

# Characteristics and the Constitutionality Test of the Property of the People's Consultative Assembly of the Republic of Indonesia

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## Abstract

This study focuses on analyzing and finding answers to the characteristic questions of the MPR Decree and the Institutions authorized to carry out the constitutionality test of the MPR Tap. Then this research is analyzed by using the *Rechtsstaat* Theory of Law, Theory of Authority, Legal Theory, Theory of Testing of Legislation, and Legal Vacancy Theory. This research is normative law research through Philosophical Approach, Legal Approach, Conceptual Approach, Historical Approach, Case Approach, and Comparative Approach. Sources of legal materials used are primary legal materials, secondary law materials, and tertiary legal materials. Analysis of legal materials in this research is done through identification of a primary legal material, then done grouping of legal materials with several methods. The MPR holds the highest powers compared to other high-ranking state institutions. Its power is able to change and establish the 1945 Constitution of the Republic of Indonesia and the MPR Decree which is the highest regulation as a reference for the legal norms underneath as proposed by Hans Kelsen and Hans Nawiasky in the *stufen* theory. MPR is authorized to issue TAP MPR which characterized *beschikking* in terms of amending and defining the 1945 Constitution of the Republic of Indonesia and Determination of the Appointment and/or Dismissal of the President and/or Vice President. The development of the constitutional system still leaves the TAP MPR product which is regulated as legitimated by MPR Decree Number I/MPR/2003 which can only be tested of constitutionality by a special judicial institution in the form of Constitutional Court *Ad Hoc*.

**Keywords:** MPR, TAP MPR, Constitutional Court, *Ad Hoc*

## 1. Introduction

Reformation in Indonesia began since the movement to undermine the new order during the government in 1998 which is realized through the amendment of the Constitution of the Republic of Indonesia Year 1945 (hereinafter referred to as the 1945 Constitution of the Republic of Indonesia) which has an impact on the change of state structure in Indonesia by putting MPR as the state high institution which was previously the highest state institution of the embodiment of the people's sovereignty. Reformasi strengthen the status of the State of Indonesia as a *rechtsstaat* in the form of Republic based on the 1945 Constitution of the Republic of Indonesia and Pancasila as the source of all sources of law and not just based on power, "meaning the concept of the Indonesian nation on the composition of the Unitary State of the Republic of Indonesia (hereinafter abbreviated NKRI) is technical in the framework of regulating the structures or forms and/or organizational structure and form of government, but more fundamental concerning the existential definition that the existence of the State of Indonesia is in its form as NKRI" (Asshiddiqie, 2013:9).

The principles of a *rechtsstaat* develop along with the development of society and state, the *rechtsstaat* is divided into two namely the formal *rechtsstaat* or classical *rechtsstaat*, and the material *rechtsstaat* or the modern *rechtsstaat*. "Formal *rechtsstaat* concerns the definition of a formal law and narrow, namely in the sense of written legislation in particular. The duty of the state is to enforce the legislation to uphold order. This traditional country type is known as the night watch country. The material *rechtsstaat* includes a broader understanding including justice in it. The task of the state not only to maintain order by carrying out the law but also to achieve the welfare of the people as a form of justice (Utrecht, 1962:9). Indonesia in the era of reform to realize the efforts of a democratic country and as a manifestation of a *rechtsstaat*, at the General Assembly of the People's Consultative Assembly of the Republic of Indonesia (hereinafter referred to as the MPR) in 1999 all the factions in the MPR have made a basic agreement on the direction of the NRI 1945, namely: 1. Agree to not change the Preamble of the 1945 Constitution; 2. Agree to maintain the form of NKRI; 3. Agree to preserve the presidential system (in the sense of at the same time to truly meet the general characteristics of the presidential system); 4. Agree to transfer the normative matters contained in the Elucidation of the 1945 Constitution into the articles of the 1945 Constitution; and 5. Agree to adopt an addendum in the amendment to the 1945 Constitution amendment of the 1945.

The Constitution of the Republic of Indonesia (NRI) of 1945 protects the citizens' constitutional rights and ensures legal certainty, therefore, for any citizen whose constitutional rights and/or authorities are violated or impaired by the application of a statutory ordinance. the invitation can then submit a formal or material test against applicable laws and regulations. The change of the state system in the fourth amendment of the 1945

Constitution of the Republic of Indonesia was marked by reducing some of the authority of the MPR state institutions, the MPR was no longer the highest institution of the state but the higher institution which was at the same level as other state institutions and the MPR could no longer form the Decree of the Majelis Permusyawaratan Rakyat Republik Indonesia (hereinafter referred to as MPR Tap). The existence of the MPR Tap to date has reaped controversy regarding its enforcement, and its testing. In its development, MPR still has legal product of MPR Decree Number I/MPR/2003 concerning Review of Material and Legal Status of Provisional People's Consultative Assembly Decree (hereinafter referred to as MPRS Tap) and Decree of People's Consultative Assembly Year 1960 up to Year 2002 dated 7 August 2003, The Decree of the People's Consultative Assembly is still in effect and binds the results of the reform of the 1945 Constitution.

In 2013 the Constitutional Court received claim of the *judicial review* *Judicial Review* of the Republic of Indonesia with the principal of the Decree of the People's Consultative Assembly of the Republic of Indonesia Number I/MPR/2003 concerning Review of Material and Legal Status of Decision Provisional People's Consultative Assembly and the Decree of the People's Consultative Assembly of the Republic of Indonesia Year 1960 Up to Year 2002 against the 1945 Constitution of the Republic of Indonesia related to the lawsuit of Article 6 of MPR Decree Number I/MPR/2003 number 30 concerning MPRS Decree Number XXXIII/MPRS/1967 on the Revocation of Government Powers State of President Soekarno. The result of Decision of the Constitutional Court in Decision Number 24/PUU-XI/2013 states that the petition cannot be accepted with the consideration that based on Attachment IIA Tap MPRS Number XX/MPRS/1966, Article 3 of MPR Decree Number III/MPR/2000 and Article 7 paragraph 1) of Law Number 12 Year 2011, the position of the MPRS/MPR Decree shall be established hierarchically under the Constitution of the Republic of Indonesia Year 1945 and above the Law. Because the MPRS/MPR Decree has a position which is hierarchically above the Act, based on Article 24C Paragraph (1) of the 1945 Constitution of the Republic of Indonesia, the examination of MPRS/MPR Tap is not included in the Court's authority.

2013 The Court shall receive a lawsuit issue of the *judicial review* *Judicial Review* with the principal of Law Number 12 Year 2011 concerning the Establishment of Laws and Regulations against the 1945 Constitution of the State of the Republic of Indonesia concerning the lawsuit for the re-registration of the MPR Decree into Article 7 paragraph (1) letter b of Law Number 12 Year 2011 concerning the Establishment of Laws and Regulations that still have legal force binds out in sync with the Law, so that material tests can be conducted in the Constitutional Court. The result of Constitutional Court Decision in Decision Number 86/PUU-XI/2013 states that the petition of the petitioners is a review of the constitutionality of the norms of the Act, *in case* Article 7 paragraph (1) sub-paragraph b of Law Number 12 Year 2011 against Article 1 paragraph (3 ) and Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which became one of the authorities of the Court, therefore the Court has the authority to adjudicate the petition. However, the petition is unacceptable and according to the petition, the petition of the petitioners is unclear and inconsistent in the petition for constitutionality testing, particularly regarding the contradiction of the norm petitioned for examination of the 1945 Constitution.

In 2014 the Constitutional Court accepts a suit *judicial review* with the same subject matter as Decision Number 24/PUU-XI/2013 with the principal issue of Judicial Review of the Decree of the People's Consultative Assembly of the Republic of Indonesia Number I/MPR/2003 concerning Review of Material and Legal Status of Provisional People's Consultative Assembly Decree and Decree of the People's Consultative Assembly of the Republic of Indonesia 1960 2002 and the Provisional People's Consultative Assembly Decree No. XXXIII/MPRS/1967 concerning the Revocation of State Government Power from President Soekarno against the 1945 Constitution of the State of the Republic of Indonesia concerning the lawsuit against MPRS Decision Number XXXIII/MPRS/1967 stipulated t on March 12, 1967, in addition to ending the position of DR. Ir. Soekarno as President of the Republic of Indonesia, in Chapter II Article 6 also states "To establish, resolve further legal issues concerning Dr. Ir. Soekarno, done according to the legal provisions in order to enforce the law and justice, and submit its implementation to the Presidential Official ". The result of Decision of the Constitutional Court in Decision Number 75/PUU-XII/2014 stipulates that the application can not be accepted on the consideration that based on Attachment IIA Tap MPRS Number XX/MPRS/1966, Article 3 MPR Decree Number III/MPR/2000, and Article 7 paragraph (1) of Law Number 12 Year 2011, the position of the MPRS/MPR Decree shall be established hierarchically under the Constitution of the Republic of Indonesia Year 1945 and above the Act. Because the MPRS/MPR Decree has a position which is hierarchically above the Act, based on Article 24C Paragraph (1) of the 1945 Constitution of the Republic of Indonesia, the examination of MPRS/MPR Tap is not included in the Court's authority.

The Court did not only accept the petition for the *judicial review* of the MPR Tap only, but sometime before in 2009 the Court accepted the suit *judicial review* with the principal case of Testing Government Regulation in Lieu of Law (hereinafter referred to as Perppu) Number 4 of 2009 on the Amendment Law Number 30 Year 2002 on the Corruption Eradication Commission against the 1945 Constitution of the State of the Republic of Indonesia. Results of Decision of the Constitutional Court in Decision Number 138/PUU-VII/2009 states the

petition is accepted on the consideration that the Perppu gives birth to legal norms and as legal norm (b) a new legal relationship, (b) a new legal relationship, and (c) the result of a new law. The legal norm was born since the Perppu was legalized and the fate of the legal norm was subject to the approval of the DPR to accept or reject the legal norms of the Perppu, but before the opinion of the People's Legislative Assembly to reject or approve the Perppu, the legal norms are valid and valid as the Law. Because it can cause legal norms whose binding force is the same as the Law, then against the norm contained in the Perppu, the Court can examine whether it is materially contradictory to the 1945 Constitution, thus the Court has the authority to examine the Perppu on the 1945 Constitution of the Republic of Indonesia prior to the rejection or approval by the People's Legislative Assembly, and after the approval of the DPR because the Perppu has become the Law.

The Constitutional Court judgment then becomes a jurisprudence for other judges in deciding the same case related to the test of the Perppu. The same case happened in the year 2014, namely the Constitutional Court Decision Number 118-119-125-126-127-129-130-135/PUU-XII/2014 with the Case of the Testing of Perppu No. 1 of 2014 on the Selection of Governors, Regents and Mayors and Testing of Perppu No. 2 of 2014 on Amendment to Law Number 23 Year 2014 on Regional Government against the 1945 Constitution of the Republic of Indonesia and Decision of the Constitutional Court Number 128/PUU-XII/2014 with the Principal Case of the Test of Perppu Number 1 Year 2014 on the Election of Governor, Regent, and the Mayor against the 1945 Constitution of the Republic of Indonesia. The judge in running the judicial power has the judicial power which is one of his duty to find the positive law so that the decision based on the judge's conviction to decide a case for the parties must reflect the nature of truth and justice. Judges' rulings should be considered in all aspects of a philosophical, juridical, sociological nature so that justice to be achieved, manifested and accountable in the judge's decision is justice that is oriented to *legal justice*, *social justice*, and *moral justice*).

Based on Article 7 of Law Number 10 Year 2004 regarding the Establishment of Laws and Regulations, there has been no reapproval of the MPR Decree as a regulation which is then based on Article 7 Paragraph (1) of Law Number 12 Year 2011 in lieu of Law Number 10 Year 2004 concerning the Establishment of Laws and Regulations re-enacted the MPR Decree as a regulation. Elucidation of Article 7 Paragraph (1) of Law Number 12 Year 2011 provides restriction that the MPR Decree referred to is MPR Decree Number I/MPR/2003 concerning Review of Material and Legal Status of MPRS Decree and MPR Decree Year 1960 up to 2002. Present MPR tap, of course, can not be separated from the institution authorized to conduct a constitutionality test in contradictory to the 1945 Constitution of the Republic of Indonesia, because in MPR Decree Number I/MPR/2003 it still relates Tap MPR/S which is the content material of the Law is regulatory. In this research, it is emphasized to analyze and find answers to the characteristic questions of the MPR Decree and the institutions authorized to carry out the constitutionality test of the MPR Tap, to clarify the existence of the MPR Tap in the development of the modern legal system of state administration. Then analyzed by using the *Rechtsstaat* Theory of Law, Theory of Authority, Theory of Laws, Theory of Testing of Legislation, and Theory of Legal Vacancy. This research is a normative legal research that is "legal research that focuses on study or study of legislation" (Salim, 2012: 64) through Philosophical Approach, Legal Approach, Conceptual Approach, Historical Approach, Case Approach, and Comparative Approach. Sources of legal materials used are primary legal material resources, secondary law material sources, and tertiary law material sources. Analysis of legal materials in this research is done through identification of a primary legal material, then done grouping of legal materials with several methods. The analysis of legal materials is then interpreted by "law through authentic interpretation, grammatical interpretation, historical interpretation, teleological/sociological interpretation, systematic interpretation, and futuristic interpretation" (Asshiddiqe, 2006:290-304).

## **2. Research Analysis and Result**

### **2.1. Position and Characteristics of The Tap MPR RI**

Position of state institutions can be interpreted in the concept of state and the concept of society, the position of state institutions in the context of the state can be demonstrated through the system and mechanism of governing governance as stipulated in the 1945 Constitution. Meanwhile, the state can be explained from the work of community infrastructure in influencing and directing the policies of state organizers. "The community infrastructure in question is a political party, a class of interests, a class of emphases, a tool of political communication and a political figure" (Faridah, 2012:3). One of the main state institutions in the Indonesian state administration system which is regulated in the 1945 Constitution of the Republic of Indonesia is the MPR. Before the MPR was formed, the role of the MPR was filled by two institutions namely the Central Indonesian National Committee (hereinafter abbreviated as KNIP) and the Constituent Assembly. During the period of the government of the United States of Indonesia (hereinafter abbreviated as RIS) there was much pressure to restore Indonesia as a unitary state, so KNIP-RIS on 17th August 1950 passed the draft provisional constitution (hereinafter referred to as UUDS). However, since the constituent body which was shown to have the authority to enact the Constitution into the Constitution failed, a Provisional People's Consultative Assembly was formed (hereinafter referred to as MPRS). Along with the failure of the Constituent write a new constitution, then on

July 5, 1959, President Sukarno pronounce decrees later called President decree on 5 July 1959. "The contents of the Presidential Decree of July 5, 1959, among others" (Fadilah, 2014: 142): 1. Setting the dissolution of the Constituent Assembly; 2. Applicability back 1945 and are no longer effective UUDS Year 1950; 3. Formation of MPRS and DPAS.

It was started from the Presidential Decree that the MPR was formed as the MPRS. The formation of the MPRS the President issued Presidential Decision No. 2 of 1959 containing the MPRS consisting of members of the Gotong Royong parliament plus envoys from the regions (Region One Level Swatantra) and groups (Golongan Karya). On September 30, 1965, the incident of alleged perpetration by members of the PKI so-called as the G-30 S/PKI took place. After that, to free the MPRS from the PKI elements. MPRS performs its role and position as the supreme body authorized to dismiss President Soekarno from the office of President and inaugurate Lieutenant General Suharto as a President/Mandataries official. In the new order period of 1966-1998 MPRS has the position as referred to in the Constitution of the Republic of Indonesia Year 1945, namely as the holder and implementer of the people's sovereignty. "After that, the MPR was formed by the election result that is done by filling some seats in the DPR, whose membership comes from the election participating organizations" (Widayati, 2001, 201). Furthermore, during the period 1999-2004 MPR's power as the highest state institution increased. "The increase of MPR power can be seen from the annual session of the MPR which aims to request performance reports from all the state high institutions" (Widayati, 2001, 203).

"The MPR is an agency recorded in the constitutional structure of the Republic of Indonesia"( Priyantono,2005:<sup>3</sup>). Actually, before the amendment of the 1945 Constitution did not recognize the term of the institution but rather the mention of the body which is seen in the general explanation of the 1945 Constitution namely, People's Sovereignty is "held by a body named Majelis Permusyawaratan Rakyat, an incarnation of all Indonesian people (*vertretungsorgan des Willens des Staatsvolkes*) (Munir, 2005:12). The term of state institution was first listed in "MPR Decree Number VIII/MPRS/1965 on Principles of Deliberation for Mufakat in Guided Democracy as a Guideline for Consultative Agencies/Representatives" (Munir, 2005:13). Prior to the amendment of the 1945 Constitution of the Republic of Indonesia MPR had great power. The People's Consultative Assembly (MPR) holds the highest positions above the House of Representatives and the President as a state high institution. Prior to the amendment to the 1945 Constitution of the Republic of Indonesia, the People's Consultative Assembly of the Republic of Indonesia was the only supreme state institution that played an important role in implementing the people's sovereignty which was expected to assume its authority in representing all Indonesian people. Based on Article 2 Paragraph (2) of the 1945 Constitution which states that "Sovereignty is in the hands of the people, and is done entirely by the People's Consultative Assembly". "The sovereignty of the people according to the theory is that the people are sovereign and represent or surrender their power to the State or government" (Amalia, 2008:19). The People's Consultative Assembly as an institution that holds the people's sovereignty has the authority in accordance with that already stated in the 1945 Constitution and the MPR Decree. The duties and authority of the MPR prior to the amendment of the 1945 Constitution of the Republic of Indonesia are contained in Article 3 and Article 6 of the 1945 Constitution and Article 3 of MPR Decree Number I/MPR/1983, which are stated as follows: 1. Defining the Basic Law; 2. Establishing the Outlines of State Policy; and 3. Choosing and appoints the President and Vice President. In 1966 as stipulated under the MPRS Decree No. XX/MPRS/1966, it was stated that the hierarchy of the regulations of the Laws in Indonesia at that time were: 1. Constitution 1945; 2. MPR's Ketetapan MPR; 3. Act or Government Regulation in Lieu of Law; 4. Government; 5. Regulation Presidential; 6. Decree Implementation: a. Regulations Ministerial Regulation of Minister of; b. Instruction; c. and etc.

Based on the letter of stipulation, it is stipulated that the position of MPR Ketetapan is under the 1945 Constitution and above the Law or Government Regulation in Lieu of Law. The State of Indonesia for the first time conducted a review in 1973 of the 16 (sixteen) MPRS Tap already held at that time as stipulated in MPR Decree Number V/MPR/1973 on Review of Products in the form of Tap MPRS RI.

1. Based on Article 1 of MPR Decree Number V/MPR/1973 there are 5 (five) provisions with notes declared no longer valid and revoked MPRS Tap, namely:
  1. Tap XIV/MPRS/66 on "Establishment of *Ad Hoc Committee of* MPRS in charge of conducting research institute State Institutions, Preparation of Power Sharing Charts among State Institutions under the 1945 Constitution System, Compilation of Complete Plans of Composition of the 1945 Constitution and Compilers of the Details of Human Rights";
  2. TAP XV/MPRS/66 on "Voting/Appointing Vice President and Procedure of Appointment of Presidential Officials";
  3. Tap XVI/MPRS/66 on "Understanding Mandataries MPRS";
  4. Tap I/MPRS/1960 on "Political Manifesto of the Republic of Indonesia as State Policy Guidelines" juncto TAP XXXIV/MPRS/67 on "Review of MPRS Decree Number I/MPRS/1960 on Political Manifesto of Republic of Indonesia as Outline of Haluan Country";
  5. TapXXXVII/MPRS/68 on "Revocation of MPRS Decree Number VIII/MPRS/1965 and on Guidelines

- for the Implementation of the People based on the wisdom of Wisdom in the Consultative/Representative".
2. Based on Article 2 of MPR Decree Number V/MPR/1973, there are 8 (eight) provisions with the notes declared no longer valid MPRS Tap because the material has been accommodated in the Guidelines of State Policy, namely:
    1. Tap XII/MPRS/66 on " Foreign Policy of the Republic of Indonesia " .
    2. Tap XXI/MPRS/66 on "Extensive Autonomy to Regions".
    3. Tap XXII/MPRS/66 on "Parties, Honor and Work";
    4. Tap XXIII/MPRS/66 on "Renewal of the Policy on Economic, Finance and Development Platform";
    5. Tap XXIV/MPRS/66 on "Defense/Security Policy";
    6. Tap XXVII/MPRS/66 on "Religion, Education and Culture";
    7. Tap XXVIII/MPRS/66 on "Welfare Improvement Policy";
    8. Tap XXXII/MPRS/66 on "Press Coaching".
  3. Based on Article 3 of MPR Decree Number V/MPR/1973, there are 3 (three) provisions with the record stated in force and need to be refined MPRS:
    1. TapTap XX/MPRS/1966 on "DPR-GR Memorandum on the Source of Law and Order of the Republic of Indonesia Regulatory Affairs of the Republic of Indonesia";
    2. Tap XXV/MPRS/1966 on "Dissolution of the Indonesian Communist Party, Statement as a Prohibited Organization throughout the Territory of the Republic of Indonesia for the Communist Party of Indonesia and the Prohibition of Any Activity to Promote or Develop Communist/Marxism-Leninismism";
    3. Tap XXIX/MPRS/1966 on "Appointment of Heroes of Ampera".

Several provisions against the MPRS Decree which have been implemented and in effect are regulated in Article 4 of MPR Decree Number V/MPR/1973 which states that "Provisional People's Consultative Assembly Decisions which have been implemented and "einmahlig" shall be provisions of the Provisional People's Consultative Assembly not mentioned in Article 1, Article 2, and Article 3 of this Decree. "Several provisions of the MPRS Decree whose material has not been accommodated are regulated in Article 5 of the MPR Decree Number V/MPR/1973 which reads: "Provisions of the Provisional People's Consultative Assembly whose material has not been accommodated and not contradictory to the Guidelines of State Policy, the implementation can be regulated in the Regulations of Laws," it explains that there are still several MPR/S Decisions which since the stipulation of MPR Decree Number V/MPR/1973 is still valid.

The various crises that plagued the Indonesian State marked the birth of a reformation who wanted a change. The birth of the movements that triggered the emergence of reform periods caused by various crises, among others: 1. Economic crisis; 2. Political crisis characterized by a crisis of leadership; 3. Constitutional crisis characterized by authoritarian national leadership on the basis of constitution (*heavy executive*).

With the end of President Soeharto's administration in the new order, the period of reform then began, after 1998. "After 1998, the reform that brought the fundamental demands of change in the Republic of Indonesia, the main demand there are 2 (two) namely the Supremacy of Law and Amendment of the 1945 Constitution of the Republic of Indonesia" (Hartoyo, 2005:2). Supremacy of law or *Supremacy of Law* is a view of the law as the highest guidance in solving problems. The supremacy of law can be viewed from two recognitions namely, normative and empirical of recognition. Normative recognition of the rule of law is manifested in the formation of hierarchical legal norms that are at the top of the constitutional supremacy. "While empirically, the rule of law is manifested in the behavior of government and society based on the rule of law". The amendment of the 1945 Constitution of the Republic of Indonesia has been implemented several times since 1999 to 2002. In 1999 in the annual session of the MPR, the whole MPR fraction made a basic agreement on the direction of change as a guideline for the amendment of the 1945 Constitution.

Based on the MPR RI Decree Number III/MPR/2000 which is one of the MPR Tap that replaces the position of MPR Tap before amendment of the 1945 Constitution in MPRS RI Tap No. XX/MPRS/1966. MPR RI Decree Number III/MPR/2000 contains the source of law and order of legislation. With the amendment or amendment to the 1945 Constitution, the MPR Decree has changed its status and legal status. Where changes occurred caused a shift in the position of the MPR and the change of function and authority of the MPR. "The nature of the MPR's work also changed, especially with regard to the MPR Tap which was initially binding inward and inward, and became binding inward only"( Langi, 2013) MPR RI Decree Number III/MPR/2000 is a product of MPR that was born with the aim to improve the previous decree of MPRS RI Decree Number XX/MPRS/1966. In the Decree of the People's Consultative Assembly Number III/MPR/2000, the following rules and regulations are defined: 1. the Constitution; 2. MPRS Decree; 3. Constitution; 4. Government Regulation in Lieu of Law; 5. Government regulations; 6. Presidential decree; 7. Local regulation.

Although the provision that was born in 2000 is refining, but the provisions actually cause other problems. Such problems are like by placing the Perppu in the order under the law. This is a problem because both laws

should be in equal or equal degrees. Therefore, in the provisions of Law Number 10 Year 2004 regarding the Establishment of Legislation which among other things is intended to replace the function and adopt the Tap MPR RI Number III/MPR/2000 material, the forms of legislation are determined to consist of: 1. Constitution and Amendment of the Constitution; 2. Government Laws and Regulations in Lieu of Laws; 3. Government regulations; 4. Presidential decree; 5. Local regulation.

In the MPR's annual session of 2003, the MPR adopted the MPR Decree Number I/MPR/2003 concerning Review of Material and Legal Status of the MPRS Decree and MPR Decree from 1960 to 2002, on which the findings were found to be 139 Decisions later into 6 articles, some declared provisions revoked, some of which are still valid until the 2004 general election results, some are "declared valid until the formulation of law, so based on this matter found at least 13 provisions that still have power such as MPRS Tap No. XXV/MPRS 1966 Concerning the Dissolution of the Indonesian Communist Party, MPR Decree Number XVI/MPR/1998 on Economic Politics in the Framework of Economic Democracy, and other provisions that are crucial and crucial if violated" (Tuwaidan, 2013).

Based on Law Number 12 Year 2011 concerning the Establishment of Laws and Regulations to re-enter the MPR Tap As a source of legislation before the 1945 Constitution and after the Law, 2011 that the types and hierarchies of the Rules of Invitation are comprised of the: 1. 1945 Constitution of the Republic of Indonesia; 2. MPR Tap; 3. Substitute Government Laws/Regulations; 4. Government regulations; 5. Presidential decree; 6. Provincial Regulations; and 7. Regency/City Regulations. According to Hans Kelsen, the norm is tiered and layered in a hierarchical order, "the norms under which it applies sourced and rely on higher norms, higher norms apply, are sourced and based on higher norms, and so on until finally stopping at a supreme norm called the basic norm (*grundnorm*)" (Indrati, 2011:1). According to Hans Kelsen the law is included in the system of dynamic norms, because the law is always established and deleted by the institutions or authorities authorized to form or delete it, so in this case not seen in terms of the content of the norm, but viewed from In terms of the entry into force or the formation of the law is valid (*valid*) if made by the institution or the competent authority to shape as well sourced and based on the norms of a higher, so in this case the norm lower (*inferior*) can be formed by the norm of higher (*superior*) and the law is tiered and multi-layered forming a hierarchy.

Based on the theory, MPR Tap has validity through the 1945 Constitution of the Republic of Indonesia as the elaboration of the Constitution also provides guidance for the legislation under its hierarchy under the authority of the authorities in its formation. As revealed by Adolf Merkl's theory that "the above legal norms are based on the norms upon which it is derived, but below it also becomes the source and basis for the underlying legal norms, so that the rule of law has a relatively period of validity" (Indrati, 2011:42), by because the validity period of a legal norm depends on the legal norms above it. If the above legal norms are revoked or removed, basically the legal norms under it will be uprooted or deleted as well. Based on Article 18 of Law Number 12 the Year 2011 concerning the Establishment of Laws and Regulations that in the preparation of the Bill list is based on one of them is an order of the MPR Tap, meaning that the position of MPR Tap above the Law is stipulated.

## 2.2. Test of Constitutionality of Tap MPR RI

Based on Article 7 paragraph (1) of Law Number 12 the Year 2011 which reads that the type and hierarchy of Legislation consists of the: 1. 1945 Constitution of the Republic of Indonesia; 2. MPR Tap; 3. Law/Perppu; 4. Government regulations; 5. Presidential decree; 6. Provincial Regulations; and 7. Regency/City Regulations. MPR, as referred to in Article 7 paragraph (1) letter b, are used as the basis for the preparation of the draft law under Article 18 of Law No. 12 of 2011 which states that in the preparation of the National Legislation Program, preparation of the draft bill is based on: 1. Command Constitution NRI Year 1945; 2. MPR Tap Commands; 3. Other law orders; 4. National development planning system; 5. National long-term development plan; 6. Medium term development plan; 7. Government work plan and DPR strategic plan; and 8. community legal aspirations and needs.

Article 18 letter b above indicates that the MPR Decree is domiciled above the law so that it is possible that the MPR Decree is contradictory to the 1945 Constitution of the Republic of Indonesia. Based on Article 9 of Law Number 12 Year 2011 it states that "in the case of a law allegedly contradictory to the 1945 Constitution of the Republic of Indonesia, the tests are conducted by the Constitutional Court and in the case of a Legislation Regulation under the Act allegedly contrary to the Act, the tests are conducted by the Supreme Court ". This resulted in a legal vacuum that occurred in the case of the constitutionality test of the MPR Tap. Everyone is entitled to fair recognition, guarantee, protection and legal certainty and equal *equality before the law* as guaranteed in Article 28D of the 1945 Constitution of the Republic of Indonesia.

The Constitutional Court has issued the decision of the Constitutional Court Number 24/PUU- XII/2013 and Number 75/PUU-XII/2014 in relation to the MPR Tap, in the ruling the Constitutional Court rejected the lawsuit for the judicial review of the MPR on the grounds that it was not the authority of the Constitutional Court to test and this would be a jurisprudence for the judges in to decide upon the same case which led to the closing of the gate of the Constitutional Court to conduct MPR Tap testing which is still valid until now as legitimated

by Article 7 of the PPPU Law. Pursuant to Article 24 of the 1945 Constitution of the Republic of Indonesia in Chapter IX governing the Judicial Authority states that: 1. The judicial power is an independent power to administer the judiciary to uphold law and justice, 2. Judicial appeals are exercised by a Supreme Court and the lower courts within the general judiciary, the religious court environment, the military court environment, the administrative court of the state and by a Constitutional Court, 3. Other bodies whose functions relate to the judicial power are regulated in law. Article 24 paragraph (2) of the 1945 Constitution of the Republic of Indonesia jo. Article 25 paragraph (1) of Law Number 48 the Year 2009 regarding Judicial Power that the types of Courts are: 1. General Courts; 2. Religious Courts; 3. Military Justice; and the 4. State Administrative Court.

Article 24 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia of the Republic of Indonesia of the Republic of Indonesia of the Republic of Indonesia of the Republic of Indonesia of the Republic of Indonesia of the Republic of Indonesia of the Republic of Indonesia of the Republic of Indonesia (NRI) NRI Year 1945 jo. Article 25 Paragraph (1) of Law Number 48 the Year 2009 concerning Judicial Power is the Special Court Body in the form of constitutional Court *Ad Hoc*. The Constitutional Court *Ad Hoc* is a special judicial institution headed by a judge *Ad Hoc* as referred to in number 9 of Law Number 48 Year 2009 on Judicial Power which states that " *Ad Hoc* Judge is a temporary judge who has expertise and experience in a particular field to examine, hear, and decide upon a case whose appointments are regulated in the Law "The special court itself is a court institution with the authority to examine, hear and decide on certain matters governed by the Act. The Constitutional Court has 9 (nine) members of the constitutional judges appointed by the President, submitted by 3 (three) persons each by the Supreme Court, 3 (three) persons by the Constitutional Court, and 3 (three) persons by the MPR. The Constitutional Court *Ad Hoc* was formed on the MPR's proposal based on certain events through Presidential Decree. This means that the Constitutional Court *Ad Hoc* is a special Court to test MPR/S Tap which is not permanent and its formation from the beginning is only meant for a while in a certain period to maintain the integrity of constitutional sovereignty.

The existence of the constitutional Court *Ad Hoc* is one of birth on the history of reform which is the solution to the development of a constitutional system in answering people's need for constitutional enforcement. The need to test this MPR/S Tap To encourage the implementation of *the rule of law* in the improvement of democracy as proposed by Albert Van Dicey which suggests that there are three main elements of *the rule of law*, namely the *Supremacy of law*, in the law of each person (*Equality before the law*), and the Constitution is not a source of human rights and if human rights are laid down in the Constitution, the Constitution shall be constitutionally *based on individual rights*. The highest authority within the state is law, it is said to be the rule of law to ensure a legal certainty due to the return of the MPR Tap.

### 3. Conclusion

Decree of the People's Consultative Assembly is the legal source for the establishment of the constitution under, the position of MPR Decree under the 1945 Constitution and above the Act as stipulated in MPRS Decree No. XX/MPRS/1966, MPR Decree Number III/MPR/2000 and Law Number 12 the Year 2011. MPR tap gets a position that is validated by other norms which are the relation and interrelation between norms with other norms. The development of the state administration has denied that the MPR institution is no longer the institution of the people's sovereignty so that the MPR's institutional structure stands in line with other state high institutions. However, the People's Consultative Assembly still has the highest authority because in exercising its authority it still has the authority to stipulate MPR Decree which has characteristic of setting *beschikking* in changing and determining the 1945 Constitution of the Republic of Indonesia and Determination on the Appointment and/or Dismissal of President and/or Vice President.

Based on Article 24 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia, the government has the authority to attribute a special judicial body to conduct a judicial review of the constitutionality of the MPR Tribunal in the form of constitutional Court *Ad Hoc* as stipulated in the Act, this court is formed on the MPR's proposal through Presidential Decree independent headed by Judge *Ad Hoc*. This Constitutional Court *Ad Hoc* has a function relating to the judicial power to conduct a judicial review of the MPR/S Tap which is still in force under Article 7 paragraph (1) sub-paragraph b of the PPPU Law as explained in the explanation that the MPR Decree is the MPR Decree I/MPR/2003 on Reconsideration of the Matter and Legal Status Tap Tap MPR and MPR 1960 until 2002.

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