

## Juridical Studies on Remission Award against Convicted Criminal of Drugs in Indonesia Imprisonment System

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### Abstract

Remission is given to convicted criminal by Government of Republic of Indonesia for giving them guidance based on conceptual system, which is guiding with giving spiritual education/guidance and skill with hope all guilty people who are in Prison will be better and deserve to get remission, with goal after released or free from Prison they will not repeat their criminal action anymore.

**Keywords:** Remission, Convicted Criminal, Criminal Action of Drugs.

### Introduction

In article 1 Number 7 Chapter 1 General Certainty of Act of Republic of Indonesia Number 12 Year 1995 about Conceptual stated that: Convicted Criminal is someone who has freedom lost punishment in Prison.<sup>1</sup> As a member of prison and one subject of implementer of verdict of the court, during endure punishment in Prison, convicted criminal always wants his/her law importance to not be rejected, such as importance to get facility appropriate with valid law rule and get right as a remission as managed in Act of Conceptual.

Conceptual is a *therapeutic* process, where convicted criminal comes to Prison in harmonic situation and has negative relationship with his surrounding society. Then, convicted criminal experiences guidance that is not free from other elements in the society, as a result the convicted criminal with the society is a unity and aptitude(harmony) lives with subsistence, until being well from harm sides.

Measuring success of conceptual system started with high or low the remission number achieved in convicted criminal guidance. During guidance time in prison and guidance in society, to every convicted criminal who endures punishment more than 6 (six) hours can be given support as remission effort to shorten punishment time, if he/she has showed achievement by doing and behaving well or joining a part to obey the country.<sup>2</sup>

Giving the time punishment elimination (remission) is a benefaction of Government of Republic of Indonesia based on Act. Remission is given to convicted criminal and prisoner who are guided in Prison after they endure punishment at least half of valid punishment time (for convicted criminal punished at least one year, and has got assessment also stated good behaved from Conceptual Observer Team called TPP. Conceptual Observer Team is Team who has job giving judgment to leader in observing to convicted criminal guidance, state/civil children and society client).<sup>3</sup>

Remission is given to convicted criminal by Government of Republic of Indonesia for giving them guidance based on conceptual system, which is guiding with giving spiritual education/guidance and skill with hope all guilty people who are in Prison will be better and deserve to get remission, with goal after released or free from Prison they will not repeat their criminal action anymore.

Law Umbrella used to apply giving remission toward convicted criminal is Act of Republic of Indonesia Number 2 Year 1995 about Conceptual, Regulation of Government of Republic of Indonesia Number 32 Year 1999 about Condition and Order of Implementation of Right of Citizen of Prison of Regulation of Government of Republic of Indonesia Number 99 Year 2012 about Second Changing on Regulation of Government of Republic of Indonesia Number 32 Year 1999 about Condition and Order of Right of Citizen of Conceptual, then regulated by Decision of President of Republic of Indonesia Number 174 Year 1999 about Remission and explained further in Regulation of Law and Human Rights Minister of Republic of Indonesia Number 21 Year 2013 about Condition and Order Giving Remission, Leave for Visiting Family, Conditional Liberation, Leave Before Freedom, and Conditional Leave, and Decision of Law Ministry and Regulations of Republic of Indonesia Number: M.09.HN.02.01 Year 1999 about Implementation of Decision of President of Republic of Indonesia Number 174 Year 1999 about Remission.

In step with era development and increasing of criminal actions happened in society living, Prison (LP)

<sup>1</sup>Undang-Undang Republik Indonesia Nomor 12 Tahun 1995 tentang Pemasyarakatan, (Jakarta, Penerbit : Sinar Grafika, 1997), hal. 72.

<sup>2</sup>Bambang Poernomo, *Pelaksanaan Pidana Penjara Dengan Sistem Pemasyarakatan*, (Yogyakarta: Liberty, 1986), hal. 155.

<sup>3</sup> Keputusan Menteri Kehakiman Republik Indonesia Nomor: M. 02-PK.04.10 Tahun 1990 Tentang Pola Pembinaan Narapidana/Tahanan. Bab II angka 10.

is not only lived by prisoner whose status as convicted criminal in common or general things such as criminal action as regulated in Act of Republic of Indonesia Number 1 Year 1946 about Book of Act of Law of Punishment shortened as KUHP, but also lived by prisoner whose status as convicted criminal enduring criminal action which is an extraordinary crimes such as Criminal Action of Drugs.

Criminal action of Drugs is one of extraordinary crimes that often happened in Indonesia. It shows that law managing about drugs crime in Indonesia, which is Act of Republic of Indonesia Number 35 Year 2009 about Drugs less effective in getting rid of this crime. It also happened with Guidance system applied to drugs prisoner based on Act Number 12 Year 1995 about Society less effective to make them learn.

### Problems Formulation

1. How is the history of regulations about remission in Indonesia?
2. What is the juridical problem of giving remission to convicted criminal of criminal action of drugs in Indonesia?

### Research Method

This research is a normative juridical research is research with conduct a review of laws and regulations and any other legal materials that are related with this research. This research used several approaches that consist of: a. Philosophical approach; b. Approach legislation; c. Conceptual Approach; and e. Case Approach.

The legal materials that used in this study consisted of primary legal materials, secondary legal materials and tertiary legal materials. Legal materials are analyzed using a prescriptive normative analysis, the analysis by arguing over the results of research by providing prescriptions or judgment of right or wrong or what should be according to the law to the facts or legal events<sup>1</sup>.

### Result and Discussion

#### History of Laws and Regulations about Remission in Indonesia

Remission in Society system defined as “elimination of punishment time: for convicted criminal after fulfilling fixed certain conditions. Elimination of punishment time is usually given on Anniversary of Independence Day of Republic of Indonesia on August 17. In Conceptual System, this remission is eye of chain of a society process, is a right from every convicted criminal which only can be achieved if the convicted criminal can show good behavior based on DPP assessment and besides that the convicted criminal first fulfilling conditions based on punishment time that has been done.<sup>2</sup>

Before the existing of Act about Society, toward convicted criminal given *Gestichtenreglement* (Jail Regulation), Ordinance December 10 1917, S. 1917-708, s.d.u. dg. S. 1919-268, S. 1920-416 and 808, S. 1921-101 and 591, S. 1922-544, S. 1923-465, S. 1924-239 and 304, S. 1925-184, S. 1926-563, S. 1927-99, S. 1931-168, S. 1932-518, S. 1934-172, 337, S. 1935-49 and 100, S. 1948-77, mb January 1 1918.<sup>3</sup>

In this regulation specifically not regulated about giving remission toward convicted criminal. In the time of Dutch Indies Administration “Remission” is a “gift”<sup>4</sup> given toward convicted criminal. This regulation regulated “*Gouvernement Besluit*” on August 10 1935 Number 23 *Bijblad* No. 13515 jo. july 9 1841 No. 12 and January 26 1942 No. 22; remission given as a gift on birthday of The Queen.<sup>5</sup>

Jail Regulation in the articles only gives chance to certain convicted criminal to release from the jail as regulated in Article 43:

- (1) In extraordinary things, jailed person can be given permission to leave Prison for a while.
- (2) It should be given a letter of permission for :
  - a. Defendant person or the accused in criminal thing, by official who sues, or if the thing is checked, by commissioner judge who has the job;
  - b. All other jailed person, by Head of Region Government or by jail director, if the jail headed by a director.
- (3) In the letter of permission should be decided the time for the jailed person can live outside the jail. If the letter is not given, by the head of the prison, the jailed person cannot leave the prison before the letter is given to the Head of prison.
- (4) The Head of Region Government/ Judge/ Prosecutor and Director of Prison, if such official pointed as head or if the prison headed by director, always must take action for the jailed person,

<sup>1</sup>MuktiFajar and Yulianto Achmad, *Dualism Normative-Empirical Legal Research (Dualisme Penelitian Hukum Normatif-Empiris)*, PustakaPelajar, Yogyakarta, 2010, p.184.

<sup>2</sup> R. Achmad S. Soema diPradja dan Romli Atmasasmita, *Sistem Pemasarakatan Di Indonesia*, (Bandung: Binacipta, 1979), hal. 28-29

<sup>3</sup> Bambang Poernomo, *pelaksanaan pidana penjara dengan sistem pemasarakatan*. Op. Cit. hal. 136.

<sup>4</sup> R. Achmad S. Soema diPradja dan Romli Atmasasmita. Op. Cit. hal. 29.

<sup>5</sup> Dwidja Priyatno, *Sistem Pelaksanaan Pidana Penjara Di Indonesia*, (Bandung: Refika Aditama, 2006), hal. 134.

- during outside the prison, tightly kept. If needed, could be asked the police help.
- (5) Soon after going back in the prison, jailed person's body should be rechecked.
  - (6) Every permission given according to this article should be told soon by state official who giving the permission to the Head of Prison Division, by explaining the reasons.

In this *Getichtenreglement*, for who have good behavior during enduring punishment will be placed in better classes, or gone down into lower class, but will not decrease punishment time, as well stated in Article 49 until Article 56, as follow:

Article 49: Jailed persons divided into four classes.

#### **Distribution of class for placing convicted criminal:**

##### **Class One:**

- (1) In class one set:
  - a. Jailed person for living the same age;
  - b. Jailed person for a while, cannot be controlled or dangerous for security of prison official or prisoner fellow.
- (2) Jailed person who enter this class should be separated from other jailed persons.
- (3) Those people if possible, should be closed in special jail and employed in jail wall environment with tight keeping.
- (4) (*s.d.u. dg. S. 1927-99*) person who jailed for a while and include in this class, if the manner is good in a year, flared up into class two. (Article 50)

##### **Class Two**

In Class Two it consists of:

- a. People who jailed more than 3 months in the beginning of the punishment, if they are not needed to be in Class One;
- b. People who jailed in prison from class one flared up to Class Two;
- c. People who jailed from Class Three decreased to Class Two. (Article 51: *s.d.u. dg. S. 1927-99*)

##### **Class Three**

(*s.d.u. dg. S. 1927-99*) In Class Three set people who jailed from Class Two, for 6 months having good behavior. (Article 52)

- (1) (*s.d.u. dg. S. 1927-99*) In class four set people jailed for three months or less than three months.
- (2) If possible these people are not placed in one room with jailed person from other class. (Article 53)

#### **Officials who have the power to propose convicted criminal classes:**

- (1) On suggestion Head of Region Government or if the head has position as director, on suggestion of Jail Director, Head of Jail Peer set the jailed person for a while in class one and flared up into class two.
- (2) Those officials have power to give discipline punishment, rise jailed person from class two into class three and decreased jailed person from class three to class two. (Article 54).

#### **Temporary Release:**

(*s.d.u. dg. S. 1927-99*). Someone who jailed in Class Three, if he endures two third and at least 9 months from the punishment, could be proposed to be released temporarily with an agreement. (KUHP 15 etc). (Article 55)

Article 56:

By remembering the condition in this regulation, so in the budget mentioned conditions about the use of difference signs by people who punished from every class and about giving sag to jailed people from class three and class four. .

In Indonesia this jail Regulation has been existed for approximately 78 years, since 1917 until 1995. Then, after released Act of Republic of Indonesia Number 12 Year 1995 about Conceptual, as long related with the condition, the Jail Regulation is not valid.

In Act of Republic of Indonesia Number 12 Year 1995 about Conceptual, the rights given to convicted criminal by Indonesia government mentioned in Article 14 subsection (1) stated, convicted criminal deserves:

- a. to do worship in his believe or religion;
- b. to get treatment, spiritually or physically;
- c. to get education and teaching;
- d. to get health service and good food;
- e. to deliver complaint;
- f. to get reading material and to follow other unbanned mass media broadcast;
- g. to get salary on the work;

- h. to be visited by family, lawyer or other certain people;
- i. to get elimination of punishment time (remission);**
- j. to get chance for having assimilation includes leave to visit the family;
- k. to get conditional release;
- l. to get leave approach released; and
- m. to get other rights as well as the valid laws and regulations (printed bold by the writer).

And in article (2) stated that: certainty about conditions and order of implementation of the rights of convicted criminal as mentioned in subsection (1) managed further by Government Regulation.

The convicted criminal's rights above decide the elimination of punishment time (remission) still be given to every convicted criminal appropriate with certainty of valid Act, and fulfilling the conditions regulated in Government Regulation of Republic of Indonesia Number 32 Year 1999 about Condition and Order of Implementation of Conceptual Guiding Citizen Rights.

The conditions to get remission as meant in PP Number 32/1999, mentioned in Article 34 that; verse:

- (1) Every convicted criminal and prisoner who endure punishment time having good behavior deserve to get remission,
- (2) Remission as mentioned in verse (1) could be added if the person enduring punishment:
  - a. Giving service to the Country,
  - b. Doing useful things to country in the name of humanity, or
  - c. Doing helpful things for Conceptual facility.
- (3) Certainty to get remission as meant in verse (1) and verse (2) is valid for convicted criminal and prisoner who wait clemency granted by head of state while enduring the punishment.

Then the next is about the validation of Decision of President of Republic of Indonesia Number 174 Year 1999 about Remission. In this decision regulated about condition of remission given and additional condition remission given to convicted criminal as follow:

**Conditions to get given remission:**

- (1) Every convicted criminal and prisoner endures temporary punishment and jail punishment can get remission if they have good behavior when enduring the punishment.
- (2) Remission is given by Law and Regulations Minister of Republic of Indonesia.
- (3) Remission as meant in subsection (1) fix by Decision of Law and Regulations Minister (Article 1)

**Kind of remission:**

- a. General Remission, given on Indonesian Independence Day on August 17, and
- b. Special Remission, given on holiday of Religiousness which is believed by the convicted criminal and prisoner, by certainty if a religion has more than one holiday in a year, therefore the chosen day is the most noble holiday by the believers. (Article 2)

**Conditions to get given remission:**

- (1) Remission as meant in article 2 can be added by additional remission if convicted criminal or prisoner endures the punishment:
  - a. Giving service to the country;
  - b. Doing useful things for country and humanity;
  - c. Doing helpful things to guiding activity in Conceptual facility.
- (2) Further Conditions about giving service and doing useful things for the country and nation or for guiding activity in Conceptual facility as meant in subsection (1) fixed by Decision of Law and Regulations Minister. (Article 3)

Number of remission can be given to prisoner regulated as follow:

**General Remission:**

- (1) Number of general remission is :
  - a. 1 (one) month for convicted criminal or prisoner who have endured punishment for 6 (six) until 12 (twelve) months; and
  - b. 2 (two) months for convicted criminal and prisoner who have endured punishment for 12 (twelve) months or more.
- (2) Giving general remission can be done as follow:
  - a. In the first year given remission as meant in subsection (1);
  - b. In the second year given remission 3 (three) months;
  - c. In the third year given remission for 4 (four) months;
  - d. In the fourth year and fifth each given remission for 5 (five) months; and
  - e. In the sixth year and so on given remission for 6 (six) months every year. (Article 4)

### **Special Remission:**

- (1) Number of special remission is:
  - a. 15 (fifteen) days for convicted criminal and prisoner who have endured punishment for 6 (six) until 12 (twelve) months; and
  - b. 1 (one) month for convicted criminal and prisoner who have endured punishment for 12 (twelve) months or more.
- (2) Giving special remission can be done as follow:
  - a. In the first year given remission as meant in subsection (1);
  - b. In the second and third year each person given 1 (one) month remission;
  - c. In the fourth and fifth year each person given 1(one) month 15 (fifteen) days remission; and
  - d. In the sixth year and so on given 2 (two) months remission every year (Article 5)

### **Additional remission:**

Number of additional remission is:

- a. ½ (half) from general remission achieved in the year for convicted criminal and prisoner who give service to country or do useful things for the country or humanity;
- b. 1/3 (one third) from general remission achieved in the year for guiding in Conceptual Facility as a promoter. (Article 6)

### **Remission as mentioned in Article 2 and Article 3 is not given to convicted criminal and prisoner who:**

- a. Punished less than 6 (six) months;
- b. Given discipline punishment and listed in the book of order violation of Conceptual facility in time counted on given remission;
- c. Is enduring Leave around Free; or
- d. Given jail punishment as replacement of fine punishment. (Article 12)

Certainty of the article has been changed by Regulation of Government Number 99 year 2012 about conditions and order of implementation of rights of conceptual citizen related with drug crime and terrorism. But, in the practice the rights should be considered for society claim especially to them who punished because certain cases, such as drugs crime, terrorism, and corruption.

### **Juridical Problem Giving Remission toward convicted criminal of drug crime in Indonesia.**

Condition of giving remission to convicted criminal regulated in Article 14 subsection (1) letter i Act Number 12 year 1995 about Conceptual. Then in Article 14 subsection (2) also manage that “condition about terms and order of implementation of convicted criminal’s rights as mentioned in subsection (1) managed further by Government Regulation”. It explained that convicted criminal’s rights are not automatically given to convicted criminal but it should pass through law procedure and order of implementation managed by valid act. It shows rights as mentioned in subsection (1) mean the Government has the authority to give remission or not to the convicted criminal, so remission is not rights that stick to convicted criminal as Human Rights, remission given by government on good assessment to convicted criminal which done by Conceptual Observer Team as long as the convicted criminal endures his punishment time.

In Government Regulation of Republic of Indonesia Number 99 Year 2012 about the Second Changing on Government Regulation of Republic of Indonesia Number 32 Year 1999 about Conditions and Order of Implementation of Conceptual Guiding Citizen Rights, in Article 34A subsection (1) Giving Remission to convicted criminal who punished because doing terrorism, drugs crime and corruption, bad things to country security, heavy bad things to human rights, also other organized criminal actions, not only need to fulfill the requirements as mentioned in article 34 also need to fulfill requirements below: a. want to cooperate with law official to help solving the case of criminal action; b. have paid the fine and replacement money appropriate with court decision to convicted criminal who punished because doing corruption; and c. Have joined program radicalism made by Conceptual facility an/or National Body of Drugs Solving Terrorism also declare: ) loyalty to Country of Unity of republic of Indonesia in a piece of paper for convicted criminal who is a citizen of Indonesia, or 2) will not repeat terrorism crime in a piece of paper for convicted criminal who is non Indonesian Citizen, punished because doing criminal action of terrorism. Subsection (2) Convicted criminal who punished because doing criminal action of drugs as mentioned in subsection (1) only valid to convicted criminal who punished in jail at least 5 (five) years.

The article above shows the less law certainty, because in Article 14 (1) letter I Act Number 12 year 1995 about Conceptual does not manage difference of giving remission to agent of certain criminal action (special), whether it is drugs crime, corruption and terrorism crime or not distinguish heavy or not punishment that done by the convicted criminal. In the article decided, all convicted criminal with good behavior deserve to get remission. Therefore between Act of Conceptual with Government Regulation above, there is conflict of

norm in giving remission. If the conditions of giving remission wanted to be tight so should be regulated in Act not in Government Regulation, because lower level regulation may not contrast with higher regulation which is Act.

It appropriates with pure law theory explained by Hans Kelsen where in the making of laws and regulations Kelsen develops *Stufentheory*<sup>1</sup> which is a study about concept of law, basic norm of law order is the highest regulation of the law order as fundamental regulation of various norm of positive law order. In this theory Hans Kelsen argues that law norms are leveled and layered in a hierarchy (structure) where the higher norm is valid, sourced and based on higher norm, and so on until a fictive and hypotheses norm that cannot be seen further, basic norm (Grundnorm). Basic Norm is the highest norm in a law system, the norm cannot be made by the higher norm, but the basic norm is fixed first by society as basic norm which is a holder for lower norms under it, as a result the basic norm called as pre-supposed.<sup>2</sup>

It appropriates with pure law theory explained by Hans Kelsen where in the making of laws and regulations Kelsen develops *Stufentheory*

One of Hans Kelsen's students, is Hans Nawiasky develops his teacher's theory about ladder of norm in relation with a country. Hans Nawiasky says a law norm of any country always has levels and layers. Lower level is valid, sourced and based on the higher norm, higher norm, sourced and based on the highest norm called as Basic Norm. Hans Nawiasky also argues that beside that layered and leveled norm, law norm of a country also grouped, and law norm grouped into four big groups as follow:

Group I *Staatsfundamentalnorm* (Country Fundamental Norm);

Group II *Staatsgrundgesetz* (Basic rule/ Country main Rule);

Group III *Formell Gesetz* ("Formal" Act);

Group IV *Verordnung & Autonome Satzung* (Implementer Rule/Autonomous Rule).<sup>3</sup>

According to Hans Nawiasky, the content of *Staatsfundamentalnorm* is a basic norm for constitutional making or act making of a country (*Staatsverfassung*), including the changing norm. Law Truth of a *Staatsfundamentalnorm* is a condition for a constitution or act to be valid. It existed before a constitution or act. Then, Hans Nawiasky says the highest norm called by Kelsen as basic norm in a country should not be called as *staatsgrundnorm* but called as *staatsfundamentalnorm* or country fundamental norm. Grundnorm has stable disposition, while in a country, the country fundamental norm can be changed suddenly because chaos, etc.

Analogously with Hans Kelsen's theory and Hans Nawiasky's theory, A. Hamid S. Attamimi does a comparison and applies in structure and law order in Indonesia in the shape of pyramid structure. Structure of Indonesia law order includes:

1. *Staatfundamentalnorm* : Pancasila (Opening of 1945 Constitutional Act);
2. *Staatsgrundgesetz* : Body of 1945 Constitutional Act, TAP MPR, and Country Order Convention;
3. *Formell Gesetz* : Act;
4. *Verordnung & Autonome Satzung* : hierarchically started from Government Regulation until Major or Regent Decision.<sup>4</sup>

Based on the theory above, it could be seen that Act cannot be cheated by rule in lower level such as Government Regulation, so related with giving remission to convicted criminal of drug crimes who treated not same with other convicted criminal from different crimes as regulated in Government regulation Number 99 Year 2012 about second changing on Government Regulation Number 32 Year 1999 about Terms and Order of Implementation of Conceptual Citizen Rights Article 34A subsection (2) in the implementation is not valid because contrast with Act Number 12 Year 1995 about Conceptual.

If the terms of giving remission wanted to be tightened to convicted criminal of drugs crime, so the norm of tightening the term of giving remission to convicted criminal of drug crime should be regulated in laws and regulations of Conceptual not in Government Regulation.

## Conclusion

In Indonesia, before the existing of Act of Conceptual, toward convicted criminal *Gestichtenreglement* (Jail Regulation), Ordinance December 10 1917, Stbl. 1917 No.708, then released Act Number 12 Year 1995 about Conceptual which one of the articles (Article 14) managed about remission, after released Government Regulation Number 32 Year 1999 about Conditions and Order of Implementation of Conceptual Guidance

<sup>1</sup>Hans Kelsen, *Pure Theory of Law*, (University of California Press, 1978). Diterjemahkan oleh Somardi, Penerbit : Rimdi Press, 1995), hal 126-137.

<sup>2</sup>Ibid.

<sup>3</sup>Maria Farida Indrati Soeprapto, *Ilmu Perundang-undangan. Dasar-dasar dan Pembentukannya*, (Yogyakarta: Kanisius, 1998), hal. 27.

<sup>4</sup>A. Hamid S. Attamimi, *Hukum Tentang Peraturan Perundang-undangan dan Peraturan Kebijakan (Hukum Tata Pengaturan)*, (Jakarta: Fakultas Hukum UI, 1993), hal. 312.

Citizen Rights, in the same year released Decision of president Number 174 Year 1999 about remission, and then released Government Decision Number 1999 Year 2012 about second change on PP Number 32 Year 1999, in Article 34A subsection (2) stated that remission only valid toward convicted criminal of drugs crime, at least 5 (five) years.

In Act of Conceptual Number 2 Year 1995 in Article 14 letter (i) remission is given to all criminal action agent every august 17, but in Regulation of Government Number 99 Year 2012 Article 34A subsection (2) not all convicted criminal have same rights to get remission so here is a norm conflict between Conceptual Act with Government Regulation below, if the remission condition tightened should be regulated in Act not in Government Regulation.

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