

Special Autonomy and the Principles of Federal System: A Blurred Portrait of the Special Autonomy for Papua

Frans Reumi

Faculty of Law, Cenderawasih University, Papua, Indonesia. E-mail: fransreumi@yahoo.com

Abstract: The spirit of implementing decentralization and special autonomy contains the principle of federal arrangements is the right solution in the Indonesian government system. A unitary state in the form of a Republic with social conditions, multicultural society, and geographical conditions with thousands of islands is a challenge in realizing prosperity. This article is normative-legal research. The data used are primary legal materials obtained from relevant regulations and secondary legal materials obtained from various related literatures. The result shows that implementing the principle of the reserve of powers was to the region and direct election system for regional heads and deputy regional heads. Meanwhile, decentralization which leads to a federal system, has positive and negative effects on the implementation of the functions and objectives of the state, stated in the spirit of special autonomy. Both *de facto* and *de jure*, this legal policy reflects the principle of the federal system, which aims to maintain the integrity of the Unitary State of the Republic of Indonesia.

Keywords: Federal System; Local Government; Papua; Regional Autonomy; Special Autonomy

1. Introduction

Indonesia is a unitary state with some federal arrangements becomes a basis for implementing regional autonomy and special autonomy in Indonesia.¹ Recently, the issue of regional autonomy in the administration of regional government among others is the emergence of debates regarding the implementation of decentralization in several regions that have received special autonomy in Indonesia. All of these issues come from the problems in the distribution of authority from the central government to the regions. The imbalance and inequality of development is an important issue. Unequal development has caused injustice to the multicultural Indonesian society in various regions.

¹ Rahmatunnisa, Mudiwati, Reginawanti Hindersah, and Tri Hanggono Achmad. "Why Regions with Archipelagic Characteristics in Indonesia Also Need Asymmetric Decentralization?" *Jurnal Bina Praja: Journal of Home Affairs Governance* 10, no. 2 (2018): 251-261.

The development of constitutional law politics with the momentum of the fall of the New Order government in 1998 was used by the reform movement in several regions to roll out various demands, ranging from requests for wider autonomy, implementation of a federal system to demands for separation from the Indonesian government. The demands of several regions that were rolling out during the reform momentum, such as the Province of Irian (now Papua), Daerah Istimewa Aceh, and Riau demanded separation from Indonesia while the Province of East Kalimantan demanded the implementation of a federal system.²

In Indonesia, the policy of decentralization leads to a federal system. This is also reflected in the regional head and deputy regional head system elections regulated in the regional government laws. This direct election system is commonly used in countries that adopt a federation or pure federal system, including the United States, Australia and Canada.³ Another critical response, termed this direct election as most concrete example to explain the view of decentralization policy in Indonesia in implementing the federal arrangements system. The spirit of decentralization which contains federal arrangements is the right way to be carried out by the Government of the Republic of Indonesia in organizing a democratic government. Differences in understanding and emergence of various conflicts of interest between the central government and regional governments, between a local government and society are a process of adaptation in the democratic process in Indonesia.

Until now, in developments after almost 23 years, the spirit of implementing the special autonomy law for the Provinces of Papua and West Papua has changed, that the proposed changes to the special autonomy law of Papua “can be”⁴ submitted by the people of Papua province. However, in practice, this provision was not implemented in a participatory manner by involving the Papuan People’s Council (MRP – *Majelis Rakyat Papua*) as the cultural representation institution for Indigenous Papuans. The term “the implementation of this law is evaluated every year and for the first time it is carried out at the end of the third year after this Law comes into effect,” also not consistently implemented. Does not involve the Papuan People’ Council as the cultural representation institution of Indigenous Papuans in fulfilling the principle of participation in the

² Trabani Rab, 2002, “Kemerdekaan, Otonomi, atau Negara Federal: Suara Rakyat Daerah”, in Ikrar Nusa Bhakti and Irine H. Gayatri (eds), *Kontroversi Negara Federal: Mencari Bentuk Negara Ideal Indonesia Masa Depan*, (Bandung: Mizan Media Utama, 2002), p. 175

³ Peer, Gazala, and Javedur Rahman. "An unpleasant autonomy: Revisiting the special status for Jammu and Kashmir." *Economic and Political Weekly* (2012): 72-75.

⁴ The term “can be” can exist and not exist, it is not a mandatory word in writing legal norms in the formation of statutory regulations. This means that the authority remains in the hands of the government according to the formulation of the law and the mandate in Article 7 paragraph (1) of Act No. 12 of 2011 concerning the establishment of legislation.

formation of Act No. 2 of 2021 concerning Special Autonomy for the Provinces of Papua and West Papua.

2. The Spirit of Implementing Special Autonomy for Papua Reflects the Principles of the Federal System

In the theory of government, normatively, there are two models of state formation, namely the federal state and the unitary state. Etymologically, the word *federal* comes from the Latin *feodus*, which means *league*. The league of autonomous city-states in ancient Greece can be seen as the first federal state. The federal form of government is derived from the constitutional experience of the United States. Starting from the understanding of *regeringsvorm* that translated as a form of government and *staatsvorm* is defined as a form of state, which can be divided into a united states and a unitary state. The structure of the state is in the form of a union and there is also a form of unity.⁵ The state, in terms of its structure produces two possible forms of state structure, namely a single-composed state, which is called a unitary state, and a pluralistic state, which is called a federal state.

A positive side of a federal state concept include: *Firstly*, federalization is the most appropriate strategy to open up powers that were previously very closed. Society generally wants openness, many mechanisms and democratic institutions have been developed in order to open up power, for example political representation. *Secondly*, federalism is seen as an attempt to balance regional, ethnic or ethnic cultural strengths within a country. *Thirdly*, in the federal system there are elements that can help avoid the trend toward intensification of economic inequality and the accompanying political and cultural conflicts. *Fourthly* is an alternative option to solve the problem of national disintegration.

In addition to the positive side that is owned in the implementation of a federal state, there is also a negative side or even the fundamental weakness of a federal state system, namely providing opportunities for all provinces as autonomous regions to enjoy the results of regional natural resources without the protection of financial balancing laws. Under such conditions, it will create jealousy and gaps between areas rich in agricultural products and areas that are dry or poor. Hence, in practice, it turns out that the federal state system must also be seen as an imperfect system in solving various problems faced by a country.

⁵ Sung, Ming-Hsi, and Hary Abdul Hakim. "Unitary, Federalized, or Decentralized?: The Case Study of Daerah Istimewa Yogyakarta as the Special Autonomous Regions in Indonesia." *Indonesian Comparative Law Review* 1, no. 2 (2019): 103-121.

Meanwhile, according to CF Strong, the concept of a unitary state which is also known as *eenheidstaat*, in terms of its structure is single, meaning that a unitary state is a country that is not composed of various countries, but only consists of one country, so that there are no countries within the country. Historically, as for the development of decentralization in Indonesia is implied that apart from improving the implementation of regional autonomy, the establishment of the three laws has also become a strategy for the government to prevent or dampen various movements and demands in the regions that have social, economic or political motives which lead to potential disintegration.⁶ According to experts, the increase in the degree of decentralization is a form of a shift from a unitary system to a federal state. This is in line with the fact that Indonesia is a country in the form of a unitary state where the power is in the central government, but the authority of the central government is determined by its limits.

Authority that is not stated in the constitution and law is defined as the authority possessed by the regional government as a reserve of powers. With these constitutional arrangements, it means that the unitary state of the Republic of Indonesia is organized by federal arrangements or arrangements with several federal principles. Dwi Andayani, in his research concluded that there had been a metamorphosis from a unitary state to a federal state.⁷ This metamorphosis is getting stronger with the granting of special autonomy status to the provinces of Aceh Darussalam, Papua and West Papua.

The function of law enforcement in the concept of a rule of law plays an important role because it is part of the process of national law activities. Law enforcement is an effort to realize ideas about justice, legal certainty and social benefits to become reality. Law enforcement is the process of making efforts to uphold or actually function legal norms as a guideline for behavior in traffic or legal relations in the life of society and the state. Viewed from the subject, law enforcement can be carried out by a broad subject and can also be interpreted as an effort to enforce the law by the subject in a limited or narrow sense. In a broad sense, the law enforcement process involves all legal subjects in every legal relationship. Anyone who carries out normative rules or does something or does not do something based on the norms of the applicable legal rules, it means enforcing the rule of law. In a narrow sense, in terms of the subject, law enforcement is only interpreted as an effort by certain law enforcement officials to guarantee and ensure that a rule of law operates as it should. In ensuring the upholding of the law, if necessary, law enforcement officials are permitted to use.

⁶ Bauw, Lily. "Special Autonomy of Papua: A Review from the Perspective of the Unitary State of the Republic of Indonesia." *Papua Law Journal* 1, no. 1 (2018): 1-26.

⁷ Hendratno, Edie Toet. "Desentralisasi yang Mengarah ke Sistem Federal dan Pengaruhnya Terhadap Pelaksanaan Fungsi Negara." *Indonesian J. Int'l L.* 4 (2006): 319.

Customary law develops following the development of society and existing traditions. Traditional law is essentially a precipitate of decency in a society whose truth gets recognition in that society. In its development, the existence of indigenous peoples still raises debates regarding their existence as customary law to regulate the daily activities of the community and resolve problems that arise in customary law communities. This is cannot be separated from the existence of legal rules made by bodies or institutions that make laws and other statutory regulations.

The existence of this customary law has been officially recognized by the state but its use is limited. Article 18B paragraph (2) of the 1945 Constitution confirms that “the State recognizes and respects the customary law community units with their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia,” which means that the state recognizes the existence of customary law and its constitutional rights in Indonesian legal system.⁸

At the legal dogmatic level, which theoretically correlates with legal theory, especially positive law, customary criminal acts (customary criminal law) must be in the form of a written formulation so that elements of customary criminal acts can be qualified as a major crime. There are no provisions that provide limitations regarding criminal acts that can be resolved through customary law. Likewise, there is no single provision that provides firmness regarding the position of customary court decisions on criminal acts that have been regulated through national law. In the dimension of legal theory, customary criminal law is seen as a living law that exist in Indonesian society. Therefore, in this dimension, customary criminal law in its implementation uses legal interpretation in the form of sociological or teleological interpretation.

This portrait tends to lead to federalism, it’s just that the government does not openly or shyly use the term state, the granting of special autonomy for Aceh, Papua and West Papua has directly or indirectly led to the formation of states. This tendency has strengthened with the existence of Helsinki’s *Memorandum of Understanding* for Aceh, although this was not explicitly stated. Whereas in a federal system, the difference between a federal state and a unitary state is determined by the degree of decentralization and the difference between a unitary state is only the degree of decentralization. Thus, the principle of the widest division of government affairs describes decentralization leading to a federal state system.

⁸ Yunus, Ahsan. "Multilayered democracy in Papua: A comparison of “Noken” system and Electoral College system in the United States." *Hasanuddin Law Review* 6, no. 3 (2020): 232-239. DOI: <http://dx.doi.org/10.20956/halrev.v6i3.2892>

There is a spirit of implementing decentralization in the second amendment to Act No. 2 of 2021 concerning Special Autonomy for Papua, where authority is implemented through the principle of decentralization which reflects that the federal system in maintaining the integrity of the country has not changed. The Papua Province “can” have a regional symbol as a banner of greatness and a cultural symbol for the grandeur of Papuan identity in the form of a regional flag and regional anthem which are not positioned as symbols of sovereignty.

3. The Spirit of Arrangement the Special Autonomy Law with the Principles of a Federal State

3.1. The Special Autonomy Law for Province of Nanggroe Aceh Darussalam with the Principle of Federal State

Decentralization through the Special Autonomy Law places special autonomy for Province of Nanggroe Aceh Darussalam, the implementation of which is proportionally placed in districts and cities or other names, and regulated in regional regulations called *Qanun*. Material content of Act No. 18 of 2001 concerning special autonomy for Province of Nanggroe Aceh Darussalam, which shows similarities to the system of division of governmental functions in a federal state, are:

Table 1. Characteristics of Federal State in the Special Autonomy Law for Province of Nanggroe Aceh Darussalam

No	Material Content of the Act No. 18 of 2001	Argumentation of Federalism
1	The authority to form a judiciary that is free from the influence of any party, this law gives pleasure to the Provincial Government of Nanggroe Aceh Darussalam to form a judiciary that is free from the influence of any party. This provision shows that Province of Nanggroe Aceh Darussalam has the same authority and is actually the authority of the Central Government, namely the authority in the field of justice or judiciary.	The authority possessed by Province if Nanggroe Aceh Darussalam can be said to be the authority of a state or is the authority of a federal state. This is an indication of the existence of a state within a state.
2	Authority to determine regional flags, this law gives authority to the Regional Government of Province of Nanggroe Aceh Darussalam to determine regional flags.	This provision, although it does not reflect the complete similarity with the flags of the states in a federal state which shows its sovereignty, nevertheless at least implies the principle of the authority of the states in a federal country in displaying symbols of sovereignty.

3	The authority to arrange levels of self-government, this law gives authority to Province of Nanggroe Aceh Darussalam to arrange the levels of self-government.	Authority like this resembles the authority of the state to organize the levels of state government. To illustrate that this condition reflects the similarity of characteristics with the federal state system, by quoting the opinion of R. Kranenburg who said that in a union state, the states have the authority to regulate their own form of state organization, although it must still be within the limits specified in the constitution of its federal.
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5	The authority to form regional regulations that can overrule other laws and regulations, this law stipulates that Province of Nanggroe Aceh Darussalam has the authority to form <i>Qanun</i> namely regional regulations that can overrule other laws and regulations by following the principle of “ <i>lex specialist derogat legi generalists</i> ’.	The authority possessed by Province of Nanggroe Aceh Darussalam implies a similarity with the powers of the states to form their own constitution. This similarity can be explained by referring to R. Kranenburg’s opinion that in a union state, the state has the authority to make their own constitution (<i>pouvoir constituent</i>), although it still has to be within the limits specified in the federal constitution.
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6	Special authority regarding the regional police, the law regulates the functional duties of the police in the field of public order and security is further regulated by Qanun of Province of Nanggroe Aceh Darussalam.	This provision shows a difference from the coordination system of the national Police which has so far been centralized both in terms of structural and functional tasks. Likewise with several other arrangements related to the implementation of regional police in Province of Nanggroe Aceh Darussalam.

Source: Primary data, 2022 (edited).

After Act No. 11 of 2006 concerning the Government of Aceh, which has reflected a special regional government related to one of the distinctive characteristics of the history of the struggle of the Acehnese people who have high resilience and fighting power. This means that the fighting power comes from a view of life that is based on a strong “*Sharia Islam*” in defending the Unitary State of the Republic of Indonesia.

3.2. The Special Autonomy Law for Papua with the Principle of Federal State

The implementation of decentralization through the second amendment of Act No. 2 of 2021 concerning the Special Autonomy of Papua gives special and broader authority to Province of Papua. The state recognizes and respects special regional government units regulated in law. Furthermore, in considering emphasized that national integration within the Unitary State of the Republic of Indonesia must be maintained by respecting the equality and diversity of the socio-cultural life of the Papuan people, through the establishment of a special autonomous region.

Table 2. Characteristics of the Federal State in the Special Autonomy Law of Papua

No	Material Content of Act No. 2 of 2021	Argumentation of Federalism
1	Authority to have a regional flag, this law gives authority to the government of Papua to have a regional flag. This provision has similarities with the Special Autonomy Law for Province of Nanggroe Aceh Darussalam, which also gives the same authority to Nanggroe Aceh Darussalam.	The authority to own this regional flag although not completely resembling the authority of the states to have their flag in the federal state as symbols of their sovereignty, at least implies the federal principle.
2	Delegating the reserve of powers to the regional government, the law stipulates that the authority of Province of Papua includes authority in all areas of government, except for the authority that belongs to the central government which has been determined based on statutory regulations.	This provision is in line with the provisions concerning the system of distribution of governmental affairs which reflect similarities with the system of delegation of the reserve of powers in a federal state, as described above. This provision indicates that the reserve of powers to administer regional administration is left to the province of Papua.
3	Authority to form special regional regulations, this law gives authority to the Province of Papua to form Special Regional Regulations (<i>Perdasus – Peraturan Daerah Khusus</i>)	This authority implies the similarity of characteristics with the authority of the states in drafting their laws and regulations in a federal state, as stated by R. Kranenburg who said that in a union state, the states have the authority to make a constitution even though it still has to be within specified limits in its federal constitution.
4	Act No. 2 of 2021 concerning the second amendment to Act No. 21 of 2001 concerning Special Autonomy for the Provinces of Papua and West Papua.	The second amendment to the Special Autonomy Law of Papua in substance does not change the principles of the federal system, namely the reserve of powers to administer regional government is handed over to the Provinces of Papua and West Papua on the principle of decentralization.

Source: Primary data, 2022 (edited).

4. Analysis of Applicability of the Federal Arrangements System in the Regional Government System

Changes the Special Autonomy Law of Papua were initially the government only proposed changes to three articles but then after a long meeting, there were additional 15 articles outside the proposed substance, two additional articles of material substance outside the changes to the Special Autonomy Law of Papua. Policies in the spirit of implementing

decentralization or the Special Autonomy Law of Papua, which lead to a federal system have positive and negative effects on the implementation of state functions.⁹

The positive effect of decentralization policies that lead to a federal system on the implementation of state functions is an increase in democracy in the administration of government, indicated by:

- a. Granting broad authority to the regions to implement regional autonomy.
- b. Strengthening the legitimacy of regional heads and deputy regional heads in the eyes of the people.
- c. Implementation of state functions that implement the principle of checks and balances.
- d. There is recognition of diversity in the life of the nation and state.
- e. Increased regional independence in developing its territory and managing its household.
- f. The easing of demands and movements in the regions against the central government.

The negative effect of the decentralization policy that leads to a federal system on the implementation of state functions is the occurrence of several things that are not in line with the ideals of granting special autonomy, including:

- a. Increased regional government ego due to differences in understanding of broad authority granting, resulting in authority conflicts between the central government and regional governments.
- b. Strengthening regional exclusivism or characteristics, even primordialism.
- c. The emergence of excessive domination over territories and natural resources that should be controlled by the state and used for the greatest prosperity of its people.
- d. There are widespread demands in several regions to obtain special autonomy status, such as that which was granted to the Provinces of Nanggroe Aceh Darussalam, Papua and West Papua.

The principle of the degree of decentralization largely and based on the principle of broadest autonomy indicates that there is a process of democratization in the administration of local government,¹⁰ which bears the character of the principles of

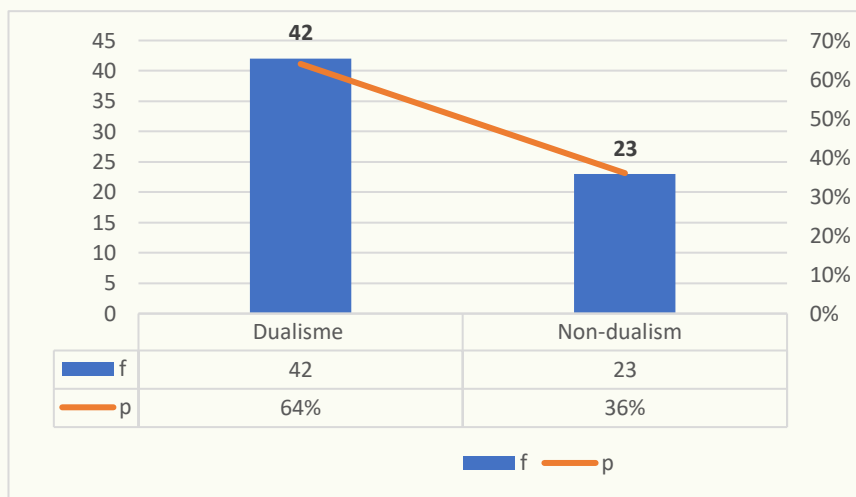
⁹ Bertrand, Jacques. "Indonesia's quasi-federalist approach: Accommodation amid strong integrationist tendencies." *International Journal of Constitutional Law* 5, no. 4 (2007): 576-605; Verdier, Pierre-Hugues, and Mila Versteeg. "International law in national legal systems: An empirical investigation." *American Journal of International Law* 109, no. 3 (2015): 514-533.

¹⁰ Rolnik, Raquel. "Democracy on the edge: Limits and possibilities in the implementation of an urban reform agenda in Brazil." *International Journal of Urban and Regional Research* 35, no. 2 (2011): 239-255.

federal arrangements, as well as several variables of democratic theory which are reflected in the principles of implementing decentralization in the Special Autonomy Law of Papua. The principle of a federal system is reflected in the spirit of the substance of Act No. 21 of 2001 which shows similarities with the system of division of governmental affairs in a federal state, including: the first is the authority to have its own regional flag and the second is the authority to form people’s representative institutions, the third is the authority to form special regional regulations.

Fulfillment of customary obligations for the settlement of customary cases in Papua is constructive as well as a wise solution in overcoming the dualism of imposing criminal sanctions experienced by perpetrators of criminal acts (convicts).¹¹ In this regard, the following is a table showing the views of respondents from the legislature, regional government and law enforcement officials as well as members of indigenous peoples regarding the existence of dualism in the handling of criminal acts in Papua.

Figure 1. Respondent's response to the dualism of the legal system in Papua



Source: Primary data, 2022 (edited).

As figure 1 shows that there are 42 respondents or 64% of respondents who agree that there is a dualism of the legal system in Papua on the grounds that crimes that have been sentenced to customary punishments are still subject to imprisonment under state law. The views of the respondents above indicate that there are differences of opinion among the respondents in which some respondents are of the view that after the imposition of customary crimes by the customary court, state law can no longer impose sanctions. On the other hand, there are respondents who are of the view that the imposition of

¹¹ Adinagoro, Budi Kasan Besari. "Restructurisation Special Autonomy Policy the Province Of Equity Papua According To Indonesian Constitution." In *Proceeding International Conference on Law, Economy, Social and Sharia* (ICLESS), vol. 1, no. 1, pp. 199-210. 2022.

customary crimes does not necessarily eliminate criminal acts that violate national law. The researcher argues that the occurrence of this difference in views is due to the absence of clear arrangements regarding criminal acts that can be resolved through customary and non-criminal courts which can only be resolved by national law. In a political constitutional perspective, there are two reasons why the decentralization policy has led to a federal system, including: *the first*, the three laws are an attempt to maintain the integrity of the Unitary State of the Republic of Indonesia from the history of its formation. *The second* is to realize equitable development and achieve people's welfare.

Decentralization policies that lead to a federal system have positive and negative effects on the implementation of state functions.¹² The positive effect of the decentralization policy that leads to a federal system on the implementation of state functions has been an increase in the administration of government, which is indicated by the granting of broad authority to the regions to implement regional autonomy, strengthening the legitimacy of regional heads and deputy heads in the eyes of the people. There is recognition of diversity in the life of the nation and state, increased regional independence in developing their territory and managing their households, and the easing of demands and movements in the regions against the central government.

On the other hand, like two sides of a coin, there is a negative effect of decentralization policies that lead to a federal system on the implementation of the functions and goals of the state. There are several things that are not in line with the spirit of special autonomy for Papua. This is indicated by the increased ego of the regional government due to differences in understanding of the broad authority granting, resulting in a conflict of authority between the central and regional governments, strengthening regional exclusivism or regional characteristics, even primordialism and the emergence of excessive control over territories and natural resources that should be controlled by the state and used for the maximum extent possible. It is undeniable that the government's unilateral policy towards the second amendment to the Special Autonomy Law of Papua within the framework of implementing executive and legislative decentralization leads to a federal system.

5. Conclusion

The arrangement of decentralization as an objective manifestation of the spirit of special autonomy is an effort to realize equitable development and poverty alleviation in Papua. Indonesia's commitment to governance must be consistently maintained to defend the sovereignty of the unitary state of the Republic of Indonesia. Implementing the principle

¹² Mehrotra, Santosh. "Governance and basic social services: ensuring accountability in service delivery through deep democratic decentralization." *Journal of International Development: The Journal of the Development Studies Association* 18, no. 2 (2006): 263-283.

of the reserve of powers was to the region and direct election system for regional heads and deputy regional heads. Meanwhile, decentralization which leads to a federal system, has positive and negative effects on the implementation of the functions and objectives of the state, stated in the spirit of special autonomy. Both *de facto* and *de jure*, this legal policy reflects the principle of the federal system, which aims to maintain the integrity of the Unitary State of the Republic of Indonesia.

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