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POLICY REVIEW FOR THE FORMULATION OF TRADITIONAL LAW IN THE 2023 KUHP

(Philosophical And Penal Policy Perspective)

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Abstract

An interesting issues in the 2023 Criminal Code is the accommodation of living law with a meaning limited to customary law as formulated in Article 2 Paragraphs (1), (2), and (3). This research aims to review or examine it in perspective philosophical and criminal law policies regarding the formulation of Customary Law in Article 2 Paragraphs (1), (2), and (3) of the 2023 Criminal Code. This research uses a normative or doctrinal juridical approach, with data sources from library materials, in the form of statutory regulations and literatures related to research. This research raises problems: 1). What is the validity of the meaning of customary law as customary law in Article 2 Paragraph (1) of the 2023 Criminal Code? 2) . How to analyze the formulation of Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the Criminal Code 2023 from a philosophical perspective? and 3). How to analyze the formulation of Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the 2023 Criminal Code from a criminal law policy perspective? The results of the research are : there is invalidity in the formulation of the meaning of customary law as only customary law, there are irregularities in the formulation of customary criminal law in Article 2 Paragraphs (1), (2), and (3), where customary offenses are made criminal offenses in Regional Regulations, both from a

philosophical and criminal law policy perspective, so that reformulation of Article 2 Paragraphs (1), (2), and (3) is needed.

Keywords
Review, Policy, Custom, Criminal Code.

Introduction

Entering the beginning of 2023, the Indonesian people, especially academics and criminal law practitioners, feel relieved by the presence of Law Number 1 of 2023 concerning the Criminal Law Code, which to replace the Dutch of the Criminal Code (Wetboek Van Strafrecht/WvS), which is effective in Indonesia until now. The urgency to create the 2023 Criminal Code emerged since the proclamation of Indonesian independence, starting with the issuance of Law Number 1 of 1946 concerning Criminal Law Regulations as the rules for enforcing the Criminal Code (WvS). The Law Number 1 of 1946 made several changes to suit the conditions of the Indonesian people after leaving Dutch colonial rule.[1] The Criminal Code (Wvs) is a Dutch derivative of the Criminal Code created in 1881, which came into effect in the Netherlands in 1886, and came into force in Indonesia on January 1, 1918. With Principles of concordance then The Criminal Code (WvS) applies in Indonesia. The principle of concordance is actually the principle for enforcing criminal regulations for Dutch people who are outside Holland, especially in their colony.[2]

If we examine the Criminal Code (WvS) philosophically, looking at the criminal rules and principles that color the formulation of its articles in Book I on General Rules, Book II on felonies, and Book III on misdemeanors, it can be said that the formulation is obsolete (*obsolete*). The Criminal Code (WvS) relies on the principle of formal legality adhered to by adherents of legalism, where law is only interpreted as statutory rules, so that

[1] Ni Putu Yulita Damar Putri and Sagung Putri M.E. Purwani, "Urgensi Pembaharuan Hukum Pidana Di Indonesia," *Jurnal Kertha Wicar* 9, no. 8 (2020).
[2] Faisal Faisal and Muhammad Rustamaji, "Pembaruan Pilar Hukum Pidana Dalam RUU KUHP," *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)* 10, no. 2 (July 30, 2021): 291, doi:10.24843/JMHU.2021.v10.i02.p08.

all rules of behavior that are outside the law, such as society's habits in passing laws and resolving conflicts as customs which live, grow, and dead in society for generations are not recognized as law. The principle of formal legality focuses on legal certainty and juridical justice. It justice based on the text of the law, not substantive justice which is contextual in nature. This situation often creates an imbalance/gap between the Criminal Code (WvS) and the need for a sense of substantive justice in society. Not only the principle of formal legality, the values that characterize the Criminal Code (WvS) also become a problem when the Criminal Code (WvS) is applied to cases where there is a conflict between the values of legal certainty, expediency and justice. This inequality originates from the legal values that underlie the Criminal Code (WvS) such as liberalism, individualism and capitalism, meanwhile the Indonesian nation adheres to religious and collective or communal values. These differences in values have an impact on criminal law enforcement in Indonesia. The Indonesian nation, which has a communal character such as being tolerant, easy to forgive, high in solidarity, is faced with Ducth criminal law which has a liberal, individual and capitalistic character. Here, legalism which is very rigid, interprets the law as *Lex Dura Sad Tamen Scripta,* wherein law is only interpreted as written rules.[3]

The 2023 Criminal Code is a response to the need of Indonesian society to have criminal law that is in accordance with the values of Indonesian life, religious values and communal values that are crystallized in Pancasila. By focusing on the principle of balance as the juridical basis of Indonesian philosophy, which is taken from the core of Pancasila, that shapes balance in the relationship between humans and their God (religious balance), the relationship between humas and themselves and others (humanity balance), as well as the relationship between humans and society and universe (social balance). The core balance of Pancasila values is manifested in the 2023 Criminal Code in the form of a balance of punishments, as follows: 1. The balance between public interests, The State interests and individual interests. 2. The balance between protection of

[3] Muhammad Alwan Fillah, "Politik Hukum Dalam Pembaruan Kitab Undang-Undang Hukum Pidana (KUHP) Di Indonesia," *VARIA HUKUM* 5, no. 1 (January 23, 2023): 52–64, doi:10.15575/vh.v5i1.23230.

public, social interests, the interests of perpetrators of criminal acts through criminal individualization, and the interests of victims (*victims of crime)*; 3. The balance between objective elements/factors (actions/outwardly) and subjective factors (people/inner thoughts/inner attitudes) in ideas *daad-dader strafrecht* ; 4. The balance between formal and material criteria; 5. The balance between legal certainty, flexibility, elasticity or flexibility and justice"; 6. The balance between national values and global/universal values; 7. Balance between human rights (human rights*)* and human obligations (responsibility capacity / human responsibilities). 7. The balance between warmaking on crime and peacemaking on crime approaches, because criminal acts are a product of social structure.[4]

One of the most prominent Indonesian things is the recognition and accommodation of the living law as a source of criminal law that formulated in Article 2 Paragraph (1), as *preleasing* the principle of formal legality. It is accommodated by the principle of material legality, meaning that customary law (the living law) is used as a source of law to determine acts that are not regulated in the 2023 Criminal Code, but in society, especially indigenous communities, are declared as acts that can be punished. It is logical that the 2023 Criminal Code is claimed to be the Indonesian Criminal Code, recognizing and accommodating living law as a source of legal and justice values that were born, grew and developed with the Indonesian nation. As a legal ideal, the legal values contained in the laws that exist in Indonesia should color the content of every Indonesian law and regulation, especially the Criminal Code which regulates individual behavior in public life, by criminalizing acts that not desired by society, in as well as i with rules for administering punishment that are not rigid (*rigid*) which are based on values - values of law and justice of the Indonesian nation. The culture of the Indonesian nation which is full of communal values gives birth to an attitude of self-centeredness, non-individuality, solidarity and respect for human rights and human obligations as a manifestation of the principle of monodualism/principle of balance which has been integrated in Indonesian human behavior.

[4] Mudemar A. Rasyidi, "Menuju Pembaharuan Hukum Pidana Indonesia," *Jurnal Mitra Manajemen* 12, no. 1 (2021): 1–10.

Soediman Kartadipradja said that the expression of the content of the soul of a nation appears in its culture, culture which is an expression of the soul of the nation concerned, in sculpture, painting, literature, dance, and also in its laws. In the legal field, we want to use it as a legal measuring tool, strictly speaking Indonesian customary law is part of our nation's culture which, according to **Van Vollenhoven** "is disappearing into the darkness of the past". Customary law, which is an expression of the soul of the Indonesian nation, is a spiritual heritage or ancestral spiritual inheritance that has been passed down from generation to generation to express the path towards justice in human relations.[5]

The living law which is formulated in 2023 Criminal Code is interpreted in a closed way *(*closed interpretation) as customary law, as stated in Elucidation of Article 2 Paragraph (1) that "the law that lives in society is **customary law** which determines that someone who commits a certain act deserves to be punished. The laws that live in society in this article relate to unwritten laws that are still valid and developing in society in Indonesia. To strengthen the implementation of laws that exist in the community, **Regional Regulations** regulate the **Customary Crimes** ". Explanation of Paragraph (2) that " In this provision, what is meant by applicable in the place where the law lives is that it applies to every person who commits a customary crime in that area. This paragraph contains guidelines for establishing customary criminal law, the validity of which is recognized by this Law." Explanation of Paragraph (3) that "Government regulations in this provision are guidelines for regions in establishing laws that live in society in Regional Regulations".

If you look closely at the Explanation of Article 2 Paragraph (1) then what is meant by customary law is unwritten customary law which is still valid and developing in Indonesia which regulates customary criminal acts. Because it is not written, the Regional Regulation regulates customary criminal acts. Explanation of Paragraph (2) is a guideline in determining customary criminal law whose validity is recognized by the 2023 Criminal Code, thus not all customary laws are recognized by the 2023 Criminal

[5] Soediman Kartahadiprodjo, *Pengantar Tata Hukum Di Indonesia* (Jakarta: Pembangunan Publisher, 1973).

Code according to Paragraph (2), and the Explanation of Paragraph (3) will be the existence of a Government Regulation as a guide for regions in establishing living law (customary law) in Regional Regulations (Perda).

Referring to the Explanation of Article 2 Paragraphs (1), (2), and (3), if studied philosophically and in penal policy, there are juridical weaknesses that will conflict with each other, where instead of recognizing and accommodating customary law as living law, it actually distorts the law. custom itself, with the formulation of the colonial model in formulating the enactment of customary law through the formulation of customary offenses in regional regulations, it can be said that there is a re-colonization of customary law formulation, so that a policy gap appears pidama law, which ultimately gives rise to problems:

1. What is the validity of the meaning of customary law as customary law in Article 2 Paragraph (1) of the 2023 Criminal Code?
2. What is the analysis of the formulation of Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the 2023 Criminal Code from a philosophical perspective?
3. What is the analysis of the formulation of Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) 2023 Criminal Code in criminal law policy perspective?

Method

This research aims to study or review the validity of the narrow meaning of customary law as formulated in Article 2 Paragraphs (1), (2), and (3) of the Criminal Code 2023, as well as the oddities in the model formulation of customary criminal law which will be outlined in regional regulations in policy studies criminal law.

The research used a normative juridical approach or doctrinal research, which used primary data in the form of legal materials with a qualitative approach to obtain and use information related to policy formulation customary law in the Criminal Code 2023.

This research is of a descriptive type with the aim of to obtain an overview of how customary law is formulated in the 2023 Criminal Code,

especially customary offenses based on the perspective of criminal law philosophy and policy.

In normative juridical research or doctrinal research, data is collected by literature study, in the form of : legal materials, books, journals and other literature related to philosophy and customary law and policy formulation in legislation.

Data analysis in this research was carried out by method descryptive analytical, in accordance with the scope of discussion, namely the validity of the meaning of customary law in the 2023 Criminal Code, philosophical analysis and criminal law policy in Article 2 Paragraphs (1), (2), and (3), Criminal Code 2023.

Result and Discussion

This research has result that it is needed validity of meaning on living law which is closely interpreted and formulated as customary law only in Article 2 Par (1), (2), and (3) in The 2023 KUHP. In addition Article 2 par (1), (2), and (3) need reformulation as only the rule of recognition to create customary law effective not to formulate customary law in national regulation or regional regulation. There are some weaknesses in formulation Article 2 Par (1), (2), and (3) in either in philosophical or criminal law policy perspectives which is provided in sub topics of discussion below.

A. Validity of The Meaning Living Law As Customary Law and Its Position In the System National Law

a.1 Validity of The Meaning Living Law As Customary Law and Its Position In the System National Law

Law reflects the common conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin. There is an organic connection of law with the being and character of the people...Law growths with the growth and strengthens with the strength of the people, and finally dies away as the nation loses its nationality. All forms of law – customary law, statutes and juristic law—are the product of the legal consciesness of the people, which is the underlying law-creating force in society. Law is found, not made. These views were

captured by notion that law is a reflection and product of the volksgeist, the spirit of people.[6]

Referring to the opinion of **F.Karl Von Savigny** quoted by **Brian Z Tamanaha** above, the law as *volkgeist* (soul of the people) is a reflection of the shared consciousness of society, where law emerges and develops and dies with society when society loses its nationality. All forms of law, whether customary law, statutes or legal regulations, are the product of society's legal awareness, where the power underlying the creation of law resides in society, so that in fact the law is found (in society) not created. **Von Savigny**'s view is captured based on the idea that law is a reflection and product of the soul of society (*volkgeist/spirit of people).* In this case, the type of law that is deeply imbued with the soul of the community is customary law (*customary law*) which originates from the original cultural values of the community, which lives and breathes with with the spirit or soul of the community.

Eugene Erlich says that "Law consists of the rules of conduct followed in everyday life – the customary practices and usages which give rise to and maintain the inner ordering of associations (the family, village community, corporation, business association .. etc). This is the living law : Law is essentially a form of social life.[7]

Law as a rule of behavior in everyday life in the form of customary practices and habitual use that arise to preserve the inner order in social relationships (families, village communities, corporations, and business associations and others), this is what is called customary law, which in essence forming law as a form of social life. **Eugene Erlich** interprets customary law (the living law) in a broad sense, in the form of habits carried out in behavior, which includes conflict resolution as carried out in everyday life both in village community families, corporations and business associations.

What is meant by habit? What is contained in a habit? And how can a behavior be accepted as a habit?Habits are social norms, which according to **Utrecht** are actions according to patterns of behavior that are fixed, steady, common, normal or customary in the life of a particular society or social

[6] Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press, 2001), doi:10.1093/acprof:oso/9780199244676.001.0001.

[7] D.J. Galigan, *Law as Social Rules* (Oxford: Oxford University Press, 2006).

life. Habits are also actions that are carried out repeatedly in society, and habits are always carried out repeatedly because they are felt to be something that they should be, and deviations from them are considered as violations of the laws that live in society, then a legal custom arises which by society lives in society is seen as law.[8]

Ontologically, customary law is a set of social rules determined by legal awareness and the needs of society (*werkelijkheid*) which are obeyed. According to **H.L.A Hart** as quoted by **Satjipto Rahardjo,** the role of habits is very prominent in societies with primary obligation rules, where the required behavioral guidelines are still very simple and are sufficiently regulated by norms. basic, both in content and form, where these norms are very close to reality in everyday life.[9]

Customary law exists in social society side by side with legal society, where legal society is organized by statutory law and social society is organized by customary law. In its application in society, customary law and statutory law do not cancel each other out because both are statements and forms of the principles of law and justice according to human views and abilities. If state law embodies its principles through sovereign power, while custom embodies justice and public benefit through approval and acceptance of public opinion from society as a whole which is accepted by public consciousness. Therefore, statutory law should be formulated in accordance with customary law.[10]

Fitzgerald provides conditions for habits to be accepted as customary (law) by society, namely: [11]

First, the eligibility requirement (makes sense or appropriateness) with the principle that habits that do not meet the requirements must be abandoned (Smooth intestine abolendus est). Here, customary authority is conditional in its application, that is, it depends on its conformity to measures of justice and public benefit. In other words, the validity of habits is not absolute. This requirement is emphasized by **Vinogradoff** that

[8] Theresia Ngutra, "Hukum Dan Sumber-Sumber Hukum," *Jurnal Supremasi* 11, no. 2 (2016).
[9] Satjipto Rahardjo, *Ilmu Hukum* (Bandung: Citra Aditya Bhakti, 2012).
[10] Ibid. Hal. 116
[11] Yules Moses Urasana, Adonia Ivonne Laturette, and Pieter Radjawane, "Perlindungan Hukum Terhadap Hak Masyarakat Hukum Adat Setelah Berakhirnya Hak Guna Usaha," *BAMETI Customary Law Review* 1, no. 1 (July 23, 2023): 26–40, doi:10.47268/bameti.v1i1.9904.

practices in everyday life are guided by considerations of give - and - take in the traffic of relationships between people and work together between people who are makes sense.

Second, there is recognition of the truth of a custom, here the enactment of customs is followed by society openly, without relying on power and approval by the society whose interests the habit accommodates. This is manifested in the form of norms that are adhered to by users, where habits must be not by force, not secretly, and also not because they are desired (*nec vi nec clam nec precaire*).

Thirdly, habits become established because they are formed over a long period of time, so habits must have a historical background beyond which it is no longer possible to recognize how and where they came from.

Thus, habits are patterns of behavior that are fixed, steady, common, normal in a particular society or social life, in a narrow environment such as a village, and in a broad environment such as a country. When behavior that is permanent and steady is repeated, which is then institutionalized and has normative power so that it is binding, repeated by many people in a community where there is the power to bind other people to do the same thing, therefore giving rise to a belief or awareness that it is appropriate to do it, and the assumption arises that that is how it should be, this is where customary norms emerge (*die normatieve Kraft des Facktischen*).

Changing habits into norms or customary law requires the following conditions:[12]

1. Material requirements, namely the existence of a series of the same actions and lasting for a very long time (*longa et inverata consuetido)*;
2. Intellectual requirements, namely that the habit must give rise to a general belief (*opino necessitatis*) that the action is a legal obligation. This belief is not only about its constancy but the belief that it should be so or that it should be, which is objectively appropriate as a legal obligation.

[12] Allya Putri Yuliani, "Peranan Hukum Adat Dan Perlindungan Hukum Adat Di Indonesia," *Jurnal Hukum Dan Ham Wara Sains JHHWS* 2, no. 9 (2023).

Sanctions as legal consequences if customary law is violated. (Sudikno Mertokusumo,)

a.2 Customary Law and Its Position in the National Legal System

Customary law from linguistics is a translation of *"adat recht"* which was first introduced by Snouck Hurgronje in the book *De Atjehers* in 1893 where the term customary law was then used by van VollenHoven as the discoverer of customary law and author of the book *Het Adatrecht van Nederlands Indie.* Van Vollenhoven defines customary law as the rules that apply to indigenous people and eastern people foreign, which on the one hand has sanctions (so it is said to be law) and on the other hand it is not codified (so it is called custom). Meanwhile Ter Haar interprets customary law as a whole a rule which is manifested in the decisions of legal functionaries who have authority (*macht, authority*) and influence, its implementation is valid and fulfilled wholeheartedly. Soepomo identified customary law as unwritten law, not in the form of a law (unstatutory law), including regulations that exist even though they are not stipulated by the authorities (state officials), after all, it is obeyed and supported by the people based on the belief that these regulations have the force of law.[13]

Relying on the definition of customary law from several experts above, it can be concluded that customary law is the totality of legal rules which are manifested in the decisions of authoritative legal functionaries (in customary courts), not codified or in the form of laws, in unwritten form, has sanctions which are obeyed and supported by the public's belief in complying with them based on propriety and are believed to have the force of law. So as a law that is not written, customary law gets its legitimacy through the decisions of customary functionaries in resolving customary offenses, as is the case common law in England. This definition of customary law will be used as a standing point *(*stand point) in discussions regarding customary law in this research.

Customary law, which is an expression of the soul of the Indonesian nation, is a spiritual heritage or ancestral spiritual inheritance that has

[13] Jenny Kristiana Matuankotta, "Pengakuan Dan Perlindungan Hukum Terhadap Eksistensi Pemerintahan Adat," *SASI* 26, no. 2 (June 4, 2020): 188, doi:10.47268/sasi.v26i2.305.

been passed down from generation to generation to express the path towards justice in relations between humans. The statement of the content of the nation's soul is seen in its culture, culture which is an expression of the soul of the nation in question, in sculpture, painting, literature, dance, and also in its laws. In the field of law, we want to use it as a legal measuring tool, strictly speaking Indonesian customary law is part of our nation's culture which according to Van Vollenhoven "disappeared into the darkness of the past".[14]

In the national legal system, customary law is not included in the Sequence of Legislative Regulations, however its position as law is recognized and guaranteed by the constitution, as formulated in Article 18 B Paragraph (2) of the 1945 Constitution of the Republic of Indonesia, that "The state recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in law ".

If we base it on the opinion of Werner Menski , that " law is everywhere as a social phenomenon based on cultural foundations, which dominant positivist approach has unsuccessfully tried to ignore in order to prevelege the state.[15] Although interpreting law everywhere is a social phenomenon based on cultural foundations, which cannot be ignored by positivists who value law.

F. Karl Von Savigny as quoted by Werner Menski, emphasized " law was inevitably part of the culture of a people", law as part of the culture of society. In turn it is transformed into the soul of the people *(*folkspirit or volkgeist) which in the end will form the nationality of a nation, as it is said that:

"any particular system of law was a reflection of this folk spirit, law as the manifestation of the common consciousness. Custom as the first manifestation of a people's spirit, so that any form of legislative law

[14] Wihelmus Jemarut, "Pendekatan Rule of Reason Dan Per Se Illegal Dalam Perkara Persaingan Usaha," *Widya Yuridika: Jurnal Hukum* 3, no. 2 (2020): 377–84.
[15] Werner Menski, *Comparative Law in Global Context (Legal System of Asia and Africa)* (Cambrigde: Cambridge University Press, 2006).

should always take into account a people's popular consciousness. No official law should be made which would violate local customary norms and the value system of the subjects. Any legislation must be harmonized with what the people concerned feel is right and wrong, so legislation is subordinate to custom. It must at all times conform to volkgeist".[16]

The legal system is interpreted as a reflection of community consciousness, where customary law is the first manifestation of the community spirit, so that all legislative products must always take into account the awareness of the community spirit which is manifested in the form of customary law. No official law may be made in violation of customary law norms and customary legal value systems, so that every legal regulation must be harmonized with the community's sense of right and wrong, in this way the law is subject to customary law, and at all times must be in accordance with the spirit of the people as stated in customary law. Savigny further said that the judge's sole duty is to enforce the customary law adhered to by the community, because law is a function of the soul of the nation/society. The function of law is as the soul of the nation, therefore customs (*custom*) that develop in society become the main source in the formation of law.[17]

Customary law as the soul of the Indonesian nation is crystallized in Pancasila, therefore customary law should be the main source in forming laws and regulations in Indonesia. The position of customary law in the national legal system is as the main source and original legal material whose values must be accommodated in the formation of legislative rules in Indonesia, where every legislative rule in Indonesia must be based on awareness (*consciousness*) of the Indonesian people which is institutionalized in customary law which has been agreed upon by the community from generation to generation as the ideal value system as desired by the Indonesian people.

B. Rule of Recognition Functionalization of Customary Criminal Law in National Legal Order

[16] Ibid. Hlm 91.

[17] William J. Chambliss and Robert B. Siedmen, *Law, Order and Power* (London: Addisom Wesley Publishing Company, 1971).

The customary laws of each ethnic group in Indonesia applied without problems until the Dutch came to Indonesia bringing the Principle of Formal Legality as a manifestation of the teachings of legism or positivism in implementing the law. The teaching of legism or positivism is a teaching that only recognizes written rules as law. Therefore, criminal law which is based on the Principle of Legality is criminal law which only determines whether or not an act can be punished and must be based on written law or legislation which must exist before the act occurs. So the legal sources recognized in implementing criminal law are only sources of written law or statutes. The consequence is a prohibition on analogies in applying criminal law, and eliminating the legitimacy of the existence of customary law as an unwritten rule.

Thus, customary law as customary law, most of which is not written, according to the view of legism which is manifested in the principle of legality, is not recognized as law. In the context of criminal law, the legal rules that applied to regulate people's behavior at that time were the Criminal Code (*Wetboek Van Strafrecht)* , which was initially based on the principle of concordance only applicable to Dutch people who were in Indonesia, but eventually it was It was gradually implemented for all Indonesian residents, namely after the independence of the Indonesian nation, through Law Number 1 of 1946 concerning Criminal Law Regulations for the Entire Territory of the Republic of Indonesia, with changes made to several articles adapted to Indonesian conditions. The enactment of the Criminal Code (WvS) was then strengthened by the unification of the application of the Criminal Code to the entire population of Indonesia with Law Number 73 of 1958 concerning Declaring the Applicability of Law no. 1 of 1946 concerning Criminal Law Regulations for All Territories of the Republic of Indonesia.

In the history of applying customary law after the arrival of the Dutch to Indonesia, it was not easy. The arrival of the Dutch and their presence in Indonesia for three centuries not only colonized Indonesia socially, politically and economically, but also colonized Indonesian customary law, which had been institutionalized centuries before the Dutch arrived, namely by being "put to sleep" or extinguished.

In the realm of criminal law, the Netherlands applies *Wetboek Van Strafrecht* with the principle of legality as a representation of the legal teachings of legism or positivism that developed in mainland Europe. This legalism teaches legal scholars in Indonesia, judges, and other legal officials to think that law is written rules, so that law is only statutory rules, customary law does not have legitimacy to be accommodated and applied in resolving criminal acts. Law enforcement, especially criminal law, is only based on the sound of the law, where the basis of reasoning is *syllogism* , which is drawn from the major premise and minor premise, so that the conclusion is certain and easy to predict, where the judge is only the mouthpiece of the law. -law (*La Bouche de la loi)* or as a statutory machine *(subsumptie automaat)* in enforcing criminal law, this is where legal certainty emerges in implementing criminal law, which establishing juridical truth and justice. In conditions like this, customary law as unwritten customary law which contains legal values and material justice has no place to apply because it is not recognized as law.

If seen from its essence, basically customary law as original law born from national culture which contains the noble values of a nation applies by itself, and does not require legitimacy based on written legal rules to enforce it. However, with the existence of the principle of formal legality in the Criminal Code brought by the Dutch, which has become ingrained in the enforcement of criminal law in Indonesia, the consequences for unwritten customary law are that the legitimacy of its validity in its own homeland is lost, unless there are written legal rules that give life as the basis for enforcing it or often referred to as the rule of recognition *(the rule of recognition*) for the application of customary law.

Specifically for the material criminal law that has been in effect in Indonesia since January 1 1918 for all European, indigenous and Eastern Foreign groups, is the Criminal Code or *Wetboek van Strafrecht voor Nederlandsh Indie* (stb. 1915 – 732), so it is practical Since the implementation of WvSvNI for all groups, customary (criminal) law cannot be applied, except by written rules as rules that recognize and accommodate the application of customary law (*rule of recognition*).

Historically, the enactment of customary law during Dutch rule was based on the rule of recognition (*rule of recognitian*) in the form of Article

131 *I.S* (*Indische Staatsregeling*) Jo Article 11 *Algemene Bepalingen van Wetgeving*. Meanwhile *Indische Staatsregeling* (IS), among other things, determined that: [18]

1. The law that applies to European groups is European criminal law based on the principle of concordance;
2. The law that applies to indigenous groups is customary law in unwritten form, where the application of customary law is "not absolute" and if necessary can be regulated in special regulations (ordinances);
3. The law that applies to the Foreign East group is their customary criminal law (Article 11 AB). (CFG Sunaryati Hartono, Analysis and Evaluation of Dutch Colonial Legacy Legislation, BPHN, 2015, Jakarta).

Article 131 IS as the basis for the application of customary law during the Dutch East Indies period determines that for the European group the law that applies is the law that exists in the Netherlands (based on the principle of concordance), for the Foreign East group the law that applies is their own law, and for the Indigenous group the law that applies what applies is customary law. However, if social interests require it, European law can apply across groups. This implementation is hereinafter referred to as submission to European law, either completely or only partially.[19]

With Article 131 I.S above, the application of customary law is not determined by customary communities but by the Dutch East Indies Government. This is stated in point 2 above that the application of customary law is not absolute, so it can be said that customary law cannot be enforced by itself, even though Article 131 I.S was created as a rule of recognition of customary law, but only as *rule of recognition* not to apply customary law. This is emphasized in point 2 that "if necessary, it can be regulated by special regulations (*ordonantie*)".

Meanwhile, Article 11 *Algemene Bepalingen van Wetgeving* (A.B) determines that for groups of indigenous people the judge will apply the religious laws, institutions and customs of the indigenous people

[18] Sunaryati Hartono, *Analisa Dan Evaluasi Peraturan Per-UUan Peninggalan Kolonial Belanda* (Jakarta: BPHN, 2015).
[19] Ibid.

themselves, as far as the laws and institutions are concerned. and this custom does not conflict with generally recognized principles of decency and justice, and also if European law applies to indigenous people or the Indigenous person concerned has submitted himself to European law.[20]

Article 11 AB is not clearly and unequivocally a rule of recognition in the application of customary law as a source of law for natives, because it is combined with religious law and other institutions, and is seen from the subject of the law, namely the native people for whom determined that European law applies to him or an indigenous person who submits himself to European law then customary law does not apply to him, even though he is a customary community that should be subject to customary law.

The application of customary law to indigenous groups creates problems, considering that customary law in Indonesia is very diverse according to ethnicity, social, culture and religion. Along with efforts to instill colonial ideology, 3 theories were used in implementing customary law during Dutch colonialism, namely:[21]

1. The theory *Receptio in complexu* , put forward by Van den Berg where customary law follows the religious law adhered to by the indigenous community.
2. *Receptie theory* put forward by Snouck Hurgronje and C.Van Vollenhoven, emphasizes that Islamic law will apply effectively among Muslims, if Islamic law is in line with customary law in Indonesia, meaning that the laws that apply in Indonesia to natives are not based on Islamic teachings, but on local customary law.
3. *Receptio a Contrario/ Receptie exit* was put forward by Hazairin, stating that the law that applies to society is religious law, where customary law only applies if it does not conflict with religious law.

After Indonesian independence, the enactment of customary law was based on the 1950 Provisional Constitution, namely Article 32, Article 43 Paragraph (4), Article 104 Paragraph (1), Article 14, Article 13 Paragraph

[20] Ibid.

[21] Felishela Erlene and Tundjung Herning Situbuana, "Tanggung Jawab Negara Terhadap Hak Masyarakat Adat Di Pulau Rempang Dalam Perspektif HAM," Jurnal Tunas Agraria 7, no. 2 (2024): 144–61.

(32), and Article 16 Paragraph (2).The contents of each article are as follows[22]:

- Article 13 Paragraph (2)
  Against his will no one can be separated from the judge, which is granted to him by the rules of law in force.
- Article 14
  1. Every person who is charged because he is suspected of committing a criminal incident has the right to be presumed innocent, until his guilt is proven in a court hearing, according to the applicable legal rules, and he is given at that hearing all the guarantees that have been determined and are necessary for his defense.
  2. It is said that no one may be required to be punished or sentenced, except because of a legal rule that already exists and applies to him.
  3. If there is a change in the legal rules as stated in the paragraph above, then provisions that are better for the suspect are used.
- Article 16 Paragraph (2)

Trespassing on the grounds of a residence or entering a house against the will of the person who occupies it is only permissible in cases stipulated in a legal regulation that applies to it.

- Article 32

Everyone in the country must obey the laws, including unwritten legal rules, and the authorities.

- Article 43 Paragraph (4)

The authorities supervise that all religious associations and associations comply with the law, including unwritten legal regulations.

- Article 104 Paragraph (1)

All court decisions must contain the reasons and in cases of punishment state the statutory rules and customary law rules that are used as the basis for the sentence.

In the history of the return of the Republic of Indonesia, the Provisional Republic of Indonesia Law was no longer applied, but returned to the 1945 Law, thus *the rule of recognition* based on the articles of the

[22] Saiful Anam, "Fungsi Hukum Adat Dalam Pembentukan Peraturan Perundang-Undangan Di Indonesia," *JOURNAL IURIS SCIENTIA* 1, no. 2 (July 31, 2023): 72–82, doi:10.62263/jis.v1i2.18.

1950 UUDS was not applies. With Indonesia's return to the 1945 Constitution, *the rule of recognition* was needed for the implementation of customary law, especially customary offenses, so Law Number 1 Drt of 1951 concerning Actions was issued. Meanwhile, to organize a unified structure of powers and procedures for civil courts, Article 5 Paragraph (3) Sub b, reads as follows:

"The civil material law and for the time being the civil criminal material law which until now applies to independent regional leaders and people who were previously tried by the Traditional Court, still applies to those people and people, with the meaning of: [23]

- That an active act must be considered a criminal act, but there is no comparison in the Civil Criminal Code, so it is considered to be punishable by a sentence of not more than three months in prison and/or a fine of five hundred rupiah, namely as a substitute punishment if the customary punishment The sentence imposed is not followed by the condemned party and the compensation referred to is considered commensurate by the judge with the magnitude of the condemned person's fault.
- That if the customary punishment imposed in the judge's opinion exceeds the imprisonment sentence or fine referred to above, then for the defendant's mistake a substitute sentence of up to 10 years in prison may be imposed, with the understanding that the customary punishment according to the judge's understanding is no longer in line with time, it must always be replaced as mentioned above.
- That an act which according to living law must be considered a criminal act and which has an appeal in the Civil Penal Code, is deemed to be threatened with the same punishment as the sentence on appeal which is most similar to the criminal act.

Article 5 Paragraph (3) Sub b of Law No.1 Drt of 1951 above, apart from being the rule of recognition of customary criminal law, also provides guidelines on how to apply civil criminal law and customary criminal law to

[23] "Undang-Undang Darurat Nomor 1 Tahun 1951 Tentang Tindakan-Tindakan Sementara Untuk Menyelenggarakan Kesatuan Susunan Kekuasaan Dan Acara Pengadilan-Pengadilan Sipil," Pub. L. No. 1 (1951).

customary incidents (customary criminal acts), without specifying the type of criminal act. Article 5 Paragraph (3) Sub b, as the rule of recognition as well as guidelines for application of customary law , is a policy that becomes a bridge so that customary law still exists in certain customary areas or where customary justice is also still alive, customary law and its customary offenses are still recognized and applied, as long as the implementation of the punishment is adhered to by the violators/perpetrators of customary offenses. However, if the perpetrator of a customary offense does not comply with the sentence (customary crime) imposed by a customary court judge, then the criminal incident can be brought to the state court with the provisions for punishment by the judge in accordance with the sentencing guidelines specified in Article 5 Paragraph (3) Sub b above.

C. Review Philosophical Formulation of Customary Law in Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the 2023 Criminal Code

The very interesting thing in the 2023 Criminal Code is the formulation of customary law which is narrowly interpreted as customary law in the 2023 Criminal Code when studied philosophically, namely a fundamental study of the nature, knowledge and origins of customary law as formulated in in Article 2 Paragraphs (1), (2), and (3) of the 2023 Criminal Code. From a philosophical perspective, customary law will be studied ontologically, epistemologically and axiologically as in the formulation of Article 2 Paragraphs (1), (2), and (3) Criminal Code 2023.

Ontologically, customary law is unwritten law, not in the form of a law, obeyed and supported by indigenous peoples whose embodiment is in the form of decisions of customary court functionaries and their implementation is fulfilled wholeheartedly. Because it is unwritten, the principles of customary law are not formulated but are inherent and animate in the decisions of customary justice functionaries, which originate from the values of law and justice held by the indigenous community concerned.

Prohibitions on actions which the community agrees are acts that violate customs and are therefore subject to sanctions, do not require

written criminalization, because they are based on legal awareness and the belief from generation to generation that the prohibited actions have consequences in the form of disturbances to the balance between the macrocosm and microcosm.

Based on unwritten material norms, the realization of customary law through decisions of customary functionaries, at first glance, is similar to *common* law system where case law or precedent as law created by the courts. This is considering the unwritten and dynamic nature of customary law.

Based on the study of the epistemology of customary law as unwritten legal rules originating from hereditary habits, which are born from human awareness to live fairly and civilized as a form of cultural ideas that contain cultural values, norms, laws and rules that are related to each other so that become a legal system that is supported by sanctions, believed in, and obeyed by indigenous peoples.

As unwritten rules originating from hereditary customs, customary law has the following characteristics:[24]

1. Traditional or conventional, that is, every provision in customary law is always related to the past and is continued and maintained from time to time.
2. Sacred in nature, this characteristic is obtained from elements originating from beliefs which play an important role in customary law provisions. This sacred nature emphasizes the authority of customary law, so that it must be obeyed by the community.
3. Flexible in nature, customary law which originates from community life is flexible in its application, experiences developments and always follows current developments. This flexibility is possible because customary law only contains principles, not detailed and detailed formulation of norms. In this way, customary law can easily adapt to the needs and development of values in society without changing the system or institutions.

[24] Sulastriyono Sulastriyono and Sartika Intaning Pradhani, "Pemikiran Hukum Adat Djojodigoeno Dan Relevansinya Kini," *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 30, no. 3 (October 15, 2018): 448, doi:10.22146/jmh.36956.

4. It is dynamic or plastic in nature, where in the form of a traditional court judge's decision it can follow developments in society in general and individuals in each case.

M According to Ter Haar , because customary law originates from decisions of traditional leaders, what is known as applicable customary law are rules based on decisions taken by traditional leaders both in concrete decisions and in the same decision. This decision then becomes law as a manifestation of the legal values that live in society.[25]

Article 2 Paragraph (1) of the 2023 Criminal Code determines that the application of the principle of legality as formulated in Article 1 Paragraph (1) does not reduce the application of laws that exist in society in determining that a person deserves to be punished even though the act is not regulated in the 2023 Criminal Code. In the Article Explanation 2 Paragraph (1) emphasizes that what is meant by law that exists in society is customary law which determines that someone who commits a certain act deserves to be punished. The laws that live in society in this article relate to unwritten laws that are still valid and developing in society in Indonesia. To strengthen the implementation of the laws that exist in the community, Regional Regulations regulate these customary criminal acts. Paragraph (2) reads: The law that lives in society as intended in Paragraph (1) applies where the law lives and as long as it is not regulated in this law and is in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia , human rights, and general legal principles recognized by the people of nations. Elucidation of Paragraph (2) confirms that what is meant by applicable in the place where the law lives is that it applies to every person who commits a customary crime in that area. It is then emphasized that this paragraph contains guidelines for establishing customary criminal law, the validity of which is recognized by this law. Furthermore, Paragraph (3) states that provisions regarding procedures and criteria for determining laws that exist in society are regulated by Government Regulations. Elucidation of Paragraph (3) emphasizes that the

[25] Retno Kus Setyowati, "Pengakuan Negara Terhadap Masyarakat Hukum Adat," *Binamulia Hukum* 12, no. 1 (August 27, 2023): 131–42, doi:10.37893/jbh.v12i1.601.

Government Regulation in this provision is a guideline for regions in establishing laws that live in society in Regional Regulations.

The provisions for the application of living law as formulated in Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) above, which are interpreted as customary law regulated by Government Regulations and Regional Regulations, are philosophically wrong. The error of Article 2 Paragraphs (1), (2) and (3) with its noble desire to recognize and accommodate customary law as living law actually eliminates the characteristics of customary law as unwritten law which is custom which has legal consequences in the form of coercive sanctions. , originates from the decision of the traditional ruler in the same concrete case as a manifestation of the values that live in society.

Meanwhile, from an epistemological point of view, customary law is law that originates from custom and becomes a legal reality in which the principles that apply in community self-interest relationships are found.

In the context of axiology, customary law as original Indonesian legal material is the material needed in the formation of criminal law in Indonesia. Djojodigoeno said that bumiputera customary law in the substantial sense as a legal reality that lives among the Indonesian people, is legal material that actually lives among the bumiputera which needs to be applied in state law because it is original Indonesian legal material.

The provisions of Article 2 Paragraph (1) of the 2023 Criminal Code and its explanation essentially contain the following 3 things:

1. The definition of unwritten law is customary law;
2. Unwritten customary law which determines that someone who commits a certain act should be punished based on unwritten law which is still valid and developing in life in Indonesia;
3. Regulation of customary crimes is carried out by Regional Regulations.

The provisions of Paragraph (2) concerning guidelines for determining customary law that applies to perpetrators of criminal acts, contain the following essence:

1. In the event that a customary crime occurs, the customary law that applies is the customary law at the place where the act was committed;

2. Customary law recognized by the 2023 Criminal Code is customary law that is in accordance with the values of Pancasila, the 1945 Republic of Indonesia Constitution, human rights, and general legal principles recognized by the people of the nation.

The provisions of Paragraph (3) regarding determining procedures and criteria for customary law recognized by the 2023 Criminal Code, essentially consist of:

1. The procedures and criteria for customary law that may apply are determined by Government Regulation;
2. Government Regulations that provide guidelines for regions in customary law that applies to indigenous communities as outlined in Regional Regulations.

Based on the formulation of Article 2 Paragraphs (1), (2), and (3) along with the Explanation, customary law is not applied as original legal material whose values are accommodated and colors the 2023 Criminal Code, but is instead taken over in the form of regional regulations, so that it will become written law, where acts which in customary law constitute customary offenses and their sanctions as long as they are not regulated in the 2023 Criminal Code, will be formulated in writing in regional regulations (Perda), the criteria for which will be determined by government regulations.

Philosophical criticism of the recognition of customary law by the 2023 Criminal Code, in this case unwritten customary offenses becoming customary offenses formulated in regional regulations, is a wrong action. Formulating customary offenses into regional regulations is an act of eliminating the original nature of customary law as unwritten law. With the loss of the original nature of customary law, customary offenses also disappear, as well as making customary offenses state offenses, because they are formulated in regional regulations which are state regulations. Meanwhile, customary law, especially customary offenses, is born from the decisions of traditional rulers regarding acts which according to local customary law values are not worthy of being committed and deserve punishment, where the decision of traditional rulers regarding these customary offenses is followed by the traditional rulers. others in completing the same action. Philosophically it is not appropriate to

formulate customary offenses in writing. Philosophical criticism is that the 2023 Criminal Code recognizes and accommodates customary law as the original basic material in determining criminal acts, criminal liability, criminal objectives, criminal guidelines and criminal regulations.

D. Review Policy Criminal Law Regarding the Formulation of Customary Law in Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the 2023 Criminal Code

Customs as a result of the agreement of society as a whole are rooted and originate from the agreement of a society, must be the basis for the formation of positive law, so that every positive law must be woven in harmony with the customs and customs of the community local. "The positive law in harmony with custom is thus seen as obligatory, and more effective, because consensual".

The 2023 Criminal Code as positive law must be intertwined with customary law, according to Brian Z Tamanaha above, customary law is a more effective provision with its consensual nature. Meanwhile Karl Von Savigny wants positive law to be intertwined with customary law, because in customary law there is people's consciousness which is a manifestation of the soul of the nation, positive law must be harmonized with people's feelings and awareness about the right and wrong behavior. Referring to the opinion of Savigny, all forms of legislation including the 2023 Criminal Code must take into account customary law. The 2023 Criminal Code must not violate the norms and value system of customary law, therefore it must be harmonized with customary law, including in determining criminal acts, and in determining the structure of the criminal system it must be in accordance with customary law as a manifestation of the national spirit.[26] In on this occasion Savigny emphasized that all state laws are subordinate to customary law.

Based on the recommendations of the Law Seminar National VI (Jakarta, 25 -29 June 1994), it is clear that the national legal system adopted is the Pancasila Legal System, namely a legal system based on the Pancasila

[26] Andri Yanto and Faidatul Hikmah, "Akomodasi Hukum Yang Hidup Dalam Kitab Undang-Undang Hukum Pidana Nasional Menurut Perspektif Asas Legalitas," *Recht Studiosum Law Review* 2, no. 2 (November 3, 2023): 81–91, doi:10.32734/rslr.v2i2.14162.

philosophy, so that all products National laws, including the 2023 Criminal Code, must be based on and in line with the Pancasila philosophy. With the awareness that the development of a nation's national law is nation-centric, the development of Indonesian national law, including in the preparation of the 2023 Criminal Code, is also nation-centric, meaning that it is based on legal values and legal culture that are born, live, grow and develop in Indonesian society, which is manifested in living laws which are believed to be noble values in behavior from generation to generation, which form customs in an unwritten form, namely customary law.

The position of customary law as original law in society originates from people's feelings and awareness, therefore it is unwritten, it does not have to be conflicted with written law, let alone abolished by written law, but should be positioned as a complement that complements written law. It is acknowledged that the formation of unwritten law is more flexible than the formation of written law, because it can overcome the gap between the validity of the law and its effectiveness, this is because of the dynamic and plastic nature of customary law as unwritten law, so that it always follows the development of values who live in society. The position of customary law in the national legal system is as a source of national law.[27]

The 2023 Criminal Code as a legislative legal product currently still uses a thinking framework that is also strong in the principles of formal legality, this was acknowledged in the VI National Law Seminar (Jakarta, 25 – 29 June 1994) that there are no clear criteria regarding customary law (customary law), especially in enforcing the law, encourages the formation of a very legal attitude and legal culture in PJP I which tends to identify law with law. It was further emphasized that in the PJP II era, the legal community in Indonesia must be directed to respect customary law as a source of law, in addition to statutory regulations and permanent jurisprudence.

Sentencing policy in the form of sentencing guidelines for judges related to customary law which is full of legal and justice values as a source

[27] Revie, "Hukum Adat Sebagai Sumber Hukum Nasional Dalam Politik Hukum Di Indonesia," *Jurnal Legal Certainty* 1, no. 1 (2019).

of justice, before the promulgation of the 2023 Criminal Code, had been formulated in statutory policies and policies in judicial practice, as follows:

1. Article 5 Paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, states that judges and constitutional justices are obliged to explore, follow and understand the legal values and sense of justice that exist in society.
2. Article 5 Paragraph (3) Sub b of Law Number 1 Drt of 1951 concerning Concerning Temporary Measures to Organize the Unity Structure of Powers and Procedures of Civil Courts, where Article 5 Paragraph (3) Sub b, reads as follows following:
   "The civil material law and for the time being the civil criminal material law which until now applies to independent regional leaders and people who were previously tried by the Traditional Court, still applies to those people and people, with the meaning of [28] :
   - That an active act must be considered a criminal act, but there is no comparison in the Civil Criminal Code, so it is considered to be punishable by a sentence of not more than three months in prison and/or a fine of five hundred rupiah, namely as a substitute punishment if the customary punishment The sentence imposed is not followed by the condemned party and the compensation referred to is considered commensurate by the judge with the magnitude of the condemned person's fault.
   - That if the customary punishment imposed in the judge's opinion exceeds the imprisonment sentence or fine referred to above, then for the defendant's mistake a substitute sentence of up to 10 years in prison may be imposed, with the understanding that the customary punishment which according to the judge's understanding is no longer in line with the times, will always be must be replaced as mentioned above.
   - That an act which according to living law must be considered a criminal act and which has an appeal in the Civil Criminal Code,

[28] Undang-undang Darurat Nomor 1 Tahun 1951 tentang Tindakan-Tindakan Sementara untuk Menyelenggarakan Kesatuan Susunan Kekuasaan dan Acara Pengadilan-Pengadilan Sipil.

is deemed to be threatened with the same punishment as the sentence on appeal which is most similar to the criminal act.

3. Jurisprudence Supreme Court Number 1644 K/Pid/1988 dated 15 May 1991, which basically states that the Supreme Court still respects the decision of the Traditional Head based on customary deliberation which provides customary sanctions to violators of customary law norms. With this jurisprudence, perpetrators of criminal acts cannot be tried using two legal rules, namely customary rules and Criminal Code rules, even though the criminal acts are regulated in the Criminal Code.

The three criminalization policies related to customary law above only provide guidance for judges in handling cases related to customary offenses which are used as a source of law, not by formulating customary offenses into statutory regulations. When compared with the formulation of the criminal policy guidelines related to customary law above, with the formulation of customary law as a source of material law which coexists with the principle of formal legality in Article 2 Paragraphs (1), (2) and (3) of the 2023 Criminal Code and the Explanation of the Articles According to the author, lawmaker Number 1 of 2023 concerning the Criminal Code took a blunder and resulted in a mistake in formulating the position of customary law as a source of material criminal law in Indonesia, by formulating customary offenses into national law in the form of Regional Regulations or Regional Regulations.

The words of Article 2 Paragraphs (1), (2), and (3) and their explanations are formulated as follows :

Paragraph (1)

The provisions as intended in Article 1 Paragraph (1) do not reduce the validity of the laws existing in society which determine that a person deserves to be punished even though the act is not regulated in this law..

Explanation of Paragraph (1)

What is meant by "law that lives in society" is customary law which determines that someone who commits a certain act deserves to be punished. The laws that live in society in this article relate to unwritten laws that are still valid and developing in society in Indonesia. To strengthen the

implementation of laws that exist in society, Regional Regulations regulate these Customary Crimes.

Paragraph (2)

The law that lives in society as intended in Paragraph (1) applies in the place where the law lives and as long as it is not regulated in this law and is in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general principles recognized by the people of nations.

Explanation of Paragraph (2)

In this provision, what is meant by applicable in the place where the law lives is that it applies to every person who commits a customary crime in that area. This paragraph contains guidelines for establishing customary criminal law whose validity is recognized by this law.

Paragraph (3)

Provisions regarding procedures and criteria for determining laws that exist in society are regulated by Government Regulations.

Explanation of Paragraph (3)

The Government Regulations in this provision are guidelines for regions in establishing laws that live in society in Regional Regulations.

In essence, Article 2 Paragraphs (1), (2), and (3) concerning the recognition of customary law as a principle of material legality, contains 3 core elements, namely:

1. The definition of living law *(living law*) is narrowly defined as customary law.

In VI National Law Seminar (Jakarta, 25 – 29 June 1994), the definition of customary law which is a translation of *living law* or living law, includes:

- In the sense that it is identical to customary law that applies in ethnic communities and customary law environments.
- In the sense of a habit recognized by society and decision makers (*decision mak* er), so that it gradually becomes law (*gewoonte recht, customary law*).

However, Article 1 Paragraph (1) has a narrow meaning, namely only customary law. Recognition of customary law is based on the idea of balance promoted in the 2023 Criminal Code, where in the context of the

principle of legality, recognition of customary law is a manifestation of the idea of balance between the principle of formal legality as formulated in Article (1) Paragraph (1) and the principle of material legality which formulated in Article 2 Paragraphs (1), (2), and (3).

2. There is recognition of customary offenses by by criminalizing them in PERDA

The principle of legality in criminal law is the principle that is the basis for the legitimacy of an act so that it can be punished, therefore is always followed by the unlawful nature of the act. The principle of formal legality contains the nature of being against formal law, where the nature of being against the law is interpreted as being against or contrary to the rules of law, so that the legitimacy of an act is said to be against the law if the act has been formulated in law and is punishable by criminal law.

The reasons for eliminating the unlawful nature of acts that are formulated in the law as criminal acts are also in the law. Meanwhile, the principle of material legality provides the basis for punishing an act when the act is not desired by society, because it is contrary to society's sense of justice and the values of law and justice adhered to by society. The principle of material legality contains the nature of being against material law (i.e. the nature of being against the law which is outside the law, such as conflicting with society's sense of justice, legal values and fairness in society), so that an action is said to be against the law if it is contrary to law. with a sense of justice and legal values in society even though it is not formulated in the law as a punishable act.

In the nature of being against the material law, there are two functions, namely the positive function, where the nature of being against the material law is used to positiveize or make acts that are outside the written rules a criminal act. Meanwhile, the negative function of the unlawful nature of material law is the function of the unlawful nature of material law to eliminate the unlawful nature of actions that are formulated in the law as criminal acts. In the negative function, the absence of material unlawfulness (*Aufweigheid Van Alle Materril Wederechtlijke*/AVAW) means that criminal acts formulated in statutory regulations have their unlawful nature removed, so they cannot be punished. In criminal law enforcement, both

the positive and negative functions of material unlawfulness are rarely applied.

The application of the principle of material legality as formulated in Article 1 Paragraph (1), (2), and (3) of the 2023 Criminal Code only applies the nature of violating material law in a positive function, namely positiveizing or determining unwritten customary offenses, which still exist and are developing becomes a criminal offense within the rules of state criminal law. Irregularities and errors in the policy of criminalizing customary offenses to become criminal acts in state law occur when unwritten customary offenses are formulated in Regional Regulations as state regulations in written form[29].

Based on critical analysis of criminalization policies, the criminalization of customary offenses in regional regulations is very inappropriate. This can be identified as the following problems:

1) The problem of recognizing customary law by formulating customary offenses in Regional Regulations

Customary offenses originate from unwritten law, namely the decisions of traditional rulers (judges), which are dynamic and plastic in nature, the measures of which quickly change and develop following the development of values community law and developments over time. So that an act that was originally a customary offense at some point will change to no longer be a customary offense, and conversely certain acts that were not previously recognized as customary offenses will be criminalized by customary courts to become customary offences.

The formulation of customary offenses in Regional Regulations actually eliminates the distinctive nature of customary offenses which are flexible, elastic and plastic and not written, becoming offenses that are formulated in written regulations in the form of Regional Regulations so that they are rigid. Formulating customary offenses into regional regulations as state regulations is a wrong step that actually eliminates customary law

[29] NI PUTU ARI SETYANINGSIH and PUTU CHANDRA KINANDANA KAYUAN, "KOMPILASI DELIK ADAT DALAM PERATURAN DAERAH SEBAGAI DASAR PEMIDANAAN DALAM RANCANGAN UNDANG-UNDANG KITAB UNDANG-UNDANG HUKUM PIDANA (RUU KUHP)," *Jurnal Yustitia* 16, no. 1 (May 31, 2022): 71–79, doi:10.62279/yustitia.v16i1.902.

itself, even though it is formulated in local regulations as regional regulations where customary law exists.

Some of the criminal policy issues that arise in the formulation of customary offenses into PERDA are as follows:

- Problems of recriminalization and reformulation of customary offenses in regional regulations;
- The issue of threatening criminal sanctions for customary offenses formulated in the Regional Regulation;
- The problem of the punishment system which is different between the punishment system in customary offenses and the regional regulation punishment system;
- The problem of shifting the nature of going against material law into the nature of going against formal law in the formulation of customary offenses in regional regulations.

2) Differences between the realm of Customary Criminal law and Regional Regulations

As explained above, basically customary law is law that originates from the feelings of awareness and agreement of indigenous peoples that have been followed for generations, in the form of unwritten law in the form of decisions of traditional judges regarding behavior that is considered to violate the agreement, where the judge's decision must be followed. by other traditional judges. Customary law as an unwritten legal rule has a unique characteristic, namely that it is very dynamic and plastic, so it is very easy to change following the development of values in society and the times. Customary law is a law formed by indigenous peoples, based on its formation, it is different from state law, which is made by state institutions and enforced on its citizens (up to bottom).

The definition of Regional Regulations in Law Number 12 of 2011 concerning the Formation of Legislative Regulations consists of Provincial Regulations, namely legislation formed by the Provincial Regional People's Representative Council with the approval of the Governor, and Regency/City Regional Regulations, namely regional regulations formed by the Council. Regency/City Regional Representative with joint approval of the Regent/Mayor.

Article 7 of Law Number 12 of 2011 above positions regional regulations as state legislation in the last place after presidential regulations. The functions of regional regulations include others:[30]

1. As a policy instrument for implementing regional autonomy and assistance tasks;
2. As implementing regulations of higher laws and regulations. In this case the Regional Regulations must not conflict with higher laws and regulations.
3. As a container for regional specialties and diversity as well as channeling the aspirations of the people in the region but must be based on Pancasila and the 1945 Constitution.
4. As a development tool in improving regional welfare.

Based on Law Number 12 of 2011 above, Regional Regulations can be identified as follows:[31]

1. Basically, regional regulations are administrative laws to support the implementation of regional autonomy and assistance tasks.
2. The criminal threat in the Regional Regulation is not the main threat, but only as a supporting sanction for administrative law.
3. The criminal threat contained in the Regional Regulation is a maximum imprisonment of 6 (six) months or a maximum fine of Rp. 50,000,000 (five tens of millions of rupiah).
4. Regional regulations can contain threats of imprisonment or fines in addition to the weight provisions above in accordance with statutory regulations.
5. Regional regulations can contain threats of sanctions in the nature of returning to the original state and administrative sanctions.

Based on the description above, in essence, regional regulations are administrative laws to carry out regional autonomy and assistance duties, while customary offenses which are in the realm of customary law are purely criminal acts in the context of customary law. Thus, it is not appropriate

[30] Claustantianus Wibisono Tanggono et al., "Mekanisme Pembentukan Peraturan Daerah Yang Berkualitas Di Pemerintah Daerah," *Journal Juridisch* 1, no. 3 (2023).

[31] Jihan Sopyana, Salsa Aulia Ratar Putri, and Siti Dewi Ratnasari, "Pencabutan Peraturan Daerah Oleh Pemerintah Pusat," *Jurnal Rechten : Riset Hukum Dan Hak Asasi Manusia* 3, no. 2 (June 21, 2022): 15–21, doi:10.52005/rechten.v3i2.84.

to formulate customary offenses into regional regulations as state law in the implementation of regional administration.

The formulation of customary offenses into state law is a form of customary law formalism, instead of providing a place and recognition for customary law in modern national criminal law, what has happened is actually reconsolidating customary law.

3) The criminalization system for customary offenses is different from regional regulations

The criminal system is a building system in the determination and imposition of punishment which consists of criminal principles and criminal objectives, criminal guidelines and rules, and actions, criminal and criminal responsibility.[32]

In customary criminal law, the structure of the criminal system is very distinctive, different from the national criminal system, concluded by the author as follows:

- The Principle of Punishment for Existing Offensest prioritizes sources of unwritten law which are plastic and ela static, regarding actions, mistakes and others in the context of customary offenses which are different from state criminal law (KUHP);
- The aim of criminalization for customary offenses which is primarily to restore balance between the macro cosmos and the micro cosmos is very dominated by spiritual interests, which is very different from the aim of state punishment which is dominated by protecting society from crime.
- Guidelines/Rules for Punishing Customary Offenses prioritize giving judges discretion in convicting perpetrators of customary offenses, based on the conscience and sense of justice of the community, so that punishment is more flexible and flexible, not relying on legal certainty.
- Customary crimes are determined through criminalization by traditional ancestors based on the belief as pamali or taboo acts, damage human relations with spiritual beings, so that they are not appropriate, they are believed to bring harm or disaster.

[32] Novandi Dwi Putra, Ilmi Firdaus Aliyah, and Dadang Syaifudin Yusuf, "Pembaharuan Hukum Pidana Positif (Positive Criminal Law Reform)," *Journal of Social Science Research* 3, no. 3 (2023).

- Liability answers in customary offenses are aimed individually and structurally, with the main aim of restoring balance.
- Traditional sanctions are in the form of real sanctions and magical sanctions in the form of traditional ceremonies and other sanctions to restore disturbed spiritual balance.

4) Limitations of Recognition of Customary Law

Not all customary laws that are still alive and developing are recognized by 2023 Criminal Code, where Article 2 Paragraph (2) provides conditions for recognized customary laws, namely in accordance with the values contained in Pancasila and the 1945 Constitution, Human Rights and general legal principles recognized by the people of nations. In restrictions on customary law, it is necessary to explain whether the restrictions relate to customary offenses or customary sanctions? Mechanism for resolving the offense? Or is it the entire system of criminal punishment for customary offenses? In the case of customary law criteria which are in accordance with general legal principles recognized by nations, it can be biased, because the legal values adopted by a nation are "nation centric", especially in customary law which has no relevance to international values. So that in legal recognition custom is enough to use Pancasila, Human Rights, and the 1945 Republic of Indonesia Constitution as the margin of appreciation.

The filter criteria that limit the application of customary law above are a consequence of the shift from customary law to state law, which is further stated that provisions regarding procedures methods and legal criteria that exist in society (customary law) are regulated by government regulations. The next problem is what about customary laws that are not covered by government regulations because they are located far inland? What are the consequences for customary law that is not recognized by the state? Is it still valid? This requires further thought

E. Ways to Recognize Customary Law in the 2023 KUHP

The recognition of customary law as a source of material criminal law in the KUHP 2023, should be returned to the nature of customary law, as original law resulting from the culture of customary communities that are different from each other, unwritten, dynamic, plastic and easy. changes according to the values that develop in indigenous communities, it is not

appropriate to recognize customary law as a source of material criminal law with the policy of formulating customary criminal acts into PERDA (Regional Regulations) as state regulations. A policy like this is exactly the same as the policy implemented by the Dutch East Indies Government, where through Article 131 IS Jo AB provides the validity of the application of customary law but with certain notes, where Article 131 IS Jo AB can be referred to as the Article Controlling the application of customary law, in where if it is not desired to come into force, then certain customary laws cannot apply.

The best way out in recognizing customary law as a source of material criminal law can be done as follows:

1. Formulate customary law as a source of law, by formulating customary offenses as formulated in Article 5 Paragraph (3) Sub b of Law Number Drt of 1951 concerning Temporary Measures to Implement Unity Composition of Powers and Procedures of Civil Courts.
2. Formulate guidelines for criminalization of customary offenses in accordance with policy and Supreme Court jurisprudence, namely Supreme Court Decision No.1644 K/Pid/1988.

Making Article 2 Paragraphs (1), (2), and (3) only as the rule of recognition of the application of customary law

Conclusion

Based on the discussion of the problems above, it can be concluded as follows:

1. The validity of customary law as the meaning of living law in society needs to be reviewed, because according to the national seminar living law is not only interpreted as customary law but as customs accepted by a particular community. In addition, the meaning of custom does not necessarily be the same as customary law, conditions are needed for a custom to become customary law.
2. Based on a philosophical study, the formulation of customary offenses into Regional Regulations, as explained in the Elucidation to Article 2 Paragraphs (1), (2), and (3) of the 2023 Criminal Code is inappropriate, considering the nature of customary offenses themselves. living in a

customary society, unwritten law is very dynamic, plastic and elastic, developing in accordance with the development of cultural values, law and justice in customary communities, while regional regulations are state regulations that are written, rigid in nature, so that in essence they are in conflict between Regional regulations with the customary rules themselves.

3. Based on a study of criminal law policy, formulating customary offenses into Regional Regulations is very inappropriate , from a policy perspective the formulation distorts the nature of customary offenses as unwritten rules, from a criminal system perspective the differences between the systems are very different punishment in customary offenses (consisting of Criminal Acts, Mistakes, Criminal Liability, Purpose of Punishment, and Sentencing Guidelines) with the state criminal system, let alone regional regulations. Judging from the criminal sanctions, it is very unequal if customary offenses are formulated in the Regional Regulation, then the criminal sanctions follow the criminal sanctions in the Regional Regulation which are very limited, so they cannot reach customary offenses which are threatened by indigenous peoples with heavier customary sanctions. . The most likely thing to accommodate customary criminal law in the 2023 Criminal Code is that customary law is only used as a source of law, and Article 2 Paragraphs (1), (2), and (3) only become rules for recognizing customary law (the rule). of recognition) of customary law to apply as is.

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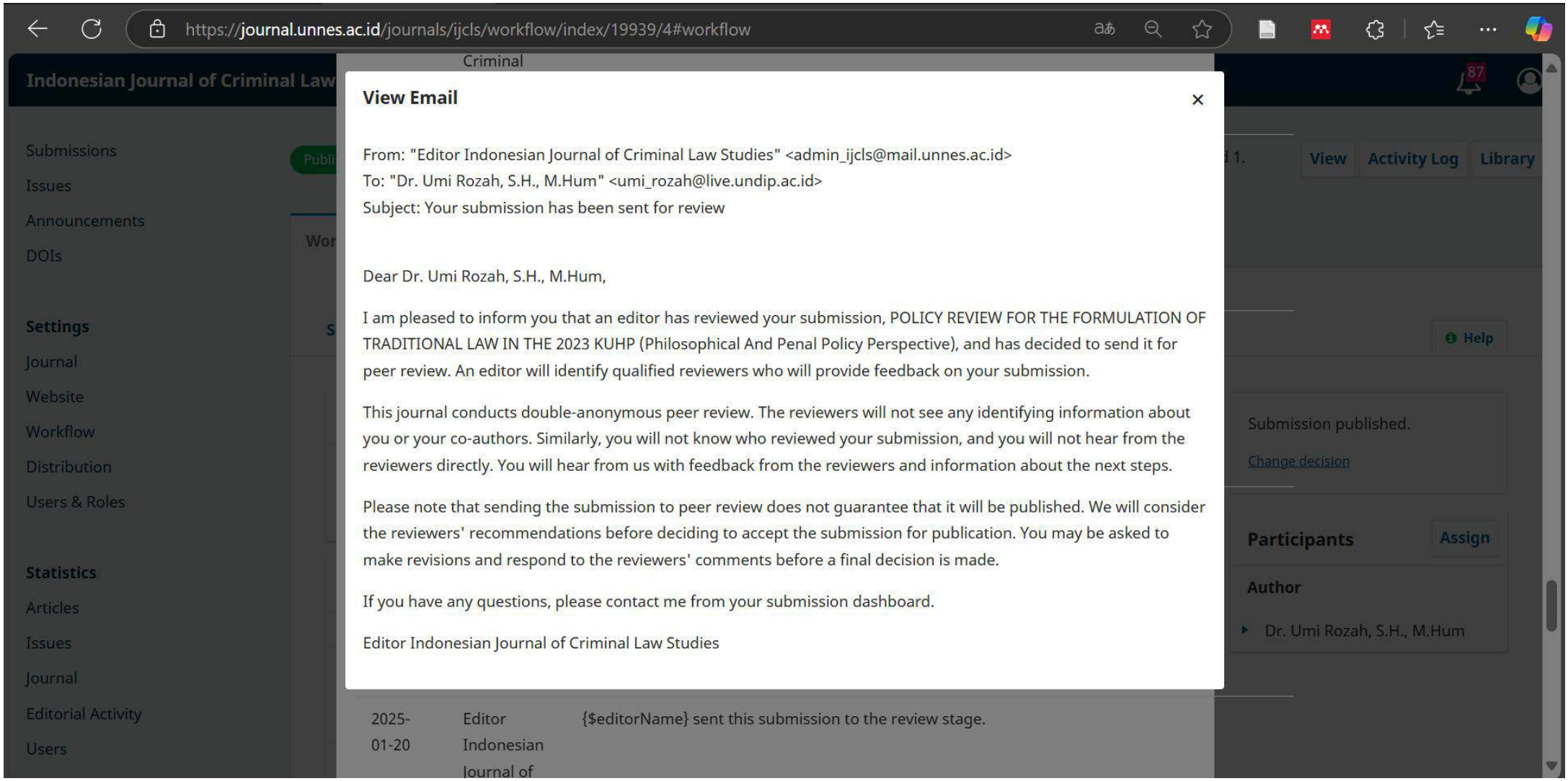
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Subject: Your submission has been sent for review
Dear Dr. Umi Rozah, S.H., M.Hum,
I am pleased to inform you that an editor has reviewed your submission, POLICY REVIEW FOR THE FORMULATION OF TRADITIONAL LAW IN THE 2023 KUHP (Philosophical And Penal Policy Perspective), and has decided to send it for peer review. An editor will identify qualified reviewers who will provide feedback on your submission.
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POLICY REVIEW FOR THE FORMULATION OF TRADITIONAL LAW IN THE 2023 KUHP

(Philosophical And Penal Policy Perspective)

Abstract

An interesting issues in the 2023 Criminal Code is the accommodation of living law with a meaning limited to customary law as formulated in Article 2 Paragraphs (1), (2), and (3). This research aims to review or examine it in perspective philosophical and criminal law policies regarding the formulation of Customary Law in Article 2 Paragraphs (1), (2), and (3) of the 2023 Criminal Code. This research uses a normative or doctrinal juridical approach, with data sources from library materials, in the form of statutory regulations and literatures related to research. This research raises problems: 1). What is the validity of the meaning of customary law as customary law in Article 2 Paragraph (1) of the 2023 Criminal Code? 2) . How to analyze the formulation of Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the Criminal Code 2023 from a philosophical perspective? and 3). How to analyze the formulation of Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the 2023 Criminal Code from a criminal law policy perspective? The results of the research are : there is invalidity in the formulation of the meaning of customary law as only customary law, there are irregularities in the formulation of customary criminal law in Article 2 Paragraphs (1), (2), and (3), where customary offenses are made criminal offenses in Regional Regulations, both from a philosophical and criminal law policy perspective, so that reformulation of Article 2 Paragraphs (1), (2), and (3) is needed.

Keywords

Review, Policy, Custom, Criminal Code.

Introduction

Entering the beginning of 2023, the Indonesian people, especially academics and criminal law practitioners, feel relieved by the presence of Law Number 1 of 2023 concerning the Criminal Law Code, which to replace the Dutch of the Criminal Code (Wetboek Van Strafrecht/WvS), which is effective in Indonesia until now. The urgency to create the 2023 Criminal Code emerged since the proclamation of Indonesian independence, starting with the issuance of Law Number 1 of 1946 concerning Criminal Law Regulations as the rules for enforcing the Criminal Code (WvS). The Law Number 1 of 1946 made several changes to suit the conditions of the Indonesian people after leaving Dutch colonial rule.[1] The Criminal Code (Wvs) is a Dutch derivative of the Criminal Code created in 1881, which came into effect in the Netherlands in 1886, and came into force in Indonesia on January 1, 1918. With Principles of concordance then The Criminal Code (WvS) applies in Indonesia. The principle of concordance is actually the principle for enforcing criminal regulations for Dutch people who are outside Holland, especially in their colony.[2]

If we examine the Criminal Code (WvS) philosophically, looking at the criminal rules and principles that color the formulation of its articles in Book I on General Rules, Book II on felonies, and Book III on misdemeanors, it can be said that the formulation is obsolete (*obsolete*). The Criminal Code (WvS) relies on the principle of formal legality adhered to by adherents of legalism, where law is only interpreted as statutory rules, so that all rules of behavior that are outside the law, such as society's habits in passing laws and resolving conflicts as customs which live, grow, and dead in society for generations are not recognized as law. The principle of formal legality focuses on legal certainty and juridical justice. It justice based on the text of the law, not substantive justice which is contextual in nature. This situation often creates an imbalance/gap between the Criminal Code (WvS) and the need for a sense of substantive justice in society. Not only the

[1] Ni Putu Yulita Damar Putri and Sagung Putri M.E. Purwani, "Urgensi Pembaharuan Hukum Pidana Di Indonesia," *Jurnal Kertha Wicar* 9, no. 8 (2020).

[2] Faisal Faisal and Muhammad Rustamaji, "Pembaruan Pilar Hukum Pidana Dalam RUU KUHP," *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)* 10, no. 2 (July 30, 2021): 291, doi:10.24843/JMHU.2021.v10.i02.p08.

principle of formal legality, the values that characterize the Criminal Code (WvS) also become a problem when the Criminal Code (WvS) is applied to cases where there is a conflict between the values of legal certainty, expediency and justice. This inequality originates from the legal values that underlie the Criminal Code (WvS) such as liberalism, individualism and capitalism, meanwhile the Indonesian nation adheres to religious and collective or communal values. These differences in values have an impact on criminal law enforcement in Indonesia. The Indonesian nation, which has a communal character such as being tolerant, easy to forgive, high in solidarity, is faced with Ducth criminal law which has a liberal, individual and capitalistic character. Here, legalism which is very rigid, interprets the law as *Lex Dura Sad Tamen Scripta,* wherein law is only interpreted as written rules.[3]

The 2023 Criminal Code is a response to the need of Indonesian society to have criminal law that is in accordance with the values of Indonesian life, religious values and communal values that are crystallized in Pancasila. By focusing on the principle of balance as the juridical basis of Indonesian philosophy, which is taken from the core of Pancasila, that shapes balance in the relationship between humans and their God (religious balance), the relationship between humas and themselves and others (humanity balance), as well as the relationship between humans and society and universe (social balance). The core balance of Pancasila values is manifested in the 2023 Criminal Code in the form of a balance of punishments, as follows: 1. The balance between public interests, The State interests and individual interests. 2. The balance between protection of public, social interests, the interests of perpetrators of criminal acts through criminal individualization, and the interests of victims (*victims of crime)*; 3. The balance between objective elements/factors (actions/outwardly) and subjective factors (people/inner thoughts/inner attitudes) in ideas *daad-dader strafrecht* ; 4. The balance between formal and material criteria; 5. The balance between legal certainty, flexibility, elasticity or flexibility and justice"; 6. The balance between national values and global/universal

[3] Muhammad Alwan Fillah, "Politik Hukum Dalam Pembaruan Kitab Undang-Undang Hukum Pidana (KUHP) Di Indonesia," *VARIA HUKUM* 5, no. 1 (January 23, 2023): 52–64, doi:10.15575/vh.v5i1.23230.

values; 7. Balance between human rights (human rights*)* and human obligations (responsibility capacity / human responsibilities). 7. The balance between warmaking on crime and peacemaking on crime approaches, because criminal acts are a product of social structure.[4]

One of the most prominent Indonesian things is the recognition and accommodation of the living law as a source of criminal law that formulated in Article 2 Paragraph (1), as *preleasing* the principle of formal legality. It is accommodated by the principle of material legality, meaning that customary law (the living law) is used as a source of law to determine acts that are not regulated in the 2023 Criminal Code, but in society, especially indigenous communities, are declared as acts that can be punished. It is logical that the 2023 Criminal Code is claimed to be the Indonesian Criminal Code, recognizing and accommodating living law as a source of legal and justice values that were born, grew and developed with the Indonesian nation. As a legal ideal, the legal values contained in the laws that exist in Indonesia should color the content of every Indonesian law and regulation, especially the Criminal Code which regulates individual behavior in public life, by criminalizing acts that not desired by society, in as well as i with rules for administering punishment that are not rigid (*rigid*) which are based on values - values of law and justice of the Indonesian nation. The culture of the Indonesian nation which is full of communal values gives birth to an attitude of self-centeredness, non-individuality, solidarity and respect for human rights and human obligations as a manifestation of the principle of monodualism/principle of balance which has been integrated in Indonesian human behavior.

Soediman Kartadipradja said that the expression of the content of the soul of a nation appears in its culture, culture which is an expression of the soul of the nation concerned, in sculpture, painting, literature, dance, and also in its laws. In the legal field, we want to use it as a legal measuring tool, strictly speaking Indonesian customary law is part of our nation's culture which, according to **Van Vollenhoven** "is disappearing into the darkness of the past". Customary law, which is an expression of the soul of

[4] Mudemar A. Rasyidi, "Menuju Pembaharuan Hukum Pidana Indonesia," *Jurnal Mitra Manajemen* 12, no. 1 (2021): 1–10.

the Indonesian nation, is a spiritual heritage or ancestral spiritual inheritance that has been passed down from generation to generation to express the path towards justice in human relations.[5]

The living law which is formulated in 2023 Criminal Code is interpreted in a closed way *(*closed interpretation) as customary law, as stated in Elucidation of Article 2 Paragraph (1) that "the law that lives in society is **customary law** which determines that someone who commits a certain act deserves to be punished. The laws that live in society in this article relate to unwritten laws that are still valid and developing in society in Indonesia. To strengthen the implementation of laws that exist in the community, **Regional Regulations** regulate the **Customary Crimes** ". Explanation of Paragraph (2) that " In this provision, what is meant by applicable in the place where the law lives is that it applies to every person who commits a customary crime in that area. This paragraph contains guidelines for establishing customary criminal law, the validity of which is recognized by this Law." Explanation of Paragraph (3) that "Government regulations in this provision are guidelines for regions in establishing laws that live in society in Regional Regulations".

If you look closely at the Explanation of Article 2 Paragraph (1) then what is meant by customary law is unwritten customary law which is still valid and developing in Indonesia which regulates customary criminal acts. Because it is not written, the Regional Regulation regulates customary criminal acts. Explanation of Paragraph (2) is a guideline in determining customary criminal law whose validity is recognized by the 2023 Criminal Code, thus not all customary laws are recognized by the 2023 Criminal Code according to Paragraph (2), and the Explanation of Paragraph (3) will be the existence of a Government Regulation as a guide for regions in establishing living law (customary law) in Regional Regulations (Perda).

Referring to the Explanation of Article 2 Paragraphs (1), (2), and (3), if studied philosophically and in penal policy, there are juridical weaknesses that will conflict with each other, where instead of recognizing and accommodating customary law as living law, it actually distorts the law.

[5] Soediman Kartahadiprodjo, *Pengantar Tata Hukum Di Indonesia* (Jakarta: Pembangunan Publisher, 1973).

custom itself, with the formulation of the colonial model in formulating the enactment of customary law through the formulation of customary offenses in regional regulations, it can be said that there is a re-colonization of customary law formulation, so that a policy gap appears pidama law, which ultimately gives rise to problems:

1. What is the validity of the meaning of customary law as customary law in Article 2 Paragraph (1) of the 2023 Criminal Code?
2. What is the analysis of the formulation of Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the 2023 Criminal Code from a philosophical perspective?
3. What is the analysis of the formulation of Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) 2023 Criminal Code in criminal law policy perspective?

Method

This research aims to study or review the validity of the narrow meaning of customary law as formulated in Article 2 Paragraphs (1), (2), and (3) of the Criminal Code 2023, as well as the oddities in the model formulation of customary criminal law which will be outlined in regional regulations in policy studies criminal law.

The research used a normative juridical approach or doctrinal research, which used primary data in the form of legal materials with a qualitative approach to obtain and use information related to policy formulation customary law in the Criminal Code 2023.

This research is of a descriptive type with the aim of to obtain an overview of how customary law is formulated in the 2023 Criminal Code, especially customary offenses based on the perspective of criminal law philosophy and policy.

In normative juridical research or doctrinal research, data is collected by literature study, in the form of : legal materials, books, journals and other literature related to philosophy and customary law and policy formulation in legislation.

Data analysis in this research was carried out by method descryptive analytical, in accordance with the scope of discussion, namely the validity of

the meaning of customary law in the 2023 Criminal Code, philosophical analysis and criminal law policy in Article 2 Paragraphs (1), (2), and (3), Criminal Code 2023.

Result and Discussion

This research has result that it is needed validity of meaning on living law which is closely interpreted and formulated as customary law only in Article 2 Par (1), (2), and (3) in The 2023 KUHP. In addition Article 2 par (1), (2), and (3) need reformulation as only the rule of recognition to create customary law effective not to formulate customary law in national regulation or regional regulation. There are some weaknesses in formulation Article 2 Par (1), (2), and (3) in either in philosophical or criminal law policy perspectives which is provided in sub topics of discussion below.

A. Validity of The Meaning Living Law As Customary Law and Its Position In the System National Law

a.1 Validity of The Meaning Living Law As Customary Law and Its Position In the System National Law

Law reflects the common conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin. There is an organic connection of law with the being and character of the people...Law growths with the growth and strengthens with the strength of the people, and finally dies away as the nation loses its nationality. All forms of law – customary law, statutes and juristic law—are the product of the legal consciesness of the people, which is the underlying law-creating force in society. Law is found, not made. These views were captured by notion that law is a reflection and product of the volksgeist, the spirit of people.[6]

Referring to the opinion of **F.Karl Von Savigny** quoted by **Brian Z Tamanaha** above, the law as *volkgeist* (soul of the people) is a reflection of the shared consciousness of society, where law emerges and develops and dies with society when society loses its nationality. All forms of law, whether

[6] Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press, 2001), doi:10.1093/acprof:oso/9780199244676.001.0001.

customary law, statutes or legal regulations, are the product of society's legal awareness, where the power underlying the creation of law resides in society, so that in fact the law is found (in society) not created. **Von Savigny**'s view is captured based on the idea that law is a reflection and product of the soul of society (*volkgeist/spirit of people).* In this case, the type of law that is deeply imbued with the soul of the community is customary law (*customary law*) which originates from the original cultural values of the community, which lives and breathes with with the spirit or soul of the community.

Eugene Erlich says that "Law consists of the rules of conduct followed in everyday life – the customary practices and usages which give rise to and maintain the inner ordering of associations (the family, village community, corporation, business association .. etc). This is the living law : Law is essentially a form of social life.[7]

Law as a rule of behavior in everyday life in the form of customary practices and habitual use that arise to preserve the inner order in social relationships (families, village communities, corporations, and business associations and others), this is what is called customary law, which in essence forming law as a form of social life. **Eugene Erlich** interprets customary law (the living law) in a broad sense, in the form of habits carried out in behavior, which includes conflict resolution as carried out in everyday life both in village community families, corporations and business associations.

What is meant by habit? What is contained in a habit? And how can a behavior be accepted as a habit?Habits are social norms, which according to **Utrecht** are actions according to patterns of behavior that are fixed, steady, common, normal or customary in the life of a particular society or social life. Habits are also actions that are carried out repeatedly in society, and habits are always carried out repeatedly because they are felt to be something that they should be, and deviations from them are considered as violations of the laws that live in society, then a legal custom arises which by society lives in society is seen as law.[8]

[7] D.J. Galigan, *Law as Social Rules* (Oxford: Oxford University Press, 2006).
[8] Theresia Ngutra, "Hukum Dan Sumber-Sumber Hukum," *Jurnal Supremasi* 11, no. 2 (2016).

Ontologically, customary law is a set of social rules determined by legal awareness and the needs of society (*werkelijkheid*) which are obeyed. According to **H.L.A Hart** as quoted by **Satjipto Rahardjo,** the role of habits is very prominent in societies with primary obligation rules, where the required behavioral guidelines are still very simple and are sufficiently regulated by norms. basic, both in content and form, where these norms are very close to reality in everyday life.[9]

Customary law exists in social society side by side with legal society, where legal society is organized by statutory law and social society is organized by customary law. In its application in society, customary law and statutory law do not cancel each other out because both are statements and forms of the principles of law and justice according to human views and abilities. If state law embodies its principles through sovereign power, while custom embodies justice and public benefit through approval and acceptance of public opinion from society as a whole which is accepted by public consciousness. Therefore, statutory law should be formulated in accordance with customary law.[10]

Fitzgerald provides conditions for habits to be accepted as customary (law) by society, namely: [11]

First, the eligibility requirement (makes sense or appropriateness) with the principle that habits that do not meet the requirements must be abandoned (Smooth intestine abolendus est). Here, customary authority is conditional in its application, that is, it depends on its conformity to measures of justice and public benefit. In other words, the validity of habits is not absolute. This requirement is emphasized by **Vinogradoff** that practices in everyday life are guided by considerations of give - and - take in the traffic of relationships between people and work together between people who are makes sense.

Second, there is recognition of the truth of a custom, here the enactment of customs is followed by society openly, without relying on

[9] Satjipto Rahardjo, *Ilmu Hukum* (Bandung: Citra Aditya Bhakti, 2012).
[10] Ibid. Hal. 116
[11] Yules Moses Urasana, Adonia Ivonne Laturette, and Pieter Radjawane, "Perlindungan Hukum Terhadap Hak Masyarakat Hukum Adat Setelah Berakhirnya Hak Guna Usaha," *BAMETI Customary Law Review* 1, no. 1 (July 23, 2023): 26–40, doi:10.47268/bameti.v1i1.9904.

power and approval by the society whose interests the habit accommodates. This is manifested in the form of norms that are adhered to by users, where habits must be not by force, not secretly, and also not because they are desired (*nec vi nec clam nec precaire*).

Thirdly, habits become established because they are formed over a long period of time, so habits must have a historical background beyond which it is no longer possible to recognize how and where they came from.

Thus, habits are patterns of behavior that are fixed, steady, common, normal in a particular society or social life, in a narrow environment such as a village, and in a broad environment such as a country. When behavior that is permanent and steady is repeated, which is then institutionalized and has normative power so that it is binding, repeated by many people in a community where there is the power to bind other people to do the same thing, therefore giving rise to a belief or awareness that it is appropriate to do it, and the assumption arises that that is how it should be, this is where customary norms emerge (*die normatieve Kraft des Facktischen*).

Changing habits into norms or customary law requires the following conditions:[12]

1. Material requirements, namely the existence of a series of the same actions and lasting for a very long time (*longa et inverata consuetido)*;
2. Intellectual requirements, namely that the habit must give rise to a general belief (*opino necessitatis*) that the action is a legal obligation. This belief is not only about its constancy but the belief that it should be so or that it should be, which is objectively appropriate as a legal obligation.

Sanctions as legal consequences if customary law is violated. (Sudikno Mertokusumo,)

a.2 Customary Law and Its Position in the National Legal System

Customary law from linguistics is a translation of *"adat recht "* which was first introduced by Snouck Hurgronje in the book *De Atjehers* in 1893 where the term customary law was then used by van

[12] Allya Putri Yuliani, "Peranan Hukum Adat Dan Perlindungan Hukum Adat Di Indonesia," *Jurnal Hukum Dan Ham Wara Sains JHHWS* 2, no. 9 (2023).

VollenHoven as the discoverer of customary law and author of the book *Het Adatrecht van Nederlands Indie.* Van Vollenhoven defines customary law as the rules that apply to indigenous people and eastern people foreign, which on the one hand has sanctions (so it is said to be law) and on the other hand it is not codified (so it is called custom). Meanwhile Ter Haar interprets customary law as a whole a rule which is manifested in the decisions of legal functionaries who have authority (*macht, authority*) and influence, its implementation is valid and fulfilled wholeheartedly. Soepomo identified customary law as unwritten law, not in the form of a law (unstatutory law), including regulations that exist even though they are not stipulated by the authorities (state officials), after all, it is obeyed and supported by the people based on the belief that these regulations have the force of law.[13]

Relying on the definition of customary law from several experts above, it can be concluded that customary law is the totality of legal rules which are manifested in the decisions of authoritative legal functionaries (in customary courts), not codified or in the form of laws, in unwritten form, has sanctions which are obeyed and supported by the public's belief in complying with them based on propriety and are believed to have the force of law. So as a law that is not written, customary law gets its legitimacy through the decisions of customary functionaries in resolving customary offenses, as is the case common law in England. This definition of customary law will be used as a standing point *(*stand point) in discussions regarding customary law in this research.

Customary law, which is an expression of the soul of the Indonesian nation, is a spiritual heritage or ancestral spiritual inheritance that has been passed down from generation to generation to express the path towards justice in relations between humans. The statement of the content of the nation's soul is seen in its culture, culture which is an expression of the soul of the nation in question, in sculpture, painting, literature, dance, and also in its laws. In the field of law, we want to use it as a legal measuring tool, strictly speaking Indonesian customary law

[13] Jenny Kristiana Matuankotta, "Pengakuan Dan Perlindungan Hukum Terhadap Eksistensi Pemerintahan Adat," *SASI* 26, no. 2 (June 4, 2020): 188, doi:10.47268/sasi.v26i2.305.

is part of our nation's culture which according to Van Vollenhoven "disappeared into the darkness of the past".[14]

In the national legal system, customary law is not included in the Sequence of Legislative Regulations, however its position as law is recognized and guaranteed by the constitution, as formulated in Article 18 B Paragraph (2) of the 1945 Constitution of the Republic of Indonesia, that "The state recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in law ".

If we base it on the opinion of Werner Menski , that " law is everywhere as a social phenomenon based on cultural foundations, which dominant positivist approach has unsuccessfully tried to ignore in order to prevelege the state.[15] Although interpreting law everywhere is a social phenomenon based on cultural foundations, which cannot be ignored by positivists who value law.

F. Karl Von Savigny as quoted by Werner Menski, emphasized " law was inevitably part of the culture of a people", law as part of the culture of society. In turn it is transformed into the soul of the people *(*folkspirit or volkgeist) which in the end will form the nationality of a nation, as it is said that:

"any particular system of law was a reflection of this folk spirit, law as the manifestation of the common consciousness. Custom as the first manifestation of a people's spirit, so that any form of legislative law should always take into account a people's popular consciousness. No official law should be made which would violate local customary norms and the value system of the subjects. Any legislation must be harmonized with what the people concerned feel is right and wrong, so legislation is subordinate to custom. It must at all times conform to volkgeist".[16]

[14] Wihelmus Jemarut, "Pendekatan Rule of Reason Dan Per Se Illegal Dalam Perkara Persaingan Usaha," *Widya Yuridika: Jurnal Hukum* 3, no. 2 (2020): 377–84.
[15] Werner Menski, *Comparative Law in Global Context (Legal System of Asia and Africa)* (Cambrigde: Cambridge University Press, 2006).
[16] Ibid. Hlm 91.

The legal system is interpreted as a reflection of community consciousness, where customary law is the first manifestation of the community spirit, so that all legislative products must always take into account the awareness of the community spirit which is manifested in the form of customary law. No official law may be made in violation of customary law norms and customary legal value systems, so that every legal regulation must be harmonized with the community's sense of right and wrong, in this way the law is subject to customary law, and at all times must be in accordance with the spirit of the people as stated in customary law. Savigny further said that the judge's sole duty is to enforce the customary law adhered to by the community, because law is a function of the soul of the nation/society. The function of law is as the soul of the nation, therefore customs (*custom*) that develop in society become the main source in the formation of law.[17]

Customary law as the soul of the Indonesian nation is crystallized in Pancasila, therefore customary law should be the main source in forming laws and regulations in Indonesia. The position of customary law in the national legal system is as the main source and original legal material whose values must be accommodated in the formation of legislative rules in Indonesia, where every legislative rule in Indonesia must be based on awareness (*consciousness*) of the Indonesian people which is institutionalized in customary law which has been agreed upon by the community from generation to generation as the ideal value system as desired by the Indonesian people.

B. Rule of Recognition Functionalization of Customary Criminal Law in National Legal Order

The customary laws of each ethnic group in Indonesia applied without problems until the Dutch came to Indonesia bringing the Principle of Formal Legality as a manifestation of the teachings of legism or positivism in implementing the law. The teaching of legism or positivism is a teaching that only recognizes written rules as law. Therefore, criminal law which is

[17] William J. Chambliss and Robert B. Siedmen, *Law, Order and Power* (London: Addisom Wesley Publishing Company, 1971).

based on the Principle of Legality is criminal law which only determines whether or not an act can be punished and must be based on written law or legislation which must exist before the act occurs. So the legal sources recognized in implementing criminal law are only sources of written law or statutes. The consequence is a prohibition on analogies in applying criminal law, and eliminating the legitimacy of the existence of customary law as an unwritten rule.

Thus, customary law as customary law, most of which is not written, according to the view of legism which is manifested in the principle of legality, is not recognized as law. In the context of criminal law, the legal rules that applied to regulate people's behavior at that time were the Criminal Code (*Wetboek Van Strafrecht)* , which was initially based on the principle of concordance only applicable to Dutch people who were in Indonesia, but eventually it was It was gradually implemented for all Indonesian residents, namely after the independence of the Indonesian nation, through Law Number 1 of 1946 concerning Criminal Law Regulations for the Entire Territory of the Republic of Indonesia, with changes made to several articles adapted to Indonesian conditions. The enactment of the Criminal Code (WvS) was then strengthened by the unification of the application of the Criminal Code to the entire population of Indonesia with Law Number 73 of 1958 concerning Declaring the Applicability of Law no. 1 of 1946 concerning Criminal Law Regulations for All Territories of the Republic of Indonesia.

In the history of applying customary law after the arrival of the Dutch to Indonesia, it was not easy. The arrival of the Dutch and their presence in Indonesia for three centuries not only colonized Indonesia socially, politically and economically, but also colonized Indonesian customary law, which had been institutionalized centuries before the Dutch arrived, namely by being "put to sleep" or extinguished.

In the realm of criminal law, the Netherlands applies *Wetboek Van Strafrecht* with the principle of legality as a representation of the legal teachings of legism or positivism that developed in mainland Europe. This legalism teaches legal scholars in Indonesia, judges, and other legal officials to think that law is written rules, so that law is only statutory rules, customary law does not have legitimacy to be accommodated and applied in

resolving criminal acts. Law enforcement, especially criminal law, is only based on the sound of the law, where the basis of reasoning is *syllogism* , which is drawn from the major premise and minor premise, so that the conclusion is certain and easy to predict, where the judge is only the mouthpiece of the law. -law (*La Bouche de la loi)* or as a statutory machine *(subsumptie automaat)* in enforcing criminal law, this is where legal certainty emerges in implementing criminal law, which establishing juridical truth and justice. In conditions like this, customary law as unwritten customary law which contains legal values and material justice has no place to apply because it is not recognized as law.

If seen from its essence, basically customary law as original law born from national culture which contains the noble values of a nation applies by itself, and does not require legitimacy based on written legal rules to enforce it. However, with the existence of the principle of formal legality in the Criminal Code brought by the Dutch, which has become ingrained in the enforcement of criminal law in Indonesia, the consequences for unwritten customary law are that the legitimacy of its validity in its own homeland is lost, unless there are written legal rules that give life as the basis for enforcing it or often referred to as the rule of recognition *(the rule of recognition*) for the application of customary law.

Specifically for the material criminal law that has been in effect in Indonesia since January 1 1918 for all European, indigenous and Eastern Foreign groups, is the Criminal Code or *Wetboek van Strafrecht voor Nederlandsh Indie* (stb. 1915 – 732), so it is practical Since the implementation of WvSvNI for all groups, customary (criminal) law cannot be applied, except by written rules as rules that recognize and accommodate the application of customary law (*rule of recognition*).

Historically, the enactment of customary law during Dutch rule was based on the rule of recognition (*rule of recognitian*) in the form of Article 131 *I.S* (*Indische Staatsregeling*) Jo Article 11 *Algemene Bepalingen van Wetgeving* . Meanwhile *Indische Staatsregeling* (IS), among other things, determined that: [18]

[18] Sunaryati Hartono, *Analisa Dan Evaluasi Peraturan Per-UUan Peninggalan Kolonial Belanda* (Jakarta: BPHN, 2015).

1. The law that applies to European groups is European criminal law based on the principle of concordance;
2. The law that applies to indigenous groups is customary law in unwritten form, where the application of customary law is "not absolute" and if necessary can be regulated in special regulations (ordinances);
3. The law that applies to the Foreign East group is their customary criminal law (Article 11 AB). (CFG Sunaryati Hartono, Analysis and Evaluation of Dutch Colonial Legacy Legislation, BPHN, 2015, Jakarta).

Article 131 IS as the basis for the application of customary law during the Dutch East Indies period determines that for the European group the law that applies is the law that exists in the Netherlands (based on the principle of concordance), for the Foreign East group the law that applies is their own law, and for the Indigenous group the law that applies what applies is customary law. However, if social interests require it, European law can apply across groups. This implementation is hereinafter referred to as submission to European law, either completely or only partially.[19]

With Article 131 I.S above, the application of customary law is not determined by customary communities but by the Dutch East Indies Government. This is stated in point 2 above that the application of customary law is not absolute, so it can be said that customary law cannot be enforced by itself, even though Article 131 I.S was created as a rule of recognition of customary law, but only as *rule of recognition* not to apply customary law. This is emphasized in point 2 that "if necessary, it can be regulated by special regulations (*ordonantie*)".

Meanwhile, Article 11 *Algemene Bepalingen van Wetgeving* (A.B) determines that for groups of indigenous people the judge will apply the religious laws, institutions and customs of the indigenous people themselves, as far as the laws and institutions are concerned. and this custom does not conflict with generally recognized principles of decency and justice,

[19] Ibid.

and also if European law applies to indigenous people or the Indigenous person concerned has submitted himself to European law.[20]

Article 11 AB is not clearly and unequivocally a rule of recognition in the application of customary law as a source of law for natives, because it is combined with religious law and other institutions, and is seen from the subject of the law, namely the native people for whom determined that European law applies to him or an indigenous person who submits himself to European law then customary law does not apply to him, even though he is a customary community that should be subject to customary law.

The application of customary law to indigenous groups creates problems, considering that customary law in Indonesia is very diverse according to ethnicity, social, culture and religion. Along with efforts to instill colonial ideology, 3 theories were used in implementing customary law during Dutch colonialism, namely:[21]

1. The theory *Receptio in complexu* , put forward by Van den Berg where customary law follows the religious law adhered to by the indigenous community.
2. *Receptie theory* put forward by Snouck Hurgronje and C.Van Vollenhoven, emphasizes that Islamic law will apply effectively among Muslims, if Islamic law is in line with customary law in Indonesia, meaning that the laws that apply in Indonesia to natives are not based on Islamic teachings, but on local customary law.
3. *Receptio a Contrario/ Receptie exit* was put forward by Hazairin, stating that the law that applies to society is religious law, where customary law only applies if it does not conflict with religious law.

After Indonesian independence, the enactment of customary law was based on the 1950 Provisional Constitution, namely Article 32, Article 43 Paragraph (4), Article 104 Paragraph (1), Article 14, Article 13 Paragraph (32), and Article 16 Paragraph (2).The contents of each article are as follows[22]:

[20] Ibid.

[21] Felishela Erlene and Tundjung Herning Situbuana, "Tanggung Jawab Negara Terhadap Hak Masyarakat Adat Di Pulau Rempang Dalam Perspektif HAM," Jurnal Tunas Agraria 7, no. 2 (2024): 144–61.

[22] Saiful Anam, "Fungsi Hukum Adat Dalam Pembentukan Peraturan Perundang-Undangan Di Indonesia," *JOURNAL IURIS SCIENTIA* 1, no. 2 (July 31, 2023): 72–82, doi:10.62263/jis.v1i2.18.

- Article 13 Paragraph (2)
  Against his will no one can be separated from the judge, which is granted to him by the rules of law in force.
- Article 14
  1. Every person who is charged because he is suspected of committing a criminal incident has the right to be presumed innocent, until his guilt is proven in a court hearing, according to the applicable legal rules, and he is given at that hearing all the guarantees that have been determined and are necessary for his defense.
  2. It is said that no one may be required to be punished or sentenced, except because of a legal rule that already exists and applies to him.
  3. If there is a change in the legal rules as stated in the paragraph above, then provisions that are better for the suspect are used.
- Article 16 Paragraph (2)

Trespassing on the grounds of a residence or entering a house against the will of the person who occupies it is only permissible in cases stipulated in a legal regulation that applies to it.

- Article 32

Everyone in the country must obey the laws, including unwritten legal rules, and the authorities.

- Article 43 Paragraph (4)

The authorities supervise that all religious associations and associations comply with the law, including unwritten legal regulations.

- Article 104 Paragraph (1)

All court decisions must contain the reasons and in cases of punishment state the statutory rules and customary law rules that are used as the basis for the sentence.

In the history of the return of the Republic of Indonesia, the Provisional Republic of Indonesia Law was no longer applied, but returned to the 1945 Law, thus *the rule of recognition* based on the articles of the 1950 UUDS was not applies. With Indonesia's return to the 1945 Constitution, *the rule of recognition* was needed for the implementation of customary law, especially customary offenses, so Law Number 1 Drt of 1951 concerning Actions was issued. Meanwhile, to organize a unified

structure of powers and procedures for civil courts, Article 5 Paragraph (3) Sub b, reads as follows:

"The civil material law and for the time being the civil criminal material law which until now applies to independent regional leaders and people who were previously tried by the Traditional Court, still applies to those people and people, with the meaning of: [23]

- That an active act must be considered a criminal act, but there is no comparison in the Civil Criminal Code, so it is considered to be punishable by a sentence of not more than three months in prison and/or a fine of five hundred rupiah, namely as a substitute punishment if the customary punishment The sentence imposed is not followed by the condemned party and the compensation referred to is considered commensurate by the judge with the magnitude of the condemned person's fault.
- That if the customary punishment imposed in the judge's opinion exceeds the imprisonment sentence or fine referred to above, then for the defendant's mistake a substitute sentence of up to 10 years in prison may be imposed, with the understanding that the customary punishment according to the judge's understanding is no longer in line with time, it must always be replaced as mentioned above.
- That an act which according to living law must be considered a criminal act and which has an appeal in the Civil Penal Code, is deemed to be threatened with the same punishment as the sentence on appeal which is most similar to the criminal act.

Article 5 Paragraph (3) Sub b of Law No.1 Drt of 1951 above, apart from being the rule of recognition of customary criminal law, also provides guidelines on how to apply civil criminal law and customary criminal law to customary incidents (customary criminal acts), without specifying the type of criminal act. Article 5 Paragraph (3) Sub b, as the rule of recognition as well as guidelines for application of customary law , is a policy that becomes a bridge so that customary law still exists in certain customary areas or where

[23] "Undang-Undang Darurat Nomor 1 Tahun 1951 Tentang Tindakan-Tindakan Sementara Untuk Menyelenggarakan Kesatuan Susunan Kekuasaan Dan Acara Pengadilan-Pengadilan Sipil," Pub. L. No. 1 (1951).

customary justice is also still alive, customary law and its customary offenses are still recognized and applied, as long as the implementation of the punishment is adhered to by the violators/perpetrators of customary offenses. However, if the perpetrator of a customary offense does not comply with the sentence (customary crime) imposed by a customary court judge, then the criminal incident can be brought to the state court with the provisions for punishment by the judge in accordance with the sentencing guidelines specified in Article 5 Paragraph (3) Sub b above.

C. Review Philosophical Formulation of Customary Law in Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the 2023 Criminal Code

The very interesting thing in the 2023 Criminal Code is the formulation of customary law which is narrowly interpreted as customary law in the 2023 Criminal Code when studied philosophically, namely a fundamental study of the nature, knowledge and origins of customary law as formulated in in Article 2 Paragraphs (1), (2), and (3) of the 2023 Criminal Code. From a philosophical perspective, customary law will be studied ontologically, epistemologically and axiologically as in the formulation of Article 2 Paragraphs (1), (2), and (3) Criminal Code 2023.

Ontologically, customary law is unwritten law, not in the form of a law, obeyed and supported by indigenous peoples whose embodiment is in the form of decisions of customary court functionaries and their implementation is fulfilled wholeheartedly. Because it is unwritten, the principles of customary law are not formulated but are inherent and animate in the decisions of customary justice functionaries, which originate from the values of law and justice held by the indigenous community concerned.

Prohibitions on actions which the community agrees are acts that violate customs and are therefore subject to sanctions, do not require written criminalization, because they are based on legal awareness and the belief from generation to generation that the prohibited actions have consequences in the form of disturbances to the balance between the macrocosm and microcosm.

Based on unwritten material norms, the realization of customary law through decisions of customary functionaries, at first glance, is similar to *common* law system where case law or precedent as law created by the courts. This is considering the unwritten and dynamic nature of customary law.

Based on the study of the epistemology of customary law as unwritten legal rules originating from hereditary habits, which are born from human awareness to live fairly and civilized as a form of cultural ideas that contain cultural values, norms, laws and rules that are related to each other so that become a legal system that is supported by sanctions, believed in, and obeyed by indigenous peoples.

As unwritten rules originating from hereditary customs, customary law has the following characteristics:[24]

1. Traditional or conventional, that is, every provision in customary law is always related to the past and is continued and maintained from time to time.
2. Sacred in nature, this characteristic is obtained from elements originating from beliefs which play an important role in customary law provisions. This sacred nature emphasizes the authority of customary law, so that it must be obeyed by the community.
3. Flexible in nature, customary law which originates from community life is flexible in its application, experiences developments and always follows current developments. This flexibility is possible because customary law only contains principles, not detailed and detailed formulation of norms. In this way, customary law can easily adapt to the needs and development of values in society without changing the system or institutions.
4. It is dynamic or plastic in nature, where in the form of a traditional court judge's decision it can follow developments in society in general and individuals in each case.

M According to Ter Haar , because customary law originates from decisions of traditional leaders, what is known as applicable customary law

[24] Sulastriyono Sulastriyono and Sartika Intaning Pradhani, "Pemikiran Hukum Adat Djojodigoeno Dan Relevansinya Kini," *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 30, no. 3 (October 15, 2018): 448, doi:10.22146/jmh.36956.

are rules based on decisions taken by traditional leaders both in concrete decisions and in the same decision. This decision then becomes law as a manifestation of the legal values that live in society.[25]

Article 2 Paragraph (1) of the 2023 Criminal Code determines that the application of the principle of legality as formulated in Article 1 Paragraph (1) does not reduce the application of laws that exist in society in determining that a person deserves to be punished even though the act is not regulated in the 2023 Criminal Code. In the Article Explanation 2 Paragraph (1) emphasizes that what is meant by law that exists in society is customary law which determines that someone who commits a certain act deserves to be punished. The laws that live in society in this article relate to unwritten laws that are still valid and developing in society in Indonesia. To strengthen the implementation of the laws that exist in the community, Regional Regulations regulate these customary criminal acts. Paragraph (2) reads: The law that lives in society as intended in Paragraph (1) applies where the law lives and as long as it is not regulated in this law and is in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia , human rights, and general legal principles recognized by the people of nations. Elucidation of Paragraph (2) confirms that what is meant by applicable in the place where the law lives is that it applies to every person who commits a customary crime in that area. It is then emphasized that this paragraph contains guidelines for establishing customary criminal law, the validity of which is recognized by this law. Furthermore, Paragraph (3) states that provisions regarding procedures and criteria for determining laws that exist in society are regulated by Government Regulations. Elucidation of Paragraph (3) emphasizes that the Government Regulation in this provision is a guideline for regions in establishing laws that live in society in Regional Regulations.

The provisions for the application of living law as formulated in Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) above, which are interpreted as customary law regulated by Government Regulations and Regional Regulations, are philosophically wrong. The error of Article 2

[25] Retno Kus Setyowati, "Pengakuan Negara Terhadap Masyarakat Hukum Adat," *Binamulia Hukum* 12, no. 1 (August 27, 2023): 131–42, doi:10.37893/jbh.v12i1.601.

Paragraphs (1), (2) and (3) with its noble desire to recognize and accommodate customary law as living law actually eliminates the characteristics of customary law as unwritten law which is custom which has legal consequences in the form of coercive sanctions. , originates from the decision of the traditional ruler in the same concrete case as a manifestation of the values that live in society.

Meanwhile, from an epistemological point of view, customary law is law that originates from custom and becomes a legal reality in which the principles that apply in community self-interest relationships are found.

In the context of axiology, customary law as original Indonesian legal material is the material needed in the formation of criminal law in Indonesia. Djojodigoeno said that bumiputera customary law in the substantial sense as a legal reality that lives among the Indonesian people, is legal material that actually lives among the bumiputera which needs to be applied in state law because it is original Indonesian legal material.

The provisions of Article 2 Paragraph (1) of the 2023 Criminal Code and its explanation essentially contain the following 3 things:

1. The definition of unwritten law is customary law;
2. Unwritten customary law which determines that someone who commits a certain act should be punished based on unwritten law which is still valid and developing in life in Indonesia;
3. Regulation of customary crimes is carried out by Regional Regulations.

The provisions of Paragraph (2) concerning guidelines for determining customary law that applies to perpetrators of criminal acts, contain the following essence:

1. In the event that a customary crime occurs, the customary law that applies is the customary law at the place where the act was committed;
2. Customary law recognized by the 2023 Criminal Code is customary law that is in accordance with the values of Pancasila, the 1945 Republic of Indonesia Constitution, human rights, and general legal principles recognized by the people of the nation.

The provisions of Paragraph (3) regarding determining procedures and criteria for customary law recognized by the 2023 Criminal Code, essentially consist of:

1. The procedures and criteria for customary law that may apply are determined by Government Regulation;
2. Government Regulations that provide guidelines for regions in customary law that applies to indigenous communities as outlined in Regional Regulations.

Based on the formulation of Article 2 Paragraphs (1), (2), and (3) along with the Explanation, customary law is not applied as original legal material whose values are accommodated and colors the 2023 Criminal Code, but is instead taken over in the form of regional regulations, so that it will become written law, where acts which in customary law constitute customary offenses and their sanctions as long as they are not regulated in the 2023 Criminal Code, will be formulated in writing in regional regulations (Perda), the criteria for which will be determined by government regulations.

Philosophical criticism of the recognition of customary law by the 2023 Criminal Code, in this case unwritten customary offenses becoming customary offenses formulated in regional regulations, is a wrong action. Formulating customary offenses into regional regulations is an act of eliminating the original nature of customary law as unwritten law. With the loss of the original nature of customary law, customary offenses also disappear, as well as making customary offenses state offenses, because they are formulated in regional regulations which are state regulations. Meanwhile, customary law, especially customary offenses, is born from the decisions of traditional rulers regarding acts which according to local customary law values are not worthy of being committed and deserve punishment, where the decision of traditional rulers regarding these customary offenses is followed by the traditional rulers. others in completing the same action. Philosophically it is not appropriate to formulate customary offenses in writing. Philosophical criticism is that the 2023 Criminal Code recognizes and accommodates customary law as the original basic material in determining criminal acts, criminal liability, criminal objectives, criminal guidelines and criminal regulations.

D. Review Policy Criminal Law Regarding the Formulation of Customary Law in Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the 2023 Criminal Code

Customs as a result of the agreement of society as a whole are rooted and originate from the agreement of a society, must be the basis for the formation of positive law, so that every positive law must be woven in harmony with the customs and customs of the community local. "The positive law in harmony with custom is thus seen as obligatory, and more effective, because consensual".

The 2023 Criminal Code as positive law must be intertwined with customary law, according to Brian Z Tamanaha above, customary law is a more effective provision with its consensual nature. Meanwhile Karl Von Savigny wants positive law to be intertwined with customary law, because in customary law there is people's consciousness which is a manifestation of the soul of the nation, positive law must be harmonized with people's feelings and awareness about the right and wrong behavior. Referring to the opinion of Savigny, all forms of legislation including the 2023 Criminal Code must take into account customary law. The 2023 Criminal Code must not violate the norms and value system of customary law, therefore it must be harmonized with customary law, including in determining criminal acts, and in determining the structure of the criminal system it must be in accordance with customary law as a manifestation of the national spirit.[26] In on this occasion Savigny emphasized that all state laws are subordinate to customary law.

Based on the recommendations of the Law Seminar National VI (Jakarta, 25 -29 June 1994), it is clear that the national legal system adopted is the Pancasila Legal System, namely a legal system based on the Pancasila philosophy, so that all products National laws, including the 2023 Criminal Code, must be based on and in line with the Pancasila philosophy. With the awareness that the development of a nation's national law is nation-centric, the development of Indonesian national law, including in the preparation of the 2023 Criminal Code, is also nation-centric, meaning that it is based

[26] Andri Yanto and Faidatul Hikmah, "Akomodasi Hukum Yang Hidup Dalam Kitab Undang-Undang Hukum Pidana Nasional Menurut Perspektif Asas Legalitas," *Recht Studiosum Law Review* 2, no. 2 (November 3, 2023): 81–91, doi:10.32734/rslr.v2i2.14162.

on legal values and legal culture that are born, live, grow and develop in Indonesian society, which is manifested in living laws which are believed to be noble values in behavior from generation to generation, which form customs in an unwritten form, namely customary law.

The position of customary law as original law in society originates from people's feelings and awareness, therefore it is unwritten, it does not have to be conflicted with written law, let alone abolished by written law, but should be positioned as a complement that complements written law. It is acknowledged that the formation of unwritten law is more flexible than the formation of written law, because it can overcome the gap between the validity of the law and its effectiveness, this is because of the dynamic and plastic nature of customary law as unwritten law, so that it always follows the development of values who live in society. The position of customary law in the national legal system is as a source of national law.[27]

The 2023 Criminal Code as a legislative legal product currently still uses a thinking framework that is also strong in the principles of formal legality, this was acknowledged in the VI National Law Seminar (Jakarta, 25 – 29 June 1994) that there are no clear criteria regarding customary law (customary law), especially in enforcing the law, encourages the formation of a very legal attitude and legal culture in PJP I which tends to identify law with law. It was further emphasized that in the PJP II era, the legal community in Indonesia must be directed to respect customary law as a source of law, in addition to statutory regulations and permanent jurisprudence.

Sentencing policy in the form of sentencing guidelines for judges related to customary law which is full of legal and justice values as a source of justice, before the promulgation of the 2023 Criminal Code, had been formulated in statutory policies and policies in judicial practice, as follows:

1. Article 5 Paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, states that judges and constitutional justices are obliged to explore, follow and understand the legal values and sense of justice that exist in society.

[27] Revie, "Hukum Adat Sebagai Sumber Hukum Nasional Dalam Politik Hukum Di Indonesia," *Jurnal Legal Certainty* 1, no. 1 (2019).

2. Article 5 Paragraph (3) Sub b of Law Number 1 Drt of 1951 concerning Concerning Temporary Measures to Organize the Unity Structure of Powers and Procedures of Civil Courts, where Article 5 Paragraph (3) Sub b, reads as follows following:
   "The civil material law and for the time being the civil criminal material law which until now applies to independent regional leaders and people who were previously tried by the Traditional Court, still applies to those people and people, with the meaning of [28] :
   - That an active act must be considered a criminal act, but there is no comparison in the Civil Criminal Code, so it is considered to be punishable by a sentence of not more than three months in prison and/or a fine of five hundred rupiah, namely as a substitute punishment if the customary punishment The sentence imposed is not followed by the condemned party and the compensation referred to is considered commensurate by the judge with the magnitude of the condemned person's fault.
   - That if the customary punishment imposed in the judge's opinion exceeds the imprisonment sentence or fine referred to above, then for the defendant's mistake a substitute sentence of up to 10 years in prison may be imposed, with the understanding that the customary punishment which according to the judge's understanding is no longer in line with the times, will always be must be replaced as mentioned above.
   - That an act which according to living law must be considered a criminal act and which has an appeal in the Civil Criminal Code, is deemed to be threatened with the same punishment as the sentence on appeal which is most similar to the criminal act.
3. Jurisprudence Supreme Court Number 1644 K/Pid/1988 dated 15 May 1991, which basically states that the Supreme Court still respects the decision of the Traditional Head based on customary deliberation which provides customary sanctions to violators of customary law norms. With this jurisprudence, perpetrators of criminal acts cannot

[28] Undang-undang Darurat Nomor 1 Tahun 1951 tentang Tindakan-Tindakan Sementara untuk Menyelenggarakan Kesatuan Susunan Kekuasaan dan Acara Pengadilan-Pengadilan Sipil.

be tried using two legal rules, namely customary rules and Criminal Code rules, even though the criminal acts are regulated in the Criminal Code.

The three criminalization policies related to customary law above only provide guidance for judges in handling cases related to customary offenses which are used as a source of law, not by formulating customary offenses into statutory regulations. When compared with the formulation of the criminal policy guidelines related to customary law above, with the formulation of customary law as a source of material law which coexists with the principle of formal legality in Article 2 Paragraphs (1), (2) and (3) of the 2023 Criminal Code and the Explanation of the Articles According to the author, lawmaker Number 1 of 2023 concerning the Criminal Code took a blunder and resulted in a mistake in formulating the position of customary law as a source of material criminal law in Indonesia, by formulating customary offenses into national law in the form of Regional Regulations or Regional Regulations.

The words of Article 2 Paragraphs (1), (2), and (3) and their explanations are formulated as follows :

Paragraph (1)

The provisions as intended in Article 1 Paragraph (1) do not reduce the validity of the laws existing in society which determine that a person deserves to be punished even though the act is not regulated in this law..

Explanation of Paragraph (1)

What is meant by "law that lives in society" is customary law which determines that someone who commits a certain act deserves to be punished. The laws that live in society in this article relate to unwritten laws that are still valid and developing in society in Indonesia. To strengthen the implementation of laws that exist in society, Regional Regulations regulate these Customary Crimes.

Paragraph (2)

The law that lives in society as intended in Paragraph (1) applies in the place where the law lives and as long as it is not regulated in this law and is in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general principles recognized by the people of nations.

Explanation of Paragraph (2)
In this provision, what is meant by applicable in the place where the law lives is that it applies to every person who commits a customary crime in that area. This paragraph contains guidelines for establishing customary criminal law whose validity is recognized by this law.
Paragraph (3)
Provisions regarding procedures and criteria for determining laws that exist in society are regulated by Government Regulations.
Explanation of Paragraph (3)
The Government Regulations in this provision are guidelines for regions in establishing laws that live in society in Regional Regulations.
In essence, Article 2 Paragraphs (1), (2), and (3) concerning the recognition of customary law as a principle of material legality, contains 3 core elements, namely:

1. The definition of living law *(living law*) is narrowly defined as customary law.

In VI National Law Seminar (Jakarta, 25 – 29 June 1994), the definition of customary law which is a translation of *living law* or living law, includes:

- In the sense that it is identical to customary law that applies in ethnic communities and customary law environments.
- In the sense of a habit recognized by society and decision makers (*decision mak* er), so that it gradually becomes law (*gewoonte recht, customary law*).

However, Article 1 Paragraph (1) has a narrow meaning, namely only customary law. Recognition of customary law is based on the idea of balance promoted in the 2023 Criminal Code, where in the context of the principle of legality, recognition of customary law is a manifestation of the idea of balance between the principle of formal legality as formulated in Article (1) Paragraph (1) and the principle of material legality which formulated in Article 2 Paragraphs (1), (2), and (3).

2. There is recognition of customary offenses by by criminalizing them in PERDA

The principle of legality in criminal law is the principle that is the basis for the legitimacy of an act so that it can be punished, therefore is always

followed by the unlawful nature of the act. The principle of formal legality contains the nature of being against formal law, where the nature of being against the law is interpreted as being against or contrary to the rules of law, so that the legitimacy of an act is said to be against the law if the act has been formulated in law and is punishable by criminal law.

The reasons for eliminating the unlawful nature of acts that are formulated in the law as criminal acts are also in the law. Meanwhile, the principle of material legality provides the basis for punishing an act when the act is not desired by society, because it is contrary to society's sense of justice and the values of law and justice adhered to by society. The principle of material legality contains the nature of being against material law (i.e. the nature of being against the law which is outside the law, such as conflicting with society's sense of justice, legal values and fairness in society), so that an action is said to be against the law if it is contrary to law. with a sense of justice and legal values in society even though it is not formulated in the law as a punishable act.

In the nature of being against the material law, there are two functions, namely the positive function, where the nature of being against the material law is used to positiveize or make acts that are outside the written rules a criminal act. Meanwhile, the negative function of the unlawful nature of material law is the function of the unlawful nature of material law to eliminate the unlawful nature of actions that are formulated in the law as criminal acts. In the negative function, the absence of material unlawfulness (*Aufweigheid Van Alle Materril Wederechtlijke*/AVAW) means that criminal acts formulated in statutory regulations have their unlawful nature removed, so they cannot be punished. In criminal law enforcement, both the positive and negative functions of material unlawfulness are rarely applied.

The application of the principle of material legality as formulated in Article 1 Paragraph (1), (2), and (3) of the 2023 Criminal Code only applies the nature of violating material law in a positive function, namely positiveizing or determining unwritten customary offenses, which still exist and are developing becomes a criminal offense within the rules of state criminal law. Irregularities and errors in the policy of criminalizing customary offenses to become criminal acts in state law occur when

unwritten customary offenses are formulated in Regional Regulations as state regulations in written form[29].

Based on critical analysis of criminalization policies, the criminalization of customary offenses in regional regulations is very inappropriate. This can be identified as the following problems:

1) The problem of recognizing customary law by formulating customary offenses in Regional Regulations

Customary offenses originate from unwritten law, namely the decisions of traditional rulers (judges), which are dynamic and plastic in nature, the measures of which quickly change and develop following the development of values community law and developments over time. So that an act that was originally a customary offense at some point will change to no longer be a customary offense, and conversely certain acts that were not previously recognized as customary offenses will be criminalized by customary courts to become customary offences.

The formulation of customary offenses in Regional Regulations actually eliminates the distinctive nature of customary offenses which are flexible, elastic and plastic and not written, becoming offenses that are formulated in written regulations in the form of Regional Regulations so that they are rigid. Formulating customary offenses into regional regulations as state regulations is a wrong step that actually eliminates customary law itself, even though it is formulated in local regulations as regional regulations where customary law exists.

Some of the criminal policy issues that arise in the formulation of customary offenses into PERDA are as follows:

- Problems of recriminalization and reformulation of customary offenses in regional regulations;
- The issue of threatening criminal sanctions for customary offenses formulated in the Regional Regulation;

[29] NI PUTU ARI SETYANINGSIH and PUTU CHANDRA KINANDANA KAYUAN, "KOMPILASI DELIK ADAT DALAM PERATURAN DAERAH SEBAGAI DASAR PEMIDANAAN DALAM RANCANGAN UNDANG-UNDANG KITAB UNDANG-UNDANG HUKUM PIDANA (RUU KUHP)," *Jurnal Yustitia* 16, no. 1 (May 31, 2022): 71–79, doi:10.62279/yustitia.v16i1.902.

- The problem of the punishment system which is different between the punishment system in customary offenses and the regional regulation punishment system;
- The problem of shifting the nature of going against material law into the nature of going against formal law in the formulation of customary offenses in regional regulations.

2) Differences between the realm of Customary Criminal law and Regional Regulations

As explained above, basically customary law is law that originates from the feelings of awareness and agreement of indigenous peoples that have been followed for generations, in the form of unwritten law in the form of decisions of traditional judges regarding behavior that is considered to violate the agreement, where the judge's decision must be followed. by other traditional judges. Customary law as an unwritten legal rule has a unique characteristic, namely that it is very dynamic and plastic, so it is very easy to change following the development of values in society and the times. Customary law is a law formed by indigenous peoples, based on its formation, it is different from state law, which is made by state institutions and enforced on its citizens (up to bottom).

The definition of Regional Regulations in Law Number 12 of 2011 concerning the Formation of Legislative Regulations consists of Provincial Regulations, namely legislation formed by the Provincial Regional People's Representative Council with the approval of the Governor, and Regency/City Regional Regulations, namely regional regulations formed by the Council. Regency/City Regional Representative with joint approval of the Regent/Mayor.

Article 7 of Law Number 12 of 2011 above positions regional regulations as state legislation in the last place after presidential regulations. The functions of regional regulations include others:[30]

1. As a policy instrument for implementing regional autonomy and assistance tasks;

[30] Claustantianus Wibisono Tanggono et al., "Mekanisme Pembentukan Peraturan Daerah Yang Berkualitas Di Pemerintah Daerah," *Journal Juridisch* 1, no. 3 (2023).

2. As implementing regulations of higher laws and regulations. In this case the Regional Regulations must not conflict with higher laws and regulations.
3. As a container for regional specialties and diversity as well as channeling the aspirations of the people in the region but must be based on Pancasila and the 1945 Constitution.
4. As a development tool in improving regional welfare.

Based on Law Number 12 of 2011 above, Regional Regulations can be identified as follows:[31]

1. Basically, regional regulations are administrative laws to support the implementation of regional autonomy and assistance tasks.
2. The criminal threat in the Regional Regulation is not the main threat, but only as a supporting sanction for administrative law.
3. The criminal threat contained in the Regional Regulation is a maximum imprisonment of 6 (six) months or a maximum fine of Rp. 50,000,000 (five tens of millions of rupiah).
4. Regional regulations can contain threats of imprisonment or fines in addition to the weight provisions above in accordance with statutory regulations.
5. Regional regulations can contain threats of sanctions in the nature of returning to the original state and administrative sanctions.

Based on the description above, in essence, regional regulations are administrative laws to carry out regional autonomy and assistance duties, while customary offenses which are in the realm of customary law are purely criminal acts in the context of customary law. Thus, it is not appropriate to formulate customary offenses into regional regulations as state law in the implementation of regional administration.

The formulation of customary offenses into state law is a form of customary law formalism, instead of providing a place and recognition for customary law in modern national criminal law, what has happened is actually reconsolidating customary law.

[31] Jihan Sopyana, Salsa Aulia Ratar Putri, and Siti Dewi Ratnasari, "Pencabutan Peraturan Daerah Oleh Pemerintah Pusat," *Jurnal Rechten : Riset Hukum Dan Hak Asasi Manusia* 3, no. 2 (June 21, 2022): 15–21, doi:10.52005/rechten.v3i2.84.

3) The criminalization system for customary offenses is different from regional regulations

The criminal system is a building system in the determination and imposition of punishment which consists of criminal principles and criminal objectives, criminal guidelines and rules, and actions, criminal and criminal responsibility.[32]

In customary criminal law, the structure of the criminal system is very distinctive, different from the national criminal system, concluded by the author as follows:

- The Principle of Punishment for Existing Offensest prioritizes sources of unwritten law which are plastic and ela static, regarding actions, mistakes and others in the context of customary offenses which are different from state criminal law (KUHP);
- The aim of criminalization for customary offenses which is primarily to restore balance between the macro cosmos and the micro cosmos is very dominated by spiritual interests, which is very different from the aim of state punishment which is dominated by protecting society from crime.
- Guidelines/Rules for Punishing Customary Offenses prioritize giving judges discretion in convicting perpetrators of customary offenses, based on the conscience and sense of justice of the community, so that punishment is more flexible and flexible, not relying on legal certainty.
- Customary crimes are determined through criminalization by traditional ancestors based on the belief as pamali or taboo acts, damage human relations with spiritual beings, so that they are not appropriate, they are believed to bring harm or disaster.
- Liability answers in customary offenses are aimed individually and structurally, with the main aim of restoring balance.
- Traditional sanctions are in the form of real sanctions and magical sanctions in the form of traditional ceremonies and other sanctions to restore disturbed spiritual balance.

4) Limitations of Recognition of Customary Law

[32] Novandi Dwi Putra, Ilmi Firdaus Aliyah, and Dadang Syaifudin Yusuf, "Pembaharuan Hukum Pidana Positif (Positive Criminal Law Reform)," *Journal of Social Science Research* 3, no. 3 (2023).

Not all customary laws that are still alive and developing are recognized by 2023 Criminal Code, where Article 2 Paragraph (2) provides conditions for recognized customary laws, namely in accordance with the values contained in Pancasila and the 1945 Constitution, Human Rights and general legal principles recognized by the people of nations. In restrictions on customary law, it is necessary to explain whether the restrictions relate to customary offenses or customary sanctions? Mechanism for resolving the offense? Or is it the entire system of criminal punishment for customary offenses? In the case of customary law criteria which are in accordance with general legal principles recognized by nations, it can be biased, because the legal values adopted by a nation are "nation centric", especially in customary law which has no relevance to international values. So that in legal recognition custom is enough to use Pancasila, Human Rights, and the 1945 Republic of Indonesia Constitution as the margin of appreciation.

The filter criteria that limit the application of customary law above are a consequence of the shift from customary law to state law, which is further stated that provisions regarding procedures methods and legal criteria that exist in society (customary law) are regulated by government regulations. The next problem is what about customary laws that are not covered by government regulations because they are located far inland? What are the consequences for customary law that is not recognized by the state? Is it still valid? This requires further thought

E. Ways to Recognize Customary Law in the 2023 KUHP

The recognition of customary law as a source of material criminal law in the KUHP 2023, should be returned to the nature of customary law, as original law resulting from the culture of customary communities that are different from each other, unwritten, dynamic, plastic and easy. changes according to the values that develop in indigenous communities, it is not appropriate to recognize customary law as a source of material criminal law with the policy of formulating customary criminal acts into PERDA (Regional Regulations) as state regulations. A policy like this is exactly the same as the policy implemented by the Dutch East Indies Government, where through Article 131 IS Jo AB provides the validity of the application of customary law but with certain notes, where Article 131 IS Jo AB can be

referred to as the Article Controlling the application of customary law, in where if it is not desired to come into force, then certain customary laws cannot apply.

The best way out in recognizing customary law as a source of material criminal law can be done as follows:

1. Formulate customary law as a source of law, by formulating customary offenses as formulated in Article 5 Paragraph (3) Sub b of Law Number Drt of 1951 concerning Temporary Measures to Implement Unity Composition of Powers and Procedures of Civil Courts.
2. Formulate guidelines for criminalization of customary offenses in accordance with policy and Supreme Court jurisprudence, namely Supreme Court Decision No.1644 K/Pid/1988.

Making Article 2 Paragraphs (1), (2), and (3) only as the rule of recognition of the application of customary law

Conclusion

Based on the discussion of the problems above, it can be concluded as follows:

1. The validity of customary law as the meaning of living law in society needs to be reviewed, because according to the national seminar living law is not only interpreted as customary law but as customs accepted by a particular community. In addition, the meaning of custom does not necessarily be the same as customary law, conditions are needed for a custom to become customary law.
2. Based on a philosophical study, the formulation of customary offenses into Regional Regulations, as explained in the Elucidation to Article 2 Paragraphs (1), (2), and (3) of the 2023 Criminal Code is inappropriate, considering the nature of customary offenses themselves. living in a customary society, unwritten law is very dynamic, plastic and elastic, developing in accordance with the development of cultural values, law and justice in customary communities, while regional regulations are state regulations that are written, rigid in nature, so that in essence they are in conflict between Regional regulations with the customary rules themselves.

3. Based on a study of criminal law policy, formulating customary offenses into Regional Regulations is very inappropriate , from a policy perspective the formulation distorts the nature of customary offenses as unwritten rules, from a criminal system perspective the differences between the systems are very different punishment in customary offenses (consisting of Criminal Acts, Mistakes, Criminal Liability, Purpose of Punishment, and Sentencing Guidelines) with the state criminal system, let alone regional regulations. Judging from the criminal sanctions, it is very unequal if customary offenses are formulated in the Regional Regulation, then the criminal sanctions follow the criminal sanctions in the Regional Regulation which are very limited, so they cannot reach customary offenses which are threatened by indigenous peoples with heavier customary sanctions. . The most likely thing to accommodate customary criminal law in the 2023 Criminal Code is that customary law is only used as a source of law, and Article 2 Paragraphs (1), (2), and (3) only become rules for recognizing customary law (the rule). of recognition) of customary law to apply as is.

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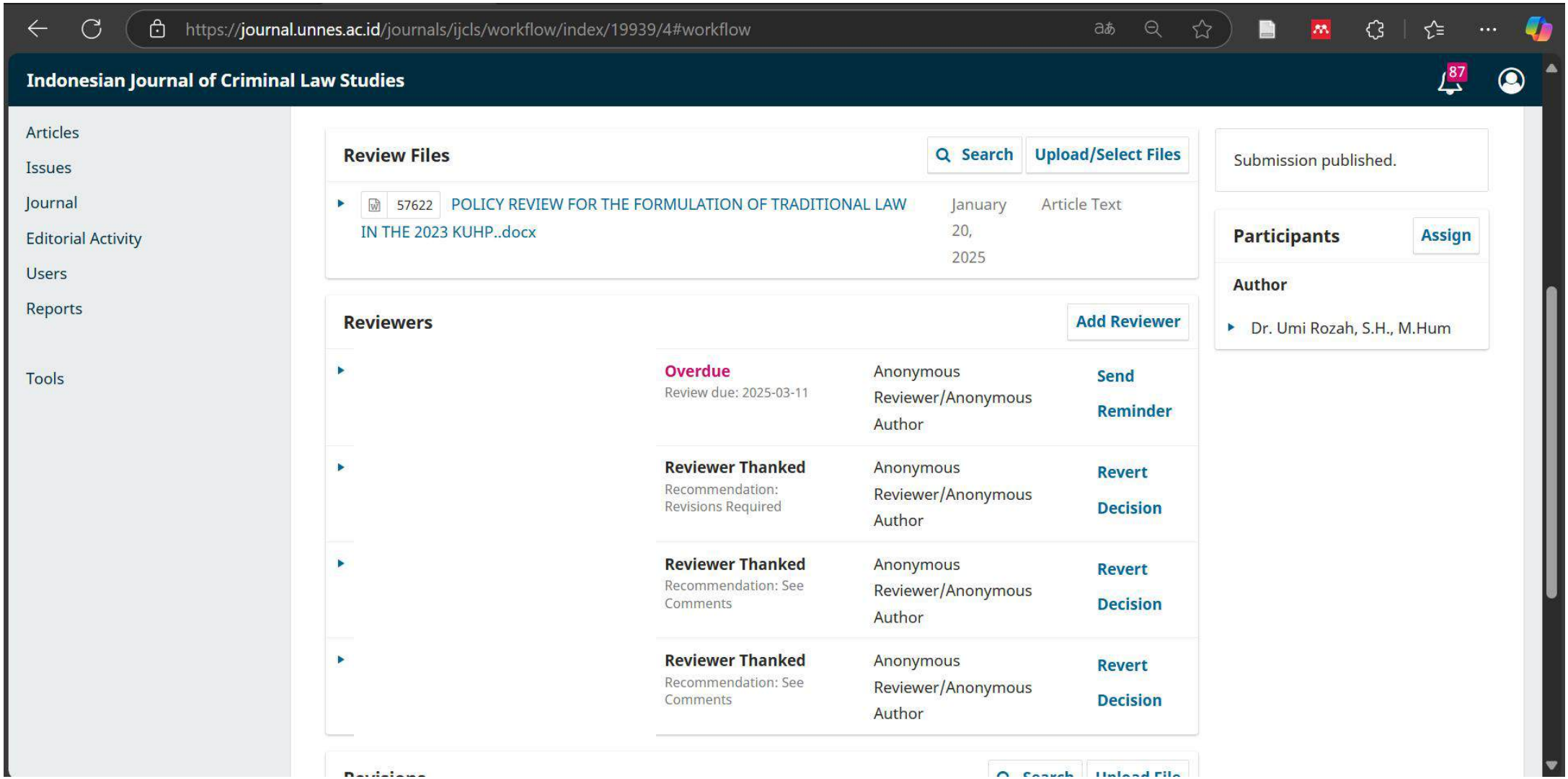
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Reviewer Evaluation *(✓) Tick the Appropriate Box*

CRITERIA	EXCELLENT	GOOD	ENOUGH	BAD
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Overall, Ranked Papers	(Very Good ---------- Bad) 10 9 8 7 6 5 4 3 2 1			**8**

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Reject in current form, but can be resubmitted		Incorrect reference presented	
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TYPE OF WRITING: Research Results ☐ Conceptual Review ☐

Comments to Authors (continue on another sheet, if necessary):

- Although the abstract mentions the need for reformulating Article 2 Paragraphs (1), (2), and (3), it would be better if it specified the direction of the reformulation. What changes or alternatives are proposed based on the findings of this research?
- In the introduction, add previous studies, state of the art, and the novelty of this research. Additionally, include the urgency of this research in the introduction.
- The discussion seems too lengthy and sometimes lacks focus. Focus more on the author's analysis to address the research questions.

Reviewer comment

February 3, 2025

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Manuscript Evaluation Form

Title	**POLICY REVIEW FOR THE FORMULATION OF TRADITIONAL LAW IN THE 2023 KUHP**

Reviewer Evaluation *(✓) Tick the Appropriate Box*

CRITERIA	EXCELLENT	GOOD	ENOUGH	BAD
Topic originality		✓		
Quality of Problem Review		✓		
Importance for the Advancement of Scientific Fields		✓		
Appropriateness of the Writing Guidelines in the Overall Representation of the Manuscript			✓	
Extend previous studies		✓		
Easy to Understand		✓		
Appropriateness of Focus and Scope		✓		
Interesting for Non-Experts		✓		
Adequate Illustrations or Images				
Indonesian/English		✓		
Overall, Ranked Papers	(Very Good ---------- Bad) 10 9 8 7 6 5 4 3 2 1			**7**

Recommendations

Accept with minor changes		Imperfect style	
Accept subject to revision, as noted in the comments	✓	Too long	✓
Reject in current form, but can be resubmitted		Incorrect reference presented	
Reject, no resubmission		Typographical and Grammatical Errors	

(✓) Centang Kotak Yang Sesuai

TYPE OF WRITING: Research Results [✓] Conceptual Review [ ]

Comments to Authors (continue on another sheet, if necessary):

The author needs to make the article more focused, and make it simpler to read. frankly, it's a very long article.

Indonesian Journal of Criminal Law Studies

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POLICY REVIEW FOR THE FORMULATION OF TRADITIONAL LAW IN THE 2023 KUHP

(Philosophical And Penal Policy Prespective)

Abstract

An interesting issues in the 2023 Criminal Code is the accommodation of living law with a meaning limited to customary law as formulated in Article 2 Paragraphs (1), (2), and (3). This research aims to review or examine it in perspective philosophical and criminal law policies regarding the formulation of Customary Law in Article 2 Paragraphs (1), (2), and (3) of the 2023 Criminal Code. This research uses a normative or doctrinal juridical approach, with data sources from library materials, in the form of statutory regulations and literatures related to research. This research raises problems: 1) . What is the validity of the meaning of customary law as customary law in Article 2 Paragraph (1) of the 2023 Criminal Code? 2) . How to analyze the formulation of Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the Criminal Code 2023 from a philosophical perspective? and 3). How to analyze the formulation of Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the 2023 Criminal Code from a criminal law policy perspective? The results of the research are : there is invalidity in the formulation of the meaning of customary law as only customary law, there are irregularities in the formulation of customary criminal law in Article 2 Paragraphs (1), (2), and (3), where customary offenses are made criminal offenses in Regional Regulations, both from a philosophical and criminal law policy perspective, so that reformulation of Article 2 Paragraphs (1), (2), and (3) is needed.

Keywords

Review, Policy, Custom, Criminal Code.

Introduction

Dikomentari [A1]: This article needs to be compared with several articles that have been published before. especially those that review the Criminal Code 2023 related to the articles raised in the research problem.

Entering the beginning of 2023, the Indonesian people, especially academics and criminal law practitioners, feel relieved by the presence of Law Number 1 of 2023 concerning the Criminal Law Code, which to replace the Dutch of the Criminal Code (Wetboek Van Strafrecht/WvS), which is effective in Indonesia until now. The urgency to create the 2023 Criminal Code emerged since the proclamation of Indonesian independence, starting with the issuance of Law Number 1 of 1946 concerning Criminal Law Regulations as the rules for enforcing the Criminal Code (WvS). The Law Number 1 of 1946 made several changes to suit the conditions of the Indonesian people after leaving Dutch colonial rule.[1] The Criminal Code (Wvs) is a Dutch derivative of the Criminal Code created in 1881, which came into effect in the Netherlands in 1886, and came into force in Indonesia on January 1, 1918. With Principles of concordance then The Criminal Code (WvS) applies in Indonesia. The principle of concordance is actually the principle for enforcing criminal regulations for Dutch people who are outside Holland, especially in their colony.[2]

If we examine the Criminal Code (WvS) philosophically, looking at the criminal rules and principles that color the formulation of its articles in Book I on General Rules, Book II on felonies, and Book III on misdemeanors, it can be said that the formulation is obsolete (*obsolete*). The Criminal Code (WvS) relies on the principle of formal legality adhered to by adherents of legalism, where law is only interpreted as statutory rules, so that all rules of behavior that are outside the law, such as society's habits in passing laws and resolving conflicts as customs which live, grow, and dead in society for generations are not recognized as law. The principle of formal legality focuses on legal certainty and juridical justice. It justice based on the text of the law, not substantive justice which is contextual in nature. This

[1] Ni Putu Yulita Damar Putri, Sagung Putri M.E. Purwani, "Urgensi Pembaharuan Hukum Pidana di Indonesia," *Jurnal Kertha Wicar* 9, No. 8 (2020): 2 , https://ojs.unud.ac.id/index.php/kerthawicara/article/view/61874

[2] Faisal, Muhammad Rustamaji, "Pembaharuan Pilar Hukum Pidana Dalam RUU KUHP," *Jurnal Magister Hukum Udayana*l 5, No. 2 (2021): 291-308, https://doi.org/10.24843/JMHU.2021.v10.i02.p08

situation often creates an imbalance/gap between the Criminal Code (WvS) and the need for a sense of substantive justice in society. Not only the principle of formal legality, the values that characterize the Criminal Code (WvS) also become a problem when the Criminal Code (WvS) is applied to cases where there is a conflict between the values of legal certainty, expediency and justice. This inequality originates from the legal values that underlie the Criminal Code (WvS) such as liberalism, individualism and capitalism, meanwhile the Indonesian nation adheres to religious and collective or communal values. These differences in values have an impact on criminal law enforcement in Indonesia. The Indonesian nation, which has a communal character such as being tolerant, easy to forgive, high in solidarity, is faced with Ducth criminal law which has a liberal, individual and capitalistic character. Here, legalism which is very rigid, interprets the law as *Lex Dura Sad Tamen Scripta,* wherein law is only interpreted as written rules.[3]

The 2023 Criminal Code is a response to the need of Indonesian society to have criminal law that is in accordance with the values of Indonesian life, religious values and communal values that are crystallized in Pancasila. By focusing on the principle of balance as the juridical basis of Indonesian philosophy, which is taken from the core of Pancasila, that shapes balance in the relationship between humans and their God (religious balance), the relationship between humas and themselves and others (humanity balance), as well as the relationship between humans and society and universe (social balance). The core balance of Pancasila values is manifested in the 2023 Criminal Code in the form of a balance of punishments, as follows: 1. The balance between public interests, The State interests and individual interests. 2. The balance between protection of public, social interests, the interests of perpetrators of criminal acts through criminal individualization, and the interests of victims (*victims of crime)*; 3. The balance between objective elements/factors (actions/outwardly) and subjective factors (people/inner thoughts/inner attitudes) in ideas *daad-dader strafrecht* ; 4. The balance between formal and material criteria; 5.

[3] Muhammad Alwan Fillah,"Politik Hukum Dalam Pembaharuan Kitab Undang-Undang Hukum Pidana (KUHP) Di Indonesia", *Jurnal Forum Studi Hukum Dan Kemasyarakatan* 5 No.1 (2023): 53-64, https://doi.org/10.15575/vh.v5i1.23230

The balance between legal certainty, flexibility, elasticity or flexibility and justice"; 6. The balance between national values and global/universal values; 7. Balance between human rights (human rights*)* and human obligations (responsibility capacity / human responsibilities). 7. The balance between warmaking on crime and peacemaking on crime approaches, because criminal acts are a product of social structure.[4]

Dikomentari [A2]: The principle of balance referred to in this paragraph needs to refer to the direct views of Barda Nawawi Arief, a professor of criminal justice from Undip. Or at least directly from the original source.

One of the most prominent Indonesian things is the recognition and accommodation of the living law as a source of criminal law that formulated in Article 2 Paragraph (1), as *preleasing* the principle of formal legality. It is accommodated by the principle of material legality, meaning that customary law (the living law) is used as a source of law to determine acts that are not regulated in the 2023 Criminal Code, but in society, especially indigenous communities, are declared as acts that can be punished. It is logical that the 2023 Criminal Code is claimed to be the Indonesian Criminal Code, recognizing and accommodating living law as a source of legal and justice values that were born, grew and developed with the Indonesian nation. As a legal ideal, the legal values contained in the laws that exist in Indonesia should color the content of every Indonesian law and regulation, especially the Criminal Code which regulates individual behavior in public life, by criminalizing acts that not desired by society, in as well as i with rules for administering punishment that are not rigid (*rigid*) which are based on values - values of law and justice of the Indonesian nation. The culture of the Indonesian nation which is full of communal values gives birth to an attitude of self-centeredness, non-individuality, solidarity and respect for human rights and human obligations as a manifestation of the principle of monodualism/principle of balance which has been integrated in Indonesian human behavior.

Soediman Kartadipradja said that the expression of the content of the soul of a nation appears in its culture, culture which is an expression of the soul of the nation concerned, in sculpture, painting, literature, dance, and also in its laws. In the legal field, we want to use it as a legal measuring tool, strictly speaking Indonesian customary law is part of our nation's culture which, according to **Van Vollenhoven** "is disappearing into the

[4] Mudemar A.Rasyidi, Menuju Pembaharuan Hukum Pidana Indonesia, "*Jurnal Mitra Manajemen*," 12, No.1 (2021): 1-10, https://doi.org/10.35968/jmm.v12i1

darkness of the past". Customary law, which is an expression of the soul of the Indonesian nation, is a spiritual heritage or ancestral spiritual inheritance that has been passed down from generation to generation to express the path towards justice in human relations.[5]

The living law which is formulated in 2023 Criminal Code is interpreted in a closed way *(*closed interpretation) as customary law, as stated in Elucidation of Article 2 Paragraph (1) that "the law that lives in society is **customary law** which determines that someone who commits a certain act deserves to be punished. The laws that live in society in this article relate to unwritten laws that are still valid and developing in society in Indonesia. To strengthen the implementation of laws that exist in the community, **Regional Regulations** regulate the **Customary Crimes** ". Explanation of Paragraph (2) that " In this provision, what is meant by applicable in the place where the law lives is that it applies to every person who commits a customary crime in that area. This paragraph contains guidelines for establishing customary criminal law, the validity of which is recognized by this Law." Explanation of Paragraph (3) that "Government regulations in this provision are guidelines for regions in establishing laws that live in society in Regional Regulations".

If you look closely at the Explanation of Article 2 Paragraph (1) then what is meant by customary law is unwritten customary law which is still valid and developing in Indonesia which regulates customary criminal acts. Because it is not written, the Regional Regulation regulates customary criminal acts. Explanation of Paragraph (2) is a guideline in determining customary criminal law whose validity is recognized by the 2023 Criminal Code, thus not all customary laws are recognized by the 2023 Criminal Code according to Paragraph (2), and the Explanation of Paragraph (3) will be the existence of a Government Regulation as a guide for regions in establishing living law (customary law) in Regional Regulations (Perda).

Referring to the Explanation of Article 2 Paragraphs (1), (2), and (3), if studied philosophically and in penal policy, there are juridical weaknesses that will conflict with each other, where instead of recognizing and accommodating customary law as living law, it actually distorts the law.

Dikomentari [A3]: You can expand on this by reading this article: https://journal.unnes.ac.id/nju/ijcls/article/view/50321 , how this article has reviewed the weaknesses of the regulation on the recognition of customary entities that must be regulated first through government and regional regulations.

[5] Soediman Kartahadiprodjo, *Pengantar Tata Hukum Di Indonesia*, (Jakarta: Pembangunan Publisher, 1973)

custom itself, with the formulation of the colonial model in formulating the enactment of customary law through the formulation of customary offenses in regional regulations, it can be said that there is a re-colonization of customary law formulation, so that a policy gap appears pidama law, which ultimately gives rise to problems:

1. What is the validity of the meaning of customary law as customary law in Article 2 Paragraph (1) of the 2023 Criminal Code?
2. What is the analysis of the formulation of Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the 2023 Criminal Code from a philosophical perspective?
3. What is the analysis of the formulation of Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) 2023 Criminal Code in criminal law policy perspective?

Dikomentari [A4]: What's this?

Dikomentari [A5]: There is a discrepancy between the number of problem formulations and the discussion, in the problem formulation there are three problems, but in the discussion, there are four.

Method

This research aims to study or review the validity of the narrow meaning of customary law as formulated in Article 2 Paragraphs (1), (2), and (3) of the Criminal Code 2023, as well as the oddities in the model formulation of customary criminal law which will be outlined in regional regulations in policy studies criminal law.

The research used a normative juridical approach or doctrinal research, which used primary data in the form of legal materials with a qualitative approach to obtain and use information related to policy formulation customary law in the Criminal Code 2023.

This research is of a descriptive type with the aim of to obtain an overview of how customary law is formulated in the 2023 Criminal Code, especially customary offenses based on the perspective of criminal law philosophy and policy.

In normative juridical research or doctrinal research, data is collected by literature study, in the form of : legal materials, books, journals and other literature related to philosophy and customary law and policy formulation in legislation.

Data analysis in this research was carried out by method descryptive analytical, in accordance with the scope of discussion, namely the validity

of the meaning of customary law in the 2023 Criminal Code, philosophical analysis and criminal law policy in Article 2 Paragraphs (1), (2), and (3), Criminal Code 2023.

Result and Discussion

This research has result that it is needed validity of meaning on living law which is closely interpreted and formulated as customary law only in Article 2 Par (1), (2), and (3) in The 2023 KUHP. In addition Article 2 par (1), (2), and (3) need reformulation as only the rule of recognition to create customary law effective not to formulate customary law in national regulation or regional regulation. There are some weaknesses in formulation Article 2 Par (1), (2), and (3) in either in philosophical or criminal law policy perspectives which is provided in sub topics of discussion below.

A. Validity of The Meaning Living Law As Customary Law and Its Position In the System National Law

a.1 Validity of The Meaning Living Law As Customary Law and Its Position In the System National Law

Law reflects the common conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin. There is an organic connection of law with the being and character of the people...Law growths with the growth and strengthens with the strength of the people, and finally dies away as the nation loses its nationality. All forms of law – customary law, statutes and juristic law—are the product of the legal consciesness of the people, which is the underlying law-creating force in society. Law is found, not made. These views were captured by notion that law is a reflection and product of the volksgeist, the spirit of people.[6]

Referring to the opinion of **F.Karl Von Savigny** quoted by **Brian Z Tamanaha** above, the law as *volkgeist* (soul of the people) is a reflection of the shared consciousness of society, where law emerges and develops and

[6] Brian Z.Tamanaha, *A General Jurisprudence of Law and Society*,(Oxford: Oxford University Press. 2001).

dies with society when society loses its nationality. All forms of law, whether customary law, statutes or legal regulations, are the product of society's legal awareness, where the power underlying the creation of law resides in society, so that in fact the law is found (in society) not created. **Von Savigny**'s view is captured based on the idea that law is a reflection and product of the soul of society (*volkgeist/spirit of people).* In this case, the type of law that is deeply imbued with the soul of the community is customary law (*customary law*) which originates from the original cultural values of the community, which lives and breathes with with the spirit or soul of the community.

Eugene Erlich says that "Law consists of the rules of conduct followed in everyday life – the customary practices and usages which give rise to and maintain the inner ordering of associations (the family, village community, corporation, business association .. etc). This is the living law : Law is essentially a form of social life.[7]

Law as a rule of behavior in everyday life in the form of customary practices and habitual use that arise to preserve the inner order in social relationships (families, village communities, corporations, and business associations and others), this is what is called customary law, which in essence forming law as a form of social life. **Eugene Erlich** interprets customary law (the living law) in a broad sense, in the form of habits carried out in behavior, which includes conflict resolution as carried out in everyday life both in village community families, corporations and business associations.

What is meant by habit? What is contained in a habit? And how can a behavior be accepted as a habit?Habits are social norms, which according to **Utrecht** are actions according to patterns of behavior that are fixed, steady, common, normal or customary in the life of a particular society or social life. Habits are also actions that are carried out repeatedly in society, and habits are always carried out repeatedly because they are felt to be something that they should be, and deviations from them are considered as

[7] D.J. Galigan, *Law as Social Rules*, (Oxford: Oxford University Press, 2006)

violations of the laws that live in society, then a legal custom arises which by society lives in society is seen as law.[8]

Ontologically, customary law is a set of social rules determined by legal awareness and the needs of society (*werkelijkheid*) which are obeyed. According to **H.L.A Hart** as quoted by **Satjipto Rahardjo,** the role of habits is very prominent in societies with primary obligation rules, where the required behavioral guidelines are still very simple and are sufficiently regulated by norms. basic, both in content and form, where these norms are very close to reality in everyday life.[9]

Customary law exists in social society side by side with legal society, where legal society is organized by statutory law and social society is organized by customary law. In its application in society, customary law and statutory law do not cancel each other out because both are statements and forms of the principles of law and justice according to human views and abilities. If state law embodies its principles through sovereign power, while custom embodies justice and public benefit through approval and acceptance of public opinion from society as a whole which is accepted by public consciousness. Therefore, statutory law should be formulated in accordance with customary law.[10]

Fitzgerald provides conditions for habits to be accepted as customary (law) by society, namely: [11]

First, the eligibility requirement (makes sense or appropriateness) with the principle that habits that do not meet the requirements must be abandoned (Smooth intestine abolendus est). Here, customary authority is conditional in its application, that is, it depends on its conformity to measures of justice and public benefit. In other words, the validity of habits is not absolute. This requirement is emphasized by **Vinogradoff** that practices in everyday life are guided by considerations of give - and - take in

[8] Theresia Ngutra, "Hukum Dan Sumber-Sumber Hukum," *Jurnal Supremasi* 11, No 2, (2016): 203, https://doi.org/10.26858/supremasi.v11i2.2813

[9] Satjipto Rahardjo, *Ilmu Hukum*, (Bandung: Citra Aditya Bhakti, 2012).

[10] *Ibid,* hal 116

[11] Yules Moses Urasan, Adonia Ivonne Laturette, Pieter Radjawane, "Perlindungan Hukum Terhadap Hak Masyarakat Hukum Adat Setelah Berakhirnya Hak Guna Usaha," *BAMETI Customary Lawa Review* 1 No. 1 (2023): 26 -40, https://doi.org/10.47268/bameti.v1i1.9904.

the traffic of relationships between people and work together between people who are makes sense.

Second, there is recognition of the truth of a custom, here the enactment of customs is followed by society openly, without relying on power and approval by the society whose interests the habit accommodates. This is manifested in the form of norms that are adhered to by users, where habits must be not by force, not secretly, and also not because they are desired (*nec vi nec clam nec precaire*).

Thirdly, habits become established because they are formed over a long period of time, so habits must have a historical background beyond which it is no longer possible to recognize how and where they came from.

Thus, habits are patterns of behavior that are fixed, steady, common, normal in a particular society or social life, in a narrow environment such as a village, and in a broad environment such as a country. When behavior that is permanent and steady is repeated, which is then institutionalized and has normative power so that it is binding, repeated by many people in a community where there is the power to bind other people to do the same thing, therefore giving rise to a belief or awareness that it is appropriate to do it, and the assumption arises that that is how it should be, this is where customary norms emerge (*die normatieve Kraft des Facktischen*).

Changing habits into norms or customary law requires the following conditions:[12]

1. Material requirements, namely the existence of a series of the same actions and lasting for a very long time (*longa et inverata consuetido)*;
2. Intellectual requirements, namely that the habit must give rise to a general belief (*opino necessitatis*) that the action is a legal obligation. This belief is not only about its constancy but the belief that it should be so or that it should be, which is objectively appropriate as a legal obligation.

Sanctions as legal consequences if customary law is violated. (Sudikno Mertokusumo,)

[12] Allya Putri Yuliani, "Peranan Hukum Adat dan Perlindungan Hukum Adat di Indonesia," *Jurnal Hukum dan Ham Wara Sains JHHWS* 2, No. 09 (2023): 863 , http://doi.org/10.58812/jhhws.v2j09.648.

a.2 Customary Law and Its Position in the National Legal System

Customary law from linguistics is a translation of *"adat recht"* which was first introduced by Snouck Hurgronje in the book *De Atjehers* in 1893 where the term customary law was then used by van VollenHoven as the discoverer of customary law and author of the book *Het Adatrecht van Nederlands Indie.* Van Vollenhoven defines customary law as the rules that apply to indigenous people and eastern people foreign, which on the one hand has sanctions (so it is said to be law) and on the other hand it is not codified (so it is called custom). Meanwhile Ter Haar interprets customary law as a whole a rule which is manifested in the decisions of legal functionaries who have authority (*macht, authority*) and influence, its implementation is valid and fulfilled wholeheartedly. Soepomo identified customary law as unwritten law, not in the form of a law (unstatutory law), including regulations that exist even though they are not stipulated by the authorities (state officials), after all, it is obeyed and supported by the people based on the belief that these regulations have the force of law.[13]

Relying on the definition of customary law from several experts above, it can be concluded that customary law is the totality of legal rules which are manifested in the decisions of authoritative legal functionaries (in customary courts), not codified or in the form of laws, in unwritten form, has sanctions which are obeyed and supported by the public's belief in complying with them based on propriety and are believed to have the force of law. So as a law that is not written, customary law gets its legitimacy through the decisions of customary functionaries in resolving customary offenses, as is the case common law in England. This definition of customary law will be used as a standing point *(*stand point) in discussions regarding customary law in this research.

Customary law, which is an expression of the soul of the Indonesian nation, is a spiritual heritage or ancestral spiritual inheritance that has been passed down from generation to generation to express the path towards justice in relations between humans. The statement of the content of the nation's soul is seen in its culture, culture which is an

[13] Jenny Kristiana Matuankotta, "Pengakuan dan Perlindungan Hukum Terhadap Eksistensi Pemerintahan Adat," *Jurnal SASI* 26, No.2, (2020): 190, https://doi.org/10.47268/sasi.v26i2.305.

expression of the soul of the nation in question, in sculpture, painting, literature, dance, and also in its laws. In the field of law, we want to use it as a legal measuring tool, strictly speaking Indonesian customary law is part of our nation's culture which according to Van Vollenhoven "disappeared into the darkness of the past".[14]

In the national legal system, customary law is not included in the Sequence of Legislative Regulations, however its position as law is recognized and guaranteed by the constitution, as formulated in Article 18 B Paragraph (2) of the 1945 Constitution of the Republic of Indonesia, that "The state recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in law ".

If we base it on the opinion of Werner Menski , that " law is everywhere as a social phenomenon based on cultural foundations, which dominant positivist approach has unsuccessfully tried to ignore in order to prevelege the state.[15]Although interpreting law everywhere is a social phenomenon based on cultural foundations, which cannot be ignored by positivists who value law.

F. Karl Von Savigny as quoted by Werner Menski, emphasized " law was inevitably part of the culture of a people", law as part of the culture of society. In turn it is transformed into the soul of the people *(*folkspirit or volkgeist) which in the end will form the nationality of a nation, as it is said that:

"any particular system of law was a reflection of this folk spirit, law as the manifestation of the common consciousness. Custom as the first manifestation of a people's spirit, so that any form of legislative law should always take into account a people's popular consciousness. No official law should be made which would violate local customary norms and the value system of the subjects. Any legislation must be harmonized

[14] Wilhelmus Jemarut, Solikatun, Pahrur Rizal, "Kajian Yuridis Masyarakat Hukum Adat," *Jurnal Hukum Widya Yuridika* 5, No.1 (2022): 118, https://doi.org/10.31328/wy.v5i1.2494

[15] Werner Menski, *Comparative Law in Global Context (Legal System of Asia and Africa*), (Cambrigde : Cambridge University Press.2006).

with what the people concerned feel is right and wrong, so legislation is subordinate to custom. It must at all times conform to volkgeist".[16]

The legal system is interpreted as a reflection of community consciousness, where customary law is the first manifestation of the community spirit, so that all legislative products must always take into account the awareness of the community spirit which is manifested in the form of customary law. No official law may be made in violation of customary law norms and customary legal value systems, so that every legal regulation must be harmonized with the community's sense of right and wrong, in this way the law is subject to customary law, and at all times must be in accordance with the spirit of the people as stated in customary law. Savigny further said that the judge's sole duty is to enforce the customary law adhered to by the community, because law is a function of the soul of the nation/society. The function of law is as the soul of the nation, therefore customs (*custom*) that develop in society become the main source in the formation of law.[17]

Customary law as the soul of the Indonesian nation is crystallized in Pancasila, therefore customary law should be the main source in forming laws and regulations in Indonesia. The position of customary law in the national legal system is as the main source and original legal material whose values must be accommodated in the formation of legislative rules in Indonesia, where every legislative rule in Indonesia must be based on awareness (*consciousness*) of the Indonesian people which is institutionalized in customary law which has been agreed upon by the community from generation to generation as the ideal value system as desired by the Indonesian people.

Dikomentari [A6]: I did not find any discussion on the relationship between the validity and intent of the principles of law that live in society and how they relate to the provisions of Article 2.1 of the National Criminal Code. I only read quotations from experts, spliced together without any analysis. Perhaps this section needs to be further refined.

B. Rule of Recognition Functionalization of Customary Criminal Law in National Legal Order

The customary laws of each ethnic group in Indonesia applied without problems until the Dutch came to Indonesia bringing the Principle of Formal Legality as a manifestation of the teachings of legism or

[16] *Ibid,* hal 91.

[17] William J. Chambliss dan Robert B. Siedmen, *Law, Order and Power,* (London : Addisom Wesley Publishing Company, 1971).

positivism in implementing the law. The teaching of legism or positivism is a teaching that only recognizes written rules as law. Therefore, criminal law which is based on the Principle of Legality is criminal law which only determines whether or not an act can be punished and must be based on written law or legislation which must exist before the act occurs. So the legal sources recognized in implementing criminal law are only sources of written law or statutes. The consequence is a prohibition on analogies in applying criminal law, and eliminating the legitimacy of the existence of customary law as an unwritten rule.

Thus, customary law as customary law, most of which is not written, according to the view of legism which is manifested in the principle of legality, is not recognized as law. In the context of criminal law, the legal rules that applied to regulate people's behavior at that time were the Criminal Code (*Wetboek Van Strafrecht)* , which was initially based on the principle of concordance only applicable to Dutch people who were in Indonesia, but eventually it was It was gradually implemented for all Indonesian residents, namely after the independence of the Indonesian nation, through Law Number 1 of 1946 concerning Criminal Law Regulations for the Entire Territory of the Republic of Indonesia, with changes made to several articles adapted to Indonesian conditions. The enactment of the Criminal Code (WvS) was then strengthened by the unification of the application of the Criminal Code to the entire population of Indonesia with Law Number 73 of 1958 concerning Declaring the Applicability of Law no. 1 of 1946 concerning Criminal Law Regulations for All Territories of the Republic of Indonesia.

In the history of applying customary law after the arrival of the Dutch to Indonesia, it was not easy. The arrival of the Dutch and their presence in Indonesia for three centuries not only colonized Indonesia socially, politically and economically, but also colonized Indonesian customary law, which had been institutionalized centuries before the Dutch arrived, namely by being "put to sleep" or extinguished.

Dikomentari [A7]: This narrative needs to be reconfirmed, I suggest you read the work of Gertrudes Johannes Resink, "*Bukan 350 Tahun Dijajah*", as a comparison material.

In the realm of criminal law, the Netherlands applies *Wetboek Van Strafrecht* with the principle of legality as a representation of the legal teachings of legism or positivism that developed in mainland Europe. This legalism teaches legal scholars in Indonesia, judges, and other legal officials

to think that law is written rules, so that law is only statutory rules, customary law does not have legitimacy to be accommodated and applied in resolving criminal acts. Law enforcement, especially criminal law, is only based on the sound of the law, where the basis of reasoning is *syllogism* , which is drawn from the major premise and minor premise, so that the conclusion is certain and easy to predict, where the judge is only the mouthpiece of the law. -law (*La Bouche de la loi)* or as a statutory machine *(subsumptie automaat)* in enforcing criminal law, this is where legal certainty emerges in implementing criminal law, which establishing juridical truth and justice. In conditions like this, customary law as unwritten customary law which contains legal values and material justice has no place to apply because it is not recognized as law.

If seen from its essence, basically customary law as original law born from national culture which contains the noble values of a nation applies by itself, and does not require legitimacy based on written legal rules to enforce it. However, with the existence of the principle of formal legality in the Criminal Code brought by the Dutch, which has become ingrained in the enforcement of criminal law in Indonesia, the consequences for unwritten customary law are that the legitimacy of its validity in its own homeland is lost, unless there are written legal rules that give life as the basis for enforcing it or often referred to as the rule of recognition *(the rule of recognition*) for the application of customary law.

Specifically for the material criminal law that has been in effect in Indonesia since January 1 1918 for all European, indigenous and Eastern Foreign groups, is the Criminal Code or *Wetboek van Strafrecht voor Nederlandsh Indie* (stb. 1915 – 732), so it is practical Since the implementation of WvSvNI for all groups, customary (criminal) law cannot be applied, except by written rules as rules that recognize and accommodate the application of customary law (*rule of recognition*).

Historically, the enactment of customary law during Dutch rule was based on the rule of recognition (*rule of recognitian*) in the form of Article 131 *I.S* (*Indische Staatsregeling*) Jo Article 11 *Algemene Bepalingen van*

Wetgeving . Meanwhile *Indische Staatsregeling* (IS), among other things, determined that: [18]

1. The law that applies to European groups is European criminal law based on the principle of concordance;
2. The law that applies to indigenous groups is customary law in unwritten form, where the application of customary law is "not absolute" and if necessary can be regulated in special regulations (ordinances);
3. The law that applies to the Foreign East group is their customary criminal law (Article 11 AB). (CFG Sunaryati Hartono, Analysis and Evaluation of Dutch Colonial Legacy Legislation, BPHN, 2015, Jakarta).

Article 131 IS as the basis for the application of customary law during the Dutch East Indies period determines that for the European group the law that applies is the law that exists in the Netherlands (based on the principle of concordance), for the Foreign East group the law that applies is their own law, and for the Indigenous group the law that applies what applies is customary law. However, if social interests require it, European law can apply across groups. This implementation is hereinafter referred to as submission to European law, either completely or only partially.[19]

With Article 131 I.S above, the application of customary law is not determined by customary communities but by the Dutch East Indies Government. This is stated in point 2 above that the application of customary law is not absolute, so it can be said that customary law cannot be enforced by itself, even though Article 131 I.S was created as a rule of recognition of customary law, but only as *rule of recognition* not to apply customary law. This is emphasized in point 2 that "if necessary, it can be regulated by special regulations (*ordonantie*)".

Meanwhile, Article 11 *Algemene Bepalingen van Wetgeving* (A.B) determines that for groups of indigenous people the judge will apply the religious laws, institutions and customs of the indigenous people themselves, as far as the laws and institutions are concerned. and this custom

[18] CFG. Sunaryati Hartono, *Analisa dan Evaluasi Peraturan Per-UUan Peninggalan Kolonial Belanda*, (Jakarta: BPHN, 2015)
[19] *Loc.Cit*

does not conflict with generally recognized principles of decency and justice, and also if European law applies to indigenous people or the Indigenous person concerned has submitted himself to European law.[20]

Article 11 AB is not clearly and unequivocally a rule of recognition in the application of customary law as a source of law for natives, because it is combined with religious law and other institutions, and is seen from the subject of the law, namely the native people for whom determined that European law applies to him or an indigenous person who submits himself to European law then customary law does not apply to him, even though he is a customary community that should be subject to customary law.

The application of customary law to indigenous groups creates problems, considering that customary law in Indonesia is very diverse according to ethnicity, social, culture and religion. Along with efforts to instill colonial ideology, 3 theories were used in implementing customary law during Dutch colonialism, namely:[21]

1. The theory *Receptio in complexu* , put forward by Van den Berg where customary law follows the religious law adhered to by the indigenous community.
2. *Receptie theory* put forward by Snouck Hurgronje and C.Van Vollenhoven, emphasizes that Islamic law will apply effectively among Muslims, if Islamic law is in line with customary law in Indonesia, meaning that the laws that apply in Indonesia to natives are not based on Islamic teachings, but on local customary law.
3. *Receptio a Contrario/ Receptie exit* was put forward by Hazairin, stating that the law that applies to society is religious law, where customary law only applies if it does not conflict with religious law.

After Indonesian independence, the enactment of customary law was based on the 1950 Provisional Constitution, namely Article 32, Article 43 Paragraph (4), Article 104 Paragraph (1), Article 14, Article 13

[20] *Loc.Cit*

[21] Felishela Erlene, Tundjung Herning Situbuana, "Tanggung Jawab Negara Terhadap Hak Masyarakat Adat di Pulau Rempang Dalam Perspektif HAM," *Jurnal Tunas Agraria* 7, Vol. 2 (2024): 144-161, http : //doi.org./10.1392/jta.v712.301.

Paragraph (32), and Article 16 Paragraph (2).The contents of each article are as follows [22] :

- Article 13 Paragraph (2)
  Against his will no one can be separated from the judge, which is granted to him by the rules of law in force.
- Article 14
  1. Every person who is charged because he is suspected of committing a criminal incident has the right to be presumed innocent, until his guilt is proven in a court hearing, according to the applicable legal rules, and he is given at that hearing all the guarantees that have been determined and are necessary for his defense.
  2. It is said that no one may be required to be punished or sentenced, except because of a legal rule that already exists and applies to him.
  3. If there is a change in the legal rules as stated in the paragraph above, then provisions that are better for the suspect are used.
- Article 16 Paragraph (2)

Trespassing on the grounds of a residence or entering a house against the will of the person who occupies it is only permissible in cases stipulated in a legal regulation that applies to it.

- Article 32

Everyone in the country must obey the laws, including unwritten legal rules, and the authorities.

- Article 43 Paragraph (4)

The authorities supervise that all religious associations and associations comply with the law, including unwritten legal regulations.

- Article 104 Paragraph (1)

All court decisions must contain the reasons and in cases of punishment state the statutory rules and customary law rules that are used as the basis for the sentence.

In the history of the return of the Republic of Indonesia, the Provisional Republic of Indonesia Law was no longer applied, but returned to the 1945 Law, thus *the rule of recognition* based on the articles of the 1950 UUDS was not applies. With Indonesia's return to the 1945

[22] Saiful Anam, "Fungsi Hukum Adat Dalam Pembentukan Peraturan Perundang-undangan Di Indonesia, " *Journal Iuris Scentia* 1, No 2 (2023): 80, https://doi.org/10.62263/jis.v1i2.18.

Constitution, *the rule of recognition* was needed for the implementation of customary law, especially customary offenses, so Law Number 1 Drt of 1951 concerning Actions was issued. Meanwhile, to organize a unified structure of powers and procedures for civil courts, Article 5 Paragraph (3) Sub b, reads as follows:

"The civil material law and for the time being the civil criminal material law which until now applies to independent regional leaders and people who were previously tried by the Traditional Court, still applies to those people and people, with the meaning of: [23]

- That an active act must be considered a criminal act, but there is no comparison in the Civil Criminal Code, so it is considered to be punishable by a sentence of not more than three months in prison and/or a fine of five hundred rupiah, namely as a substitute punishment if the customary punishment The sentence imposed is not followed by the condemned party and the compensation referred to is considered commensurate by the judge with the magnitude of the condemned person's fault.
- That if the customary punishment imposed in the judge's opinion exceeds the imprisonment sentence or fine referred to above, then for the defendant's mistake a substitute sentence of up to 10 years in prison may be imposed, with the understanding that the customary punishment according to the judge's understanding is no longer in line with time, it must always be replaced as mentioned above.
- That an act which according to living law must be considered a criminal act and which has an appeal in the Civil Penal Code, is deemed to be threatened with the same punishment as the sentence on appeal which is most similar to the criminal act.

Article 5 Paragraph (3) Sub b of Law No.1 Drt of 1951 above, apart from being the rule of recognition of customary criminal law, also provides guidelines on how to apply civil criminal law and customary criminal law to customary incidents (customary criminal acts), without specifying the type

[23] Undang-Undang Nomor 1 Drt Tahun 1951 Tentang Tindakan -Tindakan Sementara untuk Menyelenggarakan Kesatuan Susunan Kekuasaan dan Acara Pengadilan-Pengadilan Sipil, https://www.bphn. go.id> data.

of criminal act. Article 5 Paragraph (3) Sub b, as the rule of recognition as well as guidelines for application of customary law , is a policy that becomes a bridge so that customary law still exists in certain customary areas or where customary justice is also still alive, customary law and its customary offenses are still recognized and applied, as long as the implementation of the punishment is adhered to by the violators/perpetrators of customary offenses. However, if the perpetrator of a customary offense does not comply with the sentence (customary crime) imposed by a customary court judge, then the criminal incident can be brought to the state court with the provisions for punishment by the judge in accordance with the sentencing guidelines specified in Article 5 Paragraph (3) Sub b above.

C. Review Philosophical Formulation of Customary Law in Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the 2023 Criminal Code

The very interesting thing in the 2023 Criminal Code is the formulation of customary law which is narrowly interpreted as customary law in the 2023 Criminal Code when studied philosophically, namely a fundamental study of the nature, knowledge and origins of customary law as formulated in in Article 2 Paragraphs (1), (2), and (3) of the 2023 Criminal Code. From a philosophical perspective, customary law will be studied ontologically, epistemologically and axiologically as in the formulation of Article 2 Paragraphs (1), (2), and (3) Criminal Code 2023.

Ontologically, customary law is unwritten law, not in the form of a law, obeyed and supported by indigenous peoples whose embodiment is in the form of decisions of customary court functionaries and their implementation is fulfilled wholeheartedly. Because it is unwritten, the principles of customary law are not formulated but are inherent and animate in the decisions of customary justice functionaries, which originate from the values of law and justice held by the indigenous community concerned.

Dikomentari [A8]: This statement is somewhat factually weak, in some areas such as Bugis and Bali, their customary laws are written. Such as the Amannagappa trading rules in Bugis or Awig-Awig in Bali, even in Bali this has been made in Bali Provincial Decree No. 3 of 2003.

Prohibitions on actions which the community agrees are acts that violate customs and are therefore subject to sanctions, do not require written criminalization, because they are based on legal awareness and the

belief from generation to generation that the prohibited actions have consequences in the form of disturbances to the balance between the macrocosm and microcosm.

Based on unwritten material norms, the realization of customary law through decisions of customary functionaries, at first glance, is similar to *common* law system where case law or precedent as law created by the courts. This is considering the unwritten and dynamic nature of customary law.

Based on the study of the epistemology of customary law as unwritten legal rules originating from hereditary habits, which are born from human awareness to live fairly and civilized as a form of cultural ideas that contain cultural values, norms, laws and rules that are related to each other so that become a legal system that is supported by sanctions, believed in, and obeyed by indigenous peoples.

As unwritten rules originating from hereditary customs, customary law has the following characteristics:[24]

1. Traditional or conventional, that is, every provision in customary law is always related to the past and is continued and maintained from time to time.
2. Sacred in nature, this characteristic is obtained from elements originating from beliefs which play an important role in customary law provisions. This sacred nature emphasizes the authority of customary law, so that it must be obeyed by the community.
3. Flexible in nature, customary law which originates from community life is flexible in its application, experiences developments and always follows current developments. This flexibility is possible because customary law only contains principles, not detailed and detailed formulation of norms. In this way, customary law can easily adapt to the needs and development of values in society without changing the system or institutions.
4. It is dynamic or plastic in nature, where in the form of a traditional court judge's decision it can follow developments in society in general and individuals in each case.

[24] Sulastriyono, "Pemikiran Hukum Adat Djojodigoeno dan Relevansinya Kini," *Jurnal Mimbar Hukum* 30, No. 3 (2018): 455, https://doi.org/10.22146/jmh.36956.

M According to Ter Haar , because customary law originates from decisions of traditional leaders, what is known as applicable customary law are rules based on decisions taken by traditional leaders both in concrete decisions and in the same decision. This decision then becomes law as a manifestation of the legal values that live in society.[25]

Article 2 Paragraph (1) of the 2023 Criminal Code determines that the application of the principle of legality as formulated in Article 1 Paragraph (1) does not reduce the application of laws that exist in society in determining that a person deserves to be punished even though the act is not regulated in the 2023 Criminal Code. In the Article Explanation 2 Paragraph (1) emphasizes that what is meant by law that exists in society is customary law which determines that someone who commits a certain act deserves to be punished. The laws that live in society in this article relate to unwritten laws that are still valid and developing in society in Indonesia. To strengthen the implementation of the laws that exist in the community, Regional Regulations regulate these customary criminal acts. Paragraph (2) reads: The law that lives in society as intended in Paragraph (1) applies where the law lives and as long as it is not regulated in this law and is in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia , human rights, and general legal principles recognized by the people of nations. Elucidation of Paragraph (2) confirms that what is meant by applicable in the place where the law lives is that it applies to every person who commits a customary crime in that area. It is then emphasized that this paragraph contains guidelines for establishing customary criminal law, the validity of which is recognized by this law. Furthermore, Paragraph (3) states that provisions regarding procedures and criteria for determining laws that exist in society are regulated by Government Regulations. Elucidation of Paragraph (3) emphasizes that the Government Regulation in this provision is a guideline for regions in establishing laws that live in society in Regional Regulations.

The provisions for the application of living law as formulated in Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) above, which are interpreted as customary law regulated by Government Regulations and

[25] Retno Kus Setyowati, "Pengakuan Negara Terhadap Masyarakat Hukum Adat," *Jurnal Bina Mulia Hukum* 12, No.1(2023): 134, http://doi.org/10.37893/jbh.v12i1.601.

Regional Regulations, are philosophically wrong. The error of Article 2 Paragraphs (1), (2) and (3) with its noble desire to recognize and accommodate customary law as living law actually eliminates the characteristics of customary law as unwritten law which is custom which has legal consequences in the form of coercive sanctions. , originates from the decision of the traditional ruler in the same concrete case as a manifestation of the values that live in society.

Meanwhile, from an epistemological point of view, customary law is law that originates from custom and becomes a legal reality in which the principles that apply in community self-interest relationships are found.

In the context of axiology, customary law as original Indonesian legal material is the material needed in the formation of criminal law in Indonesia. Djojodigoeno said that bumiputera customary law in the substantial sense as a legal reality that lives among the Indonesian people, is legal material that actually lives among the bumiputera which needs to be applied in state law because it is original Indonesian legal material.

The provisions of Article 2 Paragraph (1) of the 2023 Criminal Code and its explanation essentially contain the following 3 things:

1. The definition of unwritten law is customary law;
2. Unwritten customary law which determines that someone who commits a certain act should be punished based on unwritten law which is still valid and developing in life in Indonesia;
3. Regulation of customary crimes is carried out by Regional Regulations.

The provisions of Paragraph (2) concerning guidelines for determining customary law that applies to perpetrators of criminal acts, contain the following essence:

1. In the event that a customary crime occurs, the customary law that applies is the customary law at the place where the act was committed;
2. Customary law recognized by the 2023 Criminal Code is customary law that is in accordance with the values of Pancasila, the 1945 Republic of Indonesia Constitution, human rights, and general legal principles recognized by the people of the nation.

The provisions of Paragraph (3) regarding determining procedures and criteria for customary law recognized by the 2023 Criminal Code, essentially consist of:

1. The procedures and criteria for customary law that may apply are determined by Government Regulation;
2. Government Regulations that provide guidelines for regions in customary law that applies to indigenous communities as outlined in Regional Regulations.

Based on the formulation of Article 2 Paragraphs (1), (2), and (3) along with the Explanation, customary law is not applied as original legal material whose values are accommodated and colors the 2023 Criminal Code, but is instead taken over in the form of regional regulations, so that it will become written law, where acts which in customary law constitute customary offenses and their sanctions as long as they are not regulated in the 2023 Criminal Code, will be formulated in writing in regional regulations (Perda), the criteria for which will be determined by government regulations.

Philosophical criticism of the recognition of customary law by the 2023 Criminal Code, in this case unwritten customary offenses becoming customary offenses formulated in regional regulations, is a wrong action. Formulating customary offenses into regional regulations is an act of eliminating the original nature of customary law as unwritten law. With the loss of the original nature of customary law, customary offenses also disappear, as well as making customary offenses state offenses, because they are formulated in regional regulations which are state regulations. Meanwhile, customary law, especially customary offenses, is born from the decisions of traditional rulers regarding acts which according to local customary law values are not worthy of being committed and deserve punishment, where the decision of traditional rulers regarding these customary offenses is followed by the traditional rulers. others in completing the same action. Philosophically it is not appropriate to formulate customary offenses in writing. Philosophical criticism is that the 2023 Criminal Code recognizes and accommodates customary law as the original basic material in determining criminal acts, criminal liability, criminal objectives, criminal guidelines and criminal regulations.

D. Review Policy Criminal Law Regarding the Formulation of Customary Law in Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the 2023 Criminal Code

Customs as a result of the agreement of society as a whole are rooted and originate from the agreement of a society, must be the basis for the formation of positive law, so that every positive law must be woven in harmony with the customs and customs of the community local. "The positive law in harmony with custom is thus seen as obligatory, and more effective, because consensual".

The 2023 Criminal Code as positive law must be intertwined with customary law, according to Brian Z Tamanaha above, customary law is a more effective provision with its consensual nature. Meanwhile Karl Von Savigny wants positive law to be intertwined with customary law, because in customary law there is people's consciousness which is a manifestation of the soul of the nation, positive law must be harmonized with people's feelings and awareness about the right and wrong behavior. Referring to the opinion of Savigny, all forms of legislation including the 2023 Criminal Code must take into account customary law. The 2023 Criminal Code must not violate the norms and value system of customary law, therefore it must be harmonized with customary law, including in determining criminal acts, and in determining the structure of the criminal system it must be in accordance with customary law as a manifestation of the national spirit.[26] In on this occasion Savigny emphasized that all state laws are subordinate to customary law.

Based on the recommendations of the Law Seminar National VI (Jakarta, 25 -29 June 1994), it is clear that the national legal system adopted is the Pancasila Legal System, namely a legal system based on the Pancasila philosophy, so that all products National laws, including the 2023 Criminal Code, must be based on and in line with the Pancasila philosophy. With the awareness that the development of a nation's national law is nation-centric, the development of Indonesian national law, including in the preparation

[26] Andri Yanto, Faidatul Hikmah, "Akomodasi Hukum Yang Hidup Dalam Kitab Undang-Undang Hukum Pidana Nasional Menurut Perspektif Asas Legalitas," *Jurnal Recht Studiosum* 2, No.2 (2023), 88, https://doi.org/10.32734/rslr.v2i2.14162.

of the 2023 Criminal Code, is also nation-centric, meaning that it is based on legal values and legal culture that are born, live, grow and develop in Indonesian society, which is manifested in living laws which are believed to be noble values in behavior from generation to generation, which form customs in an unwritten form, namely customary law.

The position of customary law as original law in society originates from people's feelings and awareness, therefore it is unwritten, it does not have to be conflicted with written law, let alone abolished by written law, but should be positioned as a complement that complements written law. It is acknowledged that the formation of unwritten law is more flexible than the formation of written law, because it can overcome the gap between the validity of the law and its effectiveness, this is because of the dynamic and plastic nature of customary law as unwritten law, so that it always follows the development of values who live in society. The position of customary law in the national legal system is as a source of national law.[27]

The 2023 Criminal Code as a legislative legal product currently still uses a thinking framework that is also strong in the principles of formal legality, this was acknowledged in the VI National Law Seminar (Jakarta, 25 – 29 June 1994) that there are no clear criteria regarding customary law (customary law), especially in enforcing the law, encourages the formation of a very legal attitude and legal culture in PJP I which tends to identify law with law. It was further emphasized that in the PJP II era, the legal community in Indonesia must be directed to respect customary law as a source of law, in addition to statutory regulations and permanent jurisprudence.

Sentencing policy in the form of sentencing guidelines for judges related to customary law which is full of legal and justice values as a source of justice, before the promulgation of the 2023 Criminal Code, had been formulated in statutory policies and policies in judicial practice, as follows:

1. Article 5 Paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, states that judges and constitutional justices are obliged to explore, follow and understand the legal values and sense of justice that exist in society.

[27]Revie, "Hukum Adat Sebagai Sumber Hukum Nasional Dalam Politik Hukum Di Indonesia," *Jurnal Legal Certainty* 1, No 1 (2019): 25, https://core.ac.uk/download/pdf/287209404.pdf.

2. Article 5 Paragraph (3) Sub b of Law Number 1 Drt of 1951 concerning Concerning Temporary Measures to Organize the Unity Structure of Powers and Procedures of Civil Courts, where Article 5 Paragraph (3) Sub b, reads as follows following:
   "The civil material law and for the time being the civil criminal material law which until now applies to independent regional leaders and people who were previously tried by the Traditional Court, still applies to those people and people, with the meaning of [28] :
   - That an active act must be considered a criminal act, but there is no comparison in the Civil Criminal Code, so it is considered to be punishable by a sentence of not more than three months in prison and/or a fine of five hundred rupiah, namely as a substitute punishment if the customary punishment The sentence imposed is not followed by the condemned party and the compensation referred to is considered commensurate by the judge with the magnitude of the condemned person's fault.
   - That if the customary punishment imposed in the judge's opinion exceeds the imprisonment sentence or fine referred to above, then for the defendant's mistake a substitute sentence of up to 10 years in prison may be imposed, with the understanding that the customary punishment which according to the judge's understanding is no longer in line with the times, will always be must be replaced as mentioned above.
   - That an act which according to living law must be considered a criminal act and which has an appeal in the Civil Criminal Code, is deemed to be threatened with the same punishment as the sentence on appeal which is most similar to the criminal act.
3. Jurisprudence Supreme Court Number 1644 K/Pid/1988 dated 15 May 1991, which basically states that the Supreme Court still respects the decision of the Traditional Head based on customary deliberation which provides customary sanctions to violators of customary law norms. With this jurisprudence, perpetrators of criminal acts cannot

[28] Undang-Undang Nomor 1 Drt Tahun 1951 Tentang Tindakan -Tindakan Sementara untuk Menyelenggarakan Kesatuan Susunan Kekuasaan dan Acara Pengadilan-Pengadilan Sipil, https://www.bphn. go.id> data

be tried using two legal rules, namely customary rules and Criminal Code rules, even though the criminal acts are regulated in the Criminal Code.

The three criminalization policies related to customary law above only provide guidance for judges in handling cases related to customary offenses which are used as a source of law, not by formulating customary offenses into statutory regulations. When compared with the formulation of the criminal policy guidelines related to customary law above, with the formulation of customary law as a source of material law which coexists with the principle of formal legality in Article 2 Paragraphs (1), (2) and (3) of the 2023 Criminal Code and the Explanation of the Articles According to the author, lawmaker Number 1 of 2023 concerning the Criminal Code took a blunder and resulted in a mistake in formulating the position of customary law as a source of material criminal law in Indonesia, by formulating customary offenses into national law in the form of Regional Regulations or Regional Regulations.

The words of Article 2 Paragraphs (1), (2), and (3) and their explanations are formulated as follows :

Paragraph (1)

The provisions as intended in Article 1 Paragraph (1) do not reduce the validity of the laws existing in society which determine that a person deserves to be punished even though the act is not regulated in this law..

Explanation of Paragraph (1)

What is meant by "law that lives in society" is customary law which determines that someone who commits a certain act deserves to be punished. The laws that live in society in this article relate to unwritten laws that are still valid and developing in society in Indonesia. To strengthen the implementation of laws that exist in society, Regional Regulations regulate these Customary Crimes.

Paragraph (2)

The law that lives in society as intended in Paragraph (1) applies in the place where the law lives and as long as it is not regulated in this law and is in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general principles recognized by the people of nations.

Explanation of Paragraph (2)
In this provision, what is meant by applicable in the place where the law lives is that it applies to every person who commits a customary crime in that area. This paragraph contains guidelines for establishing customary criminal law whose validity is recognized by this law.
Paragraph (3)
Provisions regarding procedures and criteria for determining laws that exist in society are regulated by Government Regulations.
Explanation of Paragraph (3)
The Government Regulations in this provision are guidelines for regions in establishing laws that live in society in Regional Regulations.
In essence, Article 2 Paragraphs (1), (2), and (3) concerning the recognition of customary law as a principle of material legality, contains 3 core elements, namely:

1. The definition of living law *(living law*) is narrowly defined as customary law.

In VI National Law Seminar (Jakarta, 25 – 29 June 1994), the definition of customary law which is a translation of *living law* or living law, includes:

- In the sense that it is identical to customary law that applies in ethnic communities and customary law environments.
- In the sense of a habit recognized by society and decision makers (*decision mak* er), so that it gradually becomes law (*gewoonte recht, customary law*).

However, Article 1 Paragraph (1) has a narrow meaning, namely only customary law. Recognition of customary law is based on the idea of balance promoted in the 2023 Criminal Code, where in the context of the principle of legality, recognition of customary law is a manifestation of the idea of balance between the principle of formal legality as formulated in Article (1) Paragraph (1) and the principle of material legality which formulated in Article 2 Paragraphs (1), (2), and (3).

2. There is recognition of customary offenses by by criminalizing them in PERDA

The principle of legality in criminal law is the principle that is the basis for the legitimacy of an act so that it can be punished, therefore is always

followed by the unlawful nature of the act. The principle of formal legality contains the nature of being against formal law, where the nature of being against the law is interpreted as being against or contrary to the rules of law, so that the legitimacy of an act is said to be against the law if the act has been formulated in law and is punishable by criminal law.

The reasons for eliminating the unlawful nature of acts that are formulated in the law as criminal acts are also in the law. Meanwhile, the principle of material legality provides the basis for punishing an act when the act is not desired by society, because it is contrary to society's sense of justice and the values of law and justice adhered to by society. The principle of material legality contains the nature of being against material law (i.e. the nature of being against the law which is outside the law, such as conflicting with society's sense of justice, legal values and fairness in society), so that an action is said to be against the law if it is contrary to law. with a sense of justice and legal values in society even though it is not formulated in the law as a punishable act.

In the nature of being against the material law, there are two functions, namely the positive function, where the nature of being against the material law is used to positiveize or make acts that are outside the written rules a criminal act. Meanwhile, the negative function of the unlawful nature of material law is the function of the unlawful nature of material law to eliminate the unlawful nature of actions that are formulated in the law as criminal acts. In the negative function, the absence of material unlawfulness (*Aufweigheid Van Alle Materril Wederechtlijke*/AVAW) means that criminal acts formulated in statutory regulations have their unlawful nature removed, so they cannot be punished. In criminal law enforcement, both the positive and negative functions of material unlawfulness are rarely applied.

The application of the principle of material legality as formulated in Article 1 Paragraph (1), (2), and (3) of the 2023 Criminal Code only applies the nature of violating material law in a positive function, namely positiveizing or determining unwritten customary offenses, which still exist and are developing becomes a criminal offense within the rules of state criminal law. Irregularities and errors in the policy of criminalizing customary offenses to become criminal acts in state law occur when

unwritten customary offenses are formulated in Regional Regulations as state regulations in written form[29].

Based on critical analysis of criminalization policies, the criminalization of customary offenses in regional regulations is very inappropriate. This can be identified as the following problems:

1) The problem of recognizing customary law by formulating customary offenses in Regional Regulations

Customary offenses originate from unwritten law, namely the decisions of traditional rulers (judges), which are dynamic and plastic in nature, the measures of which quickly change and develop following the development of values community law and developments over time. So that an act that was originally a customary offense at some point will change to no longer be a customary offense, and conversely certain acts that were not previously recognized as customary offenses will be criminalized by customary courts to become customary offences.

The formulation of customary offenses in Regional Regulations actually eliminates the distinctive nature of customary offenses which are flexible, elastic and plastic and not written, becoming offenses that are formulated in written regulations in the form of Regional Regulations so that they are rigid. Formulating customary offenses into regional regulations as state regulations is a wrong step that actually eliminates customary law itself, even though it is formulated in local regulations as regional regulations where customary law exists.

Some of the criminal policy issues that arise in the formulation of customary offenses into PERDA are as follows:

- Problems of recriminalization and reformulation of customary offenses in regional regulations;
- The issue of threatening criminal sanctions for customary offenses formulated in the Regional Regulation;

[29] Ni Putu Ari Setyaningsih, Putu Chandra Kinandina Kayuan, "Kompilasi Delik Adat Dalam Peraturan Daerah Sebagai Dasar Pemidanaan Dalam Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana (RUU KUHP)," *Jurnal Yustisia*,16, No.1. (2022): 71 -79. http://dx.doi.org/10.62279/yustitia.v16i1.902.

- The problem of the punishment system which is different between the punishment system in customary offenses and the regional regulation punishment system;
- The problem of shifting the nature of going against material law into the nature of going against formal law in the formulation of customary offenses in regional regulations.

2) Differences between the realm of Customary Criminal law and Regional Regulations

As explained above, basically customary law is law that originates from the feelings of awareness and agreement of indigenous peoples that have been followed for generations, in the form of unwritten law in the form of decisions of traditional judges regarding behavior that is considered to violate the agreement, where the judge's decision must be followed. by other traditional judges. Customary law as an unwritten legal rule has a unique characteristic, namely that it is very dynamic and plastic, so it is very easy to change following the development of values in society and the times. Customary law is a law formed by indigenous peoples, based on its formation, it is different from state law, which is made by state institutions and enforced on its citizens (up to bottom).

The definition of Regional Regulations in Law Number 12 of 2011 concerning the Formation of Legislative Regulations consists of Provincial Regulations, namely legislation formed by the Provincial Regional People's Representative Council with the approval of the Governor, and Regency/City Regional Regulations, namely regional regulations formed by the Council. Regency/City Regional Representative with joint approval of the Regent/Mayor.

Article 7 of Law Number 12 of 2011 above positions regional regulations as state legislation in the last place after presidential regulations. The functions of regional regulations include others:[30]

1. As a policy instrument for implementing regional autonomy and assistance tasks;

[30] Claustantianus Wibisono Tanggono, et all, "Mekanisme Pembentukan Peraturan Daerah Yang Berkualitas di Pemerintah Daerah," *Journal Juridisch* 1, No.3 (2023): 211, http://dx.doi.org/10.26623/jj.v1i3.8051

2. As implementing regulations of higher laws and regulations. In this case the Regional Regulations must not conflict with higher laws and regulations.
3. As a container for regional specialties and diversity as well as channeling the aspirations of the people in the region but must be based on Pancasila and the 1945 Constitution.
4. As a development tool in improving regional welfare.

Based on Law Number 12 of 2011 above, Regional Regulations can be identified as follows:[31]

1. Basically, regional regulations are administrative laws to support the implementation of regional autonomy and assistance tasks.
2. The criminal threat in the Regional Regulation is not the main threat, but only as a supporting sanction for administrative law.
3. The criminal threat contained in the Regional Regulation is a maximum imprisonment of 6 (six) months or a maximum fine of Rp. 50,000,000 (five tens of millions of rupiah).
4. Regional regulations can contain threats of imprisonment or fines in addition to the weight provisions above in accordance with statutory regulations.
5. Regional regulations can contain threats of sanctions in the nature of returning to the original state and administrative sanctions.

Based on the description above, in essence, regional regulations are administrative laws to carry out regional autonomy and assistance duties, while customary offenses which are in the realm of customary law are purely criminal acts in the context of customary law. Thus, it is not appropriate to formulate customary offenses into regional regulations as state law in the implementation of regional administration.

The formulation of customary offenses into state law is a form of customary law formalism, instead of providing a place and recognition for customary law in modern national criminal law, what has happened is actually reconsolidating customary law.

3) The criminalization system for customary offenses is different from regional regulations

[31] Jihan Sopyana, Salsa Aulia Ratar Putri, Siti Dewi Ratnasari, "Pencabutan Peraturan Daerah Oleh Pemerintah Pusat," *Jurnal Rechten*. 3, No.2 (2021): 18-20, https://doi.org/10.52005/rechten.v3i2.84.

The criminal system is a building system in the determination and imposition of punishment which consists of criminal principles and criminal objectives, criminal guidelines and rules, and actions, criminal and criminal responsibility.[32]

In customary criminal law, the structure of the criminal system is very distinctive, different from the national criminal system, concluded by the author as follows:

- The Principle of Punishment for Existing Offensest prioritizes sources of unwritten law which are plastic and ela static, regarding actions, mistakes and others in the context of customary offenses which are different from state criminal law (KUHP);
- The aim of criminalization for customary offenses which is primarily to restore balance between the macro cosmos and the micro cosmos is very dominated by spiritual interests, which is very different from the aim of state punishment which is dominated by protecting society from crime.
- Guidelines/Rules for Punishing Customary Offenses prioritize giving judges discretion in convicting perpetrators of customary offenses, based on the conscience and sense of justice of the community, so that punishment is more flexible and flexible, not relying on legal certainty.
- Customary crimes are determined through criminalization by traditional ancestors based on the belief as pamali or taboo acts, damage human relations with spiritual beings, so that they are not appropriate, they are believed to bring harm or disaster.
- Liability answers in customary offenses are aimed individually and structurally, with the main aim of restoring balance.
- Traditional sanctions are in the form of real sanctions and magical sanctions in the form of traditional ceremonies and other sanctions to restore disturbed spiritual balance.

4) Limitations of Recognition of Customary Law

Not all customary laws that are still alive and developing are recognized by 2023 Criminal Code, where Article 2 Paragraph (2) provides

[32] Novandi Dwi Putra, Ilmi Firdaus Aliyah, Dadang Syaifudin Yusuf, "Pembaharuan Hukum Pidana Positif (Positive Criminal Law Reform)," *Journal of Social Science Research* 3, No.3 (2023): 5 , https://j-innovative.org/index.php/Innovative/article/view/2800/2044

conditions for recognized customary laws, namely in accordance with the values contained in Pancasila and the 1945 Constitution, Human Rights and general legal principles recognized by the people of nations. In restrictions on customary law, it is necessary to explain whether the restrictions relate to customary offenses or customary sanctions? Mechanism for resolving the offense? Or is it the entire system of criminal punishment for customary offenses? In the case of customary law criteria which are in accordance with general legal principles recognized by nations, it can be biased, because the legal values adopted by a nation are "nation centric", especially in customary law which has no relevance to international values. So that in legal recognition custom is enough to use Pancasila, Human Rights, and the 1945 Republic of Indonesia Constitution as the margin of appreciation.

The filter criteria that limit the application of customary law above are a consequence of the shift from customary law to state law, which is further stated that provisions regarding procedures methods and legal criteria that exist in society (customary law) are regulated by government regulations. The next problem is what about customary laws that are not covered by government regulations because they are located far inland? What are the consequences for customary law that is not recognized by the state? Is it still valid? This requires further thought

E. Ways to Recognize Customary Law in the 2023 KUHP

The recognition of customary law as a source of material criminal law in the KUHP 2023, should be returned to the nature of customary law, as original law resulting from the culture of customary communities that are different from each other, unwritten, dynamic, plastic and easy. changes according to the values that develop in indigenous communities, it is not appropriate to recognize customary law as a source of material criminal law with the policy of formulating customary criminal acts into PERDA (Regional Regulations) as state regulations. A policy like this is exactly the same as the policy implemented by the Dutch East Indies Government, where through Article 131 IS Jo AB provides the validity of the application of customary law but with certain notes, where Article 131 IS Jo AB can be referred to as the Article Controlling the application of customary law, in

where if it is not desired to come into force, then certain customary laws cannot apply.

The best way out in recognizing customary law as a source of material criminal law can be done as follows:

1. Formulate customary law as a source of law, by formulating customary offenses as formulated in Article 5 Paragraph (3) Sub b of Law Number Drt of 1951 concerning Temporary Measures to Implement Unity Composition of Powers and Procedures of Civil Courts.
2. Formulate guidelines for criminalization of customary offenses in accordance with policy and Supreme Court jurisprudence, namely Supreme Court Decision No.1644 K/Pid/1988.

Making Article 2 Paragraphs (1), (2), and (3) only as the rule of recognition of the application of customary law

Conclusion

Based on the discussion of the problems above, it can be concluded as follows:

1. The validity of customary law as the meaning of living law in society needs to be reviewed, because according to the national seminar living law is not only interpreted as customary law but as customs accepted by a particular community. In addition, the meaning of custom does not necessarily be the same as customary law, conditions are needed for a custom to become customary law.
2. Based on a philosophical study, the formulation of customary offenses into Regional Regulations, as explained in the Elucidation to Article 2 Paragraphs (1), (2), and (3) of the 2023 Criminal Code is inappropriate, considering the nature of customary offenses themselves. living in a customary society, unwritten law is very dynamic, plastic and elastic, developing in accordance with the development of cultural values, law and justice in customary communities, while regional regulations are state regulations that are written, rigid in nature, so that in essence they are in conflict between Regional regulations with the customary rules themselves.

3. Based on a study of criminal law policy, formulating customary offenses into Regional Regulations is very inappropriate , from a policy perspective the formulation distorts the nature of customary offenses as unwritten rules, from a criminal system perspective the differences between the systems are very different punishment in customary offenses (consisting of Criminal Acts, Mistakes, Criminal Liability, Purpose of Punishment, and Sentencing Guidelines) with the state criminal system, let alone regional regulations. Judging from the criminal sanctions, it is very unequal if customary offenses are formulated in the Regional Regulation, then the criminal sanctions follow the criminal sanctions in the Regional Regulation which are very limited, so they cannot reach customary offenses which are threatened by indigenous peoples with heavier customary sanctions. . The most likely thing to accommodate customary criminal law in the 2023 Criminal Code is that customary law is only used as a source of law, and Article 2 Paragraphs (1), (2), and (3) only become rules for recognizing customary law (the rule). of recognition) of customary law to apply as is.

Dikomentari [A9]: the conclusion of this article is very good, coherent, and interesting. but the discussion does not really illustrate this, so it is reversed with this conclusion section.

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Reviewer comment

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POLICY REVIEW FOR THE FORMULATION OF TRADITIONAL LAW IN THE 2023 KUHP

(Philosophical And Penal Policy Prespective)

Commented [RR1]: After carefully reviewing the full text of your article, we observed that the term "review" suggests a mere examination without incorporating the author's arguments. We recommend replacing "review" with "analysis," as it conveys a more comprehensive approach one that not only examines the regulation of customary law in the 2023 Criminal Code but also includes the author's perspectives and arguments on the policy.

Abstract

An interesting issues in the 2023 Criminal Code is the accommodation of living law with a meaning limited to customary law as formulated in Article 2 Paragraphs (1), (2), and (3). This research aims to review or examine it in perspective philosophical and criminal law policies regarding the formulation of Customary Law in Article 2 Paragraphs (1), (2), and (3) of the 2023 Criminal Code. This research uses a normative or doctrinal juridical approach, with data sources from library materials, in the form of statutory regulations and literatures related to research. This research raises problems: 1) . What is the validity of the meaning of customary law as customary law in Article 2 Paragraph (1) of the 2023 Criminal Code? 2) . How to analyze the formulation of Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the Criminal Code 2023 from a philosophical perspective? and 3). How to analyze the formulation of Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the 2023 Criminal Code from a criminal law policy perspective? The results of the research are : there is invalidity in the formulation of the meaning of customary law as only customary law, there are irregularities in the formulation of customary criminal law in Article 2 Paragraphs (1), (2), and (3), where customary offenses are made criminal offenses in Regional Regulations, both from a philosophical and criminal law policy perspective, so that reformulation of Article 2 Paragraphs (1), (2), and (3) is needed.

Commented [RR2]: Throughout this article, please replace the term "customary law" with "Adat Law" to clearly differentiate its meaning from the general concept of adat law.

Keywords

Review, Policy, Custom, Criminal Code.

Commented [RR3]: Change to Adat

Introduction

Entering the beginning of 2023, the Indonesian people, especially academics and criminal law practitioners, feel relieved by the presence of Law Number 1 of 2023 concerning the Criminal Law Code, which to replace the Dutch of the Criminal Code (Wetboek Van Strafrecht/WvS), which is effective in Indonesia until now. The urgency to create the 2023 Criminal Code emerged since the proclamation of Indonesian independence, starting with the issuance of Law Number 1 of 1946 concerning Criminal Law Regulations as the rules for enforcing the Criminal Code (WvS). The Law Number 1 of 1946 made several changes to suit the conditions of the Indonesian people after leaving Dutch colonial rule.[1] The Criminal Code (Wvs) is a Dutch derivative of the Criminal Code created in 1881, which came into effect in the Netherlands in 1886, and came into force in Indonesia on January 1, 1918. With Principles of concordance then The Criminal Code (WvS) applies in Indonesia. The principle of concordance is actually the principle for enforcing criminal regulations for Dutch people who are outside Holland, especially in their colony.[2]

If we examine the Criminal Code (WvS) philosophically, looking at the criminal rules and principles that color the formulation of its articles in Book I on General Rules, Book II on felonies, and Book III on misdemeanors, it can be said that the formulation is obsolete (*obsolete*). The Criminal Code (WvS) relies on the principle of formal legality adhered to by adherents of legalism, where law is only interpreted as statutory rules, so that all rules of behavior that are outside the law, such as society's habits in passing laws and resolving conflicts as customs which live, grow, and dead in society for generations are not recognized as law. The principle of formal legality focuses on legal certainty and juridical justice. It justice based on the text of the law, not substantive justice which is contextual in nature. This

Commented [RR4]: 1.Flow of Thought: The explanation begins with the emergence of the 2023 Criminal Code. However, the transitions between paragraphs remain disconnected, making them appear as standalone sections rather than a cohesive unit. Strengthening the logical flow between paragraphs would enhance the overall coherence of the discussion.
2.Strengthening the Background Argument: Provide a more in-depth analysis of the background behind the emergence of both the KUHP (WvS) and the 2023 KUHP. Elaborate on the fundamental principles underlying each Criminal Code and discuss in greater detail why the 2023 KUHP is considered a response to the evolving needs of Indonesia's criminal justice system. When compared to the WvS Criminal Code, analyze the sociological and philosophical implications of the 2023 KUHP and its significance in replacing the long-standing WvS Criminal Code in Indonesia.
3.The Concept of Adat Law in the 2023 KUHP: Given that the regulation of adat law is a central theme of this research, it would be beneficial to provide a concise analysis of the potential consequences of its implementation. Specifically, consider whether its application might lead to the distortion or colonization of Indonesian adat law.
4.Literature Review: An essential element that should be incorporated into this background section is a Literature Review. Including this would demonstrate that the research is grounded in existing studies while also providing a solid justification for its academic contribution and positioning. Additionally, the introduction lacks sufficient references, despite containing several arguments that do not appear to be solely the author's original ideas. Proper citations would strengthen the credibility of the discussion.

[1] Ni Putu Yulita Damar Putri, Sagung Putri M.E. Purwani, "Urgensi Pembaharuan Hukum Pidana di Indonesia," *Jurnal Kertha Wicar* 9, No. 8 (2020): 2 , https://ojs.unud.ac.id/index.php/kerthawicara/article/view/61874

[2] Faisal, Muhammad Rustamaji, "Pembaharuan Pilar Hukum Pidana Dalam RUU KUHP," *Jurnal Magister Hukum Udayana*l 5, No. 2 (2021): 291-308, https://doi.org/10.24843/JMHU.2021.v10.i02.p08

situation often creates an imbalance/gap between the Criminal Code (WvS) and the need for a sense of substantive justice in society. Not only the principle of formal legality, the values that characterize the Criminal Code (WvS) also become a problem when the Criminal Code (WvS) is applied to cases where there is a conflict between the values of legal certainty, expediency and justice. This inequality originates from the legal values that underlie the Criminal Code (WvS) such as liberalism, individualism and capitalism, meanwhile the Indonesian nation adheres to religious and collective or communal values. These differences in values have an impact on criminal law enforcement in Indonesia. The Indonesian nation, which has a communal character such as being tolerant, easy to forgive, high in solidarity, is faced with Ducth criminal law which has a liberal, individual and capitalistic character. Here, legalism which is very rigid, interprets the law as *Lex Dura Sad Tamen Scripta,* wherein law is only interpreted as written rules.[3]

The 2023 Criminal Code is a response to the need of Indonesian society to have criminal law that is in accordance with the values of Indonesian life, religious values and communal values that are crystallized in Pancasila. By focusing on the principle of balance as the juridical basis of Indonesian philosophy, which is taken from the core of Pancasila, that shapes balance in the relationship between humans and their God (religious balance), the relationship between humas and themselves and others (humanity balance), as well as the relationship between humans and society and universe (social balance). The core balance of Pancasila values is manifested in the 2023 Criminal Code in the form of a balance of punishments, as follows: 1. The balance between public interests, The State interests and individual interests. 2. The balance between protection of public, social interests, the interests of perpetrators of criminal acts through criminal individualization, and the interests of victims (*victims of crime)*; 3. The balance between objective elements/factors (actions/outwardly) and subjective factors (people/inner thoughts/inner attitudes) in ideas *daad-dader strafrecht* ; 4. The balance between formal and material criteria; 5.

[3] Muhammad Alwan Fillah,"Politik Hukum Dalam Pembaharuan Kitab Undang-Undang Hukum Pidana (KUHP) Di Indonesia", *Jurnal Forum Studi Hukum Dan Kemasyarakatan* 5 No.1 (2023): 53-64, https://doi.org/10.15575/vh.v5i1.23230

The balance between legal certainty, flexibility, elasticity or flexibility and justice"; 6. The balance between national values and global/universal values; 7. Balance between human rights (human rights) and human obligations (responsibility capacity / human responsibilities). 7. The balance between warmaking on crime and peacemaking on crime approaches, because criminal acts are a product of social structure.[4]

One of the most prominent Indonesian things is the recognition and accommodation of the living law as a source of criminal law that formulated in Article 2 Paragraph (1), as *preleasing* the principle of formal legality. It is accommodated by the principle of material legality, meaning that customary law (the living law) is used as a source of law to determine acts that are not regulated in the 2023 Criminal Code, but in society, especially indigenous communities, are declared as acts that can be punished. It is logical that the 2023 Criminal Code is claimed to be the Indonesian Criminal Code, recognizing and accommodating living law as a source of legal and justice values that were born, grew and developed with the Indonesian nation. As a legal ideal, the legal values contained in the laws that exist in Indonesia should color the content of every Indonesian law and regulation, especially the Criminal Code which regulates individual behavior in public life, by criminalizing acts that not desired by society, in as well as i with rules for administering punishment that are not rigid (*rigid*) which are based on values - values of law and justice of the Indonesian nation. The culture of the Indonesian nation which is full of communal values gives birth to an attitude of self-centeredness, non-individuality, solidarity and respect for human rights and human obligations as a manifestation of the principle of monodualism/principle of balance which has been integrated in Indonesian human behavior.

Soediman Kartadipradja said that the expression of the content of the soul of a nation appears in its culture, culture which is an expression of the soul of the nation concerned, in sculpture, painting, literature, dance, and also in its laws. In the legal field, we want to use it as a legal measuring tool, strictly speaking Indonesian customary law is part of our nation's culture which, according to **Van Vollenhoven** "is disappearing into the

[4] Mudemar A.Rasyidi, Menuju Pembaharuan Hukum Pidana Indonesia, "*Jurnal Mitra Manajemen*," 12, No.1 (2021): 1-10, https://doi.org/10.35968/jmm.v12i1

darkness of the past". Customary law, which is an expression of the soul of the Indonesian nation, is a spiritual heritage or ancestral spiritual inheritance that has been passed down from generation to generation to express the path towards justice in human relations.[5]

The living law which is formulated in 2023 Criminal Code is interpreted in a closed way *(*closed interpretation) as customary law, as stated in Elucidation of Article 2 Paragraph (1) that "the law that lives in society is **customary law** which determines that someone who commits a certain act deserves to be punished. The laws that live in society in this article relate to unwritten laws that are still valid and developing in society in Indonesia. To strengthen the implementation of laws that exist in the community, **Regional Regulations** regulate the **Customary Crimes** ". Explanation of Paragraph (2) that " In this provision, what is meant by applicable in the place where the law lives is that it applies to every person who commits a customary crime in that area. This paragraph contains guidelines for establishing customary criminal law, the validity of which is recognized by this Law." Explanation of Paragraph (3) that "Government regulations in this provision are guidelines for regions in establishing laws that live in society in Regional Regulations".

If you look closely at the Explanation of Article 2 Paragraph (1) then what is meant by customary law is unwritten customary law which is still valid and developing in Indonesia which regulates customary criminal acts. Because it is not written, the Regional Regulation regulates customary criminal acts. Explanation of Paragraph (2) is a guideline in determining customary criminal law whose validity is recognized by the 2023 Criminal Code, thus not all customary laws are recognized by the 2023 Criminal Code according to Paragraph (2), and the Explanation of Paragraph (3) will be the existence of a Government Regulation as a guide for regions in establishing living law (customary law) in Regional Regulations (Perda).

Referring to the Explanation of Article 2 Paragraphs (1), (2), and (3), if studied philosophically and in penal policy, there are juridical weaknesses that will conflict with each other, where instead of recognizing and accommodating customary law as living law, it actually distorts the law.

[5] Soediman Kartahadiprodjo, *Pengantar Tata Hukum Di Indonesia*, (Jakarta: Pembangunan Publisher, 1973)

custom itself, with the formulation of the colonial model in formulating the enactment of customary law through the formulation of customary offenses in regional regulations, it can be said that there is a re-colonization of customary law formulation, so that a policy gap appears pidama law, which ultimately gives rise to problems:

1. What is the validity of the meaning of customary law as customary law in Article 2 Paragraph (1) of the 2023 Criminal Code?
2. What is the analysis of the formulation of Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the 2023 Criminal Code from a philosophical perspective?
3. What is the analysis of the formulation of Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) 2023 Criminal Code in criminal law policy perspective?

Method

This research aims to study or review the validity of the narrow meaning of customary law as formulated in Article 2 Paragraphs (1), (2), and (3) of the Criminal Code 2023, as well as the oddities in the model formulation of customary criminal law which will be outlined in regional regulations in policy studies criminal law.

The research used a normative juridical approach or doctrinal research, which used primary data in the form of legal materials with a qualitative approach to obtain and use information related to policy formulation customary law in the Criminal Code 2023.

This research is of a descriptive type with the aim of to obtain an overview of how customary law is formulated in the 2023 Criminal Code, especially customary offenses based on the perspective of criminal law philosophy and policy.

In normative juridical research or doctrinal research, data is collected by literature study, in the form of : legal materials, books, journals and other literature related to philosophy and customary law and policy formulation in legislation.

Data analysis in this research was carried out by method descryptive analytical, in accordance with the scope of discussion, namely the validity

Commented [RR5]: 1.In normative research, the concept of research data is not recognized; instead, research materials are used. Please feel free to revise and adjust accordingly.
2.A qualitative approach is not considered part of the normative research methodology. Instead, you may select from the following approaches: statute approach, conceptual approach, historical approach, case approach, analytical approach, comparative approach, or philosophical approach. Choose the approach that best aligns with the focus of your article. You may use a single approach or multiple approaches, as long as they effectively represent the overall research problem.
3.Clearly outline the legal materials utilized in this research, such as relevant laws and written regulations that pertain to the research topic.
4.Data analysis should go beyond merely defining concepts; it should explain how the selected analytical method will generate answers to the research problems.

of the meaning of customary law in the 2023 Criminal Code, philosophical analysis and criminal law policy in Article 2 Paragraphs (1), (2), and (3), Criminal Code 2023.

Result and Discussion

Commented [RR6]: The results and discussion section of this article currently consists of five discussion points, whereas the study's problem formulation comprises only three. Please adjust the number of discussion points to align with the problem formulation, limiting them to three. Any additional subtopics may be incorporated within the relevant sections as appropriate.

This research has result that it is needed validity of meaning on living law which is closely interpreted and formulated as customary law only in Article 2 Par (1), (2), and (3) in The 2023 KUHP. In addition Article 2 par (1), (2), and (3) need reformulation as only the rule of recognition to create customary law effective not to formulate customary law in national regulation or regional regulation. There are some weaknesses in formulation Article 2 Par (1), (2), and (3) in either in philosophical or criminal law policy perspectives which is provided in sub topics of discussion below.

A. Validity of The Meaning Living Law As Customary Law and Its Position In the System National Law

a.1 Validity of The Meaning Living Law As Customary Law and Its Position In the System National Law

Commented [RR7]: 1.The sub-title is not aligned with the content of the discussion. The discussion primarily focuses on the nature of law, adat law, and the criteria that define a custom as adat law, rather than its position within the national legal system. Please revise the sub-title to better reflect the content of the discussion.
2.This section lacks sufficient references, despite extensively discussing various legal opinions from legal experts rather than the author's own arguments. Proper citations should be included to enhance credibility.
3.It is recommended that this section place greater emphasis on the nature and definition of adat law by incorporating perspectives from both domestic and international legal experts. Meanwhile, the authentic meaning of adat law and its position within the national legal framework should be addressed in the subsequent sub-title.

Law reflects the common conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin. There is an organic connection of law with the being and character of the people...Law growths with the growth and strengthens with the strength of the people, and finally dies away as the nation loses its nationality. All forms of law – customary law, statutes and juristic law—are the product of the legal consciesness of the people, which is the underlying law-creating force in society. Law is found, not made. These views were captured by notion that law is a reflection and product of the volksgeist, the spirit of people.[6]

Referring to the opinion of **F.Karl Von Savigny** quoted by **Brian Z Tamanaha** above, the law as *volkgeist* (soul of the people) is a reflection of the shared consciousness of society, where law emerges and develops and

[6] Brian Z.Tamanaha, *A General Jurisprudence of Law and Society*,(Oxford: Oxford University Press. 2001).

dies with society when society loses its nationality. All forms of law, whether customary law, statutes or legal regulations, are the product of society's legal awareness, where the power underlying the creation of law resides in society, so that in fact the law is found (in society) not created. **Von Savigny**'s view is captured based on the idea that law is a reflection and product of the soul of society (*volkgeist/spirit of people).* In this case, the type of law that is deeply imbued with the soul of the community is customary law (*customary law*) which originates from the original cultural values of the community, which lives and breathes with with the spirit or soul of the community.

Eugene Erlich says that "Law consists of the rules of conduct followed in everyday life – the customary practices and usages which give rise to and maintain the inner ordering of associations (the family, village community, corporation, business association .. etc). This is the living law : Law is essentially a form of social life.[7]

Law as a rule of behavior in everyday life in the form of customary practices and habitual use that arise to preserve the inner order in social relationships (families, village communities, corporations, and business associations and others), this is what is called customary law, which in essence forming law as a form of social life. **Eugene Erlich** interprets customary law (the living law) in a broad sense, in the form of habits carried out in behavior, which includes conflict resolution as carried out in everyday life both in village community families, corporations and business associations.

What is meant by habit? What is contained in a habit? And how can a behavior be accepted as a habit?Habits are social norms, which according to **Utrecht** are actions according to patterns of behavior that are fixed, steady, common, normal or customary in the life of a particular society or social life. Habits are also actions that are carried out repeatedly in society, and habits are always carried out repeatedly because they are felt to be something that they should be, and deviations from them are considered as

[7] D.J. Galigan, *Law as Social Rules*, (Oxford: Oxford University Press, 2006)

violations of the laws that live in society, then a legal custom arises which by society lives in society is seen as law.[8]

Ontologically, customary law is a set of social rules determined by legal awareness and the needs of society (*werkelijkheid*) which are obeyed. According to **H.L.A Hart** as quoted by **Satjipto Rahardjo,** the role of habits is very prominent in societies with primary obligation rules, where the required behavioral guidelines are still very simple and are sufficiently regulated by norms. basic, both in content and form, where these norms are very close to reality in everyday life.[9]

Customary law exists in social society side by side with legal society, where legal society is organized by statutory law and social society is organized by customary law. In its application in society, customary law and statutory law do not cancel each other out because both are statements and forms of the principles of law and justice according to human views and abilities. If state law embodies its principles through sovereign power, while custom embodies justice and public benefit through approval and acceptance of public opinion from society as a whole which is accepted by public consciousness. Therefore, statutory law should be formulated in accordance with customary law.[10]

Fitzgerald provides conditions for habits to be accepted as customary (law) by society, namely: [11]

First, the eligibility requirement (makes sense or appropriateness) with the principle that habits that do not meet the requirements must be abandoned (Smooth intestine abolendus est). Here, customary authority is conditional in its application, that is, it depends on its conformity to measures of justice and public benefit. In other words, the validity of habits is not absolute. This requirement is emphasized by **Vinogradoff** that practices in everyday life are guided by considerations of give - and - take in

[8] Theresia Ngutra, "Hukum Dan Sumber-Sumber Hukum," *Jurnal Supremasi* 11, No 2, (2016): 203, https://doi.org/10.26858/supremasi.v11i2.2813

[9] Satjipto Rahardjo, *Ilmu Hukum*, (Bandung: Citra Aditya Bhakti, 2012).

[10] *Ibid,* hal 116

[11] Yules Moses Urasan, Adonia Ivonne Laturette, Pieter Radjawane, "Perlindungan Hukum Terhadap Hak Masyarakat Hukum Adat Setelah Berakhirnya Hak Guna Usaha," *BAMETI Customary Lawa Review* 1 No. 1 (2023): 26 -40, https://doi.org/10.47268/bameti.v1i1.9904.

the traffic of relationships between people and work together between people who are makes sense.

Second, there is recognition of the truth of a custom, here the enactment of customs is followed by society openly, without relying on power and approval by the society whose interests the habit accommodates. This is manifested in the form of norms that are adhered to by users, where habits must be not by force, not secretly, and also not because they are desired (*nec vi nec clam nec precaire*).

Thirdly, habits become established because they are formed over a long period of time, so habits must have a historical background beyond which it is no longer possible to recognize how and where they came from.

Thus, habits are patterns of behavior that are fixed, steady, common, normal in a particular society or social life, in a narrow environment such as a village, and in a broad environment such as a country. When behavior that is permanent and steady is repeated, which is then institutionalized and has normative power so that it is binding, repeated by many people in a community where there is the power to bind other people to do the same thing, therefore giving rise to a belief or awareness that it is appropriate to do it, and the assumption arises that that is how it should be, this is where customary norms emerge (*die normatieve Kraft des Facktischen*).

Changing habits into norms or customary law requires the following conditions:[12]

1. Material requirements, namely the existence of a series of the same actions and lasting for a very long time (*longa et inverata consuetido)*;
2. Intellectual requirements, namely that the habit must give rise to a general belief (*opino necessitatis*) that the action is a legal obligation. This belief is not only about its constancy but the belief that it should be so or that it should be, which is objectively appropriate as a legal obligation.

Sanctions as legal consequences if customary law is violated. (Sudikno Mertokusumo,)

[12] Allya Putri Yuliani, "Peranan Hukum Adat dan Perlindungan Hukum Adat di Indonesia," *Jurnal Hukum dan Ham Wara Sains JHHWS* 2, No. 09 (2023): 863 , http://doi.org/10.58812/jhhws.v2j09.648.

a.2 Customary Law and Its Position in the National Legal System

Customary law from linguistics is a translation of *"adat recht"* which was first introduced by Snouck Hurgronje in the book *De Atjehers* in 1893 where the term customary law was then used by van VollenHoven as the discoverer of customary law and author of the book *Het Adatrecht van Nederlands Indie.* Van Vollenhoven defines customary law as the rules that apply to indigenous people and eastern people foreign, which on the one hand has sanctions (so it is said to be law) and on the other hand it is not codified (so it is called custom). Meanwhile Ter Haar interprets customary law as a whole a rule which is manifested in the decisions of legal functionaries who have authority (*macht, authority*) and influence, its implementation is valid and fulfilled wholeheartedly. Soepomo identified customary law as unwritten law, not in the form of a law (unstatutory law), including regulations that exist even though they are not stipulated by the authorities (state officials), after all, it is obeyed and supported by the people based on the belief that these regulations have the force of law.[13]

Relying on the definition of customary law from several experts above, it can be concluded that customary law is the totality of legal rules which are manifested in the decisions of authoritative legal functionaries (in customary courts), not codified or in the form of laws, in unwritten form, has sanctions which are obeyed and supported by the public's belief in complying with them based on propriety and are believed to have the force of law. So as a law that is not written, customary law gets its legitimacy through the decisions of customary functionaries in resolving customary offenses, as is the case common law in England. This definition of customary law will be used as a standing point *(*stand point) in discussions regarding customary law in this research.

Customary law, which is an expression of the soul of the Indonesian nation, is a spiritual heritage or ancestral spiritual inheritance that has been passed down from generation to generation to express the path towards justice in relations between humans. The statement of the content of the nation's soul is seen in its culture, culture which is an

[13] Jenny Kristiana Matuankotta, "Pengakuan dan Perlindungan Hukum Terhadap Eksistensi Pemerintahan Adat," *Jurnal SASI* 26, No.2, (2020): 190, https://doi.org/10.47268/sasi.v26i2.305.

Commented [RR8]: 1.The discussion on the position of adat law within the national legal system constitutes only a small portion of the overall explanation, despite this being the core focus of the sub-title. Please expand on the discussion to provide a more comprehensive analysis of the position of adat law within the national legal framework.
2.The transitions between paragraphs remain abrupt, disrupting the flow of the discussion. Please refine the transitions to ensure a more cohesive and logically connected narrative.
3.The number of references is still insufficient. Please incorporate additional sources to strengthen the academic foundation of the discussion.

expression of the soul of the nation in question, in sculpture, painting, literature, dance, and also in its laws. In the field of law, we want to use it as a legal measuring tool, strictly speaking Indonesian customary law is part of our nation's culture which according to Van Vollenhoven "disappeared into the darkness of the past".[14]

In the national legal system, customary law is not included in the Sequence of Legislative Regulations, however its position as law is recognized and guaranteed by the constitution, as formulated in Article 18 B Paragraph (2) of the 1945 Constitution of the Republic of Indonesia, that "The state recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in law ".

If we base it on the opinion of Werner Menski , that " law is everywhere as a social phenomenon based on cultural foundations, which dominant positivist approach has unsuccessfully tried to ignore in order to prevelege the state.[15]Although interpreting law everywhere is a social phenomenon based on cultural foundations, which cannot be ignored by positivists who value law.

F. Karl Von Savigny as quoted by Werner Menski, emphasized " law was inevitably part of the culture of a people", law as part of the culture of society. In turn it is transformed into the soul of the people *(*folkspirit or volkgeist) which in the end will form the nationality of a nation, as it is said that:

"any particular system of law was a reflection of this folk spirit, law as the manifestation of the common consciousness. Custom as the first manifestation of a people's spirit, so that any form of legislative law should always take into account a people's popular consciousness. No official law should be made which would violate local customary norms and the value system of the subjects. Any legislation must be harmonized

[14] Wilhelmus Jemarut, Solikatun, Pahrur Rizal, "Kajian Yuridis Masyarakat Hukum Adat," *Jurnal Hukum Widya Yuridika* 5, No.1 (2022): 118, https://doi.org/10.31328/wy.v5i1.2494

[15] Werner Menski, *Comparative Law in Global Context (Legal System of Asia and Africa*), (Cambrigde : Cambridge University Press.2006).

with what the people concerned feel is right and wrong, so legislation is subordinate to custom. It must at all times conform to volkgeist".[16]

The legal system is interpreted as a reflection of community consciousness, where customary law is the first manifestation of the community spirit, so that all legislative products must always take into account the awareness of the community spirit which is manifested in the form of customary law. No official law may be made in violation of customary law norms and customary legal value systems, so that every legal regulation must be harmonized with the community's sense of right and wrong, in this way the law is subject to customary law, and at all times must be in accordance with the spirit of the people as stated in customary law. Savigny further said that the judge's sole duty is to enforce the customary law adhered to by the community, because law is a function of the soul of the nation/society. The function of law is as the soul of the nation, therefore customs (*custom*) that develop in society become the main source in the formation of law.[17]

Customary law as the soul of the Indonesian nation is crystallized in Pancasila, therefore customary law should be the main source in forming laws and regulations in Indonesia. The position of customary law in the national legal system is as the main source and original legal material whose values must be accommodated in the formation of legislative rules in Indonesia, where every legislative rule in Indonesia must be based on awareness (*consciousness*) of the Indonesian people which is institutionalized in customary law which has been agreed upon by the community from generation to generation as the ideal value system as desired by the Indonesian people.

B. Rule of Recognition Functionalization of Customary Criminal Law in National Legal Order

The customary laws of each ethnic group in Indonesia applied without problems until the Dutch came to Indonesia bringing the Principle of Formal Legality as a manifestation of the teachings of legism or

[16] *Ibid,* hal 91.

[17] William J. Chambliss dan Robert B. Siedmen, *Law, Order and Power,* (London : Addisom Wesley Publishing Company, 1971).

Commented [RR9]: This section provides a comprehensive overview of adat criminal law within the national legal framework. However, several aspects require improvement, including:

1. The discussion on the recognition of adat law within the national legal system has been presented; however, some provisions mentioned are no longer applicable. The author should include an analysis of the implementation of legal provisions that accommodate adat law within the national legal framework, allowing for a comparative discussion in the subsequent section.
2. Explanations that currently use numbering or bullet points should be reformatted into paragraph form to enhance readability and maintain a more formal academic structure.

positivism in implementing the law. The teaching of legism or positivism is a teaching that only recognizes written rules as law. Therefore, criminal law which is based on the Principle of Legality is criminal law which only determines whether or not an act can be punished and must be based on written law or legislation which must exist before the act occurs. So the legal sources recognized in implementing criminal law are only sources of written law or statutes. The consequence is a prohibition on analogies in applying criminal law, and eliminating the legitimacy of the existence of customary law as an unwritten rule.

Thus, customary law as customary law, most of which is not written, according to the view of legism which is manifested in the principle of legality, is not recognized as law. In the context of criminal law, the legal rules that applied to regulate people's behavior at that time were the Criminal Code (*Wetboek Van Strafrecht)* , which was initially based on the principle of concordance only applicable to Dutch people who were in Indonesia, but eventually it was It was gradually implemented for all Indonesian residents, namely after the independence of the Indonesian nation, through Law Number 1 of 1946 concerning Criminal Law Regulations for the Entire Territory of the Republic of Indonesia, with changes made to several articles adapted to Indonesian conditions. The enactment of the Criminal Code (WvS) was then strengthened by the unification of the application of the Criminal Code to the entire population of Indonesia with Law Number 73 of 1958 concerning Declaring the Applicability of Law no. 1 of 1946 concerning Criminal Law Regulations for All Territories of the Republic of Indonesia.

In the history of applying customary law after the arrival of the Dutch to Indonesia, it was not easy. The arrival of the Dutch and their presence in Indonesia for three centuries not only colonized Indonesia socially, politically and economically, but also colonized Indonesian customary law, which had been institutionalized centuries before the Dutch arrived, namely by being "put to sleep" or extinguished.

In the realm of criminal law, the Netherlands applies *Wetboek Van Strafrecht* with the principle of legality as a representation of the legal teachings of legism or positivism that developed in mainland Europe. This legalism teaches legal scholars in Indonesia, judges, and other legal officials

to think that law is written rules, so that law is only statutory rules, customary law does not have legitimacy to be accommodated and applied in resolving criminal acts. Law enforcement, especially criminal law, is only based on the sound of the law, where the basis of reasoning is *syllogism* , which is drawn from the major premise and minor premise, so that the conclusion is certain and easy to predict, where the judge is only the mouthpiece of the law. -law (*La Bouche de la loi)* or as a statutory machine *(subsumptie automaat)* in enforcing criminal law, this is where legal certainty emerges in implementing criminal law, which establishing juridical truth and justice. In conditions like this, customary law as unwritten customary law which contains legal values and material justice has no place to apply because it is not recognized as law.

If seen from its essence, basically customary law as original law born from national culture which contains the noble values of a nation applies by itself, and does not require legitimacy based on written legal rules to enforce it. However, with the existence of the principle of formal legality in the Criminal Code brought by the Dutch, which has become ingrained in the enforcement of criminal law in Indonesia, the consequences for unwritten customary law are that the legitimacy of its validity in its own homeland is lost, unless there are written legal rules that give life as the basis for enforcing it or often referred to as the rule of recognition *(the rule of recognition*) for the application of customary law.

Specifically for the material criminal law that has been in effect in Indonesia since January 1 1918 for all European, indigenous and Eastern Foreign groups, is the Criminal Code or *Wetboek van Strafrecht voor Nederlandsh Indie* (stb. 1915 – 732), so it is practical Since the implementation of WvSvNI for all groups, customary (criminal) law cannot be applied, except by written rules as rules that recognize and accommodate the application of customary law (*rule of recognition*).

Historically, the enactment of customary law during Dutch rule was based on the rule of recognition (*rule of recognitian*) in the form of Article 131 *I.S* (*Indische Staatsregeling*) Jo Article 11 *Algemene Bepalingen van*

Wetgeving . Meanwhile *Indische Staatsregeling* (IS), among other things, determined that: [18]

1. The law that applies to European groups is European criminal law based on the principle of concordance;
2. The law that applies to indigenous groups is customary law in unwritten form, where the application of customary law is "not absolute" and if necessary can be regulated in special regulations (ordinances);
3. The law that applies to the Foreign East group is their customary criminal law (Article 11 AB). (CFG Sunaryati Hartono, Analysis and Evaluation of Dutch Colonial Legacy Legislation, BPHN, 2015, Jakarta).

Article 131 IS as the basis for the application of customary law during the Dutch East Indies period determines that for the European group the law that applies is the law that exists in the Netherlands (based on the principle of concordance), for the Foreign East group the law that applies is their own law, and for the Indigenous group the law that applies what applies is customary law. However, if social interests require it, European law can apply across groups. This implementation is hereinafter referred to as submission to European law, either completely or only partially.[19]

With Article 131 I.S above, the application of customary law is not determined by customary communities but by the Dutch East Indies Government. This is stated in point 2 above that the application of customary law is not absolute, so it can be said that customary law cannot be enforced by itself, even though Article 131 I.S was created as a rule of recognition of customary law, but only as *rule of recognition* not to apply customary law. This is emphasized in point 2 that "if necessary, it can be regulated by special regulations (*ordonantie*)".

Meanwhile, Article 11 *Algemene Bepalingen van Wetgeving* (A.B) determines that for groups of indigenous people the judge will apply the religious laws, institutions and customs of the indigenous people themselves, as far as the laws and institutions are concerned. and this custom

[18] CFG. Sunaryati Hartono, *Analisa dan Evaluasi Peraturan Per-UUan Peninggalan Kolonial Belanda*, (Jakarta: BPHN, 2015)
[19] *Loc.Cit*

does not conflict with generally recognized principles of decency and justice, and also if European law applies to indigenous people or the Indigenous person concerned has submitted himself to European law.[20]

Article 11 AB is not clearly and unequivocally a rule of recognition in the application of customary law as a source of law for natives, because it is combined with religious law and other institutions, and is seen from the subject of the law, namely the native people for whom determined that European law applies to him or an indigenous person who submits himself to European law then customary law does not apply to him, even though he is a customary community that should be subject to customary law.

The application of customary law to indigenous groups creates problems, considering that customary law in Indonesia is very diverse according to ethnicity, social, culture and religion. Along with efforts to instill colonial ideology, 3 theories were used in implementing customary law during Dutch colonialism, namely:[21]

1. The theory *Receptio in complexu* , put forward by Van den Berg where customary law follows the religious law adhered to by the indigenous community.
2. *Receptie theory* put forward by Snouck Hurgronje and C.Van Vollenhoven, emphasizes that Islamic law will apply effectively among Muslims, if Islamic law is in line with customary law in Indonesia, meaning that the laws that apply in Indonesia to natives are not based on Islamic teachings, but on local customary law.
3. *Receptio a Contrario/ Receptie exit* was put forward by Hazairin, stating that the law that applies to society is religious law, where customary law only applies if it does not conflict with religious law.

After Indonesian independence, the enactment of customary law was based on the 1950 Provisional Constitution, namely Article 32, Article 43 Paragraph (4), Article 104 Paragraph (1), Article 14, Article 13

[20] *Loc.Cit*

[21] Felishela Erlene, Tundjung Herning Situbuana, "Tanggung Jawab Negara Terhadap Hak Masyarakat Adat di Pulau Rempang Dalam Perspektif HAM," *Jurnal Tunas Agraria* 7, Vol. 2 (2024): 144-161, http : //doi.org./10.1392/jta.v712.301.

Paragraph (32), and Article 16 Paragraph (2).The contents of each article are as follows [22] :

- Article 13 Paragraph (2)
  Against his will no one can be separated from the judge, which is granted to him by the rules of law in force.
- Article 14
  1. Every person who is charged because he is suspected of committing a criminal incident has the right to be presumed innocent, until his guilt is proven in a court hearing, according to the applicable legal rules, and he is given at that hearing all the guarantees that have been determined and are necessary for his defense.
  2. It is said that no one may be required to be punished or sentenced, except because of a legal rule that already exists and applies to him.
  3. If there is a change in the legal rules as stated in the paragraph above, then provisions that are better for the suspect are used.
- Article 16 Paragraph (2)

Trespassing on the grounds of a residence or entering a house against the will of the person who occupies it is only permissible in cases stipulated in a legal regulation that applies to it.

- Article 32

Everyone in the country must obey the laws, including unwritten legal rules, and the authorities.

- Article 43 Paragraph (4)

The authorities supervise that all religious associations and associations comply with the law, including unwritten legal regulations.

- Article 104 Paragraph (1)

All court decisions must contain the reasons and in cases of punishment state the statutory rules and customary law rules that are used as the basis for the sentence.

In the history of the return of the Republic of Indonesia, the Provisional Republic of Indonesia Law was no longer applied, but returned to the 1945 Law, thus *the rule of recognition* based on the articles of the 1950 UUDS was not applies. With Indonesia's return to the 1945

[22] Saiful Anam, "Fungsi Hukum Adat Dalam Pembentukan Peraturan Perundang-undangan Di Indonesia, " *Journal Iuris Scentia* 1, No 2 (2023): 80, https://doi.org/10.62263/jis.v1i2.18.

Constitution, *the rule of recognition* was needed for the implementation of customary law, especially customary offenses, so Law Number 1 Drt of 1951 concerning Actions was issued. Meanwhile, to organize a unified structure of powers and procedures for civil courts, Article 5 Paragraph (3) Sub b, reads as follows:

"The civil material law and for the time being the civil criminal material law which until now applies to independent regional leaders and people who were previously tried by the Traditional Court, still applies to those people and people, with the meaning of: [23]

- That an active act must be considered a criminal act, but there is no comparison in the Civil Criminal Code, so it is considered to be punishable by a sentence of not more than three months in prison and/or a fine of five hundred rupiah, namely as a substitute punishment if the customary punishment The sentence imposed is not followed by the condemned party and the compensation referred to is considered commensurate by the judge with the magnitude of the condemned person's fault.
- That if the customary punishment imposed in the judge's opinion exceeds the imprisonment sentence or fine referred to above, then for the defendant's mistake a substitute sentence of up to 10 years in prison may be imposed, with the understanding that the customary punishment according to the judge's understanding is no longer in line with time, it must always be replaced as mentioned above.
- That an act which according to living law must be considered a criminal act and which has an appeal in the Civil Penal Code, is deemed to be threatened with the same punishment as the sentence on appeal which is most similar to the criminal act.

Article 5 Paragraph (3) Sub b of Law No.1 Drt of 1951 above, apart from being the rule of recognition of customary criminal law, also provides guidelines on how to apply civil criminal law and customary criminal law to customary incidents (customary criminal acts), without specifying the type

[23] Undang-Undang Nomor 1 Drt Tahun 1951 Tentang Tindakan -Tindakan Sementara untuk Menyelenggarakan Kesatuan Susunan Kekuasaan dan Acara Pengadilan-Pengadilan Sipil, https://www.bphn. go.id> data.

of criminal act. Article 5 Paragraph (3) Sub b, as the rule of recognition as well as guidelines for application of customary law , is a policy that becomes a bridge so that customary law still exists in certain customary areas or where customary justice is also still alive, customary law and its customary offenses are still recognized and applied, as long as the implementation of the punishment is adhered to by the violators/perpetrators of customary offenses. However, if the perpetrator of a customary offense does not comply with the sentence (customary crime) imposed by a customary court judge, then the criminal incident can be brought to the state court with the provisions for punishment by the judge in accordance with the sentencing guidelines specified in Article 5 Paragraph (3) Sub b above.

C. Review Philosophical Formulation of Customary Law in Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the 2023 Criminal Code

The very interesting thing in the 2023 Criminal Code is the formulation of customary law which is narrowly interpreted as customary law in the 2023 Criminal Code when studied philosophically, namely a fundamental study of the nature, knowledge and origins of customary law as formulated in in Article 2 Paragraphs (1), (2), and (3) of the 2023 Criminal Code. From a philosophical perspective, customary law will be studied ontologically, epistemologically and axiologically as in the formulation of Article 2 Paragraphs (1), (2), and (3) Criminal Code 2023.

Ontologically, customary law is unwritten law, not in the form of a law, obeyed and supported by indigenous peoples whose embodiment is in the form of decisions of customary court functionaries and their implementation is fulfilled wholeheartedly. Because it is unwritten, the principles of customary law are not formulated but are inherent and animate in the decisions of customary justice functionaries, which originate from the values of law and justice held by the indigenous community concerned.

Prohibitions on actions which the community agrees are acts that violate customs and are therefore subject to sanctions, do not require written criminalization, because they are based on legal awareness and the

Commented [RR10]: The issue raised by the author regarding the formulation of adat law within a written legal framework presents a philosophically compelling discussion. However, several aspects should be considered for further improvement, including:

1. Certain sections of the discussion lack coherence and appear contradictory. For instance, the position of adat law as unwritten law is undermined by the assertion that the enactment of the 2023 Criminal Code does not diminish the application of adat law. However, this claim is not followed by a clear explanation from the author. Please ensure consistency and provide a thorough analysis to clarify this point.
2. In discussing the regulation of adat law within Regional Regulations, the author may consider incorporating the perspective of one of the drafters of the 2023 Criminal Code, Prof. Edy. He asserts that Regional Regulations primarily serve to inventory adat law rather than transform it into written law. This viewpoint can be further elaborated upon with the author's own analysis, examining whether the legal provisions within Regional Regulations merely serve as an inventory or, in practice, formalize adat law into written legislation.
3. This section lacks sufficient references. Please include additional sources to strengthen the discussion and enhance its academic credibility.

belief from generation to generation that the prohibited actions have consequences in the form of disturbances to the balance between the macrocosm and microcosm.

Based on unwritten material norms, the realization of customary law through decisions of customary functionaries, at first glance, is similar to *common* law system where case law or precedent as law created by the courts. This is considering the unwritten and dynamic nature of customary law.

Based on the study of the epistemology of customary law as unwritten legal rules originating from hereditary habits, which are born from human awareness to live fairly and civilized as a form of cultural ideas that contain cultural values, norms, laws and rules that are related to each other so that become a legal system that is supported by sanctions, believed in, and obeyed by indigenous peoples.

As unwritten rules originating from hereditary customs, customary law has the following characteristics:[24]

1. Traditional or conventional, that is, every provision in customary law is always related to the past and is continued and maintained from time to time.
2. Sacred in nature, this characteristic is obtained from elements originating from beliefs which play an important role in customary law provisions. This sacred nature emphasizes the authority of customary law, so that it must be obeyed by the community.
3. Flexible in nature, customary law which originates from community life is flexible in its application, experiences developments and always follows current developments. This flexibility is possible because customary law only contains principles, not detailed and detailed formulation of norms. In this way, customary law can easily adapt to the needs and development of values in society without changing the system or institutions.
4. It is dynamic or plastic in nature, where in the form of a traditional court judge's decision it can follow developments in society in general and individuals in each case.

[24] Sulastriyono, "Pemikiran Hukum Adat Djojodigoeno dan Relevansinya Kini," *Jurnal Mimbar Hukum* 30, No. 3 (2018): 455, https://doi.org/10.22146/jmh.36956.

M According to Ter Haar , because customary law originates from decisions of traditional leaders, what is known as applicable customary law are rules based on decisions taken by traditional leaders both in concrete decisions and in the same decision. This decision then becomes law as a manifestation of the legal values that live in society.[25]

Article 2 Paragraph (1) of the 2023 Criminal Code determines that the application of the principle of legality as formulated in Article 1 Paragraph (1) does not reduce the application of laws that exist in society in determining that a person deserves to be punished even though the act is not regulated in the 2023 Criminal Code. In the Article Explanation 2 Paragraph (1) emphasizes that what is meant by law that exists in society is customary law which determines that someone who commits a certain act deserves to be punished. The laws that live in society in this article relate to unwritten laws that are still valid and developing in society in Indonesia. To strengthen the implementation of the laws that exist in the community, Regional Regulations regulate these customary criminal acts. Paragraph (2) reads: The law that lives in society as intended in Paragraph (1) applies where the law lives and as long as it is not regulated in this law and is in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia , human rights, and general legal principles recognized by the people of nations. Elucidation of Paragraph (2) confirms that what is meant by applicable in the place where the law lives is that it applies to every person who commits a customary crime in that area. It is then emphasized that this paragraph contains guidelines for establishing customary criminal law, the validity of which is recognized by this law. Furthermore, Paragraph (3) states that provisions regarding procedures and criteria for determining laws that exist in society are regulated by Government Regulations. Elucidation of Paragraph (3) emphasizes that the Government Regulation in this provision is a guideline for regions in establishing laws that live in society in Regional Regulations.

The provisions for the application of living law as formulated in Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) above, which are interpreted as customary law regulated by Government Regulations and

[25] Retno Kus Setyowati, "Pengakuan Negara Terhadap Masyarakat Hukum Adat," *Jurnal Bina Mulia Hukum* 12, No.1(2023): 134, http://doi.org/10.37893/jbh.v12i1.601.

Regional Regulations, are philosophically wrong. The error of Article 2 Paragraphs (1), (2) and (3) with its noble desire to recognize and accommodate customary law as living law actually eliminates the characteristics of customary law as unwritten law which is custom which has legal consequences in the form of coercive sanctions. , originates from the decision of the traditional ruler in the same concrete case as a manifestation of the values that live in society.

Meanwhile, from an epistemological point of view, customary law is law that originates from custom and becomes a legal reality in which the principles that apply in community self-interest relationships are found.

In the context of axiology, customary law as original Indonesian legal material is the material needed in the formation of criminal law in Indonesia. Djojodigoeno said that bumiputera customary law in the substantial sense as a legal reality that lives among the Indonesian people, is legal material that actually lives among the bumiputera which needs to be applied in state law because it is original Indonesian legal material.

The provisions of Article 2 Paragraph (1) of the 2023 Criminal Code and its explanation essentially contain the following 3 things:

1. The definition of unwritten law is customary law;
2. Unwritten customary law which determines that someone who commits a certain act should be punished based on unwritten law which is still valid and developing in life in Indonesia;
3. Regulation of customary crimes is carried out by Regional Regulations.

The provisions of Paragraph (2) concerning guidelines for determining customary law that applies to perpetrators of criminal acts, contain the following essence:

1. In the event that a customary crime occurs, the customary law that applies is the customary law at the place where the act was committed;
2. Customary law recognized by the 2023 Criminal Code is customary law that is in accordance with the values of Pancasila, the 1945 Republic of Indonesia Constitution, human rights, and general legal principles recognized by the people of the nation.

The provisions of Paragraph (3) regarding determining procedures and criteria for customary law recognized by the 2023 Criminal Code, essentially consist of:

1. The procedures and criteria for customary law that may apply are determined by Government Regulation;
2. Government Regulations that provide guidelines for regions in customary law that applies to indigenous communities as outlined in Regional Regulations.

Based on the formulation of Article 2 Paragraphs (1), (2), and (3) along with the Explanation, customary law is not applied as original legal material whose values are accommodated and colors the 2023 Criminal Code, but is instead taken over in the form of regional regulations, so that it will become written law, where acts which in customary law constitute customary offenses and their sanctions as long as they are not regulated in the 2023 Criminal Code, will be formulated in writing in regional regulations (Perda), the criteria for which will be determined by government regulations.

Philosophical criticism of the recognition of customary law by the 2023 Criminal Code, in this case unwritten customary offenses becoming customary offenses formulated in regional regulations, is a wrong action. Formulating customary offenses into regional regulations is an act of eliminating the original nature of customary law as unwritten law. With the loss of the original nature of customary law, customary offenses also disappear, as well as making customary offenses state offenses, because they are formulated in regional regulations which are state regulations. Meanwhile, customary law, especially customary offenses, is born from the decisions of traditional rulers regarding acts which according to local customary law values are not worthy of being committed and deserve punishment, where the decision of traditional rulers regarding these customary offenses is followed by the traditional rulers. others in completing the same action. Philosophically it is not appropriate to formulate customary offenses in writing. Philosophical criticism is that the 2023 Criminal Code recognizes and accommodates customary law as the original basic material in determining criminal acts, criminal liability, criminal objectives, criminal guidelines and criminal regulations.

D. Review Policy Criminal Law Regarding the Formulation of Customary Law in Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the 2023 Criminal Code

Customs as a result of the agreement of society as a whole are rooted and originate from the agreement of a society, must be the basis for the formation of positive law, so that every positive law must be woven in harmony with the customs and customs of the community local. "The positive law in harmony with custom is thus seen as obligatory, and more effective, because consensual".

The 2023 Criminal Code as positive law must be intertwined with customary law, according to Brian Z Tamanaha above, customary law is a more effective provision with its consensual nature. Meanwhile Karl Von Savigny wants positive law to be intertwined with customary law, because in customary law there is people's consciousness which is a manifestation of the soul of the nation, positive law must be harmonized with people's feelings and awareness about the right and wrong behavior. Referring to the opinion of Savigny, all forms of legislation including the 2023 Criminal Code must take into account customary law. The 2023 Criminal Code must not violate the norms and value system of customary law, therefore it must be harmonized with customary law, including in determining criminal acts, and in determining the structure of the criminal system it must be in accordance with customary law as a manifestation of the national spirit.[26] In on this occasion Savigny emphasized that all state laws are subordinate to customary law.

Based on the recommendations of the Law Seminar National VI (Jakarta, 25 -29 June 1994), it is clear that the national legal system adopted is the Pancasila Legal System, namely a legal system based on the Pancasila philosophy, so that all products National laws, including the 2023 Criminal Code, must be based on and in line with the Pancasila philosophy. With the awareness that the development of a nation's national law is nation-centric, the development of Indonesian national law, including in the preparation

[26] Andri Yanto, Faidatul Hikmah, "Akomodasi Hukum Yang Hidup Dalam Kitab Undang-Undang Hukum Pidana Nasional Menurut Perspektif Asas Legalitas," *Jurnal Recht Studiosum* 2, No.2 (2023), 88, https://doi.org/10.32734/rslr.v2i2.14162.

Commented [RR11]: Overall, this sub-chapter presents an engaging discussion on the policy of incorporating adat law into regional regulations. However, several aspects require further attention:

1. This section addresses the formulation of customary law in the 2023 Criminal Code. To ensure a coherent and systematic discussion, the author should incorporate references from the official minutes of its drafting process and the Academic Paper on the formation of the 2023 Criminal Code.
2. Some statements lack proper citations despite not being the author's original analysis or opinion. Please provide appropriate references to support these claims.
3. A historical approach should be utilized to examine the inclusion of adat law provisions in the 2023 Criminal Code. This can be achieved by referencing the official minutes of the deliberation sessions and the corresponding Academic Paper.
4. To enhance readability and maintain a formal structure, consolidate bullet points into paragraph form instead of using numbered lists.

of the 2023 Criminal Code, is also nation-centric, meaning that it is based on legal values and legal culture that are born, live, grow and develop in Indonesian society, which is manifested in living laws which are believed to be noble values in behavior from generation to generation, which form customs in an unwritten form, namely customary law.

The position of customary law as original law in society originates from people's feelings and awareness, therefore it is unwritten, it does not have to be conflicted with written law, let alone abolished by written law, but should be positioned as a complement that complements written law. It is acknowledged that the formation of unwritten law is more flexible than the formation of written law, because it can overcome the gap between the validity of the law and its effectiveness, this is because of the dynamic and plastic nature of customary law as unwritten law, so that it always follows the development of values who live in society. The position of customary law in the national legal system is as a source of national law.[27]

The 2023 Criminal Code as a legislative legal product currently still uses a thinking framework that is also strong in the principles of formal legality, this was acknowledged in the VI National Law Seminar (Jakarta, 25 – 29 June 1994) that there are no clear criteria regarding customary law (customary law), especially in enforcing the law, encourages the formation of a very legal attitude and legal culture in PJP I which tends to identify law with law. It was further emphasized that in the PJP II era, the legal community in Indonesia must be directed to respect customary law as a source of law, in addition to statutory regulations and permanent jurisprudence.

Sentencing policy in the form of sentencing guidelines for judges related to customary law which is full of legal and justice values as a source of justice, before the promulgation of the 2023 Criminal Code, had been formulated in statutory policies and policies in judicial practice, as follows:

1. Article 5 Paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, states that judges and constitutional justices are obliged to explore, follow and understand the legal values and sense of justice that exist in society.

[27]Revie, "Hukum Adat Sebagai Sumber Hukum Nasional Dalam Politik Hukum Di Indonesia," *Jurnal Legal Certainty* 1, No 1 (2019): 25, https://core.ac.uk/download/pdf/287209404.pdf.

2. Article 5 Paragraph (3) Sub b of Law Number 1 Drt of 1951 concerning Concerning Temporary Measures to Organize the Unity Structure of Powers and Procedures of Civil Courts, where Article 5 Paragraph (3) Sub b, reads as follows following:
   "The civil material law and for the time being the civil criminal material law which until now applies to independent regional leaders and people who were previously tried by the Traditional Court, still applies to those people and people, with the meaning of [28] :
   - That an active act must be considered a criminal act, but there is no comparison in the Civil Criminal Code, so it is considered to be punishable by a sentence of not more than three months in prison and/or a fine of five hundred rupiah, namely as a substitute punishment if the customary punishment The sentence imposed is not followed by the condemned party and the compensation referred to is considered commensurate by the judge with the magnitude of the condemned person's fault.
   - That if the customary punishment imposed in the judge's opinion exceeds the imprisonment sentence or fine referred to above, then for the defendant's mistake a substitute sentence of up to 10 years in prison may be imposed, with the understanding that the customary punishment which according to the judge's understanding is no longer in line with the times, will always be must be replaced as mentioned above.
   - That an act which according to living law must be considered a criminal act and which has an appeal in the Civil Criminal Code, is deemed to be threatened with the same punishment as the sentence on appeal which is most similar to the criminal act.
3. Jurisprudence Supreme Court Number 1644 K/Pid/1988 dated 15 May 1991, which basically states that the Supreme Court still respects the decision of the Traditional Head based on customary deliberation which provides customary sanctions to violators of customary law norms. With this jurisprudence, perpetrators of criminal acts cannot

[28] Undang-Undang Nomor 1 Drt Tahun 1951 Tentang Tindakan -Tindakan Sementara untuk Menyelenggarakan Kesatuan Susunan Kekuasaan dan Acara Pengadilan-Pengadilan Sipil, https://www.bphn. go.id> data

be tried using two legal rules, namely customary rules and Criminal Code rules, even though the criminal acts are regulated in the Criminal Code.

The three criminalization policies related to customary law above only provide guidance for judges in handling cases related to customary offenses which are used as a source of law, not by formulating customary offenses into statutory regulations. When compared with the formulation of the criminal policy guidelines related to customary law above, with the formulation of customary law as a source of material law which coexists with the principle of formal legality in Article 2 Paragraphs (1), (2) and (3) of the 2023 Criminal Code and the Explanation of the Articles According to the author, lawmaker Number 1 of 2023 concerning the Criminal Code took a blunder and resulted in a mistake in formulating the position of customary law as a source of material criminal law in Indonesia, by formulating customary offenses into national law in the form of Regional Regulations or Regional Regulations.

The words of Article 2 Paragraphs (1), (2), and (3) and their explanations are formulated as follows :

Paragraph (1)

The provisions as intended in Article 1 Paragraph (1) do not reduce the validity of the laws existing in society which determine that a person deserves to be punished even though the act is not regulated in this law..

Explanation of Paragraph (1)

What is meant by "law that lives in society" is customary law which determines that someone who commits a certain act deserves to be punished. The laws that live in society in this article relate to unwritten laws that are still valid and developing in society in Indonesia. To strengthen the implementation of laws that exist in society, Regional Regulations regulate these Customary Crimes.

Paragraph (2)

The law that lives in society as intended in Paragraph (1) applies in the place where the law lives and as long as it is not regulated in this law and is in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general principles recognized by the people of nations.

Explanation of Paragraph (2)
In this provision, what is meant by applicable in the place where the law lives is that it applies to every person who commits a customary crime in that area. This paragraph contains guidelines for establishing customary criminal law whose validity is recognized by this law.
Paragraph (3)
Provisions regarding procedures and criteria for determining laws that exist in society are regulated by Government Regulations.
Explanation of Paragraph (3)
The Government Regulations in this provision are guidelines for regions in establishing laws that live in society in Regional Regulations.
In essence, Article 2 Paragraphs (1), (2), and (3) concerning the recognition of customary law as a principle of material legality, contains 3 core elements, namely:

1. The definition of living law *(living law*) is narrowly defined as customary law.

In VI National Law Seminar (Jakarta, 25 – 29 June 1994), the definition of customary law which is a translation of *living law* or living law, includes:

- In the sense that it is identical to customary law that applies in ethnic communities and customary law environments.
- In the sense of a habit recognized by society and decision makers (*decision mak* er), so that it gradually becomes law (*gewoonte recht, customary law*).

However, Article 1 Paragraph (1) has a narrow meaning, namely only customary law. Recognition of customary law is based on the idea of balance promoted in the 2023 Criminal Code, where in the context of the principle of legality, recognition of customary law is a manifestation of the idea of balance between the principle of formal legality as formulated in Article (1) Paragraph (1) and the principle of material legality which formulated in Article 2 Paragraphs (1), (2), and (3).

2. There is recognition of customary offenses by by criminalizing them in PERDA

The principle of legality in criminal law is the principle that is the basis for the legitimacy of an act so that it can be punished, therefore is always

followed by the unlawful nature of the act. The principle of formal legality contains the nature of being against formal law, where the nature of being against the law is interpreted as being against or contrary to the rules of law, so that the legitimacy of an act is said to be against the law if the act has been formulated in law and is punishable by criminal law.

The reasons for eliminating the unlawful nature of acts that are formulated in the law as criminal acts are also in the law. Meanwhile, the principle of material legality provides the basis for punishing an act when the act is not desired by society, because it is contrary to society's sense of justice and the values of law and justice adhered to by society. The principle of material legality contains the nature of being against material law (i.e. the nature of being against the law which is outside the law, such as conflicting with society's sense of justice, legal values and fairness in society), so that an action is said to be against the law if it is contrary to law. with a sense of justice and legal values in society even though it is not formulated in the law as a punishable act.

In the nature of being against the material law, there are two functions, namely the positive function, where the nature of being against the material law is used to positiveize or make acts that are outside the written rules a criminal act. Meanwhile, the negative function of the unlawful nature of material law is the function of the unlawful nature of material law to eliminate the unlawful nature of actions that are formulated in the law as criminal acts. In the negative function, the absence of material unlawfulness (*Aufweigheid Van Alle Materril Wederechtlijke*/AVAW) means that criminal acts formulated in statutory regulations have their unlawful nature removed, so they cannot be punished. In criminal law enforcement, both the positive and negative functions of material unlawfulness are rarely applied.

The application of the principle of material legality as formulated in Article 1 Paragraph (1), (2), and (3) of the 2023 Criminal Code only applies the nature of violating material law in a positive function, namely positiveizing or determining unwritten customary offenses, which still exist and are developing becomes a criminal offense within the rules of state criminal law. Irregularities and errors in the policy of criminalizing customary offenses to become criminal acts in state law occur when

unwritten customary offenses are formulated in Regional Regulations as state regulations in written form[29].

Based on critical analysis of criminalization policies, the criminalization of customary offenses in regional regulations is very inappropriate. This can be identified as the following problems:

1) The problem of recognizing customary law by formulating customary offenses in Regional Regulations

Customary offenses originate from unwritten law, namely the decisions of traditional rulers (judges), which are dynamic and plastic in nature, the measures of which quickly change and develop following the development of values community law and developments over time. So that an act that was originally a customary offense at some point will change to no longer be a customary offense, and conversely certain acts that were not previously recognized as customary offenses will be criminalized by customary courts to become customary offences.

The formulation of customary offenses in Regional Regulations actually eliminates the distinctive nature of customary offenses which are flexible, elastic and plastic and not written, becoming offenses that are formulated in written regulations in the form of Regional Regulations so that they are rigid. Formulating customary offenses into regional regulations as state regulations is a wrong step that actually eliminates customary law itself, even though it is formulated in local regulations as regional regulations where customary law exists.

Some of the criminal policy issues that arise in the formulation of customary offenses into PERDA are as follows:

- Problems of recriminalization and reformulation of customary offenses in regional regulations;
- The issue of threatening criminal sanctions for customary offenses formulated in the Regional Regulation;

[29] Ni Putu Ari Setyaningsih, Putu Chandra Kinandina Kayuan, "Kompilasi Delik Adat Dalam Peraturan Daerah Sebagai Dasar Pemidanaan Dalam Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana (RUU KUHP)," *Jurnal Yustisia*,16, No.1. (2022): 71 -79. http://dx.doi.org/10.62279/yustitia.v16i1.902.

- The problem of the punishment system which is different between the punishment system in customary offenses and the regional regulation punishment system;
- The problem of shifting the nature of going against material law into the nature of going against formal law in the formulation of customary offenses in regional regulations.

2) Differences between the realm of Customary Criminal law and Regional Regulations

As explained above, basically customary law is law that originates from the feelings of awareness and agreement of indigenous peoples that have been followed for generations, in the form of unwritten law in the form of decisions of traditional judges regarding behavior that is considered to violate the agreement, where the judge's decision must be followed. by other traditional judges. Customary law as an unwritten legal rule has a unique characteristic, namely that it is very dynamic and plastic, so it is very easy to change following the development of values in society and the times. Customary law is a law formed by indigenous peoples, based on its formation, it is different from state law, which is made by state institutions and enforced on its citizens (up to bottom).

The definition of Regional Regulations in Law Number 12 of 2011 concerning the Formation of Legislative Regulations consists of Provincial Regulations, namely legislation formed by the Provincial Regional People's Representative Council with the approval of the Governor, and Regency/City Regional Regulations, namely regional regulations formed by the Council. Regency/City Regional Representative with joint approval of the Regent/Mayor.

Article 7 of Law Number 12 of 2011 above positions regional regulations as state legislation in the last place after presidential regulations. The functions of regional regulations include others:[30]

1. As a policy instrument for implementing regional autonomy and assistance tasks;

[30] Claustantianus Wibisono Tanggono, et all, "Mekanisme Pembentukan Peraturan Daerah Yang Berkualitas di Pemerintah Daerah," *Journal Juridisch* 1, No.3 (2023): 211, http://dx.doi.org/10.26623/jj.v1i3.8051

2. As implementing regulations of higher laws and regulations. In this case the Regional Regulations must not conflict with higher laws and regulations.
3. As a container for regional specialties and diversity as well as channeling the aspirations of the people in the region but must be based on Pancasila and the 1945 Constitution.
4. As a development tool in improving regional welfare.

Based on Law Number 12 of 2011 above, Regional Regulations can be identified as follows:[31]

1. Basically, regional regulations are administrative laws to support the implementation of regional autonomy and assistance tasks.
2. The criminal threat in the Regional Regulation is not the main threat, but only as a supporting sanction for administrative law.
3. The criminal threat contained in the Regional Regulation is a maximum imprisonment of 6 (six) months or a maximum fine of Rp. 50,000,000 (five tens of millions of rupiah).
4. Regional regulations can contain threats of imprisonment or fines in addition to the weight provisions above in accordance with statutory regulations.
5. Regional regulations can contain threats of sanctions in the nature of returning to the original state and administrative sanctions.

Based on the description above, in essence, regional regulations are administrative laws to carry out regional autonomy and assistance duties, while customary offenses which are in the realm of customary law are purely criminal acts in the context of customary law. Thus, it is not appropriate to formulate customary offenses into regional regulations as state law in the implementation of regional administration.

The formulation of customary offenses into state law is a form of customary law formalism, instead of providing a place and recognition for customary law in modern national criminal law, what has happened is actually reconsolidating customary law.

3) The criminalization system for customary offenses is different from regional regulations

[31] Jihan Sopyana, Salsa Aulia Ratar Putri, Siti Dewi Ratnasari, "Pencabutan Peraturan Daerah Oleh Pemerintah Pusat," *Jurnal Rechten*. 3, No.2 (2021): 18-20, https://doi.org/10.52005/rechten.v3i2.84.

The criminal system is a building system in the determination and imposition of punishment which consists of criminal principles and criminal objectives, criminal guidelines and rules, and actions, criminal and criminal responsibility.[32]

In customary criminal law, the structure of the criminal system is very distinctive, different from the national criminal system, concluded by the author as follows:

- The Principle of Punishment for Existing Offensest prioritizes sources of unwritten law which are plastic and ela static, regarding actions, mistakes and others in the context of customary offenses which are different from state criminal law (KUHP);
- The aim of criminalization for customary offenses which is primarily to restore balance between the macro cosmos and the micro cosmos is very dominated by spiritual interests, which is very different from the aim of state punishment which is dominated by protecting society from crime.
- Guidelines/Rules for Punishing Customary Offenses prioritize giving judges discretion in convicting perpetrators of customary offenses, based on the conscience and sense of justice of the community, so that punishment is more flexible and flexible, not relying on legal certainty.
- Customary crimes are determined through criminalization by traditional ancestors based on the belief as pamali or taboo acts, damage human relations with spiritual beings, so that they are not appropriate, they are believed to bring harm or disaster.
- Liability answers in customary offenses are aimed individually and structurally, with the main aim of restoring balance.
- Traditional sanctions are in the form of real sanctions and magical sanctions in the form of traditional ceremonies and other sanctions to restore disturbed spiritual balance.

4) Limitations of Recognition of Customary Law

Not all customary laws that are still alive and developing are recognized by 2023 Criminal Code, where Article 2 Paragraph (2) provides

[32] Novandi Dwi Putra, Ilmi Firdaus Aliyah, Dadang Syaifudin Yusuf, "Pembaharuan Hukum Pidana Positif (Positive Criminal Law Reform)," *Journal of Social Science Research* 3, No.3 (2023): 5 , https://j-innovative.org/index.php/Innovative/article/view/2800/2044

conditions for recognized customary laws, namely in accordance with the values contained in Pancasila and the 1945 Constitution, Human Rights and general legal principles recognized by the people of nations. In restrictions on customary law, it is necessary to explain whether the restrictions relate to customary offenses or customary sanctions? Mechanism for resolving the offense? Or is it the entire system of criminal punishment for customary offenses? In the case of customary law criteria which are in accordance with general legal principles recognized by nations, it can be biased, because the legal values adopted by a nation are "nation centric", especially in customary law which has no relevance to international values. So that in legal recognition custom is enough to use Pancasila, Human Rights, and the 1945 Republic of Indonesia Constitution as the margin of appreciation.

The filter criteria that limit the application of customary law above are a consequence of the shift from customary law to state law, which is further stated that provisions regarding procedures methods and legal criteria that exist in society (customary law) are regulated by government regulations. The next problem is what about customary laws that are not covered by government regulations because they are located far inland? What are the consequences for customary law that is not recognized by the state? Is it still valid? This requires further thought

E. Ways to Recognize Customary Law in the 2023 KUHP

The recognition of customary law as a source of material criminal law in the KUHP 2023, should be returned to the nature of customary law, as original law resulting from the culture of customary communities that are different from each other, unwritten, dynamic, plastic and easy. changes according to the values that develop in indigenous communities, it is not appropriate to recognize customary law as a source of material criminal law with the policy of formulating customary criminal acts into PERDA (Regional Regulations) as state regulations. A policy like this is exactly the same as the policy implemented by the Dutch East Indies Government, where through Article 131 IS Jo AB provides the validity of the application of customary law but with certain notes, where Article 131 IS Jo AB can be referred to as the Article Controlling the application of customary law, in

Commented [RR12]: In the section where the author provides recommendations on recognizing adat law, it would be beneficial to include an explanation of its function and accuracy, as suggested by the author.

where if it is not desired to come into force, then certain customary laws cannot apply.

The best way out in recognizing customary law as a source of material criminal law can be done as follows:

1. Formulate customary law as a source of law, by formulating customary offenses as formulated in Article 5 Paragraph (3) Sub b of Law Number Drt of 1951 concerning Temporary Measures to Implement Unity Composition of Powers and Procedures of Civil Courts.
2. Formulate guidelines for criminalization of customary offenses in accordance with policy and Supreme Court jurisprudence, namely Supreme Court Decision No.1644 K/Pid/1988.

Making Article 2 Paragraphs (1), (2), and (3) only as the rule of recognition of the application of customary law

Conclusion

Commented [RR13]: The conclusion section should summarize the key points from each discussion concisely. Specifically, point number 3 should be further simplified, presenting only the conclusion without any additional discussion.

Based on the discussion of the problems above, it can be concluded as follows:

1. The validity of customary law as the meaning of living law in society needs to be reviewed, because according to the national seminar living law is not only interpreted as customary law but as customs accepted by a particular community. In addition, the meaning of custom does not necessarily be the same as customary law, conditions are needed for a custom to become customary law.
2. Based on a philosophical study, the formulation of customary offenses into Regional Regulations, as explained in the Elucidation to Article 2 Paragraphs (1), (2), and (3) of the 2023 Criminal Code is inappropriate, considering the nature of customary offenses themselves. living in a customary society, unwritten law is very dynamic, plastic and elastic, developing in accordance with the development of cultural values, law and justice in customary communities, while regional regulations are state regulations that are written, rigid in nature, so that in essence they are in conflict between Regional regulations with the customary rules themselves.

3. Based on a study of criminal law policy, formulating customary offenses into Regional Regulations is very inappropriate , from a policy perspective the formulation distorts the nature of customary offenses as unwritten rules, from a criminal system perspective the differences between the systems are very different punishment in customary offenses (consisting of Criminal Acts, Mistakes, Criminal Liability, Purpose of Punishment, and Sentencing Guidelines) with the state criminal system, let alone regional regulations. Judging from the criminal sanctions, it is very unequal if customary offenses are formulated in the Regional Regulation, then the criminal sanctions follow the criminal sanctions in the Regional Regulation which are very limited, so they cannot reach customary offenses which are threatened by indigenous peoples with heavier customary sanctions. . The most likely thing to accommodate customary criminal law in the 2023 Criminal Code is that customary law is only used as a source of law, and Article 2 Paragraphs (1), (2), and (3) only become rules for recognizing customary law (the rule). of recognition) of customary law to apply as is.

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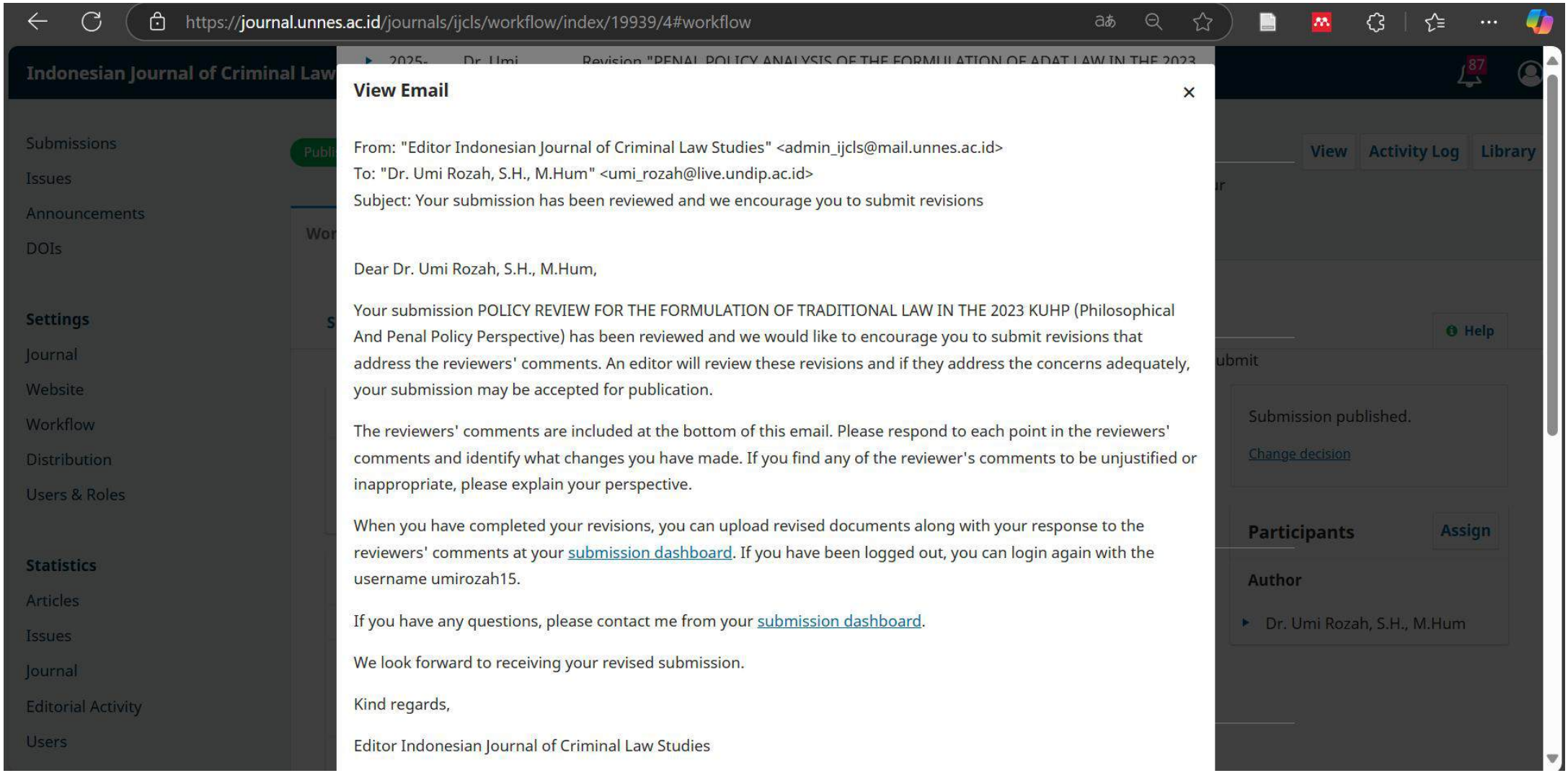
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PENAL POLICY ANALYSIS OF THE FORMULATION OF ADAT LAW IN THE 2023 KUHP

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Abstract

An interesting issues in the 2023 Criminal Code is the accommodation of living law with a meaning limited to Adat Law as formulated in Article 2 Paragraphs (1), (2), and (3). This research aims to analyze it in perspective penal policies regarding to the formulation of Living Law only as Adat Law in Article 2 Paragraphs (1), (2), and (3) of the 2023 Criminal Code. This research uses a normative or doctrinal juridical approach, with data sources from library materials, in the form of statutory regulations and literatures related to research. This research raises problems: 1). How analysis of penal policy of the formulation of living law in Article 2 Paragraph (1) of the 2023 KUHP ? 2). What is reformulation of Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the 2023 KUHP in penal policy perspective? The results of the research are : There is invalidity in the formulation of the meaning of living law as only Adat Law because the living law is wider than Adat Law, it covers all custom in society as like in business affairs and in religious life in society. Analysis in penal policy perspective can't be adjusted if the meaning living law only determined to Adat Law. There are many fallacious in formulation Article 2 Paragraph (1),(2),and (3) of the 2023 KUHP so that reformulation is needed. Reformulation of Article (2) Paragraph (1), (2), (3) should be changed to interprete the living law not

only as Adat Law which will be formulated in Regional Regulation. Article (2) Paragraph (1), (2), and (3) just needed as the recognition rules to enforce Adat Law in, in other words formulation of the living law only as an umbrella rules to enforce adat law.

Keywords
analysis, Policy, Adat, Criminal Code.

Introduction

The desire to establish a national codification initiated by the people from Indonesia itself, the source of which is dug from the earth of Indonesia by taking into account the development of the modern world in the field of criminal law, has long been initiated on various occasions including the National Law Seminar.[1]

Entering the beginning of 2023, the Indonesian people, especially academics and criminal law practitioners, feel relieved by the presence of Law Number 1 of 2023 concerning the Criminal Law Code (the 2023 KUHP), which to replace the Dutch of the Criminal Code (Wetboek Van Strafrecht), which is effective in Indonesia until now. The urgency to create the 2023 Criminal Code (its called as the 2023 KUHP) emerged since the proclamation of Indonesian independence, starting with the issuance of Law Number 1 of 1946 concerning Criminal Law Regulations as the rules for enforcing the Criminal Code (WvS). The Law Number 1 of 1946 made several changes to suit the conditions of the Indonesian people after leaving Dutch colonial rule.[2] The Criminal Code (Wvs) is a Dutch derivative of the Criminal Code created in 1881, which came into effect in the Netherlands in 1886, and came into force in Indonesia on January 1, 1918. With Principles of concordance then The Criminal Code (WvS) to be applied in Indonesia. The principle of concordance is actually the principle for

[1] Andi Hamzah, *Hukum Pidana Indonesia* (Jakarta: Sinar Grafika, 2020), Hlm.20.
[2] Ni Putu Yulita Damar Putri and Sagung Putri M.E. Purwani, "Urgensi Pembaharuan Hukum Pidana Di Indonesia," *Jurnal Kertha Wicar* 9, no. 8 (2020).

enforcing criminal regulations for Dutch people who are outside Holland, especially in their colony.[3]

The Dutch Criminal Code (WvS) relies on the principle of formal legality adhered to by adherents of legalism, where law is only interpreted as statutory rules, so that all rules of behavior that are outside the law, such as society's habits in passing laws and resolving conflicts as customs which live, grow, and dead in society for generations are not recognized as law. The principle of formal legality focuses on legal certainty and juridical justice. It justice based on the text of the law, not substantive justice which is contextual in nature. This situation often creates an imbalance/gap between the Dutch Criminal Code (WvS) and the need for a sense of substantive justice in society. Not only the principle of formal legality, the values that characterize the Dutch Criminal Code (WvS) also become a problem when it was applied to cases where there is a conflict between the values of legal certainty, expediency, and justice. This inequality originates from the legal values that underlie the Dutch Criminal Code (WvS) such as liberalism, individualism and capitalism, meanwhile the Indonesian nation adheres to religious and collective or communal values. These differences in values have an impact on criminal law enforcement in Indonesia. The Indonesian nation, which has a communal character such as being tolerant, easy to forgive, high in solidarity, is faced with Ducth criminal law which has a liberal, individual and capitalistic character. Here, legalism which is very rigid, interprets the law as *Lex Dura Sad Tamen Scripta,* wherein law is only interpreted as written rules.[4]

The 2023 KUHP is a response to the need of Indonesian society to have criminal law that is in accordance with the values of Indonesian life, such as religious values and communal values that are crystallized in Pancasila. By focusing on the principle of balance as the juridical basis of Indonesian philosophy, which is taken from the core of Pancasila, that shapes balance in the relationship between humans and their God (religious

[3] Faisal Faisal and Muhammad Rustamaji, "Pembaruan Pilar Hukum Pidana Dalam RUU KUHP," *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)* 10, no. 2 (July 30, 2021): 291, doi:10.24843/JMHU.2021.v10.i02.p08.

[4] Muhammad Alwan Fillah, "Politik Hukum Dalam Pembaruan Kitab Undang-Undang Hukum Pidana (KUHP) Di Indonesia," *VARIA HUKUM* 5, no. 1 (January 23, 2023): 52–64, doi:10.15575/vh.v5i1.23230.

balance), the relationship between humans and themselves and others (humanity balance), as well as the relationship between humans and society and universe (social balance). Indonesian legal values as living law reflected in the 2023 KUHP, especially in formulation Article 2 Paragraph (1), (2), and (3).

One of the most prominent Indonesian things is the recognition and accommodation of the living law as a source of criminal law that formulated in Article 2 Paragraph (1) the 2023 KUHP, as *preleasing* the principle of formal legality. It is accommodated by the principle of material legality, meaning that the living law which formulated as only Adat Law is used as a source of law to determine deeds that are not regulated in the 2023 KUHP, but in society, especially indigenous communities, are declared as delict that can be punished. It is logical that the 2023 KUHP is claimed to be the Indonesian Criminal Code, recognizing and accommodating Adat Law as a source of legal and justice values that were born, grew and developed with the Indonesian nation. As a legal ideal, the legal values contained in the laws that exist in Indonesia should color the content of every Indonesian law and regulation, especially KUHP which regulates individual behavior in public life, by criminalizing acts that not desired by society, in as well as with rules for administering punishment that are not rigid (*rigid*) which are based on values of law and justice of the Indonesian nation. The culture of the Indonesian nation which is full of communal values gives birth to an attitude of self-centeredness, non-individuality, solidarity and respect for human rights and human obligations as a manifestation of the principle of monodualism/principle of balance which has been integrated in Indonesian human behavior. [5]

Soediman Kartadipradja said that the expression of the content of the soul of a nation appears in its culture, culture which is an expression of the soul of the nation concerned, in sculpture, painting, literature, dance, and also in its laws. In the legal field, we want to use it as a legal measuring tool, strictly speaking Indonesian Adat Law is part of our nation's culture which, according to **Van Vollenhoven** "is disappearing into the darkness of

[5] Mudemar A. Rasyidi, "Menuju Pembaharuan Hukum Pidana Indonesia," *Jurnal Mitra Manajemen* 12, no. 1 (2021): 1–10.

the past". Adat Law, which is an expression of the soul of the Indonesian nation, is a spiritual heritage or ancestral spiritual inheritance that has been passed down from generation to generation to express the path towards justice in human relations.[6]

The living law which is formulated in the 2023 KUHP is interpreted in a closed way as Adat Law , as stated in Elucidation of Article 2 Paragraph (1) that "the law that lives in society is **Adat Law** which determines that someone who commits a certain act deserves to be punished. The laws that live in society in this article relate to unwritten laws that are still valid and developing in society in Indonesia. To strengthen the implementation of laws that exist in the community, **Regional Regulations** regulate the Adat Delicts". Explanation of Paragraph (2) that " In this provision, what is meant by applicable in the place where the law lives, it to be applied to every person who commits a adat delicts in the place adat law enforced. This paragraph contains guidelines for establishing adat law, the validity of which is recognized by this Law." Explanation of Paragraph (3) that "Government regulations in this provision are guidelines for regions in establishing rules that adat law written in Regional Regulations".

The living law in the community means law that lives, grows and exists together in social life.[7] Its essence is rooted in the sense of justice of the community, the character of the law in it follows the thinking of the community in certain cases.[8] There are various laws that live in Indonesian society, for example customary law and Islamic law. So before Indonesia's independence, Indonesian society already had the living law. In fact, there has been legal pluralism where each legal community has its own law with its own style and characteristics.

If you look closely at the Explanation of Article 2 Paragraph (1) then what is meant by adat law is unwritten law which is still valid and developing in Indonesia which regulates adat delicts. Because it is unwritten, so that

[6] Soediman Kartahadiprodjo, *Pengantar Tata Hukum Di Indonesia* (Jakarta: Pembangunan Publisher, 1973).
[7] Syofyan Hadi, "Hukum Positif Dan The Living Law (Eksistensi Dan Keberlakuannya Dalam Masyarakat)," *DiH Jurnal Ilmu Hukum* 13, no. 26 (2018): Hlm. 262, https://doi.org/DOI:10.30996/dih.v0i0.1588.
[8] Ratno Lukito, *Tradiisi Hukum Indonesia (Disertai Postcript Oleh Penulis & Pranoto Iskandar)* (Cianjur: the institute for migrant right press, 2013), Hlm 40.

the Regional Regulation regulates adat delicts as written law. Explanation of Paragraph (2) is a guideline in determining adat delicts whose validity is recognized by the 2023 KUHP, thus not all adat laws are recognized by the the 2023 KUHP according to Paragraph (2).

This research has novelty from several previous researchers such as a journal article written by Wirdi Hisroh Komeni and Ermania Widjajanti in the journal journal Of social science research volume 4 number 3 formulation of article 2 of the national criminal code which states that it causes confusion in its legal implications which results in unfair enforcement of sanctions in practice.[9] In addition, journal research submitted by Yoserwan with the title of the article Existency of adult criminal law in national criminal law after the presentation of the new Criminal Code in the journal unes law review published in 2023, in the article The regulation of customary criminal law in the New Criminal Code aims to provide a legal basis and protection for the enactment of customary criminal law. However, this arrangement creates a number of restrictions that have the potential to weaken the existence of customary law itself. Basically, what is needed is a legal basis that respects and protects customary criminal law so that it can live and develop in accordance with its own legal norms, but still within the corridors of the philosophy of the nation and state. [10] There is also research conducted by Rini Apriyani which has been written in the prioris journal published in 2018 on the existence of customary sanctions in the application of customary criminal law, in the article states that in reality, there is no clear legal certainty regarding the provision of customary criminal sanctions. In addition, the application of adat criminal law rules among indigenous peoples currently also faces various difficulties. This is due to the increasing number of community members who have understood the existence of Indonesian national law, as well as the large burden of adat sanctions given in relation to adat criminal

[9] Wirdi Hisroh Komeni and Ermania Widjajanti, "Ketidaktepatan Penerapan Hukum Pidana Adat Dalam Pasal 2 KUHP Baru: Prespektif Teori Kepastian Hukum," *Innovative: Journal Of Social Science Research* 4, no. 3 (2024): 1–9,
Doi : /https://doi.org/10.31004/innovative.v4i3.10586.
[10] Yoserwan, "Eksistensi Hukum Pidana Adat Dalam Hukum Pidana Nasional Setelah Pengesahan Kuhp Baru," *UNES LAW REVIEW* 5, no. 4 (2023): 1999–2013, Doi :https://doi.org/10.31933/unesrev.v5i4.577.

offenses.[11] The research conducted by the author has differences, especially in terms of the exposure of the problems contained in the formulation of Article 2 paragraphs 1, 2, and 3 of the National Criminal Code . In addition, this research also discusses how the ideal formulation of Article 2 paragraphs (1), (2), and (3) should be formulated.

Referring to the Explanation of Article 2 Paragraphs (1), (2), and (3), in penal policy analysis , there are juridical weaknesses that will conflict with each other, where instead of recognizing and accommodating adat law as living law, it actually distorts adat law and The government's action through the reaffirmation of conditional recognition in Law No. 1/2023 on the Criminal Code resembles a repetition of the debate on the Dutch idea of legal unification, in which indigenous communities were downgraded to weak subjects under the dominant authority of the state. Indigenous communities are considered incapable of knowing what is best for their interests, thereby justifying state intervertation.[12]

There is formulation of the colonial model in formulating the enactment of adat law through the formulation of adat delicts in regional regulations, it can be said that there is a re-colonization of adat law formulation, so that a policy gap appears in penal policy, which ultimately gives rise to problems:

1. How analysis of penal policy of the formulation of living law in Article 2 Paragraph (1) of the 2023 KUHP ?
2. What ideal reformulation on Adat Law in Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the 2023 KUHP in penal policy perspective?

Method

This research aims to analyze the validity of the narrow meaning of living law which formulated as Adat Law in Article 2 Paragraphs (1), (2), and (3) of the 2023 KUHP , the model formulation Adat Law in written

[11] Rini Apriyani, "Keberadaan Sanksi Adat Dalam Penerapan Hukum Pidana Adat," *Prioris* 6, no. 3 (2018): 227–46, Doi : /https://doi.org/10.25105/prio.v6i3.3178.

[12] Sunardi Purwanda et al., "The Fate of Indigenous Peoples' Rights Recognition After the Enactment of the National Criminal Code," *Indonesian Journal of Criminal Law Studies* 9, no. 2 (2024): 256–89, https://doi.org/https://doi.org/10.15294/ijcls.v9i2.50321.

law which is established in Regional Regulation, and ideal reformulation of Adat Law in the 2023 KUHP.

The research used a normative juridical approach or doctrinal research, which used legal materials such as relevant laws and written regulation. In addition, to obtain and use information related to policy formulation customary law in the Criminal Code 2023, this research used statutes and philosophical approaches.

This research is of a descriptive type with the aim of to obtain an overview of how adat law is formulated in the 2023 Criminal Code, especially adat delicts based on penal policy perspective.

In normative juridical research or doctrinal research, data is collected by literature study, in the form of : legal materials, books, journals and other literature related to philosophy and adat law and policy formulation in legislation.

Data analysis in this research was carried out by method descriptive analytical. This method used to collect, to set, and to analyze data and finally to describe data throughout the words to provide accurate description about the scope of discussion as follows : the validity of the meaning of living law as Adat Law in the 2023 KUHP, the model of formulation Adat Delicts in written law which will be established in Regional Regulation, and the ideal reformulation of Adat Law in Article 2 Paragraph (1),(2), and (3) of the 2023 KUHP.

Result and Discussion

A. Penal Policy Analisys Regarding to the Formulation of Adat Law in Article 2 Paragraph (1), Paragraph (2), and Paragraph (3)

The adat laws of each ethnic group in Indonesia applied without problems until the Dutch came to Indonesia bringing the Principle of Formal Legality as a manifestation of the teachings of legism or positivism in implementing the law. The teaching of legism or positivism is a teaching that only recognizes written rules as law. Therefore, criminal law which is based on the Principle of Legality is criminal law which only determines whether or not an act can be punished and must be based on written law or legislation which must exist before the act occurs. So the legal sources

recognized in implementing criminal law are only sources of written law or statutes. The consequence is a prohibition on analogies in applying criminal law, and eliminating the legitimacy of the existence of customary law as an unwritten rule.

Thus, customary law as customary law, most of which is not written, according to the view of legism which is manifested in the principle of legality, is not recognized as law. In the context of criminal law, the legal rules that applied to regulate people's behavior at that time were the Criminal Code (*Wetboek Van Strafrecht)* , which was initially based on the principle of concordance only applicable to Dutch people who were in Indonesia, but eventually it was It was gradually implemented for all Indonesian residents, namely after the independence of the Indonesian nation, through Law Number 1 of 1946 concerning Criminal Law Regulations for the Entire Territory of the Republic of Indonesia, with changes made to several articles adapted to Indonesian conditions. The enactment of the Criminal Code (WvS) was then strengthened by the unification of the application of the Criminal Code to the entire population of Indonesia with Law Number 73 of 1958 concerning Declaring the Applicability of Law no. 1 of 1946 concerning Criminal Law Regulations for All Territories of the Republic of Indonesia.

In the history of applying customary law after the arrival of the Dutch to Indonesia, it was not easy. The arrival of the Dutch and their presence in Indonesia not only colonized Indonesia socially, politically and economically, but also colonized Indonesian customary law, which had been institutionalized centuries before the Dutch arrived, namely by being "put to sleep" or extinguished.

In the realm of criminal law, the Netherlands applies *Wetboek Van Strafrecht* with the principle of legality as a representation of the legal teachings of legism or positivism that developed in mainland Europe. This legalism teaches legal scholars in Indonesia, judges, and other legal officials to think that law is written rules, so that law is only statutory rules, customary law does not have legitimacy to be accommodated and applied in resolving criminal acts. Law enforcement, especially criminal law, is only based on the sound of the law, where the basis of reasoning is *syllogism* , which is drawn from the major premise and minor premise, so that the

conclusion is certain and easy to predict, where the judge is only the mouthpiece of the law. -law (*La Bouche de la loi)* or as a statutory machine *(subsumptie automaat)* in enforcing criminal law, this is where legal certainty emerges in implementing criminal law, which establishing juridical truth and justice. In conditions like this, customary law as unwritten customary law which contains legal values and material justice has no place to apply because it is not recognized as law.

If seen from its essence, basically customary law as original law born from national culture which contains the noble values of a nation applies by itself, and does not require legitimacy based on written legal rules to enforce it. However, with the existence of the principle of formal legality in the Criminal Code brought by the Dutch, which has become ingrained in the enforcement of criminal law in Indonesia, the consequences for unwritten customary law are that the legitimacy of its validity in its own homeland is lost, unless there are written legal rules that give life as the basis for enforcing it or often referred to as the rule of recognition *(the rule of recognition*) for the application of customary law.

Specifically for the material criminal law that has been in effect in Indonesia since January 1 1918 for all European, indigenous and Eastern Foreign groups, is the Criminal Code or *Wetboek van Strafrecht voor Nederlandsh Indie* (stb. 1915 – 732), so it is practical Since the implementation of WvSvNI for all groups, customary (criminal) law cannot be applied, except by written rules as rules that recognize and accommodate the application of customary law (*rule of recognition*).

Historically, the enactment of customary law during Dutch rule was based on the rule of recognition (*rule of recognitian*) in the form of Article 131 *I.S* (*Indische Staatsregeling*) Jo Article 11 *Algemene Bepalingen van Wetgeving* . Meanwhile *Indische Staatsregeling* (IS), among other things, determined that: [13]

1. The law that applies to European groups is European criminal law based on the principle of concordance;

[13] CFG. Sunaryati Hartono, *Analisa dan Evaluasi Peraturan Per-UUan Peninggalan Kolonial Belanda*, (Jakarta: BPHN, 2015)

2. The law that applies to indigenous groups is customary law in unwritten form, where the application of customary law is "not absolute" and if necessary can be regulated in special regulations (ordinances);
3. The law that applies to the Foreign East group is their customary criminal law (Article 11 AB). (CFG Sunaryati Hartono, Analysis and Evaluation of Dutch Colonial Legacy Legislation, BPHN, 2015, Jakarta).

Article 131 IS as the basis for the application of customary law during the Dutch East Indies period determines that for the European group the law that applies is the law that exists in the Netherlands (based on the principle of concordance), for the Foreign East group the law that applies is their own law, and for the Indigenous group the law that applies what applies is customary law. However, if social interests require it, European law can apply across groups. This implementation is hereinafter referred to as submission to European law, either completely or only partially.[14]

With Article 131 I.S above, the application of customary law is not determined by customary communities but by the Dutch East Indies Government. This is stated in point 2 above that the application of customary law is not absolute, so it can be said that customary law cannot be enforced by itself, even though Article 131 I.S was created as a rule of recognition of customary law, but only as *rule of recognition* not to apply customary law. This is emphasized in point 2 that "if necessary, it can be regulated by special regulations (*ordonantie*)".

Meanwhile, Article 11 *Algemene Bepalingen van Wetgeving* (A.B) determines that for groups of indigenous people the judge will apply the religious laws, institutions and customs of the indigenous people themselves, as far as the laws and institutions are concerned. and this custom does not conflict with generally recognized principles of decency and justice, and also if European law applies to indigenous people or the Indigenous person concerned has submitted himself to European law.[15]

[14] *Loc.Cit*
[15] *Loc.Cit*

Article 11 AB is not clearly and unequivocally a rule of recognition in the application of customary law as a source of law for natives, because it is combined with religious law and other institutions, and is seen from the subject of the law, namely the native people for whom determined that European law applies to him or an indigenous person who submits himself to European law then customary law does not apply to him, even though he is a customary community that should be subject to customary law.

The application of customary law to indigenous groups creates problems, considering that customary law in Indonesia is very diverse according to ethnicity, social, culture and religion. Along with efforts to instill colonial ideology, 3 theories were used in implementing customary law during Dutch colonialism, namely:[16]

1. The theory *Receptio in complexu* , put forward by Van den Berg where customary law follows the religious law adhered to by the indigenous community.
2. *Receptie theory* put forward by Snouck Hurgronje and C.Van Vollenhoven, emphasizes that Islamic law will apply effectively among Muslims, if Islamic law is in line with customary law in Indonesia, meaning that the laws that apply in Indonesia to natives are not based on Islamic teachings, but on local customary law.
3. *Receptio a Contrario/ Receptie exit* was put forward by Hazairin, stating that the law that applies to society is religious law, where customary law only applies if it does not conflict with religious law.

After Indonesian independence, the enactment of customary law was based on the 1950 Provisional Constitution, namely Article 32, Article 43 Paragraph (4), Article 104 Paragraph (1), Article 14, Article 13 Paragraph (32), and Article 16 Paragraph (2).The contents of each article are as follows [17] :

- Article 13 Paragraph (2)

[16] Felishela Erlene, Tundjung Herning Situbuana, "Tanggung Jawab Negara Terhadap Hak Masyarakat Adat di Pulau Rempang Dalam Perspektif HAM," *Jurnal Tunas Agraria* 7, Vol. 2 (2024): 144-161, http : //doi.org./10.1392/jta.v712.301.

[17] Saiful Anam, "Fungsi Hukum Adat Dalam Pembentukan Peraturan Perundang-undangan Di Indonesia, " *Journal Iuris Scentia* 1, No 2 (2023): 80, https://doi.org/10.62263/jis.v1i2.18.

Against his will no one can be separated from the judge, which is granted to him by the rules of law in force.

- Article 14
  1. Every person who is charged because he is suspected of committing a criminal incident has the right to be presumed innocent, until his guilt is proven in a court hearing, according to the applicable legal rules, and he is given at that hearing all the guarantees that have been determined and are necessary for his defense.
  2. It is said that no one may be required to be punished or sentenced, except because of a legal rule that already exists and applies to him.
  3. If there is a change in the legal rules as stated in the paragraph above, then provisions that are better for the suspect are used.
- Article 16 Paragraph (2)
  Trespassing on the grounds of a residence or entering a house against the will of the person who occupies it is only permissible in cases stipulated in a legal regulation that applies to it.
- Article 32
  Everyone in the country must obey the laws, including unwritten legal rules, and the authorities.
- Article 43 Paragraph (4)
  The authorities supervise that all religious associations and associations comply with the law, including unwritten legal regulations.
- Article 104 Paragraph (1)
  All court decisions must contain the reasons and in cases of punishment state the statutory rules and customary law rules that are used as the basis for the sentence.

In the history of the return of the Republic of Indonesia, the Provisional Republic of Indonesia Law was no longer applied, but returned to the 1945 Law, thus *the rule of recognition* based on the articles of the 1950 UUDS was not applies. With Indonesia's return to the 1945 Constitution, *the rule of recognition* was needed for the implementation of customary law, especially customary offenses, so Law Number 1 Drt of 1951 concerning Actions was issued. Meanwhile, to organize a unified structure of powers and procedures for civil courts, Article 5 Paragraph (3) Sub b, reads as follows:

"The civil material law and for the time being the civil criminal material law which until now applies to independent regional leaders and people who were previously tried by the Traditional Court, still applies to those people and people, with the meaning of: [18]

- That an active act must be considered a criminal act, but there is no comparison in the Civil Criminal Code, so it is considered to be punishable by a sentence of not more than three months in prison and/or a fine of five hundred rupiah, namely as a substitute punishment if the customary punishment The sentence imposed is not followed by the condemned party and the compensation referred to is considered commensurate by the judge with the magnitude of the condemned person's fault.
- That if the customary punishment imposed in the judge's opinion exceeds the imprisonment sentence or fine referred to above, then for the defendant's mistake a substitute sentence of up to 10 years in prison may be imposed, with the understanding that the customary punishment according to the judge's understanding is no longer in line with time, it must always be replaced as mentioned above.
- That an act which according to living law must be considered a criminal act and which has an appeal in the Civil Penal Code, is deemed to be threatened with the same punishment as the sentence on appeal which is most similar to the criminal act.

Article 5 Paragraph (3) Sub b of Law No.1 Drt of 1951 above, apart from being the rule of recognition of customary criminal law, also provides guidelines on how to apply civil criminal law and customary criminal law to customary incidents (customary criminal acts), without specifying the type of criminal act. Article 5 Paragraph (3) Sub b, as the rule of recognition as well as guidelines for application of customary law , is a policy that becomes a bridge so that customary law still exists in certain customary areas or where customary justice is also still alive, customary law and its customary offenses are still recognized and applied, as long as the implementation of the punishment is adhered to by the violators/perpetrators of customary

[18] Undang-Undang Nomor 1 Drt Tahun 1951 Tentang Tindakan -Tindakan Sementara untuk Menyelenggarakan Kesatuan Susunan Kekuasaan dan Acara Pengadilan-Pengadilan Sipil, https://www.bphn. go.id> data.

offenses. However, if the perpetrator of a customary offense does not comply with the sentence (customary crime) imposed by a customary court judge, then the criminal incident can be brought to the state court with the provisions for punishment by the judge in accordance with the sentencing guidelines specified in Article 5 Paragraph (3) Sub b above.

The 2023 Criminal Code as positive law must be intertwined with adat law, according to Brian Z Tamanaha that adat law is a more effective provision with its consensual nature. Meanwhile Karl Von Savigny wants positive law to be intertwined with adat law, because in adat law there is people's consciousness which is a manifestation of the soul of the nation, positive law must be harmonized with people's feelings and consciousness about the right and wrong behavior. Referring to the opinion of Savigny, all forms of legislation including the 2023 Criminal Code must take into account adat law. The 2023 Criminal Code must not violate the norms and values system of adat law, therefore it must be harmonized with adat law, including in determining criminal acts, and in determining the structure of the criminal system it must be in accordance with adat law as a manifestation of the national spirit.[19] In on this occasion Savigny emphasized that all state laws are subordinate to adat law.

Based on the recommendations of the Law Seminar National VI (Jakarta, 25 -29 June 1994), it is clear that the national legal system adopted is the Pancasila Legal System, namely a legal system based on the Pancasila philosophy, so that all products national laws, including the 2023 Criminal Code, must be based on and in line with the Pancasila philosophy. With the awareness that the development of a nation's national law is nation-centric, the development of Indonesian national law, including in the preparation of the 2023 Criminal Code, is also nation-centric, meaning that it is based on legal values and legal culture that are born, live, grow and develop in Indonesian society, which is manifested in living laws which are believed to be noble values in behavior from generation to generation, which form customs in an unwritten form, namely adat law.

[19] Andri Yanto and Faidatul Hikmah, "Akomodasi Hukum Yang Hidup Dalam Kitab Undang-Undang Hukum Pidana Nasional Menurut Perspektif Asas Legalitas," *Recht Studiosum Law Review* 2, no. 2 (November 3, 2023): 81–91, doi:10.32734/rslr.v2i2.14162.

The position of adat law as original law in society originates from people's feelings and consciousness, therefore it is unwritten, it does not have to be conflicted with written law, let alone abolished by written law, but should be positioned as a complement that complements written law. It is acknowledged that the formation of unwritten law is more flexible than the formation of written law, because it can overcome the gap between the validity of the law and its effectiveness, this is because of the dynamic and plastic nature of adat law as unwritten law, so that it always follows the development of values who live in society. The position of adat law in the national legal system is as a source of national law.[20]

The 2023 Criminal Code as a legislative legal product currently still uses a thinking framework that is also strong in the principles of formal legality, this was acknowledged in the VI National Law Seminar (Jakarta, 25 – 29 June 1994) that there are no clear criteria regarding adat law, especially in enforcing the law, encourages the formation of a very legal attitude and legal culture in PJP I which tends to identify law with law. It was further emphasized that in the PJP II era, the legal community in Indonesia must be directed to respect adat law as a source of law, in addition to statutory regulations and permanent jurisprudence.

Sentencing policy in the form of sentencing guidelines for judges related to adat law which is full of legal and justice values as a source of justice, before the promulgation of the 2023 Criminal Code, had been formulated in statutory policies and policies in judicial practice, as follows:

1. Article 5 Paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, states that judges and constitutional justices are obliged to explore, follow and understand the legal values and sense of justice that exist in society.
2. Article 5 Paragraph (3) Sub b of Law Number 1 Drt of 1951 concerning Concerning Temporary Measures to Organize the Unity Structure of Powers and Procedures of Civil Courts, where Article 5 Paragraph (3) Sub b, reads as follows following:

[20] Revie, "Hukum Adat Sebagai Sumber Hukum Nasional Dalam Politik Hukum Di Indonesia," *Jurnal Legal Certainty* 1, no. 1 (2019).

"The civil material law and for the time being the civil criminal material law which until now applies to independent regional leaders and people who were previously tried by the Adat Court, still applies to those people and people, with the meaning of: [21]

- That an active act must be considered a criminal act, but there is no comparison in the Civil Criminal Code, so it is considered to be punishable by a sentence of not more than three months in prison and/or a fine of five hundred rupiah, namely as a substitute punishment if the customary punishment . The sentence imposed is not followed by the condemned party and the compensation referred to is considered commensurate by the judge with the magnitude of the condemned person's fault.
- That if the adat punishment imposed in the judge's opinion exceeds the imprisonment sentence or fine referred to above, then for the defendant's mistake a substitute sentence of up to 10 years in prison may be imposed, with the understanding that the customary punishment which according to the judge's understanding is no longer in line with the times, will always be must be replaced as mentioned above.
- That an act which according to living law must be considered a criminal act and which has an appeal in the Civil Criminal Code, is deemed to be threatened with the same punishment as the sentence on appeal which is most similar to the criminal act.

3. Jurisprudence Supreme Court Number 1644 K/Pid/1988 dated 15 May 1991, which basically states that the Supreme Court still respects the decision of the Traditional Head based on customary deliberation which provides customary sanctions to violators of customary law norms. With this jurisprudence, perpetrators of criminal acts cannot be tried using two legal rules, namely customary rules and Criminal Code rules, even though the criminal acts are regulated in the Criminal Code.

[21] Undang-undang Darurat Nomor 1 Tahun 1951 tentang Tindakan-Tindakan Sementara untuk Menyelenggarakan Kesatuan Susunan Kekuasaan dan Acara Pengadilan-Pengadilan Sipil.

The three criminalization policies related to adat law above only provide guidance for judges in handling cases related to adat delicts which are used as a source of law, not by formulating adat delicts into statutory regulations. When compared with the formulation of the penal policy guidelines related to adat law above, with the formulation of adat law as a source of material law which coexists with the principle of formal legality in Article 2 Paragraphs (1), (2) and (3) of the 2023 Criminal Code and the Explanation of the Articles According to the author, lawmaker Number 1 of 2023 concerning the Criminal Code took a blunder and resulted in a mistake in formulating the position of adat law as a source of material criminal law in Indonesia, by formulating adat delicts into national law in the form of Regional Regulations or Regional Regulations.

The words of Article 2 Paragraphs (1), (2), and (3) and their explanations are formulated as follows :

Paragraph (1)

The provisions as intended in Article 1 Paragraph (1) do not reduce the validity of the laws existing in society which determine that a person deserves to be punished even though the act is not regulated in this law..

Explanation of Paragraph (1)

What is meant by "law that lives in society" is adat law which determines that someone who commits a certain act deserves to be punished. The laws that live in society in this article relate to unwritten laws that are still valid and developing in society in Indonesia. To strengthen the implementation of laws that exist in society, Regional Regulations regulate these adat delicts.

Paragraph (2)

The law that lives in society as intended in Paragraph (1) applies in the place where the law lives and as long as it is not regulated in this law and is in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general principles recognized by the people of nations.

Explanation of Paragraph (2)

In this provision, what is meant by applicable in the place where the law lives is that it applies to every person who commits a adat delicts in that area. This

paragraph contains guidelines for establishing adat law whose validity is recognized by this law.

Paragraph (3)

Provisions regarding procedures and criteria for determining laws that exist in society are regulated by Government Regulations.

Explanation of Paragraph (3)

The Government Regulations in this provision are guidelines for regions in establishing laws that live in society in Regional Regulations.

In essence, Article 2 Paragraphs (1), (2), and (3) concerning the recognition of customary law as a principle of material legality, contains 3 core elements, namely:

1. The definition of living law is narrowly defined as adat law.

In VI National Law Seminar (Jakarta, 25 – 29 June 1994), the definition of adat law which is a translation of *living law* or living law, includes:

- In the sense that it is identical to adat law that applies in ethnic communities and adat law environments.
- In the sense of a habit recognized by society and decision makers (*decision mak* er), so that it gradually becomes law (*gewoonte recht, customary law*).

However, Article 1 Paragraph (1) has a narrow meaning, namely only adat law. Recognition of adat law is based on the idea of balance promoted in the 2023 Criminal Code, where in the context of the principle of legality, recognition of adat law is a manifestation of the idea of balance between the principle of formal legality as formulated in Article (1) Paragraph (1) and the principle of material legality which formulated in Article 2 Paragraphs (1), (2), and (3).

2. There is recognition of adat delicts by by criminalizing them in PERDA

The principle of legality in criminal law is the principle that is the basis for the legitimacy of an act so that it can be punished, therefore is always followed by the unlawful nature of the act. The principle of formal legality contains the nature of being against formal law, where the nature of being against the law is interpreted as being against or contrary to the rules of law, so that the legitimacy of an act is said to be against the law if the act has been formulated in law and is punishable by criminal law.

The reasons for eliminating the unlawful nature of acts that are formulated in the law as criminal acts are also in the law. Meanwhile, the principle of material legality provides the basis for punishing an act when the act is not desired by society, because it is contrary to society's sense of justice and the values of law and justice adhered to by society. The principle of material legality contains the nature of being against material law (i.e. the nature of being against the law which is outside the law, such as conflicting with society's sense of justice, legal values and fairness in society), so that an action is said to be against the law if it is contrary to law. with a sense of justice and legal values in society even though it is not formulated in the law as a punishable act.

In the nature of being against the material law, there are two functions, namely the positive function, where the nature of being against the material law is used to positiveize or make acts that are outside the written rules a criminal act. Meanwhile, the negative function of the unlawful nature of material law is the function of the unlawful nature of material law to eliminate the unlawful nature of actions that are formulated in the law as criminal acts. In the negative function, the absence of material unlawfulness (*Aufweigheid Van Alle Materril Wederechtlijke*/AVAW) means that criminal acts formulated in statutory regulations have their unlawful nature removed, so they cannot be punished. In criminal law enforcement, both the positive and negative functions of material unlawfulness are rarely applied.

The application of the principle of material legality as formulated in Article 1 Paragraph (1), (2), and (3) of the 2023 Criminal Code only applies the nature of violating material law in a positive function, namely positiveizing or determining unwritten adat delicts, which still exist and are developing becomes a criminal offense within the rules of state criminal law. Irregularities and errors in the policy of criminalizing adat delicts to become criminal acts in state law occur when unwritten adat delicts are formulated in Regional Regulations as state regulations in written form.[22]

[22] Ni Putu Ari Setyaningsih And Putu Chandra Kinandana Kayuan, "Kompilasi Delik Adat Dalam Peraturan Daerah Sebagai Dasar Pemidanaan Dalam Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana (Ruu Kuhp)," *Jurnal Yustitia* 16, No. 1 (May 31, 2022): 71–79, Doi:10.62279/Yustitia.V16i1.902.

Based on critical analysis of criminalization policies, the criminalization of adat delicts in regional regulations is very inappropriate. This can be identified as the following problems:

1) The problem of recognizing customary law by formulating adat delicts in Regional Regulations

Adat delicts originate from unwritten law, namely the decisions of adat judges, which are dynamic and plastic in nature, the measures of which quickly change and develop following the development of values community law and developments over time. So that an act that was originally an adat delict at some point will change to no longer be an adat delict, and conversely certain acts that were not previously recognized as adat delicts will be criminalized by adat courts to become adat delicts

The formulation of adat delicts in Regional Regulations actually eliminates the distinctive nature of adat delicts which are flexible, elastic and plastic and not written, becoming offenses that are formulated in written regulations in the form of Regional Regulations so that they are rigid. Formulating adat delicts into regional regulations as state regulations is a wrong step that actually eliminates adat law itself, even though it is formulated in local regulations as regional regulations where adat law exists. Some of the criminal policy issues that arise in the formulation of adat delicts into Regional Regulation (PERDA) are as follows:

- Problems of recriminalization and reformulation of adat delicts in regional regulations;
- The issue of threatening criminal sanctions for adat delicts formulated in the Regional Regulation;
- The problem of the punishment system which is different between the punishment system in adat delicts and the regional regulation punishment system;
- The problem of shifting the nature of going against material law into the nature of going against formal law in the formulation of adat delicts in regional regulations.

2) Differences between the realm of adat law and Regional Regulations

As explained above, basically adat law as an unwritten legal rule has a unique characteristic, namely that it is very dynamic and plastic, so it is very

easy to change following the development of values in society and the times. Adat law is a law formed by indigenous peoples, based on its formation, it is different from state law, which is made by state institutions and enforced on its citizens (up to bottom).

The definition of Regional Regulations in Law Number 12 of 2011 concerning the Formation of Legislative Regulations consists of Provincial Regulations, namely legislation formed by the Provincial Regional People's Representative Council with the approval of the Governor, and Regency/City Regional Regulations, namely regional regulations formed by the Council. Regency/City Regional Representative with joint approval of the Regent/Mayor.

Article 7 of Law Number 12 of 2011 above positions regional regulations as state legislation in the last place after presidential regulations. The functions of regional regulations include others:[23]

1. As a policy instrument for implementing regional autonomy and assistance tasks;
2. As implementing regulations of higher laws and regulations. In this case the Regional Regulations must not conflict with higher laws and regulations.
3. As a container for regional specialties and diversity as well as channeling the aspirations of the people in the region but must be based on Pancasila and the 1945 Constitution.
4. As a development tool in improving regional welfare.

Based on Law Number 12 of 2011 above, Regional Regulations can be identified as follows:[24]

1. Basically, regional regulations are administrative laws to support the implementation of regional autonomy and assistance tasks.
2. The criminal threat in the Regional Regulation is not the main threat, but only as a supporting sanction for administrative law.

[23] Claustantianus Wibisono Tanggono et al., "Mekanisme Pembentukan Peraturan Daerah Yang Berkualitas Di Pemerintah Daerah," *Journal Juridisch* 1, no. 3 (2023).
[24] Jihan Sopyana, Salsa Aulia Ratar Putri, and Siti Dewi Ratnasari, "Pencabutan Peraturan Daerah Oleh Pemerintah Pusat," *Jurnal Rechten : Riset Hukum Dan Hak Asasi Manusia* 3, no. 2 (June 21, 2022): 15–21, doi:10.52005/rechten.v3i2.84.

3. The criminal threat contained in the Regional Regulation is a maximum imprisonment of 6 (six) months or a maximum fine of Rp. 50,000,000 (five tens of millions of rupiah).
4. Regional regulations can contain threats of imprisonment or fines in addition to the weight provisions above in accordance with statutory regulations.
5. Regional regulations can contain threats of sanctions in the nature of returning to the original state and administrative sanctions.

Based on the description above, in essence, regional regulations are administrative laws to carry out regional autonomy and assistance duties, while adat delicts which are in the realm of adat law are purely criminal acts in the context of adat law. Thus, it is not appropriate to formulate adat delicts into regional regulations as state law in the implementation of regional administration.

The formulation of adat delicts into state law is a form of adat law formalism, instead of providing a place and recognition for adat law in modern national criminal law, what has happened is actually reconsolidating adat law.

3) The criminalization system for adat delicts is different from regional regulations

The criminal system is a building system in the determination and imposition of punishment which consists of criminal principles and criminal objectives, criminal guidelines and rules, and actions, criminal and criminal responsibility.[25]

In adat law, the structure of the criminal system is very distinctive, different from the national criminal system, concluded by the author as follows:

- The Principle of Punishment for Existing Offenses prioritizes sources of unwritten law which are plastic and elastatic, regarding actions, mistakes and others in the context of adat delicts which are different from state criminal law (KUHP);
- The aim of criminalization for adat delicts which is primarily to restore balance between the macro cosmos and the micro cosmos is very

[25] Novandi Dwi Putra, Ilmi Firdaus Aliyah, and Dadang Syaifudin Yusuf, "Pembaharuan Hukum Pidana Positif (Positive Criminal Law Reform)," *Journal of Social Science Research* 3, no. 3 (2023).

dominated by spiritual interests, which is very different from the aim of state punishment which is dominated by protecting society from crime.

- Guidelines/Rules for Punishing adat delicts prioritize giving judges discretion in convicting perpetrators of adat delicts, based on the conscience and sense of justice of the community, so that punishment is more flexible and flexible, not relying on legal certainty.
- Adat delicts are determined through criminalization by traditional ancestors based on the belief as "pamali" or taboo acts, damage human relations with spiritual beings, so that they are not appropriate, they are believed to bring harm or disaster.
- Liability answers in adat delicts are aimed individually and structurally, with the main aim of restoring balance.
- Traditional sanctions are in the form of real sanctions and magical sanctions in the form of traditional ceremonies and other sanctions to restore disturbed spiritual balance.

4) Limitations of Recognition of Adat Law

Not all adat laws that are still alive and developing are recognized by 2023 Criminal Code, where Article 2 Paragraph (2) provides conditions for recognized adat laws, namely in accordance with the values contained in Pancasila and the 1945 Constitution, Human Rights and general legal principles recognized by the people of nations. In the case of adat law criteria which are in accordance with general legal principles recognized by nations, it can be biased, because the legal values adopted by a nation are "nation centric", especially in adat law which has no relevance to international values. So that in legal recognition custom is enough to use Pancasila, Human Rights, and the 1945 Republic of Indonesia Constitution as the margin of appreciation.

The filter criteria that limit the application of adat law above are a consequence of the shift from adat law to state law, which is further stated that provisions regarding procedures methods and legal criteria that exist in adat law are regulated by government regulations. The next problem is what about customary laws that are not covered by government regulations because they are located far inland? What are the consequences for adat law

that is not recognized by the state? Is it still valid? This requires further thought

B. Reformulation Adat Law in Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the 2023 KUHP

The recognition of adat law as a source of material criminal law in the KUHP 2023, should be returned to the nature of adat law, as original law resulting from the culture of adat communities that are different from each other, unwritten, dynamic, plastic and easy. changes according to the values that develop in indigenous communities, it is not appropriate to recognize adat law as a source of material criminal law with the policy of formulating customary criminal acts into PERDA (Regional Regulations) as state regulations. A policy like this is exactly the same as the policy implemented by the Dutch East Indies Government, where through Article 131 IS Jo AB provides the validity of the application of adat law but with certain notes, where Article 131 IS Jo AB can be referred to as the Article Controlling the application of adat law, in where if it is not desired to come into force, then certain adat laws cannot apply.

The best way out in recognizing adat law as a source of material criminal law can be done as follows:

1. Formulate customary law as a source of law, by formulating adat delicts as formulated in Article 5 Paragraph (3) Sub b of Law Number Drt of 1951 concerning Temporary Measures to Implement Unity Composition of Powers and Procedures of Civil Courts.
2. Formulate guidelines for criminalization of adat delicts in accordance with policy and Supreme Court jurisprudence, namely Supreme Court Decision No.1644 K/Pid/1988.

Making Article 2 Paragraphs (1), (2), and (3) only as the rule of recognition of the application of adat law

Conclusion

Based on the discussion of the problems above, it can be concluded as follows:

1. Based on a study penal policy analisys, formulating adat delicts into Regional Regulations is very inappropriate, from a policy perspective the formulation distorts the nature of adat delicts as unwritten rules, from a criminal system perspective the differences between the systems are very different punishment in adat delicts (consisting of Criminal Acts, Mistakes, Criminal Liability, Purpose of Punishment, and Sentencing Guidelines) with the state criminal system, let alone regional regulations. Judging from the criminal sanctions, it is very unequal if adat delicts are formulated in the Regional Regulation, then the criminal sanctions follow the criminal sanctions in the Regional Regulation which are very limited, so they cannot reach adat delicts which are threatened by indigenous peoples with heavier adat sanctions.
2. The most likely thing to accommodate adat law in the 2023 Criminal Code is that adat law is only used as a source of law, and Article 2 Paragraphs (1), (2), and (3) only become rules for recognizing of adat law to apply as is.

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PENAL POLICY ANALYSIS OF THE FORMULATION OF ADAT LAW IN THE 2023 KUHP

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Abstract

An interesting issues in the 2023 Criminal Code is the accommodation of living law with a meaning limited to Adat Law as formulated in Article 2 Paragraphs (1), (2), and (3). This research aims to analyze it in perspective penal policies regarding to the formulation of Living Law only as Adat Law in Article 2 Paragraphs (1), (2), and (3) of the 2023 Criminal Code. This research uses a normative or doctrinal juridical approach, with data sources from library materials, in the form of statutory regulations and literatures related to research. This research raises problems: 1). How analysis of penal policy of the formulation of living law in Article 2 Paragraph (1) of the 2023 KUHP ? 2). What is reformulation of Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the 2023 KUHP in penal policy perspective? The results of the research are : There is invalidity in the formulation of the meaning of living law as only Adat Law because the living law is wider than Adat Law, it covers all custom in society as like in business affairs and in religious life in society. Analysis in penal policy perspective can't be adjusted if the meaning living law only determined to Adat Law. There are many fallacious in formulation Article 2 Paragraph (1),(2),and (3) of the 2023 KUHP so that reformulation is needed. Reformulation of Article (2) Paragraph (1), (2), (3) should be changed to interprete the living law not

only as Adat Law which will be formulated in Regional Regulation. Article (2) Paragraph (1), (2), and (3) just needed as the recognition rules to enforce Adat Law in, in other words formulation of the living law only as an umbrella rules to enforce adat law.

Keywords
analysis, Policy, Adat, Criminal Code.

Introduction

Entering the beginning of 2023, the Indonesian people, especially academics and criminal law practitioners, feel relieved by the presence of Law Number 1 of 2023 concerning the Criminal Law Code (the 2023 KUHP), which to replace the Dutch of the Criminal Code (Wetboek Van Strafrecht), which is effective in Indonesia until now. The urgency to create the 2023 Criminal Code (its called as the 2023 KUHP) emerged since the proclamation of Indonesian independence, starting with the issuance of Law Number 1 of 1946 concerning Criminal Law Regulations as the rules for enforcing the Criminal Code (WvS). The Law Number 1 of 1946 made several changes to suit the conditions of the Indonesian people after leaving Dutch colonial rule.[1] The Criminal Code (Wvs) is a Dutch derivative of the Criminal Code created in 1881, which came into effect in the Netherlands in 1886, and came into force in Indonesia on January 1, 1918. With Principles of concordance then The Criminal Code (WvS) to be applied in Indonesia. The principle of concordance is actually the principle for enforcing criminal regulations for Dutch people who are outside Holland, especially in their colony.[2]

The Dutch Criminal Code (WvS) relies on the principle of formal legality adhered to by adherents of legalism, where law is only interpreted as statutory rules, so that all rules of behavior that are outside the law, such as

[1] Ni Putu Yulita Damar Putri and Sagung Putri M.E. Purwani, "Urgensi Pembaharuan Hukum Pidana Di Indonesia," *Jurnal Kertha Wicar* 9, no. 8 (2020).
[2] Faisal Faisal and Muhammad Rustamaji, "Pembaruan Pilar Hukum Pidana Dalam RUU KUHP," *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)* 10, no. 2 (July 30, 2021): 291, doi:10.24843/JMHU.2021.v10.i02.p08.

society's habits in passing laws and resolving conflicts as customs which live, grow, and dead in society for generations are not recognized as law. The principle of formal legality focuses on legal certainty and juridical justice. It justice based on the text of the law, not substantive justice which is contextual in nature. This situation often creates an imbalance/gap between the Dutch Criminal Code (WvS) and the need for a sense of substantive justice in society. Not only the principle of formal legality, the values that characterize the Dutch Criminal Code (WvS) also become a problem when it was applied to cases where there is a conflict between the values of legal certainty, expediency, and justice. This inequality originates from the legal values that underlie the Dutch Criminal Code (WvS) such as liberalism, individualism and capitalism, meanwhile the Indonesian nation adheres to religious and collective or communal values. These differences in values have an impact on criminal law enforcement in Indonesia. The Indonesian nation, which has a communal character such as being tolerant, easy to forgive, high in solidarity, is faced with Ducth criminal law which has a liberal, individual and capitalistic character. Here, legalism which is very rigid, interprets the law as *Lex Dura Sad Tamen Scripta,* wherein law is only interpreted as written rules.[3]

The 2023 KUHP comes as a response to the demands of the Indonesian people to have criminal law regulations that are in line with the values of Indonesian life., such as religious values and communal values that are crystallized in Pancasila. By focusing on the principle of balance as the juridical basis of Indonesian philosophy, which is taken from the core of Pancasila, that shapes balance in the relationship between humans and their God (religious balance), the relationship between humans and themselves and others (humanity balance), as well as the relationship between humans and society and universe (social balance). Indonesian legal values as living law reflected in the 2023 KUHP, especially in formulation Article 2 Paragraph (1), (2), and (3).

One of the most prominent Indonesian things is the recognition and accommodation of the living law as a source of criminal law that formulated

[3] Muhammad Alwan Fillah, "Politik Hukum Dalam Pembaruan Kitab Undang-Undang Hukum Pidana (KUHP) Di Indonesia," *VARIA HUKUM* 5, no. 1 (January 23, 2023): 52–64, doi:10.15575/vh.v5i1.23230.

in Article 2 Paragraph (1) the 2023 KUHP, as *preleasing* the principle of formal legality. It is accommodated by the principle of material legality, meaning that the living law which formulated as only Adat Law is used as a source of law to determine deeds that are not regulated in the 2023 KUHP, but in society, especially indigenous communities, are declared as delict that can be punished. It is logical that the 2023 KUHP is claimed to be the Indonesian Criminal Code, recognizing and accommodating Adat Law as a source of legal and justice values that were born, grew and developed with the Indonesian nation. As a legal ideal, the legal values contained in the laws that exist in Indonesia should color the content of every Indonesian law and regulation, especially KUHP which regulates individual behavior in public life, by criminalizing acts that not desired by society, in as well as with rules for administering punishment that are not rigid (*rigid*) which are based on values of law and justice of the Indonesian nation. The culture of the Indonesian nation which is full of communal values gives birth to an attitude of self-centeredness, non-individuality, solidarity and respect for human rights and human obligations as a manifestation of the principle of monodualism/principle of balance which has been integrated in Indonesian human behavior. [4]

Soediman Kartadipradja said that the expression of the content of the soul of a nation appears in its culture, culture which is an expression of the soul of the nation concerned, in sculpture, painting, literature, dance, and also in its laws. In the legal field, we want to use it as a legal measuring tool, strictly speaking Indonesian Adat Law is part of our nation's culture which, according to **Van Vollenhoven** "is disappearing into the darkness of the past". Adat Law, which is an expression of the soul of the Indonesian nation, is a spiritual heritage or ancestral spiritual inheritance that has been passed down from generation to generation to express the path towards justice in human relations.[5]

The living law which is formulated in the 2023 KUHP is interpreted in a closed way as Adat Law , as stated in Elucidation of Article 2 Paragraph

[4] Mudemar A. Rasyidi, "Menuju Pembaharuan Hukum Pidana Indonesia," *Jurnal Mitra Manajemen* 12, no. 1 (2021): 1–10.

[5] Soediman Kartahadiprodjo, *Pengantar Tata Hukum Di Indonesia* (Jakarta: Pembangunan Publisher, 1973).

(1) that "the law that lives in society is **Adat Law** which determines that someone who commits a certain act deserves to be punished. The laws that live in society in this article relate to unwritten laws that are still valid and developing in society in Indonesia. To strengthen the implementation of laws that exist in the community, **Regional Regulations** regulate the Adat Delicts". Explanation of Paragraph (2) that " In this provision, what is meant by applicable in the place where the law lives, it to be applied to every person who commits a adat delicts in the place adat law enforced. This paragraph contains guidelines for establishing adat law, the validity of which is recognized by this Law." Explanation of Paragraph (3) that "Government regulations in this provision are guidelines for regions in establishing rules that adat law written in Regional Regulations".

The living law in the community means law that lives, grows and exists together in social life.[6] Its essence is rooted in the sense of justice of the community, the character of the law in it follows the thinking of the community in certain cases.[7]

If you look closely at the Explanation of Article 2 Paragraph (1) then what is meant by adat law is unwritten law which is still valid and developing in Indonesia which regulates adat delicts. Because it is unwritten, so that the Regional Regulation regulates adat delicts as written law. Explanation of Paragraph (2) is a guideline in determining adat delicts whose validity is recognized by the 2023 KUHP, thus not all adat laws are recognized by the the 2023 KUHP according to Paragraph (2).

This research has novelty from several previous researchers such as a journal article written by Wirdi Hisroh Komeni and Ermania Widjajanti in the journal journal Of social science research volume 4 number 3 formulation of article 2 of the national criminal code which states that it causes confusion in its legal implications which results in unfair enforcement of sanctions in practice.[8] In addition, journal research

[6] Syofyan Hadi, "Hukum Positif Dan The Living Law (Eksistensi Dan Keberlakuannya Dalam Masyarakat)," *DiH Jurnal Ilmu Hukum* 13, no. 26 (2018): Hlm. 262, https://doi.org/DOI:10.30996/dih.v0i0.1588.

[7] Ratno Lukito, *Tradiisi Hukum Indonesia (Disertai Postcript Oleh Penulis & Pranoto Iskandar)* (Cianjur: the institute for migrant right press, 2013), Hlm 40.

[8] Wirdi Hisroh Komeni and Ermania Widjajanti, "Ketidaktepatan Penerapan Hukum Pidana Adat Dalam Pasal 2 KUHP Baru: Prespektif Teori Kepastian Hukum," *Innovative: Journal Of Social Science Research* 4, no. 3 (2024): 1–9,

submitted by Yoserwan with the title of the article Existency of adult criminal law in national criminal law after the presentation of the new Criminal Code in the journal unes law review published in 2023, in the article The regulation of customary criminal law in the New Criminal Code aims to provide a legal basis and protection for the enactment of customary criminal law. However, this arrangement creates a number of restrictions that have the potential to weaken the existence of customary law itself. Basically, what is needed is a legal basis that respects and protects customary criminal law, allowing it to grow and develop in accordance with its own legal norms, but still within the framework of the philosophy of the nation and state.[9] There is also research conducted by Rini Apriyani which has been written in the prioris journal published in 2018 on the existence of customary sanctions in the application of customary criminal law, in the article states that in reality, there is no clear legal certainty regarding the provision of customary criminal sanctions. In addition, the application of adat criminal law rules among indigenous peoples currently also faces various difficulties. This is due to the increasing number of community members who have understood the existence of Indonesian national law, as well as the large burden of adat sanctions given in relation to adat criminal offenses.[10] The research conducted by the author has differences, especially in terms of the exposure of the problems contained in the formulation of Article 2 paragraphs 1, 2, and 3 of the National Criminal Code . In addition, this research also discusses how the ideal formulation of Article 2 paragraphs (1), (2), and (3) should be formulated.

Referring to the Explanation of Article 2 Paragraphs (1), (2), and (3), in penal policy analysis , there are juridical weaknesses that will conflict with each other, where instead of recognizing and accommodating adat law as living law, it actually distorts adat law and The government's action through the reaffirmation of conditional recognition in Law No. 1/2023 on the Criminal Code resembles a repetition of the debate on the Dutch idea of

Doi : /https://doi.org/10.31004/innovative.v4i3.10586.
[9] Yoserwan, "Eksistensi Hukum Pidana Adat Dalam Hukum Pidana Nasional Setelah Pengesahan Kuhp Baru," *UNES LAW REVIEW* 5, no. 4 (2023): 1999–2013, Doi :https://doi.org/10.31933/unesrev.v5i4.577.
[10] Rini Apriyani, "Keberadaan Sanksi Adat Dalam Penerapan Hukum Pidana Adat," *Prioris* 6, no. 3 (2018): 227–46, Doi : /https://doi.org/10.25105/prio.v6i3.3178.

legal unification, in which indigenous communities were downgraded to weak subjects under the dominant authority of the state. Indigenous communities are considered incapable of knowing what is best for their interests, thereby justifying state intervertation.[11]

There is formulation of the colonial model in formulating the enactment of adat law through the formulation of adat delicts in regional regulations, it can be said that there is a re-colonization of adat law formulation, so that a policy gap appears in penal policy, which ultimately gives rise to problems:

1. How analysis of penal policy of the formulation of living law in Article 2 Paragraph (1) of the 2023 KUHP ?
2. What ideal reformulation on Adat Law in Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the 2023 KUHP in penal policy perspective?

Method

This research aims to analyze the validity of the narrow meaning of living law which formulated as Adat Law in Article 2 Paragraphs (1), (2), and (3) of the 2023 KUHP , the model formulation Adat Law in written law which is established in Regional Regulation, and ideal reformulation of Adat Law in the 2023 KUHP.

The research used a normative juridical approach or doctrinal research, which used legal materials such as relevant laws and written regulation. In addition, to obtain and use information related to policy formulation customary law in the Criminal Code 2023, this research used statutes and philosophical approaches.

This research is of a descriptive type with the aim of to obtain an overview of how adat law is formulated in the 2023 Criminal Code, especially adat delicts based on penal policy perspective.

In normative juridical research or doctrinal research, data is collected by literature study, in the form of : legal materials, books, journals and other literature related to philosophy and adat law and policy formulation in legislation.

[11] Sunardi Purwanda et al., "The Fate of Indigenous Peoples' Rights Recognition After the Enactment of the National Criminal Code," *Indonesian Journal of Criminal Law Studies* 9, no. 2 (2024): 256–89, https://doi.org/https://doi.org/10.15294/ijcls.v9i2.50321.

Data analysis in this research was carried out by method descriptive analytical. This method used to collect, to set, and to analyze data and finally to describe data throughout the words to provide accurate description about the scope of discussion as follows : the validity of the meaning of living law as Adat Law in the 2023 KUHP, the model of formulation Adat Delicts in written law which will be established in Regional Regulation, and the ideal reformulation of Adat Law in Article 2 Paragraph (1),(2), and (3) of the 2023 KUHP.

Result and Discussion

A. Penal Policy Analisys Regarding to the Formulation of Adat Law in Article 2 Paragraph (1), Paragraph (2), and Paragraph (3)

The adat laws of each ethnic group in Indonesia applied without problems until the Dutch came to Indonesia bringing the Principle of Formal Legality as a manifestation of the teachings of legism or positivism in implementing the law. The teaching of legism or positivism is a teaching that only recognizes written rules as law. Therefore, criminal law which is based on the Principle of Legality is criminal law which only determines whether or not an act can be punished and must be based on written law or legislation which must exist before the act occurs. So the legal sources recognized in implementing criminal law are only sources of written law or statutes. The consequence is a prohibition on analogies in applying criminal law, and eliminating the legitimacy of the existence of living as an unwritten rule.

Thus, living law as living law, most of which is not written, according to the view of legism which is manifested in the principle of legality, is not recognized as law. In the context of criminal law, the legal rules that applied to regulate people's behavior at that time were the Criminal Code (*Wetboek Van Strafrecht)* , which was initially based on the principle of concordance only applicable to Dutch people who were in Indonesia, but eventually it was It was gradually implemented for all Indonesian residents, namely after the independence of the Indonesian nation, through Law Number 1 of 1946 concerning Criminal Law Regulations for the Entire Territory of the Republic of Indonesia, with changes made to several articles adapted to

Indonesian conditions. The implementation of the Criminal Code (KUHP) was further reinforced by unifying its application for all Indonesian citizens through Law Number 73 of 1958, which enacted the validity of Law Number 1 of 1946 concerning Criminal Law Regulations for the Entire Territory of the Republic of Indonesia.

In the history of applying customary law after the arrival of the Dutch to Indonesia, it was not easy. The arrival of the Dutch and their presence in Indonesia not only colonized Indonesia socially, politically and economically, but also colonized Indonesian living law, which had been institutionalized centuries before the Dutch arrived, namely by being "put to sleep" or extinguished.

In the realm of criminal law, the Netherlands applies *Wetboek Van Strafrecht* with the principle of legality as a representation of the legal teachings of legism or positivism that developed in mainland Europe. This legalism teaches legal scholars in Indonesia, judges, and other legal officials to think that law is written rules, so that law is only statutory rules, customary law does not have legitimacy to be accommodated and applied in resolving criminal acts. Law enforcement, especially criminal law, is only based on the sound of the law, where the basis of reasoning is *syllogism* , which is drawn from the major premise and minor premise, so that the conclusion is certain and easy to predict, where the judge is only the mouthpiece of the law. -law (*La Bouche de la loi)* or as a statutory machine *(subsumptie automaat)* in enforcing criminal law, this is where legal certainty emerges in implementing criminal law, which establishing juridical truth and justice. In conditions like this, customary law as unwritten customary law which contains legal values and material justice has no place to apply because it is not recognized as law.

If seen from its essence, basically customary law as original law born from national culture which contains the noble values of a nation applies by itself, and does not require legitimacy based on written legal rules to enforce it. However, with the existence of the principle of formal legality in the Criminal Code brought by the Dutch, which has become ingrained in the enforcement of criminal law in Indonesia, the consequences for unwritten customary law are that the legitimacy of its validity in its own homeland is lost, unless there are written legal rules that give life as the basis for enforcing

it or often referred to as the rule of recognition *(the rule of recognition*) for the application of customary law.

Specifically for the material criminal law that has been in effect in Indonesia since January 1 1918 for all European, indigenous and Eastern Foreign groups, is the Criminal Code or *Wetboek van Strafrecht voor Nederlandsh Indie* (stb. 1915 – 732), so it is practical Since the implementation of WvSvNI for all groups, customary (criminal) law cannot be applied, except by written rules as rules that recognize and accommodate the application of customary law (*rule of recognition*).

Historically, the enactment of customary law during Dutch rule was based on the rule of recognition (*rule of recognitian*) in the form of Article 131 *I.S* (*Indische Staatsregeling*) Jo Article 11 *Algemene Bepalingen van Wetgeving* . Meanwhile *Indische Staatsregeling* (IS), among other things, determined that: [12]

1. The law that applies to European groups is European criminal law based on the principle of concordance;
2. The law that applies to indigenous groups is living law in unwritten form, where the application of customary law is "not absolute" and if necessary can be regulated in special regulations (ordinances);
3. The law that applies to the Foreign East group is their customary criminal law (Article 11 AB). (CFG Sunaryati Hartono, Analysis and Evaluation of Dutch Colonial Legacy Legislation, BPHN, 2015, Jakarta).

Article 131 IS as the basis for the application of customary law during the Dutch East Indies period determines that for the European group the law that applies is the law that exists in the Netherlands (based on the principle of concordance), for the Foreign East group the law that applies is their own law, and for the Indigenous group the law that applies what applies is customary law. However, if social interests require it, European law can apply across groups. This implementation is hereinafter referred to as submission to European law, either completely or only partially.[13]

[12] CFG. Sunaryati Hartono, *Analisa dan Evaluasi Peraturan Per-UUan Peninggalan Kolonial Belanda*, (Jakarta: BPHN, 2015)

[13] *Loc.Cit*

With Article 131 I.S above, the application of customary law is not determined by customary communities but by the Dutch East Indies Government. This is stated in point 2 above that the application of customary law is not absolute, so it can be said that customary law cannot be enforced by itself, even though Article 131 I.S was created as a rule of recognition of customary law, but only as *rule of recognition* not to apply customary law. This is emphasized in point 2 that "if necessary, it can be regulated by special regulations (*ordonantie*)".

Meanwhile, Article 11 *Algemene Bepalingen van Wetgeving* (A.B) determines that for groups of indigenous people the judge will apply the religious laws, institutions and customs of the indigenous people themselves, as far as the laws and institutions are concerned. and this custom does not conflict with generally recognized principles of decency and justice, and also if European law applies to indigenous people or the Indigenous person concerned has submitted himself to European law.[14]

Article 11 AB is not clearly and unequivocally a rule of recognition in the application of customary law as a source of law for natives, because it is combined with religious law and other institutions, and is seen from the subject of the law, namely the native people for whom determined that European law applies to him or an indigenous person who submits himself to European law then customary law does not apply to him, even though he is a customary community that should be subject to living law.

The application of living law to indigenous groups creates problems, considering that living law in Indonesia is very diverse according to ethnicity, social, culture and religion. Along with efforts to instill colonial ideology, 3 theories were used in implementing living law during Dutch colonialism, namely:[15]

1. The theory *Receptio in complexu* , put forward by Van den Berg where customary law follows the religious law adhered to by the indigenous community.

[14] *Loc.Cit*

[15] Felishela Erlene, Tundjung Herning Situbuana, "Tanggung Jawab Negara Terhadap Hak Masyarakat Adat di Pulau Rempang Dalam Perspektif HAM," *Jurnal Tunas Agraria* 7, Vol. 2 (2024): 144-161, http : //doi.org./10.1392/jta.v712.301.

2. *Receptie theory* put forward by Snouck Hurgronje and C.Van Vollenhoven, emphasizes that Islamic law will apply effectively among Muslims, if Islamic law is in line with customary law in Indonesia, meaning that the laws that apply in Indonesia to natives are not based on Islamic teachings, but on local customary law.
3. *Receptio a Contrario/ Receptie exit* was put forward by Hazairin, stating that the law that applies to society is religious law, where customary law only applies if it does not conflict with religious law.

After Indonesian independence, the enactment of customary law was based on the 1950 Provisional Constitution, namely Article 32, Article 43 Paragraph (4), Article 104 Paragraph (1), Article 14, Article 13 Paragraph (32), and Article 16 Paragraph (2).The contents of each article are as follows [16] :

- Article 13 Paragraph (2)
  Against his will no one can be separated from the judge, which is granted to him by the rules of law in force.
- Article 14
  1. Every person who is charged because he is suspected of committing a criminal incident has the right to be presumed innocent, until his guilt is proven in a court hearing, according to the applicable legal rules, and he is given at that hearing all the guarantees that have been determined and are necessary for his defense.
  2. It is said that no one may be required to be punished or sentenced, except because of a legal rule that already exists and applies to him.
  3. If there is a change in the legal rules as stated in the paragraph above, then provisions that are better for the suspect are used.
- Article 16 Paragraph (2)
  Trespassing on the grounds of a residence or entering a house against the will of the person who occupies it is only permissible in cases stipulated in a legal regulation that applies to it.
- Article 32

[16] Saiful Anam, "Fungsi Hukum Adat Dalam Pembentukan Peraturan Perundang-undangan Di Indonesia, " *Journal Iuris Scentia* 1, No 2 (2023): 80, https://doi.org/10.62263/jis.v1i2.18.

Everyone in the country must obey the laws, including unwritten legal rules, and the authorities.

- Article 43 Paragraph (4)
  The authorities supervise that all religious associations and associations comply with the law, including unwritten legal regulations.
- Article 104 Paragraph (1)
  All court decisions must contain the reasons and in cases of punishment state the statutory rules and customary law rules that are used as the basis for the sentence.

In the history of the return of the Republic of Indonesia, the Provisional Republic of Indonesia Law was no longer applied, but returned to the 1945 Law, thus *the rule of recognition* based on the articles of the 1950 UUDS was not applies. With Indonesia's return to the 1945 Constitution, *the rule of recognition* was needed for the implementation of customary law, especially customary offenses, so Law Number 1 Drt of 1951 concerning Actions was issued. Meanwhile, to organize a unified structure of powers and procedures for civil courts, Article 5 Paragraph (3) Sub b, reads as follows:

"The civil material law and for the time being the civil criminal material law which until now applies to independent regional leaders and people who were previously tried by the Traditional Court, still applies to those people and people, with the meaning of: [17]

- That an active act must be considered a criminal act, but there is no comparison in the Civil Criminal Code, so it is considered to be punishable by a sentence of not more than three months in prison and/or a fine of five hundred rupiah, namely as a substitute punishment if the customary punishment The sentence imposed is not followed by the condemned party and the compensation referred to is considered commensurate by the judge with the magnitude of the condemned person's fault.
- That if the customary punishment imposed in the judge's opinion exceeds the imprisonment sentence or fine referred to above, then for

[17] Undang-Undang Nomor 1 Drt Tahun 1951 Tentang Tindakan -Tindakan Sementara untuk Menyelenggarakan Kesatuan Susunan Kekuasaan dan Acara Pengadilan-Pengadilan Sipil, https://www.bphn. go.id> data.

the defendant's mistake a substitute sentence of up to 10 years in prison may be imposed, with the understanding that the customary punishment according to the judge's understanding is no longer in line with time, it must always be replaced as mentioned above.

- That an act which according to living law must be considered a criminal act and which has an appeal in the Civil Penal Code, is deemed to be threatened with the same punishment as the sentence on appeal which is most similar to the criminal act.

Article 5 Paragraph (3) Sub b of Law No.1 Drt of 1951 above, apart from being the rule of recognition of customary criminal law, also provides guidelines on how to apply civil criminal law and customary criminal law to customary incidents (customary criminal acts), without specifying the type of criminal act. Article 5 Paragraph (3) Sub b, as the rule of recognition as well as guidelines for application of customary law , is a policy that becomes a bridge so that customary law still exists in certain customary areas or where customary justice is also still alive, customary law and its customary offenses are still recognized and applied, as long as the implementation of the punishment is adhered to by the violators/perpetrators of customary offenses. However, if the perpetrator of a customary offense does not comply with the sentence (customary crime) imposed by a customary court judge, then the criminal incident can be brought to the state court with the provisions for punishment by the judge in accordance with the sentencing guidelines specified in Article 5 Paragraph (3) Sub b above.

The 2023 Criminal Code as positive law must be intertwined with adat law, according to Brian Z Tamanaha that adat law is a more effective provision with its consensual nature. Meanwhile Karl Von Savigny wants positive law to be intertwined with adat law, because in adat law there is people's consciousness which is a manifestation of the soul of the nation, positive law must be harmonized with people's feelings and consciousness about the right and wrong behavior. Referring to the opinion of Savigny, all forms of legislation including the 2023 Criminal Code must take into account adat law. The 2023 Criminal Code must not violate the norms and values system of adat law, therefore it must be harmonized with adat law, including in determining criminal acts, and in determining the structure of the criminal system it must be in accordance with adat law as a manifestation

of the national spirit.[18] In on this occasion Savigny emphasized that all state laws are subordinate to adat law.

Based on the recommendations of the Law Seminar National VI (Jakarta, 25 -29 June 1994), it is clear that the national legal system adopted is the Pancasila Legal System, namely a legal system based on the Pancasila philosophy, so that all products national laws, including the 2023 Criminal Code, must be based on and in line with the Pancasila philosophy. With the awareness that the development of a nation's national law is nation-centric, the development of Indonesian national law, including in the preparation of the 2023 Criminal Code, is also nation-centric, meaning that it is based on legal values and legal culture that are born, live, grow and develop in Indonesian society, which is manifested in living laws which are believed to be noble values in behavior from generation to generation, which form customs in an unwritten form, namely adat law.

The position of adat law as original law in society originates from people's feelings and consciousness, therefore it is unwritten, it does not have to be conflicted with written law, let alone abolished by written law, but should be positioned as a complement that complements written law. It is acknowledged that the formation of unwritten law is more flexible than the formation of written law, because it can overcome the gap between the validity of the law and its effectiveness, this is because of the dynamic and plastic nature of adat law as unwritten law, so that it always follows the development of values who live in society. The position of adat law in the national legal system is as a source of national law.[19]

The 2023 Criminal Code as a legislative legal product currently still uses a thinking framework that is also strong in the principles of formal legality, this was acknowledged in the VI National Law Seminar (Jakarta, 25 – 29 June 1994) that there are no clear criteria regarding adat law, especially in enforcing the law, encourages the formation of a very legal attitude and legal culture in PJP I which tends to identify law with law. It was further

[18] Andri Yanto and Faidatul Hikmah, "Akomodasi Hukum Yang Hidup Dalam Kitab Undang-Undang Hukum Pidana Nasional Menurut Perspektif Asas Legalitas," *Recht Studiosum Law Review* 2, no. 2 (November 3, 2023): 81–91, doi:10.32734/rslr.v2i2.14162.

[19] Revie, "Hukum Adat Sebagai Sumber Hukum Nasional Dalam Politik Hukum Di Indonesia," *Jurnal Legal Certainty* 1, no. 1 (2019).

emphasized that in the PJP II era, the legal community in Indonesia needs to be directed to appreciate customary law as one of the sources of law, in addition to legislation and permanent jurisprudence.

Sentencing policy in the form of sentencing guidelines for judges related to adat law which is full of legal and justice values as a source of justice, before the promulgation of the 2023 Criminal Code, had been formulated in statutory policies and policies in judicial practice, as follows:

1. Article 5 Paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, states that judges and constitutional justices are obliged to explore, follow and understand the legal values and sense of justice that exist in society.
2. Article 5 Paragraph (3) Sub b of Law Number 1 Drt of 1951 concerning Concerning Temporary Measures to Organize the Unity Structure of Powers and Procedures of Civil Courts, where Article 5 Paragraph (3) Sub b, reads as follows following:
   "The civil material law and for the time being the civil criminal material law which until now applies to independent regional leaders and people who were previously tried by the Adat Court, still applies to those people and people, with the meaning of: [20]
   - That an active act must be considered a criminal act, but there is no comparison in the Civil Criminal Code, so it is considered to be punishable by a sentence of not more than three months in prison and/or a fine of five hundred rupiah, namely as a substitute punishment if the customary punishment . The sentence imposed is not followed by the condemned party and the compensation referred to is considered commensurate by the judge with the magnitude of the condemned person's fault.
   - That if the adat punishment imposed in the judge's opinion exceeds the imprisonment sentence or fine referred to above, then for the defendant's mistake a substitute sentence of up to 10 years in prison may be imposed, with the understanding that the customary punishment which according to the judge's

[20] Undang-undang Darurat Nomor 1 Tahun 1951 tentang Tindakan-Tindakan Sementara untuk Menyelenggarakan Kesatuan Susunan Kekuasaan dan Acara Pengadilan-Pengadilan Sipil.

understanding is no longer in line with the times, will always be must be replaced as mentioned above.

- That an act which according to living law must be considered a criminal act and which has an appeal in the Civil Criminal Code, is deemed to be threatened with the same punishment as the sentence on appeal which is most similar to the criminal act.

3. Jurisprudence Supreme Court Number 1644 K/Pid/1988 dated 15 May 1991, which basically states that the Supreme Court still respects the decision of the Traditional Head based on customary deliberation which provides customary sanctions to violators of customary law norms. With this jurisprudence, perpetrators of criminal acts cannot be tried using two legal rules, namely customary rules and Criminal Code rules, even though the criminal acts are regulated in the Criminal Code.

The three criminalization policies related to adat law above only provide guidance for judges in handling cases related to adat delicts which are used as a source of law, not by formulating adat delicts into statutory regulations. When compared with the formulation of the penal policy guidelines related to adat law above, with the formulation of adat law as a source of material law which coexists with the principle of formal legality in Article 2 Paragraphs (1), (2) and (3) of the 2023 Criminal Code and the Explanation of the Articles According to the author, lawmaker Number 1 of 2023 concerning the Criminal Code took a blunder and resulted in a mistake in formulating the position of adat law as a source of material criminal law in Indonesia, by formulating adat delicts into national law in the form of Regional Regulations or Regional Regulations.

The words of Article 2 Paragraphs (1), (2), and (3) and their explanations are formulated as follows :

Paragraph (1)

The provisions as intended in Article 1 Paragraph (1) do not reduce the validity of the laws existing in society which determine that a person deserves to be punished even though the act is not regulated in this law..

Explanation of Paragraph (1)

What is meant by "law that lives in society" is adat law which determines that someone who commits a certain act deserves to be

punished. The laws that live in society in this article relate to unwritten laws that are still valid and developing in society in Indonesia. To strengthen the implementation of laws that exist in society, Regional Regulations regulate these adat delicts.

Paragraph (2)

The law that lives in society as intended in Paragraph (1) applies in the place where the law lives and as long as it is not regulated in this law and is in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general principles recognized by the people of nations.

Explanation of Paragraph (2)

In this provision, what is meant by applicable in the place where the law lives is that it applies to every person who commits a adat delicts in that area. This paragraph contains guidelines for establishing adat law whose validity is recognized by this law.

Paragraph (3)

Provisions regarding procedures and criteria for determining laws that exist in society are regulated by Government Regulations.

Explanation of Paragraph (3)

The Government Regulations in this provision are guidelines for regions in establishing laws that live in society in Regional Regulations.

In essence, Article 2 Paragraphs (1), (2), and (3) concerning the recognition of customary law as a principle of material legality, contains 3 core elements, namely:

1. The definition of living law is narrowly defined as adat law.

In VI National Law Seminar (Jakarta, 25 – 29 June 1994), the definition of adat law which is a translation of *living law* or living law, includes:

- In the sense that it is identical to adat law that applies in ethnic communities and adat law environments.
- In the sense of a habit recognized by society and decision makers (*decision mak* er), so that it gradually becomes law (*gewoonte recht, customary law*).

However, Article 1 Paragraph (1) has a narrow meaning, namely only adat law. Recognition of adat law is based on the idea of balance promoted

in the 2023 Criminal Code, where in the context of the principle of legality, recognition of adat law is a manifestation of the idea of balance between the principle of formal legality as formulated in Article (1) Paragraph (1) and the principle of material legality which formulated in Article 2 Paragraphs (1), (2), and (3).

2. There is recognition of adat delicts by by criminalizing them in PERDA

The principle of legality in criminal law is the principle that is the basis for the legitimacy of an act so that it can be punished, therefore is always followed by the unlawful nature of the act. The principle of formal legality contains the nature of being against formal law, where the nature of being against the law is interpreted as being against or contrary to the rules of law, so that the legitimacy of an act is said to be against the law if the act has been formulated in law and is punishable by criminal law.

The reasons for eliminating the unlawful nature of acts that are formulated in the law as criminal acts are also in the law. Meanwhile, the principle of material legality provides the basis for punishing an act when the act is not desired by society, because it is contrary to society's sense of justice and the values of law and justice adhered to by society. The principle of material legality contains the nature of being against material law (i.e. the nature of being against the law which is outside the law, such as conflicting with society's sense of justice, legal values and fairness in society), so that an action is said to be against the law if it is contrary to law. with a sense of justice and legal values in society even though it is not formulated in the law as a punishable act.

In the nature of being against the material law, there are two functions, namely the positive function, where the nature of being against the material law is used to positiveize or make acts that are outside the written rules a criminal act. Meanwhile, the negative function of the unlawful nature of material law is the function of the unlawful nature of material law to eliminate the unlawful nature of actions that are formulated in the law as criminal acts. In the negative function, the absence of material unlawfulness (*Aufweigheid Van Alle Materril Wederechtlijke*/AVAW) means that criminal acts formulated in statutory regulations have their unlawful nature removed, so they cannot be punished. In criminal law enforcement, both

the positive and negative functions of material unlawfulness are rarely applied.

The application of the principle of material legality as formulated in Article 1 Paragraph (1), (2), and (3) of the 2023 Criminal Code only applies the nature of violating material law in a positive function, namely positiveizing or determining unwritten adat delicts, which still exist and are developing becomes a criminal offense within the rules of state criminal law. Irregularities and errors in the policy of criminalizing adat delicts to become criminal acts in state law occur when unwritten adat delicts are formulated in Regional Regulations as state regulations in written form.[21]

Based on critical analysis of criminalization policies, the criminalization of adat delicts in regional regulations is very inappropriate. This can be identified as the following problems:

1) The problem of recognizing living law by formulating adat delicts in Regional Regulations

Adat delicts originate from unwritten law, namely the decisions of adat judges, which are dynamic and plastic in nature, the measures of which quickly change and develop following the development of values community law and developments over time. So that an act that was originally an adat delict at some point will change to no longer be an adat delict, and conversely certain acts that were not previously recognized as adat delicts will be criminalized by adat courts to become adat delicts

The formulation of adat delicts in Regional Regulations actually eliminates the distinctive nature of adat delicts which are flexible, elastic and plastic and not written, becoming offenses that are formulated in written regulations in the form of Regional Regulations so that they are rigid. Formulating adat delicts into regional regulations as state regulations is a wrong step that actually eliminates adat law itself, even though it is formulated in local regulations as regional regulations where adat law exists. Some of the criminal policy issues that arise in the formulation of adat delicts into Regional Regulation (PERDA) are as follows:

[21] Ni Putu Ari Setyaningsih And Putu Chandra Kinandana Kayuan, "Kompilasi Delik Adat Dalam Peraturan Daerah Sebagai Dasar Pemidanaan Dalam Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana (Ruu Kuhp)," *Jurnal Yustitia* 16, No. 1 (May 31, 2022): 71–79, Doi:10.62279/Yustitia.V16i1.902.

- Problems of recriminalization and reformulation of adat delicts in regional regulations;
- The issue of threatening criminal sanctions for adat delicts formulated in the Regional Regulation;
- The problem of the punishment system which is different between the punishment system in adat delicts and the regional regulation punishment system;
- The problem of shifting the nature of going against material law into the nature of going against formal law in the formulation of adat delicts in regional regulations.

2) Differences between the realm of adat law and Regional Regulations

As explained above, basically adat law as an unwritten legal rule has a unique characteristic, namely that it is very dynamic and plastic, so it is very easy to change following the development of values in society and the times. Adat law is a law formed by indigenous peoples, based on its formation, it is different from state law, which is made by state institutions and enforced on its citizens (up to bottom).

The definition of Regional Regulations in Law Number 12 of 2011 concerning the Formation of Legislative Regulations consists of Provincial Regulations, namely legislation formed by the Provincial Regional People's Representative Council with the approval of the Governor, and Regency/City Regional Regulations, namely regional regulations formed by the Council. Regency/City Regional Representative with joint approval of the Regent/Mayor.

Article 7 of Law Number 12 of 2011 above positions regional regulations as state legislation in the last place after presidential regulations. The functions of regional regulations include others:[22]

1. As a policy instrument for implementing regional autonomy and assistance tasks;
2. As implementing regulations of higher laws and regulations. In this case the Regional Regulations must not conflict with higher laws and regulations.

[22] Claustantianus Wibisono Tanggono et al., "Mekanisme Pembentukan Peraturan Daerah Yang Berkualitas Di Pemerintah Daerah," *Journal Juridisch* 1, no. 3 (2023).

3. As a container for regional specialties and diversity as well as channeling the aspirations of the people in the region but must be based on Pancasila and the 1945 Constitution.
4. As a development tool in improving regional welfare.

Based on Law Number 12 of 2011 above, Regional Regulations can be identified as follows:[23]

1. Basically, regional regulations are administrative laws to support the implementation of regional autonomy and assistance tasks.
2. The criminal threat in the Regional Regulation is not the main threat, but only as a supporting sanction for administrative law.
3. The criminal threat contained in the Regional Regulation is a maximum imprisonment of 6 (six) months or a maximum fine of Rp. 50,000,000 (five tens of millions of rupiah).
4. Regional regulations can contain threats of imprisonment or fines in addition to the weight provisions above in accordance with statutory regulations.
5. Regional regulations can contain threats of sanctions in the nature of returning to the original state and administrative sanctions.

Based on the description above, in essence, regional regulations are administrative laws to carry out regional autonomy and assistance duties, while adat delicts which are in the realm of adat law are purely criminal acts in the context of adat law. Thus, it is not appropriate to formulate adat delicts into regional regulations as state law in the implementation of regional administration.

The formulation of adat delicts into state law is a form of adat law formalism, instead of providing a place and recognition for adat law in modern national criminal law, what has happened is actually reconsolidating adat law.

3) The criminalization system for adat delicts is different from regional regulations

The criminal system is a building system in the determination and imposition of punishment which consists of criminal principles and

[23] Jihan Sopyana, Salsa Aulia Ratar Putri, and Siti Dewi Ratnasari, "Pencabutan Peraturan Daerah Oleh Pemerintah Pusat," *Jurnal Rechten : Riset Hukum Dan Hak Asasi Manusia* 3, no. 2 (June 21, 2022): 15–21, doi:10.52005/rechten.v3i2.84.

criminal objectives, criminal guidelines and rules, and actions, criminal and criminal responsibility.[24]

In adat law, the structure of the criminal system is very distinctive, different from the national criminal system, concluded by the author as follows:

- The Principle of Punishment for Existing Offenses prioritizes sources of unwritten law which are plastic and elastatic, regarding actions, mistakes and others in the context of adat delicts which are different from state criminal law (KUHP);
- The aim of criminalization for adat delicts which is primarily to restore balance between the macro cosmos and the micro cosmos is very dominated by spiritual interests, which is very different from the aim of state punishment which is dominated by protecting society from crime.
- Guidelines/Rules for Punishing adat delicts prioritize giving judges discretion in convicting perpetrators of adat delicts, based on the conscience and sense of justice of the community, so that punishment is more flexible and flexible, not relying on legal certainty.
- Adat delicts are determined through criminalization by traditional ancestors based on the belief as "pamali" or taboo acts, damage human relations with spiritual beings, so that they are not appropriate, they are believed to bring harm or disaster.
- Liability answers in adat delicts are aimed individually and structurally, with the main aim of restoring balance.
- Traditional sanctions are in the form of real sanctions and magical sanctions in the form of traditional ceremonies and other sanctions to restore disturbed spiritual balance.

4) Limitations of Recognition of Adat Law

Not all adat laws that are still alive and developing are recognized by 2023 Criminal Code, where Article 2 Paragraph (2) provides conditions for recognized adat laws, namely in accordance with the values contained in Pancasila and the 1945 Constitution, Human Rights and general legal principles recognized by the people of nations. In the case of adat law

[24] Novandi Dwi Putra, Ilmi Firdaus Aliyah, and Dadang Syaifudin Yusuf, "Pembaharuan Hukum Pidana Positif (Positive Criminal Law Reform)," *Journal of Social Science Research* 3, no. 3 (2023).

criteria which are in accordance with general legal principles recognized by nations, it can be biased, because the legal values adopted by a nation are "nation centric", especially in adat law which has no relevance to international values. So that in legal recognition custom is enough to use Pancasila, Human Rights, and the 1945 Republic of Indonesia Constitution as the margin of appreciation.

The filter criteria that limit the application of adat law above are a consequence of the shift from adat law to state law, which is further stated that provisions regarding procedures methods and legal criteria that exist in adat law are regulated by government regulations. The next problem is what about customary laws that are not covered by government regulations because they are located far inland? What are the consequences for adat law that is not recognized by the state? Is it still valid? This requires further thought

B. Reformulation Adat Law in Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the 2023 KUHP

The recognition of adat law as a source of material criminal law in the KUHP 2023, should be returned to the nature of adat law, as original law resulting from the culture of adat communities that are different from each other, unwritten, dynamic, plastic and easy. changes according to the values that develop in indigenous communities, it is not appropriate to recognize adat law as a source of material criminal law with the policy of formulating customary criminal acts into PERDA (Regional Regulations) as state regulations. A policy like this is exactly the same as the policy implemented by the Dutch East Indies Government, where through Article 131 IS Jo AB provides the validity of the application of adat law but with certain notes, where Article 131 IS Jo AB can be referred to as the Article Controlling the application of adat law, in where if it is not desired to come into force, then certain adat laws cannot apply.

The best way out in recognizing adat law as a source of material criminal law can be done as follows:

1. Formulate customary law as a source of law, by formulating adat delicts as formulated in Article 5 Paragraph (3) Sub b of Law Number Drt of 1951 concerning Temporary Measures to

Implement Unity Composition of Powers and Procedures of Civil Courts.

2. Formulate guidelines for criminalization of adat delicts in accordance with policy and Supreme Court jurisprudence, namely Supreme Court Decision No.1644 K/Pid/1988.

Making Article 2 Paragraphs (1), (2), and (3) only as the rule of recognition of the application of adat law

Conclusion

From the description of the problems that have been discussed, the following conclusions can be drawn:

1. Based on a study penal policy analisys, formulating adat delicts into Regional Regulations is very inappropriate, from a policy perspective the formulation distorts the nature of adat delicts as unwritten rules, from a criminal system perspective the differences between the systems are very different punishment in adat delicts (consisting of Criminal Acts, Mistakes, Criminal Liability, Purpose of Punishment, and Sentencing Guidelines) with the state criminal system, let alone regional regulations. Judging from the criminal sanctions, it is very unequal if adat delicts are formulated in the Regional Regulation, then the criminal sanctions follow the criminal sanctions in the Regional Regulation which are very limited, so they cannot reach adat delicts which are threatened by indigenous peoples with heavier adat sanctions.
2. The most likely thing to accommodate adat law in the 2023 Criminal Code is that adat law is only used as a source of law, and Article 2 Paragraphs (1), (2), and (3) only become rules for recognizing of adat law to apply as is.

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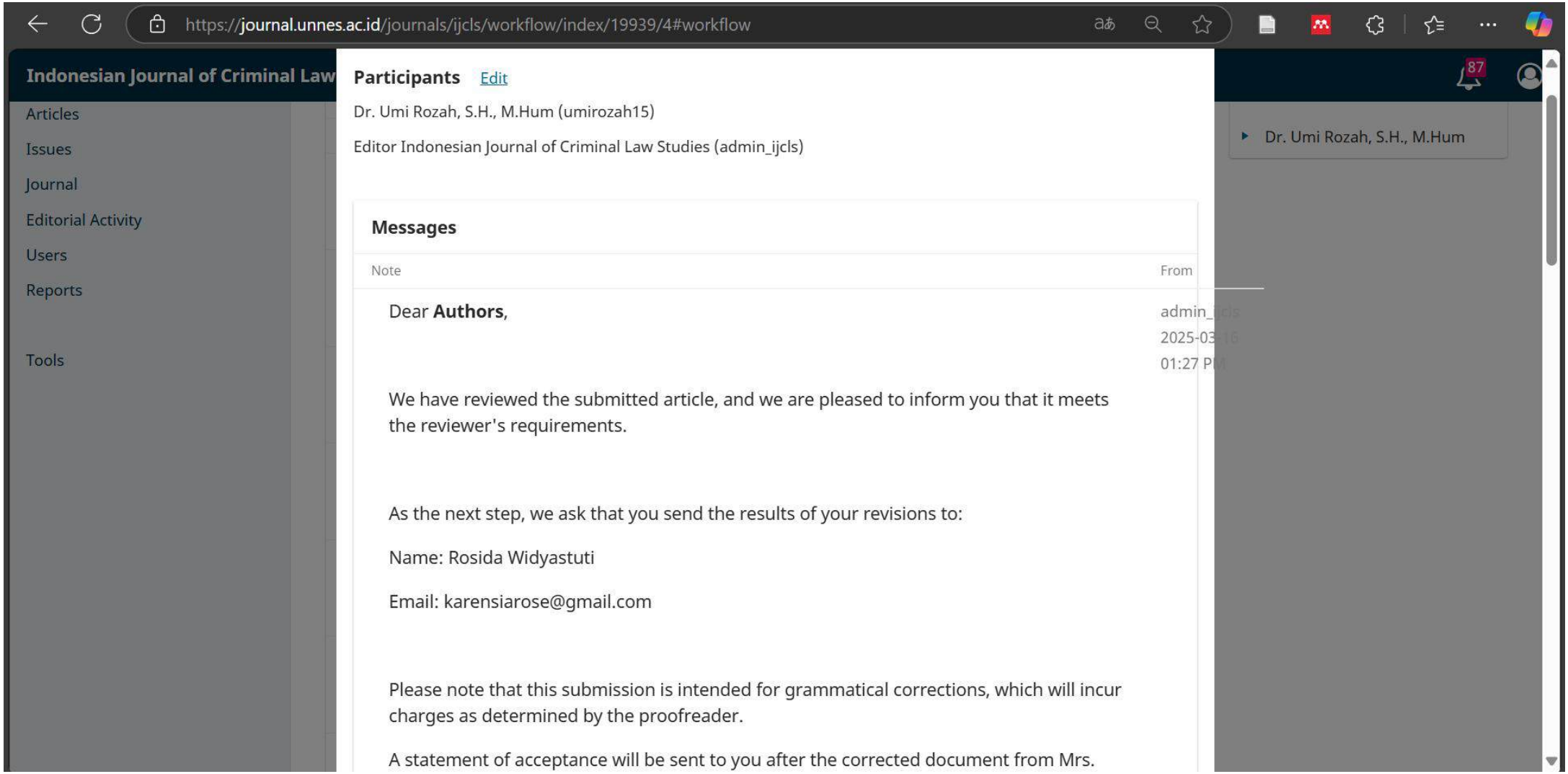
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PENAL POLICY ANALYSIS OF THE FORMULATION OF CUSTOMARY LAW IN THE 2023 KUHP

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Abstract

An interesting issue in the 2023 Criminal Code is the accommodation of living law with a meaning limited to Customary Law as formulated in Article 2, Paragraphs (1), (2), and (3). This research aims to analyze it from the perspective of penal policies regarding the formulation of Living Law only as Customary Law in Article 2, Paragraphs (1), (2), and (3) of the 2023 Criminal Code. This research uses a normative or doctrinal juridical approach, with data sources from library materials in the form of statutory regulations and literature related to research. This research raises problems: 1). How does analysis of the penal policy of the formulation of living law in Article 2 Paragraph (1) of the 2023 Criminal Code (KUHP)? 2). What is a reformulation of Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the 2023 KUHP from a penal policy perspective? The results of the research are as follows: There is invalidity in the formulation of the meaning

of living law as only Customary Law as the living law is wider than Customary Law. It covers all customs in society, such as business affairs and religious life. Analysis from a penal policy perspective can't be adjusted if the meaning of living law is only determined by Customary Law. There are many fallacies in the formulation of Article 2, Paragraphs (1), (2), and (3) of the 2023 KUHP, so reformulation is needed. Reformulation of Article (2) Paragraphs (1), (2), and (3) should be changed to interpret the living law not only as Customary Law, which will be formulated in Regional Regulation. Article (2) Paragraphs (1), (2), and (3) are just needed as the recognition rules to enforce Customary Law; in other words, formulation of the living law only as an umbrella rule to enforce Customary Law.

Keywords
Analysis, Policy, Customary, Criminal Code

Introduction

Entering the beginning of 2023, the Indonesian people, especially academics and criminal law practitioners, feel relieved by the presence of Law Number 1 of 2023 concerning the Criminal Law Code (the 2023 KUHP), which to replace the Dutch of the Criminal Code (Wetboek Van Strafrecht), which is effective in Indonesia until now. The urgency to create the 2023 Criminal Code (it's called the 2023 KUHP) emerged since the proclamation of Indonesian independence, starting with the issuance of Law Number 1 of 1946 on the Criminal Law Regulations as the rules for enforcing the Criminal Code (WvS). The Law Number 1 of 1946 made several changes to suit the conditions of the Indonesian people after leaving Dutch colonial rule.[1] The Criminal Code (Wvs) is a Dutch derivative of the Criminal Code created in 1881, which came into effect in the Netherlands in 1886 and came into force in Indonesia on January 1, 1918. With the principles of concordance, the Criminal Code (WvS) will be applied in Indonesia. The principle of concordance is actually the principle for

[1] Putu Yulita Damar Putri and Sagung Putri M.E. Purwani, "Urgensi Pembaharuan Hukum Pidana Di Indonesia," *Jurnal Kertha Wicara* 9, no. 8 (2020), Index.php/kerthawicara/article/view/61874/35618.

enforcing criminal regulations for Dutch people who are outside Holland, especially in their colony.[2]

The Dutch Criminal Code (WvS) relies on the principle of formal legality adhered to by adherents of legalism, where the law is only interpreted as statutory rules so that all rules of behaviour that are outside the law, such as society's habits in passing laws and resolving conflicts as customs which live, grow, and dead in society for generations are not recognized as law. The principle of formal legality focuses on legal certainty and juridical justice. It is justice based on the text of the law, not substantive justice, which is contextual. This situation often creates an imbalance/gap between the Dutch Criminal Code (WvS) and the need for a sense of substantive justice in society. Not only the principle of formal legality but also the values that characterize the Dutch Criminal Code (WvS) become a problem when applied to cases where there is a conflict between the values of legal certainty, expediency, and justice. This inequality originates from the legal values that underlie the Dutch Criminal Code (WvS), such as liberalism, individualism and capitalism. Meanwhile, the Indonesian nation adheres to religious and collective or communal values. These differences in values have an impact on criminal law enforcement in Indonesia. The Indonesian nation, which has a communal character such as tolerance, ease of forgiveness, and solidarity, is faced with Dutch criminal law, which has a liberal, individual, and capitalistic character. Here, very rigid legalism interprets the law as *Lex Dura Sad Tamen Scripta,* wherein law is only interpreted as written rules[3]

The 2023 KUHP comes as a response to the demands of the Indonesian people to have criminal law regulations that are in line with the values of Indonesian life., such as religious values and communal values that are crystallized in Pancasila. By focusing on the principle of balance as the juridical basis of Indonesian philosophy, which is taken from the core of Pancasila, that shapes balance in the relationship between humans and their

[2] Faisal and Muhammad Rustamaji, "Pembaruan Pilar Hukum Pidana Dalam RUU KUHP," *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)* 10, no. 2 (2021): 291, https://doi.org/10.24843/JMHU.2021.v10.i02.p08.

[3] Muhammad Alwan Fillah, "Politik Hukum Dalam Pembaruan Kitab Undang-Undang Hukum Pidana (KUHP) Di Indonesia," *VARIA HUKUM* 5, no. 1 (2023): 52–64, https://doi.org/10.15575/vh.v5i1.23230.

God (religious balance), the relationship between humans and themselves and others (humanity balance), as well as the relationship between humans and society and universe (social balance). Indonesian legal values as living law are reflected in the 2023 KUHP, especially in the formulation of Article 2, Paragraphs (1), (2), and (3).

One of the most prominent Indonesian things is the recognition and accommodation of the living law as a source of criminal law that was formulated in Article 2 Paragraph (1) of the 2023 KUHP as preleasing the principle of formal legality. It is accommodated by the principle of material legality, meaning that the living law, which was formulated as only Customary Law, is used as a source of law to determine deeds that are not regulated in the 2023 KUHP but in society, especially indigenous communities, are declared as delict that can be punished. Logically, the 2023 KUHP is claimed to be the Indonesian Criminal Code, recognizing and accommodating Customary Law as a source of legal and justice values that were born, grew, and developed within the Indonesian nation. As a legal ideal, the legal values contained in the laws that exist in Indonesia should color the content of every Indonesian law and regulation, especially KUHP, which regulates individual behavior in public life by criminalizing acts that are not desired by society, as well as with rules for administering punishment that is not rigid (*rigid*) which are based on values of law and justice of the Indonesian nation. The culture of the Indonesian nation, which is full of communal values, gives birth to an attitude of self-centeredness, non-individuality, solidarity and respect for human rights and human obligations as a manifestation of the principle of monodualism/principle of balance, which has been integrated into Indonesian human behavior.[4]

Soediman Kartadipradja said that the content of the soul of a nation appears in its culture, which is an expression of the soul of the nation concerned with sculpture, painting, literature, dance, and laws. In the legal field, we want to use it as a legal measuring tool. Strictly speaking,

[4] Mudemar A. Rasyidi, "Menuju Pembaharuan Hukum Pidana Indonesia," *Jurnal Mitra Manajemen* 12, no. 1 (2021): 1-10,
Doi :10.35968/jmm.v12i1.627.

Indonesian Customary Law is part of our nation's culture, which, according to Van Vollenhoven, "is disappearing into the darkness of the past". Customary Law, which is an expression of the soul of the Indonesian nation, is a spiritual heritage or ancestral spiritual inheritance that has been passed down from generation to generation to express the path towards justice in human relations.[5]

The living law, which is formulated in the 2023 KUHP, is interpreted in a closed way as Customary Law, as stated in Elucidation of Article 2 Paragraph (1) that "the law that lives in society is Customary Law which determines that someone who commits a certain act deserves to be punished. The laws that live in society in this article relate to unwritten laws that are still valid and developing in Indonesia. To strengthen the implementation of laws that exist in the community, Regional Regulations regulate the Customary Delicts". Explanation of Paragraph (2) that " In this provision, what is meant by applicable in the place where the law lives, it to be applied to every person who commits customary delicts in the place Customary Law enforced. This paragraph contains guidelines for establishing Customary Law, the validity of which is recognized by this Law." Explanation of Paragraph (3): "Government regulations in this provision are guidelines for regions in establishing rules that Customary Law written in Regional Regulations".

The living law in the community means a law that lives, grows, and exists together in social life.[6] Its essence is rooted in the community's sense of justice. In certain cases, the law's character follows the community's thinking.[7]

If you look closely at the Explanation of Article 2 Paragraph (1), then what is meant by Customary Law is an unwritten law that is still valid and

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[5] Soediman Kartahadiprodjo, *Pengantar Tata Hukum Di Indonesia* (Jakarta: Pembangunan Publisher, 1973).

[6] Syofyan Hadi, "Hukum Positif Dan The Living Law (Eksistensi Dan Keberlakuannya Dalam Masyarakat)," *DiH Jurnal Ilmu Hukum* 13, no. 26 (2018): Hlm. 262, DOI: 10.30996/dih.v0i0.1588.

[7] Ratno Lukito, *Tradiisi Hukum Indonesia (Disertai Postcript Oleh Penulis & Pranoto Iskandar)* (Cianjur: the institute for migrant right press, 2013), Hlm 40.

developing in Indonesia and regulates custom delicts. Because it is unwritten, the Regional Regulation regulates customary delicts as written law. The explanation of paragraph (2) is a guideline for determining customary delicts whose validity is recognized by the 2023 KUHP. Thus, not all Customary Laws are recognized by the 2023 KUHP according to Paragraph (2).

This research has novelty from several previous researchers, such as a journal article written by Wirdi Hisroh Komeni and Ermania Widjajanti in the Journal of Social Science Research Volume 4 Number 3 formulation of article 2 of the national criminal code, which states that it confuses its legal implications which results in unfair enforcement of sanctions in practice.[8] In addition, journal research submitted by Yoserwan with the title of the article Existence of Adult Criminal Law in National Criminal Law after the presentation of the new Criminal Code in the journal UNES Law Review published in 2023, in the article The Regulation of Customary Criminal law in the New Criminal Code aims to provide a legal basis and protection for the enactment of customary criminal law. However, this arrangement creates a number of restrictions that have the potential to weaken the existence of customary law itself. Basically, what is needed is a legal basis that respects and protects customary criminal law, allowing it to grow and develop in accordance with its legal norms but still within the framework of the philosophy of the nation and state.[9] There is also research conducted by Rini Apriyani, which has been written in the Prioris journal and published in 2018, on the existence of customary sanctions in the application of customary criminal law. The article states that, in reality, there is no clear legal certainty regarding the provision of customary criminal sanctions. In addition, the application of customary criminal law

[8] Wirdi Hisroh Komeni and Ermania Widjajanti, "Ketidaktepatan Penerapan Hukum Pidana Adat Dalam Pasal 2 KUHP Baru: Prespektif Teori Kepastian Hukum," *Innovative: Journal Of Social Science Research* 4, no. 3 (2024): 1–9,
Doi : /https://doi.org/10.31004/innovative.v4i3.10586.

[9] Yoserwan, "Eksistensi Hukum Pidana Adat Dalam Hukum Pidana Nasional Setelah Pengesahan Kuhp Baru," *UNES LAW REVIEW* 5, no. 4 (2023): 1999–2013, Doi :https://doi.org/10.31933/unesrev.v5i4.577.

rules among indigenous peoples is currently facing various difficulties. This is due to the increasing number of community members who have understood the existence of Indonesian national law, as well as the large burden of customary sanctions given in relation to customary criminal offences.[10] The research conducted by the author has differences, especially in terms of the exposure of the problems contained in the formulation of Article 2, paragraphs 1, 2, and 3 of the National Criminal Code. In addition, this research also discusses how the ideal formulation of Article 2, paragraphs (1), (2), and (3) should be formulated.

Referring to the Explanation of Article 2 Paragraphs (1), (2), and (3), in penal policy analysis, there are juridical weaknesses that will conflict with each other, where instead of recognizing and accommodating Customary Law as living law, it actually distorts Customary Law and The government's action through the reaffirmation of conditional recognition in Law No. 1/2023 on the Criminal Code resembles a repetition of the debate on the Dutch idea of legal unification, in which indigenous communities were downgraded to weak subjects under the dominant authority of the state. Indigenous communities are considered incapable of knowing what is best for their interests, thereby justifying state intervertation.[11]

The colonial model is used to formulate the enactment of Customary Law through the formulation of customary delicts in regional regulations. It can be said that there is a re-colonization of Customary Law formulation so that a policy gap appears in penal policy, which ultimately gives rise to problems:

1. How is the analysis of the penal policy of the formulation of living law in Article 2 Paragraph (1) of the 2023 KUHP?

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[10] Rini Apriyani, "Keberadaan Sanksi Adat Dalam Penerapan Hukum Pidana Adat," *Prioris* 6, no. 3 (2018): 227–46,
Doi : 10.25105/prio.v6i3.3178.

[11] Sunardi Purwanda et al., "The Fate of Indigenous Peoples' Rights Recognition After the Enactment of the National Criminal Code," *Indonesian Journal of Criminal Law Studies* 9, no. 2 (2024): 256–89,
Doi: 10.15294/ijcls.v9i2.50321.

2. What ideal reformulation on Customary Law in Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the 2023 KUHP from a penal policy perspective?

Method

This research aims to analyze the validity of the narrow meaning of living law, which is formulated as Customary Law in Article 2 Paragraphs (1), (2), and (3) of the 2023 KUHP, the model formulation of Customary Law in written law established in Regional Regulation, and the ideal reformulation of Customary Law in the 2023 KUHP.

The research used a normative juridical approach or doctrinal research, which used legal materials such as relevant laws and written regulations. In addition, to obtain and use information related to policy formulation customary law in the Criminal Code 2023, this research used statutes and philosophical approaches.

This research is descriptive, with the aim of obtaining an overview of how Customary Law, especially customary delicts, is formulated in the 2023 Criminal Code based on the perspective of penal policy.

In normative juridical research or doctrinal research, data is collected through literature study, including legal materials, books, journals, and other literature related to philosophy, customary Law, and policy formulation in legislation.

Data analysis in this research was carried out using the descriptive-analytical method. This method is used to collect, set, and analyze data and finally to describe data throughout the words to provide an accurate description of the scope of discussion as follows: the validity of the meaning of living law as Customary Law in the 2023 KUHP, the model of formulation Customary Delicts in written law which will be established in Regional Regulation, and the ideal reformulation of Customary Law in Article 2 Paragraph (1),(2), and (3) of the 2023 KUHP

Result and Discussion

A. Penal Policy Analysis Regarding the Formulation of Customary Law in Article 2 Paragraph (1), Paragraph (2), and Paragraph (3)

The customary laws of each ethnic group in Indonesia were applied without problems until the Dutch came to Indonesia, bringing the Principle of Formal Legality as a manifestation of the teachings of legalism or positivism in implementing the law. Legalism or positivism is a teaching that only recognises written rules as law. Therefore, criminal law, which is based on the Principle of Legality, is a criminal law that only determines whether or not an act can be punished and must be based on written law or legislation that must exist before the act occurs. Thus, the legal sources recognised for implementing criminal law are only sources of written law or statutes. The consequence is a prohibition on analogies in applying criminal law and eliminating the legitimacy of the existence of living as an unwritten rule.

Thus, living law as a living law, most of which is not written, according to the view of legalism, which is manifested in the principle of legality, is not recognised as law. In the context of criminal law, the legal rules that applied to regulate people's behavior at that time were the Criminal Code (*Wetboek Van Strafrecht)*, which was initially based on the principle of concordance only applicable to Dutch people who were in Indonesia. Still, it was gradually implemented for all Indonesian residents, namely after the independence of the Indonesian nation, through Law Number 1 of 1946 on Criminal Law Regulations for the Entire Territory of the Republic of Indonesia, with changes made to several articles adapted to Indonesian conditions. The implementation of the Criminal Code (KUHP) was further reinforced by unifying its application for all Indonesian citizens through Law Number 73 of 1958, which enacted the validity of Law Number 1 of 1946 on Criminal Law Regulations for the Entire Territory of the Republic of Indonesia.

In the history of applying customary law after the arrival of the Dutch to Indonesia, it was not easy. The arrival of the Dutch and their presence in Indonesia not only colonised Indonesia socially, politically and economically but also colonised Indonesian living law, which had been

institutionalised centuries before the Dutch arrived, namely by being "put to sleep" or extinguished.

In the realm of criminal law, the Netherlands applies *Wetboek Van Strafrecht* with the principle of legality as a representation of the legal teachings of legalism or positivism that developed in mainland Europe. This legalism teaches legal scholars in Indonesia, judges, and other legal officials to think that law is written rules, so that law is only statutory rules; customary law does not have the legitimacy to be accommodated and applied in resolving criminal acts. Law enforcement, especially criminal law, is only based on the sound of the law, where the basis of reasoning is the *syllogism*, which is drawn from the major premise and minor premise so that the conclusion is certain and easy to predict, where the judge is only the mouthpiece of the law. The law (*La Bouche de la loi)* or as a statutory machine *(subsumption automata)* in enforcing criminal law. This is where legal certainty emerges when implementing criminal law, which establishes juridical truth and justice. In conditions like this, customary law as unwritten customary law, which contains legal values and material justice, has no place to apply because it is not recognised as law.

Viewed from its essence, customary law is the original law born from national culture, which contains the noble values of a nation and applies by itself. It does not require legitimacy based on written legal rules to enforce it. However, with the existence of the principle of formal legality in the Criminal Code brought by the Dutch, which has become ingrained in the enforcement of criminal law in Indonesia, the consequences for unwritten customary law are that the legitimacy of its validity in its homeland is lost, unless there are written legal rules that give life as the basis for enforcing it or often referred to as the rule of recognition *(the rule of recognition*) for the application of customary law.

Specifically for the material criminal law that has been in effect in Indonesia since January 1, 1918, for all European, Indigenous and Eastern Foreign groups, is the Criminal Code or *Wetboek van Strafrecht voor Nederlandsh Indie* (stb. 1915 – 732) so it is practical Since the implementation of WvSvNI for all groups, customary (criminal) law cannot be applied, except by written rules as rules that recognise and accommodate the application of customary law (*rule of recognition*).

Historically, the enactment of customary law during Dutch rule was based on the rule of recognition (*rule of recognition*) in the form of Article 131 *I.S* (*Indische Staatsregeling*) Jo Article 11 *Algemene Bepalingen van Wetgeving*. Meanwhile, *Indische Staatsregeling* (IS), among other things, determined that:[12]

1. The law that applies to European groups is European criminal law based on the principle of concordance;
2. The law that applies to Indigenous groups is living law in unwritten form, where the application of customary law is "not absolute" and, if necessary, can be regulated in special regulations (ordinances);
3. The law that applies to the Foreign East group is their customary criminal law (Article 11 AB). (CFG Sunaryati Hartono, Analysis and Evaluation of Dutch Colonial Legacy Legislation, BPHN, 2015, Jakarta).

Article 131 IS, as the basis for the application of customary law during the Dutch East Indies period, determines that for the European group, the law that applies is the law that exists in the Netherlands (based on the principle of concordance), for the Foreign East group the law that applies is their law. For the Indigenous group, the law that applies what applies is customary law. However, if social interests require it, European law can apply across groups. This implementation is hereinafter referred to as submission to European law, either completely or only partially.[13]

With Article 131 I.S above, the application of customary law is not determined by customary communities but by the Dutch East Indies Government. This is stated in point 2 above that the application of customary law is not absolute, so it can be said that customary law cannot be enforced by itself, even though Article 131 I.S was created as a rule of recognition of customary law, but only as a *rule of recognition* not to apply customary law. This is emphasized in point 2 that "if necessary, it can be regulated by special regulations (*ordonantie*)".

Meanwhile, Article 11 *Algemene Bepalingen van Wetgeving* (A.B) determines that for groups of indigenous people, the judge will apply the

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[12] C.F.G. Sunaryati Hartono, *Analisa Dan Evaluasi Peraturan Per-UUan Peninggalan Kolonial Belanda* (Jakarta: BPHN, 2015).

[13] *Loc.Cit*

religious laws, institutions and customs of the indigenous people themselves, as far as the laws and institutions are concerned. This custom does not conflict with generally recognised principles of decency and justice, and also if European law applies to Indigenous people or the Indigenous person concerned has submitted himself to European law.[14]

Article 11 AB is not clearly and unequivocally a rule of recognition in the application of customary law as a source of law for natives because it is combined with religious law and other institutions and is seen from the subject of the law, namely the native people for whom determined that European law applies to him or an indigenous person who submits himself to European law then customary law does not apply to him, even though he is a customary community that should be subject to living law.

The application of living law to indigenous groups creates problems, considering that living law in Indonesia is very diverse according to ethnicity, social, culture and religion. Along with efforts to instil colonial ideology, 3 theories were used in implementing living law during Dutch colonialism, namely:[15]

1. The theory *Receptio in complexu,* put forward by Van den Berg, where customary law follows the religious law adhered to by the Indigenous community.
2. Snouck Hurgronje and C. Van Vollenhoven's *Receptie theory* emphasizes that Islamic law will effectively apply among Muslims if it is in line with customary law in Indonesia. This means that the laws that apply in Indonesia to natives are not based on Islamic teachings but on local customary law.
3. Hazairin proposed *Receptio a Contrario/Receptie exit,* stating that religious law applies to society, while customary law only applies if it does not conflict with religious law.

After Indonesian independence, the enactment of customary law was based on the 1950 Provisional Constitution, namely Article 32, Article 43 Paragraph (4), Article 104 Paragraph (1), Article 14, Article 13 Paragraph

[14] *Loc.Cit*

[15] Felishela Erlene and Tundjung Herning Situbuana, "Tanggung Jawab Negara Terhadap Hak Masyarakat Adat Di Pulau Rempang Dalam Perspektif HAM," *Jurnal Tunas Agraria* 7, no. 2 (2024): 144–61,
Doi: 10.1392/jta.v712.301.

(32), and Article 16 Paragraph (2). The contents of each article are as follows:[16]

- Article 13 Paragraph (2)
  Against his will, no one can be separated from the judge, which is granted to him by the rules of law in force.
- Article 14
  1. Every person who is charged because he is suspected of committing a criminal incident has the right to be presumed innocent until his guilt is proven in a court hearing, according to the applicable legal rules. At that hearing, he is given all the guarantees that have been determined and are necessary for his defense.
  2. It is said that no one may be required to be punished or sentenced except because of a legal rule that already exists and applies to him.
  3. If the legal rules change, as stated in the paragraph above, then provisions that are better for the suspect are used.
- Article 16 Paragraph (2)
  Trespassing on the grounds of a residence or entering a house against the will of the person who occupies it is only permissible in cases stipulated in a legal regulation that applies to it.
- Article 32
  Everyone in the country must obey the laws, including unwritten legal rules and the authorities.
- Article 43 Paragraph (4)
  The authorities supervise that all religious associations and associations comply with the law, including unwritten legal regulations.
- Article 104 Paragraph (1)
  All court decisions must contain the reasons and, in cases of punishment, state the statutory and customary law rules that are used to determine the sentence.

In the history of the return of the Republic of Indonesia, the Provisional Republic of Indonesia Law was no longer applied but returned to the 1945 Law. Thus, the rule of recognition based on the articles of the 1950 UUDS did not apply. With Indonesia's return to the 1945

[16] Saiful Anam, "Fungsi Hukum Adat Dalam Pembentukan Peraturan Perundang-undangan Di Indonesia, " *Journal Iuris Scentia* 1, No 2 (2023): 80, https://doi.org/10.62263/jis.v1i2.18.

Constitution, the rule of recognition was needed for the implementation of customary law, especially customary offences, so Law Number 1 Drt of 1951 on Actions was issued. Meanwhile, to organise a unified structure of powers and procedures for civil courts, Article 5 Paragraph (3) Sub b reads as follows:

"The civil material law and, for the time being, the civil criminal material law which until now applies to independent regional leaders and people who the Traditional Court previously tried, still applies to those people and people, with the meaning of: [17]

- That an active act must be considered a criminal act, but there is no comparison in the Civil Criminal Code, so it is considered to be punishable by a sentence of not more than three months in prison and/or a fine of five hundred rupiahs, namely as a substitute punishment if the customary punishment The sentence imposed is not followed by the condemned party and the compensation referred to is considered commensurate by the judge with the magnitude of the condemned person's fault.
- If the customary punishment imposed in the judge's opinion exceeds the imprisonment sentence or fine referred to above, then, for the defendant's mistake, a substitute sentence of up to 10 years in prison may be imposed, with the understanding that the customary punishment, according to the judge's understanding, is no longer in line with time; it must always be replaced as mentioned above.
- That an act which, according to living law, must be considered a criminal act and which has an appeal in the Civil Penal Code is deemed to be threatened with the same punishment as the sentence on appeal, which is most similar to the criminal act.

Article 5 Paragraph (3) Sub b of Law No.1 Drt of 1951 above, apart from being the rule of recognition of customary criminal law, also provides guidelines on how to apply civil, criminal law and customary criminal law to customary incidents (customary criminal acts), without specifying the type of criminal act. Article 5 Paragraph (3) Sub b, as the rule of recognition

[17] Undang-Undang Nomor 1 Drt Tahun 1951 Tentang Tindakan -Tindakan Sementara untuk Menyelenggarakan Kesatuan Susunan Kekuasaan dan Acara Pengadilan-Pengadilan Sipil, https://www.bphn. go.id> data.

as well as guidelines for the application of customary law, is a policy that becomes a bridge so that customary law still exists in certain customary areas or where customary justice is also still alive, customary law and its customary offenses are still recognized and applied, as long as the implementation of the punishment is adhered to by the violators/perpetrators of customary offences. However, suppose the perpetrator of a customary offence does not comply with the sentence (customary crime) imposed by a customary court judge. In that case, the criminal incident can be brought to the state court with the provisions for punishment by the judge in accordance with the sentencing guidelines specified in Article 5 Paragraph (3) Sub b above.

The 2023 Criminal Code as positive law must be intertwined with Customary Law; according to Brian Z Tamanaha, Customary Law is a more effective provision with its consensual nature. Meanwhile, Karl Von Savigny wants positive law to be intertwined with Customary Law because, in Customary Law, there is people's consciousness, which is a manifestation of the soul of the nation; positive law must be harmonized with people's feelings and consciousness about the right and wrong behavior. Referring to the opinion of Savigny, all forms of legislation, including the 2023 Criminal Code, must take into account Customary Law. The 2023 Criminal Code must not violate the norms and values system of Customary Law. Therefore, it must be harmonized with Customary Law, including in determining criminal acts and the structure of the criminal system. It must be in accordance with Customary Law as a manifestation of the national spirit.[18] On this occasion, Savigny emphasized that all state laws are subordinate to Customary Law.

Based on the recommendations of the Law Seminar National VI (Jakarta, 25 -29 June 1994), it is clear that the national legal system adopted is the Pancasila Legal System, namely a legal system based on the Pancasila philosophy, so that all products national laws, including the 2023 Criminal Code, must be based on and in line with the Pancasila philosophy. With the awareness that the development of a nation's national law is nation-centric,

[18] Andri Yanto and Faidatul Hikmah, "Akomodasi Hukum Yang Hidup Dalam Kitab Undang-Undang Hukum Pidana Nasional Menurut Perspektif Asas Legalitas," *Recht Studiosum Law Review* 2, no. 2 (2023): 81–91,
Doi:10.32734/rslr.v2i2.14162.

the development of Indonesian national law, including in the preparation of the 2023 Criminal Code, is also nation-centric, meaning that it is based on legal values and legal culture that are born, live, grow and develop in Indonesian society, which is manifested in living laws which are believed to be noble values in behavior from generation to generation, which form customs in an unwritten form, namely Customary Law.

The position of Customary Law as the original law in society originates from people's feelings and consciousness. Therefore, it is unwritten; it does not have to be conflicted with written law, let alone abolished by written law, but should be positioned as a complement that complements written law. It is acknowledged that the formation of unwritten law is more flexible than the formation of written law because it can overcome the gap between the validity of the law and its effectiveness; this is because of the dynamic and plastic nature of Customary Law as unwritten law so that it always follows the development of values who live in society. The position of Customary Law in the national legal system is as a source of national law.[19]

The 2023 Criminal Code as a legislative, legal product currently still uses a thinking framework that is also strong in the principles of formal legality. This was acknowledged in the VI National Law Seminar (Jakarta, 25 – 29 June 1994) that there are no clear criteria regarding Customary Law, especially in enforcing the law, encourages the formation of a very legal attitude and legal culture in PJP I which tends to identify law with law. It was further emphasized that in the PJP II era, the legal community in Indonesia needs to be directed to appreciate customary law as one of the sources of law, in addition to legislation and permanent jurisprudence.

Sentencing policy in the form of sentencing guidelines for judges related to Customary Law, which is full of legal and justice values as a source of justice, before the promulgation of the 2023 Criminal Code, had been formulated in statutory policies and policies in judicial practice, as follows:

1. Article 5 Paragraph (1) of Law Number 48 of 2009 concerning Judicial Power states that judges and constitutional justices are obliged

[19] Revie, "Hukum Adat Sebagai Sumber Hukum Nasional Dalam Politik Hukum Di Indonesia," *Legal Certainty* 1, no. 1 (2019), https://core.ac.uk/download/pdf/287209404.pdf.

to explore, follow and understand the legal values and sense of justice that exist in society.

2. Article 5 Paragraph (3) Sub b of Law Number 1 Drt of 1951 concerning Concerning Temporary Measures to Organize the Unity Structure of Powers and Procedures of Civil Courts, where Article 5 Paragraph (3) Sub b, reads as follows:
   "The civil material law and, for the time being, the civil criminal material law which until now applies to independent regional leaders and people who the Customary Court previously tried, still applies to those people and people, with the meaning of:[20]
   - That an active act must be considered a criminal act, but there is no comparison in the Civil Criminal Code, so it is considered to be punishable by a sentence of not more than three months in prison and/or a fine of five hundred rupiahs, namely as a substitute punishment if the customary punishment. The condemned party does not follow the sentence imposed, and the compensation referred to is considered commensurate by the judge, considering the magnitude of the condemned person's fault.
   - That if the Customary punishment imposed in the judge's opinion exceeds the imprisonment sentence or fine referred to above, then for the defendant's mistake, a substitute sentence of up to 10 years in prison may be imposed, with the understanding that the customary punishment which according to the judge's understanding is no longer in line with the times, will always be must be replaced as mentioned above.
   - That an act which, according to living law, must be considered a criminal act and which has an appeal in the Civil Criminal Code is deemed to be threatened with the same punishment as the sentence on appeal, which is most similar to the criminal act.
3. Jurisprudence Supreme Court Number 1644 K/Pid/1988 dated 15 May 1991, which basically states that the Supreme Court still respects the decision of the Traditional Head based on customary deliberation, which provides customary sanctions to violators of customary law

[20] Undang-undang Darurat Nomor 1 Tahun 1951 tentang Tindakan-Tindakan Sementara untuk Menyelenggarakan Kesatuan Susunan Kekuasaan dan Acara Pengadilan-Pengadilan Sipil.

norms. With this jurisprudence, perpetrators of criminal acts cannot be tried using two legal rules, namely customary rules and Criminal Code rules, even though the criminal acts are regulated in the Criminal Code.

The three criminalization policies related to Customary Law above only guide judges in handling cases related to customary delicts, which are used as a source of law, not by formulating customary delicts into statutory regulations. When compared with the formulation of the penal policy guidelines related to Customary Law above, with the formulation of Customary Law as a source of material law which coexists with the principle of formal legality in Article 2 Paragraphs (1), (2) and (3) of the 2023 Criminal Code and the Explanation of the Articles According to the author, lawmaker Number 1 of 2023 concerning the Criminal Code took a blunder and resulted in a mistake in formulating the position of Customary Law as a source of material criminal law in Indonesia, by formulating customary delicts into national law in the form of Regional Regulations or Regional Regulations.

The words of Article 2, Paragraphs (1), (2), and (3) and their explanations are formulated as follows :

Paragraph (1)

The provisions, as intended in Article 1 Paragraph (1), do not reduce the validity of the laws existing in society that determine that a person deserves to be punished, even though this law does not regulate the act.

Explanation of Paragraph (1)

What is meant by "law that lives in society" is Customary Law, which determines that someone who commits a certain act deserves to be punished. The laws that live in society in this article relate to unwritten laws that are still valid and developing in Indonesia. To strengthen the implementation of laws that exist in society, Regional Regulations regulate these customary delicts.

Paragraph (2)

The law that lives in society as intended in Paragraph (1) applies in the place where the law lives and as long as it is not regulated in this law and is in accordance with the values contained in Pancasila, the 1945 Constitution of

the Republic of Indonesia, human rights, and general principles recognised by the people of nations.

Explanation of Paragraph (2)

In this provision, what is meant by applicable in the place where the law lives is that it applies to every person who commits a customary delict in that area. This paragraph contains guidelines for establishing Customary Law, the validity of which is recognised by this law.

Paragraph (3)

Government Regulations regulate provisions regarding procedures and criteria for determining laws that exist in society.

Explanation of Paragraph (3)

The Government Regulations in this provision are guidelines for regions in establishing laws that live in society in Regional Regulations.

In essence, Article 2, Paragraphs (1), (2), and (3) concerning the recognition of customary law as a principle of material legality, contains 3 core elements, namely:

1. The definition of living law is narrowly defined as Customary Law.

In VI National Law Seminar (Jakarta, 25 – 29 June 1994), the definition of Customary Law, which is a translation of *living law*, includes:

- In the sense that it is identical to Customary Law that applies in ethnic communities and customary law environments.
- In the sense of a habit recognized by society and decision-makers so that it gradually becomes law (*gewoonte recht, customary law*).

However, Article 1 Paragraph (1) has a narrow meaning, which is only Customary Law. Recognition of customary law is based on the idea of balance promoted in the 2023 Criminal Code, where in the context of the principle of legality, recognition of Customary Law is a manifestation of the idea of balance between the principle of formal legality as formulated in Article (1) Paragraph (1) and the principle of material legality which formulated in Article 2 Paragraphs (1), (2), and (3).

2. There is recognition of customary delicts by criminalising them in PERDA

The principle of legality in criminal law is the principle that is the basis for the legitimacy of an act so that it can be punished; therefore, it is always followed by the unlawful nature of the act. The principle of formal legality

contains the nature of being against formal law, where the nature of being against the law is interpreted as being against or contrary to the rules of law so that the legitimacy of an act is said to be against the law if the act has been formulated in law and is punishable by criminal law.

The reasons for eliminating the unlawful nature of acts that are formulated in the law as criminal acts are also in the law. Meanwhile, the principle of material legality provides the basis for punishing an act when the act is not desired by society because it is contrary to society's sense of justice and the values of law and justice adhered to by society. The principle of material legality contains the nature of being against material law (i.e. the nature of being against the law that is outside the law, such as conflicting with society's sense of justice, legal values and fairness in society) so that an action is said to be against the law if it is contrary to law. With a sense of justice and legal values in society even though it is not formulated in the law as a punishable act.

In the nature of being against the material law, there are two functions, namely the positive function, where the nature of being against the material law is used to positive or make acts that are outside the written rules a criminal act. Meanwhile, the negative function of the unlawful nature of material law is the function of the unlawful nature of material law to eliminate the unlawful nature of actions that are formulated in the law as criminal acts. In the negative function, the absence of material unlawfulness (*Aufweigheid Van Alle Materril Wederechtlijke*/AVAW) means that criminal acts formulated in statutory regulations have their unlawful nature removed, so they cannot be punished. In criminal law enforcement, both the positive and negative functions of material unlawfulness are rarely applied.

The application of the principle of material legality as formulated in Article 1 Paragraphs (1), (2), and (3) of the 2023 Criminal Code only applies the nature of violating material law in a positive function, namely politicizing or determining unwritten customary delicts, which still exist and are developing becomes a criminal offence within the rules of state criminal law. Irregularities and errors in the policy of criminalizing customary delicts to become criminal acts in state law occur when

unwritten customary delicts are formulated in Regional Regulations as state regulations in written form.[21]

Based on a critical analysis of criminalization policies, the criminalization of customary delicts in regional regulations is very inappropriate. This can be identified as the following problems:

1) The problem of recognizing living law by formulating customary delicts in Regional Regulations

Customary delicts originate from unwritten law, namely the decisions of customary judges, which are dynamic and plastic in nature, the measures of which quickly change and develop following the development of values of community law and developments over time. So, an act that was originally a customary delict at some point will change to no longer be a customary delict. Conversely, certain acts that were not previously recognized as customary delicts will be criminalized by customary courts to become customary delicts.

The formulation of customary delicts in regional regulations actually eliminates the distinctive nature of customary delicts, which are flexible, elastic, plastic, and not written. They become offences that are formulated in written regulations in the form of Regional Regulations so that they are rigid. Formulating customary delicts into regional regulations as state regulations is a wrong step that actually eliminates Customary Law itself, even though it is formulated in local regulations as regional regulations where Customary Law exists.

Some of the criminal policy issues that arise in the formulation of customary delicts into Regional Regulation (PERDA) are as follows:

- Problems of decriminalization and reformulation of customary delicts in regional regulations;
- The issue of threatening criminal sanctions for customary delicts formulated in the Regional Regulation;

[21] Ni Putu Ari Setyaningsih and Putu Chandra Kinandana Kayuan, "Kompilasi Delik Adat Dalam Peraturan Daerah Sebagai Dasar Pemidanaan Dalam Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana (Ruu Kuhp)," *Jurnal Yustitia* 16, no. 1 (2022): 71–79, Doi:10.62279/Yustitia.V16i1.902.

- The problem of the punishment system which is different between the punishment system in customary delicts and the regional regulation punishment system;
- The problem of shifting the nature of going against material law into the nature of going against formal law in the formulation of customary delicts in regional regulations.

2) Differences between the realm of Customary Law and Regional Regulations

As explained above, Customary Law is an unwritten legal rule that has a unique characteristic: It is very dynamic and plastic, so it is very easy to change following the development of values in society and the times. Customary Law is a law formed by indigenous peoples. Based on its formation, it is different from state law, which is made by state institutions and enforced on its citizens (up to the bottom).

The definition of Regional Regulations in Law Number 12 of 2011 concerning the Formation of Legislative Regulations consists of Provincial Regulations, namely legislation formed by the Provincial Regional People's Representative Council with the governor's approval, and Regency/City Regional Regulations, namely regional regulations formed by the Council. Regency/City Regional Representative with joint approval of the Regent/Mayor.

Article 7 of Law Number 12 of 2011 above positions regional regulations as state legislation in the last place after presidential regulations. The functions of regional regulations include others:[22]

1. As a policy instrument for implementing regional autonomy and assistance tasks;
2. When implementing higher laws and regulations, the regional regulations must not conflict with them.
3. It should be a container for regional specialties and diversity and channel the aspirations of the people in the region, but it must be based on Pancasila and the 1945 Constitution.
4. As a development tool in improving regional welfare.

[22] Sari Dewi Oktara, ""Kewenangan Pengharmonisasian, Pembulatan, Dan Pemantapan Konsepsi Terhadap Rancangan Peraturan Daerah" (Universitas Jambi, 2025), 4, https://repository.unja.ac.id/76766/5/20250326130343phpZkWUdX.pdf.

Based on Law Number 12 of 2011 above, Regional Regulations can be identified as follows:[23]

1. Basically, regional regulations are administrative laws to support the implementation of regional autonomy and assistance tasks.
2. The criminal threat in the Regional Regulation is not the main threat but only a supporting sanction for administrative law.
3. The criminal threat contained in the Regional Regulation is a maximum imprisonment of 6 (six) months or a maximum fine of Rp. 50,000,000 (five tens of millions of rupiah).
4. Regional regulations can contain threats of imprisonment or fines in addition to the weight provisions above in accordance with statutory regulations.
5. Regional regulations can contain threats of sanctions, such as returning to the original state and administrative sanctions.

Based on the description above, regional regulations are administrative laws that carry out regional autonomy and assistance duties. In contrast, customary delicts, which are in the realm of customary law, are purely criminal acts in the context of Customary Law. Thus, it is not appropriate to formulate customary delicts into regional regulations as state law in the implementation of regional administration.

The formulation of customary delicts into state law is a form of Customary Law formalism; instead of providing a place and recognition for Customary Law in modern national criminal law, what has happened is actually reconsolidating Customary Law.

3) The criminalization system for customary delicts is different from regional regulations

The criminal system is a building system for determining and imposing punishment. It consists of criminal principles and objectives, guidelines and rules, actions, and criminal and criminal responsibility.[24]

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[23] Jihan Sopyana, Salsa Aulia Ratar Putri, and Siti Dewi Ratnasari, "Pencabutan Peraturan Daerah Oleh Pemerintah Pusat," *Jurnal Rechten : Riset Hukum Dan Hak Asasi Manusia* 3, no. 2 (2022): 15–21,
Doi:10.52005/rechten.v3i2.84.

[24] Novandi Dwi Putra, Ilmi Firdaus Aliyah, and Dadang Syaifudin Yusuf, "Pembaharuan Hukum Pidana Positif (Positive Criminal Law Reform)," *Journal of Social Science Research* 3, no. 3 (2023), https://j-innovative.org/index.php/Innovative/article/view/2800/2044.

In Customary Law, the structure of the criminal system is very distinctive, different from the national criminal system, concluded by the author as follows:

- The Principle of Punishment for Existing Offenses prioritizes sources of unwritten law, which are plastic and elastic, regarding actions, mistakes and others in the context of customary delicts which are different from state criminal law (KUHP);
- The aim of criminalization for customary delicts, which is primarily to restore balance between the macro and micro cosmos, is very dominated by spiritual interests. This is very different from the aim of state punishment, which is dominated by protecting society from crime.
- Guidelines/Rules for Punishing Customary Delicts prioritize giving judges discretion in convicting perpetrators of customary delicts based on the community's conscience and sense of justice so that punishment is more flexible and does not rely on legal certainty.
- Customary delicts are determined through criminalization by traditional ancestors based on the belief that “pamali” or taboo acts damage human relations with spiritual beings so that they are not appropriate; they are believed to bring harm or disaster.
- Liability answers in customary delicts are aimed individually and structurally, with the main aim of restoring balance.
- Traditional sanctions are real sanctions and magical sanctions, such as traditional ceremonies and other sanctions, to restore disturbed spiritual balance.

4) Limitations of Recognition of Customary Law

Not all Customary Laws that are still alive and developing are recognized by the 2023 Criminal Code, where Article 2 Paragraph (2) provides conditions for recognized Customary Laws in accordance with the values contained in Pancasila and the 1945 Constitution, Human Rights and general legal principles recognized by the people of nations. In the case of Customary Law criteria, which are in accordance with general legal principles recognized by nations, it can be biased because the legal values adopted by a nation are "nation-centric", especially in Customary Law, which has no relevance to international values. Thus, in legal recognition,

custom is enough to use Pancasila, Human Rights, and the 1945 Republic of Indonesia Constitution as the margin of appreciation.

The filter criteria that limit the application of Customary Law above are a consequence of the shift from Customary Law to state law, which further states that government regulations regulate provisions regarding procedures, methods and legal criteria that exist in Customary Law. The next problem is what about customary laws that are not covered by government regulations because they are located far inland? What are the consequences of Customary Law not being recognized by the state? Is it still valid? This requires further thought

B. Reformulation Customary Law in Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the 2023 KUHP

The recognition of Customary Law as a source of material criminal law in the KUHP 2023 should be returned to the nature of Customary Law, as original law resulting from the culture of Indigenous communities that are different from each other, unwritten, dynamic, plastic and easy. Changes according to the values that develop in Indigenous communities, it is not appropriate to recognize Customary Law as a source of material criminal law with the policy of formulating customary criminal acts into PERDA (Regional Regulations) as state regulations. A policy like this is the same as the policy implemented by the Dutch East Indies Government, where Article 131 IS Jo AB provides the validity of the application of Customary Law but with certain notes, where Article 131 IS Jo AB can be referred to as the Article Controlling the application of Customary Law, in where if it is not desired to come into force, then certain Customary Laws cannot apply.

The best way out in recognizing Customary Law as a source of material criminal law can be done as follows:

1. Formulate customary law as a source of law by formulating customary delicts as formulated in Article 5 Paragraph (3) Sub b of Law Number Drt of 1951 on Temporary Measures to Implement Unity Composition of Powers and Procedures of Civil Courts.

2. Formulate guidelines for the criminalization of customary delicts in accordance with policy and Supreme Court jurisprudence, namely Supreme Court Decision No.1644 K/Pid/1988.

Making Article 2 Paragraphs (1), (2), and (3) only as the rule of recognition of the application of Customary Law.

Conclusion

From the description of the problems that have been discussed, the following conclusions can be drawn:

1. Based on a study of penal policy analysis, formulating customary delicts into Regional Regulations is very inappropriate. From a policy perspective, the formulation distorts the nature of customary delicts as unwritten rules. From a criminal system perspective, the differences between the systems are very different punishments in customary delicts (consisting of Criminal Acts, Mistakes, Criminal Liability, Purpose of Punishment, and Sentencing Guidelines) with the state criminal system, let alone regional regulations. Judging from the criminal sanctions, it is unequal if customary delicts are formulated in the Regional Regulation. The criminal sanctions follow the criminal sanctions in the Regional Regulation, which are very limited, so they cannot reach customary delicts, which Indigenous peoples threaten with heavier customary sanctions.
2. The most likely thing to accommodate Customary Law in the 2023 Criminal Code is that Customary Law is only used as a source of law, and Article 2 Paragraphs (1), (2), and (3) only become rules for recognizing of customary law to apply as is.

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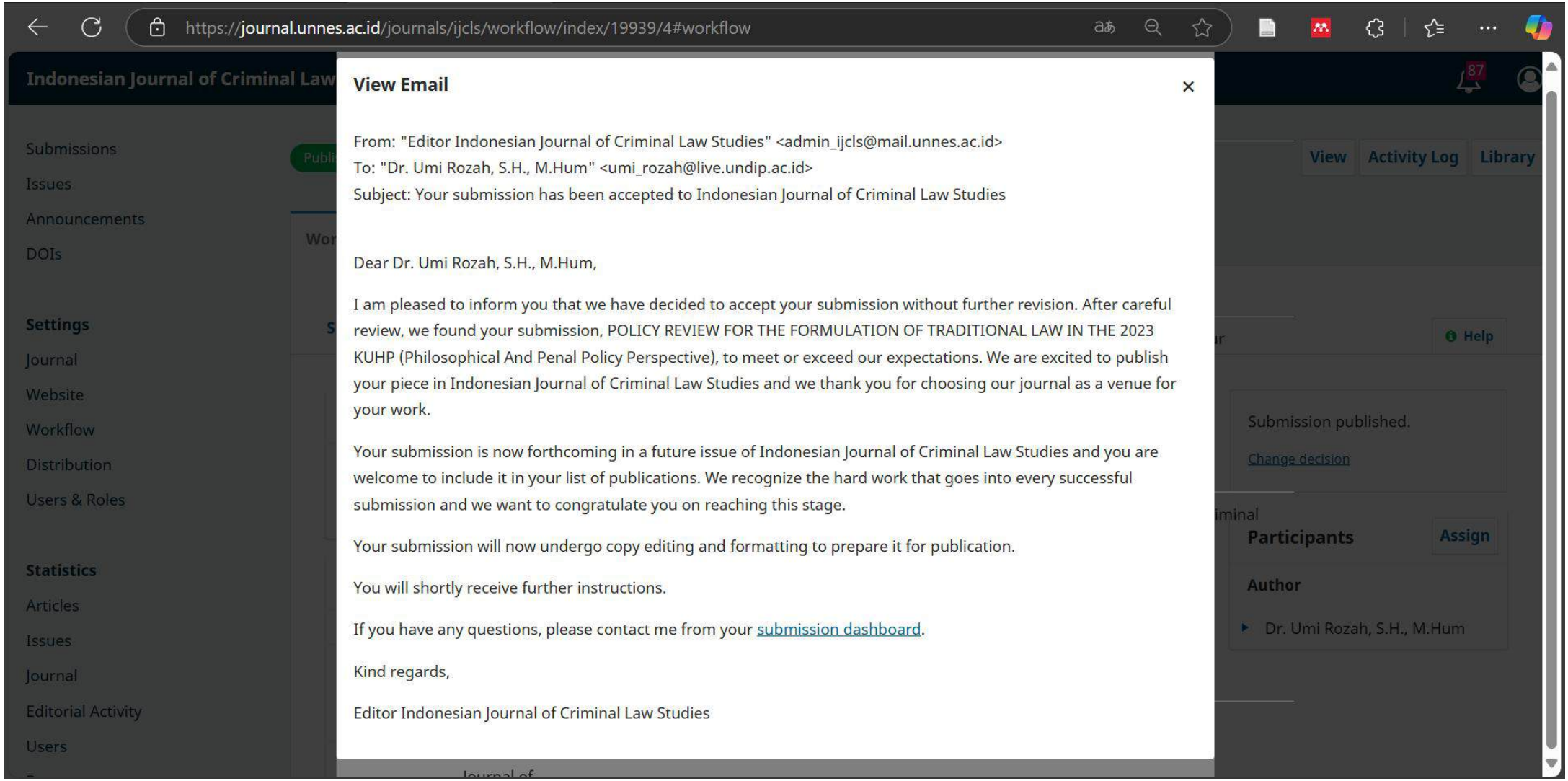
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Dear Mr/Mrs/Ms. **Umi Rozah, et.al.**
Thank you very much for your submission to our journal. We are pleased to inform you that your paper has received positive responses and excellent comments, therefore the Editorial Team has proudly decided that your paper ***is accepted for publication for Volume 10, No 1, May (2025): Indonesia J. Crim. L. Studies*** **(IJCLS)**.
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Penal Policy Analysis of The Formulation of Customary Law in The 2023 KUHP

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Abstract

An interesting issue in the 2023 Criminal Code is the accommodation of living law with a meaning limited to Customary Law as formulated in Article 2, Paragraphs (1), (2), and (3). This research aims to analyze it from the perspective of penal policies regarding the formulation of Living Law only as Customary Law in Article 2, Paragraphs (1), (2), and (3) of the 2023 Criminal Code. This research uses a normative or doctrinal juridical approach, with data sources from library materials in the form of statutory regulations and literature related to research. This research raises problems: 1). How does analysis of the penal policy of the formulation of living law in Article 2 Paragraph (1) of the 2023 Criminal Code (KUHP)? 2). What is a reformulation of Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the 2023 KUHP from a penal policy perspective? The results of the research are as follows: There is invalidity in the formulation of the meaning of living law as only Customary Law as the living law is wider than Customary Law. It covers all customs in society, such as business affairs and religious life. Analysis from a penal policy perspective can't be adjusted if the meaning of living law is only determined by Customary Law. There are many fallacies in the formulation of Article 2, Paragraphs (1), (2), and (3)

of the 2023 KUHP, so reformulation is needed. Reformulation of Article (2) Paragraphs (1), (2), and (3) should be changed to interpret the living law not only as Customary Law, which will be formulated in Regional Regulation. Article (2) Paragraphs (1), (2), and (3) are just needed as the recognition rules to enforce Customary Law; in other words, formulation of the living law only as an umbrella rule to enforce Customary Law.

Keywords
Analysis; Policy; Customary; Criminal Code.

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Introduction

Entering the beginning of 2023, the Indonesian people, especially academics and criminal law practitioners, feel relieved by the presence of Law Number 1 of 2023 concerning the Criminal Law Code (the 2023 KUHP), which to replace the Dutch of the Criminal Code (*Wetboek Van Strafrecht*), which is effective in Indonesia until now. The urgency to create the 2023 Criminal Code (it's called the 2023 KUHP) emerged since the proclamation of Indonesian independence, starting with the issuance of Law Number 1 of 1946 on the Criminal Law Regulations as the rules for enforcing the Criminal Code (WvS). The Law Number 1 of 1946 made several changes to suit the conditions of the Indonesian people after leaving Dutch colonial rule.[1] The Criminal Code (Wvs) is a Dutch derivative of the Criminal Code created in 1881, which came into effect in the Netherlands in 1886 and came into force in Indonesia on January 1, 1918. With the principles of concordance, the Criminal Code (WvS) will be applied in Indonesia. The principle of concordance is actually the principle for enforcing criminal regulations for Dutch people who are outside Holland, especially in their colony.[2]

The Dutch Criminal Code (WvS) relies on the principle of formal legality adhered to by adherents of legalism, where the law is only interpreted as statutory rules so that all rules of behaviour that are outside the law, such as society's habits in passing laws and resolving conflicts as customs which live, grow, and dead in society for generations are not recognized as law. The principle of formal legality focuses on legal certainty and juridical justice. It is justice based on the text of the law, not substantive justice, which is contextual. This situation often creates an imbalance/gap between the Dutch Criminal Code (WvS) and the need for a sense of substantive justice in society. Not only the principle of formal legality but also the values that characterize the Dutch Criminal Code (WvS) become a

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1 Putu Yulita Damar Putri and Sagung Putri M.E. Purwani, "Urgensi Pembaharuan Hukum Pidana Di Indonesia," *Jurnal Kertha Wicara* 9, no. 8 (2020), Index.php/kerthawicara/article/view/61874/35618.

2 Faisal and Muhammad Rustamaji, "Pembaruan Pilar Hukum Pidana Dalam RUU KUHP," *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)* 10, no. 2 (2021): 291, https://doi.org/10.24843/JMHU.2021.v10.i02.p08.

problem when applied to cases where there is a conflict between the values of legal certainty, expediency, and justice. This inequality originates from the legal values that underlie the Dutch Criminal Code (WvS), such as liberalism, individualism and capitalism. Meanwhile, the Indonesian nation adheres to religious and collective or communal values. These differences in values have an impact on criminal law enforcement in Indonesia. The Indonesian nation, which has a communal character such as tolerance, ease of forgiveness, and solidarity, is faced with Dutch criminal law, which has a liberal, individual, and capitalistic character. Here, very rigid legalism interprets the law as *Lex Dura Sad Tamen Scripta,* wherein law is only interpreted as written rules[3]

The 2023 KUHP comes as a response to the demands of the Indonesian people to have criminal law regulations that are in line with the values of Indonesian life., such as religious values and communal values that are crystallized in Pancasila. By focusing on the principle of balance as the juridical basis of Indonesian philosophy, which is taken from the core of Pancasila, that shapes balance in the relationship between humans and their God (religious balance), the relationship between humans and themselves and others (humanity balance), as well as the relationship between humans and society and universe (social balance). Indonesian legal values as living law are reflected in the 2023 KUHP, especially in the formulation of Article 2, Paragraphs (1), (2), and (3).

One of the most prominent Indonesian things is the recognition and accommodation of the living law as a source of criminal law that was formulated in Article 2 Paragraph (1) of the 2023 KUHP as preleasing the principle of formal legality. It is accommodated by the principle of material legality, meaning that the living law, which was formulated as only Customary Law, is used as a source of law to determine deeds that are not regulated in the 2023 KUHP but in society, especially indigenous communities, are declared as delict that can be punished. Logically, the 2023 KUHP is claimed to be the Indonesian Criminal Code, recognizing and accommodating Customary Law as a source of legal and justice values

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[3] Muhammad Alwan Fillah, "Politik Hukum Dalam Pembaruan Kitab Undang-Undang Hukum Pidana (KUHP) Di Indonesia," *VARIA HUKUM* 5, no. 1 (2023): 52–64, https://doi.org/10.15575/vh.v5i1.23230.

that were born, grew, and developed within the Indonesian nation. As a legal ideal, the legal values contained in the laws that exist in Indonesia should color the content of every Indonesian law and regulation, especially KUHP, which regulates individual behavior in public life by criminalizing acts that are not desired by society, as well as with rules for administering punishment that is not rigid (*rigid*) which are based on values of law and justice of the Indonesian nation. The culture of the Indonesian nation, which is full of communal values, gives birth to an attitude of self-centeredness, non-individuality, solidarity and respect for human rights and human obligations as a manifestation of the principle of monodualism/principle of balance, which has been integrated into Indonesian human behavior.[4]

Soediman Kartadipradja said that the content of the soul of a nation appears in its culture, which is an expression of the soul of the nation concerned with sculpture, painting, literature, dance, and laws. In the legal field, we want to use it as a legal measuring tool. Strictly speaking, Indonesian Customary Law is part of our nation's culture, which, according to Van Vollenhoven, "is disappearing into the darkness of the past". Customary Law, which is an expression of the soul of the Indonesian nation, is a spiritual heritage or ancestral spiritual inheritance that has been passed down from generation to generation to express the path towards justice in human relations.[5]

The living law, which is formulated in the 2023 KUHP, is interpreted in a closed way as Customary Law, as stated in Elucidation of Article 2 Paragraph (1) that "the law that lives in society is Customary Law which determines that someone who commits a certain act deserves to be punished. The laws that live in society in this article relate to unwritten laws that are still valid and developing in Indonesia. To strengthen the implementation of laws that exist in the community, Regional Regulations regulate the Customary Delicts". Explanation of Paragraph (2) that " In this provision, what is meant by applicable in the place where the law lives, it to

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4 Mudemar A. Rasyidi, "Menuju Pembaharuan Hukum Pidana Indonesia," *Jurnal Mitra Manajemen* 12, no. 1 (2021): 1-10, Doi :10.35968/jmm.v12i1.627.

5 Soediman Kartahadiprodjo, *Pengantar Tata Hukum Di Indonesia* (Jakarta: Pembangunan Publisher, 1973).

be applied to every person who commits customary delicts in the place Customary Law enforced. This paragraph contains guidelines for establishing Customary Law, the validity of which is recognized by this Law." Explanation of Paragraph (3): "Government regulations in this provision are guidelines for regions in establishing rules that Customary Law written in Regional Regulations".

The living law in the community means a law that lives, grows, and exists together in social life.[6] Its essence is rooted in the community's sense of justice. In certain cases, the law's character follows the community's thinking.[7]

If you look closely at the Explanation of Article 2 Paragraph (1), then what is meant by Customary Law is an unwritten law that is still valid and developing in Indonesia and regulates custom delicts. Because it is unwritten, the Regional Regulation regulates customary delicts as written law. The explanation of paragraph (2) is a guideline for determining customary delicts whose validity is recognized by the 2023 KUHP. Thus, not all Customary Laws are recognized by the 2023 KUHP according to Paragraph (2).

This research has novelty from several previous researchers, such as a journal article written by Wirdi Hisroh Komeni and Ermania Widjajanti in the Journal of Social Science Research Volume 4 Number 3 formulation of article 2 of the national criminal code, which states that it confuses its legal implications which results in unfair enforcement of sanctions in practice.[8] In addition, journal research submitted by Yoserwan with the title of the article Existence of Adult Criminal Law in National Criminal Law after the presentation of the new Criminal Code in the journal UNES Law Review published in 2023, in the article The Regulation of Customary Criminal law in the New Criminal Code aims to provide a legal basis and protection

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6 Syofyan Hadi, "Hukum Positif Dan The Living Law (Eksistensi Dan Keberlakuannya Dalam Masyarakat)," *DiH Jurnal Ilmu Hukum* 13, no. 26 (2018): Hlm. 262, DOI: 10.30996/dih.v0i0.1588.

7 Ratno Lukito, *Tradiisi Hukum Indonesia (Disertai Postcript Oleh Penulis & Pranoto Iskandar)* (Cianjur: the institute for migrant right press, 2013), Hlm 40.

8 Wirdi Hisroh Komeni and Ermania Widjajanti, "Ketidaktepatan Penerapan Hukum Pidana Adat Dalam Pasal 2 KUHP Baru: Prespektif Teori Kepastian Hukum," *Innovative: Journal Of Social Science Research* 4, no. 3 (2024): 1–9, Doi : /https://doi.org/10.31004/innovative.v4i3.10586.

for the enactment of customary criminal law. However, this arrangement creates a number of restrictions that have the potential to weaken the existence of customary law itself. Basically, what is needed is a legal basis that respects and protects customary criminal law, allowing it to grow and develop in accordance with its legal norms but still within the framework of the philosophy of the nation and state.[9] There is also research conducted by Rini Apriyani, which has been written in the Prioris journal and published in 2018, on the existence of customary sanctions in the application of customary criminal law. The article states that, in reality, there is no clear legal certainty regarding the provision of customary criminal sanctions. In addition, the application of customary criminal law rules among indigenous peoples is currently facing various difficulties. This is due to the increasing number of community members who have understood the existence of Indonesian national law, as well as the large burden of customary sanctions given in relation to customary criminal offences.[10] The research conducted by the author has differences, especially in terms of the exposure of the problems contained in the formulation of Article 2, paragraphs 1, 2, and 3 of the National Criminal Code. In addition, this research also discusses how the ideal formulation of Article 2, paragraphs (1), (2), and (3) should be formulated.

Referring to the Explanation of Article 2 Paragraphs (1), (2), and (3), in penal policy analysis, there are juridical weaknesses that will conflict with each other, where instead of recognizing and accommodating Customary Law as living law, it actually distorts Customary Law and The government's action through the reaffirmation of conditional recognition in Law No. 1/2023 on the Criminal Code resembles a repetition of the debate on the Dutch idea of legal unification, in which indigenous communities were downgraded to weak subjects under the dominant authority of the state.

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9 Yoserwan, "Eksistensi Hukum Pidana Adat Dalam Hukum Pidana Nasional Setelah Pengesahan Kuhp Baru," *UNES LAW REVIEW* 5, no. 4 (2023): 1999–2013, Doi :https://doi.org/10.31933/unesrev.v5i4.577.

10 Rini Apriyani, "Keberadaan Sanksi Adat Dalam Penerapan Hukum Pidana Adat," *Prioris* 6, no. 3 (2018): 227–46, Doi : 10.25105/prio.v6i3.3178.

Indigenous communities are considered incapable of knowing what is best for their interests, thereby justifying state intervertation.[11]

The colonial model is used to formulate the enactment of Customary Law through the formulation of customary delicts in regional regulations. It can be said that there is a re-colonization of Customary Law formulation so that a policy gap appears in penal policy, which ultimately gives rise to problems:

1. How is the analysis of the penal policy of the formulation of living law in Article 2 Paragraph (1) of the 2023 KUHP?
2. What ideal reformulation on Customary Law in Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the 2023 KUHP from a penal policy perspective?

Method

This research aims to analyze the validity of the narrow meaning of living law, which is formulated as Customary Law in Article 2 Paragraphs (1), (2), and (3) of the 2023 KUHP, the model formulation of Customary Law in written law established in Regional Regulation, and the ideal reformulation of Customary Law in the 2023 KUHP.

The research used a normative juridical approach or doctrinal research, which used legal materials such as relevant laws and written regulations. In addition, to obtain and use information related to policy formulation customary law in the Criminal Code 2023, this research used statutes and philosophical approaches.

This research is descriptive, with the aim of obtaining an overview of how Customary Law, especially customary delicts, is formulated in the 2023 Criminal Code based on the perspective of penal policy.

In normative juridical research or doctrinal research, data is collected through literature study, including legal materials, books, journals, and other literature related to philosophy, customary Law, and policy formulation in legislation.

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[11] Sunardi Purwanda et al., "The Fate of Indigenous Peoples' Rights Recognition After the Enactment of the National Criminal Code," *Indonesian Journal of Criminal Law Studies* 9, no. 2 (2024): 256–89, Doi: 10.15294/ijcls.v9i2.50321.

Data analysis in this research was carried out using the descriptive-analytical method. This method is used to collect, set, and analyze data and finally to describe data throughout the words to provide an accurate description of the scope of discussion as follows: the validity of the meaning of living law as Customary Law in the 2023 KUHP, the model of formulation Customary Delicts in written law which will be established in Regional Regulation, and the ideal reformulation of Customary Law in Article 2 Paragraph (1),(2), and (3) of the 2023 KUHP

Result and Discussion

A. Penal Policy Analysis Regarding the Formulation of Customary Law in Article 2 Paragraph (1), Paragraph (2), and Paragraph (3)

The customary laws of each ethnic group in Indonesia were applied without problems until the Dutch came to Indonesia, bringing the Principle of Formal Legality as a manifestation of the teachings of legalism or positivism in implementing the law. Legalism or positivism is a teaching that only recognises written rules as law. Therefore, criminal law, which is based on the Principle of Legality, is a criminal law that only determines whether or not an act can be punished and must be based on written law or legislation that must exist before the act occurs. Thus, the legal sources recognised for implementing criminal law are only sources of written law or statutes. The consequence is a prohibition on analogies in applying criminal law and eliminating the legitimacy of the existence of living as an unwritten rule.

Thus, living law as a living law, most of which is not written, according to the view of legalism, which is manifested in the principle of legality, is not recognised as law. In the context of criminal law, the legal rules that applied to regulate people's behavior at that time were the Criminal Code (*Wetboek Van Strafrecht)*, which was initially based on the principle of concordance only applicable to Dutch people who were in Indonesia. Still, it was gradually implemented for all Indonesian residents, namely after the independence of the Indonesian nation, through Law Number 1 of 1946

on Criminal Law Regulations for the Entire Territory of the Republic of Indonesia, with changes made to several articles adapted to Indonesian conditions. The implementation of the Criminal Code (KUHP) was further reinforced by unifying its application for all Indonesian citizens through Law Number 73 of 1958, which enacted the validity of Law Number 1 of 1946 on Criminal Law Regulations for the Entire Territory of the Republic of Indonesia.

In the history of applying customary law after the arrival of the Dutch to Indonesia, it was not easy. The arrival of the Dutch and their presence in Indonesia not only colonised Indonesia socially, politically and economically but also colonised Indonesian living law, which had been institutionalised centuries before the Dutch arrived, namely by being "put to sleep" or extinguished.

In the realm of criminal law, the Netherlands applies *Wetboek Van Strafrecht* with the principle of legality as a representation of the legal teachings of legalism or positivism that developed in mainland Europe. This legalism teaches legal scholars in Indonesia, judges, and other legal officials to think that law is written rules, so that law is only statutory rules; customary law does not have the legitimacy to be accommodated and applied in resolving criminal acts. Law enforcement, especially criminal law, is only based on the sound of the law, where the basis of reasoning is the *syllogism*, which is drawn from the major premise and minor premise so that the conclusion is certain and easy to predict, where the judge is only the mouthpiece of the law. The law (*La Bouche de la loi)* or as a statutory machine *(subsumption automata)* in enforcing criminal law. This is where legal certainty emerges when implementing criminal law, which establishes juridical truth and justice. In conditions like this, customary law as unwritten customary law, which contains legal values and material justice, has no place to apply because it is not recognised as law.

Viewed from its essence, customary law is the original law born from national culture, which contains the noble values of a nation and applies by itself. It does not require legitimacy based on written legal rules to enforce it. However, with the existence of the principle of formal legality in the Criminal Code brought by the Dutch, which has become ingrained in the enforcement of criminal law in Indonesia, the consequences for unwritten

customary law are that the legitimacy of its validity in its homeland is lost, unless there are written legal rules that give life as the basis for enforcing it or often referred to as the rule of recognition *(the rule of recognition*) for the application of customary law.

Specifically for the material criminal law that has been in effect in Indonesia since January 1, 1918, for all European, Indigenous and Eastern Foreign groups, is the Criminal Code or *Wetboek van Strafrecht voor Nederlandsh Indie* (stb. 1915 – 732) so it is practical Since the implementation of WvSvNI for all groups, customary (criminal) law cannot be applied, except by written rules as rules that recognise and accommodate the application of customary law (*rule of recognition*).

Historically, the enactment of customary law during Dutch rule was based on the rule of recognition (*rule of recognition*) in the form of Article 131 *I.S* (*Indische Staatsregeling*) Jo Article 11 *Algemene Bepalingen van Wetgeving*. Meanwhile, *Indische Staatsregeling* (IS), among other things, determined that:[12]

1. The law that applies to European groups is European criminal law based on the principle of concordance;
2. The law that applies to Indigenous groups is living law in unwritten form, where the application of customary law is "not absolute" and, if necessary, can be regulated in special regulations (ordinances);
3. The law that applies to the Foreign East group is their customary criminal law (Article 11 AB). (CFG Sunaryati Hartono, Analysis and Evaluation of Dutch Colonial Legacy Legislation, BPHN, 2015, Jakarta).

Article 131 IS, as the basis for the application of customary law during the Dutch East Indies period, determines that for the European group, the law that applies is the law that exists in the Netherlands (based on the principle of concordance), for the Foreign East group the law that applies is their law. For the Indigenous group, the law that applies what applies is customary law. However, if social interests require it, European law can

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[12] C.F.G. Sunaryati Hartono, *Analisa Dan Evaluasi Peraturan Per-UUan Peninggalan Kolonial Belanda* (Jakarta: BPHN, 2015).

apply across groups. This implementation is hereinafter referred to as submission to European law, either completely or only partially.[13]

With Article 131 I.S above, the application of customary law is not determined by customary communities but by the Dutch East Indies Government. This is stated in point 2 above that the application of customary law is not absolute, so it can be said that customary law cannot be enforced by itself, even though Article 131 I.S was created as a rule of recognition of customary law, but only as a *rule of recognition* not to apply customary law. This is emphasized in point 2 that "if necessary, it can be regulated by special regulations (*ordonantie*)".

Meanwhile, Article 11 *Algemene Bepalingen van Wetgeving* (A.B) determines that for groups of indigenous people, the judge will apply the religious laws, institutions and customs of the indigenous people themselves, as far as the laws and institutions are concerned. This custom does not conflict with generally recognised principles of decency and justice, and also if European law applies to Indigenous people or the Indigenous person concerned has submitted himself to European law.[14]

Article 11 AB is not clearly and unequivocally a rule of recognition in the application of customary law as a source of law for natives because it is combined with religious law and other institutions and is seen from the subject of the law, namely the native people for whom determined that European law applies to him or an indigenous person who submits himself to European law then customary law does not apply to him, even though he is a customary community that should be subject to living law.

The application of living law to indigenous groups creates problems, considering that living law in Indonesia is very diverse according to ethnicity, social, culture and religion. Along with efforts to instil colonial ideology, 3 theories were used in implementing living law during Dutch colonialism, namely:[15]

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13 C.F.G. Sunaryati Hartono, *Loc.Cit*

14 *Op.Cit*

15 Felishela Erlene and Tundjung Herning Situbuana, "Tanggung Jawab Negara Terhadap Hak Masyarakat Adat Di Pulau Rempang Dalam Perspektif HAM," *Jurnal Tunas Agraria* 7, no. 2 (2024): 144–61, Doi: 10.1392/jta.v712.301.

1. The theory *Receptio in complexu,* put forward by Van den Berg, where customary law follows the religious law adhered to by the Indigenous community.
2. Snouck Hurgronje and C. Van Vollenhoven's *Receptie theory* emphasizes that Islamic law will effectively apply among Muslims if it is in line with customary law in Indonesia. This means that the laws that apply in Indonesia to natives are not based on Islamic teachings but on local customary law.
3. Hazairin proposed *Receptio a Contrario/Receptie exit,* stating that religious law applies to society, while customary law only applies if it does not conflict with religious law.

After Indonesian independence, the enactment of customary law was based on the 1950 Provisional Constitution, namely Article 32, Article 43 Paragraph (4), Article 104 Paragraph (1), Article 14, Article 13 Paragraph (32), and Article 16 Paragraph (2). The contents of each article are as follows:[16]

- *Article 13 Paragraph (2)*
  Against his will, no one can be separated from the judge, which is granted to him by the rules of law in force.
- *Article 14*
  1. *Every person who is charged because he is suspected of committing a criminal incident has the right to be presumed innocent until his guilt is proven in a court hearing, according to the applicable legal rules. At that hearing, he is given all the guarantees that have been determined and are necessary for his defense.*
  2. *It is said that no one may be required to be punished or sentenced except because of a legal rule that already exists and applies to him.*
  3. *If the legal rules change, as stated in the paragraph above, then provisions that are better for the suspect are used.*
- *Article 16 Paragraph (2)*

[16] Saiful Anam, "Fungsi Hukum Adat Dalam Pembentukan Peraturan Perundang-undangan Di Indonesia, " *Journal Iuris Scentia* 1, No 2 (2023): 80, https://doi.org/10.62263/jis.v1i2.18.

Trespassing on the grounds of a residence or entering a house against the will of the person who occupies it is only permissible in cases stipulated in a legal regulation that applies to it.

- *Article 32*
  Everyone in the country must obey the laws, including unwritten legal rules and the authorities.
- *Article 43 Paragraph (4)*
  The authorities supervise that all religious associations and associations comply with the law, including unwritten legal regulations.
- *Article 104 Paragraph (1)*
  All court decisions must contain the reasons and, in cases of punishment, state the statutory and customary law rules that are used to determine the sentence.

In the history of the return of the Republic of Indonesia, the Provisional Republic of Indonesia Law was no longer applied but returned to the 1945 Law. Thus, the rule of recognition based on the articles of the 1950 UUDS did not apply. With Indonesia's return to the 1945 Constitution, the rule of recognition was needed for the implementation of customary law, especially customary offences, so Law Number 1 Drt of 1951 on Actions was issued. Meanwhile, to organise a unified structure of powers and procedures for civil courts, Article 5 Paragraph (3) Sub b reads as follows:

"The civil material law and, for the time being, the civil criminal material law which until now applies to independent regional leaders and people who the Traditional Court previously tried, still applies to those people and people, with the meaning of: [17]

- *That an active act must be considered a criminal act, but there is no comparison in the Civil Criminal Code, so it is considered to be punishable by a sentence of not more than*

[17] Undang-Undang Nomor 1 Drt Tahun 1951 Tentang Tindakan -Tindakan Sementara untuk Menyelenggarakan Kesatuan Susunan Kekuasaan dan Acara Pengadilan-Pengadilan Sipil, https://www.bphn. go.id> data.

three months in prison and/or a fine of five hundred rupiahs, namely as a substitute punishment if the customary punishment The sentence imposed is not followed by the condemned party and the compensation referred to is considered commensurate by the judge with the magnitude of the condemned person's fault.

- *If the customary punishment imposed in the judge's opinion exceeds the imprisonment sentence or fine referred to above, then, for the defendant's mistake, a substitute sentence of up to 10 years in prison may be imposed, with the understanding that the customary punishment, according to the judge's understanding, is no longer in line with time; it must always be replaced as mentioned above.*
- *That an act which, according to living law, must be considered a criminal act and which has an appeal in the Civil Penal Code is deemed to be threatened with the same punishment as the sentence on appeal, which is most similar to the criminal act.*

Article 5 Paragraph (3) Sub b of Law No.1 Drt of 1951 above, apart from being the rule of recognition of customary criminal law, also provides guidelines on how to apply civil, criminal law and customary criminal law to customary incidents (customary criminal acts), without specifying the type of criminal act. Article 5 Paragraph (3) Sub b, as the rule of recognition as well as guidelines for the application of customary law, is a policy that becomes a bridge so that customary law still exists in certain customary areas or where customary justice is also still alive, customary law and its customary offenses are still recognized and applied, as long as the implementation of the punishment is adhered to by the violators/perpetrators of customary offences. However, suppose the perpetrator of a customary offence does not comply with the sentence (customary crime) imposed by a customary court judge. In that case, the criminal incident can be brought to the state court with the provisions for punishment by the judge in accordance with the sentencing guidelines specified in Article 5 Paragraph (3) Sub b above.

The 2023 Criminal Code as positive law must be intertwined with Customary Law; according to Brian Z Tamanaha, Customary Law is a more effective provision with its consensual nature. Meanwhile, Karl Von Savigny wants positive law to be intertwined with Customary Law because, in Customary Law, there is people's consciousness, which is a manifestation of the soul of the nation; positive law must be harmonized with people's feelings and consciousness about the right and wrong behavior. Referring to the opinion of Savigny, all forms of legislation, including the 2023 Criminal Code, must take into account Customary Law. The 2023 Criminal Code must not violate the norms and values system of Customary Law. Therefore, it must be harmonized with Customary Law, including in determining criminal acts and the structure of the criminal system. It must be in accordance with Customary Law as a manifestation of the national spirit.[18] On this occasion, Savigny emphasized that all state laws are subordinate to Customary Law.

Based on the recommendations of the Law Seminar National VI (Jakarta, 25 -29 June 1994), it is clear that the national legal system adopted is the Pancasila Legal System, namely a legal system based on the Pancasila philosophy, so that all products national laws, including the 2023 Criminal Code, must be based on and in line with the Pancasila philosophy. With the awareness that the development of a nation's national law is nation-centric, the development of Indonesian national law, including in the preparation of the 2023 Criminal Code, is also nation-centric, meaning that it is based on legal values and legal culture that are born, live, grow and develop in Indonesian society, which is manifested in living laws which are believed to be noble values in behavior from generation to generation, which form customs in an unwritten form, namely Customary Law.

The position of Customary Law as the original law in society originates from people's feelings and consciousness. Therefore, it is unwritten; it does not have to be conflicted with written law, let alone abolished by written law, but should be positioned as a complement that complements written law. It is acknowledged that the formation of

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[18] Andri Yanto and Faidatul Hikmah, "Akomodasi Hukum Yang Hidup Dalam Kitab Undang-Undang Hukum Pidana Nasional Menurut Perspektif Asas Legalitas," *Recht Studiosum Law Review* 2, no. 2 (2023): 81–91, Doi:10.32734/rslr.v2i2.14162.

unwritten law is more flexible than the formation of written law because it can overcome the gap between the validity of the law and its effectiveness; this is because of the dynamic and plastic nature of Customary Law as unwritten law so that it always follows the development of values who live in society. The position of Customary Law in the national legal system is as a source of national law.[19]

The 2023 Criminal Code as a legislative, legal product currently still uses a thinking framework that is also strong in the principles of formal legality. This was acknowledged in the VI National Law Seminar (Jakarta, 25 – 29 June 1994) that there are no clear criteria regarding Customary Law, especially in enforcing the law, encourages the formation of a very legal attitude and legal culture in PJP I which tends to identify law with law. It was further emphasized that in the PJP II era, the legal community in Indonesia needs to be directed to appreciate customary law as one of the sources of law, in addition to legislation and permanent jurisprudence.

Sentencing policy in the form of sentencing guidelines for judges related to Customary Law, which is full of legal and justice values as a source of justice, before the promulgation of the 2023 Criminal Code, had been formulated in statutory policies and policies in judicial practice, as follows:

1. Article 5 Paragraph (1) of Law Number 48 of 2009 concerning Judicial Power states that judges and constitutional justices are obliged to explore, follow and understand the legal values and sense of justice that exist in society.
2. Article 5 Paragraph (3) Sub b of Law Number 1 Drt of 1951 concerning Concerning Temporary Measures to Organize the Unity Structure of Powers and Procedures of Civil Courts, where Article 5 Paragraph (3) Sub b, reads as follows:

   > *"The civil material law and, for the time being, the civil criminal material law which until now applies to independent regional leaders and people who the Customary*

[19] Revie, "Hukum Adat Sebagai Sumber Hukum Nasional Dalam Politik Hukum Di Indonesia," *Legal Certainty* 1, no. 1 (2019), https://core.ac.uk/download/pdf/287209404.pdf.

Court previously tried, still applies to those people and people, with the meaning of:[20]

- *That an active act must be considered a criminal act, but there is no comparison in the Civil Criminal Code, so it is considered to be punishable by a sentence of not more than three months in prison and/or a fine of five hundred rupiahs, namely as a substitute punishment if the customary punishment. The condemned party does not follow the sentence imposed, and the compensation referred to is considered commensurate by the judge, considering the magnitude of the condemned person's fault.*
- *That if the Customary punishment imposed in the judge's opinion exceeds the imprisonment sentence or fine referred to above, then for the defendant's mistake, a substitute sentence of up to 10 years in prison may be imposed, with the understanding that the customary punishment which according to the judge's understanding is no longer in line with the times, will always be must be replaced as mentioned above.*
- *That an act which, according to living law, must be considered a criminal act and which has an appeal in the Civil Criminal Code is deemed to be threatened with the same punishment as the sentence on appeal, which is most similar to the criminal act.*

3. Jurisprudence Supreme Court Number 1644 K/Pid/1988 dated 15 May 1991, which basically states that the Supreme Court still respects the decision of the Traditional Head based on customary deliberation, which provides customary sanctions to violators of customary law norms. With this jurisprudence, perpetrators of criminal acts cannot be tried using two legal rules, namely customary rules and Criminal Code rules, even though the criminal acts are regulated in the Criminal Code.

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[20] Undang-undang Darurat Nomor 1 Tahun 1951 tentang Tindakan-Tindakan Sementara untuk Menyelenggarakan Kesatuan Susunan Kekuasaan dan Acara Pengadilan-Pengadilan Sipil.

The three criminalization policies related to Customary Law above only guide judges in handling cases related to customary delicts, which are used as a source of law, not by formulating customary delicts into statutory regulations. When compared with the formulation of the penal policy guidelines related to Customary Law above, with the formulation of Customary Law as a source of material law which coexists with the principle of formal legality in Article 2 Paragraphs (1), (2) and (3) of the 2023 Criminal Code and the Explanation of the Articles According to the author, lawmaker Number 1 of 2023 concerning the Criminal Code took a blunder and resulted in a mistake in formulating the position of Customary Law as a source of material criminal law in Indonesia, by formulating customary delicts into national law in the form of Regional Regulations or Regional Regulations.

The words of Article 2, Paragraphs (1), (2), and (3) and their explanations are formulated as follows :

> *Paragraph (1)*
> *The provisions, as intended in Article 1 Paragraph (1), do not reduce the validity of the laws existing in society that determine that a person deserves to be punished, even though this law does not regulate the act.*
> *Explanation of Paragraph (1)*
> *What is meant by "law that lives in society" is Customary Law, which determines that someone who commits a certain act deserves to be punished. The laws that live in society in this article relate to unwritten laws that are still valid and developing in Indonesia. To strengthen the implementation of laws that exist in society, Regional Regulations regulate these customary delicts.*
>
> *Paragraph (2)*
> *The law that lives in society as intended in Paragraph (1) applies in the place where the law lives and as long as it is not regulated in this law and is in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic*

> *of Indonesia, human rights, and general principles recognised by the people of nations.*
> *Explanation of Paragraph (2)*
> *In this provision, what is meant by applicable in the place where the law lives is that it applies to every person who commits a customary delict in that area. This paragraph contains guidelines for establishing Customary Law, the validity of which is recognised by this law.*
>
> *Paragraph (3)*
> *Government Regulations regulate provisions regarding procedures and criteria for determining laws that exist in society.*
> *Explanation of Paragraph (3)*
> *The Government Regulations in this provision are guidelines for regions in establishing laws that live in society in Regional Regulations.*

In essence, Article 2, Paragraphs (1), (2), and (3) concerning the recognition of customary law as a principle of material legality, contains 3 core elements, namely:

1. **The definition of living law is narrowly defined as Customary Law.**
   In VI National Law Seminar (Jakarta, 25 – 29 June 1994), the definition of Customary Law, which is a translation of *living law*, includes:
   - In the sense that it is identical to Customary Law that applies in ethnic communities and customary law environments.
   - In the sense of a habit recognized by society and decision-makers so that it gradually becomes law (*gewoonte recht, customary law*).

   However, Article 1 Paragraph (1) has a narrow meaning, which is only Customary Law. Recognition of customary law is based on the idea of balance promoted in the 2023 Criminal Code, where in the context of the principle of legality, recognition of Customary Law is a

manifestation of the idea of balance between the principle of formal legality as formulated in Article (1) Paragraph (1) and the principle of material legality which formulated in Article 2 Paragraphs (1), (2), and (3).

2. There is recognition of customary delicts by criminalising them in PERDA

The principle of legality in criminal law is the principle that is the basis for the legitimacy of an act so that it can be punished; therefore, it is always followed by the unlawful nature of the act. The principle of formal legality contains the nature of being against formal law, where the nature of being against the law is interpreted as being against or contrary to the rules of law so that the legitimacy of an act is said to be against the law if the act has been formulated in law and is punishable by criminal law.

The reasons for eliminating the unlawful nature of acts that are formulated in the law as criminal acts are also in the law. Meanwhile, the principle of material legality provides the basis for punishing an act when the act is not desired by society because it is contrary to society's sense of justice and the values of law and justice adhered to by society. The principle of material legality contains the nature of being against material law (i.e. the nature of being against the law that is outside the law, such as conflicting with society's sense of justice, legal values and fairness in society) so that an action is said to be against the law if it is contrary to law. With a sense of justice and legal values in society even though it is not formulated in the law as a punishable act.

In the nature of being against the material law, there are two functions, namely the positive function, where the nature of being against the material law is used to positive or make acts that are outside the written rules a criminal act. Meanwhile, the negative function of the unlawful nature of material law is the function of the unlawful nature of material law to eliminate the unlawful nature of actions that are formulated in the law as criminal acts. In the negative function, the absence of material unlawfulness (*Aufweigheid Van Alle Materril Wederechtlijke*/AVAW) means that criminal acts formulated in statutory regulations have their unlawful nature removed, so they

cannot be punished. In criminal law enforcement, both the positive and negative functions of material unlawfulness are rarely applied.

The application of the principle of material legality as formulated in Article 1 Paragraphs (1), (2), and (3) of the 2023 Criminal Code only applies the nature of violating material law in a positive function, namely politicizing or determining unwritten customary delicts, which still exist and are developing becomes a criminal offence within the rules of state criminal law. Irregularities and errors in the policy of criminalizing customary delicts to become criminal acts in state law occur when unwritten customary delicts are formulated in Regional Regulations as state regulations in written form.[21]

Based on a critical analysis of criminalization policies, the criminalization of customary delicts in regional regulations is very inappropriate. This can be identified as the following problems:

1) **The problem of recognizing living law by formulating customary delicts in Regional Regulations**

Customary delicts originate from unwritten law, namely the decisions of customary judges, which are dynamic and plastic in nature, the measures of which quickly change and develop following the development of values of community law and developments over time. So, an act that was originally a customary delict at some point will change to no longer be a customary delict. Conversely, certain acts that were not previously recognized as customary delicts will be criminalized by customary courts to become customary delicts.

The formulation of customary delicts in regional regulations actually eliminates the distinctive nature of customary delicts, which are flexible, elastic, plastic, and not written. They become offences that are formulated in written regulations in the form of Regional Regulations so that they are rigid. Formulating customary delicts into regional regulations as state regulations is a wrong step that actually eliminates

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[21] Ni Putu Ari Setyaningsih and Putu Chandra Kinandana Kayuan, "Kompilasi Delik Adat Dalam Peraturan Daerah Sebagai Dasar Pemidanaan Dalam Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana (Ruu Kuhp)," *Jurnal Yustitia* 16, no. 1 (2022): 71–79, Doi:10.62279/Yustitia.V16i1.902.

Customary Law itself, even though it is formulated in local regulations as regional regulations where Customary Law exists.

Some of the criminal policy issues that arise in the formulation of customary delicts into Regional Regulation (PERDA) are as follows:

- Problems of decriminalization and reformulation of customary delicts in regional regulations;
- The issue of threatening criminal sanctions for customary delicts formulated in the Regional Regulation;
- The problem of the punishment system which is different between the punishment system in customary delicts and the regional regulation punishment system;
- The problem of shifting the nature of going against material law into the nature of going against formal law in the formulation of customary delicts in regional regulations.

2) Differences between the realm of Customary Law and Regional Regulations

As explained above, Customary Law is an unwritten legal rule that has a unique characteristic: It is very dynamic and plastic, so it is very easy to change following the development of values in society and the times. Customary Law is a law formed by indigenous peoples. Based on its formation, it is different from state law, which is made by state institutions and enforced on its citizens (up to the bottom).

The definition of Regional Regulations in Law Number 12 of 2011 concerning the Formation of Legislative Regulations consists of Provincial Regulations, namely legislation formed by the Provincial Regional People's Representative Council with the governor's approval, and Regency/City Regional Regulations, namely regional regulations formed by the Council. Regency/City Regional Representative with joint approval of the Regent/Mayor.

Article 7 of Law Number 12 of 2011 above positions regional regulations as state legislation in the last place after presidential regulations. The functions of regional regulations include others:[22]

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[22] Sari Dewi Oktara, ""Kewenangan Pengharmonisasian, Pembulatan, Dan Pemantapan Konsepsi Terhadap Rancangan Peraturan Daerah" (Universitas Jambi, 2025), 4, https://repository.unja.ac.id/76766/5/20250326130343phpZkWUdX.pdf.

1. As a policy instrument for implementing regional autonomy and assistance tasks;
2. When implementing higher laws and regulations, the regional regulations must not conflict with them.
3. It should be a container for regional specialties and diversity and channel the aspirations of the people in the region, but it must be based on Pancasila and the 1945 Constitution.
4. As a development tool in improving regional welfare.

Based on Law Number 12 of 2011 above, Regional Regulations can be identified as follows:[23]

1. Basically, regional regulations are administrative laws to support the implementation of regional autonomy and assistance tasks.
2. The criminal threat in the Regional Regulation is not the main threat but only a supporting sanction for administrative law.
3. The criminal threat contained in the Regional Regulation is a maximum imprisonment of 6 (six) months or a maximum fine of Rp. 50,000,000 (five tens of millions of rupiah).
4. Regional regulations can contain threats of imprisonment or fines in addition to the weight provisions above in accordance with statutory regulations.
5. Regional regulations can contain threats of sanctions, such as returning to the original state and administrative sanctions.

Based on the description above, regional regulations are administrative laws that carry out regional autonomy and assistance duties. In contrast, customary delicts, which are in the realm of customary law, are purely criminal acts in the context of Customary Law. Thus, it is not appropriate to formulate customary delicts into regional regulations as state law in the implementation of regional administration.

The formulation of customary delicts into state law is a form of Customary Law formalism; instead of providing a place and recognition

[23] Jihan Sopyana, Salsa Aulia Ratar Putri, and Siti Dewi Ratnasari, "Pencabutan Peraturan Daerah Oleh Pemerintah Pusat," *Jurnal Rechten : Riset Hukum Dan Hak Asasi Manusia* 3, no. 2 (2022): 15–21, Doi:10.52005/rechten.v3i2.84.

for Customary Law in modern national criminal law, what has happened is actually reconsolidating Customary Law.

3) The criminalization system for customary delicts is different from regional regulations

The criminal system is a building system for determining and imposing punishment. It consists of criminal principles and objectives, guidelines and rules, actions, and criminal and criminal responsibility.[24]

In Customary Law, the structure of the criminal system is very distinctive, different from the national criminal system, concluded by the author as follows:

- The Principle of Punishment for Existing Offenses prioritizes sources of unwritten law, which are plastic and elastic, regarding actions, mistakes and others in the context of customary delicts which are different from state criminal law (KUHP);
- The aim of criminalization for customary delicts, which is primarily to restore balance between the macro and micro cosmos, is very dominated by spiritual interests. This is very different from the aim of state punishment, which is dominated by protecting society from crime.
- Guidelines/Rules for Punishing Customary Delicts prioritize giving judges discretion in convicting perpetrators of customary delicts based on the community's conscience and sense of justice so that punishment is more flexible and does not rely on legal certainty.
- Customary delicts are determined through criminalization by traditional ancestors based on the belief that "pamali" or taboo acts damage human relations with spiritual beings so that they are not appropriate; they are believed to bring harm or disaster.
- Liability answers in customary delicts are aimed individually and structurally, with the main aim of restoring balance.
- Traditional sanctions are real sanctions and magical sanctions, such as traditional ceremonies and other sanctions, to restore disturbed spiritual balance.

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[24] Novandi Dwi Putra, Ilmi Firdaus Aliyah, and Dadang Syaifudin Yusuf, "Pembaharuan Hukum Pidana Positif (Positive Criminal Law Reform)," *Journal of Social Science Research* 3, no. 3 (2023), https://j-innovative.org/index.php/Innovative/article/view/2800/2044.

4) Limitations of Recognition of Customary Law

Not all Customary Laws that are still alive and developing are recognized by the 2023 Criminal Code, where Article 2 Paragraph (2) provides conditions for recognized Customary Laws in accordance with the values contained in Pancasila and the 1945 Constitution, Human Rights and general legal principles recognized by the people of nations. In the case of Customary Law criteria, which are in accordance with general legal principles recognized by nations, it can be biased because the legal values adopted by a nation are "nation-centric", especially in Customary Law, which has no relevance to international values. Thus, in legal recognition, custom is enough to use Pancasila, Human Rights, and the 1945 Republic of Indonesia Constitution as the margin of appreciation.

The filter criteria that limit the application of Customary Law above are a consequence of the shift from Customary Law to state law, which further states that government regulations regulate provisions regarding procedures, methods and legal criteria that exist in Customary Law. The next problem is what about customary laws that are not covered by government regulations because they are located far inland? What are the consequences of Customary Law not being recognized by the state? Is it still valid? This requires further thought

B. Reformulation Customary Law in Article 2 Paragraph (1), Paragraph (2), and Paragraph (3) of the 2023 KUHP

The recognition of Customary Law as a source of material criminal law in the KUHP 2023 should be returned to the nature of Customary Law, as original law resulting from the culture of Indigenous communities that are different from each other, unwritten, dynamic, plastic and easy. Changes according to the values that develop in Indigenous communities, it is not appropriate to recognize Customary Law as a source of material criminal law with the policy of formulating customary criminal acts into PERDA (Regional Regulations) as state regulations. A policy like this is the same as the policy implemented by the Dutch East Indies Government, where Article 131 IS Jo AB provides the validity of the application of Customary

Law but with certain notes, where Article 131 IS Jo AB can be referred to as the Article Controlling the application of Customary Law, in where if it is not desired to come into force, then certain Customary Laws cannot apply.

The best way out in recognizing Customary Law as a source of material criminal law can be done as follows:

1. Formulate customary law as a source of law by formulating customary delicts as formulated in Article 5 Paragraph (3) Sub b of Law Number Drt of 1951 on Temporary Measures to Implement Unity Composition of Powers and Procedures of Civil Courts.
2. Formulate guidelines for the criminalization of customary delicts in accordance with policy and Supreme Court jurisprudence, namely Supreme Court Decision No.1644 K/Pid/1988.
3. Making Article 2 Paragraphs (1), (2), and (3) only as the rule of recognition of the application of Customary Law.

Conclusion

From the description of the problems that have been discussed, the following conclusions can be drawn:

1. Based on a study of penal policy analysis, formulating customary delicts into Regional Regulations is very inappropriate. From a policy perspective, the formulation distorts the nature of customary delicts as unwritten rules. From a criminal system perspective, the differences between the systems are very different punishments in customary delicts (consisting of Criminal Acts, Mistakes, Criminal Liability, Purpose of Punishment, and Sentencing Guidelines) with the state criminal system, let alone regional regulations. Judging from the criminal sanctions, it is unequal if customary delicts are formulated in the Regional Regulation. The criminal sanctions follow the criminal sanctions in the Regional Regulation, which are very limited, so they cannot reach customary delicts, which Indigenous peoples threaten with heavier customary sanctions.
2. The most likely thing to accommodate Customary Law in the 2023 Criminal Code is that Customary Law is only used as a source of law,

and Article 2 Paragraphs (1), (2), and (3) only become rules for recognizing of customary law to apply as is.

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