

CHAPTER I

INTRODUCTION

A. Background Research

The continued development of the times, the more the human problems emerge. Even crime has been manipulated to fool the victims even though law enforcement and government agencies. Today, there are issues gained widespread attention both domestically and abroad, namely the rise of the trading activity or commonly referred to as human trafficking. Trafficking is a crime in the form of slavery and its model increasingly manipulated and structured. Especially for women and children that is easy and profitable to exploit.

Lecturer at Kopertis IX Sulawesi Region, Assistant Commissioner of Police (AKP), Endang Sri Hastuti,¹ argued that human trafficking includes forcing people into prostitution or other forms of sexual exploitation, forced labor, servant or practices similar to slavery. She also said that for children, exploitation, including prostitution, making transnational foster child illegitimate child marriage, or the removal of children as soldiers, beggars and the purpose of the game, or for the purpose of religious activities.

The UN Population Fund (UNFPA) to Indonesia through the UNFPA Representative, Jose Ferraris recalled, Indonesia ranked as the second most prevalent human trafficking country.² Indonesia branded as shippers, container and simultaneously acts producing criminal action.³ Indonesia is among countries that are vulnerable to the sender and destination of trafficking practices, especially women and children.⁴ Many citizens of

¹ Endang Sri Hastuti, <https://endangshastuti.wordpress.com/perdagangan-manusia/>, Accessed on 23 February 2017

² Indramayu in <http://wartakota.tribunnews.com/2013/07/01/unfpa-perdagangan-manusia-di-indonesia-masuk-peringkat-2-dunia>, Accessed 21 February 2017

³ Muhammad Iqbal, in www.menkokesra.go.id, Accessed 21 February 2017

⁴ The number of human trafficking or human trafficking that occurred in Indonesia

Indonesia exploited forced labor and debts in Asia and the Middle East, especially in the sector of domestic workers, factory workers, construction workers, manufacturing workers, oil palm plantations in Malaysia, and the vessels of fishing operations in the Indian Ocean and Pacific Ocean. Malaysia remains the main destination for Indonesian migrant workers; the government estimates that more than one million of the 1.9 million Indonesian workers in Malaysia are mostly illegal.⁵ This discourse is indeed very alarming, especially for the Indonesian people themselves, because Indonesia actually has a legal basis for the actions of this crime.

In response to the rise of the crime, the Government seeks to ratify the international law even pass some Act to prevent and combat trafficking crime. The GOI also has prepared a Draft Law on the draft Criminal Code of 2005 which will be replacing the previous Criminal Code. One part of the Criminal Code draft also regulates Human Trafficking, which is in Section Concerning Crime against Freedom People, in Part One, On-Trafficking which consists of 12 paragraphs and 16 Articles.⁶ Right on 19 April 2007 that the law 21/2007 on the Eradication of Trafficking in Persons (Act TPPO) began enacted to strengthen the criminal law in combating trafficking.⁷

reached 6651 people in the period from March 2005 until December 2014, the greatest number of digits to be among the countries where the human trafficking in the world. This was conveyed by the National Project Coordinator for Counter Trafficking and Labor Migration Unit of the International Organization for Migration (IOM) Nurul Qoiriah in Menara Kadin, Jakarta, Thursday (11/06/2015). The number of Indonesia occupies the first position with the number of 6651 people or about 92.46 percent of the women aged child victims details of as many as 950 people and as many as 4,888 adult women aged persons. While the age of the child victims of 166 men and adult men as much as 647 people. Source: Dani Jumadil Late in <https://news.okezone.com/read/2015/06/11/327/1163986/human-trafficking-di-indonesia-tertinggi-di-dunia>, accessed on 21 February 2017

⁵ Report of the US Embassy and Consulates in Indonesia <https://id.usembassy.gov/id/laporan-tahunan-perdagangan-orang-2017/>, accessed on 25 February 2017

⁶ Supriyono Widodo Eddyono. 2005. *Perdagangan Manusia Dalam Rancangan KUHP*. Jakarta: ELSAM. First edition, p. 4

⁷ Edi Hardum. 2016. *Perdagangan Manusia Berkedok Pengiriman TKI*. Jogjakarta: Ar-Ruzz Media. First edition, page 5

Other than that, the Islamic religion has forbidden and eliminated acts of bondage which is customary in the jahiliyyah Arabs. With the coming of Islam, the true independence of every human being was confirmed. In other words, man is not something that is bound and can be treated with impunity, just because someone else has the advantage over the other. Because human beings are the creation of Allah. the noblest and made man as a caliph in the earth. then a man must not be debased by way of equated with merchandise, such as animals or others that can be bought and sold. As in his word, which reads as follows:⁸

ولقد كرمنا بني آدم وحملناهم في البر والبحر ورزقناهم من الطيبات وفضلناهم
على كثير ممن خلقنا تفضيلاً { ٠٧ }

“And indeed We have honored the children of Adam, We carried them on land and at sea, We give them sustenance of good things and We favored them with a perfect excess over many We have created.”

Some other verses also regulate the relationship between people or community in which to achieve harmony then obliged to help the poor - especially women and children - freeing those trapped in slavery and give rights to those entitled to it, as in his word, which reads:⁹

وليستعفف الذين لا يجدون نكاحاً حتى يغنيهم الله من فضله والذين يبتغون
الكتاب مما ملكت أيمانكم فكاتبواهم إن علمتم فيه خيراً وءاتوهم من مال
الله الذي ءاتاكم ولا تكرهوا فتيتكم على البغاء إن أردن تحصناً لتبتغوا عرض
الحياة الدنيا ومن يكرههن فإن الله من بعد إكراههن غفور رحيم { ٣٣ }

“And those who are not able to marry let chastity (self) it, so God enables them with his gifts. and slaves that you have that memginginkan agreement, be ye made a treaty with them, if you know of any good in them, and give them party of the treasure God has given unto you. And

⁸ القرآن, سورة الإسراء الاية ٧٠

⁹ القرآن, سورة النور الاية ٣٣

do not your female slaves forced to perform prostitution, while they themselves desire chastity, Because you want to look for worldly gain. and whoever compels them, verily Allah is Oft-Forgiving, Most Merciful (to them) after they were forced to (it) “.

Assessing the basic law prohibiting such heinous acts, from the standpoint of positive law and Islamic legal point of view, humans should understand that such action is an offense to human dignity and violate human rights itself. Indeed, the widespread crime of trafficking is not only coming from perpetrators and victims factors alone. Most experts see that the Act PTPPO law difficult to enforce in Indonesia. Socialization is lacking and the lack of capacity of law enforcers become an obstacle to implementation of this law. In fact, there are many cases brought to justice.¹⁰

As in the case of trafficking, still occurs in the judge’s decision No: 741 / Pid.Sus / 2016 / PN Mdn on behalf of the defendant Abdul Aziz A.K.A Umami, on charges of prostitution.¹¹ In this case, the Prosecution considered less in action, due to the use of the Criminal Code that is lacking according to the defendant’s actions.

From the above problems, the object can be seen as a compelling reason to be formulated in the theme and title of the thesis as follows:

“Trafficking in the Perspective of Islamic law and the Draft of Criminal Code (Comparative Study)”

B. Problem Formulation

Based on the above background, the researcher formulates the following research questions:

1. How is the perspective of the Draft of Criminal Code on criminal acts of trafficking?

¹⁰ Maslihati Nur Hidayati, *Upaya Pemberantasan Perdagangan Orang Melalui Hukum Internasional dan Hukum Positif Indonesia*, Al-Azhar Indonesia Seri Pranata Sosial, vol. 1, no. 3, March 2012, p. 11.

¹¹ Directory Supreme Court of the Republic of Indonesia, Decision No. 741 / Pid. Sus / 2016 / PN Mdn

2. How is the criminal act of trafficking in the perspective of Islamic law?
3. How is the comparative analysis of the Draft of Criminal Code and the Islamic law on the crime of trafficking?

C. Writing Purpose

The objectives to be achieved in this thesis are as follow:

1. Exposing the perspective of the Draft of Criminal Code in cracking down on the crime of trafficking.
2. Outlining the perspective of Islamic law on the crime of trafficking and applied prosecution applied.
3. Analyze application of existing laws in Islam on existing laws in the Draft of Criminal Code in answering to the problems of the crime of trafficking.

D. Significance of The Thesis

While the usefulness of this thesis are:

1. Theoretical Significance

This thesis is expected to add to the treasures of knowledge and insight on the problems of trafficking, especially viewed from the perspective of Islamic law and the Draft of Criminal Code, so that everyone can understand the nature of the crime of trafficking.

2. Practical Significance

The thesis is expected to be a reference to how the application of the law in the principles of Islamic law and the Draft of Criminal Code, so that every person can escape from it. And can be considered to law enforcement authorities in taking legal policies regarding trafficking cases.

E. Literature Review

The thesis by Rohmani Eka Yanti entitled “Comparative Study of Human Trafficking Crime in the Criminal Code and Law No. 21 Year

2007 concerning the Eradication of Trafficking in Persons “, examines the diverication (comparative study) between the two laws governing the crime of human trafficking, which is between the Criminal Code and Law no. 21 of 2007, in terms of criminal liability and criminal threats. The difference lies in the charge clear problems with this thesis was based on the comparative positive law while the author under the Draft of Criminal Code and the laws of Islam.¹²

Then thesis entitled “Crime of Trafficking in Persons in the Perspective of Positive Law and Islamic Law (Analysis Decision No.1905 / Pid.B / 2009 / PN.Tangerang)” written by Falah Fajrul Syarif Hidayatullah. The author discusses mengeni human trafficking in the perspective of Islamic law and positive law, particularly the law a second perspective in the Tangerang District Court on the crime of trafficking in persons. If explored the thesis by Fajrul Falah with the authors thesis, it have different variables, the author of more lead to the Draft of Criminal Code as positive law and does not analyze the judgment as he did.¹³

A thesis written by M. Shofwan entitled “Trafficking of Women in Hadith”. focused on a review of hadith and did not refer to the positive law. In which the author in the thesis analyzed the methodology of understanding hadith offered by Syahudi Ismail.¹⁴

Likewise, in a thesis entitled “Overview of the Criminal Criminology About Child Trafficking Law in the Perspective of National and Islamic Law” written by Lelly Herlianti, the trafficking of children, especially from the view of positive law and Islamic law in terms of criminology from both

¹² Rohmani Eka Yanti, *Studi Komparasi Tindak Pidana Perdagangan Manusia Dalam KUHP dan UU No. 21 Tahun 2007 Tentang Pemberantasan Tindak Pidana Perdagangan Orang*, the thesis of Law Faculty of Muhammadiyah University of Surakarta, 2009.

¹³ Fajrul Falah, *Tindak Pidana Perdagangan Orang Dalam Perspektif Hukum Positif dan Hukum Islam (Analisis Putusan No.1905/PID.B/2009/PN.Tangerang)*, thesis of Sharia and Law Faculty Syarif Hidayatullah State Islamic University of Jakarta, in 2011.

¹⁴ M. Shofwan, *Trafficking Perempuan Dalam Hadits*, the thesis of the Faculty of Islamic Theology UIN Sunan Kalijaga 2009

the law was explained. Lelly has obvious difference with Herlianti thesis that compares the general positive law and Islamic law while more authors examined in view of the Draft of Penal Code and the laws of Islam.¹⁵

F. Research Methods

In writing this thesis the researching compiled using the following method:

1. Types of Research

This thesis is categorized into normative research libraries which mean that the activities of the study and analysis of the materials sourced from the library (books, research reports, reports of results devotion manuscripts, notes, and so on).¹⁶ While the nature of this research is descriptive-analysis.¹⁷

2. Data Collection

The data in this study were obtained from the books and documents related to the topic of research. The technique for obtaining the data, the authors conducted collecting the arguments of the Holy Qur'an, the Hadith, the books of fiqh salafiah and contemporary, the book of the Law of crime, or the legal basis related to trafficking, books, and journals that have relevance with the research question.

3. Data Analysis

This research is the analysis comperative make comparisons criminal offense trafficking problem in the perspective of Islamic law and the Draft of Criminal Code so as to facilitate in generating insights and conclusions from the comparison and relevance.

¹⁵ Lelly Herlianti, *Tinjauan Kriminologi Pidana Trafficking Mengenai Perdagangan Anak Dalam Perspektif Hukum Nasional Dan Hukum Islam*, thesis of Sharia and Law Faculty of UIN Alauddin Makassar, 2016.

¹⁶ Ibrahim, *Metodologi Penelitian Kualitatif*, (Bandung: Alfabeta, 2015), p. 37.

¹⁷ Winarno Surakhmad, *Pengantar Penelitian Ilmiah*, (Bandung: Tarsito, 1990), issue 7, p. 139.

Viewed from the angle of its shape, this type of research is evaluative research which is conducted to assess the crime of trafficking setting in the perspective of Islamic law and the Draft of Criminal Code.

G. Writing System

To facilitate discussion of the material in this legal research, the researcher systemize the writing as follows:

CHAPTER I Introduction, this chapter contains the background, the formulation of the problem, research objectives, literature review, research methods and systematic writing.

CHAPTER II Review of the literature, this chapter contains the theoretical framework and framework of thought, which outlines some of the problems associated with an overview of trafficking (trade in human beings), from the definitions, forms, as well as the concept of trading or buying and selling in Islam.

CHAPTER III Results of research and discussion, by collecting data and analyzing the Act concerning the crime of trafficking as well as the collection of arguments of anti-trafficking and / or Islamic criminal law in this case based on the Qur'an and Hadith analyzed well as legal review by the Draft of Criminal Code with Islamic law.

CHAPTER IV Closing, this final chapter contains the conclusions of the discussions and the problems exposed earlier and answer the questions listed in the formulation of the problem. And contains suggestions and concluding remarks.