

# CAUSES AND CONSEQUENCES OF THE WAR ON MARIJUANA IN INDONESIA

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## Abstract

*This article argues that the current narcotics law regime bears part of the blame, along with other criminal justice tools, for prison overcrowding and the unnecessary deprivation of liberty and dignity for violators. The multilayer categories of drug users introduced by the current narcotics law leaves too much discretion for the law enforcement agency to criminalize marijuana users. Data shows that in Jakarta and Surabaya court alone, all marijuana users are charged with multiple articles, leaving no room for them to escape from draconian sentences. This paper questions the repressive enforcement used by the Indonesian apparatus, specifically regarding marijuana, because it leads to other issues bigger than the personal use of marijuana itself. In the end, this article proposes a change in marijuana law while at the same time acknowledging the nature of political conservatism in Indonesia.*

**Keywords:** Indonesia, marijuana criminalization, marijuana, narcotics law, marijuana decriminalization.

## Abstrak

*Artikel ini mencoba menunjukkan bahwa rezim hukum narkoba sekarang ini adalah faktor utama yang menyebabkan penjara over kapasitas dan pencabutan kebebasan dan martabat seseorang yang dilakukan tidak pada tempatnya. Multi kategori tentang pengguna narkoba yang ada di dalam undang-undang narkoba memberikan terlalu banyak kekuasaan kepada aparat penegak hukum untuk melakukan kriminalisasi kepada pengguna marijuana. Data menunjukkan di Jakarta dan Surabaya saja, pengguna marijuana didakwa dengan pasal berlapis sehingga mereka harus berhadapan dengan sanksi hukum yang sangat berat. Tulisan ini mempertanyakan penegakan hukum yang represif yang dilakukan oleh aparat, karena penegakan hukum tersebut ternyata memiliki dampak yang lebih besar daripada marijuana itu sendiri. Di akhir tulisan, artikel ini memberikan saran untuk melakukan perubahan undang-undang, kemudian di saat yang sama, juga mempertimbangkan kultur politik yang konservatif di Indonesia.*

**Kata kunci:** Indonesia, kriminalisasi mariyuana, mariyuana, undang-undang narkoba, dekrimalisasi mariyuana.

## I. INTRODUCTION

*Tommy Tanggara* (49), an Indonesian painter, was arrested on October 21, 2018 at his residence at Yogyakarta because of alleged marijuana possession. Shortly after his arrest, he was presented to the media by the police. He was handcuffed, while wearing a detainee shirt and standing behind a table on which there was a single marijuana plant seized at the time of his arrest. During the interview by the media, he said that he had been using marijuana for 30 years and it helped him maintain his health and his creativity for paintings. "Marijuana is beneficial and truth (for me)," he said. It was his second arrest for marijuana.

In August 2017, *Fidelis Ari Sudarwoto*, an Indonesian civil servant from Kalimantan, was jailed for eight months and fined a billion rupiahs (approximately USD 65,000) for growing marijuana for his wife, *Yeni*. *Yeni* suffered from syringomyelia, a malformation in her spinal canal. She needed marijuana to cope with the pain she endured.

*Tommy* and *Fidelis* are just two among the thousands of individuals who face criminal prosecution in Indonesia for marijuana possession stemming from their belief that marijuana is beneficial in their lives. Indonesia goes to considerable expense to punish citizens who use marijuana for whatever reason. The Indonesian government chooses to adopt a repressive criminal justice mechanism in order to suppress its use and deter potential users. It came as no surprise when the president of Indonesia himself instructed the judicial apparatus to adopt aggressive criminal justice enforcement in addressing the drugs-related problem.<sup>1</sup> The Indonesian president, himself, stated that Indonesia is now declaring a "war on drugs" so that it could save the younger generation. In Indonesia, marijuana is considered a Schedule 1 substance because we are borrowing the scheduling from the Single Convention on Narcotic Drugs of 1961<sup>2</sup>. Marijuana is classified as a Schedule 1 controlled substance. Schedule 1 substances are categorized by the government as those with a high potential for abuse, no accepted medical use and no safe level of use under medical supervision.<sup>3</sup> Possession of marijuana risks harsh criminal sanctions. In Indonesia, personal possession of marijuana can carry a maximum penalty of 12 years.

This paper will only focus on repressive enforcement of marijuana, separate from other drugs, because the classification of marijuana as an illegal substance is a controversial issue around the globe. Although researchers have shown that heavy, long-term use of marijuana may produce adverse health effects, most conclude that occasional marijuana use does not cause health problems for the vast majority of users.<sup>4</sup> The Indonesian government has argued, however, in defense of the original

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<sup>1</sup> The official statement from President of Indonesia on 25 July 2017, Joko Widodo. He has invoked the use of force in efforts to tackle Indonesia's drug problem. See Claudia Stoicescu, "Why Jokowi's War on Drugs is Doing More Harm than Good," <https://www.aljazeera.com/indepth/opinion/2017/07/jokowi-war-drugs-harm-good-170725101917170.html>, accessed 8 November 2018.

<sup>2</sup> Indonesia also ratified (in 1976) the 1961 United Nations Conference for the Adoption of a Single Convention on Narcotic Drugs. In the schedule, marijuana is listed on Schedule 1. See *Single Convention on Narcotic Drugs*, New York, 30 March 1961, *United Nations Treaty Series*, Vol. 520, No. 7515.

<sup>3</sup> Cf. the appendix of the Undang-Undang Narkotika, para 8 says that marijuana is classified as a schedule 1 substance.

<sup>4</sup> Katherine Beckett and Steve Herbert, "The Consequences and Costs of Marijuana

convention scheduling, that marijuana is potentially a gateway drug.<sup>5</sup> However, despite popular claims regarding marijuana's role as a "gateway drug," many researchers have concluded that "there is no conclusive evidence that the drug effects of marijuana are causally linked to the subsequent abuse of other drugs."<sup>6</sup> Sadly, there exists no official research from Indonesia assessing the benefits and/or harm of marijuana. The Indonesian government has to date declined to study marijuana, though it has been eager to deny the liberty and dignity of its citizens who smoke it. According to research data conducted by the Indonesia Anti-Narcotics Agency and *Universitas Indonesia* in 2017, marijuana is the most popular drug in the country, recording 1,742,285 users out of a total 3,376,115 drug users. Apart from that, the research also showed that from 2011 to 2015, there was a 35% growth in the number of people arrested on drug-related charges. In 2011, it was 35,640 suspects compared to 51,332 suspects four years later.<sup>7</sup>

The tough on crime approach toward marijuana users is affected with a heavy cost, even as it has failed to reach its stated goal of reducing the use of marijuana. The tough on crime policy has created a bigger issue than marijuana itself. The impact on the individual violator is bad enough. Marijuana users must face a series of draconian criminal charges. In light of current circumstances, this paper will explain why it is not worth to deprive someone's liberty and dignity because of smoking marijuana. The arrest of marijuana users is also responsible for the prison overcrowding phenomenon. According to the official report from the Ministry of Law and Human Rights in 2017 (the ministry responsible for prison management), the overcrowding rate reached 600% in sum.<sup>8</sup> According to the report, the number of prisoners in Indonesia amounted to approximately 222,000 prisoners. Some 86,000 prisoners are jailed because of drug-related crimes, and 32,000 of them for drug use. Marijuana accounts for 58% of drugs used in Indonesia.<sup>9</sup>

Under the current law regime, the blame has to be pointed at the expansive definition of drug use. According to the current narcotics law regime, there are at least three categories of drug user: *Penyalahguna* (illegal drug user), *Korban penyalahguna* (who consumes drugs under duress) and *Pecandu* (a person who is addicted to drugs both physically and psychologically). The original purpose of the

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Prohibition," <https://faculty.washington.edu/kbeckett/The%20Consequences%20and%20Costs%20of%20Marijuana%20Prohibition.pdf>, accessed 8 November 2018.

<sup>5</sup> Richard J. Bonnie, *Marijuana Use and Criminal Sanctions: Essays on the Theory and Practice of Decriminalization* (Charlottesville, Va.: Michie Co, 1980), p. 34.

<sup>6</sup> See, for instance, Watson SJ *et al.*, "Marijuana and Medicine: Assessing the Science Base: A Summary of the 1999 Institute of Medicine Report," *Archives of General Psychiatry* 57 (2000): 547–552.

<sup>7</sup> See Badan Narkotika Nasional, "Official 2016 Report from Indonesia Anti-Narcotics Agency," [http://www.bnn.go.id/\\_multimedia/document/20180508/jurnal\\_data\\_puslitdatin\\_bnn\\_2017.pdf](http://www.bnn.go.id/_multimedia/document/20180508/jurnal_data_puslitdatin_bnn_2017.pdf), accessed 22 November 2018.

<sup>8</sup> Badan Penelitian dan Pengembangan Kementerian Hukum dan Hak Asasi Manusia, "Data Lapas Over Kapasitas Agustus 2017," <http://www.balithubangham.go.id/detailpost/data-lapas-di-indonesia-agustus-2017>, accessed 25 October 2018.

<sup>9</sup> Badan Narkotika Nasional, "Survei Nasional Penyalahgunaan Narkotika di 34 Provinsi Tahun 2017," [http://www.bnn.go.id/\\_multimedia/document/20180508/BUKU\\_HASIL\\_LIT\\_2017.pdf](http://www.bnn.go.id/_multimedia/document/20180508/BUKU_HASIL_LIT_2017.pdf), accessed 1 November 2018.

classifications is to distinguish the criminal elements contained in each action and subsequently to produce different treatment toward the crime. The law explicitly says that enforced rehabilitation treatment is only eligible for *korban penyalahguna* and *pecandu*. As a consequence, it creates legal uncertainties, leaving marijuana users to face draconian prison sentences. I argue that the inconsistency in terminology gives the legal apparatus too much discretion in enforcing criminal law toward drug users. It becomes clear that they are using a punitive approach because the law has instructed them to do so. Due to that fact, this paper will try to prove that the inconsistency in terminology has had an unduly severe impact on individual violators and is responsible for the phenomenon of prison overcrowding. The paper will also propose legislative alternatives to address the problem. We argue that the multiple definitions of drug user must be ended by reforming current narcotics law. Personal possession of marijuana must be decriminalized and instead considered as a civil violation because the current policy has failed to reach its stated goal. In order to do so, we have tried to offer a step-by-step approach to that change.

This research mainly will employ a doctrinal methodology to evaluate the practice of 2009 narcotics law on the charging of marijuana users. The purpose of evaluating the 2009 law is to study how it contributes to unnecessary deprivation of liberty and dignity and exacerbates prison overcrowding. I also interviewed official authorities and former marijuana convicts. Apart from that, I conducted a survey to gauge public opinion on their acceptance of personal marijuana use. This paper is written while I am studying for my doctoral degree at the University of Washington, in the United States. Seeing marijuana shops everywhere here while someone can get jailed and his life destroyed for smoking marijuana in Indonesia inspires me to write this article.

## II. OBSCURE ELEMENT OF CRIMES

The 2009 narcotics law explicitly says that one of its purposes is to guarantee the right to rehabilitation for drug users.<sup>10</sup> Theoretically, the lawmakers are aware that a punitive approach toward drug users is not the right answer to address the problem. However, that high ideal does not match the actual letter of the law. This is because the 2009 narcotics law adopted multiple categories of drugs users that created confusion on the enforcement level. Ironically, this multicategory approach has been a key factor causing prison overcrowding in Indonesia.

From the policy standpoint, the layers of drug users codified by the 2009 narcotics law places too much discretionary power on the legal apparatus. The law says that only *korban penyalahguna* and *pecandu* may be sent to rehabilitation centers. That leaves prison time as the primary sanction for *penyalahguna*. Moreover, the rehabilitation does not mean marijuana users can alleviate the prison time. The rehabilitation for marijuana users arrested by legal enforcers must be mandated by a court judgment. It means that they are obliged to follow a series of criminal justice administration such as arrest, detention and public trial. Considering the chaotic management of the Indonesian court, one has to wait six to eight months in order to receive rehabilitation convictions. The outcome of this policy

Before going further, we will need to discuss the categorization of drug users

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<sup>10</sup> See Indonesia, *Undang-Undang tentang Narkotika (Law regarding Narcotics)*, UU No. 35 Tahun 2009, LN No. 143 Tahun 2009 (Law No. 35 Year 2009, SG No. 143 Year 2009), art. 4.

under the current law regime. I have already mentioned that there are at least three categories of drug users: *Penyalahguna* (abuser), *Korban penyalahguna* (victim of the abuser) and *Pecandu* (addict). They are no different for marijuana users. Nor are there detailed definitions of each category. Consequently, there is a lot of confusion in the implementation of the law. The original reason for the multilayered definition of users was that lawmakers wanted to distinguish between the crimes and the treatment for each category at the time of arrest.

For instance, a victim of abuse must receive a more lenient sentence than the abuser simply because he is a victim. Moreover, the mandatory rehabilitation according to narcotics law only applies to an addict and the victim of abuse because the commission of the crime is considered beyond their control and without their consent. As an illustration, at a party A gave B a “space cookie” (cookies containing *Tetrahydrocannabinol* or “THC” substance from marijuana). B ate it because she thought it was just an ordinary brownie. She realized later that she was strongly affected by the THC substance. In this example, B is a *korban penyalahguna* (victim) according to the current Indonesia narcotics regime.

An addict, by contrast, is a person who consumes drugs out of a physical and/or psychological need. His mind or body needs the drugs in order to “survive.” The lawmaker tends to see both *korban penyalahguna* and *pecandu* as victims. The fact that they consume the drugs is beyond their personal moral decision. That is why rehabilitation is mandatory. This does not make any sense, though, because it assumes that once you try marijuana, you will become addicted to it and ultimately require need rehabilitation.

The authorities tend to see the level of addiction to all drugs as equivalent, which is not true. Marijuana is not addictive in the same sense as other Schedule 1 drugs, such as heroin. And the addiction itself could not be formed instantly. Therefore, there is no need for enforced treatment as *korban penyalahguna* if this group were to consume marijuana without their consent.

The same is not the case for the *penyalahguna*. According to the law, *penyalahguna* is a person who knowingly consumes illegal drugs, with no extenuating circumstances. Their action is thus a blatant violation of the law. The term “without any legal rights” and “violation of the law” means that a person must be actively consuming drugs at the time of the arrest.<sup>11</sup> The word “actively” means that the action is his rational choice based on his personal moral decision. As a consequence, the criminal charge is the primary sanction for this category of drug user. The multilayered definition confuses the implementation because of the complicated crimes contained in the article. According to the law, the use of recreational marijuana would fall into the *penyalahguna* category because it is a personal moral decision. Unfortunately, the problem is not that simple. How can the legal apparatus distinguish between *penyalahguna* and *pecandu* when there is no definitive Indonesian government research concerning the dependence and addiction of marijuana? Research data has shown that it is possible to be dependent on marijuana without being addicted.

In 2010, the Supreme Court issued a circular letter on the handling of *penyalahguna*, *korban penyalahguna*, and *pecandu*. The Court stipulated requirements so that judges could identify the variable characteristics of drug users. It was an attempt to create

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<sup>11</sup> Interview with Sulistiandriatmoko, BNN (National Narcotics Agency) spokesperson, Treatment terhadap Pengguna Marijuana (2018).

a universal agreement on what constitutes drug users. The letter mandated three categories that must be met before a defendant can be sent to rehabilitation. First, the Supreme Court regulated the amount of drug possessed at the time of arrest. For marijuana, a person possessing no more than five grams may be deemed a user with the possibility to be sent to a rehabilitation center. Second, the drug test must be positive. Third, the defendant must obtain a letter of recommendation from the doctor appointed by the judge. Lastly, they have no ties with any drug ring.

The 2010 Supreme Court letter was a breakthrough at the time because it attempted to end the controversial multicategory of drug users. It also opened the door for all categories of users to be sent to a rehabilitation centers, based on requirements stipulated in the letter. The letter explicitly states that the judge may pass a rehabilitation judgment if the suspect satisfies all of the requirements in the letter. That is entirely up to the discretion of the judge. That said, the spirit of the letter is not decriminalization but depenalization because the law still sees enforced rehabilitation as another form of punishment. Drug users are still viewed as a criminal because they have to face a series of criminal justice procedures. Legally speaking, the letter from the Supreme Court does not amend the 2009 narcotics regime because it is only a circular letter. The letter is not the law; rather it is only a procedural guide for all judges.

This confusion is also confirmed by the National Narcotics Agency (*Badan Narkotika Nasional* or “BNN”). During my interview with Senior Police Commissioner, *Sulistiandriatmoko*, the spokesperson for BNN in October 2018, he admitted uncertainties in defining drugs user. He said those exist because the legal force of the Supreme Court letter is questioned. He emphasized, the letter only binds judges and no other institutions. As a result, the decision to define drug users is based entirely on the interpretation of the elites in each institution.<sup>12</sup>

Research conducted by a Non-Governmental Organization called *LBH Masyarakat*<sup>13</sup> in 2014 proved that there are inconsistencies in convictions under the framework of the Supreme Court letter in Jakarta, Bekasi and Depok court alone. The research concluded that there were 28 drug cases that fell into the category of drug users according to the Supreme Court letter. Ironically, not all 28 cases received rehabilitation convictions. Only 20 of them obtained rehabilitation order while eight were sent to prison. In fact, the Supreme Court already realized in 2011 an inconsistency in the implementation of the letter. That year, the Court issued another circular letter to unify the legal terminology for drug user.<sup>14</sup> The letter explicitly admitted that there was an inconsistency in the criminal justice apparatus when dealing with drug users. The letter said that the use of drugs was rising sharply and that the Supreme Court felt obliged to issue new directions for all judges. The Court further emphasized that it is better for *pecandu* and *korban penyalahgunaan* to be sent to rehabilitation centers while awaiting the outcomes of their trials. The letter explicitly stated that

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<sup>12</sup> *Ibid.*

<sup>13</sup> Albert Wirya *et al.*, *Di Ujung Palu Hakim: Dokumentasi Vonis Rehabilitasi di Jabodetabek Tahun 2014* (Jakarta: Lembaga Bantuan Hukum Masyarakat, 2016), p. 40.

<sup>14</sup> Supreme Court of Republic of Indonesia, “Supreme Court Circular Letter No 4 year 2011, Penempatan Korban Penyalahgunaan Narkotika di dalam Lembaga Rehabilitasi Medis dan Rehabilitasi Sosial,” [http://bawas.mahkamahagung.go.id/bawas\\_doc/doc/sema\\_03\\_2011.pdf](http://bawas.mahkamahagung.go.id/bawas_doc/doc/sema_03_2011.pdf), accessed 20 November 2018.



only *pecandu* and *korban penyalahgunaan* could be put into rehabilitation centers.<sup>15</sup> This was confusing because the previous letter already ended the multi-definition of drug users, including *penyalahguna*. However, in the last paragraph of the letter, the Supreme Court highlighted the need for all judges to follow the 2010 letter.

Apart from the Supreme Court, each law enforcement agency also issued procedural guidelines for dealing with drug users. Because there were simply too many procedural steps from each institution, and there are at least seven institutions responsible for tackling drug-related crimes, those seven institutions enacted joint regulations in 2014. The joint regulations explicitly state that only two type of drug users, *korban penyalahguna* and *pecandu*, are eligible to be sent to rehabilitation centers.<sup>16</sup> Those seven institutions are the Supreme Court, Ministry of Law and Human Rights, Ministry of Health, Ministry of Social Affairs, Attorney General's Office, National Police Institutions and National Narcotics Agency.

The joint regulations are an attempt to address the inconsistency in criminal justice administration of drug users. The letter reiterated that it is mandatory to put *korban penyalahguna* and *pecandu* into rehabilitation centers. In consideration of the issuance of the letter, those seven institutions admitted that the number of drug users is increasing, and that is why they need to unify regulations between all of them. For instance, it is possible to conduct rehabilitation programs inside prisons and special rehabilitation centers.<sup>17</sup> The letter still views a punitive approach as the best way to deal with all categories of drug users. Rehabilitation is still enforced, and marijuana users are still viewed as criminal.

The long list of policies governing drug users does not stop there. There are other procedural regulations enacted by the Indonesian National Police. The newest addition is the Circular Letter from Head of the Detective Unit of Indonesian National Police (*Kabareskrim*) in February 2018 on rehabilitation treatment for two categories of drug users—*korban penyalahgunaan* and *pecandu*.<sup>18</sup> The letter introduced three conditions to be considered before putting drug users into rehabilitation programs at the investigation level. The first is that rehabilitation will be given to *korban penyalahgunaan* and *pecandu* who voluntarily report themselves or are reported by their parents to the legal authorities. The second is rehabilitation will be given to drug users who are arrested without any evidence but whose urine tested positive. The last consideration is that rehabilitation will be given to *korban penyalahgunaan* and *pecandu* whose urine, at the time of the arrest, tested positive, and in possession of no more than what already regulated. That letter now clarifies for the Police that only *korban penyalahgunaan* and *pecandu* are eligible to receive enforced rehabilitation.

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<sup>15</sup> *Ibid.*

<sup>16</sup> Ketua Mahkamah Agung Republik Indonesia *et al.*, "Peraturan Bersama tentang Penanganan Pecandu Narkotika dan Korban Penyalahgunaan Narkotika ke dalam Lembaga Rehabilitasi," <http://icjr.or.id/data/wp-content/uploads/2014/03/PERATURAN-BERSAMA-TTG-PENANGANAN-PECANDU-NARKOTIKA-DAN-KORBAN-PENYALAHGUNAAN-NARKOTIKA-KE-DALAM-LEMBAGA-REHABILITASI1.pdf>, accessed 20 November 2018.

<sup>17</sup> *Ibid.*, art. 7 on joint regulation.

<sup>18</sup> Kepala Badan Reserse dan Kriminal Kepolisian Republik Indonesia, "Petunjuk Pelaksanaan Rehabilitasi Pecandu Dan Korban Penyalahgunaan Narkotika," Pub. L. No. Surat Edaran Nomor SE/01/II/Bareskrim (2018).

There are too many regulations adopted by the government to “band-aid” the 2009 narcotics law. The root of the problem is the multilayer definition of drug user. Lawmakers adopted such regulations without explaining in detail how to distinguish the elements of crimes between various types of drug users. I noted that only the 2010 Supreme Court circular letter included all categories of drug users and attempted to make a universal definition of drug user. The letter attempted to reach a universal definition of drugs user based on drug possession at the time of the arrest. However, the joint regulation and procedural policy from the National Police only accommodate two types of drugs user that are eligible to receive enforced rehabilitation.

According to Article 127 of the law, only *pecandu* and *korban penyalahguna* should receive enforced rehabilitation. However, in the third paragraph of the article, it opens the possibility for *penyalahguna* to receive an enforced rehabilitation conviction under one condition, that is, if it can be proven that *penyalahguna* is a *korban penyalahguna*. In that case, the subject is obliged to receive mandatory social and health rehabilitation. The question remains, however, how to distinguish between *penyalahguna* and *korban penyalahgunaan* in marijuana cases when there is no clear threshold?

We shared that opinion with former BNN chief, *Anang Iskandar*. In his article, “Decriminalization of Narcotics Abusers in the Construction of Positive Law in Indonesia,”<sup>19</sup> he states unequivocally that decriminalization is the key to winning the war on drugs. The reliance on the punitive approach must be stopped, he said. He mentioned the practice in the Netherlands, Portugal, and Australia, where personal consumption of drugs is not criminalized but heavily controlled by the government. Given that, it is not clear why, under his administration, the path of decriminalization remained far from realization. In 2014, he signed the joint regulations that reaffirming the use of the punitive approach toward drug users. In the end, we believe that criminal justice enforcement under the current law regime leaves too much discretion for the legal apparatus. The collateral consequence is that it increases the potential for abuse of the suspect.

It is difficult for the legal apparatus to distinguish the elements of crimes among the three layers of drug users because there is no definitive test or threshold that draws a bright line between them. May 2016 research from the Institute for Criminal Justice Reform (ICJR) on the practice of rehabilitation for drug users in Surabaya showed that the punitive mindset is dominant. They studied the charges filed by prosecutors in Surabaya District Court, the second biggest court in Indonesia after Jakarta. In their indictment, the prosecutor always filed multiple charges against drug users. Only 33%, out of 30, were indicted by using Article 127, which is the only article that obligates the legal apparatus to place drug users in rehabilitation centers.

The inconsistency in the definition of drug user is exacerbated by draconian criminal sanctions. The most lenient article for drug users is Article 127, which says that only a person charged with this article is eligible to receive enforced rehabilitation. The article provides a criminal sanction for personal recreational use of Schedule 1 drugs, including marijuana. Article 127 says that the maximum prison time for *penyalahguna* using Schedule 1 drugs is four years. Paragraph 3 of the article

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<sup>19</sup> Anang Iskandar, “Penyalahguna Narkotika Dalam Konstruksi Hukum di Indonesia,” <http://dedihumas.bnn.go.id/read/section/berita/2013/10/29/791/dekriminalisasi-penyalah-guna-narkotika-dalam-konstruksi-hukum-positif-di-indonesia, accessed 25 November 2018>.



states that, if it can be proven that a *penyalahguna* is only a korban *penyalahgunaan* (victim of the abuser), then the suspect is obliged to submit to enforced medical and social rehabilitation. Based on this article, it can be understood that the rehabilitation itself constitutes a punishment because one has to face a series of criminal justice appearances so that they can receive a rehabilitation judgment. In our opinion, Article 127 is confusing because of the multilevel drug user concept introduced by the 2009 narcotics law. Before the enactment of the 2010 Supreme Court letter, there was no clear threshold defining what constitutes *penyalahguna* and *korban penyalahguna*.

Apart from Article 127, marijuana users can also be charged with Article 111. Article 111 contains a very broad and vague type of crimes that could conceivably include anyone who consumes marijuana for personal, recreational use. The criminal punishment in Article 111 is more severe than in Article 127. One could be jailed for a minimum of four years and a maximum of 12, with a fine added as additional punishment. The minimum penalty is IDR 800,000,000 (approximately USD 54,800) and maximum IDR 8,000,000,000 (approximately USD 548,000). Article 111 in 2009 narcotics law roughly translates as:

Any unauthorized person who maintains, possesses, stores, controls, or provides an illegal Schedule 1 drug in the form of plants, shall be punished by imprisonment for a minimum of four (4) years and a maximum of twelve (12) years and criminal penalties of at least Rp.800,000,000.00 (eight hundred million rupiahs) and a maximum of Rp.8,000,000,000.00 (eight billion rupiahs).

Legally speaking, what distinguishes Article 111 and 127 is the type of consumption of the drugs. Article 111 contains the element of “provides,” which means that consumption is not limited to personal use. On the other hand, Article 127 concerns personal consumption. However, the range of crimes in Article 111 is simply too broad. The word plant, maintain, possess and to store is quite ambiguous. Even the Supreme Court judge stated that almost all drug users would maintain, possess and store (keep) their drugs.<sup>20</sup> What distinguishes personal drug use from a drug dealer is the use of the drugs themselves.

This issue was reflected in the ICJR study. The study found that prosecutors always file multiple charges against drug users because they feel that the crimes contained in Articles 111 and 127 have the same characteristics. In Surabaya, the prosecutor always places Article 111 as a main charge and Article 127 as a subsidiary charge. The study by ICJR showed that all of the drug users in Surabaya court were charged with either Article 111 or 227. Prior to trial, the prosecutor typically decides the appropriate charge based on the evidence. Upon hearing the defense, the judge then has the discretion to conclude the trial.

This practice tells us that the prosecutors themselves are uncertain which article is the most suitable article for charging drug users. It is also why they have the tendency to employ both articles. The purpose of prosecutors using alternative charges is that they want to make sure that defendants will not go unpunished. At the same time,

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<sup>20</sup> Institute for Criminal Justice Reform, “Problem Pasal 111 dan Pasal 112 UU Narkotika Harus Menjadi Perhatian Serius,” <http://icjr.or.id/icjr-problem-pasal-111-dan-112-uu-narkotika-terhadap-pengguna-narkotika-harus-menjadi-perhatian-serius/>, accessed 24 November 2018.

they seek to widen the range of crimes for the defendant's action.<sup>21</sup> The combination of the punitive mindset and obscure element of crimes is very costly to the defendant. First, the use of Article 111 for marijuana use increases the likelihood of longer prison time. Anyone charged with Article 111 can face a minimum term of four years and a maximum of 12 years. Apart from that, their chance to be put into a rehabilitation center will be lost because the enforced rehabilitation can only apply to one who is charged by Article 127. Meanwhile, Article 127 only sanctions the maximum prison time for marijuana users, which is four years.

The problem in defining marijuana users and the obscurity of the element of crimes comes at a very heavy cost. I have identified at least two prices that individual violators must pay: the impact on the individual violators; and the phenomenon of prison overcrowding due to the punitive approach employed by the legal apparatus. Prison overcrowding in itself leads to another serious problem, rampant corruption and inhumane treatment within the prison.

### III. IMPACT ON INDIVIDUALS VIOLATORS

The inconsistency in defining marijuana users, combined with the vague element of crimes is a dead note for violators. The tendency to file multiple charges increases the likelihood of detention. The objective requirement for detaining a person in Indonesia is whether they face a minimum prison term of five years.<sup>22</sup> Apart from that, everything is based on the discretion of the legal apparatus. This is why the police and prosecutor usually file multiple charges, so that they have more reason to detain the violator. Article 127 does not meet the objective requirement to put the suspect in a detention center, because the maximum prison term for Article 127 is only four years. The ICJR study confirmed this assumption in which 51 drug users (13% of whom were marijuana users) out of 52 were held in the detention center. One was not detained because he was a juvenile.<sup>23</sup>

Apprehended marijuana users must then face criminal justice administration. The Indonesian legal apparatus is very unlikely to divert an investigation and wait for the court's decision. Due to the inconsistency of the law, marijuana users are still criminalized in the form of imprisonment or enforced rehabilitation. Even without conviction, detention is a statement of social disapproval, and it automatically labels marijuana users criminal.<sup>24</sup> The label of criminal is harmful enough to someone's reputation. In our opinion, it is not worth depriving someone of their liberty and dignity for smoking marijuana. The legal system has been structured to act beyond its capacity for the purpose of creating a vague notion of order in the society.

The opposing argument to my statement would be that marijuana users deserve

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<sup>21</sup> Institute for Criminal Justice Reform, "Studi SEMA dan SEJA Rehabilitasi dalam Praktek Peradilan," <http://icjr.or.id/data/wp-content/uploads/2016/08/Studi-SEMA-dan-SEJA-Rehabilitasi-dalam-Praktek-Peradilan.pdf>, accessed 24 November 2018.

<sup>22</sup> See Indonesia, *Undang-Undang tentang Kitab Undang-Undang Hukum Acara Pidana (Law regarding Indonesian Criminal Procedural Law)*, UU No. 8 Tahun 1981, LN No. 76 Tahun 1981 (Law No. 8 Year 1981, SG No. 76 Year 1981), art. 21.

<sup>23</sup> Bonnie, *op.cit.*, p. 40.

<sup>24</sup> *Ibid.*, p. 17.

such treatment because of their immoral conduct. However, this argument is weak. Looking at the history of criminalization of marijuana in Indonesia, it can be said that it is merely following the outdated 1961 Single Convention on Narcotics Drugs, which many countries have already revisited and adjusted in line with current conditions. For instance, in 2003, the United Kingdom shifted cannabis from Schedule 1 to Schedule C, which lessened the maximum penalties that could be imposed on offenders. Possession of a Schedule C drug is not an arrestable offense.<sup>25</sup>

This deprivation of liberty because of personal marijuana use could also last a significant length of time. According to the 2009 narcotics law, drug users can be detained for six days without being charged.<sup>26</sup> Without charges, one cannot be assisted by a lawyer, let alone have the right to obtain a pro bono lawyer. So, there is a possibility that someone will be detained without any information on their charges. The original purpose of having such enormous power stems from the police stance that they need more time to obtain information from a suspect tied to a drug ring. However, the marijuana users are subject to the same treatment because the law permits them to do so.

Apart from the detention, the legal apparatus often conducts a press conference after the arrest, as in the case of Tommy Tanggara. This method is widely practiced if their suspect is a public figure. The mass media is invited and can freely pose questions to the suspect. As I understand, this practice is intended to deter the crime. This is akin to the ancient practice of shaming people before the public by showing them that justice has been done and the legal apparatus has successfully restored order. That presentation undermines the presumption of innocence principle, especially in the era of advanced social media. The suspect's reputation will be destroyed, and his life will never be the same, simply because he is using marijuana. The public stigma and criminal record will always haunt him. The punishment is beginning even before the trial starts.

During the trial, the marijuana user will be handcuffed and wear a specialized detention shirt. One who is handcuffed is presumed to be a danger to the society. Their action is presumed to be evil enough to justify the handcuff. This is very sad because studies rarely link marijuana use to violence. Researchers have concluded that alcohol is more likely to promote violent behavior than marijuana. Furthermore, a large-scale, 26-year study for the Bill and Melinda Gates Foundation, published in *Lancet* in 2016, suggested that for people between the ages of 15 and 49 years old

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<sup>25</sup> In October 2001, then British Home Secretary, David Blunkett, announced proposals to reclassify cannabis as a Class C drug, placing it in the same category as anabolic steroids and benzodiazepine tranquillisers.<sup>2</sup>

In 2003, following a 2002 report of the Advisory Council on the Misuse of Drugs (ACMD), the law was changed. In 2007, then Prime Minister Gordon Brown announced a review of the government's drug strategy, including whether or not to reclassify cannabis as a class B drug.<sup>3</sup> [Same question] Following a request from the then Home Secretary, Jacqui Smith, the ACMD reviewed the evidence on cannabis and published a report in May 2008.<sup>4</sup> [Ditto] It recommended that cannabis remain a Class C drug. See Sarah Barber, "Medical Use of Cannabis," <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8355>, accessed 4 December 2018.

<sup>26</sup> Indonesia, *op.cit.*, art. 76.

worldwide, alcohol was the leading risk factor for death in 2016 and not marijuana.<sup>27</sup> Ironically in Indonesia, a suspect of corruption is not handcuffed and forced to wear specialized detention shirt. Are marijuana users more dangerous than state fund robbers?

The situation has worsened due to chaotic criminal justice management in Indonesia. In general, one criminal case can take five to six months or even more than a year. There is no regular system in court management. Consequently, one must wait up to four hours in the court cage for their trial to start. All of that is done so that marijuana users can be handed rehabilitation convictions, if they are “lucky” enough. The proponent of criminalization of marijuana will easily challenge my argument by saying that the solution to all of the issues is simple: just do not smoke marijuana because it is against the law. However, the problem is not that simple. This paper questions the use of repressive criminal justice force by the government in dealing with marijuana users. The decriminalization of marijuana is now happening globally and becoming a new civil rights issue. Ironically, the Indonesian government’s decision to criminalize marijuana is based on a Western value adopted at a 1961 convention, while the West itself is now leading a march to decriminalize marijuana and reclassify it as a civil right issue.

In the global context, one could say that smoking marijuana is not a universal crime. In fact, several countries have already decriminalized marijuana and even promote its sales so as to help the government collect a tax. The Netherlands, several states in the United States, Canada, and Uruguay are just a few examples of countries that have already fully legalized recreational marijuana. In South East Asia, the Philippines have legalized marijuana for medical use. In September 2017, the Philippines’ House of Representatives passed the medical marijuana bill<sup>28</sup> which legalizes and regulates marijuana. Medical care center must be registered and licensed with the Department of Health to acquire, possess, cultivate, manufacture, deliver, supply, and dispense the drug. This is a milestone step in the Southeast Asia region, clearly showing that the 1961 convention is outdated and must be revisited.

The number of countries that have moved on from criminal penalties for possession of marijuana is large and increasing. For instance, three European nations have removed penalties for possession of small amounts of any psychoactive substance; Italy (since 1973), Spain (about 1980), and Portugal (2001).<sup>29</sup> Interestingly, Germany’s Constitutional Court in 1994 ruled that once the state allowed the production and consumption of alcohol and tobacco, it could not criminally sanction cannabis use.<sup>30</sup> It is interesting to note that Germany’s Constitutional Court is seeing a significant

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<sup>27</sup> GBD 2016 Alcohol Collaborators, “Alcohol Use and Burden for 195 Countries and Territories, 1990–2016: A Systematic Analysis for the Global Burden of Disease Study 2016,” *The Lancet* 392, No. 10152 (September 2018): 12.

<sup>28</sup> Rodolfo Albano III, “An Act Providing Compassionate and Right of Access To Medical Cannabis and Expanding Research Into Its Medicinal Properties,” [http://www.congress.gov.ph/legisdocs/basic\\_17/HB00180.pdf](http://www.congress.gov.ph/legisdocs/basic_17/HB00180.pdf), accessed 10 December 2018

<sup>29</sup> Peter H Reuter, “Marijuana Legalization: What Can Be Learned from Other Countries?,” *Rand Drug Policy and Research Center* 1 (July 2010): 5.

<sup>30</sup> Steven Belenko and Cassia Spohn, *Drugs, Crime and Justice* (Los Angeles: Sage, 2015), p. 496.

parallel between the toxicological and pharmacological effects of nicotine and THC.<sup>31</sup> In Argentina, in 2009, the Supreme Court ruled that criminal sanctions for drug possession were unconstitutional.<sup>32</sup> In Indonesia, a group called Cannabis Circle Movement (*Lingkar Ganja Nusantara*) promotes the decriminalization of marijuana. They claim to be the first government-licensed research group, as of 2014) for the study of marijuana.<sup>33</sup> Up until now, the results of their research remains unknown.

I understand that the socio-political-legal situations in each country differ, but why adopt repressive enforcement toward marijuana users while in some parts of the globe it has already been decriminalized? Why don't we think of better solutions? Why collect taxes from tobacco smokers to fund our social security program (*Badan Penyelenggara Jaminan Sosial*)<sup>34</sup> while maintaining a tough on crime approach toward marijuana smokers?

Ideally, the government should not criminalize people merely because they follow a different cultural standard, or create an argument that is rooted in a moral perspective. As a nation, Indonesia should react to the global phenomenon of decriminalization of marijuana and pose a question to itself: it is worth destroying people's lives because they smoke marijuana? For me, it does not make any sense to justify the criminalization of marijuana when you do not have the infrastructure to punish people judiciously. In this case, we could safely say that the government treatment of marijuana users is more evil than smoking marijuana itself. I focus on marijuana because of the minor, victimless nature of the so-called crime and the sheer volume of marijuana cases that come through the criminal courts.

#### IV. MARIJUANA USERS IN PRISON

The criminalization of marijuana users is the main contributor to the phenomenon of prison overcrowding in Indonesia. According to the official report from the Ministry of Law and Human Rights in 2017 (the ministry responsible for prison management), the overcrowding rate reached 600% that year. According to the report, the number of prisoners in Indonesia reached approximately 222,000 prisoners. 86,000 were jailed for drug-related crimes and 32,000 for drug use. There is no exact number on how many marijuana users are currently in prison, but based on the research data from BNN, approximately 58% of the drug use total was for marijuana.<sup>35</sup>

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<sup>31</sup> L. Mueller, "Comparative Basic Toxicology and Pharmacology of Nicotine and Cannabinol," <http://legacy.library.ucsf.edu/tid/oby53d00>, accessed 6 November 2018.

<sup>32</sup> Graciela Rodriguez-Ferrand, "Decriminalization of Narcotics: Argentina," <https://www.loc.gov/law/help/decriminalization-of-narcotics/argentina.php>, accessed 6 November 2018.

<sup>33</sup> Lingkar Ganja Nusantara, "Riset Ganja Pertama Di Indonesia," <http://www.lgn.or.id/riset-ganja-pertama-di-indonesia/>, accessed 20 November 2018.

<sup>34</sup> In September 2018, Indonesian President, Joko Widodo, enacted a decree ordering the levy collected from cigarette packs to be channeled to the Indonesian social security program. See Indonesia, *Peraturan Presiden tentang Jaminan Kesehatan (Presidential Regulation regarding Social Security)*, Perpres No. 82 Tahun 2018 (Presidential Regulation No. 82 Year 2018), art. 99 and 100.

<sup>35</sup> Badan Narkotika Nasional, *op.cit.*, p. 5.

Prison overcrowding is a very serious issue that needs to be highlighted because it is a bigger problem than smoking marijuana itself. Failure to comply with minimum prison standards are clearly of violation of human rights standards set by international law. It is very ironic because Indonesia adopted the latest UN resolution Standard Minimum Rules for the Treatment of Prisoners (“The Mandela Rules”) in 2015. Prison overcrowding leads to inhumane conditions in prisons and rampant corruption practices. The inhumane treatment is unavoidable because the population is growing steadily while the facilities stagnate.

To verify our observations, we conducted an interview with *Adek*, a former marijuana user who experienced four years in prison. He was arrested by the police in 2017 in Jakarta. He bought marijuana from a dealer, and during the transaction, he was arrested by the police. He said that the arrest was staged because the police were using his dealer as bait. He argued to the police the transaction had yet to happen. He was charged with Article 111 and the lower court (district court) handed him a four year sentence. Later on, the Supreme Court revised his prison sentence to 1.5 years. He told me that his experience facing criminal justice administration was very traumatic. He was detained in *Cipinang* detention center (Rumah Tahanan Cipinang), and he lived with 15 other detainees in a room with a maximum capacity for seven people. For that “facility” he had to pay IDR 1,000,000 (approximately USD 69) otherwise he would be placed in another room that was even worse. Apart from that, he had to face the awful state of prison food, sanitation, and hygiene.

The pro-decriminalization of marijuana group in Indonesia is called the Cannabis Circle Movement (*Lingkar Ganja Nusantara*). In 2014, they published a book called “Now It’s Me, Tomorrow It’s You” (*Sekarang Aku Besok Kamu*). In it, they tell the story of how a marijuana user was found dead in the detention center in Yogyakarta on September 16, 2013. He was an undergraduate art school student in Yogyakarta (*Institut Seni Indonesia*), arrested by the police in August of that year. The official statement from the Police said he died because of a heart attack. However, his family said that the awful condition of the prison was the only factor to blame for his death.<sup>36</sup>

There was another story, published by the Transnational Institute, of a marijuana user arrested in 2011.<sup>37</sup> The man, known as *Rudi* (not his real name), was arrested in 2011 at his house in Bogor, West Java (an outskirt of Jakarta) after buying marijuana in Yogyakarta from a local dealer. According to the account, he was targeted by his local dealer, who had already been arrested. The police had persuaded the dealer to sell the marijuana to his customer, Rudi. According to the testimony, Rudi was beaten by the police during the investigation. They subsequently offered Rudi a deal; they would remove his cannabis-related charges in exchange for a certain amount of money. Lucky for him, he was able to escape prison time because he had the money to “buy” his way out of the Indonesian criminal justice system. The story of Rudi tells us that treatment of marijuana users is highly selective and not transparent.

The experiences of *Tommy*, *Fidelis*, *Adek*, *Rudi*, and the art school student are just the tip of the iceberg. The Minister of Law and Human Rights explicitly admitted that his institution could not meet the standards set by the UN Standard Minimum Rules

<sup>36</sup> Lingkar Ganja Nusantara, “Sekarang Aku Besok Kamu,” [https://kupdf.net/download/ebook-sabk-april-2014-lingkar-ganja-nusantara\\_5af910eee2b6f58c2896e94b.pdf](https://kupdf.net/download/ebook-sabk-april-2014-lingkar-ganja-nusantara_5af910eee2b6f58c2896e94b.pdf), accessed 2 November 2018.

<sup>37</sup> Dania Putri and Tom Blickman, *Patterns in Consumption, Production, and Policies* (Den Haag: Transnational Institute, 2016), p. 7.



for the Treatment of Prisoners, to which the Indonesian government was a signatory, because of the prison overcrowding situation. In short, the state budget could not handle a 600% overcrowding rate and the minister begged for help.<sup>38</sup> The standard sanctioned in the Mandela Rules mainly governs accommodation, food, sanitation, and hygiene to ensure that persons held by the state are treated humanely.<sup>39</sup> Prison overcrowding leads to another problem, which is rampant corruption practices in prisons and detention facilities. It is no secret that detainees must pay a certain amount of money to get “decent” facilities. As a consequence, it creates a “market” on the prison management. This happened to *Adek*. It is no secret that rampant and blatant corruption practices are strongly rooted in the Indonesian prison management system. We discussed this with the researcher from *LBH Masyarakat*, who also studied rehabilitation practices, and he confirmed this view by saying that in the prison management, there is “another law” at play, which is the law regulating the “market” for prison facilities. In order to get a “good life” in prison, you have to pay regularly to the prison official.

But the irony does not stop there. There was also a story about a drug kingpin named *Freddy Budiman*. It is a fact that drug users usually do not stop using drugs when they are in jail. Once, I visited a friend in a detention center in Jakarta. He was jailed for possession of drugs. “Prison is the safest place to consume drugs,” he said with a laugh. Drug consumption in a detention center is no longer secret in Indonesia. The case of *Freddy Budiman* in 2016 was a perfect example of how the Indonesian prison is thoroughly corrupt. *Freddy*, already sentenced to the death penalty because of his involvement in trafficking drugs, was able to traffic his drugs with the help of prison officials. There was also a report that *Freddy* made a payment to several high-ranking police officials so that his business was protected.

In order to address the prison overcrowding situation, the Minister issued a regulation in 2017.<sup>40</sup> The regulation clearly states that, to solve the situation, the criminal policy on drugs must be changed. There must be special treatment for drug users, and the prison clearly is not the answer.<sup>41</sup> The punitive approach must be stopped, and the government must react to the phenomenon by using a public health approach. We support the Minister’s perspective on this but dealing with this complex

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<sup>38</sup> Najwa Shihab, “Pura Pura Penjara Mata Najwa,” <https://www.youtube.com/watch?v=dW93uMlyqw0>, accessed 15 December 2018.

<sup>39</sup> See Article 9 of the resolution. It governs the standard of accommodation. It explicitly says that where sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself. If for special reasons, such as temporary overcrowding, it becomes necessary for the central prison administration to make an exception to this rule, it is not desirable to have two prisoners in a cell or room. [Remark: Is this a quote from the article? If not, it should be. Quote it directly as it will carry far more authority.]

<sup>40</sup> See Indonesia, *Peraturan Menteri Hukum dan Hak Asasi Manusia tentang Grand Design Penanganan Overcrowded Pada Rumah Tahanan dan Lembaga Pemasyarakatan* (Regulation of the Minister of Law and Human Rights regarding the Grand Design of Overcrowded Handling in Detention Centers and Corrections Institutions), Permenkumham No. 11 Tahun 2017 (Regulation of the Minister of Law and Human Rights No. 11 Year 2017).

<sup>41</sup> *Ibid.*, chapter 4 para. 3.

issue cannot be handled by the minister alone. The Minister of Law and Human Rights responsible for managing prisons is positioned at the end of the spectrum on this issue.

## V. JUSTIFYING DECRIMINALIZATION

Sadly, the tough on crime measures adopted by the government do not actually reduce crime. The official data from BNN show that, in 2010, there were 26,678 drug-related cases. In 2017, that number surged to 46,537 cases.<sup>42</sup> The goal to deter the crime had also failed miserably. From that number, it becomes clear that adopting a tough on crime approach does not automatically reduce marijuana use. The use of criminal justice enforcement tactics such as arrest, detention, enforced rehabilitation, and presentation of the suspect before the media are doing more harm than good for Indonesia.

The same finding can also be gleaned from the criminalization of marijuana in the United States. Before decriminalization of marijuana, each state in the U.S. was annually increasing their number of marijuana arrests. In 2006, 44% of the nation's 1,889,810 drug arrests involved marijuana, and nearly 88% of those were for simple possession.<sup>43</sup> Research conducted in Washington State in 2007, the first state in the United States to fully legalize recreational and medical marijuana, found that increasing criminal justice enforcement does not automatically mean reducing marijuana use. Despite increases in marijuana arrests, the price of marijuana dropped; its average potency increased; it became more readily available.<sup>44</sup> From other countries' experiences, it learned the war on drugs cannot be won with aggressive enforcement. Something must be changed, and clearly, mass incarceration was not working.

In this paper, I argue that using marijuana for personal recreational use poses insignificant harm. Moreover, the outcome of the policy using the instrument of criminal justice enforcement, clearly, creates a bigger problem than marijuana itself. I would argue that some calculation has to be done before criminalizing marijuana users. We have to weigh the cost and benefits of using the criminal justice system to deal with marijuana use. This is a difficult calculation but it remains necessary that governments revisit their tough on crime approach to drugs.

It is natural when the government uses the criminal justice system to enforce laws against toward people who have committed acts that society believes to deserve punishment. In the case of marijuana criminalization, Indonesia is following the nearly 60-year-old 1961 World Health Organization Single Convention on Narcotics Drugs. The convention was the first to label marijuana as an illegal substance and categorize it as a Schedule 1 drug. In 1988, Indonesia also ratified the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The treaties have served as the bedrock of the international drug control regime and introduced widely accepted penal obligations for signatory states to criminalize, under their domestic

<sup>42</sup> Badan Narkotika Nasional, "Press Release Akhir Tahun 2017," <http://www.bnn.go.id/read/berita/17997/press-release-akhir-tahun-2017>, accessed 19 December 2018.

<sup>43</sup> See United States Department of Justice, Federal Bureau of Investigation, "Crime in the United States, 2006 (September 2007)," <http://www.fbi.gov/ucr/cius2006/index.html>, accessed 19 December 2018.

<sup>44</sup> Beckett & Herbert, *op.cit.*, p. 4.

laws, unlicensed production and trade, and extended the pre-existing control regime to the cultivation of opium poppy, coca, and cannabis.<sup>45</sup> The treaty forced developing countries like Indonesia to abolish all non-medical and non-scientific uses of the three plants that had for centuries been embedded in social, cultural and religious traditions.<sup>46</sup> As has been stated, calls to revisit and revise the treaty to adapt to the economic and social changes which have occurred over the years have gone unheeded to date.

The ratification of those treaties pioneered the use of criminal justice in dealing with drug users, followed by adoption of the 1997 Indonesian laws on narcotics and psychotropics. The laws established a special institution responsible for tackling drug-related problems, the National Coordinating Agency for Drugs (*Badan Koordinasi Narkotika Nasional*). In 2002, the institution changed its name to National Narcotics Agency (*Badan Narkotika Nasional* or “BNN”). One of the main functions of BNN that is relevant to this paper is their power to use criminal justice tools in dealing with drug users.

In Indonesia, the justification for putting marijuana users in jail stems from its political conservatism. The same argument can be found in the 1972 report of the Shafer Commission, formally known as the National Commission on Marihuana [sic] and Drug Abuse, in the United States, in part because there is a need to protect society as we know it. Unfortunately, the Indonesian National Anti-Narcotics Agency has campaigned about the danger of recreational drugs without any clear argument. There appear to be two main arguments echoed by the legal apparatus in defending the criminalization of marijuana users: One, because the law says so, given their obligation to enforce the law, and two, because they believe it affects users’ physical and mental health. I use the phrase “they believe” because there is no single official study on the implications of smoking marijuana in Indonesia.

There must be a step-by-step reformation of marijuana laws in Indonesia. The revision of marijuana laws in the U.S. is a pattern worth examining. For instance, when initiatives were first introduced in California in 1972, voters rejected the decriminalization of marijuana.<sup>47</sup> Now, as of July 2019, 33 states and Washington, D.C have passed laws legalizing or decriminalizing medical marijuana, of which 11 allow it for recreational use. What can be inferred is it will take time to shift from the society that had seen marijuana as an evil substance meriting criminalization to one that considers smoking marijuana as a civil right with which the government has no authority to interfere.

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<sup>45</sup> David Bewley-Taylor and Martin Jelsma, “Regime Change: Re-Visiting the 1961 Single Convention on Narcotic Drugs,” *International Journal of Drug Policy* 23, No. 1 (January 2012): 72–81.

<sup>46</sup> David Bewley-Taylor and Martin Jelsma, “Fifty Years of the 1961 Single Convention on Narcotic Drugs: A Reinterpretation,” *Transnational Institute, Legislative Reform of Drug Policies, II* (March 2011): 20.

<sup>47</sup> Proposition 19, also known as the California Marijuana Initiative (CMI), was a ballot proposal on the November 7, 1972, California statewide ballot. This was the first attempt to legalize marijuana by ballot measure in the history of the United States. The initiative was defeated by the voters by a 66.5-to-33.5% margin. Cf. *History of marijuana on the ballot*, Ballotpedia, “History of Marijuana on the Ballot,” [https://ballotpedia.org/History\\_of\\_marijuana\\_on\\_the\\_ballot](https://ballotpedia.org/History_of_marijuana_on_the_ballot), accessed 28 November 2018.

## VI. CONCLUSION

It is clear that the mass criminalization of marijuana users in Indonesia stems from the multilayered categorization of drug users introduced by the current narcotics law. That system leaves too much room for the punitive approach adopted by the Indonesian legal apparatus. Thus our aim with this paper is to make a case for the structural reform of marijuana law in Indonesia rather than to simply amend the multilayer classification of drug users. We believe that the war on marijuana will not succeed by the current mass incarceration policy. The stated goal of the current narcotics law regime has proven to be not just unsuccessful but to have created a far bigger problem than marijuana itself.

We are well aware that reforming marijuana law in Indonesia will be a tough battle. It will not be won by invoking libertarian principles and viewing marijuana as a civil rights issue. It is tempting to say that the decision to risk one's own health through use of a psychoactive substance is a personal decision; the government has the authority to intervene only if use of the drug has incapacitated the user or induced behavior causing harm to others. However, Indonesian society is not ready for that kind of change. It will be seen as a radical shift invoked by libertarians, in a country where the liberal label is a negative political brand. That is why this study serves as a reflection as well as a proposal for an alternative to the draconian consequences of using the criminal justice tool to deal with the personal marijuana-related issues. We share the conclusion of the Transnational Institute research which says that legal reforms, even though we clearly need them, appear unlikely in the near future due to the socio-legal condition of Indonesian society.<sup>48</sup> I understand that there is a need for the government to enforce criminalization of marijuana simply on moral grounds. I do not agree with it, but in this situation it is understandable. For that reason, I propose that marijuana be allowed for medical use. Please keep in mind that my argument in this paper will not apply to any other substance because the nature of each substance differs.

In this paper, I am proposing that marijuana for personal use in the sphere of private behavior must be decriminalized. Fully legalizing for recreational and personal use would be a better idea but I believe it would cause a massive public uproar. Indonesia must first establish a special commission to study medical marijuana on its own and revisit the scheduling regulated by the UN convention. In 2017, the Minister of Health responded to the question posed by a journalist concerning research for medical marijuana. She declined to conduct research while maintaining marijuana is dangerous because it could make people "fly."<sup>49</sup> At least in the interview, she admitted that there is no single research endorsed by the government on the use and danger of marijuana. In other words, we simply criminalize our own citizens because obsolete international law instructed us to do so. Isn't it very sad? It seems unwise to use the criminal justice instrument to deal with marijuana users, and at the same time, we never question why we should deprive a citizen's liberty and dignity because he

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<sup>48</sup> Transnational Institute, *op.cit.*, p. 21.

<sup>49</sup> Ihsanudin, "Soal Ganja Untuk Pengobatan, Ini Kata Menteri Kesehatan," <https://nasional.kompas.com/read/2017/04/03/19394691/soal.ganja.untuk.pengobatan.ini.kata.menteri.kesehatan>, accessed 19 November 2018.

smokes marijuana. Moreover, it also seems wrong to defend marijuana criminalization based on its presumed social stigma or social disapproval. There must be a balance between the protection of “the value of the society that we know” and personal liberty.

In order to reach the goal of allowing medical marijuana, there must first be a study on its use so that the absurdity that happened to *Fidelis*, the civil servant jailed and fined for growing marijuana for his invalid wife, not happen again. The study of marijuana decriminalization must be viewed in the context of redefining the scope of criminal law. The effort to decriminalize marijuana should be placed in the context of the need to reallocate law enforcement resources and restore the institutional integrity of the criminal justice system apparatus. There are concrete examples on how to do it, including that of the Republic of the Philippines’ reform of their marijuana law. The cultivation, sales, and distribution must be strictly controlled by the government. There must be a statutory relationship governing the possession. Possession has to be divided into at least two categories, personal possession and possession with intent to sell. Personal possession could be divided into two groups—possession with legal rights for medical use and possession without legal rights. The latter category that exceeds the amount of what is already regulated should be charged with criminal sanctions. Apart from that, possession with intent to sell could also be charged with criminal sanction. With this concept, we draw a clear line between commercial activity and personal consumption. Furthermore, the violator cannot adjust his conduct to avoid criminal sanction because the threshold is clear. The government must set a regulation regarding the amount for recreational use. For starters, the standard set by the Supreme Court can be used as a basis to decriminalize marijuana. Apart from possession, there must be a distinction between public and private behavior use of marijuana. Using marijuana in public in a way which can harm others, such as driving under the influence and operating machinery, should remain punishable under criminal sanction.

We are of the opinion that rehabilitation is not needed for marijuana users. In the United States, research shows that an overwhelming majority of persons who experiment with marijuana and use it recreationally are not in need of treatment.<sup>50</sup> The main function of the government with regard to marijuana is educational and preventive rather than forcing its people into rehabilitation centers. Unlike alcohol, data shows that the overwhelming majority of marijuana users are not in need of treatment. They are indistinguishable from their non-marijuana using peers by any criterion other than marijuana use. What is lacking is education and injury prevention rather than rehabilitation. It must be questioned whether the cost of enforcing punitive laws against marijuana users is necessary as opposed to the probable benefit.

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<sup>50</sup> Bonnie, *op.cit.*, p. 65.

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