

Conference Paper

Legal Protection of Balinese Traditional Law During Global Tourism Destination Development

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Abstract.

This study seeks to examine the legal preservation of Balinese traditional law during the development of global tourism destinations. This study employs an empirical legal research method, in which the law is conceptualized as a phenomenon that can be observed in the actual world. Article 6, paragraph 1, stresses that “in the context of upholding human rights and the needs of indigenous people, these must be considered and protected by law, society, and the government”. The protection of human rights of indigenous peoples in Bali includes the rights of women and children, the prohibition of inhuman punishment regarding customary sanctions, rights to village land related to the protection of cultural identity and ulayat (customary) rights of local communities in tourism development. This is because Bali is a tourism development hub.

Keywords: Balinese, destination, tourism

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1. INTRODUCTION

The level of theory and practice in the implementation of human rights restrictions is influenced by the strong current of controversy between universalists and particularists. In Indonesia, even among ASEAN nations, the current of thought that does not embrace or has been unable to accept the fundamental principles of universal human rights is still very strong; therefore, it must be replaced with particularistic human rights, namely the ASEAN version of human rights. Indeed, each nation-state in the world has unique conditions in the political, economic, social, and cultural spheres that may influence the implementation of human rights.[1] However, these particular conditions are only variables that cannot eradicate the universal nature of human rights' fundamental principles. The fundamental principles of universal human rights are reflected in the

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sentiment that “humans as God’s creatures have rights that should not be ignored, or even violated, from birth onwards.”[2]

This is stated in the Preamble to the 1945 Constitution of Indonesia, which recognizes universal human rights views, as being associated with the spirit of the Indonesian state. This is reflected in the statement that “in actuality, independence is the right of all nations” and that “colonialism in the world must therefore be abolished because it contradicts humanity and justice.” In Paragraph I of the Preamble to the Constitution of 1945, the phrase “that in fact” conveys the meaning of the Indonesian people’s view of “natural” human rights, which therefore includes universal fundamental principles. The same holds true for the international-global context on December 10, 1948.[3]

The United Nations (UN) establishes the Universal Declaration of Human Rights, which serves as the International Bill of Rights and serves as the moral foundation for the protection of human rights globally. The International Covenant on Civil and Political Rights (First Generation of Human Rights, 1966), the International Agreement on Economic, Social, and Cultural Rights (Second Generation of Human Rights, 1966), and the Third Generation of Human Rights followed. These three documents gave birth to the Human Rights Development and Peace Act and contained provisions that gave birth to the principles of international law, namely self-determination (the right of a nation to determine its own fate), the spirit of decolonization, and the independence movement of Asian-African nations. The Asian-African Conference’s Bandung Declaration (1955) also contains historical information. Thus, self-determination can be said to be motivated by the inherent rights stated and implied in the 1945 Constitution’s Preamble, Paragraph I. Therefore, it is appropriate for “the Indonesian nation-state to embrace universal human rights principles, despite the fact that they cannot deny political, economic, social, and cultural variables, both as independent and dependent variables.[4]

As a fundamental privilege, the protection of human rights extends to everyone, including indigenous peoples (MHA). This means that indigenous peoples’ rights must not only be respected and protected, but also realized. Human rights reveal the fundamental power or authority a person possesses. Because human rights are basic and fundamental, their realization is essential. Article 18B paragraph (2) of the Constitution of 1945 recognizes the rights of indigenous peoples: “The state recognizes and respects customary law community units and their traditional rights so long as they are still alive and following the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated by law.”[5]

Each province in Indonesia is a factually distinct community unit governed by customary law that has existed for centuries. Customary law communities are organized

community groups that operate as a unit, inhabit a particular region, have rulers, have their own customary law and wealth, both in the form of tangible and intangible objects, and control the natural resources within their reach.”[6]

The nation-state” along with its multiculturalism, which is accompanied by constitutional legal provisions on regional autonomy, is founded on the principles of democracy, community participation, equity, and justice, and pays attention to regional potential and diversity (see Law No. 22 of 1999 pertaining to Regional Government). The Regional Government should review and place “public policy within the context of “human rights protection by taking into consideration the most important international and domestic human rights instruments. In the literature, “local human rights issues” refer to human rights issues that are characterized by the presence of a variety of cultures within multicultural societies.[7] Policies relating to the existence of customary law create opportunities for the equitable regulation and use of traditional knowledge held by communities governed by customary law. This pertains to implementing the Nagoya Protocol.

2. METHODOLOGY/ MATERIALS

This research employs the empirical legal research method as its methodology. In empirical legal research, the law is conceived of as an empirical phenomenon observable in the actual world. In this investigation, secondary data are used as preliminary data, followed by primary data or field data. Empirical legal research refers to the normative premise, where the operational definition can be derived from laws and regulations, such as the Law of the Republic of Indonesia Law no. 39 of 1999 concerning Human Rights and also the “laws” made by Balinese customary law communities, such as Awig-awig, which are evaluated based on their implementation.

3. RESULTS AND DISCUSSIONS

In Indonesia, a succession of laws and regulations have been enacted to recognize the rights of indigenous peoples, as described in the preceding paragraphs. However, in practice, these laws and regulations have not been effective. Consequently, several observers of communities governed by customary law believe that Indonesia requires its own rules governing communities governed by customary law in Indonesia. The demand for distinct regulations is currently limited to a discussion of the Customs Bill, which has not been enacted for a variety of reasons. However, given the availability of

extant laws and regulations, the rights of indigenous peoples in Indonesia should have been fulfilled to the greatest extent possible.[8]

This is evident in the issue of land, which is crucial to indigenous peoples. The land is a site to live and grow crops, as well as a burial ground for indigenous peoples. In addition, the land is inhabited by supernatural beings and ancestral entities. Article 3 stipulates that the implementation of ulayat rights and rights similar to those of communities governed by customary law, so long as they still exist in reality, must be in accordance with national and state *Ulayat* rights are rights owned by a legal alliance (village, tribe) in which the community members (legal alliance) have the right to control land whose implementation is regulated by the head of the alliance (the concerned leader of the tribe/village). On the basis of these provisions, the ulayat rights of communities governed by customary law can be defined as fundamental rights inherent to communal life that are not granted by the state. This is identical to the fundamental rights inherent in every human being, such as the right to life, which is not a state-granted privilege.[9]

Customary forest management is one of the rights of indigenous peoples that is closely related to this law. The significance of Law Number 41 of 1999's recognition of indigenous peoples' rights over forest area land management is one of the benchmarks for reforming the dominance of the state and the private sector in managing forest area land. According to the articles, it appears that, first, the state explicitly recognizes the rights of indigenous peoples to forests, and second, the state provides indigenous peoples with the opportunity to participate in the planning, designation, and development of state-planned forests.[10]

The issuance of Constitutional Court Decision Number 35/PUU-X/2012 on judicial review of Law Number 41 of 2009 pertaining to Forestry, including the decision that "Customary forests are forests that are on the territory of communities governed by customary law," the provisions regarding customary forest management as mandated by the Forestry Law are becoming increasingly emphasized. This decision has far-reaching implications for endeavors to acknowledge the existence, indigenous knowledge, and rights of indigenous peoples. However, the implementation of the aforementioned decisions is hampered by a number of obstacles, including the lack of fundamental data on the existence of indigenous peoples and local wisdom.[11]

The 1948 Universal Declaration of Human Rights implicitly protects "the rights of women and children" and reinforces the principle of nondiscrimination. Parties to the international human rights convention should ensure that men and women have equal access to civil and political rights, economic, social, and cultural rights, including the rights to development and peace. Even the ILO places women's and children's rights,

including those of “handicapped children”, in a special position due to their extremely vulnerable nature and physical condition. Menstruation leave, maternity leave, and equal pay for men and women performing the same type of work are some of the workplace protections enshrined in the Manpower Act that can serve as a model. Similarly, in the field of education, UNESCO compiles special instruments in the form of agreements, statements, and recommendations to ensure that the legal products of member nations safeguard the rights of children in the context of “mandatory education.”[12]

The Balinese customary law community is a group of individuals who create and administer Balinese customary law. Those referred to by the Balinese customary law community are Hindu Balinese bonded by both territorial and genealogical ties (village and *soroh*). In this relationship between the village chief and the *soroh*, they live in accordance with their customary law, namely Balinese customary law. The fundamental principles of customary law that apply in Bali are identical, but this does not preclude the possibility of differences in the village of *kala patra* (time, place, and circumstances) where customary law is enforced. As with the principles and customs that exist in the community of Balinese customary law, the extant differences must be addressed more judiciously, whereas the similarities that exist regardless of these differences must be emphasized more. On the other hand, the differences must be utilized individually in accordance with their beliefs, without disturbing or imposing upon the other party.[13]

In general, the principles of Balinese customary law can be summarized as follows: first, decorum and equilibrium. The principle of decorum and equilibrium is a fundamental tenet of customary law. In a society with a strong sense of community, the principle of propriety and equilibrium exists as a general rule. The community governed by customary law is a communal society that values togetherness and social harmony. In this instance, the public interest will take precedence over individual interests. This propriety teaches people to live with natural decency and equity, whereas balance teaches balanced behavior in life, wherein one teaches natural equality with the other. The term “reasonable balance” is used to distinguish it from equality, in the sense of being identical as a whole.[14] Thus, equilibrium can be interpreted as a condition or benefit that follows the circumstance. Therefore, in Balinese customary law, the obligations that must be fulfilled take precedence over the rights that must be obtained. It is possible to distinguish customary law from the laws of individual communities, which prioritize rights over duties. *Tri Murti* is a belief held by the Balinese community of customary law regarding the cycle of human existence, namely birth, life, and death. This is the belief that these three occurrences will occur in this lifetime. The teachings of *Tri Murti*, namely the existence of three entities who carry out these three life cycles,

incorporate this belief. The three are Brahma, the creator of this plane of existence, Vishnu, the preserver, and Ciwa, the return to the source.[15]

This belief in Tri Murti is manifested in every Pakraman village in Bali by the presence of three temples, as described below. Pura Desa, also commonly known as Pura Bale Agung, is the temple where Brahma, the creator of the universe, resides. Pura Puseh, also known as Pura Segara, is the abode of Vishnu as the guardian of the universe and all of its contents; and Pura Dalem is where Ciwa resides as a pamerlina, return to its origins.[16] These three sanctuaries are called Kahyangan Tiga or Kahyangan Desa. Every Pakraman village is required to have these three temples, so their existence is a defining characteristic of a village. In this circumstance, every villager is a bearer who has obligations and rights regarding the continued existence of the three temples. Besides the belief in Tri Murti, a community governed by customary law adheres to the following life principles: According to Tri Hita Karana, there are three causes of happiness: the balance of human relationships with God, the balance of human relationships with other humans, and the balance of human relationships with nature. A harmonious relationship is the source of pleasure, so this relationship must remain harmonious.[17]

Tat wam asli translates to “you are me” The notion is that in society, individuals should treat one another as they treat themselves. Hurting others is equivalent to harming oneself. Therefore, residents of communities governed by customary law have always hoped that a harmonious and peaceful existence will contribute to the prosperity of communal living. Tri Kaya Parisuda consists of three fundamental principles that must be followed: thinking well, acting well, and speaking well. Through this teaching of kindness, it is anticipated that all members of society will always spread kindness, thereby ensuring the perpetual maintenance of social order and peace. The mentioned fundamental principles must be implemented in living life in communities governed by customary law, and all of these are implemented in the provisions of Balinese customary law that are carried out in living life by Balinese customary law communities. Implementation of Balinese customary law is reflected in the existence of the customary law community, specifically the krama (citizens) of the Pakraman village. In daily life, the Balinese community governed by customary law is bound to the Pakraman village as a legal alliance for the territorial ties by which they live and conduct their lives. As a legal community unit, Pakraman Village has territory, residents, norms of life, management, and assets that are not the property of its members, and its citizens have no desire to dissolve it.[18]

A person’s membership as village manners is contingent upon (a) their enjoyment of village land as a place to reside and grow crops; (b) their marriage; and (c) their

own free will to participate as village manners. As krama desa, they will fulfill their responsibilities and acquire the corresponding privileges. These obligations include material and labor obligations to ayah-ayahan village, while the rights obtained include the rights as villagers to receive services and protection as citizens, enjoy village assets, either in the village yard as a place to live or ayahan village land in the form of agricultural land, use of graves, and other rights according to the conditions of the village in question.[19] The normative provisions reflect a beautiful *das sollen*, but they cannot be implemented promptly at the level and signal. This provision is constrained by patriarchal cultural origins (gender bias) as well as “local law” and even national law. Call it Law No. 1 of 1974 Concerning Marriage, patriarchal culture continues to prioritize the role of the household, such as the position of males as the head of the household, while the role of housewives is frequently “marginalized” in terms of decision-making.[20]

4. CONCLUSION AND RECOMMENDATION

This study provides an initial description of local human rights issues. Although the dimensions of human rights are universal, the problems that arise can also be influenced by social, cultural, economic, and political variables. Four local human rights issues were identified in Bali which were quite intensely discussed in scientific forums like this, which were studied from various scientific disciplines. The four issues include: the rights of women and children, the prohibition of cruel and inhuman punishment in relation to customary sanctions, rights to village land related to the protection of cultural identity and *ulayat* rights of local communities, as well as the rights of local communities to tourism development considering that Bali is the center of tourism development. The vulnerability and potency of local Human Rights violation at MHA in Bali especially when faced with tourism development which makes the priority of tourism facility as the main subject and ignoring community traditional rights of custom law. The solution is put in the framework of public policy namely local development with Human Rights Dimensions and consistency of implementing international and national main instrument of Human Rights and law enforcement without any exception for the enforcement of law supremacy.

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