

**REVIEW OF THE IMPLEMENTATION OF CLEMENCY
IN THE INDONESIAN CRIMINAL LAW SYSTEM
(Study of Constitutional Court Decision Number 32 / PUU-XIV/2016)**

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Abstract

Clemency is a presidential privilege that entails changes, waivers, reductions, or the elimination of criminal executions granted by the President. The scope of clemency is defined in Law No. 5 of 2010, which amends Law No. 22 of 2002 concerning Clemency. The applicable ruling must have a permanent legal force (Inkracht). Clemency can be sought for individuals sentenced to death, life imprisonment, or a minimum sentence of 2 years in prison. This study focuses on the case of Suud Rusli, a death row inmate who unsuccessfully attempted to apply for clemency but was subsequently executed. The research aims to answer the following questions: "What is the procedure for implementing clemency for the death penalty in Indonesia?" and "What is the basis for the Constitutional Court rejecting the Applicant's Application in Decision No. 32/PUU-XIV/2016?" The author uses the Juridical-Normative method, analyzing relevant legal materials, literature, principles, and theories related to the Implementation of Clemency in the Indonesian Criminal Law System (specifically, the Decision of the Constitutional Court No. 32/PUU-XIV/2016). The study reveals significant developments in the submission of clemency for death penalty cases, including a shift from the traditional hanging method under Article 11 of the Penal Code to the usage of Law No. 12/Pnips/1964 on The Procedure of Execution of The Death Penalty Imposed by the Court In the General And Military Court. The Constitutional Court, as one of Indonesia's highest judicial institutions, plays a crucial role in providing a reasoned basis for the consideration of clemency-related matters.

Keywords: Clemency, The Privileges or Prerogatives of The President, The Death Penalty

1. INTRODUCTION

The state of Indonesia is a state of law, as stated in Article 1 Paragraph (3) of the Constitution of the Republic of 1945, which declares Indonesia as a state of law. The Indonesian state provides various kinds of sanctions, ranging from light to severe criminal penalties, with the aim of deterring individuals from committing crimes or serving as a preventive measure against potential offenders.

Apart from using the Criminal Code (KUHP), Indonesia also employs Law No. 31 of 1997 on Military Justice, known as the Military Criminal Code (KUHMP), and Law No. 25 of 2014 on Military Discipline Law, specifically applicable to members of the Indonesian National Army (TNI). Article 6 of Law No. 25 of 2014 lists similar types of crimes as those found in the general Criminal Code (KUHP).

The Criminal Code (KUHP) mandates the imposition of criminal fines as punishment, requiring offenders to pay a predetermined sum of money decided by the court to the state (Syaiful Bakhri, 2010). Conversely, the Military Criminal Code (KUHMP) does not regulate criminal penalties; such penalties are solely outlined in the Criminal Code (KUHP). Among the criminal sanctions given, the most severe one is the death penalty. The application of the death penalty in Indonesia has been a contentious

issue due to various factors influencing its implementation. Nevertheless, proponents argue that the death penalty's imposition increases the effectiveness of sanctions and acts as a real deterrent.

As defined in Article 11 of the Criminal Code (KUHP), the death penalty involves the execution of the convict through hanging, where a rope is tied to the gallows around the convict's neck, and they are made to stand on a board that is later dropped. The death penalty is thus the ultimate punishment, resulting in the loss of the convict's life to deter others from committing similar crimes. Legal expert (Prodjodikoro, 1986) has argued that the death penalty remains crucial as a preventive tool against potential criminals, discouraging them from engaging in serious offenses.

Indonesia has various laws regulating the country, including those governing the granting of clemency to criminals. Pardon refers to the forgiveness granted to a criminal by the head of state (President). The procedure for granting clemency is outlined in the Republic of Indonesia Law No. 5 of 2010, which amends Law No. 22 of 2002 on clemency.

The President holds the prerogative to grant clemency to criminals. This prerogative means that clemency cannot be granted immediately but depends on the President's discretion. The President has the authority to grant partial or complete forgiveness or modify a sentence to individuals convicted of criminal offenses, but this can only happen with the approval of the Supreme Court, Indonesia's highest judicial institution.

According to Simorangkir (2004), clemency is one of the privileges or prerogatives of the President as the head of state, along with amnesty, abolition, and rehabilitation. Clemency allows the President to show mercy and reduce or forgive the punishment for individuals convicted by a judge of committing a crime.

Clemency is not a legal remedy but a right of the President as the head of state to offer forgiveness to citizens who have committed minor or serious crimes. The President's granting of clemency is not related to their position as the head of government (executive body) or the judiciary; rather, it is a prerogative aimed at safeguarding the welfare of citizens. Article 14, paragraph (1), of the 1945 Constitution of the Republic of Indonesia states that clemency can only be granted after considering the Supreme Court's views. The process of granting clemency is also governed by the Republic of Indonesia Law No. 5 of 2010, which amends Law No. 22 of 2002.

The granting of clemency should align with the principles of Pancasila and the 1945 Constitution of the Republic of Indonesia. Article 6, paragraph (1), of Law No. 5 of 2010 concerning clemency specifies that clemency decisions must consider human rights and uphold justice. However, the backlog of unresolved clemency petitions remains a challenge due to the large number of cases, with 2106 pending cases reported in a meeting of Commission III in 2012, even after the expiration of the designated time period outlined in Article 15 of Law No. 22 of 2002 concerning clemency.

This study delves into a case in Indonesia involving the assassination of one of PT Aneka Sakti Bhuana (Asaba) President Directors named Boedyharto and Serda Edy Siyep, a member of Koppasus serving as his personal bodyguard, which occurred on July 19, 2003, exactly 17 years ago from today. Four members of the Marines found them dead in front of the Gelanggang Spore (GOR) Sasana Krida Pluit, North Jakarta, around 05.30 PM.

On July 31, 2003, the police, assisted by the Navy, arrested four Marines suspected of being involved in the assassination. These four individuals were reportedly the personal bodyguards of Gunawan Santoso, who was arrested by the police on September

12, 2003. One of the Marines, Suud Rusli, a former soldier of the Amphibious Reconnaissance Battalion (Yon Taifib) holding the rank of Corporal two, received the death penalty for his involvement in the incident, along with three colleagues.

Suud Rusli, having been convicted, managed to escape from a Military Detention House due to alleged inhumane treatment (Fahmi, 2020). However, a Judicial Review of Law No. 5 of 2010 on amendments to Law No. 22 of 2002, which could have been an opportunity for Suud Rusli to seek clemency again, was rejected by the panel of judges due to not meeting the formal requirements as it had exceeded one year since his conviction.

Despite Suud Rusli's earlier pardon request being rejected by the President of the Republic of Indonesia on August 31, 2015, he and his attorney filed a Judicial Review of Law No. 5 of 2010 to potentially secure a second chance for clemency. Under Article 7, Paragraph (1), of Law No. 5 of 2010, which amends Law No. 22 of 2002, the application for clemency can only be submitted once the court decision becomes legally binding. Therefore, if Suud Rusli's current application is not accepted, he won't be able to file a second pardon to seek legal relief or a commutation of his life sentence. This study aims to explore the procedures for implementing clemency for death row inmates in Indonesia and the grounds on which the Constitutional Court rejected the applicant's application in Constitutional Court Decision Number 32/PUU-XIV/2016.

2. RESEARCH METHODS

This research follows a normative legal research approach, which involves collecting data from various existing literature sources. The research approach employed is juridical-normative, as it involves analyzing materials related to legislation, various legal literature, and principles and theories relevant to the study of the implementation of clemency within the Indonesian criminal law system (focusing on Constitutional Court decision study Number 32/PUU-XIV/2016).

The author adopts a qualitative data collection method, specifically the analysis of legal materials. This method involves studying, interpreting, and analyzing principles, laws, and regulations to present them in a logical and coherent written form, making it easily understood by readers. The analysis also includes a descriptive-analytical approach, considering the views, attitudes, and behaviors presented in the materials. The utilization of the method of analysis of legal materials serves the purpose of addressing the research questions and subsequently drawing conclusions based on the study's findings.

3. RESULTS AND DISCUSSION

3.1. Procedures for the Form of Clemency for Death Row Inmates in Indonesia

The application and granting of clemency according to Law No. 3 of 1950 on the application for clemency is all decisions of civil courts and military courts that have permanent legal force, while the application and granting of clemency according to Law No. 22 of 2002 on clemency is against all court decisions that have permanent legal force. The verdict is a death penalty, life imprisonment or a minimum of 2 years. There are several risks that are feared as a result of the verdict handed down by the judge, especially for the death penalty where there are possibilities of execution of the wrong people or innocent people.

To be able to impose the death penalty, a judge must carefully observe the Constitution of the Republic of Indonesia in 1945 and Human Rights because the death penalty is given to a convicted person who has committed a crime. In this case, the death penalty imposed in Indonesia is a positive law that is still applied to give a deterrent effect to the convict and is not a violation of human rights, because the Indonesian state adheres to Human Rights (HAM) which are limited by law, this restriction is only imposed solely to protect the Human Rights (HAM) of others and to respect others. Therefore, with the death penalty for convicts, it can protect and save the Human Rights (HAM) of others (Lady et al., 2021). As for the basis and purpose in this punishment so that the criminal sanctions criminal punishment has benefits for the community. However, if it is connected with the death penalty, the convict has the right to apply for clemency which can be channeled either through the convict's attorney, the convict's family, or the convict himself who did it.

3.2. Benchmarks in the Application for Clemency

Pardon, as already explained, is one of the prerogatives or privileges possessed by the president that has been granted by the state constitution or the Constitution of the Republic of Indonesia in 1945. Currently, the term prerogative has the meaning of the right or privilege or authority of the president as the head of State who is in an agency because it has a legitimate position and has been established by the Constitution of the Republic of Indonesia in 1945.

With the receipt of the file request for clemency from the convict, the president as head of state and head of government will decide with his own discretion and thinking to reject or grant the request for clemency from the convict. The president's decision has an absolute nature, which means that the actions of the president are related to the acceptance or rejection of the pardon.

With the reason that how the petition in this pardon can be granted or not by the president there is no information that is expressly written in the Constitution of the Republic of Indonesia in 1945 or in other laws and regulations. Because the president as head of state or head of government can exercise power regarding granting clemency to this convict for reasons which the president considers appropriate, including humanitarian reasons, justice, or also on political reasons.

According to Van Hattum in providing reasons for clemency are, among others: "according to the legal view is that the agency should not be reused as the generosity of a king or ruler, but should be used as a tool to nullify injustice, that is, if the applicable law in force can lead to an injustice. The interests of the state can also be used to excuse the granting of clemency".

From the above opinions, it can be concluded that what can and deserves to be used as a reason for granting clemency by the president to convicts, among others, is the factor of justice and humanity. With the factor of justice if for some reason and the judge has imposed a crime that is considered less fair, then in this case the pardon can be given as a way to be able to realize a justice, while in the humanitarian factor itself can be known from the state of the convict, such as whether the condition of the convict is in good condition and whether the convict has proven that he has changed for the better, then from there the pardon can also be given as a tribute to the humanity.

In the law on clemency prior to Law No. 22 of 2002 on clemency, there was a procedure involving several components related to the criminal justice system or commonly referred to as the Criminal Justice system, which in each institution ranging

from the Chief Judge of the state court, State Prosecutor, Minister of Justice, Attorney General to the Supreme Court to include its consideration related to accepting or rejecting clemency for convicts. In Law No. 22 of 2002 on clemency, there is a simplification of the rules, so there is no need for consideration other than the Supreme Court.

With this, it can be understood again that the president has absolute power regarding clemency. There are restrictions that have been written in Article 14 of the Constitution of the Republic of Indonesia in 1945 which states that in granting clemency to convicts, the president needs to pay attention to the considerations of the Supreme Court. Seen again that consideration has a nature that is not absolutely necessary to be implemented. If it is noticed in the Presidential authority regarding clemency is seen through the classical approach in criminology, which according to Thomas Hobbes as one of the utilitarian supporters has the view that the law is an order from a ruler or king, therefore the law must be justice, equality, humility, without coercion from a ruler or king, does not cause any clash (Friedrich, 2004), where the law made by the ruler or King is a rule of law that has to do with considering the benefits of peace and security of society. Then the president should be able to make people feel a peaceful state by accepting or rejecting the pardon.

If it is linked back to the theory of labeling in granting clemency to the death penalty convicts, it will be seen again with the characteristics of crimes committed by convicts. If a crime has an indirect impact that is felt by the community, then the label given by the community will not be as heavy as the label given to a convict who is proven to have committed a crime that has an impact that can be felt directly by the community. So, from here it can be seen that there is an influence on the acceptance in the community of death row convicts who in fact obtain clemency from the President.

With such a thing, the consideration of the president in giving a decision to accept or reject the request for clemency against death row in addition to seeing the characteristics of the crimes that have been committed, here also the president must pay attention to the sense of justice in the community, so as to realize the benefits for the wider community. With the explanation as above, it can be reviewed again the existence of standards to be able to grant or not a request for clemency submitted by the convict to the president either in the form of legislation or with other written provisions.

3.3. The Death Penalty in Indonesia

The death penalty in Indonesia does not only apply to the general environment, but also to the military environment, which in the determination of the president of the Republic of Indonesia No. 2 of 1964 on the procedure for the implementation of the death penalty imposed by the court in the general and military courts which in the previous article 11 of the Criminal Code (KUHP) the death penalty is carried out by an executioner or someone who carries out the death penalty in foothold). However, in Article 11 of the Criminal Code (KUHP) has been amended by Law No. 2/Pnps/1964 Jo Law No. 5 of 1969 on the procedure for the implementation of the death penalty imposed by the court in the general and military courts. Article 1 states that the execution of the death penalty against convicts is carried out by shooting to death where the execution is handed down by a court within the general court or military court. Furthermore, this provision is enhanced by the issuance of the regulation of the head of the Indonesian National Police Number 12 of 2010 on the procedure for the implementation of the death penalty.

There is a benchmark in the implementation of the death penalty when it is connected with the Constitution of the Republic of Indonesia in 1945 with Article 33

Paragraph 1 of Law Number 39 of 1999 on Human Rights reads that everyone has the right to be free from torture, punishment or cruel treatment that is inhuman, degrading the degree and dignity of Man, which contains elements that the death penalty in Indonesia can be carried out if it is not cruel or degrades human dignity.

Which in the execution of the death penalty, the executors must perform in the best way without having to torture the convict and the execution carried out must be able to accelerate the death of the convict. Through Law No. 2/Pnps / 1964, the execution of the death penalty is no longer carried out by hanging the convict but by being shot until the convict actually dies, this is done not without consideration but because the shooting penalty is still considered more humane and an effective way to do it.

3.4. The Basis for The Constitutional Court to Reject the Applicant's Application In The Decision Of The Constitutional Court Number 32 / PUU-XIV/2016

In the opinion of Gustav Radbruch in 1973 explained that legal certainty has 3 elements including legal certainty, justice and expediency. An authoritative judicial institution is an independent, neutral, competent, transparent and accountable Court which can enforce legal authority, legal protection, legal certainty and Justice. This is a requirement for a country based on law (Mappiasse & MAZHAB, 2015).

In the decision of the judge according to the circular of the Supreme Court No. 5 of 1959 and No. 1 of 1962 has the meaning of which is a statement by the judge as the owner of a high state Office authorized for it, he said at the hearing and has the purpose of being able to end or to be able to resolve a case or dispute between the litigants. In practice, all decisions are always read out based on a written script that has been prepared. In the procedural law in Indonesia, for example, the opinion is adopted that if there is a difference between the written text and the speech at the time of reading the verdict text is read, then what can be used as a handle is the oral speech spoken during the trial (Hidayat, 2013). The judge is a profession that stands alone, is not tied to other parties, and has a logical way of thinking. Standing alone here is independent which must be guaranteed without any interference from other parties.

In Article 24 paragraph 2 of the Constitution of the Republic of Indonesia 1945 explains that the judiciary is an independent power exercised by a Supreme Court and by the judiciary under it in the General Court, Religious Court, Military Court, Administrative Court and by a Constitutional Court, to administer justice that is useful to enforce law and justice in society.

Constitutional Court or Constitutional Court which is an institution in the judiciary in interpreting the Constitution, even the Constitutional Court (MK) not only put its position on the material meaningful thought verbal, grammatical, logical or historical from the constitutional text or even from the provisions of the Constitution of the Republic of Indonesia in 1945 but the Constitutional Court must determine a new direction in the interpretation of the Constitution. In this case the Constitutional Court (MK) has a Constitutional Review term which is based on the opinion expressed by Vicki. (Jackson & Tushnet, 1999) which on constitutional testing carried out on the judiciary. Judges have a way of thinking by interpreting the law especially in the Constitution or legislation products. Which is divided into two (2) Judicial Review and Constitutional Review.

In the decision of the judge regarding the rejection of the application under the name Suud Rusli rejected by the judge because it has the basis of which is : That the provisions referred to by Justice are already contained in the court decision Number 25/PUU -

XIII/2015 and in Number 40/PUU-XIII/2015 dated May 31, 2016 which explains that what is meant by Justice is one of the old assumptions in the classical doctrine of Justice which states that justice can give everyone what is due. So, this assumption becomes a necessity regarding a person being recognized by having rights so that rights exist. If someone wants to find objective justice by sticking to the assumption of justice as stated above, whether they like it or not, the first thing that must be sought is social order which has the name of law. Based on the considerations as already explained, there is no fundamental reason to be able to state that Article 2 Paragraph (3) of Law Number 5 of 2010 is contrary to the right to recognition, guarantee, protection, legal certainty and equal treatment before the law.

The next basis is that the application for clemency that has been submitted is rejected because of considerations that do not meet the formal requirements such as the lapse of time as has been decided in decision number 107/PUU-XIII/2015 dated June 15, 2016.

The next basis explains that the applicant postulates in Article 2 Paragraph 3 of Law Number 5 of 2010 on clemency which states that in applying for clemency can only be carried out once and this is contrary to the obligation of the state to protect its citizens. In this case, the court sees an anomaly as well as an incompatible contradiction.

The court further explained that the applicant made a mistake in interpreting the obligation of the state, in the case of the government, to be able to provide protection, promotion, enforcement and in terms of the fulfillment of human rights. In this case the court explained the meaning of the provision of protection, promotion, enforcement, and in the subject of the fulfillment of human rights is a guiding principle for the state, especially the government, must be placed in the context of State Life that has the foundation and the idea of a state of law which is organized based on the Indonesian national legal system which as a general principle such as the existence of a legal system created and enforced by the state which can guarantee the protection, promotion, enforcement and fulfillment of human rights. On this basis, various legal mechanisms were created that allow the equality of general principles which in practice in the life of the state become a means of high control according to the Constitution or in case of the Constitution of the Republic of Indonesia in 1945.

And the next basis is that the posit of the applicant who questions the constitutionality contained in Article 7 Paragraph 2 of Law Number 5 of 2010 which is considered vague and cannot be considered further and the application of the applicant by the court is considered to have no reason according to applicable law.

4. CONCLUSION

Clemency, which signifies a pardon, is an integral aspect of Indonesia's legal system, governed by Law No. 5 of 2010, amending Law No. 22 of 2002 on clemency. Within this legal framework, the President possesses the authority to grant clemency, subject to the consideration of the Supreme Court. To seek clemency, convicts must adhere to the stipulated procedure detailed in Article 8 to Article 12 of Law No. 22 of 2002. It's important to note that not all verdicts are eligible for clemency; the scope is limited to cases involving the death penalty, life imprisonment, or a minimum sentence of 2 years in prison. In the context of granting clemency to a convict sentenced to death, the President may take into account factors such as justice and humanitarian considerations.

The death penalty in Indonesia is an established part of positive law, with its application intended not to violate human rights or inflict cruelty. Instead, it serves as a severe punishment for those committing particularly heinous crimes. The main purpose of the death penalty is to deter potential offenders from engaging in such grave acts. In Indonesia, the execution of the death penalty follows the prescribed procedures outlined in Law No. 2/Pnps/1964, which addresses the implementation of death sentences by general and military courts. The chosen method for execution involves shooting the convict, ensuring a relatively swift and less painful death.

The Constitutional Court holds a prominent position within Indonesia's legal system, going beyond its role as a judicial body to interpret constitutional provisions. This involves considering various aspects, such as verbal, grammatical, logical, and historical elements in their decision-making process. The judges employ a legal analysis method, particularly in relation to legislative products. Notably, the rejection of the applicant's application linked to Constitutional Court Decision Number 32/PUU - XIV/2016 was grounded in several reasons. These include the absence of fundamental reasons to declare Article 2, Paragraph (3) of Law Number 5 of 2010 as conflicting with the right to recognition, guarantee, protection, legal certainty, and equal treatment before the law, as claimed by the applicant. The rejection was also attributed to the application's failure to meet formal requirements, existence of conflicting postulates leading to anomalies, the applicant's erroneous interpretation of the state's obligations, and the questioning of the constitutionality of Article 7, Paragraph 2, of Law Number 5 of 2010, citing vagueness as the reason for rejection.

REFERENCES

Amelia, R. P. (2013). Penerapan Grasi Di Indonesia Sebagai Hak Prerogatif Presiden Terhadap Terpidana Kasus Narkoba.

Bakhri, S. (2010). Kebijakan Legislatif tentang Pidana Denda dan Penerapannya dalam Upaya Penanggulangan Tindak Korupsi. *Jurnal Hukum*, 17(2), April, 317-334.

Black, C. B. H. (1990). *Black's Law Dictionary* (6th ed.). West Publishing Co.

Chazawi A. (2002). *Pelajaran Hukum Pidana 2*. Jakarta: Raja Grafindo Persada.

Djamali, R. A. (2007). *Pengantar Hukum Indonesia* (Edisi Revisi). Jakarta: PT Raja Grafindo Persada.

Efendi, R. (2019). Konstitutionalitas Masa Tunggu Eksekusi bagi Terpidana Mati dalam Sistem Pemidanaan. *Jurnal Konstitusi*, 16(2), Juni.

Firdaus, F. (2020, July 19). Suud Rusli, Eks Prajurit Elite Terpidana Mati yang Dua Kali Kabur dari Penjara Militer. *Okezone*. <https://nasional.okezone.com/read/2020/07/19/337/2248841/suud-rusli-eks-prajurit-elite-terpidana-mati-yang-dua-kali-kabur-dari-penjara-militer?page=1>

Friedrich, C. J. (2004). *Filsafat Hukum Perspektif Historis* (R. Muttaqien, Trans.). Bandung: Nusa Media.

Hidayat, A. (2013). Penemuan Hukum Melalui Penafsiran Hakim Dalam Putusan Pengadilan. *Jurnal Pandecta*, 8(2), Juli.

Hidayat, A. (2013). Penemuan hukum melalui penafsiran hakim dalam putusan pengadilan. *Pandecta Research Law Journal*, 8(2).

Jackson, V. C., & Tushnet, M. V. (1999). Comparative constitutional law.

Kania, D. (2015). Pidana Penjara Dalam Pembaharuan Hukum Pidana Indonesia. *Yustisia*, 4(1), Januari - April.

Lady, M. A., IB, R. A., & Wahyu, A. J. (2021). Kedudukan Komisi Nasional Ham Dalam Konstitusi Dan Ketatanegaraan. *Siyasah Jurnal Hukum Tatanegara*, 1(1), 76–93.

Mappiasse, A. H. A., & Mazhab, J. P. (2015). Hak Anak Atas Nafkah Terhutang Ayah dalam Perspektif Fiqh dan Hukum Positif (Studi Putusan MA No. 608 K/AG/2003). Yogyakarta: Jurusan Perbandingan Mazhab Fakultas Syari'ah Dan Hukum.

Mappiasse, S. (2015). Logika Hukum Pertimbangan Putusan Hakim (Edisi Pertama). Jakarta: Prenadamedia group.

Nurpian, M. S. (n.d.). Pengujian Keputusan Presiden Tentang Grasi. *Jurnal Rechts Vinding*.

Prodjodikoro, W. (1986). *Asas-Asas Hukum Pidana di Indonesia*. Bandung: Eresco.

Ramadhan, D. (2010). Pidana Mati Ditinjau Dari Sudut Pandang Hak Asasi Manusia. *Jurnal Ilmu Hukum, Fakultas Hukum Universitas Riau*, Edisi I, No. 1, Agustus.

Sahetapy, J. E. (2007). Pidana Mati Dalam Negara Pancasila. Bandung: Citra Aditya Bakti.

Simorangkir, J. C. T. (2004). *Kamus Hukum*. Jakarta: Sinar Grafika.