

CONFLICT OF REGULATION NORMS FOR HANDLING OF FOREIGN REFUGEES IN SELECTIVE IMMIGRATION POLICIES: CRITICAL LAW STUDIES AND STATE SECURITY APPROACHES

M. Alvi Syahrin*

Abstract: *The increasing number of asylum seekers and refugees in the territory of Indonesia has caused social disturbances, political security, and even orders in society. The number of their arrivals is not proportional to the number of settlements or placement to the recipient country (Australia). To deal with the problem of asylum seekers and refugees who enter and are in the Indonesian territory, the government issued Presidential Regulation No. 125 of 2016 concerning Handling of Foreign Refugees. This regulation does not only confirm the position of Indonesia pro against refugee humanitarian policies, but also its manufacture which is not in accordance with the legal principles of the establishment of legislation. The legal position of Presidential Regulation No. 125 of 2016 raises disharmony in the legal order (immigration) in Indonesia. Article 7 of Law Number 12 of 2011 has stipulated the order of laws and regulations that form the basis of the enactment of all legal regulations in Indonesia. The provisions of this article are in harmony with the Theory of Norms Hierarchy (Hans Kelsen) which explains that lower norms are valid, sourced and based on higher norms. However, this theory is not enacted in the formation of Presidential Regulation Number 125 of 2016, where in the body the norm is in conflict with the higher legal norms above it. The existence of this regulation has created norm conflicts which have led to the absence of legal certainty.*

Keywords: Presidential Regulation Number 125 of 2016, Refugees, Immigration

Introduction

The problem of international refugees occurred after the Second World War. Thousands of people were displaced, especially countries that were defeated in the second world war (Syahrin, 2018e). The birth of the Convention on Refugee Status, 28 July 1951 (hereinafter referred to as the 1951 Convention) and the Protocol, 31 January 1967 (hereinafter referred to as the 1967 Protocol) is also evidence and concern for the countries in the world to overcome these problems. Since then, the regulation of refugees has been included in the international legal discussion section (Syahrin, 2014b).

International refugee law is part of international law. International refugee law was born in order to ensure the security and safety of international refugees in the destination countries of displacement (Syahrin, 2014d). In addition to providing protection in the destination country, international refugees are also protected by the countries they traverse on the way to the destination country to evacuate. Thus discussing international refugee law would be more optimal if understood from the perspective of international law. International law is positioned as its legal umbrella (Syahrin, 2014c). International law itself has a long history and is

*Head of Research Center at Polytechnic of Immigration, Ministry of Law and Human Rights, Republic of Indonesia. Email: ma.syahrin@poltekim.ac.id

even as old as the national laws of countries. It grows and develops from the contribution of national laws themselves (Syahrin, 2014e).

Indonesia is a very strategic country for asylum seekers and refugees who are going to Australia. Many asylum seekers who initially only stopped in Indonesia to continue their journey to Australia, instead settled to live in Indonesia (Syahrin, 2015a). Australia's impartiality with regard to asylum seekers and refugees is increasingly apparent when they collaborate with Papua New Guinea, to transfer illegal immigrants to third-party countries (Syahrin, 2015b).

The 1951 Convention was only binding on the states parties which ratified the convention. For countries that have not ratified, there is no obligation to comply with the principles set out in the convention. There are no international sanctions that can be imposed on a country if it does not ratify a convention (Syahrin, 2015c).

The presence of refugees in Indonesia is expected to continue to increase every year. Noted, until 2019, there were around 13,840 refugees in Indonesia. The number consists of 1,466 people (Immigration Detention Centers), 1 person (Directorate General of Immigration), 1,853 people (Shelter / Temporary Shelter), 4,941 people (Community Center), and 5,579 people (Self Assessment). This number is the highest in recent years (LAKIP Directorate General of Immigration, 2019). Especially after the implementation of various legal instruments that support the policy of handling asylum seekers and refugees.

Table 1
Comparison of Number of Refugees in Indonesia
(2013 - 2019)

	Year 2013	Year 2014	Year 2015	Year 2016	Year 2017	Year 2018	Year 2019
Immigration Detention Center	1,647	2,709	2,184	2,390	1,918	1959	1,466
Directorate General of Immigration	5	17	-	-	-	18	1
Immigration office	-	2,635	2040	1992	-	103	
Shelter / Temporary Shelter	-	-	-	-	1,711	2024	1853
Community Center	2,487	2,788	3,359	3,934	4,903	4448	4,941
Self Assesment	-	2,655	5,958	5875	5,171	5785	5,579
Total	4,139	10,804	13,541	14,941	13,703	14,337	13.840

Source: Performance Accountability Report of Government Agencies (LAKIP) Directorate General of Immigration (2013 to 2019)

The current number of asylum seekers and refugees is registered with the United Nations High Commission for Refugees (UNHCR). Whereas those who are not listed are estimated to be even more. Especially for those who enter Indonesia through legal and illegal channels (Syahrin, 2015d). This increase is a warning signal for the Directorate General of Immigration that the exodus of asylum seekers and refugee migrations will continue to grow each year. It might not even be a serious threat to Indonesia going forward (Syahrin, 2016a).

Conflict areas such as Afghanistan, Myanmar, Sri Lanka, Pakistan, Iran and Iraq are the main countries of refugees and asylum seekers found in

Indonesia. Especially for the Rohingya, it is certain that the numbers will continue to grow, bearing in mind the cases of ethnic genocide they have experienced in Myanmar have not yet ended. Indonesia as a transit country cannot expel them because it is morally bound on the principle of non-refoulement. In fact, Indonesia is not a state party to the convention (Syahrin, 2016b).

The increasing number of asylum seekers and refugees to the territory of Indonesia has begun to cause concern and discomfort and has the opportunity to cause social disruption, political security, and even order in the community. The number of their arrivals is not proportional to the settlement rate or placement to the recipient country (Australia), including those who were voluntarily discharged and deported from Indonesian territory. Their existence is very vulnerable both in terms of status, economy, and psychological so that the opportunity is exploited by human trafficking networks, drug trafficking, and other criminal activities including international terrorism networks. This can have an impact as well as various problems in Indonesia (Syahrin, 2016c).

Not a few of asylum seekers and refugees who commit crimes (general and special) in Indonesia. Especially those who have received an Attestation Letter, in the form of a Refugee Card from UNHCR that seems to get international immunity rights. It should be understood, their existence is not immune to law. The misuse of asylum documents occurred in Batam, where there were 10 (ten) asylum seekers suspected of being gigolos. The case is a small example that their existence in Indonesia has caused legal unrest in the community.

The phenomenon of the refusal of some Bogor residents to the existence of asylum seekers and refugees living around Cisarua, Bogor, is evidence that their presence has caused unrest in the community. This case originated from the inconvenience of residents who began to interfere with the presence of immigrants. According to the local community, the behavior of immigrants is more arbitrary, even starting to ignore legal issues in Indonesia. Most of them committed acts of theft, violence, and even immoral towards citizens.

Anxiety over the attitudes and behavior of asylum seekers and refugees also occurred in Kupang, East Nusa Tenggara. A total of 25 illegal Middle Eastern immigrants were arrested by the local police for not paying the Grenia Hotel rent they used to stay overnight from August 24 to September 9, 2013. As a result, the hotel owner suffered a loss of around Rp. 42.9 million. The problem of asylum seekers and refugees in Indonesia does not stop at this point. The issue of living costs and shelter for illegal immigrants is also in the spotlight. Asylum seekers receive a living allowance of around 1.2 million rupiah per person per month. If a family consists of a husband and wife with two children, then in one month they can get around 4.8 million rupiah (Syahrin, 2017a).

To deal with the problem of asylum seekers and refugees who enter and are in Indonesian territory, the government issued Presidential Regulation No. 125 of 2016 concerning Handling of Foreign Refugees. In the weighing section, there is no mention of the philosophical, juridical and sociological interests of the immigration aspect. In fact, Law Number 6 of 2011 concerning Immigration is not included in the recall section. The norms that were formulated were far from the spirit of law enforcement, security, and

state sovereignty. This is certainly contradictory with the function of immigration as an authorized institution that ensures that every foreigner entering and leaving Indonesian territory brings benefits and does not harm Indonesia (Syahrin, 2017b).

This regulation raises problems among academics and immigration practitioners. This is because asylum seekers and refugees who are illegal immigrants can be excluded from administrative immigration (read: Deportation) and criminal acts. Even though Law Number 6 of 2011 concerning Immigration itself does not recognize the terms asylum seekers and refugees (Syahrin, 2019b). As a result, the Immigration Detention Center (IDC) which initially functioned only as a temporary shelter for foreigners who would be subjected to administrative immigration measures (*immigratoir*), has now turned into a shelter for asylum seekers and refugees. In fact, almost all IDC in Indonesia have excess capacity (*over capacity*) because there are too many to accommodate asylum seekers and refugees (Syahrin, 2017c). The enactment of the presidential regulation has broad impacts, one of which is the financing of the implementation of handling asylum seekers and refugees must be charged to the State Budget.

Before the enactment of the presidential regulation, Australia always provided facilities to the Indonesian government in the form of scholarship assistance, organizing training, and operational funds to handle asylum seekers and refugees in abundance. It turned out that all of that was just a political reason for Indonesia to immediately ratify Presidential Regulation Number 125 of 2016 (Syahrin, 2017d). After the presidential regulation is passed, Australia no longer has an interest in Indonesia, because the technical handling of asylum seekers and refugees now has a legal basis and funding is the full responsibility of the Indonesian government.

Juridical limits that must be understood in the concept of the principle of non-refoulement are very dependent on the legal regime adopted by each country. The politics of immigration law adopted by Indonesia today is a selective policy based on the principle of expediency (Syahrin, 2018a). The selective immigration policies defined in Part P penjelasan Act No. 6 of 2011 on Immigration. That is, only foreigners who bring benefits to the country can enter and live in Indonesia (Syahrin, 2017e).

Theoretic Conception

1. Hierarchical Theory of Legal Norms

In relation to the hierarchy of legal norms, Hans Kelsen proposed a theory about the level of legal norms (*Stufentheorie*). Hans Kelsen argues that legal norms are tiered and multi-layered in a hierarchy (arrangement). Lower norms apply, are sourced, and are based on higher norms. Higher norms apply, are sourced, and are based on even higher norms, thus equating to a norm that cannot be explored further and is hypothetical and fictitious, namely the Basic Norms (*Grundnorm*) (Kelsen, 2006).

The theory states that the legal system is a ladder system with tiered rules where the lowest legal norms must hold to higher legal norms, and the highest legal norms (such as the constitution) must hold to the most basic legal norms (*grundnorm*), according to the most basic legal norms

(*grundnorm*) are not concrete (abstract), the most basic and abstract examples of legal norms are Pancasila (Kelsen, Paulson, & Paulson, 2012).

Basic norms which are the highest norms in a system of norms are no longer formed by a higher norm, but the Basic Norms are predetermined by the community as the Basic Norms which are the basis for the norms below it (Syahrin, 2018a). Thus, Basic Norms are said to be *pre-supposed*.

The theory of the level of legal norms from Hans Kelsen was inspired by a student named Adolf Merkl who argued that a legal norm always has two faces (*das Doppelte Rechtsantlitz*). According to Adolf Merkl, an upward legal norm comes from the norm above, but downward it also becomes the source and basis for the underlying legal norms. So, a legal norm that has a valid validity period (*rechtskracht*), because it depends on the legal norms that are above it. If the legal norms that are above are revoked or removed, then the legal norms below them will be revoked or removed as well (Syahrin, 2018b).

Based on the theory from Adolf Merkl, the Hans Kelsen norm level theory also suggests that a legal norm is always sourced and based on the norms above, but the legal norms also become the source and basis for norms that are lower than there of.

In the case of a hierarchy of norm systems, the highest norm becomes the base for the norms to depend on. So that if the Basic Norms change, it will damage the norms below them. Hans Nawiasky, one of Hans Kelsen's students developed his teacher's theory of the theory of norm levels in relation to state norms. Hans Nawiasky in his book entitled "Allgemeine Rechtslehre" suggests that in accordance with Hans Kelsen's theory, then a legal norm from any country is always multi-layered and tiered. The norms below apply, are sourced, and are based on higher norms. Higher norms apply, are sourced, and are based on even higher norms, up to a highest norm called the Basic Norms (Syahrin, 2018c).

Hans Nawiasky also believes that in addition to norms that are layered and tiered, the legal norms of a country are also grouped and the grouping of legal norms in a country consists of four major groups, namely:

- Group I : *Saatsfundamentalnorm* (State Fundamental Norms)
- Group II : *Staatsgrundgesetz* (Basic Ground Rules/ Basic Ground Rules)
- Group III : *Formell Gesetz* (Formal Law)
- Group IV : *Verordnung & Autonome Satzung* (Implementing Rules & Autonomous Rules)

The groups of legal norms almost always exist in the legal norm arrangement of each country, even though they have different terms or there are a number of different legal norms for each group.

Staatsfundamentalnorm is the norm that is the basis for the formation of the constitution or the 1945 Constitution of the Republic of Indonesia (*staatsverfassung*) of a country. The legal position of a *fundamental state* is as a condition for the application of a constitution.

Staatsfundamentalnorm existed before the constitution of a country. According to Hans Nawiasky, the highest norm mentioned by Hans Kelsen as the *basic norm* in a country should not be called a *staatsgrundnorm*, but a *staatsfundamentalnorm*, or fundamental norms of the state (Syahrin, 2018f). *Grundnorm* basically does not change, while the highest norms change for example by means of a coup or revolution.

Based on Hans Nawiaky's theory, we can compare it with Hans Kelsen's theory and apply it to the structure of the legal system in Indonesia. Indonesian legal hierarchy structure using the theory of Hans Nawiasky. Based on this theory, Indonesia's legal structure is:

- 1) *Staats fundamental norm* : Pancasila
- 2) *Staats grund gesetz* : 1945 Constitution of the Republic of Indonesia
- 3) *Formell gesetz* : Formal Law
- 4) *Verord nungen Autonome Satzung* : Hierarchically ranging from Government Regulations, Presidential Regulations, to Regional Regulations

He sees Pancasila as a legal ideal (*rechtsidee*) as a driver. This requires the formation of positive law is to reach the ideas listed in Pancasila, and can be used to test positive law (Syahrin, 2018g).

With the enactment of Pancasila as a *Staats fundamental norm*, the formation of law, its application, and its implementation cannot be separated from what is stated in Pancasila.

The Hierarchy of Laws and Regulations in Indonesia is regulated in Law Number 12 of 2011 concerning Formation of Laws and Regulations Article 7 paragraph (1) which consists of the 1945 Constitution, the Decree of the People's Consultative Assembly, the Acts / Regulations of the Government Laws, Government Regulations, Presidential Regulations, Provincial Regulations and Regency / City Regulations. The hierarchy is composed of high positions to lower positions. The legal force of the statutory regulations is in accordance with the hierarchy regulated in the Act. The hierarchy of laws and regulations in force in Indonesia is inseparable from the *principle of Lex Superior Derogat Legi Inferior*. This principle results in a law with a low level of status that must be in accordance with the provisions above (Syahrin, 2018d).

The hierarchy for the formation of laws and regulations currently in force in Indonesia is regulated in Law Number 12 of 2011 concerning the Formation of Laws and Regulations. The law regulates the principles of formation, material content, types, and hierarchy of the formation of legislation (Syahrin, 2018h). So that the formation of legislation must be in accordance with the hierarchy regulated in Article 7 of the Act. According to Law Number 12 of 2011 concerning Formation of Regulations and Regulations, the types and hierarchy of Regulations that are in force up to now are composed of:

Article 7

- 1) Types and hierarchy of legislation consisting of:
 - a. The 1945 Constitution of the Republic of Indonesia
 - b. Decree of the People's Consultative Assembly
 - c. Government Act / Regulations in Lieu of Law
 - d. Government regulations
 - e. Presidential decree
 - f. Provincial Regulations
 - g. Regency / City Regulations.
- 2) The legal force of legislation in accordance with the hierarchy referred to in paragraph (1).

2. Theory of Selective Immigration Policy

The principle of selective immigration policy is a fundamental principle that applies universally to all countries in the world (Syahrin, 2018i). This principle is a manifestation of the country's sovereignty that must be respected. In positive law, a selective immigration policy is included in Part One of the Explanation of Law Number 6 of 2011 concerning Immigration which explains that:

"Based on a *selective policy* that upholds the value of human rights, the entry of foreigners into Indonesian territory, as well as foreigners who obtain a Stay Permit in Indonesian territory must be in accordance with the intent and purpose of being in Indonesia. Based on the intended policy and in the context of protecting national interests, only foreigners who provide benefits and do not endanger the security and public order are allowed to enter and stay in the territory of Indonesia."

In principle, this selective policy requires that:

- 1) Only beneficial foreigners are allowed into and within Indonesia;
- 2) Only foreigners who do not endanger the security and public order are allowed to enter and stay in the territory of Indonesia;
- 3) Foreigners must comply with legal regulations in Indonesia;
- 4) Foreigners who enter and reside in the territory of Indonesia must be in accordance with the intent and purpose.

Based on this principle, only foreigners can benefit the welfare of the people, nation and state, do not endanger security and order, and are not hostile towards the people who can enter and exit Indonesian territory (Syahrin, 2018j). Even in other interpretations, the movement of foreigners must be in accordance with state ideology and not threaten the integrity of the nation.

Normatively, every foreigner who enters into Indonesian territory must have a valid and valid travel document and visa. When linked to the principle of selective immigration policies, asylum seekers or refugees do not get an absolute guarantee to live in Indonesia on the pretext of the principle of non-refoulement (Syahrin, 2018k). Further, this selective policy in its implementation should consider the balance between security approach (*security approach*) and welfare (*prosperity approach*). Meaning, Immigration is required to prioritize aspects of national sovereignty and security in carrying out its duties and functions.

3. Theory of Immigration Core

Immigration is part of the realization of the enforcement of sovereignty in order to maintain orderly life of the nation and state towards a just and prosperous society based on Pancasila and the 1945 Constitution of the Republic of Indonesia (Syahrin, 2018m).

Article 1 number 1 of Law Number 6 of 2011 concerning Immigration states that:

"Immigration is a matter of the traffic of people entering or leaving Indonesian Territory and its supervision in order to maintain the upholding of the country's sovereignty."

Related to the Immigration Function Chess, Article 1 number 3 of Law Number 6 of 2011 concerning Immigration explains that:

"The immigration function is part of the affairs of the state government in providing immigration services, law enforcement, state security, and community welfare development facilitators."

4. Theory of Immigration Traffic Examination

The implementation of the Immigration Function along the border line is the authority of the Immigration Agency. Immigration functions along Indonesian border lines are carried out by Immigration Officials which include Immigration Check Points and Cross-border Posts. In order to improve the quality of immigration traffic checks, it is necessary to tighten the supervision of every person entering or leaving Indonesian territory.

Article 8 of Law Number 6 of 2011 concerning Immigration states that:

- 1) Every person entering or leaving the Territory of Indonesia must have a valid and valid Travel Document.
- 2) Every Foreigner entering the Territory of Indonesia is required to have a valid and valid Visa, unless otherwise specified under this Law and international agreements.

Furthermore, Article 9 of Law Number 6 of 2011 concerning Immigration explains that:

- 1) Every person entering or leaving the Territory of Indonesia is obliged to undergo an inspection carried out by an Immigration Officer at the Immigration Check Point;
- 2) Examination as referred to in paragraph (1) includes inspection of legal travel documents and / or personal identification;

In the event of doubt as to the validity of a person's Travel Documents and / or identity, the Immigration Officer is authorized to conduct a search of the body and luggage and can proceed with the Immigration investigation process.

Critical Study of Presidential Regulation Number 125 of 2016 concerning Handling of Foreign Refugees in the Immigration Perspective

There is a legal disharmony between Presidential Regulation Number 125 of 2016 and higher legal regulations, namely the 1945 Constitution of the Republic of Indonesia, Law Number 6 of 2011 and Government Regulation Number 31 of 2013. As an organic rule governing foreigners' regimes, Law Number 6 of 2011 does not become the source or basis for the formation of the Presidential Regulation. Based on the theory of the level of legal norms Hans Kelsen states that a lower norm applies, sourced and based on higher norms in order to create a match between the legal norms that are currently in force.

Presidential Regulation Number 125 of 2016 has a lower position than Law Number 6 of 2011. The validity of the Presidential Regulation should not be contrary to Law Number 6 of 2011. According to the Presidential Regulation, the Government of Indonesia seems to have obligations in handling asylum seekers and refugees such as countries that ratified the 1951 Convention and the 1967 Protocol on the Status of Refugees (Syahrin, 2018n). In fact the Government of Indonesia is not one of the countries that ratified the 1951 Convention and the 1967 Protocol on the Status of Refugees.

Provisions governing entry and exit of people from / to the territory of Indonesia are regulated in Law Number 6 of 2011. Every person who wants to enter and exit must undergo immigration checks at the Immigration Checkpoint (Syahrin, Arifin, & Nursanto, 2018). The author will compare Presidential Regulation Number 125 of 2016 with Law Number 6 of 2011 along with other derived regulations as follows.

Table 2
Conflict of Legal Norms Presidential Regulation Number 125 of 2016
concerning Handling of Foreign Refugees with Higher Legal Norms

No	Comparison	Presidential Regulation 125/2016	1945 Constitution	Act 6/2011	PP 31/2013	Permenkumham No.M.HH-11.OT.01.01 / 2009
1	Understanding IDC	Article 1 paragraph 6	-	Article 1 paragraph 33	Article 1 paragraph 24	Article 1 paragraph 1
2	Definition of Detainee	Article 43	-	Article 1 paragraph 35	Article 1 paragraph 26	Article 1 paragraph 2
3	Handling refugees	Article 4		Article 8 Article 9 Article 13	Section 2 Article 3 Article 20 Article 23	Article 4
4	The authority of UNHCR and IOM in Handling Refugees	Section 2	Article 28J	Article 8 Article 9 Article 10 Article 13 Article 43 Article 48	Article 112 Article 214	-
5	Invention	Article 5 Article 9 letter d Article 12 Article 13 Article 14 Article 15 Article 18 Article 19 Article 20 Article 21 Article 22	-	Article 8 Article 9 Article 13	Section 2 Article 3 Article 20 Article 23	-
6	Shelter	Article 24 Article 25 Article 28 Article 29	-	Article 14 paragraph (3) Article 83 Article 85 Article 87	Article 208 Article 209 Article 210 Article 221	Article 3
7	Immigration Control	Article 33 Article 34	-	Article 68	Article 172 paragraph (4)	-
8	Funding	Article 40	-	-	-	-
9	Penalty	Article 30 Article 43	-	Article 75 Article 113 Article 119	Article 25	-

Conflict of Legal Norms of Presidential Regulation Number 125 of 2016 concerning Handling of Foreign Refugees with the 1945 Constitution

Basically the Indonesian Government is not obliged to handle refugees and asylum seekers who want to enter Indonesian territory. Indonesia is one

of the countries that did not ratify the 1951 Convention and the 1967 Protocol. So that the Government of Indonesia cannot directly grant Refugee status and place foreigners suspected of asylum seekers to ratifying countries. Therefore, the Government needs UNHCR in granting refugee status to asylum seekers who meet internationally determined requirements.

The existence of asylum seekers and refugees in Indonesian territory is a form of the Indonesian State that upholds the value of human rights. This has been regulated in Article 28G of the 1945 Constitution which states that every person has the right to protect himself, family, honor, dignity, and property under his authority, and is entitled to a sense of security and protection from the threat of fear and the right to obtain political asylum from other countries (Syahrin, Artono, & Santiago, 2018).

But there are restrictions on the rights set out in Article 28J of the 1945 Constitution which states that in exercising their rights and freedoms, each person is obliged to submit to limitations set by the Law and moral considerations, religious values, security, and order common in a democratic society. Therefore, the rights of refugees and asylum seekers wishing to enter Indonesian territory are limited by Law Number 6 of 2011. According to Law Number 6 of 2011 everyone who wishes to enter and exit Indonesian territory must comply with applicable regulations (Syahrin & Irsan, 2018).

The Presidential Regulation regulates collaboration between the Government of Indonesia and UNHCR. This is because the Government of Indonesia does not have a legal instrument in determining refugee status. So the determination of the status was carried out by UNHCR. However, that does not mean that the Government of Indonesia cannot restrict foreigners from entering. The Indonesian government is fully sovereign in terms of allowing people to enter and refuse to enter Indonesian territory.

Conflict of Legal Norms Presidential Regulation Number 125 of 2016 concerning Handling of Foreign Refugees with Law Number 6 Year 2011 concerning Immigration

The meaning regulated in Law Number 6 of 2011 is not fully described in the Presidential Regulation. Law Number 6 of 2011 only regulates that patents be granted to foreigners subject to Immigration Administration Measures. Whereas in the Presidential Regulation, it does not clearly regulate the reasons for the giving of a notice.

Foreigners are at the Immigration Detention Center and have a decision on detention referred to as detainees. But there are differences in the sense of understanding Detainee stipulated in Presidential Regulation and Act No. 6 of 2011. According to Law No. 6 of 2011, Detainee a stranger who got detention decisions by immigration officers for violations of Immigration (*immigratoir*). Meanwhile, according to the Presidential Regulation, asylum seekers and refugees are referred to as detainees without obtaining a decision on immigration officials due to immigration violations (Syahrin & Pasaribu, 2018). However, measures against detainees regulated in Law Number 6 of 2011 concerning refusal of entry and Immigration Administrative Measures cannot be applied to asylum seekers and refugees residing in Indonesia. This results in inappropriate usage of the term detainment for asylum seekers and refugees.

Indonesia is one of the countries that did not ratify the 1951 Convention and the 1967 Protocol. So that Indonesia cannot grant refugee status to foreigners who claim to be asylum seekers and refugees (Syahrin & Pranata, 2018). Therefore, the Presidential Regulation regulates cooperation between the central government and the United Nations through the High Commissioner for Refugees in Indonesia and/or international organizations. However, the Presidential Regulation does not regulate the authority and limitations of international organizations. It does not specifically regulate the time vulnerable in determining refugee status until placement in a third country. This is inversely proportional to Law No. 6 of 2011 which regulates that the presence of every foreigner is required to have an appropriate Residence Permit and there is a certain period of time.

Law Number 6 of 2011 only recognizes the terminology of legal and illegal immigrants. Law Number 6 of 2011 does not specifically regulate asylum seekers and refugees. Even in Law Number 6 of 2011 there are no provisions regarding asylum seekers and refugees. Therefore, the Government of Indonesia issued Presidential Regulation Number 125 of 2016 concerning Handling of Foreign Refugees as a legal basis for handling refugees in Indonesia. The Presidential Regulation aims to regulate the role of Government agencies that have a stake in handling asylum seekers and refugees.

According to Presidential Regulation No. 125 of 2016, foreigners suspected of being asylum seekers and refugees found in emergencies are immediately handed over to the Immigration Detention Center. Submission of asylum seekers and refugees to Detention Centers, indirectly mandates the Indonesian Government to grant permission for foreigners to enter Indonesian territory without carrying out the provisions stipulated in Law Number 6 of 2011. In addition, asylum seekers and refugees want to enter Indonesian territory not through Immigration checks at Immigration Check Points. But in reality asylum seekers and refugees were immediately handed over to the detention center for data collection.

This causes a mismatch between Law Number 6 of 2011 and Presidential Regulation Number 125 of 2016. The procedure for the entry of asylum seekers and refugees into Indonesia violates the provisions in Law Number 6 of 2011. Everyone who wants to enter and leave the territory Indonesia must meet the provisions of Law No. 6 of 2011 as a legal basis in immigration practice (Syahrin, 2019c).

In Presidential Regulation No. 125/2011 does not explain the procedures for entering and exiting asylum seekers and refugees from Indonesian territory. In Article 9 letter (d) and Article 13 paragraph (3) indirectly grants permission for foreigners to enter illegally into Indonesian territory. The article has the potential to be abused by foreigners. Because according to this article every foreigner who is "suspected" or "declared himself" as an asylum seeker and refugee is handed over to the Immigration Detention Center and coordinates with the United Nations through the office of the High Commissioner for Refugees in Indonesia.

This is not in accordance with Law Number 6 of 2011, because every foreigner who enters Indonesian territory must have a valid and valid travel document and visa. If it cannot fulfill the administrative requirements, the Immigration Officer can *deny entry*. This regulation also applies to asylum

seekers and refugees who want to enter Indonesian territory (Syahrin & Prabekti, 2019). But in fact at this time asylum seekers and refugees can enter and live in the territory of Indonesia without valid and valid travel documents and residence permits. This certainly violates the administrative and criminal provisions contained in Law Number 6 of 2011 (Syahrin & Ginting, 2019).

In the Presidential Regulation the Immigration Detention Center has an obligation to handle asylum seekers and refugees. Forms of handling Immigration Detention Centers in the case of the first handler upon arrival are data collection, inspection, shelter, transfer, supervision, and return of asylum seekers and refugees to their home countries (Syahrin & Utomo, 2019). So indirectly IDC has an important role in handling the existence of asylum seekers and refugees.

According to the Presidential Regulation, the Immigration Detention Center has a duty and function in conducting surveillance of asylum seekers or refugees who are in Indonesian territory. Supervision is carried out in the form of checks and data collection on travel documents, immigration status, and identity. Whereas Law Number 6 of 2011 regulates the supervision of foreigners before entering until the activities and presence of foreigners in the territory of Indonesia (Syahrin & Widodo, 2019). The supervision is carried out by the Immigration Office in accordance with their respective work areas. In addition, Law Number 6 of 2011 does not regulate the immigration control function carried out by the Immigration Detention Center.

The Presidential Regulation does not stipulate provisions stating foreigners suspected of asylum seekers and refugees may or may not be subject to Immigration or Investigative Administrative Measures. The Presidential Regulation regulates voluntary repatriation and deportation for asylum seekers whose application for refugee status is rejected and finally rejected by the United Nations through the High Commissioner for Refugees in Indonesia (Syahrin, 2018). Voluntary repatriation or deportation is carried out in coordination with the Ministry or Agency which carries out government affairs in the field of foreign relations and foreign policy.

Meanwhile, according to Law Number 6 of 2011 regulates that any foreigner who has violated the applicable provisions may be subject to Immigration, Investigation, and Refusal Actions when he or she wishes to enter Indonesian territory. If seen from the Presidential Regulation Number 125 of 2016, the application of immigration measures according to Law Number 6 of 2011 cannot be done if it has not received the final decision from UNHCR (Syahrin & Saputra, 2019).

There are several articles that contradict President Regulation Number 125 of 2016 with Law Number 6 of 2011 related to the shifting function of the Immigration Detention Center (Syahrin, 2020). Article 9 letter d, Article 12, Article 13, Article 14, Article 15, Article 19, Article 20, Article 21, Article 22, Article 24, Article 25, Article 28, Article 29, Article 33, Article 35, Article 36, Article 29, Article 42, Article 43. The provisions stipulate that the Immigration Detention Center has the authority to be actively involved in handling asylum seekers and refugees by: recording, identifying, accommodating, placing, coordinating and monitoring.

Of course this is contrary to the term of Immigration Detention Center which is regulated in Law No. 6 of 2011 as an organic provision. In the Regulation of the Minister of Law and Human Rights Republic of Indonesia Number: M.HH-11.OT.01.01 of 2009 concerning Organizations and Work Procedures of Immigration Detention Centers, Article 3 clearly states that the Immigration Detention Center has the task of carrying out some of the main tasks and functions of the Department of Law and Human Rights in the field of detention of foreigners who violate the laws and regulations that are subject to immigration actions that have received a decision on detention in the context of return or deportation(Syahrin, 2014a). Article 4 explains that the functions of the Immigration Detention Center include duties: detention, isolation, and deportation. So there is no immigration legal instrument that regulates shifts in the function of the Immigration Detention Center, as regulated differently in Presidential Regulation No. 125 of 2016. When related to the application of Basic Norms Theory, the existence of this Presidential Regulation has the potential to be null and void by law because it contradicts the legal norms above it(Syahrin, 2019a).

Conclusion

Based on the description above, the following conclusions can be drawn. The legal status of Presidential Regulation No. 125 of 2016 concerning Handling of Foreign Refugees creates disharmony in the legal order (immigration) in Indonesia. Article 7 of Law Number 12 of 2011 concerning Formation of Regulations and Regulations has determined the sequence of laws and regulations which form the basis of all legal regulations. The provisions of this article are in line with the Hierarchical Theory of Legal Norms (Hans Kelsen) which explains that lower norms, valid, sourced and based on higher norms. Higher norms become the basis for the formation of lower legal norms below. However, this theory is not negated in the formation of Presidential Regulation No. 125 of 2016 concerning Handling of Foreign Refugees, where the norms of the body conflict with the higher legal norms above. The existence of this regulation has created norm conflicts that lead to the absence of legal certainty. The higher regulations that contradict this Presidential Regulation are as follows: The 1945 Constitution of the Republic of Indonesia, Law Number 6 of 2011 concerning Immigration, Government Regulation Number 31 of 2013 concerning Regulations for Implementing Law Number 6 of 2011 concerning Immigration, and Minister of Law and Human Rights Regulation No. M.HH -11.OT.01.01 of 2009 concerning Organization and Work Procedures of Immigration Detention Centers. Conflicting legal norms include: Definition of Detention Center, Definition of Detainee, Refugee Handling, UNHCR and IOM Authority in Refugee Handling, Discovery, Collection, Immigration Oversight, Funding and Sanctions.

References

- Kelsen, H. (2006). Law, State and Justice in the Pure Theory of Law. *The Yale Law Journal*.
- Kelsen, H., Paulson, B. L., & Paulson, S. L. (2012). *Introduction to the Problems of Legal Theory. Introduction to the Problems of Legal Theory*.
- Performance Accountability Report of Government Agencies Directorate General of Immigration(2013 to 2019)

- Syahrin, M. A. (2014a). Menakar Eksistensi Area Imigrasi. *Bhumi Pura*, 10(1), 39–41.
- Syahrin, M. A. (2014b). Penegasan Asas Kewarganegaraan dalam UU No. 12 Tahun 2006. *Bhumi Pura*, 8(1), 33–35.
- Syahrin, M. A. (2014c). Penyesuaian oleh Australia, Saatnya Imigrasi Bersikap. *Bhumi Pura*, 1(1), 30–35.
- Syahrin, M. A. (2014d). Perkembangan Konsep Nasionalisme di Dunia. *Bhumi Pura*, 11(1), 23–24.
- Syahrin, M. A. (2014e). Refleksi Hubungan Negara, Warga Negara, dan Keimigrasian. *Bhumi Pura*, 8(1), 36–38.
- Syahrin, M. A. (2015a). Beri Efek Jera Pada Pelaku Kejahatan Keimigrasian. *Bhumi Pura*, 8(1), 16–21.
- Syahrin, M. A. (2015b). Hak Asasi Bermigrasi. *Bhumi Pura*, 11(1), 45–48.
- Syahrin, M. A. (2015c). Imigran Ilegal, Migrasi atau Ekspansi? *Checkpoint*, 3(1), 29–31.
- Syahrin, M. A. (2015d). Memaksimalkan Peran Imigrasi di Perbatasan. *Bhumi Pura*, 2(1), 38–40. R
- Syahrin, M. A. (2016a). Antara Batas Imajiner dan Kedaulatan Negara. In *Imigrasi di Batas Imajiner (TPI Soekarno Hatta)* (1st ed., Vol. 1, pp. 16–31). Jakarta: Kantor Imigrasi Kelas I Khusus Soekarno Hatta.
- Syahrin, M. A. (2016b). Eksodus Warga Negara Tiongkok: Antara Kebijakan dan Penyelundupan. *Bhumi Pura*, 6(1), 38–40.
- Syahrin, M. A. (2016c). Reorientasi Fungsi Imigrasi Indonesia. In *Imigrasi di Batas Imajiner (TPI Soekarno Hatta)* (1st ed., Vol. 1, pp. 89–102). Jakarta: Kantor Imigrasi Kelas I Khusus Soekarno Hatta. 34295_Reorientasi_Fungsi_Imigrasi_Indonesia
- Syahrin, M. A. (2017a). Imigran Ilegal dan HAM Universal. *Bhumi Pura*, 5(1), 29–34.
- Syahrin, M. A. (2017b). Nomenklatur Pengawasan dan Penindakan Keimigrasian di Daerah, Perlukah Dipisah? *Bhumi Pura*, 5(1), 40–43.
- Syahrin, M. A. (2017c). Penerapan Hukum Deteni Tanpa Kewarganegaraan (Stateless) yang Ditahan Lebih Dari 10 (Sepuluh) Tahun di Rumah Detensi Imigrasi Jakarta. *Fiat Justicia*, 3(2), 455–481.
- Syahrin, M. A. (2017d). Posisi dan Perkembangan Hukum Pengungsi Internasional. *Bhumi Pura*, 5(1), 45–48.
- Syahrin, M. A. (2017e). The Implementation of Non-Refoulement Principle to the Asylum Seekers and Refugees in Indonesia. *Sriwijaya Law Review*, 1(2), 168–178.
- Syahrin, M. A. (2018a). Aspek Hukum Laboratorium Forensik Keimigrasian: Studi Kasus Pemeriksaan Paspor Palsu Kebangsaan Inggris atas nama Abbas Tauqeer. *Akta Yudisia*, 3(1), 104–135.
- Syahrin, M. A. (2018b). Indonesia Darurat Imigran Ilegal. *Checkpoint*, 5(1), 18–19.
- Syahrin, M. A. (2018c). Jus Cogens dalam Protokol Penyelundupan Migran Tahun 2000. *Bhumi Pura*, 2(1), 13–16.
- Syahrin, M. A. (2018d). Kontroversi Penerapan Prinsip Non-Refoulement bagi Pencari Suaka dan Pengungsi sebagai Suatu Jus Cogens. In *Seminar Nasional Kebijakan Pengawasan Imigran Ilegal dalam Perspektif Kedaulatan Negara*. Depok: Universitas Pancasila.
- Syahrin, M. A. (2018e). Menakar Kedaulatan Negara dalam Perspektif

- Keimigrasian. *Jurnal Penelitian Hukum De Jure*, 18(1), 43–57.
- Syahrin, M. A. (2018f). Mengukur Kekuatan Hukum Surat Edaran. *Bhumi Pura*, 6(1), 48–50.
- Syahrin, M. A. (2018g). Pembatasan Prinsip Non-Refoulement. *Bhumi Pura*, 1(1), 12–16.
- Syahrin, M. A. (2018h). Penerapan Prinsip Keadilan Restoratif dalam Sistem Peradilan Pidana Terpadu. *Majalah Hukum Nasional*, 1(1), 97–114.
- Syahrin, M. A. (2018i). Penerapan Wewenang Penyidik Pegawai Negeri Sipil dalam Melakukan Penyidikan Tindak Pidana Keimigrasian. *Seminar Hukum Nasional*, 4(1), 25–49.
- Syahrin, M. A. (2018j). Pro dan Kontra Penerbitan Perpres No. 20 Tahun 2018 tentang Penggunaan Tenaga Kerja Asing. *Bhumi Pura*, 3(1), 22–25.
- Syahrin, M. A. (2018k). Refleksi Hukum Implementasi Kebijakan Bebas Visa Kunjungan dalam Perspektif Keimigrasian. *Fiat Justicia*, 4(2), 155–169.
- Syahrin, M. A. (2018l). Rekonstruksi Paradigma Hukum Pengungsi Indonesia: Keamanan atau Kemanusiaan? In *ImmiTalk 2018: Challenges in Border Protection*. Depok: Politeknik Imigrasi.
- Syahrin, M. A. (2018m). The Immigration Crime and Policy: Implementation of PPNS Authorities on Investigation. *JILS*, 3, 175.
- Syahrin, M. A. (2018n). The Rohingya Refugee Crisis: Legal Protection on International Law and Islamic Law. In *International Conference on Indonesian Legal Studies* (Vol. 192, pp. 94–99).
- Syahrin, M. A. (2019a). Evaluasi Peraturan Presiden Nomor 125 Tahun 2016 tentang Penanganan Pengungsri dari Luar Negeri dalam Perspektif Kebijakan Selektif Keimigrasian. In *Kebijakan Indonesia dalam Penerapan Peraturan Presiden Nomor 125 Tahun 2016: Tanggung Jawab, Keamanan, dan Regionalisme*. Depok: University of Melbourne dan Universitas Indonesia.
- Syahrin, M. A. (2019b). Menggugat Kebijakan Keimigrasian Donald Trump: Diskursus Kedaulatan Negara dalam Perlindungan Hak Asasi Manusia. *Opinio Juris*, 8(2), 15–33.
- Syahrin, M. A. (2019c). Politik Hukum Keimigrasian Indonesia: Studi Pendekatan Sejarah dan Kontemporer. *Sol Justicia*, 2(1), 43–68.
- Syahrin, M. A. (2020). Penegakan Hukum Keimigrasian Indonesia dalam Keadaan Darurat (Covid-19). In *Weekly Webinar: Immigration Law Enforcement During Covid-19 Crisis: Indonesian and Australia in Comparative Perspective*.
- Syahrin, M. A., Arifin, R., & Nursanto, G. A. (2018). *Regulasi Pemeriksaan Keimigrasian di Indonesia* (1st ed.). Depok: Politeknik Imigrasi.
- Syahrin, M. A., Artono, H. B., & Santiago, F. (2018). Legal Impacts of The Existence of Refugees and Asylum Seekers in Indonesia. *International Journal of Civil Engineering and Technology*, 9(5), 1051–1058.
- Syahrin, M. A., & Ginting, B. P. (2019). Tafsir Yuridis Peraturan Direktur Jenderal Imigrasi Nomor IMI-0352.GR.02.07 Tahun 2016 tentang Penanganan Imigran Ilegal yang Menyatakan Diri sebagai Pencari Suaka atau Pengungsi dalam Kebijakan Selektif Keimigrasian. *Jurnal Ilmiah Kajian Keimigrasian*, 2(1), 109–128.
- Syahrin, M. A., & Irsan. (2018). Law Enforcement of Foreign Workers Abusing Immigration Residence Permit: Case Studies on Energy and Mining Companies. In *International Conference on Energy and Mining*

- Law* (Vol. 59, pp. 184–189).
- Syahrin, M. A., & Pasaribu, P. Y. (2018). Dialektika Hukum Determinasi Migrasi Pengungsi di Indonesia. *Jurnal Ilmiah Kajian Keimigrasian*, 1(1), 150–164.
- Syahrin, M. A., & Prabekti, R. R. (2019). Keabsahan Proses Penangkapan Pelaku Tindak Pidana di Area Imigrasi sebagai Alasan Pencegahan Keluar Wilayah Indonesia: Studi Kasus Ratna Sarumpaet. *Jurnal Ilmiah Kajian Keimigrasian*, 2(2), 49–62.
- Syahrin, M. A., & Pranata, S. (2018). Studi Kritis Kepentingan Indonesia dalam Proses Ratifikasi Konvensi Tahun 1951 dan Protokol Tahun 1967. *Jurnal Ilmiah Kajian Keimigrasian*, 1(1), 49–62.
- Syahrin, M. A., & Saputra, S. (2019). Tindakan Hukum terhadap Orang Asing Mantan Narapidana yang Memiliki Kartu Pengungsi UNHCR dalam Perspektif Keimigrasian. *Jurnal Ilmiah Kebijakan Hukum*, 13(2), 139–164.
- Syahrin, M. A., & Utomo, Y. S. (2019). Implementasi Penegakan Hukum Pencari Suaka dan Pengungsi di Indonesia Setelah Diberlakukannya Peraturan Presiden Nomor 125 Tahun 2016 tentang Penanganan Pengungsi dari Luar Negeri. *Jurnal Ilmiah Kajian Keimigrasian*, 2(2), 83–96.
- Syahrin, M. A., & Widodo, B. (2019). Diskursus Skema Pengawasan Pengungsi Setelah Penerbitan Peraturan Presiden Nomor 125 Tahun 2016 tentang Penanganan Pengungsi dari Luar Negeri dalam Perspektif Keimigrasian. *Jurnal Ilmiah Kajian Keimigrasian*, 2(1), 71–84.