

THE REVITALIZATION OF AWIG-AWIG OF THE NORTH LOMBOK ADAT LAW PEOPLE TO REALIZE A JUSTICE AND A LEGAL CERTAINTY

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Abstract

The adat criminal law is considered one of the sources of law in the Indonesian criminal law system. Its applicability is based on the provisions of Energy Law No. 1 of 1951, Article 5 paragraph (3) sub b. Such provision determines the applicability criteria of the adat criminal law, which has a limited nature, by observing the description of criminal acts in the Criminal Code. One of the adat people who still implement the adat criminal law is the one who resides in North Lombok; they use awig-awig as the primary institution to manage the relationship in society, the relationship between humans and the universe and the relationship between human and their creator. This study uses normative legal research with normative and sociological juridical approaches. The normative legal research used is abstract legal research, legal principles research, concrete legal research, and systematic legal research. Sociological juridical research is conducted towards the permitted values and principles and the applicability of the criminal adat law among the adat people in North Lombok. In conclusion, this study shows that the revitalization of awig-awig among the adat people in North Lombok is conducted because its implementation is seen and felt as more fulfilling for the adat people to achieve the sense of justice and legal certainty in reaction to the occurring people's development, on that sense, the people's development may effectively apply the awig-awig. The implementation of adat sanctions is deemed and perceived to restore cosmic balance, remove dirty deeds or clean up the disturbance to the environment of adat peoples due to the adat violation. Meanwhile, other types of criminal sanctions are considered to have no magical religious value.

Keywords: Awig-awig, Culture law, Criminal law, Justice, Legal Certainty

INTRODUCTION

The criminal law system in Indonesia belongs to the Civil Law family; this is evidence of Dutch influence as the colonialist state that occupies Indonesia for approximately 350 of. Since the first arrival of the Dutch in Indonesia, the criminal law applicable to the Dutch in Indonesia is a written criminal law equivalent to the criminal law enforced in the Netherlands by the principle of concordance (*concor dantil-beginsel*).¹ Meanwhile, at that time the Indonesian people has already have their each adat law (unwritten law) applicable. Then, on the 15th of October 1915, a new criminal law was enacted, namely the *Wetboek van Strafrecht voor Nederlandshe Indie* (WvSNI) (KB 1915, Staatsblad 1915 Nr 731), which applied to all legal subjects in Indonesia (unification) and it entered into effect on 01st of January 1918. The enactment of the WvSNI was followed by the applicability of other rules and regulations as the implementing legislations. Since then until now, the written criminal law becomes the basis of system in the criminal law applicable in Indonesia. WvSNI 1915 (KUHP) basically does not reserve any space for the implementation of adat law (unwritten law). The Article 1 paragraph (1) of the Criminal Code containing the principle of legality, stated that "*nullum delictum, nulla poena sine praevia lege poenali*" which implies: there shall be neither offense, nor punishment without previous proclaim that such act may be considered

¹ E. Utrecht, Criminal Law I ("*Hukum Pidana I*"), Pustaka Tinta Mas, Surabaya, 1986, p. 8

as an offence which is punishable under the law.² Related to this case, Utrecht views that the applicability of the Article 1 paragraph (1) of the Criminal Code and the Emergency Law No. 1 of 1951 concerning the Interim Measures to Organize the Unity of the Structures for the Authority and Procedures of the Civil Courts, then for future court practice, the adat criminal law apparently is no longer very important.³ Nonetheless, it turns out that the applicability of the adat criminal law to some adat people in Indonesia is inevitable, up to this date it remains in force and even received recognition from the law enforcement agencies, especially the Supreme Court.

In various literatures regarding the criminal law, the recognition on the applicability of the adat criminal law is based on the provisions of the Article 5 paragraph (3) sub b of the Emergency Law No. 1 of 1951, despite that such Law has been declared as invalid based on the Law No. 8 of 1981 concerning the Criminal Procedure Law (KUHP). The adat criminal law that still applicable in some adat environment in Indonesia is still being recognized provided that: *First*, if the norms in the adat criminal law is incomparable with the regular criminal law in Indonesia, then it is permissible to impose adat sanctions or may be replacable by a penalty of 3-months imprisonment. However, if such adat sanctions are more severe rather than its penalty replacement, or the adat sanctions are no longer considered as in harmony with the values of the Indonesian people as an independent country, then a maximum imprisonment of 10 years may be imposed. *Second*, if such norms in the adat criminal law has comparable provisions in the Criminal Code, then the sanctions under the Criminal Code shall prevail.

Although the provisions in the Article 5 paragraph (3) sub b of the Emergency Law No. 1 of 1951 arranges a relatively limited applicability to the adat criminal law, yet in practice such provisions are much deviated, particularly with regards to the use of adat sanctions. People tend to apply the norms and sanctions from the adat law in practice rather than from the Criminal Code, despite that there are comparable provisions in the Criminal Code. Either the District Court, the High Court or the Supreme Court not only recognize the adat criminal law as a material law but also recognize the decisions made by the adat institutions in a criminal case. In some events, cases which already have obtained decisions from the adat institutions were rejected after being brought back to the court, under the ground of: *ne bis in idem*.

One of the adat people in Indonesia that still enact the adat criminal law is in the North Lombok. The adat criminal law (adat law) applied among the adat people generally is unwritten and therefore often referred to as the unwritten law. Likewise, the adat criminal law applied among the adat people in the North Lombok under the *awig-awig* as the unwritten law. *Awig-awig* is an institution or regulation made and adhered together by the people in order to manage the relationship between humans, humans and the universe as well as humans with the creator.⁴

In contrast with other adat peoples in Indonesia, the public figures and people among the Bayan and Bantek adat people in North Lombok are not only applying the *awig-awig* for generations in their life, they also conduct adaptation and legislation in the form of the Village Regulations which transfer the form of adat law into the written law. Some specific adat groups even established the written form of the *awig-awig* to be applied to solely in their area.⁵ Actually, the perspective of the Rules and Regulations Hierarchy in Indonesia, does not recognize the Village Regulations as a legal product that well and its applicability cannot be in contrary with the Laws.⁶ However among the adat peoples in the North Lombok, they enable the Village Regulation to supersede the applicability of the Laws.

² *Ibid.*, p. 193.

³ *Ibid.*, p. 7.

⁴ The Marine and Fisheries Resources Management in *Awig-Awig* (“*Awig-Awig Pengelolaan Sumber Daya Perikanan dan Kelautan*”), Deliberation Institution for Fishermen in North Lombok (“*Lembaga Musyawarah Nelayan Lombok Utara*”).

⁵ The *awig-awig* established by the Deliberation Institution for Fishermen in North Lombok regulates the Marine and Fisheries Resources Management.

⁶ Article 7 of the Law No. 12 of 2011 *jo.* the Law no. 15 of 2019 concerning the Amendment to the Law No. 12 of 2011 concerning the Formation of the Rules and Regulations.



This article discusses on the revitalization of adat criminal law (*awig-awig*) applied to the adat peoples in the North Lombok in the effort to manifest justice and legal certainty. The discussion covers the revitalization of *awig-awig*, the position of *awig-awig* in the criminal law system of Indonesia, and the effectivity of *awig-awig* among the adat peoples in the North Lombok. Furthermore, the article will provide an analysis on the revitalization of the *awig-awig* among the adat peoples in the North Lombok as the effort to manifest the purpose of the law, namely, to invent justice and legal certainty among the society.

The Legal Basis for the Enactment of the Adat Criminal Law and the Research on the Adat Peoples in the North Lombok

a. Emergency Law No. 1 of 1951

The Emergency Law No. 1 of 1951 particularly the provisions in the Article 5 paragraph (3) sub b, often used as the legal basis for the applicability of the adat criminal law either by theorists or practitioners of the criminal law. This is based on the consideration that despite the consideration part of the Law No. 8 of 1981 concerning the Criminal Procedure Code ('CPC') stated that the Emergency Law No. 1 of 1951 must be revoked insofar concerning the criminal procedure due to its incompatibility with the purpose of the national law, however it must be interpreted that the CPC only revoke the provisions regarding the criminal procedure law. Therefore, as long as it is concerning the material side of the criminal law, in this event, the adat criminal law as regulated under the Article 5 paragraph (3) sub b of the Emergency Law No. 1 of 1951, the Emergency Law must be viewed as still in effect.

The complete formulation of the provisions in the Article 5 paragraph (3) sub b of the Emergency Law No. 1 of 1951 is:

"The material law for the civillian and for the time being the criminal material law for the civillian which until now applicable to the subjects within the autonomous region and for the people who were adjudicated before the Adat Court, shall still be applicable for those people and subjects by the understanding:

1. Whereas an act which is according to the living law must be considered as a criminal act, however it has no comparison in the Criminal Code for the civillian, then it is then shall be considered as punishable by an imprisonment for a duration of no later than three months and/or criminal fines of five hundred rupiahs, which serves as a substitute punishment if the adat law imposed is not complied by the convicted party and the substitute referred shall be considered as equivalent by the judges on the basis of the guilt of the convicted;
2. Whereas if the adat punishment imposed according to the judge's mind have exceeded the imprisonment or criminal fines referred above, then upon the guilt of the defendant may be imposed with a substitute punishment as maximum as 10 years of imprisonment, with the understanding that the judges consider that the adat punishment is no longer in harmony with the era will always be substituted as mentioned above;
3. Whereas an act which according to the living law must be considered as a criminal act and which have comparison in the Criminal Code for the civillian, then it must be considered as punishable by the same punishment with the most comparably similar criminal offense thereto."

Based on such provisions, the adat criminal law may be divided into 2 categories, namely:

1. The adat criminal acts that has comparison in the Criminal Code. For the adat criminal acts that have no comparison in the Criminal Code, then any of such adat criminal acts are punishable by the criminal sanctions in the Criminal Code.
2. The adat criminal acts that has comparison in the Criminal Code. For the adat criminal acts that have no comparison in the Criminal Code, which used adat criminal sanctions, then the substitute criminal penalties shall be an imprisonment no later than three months and/or criminal fines of five hundred rupiahs or 10 years of imprisonment.

The applicability criteria of the adat criminal law that can be implemented against a criminal act under the provisions of the Article 5 paragraph (3) sub b of the Emergency Law No. 1 of 1951 are:

1. The applicability of such adat criminal law is still recognized by the subjects in the autonomous regions and the peoples who were adjudicated by the Adat Court;



2. An act which according to the living law must be considered as a criminal act;
3. Such act has no comparison in the Criminal Code;
4. If such adat criminal act has no comparison in the Criminal Code, the adat criminal sanction shall be imposed as the principal criminal punishment, while the imprisonment of no later than 3 months and/or criminal fines of five hundred rupiahs shall be the substitute criminal punishment if the adat sanction is not implemented;
5. If the adat sanctions imposed is considered as exceeding or incomparable with imprisonment or the referred fines and it is considered as no longer in harmony with the era, then a substitute punishment of 10 years imprisonment may be imposed;
6. An act which according to the living law must be considered as a criminal act and has comparison in the Criminal Code, then it shall be punishable by the comparable criminal sentence contained in the Criminal Code for the most similar act to the adat criminal act.

b. The Cases on the Applicability of Adat Criminal Law

Several court decisions which recognize the applicability of the adat criminal law in Indonesian criminal law are among others:

- 1) The decision of the District Court of Gianyar No. 23/Pid/Sum/1976 dated on 12nd of April 1976. In this case, the Panel of Judges of the District Court of Gianyar applied the adat criminal law of the Sanggraha Logic/*Logika Sanggraha* by underlying the enactment on the Emergency Law No. 1 of 1951 Article 5 paragraph (3) sub b.

Which decision is:

- a. Declare that the defendant I Wayan Supatra as mentioned is guilty of comitting the Sanggraha Logic/*Logika Sanggraha* crime (Adat Law in Bali).
 - b. Punish him therefore with an imprisonment of 3 (three) months.
- 2) The Decision of the Supreme Court No. 93 K/Kr/1976 dated on 19th of November 1977.

In this case, the Supreme Court applied the adat criminal law applicable in the Greater Aceh District by underlying the enactment on the Emergency Law No. 1 of 1951 Article 5 paragraph (3) sub b.

Which decision is:

- a. Reject the cassation applied by the cassation appellant: 1. Zainabun binti Muhammad and 2. Hasyim bin Hamzah as mentioned;
- b. Correct the decision of the High Court of Banda Aceh dated on 9th of December 1976, No. 28/1971/PT and the decision of the District Court of Banda Aceh dated on 15th of January 1971, No. 51/1971 (S) to be read as follow:
- c. Declare to the defendant 1. Zainabun binti Muhammad and 2. Hasyim bin Hamzah are guilty of committing the crime of "adultery".
- d. Punish the cassation appellants to pay for the court fees in all levels of judiciary.

- 3) The Decision of the Supreme Court No. 1644 K/Pid/1988 dated on 15th of May 1991.

In this case, the Supreme Court applied the adat criminal law and acknowledged the decision of the Head of Adat Peoples, hence it is no longer be able to be adjudicated and punishable by the Court under the Emergency Law No. 1 of 1951 Article 5 paragraph (3) sub b.

Which decision is:

- a. Grant the cassation applied by the cassation appellant: Tauwi as mentioned;
- b. Reject the decision of the High Court of Kendari on 11th of November 1987, No. 32/Pid B/1987/PT Sultra and the decision of the Kendari District Court dated on 15th of June 1987 No. 17/Pid B/1987/PN Kdi;

Make Judgement on its own authority:

Declare that the claim from the Public Prosecutor at the Kendari District Prosecutor Office as unacceptable.

According to such decision, the Supreme Court recognize the applicability of the adat criminal punishment and the existence of the adat institutions. The criminal sanctions imposed by the Head of Adat Peoples in the form of obligation to handed a buffalo and one piece of glass cloth as payment have been complied by the convicted person, hence, that according to the Supreme Court



based on the provisions of Article 5 paragraph (3) sub b of the Emergency Law No. 1 of 1951, the defendant could not be sentenced again by the Court.

4) The Decision of the Supreme Court No. 948/K/Pid/1996 dated on 15th of November 1996.

In this case, the Supreme Court applied the adat criminal law and acknowledged the decision of the Council of Adat Peoples, hence the defendant I and defendant II may not be prosecuted again.

Which decision is:

- a. Declare that the cassation applied by the cassation appellant may not be accepted: The Public Prosecutor at the District Prosecutor Office of Poso;
- b. Accept the cassation applied by the cassation appellant/Defendant I: Amutayo Ngude as mentioned;
- c. Annul the decision of the High Court of Palu on 30th of January 1996, No. 23/Pid-B/1995/PT/PT Palu that previously annul the decision of the District Court of Poso on 28th of February 1995, No. 83/Pid.B/1994/PN Pso;

Make Judgement on its own authority:

Declare that the prosecution made by the Public Presecutor againts the Defendant I and the Defendant II is not acceptable.

The basis of the inacceptability of the prosecution made by the Public Prosecutor is the fact that the adat criminal fines imposed by the Council of Adat Peoples (HADAT) have already been paid, it was made in the form of an obligation to deliver 3 cows consisting of: 2 cows handed to the village through the Council of Adat Peoples and 1 cow handed to Rolex Taluntje as the husband of Enta Ntoo. The Supreme Court was not only acknowledged the existence of the adat criminal law but also the adat institutions that have imposed the adat criminal sanctions, in this regard, the Council of Adat Peoples (HADAT), despite that it has actually been revoked under the Act No. 8 of 1981 (KUHAP). Therefore, the defendants no longer need to be adjudicated through the State Court (General Court).

5) The Decision of the Supreme Court No. 32/K/Pid/2010 dated on 11th of March 2010.

In this case, the Supreme Court applied the adat criminal law and rejected the cassation applied by the defendant First Sergeant Ariyanto, SH., corroborating the *judex factie* decision by correcting the severity of the criminal punishment according to the provisions of the Article 5 paragraph (3) sub b of the Emergency Law No. 1 of 1951.

Which decision is:

To adjudicate:

- a. Declare the cassation applied by the Cassation Appellant II is unacceptable: The Public Prosecutor at the District Prosecutor Office of Majene as mentioned;
- b. Reject the cassation applied by the Cassation Appellant I: First Sergeant Ariyanto, SH. as mentioned;
- c. Correct the decision of the High Court of Makassar No: 300/PID/2009/PT.MKS. on 4th of September 2009, corroborating the decision of the District Presecutor Office of Majene No: 89/Pid .B/2008/PN.M. on 28th of May 2009, hence the full decisions read as follows:
- d. Declare the Defendant First Sergeant Ariyanto, SH. as mentioned has been proven as legally and convincingly guilty of committing a crime of "Adultery".
- e. Convict a crime against the Defendant and therefore he shall be imprisoned for 3 (three) months;
- f. Stipulate that the period of detention served by the Defendant shall be fully made as deduction over the criminal punishment convicted.

6) The Decision of Supreme Court No. 1901/K/Pid/2010 on 27th of April 2011.

In this case the Supreme Court applied the Toraja adat criminal law based on the provisions of Article 5 paragraph (3) sub b of the Emergency Law No. 1 of 1951, had rejected the cassation applied by the cassation appellant Samuel Patintingan and corroborated the *judex factie* decision.

Which decision is:

To adjudicate:

Reject the cassation applied by the cassation appellant/Defendant Samuel Patintingan.



As for the decision of the High Court of Makassar No. 427/PID/2008/PT.MKS dated on 9th of December 2009, it is stated that the Court:

- a. Accept the appeal submitted by the Public Prosecutor;
- b. Corroborates the decision of the District Court of Makassar dated on 12th of October 2009, No: 1444/Pid.B/2009/PN.Mks which appeal was requested as mentioned with the correction only on the qualification of criminal acts, hence the complete decision reads as follow:
- c. Declare the Defendant Samuel Patintingan as proven validly and convincingly guilty of conducting an adat criminal act of "Conducting intercourse out of marriage with other person who has equally reached adulthood of which has no comparison in the Criminal Code";
- d. Impose an imprisonment therefore, towards the Defendant Samuel Patintingan for 3 (three) months;
- e. Enact the period of arrest and detention served by the Defendant before the decision obtained final legal force, to be fully made as deduction over the criminal punishment convicted.

The decisions of the courts and the Supreme Court in the adat criminal cases which use the adat criminal law as a legal basis in adjudicating the cases are considered as giving more guarantee for the achievement of sense of justice for the public and legal certainty, since the benchmark used for the criminal sanctions imposed are based on the adat people values. Forcing the applicability of the state law to the adat people may raise injustice for them and may potentially create new conflicts since the norms applied are considered as unsuitable with the sense of justice and the prevailing values. The decisions issued by the State Court are considered and perceived as not solving the problem. Therefore, in the practice of the criminal law enforcement against the adat criminal acts, despite that there are comparable provisions in the Criminal Code and albeit the Article 5 paragraph 3 sub b of the Emergency Law No. 1 of 1951 encourage the use of criminal sanctions in the Criminal Code, the settlement in reality does not always use the criminal sanctions elaborated in the Criminal Code.

Research on the Adat Peoples in the North Lombok

1) Research on the Analysis of *Awig-Awig* Transformation in the Cultivation of Adat Forest (Case Study in Wetu Telu Community in Bayan Region, North Lombok).

The results of this study were published in the Indonesian Green Technology Journal Vol. 2 No. 2, 2013. This research was conducted by Edi Muhamad Jayadi and Soemarno, it examines the *awig-awig* as an adat rule which is applied in the cultivation of adat forests done by the Wetu Telu Community (WTC), the adat peoples who live in the Bayan Sub-District, North Lombok Regency, West Nusa Tenggara . In its development, the *awig-awig* went through transformations, which affect the sustainability of the adat forests in the Bayan region. The *awig-awig* transformation was conducted through the strengthening of internal organs and the issuance of the Village Regulations. According to the results of the study, it shows that: 1) The rules elaborated in the *awig-awig* regulate three matters, namely: prohibition, sanctions, and adat hearing proceedings, 2) In the Village Regulation, the *awig-awig* rules were added into five, namely: the prohibited matters, the permitted matters, the required matters, the sanctions, as well as the implementing mechanism of the sanctions. The *awig-awig* transformation through the strengthening of internal organs and the issuance of the Village Regulations are the efforts to respond the social change and to increase the guarantee of legal certainty for the public. 3). Internal factors consisting of: increase of the number of populations and minimum livelihoods, weak law enforcement, and existence of regional expansion; as well as the external factors consisting of: government policies, socio-cultural changes, and free markets (foreign investors), are the cause of the *awig-awig* transformation, 4) The shift of cultivation of adat forest from the adat governance to the village chief in the New Order era, has weakened the control previously held by the adat institutions towards the adat forests. The immediate impact perceived from the weakening of structure and function of the *awig-awig* for the forest is the coversion of function of adat forests in consequence of the over-exploitation made by village officials backed up by the security forces. There were no less than 17 adat forests in North Lombok which were converted into residential areas, rice fields and drylands, in that era. From such numbers, 3 were occurred in the Bayan region.

In the reformation era, the rearrangement of *awig-awig* structure and function made by the adat people in Bayan was conducted again along with the emergence of policy on the Regional Autonomy and the formation of North Lombok Regency. It is impossible to reconstitute the lost adat forests to the previous condition. However, with the strict enactment of *awig-awig* for the forest, which prioritize fair principles for the cultivation of the forest and the existence of guarantee for legal certainty, then at least it may prevent the adat forests from the exploitative practices as were happened during the New Order era.

2) Research on the Criteria for the Implementation of Adat Criminal Law Against a Criminal Act for the Purpose of the Reforming of Indonesian Criminal Law.

The research was conducted by Sigid Suseno, Widati Wulandari and Nella Sumika Putri in 2013, this study examined the basis and criteria of the enactment of the adat criminal law against an act which was considered as a criminal act either through the court decision or through the adat institution as well as its contribution towards the reforming of the Indonesian criminal law.

Based on the results of the research, it shows that in the implementation of the adat criminal law, the law enforcement officers using the Emergency Law No. 1 of 1951 Article 5 paragraph 3 sub b and the Law No. 48 of 2009 concerning the Basic Regulations on the Juridical Authority as the underlying juridical basis. Some court also use juridical and sociological basis to issue decisions, however, none of them explicitly use philosophical basis for consideration. In several Supreme Court decisions, the Judges were not only acknowledging and respecting the adat criminal law, they also do the same to the decisions from adat institutions. The decision from the adat institutions are considered as having legal force, whereas the state court has no right to adjudicate the case over under the principle of *ne bis in idem*. Meanwhile, the implementation of the adat criminal law conducted by the adat institutions is based on the sociological and philosophical basis, to ensure that it is in accordance with the social values in the society, fulfill the sense of justice among the people, and may reconstitute the magical balance hindered due to the crime.

The criteria that may be used in the implementation of the adat criminal law against a criminal act in terms of reforming the criminal law are:

- a. The adat criminal law is still alive, still valid, recognized, respected, and adhered by the adat peoples.
- b. The act is an adat criminal act according to the adat criminal law.
- c. The adat criminal sanctions are the principal criminal punishment, while the imprisonment or criminal fines are substitute criminal punishment if the adat criminal sanctions are not adhered according to the criminal sanctions for the most similar criminal acts in the Criminal Code.
- d. The adat criminal sanctions are still alive, still valid, recognized, respected, and adhered as well as in harmony with the people development.
- e. If the supposedly imposed adat criminal sanctions are not in line with the people's development, then the criminal sanctions for the most similar criminal act in the Criminal Code shall be used.
- f. The use of adat criminal law must be based on Pancasila and the legal principles in the national legal system.
- g. The use of adat criminal law must consider the philosophical, sociological, and juridical basis in terms of reforming the national law.

RESEARCH METHOD

This research is a normative legal research that use juridical normative and juridical sociological approaches. The normative legal research conducted includes: *in abstracto* legal research, namely the research made to the criminal law principles on the adat criminal law in the criminal rules and regulations and the adat law; the research on the (criminal) legal principles, namely the research on the legality principles, justice principle, equilibrium principle, magic religious principle, concrete and direct as well as the legal certainty principle; *in concreto* legal research, namely the research made to the adat criminal law in terms of the court decisions and the settlement made through the adat institutions; and systematic legal research, namely the research made towards the applicability of the adat criminal law in terms of the criminal law system in Indonesia. In addition to

the normative juridical approach in this research, the sociological juridical approach was also used to analyse the legal values and principles that applicable among the adat peoples as well as the applicability of the adat criminal law in the adat peoples in North Lombok.

The Position and Effectiveness of *Awig-Awig* among the Adat Peoples in North Lombok

The history of the criminal law in Indonesia has recorded the applicability of the adat criminal law back to the date of pluralism before the existence of unification through the *Wetboek van Strafrecht voor Nederlandsche Indie* (WvSNI) S. 1915 Nr 732 on 01st of January 1918, or the dualism of criminal law after the entry into force of the Law No. 1 of 1946 or the unification based on the Law no. 73 of 1958, which took effect on 29th of September 1958. According to Jonkers, the unification of criminal law is actually more of formal in character rather than material, since it is in fact never happened. In its implementation, there was always influence from the adat (private) law on the enforcement of the criminal law.⁷

The applicability of the adat criminal law among the adat peoples does not necessarily require legality as a basis, since the adat criminal law exists and attached inside and to the life of the adat peoples. The compliance of the adat peoples to the adat criminal law as well as its applicability is neither caused by the order from the Laws nor its existence as one of the sources of law, however since the adat criminal law is considered as the values and the norms among the adat peoples' life. According to Sudarto, the applicability of the adat law does not require any legal basis from the Laws, since the adat law is original and shall be applied automatically.⁸ It is illogical if the applicability of the adat criminal law needs the Laws which was created at latter date. Nonetheless such view shows how strong the legism concept is held among the criminal law scholars in Indonesia. In the legism concept the implementation of the adat criminal law is in contrary with the legality principles which based everything on the written law: *Nullum delictum nulla poena sine praevia lege poenali*, it elucidates the provisions of the Article 1 paragraph (1) of the Criminal Code. This principle was elaborated by Paul Johann Aseim von Feuerbach who further determined 3 other provisions, namely:

1. Any use of criminal law may only be conducted based on the criminal law (*nulla poena sine lege*);
2. The use of criminal punishment may only be possible, if an act punishable by the Laws occurs (*nulla poena sine crimine*);
3. The punishable acts according to the law, brings legal consequences that the act shall be imposed with the criminal punishment (*nullum crimen sine poena legali*).⁹

Other view was elaborated by Sudarto, that in the Article 1 paragraph (1) there are 2 matters contained:

1. A criminal act must be formulated/mentioned in the Law. This bears consequences: *first*, an act of a person which is not elaborated as a criminal act under the Law may not be convicted with criminal punishment and *secondly*, it is prohibited to use analogous.
2. Such law must exist before the criminal act occurs (it does not apply retroactively).¹⁰

According to Marjanne Termorshuizen there are 4 aspects in the legality principle, namely:


1. Criminal law provisions which was formulated in advance (*lex scripta*) may provide certainty to the citizens and the law enforcement officials, namely through the formulation of the criminal law provisions clearly and explicitly (*lex certa*) and the formulation must have quite strict and limited reach (*lex stricta*);
2. Such criminal law provisions have been democratically legitimized through the approval from the People's Representative Assembly.

⁷ J.E. Jonkers, *Criminal Law of the Dutch East Indies ("Hukum Pidana Hindia Belanda")*, Bina Aksara, Jakarta, 1987, p. 3 and 17.

⁸ Sudarto, *Criminal Law I ("Hukum Pidana I")*, Sudarto Foundation, Semarang, 1990, p. 17

⁹ P.A.F. Lamintang, *Fundamentals of Indonesian Criminal Law ("Dasar-Dasar Hukum Pidana Indonesia")*, Sinarbaru, Bandung, 1984, p. 128.

¹⁰ Sudarto, *Criminal Law I ("Hukum Pidana I")*, Sudarto Foundation, Semarang, 1990, p. 22-23.

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3. The relationship between the legality principle and the rule of law or the state of law: criminal provisions which are made written, explicit, or has democratic character shall limit the authority of the law enforcement officials and the state officials;
 4. The legality principle through the prohibition of retroactive power, related to the *schuldbeginsel*, namely the principle of no criminal punishment without wrongful act (*geen straf zonder schuld*).¹¹

Thus, in the perspective of legism concept, based on the understandings contained in the legality principle (Article 1 paragraph (1) of the Criminal Code) as mentioned, the discussion of adat law within the criminal law becomes irrelevant. The existence of legal certainty through the *lex scripta*, *lex certa*, and *lex stricta* principles within the criminal law provisions has made the adat law reserve no place in the criminal law.


Nevertheless, the applicability of the adat criminal law in the criminal law system in Indonesia is the reality of law occurred either philosophically, historically, sociologically, politically, or juridically. The adat criminal law in Indonesia is one of the sources of law which is recognized and applied among the Indonesian people besides the Laws. Such acknowledgement and applicability of the adat criminal law is not only occurred materially among the adat people but also happened formally within the state law either inside the material criminal law or among the criminal judiciary system in Indonesia. In formal, the acknowledgement towards the adat criminal law in Indonesia is conducted under the Emergency Law No. 1 of 1951 Article 5 paragraph 3 sub b. Other provision that may be used as the basis for the adat law enforcement is the Law No. 4 of 2004 concerning the Judiciary Power, particularly Article 16 paragraph (1) and Article 28 paragraph (1). The provisions of the Article 16 paragraph (1) and the Article 28 paragraph (1) provide the Judges with the legal basis to apply the adat criminal law. The court must not refuse to examine and adjudicate a case submitted to it, under the pretext that there is no law or clearer law that regulate such case, rather, the judges are obliged to examine and adjudicate the case. Furthermore, the Judges have the obligation to explore, follow, and understand the legal values and the sense of justice lives among the people.

The politics of law which confirms the adat criminal law as a source of the criminal law in Indonesia is also stipulated under the Draft of the Criminal Code Article 2, it is stated that: "The provisions as referred to in the Article 1 paragraph (1) do not reduce the applicability of the law living among the society, since the living law is the one which determines whether a person is considered punishable despite that his act is not regulated under this Law. According to the provisions in the Article 2 of the Draft of the Criminal Code, the adat criminal law is still recognized as a source of criminal law in addition to the Laws.

In the system of criminal law in Indonesia, the existence of the adat criminal law is not positioned as a matter contrary to the legality principle (Article 1 paragraph (1) of the Criminal Code), however it applies simultaneously alongside and has the same position of being the source of law with the Laws. Likewise, the legality principle, it must not be interpreted as a negation to the existence of adat criminal law, however it must be considered as providing the room for the applicability of the adat criminal law. The balance principle becomes the basis for the applicability of the two sources of the criminal law in Indonesia as mentioned - the Laws and the adat criminal law - the two go hand in hand in manifesting the purposes of law: justice, legal certainty and expedience.

In the Court decisions on the adat criminal cases as elaborated in the decisions above, the Panel of Judges were prioritizing the use of adat criminal law since it is considered as more accurate to achieve justice, legal certainty, and expedience. In the decision of the Supreme Court No. 1901/K/Pid/2010 on 27th of April 2011, for instance, the Panel of Judges viewed in its legal consideration that for the purpose of legal certainty, the Judges basically must conduct their tasks

¹¹ Marjanne Termorshuizen, "The Principle of Legality" and "The Principle of Legality in the Criminal Law in Indonesia and the Netherlands" in the Course Material Refreshing Course of Criminal Law "Same Root, Different Development", Faculty of Law University of Padjadjaran and ASPEHUPIKI, Bandung, 2006.



according to the written elaboration of the Law, however the Judges must not refuse to examine and adjudicate a case submitted to them, under the pretext that there is no law or clearer law that regulate such case, rather, the Judges are obliged to examine and adjudicate the case fairly that can be accepted by the sense of justice among the people. Therefore it is important for the Judges to have freedom to make decisions, since the Laws are not always having comprehensive regulations and often times have shortages or discrepancies, and there was never a man-made Laws that can remain in accordance with the condition of the society that continuously developing as the law within society itself, especially towards the society that is still bound to the thick customs and familial bond.

In the perspective of the purpose of punishment, the criminal conviction in the form of imprisonment and/or criminal fines against the adat criminal acts are considered as have not yet fulfilling the sense of justice, legal certainty and the expedience for the adat peoples. Imprisonment or criminal fines have not yet restored the balance of the magic religious values hindered due to the crimes and the sense of law among the people which were contaminated due to such hindrance. Such balance shall only be restored by the fulfillment of the adat sanctions. Therefore, one of the purposes of the criminal punishments in the future of criminal law in Indonesia, is to adopt the legal principles deriving from the adat criminal law, namely to resolve the conflicts caused by the criminal acts, reconstitute the balance, and bring in safety and peace feelings among the society (Article 51 of the Draft of the Criminal Code) .

The applicability of the adat criminal law in the form of *awig-awig* as an institution regulating the relationship in the society, relationship between the human and the universe and the relationship between the human and the creator, which applied through generations, may be seen and felt within the adat peoples in Bayan and Bantek in North Lombok Regency. Such *awig-awig* applied among the adat people in North Lombok can functioned alongside with the state law, even in certain matters, the adat criminal law prevails over the Criminal Laws. The applicability of the *awig-awig* among the adat peoples in North Lombok is not based on the provisions under the Laws, however it applies automatically as the source of law enforced by the adat peoples through their adat institutions. Therefore, the applicability of *awig-awig* among the adat people in North Lombok is not based on the criteria of the implementation of the adat criminal law as formulated under the Emergency Law No. 1 of 1951 Article 5 paragraph 3 sub b, particularly with regards to the criteria of acts that have comparison in the Criminal Code, acts that have no comparison in the Criminal Code and the implementation of imprisonment and/or criminal fines as sanctions. Among the adat peoples in North Lombok, the adat criminal law as regulated under the *awig-awig* used as the principal norms and they do not relate the *awig-awig* with the Criminal Code. It is more appropriate for the provisions in the Emergency Law No. 1 of 1951 Article 5 paragraph 3 sub b to become the legal basis for the law enforcement officials and not for either the adat stakeholders or the adat peoples, since the Emergency Law No. 1 of 1951 has revoked the existence of the Adat Court and Autonomous Court.

Public figures among the adat peoples in North Lombok have strengthen the enforcement of the adat law in North Lombok by revitalizing the existing norms. The revitalization was made through a large deliberation known as "*Gundem*" it specifically discuss about issues occurred among the adat society and took place in the adat house (*Gruga Agung*). The "*Gundem*" was participated by the *Pemeqel Adat*, *Kyai (Lebé, Pengundu, Ketip & Mudim)*, *Pemangku*, *Tuaq Loka* (the guardian of the traditional houses) as well as *Sesepuh*/the Elders.¹² The adat norms produced through "*Gundem*" shall cover the adat norms to be adapted or the new adat norms, this is made with the purpose to

¹² The results of interview with Rianom, Chairperson of the Adat Peoples Institution in Bayan on 25th of November 2012.

maintain the functionality of the *awig-awig* according to the development of the society.¹³ The revitalization of *awig-awig* among the adat peoples in North Lombok were conducted through:

1. Identification and inventory of the norms within the adat law which have been applied through generations and becomes the gesture and views of life for the adat peoples.¹⁴
2. Adaptation of the norms within the adat law such as the adjustment of the adat sanctions with the current conditions of the society. For example, the adat sanction to pay *kepeng bolong* which initially amounted to 10,000 pieces, was reduced into 244 pieces, it may also be replaced to the amount of money in rupiah, which nominal shall be decided by the Adat Institution afterwards. Adat sanction to handover a buffalo may be replaced by handing over a cow.¹⁵ Among the adat peoples in Bantek, the sanction to pay *kepeng bolong* has now been adjusted to the replacement of the value into rupiah since it is now harder to find the *kepeng bolong*.¹⁶
3. Establishment of the new norms within the adat law, either for the prohibited acts or for the adat sanctions. For example, the norms regarding the Marine and Fisheries Resources Management in *awig-awig* which were produced by the Deliberation Institution for Fishermen in North Lombok (*Lembaga Musyawarah Nelayan Lombok Utara/LMNLU*). Such *awig-awig* regulates prohibited acts including:
 - a. It is prohibited to use destructive gears for fishing such as explosive materials (bombs), toxic materials (potassium cyanide, tuba roots), strum, coral powder and other dangerous materials.
 - b. It is prohibited to take away and capture protected marine animals such as giant clams, sea turtles, dolphins, *lolak* or *susu bundar* and *matarai*.
 - c. It is forbidden to use compressor as supporting gears for fishing, except for the coral transplantation activities, net reparation after being stuck among the corals, and for research.
 - d. It is forbidden to take and mine the corals, sands and pebbles from the sea.
 - e. It is prohibited to dump the waste from its activities into the river and sea.
 - f. It is prohibited for businesspersons or hotel owners to dump their waste into the river, estuary and the sea.

The type of sanctions which can be imposed to the violations of *awig-awig* (according to the committed violations), are:

1. Warning and order to create written statement to refrain from repeating the same act.
2. Maximum criminal fines of Rp.5,000,000 (five million rupiah).
3. Maximum criminal fines of Rp.10,000,000 (ten million rupiah).
4. Destruction or combustion towards their supporting facilities, in case of repetition of the same violation twice.
5. A group of fishermen will act as judges by beating the convicted person, however not until death, in case of repetition of the same violation more than twice.
6. The items used for the violation shall be confiscated and the convicted person shall be imposed with criminal fines of Rp.15,000,000 (Fifteen Million Rupiah).
7. Delivery of written warning with a carbon copy sent to the authorized institution and maximum criminal fines of Rp 25,000,000 (Twenty-Five Million Rupiah).
8. Delivery of written proposal to the government to terminate or revoke the operational license of the company.
4. Codified the *awig-awig* legislation in the form of written law such as in the Village Regulations and the *Awig-Awig* for the Deliberation Institution for the Fishermen in North Lombok (*Lembaga Musyawarah Nelayan Lombok Utara/LMNLU*). For example, the Regulation of Gondang Village No. 9 of 2005 concerning the *Awig-Awig* in the Gondang Village, which was then amended by

¹³ The results of Research by Edi Muhamad Jayadi and Soemarno on the Analysis of *Awig-Awig* Transformation in the Management of the Adat Forests (Case Study in the Wetu Telu Community in Bayan Region, North Lombok), in the Indonesian Green Technology Journal Vol. 2 No. 2, 2013.

¹⁴ The results of interview with Rianom, Chairperson of the Adat Peoples Institution in Bayan on 25th of November 2012.

¹⁵ *Ibid*

¹⁶ The results of interview with Budi, Head of Adat Peoples in Banten, on 25th of November 2012.

the Regulation of the Gondang Village No. 04 of 2011 concerning the Amendment of the Regulation of Gondang Village No. 9 of 2005 concerning the *Awig-Awig* in the Gondang Village; Regional Regulation of the Bayan Village concerning Management of Adat Forests in Bayan; and the *Awig-Awig* for the Deliberation Institution for the Fishermen in North Lombok (*Lembaga Musyawarah Nelayan Lombok Utara/LMNLU*) concerning the Marine and Fisheries Resources Management.

The revitalization of *awig-awig* in the form of written law, namely through the Village Regulations is actually not in accordance with the essence of the adat law as an unwritten law. The adat law according to Soepomo is synonymous to the unwritten law and this means that the law shall not need to be formed by a legislative body, or the living law serves as the convention within the legal entities of the state (People's Representative Assembly, Regional Representative Assembly, etc.), since the adat law is arising due to the decisions and customs living among the society. According to its nature, the adat law shall be continuously growing and developing like the life itself.¹⁷ Nonetheless, with regards to the formation of the Village Regulation, the adat peoples in the North Lombok made it as a necessary reaction to the social development and the failure of the government to enforce the law through the state officials to overcome the problems among the society which have caused the hindrance on the manifestation of the sense of justice and order among the adat people.

The hierarchy of rules and regulations in Indonesia, does not recognize the Village Regulation as a legal product that well, however, among the adat peoples in North Lombok, the Village Regulations containing the *awig-awig* can be applied effectively and it can even exempt the provisions under the Laws, despite the fact that the Laws were supposedly hold higher position within the hierarchy of the rules and regulations and used as the main reference of applicability for other legal products with lower positions. The legal power of *awig-awig* within the Village Regulation is not based on the hierarchy of the rules and regulations as regulated under the Article 7 of the Law Number 12 of 2011 concerning the Formation of the Rules and Regulations, which comprised of:

- a. The 1945 Constitution of the Republic of Indonesia;
- b. The Stipulation from the the People's Consultative Assembly;
- c. The Laws/Government Regulation *in Lieu* of Law;
- d. The Government Regulations;
- e. The Presidential Regulations;
- f. The Regional Regulations of Provinces; and
- g. The Regional Regulations of Regencies/Cities.

For the adat peoples in North Lombok, it seems that the most important matter is not the form of the legal products, yet the legal substance, *awig-awig* has become the guidance and principles of behavior for the adat peoples.

The revitalization effort of the *awig-awig* among the adat peoples in the North Lombok was conducted since the *awig-awig* (including the adat criminal law) was considered as giving more sense of justice and legal certainty. In its philosophy, the adat law has a different purpose with the western society, particularly in terms of the punishment. Although that both may be categorized as justice, the adat law has a different perspective, which mainly focused on the cosmic and harmonious aspect of relationship between the physical and supernatural realms. The execution of adat sanctions is aimed to restore the magical balance due to such adat violations, it was hindered and as a result must be recovered. Among the adat peoples in Bantek, for instance, the adat sanctions were imposed to refine and remove the acts violating the adat norms, commonly known as "*menyowok*."¹⁸

Therefore, among the adat peoples in Bayan and Bantek, an adat violation resolved through the Court shall not annul the adat sanctions. Despite that the adat violation has been resolved according

¹⁷ R. Supomo, Chapters on Adat Law ("*Bab-Bab tentang Hukum Adat*"), Jakarta, University, 1963, p. 6.

¹⁸ The results of interview with Mr. Budi, Stakeholder from the Adat Peoples in Bantek in North Lombok, on 25th of November 2012.

to the state law, however if it is not resolved according to the adat law then it shall still be considered as unsettled. The adat peoples shall still view that the convicted is “dirty” before he complied to the sanction proceedings according to the adat law. Such adat sanctions shall keep in effect until the convicted person dies and in the event that he dies without completing the adat sanctions, then he will not be able to access the public services/his rights as a member of the adat society.¹⁹ Other types of criminal sanctions under the Criminal Code are not the instruments in the adat legal system and therefore are not considered as having religious magical values to restore the cosmic balance. For the adat peoples, sanctions exist to restore the cosmic balance, to remove the dirty acts or clean up the environment around them to achieve justice and legal certainty in the society.

The recognition on the importance of the adat criminal law in manifesting justice and certainty for the adat peoples is implied in the *ratio decidendi* of the Decision of the Supreme Court of the Republic of Indonesia No. 1644 K/Pid/1988 on 15th of May 1991, which stated that if a person violates the adat law then after the Head and the Leaders of the adat peoples give adat reactions (adat sanctions), none shall ever be able to submit his case again (for the second time) as a defendant to the State Judiciary Body (the District Court) with the same conviction of violating the adat law and neither he can be imposed with the imprisonment according to the provisions of the Criminal Code (Article 5 paragraph (3) sub b of the Emergency Law No. 1 of 1951). Hence, in such circumstances, the submission of his case files as well as claims from the Public Prosecutor Office to the District Court must be declared as inadmissible (*niet ontvankelijk Verklaard*). This shows the form of recognition on the applicability of the adat criminal law as the source of law that can manifest the purposes of law for the adat peoples, whereas when the adat criminal law has been used then there is no need to enact the state law. The Supreme Court in this issue is applying the *ne bis in idem*.

The existence of the adat law in Indonesia, by referring to the Soepomo line of thoughts, shall be maintained as long as it is still alive in the reality.²⁰ In short, the adat criminal law is still exists in its development since the (local) society is still using it, consequently there shall be adat criminal law that is no longer enforceable due to the absence of use by its adat peoples. In order to measure whether an adat law is still recognized, respected and adhered by its adat peoples or not, one can use the following measurements:²¹

- a. Whether the structure of the relevant adat law is still strong or has it gone through many changes;
- b. Whether the head or leader of the adat peoples are still in function and take the role as the adat law officials;
- c. Whether the stipulations /decisions from the head of the adat peoples or the adat institutions within the similar adat law settlement still occur often;
- d. Whether the adat law decisions are still the same and in accordance with the adat law system;
- e. Whether such provisions of the adat law are not in contrary to the politics of the national law or the laws.

Based on the results of the field research, it turns out that the applicability of the adat law in the North Lombok is still strong and almost all of violations there were resolved through the adat law mechanisms and executed by the adat law stakeholders. Therefore, there are very few adat violations which were resolved through the state court.²² On that note, it is safe to conclude that

¹⁹ The results of interviews with Stakeholders from the Adat Peoples in Bantek and *Pemeqel* of Adat Peoples in Karang Bajo in North Lombok, on 25th of November 2012.

²⁰ Hilman Hadikusumah, Introduction to the Adat Law in Indonesia (“*Pengantar Ilmu Hukum Adat Indonesia*”), Mandar Maju, Bandung, 2004, p. 13

²¹ Rehngena Purba, "Adat Law in Jurisprudence" (“*Hukum Adat dalam Yurisprudensi*”), Judicial Varia Number 260, July 2007, p. 31.

²² The results of interviews with the Head of the Adat Institutional Body and Adat *Pemeqel* in Gubuk Karang Bajo among the Adat Peoples in Bayan, the Adat Stakeholder in Adat Peoples in Bantek, the Deliberation Institution for the Fishermen in North Lombok, the Deputy Chairperson of the High Court of Mataram, the

the adat law that applicable among the adat peoples in North Lombok is still recognized, respected and adhered through revitalization and in some cases it may supersedes the provisions within the Laws. The adat law is also adjusting its provisions from time to time to remain relevant with the purpose of the national legislation.

CONCLUSION

Based on the results of the analysis on the applicability of *awig-awig* among the adat peoples in North Lombok, it may be concluded that the revitalization of *awig-awig* was conducted since its implementation - including the adat criminal law, considered as more fulfilling for the sense of justice and legal certainty among the adat peoples. It is also made in response to the occurring development of the people to make the *awig-awig* applied effectively in line with such action. It is viewed and perceived that the imposed adat sanctions may restore the cosmic balance, remove the dirty acts or clean up the environment among the adat peoples who were hindered due to the adat violations. Meanwhile, other types of criminal sanctions were considered to have no magical religious value. As it contains norms from the adat criminal law, *awig-awig* is applicable among the adat peoples in North Lombok as the source of direction has the same position as the Laws. In its implementation, it prevails over state law. The applicability of the *awig-awig* among the adat peoples in North Lombok is based on something other than the provisions of Article 5 paragraph (3) sub b of the Emergency Law No. 1 of 1951 since, in this regard, *awig-awig* itself is considered a source. The applicability of the adat criminal law to the adat peoples in North Lombok, which is based on the *awig-awig* has occurred through generations. It is still in effect to resolve almost all adat violations submitted to the adat law institutions and implemented by the adat law stakeholders.

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