

JURIDICAL REVIEW OF PENAL POLICY IN HANDLING NARCOTICS IN INDONESIA

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Abstract

This study aims to analyze the penal policy in tackling narcotics in Indonesia. The method used is juridical normative. The results showed that efforts to tackle criminal acts of narcotics abuse have two ways, namely using non-penal means or preventive measures (preventing before the crime occurs) and penal measures or repressive actions (after the crime has occurred). Repressive measures are all actions taken by law enforcement officials in response to the occurrence of a crime or criminal act, including repressive measures are investigations, prosecutions, and even crimes. Indonesia in its efforts to tackle criminal acts of narcotics abuse has formed a legal product to deal with this problem, including the issuance of Law Number 22 of 1997 concerning Narcotics which has been amended by Law Number 35 of 2009 concerning Narcotics. Apart from these laws, there are also other regulations, both in the form of ministerial regulations, regulations from the head of the BNN, as well as joint decrees between the minister, the head of the BNN and the head of the Indonesian National Police.

Keywords: Judicial Review, Legal Policy, Penal Policy, Criminal Law, Narcotics Handling.

A. INTRODUCTION

Narcotics abuse has now reached an appalling condition. Narcotics that were originally needed for treatment, in their development then actually cause addiction (*addiction*) to sufferers or victims. One form of development of narcotics abuse is the illicit trafficking of narcotics. Drug crime in all its forms is one of the international crimes and endangers mankind.¹

Currently, the Indonesian people and even the world community in general are faced with a very worrying situation due to the increasingly widespread illegal use of various narcotics. This concern is increasingly felt due to the widespread illicit circulation of narcotics in the community this will greatly affect the life of the nation and the next state, because the younger generation is the successor of the ideals of the nation and state in the future.

Indonesia, which was originally a transit country for narcotics trafficking, has now been used as a destination area for operations by the International Narcotics network. The high rate of drug abuse is also contributed by the actions of narcotics syndicates. Most of the abuse is in the trial group, especially in the working group. The reason for the use of narcotics due to hard work, socioeconomic ability, and environmental pressure of coworkers are factors triggering the occurrence of drug abuse in the group of workers.²

Statistical data accessed from the official website of the National Narcotics Agency of the Republic³ of Indonesia shows reports of narcotics abuse cases in Indonesia reaching from 2011 to 2018 as many as 14,010 cases of narcotics abuse, with narcotics evidence as many as 20,470,386. If interpreted in rupiah, evidence of narcotics assets reaches 5,879,844,418,373 rupiah. This data shows that narcotics abuse in Indonesia is very high and needs serious attention by the State.

Smuggling of narcotics entering the State of Indonesia from abroad is increasingly rife. A joint task force of the Directorate of Narcotics Crime, Criminal Crime, Criminal Investigation of the National Police and Customs uncovered the smuggling of 1.8 tons of methamphetamine from a Singapore-flagged ship in Riau Islands waters on Tuesday, February 20, 2018, the disclosure of methamphetamine was the largest disclosure previously, on February 7, 2018 the National Narcotics Agency (hereinafter referred to as BNN) seized 1.3 tons of methamphetamine from the Singapore-flagged MV Sunrise Glory. The ship was captured by the Indonesian Navy at KRI Sigurot 864 in the waters of the Philips Batam strait of Riau Islands, which is suspected of smuggling also carried out from Taiwan.⁴

Commissioner General of Police Budi Waseso,⁵ who at the time served as Head of the National Narcotics Agency of the Republic of Indonesia, said that methamphetamine that failed to be smuggled was only a small part of the total narcotics entering Indonesia, according to him only 10 percent of the total infiltrated in Indonesia. BNN admitted that 5 (five) tons were missed through the same route by the same ship. In its 2017 year-end report, BNN reported two of the largest disclosures, namely 1.2 million ecstasy pills from the Netherlands on July 21, 2017 and 1 (one) ton of methamphetamine in Anyer on June 13, 2017. While in early 2018 it has succeeded in uncovering 2 smugglings which within 2 (two) weeks succeeded in uncovering the smuggling of 3.1 tons of methamphetamine allegedly from Taiwan.

Seeing the increasing development of criminal acts in the field of narcotics and the impact caused by the abuse and illicit circulation of narcotics is very dangerous for the life of the nation and state, especially for the sustainability of the growth and development of the younger generation, the international community including the Indonesian nation as part of the international community began to think seriously and pay considerable attention in preventing and eradicating acts narcotics crime.

Countermeasures against drug abuse must be seen in a broad context, namely in the frame of criminal policy or criminal law policy. According to Barda Nawawi Arif, implementing criminal law policy means holding elections to achieve the best results of criminal legislation, in the sense of fulfilling the requirements of justice and usefulness.⁶

B. METHOD

The study method used in this study is normative legal research, which is a study conducted by examining certain legal problems based on the implementation of applicable laws and regulations or applied to a legal case.⁷ The research approach used is the Legislation approach and the Conceptual Approach.⁸ The research source used in this study is the result of data collection carried out with primary data and supported by *library research*. Secondary data are then grouped into three sources of legal materials used in this study are primary legal materials, secondary legal materials, and tertiary legal materials. Research techniques are descriptive analytical, analysis critically using various theories of research problems.

C. DISCUSSION

1. Penal Policy in Indonesia

Criminal law policy means how to seek or make and formulate a criminal law best, which contains how far applicable criminal provisions need to be changed or updated, what is done to prevent criminal acts, and how investigation, prosecution, trial and criminal implementation must be carried out.⁹

Criminal law policy is part of national legal politics which has different parts. Nevertheless, the implementation of criminal law policy can occur jointly from all parts in an integrated manner. The parts of the national legal politics include Criminalization Policy, *Punishment Policy*, *Criminal Justice Policy*. Criminal law policy is essentially an effort to realize criminal laws and regulations to be in accordance with circumstances in a certain time (*Ius Constitutum*) and *the future* (*Ius Constituendum*). As a logical consequence, criminal law policy is synonymous with penal reform in the narrow sense, because as a system, criminal law consists of culture, structure and *substantive law*.¹⁰

Efforts to overcome criminal acts are known as criminal policies which in foreign literature are often known by various terms, including *penal policy*, *criminal policy*, or *strafrechtspolitik* is an effort to suspend crime through criminal law enforcement, which is rational that meets a sense of justice and usefulness. In order to overcome crimes against various means as a reaction that can be given to perpetrators of crimes, in the form of criminal and non-criminal law facilities, which can be integrated with one another.

If criminal means are chosen to overcome crime, it means that criminal law politics will be carried out, namely holding elections to achieve criminal legislation results that are in accordance with the circumstances and situations at a time and for the future.¹¹ the implementation of criminal law politics must go through several stages, namely:

a) Formulation Stage

Namely the stage of criminal law enforcement in abstracto by law-making bodies. In this stage, lawmakers carry out activities to choose values that are in accordance with current and future circumstances and situations, then formulate them in the form of criminal legislation to achieve the best legislative results in the sense of meeting the requirements of justice and usefulness. This stage is called the Legislative Policy Stage.

b) Application Stage

The Application Stage is the stage of criminal law enforcement (the stage of application of criminal law) by law enforcement officials ranging from the Police to the Court. In this stage, law enforcement officials are tasked with enforcing and implementing criminal laws and regulations that have been made by lawmakers. In carrying out this task, law enforcement officials must adhere to the values of justice and usability this stage can be referred to as the judicial stage.

C) Execution Phase

The Execution Stage is the stage of concrete enforcement (implementation) of the Law by criminal implementing officials. In this stage, criminal enforcement officials are tasked with enforcing the Criminal Laws and Regulations that have been made by the lawmaker through the Criminal Application that has been stipulated in the Court's decision.

In carrying out the punishment stipulated in the Court Decision, the criminal implementing officers in carrying out their duties must be guided by the Criminal Laws and Regulations made by the lawmaker and the values of justice of a usefulness.¹²

Examining the politics of criminal law will be related to legal politics. Legal politics consists of the word *Politics* and law. According to Soedarto, the term politics is used in various meanings, namely¹³.

- 1) The word *politiek* in Dutch means something related to the state;
- 2) Means to talk about state or state-related issues.

Sudarto further emphasized that another meaning of politics is policy which is a synonym of policy. In this sense, words such as political economy, criminal politics, legal politics and criminal law politics are found.¹⁴ the relationship between politics and law, Mahfud explained that law is a product of politics. Law is seen as a *dependent* variable and politics as *an independent variable*. With such assumptions, Mahfud formulated¹⁵ legal politics as legal policies that will or have been implemented nationally by the government; includes also understanding how politics affects law by looking at the configuration of power behind making and enforcing the law. Here law cannot only be viewed as articles that are imperatives or imperatives, but must be viewed as a sub-system that in reality is not impossible to be determined by politics, both in the formulation of material and articles as well as in their implementation and enforcement.

According to Solly Lubis, legal politics is a political policy that determines what legal regulations should apply to regulate various matters of public and state life.¹⁶ On that basis, Sudarto said, legal politics is state policy through authorized bodies to implement desired regulations that are expected to be used to express what is contained in society and to achieve what is aspired to.¹⁷

In order to express the values contained in society, of course, it is not only based on juridical doctrinal views, but also includes functional views. In this regard, Paul Scholten¹⁸ rejects Hans Kelsen's view that legal decisions are nothing but logical processing of positive materials, namely laws and verdicts. According to Scholten, positive ingredients are historically and socially determined. The enactment of a law is a historical event that is the result of a series of facts that can be determined socially. Therefore, the purity of the science of law always contains something impure from its ingredients. If this is not done then according to Scholten, the science of law will be a bloodless being.

Criminal Politics or *Criminal Policy*, according to Marc Ancel can be given the understanding as *The Rational Organization of the control of crime by Society*.¹⁹ This definition is no different from the view of G Peter Hoefnagels, who states, *Criminal Policy is the rational organization of the social reaction to crime*.²⁰ This means, criminal politics can be formulated as a rational effort of the community in non-criminal countermeasures.

Criminal law politics (at the micro level) as part of legal politics (at the macro level), in the formation of laws must know the value system that applies in society, which relates to the situation in the proposed ways and with the goals to be achieved so that these things can be taken into account and respected.²¹ If this is the case, then according to Sudarto, carrying out criminal law politics means efforts to realize criminal legislation that is in accordance with circumstances and situations at a time and for the future. Sudarto further stated:²²

The formation of laws is a social process and a political process that is very important and has a broad influence, because this will give money and regulate or control society. These laws are used by rulers to achieve and realize certain goals.

Thus, it can be said that the law has two functions:

- 1) Functions to express values; and
- 2) Instrumental function.

According to Sahetapy, the role of law with a functional approach is not the same as law which acts as a mere instrument. Approach functionally, the law in its application must be directed to achieve the goal from which the law originated. If the law in Indonesia originates in Pancasila, then every product of legislation cannot be separated from the source, namely from where the law is animated, perceived and in its elaboration or manifested in its manifestation form must always breathe Pancasila. Otherwise, the law no longer functions in its true sense and is therefore more accurately referred to as an instrument. The law in this sense is only for the sake of certain interests that are not at all imbued with the spirit and idealism of Pancasila.²³

Sudarto referring to the results of a symposium on public legal awareness during the transition period, held in Semarang on January 20-23, 1975 wrote, countries that after World War II had gained independence tried to carry out modernization measures in their respective countries, With these steps, there has been a process of community development covering the economic, social, political and cultural fields.²⁴ According to Sudarto, modernization can be interpreted as a process of adjustment to the state of the world constellation at that time, if the overall relationship of politics is criminal. According to Sudarto, criminal politics can be given a narrower, broader and broadest meaning.²⁵

- a) In a narrow sense, criminal politics is described as the whole set of principles and methods on which the reaction to criminal lawlessness is based;
- b) In a broader sense, criminal politics is the entire function of the law enforcement apparatus, including the workings of the courts and police;
- c) In its broadest sense, criminal politics is the entirety of policies carried out through legislation and official bodies aimed at enforcing the central norms of society.

According to Sudarto, enforcement of these central norms can be interpreted as crime prevention. Carrying out criminal politics means holding elections from many alternatives, whichever is most effective in crime fighting efforts. In another part, Sudarto also stated that carrying out criminal law politics also makes choices to achieve the best results of criminal legislation in the sense of fulfilling the requirements of justice and usefulness. To achieve effective and effective results, policymakers can make use of the information provided by criminology, and ignoring this information will lead to the formation of non-functional laws.²⁶

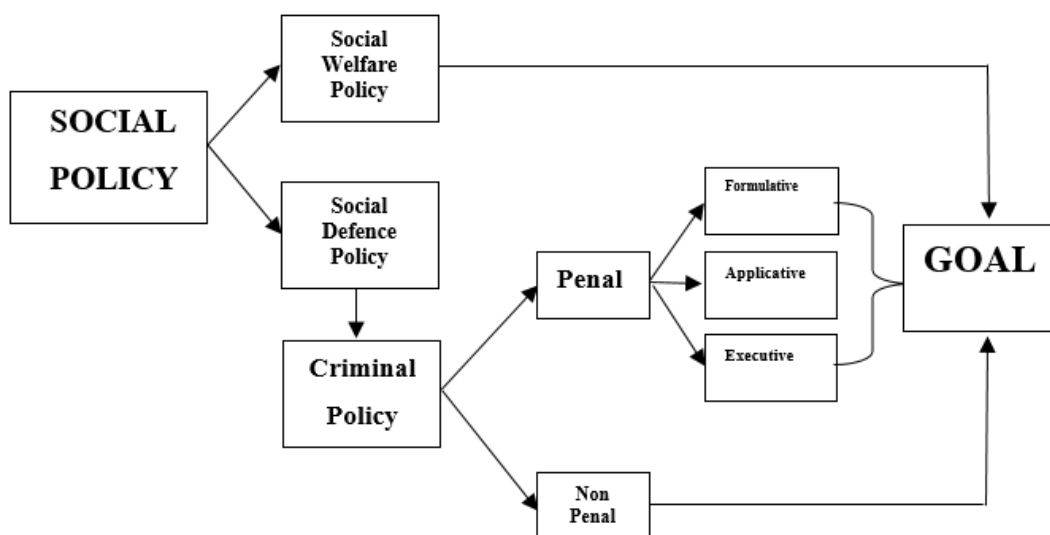
Sudarto's view above, in line with Marc Ancel, according to him, *in modern science has primary three essential components: Criminology, Criminal Law, and Penal Policy. Criminology, studies crime in all aspects. Furthermore, Criminal Law explains and applies positive rules on people's reactions to the phenomenon of crime. Penal Policy as both a science and an art has a practical purpose, primarily to enable positive regulations to be better formulated and to guide not only legislators who draft criminal legislation, but also the courts where those regulations are applied and the administration of prisons (Prison Administration) which has a practical influence on court decisions.*²⁷

Criminal politics or non-criminal countermeasures policies can cover a broad scope, this means that criminal politics can be formulated as a rational effort from the community in tackling criminal acts, as stated by G. Peter Hoefnagels that criminal *policy* can be pursued through 3 (three) ways, namely:²⁸

- 1) *Criminal Law Application;*
- 2) *Prevention Without Punishment;*
- 3) *Influencing Views of society on crime and punishment.*

Criminal control policies can be grouped into 2 (two) types, namely criminal rehandling policies using criminal legal facilities (Penal Policy) and criminal countermeasures policies using means outside the criminal law (Non Penal Policy). The main target of non-penal policy is to deal with and eliminate conducive factors that cause a criminal act.²⁹

Related to crime reduction policies as referred to above, can be illustrated through the following chart.



Penal policy is known as "Criminal Law policy" or "criminal law politics" Marc Ancel argues, Penal Policy is a science as well as an art that has a practical purpose to allow positive legal regulations to be better formulated and to provide guidance to lawmakers, courts that apply law. The criminal law policy is one component of Modern Criminal Science in addition to Criminology and Criminal Law.³⁰

Penal Policy or political (policy) criminal law is essentially about how criminal law can be well formulated and provides guidance to lawmakers (legislative policy), application policy (Judicial Policy) and criminal law implementation (Executive Policy). Legislative policy is a very decisive stage for the next stages, because when criminal legislation is made, it has determined the direction to go or in other words, what actions are considered necessary to be made as an act prohibited by criminal law. This means it concerns the criminalization process. Criminalization according to Soedarto is the process of determining a person's actions as punishable acts. The action was threatened with the formation of a law with a criminal sanction.³¹

In this regard, Barda Nawawi Arif stated,³² "policies to make good criminal laws and regulations cannot be separated from the purpose of tackling crime". Meanwhile, the definition of crime reduction according to Mardjono Reksodipoetro is an effort to control crime to be within the limits of community tolerance.³³ Furthermore, Barda Nawawi Arif³⁴ said that the crime reduction policy with criminal law, in essence, is part of the criminal law enforcement policy. Therefore, criminal law politics is part of crime reduction policies through making criminal laws and regulations which are an integral part of social politics. According to Barda, social politics can be interpreted as all rational efforts to achieve community welfare and at the same time include community protection.³⁵

If criminal politics uses criminal law politics, then criminal politics must be a deliberate and conscious move. Choosing and establishing criminal law as a means of tackling crime must take into account all factors that can support the functioning or functioning of criminal law in reality.³⁶

Therefore, the ongoing criminalization process must be evaluated because as Bruggink wrote translated by Arif Sidarta³⁷:

Today one may complain that assigning the rule of law has the opposite effect than intended. Initially, the rule of law was intended to regulate social life in a better way, but the rules of law actually suffocated social life, by shackling creativity and spontaneity too much.

To further clarify, Bruggink gives an example of the legal rules that concern the relationship between parent and child. If the government sets more rules, there is a possibility that the core relationship between parents and children will be depressed. For this reason, according to him, insight into the role of legal methods in society is needed as a starting point.³⁸

Soedarto³⁹ said, carrying out criminal law politics means holding elections to achieve the best legislative results in the sense of meeting the requirements of justice and usefulness. On another occasion, it was also stated that carrying out criminal law politics has the meaning of an effort to realize criminal laws and regulations that are in accordance with circumstances and situations at a time and for the future.

In essence, criminal law policy (*penal policy*) can be functionalized and operationalized through several stages, namely the formulation stage or legislative policy, the application stage or judicial policy and the executive stage or administrative policy.⁴⁰

2. Penal Policy in Narcotics Prevention in Indonesia

Crime reduction policies will be meaningless if development policies or social policies will actually cause criminogenous and victimogenic factors. Integral policies undertaken with an emphasis on reducing or eliminating conditions that could give rise to crime received serious attention from the 7th United Nations Congress in 1985. It is explained in the congressional document "*Crime prevention in the txt context of development*" (document A/CONF.121/L.9), that efforts to eliminate causes and conditions that can give rise to crime must be "*the basic crime prevention strategies*".

Efforts to overcome drug abuse have two ways, namely using non-penal means or preventive measures (preventing before a crime occurs) and penal or repressive measures (efforts after a crime). Repressive efforts are all actions taken by law enforcement officials in countermeasures after a crime or criminal act, including repressive efforts such as investigation, prosecution until a crime is committed.⁴¹ Meanwhile, according to Roeslan Saleh, three reasons regarding the need for crime in criminal law, as for the bottom line are as follows⁴²:

1. Whether or not criminal law is necessary does not lie in the question of the goal to be achieved, but lies in the question of how far to achieve that goal may be the use of coercion, the problem lies not in the result to be achieved but in the consideration between that outcome and the value of the limits of personal freedom.
2. There are efforts to improve or treat the condemned and in addition there must still be a reaction or violation of the norm that has been committed and cannot be given casually.
3. The influence of criminal or criminal law is not solely aimed at criminals, but also to influence non-evil people i.e. citizens of society who obey the norms of society. If criminal law is to be used, it can be seen in terms of overall criminal politics or social defence planning, which must be an integral part of the national development plan.

Awareness of the dangers of drug abuse in Indonesia has actually been around for a long time, evidenced by the existence of the *Verdoovende Middelen Ordonantie* (Stbl. 1927 No. 278 jo. No.536).

However, the handling of these problems has not been seriously carried out by the government. It was only in 1976 that Indonesia began to regulate the narcotics problem, until finally it was regulated in Law 35 of 2009 concerning Narcotics

Indonesia in an effort to overcome the criminal act of narcotics abuse has formed legal products to deal with the problem, including the birth of Law Number 22 of 1997 concerning Narcotics which has been amended by Law Number 35 of 2009 concerning Narcotics.

In addition to these laws, there are also other regulations, both in the form of ministerial regulations, BNN head regulations, and joint decisions between ministers, BNN heads and the head of the Indonesian Police.

The Government of Indonesia views the need together with other world communities to actively take part in efforts to eradicate illicit circulation of narcotics and psychodrugs, this is then the background of the State of Indonesia deciding to sign the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (United Nations Convention on the Eradication of Illicit Circulation of Narcotic Drugs and Psychotropic Substances, 1998) in Vienna, Australia on March 27, 1989 and ratified the 1961 Single Convention on Narcotic Drugs with Law number 8 of 1996, and established Law number 9 of 1976 concerning Narcotics.⁴³

Law Number 9 of 1976 concerning Narcotics, was passed based on the State Gazette of the Republic of Indonesia Number 37 of 1976. Enacted in Indonesia as a legal instrument in regulating narcotics problems, the birth of the Law is based on the Single Convention on Narcotics of 1961 and its amending Protocol, which is the result of the *United Nations Conference for Adoption of a Single Convention*.⁴⁴

Law Number 9 of 1976 concerning Narcotics was born on the considerations of:

- a) That narcotics are necessary drugs in the fields of medicine and science;
- b) That on the contrary, narcotics can also cause dependence that is very detrimental if used without careful restriction and supervision;
- c) That the manufacture, storage, distribution, and use of narcotics without careful restriction and supervision and contrary to applicable regulations is a crime that is very detrimental to individuals and society and is a great danger to human life and state life in the political, security, economic, social, cultural, and national resilience of the developing Indonesian nation;
- d) That in order to regulate the manner of provision and use of narcotics for medicinal and/or scientific purposes and to prevent and overcome the dangers that can be caused by the side effects of drug use and abuse, as well as the rehabilitation of drug addicts need to be stipulated in the new Law on narcotics, as a replacement for the *Verdoovende Middelen Ordonantie* (Stbl. 1927 No. 278 jo. No.536) which is no longer in accordance with technological progress and the times;

Article 3 paragraph (1) of Law Number 9 of 1976 stipulates that narcotics are only used for medicinal purposes and/or scientific purposes. Chapter III regulates the transportation of narcotics.

There is an obligation on the owner or loader of narcotics to inform the captain, flight captain or driver, of the type and quantity of narcotics to be transported for import or export or transit only.

In Chapter IV of Law Number 9 of 1976 concerning narcotics, it is regulated about acts that are prohibited to be carried out which include:⁴⁵

- 1) It is prohibited without the right to grow or maintain possessing in stock, possessing, storing, or controlling papaver plants, coca plants or cannabis plants;
- 2) It is prohibited without the right to produce, process, extract, convert, mix or provide narcotics;
- 3) It is prohibited without the right to possess, store to possess or to supply or control narcotics;
- 4) It is prohibited without the right to carry, send, transport or transit narcotics;
- 5) It is prohibited without the right to import, export, offer for sale, distribute, sell, buy, deliver, accept to be an intermediary for buying and selling or exchanging narcotics;
- 6) It is prohibited without the right to use narcotics against others, or to give narcotics for other people to use;
- 7) It is forbidden without the right to use for itself.

Rules are often one step behind the crime and in their application sometimes rules become incompatible with the times and technology. The Indonesian government then issued Law No. 22 of 1997 concerning Narcotics replacing Law of the Republic of Indonesia No. 9 of 1976 concerning Narcotics which was considered irrelevant to the situation at that time.

The purpose of narcotics regulation based on Law number 22 of 1997 is to ensure the availability of narcotics for the benefit of health services and / or scientific development, prevent the occurrence of drug abuse and eradicate illicit circulation of narcotics. Based on this purpose, it can be explained that the use of narcotics can only be used for the benefit of health services and / or scientific development. For this purpose, it is necessary to regulate the procurement of narcotics regulated in Law number 22 of 1997.

The Narcotics Law is also said to regulate government policy measures in order to ensure the availability of certain types of narcotics. Policy on narcotics development and supervision where the government conducts guidance on all activities related to narcotics which includes:

- 1) Meet the availability of narcotics for the benefit of health services and / or scientific development;
- 2) Prevent and eradicate all forms of abuse and illicit circulation of narcotics;
- 3) Prevent the involvement of minors in the abuse and illicit circulation of narcotics;
- 4) Encourage and support research activities and / or technology development in the field of narcotics for the benefit of health services;
- 5) Improve the capacity of drug addict rehabilitation institutions both organized by the government and by the community.

The classification of narcotics in this Law is also carried out, narcotics are divided into 3 (three) groups, Group I, II and III based on the level of dependence. Law Number 22 of 1997 concerning Narcotics regulates efforts to eradicate narcotics crimes through the threat of fines, imprisonment, life imprisonment, and the death penalty⁴⁶. Apart from that, Law Number 22 of 1977 concerning Narcotics also regulates the use of Narcotics for the benefit of medicine and health and regulates medical and social rehabilitation.⁴⁷

In its development, criminalization of victims of drug abuse is not the only solution to eradicate drug abuse which is increasing day by day. Drug crime in society shows an increasing trend both quantitatively and qualitatively with victims increasingly outside, especially among children, adolescents, and the younger generation in general.

Drug crimes that are no longer committed by individuals but are carried out by involving many people together, are organized syndicates with a very wide network, working neatly and very secretly both at national and international levels. With the increasingly complex problems above, the Government of Indonesia then issued Law Number 35/2009 concerning Narcotics.

D. CONCLUSION

Criminal law policy is part of national legal politics which has different parts. Nevertheless, the implementation of criminal law policy can occur jointly from all parts in an integrated manner. The parts of the national legal politics include Criminalization Policy, *Punishment Policy*, *Criminal Justice Policy*.

Efforts to overcome drug abuse have two ways, namely using non-penal means or preventive measures (preventing before a crime occurs) and penal or repressive measures (efforts after a crime). Repressive efforts are all actions taken by law enforcement officials in countermeasures after a crime or criminal act, including repressive efforts such as investigation, prosecution until a crime is committed.

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- 45) Excerpted from the book Politics of Law on Narcotics Law / Law Number 35 of 2009, by Siswanto, (Jakarta: Rineka Cipta), p. 10.
- 46) Law Number 35 of 2009 concerning Narcotics.
- 47) Harifin A. Tumpa, Comment ... Op. cit., p, 12

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