

# THE PAST IS ANOTHER COUNTRY: DESIGNING AMNESTY LAW FOR PAST HUMAN RIGHTS VIOLATORS

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## Abstract

*In the context past gross human rights violation cases in Indonesia, the President's constitutional authority to propose amnesty law might by and large implicate legal and ethical aspects. Holistically, any forgiveness and oblivion against any human rights violators should consider the development and the dynamic of international criminal law, which arguably have been directed to an absolute individual criminal responsibility. Against this issue, this paper finds that based on legal and ethical arguments, accompanied with various technical preconditions outlined in the Belfast Guideline on Amnesty and Accountability, an amnesty towards past gross human rights violators must be taken paradigmatically. Arguably, amnesty proceeding through an independent ad hoc committee shall be able to challenge Indonesia's transitional framework, namely: to work as a historian and a jurist. This suggests that the elements of amnesty, both procedural and substantial, need to work in the area of deliberative democracy that calls for public participation and the protection of human rights.*

**Keywords:** amnesty, transitional justice, gross human rights violation

## Abstrak

*Dalam konteks kasus pelanggaran berat hak asasi manusia (HAM) di Indonesia, kewenangan Presiden dalam memberikan amnesti dapat berimplikasi pada dua aspek, yakni: legal dan etik. Secara holistik, pemaafan dan pelupaan terhadap para pelanggar HAM pada masa lalu patut mempertimbangkan perkembangan dan dinamika hukum pidana internasional, yang mengarah pada pertanggungjawaban pidana secara absolut. Tulisan ini menyimpulkan bahwa logika argumentatif secara legal dan etik, serta berbagai prasyarat teknis di dalam Belfast Guideline on Amnesty and Accountability mengindikasikan bahwa amnesti terhadap pelanggar HAM masa lalu harus dilakukan secara paradigmatis. Dalam hal ini, proses amnesti melalui komite ad hoc yang mandiri dapat menjawab dua tantangan dalam kerangka kerja transisional di Indonesia, yakni: untuk bekerja sebagai sejarawan dan juga praktisi hukum. Dengan demikian, kebijakan amnesti mengisyaratkan bahwa elemen-elemen amnesti secara prosedural dan substantif wajib dijalankan dalam area demokrasi deliberatif yang menghendaki adanya partisipasi publik dan perlindungan terhadap HAM.*

**Kata kunci:** amnesti, keadilan transisional, pelanggaran berat HAM

## I. Introduction

In his annual speech on August 16<sup>th</sup> 2015, President Joko Widodo conveyed that several gross violations of human rights which occurred in several regions in Indonesia in the past need to be resolved justly. However, this kind of justice is indeed a broad concept that ought to be delineated and formulated into a more practical policy. In this context, the present author argues that in constructing a just policy, the state has to ensure that any measures taken should be in accordance with the law and public legitimacy. This paper identifies three main challenges in formulating this policy: *first* is the subsidiarity model of truth and reconciliation commission may contribute to the ineffective embodiment of justice for the past gross human rights violations victims. In this sense, the unconstitutionality of institutional norms and the inapplicable search for truth and reconciliation under the Law 27 of 2004 on the Truth and Reconciliation Commission require a comprehensive reconsideration and review. *Secondly*, on the other hand from a human rights law perspective, the legality of amnesty, which is considered to be one of practices chosen by the governments in several states to resolve past human rights violations, is yet to find a clear clarification after the Constitutional Court Decision Number 006 /PUU-IV/2006; and *thirdly*, as a consequence, a proportional amnesty requires legitimacy within the framework of human rights protection.

Arguably, a theoretical framework to analyze the state's past wrongs is best constructed under the transitional justice concept; particularly on the problem of how the rule of law is being implemented during a regime transition. Under this framework, the rule of law shall bridge the transition towards a more democratic-liberal regime. In this sense, there are three concepts that shall mediate the rule of law during the transition, including: (i) the role of social construction. Within this role, the construction of transitional law is mediated through the gap of social practices against the rules in force at the time of the previous regime with a successor; (ii) the role of international law in transcending domestic legal understandings. Such a dilemma of the rule of law in transitional justice may be mediated through a growing norm in international law or often referred as a source of normative transcendence; (iii) the core rule-of-law: to transcend the passing politics of the times.<sup>1</sup> Teitel also specifically argued that the rule of law in a state of transition is often associated with transformative adjudication practices.<sup>2</sup>

Evidently, several writings consider that transitional justice as a theory still does not have a sufficient basis. The phenomenon of transitional dilemma in enforcing the law, against the perpetrators of the post-war international law violations for example has not been able to distinguish the understanding of the rule of law within an ordinary and transitional justice. In a broader level, the debate about transitional dilemma refers to two different legal positions, namely between positivist and naturalist views. The *Hart-Fuller* debate after the fascist regime in Germany, for another example, illustrates that on the one hand, the positivists attempt to separate the question of the legitimacy of the law under the predecessor regime from the successor, and on the other hand, the legal naturalist focuses on the transformative role of law in order to shift the regime towards a more liberal one, on the basis that of morality is lacking in the putative future legal regime of tyranny.<sup>3</sup>

<sup>1</sup> Ruti Teitel, *Transitional Justice*, (New York: Oxford University Press), pp. 14-15t.

<sup>2</sup> *Ibid.*, p.25.

<sup>3</sup> *Ibid.*, p.13. Specifically Teitel describes: "In the positivist position advocated by Hart, the claim is that the principle of the rule of law governing transitional decision making should proceed—just as it would in

As the discourse on transitional justice has been proliferating during the last two decades, the concept is not necessarily accepted as a theory entirely, particularly from a law perspective. Related to this, pragmatically Eric Posner states that:<sup>4</sup>

In general, the analysts of transitional justice, who are typically steeped in moral theory, political theory and science, or in highly theorized international law, have gone wrong through insufficient appreciation of the ordinary law of consolidated democracies. They have erred, not by virtue of inadequate moral or political analysis, but by holding a stereotyped picture of ordinary justice, one in which all laws are always prospective, individuals costlessly obtain compensation for all harms to person or property inflicted by others, and transitions essentially never occur because the legal system runs smoothly in settled equilibrium.

Based on this argument, it appears that the real challenge of transitional justice as a concept is actually how the transition mechanism is being implemented, rather than stumbling on moral and political considerations.<sup>5</sup> Referring to the regime shift after the reign of the Nazis in Germany during the post-Second World War, Posner reveals that there are various difficulties in judging against the old regime, including: (i) perpetrators were not the instigators of crimes, but only followed orders, or were coerced into participation; (ii) they were driven by genuine ideological conviction, or, conversely, were at worst opportunists who did not share the evil ideological motives of their leaders; (iii) they did what they could to soften the regime's policies from time and time, and did not resign because their replacement would be even worse; (iv) the sheer quantity of morally compromised people render futile any effort to assign gradations of blame: "the past is another country" and people's behavior under an authoritarian.<sup>6</sup> Posner thus concludes:<sup>7</sup>

*... [t]he dominant view in the academic literature is that transitional justice is not worth doing because it interferes with the development of democratic institutions and the market economy. The interference takes diverse forms: overburdening courts, undermining property rights, depriving the government of experienced personnel, draining the treasury, burdening officials with complex technical problems, and confronting people with insoluble moral dilemmas.*

Arguably, any practical issues presented by Posner may become a strategic consideration in designing the enforcement of past gross human rights violations. Moreover, technically speaking, a cost and benefit calculation parallel to the implementation of transitional justice and ordinary justice is often overlooked in designing the transitional justice concept.

Based on a genealogical category by Teitel, the current contemporary phase of transitional justice might also situate in a stable country or, as mentioned by Winters,

*ordinary times—with full continuity of the written law... the rule of law meant breaking with the prior Nazi legal regime. As such, Nazi collaborators were to be prosecuted under the new legal regime."*

<sup>4</sup> Eric Posner and Adrian Vermeule, "Transitional Justice as Ordinary Justice," Chicago Public Law and Legal Theory Working Paper No. 40 (University of Chicago Law School, 2003), <http://www.law.uchicago.edu/academics/publiclaw/index.html>.

<sup>5</sup> *Ibid.* Posner also argues that, "The more we poke at these problems, however, the less formidable they appear. We have seen that one of the collaborator's stock excuses—"if I hadn't done it I would have been punished"—is just the criminal-law defense of duress transposed to the transitional-justice context. The philosophical conundrums surrounding duress are indeed formidable, but the legal system finesses or ignores the conundrums in fine pragmatic style."

<sup>6</sup> *Ibid.*, p. 38.

<sup>7</sup> *Ibid.*, p. 48.

in “an established democracies.”<sup>8</sup> Learning from the experience of the transitioning Latin America, which is apparently still struggling to settle human rights abuses in the past, some authors refer such a situation as the post-transitional justice. This concept was first coined by Elin Skaar to distinguish it from the existing transitional justice concept.<sup>9</sup> Such a concept basically departs from the phenomenon of judicial practices participation in bringing past human rights violators to justice. More specifically, Skaar considers that the structural problems faced in the realization of justice against past human rights violations need to be reviewed comprehensively from the perspective of the independence of the courts.<sup>10</sup> According to Skaar, several conditions for establishing an effective judiciary in post-transitional condition are to include the absence of a credible military threat, a sustained demand on the part of civil society for truth and justice, and a sufficient legal basis for prosecution.<sup>11</sup>

However, the fundamental problem eluded is whether the Republic of Indonesia recognized and entered such a period of transition. Any implications of such recognition of transition period could be associated with the transitional measures taken by the state in achieving the objectives of the regime transition. In practice, the issue of transitional justice emerged as the regime changed in 1998 from the previous authoritarian regime under President Soeharto (the ‘new order’ era) to a more liberal-democratic government (the ‘reform’ era). At the beginning of the reform era or *reformasi*, the momentum of transition could be reflected through Resolution of the People’s Consultative Assembly (*Majelis Permusyawaratan Rakyat*/MPR) No. V/MPR/2000 on the Stabilization of National Unity and Integrity. In general, the decree aims to identify the existing ‘transitional’ problems, to determine any necessary conditions leading to national reconciliation, and to set a political direction to guide the consolidation of national unity.

In the Decree, the Assembly also outlined a variety of multi-sector conditions required in the process of reconciliation in order to create a national unity and integrity. Particularly under the rule of law sector, the condition of “the establishment of a legal system based on the value-oriented philosophy of truth and justice” is a necessary condition during the transition. Furthermore, such a condition needs to be “accompanied by the willingness and ability to reveal the truth about any past events, in accordance with the laws and regulations in force, and the recognition of mistakes that have been made, as well as the endorsement of forgiveness under national reconciliation.”<sup>12</sup> As a guiding norm to resolve historic human rights violations, the Assembly also commissioned the President to:

*[. . .] form a National Truth and Reconciliation Commission as an extra-judicial agency, upon which the number and the criteria of its members shall be set by law. The Commission’s duty is to uphold the truth and expose abuses of power and human rights violations in the past, in accordance with the provisions of the laws and regulations in force, and to implement reconciliation in the perspective of common interests as a nation. Some steps that can be carried out after the disclosure of the*

<sup>8</sup> Stephen Winter, “Towards a Unified Theory of Transitional Justice,” *The International Journal of Transitional Justice* 7, (2013), p. 225.

<sup>9</sup> See. Elin Skaar, *Judicial Independence and Human Rights in Latin America*, (Palgrave Macmillan: New York, 2011).

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, p. 68.

<sup>12</sup> People’s Consultative Assembly of the Republic of Indonesia [*Majelis Permusyawaratan Rakyat Republik Indonesia*], “Decree No.V/MPR/2000,” Chapter III (4), (author’s translation).

*truth: admission of guilt, apology, forgiveness, peace, law enforcement, amnesty, rehabilitation, or any other useful alternatives to uphold national unity taking fully into account the sense of justice in the society. [author's translation]*

During the transition process, Indonesia's legal politics in resolving past human rights violations could be reflected into a two-track policy, namely the establishment of an *ad hoc* judicial body through the enactment of Law No. 26 of 2000 on Human Rights Courts and the establishment of an extra-judicial body through Law No. 27 of 2004 on the Truth and Reconciliation Commission. This two-track national reconciliation policy could presumably be regarded as a compromise between human rights law legalism approach and the embodiment of restorative justice approach as mandated under the Resolution No. V/ MPR /2000.

Furthermore, in the context of current legal and political dimension, in line with Skaar's requirements for the effective application of the rule of law in post-transitional justice context, some empirical elements that are applicable for Indonesia may cover: *first* is the possible presence of a credible military threat. Related to this, according to Sebastian and Iisgindarsah, there are three strategic gaps that are yet to change since the military reforms have been undertaken, namely: (i) loopholes within the existing laws and the resultant regulatory vacuum pertaining to certain key issues; (ii) the critical gap between the TNI's institutional role and its ability to carry out its missions, reflected in a defense economic gap; and (iii) the prevalence of shortcomings in processes of democratic civilian control.<sup>13</sup> Other findings by Mietzner convey that there remain unresolved issues in Indonesia's military reform, including the absence of credible legal proceedings against military members related to human rights violations, the full closure of military owned business, the culture of impunity, and corruption.<sup>14</sup>

*Second* finding is the constant demands by civil society for truth and justice. Various civil society movements actualized in a variety of demands, such as the People's Tribunal for violations of human rights in 1965/1966,<sup>15</sup> a collection of writings 'Testifying Sulawesi' that seeks to uncover the history using the literary-journalistic style, as well as proposing a feasible scheme to resolve past cases.<sup>16</sup> *Third* is a sufficient legal basis for human rights violation prosecution. In this element, the Indonesian criminal law in principle has already provided a strong legal basis to prosecute those who are responsible for past serious human rights violations.

Hence, in principle there has been a shift towards the prerequisite conditions of the post-transition in the contemporary Indonesia. The present author argues that, given

<sup>13</sup> Leonard C. Sebastian and Iisgindarsah, "Taking Stock of Military Reform in Indonesia," in *The Politics of Military Reform, Global Power Shift*, eds. J. Rüland et al. (Berlin Heidelberg: Springer-Verlag, 2013), p. 38.

<sup>14</sup> Muhamad Haripin, *Reformasi Sektor Keamanan Pasca Orde Baru: Melacak Pandangan dan Komunikasi Advokasi Masyarakat Sipil*, [Security Sector Reform Post-New Order Era: Tracking Views and Communication of Civil Society Advocacy], (Jakarta: Marjin Kiri, 2013), p. 156.

<sup>15</sup> Information related to the International People's Tribunal 1965 (IPT 1965) is available at: <http://www.1965tribunal.org>.

<sup>16</sup> See 1965tribunal.org. ELSAM, *Usulan Peta Jalan Penyelesaian Pelanggaran HAM Masa Lalu: Pelembagaan dan Rencana Aksi Kebijakan*, [Proposal of Roadmap on Past Human Rights Violation Settlement: Institutionalization and Policy Action Plan], *Policy Brief Series on Past Gross Human Rights Violations*, February (Jakarta: ELSAM, 2015); KontraS and ICTJ, *Menyusun Puzzle Pelanggaran HAM 1965: Sebuah Upaya Pendokumentasian*, [Completing Puzzle of 1965 Human Rights Violations: an Effort of Documentation], (Jakarta: KontraS and ICTJ, 2012). These reports documented the incidents from victim's point of view. See also Sri Lestari Wahyuningroem, "Seducing for Truth and Justice: Civil Society Initiatives for the 1965 Mass Violence in Indonesia," *Journal of Current Southeast Asian Affairs* 32, no. 3 (2014), pp. 115-142.

some researches and studies, the minimum standard of practice toward a democratic government has basically been implemented in Indonesia.<sup>17</sup> This also suggests that the achievement of justice during transitional period conceived in 1998 needs to be repositioned towards the achievement of justice in the time of post-transition. The implications of such a hypothesis would directly affect the form, measure, or the kind of policy should be taken by the state to resolve the historical burdens.

## II. Amnesty and Reconciliation in Post-Transitional Justice

The fundamental dilemma in transitional justice is how to conceptualize justice in the context of a massive shift in politics and how to ascribe the criminal liability of the offenders that generally involve the state's repressive policies.<sup>18</sup> In a broader perspective, Crocker divides reconciliation into several characteristics: (i) thick reconciliation (or maximalist/communitarian), the understanding of which requires all people affected by crimes against humanity to be able to build strong social ties with the aggressor; so pardon is a mechanism that is most commendable to achieve peace; (ii) thinner reconciliation, which is based on democratic understanding of reciprocity, which although one does not have the same point of view, all citizens are allowed to deliberate in equal conditions and make decisions about the future of democratic society; and (iii) the very thin reconciliation, which is a view that merely requires that former enemies are no longer killing each other and develop mutual tolerance between one another (or the so-called non-lethal coexistence).<sup>19</sup>

The developing discourse of human rights at the international level conveys some guidelines that could become the basis for assessing amnesty policy. Report of the independent expert to update the Set of Principles to combat impunity, Diane Orentlicher, for example, formulates as follows:<sup>20</sup>

*Even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within the following bounds:*

- a) *The perpetrators of serious crimes under international law may not benefit from such measures until such time as the State has met the obligations to which principle 19 refers or the perpetrators have been prosecuted before a court with jurisdiction - whether international, internationalized or national - outside the State in question;*
- b) *Amnesties and other measures of clemency shall be without effect with respect to the victims' right to reparation, to which principles 31 through 34 refer, and shall*

<sup>17</sup> Compare with World Justice Project, 2014 Rule of Law Report: Indonesia. In the report, the WJP measured the overall rule of law to 0.52. Indonesia ranked 8/15 in the East Asia and Pacific region. Further from a constitutional point of view, See Susanto Polamolo, "Nalar Fenomenologi: Mahkamah Konstitusi dalam Pusaran Kekuasaan dan Bahaya Krisis Weltanschauung," ["Logic of Phenomenology: Constitutional Court in the Vortex of Power and the Danger of Weltanschauung Crisis"], *Jurnal Konstitusi* 11, no. 2 (2014), pp. 212-232.

<sup>18</sup> Teitel, *op. cit.*, pp. 210-11.

<sup>19</sup> See. David A. Crocker, "Reckoning with Past Wrongs: A Normative Framework," *Ethic & International Affairs* 13 (1999): pp. 43-64.

<sup>20</sup> United Nations, Economic and Social Council, *Promotion and Protection of Human Rights: Impunity, Report of the independent expert to update the Set of principles to combat impunity*, E/CN.4/2005/102/Add.1 (8 February 2005), available from undocs.org/E/CN.4/2005/102/Add.1., Principle 24, Restrictions and other measures relating to amnesty.



*not prejudice the right to know;*

- c) *Insofar as it may be interpreted as an admission of guilt, amnesty cannot be imposed on individuals prosecuted or sentenced for acts connected with the peaceful exercise of their right to freedom of opinion and expression. When they have merely exercised this legitimate right, as guaranteed by articles 18 to 20 of the Universal Declaration of Human Rights and 18, 19, 21 and 22 of the International Covenant on Civil and Political Rights, the law shall consider any judicial or other decision concerning them to be null and void; their detention shall be ended unconditionally and without delay;*
- d) *Any individual convicted of offences other than those to which paragraph (c) of this principle refers who comes within the scope of an amnesty is entitled to refuse it and request a retrial, if he or she has been tried without benefit of the right to a fair hearing guaranteed by articles 10 and 11 of the Universal Declaration of Human Rights and articles 9, 14 and 15 of the International Covenant on Civil and Political Rights, or if he or she was convicted on the basis of a statement established to have been made as a result of inhuman or degrading interrogation, especially under torture.*

Based on these principles, in the context of the embodiment of reconciliation in the future transitional justice, the amnesty for past human rights violations needs to be supported by several prerequisites. These prerequisites indicate that the amnesty policy needs to be adjusted to the norms of human rights protection.

Literally speaking, the Oxford English Dictionary defines amnesty as “an act of forgetfulness, an intentional overlooking, a general pardon, esp. for a political offense.” The word is rooted from Greek, ἀμνηστία, which means oblivion. From a human rights perspective, there are only two major international treaties governing amnesty, namely Article 6 (4) of the International Covenant on Civil and Political Rights “Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.”; and Article 6 (5) of the Additional Protocol to the 1949 Geneva Convention Relating to the Protection of Victims of Non-International Armed Conflicts that rules “at the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or reviews those deprived of their liberty for a good, related to the armed conflict from, whether they are interned or detained.” In relation to Article 6 (5) Protocol II, the interpretation of the broadest possible amnesty is still being debated in among experts of international law, in particular on whether the article provides an exception to war crimes, crimes against humanity, and genocide.

Practically, the amnesty law in Argentina for instance, as it is considered to be the first country to apply the concept of transitional justice after the coup in 1976 that led to 8,960 fatalities and missing from 1975 to 1983, has been enacted to pardon the perpetrators of past human rights violations. Nevertheless, the *Ley de Punto Final* (Full Stop Law) and the *Ley de Obediencia Debida* (Due Obedience Law) during the Alfonsín administration, as well as pardons granted by President Carlos Menem, were evidently considered contrary to the American Convention of Human Rights in 1992.

Arguably at this point, amnesty is often qualified as impunity, which is defined by Diane Orentlicher as, “the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account -whether in criminal, civil, administrative or disciplinary proceedings- since they are not subject to any inquiry that might lead to reviews their

being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.” In prescribing an amnesty law, the state shall indeed perform calculations. At most cases, amnesty in the transitional period will need to consider political and instrumental character and assert their relation to societal reconciliation and, ultimately, to the restoration of the rule of law. In this sense according to Mallinder, the motivation to grant amnesty can be categorized as: (i) a reaction to internal unrest and domestic pressures, (ii) a means to achieve peace and reconciliation, (iii) a response to international pressure, (iv) cultural and religious transitions, (v) reparative amnesty, and (vi) a protector of the means of the state.<sup>21</sup>

Evidently, the ‘amnesty for truth’ policy applied by the South African Truth and Reconciliation Commission shows both opportunity and problem.<sup>22</sup> In terms of opportunity, amnesty in South Africa is considered to contribute to the realization of reconciliation through truth-telling in the post-apartheid society.<sup>23</sup> To be more specific, current studies depict that the application of amnesty for political crimes, as practiced in South Africa, is not necessarily uniformed. Such a measure is indeed problematic, according to Slye, given that the policy gives the authority to “the state, political parties and other political organizations in decisions concerning amnesty ‘as an individual’s application for amnesty may depend on whether the organization admits to having ordered the act in question.’”<sup>24</sup> Broadly speaking, Mallinder concludes that any crimes with political motives need to be treated differently from other crimes, and it appears to be a firm principle in international law.<sup>25</sup> In addition, practices in many countries show that the amnesty excludes crimes committed for personal gain, as these crimes are considered to be particularly economical.<sup>26</sup>

Moreover, any considerations of material objects need to be directed towards amnesty for crimes against the civilian population perpetrators. Given the extent of aspects of the crime, as Mallinder argues, “it seems advisable that states should be able to grant amnesty for crimes against civilians, - provided that they establish consultation mechanisms and alternative processes to meet the needs of victims, and are not simply granting themselves impunity for reviews of their own actions.”<sup>27</sup> It also seems to be reasonable to avoid impunity for state agents who have committed

<sup>21</sup> Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide*, (Oxford and Portland, Oregon: Hart Publishing, 2008), p. 41.

<sup>22</sup> Pizzutelli notes that, “[...] the ‘amnesty for truth’ process was not designed to provide the TRC with a powerful bargaining tool in its quest for information. Rather, the TRC was designed to provide the amnesty with some truth-seeking credibility.” Furthermore, after the South African reconciliation model provided amnesty against serious violation of human rights, international law shifts to the punitive measure towards them, as enshrined under the Rome Statute of International Criminal Court for instance. See also United Nations, *Report of the International Commission of Inquiry on Darfur to the UN Secretary General* (Geneva: United Nations, 25 January 2005); Francesca Pizzutelli, “Moving Away from the South African Model: Amnesties and Prosecutions in the Practice of 40 Truth Commissions” (Paper presented at Conference in Taking Stock of Transitional Justice, University of Oxford, 26-28 June 2009), pp. 11-12. <http://ssrn.com/abstract=2361081>, accessed on 27 October 2015.

<sup>23</sup> Normatively in Chapter 2 Article 3, the Commission aims to promote national unity and reconciliation by granting amnesty for people who make a full statement over all relevant facts about the acts associated with political objectives.

<sup>24</sup> Ronald C. Slye, “Justice and Amnesty,” in *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*, eds. Charles Villa-Vicencio and Wilhelm Voerwoerd (London: Zed Books, 2000), pp. 179-80.

<sup>25</sup> Mallinder, *op. cit.*, p. 143.

<sup>26</sup> *Ibid.*, p. 144.

<sup>27</sup> *Ibid.*, p. 145.



crimes against the civilian population, and to realize the legitimate amnesty under the perspective of deliberative democracy.

Hence, the present author argues that, in line with rational in previous section; the amnesty law should be seen as a legal action that can be applied by the state considering both the national and international legal systems. Such an argument brings us to the concept of, as Kushleyko mentions, 'smart amnesty'. This concept is basically constructed on several conditions:<sup>28</sup>

*(i) amnesty must be formed democratically with the involvement of the public and government structures in general in the drafting process; (ii) the policy must exclude the application of those responsible for war crimes, crimes against humanity, and other serious crimes against humanitarian law and human rights; (iii) policies should predict the mechanism of public procedures or liability for the recipient; (iv) The policy should provide an opportunity for victims to claim against the individual for the amnesty and provide them with concrete benefits, usually in the form of reparations; (v) the policy should be designed to facilitate the transition towards a democratic regime, or the representation of a part of the community reconciliation mechanism.*

Arguably, any terms and preconditions of smart amnesty could be integrated with other mechanisms, such as truth and reconciliation commissions and other reparation programs.<sup>29</sup> In that position, amnesty may function in order to achieve peace and internal stability, accountability in transition, national reconciliation and ultimately the rights of victims.<sup>30</sup>

### III. Amnesty Law in Indonesia

Article 14 paragraph (2) of the 1945 Constitution of the Republic of Indonesia stipulates that "the President grants amnesty and abolition by taking into consideration the House of Representatives." Therefore, amnesty is a President's constitutional authority in eliminating all legal consequences resulted from past legal actions that have been done by particular person(s) or in abolishing any on-going legal process against such persons. Practically, the Republic of Indonesia has issued amnesty policy several times since the enactment of Emergency Law No. 11 of 1954 on Amnesty and Abolition.<sup>31</sup> Article 2 of the Law provides that amnesty and abolition shall be given specifically to anyone who has committed a criminal offense as a result of political dispute between the Republic of Indonesia (Yogyakarta) and the Kingdom of the Netherlands before December 27, 1949. In the procedural term, Article 3 stipulates that in order to determine whether any criminal offenses conform the provisions under Article 2, the Government may request advice from the Supreme Court.<sup>32</sup>

<sup>28</sup> A. Kusleyko, "Accountability v. 'Smart Amnesty' in the Transition Post-conflict Quest for Peace. A South African Case Study," in *Current Issues in Transitional Justice*, eds. N. Szablewska and S. D. Bachmann (Switzerland: Springer, 2014), DOI: 10.1007/978-3-319-09390-1\_2, (31-53), p. 35.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*, pp. 35-38.

<sup>31</sup> Article 2 of the Law states that amnesty and abolition shall be granted to those who before 27 December 1949 have conducted crimes as a result of political dispute between the Republic of Indonesia (Yogyakarta) and the Kingdom of Netherlands.

<sup>32</sup> Under the law's annex, it is ruled that the differences between amnesty and abolition are: a.) the granting of amnesty abolishes all legal consequences against the aforementioned persons; b.) the granting of abolition abolishes the prosecution against the aforementioned persons.

In 1961, the President also issued Presidential Decree No. 449 of 1961 on the granting of amnesty and abolition against people involved in rebellion. This decree was issued considering that for the sake of state's interests and the unity of the nation, the President needed to give amnesty and abolition to those involved in the rebellion of David Bereueh in Aceh, Revolutionary Government of the Republic of Indonesia, and the *Perjuangan Semesta* in North Sumatera, West Sumatra, Riau, South Sumatera, Jambi, North Sulawesi, South Sulawesi, Maluku, West Papua and other regions, the rebellion of Kahar Muzakar in South Sulawesi, Kartosuwirjo rebels in West Java and Central Java, the revolt of Ibnu Hajar in South Kalimantan, and the South Maluku Republic in Maluku. The decree also demanded that the convicts shall consciously return and dedicate themselves to the Republic of Indonesia. Furthermore, in 1977, through Presidential Decree No. 63 of 1977, President gave amnesty and abolition to the followers of the Fretilin movement in East Timor. This policy was issued considering "... the State's interests and the unity of the nation, as well as efforts to better harness all potentials for the development and improvement in the province." [author's translation]

In the early period of *Reformasi*, which is the period of transition from an authoritarian regime to a more liberal regime, the policy of amnesty was adopted as "an effort to actualize the order of the nation that guarantees the performance of state governance, national development that support human rights, and national unity."<sup>33</sup> Furthermore, the amnesty policy is also one of the clauses agreed upon by the Government of the Republic of Indonesia and the Free Aceh Movement contained in the Memorandum of Understanding on 15 August 2005. In Section 3 of Amnesty and Reintegration into Society, it is agreed that:

### **3.1 Amnesty**

*3.1.1 GoI will, in accordance with constitutional procedures, grant amnesty to all persons who have participated in GAM activities as soon as possible and not later than within 15 days of the signature of this MoU.*

*3.1.2 Political prisoners and detainees held due to the conflict will be released unconditionally as soon as possible and not later than within 15 days of the signature of this MoU.*

*3.1.3 The Head of the Monitoring Mission will decide on disputed cases based on advice from the legal advisor of the Monitoring Mission.*

*3.1.4 Use of weapons by GAM personnel after the signature of this MoU will be regarded as a violation of the MoU and will disqualify the person from amnesty.*

### **3.2 Reintegration into society**

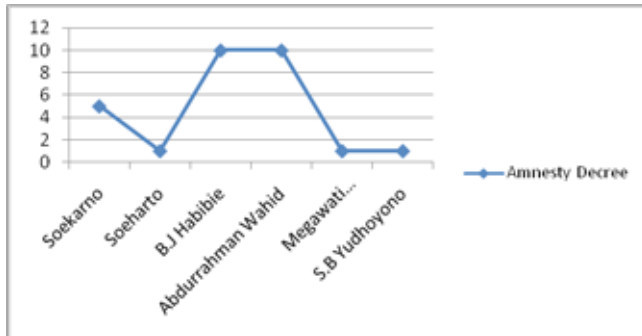
*3.2.1 As citizens of the Republic of Indonesia, all persons having been granted amnesty or released from prison or detention will have all political, economic and social rights as well as the right to participate freely in the political process both in Aceh and on the national level.*

Based on the characteristics of amnesty (and abolition) decrees between regimes, from the post-independence period up to the 1998 transition period towards a more democratic country, the Republic of Indonesia shows tendency to give pardons to any individuals involved in armed conflict, subversion and any other crimes that

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<sup>33</sup> See for instance, Presidential Decree No. 80 of 1998 on Granting Amnesty and Abolition, Presidential Decree No. 157 of 1999, Presidential Decree No. 158 of 1999, Presidential Decree No. 159 of 1999, Presidential Decree No. 160 of 1999 on Amnesty for Petrus Hari Hariyanto.

may impair the country's territorial integrity. In brief, despite constitutional changes on the amnesty consideration mechanism since the independence, the substance of amnesty reflects a rather similar object, in that it is granted to those who have committed "political-nuance crimes".<sup>34</sup> Furthermore, it could be assumed that the characteristic of amnesty also reflects the socio-political conditions of the country's sovereignty challenges during each regime.



**Figure 1: Amnesty Decree in Indonesia (1954-2005)**

Evidently, the amnesty decrees issued by the state since the independence did not explicitly mention any references to the efforts of national reconciliation, in the sense of restoring a good relationship between the evil aggressors or offenders and the affected victims.<sup>35</sup> It is thus important to state that the effort of 'reconciliation' in these amnesty policies is very thin, in that the 'enemy' who became the subject of amnesty to cease any hostile activities. Thus, based on the current political condition of Indonesia, and based on the need for reconciliation in the reform period, any option to an amnesty mechanism towards past gross human rights violations should be based on deliberation among citizens.

<sup>34</sup> Even though the term of political crimes are very flexible to be interpreted, Mallinder notes that amnesty for pure political crimes shall cover any activity of: "treason, sedition, subversion, rebellion, using false documents, forgery, anti-government propaganda, possessing illegal weapons, espionage, membership of banned political or religious organisations, desertion and defamation." Mallinder, *op. cit.*, p. 136.

<sup>35</sup> See. Abdul Hakim G. Nusantara, "Kompensasi bagi Korban Pelanggaran HAM Berat: Perspektif Komparatif," ["Compensation for the Victims of Gross Human Rights Violations: Comparative Perspective"], *Jurnal Perlindungan* 4, (2014), pp. 13-22.of



**Figure 2: Amnesty's Object (1954-2005)**

Amnesty in the context of reconciliation pursuance during the transition period actually finds its way when Law Number 27 of 2004 on the Truth and Reconciliation Commission (TRC Law) was enacted. Article 1 (9) of the TRC Law provides that "amnesty is forgiveness given by the President to the perpetrators of gross human rights violations by taking into consideration the House of Representatives." Normatively, the Commission has the duty to provide recommendations to the President regarding a request for amnesty (Article 6 (c)).<sup>36</sup> In terms of institutional aspect, the Commission has the structural element of sub-commission to provide legal considerations regarding the request for amnesty to the President (Article 16 in conjunction with Article 22). Apparently, the procedure of granting amnesty in the TRC Law is unfortunately mal-formulated. Article 27 of the TRC Law stipulates that "[C]ompensation and rehabilitation as enshrined in Article 19 shall be granted if the preceding request for amnesty has already been granted." In the TRC judicial review case at the Constitutional Court, the Court argues that:<sup>37</sup>

*This provision contains a contradiction between one part and another, specifically the parts regulating:*

*a.) The perpetrator has admitted mistakes and the truth of the facts and expressed remorse and a willingness to apologize to the victims; b.) The perpetrator may propose amnesty to the President; c.) The application can be accepted or rejected; d.) Compensation and/or rehabilitation will only be granted if the amnesty is granted by the President; e.) If the amnesty is rejected, the case will then be submitted to the Ad Hoc Court. [author's translation]*

Furthermore, the Court found that, "[D]eciding amnesty as a condition shall be an exclusion of legal protection and justice guaranteed by the 1945 Constitution."<sup>38</sup> In considering the legality of amnesty for gross violations of human rights, the Constitutional Court made a reference to the General Comment and the Report of the UN Secretary General that:<sup>39</sup>

*although [these practices] have not been accepted as binding law, it seems these conception is within the matter of the 1945 Constitution which regulates the principles of protection of human rights as contained in Article 28G Paragraph (2) of the 1945*

<sup>36</sup> Moreover under Article 7 (g) rules that the Commission has the authority to reject amnesty application if the case has been registered to the human rights court.

<sup>37</sup> Constitutional Court of Republic Indonesia, "Decision No. 006/PUU-IV/2006."

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

*Constitution, namely the right to freedom from torture, Article 28I Paragraph (1) of the 1945 Constitution, namely the right to life and the right not to be tortured, Article 28 Paragraph (4) and paragraph (5) of the 1945 Constitution, namely the protection, promotion and fulfillment of human rights is the responsibility of the state. [author's translation]*

Unfortunately, the Court seems to be reluctant to clarify the constitutionality of amnesty for past human rights violations, as the Court's decision merely focused on the lack of legal certainty of the working mechanism under the Commission for Truth and Reconciliation Law. As a consequence, the question of the constitutionality of amnesty for serious human rights violations remains unanswered, considering the idea of forgetting and forgiving the past crimes which has been a topic of serious debates from time to time in the Republic of Indonesia. The Court also did not give any considerations under what condition such an amnesty is considered constitutional.

#### IV. Designing Amnesty Law for Human Rights Violators

Based on the investigation conducted by the National Commission on Human Rights, there are several allegations of gross human rights violations involving state actors, in particular the military and allegedly individuals backed by the military, as well as individual actors who act under personal motive. Broadly speaking, there are cases that reflect the state-sponsored human rights violations. It should be understood that in the process the investigation conducted by the National Commission on Human Rights against seven gross human rights violation cases has recently produced some outputs, including, the decision of the *ad hoc* High Court of Human Rights that released the accused of gross violations of human rights in the *Tanjung Priok* case,<sup>40</sup> as well as the Special Committee of the Parliament Reports on the investigation of enforced disappearances in 1997-1998.<sup>41</sup> As for the other cases, there are yet any clear legal measures up to the present time.

As a consequence of applying the post-transition framework in Indonesia, the judicial process against these cases would certainly be a must. Referring to the transitional practices in other countries, judicial process against past violations of human rights in Latin America, for instance, Argentina, Chile, and Uruguay, which still seeks to prosecute the perpetrators regardless the long time span and several periods of governments.<sup>42</sup> Furthermore, considering the political-constitutional transition and the development of national law, enforcing the rule of law in the post-transition period indeed increases the legitimacy of the ruling government. Such a paradigmatic process of law enforcement, according to Teitel, "constructs changes in shared public justifications underlying political decision-making and behavior that simultaneously disavow aspects of the predecessor ideology and justify the ideological changes constituting liberalizing transformation."<sup>43</sup> Therefore, the rule of law is necessary to be implemented by the state towards the seven cases based on the concluded investigation, and any failure of it will contribute to an adverse impact on

<sup>40</sup> High Court of Jakarta, "Decisions No. 01/PID/HAM/Ad Hoc/2005/PT.DKI," and "ans02/PID/HAM/Ad Hoc/2005/PT.DKI"

<sup>41</sup> *Laporan Panitia Khusus Penanganan Pembahasan atas Hasil Penyelidikan Penghilangan Orang secara Paksa Periode 1997-1998* [Special Committee Report on the Investigation of Enforced Disappearance during 1997-1998] 28 September 2009. In this report, the House members recommended the President to establish an *ad hoc* human rights court to resolve the case. However, such a court is yet to be created up to this day.

<sup>42</sup> See. Skaar, *op. cit.*, p. 192.

<sup>43</sup> Teitel, *op. cit.*, p. 163.

the government's legitimacy.

However, at this point, calculations by the government would be of particular important. On the one hand, the rules provide the opportunity to resolve the cases out of court, but on the other hand, these opportunities do not necessarily ignore the results of the investigation that is considering the commitment of the Republic of Indonesia as a legal state.<sup>44</sup> Thus, in the post-transition period, the government needs to carefully weigh any resources that will be used in enforcing the law through the prosecution under *ad hoc* human rights court, with results in the form of national reconciliation. With regard to these problems, the author argues that criminal prosecutions against those suspected of committing serious human rights violations in the past can be done selectively. This selective policy thus in principle is not inconsistent with international law, considering the practices of criminal justice in international fora.

Thus, the subsequent question is whether the law permits such a prosecution in the present. From the synthesis, the Indonesian context can be based on the idea of rule of law and the direction toward the post-transitional justice in Chapter II. Prosecution of past serious human rights violations shall not only consider the elite preference and the independence of judicial power, but also the optimization of military reform which is to be deemed a very important supporting factor in realizing the legitimacy of the completion of cases that exist. It is given that the involvement of the military in cases that there is a very well-lit. Arguably, the criminal prosecution step and military reform are mutual things and need to be implemented in parallel.

Moreover, the National Medium Term Development Plan (RPJMN) 2015-2019 clearly mentions that in order to resolve past cases of human rights violations in a just manner, the law enforcement's strategy framework shall:<sup>45</sup>

*[. . .] require a national consensus of all stakeholders. It is an important first step to be able to draw a clear line that there is no tolerance for human rights violations in Indonesia based on the practice and experience of massive violence in the past. Consensus in resolving the cases of human rights violations is an important step to build new awareness in society that human rights violations cannot be tolerated and they must not reoccur in the future. By facilitating the process of exposing human rights violations in the past, then the implementation of the order of the Constitutional Court to immediately issue a policy to deal with human rights violations in the past, and the implementation of the mandate of Resolution of MPR No. V of 2000 on Stabilization of National Unity and Integrity in a medium that is strong enough to resolve cases of human rights violations. The strategy in handling past human rights violations cases would be done through the establishment of an ad-hoc commission, with the task of facilitating the process of exposing past human rights violations that is directly under the President and fully accountable to the President. The exposing of human rights violations carried out through a series of information gathering activities or documents to draw up a comprehensive report on various violence and human rights violations that occurred in the past. [author's translation]*

<sup>44</sup> See Yustina Trihoni Nalesti Dewi, "Hak Konstitusional Korban atas Pengadilan HAM yang Kompeten, Independen, dan Imparsial," ["Constitutional Rights of the Victims of Competent, Independent, and Impartial Human Rights Courts"], *Jurnal Konstitusi* 11, no. 2 (June, 2014), pp. 256-75.

<sup>45</sup> Indonesia, Ministry of National Planning, *Rencana Pembangunan Jangka Menengah Nasional 2015-2019* [The National Medium Term Development Plan 2015-2019] (Jakarta: Ministry of National Planning, 2014), para 6.4.1.



By using the term 'consensus', the government's planning policy indicates a need for public deliberation in settling the past human rights violations. Thus, it can be assumed at this point the government is seeking a process of deliberation, not merely involving the victims and the alleged perpetrators but also the Indonesians as a whole, to determine the future of the nation. As a consequence, we may assume that the elite preference under the RPJMN document implies that the cases are to be resolved through a non-judicial mechanism by establishing an *ad hoc* commission.

As a political policy, any preferences in the RPJMN need to be placed as a process to filling, quoting Primo Levi, a 'gray zone', that is the space between the perpetrators and the victims. This refers to the form of complicity in past human rights violations, which happens to be a problem in a transitional justice process. Primo Levi, along with Arendt, noticed that the complicity needs to consider any rejection or opposition towards the order. Such a perspective shall be contextualized with the description of past human rights violation cases that which were supported by the state (in this case the military forces). Paradigmatically speaking, it requires, borrowing a phrase by Hannah Arendt, an "enlarged mentality" to fill in the gray zone. Departing from Arendt's understanding, Leebaw defines "enlarged mentality" as "a kind of impartiality that is not achieved through appeals to scientific objectivity or universality, but through the work of examining a problem from the perspectives of others who may see things very differently."<sup>46</sup> Any political decisions guided by such a mentality thus directly "... require an active process of persuasion and dialogue ... [and] also entails historical reflection."<sup>47</sup> Therefore, ethically, these persuasion and historical reflection require not only a tendency to a legalistic approach against past crimes, but also a broader vision about the institutional injustices that happened in the society.

On the other hand, a paradigmatic classification of victims also needs to be done, particularly on whether the victim is an individual or group that is affected physically or also amounts to economic violence.<sup>48</sup> Given in principle, the "constructed invisibility" nature of economic violence apparently contains a significant contribution in understanding the historical injustice in the past. In this sense, the need to classify victims is not merely in order to formulate a historical narration of the facts, but also has logical implications to the victims' right to reparation and remedy. Consequently, if the state wants to be consistent with the paradigmatic view of human rights, the analysis of economic violence shall not be put in the background.

On a practical level, a 2013 study conducted by experts from across locations, disciplines, and from various approaches to amnesty successfully concluded the guidelines for preparing or evaluating amnesty policy in a post-conflict and repressive society. The guidelines, entitled *The Belfast Guidelines on Amnesty and Accountability*, aims to:<sup>49</sup>

- a) *identify the multiple obligations and objectives facing states in protecting human rights;*
- b) *explain the legal status of amnesties within the framework of the multiple legal obligations that states must reconcile;*

<sup>46</sup> Bronwyn Leebaw, *Judging State-Sponsored Violence, Imagining Political Change* (Cambridge: Cambridge University Press, 2011), p. 98.

<sup>47</sup> *Ibid.*, p. 176.

<sup>48</sup> See Dustin N. Sharp, *Justice and Economic Violence in Transition* (New York: Springer-Verlag, 2014), pp. 11-12.

<sup>49</sup> Transitional Justice Institute, *The Belfast Guidelines on Amnesty and Accountability* (Belfast: Transitional Justice Institute, University of Ulster, 2013); hereinafter "Belfast guideline".

- c) *assists states in recognizing the positive role of certain forms of amnesty in advancing transitional policy and conflict transformation goals;*
- d) *present ways that amnesties and any associated processes or institutions can be designed to complement accountability;*
- e) *recommend approaches that allow public participation and independent review of decisions to enact and grant amnesty.*

Based on *the Guidelines*, the temporal and geographical coverage shall be the first element to be considered in formulating amnesty for past human rights violations.<sup>50</sup> Departing from the investigation of the National Commission on Human Rights against seven cases of gross violations of human rights, it is necessary to consider the periodization of amnesty policy, which arguably involves a relatively long period of time between cases, and the location, which may vary one case to another.

Furthermore, the methods of publishing and public consultation on amnesty proposals shall determine its legality and legitimacy. The methods that could be used including:<sup>51</sup> *first* is through a legal instrument. Based on the 1945 Constitution and several amnesty practices throughout the history of the Republic of Indonesia, amnesty can be enacted through a presidential decree. Related to this, it is also mentioned in the guidelines that, “an amnesty enacted through a constitutional provision will be more difficult to amend”. *Second* is through a public consultation. *The Guidelines* states that a consultation ought to cover the inclusion of marginalized groups, such as victims, women, children, displaced persons, minority groups and former combatants. In the methodology, the consultation may include public meetings, surveys, focused discussion and consideration of the written report; *Third* is through a referendum. The legitimacy of amnesty could also be increased when it is being implemented through a voting mechanism in a referendum. *Fourth* is through self-amnesties. In this case, the regime allegedly responsible for gross violations of human rights shall unilaterally issue amnesty, although such a mechanism could be considered *prima facie* illegal and illegitimate.

In the context of Indonesia, the present author argues that the first and second methods are a valuable option that can be justified in terms of legality and legitimacy. A combination of legal instruments and public consultation is the most feasible effort for the government in designing amnesty. Technically, a legal instrument in the form of a presidential decree (*Keputusan Presiden*) could initially be based on public perception through a public consultation regarding amnesty for perpetrators of gross human rights violations. Furthermore, considering temporal and geographical considerations, the role of a local government in conducting a public consultation should consequently be a must. Given the embodiment of reconciliation ought to be the work of all elements of the nation, as well as considering the politics of decentralization that is constantly being developed by the Republic of Indonesia, public perception at the local level needs to be taken into consideration for the President before an amnesty is declared.

Furthermore, substantially any offenses granted forgiveness through amnesty ought to be clearly classified in the presidential decree. Based on the practice in South Africa, as it has been discussed in the previous chapter, the country needs to weigh the

<sup>50</sup> Mallinder, *op. cit.*, p. 148. Mallinder quotes, for instance: “the 1996 Croatian amnesty covered all criminal acts [committed] during the aggression, armed rebellion or armed conflicts, in or relating to the aggression, armed rebellion or armed conflicts in the Republic of Croatia [. . .] during the period from 17 August 1990 to 23 August 1996.” *Id.*

<sup>51</sup> Belfast Guideline 14. Method of enactment and public consultation.

balance between the object of amnesty (including any exclusion in it) and the aim of declaring the amnesty itself. In this context, the Belfast Guidelines states that amnesty will increase its legitimacy when it excludes serious international crimes, serious crimes against human beings that do not reach the level of international crime, and acts or offenses motivated by personal gain or malice.<sup>52</sup> Furthermore in this regard, the criteria determination of the parties that benefit from the amnesty should be spelled out in a detail manner. The distinction or categorization of individuals eligible for forgiveness, referring to Belfast Guidelines, can be based on: (i) allegiance or membership in a particular state institution or a non-state body; or (ii) rank within the institution or body, or perceived level of responsibility therein.<sup>53</sup> Against these conditions, and based on the National Commission of Human Rights investigation, amnesty exclusions should also be applied to responsible individuals based on the principle of superior command responsibility.

Moreover in Guideline 11, there are several prerequisites that must be met for the parties to be granted forgiveness through amnesty.<sup>54</sup> Departing from some options outlined in the Guidelines, several preconditions that can be adopted, namely the individual petition, the disclosure of involvement with the penalty of perjury, open or closed testimony, through truth commissions or other public inquiry, testifying against parties excluded from amnesty, handover of assets that were illegally occupied, and contribute material or symbolic reparation/remedy of victims.<sup>55</sup> In the context of Indonesia, all these prerequisites can be adopted through an *ad hoc* committee mechanism that in charge in resolving the cases. Finally in Guideline 15, any legal consequences that result from an amnesty may cover various aspects, which can be applied both to the perpetrators and the victims. In the context of the seven cases, some choices of legal consequence that can be applied including abolition or termination of all legal proceedings, as well as closure to any civil liabilities. From the victim's side, the amnesty also needs to be aimed at the elimination of all legal consequences to the victims.<sup>56</sup>

The present author argues that *the Guidelines* could be sorted selectively into two categories: procedural category (including methods of enactment and public consultation) and substantive category (including eligible offenses, eligible beneficiaries, prior conditions on amnesty beneficiaries, and legal effects). Both categories are certainly not an exhaustive list to be considered by an *ad hoc* mechanism in the future for the settlement of human rights violations. However, these principles could be the minimum threshold in forming an amnesty decision.

## V. Conclusion

The conceptual paradigm and argument described in the preceding section indicate us a need to a more paradigmatic measure in resolving past gross human rights violations. With regards these needs, this paper concludes several points: *First* is departing from the development of the current constitutional and political structure, Indonesia's transition in principle needs to be shifted to a post-transitional stage, in a sense that various conditions after the Resolution of MPR No. X/2000, which

<sup>52</sup> Belfast Guideline 7. Eligible offences.

<sup>53</sup> Belfast Guideline 8. Eligible beneficiaries.

<sup>54</sup> Belfast Guideline 11. Prior Conditions on Amnesty Beneficiaries.

<sup>55</sup> *Ibid.*

<sup>56</sup> Belfast Guideline 15. Legal effects.

requires the implementation of democratization in all fields, human rights protection, as well as reforming the role of the military, have transformed institutionally in law enforcement and government sector. Apart from any existing institutional obstacles, the situation of post-transitional politics was significantly reflected in a vast growing of human rights norms, as well as the proliferation of civil society movement up to this day. Furthermore, the discourse on human rights legalism versus restorative justice concept, as depicted by the formulation of positive laws and legal and political institutions, is yet to be optimized under the framework of national reconciliation. *Secondly* is that the politics of ‘amnesty without amnesia’ is a necessity in the context of post-transition. Under international treaties and international customary law, amnesty cannot be considered *prima facie* illegal under international law. Nonetheless, one could not deny that there exists an emerging effort to regard amnesties towards international crimes as illegal; as reflected in the practice of international justice as well as statements and *ad hoc* UN studies. To that account, in proposing amnesty decision towards past human rights violators, the state ought to consider this shift in order to increase the legitimacy of the decision. *Finally* is the ethical argument and the various prerequisites outlined under *the Belfast Guideline* indicates that granting amnesty against any gross human rights violators should be based on a paradigmatic policy. Furthermore, as a political decision, a proposal to enact amnesty law needs to consider its legitimacy in society, which suggests that the elements of amnesty, both procedural and substantive, need to work in the area of deliberative democracy that calls for public participation and human rights protection.

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