Legal Pluralism, Human Rights and the Right to Vote: The Case of the Noken System in Papua

Peer-reviewed author version

NUGRAHA, Yordan (2021) Legal Pluralism, Human Rights and the Right to Vote: The Case of the Noken System in Papua. In: Asia-Pacific journal on human rights and the law, 22 (2) , p. 255 -286.

DOI: 10.1163/15718158-22020003
Handle: http://hdl.handle.net/1942/36101

Legal Pluralism, Human Rights and the Right to Vote: The Case of the *Noken* System in Papua

Abstract

Elections in Indonesia are founded on the principle of direct, universal, free, secret, honest and fair voting. There is a notable exception in the Province of Papua, where tribes in various districts are following the noken system. The term itself has a broad scope that includes traditional decision-making practices that are deviating from the electoral standard in modern liberal democracies. Since the big man of the tribe plays a pivotal role in determining the vote, the system has been subject to controversy, and in various villages the turnout is 100% and all of the votes are allocated only to one of the candidates. Both the Indonesian General Elections Commission and the Constitutional Court have accepted this practice as reflecting the customs of the local population. However, this form of voting is contrary to the right to vote under international human rights law, since Article 25(b) of the ICCPR stipulates that elections shall be held genuinely by universal suffrage and secret ballot to guarantee the free will of the electors. Consequently, the case of noken system in Papua reflects an uneasy clash between a legal pluralist approach and universal human rights, and the goal of this research is to explore how this inconsistency could be reconciled.

I. THE CASE OF *NOKEN* IN PAPUA

Ever since the fall of the Suharto regime in 1998, Indonesia has undergone a period of democratisation to the extent that the people can not only directly elect their president and representatives in the national and local parliaments, but also the head of their provinces and regencies.[1] This rapid transformation has been lauded as a success story, although full-blown decentralisation has encouraged predatory behaviour in the form of corruption, collusion and nepotism at the regional level.[2]

[1] The term 'regency' in the Indonesian context refers to the second-level administrative division under the province. It is on the same level with counties in the United States and the United Kingdom, *Bezirke* in Austria and *départements* in France.

[2] See Edward Aspinall, 'Indonesia: The Irony of Success' [2010] 2 Journal of Democracy 20.

Indonesian West Papua has also experienced unprecedented democratisation. After decades of repression and counter-insurgency operations under Suharto, West Papua was granted special autonomy in 2001. Direct elections were held, and with increasing decentralisation, more regencies and districts were formed along tribal lines. Indonesian West Papua itself was divided into two provinces in 1999, namely "Papua Barat" ("West Papua") with Manokwari as its capital and "Papua" with Jayapura as its capital.[3] Although democratisation and decentralisation in West Papua have not been able to reduce secessionist sentiment, Edward Aspinall observed that this process managed to divert the focus of local elites and bureaucrats from "supporting independence (as they had in 1999-2000)" to "competition for patronage through elections and *pemekaran* [creation of new districts]".[4]

West Papua itself is a very heterogeneous territory with more than 261 ethnic groups.[5] The New Guinea region constitutes one of the most linguistically diverse regions in the world with about 1797 languages belonging to around 127 language families.[6] Many of them dwell in isolated rugged areas in which access is arduous. They also have their own traditional method in electing their leaders. With this diversity and remoteness in mind, holding regular elections in these areas proves to be a daunting feat.

In order to accommodate this diversity, the Indonesian Constitutional Court (*Mahkamah Konstitusi*) in 2009 decided that traditional tribal methods that are used for participating in elections, which are called the *noken* system, are allowed in various mountainous districts in the Province of Papua. The Court reasoned that the *noken* system constitutes a way for 'customary law societies' (*masyarakat hukum adat*) to participate in elections, and that imposing national standards on these tribes could cause conflict and disintegration.[7] On the one hand, this decision could be applauded for respecting indigenous rights. It could even be regarded as a form of 'state legal

[3] The terminology might be confusing, as "West Papua" might refer to either the province or the Indonesian side of Papua, whereas "Irian Jaya" is an outdated term loaded with Indonesian nationalist aspirations and "Papua" could refer to the whole island, including Papua New Guinea. For the purpose of this paper, the term "Papua" will only refer to the province.
[4] Aspinall (n 2) 28.
[5] Aris Ananta, Dwi Retno Wilujeng Wahyu Utami, Nur Budi Handayani, 'Statistics on Ethnic Diversity in the Land of Papua, Indonesia: Ethnic Diversity in Land of Papua, Indonesia' [2016] 3 Asia & the Pacific Policy Studies 458.
[6] Harald Hammarström, 'Linguistic Diversity and Language Evolution' [2016] 1 Journal of Language Evolution 19, 23. See also William A. Foley, 'The Languages of New Guinea' [2000] 29 Annual Review of Anthropology 357.
[7] Constitutional Court Decision No. 47-81/PHPU.A-VII/2009 para 3.24. See also Herlambang P. Wiratraman, Dian A. H. Shah, 'Indonesia's Constitutional Response to Plurality' in Jaclyn L Neo, Ngoc Son Bui (eds), *Pluralist Constitutions in Southeast Asia* (Hart Publishing 2019) 135-136.

pluralism' where Indonesian law officially recognises the existence of customary (*adat*) law. On the other hand, the *noken* practice is contrary to the right to vote under Article 25(b) of the International Convention on Civil and Political Rights (ICCPR). This international standard requires universal suffrage and secret ballots. Under the *noken* system, it is often the big man of the village who decides the allocation of the vote, and under another variety of the system, tribe members cast their vote in *noken* bags in a non-secret environment, and the allocation of the vote was already determined beforehand under the influence of the big man.

By embracing both *adat* law and international human rights law, the Indonesian state is facing a legal predicament in the case of the *noken* system that could be deemed as undermining the *Rechtsstaat* itself if the clash between the two remains unsolved. This constitutes one of the two main scenarios envisioned by Ellen Desmet in the relationship between international human rights law and legal pluralism, where "international human rights law and another normative order may stand, to a greater or lesser extent, in opposition to each other."[8] The goal of this research is to explore the detail of this scenario in the case of the *noken* system in the Province of Papua. This paper will start by introducing the *noken* system in Part II. Part III will describe cases in the Indonesian Constitutional Court that have led to the legal recognition of the *noken* custom. Part IV will then discuss *noken* within the context of limited 'state legal pluralism' that has been embraced under Indonesian law through Article 18B(2) of the Constitution and also the decisions of the Constitutional Court. Subsequently, Part V will elaborate the approach of international human rights law to both the right to vote and indigenous rights. Finally, Part VI will explore potential ways to reconcile the inconsistency between international human rights law and Indonesia's state legal pluralism in the case of the *noken* system.

II. THE *NOKEN* SYSTEM IN A NUTSHELL

The term *noken* refers to Papuan traditional bags that are knit from wooden fibre, although each community has its own method of production. *Noken* has various functions, such as to carry harvest, goods purchased from the market, babies or small animals. It may also be worn during traditional festivities or presented as peace offerings. The *noken* bag has been recognised as an

[8] Ellen Desmet, 'Legal Pluralism and International Human Rights Law' in Giselle Corradi, Eva Brems, Mark Goodale, *Human Rights Encounter Legal Pluralism: Normative and Empirical Approaches* (Hart Publishing 2017) 47.

Intangible Cultural Heritage in Need of Urgent Safeguarding by the UNESCO in 2012.[9] The term itself has officially entered the vocabulary of the Indonesian language through its inclusion in the Great Dictionary of the Indonesian Language (*Kamus Besar Bahasa Indonesia*).[10]

The customary voting practice in Papua is named after this cultural heritage, since ballot boxes in various districts in Papua may be replaced by *noken* bags.[11] However, the exact meaning of the term '*noken* system' remains elusive. As observed by Cillian Nolan, "*noken* involves no written rules, no uniform practices and no minimum technical standards for how votes should be recorded."[12] Nolan even stated that the lack of regulation has created a permissive environment where all forms of traditional voting may be interpreted as *noken*.[13] Furthermore, Nolan added that the term itself is a misnomer, since the *noken* bag "is often peripheral to the process".[14]

For the 2019 general elections, the Indonesian General Elections Commission (*Komisi Pemilihan Umum* or *KPU*) did issue a decision on the guideline of conduct for the *noken* system in the Province of Papua.[15] The KPU defined *noken* system as:

> A form of common agreement or acclamation to elect a President and Vice President, [and Members of] the People's Representative Council, Regional Representative Council, Papua's Regional People's Representative Council, and Regency/City Regional People's Representative Council that are conducted by elements of society in accordance with customs, tradition, culture and local wisdom of the local populace.[16]

The Guideline also explains how the Polling Station Working Committee (*Kelompok Penyelenggara Pemungutan Suara*) may count and document the result.[17] In Annex II of the Guideline, it is further stated that the *noken* system may be performed in 12 mountainous regencies

---

[9] 'Noken Multifunctional Knotted or Woven Bag, Handcraft of the People of Papua' (*UNESCO*) <ich.unesco.org/en/USL/noken-multifunctional-knotted-or-woven-bag-handcraft-of-the-people-of-papua-00619> accessed 22 August 2019.
[10] 'noken' (*Kamus Besar Bahasa Indonesia*) <kbbi.kemdikbud.go.id/entri/noken> accessed 22 August 2019. *Noken* is defined as "traditional Papuan bag made from wood fibre". The political definition of *noken* is lacking in this dictionary.
[11] Decision of the General Elections Commission of the Province of Papua No.01/Kpts/KPU Prov.030/2013.
[12] Cillian Nolan, 'How Papua voted' (*New Mandala*, 17 April 2014) <www.newmandala.org/how-papua-voted/> accessed 22 August 2019.
[13] Cillian Nolan, 'Papua's Central Highlands: The Noken System, Brokers and Fraud' in Edward Aspinall, Mada Sukmajati (eds), *Electoral Dynamics in Indonesia: Money Politics, Patronage and Clientelism at the Grassroots* (NUS Press 2016) 404.
[14] Nolan (n 12).
[15] Decision of the Indonesian General Elections Comission 810/PL.02.6-Kpt/06/KPU/IV/2019 on the Guideline of Conduct for Voting with Noken/Ikat System in the Province of Papua for the 2019 General Elections <jdih.kpu.go.id/data/data_kepkpu/KPT 810 THN 2019.pdf> accessed 22 August 2019.
[16] ibid C.23.
[17] ibid Chapter III.

in Papua, namely Yahukimo, Jayawijaya, Nduga, Mamberamo Tengah, Lanny Jaya, Tolikara, Puncak Jaya, Puncak, Paniai, Intan Jaya, Deiyai and Dogiyai.[18] However, the definition of '*noken* system' in this guideline is merely a catch-all phrase for various forms of decision making that are in line with local tribal customs, and it still leaves the specific procedure for determining 'common agreement' or 'acclamation' to the local populace.

According to Papua's People Council (*Majelis Rakyat Papua*, a special representative body for the natives in the Province of Papua) in its submission for the *Habel M. Suwae* case in the Indonesian Constitutional Court (2013), the *noken* system has long been practiced by natives inhabiting the Mee Pago and La Pago cultural area in the Central Mountains of Papua, and during the era of the Republic of Indonesia, it was implemented for the first time during the 1971 legislative election. They stated that under the *noken* system, decisions could be taken either by consensus (*musyawarah*) involving several or all tribe members, or through the deliberation of the chieftain (*kepala suku*) who is considered as the representative of the tribe. During election day, votes will be cast into *noken* bags in accordance with the decision reached or the ballots may be tied together to be punched simultaneously (*sistem ikat*).[19]

Similarly, Indonesian anthropologist Tito Panggabean wrote that there are two varieties of *noken* system that are commonly practiced in the mountainous districts of Papua. The first one is the big man system where tribe members allow their leader to vote on their behalf. The big man is a non-hereditary leader who managed to gain influence through their prowess and success in outcompeting others.[20] Under this arrangement, tribe members do not have to show up during voting day.[21] It is for this reason that one could encounter peculiar results in various mountainous districts in Papua that may raise a few eyebrows.[22] For instance, in the village of Mewut in the Regency of Puncak Jaya, all the 'polling stations' cast their vote for Joko Widodo in the 2014 Indonesian presidential election, resulting in an extreme landslide victory of 100% with a turnout

[18] ibid Annex II. As a comparison, in the 2014 election, *noken* system was implemented in 14 regencies. The 2019 list does not include Pegunungan Bintang and Yalimo.
[19] Decision of the Constitutional Court No. 14/PHPU.D-XI/2013 para. 3.24.3.
[20] Tito Panggabean, 'Sistem Noken dan "Bigman"" (Kompas, 18 August 2014) <nasional.kompas.com/read/2014/08/18/08011511/Sistem.Noken.dan.Bigman.?page=all> accessed 22 August 2019. Cf. Marshall Sahlins, 'Poor Man, Rich Man, Big Man, Chief; Political Types in Melanesia and Polynesia' [1963] 5 Comparative Studies in Society and History 285.
[21] Nolan (n 12).
[22] Panggabean (n 20).

of 100%.[23] Meanwhile, the second variety is called 'hanging *noken*' (*noken gantung*). Under this form, *noken* bags replace ballot boxes. Tribe members may cast their vote to *noken* bags in a non-secret environment, and the proportion of the votes was already determined beforehand under the influence of the big man. Panggabean also observed that elections result under the *noken* system in general would depend on the outcome of 'diplomatic war' between big men. A 100% result implies that there is a very powerful big man in one area, whereas a 50:50 proportion of the vote signifies a power struggle between two influential big men.[24] However, Nolan found that "In more recent practice, both the element of consultation and the physical act of voting seem to have disappeared from *noken* voting."[25]

Overall, each area has its own form of *noken*.[26] In the view of Nolan, the *noken* system is most aptly defined as "a set of deviations from standard electoral practice (…)."[27] Despite the lack of a uniform standard, all forms of *noken* system have two common characteristics: the big man plays a pivotal role in determining the vote, and the practice practically sacrifices individual voting rights, which implies that it is not in line with the principles of universal suffrage and secret ballot that are prevalent in modern liberal democracies.[28] As a result, the *noken* system has been subject to controversy.

It has been alleged that the *noken* system encourages electoral fraud and vote buying.[29] Nolan observed that *noken* creates a system of brokerage where the big man has the authority to determine the vote at the expense of the tribe members.[30] Candidates simply have to gain the support of brokers in particular districts to win the election,[31] and no actual voting is needed except

---

[23] The data can be found in the site of independent election watchdog Kawal Pemilu <2014.kawalpemilu.org/#0.78203.80724.83632.80740> accessed 22 August 2019.
[24] Panggabean (n 20).
[25] Nolan (n 13) 403.
[26] See 'Ahli: Penggunaan Sistem Noken Harus Dihargai' (*Hukumonline*, 13 August 2014) <www.hukumonline.com/berita/baca/lt53eb85fe1d1e5/ahli--penggunaan-sistem-noken-harus-dihargai/> accessed 22 August 2019.
[27] Nolan (n 13) 402.
[28] Cf. Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Brill 2015) 170-171; 'Pemerintah Anggap Sistem Noken Bertentangan dengan Asas Pemilu' (*Hukumonline*, 6 May 2014) <www.hukumonline.com/berita/baca/lt5368d22e8f65a/pemerintah-anggap-sistem-noken-bertentangan-dengan-asas-pemilu/> accessed 22 August 2019.
[29] Butt (n 28); Simon Butt, 'Indonesia's Constitutional Court and Indonesia's Electoral Systems' in Albert H.Y. Chen, Andrew Harding (eds), Constitutional Courts in Asia: A Comparative Perspective (CUP 2018) 214, 237-238. Nolan (n 13) 399; 'No to 'Noken'' (*The Jakarta Post*, 5 June 2018) <www.thejakartapost.com/academia/2018/06/05/no-to-noken.html> accessed 22 August 2019.
[30] Nolan (n 13) 405-406.
[31] ibid 406-408.

as a formality.[32] During the recapitulation process, it is also often the case that the discussion is on the allocation of votes, which may also involve deliberations over money or other material rewards.[33] Thus, the *noken* system is also not free and fair in practice, and it is for this reason that the system has been subject to various lawsuits, particularly by the losing candidate (including a candidate in the 2014 presidential election, Prabowo Subianto). The Election Supervisory Agency (*Bawaslu*) in 2016 even recommended that the *noken* system be abolished due to its undemocratic nature.[34]

At the same time, the permissive attitude towards the *noken* system could be applauded for accommodating diversity and tribal customs. The autochthonous communities in Papua are not a monolith and consist of multifarious tribes speaking various mutually unintelligible languages. They live in isolated villages, and the districts that have been recently created are drawn along clan and tribal lines. Due to the difficult terrain and the low literacy rate, administrating polling stations similar to the ones in Jakarta is highly arduous.[35] Furthermore, it has been argued that the *noken* system simply reflects the fact that tribe members have exchanged their voting right with patronage. Nolan held that in its ideal form, the *noken* system is "a clientelistic practice fusing traditional clan governance structures with the modern apparatus of electoral politics."[36] By allowing this system to be implemented, the KPU and the judiciary are simply adapting to local conditions and are refraining from imposing the system that is in place in the modernised part of Indonesia.

III. *NOKEN* UNDER INDONESIAN CONSTITUTIONAL LAW

From a legal perspective, the *noken* system might seem to be incompatible with the Indonesian Constitution. Article 22E(1) stipulates that "General elections shall be conducted in a direct, general, free, secret, honest, and fair manner once every five years."[37] Furthermore, Indonesia does not recognise the applicability of the concept of indigenous rights as enshrined in the UN

---

[32] ibid 410.
[33] ibid 412.
[34] 'Bawaslu Calls for Abolition of 'Noken' Voting System in Papua' (*The Jakarta Post*, 15 March 2016) <www.thejakartapost.com/news/2016/03/15/bawaslu-calls-abolition-noken-voting-system-papua.html> accessed 22 August 2019.
[35] Nolan (n 13) 400-401.
[36] ibid 414.
[37] Article 22E(1) of the 1945 Indonesian Constitution (amended 2002). See also Didik Sukriono, 'Menggagas Sistem Pemilihan Umum di Indonesia' [2009] 2 Jurnal Konstitusi 7

Declaration on the Rights of Indigenous Peoples in its territory.[38] This might create a *prima facie* impression that national law would trump indigenous law.

Nevertheless, Indonesian law does recognise the existence of "customary law societies" (*masyarakat hukum adat*). Article 18B(2) of the Indonesian Constitution enshrines that:

> The State recognises and respects customary law societies along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law.[39]

Thus, under Indonesian law, "customary law societies" are considered as a legal subject.[40] By virtue of Article 18B(2) of the Constitution, members of this sort of society possess a constitutional right to maintain their tradition and customary rights as long as four requirements are fulfilled: that the societies and their traditional rights actually exist, that they are in line with "societal development" and "principles of the state", and that they are regulated by law.[41] The exact meaning of these requirements will be clarified in Part IV.

The *noken* practice itself has been legally recognised by the Indonesian Constitutional Court. The first landmark case is the *Elion Numberi* case.[42] The dispute was concerned with an electoral dispute in the Regency of Yahukimo. Elion Numberi, a Christian preacher, fell short of being elected as a member of Regional Representative Council from the Province of Papua, as he only finished fifth in the race. He alleged that there were fictitious votes in Yahukimo favouring another candidate, Paulus Yohannes Sumino. If these votes were to be declared invalid, he would finish in the fourth place and thus officially be elected.[43] In order to support this allegation, the plaintiff presented witnesses who claimed that elections were never held in 2 out of 3 constituencies in Yahukimo.[44]

---

[38] Report of the Working Group on the Universal Periodic Review, Indonesia, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review (5 September 2012) A/HRC/21/7/Add.1 para 6.3.
[39] Article 18B(2) of the 1945 Indonesian Constitution (amended 2002). See also Tim Lindsey, Simon Butt, *Indonesian Law* (Oxford University Press 2018) 136; Yanis Maladi, Eksistensi Hukum Adat dalam Konstitusi Negara Pascaamandemen [2010] 22 Mimbar Hukum 450.
[40] Ahmad Zazili, Pengakuan Negara terhadap Hak-Hak Politik (Right To Vote) Masyarakat Adat dalam Pelaksanaan Pemilihan Umum (Studi Putusan Mahkamah Konstitusi No.47-81/PHPU.A-VII/2009) [2012] 9 Jurnal Konstitusi 136, 141.
[41] For more information, see Decision of the Constitutional Court No. 31/PUU-V/2007 para. 3.15.2-3.15.5.
[42] *Elion Numberi* case (n 7)
[43] ibid para 2.1.
[44] ibid para. 3.10.

In response, the Indonesian Constitutional Court observed that elections in Yahukimo were not held through ordinary voting, but rather "through the determination of vote by 'community agreement' or 'acclamation' by representatives of societal groups."[45] Although this practice was admittedly not in line with National Law Number 10 Year 2008 that requires ordinary voting procedures,[46] the Court declared its acceptance of the traditional acclamation method in Yahukimo. In their view, if the national electoral law were to be forced to the people in Yahukimo, it could cause conflict and disintegration within the community. The Court reasoned that a competitive setting in elections could disrupt social harmony among them.[47] Thus, accepting the traditional method of *noken* was deemed to be the most realistic approach, although the Court added that elections must still be well organised in the sense that they are not conducted fraudulently.[48] In the end, the Court found that elections were never held in many districts and that there were also mismatches in the recapitulation results of various districts. As a result, the Court concluded that there was a "structured and massive" electoral fraud, and consequently it ordered re-election and recounting of votes in the problematic districts.[49]

The Court in *Elion Numberi* did not mention Article 18B(2) the Constitution to justify its ruling. Simon Butt even argued that "the voting processes the Court endorsed are hardly democratic", and that "the Court has not transparently reconciled the requirements of Article 22E(1) with recognising these customs under Article 18B(2)."[50] In fact, as will be demonstrated in Part VI, the Court's omission might have created a defective precedent, since it could be demonstrated that the *noken* system is not in line with "societal development". Nevertheless, as observed by Herlambang Wiratraman and Dian Shah, this approach "has enabled alternative (indigenous) systems of electing political representatives to legally and constitutionally exist alongside the conventional one-person-one-vote principle."[51]

---

[45] ibid para 3.22.4.
[46] ibid para 3.23.
[47] ibid para 3.24. Excerpt from the case as translated in Butt (n 28) 170: "The Court can understand and value the cultural values alive in the unique Papua community in running the election by 'community agreement' or 'acclamation'. The Court accepts the method of collective voting… which has been accepted in Yahukimo [county], because if forced to have an election that accords with the applicable law, there are concerns that conflict will emerge in the local community. The Court believes that it is best that [these local communities] are not involved/carried to a system of competition/division within and between groups that could disturb the harmony with which they have been instilled."
[48] ibid.
[49] *Elion Numberi* case (n 7) para 3.25-3.27.
[50] Butt (n 28) 170.
[51] Wiratraman & Shah (n 7) 136.

This recognition has been reaffirmed in subsequent cases relating to allegations of electoral fraud in the Province of Papua. In the *Habel M. Suwae* case (2013), the plaintiff alleged that the decision of KPU Papua to allow ballot boxes to be replaced by *noken* is a "conspiracy" to exploit the weaknesses of the system in order to rig the vote in favour of the other candidate in the 2013 Papuan gubernatorial election, Lukas Enembe. The plaintiff reinforced its argument through witness statement that ballot boxes were never sent to the villages and voting for 18 villages was represented only by three chieftains.[52] KPU Papua as the defendant in this case responded by stating that its decision was simply meant to respect local culture and also to ensure that the *noken* system as recognised in the *Elion Numberi* case is not misused.[53]

The Constitutional Court at the end ruled that the 'conspiracy' allegation is unfounded. The Court also held that KPU Papua's decision with regard to *noken* is based on local customary law. Although this practice is not explicitly regulated under national law, the Court invoked Article 18B(2) of the Constitution to affirm that customary law societies and their rights are recognised and protected by law. Therefore, the Court upheld KPU Papua's decision.[54]

During the 2014 presidential election, the *noken* system once again became subject to a lawsuit. After losing the election, Prabowo Subianto contested the result in the Constitutional Court, claiming massive, structured and systematic fraud. While he believed that the fraud was committed nationwide, the Province of Papua attracted attention due to the application of the *noken* system. As has been mentioned before, the implementation of the *noken* system led to 100% votes for Joko Widodo in various villages, although Prabowo also managed to win entire villages such as the village of Fawi.[55] His legal team argued that the voting and recapitulation process were never held in various villages, and that votes were immediately granted to Joko Widodo without any prior consultations. They further added that actual election still needs to take place in the villages despite the *noken* system.[56]

In response, the Constitutional Court reiterated its point that the *noken* system is in line with the Constitution. It cited the precedents, *inter alia*, in the *Elion Numberi* and *Habel M. Suwae*

[52] *Habel M. Suwae* case (n 19) para. 3.24.4.
[53] ibid para 3.24.4.1.
[54] ibid para 3.24.4.4.
[55] See the data for the village Fawi in Kawal Pemilu's database (n 23).
[56] Decision of the Constitutional Court No. 1/PHPU.PRES-XII/2014, Pokok Permohonan para. 4.40.

cases.[57] The Court also agreed that the *noken* system needs to be implemented in a proper manner and that it cannot be held in areas that never used this system before.[58] The Court further added that a 100% landslide victory for a candidate in certain district is a normal occurrence under the *noken* system, and thus it cannot be assumed as an evidence of fraud. In the Court's view, "whatever the result is from the system of *noken*/*ikat*, everyone has to accept it because such electoral system has been recognised and guaranteed by the Constitution."[59] Eventually, the Court found that elections were actually held in districts by using the *noken* system, and that the result emanating from this system was properly documented by the election organisers.[60]

In these two cases, the Constitutional Court still has not clarified how the *noken* system would satisfy the test that is elaborated under Article 18B(2) of the Constitution. The Court simply assumes that such practice is in line with "societal development" and "principles of the state". Despite this omission, from a comparative perspective, the *noken* system has been accepted as part of Indonesian law.

IV. *NOKEN* AND STATE LEGAL PLURALISM

As observed by Ahmad Zazili, Article 18B(2) of the Indonesian Constitution constitutes "a legal ground for legal pluralism", specifically for *adat* law.[61] He further elaborated that "Under the national legal system there are several legal systems that are smaller and more limited, which are interrelated and organised under the unity of the national legal system."[62] The legal recognition of *adat* law itself could be traced back to the times of the Dutch East Indies. Article 75 of the *Regeringsreglement* (governmental regulation) of the Dutch East Indies in 1854 stipulated that Europeans were to be governed by laws that are valid in the Netherlands, whereas Nusantara people were subjected to their own religious and customary law, except for those who had embraced Dutch law or if the colonial administration declared Dutch law to be valid to part of the population.[63] The

[57] ibid para. 3.27.2.
[58] ibid para. 3.27.4.
[59] ibid para. 3.27.10.
[60] ibid.
[61] Zazili (n 40) 143.
[62] ibid.
[63] Cees Fasseur, 'Colonial Dilemma: Van Vollenhoven and the Struggle between *Adat* Law and Western Law in Indonesia' in Jamie S. Davidson, David Henley (eds), *The Revival of Tradition in Indonesian Politics. The Deployment of Adat from Colonialism to Indigenism* (Routledge 2007) 50.

term *adatrecht* was introduced by Dutch Orientalist Christiaan Snouck Hurgronje in his book, *De Atjehers* (1893), and it was then popularised in the academia by Van Vollenhoven.[64]

Based on the terminology of the legal pluralism scholarship, the legal recognition of *adat* law under the Indonesian legal system could be regarded as a form of 'state law pluralism', which is defined as "instances in which there are two bodies of norms within the law of a state".[65] This is to be contrasted with "deep legal pluralism", in which normative orders outside of state law are not directly associated with the state.[66] By recognising the existence of customary law societies and their traditional rights, the Indonesian state has officially endorsed the concept of legal pluralism in its national legal system.

Legal pluralism is often defined in terms of 'legal systems', 'legal orders', 'bodies of norms', or 'legal mechanisms'.[67] For instance, John Griffiths understood legal pluralism as "the presence in a social field of more than one legal order."[68] Meanwhile, MB Hooker defined it as "the situation in which two or more laws interact."[69] Sally Engle Merry described it as "a situation in which two or more legal systems coexist in the same social field."[70] Furthermore, Jacques Vanderlinden described legal pluralism as "the existence within a particular society of different legal mechanisms applying to identical situations."[71] However, as noted by Franz von Benda-Beckmann, legal pluralism is not conceptually uniform, and there are various definitions that have been proposed.[72]

Brian Tamanaha further warned that legal pluralism should not be understood in an essentialist manner, since the concept of 'law' itself has no essence and instead one should delimit the concept itself, namely by defining law as whatever instrument is identified as such through social practices.[73] Thus, Tamanaha found that 'legal pluralism' is "whenever more than one kind of

---

[64] ibid 51.
[65] Gordon R. Woodman, 'The Idea of Legal Pluralism' in Baudoin Dupret, Maurits Berger, Laila al-Zwaini (eds), *Legal Pluralism in the Arab World* (Kluwer Law International 1999) 4-5.
[66] ibid.
[67] ibid 5. Desmet (n 8) 42.
[68] John Griffiths, 'What Is Legal Pluralism?' [1986] 18 The Journal of Legal Pluralism and Unofficial Law 1.
[69] MB Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Clarendon Press 1975) 6.
[70] Sarry Engle Merry, 'Legal Pluralism' [1988] 22 Law & Society Review 869, 870.
[71] Quoted in Woodman (n 65) 4.
[72] Franz von Benda-Beckmann, 'Who's Afraid of Legal Pluralism?' [2002] 34 The Journal of Legal Pluralism and Unofficial Law 37, 72.
[73] Brian Z. Tamanaha, 'A Non-Essentialist Version of Legal Pluralism' [2000] 27 Journal of Law and Society 296, 313.

'law' is recognized through the social practices of a group in a given social arena (...).”[74] Through this definition, the variety of ‘state legal pluralism’ could be modified as ‘instances in which more than two kinds of law are recognised by the state’, and ‘deep legal pluralism’ simply refers to the situation when the recognition is only limited in the form of social practices. In the case of *adat* law in Indonesia, a non-essentialist definition would accommodate the fact that *adat* is not a monolithic legal system or order.

In the case of *noken*, despite the lack of a reference to Article 18B(2) of the Constitution in the *Elion Numberi* case, the Constitutional Court did invoke this article in subsequent cases to justify the legal recognition of *noken* under Indonesian constitutional law. In the case of *Habel M. Suwae*¸ the Court observed that:

> [E]ven though the voting mechanism through community agreement is not explicitly regulated in the Electoral Law and Regional Government Law, the Constitution recognises and protects customary law societies and their traditional rights. This recognition and protection of customary societies and their traditional rights are regulated by Article 18B(2) of the 1945 Constitution (…).[75]

Similarly, in the *Prabowo Subianto* case (2014), the Court held that “voting through *noken* or *ikat* system is lawful because it is guaranteed by Article 18B(2) of the Constitution (…).”[76] By establishing a nexus between the *noken* system and Article 18B(2) of the Constitution, the Indonesian Constitutional Court has framed the recognition of the *noken* system as belonging to the domain of customary law societies and their traditional rights. For this reason, the legal recognition of the *noken* system could perhaps be considered as an example of state legal pluralism in action.

However, Article 18B(2) of the Constitution still exhibits a form of legal centralism that is often criticised by legal pluralist scholars.[77] Although *adat* law is recognised, it is still subject to the four requirements that were completely bypassed by the Constitutional Court in *Elion Numberi*, *Habel M. Suwae* and *Prabowo Subianto* (2014). While the meaning of the fourth requirement (‘regulated by law’) is sufficiently clear, the exact scope of the three other requirements need to be

[74] ibid 315.
[75] *Habel M. Suwae* case (n 19) para. 3.24.4.4.
[76] *Prabowo Subianto* case (n 56) para. 3.27.7.
[77] Cf. Tamanaha (n 73) 299.

clarified. The Indonesian Constitutional Court has fulfilled this task in the case of *Abdul Hamid Rahayaan and Others* (2007).[78]

Firstly, the Court maintained that customary law societies could be territorial, genealogical or functional. Their actual existence could be ascertained through several elements, namely the presence of an in-group feeling among its members, the existence of a customary governance institution, customary wealth and/or objects, and customary legal norms. For territorial customary law societies, there is an additional element of a defined territory.[79]

With regard to 'societal development', there are two elements that need to be considered. The existence of customary law societies must be recognised by law as "the reflection of value development that are considered ideal in today's society (…)."[80] Furthermore, "the substance of the traditional rights must be recognised and respected by members of the [customary] society and also by society in general, and is not contrary to human rights."[81] Thus, the existence of the "societal development" criterion implies that cultural relativist arguments cannot be invoked to justify customary practices that are contrary to modern values and universal human rights.

As for the third element, namely 'principles of the state', the Court held that customary law societies and their traditional rights "must not threaten the sovereignty and integrity of the Unitary State of the Republic of Indonesia".[82] Moreover, the substance of the customary norms must be in line with national legislation.[83]

The existence of this test implies that *adat* law has simply been transposed into Indonesian law. In a way, *adat* law is still subordinated to national law, as it will only be considered as a valid law in the territory of the Republic of Indonesia if it fulfils these legal requirements. Thus, the 'state legal pluralism' that is present in Article 18B(2) of the Constitution is manifested in its 'limited' form.

---

[78] *Abdul Hamid Rahayaan and Others* (n 41) para. 3.15.2-3.15.5.
[79] ibid para 3.15.3.
[80] ibid para 3.15.4.
[81] ibid.
[82] ibid para 3.15.5.
[83] ibid.

V. *NOKEN* UNDER INTERNATIONAL HUMAN RIGHTS LAW

When discussing the *noken* system under the framework of international human rights law, there are two types of rights that need to be addressed: the right to vote and indigenous rights. Both rights have a different scope *ratione personae*: the former is individual rights that applies to everyone regardless of their origin, whereas the latter only targets a specific group, namely indigenous people. [84] If both rights are assumed to be fully applicable in the context of *noken*, there would be a conflict between the political rights of individual tribal members and the collective indigenous rights that are framed by Eva Brems as 'the right to legal pluralism'.[85] The following section will assess the applicability of the two rights in the case of *noken*. At the same time, discussion over the *noken* system would raise the issue of universality and particularism of human rights, and this matter will also be addressed in this section.

A. The Right to Vote

The right to vote is guaranteed by international human rights law. Although the ICCPR does not prescribe a model of democracy for States Parties,[86] Article 25(b) of the ICCPR establishes a particular standard with regard to the right vote. It stipulates that:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (…) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors (…).[87]

The individual aspect of this right is emphasised by the use of the term "every citizen".

Specifically with respect to electoral conduct, there are several important elements to be assessed in this article. Firstly, elections that are held must be 'genuine' and 'periodic'. Moreover, as observed by Manfred Nowak, "The particular manner in which the right to vote and to be elected is structured is specified by a number of voting principles", namely universal and equal suffrage and secret ballot.[88] The treaty body of the ICCPR, the Human Rights Committee (UNHRC), also

---

[84] Eva Brems, 'Legal Pluralism as a Human Right' in Giselle Corradi, Eva Brems, Mark Goodale, *Human Rights Encounter Legal Pluralism: Normative and Empirical Approaches* (Hart Publishing 2017) 24.
[85] ibid 28.
[86] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR commentary* (N.P. Engel 2005) 570-571.
[87] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[88] Nowak (n 86) 575-576.

explained in General Comment 25 that "Participation through freely chosen representatives is exercised through voting processes which must be established by laws that are in accordance with paragraph (b)."[89] Thus, while the ICCPR also does not prescribe an electoral system for Member States (for instance electoral college system, proportional representation or first-past-the-post), the UNHRC held that "any system operating in a State party (…) must guarantee and give effect to the free expression of the will of the electors. The principle of one person, one vote, must apply (…)."[90]

With regard to the issue of *noken*, such system is inconsistent with the principles of universal suffrage and secret ballot. The former implies that the right to vote is an individual right that may not be restricted on the basis of groups or classes.[91] The *noken* system is problematic in this regard. By granting the big man a disproportionate role in the voting process, individual rights have been sacrificed in the process. In fact, as mentioned by Cillian Nolan, the big man has become a sort of vote broker, and potential candidates simply have to appease them strategically in various districts to win the election.[92] Furthermore, even if the decision-making process involves other tribe members, at the end individual tribe members still have to respect the consensus that was reached. As a result, it is difficult to hold that the *noken* system is in line with the principle of universal suffrage.

Subsequently, when secret ballot is concerned, the UNHRC explained in General Comment 25 that this principle entails States to guarantee the secrecy of the vote.[93] Hence, for the variety of the *noken* system where tribe members cast their vote in *noken* bags in a non-secret environment, such system would constitute a violation of Article 25(b) of the ICCPR, particularly in light of the fact that the result was already decided beforehand and tribe members are unable to exercise their free will. As mentioned by Nolan, "any member of the community who decided to deviate from the "consensus" view and vote for another candidate would quickly be identified."[94]

It is also arduous to establish that the *noken* system is an exercise of a 'genuine' election. 'Genuine elections' implies that voting must be conducted in a free and fair manner, and that voters

---

[89] Human Rights Committee, General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996 ('General Comment 25') para. 7.
[90] ibid para. 21; Alexandra Tomaselli, *Indigenous Peoples and their Right to Political Participation: International Law Standards and their Application in Latin America* (Nomos 2016) 179.
[91] Nowak (n 86) 576.
[92] Nolan (n 13) 406-412.
[93] General Comment 25 (n 89) para. 20.
[94] Nolan (n 13) 403.

must be able to choose between different candidates.[95] Voting never actually took place in many villages where the *noken* system is in place, and it is often the polling officials who did the voting part.[96] Furthermore, a free and fair environment is lacking in an election system where the big man plays a decisive role in determining the vote, or where individual members have to adhere to the consensus of the tribe.

In addition to this, States also have a positive obligation to undertake effective measures to ensure that everyone is able to exercise the right to vote.[97] The UNHRC in General Comment 25 held that "Positive measures should be taken to overcome specific difficulties, such as illiteracy, language barriers, poverty, or impediments to freedom of movement which prevent persons entitled to vote from exercising their rights effectively."[98] Consequently, States are unable to rely on the fact that a tribe lives in an isolated area or that they are still illiterate.

At the same time, the right to vote itself is not absolute. In the chapeau of Article 25 of the ICCPR, it is mentioned that the rights embodied in that article may not be subject to 'unreasonable restrictions'.[99] The UNHRC clarified in General Comment 25 that the right to vote may indeed be restricted as long as the measure is "based on objective and reasonable criteria".[100] The UNHRC also explained in *Debreczeny v. The Netherlands* that the restriction may not be discriminatory or unreasonable.[101] With regard to whether a measure is discriminatory, the UNHRC in *Gillot et al v France* stated that "the evaluation of any restrictions must be effected on a case-by-case basis, having regard in particular to the purpose of such restrictions and the principle of proportionality."[102]

Despite the fact that recapitulation results from the *noken* districts are documented as if all of the tribal members have voted individually, the implementation of the *noken* system has effectively created two categories, namely those who have been deprived the individual right to vote and the big men who are able to exercise this right by their own deliberation. As has been

---

[95] General Comment 25 (n 89) para. 19; Tomaselli (n 90) 180.
[96] Nolan (n 13) 410-411.
[97] General Comment 25 (n 89) para. 11.
[98] ibid para. 12.
[99] ICCPR (n 87).
[100] General Comment 25 (n 89) para. 4.
[101] *Debreczeny v. The Netherlands*, Communication No. 500/1992, U.N. Doc. CCPR/C/53/D/500/1992 (1995) para. 9.2.
[102] *Ms. Marie-Hélène Gillot et al. v. France*, Communication No. 932/2000, U.N. Doc. A/57/40 at 270 (2002) para. 13.2.

elaborated previously in Part III and IV, under the jurisprudence of the Indonesian Constitutional Court, such system is justified by limited state legal pluralism that accommodates the traditional practices of customary law societies in Mee Pago and La Pago. It is uncertain whether upholding legal pluralism could be considered as a legitimate purpose and whether the *noken* system could be regarded as proportional in this regard.

Nevertheless, based on the existing UNHRC cases concerning restrictions on the right to vote under Article 25(b) of the ICCPR, it seems that what can be restricted in this context is the scope *ratione personae* instead of the standard that is established by that Article.[103] In *Gillot et al v France*, for instance, a distinction based on the length of residence in New Caledonia for the purpose of a self-determination referendum is considered to be objective and reasonable.[104] Meanwhile, in General Comment 25, an example of permissible restrictions that was mentioned by the UNHRC includes age limitation,[105] whereas instances of impermissible restrictions include distinction based on citizenship by birth or naturalisation and discrimination based on physical disability or illiteracy.[106] In addition to this, with regard to the general prohibition of 'unreasonable restrictions' in the chapeau of Article 25 of the ICCPR, Manfred Nowak maintained that "It is clear from the historical background that this limitations clause was to refer primarily to the issue of eligibility to vote."[107]

In fact, if restrictions on the principles governing the right to vote are to be allowed, it could have the absurd effect of degenerating 'genuine' elections into sham ones that are typical in dictatorial regimes, or in other words, the restriction could be abused to justify vote rigging. As stated by the UNHRC in General Comment 25, "Genuine periodic elections in accordance with paragraph (b) are essential to ensure the accountability of representatives for the exercise of the legislative or executive powers vested in them."[108] Restrictions or derogation of this principle would nullify the right to political participation itself. Similarly, with regard to the principle of secret ballot, the UNHRC commented that "Waiver of these rights is incompatible with article 25

[103] For cases concerning restrictions on the right to vote, see Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn, Oxford University Press 2013) 738-741.
[104] *Ms. Marie-Hélène Gillot et al. v. France* (n 102) para. 13.7-13.8.
[105] General Comment 25 (n 89) para 4.
[106] ibid para. 3 & 10.
[107] Nowak (n 86) 577.
[108] General Comment 25 (n 89) para 9.

of the Covenant."[109] The principle itself is considered important to ensure that voting is conducted freely and unimpaired.[110] In the case of *noken*, when actual voting took place, the lack of such principle has transformed the election into a mere formality in which the votes are allocated in accordance with the decision of the big man or the consensus of the tribe. Consequently, it is difficult to conceive that a restriction on the basic principles of the right to vote (including in the form of *noken*) would be tenable.

B. Indigenous Rights

Eva Brems argued that under the current international regime governing indigenous rights, there is an approach "mandating recognition of traditional law, and hence mandating the recognition and organisation of legal pluralism by the state."[111] This approach can be found in both the ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Under Article 8(2) of the ILO Convention 169, for instance, it is enshrined that indigenous people "shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights."[112] Similarly, Article 34 of the UNDRIP recognises the right of indigenous people to "promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards."[113]

However, Indonesia has not ratified the ILO Convention 169, and therefore this treaty would not be applicable in the context of *noken*.[114] As for the UNDRIP, it is also difficult to hold that this document is legally binding on Indonesia. While there are various scholars who contend that some aspects of the declaration reflect customary international law and despite the fact that the

---

[109] ibid para. 20.
[110] ibid; Nowak (n 86) 582.
[111] Brems (n 84) 28. See also Ben Saul, *Indigenous Peoples and Human Rights: International and Regional Jurisprudence* (Hart Publishing 2016).
[112] Convention (No. 169) Concerning Indigenous and Tribal People in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383 (ILO Convention 169).
[113] Resolution adopted by the General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, 2 October 2007, A/RES/61/29.
[114] 'Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)' (*International Labour Organization*, archived 6 June 2019) <web.archive.org/web/20190606104720/www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314> accessed 27 August 2019.

document has influenced legal practice at the national level, [115] the declaration is still considered as a non-binding instrument or soft law.[116] Furthermore, as argued by Alexandra Xanthaki, claims that substantial parts of the UNDRIP contain customary international law might be 'premature'. She found that:

> The 2000 ILA Statement of Principles Applicable to the Formation of General Customary International Law has accepted that resolutions can create customary international law, provided that they have been accepted unanimously or almost unanimously and that there is a clear intention on the part of their supporters to lay down a rule of international law. Unfortunately though, the Declaration cannot fall within this category (…). [S]tatements of some states who voted in favour of the Declaration made it rather obvious that they did not intend to lay down a rule of customary international law.[117]

As a result, it would be difficult to argue that Article 34 of the UNDRIP is binding on Indonesia in the context of 'customary law' societies in general.

Even if these instruments are fully applicable to Indonesia, they do not grant a leeway for arguments that are based on unfettered cultural relativism. Both Article 8(2) of the ILO Convention 169 and Article 34 of the UNDRIP stipulate that the right to retain customs must be in line with human rights standards. Since it has been established in the previous section that the *noken* system is a violation of the right to vote, it would be untenable to justify this system under the framework of indigenous rights. Therefore, under international human rights law, the practice of *noken* cannot be upheld as a right to legal pluralism.

---

[115] Megan Davis, 'To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' [2012] 19 Australian International Law Journal 17, 38-44; See also United Nations Special Rapporteur on the Rights of Indigenous Peoples, Annual Report, 11 August 2008, A/HRC/9/9 para. 41: "Albeit clearly not binding in the same way that a treaty is, the Declaration relates to already existing human rights obligations of States, as demonstrated by the work of United Nations treaty bodies and other human rights mechanisms, and hence can be seen as embodying to some extent general principles of international law. In addition, insofar as they connect with a pattern of consistent international and State practice, some aspects of the provisions of the Declaration can also be considered as a reflection of norms of customary international law (…)."

[116] Davis (n 115) 36-37; Mauro Barelli, The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples [2009] 58 International and Comparative Law Quarterly 957; Mauro Barelli, The Interplay Between Global and Regional Human Rights Systems in the Construction of the Indigenous Rights Regime [2010] 32 Human Rights Quarterly 951.

[117] Alexandra Xanthaki, 'Indigenous Rights in International Law over the Last 10 Years and Future Developments' [2009] 10 Melbourne Journal of International Law 27, 36. As a note, in 2007, Australia, Canada, New Zealand and the United States voted against the UNDRIP. However, as of 2019, they have retracted their objection. See 'United Nations Declaration on the Rights of Indigenous Peoples' (*United Nations*, 23 August 2019) <web.archive.org/web/20190823185238/https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> accessed 27 August 2019.

At the same time, such positivist outlook might attract criticism that the reasoning is based on a top-down dogmatic line of research. Although it is true that the right to indigenous law is preconditioned on its compatibility with international human rights law, Eva Brems opined that "any operationalisation of the human rights conformity clause with respect to indigenous law must engage with discussions on the relevance of cultural worldviews in the interpretation of human rights." [118] The same point could also be raised with respect to *noken* and the right to vote. While a purely positivist research indicates that Indonesia is not bound by the ILO Convention 169 and the UNDRIP, there might be a possibility for individual rights to be interpreted in a manner that favours indigenous communities. At the Inter-American level, for instance, the Inter-American Court of Human Rights in the case of *Awas Tingni v. Nicaragua* interpreted the individual right to property under Article 21 of the American Convention on Human Rights to include communitarian land ownership.[119] The Court ruled that "Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival."[120] Furthermore, as observed by Jack Donnelly, "some deviations from authoritative international human rights norms may be, all things considered, (not il)legitimate."[121] If a deviation in the form of *noken* could indeed be legitimised, a complete disregard of the right of Papuan customary law societies to the *noken* system might still be considered as problematic even if it is in line with the law..

VI. RESOLVING THE CONFLICT

The *noken* system seems to be contrary to the right to vote under international human rights law. This creates a conflict between Indonesia's adherence to the ICCPR and its commitment to limited legal state legal pluralism as demonstrated by Article 18B(2) of the Constitution and the rulings of the Constitutional Court. Despite this, since both international human rights law and *adat* law have

[118] See Eva Brems, 'Human Rights at the Intersection of Legal Orders: The Case of the 'Kharisiri'' in Christa Rautenbach (ed), *In the Shade of an African Baobab: Tom Bennett's Legacy* (Juta Publishers 2019) 193-211.
[119] Inter-American Court of Human Rights Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua (2001) IACHR 9 para. 149.
[120] ibid.
[121] Jack Donnelly, The Relative Universality of Human Rights [2007] 29 Human Rights Quarterly 281, 300.

been accepted to be simultaneously applicable under Indonesian law, there are internal mechanisms and rules that might be invoked to deal with such legal clash.[122]

This part will try to explore several potential solutions that could reconcile the conflict between the different sorts of applicable law in the case of *noken*. It will be submitted that there are two approaches that might be feasible in this regard: abolishing *noken* on the ground that it is unconstitutional or regulating *noken* so that it is in line with human rights standards (either top-bottom or bottom-up). In order to legitimise the latter, this part will rely on Jack Donnelly's framework of "relative universality".

A. Unconstitutionality of Noken

As was mentioned in Part III, the Indonesian Constitutional Court has simply assumed (or even has taken a leap of faith) that the traditional right of customary law societies in Papua to practice *noken* during elections is in line with Article 18B(2) of the Constitution. Through this omission, it could be argued that the Court has established a defective precedent. A more thorough assessment indicates that it is not in line with 'societal development'.

In the case of *Abdul Hamid Rahayaan and Others*, the Constitutional Court clarified that 'societal development' also means that the substance of *adat* rights must be in line with human rights.[123] Since it has been found that the *noken* system is a violation of the individual right to vote, it could be argued that *noken* has not satisfied the requirement of being consistent with 'societal development', and thus is unconstitutional.

Furthermore, it is also questionable whether the *noken* system fulfils the test of consistency with 'principles of the state'. As mentioned by the Court in *Abdul Hamid Rahayaan and Others*, this requirement implies that the substance of customary rights must not be contrary to national legislations. The *noken* system is not consistent with Article 22E(1) of the Constitution and Article 1(1) of Law Number 7 Year 2017, as these legal instruments stipulate that elections must be conducted in a 'direct, general, free, secret, honest, and fair manner'.[124] The same requirement could also be found in the right to vote provision under Article 43(1) of Law Number 39 Year 1999

[122] Desmet (n 8) 46
[123] *Abdul Hamid Rahayaan and Others* (n 41) para. 3.15.4.
[124] Indonesian Constitution (n 37); Law of the Republic of Indonesia Number 7 Year 2017 on General Elections.

on Human Rights.[125] The ICCPR itself has been transposed into Indonesian law in the form of Law Number 12 Year 2005 on the ratification of the ICCPR.[126] As a note, these human rights provisions could also be invoked to strengthen the previous argument that *noken* is not in line with 'societal development', particularly in light of the potential counter-argument that there is a "multitude of highly diverse sources" of human rights.[127]

Therefore, it is difficult to uphold the constitutionality of *noken*, and the inconsistency between Indonesian limited state legal pluralism and international human rights law in the case of *noken* could be reconciled by considering the system to be unconstitutional. As a consequence, from a purely legal perspective, the *noken* system as currently implemented needs to be abolished. At the same time, from a practical perspective, such decision might anger the customary law societies that are implementing the *noken* system. The practice itself might still continue despite blanket prohibition, and the decision itself could be subject to accusations of cultural imperialism.

B. Maintaining Noken through Regulation

The Constitutional Court in *Elion Numberi* has relied on practical arguments to uphold the *noken* system.[128] It is perhaps possible to reconcile limited state legal pluralism with the individual right to vote by regulating the *noken* system in order to ensure that it is in line with human rights standards. From a practical perspective, this could also help in ensuring that elections in Papua are conducted genuinely and that they do not degenerate into a vote brokerage platform. In order to legitimise this particular form of solution, this section will employ the framework of 'relative universality' that was expounded by Jack Donnelly, as the solution itself would entail the upholding of the practice of *noken*. While there are other similar frameworks that have been formulated in

[125] Law of the Republic of Indonesia Number 39 Year 1999 on Human Rights.
[126] Law of the Republic of Indonesia Number 12 Year 2005 on the Ratification of the International Covenant on Civil and Political Rights (ICCPR); see also Arif Havas Oegroseno, 'Undang-Undang Republik Indonesia Nomor 12 Tahun 2005 Tentang Pengesahan International Covenant on Civil and Political Rights/ICCPR (Kovenan Internasional Tentang Hak-Hak Sipil dan Politik)' [2006] 4 Indonesian Journal of International Law 169.
[127] See Brems (n 84) 23.
[128] *Elion Numberi* case (n 7) para 3.24.

order to legitimise the inclusion of non-Western standards,[129] this particular framework will be chosen due to its central role in the discourse on the universality and diversity of human rights.[130]

Donnelly argued that human rights are relatively universal at the level of concept, and yet it has "multiple defensible conceptions", which in itself consists of "many defensible implementations".[131] With regard to implementations, he invoked the example of the right to political participation; he stated that "the design of electoral systems to implement the right "to take part in the government of his country, directly or through freely chosen representatives"—relativity is not merely defensible but desirable."[132] However, he then conceded that international human rights provisions "often embody particular conceptions, and sometimes even particular forms of implementation."[133] In the context of Article 25(b) of the ICCPR, while the right to political participation itself can be considered as a concept, the Article prescribes universal and equal suffrage with secret ballot as specific forms of implementation. It could be argued that these forms constitute a Western invention that is framed as an international standard under both the ICCPR and also Article 21(3) of the Universal Declaration of Human Rights.

Jack Donnelly then formulated four criteria to assess whether deviation from international human rights norms might be considered as legitimate. In his view, they "can help us to grapple seriously yet sympathetically with claims in support of such deviations."[134] These criteria include differences in the level of threats to allow variations even at the level of concept, the existence of seriously-reasoned arguments to justify limited deviation, the fact that a particular conception or implementation is deeply embedded in a society so that it merits "sympathetic consideration of difference" and the increasing level of coercion that equals to decreasing level of tolerance.[135] It seems that these criteria could be invoked to legitimise particular conceptions or implementations, although the theoretical framework itself could be criticised for its inconclusiveness, arbitrariness and the fact that it is not created from an intercultural dialogue.[136]

---

[129] See, for instance, Andrew Nathan's "tempered universalism" in Andrew J. Nathan, Universalism: A Particularistic Account in Lynda S. Bell, Andrew J. Nathan, Ilan Peleg (eds), *Negotiating Culture and Human Rights* (Columbia University Press 2001) 349.
[130] Cf. Brems (n 118)
[131] Donnelly (n 121) 299; see also Jack Donnelly, Universal Human Rights in Theory and Practice (3rd edn, Cornell University Press 2013) 99-103.
[132] Donnelly (n 121) 299.
[133] ibid.
[134] ibid 300.
[135] ibid 300-301.
[136] See Brems (n 118).

In the context of the *noken* system, as exhibited in the Indonesian Constitutional Court's cases, there are seriously-reasoned arguments to justify deviation in the form of *noken*, such as respecting cultural diversity and also preventing conflict and disintegration within the concerned customary law societies. In line with one of Donnelly's arguments, the Court's practical approach has served to legitimise its decision to uphold the *noken* system. The argument that is founded on preventing disintegration could also be mentioned to demonstrate that there is a level of threat that could legitimise deviation at the level of implementation in the form of *noken*. Furthermore, it is also possible to rely on the testimony of the Papua's People Council to argue that the actual decision-making practice of *noken* is deeply embedded in the customary law societies of Mee Pago and La Pago irrespective of the fact that the implementation of the *noken* system for the purpose of modern elections only began in 1971. Based on this consideration, one could argue that Donnelly's framework provides a legitimation for upholding the practice of *noken*.

At the same time, if the *noken* system is to be maintained, its existence is still problematic from a purely positivist perspective, especially since the right to vote under the ICCPR is formulated at the level of implementation. As a form of compromise, the *noken* system could conceivably be regulated in a top-down manner so that the big man does not play a disproportionate role in the election. Indonesia could still respect the traditional decision-making method of customary law societies in the Central Mountains of Papua by allowing the tribes to have discussion and deliberation before the election. Such discussion is analogous to the ordinary conversation and debate that are typical in modern liberal democracies. One could even allow *noken* bags to be maintained as a replacement for ballot boxes. However, in order to ensure that elections are genuine, actual voting would have to take place instead of polling station officials assuming that an entire village is voting for one candidate as mandated by the big man or as decided by consensus. The KPU would have to ensure that voting is actually organised and conducted in the villages, and that the principle of secret ballot is upheld. This could leave a room for both individual right to vote and traditional decision-making process. Without the principle of secret ballot, voting process would only become a formality instead of a free exercise of the will of the electorate.

This sort of solution might also arouse criticism that it constitutes a form of cultural imperialism. In the context of *noken*, the customary decision-making procedure would be subordinated to the standard of modern liberal democracies in conducting elections. In order to strike a balance between international human rights law and the interest of customary law societies,

it might also be possible to adopt a bottom-up strategy to regulate *noken*. Jack Donnelly observed that the current international human rights consensus is highly influenced by the United States and Western Europe.[137] Nevertheless, he found that:

> Human rights dominate political discussions less because of pressure from materially or culturally dominant powers than because they respond to some of the most important social and political aspirations of individuals, families, and groups in most countries of the world. States may be particularly vulnerable to external pressure and thus tempted or even compelled to offer purely formal endorsements of international norms advocated by leading powers. The assent of most societies and individuals, however, is largely voluntary. The consensus on the Universal Declaration, it seems to me, principally reflects its cross-cultural substantive attractions.[138]

In accordance with this observation, it is important to distinguish between voluntary and coerced consensus. In the view of Donnelly, the universality of human rights has been voluntarily embraced by various actors across the globe. In the context of *noken*, customary law societies of Mee Pago and La Pago have not expressed their consent to the particular forms of implementation in guaranteeing the right to vote that is prescribed by the ICCPR. This would create the problem of a lack of cultural legitimacy. As observed by Abdullahi Ahmed An-Na'im, "people are more likely to observe normative propositions if they believe them to be sanctioned by their own cultural traditions."[139] Based on this, a bottom-up approach would be to launch a cultural dialogue to convey the importance of these particular forms of implementation in securing a genuine and non-fraudulent election. This would be in line with the 'cultural legitimacy thesis', which, as stated by An-Na'im, "accepts the existing international standards while seeking to enhance their cultural legitimacy within the major traditions of the world through internal dialogue and struggle to establish enlightened perceptions and interpretations of cultural values and norms."[140] In the context of *noken*, if such action is to be undertaken, there is a possibility that a compromise solution could be struck. Furthermore, under An-Na'im's framework, this would constitute part of the first step in the process of broadening and deepening of the universal consensus on the right to vote

---

[137] Donnelly (n 121) 291.
[138] ibid 291-292.
[139] Abdullahi Ahmed An-Na'im, 'Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment' in Abdullahi Ahmed An-Na'im (ed), *Human Rights in Cross-Cultural Perspectives. A Quest for Consensus* (University of Pennsylvania Press 1992) 20.
[140] ibid 21.

through "internal reinterpretation of, and [subsequently] cross-cultural dialogue about, the meaning and implications of basic human values and norms."[141]

VII. CONCLUSION

The *noken* system constitutes a unique case in the discourse of legal pluralism, universal human rights and indigenous rights. Indonesia has committed itself to both human rights and the accommodation of customary law societies and their traditional rights, yet at the same time it does not accept the applicability of the concept of indigenous rights in its territory. The conflict between the individual right to vote and the Indonesian state legal pluralism in the case of *noken* is caused by the unregulated nature of the system and also by the overly permissive attitude and the lack of thorough legal consideration from the Indonesian judiciary and electoral body. The defective precedent in *Elion Numberi* could have been avoided if the Constitutional Court did not simply assume that all *adat* practices would be accommodated by Article 18B(2) of the Constitution. In case of a legal clash between *adat* and human rights, it also does not imply that the *adat* practice must be abolished. If the state has concerns over diversity and potential conflict from imposing a system, it could have simply regulated the practice to ensure that both *adat* law and international human rights law could be accommodated in a legal pluralist setting.

At the same time, the *noken* case also demonstrates that conflict between customary law and human rights law could be avoided by having a sort of 'emergency brake' to ensure that the protection of customary rights is not abused to justify practices that are deemed to be inconsistent with the jurisprudence of international human rights law. Both the ILO Convention 169 and the UNDRIP contain this sort of clause, and a legal conflict in Indonesian law is also circumvented through the requirement that the substance of the rights of customary law societies must be consistent with 'societal development', including human rights. This sort of clause would serve as a compromise between respect for customary rights and the aspiration for universal human rights in a legal pluralist setting.

[141] ibid.