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# EXPLAINING CRIMMIGRATION IN INDONESIA: A DISCOURSE OF THE FIGHT AGAINST PEOPLE SMUGGLING, IRREGULAR MIGRATION CONTROL, AND SYMBOLIC CRIMINALIZATION*

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**Abstract**

*Controlling migration in the world's largest archipelago brings various challenges to Indonesian authorities which differ from other countries. Indonesia is known as the most favorite transit country for people migrating to Australia, due to its strategic geographical location. Following the fact, the decision of choosing the mechanism of criminal law to deal with irregular migration from the start makes Indonesia vulnerable to crimmigration trend. The criminalization of immigration-related conducts, the authorization of investigative power to the immigration officers, and the implementation of the 'selective policy' in the first Immigration Law (Law No. 9/1992) justify the underlying situation in Indonesia. This condition is even harsher when Indonesia joined the fight against people smuggling since the new law regarding immigration (Law No. 6/2011) which increases criminal sanctions for immigration-related offenses. Nonetheless, this punitive approach stands as a symbolic strategy, which is barely enforced by the Indonesian authorities and it only responds the problems with erroneous actions. By doing this, the Indonesian government has shown its weaknesses and inabilities to control crime problems to an acceptable level.*

**Keywords***: crimmigration, people smuggling, irregular migration control, symbolic criminalization, Indonesia*

**Abstrak**

*Upaya pengendalian migrasi di negara kepulauan terbesar di dunia memberikan berbagai tantangan bagi Indonesia yang berbeda dari negara-negara lain. Tantangan yang dihadapi menjadi lebih rumit dengan dikenalnya Indonesia sebagai negara transit bagi orang-orang yang bermigrasi ke Australia, karena letak geografisnya yang strategis. Ditambah dengan keputusan memilih mekanisme hukum pidana untuk menangani migrasi non-reguler membuat Indonesia rentan terhadap tren crimmigration. Kriminalisasi perilaku terkait imigrasi, otorisasi kekuasaan investigasi oleh petugas imigrasi, dan pelaksanaan kebijakan selektif dalam UU Imigrasi pertama (UU No. 9/1992) mendasari situasi yang terjadi di Indonesia. Kondisi ini bahkan lebih keras ketika Indonesia bergabung memerangi penyelundupan manusia sejak lahirnya Undang-Undang baru tentang Imigrasi (UU No. 6/2011) yang meningkatkan sanksi pidana bagi pelanggaran terkait imigrasi. Meskipun demikian, pendekatan hukuman ini merupakan strategi simbolik, yang hampir tidak ditegakkan oleh pemerintah Indonesia dan tidak memiliki fungsi selain menanggapi masalah dengan tindakan yang salah. Dengan melakukan hal demikian, pemerintah Indonesia telah menunjukkan kelemahan dan ketidakmampuan untuk mengendalikan masalah kejahatan pada tingkat yang dapat diterima.*

**Kata Kunci***: crimmigration, penyelundupan manusia, pengendalian migrasi non-reguler, kriminalisasi simbolik, Indonesia*

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## I. Introduction

Since the worldwide interconnectedness in every aspect of contemporary social life becomes more apparent due to globalization, human migration turns out to be an inevitable phenomenon.[1] Such movement occurs because of various motives. Bauer and Zimmerman empirically argue that the desire of individuals to seek for better economic conditions is the largest determinant of human migration.[2] In another place, Castles and Miller assert that advances in technology, communication, and transportation results in a large amount of people to migrate internationally.[3] In addition, Held, *et.al*. mention that networks of political, military, and cultural power cannot be separated from human migration because all of them intersect with each other.[4] Those are quite the reasons why the impact of migration, both global and regional, on home and host countries is multifaceted.

In 2010, a number of 214 million people are roughly calculated by International Organization for Migration (IOM) as international migrants worldwide. More recent estimates from United Nations Department of Economic and Social Affairs/Population Division suggest that there were 232 million international migrants in 2013.[5] This figure was compounded by 135.6 million (59 percent) international migrants lived in the developed regions, whereas another 95.9 million (41 percent) international migrants were found in the developing regions. Compared to such trend in 1990, this number rose by over 77 million or by 50 percent, which most of this increase happened during 2000-2010 with an annual addition of 4.6 million migrants.

Subsequently, the forms of migration could be explained into different categories. United Nation Development Programme (UNDP) illustrates this movement by using the analogy of the multiple doors of a house: permanent settlers will be allowed to enter the house through the front door; short-term visitors or workers will use the side door; and irregular migrants will set their foot in the house through the back door.[6] Nevertheless, these procedures often converge once inside the country. For instance, temporary visitors could turn into irregularity because of overstaying, or the irregular migrants could gain permission to stay in the country due to the authorization for being a refugee. Therefore, the distinction between regular and irregular migrants is not always crystal clear.[7]

[1] David Held, *et.al. Global transformations: Politics, economics and culture* (Cambridge: Polity Press, 1999), p. 2.

[2] Thomas K. Bauer and Klaus F. Zimmerman, "Causes of international migration: A survey," in Crossing Borders: Regional and Urban Perspectives on International Migration, edited by C. Gorter, et.al., (Aldershot: Ashgate Publishing, 1998), p. 95.

[3] Stephen Castles and Mark J. Miller, The Age of Migration: International Population Movements in the Modern World (London: Guilford Press, 2009), p. 147.

[4] Held, *op.cit.*, p. 416.

[5] United Nations Department of Economic and Social Affairs/Population Division (UNDESA), International Migration Report 2013, (New York: United Nations, 2013), p. 1, http://www.un.org/en/development/desa/population/publications/pdf/migration/migrat ionreport2013/Full_Document_final.pdf#zoom=100.

[6] United Nations Development Programme (UNDP) (1), Human Development Report 2009: Overcoming Barriers: Human Mobility and Development, (New York: UNDP, 2009), p. 2, http://hdr.undp.org/sites/default/files/reports/269/hdr_2009_en_complete.pdf.

[7] UNDP, *op.cit.*, p. 26. See also Alice Bloch and Milena Chimienti, "Irregular Migration in a Globalizing World," Ethnic and Racial Studies Volume 34 Issue 8 (2011): 1271-1285; Katharine. M. Donato and Amada Amenta, "What we know about unauthorized migration," Annual Review of Sociology Vol. 37 (August 2011): 529-543; Christal Morehouse and Michael Blomfield, Irregular Migration in Europe, (Washington DC: Migration Policy Institute, 2011).

However, as Bloch and Chimienti noted, irregular migration turns out to be a global case since the early of twenty-first century.[8] According to Hatton & Williamson,[9] an approximate number of 10-15 percent of total international migrants in 2004 was irregular migrants.[10] Because of its rapid occurrence in almost every country in the world, irregular migrations gains enormous attentions from both state and private actors.[11] Furthermore, according to UNDESA,[12] this condition becomes even more intense because of the fight against human trafficking and people smuggling in international level through several legal instruments such as the United Nations Convention against Transnational Organized Crime (UNCATOC), The 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (THB Protocol), and The 2000 Protocol against the Smuggling of Migrants by Land, Sea, and Air (People Smuggling Protocol). There are more than 150 countries that ratify the THB Protocol and near 130 countries became States Parties of People Smuggling Protocol. It also be accompanied with numerous scholarships concerning irregular migration, border control, people smuggling and/or human trafficking.[13]

From the aforementioned development, it is evident that irregular migration and its undesirable effects are being considered as a global problem that should be dealt seriously. Stumpf introduced the term crimmigration to describe the intertwinement of criminal law and immigration law, both in substance and procedure, as government's recent strategy to manage migration problems.[14] Up to this moment, as van der Leun and van der Woude denoted,[15] the crimmigration debates are pretty much concerned

[8] Bloch and Chimienti, *op.cit.*: 12.

[9] Timothy J. Hatton and Jeffrey G. Williamson, "What fundamental drive world migration?" (National Bureau of Economic Research Working Paper No. 9159, Paper presented to the WIDER Conference on Migration, Helsinki, September 27-28, 2002), http://www.wider.unu.edu/stc/repec/pdfs/rp2003/dp2003-23.pdf.

[10] See also International Organization for Migration (IOM), World Migration Report 2010: The Future of Migration: Building Capacities for Change (Geneva: IOM, 2010), p. http://publications.iom.int/bookstore/free/WMR_2010_ENGLISH.pdf; UNDP, *loc.cit.*

[11] Bloch and Chimienti, *op.cit.*: 1.

[12] UNDESA, *op.cit.*, p. 19.

[13] See Ishan Ashutosh and Alison Mountz, "Migration management for the benefit of whom? Interrogating the work of the International Organization for Migration," Citizenship Studies Vol. 15 Issue 1 (2011): 21-38; Bloch and Chimienti; Stephen Castles, "Why Migration Policies Fail," Ethnic and Racial Studies Vol. 27 Issue 2 (2004): 205-227; Michale Collyer, "Migrants, Migration and the Security Paradigm: Constraints and Opportunities," Mediterranean Politics Vol. 11 Issue 2(2006): 255-270; Slobodan Djajic, "Asylum Seeking and Irregular Migration," International Review of Law and Economics 39 (2014): 83-95; Donato and Amenta; Peter Dwyer, "Governance, Forced Migration and Welfare," Social Policy & Administration Volume 39 Issue 6 (December 2005): 622-639; Franck Duvell, "Paths into Irregularity: The legal and Political Construction of Irregular Migration," European Journal of Migration and Law 13 (2011): 275-295; Ratna Kapur, "Travel Plans: Border Crossings and the Rights of Transnational Migrants," Harvard Human Rights Journal Vol. 18 (March 2005): 107-138; Morehouse and Blomfield; Sharon Pickering, "Border Terror: Policing, Forced Migration and Terrorism," Global Change, Peace, & Security: Formerly Pacifica Review: Peace, Security & Global Change Vol. 16 Issue 3 (2004): 211-226; Pamela Preston and Michale P. Perez, "The Criminalization of Aliens: Regulating Foreigners," Critical Crimnology Vol. 14 Issue 1 (March 2006): 43-66; Yuji Tamura, "Migrant Smuggling," Journal of Public Economics Vol. 94 No. 7-8 (February 2010): 540-548; Savitri Taylor, "From Border Control to Migration Management: The Case for A Paradigm Change in the Western Response to Transborder Population Movement," Social Policy & Administration Vol. 39 No. 6 (December 2005): 563-586; Leanne Weber, "The Detention of Asylum Seekers as A Crime of Obedience," Critical Criminology Vol. 13 (1) (2005): 89-109.

[14] Juliet Stumpf, "The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power," American University Law Review Vol. 56 Issue 2 (2006): 381.

[15] J.P. van der Leun and M.A.H. van der Woude, "A Reflection on Crimmigration in the Netherlands: On

about the practices in the United States (US).[16] There have been various attempts to bring such discourses to the European Union (EU) context,[17] but such discussion concerning other continents remains dark.

In relation to that, Indonesia becomes an interesting case study. The strategic geographical location, which is situated between the continents of Asia and Australia and between the Pacific and Indian oceans, leads to its acknowledgment as most popular transit country for migration to Australia.[18] Besides, by looking into the fact that Indonesia has more than 17,000 islands with extensive sea borders, it is quite challenging for state authorities to control their borders comprehensively.[19] Having said that, there is a very limited attention given to this particular subject, even though, as Misscbach notes, 'it sees a great amount of in- and outward irregular migration'.[20]

This research paper begins to initiate crimmigration discourse with specific focus on the Indonesian experience. In order to better understand the context behind the phenomenon, first, it will depict theoretical frameworks of crimmigration and then move to the practices of Indonesia's migration control. It will also analyze the changes to Indonesia's response on irregular migration, especially after the international recognition of the fight against people smuggling, which has influential effect to the present development of immigration. In the final part of this paper, it will be argued that Indonesia has chosen the mechanism of criminal law to deal with irregular migration from the start. This condition becomes even harsher when Indonesia has joined the fight against people smuggling since the new law concerning immigration (Law No. 6/2011) also increase criminal sanctions for immigration-related offences. Nonetheless, this punitive approach stands as a symbolic strategy, which is barely enforced by Indonesian authorities and it serves nothing than responding the problems with erroneous actions.

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the Cultural Security Complex and the Impact of Framing," in Social Control and Justice: Crimmigration in the Age of Fear, Maria Joao Guia, Maartje van der Woude, Joanne van der Leun, (The Hague: Eleven International Publishing, 2013), pp. 41-60.

[16] See also Jennifer M. Chacon, "Overcriminalizing Immigration," The Journal of Criminal Law & Criminology Volume 102 Issue 3 Symposium on Overcriminalization (Summer 2012): 613; Stephen H. Legomsky, "The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms," Washington and Lee Law Review Volume 64 Issue 2 (2007): 475; David Alan Sklansky, "Crime, Immigration, and Ad Hoc Instrumentalism," New Criminal Law Review Vol. 15 No. 2 (2012): 157-223; Stumpf, *op.cit.*:367-419.

[17] Ana Aliverti, "Making People Criminal: The Role of the Criminal Law in Immigration Enforcement," Theoretical Criminology Vol. 16 No. 4 (July 2012): 417-434; R. Jennissen, "Recorded Crime Committed by Migrant Groups and Native Dutch in The Netherlands," in Social Control and Justice: Crimmigration in the Age of Fear, edited by Maria Joao Guia, Maartje van der Woude, Joanne van der Leun, (The Hague: Eleven International Publishing, 2013), pp. 177-197.

[18] Melissa Crouch and Antje Missbach, "Trials of People Smugglers in Indonesia: 2007-2012," Centre for Indonesian Law, Islam and Society Policy Paper No. 1 (May 2013): 1-53; Graeme Hugo, et.al., "Indonesia as A Transit Country in Irregular Migration to Australia," Australian Population & Migration Research Centre Vol. 2 No. 3 (May/June 2014): 1-8; Antje Missbach, "Doors and fences: Controlling Indonesia's porous borders and policing asylum seekers," Singapore Journal of Tropical Geography Vol. 35 Issue 2 (July 2014): 228-244; Antje Missbach and Frieda Sinanu, " "The scum of the Earth"? Foreign people smugglers and their local counterparts in Indonesia," Journal of Current Southeast Asian Affairs Vol. 30 No. 4 (2011): 57-87; Andreas Schloenhardt, "Trafficking in migrants: Illegal migration and organized crime in Australia and the Asia Pacific region," International Journal of the Sociology of Law 29 (2001): 331-378; Rizkan Zulyadi, Geetha Subramaniam, and Tan Kamello, "People smuggling in Indonesia," International Journal of Asian Science, 4(11), (2014): 1092.

[19] Missbach, *loc.cit*.

[20] *Ibid.*: 228.

## II. Criminal Law as a Tool of Migration Control

As mentioned earlier, the distinction between immigration law and criminal law is not clear anymore because many governments have used criminal law to deal with migration problem. Parkin reveals this trend has taken place for almost 30 years along with other features of stricter border control, tighter entry requirements, and larger capacities for detention and deportation.[21] Stumpf sees this merger as 'odd and oddly unremarkable' because both criminal law and immigration law have two different focuses.[22] While criminal law aims to protect society from certain acts, which are considered as harmful or dangerous, immigration law supposes to manage the traffic of migration in particular countries. However, criminal law and immigration law are similar in terms of the way they administer the connection between the state and the individual. On top of that, according to Stumpf, both criminal law and immigration law is branch of law, which creates a system of inclusion and exclusion.[23] They decide whether such individuals belong in society or not, therefore such convergence is not surprisingly exceptional.

Hypothetically, the so-called membership theory was constructed from the concept of social contract between the government and the people.[24] Those who been enlisted as the party of the contract gain positive rights and have the ability to make claims against government, whereas government will do whatever it takes to protect its constituents and legitimately could act beyond the restriction of the contract against non-members. In the context of crimmigration, Stumpf argues that membership theory most likely to undermine the protection for aliens and narrow the definitions of its member. The most obvious example is the consequences of exclusion from membership resulted from significant overlap in substance of criminal law and immigration law. Since there are consistent proliferations of criminal sanctions to the immigration violations and criminal basis for deportation from the country, immigrants will continue to be associated with criminals. Conversely, because of violating community's value through committing a crime, ex-offenders will also be treated as aliens. As a consequence, Stumpf mentions that both immigrants and ex-offenders become secondary 'member' of the country and have less privileges compared to the original members.[25]

In relation to that, Legomsky delivers similar critics to this movement.[26] The incorporation of criminal law into the realm of immigration law leaves an asymmetrical path. While the elements of criminal enforcement have firmly accepted in immigration law, the procedural safeguards from criminal adjudication have been refused. This reflects not only the ignorance of government to fulfill the primary goals of immigration law, which are to facilitate lawful immigration and to assist immigrants to integrate with their new environment, but also shows the tendency to view the immigrants as deviants since they are so busy with enhancing criminal sanctions to immigration-related conducts.[27] As a result, noncitizens will always be a vulnerable group that lives in a fear of getting deported with limited protections because of

[21] Joanna Parkin, "The Criminalisation of Migration in Europe: A State-of-the-Art of the Academic Literature and Research," Liberty and Security in Europe No. 61 (October 2013): 1.

[22] Stumpf, *op.cit.*: 379.

[23] *Ibid.*: 380.

[24] Stumpf, *op.cit.*: 377.

[25] *Ibid.*: 403.

[26] See Legomsky.

[27] Legomsky, *op.cit.*:523; see also Chacon.

violating such rules that Kelman and Hamilton[28] defines as crimes of obedience.[29]

Furthermore, Chacon reveals that the current immigration strategy, which uses criminal law to control migration, brings more harm than good.[30] By analyzing the practices in the United States of America (US), Chacon argues that there have been simultaneous movements from federal, state, and local governments to over criminalize immigration.[31] For instance, there has been a significant increase of federal prosecutions of immigration, immigration offences arises as the highest prosecuted federal criminal offences, an active assistance from state and local government in terms of enforcing federal immigration law, and numbers of attempts from states and localities to criminalize immigration-related conduct through their own laws. Aside from legislatures' failures to address the need of immigration law, as also been explained by Legomsky earlier, Chacon states the choice of imposing criminal law mechanism on the issue of immigration will creates symptom of over criminalization, such as racial profiling.[32]

In another place, Aliverti backs up Chacon's findings regarding negative effects of the use of criminal law in the field of immigration.[33] Aliverti uses the term 'hyper-criminalization' to describe the generosity of British governments to pass numbers of immigration and asylum laws that created more than 80 immigration offences in the last 15 years.[34] However, the incredible increase of criminalization of immigration was not followed with the same trend in the actual enforcement. According to Aliverti, in this particular situation, criminal law is used symbolically.[35] It means that the excessive enactment of penal legislation concerning immigration stands alone as a threat to unlikely to be realized because it is rarely enforced in the practice.[36] By the same token, British government uses criminal law to provide options when dealing with irregular migrants. For example, Aliverti mentions that criminal prosecutions were exclusively conducted to the aliens who cannot be deported from the country.[37] When this happens, criminal punishments lose its original purposes because it was compromised with the hidden goal, which is to assist the successful removal of these convicts from the country

## III.Irregular Migration Control in Indonesia

Controlling migration in Indonesia is challenging and difficult at the same time. Giving its acknowledgement as the world largest archipelago with 1.9 million square miles coverage of the total area,[38] Indonesian authorities face a unique challenge that differs from other countries. First, it has to do with the geographical landscape of the nation. Missbach points out that it is quite impossible for the Indonesian government

[28] Herbert C. Kelman and V. Lee Hamilton, Crimes of obedience: Toward a Social Psychology of Authority and Obedience, (London: Yale University Press, 1989).

[29] Legomsky, *op.cit.*: 528.

[30] Chacon, *op.cit.*: 650.

[31] *Ibid.*: 614-615.

[32] *Ibid.*: 650; see also Ben Bowling and Leanne Weber, "Stop and search in global context: An overview," Policing and Society: An International Journal of Research and Policy Vol. 21 No. 4 (2011): 480-488.

[33] Aliverti, *op.cit.*: 421.

[34] *Ibid.*: 420.

[35] *Ibid.*: 421.

[36] *Ibid.*: 428.

[37] *Ibid.*: 424.

[38] UNDP (2), "About Indonesia," http://www.id.undp.org/content/indonesia/en/home/countryinfo/.

to have a total control of its borders.[39] For example, the nature of Indonesia's extensive sea borders offers a lot of risks for state authorities to maintain the border at the very heart of the ocean. Hutton reports that more than a thousand people who attempt to reach Australia have drowned in the seas between Australia and Indonesia since 1998-February 2014.[40] Aside from that, it forces Indonesian navy or maritime police to take pragmatic measures of border control, such as intercepting asylum seekers when they are close to the coast, at the beach before leaving the country, or when their boats have broken because of technical reasons.[41] Furthermore, the long coastline of Indonesia gives tremendous opportunity for irregular immigrants to enter Indonesia. The existence of hundreds big and small traditional harbors and small piers for wooden boats to dock raises up the possibility for newcomers to meet smugglers' network and prepare their next departure from Indonesia. Even though there is a fair chance of being arrested by immigration officers at the identified entry points, there is also a big opportunity to explore new land sites that had not been observed.[42] In other words: there will always be another gate to be opened when the usual doors were closed .

Second, the difficulties come from their internal immigration officers and law enforcement agencies. Having more than ten months fieldwork experience in Indonesia, Missbach asserts that Indonesian police officers often ignore the phenomenon of irregular migration because it is perceived as a pointless effort, yet they have other priorities that should be taken care of.[43] Meliala *et.al* may have an explanation to that behavior.[44] Because of most irregular migrants seemingly used Indonesia as a transit country to Australia and brings no actual problems to their own people, Indonesian government tends to close their eyes to this movements.[45] However, as will be explained later in greater detail, this attitude has changed since the number of irregular border crossing to Australia received international attention.

In accordance with Morehouse and Blomfield's thoughts about irregular migration in Europe, illegal entry is not the sole path of irregularity in Indonesia.[46] In 2012, Indonesian Directorate General of Immigration, Ministry of Law and Human Rights (IDGI) published a report of the transformation of Indonesia immigration since 1950-2012, which contains information about irregular migration under the function of law enforcement. It is reported that there is an increase of irregular immigrants from 2008-September 2012 coming from illegal stay, illegal entry, immigrants who are waiting to be deported and asylum seekers and refugees. According to IDGI,[47] the number of asylum seekers and refugees who has been held in detention center climbs up from 164 people in 2008 to 2,023 people in 2011 (see Figure 1). The same trend also happens to illegal entry, which starts at 359 cases in 2008 and it reaches its peak

[39] Missbach, *loc.cit*.

[40] Marg Hutton, "Drownings on the Public Record of People Attempting to Enter Australia Irregularly by Boat 1998–2011," http://sievx.com/articles/background/DrowningsTable.pdf.

[41] Missbach, *loc.cit*.

[42] Adrianus Meliala, et.al., Critical Assessment on People Smuggling in Indonesia and its Various Impacts, (Jakarta: Dept. of Criminology Faculty of Social and Political Sciences University of Indonesia in collaboration with Jakarta Centre for Law Enforcement Cooperation, 2011).

[43] Missbach, *loc.cit*.

[44] Meliala, *loc.cit*.

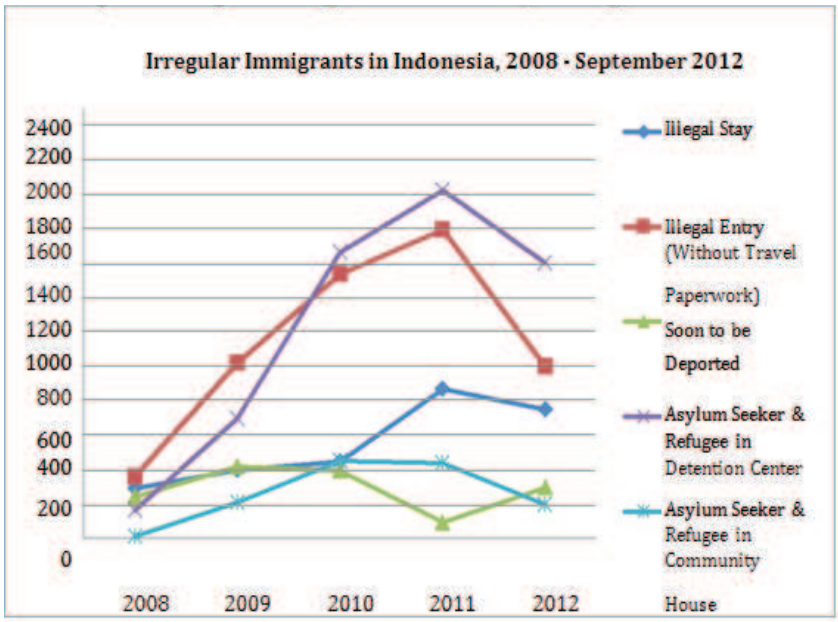
[45] See also Crouch and Missbach; Hugo, et.al; Missbach; Missbach and Sinanu; Schloenhardt; Zulyadi, et.al.

[46] Morehouse and Blomfield, *op.cit.*, p. 4.

[47] Indonesian Directorate General of Immigration, Ministry of Law and Human Rights (IDGI), Transformasi Keimigrasian Indonesia 1950-2012, (Jakarta: IDGI, 2012).

in 2011 with a number of 1,794 cases. However, it seems like there is a downward shift in 2012 for illegal stay, illegal entry, and asylum seekers and refugees in community house, but it should keep in mind that this figure was counted until September 2012 and has fair possibility to increase until the end of the year.

**Figure 1: Irregular immigrants in Indonesia, 2008-September 2012**[48]




In spite of the abovementioned trend, the criminalization of immigration -related conduct is also a part of migration control in Indonesia. In the Law No. 9/1992 regarding Immigration, there are several immigration conducts that has criminal consequences for its violations. Crouch and Missbach expose that Law No. 9/1992 imposes a prison term or a fine for failure to pass through the Immigration Office, misusing or overstaying a visa, assisting illegal foreigner, or returning to Indonesia illegally.[49] Similar to the development in the US and the United Kingdom (UK) it is clear that the Indonesian government has chosen criminal law mechanism to deal with migration problems.

Furthermore, aside from inserting the substance of criminal law into immigration law, this particular law has also enabled the investigative power to the immigration officers through Article 47. In the meantime, according to Article 42 Law No. 9/1992, the immigration officers could also operate some immigration administrative actions if there is a reasonable suspicion that aliens could endanger security and public order or does not respect or obey laws and regulations. Article 42 (2) also states that such measures can be restrictions, changes, or cancellations of residence; prohibition to be

[48] *Ibid.*

[49] Crouch and Missbach, *op.cit.*, p. 13.

in one or a few specific places in the territory of Indonesia; requirement to reside in a particular place in Indonesian region; being deported from the territory of Indonesia or refusal of entry to Indo

One of the reasons that rely on this particular decision is the fact that the Indonesian government has the desire to implement what was called by 'selective policy'. According to the Elucidation of Law No. 9/1992, the immigration officers will only be allowed to authorize aliens to enter Indonesia if such foreigners are considered to bring positive effect to the country and has no risks to jeopardize public safety in Indonesia. However, the rationale behind this approach leaves one question: Do these aliens have some chances to prove their goodness, if violation of administrative rules is punishable by criminal sanctions? The obvious answer is no. This condition is firmly in line with Stumpf's concept about the role of membership theory in the field of crimmigration.[50] By imposing criminal sanctions to immigration law violations, the Indonesian government has cleared out the possibility to view irregular migrants as normal human beings who deserve equal protection as much as those who were categorized as citizens.

In contrast to the excessive criminalization of immigration breaches, the enforcement of immigration offences is not even remarkable. From IDGI data in 2012, it is documented that there has been a total of 360 cases of misusing visa from 2008-2010. The Indonesian law enforcement agencies also succeed to prosecute 1,183 cases of illegal entry and 168 unauthorized foreigners who are in certain areas that have been declared off limits to them within this period. At certain point of view, these figures might be considered as a success. However, if it is compared to the total amount of migrants in Indonesia, which touches a number of 295,4000 people,[51] the previous statistic is terribly tiny. It is possible to say, as already highlighted by Aliverti regarding the similar practices in the UK, that the criminalization of immigration in Indonesia only serves as regulatory purposes: to provide a variety of choices for controlling irregular migration.

## IV. The Fight against People Smuggling and Harsher Regulation on Irregular Migration

Over the last decade, Indonesia has experienced several transformations in their migration control policies due to the increasing number of irregular immigrants within its territory.[52] For instance, there are significant improvements from Indonesian immigration officers in detecting fake documents at the designated entry and exit points,[53] including a substantial upgrade of its operational system.[54] These developments reveal a change in Indonesia's points of view about the phenomenon of irregular migration, which is developed from complete ignorance to an active participation. It seems like the Indonesian government has realized the negative impact of this case. Meliala, *et.al* argue that Indonesia should have received a sizeable amount of money coming from visa application and the extension of immigration

[50] Stumpf, *op.cit.*: 396.

[51] UNDESA (2), "International migration 2013," http://www.un.org/en/development/desa/population/migration/publications/wallchart/.

[52] See Missbach; IDGI.

[53] Dean Wilson and Leanne Weber, "Surveillance, Risk and Preemption on the Australian Border," Surveillance & Society 5(2) (2008): 124-141.

[54] IDGI, *loc.cit.*

permit.[55] According to Indonesian Government Regulation No. 73/2009 concerning the Types and Tariffs of Non-Tax State Revenue in Public Administration Institutions, each person will be charged 400,000 Indonesian Rupiah (IDR) or 27 Euro for visa application and IDR 500,000 or 34 euro for extending his/her immigration person per two months. Giving the fact that irregular migration to Indonesia tends to show a consistent rise from 2008-2012, the loss of revenue from this sector will be much larger.

Despite the economic reason, Missbach points out that the intense international concern on irregular migration to Australia becomes the most substantial factor that affects the way Indonesian government shapes their immigration policies.[56] Missbach and Sinanu note that the Australian government has designed its immigration and refugee policies to bring a lot of difficulties for refugee claims.[57] Following this, because of most of asylum seekers who want to enter Australia set their journey from Indonesia, the Australian government makes Indonesia their top priority partner to address the issue of people smuggling. Since then, numerous cooperation frameworks have been made between both countries and Indonesia has committed to actively participate in the fight against people smuggling.[58]

In December 2000, Indonesia became a signatory party of the UNCATOC. Two years later, Indonesia and Australia co-chaired the Bali Process, which establish multilateral framework to address people smuggling. According to Crouch and Missbach[59] since 2002, the Indonesian and Australian government has organized five ministerial conferences to promote the awareness and cooperation on people smuggling at the regional level. Furthermore, this reform continues to take place at the domestic legislation through the passage of Law No. 5/2009 which ratified the UNCATOC and Law No. 15/2009 for the ratification of the People Smuggling Protocol. Crouch and Missbach[60] vindicate such ratification as an important step for Indonesia to combat people smuggling because these statutes places several obligations to engage in international cooperation, to make major efforts to prevent people smuggling, and also to criminalize people smuggling under Indonesian law.

Additionally, the Indonesian government has established a special anti-people smuggling task force (SATGAS) with 16 local branches under the Indonesian Police (POLRI) since 2009, which consist of police officers and other staff from different authorities.[61] According to Missbach,[62] these special units have arrested more than 7,000 irregular migrants and 80 suspected people smugglers during the period of 2010-2012. However, because of people smuggling has not been stipulated as a crime under Indonesian law until 2011, these smugglers have been tried under the general immigration offences such as the failure to pass through the Immigration Office under Article 48(1) of Law No. 9/1992 or hiding, protecting, providing accommodation to an illegal foreigner under Article 54(1) b of Law No. 9/1992.[63] As a result, the punishment was lenient, which has a range of punishment from 2 months until 5

[55] Meliala, *loc.cit*.
[56] Missbach, *loc.cit*.
[57] Missbach and Sinanu, *op.cit.*: 60.
[58] See Crouch and Missbach; Missbach; Missbach and Sinanu.
[59] Crouch and Missbach, *op.cit.*: 6.
[60] *Ibid.*
[61] See Crouch and Missbach; Missbach; Zulyadi, et.al.
[62] Missbach, *loc.cit*.
[63] Crouch and Missbach, *loc.cit.*

years of imprisonment. According to Meliala, *et.al.,*[64] this condition gives no deterrent effect to the smugglers and seems likely to smuggle people in the Indonesian territory.

To rectify this dreadful condition, Indonesia has amended its immigration law in 2011 through Law No. 6/2011. Under this new law, the Indonesian legislatures criminalized people smuggling under Article 120 with a minimum prison term of 5 years and a maximum of 15 years, and a fine of a minimum of IDR 500 million (34,273 euro) and a maximum of IDR 1,500 million (102,821 euro). Since its enactment until 2012, according to Crouch and Missbach's study,[65] there were 30 cases that have been tried in Indonesian courts with a number of 38 people as convicts. This figure counts as double than 15 cases of people smuggling in the period of 2007-2011. In terms of sentences, the people smuggling cases under Law No. 6/2011 has a majority of sentences of minimum 5 year prison term with a fine of IDR 500 million (34,273 euro). Compared to the same cases under the old law, these statistics could be considered as a significant improvement. Nonetheless, the new law of immigration does not only criminalize people smuggling, but also increases penalties for other immigration offences.[66] For instance, under Article 119(1), it is punishable with a maximum 5 years of imprisonment and a fine of IDR 500 million (34,273 euro) if a foreigner stays in Indonesia without a valid document and visa. Following the same sentences, it is also an offence for a foreigner who intentionally uses a false travel document.

From the depiction of the new immigration law, it is fair to say that Indonesia has higher level of belief that the insertion of criminal law mechanism into immigration law will manage migration even better, even though the punitive approach from the previous law has not been assessed comprehensively. Instead of enhancing their system in facilitating lawful immigration and assisting the integration of immigrants to the society, the Indonesian government chooses to constantly exclude irregular immigrants from its community by imposing even harsher criminal penalties to the violation of immigration law. Even though Meliala *et.al*[67] has observed that Indonesian people has no problem with the existence of these aliens who live in temporary shelters since the local communities in Indonesia had always been plural in ethnic and cultures, it cannot be a certain guarantee that the symptoms of over criminalization, such as racial profiling, will not occur in Indonesia.[68] In contrast, Meliala *et.al*[69] also drew an interesting finding after conducting several interviews with irregular immigrants who stay in the detention center that the immigration officers has already treated them as a criminal by revoking their physical freedom and separating them from their families. This is quite evidence that these foreigners has already been put in the exclusion curve of the country.[70]

In addition, even though Law No. 6/2011 increases criminal penalties for several immigration offences in a significant level, the number of its enforcement remains low. In 2013, IDGI reported that there are only 17 cases of immigration offences that have been proceeded and a number of 2,011 people were deported from the country with no additional information, whether the deportation itself is an effect of criminal convictions or not. This reconfirms what was Aliverti said that criminal law has been

[64] Meliala, et.al., *loc.cit.*
[65] Crouch and Missbach, *op.cit.*: 15.
[66] *Ibid.*: 15-17.
[67] Meliala, et.al., *loc.cit.*
[68] See Meliala et.al; see also Legomsky.
[69] Meliala, et.al., *loc.cit.*
[70] Stumpf, *loc.cit*.

used symbolically as an accessory in the realm of immigration.[71] In other words, the Indonesian government fails to give an appropriate response to the problem of irregular migration. Instead, they are trying to prove Garland's point that using the punitive approach should be understood as a form of weakness and inability to control crime problems to acceptable levels.[72]

## V. Conclusion

The use of criminal law in the realm of immigration law is not uncommon. As it has happened in the US and several countries in Europe, Indonesia experiences the same thing. With a certain degrees of difficulties that Indonesia has to face because of its acknowledgment as the world largest archipelago, it is not surprising to know that criminal law has been used as a tool of controlling migration in Indonesia. In 1996, Garland has already predicted this punitive movement by saying that this is the easiest way for state authorities to show their strength, but it also reveals weakness and inability to control crime problems within its territory. The decision to insert criminal law mechanism to deal with immigration problem has been done, at the first hand, through Law No. 9/1992 concerning Immigration. Rather than focus on upgrading their ability to manage border, since Indonesia has been known as the world largest archipelago, the Indonesian government choose to criminalize several immigration-related conducts such as overstaying, illegal entry, misusing visa, *et cetera*.

Subsequently, this condition becomes even harsher since Indonesia has joined the fight against people smuggling in the international level. Starting with its cooperation with the Australian government and conducting several ministerial conferences to promote awareness and cooperation in addressing people smuggling, the Indonesian government also enacted Law No. 5/2009 concerning the Ratification of the UNCATOC and Law No. 15/2009 that ratifies the People Smuggling Protocol. Later on, this particular reform moves to the path that Indonesia have to amend its immigration law since it was considered to be outdated and did not stipulate people smuggling as criminal offence. Through the passage of Law No. 6/2011, the Indonesian government criminalizes people smuggling and also significantly increases criminal penalties for other immigration offences at the same time.

One notable reason of the over criminalization of immigration in Indonesia is the implementation of selective policy. The Indonesian government will allow immigrants enter the country if such foreigners are considered to bring positive effect and have no risks to jeopardize public safety in Indonesia. By doing such thing, the Indonesian government has already set its mind that irregular immigrants will never be member of its society.[73] Additionally, by looking into the fact that the actual figures of immigration offences enforcement are consistently low over time, even after increasing its criminal penalties under Law No. 6/2011, it is safe to say that criminal law has been used symbolically, just to provide options for immigration officers to deal with irregular immigrants.[74]

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[71] Aliverti, *op.cit.*: 421.

[72] D. Garland, "The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society," British Journal of Criminology Vol. 36 No. 4 (Autumn 1996): 445-471.

[73] See Stumpf, *op.cit.*: 398.

[74] Aliverti, *loc.cit*.

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