



RECOGNITION OF SOCIETY RIGHTS IN TRADITION SPECIALLY IN TOURISM REGULATION BASED ON ARTICLE 18B PARAGRAPH (2) OF THE 1945 CONSTITUTION OF THE REPUBLIC INDONESIA

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Abstract- This research is focused on the normative problem of the vacuum of recognition norms by customary law communities which causes injustice in tourism development. This research is a normative legal research with a socio legal approach. This research approach uses a statutory approach, a legal approach with a policy orientation. The absence of norms at the level of the Law, plus contradictory interpretations regarding the conditions in Article 18B paragraph (2). At the local government level, the province of Bali has actually made a number of legal products that recognize indigenous peoples in the tourism sector. It is not sufficient to prove the recognition of indigenous peoples in one area. East Java Provincial Regulation as a comparative study. The results show that the recognition of customary law communities is still included in the product of tourism regulations. It affects $\pm 60\%$ minimum operational funds, $\pm 15\%$ low sharing funds, $\pm 10\%$ local government contributions, and $\pm 5\%$ sourced from sponsors. Regarding this fact, the alternative solution is through the reconstruction of the ideal legal model for the recognition of customary law communities in the tourism sector as a legal input for drafters.

Keywords: Indigenous People, Recognition, Regulation, Sustainable, Tourism

I. INTRODUCTION

Indigenous peoples are a social fact that remains in Indonesia and predates the proclamation of the Republic of Indonesia in 1945. The socio-cultural fact reveals that indigenous peoples exist in a wide range of forms. Traditional villages as representatives of customary law communities meet the requirements of state recognition as protected legal subjects, based on their capacity as legal subjects, in the province of Bali, what is meant by customary law communities is the traditional village. The actualization of customary law communities as the subject of law and justice studies of the status of Indigenous Peoples as legal standing and their constitutional rights, it is important to understand from the perspective of the conception of law, justice, and Indigenous Peoples. The failure of the state to respond constitutionally to Article 18B Paragraph (2) of the 1945 Constitution of the Republic of Indonesia to the recognition of indigenous peoples hinders the realization of justice that fulfills the requirements and strengthens the analogy of claims of neglect of Indigenous Peoples as part of Indonesian pluralism.

Conflicts between state law and customary law that occur in the Nahua Indian region

of central Mexico indicate a debate about rights in the context of the administration of justice by and against Indians in Mexico and Latin America that question the ideal vision of customary law reveals the paradox between the intertwining of law and customary in social praxis and the revival of the ethnic discourse of an autonomous customary law system (Sierra, 1995).

Injustice of indigenous peoples as the heirs of knowledge traditional knowledge about medicinal plants and traditional medicine that has been adopted by medicine, industry, both at home and abroad, so that factories can produce traditional medicines in a modern manner (Kuspraningrum, Luth, & Safa'at, 2019). Future regulations that protect traditional medicinal technology are needed and medical care should be made more comprehensive with more attention to the economics of indigenous peoples' rights. Refers to Griffiths' theory of weak legal pluralism (Steny, 2006). International legal debate. The re-emergence of indigenous issues is fueled by the neglect of the original component of the national identity of the Latin American republics (Stavenhagen, 2002). States that state law itself has not fully implemented statutory regulations as mandated by Article 18B Paragraph (2) of the 1945 Constitution of the Republic of Indonesia. In the context of policy, there has not been any partiality regarding the rights of indigenous peoples. The material content of determining the subak landscape as a world cultural heritage is the root cause of the conflict between local government regulations and the Cultural Law Heritage and Bali Governor Regulation Number 32 Year 2010 have an impact on the justice and welfare aspects of the Subak community (Parwata, Oka, & Sudantra, 2018). Western legal procedure emphasizes factual or forensic truth. Customary law procedures require understanding in broader contexts such as 'personal' and 'narrative' truth; social truth or 'dialogue' and healing or restorative truth. Empirically, the facts of injustice against the Customary Law Community occurred in Gampong Alue Capli, Aceh; Tana Ai, NTT; Sedulur Sikep, Central Java; Bentek, NTB and the Dayak Benuaq people in West Kutai Regency (Taylor, 2007).

(Wilson, 2012) at the Regulatory level under a Ministerial Decree and Regional Regulation level, there are arrangements for the recognition of Customary Law Communities. In Bali Province, the Customary Law Community and manages the household. Based on Local Regulation No. 2 of 2012 concerning Bali Cultural Tourism and Bali Provincial Regulation No.4 of 2019 concerning Traditional Villages, traditional villages have the potential for tourism objects and can support the level of fulfilling the welfare of traditional villages economically. Problems that arise from indigenous peoples have not been regulated by law. Regulations regarding the recognition of the rights of Indigenous Peoples by the State so far have only been found in a number of laws and regulations under the law. This means that it is unclear what form of law or the substance of the regulation. Conventional approaches based on local communities applied to the concept of meta community can provide important insights into the contradictions that occur.

The problem of the absence of norms at the level of the law regarding customary law communities due to the failure to fulfill the first, second, third, and fourth conditions of Article 18B paragraph (2) of the 1945 NRI Constitution makes justice for indigenous peoples increasingly difficult to obtain. The denial of the economic rights of customary law communities in the use of land rights of customary law communities is not in line with the basic principles of tourism development based on Article 4 of Law No.10 of 2009 concerning tourism, tourism aims to increase economic growth and community welfare through conservation nature and environment. The philosophical meaning of the importance of welfare refers to the value of justice for all Indonesian people which is fundamental based on Pancasila (Sulistyaningsih, Isharyanto, & Hartiwingsih, 2017). Welfare in the philosophical dimension always pays attention to aspects of justice which are the responsibility of the state through the legislation produced. The consideration of the triple helix mutual synergy between the government and indigenous and tribal peoples as well as sponsors or investors in the tourism sector becomes a forum for criticism of the perspective of modernism which is based on the philosophy of Rene Descartes, Immanuel Kant, John Locke, and David Hume, centered on individuals who glorify instrumental rationality.

Mean while those who hold customary law, natural resources are even culturally related and natural balance is influenced by Menski's pluralism triangle theory through comparative legal studies in the global context of the European, Asian and African systems:

comparative law in a global context (Blaser et al., 2013). Ontological conflicts due to the hegemony of modern ontological assumptions are experiencing a crisis arising from the convergence of indigenous studies, science and technology studies (STS), posthumanism, and political ecology, dealing with ontological conflicts as conceptual political problems. Development of critical literacy in western cartography in Indigenous communities (Johnson, Louis, & Pramono, 2005). That is why social capital is known, such as wisdom and moral ethics in treating nature, the State through legal drafter designs new legal norms regarding customary law communities, it is important to establish reciprocal and complementary relationships between the Mawa Tata State, namely the executive and legislative construction results and the Village Mawa way which is a growing law in the behavior of individual communities is a new way to cultivate unity with one another by accommodating the first, second, third and fourth conditions of recognition of customary law communities in Article 18B paragraph (2) of the 1945 NRI Constitution. The relationship established between the State and indigenous peoples is not a subordination relationship, but an equal relationship. In line with the moral content that the State must adopt in the legal norms of customary law communities, basically refers to the value of justice for all Indonesian people. Tourism as one of the sectors that plays a role in development contributes to the acquisition of foreign exchange and employment. Therefore, the development of environmentally sustainable tourism is carried out based on an integrated and comprehensive national policy taking into account the needs of present and future generations.

The concepts and ideas of sustainable development in the tourism sector include three aspects, namely economic, social and ecological (Gumpta, et al 2016), which are described as follows: (a) The economic aspect is a planned change process in which there is an exploitation of resources. The direction of investment is oriented towards technological development and institutional changes, all of which are in harmony with increasing present and future potential to meet the needs and aspirations of indigenous peoples. (b) Social aspects, namely development with dimensions of human interaction with cultural aspects. Not only on economic issues, but maintaining the cultural sustainability of a society so that it can exist to live life. (c) Environmental (ecological) aspects, namely the sustainable development of tourism through the maintenance of essential ecological processes through the availability of sufficient resources and the socio-cultural and economic environment is maintained.

The absence of norms at the level of the Law on Customary Law Communities, coupled with the occurrence of contradictory interpretations regarding the first, second, third and fourth conditions of recognition of customary law communities in Article 18B paragraph (2) relating to the fulfillment of economic rights in tourist areas in community areas customary law. The juridical problem is that there is no law on customary law communities which causes the practice level on the ground to ignore the recognition of indigenous peoples in the field of tourism development. Even though tourism is one of the priority agendas of the national mid-term development plan based on Law No.25 of 2014 concerning RPJMN. State legal recognition of customary law is still very weak. The way customary law works is based on negotiation, often lopsided with a number of structural advantages for a stronger demographic, economic and military side (Schlee, 2013). At the level of local regulations, the province of Bali has regulated the recognition of indigenous peoples in the tourism sector. Researchers recommend a policy model for strengthening the social capital of traditional village institutions as a manifestation of customary law communities that are identical to the character of traditional villages and Balinese cultural tourism based on the Bali Provincial Regulation No. 2 of 2012 and local regulation No.4 of 2019 concerning Traditional Villages. Bali Province can be used as a rule model and analyzed from the institutional capacity of traditional villages as agents of tourism development and strengthening the customary economy which is the representative of traditional villages in Bali in forging mutual synergies between the government and customary law communities in tourism management as the realization of the Mawa Tata State and Mawa Cara Village. Data support for ± 1,493 traditional villages in Bali Province spread over ± 9 districts / cities with details of ± 8 districts and ± 1 municipalities being the strength of the social capital of this institution, it can be seen from the actualization of its role as an agent of tourism development having creativity, innovation in a characterized economy. Balinese traditional and cultural village. Comparative studies in examining local

regulations that accommodate the recognition of customary law communities were carried out in Bali Province and East Java Province.

Central Bureau of Statistics (2010), in East Java Province there are \pm 331,259 indigenous peoples who inhabit two districts of East Java Province, namely Banyuwangi Regency where the customary law community is Wong Blambangan and in Probolinggo Regency there is the Wong Brama customary law community. The customary law community in Banyuwangi Regency is known as Laros (an acronym for Lare Osing) or Wong Blambangan. They are found in Aliyan and Alasmalang Villages, Singojuruh District, Banyuwangi Regency. The number of indigenous peoples of Lare Osing \pm 297,373. Nurhidayatullah & Wuryaningrum (2013) said that other customary law communities whose existence can also be known to exist in the East Java region, namely the customary law community Wong Tengger or Wong Brama \pm 33,886 customary law communities.

The absence of legal documents to support the recognition of customary law communities by the State at the East Java Province level shows the lack of State support through the government in sustainable tourism development. The problem occurred in Alas Malang Village, Singojuruh District, Banyuwangi Regency. The neglect of customary law communities can be seen from the not optimal contribution of the government in assisting customary institutions in developing cultural tourism. The lack of operational funds is in the range of \pm 60%, the customary law community still manages and manages the assets of the customary village independently, indicating that traditional institutions have limited capabilities in managing cultural tourism, the Central Government's sharing funds through the Ministry of Tourism are relatively low at \pm 15%, under the coordination of the Office Culture and Tourism, the contribution of the Banyuwangi Regional Government is considered to be still small, reaching \pm 10%, and sourced from sponsors, the number is limited to around \pm 5% (Mahardika, 2018). In more detail, the percentage distribution of the balance of funds to the Alas Malang Village Customary Institution in 2017 can be seen in Figure 1.

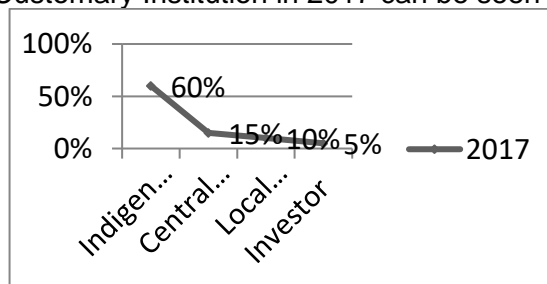


Figure 1. Percentage of Fund Balance Distribution to the Alasmalang Village Customary Institution in 2017

Based on Figure 1, it shows the absence of complete legal documents governing the recognition of customary law communities by the State in tourism development at the level of East Java Province which has an effect on the minimal involvement of indigenous peoples. This is where the problem lies because the customary law community feels they are not getting justice so that various criticisms of government policies have emerged, because they feel neglected and receive relatively minimal compensation from the government. On the other hand, the Provincial Regulation of East Java has not regulated the procedures for recognizing customary law communities and their rights and obligations in the tourism sector.

The recognition of customary law communities by the State in sustainable tourism development took samples in the Province of Bali, namely in Badung Regency and Buleleng Regency. The sample for East Java Province, namely Banyuwangi Regency and Probolinggo Regency, precisely in Bromo. The social capital of the Tenger customary law community in sustainable tourism development, in Ngadas Village shows that social capital reaches high values (Irsyad, Irwan, & Budiani, 2020), seen in table 1.

Table 1. Social Capital of Indigenous Law Community Sustainable Tourism Development
Social Capital of Indigenous Peoples

No.	Variable	Indicator	Weight	Score	Result
1	Organizational participation	Participation in organizations Prakarsa keagadiran Manifest yang dilaksanakan	7,5	2	15
2	Relation	Relations with stakeholders	2,5	2	5
3	Trust	Collaboration carried out together	2,5	1	2,5
4	Capacity building opportunities	Opportunity to be involved in the tourism business	2,5	3	7,5
5	Marketing of tourist areas	Promotions made	2,5	2	5
6	Local resources of indigenous and tribal peoples	Customs or traditions carried out to this day	2,5	3	7,5
Total				42,5	
				(High)	

Source: Research Processed Results, Adopted from research by Irsyad, Inwan, and Budiani in 2020.

Based on table 1. above, social capital can be seen with the following criteria: 10-20 (very low), 21-30 (low), 31-40 (moderate), 41-50 (high), and 51-60 (very high). The support of high social capital shows that the element of cultural preservation has also been carried out in Ngadas village, as a traditional tourism village which shows the recognition of customary law communities by the State from the results of the data recap of the high social capital of the indigenous peoples of Tengger, Ngadas Village, amounting to $\pm 42.5\%$. On the other hand, the recognition of customary law communities by the State in the development of sustainable tourism does not fully occur in the supporting tourist destinations around Mount Bromo in Pasuruan Regency including Ngadiwono Tourism Village, Tukur Village and Bhakti Alam (Wahono et al., 2017). The regional government is considered to have released the customary law community to be independent after the development of tourist destinations is carried out, it is considered to have little involvement of the Pasuruan Regency Government.

The facts of problems in the tourism sector related to various elements of recognition of indigenous peoples, the state and investors continue to emerge as legal issues that require solutions. Basically, it has been fundamentally stated in the constitution according to the first, second, third and fourth requirements in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, laws and regulations and stipulated through a strategic plan for recognition of indigenous peoples in the tourism sector in line with the RPJMN, But the manifestation of state actions in the name of the right to control the state is observed by many circles as a reflection of serious problems in the tourism sector in the Indonesian state, especially the contradictory meanings of each recognition requirement require a solution to improve the overall system because it is related to the mandate of fulfilling welfare and creating a sense of justice for all Indonesian people.

This problem requires a legal breakthrough that accompanies positive law in finding answers to the existing vacuum situation. The model for regulating the recognition of customary law communities in the tourism sector is important and this can be manifested through the reconstruction of the recognition arrangements for customary law communities in tourism development and policy models for strengthening the social capital of customary village institutions in generating cultural tourism. Reviewing the strategy for regulating the recognition of indigenous peoples in tourism development, the Regional Government of Bali Province as a pilot representation through a comparative study with the Regional Government of East Java Province by building a triple helix relationship between the state, investors and traditional village institutions. The institutional capacity of traditional villages as agents of tourism development and strengthening of the customary economy which is the representative of traditional villages in Bali in forging mutual synergies between the government and customary law communities in tourism management as the realization of the Mawa Tata and Mawa Cara villages. The traditional village as a representation of the customary law community in Bali is the strength of the social capital of this institution, it can be seen from the actualization of its role as an agent of tourism development having creativity, innovation in the economy characterized by traditional villages and Balinese culture.

(Bourchier & Hadiz, 2014) said that legal drafter can use a model of local wisdom-based tourism approach as material content of academic papers in order to sharpen the elements of legal substance in the form of an ideal policy model for recognition of indigenous peoples in the tourism sector. The element of legal culture by emphasizing tourism development in the economic sector of the local community has the principle that if the welfare of the local community has been fulfilled, it is also followed by the sustainability of its socio-

cultural life and preservation of the local environment. This approach proved to be 65.8% effective by strengthening the social capital of traditional village institutions as a form of representation of institutional elements. The law-based model by incorporating elements of social capital strengthening traditional village institutions provides a fundamental and progressive solution in the context of realizing an ideal legal reconstruction of the regulation of recognition of indigenous peoples in the tourism sector. Adopting a legal theory with a policy orientation (policy-oriented theory of law) is the result of the scientific work of American law and is one of the legal theories with a departure from legal science with its philosophical context. The focus of policy-oriented legal theory is a legal model that ideally accommodates the interests and rights of indigenous peoples so that common welfare and social justice can be realized as the constitution wills. The purpose of this study is to analyze the normative problem of the vacuum of recognition norms by customary law communities which causes injustice in tourism development

II. LITERATURE REVIEW

Problem Absence Normative Function in Statutory Norms Article 18B Paragraph (2) on the 1945 Constitution of The Republic of Indonesia

The first, second, third and fourth conditions have an effect on the absence of a law on indigenous peoples. At the level of the Regional Government of Bali Province, there are regulations for the recognition of customary law communities, such as the Bali Provincial Regulation Number 2 of 2012 concerning Balinese Cultural Tourism and Regional Regulation No.4 of 2019 concerning Traditional Villages. The province of comparison, namely the Regional Government of East Java Province, does not yet have a regulation that regulates customary law communities and culture in the tourism sector. The void in regulating the recognition of customary law communities in the tourism sector in the laws and regulations of East Java Province, it is necessary to find a legal solution by looking for the causes of these normative problems so that the right and correct legal solutions can be found (Kammerhofer, 2004). Problematic norms in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, the first condition is "still alive"; the second condition "in accordance with the development of society"; The third condition is "in accordance with the principles of the Republic of Indonesia" and the fourth condition is "regulated by law", a legal solution can be found by adding norms regulating the recognition of indigenous peoples by taking into account the multi-dimensional characteristics of indigenous peoples in the tourism sector, namely: ideology, politics, economy, social, cultural, defense and security, as well as human rights. The absence of norms regulating the recognition of customary law communities in the tourism sector in the laws and regulations of the Province of East Java, one solution to the problem can be done by using interpretation techniques to provide an explanation of the void in norms regulating the recognition of customary law communities in the tourism sector along with an explanation of the legal rules (Behling & Law, 2000)

A law on the recognition of indigenous and tribal peoples should be formed by adding laws that explicitly regulate the recognition of indigenous peoples. Adding norms that regulate tourism guided by the characteristics of tourism that contain multi dimensions. Article 4 of Law No. 10 of 2009 concerning Tourism, recognizes the economic rights and environmental preservation rights of indigenous peoples in the implementation of tourism activities as a priority program of the RPJMN. The tourism sector does not only target economic aspects, but other aspects such as social, political, cultural, religious and human rights.

Recognition Arrangements for Customary Law Communities in The Tourism Sector

which contain a philosophy of welfare because the recognition arrangements for customary law communities in the tourism sector can provide economic and welfare benefits in a broad sense to indigenous peoples, government, local governments, and investors in the tourism sector. Welfare in a broad sense is not only welfare in an economic or financial context, but includes and is not limited to security, safety, and preservation of space and the environment. The government should provide maximum legal protection to the recognition of customary law communities in tourism investment business activities to achieve the goal of recognizing indigenous peoples in the field of

sustainable tourism who preserves the space and the environment in a regenerating manner.

The arrangement for the recognition of indigenous peoples in the field of sustainable tourism including but not limited to sustainable tourism investment in the context of international law in principle regulates that sustainable tourism takes into account and is guided by community welfare, security, safety, protection, preservation of nature, space and the environment, providing appropriate treatment. Equal non-discrimination, respecting the customs and culture of local communities, and paying attention to the needs of present and future generations.

As a rule model in the formation of an ideal model for regulating the recognition of customary law communities in the tourism sector, people in Bali who are Hindu have the *Tri Hita Karana* philosophy and several concepts of local wisdom that are used as guidelines for implementation in the tourism sector and are regulated in several products of the Bali Provincial PERDA, other local regulation on Bali Cultural Tourism and local regulation on Traditional Villages. Menurut Geriya (dalam (Sustiawati, Suryatini, & Sidia, 2013)) *Tri Hita Karana* is a guideline that is uphold by the Balinese people in their daily lives which contains the value of balance and harmony regarding the relationship between humans and God (parhyangan), human relations with fellow humans (pawongan) and human relations with the environment (palemahan).

The arrangement of Balinese cultural tourism is possible and legally applicable under national law and international law because national law and international law respect the traditions and culture of the local community as a marker of the identity of the local community and subsequently become a marker of the identity of a nation and state that need to be preserved, cared for, secured, preserved existence.

The recognition of the Republic of Indonesia for the philosophy of *Tri Hita Karana* and all local wisdom of the Balinese customary law community is regulated in the Preamble to the 1945 Constitution of the Republic of Indonesia, namely ... "protecting the whole nation and all spilled Indonesian blood" as well as regulated in the first condition in Article 18B paragraph (2) The 1945 Constitution of the Republic of Indonesia which in principle determines that the State recognizes and respects special or special regional government units and recognizes and respects indigenous peoples and their traditional rights as long as they are still alive. State recognition of regional government that is special and special and State recognition to customary law communities and their traditional rights as long as the regional government and traditional community units are still alive, this recognition is a conditional recognition granted by the State.

The Recognition of the International Legal Community for the Customary Laws

The recognition of the international legal community for the customary laws, customs and culture of traditional communities or local communities is regulated in international legal documents, including: World Trade Organization (WTO). The General Agreement on Trade in Services (GATS), Multilateral Investment Guarantee Agency (MIGA), Economic Cooperation and Development (OECD), Asean Free Trade Area Agreement (AFTA), Good Corporate Governance (GCG), Unesco World Tourism Organization (UNWTO), Sustainable Development Goals (SDGs), The United Nations Environment Program (UNEP), The Man and Biosphere Program (MAB, The Uniesco's World Heritage Center, The Convention in Climate Change (UNFCCC) and John Ruggie's Principles. International community recognition to local communities or traditional society and its customs, culture, and traditional rights with full responsibility and un-conditionality. This recognition has implications and direct responsibility for the international community through international organizations and institutions carrying out legal obligations and responsibilities to safeguard, maintain, protect, practice, secure, preserve traditional community units and k e culture, customs, and traditional rights.

The normative problem of the absence of norms at the level of laws and regional regulations in East Java Province regarding the recognition of customary law communities in the tourism sector reflects that the recognition element in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia is not fulfilled, the first, second, third

and fourth conditions immediately looked for a legal solution to solve the problem. The problem of normative norms of empty norms or vacuum of norms can be solved with legal discovery (*Rechtsvinding*) and legal construction or legal exposition (*Rechtsconstructie*). The legal construction method is a method for explaining words to further form a meaning in the formation of legal norms.

To determine the level of readiness, conformity and consistency of a legal norm with the source norm is called the Validity Test (Putra, 2010). A legal norm should also be and must be constructed based on the needs of the context, based on the expectations and interests of the community where the law is applied. To determine the fulfillment and non-fulfillment of the needs, interests and expectations of the context is called the Context Test. The norm validity test in this construction has been mixed with the legal norm test according to Roscoe Pound's theory of law, which emphasizes the norm substance test. Context testing includes testing responses to the expectations of the community in which the law will apply. The test of response to expectations includes a norm construction test based on a value suitability test; and test the fulfillment of interests or needs in table 2.

III. RESEARCH METHODS

This is a legal study (doctrinal research) that aims to provide a systematic exposition of a legal rule regarding spatial planning with regard to tourism investment areas, which regulates the field of investment law as an international legal instrument in controlling over capacity tourist areas, examining the relationship between the rules of legal instruments for spatial planning, investment, tourism, environmental management and protection and so on. This study uses a statutory approach and a conceptual approach. The statutory approach is used to examine all laws and regulations related to legal issues that are being studied in this case relating to control and use of space. The statutory approach also seeks *ratio legis* and the ontological basis for the birth of legislation so that we can understand the philosophical content that lies behind the law (Marzuki, 2005). The concept of law is a constructive and systematic concept used to understand a rule, Sidharta (2008). This research is to examine the doctrines, principles, and concepts in legal science related to legal issues which are the main problems that the researchers studied, namely the legal protection of indigenous peoples from the exploitation of tourism areas in Indonesia in the perspective of international legal instruments controlling investment. An understanding of these doctrines and views becomes a guide for researchers in building a legal argumentation in solving legal issues at hand. After all legal materials are collected that are relevant to the problem, all legal materials, both primary, secondary and non-legal materials. Analysis of legal materials with legal hermeneutic techniques, if it is associated with progressive law enforcement, cannot be separated from the ideology that underlies the formulation and enforcement of law.

DISCUSSION

In the constitution the traditional rights of customary law communities are regulated in Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia which states that, "The state recognizes and respects indigenous peoples and their traditional rights as long as they are still alive and in accordance with community development and principles. The Unitary State of the Republic of Indonesia, which is regulated in law (Saraswati, Ristyawati, & Basworo, 2020). From the formulation of the article, it can be explained that (a) the state recognizes the existence of a customary law community unit that existed before the Unitary State of the Republic of Indonesia was founded and the 1945 Constitution was passed; the recognized customary law community unit must be proven to be still alive; (b) Such recognition can change dynamically following the development of society in the sense of the development of an era in which the feeling of humanity and the level of civilization grows and develops in such a way that recognition of the existence of indigenous peoples and their traditional rights must also be adapted to the needs according to space and time that dynamic; (c) the recognition must also not contradict the principles and interests of the Unitary State of the Republic of Indonesia, for example, in border areas, this recognition should not have a negative

impact on the spirit of national unity and territorial integrity of the Republic of Indonesia because the customary law area concerned exceeds the boundaries of the territorial jurisdiction of the Republic of Indonesia; and (d) that the requirements and procedures for recognition of indigenous peoples and their traditional rights must be regulated by law or in various other related laws.

The condition in the constitution is clear that there is recognition of indigenous peoples. At the level of implementing regulations for the 1945 Constitution of the Republic of Indonesia related to the fourth requirement, there is no law product on the customary law community. At the local government level, the Province of Bali has regulated customary law communities in the tourism sector and the regional government of East Java Province as a comparison for the legal products has not explicitly stated the recognition of customary law communities in the tourism sector. So that there is a norm vacuum, the solution is to carry out legal discovery (*Rechtsvinding*) through the construction and formulation of ideal legal norms in regulating the recognition of customary law communities in the tourism sector.

A more constructive description of the system process and the correlation between the legal system in the constitution and the legal products of the local government in the legal theory process with a policy orientation in regulating the recognition of indigenous peoples as a controlling instrument for sustainable tourism investment in Bali which is a pilot area because it has established government legal products. Regional recognition of indigenous peoples in the tourism sector. Arrangements for the recognition of indigenous peoples as a controlling instrument for sustainable tourism investment in Bali are presented with regard to the position and correlation between law and policy or the correlation between the legal process and the policy process. As stated by Mc-Dougal & Laswell, that the legal process is essentially a continuous or continuous policy process, where the policy process is a process that precedes the legal process and the legal process is a continuation of the policy process (Duxbury, 1993). Law that results from legal processes is basically formalized public policy. The main function of law is the policy process that provides a platform or format frame for public policy. So that a public policy can work in accordance with the plan that has been determined through public policy. Focus group discussion forums can be used as a medium for sharing information, thus the realization of its achievements is recorded in a draft academic paper. The correlation between the legal process and the policy process can be described as follows in figure 3.

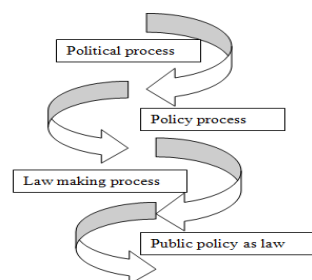


Figure 3. Correlation of Legal Process and Policy Process

McDougal (1956), defines law as “a process of decision in accordance with community expectations (Sloane, 2007). The form of law as determined by most state constitutions always describes two major forms, namely (1) law in the form of legislation, which more reflects the policy process; and (2) law in the form of court decisions, which are determined by the judge based on law, in the first part the law is more visible as part of the policy process through which the government formulates its governance policies and through law such policies are given strengthening or formal forms that guarantee or ensure its enforceability.

The ideal formulation of regulating the recognition of customary law communities in the tourism sector, with local government legal products that provide space for recognition of customary law communities in the tourism sector in Bali Province as an icon and configuration of Indonesian tourism, Bali has become one of the world's most popular tourist destinations. Tourism has become a generator driving the economic development of the Balinese people.

From the available empirical data, not less than 80% of all Balinese people depend on tourism (Wardana, 2015). Various impacts of tourism have also been felt by the Balinese people. The pressure on the environment due to physical development is getting bigger. The Regional Government of Bali Province as the holder of authority and legitimacy along with all stakeholders in rolling out sustainable tourism development. This is done as an effort to maintain consistency and continuity of the role and contribution of tourism to Bali.

The construction of an ideal model of regulating the recognition of customary law communities in the tourism sector is seen as a tool for realizing sustainable development, there must be an agreement between the government, customary law communities and tourism investors so that it is aligned with what can be defended and with clear goals to achieve this. The goals and progress indicators should be clear and divided among the three groups. In a dynamic social context, in an effort to determine the indicators that must be maintained, there will be interactions between all the stakeholders from the three elements. Interaction must also pay attention to the scope of the organizational level, namely the local, national and international levels so that tourism development still takes into account local and national culture with international standards. At the national level, Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia provides constitutional recognition of customary law communities according to the first, second, third and fourth conditions. This fourth requirement is followed up through the construction of an ideal model of regulating the recognition of customary law communities in the tourism sector so that at the level of Law and Regional Governments such as East Java Province and other provinces that have not yet established legal products regulating the recognition of customary law communities in the tourism sector to carry out legal construction. Regarding the ideal model of regulating the recognition of indigenous peoples in the tourism sector. At the national level, Law No.10 of 2009 concerning tourism mandates an integral part of national development which is carried out systematically, planned, integrated, sustainable, and responsible while still providing protection for religious values, living culture, and interests. National. He also emphasized that the principle of implementing tourism is sustainable. In developing the concept of sustainable tourism, tourism actors (government and tourism investors) must prioritize control movements against the detrimental effect of tourism. Tourism, which often uses the environment as an attraction and development, should always pay attention to the protection and preservation of the environment, for the benefit of future generations.

Attention to the existence of the environment is a concern for the existence of the environment as well as the actualization of the recognition of civil society values from the customary law community. The policy strategy for the recognition of indigenous peoples in the tourism sector that is synergized with environmental preservation can be preventive and repressive by involving all stakeholders, including the government, indigenous peoples and investors in the tourism sector. Preventively, this is done by making a blueprint for the standardization of recognition of indigenous peoples in the tourism sector that is synergized with environmental preservation. This policy serves as guidelines, criteria, technical procedures and recognition of indigenous peoples in the tourism sector in managing and maintaining the existence of tourism businesses in the future, while promoting environmental protection and conservation. This policy determines customary villages to avoid discriminatory treatment by maintaining natural conservation such as beaches, lakes, forests and cultural heritage that can reduce the negative impact of tourism commercialization. The construction of this policy will limit the tendency of discrimination against the recognition of indigenous peoples in the tourism sector. Preventive policies need to be supported by repressive policies, such as assertive and impartial actions in the context of realizing aspects of justice for all Indonesian people. Repressive measures can be administrative in nature, namely warning, coercion, as well as revocation of permits from the government, while serious violations of law can be carried out with penalties.

Based on the Global Code of Ethics for Tourism (GCET), the recognition of indigenous and tribal peoples in the tourism sector must contribute to, benefit and respect the community and existing communities, uphold ethics, customs, tolerance, and respect for differences in religion, philosophy, and moral beliefs is a consequence of the shared responsibility of all components in tourism development. *Tri Hita Karana* is the philosophy of

life of the Balinese people which in principle regulates the existence of a harmonious and balanced relationship between humans and God, humans and humans, and humans and their environment which is a source of welfare, peace and happiness for humans, as regulated in Article 1 point 6 Bali Provincial Regulation Number 16 of 2009 concerning the Bali Provincial Spatial Plan for 2009-2029. *Tri Hita Karana* as the concept of the Balinese people's life philosophy that lives, grows, develops in each Traditional Village from generation to generation has been believed and proven to achieve community welfare in an atmosphere of peace to achieve life's happiness, with the balance and harmony of the relationship between humans and God, humans with fellow humans, and humans with their environment or the universe.

Conclusion

Fourth requirements in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia regarding the recognition of customary law communities. At the statutory level, there is a vacuum in the regulatory norms for the recognition of customary law communities as stipulated in the fourth condition regulated by law. At the level of the legal product of the provincial government of Bali, there is actually a regulation on the recognition of customary law communities in the tourism sector through the Bali Provincial Regulation No.2 of 2012 and the Bali Provincial Regulation No.4 of 2019. Meanwhile, in the comparison areas in East Java province, there is also no legal community recognition regulation. Customs in tourism. The problem of absence of norms requires the construction or formulation of an ideal legal model through *rechtsvinding*. The problem of the absence of norms at the level of laws and regulations regarding the recognition of customary law communities is caused by the problem of philosophical incompleteness that has an impact on injustice for indigenous peoples in several regions in Indonesia.

The ideal formulation of norms regulating the recognition of indigenous and tribal peoples as a controlling instrument for sustainable tourism investment by considering: philosophical completeness, principles completeness, and the concept of sustainable investment as well as spatial characteristics, carrying capacity, tolerance and spatial adaptability to impacts. The ideal model for regulating the recognition of customary law communities in the tourism sector in the draft academic paper through validity testing and concept testing includes elements of completeness of the principles, including the principle of benefit, the principle of kinship, the principle of fairness and equality, the principle of balance, the principle of independence, the principle of sustainability, the principle of participatory, the principle of sustainability, the principle of democracy, the principle of equality and the principle of unity. The construction of an ideal model of regulating the recognition of indigenous peoples in the tourism sector also considers economic, political, social, cultural, religious and human rights aspects.

Suggestion

To the President of the Republic of Indonesia and the Chairperson of the People's Representative Council of the Republic of Indonesia with regard to legal reconstruction by forming a law on the recognition of indigenous peoples and adding a philosophy of protecting all Indonesian people and all Indonesian blood, namely by adding in the preamble letter a of the Law No.10 of 2009 concerning Tourism. In the preamble, considering adding Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia. Article 1 points 3 and 4 change the concept of tourism by taking into account the economic, political, social, power, religion and human rights dimensions.

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