

## Position of the 1945 Constitutional Law of the Republic of Indonesia in the Hierarchy of Indonesian State Legal Regulations

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**Abstract.** Law Number 12 of 2011 groups the 1945 NRI Constitution into types and hierarchies of laws and regulations as stated in Article 7 paragraph (1). This has given rise to discourse among Constitutional Law experts regarding whether the 1945 NRI Constitution has its own hierarchy or position. This study examines the position of the 1945 NRI Constitution in the hierarchy of laws and regulations and its conformity with the theory of the hierarchy of state legal norms. This research uses a normative legal approach with descriptive-analytical specifications, relies on secondary data through literature studies and document reviews, and is analyzed qualitatively. The results of the study show that the 1945 Constitution of the Republic of Indonesia is a State Fundamental Norm (*Staatsfundamentalnorm*) and a State Basic Rule (*Staatsgrundgesetz*). Therefore, it is not appropriate to group it in the hierarchy of laws and regulations as per Article 7 paragraph (1) of Law No. 12 of 2011. A revision of this article is needed so that the 1945 Constitution of the Republic of Indonesia is not classified as a "Type and Hierarchy of Laws and Regulations," but rather a "Type and Hierarchy of State Regulations." Further arrangements can be made through amendments to the 1945 Constitution of the Republic of Indonesia according to the mechanism in Article 37 or through an MPR Decree.

**Keywords:** Constitution; Examines; Study.

### 1. Introduction

The Republic of Indonesia is a country of law, as stated in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. Norms are a measure that must be obeyed by a person in relation to others or to their environment. The term norm comes from Arabic which means rule, while in Indonesian it is often also called a guideline, benchmark, or rule. In its development, norms are interpreted as a measure or benchmark for a person in acting or behaving in

society.<sup>1</sup>Soerjono Soekanto and Purnadi Purbacaraka stated that rules are benchmarks or measurements or guidelines for behaving or acting in life. When viewed from its essential form, rules are the formulation of a view (*oordel*) regarding behavior or attitude.<sup>2</sup>Hans Kelsen, with his theory on the levels of legal norms, explains that legal norms are hierarchical and layered in a structured system in the sense that a lower norm applies, originates from, and is based on a higher norm: and so on until a norm that cannot be traced further and is hypothetical and fictitious, namely the Basic Norm (*Grundnorm*).<sup>3</sup>In short, basic norms are the highest norms in a system of norms. These norms are no longer formed by a higher norm, but these basic norms are first determined by society as Basic Norms which are pre-supposed or dependent on the norms below them.

Nowadays, there is a discourse in the realm of Indonesian Constitutional Law, especially regarding the Hierarchy of Legislation in Indonesia. This is stipulated in the Law on the Formation of Legislation (UU PPP).<sup>4</sup>There are views from several academics that the placement of the 1945 Constitution of the Republic of Indonesia and the Decree of the People's Consultative Assembly (Tap MPR) into the type of legislation in the PPP Law causes conflict. Bagir Manan agrees that the 1945 Constitution of the Republic of Indonesia is included in the type of legislation. Because according to him, the 1945 Constitution of the Republic of Indonesia is a special rule seen from the determination and procedures for changing it which are different from other legislation. Thus, it does not violate the spirit of the 1945 Constitution of the Republic of Indonesia if the 1945 Constitution of the Republic of Indonesia is classified as one type of legislation with the highest position.<sup>5</sup>In contrast to Bagir Manan, Hamid S. Attamimi rejects the 1945 NRI Constitution and the MPR Decree to be grouped into types of legislation, furthermore Hamid S. Attamimi is of the view that placing the 1945 NRI Constitution and the MPR Decree above the law is the right thing to do.<sup>6</sup>The 1945 Constitution of the Republic of Indonesia which contains Pancasila as contained in the main ideas contained in its Preamble and contains the basic

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<sup>1</sup> Maria Farida Indrati S, 2021, *Legislation 1: Types, Functions, and Content Materials*, 1st Edition, PT Kanisius, Yogyakarta, p. 19.

<sup>2</sup> Purbacaraka Purnadi and Soerjono Soekanto, 1993, *Regarding Legal Principles*, Tata Nusa, Bandung, p. 6.

<sup>3</sup>*Ibid.*, p. 113.

<sup>4</sup>In its implementation, Law Number 10 of 2004 concerning the Formation of Legislation has been revoked by Law Number 12 of 2011 concerning the Formation of Legislation and was subsequently amended through Law Number 15 of 2019 (First Amendment), and Law Number 13 of 2020 (Second Amendment).

<sup>5</sup> Bagir Manan and Kuntana Magnar, 1997, *Several Problems of Indonesian Constitutional Law*, Revised Edition, Alumni, Bandung, p. 106-107.

<sup>6</sup> A. Hamid S. Attamimi, 1990, *The Role of the Decrees of the President of the Republic of Indonesia in the Implementation of State Government: An Analytical Study of Presidential Decrees that Function as Regulations in the Period of Pelita I-Pelita IV*, University of Indonesia, p. 287.

rules of the state in its Articles cannot be equated with the Law. Meanwhile, the MPR Decree contains the same legal norms but one level lower than the legal norms of the 1945 Constitution of the Republic of Indonesia and can be grouped into basic state rules or basic state rules that are different from the Law.

Moreover, the discourse on the position of the 1945 Constitution of the Republic of Indonesia in the Hierarchy of Indonesian Legislation as a constitution is very important, considering that the constitution is a guideline for the nation, state, and society. Because, it will affect various aspects such as the formality of a law, the mechanism for testing a law against other laws or the Constitution, to the development of science, especially in the context of Constitutional Law in Indonesia.

## **2. Research Methods**

Legal research is a process to find legal rules, legal principles, or legal doctrines to answer the legal issues faced. This is in accordance with the prescriptive character of legal science. If in descriptive science the expected answer is true or false, the expected answer in legal research is right, appropriate, inappropriate, or wrong. Thus it can be said that the results obtained in legal research already contain value.<sup>7</sup>In compiling this thesis, the author uses a normative legal research method, which only uses secondary data sources, namely laws and regulations, court decisions, legal theories and the opinions of leading legal scholars, while the analysis carried out is a normative-qualitative analysis.<sup>8</sup>The method used in this study is normative juridical. The specification of this study is analytical descriptive, which provides a detailed and systematic description. The data analysis method uses qualitative analysis.<sup>9</sup>

## **3. Results and Discussion**

### **3.1. Analysis of the Position of the 1945 Constitution of the Republic of Indonesia in the Hierarchy of Indonesian Legislation**

The function of forming Legislation has a close relationship with the state system, especially in terms of the function of state institutions and the types of Legislation produced. From a state perspective, the formation of Legislation is an important part of realizing a state of law that is in accordance with the form of state, form of government, and system of government adopted by a country.

Based on Article 1 paragraph (3) of the 1945 Constitution of the Republic of

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<sup>7</sup> Peter Mahmud Marzuki, *Legal Research*, Revised Edition (Jakarta: Kencana Prenada Media Group, 2019), 35.

<sup>8</sup> Ronny Hanitijo Soemitro, *Legal Research Methodology and Jurimetrics* (Bandung, 1990), p. 9.

<sup>9</sup> Solikun Ni'am, Akhmad Khisni, and Lathifah Hanim, "The Implementation Of Criminal Law To The Forester Of Land And Land Combustion In Blora Regency," *Journal of Daulat Hukum* 3, no. 2 (2020): 276, <https://doi.org/10.30659/jdh.v3i2.9391>.

Indonesia, it is stated that the Republic of Indonesia is a state of law. Regarding this, Jimly Asshidiqie is of the view that the principle of a state of law contains the following understandings: 1) Recognition of the principle of the supremacy of law and the constitution; 2) The principle of separation and limitation of power according to the constitutional system regulated in the Constitution; 3) Guarantee of human rights in the Constitution; 4) The principle of an independent and impartial judiciary that guarantees equality of every citizen before the law; and 4) Guaranteeing justice for everyone, including against abuse of authority by those in power.<sup>10</sup>

As explained earlier, the concept of the Indonesian Legal State is not Rechtsstaat or the Rule of Law but the Concept of the Pancasila Legal State. The concept of the Pancasila Legal State is the main characteristic and distinguishes the Indonesian legal system from other legal systems, when associated with the literature on the combination of more than one choice of social values, referred to as a prismatic choice which in the legal context is referred to as prismatic law.<sup>11</sup> Therefore, it is understood that the Pancasila legal state is prismatic in nature (prismatic law), namely law that integrates good elements from those contained in various laws (legal systems) so that a new and complete law is formed.

Based on various literatures in Indonesia, many terms are known such as Legislation, Legislation, Legislation, and State Regulations. The Dutch know several terms such as *wet*, *wetgeving*, *wettelijke regels*, or *wettelijke regeling* (en). The term Legislation comes from the term *wettelijke regels*.<sup>12</sup>

Solly Lubis, uses the term state regulation to define regulations born from legislation. While the terms statutory regulations and legislation are regulations regarding the procedures for making state regulations.<sup>13</sup> Meanwhile, Soehino uses the term legislation.<sup>14</sup> This term was once used in the Decree of the Provisional People's Consultative Assembly Number XX/MPRS/1966 as stated in the title of the decree, namely "Source of Legal Order of the Republic of Indonesia and Sequence of Legislative Regulations of the Republic of Indonesia".

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<sup>10</sup> Jimly Asshidiqie, 2003, "State Structure of the Republic of Indonesia Post Amendment to the 1945 Constitution", Denpasar, Bali, in Paper Presented at the VIII National Legal Development Seminar with the Theme of Law Enforcement in Sustainable Development. Organized by the National Legal Development Agency, Ministry of Justice and Human Rights of the Republic of Indonesia, Denpasar, Bali, 14-18 July 2003, pp. 3-4.

<sup>11</sup> Moh. Mahfud MD, Loc.cit., p. 23.

<sup>12</sup> M. Solly Lubis, Loc. cit.

<sup>13</sup> Ibid.

<sup>14</sup> Soehino, 2003, *Constitutional Law: Legislative Techniques*, Second Edition, Liberty, Yogyakarta, p. 1. In another book published in 1997, Soehino mentions the term "statutory regulations". See Soehino, 1997, *Constitutional Law, Drafting and Determination of Regional Regulations*, Liberty, Yogyakarta, p. 1.

Next, Bagir Manan explained as follows:

- 1) Legislation is a written decision issued by an authorized official or office environment, containing generally binding rules of conduct.
- 2) These are rules of conduct that contain provisions regarding rights, obligations, functions, status, or an order.
- 3) It is a regulation that has general-abstract or abstract-general characteristics, meaning it does not regulate or is not aimed at certain concrete objects, events or phenomena.<sup>15</sup>

Maria Farida defines legislation in 2 (two) senses, namely: 1) as the process of forming (the process of forming) state regulations, both at the central and regional levels; and 2) Second, as all state regulations which are the result of the formation of regulations, both at the central and regional levels.<sup>16</sup>

Law Number 12 of 2011 concerning the Formation of Legislation (UU PPP) defines Legislation in Article 1 Number 2 of the PPP Law as written regulations containing generally binding legal norms and formed or stipulated by state institutions or authorized officials through procedures stipulated in Legislation.

In a specific sense, the definition of legislation is the overall hierarchical arrangement of legislation in the form of Laws (*formell gesetz*) downwards, namely all legal products that involve the role of the people's representative institutions together with the government or involve the role of the government because of its political position in order to implement legislative products determined by the people's representative institutions together with the government according to their respective levels. In addition, also included in the definition above are all regulatory devices whose level is below Law (*formell gesetz*).<sup>17</sup>

Statutory norms have a more concrete, clear, and generally applicable nature. In fact, in statutory regulations, criminal sanctions and administrative sanctions can be included. Based on the explanation above, it can be understood that in order for the legal norms contained in the Basic Law to be applied properly, these legal norms must be realized in the form of Statutory Regulations. Therefore, the legal norms are more concrete and binding for all citizens.

Based on these reasons, overall a more specific concept will be used, namely the understanding of Legislation as the entire hierarchy of statutory regulations

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<sup>15</sup> Bagir Manan, 1994, Provisions on the Formation of Legislation in the Development of National Law, Jakarta, p. 13.

<sup>16</sup> <sup>16</sup> Maria Farida Indrati S, Op.cit., p. 15.

<sup>17</sup>Ibid., p. 10.

consisting of Laws (formell gesetz) and lower regulations.

The 1945 Constitution of the Republic of Indonesia basically does not regulate the classification of regulations under it, but then delegates it to be further regulated in the law. Therefore, this has implications for the irregularity of the hierarchy of legal norms. This irregularity can be seen in the history of changes in the hierarchy of legal norms.

Initially, the regulation of the hierarchy of legal norms was regulated in Law Number 1 of 1950 concerning Central Government Regulations. Law No. 1 of 1950 classifies it only in the form of statutory regulations as follows:

- 1) Laws and Government Regulations in Lieu of Laws,
- 2) Government regulations,
- 3) Ministerial regulation<sup>18</sup>

The reason why lawmakers did not include the 1945 Constitution as a type of Legislation is because of the position of the 1945 Constitution as the state constitution. This is in contrast when viewed from the 1990s to the present day. Based on several regulations after 1996 to the present day, the 1945 Constitution (before the amendment) or the 1945 Constitution of the Republic of Indonesia were included in the Hierarchy of Legislation as stated in Table 1.

**Table** Changes in the Hierarchy of Legislation in Indonesia

MPR Decree No. XX/MPRS/1996	MPR Decree No. III/MPR/2000	Law No. 10 of 2004	Law No. 12 of 2011
1945 Constitution	1945 Constitution	The 1945 Constitution of the Republic of Indonesia	The 1945 Constitution of the Republic of Indonesia
MPR Decree Law/Regulation	MPR Decree Law	Law/Regulation Government regulations	MPR Decree Law/Regulation
Government regulations	PERPU	Presidential decree	Government regulations
Presidential decree	Government regulations	Local regulation	Presidential decree
Implementing Regulations such as: Ministerial Regulations; Ministerial Instructions; And others.	Presidential decree		Provincial Regional Regulations
	Local regulation		District/City Regional Regulations

Based on Table 1, the 1945 NRI Constitution has the highest position in the Hierarchy of Legislation as stated in Article 7 paragraph (1) of the PPP Law.

<sup>18</sup> National Legal Development Agency, 2017, "Academic Manuscript of Draft Law on Amendments to Law Number 12 of 2011 on the Formation of Legislation", Jakarta, p. 52.

However, it is necessary to understand that in the PPP Law there are several other provisions that raise further questions in analyzing the position of the 1945 NRI Constitution.

Article 2 of the PPP Law states that Pancasila is the source of all sources of state law. This means that Pancasila is a guideline in all legal regulation making. This argument is also clarified in the Explanation of the PPP Law in the Article by Article section, especially in Article 2 as follows:

"Placing Pancasila as the source of all sources of state law is in accordance with the Preamble to the 1945 Constitution of the Republic of Indonesia, paragraph four, namely Belief in the One Almighty God, Just and Civilized Humanity, Unity of Indonesia, Democracy guided by the wisdom of deliberation/representation, and Social justice for all Indonesian people. Placing Pancasila as the basis and ideology of the state as well as the philosophical basis of the state so that every material contained in the Laws and Regulations must not conflict with the values contained in Pancasila."

Furthermore, if we look at the Additional Regulations of the 1945 Constitution of the Republic of Indonesia, Article II states that:

"With the enactment of this amendment to the Constitution, the 1945 Constitution of the Republic of Indonesia consists of the Preamble and articles."

Based on Article 3 paragraph (1) of the PPP Law, it is stated that the 1945 Constitution of the Republic of Indonesia is the basic law in the Legislation. Of course, this article is related to Article 2 of the PPP Law considering that Pancasila is a unity with the articles in the 1945 Constitution of the Republic of Indonesia. Talking about basic law, this explanation can be seen in the Explanation of the PPP Law in Article 3 paragraph (1) that:

"What is meant by "basic law" is the basic norm for the Formation of Legislation which is a source of law for the Formation of Legislation under the 1945 Constitution of the Republic of Indonesia."

Based on the explanations above, it can be concluded that the 1945 NRI Constitution is a source of law for statutory regulations. Of course, this raises the question of what about the formulation of Article 7 Paragraph (1) of the PPP Law which places the position of the 1945 NRI Constitution in the Hierarchy of Statutory Regulations?

### **3.2. The Ideal Position of the 1945 Constitution of the Republic of Indonesia in the Hierarchy of Legal Norms of the Republic of Indonesia**

- 1) Polemic on the Position of the 1945 Constitution of the Republic of Indonesia in the Hierarchy of Legislation



According to Hans Kelsen, legal norms are in a hierarchy consisting of various levels and layers. In this hierarchy, lower norms have validity, sources, and bases derived from higher norms. Higher norms have validity and sources derived from even higher norms, and this process continues until reaching an untraceable norm known as the Basic Norm (Grundnorm). This concept is known as the theory of the hierarchy of legal norms (Stufentheorie). Furthermore, Hans Nawiasky argues that the term that should be used for the highest norm referred to by Kelsen as the 'basic norm' in a country should not be 'Staatsgrundnorm' but rather 'Staatsfundamentalnorm', which means the fundamental norm of the state. Nawiasky states that the 'Grundnorm' is basically unchanging, while the highest norm can change.<sup>19</sup>

Before analyzing the position of the 1945 Constitution of the Republic of Indonesia in the group of norms created by Hans Nawiasky, it is necessary to first explain each group of norms based on their level.

a. State Fundamental Norms (Staatsfundamentalnorm)

It is the highest norm in a country that is not produced by a higher norm. This norm is 'pre-supposed' or 'set in advance' by the community in a country and becomes the basis for the legal norms below it. According to Hans Nawiasky, the contents of the Fundamental Norm of the State are norms that are the basis for the formation of a country's constitution or basic law (Staatsverfassung), including norms that regulate changes in the constitution. The essence of the Staatsfundamentalnorm concept according to Hans Nawiasky is as follows:

- a) *State fundamental norm* is the highest legal norm and is the first group;
- b) *State fundamental norm* is not formed by a higher norm, but is pre-supposed or determined in advance by society in a country and is a norm on which the legal norms below it depend;
- c) The contents of the Staatsfundamentalnorm are the basis for the formation of a country's constitution or basic law (staatsverfassung), including its amending norms;
- d) The legal essence of a Staatsfundamentalnorm is the condition for the validity of a constitution or basic law.<sup>20</sup>

b. Basic Law of the State (Staatsgrundgesetz)

The Basic Rules of the State (Staatsgrundgesetz) are a group of legal norms under the Fundamental Norms of the State. In which, the norms of the Basic Rules of the State are still basic or general and still outline, therefore the nature of the

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<sup>19</sup>Maria Farida Indrati S, Op. cit., p. 50.

<sup>20</sup>Denny Indrayana, Loc. cit., p. 20.



norms of the Basic Rules of the State is a single legal norm and is a source for the formation of a law that can directly bind everyone.

The basic rules of the state are the basis for the formation of laws (Formell gesetz) and other lower regulations. Important contents for basic rules, in addition to the outlines or main points of state policy, are also mainly the rules for enforcing and giving binding force to the legal norms of statutory regulations, or in other words, outlining the procedures for forming statutory regulations that are generally binding.<sup>21</sup>

#### c. Law (Formell Gesetz)

Literally Formell Gesetz is translated as law. In which, the law has the nature of a more concrete and detailed legal norm, and can be directly applied in society. The legal norms contained in the law do not stand alone, but consist of a pair of legal norms. In this context, there are primary legal norms that are paired with secondary legal norms. Therefore, one law can include various norms that have an enforcement nature, either in the form of criminal sanctions or coercive sanctions.<sup>22</sup> According to Maria Farida, the term Formell Gesetz or Formelle Wetten should be translated as "law" only without the addition of the word "formal" behind it. This is because if Formell Gesetz is translated as formal law, it is not in accordance with the use of the term for types of legislation in Indonesia.

#### d. Implementing Rules and Autonomous Rules (Verordnung & Autonome Satzung)

This type of regulation is below the level of law and has the function of implementing provisions in the law. Implementing regulations come from delegated authority, while autonomous regulations come from attribution authority.

Attribution of authority refers to the process of creating legislation in which the law grants authority to a state or government agency to create the regulation. This authority is inherent and allows the agency to initiate the creation of regulations as needed, within the established limits.<sup>23</sup> Meanwhile, the Delegation of Authority in the formation of Legislation (delegatie van wetgevingsbevoegdheid) is a process in which higher legislation delegates the authority to create lower legislation.

Looking at the form and meaning of staatsfundamentalnorm and staatsgrondgeetz above, it can be understood that the Preamble to the 1945 NRI Constitution is the State's Fundamental Norm, while the Basic State

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<sup>21</sup>A. Hamid S. Attamimi, Op. cit., p. 5.

<sup>22</sup>Maria Farida Indrati S, Loc. cit., p. 50.

<sup>23</sup>A. Hamid S. Attamimi, The Role of Decisions..., Loc. cit., p. 199.

Regulations/Main Rules are the Articles of the 1945 NRI Constitution.

Based on the explanation above, a law cannot contradict the norms above it. It is not appropriate to group the 1945 Constitution of the Republic of Indonesia as a Legislation, considering that the 1945 Constitution of the Republic of Indonesia is a Fundamental Norm of the State as well as a Basic Rule/Main Rule of the State.

The law that groups the 1945 Constitution of the Republic of Indonesia into Legislation is the PPP Law, which in Article 7 states that:

(1) The types and hierarchy of statutory regulations consist of:

- a. The 1945 Constitution of the Republic of Indonesia;
- b. Decree of the People's Consultative Assembly;
- c. Law/Government Regulation in Lieu of Law;
- d. Government regulations;
- e. Presidential decree;
- f. Provincial Regional Regulations; and
- g. Regency/City Regional Regulations.

(2) The legal force of statutory regulations is in accordance with the hierarchy as referred to in paragraph (1).

The next problem, there are several contradictions in the material of the PPP Law. First, in Article 1 Number 1 it is explained that the Formation of Legislation is the creation of Legislation that includes the stages of planning, drafting, discussion, ratification or determination, and promulgation. Furthermore, in Number 2 it is explained that Legislation is a written regulation that contains generally binding legal norms and is formed or determined by state institutions or authorized officials through procedures stipulated in Legislation. However, the PPP Law then groups the 1945 NRI Constitution as Legislation in Article 7 paragraph (1), this is not appropriate because the Amendment to the 1945 NRI Constitution is regulated through the mechanism of the People's Consultative Assembly (MPR) whose authority is granted by the 1945 NRI Constitution in Article 3 paragraph 1 (In Amendment III). Furthermore, the stipulation of the 1945 Constitution of the Republic of Indonesia was not based on statutory regulations, therefore the provisions of Article 1 Number 1 and Number 2 above are not appropriate.

**Second**, Article 2 of the PPP Law states that Pancasila is the source of all sources of state law. This also explains that the Opening of the 1945 NRI Constitution which is the State's Fundamental Norm is the source for the Basic Rules of the

State, namely the Articles of the 1945 NRI Constitution. As explained in the Explanation of the PPP Law in Article 2.

Furthermore, in Article 3 paragraph (1) of the PPP Law, it is stated that the 1945 Constitution of the Republic of Indonesia is the basic law in Legislation. This is explained in detail in the Explanation section of the PPP Law in Article 3 Paragraph (1). As the reason for Article 2 of the PPP Law, it is not appropriate to place the basic law which is the source of the formation of legislation to be grouped into types of legislation.

Based on the explanation above, it can be concluded that there is a contradiction in the articles of the PPP Law, especially regarding the Hierarchy of Legislation. Placing the 1945 NRI Constitution as Legislation is not appropriate, considering that the position of the 1945 NRI Constitution is a Fundamental Norm of the State and Basic Rules of the State and has the nature of a norm from the Law.

## 2) The Ideal Position of the 1945 Constitution of the Republic of Indonesia in the Hierarchy of Legal Norms of the Republic of Indonesia

Based on the previous discussion, we can see the position of the 1945 Constitution of the Republic of Indonesia and the regulations below it in the context of Hans Nawiasky's legal norm theory.<sup>24</sup> Therefore, in formulating the ideal position of the 1945 Constitution of the Republic of Indonesia in the hierarchy of legal norms in Indonesia, it is necessary to first formulate the grouping of norms for each state regulation in Indonesia as in Table 2.

Table Grouping of Legal Norms in Indonesia

<b>Group I</b>	<b>State fundamental norm (Fundamental Norms of the State)</b>	<b>1. Opening of the 1945 Constitution of the Republic of Indonesia</b>
<b>Group II</b>	<b>State Policy</b> (Basic Rules of the State/Basic Rules of the State)	1. Articles of the 1945 Constitution of the Republic of Indonesia 2. Decree of the People's Consultative Assembly
<b>Group III</b>	<b>Formal Application</b> ("Formal" Law)	1. Constitution 2. Government Regulation in Lieu of Law
<b>Group IV</b>	<b>Order &amp; Autonomous Unit</b> (Implementing Rules & Autonomous Rules)	1. Government regulations; 2. Presidential decree; 3. Regulations of the People's Consultative Assembly, Regulations of the People's Representative Council, Regulations of the Regional Representative Council, Regulations of the Supreme Court, Regulations of the Constitutional Court, Regulations of the Judicial Commission, Regulations of Bank Indonesia, and Regulations of the Audit Board; 4. Regulations of Ministers and Heads of State Institutions at Ministerial Level;

<sup>24</sup> Nawiasky, Loc. cit., p. 31.

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5. Regulations of the Head of Non-Ministerial Government Institutions; and
  6. Regulation of the Director General of the Ministry
  7. Provincial Regional Regulations;
  8. Provincial Regional Regulations;
  9. Governor Regulation;
  10. District/City Regional Regulations;
  11. Regent/Mayor Regulation;
  12. Village Regulations; and
  13. Village Head Regulations
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The explanation in Table has not been fully attached to the context of the hierarchy of each rule in Indonesia. Therefore, in formulating how the ideal position of the 1945 NRI Constitution is, there are several suggestions for legal reform related to the position of the 1945 NRI Constitution in the context of the hierarchy of legal norms in Indonesia.

The first legal update regarding the position of the 1945 NRI Constitution in the hierarchy of regulations can then be formulated in the Articles of the 1945 NRI Constitution. This is very possible considering that the Articles of the 1945 NRI Constitution are the Basic Rules of the State/Basic Rules of the State (Staatsgrundgesetz).

The norms of the basic rules of the state that underlie the formation of laws (formell gesetz) and other regulations that are at a lower level. In addition to presenting the outlines or principles of state policy, the important content of the basic rules is to ensure the application and validity of legal norms in statutory regulations, or in other words, regulate the procedure for the formation of generally binding statutory regulations.<sup>25</sup>

The phrase "law" is indeed found in several articles of the 1945 NRI Constitution, such as in Article 5, Article 20, and Article 22A of the 1945 NRI Constitution. However, when the Fourth Amendment to the 1945 Constitution came to be, there was not a single article that explained the hierarchy of regulations in Indonesia.

Based on these reasons, it is necessary to regulate the Hierarchy of Indonesian State Regulations in the Articles of the 1945 Constitution of the Republic of Indonesia. The addition of these articles needs to be formulated in the context of the nature of the norms of the Articles of the 1945 Constitution of the Republic of Indonesia which are still general and singular. The formulation of legal reform in the context of the addition of articles regarding the hierarchy of legal norms as can be seen in Table 3.

**Table** Addition of chapters and articles regarding the Hierarchy of State Regulations in the 1945 Constitution

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<sup>25</sup>A. Hamid S. Attamimi, Loc. cit., p. 5.

of the Republic of Indonesia

BEFORE	AFTER
<b>CHAPTER II PEOPLE'S CONSULTATIVE ASSEMBLY</b>	<b>CHAPTER II HIERARCHY OF STATE REGULATIONS</b>
<b>Article 2</b> <b>(1) The People's Consultative Assembly consists of members of the People's Representative Council and members of the Regional Representative Council who are elected through general elections and further regulated by law.</b> <b>(2) The People's Consultative Assembly meets at least once every five years in the nation's capital.</b> <b>(3) All decisions of the People's Consultative Assembly are determined by a majority vote.</b>	<b>Article 2</b> The hierarchy of Indonesian State Regulations consists of: a. The 1945 Constitution of the Republic of Indonesia b. Decree of the People's Consultative Assembly c. Legislation at the Central Level d. Legislation at the Regional Level
<b>Article 3</b> <b>(1) The People's Consultative Assembly has the authority to amend and establish the Constitution.</b> <b>(2) The People's Consultative Assembly inaugurates the President and/or Vice President.</b> <b>(3) The People's Consultative Assembly can only dismiss the President and/or Vice President during their term of office according to the Constitution.</b>	Deleted
<b>Source: Primary Legal Materials, processed, 2023</b>	

Based on the formulation of Table 3 regarding the addition of Chapters and Articles regarding the Hierarchy of State Regulations in the 1945 Constitution of the Republic of Indonesia, it is necessary to move Chapter II regarding the People's Consultative Assembly as a whole to Chapter III continuing with all chapters in the 1945 Constitution of the Republic of Indonesia. This can be understood if you read the entire 1945 Constitution of the Republic of Indonesia in which Chapter II of the 1945 Constitution of the Republic of Indonesia onwards explains state institutions along with their functions and authorities. Therefore, before formulating the functions and authorities of various state institutions, it is necessary to first formulate the levels of legal norms in the Republic of Indonesia. The reason for adding a Chapter after Chapter I regarding Form and Sovereignty is because Chapter I is the initial guideline for all articles in the 1945 Constitution of the Republic of Indonesia and is in line with Article 1 paragraph (3) stating that the Republic of Indonesia is a state of law.

Further legal updates, regarding the Hierarchy of Legal norms can be regulated in the Decree of the People's Consultative Assembly (Tap MPR) as previously regulated through Decree of the MPR/S Number XX/MPRS/1996 concerning the DPR-GR Memorandum Concerning the Source of Legal Order of the Republic of Indonesia and the Sequence of Legislation of the Republic of Indonesia. However, what needs to be noted is the position of the MPR Tap which is still being debated, whether the MPR Tap is included in the State Regulations that are generally regulatory, or only regulates the internal MPR itself.

Based on the opinion put forward by A. Hamid S. Attamini, which was also followed by Maria Farida Indrati, the MPR Decree is included in the Staatsgrundgesetz together with the 1945 Constitution and other constitutional

conventions.<sup>26</sup> However, after the Third Amendment, the MPR's authority to determine the broad outlines of state policy was abolished. Therefore, in order to clarify the position of the MPR Decree, it needs to be formulated clearly in the Constitution.

Furthermore, regarding the position of the MPR Decree as a Basic State Regulation and not a Legislation, this can be seen in the Constitutional Court Decision Number 75/PUU-XII/2014 as follows:

"Considering that based on Attachment II A of Tap MPRS Number XX/MPRS/1966, Article 3 Tap MPR Number III/MPR/2000, and Article 7 paragraph (1) of Law 12/2011, the position of the MPRS/MPR Decree is determined hierarchically to be below the 1945 Constitution and above the Law. Therefore, the MPRS/MPR Decree has a position that is hierarchically above the Law, then based on Article 24C paragraph (1) of the 1945 Constitution, testing of the MPRS/MPR Decree is not included in the authority of the Court."

Therefore, in the legal update regarding the inclusion of the Hierarchy of State Legal Norms in the MPR Decree, it must be preceded by the Fifth Amendment, especially regarding the addition of the MPR's authority as before the Third Amendment, namely to determine the Constitution and the broad outlines of state policy (GBHN). This is because the authority of the MPR after the Third Amendment to the 1945 Constitution has implications for the unclear position of the MPR Decree which can regulate generally (*regeling*) or regulate internally (*intern regeling*) or determine (*beschikking*).

The most fundamental reason for returning the authority of the MPR in determining the GBHN is that there are differences in the nature of norms between *staatsfundamentalnorm*, *staatsgrundgesetz*, and *formell gesetz*. As explained in the previous discussion, the 1945 NRI Constitution is a *staatsfundamentalnorm* and *staatsgrundgesetz* in which the Preamble and Articles of the 1945 NRI Constitution are one unit. Therefore, there are no Basic State Rules other than the Articles of the 1945 NRI Constitution, so there are no other rules that bridge the 1945 NRI Constitution with Laws or regulations that are equivalent or below it.

Based on the previous explanation, ideally the authority of the MPR in determining the GBHN through the MPR Decree can then be formulated regarding the Hierarchy of Legal Norms of the Republic of Indonesia as has been formulated in Table 3 regarding the addition of norms regarding the Hierarchy of Legal Norms in the 1945 Constitution of the Republic of Indonesia but then adjusted by using the MPR Decree.

Furthermore, in formulating the right hierarchy of legislation, this paper is based

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<sup>26</sup>A. Hamid S. Attamimi, *The Role of Decisions...*, Loc. cit., p. 287.

on the thoughts that have been developed by Maria Farida. In her framework of thought, Maria Farida divides legislation into two levels, namely central-level legislation and regional-level legislation, including:<sup>27</sup>

- a. The 1945 Constitution of the Republic of Indonesia
- b. Central Level Legislation
  - a) Laws and Government Regulations in Lieu of Laws;
  - b) Government regulations;
  - c) Presidential decree;
  - d) Ministerial regulation;
  - e) Regulations of the Head of Non-Ministerial Government Institutions; and
  - f) Regulation of the Director General of the Ministry.
- c. Regional Level Legislation
  - a) Provincial Regional Regulations;
  - b) Governor Regulation;
  - c) District/City Regional Regulations; and
  - d) Regent/Mayor Regulation.

However, Maria Farida's opinion is used for Law No. 10 of 2004 so that further improvements are needed. For example, the non-inclusion of the position of regulations of high state institutions (Regulations of the DPR, DPD, MPR, BPK, MA, MK, BI), the absence of the position of regulations of state institutions at the ministerial level and the absence of the position of Village Regulations. Therefore, based on the explanation of points 1 to 7, the scheme of changes to Article 7 paragraph (1) of Law No. 12 of 2011 can be described as stated in Table.

**Table** Changes in the Hierarchy of Legal Norms in Indonesia in the PPP Law

<b>BEFORE</b>	<b>AFTER</b>
<b>CHAPTER III TYPES, HIERARCHY, AND CONTENT OF LEGAL REGULATIONS</b>	<b>CHAPTER III TYPES, HIERARCHY, AND CONTENT MATERIALS</b>
<b>Article 7 paragraph (1)</b>	
The types and hierarchy of statutory regulations consist of:	The types and hierarchy of State Regulations consist of:
a. The 1945 Constitution of the Republic of Indonesia;	a. The 1945 Constitution of the Republic of Indonesia;
b. Decree of the People's Consultative Assembly;	b. Decree of the People's Consultative Assembly;
c. Laws/Government Regulations in Lieu of Laws;	c. Legislation at the Central Level consisting of:
d. Government regulations;	

<sup>27</sup>Maria Farida Indrati S, Op. cit., pp. 102-114.



<p>e. Presidential decree; f. Provincial Regional Regulations; and g. Regency/City Regional Regulations.</p>	<ol style="list-style-type: none"> <li>1. Laws/Government Regulations in Lieu of Laws;</li> <li>2. Government regulations;</li> <li>3. Presidential Regulation; People's Consultative Assembly Regulation, People's Representative Council Regulation, Regional Representative Council Regulation, Supreme Court Regulation, Constitutional Court Regulation, and Audit Board Regulation;</li> <li>4. Regulations of Ministers and Heads of State Institutions at Ministerial Level;</li> <li>5. Regulations of the Head of Non-Ministerial Government Institutions; and</li> <li>6. Regulation of the Director General of the Ministry.</li> <li>d. Legislation at the Regional Level consisting of:             <ol style="list-style-type: none"> <li>1. Provincial Regional Regulations;</li> <li>2. Governor Regulation;</li> <li>3. District/City Regional Regulations;</li> <li>4. Regent/Mayor Regulation;</li> <li>5. Village Regulations; and</li> <li>6. Village Head Regulations.</li> </ol> </li> </ol>
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**Verse (2)**

The legal force of statutory regulations is in accordance with the hierarchy as referred to in paragraph (1). Still

**Article 8**

(1) Types of Legislation other than those referred to in Article 7 paragraph (1) include regulations stipulated by the People's Consultative Assembly, People's Representative Council, Regional Representative Council, Supreme Court, Constitutional Court, Audit Board, Judicial Commission, Bank Indonesia, Ministers, agencies, institutions or commissions of the same level which are established by Law or by the Government on the orders of Law, Provincial People's Representative Council, Governor, Regency/City People's Representative Council, Regent/Mayor, Village Head or equivalent. Deleted

(2) The statutory regulations as referred to in paragraph (1) are recognized as existing and have binding legal force as long as they are ordered by higher statutory regulations or are formed based on authority.

Source: Primary Legal Materials, processed 2023

The legal update formulated in the first Amendment to the PPP Law is to eliminate the words 'Legislation' on the grounds of the effectiveness of the chapter title. Without the writing of legislation, it can be clearly seen that Law No. 12 of 2011 contains the Formation of Legislation. Then the chapter title changed to 'Types, Hierarchy, and Content Material'.

Furthermore, in Article 7 paragraph (1) there is a change in the phrase 'Types and Hierarchy of Legislation' to 'Types and Hierarchy of Legal Norms', this change

refers to previous explanations that what is formulated in the PPP Law is all state regulations which have a different position and nature of norms than laws.

The position is sorted based on the theory of the hierarchy of legal norms starting from staatsfundamentalnorm, staatsgrundgesetz, formal gesetz, verordnung & autonomous satzung. In order to make legal norms comprehensively recognized by Indonesia, the rules in which were originally in Article 8 were raised to Article 7 paragraph (1). So that the comprehensive order of legal norms in Indonesia becomes as stated in Table.

#### **4. Conclusion**

Based on the results of the review and discussion that have been described, it can be concluded that the position of the 1945 Constitution of the Republic of Indonesia is as the State Fundamental Norm (Staatsfundamentalnorm) as well as the State Basic Regulation (Staatsgrundgesetz) in the Hierarchy of Legal Norms of the State of Indonesia. The opening of the 1945 Constitution of the Republic of Indonesia has the nature of a norm that is 'pre-supposed' or 'determined in advance' by the people in a country and becomes the basis for the Constitution (Staatsverfassung). While the position of the Articles of the 1945 Constitution of the Republic of Indonesia as the Basic Rules of the State becomes the main basis for the formation of Laws (Formell Gesetz) or equivalent to laws and the rules below them. Law Number 12 of 2011 concerning the Formation of Legislation (UU PPP) in Article 7 paragraph (1) groups the 1945 NRI Constitution into Types and Hierarchies of Legislation. This then became a polemic considering that the nature of the norms of the two regulations is very different from the law, considering its position as the Fundamental Norm of the State and the Basic Rules of the State. Therefore, grouping the 1945 NRI Constitution into Types and Hierarchies of Legislation is not appropriate. Based on the problem regarding the position of the 1945 Constitution of the Republic of Indonesia in the Hierarchy of Legislation, a reconstruction can be carried out, namely: 1) The structure of the Hierarchy of State Regulations is regulated in the Articles of the 1945 Constitution of the Republic of Indonesia and in the MPR Decree with the formulation "The Hierarchy of State Regulations in Indonesia consists of: a. The 1945 Constitution of the Republic of Indonesia; b. The MPR Decree; c. Legislation at the Central Level; d. Legislation at the Regional Level". This is necessary to ensure the consistency of the hierarchy of each group of legal norms in the Republic of Indonesia; 2) In order to further narrow down the formulation in the Articles of the 1945 Constitution of the Republic of Indonesia and the MPR Decree, a more detailed grouping is needed in the PPP Law in Article 7 paragraph (1) with the formulation "Types and Hierarchy of State Regulations consist of: a. The 1945 Constitution of the Republic of Indonesia; b. The MPR Decree; c. Legislation at the Central Level consisting of: (1. UU/PERPU; 2. PP; 3. Perpres; Regulation of the MPR, DPR, DPD, MA, MK, and BPK; 4. Permen and Head of

State Institutions at the Ministry Level; 5. Regulation of the Head of Non-Ministerial Government Institutions; and 6. Regulation of the Director General of the Ministry). d. Legislation at the Regional Level consisting of: (1. Provincial Regulation; 2. Pergub; 3. Regency/City Regulation; 4. Regent/Mayor Regulation; 5. Village Regulation; and 6. Village Head Regulation)".

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The 1945 Constitution of the Republic of Indonesia

The 1945 Constitution of the Republic of Indonesia