

THE URGENCY OF CLEMENCY AS PART OF THE DEFENDANT'S DEFENSE IN COURT PROCEEDINGS

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Abstrak

Keywords:

Clemency,
Defendant's Defense,
Due Process of Law,
Substantive Justice,
Sentencing.

Clemency is a form of non-juridical defense submitted by a defendant by emphasizing humanitarian, moral, and social aspects, which aims for the judge to consider the defendant's concrete condition in determining the sentence, rather than to refute the elements of the criminal offense charged. In Indonesian criminal court practice, clemency is generally submitted at the final stage of trial, either as part of a plea (pledoi) or as a separate request, based on reasons such as health condition, age, family dependents, socio-economic background, as well as the defendant's cooperative attitude and remorse. Although not explicitly regulated in the Criminal Procedure Code (KUHAP), clemency is factually recognized and considered by judges as a mitigating circumstance, so it can be viewed as a living legal institution within the criminal justice system. The implicit normative basis of clemency is reflected in Article 197 paragraph (1) letter f of KUHAP, which requires judges to include mitigating and aggravating circumstances of the defendant in the judgment. The urgency of clemency is also related to the principle of due process of law and constitutional guarantees of the right to defense as regulated in Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia, and it plays an important role in realizing substantive justice in sentencing. However, because it does not yet have clear assessment standards, the application of clemency still depends on judicial discretion and has the potential to cause sentencing disparity. Therefore, strengthening regulations on clemency becomes an urgent need to ensure sentencing that is fair, proportional, and humane.

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INTRODUCTION

Indonesia's criminal justice system is administered within the framework of a state based on law that upholds the supremacy of law and the protection of human rights as fundamental values in the exercise of judicial authority. The principle of a rule-of-law state, as affirmed in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, requires that every law enforcement process must not only be oriented toward legal certainty but must also be implemented fairly, rationally, and based on substantive justice. Therefore, the law must not be applied mechanistically without considering the humanitarian values inherent in every individual facing the law.

In the context of criminal justice, the defendant cannot be regarded merely as an object of law enforcement who must be punished, but as a legal subject who possesses dignity and fundamental rights that must be respected and protected. This view aligns with the development of modern criminal law, which places human beings at the center of the justice system, so that criminal proceedings are aimed not only at enforcing legal norms but also at protecting human rights. According to Yahya Deramayati and Wicaksana (2021), the defendant's right to defense is comprehensively regulated in Articles 50 through 68 of KUHAP, covering various fundamental aspects such as the right to be promptly examined and tried; the right to clearly know what is suspected and charged in a language that is understood; the right to freely provide information to investigators or judges; the right to receive legal assistance either chosen independently or appointed free of charge; the right to contact family and diplomatic representatives for foreign defendants; and the right to present witnesses and experts in the defendant's favor, as well as the right to claim compensation and rehabilitation. The fulfillment of these rights constitutes a concrete manifestation of the principle of equality before the law and the implementation of human rights to be treated equally before the law. The effective implementation of such rights also depends greatly on the role of advocates as competent and ethical defenders.

One of the most fundamental rights possessed by a defendant is the right to defend oneself before a court. This right serves as a crucial instrument to ensure balance between the authority of the state to prosecute and punish and the individual's right to protect their legal interests. Without effective defense rights, the criminal trial process can become unjust and contrary to the principles of a rule-of-law state. In this context, Nanis (2022) emphasizes that advocates, as law enforcers, play a vital role in providing legal assistance to people or clients facing legal problems. Their existence is highly needed because the legal profession carries noble duties, obligations, and responsibilities toward oneself, the client, the court, and God, as well as for the upholding of justice and truth. Advocates must uphold their professional oath not to falsify anything inside or outside the court, not to knowingly encourage false lawsuits or demands without legal basis, and to dedicate their best knowledge and wisdom in their duties with loyalty to the client, the court, and God. Thus, the defense submitted by advocates should not become mere procedural formality but must truly serve as an instrument for protecting the defendant's human rights within the criminal justice system.

The defendant's defense rights are an integral part of the due process of law principle, which requires that everyone facing the law be given an equal and balanced opportunity to present their defense before the judge issues a decision. This principle implies that trials must be conducted transparently, objectively, and impartially, while

providing sufficient space for the defendant to be fully heard. Aripin et al. (2024) reinforce this argument by emphasizing the importance of the principle of *in dubio pro reo* in Indonesia's criminal justice system, which literally means "in doubt, favor the defendant." This principle states that if there is doubt regarding guilt proven in court, the benefit of that doubt must be given to the defendant by declaring them not guilty. This aligns with the presumption of innocence, where a person is considered innocent until proven legally and convincingly guilty by the court through sufficient evidence. Thus, the principles of *in dubio pro reo* and presumption of innocence are considered fundamental human rights principles in criminal law because they protect individuals from abuse of state power, safeguard individual freedom, and encourage accurate and fair trials. Indonesia's evidentiary system uses the negative statutory system (*negatief wettelijk*) as regulated in Article 183 KUHAP, which states: "A judge may not impose a criminal sentence upon a person unless, based on at least two valid pieces of evidence, the judge gains conviction that a criminal act truly occurred and that the defendant is guilty of committing it." Therefore, in this system, the judge must apply the principle of *in dubio pro reo* when making decisions: if there is reasonable doubt about the defendant's guilt, then the decision must benefit the defendant. In this context, the defense presented by advocates becomes crucial in building reasonable doubt against the public prosecutor's charges.

In criminal court practice, the defendant's defense is not only carried out through juridical arguments that aim to refute charges or the prosecutor's demands. In many cases, defense is also presented in the form of requests for leniency based on humanitarian reasons. Such defense demonstrates that defendants do not always attempt to deny their acts, but rather request that sentencing be proportional by considering the concrete conditions surrounding them. Nanis (2022), in research at the Class 1A District Court of Kupang, explains that judges in rendering decisions often use key indicators such as the defendant's good behavior during the trial, the defendant's illness, the presence of letters requesting leniency from the defendant or their counsel, and the defense memorandum from advocates. Such reasons are often used by judges to reduce punishment, although judges do not always accept the entire defense note; rather, some parts may be accepted and others rejected based on legal considerations and facts revealed during trial. Further, it is explained that the plea (*pledoi*) is a right given to a defendant prosecuted by the public prosecutor for alleged criminal acts, where the law provides an opportunity for the defendant directly or through their legal counsel to present defense arguments to prove innocence, negligence, coercion, or other reasons leading to the alleged crime, with the aim of reconstructing and positioning the legal acts and their consequences attributed to the defendant. The importance of the plea is strengthened by Article 182 paragraph (1) KUHAP, which states that after examination is completed, the prosecutor submits a criminal charge, and then the defendant and/or counsel submits a defense, which may be responded to by the prosecutor, with the defendant or counsel always having the final turn. Thus, the plea is a key element in ensuring justice by allowing the defendant to present their version of events and provide supporting evidence or arguments.

This non-juridical defense form is known as clemency. Clemency generally contains a request for the judge to consider the defendant's personal condition, social and economic background, cooperative attitude during trial, remorse for the acts committed, and the impact of sentencing on the defendant's life and family. Thus,

clemency functions as a means to bring humanitarian dimensions into the sentencing process.

Although clemency is frequently submitted in court practice, it has not received explicit regulation in the Criminal Procedure Code (KUHAP). The absence of explicit normative regulation creates debate about the legal standing of clemency particularly whether clemency has binding legal force or is only a moral consideration that is facultative for judges. Based on these conditions, the study on the urgency of clemency as part of the defendant's defense becomes important. This study is not only intended to clarify the legal standing of clemency within the criminal procedure system but also to encourage sentencing that is fair, proportional, and humane, aligned with due process of law principles and the objectives of punishment in a rule-of-law state based on substantive justice.

LITERATURE REVIEW

1. Conceptual Foundations of Clemency in Criminal Justice

Clemency is widely discussed in criminal justice literature as a humanitarian dimension within sentencing and judicial discretion. Etymologically derived from the word "clemency," it refers to mercy, compassion, and forgiveness. In criminal law, clemency is typically understood not as a mechanism to deny guilt or refute the elements of a charged offense, but as a request for mitigation grounded in moral, social, and humanitarian considerations. The central premise is that sentencing should not be purely technical or mechanistic; rather, it should account for the defendant's concrete circumstances as a human subject with dignity.

Scholars connect clemency to modern theories of punishment that move beyond purely retributive justice. Modern sentencing paradigms increasingly emphasize rehabilitation and resocialization, suggesting that punishment should contribute to reintegration rather than only retaliation. Clemency functions as a bridge between legal culpability and humane sentencing by enabling courts to examine personal factors such as health, age, family dependency, socio-economic background, remorse, and cooperation. In this sense, clemency aligns with individualization of punishment, a principle that requires sanctions to fit the offender as well as the offense.

In practice, clemency arguments often rely on contextual narratives: the defendant's life history, vulnerability, or future prospects. The literature suggests that this narrative dimension is not merely emotional persuasion but can provide relevant information for fair sentencing outcomes. At the same time, the legitimacy of clemency depends on procedural fairness: defendants must be heard, and judges must consider defenses objectively. Because clemency is often a non-judicial defense, it highlights the tension between written law and "living law," where courts acknowledge practices that are not explicitly codified but operate as recognized institutions. Therefore, clemency is not only a moral plea but also a legal phenomenon reflecting the evolving relationship between human rights, judicial discretion, and substantive justice.

2. Due Process of Law and the Defendant's Right to Defense

The right to defense is a foundational element of due process of law and a central guarantee within a rule-of-law state. Criminal procedure literature emphasizes that fairness in criminal trials requires balanced opportunities: the state may prosecute, but the defendant must have real procedural ability to challenge accusations and present defenses before a judgment is issued. This includes rights such as being informed of

charges, access to legal counsel, presenting witnesses, and receiving equal treatment before the law. In Indonesia, such guarantees are articulated through KUHAP provisions, as referenced in discussions on defense rights and fair trial principles.

A core doctrinal principle connected to due process is *in dubio pro reo*—“when in doubt, favor the defendant.” This principle works alongside the presumption of innocence and requires courts to resolve reasonable doubt in favor of the accused. The Indonesian evidentiary standard under Article 183 KUHAP also reflects this logic by requiring at least two valid forms of evidence and judicial conviction before sentencing. Due process literature argues that these principles protect individuals from arbitrary state power and ensure that criminal justice is not merely punitive but constitutionally accountable.

Within this framework, the defendant’s right to be heard is essential. Defense submissions must not be treated as formality; they must be meaningfully considered. Clemency, though categorized as non-judicial defense, remains part of the defendant’s right to defense because the law does not restrict defense to strictly legal argumentation. Literature highlights that defendants may defend themselves not only by denying guilt but also by requesting proportional sentencing based on humane reasoning. When courts disregard such submissions, it can undermine procedural justice and weaken public trust. Therefore, due process scholarship supports the view that clemency functions as a legitimate extension of defense rights, ensuring that punishment is imposed through processes that are both legally sound and human-rights oriented.

3. Judicial Discretion, Mitigating Factors, and Sentencing Individualization

Judicial discretion is a central mechanism in sentencing because not every case can be resolved through rigid application of statutory texts. Sentencing literature recognizes that judges must interpret law, weigh evidence, and balance values such as legal certainty, deterrence, rehabilitation, and proportionality. The principle of sentencing individualization emerges as a modern approach requiring punishment to reflect the offender’s personal circumstances and not solely the offense category. This principle emphasizes that justice is not achieved through uniformity alone but through appropriately tailored decisions that respect human dignity.

Mitigating factors are key tools for applying individualization. These include remorse, cooperation, health conditions, age, socio-economic hardship, family responsibilities, and the predicted impact of punishment on future rehabilitation. Clemency submissions commonly provide structured narratives of these factors. The literature notes that when courts consider mitigating factors transparently, sentencing becomes more humane and substantively just.

However, sentencing scholarship also highlights a major risk: without clear guidelines, judicial discretion may become inconsistent. Sentencing disparity can occur when similar cases receive significantly different punishments due to judges’ subjective interpretations of mitigating circumstances. This problem is particularly visible where clemency is not explicitly regulated, causing the weight of clemency arguments to vary widely across courts. Such disparity may undermine legal certainty and fairness, creating public perceptions of injustice.

Judicial reasoning requirements such as the obligation to record mitigating and aggravating circumstances in decisions can strengthen accountability. Yet the literature suggests that accountability is more effective when combined with standardized criteria that help judges assess mitigating factors consistently. Therefore, studies recommend

institutional reforms such as national sentencing guidelines, technical judicial regulations, or interpretive standards to balance discretion with consistency. Clemency becomes strategically significant here: it demonstrates how humanitarian reasoning can enrich sentencing, but also how regulation is needed to prevent clemency from being applied unevenly.

4. *Regulatory Urgency: Codifying Clemency and Strengthening Substantive Justice*

Legal reform literature often identifies “regulatory gaps” as a major challenge in criminal justice systems: practices may exist and be recognized in reality, yet lack explicit normative foundations, leading to uncertainty, inconsistency, and contested legitimacy. Clemency is a clear example of such a phenomenon in contexts where it is widely used in trials but not explicitly codified. The literature argues that when an institution operates informally, it depends heavily on individual judicial attitudes and may result in unequal outcomes across similar cases.

From a rule-of-law perspective, legal certainty and predictability are essential components of justice. If clemency is applied inconsistently, defendants may experience unequal treatment, advocates may have no stable framework for structuring non-judicial defenses, and the public may perceive sentencing outcomes as arbitrary. Sentencing disparity also threatens substantive justice, as it can produce punishments that are disproportionate to personal circumstances.

Substantive justice requires that legal outcomes reflect not only formal compliance with procedure but also the fairness and humanity of the resulting decision. Clemency supports substantive justice by integrating moral, social, and humanitarian considerations into sentencing. However, to maximize its value and minimize misuse, scholars recommend formal regulation that defines criteria, weighting, and evaluation standards for clemency-related mitigating factors. Such regulation should not eliminate judicial independence; rather, it should provide an objective framework that supports consistent discretion.

Policy recommendations frequently include (1) codifying clemency in criminal procedure reform, (2) issuing national sentencing guidelines, and (3) developing Supreme Court technical regulations to guide judicial reasoning. These measures can increase transparency and accountability, reduce sentencing disparity, and strengthen public trust. In this sense, the urgency of regulating clemency is not merely administrative; it is part of a broader modernization agenda to ensure criminal justice is fair, proportional, humane, and aligned with constitutional due process principles.

RESEARCH METHOD

The research method used is a qualitative method, namely analyzing data sourced from legal materials based on concepts, theories, statutory regulations, doctrines, legal principles, expert opinions, or the researcher’s own views

RESULT AND DISCUSSION

1. *The Concept and Legal Standing of Clemency in Criminal Law*

Etymologically, the term clemency comes from the word “clemency,” meaning generosity, compassion, or forgiveness. This meaning indicates that clemency is rooted in humanitarian values that place empathy and wisdom as part of decision-making. In criminal law, clemency is interpreted as a request for sentence mitigation submitted by the defendant or counsel based on humanitarian considerations. Clemency is not

directed at the aspect of proving the criminal offense, but rather at the sentencing stage.

Clemency places human beings as the primary subject in sentencing. Therefore, its existence becomes important to avoid rigid sentencing that is solely text-oriented. Unlike juridical defense that aims to deny the elements of the offense or the defendant's guilt, clemency acknowledges the existence of criminal conduct. However, this acknowledgment is accompanied by a request that the punishment be imposed proportionally and humanely. Therefore, clemency is not intended to eliminate criminal liability but to influence the weight of sentencing so that it matches the defendant's concrete condition.

In modern sentencing theory, punishment is no longer understood solely as retaliation (retributive justice). The paradigm has developed toward rehabilitation and resocialization. Modern sentencing also emphasizes the purpose of protecting society, where punishment is imposed not only to punish but also to prevent reoffending. Clemency plays an important role in this framework because it enables judges to adjust the sentence based on the offender's character, background, and potential for improvement. This aligns with Marc Ancel's social defense concept which seeks to preserve the rights of offenders as human beings even though they must pay for their crimes. Such a concept leads to systematic resocialization and "true judicial humanism" (Indah, 2014). This approach interprets that crime prevention and offender treatment must consider humanitarian dimensions in sentencing so that punishment is not merely a tool for punishment but also a means of guidance and restoration of offenders into society.

Through clemency, judges may apply the principle of sentencing individualization, namely imposing punishment tailored to the defendant's personal circumstances rather than merely based on the type of crime. This principle prevents substantive injustice that may arise from mechanistic application of law. Indah (2014) explains that sentencing individualization is a characteristic of modern criminal law, requiring that sanctions always consider the characteristics and circumstances of the offender, meaning punishment must fit the person, not only the act. This principle requires judges to consider factors such as personal condition, socio-economic background, cooperative attitude, remorse, and the sentencing impact on the defendant and family, so that sentencing fulfills not only formal justice but also substantive justice considering the defendant's humanity.

2. Clemency as Part of the Defendant's Right to Defense

The defendant's right to defense is one of the fundamental elements of a fair criminal justice system and is guaranteed in KUHAP as part of the fair trial principle. Article 182 paragraph (1) KUHAP states that after examination is completed, the public prosecutor submits criminal demands, and afterward the defendant and/or counsel may submit a defense before the judge issues a ruling. This shows that defense is a procedural right that cannot be ignored.

The provision does not restrict the form or substance of defense; thus, non-juridical defense such as clemency is included within the defendant's defense rights. The principle of the right to be heard requires judges to listen objectively and proportionally to all defenses submitted. Ignoring clemency without adequate consideration may be seen as violating due process of law because the defendant is not fully heard. Therefore, clemency must be understood as a legitimate part of the defendant's defense rights in criminal proceedings.

In practice, clemency becomes important because it relates to sentencing individualization. Juita et al. (2020) explain that sentencing individualization includes: (1) criminal responsibility is personal (personal principle), (2) punishment is imposed only on those who are at fault (culpability principle), and (3) punishment must be adjusted to the offender's character and condition, requiring flexibility for judges in selecting sanctions and allowing modification in implementation. This third characteristic makes clemency important because through it, judges obtain personal information that may not appear in evidence of offense elements, enabling sentencing that fulfills not only legal certainty but also substantive justice. In this sense, clemency becomes a bridge between formal justice and substantive justice oriented toward proportional and humane sentencing.

3. Clemency in Judicial Considerations

Judges have freedom in imposing punishment as regulated in Law Number 48 of 2009 concerning Judicial Power. However, this freedom is not absolute and must be used to explore, follow, and understand values of justice living in society. Article 197 paragraph (1) letter f KUHAP requires judges to include mitigating and aggravating circumstances in judgments, implicitly recognizing the relevance of clemency because clemency contains mitigating reasons. In practice, judges often consider personal conditions, cooperative attitude, and social impacts. This shows clemency has become part of sentencing practice even though not explicitly regulated.

However, due to the absence of clear normative guidelines, clemency application depends on subjectivity and discretion of each judge, which can lead to sentencing disparity and undermine legal certainty. Indah (2014) found that the absence of sentencing patterns can produce disparities, and similar conditions can occur in clemency because there are no clear parameters about what factors qualify as mitigation, how much weight each factor carries, and how these factors affect sentencing. As a result, similar cases may receive significantly different sentences due to differences in judges' subjective views on clemency.

4. The Urgency of Regulating Clemency

The absence of explicit regulation of clemency in KUHAP creates legal uncertainty in criminal court practice. Differences in judges' assessments of clemency can create perceptions of injustice. Therefore, strengthening the regulation of clemency is needed through a national sentencing guideline or reformulation of KUHAP. Such regulation is not intended to limit judicial freedom but to provide an objective framework for assessing clemency. The urgency is increasingly pressing because court practice shows inconsistency in considering mitigating factors.

Regulation is also needed to ensure consistent application of sentencing individualization across courts and to provide legal certainty for advocates in preparing defense strategies. Juita et al. (2020) argue that applying sentencing individualization requires a humanistic approach that can raise offender awareness. In this context, clemency becomes essential to bring humanitarian dimensions into sentencing by allowing judges to evaluate personal background, motivation, remorse, cooperation, and sentencing impact. Aripin et al. (2024) emphasize that advocates must be careful and thorough in drafting pleadings; clear clemency guidelines would provide stronger references for what mitigating factors may be submitted, how arguments should be structured, and what evidence should support the clemency request.

With clear guidelines, clemency can be applied consistently and measurably,

strengthening judicial accountability. Guidelines may include objective criteria such as severity of crime, defendant's role, harm caused and recovery efforts, socio-economic condition, criminal history, remorse, cooperation, and impacts on family, as well as other conditions relevant to substantive justice. Clear regulation is expected to produce sentencing that is fair, proportional, and humane and increase public trust in judicial institutions as part of criminal justice reform toward substantive justice, human rights protection, and integrative sentencing goals.

CONCLUSION

Based on the discussion above, it can be concluded that clemency is a form of non-judicial defense that has important urgency in Indonesia's criminal justice system as an implementation of sentencing individualization principles and protection of the defendant's human rights. Conceptually, clemency is rooted in humanitarian values aligned with modern sentencing paradigms, which are no longer solely retributive but also rehabilitative and resocializing. Clemency is an integral part of the defendant's defense rights as guaranteed in Article 182 paragraph (1) KUHAP, and although not explicitly regulated, Article 197 paragraph (1) letter f KUHAP implicitly acknowledges its relevance by requiring judges to include mitigating and aggravating circumstances in judgments. However, the absence of explicit normative regulation causes legal uncertainty and sentencing disparity because clemency depends on judges' subjectivity and discretion. Therefore, strengthening regulation through national sentencing guidelines or KUHAP reform is needed to realize sentencing that is fair, proportional, and humane in accordance with due process of law and substantive justice.

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