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Criminalisation of Narcotics: A Critical Review of the Effectiveness of Criminalisation Policy and Alternative Responses in the Context of Modern Criminal Law

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Abstract:
The policy of criminalisation of drugs has been the focus of public policy discussions and legal reforms in various countries. In the context of modern criminal law, this policy raises debates about its effectiveness in addressing the problem of drug abuse. Critique of drug criminalisation policies and alternative, more effective treatments. There is a need to evaluate the impact of criminalisation on the criminal justice system, public health, and human rights. In addition, we also explored alternative approaches such as decriminalisation, legalisation by regulation, and health-based approaches. Our findings suggest that alternative approaches may provide a more humane and effective solution to the drug problem. As such, this research is a normative study, with a conceptual, statutory, and comparative approach. The research therefore emphasises the importance of wider and further policy dialogue to understand the long-term implications of alternative strategies in diverse global contexts. It has a role to investigate and evaluate the effectiveness of drug criminalisation policies, as well as consider other policy alternatives in the context of modern criminal law. In other words, to deepen the understanding of whether drug criminalisation policies are effective in achieving their objectives, as well as exploring other options that may be better in the context of modern criminal law.

Keywords*: Drug Criminalisation; Drug Policy; Modern Criminal Law.*

I. Introduction

Contemporary critical accounts increasingly suggest that the problem of criminal law is not just a matter of long-recognised weaknesses in its administration (brutal conditions of confinement, weak protection of defendants' rights, police violence, etc.) but a matter of power relations, domination, and the application of criminal law.[1] Crime as one aspect of a larger set of social and historical problems. However, when historical shifts occur, paradoxes arise. One gets the impression of striking yet substantial change, and striking and substantial stability. This paradox seems to also apply to crime and society's response to crime, for example drug use and drug-related crime.[2]

[1] Benjamun Levin, "Criminal Law Exceptionalism", *Virginia Law Review*, 108, no. 6 (2022), 1383

[2] Walter B. Miller, "Ideology and Criminal Justice Policy: Some Current Issues", *The Journal of Criminal Law and Criminology",* 64, no. 2, (1973), 141

The problems of criminal law in Indonesia can be described by several important issues, including:[3]

1. there is too strict categorisation of criminal law with less consideration of the politics of criminal law formation;
2. duplication of criminal law norms in the KUHP or KUHAP with criminal law norms in laws outside the KUHP or KUHAP;
3. the formulation of criminal sanctions as a parameter of justice in the imposition of unstructured and unsystematic punishment;
4. too many laws that make criminal provisions including too frequent changes to criminal law norms in the KUHP and KUHAP;
5. basic rights for suspects/defendants/convicts tend to be violated because there is no legal certainty regarding which criminal law norms are violated so that it will have an impact on punishment;
6. the existence of law enforcement agencies authorised to investigate, prosecute and establish courts, each of which has the authority to process different criminal cases, even though the material criminal law norms violated are the same.

Based on data from the 2019 World Drugs Reports sourced from the United Nations Office on Drugs and Crime (UNODC), it states that around 275 million more people in the world or 5.6% of the total number of people in the world ranging in age from 15-64 years have used narcotics.[4] So that this makes an important note of how the law enforcement of narcotics offences in Indonesia.

Narcotics trafficking in its development penetrated the international level, its original purpose as a drug then shifted to public consumption due to its massive dependence. In 1906, in order to tackle drug abuse, the United States passed a law that required pharmacies to provide clear labels for each content of the drugs produced. Then in 1914, a regulation was drafted that required drug users and sellers to pay taxes, prohibited giving drugs to addicts who did not want to recover and detained paramedics and closed rehabilitation centres. Then in 1923, the United States banned the sale of narcotics, especially in the form of heroin. The prohibition of the sale of narcotics was the beginning of the sale/trafficking of narcotics which then spread throughout the world..[5]

Drug trafficking is considered a serious crime internationally, and Indonesia is no exception. As a form of Indonesia's commitment to play an active role and encourage world initiatives in combating drug abuse, on 27 March 1989 in Vienna, Austria, Indonesia signed the United Nations Convention on the Eradication of Illicit Trafficking in Narcotics and Psychotropic Substances which was later enacted through Law Number 7 of 1997. As a response to the international commitment, Indonesia then established two laws, namely Law No. 5 of 1997 on Psychotropic Substances and Law No. 22 of 1997 on Narcotics.[6]

Law No. 22/1997 on Narcotics mandates the establishment of a coordinating agency to establish national policies in the field of narcotics in terms of availability, prevention,

[3] Amrani Hanafi, *Politik Pembaruan Hukum Pidana,* (Yogyakarta: UII Press, 2019), 72

[4] Ovilia Yana Pradipta and Mitro Subroto, "Penjatuhan Ancaman Hukuman Mati Tindak Pidana Narkotika Berdasarkan Undang-Undang Nomor 35 Tahun 2009 Tentang Narkotika," *Supremasi Jurnal Hukum* 4, no. 1 (2019): 46–60.

[5] Supriyadi Widodo Edyyono, *et-al, Kertas Kerja: Memperkuat Revisi Undang-Undang Narkotika Indonesia Usulan Masyarakat Sipil,* (Institute for Criminal Justice Reform: Jakarta, 2017), 7

[6] *Ibid*

eradication, abuse and illicit drug trafficking. This institution was given the nomenclature of the National Narcotics Coordinating Agency (BKNN) which was later changed to the National Narcotics Agency (BNN) through Presidential Decree Number 17 of 2002.[7]

The regulation in Law No. 22/1997 on Narcotics as a concept of a criminal approach with a health approach. However, in Law Number 35 of 2009 concerning Narcotics. In principle, this law was formed with 4 (four) main objectives, that's:

a. Ensuring the availability of narcotics for the benefit of health services and/or the development of science and technology;
b. Preventing, protecting, and saving the Indonesian people from drug abuse;
c. Eradicating illicit trafficking of Narcotics and Narcotics Precursors; and
d. Ensuring the organisation of medical and social rehabilitation efforts for drug abusers and addicts.

From this description, the concept of criminalisation policy as a reference in alternative law enforcement of narcotics crimes. By definition, criminalisation is an object of study of substantive criminal law that discusses the determination of an act as a criminal offence (criminal act or crime) that is threatened with certain criminal sanctions. Despicable acts that were previously not qualified as prohibited acts are justified as criminal offences that are threatened with criminal sanctions.[8]

According to Soedarto, criminalisation can be defined as the process of determining a person's action as a punishable act. This process ends with the formation of a law where the act is threatened with a sanction in the form of punishment.[9] Then Soetandyo Wignjosoebroto argues that criminalisation is a statement that certain acts must be considered as criminal acts which are the result of normative considerations (judgments) whose final form is a decision (decisions)..[10]

In this case, what is meant by criminalisation is a change in value that causes a number of acts that were previously irreproachable and not subject to criminal prosecution, to become acts that are considered reprehensible and need to be punished. From the above understanding, it can be understood that criminalisation has at least two basic perspectives, namely the juridical perspective and the value perspective. Criminalisation basically requires a process of in-depth assessment of an act that has major implications for society. Criminalisation must be carried out in the context of legislative formation, because only the 'authorities', or in this context the legislators, have the authority to determine whether an act can be punished or not..[11]

Criminalization in the humanitarian space is a form of governance how national and supranational entities control and sanction humanitarian actors and affected populations. This includes criminalization processes, through which states, media, humanitarians, or citizens define particular groups and practices as criminal or as a crime, and the use of penal power to sanction.[12]

Criminalisation policy is an act that was previously not a prohibited act (not against the law) into a prohibited act or criminal act

[7] *Ibid*, 7-8
[8] Salman Luthan, Asas dan Kriteria Kriminalisasi, *Jurnal Hukum,* Vol. 16, No, 1, (2009): 1
[9] Sudarto, *Kapita Selekta Hukum Pidana*, (Bandung: Alumni, 1986): 31
[10] Salman Luthan, *Loc.Cit*, 2
[11] Supriyadi Widodo Edyyono, *Op.Cit*, 29
[12] Kristin Bergtora Sandvik, *Humanitarian Extractivism: The Digital Transformation of Aid (Humanitarianism: Key Debates and New Approaches),* (Manchesther Univesity Press: London, 2023), 38

(against the law) with the threat of certain criminal sanctions.[13] This is because the values and rules of criminal law norms are certainly related to morals.

In addition, there is a central problem in criminalisation using penal means (criminal law), namely in terms of determining what actions should be made a criminal offence and what sanctions should be used or imposed on violators. [14] In the process of law enforcement, with the existence of harmonious laws and regulations, in addition to law enforcers who apply these rules, it is also further an effort to increase legal awareness in society. So that the legal sub-systems namely legal substance, legal structure and legal culture can run integrally and as a unit in realising equitable law enforcement. Justice is achieved depending on the law itself, how it is applied by state institutions and the extent to which the outcome is in accordance with the ideas and sense of justice that live in society. If the law itself does appear just, it can still appear to most Indonesians as a tool to defend the interests of the rich and powerful.[15]

II. Legal Materials and Methods

Legal science is a sui generis science, which means that legal science is a separate science so that it has distinctive characteristics in its research object. This legal research is certainly normative research that examines existing legal norms, with the aim of finding the truth of coherence. This research uses the method of:

1. *statute approach* hat this research establishes *lex specialis* and *lex generalis.*[16]
2. *conceptual approach* that this research does not rely on existing regulations, it is also done because there is no or may not be legislation on the problem being solved..[17]

According to Dworkin, legal research is a study to investigate the relationship between one set of doctrines and another, to look at the order created in the world of precedents (common law) with an isolated status.[18]

III. Result and Discussion

A. Criminalisation Policy in the Context of Modern Criminal Law

Criminal policy is essentially crime prevention as well as a unity with efforts to protect society (social defence) and efforts to achieve people's welfare (social welfare). Based on Article 1 paragraph (2) of Law Number 1 Year 2023 on the Criminal Code, explained:

"In determining the existence of a criminal offence, analogies are prohibited.".

The debate on the use of analogies in criminal law is still ongoing. Although there is currently an impression that the view that prohibits the use of analogies in criminal law is more dominant. [19] but the view that analogy in criminal law is permissible is still growing.[20] The conceptual debate between the two views has yet to reach an end. In the Indonesian context, the conceptual debate on the legality of analogies in criminal law has been strengthened again following the amendment of the 1945 Constitution.[21]

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[13] Salman Luthan, Kebijakan Kriminalisasi dalam Reformasi Hukum Pidana, *Jurnal Hukum*, Vol. 6, No 11, (1999), 2

[14] Ariyanti, V, Kebijakan Penegakan Hukum Dalam Sistem Peradilan Pidana Indonesia. *Jurnal Yuridis*, Vol. 6, No. 2, (2019), 46

[15] Jonlar Purba, *Penegakan Hukum Terhadap Tindak Pidana Bermotif Ringan Dengan Restorative Justice* (Jakarta: Jala Permata Aksara, 2017).106-107

[16] Peter Mahmud Marzuki, *Penelitian Hukum*, (Kencana: Jakarta, 2005): 140-141

[17] *Ibid*, hlm 177

[18] Ronald Dworkin, Legal Research, *the MIT Press on behalf of American Academy of Art & Sciences*, Vol 102, No 2, (1973), 53

[19] Moeljatno, *Asas-asas Hukum Pidana*, (Bina Aksara,: Jakarta, 1985), 25

[20] P.A.F. Lamintang, Dasar-dasar Hukum Pidana Indonesia, (Citra Aditya Bakti: Bandung, 1997), 146

[21] Eddy O.S. Hiariej, *Asas Legalitas dan Penemuan Hukum dalam Hukum Pidana*, (Erlangga: Jakarta, 2009), 38

Paradigmatically, the provisions of Article 1 (3) of the 1945 Constitution actually affirm the view that formal legality, which has been the only measure in law, is not in accordance with the social reality of Indonesia. Therefore, the prohibition on the use of analogies in criminal law, which will negate the plurality of folk laws, should be rethought, especially in the effort to reform the national criminal law. National criminal law reform as an effort to review and reassess the socio-political, socio-philosophical and socio-cultural values in criminal law should pay attention to the plurality of people's laws.[22]

So that the purpose of imposing criminal sanctions is influenced by the reasons that are used as the basis for threatening and imposing punishment, in this context the reasons for punishment are retaliation, expediency, and a combination of retaliation that has a purpose or retaliation given to the perpetrator with a specific purpose and purpose. In formulating criminal law norms and formulating criminal threats, there are at least 3 (three) things to be achieved by the enactment of criminal law in society, that's:[23]

1. Establishing or achieving the ideal of society or the society that is aspired;
2. Maintaining and upholding noble values in society;
3. Maintaining something that is considered good (ideal) and followed by the community with negative norm formulation techniques.

Therefore, according to Eddy Hiariej, it is the freedom of human will that emphasises the actions of the perpetrators of the crime so that the criminal law is desired for the actions and not the perpetrators (daad- strafrecht). Because criminal law aims to protect society from crime, punishment aims not only to retaliate but to correct the perpetrators of crime.[24] Therefore, the concept of modern criminal law includes: corrective justice, restorative justice, and rehabilitative justice. According to him, if sorted from the classical school, modern school to neo-classical school, the purpose of punishment is as follows:[25]

First, The purpose of punishment is retribution. This means that the perpetrators of crimes must receive appropriate punishment for their actions. Here, the criminal law is no more than a lex talionis or a means of retaliating against the perpetrators of crime.

Second, Criminal punishment aims as a general prevention of crime. The existence of severe penalties imposed on the perpetrators of crime is expected to prevent others from committing crimes because there will be severe sanctions.

Third, Criminal punishment aims to have a deterrence effect so that the perpetrators of the crime will not repeat it.

Fourth, The purpose of punishment is social control, meaning that criminals are isolated so that their harmful actions do not harm society.

[22] Tongat, Reconstruction of Politics of National Criminal Law (Critical Analysis on the Prohibition of Analogy in Criminal Law), *Jurnal Konstitusi*, Vol. 12, No 3, (2015), 526

[23] Mudzakkir, *Perencanaan Pembangunan Hukum Nasional Bidang Hukum Pidana dan Sistem Pemidanaan*, (BPHN: Jakarta, 2008), 10

[24] Eddy O.S Hiariej, Menyoal Putusan Pengadilan Tindak Pidana Korupsi, *MMH*, Vol. 56, No. 1, (2013), 56

[25] Eddy O.S Hiariej, mengutip Wayne R. Lafave, *Principles of Criminal Law*, Second Edition, WESTA Thomson Reuters Business, 2010, 25-27, dalam Menyoal Putusan Pengadilan Tindak Pidana Korupsi, *MMH*, Vol. 56, No. 1, (2013), 56-57.

Fifth, The purpose of punishment is rehabilitation. This means that the perpetrators of crimes must be improved towards a better direction so that when they return to society, they can be accepted by their community and do not repeat their criminal acts.

Sixth, Criminalisation aims to educate the public about what is good and what is bad.

Seventh, Criminal justice aims to restore justice, which is known as restorative justice. Case resolution according to restorative justice does not only involve the perpetrators of crime and also law enforcement officials but also involves victims of crime.

In general, the formulation of a criminal offence, at least contains formulations about:[26]

a. the legal subjects to whom the norm is directed (addressaat norm);
b. prohibited acts (strafbaar), whether in the form of doing something (commission), not doing something (omission) and causing an effect (event brought about by the behaviour); and
c. the threat of punishment (strafmaat), as a means of enforcing the applicability or observability of the provision.

In the next development, there was a development of thought about the purpose of punishment, namely contemporary theory, which from this theory gave birth to several kinds of theories, one of which is the theory of rehabilitation and the theory of restorative justice. This rehabilitation theory explains that the perpetrators of crimes in addition to being given punishment in the form of corporal punishment must also be repaired in a better direction, so that when they return to society they can be accepted by the community and do not repeat their evil deeds again. It is from this theory that a system of punishment is born that is no longer oriented towards retaliation but prioritises the repair of criminals to return to their nature as human beings.[27]

Therefore, criminalisation policy is closely related to modern criminal law. Criminal law enforcement is one form of crime prevention efforts. The use of criminal law as a tool for crime prevention is part of criminalisation policy. Efforts to overcome crime with criminal law are carried out in order to achieve the ultimate goal of the criminalisation policy itself, namely to provide community protection in order to create order and prosperity.

Criminal law policy is only a part of national legal policy which has different parts. Nevertheless, the implementation of criminal law policy can occur together from all parts in an integrated manner. The parts of the national legal policy include criminalisation policy, punishment policy, criminal justice policy, law enforcement policy, administrative policy.[28]

It needs to be corrected that criminal law is still considered relevant to tackle crime, although there are other approaches besides criminal law in tackling crime. Criminal law as a means of controlling crime requires political conception. The political conception of criminal law to tackle crime is through the making of legal products in the form of criminal law legislation, and this cannot be separated from efforts

[26] Mudzakkir, *Op.Cit*, 9

[27] Supriyadi, S, Penetapan Tindak Pidana Sebagai Kejahtan dan Pelanggaran Dalam Undang-Undang Pidana Khusus, *Jurnal Mimbar Hukum UGM,* Vol 27, No 3, (2016), 389

[28] Mokhamad Najih, *Politik Hukum Pidana Pasca Reformasi: Implementasi Hukum Pidana sebagai Instrumen dalam Mewujudkan Tujuan Negara*, (In-Trans Publishing: Malang, 2008), 54-55

towards community welfare through social policy.[29]

In terms of modern criminal law enforcement, it can be influenced by several important factors, that's:[30]

1) The legal factor itself;
2) Law enforcement factors, namely the parties who form and apply the law;
3) Facility factors or facilities that support law enforcement;
4) Community factors, namely the environment in which the law applies or is applied;
5) Cultural factors, namely as a result of work, copyright and taste based on human spirit in the association of life.

For example, judges are considered to know all the laws or jus curia novit. This causes judges as law enforcers to have a central position in the application of law. Judges are not only required to be fair but they must also be able to interpret the law in accordance with the needs and developments that occur in the midst of the life of the justice-seeking community while still considering aspects of justice, legal certainty and the value of its benefits. Through his decisions a judge does not only apply the law in the text of the law but he also actually carries out legal reforms when faced with problems that are submitted to him and have not been regulated in law or there are rules but are deemed irrelevant to current conditions.[31]

Two central problems in criminal policy using penal means are the determination of what acts should be made criminal offences and what sanctions should be used or imposed on the offender..[32] To address the first central problem, often referred to as the problem of criminalisation, the following points must be considered:[33]

a) The use of criminal law must pay attention to the objectives of national development, namely realising a just and prosperous society that is evenly distributed materially and spiritually based on Pancasila. In connection with this, the use of criminal law aims to tackle crime for the welfare and protection of society;
b) The acts that must be prevented from being dealt with by criminal law must be desired acts, namely acts that cause harm (material or spiritual) to members of the community;
c) The use of criminal law must also take into account the principle of costs and results. (cost and benefit principle);
d) The use of criminal law must also pay attention to the capacity or ability of the workforce of law enforcement agencies, namely not to exceed the task load. (overvelasting).

The issue of criminalisation policy, according to Muladi, reminds of several measures that must be considered as guidelines, that's:[34]

1. Criminalisation must not give the impression of 'overcriminalisation' which falls into the category of the misuse of criminal sanction;
2. Criminalisation must not be ad hoc.

[29] Barda Nawawi Arief, *Kebijakan Legislatif dalam Penanggulangan Kejahatan dengan Pidana Penjara, cet. 3*, (Genta Publishing: Yogyakarta, 2010), 240

[30] Soerjono Soekanto, *Faktor-Faktor yang Mempengaruhi Penegakan Hukum*, (Jakarta: Rajawali Press, 2005), 3

[31] Vivi Ariyanti, Kebijakan Penegakan Hukum Dalam Sistem Peradilan Pidana Indonesia, *Jurnal Yuridis*, Vol. 6, No. 2, (2019), 48

[32] Jan Remmelink, Hukum Pidana, Komentar atas pasal-Pasal Terpenting dari KUHP Belanda dan Padanannya dalam KUHP Indonesia, (Jakarta: Gramedia, 2003), 14

[33] Supriyadi WIdodo Eddyono, *Meninjau Kebijakan Kriminalisasi Dalam RKUP 2015*, (Institute for Criminal Justice Reform: Jakarta, 2015), 12

[34] Muladi, *Kapita Selekta Hukum Pidana*, (Badan Penerbit Univesitas Diponegoro: Semarang, 1995), 256

3. Criminalisation must contain a victim element (victimizing) either actual or potential;
4. Criminalisation should take into account cost and outcome analysis and the principle of ultimum remedium;
5. Criminalisation must result in enforceable regulations;
6. Criminalisation must be able to gain public support;
7. Criminalisation must contain an element of 'subsociality' (causing harm to society, even if it is very small).;
8. Criminalisation should be mindful of the caveat that any criminal legislation restricts people's freedoms and allows law enforcement officials to curb those freedoms..

Considering the importance of the formulation stage in the functionalisation or operationalisation of penal policy, the policy of using criminal sanctions in Regional Regulations as part of penal policy should pay attention to the measures or criteria mentioned above.[35]

The legal interests protected in criminalisation are development interests consisting of political, economic, social welfare and human resources development interests, the environment, and social value system development interests. The protected legal interests reflect the protection of government interests rather than community interests. The criminalisation policy has five basic patterns of justification, namely the role and importance of a matter for human life and the misuse of that matter can bring harm to the community, nation and state, harm the interests of the community and/or state, contrary to religious norms, morals or decency, decency and national culture, contrary to the state ideology Pancasila and the 1945 Constitution, and contrary to government policies in the economic, political, security and socio-cultural fields.

The ultimate goal of criminal policy is the protection of society, or the achievement of public welfare. Based on this concept, according to Barda Nawawi, it is necessary to develop an integral policy between penal policy and non-penal policy. However, non-criminal efforts must be applied in a strategic position so that crime prevention efforts run effectively. These two efforts must work together (synergy) in crime prevention. The problem is how to integrate and harmonise non penal activities or policies with penal policies towards suppressing and reducing potential factors for the growth of crime. With this integral policy approach, it is expected that 'social defence planning' can really succeed. Thus, it is also expected to achieve the essence of social policy objectives contained in the national development plan.[36]

B. Criminalisation Policy in Modern Criminal Law as an Alternative for Law Enforcement of Narcotics Crime

The prohibition of drug abuse is because drugs can damage the body, starting from the brain, lungs, kidneys, liver and even the heart. Drug users also experience depression, moodiness, lack of enthusiasm, weakened thinking power, and excessive fear. Drug abuse is contrary to religious law and positive law. The Narcotics Law explains that perpetrators of narcotics abuse can be given legal sanctions according to the role and position of the perpetrator. For example, if he is a user, he will be subject to a sentence of fifteen years in prison. Then as a

[35] Adang Moelyono, Teori Kebijakan Kriminalisasi Terkait Perumusan Sanksi Pidana Dalam Peraturan Desa, *Jurnal Independent Fakultas Hukum*, Vol 5, No 2, (2017), 74

[36] Muladi dan Barda Nawawi Arief, *Teori-Teori dan Kebijakan Pidana*, (Bandung: PT Alumni, 1902), 8

dealer can be subject to a maximum imprisonment of fifteen years plus a fine.[37]

The criminal responsibility system in the perspective of criminal policy and criminal policy cannot be separated from the formulation stage, which involves the definition of every person who commits a criminal offence. And the background of a person as a subject of criminal law.[38]

According to Soedarto, there are 4 criteria that must be considered in determining whether an act can be criminalised, that's:[39]

1. The use of criminal law must pay attention to the objectives of national development, namely realising a just and prosperous society that is materially and spiritually equitable based on Pancasila. In connection with this, (the use of) criminal law aims to tackle crime and provide protection against the countermeasures themselves for the welfare and protection of society..
2. Acts that are attempted to be prevented or overcome by criminal law must be undesirable acts, namely acts that cause harm (material or spiritual) to members of the community..
3. The use of criminal law must also take into account the principle of costs and results. (cost benefit principle).
4. The use of criminal law must also take into account the capacity or workability of law enforcement agencies.

In essence, criminalisation is part of criminal policy by using the means of criminal law (penal), and therefore part of criminal law policy (penal policy).[40] The determination of an act as a criminal offence (criminalisation) depends on the legal politics of the legislator. The process of criminalisation of an act is often debated in the community. Therefore, it is appropriate if Ifdal Kasim defines the politics of criminal law as a policy, either to assess a human behaviour as evil or not evil; which Ifdal Kasim calls criminalisation or decriminalisation of a behaviour or action.[41]

In the context of modern criminal law, there is corrective justice, restorative justice and rehabilitative justice. Corrective justice focuses on repairing what is wrong, if an offence is committed then corrective justice seeks to provide adequate compensation for the injured party so that corrective justice is the domain of the judiciary.[42] Meanwhile, restorative justice is an alternative to criminal case resolution in which the criminal justice mechanism focuses on punishment which is changed into a dialogue and mediation process involving the perpetrator, victim, family. The principle of restorative justice is the recovery of victims who suffer from crime by providing compensation to victims, peace, perpetrators doing social work and other agreements.[43] The principle of rehabilitative justice emphasises the development of offenders. Rehabilitation of offenders in correctional institutions is the main focus. These two principles have not given proper attention to the interests/protection of victims, while the protection of victims in the process of resolving criminal cases should be the main focus. As a reaction to the approach in resolving criminal cases that only focuses on

[37] Oksidelfa Yanto, Peranan Hakim Dalam Pemberantasan Tindak Pidana Narkoba Melalui Putusan Yang Berkeadilan, *Jurnal Hukum Dan Peradilan*, Volume 6 Nomor 2, (Juli 2017): 267

[38] Andika Oktavian Saputra, *et-al*, Kebijakan Hukum Pidana Dalam Upaya Penanggulangan Tindak Pidana Untuk Mengurangi Overcrowded Lembaga Pemasyarakatan Pada Masa Pandemi Covid-19, *Jurnal USM Law Review*, Vol. 4, No. 1 (2021), 8-9

[39] Roeslan Saleh, *Asas Hukum Pidana Dalam Perspektif*, (Jakarta: Aksara Baru, 1981): 28

[40] Barda Nawawi Arief, *Kapita Selekta Hukum Pidana* (Bandung: Citra Aditya Bakti, 2003).

[41] J.E. Sahetapy, *Problematika Pembaruan Hukum Pidana Nasional* (Jakarta: Komisi Hukum Nasional RI, 2013)

[42] Liang Gie, *Teori-Teori Keadilan*, (Yogyakarta: Super, 1979), 22

[43] Mahkamah Agung Republik Indonesia, *Pedoman Penerapan Restorative Justice di Lingkungan Peradilan Umum*, 2020, 3

the interests of the perpetrators of criminal acts, then began to get attention about the approach to resolving cases through the principle of restorative justice.[44]

The application of this criminalisation policy is contrary to the objectives of Law Number 35/2009 on Narcotics in Article 4, that's:

a. ensure the availability of Narcotics for the benefit of health services and/or the development of science and technology;
b. to prevent, protect, and save the Indonesian people from the abuse of Narcotics;
c. eradicating illicit trafficking of Narcotics and Narcotic Precursors; dan
d. ensuring arrangements for medical and social rehabilitation efforts for drug abusers and addicts.

The article states that what must be eradicated is the illicit trafficking of narcotics and narcotics precursors, instead of criminalising drug users. The criminal offence of narcotics in Law No. 35/2009 is given a fairly severe criminal sanction, besides that it can also be subject to corporal punishment and fines, but in reality the perpetrators are increasing. This is due to the imposition of criminal sanctions that do not have an impact on drug offenders.[45]

Criminalisation Policy on Narcotics Crime can be done by:

1) Penal aspect (criminal law);
2) Non-penal aspects (prevention).

Penal aspects, beginning with an analysis of the provisions of criminal legislation relating to narcotics and psychotropic drugs, especially against criminal law policy (penal policy), through normative studies which is the stage of legislatief policy. The next study was conducted by observing the implementation of the provisions of criminal legislation (in abstrakto) narcotics and psychotropic drugs to criminal legislation (in konkrito) through the mechanism of integrated criminal justice system which is a stage of policy aplikatief which will then be forwarded to the stage of executive policy. Findings from the analysis of the results of research on the penal aspects of narcotics and psychotropic drugs, is an input to make improvements in the planning of overcoming drug abuse in the future. Criminal policy towards drugs in Indonesia must be carried out in accordance with the basic concepts of criminalisation. This criminal policy must be part of social policy or national development policy. This affirms that crime prevention and social planning need to be integrated into the overall social policy and development planning.[46]

Non-penal aspect (prevention); is a very strategic aspect because the criminal offence has not yet occurred. In addition to examining what has been done by law enforcement officials in preventing drug abuse so far, this planning study will also offer other non-penal alternatives in relation to drug abuse. Basically, the non-punitive study departs from the identification of several potential factors that can trigger drug abuse. Prevention efforts are made by improving these potential factors. [47]

Policies through non-penal channels in efforts to tackle criminal acts of drug abuse focus more on the nature of "prevention" (prevention / deterrence / control) before the crime occurs. The government is responsible for overcoming the problem of drug abuse, the government can make several efforts such as:[48]

[44] Hafrida & Helmi, Perlindungan Korban Melalui Kompensasi Dalam Peradilan Pidana Anak, *Jurnal Boma Mulia Hukum,* Vol. 5, No. 1, (2020), 120

[45] Hafrida, Kebijakan Hukum Pidana Terhadap Pengguna Narkotika Sebagai Korban Bukan Pelaku Tindak Pidana: Studi Lapangan Daerah Jambi, *Padjajaran Jurnal Ilmu Hukum,* Vol. 3, No. 1, (2016), 176

[46] Ruben Achamd & Neisa Angrum Adisti, Kebijakan Kriminal Dalam Pencegahan dan Penanggulangan Narkotika di Kota Palembang, *Legalitas: Jurnal Hukum,* Vol 12, No 1, (2020), 42

[47] *Ibid,* 48

[48] RR. Putri A. Priamsari, Kebijakan Integral Penanggulangan Tindak Pidana Penyalahgunaan

a) formulating policies on criminal offences in the field of narcotics;
b) organise communication, information, education and socialisation on drug abuse and its dangers, for example through the establishment of the National Narcotics Agency, which has a vision to determine national policy in building a joint commitment to combat drug abuse and illicit trafficking.;
c) organising care/treatment (rehabilitation) services for drug addicts;
d) Countermeasures by the Community.

The above can also be used as a non-penal countermeasure, for example for children who abuse drugs. Criminal policy against drug abuse by children can be studied/seen in a broader spectrum, namely through a criminological approach, especially in the perspective of protecting children who commit drug offences. Criminologically, we will look at the factors behind the occurrence of drug abuse by children and the negative impacts caused by the law enforcement process against children.[49]

Before the Narcotics Law came into force, there was no different treatment between users, dealers, and producers of narcotics. Narcotics users or addicts on the one hand are perpetrators of criminal offences, but on the other hand are victims. Furthermore, after the passing and enactment of the Narcotics Law, it is stated that addicts/users are those who abuse drugs without the right or against the law. While the perpetrators are reclassified into those as dealers and those as dealers, which in essence it is these perpetrators who disseminate and trade narcotics unlawfully In the Narcotics Law, narcotics dealers are categorised as perpetrators (deders) but with users categorised can be categorised as perpetrators and/or victims. Based on the typology of victims identified according to the victim's circumstances and status, that's: [50]

1) Unrelated victims, that's victims who have nothing to do with the perpetrator and become victims because of their potential..
2) Provocative victims, that's a person or victim due to the victim's role in instigating the crime.
3) Participating victims, that's someone who does not act, but whose behaviour encourages them to become a victim.
4) Biologically weak victims, that's those who are physically disadvantaged which causes them to be victimised.
5) Socially weak victims,that's those who have a weak social position that causes them to be victimised.
6) Self victimizing victims, that's those who are victimised by their own crimes.

Narcotics addicts are "self victimising victims", because they suffer from dependency syndrome as a result of their own drug abuse. Article 54 of Law Number 35 Year 2009 on Narcotics states that:

"Narcotics addicts and victims of narcotics abuse must undergo medical rehabilitation and social rehabilitation.".

If we look at the Netherlands in the prevention of drug crimes, that the Local Government is responsible for the policy of non-punitive criminalisation of drugs, by issuing a policy, one of which is the Rotterdam Municipality forming a policy Preventie- en handhavingsplan Alcohol en andere Drugs 2023-2027 De Raad van de gemeente Rotterdam or (Alcohol and Other Drugs Prevention and Enforcement Plan 2023-2027 Rotterdam Municipal Council). With its vision and strategy, the Alcohol & Drugs Prevention

Narkotika, *Jurnal Hukum Progresif*, Vol. 10, No. 2, (2022), 107-108

[49] Jacob Hattu, Kebijakan Hukum Pidana Dalam Penanggulangan Kejahatan Anak, *Sasi*, Vol 20, No. 2 (2014): 48

[50] Yuliana Yuli W & Atik Winanti, Upaya Rehabilitasi Terhadap Pecandu Narkotika Dalam Perspektif Hukum Pidana, *Adil: Jurnal Hukum*, Vol. 10, No. 1, (2019), 138-139

Programme 2023-2027 focuses on youth and adults, parents/educators, teachers, sports club supervisors, youth workers, primary healthcare professionals, volunteers, alcohol sellers and other involved parties. Implementation. With the implementation of the following standards and principles:[51]

1. Talent development and a safe, healthy/vital and promising life do not go hand in hand with alcohol and drug use problems.;
2. Adults, parents and educators take their responsibility: they set a good example and ensure that minors do not use alcohol and drugs and do not play problematic games.;
3. Liquor stores, sports canteens, night shops, catering establishments, supermarkets and all other providers of alcoholic beverages comply with the law: it is forbidden to sell alcohol to teenagers under the age of 18;
4. Catering establishments and sports clubs abide by the prohibition on continuing the journey of intoxicated persons;
5. Alcohol and/or drug use problems can arise from underlying problems but there is no solution to them.

The three pillar approach used by the Dutch government consists of Reynolds' universal prevention model, Policy and regulation (setting boundaries), public support and information (transferring boundaries) and Enforcement (guarding borders). This model clearly shows that prevention will be effective if all actions of the three pillars are invested in.[52]

There is a concept of drug prevention in the Netherlands, namely: National, Regional, and Local (village, family, etc.). At the national level, for example, the Ministerie van Volksgezondheid, Welzijn en Sport (VWS) is responsible for the theme of drug prevention. Other ministries are, for example, the ministry whose role is Justice and Security in the context of drug crime, and the Ministerie van Infrastructuur en Waterstaat or Ministry of Infrastructure and Water Management (I&F) in the context of traffic participation under the influence. Development, implementation and research towards drug prevention at the national level is carried out by research institutes such as the Trimbos Institute, Intraval/Breuer, VerweyJonker Institute and various colleges and universities. At the local level there are 11 (eleven) drug addiction treatment centres in the Netherlands, each with a prevention department. At the local level are other partners in the implementation of drug prevention activities at the local level..[53]

This is important in the context of the role of local governments and all elements of government to carry out modern criminal context criminalisation policies on narcotics crimes in Indonesia. Users and addicts should be placed as victims or patients who must be rehabilitated, and the targets of police operations are dealers. Logically, by arresting the users, it can certainly help to arrest the dealers, and then users with certain categories can be sentenced to rehabilitation as mandated in the Supreme Court Circular Letter Number 7 of 2009 concerning Placing Drug Users into Therapy and Rehabilitation Centres. Meanwhile, dealers are given strict criminal sanctions, and if they meet the requirements, they can even be sentenced to death. It can be said that on the one hand there is an extraordinary spirit in eradicating narcotics and narcotics precursors in the Narcotics Law, but on the other hand there is also a spirit to protect narcotics abuse both as addicts and as victims of narcotics abuse.[54]

The formulation of criminal sanctions in the Narcotics Law can be categorised as follows:

[51] Officiële uitgave van de gemeente Rotterdam, *Preventie- en handhavingsplan Alcohol en andere Drugs 2023-2027*, 7 Februari 2024

[52] *Ibid*

[53] Trimbos Istituut, *Principes van effectieve drugspreventie*, Utrecht, 2022, 3

[54] Wenda Hartanto, The Law Enforcement Against Narcotic And Drug Crimes Impacting On Security And State Sovereignty In The Era Of International Free Trade, *Jurnal Legislasi Indonesia*, Vol. 14, No. 1, (2017), 5

a. The formulation of criminal sanctions in the Narcotics Law can be categorised as followsa. in single form (imprisonment or fine only);
b. in alternative form (choice between fine or imprisonment);
c. in cumulative form (imprisonment and fine);
d. in a combined form (imprisonment and/or compensation).

The criminalisation of narcotics in Law No. 35/2009 will be enforced through a Criminal Justice System mechanism that prioritises Retributive Justice and the Just Desert Model. Criminal policy towards drugs in Indonesia must be conducted in accordance with the basic concepts of criminalisation. This criminal policy must be part of social policy or national development policy. The assertion that between crime prevention efforts and social planning needs to be integrated in the overall social social policy and development planning. According to Sudarto, if criminal law is to be involved in efforts to overcome the negative aspects of the development of society (modernisation), it should be seen in the overall relationship of criminal policy or social defence planning, and this must be an integral part of national development planning.[55]

In terms of overcoming narcotics crime, which is closely related to social policy. In addition, this policy must also be adjusted to the needs to be achieved and the socio-cultural conditions of Indonesia, although there are criteria that are regulated by a guideline but there is still a value that is in accordance with the soul of the Indonesian nation. This concept of law is in accordance with the opinion of Von Savigny who states that in essence the law consists of political elements (das politische element) and technical elements (*das technische element*).[56]

Non-penal policies, for example, can be carried out by the National Narcotics Agency (BNN) in an effort to overcome and prevent the abuse and distribution of narcotics in the community. Through efforts to empower, direct, monitor and increase community activities to recognise the dangers of narcotics and recognise the criminal act of illegal distribution of narcotics..[57]

Criminal law enforcement is a policy carried out through several stages, including the application and execution stages. The application stage is the application of criminal law carried out by law enforcement officials, namely police officers, prosecutors and judges. This stage is usually called the judicial stage. The execution stage is the stage of implementing the judge's decision, which is called executive or administrative policy. [58] Judges in handling cases should not be influenced by any force, of course, is the goal of society for the sake of law enforcement. Judges in handling cases should not ignore ethics, values and norms, of course, is the hope of the community to create the authority of the court. More importantly, judges must be independent.[59]

As for the penal policy, of course the realm is the determination of sanctions by court decisions, so it can be seen in the following table:

[55] Sudarto, *Hukum dan Hukum Pidana,* (Alumni: Bandung, 1977), 38.
[56] Daeng Rahman, Perspektif Kebijakan Kriminal Dalam Upaya Penanggulangan Tindak Pidana Narkotika Di Indonesia, *Unes Journal Of Swara Justisia,* Vol 4, Issue 4, (2021), 319
[57] A.R Sujono & Bony Daniel, *Komentar dan Pembahasan Undag-Undang Narkotika Nomor 35 Tahun 2009,* (Jakarta: Sinar Grafika, 2011). 133
[58] Monang Siahaan, Monang Siahaan, *Pembaharuan Hukum Pidana Indonesia* (Jakarta: Grasindo, 2016). 3
[59] Oksidelfa Yanto, *Op.Cit*,272

Table 1. Types of Criminal Sanctions for Narcotics Based on Law Number 35 Year 2009

Type	Class I	Class II	Class III
Plant, Nurture, Own, Keep, Control, Provide	Articles 111 & 112 4 to 12 years and a fine of IDR 800 million to IDR 8 billion	Article 117 3 to 10 years and a fine of 600 million to 5 billion	Article 122 2 to 7 years and a fine of 400 million to 3 billion
Production, Import, Export or dealer	Article 113 5 to 15 years and a fine of 1 billion to 10 billion	Article 118 4 to 12 years and a fine of 800 million 8 billion	Article 123 3 to 10 years and a fine of 600 million to 5 billion
Offering for sale, purchase, acceptance, and brokerage	Article 114 5 to 20 years and a fine of 1 billion to 10 billion	Article 119 4 to 12 years and a fine of 800 million to 8 billion	Article 124 3 to 10 years and a fine of 600 million to 5 billion
Membawa, mengirim, mengangkut, transito	Article 115 4 to 12 years and a fine of 800 million to 8 billion	Article 120 3 to 10 years and a fine of 600 million to 6 billion	Article 125 2 to 7 and a fine of 400 million to 3 billion
Using against others, given for others to use	Article 116 5 to 15 years and a fine of 1 billion to 10 billion	Article 121 4 to 12 years and a fine of 800 million to 8 billion	Article 126 3 to 10 years and a fine of 600 million to 5 billion
Self-abuse	Article 127 Maximum 4 years	Article 127 Maximum 2 years	Article 127 Maximum 1 year

Law enforcement of drug offences has the goal of making people obey the law. Public obedience to the law is caused by three things, that's:[60]

1) fear of sinning;
2) fear due to the power of the sovereign in relation to the imperative nature of the law;
3) fear because of the shame of doing evil. Law enforcement with non-punitive means has goals and objectives for the benefit of internalisation3) fear of being ashamed of doing evil. Law enforcement with non-punitive means has targets and objectives for the benefit of internalisation.

Statutory provisions governing narcotics issues have been drafted and enacted through the Narcotics Law. However, drug-related crimes have yet to be curbed. In many recent cases, many drug dealers and dealers have been caught and severely sanctioned, but this does not seem to have a deterrent effect on other perpetrators, and there is even a tendency to expand their areas of operation.[61]

IV. Conclusion and Suggestion

Based on the description above, it can be concluded that criminal law aims to protect the community from crime, criminal law aims not only to retaliate but to repair the perpetrators of crime. Therefore, the concept of modern criminal law includes: corrective justice, restorative justice, and rehabilitative justice. This is in line with the new Criminal

[60] Siswantoro Sonarso, *Penegakan Hukum Dalam Kajian Sosiologis*, (Jakarta: Raja Grafindo Persada, 2014), 142.

[61] O.C. Kaligis & Associates, *Narkoba dan Peradilannya di Indonesia, Reformasi Hukum Pidana Melalui Perundangan dan Peradilan* (Bandung: Alumni, 2012), 260.

Code (KUHP) which explains that in determining the existence of criminal offences, analogies are prohibited. The policy of criminalisation is the protection of society, or the achievement of public welfare. Criminalisation of narcotics in Law No. 35/2009 the enforcement process will be carried out through the Criminal Justice System mechanism which prioritises Retributive Justice and the Just Desert Model. Criminal policy towards drugs in Indonesia must be conducted in accordance with the basic concepts of criminalisation. This criminal policy must be part of social policy or national development policy.

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