

## Dissenting Opinion on the Constitutionality of Capital Punishment for Narcotics Crime

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### ABSTRACT

**Purpose of the study:** This paper aimed to answer the issues of the judicial analysis of cases No. 2 and 3/PUU-V/2007 and the reasons the judge assembly chose to present dissenting opinions.

**Methodology:** This research employed the normative juridical method. It applied literary materials as well as the literary and statute approaches. The statute approach functioned to analyze regulations that became the judges' consideration sources.

**Results:** The Constitutional Court assessed whether the crime of narcotics punishable by death is the most serious crime. According to the Constitutional Court, the phrase "the most serious crimes" must also be recited with the phrase "according to the law that is applicable during the occurrence of that crime." The Constitutional Court

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assessed that at the national level, the law applicable at that time was the Law on Narcotics. Then, at the international level, Indonesia ratified the International Convention on Narcotics and Psychotropics in 1997. The Constitutional Court argued that capital punishment was constitutional based on Article 28J Paragraph (2) of the 1945 Constitution stating that, “In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society.”

**Applications of this study:** Society and the government can use this research's results to understand why the death penalty is constitutional in Indonesia. It will motivate both parties to avoid committing crimes, particularly the serious ones.

**Novelty/Originality of this study:** This writing proves how capital punishment is constitutional in the Indonesian legal system.

**Keywords:** *Narcotics, Drugs, Capital Punishment, Constitutional Court, Decision, Constitutional, Death Penalty.*

### **ABSTRAK**

**Tujuan:** *Tulisan ini bertujuan untuk menjawab persoalan analisis hukum perkara No. 2 dan 3/PUU-V/2007 serta alasan mengapa majelis hakim mengajukan pendapat berbeda.*

**Metodologi:** *Penelitian ini mengaplikasikan metode yuridis normatif. Peneliti mengguakan bahan-bahan kepustakaan serta pendekatan pustaka dan undang-undang. Pendekatan undang-undang bertujuan untuk menganalisis peraturan yang menjadi sumber pertimbangan hakim.*

**Temuan:** *Mahkamah Konstitusi mengevaluasi apakah tindak pidana narkoba yang diancam dengan hukuman mati merupakan tindak pidana yang paling berat. Menurut Mahkamah Konstitusi, kata “kejahatan yang paling berat” juga harus diartikan bersama dengan kata “menurut hukum yang berlaku selama terjadinya kejahatan tersebut”. Mahkamah Konstitusi menilai bahwa hukum yang berlaku secara nasional adalah UU Narkotika. Sedangkan di tingkat internasional, Indonesia mengesahkan Konvensi Internasional Narkotika dan Psikotropika pada tahun 1997. Mahkamah Konstitusi*

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*berpendapat bahwa pidana mati bersifat konstitusional berdasarkan Pasal 28J Ayat (2) UUD 1945 yang berbunyi, “Dalam menjalankan hak dan kebebasannya, setiap orang wajib tunduk kepada pembatasan yang ditetapkan dengan undang-undang dengan maksud untuk menjamin pengakuan serta penghormatan atas hak kebebasan orang lain dan untuk memenuhi tuntutan yang adil sesuai dengan pertimbangan moral, nilai-nilai agama, keamanan, dan ketertiban umum dalam suatu masyarakat demokratis.”*

***Kegunaan:*** Masyarakat dan pemerintah dapat mengaplikasikan hasil penelitian ini agar memahami mengapa hukuman mati bersifat konstitusional di Indonesia. Hal ini akan memotivasi kedua belah pihak untuk menghindari perbuatan kejahatan, terutama kejahatan serius.

***Kebaruan/Orisinalitas:*** Tulisan ini membuktikan bagaimana pidana mati bersifat konstitusional dalam sistem hukum Indonesia.

***Kata Kunci:*** Narkotika, Narkoba, Hukuman Mati, Pengadilan Konstitusional, Putusan, Konstitusional, Hukuman Mati.

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## INTRODUCTION

According to Muladi, capital punishment should follow some theoretical concepts regarding the objectives of imposing criminal sanctions, such as the retributive theory, the teleological theory, and the teleological retributive theory (Eleanora, 2012). Supporters of the retributive theory state that imposing criminal sanctions against crime perpetrators fulfills the principle of justice as it will fix the moral balance damaged by crimes. Authors personally agree with the death penalty as the worst crimes, this is for future deters. Evil crimes such as serial killers or drug producers or dealers should deal with the death penalty.

Good people will become happy, whilst the bad ones will suffer due to their actions. An imbalance will prevail if crime perpetrators fail to obtain suffering due to their bad deeds. The moral balance will be achieved once crime perpetrators are imposed with sanctions, while victims obtain compensation (Salam & Karim, 2021). Meanwhile, according to supporters of the teleological theory, criminal sanctions can be imposed to attain certain benefits (Muladi, 1989).

The imposition of criminal sanctions on crime perpetrators will create better human beings. It will simultaneously prevent potential criminals, making the world a better place to live. Crimes are deemed diseases of society that can be treated through unpleasant medicine, i.e., criminal sanctions. Teleological theory thinkers state, according to Hidayat, that moral subjects should have the choice that their actions may have maximum benefits.

The benefits of action can be measured by the success in creating happiness or diminishing the suffering of every person. Further, according to supporters of the teleological retributive theory, the aim of criminal sanction imposition is plural as it pertains to teleological and retributive principles in one entity. Therefore, this theory is also referred to as the integrative theory. This theory suggests the possibility of simultaneously integrating several functions—the retributive function and the function of benefit, such as prevention and rehabilitation—that should be combined as targets that are accepted through planning in the imposition of criminal sanctions (Hidayat, 2010).

The legal system acknowledges that the traditional perspective of the Indonesian nation on capital punishment that was formerly enforced to restore the balance damaged by some serious customary crimes in various Indonesian tribes was executed through several methods. For instance, convicts on death row were burned alive on a pole, killed using *kris* (a curved dagger from Java), branded with a hot iron, hanged on a curved bamboo tree to be eaten by birds, beheaded by a sword, stoned to death, etc. (Hidayat, 2010).

Based on the juridical reasons above, when *Wetboek van Strafrecht* (the Criminal Code) was brought to Indonesia and was put into effect from January 1<sup>st</sup>, 1918, simultaneously with the Dutch colonialization based on the concordance principle, capital punishment was regulated in Article 10 as one of its criminal penalty. However, for drug dealers or producers, the death penalty was a capital punishment according to the law concerning narcotics. Therefore, in the Criminal Code, some crimes punishable with a death sentence are as follows (Sugandhi, 1981):

1. Treason by killing the head of the government (Article 104)
2. Inviting foreign countries to attack Indonesia (Article 111 Clause {2}).
3. Facilitating Indonesia's enemies in wartime (Article 124)
4. Assassination of the head of government of an ally country (Article 140 Clause {4}).
5. Perpetrating planned assassination (Article 140 clause {3} and Article 340).

6. Theft with violence by two or more people in gangs at night or by dismantling things, etc., causing someone to be severely wounded or dead (Article 365 Clause {4}).
7. Perpetrating piracy in seas, shores, beaches, and rivers, causing someone to die (Article 444).
8. Suggesting chaos, rebellion, etc. during wartime between workers in the state defense institution (Article 124 bis).

The application of capital punishment yet ignites controversy in society regarding human rights. The UN General Assembly has adopted a non-binding resolution that suggests a global moratorium against the death penalty (Yanto, 2016). Finally, the Second Optional Protocol of the International Covenant on Civil and Political Rights (ICCPR) prohibits the implementation of capital punishment in affiliated countries (Sugandhi, 1981).

In Indonesia, some convicts on death row have appealed for judicial review to the Constitutional Court against death sentence stipulations. The applicants' attorneys contended that the article on capital punishment violates Article 28A of the Second Amendment to the 1945 Constitution. Nevertheless, such an application was dismissed by the Constitutional Court's Judicial Assembly, which mainly expressed that the death sentence for serious crimes is a form of human rights limitation, however, capital punishment is imposed only on the worst forms of crimes.

Many parties in the legal sector oppose the practice of the death penalty, stating that it contravenes the 1945 Constitution. The Commissioner of the National Commission of Human Rights (*Komisi Nasional Hak Asasi Manusia*), Michael Staggs Kelsal, Roichatul Aswidah, and Rady Wirasta Nadyatama affirm that the application of the death penalty is an unconstitutional form of punishment. They explained the 1945 Constitution stating that the right to live is one that cannot be reduced under any circumstance. It is an example of a non-derogable right (Kelsall, Aswidah, & Nandyatama, 2021). Article 28 Letter A of the 1945 Constitution affirms that every citizen has the right to live, to survive, and to their livelihood. Meanwhile, Article 28 Letter G Clause (2) determines that every person has the right to be free from torture or inhumane and degrading treatment.

“Capital punishment is unconstitutional”, Aswidah said, as quoted by Ikhwanuddin (Ikhwanuddin, 2018). “According to the constitution, the right to live is one of the rights that cannot be diminished under any circumstance.” Capital punishment is a cruel and inhumane

punishment. This is explicitly stated in the Anti-Torture International Covenant and International Covenant on Civil and Political Rights. The UN Commission on Human Rights declares that the right to live is a supreme human right; if it is not fulfilled, neither are other rights. Resolution of the UN Commission of Human Rights has urged the abolition of capital punishment and countries pertaining to it must undergo a death penalty moratorium.

The judicial review applications discussed in this paper were submitted by the following people. The applicants had legal standing as they are sentenced with death penalty:

1. Edith Yunita Sianturi, whose address was Jalan Wijaya Kesuma IX/87, RT 09/06, Depok Jaya Subdistrict, Pancoran Mas District, Depok, West Java, Indonesia as APPLICANT I;
2. Rani Andriani (Melisa Aprilia), whose address was Jalan Prof. Moh. Yamin Edy gg. II RT 003/03 No. 555, Cianjur, West Java, Indonesia as APPLICANT II;
3. Myuran Sukumaran, owner of Passport No. M1888888, whose address was 16/104 Woodville Rd, Granville, Sydney, Australia 2142, as APPLICANT III;
4. Andrew Chan, owner of Passport No. L3451761, whose address was 22 Beaumaris St Enfield, Sydney, Australia 2136, as APPLICANT IV;
5. Scott Anthony Rush, born in Brisbane, Australia, on December 3<sup>rd</sup>, 1985, aged 21 years old, whose religion is Catholic, working as a laborer, Australian nationality, whose address was Tangkuban Perahu Street, Denpasar, Bali, Indonesia (Formerly living in 42 Glenwood St. Chelmer, Brisbane, Australia).

The Constitutional Court dismissed judicial review efforts toward capital punishment in Decision No. 2-3/PUU-V/2007. This decision amalgamate two identical applications, i.e., Case No. 2/PUU-V/2007 which was applied on January 16<sup>th</sup>, 2007, and Case No. 3/PUU-V/2007 which was applied on January 30<sup>th</sup>, 2007. It was settled in a judicial deliberation meeting on October 23<sup>rd</sup>, 2007, and was declared on a public plenary session on October 30<sup>th</sup>, 2007. It implies that the judicial assembly took 10 months to make a sound decision.

Based on the six-year report of the Constitutional Court, in 2007, the Court decided upon 29 cases. The fastest period they required to resolve one case was less than a month. Meanwhile, the longest period totaled ten months to decide on three cases, among them, case No. 2/PUU-V/2007 and case No. 3/PUU-V/2007. The varied periods required for examination up to the declaration of the decision relied on the complexity of the cases' substance. Therefore, the complexity of the case of capital punishment's constitutionality made the

Constitutional Court take rather a long interval to come up with a resolution. To a greater extent, this complexity can be perceived from the number of pages of the case decision, with extraordinary 471 pages. Four Constitutional Court judges issued dissenting opinions. Based on the background above, this paper aimed to answer the issue of the judicial analysis of cases No. 2 and 3/PUU-V/2007 and the reasons the judge assembly gave dissenting opinions.

## **RESEARCH METHOD**

This study employed the normative juridical method. It applied literary materials as well as the literary and statute approaches (Fajar & Achmad, 2015, p. 36). The statute approach functioned to analyze regulations that become the sources of judges' consideration (Sonata, 2014, pp. 15–35). This research revolved around exploring dissenting opinions of Constitutional Court Judges. This was conducted to analyze the background of the dissenting opinion. The research method mainly aimed to examined the development of regulations, perspectives, and doctrines in legal studies to probe such a dissenting opinion (Llyod & Freeman, 1985).

## **RESULTS AND DISCUSSION**

Different judicial opinions or dissenting opinions were discovered during the decision-making process of the cases. It can be inferred that out of the nine constitutional judges, five state that the death penalty is constitutional in the Indonesian legal system, meanwhile, the remaining stated the contrary, i.e., the death penalty is unconstitutional before the Indonesian legal system (Muryani & Rosyidah, 2020). The 5:4 comparison in the decision-making implies that the constitutionality issue of capital punishment was not issued unanimously by all constitutional judges. Even, there was a very sheer difference between the majority of judges that declared the death penalty's constitutionality and the minority judges that declared the antithesis.

One of the four constitutional judges that announced a dissenting opinion was Harjono, proposing a dissenting opinion on the applicants' legal standing. Roestandi, another constitutional judge, presented a legal standing on the material case of capital punishment. Then, judges Marzuki and Siahaan also followed suit on those issues. The following is the Decision Order of the Constitutional Court.

## DECISION ORDER

Considering Article 56 Clause (1) and Clause (5) of Law No. 24 of 2003 on the Constitutional Court (The Republic of Indonesia's State Gazette of 2003 No. 98 The Republic of Indonesia's Additional State Gazette No. 4316);

JUDGING:

[5.1] Declaring that the application of Applicant I and Applicant II in Case No. 2/PUU-V/2007 is completely rejected;

[5.2] Declaring that the application of Applicant III and Applicant IV in the Case No. 2/PUU-V/2007 cannot be accepted (*niet ontvankelijk verklaard*);

[5.3] Declaring that the application of the Case No. 3/PUU-V/2007 cannot be accepted (*niet ontvankelijk verklaard*);

Hence, it was decided that the Deliberation Meeting of Constitutional Judges on Tuesday, October 23<sup>rd</sup>, 2007 by nine Constitutional Judges were declared in the Plenary session opened for the public on this day, Tuesday, October 30<sup>th</sup>, 2007, by us, Jimly Asshiddiqie as the Chairperson concurrently as the Member, Abdul Mukthie Fadjar, H.A.S. Natabaya, I Dewa Gede Palguna, Soedarsono, H. Harjono, H. Achmad Roestandi, H.M. Laica Marzuki, and Maruarar Siahaan, each as member, accompanied by Cholidin Nasir as the Subsidiary Committee, and participated by Applicants and Applicants' Attorneys, the Government or its representatives, and the People's Representative Assembly or its representatives, as well as the Directly Related Party, the National Narcotics Assembly;

Chairperson,

Signed

Jimly Asshiddiqie

Members

This Constitutional Court decision was not unanimously decided as four judges issued dissenting opinions that affirmed that the imposition of the death sentence violated the right to life as guaranteed by Article 28 of the 1945 Constitution and Article 281 (I) which state the right to live is one of the rights that cannot be diminished under any circumstance (non-derogable rights). This 5:4 decision is deemed a decision that writes history, meaning that in Indonesia, there is an exquisite difference in opinions between those who are pros of the death penalty and those who are cons (Lubis & Lay, 2009).

The authors state their objections to the issued dissenting opinions of the Constitutional Court judge assembly. The authors acknowledge that the right to live is guaranteed in Article 28 letter A of the 1945 Constitution, stating, “Every person shall have the right to live and to defend his/her life and existence.” Moreover, the legal basis to guarantee the right to live in Indonesia is regulated in Article 9 of Law No. 39 of 1999 on Human Rights, which states:

Article 9: a. Everyone has the right to life, to sustain life, and to improve his or her standard of living. b. Everyone has the right to peace, happiness, and well-being. c. Everyone has the right to an adequate and healthy environment. In the explanation of Article 9 of the Law on Human Rights, it asserts that everyone has the right to live, to survive, and to increase their living standards.

The right to live is even appended to unborn babies and convicts on death row. In extraordinary cases or situations, i.e., for the safety of the mother in abortion cases, or based on the courtly decisions in death penalty cases, the actions of abortion or the death penalty in these cases or situations are still granted.

From the explanation of Article 9 above, it is obvious that there are two conditions in which the right to life may be restrained. The Constitutional Court has decided that capital punishment threatened to certain crimes does not violate the 1945 Constitution. This decision was declared by the Constitutional Judicial Assembly, led by the chairperson of the Constitutional Court, Jimly Asshiddiqie in the material examination decision reading session in the Constitutional Court building. According to the institution, capital punishment does not desecrate the right to live guaranteed in the 1945 Constitution since the Indonesian constitution does not apply the principle of absolute human rights.

When analyzed substantially, it is arduous to decide on the constitutionality of capital punishment. This can be seen from the insertion of points on human rights guaranteed in the Amendment of the Republic of Indonesia’s 1945 Constitution.

Relevant to the case, capital punishment is interrelated to the right to live guaranteed in Articles 28A and 28I of the Republic of Indonesia’s 1945 Constitution. Article 28A states, “Every person shall have the right to live and to defend his/her life and existence.” Following that, Article 28I Clause (1) states, “The rights to life, freedom from torture, freedom of thought and conscience, freedom of religion, freedom from enslavement, recognition as a person before the law, and the right not to be tried under a law with retrospective effect are all human rights that cannot be limited under any circumstances.”

Both articles disclose that everyone within Indonesia's legal area has a guarantee to live. Even, that right to live is part of the "human rights that cannot be limited under any circumstances." Therefore, these articles in the 1945 Constitution become highly logical arguments to examine the issuance of the law that pertain the threats of capital punishment.

Even so, the Republic of Indonesia's 1945 Constitution, especially articles on human rights, is inseparable from stipulations of Article 28J which reads: Article 28J Clause (1) states, "Every person shall have the duty to respect the human rights of others in the orderly life of the community, nation and state." Clause (2) states, "In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society."

According to the Constitutional Court, the human rights granted to citizens starting from Article 28A to Article 28I Chapter XA of the 1945 Constitution are limited by the following article which is the key article, i.e., Article 28J. This Article asserts that one's human rights shall be applied by acknowledging and respecting others' rights to achieve public order and social justice. This constitutional perspective, according to the Constitutional Court, is also continued and confirmed in Law No. 39 of 1999 on Human Rights stating that one's human rights are limited by the human rights of others for the sake of public order.

By applying capital punishment for serious crimes such as narcotics, in this case the crime perpetrated by the applicants, the Constitutional Court opined that Indonesia does not violate any international agreements, including the International Covenant on Civil and Political Rights (ICCPR), which encourages the abolition of capital punishment. Even so, the Constitutional Court corroborates that Article 6 Clause (2) of the ICCPR allows the application of capital punishment to participating countries for the most serious crimes.

The Constitutional Court stated that the abolition of capital punishment has not become a universal moral perspective of international societies. Nonetheless, the propensity to show countries that abolish the death penalty from their national laws increases. Yet, the Constitutional Court believed that some international laws, such as ICCPR, Rome Statue of International Criminal Court, and the European UN Declaration, remain rigid in the application of the death penalty (Pratama, 2019). As the largest Muslim country and member

of the Organization of Islamic Cooperation (OIC), according to the Constitutional Court, Indonesia shall embrace the Cairo Protocol validated by the OIC.

Its contents comprise that the right to live is a blessing from God that must be protected except by legal decisions. Meanwhile, the death penalty is required in the context of applying a deterrent effect towards perpetrators of crime and anticipating the chance for worse and more extensive occurrences of human rights violations. The death penalty is not merely the legal revocation of one's right to live, but more than that, legal values and the sense of justice become the supporting legitimacy of the death penalty (Permaqi, 2015).

To put it in a picture, if the national legal system does not acknowledge capital punishment, meanwhile crimes against human rights become more uncivilized and inhumane. So far, imprisonment sanctions are ineffective in creating a deterrent effect as their degrees and implications are not severe and not as effective as capital punishment. In its decision, the Constitutional Court declared that the threat of capital punishment in the Law on Narcotics and other laws has carefully and accurately been formulated. Specifically for crimes on drugs, this correction is not threatened by all perpetrators of drug-related crimes. This sanction does not apply to those abusers and users.

The reason behind those who support the death penalty is the increasing quality and quantity of crimes over time. They believe that progressively violent criminals should be treated with shock therapy in the form of the death penalty, especially for certain criminals who are deemed beyond redemption (Rasad, 2021). On the other hand, those who are against the death penalty argue that it is a final punishment, meaning once it is imposed, it cannot be rectified despite a mistake made in the conviction. Furthermore, the death penalty eliminates the possibility for convicts to amend their mistakes in the future (Jacob, 2017).

Capital punishment is only threatened by illegal producers and dealers. It is only for group I drugs, such as marijuana and heroin. Besides, capital punishment in that law is completed with minimum threat of sanctions. Thus, the penalty can only be imposed if there are highly strong pieces of evidence. Drug addicts and users are victims of those narcotics. However, those who distribute the drugs and the dealers must be sought and prosecuted, as they must be held accountable. Great negative effects occur from this illegal business, destructively influencing the young generations of this nation (Ikhwanuddin, 2018).

Concerning the capital punishment that is deemed to violate Articles 28A and 28I, the Constitutional Court carried out a systematic interpretation of that case (Tanjaya, Prasetyo,

Muhadar, & Mulyadi, 2015). The human rights in both articles must comply with the limitation of rights regulated in Article 28J of the 1945 Constitution. This system corresponds to the Universal Human Rights Declaration which regards human rights as the closing article. The Constitutional Court has rejected the abolishment of capital punishment on October 30<sup>th</sup>, 2007 when examining the application of the "Bali Nine" heroin smugglers on death row (Jaya, 2016).

The Constitutional Court proclaimed that capital punishment is constitutional based on Article 28J Clause (2) of the 1945 Constitution. This Article states that "In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society."

The Constitutional Court also decided that applicants do not have legal standing (the right to appeal a judicial review application) as they do not own Indonesian citizenship. According to Article 51 Clause (1) letter (a) of the Law on the Constitutional Court, applicants that can appeal a judicial review application are limited to Indonesian citizens (Anggara et al., 2017). Therefore, the Constitutional Court declined to provide a legal position for applicants as they are foreign citizens.

The Constitutional Court also stated that the crime of drugs is a particularly serious crime by juxtaposing it with genocide crime and crimes against humanity. The Constitutional Court expressed that capital punishment does not oppose the right to live guaranteed in the 1945 Constitution. This is because the Indonesian Constitution does not implement the principle of absolute human rights (Mujaddidi, 2021).

The capital punishment threatened for certain crimes in Law No. 22 of 1997 on Narcotics and Law Number 22 of 1997 concerning Psychotropics (for organized drug producers and dealers) is valid. It does not profane the right to live embraced in the 1945 Constitution. The Constitutional Court's opinion is based on Article 28 J of the 1945 Constitution and Law No. 39 of 1999 on Human Rights as well as ICCPR, in which human rights shall be used by acknowledging and respecting other people's human rights (Hutapea, 2016).

The International Convention on Narcotics and Psychotropics that has been ratified in Indonesia mandates effective law enforcement for its perpetrators as the crime of drugs and is

a serious crime that involves an international network. This crime is highly dangerous and it is against the safety of Indonesia's young generation (Aulia, 2022).

Although Article 6 Clause (1) of the ICCPR rejected capital punishment as it violates the right to life, Article 6 Clause (2) reveals countries that have not abolished capital punishment apply it only to perpetrators of highly serious criminal actions (Rusito & Suwardi, 2019). Perpetrators should also regard the victims' right to live, as the perpetrators do not respect human rights by committing severe crimes.

In its legal considerations, Constitutional Court positions itself to assess whether or not the application of capital punishment is a violation of the state of Indonesia against international legal instruments, especially the ICCPR. Even though it recognizes that the spirit of ICCPR is to abolish death penalties, yet Constitutional Court ventures that Article 6 Clause (2) gives room for the application of capital punishment specifically for those serious crimes.

The Constitutional Court also evaluated whether the crime of narcotics punishable by death is the most serious type of crime. According to the Constitutional Court, the phrase "the most serious crimes" should also be read with the phrase "according to the law that is applicable during the occurrence of that crime." The Constitutional Court assessed that the law applicable at that time at the national level was the Law on Narcotics. Then, at the international level, Indonesia ratified the International Convention on Narcotics and Psychotropics in 1997 (Mangku, 2019).

Under these circumstances, the Constitutional Court referred to Article 3 clauses (5) and (6) and Article 24 of that Convention containing stipulations to member countries to maximize the effectiveness of law enforcement regarding crimes on narcotics and psychotropics, including by implementing rigid steps. In this case, according to the Constitutional Court, it comprises threats on death row.

The Constitutional Court also referred to the Preamble of the Convention in stating that, factually, the crime of narcotics is a particularly serious crime. The Court even juxtaposed it with genocide and crimes against humanity. This is because, as the Constitutional Court stated, these three crimes will negatively influence the "economic, cultural, and political foundation of society and cause a danger of incalculable gravity" (Slomanson, 2011).

Then, the Constitutional Court affirmed that Indonesia's participation in the International Convention on Narcotics and Psychotropics, which mandates strong national steps to eradicate drugs, has a higher position based on Article 38 Clause (1) of the

International Court Statute compared with the UN Commission on Human Rights stating that the crimes on illegal drugs are not examples of particularly serious crimes (Muhaimin, 2022).

Concerning these arguments, Zerial (Zerial, 2007) argues that the Constitutional Court's conclusion is rather problematic for several reasons. She suggested that the Constitutional Court has ignored the opinion of the UN Commission on Human Rights contained in General Comment 6 that was adopted in 1982 and several reports of member countries, in which the direct interpretation of the "most serious crimes" referred to the ICCPR and the Human Rights. Meanwhile, the Convention on Narcotics and Psychotropics referred to the context of the general seriousness of the crime of narcotics (Santoso, 2016).

The Decision of the Constitutional Court No. 2-3/PUU-V/2007 should become the proposition to the constitutionality of the death penalty. This decision regarded two applications, namely applications No. 2/PUU-V/2007 and No. 3/PUU-V/2007 which have the same core issue. The applicants were convicts on death row in drug cases based on the Stipulations of Law No. 22 of 1997 on Narcotics. The Constitutional Court then combined these two applications as they contained the same bottom line.

The Constitutional Court is a judicial power institution that is authorized to review laws against the Constitution as mandated by Article 24C of the 1945 Constitution. The parties that deem that they have their rights violated towards the law on narcotics then appeal judicial review applications towards the Articles that regulate the death sentence in Law No. 22 of 1997 on Narcotics.

The authors accord with the Constitutional Court's decision by considering the irrevocable characteristics of capital punishment. It denotes that the formulation, application, as well as execution of the death sentence in various cases, should consider the following stipulations:

1. The death sentence is no longer the main sanction; it is a special and alternative sanction.
2. The death sentence may be imposed with a probation period of ten years, during which, if the convict shows good behavior, it can be substituted with imprisonment for life or for 20 years.
3. The death sentence may not be imposed on children who have not reached adulthood.

4. The execution of the death sentence on pregnant women and mentally ill people is postponed until those pregnant women have given birth and until those mentally ill people have been healed.

## CONCLUSION

The Constitutional Court evaluated whether the crime of narcotics that is punishable by death is the most serious type of crime. According to the Constitutional Court, the phrase “the most serious crimes” should also be recited with the phrase “according to the law that is applicable during the occurrence of that crime.” The Constitutional Court assessed that at the national level, the law that is applicable at that time was the Law on Narcotics. Then, at the international level, Indonesia ratified the International Convention on Narcotics and Psychotropics in 1997.

In this context, the Constitutional Court referred to Article 3 Clauses (5) and (6) and Article 24 of that Convention containing stipulations to member countries to maximize the effectiveness of law enforcement on narcotics and psychotropics crimes, including by implementing strict steps. In this case, according to the Constitutional Court, it includes the threats on death row.

Concerning the capital punishment that is deemed to desecrate Articles 28A and 28I, the Constitutional Court conducted a systematic interpretation of that case. The human rights in both articles must comply with the limitation of rights regulated in Article 28J of the 1945 Constitution. This systematic corresponds to the Universal Human Rights Declaration which regards human rights as the closing article. The Constitutional Court rejected the abolishing of capital punishment on October 30<sup>th</sup>, 2007 when examining the application of the "Bali Nine" heroin smugglers on death row.

The Constitutional Court argued that capital punishment is constitutionally based on Article 28J Clause (2) of the 1945 Constitution stating that, “In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society.”

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