

## Baiq Nuril's Amnesty Impacts on Legal Certainty in Indonesia

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### ABSTRACT

*Purpose of this work is to provide another view to the reader on baiq nuril's amnesty impact on legal certainty. Type of this research is normative legal research. After analyzing legal materials, it can be concluded that, first of all, baiq nuril's amnesty could be categorized as amnesty which base on individual principle, which it has a precedent as regulated in Presidential Decree Number 449 of 1961, secondly, several positive impacts of President Joko Widodo's amnesty to baiq nuril is providing legal protection to women and motivating government to clarify regulation on amnesty as soon as possible.*

**Keywords : Amnesty; Legal Certainty; Baiq Nuril's case.**

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### INTRODUCTION

Indonesia, is a democratic country which implement presidential system. In presidential system, president is a head of state also sovereignty holder within a state, that covering all aspects from governance system to human rights. Nowadays, human rights case is the most discussed issue. Human rights violation could be conducted through various ways, for example mental and physical abuse which it can be done through media, as the famous-recent case, "Ibu Nuril" case. Ibu Nuril is a temporary staff which was a sexual abuse victim.

Roeslan Saleh<sup>1</sup> and Barda Nawawi Arief mentioned that decency and criminal decency should not be limited to morality in sexual perspective, but it could be expand to control

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1 Bambang Poenomo. *Asas-Asas Hukum Pidana*. Jakarta: Ghalia Indonesia. 1992, p. 3.

over of behavior norms within society and it has no relation with the morality, respectively. Morality definition and boundaries is different according to the society applicable values.<sup>2</sup>

From those doctrine, we could clearly understand that the offender were broke morality values, but the offender was reported Ibu Nuril back, with accusation that Ibu Nuril broke Information and Electronic Transaction Law. After that, Ibu Nuril was convicted and putted in the jail for a short period, and based on President Joko Widodo's Amnesty she was freed in the beginning of 2019.

Our common understanding about amnesty, it is a presidential decree which only given to the political criminal actor. With the issued of amnesty for Ibu Nuril which is victim of sexual abuse, it was raised public attention, we could not deny that law scholars and praticians thought that in this manner, President were abuse of power, and has hidden intention.

Amnesty only given to whom break the criminal law as consequence of political problems, such as treason and rebellion. However, Indonesia had a series of historical events related to amnesty. It was started in the Soekarno's era, amnesty was regulated in Article 11 Emergency Law on Amnesty and Abolition, it stated that, President on behalf of state interest, could give amnesty and abolition to criminal offenders. At that time, Soekarno gave amnesty to PPRI rebellion in Sumatra and Manado, and some others amnesty was issued by Soekarno during his reign. And post-Soekarno's era others president were issued the amnesty, and the last one was issued by Joko Widodo for Ibu Nuril.

### **Problems Formulation**

1. How is Amnesty history in Indonesia?
2. How are the impacts of Baiq Nuril case towards Amnesty concept?

### **METHOD**

The method use in this study is normative legal research. The data use is secondary data that collected through library study. The legal problem then analyzed using the statute approach and conceptual approach.

### **ANALYSIS AND DISCUSSION**

#### **Amnesty History in Indonesia**

"Amnesty" term is well-known in society. Beside of that legal terms commonly used in the Indonesian constitutional system, it also because in the last two decades in international fora, the presence of International Amnesty had been noticed by global society. International Amnesty is a non-governmental organization which it purpose is to promote human rights as stated in the Universal Declaration of Human Rights and other instruments.<sup>3</sup>

Amnesty in legal term means is different to the above body. Etymologically, amnesty is derived from the Roman word "amnestia" which means forgetfulness or "amnestos" that means "forget". In criminal law terminology, amnesty's meaning is a power or authority to release a person or a group of people that were found guilty by the court, as an imposed of legal sanction

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2 Barda Nawawi Arief. *Beberapa Aspek Kebijakan Penanggulangan dan Penegakan Hukum Pidana*. Bandung: Citra aditya Bakti. 1998, p. 58.

3 <https://www.hukumonline.com/berita/baca/lt5d3af0b0580b9/hikmah-kasus-baiq-nuril--momen-tepat-revisi-uu-ite/>. [Accessed December 27, 2019].

from certain criminal acts. In practice, amnesty was given to a group of people, and rarely to a person.<sup>4</sup>

The first amnesty was given to all people that, before December, 27th 1949, had conducted a crime as a consequence of a political dispute between the Republic of Indonesia (Yogyakarta) and the Netherland. With amnesty, all criminal law consequences against them was deleted. And with the abolition, prosecution against them was removed.<sup>5</sup>

In 2005, President SBY was issued Presidential Decree Number 22 Year 2005 on Amnesty to more than 2000 GAM members. They were gathered to be a local party and won the election, even the GAM's member now become the Governor of Nangroe Aceh Darussalam Province. Therefore, amnesty is a legal instrumen that commonly used to solve political disputes, and it will create the equality between former rebellion and other citizens.

### **Chronological of Baiq Nuril Amnesty rewarded**

Baiq Nuril amnesty proposal was started by the recommendation of the Ministry of Justice and Human Rights to President Joko Widodo to gave her an amnesty. The case was commenced in 2012 when she got verbal abuses in her workplace, Senior High School 7 Mataram, by Headmaster. Baiq Nuril was a temporary staff in the administration office of Senior High School 7 Mataram. The headmaster was abused by told her his sexual activity with his colleague.<sup>6</sup>

Cybercrime is a crime that concluded by a person or group of people or even corporations done by computer or targeting a computer or computer system and network. Cybercrime are divided into two categories, are cybercrime in narrow and depth definitions. Cybercrime in the narrow definition is a crime against computer system, however cybercrime in depth definition including crimes on the computer system or network, and all crimes that using computer.<sup>7</sup>

Amnesty is president authority. According to criminal law scholar, Abdul Fickar Hadjar, amnesty giving will create an impact on a person legal status. For example, someone who was considered as guilty, prior to the amnesty, the status will change into not guilty."Amnesty is president authority as head of state, to nulling the legal consequences from a person's act, neither had been sentencing or not". Amnesty is not the only president's authority in the judicative field. There are, at least, three presidential authority which we had been heard regularly, namely issue clemency, abolition, and rehabilitation.<sup>8</sup>

The four President authority was regulated in Article 14 paragraph (1) and (2) Constitution of the Republic of Indonesia 1945. Amnesty and clemency could not be granted solely based on President decree. President should asking consideration of the Supreme Court to give clemency and rehabilitation. And, to give amnesty and abolition, Presiden should ask the house of representative's consideration. In Baiq Nuril case, President should hear the house of representative' consideration before deciding amnesty for Baiq Nuril.<sup>9</sup>

### **Legal Scholars's Opinion on Baiq Nuril Amnesty**

Constitutional Law expert from Faculty of Law, Udayana University, Jimmy Z. Usfunan explained that, practically, there are four criteria as an amnesty foundation. Related to baiq nuril's case, Jimmy sawn there were opportunities for her to get amnesty from President.

4 [http://berkas.dpr.go.id/puslit/files/info\\_singkat/Info%20Singkat-XI-14-II-P3DI-Juli-2019-210.pdf](http://berkas.dpr.go.id/puslit/files/info_singkat/Info%20Singkat-XI-14-II-P3DI-Juli-2019-210.pdf)

5 <https://nasional.sindonews.com/read/1424092/13/sejarah-dan-jejak-amnesti-di-indonesia-dari-orla-hingga-reforma-si-1564135588>

6 <https://www.cnnindonesia.com/nasional/20181114133306-12-346485/kronologi-kasus-baiq-nuril-bermula-dari-per-cakapan-telepon>. [Accessed December 28, 2019].

7 Widodo. (2009). *System Pemidanaan Dalam Cybercrime*. Yogyakarta: Laksbang Mediatama. p.24.

8 <https://www.bbc.com/indonesia/indonesia-48878086>. [Accessed December 28, 2019].

9 [http://rri.co.id/post/berita/697356/opini/kasus\\_baiq\\_nuril\\_dan\\_keadilan.html](http://rri.co.id/post/berita/697356/opini/kasus_baiq_nuril_dan_keadilan.html). [Accessed December 29, 2019].

“Amnesty emphasize on state interests, in this case (baiq nuril case) there were interests in human rights protection

He further explained that amnesty is one of president rights as head of state. This right was emergence since the first period of Indonesia independence until constitutional change in Indonesia. Before the amendment of 1945 Constitution, Article 14 Constitution of the Republic of Indonesia only mentioned that President could give clemency, amnesty, abolition and rehabilitation.<sup>10</sup>

This article was changed in the Temporary Constitution 1945. Article 107 was regulated that the amnesty procedure should be accommodated in laws and by asking the Supreme Court’s opinion. This condition was followed by the issued of Emergency Law Number 11 of 1954 on Amnesty and Abolition.

The different mechanism was regulated in the Article 14 Constitution of the Republic of Indonesia post-fourth-amendment stated that President, in order to give amnesty and abolition, should notice to the house of representative’s consideration. Jimmy notes that there was a development of state interest criteria to give amnesty and abolition.

First of all, amnesty is given as measurement of revivals for the rebels. This kind of amnesty were given to the rebels group that surrender to the mother state. Jimmy note that there were three Presidential Decree contained amnesty with this consideration, namely Presidential Decree Number 180 of 1959, 449 of 1961, and 568 of 1961. The three presidential decrees does not apply individual principle. Its body is addressed to the rebellion group with a political motive and had surrendered to Indonesia. One of the decrees was given to the surrender people involved in Daud Bereuh rebellion in Aceh.<sup>11</sup>

Secondly, amnesty was given in order to maintain Indonesia’s unity. There were at least eight presidential decree that clearly mentioned an individual who got the amnesty with this criteria. The eight Presidential Decrees are Presidential Decree Number 80 of 1998, 123 of 1998, 127 of 1998, 91 of 2000, 92 of 2000, 115 of 2000, 141 of 2000 and 142 of 2000.

Thirdly, in respect of Human Rights there was one presidential decree is given to all citizens who were involved to the Aceh Independence Movement, namely Presidential Decree Number 93 of 2000. They got general amnesty and abolition.

Amnesty measurement development emphasizes on president’s prerogative rights as head of state, and it can be seen from President as head of state has the rights to interpret the state interest in order to give amnesty. Referring to baiq nuril case that began with sexual abuses, which has no solid legal foundation in Indonesia. Basic rights freedom from sexual abuses is not fully protected in Indonesia.

Amnesty became the last path to freed Baiq Nuril from sentences as the last mechanism in the Supreme Court was ended and all of her petition was denied. On behalf of state interest, President as head of state, after the last legal mechanism, according to the house of representative’s consideration, Baiq Nuril was awarded amnesty.

Separately, the Head of Legal Philosophy Association, Widodo Dwi Putro said that his association was sent a letter to President Joko Widodo to gave baiq nuril amnesty. His opinion was supporting Jimmy explanation.

There has been a lot of debate among legal experts about granting amnesty in the Baiq Nuril case. Many legal experts argue that amnesty is only for convicted political cases. Most importantly, Article 14 of the 1945 Constitution does not mention amnesty only for prisoners. The Indonesian Legal Philosophy Association believes that the Cassation Verdict and Judicial

<sup>10</sup> <https://theconversation.com/analisis-di-balik-kontroversi-pemberian-amnesti-jokowi-kepada-baiq-nuril-indonesia-butuh-uu-amnesti-yang-baru-120496>. [Accessed Januari 2, 2020].

<sup>11</sup> . *Ibid*

Review of Baiq Nuril has humiliated victims of sexual harassment. It even makes victims easily snared back as a source or perpetrator of a crime.

### **Baiq Nuril's Amnesty Impact on Legal Certainty**

Amnesty is defined as a form of president's political policy in responding to public opinion and maintaining the "interests of the state". The regulation for granting amnesty in Indonesia has so far been based on two legal provisions, namely the 1945 Constitution and the Emergency Law of the Republic of Indonesia Number 11 of 1954 (Amnesty and Abolition Law).

In an amnesty, the act or criminal action is proven, and the person concerned is found guilty, but is released from legal responsibility. In the Indonesian constitutional system, granting amnesty is one of the powers of the President, in addition to abolition, clemency and rehabilitation. This can be found in the provisions of Article 14 paragraph (2) of the 1945 Constitution, which states that the President grants amnesty and abolition by taking into account the considerations of the House of Representatives. The sentence "by taking into account the considerations of the House of Representatives" only appeared after the amendment to the 1945 Constitution. Previously Article 14 reads, the President granted clemency, amnesty, abolition, and rehabilitation. Before and after the amendment to the 1945 Constitution, there has not been any law which constitutes the implementation of Article 14.

This historical background is the basis for why the "state interest" contained in the 1945 Constitution in granting an amnesty is translated in a political context. The Amnesty and Abolition Law itself does not explain what criteria are meant by the interests of the state. Based on this understanding, the granting of amnesty by the president is usually given to political figures.

Based on a search in the Legislative Information System of the Indonesian Cabinet Secretariat, Indonesia has granted 32 amnesties from his independence until today. In the list, the recipients of the amnesty are indeed those involved in the political movement, the basis for granting their amnesty is the protection of Human Rights.

In regards to Baiq Nuril amnesty, President has applied extent steps; according to Constitution of the Republic of Indonesia 1945, which founded by state interest, it could be examined further. Today, the president provide new paradigm on abstract regulation in Laws related amnesty. President gives protection against women to fulfill their basic rights. In addition, baiq nuril amnesty had been given reflection towards women to be brave and reject any sexual abuses on them. According to National Commission on Women Protection, in March 2019, there were 406.178 cases of women abuses both sexual and physical. It was increased 14% by 2019. This fact shows that Indonesia is weak in terms of women's protection, which it have to be a state obligation to protect the women.

Another issue that is influenced by Baiq Nuril's amnesty that, regarding to give amnesty, the government should decide quickly in what forms amnesty could be given in this era. Since the amnesty law itself has blurry of norms, for example, what "criminal" terms means in the law. The clarity of law intend to provide legal certainty in the community, because it could not be achieved only by the article explanation or current social condition.

### **Clear Regulation on Amnesty is urgently needed**

The debate over whether granting amnesty to Baiq Nuril offends the interests of the state should be avoided when the existing rules clearly state what criteria can be categorized as state interests. Both the 1945 Constitution and the Amnesty and Abolition Law did not clearly define what was the state interests.

Also, the two existing rules related to granting amnesty from the president, provide different instructions related to the mechanism that must be followed. The Amnesty and Abolition Law says the president can grant amnesty after obtaining written advice and the Supreme Court, which is requested first by the relevant ministries (in this case, the Ministry of Law and Human Rights). Meanwhile, according to the 1945 Constitution article 14 paragraph 2, the granting of a presidential amnesty must be based on the consideration of the House of Representatives (DPR).<sup>12</sup>

The Baiq Nuril case can be a momentum for Indonesia in making a new law related to the granting of amnesty because the legal rules are ambiguous. The new law must provide a clear mechanism related to granting an amnesty from the president. In addition, the new rules of law must also clarify definitions and indicators of state interests clearly. This will facilitate the President in using his prerogative rights. In addition, the Parliament and the community can also oversee the administration of amnesty by the President because the boundaries are clear.

## CONCLUSION

Throughout the history of Amnesty, we know that in theory and fact that amnesty was given to criminal offenders in the political sphere solely. Many states practice shows that amnesty should not be given on the basis of individual principles, this is contrary to the history that we know and had been discussed. Historically there are also amnesties were granted on the basis of individual principles such as those in Presidential Decrees Number 180, 449, and 568. Amnesty Baiq Nuril is an amnesty based on individual principles and is the first amnesty granted not to perpetrators of political crimes but to victims of sexual harassment. This is a great discovery throughout the history of amnesty in Indonesia.

As the impact on the issuance of an amnesty on Baiq Nuril by President Joko Widodo, the President indirectly provides protection for women. Another thing that has influence is the government, in this case, must move quickly and decisively to determine what amnesty can be given because this still has a debate over the ambiguity of the rules regarding amnesty.

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