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Nurul Azizah Zayzda

Universitas Jenderal Soedirman, nurul.zayzda@unsoed.ac.id

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PROTECTING ROHINGYA REFUGEES IN ASEAN: THE CONTESTED HUMAN RIGHTS IN THE WORLD OF NATION-STATES

Nurul Azizah Zayzda, Anindra Nurdiansyah¹

Abstract

This paper departs from the concern that states' policy towards refugees and asylumseekers around the world has not necessarily encouraged a true meaning of refugee protection. Instead, the policy related to their situation has been founded on the basis of states' rights to accept asylum. In consequence, there have been always cases of refugees living in limbo, denied from protection or even deported to their home countries. The fact however needs to be not taken for granted, to be acknowledged as result of construction by wide range of actors; states, intergovernmental states, international non-governmental organizations, individuals, etc. This paper is particularly interested in the ways that state through their actions- or inactions- establish a certain rhetoric about refugee rights. More specifically, this paper discusses the way ASEAN- referring to the regional organization and the individual states- shapes the rhetoric about refugee rights in their response to the Rohingya crisis. This paper collects and gather information regarding ASEAN meetings and policies as well as states' initiatives and policies which directly or indirectly address the problems of Rohingya refugees. In order to understand how these policies form the way refugees rights is understood, this paper applies critical discourse analysis by revealing the direction to which the region and its individual states bring the overall discourse on refugee rights.

Keywords: refugee, asylum seekers, ASEAN, refugee policy, critical discourse analysis.

¹ Department of International Relations, Universitas Jenderal Soedirman, Indonesia
nurul.zayzda@unsoed.ac.id

Background

The displacement of a group of people commonly addresses as “the Rohingyas” from Myanmar to neighboring countries dated back to the 1980s and is still taking place until today. The Rohingyas refer to the Muslim population of Myanmar living in the Northern Rakhine State. Their movement across border is due to the repression resulted by their denied citizenship by the government. The situation remain the same for years and escalated in 2012 with the violent incident that involved a number of the Rohingyas. The incident expanded to further repression by the state, where the government practiced human rights abuses against the Rohingyas in North Rakhine State (Refugee International, 2012), resulting in a mass migration of Rohingya people amongst all to Bangladesh, Malaysia, Thailand, and Indonesia. It was recorded that since 2012, more than 170,000 people left Myanmar by boat (CNN, 2016). Many of them headed to Malaysia, with some hundred transited in Thailand, and some hundreds stranded in Aceh. The journey taken by these population has been dangerous with the boat and the human trafficker involved. Now Rohingya refugees obtain international attention more than two decades ago with the help of communication and information technology. However, their situation has remained dire, with many still take dangerous journey from Myanmar, stranded in coastal areas of neighbouring countries, trapped in refugee camps with minimum facility, or even detained in immigration detention center for dispossession of travel documents. Ideally, there should be an alternative or new initiatives to build framework in which these refugees should not remain under-protected.

This paper is focused on analyzing the refugee policy in ASEAN as well as its individual countries, two countries in particular; Malaysia and Indonesia. ASEAN is a regional organization in which ideally can institutionalize solution for the Rohingya situation, whether it is in conflict resolution, or in refugee protection. The three countries are the pathways through which the refugees had gone through. The purpose of this analysis is to figure out the direction or the kind of rhetoric regarding refugees created by the policies. This is to say that the policy analysis is not solely

about explaining what the states have done regarding the needs of the refugees and asylum seekers. Nor is it about discussing why refugees, particularly Rohingya refugees are still in limbo despite their long history of forced displacement. This paper believes that policy is more than a technical issue to meet states' interest or humanity; policy in itself works to strengthen a certain discourse and weaken the other. Thus, the question is, do the policy made in ASEAN, and individually by Malaysia and Indonesia impose a challenge to the normal system of refugee protection?

Method

This paper uses an approach in policy analysis that is critical to its nature for or against certain ideology. It is imperative as the failure to contest the nature of policy has resulted a certain ideology to be taken for granted, uncontested and under-scrutinised (Shore and Wright, 1997: 24). The critical approach shall find the rhetoric a policy generates and maintains, the social system it reproduces, and how the "policy language" (Apthrope, 1997) works to carry out those practices. Researchers can do this by looking at the process of institutionalisation of discourse (Wright and Reinhold, 2011: 88) so, researchers appreciate how knowledge is produced as hegemony (Feldman, 2011: 241). And finally, this approach will be able to understand the behavior of the ruling power towards the object of policy, such as in inclusion or exclusion, is actually embodied in the discourse of policy (Wodak, 2008: 56).

The method applied in this paper which would enable us to perform those tasks is critical discourse analysis. In critical policy analysis, Dryzek posits that discourse analysis is one of critical analysis methods which focuses on larger system of meaning and works to disclose dominant discourses that has been taken for granted (2008: 194). A Discourse analysis refers to a process of scrutinizing the discourse and juxtaposing it to the reality, with discourse is defined as production of an object definition through "the production, dissemination and reception of set of texts" (Phillips and Hardy, 2002: 3, as cited by Bryman, 2012: 536). In this sense, it is important to acknowledge the "dominant discourse" which may colonize the other dis-

courses. Fairclough summarises from various sources the analytical framework for critical discourse analysis as followings; (1) focus on social problems with semiotic aspect; (2) apply discourse analysis to find what hinder the social problems from being solved, as well as the network of practice and relations of semiosis to other elements of the practice; (3) examine the conformity between existing social order and the problem; (4) identifying contesting discourses from the dominant ones; (5) reflect to the result of the analysis (Fairclough, 2001: 125).

This paper follows this methodological framework by firstly narrowing down the social problem into the protection of Rohingya refugee rights within ASEAN region. Rohingya refugees here work as a case study to represent an overall refugee issue in the region. The dominant discourse then will be examined through the scrutiny of network practice and through discourse analysis. As explained above, it becomes a problem when despite the international refugee law, a huge number of refugees are still denied protection. Precisely, it is the nation-states in this region that through their normal legal status to international law create the situation to this unprotected refugees. The semiotic aspect of the social problem of refugee rights can be found in the text of ASEAN and individual countries leaders' public statement, Circular, Act, or agreement between states. The discourse analysis is applied on a number of texts in the third part of this paper, and so will the identification of the contesting discourse, but prior to that, this paper carries out the stage which network of practice of the dominant discourse in the following part. The concluding part will provide the reflective of the overall research.

Refugee Rights to be protected: A Critical Appraisal on Refugee Convention

The network of practice within which refugee policy worldwide operates is linked by an international refugee law namely the 1951 Convention Relating to the Status of Refugee and operator of the law namely United Nations High Commissioner for Refugees (UNHCR). The worlds are divided by states that ratify the Convention and 'commit' to refugee protection and states that do not and are com-

but UNHCR basically can work in two categories of states as long as permitted by the government. Related to the problems faced by world refugees namely rejection by host-country, or commonly under-protected situation, Article 31 which outlines the rights of people to move across borders to seek protection needs highlight here:

- a. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence (Article 31, Refugee Convention).
- b. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

The Refugee Convention is to certain extent problematic for it mentions right to entry and not to be treated as illegal migrants, but when an asylum seeker is requested to prove their “genuineness” in the first place, this article enables states to impose restrictions on freedom of entry. The language of rights to entry and rights to protection in the article should have been the cornerstone for the hospitality principle in refugee protection because it aims to enable refugees to make entry to other places in the world without their movement being restricted. But the deriving conditions outlined by the very same article has tightened the Convention to the extent that it overly focuses on states’ border concerns and managing the aliens, and less on the responsibility to provide protection.

With the Refugee Convention and its Protocol, the world has maintained for over 60 years a refugee protection regime that while has managed to provide new life for millions of refugees, still fail to do so for other millions. This is evident in the way that a large number of world refugees still live in limbo, detained in immigration detention center or undergone a complicated refugee determination status process. Here, the dominant discourse positions refugee rights under states’ rights to

work their nation-state system.

ASEAN Policy towards the Refugees

This part elaborates the policies of ASEAN and selected ASEAN countries and analyse the discourses manifested in. By understanding the discourse, it is possible to understand the discourse produced by the policy language.

ASEAN

One of the objectives of the establishment of ASEAN is to create an area that uphold respect for human rights, as contained in the ASEAN Charter:

- a. Ensure that the peoples and Member States of ASEAN live in peace with the world as a whole in an environment that is fair, democratic and harmonious
- b. Strengthen democracy, enhance good governance and the rule of law, promote and protect human rights and fundamental freedoms, with due regard to the rights and obligations of the Member States of ASEAN
- c. Improve the well-being and a decent living for the peoples of ASEAN by providing equal access to the opportunities of development of human resources, social welfare, and justice

Related to the efforts of ASEAN to promote human rights, in 2009 an agency was established under the ASEAN that focuses on issues related to human rights; AICHR (ASEAN Inter-Governmental Commission on Human Rights). The establishment of this body also refers to Article 14 of the Charter which states that:

“In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body”.

However, these objectives have been far from success. The real evidence is when the problem of Rohingya refugee crisis who came from Myanmar surfaced, ASEAN did not issue any policy or rule to resolve these issues during 2012-2014. In 2015 when it held the 26th ASEAN Summit, the issues related to solving problems

of Rohingya refugees began to receive attention; although these discussions did not appear in the discussion in the meeting forum. The discussion was first raised by Malaysian Foreign Minister Dato' Sri Anifah Aman. He said in a press conference that, since thousands of Rohingya refugees had been fleeing from Myanmar to Thailand, Malaysia and Indonesia, this crisis could no longer be considered an internal issue for Myanmar alone. Therefore, he argued, ASEAN should address the crisis through engagement (The Jakarta Post, 2015).

With the the response of ASEAN are likely to override the problems of Rohingya refugees as a problem that injured the values of human rights upheld by ASEAN and non-functioning of the AICHR as an institution under the ASEAN assigned to ensure the protection of human rights, another human rights organizations in the ASEAN region, namely APhR (ASEAN Parliamentarians for human Rights) was initiated as the first step in solving problems. The form of initiation is the form of the release two reports about the condition of the Rohingya people and the discrimination they get in Myanmar in April 2015 and October 2015. This report is based on observations by a delegation of Asean Parliamentarians for Human Rights (APHR), which visited Mandalay, Myanmar, in April 2015. It was informed with interviews with civil society representatives and experts in Myanmar, as well as discussions with international experts on Myanmar, asean, and the prevention of atrocities. This first report examines the current situation of human rights in Myanmar and the region. The second report published in October 2015 focused largely on situation faced by the Rohingyas in Myanmar.

Along with the reports, APhR then issued an open letter containing the recommendation to resolve the Rohingya issue addressed to Myanmar and ASEAN. The contents of the open letter, include:

- Recognize the escalating crisis in Rakhine State and the plight of Rohingya as a serious danger to both Myanmar and ASEAN by prioritizing the issue in Summit meetings.
- Call upon the Myanmar government to adhere to regional and international human rights and humanitarian standards, including by rejecting the “Protection of Race

and Religion Bills.”

- Call upon the Myanmar government to address the root causes of the Rohingya crisis by amending the 1982 Citizenship Law to provide Rohingya with equal access to full citizenship in accordance with UN Resolution 69/248, promoting reconciliation initiatives, denouncing hate speech and propaganda, and holding perpetrators of violence, including government officials, accountable.
- Conduct an independent investigation of conditions and risks of increased violence and displacement in Myanmar, as well as associated risks to ASEAN, including greater refugee flows to countries like Malaysia and Thailand.
- Expand the mandate of the ASEAN Intergovernmental Commission on Human Rights (AICHR) to include country visits, inquiries, complaints, and emergency protection mechanisms, and ensure adequate independence and staffing support for its members. Engage AICHR to conduct a follow-up investigation into the Rohingya crisis.
- Commit to protecting those fleeing the crisis in Rakhine State, including by granting prima facie refugee status to Rohingya and providing the UN refugee agency with unfettered access to asylum seekers.
- As individual member states, ratify the 1951 Refugee Convention (ASEAN Parliamentarians for Human Rights, 2015).

Based on that recommendations, it seems that APHR attempted to resolve the problems experienced by ethnic Rohingya from the root of the problem. APHR believes that these problems can only be solved by the changes in the policy of Myanmar itself. This is because according to a report of APHR delegation, the emergence of Rohingya refugees in Myanmar caused by laws that discriminate against minorities, in this case the Rohingya, especially Burma Citizenship Law in 1982. It can be said that the main background of the emergence of these recommendations is that the majority of member countries of ASEAN is not a signatory to the 1951 Convention relating to the Status of Refugees or its 1967 Protocol, so if the recommendations addressed to the ASEAN countries with such background, then the problem of Rohingya refugees will take relatively long time to complete. The

recommendations also indicate that the Rohingya refugees is mainly the responsibility of Myanmar and not the responsibility of ASEAN countries. The commitment to protection is mentioned there at the point of working with UNHCR, but there is also a choice made by the body to build a discourse where refugees are actually not automatically a global responsibility when they seek asylum outside. The language “ratify the 1951 Refugee Convention” is actually a strong language to maintain the dominant discourse order.

In focus: Indonesia and Malaysia

Rohingya refugees group had reached Malaysia since the early 1990s. In the first decade of their presence in Malaysia, this group of refugee was accepted well by the local community where they could access informal labour market and certain extent of health programme and education. The trend changed with the amendment of Immigration Act in 2002 that tightened immigration control against undocumented migrants. This amendment arranged the new punishment for undocumented migrants. In 2010, Malaysian government raised a question amongst international community when the Ministry of Home Affairs planned a government identification card for refugees but cancelled it with a statement from the Home Ministry spokesman that “no law allows us to issue a card to an illegal” (Cheung, 2011: 54-55).

After the break of the 2012 violence, Malaysia and Indonesia did not settle down the problem with a particular protection policy then in the wake of 2015 large forced displacement, Malaysia conducted search and rescue policy and together with Indonesia, committed to temporary shelter for the refugees (South China Morning Post, 2016). The assurance obtained after their joint statement that stated the Minister of Foreign Affairs Retno Marsudi and Malaysian Foreign Minister Datuk Seri Anifah Aman after held a tri-partite negotiations with the Foreign Minister of Thailand General Tanasak Patimapragorn on refugees in Putrajaya, Malaysia, which reads “We agreed to offer temporary shelter as long as the placement process in other countries and the repatriation carried out within one year by the international community” (BBC, 2015). On the agreement to provide temporary shelter in

2015, it was made clear by the Foreign Minister Anifah Aman which said “What we have clearly stated is that we will take in only those people in the high sea, [...] But under no circumstances would we be expected to take each one of them if there is an influx of others” (The Guardian, 2015).

The policy language, starting from the immigration law to the temporary shelter policy reflects the constraint between human rights protection and state’s ‘national interest’. That refugees are “illegal” has been the cornerstone to reject the identification card earlier, endorsing the rhetoric that illegal means non-belonging to community, then no entitlement to rights from the state. The policy language of temporary protection also does not endorse a refugee protection that is not biased with their alien or legal identity when it requires conditions.

Alike Malaysia, Indonesia has long used its immigration law to deal with refugees arriving in Indonesia. As a major transit country of refugees around the world, Indonesia makes use of its detention center, community housing and other kinds of temporary shelters for refugees that are going through status determination with UNHCR. Indonesia do not allow placement of refugees in its territory, but temporary stay is allowed under above situation. In dealing with Rohingya crisis, as mentioned above Indonesia has allowed temporary shelter, together with Malaysia. Indonesian vice-president Jusuf Kalla further highlighted the prerequisite for this commitment “A year is (the) maximum [...] but there should be International cooperation” (CBC, 2015). Dewi Fortuna Anwar, a political adviser to Indonesia’s vice-president on the other hand emphasized on Myanmar’s responsibility, “If migrants start thinking of Indonesia as a transit point or as having a higher chance of getting resettled, that would create another problem that we have to prevent [...] We have a big desire to help but this is not just Indonesia’s responsibility. This is mainly the responsibility of the Burmese government, which should be protecting all its citizens and not forcing some of them to flee.” (CBC, 2015).

In such cases it is assumed in the policy that the placement and protection of refugees is not responsibility of a state that has not signed the 1951 Convention.

“A year is the maximum”, “higher chance of getting resettled would create another problem” is a representation of limits in human rights in the face of nation-states. While it is true that root of problem at home should be solved, but when refugees flee their country, there should be certainty that they will be able to live like other human beings. In this case, refugee rights needs to be positioned above the nation-state for when they are forcibly pushed, they are the responsibility of the world. The policy language does not initiate a challenge to the view that refugees’ rights are not above nation-states, it solely reaffirms the alien status and non-conformity of their status with a fully-entitled rights.

In this sense, the problem can be made clear if we look into a philosophical work of refugees rights, one of it in the work of Hannah Arendt and her notion of ‘the rights to have rights’, where she contends “... the right to have rights or the right of every individual to belong to humanity should be guaranteed by humanity itself. It is by no means certain whether this is possible”. Benhabib’s account on Arendt is helpful here where she argues that Arendt is skeptical with the idea of the world government for its capability to uphold democracy, and she also believes nation-state system will achieve justice and equality for it is exclusionary and aggressive in nature (Benhabib, 2004: 61). The international refugee law should represent the world government that has not been democratic enough as to grasp fully with the problems of the refugees, and the nation-state system, as represented in the ASEAN case above, has invoked the dominant discourse that puts refugee rights as the rights of states to determine whether or not to entitle their rights.

Conclusion

The discussion above has provided a way to understand policy more than tool or practical mechanism to regulate social relations. Here, policy is understood as a driver for discourse. For refugees are denied from human rights by their own community, it is the global responsibility to ensure they still can meet their human rights elsewhere. But the place to which this human rights should be provided has been limited by the practice of national law, i.e. immigration law, the disobedience to international law and the lack of initiatives to go beyond the normal order.

This means that the dominant discourse that protection issue is a matter of states' rights have been reinforced through the practice and policy language, including by ASEAN and the individual countries. This can be an attention to the civil society in the region which through their politics, can constitute challenge to the dominant discourse. This may be come in form of pressure on the government or daily activities that creates the image of refugees not as alien but as part of society that needs to be assisted despite their legal status.

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