

RESEARCH ARTICLE

## The Constitutional Right to Asylum and Humanitarianism in Indonesian Law: “Foreign Refugees” and PR 125/2016

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### Abstract

Article 28G(2) in Indonesia’s 1945 Constitution reflects a human rights approach to asylum; it guarantees “the right to obtain political asylum from another country,” together with freedom from torture. It imposes an obligation upon the state to give access to basic rights to those to whom it offers asylum, following an appropriate determination procedure. By contrast, in Presidential Regulation No. 125 of 2016 concerning the Treatment of Refugees, the Indonesian government’s response to asylum seekers and refugees is conceptualized as “humanitarian assistance,” and through a politicized and securitized immigration-control approach. We argue that the competition between these three approaches—the human right to asylum, humanitarianism, and immigration control—constitutes a “triangulation” of asylum and refugee protection in Indonesia, in which the latter two prevail. In light of this framework, this article provides a socio-political and legal analysis of why Article 28G(2) has not been widely accepted as the basis of asylum and refugee protection in Indonesia.

**Keywords:** constitutional right to asylum; humanitarianism; immigration control; Presidential Regulation No. 125 of 2016; Indonesia

### I. Introduction

The Constitution of a state, especially a formal or written Constitution, embodies a set of legal norms that are supreme in the national legal system, echoing the country’s specific history and values.<sup>1</sup> In terms of asylum-seeker and refugee protection in Indonesia, Article 28G(2) of the 1945 Constitution guarantees the right to asylum together with freedom from torture. It reads: “Every person shall have the right to be free from torture or inhumane and degrading treatment and shall have *the right to obtain political asylum from another country*” (emphasis added).

The enactment of Article 28G(2) is inseparable from the effort to strengthen human rights protection after the *reformasi* (reform period) began in 1998. *Reformasi* included a move towards democratization and human rights reform through constitutional amendment.<sup>2</sup> Prior to *reformasi*, the Soeharto government was widely regarded as an

<sup>1</sup> Lerner (2011), pp. 16, 18.

<sup>2</sup> The legal and constitutional background to the amendment is described in full in the Introduction to this Special Issue. See also Hosen (2014), pp. 322–4; Tan (2016), pp. 368–9.

authoritarian regime.<sup>3</sup> According to Feith, the Soeharto regime embodied a repressive-developmental approach.<sup>4</sup> Its culture of corruption and lack of democratic and human rights were seen as a barrier to the development agenda.<sup>5</sup> In 1998, the government's failure to deal with the Asian financial crisis, combined with deep frustration against undemocratic rule, provided the right momentum for a popular movement to force the resignation of Soeharto.<sup>6</sup> After toppling the authoritarian regime, the reform movement demanded constitutional amendments with a greater commitment to human rights.

The fact that the right to asylum is enshrined in the 1945 Constitution as the highest norm in the Indonesian legal system<sup>7</sup> is a significant indication of its status as a constitutional right, which imposes legal obligations on the state. We argue that this legal norm reflects a human rights-based approach to refugee protection, which is consistently overlooked in favour of the "humanitarian"<sup>8</sup> and "immigration-control" approaches. These three competing approaches—rights-based, humanitarian, and immigration—reflect the "triangulated" approach to asylum in Indonesia. Each of these approaches is based on different underlying values and has distinct salient features. The extent to which this "triangulated" approach influences Indonesian policy on asylum and refugees can be seen in the latest refugee regulation: the Presidential Regulation No. 125 of 2016 concerning the Treatment of Refugees (the "PR"). A careful reading of the PR reveals that the Indonesian approach to asylum is mainly based on "humanitarianism" and "immigration control." We argue that the domination of these two approaches, therefore, has weakened the normative value of the constitutional right to asylum.

It is important to clarify the difference between the "rights-based," "humanitarian," and "immigration-control" approaches. As we elaborate on in this article, Article 28G(2) of the 1945 Constitution requires a "rights-based" interpretation to its protection obligations. It is "rights-based" in the sense that, as a constitutional norm, it is a legally binding obligation on the state to interpret its laws to respect the right to asylum.<sup>9</sup> Further, we argue that international human rights law requires that asylum seekers in Indonesia be given access to basic rights.<sup>10</sup>

In contrast, the Indonesian government's approach to allowing asylum seekers and refugees to enter and reside in the territory is conceptualized by the state and Indonesian scholars as merely "humanitarian assistance," reflecting a "humanitarian" response or "humanitarianism" towards refugee protection.<sup>11</sup> Under this approach, protection is given as an exercise of the state's discretion as opposed to the fulfilment of legal obligations.<sup>12</sup> For example, although the *non-refoulement* principle legally binds Indonesia as an obligation under international law,<sup>13</sup> many Indonesian scholars argue that Indonesia's adherence

<sup>3</sup> Horowitz (2013), p. 1; Chen (2010), pp. 860–7.

<sup>4</sup> Feith (1982), pp. 491–506.

<sup>5</sup> *Ibid.*

<sup>6</sup> Chen, *supra* note 3, p. 865.

<sup>7</sup> See Suyatna et al. in this Special Issue, in particular Table 2, which sets out the hierarchy of law in Indonesia.

<sup>8</sup> The terms "humanitarian," "humanitarianism," and "humanitarian assistance" will be used interchangeably throughout this article.

<sup>9</sup> Gil-Bazo (2015), p. 28.

<sup>10</sup> Edwards (2005), p. 294.

<sup>11</sup> See the discussion of this concept in the Introduction to this Special Issue.

<sup>12</sup> Kneebone (2010), pp. 216–7; Carroll, Goldwyn, & Lagu (2009), p. 8.

<sup>13</sup> See Tobing in this Special Issue, who argues that *non-refoulement* is legally binding in Indonesia, since it is embedded in several ratified international human rights law instruments, including: the 1987 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the 1990 Convention on the Rights of the Child (CRC), and the 1976 International Covenant on Civil and Political Rights (ICCPR). This principle is also binding on Indonesia under customary international law. See on this point Weissbrodt & Horttreiter (1999), p. 3; Dewansyah & Handayani (2018), p. 482.

to it is an expression of humanitarianism.<sup>14</sup> Similarly, despite the clear foundation of the right to asylum in the Constitution and in the national legislation,<sup>15</sup> it is argued that the government's "humanitarian" approach is enshrined in key pieces of legislation and policy.<sup>16</sup> We argue that the PR adopts a predominantly "humanitarian-assistance" approach because it implements Law No. 37 of 1999 on Foreign Relations, which refers to foreign refugees or "*pengungsi dari luar negeri*."<sup>17</sup> Moreover, some commentators argue that a commitment to humanitarianism is justified by reference to Indonesia's national values, the *Pancasila* (the Sanskrit word for "five principles"), especially the second principle of a "just and civilised humanity," which we will further discuss.

The last approach under the triangulation framework is "immigration control"—the strict application of which competes with the other two approaches. In the context of refugee policy, the "immigration-control" approach tends to treat asylum seekers and refugees as illegal or irregular immigrants. In fact, the Immigration Law No. 6 of 2011 does not recognize the classification of migrants as asylum seekers and refugees, which means that migrants eligible for protection under these statuses are left vulnerable. As we explain, the PR has done little to address this issue, and instead facilitates a stringent immigration-control approach.<sup>18</sup>

Taking into account the above triangulation approach to asylum in Indonesia, the aims of this article are threefold: (1) to explain the basis and scope of the constitutional human right to asylum; (2) to explain why, in our view, Indonesian policy-makers rely heavily on the humanitarian and immigration-control approaches; and (3) to explain how the PR adopts the humanitarian and immigration-control approaches over a rights-based approach. To fulfil these aims, Section 2 of this article provides an overview of the right to seek and enjoy asylum in international law and the significance of constitutional rights to asylum. Section 3 then analyses Indonesia's approach towards refugee law by briefly explaining the historical developments in asylum- and refugee-related law and policy in Indonesia. Section 4 describes the debate in the drafting of Article 28G(2) of the 1945 Constitution and suggests a failure on the part of legislators and policy-makers to understand the scope and content of the constitutional right to asylum. Section 5 analyses the humanitarian and immigration-control approach of the PR. Finally, in Section 6, we conclude that there are multiple reasons as to why the constitutional right to asylum has not been upheld, which include a lack of political will and understanding of its significance, coupled with the perception that humanitarian values are embedded in Indonesian law and restrictive immigration policies. The combination of these factors has shaped Indonesian refugee law and policy, including the PR. Thus, we conclude that, despite the presence of the constitutional right to asylum, the PR has not shifted the tradition of a humanitarian approach to asylum in Indonesia and fails to clarify the role of immigration law in handling refugees. The consequence of this has been an undermining of the importance of the constitutional rights-based approach to asylum.

<sup>14</sup> Syahrin argues that the implementation of the *non-refoulement* principle is effected by selective policy principles in the Indonesian Immigration Law, whilst Malahayati et al. categorize the Indonesian government's approach towards implementation of international-law principles as an "absolute sovereignty approach," Syahrin (2017), pp. 175–6; Malahayati et al. (2017), p. 77.

<sup>15</sup> See the Foreword and Introduction to this Special Issue.

<sup>16</sup> These include Law No. 37 (1999) on Foreign Relations, Immigration Law No. 6 (2011), and some circular letters and regulation from the Directorate General of Immigration. See the Foreword and Introduction to this Special Issue for a full account of the legal background.

<sup>17</sup> Dewansyah, Dramanda, & Mulyana (2017), p. 352; Missbach et al. (2018), p. 3. This terminology makes a distinction between the general term "refugee" (*pengungsi*), which, in Indonesian, refers to both internally displaced persons or displaced persons from other country. See DPR-RI (1999), pp. 51–2.

<sup>18</sup> See Sadjad in this Special Issue.

## 2. The right to asylum in international law: the significance of the constitutional right to asylum in Indonesia

### 2.1 The right to asylum in international law

The institution of asylum pre-dates both the Universal Declaration of Human Rights (UDHR) and the Refugee Convention, being historically rooted as a religious command in all three monotheistic religions: Judaism, Christianity, and Islam. Gil-Bazo argues that it is a norm of “human conduct” regulating individuals and society.<sup>19</sup> In this sense, asylum has a normative character beyond being a human right and can be characterized as a norm derived from a moral code—including various religious teachings.<sup>20</sup> A significant number of countries explicitly recognize asylum in their national Constitutions.<sup>21</sup> Gil-Bazo argues that, because of its continuous historical existence across civilizations over time and its transformation as a constitutional norm worldwide, the institution of asylum can be understood as a general principle or norm in international law that is legally binding and imposes obligations on the state towards foreign individuals seeking protection.<sup>22</sup>

In international law, the right to asylum was first articulated in Article 14 of the UDHR, which guarantees “the right to *seek and enjoy* asylum” (emphasis added). However, scholars agree that this provision does not contain the right of an individual to be granted asylum.<sup>23</sup> Thus, it is interpreted as having only two aspects: (1) an individual right to seek asylum; and (2) the sovereign right of the state to grant asylum.<sup>24</sup> Although the original draft of Article 14 of the UDHR contained “the right . . . to be granted asylum,” this formulation was rejected and replaced by the phrase “to enjoy asylum,” because the former formulation limited state sovereignty to control admission to the territory.<sup>25</sup> The phrase “right . . . to enjoy asylum” reflects the desire of the drafters not to impose state obligations to grant asylum, as this was perceived as the right of the state.<sup>26</sup>

Even though the individual right to be granted asylum was proposed in the making of the International Covenant on Civil and Political Rights (ICCPR), this proposal was rejected by the majority of states, leaving the authority to grant asylum as a right of the state.<sup>27</sup> However, an individual right to be granted asylum is recognized in some international instruments with regional scope, such as the European Charter on Fundamental Rights or the American Convention on Human Rights, inspired by constitutional traditions of asylum in countries in the region.<sup>28</sup> Indeed, this aspect of the constitutional right to asylum is stressed by scholars such as Gil-Bazo and Lambert, and Messineo and Tiedemann.<sup>29</sup>

The 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention), which arose from the need to resolve the refugee crisis in Europe after World War II, does not explicitly include the right to asylum. Although, in the initial proposal, the draft Convention included an individual right to asylum, this was rejected in favour of a definition of refugee status, which emphasized the state’s obligation to grant protection as long as the criteria for persecution were met.<sup>30</sup> However, the Refugee Convention contains the

<sup>19</sup> Gil-Bazo, *supra* note 9, pp. 7, 17–8.

<sup>20</sup> Brennan et al. (2013), p. 4.

<sup>21</sup> See Kowalczyk & Versteeg (2017), p. 1124; Gil-Bazo & Nogueira (2013), pp. 9–10.

<sup>22</sup> Gil-Bazo, *supra* note 9, p. 28.

<sup>23</sup> See e.g. McAdam (2008), p. 4; Boed (1994), p. 9.

<sup>24</sup> Boed, *supra* note 23, pp. 3–9.

<sup>25</sup> McAdam, *supra* note 23, p. 4.

<sup>26</sup> Boed, *supra* note 23, p. 10.

<sup>27</sup> *Ibid.*, pp. 9–11.

<sup>28</sup> Gil-Bazo, *supra* note 9, p. 50; Gil-Bazo & Nogueira, *supra* note 21, p. 4.

<sup>29</sup> Gil-Bazo, *supra* note 9, p. 28; Lambert, Messineo, & Tiedemann (2008), p. 32.

<sup>30</sup> Boed, *supra* note 23, p. 11.

right of *non-refoulement* as stipulated in Article 33, which underpins the right to asylum. The purpose of the Convention is to require states to grant protection to individuals who meet the definition of a refugee, as well as setting out the rights of asylum seekers and refugees. Under the “declaratory” theory,<sup>31</sup> certain rights also apply to asylum seekers who have not been formally determined to be refugees, including (in addition to the right of *non-refoulement*) the right to nondiscrimination (Article 3), religious freedom (Article 4), non-penalization by reason of illegal entry (Article 31), and rights of access to the courts (Article 16). As we argue below, the right “to enjoy” asylum also envisages conferment of certain human rights.

## **2.2 The scope and content of the constitutional right to asylum: implications for Indonesia**

As a member of the UN since 1950, Indonesia is a party to the UDHR. The right to asylum in Article 28G(2) of the 1945 Constitution substantially adopted the language used in the UDHR.<sup>32</sup> Article 28G(2) states that the right of the individual is to “obtain political asylum from another country,” which arguably refers to the sovereign right of Indonesia to grant asylum to non-nationals. This interpretation is based on the premise that every state has the right to grant asylum in their territory and, consequently, it mirrors a duty to respect other states in granting asylum (and not to consider this as an unfriendly act).<sup>33</sup> Although the first aspect of the UDHR right (the individual right to “seek asylum” element) is absent in Article 28G(2), we argue that this is not significant, as it is implicit in the right to “obtain” asylum and in the right of an individual to leave his or her own country, to seek protection in another country.<sup>34</sup> The right to freedom of movement is also stipulated in the 1945 Constitution.<sup>35</sup> As we elaborate in the following section, the drafting background of Article 28G(2) also took into account the freedom of Indonesian citizens to seek asylum in other countries.

Gil-Bazo acknowledges that the English and common-law authorities agree that there is no right in international law to be granted asylum<sup>36</sup> but points out that, in some jurisdictions, such a right can be inferred from the terms of the constitutional right and other domestic legislation.<sup>37</sup> This conclusion is based on the wording of constitutional asylum clauses in several state Constitutions, such as in the Constitutions of France, Cuba, Nicaragua, Angola, Cape Verde, Portugal, and Guinea-Conakry. The relevant phrasing in those Constitutions is along the lines of “[the name of state] shall grant asylum to the foreigners . . .” or “foreigners . . . have a right to asylum” or “the right to asylum is guaranteed/shall be granted to everyone who . . .”<sup>38</sup> Many formulations of constitutional asylum reflect an individual right to be granted asylum, thus limiting state discretion in exercising its sovereign right.

Other formulations of constitutional asylum confer only the right of a state to grant or refuse an asylum request, thus stressing that the state’s sovereign right to grant asylum is

<sup>31</sup> The UNHCR recognizes a person to be a “refugee” prior to the time at which their refugee status is formally determined: UNHCR (1979), para. 28; Edwards, *supra* note 10, p. 304.

<sup>32</sup> Indrayana (2005), p. 163.

<sup>33</sup> McAdam, *supra* note 23, p. 5.

<sup>34</sup> UDHR, Art. 13(2); ICCPR, Art. 12 (2); Kowalczyk & Versteeg, *supra* note 21, p. 1240. The right to leave can also be linked to the aim of avoiding torture and other persecution guaranteed in Arts 12 and 7 of the ICCPR to which Indonesia has been a party since 2006.

<sup>35</sup> Art. 28E(1) of the Second Amendment of the 1945 Constitution.

<sup>36</sup> Gil-Bazo, *supra* note 9, p. 13. However, she leaves open the possibility of its existence through an examination of other legal traditions; *ibid.*, pp. 14–7.

<sup>37</sup> *Ibid.*, pp. 23–7.

<sup>38</sup> *Ibid.*, pp. 23–5.

discretionary.<sup>39</sup> Indonesia's Constitution, as mentioned above, possibly contains such an example in the words "to obtain . . . asylum" in Article 28G(2). Other countries state this discretion explicitly, such as in the Constitution of China (1982, Article 32), Egypt (2014 Amendment, Article 91), and Somalia (Article 23, para. 2).<sup>40</sup> In this contested area of law, it is difficult to conclude that, in international law, a principle has developed that constitutional rights to asylum must be actioned. However, it is undisputed that the authority of the constitutional norm must be respected.

In this article, we stress the fact that the Indonesian constitutional right to asylum is included in the human rights Chapter XA of the Constitution, which is largely modelled on the UDHR. As we hinted earlier, a sovereign right of the state under the UDHR to grant asylum implies the right to *enjoy* asylum. As Edwards argues:

In contrast to the right to seek asylum, the right to enjoy asylum suggests at a minimum a right "to benefit from" asylum. While a State is not obligated to grant asylum, an individual, once admitted to the territory, is entitled "to enjoy" it.<sup>41</sup>

Thus, the consequence of a sovereign right to asylum is to give refugees access to basic rights upon admission. The specific content of the right to asylum is far from settled.<sup>42</sup> Yet, in principle, states should exercise their obligations in good faith<sup>43</sup> by taking into consideration a minimum set of rights a person must enjoy so that they can live with dignity. Further, in the context of socioeconomic rights, the capacity of the state should also be considered.<sup>44</sup>

In the Indonesian context, we focus on its human rights dimension of the right to asylum—both to counter *refoulement*—and as containing the minimum content of the human right "to enjoy" asylum as argued by Edwards. It is uncontroversial in the refugee rights discourse that having an appropriate determination procedure is essential to ensure the right to *non-refoulement* and thus to seek asylum.<sup>45</sup>

### 2.3 Basis for asylum

At the national level, asylum was first instituted as a constitutional norm after the French Revolution in the 1793 French Constitution.<sup>46</sup> Gil-Bazo argues that some countries that adopted constitutional asylum provisions reflected the liberal-democratic tradition of the French Revolution.<sup>47</sup> However, if we look more broadly, we see the principle of asylum also adopted by countries in the Global South that reflect socialist traditions, such as Cuba, Algeria, Albania, Bulgaria, and Vietnam, as well as Islamic countries, such as Saudi Arabia and Iraq.<sup>48</sup> Kowalczyk and Versteeg emphasize that this reflects the tendency of the constitutional right to asylum to promote particular political ideologies.<sup>49</sup> In addition,

<sup>39</sup> Kowalczyk & Versteeg, *supra* note 21, p. 1260 (more specifically, see footnote 202).

<sup>40</sup> These examples generally use the following phrase: "the state *may grant* asylum" (emphasis added).

<sup>41</sup> Edwards, *supra* note 10, p. 302.

<sup>42</sup> *Ibid.*; e.g. Edwards refers in particular to the rights to family unity and to work.

<sup>43</sup> *Ibid.*

<sup>44</sup> ICESCR Art. 2(3).

<sup>45</sup> Gil-Bazo, *supra* note 9, p. 13. Note: Edwards argues that this obligation arises from the 1951 Refugee Convention; Edwards, *supra* note 10, pp. 301–2. Indonesia is not a party to the Refugee Convention but is bound by the *non-refoulement* obligation, as explained by Tobing in this Special Issue.

<sup>46</sup> Lambert, Messineo, & Tiedemann, *supra* note 29, p. 17. This preamble was also readopted in the 1958 French Constitution that is currently in force.

<sup>47</sup> Gil-Bazo, *supra* note 9, p. 24.

<sup>48</sup> Kowalczyk & Versteeg, *supra* note 21, pp. 1268, 1270.

<sup>49</sup> *Ibid.*, p. 1258.

Gil-Bazo identifies 14 Latin American and 11 African countries that grant the constitutional right to asylum for political reasons. Interestingly, many countries, such as Indonesia, Bulgaria, the Slovak Republic, Slovenia, and Tajikistan, incorporate the right to asylum as a human rights protection.<sup>50</sup> However, as Meili has shown, many such constitutional provisions additionally conceive the right to asylum as based on political rights and freedom.<sup>51</sup> For example, in Timor-Leste (whose history of refugees is tied to that of Indonesia),<sup>52</sup> the constitutional right is focused on “solidarity” and reads: “The Democratic Republic of East Timor shall grant political asylum, in accordance with the law, to foreigners persecuted as a result of their struggle for national and social liberation, defense of human rights, democracy and peace.”<sup>53</sup> Thus, as Matthew Price has suggested that, in its historical development, asylum has always been a political concept.<sup>54</sup>

As Kowalczyk and Versteeg observe, while some countries emphasize the right to asylum in the Constitution as an ideological tool, others have enacted asylum provisions that reflect the human rights dimension of asylum or a combination of the two.<sup>55</sup> This is manifested in Article 28G(2) of the 1945 Constitution, which refers to the denial of human rights (i.e. freedom from torture) in one’s home country as a basis to seek political asylum.<sup>56</sup> The recognition of the right to be free from “torture or inhumane and degrading treatment” in the Constitution is in line with the international obligations of Indonesia under Convention Against Torture (CAT), which Indonesia ratified in 1998, prior to the constitutional amendment that inserted Article 28G(2). The structure of Article 28G(2) shows that the Constitution clearly reflects the norm of *non-refoulement*. The Indonesian constitutional right to asylum can be interpreted as an obligation on the state not to deport or *refoule* individuals to a country where their rights will be violated or they will be tortured.<sup>57</sup> However, as we illustrate below, Article 28G(2) was introduced for particular political reasons.

#### 2.4 The significance of Pancasila

Although some early examples of constitutional rights to asylum may have been based on the tradition of liberal democracies, other constitutional rights to asylum reflect a diversity of socio-political traditions and religious values.

In Indonesia’s context, *Pancasila*—the state philosophy or national ideology<sup>58</sup>—may influence the values underpinning the constitutional right to asylum. *Pancasila* has consistently influenced the adoption of human rights provisions both in the early constitution-making (1945)<sup>59</sup> and after *reformasi* (2002).<sup>60</sup> But, the degree to which *Pancasila* has a direct influence on the recognition of the constitutional right to asylum

<sup>50</sup> *Ibid.*, p. 1270.

<sup>51</sup> Meili (2018), p. 402.

<sup>52</sup> See Damaledo in this Special Issue. Note that, unlike Indonesia, Timor-Leste has enacted legislation to implement asylum procedures and continues to receive a small number of refugees post the termination of the UNHCR’s presence in 2012: UNHCR (2015).

<sup>53</sup> The Constitution of the Democratic Republic of Timor-Leste (2002), Art. 10, para. 2. Timor-Leste acceded to the 1951 Refugee Convention in 2003 and has enacted implementing legislation.

<sup>54</sup> Price (2009), p. 25.

<sup>55</sup> Kowalczyk & Versteeg, *supra* note 21, p. 1273.

<sup>56</sup> Meili, *supra* note 51, p. 393.

<sup>57</sup> This is discussed in greater detail in Tobing’s article in this Special Issue.

<sup>58</sup> Regarding the nature of *Pancasila* as “the state philosophy,” see Prawiranegara (1984), p. 75; and, as national ideology, see Iskandar (2016), pp. 725–7.

<sup>59</sup> Latif (2011), pp. 178–201.

<sup>60</sup> See Indonesian Constitutional Court (2010), pp. 213–357.

is unclear.<sup>61</sup> In particular, the second of the five principles is relevant, namely “a just and civilised humanity.”<sup>62</sup> However, it is also important to consider whether religious values are relevant as per the first principle: “belief in the one and only God.”

There is no clear evidence that the religious values in *Pancasila* have been used to strengthen the normative character of constitutional asylum in Indonesia. The first principle was intended to cover all religions in Indonesia.<sup>63</sup> Even though the majority of the population in Indonesia are Muslim, there is an emphasis on religious pluralism.<sup>64</sup>

The second principle of *Pancasila* has been identified by scholars as a possible basis to protect asylum rights under Article 28G(2). For example, Gordyn suggests that the second principle, “a just and civilised humanity,”<sup>65</sup> has often been used by the government to justify a humanitarian approach to asylum, considering that this principle reflects “humanitarianism,” which derives from philanthropic practices, rooted in the traditions of Indonesian society, such as *Gotong Royong* (mutual assistance).<sup>66</sup> Latif, on the other hand, considers the second principle to refer to human rights protection and concludes that this principle refers to “basic human values which translate into human rights, a decent standard of living for a human beings, and a just democratic government.”<sup>67</sup> We argue that these different views about *Pancasila* may either undermine or support the constitutional right to asylum as a legal right. We note that *Pancasila* suffers from its own limitations; due to its ambiguity, it may be broadly interpreted for political purposes to subordinate human rights to pragmatic interests or to legitimize human rights violation.<sup>68</sup> It is thus an unclear guide on the nature of the right to asylum in Indonesia’s Constitution.

## 2.5 The utilization of the constitutional right to asylum

Another aspect of constitutional rights to asylum is that the different wordings of the right and diverse legal contexts have resulted in divergent interpretations of its scope in practice. For example, Meili’s observations of constitutional asylum provisions in EU countries show that some Constitutions reflect asylum criteria that are broader than the grounds in the 1951 Refugee Convention to which these countries are party. By contrast, certain Constitutions include criteria that mirror the Refugee Convention grounds (such as in Hungary and Spain, as specified in their domestic law) or are even narrower than the Refugee Convention, as in Czech Republic, Germany, and the Slovak Republic, where the ground of constitutional asylum is limited to “political opinion.”<sup>69</sup> In some Constitutions, the right to asylum exists independently apart from other laws that specify refugee rights. In France, for example, the constitutional right to asylum may be used as the basis for a claim for an asylum application to be heard.<sup>70</sup> By contrast, the Constitutions

<sup>61</sup> Based on our reading of the debate in the drafting process, there was no specific discussion on the relationship between *Pancasila* and the right to asylum; see *ibid.*, pp. 327–38.

<sup>62</sup> See the Introduction to this Special Issue. The five principles are: (1) belief in the one and only God; (2) a just and civilized humanity; (3) the unity of Indonesia; (4) democracy guided by wisdom in the consultations of the people’s representatives; and (5) social justice for all of the people of Indonesia.

<sup>63</sup> Suryadinata (2018), p. 46.

<sup>64</sup> Intan (2019), p. 242.

<sup>65</sup> The final version of *Pancasila* included in the Preamble of the 1945 Constitution adopted on 18 August 1945 was formulated by Committee Nine of BPUPKI (Body to Investigate Efforts for Preparing [Indonesian] Independence) on 22 June 1945. Previously, *Pancasila* was contained in some documents with different wording and order, but it has the same essence, and, for the first time, it appeared in Soekarno’s speech on 1 June 1945 at the BPUPKI meeting. See Prawiranegara, *supra* note 58, pp. 77–8.

<sup>66</sup> Gordyn (2018), p. 338.

<sup>67</sup> Latif, *supra* note 59, p. 243.

<sup>68</sup> Iskandar, *supra* note 58, pp. 733–2; Mutaqin (2016), p. 184.

<sup>69</sup> Meili, *supra* note 51, p. 399.

<sup>70</sup> *Ibid.*, pp. 406–8.



in other jurisdictions require implementing legislation, which Meili calls “escape clauses” to the constitutional right to asylum.

In some states in which the 1951 Refugee Convention and constitutional asylum co-exist, these two instruments play complementary roles to protect refugees. For instance, constitutional asylum in some European states is, to some extent, less important, as their legal framework includes the Refugee Convention as well as regional/EU laws.<sup>71</sup> In other regions, constitutional asylum plays a significant role in strengthening refugee protection beyond the scope of the Refugee Convention. This is evident in Ecuador’s experience, for example, where the constitutional right to asylum has been successfully used in “cause-lawyering” litigation before the Constitutional Court to challenge a presidential decree restricting asylum applications through time limitations that restricted access to asylum that are inconsistent with Ecuador’s obligations under the Refugee Convention.<sup>72</sup>

Meili suggests that the effective use of a constitutional right to asylum by lawyers and advocates is contingent on several legal and socio-political aspects,<sup>73</sup> including an independent judiciary, public attitudes towards refugees, a strategic role for civil society and advocates to defend rights, and the state’s commitment and reputation for hosting refugees.<sup>74</sup> In the Indonesian context, taking into account these factors, there are multiple reasons as to why, despite its human rights language, the constitutional right to asylum in Indonesia has not been utilized by advocates. As Meili writes, to revitalize constitutional asylum, a change in mindset “has less to do with human rights or moral authority than it does with the hard reality of domestic politics.”<sup>75</sup>

Further, when a state is a non-party to the Refugee Convention, constitutional asylum potentially represents a primary piece of infrastructure for rights protection. In the broader Southeast Asia region, Indonesia is not the only non-party to the Refugee Convention country with a constitutional right to asylum. For example, socialist Vietnam’s Constitution also recognizes this right.<sup>76</sup> In Indonesia, the normative value of the right has not been translated successfully into policies and procedures through the available laws.<sup>77</sup> Despite the fact that civil society in Indonesia is increasingly concerned with refugee rights, the socio-political environment may not be sufficiently conducive for the advocacy of such rights.

### 3. Indonesia and its history of dealing with asylum seekers

As explained in the Introduction to this Special Issue, the Prime Minister Circular Letter No.11/R.I./1956 on Political Fugitive Protection was the first administrative regulation on protection for asylum seekers after Indonesian independence in 1945.<sup>78</sup> This instrument

<sup>71</sup> Lambert, Messineo, & Tiedemann, *supra* note 29, p. 17.

<sup>72</sup> Meili, *supra* note 51, pp. 393–7.

<sup>73</sup> These factors were derived from Meili’s observations on the circumstances in which a constitutional asylum can be effectively used in Ecuador.

<sup>74</sup> Meili, *supra* note 51, p. 396.

<sup>75</sup> *Ibid.*, p. 418.

<sup>76</sup> Art. 49 of the Constitution of the Socialist Republic of Vietnam (1992, amended in 2013) states: “The Socialist Republic of Vietnam shall consider granting asylum to foreigners who are at risk because of their struggle for freedom, national independence, socialism, democracy and peace or scientific work.” In recent years, Vietnam has co-operated closely with the UNHCR to receive many thousands of Vietnamese ethnic refugees from Cambodia, as well as to resettle Montagnard refugees. See also text to *supra* note 53 regarding Timor-Leste.

<sup>77</sup> See the Foreword and Introduction to this Special Issue.

<sup>78</sup> Reza (2013), p. 123; Soeprapto (2004), p. 58.

perceived asylum as an individual right for political fugitives.<sup>79</sup> The circular related this right to the guarantee of several fundamental freedoms as stipulated in the 1950 Temporary Constitution and in the UDHR<sup>80</sup> such as freedom of religion, of expression, and to assembly,<sup>81</sup> as well as the right to seek and enjoy asylum.<sup>82</sup> This development illustrates that, although the right to asylum at that time was not explicitly included in the Constitution, the Indonesian government considered this right to be inseparable from other nationally and internationally recognized human rights.

The 1956 circular was established after the 1955 Asia Africa Conference in Bandung.<sup>83</sup> Reza argues that this circular was designed to protect freedom fighters from several countries, such as Lakhdar Brahimi, Algeria's ex-minister of foreign affairs and senior diplomat of the UN and the head of the mission of the *Front de Liberation Nationale* (FLN) office in Jakarta between 1956 and 1961.<sup>84</sup> This also correlates with Indonesia's involvement in the Asian African Legal Consultative Organisation (AALCO)—an organization formed as a result of the 1955 Bandung Conference. In 1966, the organization adopted the Principles Concerning Treatment of Refugees (Bangkok Principles), which deals with asylum in Article II, paragraph 3, which states: "The grant of asylum to refugees is a humanitarian, peaceful and non-political act."<sup>85</sup> Indonesia reaffirmed its commitment to the Bangkok Principles in 2001; although this instrument is categorized as an "advisory document" and is therefore non-binding, it is an indication of how principles should be interpreted.<sup>86</sup>

In practice, Indonesia's substantial engagement with the issue of refugees began with the Indochinese refugee crisis in 1975.<sup>87</sup> Under the Comprehensive Plan of Action (CPA), Indonesia provided temporary asylum for about 122,000 to 145,000 Indochinese refugees housed in the Galang Island Refugee Camp from 1979.<sup>88</sup> After the camp was closed in 1996, in the late 1990s and early 2000s, Indonesia began to receive a new surge of asylum seekers with a different character because of the crisis in the Middle East.<sup>89</sup> In contrast to the Indochinese refugees, these asylum seekers (mostly from Afghanistan, Iran, and Iraq) were not initially significant in number: between 1996 and 2004, only 2,850 asylum seekers with the intended destination being Australia were registered with the United Nations High Commissioner for Refugees (UNHCR).<sup>90</sup> Consistently with the government's approach under the CPA, the government again adopted a passive stance, with asylum seekers directly handled by the UNHCR in applying for refugee status. Interestingly, this movement coincided with the introduction of human rights legislation, including the constitutional asylum provision in 2000. At this time, Indonesia ratified some key international human rights instruments related to asylum, including CAT in 1998.<sup>91</sup> This time, the government responded to the issue of refugees with a more institutionalized framework under the Regional Cooperation Arrangement (RCA) with the Australian government—that also

<sup>79</sup> Art. 1 of the Prime Minister Circular No. 11/R.I./1956 states: "political fugitives who enter or find themselves in the Indonesian territory will be granted protection on the basis of human rights and fundamental freedoms in accordance with international customary law."

<sup>80</sup> See the Introduction to this Special Issue.

<sup>81</sup> See Explanatory Notes of Prime Minister Circular No.11/R.I./1956, Para. IV.

<sup>82</sup> *Ibid.*, Para. V.

<sup>83</sup> See the Introduction to this Special Issue.

<sup>84</sup> Reza, *supra* note 78, p. 123.

<sup>85</sup> This is consistent with the OAU Convention on which the AALCO Principles were modelled: Kneebone (2014), p. 316.

<sup>86</sup> *Ibid.*, pp. 314–5.

<sup>87</sup> For more information on this crisis, see Tan, *supra* note 2, p. 368; Missbach (2015), p. 31; Davies (2008), p. 107.

<sup>88</sup> Missbach, *supra* note 87, p. 36. See also further discussion on this in the Introduction to this Special Issue.

<sup>89</sup> *Ibid.*, pp. 42–4.

<sup>90</sup> *Ibid.*, p. 44.

<sup>91</sup> See also Tobing's article in this Special Issue.

involved the International Organization for Migration (IOM) and the UNHCR, as described in the Introduction to this Special Issue.<sup>92</sup>

Despite the existence in Indonesia of a constitutional right to asylum<sup>93</sup> that reflects the sovereign right to grant asylum, the above developments indicated that the government chose to transfer the refugee-status-determination (RSD) procedure to a non-state entity, in this case, the UNHCR, rather than implementing its obligations under its own laws. The continued allocation of RSD to the UNHCR under the PR indicates that the constitutional right to asylum continues to be ignored.

#### 4. Indonesia's constitutional right to asylum: issues in the law-making process

The legal background to the 2000 constitutional amendment, which inserted Article 28(G), has been explained in the Introduction to this Special Issue. There were two competing laws that dealt with asylum and refugee policy that pre-dated the Constitution: Law No. 37 of 1999 on Foreign Relations (the Foreign Relations Law); and Law No. 39 of 1999 on Human Rights (the Human Rights Law). In the Foreword to this Special Issue, Dr Soeprapto explains the background to the Foreign Relations Law. In this part, we explain the discussion of the right to asylum in the Bill on the Human Rights Law and the constitutional-amendment process. Perhaps not unnaturally, this debate focused upon the rights of Indonesian citizens fearing persecution in Indonesia in the reactionary spirit after *reformasi*. However, the drafting process of the right to asylum in the Human Rights Law also reveals a lack of understanding about the nature of the right and of the state's obligations. We argue that this lack of understanding may influence (or symbolize) the preference to conceive of refugee protection as a humanitarian obligation as opposed to embracing the value of the constitutional right to asylum (and enacting implementing legislation to operationalize it in the Indonesian legal system).

Although most of the discussion during the drafting of the Bill on the Human Rights Law focused on the context of Indonesian citizens seeking asylum in other countries,<sup>94</sup> there was an attempt to raise the issue of Indonesia's responsibility to grant asylum to foreign nationals when the Indonesian House of Representatives or *Dewan Perwakilan Rakyat* (DPR) discussed the draft on 13 July 1999. At that meeting, Ferry Tinggogoy, the chairperson of *Panitia Kerja* (Work Committee—established by the Special Committee), queried whether Indonesia would grant asylum to other countries' citizens.<sup>95</sup> However, there was no answer to this question, including from the government. It appears that the drafters had not fully resolved the question about who was to be the subject of the right to asylum. The fact that this issue was not settled suggests that the drafters did not determine an exact meaning for the right to asylum under the Human Rights Law.

Similarly, a lack of understanding of the nature of the right to asylum can be seen from the constitutional-amendment process conducted by *Majelis Permusyawaratan Rakyat* (MPR) or the People's Consultative Assembly. In a meeting of the MPR Working Group Commission (2000), Ramson Siagian from the PDIP (Indonesian Democratic Party of Struggle) Faction expressed his critical view:

Do we need something like this in our Constitution? If a person wants to seek political asylum in another country, it is a matter for that country to either accept him or

<sup>92</sup> Nethery & Gordyn (2014), p. 186; Kneebone (2017), p. 32.

<sup>93</sup> The right to asylum is also guaranteed in Art. 24 of the MPR Decree on Human Rights and Art. 28 of Law No. 39 (1999) on Human Rights.

<sup>94</sup> See DPR-RI (2001), pp. 1029–32.

<sup>95</sup> *Ibid.*, p. 1026.

not . . . I still respect the work of the PAH I [the Ad-hoc Committee I of MPR Working Group], but I see this is not like drafting a Constitution anymore.<sup>96</sup>

The view expressed by Siagian seems to suggest that the proposed wording of the right to asylum was unnecessary, since Indonesia has no right to intervene in the granting of asylum by other countries. This view is fundamentally misplaced, as it has failed to comprehend the proper meaning of the right in Article 28G(2), which is the sovereign right of the state to grant asylum.

The constitutional-amendment process did not explicitly address whether and to what extent the Indonesian government would grant asylum to foreigners who seek protection in Indonesia. Without debate on this issue, the drafters did not explore the legal consequences of inserting the right to asylum in the Constitution—consequences such as a greater responsibility for the state to grant asylum. This issue was apparently not addressed due to a lack of substantial debate on the right to asylum during the amendment process.<sup>97</sup> Instead, the substantive debate on the human rights Chapter XA tended to focus on issues of religious values as a basis for limiting rights and controversy over the clause prohibiting non-retrospective legislation.<sup>98</sup> Overall, the analysis of the drafting process of the Human Rights Law and the Constitution reveals that the drafters seemed to have different priorities with respect to the intended subject of the right—some drafters focusing on an Indonesian citizen's right to freedom of movement to seek asylum in other countries and some drafters focusing on the government's responsibility towards foreign nationals seeking asylum in Indonesia.

The post-authoritarian context in which the drafting occurred probably influenced the tendency of the drafters to place more emphasis on the rights of Indonesian citizens to seek political refuge abroad rather than on the issue of foreign nationals seeking asylum in Indonesia. According to Amnesty International, during Soeharto's regime, around 3,000 Indonesian nationals were unlawfully tried and sentenced for political crimes.<sup>99</sup> One of the methods used by this authoritarian regime included punishing critics through a travel ban, which enabled the government to "blacklist" some people from leaving the country.<sup>100</sup> The "blacklist" policy was well known by Indonesians living in the Soeharto era, which could have culturally informed the drafters when discussing the topic of asylum and freedom of movement.

Further, shortcomings of the constitutional-amendment process—such as the limited time for deliberation and lack of public participation—in turn have resulted in an overall lack of understanding about the significance of the right to asylum. Susanti notes that the PAH I (drafting committee mentioned above) as an ad-hoc body mandated to draft the amendments needed approximately nine months to produce the draft before it was submitted to the Annual Session of the MPR for approval.<sup>101</sup> However, the whole draft was debated across only five days, which means that discussion could not have extended comprehensively to all articles. Further, even though there were seminars held in some provinces to share the draft, these only involved academics, government staff, members of Parliament, and political organizations, and did not involve civil-society representatives more generally. Susanti further points out that, due to the draft deliberation being limited to five days, much lobbying occurred outside of the formal sessions (and thus did not

<sup>96</sup> Indonesian Constitutional Court, *supra* note 60, pp. 326–7.

<sup>97</sup> *Ibid.*, pp. 213–363.

<sup>98</sup> Hosen, *supra* note 2, p. 334; Indrayana, *supra* note 32, pp. 163–4.

<sup>99</sup> Refworld (1994), p. 4.

<sup>100</sup> *Ibid.*, p. 14.

<sup>101</sup> Susanti (2001), p. 3.

involve public participation). It was therefore “almost impossible for the public to really know which articles were going to be ratified at the end of the session.”<sup>102</sup>

Further, van Rooij explains how the degree of rationality of the law-making process affects the quality of legislation.<sup>103</sup> This can be measured by the extent to which the legislative process is consultative and comprehensive.<sup>104</sup> The Indonesian constitutional amendments were passed in a rush to satisfy public demands for major changes in terms of democracy and human rights. Unfortunately, this resulted in the laws being enacted without adequate planning and preparation.<sup>105</sup> Indrayana argues that constitutional reform in Indonesia failed to fully satisfy the essential elements of a democratic constitution-making process, as it had no clear objectives and there was only limited, unorganized public participation.<sup>106</sup> The process was also driven by short-term political interests.<sup>107</sup> Overall, Indonesia’s constitutional-amendment process (1999–2002) reflects a “reactionary constitutional culture,”<sup>108</sup> the consequence of which has been uncertainty with respect to acceptance of the constitutional right to asylum. The constitution-making process can usually provide guidance for the interpretation of constitutional rights. However, considering the shortcomings of the process in Indonesia, this ideal cannot be achieved. As a result, the meaning of the right to asylum in Indonesia has never been clearly determined.

## 5. The triangulation of asylum in Indonesia: what dominates the PR?

### 5.1 Rights-based vs. humanitarian approach

In this section, we argue that, although Article 28 G (2) of the 1945 Constitution adopts the international-law principle of a human right to asylum, the PR as the current primary refugee regulation adopts a humanitarian approach. To establish this claim, we examine the PR based on our interpretation of the scope and content of the constitutional right to asylum, which are: (1) acceptance of responsibility to provide appropriate legal procedures to protect those seeking asylum against *refoulement*; and (2) the commitment to provide access to basic rights upon recognition of refugee status.

#### 5.1.1 Asylum procedure

First, the PR allocates the role of RSD to the UNHCR rather than to the state.<sup>109</sup> In so doing, the Indonesian government continues the arrangement made under the RCA in 2001.<sup>110</sup> This approach fails to engage the constitutional underpinning of the human right to asylum in Article 28G(2).

It is unsettled as to whether the right to asylum creates an obligation on the state to provide an asylum procedure,<sup>111</sup> especially considering that the 1951 Refugee Convention does not explicitly require the state to conduct RSD.<sup>112</sup> However, there is agreement on the need for having an appropriate determination procedure to ensure *non-refoulement* and

<sup>102</sup> *Ibid.*

<sup>103</sup> van Rooij (2006), p. 26.

<sup>104</sup> *Ibid.*, p. 29.

<sup>105</sup> Ford (2011), p. 42.

<sup>106</sup> Indrayana, *supra* note 32, p. 290.

<sup>107</sup> *Ibid.*

<sup>108</sup> Perwira, Harijanti, & Dewansyah (2010), p. 52.

<sup>109</sup> Art. 1, para. (1) of the PR.

<sup>110</sup> Under the Regional Cooperation Agreement (RCA) 2001 between the IOM, Australia, and Indonesia, the UNHCR is responsible for conducting RSD in Indonesia. See Introduction to this Special Issue.

<sup>111</sup> Kowalczyk & Versteeg, *supra* note 21, pp. 1243–4; Gil-Bazo, *supra* note 9, pp. 13, 14–7.

<sup>112</sup> Jones & Houle (2008), p. 4.

thus the right to seek asylum.<sup>113</sup> As Edwards writes, the obligation of *non-refoulement* that underpins the concept of asylum cannot be achieved without a proper asylum procedure.<sup>114</sup> If this view is accepted, then, in principle, Indonesia should establish its own asylum procedures even though it is not a party to the Refugee Convention, as it is bound by the *non-refoulement* obligation in international law.<sup>115</sup>

When a right to asylum is constitutionalized, as in the Indonesian context, this indicates that the state is not only bound by this norm, but also has greater responsibility for its realization. In this case, shifting the responsibility of determining asylum status to the UNHCR suggests that the state has opted to have less control over determining who shall be granted asylum. From a human rights perspective, such an approach is problematic, as the state has no accountability for the process. Thus, the obligation to establish an asylum procedure needs to be recognized as a consequence of Article 28G(2) of the 1945 Constitution.

The continued deflection of responsibility for RSD to the UNHCR in the PR suggests the continuation of the humanitarian approach towards asylum instead of a rights-based approach. Chimni argues that the way in which the UNHCR operates must be seen from a broader political perspective<sup>116</sup>—as an organization that can be influenced by a coalition of powerful states, particularly from the Global North.<sup>117</sup> Taking into account this political hegemony of powerful states, it is reasonable to conclude that the RSD scheme under the PR is a mere humanitarian assistance entrusted to a foreign body.

Thus, the PR tends to take the RSD role of the UNHCR for granted, without acknowledging the potential of this organization to potentially make an inaccurate decision or to consider its limited infrastructural capacity.<sup>118</sup> Jones and Houle note that the problems with RSD performed by the UNHCR in countries of the Global South include inconsistent decisions, lack of legal representation, and lack of a review process, among others.<sup>119</sup> These deficiencies have resulted in the failure to meet procedural guarantees under international law.<sup>120</sup> Nonetheless, such countries have a tendency to accept the UNHCR's decisions automatically,<sup>121</sup> which is a general trend in the Global South that matches the reality in Indonesia. According to SUAKA (Indonesia Civil Society Association for Refugee Protection), the challenges usually faced by asylum seekers in Indonesia include a lack of access to legal assistance, limited opportunities to appeal, and resource-related issues, such as understaffing at the UNHCR.<sup>122</sup> By continuing the role of the UNHCR in RSD, and failing to implement Article 28G(2) of the Constitution, the PR fails to acknowledge the constitutional basis of the right to seek asylum in Indonesia and the need to protect against *refoulement*. Thus, Indonesia denies asylum seekers their right of access to the national courts.<sup>123</sup>

<sup>113</sup> Edwards, *supra* note 10, p. 301; Gil-Bazo, *supra* note 9, pp. 11–3; Hathaway & Foster (2014), p. 45.

<sup>114</sup> *Ibid.*

<sup>115</sup> See Tobing in this Special Issue.

<sup>116</sup> Chimni (1998).

<sup>117</sup> *Ibid.*, pp. 366–8.

<sup>118</sup> Jones & Houle, *supra* note 112, pp. 4–5.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*, p. 5.

<sup>121</sup> *Ibid.*

<sup>122</sup> SUAKA (2014).

<sup>123</sup> Under the “declaratory” theory explained in UNHCR, *supra* note 31, asylum seekers are entitled to access to the courts (Art. 16 of the 1951 Refugee Convention).

### 5.1.2 Access to rights

The second salient indication of “humanitarianism” reflected in the PR is that, contrary to Article 28G(2) of the Constitution, asylum seekers and refugees are treated as humanitarian entrants rather than rights-holders. First, in terms of the status of asylum seekers and refugees, the PR does not provide an option for local integration. There are only two durable solutions available for refugees under the PR: voluntary repatriation or resettlement to a third country.<sup>124</sup> However, the purpose of the third solution of asylum is to allow the refugee to integrate in the host country, which is clearly not envisaged by the PR.

Further, the PR has not lived up to the spirit of human rights upon which the constitutional right to asylum is predicated. As explained by Sadjad in this Special Issue, the institutional design of the PR views refugees as passive recipients of basic needs, rather than as rights-holders. Sadjad explains that earlier drafts of the PR contained references to the human rights of refugees, but they are excluded in the current PR. The PR explicitly states that basic needs, such as clean water, food, clothing, health and sanitary services, and religious amenities, are to be provided by “international organisation[s].”<sup>125</sup> In practice, this refers to the IOM’s role and, in this respect, the PR formalizes the practice that was already in place under the RCA and other arrangements.<sup>126</sup> This approach further confirms the “humanitarian” approach because the fulfilment of basic needs is contingent upon the funding of international organizations, rather than the legal constitutional obligation of the state.

As for housing, the PR gives local governments a new mandate to facilitate proper accommodation for refugees.<sup>127</sup> However, as has been discussed by others in this Special Issue, such a mandate is difficult to fulfil due to the lack of institutional and budget capacity at the local-government level.<sup>128</sup> Moreover, the PR is silent on the issue of socio-economic rights that are crucial for refugees, such as the right to work and the right to education,<sup>129</sup> which further supports the claim that refugees are seen as “humanitarian entrants” who passively receive a few basic needs without a set of rights.<sup>130</sup> The right to work is especially important to refugees because it provides autonomy and dignity to a person, which enables them to be self-sufficient and to pursue their personal development.<sup>131</sup>

The fact that the PR is silent on this issue implies that the state accepts the existing situation in which there has never been a formal right for refugees to work in Indonesia. This situation prevents refugees from enjoying an adequate standard of living, as their monthly stipend is inadequate to meet their needs.<sup>132</sup> In comparison with the regional minimum wage in Jakarta, Medan, and Makassar (as the three cities that host most refugees in Indonesia), researchers from Sandya Institute found that, although refugees receive a monthly living allowance, it is insufficient to meet an adequate standard of living.<sup>133</sup> Further, limited access to the workforce affects the mental health and sense of self-worth of refugees, considering that they may live for years in community shelters without certainty about their resettlement status.<sup>134</sup> The reality for many refugees in Indonesia is therefore contrary to the right of refugees to “enjoy asylum.”

<sup>124</sup> Arts 28, 29, 38 of the PR. Note that asylum as a “durable solution” equates to integration into a new country.

<sup>125</sup> Art. 26(3)–(5) of the PR.

<sup>126</sup> See Missbach & Adiputera in this Special Issue.

<sup>127</sup> Art. 26 of the PR

<sup>128</sup> See Suyatna et al. and Missbach & Adiputera in this Special Issue.

<sup>129</sup> The importance of these rights is also noted by Missbach & Adiputera in this Special Issue.

<sup>130</sup> Jones (2014), p. 251.

<sup>131</sup> Edwards, *supra* note 10, p. 320.

<sup>132</sup> Locastro, Alfath, & Hu (2019), p. 17.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*, p. 28.

In addition, although some refugees, especially “independent refugees,”<sup>135</sup> might be able to work in the informal sector, uncertainty about their formal rights to work renders them vulnerable to exploitation and lack of protection. For example, unlike nationals or legal migrants, who can ask the state authorities for protection if their labour rights are breached, refugees might be reluctant to do so due to the uncertainty of their legal status to work.

As some authors have noted, the reasons for Indonesia’s refusal to take greater responsibility for the care of refugees are largely pragmatic, such as the fear of creating a “pull factor,” the perceived economic burden, and an apprehension of possible conflict between locals and newcomers.<sup>136</sup> The state might also argue that it has sovereignty to limit its positive obligations concerning socioeconomic rights for non-nationals.<sup>137</sup> However, under the human rights approach, this view cannot be used to justify a restriction of socioeconomic rights for refugees without justification.<sup>138</sup> International law views asylum seekers and refugees as aliens who need special protection, and the constitutional status of the right to asylum imposes a higher burden on the state to provide justification if any limitation to their rights is deemed necessary.

The fact that the PR does not touch upon fundamental issues, such as the right to work, raises the question of whether the state has sufficiently considered their ability to fulfil these rights. For instance, taking into account its limitations, the state might choose to focus on specific rights such as the right to primary education for refugee children (contrast the Refugee Convention, Article 22(1)).<sup>139</sup> Likewise, employment opportunities for refugees can be designed in line with the general interests of the state.<sup>140</sup> At a technical-policy level, the rationale of whether that option is feasible and to what extent it can be granted within the state’s capacity seems not to have been explored. The fact that these rights are not mentioned in the PR implies that they were not seen as relevant. This confirms the use of a “humanitarian” approach in which the state’s pragmatic interests prevail over human rights protection.

## 5.2 Dominance of the immigration-control approach

In addition to the dominance of the humanitarian approach over a rights-based approach, the policy towards asylum seekers and refugees is also shaped by the immigration-control regime. This is due to failure to implement the mandates of Law No. 37 of 1999 on Foreign Relations and Law No. 39 of 1999 on Human Rights,<sup>141</sup> making those laws irrelevant to the daily practices and processes of immigration officials receiving asylum seekers. We argue that immigration control is counter-productive to the protection of asylum seekers and refugees in at least two ways. First, the framework of Law No.6 of 2011 on Immigration (the “Immigration Law”) does not distinguish asylum seekers and refugees from migrants in general, which means they can be punished and deported as illegal immigrants. Second, under the PR, the management of refugees is conceived of as strictly immigration control. As we show, this means that asylum seekers and refugees may be at risk of *refoulement*.

<sup>135</sup> The term “autonomous” or “independent” refugees is explained in the Introduction and discussed by Missbach & Adiputera in this Special Issue.

<sup>136</sup> Mathew & Harley (2014), p. 15.

<sup>137</sup> Art. 2(3) of the ICESCR.

<sup>138</sup> Edwards, *supra* note 10, p. 327.

<sup>139</sup> As Sadjad explains in her article in this Special Issue, this right was considered in earlier drafts of the PR.

<sup>140</sup> Locastro, Alfath, & Hu, *supra* note 132.

<sup>141</sup> See the Introduction and Foreword to this Special Issue.



### 5.2.1 Disharmony between asylum and the Immigration Law

The failure of the Immigration Law to provide for asylum seekers and refugees has resulted in the inconsistent application of the *non-refoulement* principle in Indonesia.<sup>142</sup> During the discussion of the draft of the Immigration Law, efforts to regulate refugees were not realized, as asylum seekers and refugees tended to be perceived only as victims of human trafficking.<sup>143</sup> Although some asylum seekers may indeed be victims of trafficking or smuggling, to view all asylum seekers as trafficking victims is inaccurate. Further, the protection needs for trafficking victims and asylum seekers are different. For example, under the Immigration Law, the government shall immediately return foreign trafficking victims to their country of origin and grant them travel documents (if they do not have them).<sup>144</sup> Clearly, applying such a rule to asylum seekers would be contrary to the *non-refoulement* principle.

Moreover, since its passage in 2011, the Immigration Law has consistently been used as the main regulatory framework for dealing with asylum seekers and refugees, despite the right to seek asylum in the Constitution and its supporting laws.<sup>145</sup> This is demonstrated by the *Qasemi* decision, which is discussed in the Introduction to this Special Issue and below. Further, the enactment of the PR has not significantly shifted the approach of immigration officials to handling asylum seekers and refugees.

### 5.2.2 Immigration-control approach in the PR

We have argued that the management of refugees under the PR can generally be characterized as “humanitarian,” but it commingles with immigration control by treating refugees as subjects of immigration security (as explained by Sadjad in her article in this Special Issue).<sup>146</sup> This is illustrated by the handling of the *Qasemi* couple by immigration officials. Under Article 13(3) of the PR, foreigners who declare themselves as asylum seekers shall be referred to the UNHCR and can only be repatriated or deported if their asylum applications have been rejected.<sup>147</sup> However, in the cases of Besmillah Qasemi and Shakira Qasemi, two asylum seekers from Afghanistan, they were sanctioned because of their failure to provide travel documents to immigration officials.<sup>148</sup>

The framing of asylum seekers as objects of immigration control raises some human rights concerns. First under the PR, refugees are transferred from immigration detention centres to community shelters.<sup>149</sup> However, a time limit on how long they should remain in such shelters is not specified. The restrictions and conditions that are placed on refugees in these shelters raises the question of whether some constitutional rights are breached, such as the right to “physical and mental well-being, a place of residence, . . . and health care” (Article 28H(1)) and the right to protection against discriminatory treatment (Article 28I(2)).<sup>150</sup>

A second measure that suggests discriminatory treatment is the obligation imposed on refugees who are transferred to a community shelter to report to the head of the immigration detention centre every month to get an identity-card stamp. A failure to do so consecutively three times without an acceptable excuse will cause a refugee to be placed

<sup>142</sup> See Tobing in this Special Issue.

<sup>143</sup> Fitria (2015), p. 116.

<sup>144</sup> Law No. 6 (2011) on Immigration, Art. 88.

<sup>145</sup> As explained in the Introduction to this Special Issue.

<sup>146</sup> See also Kneebone (2020).

<sup>147</sup> Art. 29(1) of the PR.

<sup>148</sup> Maulana et al. (2018), p. 104.

<sup>149</sup> Arts 24 and 25 of the PR. See the articles by Suyatna et al. and Missbach & Adiputera in this Special Issue.

<sup>150</sup> See also the discussion of the “declaratory” theory of refugee rights in UNHCR, *supra* note 31; and Art. 3 of the Refugee Convention (nondiscrimination).

in a detention centre.<sup>151</sup> While the state might have a legitimate reason to enforce reporting obligations, using detention as a form of punishment for the failure to meet such obligations is controversial.<sup>152</sup> This provision legitimizes the use of deterrence, which is consistent with long-existing, false narratives among state officials and society that equate refugees with illegal immigrants. Further, such reporting obligations appear to be designed for the purpose of punishment, contrary to Article 31(2) of the Refugee Convention.<sup>153</sup>

Third, under the PR (Chapter IV—“Safeguarding”), immigration authorities are required to co-operate with the police to ensure refugees remain in their designated shelter.<sup>154</sup> This implies that refugees have their freedom of movement restricted. However, the PR neither specifies the considerations on which a refugee’s movement can be limited nor provides a time limit during which these rights may be restricted.<sup>155</sup> Therefore, the decision to limit their freedom of movement is solely based on the state’s discretion under the security approach. This could be another example of action contrary to Article 31(2) of the Refugee Convention and discriminatory treatment if such restrictions are not imposed on “aliens in general in similar circumstances.”<sup>156</sup> In 2018, refugees in Makassar protested in front of the UNHCR’s building to complain about discretionary rules imposed by immigration authorities to limit their rights and freedom.<sup>157</sup> The duration and purpose of such restrictions must be reasonable.<sup>158</sup> In other words, the power of the state to restrict freedom of movement is not unlimited. The discretionary power of immigration authorities under Chapter V of the PR to supervise refugees may lead to arbitrary exercise of power and breach of the human rights of refugees.

## 6. Conclusion

This paper has analyzed Article 28G(2) of the 1945 Constitution, which contains “the right to obtain political asylum.” We explained that it reflects the sovereign rights of the Indonesian state to grant asylum and embodies a human rights approach to refugee protection. Article 28G(2) imposes obligations on the state, but we have demonstrated how it competes with and is overshadowed by Indonesia’s humanitarian and immigration-control responses to refugees. The interaction between the above three approaches can be described as a “triangulation” of refugee protection in Indonesia.

We concluded that the constitutional right to asylum in Indonesia is undervalued due to a combination of legal and socio-political factors. From a historical and socio-political point of view, we argued that Indonesia has largely viewed asylum seekers and refugees as requiring humanitarian assistance and as subjects of immigration control. We claimed that the insertion of Article 28G(2) into the Constitution was a “reactionary” move in response to *reformasi* and an appetite for human rights reforms at the time. However, an examination of the drafting process throws doubts upon the motives and understanding of the drafters of the significance of the reform that they were debating. Subsequently, the legal framework has adopted a humanitarian approach (possibly supported by

<sup>151</sup> Art. 36 of the PR.

<sup>152</sup> It has been widely reported that the use of detention results in mental-health problems for asylum seekers and refugees. See Austin, Silove, & Steel (2007). ICCPR Art. 9(1) prohibits “arbitrary” detention.

<sup>153</sup> Art. 31(2) of the Refugee Convention (no penalty for illegal entry) is applicable under the “declaratory theory.” See UNHCR, *supra* note 31.

<sup>154</sup> Art. 32(a) of the PR.

<sup>155</sup> See Missbach & Adiputera in this Special Issue for further discussion.

<sup>156</sup> Art. 3 of the Refugee Convention (nondiscrimination) is applicable to refugees under the “declaratory theory.” See also *supra* note 150.

<sup>157</sup> Kabar Makassar (2018); Padmasari (2018); Freischlad (2018).

<sup>158</sup> Zieck (2018), pp. 65–86.

*Pancasila*). Lastly, the immigration framework is in competition both with the rights-based approach and, to an extent, with humanitarianism.

We argued that the state should exercise its constitutional obligations within the human rights paradigm. At a minimum, the government must establish its own mechanisms to grant asylum, which would include the state conducting RSD, as opposed to assigning this role to the UNHCR as a non-state organization. Another consequence of a rights-based analysis is that refugees must be given access to basic rights and be treated with dignity as rights-holders. At a minimum, the rights to elementary education and work should be respected. The PR, on the contrary, embodies a humanitarian and immigration-control approach. The humanitarian approach can be seen from the two aspects of the PR.

First, under the PR, the Indonesian government has chosen to delegate its sovereign right to determining refugee status to the UNHCR. However, Indonesia is the responsible stakeholder for granting asylum as mandated by the Constitution. Second, the PR tends to view asylum seekers and refugees as objects of humanitarian discretion, rather than as rights-holders. It has not addressed the minimum rights that refugees should enjoy, such as the right to work, but rather focuses on “basic needs” that they receive as passive recipients. In this respect, the PR has failed to change pre-existing practices to protect the rights of refugees.

Further, the immigration-control approach has influenced the implementation of the PR. The management of asylum seekers and refugees under the PR positions them as subjects of immigration security, whose movements may be limited and sanctioned according to the discretion of the state. As we argued, this approach discriminates against and denies basic human rights and dignity of refugees. There is also a contradiction in the legal frameworks in Indonesia between the PR, which arguably upholds the *non-refoulement* principle, in accordance with Indonesia’s international-law obligations, and the Immigration Law, which does not recognize the status of asylum seekers and refugees.

In conclusion, the enactment of the PR has confirmed that the prevailing approach towards asylum and refugee issues in Indonesia is a mix between humanitarian and immigration-security approaches. Despite the existence of a constitutional right to asylum, the PR has perpetuated Indonesia’s humanitarian and overly restrictive securitized approach to refugees. Thus, the PR undermines the human rights approach to refugee protection that Article 28G(2) embodies and fails to fundamentally shift the structure of refugee law to the normative values of the constitutional right to asylum.

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