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Positivising Shari'a In National Regulation Through Maqasid Approach (Studies on Government Policy in Handling of Foreign Refugees in Indonesia)

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Abstract

The problematic of humanism in many countries results a phenomenon of trans-national refugee migration. Indonesia is one of country which received a massif influx of refugee wave aiming to obtain an asylum. This study discussed the policy of handling refugee in Indonesia from the maqasid sharia as perspective. Maqasid sharia, as one of the Islamic law methodological approaches in order to understanding social phenomena which positioned the interest (maslaha) as the core treatise. This study aimed to explain that the interaction between maqasid sharia as perspective and the development of national regulation, including the regulation in handling refugees, results three models of policy (instructive, integrative, and adaptive). Instructive policy implemented through taqwin model, which is issued by the state authority as positive norm. Integrative policy implemented through eclectic model, adopted the finest part from both national law and Islamic law. Adaptive policy implemented when important elements of Islamic law affirmed national policy which contained fundamental principle of universal humanism as part of shari'a.

Keywords: *Handling refugees; Maqasid shari'a; National policy*

INTRODUCTION

Indonesia is a country with an archipelagic geography format that connects cross between the Asian Continent and Australia and between the Indian Ocean and the Pacific Ocean. Indonesia's geographic position bordering the sea directly with Australia is the main factor that attracts the desire of refugees from various countries to enter Indonesia using various methods. Somali refugees transit in Yemen before heading to Indonesia. Middle East refugees from Palestine, Iraq, Syria used the visa on arrival policies from the Indonesian government which is actually intended to attract tourists from the Middle East.

Afghan refugees travel illegally and stop in several countries such as Pakistan, Thailand, Malaysia and then head to Indonesia. Rohingya refugees entering Indonesia use sea lanes that can be traversed by traditional boats (interviews with a number of refugees from several countries who apply for asylum at the UNHCR Office in Jakarta, 2016).

The Indonesian government did not ratify the 1951 Vienna Convention and the 1967 amendment of New York Protocol regarding the status of refugees. Therefore, Indonesia does not have juridical responsibilities to provide refugee's basic needs when they stayed in Indonesia. The only norm in international law imposed on Indonesia is the principle of non-refoulement, namely the principle of the prohibition of forcibly evicting refugees in their territory.

The policy of the Directorate of Immigration Ministry of Law and Human Rights of the Republic of Indonesia Number IMI-1489.UM.08.05 in 2010 positioned refugees as illegal immigrants, so that they might be subjected to detention sanctions if they cannot comply with immigration requirements while they stayed in Indonesia. The status of illegal immigrants can be abolished by immigration where the refugee has been officially recognized as a refugee in UNHCR Jakarta Office and is given an ID card or an attestation letter explaining that he/she is a legitimate refugee and is processing the status of refugees in the UNHCR Indonesia office. The Republic of Indonesia Presidential Regulation Number 125 of 2016 concerning Handling of Foreign Refugees eliminates the use word "illegal immigrants", but places refugee individuals as holders of asylum rights in Indonesia. Until the beginning of 2018 the number of refugees in Indonesia reached more than 14,000 people from Afghanistan 55%, Somalia 11%, Iraq 6%, and others from various countries.

This paper discusses the policy of handling refugees in Indonesia seen from the Maqasid syariah perspective as one the methodology approaches that used in integrating between Islamic law and national law. Maqasid syari'ah is one of the approaches in Islamic law studies to understand various social phenomena in society by positioning the principle of benefit as its main reference. The discussion of this study contains three parts. First, maqasid syari'ah in the development of Islamic law methodology. Second, maqasid sharia as a perspective on the development of national law. Third, the policy of handling refugees from the perspective of maqasid syari'ah. The final section contains conclusions from this study.

DISCUSSION

1. Maqasid Shari'ah in the Development of Islamic Law Methodology

There are two opinions related to the application of a law. First, the application of law is based on legal texts so that all events in the legal realm are only causal relations referring to the provisions contained in legal texts. Second, the law must always refer to the purpose of stipulating a rule so that in its application the law always considers the purpose behind the text written on each statutory regulation. Debates about the application of the law between scripturalists and contextualists always occur in various traditions of legal science, including studies in Islamic law in dealing with current problems. The maqasid syari'ah study which contains elements of meaning from Islamic law becomes an alternative methodology for determining the legality status of a phenomenon, seeing the enforcement of law through the point of view of the real purpose of the law itself. Placing the main intention of the rules in a position that was exalted above the written rules by revealing the wisdom behind the legal texts (Mawardi, 2010: 175 - 176).

The limited legal and religious texts in order to respond the rapid development of global social phenomena initiated scientists, thinkers, legal experts, and progressive groups to find formulations that were able to juxtapose Islamic studies with modernity and religious development. Aligned between religious orders and human values, between power, justice and equality, between legal positivism and legal values that occurred among society. The study of the elements of meaning in Islamic Law discussed in the study of maqā'idid sharia which integrates the study of Islamic law with the legal demands that always undergo on rapid changes.

Maqā'id syari'ah is the main goal of the shari'ah that might found through realizing the benefit of ibād (servants) (al-Raysuni, 1990: 7; 1999: 13). It is an alternative means in determining the legality aspect of a fact which has several distinctions from the methods used in the introduction of Islamic law. This can be seen from the opinions of maqā'id syari'ah methods from the beginning, its appearance, its growth, to its development. The maqā'id syari'ah study which discusses the element of meaning in Islamic law is believed to have first appeared in the book *al-halāh wa maqā'idubā* and *al-Hajj wa asrāruhā* by Abu 'Abdillah Muhammad bin Ali al-Turmudzi, otherwise known as Turmudzi al-Hakim. Abu

Bakr al-Qaffal al-Shashi (w. 365 H.) or known as al-Qaffal al-Kabir then confirms the maqāṣid syarī'ah in the precious of Islamic shari'ah through the book *Maḥāsīn al-Syarā'i furū' al-Ṣāfiyyah: Kitāb fī Maqāṣid al-Sharī'ah*. The development of the maqāṣid shari'a study was further elicited by Abu al-Hasan al-'Amiri (d. 381 H.) through his philosophical approach to writing the book *al-I'lām bi manāqib al-Islām* which gave rise to five foundations for a balanced social life in society, namely: *maṣṣjarah qatl nafs*, *maṣṣjarah akhd al-Māl*, *maṣṣjarah hatk al-Satr*, *maṣṣjarah Ṭalb al-'irdh*, and *khal' al-baiḍah* (means: punishment for murder, punishment for theft, punishment for violations of secrecy, punishment for vandalism, and penalties for releasing sanctity / adultery) (Mawardi, 2010: 190).

The maqāṣid shari'a study was later formed as a scientific building when Imam al-Harmayn 'Abd al-Malik al-Juwayni (d. 478 H.) arranged the level of benefit to be *ḍarūriyyāt* (premier), *ḥājjiyyāt* (secondary), and *tahṣīniyyāt* (tertiary) in his *al-Burhan fī Uṣūl al-Fiqh*. The arrangement of hierarchical *maslahat* levels which was born by al-Juwayni is considered to be the main foundation for the birth of ulama's works afterwards in the study of maqāṣid syarī'ah. Among the most prominent scholars after al-Juwayni were Abu hamid al-Ghazali who stipulated in his *al-Mustasyfā fī 'Ilm al-Uṣūl* that the main purpose of the Shari'ah was to preserve the five things that fall into the category of *ḍarūriyyāt* (premiere), or referred to as *al-Darūriyyāt al-Khams* which includes safeguarding religion, soul, mind, lineage, and wealth. Means that syari'ah rules cannot be implemented without the realization of these five things (Mawardi, 2010: 194).

The chain of development of the maqāṣid shari'a is getting stronger when al-Imam Abu Ishaq Ibrahim ibn Musa ibn Muhammad al-Lakhmi al-Syatibi al-Gharnati (d. 790 H.) classifies the benefit of the application of Shari'ah with disobedience, determines the rules about the *raf' al-ḥarj* (removing difficulties) in applying the Shari'ah, and the rules relating to the purpose of shari'ah imposition on the forgiving servant. Imam al-Syatibi explained in his work *al-Mumāfaqāt fī Uṣūl al-Sharī'ah*, that the purpose of the application of shari'ah is the achievement of benefit, is not troublesome, and that each shariah application has a specific purpose which may be expressed or implied or even not visible in the texts of sources of Islamic law.

Al-Syatibi's methodological building on maqāṣid syarī'ah explains to Islamic law reviewers that the maqasidi method differs from *ushul fiqh* (basic of Islamic jurisprudence) and *qawa'id a-fiqhiyah* even though it has the same goal, which leads to the search for the

legality status of a recent phenomenon in Islamic legal discourse. Maqāṣid syarī'ah places the *istiqrā'* method as the most important medium to prove the status of legality in Islamic law in addition to other sources similar to the method of studying ushul fiqh namely, the Qur'an and al-Hadith. Istiqrā' is the drawing of conclusions resulting from the study of specific facts, where this particular fact is not mentioned in the texts of the sources of Islamic law (al-Ghazali, 1994: 64). The istiqrā' method is inductive prioritizing detailed research that places each case in a special and unique position so as to avoid the generalization of the law from one case to another which is generally used in extracting the essence of Islamic legality through istidlāl deductive legal analogy. Al-Syatibi places this method as the main basis for determining that universal evidence (al-Kulliyat) in Islamic law is a preference of partial evidence (al-Juz'iyat) (Al-Syatibi, Al-Mufafaqat fī Uṣl al Syarī'ah, Vol. 1, 23, 37, Vol. 4, 327).

The formulation of the objectives of sharia is increasingly formed into hierarchical levels when the Imam 'Izz al-Din ibn' Abd al-Salam (d. 1261 AD) wrote the book *Qawāid al-Aḥkām fī Maṣālib al-Anam* which explains the substance between *maṣālib* (benefit) being the purpose of the Shari'ah and the *mafasid* (damage) which must be avoided from the implementation of the Shari'ah. Imam Izz al-Din ibn 'Abd Salam classifies *maslahat* to be *maṣālib 'Ammah* (general benefit), *maṣālib khaṣṣah* (special benefit), and *maṣālib juz'iyah* (partial benefit) (Umar, 2003: 87).

Systematic preparation of the intent and wisdom of the application of sharia as raised by Imam al-Syatibi encouraged Muhammad al-Thahir ibn ur Asyur (d. 1379 H.) to explain the order of practice for the application of meaning in sharia. In the book *Maqasid al-Shari'ah al-Islamiyyah*, Ibn 'Asyur clearly explains the concept of intention on the application of Shari'a which is specifically related to mutual relations between human beings, both in the field of family (*maqāsid ahkām al-'Āilah*), intentions in financial practice (*maqāsid al-taṣarrufāt al-māliyah*), covenant on work (*maqāsid ahkām al-mu'āmalah almun'aqidatu 'ala' amal-al-Abdān*), nonprofit agreement (*maqāsid ahkām al-Tabarru'āt*), meaning in the judiciary and witness (*maqāsid ahkām al-qaḍā' wa al-syahādah*), and the criminal field (*al-maqṣad min al-Jināyah*), then Ibn Asyur explained the difference between intent (*al-maqāsid*) and media (*al- Wasā'il*). Ibn 'Asyur also mentioned that tolerance, freedom, including equality, legal rights and justice, nature as a human being inherent in

nature, both tenure and intolerance, is also a form of intention in Islam (Ibn' Asyur, 2001: 114 -115, 415).

The work of Ibn Asyur explains that, the construction of the maqasid Shari'a has touched on the axiological level. The study of the meaning elements in Islamic law as a scientific building has capable of being an approach to respond the rapid changes of social problems, beyond the development of deductively based *ijtihād* analogy (*istidlal*). Even further, the construction of Maqasid in Ibn Asyur works has also developed the meaning of intentions from the opinions of the Maqasidi scholars in the previous era which seemed reluctant to place the study of Maqāṣid Shari'a in a different position than the study of Ushul fiqh and qawa'id al-fiqhiyah. Therefore, after Imam al-Juwayni initiated the level of maqasid to become *ḍarūriyyāt*, *ḥājjiyyāt*, and *taḥsīniyyāt*, then al-Ghazali determined the five main points of intention (*ḍarūriyyāt al-khams*): religion, soul, thought, offspring (*nasab*), and property that became the goal at the core of shari'ah, then al-Syatibi has the role of constructing the methodology for the study of maqāṣid syarī'ah from previously passive to dynamic, so Ibn 'Asyur is considered to be the foundation of the maqāṣid syarī'ah which touches the realm of practice in social life. Ibnu Asyur opinion influences the discussing of maqāṣid shari'ah studies, especially related to the integration between the study of Islamic law and other different scientific disciplines.

Important names that helped build the construction of the study of the maqāṣid syarī'ah in the post-Ibn 'Asyur era, such as' Illal al-Fasi (d. 1974 AD), Muhammad alGhazali, Ahmad al-Raysuni, Jamal al-Din Attiya, Taha Jabir al-Alwani, Yusuf al-Qaradawi, Muhammad Hashim Kamali, until later in the present era Jasser Auda works which integrating the study of maqāṣid syarī'ah with a systems approach. Auda concluded that Islamic law is actually a system in which the maqāṣid syarī'ah becomes the basis for the dynamism of the system. Auda argues that the framework of thinking maqāṣid syarī'ah considers the priority scale of the text in determining the legality of Islamic law needs to consider the existing social conditions, not erase, delay, or dismiss other conflicting texts (Auda, 2007: 216). That the integration between Islamic studies and other studies such as modernity (Fazlurrahman, 1984), globalization, international relations (Sulayman, 1993), law, (Hersi, 2009; Zahraa, 2003: 225-226), economic development (Dusuki and

Bouheraoua, 2011: 25-45), and various other global problems that continue to add to the complexity of life today (Smock, 1-8).

This part explains that the introduction of Islamic law through *maqāṣid syarī'ah* in the legal context has relevance to the life of the nation. It also demonstrate that the study of Islamic law has clear principles and methodologies when juxtaposed with government regulations concerning issues of human values, not just the legalization of Islamic law or Islamization of state law, but finds a real correlation that creates an integral synthesis between the principles of Islamic law and positivistic national regulations. Rane concluded that the aim of Islamic sharia is nothing but to realize universal values that have the same breath with human values contained in the principles of government so that the welfare of the nation and the state is realized (Rane, 2013: 489-520).

2. Maqāṣid Syarī'ah As a Perspective for the Development of National Law

Maqāṣid syarī'ah is etymologically formed by two syllables, *maqāṣid* and *syarī'ah*. *Maqāṣid* (مقاصد) is a plural form of word *maqṣad* (مقصد) which is a derivation of the verb *qaṣada-yaqṣudu* (دَصَّ ق - دَصُّ قِي). The word *qaṣada* has many meanings in the Qur'an, including the straight path (QS Al-Nahl: 9), easy, close and not troublesome (Surah Al-Tawbah: 42), fair, not excessive and not lacking (Surah Luqman: 19). In terms of terminology, *Maqāṣid* means the purpose desired by *syāri'* (legistalor) (Raysuni, 2013: 9). *Shari'a* has the meaning of the path to the spring, in the terminology of jurisprudence meaning the laws which are given by Allah to His servants, which are determined through the Qur'an and Sunnah through the words, deeds, and provisions of the Prophet (Zaydan, 1976: 39). Al-Raysuni defines *syarī'ah* with everything that Allah says to His servants in the form of rules, to make it easier to interpret Islam. To simplify al-Raysuni interpret *syarī'ah* as the rules contained in the Qur'an and Sunnah of the Prophet (Raysuni, 2013: 9). In the context of the Muslim minority in the West which interacts directly with the problems of migration, global citizenship and social integration, Berger means *syarī'ah* with something abstract but contains noble values. *Syarī'ah* is everything that can be judged to be good and desirable for everyone (Berger, 2013: 9-10).

In the life of the nation and state, the purpose of the state organization is to implement regulations which intended to achieve public welfare. It it seeks to realize

synchronization between rules and state goals through civil apparatus and organs in the state structure. The provisions and sanctions stipulated in a law are intended to rectify the purpose of the establishment of a state. In this case the principle of intentions plays an important role as a basic implementation for positive rules in the state regulatory system. The rules contained in positive law are a combination of goals from the lives of individuals with the purpose of the life of the state society.

Using a work framework that is in line with the maqasidi approach, Jhering places the benefit of the community as the main goal of law enforcement. To achieve this goal, the law cannot be in a rigid position, but it is dynamic and always changes and develops. Jhering explained that the concept of meaning which is the goal of law is the finalist cause that is active and futuristic. A rule is not created as a result of the development of certain social phenomena, but a regulation is designed and promulgated because it has the purpose of guaranteeing the benefit of society. According to him, there is no action taken without having a specific goal. The actions of council members and government authorities in issuing a law have the purpose of placing the public as a priority both at the time of publication and in the future, not only as a result of certain phenomena that occur in society (Jhering, 1913: 32 - 35).

Jhering analogizes the issuance of regulations with actions taken by individuals. In performing an act, individuals go through internal and external phases. The internal phase in one's actions is based on several factors. First, the purpose of doing actions, this factor is born based on the desire that is consciously influenced by certain ideas. Second, the relationship between the goal and the actions taken is in the form of fulfilling certain desires. Third, the legal concept of a goal, that every action is always based on purpose, because acting and acting with its true purpose is only a synonym. Fourth, there are rational reasons underlying the birth of a goal. If someone is robbed and then surrenders his property, in this case it does not mean that he surrenders property due to pressure from robbers, but he aims to maintain the security of his soul at the expense of his property. Every action must be based on rational goals and reasons, except for irrational actions carried out by people who are not mentally capable. The second phase is the external phase in an action. The external phase is laden with the law of causality that a desire that gives birth to an action must be in harmony with the wider natural law that is outside the

individual. Actions that are not in harmony with the larger rules of nature will give birth to certain consequences for the culprit. It does not mean that natural law has power over one's desires, but the desire of someone in power to make changes to the existence of external law (Jhering, 1913: 6-17).

In socio-legal studies, Warassih supports the existence of legal studies that can go beyond mere juridical normative boundaries. That the study of positive law has a close relationship with various studies of other scientific disciplines. Law is not an object that has been made and descended from the sky to be carried out by humans for the sake of achieving harmony in life, but the law is always influenced by its social scope (Abdurrahman, 2006: 227). Zubaida explained that there was an interrelation between the legal system and the concept of religion in the community living in the Muslim world (read: Muslim majority territory). A rule is seen as a manifestation of the religious view of the community that is collaborated with the development of juridical sociological local communities (Zubaida, 2005: 1-5). Jabiri explained that the Muslim community's view of the legal reality that lives in its environment is a reflection of its religious values, where a comprehensive codification of the Shari'ah has never been achieved, but it has always evolved step by step from one generation to the next since the time of the Prophet in Medina to the present life and so on. Legal development through the perspective of the maqasid shari'a bases the intention of the textual rule being derived by tracing the cause of the revelation and examining every social situation holistically, not only making legal generalizations of events that occur in different social contexts (Jabiri, 2009: 81 - 85). Qodri Azizi called it the modern scientific ijthad, which is based on the method of legal exploration by using several different manhaj (eclectic) (Azizi, 2003: 54).

The benefit factor is the basis for positioning the study of maqāṣid syarī'ah as a perspective for the elements of intentions in positified shari'a among national law. This process can be seen in the following diagram. Social phenomena in society are external perspectives. Maqāṣid syarī'ah is a moral perspective that underlies how legal development is carried out according to the constitution which is an internal perspective of the positive law realm. The external perspective serves to find the benefit of the nation and state in the plurality of social problems in the community. The moral perspective serves as a medium to find benefit for humans which is contained by the universal values of people's beliefs.

The internal perspective is an intermediary to find benefit in the formulation and development of national law.

The interaction between *maqāṣid syarī'ah* as a perspective and the development of national legislation via the element of intent produces three policy models. First, generating the development of national law by instructive in the *taqnīn* model. *Taqnīn* is a regulation issued by state authorities both executive and legislative to be applied as a positive norm. *Taqnīn* occurs when national law adopts Islamic law as part of its legal source, because it has been accepted by society, so Islamic law is accommodated by the state to be a positive law because it has the same goal as national law, which is oriented towards state development (Itmam, 2015: 108), for example the rules regarding marriage in Indonesia. Secondly, it is an integrative eclectic model, namely trying to adopt the best parts of national law and Islamic law, then formulated into theories and practices that are able to juxtapose the substance of Islamic law with national regulations. The eclectic nature arises from the struggle between customary law, Islamic law, and national law as part of the strategy of legal pluralism in Indonesia, for example the rules regarding the provision of mandatory wills (*washiyah wajibah*) to adopted children as a strategy of Islamic law govern the customary rules that give them inheritance. Third, it is adaptive when essential elements of Islamic law affirm national rules because it contain the basic principles of universal humanity that are desired by society and do not conflict with Islamic teachings, for example the acceptance of Muslim society in Indonesia towards Pancasila as the basis of the state because it contains principles that do not conflict with Islam.

3. Maqasid Shari'ah in the Development of Islamic Law Methodology

The problem of asylum seeker refugees has a close relationship with basic human values and fundamental rights that must be possessed by everyone. These values have a significant position in the discourse of *maqāṣid syarī'ah*. As an approach in Islamic jurisprudence that promotes universal values, *maqāṣid syarī'ah* is better able to respond to current humanitarian problems (Attiya, 2003: 177). The method of al-Syatibi *maqasidi* converges on two models of approach in finding the objectives of the Shari'ah, first through the method of causation (*ta'līl*) which is to withdraw *maslaha* and reject *mafsadat*.

The first model is then called *istinbāṭi* *ijtihād* which is a focus on exploring the ideas contained in texts that contain abstract values in sharia by exploiting linguistic methods and emphasizing analysis to sharia sources in the form of textual. The second model is *ijtihād taṭbīqī*. In the context of the current refugee phenomenon, the *ijtihād taṭbīqī* method is an induction analysis media from various sides to interpret ideas in religious texts and then contextualized with current refugee problems which are loaded with human problems (Masud, 1995).

The highest goal in sharia according to Ibn ‘Asyur comes to six points. First, sharia rules that result in general improvements in society and individuals. Second, the purpose of sharia is in accordance with human nature. Third, tolerance and concern for fellow human beings. Fourth, maintaining the continuity of human life in the global system by developing human qualities in each generation. Fifth, make improvements on the social side. Sixth, realize benefit and avoid damage and various things that lead to damage (Attiya, 2003: 123124).

The *maqasidi* method in response to the development of the current problem phenomenon has a special character. First, *maqasid syari’ah* has a character as the basis of regulatory legislation aimed at realizing human welfare through induction methods in religious source texts. Second, *maqasid syari’ah* is universal in which the manifestation of *maṣlaha* is addressed to all humanity. Third, *maqasid syari’ah* has an inclusive character discussing all human problems both related to worship and *mu’amalah*. Fourth, the method of *maqasidi* legislation is definitively based not only on one textual foundation but based on various general and specific textual and rational foundations. The four characteristics of the *maqasid sharia* method as such place it as a perspective for developing refugee handling policies that uphold human dignity (Dusuki and Bouheraoua, 2011: 316 - 336).

The increasing number of refugees in the world originating from various countries in the Muslim world, especially the Organization Islamic Cooperation (OIC) member countries, encouraged several academics to map the concept of handling refugees excavated from Islamic scientific literature (Arnaout, 1987; Suhrke, 1995; Zaat, 2007; Elmadmad, 2008: 51-63; Manuty, 2008: 24-29; Abd al-Rahim, 2008: 15-23; Turk, 2008: 714; Abou Wafa, 2009). The idea leads to the opinion that there is relevance between the concepts of protection contained in the development of Islamic history and the refugee protection

regime published by the 1951 Vienna Convention and 1967 Protocol on refugee status. Shoukri explained that Islam has a background in the concept of protecting refugees who migrate to seek asylum. The concept of al-Jiwār was explained as a form of giving protection to refugees that had existed in the traditions of Arab society before Islam (Shoukri, 2011: 4 - 7).

Zaat states that Islam requires Muslims to provide asylum protection for those who request it through their analysis which classifies as many as nine verses in the Quran which discuss explicitly and implicitly about giving asylum to those who ask for it (7: 137, QS 4:97 , QS 7: 127, QS 22: 39, QS 2: 246, QS 17: 76, QS 60: 90, QS 3: 195, QS 2: 49). Zaat also cites two hadiths which have the meaning of the obligation of a Muslim to give asylum, the first hadith which obliges a Muslim to do seven things, one of which is to give help to those who are persecuted, second is a hadith which states that it is obligatory for a Muslim being persecuted. Zaat also includes analysis of verses 72-73 of the Qur'an Surat al-Anfāl (8) which explains the obligation of Muslim societies to help other Muslim groups. The verse also contains the threat of punishment for those who refuse to provide asylum protection to refugees who migrate, while the protection is promised equal compensation (Zaat, 2007: 8-13).

Baderin categorizes refugee protection issues in the position of muamalah discussion on Islamic studies, so that the concept of protection is an area that allows Islamic law experts to develop according to the demands of world progress to respond to the notion that the law can change according to changing times, *tataghyar al-ahkām bi taghayyuri al-zamān* (Baderin, 2005: 40). Refugee protection has the same spirit as the application of sharia which leads to the affirmation of basic human rights, because the benefits of the concept of protection are nothing but aiming at survival, religion, descent, property, and other public interests safety which are the goals of sharia (Mahmassani, 1961: 88; Zaat, 200: 31). The dynamism of the concept of protection demands the search and rediscovery of sources in Islamic studies that underlie the current rules of protection (Elmadmad, 1991: 467 - 474). The discussion of the concept of refugee protection can be studied through the maqasid sharia which contains elements of intentions from Islamic law. The concept of refugee protection is part of the interests and benefits of humans which is

the goal of the sharia to humans (Hallaq, 1997: 180 - 187; Hallaq, 2004: 166 - 171; Masud, 1973).

Maqasidi's approach to the problem of refugees proves that the benefits contained in the objectives of sharia can enrich the study of current global refugee mobilization. Maqasid Sharia's point of view also emphasizes that Islam has been proven to be contextualized by the development of current phenomena. Syari'ah Islam actually had discussions that had the same path with refugee protection contained in the 1951 Convention and 1967 Protocols on refugee's status. Furthermore, it even has relevance to the development of refugee protection mandates which currently lead to burden-sharing between refugee countries of origin, transit countries, and destination countries. Therefore, the resolution of the Organization of Islamic Cooperation (formerly called the Organization of the Islamic Conference) number 34/21 - P on the problem of refugees in the Muslim world has a methodological foundation in Islamic studies if it is associated with the study of maqasid sharia. The resolution contains criticism for all repressive actions against refugees and invites all parties to find solutions for groups of refugees by minimizing and eliminating the causes of displacement and seeking solutions to the current conditions of refugees, especially with the choice of recognizing their rights as human beings, guaranteeing security when they returned to their home country.

The Resolution of the Organization of Islamic Cooperation number 34/21 - P was adopted by the 21st Conference of the level of the Organization of the Islamic Conference, April 25-29, 1993, in Karachi, Pakistan. The resolution was reaffirmed at the 7th Summit of the Organization of the Islamic Conference, December 13-15 1994, in Casablanca, Morocco. Later by issuing resolution 32/7-P (IS) containing 10 points on dealing with the problems of Muslim refugees throughout the world. Among the important points in the resolution is to invite all OIC member countries who have become members of the 1951 Convention on refugees or not, to cooperate with humanitarian agencies in providing assistance and finding solutions for refugee placements. That funding for handling refugees can be done by sharing the burden between OIC member countries through humanitarian agencies and channel by the Islamic Development Bank. Relations with UNHCR (United Nations High Commissioner for Refugees) are expected to always be intertwined with OIC member countries, both in coordination and cooperation.

Referring to the maqasidi method of Imam al-Syatibi which produces *ijtihād*

istinbāṭi and ijtihād taṭbīqī, then the resolution needs to be linked to various perspectives such as politics, economics, social and others as a multidimensional feature in Jasser Auda's version of sharia maqasid. This was done so that it would not only be OIC's policy as a representation of the global Muslim community, but also might be applied in the policies of each member country. This process is expected to lead to internal state policies that result in the application of regulations including bottom-up policies, reviewing the problem of refugees from the viewpoint of the benefit of refugees while in transit countries, as well as top-down in how implemented policies of handling refugees that are in accordance with the welfare of the country.

Regulation on refugees in Indonesia refers to the Presidential Regulation of the Republic of Indonesia Number 125 year 2016 concerning Handling of Foreign Refugees. The Presidential Regulation is the mandate of Article 25-27 of the Law of the Republic of Indonesia Number 37 year 1999 concerning Foreign Relations. In terms of the relationship between international law and national law, the Presidential Regulation is a form of indirect incorporation carried out by the Indonesian government against international conventions on refugee status. This is a form of the Indonesian government's commitment to the application of the *non-refoulement* principles contained in international agreements. Therefore, even though Indonesia is not a ratification state to the refugee conventions, but it still has responsibility of handling refugees as stipulated in Presidential Regulation

Number 125 year 2016. The substance of the Presidential Regulation Number 125 year 2016 contains humanitarian values that places refugees no longer as violators of immigration rules, but as a foreign entity that requires special handling laden with benefits for all parties, both for refugee groups and for Indonesia as a transit country.

The Presidential Regulation contains 45 articles and consists of eight chapters. Chapter one contains general provisions which contain definitions and parties related to the handling of refugees. Chapter two contains procedures that must be carried out when finding the whereabouts of refugees for the first time, steps that need to be taken, the authorities, and procedures that must be carried out if the refugee is found to have died. Chapter three contains procedures for holding in detention centres as well as in designated locations along with facilities and groupings of refugee placements based on gender, family status, ethnic and religious affiliation, and placement of refugees in shelters with special

needs. Chapter four contains security procedures as long as refugees are in Indonesia. Chapter five contains immigration supervision. Chapter six contains funding that can come from the state budget expenditure of ministries and institutions, as well as from other legal and non-binding sources in accordance with statutory provisions. Chapter seven contains other provisions that contain the separation between refugees and people smuggling, as well as reporting of information between the government and foreign institutions that manage the existence of refugees. Chapter eight contains the closing provisions that contain the period of entry into force of the Presidential Regulation and the date it starts to be promulgated.

The problem of asylum seeker and refugee's migration has a close relationship with basic human values and fundamental rights that must be possessed by everyone. These values have a significant position in the discourse of *maqāṣid syarī'ah* which emphasizes universal values to find benefit for humans. Therefore *maqāṣid syarī'ah* is considered more capable approach in Islamic law studies in responding to current humanitarian problems (Attiya, 2003: 177). The foundation of *maqāṣid shari'a* since the era before al-Juwaini, al-Ghazali, al-Syatibi, to Ibn 'Ashur, and al-Fasi, and Muslim scholars of the contemporary era such as al-Raysuni, Attiya, Kamali, and finally Jasser After, it has been proven in their works that the concept of *maqāṣid shari'a* has evolved, and is an attempt to answer the challenges of the times when social problems are increasingly complex.

Presidential Regulation number 125 year 2016 concerning Handling of Foreign Refugees is a regulation in Indonesia that emphasizes the benefit of refugees who are trying to seek asylum through the UNHCR Jakarta office. This benefit is a basic necessity for refugees so that it can be accepted by the Indonesian government for temporary domicile in the territory of Indonesia, even if referring to the 1951 Convention and 1967 Protocol on the Status of Refugees, the transit country does not have a juridical obligation to accept the influx of refugees seeking asylum. If viewed from the perspective of *maqāṣid syarī'ah*, this condition is part of the fundamental benefit of refugees. Imam Juwaini placed the need to live at the primary level (*ḍarūriyyāt*), al-Ghazali called it *al-darūriyyāt al-Khams* which included guarding religion, soul, mind, lineage, and wealth. Referring to the three kinds of benefit in the method of *istinbāt al-ahkam*, namely *maṣlahah mu'tabarah* (benefit that is recognized as in accordance with sharia), *maṣlahah mulghā* (benefit that is not recognized

because it is not in accordance with sharia objectives), and *maṣlahah mursalah* (benefit not found in accordance with or not in a Shari'ah source) (al-Raysuni, 1990: 255 - 294). The regulation of handling refugees is a tangible manifestation of the *maṣlahah mu'tabarah* based on the verses of the Qur'an and the hadith of the Prophet which call for the protection of asylum seekers as mentioned earlier. However, the technicality of handling refugees is something that is not specifically regulated by the basic texts of Islamic law, therefore it is part of the *maṣlahah mursalah* which allows humans to regulate these rules. In addition, the rules for handling the presence of foreign refugees in transit countries that do not ratify the convention on refugee status are also the implementation of the value of *faiḥ al-dar'ah*, namely the method in Islamic law that affirms certain steps as a medium to achieve results that are in accordance with benefit in line with the objectives of the law itself (Auda, 2008: 45 - 47).

CONCLUSION

Presidential Regulation number 125 year 2016 concerning Handling of Foreign Refugees is a regulation in Indonesia that emphasizes the benefit of refugees who are trying to seek asylum through the UNHCR Jakarta office. This benefit is a basic necessity for refugees so that it can be accepted by the Indonesian government for temporary. The approach of Islamic law to various contemporary phenomena through the element of benefit (*maslaha*) which is discussed in the study of *maqasid shari'a* enabled Islamic studies in capable position in respond side by side and intertwined with other scientific disciplines. The problem of handling refugees in Indonesia is one of the cases that require discussion referring to various scientific sources, regarded to national legislation, international law, and Islamic sciences. It because considering that the number of refugees currently dominated by the world's population from countries of the Islamic World. The UN High Commissioner for refugee affairs also realizes that the formulation of handling refugees in all countries requires various approaches. Factors of humanity, economy, politics, and religious values have become approaches that are currently significant to strengthen the regulation of handling refugees with the level of government and community acceptance in the country. The transit country is the largest recipient country of the waves of refugee's migration, but

those countries dominated by non-ratify countries to the Convention on refugee status held in 1951 and the Protocol to its amendments in 1967. The majority of transit countries are burdened by financial limitations to handle the existence of refugees in their territory.

The policy of handling refugees in Indonesia has experienced dynamics policies. Indochina (Vietnam) refugees in the 1970s were placed exclusively on Galang Island which was separate from Indonesian society. While the Directorate General of Immigration's policy in 2010 placed refugees with illegal immigrant status, so that they were applied to immigration sanctions unless they could show evidence that they were refugees of asylum seekers at the UNHCR Office in Jakarta. The Presidential Regulation of the Republic of Indonesia Number 125 of 2016 concerning Handling of Foreign Refugees places refugees as owners of human rights, so they can be tolerated temporarily to stay in Indonesia until their status is decided by UNHCR. Maqasid shari'a as a perspective in national regulations, in this study places the rules for handling refugees as part of national regulation. Maqasid shari'a played a significant role either as a medium in implementing shari'a in national regulation or affirmed Islamic behavior as part of national legislation. The interaction between shari'a and national regulation results three policy models. First, policies are instructive in the taqnīn model, namely regulations issued by state authorities as a positive norm to be implemented by state apparatus for society. Second, the integrative policy of the eclectic model, namely adopting the best parts of national law and Islamic law, then formulated into one particular regulation. Third, adaptive policy, which is when important elements of Islamic law affirm national rules as part of Islamic shari'a because they contain universal basic principles of humanity that do not conflict with Islamic teachings. Maqasid Shari'a's perspective on the regulation of handling refugees in Indonesia places it in the position of adaptive policy, where Islamic law affirms the provisions contained in the regulation because it contains a basic benefit for human life. This perspective serves to increase public acceptance of the existence of refugees in Indonesia, especially because the majority of refugees in Indonesia are Muslims who need humane handling from the Muslim community in Indonesia.

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