

## GRANTING CLEMENCY TO NARCOTICS CONVICTS: OVERVIEW FROM THE POLITICAL PERSPECTIVE OF INDONESIAN CRIMINAL LAW

**Irlan Puluhulawa**

Faculty of Law, Gorontalo State University  
Jl. Jend. Sudirman No. 6 Gorontalo City, Indonesia  
Email : irlanpuluhulawa91@gmail.com

### Abstract

This research aims to examine the granting of clemency by the president to convicts of narcotics cases in the perspective of legal politics. In Law No. 22 of 2002 concerning Clemency, it does not specifically explain the category of crimes that can or cannot be granted clemency. Also, the Clemency Law does not specify the reasons that can be used by the applicant. There are two main problems in this study, namely (1) What is the mechanism for granting clemency to narcotics convicts? and (2) How is the legal politics of granting clemency by the president to convicts of narcotics cases in the future? This study uses a normative research method with a statutory approach, an analytical and legal conceptual approach, and a case approach. Based on this research, it can be concluded that the mechanism for granting clemency to narcotics convicts based on Law No. 22 of 2002 concerning clemency is the same as the mechanism for granting clemency in general or there is no special classification for certain crimes. Then the researcher recommends to revise the clemency law by adding the classification of extraordinary crimes in this case drugs as an exception from granting clemency. Then the consideration of the Supreme Court must take precedence in the clemency application process before appealing to the president.

**Keywords:** *Clemency; Drugs; Legal Politics*

## Introduction

Narcotics, is the biggest crime in the world and an enemy of all countries. Indonesia which has ratified the United Nations Convention Against Licit Traffic In Narcotic Drugs And Psychotropic Substances through Law Number 7 of 1997 as amended by Law Number 35 of 2009 concerning Narcotics. In the convention, the crime of drug trafficking, narcotics and psychotropic substances is labeled as a serious crime.<sup>1</sup>

The author sees that the increase in narcotics convicts in Indonesia is a form of the fact that Indonesia is in a state of narcotics emergency. Unfortunately, narcotics convicts always rely on clemency requests to the president, which is part of the convict's right to seek forgiveness from the president as head of state.<sup>2</sup>

The regime of the Sixth President of the Republic of Indonesia, Susilo Bambang Yudhoyono, has granted clemency or pardon to two death row convicts for narcotics cases, namely Deni Setia Maharwan and Merika Pranola alias Ola. The clemency made their sentence to life imprisonment. According to Amir Syamsudin, from 2004 to 2012, of the 869 convicts

who offered clemency, there were 128 requests for clemency related to narcotics cases but only 19 were granted by the President.<sup>3</sup>

### Narcotics Convicts Who Get Clemency

Name	Case	Clemency
Schapelle Leigh	Smuggling of marijuana	5 years sentence cut
Corby (WNA)	weighing 4.2 kg to Bali on October 8, 2004.	from 20 years to 15 years
Deni Setia Maharwan (WNI)	International network drug lord	The death penalty is a life sentence
Merika Pranola (WNI)	International network drug lord	The death penalty is a life sentence
Peter Achim Franz Groobmann	Possession of marijuana weighing 4.9 grams	2 years sentence cut from 5 years to 3 years

In addition to the names above, 10 minors were sentenced to two to four years in prison whose identities are difficult to find International network drug lord.<sup>4</sup> The author considers that the president's policy of granting clemency is constitutional. On the other hand, this is a policy that considers human factors. However, it is necessary to review that law enforcement against narcotics cases

<sup>1</sup> I Komang Gede Arimbawa et.al, *Hukuman Mati Terkait Kejahatan Narkotika Dalam Prespektif Hukum Internasional*, Fakultas Hukum Universitas Udayana, Bali, 2015. Hlm 3

<sup>2</sup> <https://www.voaindonesia.com/a/grasi-untuk-terpidana-narkotika-atas->

[alasan-kemanusiaan/1527260.html](https://www.voaindonesia.com/a/grasi-untuk-terpidana-narkotika-atas-), diakses pada tanggal 7 Januari 2018

<sup>3</sup> *Ibid*

<sup>4</sup> <https://investor.id/archive/presiden-kabulkan-19-dari-128-permohonan-grasi-narkoba>, diakses pada tanggal 5 Maret 2021.

is a serious matter and requires extraordinary handling. Narcotics have hit the joints of people's lives, especially the younger generation. If the punishment for narcotics criminals is always tolerated based on humanity, then millions of victims of narcotics trafficking will continue to be a spectacle without strict law enforcement from the government.

The author thinks that although narcotics convicts seek refuge based on human rights to apply for clemency to the president, they cannot deny the human rights of other people who are victims of narcotics trafficking.

The author also understands that the clemency policy is the prerogative of the president. In other words, the president has a subjective assessment in granting clemency. The President's legal footing is only on his power as head of state as regulated in the 1945 Constitution. While sociologically, the president has no other legal basis to reject the clemency petition submitted by narcotics convicts. Therefore, a legal policy model is needed for the President in considering granting clemency to convicts of narcotics crimes. The urgency of the legal policy model will be the basis for the president to reject the clemency application submitted by narcotics convicts.

### **Research Problem**

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<sup>5</sup> Marzuki Peter Mahmud. 2016. *Penelitian Hukum*. Jakarta : Kencana Prenada Media Grup.hlm. 26

Based on the background description, the formulation of the problem in this paper is, first, how is the mechanism for granting clemency to narcotics convicts and second, How is the legal politics of granting clemency by the president to convicts of narcotics cases in the future?

### **Method**

The writing uses a normative juridical legal writing type, namely writing that is carried out by tracing positive law and documents related to the focus of the problem being studied. by using the writing approach, namely: the statute approach and the conceptual approach.<sup>5</sup>

### **Result and Discussion**

#### **Legal Politics of Granting Clemency by the President to Convicts in Narcotics Cases**

As the author has explained in previous chapters, the focus of this writing lies on granting pardons which in this case is a consequence of the rule of law in maintaining justice and so that all regulations and decisions have a basic foundation. In the amendments to the 1945 Constitution of the Republic of Indonesia, the tendency of the president's authority and power to be too strong was attempted to be limited. For example in Article 14 paragraph (1) of the

Amendment to the 1945 Constitution of the Republic of Indonesia states that "the President grants clemency and rehabilitation by taking into account the considerations of the Supreme Court."<sup>6</sup>

The issue of clemency then becomes crucial when faced with a crime that is classified as an Extraordinary Crime, one of which is a case related to narcotics as the core of the problem topic in this writing. The issue of clemency itself has become a problem in the middle of 2003 until now. Therefore, the basis for consideration of granting clemency to narcotics convicts will be presented in this writing as a description of giving clemency for narcotics convicts in the perspective of legal politics.

Current cases of drug abuse not only be the enemy of Indonesia alone, but almost all countries in the world are struggling and trying to eradicate the spread of narcotics for the future development of the country. However, it is undeniable that narcotics have now been transformed into a business area that offers huge profits. Therefore, narcotics as a crime with a broad dimension is very wary of in the international world.

At the 5th United Nations congress held in Geneva in 1975, it discussed several dimensions of crime, including:<sup>7</sup>

- a. *Crime as Business*, namely a form of crime that aims to obtain material benefits through activities in the field of business (business) or industry, which are generally carried out in an organized manner and carried out by those who have a prominent position in society.
- b. Transnational and international acts of violence that can be called acts of "terrorism".
- c. Crimes related to moving places, for example regarding passport and visa violations, prostitution, and so on. Problems related to refugees include the diversion of aid and espionage.

The problem of drug abuse itself has very broad and complex dimensions, both from a medical, psychiatry, mental health, and psychosocial point of view. Observing the development of drug trafficking among teenagers is very worrying. Therefore, in carrying out

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<sup>6</sup> Jimly Assiddiqie, *Konstitusi dan Konstitusionalisme*, dalam R. Bagus Irawan, *Hak Konstitusional Presiden Dalam Memberikan Grasi Dan Penerapannya Di Republik Indonesia*, Jurnal Ilmiah Hukum De'Jure, Vol.1 No. 2 Tahun 2016. Hlm 366.

<sup>7</sup> Brada Nawawi Arief, *Masalah Penegakkan Hukum Pidana Terhadap Tindak Pidana Ekonomi dan Lingkungan Hidup*, Makalah yang disajikan dalam Penataran Hukum Pidana Angkatan IV yang diselenggarakan oleh Fakultas Hukum Unsuud di Purwokerto pada tanggal 25 Maret-10 April 1990.

the legal process for narcotics convicts, it must be carried out based on strict regulations and not selective considering that narcotics crimes can potentially become the three dimensions of crime as described in the 5th UN Congress, namely Crime As A Business, Terrorism, and crimes related to resettlement, for example regarding passport and visa violations, prostitution and so on.

In Indonesia itself, in the investigation of narcotics crimes, the prosecution and examination in a court of criminal acts of Narcotics refer to the provisions of the criminal procedural law as stipulated in the Criminal Procedure Code (UU RI No. Law Number 35 of 2009 concerning Narcotics in Article 75 which states that investigators from the National Narcotics Agency are authorized:<sup>8</sup>

1. Investigate the truth of the report and information regarding the abuse and illicit trafficking of Narcotics and Narcotics Precursor;
2. Examine people or corporations suspected of committing abuse and illicit trafficking of Narcotics and Narcotics Precursors;
3. Calling people to be heard as witnesses;
4. Order to stop people suspected of abusing and illicit Narcotics and Narcotics Precursors and check the suspect's identification card;
5. Examine, search, and confiscate evidence of criminal acts in the abuse and illicit traffic of Narcotics and Narcotics Precursors;
6. Checking letters and/or other documents regarding the abuse and illicit traffic of Narcotics and Narcotics Precursors;
7. Arrest and detain people suspected of abuse and illicit trafficking of Narcotics and Narcotics Precursors;
8. Interdicting the illicit traffic of Narcotics and Narcotics Precursors in all areas of national jurisdiction;
9. Conduct wiretapping related to the abuse and illicit traffic of Narcotics and Narcotics Precursors after there is sufficient initial evidence;
10. Carry out covert purchase investigation techniques and delivery under supervision;
11. Destroying Narcotics and Narcotics Precursors;

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<sup>8</sup> Tim Penyusun Modul Badan Diklat Kejaksaan R.I., *Pendidikan Dan Pelatihan Pembentukan Jaksa 2019 "MODUL NARKOTIKA"* Badan

12. Perform Urine tests, blood tests, hair tests, deoxyribonucleic acid (DNA) tests, and/or other body parts tests;
13. Taking fingerprints and photographing suspects;
14. Scan people, goods, animals and plants;
15. Open and inspect every item sent by post and other means of communication that are suspected of having a relationship with the abuse and illicit traffic of Narcotics and Narcotics Precursors;
16. Sealing the confiscated Narcotics and Narcotics Precursors;
17. Conduct laboratory tests on samples and evidence of Narcotics and Narcotics Precursors;
18. Request the assistance of experts needed in connection with the task of investigating the abuse and illicit traffic of Narcotics and Narcotics Precursors; and
19. Stop the investigation if there is insufficient evidence of the alleged abuse and illicit trafficking of Narcotics and Narcotics Precursors.

Based on data from a survey by the National Narcotics Agency (BNN)

related to drug use, there were 921,695 people, or about 4.7 percent of the total students and students in Indonesia who were users of these items. In addition, drug cases occur in various circles, not only ordinary people, but also among celebrities, officials, and representatives of the people. In 2010 urine tests on several echelons I – III regional officials conducted by the Government of South Sumatra in collaboration with the Provincial Narcotics Agency found 15 people suspected of being drug users. Meanwhile, the Central Java Corruption, Collusion, and Nepotism Investigation and Eradication Committee (KP2KKN) noted that from 2010 to early February 2011, six DPRD members throughout Central Java were involved in drug abuse cases.<sup>9</sup>

In the world drug trade map, Indonesia's position has changed from a transit country to a destination country for illegal drug trafficking. Geographically, Indonesia's location is very strategic because it is between two continents, Asia and Australia, and two oceans, namely the Pacific Ocean and the Indonesian Ocean. The nature of being the largest archipelagic country (17,508 islands) with the longest coastline and borders is very likely to be a target area for the largest opium producers in Asia: Golden Triangle

<sup>9</sup> Kejahatan Narkoba, <http://www.psb/psma.org/content/blog/3531-kejahatan-narkoba>, diakses

tanggal 08 Maret 2021, Pukul 03.22 WITA.



from Laos, Thailand, and Myanmar; Golden Crescent from Iran, Afghanistan, Pakistan, and Latin America, especially Peru, Bolivia, Colombia, the shift in chemical-based drug production is believed to make China currently the largest supplier and controller of the drug business in Indonesia.<sup>10</sup>

In an international convention that began with the efforts of the League of Nations (United Nations) in 1909 in Shanghai, China by holding a conference on the illicit trafficking of drugs, then in the trial of the Opium Commission (Opium Commission) by producing the first treaty on drug control, namely the International Opium Convention (International Convention on Opium) in The Hague Netherlands in 1912, which regulates the sale of 4 types of narcotics, namely: Opium, Heroin, Morfin, and Kokain, and not forbid it. The regulation also does not include the regulation of synthetic narcotics. This is intended to protect the economic interests of the Netherlands in cooperation with the German pharmaceutical industry. Furthermore, conventions under the auspices of the United

Nations (UN) earn the following points:<sup>11</sup>

1. *Single Convention on Narcotic Drugs, in 1961, which was later amended by Protocol Amending the Single Convention on Narcotic Drugs, 1961 (1971 Protocol on Amendment to the Single Convention on Narcotic Drugs 1961)*<sup>12</sup>
2. *Convention on Psychotropic Substance, 1971, which was held in Vienna from January 11 to February 21, 1971, began to pioneer the policy of prohibiting the abuse of psychotropic substances which resulted in a list of psychotropic substances into 4 (four) groups that are subject to international supervision.*<sup>13</sup>

In this convention, the exception of punishment for psychotropic abusers, believed to be changing imprisonment to treatment, education, aftercare, and social reintegration, the convention as a whole contains the following points:

- 1) The people of nations and countries in the world need

<sup>10</sup> (Simanungkalit 2011) dalam V.L Sinta Herindrasti, *Drug-Free ASEAN 2025 : Tantangan Indonesia Dalam Penanggulangan Penyalahgunaan Narkoba*, Jurnal Hubungan Internasional, Universitas Kristen Indonesia, Vol.7 No.1 Tahun 2018. Hlm 21.

<sup>11</sup> Tim Penyusun Modul Badan Diklat Kejaksaan R.I 2019. *Loc.Cit.* Hlm 5

<sup>12</sup> Undang-Undang Republik Indonesia Nomor 8 Tahun 1976 Tentang Pengesahan Konvensi Tunggal Narkotika 1961 Beserta Protokol Yang Mengubahnya.

<sup>13</sup> Undang-Undang Republik Indonesia Nomor 8 Tahun 1996 Tentang Pengesahan *Convention On Psychotropic Substance* 1971 (Konvensi Psikotropika 1971)

to give priority to the problem of eradicating the illicit trafficking of Narcotics and Psychotropics.

- 2) Eradication of illicit trafficking of Narcotics and Psychotropics is a problem for all countries that need to be handled together as well.
- 3) The provisions stipulated in the 1961 Single Narcotics Convention, the 1972 Protocol on Amendments to the 1961 Single Narcotics Convention, and the 1971 Psychotropic Convention, need to be emphasized and perfected as a legal means to prevent and eradicate the illicit trafficking of Narcotics and Psychotropics.
- 4) The need to strengthen and improve legal facilities that are more effective in the context of international cooperation in the criminal field to eradicate transnational crime organizations in the illicit trafficking of Narcotics and Psychotropics.
- 5) In 1972 an amendment was made to The Single Convention on Narcotic Drugs 1961 Geneva with the 1972 Protocol.
- 6) *United Nations Convention Against Illicit Traffic in Drugs and Psychotropic Substances, 1988*

In a policy process, the implementation of legal politics,

especially in criminal law, is essentially gradual policy enforcement;

- a. The formulation stage, namely the stage of enforcement/implementation of abstract criminal law politics by the legislature. This stage is often referred to as the legislative policy stage.
- b. The application stage, namely the stage of applying the politics of criminal law by law enforcers, from the police to the courts. This second stage is often called the judicial policy stage.
- c. Execution stage, namely the stage of the concrete implementation of criminal law politics by criminal implementing officers. This stage is often called the executive-administrative policy stage.

The three efforts are a manifestation of a rational effort that is planned to achieve certain goals and clearly must take the form of a network of activities that are the embodiment of national policies. As for the revision of the clemency law, as the author meant earlier, it will be carried out by considering the following things, among others:

- a) Perspective on the rule of law  
In terms of granting clemency, the process of enforcing justice always clashes with the concept of the rule of law, this must be studied



more deeply, considering the rights This prerogative attached to the president in the judicial field slightly collides with the main feature of the rule of law. As a state of law (Rechtstaat), Indonesia must have a definite guarantee for the implementation of judicial power that is independent and free from the influence of other powers to enforce law and justice. As a country that adheres to constitutionalism, all actions must be based on the constitution and applicable laws, not on unlimited authority and power (absolutism).<sup>14</sup> Even though Article 14 of the 1945 Constitution paragraphs 1 and 2 states that in granting clemency, the president must pay attention to the balance between the Supreme Court and the House of Representatives for amnesty and abolition, this still does not make the president's prerogative rights any longer absolute. This is because the nature of the Supreme Court's considerations is only used as reference material by the President in making decisions, while the authority to make decisions is still entirely in the hands of the President.

#### **b) Classification of Narcotics Crime Forms in Granting Clemency**

<sup>14</sup> Yuvina Arsieta, *Sakit Berkepanjangan Sebagai Hak Untuk Mengajukan Grasi Berdasarkan Alasan Kemanusiaan Dan Keadilan*, Skripsi, Universitas Airlangga, Surabaya, 2016. Hlm 4.

Before the author discusses the classification of forms of narcotics crime, first, the author will describe the types of narcotics based on the ingredients of manufacture which can be divided into three, namely:

##### **1. Natural narcotics**

Substances and drugs can be used directly as narcotics without the need for a fermentation process, isolation, and other processes first because they can be used directly with a few simple processes. These natural ingredients generally should not be used for direct medical therapy because it is too risky. Examples of natural narcotics are marijuana, a shrub with leaves resembling cassava leaves, and hairy, the number of fingers is always odd, namely 5,7,9. This plant grows a lot in several areas in Indonesia, such as Aceh and North Sumatra.<sup>15</sup>

##### **2. Synthetic Narcotics**

This type of narcotics requires a synthetic process for medical purposes and writing as a pain reliever/analgesic. This synthetic type of drug effect is worse than natural narcotics such as marijuana. Examples such as

<sup>15</sup>Etri Ahinta Devi Rambe, *Analisa Narkoba Jenis Morfin, Amfetamin, dan THC (Tetrahidrokannabinol) Menggunakan Strip Test*, Tugas Akhir Program Studi D3 Kimia, Universitas Sumatera Utara, 2017. Hlm 6.

amphetamines, methadone, dextropropacifen, dexamfetamine, and so on.

- a. Depressants: make the user fall asleep or unconscious.
- b. Stimulants: make the wearer excited in work activities and the body feels fresher.
- c. Hallucinogens: can make the wearer hallucinate which changes feelings and thoughts.

### 3. Semi-synthetic Narcotics

Namely, substances/drugs produced by isolation, extraction, and so on such as heroin in the form of putau powder, heroin has a high potential to cause dependence. Its use is dissolved in water and then injected into a vein or inhaled through the nose after being burned. Next is morphine, which is a derivative of opium that is made by mixing poppy tree sap with other chemicals. Next is codeine which is useful for suppressing cough (antitussive) and pain relief (analgesic).<sup>16</sup>

While the types of narcotics when viewed from the classification can be divided into three, namely:

- a. Narcotics Group I  
Can only be used to develop science; not used in therapy.

High potential for dependence. Example: opium, opium, jicing, jicingko, coca (leaves and plants) cocaine, marijuana.

#### b. Narcotics Group II

In this second group, narcotics are efficacious for treatment as a last resort and can be used in therapy and/or science. High potential for dependence. Example: morphine.

#### c. Narcotics Group III

Class 3 narcotics are efficacious for treatment, can be used in therapy and or develop knowledge. Mild potential causes dependence. Example: Acetyl dihydrocodeine, codeine.

Based on this, in determining sanctions, one must pay attention to the classification of crimes, for example, the death penalty. One other strong reason why the death penalty is still in effect is because drug criminals, especially drug dealers or drug dealers, can massively damage the character of the nation's generation of children into drug addicts who can affect their physical and mental health. Therefore, drug crime is considered an extraordinary crime (Extra Ordinary Crime). And the resolution of the case is also with an extraordinary approach. Even though the enforcement of severe law enforcement to the death

<sup>16</sup><http://repository.usu.ac.id/bitstream/handle/123456789/23785/Chapter%20I.pdf?sequence=4&isAllowed=y> diakses

pada tanggal 12 Maret 2021. Pukul 00.01 WITA

penalty is intensively carried out and is expected to deter drug traffickers, the fact is that drug trafficking and trafficking are also increasing. It is recognized that drug crime is a category of crime in the drug trafficking industry which is part of the group of activities of transnational criminal organizations (Activities of Transnational Criminal Organization).<sup>17</sup>

The development of narcotics in Indonesia is none other than the existence of international organized crime from abroad. Criminal law itself views drug users as victims of criminal acts. This shows that the legal construction built in the formulation of Law No. 35 of 2009 is that addicts and victims of narcotics abuse are given action sanctions (medical rehabilitation and social rehabilitation), while narcotics abusers who are not addicts are given criminal sanctions. The parameters of victims of narcotics abuse in Law No. 35 of 2009 are too narrow and difficult to prove by the suspect/defendant. Law enforcement officials use other regulations to determine the parameters of victims of narcotics abuse. These parameters are the condition of being caught red-handed, found evidence of narcotics

for one day use, positive for using narcotics, and there is no evidence of involvement in illicit drug trafficking..<sup>18</sup> Because the parameters of being a victim of narcotics abuse are too narrow, the criminalization factor will be difficult to direct.

In the perspective of victimology, especially regarding the typology of victims, there are several opinions of legal experts regarding victims of drug abuse. Viewed from the perspective of the level of involvement of the victim in the occurrence of a crime, the definition of a victim of drug abuse is included in the typology of False Victims, namely the perpetrator who becomes a victim because of himself. Referring to the perspective of the victim's responsibility, there are self-victimizing victims, namely perpetrators who become victims because of crimes they commit themselves. It is often declared a victimless crime. However, this view forms the basis for the premise that there is no victimless crime. All or every crime involves 2 (two) things, namely the criminal and the victim. Examples of self-victimizing victims are drug addicts, alcoholism, homosexuality, and gambling. This means that the full responsibility

<sup>17</sup> (Sudarto 1987) dalam Abd. Aziz Hasibuan, *Narkoba dan Penanggulangannya*, Jurnal Ilmiah Bidang Pendidikan, Vol. 11, No.1, 2017, Fakultas Tarbiyah dan Keguruan UIN Banten. Hlm 33.

<sup>18</sup> (Arianti 2018) dalam Roni Gunawan Raja Gukguk dan Nyoman Serikat Putra Jaya, *Tindak Pidana Narkotikaa Sebagai Transnasional Organized Crime*, Jurnal Pembangunan Hukum Indonesia, Vol. 1 No.3 Tahun 2019, Fakultas Hukum Universitas Diponegoro. Hlm 338.

lies with the perpetrator, who is also the victim.<sup>19</sup>

On the other hand, the President and the Ministry of Law and Human Rights on various occasions said that they would tighten the granting of remissions, especially for crimes classified as extraordinary crimes, namely corruption, money laundering, terrorism, and narcotics. It is strange because on the one hand the President and the Ministry of Law and Human Rights are tightening against such crimes because they greatly affect human life, but instead, the president grants clemency to drug convicts. For example, President Susilo Bambang Yudhoyono's pardon for Corby has caused criticism from the public and even from the National Narcotics Agency. This is because BNN was assigned to carry out presidential instructions (Inpres) Number 12 of 2011 concerning the Implementation of National Policies and Strategies for the Prevention and Eradication of Drug Abuse and Illicit Trafficking in 2011-2015 which proclaimed 2014 as the year of saving drug users which is estimated to be higher.<sup>20</sup> In granting clemency to the convict Corby, the Supreme Court considered three things that were recommended to the President to later become the basis for granting clemency, namely:

<sup>19</sup> (Didik M. Arief Mansur dan Elistaris Gultom) dalam Parasian Simanungkalit Dewan, *Model Pemidanaan Ynag Ideal Bagi Korban Pengguna Narkoba Di*

1). The convict Corby was severely depressed and needed to be accompanied by a psychiatrist; 2). The convict Corby, who until he was sentenced, still felt innocent because the narcotics found were inserted by an unknown person; 3). The Australian police do not have a record of Corby's disability related to Narcotics, and in fact, the president's decision to grant pardons to narcotics convicts weakens the function and duty of the National Narcotics Agency and the public in eradicating drugs.

Furthermore, during the time of President Joko Widodo at the beginning of his reign, he made a breakthrough by refusing the clemency of 64 people sentenced to death for drug cases, there were 8 death convicts executed simultaneously after a long controversy, appeals, pardons, and international pressure on President Joko Widodo. Meanwhile, a Filipino woman, Mary Jane Veloso, was not executed. A French death row inmate, Serge Atlaoui, has also temporarily escaped the firing squad because he is still applying for a judicial review. Currently, the third stage of executions is still in the preparation process, there are 43 death row convicts in drug and premeditated murder cases who

*Indonesia*, Jurnal Yustisia, Vol. 1 No.3, 2012. Hlm 82.

<sup>20</sup> Weka Novia Muda.*Op.Cit.* Hlm 8.

have been on the waiting list for the certainty of execution.<sup>21</sup>

From the two leadership examples above, it can be concluded that the minimum standard for granting clemency is still abstract or purely due to the generosity of the President with the consideration of the Supreme Court through general considerations of granting clemency as described in the first problem formulation without priority benchmarks and standard classifications of extra crime acts. Ordinary crimes that deserve or do not deserve clemency are seen from the effects of crimes committed by ignoring the general causes of granting clemency.

For comparison, in the United States state of Texas possession of 2 to 4 ounces of marijuana is classified as a class A crime which is the worst type of offense and can result in a sentence of up to one year in county jail and/or a fine of up to \$4,000, or up to 2 years of supervision. community (probationary period) or three years with an extension.<sup>22</sup> Even during the administration of President Donald Trump said in a speech at the White House, that the United States

Department of Justice would seek the death penalty for drug dealers.<sup>23</sup>

In the Philippines, President Duterte has carried out extrajudicial killing/unlawful killing which, according to the Philippine police chief, has killed more than 1,500 people in a police operation against drugs known as the "war on drugs".<sup>24</sup> which President Rodrigo Duterte had previously planned for September 15, 2016, he said that he would soon reveal the final list of drug dealers which he said contained more than 1,000 names.

Meanwhile, in Indonesia, one of the inmates of the Cilegon Correctional Institution, M. Adam, was sentenced to death but was annulled by the Supreme Court which made his sentence 20 years. Even though the total wealth that he has generated through the narcotics business has reached Rp. 12.5 Trillion spread across Batam, Riau Islands with assets of Rp. 28.3 billion consisting of 19 cars, 8 boats, 2 luxury houses, 1 shophouse, 1 plot of land covering an area of 144 square meters, and gold bullion weighing approximately 2,817 grams along with various jewelry and cash worth Rp.935,000 .000. M.

<sup>21</sup>Andi Nurhaerurrijal Amin, *Eksistensi Grasi Sebagai Bentuk Upaya Hukum Terhadap Proses Pelaksanaan Pidana*, Skripsi, Fakultas Hukum, Universitas Hasanuddin, Makassar, 2015. Hlm 8

<sup>22</sup> Ivan Sadana Tarigan, *Kajian Perbandingan Hukum Pidana Tentang Sistem Penuntutan Perkara Pidana Menurut Sistem Peradilan Pidana Indonesia Dan Amerika Serikat*, Skripsi,

Fakultas Hukum, Universitas Sumatera Utara, Medan, 2018. Hlm 85

<sup>23</sup> <https://www.bbc.com/indonesia/dunia-43466874>, diakses pada tanggal 13 Maret 2021. Pukul 03.30 WITA

<sup>24</sup> Fivi Fajar Iryana dan Handoko Leksono, *Analisis Kebijakan Presiden Duterte Melakukan Extrajudicial Killing Dalam Memberantas Narkoba Di Filipina Berdasarkan Statuta Roma 1988*, Belliac Pacis, Vol.4 No.1, 2018. Hlm 44



Adam also has several assets operating in Jakarta such as car showrooms, travel, sea transportation businesses, and cash flows that spread to 14 countries.<sup>25</sup>

The author focuses on the case examples above, is the handling of narcotics cases if they have been transformed into the dimensions of Crime as Business as contained in the 5th United Nations (United Nation) congress in 1975, whose forms of crime are aimed at obtaining material benefits through activities in the field of business. business (business) or industry, which are generally carried out in an organized manner and carried out by those who have respected positions in society, so that they can be excluded from granting clemency in narcotics cases. In this case, the author focuses on convicts whose qualifications are following Article 114 of the Narcotics Law Paragraph 2 which states that:

*“in the case of the act of offering for sale, selling, buying, being an intermediary in buying and selling, exchanging, delivering, or receiving Narcotics Category I as referred to in paragraph (1) which in the form of plants weighs more than 1 (one) kilogram or exceeds five tree trunks or in the form of non-plants weighing 5 (five) grams, the perpetrator is sentenced to death, life imprisonment, or a*

*minimum sentence of 6 (six) years and a maximum of 20 (twenty) years and a maximum fine as referred to in paragraph (1) plus 1/3 (one third).*

This is, to limit the intervention of the executive in the judicial field and also as a tangible manifestation of the fight against Narcotics which has transformed into a wide and large business network with various influential people in it, which is indeed the case of the Indonesian market that has become a target for drug trafficking in the market. international. Another dimension of crime that can arise from the development of the narcotics business is crimes related to moving places, for example regarding passport and visa violations.

The legal spirit in the Narcotics Law is stated, that Narcotics crime has been transnational, carried out with a high modus operandi, advanced technology, supported by an extensive network of organizations, and has caused many victims, especially among the nation's young generation which is very dangerous to live. society, nation, and state. Opportunities are vulnerable to interference, especially narcotics that are transnational between countries

<sup>25</sup><https://regional.kompas.com/read/2019/08/30/11053381/kekayaan-bandar-narkoba-capai-rp-125-triliun-dari->

[bisnis-itu](https://bisnis-itu.com), diakses pada tanggal 13 Maret 2021, Pukul 03.19 WITA



where their citizens are perpetrators of crimes in other countries.<sup>26</sup>

### c) **Supreme Court considerations**

Concerning granting clemency, the position and role of the Supreme Court as regulated in Article 35 of the Law. Number 5 of 2004 concerning changes to the status of the Act. Number 14 of 1985 concerning the Supreme Court, has the authority to give legal considerations to the President in applications for clemency and rehabilitation. In addition, it can also provide legal considerations or advice to state institutions and other government agencies. with the participation of the Supreme Court in the consideration of granting clemency, it gives an indication of limitations on the authority of the president.<sup>27</sup>

As for the presidential authority which is formulated into the Constitution, it covers the scope of authority that is executive or to administer based on the Basic Law (to govern based on the constitution). The legislative authority or to regulate public or public interest (to regulate public affairs based on the law and the constitution). Judicial authority in the context of recovery related to court decisions, namely reducing sentences, granting pardons, or

eliminating claims related to court authority. Then the diplomatic authority, namely carrying out communications with other countries, and the last is administrative authority to appoint and dismiss people in state positions and state administration positions.<sup>28</sup>

The term prerogative itself can be interpreted as an exclusive or special right or power that is in a body or official because it occupies an official position. Clemency is not a form of intervention by the President in court decisions because it does not eliminate the guilt and also does not constitute a rehabilitation of the convict. This right is exclusive so that it is referred to as a prerogative and therefore the considerations of the Supreme Court and the balance of the House of Representatives in granting amnesty and abolition are not binding, but in a procedure, for granting clemency it must still be passed because of the authority of the Supreme Court to participate in the granting of clemency. considering requests for clemency as mandated in the constitution and increasing the role of the judiciary and legislative bodies in carrying out checks and balances, but not reducing the power of the President.<sup>29</sup>

<sup>26</sup> Husin Wattimena, *Pemberian Dan Pencabutan Grasi Prespektif Hukum Islam*, Jurnal Tahkim, Vol. XI No. 2, 2015. Hlm 54.

<sup>27</sup> *Ibid.* Hlm 62-63.

<sup>28</sup> <http://www.hukumonline.com>, diakses pada tanggal 12 Maret 2021. Pukul 20.04 WITA.

<sup>29</sup> Dermawani Siregar, *Analisis Kewenangan Presiden Dalam Pemberian*

Regarding the President's authority in granting pardons, it is called the judicial authority of the president or also called the consultative power. Given that clemency is related to various fundamental aspects, such as human rights, as well as legal certainty, the granting of clemency must be carried out carefully and selectively by taking into account the principles of justice, humanity, and the interests of the nation and state. Although the Supreme Court's considerations are not binding, at least the president must place the considerations of the Supreme Court as the main basis or main reference in garage considerations.

The reasons for the need for the president to pay attention to the considerations of the Supreme Court in granting clemency and rehabilitation are first, clemency and rehabilitation are judicial processes and are usually given to people who have already undergone the process, while amnesty and abolition are more political. Both clemency and rehabilitation are more individual, while amnesty and abolition are mass.<sup>30</sup>

In terms of considering granting clemency, a judicial power,

especially the Supreme Court and the elements in it, must prioritize the application of responsive law by judges. Bismar Siregar argues that if a judge has a conscience of justice, then he can make a fair decision. Law enforcement against crimes in Indonesia where the government as the organizer of state life needs to provide protection and public welfare.<sup>31</sup> According to Bismar, there are still many judges' decisions that have not relieved the public. The problem is, they are not consistent with the concept of justice. Therefore, Bismar reminded again, "The law is only a means",<sup>32</sup> but the main goal is the realization of justice, he has the principle "Justice is worth much higher than the law".

The consideration of granting clemency must be based on theories of justice. As stated by Theo Huijbers who cites Aristotle's theory of justice, one of which is justice in the field of legal interpretation. Since the law is general, it does not cover all concrete issues, the judge must interpret it as if he was involved in the concrete event. According to Aristotle, judges must have an epikiea, which is "a sense of what is proper"<sup>33</sup>

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*Grasi Terhadap Tindak Pidana Narkotika*, 2012. Hlm 10

<sup>30</sup> Ni'matul Huda, *Hukum Tata Begara Indonesia*, PT. Raja Grafindo Persada, Jakarta 2011. Hlm 102

<sup>31</sup> Mahmud Mulyadi, *Politik Hukum Pidana*, Bahan-bahan Kuliah Fakultas Hukum Universitas Sumatera Utara, Sumatera Utara: 2011. Hlm 6.

<sup>32</sup> Henry Arianto, *Hukum Responsif Dan Penegakan Hukum Di Indonesia*, Lex Jurnalica, Vol.7 No.2, 2010. Hlm 120.

<sup>33</sup> Hyronimus Rhiti, *Filsafat Hukum Edisi Lengkap (Dari Klasik ke Postmodernisme)*, Ctk. Kelima, Universitas Atma Jaya, Yogyakarta, 2015. Hlm 241.

In addition, in granting clemency considerations, the substance of the crime itself should be considered. As the theory of punishment put forward by Van Bemmelen, he thinks by not seeing the crime solely as a punishment, but as a form of goal that people want to achieve with an institution. There are three main ideas about the goals to be achieved with a punishment, namely:<sup>34</sup>

- a. To improve the personality of the villain himself
- b. To make people become deterrent to commit crimes and
- c. Making certain criminals incapable of committing other crimes, namely criminals

Punishment is the last resort in imposing sanctions against criminals. The state in imposing a criminal must guarantee individual independence and keep the human person respected. Therefore, punishment must have a purpose and function that can maintain the balance of the individual with the interests of the community to achieve mutual prosperity. Theories in sentencing as the basis for justification and the purpose of sentencing consist of:<sup>35</sup>

a. Absolute Theory or Revenge Theory

The main purpose of the crime is to satisfy the demands of justice (to satisfy the claims of justice), while other beneficial effects are secondary, so according to him, the punishment imposed is solely to seek justice by retaliating.

b. Relative Theory or Goal Theory

*(Utilitarian/doeltheorieen)*

According to this theory, the imposition of a crime is not just for retaliation or retaliation. Retaliation itself has no value but only as a means of protecting the interests of society.

c. Combined Theory

This combined theory tries to combine the concepts adopted by absolute theory and relativity theory. So it can be concluded that the purpose of punishment is that in addition to imposing a crime, it must be a deterrent, it must also provide protection and education to the community and the convict.

<sup>34</sup> (Lamintang 1988) dalam Noor Sidharta, *LAPORAN HASIL PENELITIAN "Syarat Pemberian Grasi Dalam Prespektif Hukum Konstitusi"*, Kepaniteraan Dan Sekretariat Jenderal Mahkamah Konstitusi Republik Indonesia, 2016. Hlm 21.

<sup>35</sup> (Titik Suharti) dalam Laelly Marlina Padmawati, *Tinjauan Yuridis Pemberian Grasi Dalam Kajian Pidana Terkait Efek Jera Pemidanaan*, Jurnal Recidive, Vol. 2 No 3, 2013. Hlm 305

In applying for the pardon, the author cites the experience of Yusril Iza Mahendra while serving as Minister of Law and Human Rights, he once rejected the French President's request to grant clemency related to drug trafficking cases committed by 14 French citizens who were sentenced to death. He thinks that the granting of clemency should be passed by submitting a request for clemency submitted through the Minister of Justice, the Attorney General, and the Supreme Court, then to the president.<sup>36</sup> So that with this method, the quality of the clemency decision can be guaranteed more justice and follow the principle of retaliation rather than submitting the decision to grant clemency directly to the president.

According to Stahl's theory, the principle of revenge is following the will of God Almighty. The principle of eternal justice requires that the punishment be imposed on everyone who has committed a crime. Stahl further stated that the state is a real arrangement of God on earth, which because of the commission of a crime has polluted its basic principles. To enforce its authority, the state must take measures against such acts, namely by eliminating the criminal or making the criminal feel suffering, where suffering itself is not a goal, but only

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<sup>36</sup> Untung Dwi Hananto, *Kekuasaan Presiden Dalam Pemberian Grasi Menurut UUD 1945*, MMH, Jilid 42, No.2, April 2013. Hlm 193

a means of to make the criminals feel the consequences of their actions.<sup>37</sup>

### **Conclusion**

The problem of granting clemency to narcotics criminals which is a major crime and has a broad and sustainable impact, researchers base criminal law on the conception of community protection. Furthermore, criminal sanctions must be matched with the need to protect and maintain the maintenance, protection, and other interests in society. Therefore, the researcher presents an update or revision to the law on clemency. In addition, the consideration of the Supreme Court to the President and also some redefinition of the dimensions of narcotics crime as a special limitation through several stages of the process without reducing the dignity of the prerogative of the president. The revision of the pardon law as intended by the researcher will be carried out by considering: Perspective on the rule of law, classification of forms of narcotics crime in granting pardons, in this case handling narcotics cases if they have been transformed into the dimensions of Crime as Business as contained in the congress. The 5th United Nations (United Nations) in 1975, to be exempt from granting clemency in narcotics cases. In this

<sup>37</sup>Noor Sidharta, *LAPORAN HASIL PENELITIAN "Syarat Pemberian Grasi Dalam Prespektif Hukum Konstitusi"*. *Ibid.* Hlm 23

case, the researcher focuses on convicts whose qualifications are following Article 114 of the Narcotics Law Paragraph 2, and the last one is the basis for the Supreme Court's deliberations.

### **Recommendation**

In-Law Number 22 of 2002 concerning Clemency, it must contain specifications for certain dimensions of crime, especially for Extra Ordinary Crime, with the dimensions of crime that have expanded, lasted for a very long time, brought wealth to the perpetrator, threatened the safety of a generation, as well as national security. . As well as other laws and regulations relating to clemency and narcotics, there should be specific standards that regulate the mechanism and qualifications of any case for which pardon or clemency can be granted, as well as specific and specific criteria that form the basis for granting clemency.

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