Policy construction of the Constitution of the Republic Indonesia political system regarding the implementation of the president's prerogative in the appointment of ministers in the era of Joko Widodo administration

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ABSTRACT

The prerogative of the President in appointing a minister is defined by the 1945 Constitution. The research uses an empirical legal approach method to analyze the practical implications and real-world applications of constitutional provisions, examining the political and legal impacts of these appointments, and exploring the broader socio-political context of such decisions within the framework of Indonesia's evolving political landscape under President Joko Widodo's administration. This paper focuses on the theoretical and practical implications of the 1945 constitution and the concept of a legal state as the law that serves as the foundation of governance and must be complied with in exercising power, bridges the gap between despotic absolutism and the advanced development of constitutionalism, thus leading to the formation of constitutional law.

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INTRODUCTION

Indonesia is a constitutional democracy. After the fall of the authoritarian New Order regime in 1998, various constitutional changes have been made to weaken the power of the executive branches. Thus, creating a new dictatorship system is almost impossible.

Indonesia today is characterized by popular sovereignty manifested in parliamentary and presidential elections every five years. Since the end of the New Order led by President Suharto and the beginning of the Reform era, every election in Indonesia is considered free and fair. However, Indonesia is not yet free from corruption, collusion, and nepotism, as well as 'money politics' where individuals can buy power or political positions. (Currently - based on the Democracy Index released by the Economist Intelligence Unit - Indonesia is still considered a 'flawed' democracy) (Economist Intelligence Unit, 2024).

The political situation in Indonesia is crucial for those planning to invest in Indonesia or those who wish to engage in business relations with Indonesia. President of the Republic of Indonesia, Joko Widodo, who is currently serving as the President, has "Appointment Power" as a way for the President to control internal coalition dynamics in governing and managing coalition parties. Cabinet positions are a major bargaining tool in building coalitions, thus expanding coalitions and punishing coalition participants who are undisciplined with cabinet reshuffles are considered effective steps (Arsil, 2017).

On Wednesday, October 23, 2019, President of the Republic of Indonesia for the period 2019 – 2024, Mr. Ir. Joko Widodo, announced his cabinet named "Kabinet Indonesia Maju" (Indonesia Onward Cabinet). The inauguration took place after a two-day interview process conducted by the president. The "Kabinet Indonesia Maju" consists of 34 ministers. Out of this number, 18 seats are filled by figures from non-political professional backgrounds, while 16 ministers are filled by figures with political backgrounds. Looking at its composition, the number of ministerial seats from political parties increased compared to the previous Working Cabinet announced in 2014. Meanwhile, the number of female ministers decreased from eight to five individuals. In terms of age, the majority of ministers in the Indonesia Onward Cabinet are over 60 years old.
Considering the composition and number of ministers in the Indonesia Onward Cabinet, it is undeniable that the number of ministers assembled is considered too large. The bloated coalition contributes to the weakness of the opposition, which should play a crucial role in controlling government policies. Moreover, the bloated coalition in the Indonesia Onward Cabinet potentially reduces the effectiveness of decision-making processes. Additionally, the selection of ministers by President Joko Widodo has sparked public controversy as they are perceived as lacking expertise.

The appointment of ministers mandated by law and as the prerogative right of a President, or referred to as "Appointment Power", is not something new in this Republic. Several studies and publications, such as the journal titled "Power and Mechanisms of Ministerial Appointments in the Presidential System in Indonesia," explain the mechanisms, appointments, and dismissals of ministers by the president in Indonesia (Gunawan, 2018). However, it does not discuss in detail the analysis of Law No. 39 of 2008 concerning the Ministry.

Yanto & Nugraha (2022) highlight the process of appointing Ministers, which tends to be based on poor criteria solely on political considerations and proposes new requirements for Ministerial appointments. Based on this issue, the author seeks to understand the relevance of the implementation of Ministerial appointments by the President of Indonesia in accordance with Law Number 39 of 2008 concerning the Ministry and the appointment of Ministers.

Etymologically, the terms Constitution, constitutional, and constitutionalism have the same core meaning, but their usage or application differs. The Constitution comprises all provisions and rules concerning statehood (the Constitution and the like) or the Constitution of a country. In other words, any action or behavior of an individual or authority in the form of policies that are not based on or deviate from the constitution means that such action (policy) is unconstitutional. On the other hand, constitutionalism is a doctrine concerning the limitation of power and the guarantee of people’s rights through the Constitution.

The Constitution of the Republic of Indonesia of 1945 serves several critical functions within the Indonesian state. Firstly, it acts as a national document encompassing noble agreements on essential aspects such as politics, law, education, culture, economics, and welfare, which are fundamental to the state’s objectives. It is regarded as the birth certificate of the new state, signifying international recognition and compliance with international law, notably through the ratification of international agreements. As the highest legal source, the Constitution defines the state’s purpose and administrative system, unifies national law, exercises social control, legitimates state institutions, and delineates the separation of powers between the legislative, executive, and judicial branches. It also embodies the nation’s identity and unity, expressing values and norms like democracy, justice, and freedom, thus guiding the state towards progress and fulfilling its aspirations. Furthermore, the Constitution limits power, preventing abuse by adapting to changing political landscapes, and protects human rights and citizen freedoms, ensuring equality, non-discrimination, and justice.

The 1945 Constitution holds a pivotal position in the Indonesian legal state, being integral to the conduct of state practices and the regulation of power. It serves as the core of the legal state, focusing on the distribution and limitation of power to uphold democracy through state institutions. Historically, constitutions in Anglo-Saxon and Continental Europe aimed to limit rulers’ authority, guarantee people’s rights, and regulate governance. The emergence of nationalism and democracy further established the Constitution as a tool for legal and political consolidation, guiding national life. Modern constitutions, including Indonesia’s, encapsulate not only legal rules but also principles, national directions, and policy guidelines that bind the rulers. The separation of powers among state institutions, as governed by constitutional law, ensures the proper functioning of state bodies, their duties, authorities, and interactions, while guaranteeing human and citizen rights and the fundamental structure and limitations of constitutional duties.

The Constitution has legitimacy, and constitutional legitimacy cannot be based solely on an assumption. Regarding legitimacy to understand why one must comply with the constitution. Regarding constitutional legitimacy, Hans Kelsen considers that (Kelsen, 2005):

“The constitution is the highest legal norm in a hierarchical unity so that it has certain legitimacy. Hans Kelsen added that this condition has implications for the recognition of the constitution as the highest norm in the state, which means that all branches of state power and every member of civil society in the state without exception are bound and obliged to comply with this highest norm”.

Regarding the legitimacy of the constitution, Carl Schmitt stated (Schmitt, 1985): "Law cannot by itself be law; Legal norms are valid because the law is formed based on legal authority. In Schmitt's terminology, each norm is based on a decision formed by concrete will. Thus, according to Schmitt, a constitution has legitimacy when the power and authority of those who form the constitution have validity”.

The research would like to explore how the 1945 Constitution define the president’s prerogative in appointing ministers, what is the state's political system regarding this prerogative, and how can this system be constructed based on the Indonesian state's constitution. It is expected to give more insight into the topic discussed and become a reference for future relevant research.
METHOD

The research used an empirical legal approach method to analyze the practical implications and real-world applications of constitutional provisions, examining how the prerogative powers have been exercised in appointing ministers, assessing the political and legal impacts of these appointments, and exploring the broader socio-political context of such decisions within the framework of Indonesia’s evolving political landscape under President Joko Widodo’s administration. The data sources for this research include the Constitution of the Republic of Indonesia, relevant laws and regulations pertaining to the appointment of ministers, and presidential decrees and other official documents related to ministerial appointments. The data analysis technique involves legal interpretation, which includes interpreting judicial decisions and legal opinions to understand how courts have addressed issues related to the president's prerogative, and evaluating the legal arguments and reasoning in relevant case law.

RESULTS AND DISCUSSION

The 1945 Constitution serves as the foundation for the formation of state institutions in Indonesia. However, it does not clearly regulate which institutions are referred to as state bodies, their structure, position, and relationships with each other. After amendments, state institutions in Indonesia are divided into two types: main state bodies (MPR, DPR, DPD, President, BPK, Supreme Court, and Constitutional Court), and supporting state bodies (state commissions). Some experts argue that after the amendment, the positions of state institutions (especially in the main state body group) are equal, based on the idea that the position of the MPR as the highest state institution has been abolished. Others suggest that Indonesia’s constitutional system adheres to the principle of the separation of powers (Ekatjahjana, 2015).

The pattern of relations between the MPR (People’s Consultative Assembly) and the President is related to the position and function of the MPR as a State institution authorized to establish the Constitution. The MPR is the institution forming state organs, has constitutional authority to decide on the President’s dismissal proposal from the DPR, and can order or delegate authority regarding a state/governmental affair to be further regulated by the DPR and the President in the form of laws. This pattern of relations can be called a constitutional pattern of relations that is constitutive-positive, authoritative-imperative, or creative.

The pattern of relations between the DPR and the President with other state institutions is primarily evident in the legislative function performed by the DPR and the President, which is to enact laws. This pattern of relations can be called a constitutional pattern of relations that is creative, meaning a pattern of relations formed based on the establishment/creation of new state institutions along with their functions based on the mandate of the constitution or the Basic Law.

Constitutionalism is the idea that government is a set of activities organized by and on behalf of the people but subject to certain limitations intended to ensure that the powers necessary for that government are not abused by those entrusted to govern Thaib et al. (2010). States executing a system of power separations are classified as either clearly separated or perfect systems, parliamentary system states, or referendum system states.

Constitutionally, Indonesia adopts a presidential government system, which is a system of government in a republican state where executive power is directly elected by the people through general elections and is separate from other powers such as the legislative and judiciary. The presidential government system is one of the types of government systems used in many countries. The presidential government system has several characteristics. According to Jimly Asshiddiqi, the characteristics of the government system include (Asshiddiqi, 2007):

1. The head of state and the head of government are led by the same person;
2. The head of state is directly accountable to the electorate, not to parliament;
3. The president cannot dissolve or dismiss parliament;
4. The cabinet is accountable to the president who is the leader of the government;
5. There is no distinction between the president as the head of state or head of government;
6. There is a vice president who assists the president;
7. The president and vice president have their respective duties, powers, rights, and obligations.

The exercise of governmental power by the president is affirmed in Article 4 paragraph (1) of the 1945 Constitution, which states: “The President of the Republic of Indonesia holds governmental powers according to the Constitution. One of the powers given to the president is the president appoints and dismisses ministers.”

The presidential system in Indonesia, in conceptualizing the mechanism of checks and balances, shows that the president does not have strong veto power, as seen in Article 20 paragraph (5) of the 1945 Constitution which states:[13] “In the event a bill that has been jointly approved is not ratified by the President within thirty days since the bill was approved, the bill shall become law and must be promulgated.”

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Fulfilling the important role of checks and balances, which theoretically restrain any authoritarian excesses that may be tempted by the ruling party, is also common in a democratic country. It is to avoid the centralization of power or misuse of power by an individual or a particular institution. Therefore, with the mechanism of checks and balances, institutions will mutually control and supervise each other, and may even complement each other. The mechanism of checks and balances fundamentally aims to impose legal limitations based on the law or to exercise control over power to prevent coercion or abuse of power.

Result

Based on the characteristics of constitutional culture, institutional relations in Indonesia essentially require deliberation to harmonize and integrate shared values contained in Pancasila, rather than a balancing model that prioritizes competing interests between institutions and political forces. Thus, the mechanism of checks and balances, structurally adopted from the American system of government, needs to be adapted to the constitutional culture of Indonesian society, which emphasizes proportionality based on harmony and integration of shared values contained in Pancasila.

The checks and balances mechanism must be implemented within the framework of Indonesian constitutional cultural values, which emphasize harmony and integration of shared values, rather than emphasizing suspicion as a cultural value that supports the functioning of the checks and balances mechanism. The principles of balancing and controlling each other's functions must be institutionalized norms that guide the behavior of individuals occupying positions in these power institutions. The principles of checks and balances that underlie the changes to the 1945 Constitution during the reform era must be reflected in constitutional rules, constitutional institutions, and constitutional culture that are practiced in governance. Therefore, according to Jimly Asshiddique, strict regulations are needed to prevent and address any potential issues (Asshiddique, 2006):

a. Conflicts or conflicts of interest between all branches of macro power, namely between (i) politics, (ii) business, (iii) community organizations, and (iv) mass media.

b. Conflicts of interest between micro quadra-political branches of power, namely (i) the executive branch; (ii) legislative branch, (iii) judicial branch, and (iv) mixed branch.

c. Conflict of interest between the institution or organization and the individual office holder.

d. Conflict of interest in making decisions in the public interest relating to subjects of people who have upward, downward, or lateral blood relations, or subjects of legal entities whose management has a relationship with the official who will make the decision.

e. Position decisions related to gratuities in the form of goods or objects that can be valued in money or honor, and political popularity are also valued as political gratification.

This arrangement can prevent conflicts of interest between all branches of power, macro, and micro, between institutions, decision-making, or office decisions related to gratification in the form of goods and objects as political gratification.

According to Budiarjo (2007), the same thing is generally defined: "A political party is an organized group whose members have the same orientation, values and ideals. The goal of this group is to gain political power and seize political positions to implement their policies."

In Rousseau's theory of popular sovereignty as the highest source of power in matters of statehood, various theories emerged to underlie the power of the Head of State. According to Padmo Wahjono, several constructions regarding this matter include (Wahjono, 2016):

Rousseau himself, with his theory, considered the existence of kings (during his lifetime) according to his theory to be merely mandataries of the people;

The Head of State is considered by some scholars to be an exponent of the people, he obtains the right to rule absolutely from his people, and there is a kind of agreement of submission from the people (lex regia which is based on pactum subjektions). We find this pattern in dictatorial states (Caesarismus in ancient Roman times);

Another pattern is one that is based on the theory of state sovereignty. According to this theory, in reality, the highest power resides in the state and because the state is abstract, in reality, the power resides in the Head of State. In terms of submission to regulations, this is due to voluntarily submitting to state products (law). Jelinek's theory is known as selbstbindungstheorie (auto-obligation of the state);

Another pattern is that which is common in parliamentary government systems. Here the king/Head of State cannot be contested "the king can do no wrong" he is just a stamp or symbol, therefore, certain rights are given special rights (prerogatives).

Popular sovereignty literally means supreme power over the people. A country that places supreme power on the people is called a democratic country. In a country that truly adheres to the principle of popular sovereignty, the division of government functions (legislative, executive, and judicial) does not in any way
reduce the meaning that the people are truly sovereign. All government functions are subject to the will of the people or the people's deliberative assembly.

According to Ramlan Surbakti, democracy, viewed structurally, is ideally a "political system that maintains a balance of differences of opinion, competition, and conflict among individuals within various groups, between individuals and groups, individuals and the government, groups and the government, and even among government institutions." (Surbakti, 2014). Meanwhile, according to Afan Gaffar, democracy is divided into normative and empirical meanings (Gaffar, 2006): "Normatively, democracy is an ideal that a state aims to achieve or organize. Empirically, democracy is its manifestation in practical political life."

On the other hand, according to Rudi, the theory of legal sovereignty states that "the highest authority in a state is the law; therefore, both the king, ruler, and people, as well as the state itself, are subject to the law. This concept of sovereignty then gives rise to the rule of law, which has the main element that every action of the state must be based on the law or be accountable to the law."

In this concept, the position of the constitution in a constitutional state is very important because the law will always be based on the constitution as the highest law in a country. In other words, according to Rudi (2013), "Any action or behavior of an individual or ruler in the form of policies that are not based on or deviate from the constitution means that action is unconstitutional."

The constitutional basis of Article 17 paragraph (2) above, as the president's right to appoint and dismiss ministers, is a prerogative right free from pressure or influence from others. The fundamental principle to be emphasized is the affirmation of legal authority in the state, marked by the existence of the constitution as the basic law or highest law in a country. Indeed, it is necessary to assert the good character of a constitutional state through the firmness and uprightness of the Constitution.

The constitutional values referred to here are values as an assessment of the implementation of norms in a constitution in practical reality. According to Karl Loewenstein, as cited by Lusia Indrastuti, there are three kinds of values or the values of the constitutions: (i) normative value; (ii) nominal value; and (iii) semantical value (Indrastuti, 2015).

Many constitutional law experts in Indonesia refer to Karl Loewenstein's work, including Jimly Asshiddiqie (2014), who elaborates on three meanings of these values, namely: "If the norms contained in the constitution, which are binding, are understood, recognized, accepted, and complied with by the legal subjects bound by them, then the constitution is called a constitution that has normative value" (Greenawalt, 1987).

According to Adnan Buyung Nasution, he states: "Even though a government (state) has principles regulated in its constitution if it does not implement them, in the practice of state administration, it cannot be said to be a constitutional state or adhere to constitutional principles" (Nasution, 2007).

The development of Indonesian constitutionalism itself after the national reform in 1998, followed by significant changes to the 1945 Constitution four times in 1999, 2000, 2001, and 2002, has fundamentally changed the blueprint of Indonesia's constitutional framework for the future. Therefore, many new books are needed to depict these new perspectives, not only in the theoretical realm but also in the field of positive law that is currently in effect, including the popularization of the 1945 Constitution after the Fourth Amendment.

Indonesia, as a legal state, as stated in the country's constitution, is stipulated in Article 1 paragraph (3) of the 1945 Constitution, which states that "Indonesia is a Legal State." Article 1 paragraph (3) above states that Indonesia is a legal state (rechtstaat), not based solely on power (machstaat). This means that the Republic of Indonesia is a democratic legal state based on Pancasila and the 1945 Constitution of the Republic of Indonesia, as a legal state according to R. Soepomo in A. Mukthie.

The principle of a legal state is the rule of law, not of man. Law is the guiding umbrella in governing, and the government and people are subject to the law. A term for a legal state is rechtstaat or constitutional state. The idea of a legal state as the law that serves as the foundation of governance and must be complied with in exercising power, bridges the gap between despotic absolutism and the advanced development of constitutionalism, thus leading to the formation of constitutional law. Therefore, according to Bagir Manan, it is stated that: "Constitutional law can be said to be identical or simply another term for constitutional law" (Manan, 2004).

Among legal experts, some attempt to distinguish between these two terms by considering that the term constitutional law has a narrower scope of understanding than the term constitutional law. It was suggested by Bagir Manan (2015): "Constitutional law is considered narrower because it only discusses the law from the perspective of constitutional texts, whereas constitutional law is not limited to the constitution. This distinction occurs because of a misunderstanding in interpreting the matter of the constitution (verfassung) itself, which seems to be equated with the constitution (gerundgesetz). Because of this error, constitutional law is understood to be narrower than constitutional law."
CONCLUSION

The President holds the highest administrative power and responsibility in the state government, with prerogative rights regulated by the 1945 Constitution. In Indonesia, the President has prerogative rights, such as appointing ministers, which are considered an absolute right. Their executive power allows them to respond to the head of state's actions, but they must maintain a stable political condition to run their government. The Supreme Court recognizes these prerogatives for their legality and constitutionality, but they must be subject to legal constraints.

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