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The Delegated Constitution: Organic Statutes, Desuetude, and Constitutional Change in Indonesia

Ciputra Sigit Suleman

Universitas Padjajaran, Bandung, Indonesia

Corresponding author: ciputra25001@mail.unpad.ac.id

ABSTRACT

The 1945 Constitution of Indonesia has not been amended since 2002, yet the rules governing presidential eligibility, the tenure of constitutional judges, the size of the executive, and the electoral calendar have all changed in the interval. Existing accounts attribute that movement to judicial interpretation. A clause-by-clause reading of the amended text identifies thirty-eight paragraphs delegating a subject of constitutional consequence to ordinary legislation, and seven subordinating a constitutional entitlement to whatever the legislature enacts. Because these statutes carry constitutional content while remaining revisable by simple majority, the operative constitution has migrated into the statute book without any norm arising outside the text. Four things a delegate statute may do to the provision authorising it are distinguished: execute it, reconfigure it, displace it, or, by never being enacted, hold it in abeyance. The fourth is the least noticed: a constitution that conditions a guarantee on a statute gives the legislature a veto over its own operation, and the recognition of customary law communities has waited on a statute never made, and the regime of emergency powers still rests on a 1959 instrument that is not a statute at all. France, Spain, and Chile each give such statutes a legislative form of their own; Indonesia, which delegates as heavily, recognises none. A standard of review calibrated to the four modalities is proposed, and constitutional omission is shown to be justiciable through a remedial technique the Constitutional Court already employs.

Keywords: delegated constitutionalism; organic statutes; constitutional desuetude; legislative omission; informal constitutional change.

JURISDICTIONAL STATEMENT

This article examines Indonesia as a single case, and draws on France, Spain, and Chile for one variable only: the legislative form given to statutes carrying constitutional content. Indonesia is chosen because it combines heavy textual delegation with an amendment rule both formally rigid and politically foreclosed, and recognises no category of organic law. The comparators each recognise such a category and secure it differently, which isolates form as the variable.

1. Introduction

Constitutions are ordinarily thought to change either through the procedure they prescribe for their own amendment or in spite of it. The comparative literature has been organised around that division for a generation: on one side the study of formal amendment, its procedures, thresholds, and limits; on the other the study of everything that alters a constitution's operative meaning without passing through those procedures, whether judicial interpretation, convention, practice, or disuse.¹ Indonesia appears at first to be a straightforward instance of the second. The 1945 Constitution was amended four times between 1999 and 2002 and has not been amended since.² In the twenty-four years that followed, the eligibility rules for the presidency, the tenure of constitutional judges, the number of ministries, the threshold for presidential nomination, and the calendar of national and regional elections have each changed, some of them more than once. None of those changes involved the People's Consultative Assembly acting under Article 37.

Yet the second category does not fit what has happened. Informal constitutional change, as ordinarily theorised, describes the emergence of a norm that operates alongside the text and diverges from it: a convention the text does not mention, an interpretation the text does not compel, a practice that overtakes what the text provides.³ In Indonesia the rules that have changed were, for the most part, never in the constitutional text to begin with. The requirement that a candidate for the presidency be at least forty years old is not a constitutional provision; it is Article 169(q) of Law No 7 of 2017 on General Elections, enacted under the authority of Article 6(2) of the Constitution, which provides only that the requirements for the office shall be further regulated by statute.⁴ The tenure of constitutional judges is not fixed by the Constitution; Article 24C(6) delegates it.⁵ The number of ministries was capped at thirty-four not by the Constitution but by Article 15 of Law No 39 of 2008, enacted under Article 17(4), and the cap was removed by Law No 61 of 2024 five days before a new President took office.⁶ In each case the operative constitutional rule sat in a statute, was

¹ The division structures the field's principal treatments. See Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press 2019); Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017); Xenophon Contiades (ed), *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Routledge 2013).

² Perubahan Pertama Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 [First Amendment to the 1945 Constitution of the Republic of Indonesia] (1999); Perubahan Kedua (2000); Perubahan Ketiga (2001); Perubahan Keempat (2002). On the amendment process and its political settlement, see Denny Indrayana, *Indonesian Constitutional Reform 1999–2002: An Evaluation of Constitution-Making in Transition* (Kompas 2008); Donald L Horowitz, *Constitutional Change and Democracy in Indonesia* (Cambridge University Press 2013).

³ The canonical statement remains Bruce Ackerman, *We the People: Transformations* (Harvard University Press 1998). For the comparative development, see Oran Doyle, 'Constraints on Constitutional Amendment Powers' in Richard Albert, Xenophon Contiades and Alkmene Fotiadou (eds), *The Foundations and Traditions of Constitutional Amendment* (Hart 2017); David Kosař and Attila Vincze, 'Constitutional Change without Constitutional Amendment' in Xenophon Contiades and Alkmene Fotiadou (eds), *Routledge Handbook of Comparative Constitutional Change* (Routledge 2020).

⁴ Undang-Undang No 7 Tahun 2017 tentang Pemilihan Umum [Law No 7 of 2017 on General Elections] (Indonesia) art 169(q); Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 [Constitution of the Republic of Indonesia 1945] art 6(2): 'Syarat-syarat untuk menjadi Presiden dan Wakil Presiden diatur lebih lanjut dengan undang-undang' ('The requirements to become President and Vice-President shall be further regulated by statute').

⁵ Constitution of the Republic of Indonesia 1945, art 24C(6): the appointment and dismissal of constitutional judges, the rules of procedure, and other provisions concerning the Constitutional Court shall be regulated by statute.

⁶ Undang-Undang No 39 Tahun 2008 tentang Kementerian Negara [Law No 39 of 2008 on State Ministries] (Indonesia) art 15, as amended by Undang-Undang No 61 Tahun 2024 [Law No 61 of 2024] (Indonesia) LN 2024/225, TLN 6994, enacted and promulgated 15 October 2024. The President was inaugurated on 20 October 2024.

changed by an ordinary legislative majority, and left the constitutional text unaltered — not because the text was circumvented, but because it had authorised precisely that.

This is not amendment and it is not informal change. It is change performed inside the Constitution's own authorising structure, and it is invisible to doctrines built to police change that comes from outside. The question the Indonesian case poses is therefore not how a constitution is altered without recourse to its amendment rule, but what becomes of a constitution that instructs the ordinary legislature to supply its own content, entrenches itself against amendment, and then watches that instruction being exercised for a quarter of a century. The answer developed here is that the constitutional text is progressively emptied from within: its provisions remain in force, cited and unrepealed, while the norms that do the work of governing sit one level below them, in instruments any parliamentary majority may rewrite.

What remains undertheorised is the connection between delegation and disuse. Three bodies of scholarship bear on the problem and none of them meets the others. The first concerns organic laws and quasi-constitutional statutes, and asks what rank such instruments hold and how they are to be identified; it is oriented to systems that already mark them out as a category.⁷ The second concerns constitutional desuetude, and asks what follows when a constitutional provision falls out of use; it treats disuse as a failure of political will directed at a power the text confers outright.⁸ The third concerns informal constitutional change in Indonesia, and has concentrated on the Constitutional Court as the agent of a silent transformation of the 1945 Constitution.⁹ None of the three asks whether a constitution's delegation architecture is itself a mechanism of desuetude — whether a text can be drained by its own instructions. Indonesia is absent from the first literature precisely because it has no organic law category to describe, which is the very feature that makes it the strongest case.

This article contends that Indonesia has a delegated constitution: a constitution whose operative content is systematically located in ordinary statutes at the Constitution's own direction, and whose rigidity at the level of formal amendment has intensified rather than restrained the movement of constitutional substance into the statutory channel. Three questions follow. First, how extensive is the delegation the 1945 Constitution performs, and what does its architecture look like once read clause by clause? Second, what does a delegate statute do to the constitutional provision that authorises it, and can the range of possibilities be ordered? Third, what follows for

⁷ William N Eskridge Jr and John Ferejohn, 'Super-Statutes' (2001) 50 *Duke Law Journal* 1215; Vanessa MacDonnell, 'A Theory of Quasi-Constitutional Legislation' (2016) 53 *Osgoode Hall Law Journal* 508; Richard Albert, Antonia Baraggia and Cristina Fasone (eds), *Constitutional Reform of National Legislatures: Bicameral Negotiations* (Edward Elgar 2019); Ittai Bar-Siman-Tov (ed), *Quasi-Constitutionality and Constitutional Statutes: Forms, Functions, Applications* (Routledge 2019). In the United Kingdom the category emerged judicially: *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151 [62]–[63].

⁸ Richard Albert, 'Constitutional Amendment by Constitutional Desuetude' (2014) 62 *American Journal of Comparative Law* 641; Richard Albert, 'Constitutional Disuse or Desuetude: The Case of Article V' (2014) 94 *Boston University Law Review* 1029.

⁹ Stefanus Hendrianto, 'The Indonesian Constitutional Court and Informal Constitutional Change' in Melissa Crouch (ed), *Constitutional Democracy in Indonesia* (Oxford University Press 2022); Stefanus Hendrianto, *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes* (Routledge 2018); Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Brill Nijhoff 2015).

judicial review in a system whose Constitutional Court reviews delegate statutes on exactly the terms it reviews any other?

The argument advanced is that delegation in the Indonesian Constitution operates in four modalities — execution, reconfiguration, displacement, and abeyance — and that constitutional doctrine has recognised only the first. Execution supplies detail and leaves the constitutional norm intact. Reconfiguration alters the content of the office or power it purports to implement while remaining formally within the terms of the delegation. Displacement occupies the constitutional field so completely that the provision ceases to operate independently and the statute becomes the only accessible source of the norm. Abeyance arises where the delegation is never exercised, and the constitutional provision remains inert for want of the statute that alone could activate it. The fourth modality inverts the received account of desuetude: the provision falls out of use not because those who hold the power decline to exercise it, but because the Constitution made its own operation conditional on an act the legislature controls. Where a constitution does that, the legislature holds a veto over the Constitution.

The contribution is threefold. The article supplies the first clause-by-clause account of the 1945 Constitution's delegation architecture, identifying thirty-eight express delegations and seven subordinating qualifications. It offers a taxonomy of delegated change portable to any system that assigns constitutional content to ordinary statute, which is to say almost every system with a written constitution. And it proposes a standard of review calibrated to the modality rather than to the instrument, together with an argument that legislative omission in the face of a constitutional delegation should be justiciable — a conclusion requiring no new remedial technique, only the redirection of one the Indonesian Constitutional Court already employs. For a reader working elsewhere, the Indonesian case isolates a variable ordinarily obscured: what happens when a constitution delegates heavily and supplies no distinct form for the instruments that receive the delegation.

2. Method

This article is doctrinal and normative. It reconstructs the delegation architecture of the 1945 Constitution from the constitutional text, traces the exercise of four delegations through the statutes and judicial decisions that have given them content, and evaluates the resulting arrangement against a standard drawn from comparative constitutional practice. It is not an empirical study of legislative behaviour, and it advances no claim about the motives of any legislature or court.

Materials and sources. The constitutional text relied upon is the 1945 Constitution as it stands after the amendments of 1999, 2000, 2001, and 2002, read in the consolidated single-text version. Because the enumeration in section 3.2 turns on exact wording, the text was read against two independent official reproductions and every clause listed was confirmed in both; where they diverged in orthography, the reading of

the Secretariat General of the People's Consultative Assembly governs.¹⁰ Statutes are cited by their Indonesian titles with an English translation in square brackets, and are taken from the national legal documentation database, which records the state gazette and supplementary gazette numbers reproduced in the footnotes.¹¹ Decisions of the Constitutional Court are taken from the Court's published decisions and from the official case summaries issued alongside them; the date given for each decision is the date of pronouncement. All Indonesian sources were read in Indonesian and all translations are the author's own. Foreign constitutional texts are cited in the official English versions published by the constitutional organs of the states concerned, save for the Chilean provisions, which were read in Spanish.

Selection and analysis. The enumeration proceeds on a textual criterion applied by an explicit decision rule. A paragraph enters the count where its operative wording makes a statute the instrument through which a constitutional subject is to be settled. The formulae that satisfy the criterion are *diatur dengan undang-undang*, *diatur dalam undang-undang*, *diatur lebih lanjut dengan undang-undang*, *ditetapkan dengan undang-undang*, and the four constructions that carry the same operative sense in different grammatical dress: the relative form *yang diatur dengan* or *yang diatur dalam undang-undang*, the temporal form *ditetapkan setiap tahun dengan undang-undang*, the attributive forms *berdasarkan undang-undang* and *sesuai dengan undang-undang*, and the forms in which a power or a status is conferred or confirmed by statute, *yang diberikan oleh undang-undang*, *yang oleh undang-undang ditentukan*, and *disahkan dengan undang-undang*.

Two categories are then distinguished by the direction in which the reference to statute runs. A delegation proper is a paragraph in which the Constitution creates an office, an institution, or a subject and directs that a statute settle it; the statute completes what the Constitution has established. A qualification is a paragraph in which the Constitution states an entitlement, a limit, or a power and makes its extent turn on what the legislature provides; the statute conditions what the Constitution has stated. The grammatical form does not decide the question, because the relative construction *yang diatur dengan undang-undang* performs both offices: in Articles 15, 18(1), 18B(1), and 31(3) it attaches to an institution or a scheme the Constitution establishes, and in Article 18B(2) it attaches to a recognition the Constitution confers. One paragraph therefore turns on the decision rule rather than on its wording. Article 18B(2) is reported as a qualification, because the statutory reference governs the recognition rather than its implementation; classifying it as a delegation would yield thirty-nine and six rather than thirty-eight and seven, and no argument in this article turns on which classification is preferred.

¹⁰ Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 dalam Satu Naskah [The 1945 Constitution of the Republic of Indonesia in a Single Text], as reproduced in the official consolidations maintained by the Secretariat General of the People's Consultative Assembly and by the National Civil Service Agency.

¹¹ Jaringan Dokumentasi dan Informasi Hukum [Legal Documentation and Information Network], Badan Pemeriksa Keuangan Republik Indonesia, <<https://peraturan.bpk.go.id>> accessed 12 September 2026.

Provisions mentioning statutes without delegating or qualifying are excluded: the ordinary legislative procedure in Articles 20, 21, and 22, the review jurisdiction in Article 24C(1), and the transitional saving in Transitional Provision I. Article 28I(5) is likewise excluded, since it delegates to *peraturan perundang-undangan* — legislation in general — rather than to *undang-undang* in the strict sense, and its inclusion would raise the total by one. The count is therefore robust within a range of thirty-eight to thirty-nine delegations and six to seven qualifications, on a total of forty-five, or forty-six if Article 28I(5) is admitted. The argument that follows does not depend on the exact figure; it depends on the order of magnitude, which no classification choice disturbs.

The delegations traced in section 4 were selected so that each of the four modalities is populated from a different constitutional function, which guards against a taxonomy generated from a single field. General elections under Article 22E(6) supply the case of execution; the Constitutional Court under Article 24C(6) and the ministries under Article 17(4) supply reconfiguration; presidential eligibility under Article 6(2), together with the electoral and second-chamber delegations, supplies displacement; and customary law communities under Article 18B(2) and states of danger under Article 12 supply abeyance. The cases were chosen because each has a documented legislative and judicial history, not because they are representative of the thirty-eight in any statistical sense, and no frequency claim is advanced. The comparative material in section 5 is confined to one variable — the legislative form prescribed for statutes carrying constitutional content — and no claim is advanced about the wider constitutional systems from which it is drawn.

Limits. Three limits should be stated. The enumeration in Table 1 is a textual count and not a measure of constitutional weight; one delegation may matter more than ten others. The account of judicial reasoning rests on the Court's published decisions and official summaries, and where a decision could not be obtained in full this is stated in the footnote and the account attributed to the source relied upon. Finally, the proposal in section 6 is addressed to a system that already possesses centralised constitutional review with *erga omnes* effect, and its transposition elsewhere would require an argument this article does not attempt.

3. The delegated constitution

3.1 A frozen amendment rule

Article 37 of the 1945 Constitution states the procedure by which the Constitution may be changed. A proposal must be submitted in writing by at least one third of the members of the People's Consultative Assembly, specifying the articles to be amended and the reasons; a session convened to consider it requires the attendance of at least two thirds of the members; and a decision to amend requires the assent of more than

half of all members of the Assembly. Article 37(5) places the unitary form of the Republic beyond amendment altogether.¹²

Measured against the comparative range, this is a rigid but not exceptional rule. It requires no referendum, no supermajority of votes cast beyond an absolute majority of the full membership, and no ratification by subnational units.¹³ Its rigidity in practice is of a different order, and it is political rather than procedural. The amendment process that closed in 2002 was conducted under five basic agreements adopted at its outset, among them the preservation of the Preamble, the retention of the unitary state, and the decision to amend by addendum rather than by replacement.¹⁴ Those agreements settled the constitutional question in a manner that has since made reopening the text appear, to successive parliamentary majorities, a risk without a corresponding reward. Proposals to amend have surfaced periodically — to restore the Broad Outlines of State Policy, to extend presidential terms, to reconfigure the Regional Representative Council — and none has reached the threshold in Article 37(1).¹⁵

The result is a constitution that is formally amendable and practically closed. Twenty-four years without a single amendment is not, by itself, evidence of desuetude; the United States has passed longer intervals without exhausting Article V.¹⁶ What matters is the conjunction. A text that has ceased to be amended and simultaneously instructs the ordinary legislature to supply its content does not simply stand still. Constitutional demand does not disappear when the amendment rule becomes unavailable; it is redirected. Where the Constitution has already named the ordinary statute as the instrument through which a subject is to be regulated, the redirection requires no ingenuity and no transgression. It requires only that the legislature do what the Constitution told it to do.

3.2 Thirty-eight delegations

Read clause by clause, the amended Constitution directs that a matter be settled by statute in thirty-eight paragraphs, and subordinates an entitlement or a power to what the legislature provides in a further seven. The delegations are not confined to procedural detail. They cover the composition of the People's Consultative Assembly (Article 2(1)); the requirements for the presidency and the conduct of presidential elections (Articles 6(2) and 6A(5)); international agreements (Article 11(3)); states of danger (Article 12); honours and decorations (Article 15); the presidential advisory council (Article 16); the creation, alteration, and dissolution of ministries (Article 17(4)); the structure of regional government, the division of authority and finance

¹² Constitution of the Republic of Indonesia 1945, art 37(1)–(5). The unamendability clause in art 37(5) was introduced by the Fourth Amendment in 2002.

¹³ For the comparative measurement of amendment difficulty and the limits of procedural measures, see Tom Ginsburg and James Melton, 'Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty' (2015) 13 International Journal of Constitutional Law 686; Astrid Lorenz, 'How to Measure Constitutional Rigidity: Four Concepts and Two Alternatives' (2005) 17 Journal of Theoretical Politics 339.

¹⁴ The five basic agreements (*lima kesepakatan dasar*) were adopted by the Ad Hoc Committee of the Working Body of the People's Consultative Assembly in 1999 and governed all four amendments. See Indrayana (n 2) ch 4; Horowitz (n 2) 3–10.

¹⁵ Successive proposals are surveyed in Melissa Crouch, 'Introduction: Constitutional Democracy in Indonesia' in Crouch (ed) (n 9).

¹⁶ Albert, 'Constitutional Disuse or Desuetude' (n 8) 1032–38, distinguishing disuse from desuetude on the ground that the former is reversible and reflects the absence of consensus rather than the loss of the power.

between the centre and the regions, and special and distinctive regions (Articles 18(1), 18(7), 18A(1), 18A(2), and 18B(1)); the composition of the House of Representatives, the rights of the House and its members, and the removal of members of the House and of the Regional Representative Council (Articles 19(2), 20A(4), 22B, and 22D(4)); the composition and standing of the Regional Representative Council (Article 22C(4)); the procedure for making statutes (Article 22A); general elections (Article 22E(6)); the form of the state budget, taxation, currency, public finance, the central bank, and the Supreme Audit Board (Articles 23(1), 23A, 23B, 23C, 23D, and 23G(2)); the bodies ancillary to the judicial power, the Supreme Court, the Judicial Commission, the Constitutional Court, and the appointment and removal of judges (Articles 24(3), 24A(5), 24B(4), 24C(6), and 25); the territory of the state (Article 25A); citizenship (Article 26(3)); the armed forces and the police (Article 30(5)); national education (Article 31(3)); the implementation of the economic and social welfare articles (Articles 33(5) and 34(4)); and the national symbols (Article 36C).¹⁷

The list describes the architecture of the Indonesian state. Every organ created by the Constitution, with the partial exception of the Presidency itself, has its composition, its membership, or its procedure assigned to a statute. Every mechanism by which power is transferred — election, appointment, removal — is likewise assigned. Two of the Constitution's most contested substantive articles, the economic provisions of Article 33 and the social welfare provisions of Article 34, close with a paragraph directing that their implementation be regulated by statute, which is to say that the Constitution itself declines to specify what they require. The delegation is not marginal to the constitutional scheme; it is the constitutional scheme's method of operation.

Three features of the architecture deserve emphasis. The first is breadth. A constitution that delegates the regulation of elections delegates a great deal; a constitution that delegates elections, ministries, courts, the central bank, citizenship, the armed forces, and the territory of the state has delegated the working parts of the state to an instrument it does not itself control. The second is the absence of any accompanying limit on the form of the delegate. A handful of delegations are constrained in substance by the paragraphs surrounding them: Article 22E(6) is bounded by the electoral principles of Article 22E(1) and (2), and Article 23(1) requires that the budget take statutory form every year. None of the thirty-eight, however, constrains the instrument itself. None says that the statute shall not diminish the office it establishes; none reserves any element of the subject to the constitutional text; none prescribes a majority or a procedure. It is the contrast that is instructive, for it shows that the drafters knew how to bound a delegation in substance and nowhere thought to bound one in form. The third is the asymmetry between the two channels. To alter Article 24C(6) requires a third of the Assembly to propose, two thirds to attend, and an absolute majority of the full membership to assent. To alter the statute enacted under Article 24C(6) requires a simple majority of those present in the House, with the

¹⁷ The full enumeration, with the verbatim Indonesian formula for each paragraph, appears in Table 1.

President's concurrence. The Constitution has thus placed a hard lock on the door and left the delegated key on the table.

Table 1. Delegations and qualifications in the 1945 Constitution of the Republic of Indonesia (after the Fourth Amendment, 2002)

Article	Operative formula	Type	Subject
2(1)	<i>diatur lebih lanjut dengan undang-undang</i>	D	Composition of the People's Consultative Assembly
6(2)	<i>diatur lebih lanjut dengan undang-undang</i>	D	Requirements for President and Vice-President
6A(5)	<i>diatur dalam undang-undang</i>	D	Conduct of presidential elections
11(3)	<i>diatur dengan undang-undang</i>	D	International agreements
12	<i>ditetapkan dengan undang-undang</i>	D	Conditions and consequences of a state of danger
15	<i>yang diatur dengan undang-undang</i>	D	Titles, decorations, and honours
16	<i>diatur dalam undang-undang</i>	D	Presidential advisory council
17(4)	<i>diatur dalam undang-undang</i>	D	Creation, alteration, and dissolution of ministries
18(1)	<i>yang diatur dengan undang-undang</i>	D	Division of territory and regional government
18(5)	<i>yang oleh undang-undang ditentukan</i>	Q	Limits on the widest possible autonomy
18(7)	<i>diatur dalam undang-undang</i>	D	Structure and procedure of regional government
18A(1)	<i>diatur dengan undang-undang</i>	D	Division of authority between centre and regions
18A(2)	<i>berdasarkan undang-undang</i>	D	Fiscal, service, and natural resource relations
18B(1)	<i>yang diatur dengan undang-undang</i>	D	Special and distinctive regional units
18B(2)	<i>yang diatur dalam undang-undang</i>	Q	Recognition of customary law communities
19(2)	<i>diatur dengan undang-undang</i>	D	Composition of the House of Representatives
20A(4)	<i>diatur dalam undang-undang</i>	D	Rights of the House and of its members
22A	<i>diatur dengan undang-undang</i>	D	Procedure for the making of statutes
22B	<i>diatur dalam undang-undang</i>	D	Removal of members of the House
22C(4)	<i>diatur dengan undang-undang</i>	D	Composition and standing of the Regional Representative Council
22D(4)	<i>diatur dalam undang-undang</i>	D	Removal of members of the Regional Representative Council

Article	Operative formula	Type	Subject
22E(6)	<i>diatur dengan undang-undang</i>	D	General elections
23(1)	<i>ditetapkan setiap tahun dengan undang-undang</i>	D	Form of the state budget
23A	<i>diatur dengan undang-undang</i>	D	Taxes and other compulsory levies
23B	<i>ditetapkan dengan undang-undang</i>	D	Currency
23C	<i>diatur dengan undang-undang</i>	D	Other matters of state finance
23D	<i>diatur dengan undang-undang</i>	D	Central bank
23E(3)	<i>sesuai dengan undang-undang</i>	Q	Follow-up to audit findings
23G(2)	<i>diatur dengan undang-undang</i>	D	Supreme Audit Board
24(3)	<i>diatur dalam undang-undang</i>	D	Bodies ancillary to the judicial power
24A(1)	<i>yang diberikan oleh undang-undang</i>	Q	Further powers of the Supreme Court
24A(5)	<i>diatur dengan undang-undang</i>	D	Supreme Court and courts below it
24B(4)	<i>diatur dengan undang-undang</i>	D	Judicial Commission
24C(6)	<i>diatur dengan undang-undang</i>	D	Appointment, dismissal, and procedure of the Constitutional Court
25	<i>ditetapkan dengan undang-undang</i>	D	Appointment and removal of judges
25A	<i>ditetapkan dengan undang-undang</i>	D	Boundaries and rights over the state territory
26(1)	<i>disahkan dengan undang-undang</i>	Q	Citizenship of persons of other nations
26(3)	<i>diatur dengan undang-undang</i>	D	Citizens and residents
28	<i>ditetapkan dengan undang-undang</i>	Q	Freedom of association, assembly, and expression
28J(2)	<i>pembatasan yang ditetapkan dengan undang-undang</i>	Q	General limitation of rights
30(5)	<i>diatur dengan undang-undang</i>	D	Armed forces, police, and civic defence
31(3)	<i>yang diatur dengan undang-undang</i>	D	National education system
33(5)	<i>diatur dalam undang-undang</i>	D	Implementation of the economic provisions

Article	Operative formula	Type	Subject
34(4)	<i>diatur dalam undang-undang</i>	D	Implementation of the social welfare provisions
36C	<i>diatur dengan undang-undang</i>	D	Flag, language, emblem, and anthem

Source: author's compilation from the consolidated single text of the 1945 Constitution, verified against two official reproductions (n 10). D denotes a delegation proper, Q a qualification. Totals: 38 delegations, 7 qualifications, 45 in all. Article 18B(2) has the grammatical form of a delegation and the function of a qualification, and is reported as Q; classifying it as D yields 39 and 6. Article 28I(5), which delegates to *peraturan perundang-undangan* rather than to *undang-undang*, is excluded; its inclusion would yield 46.

3.3 The absent category

What the Indonesian Constitution does not do is give these statutes a form of their own. There is no category of organic law in Indonesian constitutional law, no heightened majority for statutes enacted under a constitutional delegation, no mandatory review before promulgation, and no protection against implied repeal. Law No 24 of 2003 on the Constitutional Court, enacted under Article 24C(6), occupies the same position in the hierarchy of legal instruments as any other statute, and is made, amended, and repealed by the same procedure.¹⁸

That absence is not an oversight of drafting so much as an inheritance. The 1945 Constitution was drafted as a short framework document and the amendments of 1999 to 2002 lengthened it without altering its underlying method, which was to name an organ or a subject and consign its regulation to a statute.¹⁹ Where other systems responded to the same drafting method by inventing a category for the instruments that receive the delegation, Indonesia did not. Indonesian legal scholarship has occasionally used the term *undang-undang organik* to describe statutes enacted under a constitutional delegation, but the term carries no legal consequence: it is descriptive, not classificatory, and no Indonesian court has attached any effect to it.²⁰

This is the feature that makes Indonesia analytically valuable and that has kept it out of the comparative literature. The scholarship on organic and quasi-constitutional statutes has developed where the category exists, and has been concerned to determine its boundaries: which statutes qualify, what follows from qualification, how a court is to tell.²¹ Indonesia poses the prior question. It shows what a heavily delegating constitution looks like when no such category is available — when the instruments that carry constitutional content are, in every formal respect, ordinary law. The answer this article develops is that the content does not thereby become ordinary. It remains constitutional in function while losing every protection that constitutional form

¹⁸ Undang-Undang No 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-undangan [Law No 12 of 2011 on the Formation of Legislation] (Indonesia) LN 2011/82, TLN 5234, art 7(1), which lists the hierarchy of legal instruments and admits of no rank between the Constitution and the statute other than the decrees of the People's Consultative Assembly.

¹⁹ On the framework character of the original text and its authoritarian drafting premises, see Melissa Crouch, 'Restoring Indonesia's (Un)Constitutional Constitution: Soepomo's Authoritarian Constitution' (2022) 23 German Law Journal 587.

²⁰ See Jimly Asshiddiqie, *Perihal Undang-Undang* [On Statutes] (Rajawali Pers 2010) 42–49, using the term descriptively. No decision of the Constitutional Court has treated the designation as altering the standard of review or the rules of repeal.

²¹ MacDonnell (n 7) 512–20; Bar-Siman-Tov (n 7) 1–14; *Thoburn* (n 7) [62]–[63] (Laws LJ), distinguishing 'constitutional statutes' from 'ordinary statutes' by reference to the subject matter and immunising the former from implied repeal.

supplies, and the provision that delegated it is left holding an authorisation whose exercise it cannot govern.

4. Four modalities of delegated change

A delegation is an instruction, and an instruction may be obeyed in more than one way. The taxonomy proposed here distinguishes four things a statute enacted under a constitutional delegation may do to the provision that authorised it. The four are not stages of a sequence and a single statute may perform more than one of them in different provisions. They are distinguished by their effect on the constitutional norm, not by the intention of the legislature, which this article does not attempt to establish.

4.1 Execution

In the first modality the statute supplies detail the constitutional provision leaves open, and the constitutional norm survives the exercise unchanged. Article 22E(6) directs that further provisions concerning general elections be regulated by statute, and a great deal of Law No 7 of 2017 does precisely that: the registration of voters, the design of ballot papers, the tabulation of results, the timetable of the campaign.²² None of it alters what Article 22E requires, which is that general elections be held every five years, directly, publicly, freely, secretly, honestly, and fairly, to elect the members of the representative bodies and the President and Vice-President.²³ The constitutional norm is the standard against which the statute is measured, and the statute adds what the standard does not supply.

Execution is the modality constitutional doctrine assumes. It is what the word 'implementing' in *peraturan pelaksana* conveys, and it is the premise on which ordinary judicial review proceeds: the Constitution states the norm, the statute carries it into effect, and review asks whether the statute has departed from it. The premise holds for a substantial part of the Indonesian statute book and nothing in this article suggests otherwise. The difficulty is that it is assumed to hold for all of it.

4.2 Reconfiguration

In the second modality the statute alters the content of the office or the power it purports to implement, while remaining formally within the terms of the delegation. The delegation is wide enough to accommodate the alteration, and so the statute cannot be said to have exceeded its authority; what has changed is the constitutional institution itself.

The clearest instance concerns the Constitutional Court. Article 24C(6) delegates the appointment and dismissal of constitutional judges and other provisions concerning the Court to a statute, without specifying a term of office, a retirement age, or a minimum qualification. Law No 24 of 2003 established a term of five years, renewable

²² Law No 7 of 2017 (n 4) arts 198–210 (voter registration), arts 342–357 (campaign), arts 383–414 (tabulation).

²³ Constitution of the Republic of Indonesia 1945, art 22E(1)–(2).

once.²⁴ The statute has since been amended three times, and the history of those amendments is itself an illustration of the argument. The first amendment of 2011 revised the qualification and disciplinary provisions; the second, enacted in 2014 to confirm a government regulation in lieu of law, was struck down in its entirety by the Court itself, which held that the panel of experts it created displaced the nominating organs and that the Judicial Commission's role in constituting the Court's honour council smuggled back a power the Court had already held unconstitutional in 2006.²⁵ The third, Law No 7 of 2020, replaced the tenure scheme in its entirety: constitutional judges now hold office until retirement at seventy, without re-selection; the minimum age for appointment rose to fifty-five; and the terms of the Chief Justice and Deputy Chief Justice were extended from two and a half years to five.²⁶ A transitional provision permitted sitting judges to continue to the age of seventy provided their total service did not exceed fifteen years.²⁷

Nothing in that statute contradicts Article 24C(6), which is silent on every point the statute settles. Yet the institution after 2020 is not the institution the 1945 Constitution created in 2001. A judge appointed for a renewable five-year term is accountable, at the moment of renewal, to the nominating organ; a judge who serves to seventy without renewal is not. The change runs to the heart of judicial independence, and it was made by a statute passed in the ordinary way, without a single word of the Constitution being touched. The same statute's transitional provision, which conditioned continuation in office on a fifteen-year cap, illustrates how finely the composition of a constitutional court may be tuned by a delegate legislature.

The pattern is not confined to the judiciary. Article 17(4) delegates the creation, alteration, and dissolution of ministries. Law No 39 of 2008 capped the number of ministries at thirty-four; Law No 61 of 2024 removed the cap and provided that the number be determined by the President according to the needs of government, and that ministries might be created for a sub-field or a subdivision of a field of government affairs.²⁸ Whether a presidential system constrains the size of the executive is a question of constitutional design, and in Indonesia it was answered twice within sixteen years by ordinary statute.

²⁴ Undang-Undang No 24 Tahun 2003 tentang Mahkamah Konstitusi [Law No 24 of 2003 on the Constitutional Court] (Indonesia) LN 2003/98, TLN 4316, art 22, enacted and promulgated 13 August 2003.

²⁵ Undang-Undang No 8 Tahun 2011 tentang Perubahan atas Undang-Undang No 24 Tahun 2003 tentang Mahkamah Konstitusi [Law No 8 of 2011 on the Amendment of Law No 24 of 2003 on the Constitutional Court] (Indonesia); Undang-Undang No 4 Tahun 2014 [Law No 4 of 2014] (Indonesia), annulled in its entirety in Constitutional Court, Decision No 1-2/PUU-XII/2014 (13 February 2014), operative order, which restored Law No 24 of 2003 as amended by Law No 8 of 2011 and relied on Constitutional Court, Decision No 005/PUU-IV/2006 (23 August 2006), operative order, removing constitutional judges from the supervisory jurisdiction of the Judicial Commission. That two of the three amendments were directed at the Court's own composition and discipline, and that one of them had to be annulled by the Court, is the sharpest available evidence of what an unconditional delegation permits.

²⁶ Undang-Undang No 7 Tahun 2020 tentang Perubahan Ketiga atas Undang-Undang No 24 Tahun 2003 tentang Mahkamah Konstitusi [Law No 7 of 2020 on the Third Amendment to Law No 24 of 2003 on the Constitutional Court] (Indonesia) LN 2020/216, TLN 6554, enacted 28 September 2020 and promulgated 29 September 2020, arts 4, 15, 23.

²⁷ *ibid* art 87.

²⁸ Law No 61 of 2024 (n 6). The amending statute was subsequently challenged, and in Decision No 128/PUU-XXIII/2025 the Constitutional Court is reported to have ordered the phased abolition of concurrent office-holding by deputy ministers over a two-year transitional period. The full decision could not be obtained; this account follows the report in *Hukumonline*, 'Putusan MK No 128/PUU-XXIII/2025: Rangkap Jabatan oleh Wakil Menteri Akan Dihapuskan secara Bertahap selama Masa Transisi Dua Tahun' ['Constitutional Court Decision No 128/PUU-XXIII/2025: Concurrent Office-Holding by Deputy Ministers to Be Abolished in Stages over a Two-Year Transition'] (2 September 2025).

Reconfiguration is the modality that most closely resembles amendment and is least likely to be treated as such. Its formal innocence is the point: because the delegation is unconditional, any exercise of it is within power, and the reviewing court is left asking whether the statute conflicts with a constitutional provision that was drafted to say nothing about the matter. Article 24C(6) cannot supply a standard against which Law No 7 of 2020 might be measured, because the whole of what Article 24C(6) provides is that a statute shall decide.

4.3 Displacement

In the third modality the statute occupies the constitutional field so completely that the constitutional provision ceases to operate independently, and the statute becomes the only accessible source of the norm. Displacement differs from reconfiguration in what it does to the provision rather than to the institution: after displacement, the constitutional text is no longer where the rule is found, and litigants, officials, and courts consult the statute instead.

Article 6(2) is the paradigm. The Constitution states that the requirements to become President and Vice-President shall be further regulated by statute, and Article 169 of Law No 7 of 2017 sets out those requirements in twenty-one paragraphs, among them the requirement in Article 169(q) that a candidate be at least forty years of age. The constitutional provision is exhausted by the delegation; there is no residue of Article 6(2) against which Article 169 might be tested, because Article 6(2) says only that Article 169 shall exist. When the eligibility rule changed on 16 October 2023, it therefore changed at the level of the statute. In Decision No 90/PUU-XXI/2023 the Constitutional Court held Article 169(q) conditionally unconstitutional, in the sense that it lacked binding force unless read to mean 'at least forty years of age or has held or holds an office elected through a general election, including the election of regional heads'.²⁹

The decision has been discussed almost entirely as an episode in the politics of judicial integrity, and that discussion is not the concern of this article.³⁰ What matters structurally is where the change occurred. A rule determining who may stand for the highest office in the state was altered without any constitutional provision being interpreted, because the constitutional provision had nothing to interpret. The Court read a statute. It could do nothing else, and the reason it could do nothing else is that Article 6(2) had displaced itself.

Displacement explains a series of decisions that would otherwise appear to be exercises of raw constitutional creativity. In Decision No 62/PUU-XXII/2024 the Court struck down Article 222 of Law No 7 of 2017, the provision requiring that a presidential candidacy be supported by parties holding twenty per cent of the seats in the House or

²⁹ Constitutional Court of the Republic of Indonesia, Decision No 90/PUU-XXI/2023 (16 October 2023), operative order (*amar putusan*). The decision and the Court's official summary are published at <<https://www.mkri.id>> accessed 12 September 2026.

³⁰ For the ensuing ethics proceedings and their constitutional significance, see the commentary collected in Crouch (ed) (n 9); and, on the Court's institutional trajectory more generally, Butt (n 9).

twenty-five per cent of the national vote, and set out five guidelines for the legislature to observe in devising a replacement.³¹ In Decision No 60/PUU-XXII/2024 the Court recast the nomination thresholds for regional elections in Article 40(1) of Law No 10 of 2016 on a population basis, and struck down Article 40(3) outright.³² In Decision No 135/PUU-XXII/2024 the Court separated national from regional elections, requiring that regional elections be held no less than two years and no more than two years and six months after the inauguration of those elected nationally, from the cycles of 2029 and 2031.³³ Each of these decisions reorganised the constitutional order of elections. None of them amended the Constitution, and none of them needed to, because the constitutional order of elections is in Article 22E(6)'s delegate, not in Article 22E.

The same structure has hollowed the Regional Representative Council. Article 22D confers on the Council a role in legislation concerning regional autonomy, the relationship between the centre and the regions, and related matters, and Article 22C(4) delegates its composition and standing to statute. The successive statutes on the People's Consultative Assembly, the House, the Council, and the Regional Legislatures have configured that role, and the Constitutional Court was required in Decision No 92/PUU-X/2012 to restore the Council's participation in deliberation from the first level, holding it to be a co-legislator alongside the House and the President within the scope of Article 22D.³⁴ That a constitutional organ needed a judicial decision to recover a function the Constitution confers is the measure of what displacement accomplishes.

4.4 Abeyance

In the fourth modality the delegation is never exercised. The constitutional provision remains in the text, is never repealed, and is never amended, and it does not operate, because the Constitution conditioned its operation on a statute that does not exist. This is the modality the literature has not named, and it is the one that carries the sharpest consequence for constitutional theory.

Article 18B(2) provides that the State recognises and respects units of customary law community and their traditional rights, so long as they remain extant and accord with social development and the principle of the unitary state, 'as regulated in a

³¹ Constitutional Court, Decision No 62/PUU-XXII/2024 (2 January 2025), operative order, declaring art 222 of Law No 7 of 2017 contrary to the Constitution and without binding force in its entirety, with five guidelines for constitutional engineering addressed to the legislature.

³² Constitutional Court, Decision No 60/PUU-XXII/2024 (20 August 2024), operative order, concerning Undang-Undang No 10 Tahun 2016 tentang Pemilihan Gubernur, Bupati, dan Walikota [Law No 10 of 2016 on the Election of Governors, Regents, and Mayors] (Indonesia) art 40(1) and (3). A companion challenge to the minimum age for regional head candidates was dismissed in its entirety on the same day: Decision No 70/PUU-XXII/2024 (20 August 2024), operative order; the Court's clarification that the age requirement is assessed at the determination of candidate pairs appears in its reasons and not in the operative order, a distinction frequently elided in commentary.

³³ Constitutional Court, Decision No 135/PUU-XXII/2024 (26 June 2025), operative order. A subsequent challenge to the arrangement was declared inadmissible for want of standing: Decision No 124/PUU-XXIII/2025 (28 August 2025), operative order.

³⁴ Constitutional Court, Decision No 92/PUU-X/2012 (27 March 2013), operative order, concerning Undang-Undang No 27 Tahun 2009 tentang MPR, DPR, DPD, dan DPRD [Law No 27 of 2009 on the People's Consultative Assembly, the House of Representatives, the Regional Representative Council, and the Regional Legislatures] (Indonesia) and Law No 12 of 2011 (n 18). The statute on those bodies has since been replaced and amended three times: Undang-Undang No 17 Tahun 2014 (Indonesia) LN 2014/182, TLN 5568; as amended by Undang-Undang No 42 Tahun 2014; Undang-Undang No 2 Tahun 2018; and Undang-Undang No 13 Tahun 2019.

statute'.³⁵ The recognition is constitutional; the condition attached to it is legislative. The paragraph was inserted by the Second Amendment in 2000 and has never had a statute of its own. A bill on customary law communities has been before the House since 2009, has entered the national legislation programme repeatedly, and has not been enacted.³⁶ For twenty-six years the constitutional recognition of customary law communities has therefore existed as a promise whose performance is in the gift of the body it was meant to bind, and for seventeen of those years a bill to perform it has been pending. The provision has not fallen into disuse; it has never been brought into use.

Article 12 makes the point in a different register, and refines the modality. It provides that the President declares a state of danger, and that the conditions for and consequences of such a declaration shall be established by statute. Article 12 is original text: it survived all four amendments untouched, so the delegation it contains has been outstanding since 1945. The instrument that governs the matter is Government Regulation in Lieu of Law No 23 of 1959, promulgated on 16 December 1959, thirty-nine years before the amendment process began and forty-two before it closed, and it is not a statute at all but a government regulation in lieu of law of the Guided Democracy period.³⁷ A constitutional order that rebuilt the presidency, created a constitutional court, introduced direct presidential election, and wrote a bill of rights into its text left the legal regime of emergency powers in the hands of an instrument that predates all of it and that does not answer the constitutional instruction in kind. Successive proposals for a national security statute have not been enacted.

Article 18B(2) and Article 12 therefore mark two forms of the same modality, and the distinction is worth preserving. Article 18B(2) is abeyance in its pure form: the delegation has never been exercised by any instrument, and the constitutional recognition is inoperative for want of one. Article 12 is imperfect abeyance: the field is occupied, but by an instrument of the wrong rank and the wrong era, so that what governs a state of danger is not the statute the Constitution called for and is not answerable to the constitutional order that called for it. Pure abeyance leaves a constitutional guarantee unperformed; imperfect abeyance leaves it performed by an instrument the Constitution did not authorise for the purpose, which is the more difficult case because the appearance of compliance removes the occasion to notice the omission.

Abeyance inverts the received account of constitutional desuetude. In that account, a provision falls out of use because those entitled to invoke it decline to do so:

³⁵ Constitution of the Republic of Indonesia 1945, art 18B(2): '*Negara mengakui dan menghormati kesatuan-kesatuan masyarakat hukum adat serta hak-hak tradisionalnya sepanjang masih hidup dan sesuai dengan perkembangan masyarakat dan prinsip Negara Kesatuan Republik Indonesia, yang diatur dalam undang-undang*'.

³⁶ Rancangan Undang-Undang tentang Masyarakat Hukum Adat [Bill on Customary Law Communities], first tabled in 2009 and repeatedly included in the Program Legislasi Nasional without enactment; as at September 2026 it remains before the House. See *Hukumonline*, '18 Tahun Mandek, DPR Optimistis RUU Masyarakat Adat Disahkan Tahun Ini' [Stalled for Eighteen Years: The House is Optimistic the Customary Communities Bill Will Pass This Year] (11 May 2026).

³⁷ Peraturan Pemerintah Pengganti Undang-Undang No 23 Tahun 1959 tentang Pencabutan Undang-Undang No 74 Tahun 1957 dan Penetapan Keadaan Bahaya [Government Regulation in Lieu of Law No 23 of 1959 on the Revocation of Law No 74 of 1957 and the Declaration of a State of Danger] (Indonesia) LN 1959/139, TLN 1908, promulgated 16 December 1959, as amended by Perpu No 22 Tahun 1960 and Perpu No 52 Tahun 1960. It remains in force. The instrument is frequently cited as 'Law No 23/Prp/1959'; its form is that of a government regulation in lieu of law, not a statute.

the power is conferred outright, its holder declines to exercise it, and over time the non-exercise ripens into an expectation that it will not be exercised.³⁸ Desuetude so understood is a fact about political behaviour operating on a norm that is otherwise complete. Abeyance is a fact about the norm. The provision is incomplete by constitutional design, its completion is assigned to the legislature, and the legislature's inaction is not a failure to use a power but a refusal to supply a condition. The consequence is that a constitutional guarantee can be suspended indefinitely by doing nothing at all, and that nothing is precisely what constitutional review, as ordinarily practised, is unable to reach: there is no instrument to strike down, no norm to annul, and no applicant who can point to a provision that has been violated rather than left unperformed.

Put in the vocabulary of the amendment literature, abeyance is the point at which delegation becomes something more than a technique of drafting. A constitution that entrenches a guarantee and then makes its operation conditional on ordinary legislation has not entrenched the guarantee; it has entrenched a statement about what a future legislature may choose to do. The distinction between a constitutional right and a legislative aspiration collapses, not through any act of dismemberment, but through omission.³⁹

5. Why form matters: France, Spain, and Chile

Delegation is not an Indonesian peculiarity. Most written constitutions name subjects and consign their regulation to legislation, and the reasons are familiar: a constitution that specified the electoral formula, the composition of the audit board, and the retirement age of judges would require amendment whenever any of them needed adjustment. What distinguishes constitutional systems is not whether they delegate but whether they give the delegate a form of its own. Three systems that do so are set out here, not to rank them against Indonesia, but to isolate the variable.

France marks the category by procedure and by mandatory review. Article 46 of the 1958 Constitution subjects *lois organiques* to a distinct legislative process: a bill may not be deliberated and voted upon at first reading until the period specified in the third paragraph of Article 42 has elapsed; where the two chambers disagree, the National Assembly may adopt the text at final reading only by an absolute majority of its members; and organic laws concerning the Senate require the Senate's agreement and cannot be passed over its objection.⁴⁰ The final paragraph of Article 46 provides that organic laws may not be promulgated until the Constitutional Council has declared them in conformity with the Constitution, and Article 61(1) makes that referral automatic.⁴¹

³⁸ Albert, 'Constitutional Amendment by Constitutional Desuetude' (n 8) 645–52, developing the concept through the Canadian disallowance and reservation powers and the Japanese renunciation of war.

³⁹ On dismemberment as the transformation of a constitution's fundamental commitments through an instrument formally denominated an amendment, see Albert (n 1) 76–85. Abeyance produces a comparable effect on a single provision without any instrument at all, which is why the doctrines developed to identify dismemberment cannot detect it.

⁴⁰ Constitution of the French Republic of 4 October 1958, art 46, in the official English translation published by the Conseil constitutionnel, <<https://www.conseil-constitutionnel.fr/en/constitution-of-4-october-1958>> accessed 12 September 2026.

⁴¹ *ibid* arts 46 (final paragraph) and 61(1): 'Institutional Acts, before their promulgation ... shall be referred to the Constitutional Council, which shall rule on their conformity with the Constitution.'

No applicant is required. Every French organic law passes through constitutional review before it takes effect.

Spain marks the category by subject matter and by majority. Article 81(1) of the 1978 Constitution reserves to organic laws the development of fundamental rights and public liberties, the approval of the Statutes of Autonomy, the general electoral regime, and such other matters as the Constitution expressly provides. Article 81(2) requires that the approval, amendment, or repeal of an organic law be carried by an overall majority of the members of the Congress of Deputies in a final vote on the bill as a whole.⁴² Spain does not impose mandatory preventive review; organic laws are ordinarily challenged after enactment.⁴³ The Spanish technique is thus the converse of the French: a heightened threshold in the chamber, and no automatic gate at the Constitutional Court.

Chile marks the category by both, and has recently adjusted one of them. Under Article 66 of the Constitution, statutes to which the Constitution accords the character of *ley orgánica constitucional*, together with laws of qualified quorum, are established, amended, or repealed by an absolute majority of deputies and senators in office. That quorum was lowered from four sevenths by Ley No 21.535, published on 27 January 2023, and much of the comparative literature still reports the earlier figure.⁴⁴ What Ley No 21.535 did not touch is Article 93(1), under which the Constitutional Tribunal exercises mandatory preventive control over organic constitutional laws, interpretative laws, and treaties containing provisions of organic rank.⁴⁵ Chile therefore supplies a controlled comparison of its own: a system that deliberately relaxed the legislative threshold for constitutionally consequential statutes while retaining, unchanged, the requirement that every such statute be reviewed before it enters into force.

Three techniques emerge, and they are separable; Table 2 sets them out. A system may raise the majority required to enact the delegate, as Spain does and as Chile did more emphatically before 2023. It may require that the delegate pass through constitutional review before promulgation, as France and Chile do. Or it may protect the delegate from implied repeal by later ordinary legislation — a technique that belongs to the courts rather than to the constitution-maker, and that the United Kingdom has developed judicially through the category of constitutional statutes, identified by their subject matter rather than by any authorising clause.⁴⁶ The third is included here as a doctrinal technique and not as a fourth comparator system: the United Kingdom has no written constitution and therefore no delegation to receive, which is precisely why the

⁴² Constitución Española 1978, art 81(1)–(2), in the official English translation published by the Senate of Spain, <<https://www.senado.es>> accessed 12 September 2026.

⁴³ The *recurso previo* against organic laws was abolished in 1985 and survives, in restricted form, for international treaties and Statutes of Autonomy. The point made in the text does not depend on the detail of that history.

⁴⁴ Constitución Política de la República de Chile, art 66, as replaced by Ley No 21.535, published in the *Diario Oficial* on 27 January 2023. The reform is distinct from Ley No 21.481, published on 23 August 2022, which lowered the quorum for constitutional reform from three fifths to four sevenths.

⁴⁵ *ibid* art 93(1); Tribunal Constitucional de Chile, 'Atribuciones', <<https://www.tribunalconstitucional.cl>> accessed 12 September 2026. Both proposals for a new constitution were rejected at referendum, on 4 September 2022 and 17 December 2023, so the 1980 Constitution as amended remains in force.

⁴⁶ *Thoburn* (n 7) [62]–[63]; *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324 [207].

technique it has generated is available to a system that lacks a formal category. The techniques address different risks. A heightened majority addresses the risk that a bare majority will reconfigure a constitutional institution for its own advantage. Mandatory preventive review addresses the risk that a defect in a constitutionally consequential statute will go unchallenged because no one with standing has an incentive to challenge it. Protection from implied repeal addresses the risk that a constitutional arrangement will be dismantled inadvertently, by a later statute whose drafters did not consider it.

Table 2. Legislative form given to constitutionally consequential statutes in three comparator systems and in Indonesia

System	Category	Majority required	Preventive constitutional review	Protection from implied repeal
France	<i>Loi organique</i> (art 46)	Absolute majority of the members of the National Assembly at final reading; Senate consent where the Senate is concerned	Mandatory and automatic before promulgation (arts 46 and 61(1))	No general doctrine; not needed given preventive review
Spain	<i>Ley orgánica</i> (art 81)	Overall majority of the members of the Congress of Deputies in a final vote on the bill as a whole	None for organic laws	No general doctrine
Chile	<i>Ley orgánica constitucional</i> (art 66)	Absolute majority of deputies and senators in office since Ley No 21.535 (2023), formerly four sevenths	Mandatory before entry into force (art 93(1))	No general doctrine; not needed given preventive review
Indonesia	None	None	None	None

Source: author's compilation from the constitutional texts cited in section 5. The judicial technique of immunity from implied repeal, developed in the United Kingdom, is discussed in section 5 and section 6; the United Kingdom is not included as a comparator here because it has no written constitution and therefore no delegation to receive.

Indonesia is exposed to all three risks and employs none of the three techniques. Law No 7 of 2020, which reconfigured the tenure of constitutional judges, required no special majority and passed through no preventive review; it was challenged after enactment, by applicants whose standing was contested, in proceedings before the very court whose composition it governed. Law No 61 of 2024, which removed the ceiling on the number of ministries, was enacted five days before the inauguration of the President who would benefit from it, and no procedural feature of Indonesian constitutional law marked it out from any other statute. The comparison does not establish that Indonesia should adopt the French mechanism, or the Spanish, or the Chilean. It establishes something narrower and harder to evade: that the systems which delegate constitutional content have generally judged it necessary to give the delegate a form, and that Indonesia, which delegates as heavily as any of them, has not.

6. Calibrating review to the delegation

If the form of the delegate cannot be altered without amending the Constitution — and in Indonesia it cannot, since the hierarchy of legal instruments is itself a creature of statute and the amendment rule is closed — then the burden falls on review. The proposal advanced here is that the Constitutional Court should calibrate its standard of review to the modality in which the delegation has been exercised, rather than applying a single standard to every statute that happens to be enacted under a constitutional provision. Four calibrations follow from the taxonomy in section 4.

Where the statute merely executes, nothing changes. The Court asks, as it asks now, whether the statute conflicts with the constitutional norm it implements, and the ordinary presumption of constitutionality applies with full force. Nothing in this argument invites closer scrutiny of the administrative machinery of elections or the procedural detail of the audit function.

Where the statute reconfigures, the presumption should be qualified. The mark of reconfiguration is that the statute alters the composition, tenure, independence, or jurisdiction of an organ the Constitution itself creates — that it changes the institution rather than the arrangements surrounding it. Where that is so, the absence of a constitutional standard is not a reason for deference but the reason deference is misplaced: the wider the delegation, the less the constitutional text constrains, and the more the constitutional structure must. The Court already possesses the doctrinal resource for this, in the structural principles it has drawn from the Constitution as a whole — judicial independence, the separation of powers, the guarantee of a state based on law in Article 1(3). What it has not done is treat those principles as supplying the standard that an unconditional delegation withholds. A statute that shortens or lengthens the tenure of constitutional judges, alters the majority by which they decide, or adjusts the qualifications for their appointment should be required to justify the alteration by reference to the function the Constitution assigns the Court, and not merely to show that Article 24C(6) permitted a statute to address the subject.

Where the statute displaces, the consequence lies in the law of repeal rather than in the intensity of review. A provision that has become the sole operative source of a constitutional rule — Article 169 of Law No 7 of 2017 as the source of presidential eligibility, the statute on representative bodies as the source of the Regional Representative Council's legislative role — should not be susceptible to implied repeal by a later statute that does not address it. The doctrine developed in the United Kingdom is instructive here precisely because it is judicial: Laws LJ derived the category of constitutional statutes from the subject matter of the instrument rather than from any formal designation, and it is subject matter, not designation, that Indonesia lacks a way

of recognising.⁴⁷ A requirement of express repeal would impose no burden on a legislature that has considered the question, and a real one on a legislature that has not.

Where the delegation is held in abeyance, the difficulty is that there is nothing to review. This is the hardest of the four and the most important, and the argument here is that Indonesian constitutional law already contains the remedy and has simply never pointed it at omission. In Decision No 91/PUU-XVIII/2020 the Court held Law No 11 of 2020 on Job Creation conditionally unconstitutional, gave the legislature two years to cure the defect, provided that the statute would remain in force in the interval and become permanently unconstitutional if the cure were not effected, and suspended strategic measures under the statute meanwhile.⁴⁸ That decision married a declaration to a deadline and a consequence. It is a remedial technique built for the situation in which annulment would be worse than the defect, and it is equally suited to the situation in which there is nothing to annul.

Applied to abeyance, the technique would run as follows. Where an applicant establishes that a constitutional provision conditions its own operation on a statute, that the statute has not been enacted, and that a period has elapsed which cannot be explained by the ordinary demands of the legislative process, the Court should be able to declare the omission incompatible with the Constitution, to specify a period within which it must be cured, and to state the consequence of a failure to cure.

Two limits should be built into the doctrine at the outset, because without them it would be unworkable. The first is one of scope. The technique is proposed only for delegations that condition a guarantee — a right, a recognition, a protection the Constitution confers on persons or communities — and not for the thirty-eight delegations at large. A delegation that assigns the composition of an institution to a statute confers nothing on anyone, and its non-exercise leaves no one worse off than the constitutional text found them; a delegation that makes a recognition contingent leaves the holders of that recognition without it. Confining the doctrine to the conditioning of guarantees keeps it away from the great bulk of the delegation architecture, where the political-question objection considered below has real force. The second limit concerns the remedy. The natural remedy — severing the conditioning words, so that the guarantee operates unconditionally until the legislature acts — is too blunt where the conditioning words are the only source of the criteria by which the guarantee is applied. For Article 18B(2), severance would leave the recognition of customary law communities standing without any statutory means of determining which communities are recognised or which traditional rights attach, and the Court would have to supply those case by case, which is the judicial legislation the technique is meant to avoid. A narrower consequence is available and preferable: a declaration that the omission is

⁴⁷ *Thoburn* (n 7) [62]–[63]; *HS2* (n 46) [207]. The doctrine's application is contested in the United Kingdom, but its analytical move — identifying constitutional statutes by function rather than by form — is separable from the constitutional setting in which it arose, and is the move an Indonesian court would have to make for want of any formal designation to rely on.

⁴⁸ Constitutional Court, Decision No 91/PUU-XVIII/2020 (25 November 2021), operative order, in formal review of Undang-Undang No 11 Tahun 2020 tentang Cipta Kerja [Law No 11 of 2020 on Job Creation] (Indonesia). The legislature responded by amending the legislation statute to accommodate the omnibus method: Undang-Undang No 13 Tahun 2022 (Indonesia) LN 2022/143, TLN 6801, enacted and promulgated 16 June 2022.

unconstitutional, a period for its cure, and, on expiry, a defined shift in the legal position of those the provision was meant to protect — for Article 18B(2), that the burden of establishing the absence of customary tenure falls on the party asserting it, rather than on the community asserting the right. The point is not to legislate but to remove the advantage that inaction presently confers.

Three objections should be met. The first is that judicial supervision of legislative omission trespasses on the legislature's constitutional function, and that the decision whether and when to legislate is the paradigm of a political question. The objection has force against a court that would draft the missing statute; it has none against a court that declares an omission unconstitutional and leaves the drafting where it belongs. The technique is established in comparative practice, and constitutional courts in systems as different as Portugal, Hungary, and Brazil have exercised some form of it without assuming the legislative function.⁴⁹ The second objection is that Indonesia's Constitutional Court, whose authority under Article 24C(1) is to review statutes against the Constitution, has no jurisdiction over the absence of a statute. That is a serious textual point, and the answer is that the Court has repeatedly given Article 24C(1) a purposive reading in order to make its remedial powers adequate to the review it is required to conduct — conditional unconstitutionality is itself nowhere in the constitutional text, nor in Law No 24 of 2003.⁵⁰ A court that has invented a remedy to avoid the harshness of annulment may invent one to reach the case where annulment is unavailable.

The third objection is the most practical, and it was anticipated in section 4.4: an omission gives no applicant an instrument to impugn, and the standing requirement in Indonesian constitutional procedure is framed in terms of a constitutional injury caused by the statute under review.⁵¹ The answer lies in how that requirement has been applied rather than in how it is worded. The Court has long accepted that the injury may be potential rather than actual, and has admitted associations and public-interest applicants asserting the constitutional interests of their members. An applicant who is a member of a customary law community, or an association representing such communities, can identify a constitutional injury with as much precision as an applicant challenging an enacted provision: the recognition conferred by Article 18B(2) is withheld, and the withholding is traceable to the unperformed condition. What the applicant cannot do is name a statute, and the proposal advanced here is that in this class of case the unperformed delegation should stand in the place of the impugned provision. That is an extension of the Court's practice, and it should be argued for as

⁴⁹ Constitution of the Portuguese Republic 1976, art 283 (unconstitutionality by omission); and see the comparative survey in Venice Commission, *The Problems of Legislative Omission in Constitutional Jurisprudence* (CDL-AD(2008)029, 2008).

⁵⁰ On the development of conditional unconstitutionality (*inkonstitusional bersyarat*) as a judicial creation, see Butt (n 9) ch 3; and, on the legislature's response to the Court's decisions, Simon Butt and Prayekti Murharjanti, 'What Constitutes Compliance? Legislative Responses to Constitutional Court Decisions in Indonesia' (2022) 20 *International Journal of Constitutional Law* 428.

⁵¹ Law No 24 of 2003 (n 24) art 51(1), which confers standing on those whose constitutional rights or authority are impaired by the statute under review, together with the Court's own elaboration of the requirement in its subsequent practice.

such; it is not a departure from the constitutional text, which nowhere says that the only way a statute may offend the Constitution is by existing.

The calibration proposed here does not enlarge the Court's jurisdiction over statutes. It asks the Court to notice something about the statutes already before it: that some of them are doing constitutional work under a constitutional instruction, and that the instruction, being unconditional, supplies no standard by which the work may be judged. Where the constitutional text has delegated away its own capacity to constrain, the structure of the Constitution must do the constraining, or nothing will.

7. Conclusion

This article has argued that Indonesia has a delegated constitution. Thirty-eight paragraphs of the 1945 Constitution direct that a subject of constitutional consequence be regulated by statute, and seven more subordinate a constitutional entitlement to what the legislature provides, while the amendment rule in Article 37 has not been used since 2002. The conjunction of heavy delegation with a closed amendment channel has not held the Constitution still. It has moved the operative constitution into the statute book, where it is made and unmade by ordinary majorities, and left the constitutional text in force and increasingly beside the point.

In answering the research questions, the article concludes that the Constitution's delegations are exercised in four distinct ways, and that constitutional doctrine has been built for only one of them. Execution leaves the constitutional norm intact and is the case doctrine assumes. Reconfiguration alters a constitutional institution from within an unconditional delegation, as the tenure of constitutional judges was altered in 2020 and the size of the executive in 2024. Displacement empties the constitutional provision of independent content, so that the rule governing who may stand for the presidency is found in a statute and changed by a decision about a statute. Abeyance suspends a constitutional provision indefinitely by the simple expedient of not legislating, as the recognition of customary law communities has waited since 2000 on a statute that has never been made, and the regime of emergency powers has been left in the hands of an instrument of 1959 that is not a statute at all. The last of these is not desuetude as the literature has described it. Desuetude is the disuse of a power the constitution confers; abeyance is the non-performance of a condition the constitution imposed on itself, and it places the operation of the constitutional text in the hands of the body the text was meant to bind.

What follows for the study of constitutional change beyond Indonesia is a question about form rather than about Indonesia. Comparative scholarship on constitutional change has concentrated on the instruments that alter constitutional text and on the practices that diverge from it, and has treated statutes enacted under constitutional delegation as implementation. The Indonesian case shows that the delegate is a channel of constitutional change in its own right, and that its capacity to change the constitutional order is a function of the form it is given. France gives it a mandatory gate,

Spain a heightened majority, Chile both; and where a system has no formal category to give, as in the United Kingdom, its courts have supplied a judicial immunity from implied repeal. Indonesia, which delegates as heavily as any of them, gives it nothing and its courts have supplied nothing. Every system with a written constitution delegates; the question the Indonesian case makes unavoidable is what is entrenched when a constitution entrenches a provision whose whole content is that a statute shall decide.

The argument does not counsel a return to formal amendment, and it does not treat delegation as a defect to be engineered out. A constitution that specified everything it now delegates would be unworkable, and a constitution amended whenever an electoral formula needed adjustment would be no constitution at all. What the argument counsels is recognition: that the statute enacted under a constitutional delegation is not an ordinary statute in function, however ordinary it is in form; that the difference between execution, reconfiguration, displacement, and abeyance — and, within the last, between the delegation never exercised and the delegation answered by an instrument of the wrong kind — is a difference constitutional review can be made to see; and that a constitutional provision which cannot operate until the legislature permits it is not, without more, a guarantee. Constitutional change in Indonesia has not stopped. It has moved one level down, into instruments that carry constitutional weight and enjoy none of constitutional law's protections, and the task is to bring constitutional standards to where the change is actually being made.

Statements

AI use. Tier 1 (language editing) under the Journal's AI Tool Policy. The author used Claude solely to improve the English-language structure, grammar, and readability of the manuscript and for proofreading. No generative artificial-intelligence tool was used to generate research questions, arguments, analysis, findings, or conclusions, to identify, select, or interpret sources, or to produce citations. Every suggested change was reviewed by the author, who accepted or rejected it individually. The research design, the legal analysis, and the content of the article are entirely the author's own, and the author takes full responsibility for them.

Constitutional engagement. None. The author has held no advisory, drafting, litigation, adjudicative, political, or advocacy role in any of the constitutional changes analysed in this article, currently or within the last five years.

Funding. None. This research received no specific grant from any funding agency in the public, commercial, or not-for-profit sectors, and no funder held a right of review over the manuscript.

Competing interests. The author declares no competing interests. The author holds no editorial or other role with the Journal of Constitutional Change or its publishers.

Author contributions. Not applicable. The manuscript is the work of a single author, who is responsible for its conceptualisation, investigation, analysis, drafting, and revision.

Data availability. Not applicable. No new data were generated. All constitutional instruments, legislation, and secondary sources relied upon are publicly available and are cited in the footnotes and in the table of authorities.

Ethics approval. Not applicable. The research involved no interviews and no human participants.

Acknowledgements. None.

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