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Special Autonomy of Papua: A Review from the Perspective of the Unitary State of the Republic of Indonesia

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Abstract: *The authority of governance in Papua Province through Act No. 21 of 2001 is very large, as stipulated in Article 4 paragraph (1), which covering all fields of government, except with regard to foreign affairs, defense and security, monetary and fiscal, religion, and justice, and except with regard to a particular field. In addition to the authority, the authority of Papua Province added with partial authority of the Government called a special authority as provided in paragraph (2) is the authority in the field of foreign policy, defense and security, monetary and fiscal, justice and religion. This authority, causing some people argues that leads to form a federal state and also may lead to the disintegration of nation. The assessment object with regard to the substance of Act No. 21 of 2001 that opposed to the concept of a unitary state, and designing a special autonomy of Papua in accordance with the principles of the Republic of Indonesia, by using juridical-normative. The result indicates that the special autonomy through Act No. 21 of 2001 does not conflict with the concept of a unitary state; it strengthens Papuan into the Unitary State of the Republic of Indonesia. Design of special autonomy in accordance with the principles of the Unitary State of the Republic of Indonesia that gives special powers to the province of Papua in the form of delegation of authority is clear and explicit to the Province of Papua through the implementation of devolution theory and delegation of authority from the provincial to the district/cities through the implementation of real household teachings.*

Keywords: *Authority, Autonomy, Papua, Government*

INTRODUCTION

Indonesia as a unitary state are explicitly stipulated in Article 1 paragraph (1) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as “*The 1945*

Constitution) that “Indonesia is a unitary state, a Republican form”. As a unitary state, the state’s administration is conducted by the central government (government). The government has the authority to delegate or not delegate

some of their power to the regions based on its autonomy. This is according to Iswara¹ because of the unitary state “legislative authority is the central organ”.

The government in a unitary state has a crucial position in the administration, especially in a country with a vast territory, large population and a high degree of fragmentation. Various factors are vulnerable to conflict, so it needs to be managed exactly to be used as assets in national development. Concerned with that, according to Rashid² where the government is not to provide services for themselves, but to provide a service to the community and create conditions that enable every member people to develop skills and creativity for the future progress.

In line with these opinions, then according to Osborne and Gaebler³ government must get closer to the

people. Hopefully by the closeness, the government is more quickly in responding to the aspirations of people. The appropriate instrument in the Government closer to the people in this context is through government decentralization. Therefore, according to Sarundajang, the government decentralization is an element to strength the nation and to prevent the country from nation disintegration.

This is in line with the underlying reason for the Government in establishing the special autonomy for Papua, as stated in MPR Decree No. IV/MPR/1999 on State’s Guidelines of 1999-2004, Chapter IV letter g, point 2, which states that:

“... in order to develop local autonomy within the unitary state of the Republic of Indonesia, as well as to resolve issues in a fair and thorough in areas that require immediate action and sincere, it should be taken the steps as follows: a. maintaining the integrity of nation within the Unitary State of the Republic of Indonesia by respecting the equality and diversity of social and cultural life of Irian Jaya peoples through the establishment of a special autonomous as governed by Act; b. resolve cases of human rights violations in Irian Jaya through a fair trial process and dignity...”

¹ Isjwara, F. (1964). *Pengantar Ilmu Politik*. Bandung: Dhewantara, Page. 179

² Rasyid, Ryaas. (1996). *Makna Pemerintahan, Tinjauan dari Segi Etika dan Kepemimpinan*. Jakarta: PT. Yasrif Watampone, Page. 10

³ Osborne and Gaebler. (1992). *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (Terjemahan: Abdul Rosyid). (2000). *Mewirauahakan Birokrasi: Mentransformasi Semangat Wirausaha ke dalam Sektor Publik*. Jakarta: PT. Pustaka Binaman Pressindo, Page. 283

Examine the MPR Decree No. IV/MPR/1999 on the State's Guidelines 1999-2004, there are two important aspects that need to be observed, namely (1) the background of special autonomy establishment to Province of Papua is to prevent the nation disintegration, and (2) the recognition has been a human rights violation in Papua Province.

The underlying philosophy is set out in the MPR Decree, a differentiator in the governing authority of governance in the Province of Papua, which is the authority of Papua in the framework of special autonomy through Act No. 21 of 2001 on Special Autonomy for Papua (Act No. 21 of 2001) was great, as set out in Article 4 paragraph (1), which includes all field of government, except with regard to foreign affairs, defense and security, monetary and fiscal, religion, and justice, except with regard to particular fields. In addition to the authority in Article 4 paragraph (1) of Act No. 21 of 2001, the authority of Papua added with partial authority of the government called a special authority as provided in paragraph (2) is the authority in the field of foreign policy,

defense and security, monetary and fiscal, justice and religion.

This authority by some people argue that it tend to lead to federalism, as stated by Hendratno⁴ that decentralization policy as stipulated in 2 (two) statute of special autonomy, namely Act No. 18 of 2001 on Special Autonomy for Nanggroe Aceh Darussalam (Act No. 18 of 2001) and Act No. 21 of 2001 are recognized that its charge material leads to a federal system.

In addition to great authority, government institutions at the provincial level is also designed different from other provinces in Indonesia, as stated in Act No. 21 of 2001 which is in addition to the institutional of Governor and the Regional Representatives Council (DPRD)⁵, there is Papua People's

⁴ Edie Toet Hendratno. (2006). *Desentralisasi Yang Mengarah Ke Sistem Federal Dan Pengaruhnya Terhadap Pelaksanaan Fungsi Negara Di Indonesia*. Yogyakarta: Faculty of Law, Gadjah Mada University, Page. 374

⁵ Regional Representative in Papua Province is different from other provinces in Indonesia as regulated in Article 6 paragraph 4 of Act No. 21 of 2001 on Special Autonomy for Papua Province (State Gazette of the Republic of Indonesia of 2001 No.135, Supplement to the State Gazette of the Republic of Indonesia No. 4151) states that number of local legislator is 1 ¼ (one fourth) times the number of members of Papua

Assembly (MRP or *Majelis Rakyat Papua*) institutional. MRP is a cultural institution with the certain authority at the provincial level. The existence of this institution as expressed in the General Elucidation of Act No. 21 of 2001 is to provide an adequate role for the Papuans to participate in formulating regional policies and determine the development strategy.⁶ The existence of MRP expected to solve various problems in Papua. Therefore, MRP has the authority were large and very strategic in governance in Papua Province, it can be said that the successful implementation of Act No. 21 of 2001 is dependent on the duties and authority of MRP.

The strategic of this authority of MRP emerge very large fear toward the disintegration of nation, as from the beginning stated by the Minister of Home Affairs Hari Sabarno before the establishment of MRP through Government Regulation No. 54 of 2004 on MRP, MRP that has enormous

powers, it feared leads to things that could lead to the disintegration of nation. Further, it stated that issues Government Regulation on MRP means giving recognition to the establishment of a state.⁷

As described above, it is important to further study that “*special autonomy of Papua as a legal instrument in governance in Papua Province is expected to be used as a frame of the Unitary State of the Republic of Indonesia*”. Thus, the problem to be studied is whether the special autonomy through Act No. 21 of 2001 is contrary to the concept of a unitary state? and, how the design of special autonomy as the principles of the Unitary State of the Republic of Indonesia?

METHOD

This research is a normative-legal research,⁸ by using 3 (three) layers of

Province legislative as stipulated in the legislation

⁶ Ahsan Yunus. (2014). *Politik Pluralisme Hukum dalam Pemilihan Umum di Provinsi Papua; Telaah Karakteristik Pemilihan dengan Menggunakan Sistem Noken*. (Thesis). Makassar: Post-Graduate School, Hasanuddin University, pg. 32

⁷ Presence of terms *assemblies* and *people* led to the interpretation that MRP will be used as a *super body* in governance in Papua Province.

⁸ According to Peter Mahmud Marzuki, Normative-Legal research is simply called as legal research, because the term *legal research* or in Dutch called *rechtsonderzoek* always normative. Similarly, the term *juridical-normative* is also known in legal research, so that the proper term is used legal research. As stated in Peter Mahmud Marzuki. (2005). *Penelitian Hukum*. Revised Edition. Jakarta, Pages 55-56.

law science; *legal dogmatic*, *legal theory*, and *legal philosophy*. The approach of research using normative-legal or library legal research that includes the study of legal principles, legal systematic, a study of legal synchronization level, legal history and legal comparative.

Legal materials that are used for analysis were primary legal materials, i.e all legal rules established by and/or made formally by a state institution, and/or governmental bodies and enforcement is done through the forced power officially by the state, include: the 1945 Constitution, Act No. 32 of 2004, Act No. 23 of 2014, Act No. 21 of 2001 and various legislations related to the object of research. Secondary legal materials, all information about applicable laws or have been applicable in a state, includes: textbooks, legal research reports, law journals, published the results of a hearing in the House of Representatives, and other reports related to the object of research.

The object of research used in this study is divided into material and formal objects. Material object in this research is law on local governance in Indonesia focused on Act No. 22 of 1999, Act No. 21 of 2001, Act No. 32

of 2004 and Act No. 23 of 2014, while the formal object is the 1945 Constitution as basic norm (*saats fundamentalnorms*) that is focused on studies about the form of state in Article 1 (1) the 1945 Constitution and local authorities in Article 18 of the 1945 Constitution, especially Article 18B paragraph (1) the 1945 Constitution. The analysis technique is all legal material that is subsequently identified as the research's objective, and then to study by exposing and systematize and explain the positive law applicable prescriptively.

DISCUSSIONS

Special Autonomy of Papua in the Unitary State

The study on special autonomy of Papua in the unitary state is assessed by using the meaning of decentralization by Cheema and Rondinelli, as proposed that decentralization as “*different things to different people*”.⁹ Also, argued that through the decentralization carried out the transfer of planning and decision-making from central government to semi-autonomous

⁹ Cheema, G, Shabbir, en Dennis A. Rondinelli. (1983). *Decentralizataion and Development: Policy Implementation in Developing Countries*, Beverly Hills: Sage Publications, Page 18

organizations and parastatals, local government, or non-governmental organizations. Decentralization degrees are determined by “the extent to which the authority to plan and decide transferred from central government to other organizations”.

Determining the degree of decentralization that determines the form of transfer or distribution of authority, it can in the form of de-concentration or devolution. Referring to the meaning of decentralization, the distribution of authority in a state of top-level state organizer organ to lower level or to regional governments can use a variety of different forms, including the form of de-concentration and devolution.

The weight of authority in the form of de-concentration or devolution is not always similar for every unit of government (regional), depending on the policy makers and the conditions of governing units (regions). Therefore, Charles Tarlton¹⁰ distinguishes conceptually asymmetric decentralization which contains no uniformity of

authority substance content, and symmetrical decentralization which contains uniformity of authority substance content. On the basis of such meaning, then Charles Tarlton expressed the meaning of asymmetric decentralization as a situation where diversity in a society that finds its political expression through the government held with varying degrees of autonomy and powers vary.

It means that from the conceptual aspect, asymmetric decentralization can be a de-concentration or devolution, and both forms of decentralization can be done uniformly or not uniform, the only difference lies in decentralization weights used. Substantially, the asymmetric decentralization was limited to the meaning of devolution, not including de-concentration.

Charles Tarlton’ view is widely used by experts, that there is a meaning of asymmetric decentralization is only in the conceptual sense, so that asymmetric decentralization is sensed as a variation on the setting and did not question the magnitude of authority weight. In this sense, asymmetric decentralization can be interpreted in the form of devolution and de-concentration, so that in its

¹⁰ Agus Pramusinto. (2010). *Desentralisasi dan Otonomi Asimetris; Sebuah Pembelajaran Dari Negara Lain*. As cited in, *Revitalisasi Administrasi Negara, Reformasi Birokrasi dan e-Governance*. Yogyakarta. Page 100.

implementation level is translated as special autonomy, special areas, special territory and other terms. While, the meaning of asymmetric decentralization of the substance aspect will be questioned the decentralization of the magnitude of authority weight, which can be interpreted as devolution, so that the meaning of asymmetric decentralization as a special autonomy or autonomy.

Asymmetric decentralization in conceptual form in line with the opinion of Robert Endi Jaweng¹¹, that the concept of asymmetric decentralization is translated in Indonesia in the form of special autonomy, special areas/special, or special territory. While, asymmetric decentralization from substance aspect argued by Huda,¹² that asymmetric decentralization are often used interchangeably with the term autonomy, so that autonomy also referred to as asymmetric decentralization or autonomy. In line with Huda, according

Djumala¹³ that the term *self-government* that is used as the title in Act No. 11 of 2006, that is “Government of Aceh” has the same meaning as the special autonomy.

Asymmetric decentralization in its development by Richard Bird,¹⁴ also distinguished on *political asymmetry* and *administrative asymmetry*. That is, the political asymmetry is higher decentralization weight or broader authority, while the administrative asymmetry the authority given is less, it can be noted that the political asymmetry is included as devolution, while administrative asymmetry as deconcentration.

This shows that the concept of decentralization argued by the experts despite using different terms, but showed similarities in terms of providing limits on decentralization in the form of devolution and deconcentration. On the basis of this understanding, devolution can mean *political asymmetry* and deconcentration can mean *administrative asymmetry*. That is, both the de-

¹¹ Robert Endi Jaweng. *Kritik Terhadap Desentralisasi Asimetris di Indonesia*. dalam Analisis CSIS. *Politik Kekerabatan di Indonesia*. 40(2): 161.

¹² Ni'matul Huda. (2014). *Desentralisasi Asimetris dalam NKRI. Kajian Terhadap Daerah Istimewa, Daerah Khusus dan Otonomi Khusus*. Bandung: Nusa Media, Page 61.

¹³ Darmansjah Djumala. (2013). *Soft Power Untuk Aceh, Resolusi Konflik dan Politik Desentralisasi*. Jakarta: PT. Gramedia Pustaka Utama, Page. 143

¹⁴ Robert Endi Jaweng. *Op. Cit.*, Page. 164

concentration and devolution would also be implemented differently for each area or region. The term of asymmetric decentralization is used only to emphasize that decentralization does not always have to be implemented uniformly, as stated by Cheema and Rondinelli, that decentralization is “different things to different people”.

The concept of decentralization in relation to the existence of autonomous regions, the concepts argued by Cheema and Rondinelli is relevant for use, namely the existence of autonomous regions is pouring idea of the concept of devolution. This means that the concept of devolution is translated in the lives of governance through the creation of autonomous regions. The term of local autonomy, is only to clarify the position of autonomous regions in the territory of state. Thus, it is not appropriate to use the term as a principle in the regional administration.

Hence, the existence of an autonomous region is always followed by the distribution of authority from the Government, so that without authority, an autonomous region cannot be termed as an autonomous region, but

only as a mere administrative area. Therefore, the distribution of authority to each autonomous region it should have been done differently.¹⁵

Based on the sources of authority, then in the administrative area¹⁶ categorized using the source of authority in the form of “mandate”, i.e there is no a transfer of authority but mandate giver (top-level government) gives authority to other organs underneath (head/vertical agencies) to make a decision or take an action on its behalf with the obligation to account to that mandate. As for the autonomous region using a source of authority in the form of “delegation”, there is a transfer of authority, from the authority of attribution of an organ or top-level government to another organ underneath so delegator (the organ that has authorized) could examine the authorities on its behalf.

Both forms of decentralization above, has actually done in local governance in Indonesia, as demonstrated by the recognition of

¹⁵ Herdiansyah Hamzah. (2016). Legal Policy of Legislation in the Field of Natural Resources in Indonesia. *Hasanuddin Law Review*, 1(1), 108-121. doi: <http://dx.doi.org/10.20956/halrev.v1n1.218>

¹⁶ Administration region as a form of de-concentration principle

autonomous region, namely: “the unity of legal community that has boundaries are authorized to regulate and administer governmental affairs and public interests at its own initiative based aspirations community in the Unitary State of the Republic of Indonesia”. Besides the recognition of the autonomous regions, as well as the authority of the autonomous regions that distinguished the authority obtained through deconcentration and devolution, of course, within the framework of the existence recognition of autonomous regions, then devolution setting should be more dominant than deconcentration.

This setting is also in line with the characteristics of devolution as proposed by Cheema and Rondinelli:¹⁷ *First*, local government units are autonomous, independent, and clearly regarded as a separate level of government (the government controls little or no direct control); *Second*, local government has clear geographical boundaries and recognized legally to use its authority perform public functions; *Third*, local governments have corporate status and power

to secure resources in performing its functions; *Fourth*, develop a local government as an institution, namely local government institutions as an organization that provides services to meet the needs of people and as a government unit that has authority; *Fifth*, there is a mutual relationship, mutual benefit, and coordinating the relationship between the Government and the regions: namely, the regional government has the ability to interact reciprocity with other units of the central government system.

The decentralization policy in the form of devolution above has done the founding fathers’ prior to preparing the 1945 Constitution. Mohammad Hatta, since the beginning argue the importance of decentralization in government policies, even proposed to the establishment of a federal state, and stressed that the decentralization of government is not uniformity of administration for each region or autonomous regions. Ought each region or autonomous regions have differences in governance in the regions.

This is realized by the thought that each autonomous region has a historical background, customs and

¹⁷ Cheema, G, Shabbir, en Dennis A. Rondinelli. *Op. Cit.*, Pages. 18-25

various other aspects and not same; it means the spirit that carried the recognition of the diversity of every region, so that the content of autonomy for each region is not same. This spirit set forth in the 1945 Constitution before the amendment is in Article 18 and any amendments, even accommodate areas that are special.

This Article is still debatable, as some argue that since the meetings of BPUPKI is not found an explanation of the meaning of “the right of the origin in the areas that are special”, as well as in IS or IR. The sense of *zelfbesturende landschappen* is found in the draft of Constitution of Muhammad Yamin and the Small Committee of Supomo, that is the kingdom/kooti-kooti/sultanate-sultanate¹⁸, but the sense is different when set in the elucidation of Article 18 of the 1945 Constitution before the amendment, as region that have the original arrangement (*zelfbesturende landschappen and volksgemeenschappen*) by giving village examples in Java and Bali, the country in Minangkabau, village and clan in Palembang.

¹⁸ Ni'matul Huda. (2009). *Otonomi Daerah. Filosofi, Sejarah Perkembangan dan Problematika*. Yogyakarta, Page. 6

According to Huda, the structure of government though subject to the Dutch Indies, but not the formation or creation of a government of laws and regulations or the formation of the Dutch Indies. Furthermore, according to The Liang Gie, though in elucidation of the 1945 Constitution regulate such, but in the history of constitutional *zelfbesturende landschappen and volksgemeenschappen* is not categorized as a special area.¹⁹

This description indicates that Article 18 of the 1945 Constitution before the amendment are not set on the basis of granting special status or special to a certain autonomous regions. Instead special status was accommodated in Article 18B paragraph 1 of the 1945 Constitution after amendment that give recognition to their regional government that are special.²⁰ The specific meaning or special can be expanded, adapted to the

¹⁹ *Loc. Cit.*

²⁰ This is in contrast to the view of Anton Raharusun Yohanis (2009). *Daerah Khusus Dalam Perspektif NKRI (Telaah Yuridis Terhadap Otonomi Khusus Bagi Provinsi Papua)*. Jakarta, Page 260. That on the basis of historical fact, his view Article 18B does not provide the basis of special autonomy in Papua, especially associated with the principle of the unitary state. Papua' special autonomy is possible, more toward political change adaptation of Indonesia governance.

real needs of an area and the development of Indonesian state structure. Even the term of specific or special is not appropriate to be used as the title or name in local government legislation; the term is more towards giving consideration to the Government in set policy of decentralization weight for a region.

The elaboration of decentralization set out in Article 18 of the 1945 Constitution before amendment in the form of laws have ups and downs, there is always an attempt to run consistently, but at the same time always there anyway attempt to do otherwise (inconsistent). This can be seen in several stages of the elaboration of the 1945 Constitution through several laws, namely: Act No. 1 of 1945 on the Rule Concerning the Status of the Indonesian National Committee of Regions (Act No.1 1945) and Act No. 22 of 1948 on Determination of the Basic Rules Regarding Self-Governing Regions at Eligible Organize and Manage their own Household (Act No. 22 of 1948).

The next period, in 1945-1948 (post-independence), this stage is a government effort in finding the right form of decentralization with the

Unitary State. The next steps in the period 1959-1973 through Act No. 1 of 1957 on Principles of Local Government (Act No. 1 of 1957) and Act No. 18 of 1965 on the Principles of Local Government (Act No. 18 of 1965), Act No. 18 of 1965 is effort to high-degree decentralization, but at the same time conduct restriction (may be referred to as imposed decentralization). The period during the enactment of Act No. 5 of 1974 on Principles of Regional Government (Act No. 5 of 1974) is the autonomy that is really limited and tends to be centralized in its implementation.

The period of Act No. 22 of 1999 on Regional Government (Act No. 22 of 1999) is a reverse era of center to local. At almost the same time that is dated 18 August 2000, amend the 1945 Constitution, by amending Article 18 to Article 18, Article 18A and Article 18B. Specificity of Papua Province is given space in Article 18B paragraph (1), namely: “State recognize and respect the units of local government that is special or that are regulated by Act”. This means that the State give recognition to the existence of certain areas that are specific or special.

The next developments of Act No. 22 of 1999 was replaced by Act No. 32 of 2004 on Regional Government (Act No. 32 of 2004), the autonomous regional government are imposed (limited). Today, with the enactment of Act No. 23 of 2014 on Regional Government (Act No. 23 of 2014) was even more limited autonomy arrangements, which is done through local authority restriction.

Observing the regional administration above, indicating that although has been given the recognition of the autonomous region, but not followed by adequate transfer of authority to autonomous regions. This indicates indecision or inconsistency of the Government in implementing the concept of decentralization, even referred to as “subterfuge” or the strategy of the Government is half-hearted in implementing decentralization, in the form of devolution. As can be seen in the use of the term devolution in Act No. 22 of 1999, Act No. 32 of 2004 and Act No. 23 of 2014 used the term “decentralization”, which is interpreted according to Act No. 22 of 1999 and Act No. 32 of 2004 as delegation of authority, whereas in Act No. 23 of 2014 as delegation of affairs.

The implementation of decentralization in the form of devolution that half-hearted, by some argue that this attitude due to their concerns about the changing of state to federal, but actually more due to the implementation of the decentralization policy which leads to the colonial system.²¹ Therefore, the region cannot escape immediately with the distribution of authority delegated, since the final or highest decisions in governance remain in the Government.

This is in line with the view of C.F. Strong,²² that the central power has full authority to delegate some power to additional bodies, these bodies can be either the local or colonial authorities, it can even be a law-making body. It means that power is remain in the Government (center), the Government will decide to give part

²¹ Presented by Lev, in Daniel S. Lev. (1990). *Hukum dan Politik di Indonesia, Kesenambungan dan Perubahan*. Jakarta, Page 460 that the failure of revolution to erode the colonial heritage that is considered amazingly, can be seen well for the most part taken over, including in the form: the legal system, concept and structure. On the basis of Lev's opinion, it can be said that the Indonesian legal system is still animating spirit of colonial law.

²² C. F. Strong. (2004). *Konstitusi-Konstitusi Politik Modern, Kajian tentang Sejarah dan Bentuk-Bentuk Konstitusi Dunia*. Nuansa dan Nusa Media. Bandung. Hal. 115. See also, Budiardjo. 1999. *Dasar-Dasar Ilmu Politik*. Jakarta. Pages 140-145.

or pulling its power to the local. Therefore, restrictions as a unitary state are the existence of authority or the body relies on the wisdom of central authority, so no need to worry about conflicts between the central and local authorities.

This suggests that in a country that is a federal, not necessarily more decentralized than in a unitary state that is pursuing a policy of decentralization. As argued by C.F. Strong²³, that not all federal state use power-sharing to formulate a more dominant power to part state such in the US and Australia, but there is also a federal state which is predominantly formulate federal powers, as in Canada.

In line with the view of C.F. Strong, proposed by P. J. Proudhon²⁴, that the federal state in terms of ideology is a doctrine about the existence of diversity in the state in order to realize unity. In this context, it does not always have to be realized in the state as a form of federal, also the unitary state can use that understanding.

The above description shows that with the development of state form, then little difference between a unitary and federal state. Therefore, as argued by C.F. Strong is relevant for use as a reference, as essential nature of the unitary state is the rule of the central parliament and no additional bodies, and if want the additional bodies, then it under the central government. This means that the central government in a unitary state may at any time to form or remove the presence of bodies underneath (local power), compared to the federal state, the central government (federal government) does not have the power to form or remove the presence of bodies underneath (part state).

Forms of decentralization used in Indonesia when observed using any form of devolution or asymmetric decentralization in the sense of conceptual and substance to specific regions, as can be seen in Yogyakarta, Jakarta, Aceh, and Papua. Form of asymmetrical that applied in Yogyakarta, through Act No. 13 of 2012 on the Privileges of Yogyakarta.²⁵

²³ Eko Prasajo. (2005). *Federalisme dan Negara Federal-Sebuah Pengantar*. Depok, Jakarta, pg. 2; Preston King. (1982). *Federalism and Federation*. London, Page 23.

²⁴ C.F. Strong. *Op. Cit.*, Page 144

²⁵ The establishment of Yogyakarta as a special region stipulated in Act No. 22 of 1948 and further set back in Act No. 1 of 1957, but has not had clarity on its status as a special region. This status is clarified in Act No. 3 of

The privilege of Yogyakarta based on this Act lies in the procedures for filling positions, duties, and authority of the governor and vice governor, local government institutions, culture, land, and spatial planning.

The next form is seen in the governance of Jakarta based on Act No. 29 of 2007 on the Government of Jakarta as the Capital of the Republic of Indonesia (Act No. 29 of 2007),²⁶ the specificity of Jakarta lies in its position as the state capital as well as the autonomous region with the presence of district/cities as administrative region, therefore does not have a regional parliament. This leads to the autonomy is only at the provincial level that govern the different procedure in filling position of Governor/vice-Governor and Regent/Mayor, the

1950 on the Establishment of Special Region, which further amended by the Act No. 9 of 1955 on the amendment of Act No. 3 Jo. No. 19 of 1950 on the Establishment of the Special Region of Yogyakarta, there is no crucial thing regulated, just arrangement about the establishment of a region with boundaries and affairs as an autonomous region. Furthermore, the privilege of Yogyakarta is clearly clarified through Act No. 13 of 2012 on Privileges of Yogyakarta.

²⁶ Act No. 29 of 2007 replacing Act No. 34 of 1999 on Provincial Government of Capital Special Region of the Republic of Indonesia, Jakarta and Act No. 11 of 1990 on the composition of the Provincial Government of Capital Special Region of the Republic of Indonesia, Jakarta.

Governor/vice-Governor is elected directly by the people, while the Regent/Mayor by appointment by the governor.

The form of other local government, as demonstrated in the province of Aceh and Papua as 2 (two) regions are given special status within the enactment of Act No. 22 of 1999, namely the promulgation of 2 (two) local government act that seeks to provide a solution for 2 (two) regions is turbulent, when it²⁷ is Act No. 18 of 2001 on Special Autonomy for Aceh Darussalam Province and Act No. 21 of 2001.²⁸

²⁷ Provinces of Papua and Aceh Darussalam is 2 (two) regions is turbulent to release their territory of the Republic of Indonesia, as indicated by the Independent Papua Organization in Papua and Independent Aceh Movement in Aceh Darussalam. Both of these organizations are continuous struggle for independence in their respective areas.

²⁸ Province of Papua (formerly Irian Barat) *de jure* within the national legal order has been established in 1956 by Act No. 15 of 1956 jo. Act No. 23 of 1958, although *de facto* it was still dominated by the Dutch, only on May 1, 1963, *de facto* and *de jure* be part of the Unitary State of the Republic of Indonesia, while the establishment of the Autonomous Province of Irian Barat with autonomous districts in the province of Irian Barat recently conducted on 10 November 1969 by Act No. 12 of 1969. Since the establishment of autonomous Province of Irian Barat and autonomous districts on 10 November 1969 has been renamed several times that is Irian Barat become Irian Jaya and the era of reform through Act No. 21 of 2001 become Papua. The rename as the development of aspirations

Act No. 18 of 2001 in its development was replaced by Act No. 11 of 2006 on Aceh Governance (Act No. 11 of 2006) tried to improve the content of its local autonomy that is through improvements to the formulation of authority that is still common in Act No. 18 of 2001 detailing the local authority in Act No. 11 of 2006, but the authorities are still unable to implement due to the formulation of sentence in Article 11 (1) that: “the government sets norms, standards, and procedures and to supervise the implementation of affairs undertaken by Aceh Government and Regency/City government.” This means that the authority of Aceh Government remain guided by sectoral laws that regulate the standards and procedures for implementing authority in various areas of government.

As well as Aceh, Papua Province in implementing its authority is restricted, due to collide with sectoral laws. The authority based on Act No. 21 of 2001 cannot be used optimally, constraints on the implementation of authority that overlaps with the existence of sectoral laws that governs

and the people’s dynamics that indicates the existence of a separate identity.

norms, standards, procedures and criteria for the implementation of government affairs.

Observing decentralization in the form of devolution or asymmetric decentralization in local governance in Indonesia can be classified into 2 (two) forms, namely: *First*, the authority is low by regional, it can even be categorized as a pure implementation of de-concentration, as can be seen in the Special Capital Region of Jakarta and Yogyakarta that the authority is only concerned with general aspects and not substance, that is not in the authority; *Second*, the high degree of decentralization by regional, can be categorized as the implementation of devolution, as seen on special autonomy through Act No. 21 of 2001 and the autonomy of Aceh through Act No. 11 of 2006, but unfortunately, at the level of implementation, the content of autonomy for two regions is equal to other region who do not have special status and its specificity are not much different from the Special Capital Region of Jakarta and Yogyakarta.

Related to some illustration of the various forms of regional governance above, indicates that the unitary state can use decentralization in the form of

devolution or asymmetric decentralization as in the UK. Likewise, the implementation of government in a federal state is not necessarily based on decentralization in the form of devolution as in Canada. Its difference lies in the authority of the government (the center) to create or remove the existence of local government, either for a particular section (restriction of authority) or for the whole (remove the existence of region), that in the unitary state at any time can be done by the Government, but in a federal state is difficult to do.

This review is also shows that local governance arrangements differently are not contrary to the 1945 Constitution, and that the implementation of decentralization in the form of asymmetric decentralization or devolution does not conflict with a unitary state. Besides, it also shows that the government has not consistently implement the decentralization policy as set out in the legislation that has been formed.

Based on the above, the arrangement of special autonomy of Papua through Act No. 21 of 2001 as one form of local governance arrangements based on the concept of high-degree

decentralization, or by Cheema and Rondinelli called as devolution or by Tartlon called as asymmetric decentralization.

All characteristics proposed by Cheema and Rondinelli and Tartlon are supported by Huda and Djumala about the term of special autonomy that is identified with asymmetric decentralization is reflected in the substance of Act No. 21 of 2001, which can be seen in the relation pattern of center-local or relationships government with the government of Papua provincial are represented by: *first*, has great authority to regulate and manage their own household; *second*, has a clear geographical boundaries; *third*, has large allocation for funds revenue sources; *fourth*, provide services to meet the needs of the people; and *fifth*, repressive government supervision.

Legal Policy of Special Autonomy for Papua

Act No. 21 of 2001, in general can be said to have a high decentralization which is indicated by the existence of very large provincial jurisdiction, but the level of implementation is not yet optimal. It is

caused by the weakness of legislation that has implications for the overlapping authority of the government of Papua Province, and overlapping authority of Papua Province by Regency/City. This means that during the period of the enactment of Act No. 21 of 2001, the authority of Papua Province together with the provinces/districts/cities in Indonesia, which differ only in the acceptance of special autonomy funds.

Overlapping with the government authorities, due to the formulation of government authority in Article 4 paragraph (1) as in the sentence: “a certain authority in other fields established in accordance with the legislation”. This sentence can be categorized as vague norm or commonly referred to as a rubber article, because it is very elastic, easily manipulated by the policy makers, especially in accordance with Article 11 of Act No. 23 of 2014, stipulates that: “the implementation of government affairs is divided based on criteria externality, accountability, and efficiency with regard harmonious relationship among levels of government”. This means that the authority of Papua Province by Article

4 paragraph (1) of Act No. 21 of 2001 carried out by all three of these criteria.

In this context, as mandate of Article 4 paragraph (3) of Act No. 21 of 2001, the authority of Papua Province must be translated into a legal instrument in the form Perdasus/Perdasi. Things happened was when Perdasi/Perdasus is implemented, it is contrary due to the vague norm formulation, so norms, standards, procedures and criteria related to each area of authority shall be made by the Government with the legislation that is sectoral laws. There is a collision between the use of the term authority under Act No. 21 of 2001, and the term affairs under Act No. 32 of 2004 or Act No. 23 of 2014. If use the term authorities, then Papua Province has authority unanimously on certain government affairs, while use the term affairs, the authority of Papua Province is restricted by norms, standards, procedures and criteria set out in the sectoral laws.

Another thing that is indicated by the formulation of the notion of decentralization is constantly changing in the law of local government, as illustrated in Act No. 32 of 2004 the notion of decentralization in Article 1

paragraph (7) as “transfer of government authority by the Government to autonomous regions to regulate and administer government affairs in the system of the Republic of Indonesia”, then in Act No. 23 of 2014 amended in Article 1 paragraph 8 to be “transfer of government affairs by the Government to autonomous regions based on the principle of autonomy”. While the principle of autonomy is referred to in Article 1 No. 7 is the basic principle of local governance under regional autonomy. The principle includes “the principles of accountability, efficiency, externalities, and national strategic interests as stipulated in Article 13 paragraph (1).

This Act indicates authority restriction for Papua Province, in addition to using the term affairs, it also directly carry out the details of matters set out in Article 9 paragraph (1), namely: “Governance matters includes absolute government affairs, concurrent, and general”. Absolute government affairs are a matter that was the full authority of the Government. Concurrent government affairs are government functions that are divided between the Government and the Provincial and District/City,

while general government affairs are the government affairs under the authority of the President as head of government.

Furthermore, concurrent affairs have been delegated to the region is further detailed into mandatory government affairs and choice government affairs. Mandatory government affairs were divided over government affairs relating to basic services and government functions that are not related to basic services. This further shows the arrangement of political will in the government increasingly centralized governance, away from the aspect of decentralization. The implication of regional governance is uniform for the whole of Indonesia, and increasingly dependent on government subsidies.

This centralistic aspect is seen the provision of Article 16 of Act No. 23 of 2014, namely the Government in carrying out concurrent government affairs authorize to: establish norms, standards, procedures, and criteria in relation to the implementation of government affairs and implement guidance and supervision of the implementation of government affairs under the local authority.

Norms, standards, procedures, and criteria are the provisions of laws and regulations set by the Government as a guideline in the implementation of concurrent administration affairs under the authority of Government and region and commonly known as sectoral laws. Sectoral laws implemented by ministries and non-ministry agencies.

The formulation of this provision led to how large any authority or affairs of a region, and in the form of laws of local government is general and specific, the region remains flexible in exercising authority or its affairs, due to restrictions in sectoral legislation. The formulation of Act No. 23 of 2014 did not have significant differences with Act No. 32 of 2004, due to the technical aspects, not substance.

Therefore, both these laws, has similarity in: *Firstly*, the both Act using the term *affairs* in delegating government power to the region; *Secondly*, the restriction of determination of affairs to the region using specific criteria, just use the different mention; and *Thirdly*, establish guidelines or reference for the region in organizing its administration in the form of sectoral laws.

While, the difference is only related to the distribution of mandatory functions on matters relating to basic service or not. Act No. 32 of 2004 unify the mandatory functions, both with regard to basic services or not, while Act No. 23 of 2014 distinguishes mandatory affairs in both types of these services.

This description indicates that the Act 23 of 2014 and Act No. 32 of 2004 does not provide an opportunity for Act No. 21 of 2001 to be implemented optimally, especially based on Act No. 23 of 2014, the Regent/Mayor is also implementing public government affairs. If during the enactment of Act No. 32 of 2004 which are vertical agencies at the provincial level have intervened in the presence of local governments, especially with the presence of the regent/mayor as implementers of public government affairs, then increased the obscurity of decentralization in Indonesia, especially in Papua Province.

On the other hand, there is also overlap the provincial authority with the district/city. This is due to the formulation of Article 4, paragraph (4) of Act No. 21 of 2001, states that:

“the authority of districts and cities includes the authority set out in the legislation”. Legislation in question is the law governing local government namely Act No. 32 of 2004, due to Act No. 32 of 2004 emphasizes the authority of the district/city, while Act No. 21 of 2001 emphasizes the authority of the province.

The different formulation of both Act, then the authority of district/city in addition based on Act No. 32 of 2004 was also based on Act No. 21 of 2001 which, in its implementation is delegated by the Provincial Government through *Perdasi* and *Perdasus*, as stipulated in Article 4 paragraph (5), namely: “...*the regency and city have the authority under the Act is further governed by Perdasus and Perdasi.*” The formulation of this article raises problem in its implementation.

As an illustration presented problems in the field of mineral and coal mining, related to people mining permission as referred to in Article 68 of Act No. 4 of 2009 on Mineral and Coal Mining (Act No. 4 of 2009), for permission to conduct mining business in people mining regions with limited region area and investment. The authority to give permission is

conducted by the Regent as the region area has been established, namely: for individuals at most 1 (one) hectare; for community groups at most five (5) hectares; and for cooperative at most ten (10) hectares.

As this authority, the Provincial Government under Act No. 21 of 2001 assumes that limitation of mining sector management is its authority, even extending to 100 hectares,²⁹ while the district/city, their authority is based on Act No. 32 of 2004 and Act No. 4 of 2009.

The solution to the overlapping of authority is taken by the government of Papua Province by making changes to the substance of Act No. 21 of 2001, that facilitated by Felix Wanggai.³⁰ The design of these changes is alter the authority of the Papua Province by detailing any authority. As illustration,

²⁹ An area of 100 m since 2010 have been attempted to be regulated in the draft *Perdasus* on Mineral and Coal, but until now has not received approval from the Government related to a controlled substance.

³⁰ Felix Wanggai is a special staff of the President of the Republic of Indonesia that submit Academic Manuscript of the Drafting of Legislation on the Government of Papua includes main points of thinking about the changes the substance of the Act No. 21 of 2001 are presented as the main material in the administration of *Rakerdasus* by the Provincial Government of Papua, in *Sasana Krida Jayapura*, dated 29 until 30 May 2013.

in mining field,³¹ the proposed formulation, as follow:

1. Holders IUPK for Production Operation for metal-coal mining are required to pay a 4% (four percent) to the Government and 10% (ten percent) to the local government of the net profits from the operation.
2. Share of local government referred to in paragraph (1) shall be as follows:
 - a. Provincial governments get a share of 5%;
 - b. District/city governments get a share of 2.5% (two point five percent); and
 - c. Other district/city in the same province gets a share of 2.5% (two point five percent).

The arrangement of this detail authority is regarded as a solution to the overlapping authority of Papua Province by the Government authorities as well as the authority of district/city, but when analyze this detail authority, it can be inhibited through a change in the Act of local government through the changes of term fields under the region authority, so the authority of Papua Province stand-alone without any line of command, meaning that the authority of Papua Province as merely wishful

thinking or article emptied can be implemented.

Ideally, emphasis is placed on the authority of each province as the arrangement of authority in Act No. 21 of 2001. Further, the division of authority between the Government and provincial, the authorities of province is shared by using *the theory of residue*, meaning that all the authority of the Government is specified one by one, and not formulated as the authority of each province, so that if reference to Article 4 paragraph (1), then the formulation of authority was limited, as follows: “the authority of Papua Province includes authority in all areas of government, except with regard to foreign affairs, defense and security, monetary and fiscal, religion, and justice. The subsequent sentence in the form of “....a certain authority in other field as established in accordance with the legislation” is eliminated.

Although the Government authorities have been specified explicitly, but this authority does not stop here, because the government also conduct authority which are not or have not been able to be implemented by the Provincial. This means that the

³¹ Draft of Academic Transcript of the Principal of Legislation about the Government of Papua as Amendments to Act No. 21 of 2001, Page 79.

Province exercising its authority according to its ability.

The main measuring tool in the implementation of such authorities is the elaboration of these powers in a legal instrument in the form of Government Regulation (PP). If the elaboration of local governments legislation in the form of sectoral laws, then the elaboration of autonomy law are enough with PP. This regulation provides the arrangement of standards, norms, procedures and criteria for each of the areas of government under the authority of the regions. PP is the basis for the Papua Province in exercising its authority.

Implementation of this authority with the supervision of the Government and evaluated each 5 years by the Government together with the Government of Papua Province and the Government of Regency/City. In terms of evaluation results demonstrate Papua Province has not been able to exercise its powers, it must be sanctioned, can be a reduction of authority or supervision is carried out can be added its implementation volume.

Similarly, the authority of Papua Province is still done by the Government based on PP can also be

reduced load even eliminated, if Papua Province has been able to carry out all the appropriate authority of the success criteria set out in PP. The transfer of authority is done in stages with the capability of regions.

Supervision is done by the Government, must be regulated in PP, which is related to the supervision, the scope of supervision, and procedures for supervision. The preparation of this regulation should be done by accommodating the aspirations of the Papua Province, hence the discussion conducted with the Government and the Government of Papua Province. The existence of Government in the implementation of special autonomy is just only a function control of the Papua Province.

It means, the implementation of authority in the field of government in Province using the principle of decentralization in the form of devolution, deconcentration and assistance, but for exercising the authority of district/city in conjunction with the Government, using only the principle of assistance, whereas in conjunction with Province, using the principle of devolution and the principle of assistance.

Meaning the use of principle at the provincial level, namely devolution, defined as delegate of government authority³² to the Provincial, de-concentration is interpreted as a delegation of authority from the Government to the Province, and co-administration defined as the Provincial Government to the delegation of tasks to be implemented along with the guidelines and financing and should be accounted for.

As for the use of principle in the districts/cities, namely devolution and assistance. Devolution is defined as the delegation of authority from the provincial to the district/city, while assistance is defined as the delegation of tasks or assignments Provincial to districts/cities to be implemented along with implementation guidelines and funding, and should be accounted for.

Related to the local authority of district/city, then reference to Article 4 paragraph (1) of Act No. 21 2001 that focuses authority in the provinces, then this form should be maintained that the autonomous regions of provincial and district/city laid out in stages, it means know their levels (hierarchy), but the

³² Delegation of authority not power

district/city remains an autonomous region and not an administrative region.

The delegation of authority from the provincial to district/city is carried through the theory of real (real household teaching), that is authority delegation to the regions based on the real factor, as real needs and capabilities of district/city. Therefore, an authorization that has been delegated, at any time can be returned by the Province.

Main priority in this delegation is affairs³³ that delegated to the district/city as the authority related to the basic rights service of society, for example: the authority in the field of education, health, public works, transportation, industry and commerce, land, cooperatives and labor. Logically, regency/city is the closest base to the public.

The authority pertaining to the service of basic rights, which by Act No. 23 of 2014 referred to the mandatory affairs, so it can be added choice affairs or not related to the basic

³³ Terms used in managing relations between the Government and the Provincial Government of Papua uses the term of *authority*, whereas the term used in relations with the Regency of Papua Province/City uses the term *affair*.

rights, for example: a. culture, investment, environment, forestry, mining, agriculture, fisheries, housing, trade, national unity, social, statistics, sports and archival and library.

CONCLUSION

Special autonomy of Papua through Act No. 21 of 2001 does not conflict with the concept of a unitary state, because Indonesia as a country with a unitary form, then the government has authority to establish or eliminate the presence of a local government, either for a particular part (authority restriction) or for overall (eliminate region existence).

Design of special autonomy in accordance with the principle of the Unitary State of the Republic of Indonesia provide reinforcement of MRP as a legislative bodies in addition to MRP with the authority of protection for the rights of indigenous Papuans, and give special authority to the Papua Province in the form of clear and firm delegation of authority to special autonomy of Papua by remain maintain Article 4 paragraph (1) of Act No. 21 of 2001 that focuses authority in the provinces, so that the autonomous regions of provincial and district/city

laid out in hierarchy, it means recognize the hierarchy, but the district/city remains an autonomous region not administrative. The delegation of authority from provincial to district/city is conducted through the theory of the real (real household teaching) as the delegation of authority to the regions by based on real factor, as the real needs and capabilities of district/city is returned by the Province.

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