

THE IDEAL CONCEPT OF LEGAL PROTECTION OF CULTURAL RESERVES OF ANCESTRAL GRAVES THAT ARE JUST FOR CUSTOMARY LEGAL COMMUNITIES IN CULTURAL HERITAGE REGULATIONS

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Abstract

Ancestral graves are cultural heritage belonging to customary law communities. Therefore, ancestral graves must be protected, respected, cherished and preserved. This article discusses the ideal protection of ancestral graves as cultural heritage. Cultural heritage is regulated in Law number 11 of 2010 concerning cultural heritage. The government basically has an obligation to protect cultural heritage. Currently the concept of legal protection of cultural heritage is ineffective. Therefore, in this article the researcher provides an ideal concept for the legal protection of cultural heritage, especially ancestral graves.

Keywords: Legal protection, Cultural heritage, Ancestral graves, Customary law communities.

Introduction

Indonesia is rich in culture, because it has a diverse society ranging from tribes, ethnicities and beliefs. Article 1 number 1 of Law Number 11 of 2010 concerning Cultural Heritage states that Cultural Heritage is material cultural heritage in the form of Cultural Heritage Objects, Cultural Heritage Buildings, Cultural Heritage Structures, Cultural Heritage Sites and Cultural Heritage Areas on land and/or in water whose existence needs to be preserved because it has important value for history, science, education, religion and/or culture through the determination process. The Ancestral Graves in question are the graves of ancestors or parents. The emphasis on ancestral graves is on the graves of ancestors or parents who have a long lineage and have built society so that they have an identity.¹

¹ Aldy Yohanes Manueke, et. all, The Meaning of Legal Protection of Ancestral Graves as a Cultural Reserve in the National Culture System in Indonesia, International Journal of Social Science Research and Review, Volume 6, Issue 6 June, 2023 Pages: 32-41

Legal protection of cultural heritage is contained in articles 56 to article 77 of Law Number 11 of 2010 concerning Cultural Heritage. This cultural heritage protection applies to cultural heritage objects, cultural heritage buildings, cultural heritage structures, cultural heritage sites and cultural heritage areas that have received designation from the government.

Conflict is a social problem that really exists in social life, therefore conflict will occur and always exist in every space and time, wherever and whenever. Conflict is the process of achieving goals by weakening the opposing party, without paying attention to applicable norms and values.² Problems that occur in society are conflicts between indigenous communities and the government and the private sector. The government which prioritizes either development or investment from the private sector always clashes with indigenous communities. Indigenous communities' efforts to protect the land inherited from their ancestors are often criminalized, so that indigenous communities are currently in a weak position.

Ancestral graves are cultural heritage objects. An object that is not designated as a cultural heritage does not receive legal protection because cultural heritage is protected if it has received a determination from the government.³ There are fundamental problems regarding legal protection. Therefore, the author will provide an ideal concept regarding legal protection for cultural heritage of ancestral graves that is fair for customary law communities in cultural heritage regulations. The research is normative juridical legal research. Normative juridical legal research is research in the form of an inventory of applicable legislation, to search for the principles of that legislation, so that this research seeks to carry out legal discoveries that are appropriate to certain legal problems.⁴

RESULTS AND DISCUSSION

IDEAL CONCEPT OF LEGAL PROTECTION OF CULTURAL RESERVES OF ANCESTRAL GRAVES THAT ARE JUST FOR CUSTOMARY LEGAL COMMUNITIES IN CULTURAL HERITAGE REGULATIONS

Ancestral graves have an identity so that people pay respect to the ancestors in them in the form of honoring activities. Community activities in paying respects are a belief in ancestors. Each society has different ways of paying respect to its ancestors. Respect for ancestors carried out through activities at ancestral graves is part of the culture of traditional law communities. In culture itself, there are moral values of belief as respect for those who created culture and are implemented in society through tradition.⁵

² Soekanto, S. (1993). *Kamus Sosiologi*. Jakarta: PT. Raja Grafindo Persada.

³ Aldy Yohanes Manueke, et al., *Implikasi Law Of An Object That Is Not Designated As Cultural Heritage In Law Number 11 Of 2010 Concerning Cultural Heritage*, RUSSIAN LAW JOURNAL, Volume 12, Issue 2 (2024), Pages 1-9

⁴ Bahder J. Nasution, **Metode Penelitian Ilmu Hukum**, Mandar Maju, Bandung, 2008, hlm 86.

⁵ Robi Darwis. (2017). *Tradisi Ngaruwat Bumi Dalam Kehidupan Masyarakat (Studi Deskriptif Kampung Cihideung Girang Desa Sukakerti Kecamatan Cisalak Kabupaten Subang)*. *Religious: Jurnal Studi Agama-Agama Dan Lintas Budaya*, 2(1), 75–83.

Indigenous communities in Indonesia are currently in a weak position. Recognition of the existence of customary communities is hampered by article 18B paragraph 2 of the Constitution of the Republic of Indonesia "The State recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with the development of society and civilization, and in accordance with the principles of the Unitary State Republic of Indonesia, which is regulated by law." On the one hand, this Constitution recognizes the existence of Customary Law Communities, but on the other hand, the existence of customary law communities is accompanied by requirements. There are 4 conditions that must be fulfilled by a social community to be considered a 'community'. adat lawt' and these requirements constitute restrictions. If these 4 limiting conditions are not met, then customary law communities, which have lived for centuries in this country, will not be recognized as subjects of customary law along with their customary rights.

- 1) as long as it still exists; There are several questions that are detrimental to customary law communities:
 - a) who has the authority to declare and prove that the Customary Law Community is still alive or still exists, whether it is the state (the ruler) or members of the Customary Law Community.
 - b) what evidence can be used that the Customary Law Community is still alive or still exists:
 - c) what criteria must be met in order to say that the Customary Law Community is still alive or still exists.

This number one requirement, if used using reverse logic, means that the government or authorities want to say that Indigenous Law Communities actually no longer exist. The authorities stated that customary law communities must first prove for themselves that they exist. With the use of euphemism (language refinement) the words ... as long as you are alive ... mean you are dead, as long as your life has not been proven.

- 2) in accordance with current developments; This provision consciously and deliberately intends to say that ethnic groups or traditional legal communities that are not in accordance with the times and civilization are not recognized in this country as Indonesian people, citizens of Indonesian society, and subjects of Indonesian law. If so, members of traditional law communities who still live in isolation, such as the Anak Dalam, Badui Dalam, Kubu-Lubu, Dayak tribes who live in the interior of Kalimantan, tribes in Papua which are still very simple, are very far from modern human civilization. The Indonesian state, through the Constitution, ignores the existence of customary law communities because customary law communities in the interior have been left behind in terms of current developments.
- 3) in accordance with the principles of the Unitary State of the Republic of Indonesia; This requirement really distances customary law communities from the framework of the Unitary State of the Republic of Indonesia. Why? Customary Law Communities which are local-ethnic in nature are dealing with nations which are nation-state. Which principles will be difficult to fulfill if customary law communities must be equated with modern state principles. From any angle: management, law, institutions, bureaucracy and so on, can it be met to be recognized as a customary law community.
- 4) regulated in law: If the view of traditional law scholars is used as a reference that customary law is the original law of the Indonesian nation which is largely unwritten, then the fourth condition is that the regulation of the subject of unwritten customary law is regulated by

written law, then that meaning that the legislator has prepared a murderous sword to kill the subject of customary law. The killing sword is the law. Likewise, if the view that customary law is a law that lives, develops and develops in line with the growth and development of the supporting community, then the determination of the death and life of a customary law subject is determined by the written law that is created, is contrary to logic. Customary law communities must be recognized in writing based on law, and currently the customary law community law has not been ratified.

This recognition is conditional, meaning it depends on the political will of the authorities. With the above provisions, the legal protection of customary law communities is lost. The existence of these four conditions is so ambiguous and confusing that it is impossible for customary law communities to fulfill them. The issue of Recognition of Customary Law Communities in the realm of construction is related to legal protection to preserve the cultural heritage of ancestral graves. The fundamental problem regarding the meaning of legal protection for the cultural heritage of ancestral graves of traditional law communities in the constitution, namely the Constitution of the Republic of Indonesia, namely in article 18 B paragraph 2, does not reflect the spirit of protection.

Protection of Cultural Heritage in Law Number 11 of 2010 concerning Cultural Heritage states that Protection is an effort to prevent and overcome damage, destruction or destruction by means of Saving, Securing, Zoning, Maintaining and Restoring Cultural Heritage. The scope of Cultural Heritage Conservation includes the Protection, Development and Utilization of Cultural Heritage both on land and in water (seas, rivers, lakes, reservoirs, wells and swamps). Everyone can take part in protecting cultural heritage. Protection of Cultural Heritage is part of Cultural Heritage Conservation in CHAPTER VII of the Cultural Heritage Law. The state is responsible for the preservation of cultural heritage. According to Law Number 11 of 2010 concerning Cultural Heritage Article 1 number 23 Protection is an effort to prevent and overcome damage, destruction or destruction by means of saving, securing, zoning, maintaining and restoring cultural heritage.

Cultural Heritage Preservation aims to:

- a. preserving the nation's cultural heritage and the heritage of mankind;
- b. enhancing the honor and dignity of the nation through Cultural Heritage;
- c. strengthen national personality;
- d. improve people's welfare; And
- e. promote the nation's cultural heritage to the international community

Judging from the above objectives, some of the objectives are preserving the nation's cultural heritage and human heritage and strengthening the nation's personality. This is related to maintaining the culture of the very plural indigenous peoples in Indonesia. By looking at this goal, these diverse ethnic communities receive guarantees from the State to strengthen their personality.

Cultural Heritage Conservation is based on:

- a. Pancasila: What is meant by "Pancasila principles" is that cultural heritage preservation is carried out based on the values of Pancasila.
- b. Bhinneka Tunggal Ika: What is meant by the "principle of Bhinneka Tunggal Ika" is that the preservation of cultural heritage always takes into account the diversity of the population,

religion, ethnicity and group, special regional conditions and culture in the life of society, nation and state.

- c. Archipelago: What is meant by "archipelagic principles" is that every effort to preserve cultural heritage must take into account the interests of the entire territory of Indonesia.
- d. Justice: What is meant by "principle of justice" is that cultural heritage preservation reflects a proportional sense of justice and equality for every Indonesian citizen.
- e. Order and legal certainty: What is meant by "principle of order and legal certainty" is that every management of Cultural Heritage Conservation must be able to create order in society by guaranteeing legal certainty.
- f. Benefit: What is meant by the "principle of benefit" is that the preservation of cultural heritage can be utilized for the benefit of the welfare of the people in the aspects of religion, social, education, science, technology, culture and tourism.
- g. Sustainability: What is meant by "principle of sustainability" is efforts to preserve cultural heritage which are carried out continuously by paying attention to the balance of ecological aspects.
- h. Participation: What is meant by "principle of participation" is that every member of the community is encouraged to play an active role in the preservation of cultural heritage.
- i. Transparency and accountability: What is meant by the "principle of transparency and accountability" is that Cultural Heritage Conservation is accountable to the public in a transparent and open manner by providing correct, honest and non-discriminatory information.

Regulations on the protection of cultural heritage in Law Number 11 of 2010 concerning Cultural Heritage apply to cultural heritage that has received designation. The initial problem of protection at the time of registration of cultural heritage is in article 28 of Law Number 11 of 2010 concerning Cultural Heritage "Regency/City Governments cooperate with each person in carrying out registration." The problems in this article are:

1. Registration authority rests with the district/city: this means that here there are tiers of authority that must be passed in order to gain recognition as a cultural heritage.
2. The government cooperates with everyone: this means that registration here means that the government is passive in registering and the public is active in registering.
3. The government has the authority in the registration department, so the government decides whether the object is worthy of being used as a cultural heritage.

The problem regarding the recognition of cultural heritage is that it is complicated, and only following the wishes of regional leaders whether or not it can be designated as a cultural heritage, the rights of customary law communities are neglected so that customary law communities do not get justice. Justice is one of the most studied topics in philosophy. Natural law theories that prioritize the search for justice from Socrates to Francois Geny still maintain justice as the crown of law.⁶

Justice is essentially treating someone or another party according to their rights. What is the right of every person is to be recognized and treated according to their dignity, equal status, and equal rights and obligations, without distinction of race, descent and religion.

⁶ Theo Huijbers, *Filsafat hukum dalam lintasan Sejarah*, cet. vii (Yogyakarta: Kanisius, 1995), hlm. 196.

According to John Rawls, justice is a measure that must be given to achieve a balance between personal interests and common interests. According to him, there are three principles of justice, namely:

- (1) Maximum equal freedom,
- (2) Differences,
- (3) Fair equality of opportunity.

In reality, these three principles cannot be realized together because one principle could conflict with the other principles. John Rawls prioritizes that the principle of equal freedom to the greatest extent lexically applies before the second and third principles.

Rawls believes that the structure of an ideal, just society is the original basic structure of society, in which basic rights, freedom, power, authority, opportunity, income and welfare are met. This category of ideal societal structure is used to assess whether existing social institutions are fair or not and to correct social injustice.⁷ Rawls believes that what causes injustice is a social situation, so it is necessary to re-examine which principles of justice can be used to shape a good societal situation.

In order to obtain justice, improvements to the cultural heritage of the ancestral graves of traditional communities are needed, especially regarding protection in Law number 11 of 2010 concerning cultural heritage. This legal protection emphasizes the protection of the rights of indigenous peoples to determine their own destiny. The basic principle of legal protection in Indonesia is Pancasila as the state ideology and philosophy. The principle of legal protection in Indonesia is the principle of recognition and protection of dignity that originates from Pancasila.

The goals of the state are determined by the perspective of a nation (society) regarding the nature of the state, while this perspective depends on the philosophical foundation adopted. For example, the goals of the Indonesian state are determined by the perspective of the Indonesian people regarding the nature of the Indonesian state. This perspective is determined by the philosophical foundation of the Indonesian nation, namely Pancasila. In accordance with the philosophical foundation of Pancasila, in the view of the Indonesian people, the state is a means or tool to achieve the goals of the Indonesian nation, namely a just and prosperous society or social justice for all Indonesian people. The Indonesian state is a means or tool to provide prosperity for the entire Indonesian nation.⁸

Setiono believes that legal protection is an action or effort to protect society from arbitrary actions by authorities who are not in accordance with the rules of law, to create order and peace so as to enable humans to enjoy dignity as human beings. Currently, although Law Number 11 of 2010 concerning Cultural Heritage regulates the protection of ancestral graves, in reality it is not effective. Therefore, the author provides the concept of legal protection so that ancestral graves can be protected.

Legal protection by the state, Philip M, Hadjhon differentiates it into two types, namely preventive legal protection and repressive legal protection.

⁷ Hari Chand, *Modern Jurisprudence* (Kuala Lumpur: International Law Book Review, 1994), hal. 278.

⁸ Rachmad Safa'at et al. 2022. *Hak Warga Negara Dan Kewajiban Negara dalam Pengelolaan Lingkungan Hidup dan sumber Daya Alam*. Malang : Inteligencia Media, hlm 62

a. Preventive legal protection.

Protection provided by the government with the aim of preventing violations before they occur. This is contained in statutory regulations with the aim of preventing violations and providing signs or limitations in carrying out an obligation.

b. Repressive Legal Protection.

Repressive legal protection is final protection in the form of sanctions such as prison fines and additional penalties that are given if a dispute has occurred or a violation has been committed.

This research uses the theory of legal protection in preventive legal protection, in this case the people are given the opportunity to submit objections to their opinions before a government decision is formulated in a definitive form. Preventive legal protection plays a very big role in government actions which are based on freedom of action because with this legal protection the government is encouraged to be careful in making decisions.

Cultural heritage is the nation's cultural wealth as a form of thought and behavior in human life which is important in society, nation and state. Because cultural heritage is the nation's cultural wealth, it needs to be protected and preserved. The model for regulating cultural heritage protection is linked to the theory of legal protection by providing a concept of cultural heritage protection so that the rights of customary law communities are protected by law. The legal protection used by the author is preventive legal protection. Preventive legal protection is protection provided by the government with the aim of preventing violations before they occur. Therefore, the author states that the protection of cultural heritage must be carried out at the beginning even though it has not yet received a determination process. This means that protection must be put in place before the determination process.

The authority to determine cultural heritage is in the hands of the government. This means that if the government does not determine it, the cultural heritage is not protected. Here the government has absolute rights whether cultural heritage is protected or not. This initial protection makes the government play an active role in registering cultural heritage. The author gives the idea that Law Number 11 of 2010 concerning Cultural Heritage must be revised, further stating firmly that objects that meet the criteria for cultural heritage, even though they have not been designated, are protected as cultural heritage objects. The author provides an ideal concept regarding Legal Protection of Cultural Heritage, namely:

Adding Article 11A of Law Number 11 of 2010 concerning Cultural Heritage:

- 1) Objects, buildings, structures, locations and geographical units that meet the criteria of articles 5 to 10, even though they have not yet received a designation, are protected as cultural heritage objects.
- 2) everyone is prohibited from damaging, stealing and moving objects in accordance with article 11A paragraph 1

This additional article strengthens the Government's obligations in protecting cultural heritage. In areas where the fact is that currently the regional government has not created a team of cultural heritage experts, the existence of this article forces the regional government to form a team of cultural heritage experts in each region.

If the government does not implement this article, development from both the government and the private sector will be hampered. This article applies legal protection at the outset where cultural heritage, even though it has not yet received a designation, is still protected as a cultural heritage. The implementation of cultural heritage protection with this article provides stricter sanctions for violators, whether government or private.

The main aim of initial protection of cultural heritage objects that have not been designated is to prevent the negative impact of development activities on the environment and surrounding communities. According to the author, the initial concept of protection is a solution to the injustice felt by the community in getting legal protection, especially ancestral graves, therefore, to get protection, legal certainty is needed as the main goal. To gain a better understanding in relation to legal protection, our attention must be directed to the relationship between law and culture. This initial legal protection of cultural heritage also serves to ensure that local wisdom in the regions remains sustainable and can be enjoyed by future generations.

Conclusion

The ideal concept of legal protection for cultural heritage of ancestral graves that is fair for customary law communities in cultural heritage regulations is to place the protection of cultural heritage at the beginning even though it has not yet been determined. The author provides a concept, namely the addition of Article 11A: 1. Objects, buildings, structures, locations and geographical units that meet the criteria of articles 5 to article 10 even though they have not been designated as protected as cultural heritage objects. 2. Everyone is prohibited from damaging, stealing and moving objects in accordance with article 11A paragraph 1. The addition of article 11A provides legal certainty for the initial protection of the cultural heritage of the ancestral graves of customary law communities. This initial legal protection will ensure that local wisdom in the regions remains sustainable and can be enjoyed by future generations.

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