Chapter VI Decentralization of Powers and Local Autonomy

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I. Introduction and Short History of Decentralization

Decentralization is not foreign or even strange to the people of Indonesia. Decentralization itself grew hand in hand with the history and process of occupation and colonialization of the Indonesian territories. The arrival in the 16th century of the Dutch trading company *Vereenigde Oost-Indische Compagnie/VOC* and its bankruptcy in the 18th century, forced the Dutch Administration to make some legal clarifications in those territories with which they traded; these 'clarifications' were known as '*the Long Contracts'* and '*the short contracts'* which were a number of agreements between the Dutch Administration and the responsible headmen or even kings of those days, ruling over the territories in Indonesia.

The *long contracts* were usually signed with the already settled political administration units reaching to the level of kingship; in this cooperation the Dutch Administration stipulated the rights and responsibilities of the *swapraja/zelfsbestuurs-gebieden* being self-ruling territories like the kingdoms in Sumatra (Kampar - Indragiri and Deli-Serdang), the kingdoms of Yogyakarta and Surakarta in Java, and the kingdom of Goa in South Sulawesi and other kingdoms scattered all over the archipelago.

The S*hort Contracts* in fact were usually agreements with local headmen of a number of small republics who were used to take care of their own village affairs.[1] The contracts was called 'short' since they only mentioned the acknowledgement and recognition of the said territories of the Dutch Administration upper hand, although these territories were also called *swapraja/zelfbesturende gebieden;* in fact, all rights of contacts with the outside world were forbidden by the Administration. Yet, it is mostly in territories of this kind that the common laws/***Hukum Adat*** for the socio-cultural (and limited) economic life had been fostered, including the Village Courts / ***Pengadilan Adat*** [2] **,** being too far away for the legal arm of the Colonial Administration in Batavia/Jakarta. Thus before the Reformation (1998) the local

administration in Indonesia already knew a number of decentralization regulations, such as:

- Law on Decentralization/*Decentralisatiewet* , 1903
- Law on the Reformation of Administration/ *Bestuurs-hervormingswet*, 1922 (Law of the 6th of February 1922; *Indisch Staatsblad/*Ind.Stb. 1922 no. 216) and its further sub-regulations on decentralization; the *Bestuurshervormingswet* also mentioned the existence of the **de**concentration system**;**
- The **territorial** decentralization took place as follows :

Further on, the *Bestuurshervormings wet* /1922 also stipulated

(a) that the area of the "provinces" were as large as the areas of administration/*administratief gewest* was regulated by the *Provincieordonnantie* (Ind.Stb. 1924 no. 78; last revision in Ind.Stb. 1940 no. 226, 251;

(b) apart from the "provinces", the Colonial Administration also knew autonomous territories called ***Regents-schappen*** (administered by a regent/***bupati***) which nowadays cover the areas of the present regencies called ***kabupatens,*** further regulated by regulations called *Regentsschaps - rdonnanties* (Ind.Stb. 1924 no. 79; last revision Ind. Stb. 1940 no. 226) [3];

(c) territories known as ***Stadsgemeenten*** (now known as ***'kotapraja'***) covering the territory of a town which was regulated by a *Stadsgemeenten-ordonnantie* Ind. Stb. 1926 no. 365; last revision Ind.Stb. 1940 no. 226 and Ind. Stb. 1948 no. 195) (Soehino, 1995: 9-10)[4]

For territories outside/***Buitengewesten*** Java, Madura and Bali where autonomy and decentralization had been introduced, the Decentralization Law 1903 was still the main source, although some further legal developments took place:

(a) territories were known as inter-communities/ *groeps-gemeenschappen* covering areas which extended across an area equal to the usual administrative units called *gewest*, regulated by the *Groups-gemeenschappen-ordordonnanties/*regulation on inter-communities (Ind.Stb. 1937 no. 464 jo. Ind. Stb. 1938 no., 130 and 264); these territories were headed by a ***resident;***

(b) territories of town-communities/*stadsgemeenten/ kotapraja* for territories outside Java, Madura and Bali were regulated by the *Stadsgemeenten-ordonnantie Buitegewesten/*Regulation on towns in areas outside of Java, Madura and Bali whose head was the ***burgemeester***/mayor[5] (Ind. Stb. 1938 no. 131 and 271)(Soehino, 1995 : 11);

(c) if the previous territories were indirectly under the supervision of the Administration, the *Stadsgemeenten* were directly supervised by the

Administration, and the *burgemeester* was never 'a local boy' as was the case with the above mentioned territories (Soehirno, 1995 : 11);

- The **functional decentralization** (or usually called **deconcentration** was regulated through the creation of special legal entities;
  (a) for the sake of irrigation and road building
  (b) for cooperation with existing kingdoms, such as the regulation for the self-ruling territories/*zelfbesturende - gewesten/swapraja* of the kingdoms of Yogyakarta and Surakarta, for special activities, such as the *Vorstenlandse Waterschaps-ordonnantie/*Regulation on the waterways in the kingdom of Yogyakarta and Surakarta (Ind. Stb. 1920 no. 722 which was revised several times and the last revision being Ind. Stb. 1935 no. 451);

These in short were the systems and items of decentralization known from the colonial days, which in fact did not include political autonomy (Soehino, 1995 : 10).This decentralization also gave a special connotation to the word *'public interests'* which at that time should be understood as 'the interests of the colonial power' which started with building and expanding the 1) irrigation works and 2) roads as infrastructure for economic and political interest of the Administration. Contrary to these 'public' interests, the interests of the people were taken care of by the traditional common laws in the villages, thus village affairs became 'the *village home rule*'. [6] This was also another kind of decentralization which was not given by the authorities, but which grew and developed on its own, the village areas being too remote and too far away for the legal arm of the Administration. The administration of the hinterlands occurred via the regents.

As was mentioned in Chapter III on 'The Amendments to the 1945 Constitution' the Indonesian State has its roots in the Youth's Pledge/***Sumpah Pemuda*** of the 28th of October 1928. Since then the outcry was officially ***Indonesia Merdeka.*** Note should also be given to the fact that even in 1906 a culturally oriented organization called '***Retno Dumilak'*** came to life and was soon followed by another cultural-political-educational movement named ***Boedi Oetomo*** at the medical school STOVIA/*School tot Opleiding van Inlandse Artsen* (1908), ***Sarekat Islam*** (1912) and ***Muhammadyah*** in the same year. More politically oriented organization then followed, such as the ***Persatuan Bangsa Indonesia/PBI*** (Van Leur, 1955 : 348).[7] Going into the second decade of the 20th centuries a number of youth organizations came into existence, like *the Jong Soematra Bond, Jong Java, Jong Celebes Bond* and

others, which were the organizations that played an important role during the 1928 Youth' Pledge/***Sumpah Pemuda*** . In May 1927 the first Indonesian political organization – the ***Partai Nasional Indonesia*** – was founded by a number of young Indonesian intellectuals just returning from their studies in the Netherlands under the leadership of **Soekarno** (the only one in the group that was not a graduate of a university in Holland, but graduate of the Technical Institution in Bandung) and later became the first president of the Republic of Indonesia.

Dutch writers who had a deep influence on the Indonesian movement were amongst others: Eerde (1922), Haberlandt (1917) and the political anthropologist **B.J. Haga**[8] who very clearly stressed (made a distinction between) the Indonesian (indigenous) democracy and the so called modern western democracy as introduced by the Dutch. Haga – in his dissertation – apart from describing how the Dutch Administration came into being after taking over the territory previously occupied by the ***Vereenigde Oost Indische Compagnie/VOC***[9] - very sharply distinguished between territories which previously were under the reign of kings, and territories (which were in fact a series of small republics) with periodically chosen 'Main Representatives' under different names in different regions. These small republics usually made concessions to the incoming Dutch companies, but under 'unsatisfactory cooperation' on the Indonesian part, resulted in being either directly confiscated by the VOC since the 17th century , or later on in the 19th – 20th century were confiscated by the Dutch Government under the 'agreements' known as *Short Contract* (actually meaning that the area directly came under jurisdiction of the Colonial Administration*. Usually – if such area could be incorporated into already existing kingdoms – they were added to those territories, becoming a kind of suzerainty under a kingdom, or indirectly under the jurisdiction of the Administration. The kingdoms – although quite often also waged long and tedious wars – in the end signed the '*Long Contract'* thus keeping their internal sovereignty (under conditions of set by the Administration), but being totally deprived of their external (trade and war) relations. One of the last kingdoms to experience this was the Kingdom of Goa/South Sulawesi, under the condition that the territory would totally be incorporated in the territory of the Netherlands Indies, if the family could not bring a male heir to the throne (this happened only in the 80ies of the 20th century) [10]. It is generally acknowledged by many historians, that the political rise of the Netherlands since the 17th century was

very closely linked with the territorial occupation of many Indonesian territories, thus making the Netherlands one of the important world powers in the 19th century, even competing with England. Vlekke even goes further by saying that the development of the 'Age of Capitalism' at the end of the 19th century and the first decade of the 20th century was reached through exploration and expansion in other continents including in Africa and the Eastern Islands, which was a trend also carried out by the French and the English (Vlekke, 1959: 316). These expansions were inevitably obtained through the use of political and military powers together with excessive competence in production which naturally resulted into prosperity (Vlekke, 1959: 315-316).The Dutch historian Vlekke even mentioned, how '**the unification of Indonesia'** was closely related with the introduction of capitalism in Indonesia. Trading companies and banks invested in Indonesia since the 1860 (with very intensive investments between 1860 and 1880), which continued until the first decade of the 20th century (in the 1920ies).[11]

A noted dissertation on the coming into being of the Netherlands' Indies' territories, was the dissertation of **Jean Jaques Sturler** who in 1884 wrote on '*Tractaten met Engeland, Spanje en Portugal over Nederlandsch Indie'*. It explained how the territory of the then Netherland's Indies was obtained through piece by piece contracts, first between the Dutch in the Archipelago and later on through agreements amongst the (European) world powers of that time. As is generally known, the **Muenster-Paderborn/Westphalia** was the first International Law Agreement amongst world powers discussing their territories . Two centuries later – this time as an effect of the **Napoleonic War** at the **Congress of Vienna** (1815, 1824 and 1870) again a number of territories were discussed including the territories in the Archipelago which at that time became a stumbling block between the sea-powers England and the Netherlands (after Spain and Portugal left the arch pelagic scenes since the 19th century).

Since the beginning of the 20th century a number of Dutch Parliamentarians in the *Tweede Kamer* /the Hague – at the peak of the '*Ethical Politics'* – demanded for increased democratization and welfare for the Indonesians. They gave an assignment to **Mr. van Kol** to travel throughout 'the Netherlands Indies' for a period of 12 months and submit his report . In 1903 his famous report was published , in which the appalling situation of the local population in Indonesia was mentioned.

Since no changes took place (on behalf of the economic policies calling Indonesia '***wingewest***' /territory of gain/benefit, all good intentions and efforts of the *Ethical Politics* came to be looked upon only as 'pure cosmetics' for the appalling situation, since in reality, it was only the result of the political strategy to favor capitalism and colonialism. The appalling social and economic situation of the Indonesian of those days were worsened by the introduction of a policy on agriculture known as the '*cultuur stelsel*' which was connected with both forced cultivation of certain crops such as coffee, pepper, palm oil and indigo which favored investments by the estates for their export products. Gradually forced labor was introduced, which in the 20th century was even connected with political rights, such as the right to elect (village heads and their assistants) as well as the right to be elected to fill those positions (Haga, 1924) [12]. Some mining products were also of importance to the Administration, such as the copper minings in Gorontalo/North Sulawesi.

It is through Van Kol's book '*Over onze Kolonien*' (1903) that we can draw the conclusion that the well intended *Ethische Politiek* could not achieve its ideals to improve the socio-economic situation of the Indonesian population, since – especially since the two decades of the 19th century which continued into the 20th century, the Colonial Administration mainly served the economic interests of the Dutch capitalistic world. Thus the end of the 19th century and the break of the 20th century was already categorized as 'the beginning of the industrialization of Indonesia'. The continued opening of new estates brought the Administration in close contact and in conflict with the local population, giving rise to the growth of Indonesian Nationalism.

Siding with the enterprises, the Colonial Administration could not but build the needed economic infrastructure , which was the real beginning of distinguished between public functions/interests and the indigenous interests, which at village level was known as 'village affairs' and was fostered by common laws. Taking the economic interests – which were identical to the interests of the Colonial Administration - it stands to reason that the kingdoms which were close to the shores and seas were the first territories where the kings were clipped in their powers, while at the same time became more involved in the economic trading – which made them the administrative colonial arm in their own territories. In the 20ies gave this situation gave rise and reason to an anti-feudalism attitude on behalf of the national movement.

This stage of conflict of interests between the Administration and the local population then became the seeds for the concepts on decentralization. It was the expansion of irrigation works (to be benefited by the (e)states and road building (for the transportation of the agricultural goods to the harbors), that again gave conflicting connotations to the words 'village interests' and 'public interests'. Contrary to the expansion of the irrigation works and road building which mainly served the interests of the investors and Colonial Administration, 'village interests' (such as the determination of days of village feasts, village cleaning, harvests and market days etc) were left at the discretion of the village population themselves 'since they only served the socio-economic of the village population'. The Administrative interests were called ***public*** *interests*[13]***, which*** stands in clear opposition to the ***village*** *interests* [14]. More autonomy was granted, when the public/state interests were less; on the otherhand, less autonomy was given when more and bigger public/colonial interests were at hand. No wonder that the autonomy became biggest at the most remote areas. On the other hand the kingdoms which – because of their already available (although limited) economic infrastructure – became more and more elements within the trading and banking system, and as its consequence experienced less and less freedom and less political independence, in turn also aroused the nationalism on the part of the nobility.

One important difference was the regulation covering the territories in Java and Bali and territories outside them, known as *Buitengewesten*; this was stipulated in the *Inlandse Staatsregeling/IS* where the Administration had most the economic and political decisions; whereas for areas outside Java and Bali there was the *Inlandse Gemeente Ordonnantie Buitengewesten/IGOB* (1938). Compared to the areas in Java and Bali (where only the kingdoms were recognized as self-governing territories) [15], the *Buitengewesten* (especially in the east of Indonesia) had more independence and freedom to regulate themselves based on their local laws/Hukum Adat [16] and local bonds (known as *autonomie* or even *zelfbestuur*), compared to the areas of Java and Bali where the Colonial Administration had a thorough control of the day-to-day administration, with the appointed village head who since the beginning of the 20th century became the lowest colonial administrator. In Sumatra the villages enjoyed their autonomy too (like the *nagari* in West Sumatra and the *marga* in South Sumatra/Palembang), which means that during the colonial days, indeed autonomy

was known but with different limitations for most areas that have their own local common laws, autonomy was granted to the villages.

In the eastern part of Indonesia like in the Mollucas, the indigenous previous local communities could keep their independence – like the *latus* and the *patis* within their concurring areas – which were then connected through the church organization to the Colonial Administration.[17] Thus in short it can be said that the Colonial Administration even acknowledged autonomy but which was based on the degree of public-colonial interests to the villages in general, and from there on created criteria for direct control, based on local conditions. Thus note should be given, that the expression 'public interest' during the colonial days infact contradicts the present connotation of 'the citizens'/ population's interests' when the word 'public' only respresented the 'colonial' interests.

It was lawyer **Prof.Dr. Logemann**[18] who in his speech during the 3rd anniversary of the *Batavia Rechtsschool* on the 27th of October 1927 developed his system a.o. on the decentralization for the Colony. In his idealism to prepare '**home rule**' for the Indonesian people which was also the ideal of a number of English outstanding scholars and notable public servants), he gave a place to the Indonesian Common Law/***Hukum Adat***. He made a distinction between functional decentralization (only later known as *deconcentration* and territorial decentralization. As already mentioned before, territorial decentralization was practically (although officially never) given to villages being 'remote, beyond reach and influence' or to areas which were obtained by *Short Contracts*, and thus their importance was more of geo-strategic value such as the Moluccas[19]; whereas functional decentralization was given to regions such as the kingdoms and other territories obtained by L*ong Contract*[20]. Logemann – who as known later, very much influenced two very respected Indonesian professors of the Faculty of Law of the University of Indonesia, namely **Prof. Mr. Soepomo** and **Prof. Mr. Djoko Soetono.** Logemann stressed the fact, that the communities having their local common laws actually must be looked upon as small republics that took care of the local communities' limited needs and demands, capable of protecting their community's interests, keeping law and order and mostly even having **local courts,** although by then they had not yet reached the fullfledged stage; these local republics became **in fact the core of democratic institutions of the Indonesian political mind.** Logemann therefore urged in 1927 for

a Colonial Regulation on Indonesia, which would encompass all the common laws (now known as autonomy) within the colonial legal system. Note should be given that practically the Dutch concept on autonomy was **village autonomy/village home rule**. Again, for the historical development and size of the Javanese and Balinese villages this is practically impossible since the villages were much smaller. On the otherhand, this village autonomy was reasonable for many islands outside Java and Bali , where the villages covered large areas[21].

Another additional book which had influenced the thinking of the Indonesian Founding Fathers was a.o. the book by the ethnologist **Eerde** (1922).[22] He discovered that the area extending from Madagaskar (via the Nicobar Islands in the Gulf of Bengal until West New Guinea) had the same **land laws** and common laws on the use of forests products. But it was mostly the laws on the lands (limited to the Netherlands Indies) that Eerde said : "the Netherlands Indies is a **legal entity and unity'** (= '*Nederlands Indie is een rechtseenheid'*)[23]. It stands to reason how this statement could the Indonesian lawyers (who studied in Leiden/the Hague) to decide that Indonesia had an ethnological cause to become a unitary state.

With these short historical backgrounds, it is evident that the Youths' Pledge (1928) had some very clear concepts about the future of *Indonesia Merdeka* with the prerequisites that it must be: :

(1) a unitary state of Indonesia
(2) a national legal system incorporating the common laws, automatically giving those communities the autonomy (article 18 of the 1945 Constitution)
(3) be anti-feudalistic

But at the same time - since economic forces that entered Indonesia in the 1880-ies via foreign and colonial private investments influenced the local people in the hinterlands – these created opposite forces against centralization, requesting for strong economic independence which at times was often interpreted as federalism. This last concept was mostly nourished by the Dutch business world, which was trying to escape as much as possible the interference of the Colonial Administration. After 1945 this difference of concepts became stronger amongst Indonesians themselves: those intellectuals who were more scientifically and economically interested, had less interest for the masses and therefore had a stronger inclination for federalism, whereas the legally trained intellectuals with a legal-territorial approach –

were more mass-oriented (and thus closer to the religious nationalists movement). This last group was very much influenced by Eerde's legal ethnological theory, and was in favour of the unitary state. In 1945 it was the last mentioned approach, which had the majority support, possibly also because of Soekarno's charisma.

More objective analysis will explain that the Dutch Crown very probably would not have given in to Indonesia's recognition in 1949, if it were not for **Mohammad Hatta** who led the Indonesian Delegation; the compromise reached on the 27th of December 1949 was the Constitution of the Federal Republic of Indonesia/Republik Indonesia Serikat/RIS. For those favoring the unitary state, this agreement was looked upon as a political 'interphase' or stepping stone for the next step. Article 43 and article 44 of the 1949-RIS Constitution did mention the possibility – based on the principle of the sovereignty of the people in the regional states – that the population could decide for an integrations with other regional states to end the federal state, yet these integration should take place via a (to be formulated) Federal state, which would take too long a time.

The political steps taken in order to be able to return the unitary state of the Republic Indonesia, took place in two stages: Stage one consisted of by a side-consensus known as the **Inter-Indonesia Conferences** held in 1) Yogyakarta, from July to August 1949 and 2) in Scheveningen/the Netherlands on the 29th of October 1949 during the *Bijeenkomst Federaal Overleg/Meeting for Federal Resolution.* This last mentioned meeting was attended by:

(1) the delegates of the Republic of Indonesia to the The Hague Round Table Conference;
(2) delegates from the united in the BFO;
(3) delegates from West Kalimantan;
(4) Eastern Indonesia;
(5) the NIT;
(6) Madura;
(7) Banjar;
(8) Bangka;
(9) Belitung;
(10) the Larger Dayak Area;
(11) Central Java;
(12) East Java;
(13) Southeast Kalimantan;
(14) Pasundan/West Java;
(15) Riau;
(16) South Sumatra ;
(17) Eastern Sumatera[24]

These meetings agreed in Scheveningen into on the 29th of October, 1949 namely that through paragraph 43 and 44 of the Federal Republic, the federate states could determine for a unification to the Republic of Indonesia, which indeed took place based on the RIS-Constitution-1949, in such a way that on the 17th of August 1950 a new Constitution on the unitary state of the Republic of Indonesia was announced. Indeed, this Constitution can be looked upon as the most ideal constitution and the unitary state : it was indeed a parliamentary state, but it did away with the federative element. It is to be regretted that by 1959 Soekarno became impatient – and influenced by the world situation and pressure of the Cold War – the 1945 Constitution was recalled into life, although this decree must be categorized as unconstitutional.

Since this chapter does not mean to discuss the struggle between federalism and centralism during the years 1956 – 1966, which later on was also strongly mixed with an anti-communist approach, the downfall of Soekarno should not come as a surprise. Taking aside the fact whether or not the CIA was involved, one thing can be said for certain: no political discourse between the civilians and their parties could come to an open conflict, as long as the groups involved are not military involved. Another experience made by the modern history of Indonesia is, that no president can continue to reign if he or she does not enjoy the support of the military, especially the support of the army. Thus, the take over in 1966 very clearly showed that as soon as the armies in the conflict surrendered to the Soeharto regime – based on the trust of his anti-communist convictions[25] -–as soon as that the demands for federalism also diminished. Another interpretation is also, that federalism was demanded by a number of regions (where the Moslem or Christian religions were still prevailant in daily life) - when they discovered that Soekarno was too close to the communists – and demanded for a separation from the republic as a solution. Indeed – for better or worse – the steel arm under the general's smile – managed to keep the unity for the state between 1996 – 1997. Alas, for whatever reason, paragraph 18 of the Constitution 1945 was totally neglected or purposefully 'forgotten' through the creation of Law no. 5/1975 on Local Government and Law no. 5/1979 on Village Administration. Soeharto's predecessor Habibie, did not have the dominating influence which Soeharto had, and thus – especially because of the Total Crisis – the unitary state was challenged again. This time the raison d'etre often used was the

unequal distribution of wealth and the incapacity of the administration of Habibie and later of Abdurrachman Wahid to come to grips with the problems of the Crisis and the Reformation. Therefore a very quick annulments of Law no. 5/1975 and Law no. 5/1979 has demanded and the creation of a Law on Autonomy, taking paragraph 18 of the Constitution-1945 as its basis. Old wounds were re-opened, as happened the case of Aceh – which, as a sign of reconciliation received its Law no. 44/1999 [26] - and many other regencies requesting for a provincial status for the sake of the 'a better share of the cake of welfare'[27]. In very rough lines the description above has tried to inform about some core problems of the past that should be taken into consideration when analyzing Law no. 22/1999 and its application since 2001 (by Congress Resolution, 2000).

II. Law no. 22/1999 and its Basic Thoughts

Discussions on the Indonesian decentralization (1998) cannot be complete without seeking its roots in article 18 of the 1945 Constitution. Then again it was the Resolution of Congress no. XV/MPR/1998 that – within the spirit of Reformation restructured the total political and administrative foundations of the Indonesian state in all fields of life, triggered by the Total Crisis and the end of the Soeharto era. In this context the word 'decentralization' was part and parcel of democratic life in the regions. Therefore, Resolution no. XV/MPR 1999 called into life *'The Realization of Decentralization in the Regions: Its regulations on the sharing of national natural resources in a just way and a Balanced Finance are arranged between the Central- and Regional Governments.* [28] The main contents of that Resolution was the realization of a regional autonomy with a factual (in the widest sense of the word) largest sense of autonomy combined with accountability to be carried out in the regions, in proportionality of its regulations, just sharing of the benefits of the national natural resources, and a balance of finances between the Central Government and the Regions. At the same time, the application of regional autonomy is carried out based on the democratic principles and the participation of all members of society. This would enable the realization of the principles of just distribution [when sharing] the [opportunities] to benefit from the local potentials inspire of the pluralities in the regions (Bratakusumah and Solihin, 2001 : 2). Law no. 22/1999 then should be seen

as the interpretation of the principles as laid down in the Resolution no. XV/MPR/1998.[29] At the same time Resolution no. XV/MPR/1998 discussed the balanced sharing of finances between the Central-and Local Governments[30]. The principles laid down by Regulation no. XV/MPR/1998 were:

- the enactments of local autonomy by giving large, real competencies and proportional responsibilities to the regions;
- the enactments of local autonomy that has to be based on the principles of democracy, taking into consideration the plurality of the regions;
- regulations on the sharing and benefiting from national resources between the central government and the regions must to be justly carried out for the sake of the welfare of societies in the regions and the nation as a whole;
- balancing the incomes and expenditures between the regions must be carried out by taking notice of the local [resources] potentialities, the extention of the regions, its geography, number of population and the level of [average] income of the local people;
- the Local Government has the competency to manage the local national resources and to manage the sustainability of the environment[31];

At the same time the same Congress (1998) demanded for:

- the abolishment of the *Dwi-fungsi/*Double function of the Military;
- an investigation on the wealth of the fallen president Soeharto, his family and friends;
- priorities for setting the foundations for democracy and other foundations like the political parties[32], the Press Law no. 40/1999 which revoked Press Law no. 21/1982;[33]
- release of the political prisoners (Estiko and Hantoro, 2000 : 75 – 78);

So, the decentralization process during the transitional period was looked upon as being part and parcel of the democratization process.

One important step towards the **supremacy of law/judicial power** was the coming into existence of Law no. 35/1999 which revoked Law no. 14/1970 on the Principles on Competency of the Judges; under this Law no. 14/1970 the judges were responsible to two institutions at the same time, being the Supreme Court/*Mahkamah Agung* and the Ministry of Justice; whereas under Law no. 35/1999 judges are only and directly under the supervision of the Supreme Court (Estiko-Hantoro, 2000: 78).
Thus Law no. 22/1999 was a reflection of the deep concern of Congress (1998, 1999) about the realization of decentralization through Regional Autonomy as a legal tool for the empowerment of the local population by developing the capability of taking initiatives and growing creativity, which would then lead to an increased active

participation of the local citizens in the works of the Local Parliament/Representation Body and thus increasing its level and quality of outputs. Within these thoughts and hopes the full autonomy was given to the regencies and towns. This decision was taken in order to undo the negative effects of the past Law no. 5/1974 which made the regencies and towns, the administrative units of the Central Government, thus losing their competency to develop policies which would be more in congruence with local needs and aspirations.

Using the political and legal situation for the regencies (Law no. 5/1974), Law no. 22/1999 took away the 'dual function' of the regencies and replaced at the provincial level; thus the provinces – although being autonomies (without really having 'territories of their own' are at the same time the administrative deconcentrated units of the Central Government, was carry out the delegated Central Government authorities. Now, based on Law no. 22/1999 the province and the regencies have no more hierarchial power relations.

The powers of the province as an administrative unit of the Central Government and an 'autonomous' power in the province, are:

- to foster good relations between the Central Government and the regencies within the frame of the Unitary State of the Republic of Indonesia;
- to ensure real autonomy amongst the regencies and towns, and in case of inability [temporary] to act on behalf of the regencies;
- to carry out the responsibilities and powers delegated to the provinces – within the frame of deconcentration (Bratakusumah and Solihin, 2001 : 2-3);

Inspite of point 3) above, it should always be kept in mind that by 'the widest autonomy' is understood the wide competency of the autonomous regions to carry out governmental policies (and their concurrent local laws/bylaws) in all fields, except in the excluded competencies in the fields of foreign policy, defence, judiciary, monetary and financial matters and religious affairs. Other competencies, which are included in the word 'full autonomy', are the usual governmental competencies, being planning, operations, supervision and control, management and evaluation. All these competencies are needed in order to enliven and develop life in the regions. At the same time, the Local Governments' accountabilities are the other side of the competencies obtained by the Local Governments under the principles of democratic autonomous governing which aims at a better life for the regions , a.o. by increasing public and social services on their own for the sake of the welfare of the region. Thus

the rule of law and justice, distribution of resources and incomes, a harmonious inter-regency relations and relations between the Central Government and the regions within the unitary state.

Compared to the regencies and towns, **the autonomy of the provinces are more limited** since the interference of the provinces in the affairs of the regencies and towns is limited to those competencies which cannot yet be carried out yet by the regencies and towns (Bratakusumah and Solihin, 2001: 3-4).

Competencies and activities within the autonomy described by Law no. 22/199 are:

(1) autonomy is carried out and based on the principles of democracy, rule of law and justice, distribution of potential resources and incomes, taking notice of the plurality of and within the regions;
(2) autonomy is carried out as factual activities, based on the principles of 'full fledged autonomy' and accountability;
(3) the execution of the full fledged autonomy takes place at the regencies and towns level, whereas the provinces only enjoy limited autonomy ;
(4) the application of the autonomy has to be within the frame of the 1945-Constitution , in order to secure harmonious inter-regencies/towns relations and relations between the Central Government and the regions;
(5) the implementation of autonomy has to increase the autonomous capability of the local regions , for which reason the (delegated-hierarchical) administrative function of the regencies and towns towards the Central Government was deleted by Law no. 22/1999;
(6) those areas which have not reached the legal-political level of autonomous areas [34] such as authority bodies/*Badan Otorita*, harbour compounds, new settlement areas, industrial estates, agricultural estates, mining estates, forests estates, new towns, tourism estates, and new estates of other activities are under the special governmental regulations under the autonomy of the province;
(7) regional autonomy is hoped to increase the local capability to carry out the functions of local parliaments, in their functions of legislation, control and budgeting, in support of the local autonomy;
(8) the deconcentration-administrative function of the province is placed at the provincial level to carry out a number of Central Government authorities, delegated to the Governor;
(9) the supporting obligations/*tugas pembantuan* is looked upon as a reciprocal activity between the Central Government and the Regions, but also support by the Central Government and Province to the villages, which can include supportive finances, infrastructure and the development of the local human resources, which are accountable (Bratakusumah and Solihin, 2001 : 4-5);

Laws which directly influence the competencies of the regions are:

- Law no. 4/1999 on the Structure and Status of Congress/MPR and Parliament/DPR;
- Law no 22/1999 on Local Government;

- Law no. 25/1999 on the Financial Balance between the Central Government and Regions;
- Law no. 44/1999 on the Execution of the Special [Competencies] of the Province of Aceh Nangroe Darrusalam;
- Law no. 34/1999 on the Provincial Government of the Special Region of Jakarta – the Capital of the Republic of Indonesia
- A number of laws on eleven regions/*kabupatens* and after the existence of Law no. 22/1999 enabling the existence of three new provinces being Central Irian Jaya, (Estiko-Hantoro, 2000: 78 – 79);

Most of these changes had been carried out by the Transitional Government, which only lasted 512 days (Estiko-Hantoro, 2000: 79)

The Indonesian Constitution-1945 in its paragraph o. 18 (Chapter VI) on Local Government says:

> 'The territory of Indonesia is sub-divided into large and small regions, where governmental structure will be determined by law, taking into consideration the principles of consensus/ *musyawarah* within the system of state government, and the indigenous rights of the areas with special characteristics' [35]

The explanation to paragraph 18 says:

> 'I. Because the Indonesian State is a unitary state, Indonesia will not have regions within its territory which also have the status of states;
> The territory of Indonesia is sub-divided into provinces, and the provinces [again] subdivided into smaller regions;
> In autonomous territories (territory/*streek* and local common-law-community-units/*locale rechtsgemeenschappen*) or simply into plain administrative units; all will be determined by law;
> In autonomous areas, local representative bodies will be called into life, because also in the regions the government system will be based upon consensus;
>
> II. Within the territory of the Republic of Indonesia there are circa 250 regions with self-administrative units of area/*zelf <u>besturende</u>landschappen* and racial community group groups areas/ *Volksgemeenschappen* such the *desa* in Java and Bali [36], *nagari* in the Minangkabau, *dusun* and *marga* in Palembang and so on. These units or area have their indigenous structures and therefore can be looked upon as special areas;
> The state of the Republic of Indonesia respects such special units or area and all regulations by the state on such special units or area will have to consider the indigenous character of them' [37]

Based on this article of the Constitution, Congress(1998) made its Resolution no. XV/MPR/1998 on Local Autonomy for the Regions, giving wide and real

competencies together with its accompanying accountability to the Regions; this Resolution also authorized for a just regulation on the sharing of profits on the natural resources within the framework of the unitary state. It was the responsibility of Law no. 25/1999 to regulate the just sharing of profits on national natural resources. Taking the socio-cultural plurality of the regions, care was taken that the local government (based on the local autonomy) take heed of the democratic principles of the state in general but also its responsibility for a just distribution of welfare in the regions. It was hoped that because of the large competencies and reduced competition with the central government, the autonomy would automatically increase the capabilities and competencies of local human resources, which would be achieved through development of the creativity and role of Local Parliament. The creativity to be developed has to be inspired by the local people's aspirations and initiatives.

Reading article 1 no. o of Law no. 22/1999 gives a picture of the dominant political climate at the beginning of the Reformation, which formulates as follows:

> 'o. The Village/*Desa* or a similar unit known under different names but for short to be called *Desa* [here], is a legal-communal bond of a community [38] which has competencies to regulate and administer the interests of its local community based on its origins/*asal-usul* and local customs, which is acknowledged by the National Governmental System and [its territory is] within the regency.
>
> p. The territory of villages which has as its main activity in the cultivation of agriculture, including the management of the [local] natural resources, at the same time functioning as place of settlement, carrying out local administrative activities , social services and economic activities (article 1, o);
> Contrary to 'village' is the definition of the territory of the town/*kota* being :
> 'Territory of the town, is a territory with non-agricultural `activities as its main activity, with a conjunctional use of the territory as place of settlement, town activities, centralization and distribution of governmental services, social services and economic activities (article 1.q).

Prof. H.A.W. Widjaja (2001) – taking Southern Sumatra/Palembang as a case study - gives a short comparison of the status of the village/*desa/marga* in his book [39] as follows:

- in 1965, Law no. 19/1965 was issued which gave equal rights and responsibilities to all villages within Indonesia (comparing it with the Colonial Regulation distinguishing between villages on Java, Madura and Bali, and the Regions Outside Java [who in fact enjoyed a larger autonomy];

- because of the very unclear stipulations given by Law no 19/1965, the South Sumatran Government in cooperation with the Local Parliament issued Local Regulation/Bye law no. 2/1969 on the Principles of Assignments and Competencies of the Local Government at ***Marga*** level;
- Law no. 5/1979, which was issued later which – on **indigenous common law-communities** only distributed to the *marga* the competencies to take care of their common-laws (based on Government Regulations); also ordered the name ***desa*** to be used across the territory of the Republic of Indonesia, which was one of the very first opposition against the Central Government;
- the competencies which flow from Law no. 22/1999 to the villages, are according to Widjaja as follows :

(a) the autonomous administration based on local common law/**Hukum Adat**

(b) police competencies (alas, Law no. 3/2002 on the Police Force of the Republic of Indonesia did not accommodate this wish or assumption);

(c) Further nourishing of the Common Law together with the revival of the **Common Law/Adat Law Courts** (this assumption is still under discussion and under way but has not passed the stage of draft law yet);

(d) Rights of the Common Laws/**Hal Ulayat** , meaning that the **common-law-community** has a local competency to keep law and order in their communtiy and environment based on their common laws;the community has the freedom to use the open **community lands,** build hamlets/***dusun*** as sub-units under the village/*marga*, may use the woods as material to build their houses and benefit from the forests products;

(e) Enjoy the rights to collect the *marga* resources, such as *marga* **taxes;** land tenure, build houses on the community grouds, use the *marga* sands [40], open local markets, put taxes on *marga* forests logs, carry out social services for weddings, have the rights to sell locally bred cattle, etc.

(f) If during the colonial days, the village autonomous administration (usually assigned with overseeing the extention of the irrigation works and road building) is prevented from interfering in the local common laws- whose sustainability is the responsibility of the Common Law Institutions/***Lembaga Adat*** or the responsibility of the Common Law Chief/***Pemangku Adat*** – the ***Marga Government*** on the other hand, based on Law no. 22/1999 has the competencies to do both traditional assignments as well as carry out modern administrative activities and responsibilities, and thus the common laws can develop according according to the new demands and conditions (Widjaja, 2001 : 7- 8);

(g) The competencies and powers of the village government based on indigenous rights is based on:

  (1) **Indigenous Communal Rights**, article 3 of Law on the Agrarian Principles no. 1/1960;the rights to benefit from the forests products (article 17 of Law no. 5/1967);

  (2) the rights to collect the forests products (article 6 of Government Regulations/*peraturan pemerintah* no. 21/1971) ;

(h) **contrary to the traditional rights above, the village administration has no rights to benefit from the above resources** (Widjaja, 2001 : 8)

Based Law no. 22/1999 Widjaja is of the opinion that there are distinct there are three (3) formulations of that law that can be used for the village/*Marga Administration :*

(1) article 101 e on the responsibility of the village head to mediate in conflicts among the village population; which in its complete version the article says: The assignments and responsibilities of the village head are :
   (a) to lead the operation of the Village Administration;
   (b) to develop the life of the village community
   (c) to develop the village economy
   (d) keep security and order amongst the village community
   (e) mediate and reconciliate the conflicts amongst the village population
   (f) represent his/her village in or outside Courts and is allowed to appoint someone as his representative;

(2) article 104 on the Village Representation Institution/***Badan Perwakilan Marga*** whose function is 'to protect the common laws, to make village regulations, to tap and channel local people's aspirations, and control the activities of the Village administration' (article 104 of Law no. 22/1999);

(3) article 111 sub-article (1) and (2) of Law no. 22/1999 which legally obligates everybody to adhere to the indigenous origins and common laws of the villages;

These then are the basic items for a democratic life at village level as granted by Law no. 22/1999 whose articles very much took to heart the destruction of village life, especially of the traditional common-law-communities living in the remote areas and inlands of Indonesia, especially those surrounding forests which are so much sought after for their logs to be exported.

The Transitional Period towards Decentralization (2001-2002) was applied to a number of important activities to be transferred to the provinces and regions on matters of:

(1) Competencies and Institutions

(a) all deconcentration units (provincial departmental representatives/KanWil) in the provinces experienced a transfer of status and became working units of the Provincial Government, except for the five Central Governmental fields of competencies, not included in the fields to be decentralized based on Law no. 22/1999;

(b) at the regencies levels the same happened to the departmental units at regency/*kabupaten* level KanDep and UPT) excluding the five fields of Central Governmental competencies, not to be decentralized;

(c) the UPTs – operational – technical units of Central – Governmental -non-departmental institutions – through case-by-case approach were coordinated for adjustment to local decentralized conditions by Presidential Decree no. 52/2000;

(d) at the provincial levels, possibilities were not excluded for the deconcentrated units of the Central Government to coordinate with the Provincial Units/*Dinas Propinsi;*

(e) provincial representatives of the central departments with very large competencies (surpassing the responsibilities and capabilities of the previous Provincial Units could be changed into special or new Provincial Units, or integrated into existing Provincial Units; these new units are granted autonomy for their specialized fields since there were not known previously for the provinces;

(f) integration of the functions and inter-units of previously deconcentrated and present decentralized units, is now made possible;

(g) the Provincial Units (having decentralized competencies) could also be equipped with deconcentrated powers for different (but interrelated) activities;

(h) activities which had not been decided for its assignment to be either at the provincial or regency level (like the testing of motor cars) were given one year of transition for decision;

(i) the integration of different organizational unit and/or institutions takes place by Local Government Law/Bylaws;

(j) other additional fields to be settled during the Transitional Period were:
   (1) problems of transfer of Central Government officials to become officials of the Provincial cq regency Governments;
   (2) public services by the Local Government
   (3) regulation of assets from the Central Government to be transferred to the local governments, based on the transferred powers delegated to the decentralized territories;
   (4) balance of finances between the local and central government;
   (5) items concerning the power of the villages :
      (a) adjustment of the laws concerning the villages and village life in general;
      (b) status and activities of village state-businesses;
      (c) the change of status from village to become units of the administration at village level/***kelurahan***;
      (d) status of the village chief to become the village head as the lowest administrative officer (Widjaja, 2002 : 2-7) [41];

Thus Law no. 22/1999 in many ways was a <u>first effort to correct and a</u> <u>reaction to undo</u> what was stipulated in Law no. 1974. The dominance of the Central Government was felt to be too strong on the local regions and even increased centralization, although in fact the interference of the Central Government was too closely related to the autonomy and decentralization, since political and economic interests cannot be detached from local interests.

As a political phenomena, decentralization was needed to meet the new demands faced by the regions (internationalization and local supervision). At the same time, the more the regions could take care of themselves, the less active the Central Government is in local affairs, the more it can concentrate on macro international

issues of political economic relations. At the same time, the local governments – by being and becoming more and more self-reliant – will have better capacities in:

a) improving the conditions and life in the regions;
b) identify and develop the local potential resources for the needed increase of local income;
c) regions will be in a better position to determine their economic expenditures
d) increase the local manpower capabilities
e) reach a higher rate of output
f) increase local governmental transparency and accountability to the public (Widjaja, 2000 : 7)

Also the sharing of funds between the province and the regencies, favored the provinces more than the regencies, giving economic and political benefits to the province and disfavoring the regencies. The decentralization which was officially given to the regions (based on law no. 5/1974 and Law no. 5/1979) were not accompanied by the handing-over of competencies from the provinces to the regencies, which especially concern economic and financially strategies which were either had been kept at the provincial or even at central level; some competencies which had been officially 'transferred' to the regions were in fact refused by 'treating them as **sectoral** competencies, and returned those competencies to the Central Government through the vertical hierarchy.

In order to speed up the process of decentralization, the Congress of the year 1999 and the year 2000 issued Congress Resolution no. IV/MPR/1999, both of which ordered the Implementation of Law no. 22/1999 on Local Government which called into life a Central Working Team/*Team Kerja* and at the same time the implementation of Law no. 25/1999 on The Balance of Finances between the Central and Local Governments, to be executed based on the Presidential Decree no. 157/2000. It was the assignment to the Central Government Team:

(1) to formulate and develop concepts for the needed strategic policies for Law no. 22/1999 and Law no. 25/1999 , including the institutional structure for the Local Government;
(2) determine the following stages and priorities for the application of both said laws;
(3) to monitor and facilitate the formulation of regulations for the application of those laws by interrelated institutions;
(4) to provide consultations and socialization of the two said laws and their application;

(5) to determine and decide on steps needed to speed up and smoothen the execution of local decentralization, including activities of transfer of personnel, equipment and funds, and documents and archives from the Central Government to the Local Government;
(6) increase the capabilities of the regions to execute the activities previously carried out by the Central Government, thus increasing the Local Government's accountability capability;
(7) Periodically report the results of the Working Team to the President;
(8) The Working team is supported by a number of sub-teams specialized in different fields of transfer of competencies from the Central Government to the Local Government (Widjaja, 2000: 7 – 12).
(9) As a reaction to this situation, the Law no. 22/1999 in its article no 7 had as its starting point the limitation of competencies of the Central Government in the regions by using paragraph 18 of the 1945 Constitution as the original source of competencies, that only such activities which cannot be carried out by the local government (like foreign policy, defence, finance, judicial system and religious-affairs were left as the sole competencies of the Central Government. Chapter IV / Local Competencies/paragraph 7/sub-paragraph (1) mentions:

'(1) The competencies of the regions cover the competencies [needed] in all fields of governing and in all other fields, except for those competencies in the fields of foreign policies, defence, judiciary, monetary and financial, as well as religious affairs;

(2) 'All other fields' such as meant in sub-paragraph (1) covers policies in national planning and the management of macro-national development, the balance of finances, the state administrative system and the state economic institutions, development and the empowering of the human resources, the exploitation of natural resources and [the use and development] of strategic technologies, conservation [of the natural resources and environment] and national standardization';

Some **dubious articles** are a.o **article 9** which gives 'autonomy' to the provinces. Question should be asked: is this the **deconcentrated power** or the territorial decentralization ? Since the autonomous regencies are autonomous territories within the province, **how can a province still have an autonomy in the s a m e territory as the regencies ?** Since territorial autonomy is real for the regencies, at he **utmost the competencies of the province towards the regencies are of supervision :**

1) **whether the five competencies of the Central Government are well carried out in the province;**
2) **doing intra-regencies coordination for the purpose of a harmonious intra – regencies development within the province;**
3) **carry out regulations and activities thought needed when:**

(a) the regencies are not yet able to carry out their autonomy to the full;
(b) the Central Government has not given any directives and regulations on a needed activity **(article 9 sub-paragraph (2);**

Thus the dubious formulation of the Law no. 5/1974 and Law no. 5/1979 on the 'dual function' – e.g the past regencies and now the present provinces having a) autonomy in regulating the area; b) being an administrative unit of the verticle line of the Central Government - is now transferred to the provinces which have given cause to a hesitance at the provincial level to act vigorously on the regencies, and hesistance to obey on the side of the regencies.

Another unclear burden is article 13 of the Law no. 22/1999 that places an extra burden on the autonomous areas (regencies provinces ?) on the responsibility to give help in matters of finances, infrastructure and human resources development with the responsibility of accountability to the Central Government (article 13[1]). The additional problem hereto is, that on this so dubious 'responsibility to help' (article 13 (2)) are add the wording ' On each assignment such as meant in sub-article (1) a government regulation will be given'. As is generally known the 'government regulations' can very often not only deviate from the original law, but often contradicts this, which again gives reason for the regions and provinces to doubt the Central Government's sincerety on the question of decentralization.

If paragraph 3 needs some clarification on 'the sharing of the 'sea-territories', article 9 (sub-paragraph (2) and article 13 {sub paragraph (1) , (2) need improvements.

These hesitations as reflected by a number of paragraphs and/or sub-paragraphs only explain, that - although political idealism went emotional – the realities brought people back to earth again ; politically a number of competencies were gladly handed over to the regencies – again with the provinces in a dubious political position – but realities demanded a more active role of the provinces into the regencies' affairs. Probably the exploitation of the human resources – which competency is not transferred to the provinces the less to the regencies – still reflects the clash of interests between the Central Government versus the Local Governments.

If article 7 sub-article (1) gives a dubious competency to the provinces (which is the competence of the province within the province), and at the same time linking the five (5) Central-Government prerogative - activities to the activities of the

province/intra-regencies, the confusion – and of course also aversion/distrust towards the province and the Central Government – on the side of the regencies towards the province is naturally to be sought in the past experience, namely :

- that the territory of the Republic of Indonesia was sub-divided into regencies/*kabupatensand* town/*kotamadya* giving to these territories a local autonomy but at the same time burdened them with the administrative function within the vertical-central hierarchy;
- the experience of more than 30 years had shown that the 'dual function' of the regencies much more favoured the centralized administrative purposes, than the autonomy and its accountability; the regencies were not able to take decisions, without previously having obtained the needed directives from the central government (Estiko-Hantoro, 2000 : 80).

This experience was taken at heart during the formulation of Law no. 22/1999 and thus since its existence, only the provinces kept the hierarchical states from the central government, whereas the regencies were freed from their administrative accountability to the central government. Between the province and the regencies/towns based on Law no. 22/1999 (paragraph 2) there exists no hierarchical relations (Estiko-Hantoro, 2000: 80-81), in other words , full autonomy is given to the regencies and towns and its administrative functions and ties to the Central Government through the province were given up.

Another extremity of Law no. 22/1999 was that paragraph 3 'sub-divides' the seas being the competency of the province as far as 12 sea miles from the coast (during low tide)[42], whereas 1/3 of the provincial sea-territory is the resources allocated to the regencies ((Estiko-Hantoro, 2000: 81)[43]. These stipulations seemed to have been thought necessary since the sea-products are also important natural-economic national resources, but which also are of importance for the local population.[44]

As was said before, when discussing autonomy and increased decentralization – although after the existence of Law no. 22/1999 because one cannot use the expressions of the past anymore, like 'regional level I' for the province and 'region level II' for the regencies/*kabupatens* , each time at the back of the mind it should also be taken into consideration that :

(a) decentralization at the provincial level is in the nature of deconcentration, meaning that the functional autonomy in the province e.g. has a delegated authority from the central government, becoming limited in scope of

competencies owned, since a decision taken by a governor has only limited validity to the relevant province;

(b) decentralization at regency/*kabupaten* on the otherhand has derived its competence of self-government from the people who have directly chosen the regent/*bupati* and its regional parliament/DPRD; thus a bupati in coordination with his or her local parliament can make decisions **not yet decided upon or regulated by the central government. In case of conflict between the governor and the regent cq local Parliament, the central government has to make a decision/*dictum***;

A great deal of criticism has been written and said on the application of Law no. 22/1999, which indeed for many regions had been disastrous : the regents refuse to attend the (coordinating and controlling) meeting of the governor (at provincial level); another regent in another province refuses to hold sessions, because it refuses the newly appointed governor (such as chosen from two candidates and appointed by the Central Government). The first example shows near anarchy and misuse and misunderstanding of democracy and autonomy, with the regent feeling himself above the governor , as being directly appointed by the local regency-voters; the second example show that before deciding, the Central Government has to do away with its priority to choose the governor; instead it should better limit its competencies to approve and appoint the governor instead of choosing between two candidates, which still shows the more powerful overhand of the Central Government.

The confusion has been caused by both sides : the Central Government as well as the Local autonomous Goverments. Regions that had known the status of autonomy before – like the case of Palembang – have it easier now to determine which way is best for the region, after the negative experience with Law no. 5/1975 and Law no 5/1979. The fortunate example can be found in the case of Palembang/Sumatra : first of all it was part of the colonial *Buitengewesten* (= being outside of Java and Bali) and therefore since colonial days already enjoyed and practiced some degree of autonomy based on article 118 jo. Article 128 of the *Inlandsche Reglementen.* These previous privileges even since the colonial days were amongst others:

- the local population could live under a self-government system by their chosen local chiefs as village heads;
- the *Inlandsche Gemeente Ordonnantie Buitengewesten /*IN 1938 no. 490 which came into life after the first of January 1939 based on IN 1938 no. 681 which ordained that the indigenous name of the local community unit was ***marga*** or ***haminte****/gemeente* [45] by law [46] (Widjaja, 2001 : 4-5);

- other names known for 'village' through Indonesia are amongst others : ***kampung*** (Sumatera and Kalimantan)***, mukim*** (Aceh), ***nagari, desa*** (Java), ***temenggungan*** (Kalimantan) , ***wanua/distrik/pekasaan*** (North Sulawesi), ***banjar/lomblan*** (Bali and Lombok), ***manoa/laraingu/ kenaian/kefeteran/kedaton/kedaluan*** (Nusa Tenggara Timur/Easter-Smaller-Sunda-Islands), ***soa/hoana/negeri/ negorij*** (Moluccas)(Soehirno, 1995 : 13-14), ***walelagama*** (Irian Jaya/Papua Highlands – survey by Astrid S. Susanto-Sunario, 1999);

Several differences between Law no. 22/1999 and decentralization of the colonial days, is that the *swaprajas/ zelfbesturende gebieden* had been annulled (Soehirno, 1995: 14), which position is entirely the opposite of the village, which received a higher recognition in the Indonesian legal-administrative system. Yet, some accommodations based on local demands had been made amongst others by creating Law no.44/1999on the Special Province of Aceh Nangroe Darrusalam [47] and Law on the Province of Papua.

Professor **Widjaja** even mentioned how – ten years before Law no. 5/1975 and Law n. 5/1979 namely that Law no. 19/1965 brought the first confusion in the village affairs, by equal levelling and treatment of the *marga* and *haminte* as ***desapraja*** and ***common law/adat autnomy units*** (2001: 5). In this confusion the Local Parliament of the Province issued a Resolution no. 2/DPRGR/1969 on the 'Assignments and Basic Competencies of the *Marga* Self-Government' which lasted until the issue of Law no. 5/1979on Village Government, which ordained that regulation on the Customary and Common Law would be determined by Government Regulation (2001: 5). The protests made during the Reformation demanded a correction to Law no. 5/1975 and Law no. 5/1979 standardizing all villages in name, structure, and status of the Village Government, which is contrary to paragraph 18, which respected the indigenous special characteristics of villages in a number of regions.

It was Law no. 22/1999 article 9 which rehabilitated those villages known under different names beside *desa*, to choose their own territorial names according to indigenous local common laws, thus acknowledging the variety and multiplicity of the village cultural backgrounds, the community's customary ways of village participation, the indigenous local autonomy and system of democracy (which even by the colonial Dutch Administration was adhered to) was rehabilitated, and enabled the improvement of capabilities of the local inhabitants and with it taking their

empowerment into consideration. With the Law no. 22/1999 the province of South Sumatra/Palembang sees its chances for improvement of the ***Marga Government*** intself (2001: 6).

This confidence – based on professor Widaja's analysis is based on:

(1) the *marga* as an indigenous local bond consists of a confederation of territorial community/*streekgemeenschap* [48] comprising number of hamlets or sub-villages/*dusun.* A communal bond at village level is known as a local community/*localegemeenschap* consisting of the mentioned hamlets. The *marga* is the village bond to the village territoriy. The competencies of such village 'home rule' are:
   (a) autonomy based on Common Laws
   (b) having a village-police
   (c) further cultivate the common laws
   (d) having a village-common- law-court
   (e) having village territory known as ***tanah ulayat*** and competencies to administer the lands (uncultivated lands can be used by permission of the village population; also uncultivated lands and forests and communal resources, the use of which are regulated properly based on common law;
   (f) the right to benefit from local natural resources (in Palembang this is owned by the *marga*) which are communal resources of income through the same communal procedure as land tenure; for the modern *marga* the village market and forests products were communally regulated; the competency to legalize marriages, take care of cattle and its market (2001 : 7); these rights are still the traditional rights of the village, also according to Law no. 22/1999;

(2) during the colonial days the administration by the village (with the village head as the lowest administrator) the competencies of the public/state interests were separated from the communal competencies; this totally differs from Law no. 22/1999 which combines the two competencies in one institution : the village meeting (= acting like the village 'parliament' with the headman/village head being the chosen representative of the village to the outside world); during the colonial days the common law hierarchy went parallel with the colonial administration hierarchy up to the provincial level; Law no. 22/1999 limits the common law activities as fas as its real positive existence (sometimes it can be at the district/*kecamatan* level and it is still a question whether such a traditional common law hierarchy is still to be found at levels above village level). According to Law no 22/199 the **Marga Administration** is assigned with the traditional common law assignments as well as executing the decentralized competencies (2001: 7);

(3) based on the Agrarian Law n.1/1960 paragraph 3, the lands of the common law villages can continue to be regulated according to the existing local common laws;

(4) the rights to make profit from the forests products (paragraph 17 of Law no. 5/1967)

(5) the rights to use and benefit from the forest products (paragraph 6 from the Government Regulation no. 21/1971); (2001: 8)
(6) the *Marga* Administration at the same time takes care and cultivates the local common laws, which includes:
    (a) paragraph 101 e : the competencies of the village headman is to mediate in conflicts within the village;
    (b) paragraph 111 (2) : the execution of the competencies by the Village headman and Administration respects the indigenous local common and customary laws;
    (c) Paragraph 104 : the Village Representation Body (or as differently called such as the *Marga* Representation has to protect and pursue the local communal laws (2001 : 9);

A survey team, which was set up by a number of NGOs and called themselves LAPERA managed to give an overview of, the problems created by Law no. 22/1999 as follows:

(1) Law no. 22/1999 was a compromise to the changed situation under the Reformation. This compromise replaced Law no. 5/1974 on the Principles of Relations between the Central Government and the Local Government; and Law no. 5/1979 on Village Administration; The political compromise was given too late and is seen as a matter of momentum taking into consideration its controversies, substance, implications and future policies (LAPERA, 2001 : XVII);
(2) discussions on the formation of the draft Law no. 22/1999 had their influence on the proposed Amendments to the 1945 Constitution, stressing the realization of its article 18);
(3) Law no. 22/1999 was further elaborated by Law no. 25/1999 on the Financial Balance between the Central-and Local Governments;
(4) Article 7 of Law no. 22/1999 combined with Law no. 25/1999 withdrew again the competencies previously transferred to the regions, and therefore **contradicted** the spirit of Law no. 22/1999 which had been the cause for many criticisms and requests for a limited revision of a number of articles in Law no. 22/1999 and Law no. 25/1999 itself;
(5) Law no. 22/1999 was in line with the growing demand for democracy , to enable the real application of **Law no. 2/1999 on Elections** (carried out in June 1999 on **district system**, although it was a matter of fact that the highest political institutions (DPR and the MPR (1999)) were carried out based on a **mixed-system** between the district-and proportional system. It is hoped that the elections and Congress of 2004 will be carried out according to the pure district system); this reality shows that the Transitional Period is still taking place as reflected in the struggle of political approaches on the results of the 1999 elections [49];
(6) Article 7 of Law no. 22/1999 still reflects a number of political efforts to withdraw competencies already transferred to the regions, especially on assignment to the villages through their regions, in order to 'contribute to national development' giving to the villages no instruments to refuse or veto' (LAPERA, 2001 : XX)

(7) Law no 25/1999 in its further elaborations, still reflect the struggle of forces to retain the centralistic approach in economic policies and development in general (LAPERA, 2001 : XVIII – XIX);

(8) Several criticisms were even expanded to the substance of the relations between the Central Government and the Regions by stressing that real politics should show a shift or balance in the centers for political and economic decisions, from the government cq. bureaucracy to the civil society (LAPERA, 2001 : XXI);

(9) The fact that article in Law no. 22/1999 made 'religious affairs' the competency for the Central Government and thus not transferring local political decisions based on local religious realities (= the case of Aceh Nangroe Darrussalam and Irian Jaya, Papua) opens new possibilities for horizontal and vertical conflicts (LAPERA, 2001 : XXI).

III. Conclusions

Decentralization had been widely known, even before article 18 of the 1945-Constitution.

It can be said, that decentralization with a *historical* demand for Free Indonesia/*Indonesia Merdeka,* ever since the territory which by the 19th century was known as the *Netherlands Indies,* was actually a colonial – historical conglomeration of indigenous territories in Indonesia since the 16th century; most of these territories were either small-independent republics possessing their own Common Laws and local government systems, or small kingdoms, or even conglomerations of small kingdoms. It was in the interest of the Colonial Administration that these scattered territories were united into larger units; thus the Colonial Administration introduced the system of vertical hierarchical administration, with the village head as the lowest administration officer. The Colonial Administration also made use of the existing kingdoms (small or large) and built their administrative territorial units. Thus the conflict of interests between the Central Government and the Local Governments or Regions, is no new fact in Indonesian Public Law and Public Administration.

The Youth Pledge (1928) reminded the young Indonesian intellectuals of the indigenous democracy known prior to the arrival of the foreign rulers. Backed up and equipped with modern political, legal and ethnological knowledge at the turn of the 19th century into the 20th century, the acknowledgment of the National Law/***Hukum Nasional*** to become the agglomerator of existing ***Hukum Adat***/common law as its core, was forgotten, although article 18 of the 1945 Constitution accommodated the

decentralization within the unitary state. Further activities and political conflicts – such as the choice between capitalism, supported by individualism against national collectivism, put the case of decentralization in the background. The modernized version of in a cruel fact, the same conflict between capitalism and nationalism continued for another 30 years under the Soeharto regime, this time using the words 'economic development' versus 'socio-political and cultural development'. If for economic development the word 'infrastructure building' was a matter of fact, 'socio-infrastructure building' (including political infrastructure building) was neglected. With the turn of the 21st century, the word 'globalization' put social development more and more in the background, with its effect on the use of all the national resources – even of the remotest area – for the sake of 'national development'; which in the end practically came to a peak in the conflict between the 'Central Government versus Local Regions'. Then came the Economic Crisis, which developed, into a Total Crisis (1997-1999) – with all its political impacts – and total breakdown of many private and governmental institutions. It is in this context that the Reformation Movement must be seen. Reformation is sometimes even blamed for having given too little attention to the economic recovery. But a detailed study on what had been achieved in the years 1998 – 2001 indeed shows that the stressing of the Reformation was to build up a new socio-political and legal infrastructure, to become the foundation for further economic development. Again, at this stage of conflict between many economists (especially those who are globally interested) and others who stress the development of the socio-legal-political infrastructure to exists next to, or to be, the poles of principles that must sustain future economic development, on the condition that such economic development must not exploit the regions, but must especially use the non-renewable resources in a very careful way, in order to secure its further use by future generations. Further stressing that economic development must concentrate on renewable resources, education, health, science and technology as its social infrastructure. This naturally means that such development needs the participation of a knowledgeable public and population. This again in turn stresses the empowering of the Indonesian human being in order to become a new potential of 'human resources' the economists so much need. Needless to say, that therefore the democratic principles are the foundation of decentralization, also within the frame to uplift the dignity of the regions and the dignity of the Indonesian in general. For this

reason all the actions – from the Amendments to the Constitution to the many Resolutions of Congress (1998 – 2001) followed by their consecutive Laws passed by Parliament - are to be viewed as development activities to build new foundations and infrastructure for future development, which means returning to the Youth Pledge (1928) and the 1945 Constitution as mentioned in its Preamble.

NOTES

[1] Soehino, SH, [1980 …1995], *Perkembangan Pemerintah Daerah,* Yogyakarta, Penerbit Liberty. When talking about 'village' one should always take into consideration that the larger Sunda Islands like Sumatra, Kalimantan, Sulawesi and later on Irian Jaya/Papua, always covered very large areas which if measured against the villages in Java - especially in Kalimantan and Irian Jaya/Papua - can cover the area of a kabupaten in Java; this had also been the reason of tremendous mismanagement during the New Order which indeed had treated those larger areas in the same as the small villages in Java, thus **distribution of development was slow outside Java, also its opportunities for human resources development, although those larger areas had contributes tremendously to the development of Indonesia; this was one of the outcries for decentralization as soon as Reformation came into life in May 1998;**

[2] R. Soepomo, 1972, *Pertanian Peradilan Desa kepada Peradilan Gubernemen, Jakarta, Bhratara;*

[3] Since the Dutch Administration put the 1) provinces 2) regencies/*regentsschappen* and 3) the *Stadsgemeenten* **at the same political-administrative level directly under the Dutch Administration, it can be understood why nowadays in many provinces, the bupatis r e f u s e to recognize the governor as the upper power holder (as was under the Soeharto regime based on Law no. 5/1974 and Law no. 5/1979 on behalf of the Central Government;**

[4] Soehino. SH, [1980 … 1995], *Perkembangan Pemerintahan di Daerah,* Yogyakarta, Penerbit Liberty

[5] now known as ***Walikota;***

[6] which included the ***Peradilan Adat*** and ***Kehakiman Desa*** (Soepomo, 1972 : 7);

[7] Van Leur, 1955, *Indonesian Trade and Society,* the Hague-Bandung-W. van Hoeven Ltd.); also the Dutch historian Bernard H.M. Vlekke, 1959, *Nusantara: a History of Indonesia,* the Hague-Bandung/W. van Hoeve Ltd.

[8] B.J. Haga, 1924, *Indonesische en Nederlandsch-Indische Democratie,* Leiden

[9] to be distinguished from the British ***East Indian Company/EIC*** especially operating on the Indian Continent;

[10] J. Sturler, 1884, *Tractates met Engeland, Spanje en Portugal over Nederlandsch Indie*

[11] these trading companies and banks were: *the Netherlands - Indian Trading Bank, the Handelsvereniging Amsterdam, the Koloniale Bank,* and *the Bank of Dorrepaal and Co.* followed by the *Vorstenlanden* (Vlekke, 1959 : 310);

[12] It was this connection between the forced planting of certain crops such as needed by the estates for exports in connection with forced labour (by men and/or women) and then on conjunction with

political rights e.g. the right to elect and the rights to be elected limited to the forced labour, was one of the criticism of B.J. Haga against the colonial administration, saying that this system was not even known in Western Democracy and therefore, **Haga accused the colonial administration of destroying the indigenous democracy which knew pure election based on men known as *primus inter pares* in their regions and the 'head' of the village being again no one but a *primus inter pares* amongst the chosen men in the village meeting; Haga criticised the introduction of 'the western democracy' the more because it was connected with economic interests of men with capital and investments and forced labour which even in Holland was illegal;**

[13] = **colonial/state interests**

[14] Note that nowadays the word public interest means the interet of the people at large which should be served and be the main purpose of any government and any modern state;

[15] regulated by the Administration by *Inlandse Gemeente Ordonnantie/IGO Java en Madura* (Ind. Stb. 1906 no. 83; territories outside Java-Madura (and Bali to acertain extend) are regulated by the *Inlandse Gemeente Ordonnantie Buitenwesten/*IGOB

[16] Roelof H. Haveman, (2000 : 5), *The Legality of Adat Criminal Law in Modern Indonesia,* Jakarta, PT Tatanusa gave the descriptive definition on 'Adat Law' as 'written and unwritten …. customary law. More specifically: adat law is a type of customary law. Customary law is the oldest form of law rules of law that came into being because a particular community continuously and consciously observed the same rules for the same sort of relationship or conduct of the people, without they ever having been laid down by a legislator. Or, adapt law is folk law'. (Ind. Stb. 1938 no. 490 jo. Ind. Stb. 1938 no. 681 (Soehirno, 1995 : 14)

[17] this historical fact has become one of the problems within the 'horizontal conflict' in Maluku;

[18] Dr. J.H.A. Logemann, 1927, *Eenkele vraagstukken eener Indische Statesrechtsbeoefening,* Weltevreden/Jakarta - G. Kolff & Co.

[19] exit to the Indian Ocean, connecting the Indonesian Archipelago to Europe and the Middle East, South America, or via the South China Sea to Japan and China, and via the Pacific to North and South America;

[20] This in many ways is congruent to the borders of a number of important kingdoms, thus becoming the present provinces and capital of the provinces: even Law no. 22/1999 still looks upon the province as the 'extention' of the Central Government; whereas the autonomy was given to the regencies/*kabupatens* which outside Java and Bali occupy a territory of a number of previously known 'villages' but which under the recalled law no. 5/1975 on Local Government and Law no. 5/1979 on Village Administration caused enormous disasters, making the village head the lowest administrator of the central government, some never known before by the Indonesian!

[21] It was B.J. Haga's dissertation (1924) which in detail gives the characteristics of several degrees of integration inter-small republics especially on Sumatra and on he process of integration of the small kingdoms in South Sulawesi which were integrated 'through state regalia' and the very large autonomy in the Moluccas (to which area he was once appointed as Governor)

[22] …Eerde, *1922, Ethnologie van Nederlands Indie,* Leiden

[23] It is very clear that Eerde - although an ethnologist was not talking about **racial bases** for the foundation of the Republic of Indonesia, but right from the start as the **legal basis binding the population to the lands by the same laws;** also note that the state of Indonesian was never thought to be **a nation state based on race,** but from the beginning always consisted of a plurality of races

[24]

[25] General Soeharto together with General Nasution handled the political game at the forum of macro politics, whereas General Sarwo Edhie was the man who faced and led the insurrections in this areas

[26] Law no. 44/1999, *Penyelenggaraan Keistimewaan Propinsi Daerah Istimewa Aceh*

[27] The case of East Timor is a case not to be discussed here because it has nothing to do with decentralization and its development, although probably it was a (not too reasonable) impetus for the speed up of Law no. 22/1999

[28] Deddy Supriady Bratakusumah, PhD and Dadang Solihin, MA, 2001, *Otonomi Penyelenggaraan Pemerintahan Daerah,* Jakarta, PT Gramedia

[29] now known as Law no. 22/1999

[30] now known as Law no. 22/1999

[31] Didi Hariadi Estiko and Novianto M. Hantoro, 2000, *Reformasi Hukum Nasional,* Jakarta, Sekretariat Jenderal DPR-RI/Pusat Pengkajian dan Pelayanan Informasi

[32] as a consequence the 1999 Elections were participated by 48 political parties (pout of the 100 verified parties)

[33] this law revoked Law no. 21/1982 which gave to the government the right to censor and suppress the press; allowed only one Journalists organization/PWI and the withdrawal of the publications' permits to publish; soon after the existence of Law no. 4/1999 the number of publication increased from 326 to 1,397 publications

[34] these areas are **different** from the previously known areas of ***'groepsgemeenschappen'***

[35] (Note should be given to the fact that until he Law for the Province of Nangroe Aceh Darussalaam (Law no. 44/1999) and the Law for the Region of Papua in 2001, Indonesian only knew (since 1945) two special provinces, namely the Special Province of Yogyakarta and the Special province of Aceh

[36] This is incorrect since such units are called ***banjars*** in Bali

[37] translated from C.S.T. Kansil, SH - Christine S.T. Kansil SH - M.H. Engeline H. Palandeng, SH. 2001, Konstitusi-Konstitusi Indonesia, tahun 1945 - 2000, Jakarta, Pustaka Sinar Harapan

[38] = 'kesatuan masyarakat hukum'

[39] Prof. H.A.W. Widjaja, 2001, *Pemerintahan Desa/Marga berdasarkan Undang-Undang no. 22/1999 tahun 1999 tentang Pemerintah Daerah: Suatu Telaah Administrasi Negara,* Jakarta, PT Grafindo Persada

[40] nowadays being an expensive commodity for exports between Indonesia and Singapore

[41] Prof. Drs. H.A.W. Widjaja, 2002, *Otonomi Daerah dan Daerah Otonom,* Jakarta, PT Raja Grafindo Persada

[42] Law no. 22/1999/Chapter III/*Sharing of the territory* [Pembagian Daerah]: 'The territory of the Province such as meant in paragraph 2 sub-paragraph 91), is comprised of land territories and sea-territories as far as 12 sea-miles measured from the coastal line [note: usually taken during low tide) or measured into the direction of other islands within the Archipelago;

[43] Drs H.A.W, Widjaja, May, 2001, *Pemerintahan Desa/Marga Berdasarkan Undang-Undang no. 22 tahun 1999 tentang Pemerintahan Daerah: Suatu Telaah Administrasi Negara,* Jakarta, PT Raja Grafindo Persada;

[44] Estiko-Hantoro taken from Sekretariat Jenderal DPR-RI (1999 : 6), *Proses Pembahasan Rancangan Undang-Undang tentang Pemerintahan Daerah*, Jakarta, DPR-RI;

[45] = mispronounciation of the Dutch word *gemeente;*

[46] H.A.W. Widjaja, 2001, *Pemerintahan Desa/Marga berdasarkan Undang-Undang no. 22/1999 tentang Pemerintahan Daerah;*

[47] Hadi Setia Tunggal, SH, 2000, *Penyelenggaraan Keistimewaan Propinsi Daerah Istimewa Aceh*, Jakarta, Harvarindo

[48] this kind of bonds to be very common in traditional societies; the Danis in the Highlands of the Jayawijaya/Papua apart from confederation even know federations (= a confederation of confederations), thus dividing the Highlands in 3-4 Federations which when waging war against one another create a big wars in the valleys, since the parties involved are bi organizations involving hundreds and hundreds of warriors;

[49] Team LAPERA, (200, 2001), *Ombudsman Pemberian Negara*, Yogyakarta, LAPERA Pustaka Utama.