

# CONFLICT BETWEEN CUSTOMARY LAW AND HUMAN RIGHTS (HAM) IN THE IMPLEMENTATION OF THE KASEPEKANG SANCTIONS (EXCLUDING AS A CUSTODY/REVOCAION OF CUSTODY RIGHTS) IN BANJAR TRADITIONAL SENTAL KANGIN, PED VILLAGE, NUSA PENIDA DISTRICT, KLUNGKUNG REGENCY

Komang Edy Kariarta Bun<sup>1</sup>  
Universitas Mahendradatta

Erikson Sihotang<sup>2</sup>  
Universitas Mahendradatta

I Nyoman Suandika<sup>3</sup>  
Universitas Mahendradatta

Correspondence : Komang Edy Kariarta Bun ([edykariartabun94@gmail.com](mailto:edykariartabun94@gmail.com))

## Abstract

Indonesia is a constitutional state that upholds the protection of human rights as mandated by the 1945 Constitution of the Republic of Indonesia. At the same time, the Constitution recognizes the existence of customary law communities along with their traditional rights as long as they remain alive and are consistent with societal development and the principles of the Unitary State of the Republic of Indonesia. Consequently, the implementation of customary law must remain consistent with human rights principles. One form of customary sanction still applied in Balinese customary communities is kasepekang, namely social exclusion or revocation of customary rights imposed upon community members who violate customary regulations (awig-awig). This study aims to analyze the legal position of kasepekang sanctions within the Balinese customary legal system and their recognition under Indonesian national law, as well as to examine the conflict between the implementation of kasepekang sanctions and human rights principles. This research employs normative legal research using statutory, conceptual, and case approaches. The legal materials consist of primary, secondary, and tertiary legal sources analyzed qualitatively. The study concludes that the constitutional recognition of customary sanctions is guaranteed under Article 18B paragraph (2) of the 1945 Constitution and Bali Provincial Regulation Number 4 of 2019 concerning Customary Villages. Nevertheless, the implementation of customary sanctions must not violate constitutional rights guaranteed under Law Number 39 of 1999 concerning Human Rights. Sanctions resulting in discrimination, social exclusion, restrictions on religious freedom, denial of customary services, and unequal treatment before the law constitute violations of human rights principles. Therefore, harmonization between customary law and human rights protection is necessary through strengthening fair customary dispute resolution mechanisms.

**Keywords:** Customary Law, Human Rights, Kasepekang, Customary Village, Legal Protection.

## INTRODUCTION

Indonesia is a state based on the rule of law. Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia affirms that all aspects of national and state life must be based on law. As a state based on the rule of law, Indonesia also guarantees respect, protection, and fulfillment of human rights as fundamental rights inherent in every individual from birth. Furthermore, the State of Indonesia also recognizes the existence of indigenous

legal communities and their traditional rights, as stipulated in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia. This recognition demonstrates the state's respect for cultural diversity, local values, and customary legal systems that have existed long before the establishment of the modern state.

In Bali Province, the existence of customary villages plays a strategic role in maintaining the social, cultural, and religious life of the Balinese Hindu community. Customary villages have the authority to establish customary laws and regulations (*awig-awig*) and regulations (*perarem*) as guidelines for the lives of indigenous communities. One form of customary sanction recognized in the Balinese customary law system is *kasepekang*, which involves the ostracization of customary members deemed to have grossly violated customary rules. While these customary sanctions are intended to maintain order within customary communities, in practice, the implementation of *kasepekang* often raises legal issues. These sanctions not only result in social exclusion but can also deprive individuals of their right to participate in customary activities, use customary village facilities, obtain religious services, and even be prohibited from interacting with other members of the community. This situation potentially violates human rights principles, particularly the right to equal treatment before the law, the right to freedom of religion, the right not to be discriminated against, and the right to live with dignity.

This problem was evident in the application of *kasepekang* sanctions to seven heads of families in the Sental Kangin Traditional Hamlet, Ped Village, Nusa Penida District, Klungkung Regency. A dispute that began over customary land management escalated into a customary legal conflict that culminated in the imposition of *kasepekang* sanctions against indigenous people. This case demonstrates the tension between the authority of indigenous communities to enforce customary law and the state's obligation to protect the human rights of every citizen. Therefore, a legal study is needed regarding the status of customary sanctions in the Indonesian legal system and the limits of their application to ensure they remain in line with the principles of the rule of law and the protection of human rights.

1. What is the status of the *Kasepekang* customary sanction within the Balinese customary law system and its recognition in Indonesian national law?
2. What is the conflict between the application of the *Kasepekang* sanction and the principles of human rights protection?

## **METHOD**

This research is a normative legal research using a statute approach, a conceptual approach, and a case approach. The legal materials consist of primary legal materials in the

---

form of laws and regulations, secondary legal materials in the form of books, scientific journals, and research results, and tertiary legal materials in the form of legal dictionaries and legal encyclopedias. All legal materials are analyzed qualitatively using descriptive analytical methods to obtain legal arguments regarding the relationship between the application of customary sanctions (*kasepekang*) and the protection of human rights in the Indonesian legal system.

## **RESULTS AND DISCUSSION**

### **The Position of Kasepekang Customary Sanctions in the Balinese Customary Law System and Their Recognition in Indonesian National Law**

Customary law is a legal system that existed and developed in Indonesian society long before the formation of the modern state. Customary law is not merely viewed as a social custom, but rather as a system of norms that regulates the relationship between individuals and indigenous communities based on religious, communal, and philosophical values passed down through generations. According to Van Vollenhoven, customary law is the original law of the Indonesian nation, growing out of community life, thus possessing strong sociological legitimacy in regulating the lives of indigenous communities.

The recognition of customary law gained a constitutional basis following the amendment to the 1945 Constitution of the Republic of Indonesia. Article 18B paragraph (2) affirms that the state recognizes and respects customary law communities and their traditional rights as long as they remain viable, are in keeping with societal developments, and do not conflict with the principles of the Unitary State of the Republic of Indonesia as stipulated in law. This provision demonstrates that customary law is not a legal system that stands outside the national legal system, but rather is part of legal pluralism recognized by the state. In addition to constitutional recognition, the existence of customary law communities is also strengthened through Article 28I paragraph (3) of the 1945 Constitution of the Republic of Indonesia, which states that the cultural identity and rights of traditional communities are respected in accordance with the development of time and civilization. This constitutional norm demonstrates the state's obligation to maintain the existence of customary law while ensuring that its implementation adheres to human rights principles.

In Bali Province, regulations regarding customary villages are further strengthened through Bali Provincial Regulation Number 4 of 2019 concerning Customary Villages. This regulation grants customary villages the authority to regulate community life through customary laws (*awig-awig*) and customary regulations (*perarem*), which are customary legal instruments binding on all village residents. *Awig-awig* are basic rules formulated based on

---

Hindu religious values, customs, and the Tri Hita Karana philosophy, while perarem are implementing regulations tailored to the needs of the customary community. In the Balinese customary law system, any violation of the awig-awig is subject to customary sanctions. These sanctions are essentially intended to restore balance (restorative), maintain harmonious community relations, and restore customary values disrupted by violations. Unlike the national criminal law system, which emphasizes punishing the perpetrator, customary law prioritizes restoring social relations between the perpetrator and the customary community.

One form of customary sanction recognized in Balinese customary law is kasepekang. Etymologically, kasepekang means the ostracization or exclusion of an individual or group deemed to have committed a serious violation of customary law (awig-awig) or the decisions of the customary village council. The application of this sanction results in the loss of some of their customary rights, such as the right to participate in customary activities, receive customary services, use customary village facilities, and in some cases, even being barred from using the setra (traditional cemetery) or village temple for religious purposes. Essentially, the kasepekang sanction is intended as a last resort (*ultimum remedium*) in resolving customary conflicts after mechanisms of guidance, reprimands, and deliberation have failed to yield a resolution. Therefore, its implementation should be highly selective and consider the principle of proportionality and a sense of justice for all parties in the dispute. In practice, the imposition of customary sanctions should prioritize the principle of deliberation and consensus, as is a key characteristic of Indonesian customary law.

Problems arise when the implementation of kasepekang sanctions develops into a form of social exclusion that is no longer limited to customary relations but also impacts the fulfillment of a person's basic rights as a citizen. In some cases, recipients of sanctions not only lose their customary rights but also experience social discrimination, restricted access to community services, and even psychological distress due to exclusion from their neighborhoods. This situation raises questions about the limits of the authority of customary law communities to impose sanctions on their members. The case in the Sental Kanging Traditional Village, Ped Village, Nusa Penida District, Klungkung Regency, is a clear example of the tension between the implementation of customary law and the protection of human rights. Based on the description in the thesis, a dispute that began over coastal land management escalated into a conflict between residents and customary officials, ultimately resulting in the imposition of kasepekang sanctions on seven heads of families and their family members. These sanctions resulted in the residents losing various customary rights, including the right to participate in religious activities and customary services.

---

When analyzed using the rule of law theory proposed by Friedrich Julius Stahl, all forms of authority, including the authority of customary law communities, must be exercised based on the principles of human rights protection, rule of law, division of powers, and the existence of legal protection mechanisms. Therefore, recognizing customary law does not grant customary villages absolute authority to override the constitutional rights of citizens.

Furthermore, when examined using the legal protection theory proposed by Philip M. Hadjon, the state has an obligation to provide both preventive and repressive legal protection to every citizen. Preventive protection aims to prevent rights violations, while repressive protection is provided through dispute resolution mechanisms once violations have occurred. In the context of implementing Kasepekang sanctions, the state is obligated to ensure that all customary decisions remain within the constitutional framework and do not conflict with Law Number 39 of 1999 concerning Human Rights. Therefore, it is understandable that the position of Kasepekang customary sanctions in the Indonesian national legal system is recognized as part of the traditional rights of customary law communities. However, this recognition is conditional, meaning it only applies as long as its implementation does not conflict with the 1945 Constitution of the Republic of Indonesia, human rights, the principles of justice, and applicable laws and regulations. Therefore, any application of customary sanctions must adhere to the principles of proportionality, non-discrimination, respect for human dignity, and dispute resolution mechanisms that guarantee the protection of the rights of every citizen

### **The Form of Conflict between the Implementation of Kasepekang Sanctions and the Principles of Human Rights Protection**

Human Rights (HAM) are a set of rights inherent in every human being as a gift from God Almighty, which must be respected, protected, and fulfilled by the state, government, and every individual. Recognition of human rights in Indonesia is constitutionally based in Articles 28A to 28J of the 1945 Constitution of the Republic of Indonesia and is further regulated in Law Number 39 of 1999 concerning Human Rights. Therefore, all forms of exercise of power, including the implementation of customary law, must remain within the framework of respect for basic human rights.

State recognition of the existence of customary law communities, as stipulated in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, is not absolute. Such recognition is granted as long as the customary law community continues to exist, is in accordance with societal developments, and does not conflict with the principles of the Unitary State of the Republic of Indonesia. One of the fundamental principles of the Indonesian rule of law is respect for human rights. Therefore, the implementation of customary law cannot be

separated from the obligation to guarantee the protection of the constitutional rights of every citizen.

From an international legal perspective, respect for human rights is an obligation of every constitutional state. The 1948 Universal Declaration of Human Rights affirms that every human being is born free and has equal dignity and rights, regardless of ethnicity, religion, race, or social status. This principle of universality has become the basis for various international instruments concerning human rights protection, which have also been adopted in Indonesia's national legal system.

When analyzed from a human rights perspective, the implementation of the customary Kasepe kang sanction has the potential to conflict with several fundamental rights. First, the right to equality before the law. Article 27 paragraph (1) of the 1945 Constitution of the Republic of Indonesia affirms that all citizens have equal standing before the law and government. This provision is reaffirmed in Article 3 of Law Number 39 of 1999, which states that everyone has the right to receive legal protection without discrimination.

In practice, the application of the Kasepe kang sanction often prevents individuals subject to the same treatment as other customary citizens. Those who receive sanctions may lose their right to participate in customary activities, receive customary village services, use public facilities owned by the customary village, and in some cases, even be barred from using customary cemeteries or places of worship within the customary village's jurisdiction. Such treatment demonstrates differential treatment based on social status arising from customary decisions, potentially contradicting the principle of equality before the law.

Second, the right to be free from discriminatory treatment. Article 28I paragraph (2) of the 1945 Constitution of the Republic of Indonesia expressly states that everyone has the right to be free from discriminatory treatment on any basis. Similarly, Article 17 of Law Number 39 of 1999 guarantees that everyone has the right to protection from discriminatory acts in community life and in obtaining public services. Social exclusion resulting from kasepe kang sanctions can essentially be categorized as a form of discrimination if it deprives a person of the right to receive services that should still be provided to citizens. In some cases, families receiving sanctions also experience social impacts in the form of restrictions on social interaction, exclusion from community activities, and even long-term negative stigma. These impacts demonstrate that customary sanctions are not only imposed on the perpetrator but also impact family members who have not actually committed customary violations.

Third, the right to freedom of religion and to practice their religion. Article 28E paragraph (1) of the 1945 Constitution of the Republic of Indonesia guarantees that everyone

is free to embrace and worship according to their religion. This guarantee is reinforced in Article 22 of Law Number 39 of 1999, which states that the state guarantees the freedom of every person to embrace a religion and practice their religion according to their respective beliefs. In practice in several traditional villages in Bali, the implementation of kasepekang sanctions is often accompanied by prohibitions on recipients from participating in prayers at village temples or receiving religious services that are part of the life of indigenous communities. These restrictions essentially enter the realm of constitutional rights guaranteed by the state and must be viewed with caution to prevent them from developing into human rights violations.

Fourth, the right to human dignity. The essence of human rights is the recognition of human dignity. According to Manfred Nowak, respect for human dignity is a core principle in all international human rights instruments. Therefore, any form of punishment that deprives a person of their dignity through permanent social exclusion must be evaluated based on the principles of just and civilized humanity, as enshrined in the second principle of Pancasila.

When analyzed using Philipus M. Hadjon's legal protection theory, the state has two forms of legal protection: preventive legal protection and repressive legal protection. Preventive legal protection is provided so that the community has the opportunity to raise objections before a decision is implemented, while repressive protection is provided through a dispute resolution mechanism after a rights violation occurs. In the context of implementing Kasepekang sanctions, both forms of protection are crucial to ensure that customary decisions continue to guarantee the rights of citizens. Furthermore, the law enforcement theory put forward by Soerjono Soekanto explains that the effectiveness of the law is influenced by five factors: legal factors, law enforcement officials, facilities and infrastructure, the community, and legal culture. When linked to the implementation of Kasepekang sanctions, the legal culture of indigenous communities does play a crucial role in maintaining social order. However, this legal culture must develop dynamically in line with developments in human rights values to avoid conflict with the national legal system.

The case in the Sental Kangin Traditional Village demonstrates how a conflict over customary land ownership escalated into a social conflict, culminating in the imposition of kasepekang sanctions on seven heads of families. These sanctions not only impacted the relationship between residents and the traditional village but also affected the exercise of the social, religious, and community rights of the sanctioned parties. This situation demonstrates the tension between the purpose of customary law to maintain social order and the state's obligation to protect the fundamental rights of citizens. In the author's opinion, the existence

of kasepekang sanctions as part of customary law should be maintained as a form of preserving local wisdom. However, the substance and mechanisms of their implementation need to be reconstructed to align with the principles of a modern rule of law and the protection of human rights. This reconstruction can be achieved through limiting the types of sanctions, applying the principle of proportionality, providing sanctioned parties with the opportunity to defend themselves (the right to be heard), resolving disputes through deliberation, and oversight by the Traditional Village Council if customary decisions have the potential to violate residents' constitutional rights. Thus, harmonizing customary law and human rights does not mean eliminating customary law, but rather placing customary law as part of a national legal system that develops in accordance with constitutional values, respect for human dignity, justice, and the protection of human rights. This approach aligns with the concept of progressive law, which positions law as an instrument for realizing human welfare and happiness, not merely a tool for imposing sanctions

## **CLOSING**

### **Conclusion**

Based on the results of research and discussion regarding the Conflict between Customary Law and Human Rights (HAM) in the Implementation of Kasepekang Sanctions (Ostracized as Indigenous Citizens/Revocation of Indigenous Citizens' Rights) in Banjar Adat Sental Kangin, Ped Village, Nusa Penida District, Klungkung Regency, it can be concluded as follows.

1. The position of kasepekang customary sanctions in the Balinese customary law system is constitutionally recognized based on Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia which recognizes the existence of customary law communities and their traditional rights. This recognition is strengthened through Bali Provincial Regulation Number 4 of 2019 concerning Traditional Villages which gives authority to traditional villages to form awig-awig and perarem as instruments for regulating the lives of traditional communities. Thus, the implementation of kasepekang sanctions is part of the autonomous authority of traditional villages in maintaining order, balance and harmony in the lives of traditional communities. However, this recognition is conditional, namely as long as its implementation does not conflict with the 1945 Constitution of the Republic of Indonesia, human rights, public order and the principles of the Unitary State of the Republic of Indonesia.

2. The application of kasepekang customary sanctions has the potential to conflict with the principles of protecting human rights if its implementation results in restrictions on a person's basic rights, such as the right to equality before the law, the right not to be treated in a discriminatory manner, the right to practice religion, the right to obtain social services, and the right to maintain human dignity. The case that occurred in Banjar Adat Sental Kangin shows that the application of customary sanctions accompanied by social exclusion and restrictions on customary rights has created a conflict between the authority of customary law communities and the state's obligation to provide protection for the constitutional rights of citizens. Therefore, harmonization between customary law and human rights is an urgent need so that the preservation of customary law continues without reducing the protection of the basic rights of every citizen.

### **Suggestion**

Based on the research findings, the author offers the following recommendations.

1. The Government of the Republic of Indonesia, particularly the Ministry of Law, the Ministry of Home Affairs, and the Provincial Government of Bali, should formulate policies that provide guidelines regarding the limits of the application of customary sanctions to align with the principles of human rights as guaranteed in the 1945 Constitution of the Republic of Indonesia and Law Number 39 of 1999 concerning Human Rights. These guidelines are expected to serve as a reference for all customary villages in implementing customary sanctions proportionally and fairly.
2. The Bali Provincial Customary Village Council should provide guidance, supervision, and evaluation of customary laws and regulations (*adat-awig*) and regulations (*perarem*) that still contain provisions that have the potential to lead to discrimination or human rights violations. Customary dispute resolution mechanisms should prioritize deliberation, mediation, and a restorative approach over social exclusion, which has a broad impact on community life.
3. Customary village officials should emphasize the principles of proportionality, justice, expediency, and respect for human dignity in the application of customary sanctions. Every citizen who is suspected of committing a customary violation needs to be given the opportunity to provide a defense (right to be heard) so that customary decisions truly reflect a sense of justice and do not give rise to prolonged conflict.

## REFERENCES

- Abu Daud Busro dan Abu Bakar Busro. 1983. Azas-Azas Hukum Tata Negara. Ghalia Indonesia, Jakarta.
- Bahder Johan Nasution. 2017. Negara Hukum dan Hak Asasi Manusia. Mandar Maju, Bandung.
- Barda Nawawi Arief. 2016. Bunga Rampai Kebijakan Hukum Pidana. Citra Aditya Bakti, Bandung.
- Jimly Asshiddiqie. 2019. Pengantar Ilmu Hukum Tata Negara. Rajawali Pers, Jakarta.
- Manfred Nowak. 2003. Introduction to the International Human Rights Regime. Martinus Nijhoff Publishers, Leiden.
- Maria Farida Indrati Soepranto. 2010. Ilmu Perundang-Undangan. Kanisius, Yogyakarta.
- Miriam Budiardjo. 2007. Dasar-Dasar Ilmu Politik. Gramedia Pustaka Utama, Jakarta.
- Muhammad Tahir Azhary. 2003. Negara Hukum Suatu Studi tentang Prinsip-Prinsipnya. Prenada Media, Jakarta.
- Ni'matul Huda. 2020. Hukum Tata Negara Indonesia. Rajawali Pers, Depok.
- Philipus M. Hadjon. 1987. Perlindungan Hukum Bagi Rakyat Indonesia. Bina Ilmu, Surabaya.
- Rhona K.M. Smith. 2008. Hukum Hak Asasi Manusia. PUSHAM UII, Yogyakarta.
- Satjipto Rahardjo. 2009. Hukum Progresif: Sebuah Sintesa Hukum Indonesia. Genta Publishing, Yogyakarta.
- Siska Lis Suliastini. 2021. Hukum Adat di Indonesia. Sinar Grafika, Jakarta.
- Soepomo. 2003. Bab-Bab tentang Hukum Adat. Pradnya Paramita, Jakarta.
- Soerjono Soekanto. 2014. Faktor-Faktor yang Mempengaruhi Penegakan Hukum. Rajawali Pers, Jakarta.
- Soerjono Soekanto. 2014. Hukum Adat Indonesia. Rajawali Pers, Jakarta.
- Van Vollenhoven. 1987. Penemuan Hukum Adat. Djambatan, Jakarta.
- Wiranata, I Gede A.B. 2005. Hukum Adat Indonesia Perkembangannya dari Masa ke Masa. Citra Aditya Bakti, Bandung.
- Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.
- Undang-Undang Nomor 39 Tahun 1999 tentang Hak Asasi Manusia (Lembaran Negara Republik Indonesia Tahun 1999 Nomor 165, Tambahan Lembaran Negara Republik Indonesia Nomor 3886).
- Undang-Undang Nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-undangan sebagaimana telah diubah terakhir dengan Undang-Undang Nomor 13 Tahun 2022.

Peraturan Daerah Provinsi Bali Nomor 4 Tahun 2019 tentang Desa Adat (Lembaran Daerah Provinsi Bali Tahun 2019 Nomor 4, Tambahan Lembaran Daerah Provinsi Bali Nomor 4).

Keputusan Pesamuhan Agung III Majelis Desa Pakraman Bali Tahun 2010 tentang Pembatasan Penerapan Sanksi Kasepekang.