

RESEARCH ARTICLE

# The Urgency of Reforming the Death Penalty Policy for Narcotics Distributors Post the Constitutional Court Decision Number 2-3/PUU-V/2007

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## ABSTRACT

*The most questioned severe punishment that can be given for someone is death penalty as with death penalty someone's existence can be vanished and it is irrevocable. Since there is no way for turning back the time and brings the life of the person that has already executed. With the establishment of death penalty, Article 28J Paragraph (1) of the 1945 Constitution and Article 29 Paragraph (2) of the Universal Declaration of Human Rights cannot be enforced. Basic Rights directly bind the three areas of state power to obey and respect them. The application of death penalty for narcotics dealers in Indonesia is not only limited to producing legal products, but the implementation of these laws also imposed by the state or the Indonesian government. The issue of whether or not the death penalty is appropriate remains and continues in Indonesia. Nevertheless, The Constitutional Court of the Republic of Indonesia in its decision Number 2—3/PUU-V/2007 stated that death penalty is not against Article 28A and Article 28I 1945 Constitution. Hence, the act of distributing narcotics has also violated the human rights of many people in a nation because it can have a devastating impact on future generations of youth. This Normative legal research will be focus on:*

- 1. Whether the constitutional interpretation regarding the death policy for narcotics dealers in the Constitutional Court Decision Number 2—3/PUU-V/2007 according to the review of non-derogable rights?*
- 2. The need to reforms towards the death penalty policy for narcotics dealers in Indonesia?*

**Keywords:** *Death Penalty, Rights to Life, Non-Derogable Rights, Human Rights, Narcotics.*

## INTRODUCTION

The death penalty is the most severe punishment that can be given to a human being because with the death penalty, we have agreed to eliminate someone's life. There are different views on the death penalty. On the one hand, the death penalty is the last law enforcement effort that can be applied to someone who is considered as a danger to society or whose condition is irreversible. The aim is to provide a deterrent effect for other people not to take the same action as the convict has done. On the other hand, the death penalty

is considered a violation of Human Rights because the act of taking a person's life is considered as taking away the right to human life and preceded God's will.<sup>1</sup>

Death penalty is the most widely questioned punishment. Djoko Prakoso is of the opinion that the death penalty should be given to those who have committed extraordinary crimes whose death can guarantee that the criminal will not commit the crime again, so that the community can feel secure and peace.<sup>2</sup> The opposite opinion was expressed by those who disagreed with the application of the death penalty. The reason for those who agree, among other things, is that life is the most valuable possession for humans. The loss of life means the loss of all mankind. Legal experts Bismar Siregar, Buya Hamka, M. Natsir, and Ali Said are of the opinion that the need for capital punishment is as follows.

- a. Death penalty is more effective than other punishments since it has the effect of frightening and mentally threatening the offender;
- b. Valued as a practical penalty;
- c. May prevent the society from beating up the criminals;
- d. The only ascertained execution compared to life imprisonment which often gets clemency;
- e. To protect mankind.<sup>3</sup>

Many countries, like Canada, Australia, most of Asian Countries, and United States has been erased the imposition of the death penalty in their criminal code. However, there are also countries like China, Saudi Arabia, Iran, and Indonesia that are still defend death penalty with various reasons and considerations.<sup>4</sup>

The Universal Declaration of human rights stated that this penalty is clearly against the rights to life. The International Covenant and Civil and Political Rights (ICCPR) on Article 6 Paragraph (1) stated that *every human being has the right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*<sup>5</sup> Indonesia has ratified this article. Nevertheless, on Article 6 Paragraph (2) ICCPR<sup>6</sup> is still giving a certain exemption to applied the death penalty.

*“In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.”*

The rights to life are the ground basic right. It is mentioned in the Articles 28A 1945 Constitution that stated every person has the right to life and to defend his life and his livelihood. This very basic rights further stated in Articles 28I 1945 Constitution which stated the right to life, not to be tortured, freedom of thoughts and conscience, to have religion, not to be enslaved, to be recognize as a person before the law, not to be prosecuted

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<sup>1</sup> *Dissenting opinion* Hakim Laica Marzuki on Decision of Mahkamah Konstitusi Number 2—3 /PUU-V/2007.

<sup>2</sup> Djoko Prakoso. *Masalah Pidana Mati (Soal Jawab)*. Jakarta: Bina Aksara. (1987). 25—28.

<sup>3</sup> Yesmil Anwar dan Adang. *Sistem Peradilan Pidana (Konsep, Komponen & Pelaksanaannya Dalam Penegakan Hukum Indonesia)*. Jakarta: Widya Padjadjaran. (2009). 33.

<sup>4</sup> Topo Santoso. “Meyoal Hukuman Mati”. *Rubrik Media Indonesia*. (1 August 2016).

<sup>5</sup> International Covenant and Civil and Political Rights Article 6 Point (1). [www.ohchr.org](http://www.ohchr.org). Accessed on 31 October 2022.

<sup>6</sup> *Ibid.* Point (2).

on the basis of law that applies retroactively are the human rights that cannot be reduced in any form.

Article 28A and Article 28I in 1945 Constitution are the articles that regulates human rights. Further, in the theory of human rights, it is called as a non-derogable rights. So, the rights to life is a fundamental right that should be owned by every person and it is the culmination of all other kinds of human rights.<sup>7</sup>

Supposedly, with the existence of these articles, the death penalty can no longer be enforced in Indonesia. The controversial debate regarding whether or not the death penalty shall be carried out in Indonesia is no longer necessary to discuss. However, the issue of whether or not the capital punishment is appropriate remains and continues in Indonesia. Nevertheless, The Constitutional Court of the Republic of Indonesia in its decision Number 2—3/PUU-V/2007 stated that death penalty is not against towards Article 28A and Article 28I 1945 Constitution.<sup>8</sup>

The decision made by the nine justices was not unanimous. Three out of nine justices gave their dissenting opinion. Justice Laica Maruzki, Maruarar Siahaan, and Achmad Roestandhi stated that death penalty is against Article 28 of 1945 Constitution which guarantee about the right to life since the death penalty has crucified the life of a person and Article 28I Paragraph (1) that ruled of the right to life which is the right that cannot be diminish in any circumstances (non-derogable rights).

Six other justices decided that death penalty is not against the right to life which guaranteed in the 1945 Constitution since the guarantee of the human rights in the 1945 Constitution does not adhere the principle of absoluteness. According to the data from the International Amnesty,<sup>9</sup> in the year of 2021, there were 114 death sentences handed down in Indonesia. The mentioned data was not much different from the previous year in 2020 which created 117 death sentences. In a span of 5 years, this past 2 years has created the highest record in death sentences. There were 94 death sentences that handed down for the narcotics crimes, 14 death sentences for murderer crimes, and 6 death sentences for the terrorism.

The number of death sentences in 2021 that has been handed down in Indonesia is among the largest in Asia Pacific. Meanwhile, in larger countries, including in Asian countries, the death penalty has also been abolished from time to time.<sup>10</sup>

Indonesia imposed the death penalty for extraordinary crime. From historical point of view, extraordinary crimes cover 4 types of crimes, namely war crimes, crimes of aggression, crimes of genocide and crimes against humanity. However, as time has progressed, the Indonesian government has implemented several types of crimes that can be considered extraordinary crimes, such as terrorism, corruption, narcotics and psychotropics, as well as crimes against the environment.<sup>11</sup>

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<sup>7</sup> Max Boli Sabon. *Hak Asasi Manusia. Bahan Pendidikan Untuk Perguruan Tinggi*. Universitas Atmajaya, Jakarta. (2014). 8

<sup>8</sup> Constitutional Court Decision Number 2—3 /PUU-V/ 2007.

<sup>9</sup> Writers Team of Amnesty International. "Laporan Hukuman Mati 2021: Vonis Mati Di Indonesia terus Dipertahankan Tanpa Alasan." May 2022. <https://www.amnesty.id/laporan-hukuman-mati-2021-vonis-mati-di-indonesia-terus-dipertahankan-tanpa-alasan/>. Accessed on 31 October 2022.

<sup>10</sup> Ibid.

<sup>11</sup> Muhammad Hatta. *Kejahatan Luar Biasa (Extraordinary Crime)*. Lhokseumawe. (2019). 12.

Based on Law Number 35 of 2009 Article 114 Paragraph (2) Concerning Narcotics Abuse stated that one of the threats of punishment for drug dealers is death penalty. This article arises because narcotics crimes are considered to be included in one of the extraordinary crimes due to the effects that can damage the future generation.

The application of death penalty for narcotics dealers in Indonesia is not only limited to producing legal products, but also in the implementation of these laws as seen in various death penalty cases imposed by the state or the Indonesian government.

Reporting from the website of the National Narcotics Agency or BNN, the implementation of capital punishment for drug offenders is not only to give a fitting punishment or to provide a mere deterrent effect to other persons. The death penalty is intended to protect society and save the future generation from the dangers of drug abuse and illegal drugs. This determination is based on Law Number 35 of 2009 which confirms that the appropriate punishment for serious drug offenders is the death penalty.

Based on the background of this problem, it will be discussed how the law in Indonesia views the protection of human rights and vice versa, especially the death penalty for narcotics dealers which is considered contrary to the right to life as one of the human rights. Even though in reality, the act of distributing narcotics has also violated the human rights of many people in a nation because it can have a devastating impact on future generations of youth. This research will be focus on:

1. What is the constitutional interpretation regarding the death policy for narcotics dealers in the Constitutional Court Decision Number 2—3/PUU-V/2007 according to the review of non-derogable rights?
2. What are the reforms towards the death penalty policy for narcotics dealers in Indonesia?

The objectives to be achieved in this study include:

- a. Finding reasons for the need to renew the death penalty policy for narcotics dealers in Indonesia in the context of protecting citizens' fundamental rights.
- b. Knowing the constitutional interpretation of the death penalty policy for narcotics dealers in the Constitutional Court Decision Number 2–3/PUU-V/2007 according to the review of non-derogable rights.

## METHODS

This research is a normative legal research. The legal materials used in the preparation are primary legal materials which in this study are lifted from the original sources of the law. As for secondary legal materials are materials raised from reading studies, namely by reading books, journals and other related scientific works with the death penalty in narcotics crimes from the perspective of human rights, and for the tertiary legal materials in the form of carcasses, both the Big Indonesian Dictionary, the English Dictionary, and the Latin Dictionary, as well in the internet.

The technique for collecting legal materials in this study was for collecting legal materials/readings, which was carried out by collecting existing materials or studying documents from existing laws and regulations and the decisions of justices of the constitutional court. Meanwhile, when legal material is collected, the legal material will be

described and explained sentence by sentence using the method of processing legal material systematically.

## RESULTS AND DISCUSSION

### 3.1 Theoretical Conception of The Right to Life

The right to life is the most basic human right for every human being. The nature of the existence of this right is non-negotiable (non-derogable rights). The right to life is perhaps the most fundamental right of modern civilization. In the final analysis, if there is no right to life then there will be no issues in other human rights.

#### 1. Rights to Life in International Instruments

Article 3 of the Universal Declaration of Human Rights (UDHR) defines that everyone has the right to life, liberty and security. This provision clearly guarantees the right to life. Another international instrument that provides a clear formulation of the right to life is Article 6 of the ICCPR (International Covenant Civil and Political Rights). Article 6 Paragraph (1) of the ICCPR states that every human being has the inherent right to live. This right must be protected by law. No human being can be rashly deprived of the right to life.

#### 2. Rights to Life in Indonesian Legislation Provision

In Indonesia, the formulation regarding the rights to life is contained in several laws and regulations, one of which is the 1945 Constitution Amendments to the 1945 Constitution through several articles formulating the Right to Life as follows:

Article 28A: Everyone has the right to live and has the right to defend his life and existence.

Article 28B Paragraph (2): Every child has the right to survival, growth and development and has the right to protection from violence and discrimination.

Article 28H Paragraph (1): Everyone has the right to live in physical and spiritual prosperity, to have a home and to enjoy a healthy environment and has the right to obtain health services.

Article 28I Paragraph (1): The right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to have a religion, the right not to be enslaved, the right to be recognized as an individual before the law, and the right not to be prosecuted on the basis of applicable law Retreat is a human right that cannot be reduced under any circumstances.

Another national instrument related to the Right to Life is the Law of the Republic of Indonesia Number 39 of 1999 concerning Human Rights. Through several articles in the law, the right to life is formulated, including:

Article 4: The right to life, the right not to be tortured, the right to personal freedom, thoughts and conscience, the right to religion, the right not to be enslaved, the right to be recognized as an individual and equal before the law, and the right not to be prosecuted on the basis of applicable law Retrogression is a human right that cannot be reduced under any circumstances and by anyone.

Article 9: Everyone has the right to live, maintain life and improve their standard of living.

Article 53 paragraph (1): Every child from the time he is in the womb has the right to life, to maintain life and to improve his standard of living.

Examining Article 28I of the 1945 Constitution, it cannot be separated from international human rights agreements which regulate non-derogable rights, alias rights that cannot be reduced under any circumstances. This provision in international law is known through the regime of Article 4 Paragraph (1) of the International Covenant on Civil and Political Rights (ICCPR). In summary, it is stated that under certain circumstances, ICCPR participating countries can delay or reduce the enjoyment of the rights contained in the ICCPR.

The situation referred to in Article 4 Paragraph (1) that when the country is in a state of emergency, which state must be reported by the country intending to delay it to all ICCPR party countries through the UN Secretary General. Not all precarious situations can justify the postponement or reduction of human rights. Only if it is desired by circumstances, then certain rights can be reduced.

Article 4 Paragraph (2) of the ICCPR then stipulates that even in an emergency, even if a country is in an emergency, it is not permissible to postpone or reduce certain rights. These rights are as stated in several articles in the ICCPR which regulate the right to life, the right not to be tortured, not to be treated cruelly and degradingly, the right not to be enslaved, the right not to be imprisoned simply for failing to fulfill a contract, the right not to be convicted based on retroactive law, the right to recognition before the law, and the right to belief and religion.

The formulation of the 1945 Constitution in this case Article 28I Paragraph (1) in this case has the same spirit as the ICCPR. That in principle there are several human rights and freedoms that can be limited, even postponed to reduce their enjoyment in certain circumstances. However, there are several rights that are classified as rights that cannot be reduced from their enjoyment under any circumstances. Any reduction in *mana* will be stigmatized as a violation of human rights.

The right to life as guaranteed in Article 28A is a fundamental right for every human being. All rights and freedoms can only be enjoyed if humans are alive. It is not surprising that this right is included in the opening Article of Chapter XA which regulates human rights. It is stated in Article 28A that every person has the right to live and defend his life and existence. Talking about people's right to life is often associated with capital punishment, or the death penalty. In fact, this right to life should have a broader connotation, namely the state's obligation to ensure that every woman giving birth can have a safe delivery. Or again; the obligation of the state to ensure that no one within the jurisdiction of a state may die from hunger or disease that can actually be treated.

### 3. Law and Theory of Justice

The issue of justice examines and analyzes justice is objectively acceptable because of fair treatment which includes being impartial or impartial, siding with the truth, proper or not arbitrary. The theory of justice was developed by Plato, Hans Kelsen, H.L.A. Hart, John Stuart Mill and John Rawls.

Plato defines justice as the supreme virtue of the good state. A just person is a person who controls himself and his feelings which are then controlled by reason. According to Plato, justice and law are the general spiritual substance of a society that creates and maintains them.<sup>12</sup> In a just society, every human being performs the duties for which he thinks best suited to him.

Plato's opinion is a concept of moral justice which is based on harmony. Justice arises because of arrangements or adjustments that give a place in harmony with the parts that make up a society. Justice will be created in society if every member of society does their best according to their abilities and functions that are aligned with them. The role of officials in this case is to distribute functions within the state to each person according to the principle of harmony. Everyone does not interfere in tasks and affairs that are not suitable for him.

Interference with other parties carrying out this task will create conflict and discord, while these two things are at the heart of injustice. Plato argues about the essence of justice which is associated with expediency, that justice has a good relationship with fairness, which is determined by the statement that the latter becomes useful and useful only when previously utilized. The existence of justice is also understood metaphysically as a quality of a super being called a human who has properties that cannot be observed by other humans.

The result of the consequence of this is that the realization of justice is shifted to another world, beyond human experience and human reason which is the essence of creating justice which will be subject to the ways of the Creator which cannot be changed or suspected.<sup>13</sup> Therefore, Plato said that a leader of a country shall be a superman. (the king of philosopher).<sup>14</sup>

Hans Kelsen presents the essence of justice. Justice is a possible, but not necessary, quality of a social order that guides the creation of reciprocal relations among human beings. Hans Kelsen<sup>15</sup> holds the view that law as a social order can be declared fair if it can regulate human actions in a satisfactory way so that they can find happiness in it.

Hans Kelsen's view is a view of positivism. Individual values of justice are known through legal rules that contain general values, but the fulfillment of a sense of justice and happiness is still intended for everyone. Furthermore, Hans Kelsen put forward justice as a subjective value judgment. Even though a just order assumes that an order is not the happiness of each individual, it is the greatest possible happiness for all individuals by fulfilling certain needs which the authorities or legislators consider as needs that must be met.

H.L.A. Hart stated that a legal system must be able to display specific similarities regarding morality and justice. Therefore, we can conclude that no matter how well

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<sup>12</sup> Surajiyo. "Refleksi Filosofis Mengenai Keadilan dalam Sistem Hukum Pancasila." [www.repository.ut.ac.id](http://www.repository.ut.ac.id) Accessed on 30 November 2022.

<sup>13</sup> W. Friedmann. *Teori dan Filsafat Hukum*. Translated by Mohamad Arifin. 2nd Edition. Jakarta: PT RajaGrafindo Persada. (1993). 117.

<sup>14</sup> Deliar Noer. *Pemikiran Politik Di Negeri Barat*. 2nd Print, Revision Edition. Bandung: Pustaka Mizan. (1997). 1—15.

<sup>15</sup> Hans Kelsen. *General Theory of Law and State*. Translated by Anders Wedberg. New York: Russel & Russel. (1961). 120.

the law is formed, if the moral is not good, it will be useless for a statutory regulation that has been created even though the regulation has a good purpose. Therefore, synergy between law and morality is needed so that continuity is formed between elements of law enforcement.<sup>16</sup>

Theoretically, justice put forward by Hart is an illustration of the principles of justice as a result of his thoughts. What is interesting According to Hart, for jurists are the words "fair" and "unjust" when dealing with the good or bad of a law and its implementation.<sup>17</sup>

The special relationship between the characteristics of justice and law is seen in the large part a critique is made in terms of fair or unjust reviews. Similar is the case with the expression fair and unfair. If it is related to social behavior, the issue of justice also needs to consider ethics related to harmony.<sup>18</sup> The existence of certain equality or inequality in applying the concept of justice is felt to need consideration when it comes to individuals. This consideration is given because the results of social life do not have certainty when the burdens and benefits are distributed. This requires recovery when glitches occur. This equality or inequality concerns the lives of individuals per individual which is also related to human rights as the rights of human existence.

Jhon Stuart Mill presents the theory of justice. "There is no theory of justice that can be separated from the demand for expediency." Justice is the term given to the rules that protect claims to hold the necessary promises equally and so on. The aim is that these demands can improve and improve welfare and hold promises equally. Equally means that the position of people is equal (same height), equal position. John Stuart Mill's view was influenced by the utilitarianism view put forward by Jeremy Bentham. In line with Bentham's thought, Mill has the opinion that an action should aim to achieve as much happiness as possible. According to Mill, "justice originates in the human instinct to reject and repay the damage suffered, either by oneself or by anyone who gains sympathy from us, so that the essence of justice includes all essential moral requirements for the welfare of mankind."<sup>19</sup>

Mill agreed with Bentham who stated that an action should be aimed at achieving happiness. Vice versa, an action is declared incorrect if the result is something that does not reflect happiness. Furthermore, Mill stated that the standard of fairness should be based on its usefulness. According to Mill that justice comes from the human instinct to reject and repay the damage suffered, both by oneself and by anyone who gets sympathy from us.<sup>20</sup> Feelings of justice will not be in harmony with damage, suffering, and not only on the basis of individual interests, but feelings of justice will have a broader meaning so that the benefits can be reflected to others,

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<sup>16</sup> HLA. Hart. *The Concept of Law*, New York: Clarendon Press-Oxford. (1997). 240.

<sup>17</sup> Ibid. Hal. 244

<sup>18</sup> Rizal Mallarangeng. *Pers Orde Baru: Tinjauan Isi Kompas dan Suara Karya*. Jakarta: Gramedia. (2010).

<sup>19</sup> Otje Salman, S. *Filsafat Hukum: Perkembangan & Dinamika Masalah*. Bandung: PT. Refika Aditama. (2010). 44.

<sup>20</sup> Bodenheimer dalam Satjipto Rahardjo. *Ilmu Hukum*. Bandung: PT. Citra Aditya Bakti. (2006). 277.



so that the nature of justice includes all moral requirements which are very essential for the welfare of mankind.<sup>21</sup>

John Rawls analyzes the basic problems related to political philosophy by referring to the principle of freedom and the principle of equality. Rawls thinks that this is in line with the tradition of social contracts (social contracts) which were originally stated by well-known thinkers, such as Immanuel Kant, JJ Rousseau, and John Locke.<sup>22</sup>

In detail, Rawls develops the idea of the principles of justice by fully using his creative concept known as the original position and the veil of ignorance. However, as in general, every contract theory must have a hypothesis and Rawls's concept of a justice contract is no exception. He tries to position the same situation between humans in society and no party has a higher position than one another. That is, for example, in terms of position, social status, level of intelligence, ability, strength, and others, so that they can make agreements with other parties in a balanced way.<sup>23</sup>

Rawls states that such an original position rests on a reflective equilibrium definition based on the characteristics of rationality, freedom and equality to regulate the basic structure of society. Rawls's conclusion is actually almost the same as that expressed by Thomas Nagel who called it a "view from nowhere". It's just that Rawls puts more emphasis on a very abstract version of "the State of Nature".

Meanwhile, Rawls explains the concept of veil of ignorance, namely with the understanding that everyone is faced with closing all facts and circumstances about himself, including certain social positions and doctrines, thus creating ignorance about the existence of knowledge of justice that is developing. Based on these two theories, Rawls tries to invite people to get the principle of fair equality. Rawls calls his theory "justice as fairness".<sup>24</sup>

Rawls explains that the parties in the original position will apply two main principles of justice, that is, every human being has the same right to basic freedoms that are in accordance with similar freedoms for other people. Then, social and economic diversity is regulated in such a way that the best benefits will be obtained for the most disadvantaged people, and positions or positions must be open to everyone so that equality is created to achieve fair opportunities.

The first principle is known as the "principle of equal freedom", for example political freedom, freedom of opinion and expression, and freedom of religion. While the principle of the two parts (a) is called the "principle of difference" and in part (b) is called the "principle of equal opportunity".<sup>25</sup>

The principle of difference in part (1) starts from the principle of inequality which can be justified through controlled policies as long as it benefits weak groups of people. Meanwhile, the principle of equality of opportunity in part (2) does not only require the principle of quality of ability, but also based on the wants and needs of that quality. In other words, inequality of opportunities due to differences in the

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<sup>21</sup> *Ibid.*

<sup>22</sup> Pan M. Faiz "Teori Keadilan John Rawls". [www.panmohamadfaiz.com](http://www.panmohamadfaiz.com) (2009). Accessed on 29 November 2022.

<sup>23</sup> John Rawls. *A Theory of Justice*. Revision Edition. Cambridge: Belknap Press. (2005). 75.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.* 112.

qualities of ability, will, and needs can be seen as a fair value based on Rawls's perspective. Apart from that, the first principle requires equality of basic rights and obligations, while the second principle rests on the presence of conditions of social and economic inequality which in order to achieve the values of justice can be permitted if it provides benefits for everyone, especially disadvantaged groups in society.<sup>26</sup>

In relation to this principle, Rawls states that there are main rules when principles face each other. If there are problems between the principles referred to, the first principle must be positioned above the second principle. Thus, in realizing a just society, Rawls seeks to place freedom of basic rights as the highest value and must be followed by guarantees of equal opportunity for everyone. person to occupy a certain position or position. Thus, Rawls also states that with differences, it can also be accepted as long as it can increase or bring great benefits to people who are not fortunate.

#### 4. The Essence of Constitution Interpretation

The interpretation of the constitution or the Basic Law is not the same as the interpretation of the law. Based on the notion of 'constitution' or 'basic law' on the one hand, and the notion of 'law' on the other hand, it is clear that the notion of 'constitution' or 'basic law' is not the same (analogue). Therefore, the interpretation of the constitution or the constitution is not simply analogous to the notion of legal interpretation. If the constitution is defined as the Basic Law (written basic law), then the interpretation of the constitution or the Basic Law is only one part of the legal interpretation. Legal interpretation (viewed from its legal form -- *rechtsvorm*) can have a broad meaning, both the interpretation of written law (*geschreven recht*) and unwritten law (*ongeschreven recht*).

However, in practice, the distinction between the interpretation of the constitution and the interpretation of the law cannot be drawn unequivocally, because when a judge interprets the constitution, he cannot be limited to only interpreting written legal norms or in accordance with the formulation of the text, but he may interpret unwritten constitutional legal norms, such as the general law principles (*elgemene rechtsbeginselen*) which are behind the formulation of written legal norms.

In law and constitutional science, interpretation or interpretation is a method of finding law (*rechtsvinding*) in the event that a rule exists but it is not clear how it can be applied to the event. The discovery of the law is concerned with concretizing the product of law formation. Legal discovery is the process of making concrete juridical decision-making activities that directly give rise to legal consequences for an individual situation (judge decisions, decisions, making of deeds by a notary and so on). In a certain sense according to Meuwissen, legal discovery is a reflection of law formation.<sup>27</sup>

Interpretation as a method of legal discovery (*rechtsvinding*) departs from the notion that judicial work has a logical character. According to Sudikno Mertokusumo,

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<sup>26</sup> John Rawls. *Justice as Fairness: A restatement*. Edisi Ketiga. London: Harvard University Press. (2003). 83.

<sup>27</sup> B. Arief Sidharta (Traslator), *Meuwissen tentang Pengembanan Hukum, Ilmu Hukum, Teori Hukum dan Filsafat Hukum*. Bandung: P.T. Refika Aditama. (2008). 11.

interpretation or interpretation by a judge is an explanation that must lead to an implementation that is acceptable to the public regarding legal regulations for concrete events. This interpretation method is a means or tool to find out the meaning of the law.<sup>28</sup>

Interpretation as a method of legal discovery historically has relevance to a very old hermeneutic tradition. Originally, hermeneutics was a theory that concerned itself with interpreting texts, because at first it was mainly used by theologians, whose job it was to deal with religious texts. Later this branch of teaching-science also attracted the attention of historians, scholars of literature and juries. The word hermeneutic comes from the Greek, namely the verb '*hermeneuein*' which means 'interpret' or 'interpret' and the noun '*hermeneia*' which means 'interpretation' or 'interpretation'.<sup>29</sup>

### 3.2 Death Penalty Application Post-Constitutional Court Decision Number 2-3/PUU-V/2007

Since Indonesia's independence in 1945, Indonesia has implemented the death penalty as stated in its various positive law products. The Criminal Code stipulates the death penalty for treason against the president and vice president (Article 104), persuading a foreign country to go to war (Article 111 Paragraph (2)), assisting the enemy during war (Article 124 Paragraph (3)), premeditated murder (Article 340), theft with violence and resulting in death (Article 365 Paragraph (4)), extortion with violence and resulting in death (Article 368 Paragraph (2)), piracy at sea, coast and river resulting in death (Article 444).

Apart from the Criminal Code, there are also various laws and regulations that include death penalty such as Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Corruption, Law Number 5 of 1997 concerning Psychotropics, Law Invite No. 35 of 2009 concerning Amendments to Law Number 22 of 1997 concerning Narcotics, Law Number 26 of 2000 concerning the Human Rights Court (Article 36), Law Number 15 of 2003 concerning the Eradication of Criminal Acts of Terrorism.<sup>30</sup>

Regarding the death penalty sanction in Law Number 22 of 1997 concerning Narcotics, four death row convicts in narcotics cases have submitted a material review to the Constitutional Court related to the unconstitutionality of death penalty sanctions.

In the judicial review, the results of the Constitutional Court in Decision Number 2-3/PUU-V/2007 stated that the death penalty is not against the constitution, so that the death penalty is not an act that can be said to be unconstitutional.<sup>31</sup>

Reporting from the website of the National Narcotics Agency, the implementation of the death penalty for drug offenders is not only to give a fitting punishment or to give a

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<sup>28</sup> Sudikno Mertokusumo dan A. Pitlo, *Penemuan Hukum*. Bandung: Citra Aditya Bakti. (1993). 13.

<sup>29</sup> As mentioned by B. Arief Sidharta from E. Sumaryono in *Hermeneutik, Sebuah Metode Filsafat*. See B. Arief Sidharta, *Refleksi tentang Struktur Ilmu Hukum, Sebuah Penelitian tentang Fundasi dan Sifat Keilmuan Ilmu Hukum sebagai Landasan Pengembangan Ilmu Hukum Nasional Indonesia*. Bandung: Mandar Maju. (2000). 95.

<sup>30</sup> Yohanes S. Lon. "Penerapan Hukuman Mati di Indonesia dan Implikasi Pedagogisnya." *Kertha Wicaksana: Sarana Komunikasi Dosen dan Mahasiswa Volume 14, Nomor 1*. (2020). 50.

<sup>31</sup> Nata Sukam Bangun, Paulinus Soge. "Eksistensi Pidana Mati dalam Sistem Hukum Indonesia." *Jurnal Ilmu Hukum Universitas Atma Jaya Yogyakarta*, (2014) pp. 1-20. 8.

mere deterrent effect to other persons. The death penalty is intended to protect society and save the nation's children from the dangers of drug abuse and illegal drugs. This determination is based on Law Number 35 of 2009 which confirms that the appropriate punishment for serious drug offenders is the death penalty. Furthermore, Law Number 35 of 2009 concerning Narcotics stipulates death penalty in:

Article 113 Paragraph (2):

*"In the event that the act of producing, importing, exporting, or distributing Narcotics Group I as referred to in paragraph (1) in the form of plants weighs more than 1 (one) kilogram or exceeds 5 (five) trees or in the form of non-plants weighs more than 5 (five) ) gram, the offender shall be sentenced to death, life imprisonment, or imprisonment for a minimum of 5 (five) years and a maximum of 20 (twenty) years and a maximum fine as referred to in paragraph (1) plus 1/3 (one third) ."*

Article 114 Paragraph (2):

*"In the event of an act of offering to sell, sell, buy, become an intermediary in buying and selling, exchanging, delivering, or receiving Narcotics Group I as referred to in paragraph (1) which in the form of plants weighs more than 1 (one) kilogram or exceeds 5 (five ) tree trunks or in the form of non-plants weighing 5 (five) grams, the offender shall be punished with death penalty, life imprisonment, or imprisonment for a minimum of 6 (six) years and a maximum of 20 (twenty) years and a maximum fine as referred to in paragraph (1) plus 1/3 (one third)."*

Article 118 Paragraph (2):

*"In the event that the act of producing, importing, exporting, or distributing Narcotics Group II as referred to in paragraph (1) weighs more than 5 (five) grams, the offender shall be punished with death penalty, life imprisonment, or imprisonment for a minimum of 5 (five) years and a maximum of 20 (twenty) years and a maximum fine as referred to in paragraph (1) plus 1/3 (one third)."*

Article 119 Paragraph (2):

*"In the case of the act of offering to sell, sell, buy, receive, become an intermediary in buying and selling, exchanging, or handing over Narcotics Group II as referred to in paragraph (1) weighing more than 5 (five) grams, the offender shall be punished with death penalty, imprisonment for life, or imprisonment for a minimum of 5 (five) years and a maximum of 20 (twenty) years and a maximum fine as referred to in paragraph (1) plus 1/3 (one third)."*

Article 121 Paragraph (2):

*"In the event that the use of Narcotics against other people or the provision of Narcotics Category II to be used by other people as referred to in paragraph (1) results in the death of another person or permanent disability, the offender shall be punished with death penalty, life imprisonment, or imprisonment for a minimum of 5 (five) years and a maximum of 20 (twenty) years and a maximum fine as referred to in paragraph (1) plus 1/3 (one third)."*

Article 144 Paragraph (2):

*"The threat of an additional 1/3 (one third) as referred to in paragraph (1) does not apply to perpetrators of crimes that are sentenced to death, life imprisonment, or 20 (twenty) years imprisonment."*

Fredi Budiman or better known as Freddy Budiman is an example of a death row convict for drug abuse in Indonesia. Freddy is a defendant in cases of drug trafficking in a number of big cities in Indonesia. Freddy was sentenced to death at the West Jakarta District Court on July 15 2013. He was sentenced to death on charges of controlling the

circulation of 1,412,476 ecstasy pills which were put in an aquarium in a container truck and using a cell phone and the internet in Cipinang Penitentiary to regulate the distribution of narcotics.

In the decision of the West Jakarta District Court Number 2267/Pid.Sus/2012/PN.JKT.BAR., Fredi Budiman was proven guilty of committing a criminal act of narcotics abuse and was sentenced to death penalty which reads as follows:

*"Declaring the defendant FREDI BUDIMAN als BUDI bin H NANANG HIDAYAT legally and convincingly guilty of committing the crime of conspiracy without rights and against the law, offering to sell, sell, buy, receive, become an intermediary in buying and selling, exchanging, or handing over Narcotics Category I non-plants weighing 5 (five) grams, as charged by the Public Prosecutor, namely the Primary indictment Article 114 paragraph (2) in conjunction with Article 132 (1) Law Number 35 of 2009 concerning Narcotics. Furthermore, the Panel of Judges handed down a verdict, namely, "Sentenced a sentence against the Defendant with a DEATH sentence."*

Fredi Budiman was charged with 3 articles in Law Number 35 of 2009 concerning Narcotics. Primary indictment namely violating the provisions of Article 114 paragraph (2) jo. Article 132 Paragraph (1) of Law Number 35 of 2009 concerning Narcotics. Then the Subsidiary Indictment that the defendant had violated the provisions of Article 113 Paragraph (2) in conjunction with Article 132 Paragraph (1) of Law Number 35 of 2009 concerning Narcotics. Finally, the More Subsidiary Indictment that the actions of the defendant are as stipulated and punishable by law in Article 112 Paragraph (2) in conjunction with Article 132 Paragraph (1) of Law Number 35 of 2009 concerning Narcotics. In addition, Article 132 Paragraph (1) of Law Number 35 of 2009 concerning Narcotics stipulates:

*"Attempt or conspiracy to commit the crime of Narcotics and Narcotics Precursor as referred to in Article 111, Article 112, Article 113, Article 114, Article 115, Article 116, Article 117, Article 118, Article 119, Article 120, Article 121, Article 122, Article 123, Article 124, Article 125, Article 126, and Article 129, the perpetrators are sentenced to the same imprisonment in accordance with the provisions referred to in these Articles."*

The results of the panel of judges' considerations regarding the elements in 114 Paragraph (2) jo. Article 132 Paragraph (1) of Law Number 35 of 2009 concerning Narcotics that Fredi Budiman was legally and convincingly proven to have violated the provisions of the article charged in the Primary Indictment, namely the element "everyone" has been fulfilled because Fredi Budiman is someone who can be prosecuted criminal responsibility and there are no other elements that can free or release him.

Furthermore, the element "*Without rights or against the law offers to sell, sell, buy, become an intermediary in buying and selling, exchanging, providing or receiving Narcotics Group I in the form of plants weighing more than 1 kg or more than 5 trees or in the form of non-plants that weighing 5 grams or more*" has been fulfilled because in carrying out the activity of trading Narcotics Group I, Fredi Budiman does not have legality in the form of a permit because the use of Narcotics Group I must obtain approval from the Minister on the recommendation of the Head of the Drug and Food Control Agency. Furthermore, the element of "*Attempt or conspiracy to commit a crime or Narcotics precursor*" has also been fulfilled because it has been proven in the defendant's actions. Because the Primary Indictment has been proven, the Subsidiary and Subsidiary Charges do not need to be considered again.

Then, the things that incriminated Fredi Budiman included that Fredi Budiman was part of an international narcotics network in Indonesia who had violated statutory provisions and his actions were deemed contrary to the program of the government of the Republic of Indonesia to eradicate illicit traffic and drug abuse. In addition, the number of narcotics evidences in the form of ecstasy is 1,412,476 items weighing 380,996.9 grams. Fredi Budiman has also repeatedly committed these actions and is still serving time in the previous Narcotics case. Finally, Fredi Budiman carried out his actions from inside the State Detention Center / Penitentiary, even though he should have used the period of serving criminal sanctions in that place as a place for self-reflection.

### **3.3 The Urgency of Reforming the Death Penalty for the Narcotics Distributors Post Constitutional Courts Decision Number 2-3/PUU-V/2007**

The imposition of the death penalty against Fredi Budiman is one of the efforts to enforce law in Indonesia which some people consider to be the appropriate step to take. the imposition of these sanctions for perpetrators of narcotics abuse also means progress in law enforcement in Indonesia which will ultimately create fear for other people to commit criminal acts of narcotics abuse, or at least the imposition of criminal sanctions has 'eliminated' one of the 'diseases' society which in the end is also an effort to guard Indonesia's future generations towards a better direction.

However, when looking at the other side, the imposition of the death penalty on the one hand is considered cruel and excessive. Furthermore, even though there are differences here and there between the 1945 Constitution and the ICCPR (for example by not stating in the 1945 Constitution the right not to be treated or punished in a cruel, inhuman and degrading manner as a right that cannot be reduced under any circumstances) the right to life is a right that is equally stated in both instruments as a right that is considered a non-derogable right. cannot be reduced under any circumstances.

The application of the death penalty basically gives authority to the state to take away the right to life of its citizens. Therefore, he is against human rights. This is in line with what Hart has said that identifying law with morality will cause confusion in efforts to solve the problem of law and morality itself.

In line with Constitutional Justice Achmad Roestandi in his dissenting opinion on the decision of the Constitutional Court Number 2/PUU-V/2007 which emphasized that the right to life is a human right that cannot be reduced under any circumstances. The phrase "which cannot be reduced under any circumstances" means absolute, cannot be limited, cannot be reduced, and cannot be postponed.

Thus, the limitations made possible by Article 28J Paragraph (2) cannot be applied to the right to life. The main purpose of capital punishment is to deprive a person of his right to life intentionally. Therefore, it clearly contradicts Article 28A in conjunction with Article 28I paragraph (1). The imposition of capital punishment is different from killing someone in war, or killing someone in order to catch criminals. The main purpose of the actions taken by soldiers in war or killings committed by the police in catching criminals, is not with the intention of killing, but to paralyze the enemy or criminal. If in achieving the main

objective (i.e. paralyzing enemies or criminals) there is a murder, then the killing is not the main goal, but an incident that is excessive in nature.

We can use international instruments, such as the International Covenant on Civil and Political Rights (ICCPR), as a comparison tool in order to find the most appropriate interpretation of Article 28I paragraph (1). However, from the start it should be aware that there are various differences between Article 28I Paragraph (1) and Article 4 ICCPR, namely: a. The terms used: 1) Article 28I Paragraph (1) uses the term human rights which cannot be reduced under any circumstances 2) Article 4 ICCPR uses the term non-derogable rights.

## CONCLUSION

On the basis of the description above, the prohibition of restrictions on human rights contained in Article 28I paragraph (1) is absolute. Restrictions as stipulated in Article 28J paragraph (2) are not allowed to be applied to human rights. Because if the limitations in Article 28J paragraph (2) also apply to the rights referred to in Article 28I paragraph (1), then the drafters of the 1945 Constitution, *quad non*, have included articles that are useless.

International instruments can be used as a reference, and can be used as a comparison to enrich the horizons of reasoning in interpreting the constitution. However, if there are clear differences between these international instruments and the 1945 Constitution, the Constitutional Court must give priority to the 1945 Constitution. This is because the Constitutional Court was given constitutional mandates and powers to examine laws against the 1945 Constitution.

However, Indonesian society is a pluralistic society, consisting of various ethnic groups, languages, cultures and religions. This pluralistic nation has established a national consensus contained in Pancasila and the 1945 Constitution as the fundamental law in the life of society, nation and state. Fundamental law is the highest positive law that must be used as the highest guidance by all citizens, including the Constitutional Court in deciding cases reviewing laws. Article 28I paragraph (1) of the 1945 Constitution states that the right to life is a human right that cannot be diminished under any circumstances. Therefore, the death penalty whose main purpose is to deliberately deprive a person of the right to life is contrary to the 1945 Constitution. The right to life is a basic right. Basic rights are inherent dignity inherent in every human being. A basic right cannot be deviated by law, *wet, Gesetz*.

The right to life is a basic right, cannot be limited by law, *wet, Gesetz* which has a lower degree. Article 28J paragraph (1) of the 1945 Constitution and Article 29 paragraph (2) of the Universal Declaration of Human Rights cannot be enforced. Basic Rights directly bind the three areas of state power to obey and respect them. Article 1 Paragraph (3) Grundgesetz Federal Republic of Germany, reads, "...*basic rights are binding on legislature, executive and judiciary as directly valid law.*" When the death penalty is still maintained, it means that there is a *contradictio in se (tegenspraak in zichzelf)* against the basic right itself.

In the future, capital punishment or death penalty (*doodstraf*) should no longer be applied to all crimes.

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