

The Practice of People Smuggling in Indonesia: Draconian Laws for a Better Life

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Abstract

The era of globalization and the mobility of goods and services across different countries have led to the emergence of transnational crimes, one of which is human smuggling. Many countries have been harmed either directly or indirectly by the crime of people smuggling, and most importantly, the rights of smuggled people are definitely neglected. The purpose of this paper is to analyze the strictness of Indonesian national legal provisions in relation to the crime of human smuggling and law enforcement activities conducted by the state apparatus in combating the practice of people smuggling in Indonesia. This article is a conceptual article that uses qualitative methods with statutory approaches, conceptual approaches, and case approaches. Indonesia's national legal provisions related to the crime of people smuggling are contained in the Law of the Republic of Indonesia Number 15 Year 2009 on the Ratification of Protocols against the Smuggling of Migrants through Land, Sea and Air, Law of the Republic of Indonesia Number 6 Year 2011 on Immigration, and Director General of Immigration Regulations Number F-1002 on Procedure of Detention. Law enforcement by the state in combating the practice of human smuggling in Indonesia involves many agencies, but the police and immigration authorities are at the forefront of combating this crime. The international community clearly has a major role to play in combating the flow of people smuggling, starting from the home country to the transit and destination countries, so that a better human life can be realized.

Keywords: Humanity; Smuggling; Indonesian Law.



Introduction

Human smuggling is a cross border crime (Heckmann, 2004) and has become a problem in many countries (Heckmann, 2006). Many regions, such as Southeast Asia, Western Asia, Europe, and Australia, are feeling the impact of this crime. This crime, generally, does not only involve the smuggling agent and the person to be smuggled, but in practice, law enforcement officers of a country also take part in the crime sometimes, because the smuggling agency will do everything, including bribing and cooperating, as a syndicate, with unscrupulous state agents, in order to achieve success in their criminal operations.

The Southeast Asian maritime zone is a zone where illegal economic activities, such as human trafficking, human smuggling, and maritime piracy, have recently shown significant increases. It cannot be denied that the current globalization trend has made the economies of countries to become intertwined, complex and heavily dependent on maritime trade. Maritime activities help in maintaining the movement of energy, raw materials and finished goods from one country to another. In the waters of Southeast Asia, about one-third of world trade and half of the world's fuel carried by sea pass through the Malacca Strait, which plays a very central role in connecting one region with other parts of the world. Southeast Asian coastal states are very concerned about disruption of shipments, as it will have a major impact on their economies. Such concerns encourage countries in the region to proactively engage in stronger maritime security cooperation to protect their trade and prevent illegal activities. Regional maritime policy initiatives will not have a significant impact on the stability and security of Southeast Asian waters, except Southeast Asian countries clearly and effectively identify the sources of threats and challenges. Successfully identifying threat sources will inevitably lead to an understanding of how to manage cooperation, in order to address certain threats and challenges (<http://www.tabloid-diplomasi.org/previous-isuue/105-september-2010/920-isu-keamanan-maritim-re-gional-.html>). Cooperation is very important considering that the threat of cross-border crime, such as human trafficking, human smuggling, and maritime piracy, is always present, because in addition to the increasingly diverse modus operandi of smugglers, technological sophistication also promotes transboundary crimes.

People smuggling involves paying to enter illegally into the territory of a country where the person is not a citizen or permanent resident, for financial or material gain (Meliala, 2012) People smuggling means seeking to obtain, directly or indirectly, any financial gain or other materials from the illegal entry of a person into a country in which the person is not a citizen or has a residence permit. Illegal entry means crossing state borders without complying with the regulations/permissions required to enter the territory of a country legally. People smuggling is a more intense cross-border crime compared with other cross-border

crimes, such as trafficking, because in this case, the smuggling agent is passive, while the active one is the one who wants to be smuggled into a certain country.

Serious efforts have been made by various countries in the world to fight crimes against humankind through the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime. The protocol was ratified by Indonesia in 2009 through the Law of the Republic of Indonesia Number 15 Year 2009 on Protocols against the Smuggling of Migrants by Land, Sea and Air, completing the United Nations Convention against Organized Transnational Crime. In Indonesia, human smuggling has been implicitly regulated by the Emergency Law of the Republic of Indonesia Number 8 Year 1955 on Immigration Crimes as well as the Law of the Republic of Indonesia Number 9 Year 1992 on Immigration. However, the two provisions of the national law are incapable of ensnaring the perpetrators of human smuggling, because there is no definite definition of the crime.

People smuggling was merely an immigration violation not a crime at that time. It took about 19 years for the Indonesian government to formulate the problem of people smuggling into immigration issues. During that time also, people smuggling actors moved freely carrying out their activities. Finally, in 2011, the government issued Law of the Republic of Indonesia Number 6 Year 2011 on Immigration, in which there is an article with criminal provisions governing the smuggling of people. (Paembonan, 2014). The immigration law does not comprehensively regulate the smuggling of human beings; although there are provisions that can tackle people smuggling, they are very abstract. However, the ratification of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crimes, by Law of the Republic of Indonesia Number 15 Year 2009 provides a more concrete regulation of the crime of people smuggling.

Transnational crime is not only driven by trade factors or the weakness of law enforcement in Indonesia, but it is also supported by the geographical location of Indonesia. Indonesia is a geographically long country that has many entrances: airports, ports, land and water boundaries. In addition, the very long coastline of Indonesia and the fact that it is located in the cross position of world trade traffic are major factors that strongly promote the occurrence of transnational crime. Further, the occurrence of transnational crime in Indonesia may also be due its large population (Fernando, 2013).

Based on the above explanation, this article attempts to find out how strict the provisions of Indonesian national law related to the crime of people smuggling are and how law enforcement is done by the state apparatus in combating the practice of people smuggling in Indonesia. This article is a conceptual article that applies qualitative methods with statutory approaches, conceptual approaches, and case approaches (Marzuki, 2010).

Human Smuggling in Indonesian National Law

With respect to the criminal act of smuggling of migrants, Article 6 of the Protocol against the Smuggling of Migrants provides that state parties shall make laws and regulations on this crime, which is intentionally committed to obtain money or other material benefits. Indonesia is one of the countries that have ratified this protocol, which is embodied in Law of the Republic of Indonesia Number 6 Year 2011 on Immigration, which prohibits the following (Paembonan, 2014):

1. Migrant Smuggling;
The provisions on migrant smuggling are contained in Article 120 of the Law of the Republic of Indonesia Number 6 Year 2011 on Immigration.
2. Measures that provide opportunities or assistance for migrant smuggling in the form of:
 - (i) Remove fraudulently obtained identity or travel documents;
 - (ii) Obtain, provide, or own documents.
3. Assisting foreigners to live in a country without complying with the provisions of its domestic law to stay legally; Article 117, Article 118, Article 124, and Article 125 of the Law of the Republic of Indonesia Number 6 Year 2011 on Immigration arranged as described in the protocol.
4. Conduct trials, participate, organize or instruct others to commit migrant smuggling crimes
5. Acts that endanger the life or safety of migrants or inhumane treatment including exploitation of migrants. This last provision is not regulated in the Law of the Republic of Indonesia Number 6 Year 2011 on Immigration.

The protocol explains that human smuggling is the procurement of human transportation to gain illegal entry into a country. Human smuggling is a serious issue that must be addressed and needs to receive special attention from all countries. This is because human smuggling is a dangerous 'trade' not only because the money collected from smuggling is commonly used for criminal acts, such as narcotics and weapons trade, but also because smuggling is an activity that endangers the human soul itself (Chritianti, 2016). The legal basis for enforcing the law by police and immigration officers regarding this crime is guided by the prevailing laws and regulations. The laws are as follows (Meliala, 2012):

1. Law of the Republic of Indonesia Number 8 Year 1981 on the Criminal Procedure Code (KUHAP);

2. Law of the Republic of Indonesia Number 17 Year 1985 on Ratification of the United Nations Convention on the Law of the Sea (UNCLOS);
3. Law of the Republic of Indonesia Number 6 Year 1996 on Indonesian Waters;
4. Law of the Republic of Indonesia Number 2 Year 2002 on the Police of the Republic of Indonesia;
5. Law of the Republic of Indonesia Number 17 Year 2008 on Shipping;
6. Law of the Republic of Indonesia Number 43 Year 2008 on State Territories;
7. Law of the Republic of Indonesia Number 5 Year 2009 on Ratification of the Convention against Transnational Coordinated Crime;
8. Law of the Republic of Indonesia Number 15 Year 2009 on Ratification of the Protocol against the Smuggling of Migrants through Land, Sea and Air;
9. Law of the Republic of Indonesia Number 6 Year 2011 on Immigration;
10. Regulation of the Government of the Republic of Indonesia Number 23 Year 2007 on the Regional Law of the Police of the Republic of Indonesia; and
11. Regulation of the Director General of Immigration Number F-1002 on Procedure of Detention.

The investigation of human smuggling crime requires some difficult processes, because it is not a common crime but a crime involving several countries; it is an extraordinary criminal offence. So, the techniques in the investigation are unusual. After conducting an investigation with regard to a criminal offence, the investigator collects all the information obtained in the investigation for confirmation. The steps that must be followed in the framework of an investigation are as follows (Meliala, 2012):

1. Determining a crime;
2. Preparation of police reports or reports of events;
3. Task warrant;
4. Investigation order;
5. Making the minutes of the examination (witnesses, expert witnesses, suspects) (provisions of lawyers, translators and experts as well as BAP provisions abroad);
6. Making calls to witnesses as necessary;
7. Making SPDP (Notice of Commencement of Investigation);
8. SP3 (Notice of Termination of Investigation);
9. Shakedown;
10. Foreclosure;
11. Arrest; and
12. Detention.



The prosecution stage is divided into pre-prosecution, prosecution and transfer to court. (Meliala, 2012) Prosecution is a general act of delegating criminal cases to a competent district court in respect of and in accordance with the manner laid down in the law with a request to be examined and decided by a judge in court (Hamzah, 2001). When the process of delegation is done, the fate of the suspect, whose status has changed to defendant, moves from the public prosecutor to the district court where the case was delegated to. Broadly speaking, the prosecution process consists of three stages: the first stage is the research stage to ascertain whether all the materials needed to establish a strong indictment structure and run a successful proof strategy are available, so that there is no need for additional examination of the public prosecutor (JPU). If the first stage results allow the prosecutor to prosecute, then the process proceeds to the second stage. The files, suspects and evidences are investigated for a second time by the public prosecutor, and if it is found that the facts of the case are strong enough to proceed to court, the public prosecutor would start making indictments based on the data, information and evidence available to him (Meliala, 2012). The prohibition of people smuggling in Indonesia's national law resulted in great expectations of its enforcement. However, such good laws should be accompanied by adequate professionalism, integrity, quality and quantity of law enforcement. Without good law enforcement, the good laws will be useless.

The Law of the Republic of Indonesia Number 5 Year 2009 concerning Ratification of the Convention against Transnational Coordinated Crime, Law of the Republic of Indonesia Number 15 Year 2009 concerning Ratification of the Protocol against Smuggling of Migrants through Land, Sea and Air, and Law of Republic of Indonesia Number 6 Year 2011 on Immigration are the three main laws used by law enforcement in combating the crime of people smuggling. The ratification of the Convention against Transnational Crime and the Protocol against the Smuggling of Migrants through Land, Sea and Air is a manifestation of the Indonesian government's commitment to minimize or even solve the problem of people smuggling completely.

Eradication of Human Smuggling Practices in Indonesia

A problem that recently arose in Indonesia and was in the international spotlight is the crime of human smuggling, which occurs in various regions in Indonesia. The large number of illegal immigrants from Middle Eastern and South Asian countries who attempt to get to Australia to seek political asylum through the territorial waters of Indonesia means that Indonesia has to deal with thousands of people, causing legal problems for the country. Meanwhile, Australia itself has been overwhelmed by the number of immigrants coming to the territories of Christmas

and Darwin Islands, so the issue of immigrants seeking political asylum is a hotly debated issue within Australia's domestic politics.

The illegal immigrants often referred to as "boat people" consist of men, women, and children wading through the ocean with makeshift boats, and so they often experience accidents at sea, because their boats are hit by waves. Therefore, many of them are stranded in the coastal areas of Indonesia, especially the south coast of Java. In addition, there are immigrants who make Indonesia a transit area to settle for a while and then travel back to Australia with the help of Indonesian citizens in exchange for money or certain services.

In recent times, people smuggling has attracted international networks involving cross-border agents from Southeast Asian countries, including Indonesian citizens, and their clients mainly come from Middle Eastern countries. The crime of human smuggling is a crime that must be investigated thoroughly by law enforcement officers of Indonesia, such as Police Department (Polri) and various other security apparatus. Security forces and law enforcement agencies are required to expose the various practices of people smuggling. Since the practice of human smuggling involves international crime networks with many actors, tackling it cannot be done by one country alone or only one agency (Subagyo, 2013). The fact that agents of people smuggling come from Southeast Asian countries, including Indonesian citizens, as reported by various national and international news media, is a bad portrait of the prevention and handling of people smuggling crimes and has tarnished the efforts made by the government so far.

People smuggling and illegal immigration are criminal acts that are interconnected. If one of them occurs, the other may also happen, because illegal immigrants will succeed in the presence of conspiracies from smuggling agents, and people smugglers result in an increasing number of illegal immigrants. People smuggling can be interpreted as seeking to obtain, directly or indirectly, financial gain or other materials from the illegal entry of a person into a country in which the person is not a citizen or has a residence permit (Article 3 of the UN Protocol of 2000 on People Smuggling). Illegal entry means crossing the border of a state without complying with the regulations/permits required to enter the territory of the country legally. In analyzing the problem, it is necessary to discuss the weakness and incompatibility of applicable laws, especially in Indonesia, which is part of the problem of people smuggling (Kadarudin, 2013), because it makes cross-border human smuggling difficult to eradicate by the government. Cooperation between countries in the region needs to be intensified, mainly initiated by regional organizations, such as Association of South East Asian Nations (ASEAN).

People smuggling syndicates use Indonesia as one of the transit countries from where they send people illegally to their destination countries. This is revealed in the case of people smuggling handled by an officer of Soekarno-Hatta Airport Immigration Office, which occurred on October 9, 2017, when a syndicate was about to smuggle people to countries in Europe (<https://megapolitan.kompas.com>).

The officer stated as follows: “In many alternative countries, there are many flights to Europe. Low cost flights are now no longer a difficult thing, that's one indication why they came to Indonesia” (Kompas Papers) The Malaysian passport that they used was a genuine passport but not theirs. The people smuggling syndicate in question deliberately collects lost Malaysian passports and then seeks other citizens who resemble the photos in the passport, which they use to enter their destination countries in Europe, such as Germany, France, etc. The Immigration of Soekarno-Hatta Airport arrested five foreign nationals, three Sri Lankan citizens using the Malaysian passport and two Malaysians, who are part of a human smuggling syndicate that acts as a courier to deliver smugglers. The couriers are paid \$2,000 per smuggled man by the syndicate. The Soekarno-Hatta Airport Immigration Office continues to coordinate with the Malaysian Embassy in Indonesia to investigate this smuggling case. The amount of money earned is big enough to tempt anyone who has the opportunity to become a human smuggling agent. Although it has a high potential risk, such as drowning in the middle of the sea, being arrested by the authorities, and the threat of a long prison sentence, all these are still not able to dampen people’s desire, and they still take part in it.

The Directorate of Public Crimes of the Criminal Investigation Unit of the Indonesian National Police revealed some cases of human smuggling. Those who are smuggled are foreign nationals and are smuggled from Indonesia to Malaysia and Australia. Police Brigadier General Herry Rudolf Nahak (Director of Public Crime) said that the first smuggling case occurred in Makassar, South Sulawesi. People smuggling began when the Makassar City Resort Police Station and Immigration Class I Makassar arrested nine Nepalese in a house, at the Tamalate Outlet, Barbong on January 8, 2017. Eight of them had passports, but their residence permits had expired. One person did not have a passport.

In addition, four of the nine people were earlier detained (Immigration detainees) at Soekarno Hatta Airport Immigration Bureau but escaped. After interrogation, it became clear that they all intended to enter Australia illegally through the help of a smuggling network in Makassar. Police arrested Jammy Aridah alias Rizky as the liaison. Also, Sonam Ghalan alias Alif, who is allegedly a Nepali Citizen but has a family card in Indonesia, and Haji Saiful Rahim aka Daeng Tara, who allegedly supervises the ship used to take immigrants to Australia, were also arrested. From the disclosure of Tara, the average immigrants were asked to pay between \$ 2,500 and \$ 12,000 (USD) per person. Therefore, the suspects arrested by the police have contravened Article 120 of the Law of the Republic of Indonesia Number 6 Year 2011 on Immigration. Smuggling agents generally think of this crime of human smuggling as playing gambling, if they can fool the state apparatus, they will get very enormous benefits in a short time.

The second case is related to people smuggling in Dumai, Riau. The case was revealed as a result of police patrol in Jalan Sidomulyo. Police suspected the sign of a Bangladeshi citizen and decided to perform an investigation, which

resulted in the discovery of 74 foreigners in a house. There, 31 foreign resident visas, which had expired, were found. All of them were waiting to be dispatched to Malaysia. Four people were arrested and secured by Dumai Police. One of the suspects was named Tengku Said Saleh alias Haji Saleh, and he provides the ship used to take immigrants to both Malaysia and Australia. The Director of Public Crime explained that Haji Saleh's network smuggled 2,710 foreign citizens during the last eight months. Smugglers bring in 600 people in a month. In addition to Article 120 of Law of the Republic of Indonesia Number 6 Year 2011 on Immigration, suspects of human smuggling are also subject to Article 124 of the above law, which deals with granting lodging to foreigners residing illegally in Indonesia. Indonesia's law enforcement apparatus is now quite good, so the prevention and tackling of crimes in general, especially transnational crimes, such as human smuggling, can be comprehensively pursued.

Based on the cases mentioned above, it is clear that the crime of people smuggling involves many countries, including the country of origin, transit country, and country of destination. According to Agus Subagyo and Dadang Sobar Wirasuta, the current flow of people smuggling in Indonesia can actually be mapped into three important areas, namely home country, transit country, and destination country. These three areas are a cycle that needs to be examined deeply to find an integrated model of dealing with the crime of people smuggling. First, the home countries of immigrants/boat people are the countries of the Middle East and South Asia. The many conflicts, wars and political turmoil in most of the Middle East and South Asian countries encourage citizens to flee and seek protection for themselves and their families. The immigrants are mostly from Iraq, Iran, Egypt, Tunisia, Syria and Libya. Also, many immigrants come from India, Pakistan and Afghanistan. Meanwhile, in recent years, Myanmar has also become a source of immigrants; due to the persecution of Rohingya ethnic Muslims, they flee from the territory of Myanmar and seek political asylum in Australia (Subagyo, 2013). Although many Burmese seek political asylum in Australia, only a very small percentage is accepted. Among the large number of those that are not accepted, some of them who have sufficient funds patronize smuggling agents who can smuggle them into big countries, like Australia, the United States, and Canada.

Second, the transit country is a country passed through or in which immigrants temporarily stops as they leave their countries of origin. These transit countries are mostly Indonesia and Malaysia. These immigrants sail for weeks and then stop and settle temporarily in Indonesia and Malaysia, where they make preparations to travel to Australia. As a transit country, Indonesia is used as a temporary stopover by immigrants to simply rest, collect supplies, and prepare themselves for the journey to Australia. These immigrants are usually assisted by unscrupulous citizens or foreigners in Indonesia, who help to prepare all the needs of the asylum seekers, from determining where to stay to determining the location of departure and the transportation that will be used to transport them. For these

services, the asylum seekers have to pay a certain amount of money, which adds up to hundreds of millions (Subagyo, 2013). The police and immigration are responsible for dealing with people smuggling; however, in a situation where a suspect is caught red-handed, anyone can apprehend the suspect and later hand over such a suspect and evidence to the authorized party responsible for investigation. In the process of investigation, it is necessary to critically explore some important matters concerning the determination of what make someone a suspect of people smuggling, or more precisely, how to determine whether an action constitute the crime of people smuggling or not (Maulida, 2015).

Third, the destination country is the final country where the immigrants settle. Australia is the main destination country. Some immigrants have the intention to seek political asylum in New Zealand, but most of them prefer Australia. Since most refugees prefer to seek political asylum in Australia, Australia has become overwhelmed by the situation due to the lack of adequate shelters, the difficult process of handling immigration documents, and the possibility of political asylum seekers being ridden by terrorists seeking to enter the Australian territory, endangering its domestic security (Subagyo, 2013). In Indonesia, on average, every year up to 2011, more than 10,000 illegal immigrants made Indonesia both a destination and a transit state. People smuggling is aimed at supplying the international sex trade and labor market. The smuggling is done by international networks of organized crime through both intermediate and direct channels. The increasingly significant activities of organized crime groups in the smuggling of migrants constitute a threat to countries and the lives and safety of the migrants themselves. Therefore, the international community should regulate the activities of international networks of organized crime by additional protocols on smuggling of migrants. People smuggling practices have increased in recent decades, and at present, reports of unofficial migration rates continue to increase significantly in various countries (Fernando,2013). The international community is the main actor in combating transnational crimes. Intensive bilateral and multilateral meetings between countries in a region, especially in Southeast Asia under the auspices of ASEAN, is absolutely necessary, because this smuggling involving the home country harming the transit and destination countries.

People smuggling generally occurs with the consent of the person or group to be smuggled, and the most common reasons why people want to leave their home countries include opportunity to get a job and improve their economic status, hope for a better living standard for themselves and their families as well as to avoid the conflicts in their home countries. People smuggling is actually promoted by the urge to become illegal immigrants. States must be proactive in combating the crime of people smuggling, because it has harmed many countries both directly and indirectly, and it is important to consider the rights of smuggled people, because their rights are mostly neglected. Thus, the international community has a major role to play in eradicating the flow of people smuggling, starting from the home

country to the transit and destination countries, so that a better human life can be realized.

Conclusion

The provisions of Indonesia's national law related to people smuggling crime are contained in the Law of the Republic of Indonesia Number 15 Year 2009 on Ratification of the Protocol against the Smuggling of Migrants through Land, Sea and Air, Act of the Republic of Indonesia Number 6 Year 2011 on Immigration, and Regulation of the Director General of Immigration Number F-1002 concerning Procedures of Detention. Law enforcement by the state to combat human smuggling practices in Indonesia involves many agencies, but the police and immigration authorities are at the forefront of law enforcement against people smuggling crimes.***

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