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MIMBAR KEADILAN

Redesigning the Authority of Autonomous Region in Geothermal Management: a Constitutional Justice Perspective

Syofyan Hadi[1]*
[1]Universitas 17 Agustus 1945 Surabaya, Indonesia
*Corresponding Author: syofyan@untag-sby.ac.id

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Abstract

The purpose of this study is to analyse the authority of autonomous regions in geothermal management and to find a fair redesign of the division of geothermal management authority to autonomous regions. This study is a legal study with a statute, conceptual, and case approach. The primary and secondary legal materials that have been collected are then analysed normatively. The results of the study found that through the principle of the broadest possible autonomy, the central government decentralizes some concurrent government affairs to autonomous regions. One of the concurrent affairs is geothermal affairs. However, Law No. 23 of 2014 regulates the centralization of geothermal permit issuance, so that it only becomes the authority of the Central Government. In fact, this centralization is strengthened by the Constitutional Court Decision Number 11/PUU-XIV/2016. In fact, this causes injustice to autonomous regions. After all, it is contrary to Article 18 paragraph (2) and paragraph (5) and Article 18A paragraph (1) and paragraph (2) of the 1945 Constitution of the Republic of Indonesia and is inconsistent with Law No. 23 of 2014 because it only uses the principle of national strategic interests. Therefore, as an effort to provide justice for the regions, the regulation needs to be redesigned by dividing the authority to grant geothermal permits among the regions. The division of authority is carried out using the principles of accountability, externality, and efficiency by considering the location/place of the geothermal permit, users, and benefits/negative impacts of granting geothermal permits, as well as efficiency in the implementation of granting geothermal permits.

1. Introduction

Article 1, paragraph (1) of the 1945 Constitution of the Republic of Indonesia stipulates that "Indonesia is a unitary state in the form of a republic". Soehino stated that a unitary state is a state that is not composed of several states, but rather consists of only one state, so that there is no state within a state. Thus, in a unitary state, there is only one government, namely the central government, which has the highest power and authority in the field of state government, determining government policies and implementing state government both at the central government and in the regions.[1]

The main character of a unitary state is centralistic, but Indonesia uses a decentralized unitary state system.[2] This can be seen in the provisions of Article 18 paragraph (1) of the 1945 Constitution of the Republic of Indonesia which stipulates that "The Unitary State of the Republic of Indonesia is divided into provincial regions and the provincial regions are divided

[1] Soehino, "Ilmu Negara" (Yogyakarta: Liberty Yogyakarta, 2005).
[2] Adamy Nurdin, "Pengaruh Hubungan Kekuasaan Antara Pusat Dan Daerah Terhadap Kewenangan Perizinan Pertambangan Mineral Dan Batubara," *Jurnal Dharmasisya Program Magister Hukum Fakultas Hukum Universitas Indonesia* 1, no. 2 (2021); Muhammad Akbal, "Harmonisasi Kewenangan Antara Pemerintah Pusat Dan Daerah Dalam Penyelenggaraan Otonomi Daerah," *Jurnal Supremasi* XI, no. 2 (2016).

into districts and cities, each of which has a regional government, which is regulated by law". Furthermore, Article 18 paragraph (2) of the 1945 Constitution of the Republic of Indonesia stipulates that "Regional governments... regulate and manage their own government affairs according to the principles of autonomy and assignment tasks". Even Article 18 paragraph (5) of the 1945 Constitution of the Republic of Indonesia stipulates that the autonomy granted is the broadest possible autonomy except for government affairs which according to law are the affairs of the central government.[3]

Through regional autonomy, the central government decentralizes some government affairs to autonomous regions, thus creating a relationship of authority between government units as guaranteed in Article 18A paragraph (1) of the 1945 Constitution of the Republic of Indonesia and a relationship of utilization of natural resources as guaranteed in Article 18A paragraph (2) of the 1945 Constitution of the Republic of Indonesia.[4] The relationship between these government units creates a division of government affairs which, according to Article 13 of Law Number 23 of 2014 concerning Regional Government (Law No. 23 of 2014), is based on the criteria of externality, accountability and efficiency as well as national strategic interests.

One of the government affairs divided between government units is geothermal management[5] which is a sub-affair in the government affairs of energy and mineral resources. Before the enactment of Law Number 21 of 2014 concerning Geothermal (Law No. 21 of 2014) and Law No. 23 of 2014 concerning Regional Government, the division of authority in geothermal management has been regulated in various laws and regulations, including Law Number 27 of 2003 concerning Geothermal, Law Number 32 of 2004 concerning Regional Government, and Government Regulation Number 38 of 2007 concerning the Division of Government Affairs Between the Central Government, Provincial Governments and Regency/City Governments as well as other laws and regulations. In these laws and regulations, all government units have the authority in geothermal management. However, after Law No. 21 of 2014 and Law No. 23 In 2014 there was a very drastic change in the legal policy of geothermal management, even tending to be centralistic because most of the authority for geothermal management was withdrawn back to the authority of the central government.

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[3] Dodi Haryono et al., "Implikasi Rasionalisasi Retribusi Bagi Daerah Dalam Perspektif Undang-Undang Nomor 1 Tahun 2022 Tentang Perimbangan Keuangan Antara Pemerintah Pusat Dan Pemerintahan Daerah," *Jurnal Ilmu Hukum* 12, no. 2 (2023), https://doi.org/10.30652/jih.v12i2.8388; Syofyan Hadi and Tomy Michael, "Implikasi Hukum Resentralisasi Kewenangan Penyelenggaraan Urusan Konkuren Terhadap Keberlakuan Produk Hukum Daerah," *Jurnal Wawasan Yuridika* 5, no. 36 (2021): 267–90.

[4] Gunawan A Tauda, "Desain Desentralisasi Asimetris Dalam Sistem Ketatanegaraan Republik Indonesia," *Administrative Law and Governance Journal* 1, no. 4 (2018), https://doi.org/10.14710/alj.v1i4.413-435; Aris Munandar, La OdeHusen, and Askari Razak, "Tinjauan Hukum Eksistensi Otorita Dalam Undang-Undang Nomor 3 Tahun 2022 Tentang Ibu Kota Negara," *Journal of Lex Generalis (JLS)* 3, no. 12 (2022).

[5] Suyatna et al., "Implications of Utilizing Protected Forest Areas for Geothermal Business: A Legal Analysis," *Jurnal Hukum Novelty* 14, no. 1 (2023), https://doi.org/10.26555/novelty.v14i1.a24765; Agus Hermanto and Laser Narindro, "New Geothermal Law and Its Implications for Geothermal Development in Indonesia," *International Journal of Law and Management* 61, no. 1 (2019), https://doi.org/10.1108/IJLMA-10-2017-0248.

According to the explanation, there are at least 2 (two) main problems in the regulation of the division of geothermal management authority in Law No. 21 of 2014 and Law No. 23 of 2014. The two problems are, *first*: there has been an unconstitutionality between the two laws and the 1945 Constitution of the Republic of Indonesia, especially the provisions of Article 18 paragraph (2) and paragraph (5) and Article 18A paragraph (1) and paragraph (2). The unconstitutionality lies in the centralism of the two laws. This can be seen in the provisions regarding the granting of geothermal permits which are recentralized to become the authority of the central government, even though the 1945 Constitution of the Republic of Indonesia has guaranteed the implementation of the broadest possible autonomy by autonomous regions. *Second*: there has been an inconsistency between Law No. 21 of 2014 and Law No. 23 of 2014, especially Article 14 paragraph (1). Even between Article 14 paragraph (1) of Law No. 23 of 2014 with the Attachment to Law No. 23 of 2014 there is also an inconsistency. Article 14 paragraph (1) of Law No. 23 of 2014 stipulates that "The implementation of government affairs in the fields of forestry, maritime affairs, and energy and mineral resources is divided between the Central Government and the Provincial Government", however in Law No. 21 of 2014 and the Attachment to Law No. 23 of 2014 it is stipulated that the granting of geothermal permits is only the authority of the central government.

Regarding the two legal issues above, a judicial review application has been submitted to the Constitutional Court by the Governor of East Java and by the Regional House of Representative of East Java Province. However, through the Constitutional Court's decision Number 11/PUU-XIV/2016, the Constitutional Court rejected the application and stated that the provisions in Law No. 21 of 2014 and Law No. 23 of 2014 related to the granting of geothermal permits do not conflict with the 1945 Constitution of the Republic of Indonesia. The Constitutional Court in its decision stated that the central government is given the authority to determine government affairs that are decentralized to autonomous regions. Because, the central government has the authority over all government affairs. In relation to this, the author intends to examine and analyze the authority of autonomous regions in geothermal management from the constitutional justice perspective, especially Article 18A of the 1945 Constitution of the Republic of Indonesia.

A similar study was conducted by Syofyan Hadi and Tomy Michael with the title "Legal Implications of Recentralization of the Authority for the Implementation of Concurrent Affairs on the Enforcement of Regional Legal Products".[6] The research discusses the implications of the centralization of several concurrent government affairs in the Job Creation Law on the products of the enforceability of regional law products, both in the form of Regional Regulations and Regional Head Regulations. The second research was conducted by Canggih Prabowo with the title "Recentralization in the Division of Authority for the Utilization of Geothermal Energy".[7] This research discusses the recentralization of energy and geothermal utilization after the enactment of Law Number 23 of 2014 which is contrary to all efforts to make the government more accountable, efficient, and prevent externalities. The third research

[6] Hadi and Michael, "Implikasi Hukum Resentralisasi Kewenangan Penyelenggaraan Urusan Konkuren Terhadap Keberlakuan Produk Hukum Daerah."
[7] Canggih Prabowo, "Resentralisasi Dalam Pembagian Kewenangan Pemanfaatan Energi Panas Bumi," *Veritas et Justitia* 2, no. 2 (December 27, 2016): 380, https://doi.org/10.25123/vej.2272.

was conducted by Fairuz Abdul Haq, et.al with the title "Decentralization and Policy Harmonization: Reconstruction of the Division of Authority Between the Central and Regional Governments in a Unitary State".[8] The research discusses the practice of attracting interests related to the division of authority between the Central Government and the regions that has an impact on public services, so that vertical and horizontal integrative approaches are offered, as an effort to strengthen synergy and avoid fragmentation of authority. When compared to previous studies, although they have similarities because they discuss the division of authority between the Central Government and autonomous regions, this study has significant differences, especially the findings of research in the form of a redesign of the division of geothermal management seen from the perspective of justice for autonomous regions as stipulated in Article 18A of the 1945 Constitution of the Republic of Indonesia.

2. Methods

This research is normative legal research. This research used statute, conceptual, and case approach.[9] Legal materials consist of primary legal materials and secondary legal materials. Primary legal materials are collected using the inventory and categorization method, while secondary legal materials are collected using the literature search method. Primary legal materials and secondary legal materials that have been collected are then identified, classified, and systematized according to their sources and hierarchies. After that, all legal materials are reviewed and analysed using legal reasoning with the deductive method.[10]

3. Results and Discussion

3.1. Division of Authority in Geothermal Management

Article 18, Article 18A and Article 18B of the 1945 Constitution of the Republic of Indonesia are guarantees of recognition and granting the broadest possible autonomy to autonomous regions. Autonomy is "the right of self-government or decentralize means to divide and distribute, as governmental administration, to withdraw from the center or concentration".[11] Therefore, autonomy is the decentralization of authority by the central government to regional governments.[12] This indicates that the administration of government in the Unitary State of the Republic of Indonesia is no longer permitted to be centralized, but decentralized.

With the adoption of regional autonomy, there is a relationship of authority between government units in the form of a division of authority in the implementation of government affairs.[13] From the perspective of Law No. 23 of 2014, one type of government affairs is

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[8] Fairuz Abdul Haq, Doni Almas Musyafa, and Utang Rosidin, "Desentralisasi Dan Harmonisasi Kebijakan: Rekonstruksi Pembagian Kewenangan Antara Pemerintah Pusat Dan Daerah Dalam Negara Kesatuan," *Qanuniya : Jurnal Ilmu Hukum* 2, no. 2 (2025): 17–32, https://ejournal.uinsgd.ac.id/index.php/qanuniya/article/view/1819.

[9] Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2016).

[10] Irwansyah and Ahmad Yunus, *Penelitian Hukum: Pilihan Metode & Praktik Penulisan Artikel* (Yogyakarta: Mirra Buana Media, 2020).

[11] Hanry Campbell Black, *Black`s Law Dictionary* (ST. Paul, Minn: West Publishing, Co, 2009).

[12] Agus Salim Andi Ganjong, *Pemerintahan Daerah Kajian Politik Dan Hukum* (Bogor: Ghalia Indonesia, 2007).

[13] Genoveva Pupitasari Larasati, "Implementasi Desentralisasi Dalam Kerangka Negara Kesatuan Republik Indonesia," *Jurnal Komunikasi Hukum (JKH)* 8, no. 1 (2022),

concurrent affairs, which are divided into mandatory and optional concurrent affairs.[14] One of the concurrent government affairs of choice is energy and mineral resources. However, in the management of energy and mineral resources affairs, exceptional or special provisions apply, including geothermal, namely Article 14 paragraph (1) of Law No. 23 of 2014, which stipulates that "The implementation of government affairs in the fields of forestry, maritime affairs, and energy and mineral resources is divided between the Central Government and the Provincial Government". From these provisions, geothermal management is carried out only by central government units and provincial governments. The division of authority can be seen in the Appendix to Law No. 23 of 2014:

CENTRAL GOVERNMENT	PROVINCIAL GOVERNMENT	DISTRICT/CITY GOVERNMENT
1. Determination of geothermal work areas. 2. Auction of geothermal work areas. 3. Issuance of permits for direct utilization of geothermal energy across provincial regions. 4. Issuance of geothermal permits for indirect utilization. 5. Determination of electricity and/or geothermal steam prices.	1. Issuance of permits for direct utilization of geothermal energy across districts/cities in 1 (one) provincial area. 2. Issuance of a certificate of registration for supporting service businesses whose business activities are in 1 (one) provincial area.	Issuance of permits for direct utilization of geothermal energy in district/city areas.

In addition to being regulated in Law No. 23 of 2014, geothermal management is also regulated in Law No. 21 of 2014. Article 4 paragraph (1) of Law No. 21 of 2014 stipulates that "*Geothermal is a national wealth controlled by the state and used for the greatest prosperity of the*

https://doi.org/10.23887/jkh.v8i1.44063; Erwin Syahruddin and Emilda Yofita, "Politik Hukum Penguasaan Pertambangan Mineral Dan Batubara Di Indonesia," *PALAR | PAKUAN LAW REVIEW* 6, no. 1 (2022), https://doi.org/10.33751/palar.v6i1.5641; Sariul Fadilah and R. Zainul Mushthofa, "Pasang Surut Otonomi Daerah Dalam Kerangka NKRI," *JOSH: Journal of Sharia* 2, no. 02 (2023), https://doi.org/10.55352/josh.v2i2.538.

[14] Rusdianto Sesung and Syofyan Hadi, "Peraturan Presiden Nomor 33 Tahun 2020 Dalam Perspektif Otonomi Dan Desentralisasi," *DiH: Jurnal Ilmu Hukum* 17, no. 1 (January 30, 2021), https://doi.org/10.30996/dih.v17i1.4146.

people". This provision is derived from the provisions of Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia which stipulates that "*The earth, water, and natural resources contained therein are controlled by the state and used for the greatest prosperity of the people*".[15] From these two provisions, geothermal is controlled by the state. Bagir Manan stated that this concept is better known as the principle of domain, which contains the meaning of ownership. The state is the owner of land rights, therefore it has the authority to carry out actions that are of an ownership nature.[16] In relation to this, the Constitutional Court in various ratio decidendi of his decisions stated that the state's right to control means that the state has the authority to make policies (*bleid*), make arrangements (*regelendaad*), carry out administration (*bestuursdaad*), carry out management (*behersdaad*), and supervision (*toezichthoudensdaad*) for the greatest prosperity of the people.[17]

In implementing the right to control geothermal energy, Article 4 paragraph (2) of Law No. 21 of 2014 stipulates that "*Geothermal energy control by the state... is carried out by the Government, provincial governments, and district/city governments in accordance with their authority and based on the principle of utilization*". From these provisions, geothermal management is not only carried out by the central government, but also by provincial governments and district/city governments. The division of authority of government units in geothermal management can be seen in the table below:

NO	CENTRAL GOVERNMENT	PROVINCIAL GOVERNMENT	DISTRICT/CITY GOVERNMENT
1	Article 5 paragraph (1)	Article 5 paragraph (2)	Article 5 paragraph (3)
	The implementation of Geothermal Energy by the Government is carried out for: 1. Geothermal for Direct Use located at: a. across provincial areas including Production Forest Areas and Protected Forest Areas; b. Conservation Forest Areas; c. Conservation areas in waters; and d. Sea areas of	The implementation of Geothermal Energy by the provincial government is carried out for Direct Utilization which is located at: 1. across district/city areas in one province including Production Forest Areas and Protected Forest Areas; and 2. sea areas up to 12 (twelve) miles measured from the	The implementation of Geothermal Energy by the district/city government is carried out for Direct Utilization which is located at: 1. district/city areas including production forest areas and protected forest areas; and 2. sea areas up to 1/3 (one third) of the sea area under provincial authority.

[15] Jimly Asshiddiqie, *Green Constitution* (Jakarta: RajaGrafindo Persada, 2016); Latipah Nasution, "Implementasi Green Constitution Demi Mewujudkan Kehidupan Sehat dan Sejahtera," *'ADALAH* 3, no. 1 (2019), https://doi.org/10.15408/adalah.v3i1.10929.
[16] Bagir Manan, *Menyongsong Fajar Otonomi Daerah* (Yogyakarta: Pusat Studi Hukum FH-UII, 2005).
[17] Legal considerations (ratio decidendi) No. 3.10.15 Constitutional Court Decision No. 3/PUU-VIII/2010 concerning the Testing of Part of Article of Law No. 27 of 2007.

	more than 12 (twelve) miles measured from the coastline towards the open sea throughout Indonesia. 2. Geothermal for Indirect Use located throughout Indonesia, including Production Forest Areas, Protected Forest Areas, Conservation Forest Areas, and marine areas.	coastline towards the open sea and/or towards archipelagic waters.	
2	Article 6	Article 7	Article 8
	The Government's authority in organizing Geothermal) includes: 1. making national policies; 2. regulation in the Geothermal sector; 3. granting Geothermal Permits; 4. granting Direct Utilization Permits in areas under its authority; 5. coaching and supervision; 6. management of geological data and information and Geothermal potential; 7. inventory and preparation of Geothermal resource and reserve balances; 8. implementation of Geothermal	The authority of the provincial government in organizing Geothermal includes: 1. the establishment of provincial regional legislation in the field of Geothermal for Direct Utilization; 2. granting Direct Utilization Permits in areas under its authority; 3. guidance and supervision; 4. management of geological data and information and Geothermal potential in the provincial area; and	The authority of the district/city government in organizing Geothermal Energy includes: 1. establishment of regional regulations of district/city in the field of Geothermal for Direct Utilization; 2. granting of Direct Utilization Permits in areas under its authority; 3. guidance and supervision; 4. management of geological data and information and Geothermal potential in district/city areas; and 5. inventory and preparation of balance sheets of Geothermal resources and reserves in district/city areas.

	Exploration, Exploitation, and/or utilization; and 9. encouragement of research activities, development and engineering capabilities.	5.	inventory and preparation of balance sheets of Geothermal resources and reserves in the provincial area.

From the provisions of Attachment to Law No. 23 of 2014 and Law No. 21 of 2014 above, the division of authority in geothermal management is basically 2 (two), namely the regulatory and licensing fields. The two types of division of authority can be explained as follows:

a. In the field of regulation, it means that each government unit is given the authority to form legal norms as the basis for geothermal management in accordance with its authority. At the national level, laws and regulations are formed in the form of laws, government regulations or other forms of laws and regulations. Likewise at the regional level, provincial regulations are formed for the province level and district/city regulations are formed for district/city levels.
b. For permits in the field of geothermal management, it is divided into 2 (two), namely direct utilization permits and geothermal permits for indirect utilization (geothermal permits). Regarding direct utilization permits, authority is given to government units, both central, provincial, and district/city. However, the limits of authority of each government unit are on the area and location of the geothermal area. If the geothermal utilization area is across provinces or outside 12 nautical miles, then it becomes the authority of the Minister. If the geothermal utilization area is across districts/cities or is between 4-12 nautical miles, then it becomes the authority of the Governor, while if the geothermal utilization area is in a district/city area or is 1-4 nautical miles, then it becomes the authority of the Regent/Mayor to issue permits. Meanwhile, for geothermal permits for indirect utilization (geothermal permits) based on Article 6 paragraph (1) letter c and Article 23 paragraph (2) of Law No. 21 of 2014 in conjunction with the Attachment to Law No. 23 of 2014, then it becomes the authority of the Minister. Regarding licensing authority in geothermal management, it can be seen in the table below:

No	Types of Permits	Central government	Provincial government	District/City Government
1	Direct Utilization Permit	√*	√**	√***
2	Geothermal Permit	√	-	-

The regulation regarding the division of geothermal authority in Law No. 21 of 2014 and Law No. 23 of 2014 has given rise to unconstitutionality and inconsistency. The unconstitutionality can be seen in the provisions of Article 5 paragraph (1) letter b, Article 6 paragraph 1 letter c and Article 23 paragraph (2) of Law No. 21 of 2014 with the provisions of Article 18 paragraph (2) and paragraph (5) and Article 18A paragraph (1) and paragraph (2) of the 1945 Constitution of the Republic of Indonesia. Meanwhile, the inconsistency can be seen in the provisions of Article 5 paragraph (1) letter b, Article 6 paragraph 1 letter c and

Article 23 paragraph (2) of Law No. 21 of 2014 with the provisions of Article 13 paragraph (1) and Article 14 paragraph (1) of Law No. 23 of 2014.

When talking about constitutionality, the main issue is whether Law No. 21 of 2014 is in accordance with the 1945 Constitution of the Republic of Indonesia. Constitutionally, Article 18 paragraph (2) of the 1945 Constitution of the Republic of Indonesia guarantees that regional government administration is carried out based on the principle of autonomy. Even Article 18 paragraph (5) of the 1945 Constitution of the Republic of Indonesia guarantees that the autonomy carried out by autonomous regions is the broadest possible autonomy.[18] This means that the system of division of authority over government affairs is a residual function where all affairs become the authority of the region, minus government affairs that according to law are the authority of the central government. The formulation of Article 18 paragraph (5) of the 1945 Constitution of the Republic of Indonesia is an anomaly with the nature of autonomy itself. The article does not explicitly determine government affairs or at least the criteria that can be excluded by law. This provision gives full authority to the legislators to determine which the authority of the central government is and which the authority of the autonomous regions is. On the one hand, the provision provides flexibility in the relationship between the central government and the regions, but on the other hand, it has the potential to give rise to a re-centralization of power in the form of the withdrawal of government affairs that were previously given to the regions. For this reason, Article 18A stipulates that the relationship of authority is implemented by taking into account the specificity and diversity of the region and the relationship of the utilization of natural resources is implemented fairly and harmoniously. The terminology of fair and harmonious must be interpreted to mean that the relationship of the utilization of natural resources must provide mutual benefits between the central and regional governments. Regions must not be disadvantaged by a law that provides benefits only to one government unit.[19]

Based on the explanation above, the norms of Article 5 paragraph (1) letter b, Article 6 paragraph 1 letter c and Article 23 paragraph (2) of Law No. 21 of 2014 are in conflict with Article 18 paragraph (2) and paragraph (5) and Article 18A paragraph (1) and paragraph (2) of the 1945 Constitution of the Republic of Indonesia. The provisions of Article 5 paragraph (1) letter b, Article 6 paragraph 1 letter c and Article 23 paragraph (2) of Law No. 21 of 2014 which only give authority to the Central Government to issue geothermal permits are not in accordance with the principle of autonomy granted to regions as referred to in Article 18 paragraph (2) of the 1945 Constitution of the Republic of Indonesia. These provisions also conflict with Article 18 paragraph (5) of the 1945 Constitution of the Republic of Indonesia which grants the broadest possible autonomy to autonomous regions to regulate and manage government affairs. In the sense that, Article 5 paragraph (1) letter b, Article 6 paragraph (1)

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[18] Cecep Cahya Supena and Diwan Pramulya, "Tinjauan Yuridis Tentang Persamaan Dan Perbedaan Sistem Pemerintahan Daerah Otonom Dengan Sistem Pemerintahan Negara Bagian," *Moderat : Jurnal Ilmiah Ilmu Pemerintahan* 8, no. 4 (2022), https://doi.org/10.25157/moderat.v8i4.2861; Lintang Prabowo and M Tenku Rafli, "Pengaruh Otonomi Daerah Terhadap Kesejahteraan Rakyat Indonesia," *Jurnal Rechten : Riset Hukum Dan Hak Asasi Manusia* 2, no. 2 (2022), https://doi.org/10.52005/rechten.v2i2.56.

[19] Syofyan Hadi and Dkk, "Legal Reform of the Division of Authority for Mining Affairs: Balance between Regional Autonomy and National Interests," *Journal of Law and Legal Reform* 6, no. 3 (2025): 1587–1630, https://doi.org/https://doi.org/10.15294/jllr.v6i3.20947.

letter c and Article 23 paragraph (2) of Law No. 21 of 2014 closes the authority of regions to implement autonomy granted by Article 18 paragraph (2) of the 1945 Constitution of the Republic of Indonesia. Although there are exceptions specified in the law as referred to in Article 18 paragraph (5), it must still be based on the principle of the broadest possible autonomy. Therefore, laws that limit the broadest possible autonomy possessed by regions must have definite limitations, so that the principle of autonomy which is the main principle is not ignored.

In addition, Article 5 paragraph (1) letter b, Article 6 paragraph (1) letter c and Article 23 paragraph (2) of Law No. 21 of 2014 also contradict Article 18A paragraph (1) and paragraph (2) of the 1945 Constitution of the Republic of Indonesia. The provisions of Article 5 paragraph (1) letter b, Article 6 paragraph (1) letter c and Article 23 paragraph (2) of Law No. 21 of 2014 are not based on the principles of justice and harmony. With the provisions of Article 5 paragraph (1) letter b, Article 6 paragraph 1 letter c and Article 23 paragraph (2) of Law No. 21 of 2014, autonomous regions that have geothermal energy do not receive the results of geothermal utilization in accordance with their rights. By only granting the authority to grant geothermal permits to the central government, autonomous regions that have geothermal energy cannot exercise their rights and do not receive the results of geothermal energy. So that these provisions do not reflect the principle of justice. This is caused by the generalization of the provisions of Article 5 paragraph (1) letter b, Article 6 paragraph 1 letter c and Article 23 paragraph (2) which apply to all regions. So that autonomous regions that already have sufficient resources in granting geothermal permits also suffer losses due to the provisions of Article 5 paragraph (1) letter b, Article 6 paragraph 1 letter c and Article 23 paragraph (2) of Law No. 21 of 2014.

In addition to the principle of justice being violated, the provisions of Article 5 paragraph (1) letter b, Article 6 paragraph 1 letter c and Article 23 paragraph (2) of Law No. 21 of 2014 also violate the principle of harmony of government unit relations. In fact, the provisions of Article 18 paragraph (5) of the 1945 Constitution of the Republic of Indonesia only exclude the meaning of the broadest possible autonomy for absolute matters concerning state sovereignty, but do not touch on concurrent matters. Therefore, Article 5 paragraph (1) letter b, Article 6 paragraph 1 letter c and Article 23 paragraph (2) of Law No. 21 of 2014 do not provide and implement a harmonious relationship for the utilization of geothermal natural resources between government units. In fact, geothermal utilization matters must be managed by all government units, so that there is harmony between government units, both central, provincial, and district/city.

Apart from the problem of unconstitutionality, there is also the problem of inconsistency between Law No. 21 of 2014 and Law No. 23 of 2014. In fact, this inconsistency also occurs between the provisions of Article 14 paragraph (1) of Law No. 23 of 2014 and the Attachment to Law No. 23 of 2014. This inconsistency can be explained as follows:

a. Article 5 paragraph (1) letter b, Article 6 paragraph (1) letter c and Article 23 paragraph (2) of Law No. 21 of 2014 only use the principle of national strategic interests.

   Based on Article 12 paragraph (3) of Law No. 23 of 2014, geothermal energy is included in the optional concurrent affairs that can be managed by the regional government if it has geothermal potential. As one of the optional affairs in concurrent affairs, in the

utilization of geothermal energy there is a relationship of authority, utilization of natural resources which is carried out based on the principles of justice and harmony as referred to in Article 18A of the 1945 Constitution of the Republic of Indonesia.

Therefore, as a concurrent matter, geothermal utilization must comply with the principle of division of concurrent matters as stipulated in Article 13 paragraph (1) of Law No. 23 of 2014 which stipulates that "*The division of concurrent government affairs between the Central Government and the Provincial Government and the Regency/City Government as referred to in Article 9 paragraph (3) is based on the principles of accountability, efficiency, and externalities, as well as national strategic interests*". These four principles are cumulative, meaning that geothermal utilization must consider accountability, efficiency and externalities as well as national strategic interests.

However, Article 5 paragraph (1) letter b, Article 6 paragraph (1) letter b and Article 23 paragraph (2) of Law No. 21 of 2014, do not complay to the four cumulative principles at all, but only look at national strategic interests. This can be seen in the considerations in letter c of Law No. 21 of 2014: "*that in order to maintain the sustainability and resilience of national energy as well as the efficiency and effectiveness of the implementation of Geothermal for indirect use as a power plant, the authority to organize it needs to be implemented by the Government*". The use of the principle of national strategic interests is not accompanied by other principles, even though geothermal affairs are included in elective affairs in concurrent affairs. So, it can be seen that the provisions of Article 5 paragraph (1) letter b, Article 6 paragraph 1 letter c and Article 23 paragraph (2) of Law No. 21 of 2014 conflict with Article 13 paragraph (1) of Law No. 23 of 2014.

b. Article 23 paragraph (2) Law no. 21 of 2014 also conflicts with Article 14 paragraph (1) of Law no. 23 of 2014.

Article 14 paragraph (1) of Law No. 23 of 2014 stipulates that "*The implementation of government affairs in the fields of forestry, maritime affairs, as well as energy and mineral resources is divided between the Central Government and the Provincial Government*". From the provisions of Article 14 paragraph (1) of Law No. 23 of 2014, it can be seen that those given authority in the utilization of geothermal energy are the central government and the provincial government. Meanwhile, for oil and natural gas, it is the authority of the central government and permits for direct utilization of geothermal energy are managed by government units in accordance with the principles of accountability, efficiency and accountability as stipulated in Article 13 of Law No. 23 of 2014. *Vise versa*, provinces can manage what is the authority of the central government in accordance with Article 13 paragraph (2) and paragraph (3) of Law No. 23 of 2014. In other words, based on Article 14 of Law No. 23 of 2014, provincial regions are given authority like the central government with different regions in the utilization of geothermal energy.

However, Article 5 paragraph (1) letter b, Article 6 paragraph 1 letter c and Article 23 paragraph (1) of Law No. 21 of 2014 only provide authority to grant geothermal permits to the central government and provinces are only given authority to grant permits for direct utilization of geothermal energy. With these provisions, the provisions of Article 5 paragraph (1) letter b, Article 6 paragraph 1 letter c and Article 23 paragraph (2) of Law No. 21 of 2014 conflict with the provisions of Article 14 paragraph (1) of Law No. 23 of 2014.

Volume 19 Nomor 1 February 2026: 68-86

3.2. Authority of Autonomous Regions in Geothermal Management Following Constitutional Court Decision Number 11/PUU-XIV/2016

The enactment of Law No. 21 of 2011 and Law No. 23 of 2014 has brought about changes in the legal policy of geothermal management, including the authority of autonomous regions. These changes in legal policy are clearly visible in the absence of authority for autonomous regions, both provincial and district/city, in granting geothermal permits. Autonomous regions are only given the authority to grant direct utilization permits. This is very different from previous laws and regulations such as Law No. 27 of 2003, Law No. 32 of 2004 concerning Regional Government which grant authority to all government units, both central, provincial and district/city to grant geothermal permits.

In this regard, the province of East Java as a region with geothermal potential feels that its constitutional interests have been harmed by the enactment of Law No. 21 of 2014. For this reason, the Governor of East Java and the Regional People's Representative Council of East Java Province have filed a judicial review with the Constitutional Court. *Fundamentum petendi* for the Governor of East Java and the Regional People's Representative Council of East Java Province is that the enactment of Article 5 paragraph (1) letter b, Article 6 paragraph (1) letter c, Article 23 paragraph (2) of Law No. 21 of 2014 and Appendix CC Number 4 Sub-Affairs of New and Renewable Energy of Law No. 23 of 2014 is contrary to Article 18 paragraph (2) and paragraph (5) and Article 18A paragraph (1) and paragraph (2) of the 1945 Constitution of the Republic of Indonesia. With the enactment of these provisions, the Province of East Java feels that its constitutional authority has been harmed..

Regarding the application, the Constitutional Court in decision Number 11/PUU-XIV/2016 provided the following considerations:

> "[3.12.1]... In this regard, the Court must first cite the considerations of the Constitutional Court Decision Number 87/PUU-XIII/2015, dated 13 October 2016, as follows: ...even though the final responsibility for the implementation of daily government in Indonesia lies with the President (Central Government), regional governments (both provincial, district and city governments) also have responsibility in the implementation of government as long as it falls within the scope of their autonomy in the regional government system regulated by law. Thus, regional governments, within the limits of their autonomy, act for and on behalf of the state. Therefore, if the Law, within certain limits, also gives regions the authority to carry out affairs related to or connected with the livelihoods of the people, this does not conflict with the 1945 Constitution, especially Article 33 paragraph (2). This is entirely the policy of the legislators. Likewise, if the legislators are of the opinion that such matters would be more appropriate if handed over to the Central Government, this is also entirely the policy of the legislators.....
>
> [3.12.2] That based on the considerations of the Court above, the provisions that place electricity affairs, as well as geothermal energy which is a new renewable energy source as a sub-selected concurrent government affairs, whose authority is divided between the central government and provincial regions, do not conflict with the 1945 Constitution, as long as the determination is based on the principles of accountability, efficiency, externalities, and national strategic interests. This is also emphasized in other Court Decisions concerning the division of central and regional authority related to education

affairs in Decision Number 30/PUU-XIV/2016 and Decision Number 31/PUU-XIV/2016. The Court also emphasized that this is a policy of the legislator. The legislator can regulate the portion of authority of the central and regional governments themselves, this is as regulated in Article 18 paragraph (1) of the 1945 Constitution that Indonesia is divided into provincial regions and the provincial regions are divided into districts and cities, each of which has a regional government regulated by law. The phrase "regulated by law" means that the 1945 Constitution has delegated to the legislators to regulate the division of power between the central government and regional governments. Furthermore, Article 18A paragraph (1) and Article 18A paragraph (2) of the 1945 Constitution emphasize the delegation of regulations at the level of the Law regarding the division of authority between the central government and regional governments. Thus, although Article 18 paragraph (2) of the 1945 Constitution has emphasized that provincial, district and city regional governments regulate and manage their own government affairs according to the principles of autonomy and assistance tasks, this principle of regional autonomy is limited by Article 18 paragraph (5) of the 1945 Constitution, namely that regional governments exercise the broadest possible autonomy, except for government affairs that are determined by law as the affairs of the Central Government.

Based on the above considerations, Article 5 paragraph (1) letter b, Article 6 paragraph (1) letter c and Article 23 paragraph (2) of Law 21/2014 and Appendix CC Number 4 in the Sub-Affairs of New and Renewable Energy in Law 23/2014 which provides authority to organize geothermal energy for indirect use, including the authority to grant permits to the central government, do not conflict with the 1945 Constitution.....".

Based on these considerations, the Constitutional Court rejected the Applicant's application. There are at least several reasons for the Constitutional Court to reject the Applicant's application, namely (1) it is true that Article 18 paragraph (2) of the 1945 Constitution of the Republic of Indonesia provides autonomy to autonomous regions, even Article 18 paragraph (5) of the 1945 Constitution of the Republic of Indonesia provides the broadest possible autonomy, except for government affairs which according to the law are the authority of the Central Government. So the division of affairs is left to the policy of the legislators (House of Representatives and the President). Therefore, the division of affairs in geothermal management, including the granting of geothermal permits contained in Law No. 21 of 2014 and Appendix CC Number 4 in the Sub-Affairs of New and Renewable Energy in Law 23/2014 does not conflict with Article 18 paragraph (2) and paragraph (5) and Article 18A paragraph (1) and paragraph (2) of the 1945 Constitution of the Republic of Indonesia; and (2) as long as the division of affairs does not conflict with the principles of accountability, efficiency, externalities, and national strategic interests, then the division of government affairs to the regions is the authority of the legislators. For this reason, the division of affairs in geothermal management, including the granting of geothermal permits contained in Law No. 21 of 2014 and Appendix CC Number 4 in the Sub-Affairs of New and Renewable Energy in Law 23/2014 does not conflict with Article 18 paragraph (2) and paragraph (5) and Article 18A paragraph (1) and paragraph (2) of the 1945 Constitution of the Republic of Indonesia.

Regarding the legal considerations (ratio decidendi) of the Constitutional Court Decision Number 11/PUU-XIV/2016 above, the author provides several notes as follows:

a. The principle of autonomy is the spirit of the provisions of Article 18 of the 1945 Constitution of the Republic of Indonesia. In the context of the concept of a unitary state, it is true that the sovereign is the central government so that all government affairs are the authority of the central government. However, in the concept of a decentralized unitary state, the central government grants autonomy status to autonomous regions by decentralizing them as government affairs. This decentralization must be in accordance with the spirit and soul of the broadest possible autonomy as stipulated in Article 18 paragraph (5) of the 1945 Constitution of the Republic of Indonesia. The broadest possible autonomy means that in essence all affairs can be managed and regulated by autonomous regions except those that are the authority of the central government according to the law. Thus, in reality, the legislators are given the authority to determine government affairs that are decentralized to the regions. However, in exercising this authority, lawmakers must consider to the ontology of regional autonomy, diversity and regional specialization as stipulated in Article 18A paragraph (1) of the 1945 Constitution of the Republic of Indonesia, and harmoniously and fairly as stipulated in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia. In this decision, the Constitutional Court appears to only use semantic considerations from the text of Article 18 paragraph (2) and Article 18 paragraph (5) and Article 18A paragraph (1) and paragraph (2) namely regulated by law, so that the Constitutional Court stated that the division of government authority including in geothermal management is completely handed over to the lawmakers. The Constitutional Court did not consider further than the ratio legis granting autonomy to the regions. If this is left alone, lawmakers may one day re-centralize government affairs based only on political considerations.

The criteria for the division of government affairs are not specified in the 1945 Constitution of the Republic of Indonesia in a limited manner. Therefore, the criteria for the division of government affairs in various laws related to regional government change. In Law Number 32 of 2004 concerning Regional Government, only 3 (three) criteria are used, namely accountability, externality and efficiency. However, in Law Number 23 of 2014, the criteria used are the criteria for accountability, externality, efficiency and national strategic interests. The absence of clear criteria in the 1945 Constitution of the Republic of Indonesia causes lawmakers to be able to create other criteria, thus potentially re-centralizing government affairs. According to the author, it is unclear and inappropriate in its considerations. The Constitutional Court stated that the division of government affairs does not conflict with the 1945 Constitution of the Republic of Indonesia as long as it does not violate the 4 (four) criteria for accountability, externality, efficiency and national strategic interests.

3.3. Redesigning the Authority of Autonomous Regions in Geothermal Management: a Constitutional Justice Perspective

Referring to the provisions of Article 18A of the 1945 Constitution of the Republic of Indonesia, the relationship of authority and utilization of natural resources between the Central Government and Regional Governments must be regulated and implemented fairly and harmoniously by considering the principles of a unitary state and the principle of regional

autonomy.[20] The centralization of part of the authority to manage geothermal energy, as explained above, is not in accordance with the principles of justice and harmony that are the spirit of Article 18A of the 1945 Constitution of the Republic of Indonesia. In fact, this centralization is inconsistent with Law No. 23 of 2014 itself.[21] For this reason, in order to implement Article 18A of the 1945 Constitution of the Republic of Indonesia, the granting of authority to autonomous regions in geothermal energy management needs to be redesigned. This redesign is of course based on the principle of just regional autonomy while remaining based on the principle of a unitary state.

Geothermal affairs are sub-affairs in the field of energy and mineral resources. According to Article 12 paragraph (3) of Law No. 23 of 2014, these affairs are optional concurrent affairs. According to the concept of concurrent affairs regulated in Article 9 paragraph (3) of Law No. 23 of 2014, these affairs should be divided among the Regional Government. Therefore, in order to redesign the authority of autonomous regions in managing geothermal energy, the division of authority must be based on the principle of externality, the principle of accountability, and the principle of efficiency. These three principles must be the main principles, while the principle of national strategic interests must be the final criteria and must be used if it meets the explanation in Article 13 of Law No. 23 of 2014.

Explanation of Article 13 paragraph (1) of Law No. 23 of 2014 stipulates that what is meant by the division of concurrent affairs based on the principle of externality is that "the person responsible for the implementation of a Government Affair is determined based on its proximity to the area, magnitude, and reach of the impact caused by the implementation of a Government Affair". This means that based on this principle, a government affair will become the authority of a government affair measured by its proximity to the area, magnitude, and reach of the impact caused. Therefore, the granting of geothermal permits must be measured by how close or not the area where the geothermal permit is granted is. Based on this principle, the division of government affairs in the granting of geothermal permits must be carried out as follows:

1) If the area and size of the geothermal permit and its impact are only within the area of 1 district/city, then the authority to grant permits must be given by the district/city government.
2) If the area and size of the geothermal permit area and its impacts are within 2 districts/cities in 1 province, then the authority to grant permits must be given by the provincial government.
3) If the area and size of the geothermal permit area and its impacts are within 2 provincial areas, then the authority to grant permits must be given by the central government.

The three ways of dividing affairs in granting geothermal permits above have fulfilled the principle of accountability which is based on the principle of proximity to the area, magnitude and impact of granting geothermal permits. With the authority of each government

[20] Hadi and Michael, "Implikasi Hukum Resentralisasi Kewenangan Penyelenggaraan Urusan Konkuren Terhadap Keberlakuan Produk Hukum Daerah."
[21] Hadi and Dkk, "Legal Reform of the Division of Authority for Mining Affairs: Balance between Regional Autonomy and National Interests."

unit that is closer to the area, magnitude and impact of granting geothermal permits, it will facilitate responsible geothermal utilization.

Based on the explanation of Article 13 paragraph (1) of Law No. 23 of 2014, it is determined that what is meant by the division of concurrent affairs based on the principle of efficiency is that "the organizer of a Government Affair is determined based on a comparison of the highest level of utility that can be obtained". This means that based on this principle, a government affair will become the authority of a government affair measured from the highest utility or benefit that will be produced. Measuring the division of government affairs using the principle of efficiency also means that a government unit can manage government affairs if the government affairs can be managed and can bring the highest possible benefits to the government unit, by using financial resources and other resources as minimally as possible.

Based on these principles, the division of government affairs in granting geothermal permits should be carried out in the following manner:

1) If the utilization of geothermal energy in the form of indirect utilization is more beneficial/effective for the district/city government, then the geothermal permit must be granted by the district/city government.
2) If the utilization of geothermal energy in the form of indirect utilization is more beneficial/effective for the provincial government, then the geothermal permit must be granted by the provincial government.
3) If the utilization of geothermal energy in the form of indirect utilization is more beneficial/effective for the central government, then the geothermal permit must be granted by the central government.

The three methods of division are based on the division of affairs with the principle of efficiency and in accordance with the principle of regional autonomy. When measured by the highest benefits, then in fact the regions will receive higher benefits in granting geothermal permits, both in terms of regional finances and can improve people's welfare.

Based on the explanation of Article 13 paragraph (1) of Law No. 23 of 2014, it is determined that what is meant by the division of concurrent affairs based on the principle of externality is "the organizer of a Government Affair is determined based on the breadth, magnitude and reach of the impacts arising from the implementation of a Government Affair". This means that based on this principle, a government affair will become the authority of a government affair measured from the breadth, magnitude and reach of the impacts arising from the implementation of the government affair.

Based on these principles, the division of government affairs in granting geothermal permits should be carried out in the following manner:

1) If the utilization of geothermal energy in the form of indirect utilization only has an impact on the district/city area, then the geothermal permit must be granted by the district/city regional government.
2) If the utilization of geothermal energy in the form of indirect utilization has an impact across provincial areas, then the geothermal permit must be granted by the provincial government.

3) If the utilization of geothermal energy in the form of indirect utilization has an impact across provincial areas, then the geothermal permit must be granted by the central government.

The three methods of division are based on the division of affairs with the principle of externality. It should be noted that geothermal energy is one of the environmentally friendly energies, when compared to fossil energy which has a very large impact on the environment. The impacts caused by the use of geothermal energy do not all have cross-provincial impacts.

4. Conclusions

Article 18 paragraph (2) of the 1945 Constitution of the Republic of Indonesia is a guarantee of granting autonomy to autonomous regions. Even Article 18 paragraph (5) of the 1945 Constitution of the Republic of Indonesia guarantees the broadest possible autonomy. With the broadest possible autonomy, the central government decentralizes government affairs to autonomous regions, except for government affairs that according to the law are the authority of the central government. Government affairs that are decentralized to regions are referred to as concurrent affairs. One of the concurrent affairs is energy and mineral resources affairs, including geothermal energy which is categorized as a sub-affair of new and renewable energy. However, the birth of Law No. 21 of 2004 and Law No. 23 of 2014 has changed the legal policy of geothermal management, especially in granting geothermal permits. Article 5 paragraph (1) letter b, Article 6 paragraph (1) letter c, Article 23 paragraph (2) of Law No. 21 of 2014 and Appendix CC Number 4 Sub-affair of New and Renewable Energy Law No. 23 of 2014 only gives the authority to grant geothermal permits to the Minister. These provisions have been requested for judicial review to the Constitutional Court. However, in Decision Number 11/PUU-XIV/2016, the Constitutional Court rejected the application with ratio decidendi, namely (1) the division of government authority is the policy of the legislator, and (2) the division of geothermal management authority, specifically in granting geothermal permits in accordance with the principles of accountability, externality, efficiency and national strategic interests. Against such regulations, there is unconstitutionality with the provisions of Article 18 paragraph (2) and paragraph (5) and Article 18A paragraph (1) and paragraph (2) of the 1945 Constitution of the Republic of Indonesia and inconsistency with the provisions of Article 13 paragraph (1) and Article 14 paragraph (1) of Law No. 23 of 2014. For this reason, the regulation regarding centralization as the authority for geothermal management needs to be redesigned so that it can provide justice for autonomous regions. The redesigning is in the form of a regulation containing the division of authority to autonomous regions in granting geothermal permits using the principles of externality, accountability, and efficiency. By using these principles, the granting of authority to autonomous regions in granting geothermal permits is carried out by taking into account the location/place of the geothermal permit, users, and the benefits/negative impacts of granting geothermal permits as well as efficiency in the implementation of granting geothermal permits.

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