WORLD CLASS ISLAMIC CYBER UNIVERSITY
UNISSULA
SULTAN AGUNG ISLAMIC UNIVERSITY
DOCTORAL PROGRAM OF LAW
FACULTY OF LAW
PROCEEDING OF INTERNATIONAL CONFERENCE ON
THE LAW DEVELOPMENT FOR PUBLIC WELFARE
ISSN: 2798-9313
Topic: Human Right Issues of Artificial Intelligence (AI) Gaps and Challenges, and Affected Future Legal Development in Various Countries

Constitutionality Of MPR Decisions In The Hierarchy Of Legislation According To Constitutional Theory

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Abstract. *This legal writing discusses the CONSTITUTIONALITY OF MPR DECISIONS IN THE HIERARCHY OF LEGISLATION ACCORDING TO CONSTITUTIONAL THEORY. The approach to this legal research is normative legal research or library legal research, namely research carried out by studying library materials or also called secondary data. The specifications of this legal research are analytical descriptive. The legal materials used are primary legal materials and secondary legal materials, namely legal books and legal journals. The data collection and retrieval procedure used in this research is library research. The data obtained from the research will then be analyzed using qualitative descriptive data analysis techniques, namely by providing an interpretation of the data obtained rationally and objectively. From the discussion he has presented above, the conclusion that can be drawn regarding the constitutionality of the MPR TAP in the hierarchy of legislative order in Indonesia is that the constitutionality of a statutory regulation can be carried out by testing the statutory regulation. Indonesia has two judicial institutions that carry out reviews of statutory regulations, namely the Constitutional Court and the Supreme Court. The authority of the Constitutional Court is to review statutory regulations against the 1945 Constitution of the Republic of Indonesia, while the authority of the Supreme Court is to review statutory regulations under the law against the law. If you look at the tests above, it is clear that there is no authority to carry out tests on MPR Decrees. The absence of testing of MPR decisions raises the question of whether they are still relevant if MPR decisions are still included in the hierarchy of statutory regulations.*

Keywords: *Constitutionality Of MPR Decisions; Constitutional Theory; Hierarchy Of Legislation.*

Topic: Human Right Issues of Artificial Intelligence (AI) Gaps and Challenges, and Affected Future Legal Development in Various Countries

1. Introduction

Before changes were made to the 1945 Constitution, the MPR was the highest state institution that exercised sovereignty granted by the people as stated in Article 1 paragraph (2) of the 1945 Constitution. As the highest state institution, the MPR had the authority to establish the Constitution and Outlines. rather than state direction as stated in Article 3 of the 1945 Constitution. Based on the provisions of the article above, it can be said that the MPR is a state institution that makes the Constitution and is the implementer of people's sovereignty.[1]

According to Sri Soemantri, the MPR is a state institution that has the highest position and power. The powers are unlimited and are not determined in a limitative manner but rather in an enunciative manner which originates from Article 1 paragraph (2) of the 1945 Constitution. Thus, the Assembly has the highest position among other state institutions. Apart from the authority to enact the Constitution and GBHN, the MPR also has other powers, namely electing the President and Vice President according to the lines determined by the MPR. The President elected by the Assembly must submit to and be responsible to the Assembly. It can be said that the President and Vice President are the "mandaters" of the MPR and are obliged to implement the MPR's decisions. In this case the President is not "neben" but "untergeordnet" to the MPR.[2]

If you look at the MPR's authority as stated in the 1945 Constitution, the term MPR Decree (TAP MPR) is not known. The term TAP MPR only emerged from the first sessions of the Temporary People's Consultative Assembly (MPRS) which was based on article 3 of the 1945 Constitution.[3], which states that the People's Consultative Assembly (MPR) has the authority to determine the broad outlines of state direction. In connection with this authority, the MPR product became known, namely the MPR Decree (or during the MPRS period it was called the MPRS Decree/TAP MPRS).[4]

[1]The 1945 Constitution before the amendment, article 1 paragraph 2 which read "Sovereignty is in the hands of the people and is exercised entirely by the People's Consultative Assembly"
[2]Sri Soemantri, "The Position of State Institutions and the Right to Test According to the 1945 Constitution", (Jakarta: Sinar Pangganga, 1987), p. 186 .
[3]Moh. Kusnardi and Hamaily Ibrahim, "Introduction to Indonesian Constitutional Law", Jakarta: Center for Constitutional Law Studies FHUI, 1985), p.46.
[4]Rachmani Puspitadewi, Position and Legal Status of MPRS Decrees and MPR-RI Decrees after Amendments to the 1945 Constitution, Pro Justitia Law Journal vol. 25 No. 1, Feb. 2007.

Apart from that, the existence of the MPR TAP also continues to be strengthened with the issuance of MPR Decree No. III of 2000 concerning Sources of Law and the Sequence of Legislative Regulations which states that the sequence of statutory regulations is a guideline in making the legal rules under them. In Article 2 of MPR Decree no. III of 2000 it was said that the sequence of laws and regulations of the Republic of Indonesia is the 1945 Constitution; Decree of the People's Consultative Assembly of the Republic of Indonesia; Constitution; Government Regulation in Lieu of Law (Perpu); Government regulations; Presidential decree; Local regulation. The inclusion of the MPR Decree in the Hierarchy of Legislative Regulations further strengthens the position of the MPR TAP.

The changes to the 1945 Constitution also had implications for the existence of the MPR TAP itself. Initially the MPR TAP was the basis for determining the GBHN, but with the elimination of the MPR's authority to determine the GBHN, the existence of the MPR TAP would also become a problem. One of the actions taken by the MPR with the Amendment to the 1945 Constitution of the Republic of Indonesia was by issuing TAP MPR Number I/MPR/2003 concerning Review of the Material and Legal Status of Decrees of the Temporary People's Consultative Assembly and Decrees of the People's Consultative Assembly of the Republic of Indonesia from 1960 to 2002, which in the MPR TAP revoked 8 other MPR decrees and declared them invalid. Apart from that, TAP MPR Number I of 2003 also stated that 3 TAP MPR/MPRS were still in effect and stated that 5 TAP MPR would remain in effect until the formation of a government as a result of the 2004 general election.[5]

In line with its development, Law Number 10 of 2004 concerning the Formation of Legislative Regulations was issued, where in Article 7 paragraph (1) it is stated that "Types and hierarchy of Indonesian Legislative Regulations are the 1945 Constitution of the Republic of Indonesia; Law/Government Regulation in Lieu of Law; Government regulations; Presidential decree; Local regulation". If you look at this provision, you can see that the MPR TAP is not included in the types and hierarchy of Indonesian statutory regulations. The failure to place the MPR TAP in the hierarchy of statutory regulations sometimes causes problems in the field because there are several MPR TAPs that are still in force and whose position is often questioned.[6]

[5]TAP MPR Number I/MPR/2003 concerning Review of the Material and Legal Status of Decrees of the Temporary People's Consultative Assembly and Decrees of the People's Consultative Assembly
[6]Law Number 10 of 2004 concerning the Formation of Legislative Regulations

The replacement of Law Number 10 of 2004 concerning the Formation of Legislative Regulations with Law Number 12 of 2011 concerning the Formation of Legislative Regulations also has implications for the position of the MPR Decree. In Article 7 paragraph (1) of Law No. 12 of 2011 it is stated that "The types and hierarchy of Legislative Regulations consist of the 1945 Constitution of the Republic of Indonesia; Decree of the People's Consultative Assembly; Law/Government Regulation in Lieu of Law; Government regulations; Presidential decree; Provincial Regional Regulations; and Regency/City Regional Regulations". Law No. 12 of 2011 places TAP MPR in the type and hierarchy of statutory regulations. If you look at Law No. 10 of 2004, the existence of TAP MPR is abolished in the hierarchy of statutory regulations. If we look at Article 7 paragraph (1) of Law No. 12 of 2011, it can be said that the position of the MPR TAP is higher than statutory regulations, Perpu, PP, Presidential Decree and Regional Regulations.[7]

In the absence of legal measures that can be taken to test this MPR decision, is it still appropriate to place the MPR decision in the hierarchy of statutory regulations? Based on the description above, the author will examine "the constitutionality of MPR decisions in the hierarchy of statutory regulations according to Hans Kelsen's Tiered Hierarchy Theory (Stufenbau theory)".

Based on the background explanation described above, the problem formulation that can be taken is how is the constitutionality of MPR decisions in the hierarchy of laws and regulations according to Hans Kelsen's Tiered Hierarchy Theory (Stufenbau theory)?.

2. Research Methods

The approach to this legal research is normative legal research or library legal research, namely research carried out by studying library materials or also called secondary data. The specifications of this legal research are analytical descriptive. The legal materials used are primary legal materials and secondary legal materials, namely legal books and legal journals. The data collection and retrieval procedure used in this research is library research. The data obtained from the research will then be analyzed using qualitative descriptive data analysis techniques, namely by providing an interpretation of the data obtained rationally and objectively.

[7]Law Number 12 of 2011 concerning the Formation of Legislative Regulations

3. Results and Discussion

Constitutional Law is the Basic Law that establishes and regulates State organizations. Constitutional Law as an applied science will reflect in Constitutional Law as regulations as instruments in a state or state or social institution will also reflect in its implementation depending on many factors. In general, it can be divided into two factors, namely internal factors of Constitutional Law and external factors of Constitutional Law. What is meant by internal factors of Constitutional Law are juridical factors from legal qualifications or norms brought or contained in Constitutional Law regulations and the effectiveness of the law. What is meant by external factors of Constitutional Law are philosophical and sociological factors of legal qualifications and factors of legal institutions, law enforcement, legal facilities, and the legal community of legal effectiveness.[8]

The implementation of internal factors in the form of juridical factors of legal qualifications or norms of legal effectiveness of a Constitutional Law regulation will be determined according to the values contained in the juridical factors of legal qualifications or norms of legal effectiveness of a Constitutional Law regulation , namely whether the regulatory norms have the normative value, nominal value, or semantic value of a Constitutional Law regulation. The implementation of external factors and norms of a Constitutional Law regulation will be determined by the real power factors that exist in society.[9]

According to Jimly Asshiddiqqie, in practice there are three types of legal norms that can be tested or what are usually called norm control mechanisms. All three are forms of legal norms as a result of the legal decision-making process, namely normative decisions which contain and have the nature of regulations (regeling), normative decisions which contain and have the nature of administrative determinations (beschikking), and normative decisions which contain and have the nature of judgment (judgment). which is usually called a verdict. This mechanism for testing legal norms can be carried out using a testing mechanism carried out by judicial institutions known as judicial review. There are several types of testing, namely legislative review (the test is given to parliament), executive review (the test is given to the government), and judicial review (the test is given to the judiciary).[10]

[8]Sri Soemantri Martosoewignjo. Procedures and Systems for Constitutional Amendments, Print IV, (Bandung: PT. Alumni, 1987). matter. 51.
[9]Ibid, p. 2
[10]Jimly Asshiddiqqie, "Procedural Law for Reviewing Laws", (Jakarta: Constitution Press, 2006), p. 1-2

There are three forms of legal norms that are individual and concrete norms, and there are also those that are general and abstract norms. Verdicts and beschikking are always individual and concrete, whereas if the norm being tested is general and abstract, then the norm being tested is a regeling product. Testing of concrete and individual legal norms is included in the scope of state administrative justice.[11]

In reviewing laws, there are two terms, namely judicial review and constitutional review. Constitutional review which can be interpreted as testing laws against the basic law which is currently the authority of the Constitutional Court, judicial review can be interpreted as testing statutory regulations under the law against laws which are currently carried out by the Supreme Court .[12]Basically, many people equate the terms judicial review and constitutional review, even though these two terms are different. If it is a constitutional review, the test measure is carried out using the constitution as a measuring tool, but if the norm being tested uses the law as a touchstone, it can be said to be a judicial review.

If you look at the description above, it is known that to determine the constitutionality of a statutory regulation, it is necessary to carry out an examination of the statutory regulation. However, if you look at the 1945 Constitution of the Republic of Indonesia, only two types of testing of statutory regulations are known, namely testing of laws against the 1945 Constitution of the Republic of Indonesia and testing of regulations under the law against the law. So currently there is no legal effort that can be taken to test the constitutionality of the MPR Decree because there are only 2 types of testing of statutory regulations, namely legal testing of the 1945 Constitution of the Republic of Indonesia and testing of regulations under the law against the law.

If you look at Hans Kelsen's theory of norm hierarchy which divides legal norms into two parts, namely superior and inferior norms, where according to this theory the unity of legal norms is structured by the fact that the making of lower norms is determined by higher norms, and it can be said that the making of norms determined by higher norms is the main reason for the validity of the entire legal system that forms a unity.[13]Besides that, in the hierarchy theory of superior and inferior norms, it is also known that there is a relationship between norms that regulate the creation of other norms and these other norms can be called super and subordination

[11]Ibid, p. 5
[12]Jimly Asshiddiqqie, "Constitutional Testing Models in Various Countries", (Jakarta: Sinar Graphics, 2010), p. 7.
[13]Jimly Asshidddiqie and M. Ali Safa'at, "Hans Kelsen's Theory of Law", (Jakarta: Constitution Press, 2012), p. 100

relationships in a special context. The norm that determines the creation of other norms is superior, while the norms that are created are not a system of norms that are coordinated with each other, but a hierarchy of norms that have different levels.[14]

According to Jimly Asshidiqqie, the presence of the MPR Decree can be based on two things, namely the legal provisions implied in the 1945 Constitution and the basis of the legal form of the MPR TAP, namely constitutional practices or constitutional customs. Constitutional practices or customs are one of the sources of constitutional law found in every country. Basically, the Indonesian constitutional system recognizes the existence of constitutional practices or customs as mentioned in the Explanation of the 1945 Constitution.[15]In general, MPR decisions can be interpreted as a form of legislative product which is a decision of the MPR deliberation, which is aimed outward, namely regulating the broad outlines in the legislative and executive fields. So far, MPR decisions have been called Decrees or Decrees. Determinations are outward and inward, while decisions are internal.[16]

According to MPRS Decree no. XX/MPRS/1966 form of MPR regulation contains 30 outlines in the legislative field which are implemented by law; and Outlines in the executive sector which are implemented by Presidential Decree. This means that MPR decisions on the one hand can be implemented by Presidential Decree. If we look at all the MPRS decrees, it is known that there are MPR decrees whose contents regulate and there are also those whose contents are decisions (beschikking).[17]

Basically, the MPRS Decree/No.XX/MPRS/1966 concerning the DPR GR Memorandum regarding the Sources of legal order of the Republic of Indonesia and the sequence of regulations of the Republic of Indonesia's laws and regulations has an important meaning in the Indonesian legal system. The MPRS decision is through the Republic of Indonesia MPRS Decree No. V/MPR/1973 Jo MPR RI Decree No. IX/MPR/1978 was declared to remain valid and needed to be refined. MPR RI Decree No. IX/MPR/1978 is about the need for improvements included in Article 3 of MPR RI Decree No. V/MPR/1973. According to MPRS Decree/No.XX/MPRS/1966, the sequence of laws in Indonesia is (i) the 1945 Constitution of the Republic of Indonesia, (ii) MPR Decree, (iii)

[14]Ibid
[15]Jimly Asshiddiqie, "Constitution and Constitutionalism", (Jakarta: Sinar Grafa, 2010), p. 258
[16]Titik Triwulan and Ismu Gunadi Widodo, "State Administrative Law and Indonesian State Administrative Court Procedure Law", (Jakarta: Kencana Prenada Media Grup, 2011), p. 41.
[17]Op Cit, pg 41

Law/PerPPU, (iv) Government Regulation , (v) Presidential Decree, (vi) Other Implementing Regulations.

After the issuance of MPRS Decree/No. XX/MPRS/1966 above, then the MPR issued MPR Decree No. III/MPR/2000 concerning Sources of Law and Sequence of Legislative Regulations where in the MPR Decree the hierarchical sequence of statutory regulations is determined, namely (i) Basic Law; (ii) MPRS Decree; (iii) Laws; (iv) Government Regulation in Lieu of law; (v) Government regulations; (vi) Presidential Decree; (vii) Regional Regulations.

However, the hierarchy of statutory regulations has changed following the issuance of Law Number 10 of 2004 concerning the Formation of Legislative Regulations, where in Article 7 paragraph (1) of Law Number 10 of 2004 the order of Legislative Regulations in Indonesia is (i) Law -The 1945 Constitution of the Republic of Indonesia, (ii) Laws/PerPPU, (iii) Government Regulations, (iv) Presidential Regulations, (v) Regional Regulations.[18]

Basically, if you look at the authority of the MPR contained in the 1945 Constitution, it is known that the MPR has the authority to establish the Constitution and Outlines of State Policy (GBHN) as stated in Article 3 of the 1945 Constitution. There are two interpretations regarding the MPR's task of establishing the GBHN namely the outline of state direction in a broad sense and in a narrow sense. The interpretation in the narrow sense is the Outlines of State Policy (GBHN) as always determined every 5 years which are used as a reference for the President to carry out five-year development tasks. Meanwhile, what is understood in a broad sense is all directions for state direction that are needed apart from the GBHN text. Therefore, state policies other than the GBHN need to be determined in the form of MPR Decrees with a position under the Constitution. So there are so many MPR Decrees up to now, that if we examine them one by one, there are also material provisions that are truly necessary, such as the MPR Decrees on Human Rights, but there are also many that are not that important.[19]

The consequence of the position and authority of the MPR to determine the Outlines of State Policy (GBHN), resulted in the existence of the TAP MPR(S) as one of the statutory provisions containing regulations. This was then further confirmed by the MPRS Decree Number XX/MPRS/1966 which placed the MPR TAP as one of the statutory regulations which had a level

[18]Law Number 10 of 2004 concerning the Formation of Legislative Regulations
[19]Moh. Mahfud MD., "Constitutional Law Debate After Constitutional Amendments", (Jakarta: Rajawali Pers. 2010), p. 32

below the Constitution. According to Mahfud MD, the placement of the MPR TAP as a statutory regulation in the second degree (under the 1945 Constitution) is actually just an interpretation of the MPR, because the Constitution itself does not state that the MPR TAP must contain regulations (regeling) and take the form of statutory regulations. However, since the amendment to the 1945 Constitution of the Republic of Indonesia, there have been quite major changes to the MPR, such as the MPR not being the highest state institution and also the MPR not having the authority to determine the GBHN. The MPR's authority after the amendment to the 1945 Constitution of the Republic of Indonesia was to establish the Constitution, appoint the president and vice president, and dismiss the president and/or vice president as stated in Article 3 of the 1945 Constitution of the Republic of Indonesia.[2021]

The hierarchical theory of legal norms put forward by Hans Kelsen, Kelsen argues that legal norms are tiered and layered in a hierarchical order, where a lower norm applies, is sourced and based on a higher norm, as follows So on, norms that cannot be explored further and are hypothetical and fictitious, namely basic norms (Grundnorm). The basic norm, which is the highest norm in the norm system, is no longer formed by a higher norm, but the norm is established first by society as a basic norm which is the basis for the norms below it. According to Hans Kelsen, law is a dynamic norm, where law is something that is made by a certain procedure and everything that is made in this way is law.[22]

Based on Kelsen's opinion above, it is known that a legal norm always originates and is based on the norm above it, but downward, the legal norm also becomes the source and becomes the basis for norms lower than it. In terms of the structure/hierarchy of the norm system, the highest norm (Basic Norm) is the place on which the norms below it depend, so that if the Basic Norm changes, the system of norms beneath it will be damaged. Meanwhile, Hans Nawiasky is of the opinion that a legal norm in any country is always multi-layered and tiered. The lower norms apply, originate and are based on higher norms, the higher norms apply, originate and are based on a highest norm which is called the Basic Norm.[23]

According to Marida Farida, the MPR Decree is the Staatsgrundgesetz or Basic State Rules/Basic State Rules. As with the Body of the 1945 Constitution, the MPR Decree also contains outlines

[20]Ibid,
[21]Jimly Asshiddiqie, "Constitution and Constitutionalism", (Jakarta: Sinar Grafa, 2010), p. 265
[22]Hans Kelsen, "Pure Legal Theory: Basics of Normative-Descriptive Legal Science", (Jakarta: Rimdi Press, 1995), p. 110-125.
[23]Ibid, p. 109

or main points of state policy. The nature of the legal norms is still in broad outline and is a single legal norm and is not attached to legal norms containing sanctions. The Body of the 1945 Constitution, as well as the MPR Decrees are not included in the type of statutory regulations, but are included in the Staatsgrundgesetz, so placing them in the type of statutory regulations is the same as placing them too low. The body of the 1945 Constitution and MPR Decrees essentially cannot be classified as statutory regulations because they contain a higher and different type of norm than the norms contained in law.[24]

Based on the description above, it can be said that MPR decisions should not be included in the hierarchy of statutory regulations because after the fourth amendment to the 1945 Constitution of the Republic of Indonesia, the MPR had no authority to enact regulatory legal products except in the form of the Constitution or Amendments to the Constitution. Apart from that, if we refer to Hans Kelsen's opinion which states that legal norms are tiered and multi-layered, where higher legal norms are the source and basis for the formation of lower legal norms, then this does not happen in the MPR decree. So far, what has always been used as the basis for the formation of laws and regulations is the 1945 Constitution of the Republic of Indonesia, even though if it were based on Hans Kelsen's theory, MPR decisions should also be used as the basis for the formation of laws and regulations considering that the position of MPR decisions is above the law. This is because the MPR does not have the authority to enact regulatory legal products again after the amendments were made to the 1945 Constitution. Therefore, it is necessary to reconsider whether the MPR's decisions are still included in the hierarchy of statutory regulations.

4. Conclusion

From the discussion he has presented above, the conclusion that can be drawn regarding the constitutionality of the MPR TAP in the hierarchy of legislative order in Indonesia is that the constitutionality of a statutory regulation can be carried out by testing the statutory regulation. Indonesia has two judicial institutions that carry out reviews of statutory regulations, namely the Constitutional Court and the Supreme Court. The authority of the Constitutional Court is to review statutory regulations against the 1945 Constitution of the Republic of Indonesia, while the authority of the Supreme Court is to review statutory regulations under the law against the law. If you look at the tests above, it is clear that there is no authority to carry out tests on MPR Decrees. The absence of testing of MPR decisions raises the question of whether they are still

[24]Jimly Asshidiqqie, Op Cit, p. 76

relevant if MPR decisions are still included in the hierarchy of statutory regulations. If we refer to the opinions of Hans Kelsen, Mahfud MD, Jimly Asshidiqqie, and Maria Farida, it is clear that MPR decrees should be excluded from the hierarchy of statutory regulations because apart from MPR decrees, MPR decrees cannot be tested and they are not included in statutory regulations. If we refer to Hans Kelsen's opinion, it is known that MPR decisions are included in the Staatsgrundgesetz (Basic Rules/Basic Rules of the State). Basically, the DPR and the Government need to reconsider the position of the MPR TAP in the hierarchy of statutory regulations. If you look at the conclusion above, MPR decisions should not be included in the hierarchy of statutory regulations. To remove MPR decisions from the hierarchy of statutory regulations, it is necessary to amend or replace Law Number 12 of 2011 concerning the Formation of Legislative Regulations.

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