

## **CONSTITUTION IN LEGAL POLITICAL PERSPECTIVE**

Nurus Zaman

Faculty of Law, Trunojoyo University of Madura

Email: [zamany\\_02@yahoo.co.id](mailto:zamany_02@yahoo.co.id)

### **ABSTRACT**

*In this study there are 2 (two) problems studied. First, what is the form or form of legal politics in the 1945 Constitution. Second, what is the nature of legal politics in the 1945 Constitution. This research uses normative legal research. The research results obtained: First, the form or form of legal politics in the constitution as a means in order to achieve the goals of the state, namely the interests of the nation and state, the basic law of legal politics in the constitution comes from the values and character of the nation, taking into account the legal system adopted. Second, the legal politics in the 1945 Constitution is not rigid or permanent, but the nature of legal politics in the constitution is open, that is, it can adapt to the situation and conditions of its era, either through the method of interpretation or through the method of change.*

**Keywords: Political Law and Constitution**

### **Introduction**

The term constitution in this article is the 1945 Constitution, it is intended to make it easier for readers not to give a broad understanding and interpretation of the constitution. The establishment of the Indonesian State, which is independent, united, sovereign, just and prosperous, took effect on August 17, 1945. According to M. Yamin,<sup>1</sup> the result of the inauguration of the Republic of Indonesia and the declaration of independence was to defend the homeland and the nation that had occupied one hundred percent independence. State sovereignty regarding the independence of government, regional independence, and the independence of the people, all three of which are in full and complete form. In M. Yamin's view, it can be understood that the politics of state law began on August 17, 1945, even though Indonesia has only had written laws since the 1945 Constitution was enacted, namely August 18, 1945 the day after the proclamation was read and/or announced.

The essence of the political direction of state law after the enactment of the 1945 Constitution lies in the values contained in its preamble, both expressed and implied values. Thus, all the articles contained in the 1945 Constitution are a

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<sup>1</sup> Muhammad Yamin, *Proclamation of the Constitution of the Republic of Indonesia*, Jakarta: Ghalia Indonesia, 6th Printing, 1982, p. 16.

concretization of the preamble to the 1945 Constitution. According to RM. AB. Kusuma,<sup>2</sup> given that the preamble to the 1945 Constitution is a "staats fundamental norm", the source of all legal sources from the legal norms that we adhere to, then every word and punctuation mark needs to be studied seriously. The fact is that there are differences in words and punctuation in the document regarding the opening of the 1945 Constitution which can change its meaning, therefore the drafters of the amendments to the 1945 Constitution need to determine which words and punctuation are correct.

The consequences of differences in words and punctuation in the preparation, including the amendment to the 1945 Constitution, have brought different interpretations of legal politics in the constitution. In addition, legal experts, especially constitutional law experts, differ in their understanding of legal politics. However, the end of the various meanings has substantially the same meaning, namely that legal politics discusses the law of a country. Political law is related to the discussion of government policies in the field of legal development (legal policy). Legal politics is carried out through an orderly and continuous legislative process. Because society is the subject and object of legal development, community change becomes a function of legal development in Indonesia (law as a tool of social engineering). The history of legal politics in Indonesia has not shown significant results in the implementation of this function.<sup>3</sup> If legal politics tends to be a product of legislation, then the result of the legislation is in the form of a written legal product, in this case the constitution or the 1945 Constitution.

The scope of the constitution in this paper is the constitution in the narrow sense of the 1945 Constitution as a written form of state basic law. According to Bagir Manan,<sup>4</sup> the Constitution is one of the (provisions) of the constitution, apart from the Constitution there are other (provisions) of the constitution. Thus, the obligation to keep the constitution alive and actual does not only apply to the Constitution, but also to other constitutional (provisions). In the course of the formulation and preparation

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<sup>2</sup> RM. AB Kusuma, *The Birth of the 1945 Constitution*, Jakarta: Faculty of Law, University of Indonesia, 2004, p. 28-29.

<sup>3</sup> H. Deddy Ismatullah and Enung Nurjanah, *Political Law Study of Constitutional Law*, Bandung: Rosdakarya Youth, 2018, p. 2-3.

<sup>4</sup> Bagir Manan, *Reviewing the 1945 Constitution*, Malang: Brawijaya University Malang Press (UB Press), 2012, p. 3.

of the 1945 Constitution carried out by the Indonesian Independence Business Preparatory Body (hereinafter referred to as BPUPKI) experienced ups and downs in terms of the existing thinking at that time. The formulators of one and the other formulators both have different views, although in the end the different views can be united because they are concerned with the interests of a greater benefit. The birth of the 1945 Constitution has fundamental and operational objectives in the administration of government and state.

The birth of the 1945 Constitution which was formulated by the founders of the nation is part of the signs of concern from the formulators of the 1945 Constitution for Indonesia for the next period. This is evidenced by a fairly comprehensive arrangement that has high philosophical, normative and sociological values, where the main goal is to make the future of this nation more orderly, more focused, and able to determine future goals to be achieved by the nation and state.

The history of the Indonesian nation after independence, consistently placing the position of the 1945 Constitution at the top. This is because the 1945 Constitution is the basic law of the state. Because regulations that are more operational are regulated through regulations under the 1945 Constitution. There are articles in the 1945 Constitution that can be followed up by the regulations below, there are also articles that constitutionally can no longer be followed up by the regulations below. On the other hand, in principle, every written statutory regulation including the 1945 Constitution can be ascertained to have weaknesses that must be realized, especially by the existing powers. This requires the powers that have the authority to form or amend the 1945 Constitution as a written regulation to really pay close attention to what should be formed and amended in the 1945 Constitution. The 1945 Constitution as a written regulation has the potential to lag behind the situational conditions of society. Because written regulations could have been formed at that time, while the situational society has undergone changes from various dimensions. So, like it or not, the 1945 Constitution must be amended according to the times.

Legal politics requires changes to the law to be made for the better and right. Legal politics also underlines that every legal change must be seen as and assessed as a form of change that brings more value to the life of the nation and state. In addition, legal politics also responds that the law is formed by authorized human power which is full of limitations. The limited ability of the makers or modifiers of the 1945

Constitution in viewing the situational situation of the people of other nations and nations is an inseparable part of the quality of the law produced. In the perspective of natural law, the limited capacity of the legislators can still be accepted by other human legal logics. But what is difficult to accept by sound human legal logic is when the human resources owned by the legislators and the background are not clear when they are forced to become part of the lawmakers (1945 Constitution). So it is not surprising when the quality value of the legal product is low, because it is not supported by the quality of its constituents.

When legal politics is interpreted as what should be normalized, then the principle of open legal policy becomes part of the development of law towards a better and correct direction. In the sense that the spaces for making changes to the law (constitution) for the better and better are always open. Legal politics as an instrument in the field of law is intended for the common interest of the whole community, not for the interests of certain parties or the interests of groups in society. So legal politics was built in order to provide certainty to the public that the state exists through the implementation of whatever has been regulated in the constitution itself.

Indeed, the material content of the 1945 Constitution should truly describe the face of Indonesia in all its variants. Therefore, changing or whatever the name of the 1945 Constitution is also not easy to do even though the principle of open legal policy towards the 1945 Constitution is open. So that the material content in the 1945 Constitution can truly reach the needs of the community and the interests of the state, not only in the short and medium term, but also must be able to reach the long-term ideals of the nation and state. Amendments to the 1945 Constitution must adhere to the precautionary principle, especially the 1945 Constitution as the basic law of the state which incidentally is the portrait and the main instrument regarding the state and government. That's why someone who wants to know various things about a country and its government does not need that person to come to the country in question, but only needs to study the constitution that he adheres to.

The basic things that fall into the category of community needs and the interests of the state are regulated in the 1945 Constitution. For example, the form of the state and the system of government, how much state equipment is needed to exercise state power, how the state provides protection for citizens, what are the

goals of the state, and matters of a principal nature, all of which are regulated in the 1945 Constitution. It is a necessity that in modern countries, the rule of law is needed in the administration of the state. The rule of law is not only a rule of law that regulates problems casuistically, but the rule of law must have a more visionary future and as a preventive law for a long period of time. There are many advantages when the law that is formed has a visionary future, one of the advantages is that the state can suppress expenditures from the state budget in such a way, because every formation or change of law requires a high budget.

The state as the highest power in the state must be able and sensitive and sensitive in creating prosperity and welfare for its people. The state must also be able to control various actions and actions of existing powers that can reduce its authority as a state and have the potential to harm the people and the state itself. In overcoming all this legal policy, a good and correct for a country that already has a written constitution like Indonesia, it's just a matter of how the powers that exist in the country have the ability to translate the contents of its constitution. The ability to translate the contents of the constitution, of course, cannot be done by everyone. But the ability to translate the contents in the constitution can only be done by people who have the ability in the field of constitutional law and legal science in general.

A visionary-holistic constitution is the essence of legal politics from what should be normalized in the formation of laws or constitutions. On the opposite side, an independent country of course has a constitution, but it still needs changes to suit the situation and conditions of its era. Constitutional law politics is basically a crystallization of the nation's character which is formulated based on the legal needs of the community and the interests of state law. So that the legal politics in the constitution should really be able to become a parameter and measure of the next legal political development. Legal politics in the constitution must be able to expressly and implicitly provide answers to various problems of the nation and state administration. The implied nature of the constitution must really be translated properly and correctly. Therefore, it is necessary to have subject interpreters of the constitution who have capabilities in their fields, if in Indonesia, apart from the People's Consultative Assembly (hereinafter referred to as MPR) there is also the Constitutional Court (hereinafter referred to as MK). However, the power of the MK

in this respect is narrower than that of the MPR, because the MK cannot amend the 1945 Constitution, but is limited to translating the contents of the 1945 Constitution.

The party authorized to draft and amend the constitution or the 1945 Constitution must have advantages over other legal subjects. The MPR, which constitutionally has authority in the field of constitution, is expected to have different capabilities and knowledge from other state institutions such as the House of Representatives (hereinafter referred to as DPR), the Supreme Court, the Regional Representatives Council, and other state institutions. Although the 1945 Constitution stipulates that the members of the MPR consist of members of the DPR and DPD, the two state institutions are in fact still classified as institutions whose members are factually doubtful in terms of their ability in the field of constitution.

The author hopes that the perception and assessment above may not be true, and be proven by the performance of MPR members who are more professional in all respects, especially when it comes to amendments to the 1945 Constitution. It is not good and will set a bad precedent when there are issues that develop in the midst of this. the community regarding changes to the 1945 Constitution. Amendments to the 1945 Constitution are certainly changes that can deliver the achievement of state goals in a fair and equitable manner.

In Mawardi's opinion, quoted by Maskur Hidayat,<sup>5</sup> a leader or power in power in addition to having adequate individual qualities must also have a character that is liked by the people. In this case Mawardi has introduced a pattern of legitimacy that must be owned by the ruler. The legitimacy in question is that the belief that exists within the community that the authority that exists in the ruler is reasonable and deserves respect. In the opinion of King Faisal Sulaiman,<sup>6</sup> the idea of changing the 1945 Constitution emerged after seeing the fact that while using the 1945 Constitution as a written constitution, Indonesia was never democratic. Although the principle underlying the Constitution itself adheres to the notion of democracy, with an explicit statement about "the sovereignty of the people is in the hands of the people" or "populist". Although the founder of this country has affirmed his choice of a democratic system, as long as the 1945 Constitution is in effect, it regulates our

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<sup>5</sup> Maskur Hidayat, *The Concept of a Beneficial State, A Study of State Theory According to Imam Al Mawardi, Thomas Hobbes, John Locke and Jean Jacques Rousseau*, Sidoarjo: Laros, tt, p. 139.

<sup>6</sup> King Faisal Sulaiman, *Indonesian Legal Politics*, Yogyakarta, Thafa Media, 2017, p. 111-112.

constitutional system and gives that power to organic laws. This condition opens up opportunities for lawmakers, namely the President and DPR, to regulate all matters that are very crucial for the life of a democratic state, which should be regulated in a constitution.

Legal politics in the 1945 Constitution only regulates several designations of laws and regulations that must exist in the administration of government and state, both regulations in the form of Laws (hereinafter referred to as UU), Government Regulations in Lieu of Law (hereinafter referred to as Perpu) and Government Regulations (hereinafter referred to as PP). Another term for the form and type of legislation which in practice the government and statehood of the 1945 Constitution does not regulate it. This shows that the three types and forms of legislation mentioned in the 1945 Constitution are types and forms of legislation whose position is more abstract than other regulations that are more concrete in nature, such as Government Regulations, Ministerial Regulations and others. .

In the opinion of Maria Farida Indrati,<sup>7</sup> in the 1945 Constitution both before and after the amendment, not much was stated about the laws and regulations, apart from mentioning several types. The 1945 Constitution explicitly mentions only UU, Perpu, and PP, while other laws and regulations grow and develop in line with the state administration and governance practices of the Republic of Indonesia.

### **Research Methods**

This research uses normative legal research, because what is being studied is the legislation. Normative research is legal research that includes research on legal principles, research on legal systematics, research on the level of legal synchronization, research on legal history, and research on comparative law.<sup>8</sup> Legal materials consist of primary legal materials and secondary legal materials. The primary legal materials are the 1945 Constitution and UU number 12 of 2011 concerning the Establishment of Legislation. Secondary legal materials in the form of books, journals and the results of previous research in the form of theses, dissertations related to the problems and opinions of experts who are related to the

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<sup>7</sup> Maria Farida Indrati, *Science of Legislation, Types, Functions, and Content*, Yogyakarta: Kanisius, 6th Printing, 2011, p. 183

<sup>8</sup> Soerjono Soekanto, *Introduction to Legal Research*, Jakarta: UI Press, 1981, p. 51.

problems discussed. Meanwhile, there are 2 (two) approaches used, namely the statutory approach and legal history.

The technique of collecting legal materials used in this research is a literature study, namely by reviewing positive legal regulations related to the issues discussed, and books relevant to the problem, namely: the 1945 Constitution and UU number 12 of 2011 concerning the Establishment of Legislation. Furthermore, the collected materials will be analyzed descriptively qualitatively.

## **Discussion**

### **1. Legal politics as a means and direction for the administration of the state and government**

Each country has a goal to be achieved by the country concerned, and each country has different goals from one country to another, namely depending on the origin of the country it was formed based on politics. applicable law. So here the political position of law in the state as a means and guidelines in achieving state goals. In the formation of legislation, legal politics has a very important role. First, as a reason why it is necessary to establish a statutory regulation. Second, to determine what will be included in the legal or constitutional material content. These two are important because the existence of statutory regulations and the formulation of articles is a bridge between the legal politics in the implementation stage of the legislation. This is because between the implementation of laws and regulations there must be consistency and a close correlation with what is defined as politics.<sup>9</sup>

As a means and direction in the administration of the state and government, legal politics will provide answers to various problems of the nation and state. Therefore, legal politics is very important, with its non-rigid nature, the presence of legal politics is eagerly awaited by a country. Good and correct legal politics will always provide *problem solving* rather than various problems of the nation and state. Political law is a means of state and government in achieving goals. Thus, the material content that is built in the 1945 Constitution is really the material content that should be. Although the word that should itself does not end in the pouring of norms in the article at that time. The word supposed to be in the content of legal politics is always

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<sup>9</sup> Abdul Latif and Hasbi Ali, *Political Law*, Jakarta: Sinar Graphic, Third Printing, 2014, p. 19.



changing, according to the conditions. So the word should in the meaning of legal politics has a dynamic and continuous nature in a correlative way with the situation.

#### 1) The origin of the 1945 Constitution

Some say that a constitution is a substitute for the title of the 1945 Basic Law. Entering the reform era, in addition to the amendments to the 1945 Constitution, there is also the use of the term "constitution" as a substitute for the Basic Law. The use of the term is actually not new, but is now becoming more common. Even the new state institutions that were born as a result of the amendments to the 1945 Constitution in the reform era used the name "constitution", namely the Constitutional Court/MK. The use of the term substitute for the Legal Basic refers to the term in English, namely "constitution".<sup>10</sup>

The constitution comes from the basic word *constituer* which means to wake up, basically directed at understanding the framework of the state building that was formed. In fact, every state constitution contains basic arrangements as well as the goals and objectives to be achieved by the state for the administration of the state. In addition, every constitution regulates the existence of state organs and the basic rights of citizens.<sup>11</sup> The constitution is the basic law that is used as a guide in the administration of a country. The constitution can be in the form of a written basic law which is commonly called the Basic Law, and it can also be unwritten.<sup>12</sup> In the Oxford Dictionary of Law, constitution is defined as:

"The rules and practices that determine the composition and functions of the organs of the central and local government in a state and regulate the relationship between the individual and the state".<sup>13</sup>

The above definition is interpreted as follows: First, what is called a constitution is not only written rules, but also what is practiced in state administration activities. Second, what is regulated is not only related to state organs and their composition and functions, both at the central and regional levels, but also the mechanism of relations between states or state organs and citizens.<sup>14</sup>

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<sup>10</sup> Daniel Zuchron, *Suing Humans in the Constitution, Philosophical Studies or the Post-Amendment 1945 Constitution*, Jakarta: Rayyana Communicationsdo, 2017, p. 4.

<sup>11</sup> Faried Ali and Nurlina Muhidin, *Heteronomous and Autonomous Governance Law*, Bandung: Refika Aditama, 2012, p. 19.

<sup>12</sup> Jimly Asshiddiqie, *Indonesian Constitution & Constitutionalism*, Jakarta: Sinar Graphic, Second printing, 2011, p. 29.

<sup>13</sup> *Oxford Dictionary of Law*, Fifth Edition, Oxford University Press, 2003, p. 108.

<sup>14</sup> Jimly Asshiddiqie, *Introduction to Constitutional Law*, Jakarta: Rajawali Press, Fourth Printing, 2012, p. 96.

Although there are differences, basically the constitution and the basic law will contain provisions concerning, among others:<sup>15</sup>

1. State form, form of government, and system of government.
  - a. The form of the state is a unitary, federal, confederation, or union state.
  - b. The form of government is a republic or kingdom, the kingdom also includes the empire.
  - c. The system of government is a parliamentary, presidential, or mixed system (such as France and Russia).
2. State equipment. The equipment at least consists of legislative, executive, judicial powers (following the teachings of Montesquieu). For example: the United States. There are also countries that have equipment from other countries (the Netherlands), France and others.
3. How to fill in State equipment with State officials. State equipment can be filled through election (election), appointment (appointment). Elections can be carried out directly by the people through general elections, or indirectly through representative bodies.
4. Relations between state equipment (collegial relationships, supervisory relationships, advisory relationships, accountability relationships).
5. The power and limitation of the power of state equipment.
6. The relationship between state equipment/State equipment officials and the people (regulatory relations, service relations, guarantee and protection relations).
7. Citizenship and citizenship rights (basic and non-human).
8. How to update the constitution.
9. Transition rules.
10. Others (General Election Commission, Personnel Commission).

In the practice of world countries including Indonesia, no constitution is perfect and cannot be changed. On August 18, 1945, Soekarno as the Chief Drafter of the 1945 Constitution had said "that the current constitution made is a provisional constitution, if I may use this word it is an express constitution. Later, when we have a state in a more peaceful atmosphere, we will certainly gather an MPR that can make

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<sup>15</sup> Bagir Manan, *Op.cit*, p. 98-9.

a more complete and more perfect constitution. Based on Soekarno's statement above, this shows that from the beginning of the formation of the 1945 Constitution, it is still far from what it should be for the Indonesian nation and state. Even now, what Soekarno said is still happening and changes to the 1945 Constitution will always exist, especially since the 1945 Constitution itself regulates the changes.

In the opinion of Nurus Zaman,<sup>16</sup> the successive changes to the Constitution owned by a country are commonplace. However, the normality of the amendment to the Constitution indirectly shows that the quality of the drafters of the Constitution is questionable, because ideally a Constitution is valid for at least a relatively long time, the Constitution is the basic law of the state which specifically regulates basic and principal matters concerning the state. Indeed, in reality, and perhaps it will always happen that between what has been regulated in the constitution and the real needs of the people, there is always a lack of synchrony. This is rational-conceptually acceptable, because the constitution that was formed may be in accordance with the time it was formed, even though a constitution should be able to cover what events will occur in the future. Moreover, the constitution is formed on the basis of the constitution makers. So it is not an exaggeration when the author has the view that until then he will not find a perfect constitution if the constitution is still formed on the basis and the results of the agreement of its constituents.

It is said that the constitution becomes the principles of the state, in a formal sense as the basic law, but the basic principles of the constitution do not only lead as the basic foundation of the state. The basic principles of the constitution are considered as the basic essence in forming, engineering, and strengthening the basic foundations of the state so that they are maintained.<sup>17</sup> Thus, the content of legal political material in the constitution should truly reflect the character and vision and mission of the state. On the other hand, according to Jimly Asshiddiqie's opinion as quoted by Anwar C,<sup>18</sup> several aspects contained in the 1945 Constitution so that it is

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<sup>16</sup> Nurus Zaman , *Outline of National Law Development, A Philosophical, Normative and Sociological Review*, Surabaya: Bijak Publishing, 2018, p. 107.

<sup>17</sup> Muhammad Junaidi, *Constitutional Law Views and Ideas for Modernizing the State of Law*, Jakarta: Rajawali Press, 2018, p. 16.

<sup>18</sup> Anwan C, *Constitutional Theory and Law, Paradigm of Sovereignty in the 1945 Constitution (Post Amendment) Implications and Implementation in State Institutions*, Malang: Intrans Publishing, 2011, p. 135.

not sufficient to support the administration of a democratic state and uphold human rights, among others are as follows:

1. The 1945 Constitution has too few articles and paragraphs, only consisting of 37 articles so that it does not/does not regulate various matters concerning the administration of the state and the life of the nation in it which are increasingly complex.
2. The 1945 Constitution adheres to the supremacy of the MPR which means that there is no system of checks and balances between branches of state power.
3. The 1945 Constitution gives very large powers to the President (executive heavy) so that the role of the President is very large in the administration of the state.
4. Some of the contents of the 1945 Constitution contain the potential for multiple interpretations that open up opportunities for interpretations that benefit the authorities.
5. The 1945 Constitution strongly entrusts the implementation of the 1945 Constitution to the spirit of state administrators.

Looking back, the 1945 Constitution was drafted and formed at a time when the state could be said to be unstable, especially regarding prosperity and welfare for the people. Such conditions and situations result in the material content contained in the 1945 Constitution is also not perfect. According to Bagir Manan,<sup>19</sup> there is not always a congruence between *Das Sollen* and *Das Sein* which can occur due to several things, namely: First, the formulations in the Constitution are purely philosophical, apart from the existing reality. Second, the formulations are multi-interpreted (*vague*) and incomplete, so there are differences in application from time to time and are easy to misuse.

Third, the disloyalty of historical actors to their own ideals that arose because of (1) the encouragement *pragmatism*, namely encouraging or creating an attitude of being easy to meet demands or easy to adapt to reality even though it was contrary to the basic concepts of the state they had built; (2) The lust for power, which considers obedience to the basics and provisions of the Constitution, is an obstacle to exercising power freely which ends in one power in one hand which is authoritarian. Power is

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<sup>19</sup> Bagir Manan, *Reviewing the 1945 Constitution*, Malang: Brawijaya Press (UB Press), 2012, p. 111-112.

no longer exercised and intended to be the ideals of the state but as a pleasure for the rulers.

Fourth, the existence of an explanation made after the 1945 Constitution came into effect, not only an explanation but also contains new principles and rules, even giving rise to various different interpretations in its application. This causes the implementation of the 1945 Constitution to be inconsistent and inconsistent. The administration of government that is not in accordance with the *staatsidee* of democracy and the rule of law is still said to be based on the 1945 Constitution.

Furthermore, according to Bagir Manan,<sup>20</sup> implementing the 1945 Constitution in a pure and consistent manner is a concept to uphold the constitutional order in the life of society, nation and state according to the principles of democracy, the state based on law, and the general welfare according to the basis of social justice. for all Indonesian people. Bagir Manan's view above, of course, does not always have to appear in the form of direct orders from the 1945 Constitution for the competent authorities. But it can also go through various interpretations that are in accordance with the goals of the nation and state. Because the articles in the 1945 Constitution are not always in the form of articles that can be directly implemented, but sometimes there are articles that must be translated or interpreted by the existing powers through the means of the regulations under them.

It is indeed a crucial issue, when the articles that still require interpretation are carried out according to their interests. At least the consequences that will arise if the articles in the 1945 Constitution are interpreted in accordance with the interests of the subject performing the interpretation are as follows: (1) Legal certainty which is one of the objectives of the law is substantially absent or at least reduced and questioned. (2) The collapse of the value of the existing state power legitimacy. (3) The actions and actions of power have the potential to be abused. (4) Depriving the community of the value of justice. Therefore, the use of legal language in formulating the norms in the article should be carried out properly and correctly, namely based on standard language rules.

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<sup>20</sup> Bagir Manan, *Constitutional Theory and Politics*, Yogyakarta: Faculty of Law, Islamic University of Indonesia, Second Printing, 2004, p. 125.

In the opinion of Jimly Asshiddiqie,<sup>21</sup> the language of legislation is subject to good and correct Indonesian rules, writing techniques as well as spelling and punctuation. But in addition, the regulatory language has the characteristics of clarity of understanding, clarity, and straightforwardness of formulation, standardization, harmony, and adherence to principles in the use of words according to the legal needs faced. Jimly Asshiddiqie's view It does mention and specialize in statutory regulations, but according to the author it also applies to the language formulation that will be compiled in the 1945 Constitution, regardless of whether the 1945 Constitution is part of the legislation or not. However, if you look at the provisions of Article 7 of UU number 12 of 2011 concerning the Establishment of Legislation, which states: (1) The types and hierarchy of laws and regulations consist of: a) the 1945 Constitution of the Republic of Indonesia; b) Decree of the People's Consultative Assembly; c) Laws/Government Regulations in Lieu of Laws; d) Government Regulations; e) Presidential Regulation; f) Provincial Regulations; and g) City Regency Regional Regulations. Paragraph (2) The legal force of laws and regulations is in accordance with the hierarchy as referred to in paragraph (1).

Based on the provisions referred to above, the position of the 1945 Constitution is part of the type of legislation. This is also reinforced by paragraph (2) which explicitly states that the legal force of each of these regulations is in accordance with the hierarchical level. The more the regulation occupies a position above, the higher the legal force. The consequence is that the regulations under it must not conflict with the regulations above. However, the enactment of the 1945 Constitution as part of the type of legislation is not the same as the enactment of the regulations under it. If the regulation is in the form of a law or so on, then its validity must be promulgated through a specified place, for example the law is promulgated through the State Gazette, then the law is valid and binding. Meanwhile, the placement of the 1945 Constitution in the State Gazette is not a condition for the validity of the 1945 Constitution.

According to Bagir Manan,<sup>22</sup> the validity of the 1945 Constitution lies in the fact that it is a legal rule that is accepted and obeyed. Moreover, the Constitution was

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<sup>21</sup> Jimly Asshiddiqie, *Regarding the Law*, Jakarta: Rajawali Press, 2011, p. 171.

<sup>22</sup> Bagir Manan and Kuntana Magnar, *Some Problems of Indonesian Constitutional Law*, Revised Edition, Bandung: Alumni, 1997, p. 181.

established by Indonesian Independence Preparatory Committee (hereinafter referred to as PPKI) whose members are people recognized by the people as leaders whom they accept as representatives in fighting for, forming and compiling an independent and sovereign Indonesian state. If there is a lack of the Constitution, it can be improved through changes without the need to go through the procedures for establishing a new Constitution. This system of changes at the same time maintains the 1945 Constitution as a document that will remain part of the Constitution along with its amendments.

Meanwhile, according to Mahfud MD,<sup>23</sup> that the applicable law or constitution is a law or constitution that is officially enforced by the nation and state concerned without having to question whether it is good or bad or the theoretical basis. Basically, what is declared valid by the competent authority is what must be accepted. No matter how good the theories or views of experts or laws that apply in other countries, it will not be enforced if it is not officially stipulated as a constitution or law by the competent authority. Furthermore, Mahfud MD said, the legal politics contained in the 1945 Constitution as a result of the amendments are as follows: (a) the concept of the rule of law; (b) MPR is not the highest state institution; (c) regional autonomy; (d) TAP MPR is not a statutory regulation; (e) direct presidential election; (f) socio-economic rights; (g) judicial power; (h) the politics of law and regulation; and (i) national legislation program. However, what was conveyed by Mahfud MD, related to legal politics in the 1945 Constitution after the amendment, according to the author's opinion, is relative, meaning that the change at a certain time can be changed again, with the model of change that can be added and can also be reduced. This is the essence of legal politics with the meaning of what should be normalized.

UU number 12 of 2011, the 1945 Constitution includes the types and forms of legislation, but UU number 12 of 2011 does not regulate the procedure for the amendment. The procedure for amending the 1945 Constitution is regulated directly in the 1945 Constitution itself. This shows that there is a clear difference in the normative recognition of the types and forms of laws and regulations between the 1945 Constitution and the regulations under it (UU). Besides that, the parties that make changes are also different, if the regulations (UU) of the parties that make or

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<sup>23</sup> Moh. Mahfud MD, *Post-Constitutional Constitutional Law Debate*, Jakarta: RajaGrafindo Persada, 3rd Printing, 2013, p. 51-61.

make changes are the DPR together with the President and even in the case of certain laws it also involves the DPD. Meanwhile, the party authorized to amend the 1945 Constitution is the MPR, although the members of the MPR are also members of the DPR, but institutionally the two are different.

## **2. The urgency of the 1945 Constitution in the administration of the state and government**

The urgency of the 1945 Constitution in the administration of the state and government, it is proven that the preparation process was carried out before independence, both carried out by BPUPKI and PPKI. The preparation of the 1945 Constitution really requires a comprehensive-holistic thought. Because it is directly related to citizens and their own country. Legal politics in the constitution, apart from referring to the legal system adopted by the state, which is no less important, refers to the goals of the state to be achieved. Both must be in harmony, so that the building of norms built in the 1945 Constitution will describe and reflect the legal needs of the community at the same time as describing and reflecting the interests of state law. Even today, for modern law countries the model in state administration is no longer a priority, but the most important thing is how the achievement of the state's goals becomes a reality.

According to Schuit's opinion as quoted by Otong Rosadi and Andi Desmon,<sup>24</sup> that a legal system consists of three elements that have certain independence (has an identity with relatively clear boundaries) which are interrelated and each of them can be further elaborated. The elements in question are as follows: First, the ideal element, this element is formed by the system, the meaning of the law consists of rules, rules or principles. Second, the operational element, this element consists of all organizations and institutions, which are established in a legal system that is installed into it as well as position holders (*ambtsdragers*) who function within the framework of an organization or institution. Third, the actual element, this element is the entirety of concrete decisions and actions related to the meaning system of the law, both from the office bearer and from the citizens of the community in which there is a legal system.

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<sup>24</sup> Schuit in Otong Rosadi and Andi Desmon, *Legal Politics Studies, An Optics of Legal Studies*, Yogyakarta: Second Printing, 2013, p. 19-20.



For Indonesia itself, it seems that building a good and correct system is still a priority in the administration of the state and government. This can be seen from the alternation of products of laws and regulations that are formed, including policies, in addition to changes in the nomenclature of state and government administrators. On the other hand, the state or government often voices the various achievements produced. It appears that there is an asymmetry between the improvement of the system and the existing achievements, and perhaps this is part of the reason why the country's goals have not always been shared by elements of society equally. In theory it is possible to achieve both at the same time, but in reality it is not possible.

The 1945 Constitution contains the main ideas contained in the preamble and in its articles. These ideas include the mystical atmosphere of the 1945 Constitution. These ideas embody the ideals of law (*rehtidee*) which governs the basic law of the state, both written law and unwritten law. The Constitution creates these ideas in its articles.<sup>25</sup>

Legal politics in the constitution is not only limited to the scope of sources from all sources of law, but the politics of constitutional law is even more profound as a legal policy issued from all lines of state administration and government within the framework of a unitary state. Therefore, the material content contained in the 1945 Constitution is not just an ordinary regulatory material content, but belongs to a special category of material content, because in the 1945 Constitution the direction of all Indonesian state and government administration originates and ends. In simple words, the 1945 Constitution is a product of regulations that regulate from downstream to upstream of existing laws and regulations (starting with the 1945 Constitution and ending in the 1945 Constitution).

The politics of constitutional law does not have a single value, but the politics of constitutional law stems from various national values, namely those that do not only focus on the values of the Indonesian nation, but also contain the values of other nations. This is because the constitution does not only contain norms that are the needs of local communities, but the content of the constitutional material also contains what is in the interest of the state. Meanwhile, the interest of the state in the

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<sup>25</sup> Maria Farida Indrati, *Legislation, Types, Functions, and Content*, Yogyakarta: Kanisius, 6th Printing, 2011, p.58.

1945 Constitution is not only related to its people, but also relates to other countries, for example: the free and active politics that have been implemented so far.

According to Mochtar Kusumaatmadja,<sup>26</sup> so that our law (Indonesia) can develop and we (Indonesia) can relate to other nations in the world as fellow legal communities, we (Indonesia) need to maintain and develop principles and concepts that are generally human beings or universal legal principles. Due to the fact that many principles and concepts are taken from the world which originated from Roman law, it should not be an obstacle or considered to reduce our dignity (Indonesia) as an independent nation. Mochtar Kusumaatmadja, gave an example of countries such as Turkey, Thailand and Japan which were never colonized by other countries, and did not hesitate to modernize their civil law by making translations of the Swiss and German Civil Codes into their civil law codes.

Mochtar Kusumaatmadja's view above, even now seems to still be the primary choice for Indonesia, especially from a historical point of view, Indonesia is a country that has been colonized by other countries. The adoption of principles and concepts originating from other countries does not have to be in the form of formulating norms or in the form of existing articles . So that the content of the norms compiled in the 1945 Constitution truly reflects two interests and two models of anticipation between the internal affairs of the state and the external affairs of the state. The 1945 Constitution has the functions of state administration, because the 1945 Constitution contains various provisions that reflect the existence of the State and how the State was built along with the procedures related to the implementation of state governance. The general functions of the constitution are:<sup>27</sup>

1. Transformation function: the constitution contains legal pronouncements which are usually in the form of statements which are intended to have a binding effect in general because the provisions are very abstract and are formulated at a macro level. The constitution has a transformation function if the constitution is able to convert power into law.
2. Information function: the constitution contains information where the content of the information is determined by the influence of political

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<sup>26</sup> Mochtar Kusumaatmadja, *Legal Concepts in Development*, Bandung: Alumni, 2006, p. 183-184.

<sup>27</sup> Didik Sutriyono, *Law, Constitution and the Concept of Autonomy Legal Political Studies on Constitution, Regional and Village Autonomy Post Constitutional Amendment*, Malang: Setara Press, 2013, p. 51-52.

transformation with the help of the constitution. What is transformed is information that has been codified in a legal codification whose character is determined by cultural factors (eg the language used to formulate certain concepts) and other supranational factors.

3. Regulatory function: information that has been codified in the constitution has an effect on a regulation regarding the attitudes, behavior, and expectations of the people. The fact that a constitution exists is an information which is not only limited by its existence, but because of the fact that the constitution is the supreme law. The constitution regulates behavior and decision processes, and formulates legal powers, so it is called the *normative effect of the constitution*.
4. The function of canalization: the constitution contains guidelines regarding legal and political problems that must be resolved, for example: the constitution contains a procedural answer to the question of how the will of the political majority can bind everyone because in fact every law must be the influence of the will of the majority. In addition, the constitution indicates that legal and political problems must be resolved based on certain objectives or principles, such as the principle of equality, the principle of the rule of law, rechtsstaat, and so on. In this case, the constitution opens channels with specific guidelines, in which various social problems are channeled and channeled so that they are solved. Political conflicts are instead directed into certain channels and resolved in a definite way. Thus, canalization means that the constitution creates or creates a certain structure in which political and legal developments take place.

The state is present as part of the means to strengthen the existence of the nation. The existence of the state is not a goal in the nation, but the state is only an extension of the community. In the view of Islam, the existence of the state is not a goal (*ghayah*), but as a means to an end (*waslah*). The purpose of the establishment of a state is to realize the benefit of human beings physically and mentally, both in this world and in the hereafter. In other words, the presence of the state must create prosperity and prosperity that is just and divine. Because the position of the state is as an instrument or means, it makes sense if in the revelation text the form of the state and the system of government is not stated explicitly and in detail. On the other hand,

the revelation text talks a lot about the state and government in a macro and universal way. This is as reflected in the general principles of *ash-shura* (consultation), *al-is* (justice), *al-musawah* (equality), and *al-hurriyah* (freedom).<sup>28</sup>

All products of legislation under the 1945 Constitution have constitutional value in the 1945 Constitution. Every statutory regulation must have a clear principle, because laws and regulations that are formed without principles will give birth to regulations without direction and goals that are not clear. Because it is from the existing principles that the direction and purpose of a statutory regulation is known.<sup>29</sup>

The most appropriate choice is that the constitution is at least valid for a relatively long time, then the constitution regulates transitional rules. According to Bagir Manan,<sup>30</sup> the transitional rule is a legal policy and at the same time the principle of the formation and existence of a written law or a statutory regulation due to changes in a statutory regulation. Thus, the rules of transition are not found in unwritten law. Transitional rules arise because of the following:

1. One of the general principles for the formation of laws and regulations states that every new law nullifies the old law. As new laws and regulations are formed, the old basic laws and regulations that are legally similar (*van rechtswege*) are no longer valid. The consequences of not being legally enforceable, not only for similar or equivalent statutory regulations (between the new and the old), but also include all forms of lower statutory regulations, or decisions that are not statutory regulations (*beleidsregels*) and policies as a substitute for the old laws and regulations that are similar or equivalent to the new laws and regulations.
2. The principle of "*ubi societas ubi ius*", in terms of legislation, this principle implies that the formation of legislation is not in an empty space. Before new laws and regulations are made, there are almost always old laws and regulations, or more broadly there are laws with similar content to new laws and regulations. The old laws and regulations have had various legal

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<sup>28</sup> Afifuddin Muhajir, *State Administrative Fiqh, Efforts to Dialogue the Islamic State Administration System*, Yogyakarta: Ircisod, 2017, p. 23-24.

<sup>29</sup> Nurus Zaman, *Reconstruction of the Vice President's Power in the Government System in Indonesia, A New Paradigm of Efforts to Accelerate State Goals*, Bandung: Refika Aditama, 2018, p. 171.

<sup>30</sup> Bagir Manan, *Constitutional Theory and Politics*, Op Cit, p. 167-168.

consequences in their application. These various legal consequences need to be accommodated and given a reasonable place by the new laws and regulations, to ensure order, peace, justice, and legal certainty. For this reason, a connecting rule is needed that regulates the transition of the state which is tamped in the transition rule.

One of the transitional rules in the 1945 Constitution seems to be used as a constitutional rule in relation to the anticipation of a legal vacuum. The consequence is the potential for a less serious attitude from the existing powers to form good and truly open laws. It is even possible that the regulatory products that are formed are intentionally formed with the model as it is because whatever and how the state and government situation will never experience a legal vacuum. The author agrees that the provisions contained in the 1945 Constitution specifically regulating the validity of the old law are abolished, as evidence as well as a challenge for lawmakers or constitutions in forming quality, good and correct laws.

### **Conclusion**

1. The form of legal politics in the 1945 Constitution is a means for achieving state goals. So that *basic law* of building legal politics in the constitution comes from the values that live and develop in the midst of society and also refers to the legal system it adheres to. The legal political building in the constitution does not have a single value, but the legal political building in the constitution is sourced from various national values, including the content of the values of other nations. Because the constitution does not only contain norms that are the needs of the Indonesian people, but also relates to other countries, for example: the free and active politics that have been implemented so far.
2. Legal politics in the 1945 Constitution is not rigid or impermanent, but the nature of legal politics in the constitution is flexible, that is, it can adapt to the situations and conditions of its era. So that the existence of legal politics in the constitution can be changed according to the needs and interests, but the changes remain in the form of actualization and crystallization of the nation's character and the legal system adopted.

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