

THE EXISTENCE OF CLEMENCY FROM A CRIMINAL LAW PERSPECTIVE

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ABSTRACT

The Republic of Indonesia is a country based on on law . The 1945 Constitution stipulates that the Republic of Indonesia is a rule of law (*rechtsaat*) proven from provision in Opening , Trunk Body , and Explanation 1945 Constitution . In countries with level diversity its vast population like Indonesia, system presidential This effective For ensure system strong and effective government . However often , because strong the authority he has , arises problem regarding with dynamics democracy ¹. Therefore that , deep change 1945 Constitution . Concerning authority president give pardon , called authority judicial president , or also called as power president with consultation . Power with consultation is deep power its implementation need proposal or advice from related institutions with material power That's pardon, isn't it ? is effort law . Although clemency can change the status of the penalty someone , pardon looked at as right its only prerogative is in hand President . Legal effort only those mentioned in the Criminal Procedure Code. After paying attention, the regulations regarding pardon, namely Law Number 22 of 2002, are deemed to need to be improved . The law does not clearly regulate the maximum time limit for applying for clemency. The pardon law only states that a second pardon can be applied for two years after the first pardon. Pardon can also be applied for by the convict or his family. So if pardon from a death row inmate is rejected, the family can apply for it again and this can be done twice each time. This kind of situation takes a very long time, and can delay the execution of death row inmates.

Keywords : existence ; pardon ; law criminal

Introduction

The Republic of Indonesia is a country based on law. The 1945 Constitution stipulates that the Republic of Indonesia is a legal state (*rechtsaat*) proven from provisions in the Preamble , Trunk Body , and Explanation 1945 ²Constitution . The idea of a rule of law, related to the concept *the rule of law* in terms English developed by **AV Dicey** . Three important characteristics of every legal state or what is called the term *the rule of law* by **AV Dicey** , namely : 1) supremacy of law; 2) equality before the law; 3) due process of law.

In Amendment 1945 Constitution , theory of *equality before the law* contained in Article 27 paragraph (1) which states "All citizens at the same time its position in law and government and is mandatory upholding the law and government without any except ." Theories and concepts *equality before the law* as espoused by Article 27 (1) Amendment The 1945 Constitution is the basis for protecting citizens so that they are treated equal before the law and government .

Government Republic of Indonesia based The 1945 Constitution often said adhere to a presidential system , will but its nature is impure , because mixed blend with elements of the parliamentary system . But with four change First The 1945 Constitution , especially with the adoption of the electoral system president directly , and did it change structural nor functional to the MPR institution , the system of government becomes increasingly firmly become a government system presidential pure ³. In a pure presidential system , there is no longer any

¹Ibid, p.164

²Ismail Suny, *Mechanism Pancasila Democracy* , Jakarta, Aksara Baru, 1981, p.10

³ Jimmy Ashiddiqe , *Constitution and Constitutionalism* , Jakarta, Secretary General and Registrar's Office Constitutional Court of the Republic of Indonesia, 20006, p.161

need to question distinctions or separation between function head of state and head government , because in government presidential pure it is enough to have a president and vice president without question When He serves as head of state and when as head government .

In countries with levels diversity its vast population like Indonesia, this presidential system is effective in ensuring a strong and effective government system . However often , because strong the authority he has , arises problem regarding dynamics democracy ⁴. Therefore , in change 1945 Constitution , weaknesses of the presidential system like trend too strong authority and concentration Efforts are made to limit the power in the hands of the president . For example , Article 14 paragraph (1) Amendment The 1945 Constitution which states that “ President give pardon and rehabilitation with due regard Supreme Court consideration .” This aims to ensure prerogative rights president limited and no longer characteristic absolute .

Discourse on the implementation and implementation of the death penalty developed in the last six years. In other words, it is about the death penalty precisely popular in times of stress changes to the justice system. In this period several new legal provisions in fact includes the death penalty as a threat punishment maximum . For example, in Law Number 26 of 2000 concerning Human Rights Justice , or Law Number 15 of 2002 concerning Eradication Terrorism Crimes , and still are There is legislation other .

Indonesian Criminal Code, in its main crimes include the death penalty in the order First . The death penalty in Indonesia is Dutch colonial heritage , which still exists today . Temporary death penalty practice Still implemented in Indonesia, the Netherlands has delete death penalty practice since 1870 except for crimes military . Then on February 17 1983, the death penalty written off for all crimes ⁵. Of course this is very interesting thing . Because when it was implemented in Indonesia through the principle concordance , in the country of origin of the Netherlands the threat of the death penalty has been abolished .

In the explanation when forming the Criminal Code stated , that the reasons remain valid the threat of the death penalty , because exists circumstances especially in Indonesia (as a Dutch colony). Circumstances the include : 1) danger disturbed more legal order big and more threaten ; 2) Indonesia is an archipelagic country , so communication is not smooth ; 3) Indonesia's population is heterogeneous , giving rise to potency clashes in society ; 4) apparatus Inadequate police and government . ⁶However if We compare it with the situation now, then reasons this needs to be reviewed . Because of reasons This is no longer suitable to the conditions and developments of the times .

The Indonesian Criminal Code contains 11 articles crimes that carry the death penalty . These include Article 104 concerning treason, Article 340 concerning murder planning , Article 365 paragraph (4) concerning theft with violence , Article 444 concerning crime shipping , etc. The death penalty in the Criminal Code is the main crime or main . Developments occurring in Indonesia in Concept The draft of the New Criminal Code is to make the death penalty an exceptional crime , in the form of a ' conditional sentence ' . This means that the threat of the death penalty is no longer used as a means principal countermeasures crime , however is exception . The threat of the death penalty remains listed and threatened in the Criminal Code, but in its application will be done accordingly more selective .

Indonesia is one of many countries impose the death penalty . Based on notes various Human Rights Institutions Internationally , Indonesia is one of the countries that Still apply threat punishment die in the criminal law system (*Retentionist Country*) . *Retentionist* it means

⁴Ibid, p.164

⁵Jan Rummelink , *Criminal Law: Commentary on the Articles from the Dutch Criminal Code and its equivalent in the Indonesian Criminal Code*, Jakarta, Gramedia Pustaka, 2003, p.459

⁶Roeslan Saleh, *Death Penalty Problems*, Jakarta, Aksara Baru, 1978

de jure juridical , de facto according to facts regulates the death penalty for all crime . There are 71 countries included in this group. One of the largest countries in the world that is included in *the retentionist country* is the United States . Of the 50 states , there are 38 states that still do maintain threat of death ⁷penalty . Whereas like known , United States is one of the largest countries its echo in calling for the protection of human rights in the world. But in reality still applies the threat of the death penalty , also in military law .

Number of people convicted died in Indonesia, incl Enough highest after China, the United States , Congo, Saudi Arabia and Iran. In Indonesia alone , from 1982 to 2004, there were no less than 63 people who were waiting execution , or still in the process of legal action in court continued ⁸. Many reasons stated related to political resistance so that every country respects it the idea that the criminal justice system is a problem problem sovereignty national which is reflection from values cultural and religious, and reject argument that the death penalty is violation of human rights . With the exception of China and the United States , countries that still maintain the threat of the death penalty is in a country dominated by population Muslims . Meanwhile, Indonesia is a country that in fact is a country whose population is also dominated by residents Muslims .

A number of results studies of crime do not show exists correlation between punishment die with the reduction level crime . A number of studies show , those who have convicted Because murder (also premeditated) is usually not committed violence in prison . Likewise after going outside prison they no longer do violence or the same crime . On the contrary a number expert criticized , a legal perspective cannot cover the legal complexity of violent crime cases where the victim collaborates with the perpetrator crime , where the individual is both the victim and the perpetrator crime , and where the person who appears to be the victim is in reality the perpetrator crime ⁹.

Those who are pro -punishment dead think :

- (1) punishment dead is the appropriate punishment for the perpetrator murder (planned) and believe view *retribution, atonement or vengeance* , which has properties scary special ;
- (2) death penalty Still listed in a number of laws ;
- (3) punishment dead more economical than punishment lifetime life .

Those who do not agree with the death penalty think :

- (1) threat of death penalty in a way Historically it does not originate from Pancasila , because of our Criminal Code Dutch heritage , even the Netherlands itself including one of the countries that has abolish punishment dead ;
- (2) punishment dead (basically murder planning too) is something really dangerous if the person concerned is innocent . It is not possible to make improvements whatever when people have been convicted dead ;
- (3) those who oppose punishment dead value mark personal , dignity humanity generally and appreciate an approach science to understand the underlying motives every Act in demand man ¹⁰.

From the dimensions and perspective of human rights, it can be noted the development of instruments as follows :

⁷Imparsial Team , *A Policy Study in Indonesia: The Long Road to Erasure Death Penalty Practices in Indonesia* , June 2004

⁸Muladi (Paper), *Implementation of the Death Penalty in Indonesia: Its Relevance and Signification* , 7 May 2003, The Habibie Center Building, Jakarta

⁹Thomas Sunaryo, *Death Penalty, Human Rights Violations and Reform*, Kompas, 25 February 2003, p.1

¹⁰ *Ibid*

- (1) Universal Declaration of Human Rights of 1948, in Article 3 regarding the right to life , is clear contrary to the death penalty ;
- (2) Covenants International Civil and Political Rights (*International Covenant on Civil and Political Rights- ICCPR*). The *right* to life , namely in Part III Article 6 (1), states that every memusia entitled to the right to life and declared legal protection and nothing can revoke that right. Covenant International This was adopted in 1966, and has been in effect (*enter into force*) since 1976. Until November 2, 2003, it was recorded 151 countries have done it ratification / accession to this covenant ;
- (3) Second Optional of ICCPR Aiming or The Abolition of Death Penalty, 1990. This optional protocol aims to abolish the death penalty . To date, 50 countries have recorded it ratify
- (4) Protocol No.6 European Convention far The Protection of Human Rights and Fundamental Freedom, 1950 (applicable from 1 March 1985). This instrument aims to abolish the death penalty si area Europe ;
- (5) The Rome Statute of the International Criminal Court, 17 July 1998. Article 7 does not regulate the death penalty as one of the method punishment . To date, 94 countries have registered ratify this instrument.¹¹

Despite all the pros and cons of implementing the death penalty in Indonesia, this type of punishment is still applied even stated in the Concept Draft New Indonesian Criminal Code. When connected with the convict death itself , convict dead has the right to file legal action , either through advisors his law , his family , or himself Alone . These legal remedies include appeal, cassation , and judicial review . Besides, it's good through him yourself , family , or power By law , the convict can submit an application clemency to president .

Regarding authority president give pardon , called authority judicial president , or also known as presidential power by consultation . Power by consultation is power in practice need proposal or advice from institutions related to the material of power . Apart from pardon and rehabilitation , amnesty and abolition are also included in the presidential powers with consultation . Like stated in Article 14 paragraph (1) Amendment 1945 Constitution , " The President grants amnesty and abolition at the discretion of the DPR".

Authority President give clemency related to criminal law in a subjective sense . Subjective criminal law discusses the state's right to impose and carry out criminal penalties. This state right is a major state right , so it is necessary to find the basis for it through the theory of punishment . Therefore , the President grants pardon must based on the theory of punishment .

The issue of pardon start Lots discussed lately , since mid 2003 President Megawati Soekarnoputri reject application clemency six convict dead . They were five people involved murder , and one person in a drug case ¹². Giving clemency during the New Order era was nothing new . Pardon in the form of change in convict status death becomes life alive , ever given to Soebandrio and Omar Dhani. Likewise for nine another convict (1980), after that, no less than 101 applications clemency given by the president Suharto ¹³. Of course this is not the case a small number , considering the power the New Order had perched for 32 years.

In 1997, a judge at the Sekayu District Court, South Sumatra , ruled death penalty sentence to Jurit Bin Abdullah and one his colleague . Jurit and co indicted has do murder planning against Soleh Bin Zaidan in Mariana, Banyuasin , South Sumatra, passing Decision No. 310/Pid B/1997 Sekayu District Court . At the appeal level , the South Sumatra High Court with Decision No. 30/Pid/PT, 21 April 1998, also sentenced to Jurit and colleagues . This

¹¹Impartial Team , Op.Cit , p.3

¹²www.ikiran Rakyat.com/print /0203/10/1514.htm (Visited April 1, 2004)

¹³ apakabar@clark.net, Mulyana W. Kusumah , *Forgiveness Politics*, MIM August 6, 1995 edition

decision is at once strengthen decision from court previously . Then they immediately applied for clemency , however This pardon was rejected by the president . Whereas application Jurit's Judicial Review registered at the Sekayu District Court on 17 February 2003. Application Judicial review was filed in a way personally by Jurit through Palembang Class I Prison, place himself undergo punishment . Application This judicial review was also rejected .

In almost no time Simultaneously , Jurit was also charged with another murder case. That is murder of Arpan Bin Cik Din on 27 August 1997 in Mariana, Banyuasin . In this case, the Palembang District Court judge sentenced him to prison lifetime life . The judicial review proposed in the framework of this case was also declared unacceptable .

A number of risks that are feared as a result from the sentence handed down by the judge, especially for the maximum sentence like the death penalty , that is exists possibility happen execution of *innocent people*. Apart from that, there is errors in the legal process, including the prosecution process , wrongful arrest , or information from unreliable witnesses , perhaps happen ¹⁴. You could say clemency is one of institutions that can correct and resolve risk the . That's why Why clemency is outside scope of criminal justice. This gives an indication that, although clemency is authority the president who is within the scope of Constitutional Law, criminal law also looks at the existence pardon in p effort from convict to avoid from execution verdict .

Based on exposure that has been described above, the author took the initiative to presented this article in the form of research entitled "**The EXISTENCE OF GRAMMAR FROM A CRIMINAL LAW PERSPECTIVE**".

Research methods

1. Research Type

Writer in writing This thesis is research in nature descriptive analytical , with approach juridical normative ¹⁵. Namely research carried out based on library data or secondary data .

2. Data Types and Sources

The type of data used in this research is qualitative data based on secondary data . This secondary data was obtained from studies literature and documents , esp legal materials relating to pardon .

3. Data collection technique

Data obtained using legal materials relating to the issue of pardon . Data obtained from Legal materials are ¹⁶:

a. Primary legal materials, namely binding legal materials consisting of from :

- 1) Criminal Code;
- 2) Criminal Procedure Code;
- 3) RKUHP;
- 4) Amendment to the 1945 Constitution;
- 5) Law No. 22 of 2002 concerning Clemency;
- 6) Law No.4 of 2004 concerning Power Justice .

b. Secondary legal materials , namely legal materials that provide explanations of primary legal materials , doctrine , jurisprudence , and legal principles .

¹⁴Muladi (Paper), *Op.Cit* , p.12

¹⁵ Soerjono Soekanto , *Introduction to Legal Research*, Jakarta, UI Press, 1986, p.10

¹⁶ Soerjono Soekanto , *Normative Legal Research : An Overview Brief*, Rajawali Press, Jakarta, 2001, p.13

- c. Tertiary legal materials , namely legal materials that provide guidance nor explanation of primary legal materials and secondary legal materials , consisting of from :
- 1) General Indonesian Dictionary;
 - 2) Legal Dictionary;
 - 3) books ;
 - 4) Research results ;
 - 5) Masterpiece from legal circles ;
 - 6) Magazines , newspapers , print and electronic media .
4. Analyzing Data
- At stage Next , after obtaining the data and processing the data , then continued by analyzing the data obtained Good from primary legal materials as well secondary legal materials and discusses the problem . By analyzing primary data and secondary data in a way qualitative from corner legal perspective . Primary data and secondary data obtained from research has arranged in an orderly and systematic manner , then analyzed to obtain a conclusion .

Results and Discussion

A. Legal Strength of Court Decisions (Verdict)

Based on the principle of separation power , function executive , legislative and judiciary , namely branches separate powers One each other. By implementing it system separation of powers and the principle of *checks and balances* between state institutions , structures constitutional The Republic of Indonesia consisting of from three These branches of power control and balance each other One each other. These three powers namely , executive power by the president and vice president , legislative power by the Assembly People's Consultative Assembly (consisting of the DPR and DPRD), and Judicial Power by the Supreme Court and Constitutional Court .

Judicial power as one unity system , culminating in the Supreme Court and the Constitutional Court . Previously , the Constitutional Court was not recognized in the constitution of the Republic of Indonesia. The new Constitutional Court is contained in the Amendment Third 1945 Constitution . before exists change 1945 Constitution , power The judiciary consists only of judicial bodies culminating in the Supreme Court .

Within the Supreme Court , there are: four scope of justice, namely General Court, Religious Court, State Administrative Court, and Military Court . Previously , the administration of General Justice was under the Department Judiciary , the administration of Religious Courts is under the Ministry of Religion, and Military Justice is under the organization soldier . However now , fourth scope of the judiciary are under one roof, that is Supreme Court . It's like stated in Article 24 paragraph (2) Amendment The 1945 Constitution , namely reads : " Judicial power is exercised by a The Supreme Court and the judicial bodies subordinate to it in the general court , religious court, military court , State Administrative court and by a Constitutional Court ". Similar thing also outlined in Article 2 of Law No. 4 of 2004 concerning Judicial Power ¹⁷, and Article 10 paragraph (2) which is more Specific reads : "Judicial bodies under the Supreme Court include bodies within the scope of the General Court, Religious Court, Military Court and State Administrative Court."

Supreme Court has authority to:

- Judge on level cassation against decisions given at the final level by courts in all levels of justice under the Supreme Court ;

¹⁷ RI State Gazette 2004 No. 08

- Disputes over authority (competence court);
- Application review of decisions that have been made obtain permanent legal force (*inkracht*);
- Testing legislation under the law against the law (*judicial review*).

Apart from a few matter The Supreme Court also has this the authority to provide legal opinions on the government president or other State institutions . This is considered necessary so that the Supreme Court can truly function as a home justice for anyone and any institution that needs it legal opinion regarding a problem at hand ¹⁸. Regarding this matter , it is regulated in Article 27 of Law No. 4 of 2004 concerning Judicial Power ¹⁹, which reads : " The Supreme Court can grant information , considerations and advice on legal matters to state institutions and institutions government if requested ".

Article 24 Amendment Constitution of 1945 jo. Article 1 of Law No. 4 of 2004 concerning Judicial Power , states : " Judicial Power is the power of an independent state to administer court To use straighten up law and justice based on Pancasila, for the sake of implementing the rule of law of the Republic of Indonesia." Provision the contain that means power the judiciary is free from all extra power intervention judicial . So that powers outside of judicial power are not permitted to participate intervene in affairs trial . Other branches of power can only control each other with a system of *checks and balances* , without join in intervention .

However if We browse Furthermore , in Article 4 paragraph (3) of Law No. 4 of 2004 concerning Judicial Power , it is stated : "All interference in judicial affairs by other parties outside judicial power prohibited , except in cases as mentioned in the 1945 Constitution ". This statement contains meaning exceptions to Article 1 mentioned previously . That is , regarding interference in judicial power allowed to the extent regulated in the 1945 Constitution .

In Article 14 Amendment 1945 Constitution , p In general , it can be concluded that it exists intervention or interference in the field of judicial power , carried out by the President . So regarding giving pardon is related to the scope of judicial (judicial) power . With acceptance pardon , someone gets more mild , reduced , or even delete the same once the criminal execution has been carried out handed down by the judge.

Like is known beforehand , application pardon can only be applied for against a conviction the court has obtain permanent legal force (*inkracht*). Decision the court has obtain legal force cannot still be resisted by ordinary legal measures , but can be done by means external legal remedies normal . Ordinary legal remedies according to the Criminal Procedure Code (Law No. 8 of 1981), consist of: from : resistance (*verzet*), appeal, and cassation . Whereas external legal remedies normal consisting of: cassation for legal purposes and review of decisions the court has obtain strength permanent law .

When detailed further , the verdict court may take the form of :

1. free from all demands (*vrijspreek*);
2. take off from all lawsuits (*ontslag van rechtsvervolging*);
3. punishment (*veroordelend vonnis*).

Decision criminal court that has obtain permanent legal force , implementation of its execution carried out by the prosecutor, and supervision is carried out by the chairman of the court concerned based on Constitution . In terms of submission application pardon cannot delay the execution of a sentence for a convicted person , except in cases where: death penalty verdict .

¹⁸ Jimmy Ashiddiqe , *Op .Cit* , p.193

¹⁹ RI State Gazette 2004 No.08

Decision the court has obtain legal force remains punishment in form whatever , cannot be canceled and given decisions by outside governmental powers scope of the judiciary. In other words, a verdict it cannot be disturbed sue . Giving pardon is not intended to annul the law or cancel the law. The law has enforced . Giving clemency its nature only provides forgiveness , without eliminate error convict .

B. The Existence of Clemency in a Criminal Law Perspective

The law does not regulate in a way Explicitly detailing the reasons from giving pardon . **Jan Rummelink** put forward reasons giving pardon as follows :

1. If after the verdict has definite legal force convict facing a situation particularly unprofitable for him . For example convict suffer incurable disease or his family threatened will scattered berai ;
2. If after the verdict has definite legal force , it turns out that the judge was not qualified has not given attention to the circumstances , which when He know before , will result far- reaching punishment more low . Appropriate Note that this is not the case reason for requesting judicial review . I also thought of a number another judge's mistake in not opening opportunity for application judicial review ;
3. If since decision it has definite legal force , apparently situation society has changed completely, for example declaration regarding situation emergency civil Because absence food has revoked or prevailing political views has experience change basic ;
4. If it turns out has happen big legal mistake . Imagine it here decisions trial of the perpetrators crime war , which was examined and tried after the war finished . Through pardon , the decisions are clearly very unfair can still be straightened out ²⁰.

Whereas **Utrecht** , mentions 4 reason giving clemency in a way short , that is

1. family interests convict ;
2. convict Once make a contribution to society ;
3. convict suffer incurable disease ;
4. convict behave Good during are in the institution society and show repentance for his mistakes ²¹.

In developed countries such as America and Australia, there are institutions forgiveness like clemency , communication and forgiveness executive (gubernatorial pardon), from 1976 to 2005 throughout America there were 229 convicts die who gets pardon (*clemency*) based on the following reasons :

Reason	Amount
1. Request from the prosecutor/judge/prosecutor	1
2. Serving a long period of imprisonment / length of sentence	8
3. Possibility of innocence	13
4. Giving punishment inappropriate death (inappropriate / death sentences)	9
5. Disparity / defendant	3
6. Views / political views	1
7. None reason / no reason	8
8. Doubt of guilt	10
9. Mental/ dismental health reasons	6
10. Pope's Plea (John Pope)	1

²⁰Jan Rummelink , *Criminal Law: Commentary on the Articles Most important from the Dutch Criminal Code and its equivalent in the Indonesian Criminal Code* , Gramedia Pustaka Utama, Jakarta, 2003, p.587

²¹E. Utrecht, *Series of Lectures on Criminal Law II* , University, Bandung, 1965, p.240

11. Legal defects/flawed	167
12. Injustice	2

* Source : “Executive Clemency Process and Execution Warrant Precedure in Death Penalty Cases”, National Coalition to Abolish the Death Penalty (1993) with updates by DPIC.

From these data , total most of them are reasons legal defects , namely as many as 167 people. Possibility This may also happen in criminal decisions in Indonesia. Decisions that have Legal defects should not be given serious criminal decisions , let alone being sentenced to death . By giving it pardon , decisions that have disabled law expected to obtain more decisions fair .

Clemency in criminal law is not only about forgiveness or subtraction punishment based on the judge's decision only. We need to see clemency from side others , to find out about existence pardon from a criminal law perspective . These other sides , namely pardon as a citizen 's right , clemency overcome legal limitations (recovery system), clemency as the basis for eliminating the state's right to carry out a crime, and clemency connected to the goal punishment .

a. Clemency as a Citizen's Right

Like has explained before , giving clemency is revocation or effort lighten up sanctions imposed by decision criminal court . Once upon a time, ruler move on of the absolute power he has bestow pardon as a form virtue his heart . Now we no longer know pardon in kind like that, especially because prerogative rights (privileges) have submitted to government and its implementation is the responsibility answer Head of State or in a government system presidential is in the hands of the president .

In the description I have done it before too explained the change in the system of government adopted by the Republic of Indonesia, namely to become presidential pure . In the government system presidential pure , even though it doesn't exist distinction between Head of State and Chief Government , duties and authority the president is at the top state leadership , there are still duties and authorities which constitute scope government or executive and external authority scope the . Although this is not true real differentiated , like visible in the government system parliamentary .

Authority the president is outside scope executive that , for example authority in the field judicial . This authority includes remedies related to the verdict court , that is, to reduce punishment , granting forgiveness , or abolish related demands closely tied to authority court .

Regarding giving forgiveness or pardon , you need to know the concept that the convict submitted the application This pardon is not as a convict , but as a citizen . As a person citizen , person entitled request sorry to the president as the leader of the country. Article 28 D paragraph (1) Amendment The 1945 Constitution, in its sub-section on Human Rights , regulates " Everyone has the right to recognition , guarantees , protection and fair legal certainty ." as well as equal treatment before the law. ” This is the basis of each citizens , whatever status they currently hold , to obtain legal certainty .

Giving pardon is not an issue legal certainty , however reflection level legal wisdom of the president and also the public . As is consideration from Supreme Court , and various social factors as well response from certain groups , gifts clemency reflect legal wisdom from president . Maybe we forget that gift pardon is also a place Where we make room for the heart conscience humanity We .

For applicants sentenced to death penalty , pardon is problem life and death . Through giving clemency , it is possible that someone sentenced to death can be imprisoned



lifetime life or imprisonment for a certain time . Something like this will felt more wise . Because he was convicted will have opportunity to improve himself . This is different from the death penalty , which does not provide an opportunity for the convict to improve the mistake .

A the applicant who submitted the application clemency have One for two reasons here , why He asked for pardon :

1. someone who has confess his mistake and begged forgive his mistakes , but the punishment is imposed to her he felt too heavy . So he applied for clemency with hope obtain criminal leniency (punishment);
2. a person who feels himself completely innocent , intending want to look for justice for himself . By applying for clemency He hope the president can correct error court beforehand , so that justice can be served .

According to **Adami Chazawi** , by applying for pardon means from applicant's legal angle has stated guilty , and by entering a plea pardon (clemency) means him has confess that's the ²²mistake .

b. Clemency Overcomes Legal Limitations (Recovery System)

Limitations and weaknesses in the legal system may occur anywhere and at any level public anywhere . Developed countries like America, though level crime and control of the authorities law enforcement is very high , but people still realize possibility happen confusion on the subject people and application the law . More Apart from that, there is also the meaning of arriving at a point certain laws have internal limitations (the limit of law) . As it is about weaknesses in the system collection information in the criminal justice environment that could be damaging life or someone's future .

In countries that adhere to it common law system , in this case America, before somebody charged with the death penalty (capital punishment) , the witnesses were incriminating the defendant (*ade charge*) must held in a hearing separated or preliminary hearing, to determine whether the testimony is admissible legally and can be done tool evidence at trial main . Not easily A damning testimony the accused can be treated as a tool proof .

Such a system does not exist in the system event in Indonesia. A the defendant is threatened with the death penalty have very vulnerable position or weak . One testimony or more easily can be done without checked level appropriateness , as it should be held especially for that. The difference is , system Criminal proceedings in Indonesia seem so easy treat A testimony becomes a tool evidence which in fact may result destruction life si defendant .

The burden of chasing submission of case targets , often encouraging apparatus Police use unfair ways to trap defendant . The defendant's witness was used witness obtain convenience like subtraction punishment or free from lawsuits . ²³Practice so it has been common among investigators criminal cases in the Police .

Judges in Indonesia, according to the system active judge , has an active role in the trial . This active role is often not carried out according to standards profession judiciary . Many influencing factors include: relative salary low , and level legal education which is only S1. We can imagine someone who has just finished an undergraduate program, then accepted as judge and followed course prospective judge for 12 months , then apprenticeship for 6 months , then start handle matter .

Decisions and The judge's legal analysis is not open to the public . So the public cannot find out weight judge's legal analysis . It's in one parties do not educate judge, because there is n't one means sharpen judge's legal analysis of the consequences A the decision can be biased or error. Circumstances very different from judges in developed countries , before

²²Adami Chazawi , *Criminal Law Lessons Part II* , Raja GrafindoPersada , Jakarta, 2002, p . 192

²³www.Indonesiawatch.org (visited 10 August 2006)

someone becomes the judge concerned must become a prosecutor (average 10 years), then become a defense attorney (average 10 years), and then he can be nominated as a judge. Likewise regarding the decision court, despite the judge's passive role in the system jury, the judge always gives legal arguments written so that anyone can read it.

All limitations and weaknesses the legal system requires it us to uncover the principles of retrieval legal decision. Own legal fields has provide institution or means to make it possible correcting " legal errors", such as exists institution review (herziening) which can be used by the convict. Outside legal realm, institutions The remedy for that error is pardon. Pardon can be a means correct errors in legal administration. Therefore This institution is not by chance is outside justice system. Here Actually the president can do corrections by pointing out wisdom the law. Legal wisdom is needed to fill it holes in the administration of the legal and judicial systems in particular.

c. Abolition of the State's Right to Carry Out Crimes

Jan remelink enter pardon as one from three reason fall authority to execute crimes ²⁴. **Adami Chazawi** also mentioned the same thing, however He call it a term the abolition of the state's right to carry out crimes ²⁵.

The basis for abolishing the state's right to carry out criminal penalties specified in the Criminal Code is :

1. The death of the convict (Article 83)
2. Expired from execution (Article 84)

While the basis of The abolition of the state's right to carry out crimes outside the Criminal Code is a pardon given by the president taking into account consideration Supreme Court (Amendment 1945 Constitution Article 14 jo. Law No. 22 of 2002).

Basic principles of giving clemency is given to people who have sentenced by the decision that has been made have permanent legal force. The nature of the gift clemency just correcting the sentence imposed, not correcting substance consideration principal the matter. This characteristic is visible from three matters that can be decided by the president in the application pardon, namely :

1. Eliminate the implementation of all criminal penalties that have been committed handed down in the decision court ;
2. Carry out only part of the crime committed in the decision ;
3. Changing the type of crime (commutation) the type of crime that has been imposed in the verdict becomes a more criminal sentence light like stated in Article 10 of the Criminal Code.

Of three matter mentioned above, which is the basis of the elimination of the state's right to carry out criminal penalties is point number 1 only. Whereas points 2 and 3 do not eliminate the state's right to carry out criminal penalties, however just lighten the execution of the sentence.

d. The Relationship between Pardon and the Purpose of Sentencing

Regardless from things the above, regarding giving clemency must based on goals punishment, president Good grant or reject application the proposed pardon must be based on the goal punishment. According to the literature regarding the Criminal Code (Law N0 1 of 1946) by looking at systems and arrangements that remain unchanged from the parent legal

²⁴Jan Rummelink, *Op.Cit*, p.583

²⁵Adami Chazawi, *Op.Cit*, p.168

material (WvS Ned.) it can be said have objective punishment by flow compromise or combined theory , covering all aspects contained in it ²⁶.

So, in the application This is presidential pardon must considering the issue of retaliation also don't forget to consider issues regarding the protection of public legal order , either grant or reject application clemency from application . In this case input from The Supreme Court is really needed by the president as a proper body competent for that, in taking it decision by the president .

Conclusion

The following will conveyed the conclusions from research on existence pardon from a criminal law perspective :

1. Pardon is not legal effort . Although pardon can change the status of a sentence someone , pardon is seen as a prerogative that only lies in the hands of the President . Legal remedies are only those mentioned in the Criminal Procedure Code.
2. Difference pardon , amnesty , and abolition :
 - a. Pardon is authority President to grant pardon form reduction of punishment, changing the type of punishment to a more criminal one light , or abolition of criminal execution. In granting pardon , the president notice consideration from Supreme Court .
 - b. Amnesty is an authority president to abolish threatening legal consequences for something deed or political crimes . By giving amnesty , deed or crime the abolished or is deemed non- existent , so it does not have any legal consequences . In granting amnesty , President notice consideration by the House of Representatives
 - c. Abolition is authority President to revoke the claimant's rights common to sue someone who was previously towards that person has or prosecution is underway . So that the prosecution and trial process against the person concerned terminated and prosecuted released . In granting abolition , President notice consideration by the House of Representatives .
3. Existence pardon from a criminal law perspective
 - a. Pardon as a citizen 's right
The applicant applying for clemency is not a convicted person but rather as entitled citizens request sorry for the mistake to The President is the leader of the country.
 - b. Pardon is the elimination of the state's right to carry out criminal penalties
Even though it is not listed in the Criminal Code, however pardon can invalidate the state's right to carry out a crime. By granting it pardon , then the sentence is imposed to one can delete, reduce , or changed the type .
 - c. The relationship of pardon to purpose punishment
Concerning the response to the request pardon , in p clemency granted nor rejected must based on the goal punishment
 - d. Pardon is not intervention executive
Giving pardon is not Presidential intervention in the field judiciary , but rather a prerogative President to grant pardon .
Pardon is not related to the assessment of the judge's decision and cannot be removed error convict ..

²⁶Bambang Waluyo, *Principles of Criminal Law*, Ghalia Indonesia, Jakarta, p.33

A. Suggestion

Suggestions that the author can put forward related to this research are as follows :

1. After paying attention , the regulations regarding pardon that is It is felt that Law Number 22 of 2002 needs to be improved. Constitution it does not regulate clearly maximum time limit submission pardon . Constitution clemency it just mentions A second pardon can be applied for two years after the pardon First . Pardon can also be applied for by the convicted person nor family . So if clemency from convict dead rejected , the family can apply again and each can do it twice. Circumstances like this takes a very long time, and can delay the execution of the convict dead .
2. The parties involved behind application clemency like court at the level first , the Supreme Court , even the President , so that they can process it application clemency in a way truly . So that pardon is not just a matter reason to postpone or delaying the execution , especially in matters death penalty execution .
3. Clemency can actually be used as an institution recovery to correct " mistakes " in the administration of law. Even though it already exists institution judicial review (herziening) which can be used by convicts , however pardon which is outside the realm of law and is outside this criminal justice system , can be used president as a means of correcting and demonstrating wisdom the law . In America, it is a highly developed country caution and control over implementers the law is very high , it happens Mistakes in the law are still very high too. Something like this could happen in Indonesia. It is the President's duty to treat doubts about possible legal weaknesses . So that pardon can reflect level legal wisdom of the President and also the public .

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