

HUMAN SMUGGLING
FROM THE PERSPECTIVE OF INDONESIAN POSITIVE CRIMINAL LAW
(A Study of Decision No.257/PID/2021/PT BNA and No.187/Pid.Sus/2023/PN Dum)

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ABSTRACT

Lack of awareness of the crime of human smuggling and economic concerns are major factors in the occurrence of such illegal acts. While there may be victims in human smuggling, it is more of a risk of the activity rather than something that is premeditated. Deception, coercion and violence are important elements in human trafficking. The existence of this research aims to find out the extent of Indonesia's policy to tackle the problem of human smuggling in Indonesia and increase the effectiveness of law enforcement against human smuggling which cannot be done instantly, so there needs to be a continuous process. This research uses normative juridical methods and analyzes data qualitatively. The researcher processes and presents data from various sources to produce conclusions and findings based on research efforts. The results showed that the juridical consideration of the judge was the reason for imposing a fine in accordance with the provisions of the law to the defendant. In addition, there are non-juridical considerations of the judge that aggravate the punishment of the defendant, such as the defendant's actions that are contrary to the government's efforts in enforcing immigration laws and the defendant's previous conviction history.

Keywords: Law, Human Smuggling, Juridical

INTRODUCTION

According to a study entitled "Study of Human Smuggling Practices" by Muhar Junef, Indonesia has great potential for human smuggling practices. The lack of knowledge of the local community about this crime and economic problems are the main factors in the occurrence of such illegal acts. Human smuggling is an attempt to gain profit for the perpetrator by directing others to bring individuals or groups into Indonesian territory or out of the region. In Indonesia, human smuggling is not yet considered a crime, but rather an immigration offense handled under immigration laws. Human smuggling emphasizes more on the illegal transfer of

people from one country to another without any exploitation involved. While there may be victims in human smuggling, it is more of a risk of the activity rather than something premeditated. On the other hand, deception, coercion and violence are important elements in human trafficking. (Farhana, 2012)

In 2023, human smuggling was rampant in Indonesia. According to data recorded from Criminal Investigation Agency and the Regional Police, there were 3363 victims with a total of 1061 reports with modes such as Indonesian Migrant Workers / Domestic Workers, Ship crew, Commercial Sex Workers and Child Exploitation. The smugglers usually do not have official identity or permission documents to enter or leave Indonesian territory legally. Soerjono Soekanto argues that law enforcement does not only include the application of laws and judge' decisions, but also requires rational efforts in dealing with human smuggling crimes in Indonesia, which is often referred to as criminal policy.

Human smuggling is also often closely linked to complex and often undetectable illegal immigration channels. This poses challenges for law enforcement in effectively identifying and tackling human smuggling networks. In this context, cross-border cooperation and coordination between law enforcement agencies is crucial to combat this illegal practice. The majority of facilitators tend to come from highly marginalized communities - working class, low-income laborers, living in or traveling through areas with high migration flows. In short, the data shows that smugglers are ordinary citizens from a variety of backgrounds (Sanchez, 2017).

In addition, economic and social factors also play a role in driving human smuggling. Economic inequality between countries, armed conflict, and political instability can be major drivers for individuals to seek illegal routes in search of a better life. With intimidation and coercion, it is often carried out by traffickers who are familiar with the perpetrators. In such a situation, the perpetrator takes advantage of his close relationship and his more dominant position than the victim, thus making the victim feel pressured and in a lower position. This condition makes it difficult for the victim to refuse the perpetrator's request (Winarno et al, 2013). Therefore, efforts to prevent human smuggling do not only require a legal approach, but also need to involve broader efforts in addressing the root causes that drive this practice.

Previous research proposed by (Junef, 2020), which discusses the Study of Human Smuggling Practices in Indonesia, still requires renewal which must be researched in detail and

explored more so that understanding of the material becomes more significant. The author in this study has the aim to explore again and to find out the extent of Indonesia's policies to tackle the problem of human smuggling in Indonesia. In the context of Indonesian positive criminal law, there needs to be a continuous effort to improve the effectiveness of law enforcement against human smuggling. This includes not only stricter and more efficient enforcement of laws, but also capacity building of law enforcement institutions, increased public awareness, and stronger cross-sector and cross-border cooperation. This will create a safer and more secure environment for individuals who are vulnerable to being victimized by human smuggling practices, as local communities' ignorance of human smuggling crimes and economic needs are also contributing factors to the increase in human smuggling cases.

RESEARCH METHOD

This research adopts the normative juridical method using case studies of Decision Number: 257/PID/2021/PT BNA and Decision Number: 187/Pid.Sus/2023/PN Dum. By its nature, this type of research is descriptive which aims to find facts related to the application of the law in human smuggling cases (Soekanto, 2012). The data collection method is carried out through literature study techniques, collecting books, written materials, and references relevant to the research (Soekanto, 1986). Data analysis is done qualitatively, where the author processes and presents data from various sources to draw conclusions and findings. The analysis step is carried out inductively, by following specific rules which are then drawn into general rules (Winardi, 1982)

RESULTS AND DISCUSSION

Human Smuggling and The Facts Of The Application Of Human Smuggling Case Law

Under Law No. 21/2007, the crime of human trafficking has its own regulation. However, the crime of human smuggling is regulated in Immigration Law Number 6 Year 2011, especially in Article 120. The practice of human smuggling has been going on for a long time in Indonesia, especially related to the arrival of illegal immigrants from China in the 1950s. The government then regulated this through Government Regulation No. 10/1959, known as the Hoakiao regulation. The term "human smuggling" was previously not explicitly regulated in Emergency Law No. 8/1955 on Immigration Crimes nor in Immigration Law No.

9/1992. (Martha, 2016)

The Immigration Law provides a definition of human smuggling and criminal sanctions, as well as expanded powers for Immigration Civil Servant Investigators (PPNS), along with specific provisions for smuggled persons. However, Article 120 of the Immigration Law does not specifically stipulate specific sanctions against perpetrators of human smuggling in Indonesia. Article 120 paragraph (2) which states the same sanction for attempting to commit the crime of human smuggling is not in line with Article 53 paragraph (2) of the Criminal Code which considers the maximum basic punishment with a reduction of one-third in the case of an attempt (Mohede, 2019).

Regarding Article 86 of Law No. 6/2011 on Immigration, it affirms that “Immigration Administrative Measures are not applied to victims of human trafficking and smuggling”. However, this article does not consider that smuggled persons can also be considered perpetrators, as they are actively involved in the process and are aware of the whole situation. (Palembohan, 2019)

Human smuggling is a cross-border crime that involves diverse roles with different levels of involvement. Cases show that not all individuals smuggled are purely illegal immigrants; some of them have a dual role as smugglers. Ironically, there are cases where officials abuse their power to assist human smuggling syndicates. Human smuggling is also directly or indirectly linked to other cross-border crimes, such as drug trafficking, human trafficking and terrorism, and is therefore considered an enemy of humanity.

The high profitability of human smuggling makes it a very lucrative business for the perpetrators. This has led to the development of increasingly complex smuggling networks that are difficult for law enforcement to stop. Effective prevention and prosecution require inter-agency cooperation, both at the national and international levels, as well as improved detection and investigation capabilities.

Therefore, law enforcement against human smuggling requires a comprehensive and coordinated approach. In addition to prosecution and law enforcement efforts, this approach must also include prevention, victim protection, and social recovery for victims of human smuggling. Only with a holistic and sustainable approach, can it be expected that the practice of human smuggling can be effectively suppressed and human rights well protected.

In law enforcement against human smuggling, agencies such as the Police and the

Directorate General of Immigration act as the frontline. The police must be able to sort out the various modus operandi used by smugglers and immigrants to be smuggled. Although in criminal law the terms perpetrator and victim are known, in the Immigration Law there is no definition of the victim of a crime, because in the context of immigration offenses or crimes, the injured party is the state (Yasmirah et al, 2021).

In the Draft Criminal Code (RKUHP), the crime of human smuggling is regulated in Chapter XX on Human Smuggling, which is mentioned in Article 463. Although the formulation is the same, the maximum imprisonment is 10 years and category V fines for the perpetrators. The law on human smuggling crimes is not contained in a special chapter, but is regulated in several articles, including Article 120, Article 133 letter a, and Article 136 paragraphs (1) and (2), which are included in CHAPTER XI on immigration criminal provisions (Salam, 2020).

According to Indonesian positive law, criminal liability for perpetrators of human smuggling is regulated by Law Number 6 Year 2011 on Immigration. Article 120 paragraph (1) stipulates that any person who commits human smuggling is subject to a minimum imprisonment of 5 years and a maximum of 15 years, as well as a minimum fine of IDR 500,000,000 and a maximum of IDR 1,500,000,000. Attempt to commit this criminal offense is also punishable by the same punishment, as stipulated in Article 120 paragraph (2). Perpetrators who abuse their position and authority to commit the crime of human smuggling are only subject to the basic punishment, which is five years imprisonment. For corporations involved in this criminal offense, the punishment imposed is three times the main criminal provision (Article 136 paragraph (2)).

In an effort to prevent human smuggling, cooperation between states and other measures necessary to eradicate the crime, each state party to the Protocol has an obligation to share information, cooperate to improve surveillance in border areas, maintain security and document control, provide training and assistance, and take repatriation measures against smuggled migrants.

Under Indonesian positive law, criminal liability for perpetrators of human smuggling is based on Law Number 6 Year 2011 on Immigration. Article 120 paragraph (1) stipulates that any person who commits human smuggling is punishable by imprisonment for a minimum of 5 years and a maximum of 15 years, as well as a minimum fine of IDR 500,000,000 and a

maximum of IDR 1,500,000,000. The same punishment also applies to attempts to commit this crime in accordance with Article 120 paragraph (2). For those who abuse their position and authority to commit human smuggling, the basic punishment is five years imprisonment. Corporations involved in this criminal offense can be punished with three times the basic criminal provisions (Article 136 paragraph (2)). However, the roles and qualifications of criminal offenses have not been regulated in detail in this law, so small actors may be ensnared while major actors can continue to operate unhindered (Silvia, 2020).

Nowadays, the smuggling of human beings has become more frequent due to economic factors alone, which threatens state sovereignty. Therefore, the government should give priority to maintaining state sovereignty by considering changes in the background of smugglers. In law enforcement, there are three factors that influence it, namely, legal substance, legal structure, and legal culture. In relation to immigration issues, the main focus is on the substance of the law, which is expected to close the gap and prevent the crime of people smuggling and illegal immigrants as transnational crimes.

In the context of cases or decisions that have reached the level of appeal, the Panel of Judges determined that neither the Defendant's Legal Counsel nor the Public Prosecutor had filed a memorandum of appeal, so the reasons or objections to the Decision are not clearly known. The decision of the Panel of Judges at First Instance, which substantiated the allegations put forth by the Public Prosecutor in accordance with Article 120, paragraph (1), of Law Number 6 of 2011 concerning Immigration, in conjunction with Article 55, paragraph (1), of the Criminal Code, was meticulously evaluated based on the legal evidence derived from the proceedings and in alignment with the pertinent legal tenets. Consequently, these deliberations were duly acknowledged by the Court of Appeal as a pivotal aspect in the adjudication of the case.

The judge's decision does not lead to interpretation, because it is clear and provides legal certainty. The imprisonment of 5 years and a fine of IDR 500,000,000 given to the defendant is in accordance with the legal facts and evidence found during the trial, which fulfill the elements of Article 120 of the Immigration Law Jo Article 55 paragraph (1) to 1 of the Criminal Code. This allows the Panel of Judges to make considerations and make a decision, where the crime committed by the defendant is subject to an appropriate sentence.

The juridical considerations in Decision Number 187/Pid.Sus/2023/PN Dum were

based on the prosecutor's indictment, witness testimony, expert testimony, defendant's testimony, and evidence. The indictment has a central and strategic role in the examination of criminal cases in court. The defendant can only be convicted based on the qualifications of the criminal offense charged in the indictment. If the criminal offense is not charged in the indictment, the defendant cannot be sentenced. An indictment is defined as a deed containing a formulation of the criminal offense charged to the defendant by the public prosecutor, based on the conclusion of the investigation.

The indictment is tailored to the type of crime committed by the defendant. If the defendant has committed only one crime, a single indictment is used. This ensures that the focus of the case remains on one specific criminal offense, making the trial and sentencing process easier. However, if the defendant commits a crime that covers several articles of the law and it is unclear what qualifications and criminal provisions have been violated, alternative or subsidiary charges are used. By using alternative or subsidiary charges, the court can ensure that all possible offenses are accommodated in the indictment, so that the defendant can be given maximum justice.

Furthermore, in instances where the accused has perpetrated multiple offenses, each of which constitutes a distinct criminal act, a cumulative indictment is employed. In such cases, cumulative charges permit the court to evaluate each criminal act separately and to impose a sentence that reflects the degree of culpability associated with each offense. As such, the use of appropriate charges according to the circumstances of the case helps to ensure that the legal process is fair and efficient, and provides appropriate protection for the rights of the accused and the interests of society.

Based on research, the public prosecutor's indictment in Decision Number 187/Pid.Sus/2023/PN Dum is an alternative indictment. The alternative charges include Article 120 paragraph (1) of Law Number 6 of 2011 Concerning Immigration Jo Article 55 paragraph (1) to 1 Criminal Code or the Second Indictment in accordance with Article 120 paragraph (2) of Law Number 6 of 2011 Concerning Immigration Jo Article 55 paragraph (1) to 1 Criminal Code.

In instances where public prosecutors are confronted with a single criminal offense committed by a defendant, yet are uncertain about the most appropriate qualification or article to apply, they may resort to alternative indictments. Additionally, the objective is to reduce the

probability of the accused evading criminal culpability. Furthermore, the utilization of alternative charges affords judges the discretion to apply a more pertinent legal statute. Alternative charges are characterized by the use of the word “or” in the writing. In the examination of a criminal offense charged under alternative charges, all charges must be examined first. After that, the public prosecutor and the judge choose the most appropriate and proven charge (Sumolang, 2020).

Based on the juridical and non-juridical considerations of the judge, the sentence given to the defendant is imprisonment for 5 years and a fine of IDR 1,000,000,000. with the provision that if the fine is not paid, it will be replaced by imprisonment for 2 months.

In the research results, the author found that the judge considered juridically in imposing a fine on the defendant in accordance with applicable legal provisions. Understanding the principles of Indonesian positive criminal law became the main basis in the legal consideration process carried out by the judge. Factors such as objections to legal provisions, losses incurred, and special considerations related to the case become important considerations in determining the appropriate punishment.

In addition, in terms of non-juridical considerations, there are factors that make the sentence against the defendant more severe, such as violation of the government’s efforts to enforce the law in the field of immigration and the defendant’s history of previous convictions. This illustrates that judges do not merely consider legal elements; they also consider other factors pertaining to the interests of society and the state as a whole. Consequently, the ultimate resolution may serve to exemplify justice and offer the deterrent impact essential to the eradication of human smuggling.

CONCLUSION

A review of the literature on human smuggling from a positive Indonesian criminal law perspective reveals that the act is an attempt by the perpetrator to gain profit by directing individuals or groups to enter or leave Indonesian territory. In adjudicating the case, the judge duly considered the applicable legal aspects, resulting in a criminal verdict in the form of a fine against the defendant. Furthermore, non-juridical considerations also exert an influence on the severity of the punishment meted out to the defendant. These include violations of government efforts to enforce immigration laws and the defendant's history of previous sentences.

The results show that in cases such as Decision No.257/PID/2021/PT BNA and No.187/Pid.Sus/2023/PN Dum, law enforcement against human smuggling is not only based on juridical considerations, but also pays attention to non-juridical factors. These factors include the government's efforts to enforce immigration laws and the track record of defendants who have a history of previous convictions. Overall, law enforcement against human smuggling cases is carried out by taking into account various relevant aspects, both from a legal and non-juridical perspective, to maintain justice in the handling process.

In light of the aforementioned findings, it can be concluded that the handling of human smuggling cases from the perspective of Indonesian positive criminal law entails a comprehensive consideration of factors by judges. The judgment is not solely based on legal considerations; it also takes into account non-juridical factors, such as the government's efforts in enforcing immigration laws and the defendant's history. This illustrates the necessity for a comprehensive approach to ensure the maintenance of justice and order in the context of human smuggling law enforcement in Indonesia.

SUGGESTION

In the context of handling human smuggling cases, there are several suggestions that can be considered to improve the effectiveness of law enforcement and prevention of such crimes in the future. First, increased cooperation between law enforcement agencies and related institutions, such as the Marine Security Agency (*Bakamla*), the Police, and the Ministry of Law and Human Rights (*Kemenkumham*), is needed to improve monitoring and prosecution of human smuggling cases. This cross-sectoral collaboration will strengthen the government's capacity to deal with maritime security and immigration challenges.

Furthermore, it is important to raise public awareness of the dangers and consequences of human smuggling. Education and socialization on the risks associated with people smuggling can be conducted through various media, including public campaigns, education programs in schools, and cooperation with civil society organizations. By increasing public understanding of the negative impacts of human smuggling, it is hoped to reduce the demand and supply of human smuggling services and prevent future cases of human smuggling.

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