

PROOF OF THE CRIME OF SUPERNATURAL POWERS IN LAW NUMBER 1 OF 2023 AS A LEGACY OF THE WETBOEK VAN STRAFRECHT

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Abstract

This study examines the regulation of witchcraft offenses in the National Penal Code under Law Number 1 of 2023. Witchcraft, or *santet*, is a supernatural phenomenon involving metaphysical forces intended to inflict physical, mental, or emotional suffering on victims. The study aims to analyze existing legal regulations and evaluate the challenges of proving such cases within Indonesia's legal system. A normative juridical method was applied, with an analysis of legal statutes and relevant legal literature. The findings indicate that Article 252 sanctions individuals claiming to possess supernatural abilities, with penalties of up to 1 year and 6 months imprisonment or a fine of Category IV, with an additional one-third penalty if the act is committed for profit. While legal provisions exist, proving witchcraft offenses remains difficult due to their intangible nature. Approaches such as expert testimony, medical evidence, and technological tools are highlighted as alternatives for improving evidence mechanisms. In conclusion, the effectiveness of legal regulations on witchcraft offenses requires strengthening evidentiary tools and adopting holistic approaches to ensure justice and legal certainty.

Keywords: *Witchcraft; criminal law; proof; national law; metaphysical forces.*

INTRODUCTION

Indonesia is a country that is famous for its very diverse culture with various types of customs and beliefs in each region. Spiritual life in Indonesia is very strong, and has a religion that is a source of morals and spirituality that is considered as part of a tradition that is never abandoned. The condition of high spiritual values makes the belief of the Indonesian people in God and the spirits that live around humans not uncommon in every region with their own cultural characteristics. This belief is not uncommon for people in some regions to have beliefs or even the ability to see things that are supernatural or study witchcraft, for their own interests.¹ There are also many phenomena that people talk about someone who can do occultism. One of the occultism that can be done is causing illness, death, or mental or physical suffering of a person, this occultism is usually called by various terms, namely black magic, *teluh*, spells and so on.²

Black magic is a supernatural phenomenon that involves the involvement of Satan to attack the victim's body, heart, or mind without touching. The impact of this black magic act can cause visible harm to the victim, but is difficult to explain logically or medically. As a result, people who become victims of black magic can suffer and even cause death. The problem of black magic in Indonesia has become a social phenomenon that has sparked protracted debate. Black magic is considered by society as an evil act and has an impact on social instability and harm to society. Black magic is a form of spiritual crime that involves metaphysical dimensions and is a relatively new crime but has long roots. Black magic is considered against the law and should be treated as a criminal act. Black magic can be classified as a criminal act, there are several requirements to determine the act as a criminal act, these requirements are as follows: 1. There must be a human act; 2. The human act is against the law; 3. The act is prohibited by law and is subject to criminal penalties; 4. The act is carried out by a person who can be held responsible; and 5. The act must be accountable to the perpetrator.³ There is a principle in criminal law accountability

¹Putra I Gusti Agung Gede Asmara and AA Ngurah Wirasila. "Legal Review of the Crime of Witchcraft in the Perspective of Criminal Law Reform in Indonesia". *Kertha Negara Journal*/Vol.9 No.2. 2020. p.74.

²Ali Rahamat Alif Al Bukhori, et al. "Sanctions Against Perpetrators of Criminal Acts of Black Magic". *Jurnal Preferensi Hukum*. Vol 2 No.3. 2021. p.455.

³Ariman, Rasyid and Fahmi Raghieb. *Criminal Law*. Malang: Setara Press. 2016. p.60.

that uses Dutch which states *Geen straf zonder schuld*; *Actus non facit reum nisi mens sist rea*, if translated into Indonesian it is "Not punished if there is no fault". This principle is not stated in written law but in unwritten law which also applies in Indonesia. According to the expert opinion of Prof. Moeljatno, SH, a person cannot be held responsible (sentenced to a criminal offense) if he does not commit a crime. However, even though he commits a crime, he cannot always be punished.⁴ Criminalizing a person is not sufficient by proving that the person committed an act that is contrary to the law or against the law, therefore even though the act meets the formulation of a crime in the law and is not justified (an objective breach of a penal provision), it meets the requirements for sentencing. In order for the person to be held accountable, there still needs to be a requirement that the person who committed the act has made a mistake and is guilty (subjective guilt).⁵

One of the reasons behind the existence of regulations regarding black magic itself is because of the community taking the law into their own hands, resulting in chaos and harm to innocent parties. For example, a case that occurred in 2023 in South Tapanuli, North Sumatra, where the house of an elderly couple was damaged by residents, and in August 2023, a resident of Planggaran Barat Village, Banyuates District, Sampang Regency, Madura was hacked to death by a neighbor because he was accused of having black magic. According to the philosophical aspect, black magic is classified as a criminal act because it is recognized and implicitly exists in human life, causing problems and losses.⁶ Previously, it was difficult to punish black magic perpetrators in Indonesia because Indonesia upholds the principle of legality, this is stated in Article 1 paragraph (1) of the old Criminal Code which states that "an act cannot be punished, except based on the power of existing statutory provisions."⁷ In Latin, namely "*nullum delictum, nulla poena sine praevia lege poenali*" it can be concluded that an act can be categorized as a crime must be in accordance with the provisions of applicable laws. In the process of proving black magic, it is also difficult to do because black magic is a mystical thing that has an abstract dimension, it is very difficult to obtain material truth. This is very contrary to legal science, especially criminal law which is of a nature to seek material truth from an act, where the proof must be concrete, existing and real.⁸

Currently, Indonesia has a (KUHP) regulated by Law Number 1 of 2023 concerning the Criminal Code, hereinafter referred to as the National Criminal Code. The basic concept of the National Criminal Code is based on the needs and needs of the state for reform and replacement of the WvS Criminal Code (Wetboek van Strafrecht) which is a legal product of the Dutch colonial government in the Dutch East Indies. The current WvS Criminal Code is considered no longer appropriate to handle existing legal problems that need to be changed. The provisions regarding black magic contained in Article 252 of Law Number 1 of 2023 concerning the Criminal Code are: Paragraph (1) "Any person who claims to have supernatural powers, informs, gives hope, offers, or provides assistance to others that because of his actions can cause illness, death, or mental or physical suffering of a person, shall be punished with imprisonment for a maximum of 1 (one) year 6 (six) months or a maximum fine of category IV. And in paragraph (2) "If any person as referred to in paragraph (1) carries out the act to seek profit or makes it a livelihood or habit, the punishment can be increased by 1/3 (one third)."⁹ Indonesian Nation As a country based on the principle of law, Indonesia has the highest legal rules known as the Criminal Code (KUHP). The main purpose of this regulation is to protect important aspects of society, such as security, peace, welfare, and order. In order to achieve this goal, violations of criminal law are examined and tried, and this is done through the application of criminal sanctions with the main aim of providing a deterrent effect on perpetrators of crimes. By threatening with appropriate criminal sanctions, it is hoped that the community will be encouraged not to commit criminal acts, thus contributing to the creation of a safe and orderly atmosphere in the country.

RESEARCH METHODS

This legal research uses a normative legal study conducted through analysis obtained from library materials such as books, dictates, etc., connected with statutory regulations and the concepts of legal experts as the basis for

⁴Moeljatno. Principles of Criminal Law. Jakarta: Rineka Cipta. 2015. p. 167.

⁵Rosidah, Nikmah. Principles of Criminal Law. Semarang: Pustaka Magister. 2011. p. 40.

⁶Asshidiqie, Jimly. Development and Consolidation of State Institutions Post-Reformation. Jakarta: Sinar Grafika. 2010. p. 135.

⁷Criminal Code

⁸Son of I Gusti Agung Gede Asmara, AA Ngurah Wirasila. "Legal Review of the Crime *Black Magic in the Perspective of Criminal Law Reform in Indonesia*". Kertha Negara Journal Vol.9 No.2. 2020. p. 74.

⁹Law Number 1 of 2023 concerning the Criminal Code

its research.¹⁰ Normative legal research has characteristics, starting from the existence of gaps, ambiguity, conflict, emptiness in norms or legal principles. In this paper, starting from the existence of legal emptiness or legal ambiguity regarding supernatural powers (witchcraft) in positive law, not using hypotheses, and using legal materials consisting of primary legal materials and secondary legal materials. The type of research used by the author in this legal research is normative legal research, namely normative legal research is a type of legal research to find legal rules, legal principles, and legal doctrines with the aim of answering the legal issues faced. Normative legal research is conducted to find solutions to existing legal issues.¹¹

RESULTS AND DISCUSSION

Results

Almost a century the Criminal Code has been in effect in Indonesia, through Law Number 1 of 1946 WvS was enforced with several adjustments and applied nationally through Law Number 73 of 1958. WvS in its development was influenced by the French Penal Code (CP) because the latter country occupied the Netherlands for approximately three years. However, the reception of colonial law also occurred in the windmill country. In some ways WvS is influenced by *French Penal Code* (CP), for example, the teachings on inclusion (*deelneming*) follow the concept developed by the country that colonized it. However, it must be admitted that the Dutch are indeed skilled in drafting laws. The teachings on mistakes (*schulder*) are more advanced compared to those developed in countries that adhere to the common law system such as England and America. *Actus non facit reum nisi mens sit rea* abbreviated as *mens rea* is interpreted as an act does not make a person guilty, unless he mind is legally blameworthy which is a psychological element of a crime, while the psychic element is called *actus reus*. In Dutch law, the psychological element is also interpreted as the ability to be responsible, namely a person's subjective state so that he can be held accountable for the actions he has committed.

To understand the essence of Criminal Law, according to the opinion of WLG Lemaire, Criminal Law consists of norms containing obligations and prohibitions which (by the legislators) have been linked to a sanction in the form of punishment, namely a special type of suffering.¹² And according to Van Hattum's opinion, which defines Criminal Law as a whole set of principles and regulations followed by a state or other legal community, where they are the maintainers of general legal order that prohibits acts that violate the law and that link violations of its regulations with special suffering in the form of punishment.¹³ Pompe defines Criminal Law as the totality of legal regulations that determine what actions are punishable by criminal law and where the criminal law is manifested.¹⁴ From the definition given by Pompe, it can be concluded that the elements of Criminal Law consist of 2 (two), namely the first, in the form of legal regulations that determine what actions are subject to criminal penalties. Second, legal regulations on criminal penalties, their severity, and types, and then how to apply them.¹⁵

Usually people talk about Criminal Law in relation to prohibited acts and the threat of sanctions for the prohibited acts. Moelyatno provides the following definition: Criminal Law is part of the entire law in force in a country, which establishes the foundations and rules with the following objectives: 1. Determining which acts may not be done, which are prohibited, accompanied by threats or sanctions in the form of certain criminal penalties for anyone who violates the prohibition. 2. Determining when and in what cases those who have violated the prohibition can be subject to or sentenced to the criminal penalties as threatened. 3. Determining how the imposition of the criminal penalty can be carried out if there is someone who is suspected of violating the prohibition.¹⁶ Efforts to reform Criminal Law are in the field of Criminal Law Politics. As stated that politically and culturally, the implementation of the Criminal Code (KUHP) in Indonesia is actually not accountable. Although various changes and adjustments have been made to the Criminal Code, this does not make the effort to be called an effort to reform Criminal Law in the true sense and have a Nationalist character. This assertion is because changes to the Criminal Code are not only to replace *Worker's Wetboek* (WvS) becomes the Criminal Code as a product of the nation itself. Criminal Law Reform must touch on philosophical aspects, namely changes or orientations towards the principles to the level of underlying values. Urgency of changes to the Constitutional Code-The Criminal Code (KUHP) is

¹⁰Zainuddin Ali, *Legal Research Methods*, Sinar Grafika, Jakarta, 2009, p. 26

¹¹Peter Mahmud Marzuki, *Legal Research*, XVIIth Edition, Kencana Prenada Media Group, Jakarta, 2022, p. 95

¹²PAF Lamintang, *Basics of Indonesian Criminal Law*, Sinar Baru Publisher, Bandung, 1984, p. 1

¹³PAF Lamintang, *Basics of Indonesian Criminal Law*, Sinar Baru Publisher, Bandung, 1984, p. 1

¹⁴AZ Abidin and Andi Hamzah, *Introduction to Indonesian Criminal Law*, Publisher Yarsif Watampone, Jakarta, p. 1

¹⁵AZ Abidin and Andi Hamzah, *Introduction to Indonesian Criminal Law*, Publisher Yarsif Watampone, Jakarta, p. 1

¹⁶Moelyatno, *Principles of Criminal Law*, Bina Aksar Publisher, Jakarta, 1983, p. 1

based on political, practical and sociological considerations.¹⁷ As for political reasons, namely as an independent country, it is natural that the Republic of Indonesia has a Criminal Code that is nationalistic in nature. The task of lawmakers to nationalize all laws inherited from the colonial era and these efforts must be based on Pancasila as the source of all sources of law. The practical reason is based on the fact that there are increasingly fewer Indonesian law graduates who are able to understand Dutch and its principles.-legal basis. Sociological principle, where the Criminal Code contains a reflection of the cultural values of a nation. The Wetboek van Strafrecht (WvS) is not yet in accordance with the needs of society.

Discussion

Internationally, a number of countries have banned witchcraft and sorcery. To date, research on these laws has focused primarily on Africa and Melanesia. In its history, the Indonesian Criminal Code began with the enactment of Law No. 73 of 1958, which stipulated that Law No. 1 of 1946 concerning Criminal Law Regulations, with amendments and additions, was intended for all of Indonesia, the material criminal law stated in the legislation became uniform, namely intended for the entire country, because of this, changes and additions were needed which were made by the law, which were arranged in its parent law, namely in force on March 8, 1942, which according to Article VI of Law No. 1 In 1946, from its official name "Wetboek van Strafrecht voor Nederlandsch-Indie" it was changed to "Wetboek van Strafrecht", which can also be called the "Criminal Code" so that the Criminal Code can be used throughout the archipelago. In the preparation of the Wetboek van Strafrecht, which is included in the famous collection of Engelbrecht's law books, published in 1939, therefore there have been no changes and/or additions by the pre-federal government.

This can lead to a "black magic problem" – that is, as seen by locals, witches or sorcerers deserve to be killed, but when locals try to do this, they are sometimes arrested. From this perspective, black magic practitioners are protected by law, while those who cleanse their area of 'evil' are punished. Historically, several pre-colonial, customary, colonial and modern state regimes have attempted to address this 'problem' through law. The most recent attempt in Indonesia, the 'witchcraft' provision in the Draft Criminal Code which has now been ratified through Law Number 1 of 2023 concerning the Criminal Code, which will come into effect 3 years after its ratification, namely in 2026. With the aim of avoiding the problems associated with proving supernatural things by focusing on confessions. However, in the process the Criminal Code has not been ratified even though it has been drafted for years. If Law Number 1 of 2023 has been efficiently implemented, the advantage of relying on confessions is that it eliminates the need to prove supernatural things. The disadvantages are that confessions are rare; witnesses may not want to testify about confessions; confessions will occur to something that cannot be seen, the police may be too eager to ensure confessions, and the proposed punishment will be considered insufficient if it is believed that black magic has actually been done.

Significant insights into how anti-witchcraft and anti-witchcraft laws function in a number of countries can be gained from the existing literature. However, little has been written about the proposed provisions in the Draft Criminal Code to make black magic illegal. By making the admission of witchcraft illegal, the provision attempts to address the problem of providing evidence of the supernatural. However, as I will show, if adopted in the Criminal Code (Law No. 1 of 2023), the reliance on admission in the black magic provisions would be problematic in itself. To do this, I first consider the legislative experience of witchcraft in other countries. I then provide an overview of the history and practice of witchcraft, sorcery and shamanism in Indonesia. I then explain what I call the 'black magic problem', using my fieldwork as a case study. In Banyuwangi Regency, the perception of witchcraft and sorcery is a serious everyday problem. As a result, violence against, and even murder of, sorcerers sometimes occurs.

The problem that the author identifies is that locals believe that their actions are justified, even though they are illegal under state law. The situation in Banyuwangi is not unique. Rather than attempting to create laws and procedures that would protect the victims of this violence, the response of legal experts and legislators has been to propose a law that would allow for the prosecution of sorcerers and witches. The author then provides some historical context for the proposed law against black magic, looking at customary law and the responses of both colonial and modern states to the problem. The author then outlines the provisions for sorcery in the draft law in Indonesia, noting the advantages and disadvantages of relying on confessions in the draft law. As this paper has shown, meeting the need for legislation against sorcery and witchcraft will be difficult. Before proceeding, some definitions are necessary. Defining supernatural phenomena is complex in the Indonesian context. In general, what can be termed 'supernatural' practices and beliefs are widespread in Indonesia. However, the specific practices and beliefs about

¹⁷Soedarto, Law and Criminal Law, Alumni Publisher, Bandung, 1981, p. 70

sorcerers or witches and what they do vary among the many cultural groups found across the archipelago. However, authors will use the phrase 'black magic' to refer to magic that is illegal or socially unacceptable. Usually, magic that is not accepted is magic that causes bad luck. However, in some societies, dangerous magic may be used legitimately in certain contexts. It would be useful if the term 'black magic' was used only to refer to illegitimate knowledge and not specifically to harmful knowledge. Following Evans-Pritchard's (1937) usage¹⁸, it is common among anthropologists to refer to people who are thought to have actively acquired the ability to practice black magic as 'witches'. For people who are thought to be born with the ability to practice black magic, the term witch is used. One problem with this definition is that not all beliefs about magic and witches fit into the definitional box that I have created. There will always be problems with definitions, but without them, it is impossible to proceed with this research. These definitions tend to be useful when discussing Indonesian societies (with the possible exception of Melanesian societies in West Papua) so in this thesis I refer to practitioners of black magic as 'witches' if the ability is thought to be innate and 'dukun' if the ability is acquired (rather than innate).

The experience of many colonized societies suggests that the absence of laws criminalizing witchcraft was sometimes seen as a problem. Among the Lozi in Northern Rhodesia in the 1940s, for example, it was reported that, when confronted with a witch, the local courts felt 'powerless ... when confronted with what to their members was a patent criminal protected by British law' (Gluckman, 1955)¹⁹. The Bimin-Kuskusmin people in PNG also felt that the nearby Oksapmin people were attacking them with sorcery, but they 'could no longer carry out revenge attacks on the Oksapmin, because the government had banned warfare' (Zelenietz, 1981).²⁰ In Cameroon, 'The state emerged as an ally of witches in the eyes of its population, both rural and urban. It was seen as prohibiting the use of poisons, protecting witches, and punishing anti-witch practitioners' (Rowlands and Warnier 1988).²¹ Among the Navaho of North America: White courts refused to recognize the existence of witchcraft... The 'witches' were therefore in a very advantageous position for indirect extortion-they were feared but almost immune from punishment, since white government agencies did everything in their power to prevent the killing of witches (Kluckhohn, 1944).²² Thus, state law can empower the 'witch' in relation to her accusers. In some cases, colonial states in Africa and Melanesia enacted laws against witchcraft, and similar steps are being taken in these regions today. Apart from Vanuatu, as noted by Forsyth (2006)²³:

All forms of magic or witchcraft are violations, as follows:

1. Cook Islands (Crimes Act 1969, section 165); :

"Witchcraft - Everyone commits an offense and is liable to imprisonment for a term not exceeding six months who pretends to exercise or use any kind of witchcraft, sorcery, enchantment or conjuration, or undertakes to tell fortunes."

"Witchcraft - Any person commits an offense and is liable to imprisonment for a term who pretends to perform or uses any kind of magic, enchantment or sorcery, or attempts to tell fortunes."

2. Nauru (Queensland Criminal Code 1899, section 432);

"Pretending to Exercise Witchcraft or Tell Fortunes Any person who pretends to exercise or use any kind of witchcraft, sorcery, enchantment, or conjuration, or undertakes to tell fortunes, or pretends from his skill or knowledge in any occult science to where discover or in what manner anything supposed to have been or lost may be found, is guilty of a misdemeanor, and is liable to be punished with hard labor for one year."

"Pretending to Use Sorcery or Fortune Telling Whoever pretends to use or employs any kind of sorcery, witchcraft, charm, or witchcraft, or pretends to tell fortunes, or pretends to use his skill or knowledge in any occult art to discover where or by what means anything alleged to have been stolen or lost may be found, is guilty of an offence, and is liable to imprisonment with hard labour for one year."

3. Niue (Niue Act 1966 (NZ), s 199) (repealed, by amendment on 20 September 2007);

¹⁸Evans-Pritchard, E.E., 1937, *Witchcraft, Oracles and Magic among the Azande*. Oxford: Clarendon Press.

¹⁹Gluckman, M, 1955, *The Judicial Process among the Barotse of Northern Rhodesia*. Manchester: Manchester University Press, p. 159

²⁰Zelenietz, M, 1981, 'Sorcery and Social Change: An Introduction', 8 *Social Analysis* 3.

²¹Rowlands, M and Warnier, JP (1988) 'Sorcery, Power and the Modern State in Cameroon', 23(1) *Man* 118.

²²Kluckhohn, C (1944) *Navaho Witchcraft*. Boston: Beacon Press.

²³Forsyth, M (2006) 'Sorcery and Criminal Law in Vanuatu', 2006 Edition *LAWASIA Journal* 1.

“Every person is liable to imprisonment for a term not exceeding 6 months who pretends to exercise or use any kind of witchcraft, sorcery, enchantment, or conjuration, or undertakes to tell fortunes.”

“Any person who pretends to perform or uses performs or uses any kind of sorcery, sorcery, enchantment, or sorcery, or attempts to tell fortunes.”

4. Tokelau (Crimes, Procedure and Evidence Regulations 2003, r 65);

“Witchcraft - A person who pretends to exercise or use any kind of witchcraft, or undertakes to tell fortunes, commits an offense.”

“Witchcraft - A person who pretends to practice or uses any magic, or divination, commits an offence.”

5. Canada (Canada Act (RSC 1985), Section 365) (repealed, by amendment on 13 December 2018);

“365 - Everyone who fraudulently

(a) pretends to exercise or to use any kind of witchcraft, sorcery, enchantment or conjuration,

(b) undertakes, for a consideration, to tell fortunes, or

(c) pretends from his skill in or knowledge of an occult or crafty science to discover where or in what manner anything that is supposed to have been stolen or lost may be found, is guilty of an offense punishable on summary conviction.”

“365 - Any person who fraudulently

(a) pretend to do or use any kind of magic, witchcraft, sorcery, or spells,

(b) carry out, with a view to gain profit, fortune-telling, or

(c) who pretends by his skill in or knowledge of magic or sorcery to discover where or by what means something supposed to be stolen or lost may be found, is guilty of an offence punishable by summary imprisonment.”

Furthermore, under the State of Papua New Guinea's 'Witchcraft Act', those accused of witchcraft (Article 20) can be imprisoned (Zorn, 2006)²⁴, despite calls to repeal this law (Arnost, 2012)²⁵. Few scientific studies are available on the implications of these laws. Reflecting on witchcraft laws in Melanesia, Forsyth (2006)²⁶ argues that traditional systems transplanted into state legal systems ‘without due regard’ to procedural and evidential issues are doomed to failure. Only one case in Vanuatu has ever been tried under witchcraft law and this was unsuccessful. However, he suggests several options for how witchcraft could be effectively criminalised. These include allowing evidence such as divination, although this may be unacceptable to most judges. Another option is to hand over jurisdiction to customary courts, although the penalties they impose are often at odds with state law. Alternatively, the need to prove witchcraft could be removed; for example, the offence could be that a person ‘acted in a way that would reasonably cause members of his community to believe that he was practicing witchcraft.’ Another way to bring witchcraft cases to trial would be to allow belief in witchcraft as a mitigating factor in cases against defendants who had attacked or killed witches. However, the biggest stumbling block in Papua New Guinea and Vanuatu to prosecuting witches, as identified by Forsyth (2006)²⁷ and Zorn (2006)²⁸, is that judges are usually “positivists” who are unwilling to accept laws against black magic.

There is also information about laws against black magic from Africa. In Cameroon, the implementation of anti-witchcraft laws has been plagued by pragmatic problems. During colonial times, cases of witchcraft were brought to court. But the courts dismissed them due to lack of evidence against the accused. After being acquitted,

²⁴Zorn, JG (2006) 'Women and Witchcraft: Positivist, Prelapsarian, and Post-Modern Judicial Interpretations in PNG', in A Whiting and C Evans (eds), *Mixed Blessings: Laws, Religions, and Women's Rights in the Asia-Pacific Region*. Leiden: Martinus Nijhoff.

²⁵Arnost, M (2012) 'Calls for End to PNG's Sorcery Act', Radio Australia, 24 October 2024 <www.radioaustralia.net.au>.

²⁶Forsyth, M (2006) 'Sorcery and Criminal Law in Vanuatu', 2006 Edition LAWASIA Journal 1.

²⁷Forsyth, M (2006) 'Sorcery and Criminal Law in Vanuatu', 2006 Edition LAWASIA Journal 1.

²⁸Zorn, JG (2006) 'Women and Witchcraft: Positivist, Prelapsarian, and Post-Modern Judicial Interpretations in PNG', in A Whiting and C Evans (eds), *Mixed Blessings: Laws, Religions, and Women's Rights in the Asia-Pacific Region*. Leiden: Martinus Nijhoff.

the victims often sued the accused for defamation and won their cases. The unites in these terms the practices of traditional healers, anti-witchcraft specialists, and also 'true' witches (cited in Rowlands and Warnier, 1988).²⁹ Using the same colonial laws, in 1980, the State Court in Cameroon began again, punishing witches with heavy prison sentences (up to ten years) and fines, without any clear empirical evidence - all that was required was the statement of a *nganga* (healer) who had 'seen' the accused leaving their bodies at night to perform pernicious practices (Geschiere, 1998).³⁰ Even when witchcraft cases have been brought to court, problems relating to evidence have often rendered existing laws 'disappointing and even counterproductive' (Geschiere, 1998)³¹. Given these examples, it is hard to see how Indonesia's experience in passing laws against witchcraft could be any more positive.

Magical beliefs and practices can be found throughout Indonesia, as a review of research in this area shows. First, beliefs and practices related to spirits are widespread. The Bugis ethnic group originated in Southwest Sulawesi, but has spread to various regions in Southeast Asia (Linton, 1975)³². In a migrant community around Lake Lindu in Central Sulawesi, they have achieved political, economic, and cultural dominance as traders. Rituals provide an opportunity for the Bugis not only to win the spirits' favor but also to show off their wealth and rank, and to attract followers (Acciaioli, 2004)³³. The Wana, shifting cultivators of Sulawesi, struggle against centrifugal forces that they perceive as socially and psychologically disruptive. Disease is caused by parts of one's soul flying away, especially as a result of 'small feelings'. Social disintegration is caused by the spread of shifting cultivation. In the *mabolong* healing ritual, shamans negotiate 'with hidden powers on behalf of their community' (Atkinson, 1987)³⁴. Shamans were essential in the struggle to keep society and the world together. Belief in witches was also common. Among the Korowai, cannibalistic witches attacked lone victims, usually 'near relatives', who had unknowingly suffered the calamity. To this day, grieving survivors sometimes act on an accusation by ambushing and killing the witch outright, or by capturing and tying her up for transport a day's journey to a lesser third party, who then gather to execute the witch and eat her body (Stasch, 2001)³⁵.

These killings become a source of anxiety, trauma, and horror (Stasch 2001)³⁶. Secretive or clandestine actions (such as theft, adultery, and witchcraft) are considered immoral, while anti-witch actions are 'considered justified by the witches' unprecedented violence'. Killing witches asserts human control over them. Those who eat witches then take revenge on the witches' kinship groups by throwing sago feasts and giving them brides. The violence of killing and eating witches turns witch violence into something positive. However, the police respond in different ways. In one case, a witch killer and his accomplices were arrested and tortured by the police. While the killing and eating of witches is a transaction and turns witch violence into something positive, this police violence is seen as 'deep'. In Balinese Hinduism, *Rangda*, the widowed witch, is a mythological figure. Her mask is kept in the village death temple and she is considered the Queen of Witches. Her alleged followers are ordinary witches (*leyak*) who are believed to derive their powers from *Rangda*. The witches are usually neighbours or relatives of the victim. Typically, they do not identify themselves but are divined through *séances*. Shamans are sometimes suspected because they have esoteric knowledge, and women are especially suspect. If they outlive their husbands or children, and even their grandchildren, as sometimes happens, they may be held responsible for their deaths (Stephen, 2000)³⁷. In addition, women were thought to have a natural tendency to become witches because of their ritual pollution (disgust), especially as a result of menstruation (Ruddick, 1989)³⁸. Magical power is also enhanced by utilizing dangerous (magical) sources of ritual power (Hay, 2005)³⁹. Among the Javanese, who inhabit much of Central and East Java, belief in witchcraft is also common. Conducting research in the 1950s in Pare, Geertz encountered a number of shamans. Geertz also noted that witchcraft in Java 'tends to be practiced on neighbours, friends, relatives

²⁹Rowlands, M and Warnier, JP (1988) 'Sorcery, Power and the Modern State in Cameroon', 23(1) *Man* 118.

³⁰Geschiere, P (1998) 'Globalization and the Power of Indeterminate Meaning: Witchcraft and Spirit Cults in Africa and East Asia', 29 *Development and Change* 811.

³¹Geschiere, P (1998) 'Globalization and the Power of Indeterminate Meaning: Witchcraft and Spirit Cults in Africa and East Asia', 29 *Development and Change* 811.

³²Linton, J (1975) 'Pasompe "Ugi": Bugis Migrants and Wanderers', 10 *Archipel* 173.

³³Acciaioli, G (2004) 'From Economic Actor to Moral Agent: Knowledge, Fate and Hierarchy among the Bugis', Indonesia

³⁴Atkinson, J.M. (1987) 'The Effectiveness of Shamans in an Indonesian Ritual', 89(2) *American Anthropologist* 342.

³⁵Stasch, R (2001) 'Giving up Homicide: Korowai Experience of Witches and Police (West Papua)', 72(1) *Oceania* 33.

³⁶Stasch, R (2001) 'Giving up Homicide: Korowai Experience of Witches and Police (West Papua)', 72(1) *Oceania* 33.

³⁷Stephen, M (2000) 'Witchcraft, Grief, and the Ambivalence of Emotions', 26(3) *American Ethnologist* 711.

³⁸Ruddick, A (1989) 'Parallel Worlds: Healers and Witches in a Balinese Village', 8 *Contributions to Southeast Asian Ethnography* 25.

³⁹Hay, MC (2005) 'Women Standing between Life and Death: Fate, Agency and the Healers of Lombok', in L Parker (ed), *The Agency of Women in Asia*. Singapore: Marshall Cavendish.

and other fairly close acquaintances... The Javanese do not accuse outsiders of being witches. Again, the shamans do not 'identify themselves; that is, they do not declare themselves openly.' Having looked at some of the literature on beliefs in witchcraft, black magic and sorcery in general, at the time of writing this study, we wish to concentrate on the elite in Indonesia. As Slaats and Portier observe, magical belief and practice 'are by no means confined to simple, illiterate villagers'. In North Maluku, for example, decentralization, high levels of corruption and the perception of increasing use of witchcraft among politicians are closely linked. This is evidenced by the death of a political candidate named Muhammad in 2003.

"Muhammad headed a group lobbying for the creation of a new district and contested elections for the provincial parliament. Suffering from a potbelly, he was diagnosed with hepatitis but it was suspected that it was due to sorcery. This sorcery was attributed to Abdul, a close associate of Muhammad and one of the founders of the lobbying group. Apparently, "Muhammad's wife suggested that disputes over political and financial support" had driven Abdul to "turn to sorcery." In the same period, the deaths of two other politicians were attributed to sorcery. 'Sorcery', along with 'corruption,' were centrally depicted as practices that ostensibly hindered the realization of an ideal regional democracy. Sorcery was also a social technology – a tool of bureaucratic politics. Although sorcery and corruption were considered evil, individuals felt compelled to use it because others who practiced sorcery trapped people in a moral economy where patronage and suspicion fed off each other."

Another example of the elite use of sorcery is seen in the use of shamans by academics. In Indonesian universities, salaries are low, so candidates seek higher positions. Competition is fiercer, especially for wet or 'basah' positions (which give you access to funds that can be transferred) than for dry or 'keringin' positions (which do not). Scholars use shamans to gain supporters; these supporters will then be protected if the position is obtained. Meanwhile, clients seek successful supporters and their loyalty will be rewarded. Shamans are also used to harm others. In this way, sorcery is used to gain important academic positions. Research shows that judicial officials and legal experts also fear sorcery. One researcher reported a situation where a judge and his staff suspected that one of his staff had bewitched another person. The views of legal expert and professor of law at Airlangga University, Professor Weda, echo those gathered by the authors in the field. He wrote that 'the existence of sorcery in the face of the fact that it is difficult to prove this act can be seen, concluding that only prayer can defeat the attack of black magic'.

The widespread belief in black and white magic in Indonesia described in this section provides the context for the discussion of the black magic issue in the following section. Put simply, the basis of the problem is that, as Nitibaskara notes, 'there is a marked gap between the general public's perception of the 'reality' of black magic and the current legal procedures that... deny its existence. For the 'general public', there are two problems. First, local people believe in the reality of black magic, but the state cannot help them. Second, if they take action against the witches, they may end up in jail.' To illustrate the belief in the reality of black magic in more detail, the author draws on an example from previous research conducted in 2001–2002 in the interior of Banyuwangi Regency. This is the easternmost regency on Java, Indonesia's most populous island. In the pre-colonial era, the Banyuwangi region was known as Blambangan. This kingdom was incorporated into the Dutch colonial territory in the late 19th century and became part of the Indonesian state after independence. Following the fall of President Suharto in 1998, similar violence broke out again. In 1998 alone, around 100 people accused of being black magic sorcerers were murdered in Banyuwangi, East Java.⁴⁰ One of those who was imprisoned for the murder that occurred that year gave written testimony (somewhat confusing) to the researcher. Like the source, let's call him Asnawi, 35 years old, [from] Laban Asem ..., profession assistant bus driver, four children, Kabat District. Putting people who want to be killed by the community in protective custody, and [sic.] the source has received a letter from the Police that they want the source to put this person in protective custody. Because he was allowed to return, in the end he returned, and the source reported him again to the Police, he was not punished by the officers and ordered by the Police to be killed, why was the source, the person who put him in protective custody, sentenced to seven years? Is such a law appropriate and when the trial took place there were no suspects (?) and no evidence, how could the Banyuwangi Prosecutor's Office dare to sentence someone who was not guilty. In short, the problem of witchcraft is that because of fear for their lives, locals often take action to kill local witches or shamans. The state cannot provide formal protection for those who fear witches; instead, witches are considered 'protected' by laws prohibiting murder. The absence of laws against

⁴⁰Heriman, 2006.

witchcraft was seen as a deficiency, even among educated urban communities such as legislators and law enforcers. Before proceeding to an analysis of how contemporary jurists have dealt with this perceived deficiency, the author considers how other normative systems have dealt with black magic.

In pre-colonial Indonesia, witchcraft appears to have been prohibited. Historical evidence for this includes 'one of the oldest surviving legal texts in Southeast Asia', the Kitab Agama (Religious Book). In it, a small section prohibits witchcraft, stating that it is punishable by death for the perpetrator, his parents, children and grandchildren, and confiscation of his assets. Furthermore, a diary of a soldier at the Javanese court in the late 18th century records accusations of witchcraft. However, little can be concluded from these two sources. Another possible normative source for action against sorcerers and witches is adat. This term usually refers to the customary practices of cultural groups in Indonesia. Adat includes, among other things, ritual, art, law and marriage. Adat was largely unwritten and informal until the 19th century, when Dutch scholars began to record and codify it. These records seem to indicate that witchcraft was officially prohibited. One record from the 1890s reports that:

"In the Barbar Islands [sic. Babar Islands, between Timor and New Guinea], the inhabitants may beat a witch and her adult family members to death. Such an act will occur after it has been discovered, through witchcraft, that the witch has caused disease ... in others ... Among the Galela [Sulawesi] and Tobelore [Halmahera] ... Witches are killed and their bodies thrown into the sea.

During the Dutch colonial period of New Guinea (now known as West Papua), in 1964, it was reported that a female witch: would undergo one ordeal after another. Usually she participated voluntarily. She would be taken to a certain place and made to drink the sap of a type of liana [a woody vine found in tropical forests]. Then she was made to walk and dance. Most of those who underwent such treatment would start vomiting after a while, which was evidence of guilt. Eventually she would die or be killed. Those who did not vomit or die were considered innocent."

The justification for violent behavior against shamans in the customary system is as a 'necessary reaction to acts of witchcraft that threaten society, and in accordance with traditional moral and normative standards'. However, adat as the author has previously described is not relevant to the killing of 'shamans' in Banyuwangi described here for three reasons. First, there is no customary record from Banyuwangi that regulates the killing of shamans. Second, gossip condemning shamans with black magic, and the formation of ad hoc groups to kill them, in contemporary Banyuwangi is informal and, often, spontaneous. This is in contrast to the formality of customary law recorded by scholars. Third, the mention of adat by the village head quoted above is an exception; locals rarely acknowledge the existence of adat or anything similar in their villages. Having considered adat, the sources for normative systems, the author now turns to the state system.

Initially, the laws and courts for the Dutch were separate from those for the 'natives'. In other words, the Dutch attempted to create a colony in Indonesia that was legally pluralistic; Europeans were subject to Dutch law, and 'natives' were subject to customary law. Dutch East India Company (Vereenigde Oost-Indische Compagnie or VOC) During the Dutch colonial period, the legal system in Indonesia was pluralistic. Europeans were subject to Dutch law, while natives were subject to customary law. The VOC administered the colony until 1800, when it was taken over by the Dutch government. Courts for Europeans and natives remained separate, in contrast to the more centralized British colonies. Since 1918, a single criminal code has been applied to all, although procedural laws have remained different. Customary law was only applied in certain civil cases and in limited areas, but not in cases of witchcraft, which were often rejected by Dutch judges. Colonial judges presided over local Western-style courts, referring to the Dutch interpretation of custom, with the power to override it using a reluctance clause. This clause allowed customary law to be annulled if it was contrary to human values, although it was ultimately applied more as the rule than the exception. Judges consistently protected those accused of witchcraft and punished those who committed acts of violence against them:

It was not the practitioners of witchcraft who were tried, but those who violently opposed them, and thereby broke the law. They were charged with offences under the Criminal Code... most of the judges, who were Dutch, with western moral values and trained in western law, abhorred what they considered an inhumane and senseless attack on an innocent victim. In short, while customary law may have prescribed the killing of a 'witch doctor', this was not accepted by the colonial legal system.

The pluralistic formal legal system of the colonial government was perceived by many as contradictory to nationalist aspirations. Therefore, one of the biggest changes from colonial law to post-colonial or independent law

was the attempt to provide a uniform judicial system. The general opinion is that, apart from this, the legal system in practice has not undergone significant changes. In other words, the criminal law in force in Indonesia today is largely based on Dutch law. Contemporary criminal legislation in Indonesia only deals with witchcraft indirectly. As Slaats and Portier explain: If the relationship between witchcraft and law in Indonesia is discussed in the context of the formal legal system of the state, the story is much shorter, because there are practically no regulations governing witchcraft. There are no direct references to witchcraft and sorcery in colonial law, or in the current Indonesian legal code, and only a few indirect references. Indirectly related to witchcraft are two existing laws. Both are inherited from colonial law. Article 545 of the Criminal Code states that fortune-telling and dream-telling are illegal:

- (1) Anyone who earns a living by predicting someone's fate, whether by fortune telling or by interpreting dreams, is subject to a maximum imprisonment of six days or a maximum fine of four thousand five hundred rupiah.
- (2) If at the time of committing the violation less than one year has passed since the criminal penalty for the same violation was imposed, the penalty may be doubled.

Article 546 makes giving amulets and granting immunity illegal:

- (1) Threatened with imprisonment for a maximum of three months or a fine of up to four thousand five hundred rupiah:
- (2) Anyone who sells, offers, gives, distributes or has for sale or distribution amulets or items which the person concerned says have supernatural powers;
- (3) Anyone who teaches knowledge or supernatural powers which are intended to create belief that people can carry out actions which do not endanger themselves.

It should be noted that there is not a single article that implies the existence of supernatural things. The law is only aimed at those who sell, teach, or offer powers or sell objects that are claimed or accused of being supernatural objects. Apart from these two articles, there are no legislative provisions that recognize the existence of magic, let alone black magic, in the criminal or civil law of the Republic of Indonesia. A number of legal experts have suggested that strict provisions be made to prosecute perpetrators of black magic (*santet*). However, in reality, efforts to bring black magic shamans (black magic practitioners) to court are clearly difficult to do. This is because among the several laws and regulations in the Criminal Code, none are appropriate for bringing black magic perpetrators to court. To overcome this problem, a provision against black magic and black magic has been proposed and a draft is included among hundreds of other provisions in the Criminal Code (Law Number 1 of 2023) which is made under the auspices of the state.

Because there is no attres mitigating indentin coin in Colo has a period in various drafts, and various revisions, the Draft Criminal Code has not been adopted. The current revision is the responsibility of the People's Representative Council (DPR), the Regional Representative Council (DPD), and the People's Representative Council usually do not identify themselves or confess. Whether because they consciously hide their status or because they do not really believe that they have it, suspected witches rarely confess. Second, even if confessions do occur, it may be difficult to obtain evidence from a witness, which is another practical weakness in the draft law. The third problem is epistemological. From a Western empirical perspective, you cannot confess to the impossible. It is possible to confess to theft, but it is difficult to see how someone can confess to something that is witchcraft, if 'witchcraft' is understood to be impossible. The fourth problem is a legal problem. In many cases, confession does not constitute a crime, but, like motive, witness or expert testimony, fingerprints, and so on, confession is only evidence of a crime. If someone confesses to something they may have done, such as stealing the crown jewels, this is generally not enough to prove that a crime has been committed. Even if a thief openly confesses to stealing the crown jewels, or a witness can testify to the confession, this does not mean that the theft has occurred or that the confessor is guilty. Innocent people confess to crimes for a variety of reasons. This is in contrast to the third problem, which concerns confessing to something that, in the empirical tradition, is impossible. If we admit the reality of witchcraft, then it is clear that confessing to witchcraft is not the 'problem', but rather the particular people who cause misfortune and death. In other words, the local community also wants someone who uses witchcraft but does not confess to it to be punished. The provisions make confession a criminal act in itself, but 'confessing', 'informing' or 'representing' as a witch or sorcerer is not a problem for the local community. What is a problem for the local community is that witch doctors and sorcerers, they say, kill people. The fifth problem lies in the social context in which the provisions would apply. The problems with the police in Indonesia are largely anecdotal. The extremely low acquittal rate,

combined with widespread reports of police corruption and brutality, makes one think that there is a possibility that police may be coercing confessions from defendants. In other words, the law seems to rely on a 'professional' police force, which is currently still doubted by many in Indonesia. The final point is that if the accused does cause death, the maximum sentence of five years seems insufficient. In comparison, the current provisions governing premeditated murder (Article 340) stipulate a maximum sentence of life imprisonment or 20 years. In this case, the law that focuses on confessions does not get to the heart of the problem. The draft Criminal Code has been criticized for being 'not firm enough or rather vague' and for 'not being able to cover all practices of witchcraft'. Therefore, the second approach to the problem of black magic is to propose a law that directly prohibits black magic. To improve the draft law, a legal expert, Barda Nawawi suggested that the wording be changed to: Anyone who offers or provides assistance to cause death, or mental or physical suffering of another person by claiming to have black magic, sorcery, or other supernatural powers.

Here, the wording of 'providing assistance to cause death' in the revision seems to imply that an act of sorcery has taken place. If this is the wording of the sorcery provision that ultimately occurs, then it would theoretically be possible to punish someone who intentionally stabs a victim to death with a knife while claiming to 'possess sorcery'. In this hypothetical scenario, one might ask whether it is the stabbing or the words a person utters while doing so that constitute the crime. If it is the stabbing, then other provisions in the criminal code would already be able to cover this. If it is the words of the perpetrator that are stabbed, then we are back to the same problem as the previous draft provision, which relied on what a person "states" rather than what they do. The casual connection between speech and death is not established in this wording so it does not seem to get any closer to dealing with the supernatural. Therefore, this particular revision of the draft law is not necessarily more capable of covering 'sorcery practices'. The 'strengthening' and 'stipulation' in Law Number 1 of 2023 concerning the Criminal Code to be more precise actually has the effect of returning to the original problem. The magic believed in by local people is based on the idea of invisible supernatural powers, while western law demands empirical evidence (Slaats and Portier, 1993: 34, Zelenietz, 1981)⁴¹. Considered essential, laws against witchcraft were continually proposed, discussed, and recommended, but no amount of discussion could overcome the insurmountable contradiction. The state was ill-equipped to deal with witchcraft because, although it was thought to own and control the natural world, it lacked formal jurisdiction and reliable means to deal with the supernatural.

CONCLUSION

Legislative rati rather than proving the argument of supernatural powers in Law Number 1 of 2023 as a legacy of the Wetboek van Strafrecht based on the fact that many communities, witches or sorcerers are considered to actively cause misfortune to others. In response, local residents often take violent action against practitioners of black magic. Legislators in various jurisdictions have considered this a 'problem'. Trying to address it, they have introduced laws that make black magic illegal. Such laws have generally proven inadequate to solve the 'problem'. Generally, these laws have failed not because, for example, they have been struck down by the Supreme Court, but rather for more pragmatic reasons related to the lack of evidence in cases involving suspected witches or sorcerers. While the courts tend to demand visible evidence, black magic is considered to operate through invisible means. Indonesian lawmakers have attempted to introduce a new Criminal Code (Law No. 1 of 2023) to replace the previous Criminal Code (Law No. 1 of 1961) as a legacy of the Wetboek van Strafrecht with provisions that make witchcraft and black magic illegal. By emphasizing the confession of the perpetrator as evidence of black magic, the provisions seek to avoid the evidentiary problems that have plagued Anti-Witchcraft and Anti-Witchcraft Laws elsewhere. The new Criminal Code of 2023, referred to as Law No. 1 of 2023, adopted with the witchcraft provisions as they are, has one advantage and several disadvantages for law enforcement. The advantage is that confessions, as empirically verifiable events, are acceptable in the western jurisprudential tradition. The disadvantage is that witches usually do not confess and if a witch does, it is difficult to get witnesses. Furthermore, it is difficult to see how someone can confess to something that does not exist from a western empirical perspective; a confession is evidence of a crime but does not constitute a crime. The police can force confessions and, the five-year sentence is insubstantial compared to the popular perception of the seriousness of the crime that is supposed to be committed. Even if proper provisions against witchcraft and sorcery could be enacted, these provisions may not be very effective in stopping action against suspected witches and sorcerers. For example, although there are provisions prohibiting theft in the Criminal Code, in one area of Indonesia, thieves who are caught red-handed are often beheaded in Indonesia. In the same way, even if shamans and witches can be tried, this will not stop local people from killing them. Through comprehensive with

⁴¹Zelenietz, M, 1981, 'Sorcery and Social Change: An Introduction', 8 Social Analysis 3.

various countries in other parts of the world, supernatural powers, namely magic and black magic, have been declared illegal, but it has proven difficult to bring most of them to court, and when the case is brought to court, the court faces problems with evidence, in order to prevent a legal vacuum, a legal product has been formed through Law Number 1 of 2023, but the effectiveness of this legal product has been achieved. That the proof of criminal acts of black magic or black magic is essentially difficult to prove. However, by using the guidelines of Article 184 of the Criminal Procedure Code, namely by prioritizing expert testimony, it is expected that the expert testimony is a paranormal who knows more or less about the ins and outs of supernatural powers, but in an effort to reform Indonesian criminal law, namely in the Draft Criminal Procedure Code relating to the crime of black magic, more emphasis is placed on offering services using supernatural powers. That to provide further contributions related to the crime of black magic is to use expert testimony, both black magic experts, testimony from doctors related to the victim, how to use technological media, and indicative evidence.

Through Law Number 1 of 2023, or what is known as the Indonesian Criminal Code which has been enacted with provisions on supernatural powers similar to those that already exist, namely through Article 252 of the Criminal Code which is a preventive offense (prevention), the court can avoid the problems of evidence that exist in laws prohibiting black magic in other places, but will face several different problems. Therefore, based on case studies in Indonesia in general, it will confirm that courts that use the concept of western-style evidence usually cannot handle black magic problems in an effective manner for law enforcers who believe that black magic exists. The obligation to carry out a free and impartial trial process is a provision that has been formulated in various conventions which basically contain principles including: Presumption of innocence; Equality before the law; Principle of legality; *Ne bis in idem* (double jeopardy); The principle of non-retroactivity, unless there is a change from the accused that mitigates it. In several cases of supernatural power practitioners that occurred in Banyuwangi Regency, law enforcement officers should use a social approach or a moral approach in order to fulfill a sense of security and justice in the community, so that anarchic actions against people suspected of being witchcraft perpetrators can be avoided. Intensive counseling through *da'wah* media so that the community implements the provisions of their religion correctly, should be continuously carried out by law enforcement officers in coordination with religious leaders and community leaders. Thus, witchcraft perpetrators can be minimized in carrying out their activities, either of their own free will or at the behest of others in abusing or killing their victims with their supernatural powers.

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