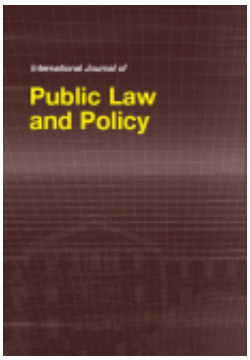

International Journal of Public Law and Policy

ISSN online: 2044-7671 - ISSN print: 2044-7663
https://www.inderscience.com/ijplap

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DOI: 10.1504/IJPLAP.2025.10067960

Article History:

Received:	12 June 2023
Last revised:	24 July 2023
Accepted:	24 July 2023
Published online:	16 December 2024

The role of local experts in the constitution-building process: the case of Indonesian Constitutional Commission

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Abstract: In contrast to their foreign counterparts, the role of local experts is rarely discussed in the literature concerning constitution-building, this difference largely due to the assumption that it is difficult for local experts to act independently of the interests of political actors during the constitution-building process. In this study, we examine the role of the Indonesian Constitutional Commission – an institution of experts established during the Indonesian constitutional amendment process from 1999 until 2002 – as the main case study. Although many Indonesian scholars consider the Commission a failed project due to its failure to influence the outcome of the amendment process and to act independently of the influence of political actors, this paper finds that the aforesaid institution did succeed in strengthening the legitimacy of the amended 1945 Constitution among some elements of society – especially activists and academics – which in turn has also facilitated the success of Indonesia's transition to democracy.

Keywords: local expert; constitution-building process; the Indonesian Constitutional Commission; the amended 1945 Constitution.

Reference to this paper should be made as follows: Suryowidodo, B., Perwira, I., Abdurahman, A. and Rahmatunnisa, M. (2025) 'The role of local experts in the constitution-building process: the case of Indonesian Constitutional Commission', *Int. J. Public Law and Policy*, Vol. 11, No. 1, pp.81–97.

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1 Introduction

The fall of President Suharto in 1998 (due to the economic crisis that hit Asia) opened up an opportunity for Indonesia to transition to democracy and amend its infamous Constitution, which had often been seen as the main source of the continuous rise of authoritarian government in Indonesia [Satrio, (2023a), p.408; Crouch, (2023), p.7].

Interestingly, this transition to democracy occurred completely unexpectedly; prior to the sudden resignation of President Suharto in May 1998, there were no signs of any regime change in Indonesia. At that time, there was no organised opposition movement, while within the Suharto Government itself, there was no reformist faction that could act as a bridge to negotiate the transition to democracy with the opposition (Horowitz, 2013). As a result of this situation, the transition process in Indonesia developed very differently from the more desirable norms in transition processes that were observed in other parts of the world. In that particular period, there were no pacts between the incumbent and the opposition that could safeguard their respective interests during the transition (Horowitz, 2013). There was no absolute political victory for the reformist side; in fact, as Donald L. Horowitz stated, what happened was that the New Order regime seemed to have survived without Suharto, as demonstrated by the appointment of B.J. Habibie, who was Suharto's last Vice President, as the new President of Indonesia after Suharto's resignation (Horowitz, 2013).

Not only that, but the institutions that had previously worked for the New Order regime also survived the transition period that lasted from 1998 to 2002. For example, although free and fair elections were held in 1999 (The Second Democratic Election in Indonesia, after that of 1955), the results of these elections still raised many doubts regarding the success of Indonesia's transition to democracy, as there was clearly still an opportunity for parties that had organisational roots since the New Order, such as Golkar, to gain a large number of seats in the People's Representative Council (DPR) [Satrio, (2019), p.13]. During this period, the position of the Military/Police faction – which for a long time become the backbone of the New Order regime – was also maintained in the

People's Consultative Assembly (MPR), at that time the highest state organ – and also the organ with the power to amend the constitution.

Notwithstanding these uncertainties, Indonesia decided to amend its 1945 Constitution. The momentum for these changes was rooted in the belief among some groups (especially activists and academics) that the 1945 Constitution was the main factor that led to the emergence of authoritarian governments in Indonesia. Changes to the 1945 Constitution were thus deemed necessary to guarantee the success of this transition (Indrayana, 2008; Melian, 2011). Surprisingly, the 1999–2002 amendments to the 1945 Constitution succeeded in creating a much more democratic constitution compared to the original constitution promulgated on 18 August 1945 (one day after independence).

This outcome was indeed unexpected, especially given that these changes were made in a process described by Horowitz as 'insider-dominated', many members of the MPR who amended this constitution having also been part of the authoritarian era [Horowitz, (2013), p.1]. In fact, during this process, some members of the MPR saw no urgency about amending the text of the 1945 Constitution (Ellis, 2002).

In the end, the substance of this constitution underwent very significant changes; the actual text of the 1945 Constitution was enlarged by around 300% after being amended (Asshiddiqie, 2017), and the amended 1945 Constitution adopted liberal-democratic principles that had previously been rejected by the founders when it was suggested they be adopted into the 1945 Constitution. When the 1945 Constitution was formed, the authors designed their own system of government, which has been termed a 'division of power' [Yamin, (1960), p.61; Satrio, 2023b]. This system – which places the MPR as the highest state organ – was formed based on the traditional conception of power that emphasises people's sense of trust toward the government rather than suspicion, the latter of which is contained in a liberal-oriented constitution (Kusuma, 2004; Satrio, 2023b). That is why the initial 1945 Constitution did not have a comprehensive mechanism for limiting powers [Iskandar, (2018), p.32], as shown by the absence of any presidential term-limits; and by its handing of so many discretionary powers to the president to determine the process of appointing officials of other state organs.

This situation changed completely after the 1945 Constitution was amended, where the amendment changed the character of the 1945 Constitution from a constitution that was previously based on a 'division of powers' system to a constitution based on doctrines derived from liberalism, such as 'separation of powers' [Harijanti and Lindsey, 2005; Satrio, (2023a), p.409]. Horowitz believes that this very significant change was enabled because the process of amending the 1945 Constitution was performed incrementally by MPR, through an inclusive process that prioritised the achievement of consensus among all political factions (Horowitz, 2013).

Apart from using the consensus method, another factor, rarely cited but that played an important role in the success of this amendment process, was the MPR's decision to form a special body, consisting of experts, to aid the amendment process, named the Constitutional Commission (*Komisi Konstitusi*), this body tasked to conduct a comprehensive study of the text of the 1945 Constitution as amended by the MPR. Although most Indonesian scholars consider the creation of this commission a failure, because their work left no impact on the text of the amended 1945 Constitution [Asshiddiqie, (2007), p.139; Indrayana, (2008), p.262], or for worse, they are being humiliated 'by those with much lower educational pedigree' as stated in the previous

work of one of us [Suryowidodo, (2021), p.231],[1] this paper reaches a different conclusion, viz. that the Commission played an important role, especially in strengthening the legitimacy of the amendments in the perception of the public.

Our decision to focus on the role of the Constitution Commission in this paper is also intended to provide a theoretical contribution to the role of experts and academics in the constitution-building process. So far, there is only minimal literature discussing the role of experts in the process of making or amending constitutions, and that scant literature mostly focuses on discussing the role of international experts in the process of constitution-building, rather than on the role of local experts (Aucoin, 2004; Ndulo, 2004; Dann and Al-Ali, 2006), due to the assumption that the local experts were usually unable to act unfettered by the interests of political actors in the constitution-building process, this assumption further strengthened by examples of local experts being used by political actors with authoritarian motives to design the constitution according to their demands, as happened in Thai during the drafting process of a new constitution in 2007, which has been conducted by experts closed to the military government (Dixon and Landau, 2021). Therefore, this paper seeks to fill the gaps in the existing literature, to show how local experts can play an important role in the constitution-building process conducted during transition to democracy, especially in reinforcing the democratic legitimacy of such a process.

2 Indonesian constitutional reform in 1999–2002: transition through a distinct path

As mentioned in the previous section, Indonesia's success in transitioning to democracy was influenced by the use of a consensus approach during the amendment process to the 1945 Constitution. Through this approach, all factions involved in the amendment process could consolidate their views, which ultimately encouraged them to accept the results almost in unanimous fashion, despite initial resistance from some factions to amending the 1945 Constitution.

To illustrate how the amendment process was conducted incrementally, we shall chronicle the amendment process from 1999 to 2002. The MPR passed this amendment by dividing the process into four stages, each connected to the other, with each stage showing consistent effort by the members of the MPR to reach consensus.

2.1 The first amendment

The main focus of the amendment process 1999 to 2002 was how to limit the powers of the President and institutionalise the principle of separation of powers that was previously absent from the text of the 1945 Constitution. Thus, in the first stage of the amendment, in 1999 (known as the first amendment), the MPR focused more on efforts to transfer the legislative powers from the President to the DPR (Lindsey, 2002). This resulted specifically in changes to Articles 5 and 20 of the 1945 Constitution. In the original text of the 1945 Constitution, Article 5 stated that the President had the power to make laws with the consent of the DPR, whereas after the first stage of the amendment, the main authority to make laws was transferred to the DPR under the newly-amended Article 20, which stated that "the DPR holds the power to make laws".

The authority of the DPR has also been expanded in the matter of granting amnesty and appointing ambassadors, in Articles 13 and 14 respectively of the 1945 Constitution. Whereas previously this authority was entirely in the hands of the president, since the changes, the president needs to secure the consent of the DPR in the exercise of these two powers. Furthermore, the most significant change that this amendment brought about was the introduction of the two-term limit (5 years per term) for any individual to serve as president. This change was made to prevent abuse of the presidential term, as demonstrated by Suharto, who ruled for 32 years.

Although the first amendment may seem successful in having limited the power of the president, in fact, as explained by Tim Lindsey this amendment works more in a 'symbolic manner' when it comes to limiting the power of the executive and separating legislative and executive authority [Lindsey, (2002), p.250]. The reason was, even though the amendment added the phrase "the DPR holds the power to make laws", the president continued still to be actively involved in the legislative process through his/her authority to propose bills, as well as to approve bills that are discussed with the DPR. At the same time, this system of government still maintained the MPR's position as the highest state organ with the right to appoint the president, thus seemingly shifting Indonesia's constitutional structure to a parliamentary system with a weakened executive (Lindsey, 2002). This amendment has at least succeeded in guaranteeing that, in the future, no president will be able to serve more than two terms.

2.2 The second amendment

While the first amendment was focused on separating the functions of the president from the legislature, the second amendment – passed on 18 August 2000 – tried to resolve fundamental problems related to civil-military relations.

In the original text of the 1945 Constitution, there was no strict separation between civilian and military, which resulted in the birth of the *dwifungsi* (dual function) doctrine that allowed the military to be involved in politics. In the second amendment to the 1945 Constitution, the authority of the Indonesian Military (TNI) and the Police (Polri) is more explicitly stated than in the pre-amended 1945 Constitution,[2] specifically, that these two institutions only have powers in their respective fields of defence and security. This amendment also stipulated that further authority for the TNI and Polri, as well as other matters related to defence and security, are to be regulated by law, thus explicitly placing the military under the command of civilian institutions (DPR and president) (Lindsey, 2002).

Apart from civilian-military relations, another equally important issue that the second amendment tried to tackle was the absence of comprehensive human rights safeguards in the 1945 Constitution. In the text of the original 1945 Constitution, there were almost no human rights safeguards, and where there were any – such as the right to associate and to express opinion – the fulfilment of these rights was very dependent on the goodwill of the government as the legislator (Satrio, 2019). As a result, during the Guided Democracy and the New Order eras, human rights abuses – especially the civil and political rights of the people – were often carried out by the authorities (Lindsey, 2004).

To anticipate the recurrence of such incidents, the second amendment incorporated comprehensive human rights safeguards into the text of the 1945 Constitution, as shown by the creation of Chapter XA in the 1945 Constitution, which consists of

Articles 28A–28J. This Chapter adopted rights contained in many international human rights instruments (Lindsey, 2002; Dewansyah and Nafisah, 2021), such as the right to be free from torture, the right to associate and assemble, the right to religion and belief, the right to obtain political asylum, the right to education, as well as the right to obtain information. In fact, this chapter also includes rights that cannot be reduced under any circumstances, such as the right to life, the right not to be tortured, and the right not to be prosecuted under retrospective laws.[3]

Finally, another issue, also the focus of the second amendment, concerns central-regional relations. It cannot be denied that, prior to the amendments, the 1945 Constitution tended to provide blank mandates for the government to utilise, by more detailed regulation, the relations between the centre and the regions, which in turn led to the central government regulating this issue in a centralised manner (Manan, 2001). This gave rise to considerable discontent in the regions, which prompted several regions to attempt secession from Indonesia after the fall of the Suharto regime. To anticipate the reappearance of this problem the second amendment significantly amended Article 18 of the 1945 Constitution to include a guarantee that the relationship between the central and regional governments be carried out in accordance with the principles of autonomy.[4]

Although this second amendment seemed successful in resolving many of the problems contained in the pre-amended version of the 1945 Constitution, there is also an assumption that this second amendment also sought to protect the prospects of political survival beyond transition of several key New Order actors. The existence of provisions prohibiting someone from being prosecuted under retroactive law in Article 28I serves as evidence for this argument; this provision was criticised by activists and academics because it was seen as precluding prosecution of members of the New Order regime involved in cases of human rights violations during the New Order (Lindsey, 2002).

Despite this criticism, the prohibition of prosecution entrenched by this retrospective law shows how a consensus approach was taken during the process of amending the 1945 Constitution, because this provision ensured that the former members of the previous authoritarian regime – which, at that time, still had considerable influence in Indonesian politics – would accept the result of this amendment.

2.3 The third amendment

Unlike the two previous amendments, the third amendment – which was passed in 2001 – was enacted after a constitutional crisis involving former President Abdurrahman Wahid. The crisis started with Wahid's move to issue a decree dissolving the DPR, which triggered the MPR to hold a special session resulting in the decision to impeach President Wahid from his position and replace him with Vice President Megawati (Lindsey, 2002). This sequence of events arose because Wahid's move was considered unconstitutional, the President having no authority to dissolve the DPR by decree.

The implications of the conflict between the president and the DPR prompted the third amendment to focus more on efforts to prevent the return of similar conflict and prevent the recurrence of any presidential impeachment process in the future (Lindsey, 2002). That is why, by this amendment, the position of the MPR was changed from that of the highest state organ to an institution co-equal with other state organs. This can be seen from the removal of the MPR's authority to appoint the president, and the provision detailing that the president must be elected directly by the people through elections held every five years (Article 6A) (Lindsey, 2002).

Apart from changes to the position of the MPR, another significant change related to the fall of President Wahid was the formation of the Constitutional Court (MK) (Hendrianto, 2018; Lindsey, 2002). The idea of establishing the MK was a proposal by the PDIP, the winning party in 1999 election, and also the party of Megawati – Wahid's successor – with the aim of ensuring that there would be no recurrence of the attempt by the MPR to impeach the president. Because the court was designed with this motivation in mind, during the amendment process, the discussion regarding MK's establishment mostly focused on its power to decide on impeachment proposals, this led to one notable constitutional law scholars in Indonesia to hail the establishment process of the MK as a "joke that turned into something serious" [Hendrianto, (2018), p.41].

Another new institution produced by the third amendment is the Judicial Commission (KY), an institution formed to supervise the behaviour of the judges, due to the infamous reputation of the Indonesian judiciary during the New Order and Guided Democracy eras (Pompe, 2005). Apart from an intention to improve the Indonesian judicial system, the formation of the KY in Article 24B of the 1945 Constitution was also driven by a conflict that had previously occurred during President Wahid's leadership, when the president refused to appoint a nominee for Supreme Court justices who had been submitted by the DPR. This occurrence prompted authorisation of the KY to nominate candidates for Supreme Court justices to the DPR, and the president's authority in this process was also restricted, so that he or she would only be able to appoint nominees as Supreme Court judges already selected by the DPR from the KY proposal (Lindsey, 2002).

Apart from the changes considered a direct response to the previous conflict between the President and the legislature, several other changes to the Indonesian constitutional system were made in the third amendment. Among them was the establishment of the Regional Representative Council (DPD) as the second chamber of the legislature that will represent the region. The decision to create the DPD was a move to follow up the idea to decentralise the power of the central government, which has emerged since the second amendment. However, it ends up with the creation of the DPD as a second chamber that did not have any important roles in the law-making process.

The decision to create a weak second chamber is evidence of how the consensus approach was used during the amendment process because it is a response to resistance by some political blocs within the MPR who views the creation of this institution as a threat to Indonesia's unitary form (Horowitz, 2013). Based on that, a common agreement was reached among members of the MPR, whereby they agreed to establish the DPD as their second chamber that would represent the region but with very limited legislative authority. As a result, the authority of the DPD became unclear; although its members are directly elected by the people, the institution itself does not have a strong role in the legislative process, since the DPD was not given any authority in the process of deliberating bills but merely the power to propose bills related to central and regional relations, natural resource management, financial balances between the central and regional government, and bills regarding the state budget (income and expenditure i.e. APBN).[5]

2.4 The fourth amendment

Compared with the previous amendments, the fourth amendment, which was implemented in 2002 (the closing stage of this series of amendments) was fairly brief.

This amendment focused more on improving and correcting the result of the previous amendments. For example, this amendment improved the provisions relating to direct presidential elections by stipulating that if no presidential candidate obtained a majority of votes, a second round would be required.[6]

This amendment also strengthened the idea of clarifying the civilian-military relationship by eliminating the presence of the military faction in the MPR. Finally, this amendment also abolished the Supreme Representative Council (DPA) – an independent organ tasked with providing advice to the president – and replaced it with an institution with the same function, but institutionally under the auspices of the presidency, namely the Presidential Advisory Council (Wantimpres).[7]

3 The rise of the Constitutional Commission

These four amendments succeeded in transforming the 1945 Constitution from a constitution that was previously designed on values that emphasised the centralisation of state power in the hands of the government into a document that prioritised restrictions on government power.

However, there are also many criticisms directed at the process of these amendments – especially those raised by activists and academics – including the notion that the process of amending the constitution was carried out in an undemocratic manner, even though the majority of the MPR members who considered and approved these amendments were elected through the 1999 election – which was the first democratic election since 1955.

One vocal critic was Denny Indrayana, a noted constitutional law scholar, who later became the Deputy Minister of Justice under the Susilo Bambang Yudhoyono administration. He argued that, even though most members of the MPR – especially those from the DPR – were elected in the free and fair election, a survey in 2001 and 2002 showed that public satisfaction with their performance was very low (only 19% and 12%, respectively) (Indrayana, 2008). According to Indrayana, such a situation is not ideal in the process of drawing up a constitution, which should be performed through a participatory process by institutions that can manifest the will of the people (Indrayana, 2008). Meanwhile, other scholars, such as Refly Harun, Suwoto Mulyosudarmo and Saldi Isra also criticised the amendment process of the 1945 Constitution, based on their belief that the MPR framed these amendments based on political calculations rather than on the public interest (Mulyosudarmo, 2001; Harun, 2002; Isra, 2001).

To remedy this, these figures proposed the idea of establishing an independent commission, its membership drawn solely from experts and academics, which would later be assigned to review the draft of the amendments made by the MPR, or – when necessary – formulate a new draft of the constitution. This distrust on the part of many activists and academics towards the amendments passed by the MPR cannot be separated from the background of many MPR members. It should also be noted that during this process, there were many MPR members previously active in the authoritarian era, including the Chair of the Ad-Hoc I Committee (Jacob Tobing) – an internal body specifically assigned by the MPR to be responsible for drafting the substance of the amendments.

Responding to these pressures, in 2002 – after the four amendments to the 1945 Constitution had been concluded – the MPR accepted public demand to form an

independent commission through MPR Decree Number I/MPR/2002, which mandated the establishment of a Constitutional Commission with the task of 'conducting a comprehensive study' in respect of the text of the amended version of the 1945 Constitution, the results of which review would be submitted to the MPR as material with which to guide their work in future.

This decision could be considered as an attempt by the MPR to find a common ground by accommodating public demands to form an independent commission, without threatening its own position as the only organ empowered to amend the constitution. This can be seen from the composition of its membership, which – despite being dominated by individuals of academic background such as its chairman Professor Sri Soemantri, who arguably was the most influential professors of constitutional law in Indonesia at that time (Harijanti, 2016a, 2016b) – included several politicians, including those who were part of Suharto's regime.[8]

It should also be noted that, when proposing the creation of a Constitutional Commission, some activists and academics went beyond just calling for experts to be included in the commission, suggesting that, additionally, this commission should consist of representatives of the public (Harun, 2002). Moreover, some even proposed to submit the result of the study by the Constitutional Commission to the people through a referendum, so as not to have the study resting solely on the decision of the MPR. (Harun, 2002).

As such, when it was later decided that the Constitutional Commission would be established by the MPR itself, with members who included figures from previous regimes, and that its work would be assessed by the MPR alone, there were several figures from civil society groups who were dissatisfied with this decision, notably Indrayana, who harshly criticised this institution as a 'fake Constitutional Commission' [Indrayana, (2008), p.262].

The MPR's decision to endow the Constitutional Commission with very weak powers cannot be separated from the caution of the MPR members toward the idea of forming a Constitutional Commission initiated by activists and academics. When this discourse emerged, many MPR members actually viewed this idea with suspicion and saw it as a threat to their authority as the only organ that could amend the constitution. This can be seen, for example, in the view of the Chairman of Golkar (one of the biggest parties in the MPR) Akbar Tandjung, who argued that this idea was unnecessary since "the MPR already consulted with 30 academics from many different disciplines when drafting the substances of constitutional amendment" [Lindsey, (2002), p.266].

Therefore, when the MPR was forced to accept the proposal that a Constitutional Commission be established, many MPR members acquiesced in this proposal unenthusiastically. Many of them still felt that the authority to amend the 1945 Constitution should be fully in the hands of the MPR, and thus saw no need to accept this demand. Some even believed that the MPR's decision to fulfil this demand could pose a threat to the consensus that was reached during the amendment process. This can be seen in the opinion of Sayuti Rahawarin from the Daulat Ummah faction, which states [Secretary General of the Indonesian Constitutional Court, (2010), p.451]:

> "Last night I was a bit emotional, I said, what is the basis for this Constitutional Commission to be formed? I want to ask, is it because of pressure from the public? Is it because the Assembly is not working properly or the approaches in deliberating the amendment are too political, or what? So, at that time, I asked

> those of you who proposed this Commission or whatever it's called, you must give the right reasons.
>
> Because, I really believe that as stated in Article 3 Paragraph (1) of the Constitution, the authority to amend and enact the constitution is the authority of the MPR. And if we [are to] form a new institution outside the authority that has been given by law to this honorable Assembly, we have to be clear first, what is the position of this institution with its authority? Don't let the results of the work of this institution that we have formed be conveyed to the Assembly [cause] another fierce debate, within the Assembly, then between the Assembly and the institution that we have formed."

Given such indications of suspicion, it is entirely logical that the MPR might tend to be resistant to the work of the Constitutional Commission, as shown by the MPR response to the results of the study produced by the Constitutional Commission, which will be explained in the next section.

4 The work of the Constitutional Commission

The Constitutional Commission produced two comprehensive studies on the amendment to the 1945 Constitution, the first being an academic review of amendments thereto, the second being a proposed correction to the text of the amended 1945 Constitution made by the MPR.

Looking at the second, it can be argued that the Constitutional Commission seems to have worked merely as a 'tailor' (*tukang jahit*) for the MPR's work [Asshiddiqie, (2007), p.141], the reason being the absence of fundamental change produced by the Commission to the text of the amended 1945 Constitution. However, what they actually did was to correct the clarity of the norms in the text of the amended 1945 Constitution. Meanwhile, regarding the commission's academic review on amendments to the 1945 Constitution, there are several interesting notes that the commission attached to the result of the amendments made by the MPR:

First, regarding the relationship between the central and regional government, the Commission criticised Article 18 paragraph (5) of the amended 1945 Constitution,[9] an article they disliked, believing it was contaminated with elements of federalism. The article in question divides the administration of government into two levels, as used in many federal states, namely central and regional. According to the commission, this suggested a divided implementation of sovereignty in a unitary state, which was inappropriate, as sovereignty should reside only with the central government (Constitutional Commission, 2002). The commission believed that, even though Indonesia was ready to practice the principle of regional autonomy that ought not to mean that sacrificing the principle of the unitary state. The outlook of the commission seems to have been heavily influenced by a classical scholarly work published by C.F. Strong 'Modern Political Constitutions', a work frequently cited by many Indonesian constitutional law scholars, including the Chairman of the Constitutional Commission, Professor Sri Soemantri [Soemantri, (1981), p.52]. The book explains that one of the characteristics of a unitary state is "the absence of subsidiary sovereign bodies" [Strong, (1972), p.72].

Second, regarding the relationship between the DPD and the DPR, the commission emphasised that the amended 1945 Constitution did not create a genuinely bicameral

system requiring the legislative process to be carried out by two chambers with equivalent powers. Rather, they believed that the amended constitution regulated relations between the two legislative chambers in a merely quasi-bicameral mode, because the DPD did not have an equivalent position with the DPR in the legislative process [Constitutional Commission, (2002), p.147]. To avoid this ambiguity, in the commission's proposed correction to the text of the amended 1945 Constitution, it was suggested the DPD be given the authority to approve or reject any proposed bill relating to the relationship between central and regional affairs.[10] This clearly demonstrated the desire of the members of the commission to adopt a strongly bicameral system.

Third, another topic discussed by the commission in its academic review is the issue of Judiciary and Law Enforcement in Article 24 of the 1945 Constitution, where the commission suggested that the regulation of the office of the prosecutor and the police should be included in Article 24 of the 1945 Constitution together with the judiciary, since the functions of these two institutions were inseparable from the performance of the courts (Constitutional Commission, 2002). Furthermore, the commission also recommends the inclusion of the ombudsman in Article 24 of the amended 1945 Constitution because they thought that the function of the ombudsman was related with law enforcement, especially to prevent arbitrariness in the administration of the state (Constitutional Commission, 184). The commission also suggested including the basic principles relating to Indonesian law-enforcement policy (*politik hukum*) in the text of the amended 1945 Constitution. According to the commission, this is to ensure the law enforcement process will always be performed in a consistent manner with Indonesia's rich cultural diversity and the traditional values of the society [Constitutional Commission, (2002), p.184]. As a result, in the draft of the proposed correction, the commission suggested adding Article 24F to the amended 1945 Constitution which would have listed Indonesia's long-term law-enforcement policies.[11]

Outside these three topics, it can be said that the commission did not make any substantial input to the result of the amendment, as they seem to be more concerned with the technical issues such as correcting the grammar in the text of the amended 1945 Constitution. Even though the work of the Constitutional Commission was more concerned with technical issues, this did not guarantee that MPR members would later accept the proposed correction to the text of the amended 1945 Constitution despite it being heavily criticised by the public. There were several reasons that made the MPR refuse to adopt the proposed correction by the Constitutional Commission, the first was that the MPR members – based on the explanation from the Chairman of the Ad-Hoc I Committee Jacob Tobing – questioned the existence of a dissenting opinion in the final chapter of the academic review conducted by the Constitutional Commission [Constitutional Commission, (2002), pp.263–273]. According to Jacob, the existence of dissenting gives the impression among the MPR members that the Constitutional Commission has political goals (interview with Jacob Tobing, Jakarta, 12 June 2022), despite being established with the sole assignment to provide academic review and settle grammatical issues in the text of the amended 1945 Constitution.

Another reason that prompted the rejection of the commission's works is its unclear authority. In MPR Decree No. I/MPR/2002, it is stated that the Constitutional Commission must conduct comprehensive review to the amended 1945 Constitution. The problem is, the term 'comprehensive review' itself does not have a clear definition. In his memoirs, the former deputy chairman of the Constitutional Commission, Albert Hasibuan

explained that at one occasion he asked the Ad-Hoc I Committee about the meaning of comprehensive review, and Albert argued that none of the committees had given a definite answer. Even Deputy Ad-Hoc I Committee, Theo Sambuaga, said that what is meant by a comprehensive review is "everything that the Constitutional Commission considers as good and appropriate in perfecting the amended 1945 Constitution" [Hasibuan and Budoyo, (2010), p.664]. This uncertain authority proved to be a problem that prompted the MPR to reject the works of the Constitutional Commission, because some members of the MPR believed that the authority of the Constitutional Commission was only related with technical issues such as correcting the grammar of the text of the amended 1945 Constitution. Whereas in reality, the works of the commission were not only limited to the technical issues within the amended 1945 Constitution, but also covered several substantive suggestions such as inserting the regulation on the institution of ombudsman to the amended 1945 Constitution.[12] The problem is, among these substantive suggestions that the commission made, there were also suggestions that potentially can thwart the consensus that had been reached by the members of the MPR.

The most striking suggestion that the commission made is on the power of the DPD. In the draft of the proposed correction produced by the commission, it was stated that the DPD should have the authority to reject and approve the bill regarding the relations between central and regional government.[13] According to the commission, this was intended to create a true bicameral system, similar with those found in many mature democracies such as Germany and the USA (Constitutional Commission, 2002). This change, even if it seems insignificant, will taint the consensus that has been reached between factions in the MPR who want more regional involvement in the policy-making process at the national level and those who see the existence of a strong second chamber that represents the region as a threat to Indonesia's unitary characters. The disagreement regarding this issue has historical roots that go back to the 1950s when Indonesia failed to create a new constitution in the Constituent Assembly [Horowitz, (2013), p.24]. With such historical burden, it was very logical that the MPR members chose to reject the proposed changes by the commission.

5 From academic to political legitimacy

As explained in the previous chapter, the Constitutional Commission completed its work and produced a comprehensive study of the amended 1945 Constitution. This led to this researcher's most fundamental question; namely, can the establishment of the commission be considered a failure, due to the refusal of the MPR to follow through on the results of the comprehensive review which were reported during the plenary meeting of the MPR in 2004?

Regarding this question, most Indonesian scholars – including some members of the Constitutional Commission itself – tend to think that the commission did fail to play an effective role. A famous constitutional law professor, who later becomes the inaugural Chief Justice of the Indonesian Constitutional Court, Jimly Asshiddiqie, believes that the MPR's refusal to revise the amended 1945 Constitution in accordance with commission's suggestion was influenced by the perception of a majority of its members that the Commission was going beyond its authorized remit (Asshiddiqie, 2007). This view among MPR members could be found, for example, in the biography of Jacob Tobing,

the Chairman of MPR's Ad-Hoc I Committee – an institution within the MPR the main responsibility of which was to draft the amendment.

In his biography, Jacob explained that there were two limits placed upon the commission's power: first, that the commission should stick to the technical issues within the text of the amended 1945 Constitution; second, that the commission should act academically (and not politically). Jacob took the view that the commission had violated the two points which as explained above, because the commission had gone too far by conducting a comprehensive study suggesting some substantive revisions in the text of the amended 1945 Constitution, including provisions which were the result of consensus among many factions in the MPR.

However, the main reason that led the MPR to reject the work of the commission, according to Jacob, was the commission's decision to use a voting mechanism when making suggestions in their work. As an institution consisting mostly of academics, and originally tasked to produce an academic review of the amended 1945 Constitution, the use of a 'voting mechanism' by the commission gave an impression to the MPR that the members of the commission had a hidden political agenda, especially to direct the results of the amendment process towards one particular point of view. This allegation becomes stronger especially after the inclusion of dissenting opinions in the last section of the academic review produced by the commission.

From a legal and formal perspective, it is a very logical conclusion that the Constitutional Commission failed to play an important role during the constitutional amendment process, due to the MPR's refusal to respond to the commission's suggestions. Interestingly, this failure actually could have been predicted since the beginning, because – as pointed out by Brandt et al. (2011) – the involvement of experts in constitution-making (as well as amendment) processes ideally happens firstly during the early stage of the constitution-making process, when their role is usually to offer advice to the political actors regarding the most appropriate procedure to formulate or amend the constitution, and, secondly, before the final stage of the constitution-making process, when their appropriate duty is to provide input to the draft constitution prior to its submission to the people or political institutions for their approval.

Referring to the two main roles usually played by experts in the constitutional drafting process, it is clear that the role of the Constitutional Commission does not fit neatly into either one of these two categories, the reason being that the commission was formed to conduct a comprehensive study of the text of the amended 1945 Constitution when the amendment process had already passed its final stage or had been officially amended. In such a situation, it is difficult to imagine that the MPR would want to revise its work, given that some of the new provisions were the result of the tough lobbying process between various political factions within the MPR.

Although the work of the Constitutional Commission seems to have failed to achieve any impact if perceived through the lens of a legal-formal perspective, this was not the case when their role is examined from a political and sociological perspective. In his book – which was written almost ten years ago – Donald L. Horowitz defined the amendment process in 1999–2002 as exceptionally 'distinctive' [Horowitz, (2013), p.1]. The reason was that Indonesia chose a different path (compared with other countries) when transitioning to democracy. By refusing to cut ties with its authoritarian past (Crouch, 2023), Indonesia's transition, done through an incremental amendment process,

helped all political factions existing at that time – including groups that were part of Suharto's regime – to reach a broad consensus (Horowitz, 2013).

Opting to use the consensus method was a choice motivated by the Indonesian political situation at that time, which was very chaotic, with the reformist factions – despite successfully winning the 1999 Election – failing to secure a majority of seats in the MPR. Apart from that, there were also bloody frictions between different ethnic and religious groups in several regions of Indonesia. In this context, there was no other choice for political actors tasked with amending the 1945 Constitution other than to apply the consensus method in order to prevent escalation of division within society (Satrio, 2023b; Horowitz, 2013). Additionally, the application of the consensus method was also the most logical way to get supporters of the New Order regime, who were politically still embedded in many state institutions, to accept the result of the amendment that democratised the political system.

Regarding the Constitutional Commission, although the existence of this institution is often seen as a failure by scholars, if analysed through a consensus perspective, it can actually be considered a success, in that this institution was formed as a response to the conditions that emerged towards the end of the amendment process, in which some sections of society began to reject and criticise the outcome of the amendment.

There were two main groups that vocally rejected the result of the amendment, the first group consisting of activists and academics known as supporters of the transition to democracy, and the second mostly consisting of loyalists of the New Order regime who rejected the transition to democracy. In the case of the former, they rejected the result of the amendment because, in their view, the amendment had been conducted undemocratically, since the process was monopolised by the MPR (Suryowidodo, 2021). As for the latter group, their rejection of the result of the amendment arose from their belief that these changes deviated from many basic principles of the original 1945 Constitution (Satrio, 2023a; Nugraha, 2023). The emergence of this rejection and criticism by several factions was considered to threaten not only the result of the amendment, but also the fate of Indonesia's transition to democracy.

That is why, by forming this commission and appointing activists and academics as its members, MPR members hoped they could reach a consensus with the activists and academics group who rejected the amended 1945 Constitution by involving them in the amendment process. Interestingly, even though their involvement through the Constitutional Commission did not produce any real input into the substance of the amended 1945 Constitution, the formation of this commission at least succeeded in partially quelling demands from activists and academics who were previously very critical of the result of the amendment. This could be seen from their acceptance of the amended 1945 Constitution, once the amendment process had ended.

In fact, currently, activists and academics are the most persistent groups in defending the amended 1945 Constitution (Hukumonline, 2021), from efforts to introduce a new amendment that can restore the 1945 Constitution to its original (pre-amended) form, such as the debate on allowing the President to seek more than two terms, reviving the GBHN, and returning the authority to appoint the President to the MPR (Satrio, 2023a; Nugraha, 2023; Mietzner, 2023). From this example, it can be said that the formation of the Constitutional Commission was one of the most successful steps taken by the members of the MPR during the amendment process, especially its effect of ensuring that the result of the amendment would be accepted by activists and academics.

6 Conclusions

It should be admitted that, within the vast literature of comparative constitutional law, the role of a local expert in the constitutional-building process is one topic rarely discussed, due to the common assumption that local experts are unable to offer objective advice compared with their foreign counterparts, especially in a fragmented political system. This study, based on the role of the Indonesian Constitutional Commission during the amendment process carried out from 1999 to 2002, shows that assumptions about the inability of local experts to act independently and objectively is hard to dispute. In a fragmented political system featuring a high level of distrust between political actors, any advice and suggestions from local experts that contradict the interests of certain political actors, will always be subject to suspicions that they are an attempt to advance the political interest of other groups.

However, although this perception is difficult to refute, this study also shows that local experts can play an important role in strengthening the legitimacy of the constitution-building process, especially in accommodating the interests of certain groups that had been sidelined in the process, which in turn could help strengthen the democratic legitimacy of the constitution that was formed.

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Notes

1 As explained by previous work of one of us, many members of the Constitutional Commission could be considered as an elite part of the Indonesian society, since many of them had a 'terminal-level degree' in legal studies, and some of them even graduated from elite universities in the West [Suryowidodo, (2021), p.230].

2 See Article 30 of the amended 1945 Constitution.

3 See Article 28I (1) of the amended 1945 Constitution.

4 See Article 18 (2) of the amended 1945 Constitution.

5 See Chapter VIIA of the amended 1945 Constitution on the Regional Representative Council.

6 See Article 6A (4) of the amended 1945 Constitution.

7 See Chapter IV of the amended 1945 Constitution on the Supreme Advisory Council that has been abolished; See also Article 16 of the amended 1945 Constitution which states that: "the President establishes an advisory council with the task of rendering advice and considerations to the President, which shall be further regulated by laws".

8 For example, Bambang Sutrisno, a member of the Constitutional Commission is also member of the Golkar (Suharto's party). Previously, he also works as a DPR member during the last stage of the New Order era (1997–2002). See https://fraksigolkar.or.id/bambang-sutrisno/.

9 See Article 18 (5) of the amended 1945 Constitution which declared that: "the regional governments exercise widest autonomy, save to government affairs determined by law as the affairs of the Central Government".

10 See Article 22D (2) on the Draft of the Proposed Correction to the Amended 1945 Constitution by the Constitutional Commission, which states that: "the Regional Representative Council can approve or reject bills on: regional autonomy; central and regional relations; formation, expansion, and merging of regions; management of natural resources and other economic resources, as well as the balance of central and regional finances that have been approved by the House of Representatives".

11 Article 24F on the Draft of the Proposed Correction to the amended 1945 Constitution declared that: "the state organizes and develops a national legal system that maintaining and respecting the diversity of values and legal sources that live in society".

12 See Article 24F and 24G on the Draft of the Proposed Correction to the Amended 1945 Constitution.

13 See Article 22D(2) on the Draft of the Proposed Correction to the Amended 1945 Constitution.