



The Application of *Sharia Maqashid* on the Protection of the Rights of Minority of Muslim Rohingya in Regional ASEAN (Indonesia-Malaysia)

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Abstract

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This study aims, first, to analyze the application of the principles of Maqashid Sharia as a principle of human rights protection against the Rohingya Muslim minority. Second, assess the extent of regional efforts (ASEAN) to protect the Rohingya Muslim minority is based on the principles of Maqashid Sharia. This study is normative juridical, i.e basic research study is conceived as legal norms or rules which applicable, both contained Islamic Law and International Law. Further, legal materials collected in the process were analyzed based approach to the law (statute approach) and qualitative approach. The results showed, first, principle of Maqashid sharia are the fundamental principles that are in line with international human rights principles set forth in the Universal Declaration Human Rights of 1948, the ASEAN Charter and the international conventions that have been globally accepted. Its application carries its own moral responsibility for the ASEAN region, to encourage its member countries (particularly Indonesia and Malaysia) obligations responsibility to protect (R2P) to the ethnic Rohingya. When referring to the ASEAN charter alone, especially member states Indonesia and Malaysia will be very limited in giving aid directly to the territory of the Rohingya, given in addition to avoiding any intervention factor that arise, as well as the government of Myanmar has declared the anti-Islamic rule in the territories of its constitution. This is the regional challenges, especially for Indonesia and Malaysia

¹ I would like to express my thankfulness to State University of Gorontalo, *Universitas Negeri Gorontalo*, (UNG), especially Department of International Law, Faculty of Law.

as a member states that embraces the principles of Islamic law once the state of the organization with Myanmar. Secondly, efforts should be made Indonesia and Malaysia are fulfilling rights Rohingya people merely when they became refugees or asylum seeker in the country. The rights can be met as a complement of the principle maqashid sharia, among others: a) freedom of religion, the right to life and freedom from fear (maintenance of soul) in this case Indonesia has established the Integrated Community Shelter (ICS) as a residence of Rohingya refugees and build mosques or places worship for Muslims Rohingya named mosque Arakan, b) fulfill the safety assurance, guarantee of human dignity (maintenance of breath), c) custody of ethnic or tribal, the right to marriage to the breeding (maintenance of descent), d) the right to education (maintenance sense), e) the right to receive a decent living by being given the opportunity to earn a living (maintenance of property).

INTRODUCTION

HUMAN rights are a natural right. Rights that everyone has and cannot be revoked. All countries and human beings should be able to accept human rights concepts, as their formulations have been perfected by adopting various diverse nationalities and religions.

The current human rights events to attract the attention of the international community are related to human rights abuses against the Rohingya Muslim minority that occurred in Myanmar. Rohingya Muslims are ethnic Muslims living in Myanmar. From the report of 2 various news has occurred Rohingya massacre (which incidentally Muslims) more than 6000 people who peaked in June 2012. This is a serious problem that must be faced by the Myanmar government for these events are contrary to human rights, namely the right to life, freedom of religion And the right to security.

Not only that, the Rohingya Muslim ethnicity is not recognized as a citizen of Myanmar because according to the Myanmar Citizenship Act of 1982 set out 3 categories of citizens, and of those 3 categories none of the categories can be applied to Rohingya. Not even admitted this ethnicity, because they are physically different. So since 1982 Rohingya is not entitled to obtain a KTP (citizenship identity card, Kartu Tanda Penduduk, KTP) or passport of Myanmar.

Judging from these facts the urgent main concerns are the citizenship rights of Rohingyas as the contents of UN Resolution submitted by UN Secretary-General Ban Ki Moon that the rights of citizenship and rights that

² Media Online Pariaman, <http://www.pariamantoday.com/2012/07/tragedi-memilukan-myanmar-dan.html>, diakses tanggal 18 April 2016

have been violated against the Rohingyas are a guaranteed human right and Protected International Law.³

Departing from human rights violations that appear to be “deliberate” by the Burmese government, which has great implications for international and regional security (ASEAN) is that the ethnic who are victims of human rights violations Rohingya is a religious and faithful ethnic group. The problem of severe discrimination against the Rohingya people who are Muslims is very vulnerable. Myanmar external parties, especially countries whose Muslim majority would never allow this to take place continuously. Especially considering the geographical conditions of Myanmar that neighboring Islamic countries such as Bangladesh, Malaysia and Indonesia. Therefore attention is not only directed to the internal conditions of the government of Myanmar but will always pay attention to the existence and dignity of every people and even the State. Due to the above the above the dignity of dignity because it is the enforcement responsibility legal or human personality which makes it capable to enjoy and use rights are followed by various obligations.

It is mentioned in the Qur'an, which reads: “And We have honored the children of Adam, We carried them on land and ocean, we give them sustenance of good things and we preferred them to the advantages of the perfect on most creatures that we have created.” (QS al-Isra: 70). This verse indicates that God raised the human level. But there are still many we encounter practices of human rights violations that have implications for the intervention of one State to another.

Shari'ah Islam itself has a purpose in line with the principles of human rights. The purpose of Islamic law or *maqashid al-syari'ah* contains the five most basic rights which are the primary needs -*dhoruriyat al-khoms*-namely the right to life, the maintenance of reason, the guardianship of the offspring, the recognition of property rights and freedom of religion. The Prophet himself in leading the people of Medina has applied the principles of human rights. There are more similarities than differences between international, national human rights principles and human rights principles from an Islamic perspective. Therefore it is necessary to understand how the application of the principle Objectives of Islamic Law (*Maqashid Sharia*) International human rights violations against the Rohingya Muslim minority.

HUMAN RIGHTS IN ISLAM

HUMAN rights in Islam are not only recognized but fully protected as one of the pillars of Islamic building. This principle is explicitly outlined in the Qur'an, among others, in the letter Al Isra verse 70: “And indeed We have

³ Suara Jakarta, <http://suarajakarta.co/news/hukum/akar-masalah-pelanggaran-ham-rohingya-ada-di-myanmar/>, access on 18 April 2016

honored the children of Adam, We carried them on land and sea, We give them sustenance of good things and We favored them with a perfect excess over many We have created.”

The verse expresses the glory of man in the text of the Qur'an is called *Karamah* (Glory). Mohammad Hasbi Ash Shiddieqy divided *karamah* into three categories. *First*, the personal glory or *karomah fardiyah*; *second*, the glory of the community or *karomah ijtimaiyah*; and *third*, political glory or *karomah siyasiyah*. In the first category, man is protected both personally and in his property. In the second category “the status of human equality is fully guaranteed” and in the third category, Islam fully guarantees the political rights of its people.

On August 5, 1990, Islamic countries incorporated in the Organization of Islamic Conference (now the Organization of Islamic Cooperation) produced a declaration of humanity according to Islamic law based on the Qur'an and As Sunnah. This Declaration is called the Cairo Declaration of 25 Articles. It is stated in the declaration that all rights and freedoms are subject to Shari'a or Islamic Law. These rights include: the right to life (Surat al-Isra: 33, Al An'am: 151); The right to equality and status (Surat al-Baqarah: 286); Freedom of expression (Surah At Taubah: 71); Right of freedom of religion (Surat al-Baqarah: 286), property rights (Surat al-Baqarah: 188, An-Nisa: 29); Right to get justice (Surat ash Shura: 15); Ha get justice (Surat as Shura: 15); Right to get the basic needs of human life (QS Adz Dzariyat: 19); And the right to education (Surah Yunus: 101).

MAQASHID SHARIAH IN RELATION TO THE PRINCIPLES OF HUMAN RIGHTS

SHARI'AH (*shari'at*) is literally the way to the source of water. In terms of religion (Islam) shari'ah is the way of life of Muslims. The Shari'ah contains the stipulations of Allah and the provisions of His Messenger, whether in the form of prohibitions or in the form of commandments, covering all aspects of life and human life.⁴

Viewed from the aspect of jurisprudence, shari'ah is the basic law norms set by God, which must be followed by Muslims based on faith related to morals, both in relation to God and with fellow human beings as well as with the natural surroundings. Fiqh (fiqh) in language means understanding, in the sense of understanding or a deep understanding that requires the deployment of potential sense. The scholars of ushul fiqh defines fiqh as knowing the laws of Islam that are *amali* (deeds). Through their detailed arguments. They define Jurisprudence as a collection of *amaliah* laws prescribed in Islam.⁵

⁴ Muhammad Daud Ali, *Asas-Asas Hukum Islam*, Jakarta: Rajawali Pers, 2001, p. 46

⁵ H.A. Hafiz Anshary, Editor H.Chuzaimah T. Yanggo, *Problematika Hukum Islam Kontemporer*, Jakarta: Pustaka Firdaus, 1994, p.8

In Islamic legal terms the Shari'a is distinguished from fiqh as follows: Shari'ah is a rule that comes from revelation, while the conclusions of revelation become (in the form of) fiqh. Shari'ah is fundamental with a wider scope, then fiqh is instrumental with limited scope of law governing human actions. Shari'ah is the decree of Allah and His Messenger, because it is eternal. Fiqh is a human work that is not eternal, it can change from time to time. Shari'ah is only one and shows unity in Islam, while fiqh shows the diversity of the visible streams called madzhab-madhab. If the so called *Islamic Shari'a Law* then fiqh is *Islamic Jurisprudence*. Between shari'ah and fiqh there are differences, as well as showing the closeness of the relationship.⁶

If we study the provisions of Allah and the provisions of His Messenger in the Qur'an and *saheeh hadiths*, we immediately know the existence of the goal of Islamic law. In general it can be formulated that the purpose of Islamic law is the happiness of man in the world and in the Hereafter, by taking the beneficial and preventing or rejecting the uncertain. In other words Islamic law *tujun* is the benefit of human life. Abu Ishaq al-Syatibi formulated five objectives of Islamic law, which maintain the religious (*hifzh al-din*), keeping the soul (*hifz al nafs*), maintaining reasonable (*hifzh al aql*), maintain descent (*hifzh al nasl*) and treasure (*hifzh al mal*). These five objectives of Islamic law are called *maqashid al-syari'ah*.

Maqasid al-Shari'ah is Islamic law objectives that must be achieved. Such a purpose can be traced in verses of the Qur'an and hadiths of the Prophet as the main source of law so that it can be formulated law-oriented jurisprudence.

This benefit can be captured by a person who is willing to earnestly use intellect. According to the scholars of *usul fiqh* term benefit is called *maslahah mursalah*. *Maslahah mursalah* as a source of law in its implementation is still considered by the fuqaha. Hanafy class schools and Shafi'i schools do not regard it as a stand-alone source of law and put it into the category of *qiyas*. While Imam Maliki and Imam Hanbali argue that *maslahah mursalah* can be accepted and can be a source of Islamic law, as long as meet the conditions specified. For essentially the existence of beneficiaries are in order to realize law purposes (*maqasid al-shari'ah*). Although there is no direct *nash* that reinforces it. The Malikiy school of thought as the bearer of the flag of *maslahah mursalah* raised three reasons as follows: First, the practice of the Companions who have used *maslahah mursalah*. As Umar bin Khattab did. He did not enforce the hand-cutting punishment of a poor thief in a famine. Another example, the Companions collect the Qur'anic manuscripts on the absence of the command of the Prophet. Second, the beneficiaries in

⁶ Muhammad Daud Ali, *Opcit*, p. 49

accordance with *the maqasid al-shari'ah*. Thirdly, If maslahat is not done, then mukallaf will experience difficulties⁷ (Zahroh, 2001: 428 - 431)

MAQASHID SHARIA ROHINGYA MINORITY RIGHTS PROTECTION

THE PURPOSE of Islamic law or sharia *maqashid* contains five of the most fundamental rights which are the primary needs (dhoruriyat al-Khoms), namely the right to life, the maintenance of a reasonable, secure descent, the recognition of property rights (property), and religious freedom. Prophet Muhammad himself in leading the people of Medina has applied the principles of human rights. There are more similarities than differences between international, national human rights principles and human rights principles from an Islamic perspective.

In relation to the protection of the rights of the Rohingya Muslim minority, the objectives of Islamic Law can be formulated as follows:

Al Muhafazah Ala al-Din (Religious Nurture)

RELIGION is something that every human must have in order to keep his dignity up. Religion is a human need that must be met, because religion that can touch the human conscience. In embracing the religion, it is proper that every religion and even Islam give protection to the followers of other religions to run their religion according to their belief.

Rohingya have been subjected to various pressures and discriminative treatments in the form of torture. The most fundamental in the event of human rights violations by Myanmar is the discriminatory treatment conducted against ethnic Rohingya who are all Muslims. Apart from the history of the political conflicts that have taken place since 1947, the Rohingya ethnic group residing in the Arakan region were treated unnecessarily because the government considered them to be very poor and uncivilized so they could not be classified as Myanmar citizens. Because of this, the Myanmar government has even voiced anti-Islamic government for its country. The peak in 2012 has been an abandonment, torture to expulsion by the Myanmar military junta against the ethical.

Based on the Declaration of Human Rights Universal, 1948, declaration of universally recognized by all civilized countries of the world guarantee religious rights of every human being in the world, it is stated in Article 2⁸, Article 16 paragraph (1)⁹, Article 18¹⁰, and Article 26 paragraph (2)¹¹.

⁷ M. Abu Zahrah, *Ushul Fiqh*, Pustaka Firdaus: Jakarta, 2008, pp. 428-431

⁸ Article 2 of the Universal Declaration in 1948: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, with no exceptions of any kind, such as the

The 1948 Universal Declaration of Human statement harmony with the principles of Islamic law *Al Muhafazhah* purpose *Ala Al-Din* in terms of human rights violations that restrict the rights of Rohingya Muslims in Myanmar government.

In the regional sphere, Myanmar is one of the ASEAN member countries, it did not uphold the purposes and principles of the ASEAN¹² concern into maintain security and peace in the country namely the respect of fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice. Yet in view of the lack of responsibility of Myanmar, discrimination and human rights abuses against Rohingya have bad implications for ASEAN regional security, especially against ASEAN-oriented ASEAN countries, Malaysia and Indonesia. These human rights violations are very much at odds with any instrument including Islamic Law. Until the year 2013 occurred bombing¹³ in the monastery Ekayana Jakarta in Indonesia and the biggest bombing occurred at Erawan shrine Bangkok, Thailand as the implications arising for acts of human rights violations against ethnic Rohingya.

Muhafazhah Ala Al-Nafs (Keeping the Soul)

IT IS the guarantee of salvation of the noble right to life. Included in the general sense of this soul is the assurance of the safety of life, limbs and the guarantee of honor of humanity. Of the latter include freedom of choice of professions, freedom of thought and expression, freedom of speech and freedom of choice of residence and prohibition of murder.

Undeniably, the Rohingya ethnic is a very persecuted minority in Myanmar. With a government widely accused of gross human rights violations, the Rohingyas may be one of the most oppressed peoples.¹⁴ Rights noble life Rohingya people taken away even no longer guarantee the safety of lives on them. In this case the equality status of the Rohingya is fully guaranteed by the goal of Islamic law *Muhafazhah Ala al-nafs*.

The suffering drew a lot of attention from countries in the world, especially Muslim majority countries. Indonesia and Malaysia as neighboring

distinction as to race, color, sex, language, religion, political or other views, origins National or community proposals, property rights, birth or other positions.”

⁹ Article 16 (1): “Men and women who are older, with no limitation due to race, nationality or religion...”

¹⁰ Article 18: "Everyone shall have the right to freedom of thought, conscience and religion ..."

¹¹ Article 26 paragraph (2): "..... Education should promote mutual understanding, tolerance and friendship among all nations, racial and religious groups, and should promote the activities of the United Nations in the maintenance of peace."

¹² Article 2, point (i), ASEAN Principles.

¹³ Satrier, “*Bom Tempat Ibadah*”, <http://m.kaskus.co.id/post/520712a8faca170c0a000003>, accessed on 20 April 2016

¹⁴ Human Rights Watch, “*Perilous Plight? Burma’s Rohingya Take to the Seas*”, 26 May 2009.

Myanmar as well as Myanmar's state-owned corporation at the regional level, is a country that does not stop monitoring the development of the Rohingya situation and pay special attention. Both countries pay special attention to the Rohingyas based on the principle of humanity and the principles of Islamic law applied in the country. At least the main reasons used as the basis for the Muslims to treat well Rohingya Muslims is their solidarity which became one of the main principles of Islam ie the principle of building *brotherhood / fraternity*.

The persecution of Rohingyas due to their racial and religious identities exacerbated by unfortunate events in Burmese history is the main reason that has driven many Rohingyas into the refugee camps of neighboring countries. Those who escaped to Malaysia and Indonesia got serious help. In Indonesia, the Rohingya refugees are given the right to live a life as it should be men, children to school and the parents mingled with the citizen in an activity to earn a living, and even has built mosques Arakan and *shelter* specifically Rohingya refugees (*Integrated Community Shelter*) in Aceh. Meanwhile, Malaysia as well as Indonesia received with the airy Rohingya refugees in the country. Not only that in Malaysia there are several organizations formed as a form of support for the Rohingya, among others: *Myanmar Ethnic Rohingyas Human Rights Organizaion Malaysia (MERHROM)*, *Rohingya Society in Malaysia (RSM)*, *Burmese Rohingya Refugee Community Malaysia (BRRCM)*, *Malaysia Arakanese Rohingya Ulama Council (ARUC)*, *Malaysia Rohingya Social and Welfare Association Pahang*, *Malaysia Burma Refugee Organization Malaysia*.

Muhafazhah Al Ala Al 'Aql (Maintain Intellect)

AL-MUHAFAZHAH *Ala Al-'Aql* , that is assured the mind of the damage that causes the person concerned is not useful in the community. Prevention efforts that are preventive by the shari'ah are actually aimed at improving the ability of the mind and keep of various things that harm. With a healthy mind man can develop science and technology and with it humans can manage and prosper the world as well as possible. The principle of equality or equality held in Islam positions any ethnic or ethnic group in a secure space. The objective of Islamic law which maintains the intellect of every human being in this case can be categorized as the right to get an education and get a decent living.

ASEAN's regional obligations relating to the protection of serious human rights victims of Rohingya are now more intensively undertaken by member states. The state is more proactive in the first handling of refugee acceptance. In International Law every refugee is treated equally with other citizens of rights such as the right to education, the right to social welfare, the right to work. Such rights are relevant to the purpose of *Muhafazhah Al Ala Al-'aql* about maintaining reasonable obligations. Until now the obligation to

carry out this goal has been applied by both ASEAN member countries, Malaysia and Indonesia, they can undertake education properly.

Muhafazhah Al Ala Al-Nasl (Maintaining Descendants)

GUARANTEE the sustainability of the human population to stay alive and grow healthy both physically and psychically. Islam provides provisions in the Qur'an and as-sunnah how to choose descent. Islam also provides lessons on how to educate children and nurture families. Related to the massacres that led to the destruction of Myanmar's military junta against the Rohingya minority is the most criticized act in the world, even they can be said to have done an ethnic cleansing within a country. Internal conflict that originated from this long political history caused many civilians who became victims. Destruction by means of this massacre and murder is a challenge to the objectives of Islamic Law, given the destruction is directed to ethnicity with the majority of Rohingya Muslims.

In this regard, ASEAN has formed a parliament specialized in dealing with issue and problem ASEAN increasingly complex, the *ASEAN Inter-Parliamentary Myanmar Caucus* (AIPMC) and coupled with the *Organization on the Islamic Cooperation* (OIC) to raise the issue of violent anti-Muslim in Myanmar to the Agency of the UN Human Rights or the *UN Human Rights Council* (UN HRC). Currently ASEAN member states incorporated as a council in the HRC include Indonesia, Malaysia, Thailand and the Philippines, have conducted various independent investigations of gross human rights violations in Myanmar. Such action is a regional *contribution* in the form of giving firmness against the Myanmar government to prevent further human rights violations and restore the rights and freedoms of the minority Rohingya. In this case *maqashid sharia* principles apply, ASEAN is making significant efforts to be able to restore the rights of the Rohingya ethnic descent is thus kept well maintained and there is no ethnic cleansing.

Muhafazhah Al Ala Al-Mal (Maintain Assets)

TREASURE is a living jewelry for humans in general. Life treasure and life. For that man is given the mandate as *khalifah* of Allah SWT, on earth to be able to manage this nature in accordance with its ability. Actually according to Islam everything is God's absolute property. But man is protected only to acquire property in lawful ways. Therefore, there is a need for legal certainty in society, in order to ensure peace in the common life.

In connection with this, in Indonesia there are several non-governmental organizations or foundations dedicated to refugee victims of human rights violations, one of which is the *Foundation of Jembatan Masa Depan* (JMD) .This Foundation provides special assistance to Rohingya refugees scattered in Aceh with a program of assistance in the form of

program Creation of sustainable livelihoods, education programs, agriculture and community development in the East Aceh region.¹⁵

The effort is an attitude in achieving the Islamic Law's goal that Indonesia provides an opportunity for Rohingya refugees residing in its territory to re-preserve their property in order to continue living properly.

CONCLUSIONS

MAQASHID Syariah principle consisting of the five objectives of Islamic law, among others: *al muhafazhah ala al-din* (religious nurture), *muhafazhah ala al-nafs* (soul guard), *al muhafazhah ala al-'aql* (maintaining reasonable), *al muhafazhah ala al-nasl* (the breeding), and *al muhafazhah ala al-mal* (maintaining the property) is a fundamental principle which is in line with international human rights principles set forth in the Universal Declaration of 1948, the ASEAN charter and the international conventions which have been globally accepted.

The application of *sharia maqashid* bring their own moral responsibility for ASEAN, to encourage member states (especially Indonesia and Malaysia) obligation of *responsibility to protect (R2P)* to the ethnic Rohingya. If referring to the ASEAN Charter only, member countries, especially Indonesia and Malaysia will be very limited in providing direct assistance to the Rohingyas, as in addition to avoiding any intervention factors that arise, also because the government of Myanmar has declared anti-Islamic government within its constitutional territory. This is the regional challenges, especially for Indonesia and Malaysia as a member nation embracing the principles of Islamic *law* once the state of the organization in Myanmar.

Therefore efforts should be made Indonesia and Malaysia are fulfilling rights of the Rohingya people merely when they became refugees (*refugee*) or asylum seeker in the country. The rights can be met as complementary of *maqashid sharia* principles, among others:

1. freedom of religion, the right to life and free from fear (maintenance person) in this case Indonesia has established the *Integrated Community Shelter* as a residence of Rohingya refugees and build mosques or places of worship for Muslims Rohingya named mosque Arakan.
2. meet safety assurance, secured the honor to humanity (maintenance breath)
3. The right to maintain ethnicity or ethnicity, the right of marriage to nurture offspring (the maintenance of offspring)
4. Right to get education (sense maintenance)
5. The right to get a decent livelihood by being given a chance to earn a living (maintenance of property).

¹⁵ Yayasan Jembatan Masa Depan, "*Bantuan untuk Pengungsi Rohingya dan Kesadaran Publik*", <http://jmd.or.id/rohingya/indonesian/>, accessed on 20 April 2016.

As the recommendation in this article to answer the challenges facing the Muslim minority Rohingya is *first*, the urgency of the formation of an ASEAN Human Rights Tribunal to prosecute violations of international human rights implications. *Secondly*, the greatest challenges facing the region, the need for firmness of ASEAN to create a “special concessions” by all ASEAN member states to all the demands of the Rohingya especially religious rights as a consequence of strengthening regional unity in the international sphere.

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Law Adagium

**All men are equal before
the law, without
distictionsex, race, religion,
and social status**