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DISCUSSION PAPER

Discussion
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CHALLENGES TO SPECIAL AUTONOMY IN THE PROVINCE OF PAPUA, REPUBLIC OF INDONESIA

This paper concerns the problems, particularly from the legal perspective, surrounding the implementation of Law No. 21/2001 on Special Autonomy for Papua Province -commonly referred to as Otsus, from its Bahasa Indonesia name of Otonomi Khusus.

For one year I was based at the main state university in Papua, Cenderawasih University in Jayapura the Provincial Capital, assisting a group of academics involved in the drafting of regulations to implement Otsus. My background is that I was seconded from the Legal Office of the devolved Scottish Government to the British Council, the idea being that autonomy in Papua is the same as devolution in Scotland – but with much better weather.

My central point in this paper will be that Otsus in Papua is in a lot of trouble. In July 2003, more than 18 months after it became a valid law, an evaluation meeting in Jayapura involving the Provincial Government, a Minister from the Central Government (Manuel Kaisiepo, an indigenous Papuan) and other provincial stakeholders concluded that Otsus has been only 10% implemented. Responsibility for Otsus' problems lies overwhelmingly with the central government in Jakarta. I will particularly focus on the Presidential Instruction (or INPRES) issued in

January 2003 which divides Papua into three new Provinces. This division of Papua is known in Bahasa Indonesia as pemekaran.

THE EVOLUTION OF PEMEKARAN

To understand the current situation, it is important to understand the evolution of the pemekaran and of Otsus.

On 26 February 1999, President Habibie received a delegation of prominent Papuans known as the "Team 100", in the State Palace in Jakarta. During this meeting, and to the astonishment of Habibie, the Team 100 submitted their desire for merdeka or independence from Indonesia. In response to this meeting, the Government designed alternative strategies to prevent independence. One of these strategies was the policy of Pemekaran. Although the efficiency of governmental administration and the acceleration of development are claimed as the justificatory reasons for pemekaran, the primary motivation is the prevention of national disintegration.

The pemekaran was realised on 4 October 1999, with the enactment of Law No. 45/99 concerning the Formation of the Provinces of

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Central Irian Jaya and Western Irian Jaya and also the establishment of three new Regencies and one new City (these are the sub-provincial levels of local government). There followed the appointment of Herman Monim (previously a civil servant) to the Governorship of Central Irian Jaya and Brigadier-General (Retired) Abraham Atururi to the Governorship of Western Irian Jaya.

The pemekaran policy concerning the formation of the Provinces of Central Irian Jaya and Western Irian Jaya was rejected by different community groups in Papua, as evidenced by large demonstrations, including a sit-in, at the provincial assembly (DPRD) building and the Governor's Office in Jayapura on 14-15 October 1999. The DPRD (provincial assembly) responded to, and legitimised, this community opposition by formally rejecting the pemekaran. There were several reasons for this rejection:

- the pemekaran had been conducted without any community consultation
- the pemekaran was not in accordance with the recommendations of the Government of Irian Jaya, which had stated that any pemekaran should be into two, not three, provinces
- the pemekaran was more intended as a strategy for strengthening the territorial integrity of Indonesia, rather than developing Papua. This point is evidenced from the format of the pemekaran, which pays little attention to social-cultural unity, readiness of human resources or economic capability.

The Central Government and the Indonesian Parliament (DPR RI) responded to the demands of the Papua community by postponing the formation of the new Provinces of Central Irian Jaya and Western Irian Jaya. Meanwhile, several other articles in Law 45/99 that regulated the formation of the three new Kabupaten (Regencies) and the new City were implemented effectively.

THE EVOLUTION OF OTSUS

On 19 October 1999, in a General Meeting of the 12th Session of the MPR (Upper House of the Indonesian Parliament), MPR Resolution No. IV/MPR/1999 concerning the Basic Guidelines of State Policy ('GBHN') for 1999-2004 was stipulated. Chapter IV, Letter G, Item 2 contained the policy of

Special Autonomy for Aceh and Irian Jaya. The complete policy formula is: "...within the framework of developing regional autonomy in the context of the unitary State of the Republic of Indonesia [NKRI], resolving fairly and completely the problems in the regions requires immediate and serious handling and the taking of the following steps: defending national integrity and respecting the variety and diversity of social and cultural life within the community of Irian Jaya, through the stipulation of special regional autonomy, which shall be regulated with a Law...".

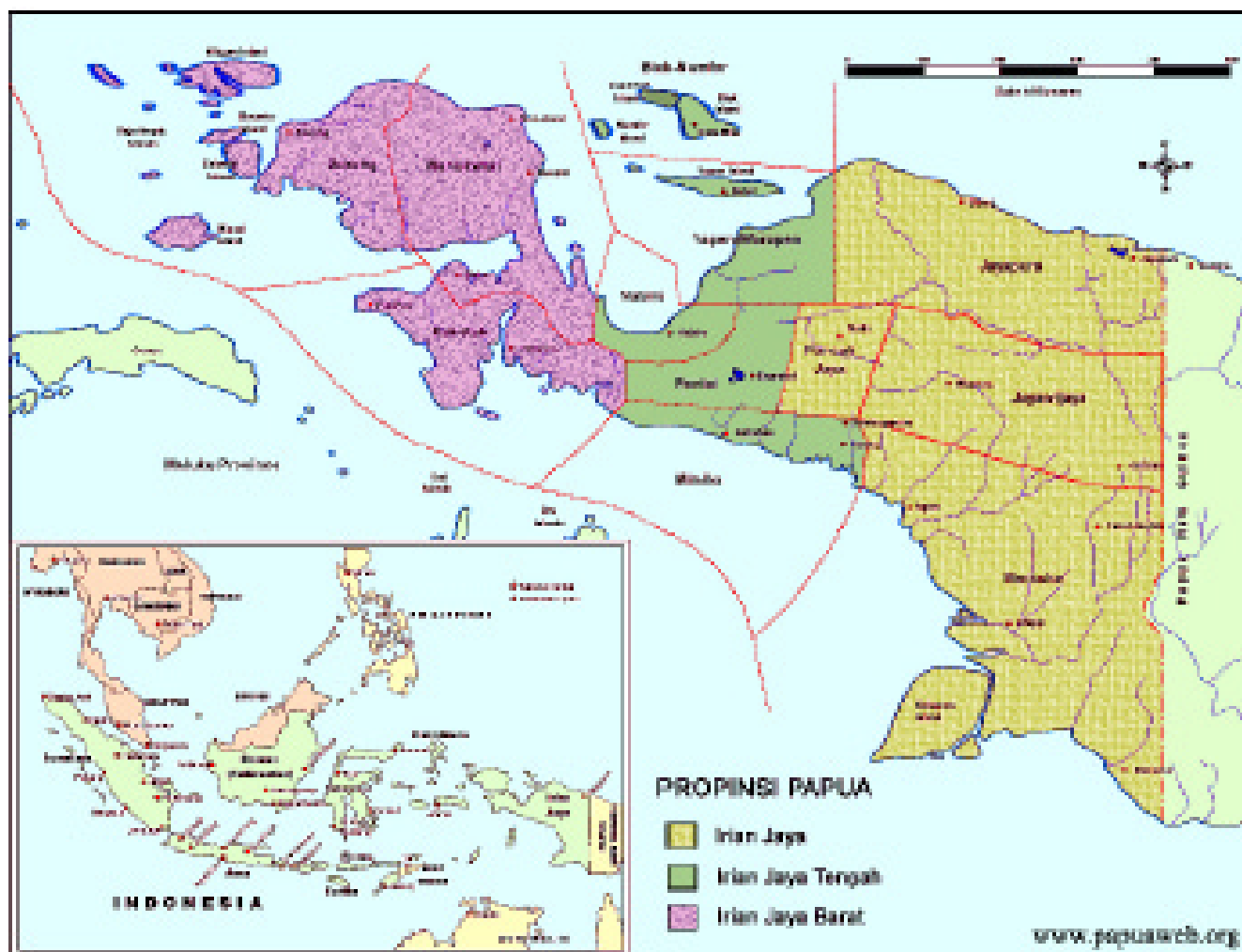
This MPR Resolution only mentions Irian Jaya (not Central Irian Jaya, Western Irian Jaya and Eastern Irian Jaya) and, politically, it annulled the contents of Law No. 45/99 (the law enacting the pemekaran), particularly those articles concerning the formation of the two new Provinces of Central and Western Irian Jaya.

No concrete action was taken to implement the MPR Resolution of 1999, however. Following an evaluation of Government activity in implementing Regional Autonomy across Indonesia in general, and Special Autonomy for Aceh and Irian Jaya in particular, the next Annual Session of the MPR in 2000 passed Resolution No. IV/MPR/2000 concerning Policy Recommendations in Implementing Regional Autonomy. One of the parts of this Resolution states that "the statute for Otsus for the Extraordinary Regions of Aceh and Irian Jaya, according to the mandate of MPR Resolution No. IV/MPR/1999 concerning Basic Guidelines of State Policy for 1999-2004, shall be issued, not later than 1 May 2001, with close attention to relevant regional community aspirations...".

However, Otsus for Irian Jaya Province was not enacted within the time limit clearly mandated by this MPR Resolution. This delay was caused by:

- political escalation in Irian Jaya Province before and after the Second Papuan People's Congress in Jayapura in 2000 which demanded independence and
- the genuine desire of the Government of President Abdowrahman Wahid to be attentive to the aspirations of Papuans.

Discussions concerning Otsus started seriously when Jaap Solossa (who had been a member of the Team 100) was inaugurated as Governor of Papua Province at the end of 2000. On Governor Solossa's initiative an Assistance Team was formed which prepared two documents: a Background Paper on Special



The division of Papua into West Irian Jaya (Irian Jaya Barat), Central Irian Jaya (Irian Jaya Tengah) and rump Irian Jaya according to Law 45/1999 and as reaffirmed by Presidential Decree 1/2003 (Inpres 1/2003).

NB. The new province of “West Irian Jaya” is now officially recognised. The division of “Central Irian Jaya” from rump “Irian Jaya” has not yet taken place and is not recognised in the electoral boundaries for the 2004 General Election. This map does *not* indicate boundary changes to create 14 new regencies (Kabupaten) as per Law 26/2002 (UU 26/2002). Most of these new Regencies do not yet exist (have offices, etc), although they are recognised in the electoral boundaries for the April 2004 General Election.

Autonomy; and a Draft Bill on Special Autonomy for Papua Province.

Neither of these documents makes any reference to three Provinces and they are entirely predicated on one Province in Papua. It is clear that the Otsus process involved the development of an entirely new concept which was inherently assumed to have superseded the prior, rejected three Provinces plan. These two documents were discussed at a Study Forum in Jayapura in March 2001. One-third of the delegates walked out in support of merdeka/independence. This shows that those elements of Papuan society which became involved in Otsus were, to an extent, stepping outside their own

community and were prepared to trust Jakarta's assurances that it sincerely wanted to implement a meaningful level of autonomy for Papua.

This draft Bill, prepared in Papua by Papuans, became the primary reference document during the legislative process. After 5 months debate, during which many elements of the draft Bill were substantially watered down, the DPR RI passed Otsus on 22 October 2001.¹ Otsus was then submitted to the President for validation and on 21 November 2001, the President of the Republic of Indonesia, Megawati Soekarnoputri, brought into effect Law No. 21 of 2001 concerning Special Autonomy for Papua Province. Otsus was to become effective as of 1 January 2002.

THE POSITION OF OTSUS NOW

In theory, Otsus has been valid for over 20 months, but it is not yet effective. This is because of three principal factors: the inability of Papua to enact secondary regulations under Otsus; the non-existence of an institution central to Otsus; and problems concerning the division of revenue

The institutional structure of Otsus is as follows:

- The Executive branch of Provincial Government is the Governor, the Deputy-Governor and their staff.
- The Legislative branch of Provincial Government consists of two bodies. The superordinate body is the existing provincial assembly, the DPRD, which under Otsus is enlarged and becomes the DPRD and is elected by all the inhabitants of Papua Province.
- Otsus envisages a new body as a quasi-upper chamber: the MRP (the Papuan Peoples Assembly). The MRP is intended to be the cultural representative of indigenous Papuans. Its members must be indigenous Papuans with one-third each of the membership being adat (the traditional tribal communities), religious and womens representatives. The MRP is a unique body within Indonesia's system of governance and its exact role and powers are laid out in some detail in Articles 19 – 25 of Otsus.

Inability to enact secondary regulations under Otsus

Regulations in the form of Provincial Regional Regulations (PERDASI) and Special Regional Regulations (PERDASUS), which are the operational basis of Otsus, do not yet exist. The delay in enacting PERDASI and PERDASUS is because the institutions with the competence to enact these two types of regulations do not yet exist. Under Otsus, the difference between these two types of implementing regulations is one of process rather than of substance. Both types of regulations are made by the DPRD together with the Governor but PERDASUS cover matters of particular interest to indigenous Papuans and therefore the approval of the MRP is also required [Article 20(1)c]. For PERDASI, the MRP has no right of veto but it can make comments and ask for a review of a particular

PERDASI before it becomes effective [Article 21(1)b]. Until now the DPRD Papua Province has not been changed into the DPRD, so PERDASI cannot be made and because the MRP does not yet exist, PERDASUS also cannot be made.

Therefore, twenty months down the line no implementing regulations under Otsus have been made, although the Governor's Office, University academics, community groups, adat communities and other stakeholders have prepared many draft regulations. No regulations have been enacted in the priority areas of education and health, nor in relation to adat rights, the hak ulayat (traditional land rights) or natural resource management. There have been no regulations concerning affirmative action, though Otsus gives Papua powers which, if used imaginatively, could improve the position of indigenous Papuans and reduce their socio-economic marginalisation.

Non-existence of the Majelis Rakyat Papua (MRP) or Papuan Peoples' Assembly

The Central Government has not yet made the Regulation establishing the MRP. The non-existence of the MRP was (until the pemekaran) the core problem facing Otsus.

The procedure stipulated in Otsus for the establishment of the MRP has 3 stages:

- The Governor of Papua Province and DPRD (regional assembly) submit a proposal to the Government detailing the requirements, numbers and procedures for the election of MRP members, as material for the Government to draw up a Government Regulation [Article 72(1)].
- From receipt of this proposal the Government has 1 month to complete the Regulation [Art 72(2)].
- Finally, the procedure for election is stipulated in a regional regulation (PERDASI), based on the Government Regulation.

The proposal from the Governor and the regional assembly was submitted to the Government on 15 July 2002. A group from the Province went to Jakarta to submit and explain the proposal to the Government. The Government, however, has not issued the Regulation and has provided no detailed explanation as to why it has failed to comply with the time limit specified in Otsus. There has been no process of dialogue with Papua about the content of this Government Regulation;

for a long time no one in Papua even knew upon whose desk the Province's proposal was sitting. Hari Sabarno, the Minister for Internal Affairs in the Central Government (Dalam Negeri) said, very explicitly, in Papua in April that the regulation would be issued in August.² August has come and gone and the regulation has yet to be issued. It is now over one year late.

Recently, there has been activity and the Department of Internal Affairs (Dalam Negeri) has been preparing a draft. However, the Government has said that it intends to diminish the role of the MRP from that intended within Articles 19 to 25 of Otsus. During a visit to Papua in April, Internal Affairs Minister Hari Sabarno explicitly stated that the central government was not satisfied with the proposal from Papua because the MRP would have the power to cancel decisions made by the DPRP and the Governor. Sabarno said that the MRP should not be able to cancel decisions such as these, that it should just be the cultural representative of Papuans and that it must not become what he described as a 'super-political body'.³

In recent days, with the Government under some pressure following events in Timika (where at least 5 people have been killed following an attempt to physically establish the new Province of Central Irian Jaya), Sabarno has repeated this line, saying that "The central government strongly opposes the idea of enabling the MRP to annul the decisions of the Governor or DPRP as proposed by the Papuans."⁴ However, Article 20(1)(c) of Otsus explicitly gives the MRP the authority "to give consideration and approval to draft PERDASUS". The MRP does therefore have the right to annul certain types of regulations and this is not a mere proposal "by the Papuans" as Sabarno claims. This is contained in the formal, valid law of Indonesia which was enacted by the Indonesian Parliament and brought into effect by Hari Sabarno's own Government. The Government's contention that the MRP must not be a political institution conflicts with its own legislation. At times it appears that Jakarta regards Otsus as a discussion document, rather than respecting it as the law of the land to be followed by all parties, including the central government.

The non-existence of the MRP has had a debilitating affect on Otsus and has made it difficult to build awareness of, and support for, Otsus in Papua. In the MRP's continued absence, Jakarta's claims to be committed to Otsus ring hollow.

Division of Revenue

Within the framework of Otsus, the division of revenue, between the Province and the Regencies (local government units) is considered to have been conducted inequitably during its first year. The revenue is distributed 60% to the Province and 40% to the Regencies. This situation has created the negative perception that Otsus merely transfers the centralist tradition from Jakarta to Jayapura. The Regencies wish to reverse this ratio of 60-40 in their favour and a draft PERDASUS containing relevant factors for deciding the division of revenue has been prepared for debate and enactment but, of course, this regulation cannot be enacted because of the non-existence of the appropriate institutions.

INPRES NO. 1/2003

To these problems, which were already sufficient, the pemekaran (the division of Papua into three provinces) was then added.

The Provincial Government and different components of the Papua community were dismayed at the issuing of Presidential Instruction (INPRES) No. 1/2003 on 27 January 2003. The INPRES commands the formation of the Provinces of Central Irian Jaya and Western Irian Jaya according to Law No. 45/99 and the activation of their governorships.

On 3 February 2003, the Minister of Internal Affairs (Dalam Negeri) issued Radiogram 134/221/SJ requesting central and provincial government officials to take operational steps relevant to the INPRES. The radiogram also said that the INPRES, made under Law No. 45/99, is to operate together with Otsus, which is highly problematic because Otsus has a procedure for pemekaran of the province which is different from Law No. 45/99.

Conflict Between the INPRES and Otsus

Article 76 of Otsus states that "Pemekaran (splitting) of Papua Province to become Provinces shall be conducted with the agreement of the MRP and the DPRP after close attention is given to social-cultural unity, readiness of human resources and economic capability and development in the future."

There has clearly not been any compliance with this article. The INPRES fails to fulfil any of the five conditions. The DPRP has not given its agreement and the MRP is unable to do so because it does not exist. The reaction to the INPRES and, in particular, the recent deaths

in Timika show that it has hardly fostered social-cultural unity. There can also be little doubt that there is neither a readiness of human resources nor of economic capability for three Provinces at this time. The Government's claims that three Provinces will assist the economic development of Papua have been somewhat unconvincing.

INPRES No. 1/2003 conflicts with Otsus. The legal question is which law is superior? The Government's pro-pemekaran legal argument centres on Law No. 45/99 which was never formally repealed or revised. The Governor-designate of Western Irian Jaya, Abraham Atururi, argues that Law 45/99 was not cancelled but only postponed and that "in a conducive situation it returns to life."⁵ Similarly, the Minister for Internal Affairs, Hari Sabarno has said that: "Law 45/99 was never withdrawn or cancelled, only postponed so it is not wrong if it is re-validated through the issuing of INPRES 1/2003."⁶ Pro-pemekaran supporters have argued that, while Article 76 of Otsus clearly requires approval for any new provinces created after Otsus was passed in November 2001, the Provinces of Central Irian Jaya and Western Irian Jaya have existed legally since 1999 and it does not matter that for 3 years and 4 months these 'Provinces' had no staff, no offices, and no actual physical existence. Therefore, it is argued, Article 76 of Otsus does not apply to the Provinces of Central and Western Irian Jaya.

Pro-pemekaran groups also contend that if Otsus was only intended to apply to one Province then Otsus should have specifically repealed Law No. 45/99. It is important therefore to address this question of why Otsus did not specifically repeal Law No. 45/99.

The background is as follows.⁷ The DPR (Indonesian Parliament) commission which discussed the draft Otsus Bill accepted that Otsus superseded Law No. 45/99. The pemekaran mandated by Law No. 45/99 had never been implemented and now it could not be carried out without the approval of the DPRP and MRP. The obvious step was to repeal Law No. 45/99, but this Law constituted the only legal basis on which the three new Regencies and the one new City had been established and accepted by the community. Consequently, it was agreed that Law No. 45/99 would be revised at a later date by deleting the articles connected with the pemekaran of the province without disturbing the legitimacy of the new Regencies and City.

This is an important issue because it shows that the Indonesian Parliament and the Government itself, in 2001, considered the pemekaran under Law No. 45/99 to be politically obsolete and that it undertook to make it legally obsolete as well. In his recent book evaluating Otsus, Agus Sumule refers to the DPR discussions at that time and the specific assurances given that this pemekaran was dead.

SUPERIORITY OF OTSUS

However, notwithstanding the fact that Law No. 45/99 was not repealed, there are other legal arguments, arising from fairly basic legal principles, for why any pemekaran of Papua Province should be regulated by Article 76 of Otsus and not by Law No. 45/99.

Lex Superiori derogat legi inferior

The first legal principle of relevance is *lex superior derogat legi inferior* which means that a superior regulation nullifies an inferior regulation. Hierarchically, Otsus is equal with Law No. 45/99 in that they are both statutes. However, Otsus has a special position because it was based on a mandate in MPR Resolutions in 1999 and 2000. The basic hierarchy of norms in the Indonesian legal system is as follows: the 1945 Constitution (and amendments to it) is the supreme legal instrument; then there are Resolutions of the MPR; and then Statutes enacted by the DPR. Therefore, an MPR Resolution constitutes the superior legal instrument compared to a statute and is only out-ranked by the Constitution itself.

The two MPR RI Resolutions of 1999 and 2000 commanded the enactment of Special Autonomy Laws for the Provinces of Irian Jaya and Aceh. This command was for one province, not three. Therefore Law No. 45/99, which conflicts with and is incompatible with these MPR Resolutions, should be nullified.

Lex Posterior derogat legi Prior

The second legal principle of relevance is *lex posterior derogat legi prior* which means that a new law sets aside a conflicting older law. This rule is also known as 'the doctrine of implied repeal'. This doctrine assumes that the legislative body was fully aware when it enacted the later law that it conflicted with the prior law and by passing the later law the legislative body's intention was to override the prior law.

This principle is particularly relevant because Otsus (Law No. 21/2001) post-dates Law No. 45/1999 by only two years and the DPR which passed both these Laws consisted of the same membership. The members of the DPR, when enacting Otsus, must have known that it conflicted with Law No. 45/99. Therefore, the intention of the DPR can be clearly ascertained. If these two statutes conflict, then the latter, Otsus, is superior and its provisions must be followed and those of Law No. 45/99 set aside. Consequently, INPRES No. 1/2003 has emerged from a statute which should not possess legal validity.

Lex Specialis derogat legi generali

Finally, and most importantly, the doctrine of *lex specialis derogat legi generali* is highly pertinent. This provides that, in the context of a difference in the normative rules between regulations of the same rank or degree, norms which are special set aside norms which are general. A special law defines certain issues more specifically and prevails over a general law on the matters contained in the special law.

Otsus is such a special law and derogates from the general Indonesia-wide regional autonomy law – Law No. 22/99. This is evidenced by a number of factors.

First, Otsus was always intended to be a *lex specialis*. The Background Paper submitted by the Province says that “the speciality of autonomy of Papua means that there are basic aspects applied only in Papua and [which] might not be applied in other areas of Indonesia, just as there are aspects applied in other areas in Indonesia which are not applied in Papua” [para 1.3]. This intention was reflected in Article 74 of Otsus which states that: “All existing statutory regulations shall be declared as applicable in Papua Province to the extent not stipulated in this Law.” The meaning of Article 74 ought to be clear: Indonesia-wide statutory regulations are only applicable in Papua Province if they do not conflict with provisions of Otsus. If there is any conflict, then the provisions of Otsus should take precedence.

Second, in addition to Article 74 there are other textual references within Otsus – particularly in the Preamble and in Article 1 – which show that Papua Province has a special kind of autonomy: a level of autonomy different, distinct and unique from the ‘normal’ level of autonomy provided for in Law No. 22/99 (the general autonomy law for Indonesia). Furthermore, the general elucidation of Otsus states that Papua Province has boundaries as

follows: to the north with the Pacific Ocean, to the south with Maluku Province and the Arafura Sea, to the west with the Provinces of Maluku and North Maluku and to the east with the State of Papua New Guinea. Therefore, in Otsus the government explicitly acknowledged that Papua Province is geographically identical to Irian Jaya Province.

Third, the general nature of Law No. 22/99 (the Indonesia-wide autonomy law) emphasises the special nature of Otsus. The inherent *lex generalis* nature of Law No. 22/99 is illustrated by the fact that it contains several territorial exceptions:

- for Jakarta, as the capital city
- for Aceh and Yogyakarta to retain their special historical privileges
- and for East Timor to be given special autonomy (Law No. 22/99 was enacted before East Timor’s independence).

Law No. 22/99 can be viewed as a blanket covering all of Indonesia but with 4 holes built into it for Jakarta, East Timor, Aceh and Yogyakarta. Otsus merely inserts another hole into that blanket for Papua. Law No. 22/99 is a classic *lex generalis* with special provisions for certain special territories. In these territories it is these special provisions which should always be given priority.

The legal conclusion ought to be that the only procedure that can be used to pemekaran Papua Province is that contained within Article 76 of Otsus. More generally, the provisions of Otsus and other statutory regulations in Indonesia should be interpreted as narrowly or as broadly as is required to give effect to the underlying *lex specialis* nature of Otsus.

Given that the legal position ought to be clear, there has been discussion in Papua about the possibility of taking a judicial review to the Supreme Court or to the recently established Constitutional Court. However, there is concern that the courts may be subject to non-legal influences. Also, law is not the predominant issue here. The issuing of the INPRES was a political act, conducted under the veneer of legalism, and perhaps therefore the situation requires a political solution.

GOVERNMENTAL ISSUES

As well as these legal questions the INPRES and the pemekaran also raise governmental and economic issues.

The Radiogram from the Internal Affairs Department No. 134/221/SJ states that the implementation of INPRES No. 1/2003 must be conducted together with the operation of Otsus for Papua Province, even though the contents of Otsus are different in important ways from the contents of Law No. 45/99. Similarly, many statements from the Government and supporters of the three Provinces within Papua have suggested that there is no incompatibility between the three Provinces and Otsus.⁸ It has been argued that, firstly, the three Provinces will be implemented and then Otsus.

However, seven months after issuing the INPRES, the Government has still not provided a detailed explanation of how Otsus would operate in the context of the three Provinces. All there has been is repeated declarations that the pemekaran and Otsus will proceed. This is indicative of the incomplete nature of democracy in Indonesia. To begin with, the central government acted in an arbitrary manner by issuing the INPRES and it then managed to avoid having to account for its actions. This also reflects the lack of domestic political pressure within Indonesia concerning the Papua question.

More fundamentally, it is not clear if the Government intends Otsus to operate across the whole area of Papua, as a single unit, or if Otsus will be applied separately to all three Provinces. For example, under Article 2 of Otsus which permits regional symbols, will there be one flag and anthem for the whole of Papua or three different flags and anthems? Presumably each new Province would have its own Provincial Assembly (DPRD). Would there then be three MRP or a single MRP to cover all three Provinces? How would a sole MRP exercise its functions across three Provinces? It might also be questioned how likely it is that the Government will establish three MRPs to represent indigenous Papuans when it has thus far failed to establish one.

There is also confusion at the level of Provincial names. Article 1(a) of Otsus states that "Papua Province is the Province of Irian Jaya which is given special autonomy within the framework of the unitary State of the Republic of Indonesia [NKRI]." However, INPRES No. 1/2003 designates the new Provinces as Central Irian Jaya and Western Irian Jaya – not as Central Papua and Western Papua. Therefore, will the new Provinces still be called Papua or will the previous, highly-disliked, Indonesian name of Irian Jaya be revived?

ECONOMIC ISSUES

Another central question, which the Government has yet to address, concerns the distribution amongst the three Provinces of the additional finance that Papua receives under Otsus. This additional finance consists of: 80% of general mining revenue in Papua; 70% of natural oil and gas mining revenue; and 2% of Indonesia's National General Allocation Fund. Since Otsus became effective, Papua Province has been receiving these additional funds, though in both post-Otsus financial years (2002 and 2003) the late release of these funds by Jakarta has caused problems for the financial management of projects. However, Papua's budget has increased substantially and without doubt the financial provisions are one of the best parts of Otsus. Indeed, it may be the case that the Central Government views Otsus from a purely financial perspective – i.e. Otsus means giving Papua more money – whereas Otsus ought to be viewed more holistically as having social, economic, political, moral, historical and cultural components.

Therefore, if there are three Provinces how will these Otsus funds be distributed, assuming that Papua continues to receive them at all? Will the natural resources revenue be distributed on a geographical basis so that Western Irian Jaya will receive revenue from the new BP natural gas project at Tangguh and so that Central Irian Jaya will receive revenue from the Freeport copper-goldmine while the remaining eastern Province will receive nothing from these projects? How will the special 2% fund be distributed amongst the three Provinces? No explanation has been forthcoming from the Government.

CONCLUSION ON INPRES AND PEMEKARAN

The Government has failed to adequately answer the central question that INPRES No. 1/2003 raises. That is, if Papua Province no longer exists in its entirety, how can Otsus be implemented? The official Government policy is to implement the pemekaran and also to implement Otsus. It is the Government's responsibility to explain how the pemekaran operates with Otsus. The absence of an explanation has caused the pemekaran to be dubbed 'the silent policy' in Papua.

Although the policy of pemekaran of Papua Province, from the perspective of administrative governance, is viewed as one of the alternatives for creating effective and efficient governmental administration and advancing development, the format of the pemekaran as regulated in Law No. 45/99 is imprecise and does not provide significant advantages for raising services, empowering the community and accelerating development in Papua. This three Provinces policy has structural flaws and it seems to indicate that the Government is not serious about development in Papua. The INPRES is not about good governance in Papua but about perceived security and political threats.

Given this, the Government's protestations that it remains committed to the implementation of Otsus lack credibility. A possible scenario is that after the three Provinces have been securely established the Government may decide that three Provinces are not, after all, compatible with Otsus and it may then decide to abandon, or radically revise, Otsus. The INPRES does not legally invalidate Otsus, but it risks rendering it politically impotent.

This prospect of revising (i.e. emasculating) Otsus has already been flagged by pro-pemekaran interests. It has been argued that the issuing of Otsus was conducted when the political conditions were "warmed with the aspiration for Merdeka" (Independence) and that the Central Govt made a mistake, especially in providing for the MRP. Behind all this is Jakarta's fear that the MRP may contain pro-Merdeka sympathisers.⁹ Essentially, there is a view that Jakarta enacted Otsus because it had to and that now it can rein Papua back in.

The INPRES is bad for Papua, but it is also a retrograde step for Indonesia as a whole. Otsus constitutes the realisation of the instruction in MPR Resolution No. IV/MPR/1999; so it acquires its legal legitimacy and political value from the representatives of the entire populace of Indonesia. By issuing the INPRES the Government has essentially ignored and disregarded one of its own laws. This is at a time when it is widely accepted that one of Indonesia's seminal problems is the state of the country's legal system and the absence of legal certainty.

Politically, the INPRES undermines those Papuans who are willing to work with Jakarta and narrows the middle ground in Papuan politics. The Papuan Presidium (the peaceful body which supports Independence) has made the point that this is what happens when you engage with the Indonesian Government.

The Presidium opposes three Provinces, although it is hardly a supporter of Otsus either, and it has called for a three-option referendum: 3 Provinces; Otsus; or Merdeka. There is, of course, no likelihood of such a referendum occurring.

There is however a solution to the current situation. The Government should cancel this pemekaran and establish the MRP which could then consult widely within Papua concerning the whole pemekaran issue. After all, Otsus permits pemekaran and provides a procedure for it in Article 76 – albeit a procedure which is internal to Papua, rather than the current, external, Jakarta-inspired pemekaran.

At this year's session, the MPR recommended that Law No. 45/99 and INPRES No. 1/2003 be revised in order to bring them into line with the spirit of Otsus. However, Internal Affairs Minister Sabarno has said, in the aftermath of the Timika trouble, that the government has no intention of dropping Law No. 45/99 and instead it has suggested adjustments to Otsus, particularly concerning the MRP.¹⁰ This is not surprising – given the investment that certain elements have made in this pemekaran policy they are unlikely to abandon it lightly.

STATUTORY REGULATIONS

I will now mention some of the other problems of a legal variety which Otsus faces.

The basic structure of Otsus is that Papua Province is given a general legislative and executive competence from which several areas are then excluded for retention by the central Government of Indonesia. Otsus does not specifically list the powers which can be exercised by Papua Province. The basic proposition under Otsus is that Papua Province has authority over all subjects which do not relate to subjects specifically retained by the central government.

Article 4(1) specifies the regional competence of Papua Province as follows: "The competence of Papua Province covers all sectors of administration, except for competence in the sectors of foreign politics, security and defence, monetary and fiscal, religion and judicature and certain authorities in other sectors stipulated according to statutory regulations."

The elucidation to Otsus then states that "certain authorities in other sectors" covers: National planning policy; Macro national development; Financial balance fund;

State administration system; State economic institutions; Development and empowerment of human resources; Utilisation of natural resources and strategic high technology; and National conservation and standardisation.

Some of these additional Central Government powers are vague and concepts such as “empowerment of human resources” or “national conservation and standardisation” could be used by the Central Government to enact regulations in areas which were intended to be within the competence of Papua Province.

In all other areas of governance not mentioned in Article 4 Papua Province can make its own regulations: PERDASUS and PERDASI. However, in many areas Otsus states that PERDASUS, PERDASI and other actions of the Province must be in accordance with statutory regulations. This occurs 39 times throughout Otsus. The Department of Internal Affairs (Dalam Negeri) has prepared a list of 39 regulations which it claims it must enact before Papua Province can enact PERDASUS and PERDASI. Papua’s regulations must then be in accordance with these Central Government regulations.

There may be circumstances in which provisions of Otsus, or PERDASUS or PERDASI made under Otsus, conflict with these other statutory regulations and the question of whether or not Otsus is superior to other statutory regulations will again arise.

Regional Symbols

For example, Article 2(2) of Otsus says that Papua Province may have its own regional flag and regional anthem so long as they are not used as symbols of sovereignty. Article 2(3) says that these regional symbols shall be further stipulated by a PERDASUS based on the provisions of statutory regulations.

Article 2(3) is included in the list of 39 statutory regulations which Internal Affairs (Dalam Negeri) intends to make concerning Otsus. At present, other regulations exist making it a treasonable offence to fly the Papuan ‘Morning Star’ Flag (as well as other flags in relation to Aceh and Maluku). The Government’s argument is that the design of the Papuan flag, allowed by Otsus, has yet to be negotiated with the Government and that until that time the Morning Star flag will remain banned.

It seems possible that the flag and anthem that Papua would wish to adopt under Article 2(2) would not be permitted according to statutory regulations made under Article 2(3).

It defeats the point of allowing regional symbols if the Central Government chooses the symbol or has a right to veto the region’s choice of symbol. For Article 2 of Otsus to be meaningful the actual choice of regional flag must be for Papua alone. It may be the case that Papua will be allowed any regional flag except for the regional flag that it would want.

Political Parties

Another example of statutory regulations that may cut across powers under Otsus concerns local political parties. Article 28(1) states that: “The inhabitants of Papua Province can form political parties.” However, Article 28(2) then says that “The procedure for forming political parties and participation in the General Election shall be in accordance with statutory regulations.”

Dispute has arisen over whether this Article permits the formation of local political parties in Papua Province, distinct from the national political parties. Law No. 31/2002 about the General Elections in 2004 stipulates that a political party will only be shortlisted by the General Elections Commission, and thus be able to contest next year’s elections, if it has branches in at least two-thirds of Indonesia’s Provinces.

Clearly, this criterion prevents any local political party from contesting the General Election. Given the conflict between Article 28 of Otsus and Law No. 31/2002 on the General Elections there is widespread concern in Papua that Article 28 is another ‘Pasal Kosong’ or ‘empty article’.

Education Law

Jakarta’s attitude towards Otsus has emerged in the context of the recently enacted statute concerning the National Education System. This Law sparked heated debate across Indonesia, largely because of its provisions on religious instruction in schools.

Article 56 of Otsus states that education is an autonomous competence for Papua Province, except that the Central Government shall stipulate the general policy for University-level education and the core curriculum at all levels of education. Consequently, the Indonesian Parliament and the Central Government can only stipulate some broad principles and should not enact detailed regulations concerning education in Papua Province.

Therefore, this Education statute should, almost entirely, be inapplicable in Papua because education is an autonomous competence

according to Otsus. As a matter of constitutional principle and state law the Indonesian Parliament should not legislate for Papua Province in autonomous areas of competence. Such an outcome easily could have been achieved by the inclusion of a territorial extent clause which would simply state: "This Law is not valid in Papua Province." Territorial extent clauses should be included in every new statute enacted by the Indonesian Parliament in the post-Otsus era. For all legislation the Indonesian Parliament should consider whether that subject is a competence retained by the Central Government or a competence for which Papua now has autonomy.

The problem lies with Government Departments when drafting legislation and then with the Indonesian Parliament which debates draft Laws. During the extensive debate on the Education Law it would appear that no one in the Central Government or in the Parliament thought to question whether this Law should even be applicable in Papua. It is this attitude, and also the basic lack of knowledge about Otsus in Jakarta, which is causing many problems.

CONCLUDING OBSERVATIONS

Otsus constituted, firstly, the acceptance by Indonesia that it has failed Papua for the last 40 years and, secondly, the heralding of a fresh start in the relationship. The Preamble concedes that appropriate levels of development, prosperity, rule of law and respect for Human Rights have not been achieved in Papua and promises that the "implementation of the special policy concerned is based on....the supremacy of law, democracy, ethics and morals". The political message underlying Otsus, from the Government's perspective, is that there were many mistakes made during the New Order Era but that we, a Reform Government, cannot be held responsible for the activities of previous Governments and we can only ensure that Papua's future, as part of Indonesia, will be better than its past.

In this context, Jakarta's approach to Otsus has been unfortunate. The issuing of the INPRES, in particular, was a gross breach of trust by the Government of Indonesia.

Operating an autonomous system of governance is not easy – as many long-standing federal and pseudo-federal states can testify. It requires a degree of political and governmental sophistication which Indonesia, perhaps, does not yet possess. However the advantages of

autonomy for Indonesia and Papua remain valid. That is, it maintains Indonesia's territorial integrity while improving Papua's governance and economy and providing a space for Papuans to express their distinctive culture and identity. This was the Government's autonomy strategy for Papua. The most charitable thing that can be said about the Indonesian Government is that perhaps it lacks the confidence to pursue an autonomy strategy.

What is required is a change in ethos on the Government's part so that it understands and acknowledges that Papua, politically and legally, cannot be treated as before and that all actions and policies undertaken by the Government concerning Papua should abide by the provisions, and spirit, of Otsus.

The position of the international community is also important. Many States welcomed and encouraged Otsus as a means of satisfying Papua's legitimate grievances while also maintaining the territorial integrity of Indonesia. If the 'middle way' of Otsus fails then, eventually, the international community may be confronted with the choice of either acquiescing to highly unsatisfactory, if not repressive, Indonesian rule in Papua or supporting a genuine act of self-determination for the territory. The international community would rather not have to make such a choice and if Otsus was fully implemented, respected and developed to its maximum potential it would probably not have to do so. Consequently, the international community may have a role, at this stage, in seeking to persuade Indonesia to revert to an autonomy strategy and properly implement Otsus.

By reverting to policies of divide and rule and security strategies, rather than continuing with the autonomy strategy laid out in Otsus, Jakarta is missing a golden opportunity to resolve Papua's problems and establish trust between Papua and Jakarta. Indonesia can no doubt sustain this policy in the short and medium term. In the long term Indonesia may regret undermining Otsus. Indonesia's policy in Papua is driven by its all-pervading fear of disintegration. Ironically, the greatest threat to Indonesia's territorial integrity comes not from the Papuans, and certainly not from the international community, but from the ill-judged actions of the Central Government. Those elements in Jakarta who are disrespecting Special Autonomy, in the name of defending the State, are in fact doing Indonesia a most enormous disservice.

AUTHOR NOTE

Dr Laurence Sullivan worked from August 2002 - August 2003 on a British Council project at Cenderawasih University in Papua assisting with the implementation of the Special Autonomy Law.

He is a lawyer with the devolved Scottish Government in Edinburgh (1999-2002 and from October 2003+). Dr Sullivan graduated LLB(Hons) from Glasgow University 1993 and completed his PhD in International Law from Cambridge University 2000.

ENDNOTES

- ¹ N.B., a paper by the Justice & Peace Secretariat of the Diocese of Jayapura examines the differences between the draft Otsus and the enacted version.
- ² *Cenderawasih Post*, 15 April 2003.
- ³ *Cenderawasih Post*, 15 April 2003.
- ⁴ *Jakarta Post*, 6 September 2003.
- ⁵ *Cenderawasih Post*, 20 February.
- ⁶ *Papua Post*, 14 April
- ⁷ From, Simon Morin, "Mengapa Instruksi Presiden RI Nomor 1 Tahun 2003 Harus Dicabut", Jakarta, 5 March 2003 and Paper by Dr August Kafiar (Vice-President of Freeport and former Rektor of UNCEN), 29 October 2002.
- ⁸ Susilo Bambang Yudhoyono, Coordinating Minister for Political and Security Affairs, has insisted that there is no contradiction - 5th February. DPR Speaker Akbar Tandjung, speaking after the DPR approved the Inpres, said: "Both laws [UU 45/99 and Otsus] are valid....This means that the division of the province is acceptable." *Jakarta Post*, 14 February 2003.
- ⁹ Decky Asmuruf, (Provincial Secretary (Sekda) of Papua Province) *Papua Post*, 27 February.
- ¹⁰ *Jakarta Post*, 9 September 2003.

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