

LEGAL CHALLENGES IN COMBATING CHILD TRAFFICKING IN MALAYSIA

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ABSTRACT

Malaysia has enacted the Anti-Trafficking in Persons and Anti-Smuggling of Migrants 2007 (ATIPSOM) Act in regulating the crime of human trafficking in Malaysia. The Act has to be read together with other relevant legislations, for instance, the Child Act 2001, Immigration Act 1956/63, and Child and Young Person (Employment) Act 1966 (Amendment) 2019. Additionally, since Malaysia is a signatory of the international instrument related to human trafficking, the implementation of the laws is required to observe the international standard. Such as, international instruments include the Protocol to Prevent, Suppress, and Punish Trafficking in Persons especially Women and Children, the Convention on the Rights of the Child, the Optional Protocol for the Sale of Children, Child Pornography, and Child Prostitution. This paper aims to analyse the challenges in implementing the existing laws to combat child trafficking in Malaysia. Therefore, this study adopted a qualitative approach that applies the doctrinal and non-doctrinal components by utilising library-based resources and conducting semi-structured interviews with relevant agencies. The findings indicate that there are loopholes in enforcing several domestic laws to comply with the international standards and necessitates improvements in terms of criminalizing child trafficking cases, demand and supply of a child for sexual exploitation, child adoption process, and the status of refugee children.

Keywords: Child Trafficking, Domestic Laws, International Standards, Problems, Challenges.

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CABARAN UNDANG-UNDANG MEMBANTERAS PEMERDAGANGAN KANAK-KANAK DI MALAYSIA.

ABSTRAK

Malaysia telah menggubal Akta Anti-Pemerdagangan Orang dan Anti-Penyeludupan Migran 2007 (ATIPSOM) dalam mengawal selia jenayah pemerdagangan manusia di Malaysia. Akta tersebut perlu dibaca bersama-sama perundangan lain yang berkaitan, contohnya, Akta Kanak-Kanak 2001, Akta Imigresen 1956/63, dan Akta Kanak-Kanak dan Orang Muda (Pekerjaan) 1966 (Pindaan) 2019. Selain itu, memandangkan Malaysia adalah penandatangan instrumen antarabangsa yang berkaitan dengan pemerdagangan manusia, pelaksanaan undang-undang perlu mematuhi piawaian antarabangsa. Seperti, instrumen antarabangsa termasuk Protokol Mencegah, Menekan dan Menghukum Pemerdagangan Orang terutamanya Wanita dan Kanak-kanak, Konvensyen Hak Kanak-Kanak, Protokol Pilihan untuk Penjualan Kanak-Kanak, Pornografi Kanak-Kanak dan Pelacuran Kanak-kanak. Kertas kerja ini bertujuan untuk menganalisis cabaran dalam melaksanakan undang-undang sedia ada untuk memerangi pemerdagangan kanak-kanak di Malaysia. Oleh itu, kajian ini menggunakan pendekatan kualitatif yang mengaplikasikan komponen doktrin dan bukan doktrin dengan menggunakan sumber berasaskan perpustakaan dan menjalankan temu bual separa berstruktur dengan agensi berkaitan. Penemuan menunjukkan bahawa terdapat kelemahan dalam menguatkuasakan beberapa undang-undang domestik untuk mematuhi piawaian antarabangsa dan memerlukan penambahbaikan dari segi menjenayahkan kes pemerdagangan kanak-kanak, permintaan dan penawaran kanak-kanak untuk eksploitasi seksual, proses pengangkatan anak, dan status kanak-kanak pelarian.

Kata Kunci: Pemerdagangan Kanak-kanak, Undang-Undang Domestik, Piawaian Antarabangsa, Masalah, Cabaran.

INTRODUCTION

The Anti-Trafficking in Person and Anti-Smuggling of Migrants 2007 (ATIPSOM) Act is the primary Act in addressing human trafficking cases. This law is a national translation of the international instrument known as the Protocol to Prevent, Suppress, Punish Trafficking in Persons especially Women and Children focusing on the prevention of

the crime, protection of the victims and prosecution of perpetrators. Meanwhile, other supplementary domestic laws are necessary to refer to when dealing with cases of child trafficking. These laws include the Child Act 2001, Immigration Act 1956/63, the Penal Code Act 574, the Child and Young Person (Employment) Act 1966 (Amendment) 2019, the Malaysia Maritime Enforcement Agency Act, the Customs Act 1967, the Evidence and Child Witness Act, the Evidence Act 1950, the Mutual Assistance in Criminal Matters (MACMA) 2002 and Extradition Act 1922. Further, the implementation of these laws ought to comply with the international standards. For example, the Child Act 2001 provision is based on the fundamental core principles of the Convention on the Rights of the Children (CRC) such as non-discrimination, the best interest of the child, the right to life and respects the views of the child.

Besides, the Act is also adopted to protect children from being exploited, abused and trafficked as mentioned under the CRC and the Optional Protocol the Sale of Children, Prostitution and Pornography (OPSC). The Malaysian government also ratified the Worst Form of Child Labour Convention (No.182) which prevents a child from being involved in hazardous work. As initiative, the Child and Young Person (Employment) Act highlights the kind of work permissible and unpermitted for children in Malaysia. However, cases of child trafficking are still on the rise in Malaysia. Children are exploited in several types of exploitation.

According to the statistic from 2014 to 2017, Malaysia received many cases of child trafficking during Interim Protection Order (IPO) and Protection Order (PO) from South East Asia. Vietnam recorded the highest number compared to Indonesia, Myanmar and Malaysia. Most child victims have been exploited into sexual exploitation, forced begging, and baby-selling syndicates from 2012 to 2017. Meanwhile, the selling baby syndicate has no recorded number from 2014 to 2017. Since sexual exploitation recorded the highest number of exploitations, the statistics suggest that the perpetrators preferred female children over male children. Notably, the challenges in combating child trafficking vary in many aspects, such as the challenges in criminalizing cases, challenges during the Interim Protection Order (IPO) and Protection Order (PO), demand and supply for child sexual exploitation, avoiding compliance with adoption laws and the status of refugee children.

DISCUSSION

Criminalizing Child Trafficking Cases.

The authority is given 21 days for the investigation to identify a suspected child as a victim of trafficking.¹ This is the first step after the authority rescues a child. In relation to this, the ATIPSOM 2007 introduces the elements that need to be satisfied in the identification of child victims of trafficking. As under the provision of the Act, such element of coercion, recruiting, conveying, transferring, harbouring, providing, or receiving a person for acquiring or maintaining labour services are forming a crime of trafficking a person. Then, it must be proven that the victim falls under one of the forms of exploitation under the Act. Coercion, for instance, is perceived in three definitions. First, it is as a threat of serious harm to or physical restraint against any person. Second, coercion refers to any schemes, plans, or patterns intended to cause a person to believe that failure to perform an act would result in serious harm or restraint against any person. Third, coercion also would be classified as abuse or threatened abuse of legal process.² Consequently, failure to establishing the required elements decreases the chances of investigating the cases and prosecuting alleged traffickers. As a result, Malaysia is the lowest tier rank for not fully meeting the minimum standards of eliminating human trafficking set forth under the Trafficking Victim Protection Act (TVPA) 2003, based on the report released by the United States Department of States of Human Trafficking.³ The state's effort on the prosecution, protection and prevention of crime is a predominant concerns under the TVPA 2003 in determining a country's tier in the annual report on human trafficking.

In addition, the element of coercion under the ATISPOM 2007 is very challenging to prove as measures in the identification process of child trafficking. Furthermore, while dealing with minor victims,

¹ Anti-Trafficking in Persons and Smuggling of Migrants Act 2007, section 51.

² Anti-Trafficking in Persons and Smuggling of Migrants Act 2007, section 2

³ "2019 Trafficking in Persons Report- Malaysia", U.S. Department of Trafficking Persons, accessed 14 May, 2022, <https://www.state.gov/reports/2019-trafficking-in-persons-report-2/Malaysia/>

coercion is not required according to the framework of international law. It can be seen as a heavy burden carried by the prosecutor and authorities to prove coercion, thus, prevents the perpetrators from being prosecuted under the trafficking offence of the ATIPSOM 2007. Therefore, there is a suggestion to exclude the element of coercion as international instruments does not require coercion in identifying a child as a victim of trafficking. This could also result with the perpetrators of being charged under other legislations which much lesser punishment than the ATIPSOM 2007. At the same time, it affects child victims of trafficking, which makes a child vulnerable to trafficking activities or sent to deportation.⁴ For example, the case *Mohammad Nizam Mohammad Selihin & Anor vs PP*⁵ discusses what amounts to coercion in identifying a child as a victim of trafficking. In this case, the coercion was decided as a core element in identifying the offence committed by the appellants which falls under Section 14 ATIPSOM Act 2007. The appellants were a married couple who hired the victim as a babysitter. The victim was Risa Dulhadi Hassan originated from Kampung Tengling Sambas Kalimantan, Indonesia and she was 14 at the time. The appellant concealed the victim's real age and claimed that she was 18 when she come to work for them. Therefore, a dental examination was conducted to prove her age. As a result, the dentist identified her age between 14 to 16 years that subjected her defined under Section 2 of the ATISPOM Act 2007. Furthermore, the appellants brought the children to Peninsular Malaysia without valid travel documentation. According to the court, the appellant knew that the child victim had travelled without documentation or work permit. This situation leads the child victim to be recruited through the deception of the job and salary. As told by the appellants, the child victim works as a babysitter to look after only the appellant's children. However, there is no mention of her salary. At the same time, the child victim had been offered a salary of RM 300 monthly as a babysitter before she came to Sarawak. Therefore, based on such a situation, it can conclude that the child is a victim of trafficking.

In another situation, after three months, the appellants started to abuse the child victim by scolding and hitting her. She also faced some of ill-treatments by the appellants during her working period. For

⁴ Interview session with respondent on February 26, 2018.

⁵ *Mohammad Nizam Mohammad Selihin & Anor v PP* [2018] MLRHU

instance, she was ordered to stay outside the house from 7 am to 4 pm, weed the grass, arrange the bricks and she was not provided with food all the time. Besides that, she was locked outside and slept in the laundry even though a room was provided for her inside the house. The effect of these conditions encouraged the child victim to climb the fence and run away from her employer. Unfortunately, the appellants' neighbour informed them about the victim's attempt. As a result, she was physically abused and kicked on the shoulder. In their defence, the appellants tried to justify their action by saying that the victim wanted to stroll around from one house to another, like in her village. However, this arguments fail to convince the judge of the court. The judge ruled that if the child victim had wanted to go out, she might have to use the front gate. It can be observed from the facts of the case that the child victim wanted to run away due to abuse. Thus, it was decided that the appellants be charged for trafficking offence. According to the judge, a threat of serious harm to any person included coercion to maintain the labour service. When the child victim was kicked and attempted to run away, it indicated that she would suffer a series of mishap if she tried to run away. That being the case, coercion is not confined to physical threats, but it also involves physical restraint.

On the other hand, exploitation is another crucial element to prove the crime of child trafficking. Admittedly, the term exploitation is given inadequate interpretation under the ATIPSOM Act 2007. Exploitation in this sense is limited only to the forms of exploitation involving children but the definition of each form of exploitation is absent. For example, in *Siti Rashidah Razali & Ors v PP*⁶, the court ruled that there was no element of exploitation. In this case ten adults and three children were arrested in the Appellants' house as they did not possess travel documents. From the statement of the subjects, they travelled to Malaysia in search for jobs, and one of them came along with her daughters to join her husband who has been working in Malaysia. The Appellants treated them well; they were given food and shelter and were allowed to watch television and are free to move around. From the subjects' statement, there was no evidence showing that they were exploited. The court subjected this case as pertaining illegal migrants under Section 51 (d) of the Immigration Act 1959/63.

⁶ *Siti Rashidah Razali & Ors v PP* [2016] 6 MLJ 417 (HC).

In *Pendakwa Raya v Heng Chun Sim*⁷, the judge maintained the previous sentence of 6 years imprisonment after the accused was dissatisfied with the previous sentences and appealed to the Session Court. The incident started when three underage victims were brought by KK and Alice from Thailand to Malaysia with a promise that three of them would start working at a restaurant with a high salary to support their families. Alice and KK withheld their passport once they arrived in Malaysia, and fake passport was given as Alice fear that they would lose their passport. They were not allowed to go anywhere without Alice and KK's permission and were forced into prostitution when they were in Langkawi for a few days. Then, Alice and KK introduced them to the accused in Bukit Mertajam and asked them to follow the accused's instruction. Later, the accused brought them to the JV Hotel and introduced them to the three male clients for prostitution.

Based on the evidence, the accused trafficked them from Alice and KK for prostitution, hence, the High Court decided to convict the accused under Section 14 ATIPSOM 2007 on the ground of child trafficking. The accused was dissatisfied with the decision and appealed to the Session Court. However, the accused failed to prove beyond reasonable doubt on several matters. First, there were elements of coercion existed in this case. It can be seen from cross examination that the three victims were forced to have sexual intercourse and obey the customers. The accused threatened the victims and allowed the customers to beat them if they fail to perform as instructed. On the other hand, the three victims not allowed any freedom of will. They were escorted by Alice and KK then given over to the accused to be brought to the male customer. The victims had no choice but were forced to do what was asked of them by Alice, KK and the accused. At the same time, their movement was restricted and guarded. There were physical restraints practised on the minds of the three victims. Based on the facts, it is a form of coercion, as mentioned under section 2 of the ATIPSOM 2007. Second, the victims were underage as defined under Section 2 of the ATIPSOM 2007.

When police arrested them, they did not carry a passport or travel documents. They informed the court that they are under 18 of age even though they could not specify their birth date and were uncertain about their age. The Investigation Officer (IO) brought them

⁷ *Pendakwa Raya v Heng Chun Sim* [2015] MLJU 2345.

to the Orthodontist and the result revealed that the three victims are between the ages of 12 to 18 years based on their clinical and radiography examination. Third, the victims were brought by the accused to the three male customers in JV Hotel for sexual intercourse. According to the clients, they paid cash to the accused after they made a choice of which girl to have. The accused accepted the money and provided each of the victim a condom. Then, the accused instructed them to work well and told them that she would be waiting for them at the area nearby the hotel. According to the raiding police officer, she found the victims and the men without their clothes. She also found paraphernalia consistent with sexual activities conducted in the hotel room. On this basis, the judge was satisfied that the accused had exploited the three victims for sexual purposes.

Challenges during the Interim Protection Order (IPO) and the Protection Order (PO).

According to the ATIPSOM Act 2007, several agencies like the Royal Malaysia Police (RMP), Immigration Department of Malaysia (IDM), Malaysia Maritime Enforcement, Customs Department, and Department of Labour have the authority to rescue the suspected child victim of trafficking.⁸ The investigation to identify whether the suspected child is a victim of trafficking will be conducted during the Interim Protection Order (IPO). The Magistrate would grant the period of 21 days within 24 hours after the suspected child is rescued. Then, the suspected child could access the protection rights to place them at a shelter home under the Department of Social Welfare (DSW). The shelter home in Johor Bahru is for male children and Negeri Sembilan is for female children. Besides, the suspected child is also eligible to access support, including education and awareness. Within this period, the enforcement authorities are required to proceed investigation of the perpetrators within seven days, as provided under Section 117 of the Criminal Procedure Code.

However, completing those investigations during IPO is not sufficient. This is because the investigation is carried out simultaneously in identifying a suspected child and the perpetrators.

⁸ Anti-Trafficking in Persons and Smuggling of Migrants Act 2007, section 27 (1).

Especially challenging is that, the seven days given to investigate the perpetrators is limited. On the other hand, it is difficult to obtain information and evidence from the victim if it is a child due to trauma experienced from the abuse, thus requiring a long time to recover. Furthermore, the Immigration Department of Malaysia is not equipped with adequate skills in investigating a victim of child trafficking, thus, calling for assistance from child experts and counsellors from the DSW. Therefore, the 21 days given does not guarantee that the suspected child will cooperate with the authorities. In addition, the 21 days are also insufficient for the Investigation Officer (IO) of RMP to deal with the suspected trafficked child victim. The district officers often handle many daily cases requiring them to open investigation papers for many types of crime, and they must follow many procedures to complete the investigation. Subsequently, the investigation procedures take more than a day or may take months, especially if it requires a formal report from the chemistry or forensic department.

On the other hand, language barrier is also a challenge for the authorities to initiate conversation with the suspected child since Malaysia receives many children from Southeast ASEAN countries namely Cambodia, Vietnam, Myanmar and Indonesia. At this background, Malaysia lacks certified interpreters and counsellors in handling the cases. Therefore, IDM would have to engage with the UNCHR to hire immediate interpreters in assisting the case at hand. Furthermore, Malaysia does not allocate adequate financial assistance for authorities to solve this issue of human trafficking.⁹ The effort to assist children in having certified interpreters is in line with the Convention on the Rights of the Child (CRC), that a State Party is required to assist in the interpretations made by a child if they cannot understand the language. In addition, this concern was also highlighted in the report on human trafficking by the United States Department of Human Trafficking, indicating that Malaysia lacks professional interpreters. This role is essential to assist staff at the shelters to have good communicate with the child victims of trafficking (Trafficking in Persons Report 2020). Therefore, these conditions call for the investigation period to be extended in ensuring that ample time for authorities is accorded. This is paramount for the authorities to

⁹ Interview session with respondent on January 24, 2018

effectively complete the investigation in identifying child victim of trafficking.

Then, a Protection Order (PO) for 90 days will be issued if a suspected child is identified as a victim of trafficking for the purpose to continuing the investigation and a trial to be conducted (Section 51 (3)). Within 90 days, the statement by the child victim will be used in the court trial as a witness.¹⁰ Otherwise, the suspected child would be repatriated to their origin country. After the proceeding and after the IPO period has expired, child victims will be returned to their families. Foreign children will be sent back through their embassy, and NGO would ensure they have safely arrived to prevent them from being re-trafficked. While Malaysian child victims would stay at the DSW shelter homes if necessary. Meanwhile, in a particular condition in which the trial of the court is delayed, the trafficked children ought to stay at the shelter home for a period of three months accorded to them. In this regard, the Malaysian government took the initiative to establish a human trafficking court in which all human trafficking cases would be deliberated to prevent the delay of trial. As of now, only one court of the kind was established in Klang Selangor with two presiding judges. Unfortunately, there plan to increase the number of courts nationwide is absent.¹¹

Before the two weeks of trial, the prosecutor is responsible to meet the child victim to explain the judicial process. However, an NGO reported otherwise where some prosecutors only meet the child on the first day of trial. The same problem as during IPO faced by the investigation officer which is getting the appropriate interpreter can hamper the effectiveness of communication.¹² In addition, it is also challenging to bring the victim child for every trial session given the availability issue of shelter homes in Kuala Lumpur. Further expenses is needed for transportation due to distance between the court and the shelter homes. As a result, the child victims would stay longer in the shelter while waiting for a new trial date, causing the shelter homes to be highly occupied as the DSW receives more recent child victims at

¹⁰ Interview session with respondent on March 9, 2018

¹¹ Interview session with respondent on March 9, 2018

¹² “2020 Trafficking in Persons Report: Malaysia”, U.S. Department Trafficking in Persons, accessed October 28, 2020, <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete=062420-FINAL.pdf>

the same time. On the other hand, it also led to a psychological effect on the child victim due to the extended period for investigation and court proceedings. For example, the child victim would feel depressed and anxious due to the traumatic experience. After months of anxiety and depression, child victims are not in the right state of mind to testify in giving evidence during the trial. Subsequently, it would affect the trial as the prosecution's success depends on the quality of evidence provided by the trafficked victim. Therefore, this psychological effect discourages the child victims from cooperating with the prosecutors due to the fact that they want to be sent back to their country of origin than wait for lengthy proceedings and see other residents in the shelter repatriated to their country.¹³

On top of that, the extension of stay at the shelter homes raises concern on the rightful entity to protect these children. Protection Officer is accountable under the current legislation to trafficked victim only for the period of three months and the same period should also apply to allow the trafficked victim to stay in shelter. Secondly, since there is no alternative place provided, question arises as to where the children should be placed. As they are not illegal, they cannot be deported even after the protection orders expire. Simultaneously, they are given immunity from immigration offences, such as unlawful entry, unlawful presence and possession of fraudulent travel documents.¹⁴ The government provides 80% of the funding for the new NGO-run shelters in Kuala Lumpur, Sabah and Penang to reduce overcrowding. However, the shelters remain under-utilized due to bureaucratic obstacles and authorities have approved only a small number of victims to be transferred to this shelter.¹⁵ Thus, to solve this issue, it has been suggested that the Malaysian government improve the efficiency of court processes and to ensure that a trial should be conducted within three months.¹⁶ Also the government prefers to establish a framework

¹³ Interview session with respondent on March 9, 2018.

¹⁴ Ibid.

¹⁵ "2018 Trafficking in Persons Report: Malaysia", U.S. Department Trafficking in Persons, accessed September 7, 2018, <https://www.state.gov/wp-content/uploads/2019/01/282798.pdf>

¹⁶ "2020 Trafficking in Persons Report: Malaysia", U.S. Department Trafficking in Persons, accessed October 28, 2020, <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete=062420-FINAL.pdf>

for the appointment of certified interpreters and to increase enforcement for the prosecutor when dealing with child victims of trafficking. As such, an alternative solution is needed to establish a legal framework if a child victim is required to stay in the shelter beyond the current period allowed. Having no plan for child victims after the Protection Order ends would make them vulnerable to being trafficked, especially Malaysian child victims.¹⁷

Demand and Supply for Child Sexual Exploitation.

According to the statistics from the DSW, sexual exploitation was recorded as the highest number that other forms of exploitation, followed by forced begging. While baby selling registered the second highest exploitation in Malaysia from 2012 to 2014. Consequently, this demonstrates a high demand for sexual services from trafficked children in Malaysia. The figures are consistent with the Human Trafficking Report released by the United States of Human Trafficking Department indicating Malaysia's failure of demonstrating commitment in reducing the demands for commercial sex.¹⁸ This issue was also raised by the NGOs that Malaysia is experiencing a growing demand for sex with children and the increasing existence of migrant and stateless children who are vulnerable to human traffickers. For example, in Sabah, migrant children from Philippines are forced into the sex trade, where the state, as a tourist destination, draws foreigners looking for sexual activities.¹⁹ Overcoming this problem requires awareness campaign and enforcement of domestic legal frameworks to avoid the conditions leading to further trafficking. Thus, it requires cooperation from stakeholders in Malaysia. Unfortunately, awareness is still lacking and insufficient in Malaysia, which has been identified as one of the reasons why these crimes continue to occur.. For example, awareness ought to commence in Malaysian embassies given this

¹⁷ Interview session with respondent on February 5, 2018.

¹⁸ "2020 Trafficking in Persons Report: Malaysia", U.S. Department Trafficking in Persons, accessed August 27, 2020, <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete=062420-FINAL.pdf>

¹⁹ Sheikh Kidir Abu Bakar, "Child Sex Trade Growing in Malaysia Tenaganita Warns", Free Malaysia Today, February 16, 2018, <https://www.freemalaysiatoday.com/nation/2018/02/16-child-sex-trade-growing-in-malaysia-tenaganita-warns>.

country receives visitors from various countries abroad to stay here temporarily. The same is necessary for Malaysians who want to visit other countries where awareness regarding visa process or travel document is needed. The embassies can utilize the opportunity to spread information on child trafficking through distribution of booklets or pamphlets that contains explanation of how the crime is operated and what action should be taken when they suspicious the child trafficking activities around them.²⁰ Awareness campaign should also be extended to the child's victims' country of origin instead of Malaysia alone as the receiving country.²¹

Avoiding Compliance with Adoption Laws.

In 2013, Malaysia had a highest number of baby selling, preceded only by sexual exploitation.²² Meanwhile, no other record is available on selling babies, even though the issue is widely reported in the media. This issue came to the fore when the media exposed the existence of such a syndicate due to the difficulties faced in the legal adoption process. Consequently, the childless couple ends up proceeding with the adoption of trafficked children instead of applying for adoption legally as stated in the registration proceeding of an adoption explained under section 6 of Adoption Act 195.²³ This section provides that the applicant is required to be interviewed before the registrar. The person who should attend is the foster children, legitimate parents, or guardians. However, the biological parents may be exempted if the consent letter of adoption is obtained from them.²⁴

This issue is also deliberated by the Suruhanjaya Hak Asasi Manusia (SUHAKAM) that the selling of babies occurring in our country amongst those who became pregnant due sexual exploitation. In order to avoid abortion and difficulties in the adoption process, the baby would be sold to a childless couple. In terms of the adoption

²⁰ Interview session with respondent on January 24, 2018.

²¹ Interview session with respondent on February 5, 2018.

²² Interview session with respondent on March 9, 2018.

²³ Chan Tau Chou, "Babies for Sale, 101 East Investigates Malaysia's Underground Baby Trade", *Al-Jazeera*, November 24, 2016, <https://www.aljazeera.com/programmes/101-east/2016/11/24/malaysia-babies-for-sale>.

²⁴ Adoption Act 1952, section 6.

process, they are many couple waiting for adoption interview causing the applicants to wait for an extended period for the approval of the application. This would mean that the chances to have an adopted baby would be given away on the first- come first serve basis. At the same time, the long waiting period for approval leads to the applicants searching for alternatives options. The implication of this situation is that the applicants resort to other new born babies than older ones. Besides, illegal adoption allows the childless couple to determine the preferred physical criteria and race of baby.²⁵ This issue was refuted by the DSW claiming that the adoption procedures are simple and straightforward in Malaysia.²⁶ This DSW's view is supported by non-governmental organizations stating that the adoption process in Malaysia is easy and uncomplicated even though the process spans a year to complete.²⁷

The citizenship of the adopted child was another issue under this issue—for example, the adoption of a stateless child who had been placed inside a hatch without a document. The lack of legislation governing this matter puts the citizen of adoption children in a grey area. According to the adoption laws, Muslim parents could adopt a baby after two years of fostering. In comparison, six months of fostering applied to the non-Muslim spouse. Therefore, prospective parents must apply for their babies' citizenship, which can take years. As mentioned under domestic law, the citizenship or nationality of the biological mother would be indicated as citizenship of child status. Subsequently, if the child is born out of wedlock and the mother is not a citizen of Malaysia, the child is automatically rendered stateless. To illustrate, section 9 and section 25 of the Adoption Act prioritise the adoptive parents. Section 9 states that all rights, duties, obligations and liabilities are vested upon the adoptive parents once an adoption order is issued. While the certificate of adoption shall not bear the word adopted under section 21(5) of the Act. However, the citizenship of an adopted child remains silent in domestic law. Based on these provisions, it indicated that legally the adoption order does not confer

²⁵ Interview session with respondent on February 5, 2018.

²⁶ Interview session with respondent on March 9, 2018.

²⁷ Boo Su Lyn, "Malaysia's adoption process simple but wait can be long, group says amid controversy", *Malay Mail*, November 30, 2016, <https://www.malaymail.com/news/Malaysia/2016/11/30/malaysias-adoption-process-simple-but-wait-can-be-long-group-amid/1261365>

Malaysian citizenship on the adopted child even if one of the adoptive parents is a Malaysia citizenship. It is also proven in many cases that the court refuses to grant Malaysian citizenship to the adopted child. Since the citizenship issue is provided under the Federal Constitution, it can only be conferred if the Federal Constitution be amended (Malay Mail, 2016). Consequently, the Adoption Act 1952 is not a legal instrument in conferring citizenship to an adopted child under section 14 (1) (b). This Act must be read together with Section (1) (a) Part II, Schedule of Federal Constitution. According to this provision, the National Registration Department (NRD) exercising the administrative function of registering order of citizenship granted by Malaysia court. Thus, NRD has requested to the adoptive parents to apply to the Minister of Home Affairs for their adopted children citizenship since there are many cases where the application for citizenship to adopted children were refused. As a result, the granting of citizenship depends on the sole discretion of the Minister and the judicial review.²⁸

For example in *Pendaftar Besar Kelahiran dan Kematian Malaysia v Pan Wee See & Anor*²⁹ (using their behalf and as litigation representation for Pan Chen Chuen, a child), the respondent adopted a child who was born in hospital in Kuala Lumpur. However, the birth certificate issued by the National Registration Department (NRD) stated the child was a Malaysian citizen. The previous decision of the High Court appealed by the respondent regarding the citizenship of an adopted child. The High Court did not allow the adopted child to have a Malaysian citizenship based on the reason that the adoption certificate was issued under Section 9 and Section 25A of the Adoption Act 1925. Therefore, the birth certificate issued by the National Registration Department (NRD) was considered void by the High Court. The court stated that the child was not a Malaysian citizen due to the absent of information regarding the biological parents of the child. Therefore, the respondent applied to the High Court to set aside the NRD decision and to register the child as a Malaysian citizenship.

²⁸ Roslina Che Soh@Yusoff, Nor Hafizah Mohd Badrol Fandi, Noraini Hashim and Nora Abdul Hak, "Protecting the Children's Right to Nationality in Malaysia: An Appraisal", *International of Journal of Academic Research in Bussiness & Social Sciences*, vol.9, no.6 (2019): 362

²⁹ *Pendaftar Besar Kelahiran dan Kematian v Pan Wee See & Anor* [2017] MLJU 390.

The respondent viewed that the adoption should accord the Malaysian citizenship since the child was born in Malaysia and the adopted parents were Malaysian citizens. The High Court held that the birth certificate issued to the child accords him a citizenship. This order was made pursuant the subsection 9 and 25A of the Adoption Act. However, during the appeal, the appellant argued the decision of the High Court based on the three reasons. First, the requirement under Article 14 (1) read with Section 1 (a) of the Part II Second Schedule of the Federal Constitution was not fulfilled by the respondent. Second, the absence of the information of the biological parents has not been considered by the High Court, (2) the determination of the child's citizenship by the Adoption Act 1952 is not relevant.

The Status of Refugee Children

Malaysia is not a state Party to the international instruments named as the 1951 Convention Relating to the Status of Refugee and 1967 Protocol Relating to the Status of Refugee. These international convention plays a crucial role in protecting the rights of refugees. As a result, Malaysia does not provide adequate legal protection for people who fled their own country due to fear of prosecution as stated under 1A (2) 1951 Convention Relating on the Status of Refugee. In this context, child refugees in Malaysia is one of the vulnerable populations exposed to being trafficked victims. The Malaysian government has not signed or ratified this international legislation to avoid a pull factor for the influx of more refugees to this country since Malaysia has a strategic geographical location in Southeast Asia. If the situation occurs in Malaysia, the government fears it will be unable to contain or manage the influx of refugees. Consequently, the Malaysian government does not enact legislation protecting refugees in this country. Therefore, the authorities treat adult and child refugees as illegal immigrants and are subject to harsh penalties, detention and deportation under the Immigration Act 1959/63.³⁰ There are some cases where refugees as young as ten are arrested, detained, charged in court or subjected to penalties merely because there are entered

³⁰ Amer Hamzah Arshad, "Malaysia's Forgotten Children: Lacking Any Meaningful Protection, Refugee Children in Malaysia Suffer in Silence", *Aliran for the Unity Monthly*, vol.25, issue 5 (2005):18-26

Malaysia without proper documents.³¹ This offence is against Section 6 (1) (c) of the Immigration Act 1959/63, which refers to a person who enters Malaysia without legal documentation to stay in the country, and the person may be under Section 6 (3) of the Act.

Besides, the Malaysian authority has no alternative legislations for refugee children to be detained with their parents during aid. It means the refugee children would place together with their families at detention centres because they are also subjected to detention. It does not choose the enforcement but arrests the entire family. However, those children would be separated into male and female facilities when they reached the age of 13 years..³² This action was criticized by the United Nations (UN) and it was justified that Immigration detention is never in the best interest of the child.³³ Furthermore, the children will be facing traumatized and struggle to understand why they are, as they see it, being punished when they have nothing wrong. Meanwhile refugee children who are not in detention centres are also deprived of shelter, education and health care. In terms of education, they are being denied because they are considered illegal immigrants in Malaysia. Obviously, they are also not allowed to enrol in public school and receiving only informal classes organized by governmental organisation.³⁴ Lack of legal status and insufficient education are amongst the reasons why refugee children are vulnerable to being trafficked.

In some cases, the refugee children have also been trafficked into bonded labour when they follow their parents to work on a farm in Melaka. The children were supposed to attend the school instead of

³¹ Ibid.

³² Samitra Parthaban and Khoo Ying Hoi, "Detention of Refugees Children in Malaysia and Thailand: Are Alternative to Detention (ATD) Workable?", *Journal of Southeast Asian Human Rights*, vol.3, no.1 (2019):59-80

³³ "Children and Families Should Never Be in Immigration Detention-UN Experts", United Nations Office of the Commissioner Human Rights, accessed August 3, 2020, <https://www.ohchr.org/EN/NewsEvents/Page/DisplaysNews.aspx?NewsID=21026&LangID=E>

³⁴ Amer Hamzah Arshad, "Malaysia's Forgotten Children: Lacking Any Meaningful Protection, Refugee Children in Malaysia Suffer in Silence", *Aliran for the Unity Monthly*, vol.25, issue 5 (2005):18-26

working with their family with unfixed payment.³⁵ Bonded labour occurs when a person is forced to work to pay off a debt. People burdened by debt are faced with coercion, violence and intimidation if they try to leave.³⁶ In addition, this situations are against the Convention on the Rights of the Child (CRC). Under this Convention, Malaysia made a reservation to Article 22 deals with refugees' children. This provision gives significant impact where all State Parties must provide assistance and protection to recognized refugee children as well as those who are asylum seekers. However, it was removed in March 1999. The removal can be seen as positive response to the world that Malaysia recognizes refugee's children and does not ignore their plight but instead render humanitarian assistance to them. Therefore, the Vienna Convention and the Law treaties to be referred for the interpretation of protection and support shall be given to child refugees. According to Article 22 of the Convention, the principal protection and assistance in the refugee context, *inter alia* include: (1) The prevention of the return of refugees to the country or territory in which their life or liberty may be endangered (2) To prevent them from penalties for entering into the state of refuge without documents (3) to reunite unaccompanied children, refugees with their children, and (4) the right to education.³⁷

As a result, the Malaysian government shall take alternative actions towards refugees and unaccompanied children who noticeably are vulnerable people and are easily trafficked. For example, the refugee child remain to be sent to Immigration Deportation Centre (IDC) even though SUHAKAM proposed the Alternative to Detention (ATD)³⁸ because there is no alternative treating for them provided under legal framework. As to the compliance with the international standard, there is a need to establish a legal framework or national legislation in recognizing the fundamental rights of refugee children in terms of education, food, health assessment and shelter.

³⁵ Interview with respondent on February 7, 2018.

³⁶ "What is Bonded Labour", Anti –Slavery, accessed August 3, 2020, <https://www.antislavery.org/slavery-today/bonded-labour>

³⁷ Dina Imaam Supaat, "Refugee Children under the Malaysian Legal Framework", *UUM Journal of Legal Studies*, vol.4 (2014): 11-14.

³⁸ ATD is defined as any legislation, policy or practice that allows for asylum seekers, refugees and migrants to reside in community with freedom of movement while their immigration status is being resolved.

RESULTS

Amendments to the ATIPSOM 2007

The ATIPSOM 2007 needs to be amended to comply with the international standard in term of the definition and scope of child trafficking. As required by the international law named the Protocol to Prevent, Suppress, and Prevent Trafficking in Person especially Women and Children (TIP Protocol), the means, such as coercion, force and deceit are not essential as core elements to prove that the child is a victim of trafficking. As compared to women or man trafficking, these elements are necessary to prove that they are victim of the crime. Thus, it indicated that a child need to be treated differently under the law enforcement as failure to effectively assist the trafficked children will jeopardize their welfare and expose them to further danger. Besides, the Act also need to define the forms of exploitation, such as sexual exploitation, slavery, prostitution and forced labour. This would assist enforcement agencies to effectively identify the victims, particularly when the victim is a child.

As discussed above, there period of the Interim Protection Order (IPO) and Protection Order (PO) should be extended to confirm if a suspected child is a victim of trafficking. A longer time for identification is needed due to condition of the child who has been traumatized and overcoming health issues which require more time for recovery. The child may need adjustment before he or she could give full cooperation to enforcement officers. Furthermore, an enforcement officers should be provided with detailed SOP in handling trafficked children especially when involving foreign children. It must be conducted by officers who are specialized in handling child trafficking rather than ordinary police officers who are burdened with other responsibilities. This SOP must take into consideration that the interest of the child is paramount at any stage of the proceedings.

On the hand, ATIPSOM 2007 ought to define sexual exploitation of children that shall include prostitution as provided under the Penal Code and child pornography under Sexual Offences against Children 2017 as a form of trafficked children. In addition, the definition for sexual exploitation must be enhanced to leave maximum

impact on those involved in supplying and demanding such exploitation.

Effective Procedures of Child Adoption and Nationality of Stateless Children.

It suggested that the adoption process in Malaysia should be speed up but with comprehensive assessment which usually take from six to nine months to be approved. For example, the law should provide exemption to parents who had experience in adoption. It is very useful to hasten adoption. Besides, the requirement under the Registration of Adoption Act 1952 requiring a child to stay with the adopted parents for two years must be opted out. The purpose of this amendment is to facilitate and encourage more adoption of children. The law must also facilitate the registration of illegal adoption to optimize protection of children. In addition, stateless children are not legally recognized and are not conferred nationality and citizenship under the Malaysia laws. This result with these children being denied of their right to access for education even though the adopted parents are Malaysians. Thus, Malaysia should permit adopted stateless children to be considered for citizenship or allowed access to fundamental rights such as education and healthcare if the children can provide the necessary documents as required by the National Registry Malaysia. To illustrate, the document proving the child was born in Malaysia and did not have citizenship from another country.

Rights of Child Refugees

Child refugees in Malaysia will be placed at the adult detention centre since there is no segregation between adults and children. The lack of status exposes them to vulnerability and some of them have been trafficked with their family members as a forced labour in Malaysia. Thus, this issue could be solved if Malaysia is a State Party to the Convention on the Rights of the Child (CRC) even though Malaysia has not signed or ratified the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees. Article 22 of the CRC provides education, healthcare and protection for the well-being of child refugees. Therefore, it could reasonably be suggested that the status of children as refugees should be addressed

under the Immigration Act 1959/63 to prevent them from being sent to detention centres. With a legal status, child refugees are eligible to access health facilities and education. Besides, the non-discrimination policies against child refugees include preservation and promotion of family unity, non-detention because of the statelessness or refugee status, non-discrimination, non-refoulement and non-punishment for illegally entry or presence in the country.

CONCLUSION

This study revealed that the problems in combating child trafficking in Malaysia are not exclusively related to the ATIPSOM Act 2007, but it also involves the implementation of other legislations. The lack of comprehensive legal framework to specifically govern issues relating to child trafficking has created difficulties for the authorities to enforce the law and to offer better protection for the children as enshrined in the Convention on the Rights of the Child (CRC). Therefore, a holistic approach needs to be implemented by the relevant agencies to ensure these problems are solved from various angles and to prevent the same issues from recurring in the future.