

Constitutional Law **by** **Mohammad Fajrul Falaakh**

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Literatures

- **Asshiddiqie, Jimly. 2008. *The Constitutional Law of Indonesia*. Malaysia: Sweet & Maxwell Asia.**
- **Bahar, Saafroedin, et.al. 1995. *Risalah Sidang BPUPKI/PPKI*. Jakarta: Sekretariat Negara RI.**
- **Ellis, Andrew. 2004. “Constitutional Reform and the 2004 Election”. *Indonesia Matters – Diversity, Unity and Stability in Fragile Times* edited by Thang D. Nguyen and Hans-Jurgen Richter, pp. 53 – 70. Singapore: Times Editions.**
- **Indrayana, Denny. 2008. *Indonesian Constitutional Reform 1999-2002*. Jakarta: Kompas.**
- **Marzuki, Peter M. 2011. *An Introduction to Indonesian Law*. Malang: Setara Press.**
- **Wheare, K.C. 1971. *Modern Constitutions*. Oxford: Oxford University Press.**
- **Ziegenhain, Patrick. 2008. *The Indonesian Parliament and Democratization*. Singapore: ISEAS.**



Meanings, definitions

- **Wade & Phillips:** Constitutional law is the rule which regulates the structure of the principal organs of government and their relationship to each other, and determines their principal functions.
- **AV Dicey:**all rules which directly or indirectly affect the distribution or exercise of the sovereign power in the state.
- **GW Paton:** Constitutional law deals with the ultimate questions of distribution of legal power and the functions of the organs of the state. In a wide sense, it includes administrative law. But it is convenient to consider it as a unit for many purpose the rules which determine the organization, power, and duties of administrative authorities.



Meanings, definitions

- **Robert MacIver : ... within the sphere of the State there are two kinds of law. There is the law which governs the state and there is the law by means of which the state governs. The former is constitutional law, the latter we may for the sake of distinction call ordinary law”.**
- **Alder dan English: “constitutional law is different from other kind of laws in that the other law of a country obtains their validity from its constitution. Constitutional law is as it were the law behind the law”.**



Meanings, definitions

- **Constitutional law is the law which governs the state; and ordinary law is the law by means of which the state governs.**
- **Constitutional law is as it were the law behind the law.**
- **Preamble of the 1945 Constitution says: “... untuk membentuk suatu Pemerintahan Negara Indonesia ... maka disusunlah Kemerdekaan Kebangsaan Indonesia itu dalam suatu Undang-Undang Dasar Negara Indonesia, ...” (the independence of Indonesia shall be formulated into a constitution of the Republic of Indonesia [in order] to form a government of the state of Indonesia which shall protect all the people of Indonesia and all the independence and the land that has been struggled for, and to improve public welfare, to educate the life of the people and to participate toward the establishment of a world order based on freedom, perpetual peace and social justice).**



Meanings, definitions

- **Aspect to be discussed in Constitutional Law course: (1). Constitution or Basic Law; (2). Organs of the state, their functions and limitations; (3). Relations among state organs; (4). Relations of the state and the citizens; incl. rights of citizens or human rights.**
- **These aspects can be divided into several themes, and each theme can be divided further into several topics.**
- **The following slides exhibit examples of those themes.**



Themes in constitutional law

- **citizenship;**
- **the general system of liberties and their limitations;**
- **territory of the state;**
- **separation of powers, checks and balances;**
- **the relations between the central government and local authorities: decentralization;**
- **the constitution of the legislature; if there are two chambers, the relations between them;**
- **the parliamentary franchise and electoral boundaries; electoral laws & disputes;**
- **its powers and privileges;**



Themes in constitutional law

- **review of legislations by constitutional court and supreme court;**
- **the method of choosing the head of state;**
- **his powers and prerogatives;**
- **the status of ministers and the position of the civil servants who act under them;**
- **the armed forces and the power to control them;**
- **military power of the president: war and peace, emergency situation;**
- **treaty making power;**



Themes in constitutional law

- the raising and spending of public money –financial legislation, tax policy
- judicial powers: Supreme Court (*Mahkamah Agung*) and lower courts, Constitutional Court (*Mahkamah Konstitusi*); judicial review & constitutional review; Judicial Commission (*Komisi Yudisial*);
- the procedure, if any, for amending the constitution; constitutional assembly, constitutional commission.



Sources of constitutional law

Sources of law: formal, informal.

Formal sources: written laws, judicial verdicts (courts decisions).

Informal sources (philosophical, political, historical, sociological perspectives): customs and conventions, legal doctrines, *opinio juris* (experts opinions).

Formal sources of CL: Hierarchy of laws (Art. 7 of Law Nr. 11/2012), decisions of CC and SC.

Informal sources of (philosophical, political, historical, sociological perspectives) CL: conventions, legal and constitutional doctrines, *opinio juris* (experts opinions).



Hierarchy of Laws

- To have a legal hierarchy is necessary determining which regulation should prevail in situations of conflicting provisions.
- There are general rules: special law takes precedence over general law (*lex specialis derogat legi generali*); newer legislation takes precedence over older one (*lex posteriori derogat lex aposteriori*).
- When conflicts are found in legislation of a different kind, a legal hierarchical structure is necessary (*lex superior derogat lex inferiori*).



Article 7 of Law Nr. 12/2011

- The Constitution (*Undang-undang Dasar 1945*)
- People's Consultative Assembly Decrees (*Ketetapan MPR*)
- Laws (*Undang-undang*) and Government Regulations in Lieu of Law (*Peraturan Pemerintah sebagai Pengganti Undang-undang atau Perppu*)
- Government Regulations (*Peraturan Pemerintah*)
- Presidential Regulations (*Peraturan Presiden*)
- Provincial Regulations (*Perda Provinsi*)
- Regulations of Regencies and Cities (*Perda Kabupaten, Perda Kota*)
- Other regulations having mandate from higher rules



Decrees of the People's Consultative Assembly

- **Until the fourth amendment to the Constitution in August 2002 the MPR decree was the highest regulatory instrument and placed above laws and other regulations.**
- **With the fourth constitutional amendment, MPR has lost its supreme status. It has also lost its old authority to regulate.**
- **As a result there is now a need to convert existing MPR decrees into law.**
- **However, Art. 7 of Law Nr. 12/2011 put the MPR decree back in the hierarchy of laws.**
- **Is this against or in conformity with the Constitution?
Yes, No, CC cannot review.**



Laws

- Implementation of constitutional provisions require statutory laws. Thus: daily constitution.
- These laws (*Undang-undang*) are created by consensus between the president and DPR –Const. Art. 20(2). These laws may originate from the president, the DPR, or the DPD for certain issues (Art. 22D(1)).
- To have effect, laws may require implementing regulations in the form of government regulations (*Peraturan Pemerintah*) or presidential regulations (*Perpres*).
- The impact of laws thus may not be clearly voiced until further legislation or regulations are fully prepared.
- Hierarchy of laws plays important role.



Government Regulations in Lieu of Law

- In an emergency situation, the president may enact a government regulation in lieu of law (*Peraturan Pemerintah Pengganti UU*) with the same function and scope as a law. The regulation must be passed as law or repealed in the next session of DPR.

Art. 22A of the Constitution.

- (1) Should exigencies compel, the President shall have the right to establish government regulations in lieu of laws.
- (2) Such government regulations must obtain the approval of the DPR during its next session.
- (3) Should there be no such approval, these government regulations shall be revoked.



Government Regulations

- Laws may be quite general, leaving many important policies to be determined in the subsequent process.
- A government regulation (*Peraturan Pemerintah*; PP) is a secondary regulatory instrument implementing a law. Const. Article 5 (2): The President may issue government regulations as required to implement laws.
- Government regulations should be prepared only where the law calls for a government regulation or does not specify the type of legislation required. It must be based on the provisions of the law and cannot exceed the principles and coverage of the law.



Government Regulations

- **Government regulations are not brought before DPR but are approved by an inter-ministerial committee and signed by the president.**
- **Government regulations cannot define sanctions; these are to be defined by the law itself.**
- **Hierarchy of laws again plays important role.**



Presidential Regulations

- **Presidential regulations (*Perpres: Peraturan Presiden*) are lower in status than government regulations. They are instruments for implementing laws, government regulations or programs. Art. 13 of Law Nr. 12/2011.**
- ***Perpres* replaced regulatory presidential decisions (“Keppres yang bersifat mengatur” yaitu “Keppres yang dibuat oleh Presiden untuk menjalankan fungsi dan tugasnya berupa pengaturan administrasi negara dan administrasi pemerintahan”; according to Art. 3 point 5 of MPR Decree Nr. III/2000 and New Order practice).**
- **Again, hierarchy of laws plays important role.**



Regional Regulations

- **Const. Art. 18 (6):** The regional authorities shall have the authority to adopt regional regulations and other regulations to implement autonomy and the duty of assistance.
- **Regional regulations (*Perda: Peraturan Daerah*)** occupy the lowest level in the hierarchy of laws. Regions have been formally empowered to regulate citizens. This change is an important aspect of the local policy.
- **Regional regulations are based on an agreement between the head of region and the Regional Representative Council (DPRD) and must comply with higher legislation (Hierarchy of laws plays important role).**



Regional Regulations

- **Regional regulations may prescribe limited sanctions (Law 12/2011 and Law 32/2004 on Regional Government).**
- **A regional regulation must be submitted to the Ministry of Home Affairs (MoHA) 15 days after it is passed. MoHA may declare a regulation void under certain circumstances.**
- **Regional governments may dispute a decision of the MoHA to nullify a regional regulation by appealing within a week to the Supreme Court, which will determine the validity of such nullification.**
- **This issue is dealt further in different course, namely judicial review.**



Outlines of constitutional development



Constitutions in Indonesia

- **1945-1949: 1945 Constitution (*UUD Negara RI tahun 1945*).**
- **1949-1950: Constitution of Federal Indonesia 1949 (*Konstitusi RIS tahun 1949*).**
- **1950-1959: Interim Constitution of 1950 (*UUD Sementara RI tahun 1950*).**
- **1959-2002: 1945 Constitution (*UUD Negara RI tahun 1945*).**
- **2002 - now: 1945 Constitution (*UUD Negara RI tahun 1945*) and four amendments.**



Indonesia's constitutional history

- The 1945 Constitution was adopted on 18/8/1945.
- *Maklumat Pemerintah* (Government announcement) of 14 November 1945: governmental system based on 1945 Constitution was changed from presidential into parliamentary system.
- *Maklumat Wapres* (announcement of Vice President) Nr. X/1945: KNIP played the role of MPR.
- Constitution of Federal Indonesia 1949 (27/12/2009-17/8/1950).
- Interim Constitution of 1950 (17/8/1950-5/7/1959).



Indonesia's constitutional history

- **Presidential Decree (*Dekrit Presiden*) of 5/7/1959:** Returned to 1945 Constitution, dissolution of the Constituent Assembly, DPR established by 1955 elections was retained, interim MPR & interim DPA were established.
- **Art. 1 (3) Law Nr. 16/1969:** functional group to include the military (ABRI) and was given seats in parliament.
- **Decree of MPR Nr. IV/MPR/1983:** a referendum was required if the MPR intended to amend the constitution.
- **Decree of MPR Nr. XIII/MPR/1998:** limited presidential tenure to two times.
- **Decree of MPR Nr. XVII/MPR/1998:** adoption of extensive human rights protection.



Adoption of 1945 Constitution

- **Political contexts:**
 - During WW-II Indonesia was under Japanese military occupation
 - Japan promised to grant independence for Indonesia: BPUPKI would be established
- **Preparing for independence**
 - BPUPKI established by Japan, 28/5/1945
 - Meetings of BPUPKI: 29 May – 1 June 1945 and 10–17 July 1945
 - BPUPKI established *Panitia Hukum Dasar* (19 members), *Panitia Kecil* (Constitution drafting committee)
 - Panitia Kecil provided a draft of the constitution on 13 July 1945
 - BPUPKI agreed the draft on 16 August 1945



Adoption of 1945 Constitution

- **Indonesia was declared independence: 17 August 1945**
- **Short period in formulating the 1945 Constitution**
 - **49 days (29 May – 16 July 1945)**
 - **13 days of meetings (29 May -1 June and 10-16 July 1945)**
- **Adoption of the constitution**
 - **Meeting of PPKI on 18/8/1945 adopted the Constitution of 1945, elected President and Vice President based on Art. III of Transitory Rules of the Constitution, planned to amend the Constitution after 6 months since the termination of Greater East Asia War (vide: Art. I of Additional Rules of the Constitution).**



Federal Indonesia's Constitution of 1949

- **Political contexts:**
 - **October 1945: governmental system based on 1945 Constitution was changed from presidential into parliamentary system (appointment of a Prime Minister, governmental responsibilities upon each minister, formation of political parties).**
 - **The Dutch attempted to reoccupy Indonesia, revolutionary war occurred, new states were established under federal system with the Netherlands (BFO)**
 - **Roundtable Conference (KMB) in The Hague 23/8 – 2/11/1949.**



Federal Indonesia's Constitution of 1949

- **Roundtable Conference, The Hague 1949**
 - **Participants:** RI, BFO, Kingdom of the Netherlands, UN (USA, Australia, Belgium).
 - **Agreement:** Formation of Federal Indonesia (RIS) consisting of RI+BFO, the Dutch acknowledge RI's sovereignty, formation of a union between RIS+the Netherlands.
 - **New constitution was needed:** establishment of a joint committee to draft the constitution.
- ***Komite Nasional Pusat RI* consented on the Constitution of Federal Indonesia (*Konstitusi RIS*) on 14/8/1949, KRIS became effective on 17 August 1949.**
- **KRIS was an interim constitution: Art. 186 allowed the adoption of a new constitution by Constituent Assembly and the Government.**



Adoption of Interim Constitution of 1950

- **Political contexts: Political agreement of 19 May 1950 between RI, Negara Indonesia Timur and Negara Sumatera Timur: RIS became a unitary state**
- **A joint committee on the drafting of a new constitution was established**
- **BP KNIP (RI) consented the new constitution on 12/8/1950**
- **DPR RIS and Senat RIS consented the new constitution on 14/8/1950**
- **RIS issued Law Nr. 7/1950 to effectuate the Interim Constitution of 1950 (UUDS 1950) from 17/8/1950**
- **Law Nr. 7/1950 also mandated general elections**
- **Art. 134 of the Interim Constitution allowed the adoption of a new constitution by Constituent Assembly and the Government**



Readoption of UUD 1945

- **Political contexts:**
 - **1955 elections resulted in the establishment of the House of Representatives (DPR) and Constituent Assembly (*Konstituante*).**
 - **Constituent Assembly implemented Art. 134 of the Interim Constitution of 1950 in order to amend the existing constitution.**
 - **Constituent Assembly had not accomplished its agenda by 5 July 1959.**



Readoption of UUD 1945

- President Soekarno issued a decree dated 5 July 1959:
 - Dissolution of the Constituent Assembly (*Konstituante*)
 - Revocation of Interim Constitution of 1950
 - Returned to the 1945 Constitution
 - DPR established by 1955 elections was retained, Interim MPR & interim DPA (*Conceil d'Etat*: presidential advisory council) were established
- Constitutional basis of presidential decree: presidential right to regulate in emergency situation (Dutch: *staatsnoodsrecht*).



The 1945 Constitution in 1959 – 2002

- Old Order (*Orde Lama*) and Guided Democracy (*Demokrasi Terpimpin*) under President Soekarno in 1959-1966
- The New Order (*Orde Baru*) in 1966-1971 (before 1971 elections)
- The New Order in 1971-1998 (post- 1971 elections)
- Post- New Order in 1998 – 2002: 1st – 4th Amendments
- 2002 – now: 1945 Constitution as amended



The making of constitutions

- **NO FIXED MODEL**
- **Political contexts**
 - **Revolutionary war: Indonesia, France, USA**
 - **Political transition: KRIS 1949, UUDS 1950, Spain 1978, the Philippines 1986, South Korea 1987, Eastern Europe 1990-an, South Africa 1992**
 - **Political transition and constitutional evolution: Amendment of the 1945 Constitution in 1999-2002**



The making of constitutions

- **Agenda setting stage**
 - **Interim constitution**
 - **Constitutional principles (34): South Africa**
 - **Constitution maker**
 - **Constitutional Court**
 - **Alternative deadlock mechanism**
 - **Time frame: 2 years in South Africa, 240 days in Thailand, .. days in Indonesia 1945**
- **Development and process of drafting stage**
 - **The important aspect of public participation**
 - **The People Constitution**
- **Adoption stage**
 - **Models of the Philippines, Thailand, South Africa**



Who adopts the constitution?

- **Parliament: with or without different requirements from the ordinary law-making**
- **Sovereign Constituent Assembly**
- **Constitutional convention**
- **Executive: Napoleon Bonaparte 1799**
- **Constitutional Commission → Thailand**
- **Methods of adoption**
 - **Referendum**
 - **Ratification by states (USA)**
 - **Approval of court (Rep. of South Africa's constitutional court)**



The Constitution of 1945

The Constitution of 1945 was amended by MPR in 1999-2002:

- ***Perubahan Pertama Undang-undang Dasar 1945 (19 October 1999);***
- ***Perubahan Kedua Undang-undang Dasar 1945 (18 August 2000);***
- ***Perubahan Ketiga Undang-undang Dasar 1945 (9 November 2001);***
- ***Perubahan Keempat Undang-undang Dasar 1945 (10 August 2002).***

The four amendments are published in the State Gazette (*Lembaran Negara RI*) Nr. 11, 12, 13 and 14 of 2006 dated 13 February 2006 –more than three years after the last amendment was agreed in 2002.

- **Art. 3 (3) of Law Nr. 10/2004 however says that such publication is not the basis of its legal validity for it already has legal effect since its was adopted by People's Consultative Assembly.**



Amendment requirements in Indonesia: A comparison

Constitution of 1945 (Amended)	Constitution of 1945 (New Order)	Constitution of 1945 (Original)	Interim Constitution of 1950	Constitution of Federal Indonesia of 1949
Amendment proposal is initiated by 1/3 members of MPR				
Min. 2/3 MPR members attend the amendment session	Min. 2/3 MPR members attend the amendment session	Min. 2/3 MPR members attend the amendment session	More than 50% members of Konstituante attend the session	Min 2/3 members of Senat and 2/3 of DPR attend the session
	Referendum			
Amendment is agreed by 50% + 1 members of MPR	Min. 2/3 of 2/3 MPR members who attend the session cosented the amendment	Min. 2/3 of 2/3 MPR members who attend the session cosented the amendment	Majority agreed the amendment	Min. 2/3 of 2/3 MPR members who attend the session cosented the amendment



Type of constitution

K.C. Wheare, 1975:

- written constitution (Indonesia, Thailand, India, USA, France) & no written constitution (Britain, Sweden, New Zealand);
- supreme constitution & not supreme constitution
- federal constitution (Constitution of Federal Indonesia of 1949, Malaysia, India, USA, Canada) & unitary constitution (Indonesia 1945, the Netherlands).
- presidential executive constitution (Indonesia 1945, USA) & parliamentary executive constitution (Singapore, Australia).;
- flexible constitution (1945 Constitution before amendment) & rigid constitution (USA, 1945 Constitution after amendment).



Content of a constitution

James Bryce (1901: 271-272): “Every political constitution has three main objects”:

- to establish and maintain a frame of government under which the work of the state can be efficiently carried on, the aims of such a frame of government being on the one hand to associate the people with the government, and on the other hand, to preserve public order, to avoid hasty decisions and to maintain a tolerable continuity of policy;
- to provide due security of rights of the individual citizen as respects person, property, and opinion, so that they shall have nothing to fear from the executive or from the tyranny of an excited majority;
- to hold the state together, not only to prevent its disruption by the revolt or secession of a part of the nation, but to strengthen the cohesiveness of the country by creating good machinery for connecting the outlying parts with the centre, and by appealing to every motive of interest and sentiment, that can lead all sections of the inhabitants to desire to remain united under one government.



Content of a constitution

- G. Sartori (1994: 197-203): structure of the state.
- Herman Finer: the autobiography of a power relationship.
- KC Wheare (1975: 33-34): rule of law.

Rocco J. Tresolini & Martin Shapiro refer to the content of the US Constitution:

- It establishes the framework or structure of government;
- It delegates or assigns the powers to the government;
- It restrains the exercise of these powers by government officials in order that certain individual rights can be preserved.



Content of RI Constitution of 1945

- Preamble
- Citizenship
- Human rights protection
- Organs of the state and distribution of powers: functional and territorial separation of powers
- Territorial jurisdiction
- Guidelines of national life: religion, national security education, culture, national economy, social welfare
- National flag, language, coat of arms, anthem
- Transitory rules
- Additional rules
- Amendment procedure and limitation.



Content of RI Constitution of 1945

- Preamble: Pancasila as a philosophical foundation of the state;
- Citizenship, human rights protection: Articles 26, 27-28, 28A-28J, 29-31, 34;
- Organs of the state and distribution of powers: Articles 1-2, 4, 6-8, 16-19, 23 (5), 24; functional and territorial separation of powers: Articles 3, 5, 10-15, 20-22, 23(1), 32-34; 18-18B.
- Territorial jurisdiction: Article 25A jo. Decree of MPR Nr. V/999 on East Timor;
- Guidelines of national life: religion (Ch. XI), national security (Ch. XII), education & culture (Ch. XIII), national economy & social welfare (Ch. XIV);
- National flag, language, coat of arms, anthem: Articles 35-36, 36A-36C (Chapter XV);
- Transitory rules: I-III;
- Additional rules: I-II;
- Amendment procedure and limitation: Article 37.



Human rights protection

- ❑ Duties of state (28I(4) RI Constitution): protect, promote, enforce and fulfill human rights.
- ❑ Extensive protection of rights in the Constitution: civil-political, ecosoc rights.
- ❑ Main ideas: dignity, freedom, equality, fraternity or solidarity.
- ❑ 28I(1) RI Constitution: *non-derogable rights*.
- ❑ 28J(2) RI Constitution: limitation of rights.
- ❑ 28J(1) RI Constitution: reciprocal principle to respect the rights of others;
- ❑ International Covenants ratified by Indonesia, e.g.: ICESCR (Law 11/2006) and ICCPR (Law 12/2006).



Human rights protection

- ❑ 28I(1) –non-derogable rights: The rights to life, freedom from torture, freedom of thought and conscience, freedom of religion, freedom from enslavement, recognition as a person before the law, and the right not to be tried under a law with retrospective effect are all human rights that cannot be limited under any circumstances.
- ❑ 28J(1): reciprocal principle to respect the rights of others (Every person shall have the duty to respect the human rights of others in the orderly life of the community, nation and state).
- ❑ 28J(2) : limitation of rights (In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society).



Human rights protection

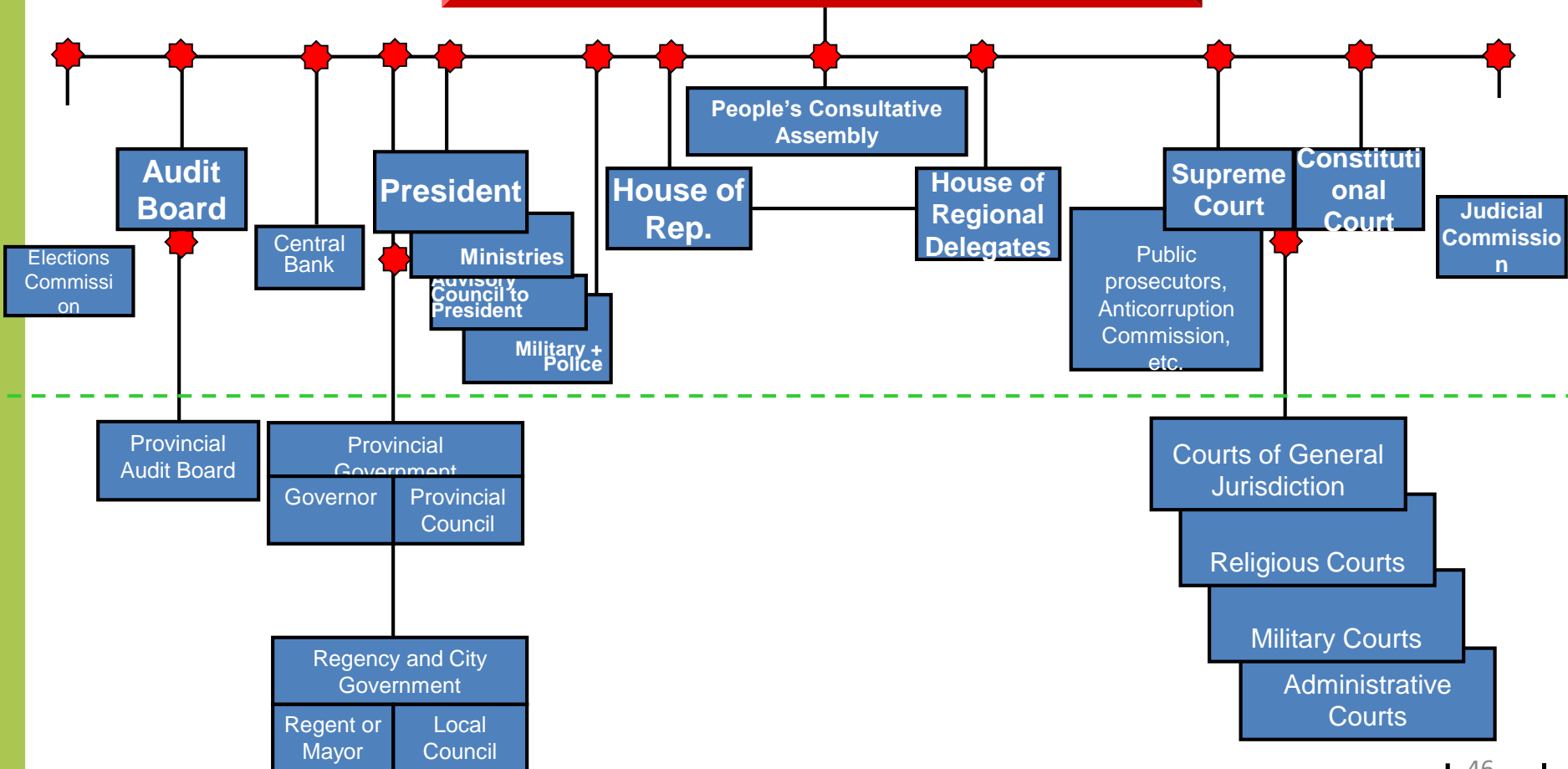
- ❑ There is Human Rights Court for past and current abuses with jurisdiction on gross violations of human rights (genocide and crimes against humanity) are tried by HR Court. Current abuses by 'regular' HR Court (in Jakarta Pusat, Surabaya, Medan, Makasar) past abuses (prior to HR Law of 2000) are tried by *Ad hoc* HR Court (established by President on DPR recommendation). HR court will be established in Aceh (Law on Government of Aceh 2006).
- ❑ Law and institution for the protection of witnesses and victims of crimes (LPSK).
- ❑ Constitutional Court protects constitutional rights from being violated by parliamentary laws.



Organs of the State in the Current Constitution

The Constitution of RI

National





Sovereignty and MPR

- ❑ Sovereignty belongs to the people and it is implemented in accordance with the Constitution. In the original 1945 constitution sovereignty was fully exercised by MPR.
- ❑ Presidential system: MPR does not elect or appoint President and Vice President; President is not accountable to MPR and there is no GBHN (state policy guidelines) to instruct President.



People's Consultative Assembly (MPR)

- ❑ People's Consultative Assembly (MPR: *Majelis Permusyawaratan Rakyat*) is an assembly consisting of fully-elected members of the House of Representatives (DPR: *Dewan Perwakilan Rakyat*) and members the House of Regional-Provincial Representatives (DPD: *Dewan Perwakilan Daerah*).
- ❑ However MPR is separate from DPR and DPD.
- ❑ MPR is a separate assembly and (super-) parliament with specific functions: (1). As a constituent assembly, to make and amend the constitution; (2). Removing President and Vice-President from office based on well grounded impeachment charge(s) initiated by DPR; (3). Inaugurate the elected President and Vice-President; (4). Elect VP when this office is vacant, elect P+VP when bothly are simultaneous vacant.



Legislature: Asymmetric bicameralism

- ❑ There is a two-chamber legislature consisting of DPR (1st chamber, House) and DPD (2nd chamber, Senate)
- ❑ DPR: House of Representatives with membership entirely elected by the people from party-list nomination according to PR system of election (PR: proportional representation).
- ❑ DPR is a full legislature holding many powerful functions: legislation, budgeting, and oversight.
- ❑ DPR has rights: to question, of inquiry, motion to censure.
- ❑ DPR also holds power to give consideration on the appointment of ambassadors, to select all justices of the Supreme Court nominated by the Judicial Commission and select 3-justice of the Constitutional Court, initiate presidential impeachment (DPD members do not have this power).



Legislature: Asymmetric bicameralism

- ❑ DPD: Council of Regional Representatives with membership entirely elected by the people from multi-member district (i.e. provincial) electoral system.
- ❑ DPD has powers to, e.g.: (1). Initiate bills on center-region relationship; (2). Provide consideration to DPR on national budget items of taxation, education and religion; (3). Send consideration in overseeing the executive, especially with regard to the policy implementation on center-region relation, administration of economic resources, state budget, taxation, education and religion.
- ❑ DPD membership is one-third of DPR members and it has no decision making power.
- ❑ DPR-DPD is an asymmetric and soft bicameralism.



Legislation

- ❑ A bill may be proposed by President, DPR or DPD;
- ❑ However laws must be deliberated and consented by both the DPR and the President. It is a parliamentary-type of legislation, with both the DPR and the President have equal vote.
- ❑ President has no veto power, although s/he may defer the promulgation of any agreed bill for at most 30 days. Any agreed bill becomes law subsequently.
- ❑ National legislation may be reviewed by the Constitutional Court and declared unconstitutional, therefore becomes null and void (or having no legal efficacy). Democracy is being checked by the judiciary based on the doctrine of constitutional supremacy.



Judiciary

- ❑ There is independent judiciary with dual-structure, consisting of a Supreme Court (*Mahkamah Agung*) and a Constitutional Court (*Mahkamah Konstitusi*).
- ❑ Supreme Court are nominated by the Judicial Commission and approved by the DPR. The elected justices of SC are inaugurated by the President. They consist of maximum 60 judges.
- ❑ There are nine judges of the Constitutional Court. Three are appointed by the President, three by the DPR, and three by the Supreme Court.
- ❑ There is a Judicial Commission, which is not a court. Members of JC are appointed by the President with the approval of DPR.



Supreme Court

Competencies of the Supreme Court

- Jurisdictions: four jurisdictions (general, administrative, religious, and military matters).
- Adjudicating “ordinary” cases on cassation level
- Reviewing subsidiary legislations
- Proposing three judges of Constitutional Court.
- Giving advice to president in granting pardon and rehabilitation
- Other competence as provided by law (e.g. Pemilukada according to Law Nr. 22/1999).



Constitutional Court

Competencies of the Constitutional Court

- Constitutional review of parliamentary laws: Are PCA decree, Perppu and Ratification of international agreement included?
- To settle disputes on constitutional powers between organs of the state (intergovernmental affairs)
- To settle electoral disputes: parliamentary elections, national and local executives.
- To decide dissolution of political party as proposed by the government –related to freedom of association
- To decide impeachment charge(s) against president or vice president as initiated by DPR.
- Why not giving CC authority to dismiss president or vice president from office?



Judicial Commission

- ❑ A judicial commission (*Komisi Yudisial*) is established to conduct judicial recruitment, i.e. for the SC justices. JC/KY selects and nominates candidates to be decided by DPR.
- ❑ But JC/KY plays no similar role in the recruitment of CC's 9-justice. CC's 9-justice are selected by President, DPR and MA (three from each state organs);
- ❑ JC is independent. It should become an institutional checks on the judges conduct. JC 7 members are appointed by President with the approval of DPR. They should have legal knowledge and experience, integrity and irreproachable character.
- ❑ JC/KY is also mandated to maintain and uphold the honor, dignity and [good] conduct of judges. The commission deals with ethical issues.
- ❑ However, KY's role to do so on the CC justices has been paralyzed by the CC (Decision Nr. 005/PUU-IV/2006).
- ❑ JC/KY plays on checks and balances relationship in SC recruitment.



President

- ❑ President is both chief executive and head of state;
- ❑ Presidency is a single office: President and Vice President are elected in a single election ticket;
- ❑ President and VP are directly elected by the people through two-round FPTP election system; presidential candidates are nominated by party or coalition of parties;
- ❑ President holds his office for a fixed term of 5-year, and can be re-elected for another term. This helps stabilize his/her administration;
- ❑ Political accountability of the President is basically to the people (s/he may or may not be re-elected) and to the Constitution (his policy is based on the guidelines provided in the Constitution).



Presidential vacancies

- ❑ If the presidency is vacant (e.g. dismissed) the VP assumes presidency. PCA should in 60 days elect VP from two candidates nominated by the new president;
- ❑ If President and VP are simultaneously vacant a triumvirate (MOFA, MOHA, MOD) administers presidency. PCA must in 30 days elect P + VP from the tickets nominated by the political parties or coalitions of political parties whose tickets won first and second place in the last presidential election. The elected P + VP will serve for the remainder of the presidential tenure.



Presidential powers

- The duties and powers of the president, who is the supreme commander of the armed forces, include, with the approval of the legislature, declaring war, making peace, and concluding treaties; declaring a state of emergency; appointing ambassadors and consuls and receiving the accreditation of foreign ambassadors, taking into account the opinion of the DPR;
- Granting clemency and restoring rights, taking into account the opinion of the supreme court; granting amnesty, taking into account the opinion of the lower house of the legislature;
- Granting titles, decorations, and honors, as provided for by law;
- Establishing an advisory council to advise the president;



Presidential powers

- Nominating 3 judges of the Constitutional Court;
- Proposing bills to DPR;
- Issuing government regulation in lieu of statute (*Perppu*) and government regulations (*Peraturan Pemerintah*).
- The president is to be assisted by state ministers, whom he or she may appoint or dismiss, and each minister is to be responsible for a particular area of government activity. The formation, change, and dissolution of state ministries is to be regulated by law.
- Other powers as provided by laws.



Presidential impeachment

- ❑ President and or VP may only be removed from office by MPR, based on impeachment articles and procedure initiated by the DPR. The Constitutional Court will decide the validity of the charge. Parliamentary vote of no-confidence no longer becomes constitutional ground for presidential removal.
- ❑ Impeachment charges: President and or VP has violated the law through an act of treason, corruption, bribery, or other act of a grave criminal nature, or through moral turpitude, and/or that the President and/or Vice-President no longer meets the qualifications to serve as President and/or Vice-President.
- ❑ Impeachment is initiated by the DPR (2/3 x 2/3) to be proven in a trial before the Constitutional Court within 90 days.
- ❑ If it is proven the DPR will subsequently impeach the President and or VP before the MPR. The decision to dismiss President and or VP is taken within 30 days by the MPR (2/3 x 3/4 attendees).



State Audit Board (BPK)

- *Badan Pemeriksa Keuangan* (State Audit Board) is a state organ inherited from Dutch colonial era: *Algemene Rekenkamer*.
- The members of the BPK are elected by the DPR with the consideration of the DPD. The President inaugurates elected members of BPK.
- The leadership of the BPK are elected by and from the members.
- The BPK shall be based in the capital of the nation, and shall have representation in every province.
- Further provisions regarding the BPK shall be regulated by law.



State Audit Board (BPK)

- BPK is a free and independent state organ.
- BPK investigates the administration and accountability of state finances.
- The report of BPK's investigation shall be submitted to the DPR, DPD or all levels of DPRD in line with their respective authority.
- Follow-up actions of such report will be taken by DPR, DPD or all levels of DPRD and/or law enforcement institutions according to law.
- In what capacity will DPR, DPD or all levels of DPRD take a follow-up action? In what capacity will law enforcement institutions take a follow-up action? E.g Bank Century case.



Elections

- ❑ Several systems: parliamentary elections (DPR/DPRD, DPD), executive elections (national, local)
- ❑ Two round system (TRS) with threshold for presidential election (Art. 6A);
- ❑ FPTP for provincial and district executives; individual, non-party candidacy is permitted;
- ❑ Proportional representation (party list) for national and local houses of representatives (DPR and DPRD). There are local parties in Aceh eligible to run in the elections;
- ❑ Multimember district (i.e. 4 from each province) for the 2nd chamber parliament (DPD).



General Elections Commission

- Principles of general elections: direct, general, free, secret, honest, and fair; once every five years.
- General elections include: elections of members of the DPR/DPRD, members of DPD, the President and Vice-President.
- (3) The participants in the election of the members of the DPR and DPRD are political parties.
- The participants in the election of the members of the DPD are individuals.
- The general elections shall be organised by a national general election commission which is permanent and independent.
- Further provisions regarding general elections shall be regulated by law.



Center-region relation: decentralization

- ❑ Indonesia is a unitary state with asymmetric center-region relationship, in the sense that the Constitution allows special arrangement between center and regions.
- ❑ Central government holds power over the entire nation, but regions are granted autonomy as provided in the Constitution and the implementing laws: e.g. The Constitution mandates the election of local councils and local executives; the Law on Local Government 2004 grants regional autonomies except on foreign policy, defense and security issues, the judicial system, monetary and fiscal policies, and religious affairs.
- ❑ Regions hold no original powers, do not give consent to or initiate constitutional amendment, established by law, and subject to national legislations. Such characteristics do not qualify regions as states in federal system.
- ❑ However, regions may issue local regulations pursuant to higher laws and subject to reviews by central executive and the judiciary (MA).

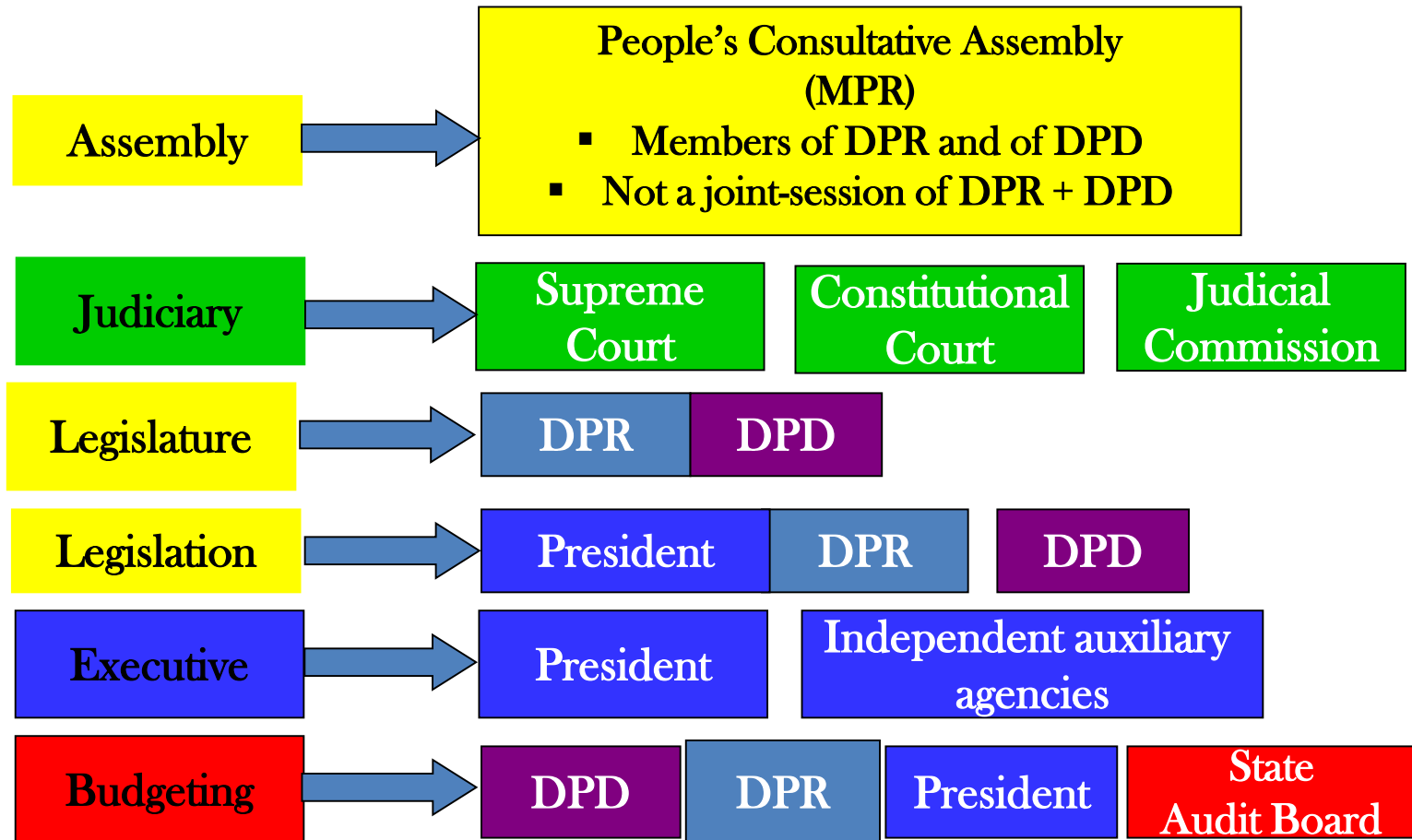


Independent constitutional bodies

- ❑ Election commission;
- ❑ Judicial commission;
- ❑ Central bank;
- ❑ Law enforcement agencies: anticorruption commission (KPK), financial frauds (PPATK), unfair trading (KPPU), human rights commissions (Komnas HAM, Komnas Anak, etc.);
- ❑ Prosecution (Attorney General Office), police;



Separation of Powers





Checks and balances

- ❑ Separation of powers: powers of the state are more distributed into several organs;
- ❑ State organs are horizontally related through checks and balances: several examples;
- ❑ Spatial distribution of powers between center and regions through decentralization (except on foreign relations, judiciary, defense, monetary and fiscal policies, and religion); it includes regional autonomy to issue local regulations pursuant to higher laws and subject to reviews by central executive and the judiciary (MA).



Constitutional Democracy

- ❑ Art. 1 (2): Sovereignty is in the hands of the people and is implemented according to this Constitution.
- ❑ Art. 1 (3): The State of Indonesia shall be a state based on the rule of law.
- ❑ People's sovereignty; Constitutional supremacy:
Constitution as the highest law; Separation of powers;
Independent judiciary; Protection of human rights; Judicial reviews of legislations.