Reconciling Refugee Protection and Sovereignty in ASEAN Member States

Law and Policy Related to Refugee in Indonesia, Malaysia and Thailand

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Abstract

Most of Association of Southeast Asian Nations (ASEAN) member countries perceive themselves as non-immigrant nations. It means that most ASEAN countries are not the destination for immigrants to settle. This approach also appears when they responded to the massive influx of the refugee in the south-east Asian region. In absence of ASEAN regional mechanism on refugee protection (which means covered all stage of treatment for refugee), a few ASEAN member countries - Indonesia, Thailand and Malaysia -, have the valuable efforts and experiences in term of refugee handling and reception, based on their domestic law and national policy, for instance in Indo-Chinese refugees' crisis in late 1980s until 1990s, and also Rohingya "boat people" crisis in 2015. This article discusses the legal efforts undertaken by the three ASEAN countries to reconcile their sovereignty in protecting refugees who enter their territories through law and policy. In addition, this article also elaborates on the extent to which laws and policies contribute to refugee protection in Southeast Asia.

Keywords: refugee protection, sovereignty, Indonesia, Malaysia, Thailand, ASEAN

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Introduction

The issue of refugee has a close connection with regional cooperation. To some extent, the regional cooperation is seen as one of the answers for the refugee movement around the world. Most likely the cooperation is initiated by the regional organization as it formed a consensus between states in a certain region to respond to any issues that emerged and effects the region. There is a tendency that in several regions, the establishment of the regional organization has reduced their national sovereignty or in other word,s, there is an organization above nation-state that has "supra" authority.

While the majority of existing regional organizations to some extent loosen the sovereignty of its member states, the Association of Southeast Asian Nations (ASEAN) regionalism model precisely promotes sovereignty to build regional cooperation or in Ginsburg's words called "sovereignty - reinforcing regionalism"[1,2,3]. This approach is strongly

reflected in the wave of refugees and asylum seekers which struck Southeast Asia, the region that became the territory of ASEAN member countries. Refugees or forced migration issues in general never considered as an official agenda of ASEAN, unless it has been considered as a crisis by ASEAN member countries, such as the Indo-Chinese crisis or within the framework of regional security issues related to transnational organized crimes issues, such as trade people or people smuggling, but not particularly on refugee protection. [5] in fact, the wave of refugees that swept the Southeast Asian region, tends to be an individual issue of each ASEAN member countries.

In the absence of ASEAN regional mechanisms on refugee protection, a few ASEAN member countries, namely Indonesia, Thailand, and Malaysia, have taken valuable initiatives and efforts to respond refugee issues, based on their national law and national policy, as seen in Rohingya "boat people" crisis in 2015. These three countries agreed to one-year temporary protection for Rohingya refugees whose stranded in their territory.

However, most of ASEAN member countries, including Indonesia, Malaysia, and Thailand, perceive themselves as non-immigrant nations. [5] It means that most of ASEAN countries – in their perspective - are not the destination for immigrants to settle permanently. These countries also not the parties of 1951 Refugee Convention and/or the 1967 Protocol (Refugee Convention and/or its Protocol). The clear implication is that actually there are no legally binding obligations for

them to set-up a durable solution for refugees. In other words, refugee reception is more likely considered as state discretion based on immigration laws and policies that show state sovereignty in security issues, rather than human rights-based approaches[6]. In addition, many criticisms addressed to "adhoc-ism" approach that they have been applied, so that it is important to discuss how the three countries struggle to carry out their solely national law perspective in terms of refugee handling and to what extent the effort brought adequate protection to refugee rights in the Southeast Asian region.

Refugee and sovereignty: Two points to reconcile

In this article, the term "refugee" is not limited to people who have been in refugee status because they meet refugee criteria under Refugee Convention and/or its Protocol, or according to national laws of countries that have national refugee legislation. Based on the generic meaning, refugee in this article also refer to asylum seeker as person who seeking protection to other country because of the threat of persecution for humanitarian and political reasons, but the status has not been determined yet as refugee.[4] Both refugees and asylum seekers, refer to the same subject but has a difference in term of stage of status, where refugees refer to the recognition of status for protection, while asylum seekers have not been determined the status as refugee or in other words: "refugee in waiting."

However, asylum and refugee status actually come from different concepts. Asylum is a derivative concept or expression of state sovereignty or prerogative, while refugee status was developed to resolve the refugee problem caused by the war in the twentieth century.[7,8,9,10,11]. As part of sovereignty, asylum is the state's right to provide even for permanent protection to a foreigner whom it wishes, for various reasons, including the most excuses of escaping criminal punishment, so that issues of political differences threaten personal safety.[12,13] Such a character of asylum indeed is actually firmly rooted in the power of the state in the field of immigration as a form of sovereignty to organize people into and out of its territory, including permitting foreigners to live in its territory.

The only mechanism of reconciliation between refugees protection and sovereignty in the context of the right to asylum is the principle of *non-refoulement*. This principle is the limit for the destination country not to return refugees to the country of origin.[14] Although this princi-

ple was first confirmed in the 1933 Convention relating to the Status of Refugee, and reaffirmed in the 1951 Refugee Convention and other documents of international law, it was recognized in its development as an international customary law.[15] That is to say, this principle not only binds to the states party of Refugee Convention and/ or its Protocol but also a third country which is not a party. However, for countries that guarantee the right to asylum in national law as well as the Refugee Convention and/or its Protocol, normatively the entry of asylum seekers should be followed up with a Refugee Determination Status (RSD), depending on the laws of the country concerned. Whereas for a country which guarantees the right to asylum or is bound by legal obligations of 1951 Refugee Convention and/or its protocol, there is generally no national institution for that purpose. RSD process is allowed for United Nation High Commissioner for Refugees (UNHCR), assisted by international organizations such as International Organization of Migration (IOM) primarily to provide technical and financial assistance to asylum seekers and refugees.

However, the presence of asylum seekers in the destination country has socio-economic impacts on the fulfillment of asylum seekers' rights, and the country's primary responsibility to its citizens, such as access to jobs, housing or educational facilities. Theoretically, immigration law is not only concerned with the selection of foreigners to enter the territory of a country but the arrangement to the migrants when they are in the host country. Therefore, the protection of the country against refugees should only be interpreted as temporary protection, as long as the threat of persecution in the country of origin still occurs. With the second reconciliation between refugee and state sovereignty in the form of a policy of temporary stay as long as the threat of persecution in the origin country still exist, and allow them to exercise their basic rights.

Law and policies related to a refugee in Indonesia, Malaysia, and Thailand

Indonesia

Although Indonesia is not a party to the 1951 Refugee Convention and its Protocol, the term "granting asylum for foreigners" and "refugees from abroad" is enumerated in Law no. 37 of 2009 on Foreign Relations. In addition, Article 28G Paragraph (2) The Second Amendment

of the 1945 Constitution also guarantees "the right of everyone to asylum from other countries." However, the law used in the practice of handling asylum seekers and refugees is the Immigration Act (UU No. 9 the Year 1992 which was replaced with No. 6 the Year 2011 on Immigration). Since the law does not allocate asylum seekers or refugees in a special status, they are often categorized as illegal immigrants if they enter Indonesia without a valid immigration document.

The latest development of Indonesia stipulates Presidential Regulation No. 125 of 2016 on Refugee as the implementing regulations of the Law on Foreign Relations. In certain respects, this Presidential Regulation provides positive direction, for example in relation to the definition of "refugees from abroad" which refers to the refugees' definition of the 1951 Refugee Convention and its Protocol. However, the Presidential Regulation does not regulate the granting of asylum by the Government of Indonesia, but only regulates the mechanisms for handling asylum seekers and refugees entering Indonesia, particularly in emergencies situations. However, the issue of determining the status of refugees, including long-term solutions for refugees remains determined by UNHCR.

Malaysia

Similar to Indonesia, there is no specific Malaysian legislation that provides protection or procedures for treating asylum seekers and refugees. In general, Malaysian law only distinguishes two main categories of migrants, namely 'documented' or 'legal' migrants and undocumented or 'illegal' migrants. It is governed by three major legal instruments:

1. The Immigration Act 1959/1963;
2. The Employment Act 1955/1998 and
3. The Penal Code.

In the Malaysian Immigration Act, there are two special articles namely Articles 6 and 51 which are used to hold and burden illegal immigrants. In amendments to the Immigration Law of 1997 and 2002 immigration violations were given heavier penalties. Thus undocumented Malaysians, regardless of whether they are perceived as illegal migrant workers or asylum seekers, five-year jail sentence, a MYR10,000 (US$2,600) fine and six strokes of the cane under the Immigration Act.[16] On the other hand, there is omission for asylum seekers and Rohingya refugees from Myanmar and migrants in Sabah

who have a long history of migrating several tribes on the island of Borneo and beyond.[17] Apart from the work of international organizations such as UNHCR and non-governmental organizations (NGOs), Malaysian refugee policy development takes place outside the framework of human rights.

Thailand

As Thailand is not a party of the 1951 Refugee Convention and its protocol, the main legal framework used in the context of refugee treatment in Thailand is the Immigration Act of 1979.[18] Under the law, similar with Malaysia and Indonesia, asylum seekers or refugees who enter are subject to arrest, detention or deportation. However, under this law, the Minister of Home Affairs with the approval of a cabinet may allow foreigners for a temporary stay in Thailand.[18] On that basis, asylum seekers and refugees may reside in Thailand but on the basis of government discretion.

Another national law relating to asylum seekers in Thailand is the 2007 Royal Thai Constitution which in Chapter 1 Section 4 provides for the duty of respecting human dignity, human rights, liberty and equal standing in law, but limited only to Thai citizens.[19] Therefore, this provision is also considered to be the barrier in terms of applies it to asylum seekers. Several provisions also relate to non-judicial refugees and in the context of obtaining employment in Thailand, the Thai Nationality Act and the Alien Work Permit Act of 1978.

Since the handling of Indo-Chinese refugees in the 1970s and 1980s (before the 1989 Comprehensive Plan of Action for Indo-Chinese Refugees (CPA)), Thailand has a policy of accepting refugees on a case-by-case basis on the basis of exceptions to the above Immigration Law. However, the Thai Government avoided the use of the term "refugee" and "refugee camp", calling it the "displaced persons" and "temporary shelters", according to Morreti, to avoid the impression that Thailand recognizes obligations under the law.[20] On the basis of this ad-hoc policy, the Government of Thailand in particular receives certain state asylum seekers, but at another times rejects them. Even the Thai UNHCR has been banned from doing refugee status determination, for asylum seekers from Myanmar at the time of Prime Minister Thaksin Shinawatra.[20] However, Thailand has shown a very positive development especially since early 2017 when the Thai Government issued Cabinet Resolution 10/01, B.E. 2560 on 10 January to establish "Committee for

the Management of Undocumented Migrants and Refugees", as well as a national screening mechanism [21] for the determination of refugee status. [22]

To what extent the law and policies protect refugee rights

The problem of legal basis and policies

From the three countries that compared in this article, the main similarity of these countries is the use of immigration law to deal with refugee flow. However, there are several differences between these countries. Indonesia, Malaysia, and Thailand use their immigration laws, without providing strict rules on asylum seekers and refugees. Even the immigration laws of the countries are not familiar with the term "refugee" or "asylum seeker", they are only regulating foreigners in general as previously stated. As noted in the previous section, asylum seekers or refugees who entered the country illegally are considered as illegal immigrants and might be the subject of sanctions or immigration measures. The acceptance of asylum seekers and refugees into the territories of the countries is based more on individual countries' immigration laws or other laws. The Immigration Law of Indonesia, Malaysia, and Thailand govern the acceptance of asylum seekers and refugees as a form of exclusion against certain foreigners. The Indonesian Immigration Act provides for the exclusion of alien entry in an emergency under Article 11 as follows:

> Paragraph (1): "In an emergency, the Immigration Officer may issue an Emergency Entry to a Foreigner."
>
> Paragraph (2): "The Entry as referred to in paragraph (1) shall be valid for a stay within a certain period of time."

The term "Emergency" in the above provisions, in the explanation of that article, is defined as follows:

> "The presence of a conveyance landing in the Territory of Indonesia in the framework of humanitarian assistance in the natural disaster area of the Territory of Indonesia (national disaster) or in the case of any means of conveyance carrying a Foreigner anchored or landed somewhere in Indonesia due to engine failure or bad weather, while the conveyance does not intend to dock or land in the Territory of Indonesia. "

Such provisions may be regarded as the legal basis for the acceptance of asylum seekers and refugees, although limited to asylum-seekers en-

tering in groups, such as "boat people" on the basis of humanitarian considerations, not due to human rights considerations. [4]

The provision of exemption in Malaysia is not only related to immigration laws, but also other laws, namely the Passport Act 1966, but specifically to be applied in Sabah and Sarawak. Under the Passport Act (Article 4), the Minister of Home Affairs may exclude certain persons or groups of persons for a permanent or limited stay, including in Sabah without a passport. In the Malaysian Immigration Act, similar provisions are similar but more general. The Malaysian Immigration Act grants power of the State Government to direct the Immigration Director of the State Governments of each state (Sabah and Sarawak) not to publish, restrict or revoke the license, pass or certificate, and authorize the state government section to allow everyone to enter eastern Malaysia (Sabah and Sarawak) as stated in Article 65 (1) and Article 69 (1). Meanwhile, the Immigration Law of Thailand regulates the exemption in Section 17, as follows:

> "In certain special cases, the Minister, by the Cabinet approval, may permit any alien or any group of aliens to stay in the Kingdom under certain conditions or may consider an exemption from being conformity with this Act.

Although the three countries put refugees as subjects that can be excluded from the general rules of immigration law, the exceptional forms are not exactly the same. Indonesia and Thailand have ruled that the exceptions apply to national territory, while Malaysia only grants exceptions for two eastern states of Sabah and Sarawak. Thus, it reflects the difference between Indonesia and Thailand as unitary states in the one hand and Malaysia on the other hand as a federation.

In terms of substance, compared to Thailand, the exceptions set forth in the Indonesian Immigration Law are more limited, especially in the event of an emergency for asylum seekers and refugees arriving at the same time, as in the case of boat man. However, in addition to the Immigration Act, Indonesia also has Law No. 37 of 1999 on Foreign Relations which expressly refers to "refugees" and "political asylum", although as a form of humanitarian assistance. This provision is also reinforced by the imposition of the right to asylum in the Second Amendment to the 1945 Constitution (2000) in the Human Rights Chapter and the issuance of Presidential Regulation No.125 of 2016 which has also used the term refugees adopted from the 1951 Refugee Convention and its Protocol. Of these three countries, Malaysia is

a country that does not provide legal exceptions to refugees except in Sabah and Sarawak, and therefore has no legal basis for receiving refugees outside eastern Malaysia, except on a discretionary policy basis. Meanwhile, as a policy, the acceptance of asylum seekers and refugees relies heavily on the shortcomings of the governments of those countries, rather than as permanent legal policy, so there is a guarantee for asylum seekers and refugees to at least not be returned to the country of origin where the threat of persecution takes place and treated humanely.

Meanwhile, from the policy optic, Thailand decision to develop a national screening mechanism for asylum seekers as stated earlier shows an intense state involvement in refugee issues compare with the others countries (Malaysia and Indonesia). Nevertheless, the initial draft of the national mechanisms that have been drafted is indeed only regulating the mechanism of determining the status of refugees, not further regulating what protection is given after they achieve refugee status.

Recently, the Government of Thailand has approved the establishment of a special regulation on this subject under the Immigration Act of Thailand and plans to amend the Immigration Act. Although it is not yet clear how to form a national mechanism for refugees in Thailand, if the mechanism is well developed, Thailand will be the only ASEAN country that has the mechanism without ratifying the Refugee Convention or its Protocol. However, in certain respects, Thai Government policy is inconsistent, for example still conducting and continuing the practice of detention in immigration detention centers, even though they are refugees, as well as children refugee.[23]

Meanwhile, the Indonesian Government's policy on refugees after Presidential Regulation No. 125 of 2016 published generally leads to the strict application of the principle of *non-refoulement* when immigrants declare themselves as asylum seekers or refugees although the placement of asylum seekers and refugees at the Immigration Detention Center is a critical note because it is perceived as a form of deprivation of liberty. In addition, the Government seems to focus on the handling of refugees in emergencies as a form of humanitarian assistance temporarily, while the determination of refugee status is still being undertaken by UNHCR, unlike Thailand which will soon move to the Government after Thailand has its own national mechanism. Compared to Indonesia and Thailand, the policy of the Malaysian Government

is considered biased because on the one hand, it allows Muslim refugees, especially Rohingya, to enter Malaysia, but not for non-Muslim refugees. [24]

The implementation of non-refoulement principle

The principle of *non-refoulement* is a key principle in international refugee law. This principle precludes states from returning a person to a place that he or she might be tortured of face persecution. Although this principle was first confirmed in the 1933 Convention relating to the Status of Refugee and reaffirmed in the 1951 Refugee Convention and other documents of international law, it was recognized in its development as an international customary law[15].That is to say, this principle not only binds to the parties of the 1951 Refugee Convention and/or its protocol (1967) but also a third country which is not a party to the Convention. In addition, the principle of *non-refoulement* has attained the status of *jus cogens* norm, which refers to a peremptory norm of international law which no derogation is permitted. [25]

The three ASEAN member countries that studied in this article also subject to this principle as both customary international law and as a legal obligation born as a consequence of ratifying the 1951 Refugee Convention or its protocol, such as for the Philippines, and Cambodia, or from other international conventions, such as Indonesia and Thailand, the Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 1984 countries which also regulate *non-refoulement* principle. However, only the Philippines consistently apply this principle. Other ASEAN countries that are the object of this study, such as Malaysia, have also been considered to violate this principle, as in the case of deportation of three Sri Lankan Tamil ethnic groups in 2015 facing the threat of persecution to torture. [22]

Even in Thailand, a country that consistently changes its refugee policy also violates its obligations on the principle of *non-refoulement*. Amnesty International, noted several incidents of forced repatriation by Thai authorities, such as the repatriation of Bahraini activist Ali Ahmed Ibrahim Haroon in 2014, a minority of Uighurs from China in 2015, two Chinese political activities, Jiang Yefei and Dong Guangping in November 2015, Turkish activist Mohammed Furkan Sökmen from the Fethullah Gülen group in May 2017, to a push-back policy toward asylum seekers and Rohingya refugees in 2008, between 2011 to 2013 and 2015. [23] Indonesia has also initiated a "push-back" policy

when Rohingya's "boat people" crisis occurred until 2015, but the policy changed, along with Thai and Malaysian attitudes that ultimately decided to provide temporary protection for 1 year. [24]

Protection of refugee rights

Related to the protection of refugee rights, almost the same as the application of the principle of *non-refoulement*, three countries have issues in respecting and fulfilling the rights of refugees. As noted earlier, Indonesia, Malaysia, and Thailand have similarities that generally do not recognize the right to work of asylum seekers and refugees. However, in practice, asylum seekers and urban refugees in Thailand do informal jobs, as well as in Malaysia.

In Indonesia there are also a number of facts in some places asylum seeker community and refugees like in Bogor, West Java, they open a business, like a barber shop or even become a motorcycle taxi driver. To date, only Malaysia that has a policy to grant the right to work to refugees, but only to Rohingya refugees, through a pilot project of work on the plantation and manufacturing industries for 300 Rohingya.[26] However, there is no certainty whether refugees from other groups in Malaysia will be able to be included in the program on the basis of the principle of non-discrimination. Thus, since in general the work of the refugees is in the informal or even illegally normative sectors, the main issue is the lack of legal protection of rights at work.

However, in relation to other rights, the experiences of the three countries implied that there are no significant issues on freedom of religion. Furthermore, in term of the right to education for refugee children, Indonesia and Thailand have allowed refugee children to attend a formal school. In Thailand, they are allowed to access formal education after they receive a Thai language course facilitated by UNHCR and various NGOs in Thailand. Meanwhile, refugee children in Indonesia can only public school after they pay some amount of fees. Among these countries, only Malaysia has a policy that prohibits refugee children to access formal education, so they obtain education through informal channel in 128 community based learning supported by UNHCR. [27]

Conclusion

This article has shown that the law and policy of three ASEAN member countries generally place acceptance of asylum seekers and refu-

gees as an exception of immigration laws of each country. This reflects how the sovereignty of the state, especially in the immigration powers, reconciles the influx of refugees as a forced migration phenomenon. However, as a form of exception, the substance of refugee policies in each country varies widely, but it is generally ad-hoc and for some countries may be called inconsistent or biased as in Thailand or Malaysia. Despite the development of laws and policies in some ASEAN countries, such as the issuing of Presidential Regulation on Refugee in Indonesia, decision to develop a refugee - screening mechanism in Thailand, the enrollment of refugee children in public schools and temporary work schemes for Rohingya refugees in Malaysia, in general, at the practical level shows the lack of legal certainty for the protection of asylum seekers and refugees, such as violations of the principle of *non-refoulement* or the detention of asylum seekers and refugees at the Immigration Detention Center.

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Notes

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