

Traditional Village as the Legal Subject of Agreement in Tourism Object Management in Bali

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ABSTRACT

The tourism object based on its management is afforded by local government and traditional village. If its management is executed by local government and the traditional village, the form of management is executed through cooperative agreement. The parties of the agreement referred to as the legal subjects are individual person and legal entity. As a legal subject of an agreement, is a traditional village a legal subject or not? According to the Civil Code (KUHPperdata), the legal subject of an agreement is only individual and legal entity, however in practice of tourism object management in Bali, traditional village is accepted as a legal subject of an agreement by regional government. Article 18B paragraph (2) of the Constitution of RI 1945, setting out: "The State recognizes and respects traditional communities along with their traditional customary rights as long as these remain in existence and are in accordance with social development and the principles of the Unitary State of the Republic of Indonesia and shall be regulated by law." And similar as the Decision of Constitutional Court Number 31/PUU-V/2007, admitted the traditional village as the Unity of Customary Law Community (KHMA). The decision of the Constitutional Court is based on the criteria or parameter on the fulfilment of Article 18B paragraph (2) of the Constitution of RI 1945, namely: (a) a Unity of Customary Law Community (KHMA) in de facto nature is still alive (actual existence) containing at least the following elements: 1) the existence of society of which its members have equal groups; 2) the presence of customary governance institutions; 3) the existence of the norms of customary law; and 4) have a particular territory; 5) its existence has been recognized by the law; 6) the substance of its traditional rights is recognized and respected by the members of KMHA; 7) the substance of its customary legal norms complies with and does not contrary to the legislations.

Keywords: Traditional village, agreement, management, bali

INTRODUCTION

Culture is part of Balinese life. Balinese culture has become the most dominant attraction in the development of tourism in Bali, among others, introducing, utilizing, preserving, and improving the quality of objects and tourist attractions, maintaining norms and values of culture, religion and natural life of Bali. Thus, Bali Island is identical with the culture and customs owned by the community, and as the main support of Balinese culture is traditional village which is now referred to as Pekraman Village.

At the beginning, the definition of traditional village is regulated in the Regional Regulation (Local Regulation) No. 06 of 1986 on the Position, Function and Role of Traditional Village as a Unity of Customary Law Society in the Level I Territory of Bali Province, then it was regulated in the Regional Regulation No. 3 of 2001 on *Pekraman* Village and was lastly amended by Regional Regulation No. 3 of 2003 on *Pekraman* Village. The understanding of Traditional Village and *Pekraman* Village in these three Regional Regulations is not much different.

Traditional village is an organization of Balinese Hindu society which is based on the unity of territory where they live and the religious spiritual as the most essential relationships and social interaction pattern of Balinese society, as well as has autonomy, namely, territory and properties as well as has the right to manage its own household. Traditional village as a self-governing community is a traditional village and the oldest form of the original village in Indonesia. The original concept was inspired by the notion of autonomy of the traditional village. Traditional villages organize and manage themselves with their own property without interference from the state. The traditional villages do not run administrative duties delegated by the state. *Pekraman* village in Bali is a form of traditional village that remains as a clear form of traditional village.

The autonomy owned by the traditional villages has resulted them to carry two primary functions, namely, cultural and economic functions. Cultural function is a function of maintaining and developing culture. While the economic function is a function of the maintaining and developing culture as an economic potential. The management of properties owned by the traditional villages includes the management of the existing attractions and tourism objects available within the traditional village. Both of these functions indicate that tourism in Bali should have a clear foundation as well as require management involving all elements of the community in supporting the economy of Balinese community. To carry out the vision of Bali tourism involving all elements of Balinese community, Balinese Government issued Regional Regulation (Local Regulation) No. 3 of 1974 on Cultural Tourism as a reference for the development of tourism in Bali. The Local regulation was amended by the Local Regulation No. 3 of 1991 which principally states that tourism developed in the territory of Bali is cultural tourism inspired by Hindu Religion. Thus, tourism activity is expected to be carried out consistently and harmoniously with the local culture and rooted on the divine values Hindu Religion. This local regulation was lastly amended by Regional Regulation No. 2 of 2012 on Balinese Cultural Tourism.

The enforcement of the Regional Regulation No. 3 of 1974 has caused legal issues in the field of tourism in Bali. The tourism management has begun being colored with commercialization and secularization signals, tourism objects in Bali located within the area of traditional villages, are managed by the local government or otherwise managed by the traditional village itself. This is affirmed by Article 16 of Regional Regulation No. 2 of 2012 of Bali Province stating: the management of tourist attraction can be conducted by the Provincial Government, *Pekraman* village, traditional institutions, individuals and business entities. While Article 25 of Regional Regulation No. 2 of 2012 states: *Pekraman* Village and/or other traditional institutions can cooperate with local governments to perform efforts to prevent tourism activities that do not comply with the cultural tourism in Bali.

The above mentioned conditions on one hand provide opportunities for traditional villages and traditional institutions (traditional institution, *banjar*, *sekaa*) to undertake the management of tourism objects. On the other hand, however, the above provisions raise philosophical, juridical, and theoretical issues. Norms and format which have not been described in the legislation on tourism management would cause injustice, fairness in the management of tourism objects. Such conditions indicate juridical issues as it would cause vacuum of law and uncertainty of law, namely, the subject status of the traditional villages in the management agreement of tourism objects.

The Recognition of Regional Government to the Traditional Village as a Legal Subject of Agreements in Tourism Object Management

Regional Regulation is a reflection of the existing stakeholders' thought in a certain region. As the parties who understand most the problems arising in their environment, intended

product should reflect values which are acceptable by majority residents of the area, including the traditional villages located in the areas concerned. Regional regulation is legal product of a particular region, enforced and applicable in the region itself. Reviewed from the aspects of regional products in the fields of law, it is surely not only the regional regulations but there are other regulations, for instance, a regulation issued by the Head of a Village or Kelurahan (Official Village) called Village Regulations, and there are laws and customs in Bali which do not have the same position as the applicability of the Village Regulations, called "*awig-awig*". *Awig-awig* is not a regulation made by the Village (Official Village or Kelurahan) and the Village Regulations are not *awig-awig*. The regulation produced by *Pakraman* Village is called *awig-awig*, it is a tool to build and maintain the spirit of the traditions considered good and beneficial to *Pakraman* Village (traditional spirit).

Bali has Cultural Tourism as an industrial brand developed. Various activities in the scope of tourism development have clearly referred to and are derived from the norms and discipline of culture grown up and developed as well upheld by Balinese people. This is reflected in local regulations, building requirements, building architecture, tourism operators and others. The commitment of the Provincial Government of Bali in promoting economic growth, improving people's welfare, overcoming unemployment, preserving nature, environment, and cultural resources as well as promoting culture is realized with the enactment of Regional Regulation No. 3 of 1991 on Cultural Tourism. Article 1 letter j determines that cultural tourism is a type of tourism development in which in its development use Balinese culture inspired by Hinduism as part of national culture as the most dominant basic potential, which is also implied the ideals on the reciprocal relationship between tourism with culture so it increases harmoniously, harmony and balance. Article 2 of the Regional Regulation No. 3 of 1991 determines that the operation of cultural tourism will be organized based on the principle of benefit, mutual business and kindship, fair and equitable, self confident and balance of life, harmony based on the philosophy of *Tri Hita Karana*. And the development of tourism objects and attractions should be carried out by considering: (1) the capability to promote economic and social cultural development; (2) religious values, customs, as well as views and values living in a society; (3) preservation of culture and life environmental quality; (4) the sustainability of tourism itself.

There are several principles that must be maintained in planning of tourism development towards cultural tourism, namely: (1) the development of tourism should include the wider community from the planning to ensure the realization of balance between economical and social interests and environment extensively; (2) the role *Pakraman* Village and traditional institutions must be enhanced since the roots of Balinese culture is derived from *Pakraman* Village, therefore the relationship between tourism and environment in wide sense including local culture should be managed to develop a mutually beneficial relationship; (3) the development of tourism is not concentrated in one place but directed to the areas which have been planned so as not to overload the carrying capacity which may cause damage against environment; (4) the growth is controlled at moderate level so it is easy to control; (5) the harmony of tourists', the local environment and local communities needs should maintained.

The success of cultural tourism development depends on a harmonious relationship between local government, local communities (traditional village) and tourism industry. Thus, the role of traditional village (and its *Banjar*) is extremely vital in the development of cultural tourism. The existence of cultural values that are not fully recognized by decision makers in setting policy should be solved with a basic strategy that is the necessity for the involvement of traditional village at all levels of decision-making. For example, in a tourist area, it is necessary to have a semi-autonomous corporation of which members represent traditional village, public sector and private sector, as the role of traditional village tourism activities can

include three aspects namely: (1) aspects of planning and decision making; (2) operational aspects in term of running a tourism business; (3) aspects of monitoring.

The participation of traditional village in tourism operations is clearly stipulated in article 12 of Regional Regulation No. 3 of 1991 stating that in the process of decision-making, the Regional Government involves community in planning, implementation and monitoring. Article 8 (1) states that the exploitation of tourism objects and attractions can be carried out by the traditional institutions, business entities or individuals. Article 13 states that with the aid of traditional village or other public institutions, Local Government conducts efforts to abolish practices that do not conform to the norms of decency.

The provision of Regional Regulation No. 3 of 1991 was then taken into the Regional Regulation No. 2 of 2012 on Cultural Tourism of Bali. Article 4 of the Regional Regulation No. 2 of 2012 states that the development of Cultural Tourism of Bali is directed to: (a) enhance the dignity, as well as strengthen the image of Balinese; (b) improve the welfare of Balinese people equally and sustainably; (c) preserve the natural environment of Bali as the basic support of social life and Balinese Culture continuously. Article 11 determines that tourist destination development must be carried out with due regard to: (a) local wisdom such as Balinese belief based on *Tri Hita Karana* and inspired by Hinduism; (b) cultural and environmental preservation, such as Balinese traditions, customs, and the rules of life environment; (c) economic potential of the community such as providing opportunity for local businesses both in the field of handicrafts and agricultural products to exhibit their works in the hotel, restaurants and other attractions; (d) the sustainability of tourism businesses. Article 16 determines that the management of tourism attractions can be carried out by Provincial Government, Pakraman, traditional institutions, individuals and business entities. Article 25 determines that traditional village and/or other traditional institutions can cooperate with governments to execute any efforts to prevent tourism activities that do not comply with the cultural tourism in Bali.

The Recognition of Individuals and Legal Entities to the Traditional Village as the Legal Subject of Agreement in Tourism Object Management

In accordance with the spirit of reform launched in 1998, the two laws which are closely related to village life (Law No. 5 of 1974 and Law No. 5 of 1979) were stated to be inapplicable any longer after the enactment of Law No. 22 of 1999 on Regional Government. Compared with the previous law (Law No. 5 of 1974 and Law No. 5 of 1979) Law No. 22 of 1999 provides greater autonomy to the regency/city, in addition to provide recognition to customary law society with all their norms. It appears obviously in Article 104 stating that "Village Representative Board or which is also called by any other name serves to protect customs, to draw up village regulations, to accommodate and distribute community aspirations, as well as to control the administrative organization of the village". Similar provisions are also known from Article 111 which reads: (1) further regulation on the village shall be enacted by regional regulations, pursuant to the general guidelines set out by the government under this law; (2) The regional regulation as stipulated in paragraph (1) shall recognize and respect the rights, customs and origin of the village.

Despite of blowing a favorable climate, traditional villagers should not be lulled. Traditional village life in the era of regional autonomy (now), instead of increasing light, but even more severe. The pressure to be faced is more choke and insistent. The pressure is coming and in and out of the traditional village. The internal pressure, among others, the existence of some people who are too eager to be rich and consumptive. The consumptive passion which is lack of control tends to undermine the traditional village itself. While the external pressure, among others, the flood of tourists from various regions and even across the world. They came to

Bali for various interests. Some are coming as tourists, looking for job, and even to live here. They also come with the values and customs prevailing in their original place, while carrying various supporting facilities, both in the form simple equipment, and fixtures of modern life with advanced technology which are hard to imagine. Generally they are diligent worker and a fast paced moving (dynamic), all of them is intended to ensure better success in various activities of life in Bali.

Article 8 of Regional Regulation No. 3 of 1991 on Cultural Tourism provides opportunities to the traditional villages to manage objects and attractions, which expressly states: "the management of objects and attractions can be done by traditional institutions, business entities or individuals". This provision provides fresh air for the development and preservation of tourism, because in addition to the tourist attraction is owned by the traditional village, they are also provided opportunity to manage the objects and the attractions owned. Traditional village serves as a cutting edge liaison between the society and government in the implementation of government programs, especially in the field of tourism. Traditional village is a very potential village in supporting tourism in Bali, because it has a variety of potential as a tourism asset, as well as the tourism type available in Bali is cultural tourism.

Some of the potentials of the traditional village in supporting tourism are: first, the structure of living patterns (residence) in the countryside is based on the concept of *Tri Hita Karana*, thus showing a distinctive pattern in the system of people's lives in Bali. The harmonious relationship between religious governance and *pawongan* governance and *palemahan* governance in the concept of *Tri Hita Karana* provides the feeling of prosperous life in the countryside. Second, according to the socio-religious character of Balinese people that the activities of Hindu religious ceremonies embodied in their daily life, especially in rural communities. *Third*, the traditional village, in addition to emit the values of Hindu religion, it also serves as a training center for Balinese culture. *Fourth*, and the atmosphere of life in traditional village is safe and secure since ancient time. Such thing is result from the realization of *trepti - ring tata-agama* (order in religious system), *trepti ring tata-pawongan* (order in human system), and *trepti ring tata-palemahan* (order in environmental system).

These opportunities cannot be easily executed considering the material ability of the traditional village and inadequate human resources owned by the traditional village in providing facilities and infrastructure, as well as the management of economic potential. The management limitations of the traditional village are often exploited by investors, both individuals and legal entities. So, the traditional village is often made ineffective in improving the traditional village economy caused by powerlessness in the management of cultural potential of traditional village itself. If the tourism objects are owned by the traditional village, but the management is done jointly with subjects outside the traditional village (individual or corporation), the management is done through agreement. The following are some examples of tourism object management that are owned or under the traditional villages, of which management is done through agreement.

Management agreement is drawn up by traditional village with individuals or legal entities, as from the beginning of the formation of traditional village, it has already been borne with financing which is quite much because of religious activities and maintenance of existing buildings within the area of *Kahyangan Tiga*. On the other hand, the revenue of the traditional village just sources from dues paid by members as well and associations (traditional banjar) existing in the area of the traditional village itself, as well as a voluntary donation (*dana punia*) obtained at the time of ceremony in the area of *Kahyangan Tiga*. One of the efforts to increase the revenue of the traditional village is from property management

in the form of tourism object management owned by the traditional village, where the traditional village draws up an agreement with individuals or legal entities. The traditional village made an agreement with the individuals as well as a legal entity should remain guided by *awig-awig* and as a form of respect by the individuals and legal entities against the existence of traditional villages as legal subjects.

CONCLUSION

Traditional Village is accepted as a legal subject of an agreement by regional government due to its *De Jure* and *De Facto* recognition. *De Jure* recognition is set out in Article 18B paragraph (2) of Constitution of RI 1945, setting out: "The State recognizes and respects traditional communities along with their traditional customary rights as long as this remains in existence and are in accordance with social development and the principles of the Unitary State of the Republic of Indonesia and shall be regulated by law." And also the Decision of Constitutional Court Number 31/PUU-V/2007 and the Decision Number 6/PUU-VI/2008 where the Constitutional Court has formulated the criteria or parameter on the fulfilment of Article 18B paragraph (2) of the Constitution of RI 1945 as follows: (a) a Unity of Customary Law Community (KHMA) in de facto nature is still alive (*actual existence*) containing at least the following elements: 1) the existence of society of which members have equal groups; 2) the presence of customary governance institutions; 3) the existence of the norms of customary law; and 4) the existence of a particular territory; b) a Unity of Customary Law Society (KMHA) does not affect the existence of the Republic of Indonesia itself as political and legal unity, namely: 1) the existence does not threaten the unity and integrity of the Republic of Indonesia and 2) the substance of its customary legal norms complies with and is not contrary to the legislations. While *de facto* recognition can be seen from the fact that there have been cooperation between Regional Government and Traditional Village, as well as agreements between the Traditional Village and individuals and legal entities in tourism object management.

ACKNOWLEDGEMENTS

This article is dedicated to civitas academica of Brawijaya University. They have already contributed significantly to this article.

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