Modelling Executive Powers in the Indonesian Constitution
A Comparative Study of Constitutions

DISSERTATION

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<th>Abbreviation</th>
<th>Full Form</th>
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<td>ABRI</td>
<td>Angkatan Bersenjata Republik Indonesia: The Republic of Indonesia Armed Forces</td>
</tr>
<tr>
<td>ASEAN</td>
<td>The Association of Southeast Asian Nations</td>
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<tr>
<td>BI</td>
<td>Bank Indonesia: Indonesian Bank (the Indonesian Central Bank)</td>
</tr>
<tr>
<td>BLBI</td>
<td>Bantuan Likuiditas Bank Indonesia: the Liquidity Aids from Bank of Indonesia</td>
</tr>
<tr>
<td>BPK</td>
<td>Badan Pemeriksa Keuangan: State Financial Auditor</td>
</tr>
<tr>
<td>BPUPKI</td>
<td>Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia: the Investigation Committee on the Preparation of the Indonesian Independence (established by the Japanese government on March 1945)</td>
</tr>
<tr>
<td>DOM</td>
<td>Daerah Operasi Militer (the Military Operation Area)</td>
</tr>
<tr>
<td>DP</td>
<td>Dewan Pertimbangan (the Advisory Council)</td>
</tr>
<tr>
<td>DPA</td>
<td>Dewan Pertimbangan Agung: the Supreme Advisory Council</td>
</tr>
<tr>
<td>DPD</td>
<td>Dewan Perwakilan Daerah: the Council of Local Representative</td>
</tr>
<tr>
<td>DPR</td>
<td>Dewan Perwakilan Rakyat: the Council of Peoples Representative</td>
</tr>
<tr>
<td>DPRD</td>
<td>Dewan Perwakilan Rakyat Daerah: the Representative Council in local government</td>
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<tr>
<td>DPRGR</td>
<td>Dewan Perwakilan Rakyat Gotong Royong: the Council of “Gotong Royong” of the People Representative</td>
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<tr>
<td>GAM</td>
<td>Gerakan Aceh Merdeka (the Aceh Independence Movement)</td>
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<tr>
<td>GBHN</td>
<td>Garis Besar Haluan Negara: the Guidelines of the State Policy</td>
</tr>
<tr>
<td>GOLKAR</td>
<td>Golongan Karya: the Political Party of Functional Group</td>
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<tr>
<td>IGGI</td>
<td>Inter Government Group on Indonesia</td>
</tr>
<tr>
<td>Inpres</td>
<td>Instruksi Presiden: the Presidential Instruction</td>
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<tr>
<td>KEPPRES</td>
<td>Keputusan Presiden: the Presidential Decision</td>
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<tr>
<td>KMB</td>
<td>Konferensi Meja Bundar: the Hague Roundtable Conference 1949 in Scheveningen</td>
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<td>KNIP</td>
<td>Komite Nasional Indonesia Pusat: the National Committee of Central Indonesia</td>
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<td>KRIS</td>
<td>Konstitusi Republik Indonesia Serikat: the Constitution of Federal Republic of Indonesia</td>
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<tr>
<td>KY</td>
<td>Komisi Yudisial (the Judicial Commission)</td>
</tr>
<tr>
<td>MA</td>
<td>Mahkamah Agung: the Supreme Court</td>
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<tr>
<td>MK</td>
<td>Mahkamah Konstitusi: the Constitutional Court</td>
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<td>MP</td>
<td>Maklumat Pemerintah: the Government Decree</td>
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<tr>
<td>MPR</td>
<td>Majelis Permusyawaratan Rakyat: the People Deliberation Assembly</td>
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<td>MPRS</td>
<td>Majelis Permusyawaratan Rakyat Sementara: the Temporary Assembly of People Representative</td>
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<tr>
<td>OPM</td>
<td>Organisasi Papua Merdeka: the Papua Independence Organization</td>
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<tr>
<td>PDI</td>
<td>Partai Demokrasi Indonesia: the Indonesian Democratic Party</td>
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<tr>
<td>Perpu</td>
<td>Peraturan Pemerintah Pengganti Undang-Undang: the Government Rules substitute Legislation</td>
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<tr>
<td>Perpres</td>
<td>Peraturan President (the Presidential Rules)</td>
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<tr>
<td>Acronym</td>
<td>Description</td>
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<tr>
<td>PKB</td>
<td>Partai Kebangkitan Bangsa: the National Revival Party</td>
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<tr>
<td>PP</td>
<td>Peraturan Pemerintah: the Government Rules</td>
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<tr>
<td>PPKI</td>
<td>Panitia Persiapan Kemerdekaan Indonesia: the Preparatory Committee on the Indonesia Independence</td>
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<tr>
<td>POLRI</td>
<td>Polisi Republik Indonesia: the Police of Republic Indonesia</td>
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<tr>
<td>PROLEGNAS</td>
<td>Program Legislasi Nasional: the National Legislation Program</td>
</tr>
<tr>
<td>PRRI</td>
<td>Pemerintah Revolusioner Republik Indonesia: the Revolutionary Government of Republic Indonesia</td>
</tr>
<tr>
<td>RI</td>
<td>Republik Indonesia: the Republic of Indonesia</td>
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<td>RIS</td>
<td>Republik Indonesia Serikat: the Federal Republic of Indonesia</td>
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Chapter 1  
Introduction

1. Background of the study

The Executive is a very important branch of government. It becomes the center point in constitutional systems mostly because in a modern government system, the concentration of government powers is on the Executive. The branch plays its significant roles in any government system. Indonesia, which has developed as a modern constitutional state, has experienced many changes of executive powers. Historically, the executive power in Indonesia has grown under different Constitutional and government regimes. By a series of constitutional amendments (the First Amendment of the Constitution of 1999 – the Fourth Amendment of the Constitution of 2001), the Amended Constitution reduced and limited the executive powers of the President. A significant change was implied by Article 5 of the First Amended Constitution, shifting the law-making power away from the President to the DPR.\(^1\) In general, the amendment of the Constitution has created protective mechanisms for the Indonesian executive powers in many ways.

The Amended Constitution does not give latitude to the President anymore.\(^2\) In almost all the executive powers, the President should rely on the DPR to obtain its authorization to

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\(^1\) The DPR (Dewan Perwakilan Rakyat) is the Council of Peoples Representatives. Before the First Amendment Constitution, Article 5 of the Constitution granted the President the power to make Law with approval from the DPR. Article 5 of the First Amendment Constitution changed the power of the President. The Article says that the President has no power to make law but only has the right to initiate law. However, According to Article 20, the President has the same power as the DPR to jointly discuss and jointly approve Bills of Legislation to become the Legislation in the legislation process.

\(^2\) With regard to Cabinet appointments, the President is bound by the constitutional and legal framework. Unlike before the Amendment Constitution, the President no longer has full power to establish and name a ministerial department. He has no discretion to form, name, or establish a ministry that he might think important to support his programs. The name and design of a ministry is defined and limited by the Law. However, even though the President has the right to nominate, select, reshuffle and dismiss a minister; practice shows that the President can’t do it freely. The President is also bound by the pre-political coalition deals during the presidential candidacy.
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exercise the executive powers. Furthermore, the Amended Constitution gives real and substantial executive powers to the Legislature; whereas, the President is given the residual and formal executive powers. For example, with most of the appointment powers, the Indonesian President acts more like a King or Queen by just formalizing the appointment.

After more than a decade, although many changes had been made as a result of the Amendment process, it seems that the Amended Constitution functions as a curb on the executive power of the President. However, it fails to provide a balanced constitutional framework for the allocation of powers and institutional system for Indonesia. What is written in the Constitution has not yet been consistently implemented in practice. There are still missing links and loopholes in particular issues of the executive powers. The Amended Constitution provides much ambiguity and vagueness in most of the text. The process of amendment that was predominantly inspired by a strong spirit to reduce the executive powers of the President seems contradictory to the purpose of the amendment process. It even undermines the equilibrium among branches within the constitutional system. It creates more branch dominancy and represses the President as the Executive.

The Amended Constitution has successfully introduced a limited presidency under a presidential system by setting limits and interventions to the executive powers of the President. The framers of the Amended Constitution missed the point that a presidency in a presidential system is an independent and a strong branch in running the state administration. Ideally, the President should be allocated a proportional amount of powers to run state administration. In addition, the framers had even made some of the constitutional provisions more ambiguous and obscure. Such a situation may trigger an unsolved conflict of powers between executive and

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1 The DPR (Dewan Perwakilan Rakyat) is the Peoples Representative Council, one of the parliaments, and has functions similar to the House of Representatives, elected directly by the people, representing the people and public opinion. It has the budget, legislative, and oversight functions.

2 The executive powers for the purposes of this research are divided into the primary and residual power to explain the actual power which is given to the DPR while the residual or the rest of the power is given to the President. The executive power can also be divided into the substantive and formal power in order to distinguish that in the substantive power, the legislative is actually the decision maker while the President has the formal power to formalize the decision made by the Legislature.

3 Many ambiguities and vague areas occur with regard to the constitutional concept in the constitutional provisions. The overlapping of constitutional concepts can be determined in the Constitutional text. Such provisions, for example the treaty clause and the emergency clause encounter difficulties in practices.
other branches. The institutional framework that has been made to equalize the government branches even gives the legislature more powers to control the President. On the other hand, the Court, particularly the Constitutional Court, came up with some of its decisions that seem to indirectly overrule and intervene in the executive powers of the President.\(^6\) It has even acted beyond its competence by setting alternative mechanisms that may potentially be contradictory to the government’s mechanisms in order to indirectly control the President’s exercise of power.\(^7\)

In the future of modern democratic government, Indonesia does need a modern Constitution that gives a proportional framework for the Indonesian government system. This is intended to minimize the conflicts of power between state institutions, to anticipate unsolved conflicts, to stabilize the government system, and to reconcile the global international challenges. To this extent, this study has a main goal to come up with an alternative design for a constitutional framework of the executive powers. In general, the purpose of this study is to review the theory of the governmental system, the executive and its power, to reflect on a comparative perspective of practices of other states, to reveal the history on how actually the Indonesian framers figured out the Indonesia presidency, to analyze the existing presidency and determine the problems, and finally to design a proposal for the future Indonesian presidency.

### 2. Concept and scopes

There are many studies on the executive powers which have been conducted. However, this research on “Modelling Executive Powers in the Indonesian Constitution: A comparative Study” is more specifically concerned with the executive powers of the Indonesian President as explicitly written in the Constitution. Since this research will offer a more appropriate constitutional design for the Indonesian executive powers, it will deal with theory and

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\(^6\) The Law No. 12/ 2011 on the Establishment of Laws, Article 10 stipulates that the President as well as the DPR has duties to follow up the Court’s decision. The following up is intended to anticipate any legal vacuum in Indonesia.

\(^7\) In one of the cases of budgetary power, the Court was acting beyond its competence by its decision on setting a method confronting the calculation method that the government had set. It has created another conflict between the President and the Court, but ended up with the government’s compliance with the Court’s decision.
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constituent frameworks of the executive power in some other states. In this research, the term “power” will mostly be used to refer to the executive powers of the President.

The executive powers in this research will be mostly referred to 8 areas, namely: the law-making power, the appointment power, the foreign affairs power (including the treaty power and the diplomacy power), the administrative power (including the budget and expenditure power), the emergency power, the military power, the war power (which in modern times is called the self-defense power), and the pardoning power. In general, those executive powers are commonly mentioned in the Constitution.

The last chapter offers a framework of the executive powers for the future Indonesian Constitution. The main idea of the framework will be that the executive power should be exercised as either a shared power, a dependent power, or an independent power. The indication depends on the fact that an executive needs to be vested with independent and unilateral power in certain situations; on the other hand, it is constitutionally important to preserve the checks and balances among branches. The framework will also introduce some new concepts to Indonesia such as executive immunity which may be relevant for the executive power, and some modern models of executive power that may be compatible to the global development of international law.

3. Research questions

Based on the background of the study, there are two major issues to be addressed in this research:

a. Description of the existing constitutional framework for the executive powers based on the historical and comparative perspective, and the effect of the Amendment to the Constitution on its implications for the executive power in Indonesia

b. An idea of solution of constitutional design on how the Indonesian executive powers should be organized in order to improve the Indonesian presidency

In order to resolve those issues, the study will mainly focus on the Constitution, its practice, and theory, and rely upon a comparative approach.
4. Scientific relevance

The research conducted for this dissertation is relevant to the development of constitutional law, in particular the subject of the executive and its powers in Indonesia. It will enrich the perspective on how the executive and its powers should be established within the Indonesian Constitution. Furthermore, the use of comparative constitutional law in this work may be beneficial for understanding the global context of constitutional values, theory, and common practices. For the specific purposes, the scientific result in this research may help in developing the Indonesian Constitution, the Indonesian government system, and particularly the development of the executive power. By using the method of constitutional comparative law, studying constitutional concepts from other states experiences, the dissertation will deliver some recommendations for an alternative design of the future Indonesian Amended Constitution related to the executive powers. The Indonesian Constitution should give the President, as the chief of the executive, appropriate portions of executive powers, most importantly substantive and accountable powers.

5. Methods and approach

This research is supported by a comparative constitutional method. The output of a comparative constitutional study commonly plays a central role by bringing into focus similarities and contrasts among states; that in the end, helps to learn from experiences from other Constitutions and states practice. For the comparative approach, one would be expected to enhance a capacity for self-reflection on a system in order to develop a better understanding of it.\(^8\)

The main sources of this research are the Constitutions, Legislations, treaties, judicial decisions, and doctrines. In general, legal sources will be interpreted systematically, based on the hierarchy, the original intent, the purpose of the Laws, and the coherency of laws. Furthermore, the political practice, historical experiences, political phenomena, and social political culture will also be briefly analysed.

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There are two groups of Constitutions in the comparative constitutional section in this study, namely: the primary Constitutions and the secondary Constitutions. The primary Constitutions are the Constitution of the Philippines, the US Constitution and the French Constitution. The Constitution of the Philippines and the US Constitution will represent “the most similar Constitutions” to the Constitution of Indonesia, within the same system of government (presidential system); whereas, the French Constitution represents “the most different Constitution” from the Constitution of Indonesia since it is a different system of government (the semi-presidential system). The three Constitutions selected for comparison have some points in common: they are pluralistic democracies with free elections, and claiming to be democratic in the system of government. Moreover, the secondary Constitutions are these of Germany, the Poland and South Africa. The second group will be used only for comparing some relevant issues. The selection of Constitutions in both groups in this thesis is mostly intended to permit an inquiry into whether there are some functional, recurrent similarities in terms and practices of executive power in comparable government systems. The different experiences of the constitutional history, the post-colonial experience (the Philippines), the political turbulence (the US), and the regime transition from authoritarian to the more democratic system of government (South Africa) in the Constitutions chosen are also very interesting from a comparative point of view.

The focus of this research is limited to the executive branch and its power specifically in a presidential system. To be more specific, it will only focus on the head of the executive, the President.

6. The structure of the book

The following Chapter 2 will contain general theory and comparison. It will present the general theory of the executive powers and government systems. Moreover, the Chapter will briefly depict the executive powers in 6 Constitutions (the US Constitution, the Philippines Constitution, the French Constitution, the Polish Constitution, the German Constitution, and the South African Constitution). Chapter 3 will be a chapter about the constitutional history of Indonesia. It will describe how the Indonesian constitution has developed the executive power
in different regimes. Chapter 4 will provide an analysis for the current issues of the executive powers under the Fourth Amended Constitution. Chapter 5 will offer a design of constitutional provisions for a future framework of the Indonesian executive powers. Chapter 6 will be the concluding and general remarks chapter.

Chapter 2

Executive Power in a Theoretical and Comparative Reflection

This chapter is a descriptive chapter of executive powers from a theoretical and comparative perspective. First, it deals with literatures about executive branches; then the powers, and the powers in different systems of government. The following section deals with the comparative perspectives and a reflection on how executive powers have developed in presidential systems, parliamentary systems, and in hybrid systems of government. This comparative perspective will give insight on how each government system works with executive powers and this will be used as a basis for the constitutional design of the proposed-future Indonesian executive power in chapter 5.

2.1. The Executive in the Constitutional System of Government: the General Theory

5. The term and nature of the executive branch

The word executive has long been recognized from the Latin words “ex sequi”, which means “follow out or carrying out” in English, and then in practice refers to the executive’s roles to carry out the political system’s policies, laws, or directives.9 The Executive becomes the more significant branch in a political and government system since the branch is the key to implementing laws and running the state administration as a whole. Duncan Watts clarifies the role of the executive branch as the branch which is charged with the responsibility for the state

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administration and the implementation of laws made by the legislature. The role is mainly as political leadership to take decisions and assume overall responsibility for the direction and coordination of government policy. Furthermore, as the policy maker and political leader, the roles of the executive include initiation, formulation, articulation, and implementation of policy with the responsibility of ceremonial tasks, control of policy making, political leadership, management of the bureaucracy, and crisis management. In daily administration, the executive branch of government performs three main functions, namely: 1. Decision-making: initiating government action and formulating public policy; 2. Implementation: executives implement (apply) the laws, which means they must also run the main departments and bureaucracies of a state; 3. Coordination: coordination and integration of the complex affairs of state. From this point of view, the executive is not just a decision maker but also an executor in all matters of state administration.

In practice, there are several models of executive branches: a single chief executive of a president, a prime minister, a chief minister, a supreme leader or a monarch and a dual executive of two offices, which consists of the president and prime minister or a ruling junta-exercising shared leadership. While a single executive enjoys all the executive powers, a dual executive has to share the powers. In literatures, writers commonly refer the executive to the phrase “core executive” to describe the complexity of integrated institutions which are in charge of daily state government affairs. Meanwhile, Will Storey considered that independent regulatory commissions could also be considered as the executive branch, since these commissions are empowered to establish for the policy area they regulate rules which have the force of law, and to enforce these rules.
In political constitutional history, the executive branch found its roots as the concept of the state had been introduced. In the late medieval transformations, John Locke proposed that the executive branch is a branch that necessarily exists to execute and enforce laws. However, in a special case, John Locke confirmed that where the public good is concerned, the executor of the laws may be given discretion to perform his powers in specific terms. Accordingly, the main executive area is to execute laws, but, it could be possible to be broader than just executing laws in the development. In a more current study, Andraz Sajo emphasized that the executive branch is important as an institution because it has a monopoly on coercion. The executive has the right to influence decisions. In current and global development, the executive branch finds its area to be broader as the scope of state administration is also broader. The roles are moving forward even more from just performing state administration to the key-centre of deciding the path of the state.

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<tr>
<th>The executive</th>
<th>Model</th>
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<tr>
<td>Term and definition</td>
<td>The executor of laws</td>
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<tr>
<td>Roles and functions</td>
<td>Run the state administration and government affairs, execute the laws,</td>
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<tr>
<td>Model</td>
<td>A single executive of A Monarch, a President, a Prime Minister, a Chief of Minister, A dual executive of President and Prime Minister A collective executive of a Prime Minister and Ministers</td>
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6. The Executive and its power in a democratic regime of parliamentary, presidency, and hybrid system

In modern democratic regimes, there are three models of government system: a parliamentary system, a presidential system, and a mixed system. Donald S. Lutz stated that in a parliamentary system, the executive usually refers to the prime minister who is selected and
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is part of the legislative; where in a presidential system, the executive is popularly elected and is not part of the legislative.\textsuperscript{21} In a presidential constitution, the president is both the head of state and head of government, the president is directly elected, and both president and legislature serve for a fixed term; while in a semi presidential constitution, a president is directly elected or popularly elected and serves for a fixed term, there is a separate position of prime minister, and the prime minister and cabinet are collectively responsible to the legislature.\textsuperscript{22} A government system could also be determined by the executive-ministers (the cabinet) relationship. With respect to the Cabinet, a presidential cabinet consists of presidential cabinet officers who hold their posts purely on the decision of their chief (the president), while in contrast, parliamentary ministers are parliamentary colleagues; a president in a presidential system can protect his cabinet members from criticism much more effectively than a prime minister.\textsuperscript{23} Furthermore, the relationship between the executive is different in a parliamentary system and in a presidential system. In a parliamentary system, a prime minister is much closer to being on an equal footing with their fellow ministers; while in a presidential system, a president will never be equal with cabinet appointees.\textsuperscript{24} The president in a presidential system has hierarchical relationships with the ministers in the cabinet, while in a parliamentary system, the prime minister as the chief executive has a collegial relationship with the ministers in the cabinet.

Moreover, Stepan and Skach argue that the minister in a cabinet can be more frequently changed in a presidential system rather than in a parliamentary system.\textsuperscript{25} This could indicate that the government in a presidential system is more flexible and exists within the authority of the President, but its relationship with the parliament is different, since the parliament does not have the power to change the cabinet. In a presidential system, if no coalition government is established as a result of the election process, representatives of the president’s party may

\textsuperscript{22} Sophia Moestrup, Semi-Presidentialism and Democracy, Editors Elgie, R., Wu, Y., Palgrave Macmillan UK, 2011, p. 2.
\textsuperscript{24} Id. at p. 62.
\textsuperscript{25} Jose Antonio Cheibub, Presidentialism, Parliamentarism, and Democracy (Cambridge: Cambridge University Press, 2007), p. 54.
be invited to fill all vacancies in the cabinet. On the other hand, in a parliamentary system, every portfolio within government, either minority or coalition, enjoys the support of a legislative majority.26

Besides being determined by the executive-cabinet relationship, the government systems could also be valued by the executive-legislature relationship. With regard to the executive-legislature relationship, Ken Newton and Jan W. Van Deth observed that even though presidential systems and parliamentary systems are theoretically different, in practice the two systems tend to converge since in practice both systems depend on a close working relationship between executive and legislature.27 To this extent, in a presidential system, the relationship between the executive and legislature also contributes to the stability of the state administration and support to the presidential survival. A good relationship between the executive and the legislature would contribute to the greater stability of the state administration.

a. Executive power in a presidency

A pure presidential system in a democracy has two fundamental characters that are: (1) the legislative power has a fixed electoral mandate which has its own source of legitimacy and (2) the chief executive power has a fixed electoral mandate which also has its own source of legitimacy.28 Moreover, Alfred Stepan and Cindy Skach argue that in a presidential system, the system may face the possibility of a political impasse between the executive and the legislature; a situation that may happen as a result of a president’s and legislature’s direct election that creates a mutual independence between both institutions.29 The situation occurs even more when a president-elect is from a minority political party sitting in the legislative. S/he will face difficulty in making policy when many of the parties sitting in the legislature are not supportive.

26 Id. at p. 55.
27 Ken Newton and Jan W. Van Deth, Op. Cit., p. 64.
29 Id. at p. 18.
A presidential system could have parliamentary tendencies. The tendencies may occur by combining elements of both presidential and parliamentary systems but still strongly bringing out the elements of the presidential system. In a presidential system with a tendency towards “parliamentarization”, there is a mechanism of parliamentary control. Another mechanism of parliamentarization in a presidential system can be observed from the operational dynamics of executive-legislative relations when they exemplified the establishment of rules governing the attendance of members of the government in the legislative chambers, the obligation to be periodically present at the legislative’s sessions, the power of the legislature to call for the ministers to appear before the assembly, soft control by the legislature (by interpellation or parliamentary question), and a vote of no confidence that translates into the censure of a minister or of the cabinet as a whole but not the president.

The executive in a presidential system mostly has three essential features according to the position and powers being inherently logical in a presidential regime, namely: leadership power resources, leadership autonomy, and personalization of the electoral process. The first

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31 Id. at p. 24: In some systems, ministers have the possibility of making use of the legislative rostrum (in Latin America, this is a possibility in Argentina, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Guatemala, Peru, and Venezuela). In others, they may appear only before legislative committees. In any case, the purpose is to transfer control over the executive to the legislative seat. Some of these controls are soft (eg interpellation or parliamentary questions). Others are hard (this is the case of the vote of no confidence). Interpellations and questions represent a soft form of control that may be expressed in written form, or directly (orally) in the parliamentary seat. Their essential purpose is to keep open channels of communication, as well as information exchanges between the parliament and the government. The vote of no confidence is a hard type of control (widely instituted in Latin American constitutions: eg in Argentina, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Panamá, Paraguay, Peru, Uruguay, and Venezuela) that translates into the censure of a minister or of the cabinet as a whole. This latter hypothesis the censure of the government by the legislature may result in the removal of one or more ministers, or even the dismissal of the prime minister, but, in contrast to parliamentary systems, not of the president himself as the head of government.
32 Thomas Poguntke and Paul Webb, *The Presidentialization of Politics: A Comparative Study of Modern Democracies,* Oxford University Press, 2005, p. 5: “1. Leadership power resources: The logic of presidentialism provides the head of government with superior executive power resources. This emanates directly from the fact that he or she is not responsible to parliament, is usually directly legitimated and has the power to form a cabinet without significant interference from other institutions. 2. Leadership autonomy: This is also a direct result of the separation of powers. While in office, the head of the executive is well protected against pressure from his own party. 3. Personalization of the electoral process: This follows directly from the natural focus on the highest elective office and implies that all aspects of the electoral process are decisively moulded by the personalities of the leading candidates.”
feature, that of the leadership power resources, may be related to the executive-cabinet relationship where the president is the chief of the cabinet and other state administration institutions. On the other hand, the leadership’s autonomy and personalization of the electoral process could be seen as a consequence of the fact that the executive in a presidential system being independently elected by the people. As a consequence of direct suffrage, a President has a personal democratic mandate. The personal mandate allows the President as the chief of executive to unilaterally make policy. An elected President has full authority to establish his government and be responsible for the state administration entirely. The president has full authority for cabinet appointments and dismissal; while ministers in the cabinet are accountable directly to the President. Furthermore, the President is an independent institution from the legislature and thus, has full authority and responsibility for his public affairs. The independent relationship between the President and the legislature is ensured by the real separation in which neither the president nor the ministers in the cabinet are members of the legislature.

In a presidential system, the executive power is vested in the hands of the president and commonly known as presidential power. Cheibub mentions three powers in which the President may have dominance over the budget process; the power to initiate budget laws, the power to amend the budget proposal, and the expenditure power in a situation where there is no approval for a budget law. In most of the presidential constitutions, the President is given some legislative powers including veto, decree, and urgency powers, as well as the government’s exclusive power to introduce certain legislation. Cheibub’s view is that the President, as the executive, may dominate the legislative initiative in most crucial areas of policy-making since the President has the exclusive right to initiate legislation that concerns the budget, taxes, and public administration. In a presidential system, Cheibub defines that the veto power of the President is relevant to the power of the President to enact a bill to become

34 Id. at p. 8.
Law by appending his signature; the veto power may have meaning in the sense that the President can refuse the bill either entirely (identified as a complete or total veto power) or partly (a partial veto power); however, the legislature, by a majority vote, has the right to override such presidential power:

“The legislative majority required for veto override is usually larger than the majority required for the approval of the bill in the first place. Most presidential constitutions (including the U.S. Constitution and the majority of the Latin American presidential constitutions) require a two-thirds majority of the legislature in order to override a presidential veto. If such a majority exists, the president is required to sign the bill and it then becomes law”. 39

In some countries, the Constitution may give the president the power to make decrees. The presidential decree powers refer to a law-making power that exists in the Constitution both in presidential and parliamentary constitutions. The determination of decree power by Carey and Shugart states that decree power varies with respect to the areas where decrees may be issued:

“First, it varies with respect to the areas where decrees may be issued. Some constitutions allow only for presidential “executive orders” – that is, purely administrative proclamations pertaining to the implementation of laws already approved by the legislature. Others allow for presidential decrees under special circumstances, which are often sufficiently vague that presidential action is possible in virtually any area (e.g., “relevance,” “urgency,” “economic or financial matters when so required by the national”). 40

In practice, decree powers are mostly used for special circumstances when there are urgent matters.

A presidential system may potentially lead to an autocratic regime. This is relevant in that in a presidential system, the power of the executive is mostly vested in the hands of a single-institution, the President. According to Héctor Fix-Fierro and Pedro Salazar-Ugarte there may be two mechanisms to stabilize and prevent the system from becoming an autocratic regime: 1. by strengthening the president’s ability to influence legislative work (strengthening the executive) and, 2. by reinforcing the ability of the members of the legislature to influence the operation of the government (increasing the power of parliament). 41 Moreover, the alternative measures to strengthen the Executive could be by strengthening the president’s

39 Id. at p. 170.
40 Id. at p. 170.
veto power on legislation passed by the legislature; giving preference to the legislative bills introduced into the legislature by the President (any such bill must be passed or rejected within a limited time); giving the President more powers to issue decrees with legislative force, or, ultimately reserving the power of introducing legislative bills to the President. On the other hand, the mechanism to increase the power of parliament could be by increasing the involvement of the legislature in the appointment and removal of cabinet members, so it can strengthen its powers to make the government accountable; or broadening its powers to shape public policy.\textsuperscript{42}

In history, the idea of the executive branch and its power in a presidential system could be traced down from the US Constitutional history. As the first written constitution and first presidential constitution, the US Constitution represents the standard on how the executive branch and its power established a presidential system. According to US Constitutional history, the executive branch in a presidency was intended to be a strong branch but with little independent power; the President is in a position to lead, influence, persuade, but rarely to command or order.\textsuperscript{43} In the beginning, the President was intended to be selected by the Congress.\textsuperscript{44} The US constitutional framers designed a mechanism to control as well as to empower the executive in 4 ways: 1. Limited government, a reaction against the arbitrary, expansive powers of the king or state and a protection of personal liberty; 2. Rule of law; the government could only act on the basis of legal and constitutional grounds; 3. Separation of power; each of the three branches of government would have a defined sphere of power; 4. Checks and balances; each branch could limit or control the executive powers.\textsuperscript{45} To this extent, the feature of the US presidential system reflects that the president is not the dominant and central institution among other constitutional branches. The powers of the executive really depend on the Legislature (the US Congress).

\textsuperscript{42}Id. at p. 21.
\textsuperscript{44}Andrew Rudalevige, The New Imperial Presidency: Renewing Presidential Power After Watergate, the University of Michigan Press, 2005, p. 21.
b. Executive power in a premiership

The history of parliamentary systems started when the UK Bill of Rights 1689 left the executive power in the hands of the Monarch but imposed conditions upon the exercise of that power to protect the interests of Parliament. Thus, the emergence of the office of the Prime Minister in 1723 required the Queen to ensure the ministers were supported by the two houses of Parliament, in particular the House of Commons, and had the exclusive privilege to determine policies of the government that are conducted on behalf of the Monarch. The British Westminster Parliamentary system is the root model of a parliamentary system. It consists of and separates the three traditional branches of government powers. In general, the parliamentary system in the UK emphasizes two important elements as features in the parliamentary system model:

1. ministers must be members of Parliament mainly in the elected house, although in Britain a few ministers may sit in the House of Lords and may be granted peerages for this purpose;
2. ministers must account to Parliament for their policies and decisions, and are thus ultimately accountable to the electorate.

The parliamentary system puts the UK in the situation where ministers belong to part of the government, and are able to exercise executive powers, whether acting in their own name or in the name of the head of state in whom the powers are vested, and are accountable to the parliament for their use of powers. This reflects that the relation between the legislative and executive powers is to be fused and does not follow a formal separation between legislative and executive. Furthermore, the system was mainly grounded on the relationship between the executive and the legislature; the legislature’s powers and the confidence that the executive received from the legislature, might prevail over the other in the exercise of political power.

The system entitles the Monarch to participate in the legislative process by giving the royal assent; the Monarch also has a discretionary power to dissolve the assembly whenever the

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49 Id. at p.652.
50 Id. at p.654.
parliament is acting contrary to the state’s interest.\textsuperscript{51} However, the Constitution generally does not designate the Monarch or the president in a parliamentary system as head of the executive; instead they have the position of the head of the state. Accordingly, a definite parliamentary majority only asserts the powers of appointing the prime minister and of dissolving parliament as a formal matter of the head of the state. Anthony W. Bradley and Cesare Pinelli argued that in a parliamentary system, the position of head of the state is maintained equally by the definite existence of parliamentary majority.\textsuperscript{52} Furthermore, a motion of confidence may be proposed by the government with the aim of ensuring that it has the support of a majority for its program, or for a single bill or policy.\textsuperscript{53} In principle, a government must resign whenever parliament approves a “no confidence” motion, or rejects a confidence motion. The parliamentary system in the UK, according to Anthony W. Bradley and Cesare Pinelli, recognizes the principle of ministerial individual accountability; the principle has the meaning that the ministers are responsible in the sense that they are answerable to the parliament for each of their departments; it reflects a chain of accountability.\textsuperscript{54}

According to the UK and most of the parliamentary Constitutions, the existence of the executive branch (the government) depends generally on the motion of confidence of the legislature; whereas, in a presidential system model, a government is independent of the legislature as a result of a direct election.\textsuperscript{55} Anthony W. Bradley and Cesare Pinelli said that most parliamentary systems corresponded to federations.\textsuperscript{56}

Commonly, the political executive in a parliamentary system (chancellor, premier, prime minister and their cabinet or council of ministers) is not directly elected but emerges from the

\textsuperscript{51} Id. at p.654.
\textsuperscript{52} Id. at p. 655.
\textsuperscript{53} Id. at p. 664.
\textsuperscript{54} Id. at p. 664.
\textsuperscript{56} Anthony W. Bradley and Cesare Pinelli, Op. Cit.,p.659: “In some countries such as Australia, Germany, South Africa, as well as other forms of government, parliamentary systems, have increasingly corresponded to the federations; it has important consequences for the national decision-making process, including the fact that a second chamber representing the regional components of the federal state is usually established; federal systems are inter alia differentiated according to whether powers among the federation and regional territories are strictly separated or mostly shared”.

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majority party or ruling coalition in the assembly. Ken Newton and Jan W. Van Deth state that the executive, in a parliamentary system usually consists of a prime minister and a cabinet or a council of ministers, in which, they share responsibilities among their members. A Prime Minister is not only the chairperson of the Cabinet but also responsible for the party organization. In addition, according to Stephen Buckley, in a parliamentary system, the executive branch is usually performed by two distinct groups of people who are politically appointed and serve as permanent officials such as the civil service in the United Kingdom.

c. Executive in a hybrid system

The concept of a Hybrid system of government: a combination and deviance

The hybrid system of government (half-presidential, quasi-presidential, quasi parliamentary, premier presidentialism, or pseudo-presidential) emerges as a combination or deviation of traditional types of presidential and parliamentary systems. Maurice Duverger introduced and elaborated the hybrid system of a semi-presidential system as a combination system between a presidential system and parliamentary system and pointed out the French Constitution of 4 October 1958. According to Robert Elgi’s study, since 1920 the term has been used to describe a situation when there was either a powerful prime minister or a powerful president. Elgie noted that the dual executive may potentially provoke a conflict between the president and the prime minister. On the other hand, according to Pasquino, the system of semi presidentialism may run risks, such as:

“1. Turn out to be a hyper-presidentialism, when the President of the Republic is also recognized as the leader of the parliamentary majority and cumulates the executive and legislative power; 2. create a constitutional crisis caused by a decision-making paralysis while this situation may be raised when the parliamentary majority is made of a coalition of parties that are opposing the president and a political and institutional clash between the prime minister and the president may ensue; 3. the paralysis is a consequence of anytime the president put too much interference with the parliamentary decision-making

60 Stephen Buckley, the Prime Minister and Cabinet, Edinburgh University Press, 2006, p. 2.
62 Robert Elgie, Semi- Presidentialism: Sub Types and Democratic Performance, Oxford University Press, 2011, p. 20
A hybrid system of government creates a framework where the President may hold considerable powers and a government. Unlike in a presidential system with the President as the single executive branch who has the full command in performing the executive power, a hybrid system allocates shared-executive powers to the President and other institutions. On the other hand, unlike in the Parliamentary system where the Monarch or the President cannot be brought down by the Parliament, in some hybrid systems of government, though the President is mostly elected by direct suffrage, the Parliament may have a significant role in removing the President; thus, this may make the President dependent on the Parliament.

In addition, Elgie observed that since the practice varies, the constitutional powers of the Presidents, Prime Ministers, and the Cabinets also multiply; sometimes the Presidents dominate Prime Ministers, or vice versa, the Prime Ministers have stronger power, or it may be that sometimes neither one dominates the other. In general, a semi-presidential system has often been an easy system to choose for strategic reasons since the system offers the prospect of a strong president; while on the other hand it enables power sharing and facilitates coalition building.

### Table 2.2 Executive under three models of democratic government systems

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<th>Parliamentary system</th>
<th>Presidential system</th>
<th>Hybrid system</th>
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<tbody>
<tr>
<td><strong>Executive branch:</strong></td>
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<td>- collective</td>
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<td>- headed by a Prime Minister</td>
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7. Executive power: scopes, sources, features and limits

The scope of executive power has been increased in modern days. However, it has a tendency to be formally limited in order to preserve the power balance with other branches; namely, the legislature and the courts. Moreover, the features of the executive powers in most legal systems have evolved over time and are not fixed since they greatly fluctuate with the actual distribution of powers at any given moment shaped by social and political circumstances.

d. The sources and categories of the power

The executive powers are derived from various sources, both constitutional and extra-constitutional, and they exist in two forms of formal and informal power. Michael A. Genovese specified the formal and informal power of the President. The formal power is derived from the Constitution and extends beyond the strictly legalistic or specifically granted powers that find their sources in the literal reading of the words of the Constitution; while informal powers find their sources in the political as opposed to the constitutional. On the other hand, Sakrisha Prakash in his work “Taxonomy of the Presidential powers” proposed that the executive (presidential) powers may be sourced from the Constitution, or from other sources. Prakash proposed four categories of executive powers that can be viewed from its sources, namely: "specific powers," "vesting clause powers," "structural powers," and "extra-
textual powers.”\(^{73}\) The specific powers may be variously found in the constitutional provisions and are specific in the sense that the powers are particularly listed.\(^{74}\) The vesting clause powers are mentioned to be power of removal, power of executing laws, and power in accordance to the exercise of certain authority in emergency situations.\(^{75}\) The structural powers according to Prakash may refer to the constitutional structure; whereas, the extra-textual powers may arise from sources outside the Constitutional text and structure.\(^{76}\)

Debates over the executive powers have come to the question of whether or not the powers are inherently attached. While in practice, the executive powers are not fixed but rather shaped by political context and the path dependent evolution of particular legal systems.\(^{77}\) The term Executive has been potentially misleading since it may create the impression that the executive power is like a fortress in which the leader does whatever he wants.\(^{78}\) The executive powers could be categorized based on the character of powers, namely: the regularable powers, residual powers, and absolute powers.\(^{79}\) The regularable powers are the powers that can be limited by the legislator through legislation; on the other hand, the residual powers are powers that are normally allocated to other branches, such as the legislature, or the judiciary, but where some remaining aspects are left to the President.\(^{80}\) In contrast with both powers, the absolute powers are the power that can be exercised without any checks.\(^{81}\) On the other hand, C.F. Strong viewed the executive powers from their functions and asserted that the modern executive branch is more flexible rather than only executing laws.\(^{82}\)

\(^{74}\) Id. at p. 331.
\(^{75}\) Id. at p. 332.
\(^{76}\) Id. at p. 332-333.
\(^{80}\) Id. at p. 334 – 335.
\(^{81}\) Id. at p. 336.
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As the main executive powers commonly originate from the Constitution and are known as constitutional powers, other powers are commonly known as delegated powers. Delegated powers are the powers that may not be derived from the Constitution since they may be given by legislation, made by the legislature or the Parliament. The powers are usually given because the executive runs the state administration and government activity. Those powers are necessary for the Legislature in case there is something urgent in the area of government. Therefore, the Legislature may delegate the power to the executive. Such powers may extend the executive powers. In a presidential system, a modern President has even more executive powers from both the Constitution and political resources (the elections, political parties, interest groups, the media and public opinion).83 There are three factors that can influence the expansion of the executive power in a presidential system: the party, popular mobilization, and administration.84

Moreover, any kind of laws (such as: the executive orders, presidential decrees, presidential decisions, executive agreements, executive directives, etc) issued by the President are also known as the instruments that may contribute to the expansion of the executive power of the President. Such laws may be issued and implemented unilaterally; it will, then, justify any kind of presidential actions. However, such presidential law should be based on the Constitution, as the primary power source, and the Legislation as the source from which the power of the executive is derived from Parliament. Therefore, the Presidential law-making power is actually derivative and residual from the Constitutional power and the legislation (the delegated power from the parliament).

Scheme 1: Summary of the Executive Powers

84 Id. at p. 319: “In the first instance, presidents may construct or strengthen national partisan institutions with which to exert influence in the legislative process and through which to implement their programs. Second, presidents may use popular appeals to create a mass base of support that will allow them to subordinate their political foes. This tactic is called “going public.” Third, presidents may seek to bolster their control of established executive agencies or to create new administrative institutions and procedures that will reduce their dependence on Congress and give them a more independent governing and policy-making capability. A Presidents’ use of executive orders to achieve their policy goals in lieu of seeking to persuade Congress to enact legislation is, perhaps, the most obvious example.”
The limits of the executive powers

The exercise of the executive powers depends on other branches, in particular, the legislature and the Court. Therefore, executive power is not a power without check and balance from others. Mostly, none of the democratic countries give the executive broad and unchecked power even in the area of national security; all divide powers in this area between the executive and the legislature, often including a role for the courts as well. In general, contemporary democracies limit the executive powers and preserve a balance of political power with the legislature and the courts that protect liberty.

In the US, the limitation over the executive branch is mainly by Congress: the Senate, by confirmation of presidential appointments and the ratification of treaties, and the House of Representatives by analyzing the budget and other forms of day-to-day scrutiny, shared by both chambers. The formal constitutional powers of the US President are originally the power that belongs to other branches. To this extent, the executive powers of the president are actually

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86 Id. at p. 2510.
88 Robert Singh, American Government and Politics: a Concise Introduction, Sage Publication, 1ST publishing, 2003, p. 130: “...As Commander-in-Chief, for example, the president faces a Congress that possesses the exclusive responsibility to declare war and fund the armed forces. The Senate must ratify treaties that the president
not independent but depend on other branches. In a political sense, the executive power in the US may be checked by the Congress and Senate by some obvious political checks that can be used to restrain a president:

"Congress has some obvious political checks it can use to restrain a president, such as refusing to pass key legislative proposals urged by the chief executive, overriding a presidential veto, or denying funding for presidential priorities. Congress may also pass legislation to reserve an executive order or to overturn administrative rules and regulations. Other tactics are Senate refusal to ratify treaties or attaching conditions and reservations to them, and, similarly, Senate failure to confirm a president’s nominees for executive or judicial appointments. Upping the ante a bit is the practice of congressional oversight, both as a routine, ongoing activity to keep watch over executive branch agencies and departments, and, more pointedly, when claims of questionable executive branch conduct arise, where more specific congressional investigations may be warranted. This basic list of legislative checks against a president is, however, juxta-posed within an existing political context. Thus, in eras of divided government, it is reasonable, although not always correct, to presume a higher degree of contentiousness and confrontation between a president and Congress, while a period of unified party government presupposes fewer legislative checks and greater policy coordination and consensus. Even this rough generalization, to be more accurate, requires closer attention to the exact party makeup in each chamber of Congress (and even to the relative strength of specific wings of each party in each house) and to the internal rules of each house".  

In most practice, the check from the Legislature may be imposed by a rejection of a legislative proposal or of state budget. Whereas, in order to balance the executive powers, the legislature may share the power with the executive branch, such as on the appointments, ministerial performance supervisory, and government policies review. Meanwhile, the Court may check the executive powers of the President. Nancy Kassop argued that the Court is a potent branch to limit the exercise of executive power and prevent the President from going beyond the boundaries. However, apart from all checks, there is always an opportunity for the President

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89 Nancy Kassop, The Constitutional Checks and Balances that Neither Check nor Balance in the Presidency and the challenge of Democracy edited by Michael A. Genovese and Lori Cox Han, Palgrave Macmillan, 2006, p. 75.

90 Id. at p. 76: “The Courts can interpret Congress’s statutory delegations of power to a president narrowly so as to reduce the president’s range of action (as the Court did so notoriously to Franklin D. Roosevelt in the early 1930s in its interpretations of new deal legislation that delegated power to the executive branch), and they can declare unconstitutional the acts of a president, rejecting his interpretation of the scope of his constitutional powers, as the Supreme Court did to Truman in 1952 in Youngstown and to Nixon in 1974 in the Watergate tapes case. The Court did exercise its responsibility and determine the limits of executive power, and it did rebuke sitting presidents for going beyond those boundaries, though the Court was not willing to even enter the debate over war
to respond to all the checks and balances that other branches may invoke by, for example, using the veto power or wielding the appointment power.\textsuperscript{91}

f. Other mechanisms to constrain the executive power

Besides the mechanism of checks and balances, some mechanisms are also significantly effective to restrain the executive powers. Jody C. Baumgartner argues that impeachment is the ultimate check on the power of a chief executive in a presidential system.\textsuperscript{92} Impeachment may be a signal that there is no perpetual branch existing with absolute power.

Other mechanisms to limit the executive powers may be taken by clarification and limitation of the application of the executive immunity in the Constitution. The idea of executive immunity is mostly beyond the doctrine that anyone is treated equally before the law. Commonly, immunity may be given conditionally in certain circumstances. In general, the ground of giving the immunity to the executive is mainly to encourage effective decision making and protect discretionary action from suits.\textsuperscript{93} However, according to some scholars, executive immunity may be granted to the executive as an absolute immunity or a qualified immunity.\textsuperscript{94} The chief executive is granted an absolute immunity when the immunity could shield him from all actions within the scope of his authority; on the other hand, a qualified immunity is given to the chief executive as a conditional immunity or a limited immunity powers during the Vietnam War. The contrast was striking, given that membership of the Court was largely unchanged”.\textsuperscript{91}

\textsuperscript{91}Id. at p. 77: “Presidents can use their veto power to register their disagreement with legislative proposal with legislative proposals, and can wield their appointment power to nominate federal judges with the hope of trying to affect more favorably the outcome of future judicial decisions. The likelihood of success of either of these efforts, however, depends heavily on the political context in which presidents exert them. But the larger point is that this constant action reaction chain of events is a clear manifestation of Madison’s handiwork and of Fisher’s dialogue.”

whenever he acts in good faith and reasonably in the circumstances.\textsuperscript{95} Furthermore, qualified immunity is about balancing the need to promote effective government and the interests of protecting citizens’ constitutional rights; it provides fair protection for Presidents when there is a presidential function which does require absolute immunity.\textsuperscript{96}

8. Executive powers: a-z

The executive powers include the whole state administration affairs; both in domestic and foreign areas. They cover all the strategic state affairs. The post-conflict organization has classified the executive powers into domestic affairs power and foreign affairs power. The domestic affairs power includes: (1) signing, promulgating, and executing laws, (2) vetoing legislation passed by the legislature, (3) declaring a state of emergency, (4) conferring titles, orders, and decorations, (5) granting individual pardons and amnesties, (6) appointing state officials and judges, (7) announcing elections, (8) calling referenda, and (9) dissolving the legislature.\textsuperscript{97} The foreign affairs power includes: (1) representing the state abroad; (2) negotiating the terms of treaties; (3) appointing ambassadors and envoys; and (4) accrediting and receiving foreign ambassadors and envoys.\textsuperscript{98} In general, there are at least 8 executive powers that are mostly found in the Constitutions, namely: the law-making power, the appointment power, the foreign affairs and treaty power, the administrative power, the emergency power, the military, war power, and the pardoning power.

a. Law-making powers

The law-making power may include the participation of the Executive in the legislative process, the power to make sub-ordinate laws, the power to make any executive rule, the power to make Emergency Laws (decree or executive order), and the power to make any other Executive Rules and Regulations. The legislative power, on the basis of separation of powers is commonly exercised by the Parliament or the Legislature; the Parliament has full authority over the whole legislative process, while the Constitutions confirm the right of the government to

\textsuperscript{96} See: \textit{Id.} p. 228.
\textsuperscript{98} \textit{Id.} at p. 32.
submit draft bills. In some states like the US, the Executive does not have the right to formally submit a bill. By not having the right to submit a bill, it does not mean that the Executive has no power in the legislative process. The Constitution gives veto power to the executive. Veto power is more like a bridge in a divided government and veto bargaining is an essential part of a theory of divided government. Charles Cameron observed that under divided government, the probability of a veto increases dramatically with the significance of the legislation. A veto power in a legislative process will reflect the more democratic system of government. It gives an opportunity for the Executive to disagree with the Legislature and bring through the opportunity to bargain in a democratic sphere. According to Charles M. Cameron, the President can shape legislation through the vetoes:

“There are three ways vetoes can shape legislation. First, an intransigent president can try to kill a bill. He uses the veto to force its re-passage, hoping outside events derail the legislation. Second, the president can force Congress to craft a new, veto-proof version of the bill, one he may still find objectionable but nonetheless preferable to the original version. Third, the president can force Congress to rewrite the vetoed bill, offering enough concessions so he will sign the repassed bill. The president may do this even though he would have been willing to sign the first bill if it were a one-shot offer. In each of these cases the veto is a form of strategic holdout intended to shape the outcome of the inter-branch bargaining. Skillful presidents can use sequential veto bargaining to impress their preferences on policy much more than static conceptions of the veto would suggest.”

The veto does not always mean that a president can dominate the law-making power. Yet, it is not about a strong power since the veto could always be over-ridden by the legislature. However, a presidential system does not always provide the executive with veto power. Many presidential Constitutions do not have veto power for the executive; while some others give the veto power implicitly. The veto power cannot be used to assess whether the Executive has a significant and dominant power or whether it has weak power in a legislative process. The Executive with veto power may still be the dominant party when in the bargaining process s/he can influence and raise support from the Legislature. On the other hand, veto power indeed appears as a weak power when it is over-ridden or waived. The Executive with the power to submit bills, on the other hand, may be weaker when there is lack of support from the

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101 Id. at p. 20.
majority in the legislature. In general, the legislative power of the President does not depend on the veto power or the power to submit the bill. It mainly depends on the bargaining process between the President and the Legislature during the process, in the legislative session, or outside the legislative forum. The indicators for the legislative power of the Executive may be viewed from the portions of distributions between the executive and legislature. However, when the veto power is combined with the power to initiate a bill, the legislative power of the Executive may be dominant in the legislative process. Meanwhile, when the Executive has only the right to initiate or propose bills, the Executive has the ability to shape legislation and control the agenda by choosing a proposal. In this context, the President would have more portions of power than the legislature in the legislative process if the Constitution gives both legislative initiatives and a veto of the bills.

b. Appointment powers

In order to perform his roles and duties, the head of the executive branch has the power to appoint state officers. The appointment power may be only a formal power to appoint, or a real power acting as the final decision maker to nominate, to promote, to elect and to appoint including to dismiss and reshuffle. Commonly, the appointment powers include the power to appoint the executive officers and judges. The appointment powers are usually implied from the Constitution and from the laws. For example, in the US Constitution, the appointment clause in Article II explicitly vests the nomination power to the President and establishes three categories of federal officials namely: the non-inferior (or principal) officers, inferior officers, and non-officers (employees).

As the appointment power could be extended but not limited, usually, the power is exercised with checks and balances and is vested in the head of state or head of government. Some constitutions, such as the US Constitution and the Philippines Constitution, explicitly allow the appointment power to be exercised during the recess or during the session. According

to the US Constitution, the appointment power may be exercised during the recess and has raised controversies since the power then is a unilateral power by the President without advice and consent from the legislature.\textsuperscript{104} The scopes of appointment are commonly clarified in the text of the Constitution as well as the mechanisms of appointment. It may include the judicial appointment (the appointment of judges), the executive appointment (the appointment of ministers, the appointment of state ambassadors and the Consuls, and other executive officers under the executive branch), the military appointment, and/or other political appointment.

c. Administrative powers: internal state administration affairs, budget and expenditure, and other affairs of state government

The administrative powers refer to the power to execute laws and to establish a state administration. The administrative powers also include the power to direct, control and supervise the ministerial cabinet and the executive departments as a whole, and state or local governments, issue executive regulations, the power to spend state budget that has been approved by the Legislature, establish any executive agencies and commission, and other state administrative affairs. In order to run the daily activities and state administration, the Executive usually has the privilege to submit budget bills.\textsuperscript{105} However, the power to approve the budget bill is vested in the Parliament.

d. Emergency powers

The emergency power is usually an extra-ordinary power to take any extra-constitutional actions in order to deal with a situation that cannot be dealt with by regular powers. The power may justify any actions deriving from discretionary powers and may allow suspension of rights. The exercise of emergency powers usually has a time limit so that any extra-ordinary actions may be applied only during an emergency situation. The emergency powers may be applied when the emergency situation cannot be sufficiently dealt with by regular powers set in the Constitution. Debates about the justification of such emergency


\textsuperscript{105} Andraz Sajo, Op. Cit., p. 190: the Spanish Cadiz Constitution 1812 was the first Constitution giving the government the privilege to submit the budget proposal.
power, raised some pros and cons. However, it is believed that constitutionally and historically speaking, the power is not unlimited and unchecked.\textsuperscript{106} Within a constitutional framework, any institution attached with the emergency power is limited in its coercive powers to deal with emergency situations. The emergency power is constrained by other branches which may check and balance the presidential emergency power.\textsuperscript{107}

According to political and constitutional theory, the emergency powers have been discussed since the experience of dictatorship of the ancient Roman Republic right up to the modern democracy in the new era of global terrorism threats.\textsuperscript{108} According to John Ferejohn and Pasquale Pasquino, there are two main differences between the ancient classical Roman and the Constitution in modern era;

\begin{quote}
"In the Roman dictatorship the agency declaring the emergency (the Senate) is different from the agent appointing the official who can exercise the emergency powers (the Consuls), and is different from the agency exercising Emergency Powers (the dictator). Moreover, the dictator is not an active magistracy during the regular government. In the modern, or neo-Roman, model the head of the executive recognizes an emergency and the same agent exercises Emergency Powers. And, the executive is a regular (not a dormant) organ of the constitutional system. One can suspect immediately that the Romans were much more concerned with potential abuses of emergency powers than were the designers of the modern constitutions who perhaps put more faith in the fact that the executive had to stand for election."\textsuperscript{109}
\end{quote}

According to John Locke, the emergency power is an extra-legal power dictated by necessity that is given to the executive, and in nature was associated with the English doctrine of prerogative to deal with incidental necessities where the law-making power was excessive or too slow to be executed. On the other hand, it permits the executive to act with discretion for

\textsuperscript{106} See: Louis Fisher, President’s Game, Legal Times Vol. XXIX No. 49, 4 December 2006.
\textsuperscript{107} Michael Freeman, Freedom or Security: The Consequences for the Democracies Using Emergency Powers to Fight Terror, Praeger Publisher, 2003, pp. 37: "...the power is constrained through the principle of state branches equality, liberty, and the concept of separation of power".
\textsuperscript{109} \textit{Id.} at p. 5.
the public good without prescription of the Law or even sometimes in contradiction with the Law, and it permits the disregard of even the direct letter of the Law.\textsuperscript{110}

The emergency power is usually written in the Constitution. According to Bruce Ackerman, defining the scope of emergency power is a serious and sensitive concern.\textsuperscript{111} Ackerman considers that there are two kinds of emergency:

"One kind is created by a terrorist attack, an atomic blast, a killer epidemic, and another when the government is paralyzed and can’t respond in a credible fashion. The first kind of emergency is an inevitability of twenty-first-century life and it will be a miracle if we can prevent all terrorist attacks, and I don’t believe in miracles. But the second kind is merely a product of an ostrich-like refusal to confront the obvious inadequacies of our present arrangements. It doesn’t take a rocket scientist to come up with a better solution; it just takes a little foresight and a bit of political will, not a lot since there is little reason to expect significant political resistance".\textsuperscript{112}

In common constitutional practice, the text of the Constitution usually provides certain circumstances that may be defined as an emergency, including International and internal conflict, direct military attack or military invasion, civil conflicts including internal disturbances, and is extended for other humanitarian catastrophes such as natural disasters, epidemics, famine, economic and political crisis, or any event which occurs and potentially contributes to the state’s collapse, a threat to national security like terrorism. Such events may be an international or internal threat to the state and community. Modern Constitutions usually also provide checks and balances for such emergency powers. Courts have the main role to review any measure during the emergency, and to conduct post-checks against the constitutionality or legality of the use of emergency power. On the other hand, legislatures may have a role to set laws concerning the state emergency and put limits on the use of emergency power. Modern Constitutions have attempted to set any measure that may be taken in time of emergency, and design certain limitations to the emergency power by providing strict and clear definitions of certain circumstances that may be classified as an emergency. The emergency powers are also restrained by international political and legal circumstances; while public participation would


\textsuperscript{111}Bruce Ackerman, Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism, Yale University Press, 2006, p. 4.

\textsuperscript{112}Id. at p. 168.
reduce the power of the centralized government altogether with legal restraint provided horizontally within the national government by separation of powers and supplemented by vertical restraints imposed by international society and popular community pressures.\textsuperscript{113}

The emergency powers include the power to determine certain circumstances as an emergency situation, the power to declare a state of emergency in part of the state or the state as a whole, the power to take any unilateral measures to deal with the emergency situation, and the power to issue and enact emergency laws. The emergency power is a temporary power. It may have a slightly unilateral character during the exercise of such power. However, the exercise of emergency power has a limited enforceability. After it has expired, such power may not be exercised unless it is authorized by the Legislature. However, according to Jules Lobel, the best response to an emergency situation is by forcing the President to immediately seek congressional and public ratification instead of putting a temporary limitation and allowing broad executive discretion.\textsuperscript{114}

\textbf{e. Military powers}

The military power of the executive is commonly expressed in the Constitution as a consequence of the Commander in chief clause. Edward S. Corwin indicates divisions within the particular area of power:

- The power in the presence of domestic war, as shown by the events of the Civil War,
- The powers in the presence of conditions of violence, real, or threatened, that are less than war
- The powers in the establishment of martial law
- The power as the delegate of Congress when the country is involved in foreign war,
- The executive’s organizational relations with the national forces.\textsuperscript{115}

The power authorizes the executive to command the national forces in active service. Moreover, the military power also allows the executive to terminate hostilities and conduct peace negotiations. In peace situation, the power enables the executive to decide the mobilization of national military forces for peace-keeping or humanitarian intervention.

f. Foreign affairs power

The foreign affairs power is generally derived as a consequence of the role of the executive as the head of state. According to Michael Genovese, the powers can be classified as the inherent power of the executive. However, since foreign affairs are also state affairs, the powers may also be executed by the executive as the head of the government. The powers are generally specified in the Constitution although the term foreign affairs power is not commonly written in the Constitution. Foreign affairs powers implied in the Constitution cover the treaty power, the diplomacy power, foreign policy making, conducting peace keeping operations, and other external affairs.

According to the British precedents, all the external affairs are assigned to the monarch including declaring wars, raising armies, making treaties, appointing ambassadors, and issuing letters of marque and reprisal (to authorize private citizens to engage in military actions). Prakash and Ramsey argued that the foreign affairs powers arose from the executive power of the Crown under a parliamentary system; while in a presidential system, the foreign affairs power is given to the President which implies that the President has the executive power including the foreign affair power. In some countries, like in the US, Louis Fisher observed that not all foreign affairs power was given to the President:

“the US Constitution grants not a single one of those powers to the president. The powers to declare war, mobilize armies, and issue letters of marque and reprisal are placed exclusively in Congress. The powers to make treaties and appoint ambassadors are given jointly to the president and the Senate”.

The foreign affairs power of a President may be determined as enumerated powers that include the President’s explicit power to make treaties (with the advice and consent of the senate),

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appoint ambassadors (with the advice and consent), and to receive foreign ambassadors (considered in the context of a broader foreign affairs). 119

With regard to the treaty power, Louis Henkin argued that the treaty making power is an important power not only as an occasional power; the appointment of ambassadors is an ordinary routine, not consequential, and even more infrequent; receiving ambassadors seems as a function and assigned duty, a ceremony that in many countries is performed by a figurehead. 120 While the treaty making powers are explicitly laid down in the Constitution, most of the Constitutions are silent about the treaty termination power. Louis Henkin considered that the silence of the Constitution renders a textual analysis impossible, but the nature, character, and structure of the treaty-making power permits logical inference to determine the locus of the authority to terminate treaties. 121

g. War powers

The war power is one of constitutional powers to empower the executive branch to act not above the law, but within the Constitution and in order to protect the state. 122 The war powers include the power to declare war, the power to mobilize the military force and the power to order any military actions. The war power in a parliamentary system commonly requires parliamentary consent. Parliamentary consent for the performance of war power may have several beneficial effects: parliamentary consent in war power accords more legitimacy to, and consolidates popular support for, military operations, increasing their effectiveness, providing the public with a strong incentive to avoid unnecessary wars, keeping military forces anchored in a given society, in contrast to standing armies, which tend to embrace interests which differ from those of citizens. 123

120 Id. at p. 38.
In the UK, the war powers are vested solely in the executive and it leaves the British Parliament having no formal role in the deployment of the armed forces. However, according to the Bill of Rights of 1689, a standing army within the Kingdom in time of peace, unless it be with consent of Parliament, is against the law; thus, while the Royal Navy may be maintained without authorization by virtue of prerogative, the authority of Parliament is required for the maintenance of the British Army, the Royal Air Force, and other land-based forces. The war power in the UK is proposed to require a parliamentary consent. However, the war power in a presidential system finds an ambiguity. In most of the presidential constitutions, the war power is formally vested in the executive but practically develops into more ambiguous ones since it mostly requires the authorization from the legislatures.

In general, the definition of war in the constitutions may be defined differently. Seth Weinberger observed that legal theorists and policy makers generally staked out two opposing views defining the constitutional meaning of a war declaration clause:

“On one side are those who argue for the broadest understanding of the declare war clause and a very limited conception of executive power. In this formulation, war must be formally declared each and every time American troops are to be sent into battle (with the possible exception of a sudden attack on American soil in which the enemy must be met before deliberations over declaring war can be held). On the other side are those who read a very narrow definition of the declare war clause, and claim that declarations of war are only necessary in extreme cases and are used to transform the legal status of the nation from a peacetime to a wartime footing. This side tends to argue that such a transformation does not require a formal declaration of war, but can be achieved through various kinds of congressional authorizations. A declaration of war, in the narrow definition, is only necessary to activate certain domestic laws that are not part of the president’s war powers, such as the power to seize private property or establish price controls or rationing patterns.”

In practice, declaring war could be by formally declaring war, claiming military confrontation to other states, or by launching a military operation against other states. However, some Constitutions, for example the US Constitution, give the war power to the Congress, while the formality to declare war has to be done by the President. Whereas, some constitutions, such as the Indonesian Constitution give the war power to the President.

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124 Id. at p. 466.
125 Id. at p. 466.
126 Id. at p. 467.
h. Pardoning powers

The pardoning power is the power to grant pardon, clemency, abolition, reprieve, amnesty, commutation and any kind of removing all or some of the monetary penalties (fines and forfeiture), or the punitive consequences of a criminal conviction.\(^{128}\) It is a singular tool of governance that is intended to restore balance in the justice system and put important issues on the national agenda.\(^{129}\) The power may be exercised unconditionally or conditionally, given as full or partial pardon by the head of the state or the executive. It can be exercised by changing the punishment (in the case of death penalty to life imprisonment), reprieve the punishment, pardon or remit the punishment. The pardoning power comes from the British Crown which was vested in the Monarch in accordance with the Monarch’s divine right to rule.\(^{130}\)

According to the US legal system, the pardoning power may be in the form of pardon, amnesty, reprieve, commutation and remission of fines; and may be exercised in an absolute, full, or unconditional pardon in which the pardon is granted without any conditions; or partial or conditional pardon which limit the pardon in time. Some scholars distinguish between amnesty and pardon by saying that amnesty is in the legislative area.\(^{131}\) In Russia, the Duma

\(^{128}\) James N. Jorgensen, “Clemency and Pardons Note”, *University of Richmond Law Review*, Vol. 27/1993, pp. 345 – 370, (accessed online from heinOnline [http://heinonline.org](http://heinonline.org) on 01/04/2012), p. 347: “Amnesty typically is extended to individuals who are subject to trial but have not yet been convicted. Although amnesty has largely the same legal effect as a pardon, it does not eliminate from a person’s record the offense for which punishment is being remitted. A reprieve on the other hand, the most limited form of clemency, is the temporary post-ponement of the execution of a sentence. Unlike other forms of clemency, a reprieve does not defeat the eventual imposition of judgment. It merely withdraws the sentence for a specified time period. Commutation also is within the president’s clemency powers. Commutation is the substitution of a lesser sentence for the original punishment imposed by a court. Unlike a pardon, it does not disturb the legal consequences that may attach to a conviction. Finally, the authority to remit fines and forfeitures which accrue from offenses against the United States is also within the broad ambit of the president’s clemency powers. The president’s power to remit fines and forfeitures, however, is limited to monetary penalties which have not yet been paid to the United States”.


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may give amnesty and sometimes serves as a positive check on the presidential pardoning power.\textsuperscript{132}

In common practice, the pardoning power is given to the head of the state or generally to the executive with the rationale that the executive may give effect to widespread public opinion in favor of or against the sentence of a particular accused person.\textsuperscript{133} Naturally, the pardoning power is typically broad without significant constraints.\textsuperscript{134} Considering the nature of pardoning power as merely a prerogative power, without significant limitation, as well as to ensure the accountability of such power in modern democratic atmosphere, James N. Jorgensen suggests that the pardoning power is exercised only after trial, conviction, and sentencing; and only in certain offences.\textsuperscript{135}

2.2. Executive Power in a Comparative Study: Different Models of Constitution of Government System and Experiences

a. A comparison of constitutional models in different government systems

This section discusses the classic model of constitutional government systems in modern democracies commonly studied in most of literatures, namely: parliamentary constitutions, presidential constitutions, and hybrid/intermediate constitutions. The focus of this part is on the executive branch and its powers. It provides a general overview on how executive powers are written in the text of the Constitution and how the Constitution prescribes the exercise of the powers. The Constitutions chosen represent different government systems: Germany, South Africa, the US, the Philippines, France and Poland.\textsuperscript{136} The US Constitution is a primary example of a presidential Constitution.\textsuperscript{137} France’s hybrid system embeds the concept of

\textsuperscript{132}Id. at p. 226.
\textsuperscript{136}All the compared states are secular states since even though Indonesia is a muslim majority state, Indonesia is a secular state. None of the compared states is an Islamic state since an Islamic Constitution would have different constitutional values of government as a secular Constitution. The comparison is addressed to adopt the constitutional terms and constitutional mechanisms that may have been written in the compared constitutions.
\textsuperscript{137}The US Constitution would be the most dominant comparison to be discussed. The US Constitution would be more compared since the US presidential system is the role model for Indonesia. It is also the real-nature of a presidential constitution.
executive powers and how they develop in modern days. The German post-war and Polish Constitution represent modern constitutions. On the other hand, South Africa with a progressive constitutional development, after being revived from constitutional crisis, has managed and developed the constitutional system progressively. The Constitution of the Philippines is chosen because the Philippines is a state in South East Asia relevant for regional comparison. It may give a spectrum of development from an entrenched democracy and constitutionalism under a similar presidential system as Indonesia. Two Constitutions are chosen to represent a parliamentary system model: the German Constitution and the South African Constitution. Under the parliamentary system, both Constitutions provide a contrasting experience of an executive branch. The Philippines Constitution is chosen on the basis that it represents alternative aspects of the presidential system, namely, a low level presidential system as the President has more weight and has substantial powers, but meanwhile, the parliament has less power to check on the president’s powers. The French Constitution and the Polish Constitution are chosen since both Constitutions have been known as the first observed Constitutions with a hybrid or semi presidential system. The semi presidential system establishes a unique dual executive. The French Constitution may have some modern mechanisms that are relevant to be of inspiration for Indonesia. Poland, on the other hand, has developed its Constitution with more modern concepts and it has set a coherent-systematic framework for the executive and executive powers.

b. Executive power: reflections on countries with a parliamentary system (a fusion power: executive and legislative)

1. Germany

Germany is a republic with a parliamentary system as the system of government. It is a federal state. As a parliamentary system, the head of state and the head of government are separated. The head of state is the Federal President and the head of government is the Federal Chancellor. The Germany Constitution is the German Basic Law (Grundgesetz fur die Bundesrepublik Deutschland) of 23 May 1949 as amended by federal statute of 29 July 2009 and incorporating the amendments resulting from the federal statute of 8 October 2008 which
entered into force with the Treaty of Lisbon on 1 December 2009.\textsuperscript{138} The German Basic Law does not explicitly clarify what are the executive powers, but instead implicitly refers to them in some of the provisions. The German Basic Law provisions indicate that the executive power belongs to the Federal Government which consists of the Federal Chancellor and the Federal Minister, and the Lander as a consequence that German is a federal state. The Lander has the executive power in a Land. It has also the power to execute federal laws in their own right.\textsuperscript{139}

**The Federal president**

The German Basic Law determines the Federal President as the head of the state. The Federal President is absolutely not the Federal government. According to Article 55 section (1), the Federal President may not be a member of the Federal Government or of a legislative body of the Federation or of a State. In general, the Federal President is not a strong President; it is because the German Basic Law does not provide provisions to empower the Federal President with real powers and does not create a strong presidency; while also, the Federal President has a weak office because he is indirectly elected without strong popular support in order to make discretionary actions.\textsuperscript{140} In most of the powers, the Federal President has no real influence other than formal power on behalf of the Federation and acting as the Federation representation. The Federal President has limited powers in practice. Article 58 of the German Basic Law states that all instructions and orders (except for the appointment and dismissal of the Federal Chancellor, the dissolution of the Bundestag under Article 63 and the request to the Federal Chancellor or a federal minister to continue the affairs until the appointment of a successor under Article 69 (3)), made by the Federal President require the counter-signature of the Federal Chancellor or the competent federal minister for the validity. On the other hand, Heringa and Kiiver mention two presidential powers which stand out in the Federal President; firstly, the Federal President may, and in fact can, refuse to sign legislation


\textsuperscript{139}Deutscher Bundestag, Basic Law for the Federal Republic of Germany, Translated by Christian Tomuschat and David P. Currie, Donald P. Kommers in cooperation with the Language Service of the German Bundestag, Printed version at November 2012: Article 83 German Constitution.

that in his view violates the Basic Law when he promulgates bills adopted on the federal legislative process; while he may not veto legislation for political reasons; and secondly, the formal power to dissolve the Bundestag.\textsuperscript{141}

The Federal President is indirectly elected by the Federal Convention (Bundesversammlung which consists of the members of the Bundestag and an equal number of members who are elected by the parliaments of the States on the basis of proportional representation).\textsuperscript{142} An absolute majority vote is required. Within the term of office, the Federal President can be impeached. Article 61 section (1) stipulates that the Bundestag or the Bundesrat (at least a quarter of the members of the Bundestag or a quarter of the votes of the Bundesrat for a motion to impeach and a majority of two-thirds of the members of the Bundestag or two thirds of the votes of the Bundesrat for the decision to impeach) may impeach the Federal President for an intentional violation of the Basic Law or another federal statute before the Federal Constitutional Court. Furthermore, Article 61 section (2) determines that the Federal Constitutional Court establishes the prosecution and decides whether the Federal President is guilty or not for having committed an intentional violation of the Basic Law or another federal statute and may declare the Federal President is removed from the office, and thus, may rule that he is prevented from exercising the functions as a Federal President.

On law-making power, the Federal President has the formal power to certify a bill into federal legislation according to Article 82 section (1) the German Basic Law. On the appointment power, the Federal President only has formal power to appoint and to dismiss the Federal Chancellor. However, he has the power to nominate a candidate for the Federal Chancellor. The Federal President also has the formal power to appoint and dismiss federal ministers according to Article 64 the German Basic Law. Article 60 Section (1) grants the Federal President the power to appoint and dismiss the federal judges, federal civil servants, officers and non-commissioned officers as far as statutory regulation does not provide to the contrary. The Federal President has the power to formally dissolve the Bundestag in a conditional situation according to Article 63 section (4) and Article 68 section (1) the German Basic Law.

\textsuperscript{141}Id. at p. 139.

\textsuperscript{142}Deutscher Bundestag, \textit{Op. Cit.}, Article 54 section (3) the German Basic Law.
On the foreign affairs power, as the head of the state, the Federal President, on behalf of the Federation has the treaty power. He represents the Federation in international law. According to Article 59 section (1), the Federal President has the power on behalf of the Federation to conclude treaties with foreign states and accredits and receives envoys. However, this power does not fully depend on the Federal President but is limited, particularly with regard to the treaties which regulate the political relations of the Federation, or which refer to objects of federal legislation; for this reason, the treaty power of the Federal President requires the consent or participation of the organs competent for such federal legislation in the form of a federal statute. Furthermore, for administrative agreements, the regulation regarding the federal administration is said to be applied as mutatis mutandis.\textsuperscript{143}

On the emergency power, the Federal President in a particular situation, referring to Article 68, has the power to declare a legislative emergency with the consent of the Bundesrat. Furthermore, in terms of the state emergency, according to Article 115a section (1) the German Basic Law, it is the power of the Bundestag with the consent from the Bundesrat and on the request of the Federal Government, to declare a state of defense. However, the Federal President has the authority in accordance with section 3 of the Article to publish the pronouncement of the state of defense. Furthermore, section 4 and section 5 of the Article emphasize that the Federal President only has the formal power to publish the declaration of the state of defense; section 5 of the Article precisely stipulates that if the finding of a state of defense has been published and the territory of the Federation is being attacked by force of arms, the Federal President may with the consent of the Bundestag make a declaration under international law regarding the existence of a state of defense. Contrary to the publication of the declaration of the state of defense, if the state of defense is declared to be terminated by the Bundestag with the consent of the Bundesrat, the Federal President has the formal power to publish the declaration of the state of defense termination.\textsuperscript{144}

\textsuperscript{143} Id. Article 59 section (1) the German Basic Law.
\textsuperscript{144} Id. Article 115l section (2) the German Basic Law.
On the pardoning power, although he may transfer the powers to other authorities\textsuperscript{145}, Article 60 of the Germany Basic Law grants the Federal President the pardoning power in individual cases on behalf of the Federation.\textsuperscript{146} The pardoning power of the Federal President is as a consequence that he is the symbol of the Federation and formally gives the pardon as a personification of the Federation.

The Federal Government and the executive powers

The Federal chancellor is the executive who is subject to the parliamentary motion of censure. The federal chancellor can be brought down by qualified procedure in Bundestag (the lower chamber). Moreover, Chapter VI of the German Basic Law stipulates about the Federal Government. Article 62 of the German Basic Law defines the Federal Government as the Federal Chancellor (Bundeskanzler) and the federal ministers. According to Article 63 section (1) and (2) the German Basic Law, the Federal Chancellor is elected, on the proposal of the Federal President, by the Bundestag without debate by a majority vote of the members of the Bundestag. Like the Federal Chancellor, the Federal ministers according to Article 64 section (1) are appointed and dismissed by the Federal President on the proposal of the Federal Chancellor.

According to Article of 65 the German Basic Law, the Federal Chancellor has the power to (1) determine the guidelines of the policy and bear responsibility for that; (2) direct its affairs according to rules of procedures as adopted by the Federal Government and approved by the Federal President. However, in general, the German Constitution implies that the executive powers are mostly exercised by the Federal government. The Federal Chancellor can not exercise the powers individually. Accordingly, the Federal government consists of the Federal Chancellor and the Federal ministers.

On the area of law-making power, the Federal Government has the power to introduce Bills in the Bundestag according to Article 76 of the German Basic Law. Furthermore, Article 80 of the German Basic Law, the Federal Government, a federal minister or the State Governments has the power to adopt ordinances (Rechtsverordnungen) which require the consent of the

\textsuperscript{145}I\textit{d.} Article 60 section (3) the German Basic Law.

\textsuperscript{146}I\textit{d.} Article 60 section (2) the German Basic Law.
In terms of the appointment power, the Federal Chancellor has the power to appoint a federal minister as his deputy according to Article 69 (1) of the German Basic Law. The German Basic Law vests the Chief Commander power of armed forces to the Federal Chancellor.\textsuperscript{147}

On the administration power, the Federal Government in particular the Minister of Finance has the expenditure power with the supervision of the Bundestag.\textsuperscript{148} In the end of the financial term, if by the end of a fiscal year the budget for the following year has not been established by a statute, the Federal Government is empowered, until its entry into force, to make all expenditures that are necessary to maintain statutory institutions and to carry out statutory measures, to fulfill the legal obligation of the Federation, and to continue constructions, acquisitions and other services, or to continue to grant benefits for these purposes, to the extent that amounts have already been approved in the budget of a previous year.\textsuperscript{149} Furthermore, the Federal Government has the power to mobilize the funds necessary for sustaining operational management up to a maximum of one quarter of the total amount of the previous budget by way of a credit.\textsuperscript{150}

According to Article 84 the German Basic Law, the Federal government has the power to issue general administrative regulations with the consent from the Bundesrat. Section (4) of the Article authorizes the Federal Government with the power to issue individual instructions in particular cases with regard to the execution of the Federal statutes. Section (3) of the Article stipulates that the Federal Government has the power to supervise the federal statutes execution in accordance with the applicable law by the States and by this purpose, the Federal Government has the power to send agents to the highest State authorities also to subordinate authorities, with their consent, or if such consent is refused with the consent of the Bundesrat. As a result of the supervision, the Federal Government, according to section (4) of the Article may request to the Bundesrat that the State has violated the law while it may be challenged before the Federal Constitutional Court.

\textsuperscript{147}\textit{Id. Article 115b the German Basic Law.}
\textsuperscript{148}\textit{Id. Article 112 - 114 section (1 the German Basic Law).}
\textsuperscript{149}\textit{Id. Article 111 section (1) the German Basic Law.}
\textsuperscript{150}\textit{Id. Article 111 section (2) the German Basic Law.}
**On the emergency power**, the Federal Government is also empowered with emergency power. Article 115f of the German Basic Law strengthened the Federal Government with some particular powers in times of state emergency in so far as the circumstances require. Those powers include the power to use the Federal Border Guard throughout the entire territory of the Federation and the power to give orders, both to the federal administration and to the State governments and, if it considers it to be urgent, to the State authorities and transfer the power to members of the State government to be determined by it. However, the execution of such powers should be notified to the Bundestag, the Bundesrat and the Joint Committee.

2. **South Africa**

The South African Constitution does not explicitly describe the choice of the government system. However, according to some provisions, the system of government is indicated as a parliamentary system. The Constitution designates a presidency and recognizes the President as both the head of the state and the head of government. The powers of the President are mostly the same as the President in presidential countries with a president and cabinet, and a bi-cameral legislature and a judiciary including a constitutional court.

One of the parliamentary system characters is reflected from the President’s appointment. The President is not directly elected but appointed by the parliament (National Assembly) from among its members and may be removed by a two-thirds vote of the National Assembly on the grounds of serious violation of Constitution or the Law, serious misconduct or inability to perform the function during his office. The South Africa Constitution designates a Presidency within a parliamentary Constitution. The President is the head of state and the head of government but he actually depends on the parliament. The Constitution distinguishes between two executive branches, namely: the national executive and the provincial executive. The national executive is in the hands of the President; while, the provincial executive is in the hands of the Premier.

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151. *Id.* Article 115f section (1) the German Basic Law.
The National Executive

The South African Constitution distinguishes the executive branch from the national executive and the provincial executive. It stipulates that the President as the head of the executive is elected from the National Assembly; the President has the power to appoint members of the government which are invested with their functions and are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.\(^{154}\) It reflects that the President and the government rely on the Parliament and in general are secured through motions of confidence or no confidence.

In general, the national executive branch and its powers are stipulated in Chapter 5 of the Constitution. Article 83a of the Constitution explicitly admits that the President has functions as the head of the State and the head of the national executive. According to the Article, the President has some constitutional obligations to uphold, defend, and respect the Constitution as the Supreme Law of the Republic and promote the unity of the nation that will advance the Republic.\(^{155}\) In order to perform the functions as head of state and head of the national executive, the President is said to have powers that are guaranteed in the Constitution and the legislation.\(^{156}\) According to Article 42 section (5) of the South African Constitution, the President has the power to summon Parliament to an extraordinary sitting at any time to conduct special business. Article 84 section (2) of the South African Constitution determines that the President is responsible for:

a. assenting to and signing Bills;
b. referring a Bill back to the National Assembly for reconsideration of the Bill’s
c. referring a Bill to the Constitutional Court for a decision on the Bill’s constitutionality;
d. summoning the National Assembly, the National Council of Provinces or
e. making any appointments that the Constitution or Legislation requires the President to make, other than as head of national executive;
f. appointing commissions of inquiry
g. calling a national referendum in terms of an Act of Parliament;
h. receiving and recognizing foreign diplomatic and consular representatives;

\(^{155}\)Constituteproject.org, South Africa’s Constitution of 1996 with Amendments through 2012, generated from excerpts of texts from the repository of the Comparative Constitutions Project and distributed on constituteproject.org,Pdf generated 23 May 2016: Article 83b, Article 83c the Constitution of the Republic of South Africa.
\(^{156}\) Id. Article 84 section 1 the Constitution of the Republic of South Africa.
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i. appointing ambassadors, plenipotentiaries, and diplomatic and consular representatives;

j. pardoning or reprieve of offenders and remitting any fines, penalties or forfeitures and

k. conferring honours.\textsuperscript{157}

The Constitution confirms that the President is the executive authority in Article 85 of the South African Constitution. The President as the executive authority here is referred to as the one who exercises the executive power together with the other members of the Cabinet.

The state administrative powers include the following:

a. powers to implement national legislation except where the Constitution or an Act of Parliament provides otherwise;

b. powers to develop and implement national policy;

c. powers to coordinate the functions of state departments and administrations;

d. powers to prepare and initiate legislation;

e. powers to exercise any other executive functions provided for in the Constitution or in national legislation.

On the law-making power, according to the South African Constitution, the President of South Africa has the power in the law-making process. The powers include assenting to and signing Bills, referring a Bill back to the National Assembly for reconsideration of the Bill and referring a Bill to the Constitutional Court for a decision on the Bill’s constitutionality. Article 79 (1) states that the President must assent to the bill when the National Assembly passes a bill.\textsuperscript{158} However, he may refuse to assent to a bill only on the grounds of its unconstitutionality.\textsuperscript{159} In this case, the South African Constitution states that the President may refer a bill back to the National Assembly for reconsideration.\textsuperscript{160} If the bill after the reconsideration has accommodated the President’s concern on the constitutionality, the President must assent to and sign the bill or refer the bill to the Constitutional Court for a decision about the constitutionality of the bill.\textsuperscript{161}

\textsuperscript{157}Id. Article 84 section 2 the Constitution of the Republic of South Africa.

\textsuperscript{158}Id. Article 79 (1) the Constitution of the Republic of South Africa.

\textsuperscript{159}Id. Article 79 (1) the Constitution of the Republic of South Africa.

\textsuperscript{160}Id. Article 79 (1 the Constitution of the Republic of South Africa).

\textsuperscript{161}Id. Article 79 (4) the Constitution of the Republic of South Africa.
the Constitutional Court decides that the bill is constitutional.\textsuperscript{162} There is no veto power for the South African President. The Constitution protects the independence of the Legislature from the Executive by providing a check on the presidential power to block the passage of legislation.\textsuperscript{163}

**On the Cabinet and other appointment power,** according to Article 91, the President has the power over the Cabinet. Article 91 section (1) points out that the President has the power to appoint the Deputy President (who will assist the President in the administration of the functions of government) and Ministers, assign the Deputy President and Ministers’ powers, and dismiss them. In terms of the Deputy President’s appointment, the President performs his power by selecting the candidate from among the members of the National Assembly.\textsuperscript{164} In exercising the minister appointment power, the President selects any number from among the members of the Assembly; and no more than two Ministers from outside the Assembly.\textsuperscript{165} Article 91 section (4) also clarifies that the President has the power to appoint a member of the Cabinet to be the leader of government business in the National Assembly.\textsuperscript{166} As a result of the Presidential appointment power, the Deputy President and Ministers are responsible for the executive powers and functions assigned by the President; however, they are collectively and individually accountable to the Parliament.\textsuperscript{167}

In order to assist the powers and functions of the Minister in the Cabinet, Article 93 gives the President the power to appoint and dismiss any number of Deputy Ministers from among the members of the National Assembly and no more than two Deputy Ministers from outside the Assembly; on the other hand, they will be responsible to the Parliament.\textsuperscript{168} Moreover, Annex B of the Constitution sets out in more detail on the Cabinet appointment by the President. As stated in the Constitution, the Cabinet of South Africa consists of the

\begin{thebibliography}{9}
\bibitem{162}Id. Article 79 (5) the Constitution of the Republic of South Africa.
\bibitem{165}Id. Article 91 Section 3b and 3c the Constitution of the Republic of South Africa.
\bibitem{166}Id. Article 91 the Constitution of the Republic of South Africa.
\bibitem{167}Id. Article 92 the Constitution of the Republic of South Africa.
\bibitem{168}Id. Article 93 the Constitution of the Republic of South Africa.
\end{thebibliography}
President, the Executive Deputy Presidents and ministers as determined in Article 91. The executive deputy President is designated by the President among the members of the Assembly. On the other hand, the cabinet appointment and the President’s power over the cabinet are based on the procedures as determined by Article 91 section 8 – section 15.

The Constitution of South Africa allows the President to establish deputy ministerial posts. The procedures of the deputy ministerial appointment are set in Article 93 section 2 – 3. The Deputy of ministers has the duties to exercise and perform on behalf of the relevant minister any of the powers and functions assigned to that Minister in terms of legislation and subject to the directions of the President. Meanwhile, the President has the power over the deputy minister and can take any action during the deputy minister’s absent. The ministers are accountable individually to the President and to the National Assembly for the administration of their portfolio. However, according to Article 102, the National assembly has the power to pass a motion of no confidence in the Cabinet but not including the President. In this situation, the President must reconstitute the Cabinet. By a vote supported by a majority of its members, the National Assembly may pass a motion of no confidence in the President, and the President and the other members of the Cabinet and any Deputy Ministers must resign.

On the other appointment power, the President, as the head of the National executive has the power to appoint the Judiciary officers. According to Article 174 section (3), the President has the power to appoint the Chief of Justice and the Deputy Chief Justice after consulting the Judicial Service Commission and the leaders of parties represented in the

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169 Id. Article 91 the Constitution of the Republic of South Africa.
170 Id. Article 91 the Constitution of the Republic of South Africa.
171 Id. Article 93 Section (1) the Constitution of the Republic of South Africa.
172 Id. Article 93 Section (2) the Constitution of the Republic of South Africa.
173 Id. Article 93 Section (4) the Constitution of the Republic of South Africa.
174 Id. Article 93 Section(5) the Constitution of the Republic of South Africa.
175 Id. Article 96 the Constitution of the Republic of South Africa.
176 Id. Article 102 the Constitution of the Republic of South Africa.
177 Id. Article 102 Section(2) the Constitution of the Republic of South Africa.
National Assembly; and appoint the President and Deputy President of the Supreme Court of Appeal.\textsuperscript{178}

Moreover, section 4 of the Article states that the President after consulting the Chief Justice and the leader of parties represented in the National Assembly has the power to appoint other judges of the Constitutional Court.\textsuperscript{179} In general, the President has the power to appoint the judges of all other courts with the advice of the Judicial Service Commission.\textsuperscript{180} In any special situation of a judge’s absence, the President has the power, with the recommendation of the Cabinet approval by the Chief of Justice, to appoint a woman or a man to be a judge of the Constitutional Court.\textsuperscript{181} The Constitution clarifies that the President has the formal power of judicial removal by adopting a resolution calling for a judge to be removed.\textsuperscript{182}

On the other issues of appointment power, the President also has the power, upon the advice of the Judicial Service Commission, to suspend a judge who is guilty of gross incompetence or guilty of gross misconduct and an in-capacity to act.\textsuperscript{183} The President, as the head of the national executive, may have the power to appoint some of the members of the Judicial Service Commission. According to Article 178 section 1f, the President appoints two members of the Judicial Service Commission from practising advocates nominated from within the advocate profession to represent the profession as a whole and after consulting the leaders of all the parties in the National Assembly, four members of Judiciary service commission.\textsuperscript{184} Another appointment power of the President as the national executive is to appoint the prosecuting authority.\textsuperscript{185}

Article 193 the South African Constitution grants formal power to the President to appoint, based on the recommendation of the National Assembly, the public protector, the

\begin{itemize}
\item \textsuperscript{178} Id. Article 174 Section (3)(Sub-s. (3) substituted by s. 13 of Act No. 34 of 2001) the Constitution of the Republic of South Africa.
\item \textsuperscript{179} Id. Article 174 Section (4)(Sub-s.(4) Substituted by S. 13 of Act No. 34 of 2001) the Constitution of the Republic of South Africa.
\item \textsuperscript{180} Id. Article 174 Section (6) the Constitution of the Republic of South Africa.
\item \textsuperscript{181} Id. Article 175 Section (1) (Sub-s. (1) substituted by s. 14 of Act No. 34o f 2001) the Constitution of the Republic of South Africa.
\item \textsuperscript{182} Id. Constituteproject.org: Article 177 Section (1) and Section (2) the Constitution of the Republic of South Africa.
\item \textsuperscript{183} Id. Article 177 Section (3 the Constitution of the Republic of South Africa).
\item \textsuperscript{184} Id. Article 178 Section 1(f); Section 1(j) the Constitution of the Republic of South Africa.
\item \textsuperscript{185} Id. Article 179 Section (1a) the Constitution of the Republic of South Africa.
\end{itemize}
auditor-general and the member of the South African Human Rights Commission, the Commission for Gender Equality, and the Electoral Commission. 186 On the other hand, according to Article 194 section 3, the President may suspend a person from office at any time after the start of the proceedings; the President also has the power to remove a person from office upon adoption by the Assembly of a resolution calling for that person’s removal. 187 On the other removal powers, Article 196 states that the President has the power to remove the relevant member of the public service commission upon the adoption by the Assembly of a resolution calling for the removal or written notification by the Premier that the provincial legislature has adopted a resolution calling for that commissioner’s removal. 188

Besides some of the executive appointment powers mentioned above, the President as the national executive also has the power to appoint the financial and fiscal commission and remove a member from office on the grounds of misconduct, incapacity or incompetence. The Premier, as the provincial executive, is also involved in the appointment process. 189 The appointment power of the President is also covered in the area of the appointment of the National Commissioner of the police service, to control and manage the police service. 190

On the foreign affairs and treaty power, Chapter 14, Article 231 section (1) of the South African Constitution stipulates that the National executive, the President, has the power to negotiate and sign all international agreements. 191 However, some particular treaties bind the Republic only after it has been approved by a resolution in both the National Assembly and the National Council of Provinces. 192 Some treaties do not require either ratification or accession, and are entered into force by the President and bind the Republic without approval by the

186 Id. Article 193 Section (4) the Constitution of the Republic of South Africa.
187 Id. Article 194 the Constitution of the Republic of South Africa.
188 Id. Article 196 Section (12) the Constitution of the Republic of South Africa.
189 Id. Article 221 Section (1)Sub-s. (1) amended by s. 2 of Act No. 2 of 1999 and substituted by s. 7 (a) of Act No. 61 of 2001 the Constitution of the Republic of South Africa.
190 Id. Article 207 Section (1) the Constitution of the Republic of South Africa.
191 Id. Chapter 14, Article 231 Section (1) the Constitution of the Republic of South Africa.
192 Id. Article 231 Section (2) the Constitution of the Republic of South Africa.
National Assembly and the National Council of Provinces must be tabled in the Assembly and the Council within a reasonable time.\(^{193}\)

**On the special power of state intelligence**, the Constitution also explicitly specifies the President’s power over the intelligence service. According to Article 209, the President has the power to establish the intelligence service other than any intelligence division of the defense force or police service by terms of national legislation.\(^{194}\) The President’s power over the intelligence service includes those items which are mentioned in Section 2 of the Article, namely: to appoint the head of each intelligence service, assume political responsibility for the control and direction of any of those services, designate a member of the Cabinet to assume the responsibility.\(^{195}\) Furthermore, Article 201 of the South Africa Constitution sets out that the President has the power to coordinate and monitor any intelligence division of the defense including police service.\(^{196}\) The Constitution ensures that the National legislation regulates the powers and functions of the intelligence service.

**On a special power**, the President has the power to proclaim that the Constitution comes into effect according to Article 243.\(^{197}\) While in particular affairs, the President has the power to transfer the functions and assign temporary functions. The transfer of functions can be made by the President, by proclamation, to a member of the Cabinet in terms of the administration of any legislation entrusted to another member or any power or function entrusted by legislation to another member.\(^{198}\) In terms of the temporary assignment of functions, the President may have the power to assign to a Cabinet member any power or function of another member who is absent from office or is unable to exercise that power or perform that function.\(^{199}\) The President has the power to proclaim the assignment of functions of a Cabinet member that assign power or function to be exercised or performed by a member.

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\(^{193}\) *Id.* Article 231 Section (3), Section (4), Section (5) the Constitution of the Republic of South Africa.

\(^{194}\) *Id.* Article 209 Section (1) the Constitution of the Republic of South Africa.

\(^{195}\) *Id.* Article 209 Section (2 the Constitution of the Republic of South Africa.

\(^{196}\) *Id.* Article 210 the Constitution of the Republic of South Africa.

\(^{197}\) *Id.* Article 243 Section (1), Section (2) the Constitution of the Republic of South Africa.

\(^{198}\) *Id.* Article 97 the Constitution of the Republic of South Africa.

\(^{199}\) *Id.* Article 98 the Constitution of the Republic of South Africa.
of a provincial Executive Council or a Municipal Council; by such proclamation, the assignment will take into effect.\textsuperscript{200}

**On the administration power**, the President as the national executive has the power to intervene in the provincial administration by taking any appropriate steps to ensure the fulfillment of an executive obligation in terms of the Constitution or legislation as stipulated in Article 100 the South Africa Constitution. According to the Article, the President may perform such a power by (1) issuing a directive to the provincial executive and describing the extent of the failure to fulfill its obligations and stating any steps required to meet its obligations; (2) assuming responsibility for the relevant obligation in that province to the extent necessary to maintain essential national standards or meet established minimum standards for the rendering of a service, maintain economic unity, maintain national security, or prevent that province from taking unreasonable action that is prejudicial to the interests of another province or to the country as whole.\textsuperscript{201} Furthermore, the intervention of the President as the national executive should be submitted in the form of a written notification to the National Council of Provinces within 14 days after the intervention started. Article 101 implies that the President has the power to make executive decisions in the form of legislation, proclamation, regulation and other instruments of subordinate legislation that can have legal consequences.\textsuperscript{202}

In terms of the state emergency, the South African Constitution states that the declaration of state emergency is by an act of parliament.\textsuperscript{203} However, Article 203 on the state of national defense stipulates that the President has the power to declare a state of national defense and must inform parliament promptly and in appropriate detail.\textsuperscript{204} While **on the military power**, the President of South Africa, as the head of the national executive holds the power as Commander in Chief of the defense force and has the power to appoint the military

\textsuperscript{200}Id. Article 99 the Constitution of the Republic of South Africa.

\textsuperscript{201}Id. Article 100 on National intervention in provincial administration(Sub-s. (1) amended by s. 2 (b) of Act No. 3 of 2003 the Constitution of the Republic of South Africa.

\textsuperscript{202}Id. Article 101 the Constitution of the Republic of South Africa.

\textsuperscript{203}Id. Article 37 the Constitution of the Republic of South Africa.

\textsuperscript{204}Id. Article 203 Section(1), Section (2), Section (3) the Constitution of the Republic of South Africa.
command of the defense force. Furthermore, the President has the power to direct the Command of the defense force.

Article 201 Section (2) clarifies that only the President, as the head of the national executive has the power to employ the defense force in cooperation with the police service, in defense of the Republic and in fulfillment of an international obligation. However, the President must inform the Parliament about the reasons for the employment of the defense force, any place where the force is being employed, the number of people involved, and the period for which the force is expected to be employed. If the Parliament does not sit during the first seven days after the defense force is employed as envisaged, the President must provide the information required to the appropriate oversight committee.

In addition, the South African Constitution provides a check to the executive power of the President in Annex B on Government of National Unity of National section 84 Sub-Section (3) that before executing the power, the President must consult the Executive Deputy President on the specific issues as follows:

- a. the development and execution of the policies of the national government;
- b. all matters relating to the management of the Cabinet and the performance of Cabinet business;
- c. the assignment of functions to the Executive Deputy Presidents;
- d. any appointment under the Constitution or any legislation including the appointment of ambassadors or other diplomatic representative;
- e. appointment of commissions of inquiry;
- f. calling a referendum;
- g. the implementation of pardoning power; pardoning or reprieveing offenders.

c. Executive powers: experiences from the presidential Constitutions (presidential system: a separation of power between the executive and the legislative)

1. US

The US Constitution reflects a classic model for a presidential system; in which, the executive and legislature are selected independently. There are some points that can be
noted from the US presidential system according to Ken Newton, namely: 1. The President has veto power and can veto legislation, on the contrary, the legislature (Congress) can override the veto by a majority of two-thirds in both houses; 2. The President is head of the armed forces, but only Congress can declare war; 3. The President makes political appointments, but they can be rejected by the Senate; 4. Congress cannot remove the president, and the president cannot dissolve Congress. Moreover, the Constitution allows the Congress to impeach a President from office. The Congress also has the power to make and enact Laws and the President is responsible to execute Laws. The President is ultimately dependent on the Congress as the Legislature. To this extent, the presidential system in the US allows the president to have an independent branch but the Constitution gives some substantial-checked powers to the president.

However, the US President not only has constitutional powers and delegated powers but also gets executive powers from many sources. There are still numerous institutional resources that may be the justification of broad ranges of power for the executive. According to the US practice, the tendency shows that the President can always expand the power through the mechanism of spending and budget control. The US President may also control the legislation process and thus, it will indirectly make the President the key institution in the legislation process. The existence of the Office of Management and Budget (OMB) may contribute to the dominant power of the President to take control through the procedure over the entire executive branch; in particular on the area of the spending, budget process, legislation process before submitted to the Congress:

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213 Id. at p. 63: “It is said, for example, that the American president has little power over Congress other than the power of persuasion. Many in the White House have found this inadequate for the purposes of government, if Congress and the president are of a different political mind they may fight each other and get little done. One image likens the president, the House, and the Senate to participants in a three-legged race – difficult to move along unless they move together; and easy to fall over. The problem is heightened if, as sometimes happens, the presidency is controlled by one political party, and one or both houses by another. If, on top of this, party discipline is weak, the majority party may be unable to pass its legislation. The result is that apparently powerful presidents are sometimes immobilized by elected assemblies. For this reason, many presidential systems have failed the test of democratic stability and some experts believe that they do not make for effective government. The USA may be the only successful example, although Costa Rica has maintained its presidential system since 1949”.
In particular, the Office of Management and Budget (OMB) serves as a potential instrument of presidential control over federal spending and hence a mechanism through which the White House has greatly expanded its power. In addition to its power over the federal budget process, the OMB has the capacity to analyze and approve all legislative proposals, not only budgetary requests, emanating from all federal agencies before being submitted to Congress. This procedure, now a matter of routine, greatly enhances the president’s control over the entire executive branch. All legislation emanating from the White House as well as all executive orders also go through the OMB. Thus, through one White House agency, the president has the means to exert major influence over the flow of money as well as the shape and content of national legislation.²¹⁴

Another mechanism that may contribute to the expansion of the executive power of the US President is the mechanism of regulatory review:

“...that presidents have used to increase their power and reach is the process of regulatory review, through which presidents have sought to seize control of rule-making by the agencies of the executive branch implementation”.²¹⁵

Meanwhile, the US Congress discretion in delegating to administrative agencies may also contribute to the expansion of the executive power; in practice, the President can always have full power to order the agencies:

“President Clinton believed the president had full authority to order agencies of the executive branch to adopt such rules as the president thought appropriate. During the course of his presidency, Clinton issued 107 directives to administrators ordering them to propose specific rules and regulations. In some instances, the language of the rule to be proposed was drafted by the White House staff; in other cases, the president asserted a priority but left it to the agency to draft the precise language of the proposal. President George W. Bush continued the Clinton-era practice of issuing presidential directives to agencies to spur them to issue new rules and regulations. In January 2009, President Obama affirmed the importance of regulatory review but said his administration would review the process to make certain that federal agency guidance by the president would be fair and would involve public participation”.²¹⁶

In the US, the executive power also has the power that comes from the people that may affect the President’s capacity to govern on the basis of popularity as well as a consequence that the executive is an institution.²¹⁷ However, the powers of the President do not always make the US President the decision maker. The right to override the veto power of the president puts the Congress as the final decision maker; on the other hand, the senate has the

²¹⁵ Id. at p. 323.
²¹⁶ Id. at p. 324.
²¹⁷ Id. at p. 314.
last word in terms of cabinet and other major executive appointments; similar also for the treaty power, and the Presidential military power as the commander in chief.  

Donald S. Lutz argued that the President does not hold real power instead of the legislature; the President is dependent to the legislature in terms of the power performance, and he clarified that the President may depend on the legislature in terms of conducting war, fund approval for the use of force, and other funds for executive agents and agencies; Donald S. Lutz reflected his argument by describing the US presidential model:

"..war to make this power meaningful, and only Congress can appropriate funds to give the commander in chief a fighting force. In addition, Congress can impeach the president, investigate executive functions and actions, create and abolish executive agents and agencies, and set or alter executive branch salaries. The president can pardon on his own, but he is left out of the amendment process completely. The president cannot affect the sitting of Congress through prorogue or calling sessions. If the electoral college fails to select a president, Congress shall select one. If the president and vice president die, are removed, or are incapacitated, Congress determines who shall be the executive currently the Speaker of the House. No other elected president in the world has so many legislative checks and restrictions placed upon him. Even most symbolic presidents can prorogue or call the legislature into session".

Constitutionally, the US executive branch mainly derives from Article II the US Constitution. It implies that the US President is only vested with the core power for an executive branch, namely: the military power, the pardoning power, the treaty power, the appointment power, the state administrative power and the power to faithfully execute the Laws. According to the text of the US Constitution, the US President very much depends on the Senate and/or the Congress. He has a little or almost has no independent power since all the power is authorized by the Senate and/or the Congress. The Constitution empowers the Congress with some powers mentioned in detail in Article I Section 8 of the US Constitution.

Section 2 of the Article sets the constitutional basis for the Military, Cabinet, Pardon, and Appointment power for the President. Paragraph 1 Section 2 of Article II of the US Constitution attaches the military power to the President as the Commander in Chief of the US Army and Navy of the United States, and of the Militia of several States. On the law-making
power, the US President’s law-making power includes the legislative powers of the executive in some area of legislative process. The US Constitution gives the veto power and legislative initiation power to the President.\textsuperscript{222} The veto power for saying “no” to legislative proposals is limited by the US Constitution which Congress can over-ride.\textsuperscript{223} The veto is merely just a written objection and the Congress may over-ride it.\textsuperscript{224} At this point, the legislative power is absolutely attached in both houses of Congress, while the formal power to sign the bill belongs to the President. To this extent, the veto power empowers the President and assigns the President with strong bargaining power. But, it does not mean that the President has dominated the legislative power since Congress has the power to over-ride it. However, in practice, the fear that veto power will be the most powerful tool for modern presidents is greater than the modern role of the President in initiating legislation.\textsuperscript{225}

In addition to the law-making power, the executive is also given the power to make other laws, the executive order, in relation to the state administration affairs. Such laws usually have specific and technical characters. They are hierarchically under the legislation. Commonly, the executive order is a regulation issued by the president and simply as a normal tool for the state management, as the rules in setting procedures, commanding, and other functional responsibilities.\textsuperscript{226} In practice, the executive order had been significant and sometimes

\textsuperscript{222}Benjamin Ginsberg \textit{et al}, \textit{Op. Cit.}, p. 311: “Two constitutional provisions are the primary sources of the president’s power in the legislative arena. The first of these is the provision in Article II, Section 3, providing that the president “shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient.” The second of the president’s legislative powers is of course the veto power assigned by Article I, Section 7.9 Delivering a “State of the Union” address does not at first appear to be of any great import”.
\textsuperscript{226}Benjamin Ginsberg, \textit{et al}, \textit{Op. Cit.}, p. 313: “Most of the executive orders of the president provide for the reorganization of structures and procedures or otherwise direct the affairs of the executive brancheither to be applied across the board to all agencies or applied in some important respect to a single agency or department. One of the most important examples is Executive Order No. 8248, September 8, 1939, establishing the divisions of the Executive Office of the President”.

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controversial in US history since it is the instrument for the US President to set a substantive policy. On the appointment power, the Constitution vests the appointment power in the US President. The functionalist perspective views that the President has the ability to identify and verify a suitable individual to fill vacancies. According to the Constitution, the US President has the power to appoint and nominate ambassadors, other public ministers and consuls, Judges of the Supreme Court, and all other officers of the United States. The US Constitution restrains the appointment power of the US President by setting checks and balances from the Senate and Congress. On the other hand, the House of Representatives, even though it has no direct roles on the appointment, may indirectly check abuses of the appointment power.

227Id. at p. 325: “For example, when President Truman ordered the desegregation of the armed services, he did so pursuant to his constitutional powers as commander in chief. In a similar vein, when President Johnson issued Executive Order No. 11246, he asserted that the order was designed to implement the 1964 Civil Rights Act, which prohibited employment discrimination. Where an executive order has no statutory or constitutional basis, the courts have held it to be void. President Clinton issued numerous orders designed to promote a coherent set of policy goals: protecting the environment, strengthening federal regulatory power, shifting America’s foreign policy from a unilateral to a multilateral focus, expanding affirmative action programs, and helping organized labor in its struggles with employers. President George W. Bush also did not hesitate to use executive orders, issuing nearly 300 during his two terms. During his first months in office, Bush issued orders prohibiting the use of federal funds to support international family-planning groups that provided abortion-counseling services and placing limits on the use of embryonic stem cells in federally funded research projects. Throughout his administration, Bush made very aggressive use of executive orders in response to the threat of terrorism. In November 2001, for example, Bush issued a directive authorizing the creation of military tribunals to try non-citizens accused of involvement in acts of terrorism against the United States. In 2007, Bush issued controversial national security directives that gave the president sole responsibility for determining when and how constitutional government could be re-established in the event of a catastrophic attack on the United States. President Obama issued thirty-eight executive orders in his first year in office, using some of them to reverse executive orders of his predecessor (just as Bush reversed some of those of the Clinton years). Obama executive orders authorized stem cell research, restored funding for international family-planning organizations, opened access to presidential papers, and barred improper interrogation methods of detainees captured by the United States”.


230Hannah Metchis Volokh, “The Two Appointments Clauses: Statutory Qualifications for Federal Officers”, Journal of Constitutional Law, Vol. 10, May 2008, pp. 745 – 789, p. 784: “The Constitution gives the House numerous tools to check abuses of the appointment power. The House of Representatives is involved in creating offices by statute before anyone can be appointed to them, and in setting the powers, duties, and salary of each office. The House also has a role in deciding whether the appointment to an office will be through the confirmation appointments process or the vested appointments process. Finally, the House can initiate impeachment of any officer. When the available tools are understood, statutory qualifications seem much less important as a means of controlling the appointment power.”
For certain appointment powers, the Constitution vests the power to the Senate to check and balance the President by giving advice and consent; however, the Constitution implies nothing about the qualification and it leaves it individually to the President and the Senate. On the other appointment power, the Congress as a whole has the role to set qualification by Law as a check over the President. According to the Constitution, the appointment of the Ambassador, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the US (or the principal officers) can only be made by and with the advice and consent from the Senate; while the Congress will prescribe by Law such appointment of inferior officers to be independently exercised by the President. The US appointment clause in the US Constitution implies two distinct appointments that may be exercised by the President; the first is the “confirmation appointment”, the appointment of principal officers (Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the US whose appointments are not provided for and which should be established by Law) in which the President has the power to nominate by and with advice and consent from the Senate; and the second is “the vested appointment” for the appointment of lower ranking officers which the Congress may by Law vest the appointment in the President alone, in the Court of Law, or in the Heads of Departments. At this point, the appointment power of the President for certain officials namely Ambassador, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the US is a shared power since the President has to share the power with the Senate and depends on the Senate’s advice and consent.

On Paragraph 3 Section 2 of the Article II the US Constitution, the Constitution gives independent appointment power during the legislature’s recess. However, although it seems that the appointment power of the US President during the recess is an independent power; it

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231 Id. at p. 789.
does not mean that the power is without checks and balances. The US practices show that the exercise of appointment power during the recess usually generates some controversies and conflicts between the executive and legislative. It is frequently used extensively by the US President. On the other hand, there are some excuses given to affirm the recess appointment power of the President including the argument that the President has to prevent executive paralysis, and administrative inefficiency, and has to ensure the functioning of the government. Functionalism allows a degree of flexibility to accommodate modern governance:

“The functionalist defense of expanded use of the recess appointments power tends to emphasize flexibility and equity. Functionalists’ arguments focus mainly on the changing character and size of the federal government, as well as on a modern political system that is wrought with deadlocks and delays”.

The appointment power of the President coincides with the power of removal. The argument to vest both powers is mainly grounded on the ability of the President to control the policy executed by his subordinates.

As the US government is a presidential system, the President has the power to appoint ministers in order to exercise the state administration. The ministers together are the cabinet.

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236 Jonathan Turley, Op. Cit., p. 966: “Four appointments made by President Obama in January 2012, however, pushed this conflict between the legislative and executive branches to a new and troubling level. In the Appointments Clause, the Framers state twice that such appointments could only be made with “the Advice and Consent of the Senate.” It is a critical check and balance provision that the two branches must agree on who should sit on federal courts and in federal offices.”
of the state. The Cabinet has no constitutional status and is not responsible to the parliament; however, the Cabinet is also a part of the popular support.\(^{241}\)

**On the foreign affairs power**, the diplomatic power of the President is given on the basis that the President is the head of the state and the representative of the state. However, practice shows that the power is exercised by the consent of the US Senate. The US President diplomatic powers not only include the treaty power but expand beyond all the areas of state diplomacy including determination of the state attitudes against other states and the international community, the power to make executive agreements or other commitments between two states to arrange any affairs below the policy and such agreement does not need the consent of the US Senate.\(^{242}\)

The US President makes treaties by and with the advice and consent of the Senate. It has the meaning that the treaty power is in the hands of the US President, upon advice of the Senate before negotiation, where in the end the President makes the treaty to which the Senate had consented.\(^{243}\) The treaty clause on the US Constitution clearly provides the mechanism for Senate consent since it implies a two-thirds Senate majority for the consent. Moreover, according to the Federalist No. 75, Hamilton argued that treaty making power

\(^{241}\)Benjamin Ginsberg *et al*, *Op. Cit.*, p. 314: “In the American system of government, the **Cabinet** is the traditional but informal designation for the heads (secretaries, or chief administrators), of all the major federal government departments. Cabinet secretaries are appointed by the president with the consent of the Senate. The Cabinet has no constitutional status. Unlike in England and many other parliamentary countries, where the cabinet is the government, the American Cabinet meets but it makes no decisions as a group. The Senate must approve each appointment, but Cabinet members are not responsible to the Senate or to Congress at large. Cabinet appointments help build party and popular support, but the Cabinet is not a party organ. The Cabinet is made up of directors but is not a true board of directors.”

\(^{242}\)Id. at p. 31D: “As head of state, the president has the power to make treaties for the United States (with the advice and consent of the Senate). And when President Washington received Edmond Genêt (“Citizen Genêt”) as the formal emissary of the revolutionary government of France in 1793 and had his cabinet officers and Congress back his decision, he established a greatly expanded interpretation of the power to “receive Ambassadors and other public Ministers,” extending it to the power to “recognize” other countries. That power gives the president the almost unconditional authority to review the claims of any new ruling groups to determine if they indeed control the territory and population of their country, so that they can commit it to treaties and other agreements. In recent years, presidents have expanded the practice of using executive agreements instead of treaties to establish relations with other countries. An **executive agreement** is exactly like a treaty because it is a contract between two countries that has the force of a treaty but does not require the Senate’s “advice and consent.” Ordinarily, executive agreements are used to carry out commitments already made in treaties or laws, or to arrange for matters well below the level of policy.”

should be shared between the legislative and executive branches since its nature is neither wholly executive nor wholly legislative. However, in more recent US practice, the President as the treaty and international agreement’s exclusive negotiator has been undermined even more by recent trade legislation, which caused Congress to offer the President a fast track legislative procedure for implementing trade agreements with other nations.

On the administrative power, the US President is the chief of the executive departments, establishing the state administration. Accordingly, the President may have the power to require the opinion of all the executive departments. Section 3 of Article II of the US Constitution confirms that the President has the power to faithfully execute the Laws. Moreover, the administrative power of the US President also refers to the power to control his subordinates’ departments, establish independent agencies, appointment and removal assigned by the Constitution. The President also has the power to control all the state agencies decisions, oversee the implementation of Laws, and as a consequence, the President has administrative responsibilities. In the area of the US state administration, the President may issue a regulation to give orders to state officials. In the US experience, the Congress gives the delegation powers to the President as the executive, in case the Congress itself cannot directly step in on the area of state administration while it is urgent for Congress to take action.

According to experience, the US Presidents usually expand their administrative power by

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245 *Id*, at p. 226.

246 *Constituteprojects.org, Op. Cit.*, The United State of America’s Constitution of 1789 with Amendments through 1992: Article II Section 2 Paragraph 1 of the US Constitution: “...when called into the actual Service of the UnitedStates; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices”.

247 *Id, Section 3 - State of the Union, Convening Congress of the US Constitution.*


249 Benjamin Ginsberg *et al, Op. Cit.*, p. 314: “Given the vast range of the federal government’s responsibilities, Congress cannot execute and administer all the programs it creates and the laws it enacts. Inevitably, Congress must turn to the hundreds of departments and agencies in the executive branch or, when necessary, create new agencies to implement its goals. Thus, for example, in 2002, when Congress sought to protect America from terrorist attacks, it established a Department of Homeland Security and gave it broad powers in the realms of law enforcement, public health, and immigration. Similarly, in 1970, when Congress enacted legislation designed to improve the nation’s air and water quality, it assigned the task of implementing its goals to the Environmental Protection Agency (EPA), which President Nixon created by an executive order. Congress gave the EPA substantial power to set and enforce air and water quality standards.”
enhancing the power of the executive office, increasing the White House control over the federal bureaucracy, expanding the role of executive orders and other instruments of direct presidential governance, and using the signing statement to negate congressional actions to which they object:

"the White House “administrative strategies” to expand the administrative power have given presidents a capacity to achieve their programmatic and policy goals even when they are unable to secure congressional approval. Indeed, some recent presidents have been able to accomplish quite a bit without much congressional, partisan, or even public support. The Executive Office of the President has grown from six administrative assistants in 1939 to today’s 400 employees working directly for the president in the White House office along with some 1,400 individuals staffing the divisions of the Executive Office. The creation and growth of the White House staff gives the president an enormously enhanced capacity to gather information, plan programs and strategies, communicate with constituencies, and exercise supervision over the executive branch. The staff multiplies the president’s eyes, ears, and arms, becoming a critical instrument of presidential power”. 250

On the emergency power, the US President is vested with the emergency power. The emergency power is related to the constitutional statutes of the President as the Commander in Chief of the Army and Navy of the United State and of the Militia of several states. It is usually expanded by the ground of Article 1 Section 9 (which is actually under the Legislative Branch), which constitutionally allows the exercise of the privilege of the Writ of Habeas Corpus be suspended in certain cases of rebellion or invasion affecting public safety. 251 The text of the Constitution does not give any definition about the state of emergency. Bruce Ackerman proposes some alternatives to set a framework for the emergency powers, of which one of the proposals is considered on the basis that the state of emergency enables the government to take extraordinary measures in its life-and-death struggle for survival. 252

On the Military power, the US President is the Commander in chief. The idea of granting the US President as the commander in chief is because the President who is also running the government administration and also has the access will take any command and action in time of emergency:

250 Id., p. 322.
251 Constituteprojects.org, Op. Cit., Article 1 Section 9 the US Constitution: “The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it”.
The president’s position as commander in chief was also designed for a republic of notables. The Founders expected the same group who ran the civilian government to take command of the army at moments of crisis.253

On the other hand, the use of military forces is actually in the hand of Congress. Although the President is the Commander in chief, constitutionally, the President is required to get approval from Congress and the Congress has the final decision on the use of force authorization:

“The position of commander in chief (the power of the president as commander of the national military and the state national guardian units when called into service) makes the president the highest military authority in the executive branch. Final authority over military matters rests with Congress, which may direct the commander in chief as it chooses.”254

When the use of military force requires the Congress approval, the US practices show that approval from the Congress is frequently often waived by the US President. The practice shows that the experiences from President Truman to President Bush had shown that the exercise of the use of force and presidential military power was exercised without requiring Congress approval and declaration of war.255 The President could exercise the military power unilaterally and the Congress may generally pass a resolution in order to affirm the military and war power of the President. Practically speaking, in the US president’s military power, the pattern for future congressional-executive relations in the military realm is based on the experience when Congress passed a resolution approving the presidential action after the President launched the military force. This may contradict the Constitution which orders the president to get the authorization of Congress before mobilizing the use of military force in any situation either abroad or when the US is under serious internal threat. There are still debatable issues about the US President’s military power. However, according to the US Constitution text, the real

253 Bruce Ackerman, The Decline and Fall of the American Republic, the Belknap Press of Harvard University Press, 2010, p. 44.
255 Id. at p. 307: “In the nineteenth century, Congress normally directed the president’s military actions and decisions. In the twentieth century, however, presidents have engaged the country in many military campaigns abroad without congressional approval. Congress has not declared war since December 1941, and yet since then American military forces have engaged in numerous campaigns throughout the world under orders of the president. When North Korean forces invaded South Korea in June 1950, Congress was actually prepared to declare war, but President Harry S. Truman decided not to ask for congressional action. Instead, Truman asserted the principle that the president and not Congress could decide when and where to deploy America’s military might. Truman dispatched American forces to Korea without a congressional declaration.”
military power actually belongs to the Congress. Without Congress authorization, if the US President exercises military power unilaterally, the use of military force must be revoked. Some practices show that some of the US Presidents had over-ridden Congress authorization and claimed that the exercise of mobilizing military forces is part of the constitutional duties and so, it is the inherent power of the President to protect the nation; even finally the Congress affirmed and passed a resolution approving the President’s use of force.\textsuperscript{256}

The roles of the US President as the Commander in Chief of the Navy, Army and Air Force have the meaning that the US President has the right to take any action including the use of military force. Since then, the US President has the highest command over the military force. As the highest of the command, the US President may be also considered as someone who knows exactly the best solution and the decision maker over the situation that is threatening the state. However, the role of the Congress is important as the branch which has the power to check whether the Presidential action abused power. Most importantly, the Congress approval and the Congress budgetary power are very crucial for financing military operations.

**On the pardoning power**, the US President’s pardoning power includes the power to grant reprieves, pardons, and amnesties against the convicted person except in the cases of impeachment. The power is commonly exercised on behalf of the President individually as a consequence of his role as the head of the state.\textsuperscript{257} The US President’s pardoning power is inherently flexible; allowing the President to grant limited or conditional pardons; however, the

\begin{footnotesize}
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\item \textsuperscript{256}Id. at p. 308: “The wars in Vietnam, Bosnia, Afghanistan, Iraq, and a host of lesser conflicts all were fought without declarations of war. In 1973, Congress responded to presidential unilateralism by passing the War Powers Resolution over President Richard Nixon’s veto. President George W. Bush responded to the 2001 attacks by Islamic terrorists by organizing a major military campaign to overthrow the Taliban regime in Afghanistan, which had sheltered the terrorists. In 2003, Bush ordered a major American campaign against Iraq, which he accused of posing a threat to the United States. U.S. forces overthrew the government of the Iraqi dictator, Saddam Hussein, and occupied the country.”
\item \textsuperscript{257}Id. at p. 310: “The presidential power to grant reprieves, pardons, and amnesties involves the power of life and death over all individuals who may be a threat to the security of the United States. Presidents may use this power on behalf of a particular individual, as did Gerald Ford when he pardoned Richard Nixon in 1974 “for all offenses against the United States which he . . . has committed or may have committed.” Or they may use it on a large scale, as did President Andrew Johnson in 1868, when he gave full amnesty to all southerners who had participated in the “Late Rebellion,” and President Carter in 1977, when he declared an amnesty for all the draft evaders of the Vietnam War. President Clinton created great controversy with a large number of last-minute pardons issued in the final days of his presidency in 2000. President George W. Bush, on the other hand, issued fewer pardons than any president in modern times”.
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practices have shown that such pardoning power has been widely exercised by some of the US presidents.\textsuperscript{258} Although it is widely exercised and being constitutionally unrestricted, the US President pardoning power is actually not the power without checks and balances from other branches. Although in the US the Congress has no direct control over the pardoning power, it could amend the Constitution to restrict the President’s authority to extend the pardoning power, and the Court may strike down pardons which may have unconstitutional conditions.\textsuperscript{259} The constitutional amendment is one fundamental way of eliminating pardons, placing the power in another hand (the legislature), limiting through the requirement of approval by other government bodies (Supreme Court or constitutional court), or setting conditions or qualifications for pardons.\textsuperscript{260} As the US does not have a constitutional court, the Supreme Court has a significant role to establish constitutional boundaries of pardoning power; however, in practice, judicial challenges over the pardoning power are commonly serving to expand rather than to limit the use and scope of pardoning power.\textsuperscript{261} According to research, some of the US Presidents have controversially used the pardoning power.\textsuperscript{262} The most controversial use of pardoning power came from President Ford who granted a pardon to Richard Nixon in the Watergate scandal case, President Clinton who used his last day in office to pardon both his half-brother and a wealthy donor’s tax-evading husband, and President Bush who commuted Lewis Scooter Libby’s prison sentence in the case of leaking the name of a CIA agent.\textsuperscript{263}

2. The Philippines

The present Constitution of the Philippines is the 1987 Constitution of the Republic of the Philippines that was approved by the 1986 Constitutional Commission on October 12, 1986; presented to President Corazon C. Aquino on October 15, 1986; ratified on February 2, 1987 by


\textsuperscript{259} Id. at p. 361.


\textsuperscript{261} See: Id. at p. 218.


plebiscite; proclaimed in force on February 11, 1987.\textsuperscript{264} The enforcement of the 1987 Constitution of the Republic of the Philippines has marked the return of the presidential system of the 1935 Constitution with the presidential powers substantially clipped and a re-installed and strengthened bi-cameral legislature.\textsuperscript{265} The Philippines President is the head of the executive branch of the government heading the Cabinet and all executive departments.\textsuperscript{266} The President holds the executive powers.

**On the law-making power,** according to the Constitution, the Philippines President has the key role in the legislative process. Article VI Section 27 (1) stipulates that the President has the power to approve or veto bills.\textsuperscript{267} Furthermore, Section 27 (2) emphasizes that the President’s veto power of any particular items in an appropriation, revenue, or tariff bill should not affect the other items which he does not object to.\textsuperscript{268} During, her administration, President Arroyo in 2006 used the law-making power, issuing presidential decrees to declare a state of emergency and direct the Armed Forces of the Philippines (she also issued a General Order commanding the armed forces of the Philippines to coordinate with the Philippines National Police to raid the “opposition” newspapers, confiscated news stories, documents, and even arrested an opposition legislator and denied him contact with his relatives during his detention and attempted to arrest five others. In other areas, the executive power had been exercised to issue the executive order to unilaterally reorganize government agencies without regard for functional objectives or the constitutional independence of other institutions (without prior legislative sanction and such executive orders were unreviewable by the Court). Not only that, the power to issue the executive order also had been used to invoke executive privilege, as an effort to shield her from checks and other oversight mechanisms in the case of a controversial government procurement contract. On the next presidential term, the President successor, President Aquino used the law-making power for issuing an executive order to block the path of


\textsuperscript{265} Jurgen Ruland, Clemen Jurgen meyer et al, Parliaments and Political Change in Asia, Institute of Southeast Asian Studies, Singapore, 2005, p. 29.

\textsuperscript{266} Constituteproject.org, Philippines’s Constitution of 1987, generated from excerpt of texts from the repository of the Comparative Constitutions Project, and distributed on constituteprojects.org: Article VII Section 1 the Philippines Constitution.

\textsuperscript{267} Id. Article VI Section 27. (1) the Philippines Constitution.

\textsuperscript{268} Id.
a former President (who was then sitting in the legislature); the President Aquino issued the executive order to remove all of the President Arroyo’s appointees. In terms of the law-making power, the Constitution actually has provided a mechanism to review the validity of any kind of legal products involving the President.\textsuperscript{269} In case the President is seriously ill, such power may be discharged by the members of the Cabinet.\textsuperscript{270}

**On the appointment power,** the Philippines President has the appointment power. According to Article VII Section 16, the President has the power to nominate and appoint the heads of the executive departments, ambassadors, public ministers and consuls, officers of the armed forces, and other officers whose appointments are constitutionally vested in the President including the members of the Supreme Court.\textsuperscript{271} However, the power is exercised with the consent from the Commission on Appointments for the executive officers appointment or according to the list from the Judicial and Bar Council in terms of the appointment of the Supreme Court’s members. It means that actually the President has formal appointment power but only relatively has real appointment power since the power is exercised by the consent from the Commission or according to the Council. Important conditions are mentioned in the Constitution with regard to the presidential appointment power. According to Section 15 of the Article, the President is permitted to exercise the appointment power except during two months before the next presidential elections and up to the end of the presidential term.\textsuperscript{272}

\textsuperscript{269}Id. According to Article VIII Section 5 the Philippines Constitution, The Philippines Supreme Court shall have the following powers:

1) Exercise original jurisdiction over cases affecting ambassadors, other public ministers and consuls, and over petitions for *certiorari*, prohibition, *mandamus*, *quo warrant*, and *habeas corpus*.

2) Review, revise, reverse, modify, or affirm on appeal or *certiorari*, as the law or the Rules of Court may provide, final judgments and orders of lower courts in:

(a) All cases in which the constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question.

(b) All cases involving the legality of any tax, impost, assessment, or toll, or any penalty imposed in relation thereto.

(c) All cases in which the jurisdiction of any lower court is in issue.

(d) All criminal cases in which the penalty imposed is reclusion perpetua or higher.

(e) All cases in which only an error or question of law is involved.

\textsuperscript{270}Id. Section 12 the Philippines Constitution In case of serious illness of the President, the public shall be informed of the state of his health. The members of the Cabinet in charge of national security and foreign relations and the Chief of Staff of the Armed Forces of the Philippines shall not be denied access to the President during such illness.

\textsuperscript{271}Id. Section 16 the Philippines Constitution.

\textsuperscript{272}Id. Section 15 the Philippines Constitution.
During the restrictive period, the President may only be permitted to exercise the power for temporary appointments for the special conditions of public safety. The appointments by the President during the permitted period of appointment may be extended by the President in office; on the other hand the successor President in office may revoke appointments made by former Presidents. In Philippines experience, the appointment power has been potentially used to give more benefits to the administration. The President had used the appointment power to appoint key public officers with the purpose to counterbalance the executive power. In practice, the President frequently exerted considerable influence over some independent agencies due to the vast and largely unchecked reach of the appointment power. The President appointed several independent officers, including the Monetary Board (which has authority to give recommendations on foreign loans) and the commission on audit (which has constitutional authority to audit the revenue, receipts, and expenditures of government); all the appointments actually are subject to the commission on appointments confirmation; but the confirmation is of little significance because the President can issue interim appointments pending the confirmation. That is why all the commissions of appointments are dominated by the President’s relatives or allies sitting in Congress. The Philippines had experience of controversial appointments during the President Arroyo administration. President Arroyo used the appointment power to fill many significant positions during the constitutional restrictive period of appointment; such appointments allegedly gave benefit to her allies. The controversial appointments (the public called them “midnight appointments”) included the appointment of 169 positions in the government owned and controlled corporations, and some positions in government agencies:

“Outgoing President Gloria Macapagal Arroyo has been churning out “midnight” appointments on a daily basis, all backdated before the constitutional ban on appointments during an election period. From March 1 to March 9 alone, Arroyo supposedly appointed 169 people to positions in Government-Owned and -Controlled Corporations (GOCCs) in 10 government agencies, including those under the Office of the President (OP). The ban on appointments to executive positions started on March 10. All in all, Arroyo

273 *Id.* Section 14 the Philippines Constitution.

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appointed 250 persons via midnight appointments, a government source, who provided the documents, said.\textsuperscript{275}

The appointments were constitutionally controversial since they contravened Section 15 of Article VII. The public believed that the appointments were unconstitutional because the appointments were made during the restriction period that Section 15 of Article VII of the Constitution prescribed. It should be for two months immediately before the next presidential elections and up to the end of her term except for appointments which were temporary; President Arroyo should not perform the appointment power. The successor President, President Aquino, responded to such controversial appointments with revocation and invalidated some of the appointments.\textsuperscript{276}

The Philippines Constitution grants a vice president in the same term of office as the President and permits the vice president to be appointed (without any confirmation) as a member of the cabinet.\textsuperscript{277} The Constitution also provides a comprehensive explanation about the anticipative position of a Vice President. Section 7 of the Article specifies the situation when the Vice President constitutionally acts as the President. According to the Section, the Vice President may act as the President in the situation if the President elected failed, if the President should not have been chosen, or if the President died or was permanently disabled.\textsuperscript{278} Furthermore, the Constitution clarifies that the Vice President will succeed as the President in the case where the President in office is dead, permanently unable to hold the powers, removed from the office, or resigned.\textsuperscript{279} Only in the case that the Vice President’s office is vacant during the term of office, the President has the power to nominate a Vice

\textsuperscript{276}Inquirer.net, the Court of Appeals junks Arroyo “midnight appointments”, September 6, 2013, available online at: \url{http://newsinfo.inquirer.net/482351/ca-junks-arroyo-midnight-appointments} (accessed on January 6 January 2014).
\textsuperscript{277}Constituteproject.org, \textit{Op. Cit.}, Article XII Section 3 the Philippines Constitution.
\textsuperscript{278}\textit{Id.} Article XII Section 7 the Philippines Constitution.
\textsuperscript{279}\textit{Id.} Article XII Section 8 the Philippines Constitution.
President from among the Members of the Senate and the House of Representatives. However, the appointment should be confirmed by a majority voting in Congress.

**On the foreign affairs power,** the President on behalf of the Philippines has the power (with limitations by laws) to make contracts or guarantee foreign loans with the consent from the Monetary Board and must be reported to the Congress. Furthermore, with regard to the treaty power, the Philippines President has treaty power with the consent from at least two-thirds of the Senate. According to the provision, the President can only exercise the power to make a treaty or any kinds of international agreement with the consent of at least two-thirds of all members of Senate. Additionally, according to Article XII, the President also has the power to make agreements with foreign-owned corporations on technical or financial assistance for large scale exploration, development, and utilization of minerals, petroleum, and other mineral oils. In exercising the power, the President does not need consent from either Congress or the Senate but the President has to notify the Congress all the contracts that have been made within 30 days.

**On the administration power and the budgetary-expenditure powers,** the President has the power to propose budget expenditure and sources of financing, including receipts from existing and proposed revenue measures, according to Article 22. The Congress may not increase the appropriations recommended by the President for the operation of the Government specified in the budget. However, the power to issue revenue or tariff bills, bills authorizing increase of the public debt, bills of local application and private bills is vested in the House of Representatives with the involvement of the Senate to propose any bills for amendment. The President, the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, the heads of Constitutional

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280 Id. Section 9 the Philippines Constitution.
281 Id. Section 20L the Philippines Constitution
282 Id. Section 21 the Philippines Constitution.
283 Id. Article XII Section 2 para 4 and 5 the Philippines Constitution.
284 Id. Section 22 the Philippines Constitution: The President shall submit to the Congress, within thirty days from the opening of every regular session as the basis of the general appropriations bill, a budget of expenditures and sources of financing, including receipts from existing and proposed revenue measures.
285 Id. Section 25 the Philippines Constitution.
286 Id. Article VI Section 24 the Philippines Constitution.
Commission have the authorization to augment the general appropriations according to their respective office from savings in other items of their respective appropriations.\textsuperscript{287} In practice, during the President Arroyo administration in 2008, the budgeting power had been used to increase the state budget for some government projects. Most controversially, the power was allegedly used for other personal purposes, that is, for supporting the President’s political allies. It was also reported that in 2009, the President funded some of her foreign travels with the government’s emergency fund. The legislative significance about the spending priorities had less impact on actual public spending than might be expected from a review of budget documents; the President had claimed a legal right to redirect funds to their favored projects.

As the head of the executive, the President has the power to direct command and control all executive departments and government agencies.\textsuperscript{288} Some government agencies are under the direct command of the President such as the Philippines Council of Film Development, the Metropolitan Manila Development Authority and the Securities and Exchange Commission. Constitutionally, the President also heads the independent economic and planning agency established by the Congress which has the role to recommend to the Congress and implement continuing integrated and coordinated programs and policies for national development.\textsuperscript{289} The administrative power of the Philippines President also includes Article X section 4. According to Section 4 of the Article, the President of the Philippines has the power to exercise general supervision over local government. This is also in accordance with the Philippines as a unitary state; and thus, the President has a unitary power performing a Unitarian presidential power. For this purpose, the Constitution in section 14 of Article X also empowers the President to specify power related to the administration of local government.\textsuperscript{290} Under section 16 of the Article, the President has the power to exercise general supervision over autonomous regions to ensure that laws are faithfully executed.\textsuperscript{291}

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\textsuperscript{287}Id. Article VI Section 25 (5) the Philippines Constitution.
\textsuperscript{288}Id. Article VII Section 17 the Philippines Constitution: The President shall have control of all the executive departments, bureaus, and offices. He shall ensure that the laws are faithfully executed.
\textsuperscript{289}Id. Article XII Section 9 the Philippines Constitution.
\textsuperscript{290}Id. Article X Section 14 the Philippines Constitution.
\textsuperscript{291}Id. Article X Section 16L the Philippines Constitution
\end{footnotesize}
On the military power, the President of the Philippines is the Commander in Chief of the Philippines Armed Forces according to Article 7 Section 18 of the 1987 Constitution. Accordingly, the President has the power to call out the armed forces to prevent or suppress lawless violence, invasion or rebellion. At this point, the use of such power may also be against the private armies, paramilitary forces, civilian home defense forces and other armed groups which are not recognized by the authority and the Constitution as mentioned in Article XII Section 24. Practically, President Aquino used his military power as Commander in Chief to command the Philippines armed forces to take any action against conflict in Zamboanga by the MILF rebels.

On the emergency powers, as the Commander in Chief, the Constitution grants the President with the emergency power permitting the President to take any action for public safety including suspending the privilege of the writ of habeas corpus or declare martial law in any part or the whole part of the Philippines. Although the President seems to be granted a unilateral emergency power in time of state emergency, the Constitution also provides the mechanism of check and balance from the Congress and the Court against the presidential emergency power. Still according to Section 18, the Congress has the power to extend or suspend the proclamation of a state emergency in the interests of public safety; on the other hand, the Court has the power to review any appropriate proceeding filed by citizens with respect to the declaration of a state emergency. Furthermore, some measures may be taken during a state emergency including those mentioned in Article XII Section 17 – 19. The President, for the necessity or emergency, may certify the immediate enactment of the bill.

On the war power, the real war power is vested in the Congress. According to Article VI Section 23, by a vote of two-thirds of both Senate and House of Representative, Congress has

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292 *Id.* Article XII Section 24 the Philippines Constitution.
294 *Constituteproject.org*, *Op. Cit.*, Article 7 Section 18 the Philippines Constitution.
295 *Id.* Article XII Section 18 the Philippines Constitution.
296 *Id.* Article XII section 17 – section 19 the Philippines Constitution.
297 *Id.* Article VI Section 26 (2) the Philippines Constitution.
the power to declare war.\textsuperscript{298} The Congress by law also has the power to authorize the President to exercise powers necessary and proper to carry out a declared national policy.\textsuperscript{299} The Congress has the power to pass the bill.\textsuperscript{300}

**On the pardoning power,** the President has the pardoning power to grant reprieves, commutations, pardons, remit fines and forfeitures according to Article VII Section 19.\textsuperscript{301} However, the power can only be exercised after conviction by the final judgment and does not apply to impeachment cases. The exercise of the presidential pardoning power in particular of granting an amnesty should be performed with the support of a majority of all the members of the Congress.

The President and the Vice President are directly elected by the people according to Article VII Section 4 paragraph 1. Accordingly, the voting system is based on the simple majority vote where a candidate with the highest votes is elected as the President. However, in case there are two or more candidates having the same votes, there will be an election by Congress. The voting system in the second round is also a simple majority vote by both Houses of the Congress separately.\textsuperscript{302} In the presidential election, the Court has a role as the sole judge for the qualification of the President or Vice-President and any issues related to the election. Section 11 of the Article emphasizes the right of the Vice President during the written declaration from the Congress (the Senate and the House of Representative) on the disability of the President to carry out the power and duties. In this situation, the President’s executive power and duties will be diverted to the Vice President; and accordingly, the Vice President will have the executive power during the process of impeachment.\textsuperscript{303}

The Philippines Constitution has provision in anticipating abuse of power by the President in any case of affiliation and relatives. Section 13 of the Article clarifies the prohibition and attitudes of the President, Vice President, and other executive officers during

\textsuperscript{298} Id. Article VI Section 23 (1) the Philippines Constitution.
\textsuperscript{299} Id. Article VI Section 23 (2) the Philippines Constitution.
\textsuperscript{300} Id. Article VI Section 26. (1) the Philippines Constitution.
\textsuperscript{301} Id. Section 19 the Philippines Constitution.
\textsuperscript{302} Id. Section 4 the Philippines Constitution.
\textsuperscript{303} Id. Section 11 the Philippines Constitution.
On the Presidential Impeachment, the Philippines Constitution clarifies that the President may be removed from office on particular criminal grounds. According to section 7-9 of Article VII, the President may be removed on the grounds of inability during his office, death, illness, permanent disability, resignation. According to Article XI on the accountability of public officers section 2, the President may be subject to be removed from office on impeachment for and on conviction of culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust. A series of mechanisms according to Article XI Section 3–8 are constitutionally taken as the impeachment process for the President. According to the Article, the House of Representative has the power to initiate the impeachment process. The process will democratically involve the Senate and Supreme Court and end up by the Congress promulgation of the presidential impeachment. In this case, the House of Representatives may have the exclusive power to initiate all cases of impeachment.

d. Executive power in a hybrid system of government

1. France: Executive power under the Fifth Republic Constitution

The French Constitution (the Fifth Republic Constitution) is the Constitution of 4 October 1958 as amended by constitutional statute 2008-724 of 23 July 2008. The Constitution establishes a dual executive, the President and Prime Minister. It requires the President and the Prime Minister to share some of the executive power. In some areas, the Constitution requires the exercise of executive power to be shared; at this point, both the President and the Prime Minister have the right to veto. Such mutual veto sometimes may trigger conflict and deadlocks. For many important acts, such as appointments and the

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304 Id. Section 13 the Philippines Constitution.
305 Id. Article XI Section 2 the Philippines Constitution.
306 Id. Article XI Section 2 the Philippines Constitution.
307 Id. Article XI Section 3 the Philippines Constitution.
308 Id. Section 3. (1) the Philippines Constitution.
310 See: Cole J. Harvey, The Double-Headed Eagle: Semi-Presidentialism and Democracy in France and Russia, Bachelor of Philosophy Thesis, Submitted to the Dean of the University Honors College, University of Pittsburgh,
promulgation of laws, the President should give mutual counter-signatures, while on the other important power such as the military power of Commander in chief and foreign policy, the President has to exercise the power with reference to the Prime Minister and national Assembly.\textsuperscript{311} For such as a fundamental act like constitutional amendment, the President, on the recommendation of the Prime Minister and Members of Parliament has the right to initiate amendments to the Constitution.\textsuperscript{312}

Andrew Knapp and Vincent Wright observed that though both president and prime minister wield powers according to political circumstances, their powers reside mainly in the constitutional text.\textsuperscript{313} The Constitution provides both President and Prime Minister with equally strong and significant power and makes it possible to be exercised individually. It places the President as the final decision maker and the dominant figure in some of the executive power; on the other hand, it gives the Prime Minister dominance in the Government and the Parliament. It is assumed that such as foreign affairs and defense power are to be mostly exercised independently by the President.\textsuperscript{314}

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defended on 14 July 2008, p. 18: "While defense and foreign policy are largely controlled by the president, there are times when presidential decisions are subject to veto by the prime minister, and vice versa. This mutual veto increases the likelihood of friction and government gridlock, but also obliges the two executives to work more closely together, and encourages negotiation and compromise. For example, the president is empowered to call national referendums, but only on the proposal of the prime minister or a joint resolution of the houses of parliament (Article 11). Both players, then, have an effective veto over a proposed referendum. The president may decline to formalize a referendum proposed by the prime minister, and the prime minister may refuse to propose a referendum desired by the president. The appointment of the various ministers is another area of shared responsibility. It is the president who appoints and dismisses the government ministers, but only on the proposal of the prime minister himself (Article 8)."
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\textsuperscript{311}See more on Andrew Knapp and Vincent Wright, the Government and Politics of France, 4\textsuperscript{th} Edition, Routledge, London, 2001, p. 113: “The prime minister, on the other hand, has no interest as a presidential aspirant in assaulting the institutions of which he hopes, eventually, to become the guarantor. The two heads of the executive remain political adversaries, even enemies, but they also need each other.”
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\textsuperscript{312}Constituteproject.org, France’s Constitution of 1958 with Amendments through 2008, generated from excerpt of texts from the repository of the Comparative Constitutions Project, and distributed on constituteproject.org: Article 89 of the Fifth Republic Constitution (the French Constitution).
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\textsuperscript{313}Andrew Knapp and Vincent Wright, Op. Cit., p. 82.
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\textsuperscript{314}See: Cole J. Harvey, Op. Cit., p. 17: “While the constitution places the armed forces at the disposal of the government, it also names the president as commander-in-chief (Article 15), proclaims him the guarantor of national independence and territorial integrity (Article 5), and places him at the head of “the higher national defense councils” (Article 15). Presidents have also been assertive in the area of foreign policy. The constitution
\end{flushright}
The President of the Republic under the Constitution of the Fifth Republic

The Fifth Republic Constitution empowers the President with limited numbers and scope of discretionary powers.\textsuperscript{315} Some of the Presidential powers have to be exercised with reference to the Prime Minister’s or National Assembly’s counter-signature. During the Presidential term of office, the French President is shielded with the immunity given by the Constitution.\textsuperscript{316}

According to Article 5 of the Constitution of the Fifth Republic, the President of the Republic has several symbolic powers as the guarantor of national independence, territorial integrity and (by his arbitration) the proper functioning of the public authorities as well as the continuity of the State, and observance of treaties. Furthermore, according to Article 64, he also acts as the guarantor of the independence of the Judicial Authority.\textsuperscript{317} As a consequence, according to Article 65 of the Fifth Republic Constitution, the French President presides over the High Judiciary Council.

The French President is considered to have control over the government. The President has some powers that can directly affect the government, such as, the power to determine the size and shape of the government; the power to appoint and dismiss the Prime Minister, the power to intervene directly in the choice of individual ministers, and the power to determine the political balance of the government.\textsuperscript{318} Moreover, the President is the chief of the nation’s policy makers since in practice, the President has access to intervene in the policy making procedure at all stages.\textsuperscript{319}

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\item \textsuperscript{315} Id. at p. 12.
\item \textsuperscript{316}Constituteproject.org, Op. Cit., Article 67 the Fifth Republic Constitution.
\item \textsuperscript{317} Id. Article 64 of the Fifth Republic Constitution.
\item \textsuperscript{318}Andrew Knapp and Vincent Wright, Op. Cit., 2001, p. 103
\item \textsuperscript{319}Id. Andrew Knapp and Vincent Wright, 2001, p. 104: “the President fixes the agenda and time table of the Council of Ministers and determine the government programs, he has direct and indirect access to the ministers, he has access to act as a final court of appeal over the Prime Minister on the policy issues, the President signs decree for implementing government legislation, etc.”
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Article 11 paragraph 1 the Constitution of the Fifth Republic stipulates that the President of the Republic has the power to submit a referendum concerning any government bills, in particular issues of the organization of public authorities, reforms relating to the economic, social or environmental policy of the nation and the public services which contribute to it; the power to propose the authorization of the ratification of a treaty which, while not being contrary to the Constitution, would have an effect on the functioning of the institution.\textsuperscript{320} In practice, the power to call a referendum has some political purposes such as establishing a direct line of communication between president and the people, reinforcing the unity of the governmental coalition, and dividing the political opposition.\textsuperscript{321}

On the law-making power, the President of the Republic has the important role. He has the power according to Article 10 of the Fifth Republic Constitution to promulgate statute and ask the parliament to deliberate a new statute or certain provisions.\textsuperscript{322} He has no veto power but has a real indirect role in the legislative process.\textsuperscript{323} Moreover, the President has the right to refer any bills, Institutional Acts, Rules of Procedure of the Houses of Parliament (Article 61) to the Constitutional Council for their conformity to the Constitution.

\textsuperscript{320}Constituteproject.org, Op. Cit., Article 11 paragraph 1 the Constitution of the Fifth Republic.

\textsuperscript{321}See more: Andrew Knapp and Vincent Wright, Op. Cit., p. 84 - 85: “Article 11 may be invoked without the prime minister’s countersignature; the constitutional requirement that a referendum should be proposed to the president by the government or parliament has meant in practice that the Council of Ministers is notified of the presidential decision. Of the nine referenda since 1958, the first four – ratifying the constitution itself in 1958 and amending it in 1962, as well as agreeing first the ‘self-determination’ of Algeria (in 1961) and then its independence (in 1962) – may be rated successes, with turn-outs of at least 75 per cent and yes votes of at least 61 per cent. The other five were less kind to their initiators: the voters rejected proposals to reform the Senate and the regions in April 1969, provoking de Gaulle’s immediate resignation; a wafer-thin majority ratified the Maastricht Treaty on European Union in September 1992; high abstention rates greeted referenda on the enlargement of the European Community in April 1972, on the future of the troubled Pacific territory of New Caledonia in November 1988, and above all on the five-year presidential term in September 2000, when barely a quarter of the electorate cast a valid vote.”

\textsuperscript{322}Constituteproject.org, Op. Cit., Article 10 of the Constitution of the Fifth Republic.

\textsuperscript{323}Andrew Knapp and Vincent Wright, Op. Cit., p. 86: “The president does not set foot in parliament and, unlike his American counterpart, has no legislative veto. Nevertheless, he has a real if indirect role in the legislative process. He chairs the Council of Ministers (Article 9), like his predecessors of the Third and Fourth Republics, and may do so more actively than they. He may request the ‘reconsideration’ of laws passed by the parliament (Article 10), though as a simple majority remains sufficient to carry any resulting vote, this right is rarely invoked. He may put a legislative proposal to referendum. He signs ordonnances (that is, primary legislation delegated to the government by parliament) and decrees (which implement primary legislation) under Article 13, though the constitution does not state whether he may refuse to do so.”
On the appointment power, Article 8 of the Constitution of the Fifth Republic stipulates that the French President has the power to appoint and dismiss the Prime Minister. He also has the power to appoint other members of the Government, as well as, terminate their functions. Following up, according to Article 9 of the Constitution of the Fifth Republic, the President of the Republic has the power to preside over the Council of Ministers. According to Article 13, the President has the appointment power of some civil and military posts of the state.\(^{324}\) According to the Article, the appointment is made by an Institutional Act and should be exercised after public consultation with the relevant standing committee in each House, and the President is bound by the votes in each committee. In practice, Andrew Knapp and Vincent Wright observed that the appointment power of the President is exercised in a wide range of other public sector posts.\(^{325}\) Furthermore, the President has the appointment power of the three members of the Constitutional Council.\(^{326}\)

On the foreign affairs and treaty power, the President has significant power in the foreign policy making and European affairs.\(^{327}\) Article 14 indicates the diplomacy power of the President including the power to accredit ambassadors and envoys with extraordinary foreign power and vice versa.\(^{328}\) On the treaty power, the President has the power to negotiate and ratify treaties.\(^{329}\) However, it does not mean that the treaty power of the President is exercised as unchecked and unbalanced power. According to Article 53, there are certain treaties or international agreements that must be ratified or approved only by an Act of Parliament.\(^{330}\) The Constitutional Council, according to Article 54 also may have a role on the treaty process. It may determine that an international undertaking contains a clause contrary to the Constitution and


\(^{325}\)Andrew Knapp and Vincent Wright, Op. Cit., p. 86: “This list, though, is not exhaustive, and in practice the president may propose candidates for a wide range of other public-sector posts, for example secret service chiefs, senior broadcasting chiefs or heads of nationalized industries.”


\(^{328}\)Id. Article 14 of the Fifth Republic Constitution.

\(^{329}\)Id. Article 52 of the Fifth Republic Constitution.

\(^{330}\)Id. Article 5 of the Fifth Republic Constitution 3.
the authorization to ratify or approve the international undertaking involved may be given after the Constitution is amended.\textsuperscript{331}

**On the military power,** the President has the power as the Commander in Chief and the power to preside over the higher national defence councils and committees.\textsuperscript{332} **In terms of the emergency power,** the Constitution states that the President has to share the power with the Prime Minister. Article 16 determines the state of emergency as situations where the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfillment of its international commitments are under serious and immediate threat; and the situation where the proper functioning of the constitutional public authorities is interrupted.\textsuperscript{333} In such an emergency situation, the President has the emergency power to take measures but only after formal consultation with the Prime Minister, the Presidents of the Houses of Parliament, and the Constitutional Council. To an extent, Article 16 of the Constitution indicates that the emergency power of the President is not a unilateral power that the President can exercise independently. Furthermore, the Article also indicates that there is term limit of the emergency power application. It orders that after thirty days of operation of the emergency power, the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators, may refer to the Constitutional Council to decide whether or not the emergency situation should be renewed.

**On the pardoning power,** the French President has the power to grant individual pardons.\textsuperscript{334}

- **Prime Minister and the Government**

Title III of the Fifth Republic Constitution is the constitutional basis for the French government. In general, the Constitution implies that the Prime Minister is a significant figure in the government affairs and enjoys significant executive power. Andrew Knapp and Vincent Wright observed that some of the French Prime Minister’s power can be exercised
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independently under the President’s intervention and support from a loyal parliamentary majority; however, some power such as appointment and defense power have to be shared with the President.\textsuperscript{335} As the Prime Minister is the actual director of the Government, he automatically enjoys the whole government powers. Article 20 of the Constitution declares that the government has the power to determine and conduct the policy of the Nation, and has the power, at its disposal, over the administration of the civil service and the armed forces.\textsuperscript{336} However, some articles specifically express the Prime Minister’s power exclusively. Article 21 of the Fifth Republic Constitution implies that the Prime Minister has the power to direct the actions of the Government. It specifies that the Prime Minister has some powers in the following areas:

- National defense
- The implementation of legislation
- Regulation making
- Civil and military appointment
- Power delegation to Ministers
- Military affairs (represent for the President of the Republic as chairman of the councils and committees of higher national defense
- (in exceptional cases), represent for him as chairman of a meeting of the Council of Minister for a specific agenda.\textsuperscript{337}

The Prime Minister has the power to propose the appointment and to recommend the termination of the members of the Government to the President.\textsuperscript{338} Moreover, the Prime Minister also has the power to require an extra-ordinary session of parliament for a specific agenda.\textsuperscript{339}

\textbf{On the law-making power,} Article 39 of the Fifth Republic Constitution confirms that the Prime Minister has the right to initiate legislation.\textsuperscript{340} In some of constitutional articles, the Prime Minister has significant power in law-making. Article 61 allows the Prime Minister to refer the Institutional Acts, the Private Members’ Bills, and the Rule of Procedures of the Houses of Parliament, before their promulgation, to the Constitutional Council for their

\textsuperscript{335} Andrew Knapp and Vincent Wright, \textit{Op. Cit.}, p. 83.
\textsuperscript{336} Constituteproject.org, \textit{Op. Cit.}, Article 20 of the Fifth Republic Constitution.
\textsuperscript{337} \textit{Id.} Article 21 of the Fifth Republic Constitution.
\textsuperscript{338} \textit{Id.} Article 8 of the Fifth Republic Constitution.
\textsuperscript{339} \textit{Id.} Article 29 of the Fifth Republic Constitution.
\textsuperscript{340} \textit{Id.} Article 39 of the Fifth Republic Constitution.
conformity with the Constitution. On the treaty power, the Prime Minister has the right to refer any treaty and International agreement to the Constitutional Council on its conformity to the Constitution before it is ratified or approved.

Article 49 constitutes some other significant powers of the Prime Minister. According to the Article, the Prime Minister, after deliberation by the Council of Ministers, has the power to ask the National Assembly for a vote of no-confidence against the government concerning the issue of government’s program or possibly a general policy statement.

Andrew Knapp and Vincent Wright argued that the Prime Minister, as the head of government, may also dominate the parliamentary activities which may be done by requesting delegated legislation or the procedure of the blocked vote; he also can control the complex procedure to deal with legislative deadlock in the parliament:

“It is the prime minister, as head of the government, who wields the battery of constitutional provisions designed to curb the activities of parliament: the request for delegated legislation under Article 38, for example, or the procedure of the vote bloqué under Article 44, under which parliament may be obliged to vote on the government’s version of a bill. It is the prime minister, finally, who controls the complex procedure under which bills are shuttled between the two houses of parliament (National Assembly and Senate) for successive readings before an agreed version (or failing that, the Assembly’s version) is passed”.

With regard to war power, Article 35 of the Constitution of the Fifth Republic implies that the Parliament holds the real power to authorize war. On the other hand, it lays down the other power to decide the mobilization of armed forces on the purpose of international intervention to the Government.

2. Poland

The Polish semi-presidential system is regulated under the Polish Constitution 1997. The Polish 1997 Constitution recognizes a dual executive and places the Polish President as part

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341 *Id.* Article 61 of the Fifth Republic Constitution.
342 *Id.* Article 54 of the Fifth Republic Constitution.
343 *Id.* Article 49 of the Fifth Republic Constitution.
Generally, according to the Constitution, the executive power is jointly conferred upon the President and the Council of Ministers.\textsuperscript{347}

**The Polish President**

The Polish President constitutionally performs duties as the head of the state and is not inherently strong, but constitutional practices can make him a powerful figure.\textsuperscript{348} The Polish President is elected in universal, equal, direct elections conducted by secret ballot.\textsuperscript{349} According to Article 145, the President may be held accountable before the Tribunal of State for an infringement of the Constitution or Statute, or for commission of an offence.\textsuperscript{350}

Certain symbolic powers are given to the Polish President in Article 126 of the Poland Constitution. The powers include the power as the supreme representative of the Republic of Poland and the power as the guarantor of the continuity of State authority, the power to ensure the observance of the Constitution, and the power to safeguard the sovereignty and security of the State as well as the inviolability of its territory.\textsuperscript{351}

The President may have the power to recall a minister in whom a vote of no confidence has been passed by the Sejm.\textsuperscript{352} The President also has the power to affect changes in the composition of the Council of Minister on the application of Prime Minister.\textsuperscript{353} The Prime Minister has to submit the resignation of the Council of Ministers in certain situations.\textsuperscript{354}

**On the law-making power**, Article 142 determines that the President has the power to issue regulations and executive orders as well as the power to issue decisions within the scope

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\textsuperscript{347} Id. at p. 258.

\textsuperscript{348} Id.

\textsuperscript{349} Constituteproject.org, Poland’s Constitution of 1997 with Amendments through 2009, generated from excerpts of texts from the repository of the Comparative Constitutions Projects, and distributed on constituteproject.org: Article 127 the Polish Constitution.

\textsuperscript{350} Id, Article 145 section 1 of the Polish Constitution, Article 145 section 2 of the Polish Constitution, Article 145 section 3 of the Polish Constitution.

\textsuperscript{351} Id. Article 126 of the Polish Constitution.

\textsuperscript{352} Id. Article 159 Section 1, Article 159 section 2 of the Polish Constitution.

\textsuperscript{353} Id. Article 161 of the Polish Constitution.

\textsuperscript{354} Id. Article 162 of the Polish Constitution.
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of the discharge of his other authorities.\textsuperscript{355} Furthermore, except for certain issues that are stipulated in Article 144 section 3,\textsuperscript{356} according to Article 144 of the Polish Constitution, the President has the power to issue Official Acts to exercise his constitutional and statutory authority.\textsuperscript{357} The Official Acts of the President have to be validated by the Prime Minister’s signature.\textsuperscript{358}

On the appointment power, according to the Constitution, the President has the power to nominate a Prime Minister and appoint a Prime Minister together with other members of a Council of Ministers and accept the oaths of office of members of such newly appointed Council of Ministers.\textsuperscript{359} The President assists by a Presidential Chancellery. He has the power to establish the statute of the Presidential Chancellery including to appoint and dismiss its Chief.\textsuperscript{360}

On the foreign affairs power, the Polish President, as the representative of the state in foreign affairs, according to Article 133 section 1 of the Polish Constitution, has the power to ratify and renounce international agreements, appoint and recall the pleni-potentiary representatives of the Republic of Poland to other states and to international organization, to receive the Letters of Credence and recall of diplomatic representatives of other states and international organizations accredited to him.\textsuperscript{361} Moreover, section 2 of the Article allows the President, before ratifying an international agreement, to refer to the Constitutional Court and request it to adjudicate upon the conformity of the international agreement to the Constitution.\textsuperscript{362} In general, with regard to foreign policy power, the Constitution requires the President to cooperate with the Prime Minister and the appropriate minister.\textsuperscript{363}

\begin{itemize}
\item \textsuperscript{355}\textit{Id.} Article 142 section 1, Article 142 section 2 of the Polish Constitution.
\item \textsuperscript{356}\textit{Id.} Article 144 section 3 of the Polish Constitution.
\item \textsuperscript{357}\textit{Id.} Article 144 section 1 of the Polish Constitution.
\item \textsuperscript{358}\textit{Id.} Article 144 section 2 of the Polish Constitution.
\item \textsuperscript{359}\textit{Id.} Article 154 section 1 of the Polish Constitution.
\item \textsuperscript{360}\textit{Id.} Article 143 of the Polish Constitution.
\item \textsuperscript{361}\textit{Id.} Article 133 section 1 of the Polish Constitution.
\item \textsuperscript{362}\textit{Id.} Article 133 section 2 of the Polish Constitution.
\item \textsuperscript{363}\textit{Id.} Article 133 section 2 of the Polish Constitution.
\end{itemize}
On the military power, the Polish President has the military power as the Supreme Commander of the Armed Forces of the Republic of Poland. Furthermore, the Constitution also specifies the power of the President as the Supreme Commander into two different situations: the power in times of peace and the power in a period of war. According to Article 134 section 2, in times of peace, the Polish President has the power of command over the Armed Forces through the Minister of National Defence. In times of war, the President has the power to appoint the Commander in Chief of the Armed Forces on request of the Prime Minister. At the administrative level, the President as the Supreme Commander has the power to appoint the Chief of the General Staff and commanders of branches of the Armed Forces for a specified period of time. He has also the power to confer military ranks on the request of the Minister of National Defence and as specified by statute. On the national security issues, the National Security Council is the advisory organ to the President of Poland. On the special issue of a direct external threat to the State, at the request of the Prime Minister, the President has the power to order a general or partial mobilization and deployment of the Armed Forces in defence of the state. On the civic power, the Polish President has the power to grant Polish citizenship and has the power to give consent for renunciation of Polish citizenship. On the pardoning power, as the head of the state, the President of Poland has the power to confer orders and decorations. With regard to the pardoning power, according to Article 139, the President has the power to grant pardon which may not be extended to individuals convicted by the Tribunal of State. On the cabinet council, According to Article

364 Id. Article 134 section 1 of the Polish Constitution.
365 Id. Article 134 section 2 of the Polish Constitution.
366 Id. Article 134 section 4 of the Polish Constitution.
367 Id. Article 134 section 3 of the Polish Constitution.
368 Id. Article 134 section 5, Article 134 section 6 of the Polish Constitution.
369 Id. Article 135 of the Polish Constitution.
370 Id. Article 136 of the Polish Constitution.
371 Id. Article 137 of the Polish Constitution.
372 Id. Article 138 of the Polish Constitution.
373 Id. Article 139 of the Polish Constitution.
141, the President may have the power, on particular matters, to convene the Cabinet Council and to preside over the Council of Ministers debates.\textsuperscript{374}

**The Council of Ministers, the Prime Minister, and Government Administration**

The 1997 Polish Constitution confirms that the Council of Ministers and the Prime Minister are the dominant and central part of the executive.\textsuperscript{375} Article 146 clarifies that the Council of Ministers conducts the internal and foreign affairs.\textsuperscript{376} It consists of the Prime Minister as the President of the Council of Ministers and ministers;\textsuperscript{377} and may also include the Deputy Prime Minister who may be appointed as the vice president of the Council of Ministers.\textsuperscript{378} It also has the duty to manage the government administration.\textsuperscript{379} Furthermore, Article 146 section 4 specifies the duties of the Council of Ministers, which are mainly to perform government affairs.\textsuperscript{380} As Poland recognizes a dual executive, the Constitution clarifies the Prime Minister’s power. According to the Polish Constitution, the powers of the Prime minister are specified in Article 148.\textsuperscript{381} The Prime Minister has also the power to allocate government administration tasks to the ministers.\textsuperscript{382} He has the power to request to revoke a regulation or order of a minister.\textsuperscript{383} In general, the Prime Minister has the power of control over the body of civil servants.\textsuperscript{384} The Prime Minister, within 14 days after his appointment, has to submit a program of activity of the Council of Ministers to the Sejm.\textsuperscript{385}

The Polish Constitution does clarify that the member of the Council of Ministers is accountable to the Tribunal of State for an infringement of the Constitution or Statutes.\textsuperscript{386} The motion may be passed by the President or at least 115 Deputies.\textsuperscript{387}

\textsuperscript{374}Id. Article 141 section 1 of the Polish Constitution.
\textsuperscript{376} Constituteproject.org, Op. Cit., Article 146 section 1, Article 146 section 2 the Polish Constitution.
\textsuperscript{377} Id. Article 147 section 1 of the Polish Constitution.
\textsuperscript{378} Id. Article 147 section 2 of the Polish Constitution.
\textsuperscript{379} Id. Article 146 section 3 of the Polish Constitution.
\textsuperscript{380} Id. Article 146 section 4 of the Polish Constitution.
\textsuperscript{381} Id. Article 148 of the Polish Constitution.
\textsuperscript{382} Id. Article 149 section 1 of the Polish Constitution.
\textsuperscript{383} Id. Article 149 section 2 of the Polish Constitution.
\textsuperscript{384} Id. Article 153 section 2 of the Polish Constitution.
\textsuperscript{385} Id. Article 154 section 2 of the Polish Constitution.
\textsuperscript{386} Id. Article 156 section 1 of the Polish Constitution.
2.3. Closing remarks

There is a general feature of the constitutions in terms of the Executive and its powers. They recognise the Executive as one of the constitutional branches which has the power to execute the Laws and the power of the state administration. All the constitutions under different systems provide checks and balances systems among three branches. There are similarities among the three models of constitutions in terms of preventing abuse of power by the Executive. However, in terms of the actual executive powers, there is a degree of difference among countries depending on different systems of government in terms on how the powers are given. From the comparisons of the 6 Constitutions, some of following points may be considered by Indonesia in order to improve the executive powers:

1. Most of the 6 Constitutions have been set in more modern and up to date terminology, such as the German Constitution that uses modern terms of state defence instead of using the war terms, and the South African Constitution that uses modern terms of state of national defence to replace the term of war power. The French Constitution, on the other hand, has set a modern framework of a fixed definition for the state emergency. It defines the emergency as the situation where the institution of the Republic, the independence of the Nation, the integrity of its territory or the fulfillment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted. The French Constitution has even more modern ideas in adopting a specific issue of international intervention which has been developed by International law.

2. Most of the 6 Constitutions give more clarity, such as the South African Constitution that gives more clarity about the President as the Commander in Chief. It also provides the determination of the scopes of the administrative power of the President as the national executive in its Article 85. On the other hand, the French Constitution

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*Id.* Article 156 section 2 of the Polish Constitution.

*See:* table 2.3.

Adopting modern and up to date terminologies in the Constitution would help Indonesia develop as a modern state, adaptive to the global development problems nationally and internationally. It is also to help the Indonesian Constitution to be a living constitution that could answer any problems which may arise in the modern world.
provides clarity of the role of the President and the scope of a treaty. It gives the President of the Republic the power to negotiate and ratify treaties. The Constitution also provides the scopes of treaties namely the peace treaties, trade agreements, treaties or agreements relating to international organizations, those committing the finances of the State, those modifying provisions which are the preserve of statute law, those relating to the status of persons, and those involving the ceding, exchanging or acquiring of territory; those treaties may be ratified or approved only by an Act of Parliament.

3. Most of the 6 Constitutions provide a mechanism of checks and balances to prevent abuse of power, for example, the Polish Constitution sets a mechanism for the President to refer to the constitutional tribunal for adjudication upon a bill’s conformity to the Constitution; and based on the Constitutional tribunal’s judgement, the President may refuse to sign the bill. It also sets a mechanism for the President to refer to the Constitutional tribunal before the ratification of an international agreement to adjudicate upon its conformity to the Constitution.

4. Most of the 6 Constitutions provide special powers that are relevant to the state and to the Executive; for example, the South African Constitution sets an article for the presidential power on the specific issue of the state intelligence service. On the other hand, the Polish Constitution also empowers the President with the consent from the Senate for a special power to call a referendum which gives the possibility for the President to invoke a referendum, in respect of matters of particular importance to the State.

5. Most of the 6 Constitutions provide a clear limitation to the Executive power, such as the US constitution which provides a firm limitation that the President may have pardoning power except for impeachment cases. On the other hand, the Philippines Constitution also makes the limitation for the pardoning power. It clearly says that except in cases of impeachment, the President has pardoning powers, including the power to grant reprieves, commutation, and pardons, and remit fines and forfeitures, after conviction by final judgment.
Table 2.3 Features of three government systems

<table>
<thead>
<tr>
<th>Features</th>
<th>Parliamentary Constitution</th>
<th>Presidential Constitution</th>
<th>Mixed Constitution</th>
<th>Other Constitution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Head of State</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Appointment</td>
<td>● (direct-indirect elected)</td>
<td>● (direct elected)</td>
<td>● (direct elected)</td>
<td>● (direct elected/indirect elected)</td>
</tr>
<tr>
<td>Removal</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Head of Government</td>
<td></td>
<td>● (indirect elected)</td>
<td>● (direct elected)</td>
<td>● (direct elected)</td>
</tr>
<tr>
<td>Executive branch</td>
<td>Prime minister</td>
<td>President</td>
<td>President – prime minister</td>
<td>President/prime minister/cabinet</td>
</tr>
<tr>
<td>Government formation</td>
<td>Mutual Dependent to parliament</td>
<td>Mutual Independent from legislative</td>
<td>Mutual Dependent to the parliament and to elected President</td>
<td>-</td>
</tr>
</tbody>
</table>

Table 2.4 Summary of general characteristic of three models of government systems

<table>
<thead>
<tr>
<th>Models of system of government</th>
<th>Parliamentary system</th>
<th>Presidential system</th>
<th>Mixed system</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Separation of head of state and head of government</td>
<td>Fusion of head of state and head of government</td>
<td>The executive: President and Prime minister (dual executive – power sharing) – a multiply executive branch</td>
</tr>
<tr>
<td></td>
<td>The executive branch: Prime minister and the cabinet – collective executive branch</td>
<td>The head of executive branch: President and the cabinet (single executive)</td>
<td>To exist, government depend on both on a legislative majority assembly and on elected president (dual responsibility and mutual dependent)</td>
</tr>
<tr>
<td></td>
<td>Head of executive: the Prime minister; can be changed anytime</td>
<td>The head of executive branch: President; constitutionally fixed term office</td>
<td>The government can be removed during term office by either the assembly or the directly elected President</td>
</tr>
<tr>
<td></td>
<td>Relationship executive-legislative: Fusion of executive and legislative (mutual dependent)</td>
<td>Relationship executive-legislative: Separation of executive and legislative (mutual independent)</td>
<td>The President can dissolve the assembly and call early elections</td>
</tr>
<tr>
<td></td>
<td>Government depends on and is responsible to the parliament</td>
<td>To exist, government does not need support from legislative majority</td>
<td></td>
</tr>
</tbody>
</table>
Direct presidential election mechanism
- Indirect elected of head of government by the President applied in combination with assembly confidence
- Dual legitimacy (Presidential direct election and legislative direct election) + indirect election of prime minister
- Ministerial responsibility: collectively and individually to the parliament and to the elected President
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Scheme 2: Government Systems

Conclusion

Parliamentary Constitutions:
Germany
Weak executive power: President-weak, Chancellor-weak

South Africa
Strong executive power: the President–considerable powers but could be brought down by the Parliament vote of no-confidence

Presidential constitutions:
US
Limited executive power: President–shared powers, strong legitimacy

The Philippines
Strong executive power: President–strong powers, strong legitimacy

Mixed constitutions:
France: dual executive powers between the President and the Prime Minister
Poland: dual executive powers between the President and the Prime Minister
Chapter 3
The Development of Executive Power in Indonesian Constitutional History

This Chapter describes how the executive powers evolved in Indonesian constitutional history before the current Amended Indonesian Constitution. In this chapter, the development of the executive powers in Indonesia will be described in a chronological sequence of government regimes. The chapter is structured as follows. First, it will briefly introduce the sequence of constitutional regimes in Indonesia. Second, it will recount the executive powers under the period of the Indonesian constitution from the post-Dutch colonial period to Indonesian independence. Next, it will discuss a short experience of executive powers under the Indonesian parliamentary system when the Constitution of the KRIS (the Constitution of Federal Republic Indonesia) was enforced in 1949 in Indonesia. Following the discussion of the temporary Indonesian Constitution 1950, the chapter will address the problems of the return of the Indonesian presidential system with its implications for the executive powers. Moreover, it will also describe the practices of the executive powers under the period of re-instatement of the 1945 Indonesian Constitution. The final part of this chapter will briefly describe the executive powers during the process of the Amended Constitution.

3.1. Introduction: sequences of Constitution regimes in Indonesia

Indonesia experimented with Constitutions. The first Constitution (hereafter referred to as the UUD 1945) was in force during the period of 18 August 1945 to 27 December 1949. The Constitution was drafted the day after Indonesia’s unilateral proclamation of independence and entered into force on 18 August 1945. The second Constitution, (hereafter referred to as the KRIS Constitution) was a very short-lived Constitution, enacted from 27 December 1949 to 17 August 1950. The third Constitution (hereafter referred to as the UUDS 1950) was in force temporarily for 9 years from 17 August 1950 to 5 July 1959. The following Constitution entered
into force as a result of a Presidential Decree. By the 1959 Presidential Decree, the 1st President of Indonesia, Soekarno reinstated the UUD 1945 (the 1st Indonesian Constitution of 18 August 1945). It was in force from 5 July 1959 to 1999. The Constitution was therefore the longest living Constitution and had been enacted under different regimes of Indonesian governments; the Old Order (“orde lama”) which was under the 1st Indonesian President Soekarno, the New Order (“orde baru”) which was under the authoritarian regime of President Soeharto, and the Reformation Era which was under the transition President of BJ. Habibie. During its existence, the Constitution was never ratified. Although it was said constitutionally in its provision that the MPR (the Majelis Permusyawaratan Rakyat) had the power to ratify the Constitution, the MPR never did so.

Under different Constitutions, the executive powers in Indonesia experienced lots of turbulence. Those experiences influenced significantly the constitutional systems and state practice. The most significant influence was the character of the executive powers.

3.2. Executive power in Indonesian constitution making (from the post-Dutch colonial period to Indonesian independence)

The development of the executive powers in Indonesia started as the Indonesian Constitution was drafted in 1945 (the UUD 1945). It consisted of a preamble, provisions, transitional provisions, additional provisions, and general and provisional annotations. It had embedded the first Indonesian executive powers. The preparation of the draft of the Indonesian Constitution started on 29 April 1945 by the Japanese government. For this

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390 The MPR (Majelis Permusyawaratan Rakyat) is the People’s Representative Consultative Assembly. The members of the MPR were all members of the DPR and other representatives including the provinces representatives, military representatives, and minority groups. The MPR was at the time the parliament in Indonesia and had strong power including to elect and impeach the President. Currently, the MPR consists of all members of the DPR and all members of the DPD (the provinces representatives).

391 Annotation to the Constitution was part of the Constitution that had legal consequences. It had content on the explanation and the elaboration. It consisted of two parts; the general explanation and the provisions explanation. The general explanation explained about the Constitution as a whole; whereas, the provisions explanations were about the explanation and elaboration of each of the provisions.

392 Naskah Komprehensif Perubahan Undang-Undang Dasar Republik Indonesia Tahun 1945, Buku 1: Latar Belakang, Proses dan Hasil Perubahan UUD 1945, Edisi Revisi, Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2012: “the Japanese government issued the Declaration of “Gunseikan” of the Japanese army commander No. 23 on the establishment of “Dokuritsu Zyumbi Tyoosakai” (in Indonesia: BPUPK (Badan Penyelidik
reason the Japanese government established the “BPUPK”. The BPUPK had a special committee namely, the committee of the basic law that mainly had special duties to draft the Constitution. On 11 July 1945, the Committee made some important decisions on the choice of the Unitary state (the Republic of the Unitary), and on the choice that a President in Indonesia is the head of the state. According to Provision III of the Transitional Provision of the first Indonesian Constitution (the UUD 1945), the first President and his vice President were elected by the PPKI (the Committee for the preparation of Indonesian Independence). There was no provision about a direct mechanism for the presidential election except that the President was indirectly elected by the people through the MPR as the Council of People Representatives. The President collegially worked with the Vice President, the ministers and the state secretary and was responsible to the MPR. According to Provision IV of the first Indonesian Constitution (the UUD 1945), the President had the power to exercise the MPR’s power, the DPR’s powers and the DPA’s powers before their establishment. With all the powers given by the Constitution, the Indonesian President constitutionally had exceptionally broad powers. The President exercises the three powers of the constitutional institutions (the MPR, the DPR, and the DPA). However, in exercising his constitutional powers, the Constitution assigned a national committee acting to assist the President, namely the Indonesian Central National Committee or “KNIP (Komite Nasional Indonesia Pusat)”. Later on, the KNIP was the embryo of the DPR (the “Dewan Perwakilan Rakyat” as the council of people representatives).

According to the first Indonesian Constitution (UUD 1945), the executive power was under Chapter III, with the title “the power of the state government”. Article 4 of the Constitution stipulated that “the President of the Republic of Indonesia shall hold the power of

Usaha Persiapan Kemerdekaan/the Committee on the investigation of the Indonesian Independence).” See further on page 19 to 43.
393 Provision III of the Transitional provision of the 1st Indonesian Constitution, hereinafter is the “UUD 1945” (Appendix 1).
394 The MPR’s power were the power to appoint and dismiss the President and the power to make and amend the Constitution.
395 The DPR’s power were the powers to make laws.
396 The DPA’s power were the powers to give any advises and considerations to the President.
397 Provision IV of the Transitional provision of the 1st Indonesian Constitution (the “UUD 1945”) (Appendix 1).
government in accordance with the Constitution”. Although the Constitution did not spell out explicitly the word “executive powers”, it implied that the President institutionally possessed such powers. Furthermore, the following articles determined the power of the President as the government of the state.

According to the first Constitution, the President had various law-making powers. Article 5 section 1 of the Constitution confirmed that the President had the legislative power with the DPR’s approval. The President had to share the legislative power with the DPR (the Council of People Representatives). However, the President was the main institution to make laws and the DPR was the sharing partner to give the bills approval. Thus, the President was the legislator and had the power to make and enforce laws. On the other law-making areas, Article 5 section 2 determined that the President also had other legislative powers to make government regulations as Legislation directives in order to implement the laws.

Moreover, the President, according to the Constitution had the foreign affairs power. The foreign affairs powers were determined in Article 11 and Article 13 of the Constitution. The scope of powers included war power, peace power, treaty making powers, and diplomacy powers of appointing ambassadors, consuls, and receiving the credentials of foreign ambassadors. Article 10 affirmed that the President had the military power of commander in chief of the army, the navy and the air force. Article 12 gave the President the power to declare a state of emergency. Furthermore, according to Article 22, the President had the power to issue government regulations in lieu of laws in times of state emergency (the emergency law). However, such emergency laws had to be consented to by the DPR.

As the head of the state, the Constitution gave the President the power to give pardon and the power to grant honors. The pardoning powers of the president included giving mercy,

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398 Article 5 section (1) the UUD 1945 (Appendix 1).
399 Article 5 section (2) the UUD 1945 (Appendix 1).
400 Article 11 (Appendix 1), Article 13 section (1)(Appendix); Article 13 section (2) the UUD 1945 (Appendix 1).
401 Article 10 the UUD 1945 (Appendix 1).
402 Article 12 of the UUD 1945 (Appendix 1).
403 Article 22 Section (1), Section (2), Section (3) of the UUD 1945 (Appendix 1).
amnesty, pardon and restoration of rights.\textsuperscript{404} The President also had the power to grant titles, decorations, and other distinctions of honours according to Article 15 of the Constitution.\textsuperscript{405} As the head of the government, the President had the power to preside over the Cabinet. Article 17 Section 3 of the Constitution gave the President the power to appoint and dismiss the ministers.\textsuperscript{406} Constitutionally, the ministers were the President’s assistants and were responsible to the President.\textsuperscript{407} The President was granted the power to conduct the state administration.\textsuperscript{408} In order to establish the state administration, the Constitution assigned the state budgetary and spending power in the President’s domain. The President had the power to make the state budget law.\textsuperscript{409} The budgeting power was also relevant to the legislative power of the President that was mentioned in Article 5 section (1) of the Constitution. In exercising the budgetary power, the President had to make the state budgetary Law and must have the DPR’s approval. In relevance to that, the Constitution allowed the President to fully exercise spending power. However, the Constitution asserted that the President should be accountable for the performance of spending power. The accountability of the spending power was verified by the State Finance Auditor Council (BPK) and had to be reported to the DPR.\textsuperscript{410}

While the Transitional Provision Clause IV of the Constitution gave extra power to the President to have the MPR’s, the DPR’s, and the DPA’s power;\textsuperscript{411} the additional provision of the Constitution authorized the President to take any preparatory steps and execute all the

\textsuperscript{404} Article 14 of the UUD 1945 (Appendix 1).
\textsuperscript{405} Article 15 of the UUD 1945 (Appendix 1).
\textsuperscript{406} Article 17 section (2) of the UUD 1945 (Appendix 1).
\textsuperscript{407} Article 17 section (1) (Appendix 1), Article 17 section (3) of the UUD 1945 (Appendix 1).
\textsuperscript{408} It was shown on the original annotation that “concentration of power and responsibility upon the President.
\textsuperscript{409} Chapter VII on State Finance, Article 23 section (1) of the UUD 1945 (Appendix 1).
\textsuperscript{410} Article 23 section (5) of the UUD 1945 (Appendix 1).
\textsuperscript{411} According to Article 3 the UUD 1945 (Appendix 1); Furthermore, the power of the MPR was also stipulated in Article 37 of the UUD 1945 (Appendix 1) that the MPR had the power to amend the Constitution. Meanwhile, the powers of the DPR according to the UUD 1945 was only providing counterbalance to the performance of the executive powers. The DPR had the power to approve a bill to become the law. The member of the DPR had also the right to purpose a bill. The DPR had also the power to give any other approval and recommendation to the performance of the executive power; for example, the DPR had the power to give approval for the Presidential emergency law, approve the declaration of war, the treaty making, the peace making by the President. While the DPA according to Article 16 section 2 had the power to propose any suggestion to the President.
Constitutional duties. In practice, though the President was the decision maker, the Presidential power in that period was not really exercised absolutely by the President. The President was assisted by the KNIP (the National Committee).

The intention of the framers to establish a limited government was reflected in the Constitutional provisions. The Constitution explicitly affirmed in the General Annotations of the Constitution that Indonesia adopted the constitutional system with the government based on the Constitution and thus, the government, as a whole, had limited powers and could not have absolute power. The Constitution set down the highest power of the state in the hand of the MPR as articulated in the annotation of the Constitution as (Die gezamte staatgewalt liegth allein bei der Majelis). The framers personified the MPR as the representatives of the people and all at once manifested the sovereignty of the people. The MPR had the main power to determine the Constitution and the GBHN (the Outline of the State Policy) as well as to appoint the President and the Vice President. In this point, the Constitution implied that the President was dependent on the MPR. It was determined that the President had no equal position with the MPR, but he was subordinate to the MPR. The President was the mandator of the MPR. The President had to pursue state policy as outlined by the MPR. As consequence, the President was responsible and accountable to the MPR.

To sum up, the first Constitution really reflected a parliamentary system. The fact was that the President was not directly elected by the people instead through a majority vote in the MPR’s session; the constitutional duty of the President was to implement the Guidelines of the State policy set by the MPR; and the fact that the President was responsible to the MPR, implied that the President was really dependent on the MPR. The President could not independently exist without the MPR.

Unlike the hierarchical relationship between the President and the MPR, the relationship between the President and the DPR was constitutionally based on a mutual

412 Additional Provisions of the Constitution imposed that “within six months after the end of the Great East Asia War, the President of Indonesia shall take preparatory steps and execute all the provisions of this Constitution.
413 Transitional Provision Clause IV of the UUD 1945 (Appendix 1).
414 Chapter IV of the Annotation to the Constitution of the UUD 1945 on the President is the Chief Executive of the State under the MPR.
The relationship.\textsuperscript{415} The President did not depend on the DPR; the President was not accountable to the DPR. The President had equally the same position as the DPR. The DPR acted as counterbalance to the President. The President should obtain the approval of the DPR to make laws (Gezetsgebung) and to determine the state budget. Technically, the President had to cooperate with the DPR.\textsuperscript{416} Moreover, the UUD 1945 strongly clarified that the executive powers of the President were not unlimited. Chapter VII of the General Annotation of the Constitution elaborated that “Although the President as the head of the state is not accountable to the DPR, the President is not a dictator since his power is not unlimited”. The Chapter clearly implied that the Constitution did not intent to grant absolute powers to the President.

However, the Constitution gave the power to the President to establish a cabinet of ministers. According to Chapter VI, the General Annotation of the Constitution, the ministers were the President’s assistants. They were not responsible and accountable to the DPR and the MPR. It was the President who appointed and dismissed the ministers of the state. Their status and position fully depended on the President. They mainly exercised day-to-day executive powers. The ministers were not just ordinary senior officials. They had a strategic position within the state. As the head of a ministerial department, a minister was obliged to have competence in specific areas related to his duties. To this extent, the minister had great influence on the Presidential policy making. However, in determining the policy and for the purpose of state administration coordination, the ministers had to work in close cooperation with one-another under the leadership of the President.

The annotation to the constitutional provisions on executive power

According to the Constitutional Annotation of Chapter III, the President was the chief of the executive within the state and had the power to enforce laws by issuing government regulations. The Constitution also stressed that the President had the legislative power and shared the power with the DPR. Such kind of power sharing was also emphasized in the

\textsuperscript{415} The Annotation provision of the UUD 1945 (the first Indonesia Constitution).
\textsuperscript{416} Chapter VII of the Constitutional paragraph 2-4 of the UUD 1945 (Appendix 1).
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constitutional explanation. Furthermore, Chapter VII of the Annotation of the Constitution vested the oversight function in the DPR vis a vis the President. The oversight function could be by sharing powers and checking the exercise of the Presidential power. In terms of the legislative power, according to the Annotation, the DPR had the power to approve all bills made by the President. However, the DPR was also granted the power to initiate the bills. Moreover, the DPR had the right to control the budget. The DPR could oversee the President and could invoke interpellations, investigations, and question the President’s decisions and the government’s policy. On the emergency power, the annotation of the Article 22 clarified that the President in exercising emergency power should obtain approval from the DPR to validate the emergency law. Therefore, all measures and actions taken by the President must be justified.417

In terms of state finance, Chapter VIII Article 23 Sections 1, 2, 3, 4, of the Annotation Constitution clarified that the DPR had the power to control the budget by giving approval or rejection to the bill of the state budget. The state budget was determined as the state expenditure and the state income. The rationality that the DPR should have the power to give approval or rejection was because the DPR represented the people.418 On the grounds that the people had the right to determine how to collect the revenue and the expenditure, any fields of the income in particularly taxes must be determined by law and most importantly approved by the DPR. The meaning of the DPR’s approval actually implied that the role of the DPR was the key. The DPR had a stronger position than the government on the budget decision.419 If the DPR did not approve the state budget law, the government could not exercise the budgetary power. Therefore, on the budgeting area, the President was bound by the DPR’s approval.

The President was granted exclusive and extra-ordinary powers by the transitional provision in the Constitution. The exclusive and extra-ordinary powers empowered the

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417 Article 22 of the constitutional explanation of the UUD 1945 (Appendix 1).
418 The rationality of giving the power to the DPR was also in line with the spirit of the sovereignty of the people and democracy.
419 The annotation to the constitutional provision 23 clarified that besides the DPR represented the people and whereas the people have the right to determine the state income and expenses, how the government spends the money that has been approved by the DPR must also conform to the decision on the budget.
President with the MPR’s power, the DPR’s power and all institutional power that had not yet been established after the unilateral independence. However, Ismail Suni believed that although the President had been granted exclusive powers by the transitional provision, the President could not have all the MPR’s power; especially the power to set the Constitution and the power to appoint the President and the Vice President.\footnote{Ismail Suni, Pergeseran Kekuasaan Eksekutif, Aksara Baru, Jakarta, 1986, p. 35} On the other hand, the President could temporarily restrain the enactment of part of the Constitution only to deal with the situation, overcome the perils and restore the situation and to exercise the power to establish the MPR and the DPR; but that did not mean that the President could amend the Constitution permanently.\footnote{Id. at p. 35.} 

In general observation of the constitutional text, the first Constitution actually gave limited powers to the President as the head of the executive although the President was occasionally vested with extra-ordinary power. The Constitution had explicitly intended that the executive powers were mostly shared between the President and the DPR. The President was bound by the DPR’s approval in exercising the powers. The dependency and responsibility of the President to the MPR and the hierarchical relationship between the President and the MPR showed that the Constitution wanted the President to have limited power as a state institution.

In practice, after the appointment of the first Indonesian President and Vice President, the President dismissed the PPKI (Preparatory Committee on Indonesia Independence) on 29 August 1945 and established the KNIP (Indonesian Central National Committee). The establishment of the KNIP by the President was stated in Chapter IV of the transitional provisions. The KNIP had the duties to assist the President and not independently or collectively execute the Laws.\footnote{Id. at p. 27. In establishing the Committee, the President was assisted by the Vice President. The President had appointed 135 members of KNIP, in which the KNIP members were including the members of the dismissed PPKI.} The President had also appointed the Cabinet which consisted of ministers as the President’s assistants.\footnote{Id. at p. 28.} Two months after the Constitutional enactment, on 16 October 1945, the Vice President issued the “\textit{Maklumat No. X}” (the Vice President Declaration No. X). This Vice President Declaration No.X stated that the KNIP, before the establishment of the MPR

\footnote{\textit{Id. at p. 35.}}
and the DPR, had the legislative power and together with the President set the GBHN (guidelines to the state policy). It also decided that since it was in a crucial situation, the KNIP should delegate its power to a working committee that was appointed by and responsible to the KNIP. Ismail Suni observed that since 16 October 1945, the President had to share his power set by Article IV the transitional provisions; the power to set the guidelines of the state policy (the GBHN) and the power to make Laws with the KNIP. On the other hand, the President still had the power to supervise the Ministers until it was changed on 11 November 1945 when the working committee of the KNIP proposed to the President the ministerial responsibility to the Parliament (which in this period was the KNIP). Since the working Committee’s proposal was approved by the President, the constitutional practice in Indonesia was said to be unconstitutional. The proposal of ministerial responsibility and the existence of the prime minister were not in accordance with the Constitution. However, the approval for the ministerial responsibility to the Parliament was given by the Government Declaration (Maklumat Pemerintah) on 14 November 1945 whereby the Ministers were the members of the Cabinet led by a Prime Minister, Sjahrir, and were not responsible to the President. In consequence, as it was observed by Ismail Suni, the executive powers had been shifted from the President to the Prime Minister. In effect, the power of President Soekarno was reduced to that only of figurehead. However, the appointment of the Prime minister had been

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424 Id. at p. 28.
425 Id. at p. 29: “The powers of the working committee under the KNIP were determined as follows: a. set the guidelines of the state policy together with the President, however, the working committee had no right to intervene in the government’s daily policy (dagelijks beleid), the President still had the power as the government daily maker; b. set the Legislation (concerning all kinds of government affairs) together with the President. However, to execute the Laws, it is the power of the government. The government was determined just as the President assisted by the minister and other state officials under the President.”
426 Id. at p. 29.
427 Id. at p. 30: “the arguments that the working committee proposed the Ministerial responsibility to the Parliament were not only because the Constitution did not prohibit the ministerial responsibility but also on the basis that the ministerial responsibility to the Parliament reflected the people sovereignty. As a consequence of the President’s approval to the ministerial responsibility, since 14 November 1945, the Presidential Cabinet was changed into the new parliamentary Cabinet with Sutan Sjahrir as the Prime Minister.”
428 Id. Ismail Suni (1986), p. 31.
429 Colin Brown, a Short History of Indonesia: the Unlikely Nation?, Allen and Unwin, Australia, 2003, p. 163: “It is described that “in October–November 1945, the provisional government appointed Sjahrir as Prime Minister—a post not mentioned in the recently adopted Constitution—and in effect reduced Sukarno’s status to that of
challenged by Tan Malaka, his opponent, and politics were stalemated until President Soekarno intervened to reappoint Sjahrir.430

In January 1948, the government agreed to the Renville agreement.431 As a result, there was great division within Republican ranks; many of them were more radical political leaders. Both were Muslims and the left wing, claimed that the agreement was a sell-out to the Dutch; they forced the resignation of the government which had signed it.432 President Soekarno decided to appoint vice president, Hatta as the new prime minister.433 The political and economic situation was very difficult at the time, not only because of the government’s tension with its opponents, but also as a result of a Communist party rebellion. In December, the Dutch launched a second military attack.434 However, in that period, external pressures and the rise of rebellion, communism and its guerilla warfare caused the Dutch to change their policy and overcome its unprepared military and policy.435 As a result of the round table conference, the Dutch recognized Indonesian independence. However, that recognition was not given to the unitary Republic of Indonesia, but to the Federal Republic of the United States of Indonesia (the RIS) which consisted of 16 states. Further, this Round Table Conference caused the Parliamentary Constitution of RIS (KRIS 1949) to replace the first Constitution of UUD 1945. Thus, the government system in Indonesia changed from a presidential system to a parliamentary system.

Table 3.1 Executive power under the first Indonesian Constitution of UUD 1945

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figurehead. He was still head of state, but no longer head of government, making it more difficult for the Dutch to argue that the Republican government was in the hands of former collaborators with the Japanese. Although the Prime Ministership changed hands several times during the revolution, this political system was maintained; indeed, it was only replaced in 1957 when Sukarno reasserted Presidential authority.”

430 See: Id. at p. 164-165.
431 Under the agreement, the Republic conceded to the Dutch the territories that it had lost in the attack, in return for another Dutch promise of eventual independence.
433 Id. at p. 167.
434 Id. at p. 168.
435 Id. at p. 169: “They restored Sukarno and Hatta to Yogyakarta and began yet another round of negotiations at what was called the Round Table Conference, which led this time to a formal Dutch recognition of Indonesian independence in December 1949.”
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|                   | The power to take any measures and action promptly and appropriately (Article 22 of the annotation to the constitutional provisions) | Checked by the DPR **  

| Administrative and appointment powers | The power to appoint and dismiss the ministers (Article 17 section 2) | *  
|--------------------------------------|---------------------------------------------------------------------|----|
|                                      | The power to grant titles, decoration, and other honorary signs (Article 15) | *  
|                                      | The power to propose the state budget (23)                           | *  
|                                      | The power to set the political government policy and direct the ministers in the state government (chapter VII paragraph 3 of the general annotation of the Constitution) | *  
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|                 | The power to organize and establish the system as set by the Constitution (Article 1 of the additional provision) | *  

*the President  
**the President on behalf of the government

3.3. Indonesian executive power under the Constitution of the Republic of Indonesia Federalism (the KRIS “Konstitusi Republik Indonesia Serikat”): a short experience of executive power under a parliamentary system

- The executive under the KRIS Constitution
The Constitution of the Republic of Indonesia federalism (hereafter referred to as the “1949 KRIS”) was only in force during a one year period of 1949 to 1950. It was taken into force as a consequence of the Hague round table conference (the Konferensi Meja Bundar) on 23 August- 2 November 1949. The agreement was made on Saturday, 29 October 1949 in Scheveningen by the delegation of the Republic of Indonesia and the delegation of the Federal agreement (Bijeenkomst Federaal Overleg). As a result of the agreement, the Republic Federal of Indonesia had a Federal Constitution namely the Constitution of the Republic Federal of Indonesia (hereafter referred as the KRIS 1949 Constitution). The 1949 KRIS Constitution was in accordance with the main purpose of the agreement. It provided the real and unconditional transfer of sovereignty from the Kingdom of Nederland to the United States of Indonesia and the establishment of the Indonesian government. The 1949 KRIS Constitution was drafted by representatives from various states and provinces. It had 197 provisions plus an appendix and represented a mixture of concepts, principles, and institutions from several constitutional sources including the United States of America. The President of the Republic Federal Indonesia ratified the KRIS Constitution by Presidential Decree No. 48 in 31 January 1950. According to the Constitution, Indonesia had 6 main state institutions: the President, the ministers, the senate, the people’s representatives (the DPR), the Indonesian Supreme Court,

436 The Conference, which was addressed to resolve the conflict of the Dutch aggression I and II in 1947 and 1948, had resulted in 3 main points: the establishment the state of Republic of Indonesia Federal, the transfer of sovereignty from the Dutch to the Republic of Federal Indonesia, and the establishment of Uni Republic of Federal Indonesia and the Kingdom of the Netherlands. As a consequence of the conference, the Constitution of KRIS was drafted to give constitutional basis to the transformation of the Unitarian state to a federal state. The Constitution was drafted on the Conference by the BFO delegation and was entered to force on 27 December 1949. It consists of a Preamble of 4 paragraphs, the body of 6 chapters and 197 provisions, and the annex.

437 Charles Cheney, “The Status of the Republic of Indonesia in International Law”, Colombia Law Review Vol. 49, No. 7, November 1949, pp. 955 - 966 965, Colombia Law Review Association, accessed 10/11/2012. “It was declared that "sovereignty will be transferred to the Provisional Federal Government of the United States of Indonesia which shall function on the basis of a provisional constitution," and that all "powers of the Netherlands supreme legislative body, of the Crown and of the Governor-General, including the title which the Governor-General had held in consultation with the Volksraad (People’s Council) or the Raad van Nederlands-Indie (Council for the Netherlands Indies) shall be vested in the Provisional Federal Government.” It was announced that the Provisional Constitution should not contain any provision inconsistent with the Charter of Transfer of Sovereignty, and also that the Charter of Sovereignty should contain provisions”.

and the Council of financial supervision.\textsuperscript{439} Furthermore, based on Article 68 of the 1949 KRIS Constitution, the government of the state consisted of the President and the Ministers acting in collaboration.\textsuperscript{440} The Article implied that the executive power was in the hands of the President and the Ministers acting in collaboration.

According to Article 70 Section 1, the President and the Minister should not run any other general positions inside and outside the Federal Republic of Indonesia. They could not have dual positions while in office. Furthermore, Section 2 of the Article stipulated that the President and the Ministers should not be directly or indirectly involved or to be the underwriter of a profit company. Section (3) of the Article also stipulated that they could not have any claims against the Republic Federal of Indonesia apart from a general obligation letter. According to Section (4) of the Article, the constitutional conditions still bound the President and the Ministers three years after their resignation from the office.

In terms of a state of emergency, all the ministers and the special ministers acted together to make any decisions that had the same legal force to replace the Council of Ministers’ decisions.\textsuperscript{441} In general, the Prime Minister (in case of the absence of the Prime Minister, will be replaced by the special Minister) conducted and sat in the Council of Ministers session to discuss the public interest of the Federal Republic of Indonesia.\textsuperscript{442} The Council of Ministers should always notify all the important affairs to the President. The Ministers were responsible for all the government policy, both individually and collectively.\textsuperscript{443}

- **Presidential duties and power**

Article 69 of the 1949 KRIS Constitution gave the position of the head of state to the President. Unlike a head of state in the parliamentary system under the monarchial system, the President as the head of State was elected by the state representatives who had the


\textsuperscript{440} Article 68 section 1 of the 1949 KRIS Constitution, Article 68 Section 2 of the 1949 KRIS Constitution (Appendix 2).

\textsuperscript{441} Article 75 section (1) of the 1949 KRIS Constitution.

\textsuperscript{442} Article 76 section (1) of the 1949 KRIS Constitution.

\textsuperscript{443} Article 118 section 2 of the 1949 KRIS Constitution.
authorization to come together in agreement on the election of a head of state. In general, the main presidential duties were derived from the presidential oath. As the head of state and according to the constitutional oath, the President had duties to promote the welfare of the Federal Republic of Indonesia, protect and preserve the freedom and rights of all the citizens. According to the constitutional oath, the President also had duties to retain the laws and ensure the execution of laws in the Federal Republic of Indonesia. In case of presidential absence and in order to fulfill his constitutional duties, the President could order the Prime Minister to take over the daily work.

The President had the power to order and appoint the Prime minister and the ministers. Before taking the office, the ministers were required to take the formal vow before the President. The appointment and dismissal of the minister was set by Government Decree. According to Article 74 section (1) KRIS Constitution, the President with the states representatives agreed to appoint a Cabinet Committee consisting of three members to establish a cabinet and appoint ministers. According to the advice of the Cabinet maker, the President appointed the Prime minister from one of the three members of the Cabinet and the other two would be appointed as the ministers. Furthermore, the President determined department ministers and non-department ministers. The determination should be in line with the advice and signed by the three members of the cabinet maker. The Ministers with a ministerial department included the Minister of Defense, the Minister of foreign affairs, the Minister of Home Affairs, Minister of Finance and economic affairs, and the Prime Minister. Besides appointing the ministers, Article 85 section (1) of the KRIS Constitution gave the power to the President to appoint the Chief of the Senate according to the advice of the Senate.

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445 Article 72 section 1 of the 1949 KRIS Constitution.
446 Article 77 of the 1949 KRIS Constitution.
447 The cabinet maker was appointed by the President and the states representative to give advice to the President with regard to the minister appointment.
448 Article 74 section (2) of the 1949 KRIS Constitution.
449 Article 85 section 1 (Appendix 2) the 1949 KRIS Constitution.
general, the position of the President according to the KRIS Constitution was fairly strong. Article 118 section (1) stipulated that the President had inviolability.

The President granted honorable decorations based on the Federal Laws. Furthermore, the President had the power to give pardon, and amnesty after asking the Supreme Court’s advice. As the head of the state, in the field of diplomatic foreign affairs power, the Constitution stated that the President formally appointed the Republic Federal of Indonesia’s representatives for other states and accepted other states’ representatives for the Republic Federal of Indonesia. Furthermore, Article 182 (1) emphasized that the President was the highest commander as Chief in the Republic Federal of Indonesia. In formal procedures and according to the Federal Law, the President appoints, promotes and dismisses the officers of the state forces.

- Government power

Chapter IV of the 1949 KRIS Constitution described the state administration and how the government’s affairs were run. Article 117 section 2 emphasized that this main duty was addressed to the government’s power as the purpose of establishing the state administration. Ministers signed Presidential Decrees. In general, under the KRIS Constitution, the Prime Minister’s position was indeed enormously strong in the government system. The President played a small public role throughout 1949 and primarily only in a ceremonial capacity.

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450 Article 126 the 1949 KRIS Constitution.
451 Article 160 the 1949 KRIS Constitution Section (1) (Appendix 2), Article 160 Section (2) (Appendix 2), Article 160 Section (3) the 1949 KRIS Constitution (Appendix 2).
452 Article 178 of the 1949 KRIS Constitution (Appendix 2).
453 Article 181 (3) of the 1949 KRIS Constitution (Appendix 2).
454 Government is the President and the ministers.
455 Article 117 (2) of the 1949 KRIS Constitution (Appendix 2).
456 Article 119 of the 1949 KRIS Constitution (Appendix 2).
457 Herbert Feith, The Decline of Constitutional Democracy in Indonesia, Equinox Publishing, 1st Edition, Jakarta, 2007, p. 49: “It was not that he towered over his colleagues in the way of leaders who choose men of markedly inferior ability as their associates and lieutenants. On the contrary, his ministers were men of a high order of both ability and prestige."
458 Id, at p. 50
In terms of the law-making power, the government had the power to make laws together with the DPR and the Senate. The government had the power in all areas of the law-making power. While on the other hand the President had a significant role in the whole law-making process. The proposal of a bill that was proposed by the government was sent through presidential message to the DPR. On the other hand, the DPR had the right to propose Legislation to the government. If the proposal came from the Senate, the President was informed and notified by a copy of the proposal. The President had significant roles in every stage of the legislation making process. The President had roles in the early process of proposing the legislation, the joint discussion session, and the validation of the legislation. Besides the legislation making process, according to Article 139 the 1949 KRIS Constitution, the government had the power to authorize and be responsible for setting the emergency law. However, according to Article 140 section (1) of the 1949 KRIS Constitution, the Emergency Law should be passed to the DPR to be discussed further. If the DPR rejected and did not approve the Emergency Law, the Law was no longer valid and had no legal consequences. Furthermore, the Constitution empowered the government to make other laws; namely, Directives Law to implement the Legislation. By setting the Federal Legislation and the government regulation, the government could order state institutions to set further arrangements as determined in both Laws and the regulation.

The DPR and the Senate check the government power

The 1949 KRIS Constitution provided a check and balance mechanism for the government power. The DPR had the right of interpellation and right of inquiry and the rights

459 Article 128 section (1) the 1949 KRIS Constitution.
460 Article 128 section (2) the 1949 KRIS Constitution (Appendix 2). Article 128 Section (3) the KRIS Constitution (Appendix 2).
461 Article 139 section (1) of the 1949 KRIS Constitution (Appendix 2), Article 139 Section (2) of the 1949 KRIS Constitution (Appendix 2).
462 Article 140 section (2) of the 1949 KRIS Constitution (Appendix 2), Article 140 section (3) of the 1949 KRIS Constitution (Appendix 2), Article 140 Section (4) of the 1949 KRIS Constitution.
463 Article 141 of the 1949 KRIS Constitution Section (1) (Appendix 2), Article 141 of the 1949 KRIS Constitution Section (2) (Appendix 2).
464 Article 142 (1) the 1949 KRIS Constitution.
465 Article 120 section (1) the 1949 KRIS Constitution.
to investigate (enquete) according to the federal law.\textsuperscript{466} On the other hand, according to Article 120 section (2) of the 1949 KRIS Constitution, the ministers had constitutional duties to counterbalance the DPR’s measures by giving written or oral explanations.\textsuperscript{467} However, the DPR could not force the Cabinet or Minister to step down from office.\textsuperscript{468} Besides the DPR, the 1949 KRIS Constitution also recognized the Senate. In a special session and important situation regarding the relationship between states or the relationship between a state and the Republic Federal of Indonesia, the government should consider the Senate. The government should inform it of any decisions except for the Emergency Law.\textsuperscript{469}

- **Executive immunity**

The 1949 KRIS Constitution did not give any privileges to particularly the President and other state officers and the executive in general. The President and other executive bodies could be prosecuted before the Court either during office or after resignation. Article 148 (1) of the 1949 KRIS Constitution stipulated that the President, Ministers, Chief and members of the Senate, the Chief and the members of the DPR, the Chief, Vice-Chief and members of the Supreme Court, the State Prosecutor of the Supreme Court, Chief and Vice Chief of the State Financial Supervisor, the President of the Bank, members of the high council, and other state officials as determined by the Federal Law might be prosecuted before the Supreme Court. The prosecution could also be started after resignation. They could be prosecuted because of crimes, official offences, and other violations as determined by the Federal Law during their office.

Article 174 of the 1949 KRIS Constitution stipulated that the Government held the power of foreign affairs. The President made and validated all the treaties and other agreements with other states. The treaty or other agreements were not ratified unless approved by the Legislation.\textsuperscript{470} However, in exercising the power to conclude and make treaties and other agreements, the President could only do it with the authorization from the

\textsuperscript{466} Article 121 the 1949 KRIS Constitution.
\textsuperscript{467} Article 120 section (2) of the 1949 KRIS Constitution (Appendix 2).
\textsuperscript{468} Article 122 the 1949 KRIS Constitution.
\textsuperscript{469} Article 123 Section (1) – Section (6) the 1949 KRIS Constitution (Appendix 2).
\textsuperscript{470} Article 175 (1) of the 1949 KRIS Constitution.
The executive power on the foreign affairs implied the power to decide the state participation in International Organizations. According to Article 177 of the 1949 KRIS Constitution, the Government undertook to solve the dispute with other states peacefully and also decided to ask or accept the International Court or International arbitration’s decision. The Article implied that the Government also had the power to influence the decision making whether or not to ask, accept, or not accept the International Court or International arbitration’s decision.

The government had the power in terms of the state defence affairs. Furthermore, the Government had the power to appoint (if necessary) the defence personnel under the general commander. The Minister of Defence could be appointed for the position. Article 183 Section (1) stipulated that the government declared war only if it was permitted by the DPR and the Senate. In this case, according to Section (2) of the article, the DPR and the Senate decided to give permission to declare war by holding a plenary session of the DPR and the Senate chaired by the chief of the DPR. On the other fields of the emergency power, Article 184 (1) mentioned that the government did hold the emergency power and had the power to declare that the state was in a state of war or in a war emergency. Further impact that comes as a consequence of the emergency declaration is regulated by the Federal Law.

Instead of the power that had relevance to the state administration affairs, the Constitution implied that the government together with the Constituante had the power to set the Constitution. The government in this case also referred to the President. After setting the Constitution, the government had duties to make sure that the Constitution was implemented.
and adjusted by the Legislation and other laws. In general, the annex of the Republic Federal of Indonesia Constitution, Article 51, determined the scope of the executive powers in state administration affairs.

In practice, the Round Table Conference negotiations came to an agreement that the government of RIS recognized all the rights, concessions, and permission which had been granted by the colonial Dutch government. The negotiation also came to an agreement on the transfer of sovereignty from the Dutch to the new state namely the United States of Indonesia (RIS). However, the Dutch still influenced not only the area of politics but also all

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478 Article 196 of the 1949 KRIS Constitution (Appendix 2).
479 (a) Regulates the citizenship and residence of Republic Federal of Indonesia; (b) Immigration and emigration; (c) general affairs of colonization and transmigration; (d) pardoning: clemency, amnesty, and abolition; (e) the copy right, intellectual property rights, and kwekersrecht; (f) public law and civil law; (g) civil law and commercial law, on behalf of the social interest; economy, and other civil interest; (h) criminal law; (i) Private law; (j) the organization of federal judiciary; (k) land registration; (l) legal-economic nexus; (m) the compensation as a consequence of war; (n) Police and the principle of the state federal administration; the police official education; provide and promote the technical and empowerment of the republic federal of Indonesia’s police; measures to promote the cooperation of the police; (o) currency, bank, and foreign exchange; (p) tax company; (q) tax property; (r) income tax for the special affairs that is determined by the Federal Law; (s) import and export including the entry and exit custom and also the determination of the duty; (t) stamp duty; (u) custom; (v) government monopoly; (w) the foreign affairs, international relation, international rights and obligation of the government, international relation; (x) state defense, including the criminal law and the military law, the judicial and the emergency law (declaring war and a war emergency); (y) Institute and science that benefit to the Republic Federal of Indonesia; (z) maintenance of the monument and the natural protection that benefit to the Republic Federal of Indonesia; (A) collecting data statistic and documents that is important to the Republic Federal of Indonesia; (B) the arrangement and social measures that is important to the Republic Federal of Indonesia; (C) Guidelines of the state official; (D) education; (E) mass communication; (F) general rules of the import and movie industry’s supervision; (G) the general guidelines of the agrarian politic; (H) the endemic diseases; (I) commerce, industry, agriculture, keradjinan, pertanian, fishery, farm and economic affairs, and food; (J) the transportation; (K) aircraft and metereology; (L) Topography dan hidrography; (M) sea surveillance; (N) the harbor maintenance, river; (O) the telecommunication affairs; (P) mining arrangement; (Q) water, electricity, the exploitation of the water company.

480 Colin Brown, Op. Cit., p. 171: “.in effect, this meant that the Indonesian government agreed to honor all the agreements under which Dutch capital had been able to exploit the resources of Indonesia.”
481 L.C. Green, “Indonesia, the United Nations and Malaysia”, Journal of Southeast Asian History, Vol. 6, No. 2, Modern Malaysia, Sept, 1965, pp. 71-86, Cambridge University Press on behalf of Department of History, National University of Singapore, Accessed: 10/11/2012, p. 73, “It was agreed that The Netherlands would surrender sovereignty over the areas not yet governed by the Republic, while the Republic would surrender its own ‘sovereignty’. As a result of this dual surrender a new Federal sovereign would be established, of which the Republic would constitute but one part. At the same time, the Netherlands-Indonesian Union was pro claimed with the agreement of the Nationalist leaders. On the day of the transfer of sovereignty, December 27, 1949, the United States of Indonesia was recognized by the United Kingdom and most of the members of the Commonwealth. This
sectors such as military and economy and treated Indonesia as if it was still under Dutch control.\textsuperscript{482} This situation provoked mixed reactions among the Indonesian politicians. Some national leaders thought that the revolution was to be a change of regime, from the Dutch to Indonesia with a lot of changes in the details of the basis.\textsuperscript{483} They thought that the politics and government system should reflect Indonesian values and not those of the Dutch. They also had provoked the change of the new regime of changing into the presidential system. By this, they meant that the all unwanted foreign influence, including the Dutch influence, had to be driven out of Indonesia. Besides, in the period of the Constitution of 1949 KRIS there were major political issues faced by Indonesia.\textsuperscript{484} On 17 August 1950, President Soekarno announced the rejection of the federal system and the restoration of the Unitarian Republic of Indonesia.\textsuperscript{485} As a consequence, the temporary Constitution was drawn up and adopted before the Constituante (Constituent Assembly) was elected to undertake the task for drafting a permanent Constitution.

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<td>Emergency</td>
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act of recognition was followed the next day by similar action on behalf of the United States, Portugal and Formosa. Soviet recognition was delayed until well into January 1950, to be followed by that of Rumania in February. Unlike the recognition of the Republic of Indonesia earlier, recognition now was on a \textit{de jure} basis, and as such regarded as irrevocable.”

\textsuperscript{482}Id, L. C. Green (1965), p. 73: “Soekarno had been President of the Republic and retained this position in the United States, with the Queen of the Netherlands as Head of the Union symbolizing the ‘voluntary and lasting cooperation between the partners.”


\textsuperscript{484}See more on: Colin Brown, \textit{Op. Cit.}, p. 175, ” the first major political issue that Indonesia faced after the recognition of its independence was its formal structure, specially, whether it would remain a federal state, with power shared between the central and provincial governments, or revert to a unitary format, in which the power of the central government was unchallenged.”

\textsuperscript{485}Colin Brown, \textit{Op. Cit.}, p. 186:.”Sukarno had never made anybones about the fact that he rejected parliamentary democracy, with its competing political parties and its emphasis on reaching decisions by majority votes. To him, this system was inherently divisive, alien to Indonesian political culture and the prime cause of the country’s political instability. The political parties, in particular, were in his sights. In October 1956, he made a speech strongly critical of the parties, and calling for the establishment of a new form of democracy”.

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### 3.4. Indonesian executive power under the Temporary Constitution of Republic Indonesia (the “UUDS 1950”)

The Temporary Constitution of the UUDS 1950 (hereafter referred to as the UUDS 1950) was ratified in Jakarta on 15 August 1950 by the President of the Republic Federal of Indonesia (Soekarno), the Prime Minister (Mohammad Hatta), and the minister of justice (Soepomo). It was published at the same time by the minister of justice. The text of the temporary
Constitution was the 1949 KRIS Constitution text with some additional contents from the UUD 1945. The legal form of ratification of the temporary Constitution 1950 was Legislation, the Republic Federal Legislation No. 7/1950 on the conversion from the 1949 KRIS Constitution to the Temporary Constitution of Republic of Indonesia. The significant changes from the 1949 KRIS Constitution to the Temporary Constitution were mainly about the changes of the State, from the Federal State to the Unitarian State. The government system was thought to be a parliamentary democracy. Although it was said to be a parliamentary democracy, the text of the Constitution did not explicitly say so. Unlike the KRIS Constitution which specified clearly that the government was the President and the ministers in Article 68, the temporary Constitution 1950 did not explicitly specify the government in any of the provisions. However, Chapter II on State institutions, Section 1 on the government (Article 45 – Article 55) recognized the position of the President, the Vice President, the cabinet, the Prime minister and the ministers.

According to Article II, the temporary Constitution of the UUDS RI 1950 entered into force on 17 August 1950. The Constitution determined that the state institutions consisted of: a. the President and the Vice President; b. Ministers; c. the DPR; d. the Supreme Court; e. the Financial supervisor Council. The President and the Vice President were to be categorized as the government of the state based on Article 45. There was no clarification provided about the holder of the executive power. However, it was stipulated that the President was the head of the state and was assisted by a Vice President.

Unlike in the KRIS Constitution which did not recognize the position of a Vice President, the temporary Constitution 1950 reintroduced the position of the Vice President without including the Emergency Clause (that empowered the President in time of emergency to install a presidential cabinet not on the basis of the party strength). This would make possible the existence of a non-parliamentary cabinet. According to the Article, for the first time, the President had the power to appoint the Vice President who was recommended by the DPR. The

486 The UUD 1950 (excerpted from www.reformasihukum.org, unofficial translated by the author), Article 44 of the UUDS 1950.
487 Article 45 of the UUDS 1950 (Appendix 3).
Vice President, in the case of a presidential resignation, will constitutionally succeed the President.\textsuperscript{488}

The government had its office in the capital city and had the power to decide other places in an emergency.\textsuperscript{489} Before officially holding the position, the President and the vice President should make an oath according to their religion before the DPR to:

- Directly and indirectly not give any promise or give something to anyone
- not accept directly and indirectly any promises or gift from anyone
- Promote the welfare of the Republic of Indonesia, protect and preserve the freedom, general and particular rights of the residents of the state
- Faithfully execute the Constitution and maintain all the laws in the Republic of Indonesia, faithfully fulfill all the duties that are inherently imposed as the consequences of the office of the head of the state.\textsuperscript{490}

In running the state government, the President had the power to establish the ministries.\textsuperscript{491} The procedures of the ministry establishment were mentioned in Article 51 of the Constitution as follows:

1. The President appoints a person or some person as the Cabinet Maker\textsuperscript{492}
2. According to the advice of the Cabinet maker, the President appoints a Prime Minister and other Ministers
3. According to the Cabinet committee's (for appointing the ministers) advice, the President decides the ministers who have the duties to preside over a Ministry. The President may appoint ministers who do not need to lead a Ministry
4. The Presidential decision to appoint the Ministers was signed by the Cabinet Maker
5. The appointment and the dismissal of the Ministers office term and the resignation of the Cabinet was realized by the Presidential Decree

It was constitutionally confirmed that the ministers are responsible to parliament either individually or collectively.\textsuperscript{493} However, in contrast with the UUD 1945 Constitution, the

\textsuperscript{488} Article 48 of the UUDS 1950 (Appendix 3).
\textsuperscript{489} Article 46 of the UUDS 1950 (Appendix 3).
\textsuperscript{490} Article 47 of the UUDS 1950.
\textsuperscript{491} Article 50 of the UUDS 1950 (Appendix 3).
\textsuperscript{492} According to Herbert Feith (Op. Cit, Herbert Feith, p. 147): “the form One measure of a formateur’s power was the extent to which he was able to bring together a cabinet by compromises on policies and interests rather than by compromises between personal cliques whose demands were often not capable of being translated into a self-consistent policy.”
\textsuperscript{493} Article 83 section 2 of the UUDS 1950 (Appendix 3).
ministers were not responsible to the President but to the legislative assembly.\(^{494}\) Furthermore, Article 52 clarified that the ministers by forming a council of ministers headed by the Prime Minister were responsible to discuss public and state interests in a joint discussion and should inform the President of all important affairs.\(^{495}\) The government policies were set by presidential decree which had to be signed by the minister or the minister in the area of the policy.\(^{496}\) With regard to government affairs, the cabinet was given enormous power.\(^{497}\) The ministers could act broadly.\(^{498}\) Besides establishing and appointing the ministers, the President had the power to appoint the chief, vice chief, members of the Supreme Court\(^{499}\) and in the area of the council of finance.\(^{500}\)

In performing their duties, the President and the Vice President were constitutionally inviolable.\(^{501}\) Although the President was inviolable and was said in Article 84 to have the right to dissolve the House of Representatives by a presidential decree, the dissolution was only

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\(^{494}\) Herbert Feith, \textit{Op. Cit.}, p. 95. “The Republic's cabinet was responsible to its legislative assembly, this on the basis not of the Republic's written constitution of August 1945, but of a convention dating back to November 1945.”

\(^{495}\) Article 52 of the UUDS 1950 (Appendix 3).

\(^{496}\) Article 85 of the UUDS 1950 (Appendix 3).

\(^{497}\) Herbert Feith, \textit{Op. Cit.}, p. 96, “In one respect the cabinet was given enormous power: the constitution prepared by the joint committee provided, as the RUSI constitution had, for the possibility of emergency laws which could be made by the government alone and would be valid until such time as they were specifically counter-manded by parliament. In other respects, however, the new constitution was tilted in parliament’s favour. Parliament was placed in the position of being able to force the resignation of a cabinet or of individual ministers. On the other hand, the power of the cabinet to dissolve parliament was less clearly specified.”

\(^{498}\) Herbert Feith, \textit{Op. Cit.}, p. 147, “Cabinet members may have been in a weak position to effect the broad economic and social policies to which they were formally committed. But when their role is looked at without reference to considerations of long-term policy, it becomes clear that they were men of great influence. Particularly in the new and administratively fluid ministries but in some older ones too, ministers could play a virtuoso role, making important decisions without being closely checked by the cabinet as a whole, by the senior bureaucrats of their ministry, or by their respective parties. They could issue ministerial regulations on a wide range of subjects. Sometimes without anyone outside their ministries knowing that a particular regulation had been made or what it involved. They could exercise a broad degree of discretion as regards the distribution of funds and the \textit{How} of patronage. And they had considerable freedom in the matter of appointments and transfers. In all these ways they could help not only their parties but also their own group of friends, associates, and followers. Thus it mattered a great deal who were the individual occupants of ministerial portfolios.”

\(^{499}\) Article 79 of the UUDS 1950 (Appendix 3).

\(^{500}\) Article 81 of the UUDS 1950 (Appendix 3).

\(^{501}\) Article 83 section 1 of the UUDS 1950 (Appendix 3).
possible if the President was able to conduct an election of the new House of representatives within 30 days.  

In terms of law-making power, the Constitution implied that the President had significant power in the legislation-making process. It was stipulated in Article 89 that “the legislative power was held by the President (the government) jointly with the DPR.” The President (the government) had the power to propose a bill of legislation through presidential message to the DPR. On the other hand, the DPR had also the power to propose legislation to the government. On the President’s bill, the DPR had the right to make changes. In further stages, whether the DPR accepted or rejected the proposal of legislation, the DPR should notify the President. If the process continued, the proposal would be sent to the President and validated by the President (the government). During the process, if the proposal of the legislation was not accepted by the DPR, the government could withdraw it.

The legislation had the function to order state institutions and to regulate certain subjects. It was also an important instrument for the government in running the state administration. Article 113 stipulated that the budget of the state expenses and the state income can only be decided by legislation. The bill for the state budgetary legislation was proposed by the government to the DPR. The proposal of the legislation indicated that the calculation of the budget should be validated by the Council of the Financial Supervisor and in the end the government in spending the money should be responsible to the DPR.

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502 Herbert Feith, Op. Cit., p. 96, “It was said in Article 84’ of the Constitution that "the President has the right to dissolve the House of Representatives," but also, in the next sentence, that "the Presidential Decree announcing such dissolution shall also order the election of the new House of Representatives within 30 days." Thus it appeared, at least to one major school of constitutional interpretation, that dissolution was possible only in situations where it was feasible to elect a new House within 30 days.”
503 Article 90 of the UUDS 1950 (Appendix 3).
504 Article 91 UUDS 1950 (Appendix 3).
505 Article 92 of the UUDS 1950 (Appendix 3).
506 Article 93 the UUDS 1950 (Appendix 3).
507 Article 94 of the UUDS 1950 (Appendix 3).
508 Article 99 section 1 UUDS 1950 (Appendix 3).
509 Article 114 of the UUDS 1950 (Appendix 3).
510 Article 116 of the UUDS 1950 (Appendix 3).
being a tool to legitimise the state budget, the legislation was the instrument for the government to impose taxes and customs.\textsuperscript{511}

Other presidential law-making power could be determined by Article 96. According to the Article, the government had the power to set Emergency Laws.\textsuperscript{512} During the next DPR’s session, the Emergency Law should be proposed to the DPR. This way, the Emergency Law was based upon the proposal of legislation from the government. However, if it was rejected, the law would be legally invalid.\textsuperscript{513} However, the Article did not explicitly specify the presidential power in the process. It only generally referred to the government in general.\textsuperscript{514}

The President as the head of the state had the right to give honorable decorations.\textsuperscript{515} In other area, still in the role as the head of the state, the President was granted the power of pardoning, amnesty, and abolition.\textsuperscript{516} The power could only be exercised after getting advice from the Supreme Court. The Constitution also determined that the government held the power in general financial affairs.\textsuperscript{517} On the other hand, the financial management power was constitutionally checked by a financial supervisory council and further, the result would be communicated to the DPR.\textsuperscript{518} In daily state management, the Constitution gave the right to the government to make any arrangement for the state’s financial benefit. Article 118 Section 2 of the UUDS 1950 stipulated that the government had the right according to the laws to issue the currency and treasury promissory notes. In official daily management, Article 119 section 1 of the UUDS 1950 clarified that the government had the right to determine the salary and other incomes for state officials and members of state institutions according to the laws.

Chapter V of the Constitution determined the constitutional basis for the foreign affairs power of the President and the government in general. According to Article 120 Section 1 of the Constitution, the President had the power to make and ratify treaties and other agreements

\textsuperscript{511}Article 117 of the UUDS 1950 (Appendix 3).
\textsuperscript{512} Article 96 section 1 and section 2 of the UUDS 1950 (Appendix 3).
\textsuperscript{513} Article 97 of the UUDS 1950 (Appendix 3).
\textsuperscript{514} Article 98 of the UUDS 1950 (Appendix 3).
\textsuperscript{515} Article 87 of the UUDS 1950 (Appendix 3).
\textsuperscript{516} Article 107 of the UUDS 1950 (Appendix 3).
\textsuperscript{517} Article 109 section 4 of the UUDS 1950 (Appendix 3); Article 111 section 1 of the UUDS 1950 (Appendix 3)
\textsuperscript{518} Article 112 section 1 of the UUDS 1950 (Appendix 3).
between states. Furthermore, Section 2 of the Article emphasized that the President, through Legislation, also had the power to decide treaties and other agreements to be concluded. With regard to state participation in International organizations, Article 121 stipulated that according to the treaties and other agreements determined by Article 120, the government had the power to decide that the Republic of Indonesia should enter into an international organization. In other diplomatic affairs, Article 122 of the UUDS 1950 constitutionally empowered the government to undertake any measures in order to peacefully resolve a conflict with other states. In respect to that, the Constitution also provided constitutional options for the government to decide whether or not to ask for or accept the International Court or International arbitration. In term of international relations, the UUDS 1950 gave the president the power to appoint the representatives of the Republic of Indonesia to other states and to accept other states representatives to the Republic of Indonesia.

With regard to the state defense, Article 126 section 1 of the UUDS 1950 stated that the government held the state defense affairs. Under the Constitution, in time of war, the President had the power as commander in chief. In general conditions, the President held the highest power of the Army of the Republic of Indonesia. The same as in the KRIS Constitution, the UUDS 1950 granted the President the power to declare war. However, this power could only be exercised with the permission of the DPR. In other situations of emergency, unlike the KRIS Constitution that explicitly mentioned that the government had the power to deal with the emergency situation, the UUDS 1950 indicated that the President had the power to declare that the Republic of Indonesia or part of the state territory was in an emergency situation. The declaration of the state emergency could be made with the assumption that the state security, public interest and international security in general was threatened by a dangerous situation.

- Executive immunity

519 Article 120 Section 1 the UUDS 1950 section 1 (Appendix 3).
520 Article 120 section 2 of the UUDS 1950 (Appendix 3).
521 Article 123 of the UUDS 1950.
522 Article 127 section 1 – section 3 of the UUDS 1950 (Appendix 3).
523 Article 128 of the UUDS 1950 (Appendix 3).
524 Article 129 section 1 of the UUDS 1950 (Appendix 3).
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The similarity between the KRIS Constitution and the UUDS 1950 could also be seen from the presidential immunity’s provision. Article 106 Section 1 explicitly expressed that the President in office could be prosecuted before the first and the highest Supreme Court. The prosecution could also be started after the resignation of the President. The grounds of the prosecution could be crimes and other violations that had been committed by the President during his office.525

- Check and balance against the presidential power under the UUDS 1950

The Constitution recognized the DPR in Article 56 as the state institution representing all the Indonesians. Article 69 Section 1 stipulated that the DPR has the right of interpellation and right to question; each of the members had the right to do so. According to Article 70, the DPR had also the right to investigate (enquete right). In return, it was clearly stated that the ministers had the constitutional duty to give the DPR all written and unwritten explanations which were required by the DPR.526 However, the explanations should not be contradictory to the public interest of the state. In case that the explanation contradicted the public and state interest, the ministers had the right to ignore the DPR inquiry. Unlike other Constitutions, the UUDS 1950 gave the power to the President to dissolve the DPR.527

In practice, the temporary Constitution of 1950 had replaced the parliamentary Constitution of KRIS 1949. Although the text of the Temporary Constitution was imported from the KRIS Constitution, the text gave a different power to the President. In general, the power of the President was not really strong. Since it was said that the system was parliamentary democracy, the President was said to be only a figurehead position. Article 52 implied that the ministers in the Ministerial council led by the Prime Minister had an important position in state administration.528

525 Article 106 section 1 of the UUDS 1950 (Appendix 3).
526 Article 69 section 2 of the UUDS 1950.
527 Article 84 of the UUDS 1950 (Appendix 3).
528 Article 52 of the UUDS 1950 (Appendix 3).
Article 85 stipulated that all the Presidential Decrees including those regarding the performance of the Presidential military powers should be counter-signed by the ministers.\(^{529}\) The Article limited the presidential power for only formal powers concerning the appointment. With regard to the formal appointment, the President only acted formally and in accordance with the recommendation of the Cabinet Committee (a committee to establish the cabinet and appoint ministers) and the recommendation of the House of Representatives (on the appointment of the vice president). However, in practice, the position of President Soekarno during the period was stronger because of the support from the army commander and vice versa the President used his influence for the army organization.\(^{530}\) On the other hand, the cabinet did not really gain much support from the army.\(^{531}\) The relationship between the President and the cabinet could be seen in two perspectives. One perspective, though the President did not have direct power to establish the Cabinet instead of through the Cabinet maker, the President could still use his influence since the makers were appointed and associated with the President.\(^{532}\) Another perspective was that the Cabinet had a kind of mutual relation to the President in fact the existence of the Cabinet was greatly supported by the President.\(^{533}\) During the period of the Wilopo Cabinet, the Presidential dissolution power had been challenged by the situation of parliament and cabinet deadlock; however, it did not happen and was ended by a new Cabinet.\(^{534}\)

\(^{529}\) Article 85 of the UUDS 1950 (Appendix 3).
\(^{530}\) Herbert Feith, *Op. Cit.*, p. 250, "Many of the personnel changes which the army leaders had effectedit in 1951 and the first half of 1952 had clearly lessened his influence within the army, and on at least one occasion in 1952 he had intervened against the army leaders’ personnel policy by refusing to sign a decree.
\(^{531}\) Herbert Feith, *Op. Cit.*, p. 172, “in the months of January, February, and March 1951 Prime Minister Natsir obtained considerable support from the army leaders in his covert struggle with the President. It was an early manifestation of what was to become a characteristic situation of the politics of our period, the situation where the two chief extra parliamentary centers of power, the President and the army, were pulling the contenders in the cabinet-parliament arena in opposite directions. But, whether because of the army leaders’ disinclination to use their influence too openly-perhaps the result of internal army division or because of a reluctance on Natsir’s part to allow them to enter too far into civilian and constitutional politics, army support was not forthcoming on a scale sufficient to counter-balance the pressures exerted by the President.”
\(^{532}\) Herbert Feith, *Op. Cit.*, 214, “Both of the formateurs were long-time associates of the President, and most of the principal figures in the cabinet, men such as Suwirjo, Iskaq, and Subardjo, had likewise long been tied to Soekarno as associates or supporters.
As the issues at the time were about economic issues and capitalism, the Government had control over the economy and finance. During that period of 1950, Indonesia was suffering a deteriorating economic situation. To overcome the situation, the Government mostly used their power to reduce the number of people on the public payroll, raise efficiency and reduce the drain on the national budget, even though, it was unsuccessful. The Prime Minister at the time dominantly tried to overcome the government affairs. The crisis came from not only the economic situation but also from the territorial sovereignty dispute. For example, the territorial dispute issues of Irian Jaya. In this case, the Prime Minister had the role to politically negotiate. At the time, Prime Minister Ali Sastroamidjojo had a great influence in particular in foreign affairs. He initiated the establishment of the Asia-Africa bloc, the non-alliance states movement. On the other hand, in the spirit of revolution, President Soekarno introduced “guided democracy”.

During the period of 1956-1957, after the election of 1955 and as a consequence of the election result (on the issues of the geographical division and the resignation of Vice President Hatta in 1956), a group of regional military commanders in Sumatera and Sulawesi seized power from the local civilian administrations appointed by Jakarta and set up their own administration. This situation called President Soekarno to declare a state of martial law across Indonesia. However, the effort taken had failed to overcome the rebels. This situation compelled President Soekarno to authorize the army to take military action.

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535 Colin Brown, Op. Cit., p. 190 – 191: “...the guided democracy was a system of government in which the parliament was to play a relatively small role, as were most political parties, with the increasingly important exception of the Communist party. It was a system that saw the Indonesian army consolidate its position as a major political force.”


537 Colin Brown, Op. Cit., p. 188.

538 See more: Colin Brown, Op. Cit., p. 188: “On 15 February 1958, the establishment of the Revolutionary government of the Republic of Indonesia (the PRRI: the Pemerintah Revolusioner Republik Indonesia) was proclaimed in West Sumatra. Two days later, the rebels from Sulawesi also joined the PRRI. They were not seeking separation from Indonesia but rather its reform. The situation provoked President Soekarno to authorize General Nasution (Army Commander) to take military action and resulted with victory for the central government. The victory strengthened the President Soekarno’s position and brought him the opportunity to move forcefully against his opponents. In 1960, Soekarno had banned two of the political parties as his opponents (the Masjumi and the Indonesian Socialist Party), which had expressed the strongest opposition to his proposal for a reorganization of the Indonesia political system.
The executive power during the period was also challenged by foreign policy issues, particularly the effort to get international recognition for Indonesia. On the one hand, the president had to deal with the politics of nationalization of company affairs within the Indonesia territory by expelling foreign influence in domestic businesses.\(^{539}\) On the other hand, the presidential diplomatic power was challenged by the war with the West Irian territory.\(^{540}\)

In general, according to the constitutional practices during this period, the power and the role of the President were merely within the scopes of nominal power rather than real power. However, there were many influences on state affairs by the President on the basis that the President was not only the symbol of the state but also a revolutionary leader. The situation sometimes provoked clashes between the President and the Cabinet.\(^{541}\) In the period of the Wilopo cabinet, the President indicated his reluctance to work with the cabinet.\(^{542}\)

During the period, the situation was even more complicated since the Konstituante (the Constituent Assembly), established by the first election on 1955 had unsuccessfully drafted a permanent Constitution for Indonesia. This situation provoked Soekarno to formally propose the re-instatement of the first Constitution of 1945. Since the presidential proposal to re-adopt the Constitution was never agreed by the Konstituante, this situation prompted President

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\(^{539}\) Colin Brown, *Op. Cit.*, p.191: “President Soekarno had decided to announce that Indonesia follow a new course of action in trying to recover the territory, putting direct pressure on the Dutch by a campaign against Dutch business interests in Indonesia. As a consequence, the major Dutch businesses were taken over in most instances by their employees, although all eventually came under government or military control. Dutch nationals were subjected to public harassment, and most were finally expelled from Indonesia. Mass rallies and parades were held in cities, towns, and villages across Indonesia, demanding that the Dutch get out of the territory.”

\(^{540}\) Herbert Feith, *Op. Cit.*, p. 318: “At the same time the cabinets did not engage in dramatic foreign policy activities or attempt to evoke excited responses at home to their roles in the international arena. In handling the Irian question, they did their best, within the limits of their relationship to President Soekarno, to discourage agitational support of the claim.”


\(^{542}\) Herbert Feith, *Op. Cit.*, p. 244 – 245, “The President had certain personal reasons to feel antagonistic toward the Wilopo cabinet. The cabinet contained a number of the men with whom he had come into conflict in the period of the Natsir cabinet, and it indicated as soon as it had taken office that it would insist, as the Natsir cabinet had (and the Sukiman cabinet had not), on a sharp limitation of the President’s prerogatives. The matter came to the fore at the very beginning of the Wilopo cabinet’s period of office when the cabinet obliged the President to cancel arrangements made by him and the ex-Foreign Minister, Subardjo, for a presidential visit to Italy.”

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Soekarno to issue the unilateral presidential decree on the re-instatement of the first Constitution of the UUD 1945.\textsuperscript{543}

Constitutionally, according to Article 134 of the temporary Constitution of UUDS 1950, the \textit{Konstituante} together with the President would promptly set the Constitution. The Constitution was expected to replace the temporary Constitution of UUDS 1950. First after the 1955 general election for the \textit{Konstituante}'s members, on 10 November 1956, President Soekarno opened the first session of \textit{Konstituante} in Bandung. Since then, there were serious debates in drafting the state principles within the \textit{Konstituante}. This situation led to a deadlock. On 19 February 1959, the Cabinet Djuanda took the position to decide the government mandate to re-instate the Constitution of UUD 1945. The mandate was stated in the Government Decree of 19 February 1959 with the argument that the debate within the \textit{Konstituante} had a significant influence on the people and had potentially created conflict caused by the deadlock. On behalf of the government (the administration), President Soekarno delivered the president and government’s recommendation to re-instate the Constitution of UUD 1945 on 22 April 1959. There were three points made by the President: 1. the re-instatement of the Constitution of UUD 1945; 2. the re-instatement of the Constitution procedure; 3. the consolidation of the functional faction into the DPR. It was stated by the President that the Constitution of UUD 1945 was a democratic Constitution and reflected the identity of the nation. At this point, President Soekarno also introduced guided democracy, which was determined as a suitable democracy that should be adopted by Indonesia. It was based on the key principle of deliberation and wisdom. The President accordingly would appoint capable person as his assistants. However, the President and his assistants were responsible to the MPR. The presidential and government recommendation did not work at all since there were still debates within the \textit{Konstituante} in the deal to re-instate the Constitution of UUD 1945. This deadlock had provoked President Soekarno to issue a presidential decree to impose the re-instatement of the Constitution of the UUD 1945. The grounds of the Presidential Decree were mostly because the \textit{Konstituante} did not respond to the Presidential and

government mandate to re-instate the Constitution of UUD 1945; On the other hand, the *Konstituante* had been considered to fail in performing their duty to set the new Constitution. To this extent, the President assumed that such constitutional problems would significantly impact the state emergency. On the main basis of protecting of the state and the people, President Soekarno delivered the Presidential Decree to re-instate the Constitution of UUD 1945, dismiss the *Konstituante*, and thus, dismiss the temporary Constitution of the UUDS 1950. Furthermore, the President also set the establishment of the temporary MPR and the temporary DPA.

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3.5. The Indonesian Constitution under the UUD 1945 (the period of reinstatement of the UUD 1945 after the temporary Constitution of 1950)

e. Executive power under the UUD 1945: Soekarno administration (1959 – 1968)

Textually, the executive power under the Constitution of UUD 1945 that was re-instated by President Soekarno with the Presidential decree 1959 was the same as the executive powers in the Constitution of UUD 1945 that was enacted after the unilateral independence proclamation. However, during Soekarno’s administration, the executive powers had been exercised unlawfully. Many constitutional violations were made by President Soekarno. The President used the power to appoint the Chairman of the MPRS, the Chairman of the DPRGR, the Vice Chairman of the DPA and the Chairman of the Council of National drafting committee as the main first vice minister. On the other hand, the Vice chairman of MPRS and the vice chairman of DPRGR were appointed as ministers. Another constitutional violation could be seen in the Decree of MPRS III/1963 concerning the presidential appointment for long-life tenure. These constitutional violations provoked a constitutional crisis in terms of the presidential leadership.

In practice, it was observed that President Soekarno was the sole interpreter of the revolution; he used his power to deal with the revolution era. The President had a strong

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*the President  
**the government

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544 The MPRS was the temporary MPR (the People Representative Assembly), the DPRGR was established by the President since the DPR (as a result of the first election 1955) did not approve the government’s proposal on state budget. To this extent, the President established a new DPR which was named as DPRGR (the mutual aid of Council of people representative). All the members of the DPRGR were appointed by the President. The President also set all the rules with regard to the DPRGR.  
545 Ismail Suni, Op. Cit., p. 204-205.  
546 L.C. Green, Op. Cit., p. 71 “Soekarno calls for an abandonment of the rule of law at home when it appears that legal principles may hinder the personal ambitions of one who regards himself as the personification of a
In this period, the presidential power also dealt with the rebellion movement. In 1962, the President used his emergency power to declare the end of martial law as the rebel leader of DI/TII, Kartasuwirjo had been captured and the end of the West Irian campaign had deprived the army of their intention to maintain martial law.\footnote{548}

Another constitutional crisis was also caused by political tension especially after the Indonesian Communist Party insurgency. In this period, Indonesia suffered from political and economic devastation, but President Soekarno ignored the political and economic crisis but was concerned by the conflict between Indonesia-Malaysia. As the tension was getting worse, the people demanded that President Soekarno overcome the conflicts and the crises. However, because of the political tension, the President was in a difficult position to determine the solutions. In general, Herbert Feith stated that during this period, the presidential power was dominantly agitational politics and characterized to be more progressive.\footnote{549} Still according to Soekarno’s concept of guided democracy, a democracy with leadership, President Soekarno revived the idea of the establishment of a new National Planning Board.\footnote{550}

\footnote{547}Herbert Feith, \textit{Op. Cit.}, President Soekarno, the Army and the Communists: the Triangle Changes Shape, \textit{Asian Survey}, Vol. 4, No. 8 (August, 1964), University of California, pp. 969 – 980, Accessed on 10/11/2012, p. 969: “On June 23, 1962, Major-General Achmad Yani replaced General A. H. Nasution as Chief of Staff of the army, with Nasution assuming the new position of Chief of Staff of the armed services, as well as remaining Deputy First Minister for Defense and National Security. This represented a major increase in President Soekarno's influence within the army”.
\footnote{548}Id. at p. 971.
\footnote{549}Id. at p. 978: “the President’s power has always rested in large part on agitational skills and his moves to the left in the last two years can be explained partly as a requirement for the maintenance of agitational politics: forced to choose between economic stabilization and an ongoing struggle against neocolonialist Malaysia, he chose the latter, alienated the West and so had to align himself with the Communists. It may well be that Soekarno's actions in the last two years have been as much role-determining as role-determined, that he has been secure enough in his position in this recent period to be able to fashion policies partly on the basis of his ideas and attitudes about the future. It is often said that the President is deeply concerned with the question of how history will regard him. He certainly has considerable admiration for Communist regimes. And he is a man with a progressive and profoundly historicist view of history, consequently, a man who is likely to be unhappy about the possibility of being succeeded by any regime which he would see as reactionary.”
\footnote{550}Justus M. van der Kroef, “Guided Democracy in Indonesia”, \textit{Far Eastern Survey} Vol. 26 No. 8 (August 1957), pp. 113 – 124, Institute of Pacific Relations, accessed 02/11/2012, p. 115, “At that time the President also revived an earlier idea: the establishment of a new National Planning Board, to supersede the present National Planning Bureau, which has no “over all planning function.”
In general practice, the executive powers used by President Soekarno also had to deal with the lack of international awareness specifically on the Indonesian position against the cold war. On a domestic level, crisis still came from the issue of the Indonesian territory in particular Irian Jaya. In other International issues, President Soekarno used the power to make a foreign affairs policy in confronting the Federation of Malaysia. He continued to set a diplomatic foreign policy against Malaysia and proclaimed the Indonesian position against the establishment of the Federation of Malaysia. The confrontation provoked Soekarno to use his power to show the commitment of anti-colonialism and anti-communism to the International community. However, it changed as President Soekarno had his new doctrine about Indonesia’s position in the world. In the other issues of international relations, still relevant to the Malaysian issue, President Soekarno used his power to withdraw from the UN in 1964. President Soekarno even issued foreign policy to break off the link with some International organizations. Soekarno also employed his executive power to express

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551 Colin Brown, Op. Cit., p. 192: "Under Sukarno, there seemed to be a real likelihood that Indonesia would throw its lot with the communists, especially and most dangerously with China, with potentially disastrous consequences for American strategy in Asia. Sukarno thus had to be diverted from the communists, to be shown that he had more to gain from friendly relations with Washington than with Beijing."

552 Id. at p. 193, .."with his new approach to the Irian Jaya issue, Soekarno had given the people the sense that they were participating in a great crusade against colonialism; a crusade not just national but also international in its reach. The campaign was also important in cementing the unity of the Indonesian nation, so recently under challenge in Sumatera and Sulawesi. Virtually no identifiable group in the community opposed it: communists, Muslims, military leaders and politicians of all persuasions participated in the struggle. The contrast with the divisive politics of the parliamentary democracy period was striking.”

553 Id. at p. 193-194.

554 Id., "in January 1963, Foreign Minister Subandrio announced Indonesia’s opposition to the plan, proclaiming: "The President has decided that henceforth we shall pursue a policy of confrontation against Malaya . . . we have always been pursuing a confrontation policy against colonialism and imperialism in all its manifestations. It is unfortunate that Malaya, too, has lent itself to become tools of colonialism and imperialism. That is why we are compelled to adopt a policy of confrontation."


557 Colin Brown, Op. Cit., p. 195, “At the end of 1964, Sukarno withdrew Indonesia from the United Nations in protest at Malaysia’s election to a seat on the Security Council. By the time the first major blow fell against the Sukarno regime in 1965, despite having been in progress for two years the ‘crush Malaysia’ campaign was to all intents and purposes stymied”.

558 M.C. Ricklefs, A History of Modern Indonesia since c.1200, 3rd Edition, Palgrave Macmillan, 2001, p. 338, In August 1965 Sukarno withdrew Indonesia from remaining links with the capitalist world (International Monetary Fund, Interpol, World Bank). When Lee Kuan Yew tearfully announced Singapore’s separation from Malaysia on 9 August, Sukarno viewed this as confirmation of the righteousness of confrontation. But Singapore’s separation also
Indonesia’s position on issues such as colonialism and imperialism and other issues related to American’s foreign policy and its interest to regional Asia.\textsuperscript{559} It implied that the presidential foreign affairs powers were used to indirectly secure the position of the President.\textsuperscript{560} On the treaty making power, the presidential power was exercised in accordance with the domestic policy on “friendly Chinese policy” that the President Soekarno had for ethnic Chinese in Indonesia.\textsuperscript{561} The regime of Soekarno administration came to an end as not only the conflict between the two political forces of army and Communist Party (PKI: Partai Komunis Indonesia) had risen but also from the guided democracy which he campaigned for and further resulted in the banning of the Communist Party in Indonesia.\textsuperscript{562} The conflict was marked by the 30 September movement of such a scenario of a coup d’etat and rendered what was called the transitional authority from the Soekarno administration to the Soeharto era.\textsuperscript{563}

\subsection*{f. Executive power under UUD 1945: Soeharto administration (1968 – 1998)}

In 1968, the transitional period of regime from the Soekarno to Soeharto administration was virtually complete by a mandate in which president Soekarno gave temporary authority to


\textsuperscript{560}Herbert Feith, \textit{Op. Cit.}, p. 979, “President Soekarno is probably restrained from making moves in the direction of Cuba-like dependence on the Communist countries by fear that such moves could alarm powerful elements in the Indonesian army and add to their willingness to support some sort of coup against him”.

\textsuperscript{561}Colin Brown, \textit{Op. Cit.}, p. 196: “Indonesia’s ethnic Chinese population experienced decidedly mixed fortunes during the guided democracy period. Sukarno himself was not anti-Chinese. Indeed, in a country where anti-Chinese outbursts from national leaders were distressingly commonplace, he stands out as having supported full membership of the Indonesian national community for citizens of ethnic Chinese descent. And the increasingly close relations between Indonesia and China, especially in the 1960s, meant that, at least at the public political level, being of ethnic Chinese descent was not a handicap. A Dual Nationality Treaty had been negotiated between China and Indonesia in 1955, the object of which was to resolve once and for all the question of the nationality of ethnic Chinese in Indonesia.”

\textsuperscript{562}Colin Brown: \textit{Op. Cit.}, p. 198, “the end for the Soekarno regime came in the mid-1960s, largely as a result of the rising conflict between the two political forces which apart from Soekarno himself had gained most from guided democracy: the communists and the military.

\textsuperscript{563}Id, Other troops seized control of the centre of Jakarta and broadcast a statement in the name of what they termed the ‘30th September Movement’, saying that they had acted to protect the President from a coup d’état being planned by right-wing generals in the pay of the CIA.
Soeharto. The new administration led by Soeharto was called the “New Order” era. Under the Constitution of UUD 1945, the Soeharto administration campaigned to implement the Constitution genuinely and consequently. The focus of the executive powers was addressed to set the achievement of political and economic stability, and further the economic development by its major broad policy objectives. In many issues, President Soeharto used the executive power under the Constitution as a tool to create his own political system and secured his political office. Even so, Soeharto had the same belief as Soekarno that Indonesia should have its own political system. With regard to the foreign affairs power, Soeharto used his power through his foreign policy which was rather different from that of Soekarno’s. Unlike Soekarno’s foreign affairs power that had already been used to raise international recognition of Indonesia’s position as a state; the Soeharto’s foreign affairs power aimed at promoting Indonesia in the regional forum. Not only regionally, Soeharto also expanded his foreign policy byestablishing a good diplomatic relationship with all states. He had also a significant policy

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564 It was called “SUPERSEMAR” of Surat Perintah 11 Maret, the mandate from President Soekarno to Soeharto to exercise temporary authority in Soekarno’s name on 11 March 1966. Further on, Soeharto became the President replaced Soekarno in 1967.


566 Id. at p. 204, “While in political terms Suharto may have differed from Sukarno on many issues, one thing they shared was the belief that western political systems would not work in Indonesia. Suharto set out to create his own political system, which maintained a fine balance between allowing a degree of public debate on political issues and at the same time ensuring that his government’s control over political power was not threatened.”

567 Id. at p. 208, Sukarno’s foreign policy had been activist and global in its scope and, in the later years of guided democracy, increasingly aligned with China. Sukarno saw himself as a world figure, the leader of Southeast Asia. Suharto’s foreign policy was much less visible, and regionally rather than globally directed. Suharto government ended confrontation with Malaysia. It also froze diplomatic relations with China, alleging that Beijing had supported the PKI’s coup attempt. Relations with China were not normalized until August 1990. In 1967 Indonesia joined with Malaysia, Thailand, Singapore and the Philippines to form the Association of Southeast Asian Nations (ASEAN). Brunei, Burma, Cambodia, Laos and Vietnam subsequently joined the group. There is little doubt that most Indonesian politicians saw their country as the natural leader of ASEAN; nonetheless, the government went out of its way on most issues to avoid the appearance of dominating the association.

568 M. C. Ricklefs, Op. Cit., p. 391: In 1989 he made a state visit to the USSR, already teetering on the brink of collapse. What he saw presumably enhanced his determination to avoid similar events in Indonesia. He also normalized Indonesia’s relations with China that year. He and Chinese Premier Li Peng exchanged visits in 1990 and Jakarta received the first Palestinian ambassador to Jakarta, all steps enhancing Indonesia’s standing in the Non-Aligned Movement. In September 1991 Indonesia was elected to the Movement’s presidency and the following year its summit meeting was held in Jakarta.
to stop foreign financial aid from other states.\(^{569}\) During Soeharto’s administration, Soeharto intervened in the independence of the Central Bank by directly steering its policy.\(^{570}\) Later on, the policy induced the scandal (known as “BLBI\(^{571}\) scandal”).\(^{572}\) On other fields of the political system, President Soeharto used his power to intervene in political parties by simplifying the political parties and merging the Islamic political parties into one party of PPP.\(^{573}\) Since then, there have only been three political parties in Indonesia, the PPP, Golkar, and PDI. This was done as an effort to consequently confirm the commitment of non-sectarianism and to genuinely implement “Pancasila”, as the basic of the state. Furthermore, as he had a military background in his whole career, Soeharto was fully supported by the military (army police namely ABRI/ Angkatan Bersenjata Republik Indonesia/Republic Indonesia Armed forces).\(^{574}\) To

\(^{569}\) Id. at p. 396, In early 1992 the Dutch government, which chaired the IGGI consortium, made it clear that it thought aid to Indonesia should be linked to an improved human rights performance. Soeharto’s response reflected his estimation of his own and his nation’s standing. He thereby effectively abolished the group that had channeled aid to Jakarta for 25 years.

\(^{570}\) Kevin O’Rourke, Reformasi: The Struggle for Power in Post Soeharto Indonesia, Allen&Unwin, 2002, p. 49, “The minister of finance, Mar’ie Muhammad visited parliament to fulfill a summons for testimony. Parliament had always been a rubber-stamp body, but occasionally it would exert its constitutional privilege to question policymakers—partially when those policy-makers had fallen out of favor with Cendana. On this occasion Muhammad was questioned about rumors that BI had been quietly lending out large sums over the past two months—in contravention of its own tight monetary policy. In particular, parliamentarians questioned whether it was true, as they had ‘heard’, that BI had disbursed some Rp8 trillion (or around $2.4 billion at prevailing exchange rates) to five large banks. Muhammad refused to answer. In a cabinet meeting on 3 September 1997, Soeharto instructed the minister of finance Mar’ie Muhammad and the chief of bank central, Djiwandono to lend central bank funds to such cash-strapped banks, lest they default on their depositors.

\(^{571}\) The BLBI was a scheme from the Indonesia Bank to give liquidity aid to 48 banks in Indonesia as a result of banks in Indonesia suffered from liquidity problems in 1998. The Scheme was given in accordance to the Indonesia-IMF agreement to overcome the economic crisis. However, the scheme was indicated as diverted and blown up as a scandal. The scandal had indicated the involvement of some state officers which led to the corruption.

\(^{572}\) Id. at p. 60, “the instructions that Soeharto issued to BI on 27 December were sent by letter through State Secretary Moerdiono. The letter was marked confidential, but a parliamentary investigation later discovered that copies were leaked to certain bankers.”

\(^{573}\) Colin Brown, Op. Cit., p. 202, “In 1973, Suharto took explicit action against the four Muslim political parties then still in existence, including the long-standing Partai Sarekat Islam Indonesia and the Nahdatul Ulama. These four parties were required to amalgamate in the United Development Party, the Partai Persatuan Pembangunan (PPP), which was, however, denied the right to use Islamic symbols or even to call itself an Islamic party: its philosophical base was to be the Pancasila with its non-sectarian commitment to belief in one supreme god.”

\(^{574}\) M.C. Ricklefs, Op. Cit., p. 372, The central pillar of the Soeharto regime was the military, known in Indonesia as ABRI (Angkatan Bersenjata Republik Indonesia, Armed forces of the Republic of Indonesia). ABRI consisted of four services: army, navy, airforce and police. Soeharto brought to the Presidency an understanding of military personnel and politics which he employed throughout his time.
this extent, the simplification of the political party was also mainly to undermine potential non-military opponents and control Golkar as a dominant political party which supported him.575 Moreover, his intervention to one of Golkar’s party rivals whom he assumed to be serious political challenges for his position was implicated through violence. An attack had been launched on one of political parties headquarter (the PDI’s) by the Soeharto regime.576

During the administration, there were many cases of communal and religious conflicts. To overcome conflicts, Soeharto used his military power by mobilizing military forces. The executive powers during Soeharto’s administration also faced challenges on particular issues of state territory and separatism. The territorial issues came from the East Timor integration. In 1975, under Soeharto’s administration, there was a military operation called “Seroja operation”. The military operation invaded East Timor in order to integrate East Timor under Indonesia rule. Eventually, in 1976 the loss of Fretellin as the political party that ruled in East Timor and support from the International community ended with the East Timor integration. During the invasion, it was believed that many human rights violations had occurred. Soeharto’s administration was accused of responsibility for human rights violations during the Seroja military operation. Also, Soeharto used his power to deal with separatism in Aceh. Conflict against the issue of the Aceh Independence movement by GAM (Gerakan Aceh Merdeka) provoked Soeharto to mute the separatism movement. Soeharto proclaimed Aceh to be a Military Operations Area (Daerah Operasi Militer/DOM), proclaimed that part of the state (the province of Aceh) was under a state emergency, enforced the emergency/special law and gave a broad mandate to the Army.577 In economic development, Soeharto used the constitutional economic provision of Article 33 UUD 1945 to stir the economic sectors such as investment, production, taxes, mining, commercial agriculture, and other sectors.578 In many economic sectors, Soeharto used his powers widely to not only boost the Indonesia economy but also

575Id. at p. 397: “Soeharto sought tighter control of Golkar and to undermine potential non-military opponents.”
576Kevin O’Rourke, Op. Cit., p. 1, “Raid PDI Headquarters” That simple command, issued by President Soeharto to his security forces in July 1996, triggered the extraordinary political power struggle that would consume Indonesia for years to come.”
578Article 33 of the UUD 1945 had been interpreted that all sectors that .... was dominated by the government.
abused his power to benefit his family and his cronies. In brief, the executive powers had been misused during the Soeharto administration. It had mostly led to some serious corruption cases in Indonesia. It weakened all the institutions under his administration. In practice, it was known that Soeharto had dominated all institutions. As the President, he controlled all state institutions and all state sectors. In January 1998, there was a great financial crisis followed by government collapse in Indonesia. Such a situation caused a constitutional crisis. Soeharto tried to maintain his position by creating a new Cabinet.

g. Executive power under the UUD 1945 (the Habibie administration) (1998 – 1999)

The period of the Constitution of the UUD 1945 entered a new phase after the fall of the Soeharto administration. After the resignation of Soeharto, Vice President, Habibie, succeeded Soeharto as the Indonesian President. The executive power during the Habibie administration was still under the Constitution of UUD 1945 and was mainly used to support the reformation agenda in an interregnum. Unlike during the Soekarno administration and the Soeharto administration, during the Habibie administration, the executive powers were mainly used as a tool to appease the Indonesian people for a political change and new arrangements in all sectors. Habibie used his presidential pardoning power to grant amnesty and abolition for all...
political prisoners prosecuted during Soeharto’s administration. In all sectors, though Habibie was not really successful, Habibie used his presidential power to appease public demands to redress the state stability that was shattered by corruption, improve law enforcement, and reveal human rights violations during Soeharto’s administration. Habibie used his power to terminate the state of emergency in Aceh including the abolishment of the application of the military operation and the emergency law that had been applied during the Soeharto administration. One of the remarkable issues during Habibie’s administration was the decision for a referendum to decide the East Timor independence or integration. However, there were also some human rights violation issues in which Habibie was strongly presumed to be a person who was responsible for the violations during the referendum in East Timor. This was because he was the president at that period, and constitutionally, he was the Commander in chief mobilizing the Indonesian military action with such terror, violence, and actions of the troops under the Indonesian military. On the basis that he was the Commander in chief, fingers were pointed that he knew all the actions addressed to undermine the referendum. With regard to the military relationship, Habibie fully relied on mutual dependence with the military forces. During Habibie’s administration also, the ABRI (as the military forces in Indonesia) was

584 M.C. Ricklefs, Op. Cit., p. 414, “Habibie began releasing political prisoners within weeks of becoming President, a vital step in the direction of both openness and reconciliation. Among them were regional separatists and elderly ex-PKI figures held for over thirty years. Amnesties were granted to H. Mohammad Sanusi and others arrested after the Tanjung Priok incident of 1984, including (post-humously) Hartono Dharsono.”

585 Steven Drakeley, Op. Cit., p. 171, Habibie ended the Military Operations Area (DOM) in Aceh and ordered the withdrawal of combat units, signaling his intention to pursue dialogue and reform in order to redress Acehnese grievances. But the most he was prepared to offer was autonomy within the parameters of his proposed national decentralization measures.

586 Marcus Mietzner, The Politics of Military Reform in Post-Suharto Indonesia: Elite Conflict, Nationalism, and Institutional Resistance, the East-West Center, Washington, 2006, p. 10-11, “The new president relied on support from the armed forces to stabilize his rule, fend off societal challenges to his legitimacy, and prevent individual officers from undermining the reformist policies of his administration. The armed forces, on the other hand, needed the good will of the president, given his constitutional powers to appoint senior military leaders, distribute resources, and set the political agenda. This mutual dependence produced important policy compromises as far as military reform was concerned. Most important, the military was granted the right to formulate its own reform agenda. In return, however, the armed forces had to pledge their support for Habibie and refrain from interfering with the process of political reform. This trade-off was reflected in a number of political events throughout the
separated from the Police. Under the appointment power, Habibie established his cabinet and tried to dismiss Soeharto’s cronies.  

h. Abdulrahman Wahid administration (1999 – 2001)

After one year of his administration, Habibie’s administration conducted a presidential election. The result of the election was Abdulrahman Wahid administration with his vice president, Megawati. Still under the Constitution of UUD 1945, Wahid used his presidential power to fulfill his promise of establishing ministries on behalf of political pluralism and political ally. With regard to the foreign affairs power, Wahid had a controversial vision to use his power to make commercial relations with Israel, which raised criticism from many Indonesian Islamic activists. On the issue of Aceh, Wahid used his power to open peace negotiations with the Aceh Independence movement (GAM). However, the situation in Aceh was even worse since the GAM proclaimed its independence on 4 December 2000 on the 24th GAM’s anniversary. Wahid persuaded Aceh about the referendum; however, the referendum was defined differently from Habibie’s referendum on East Timor. Wahid proposed a referendum for Aceh to use the Shariah Islam (Islamic law) applied in Aceh and gavespecial autonomy to the administration of Aceh as a special province under Indonesia. The initiative for a peaceful dialogue with GAM was taken by Wahid in Geneva on 12 May 2000. The dialogue had generated an agreement that aimed to arrange a temporary halt to hostilities to allow the two parties some breathing space in which to seek some more permanent resolution of their dispute. Further on, Wahid allowed the enforcement of Shariah Islam in Aceh. Other crucial

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second half of 1998. First, Habibie demanded in July 1998 that Wiranto assist in the election of his candidate for the chairmanship of Golkar, the former government party of the New Order.”

587 Michael Malley, “the 7th Development Cabinet: Loyal to a Fault?, Indonesia”, No. 65 (April, 1998), pp. 155 – 178, Southeast Asia Program Publications at Cornell University, accessed: 02/11/2012, p.177, B. J. Habibie announced the formation of the Development and Reform Cabinet on May 22, just a day after he acceded to the presidency. The composition of the new cabinet reflects Habibie’s own interests less than the exigencies of Soeharto’s rapid exit. Major changes to the cabinet include: the replacement of ministers most closely linked to Suharto, including Bob Hasan, Tutut, Fuad Bawazier, and Subiakto Tjakwerdaya; the first appointment of non-Golkar political party members since the 1970s; removal of the central bank governor from the cabinet to enhance Bank Indonesia’s independence; and the recreation of the two state minister portfolios Soeharto had entrusted to coordinating ministers. Of the thirty-seven officials with cabinet rank, sixteen were not members of Soeharto’s last cabinet. Despite these changes, the views of cabinet ministers matter less to Indonesian politics now than under Soeharto, since the momentum for political changes comes almost entirely from outside the government.

588 Muhaimin Iskandar, Gus Dur yang Saya Kenal: Catatan Transisi Demokrasi Kita, LKis, Yogyakarta, 2004, p. 14-18
issues during Wahid’s administration were the separatism movement in Irian Jaya (the OPM) and some multi ethnic-religious conflicts in Maluku, Sulawesi, and Kalimantan. For these reasons, during his administration, Wahid had enforced a state of emergency in some of the affected provinces. As one of the reform agenda was eradicating corruption, Wahid had dedicated his executive power to make efforts on the corruption eradication progress.589

Ironically, in July, 23 2001, alleged corruption in the financial scandal of the Sultan Brunei Darussalam funds for Aceh, and his weaknesses in leading his cabinet, the MPR brought him down. Wahid refused to fulfill his obligation to deliver his accountability speech before the MPR.590 Wahid resisted and issued a presidential decree to freeze the MPR.591 However, it had been ignored and the MPR came to the decision of Wahid’s impeachment.592 During his administration, Wahid faced challenges from the DPR while performing his presidential power.593 Not only often troubled with his policy in which he was always confronted by the DPR, Wahid was also troubled by the army. It was because Wahid came as a civilian to lead the military.594 Wahid even used his power to try to reduce the military influence within his office by appointing a non-military minister of defense (Matori Abdul Djalil) and tried

589Kevin O’Rourke, Op. Cit., p. 363: “The president established various anti-corruption commissions, sacked the Wiranto-era police chief and appointed credible figures to head the state oil and power monopolies, but these were only piecemeal steps. Wahid never presented a coherent strategy for comprehensive legal system reform which was a requisite for a sustainable economic recovery.”

590Id. at p. 407, “When the MPR convened on Monday morning to hear his speech of accountability, he failed to appear. Wahid’s absence simplified the MPR’s task. In the afternoon, the assembly convened to vote on a measure that would reject the undelivered accountability speech; revoke Wahid’s mandate; and install Vice-President Megawati as president, effective at once.”

591Steven Drakeley, The History of Indonesia, Westport, Conn: Greenwood Press, 2005, p.159, “Ironically also in his last months and weeks, Wahid explored a number of desperate and undemocratic measures to cling to power such as suspending parliament and declaring a state of emergency with army support (which the army refused to give).”

592M.C. Ricklefs, Op. Cit., p. 421, “He attempted to suspend the nation’s parliamentary institutions by decree to prevent this outcome, but no one paid any attention. The MPRgathered in a special session, removed Abdurrahman and installed MegawatiSukarnoputri as the nation’s fifth President, to serve until the next generalelections scheduled for 2004”.

593Steven Drakeley, Op. Cit., p. 156, “Wahid could rely on only around 10 percent of the votes in parliament and so experienced great difficulty securing parliamentary approval of his program. These problems were not solely a natural consequence of the balance of power within DPR.”

594Id. at p. 157, “the biggest problem for Wahid was the army. It had begun the post-Soeharto era internally divided and unsure how much reform of itself and of the Indonesian political system it should allow. It was also rattled by the abrupt exposure of its unpopularity and consequently had difficulty gauging just how far it needed to retreat. By the time Wahid became president, however, the army had regained much of its composure and coherence.”
to make a radical reform within the military institution.\textsuperscript{595} On other issues of economics, Wahid used his power to intervene in state enterprises.\textsuperscript{596}

3.6. Executive powers under 1\textsuperscript{st}, 2\textsuperscript{nd} and 3\textsuperscript{rd} Amendment of the UUD 1945

Executive power under the UUD 1945: Megawati administration (2001 – 2004)

Weatherbee characterizes the Megawati administration as merely about policy drift and bureaucratic stasis and only focused on personal political power and status that was confirmed by greatness ceremony.\textsuperscript{597} One important agenda in the Megawati administration was the continuation of the fourth Constitutional amendment process. The exercise of the executive powers during Megawati’s administration was mostly for continuing and accelerating the reforms agenda and retaining her power and position as the Indonesian president. Megawati established her Cabinet mainly supposed to be different from the Cabinet during previous administrations and with more professional and competent characters.\textsuperscript{598} However, under her leadership, the cabinet was lacking coordination.\textsuperscript{599} On the other hand, Megawati was able to gain support from the military.\textsuperscript{600}

\textsuperscript{595}Marcus Mietzner, Op. Cit., p. 20: “In the first months of his administration, Wahid “took a series of measures to exert civilian control over the military and rein in the Army”. Compensating key army officers like Wiranto, Yudhoyono, and Gumelar with cabinet posts, Wahid removed them from command positions and elegantly ended their military careers. He also appointed a widely respected civilian academic as minister of defense (the first since the early 1950s), disbanded amilitary-coordinated security agency notorious for its political surveillance activities, and abolished the socio-political offices at the Ministry of the Interior, a traditional military stronghold. Wahid, it appeared, was determined to initiate a radical process of military reform and enforce civilian supremacy over the political realm. The replacement of several army generals who had risen to prominence under Suharto’s rule aimed at the very break with the New Order military that Habibie had not achieved. Wahid had identified Wiranto as the major obstacle to further military reform and consequently moved to destroy the latter’s patronage network spread throughout the TNI hierarchy. In this context, he asked his personal confidant, Matori Abdul Djalil, the chairman of the NU-affiliated PKB (Partai Kebangkitan Bangsa, National Awakening Party), to come up with a list of military officers who could be expected to take the lead in revamping TNI’s institutional structures.”

\textsuperscript{596}Id. at p. 27, Wahid intervened in legal proceedings and in the internal affairs of state enterprises, apparently in order to promote the political and economic interests of his major financial patrons. Moreover, he appeared increasingly erratic, threatening to arrest his political adversaries and producing headlines with controversial statements and policies on an almost daily basis.


\textsuperscript{598}Steven Drakeley, Op. Cit., p. 161:“Weighted toward competent and respected reform-oriented technocrats rather than "political" appointments, it seemed to be a cabinet that would not be held hostage to the special interest groups that had hindered progress during the Habibie and Wahid administrations.”

\textsuperscript{599}Id. at p. 162:“Megawati lacked genuine commitment to reform seemed borne out by the experiences of the reform-minded cabinet ministers as they battled to effect change without the political backing needed to
As for appointments, Megawati used her power to appoint a state attorney general whose main duties were to deal with corruption issues, though it raised cynical views.\textsuperscript{601} During her administration, Megawati continued the agenda to deal with the issue of Aceh. She facilitated the peace agreement; however, the agreement collapsed and later on, she used her emergency powers to declare an Aceh emergency and enforced the emergency law in the territory.\textsuperscript{602}


President Susilo Bambang Yudoyono (SBY) was the first President who was directly elected by the people and the first incumbent President who took office for two periods according to the limitation of the presidential term in the Amended Constitution. His first term in office was 2004 – 2009 and his second term was 2009 – 2014. During both terms in office, overcome resistance. Criticisms were also made of the lack of coordination among the various ministries and the lack of drive and leadership emanating from the top. While vice president, Megawati had remained glumly silent and inactive, keeping her political distance from Wahid lest she be tarnished by his failings. As president, she finally had the opportunity to pursue the noble political objectives she always intimated she had. It soon became apparent, however, that what many had long suspected was indeed the case. Her political silence and quietude had not been "Javanese" reticence hinting at strength and purity of purpose and unsuspected abilities. Instead, Megawati's "stillness" had merely obscured her weaknesses.\textsuperscript{600}

id. at p. 163: "Unlike Wahid, she was not inclined to pursue the difficult issue of reforming the army and recasting the army-civilian relationship. In exchange for unobtrusive political support, her administration was content to allow the army to run its "own" affairs. Megawati was (in practice) also in broad sympathy with the army's hard-line attitude toward separatists. As expected, therefore, Megawati did not experience the lack of cooperation that Wahid had from the army in dealing with security problems."

id. at p. 161: "Megawati appointed M. A. Rachman, a senior career bureaucrat from within the department. More cynical political observers concluded that Megawati wanted somebody who could be relied upon to pursue only those prosecutions for corruption and human rights abuses that met with her approval. According to this view, Rachman's appointment would mean that those members of the elite closely associated with PDI-P, Megawati, and her businessman-politician husband, Taufik Kiemas, would be immune from prosecution. It would also mean that other powerful and wealthy individuals could avoid justice unless it suited Megawati's administration to prevent them from doing so."

Marcus Mietzner, \textit{Op. Cit.}, p. 39: "throughout 2002 and early 2003, Megawati allowed her coordinating minister for political and security affairs, Susilo Bambang Yudhoyono, to seek a peaceful settlement of the Aceh problem through negotiations. The efforts resulted in a "cessation of hostilities agreement" in December 2002, but most civilian politicians and the armed forces were unwilling to endorse it. The military was widely suspected of sabotaging the peace deal by engineering attacks on monitors of the cease-fire, and in May 2003 the agreement collapsed. Unanimously supported by Parliament and the vast majority of the public, Megawati declared martial law and launched one of the largest military campaigns in Indonesian history."
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President SBY employed executive powers under the Amended Constitution which will be discussed in the following chapter. However, in general, the character of the executive powers during the SBY’s administration was relatively weak. It was not only because of the vagueness and ambiguity of the Amended Constitution but also because President SBY’s administration was backed by weak coalition parties in the government. For example on the appointment of ministers, President SBY was restricted by the grand coalition parties which made it difficult for the President to exercise his prerogative right in nominating and appointing the ministers.603 The situation was more like there were political compromises on the Cabinet appointment and the President had to accommodate the different interests of each party in the coalition government.604 While in general, President SBY was much more active in foreign affairs to raise the role of Indonesia internationally.605 However, during the second term of his administration, President SBY had to deal with controversies such as Bank Century and the institutional scandals concerning the KPK (anti-corruption commission) and the National Police.606

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603 See: Aly Yusuf, “Evaluasi Pemerintahan SBY – KALLA, Policy Assessment”, Juni 2005, The Indonesian Institute, www.theindonesianinstitute.com, p. 6 -10: “There was great intervention from the political parties in the “grand coalition” supported SBY in the 2004 election. In general the Cabinet formation during the SBY’s administration much more reflected the coalition of parties in the 2014 election rather than the meritocracy and professionals.”

604 Hanta Yuda AR, “Evaluating the First Year of the SBY Administration’s Performance”, The Indonesian Update, Volume V, No. 7, the Indonesian Institute, 2010, p. 6: On one side, the loyalty is to the President, but on the other side, they remain loyal to the parties. In situation like this, the performance of the cabinet is being hostage by the interest of the coalition parties. The government is also being held hostage by transactional coalition through the Secretariat of the Joint Coalition Parties.

605 See: Marcus Mietzner, SBY’s mixed legacy, www.indoupdate.com: President SBY put Indonesia back on the map of regional and global powers by leading ASEAN and admitting to the G20.

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Figure 1. The period of the Indonesian executive powers according to the enactment of the Constitution

The Indonesian Executive powers in period

- Under the UUD 1945 Constitution (1945 - 1949)
- Under the KRIS 1949 Constitution (1949 - 1950)
- Under the Temporary 1950 Constitution (1950 - 1959)
- Under the UUD 1945 Constitution (After the Presidential Decree 1950 (1959 - 1999)

Notes:

1. Under the UUD 1945 Constitution (1945 – 1949); the system of government was a presidential system; the executive power was in the hands of the President. The President was granted broad powers not only executive powers but also other powers that should be held by other branches (the MPR, the DPR, and the DPA). The characters of the executive powers in this period were dominant, stronger than any other powers, unchecked, revolutionary. The President used the executive powers to mainly raise the International awareness over the existence of Indonesia as a state. The foreign affairs power in particular the diplomacy powers were often used by the President.

2. Under the KRIS 1949 Constitution (1950), the system of government was a parliamentary system; the executive power was shared by the President and the Prime Minister

3. Under the 1950 Temporary Constitution (1950 – 1959), the system of government was a presidential system, the executive power was in the hands of the President; however, there was a prime minister. But since the President introduced guided democracy, the prime minister was also under the control of the President. In this period, the emergency power was often used by the President in order to struggle and survive from not only the external but also the internal threats.
4. Under the UUD 1945 Constitution (after the Presidential Decree 1959), the system of government was a presidential system, the executive power was in the hands of the President. The characteristics of the executive powers can be not only viewed according to the constitutional text but also reflected from the state practices during each different presidential office. As originally the same as the first UUD 1945 Constitution, the text gave strong and broad executive powers to the President. However, the practices shown many unconstitutional power’s performances. The President used the constitutional provision to abuse and to manipulate the powers.

3.8. Closing remarks

The period of 1945-1949 was the period when Indonesia struggled against the formal institutional colonization. The executive powers during this period were constitutionally exercised by the President. The characteristics of the power were much more revolutionary with the main purpose to bring radical changes in politics, social, and economics. The powers were mostly attributed by the Constitution but had been unconstitutionally applied. Textually, according to the Constitution, the executive powers originally belonged to the MPR and the MPR would give the mandate and delegate powers to the President. This was because under the Constitution, the President was under, and responsible and accountable to the MPR. In this
context, the Constitution intended that the power of the executive was controlled by the MPR. Moreover, according to the Constitution, the MPR had the power to set the Guidelines of the State Policy (GBHN – Garis-Garis Besar Haluan Negara). It had the meaning that the exercise of the executive powers by the President was indeed under the MPR’s authorization. In consequence, at the end of the Presidential office, the Constitution required the President to deliver an accountability speech about his responsibility for the exercise of executive powers during his office. However, in practice, what constituted the Constitutional text was not reflected in practice. It was not only because of many unconstitutional events but also because most of the state institutional organs including the MPR had not yet been established. In addition, the transitional provisions of the Constitution which was drafted just after Indonesia’s unilateral declaration of independence, vested the MPR’s, DPR’s, and Advisory body’s power to the President. It granted the President with multiple powers including extraordinary powers to enact the Constitution and GBHN/ the Guidelines of the State Policy, to make Laws and make any recommendations, and to establish a National Committee which would have the role to assist the President. Thus, during the period, the exercise of the executive powers reflected a hyperactive presidency since the President could act beyond the Constitution. The executive powers of the President in this period played out as a dominant power since the President had both executive and legislative powers. The first Indonesian President, Soekarno, appeared to have participated in all major governmental decisions, including the promulgation of any laws or decrees, which required signature from either the President or the Vice President and it was Soekarno’s position that the signature was no mere formality but an indication of a presidential approval which he had the right to withhold when he disagreed.607 During this period, Indonesia also experienced many independent and unilateral executive powers of the President. It was noted that more than 3 times, the President had unilaterally exercised emergency powers on the grounds of state emergency.608 In general, the executive powers were

607 Id. at p. 43.
608 Id. at p. 47, from 29 June 1946 to 3 October 1946 as consequence of the prime minister, Sutan Sjahrir’s abduction; from 27 June 1947 to 3 July 1947 as consequence of the crucial political situation because of the deadlock of the Indonesia- Netherlands negotiation; 15 September 1948 to 15 December 1948 as a consequence
mostly for revolutionary purposes. Since the Constitution was enacted right after Indonesia’s unilateral declaration of independence in 1945, the power of the executive was mainly used not only to support Indonesia externally as a state, to bring Indonesia in to the International community and raise international awareness, but also internally to restore security and maintain the sovereignty and the territory. For such purposes, the first Indonesian President had frequently used both his diplomacy powers and military powers. On other areas, the emergency powers were mainly used to deal with external threats, threats from other states, and to confront internal separatist movements that threatened state sovereignty, legitimate government, and territory. However, not more than 3 months after the enactment of the Constitution, the system of government practically shifted from a presidential system to a parliamentary system. Since then, the executive powers were shifted from the President to the Prime Minister, even though the position of the prime minister was not recognized by the Constitution. The introduction of a parliamentary system and a prime minister by practicesignificantly influenced the executive power. The executive powers were shifted from the President to the prime minister, while the President was mainly the head of state. To conclude, the Indonesian executive powers under the first Indonesian Constitution were really exercised beyond the Constitution. The executive powers grew as dominant and unilateral powers without checks and balances. Neither the Legislature nor the Courts could question and challenge the use of the executive powers during the period of 1945 - 1949.

During the period of 1949 to 1950, Indonesia struggled with the aftermath of the influence of the Dutch government. Though Indonesia’s independence had been recognized, Indonesia was still under Dutch colonization. One major political issue that Indonesia had to deal with was the Dutch idea on Indonesian federalism. The Federal Constitution, the KRIS, was drafted with parliamentary characters. The Constitution determined that the executive power
was vested in the President and the Prime Minister. As the Constitution had parliamentary characteristics, the President only had nominal formal executive power while the real executive power remained with the Prime Minister. However, the use of executive powers was not really significantly remarkable since the Constitution was only enforced for less than 1 year.

During the next period, Indonesia was under the Temporary Constitution of 1950. During the temporary Constitution, the system of the government was actually a parliamentary democracy. The Constitution not only recognized a Prime Minister but also reintroduced a Vice President. Thus, the Constitution implied that the government consisted of the President (as the head of the state), the Vice President (assisted the President), the Prime Minister and the Ministers. Under the Temporary Constitution 1950, the executive power still had to struggle with anti-colonization and anti-imperialism. It still, on the other hand, struggled with Indonesian foreign policy in order to deal with challenges of International awareness; in particular the Indonesian position as a State in International Communities. In this period, the role of the President was still dominant. The use of the executive powers in this period was mostly addressed to deal with political instability and economic crises. It had also dealt with the effort to restore security within the state and the struggle for the state territory. However, although the power of the President was not really strong since he only had nominal/ formal powers rather than substantive powers, the President still played a dominant executive figure among others. One of the remarkable uses of the power was the use of emergency power. The President issued a Presidential Decree to order some fundamental points including the dissolution of the Constitutional Assembly and the re-enactment of the first 1945 Indonesian Constitution.

In the following period, the executive branch was under the re-instated first Indonesian Constitution (UUD 1945). During the period, in most regimes of administration (the Soekarno administration, the Soeharto administration, the Habibie administration, the Wahid administration, and the Megawati administration), the executive powers were used mostly to strengthen the political position of the President. Although the Constitution stipulated that the President was under the MPR and was responsible and accountable to it, the President was
extremely dominant with the position at the top of a steep hierarchy. In all particular areas the ministers as leaders in their area of planning, really depended on their relationship with the President. During Soeharto’s administration, the executive powers had been used with wide-discretion. However, the use of the executive powers during the period of the re-instatement of the First Indonesian Constitution (UUD 1945) varied according to different presidential regimes. Although the Constitution required the President to be responsible and accountable to the MPR, the practice during each presidential office showed different experiences. On the appointment power, each President had his own discretion to establish and appoint the Cabinet. In terms of foreign affairs, each President had specific focuses. In general, the characteristics of the executive powers under the UUD 1945 were strong. In some cases, the President was granted full power with limited checks and balances from other institutions. There was no significant control of the executive powers. The mechanism of checks and balances did not really work. Most of the Presidents within their offices enjoyed wide executive powers and employed them frequently. The executive powers were mostly used to secure their office position. Lastly, the first and the second regimes of SBY’s administrations may be now counted in the historical path. However, since the regimes were under the Amended Constitution, the regimes may represent a perfect picture to describe the Indonesian executive powers under the Amended Constitution.
Chapter 4

Indonesian Executive Power under the Amended Constitution

This chapter analyses how the executive power in Indonesia is organised under the Amended Constitution. This chapter will build a perspective on how the executive power in Indonesia has been changed and evolved as the Constitution has been amended four times after the fall of the authoritarian regime and during the rise of the democratic system in Indonesia.


The Indonesian Constitution has been changed by a series of constitutional amendments. It has been amended four times (1999, 2000, 2001, and 2002) during the transition period of the state reformation and after the 1998 fall of the authoritarian regimes of the new period (orde baru). The period was marked by the end of the President Soeharto’s administration and the beginning of a more democratic regime of the so-called “reformasi” in 1999. After the new government had been installed, the agenda of the amended constitution was proposed on the basis of the purpose to weaken the President and limit executive powers.

The aims of the amendment process were mainly:

- to curb and reduce Presidential power through the distribution of powers, vertically and horizontally
- to change the power from centralization to decentralization
- to increase the role of the DPR to oversee the executive power
- to change the structure of the MPR from a unicameral system to a bicameral system
- to restore sovereignty to the people through direct elections
- to establish the separation of power with a check and balances mechanism within the three branches of government
- to rearrange the judicial system and rule of law
- to guarantee human rights, state obligations and limitation of power in order to prevent the abuse of power.

CHAPTER 5: THE INDONESIAN PRESIDENCY: THE IDEAS AND THE PROPOSAL

1. Introduction: From President Soekarno to President Jokowi

This chapter will in particular be concerned with the general conclusions on relevant issues in this dissertation and alternative solutions for a constitutional improvement. The previous chapters have explored the theory, history, development, and current specific issues of Indonesian executive power under different constitutional regimes. It shows in chapter 3 that the Indonesian executive powers had been performed differently under different constitutional regimes. Under the First Indonesian Constitution (UUD 1945), the Executive emerged as a revolutionary branch with strong and dominant powers to deal with revolutionary situations, the struggle for Indonesian independence, and International recognition. After experiencing the revolutionary executive powers, Indonesia moved on to the authoritarian regime. Under the authoritarian Soeharto regimes, the Indonesian Constitution was used as an authoritarian constitution, justifying the dominance of the executive branch and strengthening the authoritative executive powers of the President. The fall of the Soeharto administration in 1998 brought a transitional government under the Habibie administration. During his one year administration, Habibie made a noteworthy decision which had significant impact on both foreign and domestic affairs by giving a referendum to Timor-Timur. He performed a unilateral presidential decision on a referendum for Timor Timur which was urgently made after an informal consultation with some Ministers and was validated by the MPR’s decision. Another new Indonesian President, President Wahid, was elected in 1999 by the parliament (the MPR). During the Wahid administration, the process of the Indonesian Amended Constitution was started by a special commission of the MPR. President Wahid performed his executive power under the First Amendment of the Constitution as he wished and in his own way. Moving on to...

883 On May 1998, the massive people and student’s demonstration all over Indonesia and specifically in Jakarta successfully brought down the Soeharto’s administration. The demonstration was mainly provoked by the monetery crisis in Indonesia.
Megawati’s administration, the executive power was partly performed under the III Amended Constitution (2001 – 2002) and the IV Amended Constitution (2002 – 2004). During her administration, Megawati was more prudent in using the executive powers. After a series of constitutional Amendments, the Amended Constitution introduced a new model for the Indonesian presidential system. The system was designed to stifle the executive powers of the President. The Constitution was made to be more protective of the executive power. The checks and balances of the executive power of the President became even more stringent. In 2004, the administration turned to President Susilo Bambang Yudoyono (SBY) as a result of the first democratic direct presidential election according to the Amended Constitution. In the two terms of SBY’s office (the first office term was 2004-2009, the second office term was 2009-2014), the executive powers have been exercised under the Amended Constitution with some vagueness and obscurity of concepts in most of its provisions as has been discussed in chapter 4. Since 2014, in the new era of the Jokowi administration, the executive powers of the President are also performed under the Amended Constitution. However, it is performed in a very different style with more pressure from the parliament.

2. Indonesian presidency and the executive powers: idea for the future executive powers in Indonesia

This section will present ideas for redesigning the Constitution, in particular, to redesign the Articles which concern the executive powers. The main issues in this part will be more about the future of the Indonesian presidency and what and how the executive powers should be given in order to improve the presidency. First, it will be an elaboration of the executive powers that should be given to the President, how the President should be given the executive powers, and how the mechanism of counter-balance from other branches should be regulated. Second, by combining local and international values, reflecting aspects of the 6 Constitutions (the US Constitution, the Philippines Constitution, German Constitution, South African Constitution, French Constitution, and Polish Constitution), and imitating some constitutional concepts, the proposal on how the executive power of The Indonesian President should be given will be drawn.
a. A choice of presidency: from a high level of presidential system to an original style of presidential system

A presidential system is still the best choice for Indonesia. Firstly, because it would not be easy to switch to other types of government systems and the process would very complicated if the system is changed. The mechanism of changing to a new system will take more time to set up and install a new framework, while it would not be easy to adapt to such a new mechanism. Secondly, each government system has its advantages and disadvantages. After almost two decades, Indonesia has gained benefits from experience of the presidential system and has successfully passed through transitional periods of presidential systems. The advantages and disadvantages of the system have helped the Indonesian government system to develop. However, the system needs improvement in order to encourage its effectiveness.

According to the development, there are some models of presidential system: the US style presidential system, a high level of presidential system (hyper-presidential system) and a low level presidential system (passive-presidential system). It is considered that a hyper-presidential system is a presidential system which provides more/strict checks on the presidential power, while a passive-presidential system is a presidential system which provides fewer/weak checks on the presidential power. Whilst, an original presidential system is a presidential system which is based on the original idea of the US Constitutional framers where the President was intended to be an independent branch, a strong institution, but had few substantial portions of executive powers, undefined executive power can only be exercised with and by the power of other branches. However, some states built a presidential system

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885 Read: Susan Rose Ackerman, “Hyper-Presidentialism: Separation of Powers without Checks and Balances in Argentina and the Philippines”, 2011, Faculty Scholarship Series, Paper 4155, accessed online via www.digitallcommons.law.yale.edu/fss_papers/4155. Susan Rose-Ackerman used the hyper-presidential term to explain how the presidential system in the Philippines and Argentina is adopted. However, she used the terms differently. She determined the term hyper-presidential as the system where the President has more unilateral power.

886 Eric A Posner and Adrian Vemeule, "Tyrannophobia", in: Tom Ginsburg, Comparative Constitutional Design, Cambridge University Press, 2012, p. 325: "The veto power might be understood just to mean the right to veto unconstitutional legislation, not legislation that the president rejected on policy grounds, the commander in chief power could refer only to tactical control, not military strategy and foreign policy in general, the power to receive ambassadors could refer to a ceremonial role, not the power to recognize states and governments".
by vesting wide substantial powers and leaving the powers independently to the President. While other states proportionally allocated the executive powers to the President, some states are simply inspired by a parliamentary system, establishing a presidency by only giving the President formal power for the executive affairs.

According to Indonesian history, Indonesia was established as a republic. The Founding fathers established a presidency within the Indonesian government system. Although the Constitution does not strictly say that the Indonesian system is a presidential system, in practice, the President is the head of state and head of government. Before the Amendment, the Indonesian parliament was the key of the government. It could impeach the president and appoint the president. Under such a framework, practice became more confusing when conflicts happened between the President and the parliament since the Constitution did not provide appropriate solutions. At this point, it is important to strongly confirm that a presidential system is still a plausible system to be adopted in Indonesia.

To redesign a more appropriate presidential system for Indonesia, firstly, it is important to reflect on US presidential history. Not only because the US Constitution is the world’s first written Constitution introducing the presidential system, but also because the US constitutional system has historically set the standard on how executive powers could be exercised under a presidency. Accordingly, the framers of the US Constitution intended to have an independent executive branch assigned to the US President with substantive limitations of executive powers. The framers of the US Constitution gave the US Congress more powers than the powers that were attached to the US President. However, the US President was assigned with some powers that are relevant to his roles and functions. Although the US President is considered as the key point of the government, in exercising the power, the US President has to share his executive powers with either the Congress or the Senate.

The original idea of a presidency has been developed and applied in various ways. In practice, the tendency to over limit and put too much limitation to the executive power may

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887 The first Constitution indicated that Indonesia was a parliamentary system. The Constitution assigned the MPR as the key where the President was dependent on it, being elected and responsible to the MPR. This is a little bit contradictory with what the framers actually wanted for a government system.
appear as a phenomenon of weak executive power. Such a tendency indicates hyper-presidential (less executive power, more checks and balances) since there are hyperactive checks and balances over the executive power and the President as the executive branch. In this situation, the executive power is over limited and over controlled. Too much intervention is given from other branches; the parliament and the courts. The President is given only formal and limited executive powers. The President is conceived to have weak executive power or even only artificial executive powers while the real powers are vested in other institutions. In such a framework, the executive branch may be the weakest branch among others. On the other hand, another presidential model shows the tendency of unilateral executive powers which are vested in an independent executive branch. Such a model may appear in a situation where passive checks and balances over the executive are exercised. The tendency may indicate a passive presidency where the executive power is given broadly with fewer checks and balances from other institutions. In a framework where the President is given dominant and unilateral executive power, most of the executive powers may be exercised according to the personal discretion of the President. The President does not need to seek any authorization before he executes the powers and most of the powers are not to be shared with other institutions.

Under the Amended Constitution, the executive powers of Indonesian presidents are mostly weak. The Constitution has made an over-limitation of the executive powers, while, in performing the power, the President is not only constrained by the Constitution but also has to deal with “political limitations” from parliament. From the period of the First Indonesian Constitution to the period of 1998, before the process of the Amendment, Indonesia was familiar with a passive-presidential model. The executive powers of the President were strong and dominant. A powerful president exercised the executive powers with very small checks from other branches or went even unchecked. As Indonesia has experienced both hyper and passive presidentialism, the more plausible plan is to redesign the Indonesian system with an original model of presidentialism as in the US. A system which gives proportional checks and provides balancing power between three branches (the executive, the legislature, and the
judiciary). It may be realized by bringing back the powers of the President. The President must be given significant executive powers that are relevant to the duties and roles while proportional checks and balances must be performed by the parliament and the courts. A proportional framework of checks and balances is that other branches will act proportionally to equalize the executive powers. The Legislature would not overstep constraint and dominate the executive powers of the President, but rather be working as a mutual partner. On the other hand, the Courts would not intervene but act as truly constitutional interpreters. The President should remain the key figure of government, vested with significant executive powers that are relevant to his roles and duties. The power of other institutions should be encouraged to be more advisory rather than extremely contentious. To strengthen the institutional checks and balance from the legislative to the executive, the legislative should not direct the executive but be a counterpart to the executive. The President, vice versa, should also be given the power to counter-balance the Legislature. It would also be reasonable to empower the Constitutional Court with the power to offer passive advisory opinions, that is, an advisory competence that may be given by the Court when any branch requires constitutional advice. In some areas, the President should be given real powers. For example in some of appointment powers, the President should be given nominal powers, rather than just formal powers, to nominate, select and appoint the ministers without any political pressure from others. While in other areas, such as the pardoning power, the president should share the power with other branches. This, inter alia, is merely to respect the judicial process and not make it too easy for the President to contradict the Court’s decisions. On the emergency power, the Constitution should accommodate “an extra-ordinary” situation where the President is mostly expected to take urgent and substantial action by still respecting mutual and equal relations between the three branches. By still preserving the “natural conflict” between the executive and the legislative, the Constitution must provide a clear framework to solve the conflicts.

b. Model of checks and balances of the executive powers for Indonesia
In the development of constitutional theory, there are some mechanisms to be applied to constrain the executive powers, such as the classic mechanism of checks and balances from the Legislature by a real mechanism for control, oversight, and judicial review of the Legislature. Moreover, some scholars argue that the mechanisms of impeachment and removal are also effective to check one particular type of abuse of power by the executive, namely, corruption.\footnote{See: “Checking Executive power: Presidential Impeachment in Comparative Perspective” Edited by Jody C. Baumgartner and Naoko Kada, Praeger Publishers, USA, 2003, p. 133.} Meanwhile, some constitutional doctrines, such as executive immunity may be relevant to limit executive powers and enhance executive accountability. To be applied effectively and in co-existence with the constitutional system, the Constitution should clarify the application of such a doctrine including its limits.

The executive powers should rely on checks and balances mechanisms, such as legislative control, legislative oversight, and other institutional functions. According to Posner and Vermeule, the legal checks, either the requirement that the executive should obtain the consent of other government officials (legislator) before acting; or the requirement that the executive submit to periodic popular elections is the mechanism in order to avoid unchecked executive power and prevent dictatorship in the presidency.\footnote{Eric A.Posner and Adrian Vemeule, \textit{Op. Cit.}, p. 319: The fewer the checks, the more plausible the “dictator” label becomes.} On the other hand, citing from a parliamentary system, parliamentary control of the executive is important to anticipate the great expansion of power in the global modern era.\footnote{Anthony W. Bradley and Cesare Pinelly, \textit{Op. Cit.}, p. 668, In general, parliamentary control of the executive is perceived as being particularly needed given the great expansion in the importance of international organizations and in government activities connected with the adhesion to supranational organizations.} However, there are other checks and balances that may potentially create gridlock and make it difficult to pass necessary reforms; such as the elaboration of veto gates (bi-cameralism and a committee system); legislative and judicial oversight of executive action; and other checks and balances, all with a view to minimizing the risk of executive dictatorship.\footnote{Eric A.Posner and Adrian Vermeule, \textit{Op. Cit.}, p. 338.} The mechanism of checks and balances to
check the executive may potentially have a risk of becoming tyrannical when it is an independent institution such as in the oversight bodies.\footnote{In common practice of a presidential system, the oversight function of the Legislature is more significant when the government is backed-up by a majority. However, the Constitution should provide more specific mechanisms to make Legislative branch functions more applicable. To make Legislature control more effective, the mechanism of questions and the interpellation mechanism can be borrowed and adopted from the mechanism of parliamentary control in parliamentary states. Such a mechanism will allow the Legislature to invoke questions and interpellation; it may be followed by a short debate and a vote whether the executive’s response is acceptable. But however, most importantly, since the system is a presidential system, the vote should not end with a vote of no confidence but should end with a Legislature recommendation that will oblige the executive to take the recommended actions.}

In common practice of a presidential system, the oversight function of the Legislature is more significant when the government is backed-up by a majority.\footnote{Id. at p. 339.} However, the Constitution should provide more specific mechanisms to make Legislative branch functions more applicable. To make Legislature control more effective, the mechanism of questions and the interpellation mechanism can be borrowed and adopted from the mechanism of parliamentary control in parliamentary states. Such a mechanism will allow the Legislature to invoke questions and interpellation; it may be followed by a short debate and a vote whether the executive’s response is acceptable. But however, most importantly, since the system is a presidential system, the vote should not end with a vote of no confidence but should end with a Legislature recommendation that will oblige the executive to take the recommended actions.

The following table offers the model of checks and balances of the executive power of the Indonesian President:

<table>
<thead>
<tr>
<th>Powers</th>
<th>Models</th>
<th>Mechanism Check and balance</th>
</tr>
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<tbody>
<tr>
<td>Law-making powers</td>
<td>1. Legislative power</td>
<td></td>
</tr>
<tr>
<td>1. On legislative power:</td>
<td>- The President is not a co-legislator to the DPR and has no equal power. The President has no power to jointly approve a bill with the DPR, instead he only has the right to discuss in a joint discussion to give opinion and recommendation to the bill (this scenario is part of giving the President the opportunity to measure to what extent he could execute the Laws)</td>
<td>1. On legislative power: - The main legislative power is in the hands of the parliament. The DPR has the power to approve or reject the bill - The bill initiative from the President will be considered by the parliament and proceed in a legislative process in a joint discussion between the President and the DPR - The President has the veto power and the DPR may override the veto power of the President with the mechanism of 2/3 majority of votes</td>
</tr>
<tr>
<td></td>
<td>- It is not a sharing power since the President only has residual power from the DPR (Parliament). The President only has the rest of the whole power.</td>
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<tr>
<td></td>
<td>- The President only has the power to initiate any bills, the power to preview the bill (in a joint discussion session), but not the power to approve the bill.</td>
<td></td>
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<tr>
<td></td>
<td>- The President has to legalize and promulgate the legislation as a result of the legislative process</td>
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\footnote{Anthony W. Bradley and Cesare Pinelli, Op. Cit., p. 667.}
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2. **Sub-ordinate Legislation/government law**

- Giving the legislative powers to the DPR respects its nature as the parliament and its legislative nature.
- Still give the President the right to intervene (by giving veto) the legislative making process as he is the executive who in the end will execute the Laws. He has to make sure whether he is able to execute the Laws, or otherwise, the Laws will never be executed.
- There should be a mechanism for the parliament to override the veto of the President.

2. **For sub-ordinate Legislation:**
   - The President has the power to execute Laws and to make sub-ordinate Legislation for implementing the legislation.
   - It would not be a shared power but a unilateral power; performed only by the President on behalf of the government but it does not mean without any checks from other branches.

3. **Executive law**

- The President has the power to make any executive law for use in the executive or state administration area and not in general issue.
- It is a unilateral power that the President will perform the power alone involving the executive branch. The President would not need any approval, confirmation, or even opinion from other branches.

3. **For the executive law:**
   - The President has the power to make any executive law for use in the executive or state administration area and not in general issue.
   - It is a unilateral power that the President will perform the power alone involving the executive branch. The President would not need any approval, confirmation, or even opinion from other branches.

**Appointment powers**

1. **State officer**

- The President has the power to nominate, select, and formally appoint the state officers (such as the Constitutional Court Judges, Supreme Court Judges, chief of judicial commission, chief of state financial auditor, other state officers for state Constitutional institutions, and state independent commission such as chief of commission of corruption).
- It is a formal power of the President to ceremonially appoint the state officers.
- There should be an equal and proportional sharing power between the President and other branches involved in the appointment power.
- The President has the same portion in

2. **Public officer**

1. **For the state officers’ appointment:**
   - The parliament has the same power to nominate and be involved actively in the selection process of the state officers.
   - The Court (if it is about the judges appointment) has also has the power to be involved in the selection process.
   - Other State Commissions such as the Judicial Commission has the power to nominate and be involved in the selection and appointment process of the judges.
3. Executive officer

- For the power to appoint the public officers:
  - The President has the power to nominate, select, and appoint the public officers
  - The appointment power of public officers is a real and formal power with check
  - The public officers include the chief of police, state prosecutor, etc

4. High ranked Military officers

- For the power to appoint the high ranking military officers:
  - This appointment power is related to the power as Commander in Chief
  - The President has the power to nominate, select, and appoint the high rank of Military officers including the chief of the Indonesian army, chief of the Indonesian air force, chief of the Indonesian navy, and other high ranking military officers
  - The President needs to notify the parliament
  - The President may ask opinion from other institutions but the appointment will be made by the President

Foreign affairs power

1. Treaty power

- The President has the power to negotiate and conclude treaties and international agreements
- Certain treaties and international agreements would be exercised with the approval from the DPR legislature before the ratification

2. Diplomacy power

- The President has the power to issue any diplomacy policies

3. Other Foreign policies

- The President has the power to issue foreign policies
  - The President has the power to issue other foreign policies including the decision to access international organizations, participation in peace keeping operations
  - It is a real and formal power.

War power

1. The power to invoke self-defense

- The President has the power to invoke self defense according to International law; however, the war decision should be approved by the legislature

2. The appointment power for public officers would be by the opinion of the DPR. However, the decision maker is the President. The President must maintain the professionalism and reduce political interest.

3. The parliament has no power to be involved in the nomination, selection, and appointment process. However, the parliament would always oversee the performance of all the executive officers and employ the overseeing mechanism (require clarification, investigate, and advise dismissal at anytime to the President)

4. For the appointment of high ranked military officers the checks and balances would be:
  - The nomination and selection will be conducted by the President and the committee of high ranking military officer appointments.
  - After the nomination and selection process, the President may ask opinion of the parliament
  - The President must notify the appointments to the parliament

In general, there should be a Commission of appointment which has the power to focus on the nomination, selection, and appointment process of all officers

1. In the treaty power, the legislature has the power to give approval for certain treaties and international agreements

2. In the diplomacy power, the legislature has the power to oversee the implementation of diplomacy power and at any time can give an opinion to the President

3. In the foreign policy power, the legislature would have the power to oversee the implementation of foreign policies and at any time can give opinion and advice to the President

1. Power to declare war
  - The legislature has the power to give confirmation to the President
  - The legislature has at any time the right to give opinion and advice
### 2. The use of force power

<table>
<thead>
<tr>
<th>Use of Force Power</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The power to use force</td>
<td>- It is the power of the President but the power should get approval from the legislature</td>
</tr>
<tr>
<td>2. The President has the power to use force with the approval from the DPR</td>
<td>- The President has the power to mobilize the use of force abroad for the purpose of supporting international intervention with confirmation from the DPR</td>
</tr>
<tr>
<td>3. The DPR has the power to confirm the use of force abroad for international intervention</td>
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### Budgetary power

<table>
<thead>
<tr>
<th>Budgetary Power</th>
<th>Description</th>
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<tbody>
<tr>
<td>1. Initiate budget</td>
<td>- The power to initiate a budget:</td>
</tr>
<tr>
<td></td>
<td>- The President has the power to initiate and discuss the state budget. However, the legislature has the power to approve the state budget</td>
</tr>
<tr>
<td></td>
<td>- It is the power with approval from the legislature</td>
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<tr>
<td></td>
<td>- It is not a shared power since the President only has the power to discuss and negotiate while the approval is made by the DPR</td>
</tr>
<tr>
<td>2. Expenditure power</td>
<td>- The President has the spending power</td>
</tr>
<tr>
<td></td>
<td>- It is not a shared power since the President spends from the approved budget</td>
</tr>
<tr>
<td></td>
<td>- To perform the expenditure power, the President does not need any approval, confirmation or consideration from the legislature</td>
</tr>
<tr>
<td>1. The power to initiate budget:</td>
<td>- The legislature has the power to approve the state budget</td>
</tr>
<tr>
<td></td>
<td>- The constitutional court has the power to review the state budget and come to its opinion and advice</td>
</tr>
<tr>
<td>2. Expenditure power:</td>
<td>- Although the legislature would not be confirmed, it can always oversee presidential spending</td>
</tr>
<tr>
<td></td>
<td>- The legislature can always at any time require the clarification, investigation or cut the budget</td>
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<tr>
<td></td>
<td>- The state auditor has the authority to oversee, make report, and audit the spending budget</td>
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</table>

### Pardoning power

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<thead>
<tr>
<th>Pardoning Power</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The power to grant pardon</td>
<td>- The President has the power to grant pardon and amnesty</td>
</tr>
<tr>
<td></td>
<td>2. In giving the pardon, the President shall have recommendation and advice from the commission on the prerogative of pardon. In giving the amnesty, the President shall have advice from the DPR.</td>
</tr>
<tr>
<td>2. The power to grant amnesty</td>
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### The emergency power

<table>
<thead>
<tr>
<th>Emergency Power</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The power to decide emergency in part or the whole state territories</td>
<td>- The President has the power to declare a state emergency without any approval from other branches. In an emergency situation where the state under real threat (such as terrorist attack, natural disaster, economic collapse, political chaos) or military attack that undermine national peace and security, the President has unilateral power to take any action to overcome the situation</td>
</tr>
<tr>
<td>2. The power to take any action during state emergency</td>
<td>- However, apart from the real threat or military attack, the President has the power to take any action with the approval from the DPR</td>
</tr>
<tr>
<td>1. There should be an ad-hoc commission established by the Parliament to observe any measures and actions of the President during the state emergency. The court has the power to review any legal consequences that result from any legal measure taken by the President</td>
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<td></td>
<td>2. For the emergency law:</td>
</tr>
<tr>
<td></td>
<td>- The legislature can always oversee the implementation of the emergency law that is enacted in times of emergency and always has the power to get clarification from the President</td>
</tr>
</tbody>
</table>
|                  |   - The legislature can always ask the
3. The power to issue emergency law and establish ad-hoc institution to overcome the emergency situation

3. The President has the power to issue emergency law in a time of state emergency or other emergency situation where there is no legislation.

4. The President has the power to establish ad-hoc institutions relevant to the emergency situation

President to revoke the emergency law after the adoption of the legislation on the emergency issue

- The Court has always the power to review the constitutionality and the legality of the emergency law and has the power to come to the conclusion that the emergency law should be revoked.

<table>
<thead>
<tr>
<th>Administrative power</th>
<th>In administrative power:</th>
<th>In administrative power:</th>
</tr>
</thead>
</table>
| 1. The power to establish the ministerial department and any other extra ministerial department (independent department) | 1. The establishment of cabinet of ministers
- The President has the power to establish cabinet of ministers according to the President's vision, mission, and programs.
- The President has the power to establish, set, reshuffle, and dissolve a ministerial department.
- The President has the power to nominate, select and appoint ministers
- The President shall notify the establishment of ministerial departments and appointment of ministers | 1. The legislature has the power of control over the budget of the establishment of a ministerial department and the appointment of ministers. The state auditor has the power to audit the ministerial budget |
| 2. The power to control over the cabinet | 2. The President has the power to directly lead the cabinet and give direct command to the ministers | 2. The legislature can at anytime have oversight by requesting clarification and explanation from the minister through the President |
| 3. The power to issue the executive law | 3. The President has the power to issue government regulations in order to regulate state administration | 3. Supreme court has the power to decide the legality of the executive law |
| 4. The power to establish executive commissions, agencies, other executive bodies | 4. The President, when it is needed, has the power to establish executive commissions, agencies, or other executive bodies. The President shall notify the Parliament. The President has also the power to set, reshuffle, or dismiss the executive commissions, executive agencies, or other executive bodies | 4. The legislature has the oversight power. The state auditor has the power to audit the budget |
| 5. The power to establish any executive auxiliary bodies or any institution supporting state administration | 5. In running the state administration, the President for any reason has the power to establish executive auxiliary bodies with the approval from the legislature | 5. The legislature: Constraint of the budget agencies establishment, oversight of the agencies’ performance |
| 6. The power to supervise the local government and autonomous provinces | 6. The President has the power to supervise the local government and autonomous province government. Such power is as a consequence of the presidential Unitarian model | 6. The legislature: oversight function |
| 7. Power to set state policy and public policy | 7. The President has the power to set state policy and public policy | 7. The legislature: oversight function |

The extraordinary power

The power to call referendum in the situation needed

According to the Indonesian experience with the province of Timor-Timur (which is now Timor Leste), the idea of giving the President the power to call a referendum would have a constitutional basis; so, any action taken as a result

The power is a dependent power that can only be exercised with the approval from both chambers in the MPR
of the referendum will be easier to be checked by other branches. It will be a sharing power between the president and the legislature. To perform the power, the President should get approval from the legislature

<table>
<thead>
<tr>
<th>The military power</th>
<th>For the military power:</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The Commander in chief of army, navy and air force</td>
<td>1. The President is the Commander in chief of army, navy, and air force. As a result, the military organization is under the President</td>
<td>1. With regard to the Commander chief power, the DPR has the oversight power to oversee budget of the military organization</td>
</tr>
<tr>
<td>2. The power to maintain national peace and security</td>
<td>2. As the Commander in chief, the President has the power and duty to maintain national peace and security</td>
<td>2. The DPR has the power to check over the power of national peace and security by law.</td>
</tr>
<tr>
<td>3. The power to directly command the military force</td>
<td>3. The President has the power to directly command the military force. In commanding the military force, except during a military operation, the President shall have confirmation from the DPR</td>
<td>3. Confirmation from the DPR is only needed when there is no urgent situation. However, in some situations such as during a military operation, the President is permitted to directly command military forces without confirmation from the DPR</td>
</tr>
<tr>
<td>4. The power over the military organization</td>
<td>4. The President has the power of full intervention over the military organization including the power to reorganize the military organization</td>
<td>4. The DPR check over the organization by the budget</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Accessories power</th>
<th>The accessories power is a consequence of the role of the President as the head of the state</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Power to make sure that the state’s compliance to the International obligation that Indonesia has already a party</td>
<td>1. The President, as the head of the state, according to the development of international criminal law is the subject to the international criminal court. At this point, the constitution should provide the anticipation and establish a mechanism to avoid and facilitate if there is a case regarding international law. The Constitution should accommodate such international developments</td>
<td>1. The legislature has the power to be notified about all the foreign policy that the president has made</td>
</tr>
<tr>
<td>2. Power to grant honorary titles</td>
<td>2. The power to grant honorary titles is a consequence of the President being the head of state. In exercising such power, the President has to establish a council of honorary awards to give recommendations and opinions</td>
<td>2. The legislature has to be notified and has the right to clarify, to challenge and to give opinion to the President</td>
</tr>
</tbody>
</table>

### c. Design constitutional text for future Indonesia executive power

This section is about the proposal of design for the executive power in Indonesia. With the assumption that the government system is a presidential system, the executive power would be vested in the hands of the President. The powers include law-making power, budgetary and expenditure power, appointment power, foreign affairs power, administrative power, power to invoke self-defense replacing the classic concept of war power, military power, emergency power, pardoning power, accessories and symbolic powers, and extraordinary powers. The allocation of powers should be based on the principles of proportionality.
and the necessity. In general, proportionality concerns the quantities and substances of the power that relates to the role of the President in a presidential system. This is to avoid any disproportionate allocation of power that may cause the domination of power by one of branches. Meanwhile, it is necessary to consider the reasons and priority level of the power which is given to the President. There must be a legitimate and reasonable purpose in giving the power to the President.

To this extent, there are three models of the allocation of executive powers that have been developed in practice and may be adopted in Indonesia. Model 1 is a shared power. The idea is addressed to the power which has widespread impact on the state and public interest; while actually the power is not in the area of the executive. Such power must be exercised jointly by the President and the DPR. In this model, the executive power is not only enjoyed by the President alone but also enjoyed by the DPR. The President equally has the same power and role. A shared power is commonly actualized by joint approval; the President and other branches produce joint approval. The power would not be exercised if one party does not approve. Model 2 is a dependent power. The idea is that the President can exercise executive power only when the DPR gives approval. The model would be addressed for the power that potentially may be abused by the President. For example in a diplomacy power, when the President has the real power to conduct a special humanitarian mission; the DPR on the other hand, has the power of the purse, and therefore, it has the power to decide whether or not the mission may be called. The power should then be exercised dependent on the approval of the DPR that is expressed in the budget approval. Model 3 is an independent power. The idea is that the President can exercise executive power independently while on the other hand, other branches may check by giving consideration, opinion, advice, or recommendation. However, the final decision is independently made by the President.

894 The independent power could be addressed to solve the situation that under the Indonesian Constitution (Amended) the President is mostly a weak branch among others. Therefore, to make a balance against other dominant branches and to make sure of the president’s survival vis a vis other branches, the independent power is assumed to be a plausible solution to maintain a good balance between the Legislative and the President, between democracy and efficiency and rule of law. This is also considering that the experiences of presidency under the Amended Constitution as well as in the present situation creates an ineffective president and does too little to spur the Legislature into action and does too little to balance the powers of the Legislature.
Rosa Ristawati: Modelling Executive Powers in the Indonesian Constitution: A comparative Study

On the law-making power, the President should be given limited substantial powers in the legislative process. In order to accommodate the spirit of the 1999 amendment which was reducing the president’s power, it would be more rational not to give the President equal powers as the DPR with regard to the approval in a legislative process. However, the President still should be given the power to initiate bills; but the framework would not place the President as a co-legislator who has the power to sit in a joint approval session with the DPR. The articles of the Constitution may be written as follows:

|”The DPR holds the Legislative power” |
|”All the bills are initiated by the DPR or the President” |
|”The DPR has the power to amend, reject, or approve bills” |
|”The President or the DPR, before the promulgation, may refer to the Constitutional Court to review its constitutionality.” |
|”The President has the veto power of a bill” |
|”The DPR may override the veto power of the President with 2/3 of the votes cast” |
|”The President signs and promulgates the Law” |

In the legislative process, the President should be still given significant power to initiate bills. Furthermore, the President should be given veto power. To counter-balance the President’s veto, the DPR could override the veto. However, the President may veto bills. On the other hand, the role of the Court must be strengthened as a counter-weight. The most important thing is that the process should reflect a democratic mechanism on the basis of equality among branches. It is rational not to give the President an equal power in joint approval with the DPR because the experiences of joint approval commonly raise conflicts between the President and legislature. It mostly will generate an ineffective government. On the other hand, it would take longer for the legislative process because of a legislative deadlock.

Other law-making power should be vested to the President. To this extent, the President would have the authority to make rules and regulations. Those powers are including the power to make sub-ordinate Legislation, the power to make executive law, the power to make Presidential law, and the power to make emergency law. The power to make sub-ordinate Legislation is related to the President’s duties to implement the Law. At this point, the sub-
ordinate legislation should be based on the Laws. The sub-ordinate law is mainly about the President’s direction and guidance to implement Legislation.

On the other hand, the presidential law is the law made by the President in order to overcome a legal vacuum when there is no Legislation concerning particular issues and it is immediately required by the public. The Presidential law is a temporary and ad-hoc law, has time limits and is only enacted within 1 year. If it is needed, after the time limit of 1 year, the President has to submit the presidential Law to be jointly discussed as a bill and approved by the DPR to become Law. The presidential law is relatively different from the emergency law. It is not as unchecked power since the Constitutional Court has the power to review the constitutionality of the law during the enactment. Alternatively, to check and constrain the presidential law and in order to compete and overcome the legal vacuum, the DPR may be given the power to make ad-hoc legislation.

The design for the law-making power besides the power to initiate bills would be as follows:

“The President has the power to make executive laws and to set rules and regulations in the area of the administration”

“The President has the power to execute laws and to make sub-ordinate legislation. In order to make sub-ordinate Legislation, the President should get consideration from the DPR”

On the budgetary power, the design for the constitutional provision would be as follows:

**The President has the exclusive power to submit the budget bills to the DPR for its consideration and approval**

*After the budget bill has been approved by the DPR, the President has the spending power*

*The DPR has the power to oversee the spending of the state budget and ensure the transparency and accountability of the expenditure*

With regard to the war power, the term war is out of date and does not specifically refer to particular cases since nowadays, war is broadly defined, not only covering hostilities between states but also encompassing any kinds of threats to the state. The term “use of force” may be appropriate in the context of global development and more up to date compared to the term “war”. The term “use of force” is based on Article 2(4) UN Charter which requires states to refrain from the use of force against the territorial integrity or political independence of
Another state.\textsuperscript{895} Furthermore, Article 51 UN Charter gives states the right to individual self-defence and collective self defence. This allows states to use force against armed attack and imminent threat. Accordingly, there are some concepts that are relevant to the concept of war, namely: the use of force, the armed attack, individual self defence, collective self defence, pre-emptive self defence and imminent threat. The German Constitution in Article 115a has used the term “state defence” instead of war.\textsuperscript{896} Whereas, the South African Constitution uses the words “state of national defence” and attaches the power to declare a state of national defence to the President.\textsuperscript{897} To this extent, it would be rational to refer to the German concept of state defence and the South African concept that allows the President to have the power to declare a state of national defence.

The power to invoke self defence and call the use of military forces clause would be written as follows:

\begin{table}[h]
\centering
\begin{tabular}{|l|}
\hline
The President has the power to invoke the state of self defence with approval from the DPR  \\
The President has the power to invoke the use of force and declare a state of national defence with the approval from the DPR  \\
\hline
\end{tabular}
\end{table}

The power to invoke self defence as well as the power of use of force is a shared power between the President and the DPR. The purpose to put such power in the hands of the President and the DPR is to strengthen and make accountable the President’s decision. The DPR’s approval reflects support from the people. The use of force would be the use of military force either at home or abroad. It also includes any purposes for humanitarian intervention and for peace-keeping operations.

In practice, there are different issues faced by the Indonesian President and the US President concerning the war power. The US frequently deals with the use of force abroad against international armed conflict. In practice, how Obama interpreted the US Constitution regarding to war power in his presidential campaign statement of 2007 was better than what the facts had shown:

\footnotesize\hspace{1cm} \textsuperscript{895}Article 2(4) UN Charter.  \\
\footnotesize\hspace{1cm} \textsuperscript{896}Article 115a (1) German Constitution and Article 115a (5) German Constitution.  \\
\footnotesize\hspace{1cm} \textsuperscript{897}Article 203 of the South African Constitution on State of national defence.
“As a presidential candidate in 2007, Obama agreed: “The President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation.” Fast forward four years. In announcing the intervention in Libya, Mr. Obama told Congress that he was acting “pursuant to my constitutional authority to conduct U.S. foreign relations and as commander in chief and chief executive.”

The US practice may not be the case for Indonesia. Whereas the US is familiar with the use of military forces abroad for international armed conflicts, Indonesia has never been involved in such acts. However, internal armed conflict and other kinds of domestic threat may be a potential threat for Indonesia. Nevertheless, in experience, Indonesia has dealt with some territorial conflicts that sometimes trigger the use of military force. The fact that Indonesia has many islands makes Indonesia familiar with border conflicts and other cases of territorial conflict with Malaysia, the Philippines, Singapore, the New Guinea, East Timor, Australia and other countries. Such a situation may be a threat to Indonesian peace and security. When such a situation has to be dealt with, the President is constitutionally responsible to take any action including the mobilization and the use of military action abroad in order to preserve the territories.

In the other area, the power as the Commander in chief is strongly associated with the use of force, military mobility, and the highest military decision making. As the Commander in chief it should be clear that the President has the highest power in military administration and military organization. Furthermore, the President would have the power to command the military action in the battle field and have the power to direct any military operation authorized by the parliament. To formulate a Commander in Chief clause, the South African Constitution may provide a good model of a constitutional basis for the military power of the President. Article 202 of the South African Constitution does not just stipulate that the President is the

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898 Foxnews, Constitution Allows Obama to strike Syria Without Congressional approval, accessed online at: http://www.foxnews.com/opinion/2013/08/30/constitution-allows-obama-to-strike-syria-without-congressional-approval/

899 Kompas, Indonesia vs Malaysia Fenomena Perbatasan Negara Berdaulat, accessed online at: http://hankam.kompasiana.com/2011/04/13/indonesia-vs-malaysia-fenomena-perbatasan-negara-berdaulat-355153.html: The territorial conflicts between Indonesia and other countries may happen because of special interest (claiming the natural resources or territorial expansion), and people illegally intrudingacross the border. The conflicts sometimes also provoke military action in frontier areas.
Commander in Chief of the defence forces but also clarifies the consequences of the constitutionality of the President’s office as the Commander in Chief. The Article clarifies that as the Commander in Chief, the President must appoint the Military Commander of the defence force. Moreover, the Constitution also clarifies that the President has the power to authorize the use of defence force in three circumstances of cooperation with the policeservices, in defence of the Republic, or in fulfillment of an international obligation.

Furthermore, the power to decide the mobilization of military force abroad for the purpose of International intervention should be given to the President. The concept of armed forces intervention abroad could be taken from the French Constitution Article 35. In such power, the President would have the power to mobilize the armed forces for a particular purpose of international intervention. Such power would be an independent power but may be confirmed by the DPR.

The proposal for the Commander in Chief would be as follows:

| Article 202 Command of defence force of the South African Constitution. |
| Article 201 of the South African Constitution. |
| Article 35 of the French Constitution. |
| Article 209 of the South African Constitution on the Establishment and control of intelligence services. |

As terrorism and other internal disturbances are potential threats to Indonesia, it would be important to consider the intelligence clause of the South African Constitution to be adopted by the Indonesian Constitution. The design for the intelligence power for the President would be as follows:

| The President has the power to direct, and control any intelligence services within the legal framework established by Law; |
| The President has the power to appoint the Chief of the secret intelligence service and other senior members |
With regard to the emergency power, the most important thing is setting a firm definition that would include the scope of the emergency situation. In general, state emergency refers to several situations where there is an armed attack such as invasion, aggression, rebellion, or non-armed attack such as terrorism, natural disaster, economic and public order chaos that results in real or imminent threat to the national peace and security. At this point, any urgent measures and actions are needed to overcome the situation. Furthermore, the important thing of the emergency power is about measuring the threat to the national peace and security. According to the international law development, the UN Security Council has broadly defined the term threat to international peace and security. Similar to the common practices, the threat to international peace and security is not only about a military attack but also including other threats such as terrorism, economic and political deterioration, natural disaster, disease, poverty, human rights abuses, etc.

With regard to the emergency powers of the President, it would be rational to refer to the term of “threat to international peace and security” that the UN Security Council has defined. Similar to the threats against International peace and security, the threats against national peace and security include armed attacks and non-armed attacks that potentially put the state in chaotic situations, total breakdown of the law and public order, or political and economic deterioration. In a modern and democratic era, the emergency power is given in a limited term and exercised with control from other institutions on the basis of the rule of law and human rights values. The emergency power of the President would be for a limited period and could not be prolonged indefinitely for the life of the regime.

When the attack or other threat is real, and when there is a conflict that should be ended, the President would be given a unilateral emergency power and may use his discretion to override the administrative and legal framework. In some of tangible threats that are relevant to the state and emergency situation, the need for formal approval from the parliament would inhibit the urgent action. The President at this moment should benefit from his position as the Commander in chief and act as the highest authorization to protect the state and the people. However, if the attack is imminent and not a potential threat that immediately
needs a response, the approval from the legislature must be required. This is intended to obtain legitimate action approved by the legislature as representative of the people.

With regard to the articulation of the emergency power in the Constitution, it is important to refer to the power of the President to take any measures according to Article 16 of the French Constitution as part of the emergency power. To this extent, the President has the emergency power to take any measures in an emergency situation that intimidates state independence, the integrity of the state territory, or the fulfillment of international commitments under serious and immediate threat, or the situation where the proper functions of the constitutional public authorities are interrupted. The power and any measures taken by the President should be the subject of consultation with the DPR, the DPD, the Supreme Court, the Constitutional Court and other institutions.

The other significant emergency power that may be given to the President is the power to make emergency law. The Law mostly relates to martial law and the power is given as a consequence of the President being the Commander in chief. The emergency law is commonly issued when the state is under the real armed attack. Similar to the presidential law, the emergency law is not power without check. The Court has the power to review the constitutionality of the law.

The design for the emergency power constitutional provision would be as follows:

| The President has the emergency power. |
| The emergency power is exercised in circumstances of any attacks or disasters that will undermine the state, and political and economic stability. |
| The emergency power of the President shall not exceed 6 months. This period may only be extended with the DPR’s approval. |
| In the context of an emergency situation, the President must take all measures necessary. The emergency measures taken by the President are put before the DPR for approval. |
| The Constitutional Court has the power to review the constitutionality of any emergency measures taken by the President. |

With regard to the responsibility for foreign affairs, the first point should be clarifying the scopes of foreign affairs. It is also to clarify in which area the President is need to be given the substantive power and in what area the President is given the formal power which should

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904 Article 16 the French Constitution.
be shared by other institutions. To clarify the foreign affairs (especially that has significant and relevant impact to the people and state as a whole), the scope of power should also be clearly mentioned in the Constitution. This is because such power may be potentially abused while the negative impact and disadvantage can endanger people as a whole and the existence of the state. It is also important to classify certain powers, such as the power to conclude an important and substantive treaty, into powers that should be shared along with the DPR. In general, the foreign affairs powers should include the treaty power, the diplomatic power, and the foreign policy making power.

On the treaty power, it is important to distinguish between treaty and international agreements according to their impact and scope. For this purpose, the concept of the treaties classification according to Article 53 of the French Constitution provides an example of clarity of the classification. According to the Article, there are 3 sorts of treaties: peace treaties, trade agreements, treaties or agreements relating to international organizations. Moreover, those three sorts of treaty should be ratified or approved by an Act of Parliament if: they commit the finances of the State, if they modify provisions which are the preserve of statute law, if they relate to the status of persons, and if they involve the ceding, and exchanging or acquiring of territory.

In the case of Indonesia, the design would be as follows:

<table>
<thead>
<tr>
<th>The President makes and unmakes treaties. To make peace treaties, trade agreements, treaties or agreements relating to international organizations, the President needs the approval of the DPR determined by Laws.</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Constitutional Court may review the constitutionality of any treaties or international agreements challenged by either the President or the DPR before becoming a party (to the treaty or the international agreements)</td>
</tr>
<tr>
<td>To have domestic effect, all treaties or international agreements shall be transformed into Law</td>
</tr>
</tbody>
</table>

In terms of the diplomacy power, the area of diplomacy is mostly the domain of the President. It is because that the President is the head of the state and head of government. The diplomacy is part of running the state administration externally. To this extent, the power

\[905\] Article 53 the French Constitution.
should be independently exercised by the President without intervention from other branches. The clause would be as follows:

| The President has the power to give diplomatic accreditation by issuing a letter of credence. The President has the power to verify diplomatic letters from other states |
| In some other certain diplomatic affairs related to foreign policy, the President must also be given a more substantive and independent power to determine, decide and deliver his view. This is because foreign policy making is part of the area of the executive. On 10 September 2013, President SBY delivered a letter to the UN Security Council about Syria. In his letter, the President addressed his disagreement with the US President’s plan to launch a military force against Syria. In the G20 Meeting, the President delivered his personal view about the possibility not to use military force, but instead a peaceful operation under the UN and engage the political process with the people of Syria. The President SBY also offered Indonesian participation in the peacekeeping operation for Syria. At this point, the President had his personal point of view in which he does not have to consult the parliament. The clause would be as follows: |

| The President is incharge of foreign affairs. The DPR must be consulted in a commencement, termination of the diplomatic relation and major policy issues, to be detemined by law. |
| The President has the power to decide on a participation in any international activities, such as the peacekeeping operations after due consultation with the DPR |
| The President ensures state compliance with International law including treaties and other international law instruments. |

On the pardoning power, the power should be given as an independent power where the President has the more substantial power to decide the final word. However, the power will always be exercised by and with advice. In some arguments, such power is classified as a judicial power of the President. However, for some reasons it may be inappropriate to say that the pardoning power of the president is a judicial power of the President. It is because judicial affairs are not under the area of executive affairs. The executive affairs are only for implementing the laws made by the Legislature but also including the implementation of the Court’s decision. The pardoning power of the President is always exercised after the judicial
process is finished. It is usually exercised after the court decision has been finalised. After the final court decision, the process will turn to the executive area as part of the law enforcement in order to implement the court decision. At this point, communication between the President and the Court would be needed. This is to respect the Court’s decision and the judicial process that has already been finished. By involving the Court, the pardoning power of the President would not undermine the judicial process.

In general, it is argued that even though the pardoning power is a prerogative of the President, the power should be exercised after advice. For this matter, with the assumption that the President is the head of the state, there should be a commission on the Prerogative of pardoning established by the President. The commission’s main duty is to give recommendations to the President. The Constitution also has to provide the limitation of the pardoning power of the President. In this point, the US Constitution may give a good reference as it gives the President the pardon power except in cases of impeachment. In addition, the Philippines Constitution may give a good reference for the articulation of amnesty.

Referring to the Philippines Constitution where the President has the concurrence votes of the Congress, the Indonesian Constitution should articulate that the amnesty granted by the Indonesian President should be with the advice of the DPR. It is because the President should still be given discretion, though it is limited, to determine the final decision on amnesty.

The design for the pardoning power clause would be as follows:

| The President may grant pardon, except, in cases of impeachment, only upon advice from the commission of pardoning. |
| The President may grant amnesty but only upon the advice of the DPR |

The following is the appointment and the state administration power. The appointment power is the most potential for the abuse of power. For the appointment power, the provision

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906 The composition of the Commission may refer to the composition of Switzerland’s commission on the Prerogative of pardoning, consisting of the President’s advisory council, the state prosecutor, the minister of justice and human rights, and from the Supreme Court.

907 Article II section 2 of the US Constitution.

908 Article VII Section 19 the Philippines Constitution.
should articulate the categories of the appointment, namely: the judicial appointment, state officer appointment (members of state institutions mentioned in the Constitution), public officer appointment (including the members of the independent agencies, state prosecutor, Chief of police, etc), executive officers appointment (ministers and other executive officers for the presidential office and the state ambassador), and military appointments (including high ranked military officers of army, navy, and air force). The appointment power may include the power to nominate, select and formally appoint. For the appointment power, the Philippines Constitution may provide a good reference in particular on the existence of a commission of appointment. As for Indonesia, there should be an independent advisory commission of appointment consisting of the DPR, DPD, Supreme Court, the Judicial Commission and other state institutions to advise the President.

The President has the appointment power to appoint public officers determined by laws, upon advice from an independent advisory commission of appointment and upon the opinion of the DPR.

The appointment of the senior member of the state officers and the Judges are made by a joint approval from the DPR, the President, and other state institutions. On the appointment of the Constitutional Court Judges, the joint approval is from the President, the DPR, and the Supreme Court; and on the appointment of the Supreme Court judges, the joint approval is from the DPR, the President and the Judicial Commission.

In running the state administration, the President nominates, selects, and appoints ministers. The Ministers are under the executive department headed by the President.

The President has the power to determine and establish ministerial departments and extra ministerial departments and has the power to coordinate and direct control over ministerial departments and other extra ministerial departments.

The President appoints state ambassadors and other executive officers within the executive areas determined by law.

The President has the power to establish presidential office, executive commission, agency, or other executive auxiliary bodies to assist in particular area of the executive determined by laws.

The President has the power to supervise and coordinate local government and autonomous provincial government as a consequence of the unitary model of the state.

The President makes and implements national policy and public policy for the purpose of state administration.

The President has the power to take any measure in accordance with anti-corruption measures.

The appointment powers have great potential for abuse of power. Therefore, it should be given in different ways. In addition to anticipating the abuse of power, however, the design
should still give room for the President to independently perform certain appointment powers. On the judicial appointment, the President would appropriately be given the power to formally appoint while the real appointment power would be attached to a joint approval. For the state ambassadors appointment, public officer appointment, military appointment, the model would be that the President has to act upon the advice of an independent advisory commission of appointment and the opinion of the DPR. For executive appointments that mostly have an executive function including ministers, chiefs of executive non-ministerial department, other chiefs of executive agencies under the executive branch, and the executive officers within the presidential office, the President should be given independent power with his own discretion but in order to maintain a proportional power, the DPR should be notified about the appointments and at any time should have the right to give its opinion to the President.

With respect to the administrative power, since it is the main power for the President, Article 85 of the South African Constitution may provide a good example to explicitly determine the administrative powers of the President.\textsuperscript{909} It clearly shows the main purpose of the executive function as the executor of national legislation, developer and executor of national policy, coordinator of the functions of state departments and administrations and the branch which performs any other executive functions provided for in the Constitution. Referring to the South Africa Constitution, the articulation of the provision should clearly specify the administrative power of the President. The design of the administrative power would cover the power to:

1. exercise executive authority  
2. implement national legislation  
3. establish ministerial departments and any other extra ministerial departments (independent departments);  
4. coordinate and control over the cabinet;  
5. issue government regulations;  
6. establish executive commissions, agencies, other executive bodies;  
7. establish other executive departments (such as executive auxiliary bodies or any institutions supporting state administration);  
8. supervise the local government and autonomous provinces;  
9. set and implement national policy and public policy

\textsuperscript{909} Article 85 of the South African Constitution.
10. set executive law

The President has the power to establish a cabinet of ministers according to the vision, mission, and program of the President. He has also the power to reshuffle, or dissolve a ministerial department, the power to appoint, change, and dismiss the ministers. The administrative power of the President would be mostly an independent power where the President is the main decision maker and given the opportunity to independently decide but the President still has to notify the DPR.

The Constitution has to make clear that ministers are the assistants of the President. It should provide the mechanism for the ministers to support the President’s constitutional duties, state administration and daily governmental activities. The President should appoint ministers based on their expertise and professionalism. Ministerial appointments on the basis on professionalism and expertise would help to avoid abuse of ministerial authority and anticipate ministers acting *ultra vires*; in fact in ministerial policy making, conflicts with the group interests of political parties were always involved and the policies in these matters are usually just a matter of bargaining.\(^{910}\) To this extent, it will be important to clarify that the ministers are under the executive department which is headed by the President as the head of government. The term executive department may refer to the US Constitution.

Moreover, the administrative powers of the President should be mostly given as an independent power. The Parliament may only use its power to invoke the oversight function and the Court may review the constitutionality of any of the government’s legal products. The administrative power would be more about executive affairs and they fall under the president as the head of government. The check over such power would be appropriately conducted by observing the running of the state administration. This is merely to maintain the independency of state administration. However, in certain powers such as the power to establish an executive commission, agency, or other executive auxiliary bodies, the power would also be given as an independent power but must be performed following consideration from the DPR. The consideration should be only on the grounds of the budget instead of

political grounds. In addition, it would also be important to give and specify in details about the power of the President as the unitary executive branch to supervise and intervene in certain purposes and particular issues of the local government. To this extent, the South African Constitution may give a good example to consider providing a constitutional basis for the President’s powers that is related to local government. According to Article 100 of the South African Constitution, the President as the head of the national executive has the power to intervene and take some measures when a local government does not fulfill an executive obligation in terms of the Constitution or legislation. Moreover, it is also important to refer to the Philippines Constitution Article X section 4 for the real power of the President to supervise the local governments.

In addition, there should be an additional power namely the extraordinary power for the President. The power may be needed for extraordinary circumstances when a fundamental decision is required or when the state’s sovereignty is under threat, such as a constitutional issue concerning self-determination. This is according to the Indonesian experience when the referendum to give the right of self-determination for the province of Timor-Timor (which is now Timor Leste) in 1999 had no constitutional basis. The referendum that was conducted during the Habibie administration was said to be unconstitutional since it had no constitutional basis; on the other hand, the referendum had brought a major substantial decision for the Timor Leste secession. In the future, to deal with similar issues, the Constitution needs to provide an extraordinary power for the President.

The power of referendum would be given for a very few and special circumstances, under high pressure, and in a situation when there is an issue concerning state sovereignty and territory. The parliament is the key point for such power. An extraordinary power should be a dependent power. It depends only on the approval from the both chambers in the MPR (the DPR and the DPD) and also the Constitutional Court. The clause of the referendum power would be as follows:

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911 Article 100 of the South African Constitution.
The President by and with the consent from the MPR, has the power to call a referendum in a situation when the state sovereignty requires it or in urgent situations when there is a fundamental and essential state question. The Constitutional Court may give a decision on the constitutionality of a referendum to be held upon request by the MPR, the President, the DPR, or the DPD.
CHAPTER 6: CONCLUSION AND GENERAL REMARKS

The Fifth Amendment of the Indonesian Constitution must be put on the agenda. It must be an agenda to reduce the ambiguity and obscurity in most of the Articles in the Amended Constitution. To be consistent with the democratic sphere, the process of amendment must accommodate public participation. It does not only reflect the proper theory, but also reconciles local and global international developments. This is intended to anticipate global challenges faced by Indonesia.

Since experiment with other features of government system would be more precarious, the presidential system still needs to be preserved in Indonesia. It is not only because its original reason, which relates to the Indonesian founding father’s intention of the first Republic of Indonesia, but also due to the idea of preserving the Indonesian presidency as the original Indonesian government. Although the system has often been practised along with some irregularities, the presidential system has for a long period survived in Indonesia. Changing to another system would be ineffective and inefficient for Indonesia. It would take another transitional period. Experimenting with a new regime will not only push Indonesia to adjust with the new institutional framework, but also to deal with other legal and political complexities that could be even more problematic. Another factor that makes the presidential system worth preserving is because Indonesia has to deal with the complexity of political institutions. The presidential system would help, at least, to reduce the complexity by providing a simple institution with its feature of a single executive. Furthermore, according to theory, the system provides checks and balances and adheres to the doctrine of the separation of powers. By the separation of powers and checks and balances, it is expected that conflicts of power between branches as well as abuse of powers can be minimized.

However, having regard to all the considerations to keep the presidential system, it does not mean that Indonesia has been satisfied with the existing presidential system. The process of finding the best model of a presidential system in Indonesia should continue. Indonesia must decide and clarify in what way the presidential system would be adapted, what presidential model would be chosen (whether a system that gives limited executive powers to the
president, a system that gives wide and excessive substance of executive powers to the
president, or a system that gives proportional executive power to the president).

There are no perfect or best practice government systems in the world; however, it
would be good to have the framework for the executive power which is enriched with the
adoption and combination of some good elements that have been well practised by other
states. With all challenges and problems faced, the original US presidential system model which
allocates a proportional power to the President is the main model for a presidential system; a
system which empowers the President with substantive powers without being over protective
to the President. It is a system that views the executive as not only the executive, but also as the
sole branch that has roles as the head of government and head of state and as the organ that
can immediately react to any kinds of challenges and can deal with modern international
developments. On the other hand, some states such as France, Germany, Poland, and other
states which have adopted other frameworks for the executive powers should also be
considered as giving a good model for the executive power.

In general, the Indonesian president should be still given at least some essential powers
as follows:

1. law-making powers, including the power to initiate Laws together with the DPR,
   and other kinds of rules and regulations;
2. the budgetary and spending power, including the budget proposal and control
   over budget expenditure;
3. the emergency power, including the power to determine and declare state
   emergency, issue emergency law, and take any measure to overcome and
   restore the situation;
4. the self-defense power, including the power to invoke the use of military force;
5. the military power including the power to lead the armed forces organization,
   the power to ensure the national security and state sovereignty, the power to
   command and mobilize military forces, and the power to take any decision to
   participate in an international intervention or military operation;
6. the foreign affairs power including the treaty power, the diplomatic power, and other foreign policy powers including the power to ensure state compliance with International obligations;
7. the pardoning power;
8. the appointment power, consisting of the appointment of state officers including the judicial appointment; the public officers including the military appointment, the chief of police appointment, the state prosecutor, etc; the executive officers including the ministers, state ambassadors, and other executive officers;
9. the administrative power, including the power that is relevant to the state administration and local government administration, and the additional symbolic power to take any measure in accordance with anti-corruption measures; and
10. the power to call a referendum that may be applied in an extra-ordinary situation when a fundamental issue arises.

The exercise of executive power does not only depend on the Constitution and Laws but also on other factors such as the presidential election system, political bargaining, legislature’s support; some factors like the presidential nomination and election process may have direct or indirect influences. This work does not recommend how the election system should be and what is the best presidential election system which should be adopted for the Indonesian presidential system. That is another area of future research. However, to be consistent with a presidential model, it is necessary to preserve a direct presidential election in Indonesia. It is also important to encourage a strong figure whom represents an entire nation rather than party interest. In fact, the party coalition in the parliament and the parliamentary majority vote is also significant to the executive power and its exercise. The more support the President gain from the legislature, the more legitimate the executive power exercised by the President.

In order to promote executive accountability in Indonesia, it is important to formulate a provision about executive immunity and privilege in the Constitution.\(^{912}\) This is not only for a

\(^{912}\) The executive immunity is part of guaranteeing the balancing power among the three branches of government. By explicitly adopting executive immunity in the Constitution, it will give constitutional certainty to the problems
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clarification of in what way and what limits the immunity and privilege should be given to the President, but also to maintain the accountability of the executive power performance. At this point, a qualified immunity may be plausibly adopted by the Indonesian Constitution. A qualified immunity should be given in order to give the President limited immunity in certain official issues. It has to be given by clearly expressing an immunity clause in the Constitution. This is in order to prevent abuse of power by the President in the area of his private capacity by still legally shielding the President on the area of official capacity.

As the present Indonesian Constitution gives limited portions of the executive powers to the President and this removal of some substantial executive power from the President will provide over-checks and over-control for the exercise of power. The situation will treat the President as an underdog vis a vis the Legislature. In fact, it contributes to the disadvantage of the Indonesian constitutional system as a whole, provoking unsolved institutional conflicts, and preventing the President from quickly dealing with imminent challenges and problems. Moreover, the unsolved conflicts between the Legislative and the President have put more tension in their relationship. The Legislature and the President are more often fighting for their institutional powers, for example on the appointment power, currently the appointment power of the President is not real but only just a formal power. The Legislative mostly dominates the appointment power; they intervene too often for political reasons. This, in fact, frequently obstructs the President’s actions. The Legislative actually already has enough tools to constrain the presidential power in this area. They can use the scrutiny and budgetary power to counter-balance the Presidential powers. Moreover, they can also invoke any kind of constitutional mechanism such as the right of question, the right of interpellation or right of investigation to counter-balance the appointment power of the President. Too many Legislature interventions in the appointment process, about what actually the process should

which arise on the special issue of the institutional conflict or power conflict. An explicit executive immunity clause would also help to make effective the roles of the President in office, which would benefit from protection for any controversial action that must be taken during the office. However, the immunity proposed in this thesis would not an absolute immunity, but a limited immunity which is commonly defined as a qualified immunity.
be on the area of the President, will be representing more political interest rather than useful debate.

The Constitution must enable the President to exercise the executive power as well as enhancing the executive accountability in order to tackle emergency situations and take any action when a quick response is needed. Moreover, the Constitution should clarify which power should be shared, which power needs to rely on another branches’ approval, and which power may be independently exercised by the executive. To be more adaptive to global developments, the President as the executive branch must be able to ensure state compliance with International obligations and enable the President to take any measures to react against any International challenges.

The Constitution should clarify whether the executive power is a shared power which can only be exercised jointly with other branches, a dependence power which may only be exercised after the approval or consent by other branches, or a virtually substantive power of the President which can be independently exercised by the President. At this point, the Legislature and the Court play the role to counter-balance the executive branch. On the other hand, it is important to enhance the Court’s independency and roles.

With regards to the Legislative power, the power should remain in the hands of the Legislative branch as a whole. It is not only to avoid excessive overlap of the presidential power, with the theory that the Legislature is a branch which holds the power to make law, but also to prevent any inefficient deadlocks and conflict between the legislature and the executive. In Indonesia, while preserving the legislative power in the Legislature, the President should still be involved in the legislative process. However, the President should not be the co-legislator who equally has the same power as the Legislature but the partner-observer in the legislative process. The President may initiate the bill, jointly discuss but not jointly approve the bill. In the joint discussion, the President would better to have the right of executive preview over the legislation by submitting the bill to the constitutional court in order to test the constitutionality of the bill. Such mechanism can be found in the Polish Constitution of Article 122 stating that the President may refer to the Constitutional Court for the constitutionality of the bills.
However, the process from the executive preview to the judicial preview of the legislation should be conducted within a limited time and should not delay the legislation process. It should be limited within 14 days, after which the Legislative may still go to the next stage of approval.

Furthermore, the President should be given the power to make rules and regulations. In general, it would be plausible to look at the Polish Constitution as it provides a good model for the law-making power of the President. It clarifies that the President has the power to make regulations, executive orders, the power to issue decisions within the scope of his authority, and has the power according to Article 144 to issue official acts in particular formal matters.

On the appointment power, it is important to make a clear distinction of appointment, particularly the state officer appointment (members of the state institutions established by the Constitution) including judicial appointment, public officers appointment including military appointments, the chief of police appointment, the state prosecutor, etc; and the executive appointment including the ministers, state ambassador, and other executive officers in the area of the executive. On the state officer appointment (the appointment of the members of the state institutions), the President should be merely acting as a branch running checks and balances vis a vis other branches. In such powers, the President should share the power with the Legislature; he has the right to nominate but the appointment should be jointly made by the DPR and other state institutions. On the judicial appointment, the President may have the formal power to formalize the appointment but the real judicial appointment would be with the joint approval of the DPR, the President, and other state institutions. On the executive officer appointment in particularly the cabinet appointment, the President should be given independent powers to establish ministries, appoint, reshuffle, and dismiss the ministers. Moreover, for the other executive officers appointment, such as the appointment of the state

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913 In some cases of the appointment of the Constitutional Court’s Judges, the President SBY had unilaterally appointed a Constitutional Court Judge without considering the transparency principle. The case on the appointment of Judge Patrialis Akbar had raised a question before the Administrative Court (PTUN); however, the Court came to its decision to revoke the Presidential Decision 87/2013 on the appointment of Judge Patrialis Akbar on 23 December 2013 (accessed on: http://www.merdeka.com/peristiwa/adnan-buyung-gembira-atas-putusan-patrialis-sebut-sby-otoriter.html, 24/12/2013).
ambassador, the member of executive agency or other executive officers within the presidential office, the President should be given more actual and substantive power instead of only formal appointment power. For this matter, the Philippines Constitution may provide a fair enough power in its Constitution. There should be a Committee of appointment (CA) that would formally work along with the president in the selection and nomination process of the executive officers, but the President would be the final decision maker. Therefore, the appointment power in particular areas of the executive would remain in the hands of the President as the executive. The legislature could oversee the performance and daily work of the executive officer and would have the power to criticise, give opinion, or even dismissal advice.

As the nature of the executive is for running the state administration, the President should be seen as an independent branch in running the daily state administration. It would be necessary to clarify the ministerial departments as the executive department in the Constitution to strongly confirm that the ministers are under the President as the head of government. The use of the term “the executive department” would be like in the US Constitution (Section 2 of Article II). As a unitary state, the President should have the power to supervise, develop, and control the local government including autonomous government in Indonesia. The President should have the power to coordinate all the local government affairs including the decision for expanding or merging the local government territories. At this point, the Philippines may provide an appropriate model for consideration. Article X section 4 of the Philippines Constitution firmly states that the President has the power to exercise general supervision over local governments. The need to have the supervision power over the local government written in the Constitution is not only for confirming that Indonesia is a unitary state, but also to provide a constitutional basis for the President to react immediately whenever it is needed. The power would enable the President to manage his daily administration, direct and control the institution in his branch while the parliament is doing its function, scrutiny and oversight of the administration. Additionally, it is also important to expressly determine the President’s power to intervene in the local government on the President’s administrative power on the grounds that he is the head of the national executive.
The foreign affairs power should be mainly vested in the hands of the President. However, the exercise of such power would be exercised in consultation by and with the DPR. On the treaty making power, the President should have the main power to make a treaty by and with the advice from the DPR. The DPR may challenge the constitutionality of the draft of the treaty by submitting the draft of the treaty to the constitutional court. As a result, the President may only ratify the treaty after the Constitutional Court has confirmed that the treaty is compatible with the Constitution or the Constitution has been reconciled with the subject of the treaty. At this point, the mechanism of treaty power in the Polish Constitution is a good example to consider. According to Article 133 section (2) of the Polish Constitution, the President may refer to the Constitutional Court for the conformity of the treaty to the Constitution.\footnote{Article 133 Section 2 Polish Constitution.} For the treaty classification, the French Constitution may help. Article 53 French Constitution expressly provides the classification of treaty and determines which treaty should be ratified or approved by the Law.\footnote{Article 53 French Constitution.} On the other foreign affairs power or the diplomacy power, again, Article 133 section (1) of the Polish Constitution may be appropriate to be adopted. It clearly defines the diplomatic power of the President.\footnote{Article 133 Section 1 the Polish Constitution.}

In a global development of the international law, it would be important to give the power to take any action in order to ensure state compliance with the international obligation and the power to make sure that the implementation of international law depends on the President. The reason is not only because the President as the executive is the only branch which could take any direct response but also because it is commonly recommended by International law that the President is the representative of the state in the international community. Moreover, in international law perspective, the President as the executive has to be legally responsible before the International adjudication to represent his state. To this extent, the President should be given the power to take any measure in order to ensure state compliance with the International obligation.
Furthermore, as the modern international practices have rapidly developed, the term war has been defined broadly but seems old-fashioned. In this context, the German Constitution has used a modern concept of the state of defence instead of using the term war power in Article 115(a). The German term of state defence may be adopted to replace war power on the Indonesian Constitution. Moreover, the concept of a state of national defence, as mentioned in the South African Constitution, would be fit to replace the concept of war. In common practice, such power is a dependent power to be performed upon the DPR’s approval.

The German Constitution provides the determination of the term as imminent threat and immediate attack. The President would only exercise the emergency power on particular issues. The emergency power of the President would only be exercised for actual and immediate threats. Other than that, the President should confirm and seek approval from the DPR. The emergency clause in the French Constitution would also be reasonable to be adopted. It provides clear definition of the emergency situations.

On the other hand, the Constitution should guarantee the power of the President to command over the military forces in times of peace and in times of armed conflict. At this point, the model of Supreme Commander in Chief by the Polish Constitution in Article 134 and Article 136 combined with the Commander in Chief model written in the South African Constitution may be a good model to be adopted.

In addition, based on the Indonesian experience of a fundamental and crucial question about the secession of the province of Timor-Timur (which is now Timor-Leste) there should be an anticipatory power that might be invoked by the President. For a very fundamental state question, such as the issue relating to secession, right of self-determination, or state accession to (what is now being designed)a union model of the AEC (ASEAN Economic Community) or any union models similar to the EU model, it is important to empower the President with the power to call a referendum. However, such power would only be exercised by and with approval from the two chambers of the MPR (the DPR and the DPD). The inspiration of such a referendum power is from the Polish Constitution (Article 125) which gives the possibility for the President to invoke a referendum in respect of matters of particular importance to the State.
Furthermore, the President is given the power to initiate the budget while the real power of approval is with the DPR. After the budget is approved, the President should be given the power to spend the budget independently. The DPR at this point could always monitor and oversee the exercise of spending power of the President. This model is similar to what happens in the US.

For the pardoning power, it is worth referring to the US and the Philippines. According to the US pardoning clause, it is important to clearly express the limitation of pardoning power; that the pardoning power does not apply in the impeachment case. While in general, the scopes of pardoning power would be rationally defined as what is written in the Philippines.

It is important to consider setting a constitutional basis for the power of the President that relates to the establishment and control of state intelligence services. This would be not only in order to maintain the accountability of intelligence operations but also providing a constitutional check over any intelligence operations conducted in a secret way by the President. To this extent, Article 209 of the South African Constitution may provide a model for the intelligence power of the President.

Lastly, as corruption is one of the greatest enemies for Indonesia and in order to enhance the anticipation and support on the anti-corruption commitment, a symbolic constitutional power, namely the anti-corruption power for the President may also be considered.\(^{917}\) The reason for giving the anti-corruption power to the President is because the President, as the head of the executive has to deal with the bureaucracy within the state administration. The President should ensure control over the bureaucracy and the executive

\(^{917}\) Such anti-corruption power had been introduced in the Venezuela constitutional system when President Nicolas Maduro seeks the national legislature to enhance his constitutional power. He seeks fast-track legislative powers to enable him enacting the laws by decree without the parliament in order to help his government to fight against corruption (see: Ezequiel Minaya: Venezuelan Leaders Seeks to Boost His Power, the Wall Street Journal, August 13, 2013, available online on http://online.wsj.com/news/articles/SB1000142412788732476970457909772676705350, last accessed 12/10/2013). The Venezuelan requirement for enhancing the Presidential power was approved by the Venezuelan national legislature by giving a special power to the President the decree powers to fight corruption and economic war (see: Ryan Mallett-Outtrim: Venezuela’s Legislature Gives Maduro Decree Powers to fight against Corruption and Economic War, Venezuelanalysis.com, November 20, 2013, available online on http://venezuelanalysis.com/news/10178, last accessed 12/10/2013.
department under the executive branch, including making sure the application of anti-corruption policy on the entirety of all institutions under his branch. It is rational to give to the President since the President has a direct access to the cabinet, state institution, executive agencies, local government, and other state agencies.
Summary

Modelling Executive Powers in the Indonesian Constitution

A comparative study of Constitutions

This PhD dissertation on “Modelling Executive Powers in the Indonesian Constitution: A Comparative study of Constitutions” generally proposes a presidency model for Indonesia. It mainly addresses to seek and find an appropriate constitutional framework for giving executive powers to the President. The issue is crucial for the proper and effective functioning of the Presidency as one of the important constitutional branches. This dissertation proposes a design framework of constitutional provisions on the specific issue of the executive powers of the President.

This dissertation has the main method of observing theory and comparing other Constitutions to draw a general conclusion on how should the Executive be established in different countries. By comparing the Constitutions and analysing the constitutional provisions, concerning the Executive and its powers, this dissertation identifies the constitutional standards on how executive powers should be given to the President in the Indonesian presidential system. Another method used in this dissertation is to referring back to the constitutional history in Indonesia, in which the executive powers have evolved under different Constitutions, different regimes, and different models of government systems.

In general, the arguments in this dissertation include the Executive and its powers provided by different model of Constitutions, thus encompassing the general executive mode and the modes of the executive powers. The findings presented in this dissertation are based on the normative method of analysis. The Constitutions are the normative basis of analysis in this dissertation, which, along with the Laws and Judicial decisions, allow us not only to determine the content of certain constitutional structures of government, but also to identify constitutional practices which do not come directly from the constitutional provisions. Limiting the scope of analysis to the constitutional provisions was intentional, as the Constitution is the main key to creating a constitutional and legal framework for the system of government, a presidential system, in Indonesia.
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There are two major issues which presented themselves as the research questions in this dissertation. The first issue deals with the description of the existing constitutional framework for the executive powers in the Indonesian Constitution and the effect of the Amendment on the Constitution and its implications for the executive powers of the Indonesian President. The other is the assessment of the Indonesian executive powers and the idea for an alternative constitutional design of the Indonesian executive powers that may be developed in order to improve the Indonesian presidency, reduce unsolved power conflicts between branches, prevent abuse power and corruption, and adapt to International challenges.

The dissertation consists of six chapters. While the first chapter is an introductory chapter, the second chapter is devoted to issues related to defining the theory and the depiction of other Constitutions to seek to find constitutional regularity standards for the Executive branch and how the Constitutions allocate the executive powers to the executive branch. In this chapter, an attempt is made to classify the constitutional standards and constitutional frameworks. Moreover, the relations between constitutional frameworks and other frameworks that make up the group of constitutional rules defining the powers of the Executive in the government systems are compared and described. The third chapter is focused on the historical issue related to the development of the executive and its powers in Indonesia. It depicts the constitutional practices within different regimes of the Indonesian Presidents. The fourth chapter is focused on the matters related to the Executive and the executive powers under the Amended Constitution. There is an attempt to present the current constitutional conditions concerning the interpretation of the constitutional provisions. It is also essentially to identify all common features of the Indonesian presidential system. The constitutional provisions of the current Amended Constitution and identification of the vagueness, ambiguities, irregularities and inconsistencies in particular issues of the Executive and its powers mentioned in the Constitution, are also being reviewed in this chapter. The reviews are concentrated to identify the vagueness and ambiguity of the constitutional provision concerning the Executive and its power. In this chapter, the analysis and descriptions are outlined to find problems of what is happening with the system of government in Indonesia generally, and in particular, problems with the Presidency and its powers. Finally, the solutions of problems identified in this chapter are offered. The next chapter is devoted to proposing a design of constitutional framework on the particular issue of the Executive and the executive powers. The design is based on the constitutional regularity features and common characters
of system of governments under some Constitutions. The design being made is addressed to prevent abuse of powers but still preserving the normal roles of the Executive in a presidential system. Such design may be introduced in order to propose the fifth amendment to the Constitution in Indonesia.

The result of the research in this dissertation confirms that the executive powers in Indonesia have been evolved, starting from the revolutionary strong character of the executive powers to the authoritarian strong character and coming to the weak character of the executive powers. Following the fall of the regime of President Soeharto in Indonesia, the amendment to the Constitution had been proposed to curb the executive powers of the President. The Amended Indonesian Constitution had successfully introduced a limited presidency under a presidential system by setting limits and interventions to the executive powers of the President. The Legislature mostly dominated the Executive; it made too many political interventions into the executive powers. This, in fact, frequently prevented the President from, acting genuinely as what it should be.

Furthermore, it contributed to the increasing disadvantages of the Indonesian constitutional system as a whole, the unsolved institutional conflicts and over-restrained the President from quickly reacting to deal with imminent challenges and problems. The conclusion of this dissertation generally affirms that the Constitutional provisions establish the key elements of the system of government in Indonesia. Therefore, the framework of the Constitution, which elaborated from the articles, has to be fixed in order to improve the performance of the Indonesian presidency. Furthermore, this dissertation indicates that a presidential system is the system where the President has to be given some substantial executive powers, in order to support the president’s functions and roles, but has to be checked and balanced by other institutions.

**Key words:** the Constitution, the Executive, the executive powers, presidential system, the Indonesian President, Amendment Constitution
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Modelling Executive Powers in the Indonesian Constitution
A comparative study of Constitutions
Pemodelan Kekuasaan Eksekutif dalam Konstitusi Indonesia:
Studi Perbandingan Konstitusi


Dalam disertasi ini terdapat dua isu utama yang keduanya diformulasikan dalam rumusan masalah. Isu pertama adalah deskripsi pasal-pasal konstitusi yang berlaku dan ada dalam kerangka Konstitusi
Indonesia yang merujuk pada kekuasaan eksekutif dalam Konstitusi Indonesia dan efek Amandemen Konstitusi beserta implikasinya terhadap kekuasaan eksekutif. Isu kedua adalah analisa kekuasaan eksekutif di Indonesia dan ide alternatif desain konstitusional untuk kekuasaan eksekutif di Indonesia yang mungkin dapat dibangun untuk memperbaiki kepresidenan di Indonesia, mengurangi konflik kekuasaan antar cabang kekuasaan yang tidak terselesaikan, mengantisipasi penyalahgunaan kekuasaan dan korupsi, dan mengadaptasi tantangan-tantangan internasional.


Hasil penelitian dalam disertasi ini menegaskan bahwa kekuasaan eksekutif di Indonesia telah berkembang secara berevolusi, dimulai dari karakter revolusioner kuat kekuasaan eksekutif berkembang menjadi kekuasaan eksekutif yang berkarakter otoriter kuat, dan beralih menjadi kekuasaan eksekutif yang mempunyai karakter lemah. Setelah jatuhnya rezim Soeharto di Indonesia, amandemen terhadap Konstitusi di Indonesia telah memangkas kekuasaan eksekutif presiden Indonesia. Amandemen
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terhadap Konstitusi di Indonesia telah berhasil mengintroduksir kepresidenan yang berbatas dalam sebuah sistem presidensial dengan memberikan batasan-batasan dan intervensi-intervensi terhadap kekuasaan eksekutif presiden. Legislatur bertendensi dominan terhadap eksekutif dengan terlalu banyak memberikan intervensi politik terhadap kekuasaan eksekutif. Hal ini, dalam faktanya, telah berulang kali menghalangi presiden untuk melakukan hal yang seharusnya dilakukan oleh presiden. Lebih lanjut, hal tersebut berkontribusi untuk meningkatkan kerugian-kerugian sistem konstitusional Indonesia secara menyeluruh, memprovokasi konflik institutional yang tidak terselesaikan, dan pengekangan berlebihan terhadap presiden untuk secara cepat berreaksi menghadapi tantangan nyata dan permasalahan-permasalahan.


Kata kunci: Konstitusi, Eksekutif, Kekuasaan Eksekutif, Sistem President, Presiden Indonesia, Amandemen Konstitusi.
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Appendix 1
Excerpts from The First Indonesian 1945 Constitution (the UUD 1945 18 August 1945)
Source: Naskah Komprehensif Perubahan UUD 1945, Edisi Revisi, Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2012 (translation by the author)

<table>
<thead>
<tr>
<th>Articles</th>
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<tbody>
<tr>
<td>Provision III of the Transitional Provision</td>
<td>At the first time the Republic of Indonesia is established, the President and the Vice President shall be elected by the Preparatory Committee for Indonesia’s Independence</td>
<td></td>
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<tr>
<td>Provision IV of the Transitional provision</td>
<td>Prior to the formation of the MPR, the DPR, and the DPA in accordance with this Constitution, all their powers shall be exercised by the President assisted by a national committee</td>
<td></td>
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<tr>
<td>Article 3</td>
<td>The MPR has the power to enact the Constitution and the GBHN (the guidelines of the state policy)</td>
<td></td>
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<tr>
<td>Article 5 section (1)</td>
<td>The President shall hold the power to make Laws with the DPR’s approval</td>
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<tr>
<td>Article 5 section (2)</td>
<td>The President shall make the government regulations as the directives to the Laws</td>
<td></td>
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<tr>
<td>Article 10</td>
<td>The President is the Supreme Commander of the Army, the Navy, and the Air Force.</td>
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<tr>
<td>Article 11</td>
<td>With the approval from the DPR, the President declares war, makes peace and concludes treaties with other states</td>
<td></td>
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<tr>
<td>Article 12</td>
<td>The President declares the state of emergency. The conditions for such a declaration and the measures to deal with the emergency shall be set by law.</td>
<td></td>
</tr>
<tr>
<td>Article 13 section (1)</td>
<td>The President appoints ambassadors and consuls</td>
<td></td>
</tr>
<tr>
<td>Article 13 section (2)</td>
<td>The President receives the credentials of foreign ambassadors</td>
<td></td>
</tr>
<tr>
<td>Article 14</td>
<td>The President grants mercy, amnesty, pardon, and restoration of rights</td>
<td></td>
</tr>
<tr>
<td>Article 15</td>
<td>The President grants titles, decorations, and other distinctions of honors</td>
<td></td>
</tr>
<tr>
<td>Article 17 Section (1)</td>
<td>The President shall be assisted by the Ministers of State.</td>
<td></td>
</tr>
<tr>
<td>Article 17 Section (2)</td>
<td>The ministers are appointed and dismissed by the President</td>
<td></td>
</tr>
<tr>
<td>Article 17 Section (3)</td>
<td>The Ministers shall head the government departments</td>
<td></td>
</tr>
<tr>
<td>Article 22 Section (1)</td>
<td>In case of a compelling emergency, the President has the right to issue government regulations in lieu of laws (the emergency laws)</td>
<td></td>
</tr>
<tr>
<td>Article 22 Section (2)</td>
<td>Such regulations shall have the consent from the DPR during its subsequent sessions</td>
<td></td>
</tr>
<tr>
<td>Article 22 Section (3)</td>
<td>Where the approval of the DPR is not obtained, the government regulation shall be revoked</td>
<td></td>
</tr>
<tr>
<td>Chapter VII on State Finance, Article 23 section (1)</td>
<td>The annual state budgetary shall be set by law. In case of the DPR rejects the draft of budget, the government shall adopt the budget of the preceding year</td>
<td></td>
</tr>
<tr>
<td>Article 23 section (5)</td>
<td>In order to examine the accountability of the state finances, a State Auditor shall be established by law. The audit report of the state auditor shall be reported to the DPR.</td>
<td></td>
</tr>
<tr>
<td>Transitional Provision Clause IV</td>
<td>Prior to the formation of the MPR, the DPR, the DPA (Supreme Advisory Council) in accordance with this Constitution, all their powers shall be exercised by the President assisted by a national committee.</td>
<td></td>
</tr>
<tr>
<td>Chapter VII paragraph 2-4</td>
<td>The President in exercising his powers has to take into consideration of the DPR’s opinion. The President cannot dissolve the DPR. The members of the DPR are also members of the MPR. The DPR is acting as counterbalance to the President. It functioned to oversee that the President’s has to act in accordance with the guidelines of the state policy which been set by the MPR. In any reasons that the DPR is in opinion that the President has acted in contrary to the state policy as laid down in the Constitution and the state guidelines that had set by the MPR, the DPR can call for a special session and request for the president’s accountability</td>
<td></td>
</tr>
<tr>
<td>Article 22 of the constitutional explanation</td>
<td>Article 22 of the Constitution concerns the emergency rights (noodverordeningenrect) of the President. The necessity to have the article 22 is that the article will give constitutional basis for the government to guarantee the safety of the country by taking prompt and appropriate action. However, by the article, the government cannot eschew from the DPR’s control. The DPR may put intervention to the president’s emergency power by approving the emergency law issued by the President on behalf of government.</td>
<td></td>
</tr>
<tr>
<td>The annotation to the constitutional provision 23</td>
<td>Besides the DPR represents the peoples and whereas the people has the right to participate in determining the state income and expenses, how the government spends the money (approved by the DPR)</td>
<td></td>
</tr>
<tr>
<td>Annotation IV</td>
<td>&quot;Under the People’s Consultative Assembly, the President is the highest government executive. In running the administration, the power and the responsibility are rested in the President.</td>
<td></td>
</tr>
</tbody>
</table>
Appendix 2  
Excerpts from The Federal Republic Indonesia Constitution 1949 (KRIS 1949)  
Translation by the author

<table>
<thead>
<tr>
<th>Articles</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Chapter III</strong></td>
<td>The state institutions are the President, the ministers, the senate, the people representative (the DPR), the Indonesia Supreme Court, and the Council of state financial auditor.</td>
</tr>
<tr>
<td>Article 68 Section (1)</td>
<td>The President and the ministers altogether are the government of the State.</td>
</tr>
<tr>
<td>Article 68 Section (2)</td>
<td>As the state government, the President and a minister or some or all the ministers, have special responsibility or general responsibility. The government of the State has to be in Jakarta and in case of the state of emergency, the government has the power to decide other places to be the head quarter of the state.</td>
</tr>
<tr>
<td>Article 85 Section (1)</td>
<td>The President has the power to appoint the Chief of Senate according to the advice of the Senate.</td>
</tr>
<tr>
<td>Article 117 (2)</td>
<td>The government has the power to establish the Indonesia state welfare and specially to maintain the Constitution, the Federal Law, and other rules that are applied in Indonesia</td>
</tr>
<tr>
<td>Article 120 section (2)</td>
<td>The Ministers have to give written or oral explanation to the DPR as they required, as long as it is not against the public interest of the Republic Federal of Indonesia</td>
</tr>
<tr>
<td>Article 123</td>
<td>Section (1) The government takes notice to the Senate only if it deemed to be necessary. Section (3) The Senate is to be considered about the important and special affairs regarding some or all states or part of the states or a special relationship between the Republic Federal of Indonesia and the states. The rule is excluded in any urgent and emergency situation that needed to be taken of an emergency action while the Senate is in recess. Section (4) The Senate is considered instead of the bill of the emergency law Section (5) The Government shall have to notify the Senate all the decisions that the Senate has the right to be considered Section (6) In accordance that the Senate is considered, it is mentioned in the head of the Decision Letter</td>
</tr>
<tr>
<td>Article 128 section (1)</td>
<td>The proposal from the Government on the Legislation is delivered to the DPR through the Presidential message and will be sent to the Senate to be noted.</td>
</tr>
<tr>
<td>Article 128 section (2)</td>
<td>The Senate has the right to propose the bill of legislation to the DPR on particular issues regarding to Article 127a. The Senate uses the rights by notifying the copy of bill proposal to the President.</td>
</tr>
<tr>
<td>Article 128 section (3)</td>
<td>The DPR has the right to propose the bill of the Legislation to the Government.</td>
</tr>
<tr>
<td>Article 139 section (1)</td>
<td>The Government has the right to authorize and responsible to enact the emergency law, to adjust to the establishment of the Federal administration in time of emergency that needs to be taken in action.</td>
</tr>
<tr>
<td>Article 139 Section (2)</td>
<td>The emergency laws are the Federal Law without prejudice</td>
</tr>
<tr>
<td>Article 140 section (2)</td>
<td>If the emergency law is rejected by the DPR, the law is no longer valid.</td>
</tr>
<tr>
<td>Article 140 Section (3)</td>
<td>If the emergency law is no longer valid and it is not being amended, the Federal law shall take action on it.</td>
</tr>
<tr>
<td>Article 140 Section (4)</td>
<td>If the rules determined in the emergency law is changed and enacted as the federal laws, all the consequences shall be adjusted to the laws.</td>
</tr>
<tr>
<td>Article 141 Section (1)</td>
<td>The government regulations as directive to the Legislation are made by the government and have the functions to implement the legislation</td>
</tr>
<tr>
<td>Article 141 Section (2)</td>
<td>The government regulations can be completed with the sanctions. The sanction is limited by the Federal laws.</td>
</tr>
<tr>
<td>Article 160 Section (1)</td>
<td>The President shall have the right to give pardon. The pardon shall be given after the advice from the Supreme Court, and given by the Federal law without asking other Courts to give the advice.</td>
</tr>
<tr>
<td>Article 160 Section (2)</td>
<td>If the capital punishment is determined by the Court, it shall not be executed before the President decided to give or reject the pardon</td>
</tr>
<tr>
<td>Article 160 Section (3)</td>
<td>The Amnesty shall only be given by the Federal Law or according to the authorization of the Federal Law by the President after asking for the advice from the Supreme Court</td>
</tr>
<tr>
<td>Article 176</td>
<td>According to the treaty and agreements that determined by Article 175, the Government shall decide to participate in the International organizations</td>
</tr>
<tr>
<td>Article 178</td>
<td>The President appoints the Republic Federal of Indonesia's representatives for other states and accepts other states representatives</td>
</tr>
<tr>
<td>Article 181 (1)</td>
<td>The Government has the power of state defense affairs</td>
</tr>
<tr>
<td>Article 181 Section (3)</td>
<td>The officers of the state defense are appointed, promoted, and dismissed on behalf of the President and according to the Federal Law</td>
</tr>
<tr>
<td>Article 184 section (1)</td>
<td>According to the Federal Law, the Government declares the Republic Federal of Indonesia or part of the state is under the war or under the emergency war when it is necessary and urgent for the national interest and international security</td>
</tr>
<tr>
<td>Article 184 section (2)</td>
<td>The Federal Law regulates the consequences of the declaration of the state of emergency and stipulates that the civil power according to the Constitution, the public order, and the policy, can be transferred to other civil powers or military powers. Whereas, civil authority can be subjected to the military powers.</td>
</tr>
<tr>
<td>Article 186</td>
<td>The “Konstituante” (the Committee of Constitution), together with the Government shall immediately set the Constitution of Republic of Federal Indonesia replacing the temporary Constitution</td>
</tr>
<tr>
<td>Article 187 Section (1)</td>
<td>The draft of the Constitution is made by the Government with the presidential mandate to the Konstituante to be discussed in a session</td>
</tr>
<tr>
<td>Article 187 Section (2)</td>
<td>The Government shall ensure that the draft of the Constitution is according to the development of the Republic of the Federal Indonesia, the people’s will and democracy in article 43 and 46</td>
</tr>
<tr>
<td>Article 188 (1)</td>
<td>The “Konstituante” consists of all members of the DPR that has been elected according to Article 111, the new Senate that has been elected according to Article 97 and the ad-hoc members.</td>
</tr>
</tbody>
</table>
| Article 189 | (1) the “Konstituante” cannot hold session and decide the draft of the New Constitution if the session is not held by at least 2/3 of the members.  
(2) the Konstituante has the right to change the draft of the Constitution. The new Constitution is enacted if the draft of the Constitution is accepted by at least 2/3 of the present members and will be validated by the Government.  
(3) If the draft of the Constitution has been accepted by the Konstituante, it will be sent to the President to be validated by the Government. The Government shall validate the draft of the Constitution immediately and shall publish the Constitution.  
(4) Each of the states is given the opportunity to accept the Constitution. In term that the State does not accept the Constitution, the Federal State has the right to discuss on a special relationship of the Republic Federal of Indonesia and the Kingdom of the Netherlands |
| Article 196 | After the Constitution is enacted, the Government order a committee that is appointed to run its duties as the direction, work and make sure that the rules that are needed by the Constitution is set, and all the Laws is set and adjusted according to the Constitution |
Appendix 3
Excerpts from The Temporary Constitution 1950 of Indonesia (the UUDS 1950)
Translation by the author

<table>
<thead>
<tr>
<th>Articles</th>
<th></th>
</tr>
</thead>
</table>
| Article 45 | 1. the President is the head of the state.  
2. in exercising his duties, the President is assisted by a Vice President  
3. the President and the Vice President is elected according to the Law  
4. For the first time, the Vice President is appointed by the President with the advice by the DPR |
| Article 46 | 1. The President and the vice president hold the position in the government office  
2. The government is based in Jakarta. In term of emergency, the government has the right to decide others |
| Article 48 | If the President died, resign, or cannot run his duties in his office period, he can be replaced by his vice president until the office term is finished |
| Article 50 | The President establishes the ministries. |
| Article 52 | 1. In a joint discussion session to discuss public interests of the Republic of Indonesia, the Ministers hold the Council Minister session which are chaired by the Prime minister or if the Prime minister is in absence, by the Minister who is appointed by the Council of the Minister  
2. The Council of the Minister always informs all the important affairs to the President and the Vice President. A minister has the duties to do so in terms of the special affairs that are belongs to his duty |
| Article 55 | 1. the president, vice president, and ministers are prohibited to have double offices, neither in Indonesia nor abroad  
2. the President, the vice President and ministers are prohibited to directly or indirectly involved in a corporation according to the agreement to have profits or benefits, neither with the Republic of Indonesia nor with one of the autonomy provinces in Indonesia  
3. They cannot have any claims on behalf of the Republic of Indonesia except for general state obligations  
4. The prohibitions are also valid for the period three years after the office is finished |
| Article 79 | 1. The chief, the vice-chief and the Supreme Court members are appointed according to the laws. The appointment is for the whole life  
2. The Legislation decides that the Chief, the vice-chief, or the members of the Supreme Court, to be dismissed in certain ages  
3. They can be dismissed or fired according to the procedures set by the laws  
4. They can be dismissed by the President or by their proposal |
| Article 81 | 1. The chief or the vice chief or the members of the state auditoris appointed according to the laws. The appointment is for the whole life.  
2. The Legislation decides that the chief, the vice chief, or the members of the state auditor is dismissed in certain ages  
3. They can be removed or dismissed according to the laws  
4. The can be dismissed by the President |
| Article 83 section 1 | The President and the Vice President are inviolability |
| Article 83 Section (2) | The Ministers are responsible for all the government policy either jointly or individually |
| Article 84 | The President has the rights to dissolve the DPR. A presidential decision declares the dissolution and orders to set the new DPR's election within 30 days |
| Article 85 | All the Presidential decrees including those concerning the performance of presidential military powers military powers shall be countersigned by the ministers; except for the decree concerning on the appointment of the vice president (upon the recommendations submitted by the House of representative in article 45 paragraph 4) and decree concerning the appointment of the cabinet committee and of ministers in accordance to the recommendation of the cabinet committee (article 52 paragraph 4). |
| Article 87 | the President gives the honorable titles according to the laws |
| Article 90 | 1. The government's proposal on the bill of the legislation is delivered to the DPR by the presidential message  
2. The DPR has the right to propose the bill of legislation to the government |
| Article 91 | the DPR has the right to change the proposal of Legislation that is proposed by the Government |
| Article 92 | 1. If the DPR accepts the proposal of legislation either with or without any changes, the proposal is sent with the notification to the President  
2. If the DPR rejects the proposal of legislation from the government, it shall be notified to the President |
| Article 93 | if the DPR decides to process the proposal of Legislation, they will send the proposal to be validated by the government to the President |
| Article 94 | 1. As long as the proposal of Legislation has not been accepted by the DPR according to the law, the proposal can be withdrawn by the government  
2. The Government shall validate the proposal of Legislation that has been accepted except if within one month, it is being challenged.  
3. The validation by the government or the government's objection as mentioned in previous article will be notified |
### Rosa Ristawati: Modelling Executive Powers in the Indonesian Constitution: A comparative Study

| Article 96 | Section 1. The government has the right of authority and responsibility to set the emergency law that determined the state administration and the government affairs because of the urgent situation that shall need to be immediately anticipated. Section 2 of the Article stipulates that the emergency law has the power and the degree as legislation. |
| Article 97 | 1. The rules which are determined in the emergency law, after they are set, shall be delivered to the DPR at least in the next session. The DPR will discuss the law according to the procedures 2. If the emergency law is rejected, the law is invalid. 3. If the emergency law is invalid and does not determine the consequences, either the situation can be recovered or not, it shall have to be determined the action in anticipating the result and consequences. 4. If the substance on the emergency law is changed and the emergency law is set as legislation, the results and its consequences shall be determined according to the law |
| Article 98 | 1. The rules establish legislation is set by the Government. It is called by the government rules 2. The government rules can have criminal sanctions against the violation. The sanction is limited by the legislation |
| Article 99 | Section (1) the Legislation and the government rules can order other state institutions to regulate certain subjects which are determined in the laws |
| Article 106 | Section (1) the President, the vice president, the ministers, the chief and the vice chief and the members of the DPR, the chief, the vice chief and the members of the Supreme Court, state prosecutor in the Supreme Court, the chief, the vice chief, and the members of the council of the state financial supervisor, the President of the bank, the members of the highest institutions and other state officers who are appointed by the legislation, are prosecuted in the first and highest Supreme Court after their resignation. The prosecution can be held because of the crimes and official violation and other crimes and other violations that are determined by the legislation and acted within their office |
| Article 107 | 1. The President has the right to give pardoning. The pardoning is given after asking the advice from the Supreme Court 2. In case of death penalty, it cannot be executed before the President decides to give or not to give the pardoning 3. The Amnesty and abolition is only be given by law or on behalf of the law, by the President after asking the advice to the Supreme Court |
| Article 109 | Section 4 Valid payment tools are diffused by the government of the Republic of Indonesia or the bank. |
| Article 111 | Section 1 The government holds the financial general affairs. The state financial is managed and responsible according to the law |
| Article 112 | Section 1 The state auditor shall audit the state financial. Furthermore, section 2 of the Article stated that the report of the auditing are submitted to the DPR |
| Article 114 | 1. The proposal of the state budget legislation is proposed to the DPR but the government in early of the year that shall not within 2 years 2. The proposal to amend the state budget legislation is proposed to the DPR by the government |
| Article 116 | the state expenses and the state incomes of the Republic of Indonesia are being responsible to the DPR |
| Article 117 | The government shall not collect tax, customs for the benefit of the state instead of according to the Law or authorized by the laws |
| Article 120 | Section 1 the President makes and ratifies treaty and other agreements between other states. Instead of contradictory to the laws, the treaty or other agreements shall not be ratified. They shall be approved by the Legislation” |
| Article 120 | Section 2 The President concludes and decides treaty and other agreements by the Laws” |
| Article 127 | Section 1 – Section 3 1. the President has the highest power in the army of the Republic of Indonesia. 2. the government assigns the army under a commander in chief. The President has the power to appoint and dismiss the army officers. 3. the army officers are appointed and dismissed by and on behalf of the President according to the laws” |
| Article 128 | the President shall not declare war instead of by the approval from the DPR. |
| Article 129 | Section 1 According to the laws, the President can declare the Republic of Indonesia or part of the Republic of Indonesia is under dangerous situations on the basis of state security, public interest and international security |
Appendix 4
Excerpts from The Amended Constitution of Indonesia (the “UUDNRI 1945”)

<table>
<thead>
<tr>
<th>Articles</th>
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</tr>
</thead>
</table>
| Article 11 Section (1) | “The President with the approval from the DPR declares war, makes peace and concludes treaty with other countries”.
| Article 11 Section (2) | “The President in making other international agreements, which potentially create an extensive and fundamental impact on the people, influence the state financial burden, and/or require an amendment to or the enactment of a law, shall obtain the approval from the DPR”.
| Article 13 Section (1) | The President appoints ambassadors and consuls.
| Article 13 Section (2) | In the appointment of ambassadors, the President takes into account the consideration of the DPR
| Article 13 Section (3) | The President receives the accreditation of ambassadors of foreign nations by taking into account the consideration of the DPR
| Article 16 | The President establishes an Advisory Council which has the duty to give advice and consideration to the President. Furthermore, the establishment shall be regulated by Law
| Article 17 Section (1) | The Ministers are the President's assistant
| Article 20A Section (1) | The DPR shall hold legislative, budgeting and oversight functions
| Article 22 | Section 1: In time of urgent and emergency situation, the President has the power to issue the government rule in lieu of the Legislation/ the emergency law
| Article 22A Section (3) | The candidates of the Supreme Court judges are proposed to the judicial commission to the DPR to have its approval. They will be formally appointed as the Supreme Court judges by the President.
| Article 24C Section (3) | The Constitutional Court has 9 judges that formally appointed by the President. The candidates are proposed by each 3 judges from the Supreme Court, 3 judges form the DPR, and the three Judges from the President
| Article 30 Section (3) | The TNI (the “Tentara Nasional Indonesia”: the Indonesian National Military) consists of the Army, Navy, and Air Force, as the state instrument, has duties to defend, protect, and maintain the state sovereignty and integrity
### Appendix 5
Excerpts from the National Legislations

**Source:** the Indonesian Laws, translation by the author

<table>
<thead>
<tr>
<th>Articles</th>
<th>Law No. 37/1999 on Foreign Relations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 6 Section (1) Law No. 37/1999</td>
<td>The power to establish the International relation and to apply political foreign policy is in the hand of the President. Whereas, the power to declare war, make peace, and the agreements with other states needs approval from the DPR</td>
</tr>
<tr>
<td>Article 6 Section (2) Law No. 37/1999</td>
<td>The President delegates the power to establish the International relation and to apply the Republic of Indonesia political foreign policy to the Minister</td>
</tr>
<tr>
<td>Article 7 Section (1) Law No. 37/1999</td>
<td>The President appoints the state official in addition to the foreign affairs minister, the government official, or others in order to establish foreign affairs relation in a particular field</td>
</tr>
<tr>
<td>Article 9 Section (1) Law No. 37/1999</td>
<td>The establishment and the termination of the diplomatic or consular with other states and the membership and the membership termination from the international organization shall be decided by the President with the consideration from the DPR.</td>
</tr>
<tr>
<td>Article 9 Section (2) Law No. 37/1999</td>
<td>To establish and shutdown the diplomatic or consular representative office in other countries or the representative office of Indonesian government in the international organization, the President shall make Presidential Decision.</td>
</tr>
<tr>
<td>Article 10 Law No. 37/1999</td>
<td>To send the troops or the peace keeping mission are decided by the President with the consideration from the DPR</td>
</tr>
<tr>
<td>Article 22 Law No. 37/1999</td>
<td>In terms of war or the termination of the diplomatic relation with other countries, the minister or the state officer assigned by the President, coordinates effort for secure and protect national interest including the citizen.</td>
</tr>
</tbody>
</table>
| Article 25 Law No. 37/1999 | Section 1: “the Authority to grant asylum for foreigner is in the hand of the President with the consideration from the minister”;
| Section (2): further shall be regulated by a presidential decision” |
| Article 27 Section (1) Law No. 37/1999 | The President decides the policy against the refugees from outside countries with the consideration from the minister; in section (2), the main policies shall be regulated by the Presidential decision. |

<table>
<thead>
<tr>
<th>Articles</th>
<th>Law No. 24/2000 on International Agreements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 2 Law 24/2000</td>
<td>The Foreign minister has the competence to give the political consideration and take any actions against the treaty making and its ratification. However, the Competences shall be consulted with the DPR</td>
</tr>
<tr>
<td>Article 5 Section (1) Law No. 24/2000</td>
<td>The state institutions and the government institutions, whether it is a department or a non- department, in the national level and local level, that has an initiative to make international agreements, shall consult and coordinate with the minister.</td>
</tr>
<tr>
<td>The explanation off Article 11 Section (2) Law No. 24/2000</td>
<td>Although the President does not need to ask for the DPR’s approval, the DPR can oversee the government in terms of treaty implementation, by monitoring the implementation the Laws (which transform a treaty or an agreement).</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Articles</th>
<th>Law No. 2/2002 on the State Police of the Republic Indonesia</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 11 Law No. 2/2002</td>
<td>Within 20 days of work after the Presidential letter, the DPR shall give approval or disapproval. However, in case that the DPR does not give any decisions, the candidate of the chief of police is assumed to be approved by the DPR. In any urgent case, the President temporarily dismisses the chief of police and appoint a temporary chief and ask the DPR’s approval.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Articles</th>
<th>Law No. 34/2004 on the National Army of Indonesia</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 13 Law 34/2004</td>
<td>The President proposes one name of the candidate chief of military to have the DPR’s approval. The approval from the DPR on the candidate of the chief military shall be given at least 20 days work after the proposal is received. In case that the DPR rejects; the President shall propose other candidates. However, in case there is no response from the DPR, the DPR is assumed to be agreed with the President’s nominee</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Articles</th>
<th>Law No. 16/2004 on the State Prosecutor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 37 Law 16/2004</td>
<td>The state prosecutor shall accountable make a report and shall submit it to the President and the DPR.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Articles</th>
<th>Law No. 1/2004 on the State Treasury</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 41 Law 1/2004</td>
<td>The government makes long-term investment to have economic, social, or other benefits. It can be in the form of shares, obligations, and direct investments. The government encloses its shares to the state company, local government company, or private company.</td>
</tr>
<tr>
<td>Article 46 Law 1/2004</td>
<td>The DPR’s approval shall be needed for transferring assets, property of land, building, and state property more than 1 Billion Rupiah.</td>
</tr>
<tr>
<td>Article 58 Section (1) Law 1/2004</td>
<td>For the improvement of the government performance, the transparency and the accountability of the state finances management, the President as the head of the government, has the power to comprehensively direct and establish the system of the internal government control.</td>
</tr>
<tr>
<td>Article</td>
<td>Description</td>
</tr>
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</tr>
<tr>
<td>Article 14 Law 39/2008</td>
<td>For the purpose of synchronization and coordination among the ministerial affairs, the President may establish a ministry of coordination.</td>
</tr>
<tr>
<td>Article 22 Law 39/2008</td>
<td>The requirements to be appointed as minister are as follows: Indonesian citizenship, loyal to God, loyal to the &quot;Pancasila&quot; as the state ideology, devoted to the UUD NRI 1945 as the Indonesia constitution, devoted to the aims of the proclamation of independence, physically and mentally healthy, having high integrity and good personality and never been sentenced to prison under the court decisions for committing serious crimes.</td>
</tr>
<tr>
<td>Article 20 Law No. 39/2008</td>
<td>The liquidation of a ministry (education, culture, health, social, labor, industry, trade, mining, energy, public work, transmigration, transportation, information, communication, agriculture, plantation, forestry, animal husbandry, marine and fisheries, national development planning, state apparatus, state secretariat, state company, land, population, environment, science, technology, investment, cooperation, small and medium enterprises, tourism, woman empowering, sports, housing and construction area or disadvantages area) shall have with the DPR consideration. The DPR consideration shall also be asked by the President in terms of the liquidation of the ministry of religion, justice, finance, and defense.</td>
</tr>
<tr>
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<td>Section 2: A member of the DPD shall not be prosecute and accused before the Court for the statement, question, and/or opinion which delivered either written or unwritten within the DPD's session or outside the DPD's session that related to the functions, duties and authorities of the DPD. Section 3: A member of the DPD shall not be removed because of the statement, questions, and/or the opinion that deliver within the session or outside session that related to the function, duties and authority of the DPD.</td>
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<td>Article 8 Section (2) Law No. 12/2011</td>
<td>The Ministerial Rules, as long as ordered by the higher law are regarded as law and have legal binding. The Ministerial Rules are rules which set by a Minister in order to particular government affairs. The explanation of Article 8 Law No. 12/2011</td>
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<td>Article 52 Law No. 12/2011</td>
<td>Section 4: In case that the DPR gives approval to an emergency law, such law shall be set as the Legislation. Section 5: In case that the DPR disapproves the emergency law, the emergency law shall be revoked and shall be declared invalid by Law.</td>
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<td>Article 155 Law No. 12/2011</td>
<td>The making of budgetary framework is based on the work plans of the government in order to implement the state’s purposes. The government’s work plans are made by the Government to be discussed and jointly agreed with the DPR. The Government work plans which have been discussed and jointly agreed are the guideline to arrange the state budget and shall be set as the state budget by a Presidential Decision.</td>
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<td>Article 36 Law 17/2011</td>
<td>The DPR’s consideration against the candidate of the Chief of the state intelligence is given at least within 20 working days after the request of a consideration is received by the DPR.</td>
</tr>
</tbody>
</table>

**Law No. 39/2008 on the State Ministry**

| Article 14 Law 39/2008 | For the purpose of synchronization and coordination among the ministerial affairs, the President may establish a ministry of coordination. |
| Article 22 Law 39/2008 | The requirements to be appointed as minister are as follows: Indonesian citizenship, loyal to God, loyal to the "Pancasila" as the state ideology, devoted to the UUD NRI 1945 as the Indonesia constitution, devoted to the aims of the proclamation of independence, physically and mentally healthy, having high integrity and good personality and never been sentenced to prison under the court decisions for committing serious crimes. |
| Article 20 Law No. 39/2008 | The liquidation of a ministry (education, culture, health, social, labor, industry, trade, mining, energy, public work, transmigration, transportation, information, communication, agriculture, plantation, forestry, animal husbandry, marine and fisheries, national development planning, state apparatus, state secretariat, state company, land, population, environment, science, technology, investment, cooperation, small and medium enterprises, tourism, woman empowering, sports, housing and construction area or disadvantages area) shall have with the DPR consideration. The DPR consideration shall also be asked by the President in terms of the liquidation of the ministry of religion, justice, finance, and defense. |
| Article 265 Law No. 27/2009 | Section 2: A member of the DPD shall not be prosecute and accused before the Court for the statement, question, and/or opinion which delivered either written or unwritten within the DPD's session or outside the DPD's session that related to the functions, duties and authorities of the DPD. Section 3: A member of the DPD shall not be removed because of the statement, questions, and/or the opinion that deliver within the session or outside session that related to the function, duties and authority of the DPD. |
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| Article 36 Law 17/2011 | The DPR’s consideration against the candidate of the Chief of the state intelligence is given at least within 20 working days after the request of a consideration is received by the DPR. |
The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately choose by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner choose the President. But in choosing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall choose from them by Ballot the Vice President.

The Congress may determine the Time of choosing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased while he shall have been in Office, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—“I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.
| Article II  
| Section 3 | He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States. |
| Article II  
| Section 4 | The President, Vice President and all civil Officers of the United States, shall be removed from Office on impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors. |
### Article VII Section 1
No person may be elected President unless he is a natural-born citizen of the Philippines, a registered voter, able to read and write, at least forty years of age on the day of the election, and a resident of the Philippines for at least ten years immediately preceding such election.

### Article VII Section 2
The national territory comprises the Philippine archipelago, with all the islands and waters embraced therein, and all other territories over which the Philippines has sovereignty or jurisdiction, consisting of its terrestrial, fluvial and aerial domains, including its territorial sea, the seabed, the subsoil, the insular shelves, and other submarine areas. The waters around, between, and connecting the islands of the archipelago, regardless of their breadth and dimensions, form part of the internal waters of the Philippines.

### Article VII Section 3
There shall be a Vice-President who shall have the same qualifications and term of office and be elected with, and in the same manner, as the President. He may be removed from office in the same manner as the President.

### Article VII Section 4
The President and the Vice-President shall be elected by direct vote of the people for a term of six years which shall begin at noon on the thirtieth day of June next following the day of the election and shall end at noon of the same date, six years thereafter. The President shall not be eligible for any re-election. No person who has succeeded as President and has served as such for more than four years shall be qualified for election to the same office at any time.

No Vice-President shall serve for more than two successive terms. Voluntary renunciation of the office for any length of time shall not be considered as an interruption in the continuity of the service for the full term for which he was elected. Unless otherwise provided by law, the regular election for President and Vice-President shall be held on the second Monday of May.

The returns of every election for President and Vice-President, duly certified by the board of canvassers of each province or city, shall be transmitted to the Congress, directed to the President of the Senate. Upon receipt of the certificates of canvass, the President of the Senate shall, not later than thirty days after the day of the election, open the returns of every election for President and Vice-President, or the Acting President shall take possession of the certificates of canvass, the President of the Senate shall, not later than thirty days after the day of the election, open all the certificates in the presence of the Senate and the House of Representatives in joint public session, and the Congress, upon determination of the authenticity and due execution thereof in the manner provided by law, canvass the votes.

The person having the highest number of votes shall be proclaimed elected, but in case two or more shall have an equal and highest number of votes, one of them shall forthwith be chosen by the vote of a majority of all the Members of both Houses of the Congress, voting separately.

The Congress shall promulgate its rules for the canvassing of the certificates. The Supreme Court, sitting en banc, shall be the sole judge of all contests relating to the election, returns, and qualifications of the President or Vice-President, and may promulgate its rules for the purpose.

### Article VII Section 5
Before they enter on the execution of their office, the President, the Vice-President, or the Acting President shall take the following oath or affirmation:

"I do solemnly swear [or affirm] that I will faithfully and conscientiously fulfill my duties as President [or Vice-President or Acting President] of the Philippines, preserve and defend its Constitution, execute its laws, do justice to every man, and consecrate myself to the service of the Nation. So help me God."

[in case of affirmation, last sentence will be omitted].

### Article VII Section 6
The President shall have an official residence. The salaries of the President and Vice-President shall be determined by law and shall not be decreased during their tenure. No increase in said compensation shall take effect until after the expiration of the term of the incumbent during which such increase was approved. They shall not receive during their tenure any other emolument from the Government or any other source.

### Article VII Section 7
The President-elect and the Vice-President-elect shall assume office at the beginning of their terms. If the President-elect fails to qualify, the Vice President-elect shall act as President until the President-elect shall have qualified.

If a President shall not have been chosen, the Vice-President-elect shall act as President until a President shall have been chosen and qualified.
Rosa Ristawati: Modelling Executive Powers in the Indonesian Constitution: A comparative Study

<table>
<thead>
<tr>
<th>Article VII Section 8</th>
<th>In case of death, permanent disability, removal from office, or resignation of the President, the Vice-President shall become the President to serve the unexpired term. In case of death, permanent disability, removal from office, or resignation of both the President and Vice-President, the President of the Senate or, in case of his inability, the Speaker of the House of Representatives, shall then act as President until the President or Vice-President shall have been elected and qualified. The Congress shall, by law, provide who shall serve as President in case of death, permanent disability, or resignation of the Acting President. He shall serve until the President or the Vice-President shall have been elected and qualified, and be subject to the same restrictions of powers and disqualifications as the Acting President.</th>
</tr>
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<tr>
<td>Article VII Section 9</td>
<td>Whenever there is a vacancy in the Office of the Vice-President during the term for which he was elected, the President shall nominate a Vice-President from among the Members of the Senate and the House of Representatives who shall assume office upon confirmation by a majority vote of all the Members of both Houses of the Congress, voting separately.</td>
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<tr>
<td>Article VII Section 10</td>
<td>The Congress shall, at ten o’clock in the morning of the third day after the vacancy in the offices of the President and Vice-President occurs, convene in accordance with its rules without need of a call and within seven days, enact a law calling for a special election to elect a President and a Vice-President to be held not earlier than forty-five days nor later than sixty days from the time of such call. The bill calling such special election shall be deemed certified under paragraph 2, Section 26, Article VI of this Constitution and shall become law upon its approval on third reading by the Congress. Appropriations for the special election shall be charged against any current appropriations and shall be exempt from the requirements of paragraph 4, Section 25, Article VI of this Constitution. The convening of the Congress cannot be suspended nor the special election postponed. No special election shall be called if the vacancy occurs within eighteen months before the date of the next presidential election.</td>
</tr>
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<td>Article VII Section 11</td>
<td>Whenever the President transmits to the President of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice-President as Acting President. Whenever a majority of all the Members of the Cabinet transmit to the President of the Senate and to the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice-President shall immediately assume the powers and duties of the office as Acting President. Thereafter, when the President transmits to the President of the Senate and to the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office. Meanwhile, should a majority of all the Members of the Cabinet transmit within five days to the President of the Senate and to the Speaker of the House of Representatives, their written declaration that the President is unable to discharge the powers and duties of his office, the Congress shall decide the issue. For that purpose, the Congress shall convene, if it is not in session, within forty-eight hours, in accordance with its rules and without need of call. If the Congress, within ten days after receipt of the last written declaration, or, if not in session, within twelve days after it is required to assemble, determines by a two-thirds vote of both Houses, voting separately, that the President is unable to discharge the powers and duties of his office, the Vice-President shall act as President; otherwise, the President shall continue exercising the powers and duties of his office.</td>
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<tr>
<td>Article VII Section 12</td>
<td>In case of serious illness of the President, the public shall be informed of the state of his health. The members of the Cabinet in charge of national security and foreign relations and the Chief of Staff of the Armed Forces of the Philippines shall not be denied access to the President during such illness.</td>
</tr>
</tbody>
</table>
| Article VII Section 13 | The President, Vice-President, the Members of the Cabinet, and their deputies or assistants shall not, unless otherwise provided in this Constitution, hold any other office or employment during their tenure. They shall not, during said tenure, directly or indirectly, practice any other profession, participate in any business, or be financially interested in any contract with, or in any franchise, or special privilege granted by the Government or any subdivision, agency, or instrumentality thereof, including government-owned or controlled corporations or their subsidiaries. They shall strictly avoid conflict of interest in the conduct of their office. The spouse and relatives by consanguinity or affinity within the fourth civil degree of the President shall not, during
| Article VII Section 14 | Appointments extended by an Acting President shall remain effective, unless revoked by the elected President, within ninety days from his assumption or re-assumption of office. |
| Article VII Section 15 | Two months immediately before the next presidential elections and up to the end of his term, a President or Acting President shall not make appointments, except temporary appointments to executive positions when continued vacancies therein will prejudice public service or endanger public safety. |
| Article VII Section 16 | The President shall nominate and, with the consent of the Commission on Appointments, appoint the heads of the executive departments, ambassadors, other public ministers and consuls, or officers of the armed forces from the rank of colonel or naval captain, and other officers whose appointments are vested in him in this Constitution. He shall also appoint all other officers of the Government whose appointments are not otherwise provided for by law, and those whom he may be authorized by law to appoint. The Congress may, by law, vest the appointment of other officers lower in rank in the President alone, in the courts, or in the heads of departments, agencies, commissions, or boards. The President shall have the power to make appointments during the recess of the Congress, whether voluntary or compulsory, but such appointments shall be effective only until disapproved by the Commission on Appointments or until the next adjournment of the Congress. |
| Article VII Section 17 | The President shall have control of all the executive departments, bureaus, and offices. He shall ensure that the laws be faithfully executed. |
| Article VII Section 18 | The President shall be the Commander-in-Chief of all armed forces of the Philippines and whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion or rebellion. In case of invasion or rebellion, when the public safety requires it, he may, for a period not exceeding sixty days, suspend the privilege of the writ of habeas corpus or place the Philippines or any part thereof under martial law. Within forty-eight hours from the proclamation of martial law or the suspension of the privilege of the writ of habeas corpus, the President shall submit a report in person or in writing to the Congress. The Congress, voting jointly, by a vote of at least a majority of all its Members in regular or special session, may revoke such proclamation or suspension, which revocation shall not be set aside by the President. Upon the initiative of the President, the Congress may, in the same manner, extend such proclamation or suspension for a period to be determined by the Congress, if the invasion or rebellion shall persist and public safety requires it. The Congress, if not in session, shall, within twenty-four hours following such proclamation or suspension, convene in accordance with its rules without need of a call. The Supreme Court may review, in an appropriate proceeding filed by any citizen, the sufficiency of the factual basis of the proclamation of martial law or the suspension of the privilege of the writ of habeas corpus or the extension thereof, and must promulgate its decision thereon within thirty days from its filing. A state of martial law does not suspend the operation of the Constitution, nor supplant the functioning of the civil courts or legislative assemblies, nor authorize the conferment of jurisdiction on military courts and agencies over civilians where civil courts are able to function, nor automatically suspend the privilege of the writ of habeas corpus. The suspension of the privilege of the writ of habeas corpus shall apply only to persons judicially charged for rebellion or offenses inherent in, or directly connected with, invasion. During the suspension of the privilege of the writ of habeas corpus, any person thus arrested or detained shall be judicially charged within three days, otherwise he shall be released. |
| Article VII Section 19 | Except in cases of impeachment, or as otherwise provided in this Constitution, the President may grant reprieves, commutations, and pardons, and remit fines and forfeitures, after conviction by final judgment. He shall also have the power to grant amnesty with the concurrence of a majority of all the Members of the Congress. |
| Article VII Section 20 | The President may contract or guarantee foreign loans on behalf of the Republic of the Philippines with the prior concurrence of the Monetary Board, and subject to such limitations as may be provided by law. The Monetary Board shall, within thirty days from the end of every quarter of the calendar year, submit to the Congress a complete report of its decision on applications for loans to be contracted or guaranteed by the Government or government-owned and controlled corporations which would have the effect of increasing the foreign debt, and containing other matters as may be provided by law. |
| Article VII Section 21 | No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate. |
| Article VII Section 22 | The President shall submit to the Congress, within thirty days from the opening of every regular session as the basis of the general appropriations bill, a budget of expenditures and sources of financing, including receipts from existing and proposed revenue measures. |
| Article VII Section 23 | The President shall address the Congress at the opening of its regular session. He may also appear before it at any other time. |
| Article IX B on the Civil Service | The Chairman and the Commissioners shall be appointed by the President with the consent of the Commission on Appointments for a term of seven years without reappointment. Of those first appointed, the Chairman shall hold
| Commission Section 1 (2) | office for seven years, a Commissioner for five years, and another Commissioner for three years, without reappointment. Appointment to any vacancy shall be only for the unexpired term of the predecessor. In no case shall any Member be appointed or designated in a temporary or acting capacity. |
| Article IX C on the Commission on Elections Section 1 (2) | The Chairman and the Commissioners shall be appointed by the President with the consent of the Commission on Appointments for a term of seven years without reappointment. Of those first appointed, three Members shall hold office for seven years, two Members for five years, and the last Members for three years, without reappointment. Appointment to any vacancy shall be only for the unexpired term of the predecessor. In no case shall any Member be appointed or designated in a temporary or acting capacity. |
| Article IX C on the Commission on Elections Section 5 | No pardon, amnesty, parole, or suspension of sentence for violation of election laws, rules, and regulations shall be granted by the President without the favorable recommendation of the Commission. |
| Article IX D on the Commission on Audit Section 1 (2) | The Chairman and the Commissioners shall be appointed by the President with the consent of the Commission on Appointments for a term of seven years without reappointment. Of those first appointed, the Chairman shall hold office for seven years, one Commissioner for five years, and the other Commissioner for three years, without reappointment. Appointment to any vacancy shall be only for the unexpired portion of the term of the predecessor. In no case shall any Member be appointed or designated in a temporary or acting capacity. |
| Article X on Local Government Section 4 | The President of the Philippines shall exercise general supervision over local governments. Provinces with respect to component cities and municipalities, and cities and municipalities with respect to component barangays, shall ensure that the acts of their component units are within the scope of their prescribed powers and functions. |
| Article X on Local Government Section 14 | The President shall provide for regional development councils or other similar bodies composed of local government officials, regional heads of departments and other government offices, and representatives from non-governmental organizations within the regions for purposes of administrative decentralization to strengthen the autonomy of the units therein and to accelerate the economic and social growth and development of the units in the region. |
| Article X on Local Government Section 16 | The President shall exercise general supervision over autonomous regions to ensure that laws are faithfully executed. |
| Article XI on Accountability of Public Officers Section 2 | The President, the Vice-President, the Members of the Supreme Court, the Members of the Constitutional Commissions, and the Ombudsman may be removed from office on impeachment for, and conviction of, culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust. All other public officers and employees may be removed from office as provided by law, but not by impeachment. |
| Article XI Section 9 | The Ombudsman and his Deputies shall be appointed by the President from a list of at least six nominees prepared by the Judicial and Bar Council, and from a list of three nominees for every vacancy thereafter. Such appointments shall require no confirmation. All vacancies shall be filled within three months after they occur. |
| Article XI Section 16 | No loan, guaranty, or other form of financial accommodation for any business purpose may be granted, directly or indirectly, by any government-owned or controlled bank or financial institution to the President, the Vice-President, the Members of the Cabinet, the Congress, the Supreme Court, and the Constitutional Commissions, the Ombudsman, or to any firm or entity in which they have controlling interest, during their tenure. |
| Article XII on National Economy and Patrimony Section 2 paragraph 4 | The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources. The President shall notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution. |
| Article XII on National Economy and Patrimony Section 17 | In times of national emergency, when the public interest so requires, the State may, during the emergency and under reasonable terms prescribed by it, temporarily take over or direct the operation of any privately-owned public utility or business affected with public interest. |
| Article XVIII on Transitory Provisions Section 4 | All existing treaties or international agreements which have not been ratified shall not be renewed or extended without the concurrence of at least two-thirds of all the Members of the Senate. |
| Article XVII on Transitory Provision Section 6 | The incumbent President shall continue to exercise legislative powers until the first Congress is convened. |
| Article XVII on Transitory Provision Section 7 | Until a law is passed, the President may fill by appointment from a list of nominees by the respective sectors, the seats reserved for sectoral representation in paragraph (2), Section 5 of Article V1 of this Constitution. |
| Article XVII on Transitory Provision Section 8 | Until otherwise provided by the Congress, the President may constitute the Metropolitan Manila Authority to be composed of the heads of all local government units comprising the Metropolitan Manila area. |
### Appendix 8

**Excerpts from The German Basic Law**

*Source: German Constitution, Deutscher Bundestag, Basic Law for the Federal Republic of Germany, translated by Christian Tomuschat and David P. Curie, Donald P. Koppers in cooperation with the Language Service of the German Bundestad, Printed version at November 2012*

<table>
<thead>
<tr>
<th>Article 25 on Primacy of International Law</th>
<th>The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.</th>
</tr>
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<tbody>
<tr>
<td>Article 55</td>
<td>1) The Federal President may not be a member of the government or of a legislative body of the Federation or of a Land.</td>
</tr>
<tr>
<td>Article 58</td>
<td>Orders and directions of the Federal President shall require for their validity the countersignature of the Federal Chancellor or of the competent Federal Minister. This provision shall not apply to the appointment or dismissal of the Federal Chancellor, the dissolution of the Bundestag under Article 63, or a request made under paragraph (3) of Article 69.</td>
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<tr>
<td>Article 59 on Representation of the Federation for the purposes of international law</td>
<td>(1) The Federal President shall represent the Federation for the purposes of international law. He shall conclude treaties with foreign states on behalf of the Federation. He shall accredit and receive envoys.</td>
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<td>(2) Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. In the case of executive agreements the provisions concerning the federal administration shall apply mutatis mutandis.</td>
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<td>Article 60 on Appointment of civil servants - Pardon - Immunity</td>
<td>(1) The Federal President shall appoint and dismiss federal judges, federal civil servants, and commissioned and noncommissioned officers of the Armed Forces, except as may otherwise be provided by law.</td>
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<td>(2) He shall exercise the power to pardon individual offenders on behalf of the Federation.</td>
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<td>(3) He may delegate these powers to other authorities.</td>
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<td>(4) Paragraphs (2) to (4) of Article 46 shall apply to the Federal President mutatis mutandis.</td>
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<td>Article 61 on Impeachment before the Federal Constitutional Court</td>
<td>(1) The Bundestag or the Bundesrat may impeach the Federal President before the Federal Constitutional Court for wilful violation of this Basic Law or of any other federal law. The motion of impeachment must be supported by at least one quarter of the Members of the Bundestag or one quarter of the votes of the Bundesrat. The decision to impeach shall require a majority of two thirds of the Members of the Bundestag or of two thirds of the votes of the Bundesrat. The case for impeachment shall be presented before the Federal Constitutional Court by a person commissioned by the impeaching body.</td>
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<td>(2) If the Federal Constitutional Court finds the Federal President guilty of a wilful violation of this Basic Law or of any other federal law, it may declare that he has forfeited his office. After the Federal President has been impeached, the Court may issue an interim order preventing him from exercising his functions.</td>
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<tr>
<td>Article 63</td>
<td>Election of the Federal Chancellor</td>
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<td></td>
<td>(1) The Federal Chancellor shall be elected by the Bundestag without debate on the proposal of the Federal President.</td>
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<td></td>
<td>(2) The person who receives the votes of a majority of the Members of the Bundestag shall be elected. The person elected shall be appointed by the Federal President.</td>
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<td>(3) If the person proposed by the Federal President is not elected, the Bundestag may elect a Federal Chancellor within fourteen days after the ballot by the votes of more than one half of its Members.</td>
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<td>(4) If no Federal Chancellor is elected within this period, a new election shall take place without delay, in which the person who receives the largest number of votes shall be elected. If the person elected receives the votes of a majority of the Members of the Bundestag, the Federal President must appoint him within seven days after the election. If the person elected does not receive such a majority, then within seven days the Federal President shall either appoint him or dissolve the Bundestag.</td>
</tr>
<tr>
<td>Article 65</td>
<td>Power to determine policy guidelines - Department and collegiate responsibility</td>
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<td>The Federal Chancellor shall determine and be responsible for the general guidelines of policy. Within these limits each Federal Minister shall conduct the affairs of his department independently and on his own responsibility. The Federal Government shall resolve differences of opinion between Federal Ministers. The Federal Chancellor shall conduct the proceedings of the Federal Government in accordance with rules of procedure adopted by the Government and...</td>
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</tbody>
</table>
Table:<br><br>**Article 65a**<br>Command of the Armed Forces<br>(1) Command of the Armed Forces shall be vested in the Federal Minister of Defense.<br><br>**Article 67**<br>Vote of no confidence<br>(1) The Bundestag may express its lack of confidence in the Federal Chancellor only by electing a successor by the vote of a majority of its Members and requesting the Federal President to dismiss the Federal Chancellor. The Federal President must comply with the request and appoint the person elected.<br>(2) Forty-eight hours shall elapse between the motion and the election.<br><br>**Article 68**<br>Vote of confidence<br>(1) If a motion of the Federal Chancellor for a vote of confidence is not supported by the majority of the Members of the Bundestag, the Federal President, upon the proposal of the Federal Chancellor, may dissolve the Bundestag within twenty-one days. The right of dissolution shall lapse as soon as the Bundestag elects another Federal Chancellor by the vote of a majority of its Members.<br>(2) Forty-eight hours shall elapse between the motion and the vote.<br><br>**Article 69**<br>Deputy Federal Chancellor - Term of office<br>(1) The Federal Chancellor shall appoint a Federal Minister as his deputy.<br>(2) The tenure of office of the Federal Chancellor or of a Federal Minister shall end in any event when a new Bundestag convenes; the tenure of office of a Federal Minister shall also end on any other occasion on which the Federal Chancellor ceases to hold office.<br>(3) At the request of the Federal President the Federal Chancellor, or at the request of the Federal Chancellor or of the Federal President a Federal Minister, shall be obliged to continue to manage the affairs of his office until a successor is appointed.<br><br>**Article 76**<br>Bills<br>(1) Bills may be introduced in the Bundestag by the Federal Government, by the Bundesrat, or from the floor of the Bundestag.<br>(2) Federal Government bills shall first be submitted to the Bundesrat. The Bundesrat shall be entitled to comment on such bills within six weeks. If for important reasons, especially with respect to the scope of the bill, the Bundesrat demands an extension, the period shall be increased to nine weeks. If in exceptional circumstances the Federal Government on submitting a bill to the Bundesrat declares it to be particularly urgent, it may submit the bill to the Bundestag after three weeks or, if the Bundesrat has demanded an extension pursuant to the third sentence of this paragraph, after six weeks, even if it has not yet received the Bundesrat’s comments; upon receiving such comments, it shall transmit them to the Bundestag without delay. In the case of bills to amend this Basic Law or to transfer sovereign powers pursuant to Article 23 or 24 the comment period shall be nine weeks; the fourth sentence of this paragraph shall not apply.<br><br>**Article 81**<br>Legislative emergency<br>(1) If, in the circumstances described in Article 68, the Bundestag is not dissolved, the Federal President, at the request of the Federal Government and with the consent of the Bundesrat, may declare a state of legislative emergency with respect to a bill, if the Bundestag rejects the bill although the Federal Government has declared it to be urgent. The same shall apply if a bill has been rejected although the Federal Chancellor had combined it with a motion under Article 68.<br>(2) If, after a state of legislative emergency has been declared, the Bundestag again rejects the bill or adopts it in a version the Federal Government declares unacceptable, the bill shall be deemed to have become law to the extent that it receives the consent of the Bundesrat. The same shall apply if the Bundestag does not pass the bill within four weeks after it is reintroduced.<br>(3) During the term of office of a Federal Chancellor, any other bill rejected by the Bundestag may become law in accordance with paragraphs (1) and (2) of this Article within a period of six months after the first declaration of a state of legislative emergency. After the expiration of this period, no further declaration of a state of legislative emergency may be made during the term of office of the same Federal Chancellor.<br>(4) This Basic Law may neither be amended nor abrogated nor suspended in whole or in part by a law enacted pursuant to paragraph (2) of this Article.<br><br>**Article 82**<br>Certification - Promulgation - Entry into force<br>(1) Laws enacted in accordance with the provisions of this Basic Law shall, after countersignature, be certified by the Federal President and promulgated in the Federal Law Gazette. Statutory instruments shall be certified by the agency that issues them and, unless a law otherwise provides, shall be promulgated in the Federal Law Gazette.<br><br>**Article 84**<br>(2) The Federal Government, with the consent of the Bundesrat, may issue general administrative rules.<br>(3) The Federal Government shall exercise oversight to ensure that the Länder execute federal laws in accordance with the law. For this purpose the Federal Government may send commissioners to the highest Land authorities and, with
their consent or, where such consent is refused, with the consent of the Bundesrat, also to subordinate authorities.

(4) Should any deficiencies that the Federal Government has identified in the execution of federal laws in the Länder not be corrected, the Bundesrat, on application of the Federal Government or of the Land concerned, shall decide whether that Land has violated the law. The decision of the Bundesrat may be challenged in the Federal Constitutional Court.

(5) With a view to the execution of federal laws, the Federal Government may be authorized by a federal law requiring the consent of the Bundesrat to issue instructions in particular cases. They shall be addressed to the highest Land authorities unless the Federal Government considers the matter urgent.

**Article 85**

(2) The Federal Government, with the consent of the Bundesrat, may issue general administrative rules. It may provide for the uniform training of civil servants and other salaried public employees. The heads of intermediate authorities shall be appointed with its approval.

**Article 86**

Federal administration

Where the Federation executes laws through its own administrative authorities or through federal corporations or institutions established under public law, the Federal Government shall, insofar as the law in question contains no special provision, issue general administrative rules. The Federal Government shall provide for the establishment of the authorities insofar as the law in question does not otherwise provide.

**Article 87**

Matters

(1) The foreign service, the federal financial administration, and, in accordance with the provisions of Article 89, the administration of federal waterways and shipping shall be conducted by federal administrative authorities with their own administrative substructures. A federal law may establish Federal Border Police authorities and central offices for police information and communications, for the criminal police, and for the compilation of data for purposes of protection of the constitution and of protection against activities within the federal territory which, through the use of force or acts preparatory to the use of force, endanger the external interests of the Federal Republic of Germany.

**Article 87a**

Armed Forces

(1) The Federation shall establish Armed Forces for purposes of defense. Their numerical strength and general organizational structure must be shown in the budget.

(2) Apart from defense, the Armed Forces may be employed only to the extent expressly permitted by this Basic Law.

(3) During a state of defense or a state of tension the Armed Forces shall have the power to protect civilian property and to perform traffic control functions to the extent necessary to accomplish their defense mission. Moreover, during a state of defense or a state of tension, the Armed Forces may also be authorized to support police measures for the protection of civilian property; in this event the Armed Forces shall cooperate with the competent authorities.

(4) In order to avert an imminent danger to the existence or free democratic basic order of the Federation or of a Land, the Federal Government, if the conditions referred to in paragraph (2) of Article 91 obtain and the police forces and the Federal Border Police prove inadequate, may employ the Armed Forces to support the police and the Federal Border Police in protecting civilian property and in combating organized armed insurgents. Any such employment of the Armed Forces shall be discontinued if the Bundestag or the Bundesrat so demands.

**Article 87b**

Federal Defense Administration

(1) The Federal Defense Administration shall be conducted as a federal administrative authority with its own administrative substructure. It shall have jurisdiction for personnel matters and direct responsibility for satisfaction of the procurement needs of the Armed Forces. Responsibilities connected with pensions for injured persons or with construction work may be assigned to the Federal Defense Administration only by a federal law requiring the consent of the Bundesrat. Such consent shall also be required for any laws to the extent that they empower the Federal Defense Administration to interfere with rights of third parties; this requirement, however, shall not apply in the case of laws regarding personnel matters.

(2) In addition, federal laws concerning defense, including recruitment for military service and protection of the civilian population, may, with the consent of the Bundesrat, provide that they shall be executed, wholly or in part, either by federal administrative authorities with their own administrative substructures or by the Länder on federal commission. If such laws are executed by the Länder on federal commission, they may, with the consent of the Bundesrat, provide that the powers vested in the Federal Government or in the competent highest federal authorities pursuant to Article 85 be transferred wholly or in part to federal higher authorities; in this event the law may provide that such authorities shall not require the consent of the Bundesrat in issuing general administrative rules pursuant to the first sentence of paragraph (2) of Article 85.

**Article 91**

Internal emergency

(1) In order to avert an imminent danger to the existence or free democratic basic order of the Federation or of a Land, a Land may call upon police forces of other Länder, or upon personnel and facilities of other administrative authorities and of the Federal Border Police.

(2) If the Land where such danger is imminent is not itself willing or able to combat the danger, the Federal Government may place the police in that Land and the police forces of other Länder under its own orders and deploy units of the Federal Border Police. Any such order shall be rescinded once the danger is removed, or at any time on the demand of...
the Bundesrat. If the danger extends beyond the territory of a single Land, the Federal Government, insofar as is necessary to combat such danger, may issue instructions to the Land governments; the first and second sentences of this paragraph shall not be affected by this provision.

<table>
<thead>
<tr>
<th>Article 115a</th>
<th>Declaration of state of defence</th>
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<tr>
<td>(1) Any determination that the federal territory is under attack by armed force or imminently threatened with such an attack (state of defence) shall be made by the Bundestag with the consent of the Bundesrat. Such determination shall be made on application of the Federal Government and shall require a two-thirds majority of the votes cast, which shall include at least a majority of the Members of the Bundestag.</td>
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<td>(2) If the situation imperatively calls for immediate action, and if insurmountable obstacles prevent the timely convening of the Bundestag or the Bundestag cannot muster a quorum, the Joint Committee shall make this determination by a two-thirds majority of the votes cast, which shall include at least a majority of its members.</td>
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<td>(3) The determination shall be promulgated by the Federal President in the Federal Law Gazette pursuant to Article 82. If this cannot be done in time, promulgation shall be effected in another manner; the determination shall be printed in the Federal Law Gazette as soon as circumstances permit.</td>
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<td>(4) If the federal territory is under attack by armed force, and if the competent federal authorities are not in a position at once to make the determination provided for in the first sentence of paragraph (1) of this Article, the determination shall be deemed to have been made and promulgated at the time the attack began. The Federal President shall announce that time as soon as circumstances permit.</td>
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<td>(5) If the determination of a state of defense has been promulgated, and if the federal territory is under attack by armed force, the Federal President, with the consent of the Bundestag, may issue declarations under international law regarding the existence of the state of defense. Under the conditions specified in paragraph (2) of this Article, the Joint Committee shall act in place of the Bundestag.</td>
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<tr>
<th>Article 115b</th>
<th>Power of command of the Federal Chancellor</th>
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<tr>
<td>Upon the promulgation of a state of defense the power of command over the Armed Forces shall pass to the Federal Chancellor.</td>
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<th>Article 115d</th>
<th>Urgent bills</th>
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<td>(1) During a state of defense the federal legislative process shall be governed by the provisions of paragraphs (2) and (3) of this Article without regard to the provisions of paragraph (2) of Article 76, the second sentence of paragraph (1) and paragraphs (2) to (4) of Article 77, Article 78, and paragraph (1) of Article 82.</td>
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<td>(2) Federal Government bills that the Government designates as urgent shall be forwarded to the Bundesrat at the same time as they are submitted to the Bundestag. The Bundestag and the Bundesrat shall debate such bills in joint session without delay. Insofar as the consent of the Bundesrat is necessary for any such bill to become law, a majority of its votes shall be required. Details shall be regulated by rules of procedure adopted by the Bundestag and requiring the consent of the Bundesrat.</td>
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<td>(3) The second sentence of paragraph (3) of Article 115a shall apply to the promulgation of such laws mutatis mutandis.</td>
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<tr>
<th>Article 115f</th>
<th>Use of Federal Border Police - Extended powers of instruction</th>
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<td>(1) During a state of defense the Federal Government, to the extent circumstances require, may:</td>
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<td>1. employ the Federal Border Police throughout the federal territory;</td>
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<td>2. issue instructions not only to federal administrative authorities but also to Land governments and, if it deems the matter urgent, to Land authorities, and may delegate this power to members of Land governments designated by it.</td>
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<td>(2) The Bundestag, the Bundesrat and the Joint Committee shall be informed without delay of the measures taken in accordance with paragraph (1) of this Article.</td>
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**Appendix 9**

**Excerpts from The South African Constitution**

Source: South Africa’s Constitution of 1996 with Amendments through 2012, generated from excerpts of texts from the repository of the Comparative Constitutions Project and accessed at [www.constitutionproject.org](http://www.constitutionproject.org)

<table>
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<tr>
<th>Article</th>
<th>Excerpts</th>
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<tbody>
<tr>
<td>Article 83</td>
<td>The President&lt;br&gt;The President:&lt;br&gt;(a) is the Head of State and head of the national executive;&lt;br&gt;(b) must uphold, defend and respect the Constitution as the supreme law of the Republic; and&lt;br&gt;(c) promotes the unity of the nation and that which will advance the Republic.</td>
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<td>Article 84</td>
<td>Powers and functions of President&lt;br&gt;(1) The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.&lt;br&gt;(2) The President is responsible for:&lt;br&gt;(a) assenting to and signing Bills;&lt;br&gt;(b) referring a Bill back to the National Assembly for reconsideration of the Bill's constitutionality;&lt;br&gt;(c) referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality;&lt;br&gt;(d) summoning the National Assembly, the National Council of Provinces or Parliament to an extraordinary sitting to conduct special business;&lt;br&gt;(e) making any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive;&lt;br&gt;(f) appointing commissions of inquiry;&lt;br&gt;(g) calling a national referendum in terms of an Act of Parliament;&lt;br&gt;(h) receiving and recognizing foreign diplomatic and consular representatives;&lt;br&gt;(i) appointing ambassadors, plenipotentiaries, and diplomatic and consular representatives;&lt;br&gt;(j) pardoning or reprieving offenders and remitting any fines, penalties or forfeitures; and&lt;br&gt;(k) conferring honors</td>
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<td>Article 85</td>
<td>Executive authority of the Republic&lt;br&gt;(1) The executive authority of the Republic is vested in the President.&lt;br&gt;(2) The President exercises the executive authority, together with the other members of the Cabinet, by:&lt;br&gt;(a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;&lt;br&gt;(b) developing and implementing national policy;&lt;br&gt;(c) co-ordinating the functions of state departments and administrations;&lt;br&gt;(d) preparing and initiating legislation; and&lt;br&gt;(e) performing any other executive function provided for in the Constitution or in national legislation.</td>
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| Article 86 | Election of President<br>(1) At its first sitting after its election, and whenever necessary to fill a vacancy, the National Assembly must elect a woman or a man from among its members to be the President.<br>(2) The Chief Justice must preside over the election of the President, or designate another judge to do so. The procedure set out in Part A of Schedule 3 applies to the election of the President.<br>[Sub-s. (2) substituted by s. 6 of the Constitution Sixth Amendment Act of 2001.]

[Sub-s. (3) substituted by s. 6 of the Constitution Sixth Amendment Act of 2001.]

| Article 87 | Term of office of President<br>When elected President, a person ceases to be a member of the National Assembly and, within five days, must assume office by swearing or affirming faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2. |
| Article 88 | Assumption of office by President<br>When elected President, a person ceases to be a member of the National Assembly and, within five days, must assume office by swearing or affirming faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2. |
| Article 89 | Removal of President<br>(1) The National Assembly, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the grounds of:<br>(a) a serious violation of the Constitution or the law;<br>(b) serious misconduct; or<br>(c) in-ability to perform the functions of office.<br>(2) Anyone who has been removed from the office of President in terms of subsection (1) (a) or (b) may not receive any benefits of that office, and may not serve in any public office. |
### Article 90
**Acting President**
1. When the President is absent from the Republic or otherwise unable to fulfill the duties of President, or during a vacancy in the office of President, an office-bearer in the order below acts as President:
   - (a) The Deputy President.
   - (b) A Minister designated by the President.
   - (c) A Minister designated by the other members of the Cabinet.
   - (d) The Speaker, until the National Assembly designates one of its other members.
2. An Acting President has the responsibilities, powers and functions of the President.
3. Before assuming the responsibilities, powers and functions of the President, the Acting President must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.
4. A person who as Acting President has sworn or affirmed faithfulness to the Republic need not repeat the swearing or affirming procedure for any subsequent term as acting President during the period ending when the person next elected President assumes office.
   [Sub-s. (4) added by s. 1 of the Constitution First Amendment Act of 1997.]

### Article 91
**Cabinet**
1. The Cabinet consists of the President, as head of the Cabinet, a Deputy President and Ministers.
2. The President appoints the Deputy President and Ministers, assigns their powers and functions, and may dismiss them.
3. The President:
   - (a) must select the Deputy President from among the members of the National Assembly;
   - (b) may select any number of Ministers from among the members of the National Assembly; and
   - (c) may select no more than two Ministers from outside the Assembly.
4. The President must appoint a member of the Cabinet to be the leader of government business in the National Assembly.
5. The Deputy President must assist the President in the execution of the functions of government.

### Article 92
**Accountability and responsibilities**
1. The Deputy President and Ministers are responsible for the powers and functions of the executive assigned to them by the President.
2. Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.
3. Members of the Cabinet must:
   - (a) act in accordance with the Constitution; and
   - (b) provide Parliament with full and regular reports concerning matters under their control.

### Article 93
**Deputy Ministers**
1. The President may appoint:
   - (a) any number of Deputy Ministers from among the members of the National Assembly; and
   - (b) no more than two Deputy Ministers from outside the Assembly, to assist the members of the Cabinet, and may dismiss them.
2. Deputy Ministers appointed in terms of subsection (1) (b) are accountable to Parliament for the exercise of their powers and the performance of their functions.
   [S. 93 substituted by s. 7 of the Constitution Sixth Amendment Act of 2001.]

### Article 97
**Transfer of functions**
The President by proclamation may transfer to a member of the Cabinet:
1. (a) the administration of any legislation entrusted to another member; or
2. (b) any power or function entrusted by legislation to another member.

### Article 98
**Temporary assignment of functions**
The President may assign to a Cabinet member any power or function of another member who is absent from office or is unable to exercise that power or perform that function.

### Article 100
**National intervention in provincial administration**
1. When a province cannot or does not fulfill an executive obligation in terms of the Constitution or legislation, the national executive may intervene by taking any appropriate steps to ensure fulfillment of that obligation, including:
   - (a) issuing a directive to the provincial executive, describing the extent of the failure to fulfill its obligations and stating any steps required to meet its obligations; and
   - (b) assuming responsibility for the relevant obligation in that province to the extent necessary to:
     - (i) maintain essential national standards or meet established minimum standards for the rendering of a service;
     - (ii) maintain economic unity;
     - (iii) maintain national security; or
   - (iv) prevent that province from taking unreasonable action that is prejudicial to the interests of another provinces or to the country as a whole.
   [Sub-s. (1) amended by s. 2 (b) of the Constitution Eleventh Amendment Act of 2003.]
2. If the national executive intervenes in a province in terms of subsection (1) (b):
   - (a) it must submit a written notice of the intervention to the National Council of Provinces within 14 days after the intervention began;
   - (b) the intervention must end if the Council disapproves the intervention within 180 days after the
Article 101 Executive decisions
(1) A decision by the President must be in writing if it-
(a) is taken in terms of legislation; or
(b) has legal consequences.
(2) A written decision by the President must be countersigned by another Cabinet member if that decision concerns a function assigned to that other Cabinet member.
(3) Proclamations, regulations and other instruments of subordinate legislation must be accessible to the public.
(4) National legislation may specify the manner in which, and the extent to which, instruments mentioned in subsection (3) must be-
(a) tabled in Parliament; and
(b) approved by Parliament

Article 102 Motions of no confidence
(1) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the Cabinet excluding the President, the President must reconstitute the Cabinet.
(2) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign.

Article 174 Appointment of judicial officers
(1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.
(2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.
(3) The President as head of the national executive, after consulting the Judicial Service Commission and the leader of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice and, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal.
(4) The other judges of the Constitutional Court are appointed by the President, as head of the national executive, after consulting the Chief Justice and the leaders of parties represented in the National Assembly, in accordance with the following procedure:
(a) The Judicial Service Commission must prepare a list of nominees with three names more than the numbers of appointments to be made, and submit the list to the President.
(b) The President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made.
(c) The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list.

Article 177 Removal
(1) A judge may be removed from office only if-(a) the Judicial Service Commission funds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and
(b) the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.
(2) The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.
Article 179

Prosecuting authority

(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of-
   (a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and
   (b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.

Article 193

Appointments

(1) The Public Protector and the members of any Commission established by this Chapter must be women or men who-
   (a) are South African citizens;
   (b) are fit and proper persons to hold the particular office; and
   (c) are complied with any other requirements prescribed by national legislation.

(2) The need for a Commission established by this Chapter to reflect broadly the race and gender composition of South Africa must be considered when members are appointed.

(3) The Auditor-General must be a woman or a man who is a South African citizen and a fit and proper person to hold that office. Specialised knowledge of, or experience in, auditing, state finances and public administration must be given due regard in appointing the Auditor-General.

(4) The President, on the recommendation of the National Assembly, must appoint the Public Protector, the Auditor-General and the members of-
   (a) the South African Human Rights Commission;
   (b) the Commission for Gender Equality; and
   (c) the Electoral Commission.

(5) The National Assembly must recommend persons-
   (a) nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly; and
   (b) approved by the Assembly by a resolution adopted with a supporting vote-
       (i) of at least 60 per cent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector or the Auditor-General; or
       (ii) of a majority of the members of the Assembly, if the recommendation concerns the appointment of a member of a Commission.

(6) The involvement of civil society in the recommendation process may be provided for as envisaged in section 59 (1) (a).

Article 194

Removal from office

(1) The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on-
   (a) the ground of misconduct, incapacity or incompetence;
   (b) a finding to that effect by a committee of the National Assembly; and
   (c) the adoption by the Assembly of a resolution calling for that person's removal from office

(2) A resolution of the National Assembly concerning the removal from office of-
   (a) the Public Protector or the Auditor-General must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or
   (b) a member of a Commission must be adopted with a supporting vote of a majority of the members of the Assembly.

(3) The President-
   (a) may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and
   (b) must remove a person from office upon adoption by the Assembly of the resolution calling for that person's removal.

Article 198

CHAPTER 11 SECURITY SERVICES (ss 198-210)

Governing principles

The following principles govern national security in the Republic:

(a) National security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life.

(b) The resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation.

(c) National security must be pursued in compliance with the law, including international law.

(d) National security is subject to the authority of Parliament and the national executive.

Article 199

Establishment, structuring and conduct of security services

(1) The security services of the Republic consist of a single defense force, a single police service and any intelligence services established in terms of the Constitution.

(2) The defense force is the only lawful military force in the Republic.

(3) Other than the security services established in terms of the Constitution, armed organizations or services may be...
### Article 201
**Command of defence force**

(1) The President as head of the national executive is Commander-in-Chief of the defence force, and must appoint the Military Commissioner of the defence force.

(2) Command of the defence force must be exercised in accordance with the directions of the Cabinet member responsible for defence, under the authority of the President.

### Article 203
**State of national defence**

(1) The President as head of the national executive may declare a state of national defence, and must inform Parliament promptly and in appropriate detail of-
   - the reasons for the declaration;
   - any place where the defence force is being employed; and
   - the number of people involved.

(2) If Parliament is not sitting when a state of national defence is declared, the President must summon Parliament to an extraordinary sitting within seven days of the declaration.

(3) A declaration of a state of national defence lapses unless it is approved by Parliament within seven days of the declaration.

### Article 207
**Control of police service**

(1) The President as head of the national executive must appoint a woman or a man as the National Commissioner of the police service, to control and manage the police service.

### Article 209
**Establishment and control of intelligence services**

(1) Any intelligence service, other than any intelligence division of the defence force or police services, may be established only by the President, as head of the national executive, and only in terms of national legislation.

(2) The President as head of the national executive must appoint a woman or a man as head of each intelligence service established in terms of subsection (1), and must either assume political responsibility for the control and direction of any of those services, or designate a member of the Cabinet to assume that responsibility.

### Article 210
**Powers, functions and monitoring**

National legislation must regulate the objects, powers and functions of the intelligence services, including any intelligence division of the defence force or police service, and must provide for-
   - the co-ordination of all intelligence services; and
   - civilian monitoring of the activities of those services by an inspector appointed by the President, as head of the national executive, and approved by a resolution adopted by the National Assembly with a supporting vote of at least two thirds of its members.

### Article 220
**Financial and Fiscal Commission (ss 220-222)**

(1) There is a Financial and Fiscal Commission for the Republic which makes recommendations envisaged in this Chapter, or in national legislation, to Parliament, provincial legislatures and any other authorities determined by national legislation.

(2) The Commission is independent and subject only to the Constitution and the law, and must be impartial.
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Article 231
International agreements
(1) The negotiating and signing of all international agreements is the responsibility of the national executive.
(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

Article 232
Customary international law
Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

Article 233
Application of international law
When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

Article 238
Agency and delegation
An executive organ of state in any sphere of government may:
(a) delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state, provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed; or
(b) exercise any power or perform any function for any other executive organ of state on an agency or delegation basis.

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ANNEXURE B GOVERNMENT OF NATIONAL UNITY: NATIONAL SPHERE

1. Section 84 of the new Constitution is deemed to contain the following additional subsection:
'(3) The President must consult the Executive Deputy Presidents-
(a) in the development and execution of the policies of the national government;
(b) in all matters relating to the management of the Cabinet and the performance of Cabinet business;
(c) in the assignment of functions to the Executive Deputy Presidents;
(d) before making any appointment under the Constitution or any legislation, including the appointment of ambassadors or other diplomatic representatives;
(e) before appointing commissions of inquiry;
(f) before calling a referendum; and
(g) before pardoning or reprieving offenders.'.

2. Section 89 of the new Constitution is deemed to contain the following additional subsection:
'(3) Subsections (1) and (2) apply also to an Executive Deputy President.'

3. Paragraph (a) of section 90 (1) of the new Constitution is deemed to read as follows:
'(a) an Executive Deputy President designated by the President;'

4. Section 91 of the new Constitution is deemed to read as follows:
'Cabinet
Section 91 (1) The Cabinet consists of the President, the Executive Deputy Presidents and-
(a) not more than 27 Ministers who are members of the National Assembly and appointed in terms of subsections (8) to (12); and
(b) not more than one Minister who is not a member of the National Assembly and appointed in terms of
subsection (13), provided the President, acting in consultation with the Executive Deputy Presidents and the leaders of the participating parties, deems the appointment of such a Minister expedient.

(2) Each party holding at least 80 seats in the National Assembly is entitled to designate an Executive Deputy President from among the members of the Assembly.

(3) If no party or only one party holds 80 or more seats in the Assembly, the party holding the largest number of seats and the party holding the second largest number of seats are each entitled to designate one Executive Deputy President from among the members of the Assembly.

(4) On being designated, an Executive Deputy President may elect to remain or cease to be a member of the Assembly.

(5) An Executive Deputy President may exercise the powers and must perform the functions vested in the office of Executive Deputy President by the Constitution or assigned to that office by the President.

(6) An Executive Deputy President holds office-
(a) until 30 April 1999 unless replaced or recalled by the party entitled to make the designation in terms of subsections (2) and (3); or
(b) until the person elected President after any election of the National Assembly held before 30 April 1999, assumes office.

(7) A vacancy in the office of an Executive Deputy President may be filled by the party which designated that Deputy President.

(8) A party holding at least 20 seats in the National Assembly and which has decided to participate in the government of national unity, is entitled to be allocated one or more of the Cabinet portfolios in respect of which Ministers referred to in subsection (1) (a) are to be appointed, in proportion to the number of seats held by it in the National Assembly relative to the number of seats held by the other participating parties.

(9) Cabinet portfolios must be allocated to the respective participating parties in accordance with the following formula:

(a) A quota of seats per portfolio must be determined by dividing the total number of seats in the National Assembly held jointly by the participating parties by the number of portfolios in respect of which Ministers referred to in subsection (1) (a) are to be appointed, plus one.

(b) The result, disregarding third and subsequent decimals, if any, is the quota of seats per portfolio.

(c) The number of portfolios to be allocated to a participating party is determined by dividing the total number of seats held by that party in the National Assembly by the quota referred to in paragraph (b).

(d) The result, subject to paragraph (e), indicates the number of portfolios to be allocated to that party.

(e) Where the application of the above formula yields a surplus not absorbed by the number of portfolios allocated to a party, the surplus competes with other similar surpluses accruing to another party or parties, and any portfolio or portfolios which remain unallocated must be allocated to the party or parties concerned in sequence of the highest surplus.

(10) The President after consultation with the Executive Deputy Presidents and the leaders of the participating parties must-
(a) determine the specific portfolios to be allocated to the respective participating parties in accordance with the number of portfolios allocated to them in terms of subsection (9);

(b) appoint in respect of each such portfolio a member of the National Assembly who is a member of the party to which that portfolio was allocated under paragraph (a), as the Minister responsible for that portfolio;

(c) if it becomes necessary for the purposes of the Constitution or in the interest of good government, vary any determination under paragraph (a), subject to subsection (9);

(d) terminate any appointment under paragraph (b)-

(i) if the President is requested to do so by the leader of the party of which the Minister in question is a member; or

(ii) if it becomes necessary for the purposes of the Constitution or in the interest of good government; or

(e) fill, when necessary, subject to paragraph (b), a vacancy in the office of Minister.

(11) Subsection (10) must be implemented in the spirit embodied in the concept of a government of national unity, and the President and the other functionaries concerned must in the implementation of that subsection seek to achieve consensus at all times: Provided that if consensus cannot be achieved on-

(a) the exercise of a power referred to in paragraph (a), (c) or (d) (ii) of that subsection, the President’s decision prevails;

(b) the exercise of a power referred to in paragraph (b), (d) (i) or (e) of that subsection affecting a person who is not a member of the President’s party, the decision of the leader of the party of which that person is a member prevails; and

(c) the exercise of a power referred to in paragraph (b) or (e) of that subsection affecting a person who is a member of the President’s party, the President’s decision prevails.

(12) If any determination of portfolio allocations is varied under subsection (10) (c), the affected Ministers must vacate their portfolios but are eligible, where applicable, for reappointment to other
(13) The President-
(a) in consultation with the Executive Deputy Presidents and the leaders of the participating parties, must-
(i) determine a specific portfolio for a Minister referred to in subsection (1) (b) should it become necessary pursuant to a decision of the President under that subsection;
(ii) appoint in respect of that portfolio a person who is not a member of the National Assembly, as the Minister responsible for that portfolio; and
(iii) fill, if necessary, a vacancy in respect of that portfolio; or
(b) after consultation with the Executive Deputy Presidents and the leaders of the participating parties, must terminate any appointment under paragraph (a) if it becomes necessary for the purposes of the Constitution or in the interest of good government.

(14) Meetings of the Cabinet must be presided over by the President, or, if the President so instructs, by an Executive Deputy President: Provided that the Executive Deputy Presidents preside over meetings of the Cabinet in turn unless the exigencies of government and the spirit embodied in the concept of the government of national unity otherwise demand.

(15) The Cabinet must function in a manner which gives consideration to the consensus-seeking spirit embodied in the concept of a government of national unity as well as the need for effective government.’

5. Section 93 of the new Constitution is deemed to read as follows:
‘Appointment of Deputy Ministers
93 (1) The President may, after consultation with the Executive Deputy Presidents and the leaders of the parties participating in the Cabinet, establish deputy ministerial posts.
(2) A party is entitled to be allocated one or more of the deputy ministerial posts in the same proportion and according to the same formula that portfolios in the Cabinet are allocated.
(3) The provisions of section 91 (10) to (12) apply, with the necessary changes, in respect of Deputy Ministers, and in such application a reference in that section to a Minister or a portfolio must be read as a reference to a Deputy Minister or a deputy ministerial post, respectively.
(4) If a person is appointed as the Deputy Minister of any portfolio entrusted to a Minister-
(a) that Deputy Minister must exercise and perform on behalf of the relevant Minister any of the powers and functions assigned to that Minister in terms of any legislation or otherwise which may, subject to the directions of the President, be assigned to that Deputy Minister by that Minister; and
(b) any reference in any legislation to that Minister must be construed as including a reference to the Deputy Minister acting in terms of an assignment under paragraph (a) by the Minister for whom that Deputy Minister acts.
(5) Whenever a Deputy Minister is absent or for any reason unable to exercise or perform any of the powers or functions of office, the President may appoint any other Deputy Minister or any other person to act in the said Deputy Minister’s stead, either generally or in the exercise or performance of any specific power or function.’

6. Section 96 of the new Constitution is deemed to contain the following additional subsections:
‘(3) Ministers are accountable individually to the President and to the National Assembly for the administration of their portfolios, and all members of the Cabinet are correspondingly accountable collectively for the performance of the functions of the national government and for its policies.
(4) Ministers must administer their portfolios in accordance with the policy determined by the Cabinet.
(5) If a Minister fails to administer the portfolio in accordance with the policy of the Cabinet, the President may require the Minister concerned to bring the administration of the portfolio into conformity with that policy.
(6) If the Minister concerned fails to comply with a requirement of the President under subsection (5), the President may remove the Minister from office-
(a) if it is a Minister referred to in section 91 (1) (a), after consultation with the Minister and, if the Minister is not a member of the President’s party or is not the leader of a participating party, also after consultation with the leader of that Minister’s party; or
(b) if it is a Minister referred to in section 91 (1) (b), after consultation with the Executive Deputy Presidents and the leaders of the participating parties.’
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Appendix 10
Excerpts from The French Constitution

<table>
<thead>
<tr>
<th>Article</th>
<th>Text</th>
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<tbody>
<tr>
<td>Article 5</td>
<td>The President of the Republic shall ensure due respect for the Constitution. He shall ensure, by his arbitration, the proper functioning of the public authorities and the continuity of the State. He shall be the guarantor of national independence, territorial integrity and due respect for Treaties.</td>
</tr>
<tr>
<td>Article 6</td>
<td>The President of the Republic shall be elected for a term of five years by direct universal suffrage. No one may hold office for more than two consecutive terms. The manner of implementation of this article shall be determined by an Institutional Act.</td>
</tr>
<tr>
<td>Article 7</td>
<td>The President of the Republic shall be elected by an absolute majority of votes cast. If such a majority is not obtained on the first ballot, a second ballot shall take place on the fourteenth day thereafter. Only the two candidates polling the greatest number of votes in the first ballot, after any withdrawal of better placed candidates, may stand in the second ballot. The process of electing a President shall commence by the calling of said election by the Government. The election of the new President shall be held no fewer than twenty days and no more than thirty-five days before the expiry of the term of the President in office. Should the Presidency of the Republic fall vacant for any reason whatsoever, or should the Constitutional Council on a referral from the Government rule by an absolute majority of its members that the President of the Republic is incapacitated, the duties of the President of the Republic, with the exception of those specified in articles 11 and 12, shall be temporarily exercised by the President of the Senate or, if the latter is in turn incapacitated, by the Government. In the case of a vacancy, or where the incapacity of the President is declared to be permanent by the Constitutional Council, elections for the new President shall, except in the event of a finding by the Constitutional Council of force majeure, be held no fewer than twenty days and no more than thirty-five days after the beginning of the vacancy or the declaration of permanent incapacity. In the event of the death or incapacitation in the seven days preceding the deadline for registering candidacies of any of the persons who, fewer than thirty days prior to such deadline, have publicly announced their decision to stand for election, the Constitutional Council may decide to postpone the election. If, before the first round of voting, any of the candidates dies or becomes incapacitated, the Constitutional Council shall declare the election to be postponed. In the event of the death or incapacity of either of the two candidates in the lead after the first round of voting before any withdrawals, the Constitutional Council shall declare that the electoral process must be repeated in full; the same shall apply in the event of the death or incapacitation of either of the two candidates still standing on the second round of voting. All cases shall be referred to the Constitutional Council in the manner laid down in the second paragraph of article 61 or in that laid down for the registration of candidates in the Institutional Act provided for in article 6. The Constitutional Council may extend the time limits set in paragraphs three and five above, provided that polling takes place no later than thirty-five days after the decision of the Constitutional Council. If the implementation of the provisions of this paragraph results in the postponement of the election beyond the expiry of the term of the President in office, the latter shall remain in office until his successor is proclaimed. Neither articles 49 and 50 nor article 89 of the Constitution shall be implemented during the vacancy of the Presidency of the Republic or during the period between the declaration of the permanent incapacity of the President of the Republic and the election of his successor.</td>
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<tr>
<td>Article 8</td>
<td>The President of the Republic shall appoint the Prime Minister. He shall terminate the appointment of the Prime Minister when the latter tenders the resignation of the Government. On the recommendation of the Prime Minister, he shall appoint the other members of the Government and terminate their appointments.</td>
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<td>Article 9</td>
<td>The President of the Republic shall preside over the Council of Ministers.</td>
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<td>Article 10</td>
<td>The President of the Republic shall promulgate Acts of Parliament within fifteen days following the final passage of an Act and its transmission to the Government. He may, before the expiry of this time limit, ask Parliament to reopen debate on the Act or any sections thereof. Such reopening of debate shall not be refused.</td>
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<tr>
<td>Article 11</td>
<td>The President of the Republic may, on a recommendation from the Government when Parliament is in session, on a joint motion of the two Houses, published in the Journal Officiel, submit to a referendum any Government Bill which deals with the organization of the public authorities, or with reforms relating to the economic or social policy of the Nation, and to the public services contributing thereto, or which provides for authorization to ratify a treaty which, although not contrary to the Constitution, would affect the functioning of the institutions. Where the referendum is held on the recommendation of the Government, the latter shall make a statement before each House and the same shall be followed by a debate.</td>
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<tr>
<td>Article 11(1)</td>
<td>The President of the Republic may, on a recommendation from the Government when Parliament is in session, on a joint motion of the two Houses, published in the Journal Officiel, submit to a referendum any Government Bill which deals with the organization of the public authorities, or with reforms relating to the economic, social or environmental policy of the</td>
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<td>Article 12</td>
<td>The President of the Republic may, after consulting the Prime Minister and the Presidents of the Houses of Parliament, declare the National Assembly dissolved. A general election shall take place no fewer than twenty days and no more than forty days after the dissolution. The National Assembly shall sit as of right on the second Thursday following its election. Should this sitting fall outside the period prescribed for the ordinary session, a session shall be convened by right for a fifteen-day period. No further dissolution shall take place within a year following said election.</td>
</tr>
<tr>
<td>Article 13</td>
<td>The President of the Republic shall sign the Ordinances and Decrees deliberated upon in the Council of Ministers. He shall make appointments to the civil and military posts of the State. Consulaires d'Etat, the Grand Chancelier de la Légion d'Honneur, Ambassadors and Envoys Extraordinary, Consulaires Maîtres of the Cour des Comptes, Prefects, State representatives in the overseas communities to which article 74 applies and in New Caledonia, highest-ranking Military Officers, Recteurs des Académies and Directors of Central Government Departments shall be appointed in the Council of Ministers. An Institutional Act shall determine the other posts to be filled at meetings of the Council of Ministers and the manner in which the power of the President of the Republic to make appointments may be delegated by him to be exercised on his behalf. An Institutional Act shall determine the posts or positions, other than those mentioned in the third paragraph, concerning which, on account of their importance in the guaranteeing of the rights and freedoms or the economic and social life of the Nation, the power of appointment vested in the President of the Republic shall be exercised after public consultation with the relevant standing committee in each House. The President of the Republic shall not make an appointment when the sum of the negative votes in each committee represents at least three fifths of the votes cast by the two committees. Statutes shall determine the relevant standing committees according to the posts or positions concerned.</td>
</tr>
<tr>
<td>Article 14</td>
<td>The President of the Republic shall accredit ambassadors and envoys extraordinary to foreign powers; foreign ambassadors and envoys extraordinary shall be accredited to him.</td>
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<tr>
<td>Article 15</td>
<td>The President of the Republic shall be Commander-in-Chief of the Armed Forces. He shall preside over the higher national defence councils and committees.</td>
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<tr>
<td>Article 16</td>
<td>Where the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfillment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted, the President of the Republic shall take measures required by these circumstances, after formally consulting the Prime Minister, the Presidents of the Houses of Parliament and the Constitutional Council. He shall address the Nation and inform it of such measures. The measures shall be designed to provide the constitutional public authorities as swiftly as possible, with the means to carry out their duties. The Constitutional Council shall be consulted with regard to such measures. Parliament shall sit as of right. The National Assembly shall not be dissolved during the exercise of such emergency powers. After thirty days of the exercise of such emergency powers, the matter may be referred to the Constitutional Council by the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators, so as to decide if the conditions laid down in paragraph one still apply. The Council shall make its decision publicly as soon as possible. It shall, as of right, carry out such an examination and shall make its decision in the same manner after sixty days of the exercise of emergency powers or at any moment thereafter.</td>
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<tr>
<td>Article 17</td>
<td>The President of the Republic is vested with the power to grant individual pardons.</td>
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<tr>
<td>Article 18</td>
<td>The President of the Republic shall communicate with the two Houses of Parliament by messages which he shall cause to be read aloud and which shall not give rise to any debate. He may take the floor before Parliament convened in Congress for this purpose. His statement may give rise, in his absence, to a debate without vote.</td>
</tr>
</tbody>
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When not in session, the Houses of Parliament shall be convened especially for this purpose.

**Article 19** Instruments of the President of the Republic, other than those provided for under articles 8 (paragraph one), 11, 12, 16, 18, 54, 56 and 61, shall be countersigned by the Prime Minister and, where required, by the ministers concerned.

**Article 20** The Government shall determine and conduct the policy of the Nation. It shall have at its disposal the civil service and the armed forces. It shall be accountable to Parliament in accordance with the terms and procedures set out in articles 49 and 50.

**Article 21** The Prime Minister shall direct the actions of the Government. He shall be responsible for national defence. He shall ensure the implementation of legislation. Subject to article 13, he shall have power to make regulations and shall make appointments to civil and military posts.

He may delegate certain of his powers to Ministers. He shall deputize, if the case arises, for the President of the Republic as chairman of the councils and committees referred to in article 15. He may, in exceptional cases, deputize for him as chairman of a meeting of the Council of Ministers by virtue of an express delegation of powers for a specific agenda.

**Article 22** Instruments of the Prime Minister shall be countersigned, where required, by the ministers responsible for their implementation.

**Article 23** Membership of the Government shall be incompatible with the holding of any Parliamentary office, any position of professional representation at national level, any public employment or any professional activity. An Institutional Act shall determine the manner in which the holders of such offices, positions or employment shall be replaced. The replacement of Members of Parliament shall take place in accordance with the provisions of article 25.

**Article 24** Parliament shall pass statutes. It shall monitor the action of the Government. It shall assess public policies. It shall comprise the National Assembly and the Senate. Members of the National Assembly, whose number shall not exceed five hundred and seventy-three, shall be elected by direct suffrage. The Senate, whose members shall not exceed three hundred and forty-eight, shall be elected by indirect suffrage. The Senate shall ensure the representation of the territorial communities of the Republic. Statutes shall also determine the rules governing:

- the setting up of new categories of courts and the status of members of the Judiciary;
- the system for electing members of the Houses of Parliament, local assemblies and the representative bodies for French nationals living abroad, as well as the conditions for holding elective offices and positions for the members of the deliberative assemblies of the territorial communities;
- the fundamental guarantees granted to civil servants and members of the Armed Forces;
- the nationalization of companies and the transfer of ownership of companies from the public to the private sector.

**Article 25** Statutes shall also lay down the basic principles of:

- the general organization of national defense;
- the self-government of territorial communities, their powers and revenue;
- education; the preservation of the environment;
- systems of ownership, property rights and civil and commercial obligations;
- Employment law, Trade Union law and Social Security.

Finance Acts shall determine the revenue and expenditure of the State in the conditions and with the reservations provided for by an Institutional Act.

Social Security Financing Acts shall lay down the general conditions for the financial equilibrium thereof, and taking into account forecasted revenue, shall determine expenditure targets in the conditions and with the reservations provided for by an Institutional Act.

Programming Acts shall determine the objectives of the action of the State. The multiannual guidelines for public finances shall be established by Programming Acts. They shall contribute to achieving the objective of balanced accounts for public administrations. The provisions of this article may be further specified and completed by an Institutional Act.

**Article 30** A declaration of war shall be authorized by Parliament.

**Article 31** The Government shall inform Parliament of its decision to have the armed forces intervene abroad, at the latest three days after the beginning of said intervention. It shall detail the objectives of the said intervention. This information may give rise to a debate, which shall not be followed by a vote. Where the said intervention shall exceed four months, the Government shall submit the extension to Parliament for
authorization. It may ask the National Assembly to make the final decision. If Parliament is not sitting at the end of the four-month period, it shall express its decision at the opening of the following session.

Article 36
A state of siege shall be decreed in the Council of Ministers. The extension thereof after a period of twelve days may be authorized solely by Parliament.

Article 37
Matters other than those coming under the scope of statute law shall be matters for regulation. Provisions of statutory origin enacted in such matters may be amended by decree issued after consultation with the Conseil d’État. Any such provisions passed after the coming into force of the Constitution shall be amended by decree only if the Constitutional Council has found that they are matters for regulation as defined in the foregoing paragraph.

Article 37-1
Statutes and regulations may contain provisions enacted on an experimental basis for limited purposes and duration.

Article 38
In order to implement its program, the Government may ask Parliament for authorization, for a limited period, to take measures by Ordinance that are normally the preserve of statute law. Ordinances shall be issued in the Council of Ministers, after consultation with the Conseil d’État. They shall come into force upon publication, but shall lapse in the event of failure to table before Parliament the Bill to ratify them by the date set by the Enabling Act. They may only be ratified in explicit terms. At the end of the period referred to in the first paragraph hereinabove Ordinances may be amended solely by an Act of Parliament in those areas governed by statute law.

Article 39
Both the Prime Minister and Members of Parliament shall have the right to initiate legislation. Government Bills shall be discussed in the Council of Ministers after consultation with the Conseil d’État and shall be tabled in one or other of the two Houses. Finance Bills and Social Security Financing Bills shall be tabled first before the National Assembly. Without prejudice to the first paragraph of article 44, Bills primarily dealing with the organization of territorial communities shall be tabled first in the Senate. The tabling of Government Bills before the National Assembly or the Senate, shall comply with the conditions determined by an Institutional Act. Government Bills may not be included on the agenda if the Conference of Presidents of the first House to which the Bill has been referred, declares that the rules determined by the Institutional Act have not been complied with. In the case of disagreement between the Conference of Presidents and the Government, the President of the relevant House or the Prime Minister may refer the matter to the Constitutional Council, which shall rule within a period of eight days. Within the conditions provided for by statute, the President of either House may submit a Private Member’s Bill tabled by a Member of the said House, before it is considered in committee, to the Conseil d’État for its opinion, unless the Member who tabled it disagrees.

Article 40
Private Members’ Bills and amendments introduced by Members of Parliament shall not be admissible where their enactment would result in either a diminution of public revenue or the creation or increase of any public expenditure.

Article 41
If, during the legislative process, it appears that a Private Member’s Bill or amendment is not a matter for statute or is contrary to a delegation granted under article 38, the Government or the President of the House concerned, may argue that it is inadmissible. In the event of disagreement between the Government and the President of the House concerned, the Constitutional Council, at the request of one or the other, shall give its ruling within eight days.

Article 42
The discussion of Government and Private Members’ Bills shall, in plenary sitting, concern the text passed by the committee to which the Bill has been referred, in accordance with article 43, or failing that, the text which has been referred to the House. Notwithstanding the foregoing, the plenary discussion of Constitutional Revision Bills, Finance Bills and Social Security Financing Bills, shall concern, during the first reading before the House to which the Bill has been referred in the first instance, the text presented by the Government, and during the subsequent readings, the text transmitted by the other House. The plenary discussion at first reading of a Government or Private Members’ Bill may only occur before the first House to which it is referred, at the end of a period of six weeks after it has been tabled. It may only occur, before the second House to which it is referred, at the end of a period of four weeks, from the date of transmission. The previous paragraph shall not apply if the accelerated procedure has been implemented according to the conditions provided for in article 45. Neither shall it apply to Finance Bills, Social Security Financing Bills, or to Bills concerning a state of emergency.

Article 43
Government and Private Members’ Bills shall be referred to one of the standing committees, the number of which shall not exceed eight in each House. At the request of the Government or of the House before which such a bill has been tabled, Government and Private Members’ Bills shall be referred for consideration to a committee specially set up for this purpose.

Article 44
Members of Parliament and the Government shall have the right of amendment. This right may be used in plenary sitting or in committee under the conditions set down by the Rules of Procedure of the Houses, according to the framework determined by an Institutional Act. Once debate has begun, the Government may object to the consideration of any amendment which has not previously been
Article 45
Every Government or Private Member’s Bill shall be considered successively in the two Houses of Parliament with a view to
the passing of an identical text. Without prejudice to the application of articles 40 and 41, all amendments which have a
link, even an indirect one, with the text that was tabled or transmitted, shall be admissible on first reading.
If, as a result of a failure to agree by the two Houses, it has proved impossible to pass a Government or Private Member’s
Bill after two readings by each House or, if the Government has decided to apply the accelerated procedure without the two
Conferences of Presidents being jointly opposed, after a single reading of such a Bill by each House, the Prime Minister, or in
the case of a Private Members’ Bill, the Presidents of the two Houses acting jointly, may convene a joint committee,
composed of an equal number of members from each House, to propose a text on the provisions still under debate.
The text drafted by the joint committee may be submitted by the Government to both Houses for approval. No amendment
shall be admissible without the consent of the Government.
If the joint committee fails to agree on a common text, or if the text is not passed as provided in the foregoing paragraph,
the Government may, after a further reading by the National Assembly and by the Senate, ask the National Assembly to
reach a final decision. In such an event, the National Assembly may reconsider either the text drafted by the joint
committee, or the last text passed by itself, as modified, as the case may be, by any amendment(s) passed by the Senate.

Article 49
The Prime Minister, after deliberation by the Council of Ministers, may make the Government’s program or possibly a
genral policy statement an issue of a vote of confidence before the National Assembly.
The National Assembly may call the Government to account by passing a resolution of no-confidence. Such a resolution
shall not be admissible unless it is signed by at least one tenth of the Members of the National Assembly. Voting may not
take place within forty-eight hours after the resolution has been tabled. Solely votes cast in favour of the no-confidence
resolution shall be counted and the latter shall not be passed unless it secures a majority of the Members of the House.
Except as provided for in the following paragraph, no Member shall sign more than three resolutions of no-confidence
during a single ordinary session and no more than one during a single extraordinary session.
The Prime Minister may, after deliberation by the Council of Ministers, make the passing of a Finance Bill or Social Security
Financing Bill an issue of a vote of confidence before the National Assembly. In that event, the Bill shall be considered
passed unless a resolution of no-confidence, tabled within the subsequent twenty-four hours, is carried as provided for in
the foregoing paragraph. In addition, the Prime Minister may use the said procedure for one other Government or Private
Members’ Bill per session.
The Prime Minister may ask the Senate to approve a statement of general policy.

Article 50
When the National Assembly passes a resolution of no-confidence, or when it fails to endorse the Government program or
genral policy statement, the Prime Minister shall tender the resignation of the Government to the President of the Republic.

Article 52
The President of the Republic shall negotiate and ratify treaties. He shall be informed of any negotiations for the conclusion of an international agreement not subject to ratification.

Article 53
Peace Treaties, Trade agreements, treaties or agreements relating to international organization, those committing the
finances of the State, those modifying provisions which are the preserve of statute law, those relating to the status of
persons, and those involving the ceding, exchanging or acquiring of territory, may be ratified or approved only by an Act of
Parliament. They shall not take effect until such ratification or approval has been secured.
No ceding, exchanging or acquiring of territory shall be valid without the consent of the population concerned.

Article 53-1
The Republic may enter into agreements with European States which are bound by undertakings identical with its own in
matters of asylum and the protection of human rights and fundamental freedoms, for the purpose of determining their
respective jurisdiction as regards requests for asylum submitted to them.
However, even if the request does not fall within their jurisdiction under the terms of such agreements, the authorities of
the Republic shall remain empowered to grant asylum to any foreigner who is persecuted for his action in pursuit of
freedom or who seeks the protection of France on other grounds.

Article 53-2
The Republic may recognize the jurisdiction of the International Criminal Court as provided for by the Treaty signed on 18

Article 54
If the Constitutional Council, on a referral from the President of the Republic, from the Prime Minister, from the President
of one or the other Houses, or from sixty Members of the National Assembly or sixty Senators, has held that an
international undertaking contains a clause contrary to the Constitution, authorization to ratify or approve the international
undertaking involved may be given only after amending the Constitution.

Article 55
Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with
respect to each agreement or treaty, to its application by the other party.

Article 64
The President of the Republic shall be the guarantor of the independence of the Judicial Authority.
He shall be assisted by the High Council of the Judiciary.
An Institutional Act shall determine the status of members of the Judiciary.
Judges shall be irremovable from office.

Article 65
The High Council of the Judiciary shall be presided over by the President of the Republic. The Minister of Justice shall be its
ex officio Vice-president. He may deputize for the President of the Republic.

The High Council of the Judiciary shall consist of two sections, one with jurisdiction over judges, the other over public prosecutors.

The section with jurisdiction over judges shall comprise, in addition to the President of the Republic and the Minister of Justice, five judges and one public prosecutor, one Conseiller d'État appointed by the Conseil d'État, and three prominent citizens who are not members either of Parliament or of the Judiciary, appointed respectively by the President of the Republic, the President of the National Assembly and the President of the Senate. The section with jurisdiction over public prosecutors shall comprise, in addition to the President of the Republic and the Minister of Justice, five public prosecutors and one judge, and the Conseiller d'État together with the three prominent citizens referred to in the preceding paragraph.

The section of the High Council of the Judiciary with jurisdiction over judges shall make recommendations for the appointment of judges to the Cour de cassation, the Chief Presidents of Courts of Appeal and the Presidents of the Tribunaux de grande instance. Other judges shall be appointed after consultation with this section.

This section shall act as disciplinary tribunal for judges. When acting in such capacity, it shall be presided over by the Chief President of the Cour de cassation.

The section of the High Council of the Judiciary with jurisdiction over public prosecutors shall give its opinion on the appointment of public prosecutors, with the exception of posts to be filled at meetings of the Council of Ministers. It shall give its opinion on disciplinary measures regarding public prosecutors. When acting in such capacity, it shall be presided over by the Chief Public Prosecutor at the Cour de cassation.

An Institutional Act shall determine the manner in which this article is to be implemented.

Article 65(1)

The High Council of the Judiciary shall consist of a section with jurisdiction over judges and a section with jurisdiction over public prosecutors.

The section with jurisdiction over judges shall be presided over by the Chief President of the Cour de cassation. It shall comprise, in addition, five judges and one public prosecutor, one Conseiller d'État appointed by the Conseil d'État and one practicing lawyer, as well as six qualified, prominent citizens who are not Members of Parliament, of the Judiciary or of the administration. The President of the Republic, the President of the National Assembly and the President of the Senate shall each appoint two qualified, prominent citizens. The procedure provided for in the last paragraph of article 13 shall be applied to the appointments of the qualified, prominent citizens. The appointments made by the President of each House of Parliament shall be submitted for the sole opinion of the relevant standing committee in that House.

The section with jurisdiction over public prosecutors shall be presided over by the Chief Public Prosecutor at the Cour de Cassation. It shall comprise, in addition, five public prosecutors and one judge, as well as the Conseiller d'État and the practicing lawyer, together with the six qualified, prominent citizens referred to in the second paragraph.

The section of the High Council of the Judiciary with jurisdiction over judges shall make recommendations for the appointment of judges to the Cour de cassation, the Chief Presidents of Courts of Appeal and the Presidents of the Tribunaux de grande instance. Other judges shall be appointed after consultation with this section.

The section of the High Council of the Judiciary with jurisdiction over public prosecutors shall give its opinion on the appointment of public prosecutors.

The section of the High Council of the Judiciary with jurisdiction over judges shall act as disciplinary tribunal for judges. When acting in such capacity, in addition to the members mentioned in the second paragraph, it shall comprise the judge belonging to the section with jurisdiction over public prosecutors.

The section of the High Council of the Judiciary with jurisdiction over judges shall give its opinion on disciplinary measures regarding public prosecutors. When acting in such capacity, it shall comprise, in addition to the members mentioned in paragraph three, the public prosecutor belonging to the section with jurisdiction over judges.

The High Council of the Judiciary shall meet in plenary section to reply to the requests for opinions made by the President of the Republic in application of article 64. It shall also express its opinion in plenary section, on questions concerning the deontology of judges or on any question concerning the operation of justice which is referred to it by the Minister of Justice.

The plenary section comprises three of the five judges mentioned in the second paragraph, three of the five prosecutors mentioned in the third paragraph as well as the Conseiller d'État, the practicing lawyer and the six qualified, prominent citizens referred to in the second paragraph. It is presided over by the Chief President of the Cour de cassation who may be substituted by the Chief Public Prosecutor of this court.

The Minister of Justice may participate in all the sittings of the sections of the High Council of the Judiciary except those concerning disciplinary matters. According to the conditions determined by an Institutional Act, a referral may be made to the High Council of the Judiciary by a person awaiting trial.

The Institutional Act shall determine the manner in which this article is to be implemented.

Article 67

The President of the Republic shall incur no liability by reason of acts carried out in his official capacity, subject to the provisions of Articles 53-2 and 68 hereof.

Throughout his term of office the President shall not be required to testify before any French Court of law or Administrative authority and shall not be the object of any civil proceedings, nor of any preferring of charges, prosecution or investigatory measures. All limitation periods shall be suspended for the duration of said term of office.

All actions and proceedings thus stayed may be reactivated or brought against the President one month after the end of his term of office.

Article 68

The President of the Republic shall not be removed from office during the term thereof on any grounds other than a breach
of his duties patently incompatible with his continuing in office. Such removal from office shall be proclaimed by Parliament sitting as the High Court. The proposal to convene the High Court adopted by one or other of the Houses of Parliament shall be immediately transmitted to the other House which shall make its decision known within fifteen days of receipt thereof. The High Court shall be presided over by the President of the National Assembly. It shall give its ruling as to the removal from office of the President, by secret ballot, within one month. Its decision shall have immediate effect. Rulings given hereunder shall require a majority of two thirds of the members of the House involved or of the High Court. No proxy voting shall be allowed. Only votes in favor of the removal from office or the convening of the High Court shall be counted. An Institutional Act shall determine the conditions for the application hereof.

**Article 72-4**

No change of status as provided for by articles 73 and 74 with respect to the whole or part of any one of the communities to which the second paragraph of article 72-3 applies, shall take place without the prior consent of voters in the relevant community or part of a community being sought in the manner provided for by the paragraph below. Such change of status shall be made by an Institutional Act. The President of the Republic may, on a recommendation from the Government when Parliament is in session or on a joint motion of the two Houses, published in either case in the Journal Officiel, decide to consult voters in an overseas territorial community on a question relating to its organization, its powers or its legislative system. Where the referendum concerns a change of status as provided for by the foregoing paragraph and is held in response to a recommendation by the Government, the Government shall make a statement before each House which shall be followed by debate.

**Article 89**

The President of the Republic, on the recommendation of the Prime Minister, and Members of Parliament alike shall have the right to initiate amendments to the Constitution. A Government or a Private Member's Bill to amend the Constitution must be considered within the time limits set down in the third paragraph of article 42 and be passed by the two Houses in identical terms. The amendment shall take effect after approval by referendum. However, a Government Bill to amend the Constitution shall not be submitted to referendum where the President of the Republic decides to submit it to Parliament convened in Congress; the Government Bill to amend the Constitution shall then be approved only if it is passed by a three-fifths majority of the votes cast. The Bureau of the Congress shall be that of the National Assembly.

No amendment procedure shall be commenced or continued where the integrity of national territory is placed in jeopardy. The republican form of government shall not be the object of any amendment.
### Article 126
The President of the Republic of Poland shall be the supreme representative of the Republic of Poland and the guarantor of the continuity of State authority.

The President of the Republic shall ensure observance of the Constitution, safeguard the sovereignty and security of the State as well as the inviolability and integrity of its territory.

The President shall exercise his duties within the scope of and in accordance with the principles specified in the Constitution and statutes.

### Article 127 (1)
The President of the Republic shall be elected by the Nation, in universal, equal and direct elections, conducted by secret ballot.

The President of the Republic shall be elected for a 5-year term of office and may be re-elected only for one more term. Only a Polish citizen who, no later than the day of the elections, has attained 35 years of age and has a full electoral franchise in elections to the Sejm, may be elected President of the Republic. Any such candidature shall be supported by the signatures of at least 100,000 citizens having the right to vote in elections to the Sejm.

A candidate who has received more than half of the valid votes shall be considered elected President of the Republic. If none of the candidates has received the required majority of votes, then a repeat ballot shall be held on the 14th day after the first vote.

The two candidates who have received the largest number of votes in the first ballot shall participate in a repeat ballot. If one of the two such candidates withdraws his consent to candidacy, forfeits his electoral rights or dies, he shall be replaced in the repeat ballot by the candidate who received the next highest consecutive number of votes in the first ballot. In such case, the date of the repeat ballot shall be extended by a further 14 days.

The candidate who receives the higher number of votes in the repeat ballot shall be elected President of the Republic.

The principles of and procedure for nominating candidates and conducting the elections, as well as the requirements for validity of the election of the President of the Republic, shall be specified by statute.

### Article 128
(1) The term of office of the President of the Republic shall commence on the date of his assuming such office.

(2) The election of the President of the Republic shall be ordered by the Marshal of the Sejm to be held on a day no sooner than 100 days and no later than 75 days before expiry of the term of office of the serving President of the Republic, and in the event of the office of President of the Republic falling vacant - no later than the 14th day thereafter, specifying the date of the election which shall be on a non-working day and within a period of 60 days of the day of ordering the election.

### Article 129 (1)
The Supreme Court shall adjudicate upon the validity of the election of the President of the Republic.

A voter shall have the right to submit a complaint to the Supreme Court concerning the validity of the election of the President of the Republic in accordance with principles specified by statute.

In the event of the election of the President of the Republic being judged invalid, a new election shall be held in accordance with the principles prescribed in Article 128, para. 2 in relation to a vacancy in the office of President of the Republic.

### Article 130
The President of the Republic shall assume office upon taking the following oath in the presence of the National Assembly:

"Assuming, by the will of the Nation, the office of President of the Republic of Poland, I do solemnly swear to be faithful to the provisions of the Constitution; I pledge that I shall steadfastly safeguard the dignity of the Nation, the independence and security of the State, and also that the good of the Homeland and the prosperity of its citizens shall forever remain my supreme obligation." The oath may also be taken with the additional sentence "So help me, God."

### Article 131 (1)
If the President of the Republic is temporarily unable to discharge the duties of his office, he shall communicate this fact to the Marshal of the Sejm, who shall temporarily assume the duties of the President of the Republic. If the President of the Republic is not in a position to inform the Marshal of the Sejm of his incapacity to discharge the duties of the office, then the Constitutional Tribunal shall, on request of the Marshal of the Sejm, determine whether or not there exists an impediment to the exercise of the office by the President of the Republic. If the Constitutional Tribunal so finds, it shall require the Marshal of the Sejm to temporarily perform the duties of the President of the Republic.

The Marshal of the Sejm shall, until the time of election of a new President of the Republic, temporarily discharge the duties of the President of the Republic in the following instances:

1) the death of the President of the Republic;
2) the President's resignation from office;
3) judicial declaration of the invalidity of the election to the Presidency or other reasons for not assuming office following the election;
4) a declaration by the National Assembly of the President's permanent incapacity to exercise his duties due to the state of his health; such declaration shall require a resolution adopted by a majority vote of at least two-thirds of the statutory number of members of the National Assembly;
5) dismissal of the President of the Republic from office by a judgment of the Tribunal of State.
6) If the Marshal of the Sejm is unable to discharge the duties of the President of the Republic, such duties shall be discharged by the Marshal of the Senate.
The President of the Republic shall hold no other offices nor discharge any public functions, with the exception of those connected with the duties of his office.

The President of the Republic, exercising his constitutional and statutory authority, shall issue Official Acts. Official Acts of the President shall require, for their validity, the signature of the President of the Republic.

The President of the Republic shall act as a constitutional organ. The President of the Republic may, regarding particular matters, convene the Cabinet Council. The Cabinet Council shall be composed of the Council of Ministers whose debates shall be presided over by the President of the Republic. The Cabinet Council shall not possess the competence of the Council of Ministers.

The President of the Republic shall exercise command over the Armed Forces of the Republic of Poland. The President of the Republic shall be the Supreme Commander of the Armed Forces of the Republic of Poland.

The President of the Republic shall issue decisions specified in Articles 92 and 93.

The President of the Republic may, on request of the Prime Minister, order a general or partial mobilization and deployment of the Armed Forces in defense of the Republic of Poland.

The President of the Republic, for a period of war, shall appoint the Commander-in-Chief of the Armed Forces. The duration of their term of office, the procedure for and terms of their dismissal before the end thereof, shall be specified by statute.

The President of the Republic shall confer military ranks as specified by statute.

The President of the Republic shall have the power of pardon. The power of pardon may not be extended to individuals convicted by the Tribunal of State.

The President of the Republic shall cooperate with the Prime Minister and the appropriate minister in respect of foreign policy.

The President of the Republic shall accept responsibility for the Government, which shall be specified by statute.

The President of the Republic shall hold no other offices nor discharge any public functions, with the exception of those connected with the duties of his office.

The President of the Republic, exercising his constitutional and statutory authority, shall issue Official Acts. Official Acts of the President shall require, for their validity, the signature of the President of the Republic.
12) accepting resignation of the Council of Ministers and obliging it to temporarily continue with its duties;
13) applying to the Sejm to bring a member of the Council of Ministers to responsibility before the Tribunal of State;
14) dismissing a minister in whom the Sejm has passed a vote of no confidence;
15) convening the Cabinet Council;
16) conferring orders and decorations;
17) appointing judges;
18) exercising the power of pardon;
19) granting Polish citizenship and giving consent for renunciation of Polish citizenship;
20) appointing the First President of the Supreme Court;
21) appointing the President and Vice-President of the Constitutional Tribunal;
22) appointing the President of the Supreme Administrative Court;
23) appointing the presidents of the Supreme Court and vice-presidents of the Supreme Administrative Court;
24) requesting the Sejm to appoint the President of the National Bank of Poland;
25) appointing the members of the Council for Monetary Policy;
26) appointing and dismissing members of the National Security Council;
27) appointing members of the National Council of Radio Broadcasting and Television;
28) establishing the statute of the Presidential Chancellery and appointing or dismissing the Chief of the Presidential Chancellery.
29) issuing orders in accordance with the principles specified in Article 93;
30) resigning from the office of President of the Republic.

Article 145
(1) The President of the Republic may be held accountable before the Tribunal of State for an infringement of the Constitution or statute, or for commission of an offence.
Bringing an indictment against the President of the Republic shall be done by resolution of the National Assembly passed by a majority of at least two-thirds of the statutory number of members of the National Assembly, on the motion of at least 140 members of the Assembly.
On the day on which an indictment, to be heard before the Tribunal of State, is brought against the President of the Republic, he shall be suspended from discharging all functions of his office. The provisions of Article 131 shall apply as appropriate.

Article 146
(1) Chapter VI THE COUNCIL OF MINISTERS AND GOVERNMENT ADMINISTRATION
The Council of Ministers shall conduct the internal affairs and foreign policy of the Republic of Poland.
The Council of Ministers shall conduct the affairs of State not reserved to other State organs or local government.
The Council of Ministers shall manage the government administration.
To the extent and in accordance with the principles specified by the Constitution and statutes, the Council of Ministers, in particular, shall:
1) ensure the implementation of statutes;
2) issue regulations;
3) coordinate and supervise the work of organs of State administration;
4) protect the interests of the State Treasury;
5) adopt a draft State Budget;
6) supervise the implementation of the State Budget and pass a resolution on the closing of the State's accounts and report on the implementation of the Budget;
7) ensure the internal security of the State and public order;
8) ensure the external security of the State;
9) exercise general control in the field of relations with other States and international organizations;
10) conclude international agreements requiring ratification as well as accept and renounce other international agreements;
11) exercise general control in the field of national defence and annually specify the number of citizens who are required to perform active military service;
12) determine the organization and the manner of its own work.

Article 147
(1) The Council of Ministers shall be composed of the President of the Council of Ministers (Prime Minister) and ministers.
Vice-presidents of the Council of Ministers (Deputy Prime Ministers) may also be appointed within the Council of Ministers.
The Prime Minister and Deputy Prime Ministers may also discharge the functions of a minister.
(2) The presidents of committees specified in statutes may also be appointed to membership in the Council of Ministers.

Article 148
The Prime Minister shall:
1. represent the Council of Ministers;
2. manage the work of the Council of Ministers;
3. issue regulations;
4. ensure the implementation of the policies adopted by the Council of Ministers and specify the manner of their implementation;
5. coordinate and control the work of members of the Council of Ministers;
6. exercise, within the limits and by the means specified in the Constitution and statute, supervision of local government.
7. be the official superior of employees of the government administration.

Article 149
(1) Ministers shall direct a particular branch of government administration or perform tasks allocated to them by the Prime Minister. The scope of activity of a minister directing a branch of government administration shall be specified by statute.
**Article 150**  
A member of the Council of Ministers shall not perform any activity inconsistent with his public duties.

**Article 151**  
The Prime Minister, Deputy Prime Ministers and ministers shall take the following oath in the presence of the President of the Republic:

> "Assuming this office of Prime Minister (Deputy Prime Minister, minister) I do solemnly swear to be faithful to the provisions of the Constitution and other laws of the Republic of Poland, and that the good of the Homeland and the prosperity of its citizens shall forever remain my supreme obligation."

The oath may also be taken with the additional sentence "So help me, God."

**Article 152**  
The voivod shall be the representative of the Council of Ministers in a voivodship. The procedure for appointment and dismissal, as well as the scope of activity, of a voivod shall be specified by statute.

**Article 153**  
A corps of civil servants shall operate in the organs of government administration in order to ensure a professional, diligent, impartial and politically neutral discharge of the State’s obligations. The Prime Minister shall be the superior of such corps of civil servants.

**Article 154**  
The President of the Republic shall nominate a Prime Minister who shall propose the composition of a Council of Ministers. The President of the Republic shall, within 14 days of the first sitting of the Sejm or acceptance of the resignation of the previous Council of Ministers, appoint a Prime Minister together with other members of a Council of Ministers and accept the oaths of office of members of such newly appointed Council of Ministers.

The Prime Minister shall, within 14 days following the day of his appointment by the President of the Republic, submit a program of activity of the Council of Ministers to the Sejm, together with a motion requiring a vote of confidence. The Sejm shall pass such vote of confidence by an absolute majority of votes in the presence of at least half of the statutory number of Deputies.

In the event that a Council of Ministers has not been appointed pursuant to para. 1 above or has failed to obtain a vote of confidence in accordance with para. 2 above, the Sejm, within 14 days of the end of the time periods specified in paras 1 and 2, shall choose a Prime Minister as well as members of the Council of Ministers as proposed by him, by an absolute majority of votes in the presence of at least half of the statutory number of Deputies. The President of the Republic shall appoint the Council of Ministers so chosen and accept the oaths of office of its members.

**Article 155**  
In the event that a Council of Ministers has not been appointed pursuant to the provisions of Article 154, para. 3, the President of the Republic shall, within a period of 14 days, appoint a Prime Minister and, on his application, other members of the Council of Ministers. The Sejm, within 14 days following the appointment of the Council of Ministers by the President of the Republic, shall hold, in the presence of at least half of the statutory number of Deputies, a vote of confidence thereto.

In the event that a vote of confidence has not been granted to the Council of Ministers pursuant to para. 1, the President of the Republic shall shorten the term of office of the Sejm and order elections to be held.

**Article 156**  
The members of the Council of Ministers shall be accountable to the Tribunal of State for an infringement of the Constitution or statutes, as well as for the commission of an offence connected with the duties of his office. On the motion of the President of the Republic or at least 115 Deputies, resolution to bring a member of the Council of Ministers to account before the Tribunal of State shall be passed by the Sejm by a majority of three-fifths of the statutory number of Deputies.

**Article 157**  
The members of the Council of Ministers shall be collectively responsible to the Sejm for the activities of the Council of Ministers. The members of the Council of Ministers shall be individually responsible to the Sejm for those matters falling within their competence or assigned to them by the Prime Minister.

**Article 158**  
The Sejm shall pass a vote of no confidence in the Council of Ministers by a majority of votes of the statutory number of Deputies, on a motion moved by at least 46 Deputies and which shall specify the name of a candidate for Prime Minister. If such a resolution has been passed by the Sejm, the President of the Republic shall accept the resignation of the Council of Ministers and appoint a new Prime Minister as chosen by the Sejm, and, on his application, the other members of the Council of Ministers and accept their oath of office.

A motion to pass a resolution referred to in para. 1 above, may be put to a vote no sooner than 7 days after it has been submitted. A subsequent motion of a like kind may be submitted no sooner than after the end of 3 months from the day the previous motion was submitted. A subsequent motion may be submitted before the end of 3 months if such motion is submitted by at least 115 Deputies.

**Article 159**  
The Sejm may pass a vote of no confidence in an individual minister. A motion to pass such a vote of no confidence may be submitted by at least 69 Deputies. The provisions of Article 158, para. 2 shall apply as appropriate.

The President of the Republic shall recall a minister in whom a vote of no confidence has been passed by the Sejm by a majority of votes of the statutory number of Deputies.

**Article 160**  
The Prime Minister may submit to the Sejm a motion requiring a vote of confidence in the Council of Ministers. A vote of confidence in the Council of Ministers shall be granted by a majority of votes in the presence of at least half of the statutory number of Deputies.
| Article 161 | The President of the Republic shall, on the application of the Prime Minister, effect changes in the composition of the Council of Ministers. |
| Article 224 | The President of the Republic shall sign the Budget or interim Budget submitted to him by the Marshal of the Sejm within 7 days of receipt thereof, and orders its promulgation in the Journal of Laws of the Republic of Poland (Dziennik Ustaw). The provisions of Article 122, para. 5 shall not apply to the Budget or any interim budget. If the President of the Republic has made reference to the Constitutional Tribunal for an adjudication upon the conformity to the Constitution of the Budget or interim budget before signing it, the Tribunal shall adjudicate such matter no later than within a period of 2 months from the day of submission of such reference to the Tribunal. |
| Article 231 | The President of the Republic shall submit the regulation on the introduction of martial law or a state of emergency to the Sejm within 48 hours of signing such regulation. The Sejm shall immediately consider the regulation of the President. The Sejm, by an absolute majority of votes taken in the presence of at least half the statutory number of Deputies, may annul the regulation of the President. |
| Article 232 | In order to prevent or remove the consequences of a natural catastrophe or a technological accident exhibiting characteristics of a natural disaster, the Council of Ministers may introduce, for a definite period no longer than 30 days, a state of natural disaster in a part of or upon the whole territory of the State. An extension of a state of natural disaster may be made with the consent of the Sejm. |
CURRICULUM VITAE

Rosa Ristawati (February 17, 1979) holds a Bachelor degree in Laws (SH) (Airlangga University, Indonesia, 2002). Her Bachelor thesis was “The Principle of Proportionality in Contract Law: a Case Study on Private Construction Contract”. In 2004, she got a Masters degree in Business Law (MH) from Surabaya University, Indonesia. Her master thesis was “The Implementation of Good Corporate Governance on the Banking System in Indonesia”. In 2010, Rosa got an LLM in International Law and the Law of International organizations from University of Groningen (Rijksuniversiteit Groningen) the Netherlands. Her LLM thesis was “Presidential Powers in Time of Terror: Comparative Study of the US and Indonesia”.

Rosa started her academic career in 2003 as she joined the Catholic University of Widya Mandala in Surabaya, Indonesia. She taught Law and Psychology at the Faculty of Psychology. On April 2006, Rosa started working as lecturer at the Faculty of Law, Airlangga University. During the time, she taught Indonesian Constitutional Law and comparative constitutional law. Her research interests are including Constitutional Law, Comparative Constitutional Law, Constitutional design, and the Law of International organizations.

In 2009, she was granted the University of Groningen Talent Grant, a scholarship by the University of Groningen. She got an opportunity to study Master of Laws programmes (the LLM programme in International Law and the Law of International Organizations) at the Faculty of Law, Groningen University, the Netherlands (September 1, 2009- 31 August 2010).

In September 2011, Rosa started her PhD project at Maastricht University, the Netherlands. The project was the three years PhD project under the Indonesian Ministry of Education. Her research focusses on the constitutional law and the comparative constitutional law. During the PhD program, she also joined the ius commune research school where she gained workshops, PhD trainings, and PhD conferences. She accomplished the ius commune PhD training program within three years and got the certificate as researcher from the ius commune research school on 2013.

In her second year of PhD program, she was granted the 2012 SUN scholarship, a summer school scholarship by the Central European University where she got an opportunity attending summer school program on comparative regionalism at CEU, Budapest. In October 2012, she got an opportunity to be a visiting scholar at CEU, Budapest. Her PhD thesis at Maastricht University on “Modelling Executive Powers in the Indonesian Constitution: A Comparative Study of Constitutions” was approved on Summer 2017 and defended on Winter 2017.