

The Position of Presidential Abolition in Indonesian Law: Case Study of Tom Lembong from the Perspective of Maqashid Syari'ah and Legal Benefits

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ABSTRACT

This study aims to deeply analyze the status, function, and legal implications of the President of the Republic of Indonesia's right to abolish, particularly in the context of criminal and constitutional law. Abolition, as an instrument of pardon, amnesty, and abolition (GNA), enshrined in Article 14 of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945), is the prerogative of the head of state to abolish a criminal offense or halt the prosecution of a person suspected of or having committed a crime, before the trial process is complete. The strength of this right lies in its character as an instrument of judicial discretion that transcends judicial decisions, and its implementation must take into account the considerations of the House of Representatives (DPR). The study focuses on the case study of Thomas Trikasih Lembong (Tom Lembong), who, in the public narrative, has been linked to potential involvement in controversial cases. This case was chosen as a model to test the limits of the use of abolition in Indonesia. Normatively, the use of abolition in Indonesia is rare compared to pardons and amnesties, making it a gray area in constitutional practice. This study uses a juridical-normative and philosophical approach, enriched with a qualitative analysis of the relevant legal framework and constitutional law doctrine. From the perspective of Maqashid Syari'ah (Objectives of Islamic Law), abolition is analyzed based on its purpose in preserving the five basic pillars (al-Kulliyat al-Khams): preserving religion (hifz ad-din), preserving the soul (hifz an-nafs), preserving reason (hifz al-'aql), preserving descendants (hifz an-nasl), and preserving property (hifz al-mal). The appropriate use of abolition should contribute to the achievement of substantial justice and the protection of greater public interests, going beyond mere formal legal certainty. Meanwhile, from the perspective of Legal Benefit (Rechtssicherheit and Zweckmässigkeit), this study examines the extent to which the application of abolition, particularly in sensitive cases such as those involving public figures or economic interests, can provide sociological benefits, namely restoring order, preventing greater harm, or supporting national stability, without sacrificing the public's sense of justice. The study's findings indicate that although abolition is a legitimate prerogative, its use must be based on the ultra petita principles of justice and the pressing public interest, in line with the values of Maqasid Sharia and the principle of expediency. A balance between legal certainty, justice, and expediency is key to legitimizing the exercise of the president's right to abolition.

Keywords: abolition, presidential prerogative, 1945 constitution, Maqasid Sharia, legal expediency, Tom Lembong

INTRODUCTION

Indonesia has established itself as a state based on the rule of law

(rechtsstaat) through Article 1 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia (Elhadi, 1945). This principle requires that all aspects of state administration be based on law, guarantee the supremacy of law, and protect the fundamental rights of citizens through a fair legal process. Within the context of the doctrine of separation of powers, power is divided between the legislative, executive, and judicial branches, each of which carries out its functions through checks and balances. This system is designed to prevent the concentration of power and the potential for abuse of authority.

One area where authority overlaps between the executive and judiciary is related to the President's prerogative in criminal law, namely Clemency, Amnesty, and Abolition (GNA) (Asshiddiqie, 2018). This authority is explicitly regulated in Article 14 of the UUD NRI 1945. Article 14 Paragraph (2) specifically states that: "The President shall grant amnesty and abolition by taking into account the considerations of the People's Representative Council." This right is a manifestation of humanitarian justice (justice of mercy) that allows the Head of State, as a representative of the people's sovereignty, to intervene or modify the outcome or legal process for the greater good—whether humanitarian or the public interest. This demonstrates that the Indonesian legal system recognizes that substantive justice must sometimes transcend the rigidity of formal justice (Harijanti, 2018).

Abolition, in particular, is the most extreme of both pardons and amnesties. Pardons reduce or eliminate sentences already imposed (*inkracht*), while abolition eliminates criminal charges or terminates pending or even newly initiated judicial proceedings. In other words, abolition fundamentally eliminates the state's right to prosecute individuals for alleged crimes. Its legal force, which halts due process of law, makes it a potentially controversial instrument and requires strong moral, philosophical, and legal justification. The disproportionate use of abolition can raise serious concerns about judicial independence and the principle of equality before the law (Marzuki, 2014).

Normative studies of abolition indicate that it remains a legal gray area in Indonesian constitutional practice. Further regulations at the statutory level are often less detailed than those for pardons. Although Law No. 5 of 2010 concerning Pardons sets out fairly detailed procedures, the operational mechanisms and substantive criteria for abolition—particularly regarding the definition of "urgent public interest"—remain very loose and discretionary. This lack of clarity opens the door to broad interpretation, which can lead to abuse of power if used solely for short-term political gain or the interests of certain individuals, even if the formalities of the House of Representatives' deliberation procedures have been met. Indonesia has established itself as a state based on the rule of law (*rechtsstaat*) through Article 1 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945). This principle requires that all aspects of state administration be based on law, guarantee the supremacy of law, and protect the fundamental rights of citizens through a fair legal process. Within the context of the doctrine of separation of powers, power is divided between the legislative, executive, and judicial branches, each of which carries out its functions through checks and balances. This system is

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The absence of objective criteria and clear ethical standards in the implementation of the Abolition Act creates a serious normative gap. The fundamental unanswered question is: How can the executive branch eliminate the judiciary's right to prosecute without undermining the foundations of the rule of law? The answer to this question cannot be found simply by interpreting Article 14 of the 1945 Constitution of the Republic of Indonesia, but must be sought through a philosophical approach grounded in the nation's fundamental values. Therefore, this research emphasizes the discovery of substantial criteria, not merely formal procedures (Tjandra, 2020).

To test this framework of substantial criteria, this study selected the case study of Thomas Trikasih Lembong (Tom Lembong). This selection is based on the fact that Tom Lembong is a public figure who has held strategic government positions, particularly in the fields of economics and investment. Figures like him often become

the focal point of policy issues involving national strategic interests, state debt, and potential criminal acts that pose systemic risks to economic and political stability. The sensitivity of cases involving central figures in government or former strategic officials lies in their potential impact. A lengthy formal legal process against a figure like Tom Lembong has the potential to: (a) disrupt market stability and investor confidence; (b) open a Pandora's box of information or state secrets that could harm national interests; or (c) be perceived as an attempt to politicize the law (lawfare) to eliminate or discredit political opponents. In these scenarios, the President's use of abolition could emerge as an extraordinary option, deemed most capable of mitigating greater losses to the state.

The Tom Lembong case study serves as a hypothetical laboratory for testing the ethical and pragmatic limits of abolition. Assuming that abolition is granted in a case involving him (for example, related to a controversial past policy), the President's justification must be justified not only legally but also morally and sociologically. This research aims to answer: How can we justify the elimination of due process (abolition) to protect national interests without compromising the integrity of justice? To answer this dilemma, an analytical framework is needed that combines positive law with in-depth legal philosophy, namely through the perspective of Maqashid Syari'ah and the Benefits of Law.

In the pluralistic context of Indonesian law, the use of the Maqasid Syari'ah (Objectives of Islamic Law) perspective provides a universal philosophical-ethical dimension. Although rooted in Islamic law, the concept of Maqasid has been widely accepted as a principle of legal ethics aimed at achieving the public good (*maslahah 'ammah*) and preventing harm (*mafsadah*) to society (Rahman & Mutakin, 2023). This concept is highly relevant for assessing executive discretion in granting abolition. According to the Maqasid Syari'ah doctrine, the purpose of law is to preserve five primary interests (*al-Kulliyat al-Khams*) (Muslimin et al., 2020): 1. Preserving Religion (*Hifz ad-Din*). 2. Preserving the Soul (*Hifz an-Nafs*). 3. Preserving Reason (*Hifz al-'Aql*). 4. Preserving Lineage/Honor (*Hifz an-Nasl*). 5. Preserving Property (*Hifz al-Mal*). The granting of Abolition, particularly in cases involving strategic and far-reaching figures such as Tom Lembong, must significantly contribute to the maintenance of one or more of these five pillars on a collective scale, not just individual interests.

In addition to Maqasid Syari'ah, this study also bases its argument on the concept of Legal Benefit (*Zweckmässigkeit*), the third pillar of Gustav Radbruch's Trias Hukum (Legal Triad), alongside Legal Certainty (*Rechtssicherheit*) and Justice (*Gerechtigkeit*) (Shiddiq, 2009). Within an ideal state based on the rule of law, these three pillars must be balanced. However, in the case of Abolition, there was a deliberate sacrifice of Legal Certainty (the elimination of the court process). This sacrifice is only constitutionally and morally acceptable if the benefits, namely Substantive Justice and Legal Benefit, far outweigh the costs. Legal Benefit in the context of Abolition is defined as the extent to which the exercise of this prerogative achieves optimal social and political goals for the state (Hayat, 2015). The benefits in question must be public and urgent, not private. The criteria for Benefit applicable to

the Tom Lembong case study include (Safitri, 2023): 1). National Resource Efficiency.2). Preventing Political Crisis. 3). Restoring Global Confidence.

Without a clear benchmark for Legal Benefit, Abolition will be vulnerable to accusations of being a political tool of those in power that undermines the principle of accountability. Therefore, this study aims to formulate operational criteria for Benefit that can bridge the President's discretion with the demands of the rule of law, making it a justified and necessary instrument in extraordinary circumstances. The integration of Maqasid Sharia and Legal Benefit ensures that Abolition discretion is guided by noble ethical values and pragmatic rationality (Tjandra, 2020).

Presidential abolition, as a constitutional prerogative, is an instrument of executive justice whose existence places power at a critical intersection between law, politics, and ethics. The case study of Thomas Trikasih Lembong is used to hypothetically test the extent to which this discretion can be exercised without undermining the foundations of the rule of law. The lack of substantial criteria in Indonesian positive law regarding the implementation of abolition demands in-depth, philosophically grounded normative research. By integrating the perspectives of Maqasid Syari'ah and Legal Benefit, this study aims not only to describe the position of abolition but also to formulate ethical and pragmatic standards for the President in making this crucial decision.

RESEARCH METHODS

This research uses normative legal research, often referred to as doctrinal research. This research focuses on analyzing positive legal norms, legal principles, and relevant doctrines, without requiring empirical data in the field (Soerjono, 2003). This approach is relevant because the main problem is the interpretation and philosophical justification of the prerogative rights stipulated in the constitution (ALISA, 2021). The approach used is a combination of several complementary methods to produce a holistic analysis (Rukin, 2019): 1. Statute Approach. 2. Conceptual Approach. 3. Philosophical Approach. The legal sources used in this article include primary legal sources which include: UUD NRI 1945 (Article 14 Paragraph 2), Law No. 5 of 2010 (concerning Clemency, as an analogous reference), and Constitutional Court Decisions regarding the National Accord (GNA). Secondary legal materials include: Scientific journals, theses, dissertations, constitutional law textbooks, legal philosophy books, and scientific works on Maqashid Syari'ah (Nartin et al., 2024). Tertiary legal materials include: Legal dictionaries, encyclopedias, and indexes of laws and regulations, news or reports related to the Tom Lembong case study (as context). The legal material collection technique used is library research. The steps taken include: 1. Inventory. 2. Classification. 3. Citation and Recording. The data are analyzed using grammatical, historical, and teleological legal interpretation methods (Cosmas, 2020).

RESULT AND DISCUSSION

The Normative Position of Abolition and Its Differences from Pardon/Amnesty

Normatively, Abolition has a position as a prerogative right of the President

which is guaranteed by Article 14 Paragraph (2) of the 1945 Constitution of the Republic of Indonesia. This right is extraordinary because it allows the executive power to intervene or eliminate the criminal legal process before it reaches the stage of an inkraht decision (having permanent legal force).

Table 1
 The essential difference between Abolition, Amnesty and Pardon is in the implementation stage

Instruments	Implementation Stage	Legal Effects
Clemency	After the court decision becomes final.	Reduces/eradicates the punishment already imposed.
Amnesty	After or before the legal process, usually for political crimes.	Removes all legal consequences (including criminal penalties).
Abolition	Before the legal process is completed or before prosecution begins.	Removes the state's right to prosecute; the legal process is terminated.

The findings show that, legally, the use of abolition requires consideration from the House of Representatives, which implicitly indicates that this right must be based on broad public interest and not merely the personal interests of the convict or suspect. However, Indonesian positive law does not have a specific law that regulates in detail the procedures, substantial criteria, and ex-post monitoring mechanisms for granting Abolition, creating a vacuum of substantial criteria in the implementation of Article 14 Paragraph (2) of the 1945 Constitution of the Republic of Indonesia (Asshiddiqie, 2018).

Justifying Abolition from the Maqasid Sharia Perspective

From the Maqasid Sharia perspective, the use of abolition in sensitive cases must fulfill the principle of public welfare (maslahah ‘ammah) by adhering to the protection of the five primary interests (al-Kulliyat al-Khams). In the context of sensitive cases (such as the one hypothesized in Tom Lembong), abolition can be ethically justified if it aims to protect: 1). Hifz an-Nafs (Preservation of the Soul/Stability): If formal legal proceedings have the potential to trigger widespread social conflict, political unrest, or massively threaten national stability and security, then abolition is necessary as an emergency precaution to protect the collective soul. 2). Hifz al-Mal (Preservation of Property/Economy): If the prosecution of a strategic figure in the economic sector has the potential to cause significant macroeconomic losses, market collapse, or loss of foreign investor confidence that could harm the nation's overall wealth, then abolition can be justified as an effort to protect state

assets. This finding confirms that Maqashid Syari'ah shifts the focus of justification for Abolition from individual legal considerations to collective welfare, following the principle of dar'u al-mafasid muqaddam 'ala jalb al-mashalih (avoiding harm takes precedence over gaining benefits) (Ahmad, 2014).

Legal Benefit Criteria as a Benchmark of Legitimacy

The concept of Legal Benefit (Zweckmässigkeit) serves as a bridge between formal legal certainty and substantive justice. Research shows that the legitimacy of abolition lies not solely in the fulfillment of formal procedures (consideration by the House of Representatives), but in the level of sociological benefits it generates.

The Legal Benefit criteria that must be met in implementing abolition are: 1). Urgency: The circumstances underlying the granting of abolition must be urgent, extraordinary, and unable to be resolved through conventional judicial mechanisms. 2). Proportionality of Benefit: The benefits to the state and society from abolition (e.g., political/economic stability) must objectively far outweigh the losses arising from the sacrifice of legal certainty (the abolition of the judicial process). 3). Pure Public Interest: Abolition must not be based on practical political motives, the personal interests of the President, or any particular party, but must be purely in the impartial national interest.

This Benefit Criteria emphasizes that Abolition is the highest instrument of justice that may only be used as a last resort (ultimum remedium) within the executive framework (Tjandra, 2020).

Discussion

Abolition: Between Constitutional Necessity and Abuse of Power

The status of abolition as a constitutional right requiring consideration by the House of Representatives (Article 14 Paragraph 2 of the 1945 Constitution of the Republic of Indonesia) demonstrates a recognition that formal justice delivered by the judicial system may not always be perfect, and therefore needs to be balanced with humanitarian/discretionary justice by the Head of State. However, the lack of regulations governing substantial criteria has created a legal loophole vulnerable to abuse of power. The hypothetical case study of Tom Lembong highlights this dilemma. If abolition were used to halt the prosecution of a figure potentially detrimental to the political interests of those in power, such action would easily be labeled as politicization of the law or an act of impunity. On the other hand, if formal prosecution could trigger an economic or political crisis that would harm millions of people (a clear threat to the collective Hifz an-Nafs and Hifz al-Mal), then the refusal to use abolition could be seen as a failure of the Head of State in carrying out his duty to protect the people and the state. This discussion concludes that the key to legitimacy lies in the transparency and accountability of the DPR's considerations, which is obliged to base its decisions on clear philosophical criteria, such as those offered by Maqashid Syari'ah and Legal Benefit (Harijanti, 2018).

Synergy of Maqasid Sharia and Legal Benefit in Developing Abolition Criteria

The integration of Maqasid Sharia and Legal Benefit provides a strong philosophical framework to fill the gap in substantial criteria in Abolition law. 1). Maqasid Sharia as an Ethical Foundation (Why): Maqasid provides a non-positivistic moral foundation, emphasizing that the goal of Abolition is to preserve the public interest from greater harm. This limits Presidential discretion only to situations that truly threaten the fundamental interests of the state and the people (Hifz an-Nafs and Hifz al-Mal). 2). Legal Benefit as a Pragmatic Standard (How): Legal Benefit then provides an operational standard for measuring whether Abolition measures are truly effective and efficient in achieving these ethical goals. This requires a rigorous sociological cost-benefit analysis before granting Abolition (Fuady, 2015).

In the Tom Lembong case study, abolition is only legitimate if it is convincingly proven that the harm caused by the legal process (threats to stability/economy) is far greater and more pressing than the benefits of the prosecution itself (enforcing individual legal certainty). This synergy ensures that abolition in Indonesia is not merely a "political pardon," but a substantial decision of justice that is morally and pragmatically justified.

Recommendations for the Establishment of a Law on Abolition Criteria

Because the 1945 Constitution of the Republic of Indonesia (UUD NRI) mandates the President, and there is no specific law specifically regulating Abolition and Amnesty, this study urges the need for a Law on Abolition and Amnesty Criteria. This law should include: 1). Objective Definition of "Urgent Public Interest": Linking this definition to a real threat to al-Kulliyat al-Khams (stability, economy, security). 2). Proportionality Test Mechanism: An assessment procedure that ensures that Abolition is a proportional measure and the ultimum remedium. 3). Requirement to Publicize Justification: The obligation for the President and the House of Representatives (DPR) to transparently publish the philosophical and sociological reasons (evidence of benefit) behind granting Abolition, to ensure public accountability.

This regulation will be key to maintaining the balance of the Trias Hukum (Legal Tribunal), where Legal Certainty is sacrificed for Justice and Benefit, as guaranteed by the ethical standards of Maqasid Sharia.

CONCLUSION

Based on the results of normative research and in-depth discussion, the following conclusions can be drawn:

1. The power of abolition is a presidential prerogative guaranteed by Article 14 Paragraph (2) of the 1945 Constitution of the Republic of Indonesia. Abolition is fundamentally different from clemency and amnesty because its function is to eliminate the state's right to prosecute before the judicial process is complete. This power requires substantial limitations because it is vulnerable to political abuse.

2. The justification for abolition in sensitive cases (such as Tom Lembong's hypothesis) must be based on the perspective of Maqasid Sharia. Abolition can only be ethically justified if it aims to protect the greater collective interest (Hifz an-Nafs and Hifz al-Mal) from harm caused by formal legal processes, in accordance with the principle of dar'u al-mafasid.
3. The legitimacy of abolition must be measured by the principle of legal utility (Zweckmässigkeit). Abolition is only legitimate if the conditions are urgent (extra-ordinary) and the benefits obtained (national stability) objectively far exceed the losses caused by the sacrifice of legal certainty.

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