

# JURNAL CITA HUKUM

*Indonesian Law Journal*



- **Existence of Clemency as President Prerogative Right (Comparison Study of Indonesia with Countries of the World)**  
*Fathudin & Ahmad Tholabi Kharlie*
- **Diversity in the Child Criminal Justice System**  
*Sartika Intaning Pradhani*
- **National Legal Reforms about Unofficial Marriage**  
*Dwiyana Achmad Hartanto*
- **The Eradication Concept of Illegal Fishing In Keeping Security and State Sovereignty in The Fisheries; The International and National Legal Perspective of Indonesia**  
*Muh. Risnain*
- **The Paradigm of Cyberporn On Legal Culture and Religion Perspective**  
*Prima Angkupi*
- **Traditional Wisdom of Adat Law Baduy Community In Farming System in Kanekes Village**  
*Sodikin*
- **Shift of Criminal Acts of Copyrights to the Direction of Civil**  
*Sufiarina*
- **Prevention of Dumping Practice in Asean China Free Trade Area Regarding Government Regulation Number 34 Year 2011**  
*Dewi Anggraeni*
- **Legal Protection Against Indonesian Umrah Jemaah**  
*Salman Maggalatung*

Jurnal

# CITA HUKUM

**VOL. 5 NO. 1 JUNE 2017**

CITA HUKUM is Indonesian law journal published by Faculty of Sharia and Law, State Islamic University Syarif Hidayatullah Jakarta in associate with Center for Study of Indonesian Constitution and Legislation (POSKO-LEGNAS) UIN Jakarta. This journal specializes in Indonesian Legal Studies and try to present various results of the latest and high quality scientific research which is issued twice in a year at June and December.

CITA HUKUM has become a CrossRef Member since year 2015.

Therefore, all articles published by CITA HUKUM will have unique DOI number.

#### INTERNATIONAL ADVISORY BOARD

Prof. Tim Lindsey, SCOPUS ID: 36785442900; h-index: 5, Melbourne University Australia  
Prof. Muhammad Munir, Scopus ID: 54414595100 h-index: 1, Department of Law, International Islamic University Islamabad, Pakistan  
Prof. Stephen Koos, Department of Law, Muenchen University Germany  
Prof Mark Cammack, Scopus ID: 6507998992 h-index: 3, Southwestern Law School Los Angeles USA  
Ph.D Asep Saepudin Jahar, Scopus ID: 57156653300 h-index: 1, Departement of Economic Law Universitas Islam Negeri Syarif Hidayatullah Jakarta  
Ph.D Euis Nurlaelawati, Scopus ID: 56247081700 h-index: 1, Faculty of Sharia and Law, Universitas Islam Negeri Sunan Kalijaga

#### EDITORIAL BOARD

Prof. Gani Abdullah, h-index Google Scholar: 5, Universitas Islam Negeri Syarif Hidayatullah Jakarta  
Prof. Astim Riyanto, h-index Google Scholar: 5, Faculty of Law Universitas Pancasila  
Prof. Salman Maggalatung, h-index Google Scholar: 2, Universitas Islam Negeri Syarif Hidayatullah Jakarta  
Prof. Erna Widjajati, h-index Google Scholar: 1, Faculty of Law Universitas Krisnadwipayana  
Dr. Khamami Zada, orcid ID 0000-0002-1799-9979, h-index Google Scholar: 10, Universitas Islam Negeri Syarif Hidayatullah Jakarta  
Dr. Ahmad Tholabi Kharlie, Thomson Reuters Id: R-5028-2017, h-Index Google Scholar: 1, Universitas Islam Negeri Syarif Hidayatullah Jakarta

#### EDITOR IN CHIEF

Nur Rohim Yunus, Thomson Reuters Researcher ID: F-3477-2017, ORCID ID: 0000-0003-27821266, SSRN ID: 2645355, h-index Google Scholar: 2, Departement of Constitutional Law, Universitas Islam Negeri Syarif Hidayatullah Jakarta, Indonesia

#### MANAGING EDITOR

Muhammad Ishar Helmi, Thomson Reuters Researcher ID: F-3345-2017, ORCID ID: 0000-0001-7060-8191, h-index Google Scholar: 1, Departement of Criminal Law Universitas Islam Negeri Syarif Hidayatullah Jakarta, Indonesia

#### EDITORS

Indra Rahmatullah, ORCID ID: 0000-0002-6160-4225, h-index Google Scholar: 1, Departement of Economic Law, Faculty of Sharia and Law, Universitas Islam Negeri Syarif Hidayatullah Jakarta, Indonesia  
Mara Sutan Rambe, ORCID ID: 0000-0001-5404-6635, h-index Google Scholar: 1, Departement Criminal Law, Faculty of Law, Universitas Islam Negeri Syarif Hidayatullah Jakarta  
Fathudin, Thomson Reuters Reaseacher ID: F-4958-2017, ORCID ID: 0000-0002-3692-0154, Departemet of Constitutional Law, Faculty of Law, Universitas Islam Negeri Syarif Hidayatullah Jakarta

#### ENGLISH LANGUAGE EDITOR

Fitria Fitria, ORCID ID: 0000-0001-9733-1233, Departemet of International Law, Universitas Islam Negeri Syarif Hidayatullah Jakarta.

#### ASSISTANT TO THE EDITORS

Erwin Hikmatiar, Thomson Reuters Researcher ID: F-3235-2017, ORCID ID: 0000-0003-4103-818X, Universitas Islam Negeri Syarif Hidayatullah Jakarta

#### Alamat Redaksi

Fakultas Syariah dan Hukum UIN Syarif Hidayatullah Jakarta  
Jl. Ir. H. Juanda 95 Ciputat Jakarta 15412  
Telp. (62-21) 74711537, Faks. (62-21) 7491821

Website: [www.fsh-uinjkt.net](http://www.fsh-uinjkt.net), E-mail: [jurnal.citahukum@uinjkt.ac.id](mailto:jurnal.citahukum@uinjkt.ac.id)  
Permalink: <http://journal.uinjkt.ac.id/index.php/citahukum>

Jurnal

**CITA HUKUM**

## Table of Content

- 1**      **Existence of Clemency as President Prerogative Right  
(Comparison Study of Indonesia with Countries of the World)**  
*Fathudin, Ahmad Tholabi Kharlie*
- 25**     **Diversity in the Child Criminal Justice System**  
*Sartika Intaning Pradhani*
- 41**     **National Legal Reforms about Unofficial Marriage**  
*Dwiyana Achmad Hartanto*
- 59**     **The Eradication Concept of *Illegal Fishing* In Keeping Security and  
State Sovereignty in The Fisheries; The International and National  
Legal Perspective of Indonesia**  
*Muh. Risnain*
- 75**     **The Paradigm of Cyberporn On Legal Culture and Religion  
Perspective**  
*Prima Angkupi*
- 89**     **Traditional Wisdom of Adat Law Baduy Community In Farming  
System in Kanekes Village Leuwihdamar Lebak Banten**  
*Sodikin*
- 109**    **Shift of Criminal Acts of Copyrights to the Direction of Civil Dispute  
(Review of Article 95 Paragraph (4) of Law Number 28 Year 2014 on  
Copyright)**  
*Sufiarina*
- 135**    **Prevention of Dumping Practice in Asean China Free Trade Area  
Regarding Government Regulation Number 34 Year 2011**  
*Dewi Anggraeni*
- 171**    **Legal Protection Against Indonesian Umrah Jemaah**  
*Andi Salman Maggalatung*



## Existence of Clemency as President Prerogative Right (Comparison Study of Indonesia with Countries of the World)\*

**Fathudin<sup>1</sup>, Ahmad Tholabi Kharlie<sup>2</sup>**

FSH UIN Syarif Hidayatullah Jakarta

Jl. Ir. H. Juanda No. 95 Ciputat Tangsel

E-mail: [1fathudin.fshs@uinjkt.ac.id](mailto:fathudin.fshs@uinjkt.ac.id), [2abimania@uinjkt.ac.id](mailto:abimania@uinjkt.ac.id)

DOI: [10.15408/jch.v5i1.6574](https://doi.org/10.15408/jch.v5i1.6574)

### **Abstract:**

The debate about the existence of clemency as a prerogative of the president stems from the understanding that the rights is coming independently from the authority and without any branches of power. In this context, the comparative study of the constitutional norms in some countries in the world related to the norm of clemency is important to read the tendency of other countries about clemency rules. This study shows that the constitutional norm of countries in the world basically has the same tendency in the application of clemency by the president; there is involvement of other branches of power. Some constitutions of the world call the recommendation, hearing, information, consultation, advice, in accord, concurrence (approval) and others. The involvement of other branches of power in the grant of pardon does not mean reducing the authority of the president (prerogative), but it has become a tendency in almost all modern states to embrace the system of government power within the framework of public accountability. The term prerogative of the president (absolute) in practice is no longer absolute and independent.

**Keywords:** Clemency, Prerogative Right, Presidential Power

---

\* Received: March 12, 2017, Revised: April 23, 2017, Accepted: Mei 24, 2017.

***Eksistensi Grasi Sebagai Hak Prerogatif Presiden***  
***(Perbandingan Indonesia Dengan Negara-Negara Di Dunia)***

**Abstrak:**

*Perdebatan seputar eksistensi grasi sebagai hak prerogatif presiden berpangkal pada pemahaman yang menyebut bahwa suatu hak disebut sebagai hak prerogatif presiden jika kewenangan yang lahir dari hak tersebut bersifat khusus dan mandiri tanpa adanya keterlibatan cabang kekuasaan lain. Dalam konteks ini, kajian perbandingan terutama terhadap norma konstitusi di beberapa negara di dunia terkait dengan norma tentang grasi menjadi penting untuk memotret kecenderungan yang dimiliki negara-negara lain dalam hal pengaturan tentang grasi. Kajian ini menunjukkan bahwa norma konstitusi negara-negara di dunia pada dasarnya memiliki kecenderungan yang sama dalam penerapan pemberian grasi oleh presiden, yakni ada keterlibatan cabang kekuasaan lain. Beberapa konstitusi negara-negara di dunia menyebut keterlibatan tersebut dengan menggunakan ragam istilah seperti recommendation, hearing, inform, consultation, advice, in accordance, concurrence (persetujuan) dan lain-lain. Adanya keterlibatan cabang kekuasaan lain dalam mekanisme pemberian grasi bukan berarti mereduksi kewenangan presiden (hak prerogatif), tetapi memang menjadi kecenderungan hampir di semua negara-negara modern untuk menganut sistem pemerintahan yang berusaha menempatkan segala model kekuasaannya dalam kerangka pertanggungjawaban publik, sehingga istilah hak prerogatif presiden (secara mutlak) dalam praktiknya tidak lagi bersifat mutlak dan mandiri.*

**Kata Kunci:** *Grasi, Hak Prerogatif, Kekuasaan Presiden*

**How to cite item (turabian):**

Fathudin, and Kharlie, Ahmad. "Existence of Clemency as President Prerogative Right (Comparison Study of Indonesia with Countries of the World)" *JURNAL CITA HUKUM* [Online], Volume 5 Number 1 (June 2017)

### Introduction

Indonesia's democratic transition process that rolled out in 1998 through the reforms, has an impact on the amendment process of the constitutional amendment which has been poured in the series of amendments, ranging from Amendment I to IV amendment. Among the new ideas summarized in the second amendment of the 1945 Constitution were the principle of checks and balances and the assertion of the purification of presidential government system.<sup>1</sup> The implications of amendments to the 1945 Constitution also had an impact on the fundamental changes surrounding the position and authority of President of Indonesia. Those were the impact of the application of checks and balances mechanisms among state institutions in carrying out the principle of mutual supervision among various branches of state organizers, executive, legislative and judiciary. The application of the principle of checks and balances of powers of the president, including the authority of the president which should be independent (prerogative). Such redactions, for example, can be seen from the involvement of the House of Representatives in exercising the authority of the President, both in the context of the necessity of obtaining the approval of the House of Representatives and merely considering the consideration of the DPR.

The application of the checks and balances mechanism among branches of power also has the implications for the strengthening of the position and authority of the House of Representatives as one of the branches of power. In addition to holding the power to form laws<sup>2</sup>, now the House also has a supervisory function.<sup>3</sup> The oversight function is, for example, the role of Parliament in giving consideration to the president regarding amnesty and abolition.<sup>4</sup> Likewise, in the case of accepting the placement of ambassadors of

---

<sup>1</sup> According to Jimly Asshiddiqie there are four new ideas that are summarized in the 1945 Constitution after the amendment, such as: (a) affirmation of the ideals of democracy and monocracy simultaneously and complementarily complimentary, (b) separation of powers and principles of checks and balances, (3)) purification of presidential government system, (d) strengthening the ideals of unity and diversity within the Unitary State of the Republic of Indonesia. See on Jimly Asshiddiqie, Indonesian Citizenship Structure after the Fourth Amendment of the 1945 Constitution, Paper presented at Development of National Law Seminar VII organized by BPHN Ministry of Law and Human Rights, Denpasar 14-18 July 2003, P. 2.

<sup>2</sup> Article 20 paragraph (1) of the 1945 Constitution of 1945, The House of Representatives holds the power to form laws.

<sup>3</sup> Article 20 Paragraph (1) of the 1945 Constitution of the Republic of Indonesia states that "the People's Legislative Assembly has the functions of legislation, budget functions, and supervisory functions.

<sup>4</sup> Article 14 Paragraph (1) of the Republic of Indonesia States that "The President grants amnesty and abolition with due regard to the consideration of the House of Representatives."



other countries, the president is also required to consider the consideration of the House of Representatives first.<sup>5</sup>

In a presidential government system, besides has an executive and legislative authorities President also has jurisdictional authority in the context of restoration of judiciary, grant pardons or eliminate claims that are closely related to the jurisdiction of the court.<sup>6</sup> The Judicial authority is related to the president's authority in granting pardons. In some constitutions of countries in the world, clemency is often referred to as one of the powers of the president in the scope of the presidential prerogative.

Prior to the amendment of the 1945 Constitution, the provisions on Clemency contained in Article 14 which limited to assert that the president grants pardons, amnesty, abolition, and rehabilitation.<sup>7</sup> The elucidation of that article formulation confirmed that the Clemency authority was exercised by the president in his capacity as head of state. It's same with the contents of Article 35 of Law Number 14 in 1985 regarding the Supreme Court, which was mentioned that the Supreme Court provided legal advice to the president as head of state in the granting or rejecting the clemency.<sup>8</sup> The granting of pardon by the president in his capacity as head of state means by many people as a prerogative of Him.

In contrary, after amendment reduction in Article 14 of the 1945 Constitution of the Republic of Indonesia, contains of that article changed in redaction become "president granting pardon and rehabilitation with due consideration of the Supreme Court." Likewise, in Law Number 5 in 2004 regarding the Amendment of Law Number 14 in 1985 regarding the Supreme Court had adjusted to the provisions contained in the 1945 Constitution of the Republic of Indonesia. The Article 35 of Law Number 5 in 2004 also had editorial changes which are the Supreme Court provides legal consideration to the president in appeals for pardon and rehabilitation. It is clear that this provision eliminates the phrase "president as the head of state."

---

<sup>5</sup> Article 13 paragraph (2) and paragraph (3) of the 1945 Constitution of the Republic of Indonesia. In the case of appointing ambassadors, the President takes into consideration the House of Representatives and the President accepts the placement of ambassadors of other countries with due regard to the consideration of the House of Representatives.

<sup>6</sup> Article 14 paragraph (2) of the 1945 Constitution of 1945, President grants amnesty and abolition with due consideration of the House of Representatives.

<sup>7</sup> Article 14 of the 1945 Constitution, the President grants pardons, amnesty, abolition, and rehabilitation.

<sup>8</sup> Article 35 Constitution number 14 in 1985 about Supreme Court.

## Existence of Clemency as President Prerogative Right

The involvement of other branches of power in terms of execution of the president's authority in granting pardon reaps a variety of interpretations, which are related to the existence of the clemency as the prerogative rights of the president. Because, in common people understanding, a right can be prerogative if the president's authorities are specific and independent. However, if the definition is based on that understanding, so the provisions contained in Article 14 of the 1945 Constitution of the Republic of Indonesia are impressed to affect the consequences of the position of pardon as a prerogative right of the president. This is the contrast to the doctrine that developed before the amendment of the 1945 Constitution, were determined of giving granting, pardon, amnesty, abolition, and rehabilitation were the prerogatives of the president because it was affirmed in the context of his position as head of state as a symbol of national unity.

The existence of the abolition of explanation of the 1945 Constitution which stated that the capacity of the president as head of state also reap a variety of interpretations. Some legal experts argue that Clemency is no longer as a prerogative of the president because the phrase of a president as head of state is no longer in the 1945 amendment. While in other opinions assert that in the presidential government system the authority to grant pardons is in the hands of the president in his capacity as president. It is different from the parliamentary system where there is a head of state that has an authority in granting the pardon. So, In Indonesia, the term of President is used to determine the head of state while the head of government. Therefore, in Indonesia, there is no recognition of the separation of these two functions as is common in the parliamentary democracy.

Based on the explanation above, the study of the constitutional norms in several countries in the world related to the president's authority in granting clemency becomes important. Through this study, it is hoped that it can be described the similarities and differences regarding the mention of such authority in the constitutional norms in several countries in the world and related to the mechanism of authority in the realm of its implementation. This study focuses on a comparison study of constitutional norms in some countries on the position of clemency as one of the prerogatives and the authority of the president. This study was conducted by comparing the constitutional norms in some countries related to power to pardon (power to pardon) as part of a branch of presidential power in the field of judicial.

## The Definition of Clemency as Prerogative

The term of pardon comes from the word "gratie" in Dutch or granted in English, while in Latin it is termed pardonable, then it is translated into English become pardon. The word pardon in English if in the context of the noun is defined as forgiveness of a person's offense or in legal terms is defined as a pardon of a serious offense or against the offending perpetrator. While in the context of verb pardon is defined as an effort to release a person from a liability as a result of a violation that he has done. Other terms often are used to refer the forgiveness are amnesty, clemency, grace (Monaco), or mercy (Sweden). This power of forgiveness is almost in all the constitutions of the countries of the world. In addition, clemency is also a part of modern political features and in practice, it often attracts attention.

According to Black's Law Dictionary, a pardon is an executive action that mitigates or sets of punishment for a crime. An act of grace from governing power which mitigates the punishment the law demands the offense and restores the right and privileges forfeited on account of the offense.<sup>9</sup> The term of "pardon" in the Great Dictionary of Indonesian is defined as a forgiveness given by the head of state to CONVICT. While the definition of clemency was formulated in Article 1 of Law Number 20 in 2002 is defined as a pardon in the form of change, mitigation, reduction or elimination of criminal practice to the convicted person given by the President. From the descriptions above, it can be concluded that clemency is an action done by the president in giving forgiveness to someone by changing, deleting or reducing the punishment given by the judge. In the context of law, amnesty can, as an act of government executive who demulcent the criminal offense. Mercy single executive to someone who has committed a crime or who has Yogyakarta: of a crime.

The power for giving amnesty had a long story. It is noted that the first user of this authority appeared in the oldest legal code of the law code of Hammurabi in the 18th century BC. Whereas the practice of clemency itself is done for the first time in the British Empire. At that time a king had a prerogative that was interpreted as a gift of kings (*vorstelijk gunst*) is the privilege of being able to forgive almost all forms of crime committed by a person who against the kingdom. This forgiveness is defined in context as the merciful nature of the king. Thus, from the very beginning of his appearance, clemency is truly a prerogative as a merciful attitude of the king in his privileges. But over the time, the power to forgive becomes part of the process

---

<sup>9</sup> <http://dictionary.reference.com/browse/pardon>. Accessed on 4th April 2014, 19.35 WIB.

## Existence of Clemency as President Prerogative Right

of rechecking of the judicial system process which is often considered of injustice. Such the unfair punishments can be moderated through the granting mechanism by the Executive.<sup>10</sup>

In practice, the power to grant forgiveness or pardon is often included in the scope of the prerogative of the king and the president. The prerogative term is derived from Latin *praerogativa* (chosen as the earliest vote), *praerogativus* (requested as the first voter), *praerogare* (requested before asking for another), in English prerogative while in German Das Vorrecht which means privilege. According to Joseph Azize, the prerogative is the right of power within the context of its theory of application without any limits and interventions. Padada Wahjono also stated that a right is called as the prerogative of the president of the authority born from the right which is special and independent.<sup>11</sup> So prerogative is an independent authority owned by a President.<sup>12</sup> From the explanations above, the conception of prerogatives can be interpreted as a privilege possessed by certain institutions that are independent and absolute in the sense of being inviolable by other institutions or branches of power. In the modern states system of government, this right is usually owned by the head of state, either a king or a president and head of government in certain fields stated in the constitution.<sup>13</sup>

In the dark ages of Europe, a king usually has absolute power; even a king can claim that the state is His mine. That statement is illustrated that the figure of a king is a complete representation of the existence of a state. The existence of the absolute power that led to the privilege of a king called by prerogative. Historically, the concept of prerogative is part of a king's privilege was first applied in the history of British administration. This right provided the privilege of political rulers to decide upon their own judgment, although sometimes the decisions were made for no reason except the personal will of the leader himself.<sup>14</sup>

---

<sup>10</sup> Jody C. Baumgartner and Mark H. Morris, "Presidential Power Unbound: A Comparative Look at Presidential Pardon Power," *Journal of Politics & Policy* Volume 29th No. 2 of June 2001, p. 212.

<sup>11</sup> Joseph Azize, "The Prerogative of Mercy In NSW," *Jurnal Public Space; The Journal of Law and Social Justice*, p. 8.

<sup>12</sup> Padmo Wahyono, *Negara Republik Indonesia*, (Jakarta: Rajawali, 1986). p. 53.

<sup>13</sup> Siska Yuspitari, "Sistem Multipartai di Era Pemerintahan Susilo Bambang Yudhoyono 2004-2009" in *Dinamika Politik Journal* | Vol.1 | No.1 | Agustus 2012 ISSN: 2302-1470, p. 30.

<sup>14</sup> Hendri F. Isnaeni, "That's president's prerogative rights to rule, not me" in *FIGUR Magazine*, 9th edition, XI/February 2007.

In Britain, the power to grant pardons to a criminal is a privilege possessed by the king in which he could reduce any punishments for what he had decided upon a person. At the beginning of its enforceability, there was no limitation of power in granting the pardon granted by the king. But in its development, especially during the reign of King Charles II between 1660 and 1685, the power to grant forgiveness could be granted to all forms of crime except to the case of impeachment.<sup>15</sup>

Unlike Britain, the United States of America at the end of the 18th century, when the instruments of law were developed for its constitutional purposes, the constitutional drafters did not include provisions on the president's power to grant pardons into the Constitution. This is because many people refused that rule, it cause of they thought it was a big mistake if the power of clemency was given only to one branch of power. This reason is based on the condition of America which at that time was under the reign of George III who is considered tyrannical, so feared the existence of such power would provide legitimacy to his government.<sup>16</sup>

During the next administration, Alexander Hamilton period, the conception of a head of state forgiveness regarded as very important in a government. Through his efforts, he was able to convince the constitutional drafter to include amnesty as part of the president's power. He believed that it would be very useful in some critical situations especially in order to save the national crisis. The effort proved that it was very useful later on. President George Washington used this power when there was a rebellion in 1794 by peasants. The Farmers rebelled as a form of protest against the policies of the United States government that imposed a tax on maize crops. Nevertheless, through the power of the president, the peasants who perpetrated the acts of rebellion could be liberated and forgiven by the mechanism of granting pardons.<sup>17</sup>

Further development, at the time after the growth of the modern states in which the judicial power has been separated by the power of government over the influence of *Trias Politica*,<sup>18</sup> in which the power of government cannot

---

<sup>15</sup><http://www.historyking.com/miscellaneous/History-of-Presidential-Pardon.html>. Retrieved on April 4, 2014 at 8 P.M.

<sup>16</sup> *Ibid.*

<sup>17</sup><http://www.historyking.com/miscellaneous/History-of-Presidential-Pardon.html>. Retrieved from online on 4 April 2014 at 8 P.M

<sup>18</sup> Sir Ivor Jennings, distinguishes the separation of power in material and formal sense. Separation of power in the material sense is the separation of powers in the sense of power sharing is firmly defended in the function of state tasks which characteristically shows the existence of the

at all interfere with the judicial power, the granting of pardons changed into a corrective action against the court's decision, especially in its implementation. In Indonesia, the practice of granting pardon has been imposed since the Dutch East Indies through *Gratieregeling* as stated in *Staatsblad* 1933 No. 2. Then, during the Japanese occupation, the regulations applied where the Japanese Army Regulations stipulated in *Osamu/Sei/Hi/No.1583* which were enforced in Java and Madura.<sup>19</sup>

### The Meaning of Clemency as the President's Prerogative Right in Indonesia

One form of agreement in the implementation of 1945 Constitution amendments is the preservation of the presidential system as the system of the Indonesian government, in addition, to make the system ideal. As stated in the 1945 Constitution the president is the head of state and the head of government.<sup>20</sup> The editors of the article constitute a constitutional basis for the claim that Indonesia is a country that embraces a presidential government system<sup>21</sup> According to Bagir Manan, in a presidential government system, only one executive is known. The functions of the chief executive and head of state are in one hand and single executive. The single executive power holder in the

---

separation of powers on three bodies, namely legislative, executive, and judicative. While the meaning of the separation of powers in the formal sense is the division of power was not maintained firmly. Sir Ivor Jennings, *The Law and the Constitution*, 4<sup>th</sup> edition, (London: The English Language Book Society, 1976), p. 22. Robert M. McIver says that the separation of power in the material sense is called separation of powers, while the separation of powers in the formal sense is called the division of powers. Robert M. McIver, *the Modern State*, (Oxford: Oxford University Press, 1950), p. 364.

<sup>19</sup> In Article 1 of the regulation it is determined that in addition to the rules, the solicitation of forgiveness shall be dealt with in accordance with the former rules. The first rule is the Dutch East Indies government regulations contained in "*Gratieregeling*" in *Staatsblad* 1933 Number 2. See General Provisions in the Explanation of Government Regulation of the Republic of Indonesia Number 7 The year 1947 About Conducting Appellate Regulation In accordance with Current Circumstances.

<sup>20</sup> The 1945 Constitution of the Fourth Amendment of Article 4 and Article 17 and the 1945 Constitution Article 10, 11, 12, 13, 14, 15. See also Ni'matul Huda, *Politics ...*, p. 123, similarly, the assertion contained in Article 4 paragraph (1) of the 1945 Constitution, said that The President of the Republic of Indonesia holds the power of government according to the Constitution, So the executive function is left to the president.

<sup>21</sup> Also say, unfortunately, the system formulated in the 1945 Constitution is claimed by the designer as a presidential system with no adequate theoretical explanation of the choices of the Presidential model in question. As a result, the generation of Indonesian leaders in the late days often mistakenly understands the system of government under the 1945 Constitution as if truly a pure Presidential system. See: Jimly Asshiddiqie, *Constitutional Law and the Pillars of Democracy*, (Jakarta: Constitution Press, 2005), p. 110.

presidential government system is not accountable to the house of representative people, but directly to the electorate because it is elected directly or elected through an electoral college.<sup>22</sup>

In the presidential government system, a president has the scope of authority:<sup>23</sup> First, the executive authority is to organize the government based on constitution, second, legislative authority or to regulate public or public interest,<sup>24</sup> third, the judicial authority in the context of the restoration of justice related to the judgment of the courts,<sup>25</sup> Fourth, the diplomatic authority, the fifth, the administrative authority to appoint and dismiss people in state positions and administrative positions state, and sixth, authority in the field of security.<sup>26</sup>

In his capacity as the head of state, the President of Indonesia has powers which are also a part of the presidential prerogatives including; first, holding the highest authority over the Army, Navy and Air Force<sup>27</sup>. Second, declare war, peace, and agreement with other countries,<sup>28</sup> Third, State of danger,<sup>29</sup> fourth, appoint ambassadors and consuls and accept other ambassadors,<sup>30</sup> fifth, grant pardons, amnesty,<sup>31</sup> and abolition<sup>32</sup> And

---

<sup>22</sup> Bagir Manan, *Lembaga Kepresidenan*, (Yogyakarta: FH-UUI Press, 2003), p. 15-16.

<sup>23</sup> Jimly Asshiddiqie, *Format Kelembagaan Negara dan Pergeseran Kekuasaan dalam UUD 1945*, (Yogyakarta: FH UII Press), P. 75-77.

<sup>24</sup> See the 1945 Constitution of 1945 Article 4 paragraph (1) mentioned that the President of the Republic of Indonesia holds the power of government according to the Constitution.

<sup>25</sup> In Indonesia, the President's power in the legislative field means that the President works in conjunction with the DPR, namely: Submitting the Draft Law (Article 5 paragraph (1) and Article 20 paragraph (2)). Discussing the State Budget / APBN Budget (Article 23 paragraph 2).

<sup>26</sup> Miriam Budiarjo, *Dasar-Dasar Ilmu Politik*, (Jakarta: Gramedia Pustaka, 2009), P. 297.

<sup>27</sup> Article 10 of the 1945 Constitution of 1945 The President holds the highest authority over the Army, Navy and Air Force.

<sup>28</sup> Article 11 Paragraph (1) of the 1945 Constitution 1945 The President with the consent of the People's Legislative Assembly declare war, makes peace and agreements with other countries.

<sup>29</sup> Article 12 of the 1945 Constitution of the Republic of Indonesia President declares a state of danger. The terms and consequences of hazards shall be established by law.

<sup>30</sup> Article 13 of the 1945 Constitution of 1945. The President appoints ambassadors and consuls.

<sup>31</sup> Amnesty is a statement to the people involved in a criminal offense to eliminate all criminal consequences arising from such criminal act. This amnesty is indicated against persons who have already been sentenced or not, who have been investigated or not yet examined for such acts. Here lies the difference between pardon, abolition, and rehabilitation, because amnesty is directed to the people. In some countries, this amnesty is given to political offenses, rebellions, and strikes of workers who bring widespread consequences to the interests of the state. See Muhammad Ridhwan Indra, *Presidential Status in the 1945 Constitution*, (Jakarta: CV Haji Masagung, 1989), p. 18-19.

## Existence of Clemency as President Prerogative Right

rehabilitation and Sixth give a sign of honor.<sup>33</sup> This power is president's power in his capacity as a head of state, as a symbol of unifying the nation.<sup>34</sup>

In the judicial field, the president has power which includes;<sup>35</sup> First, the power of giving clemency to the convicted person, either the abolition of punishment or the reduction of punishment; Second, the president has the power to stop the prosecution of the person who has committed a crime by giving abolition, Third, the authority to grant amnesty and Fourth, the president has the power to rehabilitate a person whose rights have been lost due to a court decision. Prior to the amendment of the 1945 Constitution, the Constitution of the Republic of Indonesia mandated some form of presidential power in the field of judicial affairs. These powers include; First, the power to grant clemency to the convicted person, both in the form of abolition of punishment and reduction of punishment; Second, the president has the power to stop the prosecution of the person who has committed a crime by giving abolition; Third, the president has the authority to grant amnesty and Fourth, to rehabilitate to someone whose rights have been lost due to a court decision<sup>36</sup>.

Same with the 1945 Constitution, the RIS Constitution also stated that the president has right to give forgiveness and leniency, or the punishments imposed by a court verdict. If the judgment is a death punishment and then the decision could not be executed before the president obeys the rules set out by the Federal Law and the convict is given the opportunity to grant pardon.<sup>37</sup> While amnesty can only be granted under the Federal Act, granted by the president after seeking advice from the Supreme Court.<sup>38</sup> While the provisions on abolition are not explicitly contained in the constitution of the RIS, it is

---

<sup>32</sup> Abolition is the act of stopping the investigation of a case, but to the case, the court has not passed its verdict. The reason for giving this abolition lies in the public interest in the case of state security concerns that cannot be sacrificed by court decisions. See Muhammad Ridhwan Indra, *Presidential Status in the 1945 Constitution*, (Jakarta: CV Haji Masagung, 1989), p. 18-19.

<sup>33</sup> Article 14 of the 1945 Constitution of 1945. The President grants clemency and rehabilitation with due consideration to the Supreme Court.

<sup>34</sup> Article 15 of the 1945 Constitution of the Republic of Indonesia "President grants titles, services, and other honor signs regulated by law."

<sup>35</sup> Abdul Ghofar, *Perbandingan Kekuasaan Presiden Indonesia Setelah Perubahan UUD 1945 dengan Delapan Negara Maju*, (Jakarta: Kencana Prenada Media Group, 2009), p. 78.

<sup>36</sup> Abdul Ghofar, *Perbandingan Kekuasaan Presiden Indonesia Setelah Perubahan UUD 1945 dengan Delapan Negara Maju*, (Jakarta: Kencana Prenada Media Group, 2009), p. 78.

<sup>37</sup> Article 160 paragraph (1) dan paragraph (2) Constitution of RIS.

<sup>38</sup> Article 160 paragraph (3) of the Constitution of the RIS states that amnesty can only be granted by Federal Law. Nor, on the power of the Federal Law, by the president after seeking advice from the Supreme Court.



specifically regulated in the annex to the 1949 Constitution of RIS as one of the main administrative items imposed on the central government.<sup>39</sup>

The Presidential power in the field of judicial in the terms of granting pardon is already contained in the history of the Indonesian constitution, ie: the 1945 Constitution, the Constitution of the RIS, the 1950 Constitution and the 1945 Constitution of the Republic of Indonesia.<sup>40</sup> Whereas there is a change in the wording aspect. For example, in the Constitution of the Republic of Indonesia, in which the provisions on clemency are a text read as follows: "The President has a right to forgive the penalties imposed by the judicial decree. The right to do so after seeking advice from the Supreme Court, meanwhile in federal law there is no Court for giving advice to president before giving clemency."<sup>41</sup>

In the provisional Constitution of 1945 the provisions on pardon read: "The President has the right to grant clemency from the sentences imposed by the court's decision. The right is done after seeking the advice of the Supreme Court with the law is not directed other courts to give advice."<sup>42</sup>

In the 1945 Constitution before the amendment of the provision reads: "The President grants clemency, amnesty, abolition, and rehabilitation."<sup>43</sup> While in the 1945 Constitution of the Republic of Indonesia as the result of the 1945 amendment, the provision reads: "The President grants clemency and rehabilitation with due consideration to the Supreme Court."<sup>44</sup>

In article 35 of the Law of the Republic of Indonesia Number 14 in 1985 regarding the Supreme Court also mentioned: "The Supreme Court provides legal advice to the President as Head of State for granting or rejecting

---

<sup>39</sup> Ismail Suny, *Pergeseran Kekuasaan Eksekutif*, p. 93.

<sup>40</sup> In the history of the Indonesian constitution, initially imposed is the 1945 Constitution, the 1945 Constitution was subsequently replaced by the Constitution of Through the Presidential Decree of July 5, 1959, the 1945 Constitution was declared provisional 1950 Constitution (UUDS 1950). Valid in Indonesia until today. Until August 10, 2002, the 1945 Constitution has been amended four times by the People's Consultative Assembly (MPR). the United States of Indonesia (Constitution RIS) on 27 December 1949, on 17 August 1950 the Constitution of the RIS was replaced.

<sup>41</sup> Article 107 paragraph (1) Undang-Undang Dasar Sementara 1945 (Provisional Constitution 1945).

<sup>42</sup> Article 14 UUD 1945

<sup>43</sup> Article 14 UUD NRI 1945.

<sup>44</sup> Article 35 Undang-Undang Republik Indonesia Nomor 14 Tahun 1985 Tentang Mahkamah Agung (the 1985 Constitution of the Republic of Indonesia number 14 about Supreme Court).

## Existence of Clemency as President Prerogative Right

pardons.”<sup>45</sup> Whereas in Article 35 of Law of the Republic of Indonesia Number 5 in 2004 About Amendment to Law Number 14 in 1985 regarding the Supreme Court, the article's editors are changed become: “The Supreme Court provides legal consideration to the President in appeals for pardon and rehabilitation.”<sup>46</sup>

The need for consideration of the Supreme Court in terms of granting pardon by the President also included in Law No. 22 in 2002 on clemency, with the redactions: “The President has the right to grant or reject the petition for pardon filed by the convicted person as referred to Article 2 after receiving consideration from the Supreme Court.”<sup>47</sup>

The changes in wording that occurred in article 14 of the 1945 Constitution of the Republic of Indonesia is mentioned that the President in granting pardon and rehabilitation should pay attention to the consideration of the Supreme Court. Similarly, when the President gives amnesty and abolition must consider to the consideration of the House of Representatives.

### The Rule of Clemency in the Constitution of Various Countries

The power to forgive the culprits has been a privilege for almost every authority in the world since ancient times.<sup>48</sup> According to Kathleen Dean Moore, clemency is a legitimate act of the executive to relinquish in whole or in a part of the consequences of punishment of a guilty verdict of a criminal offense committed by a person.<sup>49</sup> The modern practice of forgiveness its origin from British system in which it is the Royal Prerogative of the King to forgive. Moreover, besides England, applying right for forgiveness is also found and mentioned in the code of Hammurabi through a series of decrees developed in Babylon almost 4,000 years ago. During the medieval period, a pardon was

---

<sup>45</sup> Article 35 Undang-Undang Republik Indonesia Nomor 14 Tahun 1985 Tentang Mahkamah Agung (the 1985 Constitution of the Republic of Indonesia number 14 about Supreme Court).

<sup>46</sup> Article 35 Undang-Undang Republik Indonesia Nomor 5 Tahun 2004 Tentang Perubahan Atas Undang-Undang Nomor 14 Tahun 1985 Tentang Mahkamah Agung (the 2004 Constitution of the Republic of Indonesia number 5 about alteration of the 1985 Constitution about the Supreme Court).

<sup>47</sup> Article 4 paragraph (1) UU No. 22, year 2002 about clemency.

<sup>48</sup> In the Old Testament and New Testament there is the term "divine pardon" which then becomes the reference of prerogative as a form of mercy which is also contained in the Mosaic Law, Greek Law, and Roman law. Furthermore, William F. Duker, the President's Power to Pardon: A Constitutional History, 18 WM. & MARY L. REV. 475, 476 (1977).

<sup>49</sup> Kathleen Dean Moore, Pardons: Justice, Mercy, and the Public Interest Oxford (University Press 1989), P. 4.

extensively used as a method to reduce the density in prisons during the war, political uprising and others. In modern democracies, the power to grant pardons or pardons is in the hands of their chief executive.<sup>50</sup> While the King of England has applied the power to forgive for centuries, this power has not appeared in writing in a code of law until the seventh century. Over the time, the authority to forgive is practiced as a form of oversight of the system of judicial system development that is often known to be cruel and unforgiving. A punishment deemed unfair or unjust can be softened through the act of granting pardons by the Executive.<sup>51</sup>

In some countries, the power of the president to grant forgiveness to the perpetrator has various terms, ie "right to grant pardons," the prerogative of mercy, the prerogative of mercy and granting amnesty, the right of clemency, a power of mercy, the power to grant, Grant pardons. Although with various terms but has the same meaning that as one branch of the president's power to forgive the perpetrators of crime. In some countries, although forgiveness is the right of a king's mercy, in the implementation and technical level is not always given directly by the president or the king. For example in Canada, clemency is granted by the Governor-General of Canada or the Governor in the Council (Federal Cabinet) as a form of prerogative. The Applications for pardon are addressed to the National Parole Board.<sup>52</sup>

It is noted from the 189 constitutions of countries in the world there are 173 constitutions in which there are norms that regulate the power to pardon. In this study, the authors only took 55 constitutions from 173 the constitution as a sample. The author tried to categorize the norm about the pardon of the 55 constitutions as follows:

### **Clemency as a Prerogative right of President**

In countries such as Brazil used the term exclusive power, in Algeria, the constitution states that between the powers and rights of the president is the president's prerogative has the right to grant pardons and reduce or alleviate punishment.<sup>53</sup> Rwanda mentioned that the president has the authority to

---

<sup>50</sup><http://www.lawteacher.net/administrative-law/essays/power-to-pardon-an-analysis-law-essays.php>

<sup>51</sup> Jody C. Baumgartner, "Presidential Power Unbound: A Comparative Look at Presidential Pardon Power" *Jurnal Politics & Policy* Volume 29 No. 2 June 2001, p. 212.

<sup>52</sup> <http://en.wikipedia.org/wiki/Pardon>.

<sup>53</sup> Article 77 Algeria constitution mentioned that "In addition to the powers expressly conferred upon him by this Constitution, the President of the Republic shall enjoy the following

## Existence of Clemency as President Prerogative Right

provide prerogative mercy with procedures that have been established by law and after consultation with the Supreme Court.<sup>54</sup> In addition to those countries, such as Bangladesh,<sup>55</sup> Brunei Darussalam,<sup>56</sup> Jordan,<sup>57</sup> Denmark<sup>58</sup> and Chile the power to pardon is also explicitly referred to as the prerogative of a head of state (both kings and presidents). There are some countries who call the term prerogative of mercy and some others used the term special attribution of the president (Chile).<sup>59</sup> These terms actually have the same meaning substantially which is interpreted as a form of forgiveness.

### Consideration of others institution in granting the clemency

Based on 55 samples, the researcher analyzes that there are several countries which have a mechanism for granting pardons, in the implementation, they do the consultation with other state institutions. Such Brazil, in granting pardons it can be done after hearing of agency instituted by law,<sup>60</sup> in Columbia grants may be granted after informing the Congress,<sup>61</sup> in

---

powers and prerogatives: (9) He shall have the right to grant pardons, and to reduce or to commute sentences.

<sup>54</sup> Article 111 Rwanda Constitution "The President of the Republic shall have authority to exercise the prerogative of mercy in accordance with the procedure determined by Law and after consulting the Supreme Court on the matter. He/she shall have the authority of issuing national currency in accordance with procedures determined by the Law.

<sup>55</sup> Article 49 Bangladesh constitution mentioned that Prerogative of mercy "The President shall have the power to grant pardons, reprieves, and respites and to remit, suspend or commute any sentence passed by any court, tribunal or other authority.

<sup>56</sup> Article 9 Brunei Darussalam constitution mentioned that Prerogative of Mercy (1) "His Majesty the Sultan and Yang Di-Pertuan may, at any time, exercise, in respect of any offence for which the offender may be tried in Brunei Darussalam, such one or more of the following powers as he may think fit, namely power to-- grant to any person concerned in, or convicted of, any such offence a pardon either free or subject to lawful conditions.

<sup>57</sup> Article 38 Jordan constitution mentioned that The King and His Prerogatives "The King has the right to the special pardon and to remit the sentence, but the general pardon shall be determined by a special law."

<sup>58</sup> Article 24 of Denmark constitution mentioned that "The King shall have the prerogative of mercy and of granting amnesty. The King may grant Ministers a pardon for sentences passed upon them by the High Court of the Realm only with the consent of the Folketing."

<sup>59</sup> Article 32 of Chile constitution mentioned that the special attributions of the President of the Republic [are]: (14) to grant individual pardons in the cases and forms that the law determines. Pardon will be inapplicable when no final sentence has been pronounced in the respective proceedings. The functionaries accused by the Chamber of Deputies and condemned by the Senate may only be pardoned by the Congress;

<sup>60</sup> Article 84 of Brazil constitution mentioned that "The President of the Republic has the exclusive powers to grant pardons and commute sentences, after hearing, if necessary, from the agencies instituted by law;

Paraguay, pardons may be granted after considering reports from the Supreme Court,<sup>62</sup> in Cameroon requiring consultation with the Superior Court of Justice,<sup>63</sup> Kenya, the president may give clemency to forgive someone on the advice of the Advisory Committee.<sup>64</sup> The forgiveness can be given either through the pardon of liberation or conditional forgiveness. In Rwanda clemency is also provided under applicable law and may be granted after consultation with the Supreme Court.<sup>65</sup> In Somalia, forgiveness and punishment of criminals can be given by the federal president after obtaining a recommendation from the Judicial Service Commission.<sup>66</sup> In Zimbabwe, the president can grant pardons after consultation with the cabinet.<sup>67</sup> In Iran, both forgiveness and punishment are awarded with a recommendation from the head of judicial power.<sup>68</sup> In other countries such as Iraq,<sup>69</sup> the Philippines,<sup>70</sup>

---

<sup>61</sup> Article 201 of Columbia constitution mentioned that "It is the duty of the Government to do the following in relation with the Judiciary Branch: (2) Grant pardons, reprieves, or amnesties for political crimes, in accordance with the law, and inform Congress about the exercise of this power. These exonerations may, in no case, affect the responsibility the grantees have with respect to private individuals.

<sup>62</sup> In Article 238 i Paraguay constitution mentioned "[The following] are duties and attributions of whoever exercises the presidency of the Republic: (10) to pardon or to commute the penalties imposed by the judges and Tribunals of the Republic, in accordance with the law, and with [a] report of the Supreme Court of Justice;"

<sup>63</sup> Article 8 (7) of Cameroon constitution mentioned: "He shall exercise the right of clemency, after consultation with the Higher Judicial Council."

<sup>64</sup> Article 133 Power of mercy (1) "On the petition of any person, the President may exercise a power of mercy in accordance with the advice of the Advisory Committee established under clause (2), by- (a) granting a free or conditional pardon to a person convicted of an offense.

<sup>65</sup> In Article 111 of Rwanda constitution mentioned that The President of the Republic shall have authority to exercise the prerogative of mercy in accordance with the procedure determined by Law and after consulting the Supreme Court on the matter. He/she shall have authority of issuing national currency in accordance with procedures determined by the Law.

<sup>66</sup> In Article 90 of Somalia constitution mentioned The Responsibilities and Powers of the President of the Federal Republic of Somalia. The powers and responsibilities of the President of the Federal Republic of Somalia are to (p) Pardon offenders and commute sentences on the recommendation of the Judicial Service Commission.

<sup>67</sup> In Article 112 Zimbabwe constitution mentioned "Power of mercy(1) The President, after consultation with the Cabinet, may exercise the power of mercy, that is to say, may-- (a) grant a pardon to any person concerned in or convicted of an offence against any law."

<sup>68</sup> In Article 110 Iran Constitution mentioned "Following are the duties and powers of the Leadership: (11) Pardoning or reducing the sentences of convicts, within the framework of Islamic criteria, on a recommendation [to that effect] from the Head of judicial power. The Leader may delegate part of his duties and powers to another person."

<sup>69</sup> In Article 73 of Iraq constitution mentioned: "To issue a special pardon on the recommendation of the Prime Minister, except for anything concerning a private claim and for those who have been convicted of committing international crimes, terrorism, or financial and administrative corrupt."

## Existence of Clemency as President Prerogative Right

Singapore,<sup>71</sup> Denmark,<sup>72</sup> Greece,<sup>73</sup> Netherlands,<sup>74</sup> and Argentina also have the same mechanism, where the process of forgiveness, mitigation, and reduction of punishment is consulted with other institutions or branches of power. In addition Israel also applies the granting of pardon from the president with the recommendation of the Minister of Justice. It same in Italy, according to Article 87 of the Italian Constitution states that the granting of pardon requires a counter signature from the Minister of Justice. Even. The Italian Constitutional Court has ruled that the Minister of Justice shall sign the act of pardon.<sup>75</sup>

There are also countries with special committees in relation to granting pardons, such as in Russia, they have an amnesty Committee who arrange on the list of persons deemed eligible for pardon and then they submitted to the president.<sup>76</sup> The South African Constitution article 84 (2) states that the president in his capacity both as head of state and head of government is responsible for forgiveness, reducing punishment.<sup>77</sup> In Spain, The *derecho de gracia* (true grace) or *indulto* (forgiveness) is recognized by the Spanish Constitution of 1978 as part of the privilege of a Spanish King and it set in chapter 62 (i). In Spain, procedures and requirements for granting clemency are committed by both the convicted person and his or her family to volunteer. The court that has sentenced the case report and will be considered together with the comments of the Prosecutor and the perpetrator of the crime if it still exists. After that, the Minister of Justice all of that. And then, The Minister of Justice

---

<sup>70</sup> In Article 9 Philippines's constitution mentioned: "He shall also have the power to grant, amnesty with the concurrence of a majority of all the Members of the Congress."

<sup>71</sup> In article 22P of Singapore Constitution mentioned" Grant of pardon, etc. (1) The President, as occasion shall arise, may, on the advice of the Cabinet : (a) grant a pardon to any accomplice in any offence who gives information which leads to the conviction of the principal offender or any one of the principal offenders, if more than one;

<sup>72</sup> In Article 24 Denmark Constitution stated that "The King shall have the prerogative of mercy and of granting amnesty. The King may grant Ministers a pardon for sentences passed upon them by the High Court of the Realm only with the consent of the Folketing.

<sup>73</sup> In Article 471 of Greece Constitution stated that The President of the Republic shall have the right, pursuant to a recommendation by the Minister of Justice and after consulting with a council composed of its majority of judges, to grant pardons, to commute or reduce sentences pronounced by the courts, and to revoke all consequences at law of sentences pronounced and served."

<sup>74</sup> In Article 122 of Netherland Constitution Stated that" Pardons shall be granted by Royal Decree upon the recommendation of a court designated by Act of Parliament and with due regard to regulations to be laid down by or pursuant to Act of Parliament.

<sup>75</sup><http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2006&numero=200> - Sentence nr. 200/2006 - Constitutional Court of Italy.

<sup>76</sup> Article 89 Konstitusi Federasi Rusia (Russian Federation Constitution).

<sup>77</sup> Article 84 paragraph (2) Constitution Afrika Selatan (South African Constitution).

reports all of the issues of pardons to the Cabinet of Ministers. If the Cabinet decides to forgive the Minister of Justice will recommend it to the King.

In Turkey, the practice of granting pardons is done by the president as part of his rights. As stated in the article number 104 states that the president can "forgive, on the grounds of a chronic illness, disability, or because of an elderly prisoner either reducing part or all of the punishment imposed on an inmate."<sup>78</sup> After the submission is filed by the criminal, the Forensic Medical Council will ensure that the prisoner is suffering from a chronic, disability, or elderly illness. After that, the Department of Justice will report his condition to the president, and the president will determine whether to grant the pardon or not.<sup>79</sup>

In India, although the Indian constitution determines that the pardon authority is in the hands of the president and the governor, in practice it is coordinated and on the advice of The Council of Ministers, whether or not the suggestion should be followed in deciding to accept or reject a pardon request that<sup>80</sup> requires a test. As in the Constitution of India article 74 mentioned: "The Council of Ministers headed by the Prime Minister would aid and advise the President, who shall, in the exercise of his functions, act in accordance with such advice." While in I constitution of India article 163 stated that: "The Council of Ministers headed by the Chief Minister would aid and advise the Governor in the exercise of his functions."

The other institutions' involvement in granting pardons in the countries which mentioned above uses the words contained in their constitutional norms such as recommendation, hearing, inform, consultation, advice, in accordance, concurrency, and others. In Indonesia, it uses the term using the sentence: paying attention to the Supreme Court. If traced in the 1945 Constitution of 1999, the draft amendments to Article 14 paragraphs (1) and (2) initially read: "The President grants pardons and rehabilitation based on Supreme Court

---

<sup>78</sup> Article 104 Constitution Turkey mentions The President of the Republic is the Head of the State. In this capacity he represents the Republic of Turkey and the unity of the Turkish Nation; he ensures the implementation of the Constitution and the regular and harmonious functioning of the organs of state. To this end, the duties he or she performs, and the powers he or she exercises, in accordance with the conditions stipulated in the relevant articles of the Constitution are as follows: To remit, on grounds of chronic illness, disability, or old age, all or part of the sentences imposed on certain individuals

<sup>79</sup> <http://en.wikipedia.org/wiki/Pardon>.

<sup>80</sup> Parul Kumar, "The Executive Power to Pardon: Dilemmas of the Constitutional Discourse", *NUJS LAW REVIEW* 2 *NUJS L. Rev.* (2009), p. 15.

## Existence of Clemency as President Prerogative Right

considerations.”<sup>81</sup> While in paragraph (2) states: “President is an amnesty member, abolition based on the consideration of the House of Representatives.”<sup>82</sup>

The changes of the redaction draft which initially as desired of necessity to pay attention to the Supreme Court's consideration that is by "wording" base. The word based on the response by various factions of the members of the session, because the word has a more instructive meaning (mandatory) that is considered to reduce the prerogative of the first president in granting pardons, rehabilitation, amnesty, and abolition. Therefore, the editor is refined by using redaction, with attention. Sentence by using with attention is interpreted not binding the president, because of the president's right to accept or reject these considerations.<sup>83</sup>

It is important to note that the presence of other institutions such as the Supreme Court and the House of Representatives in the context of giving consideration to the president is a spirit to be built in the 1945 Constitution by applying the mechanism of checks and balances, so that there is an interactional relationship between branches of power. In the context of granting clemency and rehabilitation, consideration is given by the Supreme Court. This is because pardons and rehabilitation are a judicial process and are usually given to people who have undergone a process (court decision). In addition, pardons and rehabilitation are also provided in an individual context.<sup>84</sup>

In contrast, to give clemency and rehabilitation, amnesty and abolition are usually bulk, such as being given to rebel groups/makers. Kahar Muzakar's rebellion was not processed legally but directly using amnesty and abolition mechanisms. Therefore, the judicial case such as pardon and rehabilitation of its consideration from the judicial institution of the Supreme Court, while the case

---

<sup>81</sup> Look at Majelis Permusyawaratan Rakyat Republik Indonesia, Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, (Jakarta: Setjend MPR RI, 2010), p. 337.

<sup>82</sup> Look at Majelis Permusyawaratan Rakyat Republik Indonesia, Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, and P. 37.

<sup>83</sup> Lihat Majelis Permusyawaratan Rakyat Republik Indonesia, Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, (Jakarta: Setjend MPR RI, 2010), p. 337-339.

<sup>84</sup> Lihat Majelis Permusyawaratan Rakyat Republik Indonesia, Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, (Jakarta: Setjend MPR RI, 2010), p. 342.



of a political nature because it has not been touched by the judicial process, the consideration of the House as a political institution.<sup>85</sup>

### **The Other Institutions Are Not Involved**

Based on 55 constitutions which researcher examined, there are some countries whose constitutional norms do not mention the involvement of other branches of power in terms of granting pardons, such as in France,<sup>86</sup> Venezuela,<sup>87</sup> Mexico,<sup>88</sup> Algeria,<sup>89</sup> Central African Republic,<sup>90</sup> Congo,<sup>91</sup> Madagascar,<sup>92</sup> Liberia,<sup>93</sup> Nigeria,<sup>94</sup> Morocco.<sup>95</sup>

and other countries such as South Africa, Sudan, Afghanistan, Armenia, Bahrain, Bangladesh, Brunei Darussalam, Japan, Jordan, Kuwait, Lebanon, Pakistan, Qatar, Syria, United Arab Emirates, Uzbekistan, Austria, Bulgaria, Finland, Germany, Nauru, and Solomon Island.

Although they not explicitly stated in the constitutional norms related to the existence of other branches of power in the exercise of granting pardons, there is still the possibility of involvement of other branches of power mentioned in the law. such in India, although the constitutional norm governing pardons does not mention the involvement of other branches of power, but in its implementation involves the council of ministers who have a

---

<sup>85</sup> Lihat: Majelis Permusyawaratan Rakyat Republik Indonesia, Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, (Jakarta: Setjend MPR RI, 2010), p. 342.

<sup>86</sup> Article 17 "The President of the Republic is vested with the power to grant individual pardons."

<sup>87</sup> Article 236 "The following are attributions and duties of the President of the Republic: (19) To grant pardon."

<sup>88</sup> Article 89 "The powers and duties of the President are the following: To grant, conforming to the laws, pardons to criminals convicted of crimes within the competence of the federal courts, and to those convicted of common crimes in the Federal District.

<sup>89</sup> Article 77 "In addition to the powers expressly conferred upon him by this Constitution, the President of the Republic shall enjoy the following powers and prerogatives."

<sup>90</sup> Article 22 "He has the right of pardon."

<sup>91</sup> Article 80 "The President of the Republic exercises the right of pardon"

<sup>92</sup> Article 58 "The President of the Republic exercises the right of pardon

<sup>93</sup> Article 59 "The President may remit any public forfeiture and penalties suspend and fines and sentences, grant reprieves, and pardons, and restore civil rights after conviction for all public offenses, except impeachment.

<sup>94</sup> Article 175 (1) The President may- (a) grant any person concerned with or convicted of any offense created by an Act of the National Assembly a pardon, either free or subject to lawful conditions;

<sup>95</sup> Article 58 "The King exercises the right of pardon"

role of providing assistance and advice to the president in carrying out its function.<sup>96</sup>

### Conclusion

Based on 55 constitutions of countries in the world which comparable by the researcher, it can be concluded that the authority to forgive through the mechanism of granting of pardon entered one of the material content of the constitution almost in the majority of countries in the world. There are some countries whose constitutional norms still state that granting pardons is a prerogative of presidents such as Algeria, Rwanda, Bangladesh, Brunei Darussalam, Jordan, Denmark, and Chile. In these countries, the power to pardon by the head of state is explicitly referred to as a prerogative despite the mechanism still possible involving other branches of power. Several norms of the constitution of countries are also examined, which normatively mention the involvement of other branches of power in the application of the pardoning authority by using various terms such as recommendation, hearing, inform, consultation, advice, in accordance, concurrency, other. In this context, there are similarities with Indonesia where the Indonesian constitutional norm also states that the president grants clemency and rehabilitation with due consideration to the Supreme Court.

From this comparative study it can be concluded that the involvement of other branches of power in the mechanism of granting does not mean reducing the authority of the president (prerogative), but indeed there is a tendency almost in all modern states to embrace a system of government that seeks to place all models of power within the framework of public accountability. Thus, the power that cannot be controlled, rocked and accounted for, this is often referred to as the prerogative of the president (absolute) in practice is difficult to get a place. Therefore, in the practice of state administration of modern countries, prerogatives are no longer absolute and independent, except in the case of policy making in the context of governing.

In the context of Indonesia, clemency as one of the branches of presidential power is still the prerogative of the president for two reasons; firstly, in the presidential government system, there is no difference between the president's position as head of state and the position of president as head of government. Therefore, a pardon is given by the president in his capacity as the

---

<sup>96</sup> Article 74 The Council of Ministers headed by the Prime Minister would aid and advise the President, "who shall, in the exercise of his functions, act in accordance with such advice.

president who has two positions both as head of state and as head of government. The second reason, even though the Supreme Court is considered necessary, but the consideration is not binding, it is only an advisement function. So that, the consideration is not interpreted as a form of intervention branch of judicial power against the branch of executive power.

## **References**

- Asshiddiqie, Jimly "Struktur Ketanegaraan Indonesia Setelah Perubahan Keempat UUD 1945" Makalah disampaikan pada Seminar Pembangunan Hukum Nasional VII yang diselenggarakan oleh BPHN Kementerian Hukum dan HAM, Denpasar 14-18 Juli 2003).
- Asshiddiqie, Jimly *Konstitusi dan Konstitusionalisme*, Jakarta: Konstitusi Press, 2005.
- Asshiddiqie, Jimly, *Format Kelembagaan Negara dan Pergeseran Kekuasaan dalam UUD 1945*, Yogyakarta: FH-UII Press, 2005.
- Asshiddiqie, Jimly, *Hukum Tata Negara dan Pilar-pilar Demokrasi*, Jakarta: Konstitusi Press, 2005.
- Asshiddiqie, Jimly, *Implikasi Perubahan UUD 1945 Terhadap Pembangunan Hukum Nasional*, Jakarta: Mahkamah Konstitusi, 2008.
- Asshiddiqie, Jimly, *Implikasi Perubahan UUD 1945 Terhadap Pembangunan Nasional*, Jakarta: Mahkamah Konstitusi RI, 2005.
- Asshiddiqie, Jimly, *Komentar atas Undang-Undang Dasar 1945*, Jakarta: Sinar Grafika, 2009.
- Asshiddiqie, Jimly, *Pergumulan Peran Pemerintah dan Parlemen dalam Sejarah; Telaah Perbandingan Konstitusi Berbagai Negara, Cet.1*, Jakarta: UI-PRESS, 1996.
- Azize, Joseph, "The Prerogative of Mercy In New" *Jurnal Public Space; The Journal of Law and Social Justice*.
- Budiarjo, Miriam, *Dasar-Dasar Ilmu Politik*, Jakarta: Gramedia Pustaka Utama, 2009.
- Campbell Black, Henry, *Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern* St. Paul, Minn: West Group, 1991.

## Existence of Clemency as President Prerogative Right

- Departemen Pendidikan dan Kebudayaan, Kamus Besar Bahasa Indonesia, Jakarta: Balai Pustaka, 1990.
- Effendy Yusuf, Slamet dan Umar Basalim, *Reformasi Konstitusi Indonesia Perubahan Pertama UUD 1945*. Jakarta: Pustaka Indonesia Satu, 2000.
- Falaakh, Moh. Fajrul, 'Menata Sistem Presidensial', dalam Zainal Arifin Mochtar dan Saldi Isra (ed). Jalan Berliku Amandemen Konstitusi. Jakarta: Kelompok DPD di MPR, 2009.
- Ghoffar, Abdul Perbandingan Kekuasaan Presiden Indonesia Setelah Perubahan UUD 1945 dengan Delapan Negara Maju, Jakarta: Kencana Prenada Media Group, 2009.
- Ibrahim, Johnny Teori dan Metodologi Penelitian Hukum Normatif, Malang: Bayumedia Publishing, 2010.
- Jennings, Ivor, *The Law and the Constitution*, 4 edition, London: The English Language Book Society, 1976.
- Jody C. Baumgartner dan Mark H. Morris, "Presidential Power Unbound: A Comparative Look at Presidential Pardon Power," *Jurnal Politics & Policy*, Volume 29, No. 2, June 2001.
- Joeniarto, Demokrasi dan Sistem Pemerintahan Negara, Yogyakarta: Bina Aksara, 1982.
- Kumar, Parul, *The Executive Power to Pardon: Dilemmas of the Constitutional Discourse*, *NUJS LAW REVIEW* 2 *NUJS L. Rev.* (2009).
- Kusnardi, Moh dan Harmaily Ibrahim, *Hukum Tata Negara Indonesia*, Jakarta: Pusat Studi Hukum Tata Negara FH UI, 1988.
- Magnis-Suseno, Franz, *Etika Politik: Prinsip Moral Dasar Kenegaraan Modern*, Jakarta: Gramedia, 1993.
- Mahfud MD, Moh, *Dasar dan Struktur Ketatanegaraan Indonesia*, Jakarta: Rineka Cipta, 2000.
- Mahmud Marzuki, Peter, *Penelitian Hukum*, Jakarta: Kencana, 2008.
- Majelis Permusyawaratan Rakyat Republik Indonesia, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*, Jakarta: Setjend MPR RI, 2010.
- Manan, Bagir, *Lembaga Kepresidenan*, Yogyakarta: Gama Media, 1999.

- Marganda Aritonang, Dinoroy, Penerapan Sistem Pemerintahan Presidensil di Indonesia Pasca Amandemen UUD 1945, *Jurnal Mimbar Hukum* Volume 22 Nomor 2 Juni 2010.
- Mulyosudarmo, Suwoto, Kekuasaan dan Tanggung Jawab Presiden Republik Indonesia; Suatu Penelitian Segi-Segi Teoritik dan Yuridik Pertanggung Jawaban Kekuasaan, Surabaya: Disertasi Doktor Pascasarjana Universitas Airlangga, 1990.
- Novianti, "Kontroversi Pemberian Grasi Terhadap Corby" dalam *Info Singkat Hukum* Vol. IV, No. 11/I/P3DI/Juni/2012.
- Nurmawati, Made, Check and Balances dalam Lembaga Perwakilan Indonesia, *Jurnal Lembaga Ilmu Pengetahuan Indonesia (LIPI)*.
- Ridhwan Indra, Muhammad, Kedudukan Presiden dalam UUD 1945, Jakarta: CV Haji Masagung, 1989.
- Robert M. McIver, *the Modern State*, Oxford: Oxford University Press, 1950.
- Sukardja, Ahmad, *Hukum Tata Negara dan Hukum Administrasi Negara Dalam Perspektif Fiqih Siyasah*, Jakarta: Penerbit Sinar Grafika, 2012.
- Triwulan Tutik, *Titik Pokok-pokok, Pokok-Pokok Hukum Tata Negara Indonesia Pasca amandemen UUD 194*, Cerdas Pustaka Publisher, 2008.
- Valerine J. L. Kriekhof, dkk, *Metode Penelitian Hukum (Seri Buku Ajar)*, Buku A, Depok: Fakultas Hukum Universitas Indonesia, 2000.
- Wahyono, Padmo, *Negara Republik Indonesia*, Jakarta: Rajawali, 1986.
- Yuda A. R, Hanta, *Presidensialisme Setengah Hati: dari Dilema ke Kompromi*, Jakarta: PT Gramedia Pustaka Utama, 2010.
- Yunus, Nur Rohim, *Restorasi Budaya Hukum Masyarakat Indonesia*, Bogor: Jurisprudence Press, 2012.
- Yuspitasari, Siska "Sistem Multipartai di Era Pemerintahan Susilo Bambang Yudhoyono 2004-2009" dalam *Jurnal Dinamika Politik*, Vol. 1, No. 1, Agustus 2012, ISSN: 2302-1470.
- Zainal Arifin Mochtar dan Saldi Isra (ed). *Jalan Berliku Amandemen Konstitusi*. Jakarta: Kelompok DPD di MPR, 2009.

in Collaboration with :



Indexed by :



Universiteit  
Leiden



PRINCETON  
UNIVERSITY



HARVARD  
LIBRARY



JURNAL CITA HUKUM is a peer-reviewed journal on Indonesian Law Studies published bi-annual (June & December) by Faculty of Sharia and Law Universitas Islam Negeri Syarif Hidayatullah Jakarta in cooperation with Center for the Study of Constitution and National Legislation (POSKO-LEGNAS). JURNAL CITA HUKUM aims primarily to facilitate scholarly and professional discussions over current developments on legal issues in Indonesia as well as to publish innovative legal researches concerning Indonesian laws.

