The Existence of Democratic Governor Election in Particular Autonomous Framework of Papua Province

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Abstract

Every formed state shall have reasons and aims. The aim of state in this realm can be interpreted as state vision, generally aimed to create welfare, proseperity, and happiness for its people. (*bonum publicum, common good, common wealth*). "Sovereignity" concept was actualized in various forms in state government implementation. One of the actualization form on sovereignity concept is "Regional Chief Election such as Governor and Vice Governor Election" Regional Chief Election Regulation is regulated in Article 18 (4) of the1945 Constitution. According to Law of Particular Autonom, Papua Province is governed by a Government and is helped by a Vice Government. Government in addition to serving as chief of the region, also serving as vice government in region, thus, he or she is under and responsible to President and as a regional chief, responsible to the People's Representative Council.

Keywords: Democratic Governor election, Particular Autonomy

1. Introduction

Every formed state must have reasons and aims. The aim of state in this realm can be interpreted as state vision generally aims to create welfare, proseperity, and happiness for its people. (*bonum publicum, common good, common wealth*)¹. According to that, Aristoteles stated that: The Aim of state is for its people's interest, thus they can live well and happily. State is a unity to reach the highset kindness, that is the perfection of human as member of state²".

Constitutionally, the protection of people's interest as the sovereignity holder in Republic of Indonesia is regulated in Article 1 (2) of the 1945 Constitution of the Republic of Indonesia states that "The sovereignty shall be in the hand of the people and implemented according to the Constitution." Regarding the word "sovereignty" in Bahasa Indonesia which came from Arabic "daulah" or "daulat" which means power or government dinasty, which equals to *sovranita* in Italian³. According to Kuntjoro Purbopranoto stated that: " power which is called sovereignty is absolute to its people, however in outside, its absoluteness is limited, by state territorial borders and because of another state's sovereignity which also based on law thus, state that is based on law can only be faced by law".⁴

Padmo Wahjono expressed that : the word *souvereignty/sovereignty* is equal with the words *souvereiniteit, souvereinet,* and *sovranus.* Those words came from Lation word *superanus* which means "the high"⁵. L.J van Apeldoorn explained "sovereignty" came from Latin "*superanus*" or "*superior*" then became "*supremus*"⁶. People as the sovereignty holder in the state according to the 1945 Constitutioon, inted to determine the people who sit in governmence which means legislative power, executive power and yudicative power to take legal actions for their lives (people's lives)

Generally, there is an understanding on the importance of an election as the implementation of people's sovereignty. Election not necessary implemented in modern democracy life (representative democracy). It is recognized that election must run by an institution that has strong commitment towards sovereignty, be independent and has ability to run election well and right.

Government together with people's representative institution at first determines or makes rules, which are agreed whether in constitution form, or implementation rules. The rules must be democratic, complete, and give guarantee for the implementation of people's sovereignty. Government is part of the nation who controls all of the state's assets, thus, government must facilitate all the needs in running the election. Furthermore, there shall be a conducive atmosphere, which is allows for people's aspiration to be channeled optimally and not artificial.

One of the implementation of people's sovereignty in Indonesia is general election. In the development

¹ Deddy Ismatullah and Asep A. Sahid Gatara, in I Gde Pantja Astawa and Siprin Na'a, Understanding State Science and State Theory, Refika Aditama, Bandung, 2009, p. 45.
² Ibid

³ Astim Riyanto, United State – Concept, Principles, and its Actualization, Yapemdo, Bandung, 2006, p.41.

⁴ Ibid p. 39.

⁵ Ibid pp. 41-42.

⁶ Ibid. p.42.

of Indonesian government performance, scope of general election has been expanded, not only related to the membership of the people's representative institutions such as the People's Representatives Council of the Republic of Indonesia, the Regional Provinces People's Representatives Council, and Regional People's Representative Council and the filling position of President and Vice President which run directly, however the concept of general election is was expanded including general assembly of head of region, governor, regent, and mayor. Expension of the general election concept in head of region election has been executed since the material of the General Election of Head of Region in the Law No 32 of 2004 on Regional Government, regulated.

Technically, the first of head of region election regulated in Government Regulation (GR) No 6 of 2005 on Election, Ratification of the Appointment and Dismissal of Head of Region and Vice of Head of Region. Definition on Head of Region Election as regulated in Article 1 no 1 GR of Head of Region Election PP Pemilihan Kepala Daerah, explained that : Head of Region and Vice of Head of Region Election hereinafter called election is a tool of people's sovereignty implementation in provincial area and/or region/municipal according to Pancasila and the 1945 Constitution of the Republic of Indonesia to choose Head of Region and Vice Head of Region

Papua Province as the Province of which Particular Autonomous Status is given accordint to Law No 21 of 2001 on Particular Autonomous for Papua Province, regulates one of the material on Governor and Vice Governor Election. Provision of Article 12 only regulates requirements for Papuan Governor and Vice Governor candidates in the other hand, implementation until inauguration process of Governor and Vice Governer are executed according to the laws. Thus, particular autonomous characteristics only related to the requirements of governor and vice governor candidates which must be the native of Papua (Article 12 (a)), and stages, selection process until inauguration, refer to the laws.

Phrase : "regulated further by the law regulation" as it is stated in Article 13 of the Particular Autonomous Law, refers to the Law No 22 of 1999 on Regional Government. Governor and Vice Governor Election Format through the implementation of the Papuan Particular Autonomous Laws, executed by Papuan's Representative Council (PRC). Authority of PRC to choose Governor and Vice Governor as regulated in 7 (1) of the Particular Autonomous Law of Papua. PRC authority to choose Governor and Vice Governor is cancelled by Constitutional Court through decision No 81/PUU-VIII/2010. The legal consequence of the decision is the loss of special characteristics, which are adopted by Papua Province

Governor Election by PRC is one of the state's recognition form on Particular Autonomous because the Particular Autonomous Laws had been made before the Laws No 32 of 2004 on Regional Government was made and implemented, which regulates Head of Region election, such as Governor, Regent, and Mayor, which directly executed. Alteration and changes on natioanl laws (national legal products) which are adapted to the dynamic of government state development and the development of Indonesian people in the whole, are influential to the Particular Autonomous of Papua existence. "Particular Autonomous" existence is weakened and giving less significant influence in regional government implementation, if legal product establishment in regional government realm does not respect the Particular Autonomous Laws by giving regulation that contains exception for Papua Province on regulated matters. Thus, the political law development will give impacts of such uncertainties of particular autonomous status in governor and vice governor election in Papua Province.

2. The Actualization of People's Sovereignty Concept on Regional Head Election in Indonesia

"Sovereignty" concept is actualized in many forms at state government implementation. One fo the actualization on the sovereignity concept is "Regional Head Election is equal with Governor and Vice Governor Election. Regional Head Election Regulation in Indonesia is regulated in Article 18 (4) of the 1945 Constitution: "Governors, Regents, Mayors, as the respective heads of provincial, regency, and municipal governments shall be elected democratically." The changes of the 1945 Constitution of the Republic of Indoensia also contains regulation on Regional Head Election, it is not stated directly but stated as "shall be elected democratically".

The meaning of "democratic" was interpreted by Government as the direct form of Regional Head election that is carried out by the people. To carry out the provision of the Article, in the Law No 32 of 2004 on Regional Government. Government makes regulation on Regional Head Election. In the general explanation of the Regional Government Laws, considering the duty and authority of the Regional People's Representative Council according to the Laws No 22 of 2003 on the Structure and Position of People's Consultative Assembly, the People's Representatives of the Republic of Indonesia, the Regional People's Representative Council, that the Regional People's Representative Council does not have duty and authority to elect Regional Head and Vice Regional Head, thus democratize election in the Laws is carried out directly by the people.

Regional Head Election is democratically elected in the meaning of "directly elected" shows that Government intends to carry out: (a), people's sovereignty principal as regulated in Article 1 (2); (b), law state principal as regulated in Article 1 (3); and political Human Rights regulated in Article 28E (2) of the 1945 Constitution states "everyone shall be entitled to freedom to be convinced of their belief, express their opinions and attitudes, in accordance with their heart". The guarantee on the rights also regulated in Article 43 (1) of the

Law 39 of 1999 on Human Rights states that "everyone has the right to be elected and to elect in election based on equal right through direct, public, liberal, confidential, fair, and equitable vote in accordance with the laws."

Democracy is a concept that means government where the highest power (or sovereignty) is in the people's hands or democracy is governance by the people or majority government. One of the most common definition of democracy is democracy is governance by the people which the highest power is in the people's hands and run directly by them or their chosen representatives under democracy election system. From this limitation, shows several important elements of democracy such as power, which is implemented directly, or through representative, sovereignty in the people's, free election system. People's sovereignty principle and freedom is very important in the conception. Furthermore, democracy also contains a set of practices and procedures from freedom of long and winding institutional process.

From the practice, democracy can be distinguished as: direct and indirect (representative democracy). Direct democracy is a democracy system which usually all people involve in decision or policy making of which produced by state; they do not represent review, thought, or their interest to other on behalf of them. Direct democracy is older or commonly known as the old Greek democracy or the Athena democracy. This model of democracy commonly implemented in small states and with less number of population. Meanwhile, indirect democracy is more public and enforced in many modern states these days. The big number of population and wide area of state cause indirect democracy or representative democracy is more preferable. In this model, people will choose representatives or officials who will make decision or policical policy, formulate laws and run program for public interest on behalf of them. People represent interest, aspiration, or their view to board members, leaders or official who have been chosen through election. Thus, government authority to make decision or policy and to enforce it, based on people's agreement, which is given through election.

Election is a mechanism to choose representatives or officials on behalf of the people in doing their duties. In the other hand, people choose representatives or officials to represent them in election, thus people also mandate the representatives and officials on behalf of the people, make and take decision or policy and implement the program on behalf of the people. To obtain representatives or officials on behalf of the people, the election must be democratic.

Rights to be active and involve in political activities as natural rights is defined by McClosky as: people volunteering activity to take part in election process. Same with McClosky, Nie and Verba stated that political participation is people's activities.¹ Direct regional head election is considered as real expression of people's sovereignty (in region) not only as viewers but people also involved in determining their future and region. Through direct regional head election is also considered as principal of democracy fulfillment that is people's participation in political life through right to choose and to be chosen as public official (government head/regional head).

Direct regional head election is considered as the implementation of sovereignty as stated in Article 1 (2) the 1945 Constitution of the Republic of Indonesia. Through the regional head election, people's sovereignty is more guaranteed particularly right of the people to involve in government. In the Constitution this right is guaranteed in Article 27 (1): All nationals shall have equal position before the law and government and hold high the law and government, nothing accepted. Furthermore, Article 28 C (2) states: Everyone shall be entitled to improve himself or herself in fighting for their rights collectively to build their community, nation, and state. It is also stated in Article 28 D (3): Each national shall be entitled to obtain an equal opportunity in the government.

By ensuring human rights in the instruments, thus rights are also involved in government in right to choose and to be chosen of which parts of constitutional rights and human rights as well. By having violation on these rights, it is considered as human rights violation and constitutional rights violation. In the preamble of People's Consultative Assembly Decision No XVII/MPR/1998 on Human Rights states, "that preamble of the 1945 Constitution of the Republic Indonesia has mandated recognition, respect, and will for implementation of human rights in organizing social, nation, and state life " (b) dan "that Indonesian nation as part of global citizen shall respect human rights as stated in the Universal Declaration of Human Rights of United Nations and other international instruments on human rights" (c).

Furthermore, in Article 1(3) of the 1945 Constitution states that "the State of Indonesia shall be a constitutional state". Regarding of legal state concept, Aristoteles as the pupil of Plato, in his book *Politica*, provide a view that a good state is a state where governed by constitution and law sovereignty. There are three elements of constitutional: *first*, government implemented for public interest; *second*, governance is implemented according to the laws, not implemented arbitrarily without convension and constitution; *third*, constitutional government means government that is implemented on behalf of the people, not as coercion or

¹ Affan Gaffar, Indonesian Politic: Transition towards Democracy, Pustaka Pelajar, Yogyakarta. 2002, p. 32.

pressure. Constitution is set of regulations dan authority shall regulate the state based on those regulations.¹ Besides Plato and Aristoteles, law state concept (rechtsstaat) was also arised by Freidrich Julius Stahl from European Continental Law of which was inspired by Immanuel Kant. Elements of law state (*rechtsstaat*) according to Stahl are :

- 1. Human rights protection;
- 2. Separation or power division to protect those rights;
- 3. Government based on the constitution; and
- 4. Administration court on dispute².

State law concept (*rule of law*) from A.V. Dicey, who was expert in Anglo Saxon legal system. The elements of *Rule of Law* are:

- 1. Supremacy of the law, is *absence of arbitrary power*, in the sense of a person can only be punished if he/she violates the law;
- 2. Equality before the law. This theorem is applied for ordinary people and officials;
- 3. Ensuring human rights by the laws (in other countries by constitution) and court decisions.³

Views from Stahl or A.V Dicey show that one of the element of law state is human rights protection. Elements of law state which were proposed by those experts are criteria to examine the existence of a law state including Indonesia on the establishment of state law status. As consequences of the establishment of law state, government established regulations on human rights in the 1945 Constitution of which are elaborated further in the national laws.

Constitutionally, this right is ensured in Article 28E (2) which states that each person has the right to be free in his convictions, to assert his thoughts and tenets, in accordance with his consience. The guarantee on that right is also regulated in Article 43 (1) of Human Rights Law states that each citizen has a right to be elected and to elect in election in accordance with equality of the right by direct, public, liberal, confidential, fair, and equitable vote in accordance with regulatons of the constitution.

Governor Election shall be exercised liberally, honestly, fairly, and with dignity in accordance with the constitution, basic values of human rights, democracy principals, Pancasila values and cultural values. All of those will give impacts such as no conflict occurs, all parties accept the result of the election, the election process is executed liberally, fairly, and equally. Jimly Asshiddiqie expressed that, Human Rights is right that inherent to human, thus, that is different from the definition of the citizen's rights which is not included in the definition of Human Rights⁴. Human Rights is the basice right which has been carried by human since he/she was born as a bless from God and does not come from state and law, but from God as the creaturer of the universe.⁵

3. Actualization of People's Sovereignty Concept in Papuan Governor Election

Pursuant to Particular Autonomous Laws, Papua Province is governed by a Governor, which is also called Executive Head and helped by a Vice Governor. Aside from serving as Regional Head, he is also serving as the representative of governor in region, because he is under and responsible to President and as the Regional Head, he is responsible to the Regional People's Representative Council.

Governor and Vice Governor position fulfillment has been regulated in the Laws No. 21 of 2001that is elected by Papuan's Representative Council after receiving consideration and agreement from People's Consultative Assembly. Governor Election by Papuan's Representative Council as it is regulated in the Particular Autonomous Laws, there is a judgment that it was caused during the the Laws No 21 of 2001 making referred to the Laws No 22 of 1999 of which at that time, the Regional Province and Region/Municipality were done by Regional People's Consultative Council. However, if it is traced almost at the same time with the government providing Particular Autonomous Nanggroe Aceh Darussam, which regulated that Governor shall be elected directly.

Governor election by Regional People's Representative Council has changed when the Laws No 22 of 1999 replaced with the Laws No 32 of 2004, that the Regional Head Election whether governor, regent, and mayor are directly elected by the people. In this laws, it is clearly stated that the mechanism of regional head office fulfillment is executed by direct election. This clearly stated in the Article 56 (1): *Regional and Vice Regional Head are elected in one pair candidate which executed democratically in accordance with direct, public, liberal, confidential, honest, and fair basis, furthermore in subsection (2) Candidate pairs as explained above in subsection are submitted by political parties or combined political parties.* Participants of regional and vice regional head election are candidate pairs who are proposed in pairs by political parties or combined

¹ Azhary Tahir, "Law State" in HR Ridwan, "*State Administrative Law*", PT. Raja Grafindo Persada, Jakarta, 2006, p. 2-3 ² Ibid. p. 3.

³ Ibid. pp. 3-4

⁴ Jimly Asshiddiqie, *The Principals of Indonesia Constitutional Law*, PT. Bhuana Ilmu Populer, Jakarta, 2007, p. 616.

⁵ H. Rozali Abdullah dan Syamsir, *Human Rights Development and Human Rights Court Existance in Indonesia*, Jakarta, 2001, p.10.

political parties¹

Relating to governor and vice governor election in regions that have special status and are given particular autonomy, thus in the laws No 32 of 2004 on Regional Government regulates in Article 225 and 226 (1). Article 225 of the Laws No UU 32 of 2004 on Regional Government, states that regions with special status and are given particular autonomy besides regulated with this laws, particular provisions are also implemented which are regulated in the other laws. Further, in Article 226 (1) Provisions in this laws only apply for Special Region of Capital City Jakarta, Nanggroe Aceh Province, and Special Region of Yogyakarta Province, as long as not particularly regulated in separated laws.

In Article 18B (1) of the 1945 Constitution, states that the state shall acknowledge and respect the regional administrative units, which are special in nature as stipulated by law. This provision gives autonomy and decentralization authority that are not equal to in particular special regions, different from autonomy regulations for other regions which are generally regulated based on Article 18 of the 1945 Constitution. Therefore, based on the Laws No 21 of 2001 on Particular Autonomy for Papua Province has specific character that is different from implemented autonomy in other regions. Those specialties can be seen clearly from the central of autonomy in provincial level. This is the recognition that Papuan is one social unity, while regency or municipal shall only be seen as administrative divisions or area. Thereof, governor and vice governor regulations of Papua Province in Papua Particular Autonomous Laws, applied *lex specialist derogat lex generalis* (special regulations shelve general regulations).

However, characteristic of *lex specialist derogat lex generalis* does not have legal power to be implemented because of the lack of further norm regulations. For further implementation of regional head election, government has established Government Regulation of the Republic of Indonesia No 6 of 2005 on the Election, Assignation Verification, and Dismissal of Regional Head and Vice Head; governor election generally included Papuan governor election. Hence, Governor and Vice Governor Election of Papua Province is equal to other provinces in Indonesia that is done directly. The difference is in other Provinces, General Elections Commission, while in Papua Province for verification does Governor and Vice Governor election in all steps, the requirement of prospective candidate is done by Papuan People's Representative Council and originality of Papuan done by Papuan Representative Assembly.

Regent and Vice Regent and Mayor/ Vice Mayor election are executed directly as well as lain Regent and Vice Regent and Mayor/ Vice Mayor election in other regions, as regulated in Article 140 PP No. 6 of 2005, because the Laws No. 21 of 2001 only regulates related matters of Governor and Vice Governor election. Regulations that only be focused on Governor and Vice Governor in the implementation caused problems, as Regent/Vice Regent Election of Jayapura Regency case in 2009, and case of Regent/Vice Regent Election of Mimika case in 2013.

The problems occurred because of the misinterpretation of the requirement of native Papua, because Article 12 (a) of the Laws No. 21 of 2001 requires Governor and Vice Governor shall be native Papua, and for Regent and Vice Regent is not regulated. As the solution of this problem, Papuan Representative Assembly in 2009 released Papuan Representative Assembly Decision No: 14/MRP/2009 on Native Papua Decision as the Special Requirement on Decision of Prospective Candidate of Regent/Vice Regent and Mayor/Vice Mayor in Papua Land. Native Papua decision in Papuan Representative Assembly decision uses criterias: Penentuan orang asli Papua dalam Keputusan MRP tersebut menggunakan kriteria:

- a. Person who was born from native Papua father and mother Melanesia race.
- b. Person who inherits paternal line (patrilineal system)
- c. Person who has cultural basic in native Papuan custom.

Examining the problems, can be stated that Article 12 a linked to the philosophy of the Laws UU No. 21 of 2001 caused menimbulkan *ambigue*, that is one side only based on Article 12 a, thus, the requirement of native Papua can only be applied in Governor/Vice Governor election, while for Regent/Vice Regent Election can not be applied. However, on the other side, by referring to the philosophy of the Laws No. 21 of 2001 and comprehensively examining the laws, thus, the requirement of native Papua for Regent/Vice Regent can not be said as invalid however, it is still decided by Perdasus, that is the formulation whether still requires native Papua in Regent/Vice Regent or not.

In this context, if it is a state, then it is state authority to determine who will be its citizen, however by paying attention to several limitations, such as: international conventions, customary international, and general legal principals relating on citizenship.² So Papua Province can make Perdasus regarding on whoever is recognized as native Papua, this formulation is not being misused for tentative political interest. As the illustration in Governor/Vice Governor election in accordance with the mandate of Article 11 of the Laws No. 21 of 2001 must be elaborated in Perdasus form, which further regulated in Perdasus No. 6 of 2011 on Governor

¹Laws No 32 of 2004 on Regional Government Article 59 (1).

²Sudargo Gautama, *Citizens and Foreigner*, *Following the Rules and Examples*, Bandung, 1997, p. 7.

and Vice Governor Election. The requirement of native Papua, stated in Article 2 (1) "Native Papua is a person who comes from Malenesia race that consists of Papua native tribes" furthermore, people who come from Malenesia race that consists of Papua native tribes, explicitly explained as "a person whose father and mother come from Malenesia race that consists of Papua native tribes". It means that to be nominated as Governor and Vice Governor must be a person whose parents are native Papua.

This provision caused unfairness, because Article 1 No. 21 of 2001 provides wider chance that is not only native Papua whose one of his parents is native papua, however not native Papua can be a candidate of Governor and Vice Governor, the important thing is recognized by particular customary law community. Factually, before Papua became part of Indonesia, the native Papua had lived together with non-native Papua from other parts of Indonesia, in particular on the coastal area of Papua.

Referring to this analysis, solution is needed to re-arrange the native Papua requirement, that is referring to 6 (1) of the 1945 Constitution before amendment, the President shall be a native Indonesian citizen, however the formulation still acommodated several parts of Perdasus No. 6 of 2011, then the formulation became: Governor and Vice Governor candidate shall a person whose father or mother comes from Melanesia race which is Papua native tribe.

4. Conclucion

Democracy is a concept that means government where the highest power (or sovereignty) is in the people's hands or frequently stated that democracy is government by the people or majority government. One of the most common definition of democracy, that democract is government by the people, where the highest power is in the people's hands and directly run by them or the elected representatives under liberal election. According to Particular Autonomous Laws, Papua Province is governed by a Governor also called Executive Head and assisted by a Vice Governor. Governor not only serving as Regional Head but also serving as government representative in region, thus, governor is under and responsible to President and as Regional Head, responsible to Regional People's Representative Council.

Governor and Vice Governor position fulfillment has been regulated in the Laws No. 21 of 2001 that is elected by Papua People's Representative Council after receiving recommendation and agreement from Papua Representative's Assembly. Governor election by Papua People's Representative Council as regulated in the Particular Autonomous Laws, there is opinion that was caused at the Laws No. 21 of 2001 making, referring to the Laws No. 22 of 1999, at that moment Provincial and Regent/Municipal Regional Head by Regional People's Council.

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