

# Legal Position of Awig –Awig in the National

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## Legal Position of Awig –Awig in the National Legal System as a Source of Law (Written Customary Law)

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### Abstract

Village is the smallest part of the state structure. A number of villages in Indonesia have distinctive features which contain traditional elements. One of the elements of this custom is customary law. In the community of Pakraman Bali Village, there are indigenous people in which customary law applies. This customary law is stated in awig-awig. If we look at the discussion then it is related to the legal structure, of course there is a connection related to that part of the legal system. The legal system in a state can be referred to as a national legal system in which the national legal system has parts or elements that each function and have a relationship, namely between one part and another. Likewise, there are laws that are part of the customary law community where the customary law community is part of the village which is an institution in the state structure. This then becomes an issue of how the position of awig-awig is in the national legal system. This research was conducted through an analysis of legal facts and legal doctrine, namely the theoretical and statutory approaches. This article is the result of research funded by the university, so it is the outcome product of this research. The discussion in this analysis shows that awig-awig is written customary law, while what is generally understood so far is the unwritten law. In addition, the position in national law is recognized because it is the right of the customary law communities in Bali (adat in Pakraman Village, Bali). In addition, of course, awig-awig can be used as a source of material law, which is a social conception that exists in society, some of which are still applicable and some need conformity.

**Keywords:** Awig-Awig, Customary Law, Written, Legal Resources

### I. Introduction

Village is the smallest part of the state structure. Indonesia in the state structure in accordance with Article 18 of the constitution is divided into smaller regional areas which can be called provinces. The provinces are then divided into smaller areas which can be referred to as districts or cities. In that city area, each city or district is further divided into villages or sub-districts. The village is the smallest institution or level of government. A number of villages in Indonesia have distinctive features which contain traditional elements. One of the elements of custom is customary law. Customary law is a norm or limitations or provisions that become boundaries for the customary village community concerned. Customary law also has certain characteristics, namely, for example, it is distinctive, which is a picture of the community concerned. In addition, there are some experts who say the characteristics of customary law are not written or

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oral. This customary law applies to certain communities or can be called local as well as looking at the concept of the scope of work. Likewise with Pakraman Village, which has a customary law known as awig-awig. This awig-awig is customary law for the Pakraman people. This is still true today (article written). This awig-awig is a characteristic of an area. This is because it applies specifically to that area which is certainly different from other regions. This awig-awig is because it is a norm that is taken in the life of the community so that it is strong in the social elements of the community so that it is thick with the description of the community that is in the scope of customary law. This is what is then seen in the structure of the legal system that the reality of customary law, namely awig-awig, still applies to the indigenous peoples concerned.

One of the elements of this custom is customary law. In the community of Pakraman Bali Village, there are indigenous people in which customary law applies. This customary law is stated in awig-awig. If we look at the discussion then it is related to the legal structure, of course there is a connection related to that part of the legal system. The legal system in a state can be referred to as a national legal system in which the national legal system has parts or elements that each function and have a relationship, namely between one part and another. Likewise, there are laws which are part of the customary law community where the customary law community is part of the village which is one of the institutions in the state structure. This then becomes an issue of how the position of awig-awig is in the national legal system. This research was conducted through an analysis of legal facts and legal doctrine, namely the theoretical and statutory approaches. Analysis is carried out on legal facts to doctrines or theories relating to customary law and the legal system prevailing in Indonesia. Another analysis was carried out in relation to legal facts regarding the prevailing laws and regulations in Indonesia. In the legal system, if you look at the laws in force in Indonesia, it has groups and levels that are also regulated in statutory regulations. Therefore, the analysis is more about normative literature. This is then interested in research because so far it is generally known that customary law is a conception which is then understood as unwritten law. This is because customary law is usually known that the customary law is oral and not written or not even written or not, for example, it only exists on or is located on separate artifacts such as palm leaves, wood or even stone. This article is the result of research funded by the university, so it is the outcome product of this research.

## II. Method

This then becomes an issue of how the position of awig-awig is in the national legal system. This research was conducted through an analysis of legal facts and legal doctrine, namely the theoretical and statutory approaches. Analysis is carried out on legal facts to doctrines or theories relating to customary law and the legal system prevailing in Indonesia. Another analysis was carried out in relation to legal facts regarding the prevailing laws and regulations in Indonesia. In the legal system, if you look at the laws in force in Indonesia, it has groups and levels that are also regulated in statutory regulations. Therefore, the analysis is more about normative literature. This is then interested in research because so far it is generally known that customary law is a conception which is then understood as unwritten law. This is because customary law is usually known that the customary law is oral and not written or not even written or not, for example, it only exists on or is located on separate artifacts such as palm leaves, wood or even stone. This article is the result of research funded by the university, so it is the outcome product of this research.

## III. Main Heading of the Analysis or Results

The legal system has a definition consisting of a system of diction and law. The system has the meaning of a noun which is a device or element which then regularly and there is a connection that has the form of totality or is an orderly arrangement derived from views, principles, theories, and others.<sup>1</sup> The system in this sense means that the system is a relationship that occurs between one thing and another. The relationship between one thing and another as a whole forms a pattern that is continuous and not scattered but organized. If you look at the opinion of Subekti, the system contains the notion of an order or an orderly order, is a whole consisting of many parts, these parts have a relationship between one another which is arranged demanding a pattern or plan to achieve a goal.<sup>2</sup> Subekti's opinion can be interpreted that the system consists of ordered and orderly parts, then these parts have a relationship between one part and another (a relationship), and the relationship between these parts forms a pattern that achieves a

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<sup>1</sup> Badan Pengembangan dan Pembinaan Bahasa . Kementerian Pendidikan dan Kebudayaan Republik Indonesia. 2016. Kamus Besar Bahasa Indonesia (KBBI Online). <https://kbbi.kemdikbud.go.id/entri/sistem>. 18 October 2020. 08.30.

<sup>2</sup> Inu Kencana Syafie, 2003, Sistem Adminitrasi Negara Republik Indonesia (SANRI), Jakarta, Bumi Aksara, p. 2

goal. The legal system besides consisting of a system definition then there is a legal definition. Law has the definition of a whole set of rules or rules in a common life which are the whole rules of behavior that apply in a common life, which can be enforced with a sanction.<sup>3</sup> Thus the legal system has a definition, which is a set of attitudes that are rooted and historically conditioned to the nature of law, legal rules in society and political ideology, organization and operation of the legal system.<sup>4</sup> This means that the legal system is an organized, structured unit consisting of elements or parts that interact with each other and establish cooperation for the interests and goals of unity.<sup>5</sup> The legal system is a description of the whole pattern consisting of parts or elements, parts or elements with respect to the law, which then the parts or elements have a relationship between one another. It also relates to legal matters, the relationship is a pattern or process or plan which then leads to legal objectives. The legal system is generally known to vary depending on the factors that exist in a scope or area that is subject to legal treatment. If you look at the international aspect, there is an international legal system because it connects between countries and the national legal system that applies to each country that is the target of a law.

The national legal system, if you look at the parts of the system, can be divided using certain criteria. One of them is that when viewed from the aspect of its form or form, the law is divided into unwritten law, for example customary law, customary law and written law which is the law set forth in statutory regulations.<sup>6</sup> If we look at the classification of the legal system, namely the law in the aspect of existence, then look at the definition of each classification, then in each classification there is another system which is a small part; from a broader system. For example, in written law there are laws, this statutory regulation has sections, or classifications that have a relationship between one another, which may form a horizontal or vertical pattern. One of them is for example the system of laws and regulations which can be seen in the hierarchical construction of laws and regulations, namely in Article 7 paragraph (1) of Law Number 12 of 2011

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<sup>3</sup> Sudikno Mertokusumo. 2010. *Mengenal Hukum Suatu Pengantar (Edisi Revisi)*. Yogyakarta: Cahaya Atma Pushtaka. p. 49

<sup>4</sup> Inu Kencana Syafii. 2003. *Sistem Administrasi Negara Republik Indonesia*. Jakarta: Bumi Aksara. p. 2.

<sup>5</sup> Sudikno Mertokusumo. 2007. *Penemuan Hukum Sebuah Pengantar*. Yogyakarta: Liberty Yogyakarta. p. 18

<sup>6</sup> Sudikno Mertokusumo. 2011. *Teori Hukum*. Yogyakarta: Universitas Atma Jaya Yogyakarta. p. 166.

concerning the Formation of Legislation. Hierarchical construction in Article 7 paragraph (1) of Law Number 12 of 2011 concerning the Formation of Laws and Regulations has a relationship that is regulated in Article 7 paragraph (2) of Law Number 12 of 2011 concerning the Formation of Laws and Regulations, namely related to strength law adapted to the hierarchy in Article 7 paragraph (1) of Law Number 12 Year 2011 concerning the Formation of Legislation. Even if in general it appeals to a norms of nature, this type of law leads to a more abstract realm even to the philosophical realm, which is also related to the source of law. The source of law is the reason why a law is made, meaning that there is a source relationship, meaning that it is also a part of the legal system.

Law, when viewed in the essence of people's early life, is that as a social norm, law is a cultural product, so even though in the concept of primitive society there is still law.<sup>7</sup> It can be said that if there is a social relationship between humans then there must be a limit or something that becomes a limitation or an action related to the relationship between humans, this limitation can also be referred to as law because it is a guide for how to behave between humans. Law has a classification that influences the legal system. Sudikno Mertokusumo, legal classification when viewed from the aspect or in terms of its form or form, law is divided into unwritten law (customary law, customary law) and written law (law set forth in statutory regulations).<sup>8</sup> Legal classification according to its form is divided into two classifications, namely written law and unwritten law. Written law has a definition as legal rules in the form of written or written down, contained in various forms in the form of statutory regulations. In addition, there are laws that are classified into unwritten legal forms. Unwritten law has the meaning of law that grows together with society that occurs spontaneously and easily adapts to the development of society, develops in society. According to Sudikno Mertokusumo, customary law in the legal classification of form or form aspects is classified into law that has an unwritten form.

The position of customary law in legal science cannot be compared with the classification of law in other legal sciences. This parallel classification is like being

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<sup>7</sup> Peter Mahmud Marzuki. 2018. Pengantar Ilmu Hukum Edisi Revisi. Jakarta: Prenada Media. p. 51

<sup>8</sup> Sudikno Mertokusumo. 2016 . Mengenal Hukum Suatu Perngantar. Yogyakarta: Cahaya AtmaPustaka. p. 166

aligned with constitutional law, then aligned with administrative law and / or alignment between customary law and other legal classifications. Unlike other legal concepts, the concept of customary law has sections which constitute or can constitute other areas of law. For example, customary law has other areas of law, customary law regulates the share of power in the customary sphere, this concept also exists in the concept of constitutional law but is local in nature, for example, customary law regulates the methods of marriage which is also found in the concepts of civil law. This understanding can also be related to the enforcement of customary law where customary law applies to certain areas which are limited to certain areas. Because it applies in a certain place so that the customary law in one area and the customary law in another area is not the same. This is different from other legal concepts such as constitutional law which is general in nature. This is like in awig-awig where there are fields of civil law and others.

Customary law is not a separate legal field. This is because customary law covers one or more other legal fields. This customary law also contains other areas of law. For example, customary law in the Batak community has provisions related to patrilineal marriage, for example honest marriage. The concept of marriage is also known in civil law or in the field of civil law. In addition, for example, if we are familiar with Balinese people, there are customary laws related to marriage, where marriage is allowed if it has an age requirement, which is called *menek bajang*. This is a norms of behavior which provisions are made by the community (namely the Balinese indigenous people) which are then outlined in the form of awig-awig as a guideline for Balinese indigenous peoples. There is also something related to family law, where the concept of family law is a concept of civil law. For example, this is related to the form of singing, namely the withdrawal of a man into the family family of a woman if he is married.

Customary law, when viewed from the term, can be found diction *adatrecht* in the doctrine of customary law. Customary law is a translation of *adatrecht*, but in the realm of customary law doctrine which is a translation of *adatrecht*, it has a different meaning between customary law and *adatrecht*. In fact, there is an acknowledgment that adat law and *adatrecht* have an unwritten meaning but then *adatrecht* has a part which is written law. This means that if we look at the diction of customary law, what we can draw from this definition is that customary law is an unwritten law. Laws called unwritten law are laws that live in society, this is manifested in people's behavior. This unwritten law was

then realized into the actions of the law enforcers. Customary law also often contains religious elements or values. In addition, customary law can also take the form of provisions, namely in a legislative or statutory manner. This awig-awig falls within that sense. Awig-awig as a manifestation of customary law can be included as written customary law.

Awig-awig is a customary law if you look at the characteristics of customary law. If we look at the universal meaning associated with customary law, it can be seen that customary law is a manifestation of the limitation of behavior that exists in people's lives. Awig-awig is a manifestation of limiting behavior for Balinese people. Awig-awig is a customary norm which contains the characteristics of the people in Bali or Balinese society. Customary law, namely awig-awig, is meant to have the characteristics of the Balinese customary community because it is in accordance with the circumstances and habits of the Balinese people. This also applies to people in Bali and does not apply to other communities or other places outside of Bali. Because it is possible if what is formed or normalized in awig-awig is different from something normalized in other customary laws outside Bali. The customary law referred to as awig-awig is manifested in the behavior of the people in Bali. If you look at the characteristics of customary law, these characteristics are found in awig-awig. The customary law formed with the awig-awig product applies to the indigenous people concerned. This means that customary law with awig-awig products applies to certain communities and applies to communities in a certain scope. It also means that awig-awig has communal characteristics, that is, awig-awig has social characteristics, which means it applies to groups of people who are considered as a whole or are seen as something consisting of people and that law applies. Such traits or characteristics attached to awig-awig means that awig-awig has a characteristic that is meant as customary law. This proves that there is a relationship between one person and another. Such public relations mean that there is a characteristic of mutual need between one person and another. This is the basic concept of the law itself. This concept implies that each of these people cannot live independently because there is a desire to socialize with other people so it is necessary to establish relationships with other people. Such a concept makes it even clearer that there is a social concept in everyone's description. Finally, then everyone needs to live in society. Just like awig-awig as a product of customary law, it means that there is an agreement on the results of the



socialization of each of these people, then it produces boundaries that contain mutually recognized values and become guidelines for the scope of the group consisting of these people. This means that awig-awig as customary law applies to people who are members of the Balinese customary community or apply to the objectives of the formation of awig-awig who are members of the community. This means that there is a concept of public interest, namely the social interest which is a communal group, so that there are also characteristics of prioritization of an interest which is the public interest in a community known as indigenous peoples (what is meant here is the Balinese people who are part of the or who are targeted by customary law products awig-awig). This means that the interests in the public name referred to by the community take precedence over the interests of each of these people. The point is that the interests of the community in the group in question (Balinese people who are the targets of awig-awig) are prioritized over the interests of individuals who are members of the customary community.

Awig-awig covers all areas of law, for example, there are fields that are characterized by civil, criminal, or even governance. For example, related to governance or community relations with general matters that become the power of adat, namely related to the *Kawusang Mabanjar* sanction which is a customary sanction related to the citizenship status of the indigenous community concerned for committing a mistake so that the status of that person is dismissed as part of residents of the banjar. This is related to the field of governance law or in general called constitutional law which contains similarities related to citizenship law which specifically relates to citizenship, namely related to the regulation of citizenship status. This can be seen from the objects that are regulated, namely related to citizenship or citizenship status. In addition, for example relating to crime, there are several, for example, relating to the *jiwa danda* which is a sanction in customary law in the form of suffering imposed on both body and spirit. *The Jiwa Danda* also has its types which are its parts. One of them is that there is a sanction *Kalatengan* which is a sanction for someone who has violated customary law by the presence of torture or torture using a tool, namely *lateng* leaves. Other laws in customary law besides being criminalized are also related to the characteristics of civil law. For example, this is related to inheritance related to the distribution of inheritance which is patrilineal in nature. This is also related to layered social status which then affects the provisions that apply to marriage in Balinese custom. This is or there is an element of civility, which is

related to marriage where it can be understood together that marriage is included in a person's civil affairs. The provisions in awig-awig have religious characteristics because the customary sanctions (as well as awig-awig) are based on spiritual or religious values. This is in accordance with the principles or characteristics of customary law which are spiritual norms or have religious elements. This means that the law exists in Balinese society, one of which is awig-awig which is customary law which contains elements in other areas of law. The character of customary law is that in customary law there are elements of other legal norms or other areas of law, this customary law cannot be equated with those other areas of law. This is because customary law covers all fields, not just one field, there are even two or more fields that are different from other laws which consist of one field or only in certain fields. Therefore, it is natural that customary law cannot be aligned with other areas of law because it is universal, the meaning is not universal, applies in general, but universal, it covers various areas of law.

Awig-awig is a written law if it is seen in the manifestation of the norm. This is of course different from the general view that is usually known that what is called customary law in general is oral or unwritten. In contrast to awig-awig there is bookkeeping and is in writing. If you look at the legal source structure, awig-awig as customary law is a written source of law if it is then used as a guideline for regulatory regulations for government in the state structure. This can be understood because the source of law in general is a source of material law and a source of formal law. One of the things that is meant by material sources of law is customary law, namely awig-awig for the community of Balinese law in Pakraman village. Thus the norms in awig-awig customary law can be used as a source of law for regulations which are *regeling* in nature. This, for example, is a source of customary law, namely the awig-awig that becomes a reference when you want to form village regulations or even become a legal consideration or sociological basis for the formation of regional regulations. This awig-awig, as customary law, is recognized as part of the customary law community as regulated in the constitution, namely the 1945 Constitution of the Republic of Indonesia which is the basic law, namely in Article 18B paragraph (2). This means that awig-awig is recognized and applies as long as it is in accordance with the principles of the state because it is again a customary law community which is their traditional right.

#### IV. Conclusion

Based on the results of this research, it can be concluded that the people of Desa Pakraman still need a container in the form of regulations which regulate traditional activities, customary norms so that Awig-Awig is formed as written customary law. Where in the current era of globalization the position of Awig-awig as written customary law still exists and is still obeyed by local indigenous communities, as well as the contents of these awig-awig also adjust to the development of the times so that the existing rules can still have relevance to the current state. The adjustments related to the contents of these awig-awig are inseparable from the appearance of violations against Awig-awig itself. Indigenous peoples generally solve problems related to violations of awig-awig through several stages. Although there are written sanctions in them, indigenous peoples prefer to resolve these violations by means of family relations. The existence of Awig-Awig as written customary law still needs further study, but an important role is needed by the government in supporting awig-awig as a basis for local wisdom as awig-awig has an important role as a guide in current globalization and it is hoped that Balinese people will be able to both understand the importance of applying awig-awig.

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