



State Recognition Of Indigenous Communities' Political Rights (Right To Vote) In General Elections Implementation

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Abstract- Constitutional rights are fundamental rights for all Indonesian society, including indigenous communities that uphold the values of their customary law. Often, customary law differs from the positive law that applies in Indonesia, but that is not a reason to deny customary law within indigenous communities in a particular area. The indigenous community in Yahukimo is an example of a community that still practices its customary law in various aspects of life. Therefore, even in the implementation of elections, they use their own customary law and do not adhere to the Election Law. Noken is their way of conducting voting. Constitutional recognition of Noken can be accepted by the Constitutional Court as a cultural value.

Keywords: Noken, Constitutional, Indigenous Community.

I. INTRODUCTION

General elections are a form of implementation of people's sovereignty to actively participate in determining the form of government. General elections held in Indonesia are a means of achieving democratic government through a fair and just mechanism. The existence of elections is recognized by countries that support the principle of popular sovereignty and take place in different political systems, whether democratic, dictatorial, or totalitarian. The core of the election problem arises from two fundamental issues that are always challenged in state practice, namely the concept of popular sovereignty and the understanding of democracy. Democracy is the embodiment of people's sovereignty and general elections reflect this democracy. General elections are also one of the essential means of expressing citizens' human rights. Therefore, to fulfill the citizens' human rights, it is imperative for the government to ensure the implementation of general elections according to the predetermined state schedule. Following the principle of people's sovereignty, where the people are sovereign, all aspects of organizing general elections must also be returned to the people for their determination. A government that fails to guarantee the conduct of general elections, delays the implementation of general elections without the consent of the representatives of the people, or takes no action to facilitate the proper conduct of general elections, constitutes violations of human rights.

The purpose of general elections is none other than to implement the

principles of democracy by electing representatives of the people in the legislative bodies (Saleh, 2009). All of this is done in order to involve the people in the affairs of the state. The implementation of democracy through general elections is expected to be conducted in a healthy, honest, fair, and democratic manner, in accordance with the spirit of the established legislation. Along with its development, the implementation of elections has undergone changes both in technical aspects and systems. Various forms of changes in the implementation of elections are influenced by the cultural characteristics of the society. The Indonesian nation has unique characteristics that have been shaped by history and the development of its culture. These characteristics influence the legal system as the formation of a legal system is closely related to the culture of society. The characteristics and identity of a nation significantly determine the foundations of nationalism and statehood in the constitution. Considering this, it is reasonable for the Indonesian nation, formed by various ethnic groups, to recognize the existence of indigenous laws of the native people, namely customary law, which is still highly respected by indigenous communities. Law does not arise from arbitrary actions but is constructed and can be found within the spirit of society. This aligns with what Von Savigny taught, that law follows the spirit or ethos (*Volkgeist*) of the people in the society where the law applies. Each society has its own *Volkgeist*, and as a result, the laws of each society differ as well.[1]

The law being referred to here is customary law. Based on Von Savigny's teachings, customary law essentially permeates the positive law of a nation, and the roots of a country's statehood can be traced back to its own history, as reflected in its customary law. Guided by *Volkgeist*, it is common for laws to lack universal applicability because each society possesses its own distinct spirit deeply rooted in its values, thereby influencing the understanding of the applicable law within that specific community. The history of the formation of the Indonesian nation's constitution began with the process of deliberating the 1945 Constitution, which shows that the 1945 Constitution was created with aspirations rooted in the unique spirit of the Indonesian nation and the customary statecraft experiences practiced by the Indonesian society. As Soepomo stated during the BPUPKI deliberations, "the foundation and structure of a state are related to its legal history (*rechtsgeschichte*) and social institutions." [2]

The existence of law in Indonesia is closely related to society. Without society, the law is like an inanimate object, unable to fulfill its purpose and objectives. Therefore, the law must be able to provide protection for the dignity and honor of individuals, including the protection of fundamental rights for everyone. One of these fundamental rights is implemented through constitutional rights, which are essentially possessed by every Indonesian citizen, regardless of their location, whether in urban or rural areas. The government must provide legal protection to all Indonesian residents based on the concept of recognizing human rights. Protection of

human rights does not only include protection of individuals but also protection of individual constitutional rights in the field of customary law. The realization of the protection of constitutional rights from a customary law perspective can be seen through a few provisions originating from basic norms (fundamental recht statutes or basic law), starting from the 1945 Constitution, MPR decrees, replacement laws/regulations. Laws, government regulations, presidential regulations, provincial regulations, and government/city regulations. The development of human rights thinking in Indonesia has experienced ups and downs, which can clearly be seen through the table of historical periods in Indonesia from 1908 until now. Essentially, the concept of human rights is not solely about individual rights. The concept of human rights has been known by the Indonesian people, especially since 1908 with the birth of Budi Utomo, which marked the emergence of awareness about the importance of forming a nation-state through various writings in a magazine called *Goeroe Desa*. The prominent concept of human rights at that time revolved around the right to independence, meaning the right of a free nation to determine its own destiny (the rights of self-determination).[3]

Paragraph 3 of Article 1 of the 1945 Constitution of the Republic of Indonesia states that Indonesia is a rule of law state and the consequence of a rule of law state is respect for the law as the supreme commander of the Indonesian state administration. According to J.G. Steenbeek, the constitution as the highest principle of a country must include at least three main elements: (1) guaranteeing and respecting human rights and the rights of citizens, (2) establishing the basic structure of the state, and (3) dividing and limiting state obligations are also fundamental issues.[4] Every country is obligated to protect and uphold human rights. The regulation of human rights in the constitution demonstrates that human rights have become a constitutional matter, binding all relevant parties, especially state officials and government authorities at both the central and regional levels, including the executive, legislative, and judicial branches. The fulfillment of human rights is not solely the responsibility of state officials and government authorities but also of every individual and citizen. However, it is explicitly stated in the 1945 Constitution that the responsibility for implementing human rights lies with the government.[5]

As a member of the international community, Indonesia must respect, and uphold the principles and objectives of the UN Charter and the Universal Declaration of Human Rights (UDHR), abbreviated as UDHR. The UDHR covers human rights and fundamental freedoms, serving as a benchmark for the protection and respect of human rights for both UN members and individuals within its jurisdiction. During the construction process, on 16 December 1966, through resolution 2200A (XXI), the United Nations General Assembly adopted the International Covenant on Civil and Political Rights (ICCPR) and its optional Protocol, as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The International Covenant on Civil and Political Rights and its Optional Protocol came into force on March 23, 1976. This means that the Indonesian government is responsible for ensuring the realization of the civil and political rights of all citizens. The political rights stipulated by the UDHR include the right to participate in the government of a country directly or through freely chosen representatives, and the right to equal opportunities to occupy positions in government. . summary. Government power must be expressed through periodic and honest elections based on universal and equal suffrage, carried out by secret ballot or other free voting procedures that guarantee freedom of choice.

One of the political rights guaranteed in international covenants such as the ICCPR is the right of every citizen to participate in public or political affairs, such as the right to vote and be elected, and to have equal access to public office in their country based on the same general qualifications. The Indonesian constitution also includes provisions regarding the right to vote, stated in Article 28, which guarantees the right of every citizen to vote and be elected in the context of representative institutions of the people. This aims to realize the organization of the state, which declares itself as a country based on the sovereignty of the people through representation. Therefore, in Indonesia, general elections are held periodically every five years to elect representatives in the district/city regional representative council, provincial representative council, the national parliament, the Regional Representative Council, the President, and the Vice President. This is a manifestation of the fulfillment of civil and political rights to vote and be elected within the framework of representative institutions as the voice of the people. General elections are closely related to the functioning of a democratic and rule of law state.

The existence of indigenous peoples in Indonesia cannot be denied because they existed long before the independence of the Republic of Indonesia. Indigenous communities are groups of people who share kinship ties and have common life rules that have been adhered to for generations. They have their own traditional customs and practices, which are often not recognized by the government, especially in the period before the reformera, as they are considered contrary to modern laws. Political and legal recognition for indigenous communities is their rightful entitlement, not just in the form of symbolic written recognition, but also through concrete implementation in the governance and daily life. One concrete example of state recognition of the constitutional rights of indigenous communities in the political realm, particularly regarding the conduct of general elections, is through the Constitutional Court Decision No.47- 81/PHPU.A-VII/2009. Initially, this decision sparked controversy because the customary practices of indigenous communities differed from the prevailing positive law. However, it is essential to respect the existence of indigenous communities and their deeply held traditions. The Constitutional Court Decision No.47-81, related to disputes over the results of general elections, originated from electoral violations in three electoral districts in Yahukimo Regency, Papua Province.

Based on the testimonies of witnesses, there was no voting held in two electoral districts, while one district had issues with the voting process. In the Lolat district, voting was done through acclamation, where all community leaders and members were gathered in one location. The voting process was led by the customary chief, and through acclamation, they selected political parties and candidates for the Papua Regional Representative Council. This kind of voting method had become a customary practice in Yahukimo due to the challenging geographical location of the region, situated in the mountains, which made the distribution of election logistics difficult.

Based on the election results in Yahukimo, Elion Numberi obtained 3,030 votes through acclamation, but his votes became null when they reached the Provincial Commission of Papua. The candidate who received the highest number of votes according to the data from the Provincial KPU was Paulus Yohanes, with a total of 256,047 votes. Half of his total votes, 148,000 votes, came from Yahukimo, even though there was no voting in two electoral districts, and the acclamation voting had declared Elion as the winner. Consequently, Elion Numberi brought this issue to the Constitutional Court to request a re-voting. These facts represent the diverse reality of Indonesian society and highlight the existence of customary laws that are firmly held by indigenous communities, which cannot be denied by positive law. The Constitutional Court decision that granted Elion Numberi's request for a re-voting due to suspected irregularities also acknowledged the possibility of using "traditional" voting methods while considering local customary laws. This article delves deeper into examining the political rights of indigenous communities recognized by the state, particularly concerning the implementation of elections (general elections), with a case study on Constitutional Court Decision No.47-81/PHPU.A- VII/2009. The focus of the issue is how the state recognizes and respects the constitutional rights of indigenous communities in the political field, specifically the right to vote.

II. RESEARCH METHOD

The research utilizes a normative legal and socio-political approach, with a focus on legal and socio-political literature. The material encompasses legislation and materials that cover the main scope of the research topic. Legal research aims to examine legal norms that have coercive effects (sanctions) or social processes that legitimize decisions made by authorized officials.[6] The socio-political research approach is intended to transform adequate empirical interpretations into a new conceptual framework that can be tested. If the operational definition and empirical data sources have perfect validity, the analysis hypothesis is identical to the initial conclusions. [7] According to Judith Green, research that relies on the process and main objective of understanding the research object from a socio-political practical aspect leads to descriptive data analysis.[8] Qualitative research involves procedures to gather data and produce descriptions. Constitutional rights of

indigenous communities, which are often overlooked in the implementation of elections, require the stance and policies of election organizers that are classified within the electoral system.

III. FINDINGS AND DISCUSSION

The Constitutional Rights of Indigenous Communities in Indonesia

Social interactions between civilizations from an anthropological perspective give rise to communities or groups of people with distinct socio-cultural characteristics among different groups or regions. These communities live exclusively according to customs and traditions inherited from their ancestors or adapt and assimilate the civilization brought by external parties. These communities are referred to as indigenous communities or, as Prof. Dr. C. Snouck Hurongro called them, customary law societies. Legal associations or customary law societies (*rechtsgemeenschap*) are subjects of law, as stated by Van Vollenhoven. Law without subjects of law is mere deception, as the subjects of law are the supporters of law, namely those who support the rights and obligations regulated by the law.[9] Customary law continues to exist and evolve, even though it has faced obstacles, challenges, and various forms of threats for decades. Customary law has its own distinct nature and uniqueness compared to other legal systems. Three unique characteristics of customary law include being highly traditional in nature, capable of change, and adaptable.[10] These characteristics indicate that while customary law maintains its traditional values, it can also embrace changes that influence it, showcasing the flexibility of customary law.

Hilman Hadikusuma argues that Indonesian society is comprised of diversity that has existed since the era of Malay Polynesia because of different ancestral origins, places of residence, natural environments, and the influence of major religions that have blended with the local indigenous cultures throughout the archipelago. The indigenous legal communities in Indonesia today originate from the Malay Polynesian ethnic groups.[11] Traditional constitutional law received little attention from the government before the reform era. Although the founding fathers recognized the importance of traditional constitutional law and formulated its recognition of the existence of indigenous legal communities in the provisions of the 1945 Constitution prior to its amendments and explanations, the policies developed at that time aimed for centralization and standardization of state administration at the regional level. The legal aspects of indigenous communities were limited to civil law matters, which did not involve much government intervention. Even existing legislation aimed to standardize the governmental structure without considering the existing societal structure, resulting in communities having to adhere to unfamiliar social norms and structures that may not align with local values. This led to tension and social injustice, often leading to conflicts.

With the advent of the reform movement, the need for recognition and

protection of indigenous legal communities emerged. Policies shifted from centralization to decentralization and development based on local wisdom with respect for indigenous legal communities, including traditional constitutional law. The affirmation of recognition for indigenous legal communities and traditional constitutional law was achieved by incorporating normative elements into the explanations of the 1945 Constitution, making them an integral part of the articles. This was intended to reaffirm and strengthen these provisions to ensure their implementation in the practice of nation-building and governance. Regarding community solidarity, customary law and customary law of the constitution are regulated in Article 18B(1) as follows: (1) The State recognizes and respects regional government units that have special and distinct characteristics recognized by statutory regulations. (2) The State recognizes and respects the unity of customary law communities and their traditional rights, as long as they still exist and are in line with the development of society and the principles of the State, the Unitary State of the Republic of Indonesia is regulated by law.

The provisions of Article 18B of the 1945 Constitution serve as the basis for legal pluralism, particularly in terms of local government in accordance with the respective traditional constitutional law. Within the national legal system, there are several smaller and limited legal systems that are interconnected and organized within the framework of the national legal system. Indigenous legal communities are social communities (*paguyuban*) of human beings who feel united based on shared ancestry and/or specific territories. They inhabit specific areas, possess their own resources, are led by individuals or a few individuals who are regarded as having authority and power, adhere to a set of values as a guiding principle in life, and have no desire for secession.

The contents of Article 18B paragraph (2) of the 1945 Constitution as a condition for the existence of customary law communities in Indonesia consist of four conditions. First, "as long as it is alive" which means that the ancestral territory or territorial area of customary law communities can still maintain its existence and not fade away due to external influences. Members of traditional law communities remain bound by strong blood ties. Second, "in accordance with the development of society", meaning that traditional provisions must not conflict with the progress of today's society which cannot avoid global influences. Third, the "principle of the Unitary State of the Republic of Indonesia" which means that the laws enforced in society are a true embodiment of customary provisions or customs that have been passed down from generation to generation. Fourth, "regulated by law", meaning that customary law which is still firmly adhered to by customary law communities, has been deemed valid in the 1945 Constitution (Article 18B), explained in more detail in other legal regulations such as Law Number 24 of 2003 concerning the Constitution. Court. The provisions in this law, among other things, regulate that the customary law community as a unit is one of the parties that can become a litigant in a case at

the Constitutional Court, as regulated in Article 51 paragraph (1) letter b of the Law. law. Number 24 of 2003.

Regarding the indigenous legal community, Natabaya quotes the definition proposed by Hazairin and Surojo Wignjodipuro. According to Hazairin, it is "social units that have the completeness to stand independently, namely having legal unity, governing unity, and environmental unity based on collective rights to land and water for all members." Meanwhile, Surojo refers to the indigenous legal community as a "union that constitutes units with an organized and lasting structure, having their own leadership and wealth, both material and immaterial." [12] The legitimacy of the constitutional rights of indigenous peoples is not only recognized in the 1945 Constitution and Law Number 24 of 2003 concerning the Constitutional Court but is also recognized in the 2007 UN Declaration on the Rights of Indigenous Peoples, especially in the 2007 preamble and article 27. Preamble to the Declaration The United Nations states: "It is also recognized that the situation of indigenous peoples varies between regions and from one country to another and that national and regional characteristics and different historical and cultural contexts matter. must be taken into account." Article 27 states that "The State must establish and implement, in cooperation with the indigenous peoples concerned, a fair, independent, impartial, open and transparent process, recognizing the legitimacy of laws, traditions, customs and systems customary community lands, to recognize and regulate the rights of indigenous peoples in relation to their lands, territories and resources, including resources traditionally owned, occupied or used. Indigenous communities have the right to participate in this process.

The recognition of the constitutional rights of indigenous peoples is also in line with the International Labour Organization (ILO) Convention of 1986. These constitutional rights are inherent to indigenous peoples as individuals or as a community with a customary environment. However, due to differences in sociocultural characteristics compared to the wider society, there is a need for concessions or protection as a reference and guarantee of equal treatment as citizens, ensuring their access to livelihoods easily.

The recognition and respect for special or unique local government units encompass the recognition of the application of customary constitutional law in accordance with the local community's structure. This includes both the aspects of local government structure and its formation. Communities with special and unique structures cannot be forced to adhere to provisions that are not suitable. This recognition is intended to include customary constitutional law, both at the village and nagari levels, clan levels, or even broader levels. Reimposing customary constitutional law, which is no longer alive within the community, on a local community that has significantly different structures and cultures would be unreasonable and inappropriate.

Indigenous communities have their own legal system known as customary law, which serves as a guide for their communal life. The customary

law of the majority of indigenous communities is unwritten, although there are some written customary laws. Unwritten customary law is flexible and easily adaptable, allowing it to be adopted and aligned with the formal laws of the state since formal laws are essentially derived from customary law. However, the issue in Indonesia lies in the fact that the formal legal system of the state is a product of imported laws from other countries, making it challenging to accommodate the indigenous legal system. As a result, indigenous communities lack strong constitutional rights within the state legal system.

The constitutional rights of indigenous communities are fundamental rights of every individual to receive recognition and equal treatment in various sectors of national life. This ensures that they (indigenous communities) have the opportunity to develop themselves and their communities effectively, alongside all other non-indigenous citizens.

The State's Recognition of the Constitutional Rights of Indigenous Communities in Elections

On the previous discussion, it has been explained that the state has recognized the existence of indigenous communities, which is manifested through permanent juridical recognition by the Indonesian state constitution in the form of the TAP MPR No. XVII/MPR 1998 on Human Rights. The essence of the decree states that the State Institutions and all Government Apparatus must respect, uphold, and disseminate the understanding of human rights to the entire society. The respect, enforcement, and dissemination of human rights by the community are carried out through societal movements based on their awareness and responsibility as citizens in societal, national, and state life.

The indigenous community in Yahukimo, as part of Indonesian citizens, adheres to their customary law in carrying out all aspects of their daily lives, which are respected and protected by the constitution as long as they are not in conflict with Pancasila and the 1945 Constitution. The implementation of general elections to elect the Regional Representative Council (DPR), Regional Representative Councils (DPRD), and Regional Representative Councils for Papua (DPD) by the indigenous community in Yahukimo is considered part of their activities that are subject to their customary law. Therefore, in the implementation of elections, the indigenous community is not subject to Law No. 10 of 2008 concerning Elections but follows their customary provisions. This is also supported by Perpu No. 1 Tahun 2008 tentang Perubahan Atas Undang-Undang No. 21 Tahun 2001 Tentang Otonomi Khusus Bagi Provinsi Papua.

Legal recognition of customary law communities, apart from being regulated in the MPR Decree, is also regulated in Article 6 of Law Number 39 of 1999 concerning Human Rights. Article 6 emphasizes that in advancing human rights, differences and needs within customary law communities must be considered and protected by law, society and the government. The cultural identity of indigenous peoples, including their rights to customary lands, is protected over time. Furthermore, Article 18B paragraph (2) and Article 28I

paragraph (3) of the 1945 Constitution as amended also recognize the existence of customary law communities who enforce their customary laws. Article 18B(2) states that the State recognizes and respects the unity of customary law communities and their traditional rights as long as they still exist and are in accordance with the development of society and its rights based on the principles of the Unitary State of the Republic of Indonesia, regulated by law. Next, Article 28I(3) clearly states that the cultural identity and traditional rights of the community are respected in accordance with developments over time and civilization.

The juridical recognition reflected in the constitution, as explained above, is a concrete form of Indonesia's recognition and respect for the existence of indigenous communities. This recognition has taken a longtime and sacrifices, even though customary law is the original law of Indonesian society that existed first and has its own way of life. However, in practice, during the New Order era and the early days of the reform era, it was often not recognized by the government.

The state's support, especially from judicial institutions, for indigenous communities and their laws gradually becomes apparent through the decisions made by judges regarding issues involving indigenous communities. Customary provisions have become a consideration for judges in deciding a case, as judges have become aware that the basis of the law is not limited to written formal laws but also includes the unwritten laws that are alive and practiced by indigenous communities. One concrete example is the case of disputes over the results of general elections for members of the Regional Representative Council (DPD) in Yahukimo Regency, where the procedural implementation was adjusted to the mechanisms of customary law. Some consider this model unconventional and in conflict with the election procedures regulated by UU No. 7 Tahun 2017 tentang Pemilihan Umum (Election Law).

General elections held in Yahukimo Regency since 1971 were held independently, with ballot papers marked by representatives of tribal leaders. Marking is not carried out at the TPS and marked ballots are not put in the ballot box but in a traditional Papuan bag called a "Noken". This procedure is called token election, that is, the traditional election system. This election model emerged in a Constitutional Court trial when there was a dispute over the election results proposed by Pdt. Elion Numberi and Hasbi Suaib, S.T. The applicant's concern is not with the constitutionality of the token model as a voting method, but with the dispute over the election results for DPD members. However, elections with a token model are directly related to the validity of the election and the number of votes contested. Therefore, when the votes obtained in an election using the token model are declared valid, the token model is implicitly recognized as a constitutional voting procedure.[13]

The Constitutional Court Decision No. 47- 81/PHPU.A-VII/2009, in

principle, granted the request of the first applicant, Elion Numberi, which called for a repeat vote in 37 districts and a recount in 14 districts in Yahukimo Regency, Papua Province. The repeat vote and recount were decided upon during a plenary session before the final judgment was handed down. The core considerations of the Constitutional Court in its decision are as follows: First, the election process was undemocratic, as in Yahukimo, 37 districts did not conduct the marking as required by the applicable regulations, but instead relied on agreement or "acclamation." Second, the Constitutional Court, in the case of Yahukimo, still respected the cultural practice of conducting elections through collective decision-making ("warga consensus" or "acclamation"), which has been accepted by the community. Third, allowing election irregularities to persist would undermine democracy and lead to repetition of such issues. Fourth, the Constitutional Court is not bound to examine and decide solely based on quantitative aspects by merely recapitulating the officially declared vote counts by the Election Commission (KPU). Instead, the Court has the authority to order a repeat vote and recount.

The Constitutional Court's decision has shown progress by rendering an interim decision rather than a final decision, and this was made possible through the introduction of a revised Constitutional Court Regulation. In comparison to the previous four decisions on regional elections (pemilukada) in 2008 and 2009, which were finalized and legally binding, the consequences are different. For an interim decision, the Constitutional Court has the authority to oversee the implementation of the decision and ensure compliance by the election organizers. The Election Commission (KPU), both at the provincial and regency/municipal levels, still has the obligation to be accountable for the vote count and recount as ordered by the judicial institution.

Through its decision, the Constitutional Court has set aside procedural provisions and disregarded certain positive legal provisions, particularly those of a formal nature that regulate the authority of the Constitutional Court and the procedures or mechanisms within the general election system. However, the constitutional judges did not entirely ignore positive legal provisions. In the legal considerations of the decision, the Court also based itself on certain provisions of the constitution and other legislation. The legal foundations used by the Court are mostly fundamental or substantive in nature, such as provisions related to the principles of a democratic rule of law, democracy based on law, constitutional rights of citizens, principles of legal certainty and order, and the principles of fairness and justice in elections. Additionally, the Court relied on sociological conditions, accommodating certain local cultures and accepting and recognizing customary law still adhered to by local indigenous communities within the national electoral system. The Constitutional Court's decision explicitly and clearly accepts the traditional representation-based acclamation mechanism as a valid, constitutional method that does not contradict the one man one vote mechanism already implemented since the direct presidential elections in 2004 and regional elections (Pilkada) since 2005.

The Constitutional Court has made a new breakthrough in the voting procedures of general elections. The Court's decision serves as jurisprudence for any traditional model of elections within the Indonesian electoral system, both in legislative and executive elections at all levels of governance. The norm arising from the Court's decision is a *lex specialist* norm in electoral law, which previously only legalized the principle of one man one vote with the method of casting/marketing ballot papers.

In summary, the Constitutional Court's decision No. 47-81, regarding the calculation of general election results, can be concluded that the Court relied more on principal or substantive legal considerations rather than procedural provisions. This decision offers a new perspective on the organization of elections, particularly in the practice of DPD (Regional Representative Council) elections.

The model of general elections using "noken" reinforces the role of customs in building democracy. This model is carried out through deliberations between tribal chiefs and the community. The community engages in discussions to determine which party and who will be chosen as their representatives in parliament. After the deliberations, tribal chiefs are assigned to represent the voters in marking the ballots. The marked ballots are then placed inside the "noken" according to the agreed-upon choices. The noken, a large pouch filled with stones, pigs, tubers, and firewood, symbolizes the festive atmosphere of the elections. For the people of Yahukimo, elections are synonymous with joyful celebrations. The tribal chiefs are also busy marking the ballots for the designated parties based on the ballots placed inside the noken pouches. The marked ballots are then compiled in form C1. The tribal chiefs in Yahukimo believe that elections should not create animosity among them. The people of Yahukimo do not want to be divided due to different choices, so they conduct deliberations beforehand to decide who or which party to vote for.[14]

The deliberations conducted by the indigenous community in Yahukimo reflect the customary constitutional law, which is a characteristic of Indonesia's governance system. Deliberations are necessary to ensure that the desires of each community member are heard and agreed upon in decision-making forums. Deliberations can also serve to limit the power of overly authoritarian parties, as through deliberations, consensus can be reached and accepted by the members. The geographical conditions have a significant impact on the implementation of elections in remote areas. The delay in logistics delivery results in electoral processes in several regions (especially remote areas with limited access to transportation) being unable to proceed according to the predetermined schedule. Due to these factors, the local communities in remote areas resort to implementing elections in their own unique ways.

In its decision, the Constitutional Court stated that based on legal facts, the general election in Yahukimo Regency was not carried out through marking

on ballot papers but rather through "community deliberation" or "acclamation". The Constitutional Court understands and respects the cultural values that exist among the Papuan people in holding elections through a "community consensus" or "acclamation" system. This is because holding elections in accordance with applicable laws and regulations can cause conflict between local groups. The Constitutional Court is of the opinion that they should not be involved in a system of competition or division within and between groups that could disrupt the harmony they uphold. The Constitutional Court applies a progressive legal paradigm by not solely relying on a legal perspective, but also accommodating and recognizing customary law that exists in society.

Referring to the Constitutional Court ruling, it demonstrates that the state, in this case, the Constitutional Court, has acted wisely and judiciously in deciding a dispute involving customs or customary law that still applies to a particular indigenous group or community. The Constitutional Court is not solely bound by formal legal foundations in the form of written legislation but also respects unwritten laws that are highly valued by the indigenous community still existing in a particular region. Essentially, enforcing written legal provisions on indigenous communities that highly value customary law is equivalent to provoking internal conflicts among the indigenous communities, which adversely affects their development, as written laws, in general, significantly differ from the customary laws adhered to by indigenous communities.

The Constitutional Court indirectly conducts legal discovery (recht finding) by considering customary law that still exists in society. The Constitutional Court collaborates between customary law and the prevailing electoral system to fill the representative institutions in Indonesia. If related to Durkheim's typology, this ruling attempt to reconcile the tensions between mechanical solidarity and organic solidarity in society. Regarding these forms of solidarity, Durkheim proposed a typology that aims to dichotomously differentiate between two types of solidarity: mechanical and organic. Society evolves from the old with mechanical solidarity to the new with organic solidarity. This development is parallel and in line with the increasing differentiation of division of labor within society, from segmental to functional differentiation. In Durkheim's concept, this differentiation of division of labor cannot be disregarded as a central theme that explains various changes in structural matters and the restructuring of society, its types of solidarity, and the function of law. [15]

IV. CONCLUSION

In conclusion, the Constitutional rights of indigenous communities in Indonesia have gradually gained recognition and protection over time. The Indonesian government has acknowledged the existence and importance of indigenous legal communities, incorporating them into the provisions of the 1945 Constitution and other legislation. The recognition of indigenous communities and their traditional constitutionallaw is based on the principles

of respecting regional governance units with special characteristics and the rights of indigenous legal community units.

Indigenous communities in Indonesia have their own legal systems known as customary law, which have unique characteristics of being highly traditional, capable of change, and adaptable. These legal systems are essential for the communal life of indigenous communities and serve as a guide for their daily activities. However, the formal legal system of the state, which is influenced by imported laws, poses challenges in accommodating and integrating the indigenous legal system.

The recognition of the constitutional rights of indigenous communities is not limited to the Indonesian constitution but is also reflected in international instruments such as the United Nations Declaration on the Rights of Indigenous Peoples and the International Labour Organization Convention. These rights emphasize the protection of the cultural identity, traditions, and customary lands of indigenous communities, as well as their participation in decision-making processes.

The state's recognition and support for the constitutional rights of indigenous communities have been demonstrated through judicial decisions that take into account customary provisions. Judges have acknowledged the importance of unwritten laws and have considered them in their rulings. An example is the case of general elections in Yahukimo Regency, where the token model of elections, based on customary practices, was recognized and validated by the Constitutional Court.

While progress has been made in recognizing and protecting the constitutional rights of indigenous communities in Indonesia, challenges and tensions still exist. It is important for the government to continue supporting and respecting the rights of indigenous communities, ensuring their equal treatment and opportunities for development within the nation. The integration of customary law with the formal legal system and the promotion of cultural diversity and pluralism are crucial steps towards achieving social justice and harmony in Indonesian society.

REFERENCES

1. Rasyidi, L., & Rasyidi, I.: *Dasar-Dasar Filsafat dan Teori Hukum*. Citra Aditya Bakti, Bandung (2001)
2. Maladi, Y.: *Eksistensi Hukum Adat Dalam Konstitusi Negara Pasca Amandemen*. *Mimb. Huk.* 22, 453 (2010)
3. Manan, B.: *Perkembangan Pemikiran dan Pengaturan Hak Asasi Manusia di Indonesia*. Alumni, Bandung (2001)
4. Soemantri, S.: *Prosedur dan Sistem Perubahan Konstitusi*. Alumni, Bandung (2006)
5. Affandi, H.: *Tanggung Jawab Negara Dalam Melindungi Hak atas Atas Pendidikan Dalam UUD 1945*. *J. Huk. Positum.* 223
6. Waluyo, B.: *Penelitian Hukum Dalam Praktik*. Sinar Grafika, Jakarta (2002)
7. Wallace, W.L.: *Metode Logika Ilmu Sosial*. Bumi Aksara, Jakarta (1994)
8. Green, J.: *A Guide to Using Qualitative Research Methodology*. Nouria Brikci -

- Research Officer, London (2007)
9. Rato, D.: Pengantar Hukum Adat. LaksBang PRESSindo, Yogyakarta (2009)
 10. Salman, R.O.: Rekonseptualisasi Hukum Adat Kontemporer. Alumni, Bandung (2002)
 11. Hadikusuma, H.: Pengantar Ilmu Hukum Adat Indonesia. Mandar Maju, Bandung (1992)
 12. Natabaya, A.S.: Masyarakat Hukum Adat dalam Perspektif Konstitusi. Diskusi Akademik, "Mendefinisikan Masyarakat Hukum Adat." (2008)
 13. Arizona, Y.: Konstitusionalitas Noken: Pengakuan model pemilihan masyarakat adat dalam sistem pemilihan umum di Indonesia. J. Konstitusi Pusako Univ. Andalas. 3, 109–132 (2010)
 14. Sadikin, U.H.: Memilih Teknologi Pemilu di Indonesia, <https://rumahpemilu.org/memilih-teknologi-pemilu-indonesia-2/>
 15. Wignjosoebroto, S.: Hukum Dalam Masyarakat : Perkembangan dan Masalah, Sebuah Pengantar ke Arah Kajian Sosiologi Hukum. Bayumedia Publishing, Malang (2008)

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