

CUSTOMARY VILLAGE-BASED FOREIGN CAPITAL INVESTMENT MANAGEMENT

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Abstract

The Economic Policy Package Volume X has been announced by the Government on February 11th, 2016. The concrete step of the policy package is to revise the Presidential Regulation concerning the field of business in investment known as the negative list of investment. Areas of business that are experiencing changes in the negative list of investment include the sector of Tourism and Creative Economy. In Bali, the tourism appeal is built and developed, apart from Government and private, is also managed by the community of customary villages. The existence of customary village-based tourism can attract foreign investors or otherwise require foreign capital which may then be agreed upon in the form of agreement. In addition to globalization, other things that could lead to the possibility of such agreement are the liberalization in the field of investment and tourism. Liberalization arises from various international agreements that have been agreed by the Government, such as one of ASEAN regional liberalization with the ASEAN Economic Community. So, to face that possibility, the Government needs to regulate foreign investment in customary village based tourism with various levels of policy. As a normative legal research, the method used in this study is a legislative approach that is integrated with a conceptual approach. Policy and legislation have variations in relationships based on differences in understanding and application of the use of policy concepts. The policies studied in normative legal research, in addition to legislation also concerning government actions relating to the terms discretion, policy, *beleid*, and *ermessen* are reviewed.

Keywords: *Arrangement, foreign investment, customary village-based tourism*

I. INTRODUCTION

When measured in quantity, the role of tourism is quite real as the backbone of development in Indonesia.¹ The expectation of the government for the development of tourism for development of the country is in order to give maximum benefit to the people of Indonesia. As a tourism development capital of Indonesia, great natural potential and high cultural art is the strength of Indonesian tourism.² The strength of Indonesian tourism is spread in various areas, including in Bali Province.

The development of tourism in Bali, as an industry, has been able to provide multiple impacts on improving the welfare of the community, both directly and indirectly, but the success of the development is experiencing a decline caused by various cumulative problems that are less supportive of the development of tourism sector.³ To cope with the cumulative problems, in the era of regional autonomy has now developed a model of community-based tourism. There was a social change in the form of increasing the number

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1. Parikesit Widiatedja, I.G.N 2010, *Liberalisasi Jasa dan Masa Depan Pariwisata Kita*, Udayana University Press, Denpasar, p. 11.
 2. Oka Yoeti A. H., 1996, *Anatomi Pariwisata Indonesia*, Penerbit Angkasa, Bandung, p. 133.
 3. Gelgel, I Putu, 2009, *Industri Pariwisata Indonesia dalam Globalisasi Perdagangan Jasa Implikasi Hukum dan Antisipasinya*, Refika Aditama, Bandung, p. 2.
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of Balinese who rose and appeared to manage the potential of tourism in the region collectively through the village, in this case, *pakraman* village.⁴

As a unit of customary law community, the management of tourism potential by customary village is done on the management of tourism attraction, such as Tanah Lot, Pandawa Beach, Kedonganan Beach, Uluwatu in Pecatu, terraced paddy fields in Ceking, and ecotourism in Tenganan, Dauh Tukad, Karangasem. Judging from the revenue increase, in 2005 Tanah Lot tourist attraction revenue was Rp. 2.2 billion, then increased until 2015 to Rp. 41.4 billion. Similarly, the management of Pandawa Beach which in 2013 sells tickets for Rp. 2000 has received revenue of Rp. 739,390,500, and by 2015 its revenue has increased to Rp. 5,060,932,497 with ticket price Rp. 4000.⁵ This suggests that tourism management can be considered successful from an economic point of view.

Economic aspects are experiencing a global process in the current era of globalization. One of the dominant features of globalization is the presence of acceleration.⁶ The package of Economic Policy X as the Government's policy is aimed at attracting foreign investors to invest in Indonesia in order to accelerate development to face increasingly tight competition among nations. In today's global economy, a country's economic openness is a must.⁷ The country's economic openness to the flow of foreign investment to a country is not only a country's need to participate in the global economy, but it is also a must for a country to meet the scarcity of economic resources in its country so that it can be fulfilled immediately by the role of the resources foreign.

Currently, there is no legislation that specifically regulates foreign investment activities in customary village-based tourism especially if the relationship between foreign investors and customary village is set forth in a commitment in the form of agreement, so as to provide legal security, it is necessary to review through the harmonization of legislation, applicable invitation to acknowledge Government prescriptions. Similarly, in the purpose of legal development, the formation of law-oriented policies can be used as a means to regulate foreign investment activities in customary village-based tourism. From the harmonization of legislation and/or the formulation of legal policy, law politics will be able to be indicated with consideration of social change caused by the development of time. Based on the background description, the question arises about the legal problem, how is the Government policy in foreign investment in customary village-based tourism?

II. METHOD

As a normative legal research, the method used in this study is a legislative approach that is integrated with a conceptual approach. The results showed that the data from primary law, namely in the form of legislation and data sourced secondary law found that tiered policy based on its authority in order to realize legal certainty. P. Nicolai says that what is meant by authority is the ability to perform certain legal actions, those actions that are intended to cause legal consequences, and include the arising and disappearance of legal consequences. The right contains the freedom to do or not to perform certain actions, or to require another party to take certain action while the obligation contains the obligation to perform or not to perform certain actions.⁸ Then, what is meant by legal security is the legal instrument of a country that is able to guarantee the rights and obligations of every

4. Darna Putra I Nyoman, 2015, *Pariwisata Berbasis Masyarakat Model Bali*, Program Studi Magister Kajian Pariwisata Universitas Udayana, p. x.

5. *ibid.* p. 191

6. Sutjipta I Nyoman, 2005, *Pariwisata Revolusi di Pulau Dewata*, Universitas Udayana, Denpasar, hal. 26-27, dalam *ibid.* p. 16.

7. Supancana I.B.R., 2011, *Kompendium Bidang Hukum Investasi*, Badan Pembinaan Hukum Nasional □ Kementerian Hukum dan Hak Asasi Manusia RI, Jakarta, p. 3.

8. Nicolai P., & L.J.A. Damen, 1994, *Bestuursrecht*, Factotum, Amsterdam, p. 4.

citizen. Legal security is divided into two kinds namely⁹ :

1. Security because of the law, the law ensures certainty between one party to another, which means the consistency of the application of the law to everyone indiscriminately, and
2. Security within or from law, which means legal certainty is achieved if the law is as large as the law, there is no conflicting provision of the law based on a logical and definite system, made in the reality of law and in it there is no term that can be interpreted in different ways-labs or closed.

III. DISCUSSION

Liberalization, as a legal politics in the field of international economy is inevitable in the current era of globalization. The Government has continued to address these challenges by actions through various policies and/or subsequently incorporated into various laws and regulations. Thus it can be asserted that between policy, politics, and legislation have interrelated relationship. Through the political aspect, in this study politics is not understood with the understanding of ways or tactics with a relation to power¹⁰, but is limited by policy understanding based on the translation of the policy. So the politics referred to in this legal review is legal policy, which in the legal discipline moves on the level of ethics and techniques of forming and inventing legal activities.¹¹ Padmo Wahjono said that the politics of the law is the policy of state organizers that are fundamental in determining the direction, form and content of the law to be formed.¹² According to Soedarto, legal politics is the policy of the state through the state bodies authorized to establish the desired rules that are expected to be used to express what is contained in society and to achieve what is aspired to.¹³ Legal politics also can be understood by the basic policy of state administration in the field of law which will be, is, and has been applicable, sourced from the values prevailing in society to achieve the goals of the intended state.¹⁴ Quoting Bellefroid's opinion that legal politics investigates what changes should be made to existing law, in order to meet the new conditions of community life, legal politics continue the development of lawful order, develop *ius constitutum* into *ius constituendum*.¹⁵ So that the legal politic that studies the laws prevailing in a particular society, at a certain time also be one part of legal science, in addition to legal dogmatic, legal history, comparative law, and general legal theory.¹⁶ This opinion seems to contradict the notion of legal policy as legal politic, the decomposition of legal political relations with legal science is needed to show that between policy and politics can be distinguished so that it can be said to have an autonomous relationship.

When associated with policy making and policy executing practices in the field of law, legal politics as a theory discloses policy evaluation, policy approximation and policy recommendation in the field of law. It is based on systematic thinking about the discipline of the law, which is always related, that is one with philosophy and on the other with politics, with conditions sometimes the starting point is philosophy, and then politics equips, or vice versa.¹⁷ Hence, the authors point out that the difference in definitions resulted in the use of,

9. Van Kaan dalam Efernando M. Manullang, 2007, *Menggapai Hukum Berkeadilan Tinjauan Hukum Kodrat dan Antinomi Nilai*, PT. Kompas Media Nusantara, Jakarta, p. 92.

10. KBBI Daring, <http://kbbi.web.id/politik>, accessed on May 19, 2017.

11. Purnadi Purbacaraka dalam Soejono Soekamto dan R. Otje Salman (editor), 1998 *Disiplin Hukum dan Disiplin Sosial, Edisi 1, Cetakan ke 2*, Rajawali, Jakarta, p. 175-176.

12. Padmo Wahjono, 1986, *Indonesia Negara Berdasarkan Atas Hukum, Cetakan Ke 2*, Ghalia Indonesia, Jakarta, p. 160.

13. Soedarto, 1983, *Hukum Pidana dan Perkembangan Masyarakat, Kajian Terhadap Hukum Pidana*, Sinar Baru, Bandung, p. 20.

14. Iman Syaekani dan A. Ahsin Thohari, 2013, *Dasar-Dasar Politik Hukum, Cetakan Ke 13*, PT. Rajagrafindo Persada, Jakarta, p. 32.

15. Johannes Henricus Paulus Bellefroid, 1952, *Inleiding tot de Rechtswetenschap in Nederlands*, Dekker & Van Vegt, Nijmegen Utrecht, p. 18.

16. *ibid*.

17. Purnadi Purbacaraka dan M. Chidir Ali, 1990, *Disiplin Hukum*, Citra Aditya Bakti, Bandung, p. 1.

between policy, politics, and legislation in legal studies resulting in a pattern of equivalent, autonomous, complementary or influencing links. This happens solely because the object being studied relates to legislation that has a hierarchy level.

Between statutory regulations, politics and policies there is a linkage so it is feasible to be a legal study with various patterns of relationships. The establishment of legislation especially the Act is basically a policy, namely the state politics formed by the House of Representatives and the President.¹⁸ Such a policy is a formal agreement between the Parliament and the Government, in this case the President, to regulate the whole life of society, nation, and state. The state institutions are acting on behalf of the state in shaping the law. Including a policy of state politics is also when the House of Representatives and the President determine a sanctionable act, including criminal, administrative and civil sanctions. Furthermore, the formulation of legislation under the Act, in this case the Government Regulation, the Presidential Regulation, and the Ministerial Regulation or the regulation of certain state institutions, is also a policy, either formed on the basis of the delegation or self-determination independently, in the context of governance or a regulation of procedures within the framework of public services.¹⁹

The government's authority to enact legislation in the Indonesian Government is not a result of historical development as it did in Europe, against the absolutism of the king or ruler, which then gave rise to a strict separation of powers with the intention of restricting the king's power. The authority of the Indonesian government to enact the legislation is based on the concept of "*uitvoering*" in the sense of "*besturen*."²⁰ The government does not simply enforce legislation as it does in the idea of separation of powers or the concept of political trials. The functions and functions of government can be grouped into functions of legislation and enforcement (translation of *regenen en handhaven*), making decisions (translation of *beschikken*), and making policy (translation from *beleidsregel*).²¹

A state with a government that acts merely following the law solely is something that is politically unworthy (translation of *ein politisches unding*). Being about the direction arising from government activities can never be established by a rule of law, therefore, the notion of government is by no means purely solely (termed *Verwaltung ist niemals blosze Vollziehung*).²²

Almost every aspect of community life as a citizen involves the government, but in that engagement, any government action must be based on law on the basis of the legality principle which by the Government has been determined in the provisions of Article 1 paragraph 3 of the 1945 Constitution of the State of the Republic of Indonesia by stipulating that "Indonesia is a legal state".²³ In fact, basing every act of government in the public sphere on the written law is not without problems.²⁴ As a form of written law, legislation has limited reach and sometimes only the most fulfilling legal politics at the time of its formation, so it is easy to fall behind compared to social change.²⁵ Marbun said that the concept of a legal state creates a dilemma between that any government action should not be contrary to both written and unwritten laws, but at the same time that the government is also charged with an increasingly widespread role and duties and responsibilities.²⁶ So often

18. Pusat Penelitian Dan Pengembangan Sistem Hukum Nasional, 2008, "*Laporan Kompendium Bidang Hukum Perundang-Undangan*." Badan Pembinaan Hukum Nasional Departemen Hukum Dan Hak Asasi Manusia Republik Indonesia, p. 11.

19. *ibid.*

20. H.D. van Wijk/Willem Konijnenbelt, 1995, *Hoofdstukken van Administratief Recht*, Uitgeverij Lemma BV, Utrecht, p. 99-100.

21. Ridwan, 2014, *Diskresi Dan Tanggung Jawab Pemerintah*, FH UUI Pres, Yogyakarta, p. 102.

22. A. Hamid S. Attamimi, dalam *ibid.*, p. 90.

23. Ridwan, *op.cit.*, p. 4.

24. *ibid.*, p. 5.

25. Bagir Manan, dan Kuntana Magnar, 1987, *Peranan Peraturan Perundang-undangan dalam Pembinaan Hukum Nasional*, Armico, Bandung, (selanjutnya disebut Bagir Manan dan Kuntana Magnar I) p. 16.

26. Marbun SF., 2001, *Pembentukan, Pernerlakuan, dan Peranan Asas-asas Umum Pemerintahan yang Layak dalam Menjelmakan Pemerintahan yang Baik dan Bersih di Indonesia*, Disertasi, Universitas Padjajaran Bandung, p. 110.

there is a gap between legality and reality which then in order to overcome it is given the authority to the government to be able to act on its own initiative in settling the gap that largely caused by the existence of social change.²⁷

The actions of the government's own initiative gain a different understanding by jurists, but to make it easier to understand it, all the perspectives of the concept of policy concepts for each problem formulation are discussed in this study as there is a contextual difference.

The first policy outlined is a policy with the notion of government action in terms of *Freies Ermessen*. Etymologically *freies ermessen* is derived from the word *frei* which means free, loose, unbound, and independent, then *freies* which means free, unbound, and independent, *Ermessen* means to consider, judge, guess and estimate, so *freies ermessen* means people who have the freedom to judge, guess, and consider something.²⁸ Hence, in terms of *Freies Ermessen*, understanding is given that the government has the independence or the freedom to act²⁹ related to the dilemma Marbun said. But in another view of freedom it is considered a deviation because when *Ermessen* is given to the government does not mean the government is free in determining legal relationships, so according to Philipus M. Hadjon *Ermessen* should be in accordance with the obligations or that are bound by the rule of law.³⁰

Furthermore, it is also in the viewpoint that gives differences of opinion between the policy as *beleid* which is then determined in written form, with the policy as *beleidsregel* which is understood as a policy and regulation policy. These two perspectives are caused by the fact that policies may result in legislation or just policy regulations.³¹

The conceptual bases on the policy described above show that this study accommodates different opinions so as to put the concept of policy also in terms of discretion which in the provisions of Article 1 Number 9 of Law Number 30 of 2014 concerning Government Administration, Statute Book of the Republic of Indonesia of 2014 Number 292 and Supplement to the State Gazette of the Republic of Indonesia Number 5601 (hereinafter referred to as the Administrative Act 2014) determined that:

"Discretion is a Decision and/or Action established and/or implemented by a Government Official to address the concrete concerns faced in the administration of government in terms of choice, non-regulating, incomplete or unclear legislation and government stagnation."

Governance contains two formal and material aspects. The government in the formal sense contains the regulating power (the translation of the term *Verordnungs gewalt*) and the breaking power (translation of the term *Entscheidungs gewalt*), and the government in the material sense contains two related elements into one, namely the element of rule and the element of execution (translation from *das Element der Regierung und das der Vollziehung*).³² The term government and governance has a different meaning when viewed from the aspect of public law. Governance is the executor of the duties of government, and government is understood as a tool or apparatus that runs the governance which in a broad sense includes all the state fittings which essentially consists of branches of executive, legislative and judicial power, or state equipment that acts for and on behalf of the state. While government in the narrow sense mentioned as an executive branch at the central and regional levels.

In line with the development of state functions and governance, matters of governance

27. Utrecht E., 1988, *Pengantar Hukum Administrasi Negara Indonesia*, Pustaka Tinta Mas, Surabaya, p. 30.

28. Marcus Lukman, 1996, *Eksistensi Peraturan Kebijaksanaan Dalam Bidang Perencanaan Dan Pelaksanaan Rencana Pembangunan Di Daerah Serta Dampaknya Terhadap Pembangunan Materi Hukum Tertulis Nasional*, Universitas Padjajaran, Bandung, p. 205.

29. *ibid.*

30. Philipus M. Hadjon, et.al., "*Hukum Administrasi dan Good Governance*", Universitas Trisakti, Jakarta, 2010, p. 24.

31. Ridwan, *op.cit.*, p. 6.

32. *ibid.*

are not something that can be recognized in detail and complete. Any symptom of the life of society, nation, and state, especially related to the service of affairs and public interest, whether in the field of politics, economy, social, and culture can enter into governance matters. Based on the presentation, it can be mentioned that the division of functions and governance affairs is essentially the division of functions, duties, and responsibilities between the central government and regional governance. This means that the service function to the citizens is also the responsibility of the regional governance unit. In other words, as with central governance service functions, local governments are required to serve and resolve any such matters, regardless of whether the issue is determined or not in legislation. This brings the consequence that the local government is also attached with discretion authority. The discretion which is the freedom of the organs of the government to make choices and to do or not to act, raises two kinds of freedom: the first is the freedom to take policy (translated from *beleidsvrijheid*) because the law does not provide direction when authority is exercised or not in redaction of "can". Then the second is freedom of consideration (translation of *beoordelingsvrijheid*) is freedom found when the LAW contains vague provisions for matters which in practice must be detailed so that sometimes the terms are added to the phrase "in consideration of", although it is not a requirement. Lawmakers allow the government to assess whether certain facts or situations are within the scope of the definition or norm.³³ Building on this, the Regional Government of Bali Province has done the discretion by stipulating the policies that have been established in the form of Local Regulation and Governor Regulation on aspects, related to the formulation of the problem studied. Foreign capital investment in customary village-based tourism can be implemented with the policy of adjustment of spatial plan of area, general plan of regional investment, master plan of development of regional tourism based on Bali Provincial Regulation No. 4 of 2011 on Organization and Work Procedure of Bali Province, Bali Provincial Gazette of 2011 Number 4, Supplement to the Regional Gazette of Bali Province No. 4, was established the Bali Investment and Licensing Agency (hereinafter abbreviated CILB Bali). As a regional technical institution, CILB Bali is then given the main task and accompanied by authority.

In addition to acting as a regulator based on the position of government in the perspective of public law, the Regional Government may also act in the perspective of civil law as it is the policy of several District Governments in Bali which establish agreements with customary villages in tourism management. If explored, the agreement made for the purpose of welfare is a government policy by placing itself parallel to the traditional village in accordance with the principle of equality as one of the principles of the agreement. Thus, the participation of foreign investment in customary village-based tourism is a policy that is most likely to be done, primarily over customary village initiatives, which seek to develop or who wish to build tourism management. Local government can choose the legal position according to the desired role, and freedom of choice it can be said as a form of policy in terms of discretion based on *freies ermesen* authority. So with the implementation of this activity, the pattern of relationships that are often disclosed in the theory of investment law will be built and harmoniously established i.e., the synergy between indigenous villagers, foreign investors, and local governments. The result of the synergy of all provisions other than as the fulfillment of the legality principle, for the sake of legal certainty, the policy can be formulated into the form of rules in stages including by the Village, namely Village Regulation, and/or *awig-awig* especially for *Desa Adat* 'Customary Village'.

Law is a provision established under an authoritative policy process by balancing authority and control as reciprocal and correlative energy in the policy process. Thus, with the government policy process³⁴, starting from national policy, regional policy up to village

33. H.D. van Wijk/Willem Konijnenbelt, op.cit., p.163. This theory is based on the division made by W. Duk which in its development is also followed by F.C.M.A Michiels, op.cit., p. 106.

34. Ida Bagus Wyasa Putra, 2016, *Teori Hukum Dengan Orientasi Kebijakan (Policy-Oriented Theory of Law)*, Pemecahan Problem Konteks dalam Proses Legislasi Indonesia, Udayana University Press, Denpasar, p. 115.

policy in foreign investment in customary village-based tourism, there is a great expectation that the law to be established in stages through a tiered policy process can also be based on prescriptions or expectations of real society.

IV. CONCLUSION

Grounded on the results of the analysis of research data described in the previous section, in response to the problem formulation, several conclusions can be drawn, which are that policy and legislation have variations in relationships based on differences in understanding and application of the use of policy concepts. The policies studied in normative legal research, in addition to legislation also concerning government actions relating to the terms discretion, policy, *beleid*, and *ermessen* are reviewed. The policy, as the government's action is based on authority, so as to overcome the legal void, the Government's policy on foreign investment in customary village-based tourism is necessary for legal certainty. Government policy can be described in stages, starting from National Policy through national law politics, Regional Policy through decentralization and co-administration, and Village Policy including Customary Village through its position and autonomy, which in this case is special in Bali based on the concept of *Tri Hita Karana*.

From the above conclusions, what can be suggested is that foreign investment activities in indigenous village-based tourism have no special arrangements, whereas general rules already exist, but provide freedom of choice including freedom of interpretation and synchronization or harmonization. It can be tiered according to hierarchy and authority through Government policy. The statements of public officials or other governance organs are often referred to as policies, but a policy chosen and based on general principles of good governance is recommended to be formulated in a written form for the security of law which in this case aims to regulate investment activities foreigners on customary village-based tourism.

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