

The Existence of People's Consultative Assembly Decrees After the Amendment of the 1945 Constitution of the Republic of Indonesia In the Framework of Orderly Arrangement of Legislation in Indonesia

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Abstract

The amendment of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) has resulted in fundamental changes to Indonesia's constitutional system compared to the pre-amendment period. One of the most significant changes is the transformation of the state's organizational structure from a distribution of power model—where the People's Consultative Assembly (MPR) functioned as the embodiment of popular sovereignty—toward a separation of powers model based on the principle of checks and balances. This shift is particularly evident in the provisions of Article 1(2) in conjunction with Article 3 of the 1945 Constitution. The redefinition of the MPR's position, functions, duties, and authorities has legal implications for the status and hierarchy of MPR decrees (TAP MPR) within the national legal system. The reinstatement of certain TAP MPR following the constitutional amendments was formalized through Article I of the Supplementary Provisions of the 1945 Constitution and later reaffirmed in TAP MPR No. I/MPR/2003 concerning the Existence of TAP MPR: Review of the Material and Legal Status of Decrees of the Provisional People's Consultative Assembly and the People's Consultative Assembly from 1960 to 2002. From a positive legal perspective, the existence of TAP MPR is officially recognized as a category of legislation and incorporated into the legal hierarchy. However, from a legislative science perspective, the legal norm established in Article I of the Supplementary Provisions of the 1945 Constitution is problematic and unconstitutional, as it contradicts the 1945 Constitution itself. This issue has broader implications for the validity of TAP MPR as part of the national legal framework and necessitates a systematic approach to ensuring a more coherent and orderly legislative system in the future. This study seeks to address the following research questions: Is the existence of TAP MPR, as currently in effect, constitutionally valid? What legal measures should be taken regarding the continued validity of TAP MPR in the effort to establish a coherent legislative system in Indonesia? This research adopts a normative legal approach

utilizing doctrinal normology, with historical and juridical-analytical methodologies. The data used in this study consist of secondary data sources, including primary legal materials, secondary legal materials, and tertiary legal materials. The key findings of this study are as follows: The Legal Status of TAP MPR: From a juridical perspective, the existence of TAP MPR/MPRS is based on Article I of the Supplementary Provisions of the 1945 Constitution. However, from a legislative science perspective, the formulation of this legal norm is unconstitutional, as it contradicts Article 1(2) in conjunction with Article 3 of the 1945 Constitution. Given that the legal basis for recognizing TAP MPR is unconstitutional, its regulation in lower-ranking legislation—namely, TAP MPR No. I/MPR/2003 and Law No. 12 of 2011—is also unconstitutional by extension (*mutatis mutandis*). The unconstitutional nature of Article I of the Supplementary Provisions has, in effect, allowed the MPR to engage in legal maneuvering, resulting in the issuance of TAP MPR No. I/MPR/2003. Consequently, TAP MPR No. I/MPR/2003 itself must also be deemed unconstitutional. Furthermore, the existence of TAP MPR as a component of positive law has been formalized in Law No. 12 of 2011 on the Formation of Laws and Regulations, which recognizes TAP MPR as a category of legislation and includes it within the legal hierarchy. However, the juridical recognition of TAP MPR within this law is also unconstitutional, as it is derived from an unconstitutional legal foundation. Legal Measures for Legislative Reform in Indonesia: First, the MPR should amend the 1945 Constitution by removing Article I of the Supplementary Provisions to eliminate the unconstitutional basis for TAP MPR. Second, the MPR should conduct a legislative review of TAP MPR No. I/MPR/2003 by issuing an MPR decision to revoke and declare it null and void. This can be further reinforced through legislative review and judicial review (i.e., a constitutional challenge) against Law No. 12 of 2011 to ensure its alignment with the constitutional framework. By implementing these legal measures, Indonesia can establish a more structured and constitutionally sound legislative system, ensuring consistency with the principles enshrined in the 1945 Constitution.

I. Introduction

From the perspective of substantive changes to the provisions of UUD NRI 1945, the amendments resulted in a fundamental transformation of Indonesia's constitutional system compared to its pre-amendment state.¹ One of the most significant changes was the shift in the organizational design of state power from a distribution of power concept—where the MPR represented the embodiment of the people's sovereignty—towards a separation of powers model based on the principles of checks and balances.² This transition is evident in the revision of Article 1, Paragraph (2) of UUD NRI 1945, which originally stated, "Sovereignty is in the hands of the people and is exercised entirely by the People's Consultative Assembly," to "Sovereignty is in the hands of the people and is exercised in accordance with the Constitution."³ Following this amendment to Article 1, Paragraph (2), Article 3, which stipulated that "The People's Consultative Assembly determines the Constitution and the broad outlines of state policy," was subsequently repealed. This change in the status, functions, duties, and authority,⁴ of the MPR had legal implications for the status and position of MPR Decrees (TAP MPR) within the hierarchy of Indonesia's legal and regulatory framework.⁵

From a historical constitutional and legislative perspective prior to the amendments, MPR Decrees played a significant role in Indonesia's legal system. This role was closely tied to the function of the MPR as the highest state institution representing the people's sovereignty. The importance of MPR Decrees dates back to the issuance of TAP MPRS No. I/MPRS/1960 concerning the Political Manifesto of the Republic of Indonesia as the Broad Guidelines of State Policy. From 1960 to 2002, a total of 139 MPRS/MPR Decrees were issued. Given their significance in shaping Indonesia's legal framework, these decrees were recognized within the hierarchy of Indonesian legislation, as formally established through TAP MPRS No. XX/MPRS/1966 on the Memorandum of DPR-GR Regarding the Sources of Legal Order and the Hierarchy of Legislation of the Republic of Indonesia. This was later replaced by TAP MPR No. III/MPR/2000 on the Sources of Law and the Hierarchy of Legislation.

Recognizing the crucial role of MPRS/MPR Decrees in the legal hierarchy, the amended UUD NRI 1945 introduced Article I of the Additional Rules, which states: "The People's

¹ Pataniari Siahaan, **Politik Hukum Pembentukan Undang-Undang Pasca Amandemen 1945**, KonPress, Jakarta, 2012, hal.1.

² Sekretariat Jenderal MPR RI, **Panduan Pemasyarakatan Undang-Undang Dasar Negara RI dan Ketetapan Majelis Permusyawaratan Rakyat Republik Indonesia**, Jakarta, 2012., hal. 132.

³ Perubahan Ketiga UUD NRI Tahun 1945 Tahun 2001

⁴ Lihat Bagian "menimbang" huruf c Ketetapan MPR RI No.I/MPR/2003 tentang Ketetapan Majelis Permusyawaratan Republik Indonesia Tentang Peninjauan Terhadap Materi dan Status Hukum Ketetapan Majelis Permusyawaratan Rakyat Sementara dan Ketetapan Majelis Permusyawaratan Rakyat Tahun 1960 Sampai Dengan Tahun 2002.

⁵ Peraturan yang berlaku mengacu pada TAP MPR RI No. III/MPR/2000 tentang Sumber Hukum dan Tata Urutan Peraturan Perundang-Undangan

Consultative Assembly is assigned to review the content and legal status of MPRS and MPR Decrees to make a decision in the 2003 General Session of the People's Consultative Assembly." In accordance with the mandate of Article I of the Additional Rules of UUD NRI 1945, the MPR subsequently issued TAP MPR No. I/MPR/2003 concerning the Review of the Content and Legal Status of MPRS and MPR Decrees from 1960 to 2002. This decree consists of seven articles, but two are particularly noteworthy: Article 2, which states: "MPRS and MPR Decrees that remain in effect under specific provisions" (including three decrees). Article 4, which states: "MPRS and MPR Decrees that remain in effect until superseded by legislation" (including eleven decrees).

The continued validity of certain MPRS/MPR Decrees under TAP MPR No. I/MPR/2003 was subsequently recognized in Law No. 12 of 2011 on the Formulation of Legislation. This recognition marked a shift from Law No. 10 of 2004, which had previously excluded MPRS/MPR Decrees from Indonesia's legislative hierarchy. However, Law No. 10 of 2004 was later repealed and replaced by Law No. 12 of 2011. A closer examination of Articles 7 (1) and 7 (2) of Law No. 12 of 2011 raises questions regarding the juridical basis for reinstating MPR Decrees within the legal hierarchy. This is particularly evident in the "considering" section of the law, which does not reference Article I of the Additional Rules of UUD NRI 1945 in conjunction with TAP MPR No. I/MPR/2003 as a legal foundation. This omission has led to ongoing legal debates regarding the constitutional legitimacy of MPRS/MPR Decrees. As a consequence of these legal ambiguities, further questions arise regarding the appropriate legal measures to be undertaken in order to ensure systematic organization of Indonesia's legal and regulatory framework. The formulation of the problem in this study is as follows: a. Is the existence of the MPR Decree that is still in force today constitutionally valid? b. What legal steps must be taken against the MPR Decree that is still in force in order to organize the orderly regulation of laws and regulations in Indonesia?

2. Research Method

This research falls within the scope of normative or juridical legal studies, employing the doctrinal normology method, which is based on norms as teachings that regulate behavior.⁶ Additionally, this study encompasses descriptive-analytical research, aiming to describe the background of the enactment of People's Consultative Assembly Decrees (TAP MPR) as part of the legal framework, examine the conformity of TAP MPR with the characteristics of legal norms within a regulation (regeling) based on existing theories, and propose a conceptual framework for the appropriate positioning of TAP MPR within the 1945 Constitution of the Republic of Indonesia to ensure a systematic legislative structure in Indonesia. The research adopts both a historical and juridical-analytical approach. The historical approach seeks to explore the historical development of TAP MPR and its recognition as a form of legislation. Meanwhile, the juridical-analytical

⁶ Bernard Arief Sidharta, "Refleksi tentang Fondasi dan Sifat Keilmuan Ilmu Hukum Sebagai Landasan Pengembangan Ilmu Hukum Nasional". Disertasi, Universitas Padjajaran, Bandung, 1996, hal. 189-190.

approach serves as a determining factor, as the issues examined and analyzed in this study pertain to legal or juridical matters, including legal politics that influence them.

The data used in this research consists of secondary data, which includes primary, secondary, and tertiary legal materials. Primary legal materials comprise legislation, including the 1945 Constitution of the Republic of Indonesia, TAP MPRS/MPR, and laws specifically related to the formation of regulations. Secondary legal materials consist of books, literature, session transcripts, and other relevant publications. Meanwhile, tertiary legal materials include the Indonesian language dictionary and legal dictionaries.

3. Results and Discussion

Existence of MPR Decree After Amendment to the 1945 Constitution of the Republic of Indonesia

The Constitution or Basic Law in French is referred to as "constituer," which means "to form," leading M. Solly Lubis to interpret the term "constitution" as the formation of a state.⁷ Additionally, Wirjono Prodjodikoro⁸ defines the constitution as the starting point for all regulations concerning a state. In Dutch, the constitution is known as "Grundwet," which consists of two words: "Grund," meaning "ground" (foundation), and "Wet," meaning "law." Therefore, "Grundwet" can be translated as "Basic Law."⁹

The existence of a constitution in a country is inseparable from human history regarding the relationship between rulers and the people, particularly the dominance of power exercised by rulers over their citizens. To control this, various ideas emerged, such as the rule of law, the protection of human rights, the trias politica, and general elections. Additionally, the concept of constitutionalism advocates for limited government, which aims to restrict governmental power to prevent arbitrary actions. In constitutional democracy, this idea requires a democratic government—one that is limited in power and is not permitted to act arbitrarily against its citizens. These governmental limitations are outlined in the constitution; hence, it is often referred to as "constitutional government" or "restrained government."¹⁰

Regarding the position of the Constitution or Basic Law in a state, Hans Kelsen,¹¹ in his concept of "the hierarchical structure of the legal order of a state," places the constitution at "the highest level within national law." Here, the constitution is understood not in a formal sense but in a material sense. Because the constitution is always characterized as "fundamental law," it serves as the basis of the national legal order, making the material constitution a special form of constitutional law or a constitutional form.¹² Kelsen's opinion on the position of the constitution

⁷ M. Solly Lubis, *Asas-Asas Hukum Tata Negara*, Alumni, Bandung, 1978, hal. 44.

⁸ Wirjono Prodjodikoro, *Asas-Asas Hukum Tata Negara di Indonesia*, Dian Rakyat, Jakarta, 1980, hal. 10.

⁹ Dahlan Thalib, *Kedaulatan Rakyat, Negara Hukum dan Konstitusi*, Liberty, Yogyakarta, 2000, hal. 6.

¹⁰ Miriam Budiardjo, *Demokrasi di Indonesia, Demokrasi Parlemen dan Demokrasi Pancasila*, Gramedia, Jakarta, 1996, hal. 52.

¹¹ Hans Kelsen, *General Theory of Law and State*, Harvard University Press, 1945, Cambridge Massachusetts, USA, 1954, hal. 124.

¹² *Ibid.*, hal. 124 dan hal. 258.

is relevant to his theory, the Stufentheorie,¹³ and the application of the legal principle *lex superior derogate legi inferiori*.

Based on the position of the constitution and its contents, which serve as the fundamental foundation for the formation of laws at a lower level, both current and future laws must align with the constitution. Before the amendments to the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945), MPRS/MPR Decrees (TAP MPRS/MPR) were recognized as one of the types of legislation. The first regulation regarding this was TAP MPRS No. XX/MPRS/1966 on the DPRGR Memorandum concerning the Sources of Legal Order of the Republic and the Hierarchy of Legislation in Indonesia. TAP MPR/MPRS, as a form of legislation issued by the MPR/MPRS, was based on the legal foundation of Article 3 of UUD NRI 1945 (before the amendment). Its existence remained because it was hierarchically positioned below UUD 1945, classifying it within the *Staatsgrundgesetz* group, as defined by Hans Nawiasky. The sacred nature of TAP MPR/MPRS paralleled the sanctity of UUD 1945, protected by the argument that "sovereignty is in the hands of the people and is fully exercised by the MPR."

Based on the author's research, among the 139 TAP MPRS/MPR decrees issued between 1960 and 2002, a classification by period and legal norm characteristics can be presented in the table below

No	Periode	Number of TAP MPRS/MPR	Regulated Field	Legal Norm Characteristics
1.	1960-1965	8	Politics 5 TAP (62%) Non-Politics: 3 TAP (38%)	- Beschikking (7 Tap/87%) - Beleidsregel (1 TAP/13%)
2.	1966-1998	84	Politics 74 TAP (88%) Non-Politics 10 (12%)	- Regeling 10 (12%) - Beschikking 27 (73%) - Regeling+Beshikking 9 (11%) - Deklaratif 3 (4%)
3.	1998-2002	47	Politics 40 TAP (85%) Non-Politics 7 (15%)	- Regeling 12 (25%) - Beschikking 62 (57%) - Regeling+Beshikking 6 (13%) - Deklaratif 1 (2%)
		139 TAP		

Based on the table above, in the development of Indonesia's state governance, particularly from the perspective of legislation, out of the 139 TAP MPR/MPRS issued, 119 TAP MPR/MPRS (85%) are legal products regulating the political sector. Meanwhile, in terms of legal norm characteristics, only 22 out of 139 TAP MPR/MPRS are regulatory in nature. This raises the question of whether TAP MPR/MPRS can rightfully be classified as one of the types of legislation and subsequently placed within the legal hierarchy. With the amendment of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945), the existence of TAP MPR/MPRS needs to be reevaluated in line with the constitutional reform spirit, particularly concerning its status, function, role, and authority. This began with the amendment of Article 1(2) of UUD

¹³ Maria Farida Indrati S, *Ilmu Perundang-Undangan, Jenis, Fungsi dan Materi Muatan*, Jilid 1, Kanisius, Yogyakarta, 2007, hal. 41

NRI 1945, which initially stated, "Sovereignty is in the hands of the people and is exercised entirely by the People's Consultative Assembly," to "Sovereignty is in the hands of the people and exercised in accordance with the Constitution."

The amendment to Article 1(2) of UUD NRI 1945 altered the structure of state institutions within Indonesia's constitutional system. Previously, the MPR was the highest state institution responsible for managing the people's sovereignty through the concept of the distribution of power, where the MPR delegated power to other high state institutions. However, the amendment shifted this towards the concept of separation of powers among state institutions, based on the principle of checks and balances. This shift was followed by the removal of Article 3 of UUD NRI 1945, which previously stated that "The People's Consultative Assembly determines the Constitution and the broad outlines of state policy." This was later replaced with the following provisions in Article 3 of UUD NRI 1945:

Article 3:

1. The People's Consultative Assembly has the authority to amend and enact the Constitution.
2. The People's Consultative Assembly inaugurates the President and/or Vice President.
3. The People's Consultative Assembly can only dismiss the President and/or Vice President during their term in accordance with the Constitution.

With the removal of the phrase "... and the broad outlines of state policy" from Article 3 before the amendment, the legal basis for issuing TAP MPR/MPRS, which had been used as justification, ceased to exist. Constitutionally, since 2001/2002, the MPR no longer has the authority to issue TAP MPR. However, in 2002, the Additional Provisions of UUD NRI 1945 introduced Article I, which stated that "The People's Consultative Assembly is tasked with reviewing the content and legal status of the Resolutions of the Provisional People's Consultative Assembly and the People's Consultative Assembly for decision-making in the 2003 MPR Session." This provision created the impression that the MPR still had the authority to issue resolutions until 2002. Reviewing the MPR meeting records regarding its tasks in PAH I/III sessions, particularly concerning the MPR's authority to "determine the broad outlines of state policy" as per Article 3 of UUD 1945 (before the amendment), there was a general consensus to eliminate this authority. With this elimination, the legal basis for recognizing TAP MPR as a type of legislation disappeared. Nevertheless, during the MPR sessions on constitutional amendments, differences of opinion persisted. As noted by Amien Rais, the chairman of the meeting during the Consultation Meeting between the Working Committee Leadership and PAH Leadership on June 18, 2002.

Regarding the MPR's authority, careful examination of discussions in the MPR Working Committee and its associated bodies reveals three key perspectives: **On MPR Decisions:** Some argue that in the future, including during the 2002 MPR Annual Session, the MPR should not have the authority to issue decisions beyond its amended powers. Others believe the MPR should still have this authority. This necessitates a discussion on the legal standing of non-amendment MPR draft decisions currently being prepared. **On the Form of MPR Decisions:** Some believe the MPR should no longer issue resolutions in the form of TAP MPR. Others argue that the MPR should retain the ability to issue resolutions as a form of its decisions. The

issue is whether the non-amendment MPR decisions in the 2002 Annual Session should still be considered valid without the TAP MPR framework.

Examining Article 3 and Article I of the Additional Provisions of UUD NRI 1945, several critical issues arise. First, does Article I of the Additional Provisions contradict Article 3? If the amended Article 3 abolished the MPR's authority to issue binding resolutions, then by 2003, the MPR should no longer have issued binding resolutions as it did under the pre-amendment Article 3. Second, the wording of Article I suggests that the MPR was tasked with "reviewing" and "making decisions," but this does not necessarily mean issuing TAP MPR. The author argues that the MPR exceeded its authority by issuing TAP I/MPR/2003, effectively using Article I as a loophole to maintain TAP MPR as a legislative type. This is evident in the issuance of TAP MPR No. I/MPR/2003, which is legally unconstitutional. With the enactment of certain TAP MPR/MPRS under TAP MPR No. I/MPR/2003, the question arises: who are the intended addressees of these resolutions? Given the amendment to Article 1(2) of UUD NRI 1945, the MPR is no longer the highest state institution capable of delegating power to other institutions, including issuing TAP MPR as a legislative type.¹⁴ Referring to Maria Farida Indrati Soeprapto's view on the "validity" and "efficacy" of norms, a norm is valid if established by a higher norm or an authorized institution. In practice, the effectiveness of a norm depends on whether it is adhered to. In this context, TAP MPR No. I/MPR/2003 has legal validity but lacks efficacy.

In the context of legislation, Article 22A of the 1945 Constitution of the Republic of Indonesia stipulates that "Further provisions regarding the procedures for the formation of laws shall be regulated by law." Consequently, its implementation is currently governed by Law No. 12 of 2011 on the Formation of Legislation, which repeals and declares Law No. 10 of 2004 on the Formation of Legislation invalid. Referring to Article 7, paragraph (1) of Law No. 12 of 2011 concerning the Types and Hierarchy of Legislation, the People's Consultative Assembly Decrees (TAP MPR) in question are those that remain in effect in accordance with the provisions of Articles 2 and 4 of TAP MPR No. I/MPR/2003. TAP MPR is positioned below the 1945 Constitution of the Republic of Indonesia. This differs from the provisions under Law No. 10 of 2004, where TAP MPR was removed from the types and hierarchy of legislation.

The placement of TAP MPR within the types and hierarchy of legislation in Law No. 12 of 2011 is accompanied by inconsistencies in the structuring of legislation. This inconsistency is evident in Article 10, paragraph (1), which states that "The material content that must be regulated by law includes: a. further regulation regarding provisions of the 1945 Constitution of the Republic of Indonesia; b. a mandate from a law to be regulated by law; c. ratification of certain international treaties; d. follow-up on Constitutional Court decisions; and/or e. fulfillment of legal needs in society." On the other hand, Article 18 states that "In the preparation of the National Legislative Program as referred to in Article 16, the drafting of the list of bills is based on: a. a mandate from the 1945 Constitution of the Republic of Indonesia; b. a mandate from a TAP MPR; c. a mandate from other laws; d. the national development planning system; e. the national long-term development plan; f. the medium-term development plan; g. government work plans and the strategic plan of the House of Representatives; and h.

¹⁴ Maria Farida, *Op.cit.*, hal.39

public aspirations and legal needs." Additionally, the "considering" section as the legal basis for the issuance of Law No. 12 of 2011 only mentions Articles 20, 21, and 22A of the 1945 Constitution of the Republic of Indonesia, without mentioning Article 1 of the Additional Provisions of the 1945 Constitution or TAP MPR No. I/MPR/2003. This suggests a lack of thoroughness in formulating the legal basis of Law No. 12 of 2011, raising questions about the necessity of accommodating the existence of TAP MPR within the law.

From a juridical-constitutional perspective, we face a difficult choice. On one hand, Law No. 12 of 2011 on the Formation of Legislation must be accepted as the applicable positive law. On the other hand, its content, which accommodates the existence of TAP MPR, is laden with constitutional violations (unconstitutionality). In this regard, the author aligns with Suhariyono AR¹⁵, who argues that "from a drafting perspective, the existence of TAP MPR in Law No. 12/2011 is 'hanging,' meaning it lacks a foundation and does not stand on solid ground. Law No. 12/2011 does not regulate how TAP MPR is formed, if at all possible, including its material content. If the drafting is imperfect, then substantively, TAP MPR is considered ineffective; in other words, its existence is as good as nonexistent." Upon further examination of the recognition of TAP MPR's existence in Law No. 12 of 2011, legal experts hold differing opinions.

Among those who support its inclusion is Satya Arinanto, an expert in a public hearing with the Special Committee of the House of Representatives on the Draft Law on the Formation of Legislation on January 26, 2011. He stated:¹⁶ "TAP MPR exists; I will explain later. TAP MPR exists, though perhaps in a different way than my colleague, Prof. Asep Warlan, might perceive. I will explain. TAP MPR, as a written fundamental law, is a convention..." He further explained, "Previously, I assisted MPR PAH II in drafting TAP I of 2003. There was Article 1 of the Additional Provisions in the Fourth Amendment, which stated that MPR must review past MPRS and MPR decrees. This was necessary because, after the Fourth Amendment, MPR was no longer the highest state institution. At that time, MPR sought assistance from PAH II, which, in turn, consulted the Center for Constitutional Law Studies at the University of Indonesia and the Faculty of Law at Gadjah Mada University. I was part of the UI team, alongside Prof. Maria Farida, a constitutional law expert, and Prof. Juhri, who later became Chief Justice of the Constitutional Court. We were given three months to draft this, unlike the UGM team, who simultaneously prepared the rationale and the list of TAP MPRs. That is how TAP No. I of 2003 came into being..." He further emphasized, "I have not listed them all, but Prof. Asep mentioned a few. This is important because there needs to be a hierarchy defining TAP MPR, as TAP MPR will always exist. The issue is: where does it belong in the hierarchy?"

Conversely, Asep Warlan Yusuf initially opposed placing TAP MPR within the legislative hierarchy, arguing,¹⁷ "TAP MPR should not be included in our legislative hierarchy. Why? Because the Constitution does not mandate MPR to establish broad policy guidelines as

¹⁵ Suhariyono AR, *Pembentukan Peraturan Perundang-Undangan yang Baik*, Papas Sinar Sianti, Depok, Jawa Barat, 2021, hal. 65

¹⁶ Sekretariat jenderal DPR RI, Risalah Rapat Panitia Khusus DPR RI Rancangan Undang-Undang tentang Pembentukan Peraturan Perundang-Undangan, Rabu 26 Januari 2011, Jakarta, 42, 45 hal.61.

¹⁷ *Ibid.*, hal. 40. Bahkan Harun Al Rasyid mengatakan bahwa TAP MPR produk haram, lihat risalah Rapat Panitia dengan Dirjen Perundang-Undangan Kemenkumham RI, 15 Juni 2011.

previously outlined in the Constitution. However, the next issue is: what happens to existing TAP MPRs? They have not been revoked by the Constitution or other TAP MPRs, and some still remain in effect—three, for example. This creates a dilemma, as their status remains unclear. Therefore, esteemed Chairperson and Members of the Council, it would be best to include a specific chapter addressing TAP MPR to clarify its legal standing and ensure certainty in its application." He further stated, "The material content that remains valid must still exist. My suggestion is that TAP MPR should be positioned between the Constitution and laws in the hierarchy. Otherwise, how do we address those still in effect? They will continue to exist unless MPR issues a new decree revoking all previous TAP MPRs and MPRS decrees."

Slightly differing from the experts above, the author believes that TAP MPR should still be included in the legislative hierarchy based on non-juridical arguments. The necessity of TAP MPR is primarily supported by non-legal considerations, as highlighted by MPR leadership, who stated: "The remaining valid MPRS and MPR decrees hold significant importance concerning ideological, political, economic, social, and legal development, especially after the amendments to the 1945 Constitution." ¹⁸ However, in the author's view, this assertion is "far from reality." Since TAP MPR was recognized in Law No. 12 of 2011, its placement within the legislative hierarchy has not significantly contributed to legal development.

2. Legal steps that must be taken regarding the MPR Decree which is still in force in order to regulate the orderly implementation of laws and regulations.

The desire to shift paradigms in accordance with the spirit of the provisions of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) is not easily realized at the implementation level, as it is often marked by differing opinions and contradictions, with arguments shaped by specific interests under the guise of democracy. The amendments to Article 1(2) and Article 3 of the 1945 Constitution have faced strong resistance, particularly regarding the desire to maintain the People's Consultative Assembly Decrees (TAP MPR) as a binding decision of the MPR. The introduction of Article I of the Supplementary Provisions of the 1945 Constitution, despite being formulated in a neutral and seemingly straightforward manner, has proven to be a complex issue, potentially leading to new legal challenges, particularly in the fields of constitutional law and legislative theory. A deeper examination of the discussions in the MPR during the 2002 sessions reveals that the inclusion of Article I of the Supplementary Provisions of the 1945 Constitution was influenced by two opposing viewpoints, as noted by Amin Rais,¹⁹ the session chair, during the Consultation Meeting between the Leadership of the Working Body and the Leadership of the Ad Hoc Committee (PAH) on Tuesday, June 18, 2002. The first view asserted that the MPR should no longer issue decisions in the form of TAP MPR, while the second maintained that the MPR should retain the authority to issue TAP

¹⁸ Pernyataan Ketua MPR (Taufiq Kiemas) dalam Risalah Rapat Konsultasi Pansus DPR RI RUU Pembentukan Peraturan Perundang-Undangan dengan Pimpinan MPR RI, Kamis 20 Januari 2011, hal.2-3.

¹⁹ MPR RI, *Risalah Perubahan UUD Negara RI Tahun 1945, Tahun Sidang 2002*, Buku Ketiga, Jakarta, 2010, hal.248.

MPR as a form of MPR decision. The first perspective raised concerns regarding the status of decisions on non-amendment matters discussed during the 2002 Annual Session of the MPR (emphasis added by the author).

The legal norm established by Article I of the Supplementary Provisions of the 1945 Constitution, as enacted in 2002, has served as a means of legal maneuvering, enabling the MPR to revive TAP MPR/MPRS. Furthermore, from the author's perspective, the formulation of this legal norm contradicts Article 3 of the 1945 Constitution, which was also enacted in 2002. This is because, under Article 3 of the 1945 Constitution, the MPR no longer holds the authority to establish TAP MPR as a form of legislation. The subsequent issuance of TAP MPR No. I/MPR/2003 further underscores that the MPR's actions were unconstitutional, as they involved legal maneuvering through the provisions of Article I of the Supplementary Provisions of the 1945 Constitution. With regard to the legal norm established by Article I of the Supplementary Provisions of the 1945 Constitution, the author considers this provision to be unconstitutional, as it contradicts the essence of Article 1(2) and Article 3 of the 1945 Constitution. Therefore, the necessary legal course of action for the MPR is to amend the 1945 Constitution by exercising its constitutional authority and following the procedures outlined in Article 37 of the 1945 Constitution, specifically by removing the provisions of Article I of the Supplementary Provisions. However, this approach is not without criticism, particularly concerning whether Article I of the Supplementary Provisions falls within the scope of constitutional amendments as intended by Article 37 in conjunction with Article II of the Supplementary Provisions of the 1945 Constitution. As a consequence of the unconstitutional nature of the legal norm within the Supplementary Provisions of the 1945 Constitution, TAP MPR No. I/MPR/2003—along with the existence of Articles 2 and 4 within that decree—must also be deemed unconstitutional, as its legal foundation is based on the provisions of Article I of the Supplementary Provisions. The legal remedy available to the MPR concerning TAP MPR No. I/MPR/2003, which the author also considers unconstitutional, is for the MPR to convene an Annual Session and, during this session, issue a decision to revoke and declare TAP MPR No. I/MPR/2003 null and void. This aligns with the opinion of Dian Agung Wicaksono, who stated that "TAP MPR, as a product of the MPR, must be reviewed and revoked by the MPR itself when no other state institution possesses the authority to conduct such a review. Additionally, the legal instrument for revocation only requires an MPR Session decision."²⁰

The existence of TAP MPR is acknowledged under Law No. 12 of 2011 on the Formation of Laws and Regulations, particularly regarding specific TAP MPR/MPRS as referred to in TAP MPR No. I/MPR/2003. Its position within the hierarchy of

²⁰ Jurnal Konstitusi, Mahkamah Konstitusi RI, Volume 10, Nomor 1, Maret 2013, hal.172-173.

legislation is placed directly below the 1945 Constitution, as stipulated in Article 7(1) in conjunction with the explanation of Article 7(1)(b) of Law No. 12 of 2011. However, the recognition of TAP MPR within Law No. 12 of 2011 is considered ineffective and unconstitutional, as the legal basis for its inclusion in the law is also unconstitutional. Given that Law No. 12 of 2011 is currently in force as positive law, an evaluation of the existence of TAP MPR within this law can be conducted through two approaches. First, the House of Representatives (DPR) and the government could conduct a ****legislative review**** of TAP MPR's inclusion in Law No. 12 of 2011, which would involve amending the law to remove TAP MPR through a ****Third Amendment to Law No. 12 of 2011 on the Formation of Laws and Regulations****. Second, a ****judicial review**** could be filed with the Constitutional Court, arguing that Law No. 12 of 2011 contradicts the 1945 Constitution, with the objective of aligning the law with the principles enshrined in the constitutional provisions. As a final note, if constitutional amendments were successfully made to revoke Article I of the Supplementary Provisions of the 1945 Constitution, and the MPR issued a decision repealing TAP MPR No. I/MPR/2003, then a legislative review or judicial review of Law No. 12 of 2011 would no longer be necessary.

4. Conclusion

The conclusions of this study are as follows:

- a. The existence of the People's Consultative Assembly Decrees (TAP MPR/MPRS) currently in force is based on Article I of the Supplementary Provisions of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945). Subsequently, based on TAP MPR No. I/MPR/2003, certain TAP MPR/MPRS were declared valid. From a legislative studies perspective, the legal norm formulation in Article I of the Supplementary Provisions of the 1945 Constitution is, in fact, constitutionally contradictory (unconstitutional) to Article 1(2) in conjunction with Article 3 of the 1945 Constitution. This unconstitutional legal norm formulation was instead used by the MPR as a basis for legal maneuvering, leading to the issuance of TAP MPR No. I/MPR/2003. Consequently, TAP MPR No. I/MPR/2003 is also unconstitutional. The existence of TAP MPR as positive law was later regulated under Law No. 12 of 2011 on the Formation of Laws and Regulations. However, the recognition of TAP MPR as a form of legislation and its inclusion in the legislative hierarchy is, from a legal perspective, also unconstitutional.
- b. Legal efforts to reorganize the legislative framework in Indonesia include the following: First, the MPR could amend the Constitution by removing Article I of the Supplementary Provisions of the 1945 Constitution. Second, the MPR could conduct a "legislative review" of TAP MPR No. I/MPR/2003 by issuing an MPR decision to revoke and declare it no longer in effect. If either of these measures is successfully implemented, a legislative review and judicial review of Law No. 12 of 2011 would no longer be necessary.

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