



# Legal Politics of the President's Grant of Pardon Based on the Perspective of Justice and Humanity in the Indonesian Judicial System

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## ABSTRACT

*This research aims to explore and understand the legal politics behind granting a Pardon by the President of Indonesia in the justice system and the factors influencing the decision to grant a Pardon. The research method used is normative legal research, which focuses on positive legal analysis, legal principles, and legal doctrine. The approach used includes a statutory approach to analyze related regulations and a conceptual approach. The research results show that Granting a Pardon by the President is a constitutional right that the President has without interference from other institutions. After the amendment to the 1945 Constitution of the Republic of Indonesia, sometimes there are restrictions on the President's powers, which are considered too broad, and to prevent authoritarianism from the President. In line with these changes, especially in granting pardons, the President must pay attention to the considerations of the Supreme Court. This is not an intervention by the President in the Judiciary institution. However, with a checks and balances mechanism, the President has the basis for consideration from the institution concerned even though the decision to grant it is purely based on the President's constitutional rights.*

**Keywords:** Clemency, Justice and Humanity, Justice System, President, Politics of law.

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## 1. INTRODUCTION

Indonesia is a legal country where every legal product is binding and determines human behavior. This is written in Article 1, paragraph (3) of the 1945 Constitution of the Republic of Indonesia, which states that Indonesia is a legal state. Indonesia adheres to a system of government that is presidential, where the President holds government power. Indonesia has three separations of powers: Executive, Legislative, and Judicial, with a checks and balances mechanism (Yani, 2018). In the government system adhered to by Indonesia, the President holds the power to run the government.

Simply put, the President is the Head of State and the Head of Government. Therefore, the President is given special privileges that other institutions cannot interfere with, namely, prerogative rights. Wrongone right prerogative Within the President's authority as Head of State and Head of Government is granting Pardon, amnesty, abolition, and rehabilitation. This is according to Article 14 of the 1945 Constitution of the Republic of Indonesia.

Pardon is forgiveness in the form of change, relief, reduction, or elimination of criminal penalties for convicts granted by the President. The granting of a Pardon by the President is not an intervention by the President in the judicial sector but rather a privilege owned by the President (Hidayatullah, 2018). Granting a Pardon is an example of the checks and balances mechanism adopted by the Indonesian government; namely, in granting a Pardon by the President, according to the law, the President must ask for consideration from the Supreme Court. Even though he has to ask for advice from the Supreme Court in granting a Pardon, the President is purely using his prerogative (Sidda, 2021). Pardon is a non-legal effort. Therefore, provisions regarding Pardon are not contained in the Criminal Procedure Code, the Basic Law on Judicial Power, or the Supreme Court Law but are regulated separately in Law

Number 22 of 2002 concerning Pardon as amended by Law Number 5 of 2010 concerning Amendments to Law Number 22 of 2002 concerning Pardon (Sinaga, 2021).

Pardon is a final hope of forgiveness that provides an opportunity for a convict with permanent legal powers to obtain justice according to law and humanity for mistakes and correction of the sentence imposed on him. The President, as Head of State and Head of Government, must grant a Pardon based on justice and humanity. Justice, which comes from the word "fair," according to the Big Indonesian Dictionary (KBBI), means equal; not heavy-side; impartial; side with what is right; hold in truth; duly; not arbitrary. Justice in the Big Indonesian Dictionary (KBBI) is defined as actions, treatment, and suchfair(KBBI, 1969). This is the basis for granting pardon-based justice, which is not tied to a particular event. The granting of a Pardon by the President requires taking into account the provisions and considerations of the Supreme Court and making decisions with a sense of justice.

The granting of pardons by heads of state has existed since the reign of the Roman emperors, followed by kings on the European Continent. This granting of Pardon was based solely on the generosity of the kings, which was a form of the King's compassion. Van Hammel defines the granting of a Pardon as a statement from the highest authority that states that the consequences, according to criminal law, of an offense are nullified in whole or in part. However, as time goes by, granting pardons may no longer be used based on the generosity of the head of state but instead becomes a correction of legal injustice, which in its implementation will lead to injustice (Lamintang, 2017).

Clemency in Indonesia has already been arranged for a long time. During the Dutch colonial period, regulations regarding Clemency were regulated in the Gratieregelling in the 1993 Staatblad Number 2 and Verodening Militair Gezag dated 12-XII-1941 Number 108/DvO (Sidda, 2021). However, as time progressed and the Indonesian state constitution changed, the regulations changed and regulations regarding Pardons were born, which are used as the current essential reference in Law Number 22 of 2002 concerning Pardons as amended into Law Number 5 of 2010 concerning Amendments to Law Number 2 of 2002 concerning Clemency. This shows that granting a Pardon has been around for a long time and has been done since long ago. Historically, the granting of pardons by the President has often given rise to public debate or polemics. One thing that has invited controversy and public polemics in granting pardons is President Jokowi's granting of Clemency to former Riau Governor Annas Maamun. Annas Maamun is a proven former governor of the corruption crime of changing the function of forest areas; he was sentenced to 7 years in prison but received a pardon with a reduction of one year. This is considered by the public as a form of government consistency, especially by President Jokowi, in eradicating corruption (Prabowo, 2019).

The legal politics of granting pardons to the Indonesian President is essential in maintaining justice and humanity in the justice system. However, the challenges demonstrate the need for further reform to ensure that pardons are granted relatively, transparently, and based on solid principles of justice and humanity. Based on the problem description, in this research, the author will discuss the legal politics of granting a pardon by the President in the Indonesian judicial system and the factors in granting a pardon based on the perspective of justice and humanity.

## **2. RESEARCH METHODS**

The research method used is normative legal research (normative law research), a law conceptualized as norms or rules that apply in society and become a reference for everyone's behavior. So normative legal research focuses on positive law inventories, legal principles, doctrine, legal discoveries in cases in concreto, legal systematics, synchronization levels, legal comparisons, and legal history (Kadir, 2004). Secondary data, namely data obtained from the literature, will be used (Ashsofa, 1996). The approaches used in this legal research are the statutory and conceptual approaches. The legislative approach is an approach that analyzes the rules and regulations relating to the legal issue (Marzuki, 2011). After the legal material has been processed, it is then continued with legal material analysis techniques using qualitative analysis, namely discussing the legal material obtained by referring to the existing theoretical basis (Fajar, 2010).

### 3. RESULTS AND DISCUSSION

#### 3.1 Legal Politics of Granting Pardons

Indonesia adheres to a presidential system of government where the President and Vice President hold the wheel of government. As a wheelholder in government, the President has constitutional rights given to him without interference from other institutions. These constitutional rights are also known as rights prerogative President. President's constitutional rights are written in the 1945 Constitution of the Republic of Indonesia. The 1945 Constitution of the Republic of Indonesia has undergone 4 (four) amendments, which also change the powers of the President. The background to the amendment Invite-The Constitution of the Republic of Indonesia because it is assessed that the power of the President is significant, which has a strong tendency to have authority. One of the constitutional rights that the President has is granting Pardon.

Pardon is forgiveness in the form of change, relief, reduction, or elimination of the execution of sentences for convicts granted by the President. The granting of a Pardon, normatively based on the principles of humanity and justice, is often debated, especially in cases involving corruption, narcotics, or other specific crimes (Muhammad, 2018). Adami Chazawi stated that by submitting a request for Clemency, a person has legally admitted guilt because applying for Clemency usually occurs after a person has been declared legally guilty (Chazawi, 2002).

The granting of a Pardon by the President is not a matter of head power government in the executive field but rather a privilege that he has, namely a proper prerogative. In granting a Pardon, the President takes into account the considerations of the Supreme Court as a judicial institution. This is an example of Indonesia adhering to the principle or government mechanism of checks and balances, which involves mutual control between institutions. In carrying out their duties, the two institutions supervise and control each other to ensure no abuse of authority. With considerations from the Supreme Court, it will be a limitation for the President to grant a Pardon so that the President can avoid granting a Pardon based on considerations other than the law while still upholding justice and legal certainty and not forgetting humanity (Sinaga, 2021).

Even though the President's granting of Pardon is based entirely on his constitutional rights, he still asks for consideration from the Supreme Court. The role of the Supreme Court is a form of limitation on the President's power. The government system adopted by Indonesia tends to the magnitude of the President's power, so with this consideration, the granting of a Pardon is not arbitrary meddle the power of the President but more to prevent abuse of the President's authority (Irawan, 2016). This is in line with Montesquie's theory of justice, adopted in the Indonesian government system, which is the theory of division of power known as Trias Politica. According to Montesquie, Trias Politica is a concept of power distribution with separation and mutual power in equal positions but controlling each other (Asshiddiqie, 2003).

The President's authority to grant a Pardon can be viewed from 2 (two) things, namely the constitutional authority of the President and the authority to grant a Pardon based on the pardon law. The President's constitutional authority is written in Article 1, paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which states that the State of Indonesia is a Unitary State in the form of a Republic. The position of the President is as head of government and head of state. Because the President is the head of government and head of state, the President has constitutional rights that cannot be granted intervened with other institutions. One of them is granting Pardon to convicts. This is written in Article 14, paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which states that the President grants Pardon and rehabilitation by considering the considerations of the Supreme Court.

The President's authority based on Law Number 22 of 2002 concerning Clemency as amended into Law Number 5 of 2010 concerning Amendments to Law Number 2 of 2002 concerning Clemency is written in Article 4 paragraphs (1) and (2) which, in essence, that the President has the right to grant or reject a request for Clemency submitted by a convict after receiving consideration from the Supreme Court, which may take the form of commuting or changing the type of sentence, reducing the amount of the sentence, or eliminating the execution of the sentence.

### **3.2 Factors in Granting Pardons Based on a Justice and Humanity Perspective**

Pardon is forgiveness in the form of change, relief, reduction, or elimination of criminal penalties imposed by the President as head of state. The President's authority in granting a Pardon is his constitutional right, and the decision to grant or refuse a Pardon is absolute. The statutory regulations do not clearly state the reasons or considerations used by the President in granting a Pardon in consideration of letters b and c of Law Number 5 of 2010 regarding Law Number 22 of 2002 concerning Pardon, which explains that the President can grant a Pardon to obtain and uphold true justice and human rights against court decisions that have permanent legal force.

In this case, the Pardon given to the convict must reflect justice and protection of human rights as well as legal certainty based on Pancasila and the 1945 Constitution of the Republic of Indonesia (Raftanzani, 2010). According to Jan Rummelink, the reasons underlying the granting of a Pardon include several things:

- a. After the convict has served a legally binding sentence, he may face exceptional circumstances that are very detrimental to him. This can include situations where the convicted person experiences a change in circumstances that is very difficult for him or her.
- b. After a sentence has become legally binding, sometimes judges do not pay adequate attention to mitigating factors that should have been considered beforehand, which may result in a lighter sentence being imposed.
- c. After a sentence has entered into legal force, a dramatic change in the social or political situation may influence the legal decision. For example, the declaration of a civil emergency may be a factor that influences the determination of punishment.
- d. Suppose significant errors occur in the judicial process, especially in war crimes that are tried after the war has ended. In that case, a pardon can be used as a mechanism to correct the injustice that occurred in the court decision. By granting a Pardon, sentencing decisions can be revised to ensure greater justice.

Justice and humanity go hand in hand when granting Pardon. From the perspective of justice, granting a Pardon can be a correction of existing law accepted by the convict. Every convict has the right to apply for Clemency by what is written in the Pardon Law. This Pardon is a form of legal correction, which, if assessed at that time, the judge did not consider several factors when giving the sentence. Judges often need to be more careful when weighing several factors and often only focus on the subject matter of the case. Therefore, a pardon is an effort by the President to correct the situation. The humanitarian factor in granting a pardon may be age, health, good behavior, and the country.

The law does not regulate the reasons that can be used as a basis for considering and granting a Pardon by the President as Head of State. The Pardon granted by the President is a form of improvement in court decisions that do not prioritize a sense of justice and humanity. Presidential considerations by the Pardon Law must be written as a Decree on Clemency and Memorandum. There are two things that the President is considering, namely Justice and Humanity. Justice considerations focus on, for example, whether the elements of the criminal act have been fulfilled, whether they have been committed repeatedly, and what type of crime has been committed. Meanwhile, humanitarian considerations focus on the person of the convict, such as health. However, the elements of Justice and Humanity are broad and abstract.

The President's consideration in granting Clemency can be seen in the Presidential Decree and the Presidential Decree memorandum regarding Clemency. However, access to information on Presidential Decrees and Clemency Memorandums are documents that the public excludes (Rachman, 2016). Based on the Jakarta PTUN (State Administrative Court) Decision Number 1/G/KI/2016/PTUN-JKT, which cancels the Information Commission Decision Number 58/XII/KIP-PS-AMA/2015 Appeal Decision in the Information Dispute case against Ministry State Secretariat for Requests for Information on Clemency Decisions for Death Row Convicts. In the Minister of State Secretariat Regulation Number 2 of 2016, Article 5 states that information in archives classified as confidential and highly confidential is excluded by statutory regulations (ICJR, 2016).

The decision of the PTUN (State Administrative Court) is in line with the Decree of the Information and Documentation Management Officer of the Ministry of State Secretariat Number 1 of 2012 concerning Determining the Classification of Excluded Information within the Ministry of State Secretariat jo. Minutes of Consequence Test Number 1/PPID-Kemensekneg/2016, dated April 5, 2016, states that the decision information regarding Clemency is

excluded from the information and copies thereof (Humas, 2016). This is the basis for the inaccessibility of the Clemency Decree and Memorandum because they are documents excluded from the public.

#### **4. CONCLUSION**

Several aspects need to be considered in the legal politics of granting a Pardon by the President in the Indonesian justice system. First, as a country that adheres to a presidential system, Indonesia gives the President the constitutional right to grant Pardon as a form of Pardon to convicts. However, granting a pardon must be based on the principles of humanity and justice, and advice from the Supreme Court as a judicial institution must be considered. Second, granting a Pardon by the President is not merely an executive authority but also a form of privilege granted to him. In this context, the Supreme Court is an important mechanism to monitor and limit the President's power in granting Pardons so that it does not violate the principles of justice and legal certainty. In addition, granting pardons should not be done carelessly or arbitrarily, especially in serious crimes such as corruption or narcotics. This is because the principle of justice demands that the punishment given to criminals be in line with the level of the crime committed, as well as to emphasize fair and firm law enforcement.

Factors influencing the granting of Clemency include the convict's exceptional circumstances after the conviction, lack of attention to mitigating factors by the previous judge, dramatic changes in the social or political situation, and gross errors in the judicial process. In granting a Pardon, justice and humanity must be in harmony, with efforts to provide necessary legal corrections and ensure the protection of human rights. However, despite the importance of transparency in the pardon-granting process, information regarding pardon decisions and memorandums should be included in public access. However, the granting of a Pardon by the President must remain based on applicable legal principles, including justice, humanity, and legal certainty, to provide confidence to the public that the justice system is functioning correctly and fairly.

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