human trafficking is provided in Section 2 of the Act. The “trafficked person” has been defined as any person who is the victim or

<sup>27</sup> *Forced or Compulsory Labor Convention*, U.N.T.S 55, entered into force 1 May 1932, Art. 2.

<sup>28</sup> See *Barat Estates Sdn Bhd & Anor v Parawakan Al Subramaniam & Ors* [2000] 4 MLJ 107.

<sup>29</sup> “Introduction Trafficking in Persons Report July 2001,” U.S. Department of State, <<http://www.state.gov/j/tip/rls/tiprpt/2001/3929.htm>> (accessed 3 Jan, 2013).

object of an act of trafficking in persons. “Trafficking in persons” means all actions involved in acquiring or maintaining the labour or services of a person through coercion, and includes the act of recruiting, conveying, transferring, harbouring, providing or receiving a person for the purposes of this Act.

In prosecuting trafficking cases, it is vital to the prosecution to prove that there is “exploitation” involved in the case.<sup>30</sup> Section 2 of the principal Act<sup>31</sup> has listed some forms of exploitation which includes all forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, any illegal activity or removal of organs.

The purpose of Parliament passing the Anti-Trafficking in Persons Act 2007 is to provide for the trafficking offence, the protection and assistance of trafficked persons, the establishment of the Council for Anti-Trafficking in Persons, and things related to the crime.<sup>32</sup>

Before the Act was passed, there were many criticisms directed towards Malaysia on the efforts taken to combat trafficking in persons. U.S. State Department Trafficking in Persons Report<sup>33</sup> for example, has reported on Malaysia’s lack of efforts in combating the trafficking. The report was later rejected outright by the Honourable Minister of Women, Family and Community, which expressed the stand of Malaysian government on the crime. The report has disappointed the government of Malaysia since it is inaccurate and does not reflect Malaysia’s continuous efforts in combating human trafficking.<sup>34</sup>

Thus, the enactment of the Anti-Trafficking in Persons Act 2007 is a manifestation of the government’s determination to tackle these issues. The Act is a specific legislation encompassing aspects of prosecution, prevention, care and protection to address the crime of human trafficking. The passing of the Act by Malaysia’s House of Representatives on 10

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<sup>30</sup> Malayan Law Journal Reports/2011/Volume 6/Siti Rashidah bt Razali dan yang lain lwn Pendakwa Raya - [2011] 6 MLJ 417 - 12 May 2011.

<sup>31</sup> Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act, 2007 (Act No. 2 of 2007).

<sup>32</sup> Malayan Law Journal Unreported/2008/Volume /Pendakwa Raya v Nam Oithantip - [2008] MLJU 297 - 13 June 2008.

<sup>33</sup> U.S. State Department Trafficking In Persons Report, June 2007.

<sup>34</sup> *Supra* no. 26.

May 2007 has brought a new light and hope to Malaysia where it has been a significant tool for anti-trafficking.<sup>35</sup>

After its enforcement on 15 November 2010, the principal Act is known as the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007. The amendment is done in order to strengthen the regulatory framework to deal more effectively with the issues of human trafficking and smuggling of migrants where several provisions were incorporated on smuggling of migrants and other ancillary offences.

The Act has a wider scope of application where it will apply to the offences committed either inside or outside Malaysia, and regardless of the nationality or citizenship of the offender, in the situations where Malaysia is the receiving country or transit country or the exploitation occurs in Malaysia and if the receiving country or transit country is a foreign country but the trafficking in persons or smuggling of migrants starts in Malaysia or transits in Malaysia.

In Malaysia, human trafficking comes in various forms of exploitation. Among the reported forms of exploitation is forced labour, sexual service, selling of babies, and forced marriage.<sup>36</sup> The offender will be punished, the highest punishment under the Act is maximum life imprisonment (20) years and a maximum fine of RM1 million.

## **Supplemental Acts for Human Trafficking in Malaysia**

Other than the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, there are seven statutes relevant to human trafficking in Malaysia. They are the Immigration Act 1959/63 [Act 155], Malaysian Maritime Enforcement Agency Act 2004 [Act 633], Customs Act 1967 [Act 235], Evidence Act 1950 [Act 56], Court of Judicature Act 1964 [Act 91], Child Act 2001 [Act 611], and Penal Code [Act 574]. These

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<sup>35</sup> *Ibid.*

<sup>36</sup> Supt. P.R Gunarajan a/l/Ramayal, (2013, September). Organised Crime: Government Initiatives, Laws and Investigation of Human Trafficking in Person and Smuggling of Migrants in Malaysia. Paper presented at International Conference on Trafficking organized by World Youth Foundation, Malacca.

supplemented Acts might be available for the procedures and offences which are not governed or fulfilled under the principal Act.

As in the case of *Siti Rasyidah*,<sup>37</sup> the learned judge found that the offence was proven under Section 56 (1) (d) of the Immigration Act 1959/63 instead of under Section 12 or 14 of the principal Act after the prosecution failed to prove the element of “exploitation.” The conviction and sentence of the original charges were struck out and the accused were convicted under Section 56 (1) (d) of the Immigration Act 1959/63 for harbouring illegal immigrants in the premise.

## **ISLAMIC LAW’S PERSPECTIVE ON HUMAN TRAFFICKING**

Historically slavery was common in pre-Islamic societies. The prevailing view among Muslim scholars is that Islam did not abolish slavery at the outset. The Qur’an accepted the institution of slavery as an established part of the life of believers. At the outset, it thus sought to humanize and regulate the practice of slavery rather than seek its outright and immediate abolition. While the Qur’an thus instructs Muslims to be kind to the slaves and to treat them fairly, Islamic teachings of the Qur’an and the traditions of the Prophet were intended to gradually eliminate the institution of slavery. This gradual reform, rather than the outright abolition of slavery, is consistent with the Islamic philosophy of gradual social change. For example, the prohibition on drinking wine and the prohibition of earning interest on loans were both enacted gradually. At the time when Islam was introduced, the practice of slavery was prevalent and complete, and immediate abolition would have upset the social and economic foundation of society.

In the present day laws, exploitation is the key element of the definition of trafficking in persons. It is what differentiates trafficking in persons from similar crimes such as the smuggling of migrants. Exploitation takes a variety of forms. In addition to slavery and practices similar to slavery, the comprehensive definition in the Trafficking in Persons Protocol includes the following forms of exploitation: forced

<sup>37</sup>

*Siti Rashidah binti Razali & Ors v PP* [2011] 6 MLJ 417.

labour or services, the exploitation of the prostitution of others or other forms of sexual exploitation, and removal of organs. The Protocol leaves the definition open to incorporation of other forms of exploitation, as those indicated here are listed “at a minimum.” Islamic law outlines a general prohibition of exploitation and specifically prohibits certain types of exploitation including similar to the Trafficking in Persons Protocol, the prohibition of labour exploitation, of exploitation of the prostitution of others and of trafficking in human organs. In addition to the practices specifically covered by the Protocol, Islamic law condemns other forms of exploitation, such as those that may arise out of illegitimate adoption practices and forced marriages.

The Trafficking in Persons Protocol includes forced labour and services as a form of exploitation in the definition of trafficking in persons. Trafficking for the purposes of forced labour and services is one of the most prevalent forms of trafficking in persons throughout the world today, and it is particularly important in some wealthy Muslim countries. There are large pools of foreign labourers who work in the construction industry, in the hospitality industry and as domestic servants, and many of them are vulnerable to exploitation. This form of trafficking often involves deceptive contracts, with a promise of compensation replaced by debt that is to be repaid through work, wages which are a mere fraction of those promised, exploitative working hours which do not reflect those promised, restriction of movement, and hard physical labour often in unbearable conditions.

The Islamic labour laws for example clearly prohibit the exploitation of labour. A tradition of the Prophet states:

Give the hired man his wages before his sweat dries.  
(reported by Ibn Maajah, 2:817).

As stated in the Qur’an, 7:85 which means:

So fulfil the measure and weight and do not deprive people of their due and cause not corruption upon the earth after its reformation. That is better for you, if you should be believers.

This applies equally to men and women (Qur’an, 4:32) which means:



... to men is allotted what they earn, and to women what they earn.

There are four major principles which are emphasised in Islamic labour law that are particularly relevant when considering the violations of labour practices that constitute forced or exploitative labour under the concept of trafficking in persons. First, if one is employing a worker he must fulfill his contractual obligation. In the Qur'an, an-Nahl 16:91 it is stated upon translation:

And fulfill the covenant of Allah when you have taken it, [O believers], and do not break oaths after their confirmation while you have made Allah , over you, a witness. Indeed, Allah knows what you do.

Further, the Islamic tradition advocates that wages must be paid upon a worker's completion of the agreed upon contract. Thirdly, when there is an agreement to work, compensation must be specified prior to entering into a contract. Finally, in another tradition, the Prophet stated that "if you are employing a worker, you have to tell him how much he will be compensated for his labour."

Cases of trafficking in persons for forced labour and exploitative labour usually involved the violation of at least one, but more frequently of several of these injunctions. The Islamic legal tradition in the realm of labour law thus provides clear guidelines prohibiting these types of practice. That is an important element in the present compilation of Islamic prohibitions of the various acts that constitute trafficking in persons.

The Islamic tradition values work and considers it as an act of worship, with recognised rights of the employer and of the employee. Importantly, the concept of a contract in Islam does not exist merely as a legal institution necessary for the satisfaction of legitimate private needs. The very foundation of a contract is a covenant, a pact between God and man. For example, clear and transparent agreements are emphasised before a worker enters into a work contract so the worker will be protected and motivated to work honestly and securely and contracts are to be duly fulfilled:

O you who believe! Fulfil the obligations.  
(The meaning of Qur'an, 5:1).

A contract in Islamic law is thus not merely a matter of secular law between the contracting parties, it is of a sacred nature as it is a covenant with God.

Islam condemns the infliction of harm. Inflicting hardship and harm, whether intentional or not, is thus prohibited. Hence, subjecting any person to hard labour is likewise prohibited, as illustrated in the Qur'an, 22:78 which means:

He has chosen you and has not laid upon you in religion  
any hardship.

This sentiment is restated in the Qur'an, 2:185 which means:

Allah desires for you ease. He desires not hardship for  
you.

Forced labour often requires excruciating and harmful forms of labour, Islam thus prohibits these types of practices. In addition, the illicit means by which persons are frequently trafficked, such as coercion and deception, would also fall under the category of types of labour practices prohibited under Islamic law. Forced labour or services, including such practices as forced begging, are not acceptable in the Islamic tradition, in harmony with the prohibition on trafficking in persons for the purpose of forced labour or services in international law under the Trafficking in Persons Protocol. The Islamic tradition prohibits corrupt, deceptive and coercive practices and thus addresses some of the most important contributing factors to the trafficking infrastructure and illicit means involved in trafficking.

Trafficking in persons for the purpose of sexual exploitation, a recognised purpose of exploitation under the Trafficking in Persons Protocol is one of the most prevalent forms of trafficking in persons throughout the world, including in some Muslim countries. Forced prostitution is one of the most common forms of sexual exploitation that victims of trafficking, especially women and girls, are forced to endure. Often, deceived by promises of employment as waitresses, saleswomen

and similar occupations, women and girls find themselves instead forced into and exploited in prostitution or other forms of sexual exploitation.

Islamic law provides a basis for the prohibition of the act of prostitution in many of the Muslim countries. While the act of prostitution per se may not constitute an offence in some legal systems, Islamic law considers an act of prostitution as a form of sexual exploitation and thus forbids it. Forced prostitution is likewise forbidden, as is sexual exploitation for profit, according to the Qur'an, 24:33 which means:

But force not your maids to prostitution when they desire chastity, in order that ye may make a gain in the goods of this life.

The tradition of the Prophet likewise prohibited taking the earnings of a soothsayer and the money earned by prostitution. It must also be stressed here that the Recommended Principles and Guidelines on Human Rights and Human Trafficking developed by the Office of the United Nations High Commissioner for Human Rights, stress the importance of non-criminalization with respect to any illegal activities a trafficked victim may have been involved in as a result of being trafficked.

Another form of exploitation defined under the Trafficking in Persons Protocol is that of trafficking in human organs, which involves the illicit provision of human organs to those who need and can afford them and the taking of those organs from poverty-stricken individuals, who may or may not be aware of what the procedure entails, or of its consequences. The price at which the organs are sold to the recipient is far higher than that paid to the so-called "donor" (if they are paid at all).

Islamic law clearly prohibits the buying or selling of a human being or part of his or her body. According to the tradition of the Prophet, it is "haram," or absolutely prohibited to deal unlawfully in a Muslim's blood, property or honour. Islamic law, which holds all human beings to be owned solely by God, thus prohibits the possibility of the sale of another human being, as no human being may be owned by another. By extension, this applies to the sale of a part of a person's body (with the exception of a mother's milk).

The prohibition of the sale of human organs has recently been reiterated and supported in a number of Islamic forums and human rights documents. For example, the International Conference of Islamic Jurisprudence, in its decision No. 1 of 1988, emphasized the Islamic

position in prohibiting transactions in human organs.<sup>38</sup> The donation of a human organ is subject to strict limitations, including that such a donation may not subject the donor to death or bodily harm, that the donation is made with the full and informed consent and that the donor is of legal age. Similarly, the limited permissibility of the sale of human organs is subject to dire necessity and is only permissible when the patient cannot find a donor, his life is in danger and he has no other alternative to cure his ailment. And even in such a case, it may be argued that such permission would become immediately null and void if the contract to obtain the necessary organ were to be characterised by deceit, misinformation, coercion or any other violation of a contract in compliance with Islamic law, as discussed earlier. It is thus implied that the brokering of human organs in the fashion in which it occurs within the context of the crime of trafficking in persons would clearly be prohibited by Islamic law.

## CONCLUSION

It is obvious that nowadays organised criminal syndicates which operate internationally are trafficking a great number of women and children who are vulnerable and innocent, and abuse them in vice activities such as prostitution. In Islam not only prohibits prostitution, but the activities that lead to prostitution are also prohibited. A number of international and regional human rights documents adopted in the Muslim world, as well as some Muslim constitutions and national legislation have all condemned and prohibited trafficking in persons and/or related crimes. For example, Article 13 of the Cairo Declaration on Human Rights in Islam of 1990 states that an employee may neither be assigned work beyond his capacity nor be subjected to compulsion or harmed in any way. Likewise, since prostitution is prohibited under Islamic law, not only trafficking for the purpose of exploitation of the prostitution of others, but trafficking for the purpose of prostitution is prohibited under the Arab Charter of Human

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<sup>38</sup> An earlier *fatwa*, or legal opinion, was issued by the Ministry for Awqaf (Trust) and Islamic Affairs of Kuwait in 1985, stating that the purchase of another's kidney is haram, since God created people in a respectable and beautiful image (Qur'an, Sura At-Tin 4). Consequently, parts of the body should not be removed and sold for compensation.

Rights. Article 10 of the Charter makes this distinction, prohibiting trafficking in human beings for the purposes of prostitution and the exploitation of the prostitution of others or any other form of exploitation. Thus it is concluded that Islamic law is in harmony with the international law on trafficking in persons.