

## Principle of Original Authority In Territorial Decentralization

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**Article history:** Received: 24 June 2023, Accepted: 15 July 2023,  
Published: 17 July 2023

**Abstract:** Indonesia is a unitary state, where within the framework of the unitary state, power is divided between the central government and regional governments. The regional government is divided into three levels, namely provincial, district, and city regional government. The division of powers to local governments is interpreted as the principle of autonomy. In the NA RUU-Pemda as well as the General Elucidation of the UU-Pemda, it is implied and stated that the autonomy that exists in an autonomous region is a gift. Meanwhile, from the point of view of its establishment, regional autonomy is original, not granted, and is a regional right based on its principle. In principle, the regional right to regulate and manage it is an original right and is not a gift from the central government. From this principle, provisions were born which stated that provincial, regency, and city regional governments regulate and manage their own government affairs according to the principles of autonomy and co-administration.

**Purpose:** The purpose of this study is to explain that regional autonomy is not a gift from the central government but the original authority possessed by the regional government.

**Design/Methodology/Approach:** This research is legal research. The approach method used in this study is to use a statutory approach, historical approach, and conceptual approach.

**Findings:** In principle, the right of the region to regulate and manage it is an original right and is not a gift from the central government. From this principle, the provisions of Article 18 paragraph (2) were born which states that provincial, regency, and city regional governments regulate and manage their own

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government affairs according to the principles of autonomy and co-administration.

**Originality/Value:** This research tries to explain that regional autonomy in Indonesia is a regional original right, not the result of a gift from the central government. because in several studies that raise regional autonomy, it is always explained that the autonomy obtained by the regional government is the result of a gift from the central government. The difference in point of view is what makes this research a novelty.

**Keywords:** autonomy; decentralization; local government

**Paper Type:** Journal Article

## Introduction

In terms of structure, a country that is not composed of several countries with the highest power and authority in the hands of the central government is called a unitary state or unitary state (Soehino 2005; Fatkhul Muin 2015). Referring to this understanding, it can be concluded that Indonesia is a unitary state (Reynold Simandjuntak 2015). The affirmation that Indonesia is a unitary state is stated in Article 1 paragraph (1) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as UUD NRI 1945). Within the framework of a unitary state, Indonesia implements a horizontal and vertical division of powers. The division of power horizontally divides the existing power in Indonesia into executive, legislative and judicial powers. Meanwhile, the division of power vertically divides the power relationship in Indonesia between the central government and regional governments (Jimly Asshidiqie 2016).

The regional government is divided into three levels, namely provincial, district, and city regional government (*vide* Article 18 paragraph (1) of the Constitution). NRI 1945) each of which has the right/authority to freely and independently regulate and manage their household affairs. In other words, local government in Indonesia has autonomy. Related to this, in the Majelis Permusyawaratan Rakyat (MPR) continuing to discuss changes to the 1945 Constitution (hereinafter referred to as the UUD 1945), Bagir Manan said that

autonomy is principally genuine autonomy, not granted and is a regional right based on its principle (Kementerian Dalam Negeri Republik Indonesia 2011). Departing from this principle, the formulation of Article 18 paragraph (2) was born UUD NRI 1945 which in full emphasizes: "provincial, regency and city regional governments regulate and manage their own government affairs according to the principle of autonomy and co-administration".

Organic law from Article 18 of the UUD NRI 1945 is Law Number 23 of 2014 concerning Regional Government (hereinafter referred to as Law No. 23/2014). Before establishing Law No. 23/2014, the Ministry of Home Affairs carried out a legal review as outlined in the Academic Paper of the Draft Law on Regional Government (hereinafter referred to as the NA RUU-Pemda) which was published in 2011. In the NA RUU-Pemda, it says that basically regional autonomy is given to regional people as a legal community unit that occupies an area with certain boundaries (Kementerian Dalam Negeri Republik Indonesia 2011). In addition, it is also said that the regions obtain authority from the state which is actually the executive authority belonging to the president (Kementerian Dalam Negeri Republik Indonesia 2011). The background thinking in the NA RUU-Pemda is then explained in the general explanation of Law No. 23/2014 which says:

The granting of the widest possible autonomy to the Regions is carried out based on the principle of a unitary state. In a unitary state, sovereignty only exists in the state government or national government and there is no sovereignty in the regions. Therefore, no matter how wide the autonomy granted to the Regions, the final responsibility for administering the Regional Government will still be in the hands of the Central Government (vide General Explanation 4th paragraph of Law No. 23/2014).

Both the NA RUU-Pemda and the general explanation of UU No. 23/2014 implied and stated that the autonomy that exists in the autonomous region is a gift. Meanwhile, when examined from the point of view of the thinking that existed at the time Article 18

paragraph (2) of the UUD NRI 1945, as said by Bagir Manan, that regional-owned autonomy is genuine, not granted, and is a regional right based on its principles.

Based on the description above, a formulation of the problem is obtained, namely: is the authority of the autonomous region in Indonesia an original authority or a gift from the central government?

### **Methods**

This research is legal research (Peter Mahmud Marzuki 2016). The approach method used in this study is to use a statutory approach, historical approach, and conceptual approach.

### **Discussion and Findings**

#### **Regional Autonomy Concept**

Autonomy is born from the rule of law concept of democracy which is an evolving concept from mid 18th century (eight-twelve) to the 20th (twentieth) century. From this concept then developed one thought becoming a forerunner will birth autonomy area. To dig deeper into the autonomy area There is good We browse formerly about whatever that is elements of the rule of law democracy. In his book entitled *Besturen Door De Overheid*, JBJM ten Berge mentions several *interesting seisen in rule of<sup>3</sup> law country's democracy*, one of which is *spreading van bevoegdheden* or spreading authority (J.B.J.M. ten Berge and F.C.M.A. Michiels 2001): The question is, why is there a need deployment authority? Ten Berge started the explanation with said (J.B.J.M. ten Berge and F.C.M.A. Michiels 2001)): "*machtsophoping in het centrum van een samenleving bij een enkel bestuursorgaan corrupeert*". From thinking about the needed deployment of power among the different organs of government. According to ten Berge there are two variants *spreading van bevoegdheden: horizontale*

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<sup>3</sup> The translation of *inrichtingseisen* is the design/arrangement/arrangement that is required or required there is, is usually used in context arrangement particular building or room.

*spreading and vertical spreading. Related verticale spreading van bevoegdheden* he says:

*Daarmee bedoelen we de spreading van overheidsmacht over verschillende openbare lichamen, hetzij territoriale lichamen..., hetzij functionele lichamen.... Hey gaat hier om decentralization: macht wordt gespreid over personen en colleges die niet hiërarchisch ondergeschikt zijn aan hogere niveau en die daarom een zekere mate van zelfstandigheid bezitten.*

If We look for equivalent from the word *zelfstandigheid* in Indonesian, then will We get the word *independence* as equivalent. Meanwhile in context law state administration *zelfstandigheid* associated with *autonomie*. Kindly etymology of the word *autonomie* originate from Greek which is combined from *autos* and *nomos*. In his book entitled *Inleiding Tot De Studie van Het Nederlandse Recht*, van Apeldoorn said (R. J. B. Bergamin 2003): “*wanneer het gedecentraliseerde organ zowel op het gebied van de wetgeving als op het gebied van het bestuur in vrijheid een eigen beleid mag voeren ten aanzien van de eigen huishouding, is er sprake van autonomie*”.

If ten Berge uses the term “*spreiding*” or “*spreading*”, is different from Jimmy Asshiddiqie who is more inclined to use the term “*division*” in the framework of the division of powers in a country. He followed the opinion of Arthur Mass who said there are two meanings to “*division of power*”, namely in its horizontal or *capital division of power* and vertical or *territorial division of power* (Jimmy Asshiddiqie 2016). Power sharing in a manner vertical happens between higher state organizations to lower state organizations, or as they are known with term decentralization. As he did quote from opinion Hoogerwerf said that decentralization is acknowledgment or submission of authority by a higher public body to lower public bodies to regulate and manage in a manner independent and based on own interests of government affairs (Jimmy Asshiddiqie 2016). So according to Hoogerwerf, a public body in decentralization get the authority to regulate and administer

his government. About what does it mean to manage and what it mean to manage, Mohamad Mahfud MD says:

Regulatory action is set regulation general, in an autonomous sense according to provisions about circumstances and events abstract, or commands and prohibitions that are not intended for individuals special. Meanwhile, the action takes care of nature and takes action specifically regarding circumstances and events concrete or intended for a person's special.

Furthermore, Jimmy Asshiddiqie in a manner generally differentiate decentralization into 3 (three) meanings, namely: (Jimmy Asshiddiqie 2016)

- a) Decentralization in the sense of deconcentration;
- b) Decentralization in the sense of delegation authority;
- c) Decentralization in the sense of devolution.

Decentralization in the sense of deconcentration is only limited to the assignment of intermediate work tasks organization's high government to the organization's lower government (Hanny Wulandari Yasin and Tomy Michael 2022). In other words, it happened something bestowal authority in a mandatory sense (Dian Berliansyah Putra, Firstianty Wahyuhening Fibriany, and Heri Aryadi 2022). Meanwhile, decentralization in the second sense is a form of delegation of authority to take decisions complete with not quite enough he sued. It means that *delegans* or recipient authority carry out authority the on not quite enough the answer itself (J.B.J.M. ten Berge and F.C.M.A. Michiels 2001). However, at this stage, decentralization occurred incompletely. As Hadjon said, full decentralization is not just covering authority to regulate and administer the method run it. Decentralization of this kind is also called *medebewind* or auxiliary duties. Decentralization in the sense that the latter happened something bestowal authority and function government by government center to government area (Eviandi Ibrahim 2022). In

decentralization in a sense this devolution, the government area is given authority to regulate (*regelendaad*) and administer (*bestuursdaad*) related principles and methods running it, so area the become autonomous (Philipus M Hadjon and R. Sri Soemantri Martosoewignjo 2008).

With obtaining autonomy status by certain (regional) government organs (Eviandi Ibrahim 2022), then all household affairs no longer depend on the government center (Imam Ropii 2015). Likewise with all the need for sources of funds needed to finance rotation wheel his administration. To cover the need for the source of these funds, also held the so-called fiscal decentralization. Not rare happen a unitary state to apply different ways and principles in dividing government affairs and fiscal affairs (Adissya Mega Christia and Budi Ispriyarso 2019). About how autonomy is given and what are the scope limits, Mohamad Mahfud MD explained 3 (three) principles of autonomy:

- a) Principle Formal Autonomy  
In this principle the division of tasks, authorities, and responsibilities answer between the central and regional regulations to manage their own households are not specified in the regulations legislation.
- b) Principle Autonomy Material  
In this principle the division of tasks, authorities and responsibilities answer loaded in a manner detailed in the regulations legislation.
- c) Principle Autonomy Real  
Principle autonomy real is road middle between principle formal and material autonomy. Principle autonomy real base delivery of government affairs area on the factors real.

Power government held by the president is power executive or power ruler outside *regelgeving* and *rechtspraak*. Understanding from power the government just mentioned is what JJH Bruggink calls as *intention* from A understanding. Intention in English is called "*sense*", while in language French "*signification*" and Bruggink's intentions

meant the whole embodying features something understanding (Arief Sidharta 2015). In addition to the intention/content understanding also distinguished what Bruggink said as an extension/scope understanding. Extension means all the objects or people included in the understanding (Arief Sidharta 2015). Extension or scope from power government held by the president in the form of government affairs which are in the Local Government Law classified become: (a) government affairs absolute; (b) government affairs concurrent; and (c) government affairs general (*vide* Article 9 Law No. 23/2014).

Within the unitary state that implements principle decentralization happen submission of part of the government affairs by the center to areas to organize and manage with principle freedom and independence within certain limits. However, not all government affairs in a unitary state can be submitted to the area. There are several government affairs that are entire must still in hand government center namely government affairs existence between nation and state if handed over to the region potentially raises disintegration of nation and state (Kementarian Dalam Negeri Republik Indonesia 2011). In Law No. 23/2014 government affairs entirely become authority government center called government affairs absolute which includes: (a) foreign policy affairs; (b) defense; (c) security; (d) justice; (e) monetary and fiscal national; and (f) religion (*vide* Article 10 paragraph (1) Law No. 23/2014). Administration of government affairs is absolute, carried out directly by the ministry or agency government non-ministerial and it is also possible to be delegated to agency vertical in area or to the governor in office as a government representative center with principle deconcentration (*vide* Article 10 paragraph (2) Law No. 23/2014).

Government affairs public affairs is a government affair that becomes authority president as head of government concerned with the maintenance of Pancasila, the UUD 1945, Bhinneka Tunggal Ika, guarantees compatible relationships based on ethnicity, religion, race, and inter-class as a pillar of life nation and the state as well as facilitate



life democratically (*vide* Explanation General point 3rd paragraph third Law No. 23/2014). Execution of government affairs general in the delegated area (principle deconcentration) to governors and regents/guardians city remember other than status as area autonomous regions, provinces and districts/cities are also administrative areas which are the working areas of governors and regents/guardians city in position as guarantor responsible for government affairs general (*vide* Article 1 in conjunction with Article 4 in conjunction with Article 25 paragraph (2) Law No. 23/2014).

In a unitary state that implements system decentralization happen submission some government affairs from the center to the regions according to principle autonomy and co-administration. In Indonesia, government affairs can be handed over or decentralized by the center to the regions called with government affairs concurrently (*vide* Article 9 paragraph (3) Law No. 23/2014). The principle behind the penomenclature of “governmental affairs concurrent” is that it does not exist only one thing to do in a manner of decentralization without centralization, meaning that the state can give authority to the government center to regulate government affairs, even those affairs held with through principle decentralization or co-administration (Kementerian Dalam Negeri Republik Indonesia 2011). This shows that Indonesia currently used the principle of “*concurrence function*” which means applied principle concurrency of every government affairs and what is done in the government center also becomes an authority province and powers district/city only the scale is different (Kementerian Dalam Negeri Republik Indonesia 2011). The government center is authorized to carry out government affairs on a national and international regional scale, governance area province on a provincial or cross-regional scale regency/municipality within the province concerned, while the government area district/city authorized to carry out government affairs on the scale of the district/city concerned (Kementerian Dalam Negeri Republik Indonesia 2011).

Government affairs concurrently something is must organized by all regions, called government affairs mandatory, and some are in nature must organize accordingly the potential possessed by each region which is called government affairs choice (*vide* Article 1 point 14 and 15 jo. Article 11 Law No. 23/2014). Mandatory government affairs hosted by all regions can subdivide into government affairs-related obligations with service basic and irrelevant with service basis (*vide* Article 11 paragraph (2) Law No. 23/2014).

### **The Principle of Genuine Authority in Territorial Decentralization**

Formation is a unitary state declared by the founder's nation at the time independence with the claim of the whole territory as part of the state (Hufron and Syofyan Hadi 2016). So the entire territory of the country is in one The first form of power and government was the government center as holder power the same thing exactly happened to this country seven twenty-four years ago. Precisely on 17 August 1945, where the Indonesian nation proclaimed its independence and declared the formation as a unitary state with the sovereignty of the people<sup>4</sup>. As a country that previously used Dutch colonialism, the concepts of statehood inherent in the thinking of the founder's nation dominated by state concepts Europe continental. The concept of the rule of law/*rechtsstaat* is the ideal concept of the middle state growing at that time (Ramli, Muhammad Afzal, and Gede Tusan Ardika 2019). Therefore the concept is finally the choice and consensus of the founder's nation in organizing wheel Indonesian government. *Rechtsidee* This is then included in the description general constitution of 1945 which confirms that Indonesia is a country based on law (*rechtsstaat*) and not based on the state on power mere (*machtsstaat*).

As we do study in state science, the concept of a rule of law/*rechtstaat* at first only gave authority to the state to guard the state against threats from outside. That's where it came from designation *de*

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<sup>4</sup> Preamble of the UUD NRI 1945 paragraph fourth jo. Explanation General UUD 1945 numbers II jo. Law No. 23/2014 number 1 paragraph first.

*nachtwachterstaat*. Unfortunately in its development, the concept of *de nachtwachterstaat* failed to provide welfare to the society (Oman Sukmana 2017). it was caused by the emergence of powers clan increasingly bourgeois oppress clan lower class society and increasingly add amount poverty. As an answer to failure *de nachtwachterstaat* came the concept of *de moderne rechtstaat* which gives more authority for the country to participate and intervene in providing welfare to the people. From *de moderne rechtstaat* that's it then develops a *verzorgingstaat* concept that obliges the state to administer well-being to the people. *Verzorgingstaat* concept this is what seems to have caught the attention of the founder's nation which is then written in the explanation general UUD 1945 which confirms that the country wants to realize social justice for all the people.

So Indonesia is a country with a *modern* concept *verzorgingstaat* that gives obligation for the state to be responsible answer advancing the well-being of the people. Not quite enough answer it will not be easy to create if Indonesia implements a system centralized government remember the area of Indonesia which includes regions used colonies Dutch East Indies<sup>5</sup>. Circumstances Indonesia's geography and diversity between areas become base thoughts for the founder's nation to then set choices on implementation system decentralization in this unified state (Kementerian Dalam Negeri Republik Indonesia 2011).

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<sup>5</sup> Although in the UUD 1945 (before the amendment) it was not stated provision about the territory of the country, will but the discussion is one of the important agendas in the BPUPK session was first carried out on May 29, 1945. On occasion the Moh. Yamin convey through his speech about five parts land to be connected with Indonesia, namely: the former area colony The divided Dutch East Indies on Sumatra Island, parts of Borneo, Java, Celebes, Lesser Sundas, Maluku with islands around it, with reduced area war special which includes Tarakan, Morotai, Papua, and Halmahera; East area Portuguese and North Borneo; Peninsular Malaya (Malacca) with islands around it, apart from Terangganau, Kelantan, Kedah, and Perlis. See (Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi 2010)

A consequence of application system decentralization in a unitary state is the formation of what CW van der Pot calls *gebiedscorporaties* or legal entity cantonal. The question then is who formed it *gebiedscorporaties*? The answer can We find the principles that exist in a unitary state. Isn't it that in a unitary state, there is the principle that The government that was first formed was the government center as government national? Because it's the government national that then will form *gebiedscorporaties* as executors of government affairs at the level local. In Indonesia *gebiedscorporaties* it's called provinces, districts, and cities. Each province, district, and city have authority to regulate and manage their own household affairs. Here is what is meant by household affairs are all related government duties that interest the public locally. Same thing wrote van der Pot in his book which says: "*de eigen huishouding der lagere gemeenschappen omvat de behartiging van de overheidstaken*". In Indonesian, *eigen huishouding* has the meaning of its own household affairs, while *behartiging van de overheidstaken* means to take care of with full dedication all government duties. The UUD 1945 it is not used household phrases but government affairs phrases as confirmed in Article 18 paragraph (2): "Government area province, region counties, and cities organize and manage government affairs yourself..." Isn't it in a unitary state all government affairs is something unanimity held by the government center? (Hufron and Syofyan Hadi 2016). As has been discussed in the previous paragraph, a decentralized unitary state government center forms a government area that carries out government affairs in an area within the boundaries of its territory. Governments This area is actually a formal form or *legal entity* from societies owned law right native to organize and manage their own household affairs and interests the people<sup>6</sup>. Within the framework of a unitary state, the right to organize and manage the Still must be filled

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<sup>6</sup> Abstracted from what was said Bagir Manan at the trial for amending the UUD 1945 on August 13, 2000, (Jimly Asshiddiqie and Bagir Manan 2006).

with government affairs which in essence have been held in a manner completely by the government center. Therefore, hold it governing provisions about connection authority between government center and government that area on the level Constitution regulated by Law No. 23/2014.

In a unitary state, there is the principle that all the affairs of the state are not divided between the government center and the government local (Hufron and Syofyan Hadi 2016). From understanding the can conclude that in essence principle The main thing that is adhered to in a unitary state is the principle of centralization government. However, in the modern era, a unitary state can apply the principle of decentralization in its governance in order to achieve goals certain. In the context of the Unitary State Republic of Indonesia (NKRI), decentralization becomes a choice to make it happen people's welfare and social justice as Moh. Yamin said as one father founding father nation in the session of the Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan (BPUPKI) on 29 May 1945. Choice the has agreed upon by the founders of the nation at that time realized that the principle of centralization in governance government was no realistic choice given the vast territory of Indonesia which consists of thousands of islands with pluralistic regions (Kementerian Dalam Negeri Republik Indonesia 2011). The consensus of the founder's nation to apply the principle of decentralization give birth to the provision about government area in Article 18 of the constitution of Indonesia's first written UUD 1945.

The principle behind provision Article 18 of the UUD 1945 is that Indonesia recognizes owned rights societies law adat in managing and managing all affairs and interests themselves member the people. This right is carried out on a daily basis and organized by an organ viz government area<sup>7</sup>. Within the framework of the Unitary State of the

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<sup>7</sup> Regional government in this context is regional government in a broad sense, namely the regional head and the people's representative body in the region.

Republic of Indonesia, the right to organize and manage the State must be filled with government affairs in essence held in a manner intact by the president as holder power government. In other words, part of government affairs exists real from the power government (executive) held by the president handed over to the government area. In a sense here it arises a connection authority between the government center and the government area.

From what agreed with the founder's nation about the principle decentralization born provision Article 18 in the UUD 1945 which reads: "The division of Indonesia's regions into large and small areas, with the form of government structure established by law, by looking at and remembering the deliberative basis in the system of state government, and the origin rights in the regions special" (*vide* Article 18 of the UUD 1945). The rationale behind the provisions of Article 18 is that Indonesia is an *eenheidstaat* and therefore there is no *onderstaat* within Indonesia. As *eenheidstaat*, under Indonesia, there are only regional governments. These regional governments can be autonomous or only administrative regions. In regions that are autonomous in nature, the government will continue to use a deliberative basis, because of this, regional representative bodies will be formed in these areas.<sup>8</sup>

In its development, The Indonesian constitution has undergone several changes and amendments. On 27 December 1949 the 1945 Constitution was replaced by the Constitution of the United States of Indonesia (next called RIS Constitution). Not long after that, precisely on 15 August 1950 the RIS Constitution was replaced with The Provisional Constitution of the Republic of Indonesia (hereinafter called UUDS). In fact, UUDS is felt not in accordance with the ideology

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<sup>8</sup> Excerpted from Soepomo's explanation at the BPUPK session on 15 July 1945 and Explanation of the 1945 Constitution

and law in force in Indonesia<sup>9</sup>. On the basis of these considerations, Soekarno as President/Commander in the Chief Supreme Armed Forces Republic of Indonesia stipulates the validity of return to the 1945 Constitution for all regions of Indonesia through Decree President 5 July 1959. In 1998 formed something movement known society with the Reform movement. This movement is at its core demand held changes to the 1945 Constitution. Demands from the reform movement had brought Indonesia to the applicable constitution now, the UUD NRI 1945.

We know that domestic political dynamics have required our constitution to undergo several amendments and improvements. The phenomenon experienced by Indonesia is exactly what KC Wheara (*Modern Constitution*) said, quoted by Jimly Asshiddiqie, that amendments to the constitution are primarily not determined by legal provisions governing procedures for change but are rather determined by various political and social forces that dominant at any given moment (Jimly Asshiddiqie and Bagir Manan 2006). In the MPR meeting discussing changes to the UUD 1945, the terminology of regional autonomy began to be used as part of the decentralization concept applied in Indonesia. In the *ad hoc* committee meeting of the 9th MPR preparatory body, on 16 December 1999, Bagir Manan said that he had always interpreted decentralization to mean autonomy. In addition, Bagir Manan also added that autonomy is a subsystem of the unitary state and is a mechanism that belongs to the unitary state. During the deliberations of the *ad hoc* committee meeting of the MPR preparatory body, various national figures emerged to provide affirmation and clarity regarding regional autonomy. One such figure is Hamdan Zoelva who said (Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi 2010):

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<sup>9</sup> Abstracted from President Soekarno's four reasons in the mandate given to the constituent assembly to return to the 1945 Constitution (Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi 2010).

Local Government Issues. The UUD 1945 very succinctly regulates this issue, namely only one article without a verse, even though how big this regional problem is both related to the relationship between the regional government and the central government. This Constitution should clearly define what is the authority of the central government and what matters are handed over to regional governments. According to our faction, the issue of the division of authority, even on the main matters, needs to be regulated in this Constitution in order to provide guarantees and clarity to the regions as the building blocks of this republic while at the same time avoiding the threat of disintegration of the nation at this time, which is triggered by regional discontent.

The encouragement from various national figures has resulted in regulations regarding regional government which contain clearer and more detailed provisions in the Indonesian constitution. Previously, Article 18 only consisted of 1 (one) article without a paragraph, now it has 3 (three) articles, namely Article 18, Article 18A, and Article 18B. Article 18 consists of 7 (seven) paragraphs, Article 18A consists of 2 (two) paragraphs, and Article 18B also consists of 2 (two) paragraphs. However, the concept behind it is still the same as idealized by the founders of the nation, namely *verticale spreading van Machten* or the vertical distribution of power.

Since the enactment of the UUD NRI 1945, it has been expressly stated that the Unitary State of the Republic of Indonesia is divided into regions that regulate and manage their own governmental affairs. The regional government that has the widest area coverage is called the province. Within the territory of the province, there are regional governments whose coverage area is smaller, called districts or cities. This division of the Unitary Republic of Indonesia into provinces, districts, and cities is what van Der Pot calls territorial decentralization. He stated this in his book *Handboek van Het Nederlandse Staatsrecht* (van der Pot 1968):

*“gebiedscorporaties zijn onze provincies als gemeenten niet gedacht moeten worden als bloot administratieve ressorten van het rijk zonder*



*eigen bevoegdheden, maar dat zij te onzent meer zijn. Zij hebben een regelende en een besturende bevoegdheid, die niet beperkt zijn tot een of meer uitdrukkelijk genoemde belangen maar door de grenzen van haar gebied".*

So in short according to van der Pot, *provincies* (equated to provinces) and *gemeenten* (equated to districts) are regional legal entities (*gebiedscorporatie*) that have the authority to regulate and administer within their territory. In the context of the Unitary State of the Republic of Indonesia, *the gebiedscorporaties include* provinces, districts, and cities.

When we talk about decentralization, in essence, we are talking about the authority of local/regional level governments to regulate and manage their household affairs independently; so there is authority to form regulations (*regelgevende bevoegdheid*) and authority to govern (*besturende bevoegdheid*). Unfortunately, it is quite difficult for ordinary people or even law faculty students to understand in principle the regional authorities. The difficulty that arises in understanding in principle the authority of local/regional government is caused by the existence of two propositions that seem *contradictio in terminis*. On the one hand, it is said that decentralization in a unitary state is not the transfer of sovereignty to the regional government, but only limited to the transfer of authority and essentially the regions do not have any authority except for the authority delegated and delegated by the central government (Hufon and Syofyan Hadi 2016). However, on the other hand, it is said that regional authority in regulating and administering its government affairs is attributive in nature and this authority is given explicitly by the constitution. Here the author will try to describe the two propositions related to local government authority which seem *contradictio in terminis*. First, the authority of the region to regulate and administer is basically an original/attribution authority, therefore this authority has its own place in the provisions of the constitution. Before a state was formally formed, there were native community groups that regulated and managed the interests of

members of the community group themselves. These community groups are legal community groups or *rechtsgemeenschappen* or *legal entities* which can be territorial, genealogical, or general.<sup>10</sup> The existence of certain goals or other unifying reasons can encourage these community groups to jointly form a unitary state. In the event that the unitary state formed by these community groups applies the principle of decentralization, then the original authority of the legal community groups to regulate and manage the interests of their own community members is allowed to exist and is given space in the constitution which is a mutual agreement in forming an inter-legal unitary state *the entities* earlier. This logic legitimizes the original authority of the local/regional government in regulating and managing its government affairs. In other words, the original rights/authorities that had existed from the start were acknowledged and allowed to remain by the state.

To understand more about the original authority of the provinces and districts in regulating and administering their domestic affairs, it is helpful to have a look at the Dutch legal system which employs a legal system most similar to that of Indonesia. In *De Nederlandse Grondwet* (Dutch written constitution) Article 124 paragraph (1) it is emphasized: *Voor provincies en gemeenten wordt bevoegdheid tot regeling en bestuur inzake hun huishouding aan hun besturen overgelaten* (*underline from the author*). The free translation of the provisions of Article 124 paragraph (1) *Grondwet* into Indonesian is: regulatory and governmental authority for provinces and regencies in terms of household affairs is surrendered (*overgelaten*) to their government. *In this provision, the word overlaten (to surrender) is deliberately used and not the word overdragen (to hand over/delegate) as used in describing the notion of delagatie van bevoegdheid.* To find out why the word *overlaten* is used, it is better if we look at PJ Boon's opinion regarding the provisions of Article 124 paragraph (1) *Grondwet* (van der Pot 1968):

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<sup>10</sup> quoted from opinion Bagir Manan in the MPR session continued on 13 August 2000 (Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi 2010).

*dit eerste lid, de taak van autonomie betreffend, brengt via de term 'overlaten' de historisch gezien correcte gedachte tot uitdrukking dat het zelfstandig regelen en besturen de gemeenten en provincies niet van rijkswege is toebedeeld, maar dat het gaat om een oorspronkelijke bevoegdheid.*<sup>11</sup>

So in his statement, PJ Boon gave an interpretation of the word “overlaten” which according to him emphasized the idea that provincial and regency authority is not a gift from the kingdom (central government) but is a genuine authority. The same thing was stated by van der Pot regarding Article 124 paragraph (1) *Grondwet* which said “....het gebruik van het woord “overgelaten” schuilt de erkenning, dat hier van rijkswege niet iets werd toegekend (underline from author), maar iets werd gelaten waar het van oudsher (author's underline) was” (van der Pot 1968). So according to van der Pot the use of the word “overlaten” shows the recognition that regulatory and governmental authority from the regions is not a gift from the kingdom (central government) but is something that existed historically even before the Dutch kingdom itself was formed.

Likewise in the context of the Unitary State of the Republic of Indonesia, that regional authority in regulating and managing its household affairs is genuine authority. This was conveyed by Bagir Manan in the Advanced MPR session which discussed the provisions of Article 18 paragraph (2): ....that autonomy is not granted... Autonomy exists, which is one thing that is indeed a regional right based on its principle. ...Autonomy can originate from within the region, for example, our regional government, this autonomy is not granted. Its autonomy is genuine autonomy,... From Bagir Manan's explanation, it was later agreed by the members of the drafters of the 1945 amendments that in principle the regional right to regulate and

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<sup>11</sup> in relation to the task of autonomy, the word 'surrender' in paragraph (1) illustrates the historical view that the provincial and regency authorities in governing and administering were not given by the kingdom, but a genuine authority.

manage it is a genuine right and is not a gift from the central government. From this principle, the provisions of Article 18 paragraph (2) were born which states that provincial, regency, and city regional governments regulate and manage their own government affairs according to the principles of autonomy and co-administration.

### **Conclusion**

In a unitary state that is decentralized, the central government forms regional governments that carry out government affairs in the regions within its territorial boundaries. These local governments are actually a formal form or *legal entity* of legal communities that have the original right to regulate and manage their own household affairs and the interests of their people. Within the framework of a unitary state, the right to regulate and manage it still has to be filled with governmental affairs which in essence have been fully held by the central government. Because of this, provisions were made to regulate the relationship of authority between the central government and regional governments at the statutory level. In Indonesia, government affairs that can be delegated or decentralized by the center to the regions are called concurrent government affairs. There are concurrent government affairs that are mandatory for all regions to carry out, called mandatory government affairs, and there are also those that are required to be carried out in accordance with the potential possessed by each region which is called elective government affairs. Government affairs that must be carried out by all regions can be subdivided into mandatory government affairs related to basic services and those that are not related to basic services.

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