



JOURNAL OF LEGAL STUDIES

<https://e-journal.uum.edu.my/index.php/jls>

How to cite this article:

Abdul Hamid, H. B. (2023). Consent in a trafficking paradigm: Exploring the conflation between trafficked and voluntary sex work. *UUM Journal of Legal Studies*, 14(1), 161-188. <https://doi.org/10.32890/uumjls2023.14.1.7>

CONSENT IN A TRAFFICKING PARADIGM: EXPLORING THE CONFLATION BETWEEN SEX TRAFFICKING AND VOLUNTARY SEX WORK

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Received: 22/9/2021 Revised: 30/3/2022 Accepted: 6/7/2022 Published: 18/1/2023

ABSTRACT

This article explores the notion of consent in the trafficking paradigm and the conflation of voluntary sex work and sex trafficking in Malaysia. The article argues that because consent of a trafficked victim is irrelevant in the context of international law, the authorities tend to conflate voluntary sex work with trafficked sex work. This obstructs a clear definition of trafficking and places women in precarious positions. The article also aims to evaluate the approaches in protecting victims through raids and rescue operations, shelter detention, and judicial processes in the respective states in the country. The article will demonstrate that while women are uniquely positioned to be a part of the fight against sex trafficking through their access to information, their consent to be part of the process in tackling sex trafficking has been ignored, negated, and disregarded throughout the anti-trafficking regime. Such practices are seen as violating women's fundamental rights and fosters distrust between trafficked women and

the authorities. It also demonstrates the failure of the government in addressing human trafficking issues.

Keywords: Agency, conflation, consent, sex work, sex trafficking, victim-protection.

INTRODUCTION

The term ‘sex trafficking’ is commonly used to describe activities which involves trafficking for sexual exploitation. Although men, women and children are all at risk of being trafficked and exploited in the sex trade, this article only focuses on women, particularly migrant women who have been trafficked to Malaysia for the purpose of sexual exploitation. The Anti Trafficking in Persons and Anti-Smuggling of Migrants Act, 2007 (ATIP) does not specifically define the meaning of ‘sexual exploitation’, but defines ‘exploitation’ to include ‘all forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or any illegal activity or the removal of human organs’ (s2). The meaning of ‘any illegal activity’ in section 2 of the ATIP is rather vague. This suggests that it may refer to any form of sex work including voluntary sex work, given that sex work is illegal in Malaysia. Therefore, a migrant woman who voluntarily engage in sex work will be charged and prosecuted under s.8 of the Immigration Act 1956/63, which prohibits the entry of sex workers or any individual who intends to become a sex worker.

Based on existing reports, most women who are trafficked to Malaysia originated from neighbouring countries such as Vietnam, Thailand, China, Indonesia, and the Philippines (U.S Department of State, 2016, 2018, 2021). Thus, Malaysia has been categorised as a hub, transit, and destination for sex trafficking activities in the Southeast Asia region (Buang, 2017).

According to David et al. (2019), 40 million out of the 258 million migrants are trapped in ‘modern day slavery’ (a term which is always used interchangeably with human trafficking), with women experiencing higher rates of ‘modern slavery’ in domestic work, the sex industry and forced marriage. The effect of strong ‘push factors’ such as poverty and unemployment and pull factors, such as work

opportunities and higher wages have resulted in the pressure to migrate in search of a better quality of life (Ibid). However, restrictive immigration policies and the lack of resources have become a major obstacle for women to migrate. As a result, women often consult the services of recruitment agencies, brokers, smugglers, and other intermediaries, to find overseas employment and facilitate their migration. Although some women may succeed in securing a legal job abroad through their intermediaries, many others are smuggled or trafficked into the sex industry. As such, sex trafficking is often viewed as a subset of illegal migration or smuggling as it often involves the breaching of immigration controls.

The UN Convention on the Rights of Migrants (UNCRM) defines migration as the voluntary movement of persons across borders for personal reasons. Thus, a migrant sex worker is generally referred to as a person who moves from one location to another; a person who crosses state borders or stays within them; a person who may have various legal statuses; and a person who engages in any kind of sexual or erotic service in exchange for money, food, shelter, and resources (Lam, 2018). Conversely, a trafficked sex worker would include anyone who has been forced, coerced, deceived, and exploited in the commercial sex trade (Chapkis, 2003). This is based on Article 3a of the United Nations ‘Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children’ (the Palermo Protocol) which defines trafficking in persons 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’ (United Nations, 2003). The definition of exploitation in this article has been further expanded to include sexual exploitation, forced labour, slavery practices, servitude, and the removal of organs.

The movement of persons is also essential in acts of smuggling and trafficking (Lyons & Ford, 2013). While smuggling usually involves payment of fees from the migrant to the smuggler to facilitate an illegal border crossing, human trafficking involves the movement of people internally or trans-nationally for the purpose of exploitation at the intended destination (Kelly, 2003; “Resolution 20/3 on Human

Rights of Migrants,” 2012). As such, trafficked persons are usually referred to as ‘victims of human trafficking’ while smuggled persons are regarded as ‘offenders’ because they are in violation of immigration laws (Iselin & Adams, 2003).

While the definition of voluntary and trafficked sex work may seem quite distinct in itself, identifying and differentiating a voluntary sex worker from a trafficked sex worker appears to be challenging for law enforcement. This is because of the diverse understanding of sex trafficking, and the fact that ‘consent’ by trafficked persons remains irrelevant in cases of trafficking. The matter is highlighted in Article 3b of the Palermo Protocol, which stipulates that *‘the consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used’*. Similarly in Malaysia, the ‘consent’ of a victim of trafficking is considered irrelevant according to s.16 of the Anti-Trafficking in Persons and Anti-Migrant Smuggling Act 2007. Section 16 of the ATIP states that *“in a prosecution for an offence under section 12, 13 or 14, it shall not be a defence that the trafficked person consented to the act of trafficking in persons.”*¹ This gives the law enforcement officials a wide amount of discretion to assess a trafficking situation and identify victims. Given the abolitionist stance towards sex work in Malaysia, law enforcement officials often believe that sex workers need to be ‘saved’ from their work because sex work is exploitative and harmful (Soo Jin & Shu Xu, 2016). Therefore, massive raid and rescue operations are carried out by law enforcement to ‘save’ women from their workplace.

Despite the ‘victim’ status accorded to trafficked women, they are often regarded as ‘criminally deviant’ or ‘immoral’ individuals who pose a risk to the state and society, and who require secure containment, punishment, and expulsion (Oselin, 2010) Hence, the need to continue with the policies and laws of secure incarceration and detention, which are referred to as ‘protection.’ With consent being irrelevant for victims of trafficking, authorities are given a wide amount of discretion to identify victims. Although this may be considered ‘convenient’ from the perspective of policing, it has also created confusion among authorities who are regularly unable to draw

¹ Section 12, 13 and 14 of the ATIP refers to offences of trafficking of persons through various means.

a clear distinction between women who have been sexually trafficked and voluntary sex workers (Chin, 2013b; Saunders, 2005). As a result, trafficking is often conflated with migration. In this instance women who voluntarily engage in sex work are sometimes categorised as ‘trafficked and consequently ‘rescued’ by the state in the name of ‘protection’. Conversely, women who insist in having agency and refuse to cooperate with the authorities may be categorised as offenders and charged with breaching immigration rules. The responses carried out by the state demonstrates the power imbalance held between state officials and individuals engaged in sex work.

In light of such circumstances, this article aims to explore the notion of consent in the trafficking paradigm and examine how the consent of victims are often ignored, negated, and disregarded, particularly if they are engaged in sex work. The article will also explore the debates surrounding sex work and how the states’ views of sex work might influence the victim identification process. The article argues that because consent has been stated as irrelevant in the Palermo Protocol and the ATIP, the authorities are given a wide discretion to assess a trafficking situation and identify a woman’s status. This has resulted in the conflation between voluntary sex work and trafficked sex work, and the ambiguities in identifying victims. The article argues that the conflation of sex trafficking and voluntary sex work obscures and obstructs a clear definition of trafficking and results in multiple, sometimes oppositional, and shifting understandings of sex trafficking. As a result, attention is drawn away from the ‘real victims of trafficking’ towards voluntary sex workers.

Although the law does not specifically describe the overall characteristics of a trafficked victim, the stereotypical image of a trafficked victim is a woman who is weak, passive, vulnerable, deprived of her agency and wanting to be rescued by a paternalistic entity (Wijk, 2013). The stereotyping of these characteristics often appear in the media through newspapers, movies, news, and documentaries which have, in turn shaped the understanding and beliefs of society (Greer, 2007). Similar stereotyping occurs in Malaysia through local movies, news, documentaries, and billboards which often display images of abused women tied up and chained and wanting to be rescued by the authorities (Hamid, 2021). In reality, women’s experiences of trafficking are diverse, and many are able to exercise their agency even if they were exploited. However, prevailing official discourses

on the ‘ideal’ victim has juxtaposed agency as opposed to victimhood. In this regard, trafficked victims are positioned as being naïve and helpless (Brunovskis & Surtees, 2008) while those who appear to have exercised their agency and ‘choose’ to work as sex workers are not to be considered ‘real victims.’ Therefore, understandably the discursive erasure of women’s agency, particularly when it involves sex work, acts to reinforce victim stereotypes. Victims are presumed to be incapable of giving consent and to make decisions for themselves. As a result, a victim’s consent becomes irrelevant in cases of trafficking, which then becomes problematic because it does not only violate women’s rights and agency, but also frustrates anti-trafficking efforts by the authorities.

CONSENT

There is no clear definition of the meaning of consent in the Palermo Protocol. This is because the notion of ‘consent’ in sex work has been a contentious issue among feminist groups. A radical feminist such as Farley (2003) claims that women cannot exercise free will in sex work because the conditions that permit genuine consent – physical safety, equal power with buyers and realistic alternatives – are not present. According to Farley (2003), structural inequalities, such as a lack of shelter, food, and income, should not be considered valid grounds to consent to sex work. However, a liberal feminist such as Agustin (2006) argues that women should not be held responsible for such factors which are beyond their control. Instead, women should be able to make their own conscious decision to enter the sex trade and improve their economic situation and lifestyle within these structural constraints (Agustin, 2006). Thus, liberal feminist scholars have acknowledged women’s rights to engage in sex work (Beran, 2012; Nussbaum, 1999). They argued that sex work should be viewed as a legitimate form of work and women should have the capacity and right to consent to sex work (Ibid).

However, both groups (radical and liberal) agree that any consent made by a person will be irrelevant if the person ends up being exploited at any point of time by her traffickers or employers (Giusta, et al., & Strom, 2008; Iselin & Adams, 2003). Similarly, Article 3(b) of the Palermo Protocol states that the consent of a victim of trafficking in persons to the intended exploitation shall be irrelevant when any of

the (above) ‘means’ have been used. As the law currently stands, sex workers fear prosecution and in some cases, deportation if they come forward. At the same time, they are uniquely positioned to be a part of the fight against sex trafficking through their access to information. Although the law on human trafficking and smuggling has long been understood by many scholars and key stakeholders such as the police, immigration and other enforcement officers, identifying a victim of trafficking is far from being straight forward. This is because the identification of a victim is heavily influenced by the approach to sex work and one’s perception of trafficking.

Scholars and advocates are generally divided into two opposing theoretical camps with regards to sex work. The abolitionists or neo-abolitionists group condemns all forms of voluntary and involuntary sex work and view sex work as a form of oppression against women (Gerassi, 2015). These groups, including radical and Marxist feminists have argued that sex work can never be entirely consensual because it is exploitative and harmful (Tiefenbrun, 2002). To them, sex work equals trafficking and therefore, should be eliminated (George et al., 2010). In contrast, the liberal feminist groups have asserted that coercion must be a necessary element to constitute trafficking (Davies, 2010; Ferguson et al., 1984). This group, including many sex positivists are more concerned with women’s autonomy and rights as workers and respects women’s desire to engage in sexual labour (Gerassi, 2015). To them, sex work should be treated as any other legitimate form of labour.

For countries which have adopted the abolitionist approach or anti-sex work perspective such as Malaysia, sex work is viewed as ‘immoral’ and ‘criminally deviant.’ To them, all forms of sex work, regardless of consent, should be considered trafficking (Hamid, 2019b). Therefore, there is a perception that all trafficked women want to be rescued by the authorities (Ibid). However, Zimmerman and Watts (2003) argued that ‘not all women who have been trafficked are traumatised, consider themselves victims, detest their captors, or wish to escape or go home’ (p.3). Instead, many of them prefer to continue working for their traffickers and earn an income (Toney-Butler & Mittel, 2019). Such attitudes serve to excuse and partly absolve the perpetrators of violence and add to the notion that women’s victimisation is sometimes justified (Ibid). To avoid such repercussions, the Palermo Protocol (see Art. 3b) and the ATIP (see s.16) dictates that any consent

given by a trafficked person shall be considered ‘irrelevant’ and would not absolve the perpetrator from the crime. Although this provision might prevent perpetrators from blaming the victim for their own victimisation, it has also given the authorities a wide discretion to override the women’s choice and consent.

In this instance, women who made voluntary choices to migrate and engage in sex work may be scrutinised and presumed to be irrational for making such a decision. Authorities may also argue that the women’s consent should not be given due consideration because they have been coerced and exploited (see. Art. 3(b) Palermo Protocol). However, the element of ‘coercion’ and ‘exploitation’ is subject to individual interpretation. At present, there do not seem to be a clear guideline on how coercion and exploitation are supposed to be assessed by state officials. Although there are some indicators given by the UNDOC to identify trafficked victims such as individuals who shows signs of fear or anxiety, injuries, or others, these indicators would still depend on the law enforcement’s discretion. Also, these indicators are not mandatory, but rather directory. Due to these uncertainties, state officials often conflate voluntary sex work and trafficked sex work. As a result, many sex workers have been ‘rescued’ and categorised as trafficked even though they do not perceived themselves as having been trafficked (Hamid, 2019c). Such a conflation does not only victimise women, but may also affect the prosecution’s case in court because women may be reluctant to testify in court, or would not testify in favour of the prosecution. This may jeopardise the prosecution’s chance of winning in court and also affect the conviction rate of such cases. These reasons (among others) have also been cited in several research and reports conducted by NGOs and activists.

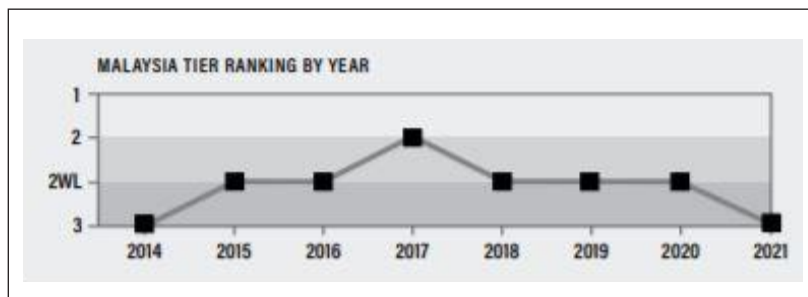
For example, the U.S Annual Trafficking in Persons Report on Malaysia have lamented on the low number of prosecutions and convictions attained in Malaysia despite the massive raids and rescue operations carried out on establishments that employs trafficked women. (U.S Department of State, 2021). Based on their investigations, the number of individuals convicted of trafficking related charges does not commensurate with the number of investigations conducted. For example, in 2017, the Malaysian government conducted 556 trafficking-related investigations, but only charged 80 individuals in court. This number is much lower compared to the 175 cases

registered in the courts in 2016 (U.S Department of State, 2018). The number of prosecution and conviction continue to dwindle in the following years and did not show any signs of improvement. In 2020, only 20 individuals were prosecuted and convicted out of the 277 investigations conducted compared to the 2,229 victims identified by the authorities (U.S Department of State, 2020). Conviction rates were also relatively low in 2019, when only 50 individuals were convicted out of the 281 investigations conducted, and the 1,305 potential victims identified (U.S Department of State, 2020).

As a result, the U.S Department of State has placed Malaysia at Tier 3 in its Trafficking in Persons Report (TIP) for failing to comply with the ‘minimum standards for the elimination of trafficking’ pursuant to Section 108 of the Trafficking of Victims Protection Act 2000 (TVPA). Malaysia was downgraded to Tier 3 for failing to make significant improvements in its anti-trafficking efforts and victim protection policies after being placed at the Tier 2 Watch List for three consecutive years. Malaysia’s past records can be seen in Figure 1.

Figure 1

Tier Ranking of Malaysia by Year



Note. Source is from the U.S Department of State, 2021

Countries in Tier One are those in which their governments have complied with the TVPA’s standards by making efforts to address the problem of human trafficking. A Tier Two ranking refers to countries who are making efforts to comply with the TVPA standards, but have not fully complied with the standards just yet. The Tier Two Watchlist categorises countries which have failed to show their commitments or made any significant attempts to counter human trafficking. A Tier

Three ranking which is the lowest ranking in the tier system lists countries that do not fully comply with the minimum standards of the TVPA and are not making any significant efforts to do so (U.S Department of State, 2018). Malaysia was ranked at Tier Three in 2021 after the country was placed at the Tier Two Watchlist for three consecutive years (see Figure 1). The lower ranking is attributed to various reasons which includes the rising number of victims, failure to carry out proper investigations, low prosecution rate, poor conviction rate, and ineffective victim protection policies. Malaysia's current Tier Three ranking could result in the withdrawal of aid and assistance (excluding trade-related and humanitarian assistance) from the US and other international organisations (Carrington & Hearn, 2003; Coomaraswamy, 2003).

Although, the US has regularly been criticised for its tier ranking process, the TIP Report plays an important role in influencing governments to introduce anti-trafficking laws and policies, given the absence of any other regulatory benchmark on trafficking. Therefore, the tier ranking plays an important role in ascertaining a country's status in its fight against human trafficking and victim protection measures. In response, countries are sometimes obliged to demonstrate its anti-trafficking efforts by conducting vigorous raids and rescue operations. While these practices may sometimes remove women from a trafficking situation, it has led to various problems such as the misidentification of victims and equating voluntary sex work with trafficked sex work. Thus, the U.S 2021 Trafficking in Persons Report states that the Malaysian government continue to conflate human trafficking and migrant smuggling, which impeded anti-trafficking law enforcement and victim identification efforts (U.S Department of State, 2021). More concerning is that women are harmed through enforcement raids because these raids are invariably traumatic and have strong negative effects on migrant women, particularly on their legal status (Ditmore & Thukral, 2012). This however, is often overlooked by the authorities because of the 'saviour complex' that underpins their mentality towards sex work. To them, sex work is inherently harmful and coerced, and therefore, steps need to be taken to preserve women's dignity and image of the country.

CONCEPT OF HUMAN DIGNITY IN MALAYSIA

The Universal Declaration of Human Rights² stipulates that all human beings are to be treated equally and with dignity. Human rights and

the concept of dignity were mentioned four times in this Declaration. However, many women continue to struggle daily to have their most basic rights protected. This includes the right to make their own decisions, the right to be heard, the right to refuse, and the right to freedom of movement.

In Malaysia, the understanding of sex work is often related to the concept of dignity and morality. Although Malaysia is a liberal democratic country that has adopted the common law based on the British Westminster style system, its official religion is Islam (see Article 3 Federal Constitution) and the majority of the population are Muslims. The constitution of Malaysia also dictates that Muslims shall be bound to a dual justice system – the secular laws (criminal and civil) and Sharia laws (Islamic laws). However, the administration of Islamic law is mostly related to personal laws such as on marriage, divorce, inheritance and other offences that are against the precepts of the religion of Islam. Sex work or prostitution is one of them as it constitutes a grave sin in Islam. In this regard, any person (particularly women) who engage in sex work or sex related activities are often blamed for violating religious principles and tarnishing the image of the country (Lasimbang et al., 2016). Thus, in an effort to uphold the ‘dignity’ of women, ‘strict laws’ have been enforced to ensure that the pollution of culture, religion, and morality does not occur (Ariffin, 1986; Lean, 1998).

For example, state officials have been given the authority to arrest sex workers on the grounds of protecting the sanctity of religion and Asian values (Barmania & Aljunid, 2017). According to section 372B of the Malaysian Penal Code, any person found soliciting for the purpose of prostitution or any immoral purpose in any place, and those who are found guilty of such acts can be punished with imprisonment for a term not exceeding one year, or with a fine or with both. The punishment is even more severe for Muslim sex workers, whereby they can be fined, imprisoned or caned. For example, Section 21 of the Syariah Criminal Offences (Federal Territories) Act 1997 (Syariah Act) states that:

Any woman who prostitutes herself shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof.

The above provisions clearly criminalise sex workers and single out women sex workers. They are indicative of how Islamic laws are used to impose harsh punishments and fines on women engaged in sex work. The above provisions stems from the prohibition of *zina* (illicit intercourse) in Islam and thus, sex work is considered as an act of *zina*. The punishment for *zina* in the Qur'an can be found in verse An-Nur 24: 2:

The fornicatress and the fornicator, flog each of them with a hundred stripes. Let not pity withhold you in their case, in a punishment prescribed by Allah, if you believe in Allah and the Last Day. And let a party of the believers witness their punishment. This punishment is for unmarried persons while married persons should be stoned to death (English language translation of the Qur'an, 1984).

Although the above verse includes men, the Syariah Act and most Syariah Criminal Offences Act in Malaysia² have provisions on the severe legal and social consequences for Muslim women who engage in sex work. If convicted, the woman will be sentenced to a fine not exceeding five thousand ringgit, or to imprisonment for a term not exceeding three years, or to whipping not exceeding six strokes, or to any combination thereof.³ The Syariah Act also imposes similar punishments to any person (male) who prostitutes his wife or child, or a child under his care; or causes or allows his wife or child, or a child under his care to prostitute herself (see s.21 of the Syariah Act). This systematic surveillance of Muslim women's morality reinforces patriarchal rights and contravenes the State's commitment to protect and guarantee the principle of equality under the Universal Declaration of Human Rights and the Convention on the Elimination of All Forms of Discrimination Against Women, which was ratified by Malaysia in 1995.

The present article has argued that the above guidelines underpinned the views of enforcement officers and judiciary towards women

² See s.21 of the Act 559 Syariah Criminal Offences (Federal Territories) Act 1997; s.23 Enactment No. 9 of 1995 Syariah Criminal Offences (Selangor) Enactment; s. 19 Kedah Enactment No. 9 Of 1988 Syariah Criminal Code Enactment (Kedah) Enactment; s.69 Enactment No. 4 of 1992 the Syariah Criminal Enactment (Negeri Sembilan).

³ Ibid.

engaged in sex work (United Nations, 2006). The guarding of women's bodies and dignity is a manifestation of the protection of the Islamic identity, communal dignity and social and cultural continuity (Moghissi, 1999).

The concept of 'human dignity' is also encapsulated under Article 8 of the Malaysian Federal Constitution, which prohibits any form of discrimination on the basis of gender 'except as expressly authorized by the Constitution'. In the case of *Lembaga Tata tertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi A/L K Perumal (2000)*, the Court of Appeal ruled that it is the fundamental right of every person within the shores of Malaysia to live with a common human dignity. Gopal Sri Ram JCA (one of the judges in this case) stated that a person who is deprived of his/her reputation is also deprived of his/her right to life according to Article 5(1) of the Federal Constitution. As such, the right to reputation becomes a part of human dignity. Based on such principles, sexual offences and exploitation have been condemned as the 'gravest crime against human dignity', because of the feelings of humiliation, degradation and guilt endured by the victim. Although such condemnation is meant to protect women from being sexually exploited, it has also provided a pathway for state institutions to control women's bodies and behaviour. Thus, section 16 of the ATIP serves this purpose by giving the authorities the unfettered discretion to override a woman's consent if the person is perceived as trafficked. As a result, voluntary sex work becomes conflated with trafficked sex work, and the identification of victims becomes doubtful and questionable.

METHODOLOGY

As earlier stated, the purpose of this research is to explore the notion of consent in the trafficking paradigm and the conflation of sex work and sex trafficking in Malaysia. The study also aims to evaluate the states' approaches in protecting victims through their raid and rescue processes, shelter detention, and judicial processes. Given the nature of the study which focuses on sex trafficking and governmental response to trafficking, the use of secondary data analysis is thought to be a viable method for the study. Moreover, secondary data analysis offers methodological benefits that can contribute to the field of human trafficking through an alternative perspective. In this context,

the data can be interpreted and analysed using multiple approaches and lens. This facilitates the growth and expansion of knowledge and also provides for a nuanced understanding of the data obtained.

According to Creswell (2009), secondary analysis is a structured approach with procedural and evaluative steps that explains how a researcher gathers, analyses, and interprets data in a report. Most secondary method research starts with what is already known and investigated in the stated area of interest before moving on to what is still unknown about the subject. Therefore, secondary data processing is an analytical exercise that includes methodological and evaluative measures, much like gathering and analysing primary data (Doolan & Froelicher, 2009). Furthermore, vast quantities of data are readily available through technological developments which allows data to be collected, compiled, and archived for the purpose of research (Johnston, 2014). Thus, utilizing existing data for research using secondary data analysis has become a viable method of research and it also allows data to be analysed through multiple readings and interpretations.

Given the benefits of using secondary analysis, this study was conducted using primary and secondary sources such as books, journal articles, legislations, published reports, newspaper and magazine articles, websites of non-governmental organizations (NGOs), and of governments including the U.S Department of State, covering the period from 2003 to 2021. The most common keywords used for this analysis are terms and phrases such as: ‘conflation’, ‘consent’, ‘dignity’, ‘sex work’, ‘sex trafficking’, ‘sex work’, ‘prostitution’, ‘sex trafficking in Malaysia’, ‘shelter’, ‘trafficked women’, ‘migrant sex workers’, ‘rescue’, ‘respect’, ‘policing’, ‘prosecution’, ‘victim-protection’, and a combination of or two or more of those terms. However, the research has excluded works on refugees, asylum seekers, stateless persons, and smuggled migrants.

Most of the data in this research was taken from local and international newspaper reports, as well as non-governmental institution reports which provided extensive coverage on trafficked migrant women and migrant sex workers in Malaysia. Data was also obtained from the U.S Department of State website which provided comprehensive annual reports on countries. The fieldwork was conducted in Malaysia so data was obtained from the United States embassy in Malaysia, other state agencies and officials, NGOs and international organizations.

RESULTS AND DISCUSSION

Based on the analysis made on the ‘notion’ of consent and the concept of human dignity in Malaysia, the article asserts that ‘consent’ in sex trafficking is almost invisible and insignificant in one way or the other. In this regard, the article has argued that consent in trafficking acts as a double edge sword for migrant sex workers. Women who are identified as ‘trafficked’ would be infantilised and treated as individuals who are not capable of giving their consent, while those who insists in having agency and ‘choose’ to work in the sex trade will be categorised as offenders and charged in court on two counts – as illegal immigrants and illegal sex workers (Chin, 2013b; The Global Network of Sex Work Projects, 2011). While the irrelevance of consent may be intended to prevent perpetrators from using the consent of victims as their defence, it has also resulted in the violation of women’s rights and agency. Thus, the findings in the present study have demonstrated how the ‘consent’ of trafficked persons have been invisible, ignored, denied, and disregarded throughout the post-trafficking phase, which has been carried out through acts of rescue, shelter, and prosecution.

(i) Raid and Rescue

The rescue of potential trafficking victims is carried out by law enforcement without the consent of the victims. These rescues have also been reported to be highly traumatic and humiliating because women are sometimes apprehended by the enforcement officers while they are naked or performing sexual acts on their clients. In most cases, raids are also carried out in a tactical way which instils fear upon the women. This is because raid and rescue operations on trafficking activities in Malaysia are carried out based on the Criminal Procedure Code (CPC). The CPC does not clearly stipulate ways and methods of rescuing victims as it is designed to facilitate a criminal investigation, the apprehension of offenders and criminal proceedings in court. Therefore, the CPC is designed to be more ‘offender centric’ than ‘victim friendly.’ It comes as no surprise then that trafficked women are sometimes made to feel like they were being accused of committing a crime instead of being victims of the crime (Hamid, 2019a).

Further et al. (2012) have argued that law enforcement raids do not take into account the different power dynamics that exist between

the actor engaging in the raid, and the person who is subject to the raid. In this context, law enforcers possess an enormous degree of power and influence while women feel trapped and helpless as they are considered to be a part of the trafficking activity. Therefore, the UN in its ‘Trainer’s Guide on Human Rights’ module suggests that law enforcers should not only focus on asserting their authority, but consider the facts and circumstances to guide their use of power (United Nations, 2002). In this regard, law enforcers are advised to treat potential victims with compassion and respect (Ibid). In spite of this proposal, raids continue to be accompanied by violations of the human rights of trafficked persons and sex workers (Nadaswaran & Leon, 2021). Such practices are prevalent in Malaysia till today despite the spread of Covid-19 (U.S Department of State, 2021). According to reports, enforcement officers did not implement the Standard Operating Procedures effectively during law enforcement raids or among vulnerable populations with whom authorities come into contact with (ibid). This according to Ditmore & Thukral (2002) can be counterproductive to the underlying goals of anti-trafficking initiatives. Although research has shown that there have been some success in law enforcement raids, it has actually led to the identification of very few trafficked victims (Ditmore & Thukral, 2012). This is evident in Malaysia where enforcement officers continue to rely on victims to self-identify, despite the numerous law enforcement raids carried out in premises suspected of providing sexual services (U.S Department of State, 2021). Thus, sex workers activists argue that these forms of ‘rescue’ create fear among migrant sex workers and isolate them from the mainstream society and generates distrust towards the authorities (Global Network of Sex Projects, 2017). The fear of the authorities could lead women to cooperate with their traffickers and hide themselves from being identified by the enforcement officers.

Women may also become suspicious of national sex worker organisations because they may feel that these organisations are acting as informants for immigration or are simply masquerading as ‘rescuers’ (Ibid). This compromises women’s access to support and services (Ibid). Thus, the sex worker rights movement (particularly in the global south) have continuously demanded recognition of sexual labour as labour: they challenge stigma, discrimination, and all forms of violence, including those perpetrated by law enforcement; they seek to improve working conditions; lobby for full human, social, and labour rights; advocate for the decriminalisation of sex work; and

provide peer-based support and services (Lepp & Gerasimov, 2019). According to them, any policy designed to fight human trafficking must extend beyond criminalising traffickers to reinforce the rights of immigrants and workers. Therefore, scholars argue that survivor-centred approaches are more practical and necessary because they allow for full recovery from a trafficking experience, which was not possible through prosecution-oriented legal procedures.

(ii) Shelter Protection

The detention and placement of trafficked women in shelters following the raid and rescue process are carried out without the consent of the women. Women are not given the choice or option to deny shelter protection. Their consents are not sought before they are placed in the shelter. Instead, authorities insist that the women have to be protected and hence, agreed to be placed in the shelter pending repatriation (Brunovskis & Surtees, 2012; Edward, 2016). There has however, been no evidence of such claims. Those who have refused to be categorised as ‘trafficked’ and insisted that they have chosen to migrate and engage in sex work might be categorised as offenders, charged in court for breaching immigration rules and engaging in sex work, and imprisoned if found guilty before being deported (Chin, 2013a; Hales, 2017). In this instance, women might falsely admit to being trafficked to escape prosecution. This clearly shows how ‘consent’ in trafficking and sex work has the potential of incriminating women one way or the other. This would not only jeopardise the prosecution’s success in court, but would also blur one’s interpretation and understanding of ‘trafficking’.

According to the ATIP, trafficked women are given an initial 21-day interim protection order (for suspected trafficking victims) and/or a subsequent 90-day protection order (for certified trafficking victims) from the court. The period of detention may also be extended by the Court to facilitate the prosecution’s case against the traffickers, since the prosecutors mainly rely on the cooperation and testimony of the women (U.S Department of State, 2012, 2016). Although the term Protection Order is closely associated with the ‘welfarist language or rehabilitation and protection’, treatment accorded to women in shelters is punitive and violates their rights. Gallagher & Lee (2010) describe these shelters as resembling immigration detention centres and not

complying with the guidelines contained in the ‘Recommended Principles and Guidelines on Human Rights and Human Trafficking’ (in United Nations High Commissioner For Human Rights, 2003, the Guidelines). Guideline 1(6) states that all anti-trafficking measures should protect the trafficked victim’s freedom of movement and should not infringe upon the victim’s rights. Guideline 6 ensures that shelter provisions should not be made contingent on the willingness of the victims to give evidence in criminal proceedings and victims should not be held in immigration detention centres, other detention facilities or vagrant houses. However, the Malaysian government does not seem to adhere to these guidelines. The authorities deny that victims of trafficking are subject to detention, but instead assert that the victims have agreed to restrictions on their freedom of movement (Gallagher & Pearson, 2010). Thus, Nowak (2005, pp. 224-226) notes that:

Deprivation of liberty provided by law must not be ‘manifestly disproportional, unjust or unpredictable. The manner in which someone makes a decision to deprive an individual of his or her liberty must be appropriate and proportional in light of the circumstances of the case. Importantly, a detention situation that was originally not arbitrary might become so if the detention continues without proper justification.

In this regard, state authorities often claim that the detention of victims is necessary to secure their presence and cooperation in the criminal prosecution of their traffickers (Gallagher & Pearson, 2010). This shows how shelters are being forced upon trafficked women and being made contingent upon women testifying in court, which contravenes Guideline 6 (see above). Repatriations are also carried out without the consent of the women, which suggest that women are being forcibly repatriated. Therefore, the term ‘forced repatriation’ is used in this article because women are not given the option to remain in Malaysia upon the expiry or the revocation of their protection orders.

Conditions in the Shelter

Shelters operate under high levels of security, including barbed wire fences and security guards, which are intended to prevent women from escaping rather than to protect them from harm (U.S Department of

State, 2012; United Nations Human Rights Council, 2015). Sheltered women are forced to wear uniforms, required to undergo multiple interviews or interrogation with government officials, held under strict surveillance, prohibited from communicating with anyone outside the shelter, and are deprived of medical, legal, interpreter and psychological services (Maggie Lee, 2014; U.S Department of State, 2014). In response to the repressive treatments accorded to trafficked women, non-governmental organisations such as the Human Rights Commission of Malaysia (SUHAKAM) and Tenaganita have undertaken the complex task of monitoring the violations of human rights with respect to human trafficking and abuse of migrants that occur in these settings (official portal Human Rights Commission of Malaysia, 2013; Tenaganita, 2012). Over the years, NGOs have raised concerns about overcrowding, poor living conditions, restriction of movement, and physical and verbal abuse towards migrants detained in the shelters (Gallagher & Pearson, 2010; official portal Human Rights Commission of Malaysia, 2013; Tenaganita, 2012). They have continuously imposed pressure on the Malaysian government to adopt non-punitive practices and to improve treatments and conditions. SUHAKAM has also urged the government to address the restricted rights of victims of human trafficking, and to protect victims and to deter human trafficking with the aid of civil society groups, diplomatic missions, and relevant stakeholders (Yunus, 2014).

Despite all the criticisms that has been levelled at the government on their victim protection policies, there are groups who believes that the shelters provided by the government constitutes a ‘temporary haven’ for trafficked women (Edward, 2016). To them, the act of ‘rescue’ and detaining women in shelters is thought to be the ‘ideal’ mode of protecting them (Ibid). However, Gallagher & Pearson (2010) argues that the detention of trafficking victims is not a universal practice. This is because in many countries, the right of victims of trafficking to freedom of movement is respected, and the provision of support and protection is based on genuinely informed consent (Ibid). This is however, not the case in Malaysia as consent is not sought from the women for the rescue, shelter or being a witness for the prosecution (Hamid, 2019a). Instead, the provision of living in the shelter is compulsory for women who have been classified as trafficked (section 51 (3), ATIP). Therefore, shelter detention has become one of the most problematic practices that has been justified by the anti-trafficking imperative.

(iii) Prosecution

The testimony of trafficked women is vital to prove the prosecution's case and convict the traffickers (Hamid et al., 2018). In this context, women are bound by the provisions contained in the Malaysian Evidence Act 1950 (see s. 60) on oral evidence, which positions oral testimony as a form of primary evidence. Given this, women who testify are subject to questions that could discredit their ability as witnesses (sections 132, 135 and 137, Evidence Act). Women are compelled to become witnesses in court in exchange for shelter protection, even though there is no formal agreement made to this effect. This can be concluded from the fact that all women who are placed in the shelter will only be repatriated after their cases are heard in court. However, their consent is not sought during judicial proceedings and processes, and they do not have a right to refuse being called to attend court as a witness. This becomes problematic because not all women detest their traffickers and wish to testify against them. Some may fear the repercussions of incriminating their traffickers, while some may genuinely perceive their trafficker as a 'friend', 'helper' or a good person. Given this, women might choose to exonerate the accused by refusing to cooperate or testify in favour of the prosecution. Any circumstantial, physical, or documentary evidence produced in trafficking proceedings could only corroborate the fact that the woman was engaged in sex work, but cannot prove the element of coercion as required under the ATIPSOM. In this context, Kim (2011) argues that coercion would be difficult to prove because it frequently consists of threats that need to be corroborated by the testimony of the victim or witness. Furthermore, expert medical opinions may only attest the existence of bruises or injuries on the victim's body, but psychological coercion such as restrictions of freedom, isolation, humiliation, and threats to report to authorities can only be witnessed through the victim's testimony (United Nations Office on Drugs and Crime, 2017). Therefore, the victim's testimony is not only a necessity, but also a legal requirement in most states (Farrell et al., 2014). For these reasons, women who are identified as trafficked by the state are usually compelled to give evidence in court (Ibid).

Although trafficked women are categorised as victims and are immune from being prosecuted under the ATIP, they are still subject to other

legislations, such as the Immigration Act (section 8) and the Passport Act 1966 (sections 2 and 9). Therefore, the legal protection of women in court processes is limited and does not necessarily translate into justice for women, but instead becomes more of an adversarial ground for prosecution and defence lawyers to prove their cases. Women who are ‘rescued’, ‘questioned’ and brought to court to recount their stories are then cast aside to deal with the next phase of repatriation. This raises the question as to whether trafficked women are genuinely perceived and treated as ‘real victims’ or merely used as a tool to assist the state to combat sex trafficking. It also shows how the victim protection framework acts to silence women by force. Therefore, this article argues that there is a prevailing silence about the violence against women, particularly trafficked women, and the protection of their rights. This includes the harm they often face while in state custody. This is because the real objective is to control unwanted migration, control state borders, and penalise migrant sex workers in order to preserve the image and sanctity of the country.

CONCLUSION

The term ‘consent’ in trafficking has resulted in differing perspectives of sex work and sex trafficking. Given that consent is irrelevant in cases of trafficking, authorities tend to conflate voluntary sex work with trafficked sex work. Thus, the Global Network of Sex Work Projects (2011) has argued that the conflation of sex work and trafficking was actually a conscious attempt to abolish sex work and prevent women from migrating for sex work. This has been made evident through the anti-trafficking legislations, policies, and interventions which targeted sex workers (particularly migrant sex workers) (Ibid). It also sought to undermine sex workers’ security and ability to control their lives (Ibid). Therefore, many sex worker groups have argued that it is important to demarcate sex work and sex trafficking clearly (Healy et al., 2012). This is because conflating sex work with trafficking infantilises women and portrays them as dependents without agency and decision-making power (Lalani, 2008). This is exacerbated by the lack of clear structures on victim-identification and referral in many countries, including Malaysia (Lee, 2011).

Although a lot of research has been carried out on the punitive aspect of policing when rescuing trafficked women, law enforcers continue

to conduct raids and rescue operations through tactical methods which often harm women. Therefore, the present article has argued that the criminalisation of sex work exposes trafficked women to abuse and exploitation by law enforcement officials, such as police officers. In addition, sex worker groups such as The Global Network of Sex Work Projects (NSWP) has critiqued such acts of ‘rescue’, and argued that the raids on workplaces and establishments that offered sexual services were carried out in the name of trafficking, but were actually aimed at eradicating sex work (The Global Network of Sex Work Projects, 2011). Similarly, enforcement raids in Malaysia are primarily aimed at apprehending traffickers and eradicating sex work while ‘rescuing’ victims remain secondary, in the sense that victims are used as a tool or a form of evidence to implicate traffickers of their crime. In this regard, the identification of victims will be based on ‘gut assessment’ or the discretion of the law enforcers, given the ambiguity of the definition of trafficking. This can lead to the misidentification of victims. Such practices instil fear upon the migrant women and subject them to the continual threat of harm throughout their period of being trafficked.

As a result, the interpretation of trafficking becomes blurry and indefinite, and the trafficking definition becomes a double-edged sword which can convert a non-trafficked victim into a sex-trafficked victim and vice versa. This shows that the policy and ideological contexts within which trafficking is considered are complex and ambiguous (Natalie, 2017). Therefore, the present article has argued that the terms and definitions in current trafficking legislations need to be worded and understood more clearly while giving victims the opportunity to exercise their agency. The term ‘consent’ should not only have a ‘cosmetic’ effect in legislations, but a genuine effect of understanding women’s decision and choice. Further, the term coercion, trafficking, traffickers, and victims of trafficking need to be clearly defined in the ATIPSOM to avoid any confusion or ambiguities that may arise. Such form of responses would at least protect women’s rights and accord them with the necessary justice, respect, and dignity.

ACKNOWLEDGMENT

This research received no specific grant from any funding agency in the public, commercial or non-profit sectors.

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