



TECHNIUM

SOCIAL SCIENCES JOURNAL

9 R Ø

1

\$ Q H Z G H F D
I R U V R F L D O

, 6 6 1



Z Z Z W H F K Q L X P V F L H Q F H F R E

The existence of Awig – Awig Bali Traditional Village regarding legality principles in National Criminal Law

Desak Made Rai Ningsih, Made Warka, Slamet Suhartono, Otto Yudianto

Faculty of Law, Universitas 17 Agustus 1945 Surabaya

dsakningsih@gmail.com

Abstract. The type of research used in this research is normative legal research, also commonly called doctrinal legal research or library research, so the approaches used are the statutory approach, conceptual approach, philosophical approach, and case approach. The existence of *awig-awig* isn't only determined by the existence of a sense of belonging and recognition from the soul of the community (*Volkgeist*), but must also comply with the laws and regulations, basic principles of human rights, and applicable state law. Indonesia is a state of law (*rechtstaat*) by prioritizing legal certainty, so that an independent legal symbol is under the authority of one door, namely the national court. The existence of *awig-awig* as a symbol of recognition of the existence of customary law community units has been constitutionally recognized as regulated in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia and even in Law No. 48-2009, judges are obliged to explore, follow and understand the values of customary law, especially *awig-awig* in Traditional Villages in Bali.

Keywords. *awig-awig*; criminal law

Introduction

Customary law and Hinduism in Bali are an inseparable unit. Customary law and Hindu religion in Bali in reality live side by side and complement each other. From this reality, it can be assumed that compliance with customary law in Bali isn't solely because of the content and nature of the law, but more than that, because of the existence of elements that are sacred or sacred in the sense that it's in accordance with the view of life based on the teachings of Islam Hinduism.(Febriawanti & Mansur, 2020)

The Balinese customary law community recognizes various acts that are considered criminal acts that are currently still valid, obeyed and carried out. Among them are crimes related to property such as theft. The crime of theft according to custom in Bali is meant the theft of tangible objects and given a certain meaning, so that according to public belief, these objects have material or immaterial values, including theft of objects used as facilities or infrastructure for religious ceremonies carried out by the community generally sacred in holy places (*pura*).(Leonard, 2016)

Customary offenses, in the view of indigenous peoples in Bali, not only result in material losses but also immaterial losses. Immaterial losses require a recovery measure, by imposing an obligation on the violator in the form of organizing certain traditional rituals aimed at restoring the imbalance in society from feeling dirty ("*leteh*"), which indigenous peoples

always seek to recover from. In the traditional village environment in Bali, there has been a strong belief that violations of customary norms that haven't been resolved according to the provisions of applicable customary law, will cause disturbances that cause the suffering of 'Krama adat'.

However, in some cases of adat offenses which from the point of view of formal law are nothing more than ordinary criminal acts, but from the point of view of adat, these cases cannot be completely resolved through the criminal justice mechanism. In the sense that the sentence imposed by the judge hasn't been able to restore the balance of the 'cosmos' caused by a customary offense. (Widnyana, 1993)

Philosophically, customary law is recognized as stated in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia which states: "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 the principles of the Unitary State of the Republic of Indonesia, which are regulated by law." If it's related to the provisions of customary law in Bali, it's based on the concept of *Tri Hita Karana* which means that three causes of community welfare in people's lives are always maintained a balance which is manifested in three relationships, namely: *Parahyangan*, namely the relationship between humans and their creator, namely Sang Hyang Widhi Wasa; *Palemahan*, namely the relationship between humans and the natural environment where they live; and *Pawongan*, namely the relationship between humans and fellow creatures created by God.

In formal juridical terms, new customary criminal acts have a valid legal basis with the issuance and promulgation of Law No.1/Drt/Year 1951 concerning Temporary Measures to organize a unified structure, powers and procedures for Civil Courts (hereinafter referred to as Law No. 1 Drt/1951) which allows judges to impose customary sanctions, but in practice this is very rarely done.

The existence of Balinese customary criminal law in the form of *awig-awig* can be said to be between "there" and "nothing". The argument that should be put forward in this context is why the study of customary criminal law is assumed to exist or not. Judging from the dimensions of the principle of formal legality and the principle of material legality, there are "*principle of legality*", "*legaliteitbeginsel*", "*non-retroactive*", "*de la legalite*" or "*ex post facto laws*".

The principle of legality as referred to in the provisions of Article 1 of the Criminal Code is indeed one of the fundamental principles that must be maintained, but it's use must be wisely and carefully, because if it's not wise and not careful, it can boomerang. If the implementation of Article 1 of the Criminal Code, in fact, negates the existing legal values and living in the community cannot be properly channeled or even rejected at all, then the customary law values/laws that live in the community have been killed/killed by their own people through weapons/bullets/knives obtained from former colonizers. (K. A. M. P. Putri et al., 2019)

The application of the principle of limited legality and incorporating the values of customary law of *awig-awig* in Bali, is very interesting to explore in this dissertation. Even the jurisprudence of the Supreme Court determines that the Supreme Court of the Republic of Indonesia as the highest judicial body in Indonesia still respects the decision of the Customary Chief (Pemuka Adat) which imposes customary sanctions on violators of customary law norms.

The General Judiciary Body cannot be justified to try a second time violators of customary law by giving imprisonment (Article 5 paragraph (3) sub b of Law Number 1 of 1951 in conjunction with Articles of the Criminal Code). Therefore, the logical consequence can be said that it can be justified if the Customary Head has never given repeated customary sanctions against violators of customary law, but on the other hand the position of judges in the state

judiciary is fully authorized to try them based on the provisions of Article 5 paragraph (3) sub b. Law No. 1 of 1951 in conjunction with the Articles of the Criminal Code. Based on the above background, a research question can be raised, namely how is the existence of awig-awig traditional villages in Bali related to the principle of legality in national criminal law? And how is the regulation of criminal sanctions against perpetrators of criminal acts based on the legality principle of the Criminal Code in Balinese traditional village awig-awig?

Research Methods

The type of research used in this research is normative legal research, also commonly called doctrinal legal research or library research, so the approaches used are the statutory approach, conceptual approach, philosophical approach, and case approach.(N. F. Putri et al., 2020)

Research Results and Discussion

The Existence of Awig – Awig Traditional Villages in Bali regarding Legality Principles in National Criminal Law

The authority of the Traditional Village to make village rules/*Awig-awig* which will be enforced in the customary village according to Law Number 6 of 2014 concerning Villages. In Article 103 of the Law of the Republic of Indonesia Number 6 of 2014 concerning Villages (Law No. 6 - 2014) it's stated that Traditional Villages are given authority based on rights which include :

- a. Regulation and implementation of government based on the original structure;
- b. Arrangement and management of ulayat/customary village territory;
- c. Preservation of traditional socio-cultural values;
- d. Settlement of customary disputes based on customary law applicable in Traditional Villages in areas that are in line with human rights principles by prioritizing the settlement of deliberation and consensus;
- e. The holding of the tribunal of the customary village court in accordance with the provisions of the legislation;
- f. Maintenance of peace and order in the customary village community based on customary law applicable in the customary village; and
- g. Development of customary law life in accordance with the socio-cultural conditions of the Indigenous Village community.

Based on the results of the study, it shows that the existence of *awig-awig* isn't only determined by the existence of a sense of belonging and acknowledgment of the soul of the community (*Volkgeist*), but must also comply with the legislation, basic principles of human rights, and applicable state law. Indonesia is a state of law (*rechtstaat*) by prioritizing legal certainty, so that an independent legal symbol is under the authority of one door, namely the national court. The existence of *awig-awig* as a symbol of recognition of the existence of customary law community units has been constitutionally recognized as regulated in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia and even in the Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power (UU No. 48-2009) that judges are obliged to explore, follow and understand the values of customary law, especially *awig-awig* in Traditional Villages in Bali.

The results of the research above, supported by the results of previous research by Wayan Officialni, said that the community in the village of Pakraman has a strong foundation to play a role in the implementation of Regional Autonomy, in order to create peace and order

in their respective regions and is recognized in the national criminal law system and the application of customary law. Customary law in the village of Pakraman (awig-awig) is recognized and respected in the government system of the unitary state of the Republic of Indonesia. (Resmini, n.d.) This is in line with the research results of I Ketut Wirawan, who stated that the fact that there is recognition and respect for the customary law community unit (Pakraman Village Organizers in the Village Government System in Bali) in Law No. 6-2014. (Wirawan, n.d.)

The concept of the principle of legality for the Indonesian Criminal Code that can accommodate customary offenses, where customary offenses are recognized in Indonesian formal law. (Aarssen, L. W., & Crimi, L. (2016). Legacy, leisure and the ‘work hard—Play hard’ hypothesis. *The Open Psychology Journal et al.*, 2019) To accommodate customary offenses, the application of the legality principle has been expanded, which includes the formal and material legality principles. Application of the principle of material legality with the following conditions: contextual; the sentence imposed doesn’t conflict with Pancasila; limitation of legal subjects; premium remedium in certain cases. (Shidarta, 2020)

The existence of the Awig-Awig Traditional Village in Bali as long as it’s adhered to by the indigenous peoples concerned is still recognized in national law. In other words, customary sanctions that are still in effect in the community have coercive power as long as they are adhered to by the indigenous peoples concerned and the customary sanctions are deemed to be in accordance with the community’s sense of justice and not against national law.

Setting criminal sanctions against perpetrators of criminal acts with the legality principle of the Criminal Code in the Awig – Awig Balinese Traditional Village

Awig-awig regulates the rights and obligations of *Krama* in traditional villages accompanied by strict sanctions, more real and usually in written form. *Awig-awig* becomes a guideline/benchmark, or limits on what is allowed and what isn’t to be done, while also having a role in determining the form of reaction for violators. Talking about *awig-awig* found in traditional villages is an embodiment of customary law, it plays an important role in regulating the life order of negative influences on society in the fields of religion, blindness, and socio-economics.

The results of the study indicate that the regulation of customary criminal sanctions for perpetrators against awig-awig Traditional Villages in Bali according to Article 5 paragraph (3) b of Law Number: 1/Drt/1951 it’s clear that all crimes related to the Customary Criminal Law are handed over first to the Awig-awig Traditional Village in Bali and cannot be tried again by the general court. This is in line with the essential legal protection for perpetrators of criminal acts by prioritizing restorative justice which has the same values as customary criminal law, customary criminal law is imbued with a magical religious family nature, where the priority isn’t a sense of individual justice; but rather a sense of familial justice, so that a peaceful settlement of cases is believed to bring harmony (harmony). (Yunianto & Michael, 2021)

So customary sanctions function as a stabilizer to restore the balance between the world of birth and the unseen world. The manifestation of customary sanctions varies depending on the values and feelings of justice of the community concerned. Besides that, the punishment must be fair, meaning that the punishment must be felt fair, both by the judge and the victim or by the community so that the imbalance disappears.

The findings of his research, that the courts almost never (very rarely) impose customary sanctions in their decisions, this is because customary sanctions are not regulated in the Criminal Code. Such a situation certainly doesn’t provide a sense of justice to the community, because the threat that can be imposed on customary violators is very light as regulated in Law

No. 1/Drt/1951. In the event that the act by the community is a despicable act and isn't justified by custom and religion.

Conclusion

The existence of *awig-awig* isn't only determined by the existence of a sense of belonging and recognition from the soul of the community (*Volkgeist*), but must also comply with the laws and regulations, basic principles of human rights, and applicable state law. Indonesia is a state of law (*rechtstaat*) by prioritizing legal certainty, so that an independent legal symbol is under the authority of one door, namely the national court. The existence of *awig-awig* as a symbol of recognition of the existence of customary law community units has been constitutionally recognized as regulated in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia and even in Law No. 48-2009, judges are obliged to explore, follow and understand the values of customary law, especially *awig-awig* in Traditional Villages in Bali.

The regulation of customary criminal sanctions for perpetrators against *awig-awig* Traditional Villages in Bali in accordance with Article 5 paragraph (3) b of Law Number: 1/Drt/1951 it's clear that all crimes related to Customary Criminal Law are submitted to *Awig-awig* Traditional Villages in Bali and cannot be tried again by the general court. This is in line with the essential legal protection for perpetrators of criminal acts by prioritizing restorative justice which has the same values as customary criminal law, customary criminal law is imbued with a magical religious family nature, where the priority isn't a sense of individual justice; but rather a sense of familial justice, so that a peaceful settlement of cases is believed to bring harmony (harmony).

References

- [1] Aarssen, L. W., & Crimi, L. (2016). Legacy, leisure and the 'work hard—Play hard' hypothesis. *The Open Psychology Journal*, 9. Retrieved from aarssenl@queensu.ca,
- [2] Abdollahi, A. (2013). Political psychology of the death terror. In S. J. Sinclair, D. Antonius, S. J. Sinclair (Ed), & D. Antonius (Ed) (Eds.), *T. political psychology of terrorism fears*. (pp. 213–226). <https://doi.org/10.1093/acprof:oso/9780199925926.003.001>,
- [3] Abdollahi, A., Pyszczynski, T., Maxfield, M., & Luszczynska, A. (2011). Posttraumatic stress reactions as a disruption in anxiety-buffer functioning: Dissociation and responses to mortality salience as predictors of severity of posttraumatic symptoms. *Psy*, 329–341. Retrieved from tpyszczynski@uccs.edu,
- [4] Abel, E. L., & Kruger, M. L. (2009). Mortality salience of birthdays on day of death in the major leagues. *Death Studies*, 33(2), 175–184. Retrieved from eabel@wayne.edu,
- [5] Abeyta, A. A., Juhl, J., & Routledge, C. (2014). Exploring the effects of self-esteem and mortality salience on proximal and distally measured death anxiety: A further test of the dual process model of terror management. *Motivation and Emotion*, 38(4), 523–528. Retrieved from andrew.abeyta@my.ndsu.edu,
- [6] Abeyta, A. A., Nelson, T. A., & Routledge, C. (2019). Precious time: The role of time and temporal thought in managing death awareness. In C. Routledge & M. Vess (Eds.), *H. of terror management theory*. (pp. 209–225). <https://doi.org/10.1016/B97-0-12-811844-3.0000-1>,
- [7] Abrams, D. (2004). The development of social identity: What develops? In M. Bennett, F. Sani, M. Bennett (Ed), & F. Sani (Ed) (Eds.), *T. development of the social self*. (pp. 291–312). https://doi.org/10.4324/9780203391099_chapter_1,

- [8] Adams, C. B. L. (2012). Beyond attachment: Psychotherapy with a sexually abused teenager. *American Journal of Psychotherapy*, 66(4), 313–330. Retrieved from CBLAdams@bellsouth.net,
- [9] Agroskin, D., & Jonas, E. (2013). Controlling death by defending ingroups—Mediational insights into terror management and control restoration. *Journal of Experimental Social Psychology*, 49(6), 1144–1158. Retrieved from dmitrij.agroskin@sbg.ac.at,
- [10] Agroskin, D., & Jonas, E. (2014). Erratum to “Controlling death by defending ingroups—Mediational insights into terror management and control restoration”. *Journal of Experimental Social Psychology*, 52, 24. Retrieved from dmitrij.agroskin@sbg.ac.at,
- [11] Agroskin, D., Jonas, E., Klackl, J., & Prentice, M. (2016). Inhibition underlies the effect of high need for closure on cultural closed-mindedness under mortality salience. *Frontiers in Psychology*, 7. Retrieved from mptg2@mail.missouri.edu,
- [12] Agustin, A. A., & Francisco, V. G. J. (2008). Analysing the effects of mortality salience on prejudice and decision-taking. *New Developments in the Psychology of Motivation*, 53–65.,
- [13] Agustin, E.-E. (2009). Effects of mortality salience aroused by threats against human identity on intergroup bias. *European Journal of Social Psychology*, 39(5), 862–867. Retrieved from pspeteta@ss.ehu.es,
- [14] Ai, A. L., Kastenmüller, A., Tice, T. N., Wink, P., Dillon, M., & Frey, D. (2014). The Connection of Soul (COS) scale: An assessment tool for afterlife perspectives in different worldviews. *Psychology of Religion and Spirituality*, 6(4), 316–329. Retrieved from amyai8@gmail.com,
- [15] Allen, M. W., & Wilson, M. (2005). Materialism and food security. *Appetite*, 45(3), 314–323. Retrieved from m.allen@econ.usyd.edu.au,
- [16] Alper, S., & Özkan, T. (2015). Do internals speed less and externals speed more to cope with the death anxiety? *Transportation Research Part F: Traffic Psychology and Behaviour*, 32, 68–77. Retrieved from sinan.alper@metu.edu.tr,
- [17] Amiot, C. E., Sukhanova, K., Greenaway, K. H., & Bastian, B. (2017). Does human–animal similarity lower the need to affirm humans’ superiority relative to animals? A social psychological viewpoint. *Anthrozoös*, 30(3), 499–516. Retrieved from amiot.catherine@uqam.ca,
- [18] An, E., Lo, C., Hales, S., Zimmermann, C., & Rodin, G. (2018). D. and death anxiety in advanced cancer. P.-O. <https://doi.org/10.1002/pon.484>,
- [19] Anaki, D., Brezniak, T., & Shalom, L. (2012). Faces in the face of death: Effects of exposure to life-threatening events and mortality salience on facial expression recognition in combat and noncombat military veterans. *Emotion*, 12(4), 860–867. Retrieved from david.anaki@biu.ac.il,
- [20] ... Goldenberg, J. L., Pyszczynski, T., Greenberg, J., Solomon, S., Kluck, B., & Cornwell, R. (2001). I am not an animal: mortality salience, disgust, and the denial of human creatureliness. *Journal of Experimental Psychology. General*, 130(3), 427–435. Retrieved from <http://www.ncbi.nlm.nih.gov/pubmed/11561918>. (2019). The effects of values, expectations, and mortality reminders on individuals’ choices between alternatives. In *Dissertation Abstracts International: Section B: The Sciences and Engineering*.
- [21] Febriawanti, D., & Mansur, I. A. (2020). Dinamika Hukum Waris Adat di Masyarakat Bali Pada Masa Sekarang. *Media Iuris*, 3(2). <https://doi.org/10.20473/mi.v3i2.18754>

- [22] Leonard, T. (2016). PEMBAHARUAN SANKSI PIDANA BERDASARKAN FALSAFAH PANCASILA DALAM SISTEM HUKUM PIDANA DI INDONESIA. *Yustisia Jurnal Hukum*, 5(2). <https://doi.org/10.20961/yustisia.v5i2.8764>
- [23] Putri, K. A. M. P., Puspitasari, N. W. F., Dewi, N. K. K., Ekarini, N. W., Dewi, I. A. P. P., & Mertadana, D. P. K. (2019). PENGARUH HUKUM ADAT ATAU AWIG-AWIG TERHADAP PENGELOLAAN DANA DESA DI DESA BANJAR KECAMATAN BANJAR KABUPATEN BULELENG PROVINSI BALI. *Jurnal Ilmiah Akuntansi Dan Humanika*, 8(1). <https://doi.org/10.23887/jinah.v8i1.19856>
- [24] Putri, N. F., Vionia, E., & Michael, T. (2020). PENTINGNYA KESADARAN HUKUM DAN PERAN MASYARAKAT INDONESIA DALAM MENGHADAPI PENYEBARAN BERITA HOAX COVID-19. *Media Keadilan: Jurnal Ilmu Hukum*. <https://doi.org/10.31764/jmk.v11i1.2262>
- [25] Resmi. (n.d.). *Lembaga Penyelesaian Sengketa Dan Penerapan Sanksi Adat Desa Pakraman Di Bali Dalam Perspektif Pembaharuan Hukum Pidana Nasional*.
- [26] Shidarta, S. (2020). Bernard Arief Sidharta: Dari Pengembangan Hukum Teoretis ke Pembentukan Ilmu Hukum Nasional Indonesia. *Undang: Jurnal Hukum*, 3(2). <https://doi.org/10.22437/ujh.3.2.441-476>
- [27] Widnyana, I. M. (1993). *Kapita Selekta Hukum Pidana Adat*.
- [28] Wirawan, I. K. (n.d.). *Pengakuan dan Penghormatan Terhadap Kesatuan Masyarakat Hukum Adat (Penyelenggara Desa Pakraman dalam Sistem Pemerintahan Desa di Bali)*.
- [29] Yunianto, B., & Michael, T. (2021). KEBERLAKUAN ASAS EQUALITY BEFORE THE LAW BAGI PEJABAT PELAKSANA KEBIJAKAN PENANGANAN COVID-19. *Mimbar Keadilan*, 14(1). <https://doi.org/10.30996/mk.v14i1.4334>