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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

[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

[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 Scientia* 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

[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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