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Asylum and refugee law in Indonesia

What about the legislative process and discretion at the implementation level of the national legal arrangement of refugee treatment in Indonesia?

THE TRAJECTORY

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1. Introduction

My PhD research deals with the national legal arrangement of refugee treatment in Indonesia. It focuses on two aspects: the lawmaking process and discretion at the implementation level, which it perceives as dialectical or cyclical, rather than separate processes.[2] I look at three national legal instruments in particular: the right to asylum provision in the Constitution, the 2011 Immigration Law, and Presidential Regulation (PR) 125/2016 on the Treatment of Foreign Refugees. These legal instruments are important, but as I will show later, they are also problematic to deal with refugees in the context of Indonesia as a non-signatory state to the 1951 UN Refugee Convention or the 1967 Refuge Protocol.

Currently, there are more than 12,000 refugees and asylum seekers in Indonesia; more than a half of the population comes from Afghanistan and the second largest group is Rohingya.[3] Although the number of migrants is relatively small compared to the number of migrants in Europe or other Southeast Asian countries, such as Bangladesh and Malaysia, the case of Indonesia is interesting because its reception of these migrants reflects the fact that Indonesia considers itself merely as a transit country.[4] This is related to the circumstance that for most of these migrants the preferred destination was Australia, least until 2013/2014 when the country started implementing a policy of full deterrence, including military-based pushback operations[5] and extraterritorial processing agreements with some Pacific countries.[6]

In Indonesia many refugees were detained in immigration detention centers (IDCs) under the 2011 Immigration Law, but since 2018 the government has started to release all the detained refugees due to cuts in Australian funding of the International Organization of Migration (IOM) which funded the operation of these detention centers and financially support refugees.[7] While Indonesia knows a constitutional right to asylum and has other relevant human rights provisions, refugee status determination (RSD) is delegated to the UN refugee agency UNHCR and the conditions of refugees are generally described as lacking access to fundamental rights.[8]

Although according to PR No. 125/2016 migrants seeking asylum must be referred to UNHCR,[9] immigration officials sometimes start criminal proceedings against them, as I will later explain. However, there are also some positive practices by government agencies in implementing human rights laws towards refugees, such as tolerating refugees working in the informal sector and opening access to formal education for them nationwide.[10] These practices also reflect how government officials exercise discretion in implementing the legal frameworks I elaborate further in this research, which explores Indonesia's motives for constructing the current complex legal

1 Bilal Dewansyah is also lecturer (on study leave) at Constitutional Law Department, Universitas Padjadjaran's law faculty, Indonesia; the research is funded by a LPDP scholarship of the Indonesian Government.
2 W.J. Chambliss, 'On Law Making' in W.J. Chambliss & S. Z. Majorie S. Zatz (eds), *Making Law: The State, The Law and Structural Contradiction*, Bloomington & Indiana Polis: Indiana University Press 1992, p.9; T.C. Halliday, 'Recursivity of Global Normmaking: A Sociolegal Agenda', *Annu. Rev. Law Soc. Sci.* 2009/5, p. 269.
3 UNHCR, 'Monthly Statistical Report Indonesia', Jakarta: UNHCR Indonesia, March, 2023, p. 1.
4 A. Missbach, *Troubled Transit: Asylum Seekers Stuck in Indonesia*, Singapore: ISEAS-Yusof Ishak Institute 2015, p. 29-30.
5 A. McNevin, A. Missbach, 'Luxury Limbo: Temporal Techniques of Border Control and the Humanitarianisation of Waiting', *IJMBS* 2018/ 4, No. 1/2, p. 18.
6 A. Lazarus Hirsch, 'The Borders Beyond the Border: Australia's Extraterritorial Migration Controls', *RSQ* 2017/36, No. 3, p. 76-77.
7 A. Missbach, 'Substituting immigration detention centres with 'open prisons' in Indonesia: alternatives to detention as the continuum of unfreedom', *Citizensh Stud* 2021/25, No. 2, p.225.
8 C. Gordyn, 'Pancasila and Pragmatism: Protection or *Pencitraan* for Refugees in Indonesia?' *JSEAHR* 2018/2, No. 2, p.341.
9 Article 13 (3).
10 B. Lau, 'A Transit Country No More: Refugees and Asylum Seekers in Indonesia,' *MMC Research Report*, May 2021, p. 60; UNHCR, 'Fact sheet: Indonesia', December, 2020, p. 3.

framework, including an assessment of the influence Australia exercises on making such laws.

2. Methodology and research process

This research is situated in sociolegal studies and involves doctrinal legal analysis as well as empirical research. I conducted the doctrinal analysis and the initial socio-political analysis before I started my PhD-trajectory; they were completed in the first year of my PhD.[11] After I started my PhD in 2020, I took one step back conducting a systematic literature review to map and study the scholarly contributions on the topic of asylum seekers and refugees in Indonesia.

After conducting this literature review (from November 2020 to June 2021), my initial plan was to visit Indonesia to conduct fieldwork. However, this was not possible due to Covid-19. Therefore, I adjusted my research design and started virtual fieldwork conducting online interviews as well as phone interviews with respondents in Indonesia. The targeted group were people involved in the lawmaking process of the concerned laws as well as those involved in their implementation: lawmakers (members of parliament, representative of the government), civil society organizations, international organizations (UNHCR and IOM), academics, Indonesia's National Human Rights Commission, judges, government officials from central government agencies and also local officials, in four cities: Jakarta, Makassar, Tanjung Pinang (Bintan) and Lhokseumawe (Aceh).
After about six months of virtual fieldwork, I was able to visit Indonesia from the end of December 2021 until March 2022 as the Covid-19 situation improved. In total, I conducted 78 audio-recorded semi-structured interviews and six informal conversations (unrecorded). For the lawmaking analysis, I analyzed the data in such a way as to uncover the 'implied problem' or 'problem representation' underlying a policy.[12]

3. Some initial findings

3.1 Competing approach in asylum and refugee legislations

The legal analysis shows that these laws represent competing approaches, one advocating a rights perspectives, as represented by the Constitution [13] and another promoting a humanitarian approach to deal with refugee issues in a discretionary manner (the 2011 Immigration Law, and PR 125/2016). The latter two laws seem to contradict the Constitution, especially its Article 28G (2) which guarantees the right to asylum together with freedom from torture which sustains the *non-refoulement* principle. The general problem is that many human rights guarantees in the constitution are not followed by implementing legislation, which makes it hard to change the main actors' attitude.[14] This problem is also apparent where it concerns the constitutional right to asylum and where there is no legislation that translates this right into a procedural mechanism. Ideally, the minimum consequence of this right is that besides the duty to uphold the *non-refoulement* principle, Indonesia should also establish its own asylum procedures even though it is not a party to the Refugee Convention. [15] Nevertheless, the 2011 Immigration Law makes no reference at all to asylum seekers and refugees. They are regarded as illegal immigrants under this law and its implementing regulations. [16]

Another problematic piece of legislation is PR 125/2016. On the one hand, the PR reflects significant progress: it adopts the definition of refugees in the Refugee Convention and the Protocol, regulates designated shelter for refugees as alternative to detention, determines the minimum basic needs for them as well as involves more actors outside Immigration authorities, including local governments.[17] It also mentions clearly that refugee treatment should be in accordance with general international law and national legislation[18] in line with asylum provisions in its parent act, the 1999 Law on Foreign Relations.[19] On the other hand, in many respects, it refers to general immigration law and it regulates immigration supervision in a special chapter.[20] And instead of establishing a national asylum procedure to implement the constitutional right to asylum, PR 125/2016 makes no change on asylum procedure, leaving RSD again to UNHCR. Even though from this arrangement PR 125 implicitly reflects a non-refoulment principle, at least to a degree, the choice to adopt this principle in a PR, which has a lower position in the legal hierarchy compared to the Law (undang-undang), makes this regulation less binding than, in this case, the Immigration Law.

3.2. Problematization of asylum and refugee in lawmaking process

The previous discussion correlates with my findings about the lawmaking process that the three legal instruments have different problems to solve in relation to asylum and refugee matters.
First, there was no specific discourse on the right to asylum during the second constitutional amendment process in 2000. Instead, the constitution makers (MPR-members) focused on general human rights problems, but were silent on the detailed procedure to protect human rights, including the right to asylum. Thus, the scope, meaning as well as procedure of this right were not clearly determined, resulting in various understandings about the nature of this right among the MPR members, in particular whether it only refers to Indonesian citizens seeking asylum abroad or also to foreigners in Indonesia, including refugees.

Second, the discourse dominating the making of the 2011 Immigration Law focused on crimmigration: the attempt to diminish irregular migration by addressing transnational organized crimes, especially people smuggling by 'syndicates' who facilitated migrants – most of them asylum seekers – to come to Indonesia. Even though at that time some members of parliaments (DPR) wanted to regulate refugees in that law, the majority rejected refugee provisions not only to avoid the socioeconomic burdens, but also because of an anti-foreign sentiment that perceives foreigners in general as a threat to Indonesian citizens and national interests – a sentiment related to Indonesia's colonial history.

Third, the making of PR 125/2016 to some extent shifted the discourse from avoiding a regulatory approach to refugees explicitly, as in the 2011 Immigration Law, to the need of having a practical legal framework. I found that PR 125/2016 was intended to solve the problem of coordination in handling refugees among involved agencies. This problem is a consequence of the 'silo mentality' in Indonesian bureaucracy in which each government agency prioritizes its own legal framework in the inter-agencies relation. This mentality also led to a lengthy discussion of the PR draft. Although some human rights provisions were included in the earlier versions of the

11 Some material of this analysis has been published in B. Dewansyah, R.D. Nafisah, 'The Constitutional Right to Asylum and Humanitarianism in Indonesian Law: 'Foreign Refugees' and PR 125/2016', *AJLS* 2021/8, No. 3, pp. 536-557.
12 C. Bacchi, *Analysing policy: What's the problem represented to be?* NSW: Pearson Australia, 2009, pp. ix-x, xvii, 39.
13 See also Law 39/1999 on Human Rights.
14 A. Bedner, 'The Need for Realism: Ideals and Practice in Indonesia's Constitutional History' in M. Adams, A. Meuwese, & E. Ballin (Eds.), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*. Cambridge, New York: Cambridge University Press, 2017, p. 187.
15 B. Dewansyah & R.D. Nafisah, *op.cit.*, pp. 541, 549, 554.
16 Regulation of Director General of Immigration No. IMI-1489.UM.08.05 Year 2010 regarding the Treatment of Illegal Immigrants, replaced by Regulation of Director General of Immigration No. IMI-0352.GR.02.07 Year 2016.
17 Article 1 PR 125/2016.
18 Article 3 PR 125/2016.
19 Article 26 PR 125/2016.
20 See Article 9 – 24, and Chapter V PR 125/2016.

PR's draft,[21] many government agencies strongly rejected it, making a compromise unavoidable. Thus, not only were such rights-based provisions removed in the final version of the PR, but some detailed provisions were also omitted.

In the two latter processes of lawmaking, I found traces of Australia's influence in different ways. In contrast to the existing literature, which suggests that Australia's influence is conclusive, my finding on the making of the 2011 Immigration Law shows that Indonesia follows its own agenda in combating people smuggling, which is to protect Indonesian citizens from cross-border human trafficking. In fact, the creation of PR 125/2016 can be seen as a response to counter Australia's extraterritorial asylum policy, including its unilateral push-back policy, by restating Indonesia's role as a transit country and its relegating all costs incurred to accommodate refugees to the responsibility of IOM, which is mainly funded by Australia.

Even local immigration offices interact more with their local partners, such as the police, rather than with their parent agencies at the central level, which provides greater flexibility in responding to refugee needs, but sometimes these local actors exceed their jurisdiction.

3.3. Discretionary implementation of laws

My initial findings show that discretion at the implementation level is unavoidable and has continued even after PR 125/2016 was enacted, with different forms and actors. Before the PR, discretion primarily influenced the application of the Immigration Law, such as to detain asylum seekers in IDCs or to let them live in other places, or to move them from IDCs to IOM's community houses. Discretion also determined the decision to accept or reject asylum seekers, especially after a mass maritime arrival. After the PR takes effect, not only have forms of discretion expanded, but they also involve more government actors. Most forms of discretion have developed to overcome practical challenges faced by refugees in their daily lives as well as fulfilling their basic needs, such access to formal education for refugee children, civil registration for refugee children born from mixed marriages with locals, as well as the empowerment program co-organized with CSOs to engage in productive activities or even tolerate them to generate income – as I found in some cities during my fieldworks where refugees sell food, groceries or even bicycle in their IOM's accommodations. Most discretionary policies and decisions rely on humanitarian grounds and feelings of empathy to refugees, but when it decided to provide access to education for refugee children the government based this policy on human rights obligations under the Convention of the Rights of the Children.[22] However, none of this can be reduced to the constitutional right to asylum.

In terms of actors, discretion after PR is decided not only by immigration or security agencies (coast guard or police), but also by local governments, which play an active role in refugee issues. This has not only changed the chain of discretion[23] but also decision-making in general, from being highly centralized, involving only immigration authorities from headquarters to local offices or IDCs, to a more decentralized pattern where decisions are made jointly among agencies at the local level in local refugee task forces, in addition to national task forces at the ministerial level. Even local IDCs or immigration offices interact more with their local partners, such as the police at the city level and some agencies in local government, rather than with their parent agencies at the provincial or central level. While this pattern provides greater flexibility in responding to refugee needs at the local level, sometimes these local actors exceed their jurisdiction, ignoring the so-called recommendations of the national task force for refugees, as I found in several cities in Aceh province.

I also found the important role of street-level bureaucrats in exercising discretion, such as tolerating refugees to engage in self-employment activities. However, unlike has been recorded about such officials in Western countries who exercise broad discretion in the form of their own policies, [24] the discretion Indonesian officials exercise is based on the policies or personal characteristics of their patron. Such tolerance is only possible if their patron has empathy for refugees, but it is not possible if the patron is extremely rule-bound. Thus, changes in leadership within a bureaucratic unit can have a significant impact on how street bureaucrats exercise discretion.

However, PR 125/2016 cannot fully overcome the silo mentality. In 2018, a couple of Hazara ethnic asylum seekers from Afghanistan were imprisoned based on the 2011 Immigration Law because they could not provide travel documents when Immigration requested these, ignoring what is regulated in the PR.[25] Further, some local officials during my fieldwork complained that the PR does not regulate important things in detail, such as consequences on civil registration for refugee children born in Indonesia, or unregistered marriages with locals or among refugees. This leads to a demand for new laws, especially to revise the PR.

4. Concluding remarks

Some of my research findings may not be surprising for readers familiar with the literature on refugees. What may be new is that my findings show that while perceiving migrants, including refugees, as a threat is not only a common view in the Global North but also in Indonesia, what makes Indonesia's case different is that this is closely related to an anti-colonial narrative in order to protect its citizens. What can be learned as well from this case is that it is a bad idea to make Australia's policy in dealing with transit countries a reference for EU asylum policy. This policy clearly worsened the conditions for refugees in Indonesia.

And finally, my research indicates that discretion is required to fill in the gaps created by different laws responding to different problems connected with immigration as strongly influenced by the Indonesian bureaucracy's silo mentality. Yet, discretion is not a panacea to overcome all refugee matters and it can also cause injustices, which in turn results in new demands for lawmaking – thus reflecting the dialectical or cyclical nature of lawmaking in general in response to the needs and dynamics in implementing asylum and refugee legislation. ◄

21 M.S. Sadjad, 'What Are Refugees Represented to Be? A Frame Analysis of the Presidential Regulation No. 125 of 2016 Concerning the Treatment of Refugees 'from Abroad'', *AJLS* 2021/8, No.3, pp. 460-461.

22 D. Agustina, '*Pendidikan Bagi Anak Pengungsi di Indonesia (Education for Refugee Children in Indonesia)*', Article, *BPMP DKI Jakarta – Kemendikbud,* retrivied from: https://bit.ly/44jVhOu.

23 M. van der Woude, *Chain Reactions in Criminal Justice System,* The Hague: Eleven International Publishing, 2017, p. 16-18.

24 M. Lipsky, *Street-level Bureaucracy, Dilemmas of the Individual in Public Services,* Updated ed., New York: Russel Sage, 2010, p. 13.

25 District Court of Tangerang (in Tangerang), Official Copy of Verdict No. 01 & 02/ Pid.S/2018/ PN. TNG, 15-08-2018 & Verdict No. & 02/ Pid.S/2018/ PN. TNG, 20-08-2018.