

POSITION OF THE DECREE OF THE PEOPLE'S CONSULTATIVE ASSEMBLY (TAP MPR) IN THE HIERARCHY OF LEGISLATION IN INDONESIA

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POSITION OF THE DECREE OF THE PEOPLE'S CONSULTATIVE ASSEMBLY (TAP MPR) IN THE HIERARCHY OF LEGISLATION IN INDONESIA

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ABSTRACT

The reinsertion of the People's Consultative Assembly Decree (Tap MPR) into the hierarchical system of Indonesian statutory regulations through Law Number 12 of 2011 concerning the Formation of Legislative Regulations, has caused several problems, namely: 1) The position of the MPR Tap in the hierarchy of statutory regulations. Invitation; and 2) Which state institution should be given the authority to test the MPR Decree. The research results show that the position of the MPR Decree in the hierarchy of laws and regulations in Indonesia is in a "grey" position because after the amendment to Article 3 of the 1945 Constitution, the MPR no longer has the authority to form Decrees containing regulations that come into force. Where initially the Decree was a second-degree statutory regulation, but after the amendment to the 1945 Constitution, the Decree could no longer be issued as a statutory regulation. Meanwhile, in terms of the authority to review the MPR Decree, the authority for such review can be given to the Constitutional Court. If this has to be done, it can be done by making changes to the limitative formulation in the 1945 Constitution. This change could be in the form of adding the authority to review the MPR Decree on the 1945 Constitution by the Constitutional Court through legislative interpretation and/or judicial interpretation.

Keywords: Hierarchy, Position of Tap MPR, Laws and Regulations.

ABSTRAK

Dengan dimasukkannya kembali Ketetapan Majelis Permusyawaratan Rakyat (Tap MPR) ke dalam sistem hierarki peraturan perundang-undangan Indonesia melalui Undang Undang Nomor 12 Tahun 2011 Tentang Peraturan Perundang-undangan, menyebabkan beberapa permasalahan, yaitu: 1) Kedudukan Tap MPR dalam hierarki peraturan perundang-undangan; dan 2) Lembaga negara mana yang seharusnya diberikan kewenangan untuk menguji Tap MPR. Hasil penelitian menunjukkan bahwa kedudukan Tap MPR dalam hierarki peraturan perundang-undangan di Indonesia ada pada posisi yang "abu-abu" karena setelah adanya amandemen pada Pasal 3 UUD 1945, MPR tidak lagi mempunyai kewenangan untuk membentuk Ketetapan Ketetapan yang berisi peraturan yang berlaku keluar. Dimana awalnya Ketetapan Ketetapan itu merupakan peraturan perundang-undangan derajat kedua, tetapi setelah adanya amandemen UUD 1945, Ketetapan tersebut tidak dapat lagi dikeluarkan sebagai peraturan perundang-undangan. Sedangkan dalam hal kewenangan pengujian Tap MPR, maka kewenangan pengujian tersebut dapat diberikan kepada Mahkamah Konstitusi. Jika hal itu harus dilakukan, maka dapat dilakukan dengan melakukan perubahan terhadap rumusan limitatif dalam Undang-Undang Dasar Tahun 1945. Perubahan itu dapat berupa penambahan kewenangan pengujian Tap MPR terhadap UUD 1945 oleh Mahkamah Konstitusi melalui cara *legislative interpretation* dan/atau *judicial interpretation*.

CONCLUSION

The Decree of the People's Consultative Assembly (Tap MPR) has received official legitimacy in the hierarchy of Indonesian legislation since Law Number 12 of 2011 concerning the Formation of Legislation was enacted. Unlike previous provisions, Law Number 10 of 2004 concerning the Formation of Legislation stipulates that the Tap MPR is not included in the category of types of legislation. If observed carefully, Law Number 12 of 2011 is an improvement on the shortcomings of Law Number 10 of 2004, namely: First, the material of Law Number 10 of 2004 causes confusion or inconsistent interpretation, so that it does not provide legal certainty. Second, the technique of writing the formulation of Law Number 10 of 2004 is inconsistent. Third, there is new material that must be regulated to meet the development or requirements for the formation of legislation. Fourth, the material is described in each chapter in an orderly manner.¹

Law Number 12 of 2011 includes several new contents as improvement to the previous Law, namely:²

- a. Addition of the Decree of the People's Consultative Assembly (Tap MPR) as one type of Legislation and its hierarchy is placed after the 1945 Constitution of the Republic of Indonesia;
- b. Expansion of the scope of planning for Legislation not only for Prolegnas and Prolegda but also planning for Government Regulations, Presidential Regulations, and other Legislation;
- c. Regulation of the mechanism for discussing the Draft Law on the Revocation of Government Regulations in Lieu of Laws;
- d. Regulation of Academic Manuscripts as a requirement in the preparation of Draft Laws or Draft Provincial Regulations and Draft Regency/City Regulations;
- e. Regulation of the participation of Drafters of Legislation,
- f. Researchers, and experts in the stages of Formation of Legislation.

¹ Lihat Penjelasan Undang-Undang Nomor 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-undangan.

² *Ibid.*

However, the reasons underlying Law Number 12 of 2011 to reinsert the MPR Decree into the category and hierarchy of regulations were not found. Therefore, the reinsertment of the MPR Decree into the types and hierarchy of laws and regulations has raised many questions and even given rise to pros and cons. In addition, the reinsertment of the MPR Decree into Law Number 12 of 2011 has raised debate about which institution has the authority to test the MPR Decree.

Jimly Asshiddiqie argues that re-placing the MPR Decree as a regulation whose hierarchy is above the law, but below the 1945 Constitution is a mistake that has an extraordinary impact. Because its hierarchy is above the law, the institution that has the authority to change, revoke, or test the law cannot change or revoke the constitutionality of the MPR Decree. Conversely, the institution that has the authority to change the Constitution also does not have the authority to change or revoke the MPR Decree. From several of these issues, the author is interested in further examining the issue of the position of the MPR Decree in the hierarchy of laws and regulations in Indonesia, although the issue that the author discusses is not a new issue, according to the author, this issue is still worthy of being discussed in more detail. Based on the explanation above, several problems can be formulated as follows: 1) what is the position of the MPR Decree in the hierarchy of laws and regulations in Indonesia? And 2) which institution should be given the authority to test the MPR Decree? This study aims to: 1) find out and analyze the position of the MPR Decree in the hierarchy of laws and regulations in Indonesia and 2) find out and analyze which institutions should be given the authority to test the MPR Decree.

RESEARCH METHODOLOGY

This research is a type of normative legal research, where this research focuses on examining the application of norms in laws and regulations and other literature materials that are relevant to the theme that the author is researching. The existing literature materials will be analyzed using a qualitative descriptive method, where the author will collect various kinds of relevant legal materials according to the theme that the author is researching, then the author will describe them so that a picture will be obtained that is in accordance with the actual situation and can answer the existing problems. The data used is secondary data consisting of primary legal materials, secondary legal materials and tertiary legal materials.

RESULTS AND DISCUSSION

The Position of MPR Decrees in the Hierarchy of Legislation in Indonesia

In general, the MPR Decree is classified as a basic state regulation (*staatsgrundgesetz*) or basic norm. However, this Attamimi categorization was carried out before the amendment to the 1945 Constitution, namely when the MPR was still the highest state institution. The MPR Decree before the amendment to the Constitution was indeed one of the legal products on the same level as the Constitution, which showed the authority and position of the MPR as an institution that embodies the sovereignty of the people in the state system applicable in Indonesia. This is in accordance with the explanation in Article 3 of the 1945 Constitution, which reads, *"Because the People's Consultative Assembly holds the sovereignty of the state, its power is unlimited, considering the dynamics of society, once every 5 years the Assembly pays attention to everything that happens and all the currents at that time and determines what directions should be used for the future."*

At the beginning of the New Order era, the MPR Decree established the structure of legal sources and their hierarchy. Decree No. XX/MPRS/1966 established the hierarchy of legal regulations on sources of legal order as follows:

1. Constitution (UUD)
2. MPRS Decree (Tap MPRS)
3. Laws and Government Regulations in Lieu of Law (UU) and (Perpu)
4. Government Regulations (PP)
5. Presidential Decrees (Keppres)
6. Ministerial Regulations (Permen) and so on.

In order to make changes to the sources of legal order that have been stated in Decree No. XX/MPRS/1966, at the 2000 MPR general session, the MPR has stipulated MPR Decree No. III/MPR/2000, where in the MPR Decree there has been a change in the hierarchy in the existing legal regulation system in Indonesia, so that the hierarchical order becomes:³

1. Constitution (UUD)
2. MPR Decree (Tap MPR)
3. Law (UU)
4. Government Regulation in Lieu of Law (Perpu)
5. Government Regulation (PP)

³ Riri Nazriyah, *MPR RI Kajian Terhadap Produk Hukum dan Prospek di Masa Depan*, UII Press, Yogyakarta, 2007, hlm 290.

6. Presidential Decree (Keppres)

7. Regional Regulation (Perda)

In this era of reform, the MPR Decree is considered as an extension of power to make regulations that support or legitimize the interests of power. Thus, the term "sunset closure" emerged, referring to gradual efforts to eliminate the MPR Decree as a source of law in the existing legal system in Indonesia. In addition, this also became the basis for the evaluation that was accompanied by the elimination of the MPR Decree (S) in 2003 which was carried out at the MPR General Session.

Based on Law No. 10 of 2004, there has been a change in the hierarchy of laws and regulations. The hierarchy of laws and regulations is as follows:

1. Constitution and Amendments to the Constitution
2. Laws and Government Regulations in Lieu of Laws
3. Government Regulations
4. Presidential Regulation
5. Regional Regulations

Maria Farida Indrati stated that there are several things that need to be straightened out to understand Law Number 10 of 2004, especially in the hierarchy of the MPR Decree. Things that need to be understood are: First, the MPR Decree cannot be categorized as a statutory regulation because it has a higher type of norm and is different from the norms regulated in the law. The nature of the legal norms of the MPR Decree is one level lower than the norms regulated in the Body of the 1945 Constitution. Second, if the 1945 Constitution is included in the category and hierarchy of statutory regulations, why is the MPR Decree not also included? This is because according to Article 2 and Article 4 of MPR Decree No. 1/MPR/2003 concerning Review of the Material and Legal Status of the MPRS/MPR RI Decrees from 1960 to 2002, there are still 14 MPR Decrees that are still valid.⁴

Basically, the MPR Decree after 2004 must be understood differently from the previous MPR Decree, where the previous MPR Decree had legal norms that were regulatory in nature. This is because the MPR from the 2004 election and beyond is a high state institution with different constitutional authority from the previous MPR. If the MPR Decree/S before the MPR from the 2004 election contained legal norms that were regulatory in nature, then

⁴ Maria Farida Indrati, *Ilmu Perundang-undangan: Jenis, Fungsi, dan Materi Muatan*, Kanisius, Yogyakarta, 2007, hlm 100-101.

the current MPR Decree only contains legal norms that are administrative in nature (beschikking).⁵

In its development, Law Number 10 of 2004 was changed to Law Number 12 of 2011. Based on Law Number 12 of 2011, the hierarchy of statutory regulations is as follows:⁶

1. The 1945 Constitution of the Republic of Indonesia (UUD 1945)
2. Decree of the People's Consultative Assembly (Tap MPR)
3. Laws and/or Government Regulations in Lieu of Laws (UU and/or Perppu)
4. Government Regulations
5. Presidential Regulations (Perpres)
6. Provincial Regulations (Perda Provinsi)
7. Regency/City Regulations. (Perda Kabupaten/Kota)

The MPR Decree in Article 7 paragraph (1) letter b of Law Number 12 of 2011 can be explained by the explanation of the article which states that, "What is meant by "People's Consultative Assembly Decree" is the Temporary People's Consultative Assembly Decree and the People's Consultative Assembly Decree which is still in effect as referred to in Article 2 and Article 4 of the Decree of the People's Consultative Assembly of the Republic of Indonesia Number: I/MPR/2003 Concerning Review of the Material and Legal Status of the Temporary People's Consultative Assembly Decree and the People's Consultative Assembly Decree from 1960 to 2002, dated 7 August 2003."

In the provisions of MPR Decree Number I/MPR/2003, it has been determined which MPR Decrees are still valid and which are no longer valid from the total Decrees made from 1966 to 2002. In the provisions of MPR Decree Number I/MPR/2003, the existing MPR Decrees are grouped into 6 (six) Articles, namely:

1. Article 1 on MPR/MPRS Decrees that have been revoked and declared invalid (8 Decrees)
2. Article 2 on MPRS/MPR Decrees that have been declared valid with provisions (3 Decrees)
3. Article 3 on MPRS/MPR Decrees that have been declared to remain valid until the formation of a government resulting from the 2004 general election (8 Decrees)

⁵ Mohan³⁵ d Zamroni, "Mencermati Eksistensialisme Ketetapan MPR: Sebuah Pergulatan Pemikiran", *Jurnal Legislasi Indonesia*, Vol. 10 No. 1, Maret 2013, hlm 110.

⁶ Lihat Pasal 7 Undang Undang Nomor 12 Tahun 2011

4. Article 4 on MPRS/MPR Decrees that have been declared to remain valid until the formation of a Law (11 Decrees)
5. Article 5 on MPRS/MPR Decrees that have been declared to remain valid until the establishment of new rules of procedure by the People's Consultative Assembly of the Republic of Indonesia resulting from the 2004 general election (5 Decrees)
6. Article 6 on MPRS/MPR Decrees that do not require further legal action, either because they are final (enfinalig), have been revoked, or have been completed. (104 Decrees)

Based on the categorization above, the MPR Taps that are still in force can be seen in Articles 2 and 4, where there are a total of 13 MPR Taps that are still in force, including:

1. Decree of the MPRS No. XXV/MPRS/1966 Concerning the Dissolution of the Indonesian Communist Party, the declaration of the Indonesian Communist Party as a banned organization throughout the territory of Indonesia and the prohibition of all activities to spread or develop the ideology or teachings of Communism/Marxism-Leninism.
2. Decree of the MPR No. XVI/MPR/1998 Concerning Economic Politics in the Framework of Economic Democracy.
3. Decree of the MPR No. V/MPR/1999 Concerning the Determination of Opinion in East Timor.
4. Decree of the MPRS No. XXIX/MPRS/1966 Concerning the Appointment of the Ampera Heroes. (in the latest developments, Law No. 20 of 2009 Concerning Titles, Medals, and Honors has been formed)
5. Decree of the MPR No. XI/MPR/1998 Concerning State Administrators Who Are Clean and Free of Corruption, Collusion, and Nepotism.
6. Decree of the MPR No. XV/MPR/1998 Concerning the Implementation of Regional Autonomy, Regulation, Distribution and Utilization of National Resources in a Fair Manner, and the Balance of Central and Regional Finances in the Unitary State of the Republic of Indonesia.
7. MPR Decree No. V/MPR/2000 Concerning Strengthening National Unity and Integrity.
8. MPR Decree No. VI/MPR/2000 Concerning Separation of Indonesian National Army and Indonesian National Police.

9. MPR Decree No. VII/MPR/2000 Concerning Role of TNI and Role of Polri.
10. MPR Decree No. VI/MPR/2001 Concerning Ethics of National Life.
11. MPR Decree No. VII/MPR/2001 Concerning Vision of Indonesia for the Future.
12. MPR Decree No. VIII/MPR/2001 Concerning Recommendations for Policy Direction for Eradicating and Preventing Corruption, Collusion and Nepotism.
13. MPR Decree No. IX/MPR/2001 Concerning Agrarian Reform and Management of Natural Resources.

The thirteen Taps above are the Taps contained in the explanation of Article 7 paragraph (1) letter b of Law Number 12 of 2011, with details of the categorization of the 11 MPR Taps which are no longer valid due to the existence of the law⁷ and 3 MPR Taps which are still valid to this day.⁸ MPR Decree No. V/MPR/1999 on Determination of Opinion in East Timor is automatically no longer valid because the regulations regulated therein have been implemented. Therefore, the two remaining MPR Decrees are still valid until now because their legal status has not been revoked or replaced by law. The question now is, can the MPR Decrees outside the two MPR Decrees be declared valid again and used as a formal source of law? Logically, this is impossible because it is impossible for the validity of higher regulations to be legitimized or made based on lower regulations, in this case Law Number 12 of 2011.

Institutions That Should Be Given the Authority to Test MPR Decrees

With the reinsertion of the MPR Decree into the hierarchy of laws and regulations, the consequence is that there is a legal vacuum relating to which institution has the authority to test the MPR Decree if it is considered to be in conflict with a higher law. After Article 3 of the 1945 Constitution was amended, the MPR no longer has the authority to make Decrees containing regulations that apply outwardly. Where initially, the Decrees were in the form of second-degree laws and regulations, but after the 1945 Constitution was amended, the Decrees could no longer be issued as second-degree laws and regulations.⁹

¹⁴ that Pasal 4 Tap MPR Nomor I/MPR/2003
¹⁵ that Pasal 2 Tap MPR Nomor I/MPR/2003

⁹ Moh. Mahfud MD, *Politik Hukum di Indonesia*, sebagaimana dikutip oleh Wan Laila P. Darwis dan Frisna Adelina Pardede, "Keberadaan Ketetapan Majelis Permusyawaratan Eksekusi: *Journal Of Law*, Vol. 6 No. 2 Desember 2024

If we deeply understand the meaning contained in Article 24A paragraph (1) and Article 24C paragraph (1) of the 1945 Constitution, as well as Article I of the Additional Provisions of the 1945 Constitution, then it will be seen that the MPR Decree is actually no longer part of the types of laws and regulations in force in Indonesia. In the 1945 Constitution, the Constitutional Court has the authority to test laws against the Constitution at the first and final levels, and its decision is final and binding. However, because Law Number 12 of 2011 includes the MPR Decree in the hierarchy of laws and regulations, it can be said that the MPR Decree is part of the types of laws and regulations in force in Indonesia. Based on Article 7 of Law Number 12 of 2011, the MPR Decree has a higher position than laws or Perppu. Therefore, because the MPR Decree is below the Constitution and above laws or Perppu and the Constitution which are the benchmarks for its testing, the party that has the authority to conduct the testing is the Constitutional Court.

In MPR Decree Number 1 / MPR / 2003, there are eleven MPR / S Decrees that are still valid until the formation of laws that regulate the contents of the decree. According to Jimly Asshiddiqie, the level of the eleven MPR / S Decrees is determined by the MPR itself, therefore the law can change it. Thus, there are four institutions, namely the President, DPR, DPD, and the Constitutional Court, which have the constitutional authority to discuss laws. In addition, Jimly Asshiddiqie stated that the remaining MPR / S Tap legal products, although in the form of decrees, contain legal norms that are comparable to the material of the law.

Therefore, the remaining MPR/S Taps can be considered equivalent to laws in a material sense. If the MPR/S Taps that are still in force are not the Constitution or amendments to the Constitution, then their status must be considered equivalent to laws because our new legal system built on the 1945 Constitution no longer recognizes legal products below the 1945 Constitution and above laws and/or Perppu. Because of the legal status in a material sense, the process of revoking, changing, implementing, and enforcing the law as well as testing its constitutionality must be based on the applicable legal provisions as they should be. Thus, the state institutions that have the authority to determine the legal and material status of the MPR/S Taps that are still in force are the President, DPR, DPD, and Constitutional Court, in accordance with their respective constitutional authorities. Because indeed

these four institutions have the authority in terms of the formation, change, and cancellation of laws.¹⁰

However, the problem is how to include the testing of the MPR Decree into the authority of the Constitutional Court, because constitutively the Constitutional Court only has the authority to test laws against the 1945 Constitution. According to I Dewa Gede Palguna, if the Constitutional Court is given the authority to test the MPR Decree, then the limiting formulation in the 1945 Constitution must be changed. Furthermore, I Dewa Gede Palguna stated that there are two ways to add to the authority of the Constitutional Court. First, the interpretation of the law or legislative interpretation, which is the original or official interpretation of the legislator regarding several definitions contained in the law, in this case the law on the Constitutional Court. Thus, if this method is chosen, then the legislator only needs to make changes to the law. In addition, such actions have actually been carried out when the authority was transferred from the Supreme Court to handle disputes over regional election results to the Constitutional Court. Second, legal interpretation or judicial interpretation, which is the authority of the Constitutional Court, where the Constitutional Court has the authority to interpret the meaning contained in the law, including the MPR Decree, because if the MPR Decree is considered a law, then the Constitutional Court has the authority to test the MPR Decree.¹¹

Therefore, the author considers that the Constitutional Court has the authority to review the MPR/S Tap with the note that the MPR/S Tap is considered a law and is legally included in the category and hierarchy of laws and regulations applicable in Indonesia. However, it would be better if the MPR/S Tap is not included in the hierarchy of laws and regulations

CONCLUSION

Based on the discussion above, it can be concluded that:

1. The position of the MPR Decree in the hierarchy of laws and regulations in Indonesia is in a "grey" position because after the amendment to Article 3 of the 1945 Constitution, the MPR no longer has the authority to form Decrees containing regulations that apply

¹⁰ Jimly Asshidiqie, *Perihal Undang-Undang*, Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI, Jakarta, 2006, hlm 79.

¹¹ I Dewa Gede Palguna, *Pengaduan Konstitusional (Constitutional Complain)*, Upaya Hukum Terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara, Sinar Grafika, Jakarta, 2013, hlm 583-681.

abroad. Where initially the Decrees were second-level laws and regulations, but with the amendment to the 1945 Constitution, the Decree can no longer be issued as laws and regulations.

2. Meanwhile, in terms of the authority to test the MPR Decree, the authority to test should be given to the Constitutional Court. If the Constitutional Court is given the authority to test the MPR Decree, then there must be a change to the limitative formulation in the 1945 Constitution. This change can be in the form of adding the authority to test the MPR Decree against the 1945 Constitution by the Constitutional Court through legislative interpretation and/or judicial interpretation.

The recommendation that the author can convey is that the legislators must immediately revise Law Number 12 of 2011, especially those related to the hierarchy of laws and regulations because in general the material content of the law is indeed not in accordance with the developments that occur in society. In addition, there also needs to be an amendment to the 1945 Constitution, especially the Article regarding the authority of the Constitutional Court (if indeed the MPR Decree is still enforced).

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