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LEGAL POLITIC OF THE FORMATION OF INDONESIAN NATIONAL CRIMINAL CODE (*KUHP*)[1]

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Abstract

Legal politic is a policy of legislation through the stages of formulation/formulation that is the drafting of a regulation both the rules in general and the special rules of criminal by the legislator in this case the legislator with the Government. The errors or weaknesses of the legislative policy are part of a strategic error that can be an obstacle to prevention and crime prevention at the Judicative and Execution stage. The political formation of the future Penal Code does not only deal with the substance of law, the legal structure but rather focuses on the legal culture based on Pancasila as the basis of the State. Renewal of criminal law is more directed to actions in the form of a series of prohibited acts, criminal/false responsibility and punishment system. The method used is mix method consisting of Juridical-Normative legal writing method and collaboration of Juridical-Empirical. The results of this study are the politics of the formation of the National Criminal Code, referring to the Neo-Classical School thought that maintains a balance between the objective (*Actus Reus*) and Subjective (person/soul/mind/*Mens rea*) and actually the form of Political law is Unification and codification of law, Supremacy of law, Renewal of national law, Eliminating legal dualism, Increasing legal awareness and legal culture, Firm enforcement is firm, consistent, and non -discriminatory.

Keywords: Legal Politic, KUHP, Constitution of the State of the Republic of Indonesia of 1945

I. INTRODUCTION

Based on the historical dimension, there are many applicable regulations in the form of Civil Code (*BW*), Trade Code, or the provisions of colonial inheritance legislation that is still and is being used by the Judiciary to regulate the order of life of the people of Indonesia. In other words, Law enforcers use the Colonial Product Rules to colonize back the nation's children who should have been independent seventy three years ago.

Special Criminal Code, known in Indonesia as *KUHP* currently applicable is the Criminal Code of the Republic of Indonesia since January 1, 1918, but after the indepence of Indonesia, *KUHP* is validly applicable through the Act no. 1 of 1946 (has been amanded and adjusted to the needs of the people of Indonesia and subsequently the Criminal Code which declared generally (unification of criminal law) since then until now has not been made change. It must be acknowledged that has been much effort to adjust the Dutch colonial heritage law in the presence of the State of RI (Republic of Indonesia) as an independent state and with the development of other social life, both nationally and internationally.

The effort by making the Act which amend part of Article in *KUHP*, among others Law no. 4 of 1976 by amending and adding several articles of expansion of the enactment of the Criminal Code and crimes against aviation facilities/infrastructures, Law no. 27 of 1999 on Crimes Against State Security, Law no. 3 of 1971 replaced by Law no. 31 of 1999 Jo Law no. 20 of 2001 related to corruption, Law no. 15 of 2003 on Terrorism, Law no. 8 Year 2010

1. Simon Nahak, Political Law for the Establishment of the National Criminal Law Cukes in Indonesia, Paper presented in the framework of Comparative Study of Postgraduate Students of MIH Unwar with Students of MIH FH. UNTAR Jakarta and the Indonesian Constitutional Court in Jakarta Thursday, February 8 2018

related to Money Laundering, and so on.

The Politics of the Establishment of the National Criminal Code in principle is not only partial but must meet the demands of four masses of fundamental changes namely; decolonization, democratization, consolidation and harmonization.

Along with the development of science and technology, the types of criminal acts are increasingly developed such as economic crime, corruption, money laundering, criminal acts of taxation, illegal logging, illegal fishing, narcotics, human trafficking, state security crimes, crime of extradition, crime of *mayantara* (cyber crime), terrorism, blasphemy on religion, sexual crimes, tourism envi- ronmental crimes, the growing urgency of the change of the Criminal Code becomes a necessity for reform of the National Criminal Code.

The description proves that there are many public crimes as well as new special criminal acts which of course must be immediately regulated by the establishment of legislation that is appropriate to the state of Indonesian society. Based on the description of the background, there are two problems in discussed in this paper as formulated below: first is the politics of criminal law establishment in Indonesia and second is the realization of legal politics in Indonesia.

II. METHOD

The method used in the writing of this paper is a method of mix method consisting of Juridical-Normative legal writing method and collaboration of Juridical - Empirical.

Peter Mahmud Marzuki writes that the range of studies using the *normative approach* is: statute approach, case approach, historical approach, comparative approach, conceptual approach[2]. In line with Peter Mahmud Marzuki, J. Ibrahim also wrote his opinion but added an analytical approach (analitycal approach), philosophical approach (philosophical approach)[3]. The approach used is the legislative approach, conceptual approach, historical approach, analytical approach and philosophical approach.

Valerine J.L. Kriekhoff, a retired Supreme Court Justice of the Republic of Indonesia wrote that: The Application of Normative Law Research in Criminal Law applies normative legal research; in criminal law studies related to:

A. Learning objectives in each strata of law education, for example in Strata 1/S-1 lecture weight is on the basic concepts in legal science ("*begrip*') and practical aspects (as a foundation to the profession), so that research is more descriptive and prescriptive. Illustrations in this case see the application of criminal provisions in court decisions, so the approach is on legal dogmatic (positive law) and criminal law (legal theory in the strict sense). Students are required to use legal reasoning in analyzing, for example by reviewing criminal provisions in the law by taking into account the principles in legislation and requirements of law formation and in this stratum the student is expected to apply the approach interdisciplinary (theory in the broad sense) eg Criminology. In doctoral program, students are expected to conduct philosophical studies, for example by reviewing criminal provisions in the law by analyzing its philosophical basis, its ontology basis and its legislation ratio;
B. The scope of legal research, within this scope of criminal law research can be conducted or covers:
    1. Legal concepts such as the concept of "right of self determination" or the concept of "Whistle Blower" and research on the principle of law, for example the principle of "presumption of innocence"
    2. Historical studies which may include legal history (d.h.i criminal law), or history of

2. Peter Mahmud Marzuki, *Penelitian Hukum*, Jakarta: Kencana Prenada Media Group, 2006
3. Johny Ibrahim, *Teori dan Metodelogi Ppenelitian Normatif*, Malang Bayu Media Publshing, 2006

legislation;

3. Case studies, by tracing the 'decidendi ratios' in decisions or analyzing 'heteronomic' or 'autonomy"[4] in a decision based on the "Legal Discourse Theory" or Theory of Legal Argumentation".[5]
4. Comparative studies that may include comparative law enforcement papers in some countries (such as the Corruption Eradication Commission) comparisons of laws (such as the Juvenile Justice Act, Money Laundering);
5. Analytical research, for example, analyzes the Criminal Concept of Act Against the Law in environmental crime cases, or the concept of 'discretion' in corruption committed by state officials;
6. Theoretical approaches, such as research on the theory of punishment (or which can be combined with philosophical and comparative research - as in the civil law and common law.[6]

In addition to the Normative Juridical method, the Juridical Empirical method is also used as a collaboration because it is de facto in line with the development of the globalization era that various crimes occur in the community but the regulation is still needed to regulate the communal order in society, so that the Criminal Code reform is not only related to legal substance and structure law but there needs to be a renewal of legal culture.

The method of mix method is the collaboration between normative law research methods and empirical law research is not only limited to the two methods of legal research but also the way to get the results of collaborative research between law and other sciences such as Tax Science, Economics, Political Science, Science Culture, Anthropology, Other Social Sciences, hygiene, exact science and science that developed in the era of technology support the process of forming a legislation.[7]

The description confirms the method used in this paper is the method of juridical-normative writing as described by Peter Mahmud Marzuki, Johny Ibrahim and Valerine J.L. Kriekhoff above.

The choice of juridical-normative method of writing is used to observe the empty legal normality, blurring or conflict in this description because so far the State of Indonesia does not have a National Criminal Code so that when examined from the juridical-normative aspect there is an empty penorma that is legal norm in the form of legal substance which is altogether has not been regulated in the Criminal Code, Law Norms are blurred that is in the Criminal Code is still vague Legal norms such as; in the formulation of the Criminal Code II the arrangement has not yet used the "minimum formulation but still using the maximum formulation, punished forever", there has been no formulation "sentenced to at least umpteen years and/or fine the amount of Rupiah "And the conflict of legal norms that is still there is insynchronization between the Act with the Constitution, between the Act with the Act or between the Act under it with the Law above in a hierarchy of Legislation - invitation. In addition empirically there is a gap between the legal theory/legal norms that have been regulated in legislation with reality in society or often referred to by the term (das sein with das solen).[8]

4. G.J. Wiarda, *Drie Typen van Rechtsvinding*, Zwolle: Tjeenk Willink, 1980
5. Jurgen Hubermas, *Between Facts and Norms*, Great Britain, Polity Press, 1996
6. Valerine J.L. Kriekhoff, *Penelitian Hukum Normatif Dalam Hukum Pidana*: Metode dan Aplikasinya, dalam buku Demi Keadilan Antologi Hukum Pidana dan Sistem Peradilan Pidana 6 Dasawarsa Harkristuti Harkrisnowo, Jakarta : Pustaka Kemang, 2016, p. 527-529
7. Simon Nahak, Politik Pembentukan Kitab Undang-Undang Hukum Pidana (KUHP) Nasional di Indonesia, Makalah Studi Banding, *Op. Cit.*, p. 5
8. Simon Nahak, Ibid., p. 6

III. DISCUSSION

A. Political Formation of Criminal Law in the Indonesian Criminal Code

Barda Nawawi Arief writes, in a seminar on the National Law Reform Review organized by the National Legal Development Board (in Indonesian abbreviated *BPHN*); on the date 14 - 16 June 1982 has been agreed by the team from the study of Criminal Law.

"Criminal law contains three issues concerning, prohibited conduct, prohibiting, and criminal. Based on such thoughts, in Chapter II there is a separate chapter on "Criminal Acts and Criminal Accountability" (Chapter II) separated from the Chapter on "Criminal, Action and Criminal Act", Chapter III is based on the systematic division between "Criminal Acts and Criminal Accountability ", In Chapter II there are separate chapters on" criminal acts "with chapters of error", as well as separate chapters on "justification" and "excuses of forgiveness".[9]

Based on the opinion of the criminal law expert, then in the draft National Criminal Draft only recognize two books are book I on General Provision and second book about Criminal Act. So from Politics of Law, Legal Policy, Politic of Legislation, Politic of legal Products, Politic of law Development, Politic of law enforcement, Politic of Jurispridence, there are some changes in the National Criminal Code is aimed at a single mission that implies the "decolonization" of the Criminal Code in the form of "recodification", but later in the era of national and international development the second mission is the mission of "democratization of criminal law" which among others is marked by the entry of criminal acts against Human Rights, and the abolition of a crime of obliteration of hostility or hatred (*Haatzaai-articleen*) which constitutes a formal criminal act and re-formulated as a criminal act of contempt which is a material offense. The third mission is the mission of "consolidation of criminal law" because since the independence of criminal law legislation has experienced rapid growth both inside and outside the Criminal Code with various peculiarities, so it needs to be reorganized within the framework of Principles of Criminal Law set forth in Book I of *KUHP*. Furthermore, the fourth mission is "adaptation and harmonization" to various legal developments that occur both as a result of developments in the field of criminal law science as well as the development of values, standards and norms recognized by civilized nations in the international world.[10]

The politics of the establishment of the National Criminal Code refers to the Neo-Classical School thinking that maintains a balance between objective factors (Actus Reus) and Subjective factors (person/soul/mind attitude/Mens rea), so that the focus of attention is not only on the crime in the form of a series of actions that occur, but also on the individual aspects of the perpetrators of criminal acts (*Daad-dader-Strafrecht*), as well as against victims of crime (victimology), thus affecting the formulation of three criminal law issues namely the formulation of the anticorruption law, criminal liability or misconduct and sanctions in a criminal punishment system and actions.

The targets to be achieved in the political establishment of the National Criminal Code in the form of legal products (legal products) Act no. ... .The year ... about the Criminal Code is:

1. Ensure legal certainty, creating benefit and justice in the criminal prosecution process;
2. The punishment process is not meant to narrate and degrade human dignity;
3. Increasing public confidence in the seriousness of the government in solving legal conflicts within the community while upholding legal norms
4. As one of the government's efforts in promoting respect for human rights values; and

9. Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana Perkembangan Penyusunan Konsep KUHP Baru, (*Jakarta: Penerbit Kencana Predana Media Group, 2010), p. 98-99
10. Term of Reference Working Visit of Commission III of the House of Representatives to Bali Province Related to Discussion of Draft Law of the Republic of Indonesia on the Criminal Code Law, Commission III of the House of Representatives of Indonesia Republic 2016 p. 3-4

5. Strengthening Law enforcement and supremacy in Indonesia.[11]

Some of the main issues that to date require review are:

1. The application of the legality principle set forth in Article 2 of the Criminal Code Draft which recognizes the living law in society. In the course of the debate, some argue that it is necessary to compile the customary law and living laws of that society so that there are boundaries that provide legal certainty, which is also the essence of the legality principle;
2. Reorientation of the criminal responsibility system that is oriented to the perpetrator. He also recognizes new things such as misconduct and crime preparations, criminal acts and the purpose of crime;
3. Changes to criminal and criminal punishment systems with single and alternative formulation. In this case the recognition of *the double track system* in the punishment system, namely the subject of criminal law may be subject to additional criminal, which is adapted to the development of criminal law regarding punishment system or punishment against certain offender;
4. The existence of new types of criminal punishment systems such as criminal supervision and social work as well as additional criminal adjustments that have been developed in other legislation such as the payment of indemnity and the fulfillment of customary obligations that are still the pros and cons;
5. Got input related to the development of criminal acts or conventional crime that is currently regulated in the Criminal Code and criminal acts that developed outside the Criminal Code that need to get a response and the direction of criminal law policy.[12]

The description emphasizes that the specific principle of legality is not only discussed by law living in society based on legal substance, but must be studied and observed from the legal culture of the local community. Examples of problems of cockfighting (*taburah*) in Bali, (*Futu Manu*) in Timor, in the Criminal Code are prohibited but customarily permit. Similarly, the issue of sexual harassment between adults against children and/or underage persons is regulated, but sexual harassment against adult human beings against adult men, men against men or women against men, or sodomy/pedophilia is legally substance not regulated.

The punishment system in the Criminal Code is not subject to minimum penalty but the maximum penalty, so it does not guarantee justice and legal certainty because there is a lack of legal norm.

B. The Realization of Political Law

Actually the form of Political law is Unification is the unification of the law that applies nationally and the codification of law is the legal bookkeeping in the form of legal writing into a Book of Law, Supremacy of law is an effort to provide guarantee of the realization of justice by upholding the principle of equality before the law, Renewal national law is an attempt to review and reform (reorientation and reform of Criminal law).

Furthermore, it is necessary to abolish the dualism of the law into secularism in criminal law, to raise the consciousness of the law as the consciousness or values contained within man about existing law and the expected law and legal culture of the same general response of certain societies to the legal phenomena usually influenced by non-legal factors such as values, attitudes and views of the community called culture, firm, consistent, and non-discriminatory law enforcement.

Law enforcement as regulated in Article 1 paragraph (3) of the 1945 Constitution of the

11. Ibid, p. 5
12. Ibid., p. 6

Republic of Indonesia determines "Indonesia is a State of law".[13] So in the political dimension of law enforcement, law enforcement must be consistent and not discriminative in the form of unfair service.

IV. CONCLUSION

A. Coclusion

The Politics of the Formation of the National Criminal Code, referring to the Neo-Classical School thought that maintains a balance between the objective (*Actus Reus*) and Subjective (person/soul/mind/*Mens rea*) , so that the focus of attention is not only on the crime in the form of a series of actions that occur, but also on individual aspects of the perpetrators of criminal acts (*Daad-dader-Strafrecht*), as well as victims of crime (victimology), thus affecting the formulation of three criminal law issues namely the formulation of unlawful acts, criminal liability or mistakes and sanctions in criminal punishment system in the form of criminal action.

Actually the form of Political law is Unification and codification of law, Supremacy of law, Renewal of national law, Eliminating legal dualism, Increasing legal awareness and legal culture, Firm enforcement is firm, consistent, and non-discriminatory

B. Suggestion

In fact, the ultimate objective of the law is Justice and Legal Certainty so for the realization of the aims of the law, the Political Establishment of the National Criminal Code is urgent to be renewed so that there will be no void of legal norms, obscurity of legal norms and conflict of legal norms.

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13. Article 1 paragraph (3) of the 1945 Constitution of the State of the Republic of Indonesia

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Legislation

Constitution of the State of the Republic of Indonesia of 1945

KUHP (Criminal Code)

Book of Criminal Procedure Code

Draft of the Criminal Code of 2016