

The Influence of TAP MPR's Position on The Hierarchy System of Indonesian Laws and Regulations

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Abstract

This study aims to analyze the influence of TAP MPR in Indonesia. Placement of MPR Provisions in Law No. 12 of 2011 on the hierarchy of Legislation in Indonesia becomes one of the problematics that needs to be discussed, on the grounds of the position of MPR provisions that are under exactly the Constitution of 1945. This is based on the position of the MPR Decree itself which will automatically become a reference to the rules under it, in accordance with the theory of stairs put forward by Hans Kelsen. Although from the point of view of the position of MPR determination is still understandable if Hans Nawiasky theory is used as the basis. But in terms of testing itself of course this will raise a big question mark for all of us because in the Constitution of 1945 institutions or institutions that have the right to conduct a test of the Law is the Constitutional Court and the Supreme Court, but within its own scope the Provision of MPR is outside the juridical territory of the two Institutions themselves. Therefore, there needs to be a solution if at any time the MPR Decree is not in accordance with the basis of the 1945 Constitution so that there will be no defects in one of the legal sources of the State of Indonesia.

Keywords: TAP MPR; Hierarchy; Judicial Review; Legislation

Abstrak

Kajian ini bertujuan untuk menganalisis pengaruh TAP MPR di Indonesia. Penempatan Ketentuan MPR dalam Undang-Undang Nomor 12 Tahun 2011 tentang Hierarki Peraturan Perundang-undangan di Indonesia menjadi salah satu problematika yang perlu dibahas, dengan alasan kedudukan ketetapan MPR yang berada di bawah UUD 1945. Hal ini berdasarkan posisi Ketetapan MPR sendiri yang secara otomatis akan menjadi acuan aturan di bawahnya, sesuai dengan teori tangga yang dikemukakan oleh Hans Kelsen. Meski dari sudut pandang posisi penentuan MPR masih bisa dimaklumi jika teori Hans Nawiasky dijadikan dasar. Namun dalam hal pengujian sendiri tentunya hal ini akan menimbulkan tanda tanya besar bagi kita semua karena dalam UUD 1945 lembaga atau lembaga yang berhak melakukan uji materi UU adalah Mahkamah Konstitusi dan Mahkamah Agung, namun dalam lingkupnya sendiri Ketentuan MPR berada di luar wilayah yuridis kedua Lembaga itu sendiri. Oleh karena itu, perlu ada solusi jika sewaktu-waktu Ketetapan MPR tidak sesuai dengan dasar UUD 1945 sehingga tidak akan terjadi cacat pada salah satu sumber hukum Negara Indonesia.

Kata kunci: TAP MPR; Hierarki; Judicial Review; Legislasi



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A. INTRODUCTION

In each country must be a hierarchy of legislation that moves the process of running a country. In Indonesia this is called hierarchies, in the large Dictionary of Bahasa Indonesia itself the hierarchy is interpreted as a level or level, so if we refer to it then the hierarchy can be explained as a component or structural which in the highest chart it will be a reference to the charts below.¹ In the category of Indonesian law itself there is already a hierarchy of laws and regulations governing the running process of a country where this has been regulated in Law No. 12 of 2011 article 7 (1), and in one component of the legal hierarchy there is one component that is still debated to date about the importance or not of this legal component is included in the hierarchy of Indonesian legislation, namely Tap MPR.²

TAP MPR itself procedural is a legal product made by the Indonesian Consultative Assembly or we can brief as MPR.³ In the early days of self-independence in which Indonesia adhered to the principle of supremacy of the People's Consultative Assembly (MPR) which if we refer to the international realm, this kind of principle is similar to the system of parliamentary government which in its own parliament the position of the legislative body feels very powerful compared to other institutions, but also we see the Indonesian nation that adheres to the system of presidential government, this kind of thing can not immediately we make a reference that Indonesia at that time had violated the system of government itself⁴.

So, this kind of thing that happened in Indonesia at that time can be called as one variant (form) supremacy of parliament in the world because in article 1 (2) of the 1945 Constitution before the amendment itself explained " Sovereignty is in the hands of the people, and carried out entirely by the People's Consultative Assembly." Explicitly the sentence in the article means that the People's Consultative Assembly is a form of the contour body of people's sovereignty, so it is not surprising if the People's Consultative Assembly at that time was the highest Institution of the Government of Indonesia. After the amendment of the 1945 Constitution, the People's Consultative Assembly (MPR) has not possessed a

¹ Hasanuddin Hasan, "Hierarki Peraturan Perundang-Undangan Negara Republik Indonesia Sebagai Suatu Sistem," *Madani Legal Review* 1, no. 2 (2017): 120–30, <https://doi.org/10.31850/malrev.v1i2.32>.

² Aditya Rahmadhony, "Ketetapan Majelis Permusyawaratan Rakyat Dalam Sistem Peraturan Perundang-Undangan Indonesia," *PALAR (Pakuan Law Review)* 6, no. 1 (2020): 92–120, <https://doi.org/10.33751/palar.v6i1.1910>.

³ Nisrina Irbah Sati, "Ketetapan MPR Dalam Tata Urutan Peraturan Perundang-Undangan Di Indonesia," *Jurnal Hukum Dan Pembangunan* 49, no. 4 (2020): 834–46, <https://doi.org/10.21143/jhp.vol49.no4.2343>.

⁴ Muksana Pasaribu, "Kedudukan Hukum Islam Dalam Sistem Civil Law Dan Sistem Common Law," *Jurnal Justitia: Jurnal Ilmu Hukum Dan Humaniora* 7, no. 1 (2020): 77–83, <https://doi.org/10.31604/justitia.v7i1.77-83>.

position as the highest state institution, but as the state high institution where its position is parallel with other state institutions.⁵

In the process itself the People's Consultative Assembly which at that time was named the Provisional People's Consultative Assembly or MPRS due to the issuance of the presidential decree on July 5, 1959 first issued its legal product, TAP MPR in 1966 with decree number XX/MPRS/1966.⁶ The decree was issued to regulate the type and hierarchy of laws and regulations in Indonesia in appendix II (Main Mind IIA) TAP MPRS itself right under the 1945 Constitution.

So, in other words since the regulations governing TAP MPR were issued, its position since the past has been right under the 1945 Constitution and it is up to the latest Indonesia legislation namely Law No. 12 of 2011 but in its own journey TAP MPR was never in the structural hierarchy of Indonesian legislation precisely in law no. 10 of 2004, but in the absence of TAP MPR in the law then not so the existence of TAP MPR will not be recognized. However, this only lasted 8 years because in the latest law that applies until now the position of TAP MPR Back under the 1945 Constitution, of course this is a separate obstacle related to the testing of legal norms against TAP MPR and vice versa TAP MPR against the Constitution of the Republic of Indonesia 1945.

Theoretically, the testing of norms can be divided into two, firstly the testing of the law against the 1945 Constitution conducted by the Constitutional Court Institution based on article 24C paragraph (1) and the youthful testing of legislation under the Law against the law conducted by the Supreme Court in accordance with article 24A paragraph 1.

However, the testing of TAP MPR is the problem⁷, because there is no regulation that states the existence of an agency that can review the existing norms against TAP MPR. So, it is clear if we tip with theoretical studies both the Court and MA cannot do a review of the TAP MPR because their authority clumps are not there if we are based on what has been written in the 1945 Constitution⁸. After the amendment of the 1945 Constitution itself MPR does not have the authority to issue TAP MPR again, but of course this does not close the possibility of misappropriation of TAP MPR against the 1945 Constitution. If we know for ourselves, until now Indonesia still enforces eight TAP MPR. The eight TAP MPR are:

1. TAP MPRS No XXV/MPRS/1966 on the dissolution of the Communist Party of Indonesia, the declaration as a prohibited organization throughout the territory of the Republic of Indonesia for the Communist Party of Indonesia and the prohibition of any activities to disseminate or develop communist/Marxism-Leninism
2. TAP MPRS No. XXIX/MPRS/1966 on The Appointment of Ampere Heroes

⁵ Sulardi and Fitria Esfandiari, "The Authority of the People's Consultative Assembly and the Discourse of the Limited Amendment of the Constitution," 2020, <https://doi.org/10.2991/aebmr.k.200513.050>.

⁶ Arifin S Tambunan, "Menelusuri Eksistensi Ketetapan MPRS NO. XX/MPRS/1966," *UNISIA: Jurnal Ilmu-Sosial* 30, no. 65 (2007): 238–50, <https://doi.org/10.20885/unisia.vol30.iss65.art3>.

⁷ Tyan Adi Kurniawan and Wilda Prihatiningtyas, "Problematika Kedudukan TAP MPR Dalam Uu No. 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-Undangan," *Yuridika* 27, no. 2 (2012): 121–40, <http://dx.doi.org/10.20473/ydk.v27i2.292>.

⁸ Sholahuddin Al-Fatih, "Model Pengujian Peraturan Perundang-Undangan Satu Atap Melalui Mahkamah Konstitusi," *Jurnal Ilmiah Hukum LEGALITY* 25, no. 2 (2018): 247, <https://doi.org/10.22219/jihl.v25i2.6005>.

3. TAP MPR No. XI/MPR/1998 on The Implementation of a Clean and Free State KKN (Corruption, Collusion, Nepotism)
4. TAP MPRS No XVI/MPR/1998 on Economic Politics in the Framework of Economic Democracy.
5. TAP MPR No. VI/MPR/2001 on Ethics of National Life
6. TAP MPR No. VII/MPR/2001 on Indonesia's Vision of the Future
7. TAP MPR No. VIII/MPR/2001 on Recommendations for Policy Direction of Eradication and Prevention of KKN (Corruption, Collusion, Nepotism)
8. TAP MPR No. IX/MPR/2001 on Agrarian Reform and Natural Resource Management

The eight TAP MPR mentioned to date have not been revoked and remain valid in the Indonesian government. Problematics present if the post- TAP MPR later this one of them there is a conflict with the 1945 Constitution, this kind of thing does not close the possibility can happen if we see for ourselves how the development of the law in each year, therefore we need to anticipate these kinds of possibilities. If we refer to the Decree of MPR No. 1/MPR/2003 on the Review of Materials and Legal Status of the Provisions of the People's Consultative Assembly Year (MPRS) and the Provision of MPR RI Year 1960 to Year 2002.

If we look at what is written in the TAP MPR then implicitly this provision only seeks to provide legal affirmation of the TAP MPR, although after the amendment of the 1945 Constitution itself this legal product cannot be made or repealed. Precisely with this kind of condition it will make the public wonder, then for what reason tap MPR was put back even though after the amendment of the 1945 Constitution there is no longer the authority of the MPR Institution to make or establish TAP MPR back and if there is an error in the eight TAP MPR institutions who are entitled to review the TAP MPR while in the 1945 Constitution itself is not written one institution that can conduct a review of TAP MPR. Therefore, this paper will focus on the two problem points mentioned above.

Based on what has been presented above, then here are two problems that can be taken:

1. Why is MPR regulation again included in one of the sources of Indonesian law based on Law No. 12 of 2011?
2. Institutions entitled to review the MPR Decree in the event of any deviation from the 1945 Constitution?

B. METHOD

Writing is descriptive, which is to describe thoroughly what is the regulation of MPR in the hierarchy of legislation and the impact that is issued to the position of MPR determination position right in the 1945 Constitution.

The approach method used based on the problem is normative juridical research in the form of problem approach through literature study in this journal and legislation⁹ that if it can strengthen what is written in this Journal.

⁹ Nur Putri Hidayah, Said Noor Prasetyo, and Tongat, "Identity Theft and the Rules in Indonesia's Criminal Law," *Advances in Economics, Business and Management Research* 121, no. 1 (2019): 29–34, <https://doi.org/10.2991/aebmr.k.200226.006>.

There are several methods of problem approach that will be outlined in this scientific writing,¹⁰ some of which are as follows:

1. Historical Approach

The approach with History intends to explain the development of the areas of law studied. This approach is done by dissecting the background of what is learned and the developments that will be limited in the future. This research can provide an overview related to the position of TAP MPR.

2. Statutory Approach

The approach to legislation is absolute when the concept of our study uses normative juridical studies.¹¹ Because what will be reviewed in this journal is the rule of law that is indeed the central theme of a legal product assessment research. This approach is carried out with the relevant laws and regulations related to the legal issues discussed in this journal. The research will be focused on the impact of the 1945 MPR determination position under the 1945 Constitution.

3. Conceptual Approach

The conceptual approach moves from the views and doctrinal that develop in the science of law.¹² As well as the formulation of the Constitution of 1945 against the Provision of MPR.

The theory used in this research is the theory of research in the study of the field of law, where the author uses several kinds of theories such as Trias Politika, Check and Balance that have been widely used in the world of international state regulation.¹³ The basic concept is the absence of an Institution that can have authority that exceeds its scope limit and, in each institution, there must be a synergy in order to create good communication between government agencies.

C. RESULT AND DISCUSSION

The reform era is a moment where the State of Indonesia can simplify everything that feels wrong during the new order period.¹⁴ Because in this new order era is very clear that the principle of *check and balance* is not visible at all. Therefore, in this era of reform is expected what is expected by our *founding fathers* can be run as much as possible.

Reflecting on the era before the reform in which there is a highest institution based on article 1 (2) of the 1945 Constitution and article 3 (1) before the amendment, in the article

¹⁰ Depri Liber Sonata, "Metode Penelitian Hukum Normatif Dan Empiris: Karakteristik Khas Dari Metode Meneliti Hukum," *FIAT JUSTISIA: Jurnal Ilmu Hukum* 8, no. 1 (November 5, 2015): 15–35, <https://doi.org/10.25041/fiatjustisia.v8no1.283>.

¹¹ Muhamad Akhsanul Fadli, "Transcendental Approach in Legal Aid Concept in Indonesia: A Philosophy of Law Perspective," *The Indonesian Journal of International Clinical Legal Education* 3, no. 4 (2021): 465–80, <https://doi.org/10.15294/ijicle.v3i4.48293>.

¹² Terry Hutchinson and Nigel James Duncan, "Defining and Describing What We Do: Doctrinal Legal Research," *Deakin Law Review* 17, no. 1 (2012): 83–119, <https://doi.org/10.21153/dlr2012vol17no1art70>.

¹³ Sholahuddin Al-Fatih, "Penerapan Threshold Dalam Pemilu Menurut Perspektif Gustav Radbruch Dan Hans Kelsen," *Audito Comparative Law Journal (ACLJ)* 1, no. 2 (2020): 78–84, <https://doi.org/10.22219/audito.v1i2.13973>.

¹⁴ Budi Gunawan and Barito Mulyo Ratmono, "Threats to the Ideology of Pancasila In the Reform Era: Praxis Case of Regional Development Policy," *Jurnal Studi Pemerintahan* 9, no. 1 (2018): 58–82, <https://doi.org/10.18196/jgp.v9i1.4070>.

it explains that MPR is a body that represents the sovereignty of the People of Indonesia and MPR is a body that sets the outlines of the direction of the state (GBHN).

Although, in the article is not explained in writing that the MPR is the highest body of the state but in the essence of both articles implied that MPR is the construction of the sovereignty of the people itself and is the body that governs the direction of the state which in this way means that the MPR is the highest body of the state at the time.

This certainly violates the concept of the rule of separation of powers based on the concept¹⁵ of *trias politika* and *the principle of check and balance*, but with the return of the constitution to the path that should be in the era of reform, then on October 21, 1999 for the first time an amendment to the 1945 Constitution, this is just the opening gate to the changes that will be made to the 1945 Constitution until finally found the form of the 1945 Constitution which is materially in accordance with what Indonesia needs in the future and finally on August 1, 2002 held the fourth or last amendment until this journal was made against the 1945 Constitution that lasted until August 11, 2002 marked the beginning of the establishment of a new Indonesian constitution.

In one of the articles affected by the amendment is article 1 paragraph (2) which explains the sovereignty of the people is in the hands of the MPR replaced with a new explanation that reads "sovereignty is in the hands of the people and is carried out according to the Constitution." and article 3 paragraph (1) which previously reads "The People's Consultative Assembly establishes the Constitution and The Bow Outlines of there is a State Direction" then replaced "The People's Consultative Assembly is authorized to amend and establish the Constitution." Chapter 3 itself which initially contained only one explanation of the verse then carried out the addition to the current three verses in the chapter.

With the new provisions of course end the position of MPR as the highest institution in Indonesia so that all institutions in Indonesia be it the legislature, executive, and judiciary have the same level, but of course this also causes a chain effect on the authority of the MPR itself, one of which is the removal of authority to regulate the outline of the state direction (GBHN). With this, MPR automatically cannot have authority which in this context is regulating (*regeling*) or can be called as TAP MPR this at the same time end the authority of MPR that has been going on since 1960 ago.

As mentioned earlier, that form of MPR Decree began to be known since 1960, namely since MPRS first convened and made decisions. This practice is running and continued by MPR. Because it has been running long enough and accepted as part of Indonesian constitutional practice, the form of MPR Decree be one of the Indonesian laws¹⁶. In its own level of regulation, it is explained that the strictness of MPR has power both in and out. Binding power into means the provision of MPR binding all members of the MPR with the intended that all members of the MPR comply with and apply what has been agreed in the order, while binding out means that this provision must be implemented by the whole nation due to its legal nature.

¹⁵ Ibnu Sina Chandranegara, "Architecture of Indonesia's Checks and Balances," *Constitutional Review* 2, no. 2 (2016): 270–91, <https://doi.org/10.31078/consrev226>.

¹⁶ R Nazriyah, "Penguatan Peran Majelis Permusyawaratan Rakyat Dalam Struktur Ketatanegaraan Indonesia," *Jurnal Hukum Dan Pembangunan* 47, no. 1 (2017): 39–60, <http://dx.doi.org/10.21143/jhp.vol47.no1.134>.

With all the authority given to MPR in the era before the reform, of course this raises a big question mark to some parties who are quite questioning about the existence of the MPR itself. If examined more deeply about the principles that have been disseminated by Montesquieu on trias politica about the separation of power delivered to the three Institutions, namely:

1. Legislative

Legislative institutions are institutions or bodies that are functionally tasked to create and formulate laws, policies, and regulations in a country. In Indonesia itself this institution consists of the House of Representatives (DPR), the House of Regional Representatives (DPD), and a combination of the House of Representatives and the House of Regional Representatives, namely the People's Consultative Assembly (MPR) this is because in Indonesia adheres to a bicameral system that is a system consisting of two rooms aimed at achieving good order and expected to achieve check and balance between state institutions, especially in legislative institutions.

2. Executive

An executive institution is an Institution or body that is functionally tasked to carry out policies, laws, and regulations created by the Institution or legislative body. The body consists of presidents, vice presidents, and ministers.

3. Judiciary

A judicial institution is an institution or body that is functionally tasked to supervise, supervise, and monitor the process of law implementation, and supervision of legal implementation in a country. The body consists of the Constitutional Court (MK), the Supreme Court (MA), and the Judicial Commission (KY). The position of the Constitutional Court (MK) is as negative legislature. But in a certain decision the Constitutional Court acts as a positive legislature.¹⁷

Based on what is described above, we can conclude that the happiness of power in the Indonesian government system implicitly applies the concept of trias politica. But here is confusing When the era before the reform of the People's Consultative Assembly (MPR) has too much authority for one legislative institution that of course this will affect check and balance not only in legislative institutions but all Indonesian institutions will not only be affected.

1. **Check and Balance in State Regulation Before Amendment**

The principle of check and balance is the principle of state regulation that requires the three Institutions or legislative, executive, and judicial powers can control each other and have an equal position. Such application aims to avoid abuse of authority from state organizers or individuals occupying government positions. Technically, check and balances in a democracy is a natural thing with the aim to avoid abuse of power of an institution or power that is only concentrated in certain institutions or individuals.

¹⁷ Fitria Esfandiari and Moh. Fadli, "Repositioning the Role of the Constitutional Court as Positive Legislature in Indonesia," 2020, <https://doi.org/10.5220/0009923411041111>.

According to Mahfud MD, one of the weaknesses of the 1945 Constitution before the amendment is the absence of a checks and balances mechanism. This can be proven by the overly prominent role of the president at that time, with his various prerogatives. But I personally think the MPR Institution can also be categorized as an Institution that does not meet the principles contained in the principle of check and balance, it is because in the making of MPRS decree No.XX/MPRS/1966 on Memorandum DPR-GR concerning the Source of Law Order of the Republic of Indonesia and the Order of Legislation of the Republic of Indonesia.

They put the provision of MPRS right under the 1945 Constitution especially if we look at the rules of check and balance in order to create a condition in which all Institutions can coordinate with each other with the aim of not committing abuse of power. But placing the provision of MPRS right under the 1945 Constitution can also be said as abuse of power at that time, this is because in the 1945 Constitution the role of the Judiciary institutions was all taken over by the Supreme Court, this certainly shows clearly that the role of the supervisory or judicial institutions at that time was very minimal to create a fair state environment.

Especially considering that at that time the legislative position is higher than the other two institutions, certainly makes the principle of check and balance and triac politica not present at all in the Indonesian constitutional environment. Of course, this makes Indonesia a country that adheres to the parliamentary system of government because of the role of legislative institutions that are very felt at that time especially by bestowing the presidential election process to the MPR in the absence of a democratic process which will further degrade the level of people's trust in their own government. The system that according to the government at that time was a presidential system precisely on some of its own mechanisms like the parliamentary system of government, one of which was the placement of MPRS provisions itself.

2. MPR Provision

Hans Kelsen argues that legal norms are tiered and multi-layered in an order hierarchy, where a lower norm applies, sourced, and based on higher norms, higher norms apply, sourced, and based on higher norms, so onwards to a norm that cannot be traced further and is hypothetical and fictitious, namely the basic norm (*grundnorm*)¹⁸. Basic norms themselves are the highest norms, because norm aini is formed from the results of culture and norms that are ingrained in society and then established by the surrounding community as the foundation of norms that will apply in the future to the life of their society.

Hans Kelsen's theory was later developed by Hans Nawiasky in his theory called *die lehre vom dem stufenaufbau der rechtsordnung or die stufenordnung der rechtsnormen*. Hans Nawiasky's own legal norms in a country are always tiered, as follows: The fundamental norms of the state (*staatsfundamentalnorm*); Basic rules of state/state rules

¹⁸ Zaka Firma Aditya and Muhammad Reza Winata, "Reconstruction Of The Hierarchy Of Legislation In Indonesia," *Negara Hukum: Membangun Hukum Untuk Keadilan Dan Kesejahteraan* 9, no. 1 (2018): 79–100, <https://doi.org/10.22212/jnh.v9i1.976>.

(*staatsgrundgesetz*); Law (formal) (*formellegesetz*); and implementing regulations and autonomous regulations (*veordnung and autonomie satzung*)¹⁹.

According to Nawiasky himself the content of the fundamental norm (*staatsfundamentalnorm*) is a basic norm for the establishment of the constitution of a country where in Indonesia itself this is realized by the Constitution of 1945. Then under the fundamental norms of the state (*staatsfundamentalnorm*) there are basic rules of state/state rules (*staatsgrundgesetz*) that are poured into the torte of the Constitution. Below it again is); The (formal) law (*formellegesetz*) is then set forth as regulations which in this case aim to expand the material content of the Constitution. The lowest norms are implementing regulations and autonomous regulations (*veordnung and autonomie satzung*) in Indonesia itself these two regulations are Government Regulations and Regional Regulations.

Based on the theory stated by Hans Nawjasky, the position of TAP MPR here is the basic rules of the state/the basic rules of the state (*staatsgrundgesetz*) while making this provision clings to the fundamental norms of the state (*staatsfundamentalnorm*) in this case the Constitution of 1945. With begin, TAP MPR is the regulator of the main points of mind that in the Constitution of 1945.

The establishment of Law No. 10 of 2004 for the first time in a series of hierarchical positions of Indonesian laws and regulations of MPR regulation is disabled and replaced by law. Of course, this caused a lot of confusion to tap MPR because it is no longer considered as one of the existing laws and regulations in Indonesia, this is coupled with the still validity of TAP MPR at that time that important matters become unclear about its legal status.

However, article 7 of Law No. 10 of 2004 states that "The type of legislation other than as referred to in Paragraph (1) is recognized for its existence and has binding legal force as long as it is instructed by higher laws" , and is explained again in the explanation of Article 7 paragraph (4) which states "Types of Laws and Regulations other than in this provision, among others, regulations issued by the People's Consultative Assembly and the House of Representatives, the House of Regional Representatives, the Supreme Court, the Constitutional Court, the Audit Board, Bank Indonesia, Ministers, Heads of Agencies, Institutions, or Commissions of the same level formed by law or government at the behest of the law, the Provincial People's Representative Council, governors, the District/City People's Representative Council, regents/mayors, village heads or the equivalent.

Based on the results of the above review and the authority of the MPR after the amendment to the 1945 Constitution, the MPR is no longer authorized to establish provisions that are governing and for this reason also TAP MPR is excluded from the hierarchy of Indonesian laws and regulations in the provisions of Law No.10 of 2004. Although it has been explained in article 7 paragraph (4) of Law No.10 of 2004 on the still recognized existence of TAP MPR but, this still raises the issue of unclear legal status of TAP MPR. The vagueness of the position that implies the previous MPR provisions was then answered by the establishment of Law No.12 of 2011 on the Establishment of Legislation. With the enactment of this new law, clearly Law No. 10 of 2004 does not apply Again.

¹⁹ Martha Riananda, "Dinamika Kedudukan TAP MPR Di Dalam Hierarki Peraturan Perundang-Undangan," *Fiat Justisia: Jurnal Ilmu Hukum* 8, no. 2 (2015): 295–310, <https://doi.org/10.25041/fiatjustisia.v8no2.297>.

In the previous law that did not put the TAP MPR as one of the sources of Indonesian law, in Law No. 12 of 2011 in Article 7 paragraph (1) which states, the type and hierarchy of legislation consists of:

- a. The Constitution of the Republic of Indonesia year 1945;
- b. MPR Provisions;
- c. Substitute Government Law/Regulation;
- d. Government Regulation;
- e. Presidential Regulation;
- f. Provincial Regulations; Dan
- g. District/City Regulations.

Based on the provisions contained in the article above raises the implications for the existence of the re-existence of the MPR Regulation to be one of the sources of material law based on that affirmed by Mahfud MD, "that as a legal source, TAP MPR can be used as a source of material hokum (legal making materials), but not a formal legal source (legislation)." In this way TAP MPR Back to be one of the references related to the making of legislation under it. The institutions that handle the Law in this case the DPR, President, MA and The Court should really pay attention to the TAP MPR that is still valid.

The reassessment of TAP MPR under the Constitution of 1945 shows that the relationship between the two norms is delivered by these two legal sources in accordance with the napa in Hans Nawiasky's theory namely: *die lehre vom dem stufenaufbau der rechtsordnung* or *die stufenordnung der rechtsnormen*. In terms of its own function TAP MPR has the function of regulating further related to what if not regulated in the Constitution of 1945 which only regulates the main things and indeed required further elaboration related to the rules contained in it. However, some sources also said that the return of tap MPR in the hierarchy of legislation is only a form of affirmation that the product made by MPR is still valid and recognized legally.

The re-placement of TAP MPR in Law No. 12 of 2011 raises a problem that used to exist, namely about who will conduct the assessment if there is a mistake with the current MPR Decree. The authority of ma and MK given by the Constitution of 1945 can only test the Law on the 1945 Constitution (MK) and conduct regulations under the Law on Law (MA). Of course, if we look at theoretical studies these two instances cannot *conduct judicial review of* TAP MPR, thus Law No. 12 of 2011 does not necessarily become final from our legal sources until now.

3. **Judicial Review of MPR Regulation**

The re-placement of MPRS provisions and provisions of MPR RI as one type of legislation in the hierarchy of legislation stipulated in Article 7 paragraph (1) letter b, Law No. 12 of 2011 on the Establishment of Legislation is based on the thinking of the weaknesses contained in Law No. 10 of 2004 on the Establishment of Legislation. One of the improvements is the addition of MPR/S provisions as one type of legislation placed after the 1945 NRI Constitution. The provision of MPRS/MPR which is declared still valid in accordance with MPR decree Number I/MPR/2003 and in accordance with Law No. 12 of 2011.

Various opinions of constitutional law experts who discuss the Decree of the People's Consultative Assembly can be tested to the Constitutional Court, because the Constitutional Court is more authorized to test the MPR Decree, according to researchers of course this would be contrary to the Constitution of 1945. But theoretically, such a thing becomes a debate because the authority given by the Constitution of 1945 the authority of the Constitutional Court does not reach the realm of TAP MPR. Therefore, there are also many who doubt the authority of the Supreme Court of the Constitution to test the TAP MPR based on the position of the hierarchy of legislation.

The position of TAP MPR in Law No. 12 of 2011 certainly issued an issue in the testing of norms among other laws and regulations.²⁰ This happens because it is feared that there will be a conflict between the TAP MPR and the 1945 Constitution, and what if the legislation under the TAP MPR is contrary to the TAP MPR itself. When we refer to the judiciary, the authority to conduct material testing is the Constitutional Court. However, again this is again in question when we look at the authority written in the 1945 Constitution against the Constitutional Court.

If we look at TAP MPR No. I/MPR/2003 precisely in Article 4 because in the article TAP MPR equates its position with the Law that is required to be made as a substitute for the norms stipulated in the previous TAP MPR. Based on Article 4, the Constitutional Court should be able to conduct testing of TAP MPR. However, if we look at what is mentioned in Article 2 of TAP MPR No. I/MPR/2003, then the Constitutional Court is not authorized to conduct testing of TAP MPR as stated in the provisions in Article 2 does not require changes or revocation through the Law as contained in Article 4.

In the process itself TAP MPR has been made a judicial review application *several* times to the Constitutional Court but the petitioners' application is considered non-existent/lost which of course this causes confusion on the part of the Constitutional Court. The first example is the decision related to No. 86/PUU-XI/2013 concerning The Testing of Law No. 12 of 2011 on the Establishment of Legislation, where the proposed article 7 paragraph (1) letter b is placed TAP MPR in the hierarchy of legislation and no state institution is authorized to test it so as not to cause uncertainty of testing against the TAP MPR itself, the Constitutional Court did not accept the application submitted by Viktor's brother and friends.

And the second example related to the testing of MPR Decree No.1/MPR/2013 on Review of Materials and Legal Status of TAP MPR from 1960 to 2002 against the Constitution of 1945, with the material tested article 6 paragraph (30) Tap MPRS Testing No. XXXIII/MPRS/1967 concerning the revocation of the power of government from President Soekarno the Constitutional Court adjudicated and did not accept the Application submitted by Murnanda Utama and friends from Maharya Pati foundation, because the applicant's application was considered vague and Testing on Tap MPR Number I/MPR/2003 on The Review of Materials and Legal Status of Tap MPR Year 1960 to 2002 against the Basic Law of NRI 1945, with the material tested Article 6 number (30) Testing Tap MPRS

²⁰ I Made Aryana Putra Atmaja and I Nyoman Suyatna, "Politik Hukum Pengaturan TAP MPR Dalam Hierarki Peraturan Perundang-Undangan," *Udayana Master Law Journal* 4, no. 2 (2015): 233–40, <https://doi.org/10.24843/JMHU.2015.v04.i02.p03>.

No. XXXIII/MPRS/1967 on the revocation of the power of government from president Soekarno. And this is the second time that the Constitutional Court has made the same decision regarding the phased testing of MPR regulation.

Reflecting on what has been discussed above about how the obstacles faced by the Constitutional Court if it will conduct testing of TAP MPR. There is one other way related to the testing of TAP MPR called legislative review. Legislative review itself is an effort to legislative institutions or other institutions that have the authority of legislation to change a law. By way of legislative review itself can be said to be the safest path that can be taken if it wants a review process against TAP MPR, due to the absence of institutions that are bound by the limits of testing authority such as in the case of the Constitutional Court and the Supreme Court which is limited by the 1945 Constitution. But the consequence if done legislative review is a very slow procedure when we compare with judicial review then based on this reason legislative review can be said to be the last option assembled with the road-testing legislation.

D. CONCLUSION

From the exposure that has been discussed above, it can be concluded include:

1. The inclusion of MPR firmness in Law No. 12 of 2011 is an effort made by the government aimed at ensuring the certainty or clarity of the law on MPR provisions that are still valid in Indonesia.
2. Efforts to test the Provision of MPR (*judicial review*) if there is a mistake or deviation to the Constitution of 1945, can be done *through a legislative review which* is an effort of legislative institutions that have the authority of legislation to review the legislation they have made. This effort makes far more sense than submitting it to the Constitutional Court.

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