

# State and Ambivalence of Presidential Powers

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**Abstract:** This study discusses the political process relating to the issue of presidential prerogative control with an emphasis on the views and interests of the actors involved in discussing the issue. This study explains two main questions: (1) How is the actualization of the president's prerogative power in Indonesia's presidential system after the constitutional amendment? (2) What is behind the ambivalence of the president's prerogative power formulation in Indonesia's presidential system after the constitutional amendment? The results of this study found that constitutional amendments related to the president's prerogatives revealed an ambivalence that distorted the meaning of the prerogative itself and was not strict between limiting or actually expanding the president's power. This happens because of the tug-of-war between legislative and executive interests. Behind the issue of controlling the president's prerogative powers, there is the interest of legislative institutions to equalize power with the president. Instead, the executive seeks to maintain or extend the president's prerogative power.

**Keywords:** *Prerogative, presidential, constitutional amendments*

## 1 Introduction

Prerogative power is a crucial part of the president's power in the presidential system. This power often leads to debate related to the nature of privilege and its emergency in the constitutional system of democracy. The lawsuit against the nature of the prerogative power, in particular, largely arises from the view of liberal constitutionalism who fear that its excess will violate the freedom of the people.

The Constitution of the Republic of Indonesia, both before and after the changes, does not explicitly mention the term prerogative power of the president. But implicitly and realistically there are several constitutional provisions and presidential actions that can be categorized as the exercise of prerogative powers. Referring to Wilson's classification in mapping the power of the president of the United States, there are three categories of prerogative powers, namely: (1) prerogative powers which are in the hands of the president himself, (2) prerogative powers which are in the hands of the president and senate; (3) prerogative powers in the hands of presidents and congresses. The prerogative powers included in the first category include the president's power over the armed forces (the commander-in chief of the armed forces), the power of granting postponement and remission of the law (grand reprieves and pardons), accepting ambassadors, receiving ambassadors, the power to appoint subordinates (appoint of official to lesser officers). The second category of prerogative power is the power to make agreements with other countries (make of treaties), and the power to appoint ambassadors, judges and high officials (appoints of the ambassadors, judges, and high officials). Whereas

included in the third category of prerogative power is approving the law (approve of legislation) [1].

The categorization of prerogative powers is also contained in the constitution of the Republic of Indonesia, the 1945 Constitution. In the 1945 Constitution, provisions which can be categorized as prerogative powers are contained in articles 10, 11, 12, 13, 14, 15, and 17. The power of the President which is considered to have the nature prerogatives are: (1) the President holds the highest authority over the Army, Navy and Air Force, (2) the President's power declares war, makes peace and agreements with other countries, (3) the President's power declares a state of danger, (4) the power of the President appoint ambassadors and consuls, and receive ambassadors from other countries, (5) the power of the President grants pardon, amnesty, abolition and rehabilitation, (6) the power of the President gives titles, honors to people who have contributed to the nation or state, and (7) power formed the Presidential Advisory Council.

The fundamental issue that was the subject of debate in the discussion of the president's prerogative powers during the 1945 amendment process centered on how the mechanism of limitation or control of such power. In general, the legislators involved in the discussion want legislative involvement in supervising the implementation of the president's prerogative powers. The views that developed related to the mechanism of legislative involvement were polarized in two options, namely oversight is loose in which the legislature only gives consideration, and binding supervision in which the legislature participates in approving the implementation of the president's prerogative powers.

The formulation of an amendment to the president's prerogative power arrangement has not explicitly realized the initial agreement on the amendment's objective to limit the president's power. The involvement of the legislature in giving approval or consideration to some prerogative implementation of the president cannot yet be said to be a limitation of the president's power. It could be that this involvement in turn gives political legitimacy to certain actions taken by the president. The constitutional uncertainty was further strengthened by the addition of presidential power in forming a deliberative council that was located under the president. In short, the results of the constitutional amendment decision related to the president's prerogative revealed ambivalence. Aside from deviating from the prerogative meaning itself, it is also far from the spirit and initial agreement to limit the power of the president.

The uncertainty in responding to the existence of prerogatives in the constitution has given rise to ambiguities in the exercise of power. It is not clear whether the intention is to limit the president's power or legitimize the president's prerogative power. This is reflected in the results of the constitutional amendments related to the president's prerogative which has not yet fully placed limits on the power of the president in exercising his discretionary powers. Instead of limiting power, the results of the constitutional amendment actually provide additional power to the president with prerogative powers to form a deliberative council. The power of the president to form a deliberative council further strengthens the prerogative of the president in the constitution. Before the constitutional amendment there was a Supreme Advisory Council (DPA) which was a high state institution that had an equal position with the president in the position of State institutions. After the constitutional amendment, the institution was changed into a presidential advisory council whose position was directly under the president.

The results of the constitutional amendments related to the regulation of presidential prerogative powers have not explicitly limited presidential powers and realized the initial agreement on the amendment's objectives to reinforce the presidential system. On the satu

side, there is still a legislative role in giving approval or consideration to some of the president's prerogative practices, on the other hand, the president actually gets additional power to form a presidential advisory council. It does not rule out the possibility of legislative involvement in the president's prerogative right not to control, but on the contrary gives political legitimacy to certain actions taken by the president. In short, the results of the constitutional amendment decision related to the president's prerogative gave rise to ambivalence. Besides obscuring the prerogative meaning itself, it is also far from the spirit and initial agreement to limit the power of the president.

Departing from the background and the formulation of the problem, this study seeks to provide an explanation of the following problem: How is the actualization of the president's prerogative power in Indonesia's presidential system after constitutional amendments? and what lies behind the ambivalence of the president's prerogative power formulation in Indonesia's presidential system after constitutional amendments?

## **2 Theoretical Foundation**

### **2.1 Presidential System Concepts**

Most views on presidentialism put more emphasis on presidential power in the context of separation of power. According to Arend Lijphart the main characteristic of a presidential system is the separation of the executive and legislative branches, with executive power outside the legislative body. This is very different from the parliamentary system which is characterized by the legislature as the main venue for drafting the law and (through majority decisions) executive power. The simplest definition of the difference between the two systems is the relative degree of executive independence. In the presidential system, the executive is relatively independent of the legislature. In the parliamentary system, there are interdependencies and interrelations in legislative and executive capacities [2].

Almost in line with Lijphart, Shugart and Carey who claim that the principle is related to clear division of responsibilities, where the executive branch administers the law, the legislature makes the law, and the court interprets or reviews the review constitutionally invite. In parliamentary government basically fusion (joint) [3].

In detail, Giovanni Sartori emphasized that a system is called presidential if (1) the head of state is elected by the people (head of state is popularly elected); (2) during his pre-established tenure parliament can neither appoint nor remove the government; (3) the head of state is also the head of the government (cabinet) [4]. The presidential system offers two key roles that always exist in government: the head of state and the head of government.

### **2.2 Conception of Prerogative Power**

Prerogative power is often identified with a unilateral action (unilateral action) of the government (executive) in making decisions and implementing policies (policy exercise). In presidential studies, prerogative power includes a decision taken by the president, based on his interpretation of his constitutional power, through initiatives that he has and must be limited by other branches of government [5].

The main reference explanation of the president's prerogative powers departs from John Locke's view of the president's executive power. Locke's conception of prerogative power as

exemplified by William Blackstone, is explained as “*a discretionary power of acting for public good, where the positive law are silent*”[6]. According to Locke, prerogatives are needed relating to various emergency situations (*multifarious emergencies*) “Where the law has not or does not provide rules”[7].

Thus John Locke explicitly explains the prerogative meaning as the power to act according to discretion, for public needs, without legal provisions, and sometimes even against the law, as the following quote: “*This power to act according to discretion for the public good, without prescription the law and sometimes even against it, is that which is called prerogative*”[7]. In another section, the chapter on tyranny, Locke reiterates the definition of the prerogative is “*arbitrary Power in some things left in the Prince’s hand to do good, not harm to the people*”[7].

From the definition above, there are two essential meanings of prerogative power, first, prerogative is the power to act for the public good and is limited by that goodness. Second, prerogative power is not bound by positive law. Prerogatives are discretions that are above and beyond the law, therefore, with that power it allows the authorities to take action in the absence of law and act against the law.

### 3 Discussion

Although there is not a single word 'prerogative' in the 1945 Constitution, both before and after the changes, the President of the Republic of Indonesia has several powers that tend to have the meaning of prerogative power as the power held by the king in the monarchy system. As the holder of power in a monarchical system, a king has some power to take unilateral action and, even, against the law especially in emergency situations. A king has power in foreign affairs (diplomacy), diplomacy, power over the armed forces (commander in chief), power declares war (war power), veto power over the legislature (legislative power), appoints judicial and executive officials, provide forgiveness for violators of the law (pardon power). Some of these powers are considered to be inherent power both as the chief executive and as the head of state which is then referred to as prerogative power.

In accordance with the constitution, both before and after the changes, the President of the Republic of Indonesia has several powers such as those of the king in the monarchy system. Such power is often referred to as royal prerogatives. Even those powers are clearly stated (enumerated power) in the constitution. The president has power over the armed forces (commander in chief) [8], declare war and make peace with other countries [9]. The president has power in foreign affairs and diplomacy.[10] In the field of law, the president has pardon power and restoration of good name [11]. As chief executive, the president has the power to appoint and dismiss ministers [12] and other executive officials and powers form a judgment board[13].

The president's prerogative power was one of the issues discussed in the constitutional amendments in 1999-2002. The fundamental issue that was the subject of debate in the discussion of the president's prerogative powers during the 1945 amendment process centered on how the mechanism of limitation or control of such power. In general, the legislators involved in the discussion want legislative involvement in supervising the implementation of the president's prerogative powers. The views that developed related to the mechanism of legislative involvement were polarized in two options, namely oversight is loose in which the

legislature only gives consideration, and binding supervision in which the legislature participates in approving the implementation of the president's prerogative powers.

### **3.1 Prerogative Power Arrangement: Between Restrictions and Extensions**

The formulation of an amendment to the president's prerogative power arrangement has not explicitly realized the initial agreement on the amendment's objective to limit the president's power. The involvement of the legislature in giving approval or consideration to some prerogative implementation of the president cannot yet be said to be a limitation of the president's power. It could be that this involvement in turn gives political legitimacy to certain actions taken by the president. The constitutional uncertainty was further strengthened by the addition of presidential power in forming a deliberative council that was located under the president. In short, the results of the constitutional amendment decision related to the president's prerogative revealed ambiguity. Aside from deviating from the prerogative meaning itself, it is also far from the spirit and initial agreement to limit the power of the president.

The reality reflected in the process and results of constitutional amendments, especially the prerogative regulation of presidential powers, is the result of compromising various interests in the legislature. Compromise is a meeting point of various institutional or personal interests that are fought in the constitutional amendment process. The results of the constitutional amendment were confused in a situation where the framers involved were influenced by their interests and power. The various forms of interests and power have both institutional and personal dimensions.

Ideally, the design of the constitution as a reference for the political system emphasizes the functions of government among the parts of government which not only affect the stability of democracy, but also the efficiency of the political system and the guarantee of public freedom. Or in Paul R. Verkuil's view, at the very least, the constitution serves two important purposes - efficiency and freedom (liberty). To achieve this goal the constitution designs a governance structure with a clear distribution of authority mechanisms [14].

Related to the issue of constitutional prerogative power, it should be able to simultaneously solve two mutually inconsistent goals, firstly, it must enable state administrators to deal with ordinary and extraordinary political problems. Second, the constitution must prevent state administrators from becoming a threat to the values of freedom and other values that they should maintain.

The fundamental principles that underline the constitutional system will help explain the debate over the governance of government. The main constitutional principle in achieving efficiency and freedom is the distribution of authority in the government system. With the distribution of power occurs the spread, rather than concentration of power. Such a mechanism can occur when the constitution divides and defines explicitly the powers of each branch of government. The constitutional firmness in defining the power and authority of the parts of government will not only produce efficiency in the administration of government, but will also protect freedom from the tyranny of power.

But the face of the constitution as explained above is an ideal type which is rather difficult to realize. Such an ideal constitution can only be realized when the framers involved in the formation process have a neutral attitude and are only oriented towards the public interest. Meanwhile, in reality, it is often inevitable if those who play a role in formulating the constitution more consider the needs of their constituents or parties. In addition, the

constitutional process raises problems when constitutional formulators only consider the institutional or personal interests they have.

Reality as explained above also occurs in the process of discussing the president's prerogative power amendment. Examining the results with the initial agreement on the purpose of the amendment shows if the constitutional amendment process leaves problems. Although it is rather difficult to determine directly whether the president's prerogative power arrangement matches the main substantive standard of the amendment, it can be seen indirectly by considering the quality of the legislative process that affects the outcome of the final amendment.

The validity of the standard changes in the constitution can be measured by seeing whether the adoption of the changes is consistent with the initial agreement and democratic values or not. However, according to Orentlicher, when substantive standards are difficult to give a clear direction, procedural standards often provide the best alternative. In other words, if it is difficult to know whether the amendment results are appropriate or not, the assessment is transferred by looking at whether there is a problem (breakdown) in the process that reduces the level of confidence in the substantive results [15].

The issue of the constitution arises when the process of drafting the constitution is crammed with various interests outside the substantive objectives. When the constitution-drafting actors are more concerned with their own interests, it is less likely to serve the public interest. Assumptions like this are correlations that always result from procedural standards in the process of establishing or changing constitutions everywhere. The problem then is because partial interests affect the political process which raises not only doubts about the legitimacy of the resulting constitutional substance, but also makes the political system unclear as a result of the process.

If you follow Elster's taxonomy about the interests in the constitutional amendment process related to the president's prerogative power, there are at least two influential interests. First, legislative institutional interests. The institutional dimension of the constitutional process can involve competing interests to increase the power of each institution. It is undeniable that between the president and the legislature are very concerned about how much power they enjoy in their office capacity. When government institutional actors are involved in the process of drafting the constitution, the expansion of their power may be at stake.

In the constitutional amendment process, when the legislature decides that the implementation of certain presidential prerogatives requires legislative approval, the decision will have implications not only for the need for oversight of the executive branch, but also that it will have implications for expanding legislative authority in the constitutional system. Thus, the design of presidential prerogative power arrangements becomes problematic because the change in power is not merely limited to the president's power. These changes can not be avoided having a load of interests that arise from legislative institutions to add and expand the institutional power.

It is not yet clear whether the motivation behind the establishment of the legislature is the will to limit the president's prerogative power or whether the legislative desire to expand greater power. There are political problems when the constitution drafting actors are involved in directing the constitutional interests of the legislature. Constitutional confusion like this can reduce the level of public trust and obscure the character of the constitutional system.

Second, group interests (group interest). In the modern era legislation model, according to Elster, the interests of the groups mostly took the form of the interests of the ruling political parties. These interests often determine the formation of electoral laws and various parts of the

machinery of government [16]. The interests of the ruling political parties can be in the form of maintaining power or expanding the scope of power.

In the president's prerogative power amendment, it appears that group interests are reflected in the will of the ruling political party, PDIP, to increase or expand the president's power. This is evident in the discussion related to the existence of the Supreme Advisory Council (DPA) in the structure of the state high institutions. In the process of discussing the DPA issue, the attitude of the PDIP was somewhat different at the beginning of the discussion when Megawati Soekarnoputri was not yet president and at the end of the discussion (the third and fourth discussions) when the Chairperson of the PDI-P had held the president's power.

In the discussion of the first and second changes, PDIP is more passive by not giving much argument about the existence of DPA. Even if there are views expressed tend to be conservative to maintain the institution with a few notes of improvement. But in the discussion of the third and fourth changes, when Megawati Soekarnoputri had assumed the presidential position, she was very active in giving her views and arguments related to the changes in the DPA.

The speakers from PDIP were not only active, but also gave arguments at length and in detail by looking at the DPA from various aspects ranging from historical, theoretical, and socio-cultural aspects. Estuary of the various arguments leads to the change of DPA from its position as a high state institution into a mere deliberative council under the president. This for example can be seen from the proposal of one of the members of the F-PDIP, I Dewa Gede Palguna, as follows: "Therefore in my understanding in our analysis it would be better if this DPA let it indeed become part of the executive, especially in this case presidential advisors, government advisors might be called that. Thus who has the authority and even then it is entirely the president to appoint it [17].

A more detailed and decisive view was conveyed by another F-PDIP member, Sutjipto as follows: "In conclusion, there is an urgency, a function is there, but we tend not to be structured in the high state institutions. But included in the executive family in the form of advisory bodies, this is where wise people, smart people, bija people, and so on, nature culture was included there that will help the president who will advise to the president but the decision is up to president [17].

### **3.2 Interest and Power**

In addition to conflicts of interest, the constitutional amendment process specifically related to prerogative powers cannot be separated from the classic debate about executive and legislative relations. Ideally, as Aiyede and Isumorah illustrate the interaction between the executive and the legislature is very important for the consolidation of democracy when the two institutions function and interact in a form that reinforces trust in government and the process through which the positions of government institutions are filled. This argument has been reinforced by Kopecky who sees the relationship between the legislature and the executive as a key that defines the functioning of the political system.

But it cannot be denied, according to Lijphart, the relationship between the legislature and the executive is a power relationship, more precisely, a power struggle. This relationship occurs when institutions try to dominate one another by expanding or increasing the power of each institution in the constitutional format. In a presidential system, in large part, as a result of legislative members losing their oversight role to the overall executive influence.

Power struggles can take the form of an institution or branch of government to dominate other institutions, also in the form of an institution using its constitutional power to reduce or

limit the power of other institutions through constitutional amendments, such as when the Legislature tries to reduce the power of the president. When the legislature decreases the authority of other branches of government, then there is an opportunity to expand its power.

In the case of constitutional changes, the legislature seeks to balance the executive power or increase the power of legislative members. Instead, the executive to maintain or expand its power. The fight for balance and maintaining power of the two institutions is the implication of the institutional interests between the two. These interests will manifest in the role played by each institution. As a legislature will give a stronger role in the legs of the legislative branch compared to the executive and judiciary. Likewise, when the president is involved in the constitution-making process, he will tend to encourage a strong presidential institution (strong presidency) [18].

In the process of changing the president's prerogative powers through constitutional amendments, there seems to be a phenomenon towards the power struggle between the legislature and the executive. They proposed and ratified a provision that required legislative involvement in the implementation of the president's prerogative powers. This proposed legislative involvement arises from parties that do not have executive power. They have their own arguments as conveyed by Zain Bajber follows: "This consideration means that the DPR knows that when the ambassador goes abroad, what is done. During this time the ambassador was a place to accommodate former politicians or ministers, or other officials, not people who truly represent the interests of this country" [19].

While on the other hand there is a group of people as the ruling party, which represents the executive power trying to maintain the president's prerogative power. Because of that the attitude of the ruling party like PDIP which at that time was the executive power holder did not agree with the involvement of the DPR to give consideration in the prerogative power of the president. This was also confirmed in the interview with Jacob Tobing as follows: "For example the President appoints and dismisses the Commander must with the approval of the Parliament. That does not match the provisions of the 1945 Constitution which says that the highest authority in the Air Force, Army and Navy is the president. So that was wrong. The period of the highest authority asks for the approval of other institutions" [20].

But power relations in the form of such battles are not always a win or lose contestation. Not always if one branch of government has increased power, another branch must go down. There are ups and downs of power between the two branches. The balance of power is considered carefully and is always open for improvement. In other words, according to Roger H. Davidson [21], legislative-executive power relations are a matter of compromise and accommodation, not absolute obstacles.

Amendments to the constitution, especially related to the president's prerogative powers, are undeniably part of a political process that is somewhat difficult to release from accommodation and compromise. A process like this requires the actors to move away from defending their position and interests to find common ground with other interests to reach a consensus. The problem is then a consensus resulting from political compromise usually becomes something that no longer has a clear identity.

In the context of constitutional amendments relating to the president's prerogative powers the accommodation and compromise process has not only forced the actors to change their respective positions, but has also changed the substance of the amendment itself. As explained earlier that one of the substances that became the spirit and the initial agreement in the MPR was the limitation of presidential power. But then the results of the last amendment showed that in addition to a small portion there was a limitation of presidential power, there was also



an increase in presidential power. This reality has an impact not only to confuse the constitution, but also has given rise to ambiguity in the political system.

One that raises an important question from the results of a compromise in controlling the president's prerogative power is the involvement of the DPR in the appointment of executive officials or officials who are part of the executive such as the TNI Commander, Chief of Police of the Republic of Indonesia, Ambassador, and others. This involvement is part of the clause giving approval to the president's authority. The argument underlying the involvement departs from the pretext of carrying out the function of supervision.

But then it becomes ambiguous when the actualization of the agreement is realized by participating in determining or deciding officials' nominations through the fit and proper test. This far-reaching legislative involvement is considered contrary to the initial provisions stating that the president holds power over the Army, Navy and Air Force. This is as stated by Jacob Tobing: "The appointment of the TNI Commander with the approval of the DPR is not in accordance with the 1945 Constitution" [20].

Actions like these have strayed far from the oversight function of legislation, and instead tend to carry out the executive function. In several legislative oversight concepts explain that the function is to control the implementation of executive tasks so that they become effective and pay attention to the interests of the people. Supervision is a legislative check and balance function, which aims to ensure that the program is carried out legally, effectively, and achieves the desired goals [22].

In practice in some countries there is consideration that the legislature is given the authority to confirm the appointment of public officials, such as in the United States or Nigeria. However, as confirmed by W.H. Taff, behind the confirmation of executive candidacy, the legislature is unlikely to exercise appointment power. This explains that although there is a legislative tendency to be involved in overseeing executive power, it is still within the corridor of the role of each institution. So, there should still be a clear separation of powers so that the control mechanism can work.

But it cannot be denied, besides the legislative involvement in the implementation of the president's prerogative powers, from the opposite pole, the president also gains additional power. This can be seen when the constitutional amendment at the last moment came to an agreement to dissolve the Supreme Advisory Council (DPA) and replace it with the Presidential Advisory Council. The status of the new consideration board is entirely under the control of the president. Formed and dismissed by the president, without involving other institutions including the legislature.

The results of the president's prerogative power amendment illustrate a mutually beneficial agreement for two opposites. On the one hand, there is an agreement to pave the way for the legislature to enter the executive sphere, but on the other hand increase the ammunition of executive power. This shows that certain characteristics of institutional design, besides depending on the mechanism of formation of institutional interests, also cannot be ignored there are interests of political actors at the micro level. In this connection, it can be seen that the limitation of the president's prerogative powers may be part of the institutional interests of the legislature, but behind that there are the interests of political parties which are an extension of the executive arm which maintains or expands the president's power.

## 4 Conclusion

In the case of prerogative power, there seems to be a tug of war between the institutional legislature and the executive. In addition to controlling the president's prerogative power, there is the interest of legislative institutions to equalize power so that it has a balanced power with the president. However, political parties that represent the president's power in the legislature have an interest in maintaining or extending the prerogative power of the president.

The implication of the battle that has taken place has refracted the initial substance of the constitutional amendment to limit the power of the president. Instead of limiting power, the president actually obtains additional powers in other aspects. This then not only distorted the initial substance of the constitutional amendment, but also created an overlapping of authority between the executive and legislative branches.

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