

TRAFFICKING IN THE PERSPECTIVE OF ISLAMIC LAW AND THE DRAFT CRIMINAL CODE

Imam Kamaluddin,* Azzah Hafizhah**
iwashere719@gmail.com

Abstract

Human trafficking is a crime that violates human rights. Especially for women and children that is easy and profitable to be exploited. In this modern era, it is still common crime of human trafficking are where the action is carried out in the form and a new mode increasingly manipulated and structured. Indonesian government itself participated in the eradication of this crime, which has been regulated in article 297 of the Penal Code and updated in the Draft Bill Draft Article 546 of the Criminal Code. This research aims to find out the crime of trafficking is in terms of Islamic law perspective and the perspective of the Penal Code Bill. Writing research use descriptive qualitative type of method and a comparatif research-analysis that makes comparisons the crime of trafficking issues in the perspective of Islamic law and the draft Criminal Code. The results of this paper is the legal conformity of the crime of trafficking in the Draft Bill to the Islamic law in the prosecution and combating such crime. In order to become a reference in law enforcement transnational crime, combating and stopping crime is not humane.

Keywords: *Trafficking, the draft Penal Code, Islamic law.*

*Dosen Fakultas Syariah, Prodi Perbandingan Madzhab , Universitas Darussalam Gontor

**Mahasiswi Fakultas Syariah, Prodi Perbandingan Madzhab , Universitas Darussalam Gontor

I. Introduction

Nowadays, 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 that slavery in the form and a new mode increasingly manipulated and structured. Especially for women and children that is easy and profitable to exploit.

Lecturer Kopertis IX Sulawesi Regional Assistant Commissioner of Police (AKP), Endang Sri Hastuti,¹ the exploitation defines human trafficking including forcing people into prostitution or other forms of sexual exploitation, forced labor, servant or practices similar to slavery. He also said that for children, exploitation, including for 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 ranks as the country's second most prevalent human trafficking.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 Indonesia exploited forced labor and debts in Asia and the

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 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/2015/06/11/337/1163986/human-trafficking-di-indonesia-tertinggi-di-dunia>, accessed on 21 February 2017

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 whose status is not officially in Malaysia.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 mebuat some Act to prevent and combat trafficking crime. The Government of Indonesia also has prepared a Draft Law on the draft Criminal Code of 2005 which will be replacing the old Criminal Code. One part of the Criminal Code draft also regulates Crime Human Trafficking, which is in Section Concerning Crime against Freedom People, in Part One, On-Trafficking which consists of 12 paragraphs and 16 of Article.⁶

Other than that, Islam has forbidden and eliminate acts of bondage which is customary in the jahiliyyah Arabs. With the advent of Islam, the true independence of every human being and more precious than any other being. 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 seorang 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:⁷

وَلَقَدْ كَرَّمْنَا بَنِي آدَمَ وَحَمَلْنَاهُمْ فِي الْبَرِّ وَالْبَحْرِ وَرَزَقْنَاهُمْ مِنَ الطَّيِّبَاتِ وَفَضَّلْنَاهُمْ عَلَى كَثِيرٍ مِّمَّنْ خَلَقْنَا تَفْضِيلًا {٠٧}

"And indeed We have honored the children of Adam, We carried them on land

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, *Perdagangan Manusia Dalam Rancangan KUHP* (Jakarta: ELSAM, 2005), First edition, p. 4.

⁷ القرآن, سورة الإسراء الآية ٠٧

and at sea, We give them sustenance of good things and We favored them with a perfect excess over many We have created.»

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 contrary 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 were brought to justice.⁸

B. Definition of Trafficking

The understanding in the community against trafficking is still very limited. This is because the information obtained in the community about trafficking remains low. The issue of child trafficking and women began to attract the attention of many parties in Indonesia when ESCAP (United Nations Economic Social Committee for Asia-Pacific) issued a statement which put Indonesia along with 22 other countries on the device or the lowest third in addressing this issue.⁹

Formerly trafficking is defined as the movement of people with coercion of women across state lines for the purpose of prostitution. Currently, trafficking is defined as the forced displacement of people, especially women and children with or without their knowledge, both at home and abroad for the purpose of labor exploitation, prostitution, and marriage is not balanced (servile marriage). So, there is the expansion of the definition to include issues and violence more broadly.¹⁰

Agency of the United Nations (United Nations) has established a special unit called the United Nations Office on Drug and Crime (UNODC), which concentrates also on the issue of human trafficking and the smuggling of illegal immigrants. According to UNODC:¹¹

⁸ 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.

⁹ Alfitra, *Modus Operandi Pidana Khusus di Luar KUHP*, (Jakarta: Raih Asa Sukses, 2014) first edition, p. 107.

¹⁰ *Ibid.* p. 164

¹¹ Budi Winarno, *Dinamika Isu-Isu Global Kontemporer*, (Yogyakarta: CAPS, 2014),

Human trafficking is revenue (business) acquired by way of the wicked are like compulsion, fraud or deception for the purpose of exploiting them. Smuggling is an attempt to obtain money or other material gain by entering someone illegally into a country in which the person is not a citizens.

The protocol definition according to the spirit of the definition of trafficking in women and children as stated in the Decree of the President of the Republic of Indonesia No. 88 of 2002 on the National Action Plan (NAP) for the Elimination of Trafficking in Women and Children, which states: "the trafficking of women and children are all acts of perpetrators (traffickers) containing one or more acts of recruitment, transportation between regions and between countries, alienation, departure, reception and temporary shelter or at the destination of women and children by threats, use of verbal and physical abuse, abduction, fraud, deception, abuse of a position of vulnerability (for example when a person has no other choice, isolated, drug addiction, debt trap and others), giving or receiving of payments or benefits.¹²

UN in session generally 1994 defines trafficking as the displacement of people over the limit of territorial, national and internasional in dark and unlawful, especially from developing countries and countries with economies in transition with the aim of forcing women and girls in a situation of oppression and sexual exploitation and economic, as well as other illegal act related to trafficking such as forced domestic labor, false mating, illegal workers, and false adoption in the interest of recruiters, traders and syndicated crime.¹³

In protocol II Transitional Organized Crime (TOC) stated that:¹⁴

1. Trafficking in persons shall mean there recruitment, transportastion, Transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction of proud, of deception, of the abuse of power or a position of vulnerability or of the giving or receiving of payments or benefitsto Achieve the consent of a person having control over another person, for the purpose of

issue 1, hal.327

¹² Alfitra. *Op. cit.* P. 167

¹³ M. Makhfudz, *Kajian Praktek Perdagangan Orang Di Indonesia*. Jagakarsa Tama University Law Journal. Volume 4, No. 1, p. 5.

¹⁴ Alfitra. *Op. cit.* p. 166

exploitation. Exploitation shall include, at a minimum, the exploitation of the Prostitution of others forms of sexual exploitation, forced labor or Service, slavery, servitude or removal of organs.

2. The consent of a victim of trafficking in persons to the intended Exploitation it set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.
3. The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered "in person trafficking" even if this does not involve any of this article.
4. "Child" shall mean any person under eighteen years of age.

The above definition does not emphasize the recruitment and sending that determines such act is a criminal offense of human trafficking, but also related to the exploitative conditions in which people are trafficked. From that sense, there are three different elements which are related to each other, namely:¹⁵

- a. Actions or deeds done, that is the recruitment, transportation, transfer, harboring or receipt of persons;
- b. Ways, using the threat or use of force, or other forms of coercion, kidnapping, deceit, deception, abuse of power or position of vulnerability or of the giving or receiving of payments or benefits to obtain the consent of the people;
- c. Or purpose, for the purpose of exploitation. Exploitation shall include at least the exploitation of the prostitution of others or other forms of exploitation, forced labor, slavery, servitude and removal of organs.

Thus, the definition of sexual exploitation are those engaged in prostitution, servicing or sex slaves or become the object of activity of pornography because of the threat of coercion, of abduction wronged, being sold or because the victim of fraud. The exploitation of the prostitution of others is an activity to obtain money and other benefits from the prostitution activities of others in prostitution or sexual activity. The other form of exploitation of forced labor, slavery, servitude, or the sale of the sense organs contained in the instruments of international law.

¹⁵ Farhana, *Aspek Hukum Perdagangan Orang Di Indonesia*, (Jakarta: Sinar Grafika, 2010), Issue. 1, p. 21

Such as forced labor contained in the ILO Convention No. 29 on Forced Labor and Convention No. 105 on the Abolition of Forced Labor.¹⁶

a. Trafficking Forms

Forms of the Crime of Trafficking in Persons (Human Trafficking):¹⁷

1. Migrant Workers

Migrant workers are people who migrated from his native region to another place and then work at the new site in a period of relatively settled. According to S. Lee Everet in Muhadjir Darwin that the decision to move residence from one area to another is a consequence of the difference in value between the usefulness of origin and destination. Displacement occurs when there is a driving factor of the place of origin and pull factors of destination.

2. Child Labor

Trafficking in children can be defined as any act and attempted acts involving the recruitment, transportation both within and between countries, purchasing, sales, shipping, and receiving child by using deceit, violence, or by the inclusion of debt for the purpose of forced domestic work, care sexual slavery, bonded labor, or any other slavery-like conditions, the child either get paid or not, in a different community with a community in which the child is living as a fraud, violence, or involvement of the debt first occurred.

3. Crime of Prostitution

Literally, prostitution means the exchange of sexual intercourse with money or gifts in a trade transaction. By law, prostitution is defined as the sale of sexual services that include sexual act not amounting to copulation and sexual intercourse.

4. Child Trafficking Through Adoption (Adoption)

Adoption procedure is done strictly to protect the rights of children are raised and prevent abuses and crimes such as child trafficking. Ignorance of this procedure creates a perception in the community that it is easier to adopt a child, so often people acting outside the law, then it can happen crime of trafficking in children.

¹⁶ *Ibid.* p. 24.

¹⁷ Ginting, *Kebijakan Hukum Pidana Dalam Menanggulangi Tindak Pidana Perdagangan Orang (Human Trafficking)*. Journal of the Faculty of Law, University of North Sumatra, 2013, p. 7.

5. Slavery Guise of Marriage and Mail Order

Typically, the practice of slavery under the guise of marriage and mail order bride carried by foreign nationals to female nationals of Indonesia. One of the modus operandi of trafficking in persons who else is mail order brides (mail border bride) which is a forced marriage where the parents arranged her marriage. This booking marriage becomes trafficking when exploitation occurs both sexually and economically through fraud, penyesengsaraan, detention document, so it can not escape from exploitation, as well as the closing of access to information and communication with family.

6. Implantation Organ

Jakarta, Indonesia has been declared as a potential area for trafficking in children and women. Throughout 2003-2004 found at least 80 cases of child trafficking under the guise of adoption involving domestic network. In some cases it was found later revealed their baby in adoption for their organs, and most babies are adopted will be sent to a number of countries including Singapore, Malaysia, the Netherlands, Sweden, and France. This was revealed by the former chairman of the Task Force for the Elimination of Child Trafficking and Women Ministry of Women Empowerment, Rachmat.

One aspect of modern slavery maketh concern is human life as a commodity trading, placing a monetary value on the lives of women, men, or children. Either in brothels or in enslavement camp, a given price on a victim's freedom. Organizations and individuals who are trying to rescue the victims sometimes have to choose to buy the freedom of women. By paying ransom immediate results obtained. One victim was released from bondage. However, the implications of this practice is becoming increasingly complicated.¹⁸

b. Trafficking on The Draft Criminal Code Perspective

Application of criminal sanctions in Indonesia implemented into the draft Penal (Penal Code), the imposition of criminal sanctions against the crime of trafficking in persons (human trafficking) of the Criminal Code is set in the book II of Article 295 paragraph (1) numbers 1 and 2, Article 295 paragraph (2), Article 296, Article 297, Article 298 paragraph

¹⁸ Agung Sulistiyo, *Perlindungan Korban Kekerasan Kejahatan Perdagangan Manusia dalam Sistem Hukum Pidana Indonesia*, Pandecta, vol. 7, no. 2, July 2012, p. 3

(1), (2) and Article 506.¹⁹

The settings in the Criminal Code still need improvement in order to ensnare any activity or new modes of trafficking, then it missed the birth of Law No. 21 of 2007 on the eradication of trafficking in persons. Attendance Law Number 21 Year 2007 concerning the Crime of Trafficking in Persons, is not a guarantee that the crime of trafficking in persons can be eradicated. Law enforcement agencies still have not been able to maximize their role in combating trafficking in persons. This can happen because of the lightness of the sentence given to perpetrators of human trafficking in Indonesia. As a result of trafficking cases can not be overcome but rather increased.²⁰

Meanwhile, The Government of Indonesia has also prepared a draft bill on the draft Penal Code of 2005 which will replace the current Penal Code. One part of the draft Penal Code also governs the Human Trafficking Crime, the Criminal Section of the Independence of Peoples, in Part One, on Trafficking in Persons, which consists of 12 paragraphs and 16 articles. Taking the formulation of the draft Anti-Trafficking in Persons in the draft Criminal Code, is actually very positive, with a record of the framers of the draft Penal Code closely enough to transfer formulations related to the crime. The problem is, the full draft of the Criminal Code itself does not conduct any conclusions, because there is some definition as it is very important but it is not included.²¹

Article 546 of the Penal Code Draft Crime of Trafficking in Persons formulated as follows:²²

Any person who recruits, delivery, handover of persons by force or threat of force, fraud, kidnapping, confinement, abuse of power, exploitation of a position of vulnerability, or debt bondage, for the purpose of exploiting or acts that can be exploited that person, shall be sentenced for a criminal offense trafficking in persons, with imprisonment of three (3) years and maximum of 15 (fifteen) years

¹⁹ Ayu stefani dan Putra Atmadja, *Sanksi Pidana Terhadap Tindak Pidana Perdagangan Orang (Human Trafficking) di Indonesia*, Kertha Wicara, vol. 04, no. 03, September 2015, p. 03.

²⁰ Hotlarisda Girsang, *Pemberantasan Tindak Pidana Perdagangan Orang Melalui Undang-Undang Pencegahan dan Pemberantasan Tindak Pidana Pencucian Uang*, Jurnal Ilmu Hukum, vol. 5, no. 1, March 2014, p. 3.

²¹ Widodo Supriyadi Eddyono, *op.cit.*, p. 18.

²² *Ibid.*, p. 18.

and a fine not less than Category IV and most Category VI.

If specified above formula consists of three elements, namely: (i) “everyone is doing”: the recruitment, transportation, storage, transportation, transfer, harboring or receipt of a person; (ii) “with” threats of violence, use of force, abduction, confinement, fraud, deception, abuse of power or of a position of vulnerability, debt bondage, or giving payments or benefits; (iii) “for the purpose of” exploiting that person.²³

In addition to the chapter on trade itself, the Draft Penal Code also categorize other crimes that are classified as part of human trafficking, namely: Incorporating people into Indonesian territory for commercial (Article 545); Removing people from Indonesian territory for commercial (Article 546); Trafficking resulting in serious injury or illness (Article 547); Trafficking by organized group (Article 548); The organization without revenue (Article 549); Intercourse and abuses against the trafficked person (Article 550); Forgery or identity documents to facilitate trafficking in persons (Article 551); Abuse of power for trafficking in persons (Article 552); Hide people who do the trafficking in persons (Article 553); Trafficking in persons on board (Articles 554-555); Transport people to trade with ships (Article 556); and the facilitation and expansion (Articles 557-559). Articles of the above in principle are articles that are extra even though these chapters are about the guards, if the implementation of Article 546 can not be used.²⁴

This article does not explain all the explanations and definitions (terminology) key (in the table) used in the context of the crime of human trafficking. The draft Penal Code provides only a limited understanding, and understanding is actually found in the articles that are qualified with a different set of crimes of human trafficking. Definitions are also only includes violence, threats of violence, the notion of abduction, confinement and others. Understanding violence in the draft Criminal Code is every act of abuse of physical force with or without the use of tools is unlawful and poses a danger to the body, life, liberty, physical,

²³ Supriyadi Widodo Eddyono dan Ahmad Sofyan, *Tindak Pidana Perdagangan Orang Dalam Rancangan KUHP*, (Jakarta: Institute for Criminal Justice Reform (ICJR), 2016), p. 1.

²⁴ *Ibid.*, p. 1.

sexual, psychological, including making the unconscious or helpless.²⁵

In general, balanced and criminal provisions in accordance with the Convention which states that all parties must take all measures necessary to criminalize all acts related to trade and sanctions will be imposed on those who act as the main perpetrators, accomplices and as part of an organization. But there is one thing to debate, namely the absence of sanctions difference between state officials and private persons in the draft Criminal Code. Stated that state officials (referred to as the host country) face the same sanctions to individuals, between 3-15 years in prison. Although official act automatically result in a range of the most severe punishments in the bill.²⁶

Just as in the Criminal Code, the draft Criminal Code for people involved in this specially organized, not following the rules of participation in the General Provisions. Compared to the Criminal Code, criminal liability in the draft Criminal Code to other participants in trading is relatively lighter (see Article 461 paragraph (1) and Article 462 of the draft Criminal Code than Article 325, paragraph (1) and article 326 of the Criminal Code), unless Article 463 of the draft Criminal Code (cf. Article 327 of the Criminal Code).²⁷ Basically the draft Criminal Code provisions in the Criminal Code is no different, especially regarding the elements of the offense. Only the immature age limit the draft Criminal Code explicitly mention it, so it would be easier for the application of that provision. One thing that is different from the Criminal Code is the special minimum sentence for certain offenses are considered serious, as in article 470 of the draft Criminal Code.²⁸

c. Trafficking on The Islamic Law Perspective

Sale and purchase is one *mu'ammalah* in the Islamic injunctions *mubah* as explained in the previous chapter. This practice has long been realized since time immemorial, and even Muhammad was the expert in the trade or sale. He started this practice since he is still fairly teenager and became a role model for a merchant with its properties are fair and

²⁵ Widodo Supriyadi Eddyono, *op.cit.*, p. 20.

²⁶ Widodo Supriyadi Eddyono in <https://kuhpreform.wordpress.com/2008/01/17/perdagangan-orang-trafficking-person-dalam-ruu-kuhp/>, Accessed on 29 April 2018

²⁷ Harkristuti Harkrisnowo, *Laporan Perdagangan Manusia di Indonesia*, (Universitas Indonesia Human Right Center, Jakarta, 2003), p. 45.

²⁸ *Ibid.*, p. 48.

honest in carrying out the sale. Islam came with the laws governing which set the pattern of community life, as well as in practice this *muammalah*, Islam gives specific conditions in the run and give an overview practice of buying and selling or trading that should not be or forbidden to do. One of them is the practice of buying and selling of slaves, which was rampant in the days *jahiliyyah*.

If you look at Islamic texts and Companion application against slavery, will be seen very clearly that in fact Islam does not want slavery lasting on earth. It is observed clearly through a very significant difference between the concepts of Islamic and conventional concept of slaves. When the conventional world speaks volumes about the causes that make people into slaves, otherwise Islam busy speaking about efforts to release the slaves of slavery, in the conventional world when talking about the use of slave arbitrarily by the employer. Conversely Islam speaks of noble ethics and good treatment of slaves.²⁹

Islam is not limited to cover all the channels that make people become slaves to meetings and open channels as possible to get out of bondage, but more than that Islamic governing the treatment of slaves very well, namely:³⁰

- a. Treat slaves as well as possible (Surat al-Nisa [4]: 36).
- b. Treat slaves as a respectable human being, as stated in a Hadith that anyone who accuses his slave when the slave is free from the charges then later on the Day of Resurrection he will be beaten unless the charge is true.
- c. Slaves as human beings who have rights and obligations as mentioned in a Hadith that wages should be given before his sweat dries.
- d. Treat slaves as a family treat themselves as described in the Hadith that the slaves are your relatives who serve Allah under *pengawasanmu*, therefore, who serve God under his control, let him feed on the kind of food he eats, clothe of kind of clothes she wears, and not burden him with a heavy workload.
- e. Treat slaves as spouse (Surat al-Nisa [4]: 25).
- f. Set aside part of the property to help the liberation of slaves (Surat al-Nur [24]: 33).

²⁹ Ahmad Sayuti, *Perbudakan Dalam Hukum Islam*, Ahkam, vol. 15, no. 1, January 2015, p. 1.

³⁰ *Ibid*, p. 4.

In the perspective of jurisprudence, a solution that can be coupled with the active involvement of all parties can go through three stages: prevention, the implementation and enforcement (prosecution), and protection. In Islamic law, trafficking in persons, human slavery were considered damaging human basic rights as human beings and the rights of God as God. Human trafficking on human beings is tantamount to violating the rights of God, and man is enslaving another human being is equal to position himself as God. The crime of trafficking is also incompatible with the *maqasid al-shari'ah*.³¹

Furthermore, if we see trafficking in Islamic law, where one of the methods developed Ulama '*Usul Fiqh* in concluded law of texts is *Masalah Al-Mursalah*, which is a benefit that no *nash juz'i* (detailed) that supports it but this benefit supported by a number of texts by means *istiqara* (indicative of a number of texts).³²

Referring to the basis of thought Fiqh anti Trafficking appears that the dimensions of the crime of Trafficking so complex, encompassing various forms of lawlessness and crimes against humanity, from the act of persuasion, offering the lure, false promises, through coercion, violence, exploitation, an attacker physical, psychological, and sexual. Organ harvesting, as well as other forms of violation of human dignity that is very humbling, to say that trafficking is a crime that brought together a number of violations of humanitarian and moral layered, fragmented, but sequential, linked, and involves many parties.³³

Given this practice has an impact that is not in line with the guidance of Shari'ah ie, not create danger to others or to himself. This is in line with tradition the Prophet. And this is the rule:

لا ضرر ولا ضرار { رواه مالك وابن ماجه }³⁴

This rule explains that the sales person is not allowed because of the danger to others, for damaging the honor of others, and therefore the government or whoever is authorized to prohibit the criminal acts of the perpetrators of trafficking and

³¹ *Ibid*, p. 5.

³² Ruslan Abdul Gani, *Tindak Pidana Trafficking Menurut Hukum Positif dan Hukum Islam (Suatu Analisis Perbandingan Hukum)*, Jurnal Ilmiah Universitas Batanghari , vol. 17, no. 1, 2017, p. 5.

³³ Ruslan Abdul Gani, *op.cit.*, p. 7.

³⁴ قسم المنهج الدراسي, مختصر أصول الفقه والقواعد الفقهية, (معهد دار السلام كونتور للتربية الإسلامية الحديثة, الطبعة الجديدة نوفمبر ٢٠٠٢), ص. ٧٣.

*provide just punishment.*³⁵

In the *fiqh jinayah*, the penalty can be divided into several groups according to the terms of his review is based on the linkage of the sentence to another sentence that includes the principal (*al'uqubah al-ashliyyah*), substitute penalty (*al'uqubah al-badaliyyah*), additional penalties (*al'uqubah al-ab'iyah*) dan supplementary punishment (*al'uqubah at-takmiliyyah*).³⁶

Sanctions against the perpetrators of such trafficking *ta'zir* punishment, because there is no clear provision in al-Qur'an and the Hadith, the shape and size of its decision handed *ijtihad* competent judge or priest. *Ta'zir* kinds of penalties could be sentenced to death, prison, exile, crucifixion, flagellation, isolation and threats.³⁷ *Ta'zir* implementation handed over to the priest or ruler (judge) will assign or sentencing. Judges have the freedom to set *ta'zir* to criminal or offense carries a minimum sentence is not determined by *nash* (Qur'an and Hadith). Therefore *ta'zir* the rulers can organize orderly life and being able to anticipate the various possibilities that occur suddenly.³⁸

Prison sentences in view of Islamic criminal law differs from that of positive law. According to Islamic law, a prison sentence is seen not as a primary, but only considered as an optional punishment. Principal punishment in Islamic law for acts that are not punishable by a sentence had is volume or whip. Normally the penalty is only imposed for acts that rated mild or moderate. Although in practice it may also apply to acts considered severe and dangerous. This is because the punishment is categorized as a rule of judges, therefore according to the benefit considerations may be imposed for criminal offenses are considered severe.³⁹ In Islamic law, punishment or fines *diyat* is applied as a complementary or additional punishment from the penalties that have been determined by *ulil* with authority, in order for an offender to get a

³⁵ Rusdaya Basri, *Hukum Trafficking dalam Perspektif Hukum Islam*, Hukum Diktum, vol. 10, no. 1, January 2012, p. 7.

³⁶ Vera Chatuningtias Safitri, *Penambahan Sepertiga Hukuman Bagi Pelaku Tindak Pidana Perdagangan Orang Perspektif Hukum Pidana Islam*, Al-Jinayah, vol. 2, no. 1, June 2016., p 16.

³⁷ Yushinta Pramugarini *Hak Restitusi Korban Tindak Pidana Perdagangan Orang Perspektif Hukum Pidana Islam*, Al-Jinayah, vol. 2, no. 2, December 2016., p. 5.

³⁸ *Ibid*, p. 23.

³⁹ *Ibid*, p. 19.

deterrent effect and do not repeat such actions in the future.⁴⁰

In Islam, the prohibition of trafficking is certainly not without reason. Because, in addition can be considered as crimes against humanity for loot and desecrate basic human rights, as well as threatening and destructive to the value built religious teachings such as justice, equality, welfare. The values are very important and becomes the foundation in an effort to build an ideal human relationships. Sacrilege of humanity values such incredible impact in imaging a nation, particularly those seen as religious. Therefore, the practice of trafficking was clearly troubling the people and desecrating religious communities.⁴¹

d. Legal Analysis of Trafficking Crime

From the description in the previous chapter, found intersection point between the draft Criminal Code and Islamic law in the prosecution of trafficking, namely that in the draft Criminal Code and Islamic law in the case of the prosecution the crime of trafficking element of the most fundamental is the punishment on the perpetrators of criminal acts of trafficking is, in order to provide a deterrent effect to the offender from committing the crime back.

When analyzed in terms of punishment then we find in the legal instrument in the Penal Code, particularly article used in cracking down on the crime, as in article 546 of the Penal Code Draft. If specified in the formula consists of three elements, namely: (i) "everyone is doing": the recruitment, transportation, storage, transportation, transfer, harboring or receipt of a person; (ii) "with" threats of violence, use of force, abduction, confinement, fraud, deception, abuse of power or of a position of vulnerability, debt bondage, or giving payments or benefits; (iii) "for the purpose of" exploiting that person.⁴²

With defined as above, then a criminal act of human trafficking can be met if one of the three parts is done. For example, a recruit with the use of a position of vulnerability for the purpose of exploiting that person has complied with this article. This article is also the main article and the article the most important in determining the offenses related to human

⁴⁰ *Ibid*, p. 16.

⁴¹ Mufidah, *Mengapa Mereka Diperdagangkan? (Membongkar Kejahatan Trafficking dalam Perspektif Islam, Hukum, dan Gender)*, (Malang: UIN-Maliki Press, 2011), p. 74.

⁴² Widodo Supriyadi Eddyono and Ahmad Sofyan, *op.cit.*, p. 1.

trafficking, because all other articles related in Part One, trafficking in persons should first meet the elements of human trafficking.⁴³

Then, there is something to debate, namely the absence of sanctions difference between state officials and private persons in the draft Criminal Code. Stated that state officials (referred to as the host country) face the same sanctions to individuals, between 3-15 years in prison. Although official act automatically result in a range of the most severe punishments in the bill, there is no additional penalty imposed on the basis of abuse of power or of the state apparatus.⁴⁴

If there are further analyzed the crime of insider trading regulation draft Criminal Code is an important and positive development. However, the formula is still found some important problems, the problem is (1) the meaning and definition of the ground, (2) is not included formulation of this crime specifically intended for children, (3) not emphasized “by consent” or “consent of the victim” as the argument was not accepted in the crime of human trafficking, and (4) issues related to criminal sanctions.⁴⁵

Commission III also found KOMNASHAM solicit input regarding the draft Criminal Code. Commission Commissioner Rasheed said in a draft of the Criminal Code has not been consistent in the issue of human trafficking. He calls human trafficking a crime setting in the Draft Bill is actually an adoption of the Law of the Crime of Trafficking in Persons (PPO). He lays out, in the draft in the draft Criminal Code, there is a drawback that the formulation of the definition. For example, do not include the formulation of this crime specifically intended for children.⁴⁶

Compared with Islamic law which extends the punishment aspect and not limited, in the sense of an all-encompassing one, whoever the victim and whoever the perpetrators, it remains to perpetrator will be sanctioned. So by analyzing the draft Criminal Code with Islamic law, also found a significant point of difference. According to Islamic law, a prison sentence is seen not as a primary, but only considered as a punishment

⁴³ Widodo Supriyadi Eddyono, *op.cit.*, p. 19.

⁴⁴ Widodo Supriyadi Eddyono in <https://kuhpreform.wordpress.com/2008/01/17/perdagangan-orang-trafficking-person-dalam-ruu-kuhp/>, Accessed on 29 April 2018

⁴⁵ Widodo Supriyadi Eddyono, *op.cit.*, p. 25.

⁴⁶ Dhani Irawan in <https://news.detik.com/berita/d-3018199/komnas-ham-nilai-ruu-kuhp-lemahkan-pemberantasan-kasus-perdagangan-orang>, Accessed on May 25, 2018.

option. The ultimate punishment in Islamic law for acts that are not punishable by a sentence had is volume or whip.⁴⁷

The punishment in Islam is called *ta'zir*. Namely the Punishment imposed on offenders who commit violations - both with regard to the rights of God and of human rights - and are not included in the category of *hudud* punishment or expiation. Because *ta'zir* not determined directly by the Qur'an and hadith, then this becomes the competence of local authorities. In deciding type and size *ta'zir* sanctions, must consider carefully the instructions *nash* as it concerns the common good.⁴⁸

If the note again that a prison sentence in Article 546 of the Criminal Code Plan is 3-15 years, it is clear that there are no minimum penalties, which could have been perpetrators even get a prison sentence of less than six years, or even just a few months. Moreover, if the trafficker terbut is an official or officials of the state, given no additional punishment for misconduct kekeuasaan. If this happens it will cause harm to the victims of this trafficking crime. Losses in the sense of mental and physical. This penalty can not give deterrent effect to tarfficker, and can even add other cases that are strongly associated with the crime of trafficking.

Being in Islam, in addition to *ta'zir* penalty, the offender could be charged *diyat* or fines. *Diyat* penalty is a treasure that must be paid and provided by the offender to the victim or his guardian as compensation, due to criminal acts committed by the offender to the victim.⁴⁹

D. CONCLUSION

In the draft of the Criminal Code Trafficking formula is not defined in more detail on important notions related to trafficking in persons. Understanding the important understanding that these are not defined, are: First, the definition of "for the purpose of exploiting" or "result in the person being exploited". The definition is not found in the draft Penal Code, both in the formulation of the Article in the same chapter or more, including explanation of the definition in Book I and explanation of Article. The absence of this understanding will create important implications for the application of this article or testing in

⁴⁷ Yushinta Pramugarini, *op.cit.*, p. 19

⁴⁸ Nurul Irfan and Masyrofah, *Fiqh Jinayah*, (Jakarta: Amzah, 2014), p. 139

⁴⁹ Yushinta Pramugarini, *op.cit.*, p. 16.

cases of trafficking (to prove this element) will inevitably lead to problems. Second, the definition of “delivery”, “handover”, “recruitment” was not found in the draft Criminal Code. The third is the definition of fraud, kidnapping and confinement. For this definition is found in the draft Penal Code, but these notions are not in the context of human trafficking. The definition contained in the stand-alone criminal offense, namely the crime of fraud, kidnapping and hostage-taking.⁵⁰

If explored further from the standpoint of positive law and Islamic law, the draft of the Criminal Code could not be sufficient to crack down on trafficking and combating crime. Islamic law enforced see the benefit and to create harmony in the Islamic concept of life is to return to the five principal known as *al-muhafadhah 'ala al-khams kuliyyat*. The definition in the draft Penal Code has not been able to trap due to inadequate follow-trafficking, as already described, and especially not include *muhafadhah 'ala al-khams kuliyyat*.

BIBLIOGRAPHY

القرآن الكريم

قسم المنهج الدراسي, مختصر أصول الفقه والقواعد الفقهية, (معهد دار السلام كونتور للتربية الإسلامية الحديثة, الطبعة الجديدة نوفمبر ٢٠٠٢)

Alfitra. 2014. *Modus Operandi Pidana Khusus di Luar KUHP*, Jakarta: Raih Asa Sukses, 1st edition.

Basri, Rusdaya, *Hukum Trafficking dalam Perspektif Hukum Islam*, Hukum Diktum, vol. 10, no. 1, January 2012.

Eddyono, Supriyono Widodo. 2005. *Perdagangan Manusia Dalam Rancangan KUHP*. Jakarta: ELSAM. 1st edition.

Farhana. 2010. *Aspek Hukum Perdagangan Orang Di Indonesia*, Jakarta: Sinar Grafika, Issue. 1.

Gani, Ruslan Abdul. 2017. *Tindak Pidana Trafficking Menurut Hukum Positif dan Hukum Islam (Suatu Analisis Perbandingan Hukum)*, Jurnal Ilmiah Universitas Batanghari, vol. 17, no. 1.

Ginting. 2013. *Kebijakan Hukum Pidana Dalam Menanggulangi Tindak Pidana Perdagangan Orang (Human Trafficking)*. Journal of the Faculty of Law, University of North Sumatra.

⁵⁰ Widodo Supriyadi Eddyono, *op.cit.*, p. 34.

- Girsang, Hotlarisda, *Pemberantasan Tindak Pidana Perdagangan Orang Melalui Undang-Undang Pencegahan dan Pemberantasan Tindak Pidana Pencucian Uang*, Jurnal Ilmu Hukum, vol. 5, no. 1, March 2014.
- Harkrisnowo, Harkristuti. 2003. *Laporan Perdagangan Manusia di Indonesia*, Universitas Indonesia Human Right Center, Jakarta.
- Hidayati, Maslihati Nur, *Upaya Pemberantasan Perdagangan Orang Melalui Hukum Internasional dan Hukum Positif Indonesia*, Al-Azhar Indonesia Seri Pranata Sosial, vol. 1, no. 3, March 2012.
- Irfan, Nurul and Masyrofah. 2014. *Fiqh Jinayah*, Jakarta: Amzah.
- Makhfudz, *Kajian Praktek Perdagangan Orang Di Indonesia*. Jagakarsa Tama University Law Journal. Volume 4, No. 1.
- Mufidah. 2011. *Mengapa Mereka Diperdagangkan? (Membongkar Kejahatan Trafficking dalam Perspektif Islam, Hukum, dan Gender)*, Malang: UIN-Maliki Press.
- Pramugarini, Yushinta, *Hak Restitusi Korban Tindak Pidana Perdagangan Orang Perspektif Hukum Pidana Islam*, Al-Jinayah, vol. 2, no. 2, December 2016.
- Safitri, Vera Chatuningtias, *Penambahan Sepertiga Hukuman Bagi Pelaku Tindak Pidana Perdagangan Orang Perspektif Hukum Pidana Islam*, Al-Jinayah, vol. 2, no. 1, June 2016.
- Sayuti ,Ahmad, *Perbudakan Dalam Hukum Islam*, Ahkam, vol. 15, no. 1, January 2015.
- Stefani, Ayu dan Putra Atmadja, *Sanksi Pidana Terhadap Tindak Pidana Perdagangan Orang (Human Trafficking) di Indonesia*, Kertha Wicara, vol. 04, no. 03, September 2015.
- Sulistiyo ,Agung, *Perlindungan Korban Kekerasan Kejahatan Perdagangan Mnesia dalam Sistem Hukum Pidana Indonesia*, Pandecta, vol. 7, no. 2, July 2012
- Widodo, Supriyadi dan Ahmad Sofian. 2016. *Tindak Pidana Perdagangan Orang Dalam Rancangan KUHP*, Institute for Criminal Justice Reform (ICJR): Jakarta.
- Winarno, Budi. 2014. *Dinamika Isu-Isu Global Kontemporer*, Yogyakarta: CAPS, issue 1.

Website Source

- Eddyono, Widodo Supriyadi, in <https://kuhpreform.wordpress.com/2008/01/17/perdagangan-orang-trafficking-person-dalam-ruu-kuhp/>, Accessed on 29 April 2018
- Hastuti, Endang Sri, http://ms.wikipedia.org/wiki/penyelundupan_manusia, Accessed on 23 February 2017
- Indramayu in <http://wartakota.tribunnews.com/2013/07/01/unfpa-perdagangan-manusia-di-indonesia-masuk-peringkat-2-dunia>, Accessed 21 February 2017
- Iqbal, Muhammad, in www.menkokesra.go.id, Accessed 21 February 2017
- Irawan, Dhani, in <https://news.detik.com/berita/d-3018199/komnas-ham-nilai-ruu-kuhp-lemahkan-pemberantasan-kasus-perdagangan-orang>, Accessed on May 25, 2018.
- Jumadil, Dani, Late in <https://news.okezone.com/read/2015/06/11/337/1163986/human-trafficking-di-indonesia-tertinggi-di-dunia>, accessed on 21 February 2017
- Report of the US Embassy and Consulates in Indonesia <https://id.usembassy.gov/id/laporan-tahunan-perdagangan-orang-2017/>, accessed on 25 February 2017.