



## Reconstruction of the moratory of the provision of remissions against drug criminal as additional punishment in a justice value-based penal system

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### Abstract

The purpose of this study is to examine and analyze the legal construction of a moratorium on granting remissions to narcotics convicts as additional punishment in the current criminal system that is not yet based on justice values; This research is a qualitative-type of research, with sociological juridical approach that is descriptive analysis which relies on Primary data obtained in the field, and analyzed using the Pancasila Justice Theory. The moratorium on granting remissions is not an additional penalty imposed by a judge but is a policy of the Correctional Institution. The weakness of the moratorium on granting remissions to narcotics convicts based on paragraph (1) letter (a) in Article 34A of Government Regulation Number 99 of 2012 is not effective and creates legal uncertainty because there is no guarantee that the willingness to cooperate will be granted, therefore, Article 34A paragraph (1) letter a Government Regulation Number 99 of 2012 which reads that he is willing to cooperate with law enforcement to help dismantle the criminal case he has committed, must be reconstructed with the sound of the phrase: no court decision which has permanent legal force revoke their right to get remission.

**Keywords:** reconstruction, moratorium, remission, narcotics, criminalization

### Introduction

The remission moratorium for narcotics convicts is not an additional punishment such as in the form of revocation of political rights or the right to be elected as state officials in corruption crimes or which is usually imposed on corruption convicts. remission, either while serving a temporary sentence or revoking it for a certain time or revoking rights that can be changed again, the moratorium on remission in Indonesia is based on the mandate of PP 99/2012 and other related regulations, prisons determine whether narcotics convicts will be given remission while serving their temporary sentence or must The moratorium is based on a judicial decision that has permanent legal force, even though there is no order in its decision that states that the sentence is subject to additional punishment in the form of revocation of the right to obtain remission as long as the convict has not expressed his willingness to become a Justice Collaborator mean that the remission moratorium is not an additional punishment, even though it is, because narcotics convicts who receive a remission moratorium will serve a much longer period of time compared to convicts who receive remission, even though the sentence imposed by the judge is the same (Onyeka, 2021).

The lifting of the moratorium on granting remissions required that the convict be willing to become a Justice Collaborator, thus the moratorium on remission in question, is not only a form of regulation tightening but can also be interpreted as an additional punishment, in the form of a moratorium on remission, which is not contained in the court's decision (Susanto, 2010). The requirements to become a Justice Collaborator who are required to receive remission need to be studied further, because it is not appropriate for an additional criminal to be imposed by an institution outside the judiciary, such as prisons which

increase the criminal period through a moratorium on remissions, and it is also inappropriate if the willingness narcotics convicts to become Justice Collaborators are used as an excuse to lift the remission moratorium due to their willingness to become Justice Collaborators should be in the proceedings in the judicial process, both from the Police Investigator; The Public Prosecutor (JPU) as well as during the trial process in the Court, not when serving a sentence in the Correctional Institution. Especially in narcotics crimes, the determination of willingness to become a Justice Collaborator should occur and be determined while the defendant is still being examined by the investigator, if in the investigation process after the investigator has offered the defendant to become a Justice Collaborator given enough time by the investigator to consider whether he is willing or not, then if the defendant refuses to become a Justice Collaborator, then at that time it is also determined that the defendant is not a Justice Collaborator in the Dossier of the Examination Procedure, and when the Public Prosecutor conducts a prosecution in Court, one of the demands is to impose an additional penalty in the form of revocation of the right to get remission instead of a moratorium. The importance of the accused of narcotics crime being a Justice Collaborator since the investigation process is because this is deemed to be more effective than just submitting a willingness after a long time inhabiting the Narcotics Prison. The eradication of narcotics crimes is different from handling other criminal acts, the eradication of narcotics crimes requires speed of action from the investigators, the investigator's delay in uncovering the circulation of narcotics, not only can potentially give the dealers and dealers enough time to flee but there will be more narcotics circulation in the community, because as long as it is suspected or the suspect is being hunted by

investigators, the circulation of narcotics by the suspect or convict will automatically expand because by circulating and selling the narcotics the suspect or convict will get capital and provisions during his escape, the implication of which is that the suspect or the suspect will escape the pursuit of investigators.

Thus the defendant's willingness to become a Justice Collaborator, the target is not only to arrest a narcotics network, but also to stop the circulation of narcotics in order to avoid the fall of more narcotics victims (Maria, 2020), narcotics convicts who have just submitted their willingness to become Justice Collaborators after serving a crime not since the convict was arrested and being made a suspect, is ineffective because it has implications for the wider distribution and network of narcotics circulation, and results in more narcotics victims.

This problem is what urges the author to study it further in a research with the main problem as follows:

1. What are the weaknesses of the legal construction of the moratorium on granting remissions to narcotics convicts as an additional punishment?
2. How is the reconstruction of the moratorium on granting remissions to narcotics convicts as an additional punishment in the penal system based on the value of Justice?

### Method of Research

The research paradigm used in this research is the Constructivism Paradigm, which is a theoretical approach to communication. The research conducted by the author is more aimed at the legal approach and the case approach. The research will be conducted using sociological or empirical legal research methods (Amiruddin & Zainal, 2004). The empirical juridical method in this study reviews and sees and analyzes the problems that become the object of research (Pratama, 2020), which is the Reconstruction Of The Moratory Of The Provision Of Remissions Against Drug Criminal As Additional Punishment In A Justice Value-Based Penal System.

### Research Result and Discussion

#### 1. Weaknesses of The Legal Construction of The Moratorium on Granting Remissions To Narcotics Convicts As An Additional Punishment

The moratorium or tightening policy on granting remissions and parole issued by the Ministry of Law and Human Rights has become controversial among the government and parliamentarians. This policy specifically issued by the government is intended for prisoners of certain cases, namely Corruption, Terrorism, and Narcotics. Regardless of the motive behind the tightening of the granting of remissions and parole, it is important to look at the policy slices which of course will be related to the protection of human rights.

Philosophically speaking, the purpose of imprisonment, besides causing pain to the convict due to the loss of freedom of movement, is (also aimed at) to guide the convict to repentance, educating him so that he becomes a useful member of the society. In short, this goal is referred to as Correctional. Therefore, the Correctional Policy that was developed shows a commitment to changing the conditions of the convicts, through the process of fostering and treating them very humanely, through the protection of the rights of the convicts. Correctional functions prepare

Correctional Inmates to be able to integrate in a healthy manner with the society so that they can play their role again as free and responsible members of society. This commitment is emphasized in Article 5 of the Correctional Law, that the correctional development system is carried out based on the principles of protection, equality of treatment and service, education, guidance, respect for human dignity, loss of independence is the only suffering, and guaranteed the right to keep in touch with family, friends, and other people. In line with the description above, the legal substance of the moratorium or tightening of granting remissions to narcotics convicts has weaknesses and is not in line with the objectives of the correctional itself.

Often the emphasis on law enforcement is always placed on the aspect of order alone. This may be due to the fact that law is identified with the enforcement of legislation, an assumption like this is very wrong because the law must be seen in one system, which creates certain interactions in various elements of the legal system that do not only refer to the rules (codes of rules) and regulations but covers a broad field, including structures, institutions, and processes that fill them and are related to the law that lives in society (living law) and legal culture (legal culture).

In the context of law enforcement, legal culture is a very important element. Legal culture includes the views, habits, and behavior of the community regarding the values and expectations of the applicable legal system, in other words, legal culture is the climate of social thinking about how the law is applied, violated, or implemented. Every society, state, and community has its own legal culture which is influenced by cultural values that live in the community, whether it is ethnicity, custom, or religious influence (Wahyu, 2018).

Seeing this reality, law enforcers should not only prioritize formal legal aspects. Law enforcement which is only based on the substance of formal legal norms contained in the law (Positive/Textbook Law), will tend to injure people's sense of justice. The emphasis should also be on the living law. Furthermore, law enforcers must pay attention to the legal culture (legal culture), to understand the attitudes, beliefs, values and hopes, and thoughts of the community towards the law in the applicable legal system.

Theoretically, the purpose of law includes three things, namely justice, certainty, and expediency. Justice can be said to be the main goal that is universal. Justice is indeed an abstract concept, however, the concept of justice contains the meaning of protecting rights, equality, and position before the law, as well as the principle of proportionality between individual interests and social interests. The abstract nature of justice is because justice cannot always be born from rationality, but is also determined by the social atmosphere which is influenced by other values and norms in society. Therefore, justice also has a dynamic nature which sometimes cannot be accommodated in positive law.

From the above conception, it can be seen that law enforcement based on the value of justice must include the following matters:

- a. Human Rights Protection;
- b. Equality and position before the law; and
- c. The principle of proportionality between individual interests and social interests.

The rapid development of people's lives as a result of the process of implementing development in all areas of life,

such as social, political, economic, security, and cultural have brought negative impacts in the form of increasing the quality and quantity of various kinds of crimes that are very detrimental and disturbing to the community and also difficult to cure.

Some extraordinary crimes in Indonesia and many other countries are corruption, narcotics crime, and terrorism, which are increasingly threatening and disturbing the whole community, becoming a very serious problem and can be said to be an entrenched crime. Various efforts have been made to overcome these crimes which are set forth in various laws and regulations. However, the eradication of these crimes did not go well apart from law enforcement as well as in the final stages of the criminal system namely the coaching system in the penitentiary system which was less effective.

The state has the right and responsibility to correct every lawbreaker who commits a criminal act through a coaching process. In order for the development to run well, one of the ways to do this is by giving remissions to prisoners which is one of the rights of prisoners, including convicts for special crimes.

Prison remission rights as stated in Article 14 Paragraph (1) letter i of Law Number 12 of 1995 concerning Corrections. Every convict of a special crime who wants his rights to be fulfilled must meet substantive and administrative requirements. However, these conditions are tightened in obtaining them, the conditions are regulated in Article 34 of Government Regulation Number 99 of 2012 concerning the Second Amendment to Government Regulation Number 32 of 1999 concerning Conditions and Procedures for the Implementation of the Rights of Correctional Inmates.

The tightening of conditions for granting remissions to convicts for special crimes has caused extraordinary unrest from convicts and some families of convicts, especially those who objected to the issuance of Government Regulation No. 99 of 2012, as this regulation is not retroactive. Giving remissions to prisoners in the Correctional Institution is the beginning of achieving a goal of the correctional system and as one of the motivations for prisoners to develop themselves. If the prisoner has carried out his obligations properly, then he or she is entitled to get remission as long as the requirements have been met.

To realize a law that is based on the value of justice, it is necessary to reform the law enforcers themselves, both institutional reforms and reforms from individual law enforcers. The ideal institutional reform must refer to three main orientations, namely the principle of democracy, the rule of law, and human rights.

The principle of democratic oversight emphasizes that in carrying out its roles and functions, law enforcement must uphold the principles of transparency, accountability, Responsiveness, control of democratic institutions that represent the public interest, and open up public participation. In terms of reforming the police institution, for example, referring to the concept of democratic policing, at least police reform consists of six interdependent pillars, namely; internal control of the security institution (police), government/executive control, parliamentary oversight, judicial oversight, and civil society oversight.

The Reform of law enforcement institutions must be aimed at strengthening the rule of law. The principle of the rule of law requires a commitment to human rights norms. Institutional reform based on the rule of law emphasizes that

a law enforcer must not only enforce the law based on applicable positive legal provisions but also must be sensitive to the principles of justice and humanity.

The Reform of law enforcement institutions in an era where democracy is recognized as its fundamental foundation cannot ignore the applicable human rights standards, both as a benchmark for accountability to external parties, as well as as a guide for the internal governance of institutions. The Human rights standards in question are all the rules and provisions contained in various international human rights instruments, especially those that are legally binding for countries that have ratified them.

Furthermore, reform of law enforcement institutions must pay attention to the importance of integrating the criminal justice system within the framework of law enforcement. The practice of judicial mafia is always followed by the abuse of authority (corruption) by law enforcement officers. Meanwhile, the eradication of corruption tends to neglect the relationship between the criminal justice system, where the agenda for eradicating corruption tends to focus on large cases and on corruption in the police, prosecutors, and judiciary (courts). The lack of budget support provided by the state is often used and used as a justification by law enforcement officials to seek illegal sources of funding for personal gain and result in discrimination against the public.

## **2. Reconstruction of The Moratorium on Granting Remissions To Narcotics Convicts As An Additional Punishment In The Penal System Based On The Value Of Justice**

The policy of not giving remissions or tightening the granting of remissions to convicts of special crimes, namely corruption, terrorism, narcotics and narcotics precursors, psychotropics, other transnational organized crimes, in fact, has contradicted the concept of penitentiary itself or in other words, the policy seems to restore the system again into the prison system. Remission is an instrument of the concept of correctional itself which aims to stimulate or motivate prisoners to always do good. So with the policy of not giving remissions to perpetrators of special crimes that have been mentioned in Government Regulation no. 99 of 2012 is contrary to the philosophy of punishment, namely preventive, rehabilitative and social reintegration, all of which are included in the concept of correctional (Agus, 2016).

The embodiment of a criminal sanction can be seen as a process of realizing a policy through three stages, namely the stage of determining the criminal by the legislator. The stage of giving or imposing a crime by the Court. The implementation stage is carried out by the criminal executor, namely the criminal execution apparatus. The series is seen as a unified process, and at this stage of legislative policy, it is hoped that there will be a guideline for the following stages. But at this stage there are many problems, especially the number of laws that contain types of criminal sanctions as the main sanctions, therefore, a legislator must understand criminal and sentencing issues.

Initially, the moratorium was understood as a termination, then it was replaced by the term tightening. However, they both have different foundations and implications. The moratorium on remission of special convicts, namely convicts of special crimes, has implications for controversial policies, even to the point of designing the roll-out of the right of interpolation. The regulation regarding the granting

of prisoners' rights is regulated in Law no. 12 of 1995 concerning Corrections and the regulation of conditions and tightening of the granting of remission rights was initially regulated in Government Regulation No. 28 of 2006 and is now regulated in Government Regulation no. 99 of 2012 the second amendment to Government Regulation no. 32 of 1999.

The term moratorium surfaced and became public attention when the Minister of Law and Human Rights issued a Decree numbered M.HH-07.PK.01.05.04 regarding tightening remissions on November 16 of the year 2011 which canceled the Decree of the Minister of Law and Human Rights on Granting Remission dated October 30, 2011. In addition, prior to the enactment of the Decree of the Minister of Justice dated November 16, 2011, the Director-General of Corrections issued a Circular regarding the Moratorium on granting remissions to prisoners. The debate over the existence of the decrees and circulars referred to has given rise to the term remission moratorium policy.

Regulation of the Moratorium on Granting Remissions due to the Government Regulation no. 28 of 2006 concerning the Terms and Procedures for the Implementation of the Rights of Correctional Inmates, has made the existence of Government Regulation Number 32 of 1999 concerning the requirements and procedures for the Implementation of the Rights of Correctional Inmates in need to be revised and the first amendment was made through Government Regulation no. 28 of 2006 with the consideration of adjusting to legal developments and a sense of justice in society, especially in relation to prisoners who commit criminal acts that result in great losses to the state or society or many victims or cause panic, anxiety, or extraordinary fear to the public. Therefore, the government regulation no. 28 of 2006 stipulates a moratorium or tightening on extraordinary crimes as an answer to the manifestation of a sense of justice in society. Article 34 Government Regulation no. 28 of 2006, stipulates the conditions for obtaining remission, namely that every convict and child that has a law problem has the right to get remission, and remission, as referred to in paragraph (1), is given to a convict and underaged convict if he or she is of good behavior and has served a criminal period of more than 6 (six) month. Then for convicts who are convicted for committing criminal acts of terrorism, narcotics and psychotropic substances, corruption, crimes against state security and serious human rights crimes, and other transnational organized crimes, are given remission if they meet the requirements of good behavior, and have undergone 1/3 (one third) of the period. Finally, the remission as referred to in paragraph (1) is given to convicts if they meet the requirements for carrying out actions that assist prison activities (Sujasmin, 2018).

Based on the description above, the stipulation of Government Regulation no. 28 of 2006 concerning the remission moratorium policy is a policy to tighten the rights of convicts to reduce their criminal period by setting strict conditions and procedures and set forth in the laws and regulations regarding the granting of such remissions, especially to convicts of extraordinary crimes. Normatively and theoretically, the remission moratorium policy for convicts of extraordinary crimes can be analyzed that the criminal law policy is in the context of law enforcement for a crime.

Then the regulation of the moratorium on the granting of

remissions in view of the government regulation no. 99 of 2012 concerning Terms and Procedures for Implementing the Rights of Prisoners, the Policy of the Minister of Law and Human Rights in implementing a moratorium policy on granting remissions is viewed from the spirit of eradicating organized crimes and deserves appreciation. Law number 28 of the year 2006 has not been able to overcome the eradication of extraordinary crimes, an extraordinary crime and the consequences of these actions resulted in huge losses to the state and this was considered to have injured the sense of justice in the community and demanded that the perpetrators be punished as severely as possible and commensurate with their actions. Based on these considerations, in 2011, it became a hot discussion in the community, especially legal experts to propose the Ministry of Law and Human Rights revise Government Regulation no. 28 years and to be replaced by Government Regulation no. 99 of 2012 concerning the second amendment to Government Regulation no. 32 of 1999 concerning the Terms and Procedures for the Implementation of the Rights of Correctional Inmates, the Government Regulation no. 99 of 2012 is considered to answer the sense of justice in the community, and the community hopes that the regulation can provide a deterrent effect to every prisoner who commits a special crime.

A number of people think that the issuance of Government Regulation No. 99 of 2012 is considered to have violated the rights of prisoners. This regulation is used by the government to tighten prisoners' rights, such as granting remission, parole, assimilation, right to leave before being released, and others. This government regulation only applies to certain prisoners, such as drugs, terrorism, and corruption. Of course, the prisoners were not satisfied with the regulation, they considered the issuance of Government Regulation no. 99 of 2012 as a nightmare for them because of the different treatment between general crimes and special crimes that caused discrimination of rights which made them depressed, as after several years since the issuance of the regulation there have been many polemics that occurred in the Correctional Institution.

Correct law enforcement is fair and just law enforcement, and fair law enforcement is law enforcement that provides great protection and benefits for everyone and justice seekers themselves, the extent to which understanding the meaning and implementation of law enforcement will determine in real terms. Image of law in society. A complete, good and perfect set of principles and rules does not mean much to society if it is not applied or enforced correctly and fairly.

Prison remission rights as stated in Article 14 Paragraph (1) letter i of Law Number 12 of 1995 concerning Corrections states that every convict of a special crime who wants his rights to be fulfilled must meet substantive and administrative requirements. However, these conditions are tightened in obtaining them, the conditions are regulated in Article 34 of Government Regulation Number 99 of 2012 concerning the Second Amendment to Government Regulation Number 32 of 1999 concerning Conditions and Procedures for the Implementation of the Rights of Correctional Inmates.

The tightening of conditions for granting remissions to convicts for special crimes has caused extraordinary unrest from convicts and some families of convicts, especially those who object to the issuance of Government Regulation

No. 99 of 2012, and this regulation is not retroactive. Giving remissions to prisoners in the Correctional Institution is the beginning of achieving a goal of the correctional system and as one of the motivations for prisoners to develop themselves. If the prisoner has carried out his obligations properly, then he is entitled to get remission as long as the requirements have been met.

Based on the description of the theoretical and empirical analysis and discussion, it can be concluded that the moratorium on granting remissions to narcotics convicts in a legal structure does not describe a good integrated criminal justice system (Friedman, 2001). Legally, the substance of the moratorium on granting remissions to narcotics convicts is not based on and does not have the authority to provide additional penalties in the form of revocation of the right to obtain remission for narcotics convicts, according to legal culture, the moratorium on granting remissions to narcotics convicts is contrary to the values that live in society, especially the values of Pancasila (Pinasang, 2012).

Reconstruction of Article 34A of Government Regulation of the Republic of Indonesia Number 99 of 2012 concerning the Second Amendment to Government Regulation Number 32 of 1999 concerning Terms and Procedures for the Implementation of the Rights of Correctional Inmates is based on the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, and the laws and regulations that higher degree than the Government Regulation of the Republic of Indonesia Number 99 of 2012.

The theoretical implication of the reconstruction of Article 34A of the Republic of Indonesia Government Regulation Number 99 of 2012, the authority to revoke the right to obtain remission for narcotics convicts is the authority of judges, whether judges of the District Court, High Court, or Supreme Court through additional criminal decisions of revocation of certain rights.

The practical implications for the reconstruction of Article 34A of the Indonesian Government Regulation Number 99 of 2012 are as follows

- a. The Criminal Procedure Code must be reformulated immediately, especially in relation to Justice Collaborators who have not been regulated in the Indonesian Criminal Procedure Code.
- b. The Criminal Code must be reformulated immediately, especially in relation to the additional penalty of revocation of the right to obtain remission.
- c. The laws and regulations related to the Moratorium on Granting Remissions must immediately reformulate additional penalties related to the revocation of the right to obtain remissions.

## Conclusion

1. The weakness of the moratorium on granting remissions to narcotics convicts lies in paragraph (1) letter (a) in Article 34A of Government Regulation Number 99 of 2012 as it is not effective and can cause legal uncertainty, because the willingness to cooperate with law enforcement to help dismantle criminal cases that they have committed does not guarantee that the investigation and/or prosecution will be granted. Thus, if it is rejected, the convict will not get remission wherein a legal structure, the Correctional Institution is not an institution that can impose a crime, according to legal culture, the moratorium on granting remissions is

contrary to the value of Pancasila justice as the culture of the Indonesian nation.

2. Article 34A paragraph (1) letter a Government Regulation Number 99 of 2012 which reads that he is willing to cooperate with law enforcers to help dismantle the criminal case he has committed, must be reconstructed with the sound of the phrase: there is no court decision that has a permanent legal force that revokes their right to get remission.

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