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The Constitutional Court Decision Regarding Disputes of Legislative Election; from a Progressive Law Enforcement to the Recognition of Customary Law Communities in Democracy

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Abstract-Decision of the Constitutional Court Number: 47-18 / PHPU. A / VII / 2009 Concerning Disputes over Election Results of the Regional Representative Council Members, Electoral District of Yahukimo Regency, Papua is a breakthrough step in a progressive law enforcement effort. The research method used a normative juridical and descriptive analysis. The Constitutional Court views that elections in Yahukimo Regency are indeed not held based on the prevailing laws and regulations, but the Constitutional Court can understand and respect the cultural values that live in the typical Papuan community in holding general elections by means of a system of citizen agreement or acclamation or Noken system. This is a form of progressive law enforcement and at the same time recognition of indigenous peoples in democracy. In addition, through this ruling the Constitutional Court has recognized the existence and rights of indigenous peoples, because so far the court has often been unable to be relied upon to develop a legal breakthrough for the recognition of the existence and rights of indigenous peoples because it is still very much dominated by the legal-positivistic paradigm. The Noken system is still very strong because it is still widely applied by various cultural communities of indigenous Papuans. Deliberation in the Noken system is a discursive and contestation practice to determine political decisions, such as candidates or political parties in elections. The core of the Noken system is community participation through consultation and discussion in determining political choices collectively and this is the local wisdom that is applied by the Papuan people in democracy.

Keywords: *Progressive Law Enforcement; Custom Society*

I. INTRODUCTION

The role of the Constitutional Court since its presence sixteen years ago was considered quite significant, especially in contributing to safeguarding the law and developing democracy. But this young age made the Constitutional Court not yet well known to the wider audience. Various things, terms and concepts related to the Constitutional Court and all of their authority have not been well understood by the public. In line with the Constitutional Court's mission to build Indonesia's constitutionality and constitutional awareness culture, efforts to provide an understanding of the Constitutional Court are continuously carried out.

In Indonesia to date, the Constitutional Court has carried out the duties properly. As a body of state guards and interpreters of the constitution whose decisions are final and binding, the Constitutional Court is the last guardian in safeguarding the constitutionality of a law. Many decisions of the Constitutional Court that gets thumbs up from the public included legal experts such as Satjipto Rahardjo when the Constitutional Court made a decision that Indonesian citizens may take general elections even though they did not have a voter card or were not registered in the voter list as long as they had a National Identity Card or Passport. He stated that we were truly guilty when we mentioned the Constitutional Court's ruling that was only mentioned in passing. Maybe we need to set up a monument so that people always remember that one day in its history, Indonesia once had a court that worked respectfully, helped to feel the suffering of its people and saved the nation from a dire situation.[1]

Many parties stated that most of the decisions of the Constitutional Court that were progressive meant that not only procedural justice had been carried out, but also prioritized substantive justice. Examples include cancellation of the results of post-conflict local elections in East Java, where many parties stated that the Constitutional Court ruling was excessive or out of authority. The Chief Justice of the Constitutional Court Mahfud MD at that time stated that the Constitutional Court must not be shackled or confined by the law, whereas before our eyes there was injustice (cheating). Legal breakthroughs made by the Constitutional Court in making decisions are progressive forms of law or the implementation of progressive law enforcement. However, there is also the opposite, which means that the Constitutional Court's decision is deemed not to fulfill a sense of justice in society, for example the Constitutional Court ruling that allows former corruptors to run for legislative members and several other decisions.

The idea of progressive law departs from two basic components in law, namely rules and behavior. Here, the law is placed as an aspect of behavior but also at the same time as a regulation. Regulations will build a positive legal system, while behavior or humans will move the rules and systems that have (will) be built [2] If observed, the idea of a progressive law product by Satjipto Rahardjo

emphasizes the dehumanization aspect of legal products which will be compiled or built later in the future. Law must be composed for humans not the other way around. Thus, humans will be composed at a central point of law, so that it means; happiness, prosperity, sense of justice and so on are central to legal concern. Law is only a means to guarantee and safeguard various human needs. If the law is not able to achieve such guarantees, it must be done and there must be a concrete effort towards the law, including arrangements and restructuring [3]

One of the decisions of the Constitutional Court which is considered progressive and at the same time a form of recognition of indigenous peoples in democracy is that it is permissible for citizens in Papua to use the Noken system, which is a form of community agreement in selecting certain leaders in elections. Aside from the issue of progressive law enforcement, the Constitutional Court in handling disputed cases in legislative elections in Yahukimo Regency, Papua; is in the Constitutional Court Decision No.47-81 / PHPU.A-VIII / 2009 implicitly acknowledging that elections with the Noken system are considered valid. Although legally formal contrary to the procedures regulated by the Election Law, this was a breakthrough made by the Constitutional Court in order to recognize the customs of democratic indigenous peoples.

Normatively the general election with ¹² model of citizen agreement is not in accordance with the principles of general election in Indonesia ¹⁰. As for the principles of general elections stipulated in Article 22E paragraph (1) of the 1945 Constitution "general elections are carried out directly, publicly, freely, secretly, honestly and fairly every five years". [4]. Studies on the legality of the use of the Noken system in the 2009 and 2014 elections and the 2014 presidential election in Papua have been widely carried out. Some studies state that the Noken system is legal in the Indonesian legal system because it adapts to the cultural characteristics of Papuans who follow the Melanesian tradition. The Noken system is still very strong because it is widely discussed and applied by various cultural communities of indigenous Papuans. Deliberation in the Noken system is a discursive and contestation practice to determine political decisions, such as candidates or political parties in elections. The core of the noken system is community participation through consultation and discussion in determining political choices collectively [5]

Based on this background, this paper will discuss the decisions of the Constitutional Court in the context of progressive law enforcement and the recognition of customary law communities. The decision of the Constitutional Court is Decision No.47-81 / PHPU.A-VIII ⁶2009 concerning the dispute over the results of the election of members of the Regional Representative Council, the Electoral District of Yahukimo Regency, Papua. The writers take the case of the legislative elections in Yahukimo district, because for the first time the Constitutional Court recognized the custom of the

Papuan indigenous people in general elections even though this was against the Law.

II. RESEARCH METHOD

This study using normative legal research methods by means of library research. The data used are secondary data, that is the decision of the Constitutional Court No. 47-81 / PHPU.A / VII / 2009 concerning The Dispute over Election Results of Regional Representative Council Members, Yahukimo Regency Papua electoral districts, journals, books and related laws and regulations.

The data were analyzed in a descriptive analytical. The analysis phase starts from data collection, then the data is presented by selecting, classifying systematically, logically and juridically to find out specific images related to the problems in the study. After that, the writers makes an interpretation, then compares it with the theory and concept of secondary data consisting of scientific books, journals, and related laws and regulations as well as legal opinions from legal experts.

III. FINDINGS AND DISCUSSION

In the elections of 2009, the people in Yahukimo District of Papua were involved in the election, but in its implementation it was adjusted to the adat mechanism. Election day ballot papers represented by the tribal chiefs. The cheating was not carried out in the voting booth and the ballot paper that was checked was not put into the ballot box, but was put into a typical Papuan bag called "Noken".

For Papuans, Noken is meant as a symbol of good life, peace and fertility. Therefore, these bags woven from bark have an important position in the cultural structure of the Papuan people. Not just anyone can weave bark into Noken. Only Papuan women are allowed to make Noken, and women who have not been able to weave bark into Noken are considered immature and not yet eligible for marriage. From the philosophical meaning it is appropriate that the election be carried out in a good and peaceful manner for the prosperity and welfare of its citizens. In the cultural system of the indigenous people of Papua, in terms of democracy from ancient times to the present, decision-making concerning joint interests is carried out through the Noken system and / or the tie system. The mechanism for decision making through the Noken system and / or the tie system can be based on, first, a deliberation meeting involving the community as a whole; The second is based on the decision of the chief's authority which is a political representation of the community or certain people as representatives [6].

As an election model, the Noken model reinforces the role of adat (custom) in building democracy. The selection of the Noken model was carried out first with deliberations between tribal heads and the community. The community conducts deliberations to determine which party and who will be elected as their representative in parliament. After deliberation, the tribal

Chief was assigned to represent the voters to conduct the contest. The paper that has been checked is put into noken based on the choices that have been agreed together. The selection of the Noken model was revealed in the legislative election dispute case Number 47-81 / PHPU.A / VII / 2009 concerning the Dispute over Election Results of Regional Representatives Members in the Constitutional Court submitted by two applicants, namely Elion Numberi and Hasbi Suaib. Actually, the question of the two applicants is about the dispute over election results for members of the Regional Representative Council, so it is not Noken's constitutionality as an election model. But inevitably, the selection of the Noken model is directly related to the legitimacy of the election and the number of disputed votes. So, when the votes obtained from the selection of the Noken model are declared valid, then implicitly the selection of the Noken model is recognized as one of the constitutional procedures for election [7].

At that time a number of people questioned the selection of this Noken model because this model was unusual and contrary to the procedures for elections which were regulated by Law No. 10 of 2008, that is The Law on Legislative Elections. Hasbi Suaib, a candidate for the Regional Representative Council from Papua as the applicant, questioned the Noken model because it later made him not get a vote in one area where there were many supporters. At least there are two things that need to be observed in relating the selection of the Noken model to the electoral system in Indonesia as stipulated in the Election Law, namely: (1) Related to the principle of elections which is carried out effectively and efficiently directly, publicly, freely, confidentially, honest and fair; and (2) With provisions regarding the procedure for voting in the Election Law.

These two things need to be examined because in the selection of the Noken model, individual citizens do not carry out direct construction, but are represented by the head of the tribe. Then the equipment in the election and ballot boxes were replaced with Noken as a place to collect ballot papers. The amount of noken used as a place to collect votes depends on the number of candidates who get votes from one polling station [6]. In the decision on the application submitted by the two applicants, the Constitutional Court did not explicitly state its assessment of the constitutionality of the Noken model as part of the procedure for voting in the election. This is because what the petitioner is questioning about the dispute over the results of the general election, not the examination of the law. However, the decision of the Constitutional Court in this case has implications for the constitutionality of the provisions contained in the Election Law [8].

By admitting that implicitly the selection of this Noken model into a legitimate procedure in the conduct of elections by the Constitutional Court makes us rethink the social structure in society that every change of law must respond to. This is an object of study that is often examined with the sociology of law optics and legal

anthropology. With this approach, the constitution as the highest legal norm in the implementation of national and state life gets contextualization on diverse social fields. In addition to seeing it as an acknowledgment, this decision also reflects a commitment in building democracy in a pluralistic country like Indonesia. Democracy always places humanity as the owner of sovereignty which is then known as the principle of popular sovereignty. [6]. As is known, there are 3 approaches in the systematic formulation of constitutional formulations, namely governance approaches, human rights approaches and cultural approaches. Associated with these three approaches, the Constitutional Court's decision which implicitly acknowledges the selection of the Noken model is a new approach in the recognition of the rights of indigenous peoples. This new approach is a political approach to indigenous peoples to be involved in elections using mechanisms that develop in their communities [9].

The Constitutional Court views that the general elections in Yahukimo Regency are not held based on the applicable legislation, namely Law No. 10 of 2008 concerning General Elections of Members of the People's Legislative Assembly, Regional Representative Council, and Regional People's Representative Council (Legislative Election), because they are not by ballot papers, but by "citizen agreement" or "acclamation" and the results are included in the recapitulation vote count results. However, the Constitutional Court can understand and respect the cultural values that live among Papuans who are typical in holding general elections by means of a "community agreement" or "acclamation" system. The Court accepts the collective election method ("citizen agreement" or "acclamation") that has been received by the community of Yahukimo Regency, because if it is forced to vote in accordance with the prevailing laws and regulations it is feared that conflicts will arise between local community groups. The Court argued that indigenous peoples should not be involved / brought into a system of competition / division within and between groups that can disrupt the harmony they have experienced. The acceptance of this realistic way must certainly be carried out well by the organizers or election committees, in this case the Yahukimo Regency General Election Commission [10].

After the issuance of the Decision of the Constitutional Court No. 47-18 / PHPU.A / VII / 2009 was followed by amendments to the Law governing Elections. However, since the elections of 2009 until now none of the laws governing elections have been specifically treated in certain areas such as in Yahukimo Papua. This Noken system election arrangement must be conducted in-depth and comprehensive assessment, because if not the Noken system can be misused and utilized by interested parties. Therefore there are some groups who suggest that the Noken system be removed for fear of being misused.

However, the desire to remove the Noken system and / or tie system cannot be realized immediately with a short and fast time. There needs to be an improvement in the implementation of elections with the Noken system and / or a continuous tie-up system to minimize losses on this principle. The state must be present to carry out democracy and protect the voting rights of all its citizens because elections are not only a party of democracy but more important than that, namely the existence of legal events concerning the future of the nation. Therefore the State is obliged to ensure that the Elections in the Provinces / Regencies / Cities in Papua which still apply the Noken system and / or the tie system, are carried out in a way that is totally free from manipulation [11]. Regardless of the issue in implementing it, there are at least two new aspects of the recognition of the existence and rights of indigenous peoples in Indonesia, first is the legal approach to becoming an applicant in the testing of laws that is detrimental to the constitutional rights of indigenous peoples. And the second is a political approach that recognizes indigenous peoples' election models as in the experience of indigenous peoples in elections in Yahukimo district, Papua. Both are formal approaches to building relations between the State and indigenous peoples [12].

The decision of the Constitutional Court can also be said to be progressive because the decision is the first decision issued by the Constitutional Court in recognition of indigenous peoples. In this case, it is carried out implicitly through its authority in resolving disputes over general election results. In his consideration of the Constitutional Court ruling that acknowledged the election model by the indigenous people in Yahukimo, Ahmad Sodiki, one of the constitutional judges, developed it more broadly with the idea of a pluralist constitution. According to him, the character of the Indonesian constitution is a pluralist constitution which should be able to be developed further to recognize the diversity that exists within the republic. With the recognition or rule of recognition the Indonesian constitution can become a living constitution and responsive to diversity [13]. This is in line with Jimly Asshiddiqie's view that the constitution has roots and is truly a part of the system of living, practiced and developed along with the development of society (*the living constitution*).

IV. CONCLUSION

Decision of the Constitutional Court No. 47-18 / PHPU.A / VII / 2009 is a breakthrough step in order to enforce progressive law. Progressive law aims to achieve substantive justice not only procedural justice or legal certainty. It is time for the culture of law enforcement to concentrate too much on the legal system as the only regulation building without including and formulating elements of behavior or humans in it must be abandoned. The law can no longer be placed as an absolute and autonomous document.

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