

Human Right and Conflict of Custom in Bali (The Case of “Caste Status” Change Caused *Kesepekang*¹ in Bungaya Traditional Village of Karangasem)

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Abstract

The State is responsible for protecting human rights of various aspects of life. Bali with its values of local wisdom cannot be avoided from conflicts which at the beginning was an individual conflict of Balinese with traditional village leading to violations against human rights. This article studies the human rights and custom conflicts in Bali (the case "caste status" change resulted in *Kesepekang* in Bungaya Traditional Village of Karangasem). This study focuses on two main points, namely, (1) finding human right instruments underlying the behavior of people in Bungaya Village, (2) what are the responsibilities of Bungaya Traditional Village to residents changing their caste status in the Traditional Village related to the enforcement of human rights? This study uses socio-legal research in combination with research methods of cultural studies to find out local cultural values that can trigger the sanction of *kesepekang*. The results of this study explained that the Law of Human Rights in Bungaya Traditional Village has been ruled out by Custom Officers (*Prajuru Adat*). The traditional case of *Kesepekang* is a social sanction for indigenous residents who violate the change of "caste status". The Traditional Village Officers of Bungaya perceived that values or commandment belief/*fatwa Kebayan Wayan* is an absolute truth, therefore it can sentence to *Kesepekang* for the village members in the event of custom violation.

Keywords: Human rights, Caste Status Change, *Kesepekang* sanctions.

I. INTRODUCTION

A. BACKGROUND.

Paying attention to the increasing global world conditions, in almost every country, both developed and developing countries begin to understand the importance of protection to Human Rights (HR). All human beings, essentially, have the same dignity and degree, as well as same rights and obligations, regardless of sex, color, ethnicity, religion or social status of the others. Since every human being has a lofty degree (*human dignity*) deriving from God creating them as free individual who is able to develop him/herself.³

Discourse on Human Rights has become a real concern and struggle of human race, along with the development of the world civilization in order to attain the glory of human life. This suggests the emergence of a new consciousness of human being that he/she had honor to be maintained and as an important part in his/her life in the society, nation and state. In addition to the awareness of individuals in society, upholding Human Rights is also highly dependent on the consistency of the state in protecting the rights of every citizen. Such consistency is highly dependent on the political will and political action of the state agencies or state officials.⁴

The State as sovereign holder of people is not solely to strengthen their power, but also to protect their citizens in different aspects of life, including their human rights as a human being. Human Rights is an authority inherent in every human which must be recognized and respected by the state. This conception also underlies the rules of international law that protection and promotion of Human Rights shall be the main responsibility of the state. In Indonesia, this matter is stipulated in Article 28 I paragraph (4) of Chapter XA of the Constitution of 1945 of the Second Amendment, which reads that: "protection, promotion, enforcement and fulfillment of human rights is the responsibility of the state, especially the government".

Human Rights as the idea of paradigm and conceptual framework was not born with the existence of *Universal Declaration of Human Rights (UDHR / UDHR)* in 1948, however it can be regarded as recognition of formal juridical and culmination of struggle of majority of human beings seeking for justice and for the establishment of world peace. However, because of various characteristics of the community, the state ideology

¹*Kesepekang* is one of the customary sanction in Bali. *Kesepekang* is derived from the word *sepek* containing the meaning of disputing person(s) before other persons.

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³Dede Rosyada, et al, 2003, *Democraton, Human Right and Civil Society*, revised edition, Team ICCE UIN Syarif Hidayatullah and Prenada Media, Jakarta, p. 200.

⁴Majda El-Muhtaj, 2005, *Human Right in Indonesian Cinstitution: from Constitution of 1945 to the Amendment of Constitution of 1945 of 2002*, Prenada Media, p. 7.

or religion, it will be found differences between one another. Differences in cultural background and history becomes an issue and obstacle in formulation and development of human rights as a fundamental right (human) being inherent in every human being.

Indonesia is a country of law (*rechstaat*) as mandated by the Constitution (Constitution of 1945) Article 1 paragraph (2) stating that: Indonesia is a state of law. Bali is one of the provinces in Indonesia and is known of its natural beauty as implied in the phrase "The Last Paradise". Bali also has a number of local wisdom and culture that depicts the harmony of the population, such as *paras-paros salunglung sebayantaka* (always together in joy and sorrow), satya (faithful, honest). However, it does not mean that the Villagers in Bali are free of indigenous conflict.¹

In the context of constitution, Human Rights granted protection to culture are Article 28i paragraph (3), Paragraph (4), and paragraph (5) of the Constitution of RI of 1945 Article 28i paragraph (3) states that: cultural identity and rights of traditional community should be respected aligned with the era and civilization development; paragraph (4) protection to promotion, enforcement and fulfillment of human rights is the responsibility of the state, especially the government; paragraph (5) to uphold and protect human rights in accordance with the principles of democratic constitutional state, the implementation of human rights are guaranteed, governed and set forth in the legislations. Regional Regulation of Bali Province No. 3 of 2001 on Pekraman Village Pekraman stipulated in Article 11, paragraph 2, states that "*awig-awig* of Pakraman Village should not conflict with religion, Pancasila (Five Principles), Constitution of 1945, and Human Rights". The Government recognizes that traditional community and their privileges to the extent consistent with Pancasila and Article 18 b Paragraph (2) Constitution of RI 1945, stating that "the State recognizes and respects traditional community and their traditional rights as long as they are still alive, and in accordance with the development of society and the principles of the Republic of Indonesia as stipulated in the Law". In this context *awig awig* is one of the privileges recognized by the state, however its rules shall automatically be in accordance with Pancasila and Paragraph b of Article 18 (2) of Constitution of RI 1945. If it is related to ith the case in the Traditiona Village of Bungaya, *awig-awig* has preceded the constitutional provisions that exist in Indonesia. So it seems there has been a conflict of norms.

The Customary conflict occured in the Traditional Village of Bungaya began in 1977 by the public election was held, Adi Putra, and his friends (and others) were objection to be registered as voters by the registrar for the registration officer was not willing to include the name "I Gusti" in front Adi Putra's (and his friends) name. This case continued and by three decades of conflict, then it just got settlement in 2007. The trigger from the customary conflict was the desire of Adi Putra, (and his friends) to change the status of caste. Adi Putra (and his friends) required a change of caste against himself and his families, from caste Shudra into caste Wesya through the name change, by adding the title "I Gusti" in front of his name respectively.

1.2 Problems Formulation

Based on the background of the above problems, it can be drawn up problems formulation as follows:

1. What are the Human Rights instrument underlying the behavior of people in Bungaya Village?
2. Whate are the responsibility of Traditional Village of Bungaya towards residents changing the "Caste Status" in the Traditional Village associated with the enforcement of human rights?

1.1. Methods of Research

a. Types of Research

The study of Human Rights and Customary Conflict in Bali (Case of "caste status" change resulted in *Kesepehang* in the traditional village of Bungaya Karangasem), using socio-legal method of study, by performing textual study, the articles of the legislations and policies can be critically analyzed and explained the meaning and implications of the legal subjects (including marginalized groups). In this case, it is explained that the meaning of these articles is harmful or beneficial for specific community groups. In socio-legal study, it has been discussed the constitution until legislation on the lowest level as a village regulation, in this case up to the village level in the form of cutomary *awig awig* of Bungaya villages.² This research studies about the existing legal issues based on the prevailing legal provisions conducted by studying library materials³. The socio-legal studies developed various new methods as the result of combination between method of law and social science. In other respects, this research linked the normative legal research, namely, a legal research examining written laws of the various aspects, namely theory, history, philosophy, comparative, structure, and composition, scope

¹ I Wayan Windia, 2008. *Customary Conflict and Kesepehang Sanction in Traditional Village of Bungaya*, in "Dissertation, Post Graduate Program of Udayana University", Pasca Unud, Denpasar, p. xiv.

² Sulistyowati Irianto and Shidarta, 2011, *Method of Legal Research, Constellation and Reflection*, Yayasan Pustaka Obor Indonesia, Yayasan Pustaka Obor Indonesia, Jakarta, h. 178.

³ Soerjono Soekanto and Sri Mamudji, 2001, *Normative Legal Research, a Brief Review*, PT Raja Grafindo Persada, Jakarta, h. 13

and content, consistency, overview and chapter by chapter, formality and the binding force of a law and the legal language used, as well as using methods of cultural studies to find out the value of local wisdom that no longer fits for Human Rights which is currently developing in accordance with the demands of the international community, the Republic of Indonesia based on the ideology of Pancasila and the implementation in the Traditional Village of Bungaya.

b. Type of Approach

Studies on the issue of human rights and customary conflict in Bali (Case "caste status" change resulted in *Kesepe kang* in the traditional village of Bungaya Karangasem), applied legislation approach (the Statute Approach) as the main approach. It is also equipped with the approach of the case (Case Approach) in the method of approach to legislation that researchers need to understand the hierarchy, and principles of legislations. Legislation approach is the approach by using legislation and regulations. It is also accompanied by citing the views or opinions of the experts found in the books or literatures relevant to the problem of study (analytical and conceptual approach) or secondary law. Therefore, it does not merely study the provisions of rule of law, but also use a substance derived from the literature in order to analyze legal material presented as a discussion.

II. RESULTS AND DISCUSSION

A. Legal Instruments and Human Rights Underlying the Behavior of Society in Bungaya

The term of Human Rights (HAM) is derived from French words *Droits L'Homme* meaning human rights. In English, Human Rights is referred to Human Rights and *Menselijke Rechten* in Dutch. Etymologically, Human Rights is fundamental right brought since a man was born as a natural gift from the Creator. In other words, Human Rights is not an award by human being, positive law, moreover apparatus of a country. Human rights means attached (inherent) in human being in line with the nature and dignity as human beings.¹

The realization of Universal Declaration of Human Rights which was declared on 10th of December 1948 became the starting point of the realization of fundamental conception of human rights as defined in the manuscript and applied globally. However, long time before that, it had been born a few texts reflecting the seeds of recognition and respect for Human Rights. The manuscripts include:

1. *Magna Carta*, or Great Charter: A document prepared by the king John Lackland on July 15, 1215 recognizing the independence and freedom of individual rights fully which cannot be reduced.
2. *Bill of Rights* or the Law of Rights: a law of 1689 which was accepted by the British Parliament after being successfully to fight against King James II in previous years in a bloody revolution right known as The Glorious Revolution of 1688. Moreover, the principle of equality (equality before the law) became known at this time.
3. *Bill of Rights* or Law of Rights: A manuscript compiled by the American people in 1769 and later became part of the Constitution in 1791. This law states that human being is free since in the mother's stomach, so after birth he should not be tied to rules of state.
4. *Declaration des Droits de l'home et du citoyen* or Declaration of rights of human beings and citizens: A manuscript of 1789 which was launched in the beginning of French revolution, in opposition to the ruling old regime. One of the most important articles is the prohibition of arrest without a warrant issued by an authorized official.
5. *The Four Freedoms*: The President of the United States at that time, Franklin D. Roosevelt on January 6, 1941 formulated four (4) ideas on human being fundamental rights, including: freedom to speech (freedom to speech and state opinion), freedom to religion (freedom of religion), freedom from want (free of poverty), freedom from fear (freedom of fear).

According to French Legal Expert Karel Vasak, the flow of development Human Rights is divided into three generations. The first generation of Human Rights is related to the protection of civil and political rights (civil and political rights), and stipulated in Article 2 to 12 of Universal Declaration of Human Rights. The characteristics of Human Rights in this generasi protect human personal life, respect sovereignty of the individual as well as absence of state intervention. The second generation of Human Rights also includes economic, social, and cultural rights. Human Rights in this generation is set out in Articles 22-28 of the Universal Declaration of Human Rights. The rights recognized in this generation include the right to social security, the right to work, right to adequate standard of living, the right to education, and the right to protection of scientific, literary, and art. Human Rights in the third generation is based solidarity or brotherhood (fraternity). Legally, the third generation of Human Rights can be found in Article 28 of the Universal Declaration of Human Rights to which it fraternity or the rights of third generation unrepresentable by demands for the right to solidarity or collective rights. Through the demands for the rights of solidarity, the developing countries desire the creation of economic order and international law conducive to ensuring the following rights: The right to development,

¹ IGN Parikesit Widiatedja, 2011, *Tourism Liberalization Policy, Concept Construction, Types of Problems and Solution Alternatives*, Udayana University Press, Denpasar, p. 62

right to peace, the right to own natural resources, the right to a good environment, the right to their own cultural heritage.

However, the three generation of human rights conception in principle has the same characteristics, namely to understood in the context of power relation that is vertical, between the people and government within a country. Any violation to human rights ranging from first to third generation always involves the role of government commonly categorized as a crime by government including in the definition of political crime as opposed to understanding crime against government (crimes against official power). Therefore, the point which is always subject to human rights struggle is the repressive power of the state against its people. However, in presence development now and in the future, as outlined above, the dimensions of human rights will turn increasingly complex in nature.

Human Rights in Indonesia sources and leads to Pancasila. Meaning that the Human Rights have strong assurances from the philosophy of the nation, Pancasila. With Pancasila as the disembugue, it is intended that the implementation of human rights should consider the lines specified in the provisions of Pancasila. For Indonesia, the implementation of human rights does not mean to carry out freely, but it should pay attention to the provisions contained in the Indonesian national phylosophy of life, Pancasila. Basically it is due to that there is no right absolutely implemented without regard to the rights of others. Each right will be limited by the rights of others. If in exercising the rights, we do not pay attention to the rights of others, then there is a conflict of rights or interests in social life, nation and state

The Republic of Indonesia recognizes and upholds human rights and human freedoms as the rights naturally inherent and inseparable from human beings which should be protected, respected and enforced in order to improve human dignity, prosperity, happiness, and intelligence and justice. Various human rights instruments owned by the Republic of Indonesia, namely:

1. Constitution 1945 of RI,
2. Decree MPR No. XVII / MPR / 1998 on Human Rights,
3. Law No. 39 of 1999 on Human Rights,
4. Law No. 26 of 2000 on Court of Human rights.

Concretely, it is for the first time Human Rights is stipulated in the Charter of Human Rights as an annex to the Indonesian People's Consultative Decree No. XVII / MPR / 1998.

The arrangement of Human Rights in Bali is stipulated in the Regulation No. 3 of 2001 on Pekraman Village in Article 11, paragraph 2, stating "*awig awig* of Pakraman Village should not conflict with religion, Pancasila, Constitution of 1945, and human rights". Christian Tomuschat, in his book entitled Human rights, stated there are three (3) typology obligations (typology of state obligation context of human rights), i.e. obligation to respect means the obligation to respect, that individual cannot be impeded in their efforts, in their access to activities protected by social and economic rights or obligations of the state to respect. Obligation to protect means the obligation to protect, that action should be taken to ensure that the third party does not prevent individuals from enjoying the rights they hold obligation to fulfill, which means that it is the state duty to take steps reflecting to provide individuals the right to realize the benefits concerned.

If the three typology obligations in the context of human rights are related to the case occurred in the village of Bungaya, the Government can only do their obligation to respect, whereas the obligation to protect and to fulfill the obligation can not be done. In this case the fulfillment of economic, social, and cultural views of the government's ability. Regulations at the village level can be drawn up in the form of *awig-awig*. The legal instruments and human rights underlying the behavior of people in the village of Bungaya can be drawn up in the form of *awig-awig*.

B. Law and Human Rights in the Dymanic of Customary Society in Bali from Customary Conflict Indigenous and Caste Status Changes to Kesepekang.

The description of Human Rights as mentioned above, suggests that human rights must be upheld in the society in any circumstances whatsoever. In addition, Human Rights will be binding to a country if it is set forth in the laws of the country. The Republic of Indonesia has issued a legal product namely Law No. 39 of 1999 on Human Rights. In the preamble (consideration): (d) whereas, the nation of Indonesia as a member of the United Nations should carry out moral and legal responsibility to uphold and implement the Universal Declaration of Human Rights established by the United Nations, as well as various international instruments about human rights which has been accepted by the Republic of Indonesia.¹

According to Moh Mahfud MD, as a legal politic, many violations of human rights ocured during the New Order regime, if it is linked to the constitution, the terms of the socio-legal and cultural, in fact the arrangement of Human Rights in the Constitution of 1945 opened opportunities for violations by the authorities

¹ See Law No.39 of 1999 on Human Rights, Consideration (d).

because the formulation contained in Constitution of 1945 makes the Human Rights as Human Rights residue.¹ In the New Order, the politic of Human Rights is dominating by *politic no, economic, yes*; which means the domination and hegemony of dominant state power in the name of economic interest. In this case, the state political right is to cope freedom of speak. According to John Ufunan, in relation to freedom of expression in Indonesia under the New Order, the control function of the press tangible delivery of criticism and investigation to expose abuses of power, arbitrariness of government officials corruption, Collusion and Nepotism detrimental to the people, control the actions of individuals and societies that violate the rights and harm others. During the New Order, such function was not fully implemented since the newspaper writing the news related to corruption, collusion and nepotisme committed by officials always intimidated and threatened with sanction of their SIUUP revocation.²

In the context of Human Rights, which is associated with THE culture of human rights, it can be assessed on the customary conflict in Bali. According to Griadi the notion of customary conflict using the term customary dispute but by 2005 used the term customary conflict. Then Astiti mentioned customary cases, while sudantra (2007) used traditional case, while in this paper we use the concept of Griadi by using the term customary conflict. The term of conflict in Warsito (1990: 123) is called *biota* (conflict), Kersten mentioned as the term of *ieg*, argument, by mouth or fighting each other. Conflict or disagreement can happen anywhere and anytime by various causes. The form of conflict is sometimes simple, such as differences of opinion (*tios pikayun*), frequently appears in moderate scale, such as, quarrel (*mejugjag*) and sometimes in setious scale, such as physical conflict or fighting or *mesiat*. Conflict means a conflict between groups with individuals causing emotions, hatred, anger, so that the parties concerned are trying to attack each other, injuring, damaging or destroying one another, due to the violation of the customary law of Bali or because of different interests.³ In fact the politics of law relating to Human Rights and raising *Kesepekang* in Bali needs implementation in a consistent basis. In fact what is set formally (law) was not always followed carefully.⁴ The practices of human rights violations under the name of traditional village have occurred in Bali. Similarly, under the name of the value of local wisdom has injured traditional traditional village of Bungaya in term of gathering, religion, and economic violations/selling and buying in the traditional village of Bungaya. The role of traditional village and Traditional Banjar Adat in the settling custom cases under decision-making model of *suryak siu* or *briuk siu* (the concept is more participants). Similarly, *awig-awig* is used as the basis for resolving conflicts are outdated, there are no definite procedural law. Moreover, the belief that *titah Kebayan wayan* is a fatwa⁵ which cannot be denied the limitation of traditional officers' (prajuru) insight in understanding the nature of human rights law. The concept of the traditional village to the members violating *awig-awig* is surely required to charged with sanction *Kesepekang*, without seeing that awig-awig/traditional village regulations are outdated which human rights law. In this paper the customary conflict and *kesepekang* are analyzed with the conflict between the traditional village and the village members arising because of violation to customary norms or norms of Hinduism and after the violators of custom are penalized with customary sanction but the persons concerned are not willing to fulfill the traditional sanctions required by local village customs therefore conflict arises between both parties. The concept of *kesepekang* is one of the traditional sanctions known in Bali by Kersten *kesepekang* is derived from the word *sepek* meaning "making problem before other people", in the dictionary of Balinese - Indonesia mentioned that the word *sepek* is defined as "isolate" and *kesepekang* is the same as being isolated.⁶ To understand the events of violation to human rights law of *Kesepekang* in the traditional village of Bungaya as follows:

➤ Case of Position

This conflict began in 1977 by the public election where Adi Putra, and his friends were objection to be

¹Moh. Mahfud MD, 2009, *Amendment of Constitution of 1945 for State Administration Reformation*, UII Press, Yogyakarta. See also, Moh Mahfud,MD, 2008. *Legal Politic of Indonesian Human Right*, in "Developing Indonesian Law Inauguration Speech as the Professor of Law Science, Kreasi Total Media, Yogyakarta, p.259.

²Yohanes Ufunan, 2011, *Politic Human Rights, Freedom of Expression in Indonesia*, Udayana University Press, Denpasar, p. 324.

³I Wayan Windia, op.cit., p. 31-32

⁴Cf. Bintan Regen Saragih, 2006, *Legal Politic*, CV Utomo, Bandung, p. 14.

⁵I Wayan Windia, op.cit., p. 197.

⁶Other opinion on *kesepekang* was proposed by Wayan Konti Santika, a Lecturer of Balinese Customary Law of Udayana University, Faculty of Law, who proposed that *kesepekang* is derived from the word *sepi ikang* having the meaning of isolate to, *sepi ikang* means being isolated. In the context of customary sanction according to Konti santika *kasepekang* means their existence as the social members are still recognized but they are isolated from various activities of banjar adat, or traditional village. Moreover a person is in the status, he is not only being isolated but he is duly considered to be inexistence, therefore it is not merely *kasepekang* but *kanorayang*. *Nora* means not exist. (See in the Dessertation of I Wayan Windia, 2008, *Customary Conflict and sanction of kesepekang in the Traditional Village of Bungaya, Karangasem Regency Bali : Cultural Science Persepective* dessertation has not been published), Denpasar, Post GRaduate Program of Udayana University, p. 33

registered as voters by the registrar for the registration officer was not willing to include the name " I Gusti" before the name of Adi Putra, and his friends, the case continued to drag on and after close to three decades being involved in the conflict, then a tragic settlement was in 2007. Adi Putra and others had to leave the traditional village of Bungaya Karangasem, their houses were dismantled under the name of traditional village and then the land is dominated by traditional village of Bungaya. The trigger of the customary conflict was the desire of Adi Putra, and his friends to change "caste status".¹ In the view of Dewa Palguna, in the event of politicization occurred in the traditional village, there would be torture against Hinduism.² Further, in the case of Adi Putra and others desire to change the caste himself and his family, from caste Shudra to caste Wesya through name change, by adding the title "I Gusti" in front of each of his name, such change of Caste was made due to several reasons:

First, in accordance with the relevant history the persons in questions was from the inheritance of "I Gusti"; they have inscription stating that their ancestors are the inheritance of "I Gusti". But in the course of history without being known the persons concerned use the name commonly used by most people, such as Wayan, made, Nyoman and Ketut. In a letter land ownership (known as "DD", certificates of graduation, and decrees as civil servants, they also used the name commonly used by the most people.

Second, they are from the village of Bona Gianyar Regency and they have recognition from their families in Bona. Therefore they want to use the same name as their surname in Bona. They did not want to *ninggal kawitan* (leaving their original ancestors)

Third, they did not want to have any difficulties when they have ceremony "*nuntun*" to Bona. Their reason was that the ancestors they "tuntun " (take) to the traditional village of Bongaya is using the name of "I Gusti". Therefore, it is believed that if the ceremony is not under the name of *I Gusti* they will have trouble.

Fourth, there is a strong belief among them that they came to live in this world by following these origins, they will succeed in careers and jobs (save or stuffing). Conversely, when they deny their origin they will not succeed in their life (*not survive*) and sick (*kegeringan*). The change of name and addition of name with caste "I Gusti" are seen in the table below:

No	Original Name	Requested Name
1	I Putu Susila	I Gusti Putu Susila
2	I Gede I Rawan	I Gusti Gede Irawan
3	Ni Sri Ariani	Ni Gusti Ariani
4	Agus Atmanadi	I Gusti Atmanadi
5	Ngurah Aryadi	I Gusti Ngurah Aryadi
6	Mantera Adi Warsika	I Gusti Mantera Adi Warsika
7	Sri Wijayanti	Ni Gusti Sri Wijayanti
8	I Ketut Alit	I Gusti Ketut Alit
9	Agus Susena	I Gusti Agus Susena

The seriousness of Adi Putra's family and friends to add a name (I Gusti) before their names began in 1977 and subsequently in 1985 the problem arised when the name change was attempted by renaming their children who were going to school in the village of Bungaya. This was disputed and rejected by the school in the traditional village of Bungaya. Then loosing no idea, Adi Putra and others educated their children in Saraswati School and even one of these children becomes the member of the police under the name of I Gusti Putu Susila. Then a question mark of objection appeared in the public of the Traditional Village of Bungaya after renaming their children, there was a change in attitude, especially in the address system which normally used common Balinese language (Colloquial Balinese) both with other villages and in the internal village. Moreover, openly the group of Adi Putra and others appealed to the resident to address them by using higher class (refine) language to them. The next objection arised from the villagers at the village office of Bungaya kangin that Adi Putra and others were very serious about his desire to add to calls Wesya *I Gusti* in front of his name. It was firstly known from the request of identity cards under the the name of I Putu Susila, the Police, became I Gusti Putu Susila.

Villagers were objection after knowing the name change was made based on the declaration of

¹The concept of "Kasta" constitutes a misconception of Balinese for centuries. The grouping of Balinese Ethnic Community based on geneology called as *catur wangsa*, where people, in addition to have their own attributes also got social status from the Kings governing Bali in the past. The notion of the term: arga, Clan, Pam and tribe were not known in Balinese Community. The term known in Balinese Ethnic Community are *soroh Pasek*, *soroh Pande*, *soroh Sang* and so forth which are great amount in Bali. The Letter of Governor, Chief of Level I Territory of Bali Number: MPLA/I/243/1994, dated 2nd of June 1994. In **Bhagawad Gita. IV. 13**: Caaturvarnyam mayaa srshtam; Gunakarma vibhaagasah; Tasya kartaaram api maam; Viddhi akaartaaram avyayam; Means: I create Catur varna based on guna and karma. Though I am the Creator, I control the movement and change.

² Dewa Palguna, 2004, *Diagnose our Sickness Customary Law*, in "Bali Post dated 2nd of Nopember 2004, p.2-5.

Traditional Village of Bungaya which was held by De Sala Swarta at that time supported by the Chief Village of Bungaya Kangin, who at that was held by Ida Bagus Wayan Kondra pursuant to the Letter dated 24th of December 1997 which among other things, justified and approved the existence of caste *I Gusti* in Kecicang Bedugul. In this case, it is not clear the motive of the issuance of Declaration, whether the background was for personal benefit or political interests, but clearly the contents of a letter described that Adi Putra was from the traditional village of Bungaya, De Sala Suwarta issued the certificate stated that Adi Putra and their friend was dismissed as Bungaya traditional villagers. The objections of traditional village to the change of name of Adi Putra and others by the addition of *I Gusti* in front of their names are stipulated in the decision of Bungaya village institution, Bebandem Sub-District, Karangase Number: 20/I/Adat/1999, dated 5th of February 1999. In the decision, it was determined several reasons led the objection of the Traditional Village of Bungaya including: **First**, the traditional village Bungaya mengangkap found that unscrupulous persons with caste "*I Gusti*" does not meet the stipulations Panca Dresta applicable in Desa Adat Bungaya as follows:

1. **Kuna dresta**, meaning since three purusa offsprings inherent in effect since father, grandfather (Pekak), Great Grandfather (Kompyang) there was no or never existed any *I Gusti* caste in Kecicang Bedugul.
2. **Loka dresta**, which means that none of the neighboring villages address *I Gusti* to these people.
3. **Desa dresta**, which means that none of the Villagers throughout Bungaya up to the present knows or use the address of *I Gusti*.
4. **Sastra dresta**, which means that in any literary utterances both in the lists or pipil of land ownership and so forth, none listed or contained *I Gusti*.
5. **Agama dresta**, which means that in the event of the party of I Putu Susila and his friends performed *Pitra Yadnya* Ceremony (cremation) or *ngerorasin* whether from I Putu Susola's family and his friends', he considered himself as *I Gusti*, he is be prepared to worship their pitra ancestors. If he is willing, the Caste of *I Gusti* will automatically be *rered* if not, then they include in *nilas or tilar kawitan*. If all this five traditional dresta which are still upright violated or ignored, it is clear that action is an abuse or *ngiung dresta adat* of Bungaya which may be said as a religious defamation.

Second, the change of name is believed to cause various problems such as a change in the traditional village manners of behaving and speaking, change of swadarma which should be carried out to the traditional village of Bungaya.

Third, the traditional members of Bungaya Village misdoubt the inscription used as an excuse by Adi Putra and his friends. These doubts were based on the developing story from generation to generation. The case of Adi Putra and his friends has a historical connection of the past. When the villagers refused migrants who brought the case of Wesya although the persons concerned had done with the inscription evidence. According the opinion of traditional village officers of Bungaya, the change of caste would directly affect the manners to communicate Balinese language. This means that before the change of name, communication is performed by using Balinese ordinary language, while after Adi Putra, and friends, adding the caste of "*I Gusti*" in front of their names, most people who want to communicate with them should use the refine Balinese language (*basa alus*).

➤ Analysis

Referring the Decree of Governor of Bali, Number: MPLA/I/234/1994, on the subject of: family name, clan, Pam, tribal and Knighted Title in Bali, dated, 2nd of June 1994, to the Office of the Department of Justice of Bali Province of Denpasar in point (6), at present there is no authorized institution providing new nobility title to the Balinese people. As for the title of nobility existing today in the ethnic communities of Bali is a designation of the continuation of aristocratic ancestry which is factually a historical fact. Therefore, if at present there is a request from someone to amend the title of nobility, they should firstly demonstrate authentic evidence of legitimate title of nobility attached to the name of his ancestors, namely: great grandfather (three levels along the lines of purusa).¹

The theory which can be used to this problem is the theory of Cultural Relativism (Cultural Relativism Theory). The issue of cultural relativism (cultural relativism) emerges towards the end of the Cold War as a response to the claims of the idea of universal human rights internationally. The idea of cultural relativism argues that culture is the only source of legitimacy of the rights or moral rules. Therefore, human rights is considered to be necessary to be understood from the context of the culture of each country. All Culture has the right to life and the same dignity that should be respected. Based on this proposition, the defenders of the idea of cultural relativism reject the universalization of human rights, especially when it is dominated by one particular culture. The idea that human rights is generally tied to cultural context promoted by developing countries and Islamic countries. This idea is so prominent in 1990s - especially before the World Conference on Human Rights in Vienna, stringly promoted by the leaders and scholars (which typically represents the interests of the status

¹Decree of Level I Territory of Governor of Bali, No MPLA/I/234/1994, Subject: Family Name, Clan, Pam, tribe dan Noble Title in Bali; to the Chief of Regional Office of Department of Justice of Bali Province.

quo) in those countries. The State leaders di Valley Region of Western Pacific, for example, filed a claim that what they refer to as "Asian Values" (Asian Values) more relevant to progress in this area, rather than "Western Values" (such as human right and democracy) were judged to be so urgent for Asian nations. The most famous is in advocating "Asian values".¹ In this study relation, Balinese ethnic has value of high culture such as Tri Hita Karana, the cultural values of Hinduism, *sagiliki-saguluk sabayantaka*, *Tat Tvam Asi*, the value of *menyama braya*. However, when confronted with the problem of customary conflict deriving from the problem of "caste" Sudra changed to "I Gusti" in the Traditional Village of Bungaya in Karangasem, the customary villages was objection and even led to the occurrence of *kesepekang*.

Based on the Decision of the traditional village institution of Bungaya, Sub-District of Bebandem, Karangasem Regency, No: 20 / I / Adat/ 1999, dated 5th of February 1999 which was signed by Kelian Desa Adat Bungaya De Salah Sukata, it was decided to give customary sanctions to Adi Putra and friends as follows:

1. Not permitted to maturan (pray) at the temple of traditional village of Bungaya.
2. Not allowed to bury their dead in the cemetery *sejebag desa adat* / all over Bungaya area.
3. Not allowed to fetch water to drink or to bathe in the shower, on the river or in the trenches and so forth in the area of traditional village of Bungaya.
4. Not allowed to perform *Adol atuku*/sell in the market of Bungaya traditional village.
5. It is similarly affirmed to them not to perform any action or actions that are contrary to the applicable law.
6. This decision is valid since it is enacted.

From the legal facts developed in the traditional village of Bungaya, it can be studied with the theory of legal certainty. In the constitutional state, legal certainty as the principle prioritizes the basis of legislation, compliance and justice in every policy of national administration. Basically the principle of legal certainty requires that any agency or official decision of the state administration, should really respect the laws in force, means the law must be genuinely implemented, as appropriate as this principle requires legal stability.

In addition to the principle of legal certainty, there is a principle of legality in a constitutional state as a principle that is always upheld by every country declaring itself as a constitutional state,² means any authority or actions of government agencies must be based on legislations. Applicability of the principle of legality in all forms (due process of law) is that all government action must be based on legitimate and written legislation.³

Further, in the context of the theory of legal certainty, it is understandable that the theory of legislation system of Hans Kelsen, in his book entitled "General Theory of Law and State", known as *Stufenbauo Theory*, *stufen* means floor or staired building, according to this theory all legal norms constituting an integral part of the structure of the pyramid, meaning that the there is a functional relationship or norm with each other in the legal system, which can be described as follows: "that the next base and the legality of a norm lies on the above norm itself."⁴

The elements of Indonesian constitutional state based on Pancasila according to Sri Soemantri Martosoewignjo are as follows:

- a. There is recognition to the guarantee of human rights and citizenship.
- b. There is division of state power.
- c. Whereas, in performing their duties and obligations, the government must always be based on the principle of applicable law both written and unwritten.
- d. The existence of judicial authority in running the independent power.⁵

For the case of "Customary Conflict" and *Kesepekang* in Bungaya, the theory of Legal System proposed by Fridman⁶ can be applied which consists of three components of system, they are: 1) the substantive law (legal substance); 2) legal structure (legal structure) and 3). Legal culture (legal culture) that the explanations can be described as follows:

1. The substance of law (legal substance) is the overall rule of law, including the principle of law and legal norms both written and unwritten including court rulings.
2. The legal structure is the overall legal institutions and their staff members, including police with its police officers, prosecutor with its prosecutors, courts with judges and so on.
3. Culture of law (legal culture), aspects of culture is a basic outline on behaviour setting out the rules

¹ Rhona, K.M, Smith, et.al, 2008, *Human Right Law*, Yogyakarta, PUSHAM UII, Yogyakarta, p. 20-21.

² Indroharto, 2004. *The Effort to Understand Law on State Administration Justice*, Pustaka Sinar Harapan, Jakarta, p. 83.

³ Jimly Assdiddiqie, 2004, *Indonesian Constitution and Constitutionalism, In Cooperation of MK RI amd Centre of Legal Study of State Administration*, Jakarta, Faculty of Law of UI, p. 125.

⁴ Hans Kelsen, 1973, *General Theory of Law and State*, "in Mustafa Bachsan , Indonesian State Administration Legal System, PT Citra Aditya Bhakti, Bandung, p. 37.

⁵ Sri Soemantri Mertosoewignjo, 1992. *Collection of Indonesian State Adminitrative Law*, Alumni, Bandung, p. 11.

⁶ Achmad Ali, 2009. *Disclosing Legal Theory dan judicial prudence including Law Interpretation (legisprudence)*, Media Group, Jakarta, p. 223.

regarding what should be done and what should not be done.

The practice of human rights law, especially in the substance of law just as the norms contained in the law in books, but in practice human rights law is different from the reality in the field. The values living in the community becomes legal norm binding indigenous people of Bungaya to ensnare the law of *Kesepekang* of the indigenous people, especially Adi Putra (and friend). The Law used to complete the customary case of increasing "Caste status" from Sudra to Wesya Status resulted in *kesepekang* is awig awig of traditional village of Bungaya. It is obvious that the settlement with customary law predominantly traditional village and indigenous Banjar will marginalize customary members (Adi Putra and friend) in completion of this customary case. The benefits that can be used in marginalizing the customary members/reidents is to utilize more votes or *suryak siu* or *briuk siu*. Deficiencies of awig awig in settling custom case is that there is no procedural law in proceedings in traditional villages. The most important thing is the substance of awig-awig of the oldest of Traditional Village of Bungaya, yet outdated, among other traditional sanctions of *Kesepekang* run rigidly, like prohibiting prayer to the village temple of traditional village of Bungaya, not allowed to bury the bodies in graves in the traditional village of Bungaya, not allowed to take water to drink or to bathe in the shower, on the river, or in the trenches and so in the area of traditional village of Bungaya, and not allowed to sell (*Adol atuku*) in the traditional village market of Bungaya.¹

The reason why Adi Putra (and friends) want to claim "Caste Status" of the name "I Gusti" and re-use it as used previously by his ancestors because "*tan purun tiwal ring daging prasasti*" (do not dare to violate the provisions laid down in the inscriptio).² In this context it is necessary to expand the interpretation of the awig-awig of traditional village of Bungaya due to the vacant of law and awig-awig is not in accordance with the development, use as one of the postmodernist legal theories known as the critical legal studies (critical legal studies). According to the initiators Richard A Posner, it has led to the interpretation of law, namely the rise of power of other forces beyond the dominance of modern law for this individual, liberal, capitalistic. This interpretation is the widespread participation of the community (emancipation) in law.³

In the context of the cases mentioned above, in the theory of cultural relativism, it turns out that the culture of "*kesepekang*" contains "isolation" from the traditional village of Bungaya againts the member of the traditional village on behalf of Adi Putra, and friends, so that his house was dismantled by traditional village because they use the name of "I Gusti". Due to this *Kesepekang*, Adi Putra and friends are not allowed to prayer to Village Temple of Bungaya, not allowed to bury the dead, not allowed to take water, not allowed to sell and buy in the Traditional market Bungaya Village.

In juridical analysis, the Traditional Village of Bungaya had violated the Constitution of 1945, Article 28i paragraph (4) on Protection, worship, enforcement, and fulfillment of human rights is the responsibility of the state, especially the government; Article 28J paragraph (1) every person shall respect the human rights of others in an orderly society, nation and state. Article 29, Paragraph (2), the state guarantees the freedom of each citizen to profess his own religion and to worship according to his religion or belief. Article 28H Paragraph (4), everyone has the right to have private property rights and property rights must not be taken over arbitrarily by anyone. Further referring to the legal norms in Law No. 39 of 1999 on Human Rights, Article 22, Paragraph (1) every person is free to embrace their religion and to worship according to their religion or belief; Paragraph (2) The state guarantees the freedom of every person to embrace their religion and to worship according to their religion or belief; Article 31 paragraph (1) the residence of anyone should not be disturbed. In terms of this case, due to the case "caste" to change the name of Adi Putra, and friends resultd in customary conflict leading to *kesepekang*. Being excluded or isolated from the traditional village of Bungaya based on the agreement of traditional village of Bungaya, such as, not allowed to pray, not allowed to bury corpse, not allowed to buy and sell in the traditional village of Bungaya, not allowed to take water, and bathe in the shower of the traditional village of Bungaya. Furthermore, with regard to human rights in the context of this *kesepekang*, in the Regulation of Pakraman No. 3 of 2001, it is expressly stipulated that in Article 11 (2) of Pakraman awig-awig must not conflict with religion, Pancasila, Constitution of 1945, and human rights.

III. CONCLUSION & SUGGESTION

A. CONCLUSION

1. Human Rights can be divided into three generations, the first generation is Human Rights relating to the protection of civil and political rights (civil and political rights), the second generation is Human Rights also including economic, social, and culture. The rights recognized in this generation include the right to social security, right to work, right to adequate standard of living, right to education, and right to protection

¹ I Wayan Windia, 2008, *op. cit.*, p. 203-204.

² *Ibid.*, h. 210.

³ Santos, Boaventure De Souse, 1995, *Toward a new Common Sense, Law Science and Politics in the Paradigmatic transition*, Routledge, New York, p. 1.

of scientific, literary, and art. Human Rights on third generation is solidary or brotherhood rights-based (*fraternity*). Human Rights, in Indonesia, is stipulated in the Constitution of RI of 1945 in Article 28, Law No. 39 of 1999 and other relevant provisions; at regional level, especially in Bali, the Human Rights is stipulated in the law No. 3 of 2001 on *Pekraman village*. Legal instruments and Human Rights underlying social behaviour of Bungaya are customary *awig awig* which has been outdated and did not adopt the Law and Human Rights.

2. The images Human Rights violation in the New Order regime viewed from Socio-legal and cultural issues cannot be ruled out. The country with the reasons of development easily displaced their people. When Press controled the government, then the aptly device used is intimidation and revocation of their licenses (SIUUP). In general, the image of Human Rights in Indonesia during the New Order regime, affects the implementation to the case of "Indigenous Conflict" in Bali, especially in Traditional Village of Bungaya, of indigenous conflict to be "*Kesepekang*". This case happened to Adi Putra, and his comrades, by change his front name "*I Gusti*". Meaning that from indigenous conflict about "*Caste*" to the tragic ending of dismantling his house (remove by using bulldozer). It is a form of human rights violation. "Exclusion" on behalf of the traditional village is a form of disobedience to indigenous community sanction, which is not relevant to the dynamics of society, and the development of International Human Rights, National and regional regulations of *Pakraman Village*. Pursuant to the Circular of Governor of Bali No. MPLA / I / 234/1994, there is no an authorized institution provides the new national designation. During the royal era, the authority was from the kings, which was removed in the royal institution in Bali in 1957. The Caste in Hindu is a misconception for centuries which needs contemporary interpretation based on Human Rights.

B. SUGGESTION

The Balinese indigenous people (traditional village / Pakraman Village) should be provided with legal counseling and Human Rights relating to customary law, traditional sanctions so that custom cases having the implications of "*Kesepekang*" will not be repeated in other Traditional Village in Bali. Traditoonal Villages in Bali through their Traditional Village Officers need to be given with an understanding of "caste" in Bali based on religious literature, so that the implementation of cultural life and Hindu cause no indigenous conflicts affecting to Human Rights violations, and violations of law.

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